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7 **SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY**

8 MITCHELL SHOOK

November 29, 2022

9 Plaintiff

10 vs.

No.: 19-2-07135-0  
Court of Appeals No.: 57246-0

11 CITY OF TACOMA

12 Defendant

13 CLERK'S PAPERS PER  
REQUEST OF APPELLANT  
TO THE  
COURT OF APPEALS,  
DIVISION II

14 HONORABLE ADMINISTRATION  
15 Trial Judge

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**SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY**

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No.: 19-2-07135-0  
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INTRODUCTION -NATURE OF ACTION

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

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

The Click! system was established to “*provide telecommunications services for data transport, high speed internet access, full cable television service, and, among other things, 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*”

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

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

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

<sup>1</sup> The 1997 City Council Resolution No. 33668

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Since Click!’s system is part of Tacoma Public Utility<sup>2</sup>, and no such vote of the people is planned or provided for, there is an imminent risk that the terms of City charter will be violated.

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

1. PARTIES

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

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

2. JURISDICTION AND VENUE

2.1 This Court has subject matter jurisdiction over this issue, since the City is located in Pierce County and the events related to this petition have substantially occurred in Pierce County; additionally, the superior court has

<sup>2</sup> City of Tacoma Resolution 40272

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subject matter jurisdiction over this action under RCW 2.08.010 because plaintiff seeks writs of mandamus and/or prohibition.

2.2 Given no other speedy or adequate remedy, RCW 7.16.040 provides the Court jurisdiction over this matter.<sup>3</sup>

3. FACTS

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

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

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

3.2.1 The 1996 CITY of Tacoma ORDINANCE NO. 25930 States *"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*

<sup>3</sup> A writ of review shall be granted by any court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one 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.

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*control the use thereof<sup>4</sup> or lease any equipment or accessories necessary and convenient for the use thereof; and*

3.2.2 CITY of Tacoma ORDINANCE NO. 25930 States *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*

3.2.3 CITY of Tacoma ORDINANCE NO. 25930 States *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**<sup>5</sup>, and load shaping; and*

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

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

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

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

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*telecommunications system as part of the Electric System<sup>6</sup> in order to construct these telecommunications improvements”*

3.2.6 Exhibit A to 1996 City of Tacoma ORDINANCE NO. 25930<sup>7</sup> stated the telecommunications project would include “demand side management (DSM) functions<sup>8</sup>, CATV and Internet Access.

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

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

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

<sup>6</sup> Emphasis added to point out that the telecommunications system is a “part of the electric system”

<sup>7</sup> Passed on July 26, 1996 when the telecommunications system was approved

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

<sup>9</sup> Kelley, 120313 WAAGO, AGO 2013-6 2013

<sup>10</sup> 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.

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

3.3.1 The 1997 Council Resolution No. 33668 states: "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,

3.3.2 The 1997 Council Resolution No. 33668 states "WHEREAS a broadband 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;"

3.3.3 The 1997 Resolution No. 33668 states "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

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<sup>11</sup>*

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

10  
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.

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<sup>11</sup> Emphasis added to highlight fact that system is owned by TPU

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

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

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

3.8 In 2017 Click! Network’s annual operating revenues were approximately \$26,519,861<sup>13</sup>.

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

<sup>12</sup> Telecommunications Infrastructure Section, on Page 47, Bond Prospectus for CITY OF TACOMA, WASHINGTON \$70,575,000 Electric System Revenue Bonds, Series 2017  
<sup>13</sup> 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  
6 3.8.3 “Click! has thousands of customers and considerable goodwill”, as  
7 confirmed by Click! Network General Manager, Tenzin Gyaltzen, who  
8 stated so in his February 7<sup>th</sup>, 2018, Declaration In Support Of Defendants  
9 Opposition To Partial Summary Judgement -page 3 , Pierce County  
10 Superior Court Case No 17-2-08907-4

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.

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

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

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

3.12 Click! currently holds telecommunications or video franchises from the City of Tacoma, City of Fircrest, City of Fife, City of Lakewood, City of University Place, and Pierce County to offer Cable TV, high speed Internet, digital phone, as well as fiber-delivered data solutions to area residents and businesses<sup>15</sup>.

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

<sup>14</sup> From AMENDED RESOLUTION NO. U-10879 Adopted by TPU Board on 9-28-16

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

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

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

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

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

<sup>16</sup> AMENDED RESOLUTION NO. U-10879 -Page 4, This is Whereas #20

<sup>17</sup> AMENDED RESOLUTION NO. U-10879 -Page 4, This is Whereas #17

<sup>18</sup> <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*".<sup>19</sup>

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

17 3.19.1 City Council Resolution #39347 states: "*WHEREAS the  
18 telecommunications system was constructed and has been in continuous  
19 operation since 1999, and has proven to provide benefits for the City  
20 electric utility and electric utility customers located both Inside and outside  
21 City limits*"<sup>21</sup>

22 3.19.2 City Council Resolution #39347 states: "*WHEREAS the  
23 telecommunication system is now a vital component of the City's electric  
24 utility and continued operation and maintenance of the system is an  
25 essential function of the electric utility*"

26  
27 <sup>19</sup> Page one of Amended Resolution U-10828

<sup>20</sup> City Council Resolution #39347 -page 1

<sup>21</sup> City Council Resolution #39347 -page 1

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

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

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

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<sup>22</sup> Passed by City Council on December 15 2015

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3.20.1 Data transport for the Salishan demand response hot water heater project utilized Click! Network’s cable modem system<sup>23</sup>.

3.20.2 Demand response technology requires two-way communications.

3.20.3 Demand response technology holds potential for load reduction and energy savings<sup>24</sup>.

3.20.4 RCW 35.92.360<sup>25</sup> -Energy conservation plan states "The legislature finds that energy conservation can take many useful and cost-effective forms, and that the types of conservation projects available to utilities and customers evolve with time as technologies are developed and market conditions change. In some cases, **electricity conservation projects are most cost-effective when they reduce the total amount of electricity consumed**<sup>26</sup> by an individual customer, and in other cases they can be cost-effective by reducing the amount of electricity a customer needs to purchase from an electric utility.

3.21 The Click! Engagement Committee (“the committee”) was formed in January 2016, per the direction of the Tacoma Public Utilities Board and the City Council.

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

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<sup>23</sup> Email from Click! General Manager Tenzin Gyaltzen

<sup>24</sup> BPA Salishan Demand Response Water Heater Final Report 2018

<sup>25</sup> Findings-Intent-2002 c 276

<sup>26</sup> Emphasis added to point out the Nexis 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 Cobb<sup>27</sup>.

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!<sup>28</sup>

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.<sup>29</sup>

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

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

25 <sup>27</sup> CLICK! NETWORK Business Plan -by Click! General Manager Tenzin Gyaltzen. Revised 3-20-17 -  
26 Executive Summary Page 2

27 <sup>28</sup> AMENDED RESOLUTION NO. U-10879

<sup>29</sup> 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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by the City, who recommended to the TPU Board and City Council that they should proceed with the term sheet proposed by Rainier Connect.

3.24 The Rainier Connect term sheet<sup>30</sup> presented to City Council states that *“The IRU term will be 20 years (“IRU Term”). On the expiration of the IRU Term, the IRU can be renewed for two additional periods of 10 years (“Extension IRU Terms”) so long as Rainier Connect is in compliance with all the terms of its contractual relationships with the City of Tacoma and TPU.”*

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

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

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<sup>30</sup> 12. Tacoma Click! -Rainier Connect Public-Private Partnership Term Sheet Presented by JoAnn Hovis on March 5, 2019

<sup>31</sup> emphasis added to point out the fact of the asset sale.

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

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

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

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

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

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

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

<sup>33</sup> 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.<sup>34</sup>

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 time<sup>35</sup>

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 services<sup>36</sup>.

21  
22  
23 \_\_\_\_\_  
24 <sup>34</sup> Public-Private Partnership Term Sheet March 4, 2019

25 <sup>35</sup> 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 <sup>36</sup> 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,<sup>37</sup> Fiber To The Home (“FTTH”) Internet services, and advanced metering

<sup>37</sup> 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*<sup>38</sup>;
- 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 between 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;
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<sup>38</sup> Emphasis added to bring attention to the term "lease".

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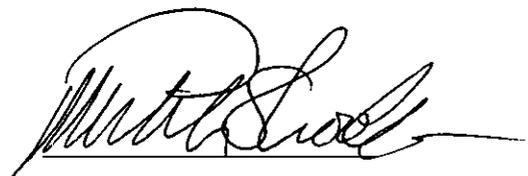
(12) Mandating and requiring that the City obtain approval from of a majority vote of the electors at a municipal election in the manner provided by the city charter prior to entering into a contract for an IRU, sale or lease of the Click! system to Rainier Connect;

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

(14) Public policy requires citizens have a right to expect the terms of their City Charter to be followed -especially when it affects an important resource such as public utility control and oversight on their municipal Internet service<sup>39</sup>.

(15) Awarding such other and further relief as the Court may deem just, equitable and proper under the circumstances.

4/17/19  
Dated

  
Mitchell Shook  
Plaintiff, pro se

<sup>39</sup> Click is the second largest municipal Internet service provider in the nation.

May 06 2019 3:19 PM

KEVIN STOCK  
COUNTY CLERK  
NO: 19-2-07135-0

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

Mitchell Shook,

Plaintiff Pro Se,

vs.

CITY OF TACOMA,

Defendant.

NO. 19-2-07135-0

ANSWER TO COMPLAINT

COMES NOW Defendant City of Tacoma, appearing by and through William C. Fosbre, Tacoma City Attorney, and M. Joseph Sloan, Deputy City Attorney, and in answer to the Plaintiff's Complaint for Declaratory, Injunctive, Prohibition and Mandamus Relief, hereinafter referred to as the "Complaint", not waiving objections based upon jurisdiction, improper, joinder and service, admits, denies and alleges as follows:

1. The Plaintiff's paragraphs entitled: "INTRODUCTION-NATURE OF ACTION" contain opinions and conclusions of law for which no response is required. However, because some of the allegations are inaccurate, Defendant denies the allegations contained therein.

- 1 2. In answer to Plaintiff's Complaint, paragraph 1 contains legal conclusions that  
2 require no response. To the extent a response could be required, Defendant  
3 admits that it is a municipal corporation located in Pierce County, Washington,  
4 operating as a first class charter city under the laws of the state of Washington.  
5 By way of further answer, Defendant lacks sufficient knowledge or information  
6 to form a belief as to the truth of the remainder of the allegations contained  
7 therein; however, Defendant specifically denies that Tacoma Power operates a  
8 business unit known as Click! Network ("Click!"). Rather, Click! is a trade name  
9 for an operating unit of Tacoma Power and a multi-service broadband  
10 telecommunications provider within Tacoma Power's service area. Defendant  
11 admits that Click! provides retail cable television and wholesale high-speed  
12 internet services to Tacoma Power customers, both residential and commercial.  
13
- 14 3. In answer to paragraph 2.1 of Plaintiff's Complaint, the allegations contained  
15 therein are legal conclusions, that the law speaks for itself, and to the extent  
16 that the same may be construed as containing an allegation to which a  
17 response is required, Defendant denies the allegations contained therein.
- 18 4. In answer to paragraph 2.2 of Plaintiff's Complaint, inclusive of footnote no. 3,  
19 the allegations contained therein are legal conclusions, that the law speaks for  
20 itself, and to the extent that the same may be construed as containing an  
21 allegation to which a response is required, Defendant denies the allegations  
22 contained therein.<sup>1</sup>  
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<sup>1</sup> RCW 7.16.050 requires the submission of an affidavit by the Plaintiff in a statutory writ proceeding.  
ANSWER TO COMPLAINT- 2

- 1 5. In answer to paragraph 3.1 of Plaintiff's Complaint, Defendant denies the  
2 allegations contained therein. The quotation is incomplete<sup>2</sup>.
- 3 6. In answer to paragraph 3.1.1 of Plaintiff's Complaint, Defendant admits the  
4 allegations contained therein.
- 5 7. In answer to paragraphs 3.2, 3.2.1, 3.2.2, 3.2.3, 3.2.4 and 3.2.5 of Plaintiff's  
6 Complaint, Ordinance No. 25930 speaks for itself; therefore, no response is  
7 required. Furthermore, some provisions cited by the Plaintiff are incomplete,  
8 and the footnotes contain legal conclusions for which no response is required.
- 9 8. In answer to paragraph 3.2.6 of Plaintiff's Complaint, inclusive of footnote nos.  
10 7 and 8, Exhibit A to Ordinance No. 25930 speaks for itself; therefore, no  
11 response is required. However, the provision cited by the Plaintiff is incomplete  
12 and taken out of context; accordingly, Defendant lacks sufficient knowledge or  
13 information to form a belief as to the truth of the remainder of the allegations  
14 contained therein and therefore denies same.
- 15 9. In answer to paragraph 3.2.7 of Plaintiff's Complaint, inclusive of footnote no. 9,  
16 RCW 19.285, Initiative 937 and the Energy Independence Act speak for  
17 themselves, and paragraph 3.2.7 contains legal conclusions not requiring a  
18 response. To the extent a response is required, because the allegations are  
19 vague and ambiguous, Defendant lacks sufficient knowledge or information on  
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24 <sup>2</sup> Tacoma City Charter, Section 4.6: *The City shall never sell, lease, or dispose of any utility system,*  
25 *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.*

1 which to form a belief as to the truth of the allegations contained therein, and  
2 therefore denies same.

3 10. In answer to paragraph 3.2.8 of Plaintiff's Complaint, inclusive of footnote no.  
4 10, the allegations contained therein, together with Plaintiff's footnotes, contain  
5 legal conclusions and speculation regarding compliance with RCW 19.285.040  
6 for which no response is required. However, to the extent a response is  
7 required, Defendant lacks sufficient knowledge or information to form a belief as  
8 to the truth of the matters alleged therein and therefore denies same.

9 11. In answer to paragraph 3.3 of Plaintiff's Complaint, the allegations contain  
10 conclusions of law for which no response is required. However, if a response is  
11 required, Resolution No. 33668 and Resolution No. U-9258 speak for  
12 themselves. Furthermore, the Plaintiff has misquoted the language of  
13 Resolution No. 33668, and for this reason, the allegations contained therein are  
14 denied.  
15

16 12. In answer to paragraphs 3.3.1, 3.3.2, and 3.3.3 of Plaintiff's Complaint,  
17 Resolution No. 33668 speaks for itself; therefore, no further response is  
18 required. Should a response be required, the alleged quotations from  
19 Resolution No. 33688 contain errors in punctuation in paragraphs 3.3.1 and  
20 3.3.2, and 3.3.3 and is not an accurate or complete quotation from Resolution  
21 No. 33668; therefore, allegations as to their content are denied.

22 13. In answer to paragraph 3.3.4 of Plaintiff's Complaint, Defendant admits that  
23 Click! is a trade name for an integrated unit of Tacoma Power, a division of  
24  
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1 Tacoma Public Utilities, a department of the City of Tacoma, however denies  
2 the remaining allegations contained therein.

3 14. In answer to paragraph 3.3.2 (incorrectly numbered and repeated on page 8 of  
4 Plaintiff's Complaint following paragraph 3.3.4). Defendant admits that Click! is  
5 the trade name for an integrated unit of Tacoma Power, a division of Tacoma  
6 Public Utilities, a department of the City of Tacoma. Defendant admits that the  
7 first level of oversight is Click! management; next, the Power Superintendent,  
8 next the Director of Utilities, then the Utility Board, and finally, the Tacoma City  
9 Council. Defendant denies the remaining allegations contained therein.

10 15. In answer to paragraph 3.3.3 (incorrectly numbered and repeated on page 8 of  
11 Plaintiff's Complaint, following incorrectly numbered paragraph 3.3.2),  
12 Defendant admits that in a declaratory judgment action brought by the City of  
13 Tacoma in Pierce County under Superior Court Cause No. 96-2099380, an  
14 order was issued on May 9, 1997, concluding that the City had authority to  
15 issue electric revenue bonds. Defendant, by way of further answer, responds  
16 that the allegations contain legal conclusions for which no response is required,  
17 and that to the extent a response is required, Defendant denies the remaining  
18 allegations contained therein.

19  
20 16. In answer to paragraph 3.4 of Plaintiff's Complaint, though Defendant admits  
21 that it has the technologies described therein; however, because the allegations  
22 are not completely accurate, Defendant denies the remaining allegations  
23 contained therein.  
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1 17. In answer to paragraph 3.5 of Plaintiff's Complaint, inclusive of footnote no. 12,  
2 though Defendant admits that it owns a network that includes the use of some  
3 of the technologies described, because the allegations are vague and  
4 incomplete, Defendant cannot ascertain the truth of the allegations contained  
5 therein and therefore, denies same.

6 18. In answer to paragraph 3.6 of Plaintiff's Complaint, Defendant admits that it has  
7 some of the technologies described therein; however, because the allegations  
8 are not completely accurate, Defendant denies the allegations contained  
9 therein.

10 19. In answer to paragraph 3.7 of Plaintiff's Complaint, Defendant admits the  
11 allegations contained therein.

12 20. In answer to paragraph 3.8 of Plaintiff's Complaint, Defendant admits the  
13 allegations contained therein.

14 21. In answer to paragraph 3.8.1 of Plaintiff's Complaint, Defendant admits the  
15 allegations contained therein.

16 22. In answer to paragraph 3.8.2 of Plaintiff's Complaint, Defendant admits the  
17 allegations contained therein.

18 23. In answer to paragraph 3.8.3 of Plaintiff's Complaint, Defendant admits the  
19 allegations contained therein.

20 24. In answer to paragraph 3.8.4 of Plaintiff's Complaint, Defendant lacks sufficient  
21 knowledge or information to form a belief as to the truth of the allegations  
22 contained therein and therefore denies same.  
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1 25. In answer to paragraph 3.9 of Plaintiff's Complaint, Defendant admits that the  
2 Utility Board is comprised of five members, and that they are appointed by the  
3 Mayor and confirmed by the Tacoma City Council. As for Section 4.3 of the  
4 Tacoma City Charter, it speaks for itself. The remaining allegations contain  
5 conclusions of law for which no response is required.

6 26. In answer to paragraphs 3.10 and 3.10.1 of Plaintiff's Complaint, Title 12 of the  
7 Tacoma Municipal Code speaks for itself.

8 27. In answer to paragraph 3.10.2 of Plaintiff's Complaint, Defendant denies the  
9 allegations contained therein. Matters of all utility rates are subject to Utility  
10 Board and City Council review, and if deemed appropriate, are approved.

11 28. In answer to paragraph 3.11 of Plaintiff's Complaint, Defendant admits that the  
12 Gateway meters operate over Click!'s HFC network; however, because the  
13 allegations are not completely accurate, Defendant denies the remaining  
14 allegations contained therein.

15 29. In answer to paragraph 3.11.1 of Plaintiff's Complaint, inclusive of footnote  
16 no. 14, Defendant admits the allegations contained therein, except as to the  
17 reference to Amended Resolution No. U-10879, the document speaks for itself,  
18 and therefore no response is required.

19 30. In answer to paragraphs 3.11.2 and 3.12 of Plaintiff's Complaint, inclusive of  
20 footnote no. 15, because the allegations are not completely accurate,  
21 Defendant denies the allegations contained therein.

22 31. In answer to paragraph 3.13 of Plaintiff's Complaint, Amended Resolution No.  
23 U-10879 speaks for itself; therefore, no response is required.  
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1 32. In answer to paragraphs 3.14, 3.15 and 3.16 of Plaintiff's Complaint, inclusive  
2 of footnote nos. 16, 17, and 18, Amended Resolution No. U-10879 speaks for  
3 itself; therefore, no response is required; however, because the Plaintiff has  
4 misrepresented the language of the Resolution, Defendant denies the  
5 allegations contained therein.

6 33. In answer to paragraph 3.17 of Plaintiff's Complaint, the Defendant denies the  
7 allegations contained therein.

8 34. In answer to paragraphs 3.18, 3.18.1, 3.19, 3.19.1 and 3.19.2, inclusive of  
9 footnotes 19, 20 and 21, Resolution No. U-10828, the Tacoma City Charter and  
10 Resolution No. 39347 speak for themselves; therefore, no response is required.  
11 However, because the provisions quoted are misquoted, Defendant denies the  
12 allegations contained therein.

13 35. In answer to paragraphs 3.19.3 and 3.19.2 (3.19.2 incorrectly numbered and  
14 repeated on page 14 following correctly numbered paragraph 3.19.3) of  
15 Plaintiff's Complaint, inclusive of footnote no. 22, Resolution No. 39347 speaks  
16 for itself; therefore, no response is required. However, Defendant denies that  
17 paragraphs 3.19.3 and 3.19.2 of Plaintiff's Complaint accurately reflect the  
18 provisions from the Resolution as represented.

19 36. In answer to paragraphs 3.20, and 3.20.1 of Plaintiff's Complaint, Defendant  
20 admits the allegations contained therein.

21 37. In answer to paragraph 3.20.2, Defendant lacks sufficient knowledge or  
22 information to form a belief as to the truth of the matter asserted, and therefore,  
23 denies same.  
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1 38. In answer to paragraph 3.20.3 of Plaintiff's Complaint, Defendant admits the  
2 allegations contained therein.

3 39. In answer to paragraph 3.20.4 of Plaintiff's Complaint, RCW 35.92.360 speaks  
4 for itself; therefore, no response is needed. Furthermore, Defendant denies  
5 that what is stated is an accurate representation of the language of the statute  
6 or its title.

7 40. In answer to paragraphs 3.21, 3.21.1 and 3.21.2 of Plaintiff's Complaint,  
8 Defendant admits the allegations contained therein.

9 41. In answer to paragraph 3.22 of Plaintiff's Complaint, because this paragraph  
10 incorporates the Plaintiff's footnote that refers to a September 28, 2016,  
11 Amended Resolution, Defendant lacks sufficient information to form a belief as  
12 to the truth of the allegation contained therein, and therefore denies same.

13 42. In answer to paragraphs 3.23, 3.23.1, 3.23.2 and 3.23.3 of Plaintiff's Complaint,  
14 Defendant denies the accuracy of the events represented in paragraph 3.23;  
15 however, Defendant admits the remaining allegations contained therein.

16 43. In answer to paragraph 3.24 of Plaintiff's Complaint, the referenced "term  
17 sheet" speaks for itself; therefore, no response is required. Because the entire  
18 provision has not been stated, Defendant denies the allegations contained  
19 therein.

20 44. In answer to paragraph 3.25 of the Plaintiff's Complaint, the "term sheet"  
21 speaks for itself. Furthermore, because the relevant provisions of the term  
22 sheet have not been accurately stated, Defendant denies the allegation  
23 contained therein.  
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1 45. In answer to paragraph 3.26 of Plaintiff's Complaint, Resolution No. 40272

2 speaks for itself. However, because the provisions of the Resolution have not  
3 been accurately stated, Defendant denies the allegations contained therein.

4 46. In answer to paragraph 3.27 of Plaintiff's Complaint, the "term sheet" speaks for

5 itself; therefore, no response is required; however, because the allegation  
6 inaccurately states the alleged provision of the term sheet, Defendant denies  
7 the allegation contained therein.

8 47. In answer to paragraph 3.28 of Plaintiff's Complaint, the "term sheet" speaks for

9 itself; therefore, no response is required.

10 48. In answer to paragraph 3.29 of Plaintiff's Complaint, the allegation contains the

11 Plaintiff's legal opinion for which no response is required. Furthermore, the  
12 "term sheet" speaks for itself, and accordingly, the allegation requires no  
13 response.

14 49. In answer to paragraph 3.30 of Plaintiff's Complaint, the allegation is vague and

15 ambiguous; furthermore, the Defendant lacks sufficient knowledge or  
16 information in which to form a belief as to the truth of the allegation, and  
17 therefore denies same.

18 50. In answer to paragraph 3.30.1 of Plaintiff's Complaint, any memo from the TPU

19 Director to the Tacoma City Council would speak for itself; therefore, no  
20 response is required.

21 51. In answer to paragraph 3.31 of Plaintiff's Complaint, the April 2, 2019, letter

22 speaks for itself; therefore, no response is necessary. Furthermore, the actual  
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1 language used in the letter is not accurately represented in the allegation;  
2 therefore, Defendant denies the allegation contained therein.

3 52. In answer to paragraph 3.31.1 of Plaintiff's Complaint, the allegation contains  
4 Plaintiff's legal opinion and speculation for which no response is required.  
5 Furthermore, the letter at issue speaks for itself; accordingly, no response is  
6 required.

7 53. In answer to paragraph 3.32 of Plaintiff's Complaint, the allegation contains the  
8 Plaintiff's legal opinion for which no response is required. Furthermore, the  
9 "term sheet" speaks for itself.

10 54. In answer to paragraph 3.32.1 of Plaintiff's Complaint, the allegation contains  
11 the Plaintiff's legal opinion and interpretation of the Statement of Financial  
12 Accounting Standards for which no response is required; furthermore, the  
13 purported standard speaks for itself.

14 55. In answer to paragraph 3.33 of Plaintiff's Complaint, the allegation contains the  
15 Plaintiff's legal opinion and speculation for which no response is required.  
16 Furthermore, the "term sheet" speaks for itself. Accordingly, no response is  
17 required.  
18

19 56. In answer to paragraph 4.1 of Plaintiff's Complaint, the Defendant, having fully  
20 answered Plaintiff's Complaint, denies that the Plaintiff does not have an  
21 adequate remedy at law, and denies that the Plaintiff is entitled to any of the  
22 remedies or relief of any type or nature.  
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AFFIRMATIVE DEFENSES

1  
2 57. In further answer to Plaintiff's Complaint, and as Defendant's FIRST  
3 AFFIRMATIVE DEFENSE, Defendant alleges that the Plaintiff has failed to  
4 state a claim for which relief can be granted.

5 58. In further answer to Plaintiff's Complaint, and as Defendant's SECOND  
6 AFFIRMATIVE DEFENSE, Defendant alleges that the Plaintiff lacks legal  
7 standing to pursue his claim against the Defendant.

8 59. In further answer to Plaintiff's Complaint, and as Defendant's THIRD  
9 AFFIRMATIVE DEFENSE, the Plaintiff's claims are barred by operation of the  
10 legal doctrines of waiver, laches and estoppel. Since at least as early as 2006,  
11 Click! has contracted with multiple Internet Service Providers (ISPs), including,  
12 but not limited to, Advanced Stream for use of the Click! Network to provide  
13 retail internet services.

14  
15 60. In further answer to Plaintiff's Complaint, and as Defendant's FOURTH  
16 AFFIRMATIVE DEFENSE, the Plaintiff's claim for injunctive relief is barred by  
17 the fact that the Plaintiff has the option of pursuing remedies at law.

18 61. In further answer to the Plaintiff's Complaint, and as the Defendant's FIFTH  
19 AFFIRMATIVE DEFENSE, Plaintiff's damages, if any, were the proximate result  
20 of the Plaintiff's comparative or contributory fault.

21 62. In further answer to the Plaintiff's Complaint and as Defendant's SIXTH  
22 AFFIRMATIVE DEFENSE, to the extent the Plaintiff requests damages, the  
23 Plaintiff's damages, if any, were the sole and proximate result of the Plaintiff's  
24 failure to mitigate his damages.  
25

1 63. In further answer to Plaintiff's Complaint, and as Defendant's SEVENTH  
2 AFFIRMATIVE DEFENSE, the Plaintiff's claims are barred, in whole or in part,  
3 by operation of res judicata or collateral estoppel arising from issues litigated  
4 and orders issued by the Pierce County Superior Court in 1996<sup>3</sup> and 1997  
5 authorizing the System that is now Click! Network.

6 64. In further answer to Plaintiff's Complaint, and as Defendant's EIGHTH  
7 AFFIRMATIVE DEFENSE, the Plaintiff's claims are not ripe for adjudication.

8 65. In further answer to Plaintiff's Complaint, and as Defendant's NINTH  
9 AFFIRMATIVE DEFENSE, the Plaintiff's claim for relief is barred by the  
10 doctrine of unclean hands.

11 66. In further answer to Plaintiff's Complaint, and as Defendant's TENTH  
12 AFFIRMATIVE DEFENSE, the Plaintiff's Complaint for Mandamus Relief does  
13 not comply with the provisions of RCW 7.16.050 and RCW 7.16.170, and relief  
14 is therefore barred.

15 67. In further answer to Plaintiff's Complaint, and as Defendant's ELEVENTH  
16 AFFIRMATIVE DEFENSE, the Plaintiff has failed to join an indispensable party  
17 as a result of which relief cannot be granted.

18  
19 PRAYER FOR RELIEF

20 Having fully answered the allegations of Plaintiff's Complaint, Defendant prays  
21 for judgment as follows:

- 22 1. That the Plaintiff be denied declaratory relief;  
23 2. That the Plaintiff be denied injunctive relief;  
24

25  

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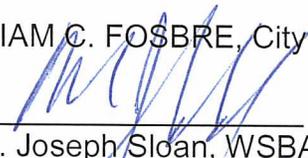
<sup>3</sup> *City of Tacoma v. Taxpayers & Ratepayers of the City of Tacoma*, Pierce Cause No. 96-2-09938-0  
ANSWER TO COMPLAINT- 13

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3. That the Plaintiff take nothing by his Complaint;
4. That the Plaintiff's Complaint be dismissed with prejudice;
5. That judgment be entered for the Defendant;
6. For such other and further relief as the Court deems just and equitable.

Dated this 6th day of May, 2019.

WILLIAM C. FOSBRE, City Attorney

By: 

M. Joseph Sloan, WSBA #13206  
Deputy City Attorney  
Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
PO Box 11007  
Tacoma, WA 98411  
Phone: (253) 502-8962  
Fax: (253) 502-8672  
Email: joseph.sloan@ci.tacoma.wa.us

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that on the 6<sup>th</sup> day of May, 2019, I caused a true and correct copy of Defendant's Answer to be delivered via regular first class mail to the following:

Mitchell Shook  
3318 6<sup>th</sup> Ave., Suite C  
Tacoma, WA 98406

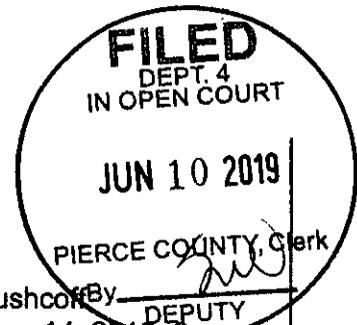
Dated this 6<sup>th</sup> day of May, 2019, in Tacoma, Washington.



\_\_\_\_\_  
Diane Kubicek  
Paralegal

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Judge Bryan Chushcock By DEPUTY  
Hearing Date: June 14, 2019, 9 a.m.

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

Mitchell Shook,  
Plaintiff Pro Se,  
vs.  
CITY OF TACOMA,  
Defendant.

NO. 19-2-07135-0

ORDER GRANTING  
DEFENDANT'S MOTION TO  
CONSOLIDATE

ORDER

This matter having come on before this Court, upon the Motion of Defendant City of Tacoma, and the Court having considered the Motion of Defendant City of Tacoma to Consolidate Pierce County Superior Court Cause No. 19-2-07873-7 with the above-referenced cause, the Declaration of M. Joseph Sloan in support thereof, and authorities stated therein, the arguments therein, and there being no opposition thereto, and having established that these two matters involve common questions of law and fact and that consolidation will serve the interests of judicial economy, that consolidation does not change the substantive rights of any of the parties and will not result in prejudice to any party; now therefore, it is hereby,

ORDER GRANTING DEFENDANT'S  
MOTION TO CONSOLIDATE - 1

Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
P. O. Box 11007  
Tacoma, Washington 98411  
Phone 253.502.8348  
Facsimile 253.502.8672

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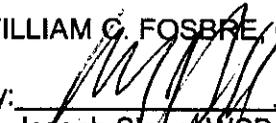
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1 ORDERED, ADJUDGED and DECREED that Defendant City of Tacoma's  
2 Motion to Consolidate is hereby GRANTED; and it is further  
3 ORDERED, ADJUDGED and DECREED that the matter of *Thomas McCarthy,*  
4 *et al. v. City of Tacoma,* Pierce County Superior Court Cause No. 19-2-07873-7 is  
5 consolidated with the instant matter under Pierce County Superior Court Cause  
6 No. 19-2-07135-0, neither case subject to a stay.

7 It is further, ORDERED, ADJUDGED and DECREED that all parties are to  
8 bear their own attorney's fees and costs incurred on this Motion to Consolidate only.

9 Done in open Court this 10<sup>th</sup> day of June, 2019.

10   
11 JUDGE BRYAN CHUSHCOFF

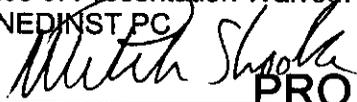
12 Presented by:  
13 WILLIAM C. FOSBRE, City Attorney  
14 By:   
15 M. Joseph Sloan, WSBA #13206  
16 Deputy City Attorney  
17 Attorney for Defendant

FILED  
DEPT. 4  
IN OPEN COURT  
JUN 10 2019  
PIERCE COUNTY Clerk  
By:   
DEPUTY

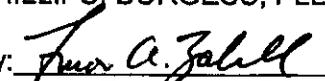
18 So stipulated, approved as to form,  
19 Notice of Presentation Waived:

20 By:   
21 Mitchell Shook, Plaintiff Pro Se

22 So stipulated, Approved to form;  
23 Notice of Presentation Waived:  
24 KLINEDIKST PC

25 By:   
26 Stephanie D. Olson, WSBA #50100  
27 Attorneys for Plaintiff, Shook,  
28 Limited Appearance

29 So stipulated, approved as to form,  
30 Notice of Presentation Waived:

31 PHILLIPS, BURGESS, PLLC  
32 By:   
33 Trevor A. Zandell, WSBA #37210  
34 Kent Van Alstyne, WSBA #49928  
35 Attorneys for Plaintiffs McCarthy and Anderson

ORDER GRANTING DEFENDANT'S  
MOTION TO CONSOLIDATE - 2

Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
P. O. Box 11007  
Tacoma, Washington 98411  
Phone 253.502.8348  
Facsimile 253.502.8672

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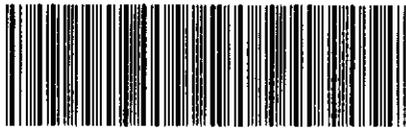
**CERTIFICATE OF SERVICE**

I, Diane Kubicek, hereby certify that on the date below, I served the foregoing document via the method indicated below on all counsel of record and Plaintiff Pro Se:

<b>Plaintiff Pro Se:</b> <b>Mitchell Shook</b> 3318 6 <sup>th</sup> Ave., Ste. C Tacoma, WA 98406  P.O. Box 7641 Tacoma, WA 98417 <u><a href="mailto:mitch@advancedstream.com">mitch@advancedstream.com</a></u>	<input type="checkbox"/> Email <input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Legal Messenger
<b>Attorneys for Plaintiff Shook, Limited Appearance:</b> <b>Stephan D. Olson</b> KLINEDINST PC 701 5 <sup>th</sup> Ave. Ste. 1220 Seattle, WA 98104-7007 <u><a href="mailto:solson@klinedinstlaw.com">solson@klinedinstlaw.com</a></u>	<input type="checkbox"/> Email <input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Legal Messenger
<b>Attorneys for Plaintiffs McCarthy and Anderson:</b> <b>Trevor A. Zandell</b> <b>Kent Van Alstyne</b> PHILLIPS BURGESS PLLC 714 Columbia St. NW, Ste. 320 Olympia, WA 98501 <u><a href="mailto:tzandell@phillipsburgesslaw.com">tzandell@phillipsburgesslaw.com</a></u> <u><a href="mailto:kvanalstyne@phillipsburgesslaw.com">kvanalstyne@phillipsburgesslaw.com</a></u>	<input type="checkbox"/> Email <input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Legal Messenger

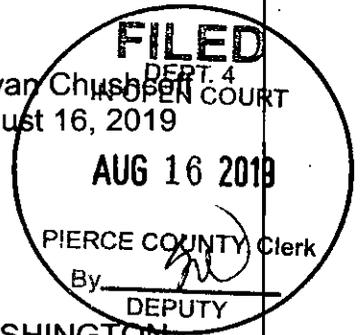
DATED this \_\_\_\_\_ day of June, 2019, in Tacoma, Washington.

\_\_\_\_\_  
Diane Kubicek, Paralegal  
Office of the City Attorney  
Department of Public Utilities



19-2-07135-0 53728717 ORGLA 08-21-19

The Honorable Bryan Chushenko  
HOPEN COURT  
Hearing date: August 16, 2019  
Time: 9:00 a.m.



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

MITCHELL SHOOK,

Plaintiff Pro Se,

NO. 19-2-07135-0

vs.

*GRANTING*

ORDER ~~DENYING~~ PLAINTIFF  
MITCHELL SHOOK'S MOTION FOR  
LEAVE TO AMEND COMPLAINT

CITY OF TACOMA,

Defendant.

(Proposed)

THOMAS MCCARTHY; and CHRISTOPHER  
T. ANDERSON,

Plaintiffs,

vs.

CITY OF TACOMA,

Defendant.

ORDER

This matter having come on regularly before this Court on the Motion of Plaintiff Mitchell Shook for Leave to Amend Complaint, and having considered Plaintiff's Motion, the Proposed Amended Complaint for Declaratory, Injunctive, Prohibition and Mandamus Relief attached thereto, and having considered Defendant City of Tacoma's Opposition to Plaintiff Mitchell Shook's Motion to Amend Complaint

ORDER DENYING PLAINTIFF  
MITCHELL SHOOK'S MOTION  
FOR LEAVE TO AMEND COMPLAINT- 1

Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
P. O. Box 11007  
Tacoma, Washington 98411  
Phone 253.502.8348  
Facsimile 253.502.8672

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and the Order Denying Motion for Writ of Prohibition and for Preliminary Injunction attached thereto, and having established due cause, now therefore, it is hereby:

ORDERED, ADJUDGED and DECREED, that Plaintiff's Mitchell Shook's ~~Motion for Leave to Amend Complaint is hereby DENIED~~ <sup>GRANTED</sup>; it is further:

~~ORDERED, ADJUDGED and DECREED, that all parties and to bear their own attorney's fees and costs.~~

*Handwritten:* 49928

Done in open Court this 16<sup>th</sup> day of August.

*Signature of Judge Bryan Chushcoff*  
\_\_\_\_\_  
Judge Bryan Chushcoff

Presented by:

WILLIAM C. FOSBRE  
Tacoma City Attorney

*Signature of Chris Bacha*  
\_\_\_\_\_  
Chris Bacha, WSBA #16714  
Chief Deputy City Attorney

**FILED**  
DEPT. 4  
IN OPEN COURT  
  
AUG 16 2019  
  
PIERCE COUNTY, Clerk  
By *Signature*  
DEPUTY

Approved as to form:

*Signature of Mitchell Shook*  
\_\_\_\_\_  
Mitchell Shook, Plaintiff Pro Se

Approved as to form:

PHILLIPS BURGESS, PLLC

*Signature of Trevor A. Zandell*  
\_\_\_\_\_  
Trevor A. Zandell, WSBA No. 37210  
Kent van Alstyne, WSBA No. 49928  
Attorneys for Plaintiff, McCarthy and Anderson

ORDER DENYING PLAINTIFF  
MITCHELL SHOOK'S MOTION  
FOR LEAVE TO AMEND COMPLAINT- 2

Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
P. O. Box 11007  
Tacoma, Washington 98411  
Phone 253.502.8348  
Facsimile 253.502.8672

August 26 2019 3:53 PM

KEVIN STOCK  
COUNTY CLERK  
NO: 19-2-07135-0

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

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9 **IN AND FOR THE COUNTY OF PIERCE**

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12 Mitchell Shook,

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14 Plaintiff Pro Se

15 v.

16 CITY OF TACOMA

17 Defendant

18 AS CONSOLODATED  
19 THOMAS MCCARTHY  
20 AND CHRISTOPHER ANDERSON  
21 PLAINTIFFS

22 vs.

23 CITY OF TACOMA  
24  
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27

No. 19-2-07135-0

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

1 TABLE OF CONTENTS

2

3 Nature of This Action 2

4 1. PARTIES 3

5 2. JURISDICTION AND VENUE 3

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7 4. CLAIM FOR RELIEF 21

8 5. PRAYER FOR RELIEF 24

9

10 AMENDED COMPLAINT

11 **Plaintiff, Mitchell Shook, hereby amends his Complaint to add facts, causes of action and**  
12 **relief sought. Plaintiff can certainly prove these charges.**

13 **Additional facts are added starting at “Paragraph 3.34” on page 16, new causes of action**  
14 **are in Section IV beginning with paragraph 4.2 on page 21, and further relief sought is under**  
15 **“Section V” beginning at paragraph 16 on page 21..**

16 INTRODUCTION -NATURE OF ACTION

17 Click! Network (“Click!) was established in 1997, by Tacoma City Council, as a “*broad band*  
18 *telecommunications system that shall be owned, operated and controlled by the City of Tacoma*  
19 *Department of Public Utilities Light Division*”<sup>1</sup>.

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

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

25 The Click! Network telecommunication system continues to fulfill its original mandate, providing  
26 wholesale broadband Internet services to over 20,000 Tacoma Public Utilities customers, with a state-

27  

---

<sup>1</sup> The 1997 City Council Resolution No. 33668

1 of-the-art cable modem and Gigabit Fiber To The Home (“FTTH”) system -while delivering  
2 television services to over 12,500 Tacoma Public Utilities customers over the system.

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

6 Tacoma City Charter, Article IV § 4.6, clearly prohibits the disposal of a “utility system” without  
7 a majority vote of the electorate. Similarly, RCW 35.94 requires a vote for any sale, lease or disposal  
8 of “any part” of a municipal utility system.

9 Since Click!’s system is part of Tacoma Public Utility<sup>2</sup>, and no such vote of the people is planned  
10 or provided for, there is an imminent risk that the terms of City charter will be violated.

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

#### 14 1. PARTIES

15 Plaintiff Mitchell Shook is a resident of Tacoma, a Tacoma Public Utilities rate payer, taxpayer to  
16 City of Tacoma’s general government and Click! customer; and, as such, has standing to seek the  
17 relief requested in this petition.

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

#### 23 2. JURISDICTION AND VENUE

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

27 \_\_\_\_\_  
<sup>2</sup> City of Tacoma Resolution 40272

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

3 2.2 Given no other speedy or adequate remedy, RCW 7.16.040 provides the Court  
4 jurisdiction over this matter.<sup>3</sup>

### 5 3. FACTS

6 3.1 Tacoma City Charter Section 4.6 requires “*The City shall never sell, lease or dispose of any*  
7 *utility system*” without a “*majority vote of the electors*”.

8 3.1.1 Click is multi-service broadband telecommunications provider and operating section of  
9 Tacoma Power providing retail cable television and wholesale broadband internet services to Tacoma  
10 Power’s residential and business customers.

11 3.2 Ordinance NO. 25930 was passed by Tacoma City Council in 1996 and entitled “*AN*  
12 *ORDINANCE of the City of Tacoma, Washington establishing a telecommunications system as*  
13 *part of the Light Division*”.

14 3.2.1 The 1996 CITY of Tacoma ORDINANCE NO. 25930 States “*WHEREAS, RCW 35.92.050*  
15 *authorizes cities to construct and operate works and facilities for the purpose of furnishing*  
16 *any persons with electricity and other means of power and to regulate and control the use*  
17 *thereof<sup>4</sup> or lease any equipment or accessories necessary and convenient for the use*  
18 *thereof; and*

19 3.2.2 CITY of Tacoma ORDINANCE NO. 25930 States *WHEREAS, the Utility Board and the*  
20 *Council have determined that it is in the best interest of the City that it install a*  
21 *telecommunications system among all of its Electric System substations in order to improve*  
22 *communications for automatic substation control; and*

---

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

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

1 3.2.3 CITY of Tacoma ORDINANCE NO. 25930 States *WHEREAS, the City has determined*  
2 *that it is prudent and economical to provide additional capacity on such*  
3 *telecommunications system to provide the Electric System with sufficient capacity to*  
4 *perform or enhance such functions as automated meter reading and billing, appliance*  
5 *control<sup>5</sup>, and load shaping; and*

6 3.2.4 City of Tacoma ORDINANCE NO. 25930 States *WHEREAS, the Light Division may wish*  
7 *to connect such telecommunications system to individual residences and businesses in its*  
8 *service area or to other providers of telecommunications services; and*

9 3.2.5 The 1996 City of Tacoma ORDINANCE NO. 25930 States *WHEREAS, the City has*  
10 *determined that it should create **a telecommunications system as part of the Electric***  
11 ***System**<sup>6</sup> in order to construct these telecommunications improvements”*

12 3.2.6 Exhibit A to 1996 City of Tacoma ORDINANCE NO. 25930<sup>7</sup> stated the  
13 telecommunications project would include “demand side management (DSM)  
14 functions<sup>8</sup>, CATV and Internet Access.

15 3.2.7 In 2006, Washington voters approved Initiative Measure 937, known as the Energy  
16 Independence Act. The measure, which was codified at RCW 19.285, requires electric  
17 utilities with more than 25,000 customers to take certain measures to conserve energy<sup>9</sup>

18 3.2.8 Demand-side management (DSM) or demand-side response (DSR) is the modification of  
19 consumer demand for energy through various methods -such as financial incentives.

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23 \_\_\_\_\_  
24 <sup>5</sup> Emphasis added, for it should be recognized that “appliance control” is not possible without two way  
25 communication between an appliance and the user -as such “appliance control” is an energy related  
26 function.

27 <sup>6</sup> Emphasis added to point out that the telecommunications system is a “part of the electric system”

<sup>7</sup> Passed on July 26, 1996 when the telecommunications system was approved

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

<sup>9</sup> Kelley, 120313 WAAGO, AGO 2013-6 2013

1 Demand-side management encourages the consumer to use less energy during peak hours,  
2 or to move the time of energy use to off-peak times such as nighttime and weekends.<sup>10</sup>

3 3.3 The Tacoma City Council approved construction of Click! Network on April 8,1997. The City  
4 Council delegated authority to the Public Utility Board and the Department of Public Utilities  
5 ("TPU"), Light Division (dba "Tacoma Power"), to implement, own and manage a broadband  
6 telecommunications system ("Click! Network" or "Click!"), as authorized through City Council  
7 Substitute Resolution No. 33668, approved April 8, 1997, and Public Utility Board Amended  
8 Substitute Resolution U-9258, which was approved on April 9 1997

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

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

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

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27 <sup>10</sup> 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 *Utilities, Light Division is hereby authorized to proceed to implement said proposal for a broad*  
2 *band telecommunications system, and That the proposed broad band telecommunications system*  
3 *shall be owned, operated and controlled by the City of Tacoma Department of Public Utilities*  
4 *Light Division*<sup>11</sup>"

5 3.3.4 Click! operates as part of TPU. Click is one Tacoma Power's 6 business units -which units are  
6 generation; power management; transmission and distribution; rates, planning and analysis; Click  
7 Network; and utility technology services.

8 3.3.2 Click! is not a separate business unit or enterprise fund. It is an organizational unit within the  
9 Power enterprise fund. The first line of Click! oversight is the Power Superintendent and the  
10 Power management team. From there, oversight is provided by, the TPU CEO, the Board, and the  
11 City Council.

12 3.3.3 TPU Revenue Bonds were approved, by a declaratory judgement, to pay for construction of the  
13 Click! system; and, no general fund dollars have been committed to the project.

14 3.4 Approximately 1,500 miles of fiber and coaxial cable have been constructed by Tacoma  
15 Power in the cities of Tacoma, University Place, Fircrest, Lakewood and Fife, and portions of  
16 unincorporated Pierce County, providing Tacoma Power with a state-of-the-art telecommunication  
17 system with which supports transmission and distribution operations, advanced metering, and retail  
18 and wholesale commercial services. The network currently covers approximately 66% of the  
19 households in Tacoma Power's service territory.

20 3.5 The network consists of a hybrid fiber-optic coaxial ("HFC") system, which delivers two-way  
21 signals for cable TV, cable modem,<sup>12</sup> Fiber To The Home ("FTTH") Internet services, and advanced  
22 metering.

23 3.6 In addition, SONET ("Synchronous Optical Network") and Gigabit Ethernet technologies  
24 are used to support communications across Tacoma Power's transmission and distribution system and  
25

26 \_\_\_\_\_  
27 <sup>11</sup> Emphasis added to highlight fact that system is owned by TPU

<sup>12</sup> Telecommunications Infrastructure Section, on Page 47, Bond Prospectus for CITY OF TACOMA,  
WASHINGTON \$70,575,000 Electric System Revenue Bonds, Series 2017

1 to carry out data transport services for commercial customers. The network was designed and  
2 constructed to meet high telecommunications standards, containing a redundant backbone and  
3 redundant service loops, which seek to ensure uninterrupted signal transport in the event of a network  
4 break.

5 3.7 Commercial telecommunication services were Launched in 1998 under the brand name Click!  
6 Network. Click! provides three commercial telecommunication services to TPU customers; retail  
7 cable television, wholesale broadband transport and wholesale high-speed Internet delivered over  
8 cable modem and FTTH.

9 3.8 In 2017 Click! Network's annual operating revenues were approximately \$26,519,861<sup>13</sup>.

10 3.8.1 Click! ended 2018 with more than 12,500 cable TV customers, 20,000 wholesale  
11 high- speed Internet service customers, and more than 100 wholesale broadband transport  
12 circuits.

13 3.8.2 Click! has "significant goodwill", According to Section 2.3 of the January 23, 2018  
14 presentation by Joann Hovis, of CTC Technology, at the City Council-TPU Board Joint Study  
15 Session. Ms. Hovis' report was titled Strategy Alternatives for Tacoma Click!:

16 3.8.3 "Click! has thousands of customers and considerable goodwill", as confirmed by Click!  
17 Network General Manager, Tenzin Gyaltzen, who stated so in his February 7<sup>th</sup>, 2018, Declaration  
18 In Support Of Defendants Opposition To Partial Summary Judgement -page 3 , Pierce County  
19 Superior Court Case No 17-2-08907-4

20 3.8.4 Click! is the nations second largest municipal CATV and Internet service -behind  
21 Chattanooga TN.

22 3.9 TPU is governed by the City's public utility board, whose five members are appointed by the  
23 mayor and confirmed by the city council. Utility budgets and rates are subject to approval by the city  
24 council. **Section 4.3 of the City charter** provides City council with oversight on rates and the  
25 authority *"to fix and from time to time, revise such rates and charges as it may deem advisable for*  
26 *supplying such utility services the City may provide"*.

27  

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<sup>13</sup> CLICK! NETWORK COMMERCIAL OPERATIONS OPERATIONAL SUMMARY - December 31, 2017

1 3.10 Title 12 “Utilities” of the Tacoma Municipal Code regulates utilities and rates.

2 3.10.1 Click! CATV and wholesale Internet rates are regulated under Title 12 of the Tacoma  
3 Municipal Code, in section 12.13

4 3.10.2 Click! TV and Wholesale Internet rates are approved by the Public Utility Board  
5 (Board) and City Council, the same as Power, Water, and Rail rates.

6 3.11 Over 10,000 TPU electric customers currently have Tacoma Power Gateway meters  
7 installed on their homes. These “gateway meters” operate over Click! Network’s HFC plant.

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

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

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

18 3.13 AMENDED RESOLUTION NO. U-10879, states:” #20. *WHEREAS Tacoma Power has*  
19 *excess power generation capacity within its service territory. In the past, Tacoma Power has*  
20 *benefited greatly by selling this excess capacity in the wholesale power markets to the benefit of all*  
21 *retail electric customers. Over the past few years, wholesale power prices and sales have dropped*  
22 *substantially. In support of Tacoma Power's strategic business plan, Tacoma Power wants to make*  
23 *up this lost revenue by looking at ways to increase its retail power sales through economic growth in*  
24 *the community. Communities across the nation have benefited economically from competitive access*  
25 *to internet services in their communities.*”

26 \_\_\_\_\_  
27 <sup>14</sup> From AMENDED RESOLUTION NO. U-10879 Adopted by TPU Board on 9-28-16

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

1 3.14 AMENDED RESOLUTION NO. U-10879 also states: “Tacoma Power’s continued operation  
2 and maintenance of the telecommunications system for internet access purposes assists in making the  
3 internet services competitive in Tacoma Power’s service area, which increases economic growth that  
4 leads to greater retail power sales”.<sup>16</sup>.

5 3.15 AMENDED RESOLUTION NO. U-10879 stated “WHEREAS The Internet-related uses of  
6 the Click! telecommunications system provide Tacoma Power customers benefits by giving them  
7 access to advanced customer services options such as: power use monitoring, outage reporting,  
8 scheduling of services, bill paying, and electrical appliance control.

9 3.16 AMENDED RESOLUTION NO. U-10879 stated that “WHEREAS In planning for an  
10 uncertain and unknown future<sup>17</sup>, there may be other potential functions related to the supplying of  
11 electricity to customers who might also make energy related usage of the telecommunications system  
12 infrastructure including: cyber security efforts, electric car charging and metering, enhanced “smart  
13 home” uses that allow customers to control power usage by time of day, participate in demand  
14 response programs, behavior-based saving programs, outage communications, energy audits, and  
15 participation in Evergreen Options”<sup>18</sup>

16 3.17 One purpose for creating Click! was to have a telecommunications system sophisticated  
17 enough to enable TPU to compete effectively in the rapidly evolving electric industry.

18 3.18 Amended Resolution U-10828, adopted by the City’s public utility board on December 3,  
19 2015, states “*WHEREAS the broadband telecommunication system is critical infrastructure for*  
20 *Tacoma Power*

21 3.18.1 Amended Resolution U-10828 cites Charter 4.6 as requiring a vote of the people to  
22 before the City may “*lease or dispose of any utility system*”.<sup>19</sup>

26 <sup>16</sup> AMENDED RESOLUTION NO. U-10879 -Page 4, This is Whereas #20

27 <sup>17</sup> AMENDED RESOLUTION NO. U-10879 -Page 4, This is Whereas #17

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

<sup>19</sup> Page one of Amended Resolution U-10828

1 3.19 City Council Resolution #39347 states: “1997, the City of Tacoma, through its electrical  
2 utility, embarked on an effort to construct and operate a state-of-the-art telecommunication system  
3 for the benefit of its electric utility and its electric utility customers”<sup>20</sup>

4 3.19.1 City Council Resolution #39347 states: “WHEREAS the telecommunications  
5 system was constructed and has been in continuous operation since 1999, and has proven to  
6 provide benefits for the City electric utility and electric utility customers located both Inside  
7 and outside City limits”<sup>21</sup>

8 3.19.2 City Council Resolution #39347 states: “WHEREAS the telecommunication system  
9 is now a vital component of the City's electric utility and continued operation and  
10 maintenance of the system is an essential function of the electric utility”

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

23 3.19.2 City Council Resolution #39347 stated: “WHEREAS some benefits of the City's  
24 electric utility telecommunication system include enhancing communication between electric  
25 utility assets and electric utility consumers, and providing electric utility customers a means  
26

27 <sup>20</sup> City Council Resolution #39347 -page 1

<sup>21</sup> City Council Resolution #39347 -page 1

<sup>22</sup> Passed by City Council on December 15 2015

1 *to instantly access electric utility accounts information for payment of bills, report outages,*  
2 *and obtain energy usage and conservation information, and;*

3 3.20 That a water heater “demand response project” was recently conducted by Tacoma Power, in  
4 the Salishan housing development neighborhood, under an agreement with the Tacoma Housing  
5 Authority.

6 3.20.1 Data transport for the Salishan demand response hot water heater project utilized Click!  
7 Network’s cable modem system<sup>23</sup>.

8 3.20.2 Demand response technology requires two-way communications.

9 3.20.3 Demand response technology holds potential for load reduction and energy savings<sup>24</sup>.

10 3.20.4 RCW 35.92.360<sup>25</sup> -Energy conservation plan states "The legislature finds that energy  
11 conservation can take many useful and cost-effective forms, and that the types of conservation  
12 projects available to utilities and customers evolve with time as technologies are developed and  
13 market conditions change. In some cases, **electricity conservation projects are most cost-**  
14 **effective when they reduce the total amount of electricity consumed**<sup>26</sup> by an individual  
15 customer, and in other cases they can be cost-effective by reducing the amount of electricity a  
16 customer needs to purchase from an electric utility.

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

19 3.21.1 The Committee was comprised of seven members as follows: Mayor Marilyn Strickland,  
20 City Council Member Marty Campbell, Public Utility Board Member Mark Patterson, Public  
21 Utility Board Member Karen Larkin, industry experts Janine Terrano and Terry Dillon, and  
22 ratepayer advocate Andrea Cobb<sup>27</sup>.

23 3.21.2 The Committee met 16 times between January 22,2016 and August 1,2016.

24  
25 <sup>23</sup> Email from Click! General Manager Tenzin Gyaltzen

26 <sup>24</sup> BPA Salishan Demand Response Water Heater Final Report 2018

27 <sup>25</sup> Findings-Intent-2002 c 276

<sup>26</sup> Emphasis added to point out the Nexus between Internet access and the ability to conserve energy

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

1 3.22 Studies by the Click! Engagement Committee and Tacoma Power’s financial analysis  
2 demonstrate that continuing to provide CATV services in support of retail internet services makes the  
3 sale of such services a more competitive overall product and improves the financial sustainability of  
4 Click!<sup>28</sup>

5 3.23 In July 2018, the City Council and Public Utility Board (“Board”) directed Joann Hovis, of  
6 CTC Technology & Energy (“CTC”), to negotiate with Rainier Connect and Wave Broadband, and to  
7 develop formal partnership proposals regarding the operation and use of the Click! Network.

8 3.23.1 Two Public-Private Partnership Term Sheets (“term sheets”) for operation and use of  
9 Click! Network, one from Rainier Connect and one from Wave Broadband, were presented to  
10 the Council and Board, at a Joint Study Session on March 5, 2019.<sup>29</sup>

11 3.23.2 Both of these term sheets proposed a 20-year IRU with two 10-year extensions.

12 3.23.3 The term sheets from Rainier Connect and from Wave Broadband were compared and  
13 evaluated by Joann Hovis of CTC, a consultant hired by the City, who recommended to the  
14 TPU Board and City Council that they should proceed with the term sheet proposed by  
15 Rainier Connect.

16 3.24 The Rainier Connect term sheet<sup>30</sup> presented to City Council states that *“The IRU term will be*  
17 *20 years (“IRU Term”). On the expiration of the IRU Term, the IRU can be renewed for two*  
18 *additional periods of 10 years (“Extension IRU Terms”) so long as Rainier Connect is in compliance*  
19 *with all the terms of its contractual relationships with the City of Tacoma and TPU.”*

20 3.25 The Rainier Connect term sheet (“the term sheet”) states: *“Rainier Connect will be granted use*  
21 *of other assets currently used by Click! in the provision of cable television and broadband data*  
22 *services, including equipment used to operate the Network and deliver services to customers,*  
23 *customer accounts, inventory of spare parts and equipment, prepaid items, and material contracts, in*  
24 *each case related to the operation of the Network and the provision of products and services*

25 \_\_\_\_\_  
26 <sup>28</sup> AMENDED RESOLUTION NO. U-10879

27 <sup>29</sup> 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

<sup>30</sup> 12. Tacoma Click! -Rainier Connect Public-Private Partnership Term Sheet Presented by JoAnn Hovis on  
March 5, 2019

1 (collectively, “Related Assets”). **The Related Assets will be conveyed to Rainier Connect subject**  
2 **thru the terms of an asset purchase agreement (“APA”)**<sup>31</sup> to be negotiated between the parties.”<sup>32</sup>

3 3.26 Further negotiations with Rainier Connect were approved by City council on March 26<sup>th</sup>,  
4 2019, with the passage of Resolution 40272, entitled: “A resolution approving the execution of an  
5 agreement between the Department of Public Utilities, Light Division d.b.a. Tacoma Power, and  
6 Rainier Connect to negotiate in good faith formal partnership contracts related to the operation and  
7 use of the Click! Network”

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

15 3.28 The term sheet states: “The Tacoma Power Fiber on Critical Routes is collocated with the  
16 fiber optic strands that are used by Click! and are now planned to lease to Rainier Connect under  
17 the IRU.”

18 3.29 The term sheet with Rainier Connect does not provide City council any control over TV or  
19 Internet rates.

20 3.30 The term “IRU” has frequently been described as a “Lease” by Tacoma City and TPU policy  
21 makers since the concept of a public-private partnership was first introduced in 2015.

22 3.30.1 In a May 6, 2015 Memo from TPU Director Gaines responding to “Council inquiries  
23 from the March 31, 2015 Joint Study Session” the “IRU” is described as a “Lease”.

24 3.31 On April 2, 2019 a Letter of Intent (“LOI”) was signed by TPU Director Jackie Flowers with  
25 Rainier Connect. The LOI states “In the proposed transaction, Rainier Connect would obtain an

26 \_\_\_\_\_  
27 <sup>31</sup> emphasis added to point out the fact of the asset sale.

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

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

1 exclusive indefeasible right to use ("IRU") and operate the hybrid fiber coaxial ("HFC") system that  
2 today the Department of Public Utilities, Light Division ("Tacoma Power") d/b/a/ Click! Network  
3 ("Click") operates to provide wholesale and retail video and broadband products and services to  
4 residents and businesses in the City and in other jurisdictions in which Click! is franchised to  
5 operate".

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

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

10 3.32.1 FASB Statement of Financial Accounting Standards ("SFAS") No. 13, *Accounting for*  
11 *Leases*, and the related interpretations of this standard, provide the relevant GAAP for lease  
12 accounting, including the definition of a lease. This accounting literature defines a lease as an  
13 agreement conveying the right to use property, plant or equipment for a period of time<sup>35</sup>

14 3.33 The term sheet represents significant material changes to the Click! Business model, including  
15 the removal of TPU as the primary operator of Click!, the sale or lease of telecommunications system  
16 equipment or capacity, the outsourcing of work and discontinuance of TPU products and services<sup>36</sup>.

17 3.34 Since its inception in 1996, *Click! has been a part of Tacoma Power* and was initially  
18 financed with Tacoma Power revenues and resources.<sup>37</sup>

19 3.35 Defendant defines TPU's "Communications Network" as "that network **owned, operated,**  
20 **and maintained by Click!**, consisting of redundant fiber optical backbones, redundant fiber optical  
21 service loops and coaxial cable distribution cables on which numerous applications are provided,  
22 which network includes, but is not limited to, Department of Public Utilities' two-way  
23

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24 <sup>34</sup> Public-Private Partnership Term Sheet March 4, 2019

25 <sup>35</sup> 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 <sup>36</sup> 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

<sup>37</sup> Confirmed by Tacoma City Council Resolution No. 39577

1 communications services, commercial retail cable television, wholesale Internet services, wholesale  
2 data transport services, and I-Net services”<sup>38</sup>.

3 3.36 **Click!’s customers**, thru their usage of the telecommunications system’s broadband Internet  
4 access, ethernet transport and cable television services, **have shared in paying for** and offsetting part  
5 of the **capital costs** of constructing *Tacoma Power’s telecommunications system*, as well as in the  
6 **operation and maintenance** (“O&M”) of this infrastructure. By sharing in these costs, Click!’s  
7 operation benefits all Tacoma Power electric customers who otherwise would pay 100% of the capital  
8 and O&M costs.<sup>39</sup>

9 3.37 At least \$100 million dollars has been spent in constructing the telecommunications system  
10 that allows delivery of Click!’s commercial telecommunication services.

11 3.38 On May 12, 2015 Defendant estimated that “approximately \$200 million in historical cost and  
12 approximately \$80 million in book value of the Fiber/Coax system” existed at that time, and “the  
13 initial capitalization date was around 1999.”

14 3.39 Tacoma Power's continued operation of the telecommunications system for provision of  
15 broadband services assists in making Internet services competitive in Tacoma Power's service area.  
16 This benefits Tacoma Power by stimulating and increasing economic growth, which leads to greater  
17 retail power sales. Other benefits include “allowing the utility to continue to efficiently and  
18 effectively meet the demands of new federal regulations relating to reliability of the electrical system,  
19 combating threats from possible cyberterrorism acts, participating in energy transactions and trades to  
20 balance the energy markets in less than 15-minute increments, enhancing communication between  
21 electric utility assets and electric utility consumers, and providing electric utility customers a means  
22 to *instantly access electric utility accounts* information for payment of bills, *report outages, and*  
23 *obtain energy usage and conservation information.*”<sup>40</sup>

24 3.40 No direct cost audit or “*product line profitability*” analysis for Click! has ever been done.  
25

26  
27 <sup>38</sup> Institutional Network Services Agreement between City of Tacoma and Click! Network, 12/21/2009-p. 3

<sup>39</sup> Confirmed in Resolution U-10879. passed by Tacoma Public Utility Board on 9-28-16

<sup>40</sup> Tacoma City Council Resolution 39347, passed on December 15, 2015

1 3.41 In violation of state law, Tacoma Public Utilities is paying 7.5% of Click! Network's  
2 broadband revenues to Defendant's general fund.

3 3.42 In a single month, October 2018, this 7.5% "tax" or B&O "fee" amounted to \$52,297.18.

4 3.43 In distributing shared capital and O&M expenses between Click!'s commercial operations and  
5 Tacoma Power's traditional electrical services, Defendant follows a cost "**allocation methodology**"  
6 with formulas guided by the "*Governmental Accounting Standards Board*" ("GASB").

7 3.44 Defendant's "fully distributed" allocation methodology is based on GASB rules designed to  
8 distribute shared "indirect costs", across City departments, not to determine "profits" in a commercial  
9 sense. Accordingly, many different types of "**general overhead costs**" appear as "expenses" under  
10 various sections of Click!'s Operational Summaries.

11 3.45 Many of these indirect "**overhead costs**" are expenses completely unrelated Click!'s  
12 commercial telecommunications activities whatsoever.

13 3.46 These indirect "**unrelated costs**" include such things, by way of example, as the Tacoma  
14 Mayor's salary and City Council member's salaries.

15 3.47 Given the many unrelated and indirect costs included under GASB rules in the preparation of  
16 Click!'s Operational Summaries, no true and accurate representation of Click!'s "**actual income**" or  
17 true profitability "**as an enterprise**" is provided by these statements. Defendant's governmental  
18 accounting methods are not designed to track "profits," as such.

19 3.48 In preparing Click!'s Operational Summaries, Defendant follows "**not-for-profit accounting**  
20 *and financial reporting principles by governmental entities,*" as outlined by GASB. Determining  
21 Click!'s true performance and profitably from business-type "proprietary activities," as an enterprise,  
22 is not the object of GASB rules.

23 3.49 The accounting methodology Defendant uses in preparation of Click! Operational Summaries  
24 artificially increase Click!'s expenses and do not reflect the System's actual "*operating profits or*  
25 *losses*" as an "enterprise."

26 3.50 In 2015 the "**cost allocation formulas**" were significantly updated by TPU management -  
27 resulting in "significant" changes to the allocation methodology. This "significant update" resulted in

1 *shifting costs*, from a previous ratio of approximately 75% to Click! and 25% to Tacoma Power, to a  
2 “**new ratio**” of 94% to Click! and only 6% to Tacoma Power.<sup>41</sup>

3 3.51 The change in the allocation formulas resulted in *\$5.7 million of additional expenses* being  
4 allocated onto Click!. These **additional costs** were retroactively reflected in Click!’s Operational  
5 Summaries beginning on January 1, 2015.

6 3.52 In 2016 Tacoma City Council passed a Resolution recognizing that the internal cost allocation  
7 formulas between Click! and Tacoma Power had changed significantly; and, that TPU management  
8 had “*substantially increased the share of cost allocations borne by Click! Network*”.

9 3.53 In this 2016 Resolution, City Council directed the City Manager to **hire an independent**  
10 **third-party consultant** to “*audit, analyze, and establish a reasonable methodology*” for cost  
11 allocation between Tacoma Power and Click! Network. **This audit was never done.**

12 3.54 This City Council Resolution specifically cited “**significant concerns**” over the “**veracity**  
13 **and appropriateness**” of the accounting assumptions and “cost allocation” methodology implemented  
14 by Tacoma Power. The Resolution determined that such concerns “**must be resolved.**”

15 3.55 This Council resolution authorized \$100,000 for an independent consultant to audit, analyze,  
16 and establish an *independent cost allocation methodology* between Tacoma Power and Click!.

17 3.56 A third-party consultant, NEWGEN STRATEGIES, LLC (“**NewGen**”) was hired and a  
18 contract issued in January 2017 to audit Click! pursuant to Council’s direction. The contract specified  
19 NewGen would “**evaluate the methodology used to allocate costs** between Tacoma Power’s electric  
20 and cable (Click!) operations and determine *the extent to which it is reasonable*”<sup>42</sup>.

21 3.57 In March 2017 the City Attorney issued a “Notice of Contract Suspension” to NewGen stating  
22 it is “*in the best interest of the City to suspend the professional services agreement with NewGen*  
23 *dated January 9, 2017.*” **The contract was thus terminated, and the audit never completed.**

24 3.57 The “*significant concerns*” identified by City Council in the 2016 Resolution requiring an  
25 audit **were never addressed** by NewGen, or in any subsequent audit. The “*veracity and*  
26

27 \_\_\_\_\_  
<sup>41</sup> Confirmed by Tacoma Public Utilities 2015 Annual Report

<sup>42</sup> Jan 9<sup>th</sup>, 2017 contract between City of Tacoma and NEWGEN Strategies.

1 *appropriateness*” of the accounting assumptions and “*cost allocation*” methodology remain  
2 *unanswered issues and genuine questions of material fact.*

3 3.58 The City Charter provides that the revenues of utilities owned and operated by the City shall  
4 never be used for any purposes other than the necessary operating expenses thereof, the making of  
5 additions and betterments thereto and extensions thereof, and the reduction of rates and charges for  
6 supplying utility services to consumers.

7 3.59 The City of Tacoma maintains an **Institutional Network** (I-Net) serving the City, schools,  
8 and government agencies. The I-Net system has an agreement with TPU to utilize a portion of TPU’s  
9 telecommunications plant. This agreement includes an “*incremental cost arrangement*,” where the  
10 City only pays for “*incremental costs*,” or those costs “*over and above* the costs that Tacoma Power  
11 would have incurred” for the system to serve Tacoma Power’s own non-I-Net purposes.<sup>43</sup>

12 3.60 Click! Network has no such “*incremental cost arrangement*” with TPU; rather, under the  
13 “*updated cost allocation formulas*,” put into place in 2015, Click! **bears 94% of the costs** associated  
14 with operations and maintenance of the shared telecommunications system.

15 3.61 Click!’s Operational Summaries are negatively impacted by Tacoma Power’s subsidization of  
16 I-Net’s expenses, such as capital costs, engineering, design, conversion work<sup>44</sup>, safety equipment,  
17 power usage, surveillance, monitoring, emergency readiness, O&M expenses, etc. The actual pro-rata  
18 share of these costs should rightfully be allocated to Defendant, as general government costs.

19 3.62 Defendant’s accounting policies shift unrelated I-Net costs, from general government, onto  
20 Click!’s Operational Summaries. This creates a distorted and misleading view of Click!’s financial  
21 performance and conceals the true financial performance of Click!’s operations as an enterprise.

22 3.63 Defendant routinely presents these erroneous Operational Summaries to the media and  
23 policymakers as accurate representations of Click!’s true financial performance as an enterprise.

24 3.64 Defendant has admitted, thru an authorized party-opponent, that these accounting practices  
25 produce a wrongful, inaccurate and disparaging perception of Click!’s performance.  
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<sup>43</sup> Tacoma City Manager, Ray Corpuz, December 12, 1997 memorandum.

<sup>44</sup> Such as undergrounding of telecommunication plant assets

1 3.65 This **wrongful perception** of Click!, as a “*money losing venture*”, poisons the minds of  
2 policymakers and the public alike. This harmful “misconception” is a primary reason for  
3 policymaker’s considering privatization of Click!. More simply stated, if Click! were *properly seen*  
4 *as a successful and profitable venture*, all support for privatization of Click! would cease to exist.

5 3.65 TPU, as a non-profit, municipal public service enterprise, follows a “cost recovery” based  
6 pricing policy. Rates are set to recover costs of service and insure future funding for operations.  
7 Assigning unrelated costs to Click! results in higher rates being paid by customers for Click! services.

8 3.66 Tacoma Power will soon release a “customer service app” providing online customer support  
9 functions for utility customers. Among the features and benefits this “app” will bring are outage  
10 alerts, “leak detection,” real time billing, payment and usage information. The “app” *requires Internet*  
11 *access*. As such, *Internet access has a nexus* to provision of other utility services.

12 3.67 Click! faces competition from commercial, for profit, telecommunications service companies.  
13 These competitors have long opposed the competition created by municipal broadband systems such  
14 as Click!’s. They commonly employ lobbyists to carry out their agenda of destroying and preventing  
15 municipal competition. The lobbyists’ efforts and political contributions are no secret. Their activities  
16 are well organized, well documented and well known to Defendant’s staff and its policymakers.

17 3.68 Public concerns, suspicion and accusations over TPU management’s accounting for Click!’s  
18 costs have been widespread since 2015. On September 22, 2016, at a City Council meeting where the  
19 issue of reappointing TPU Director Bill Gaines was before the City Council, Council Member Ibsen  
20 cited the Director’s “*dishonest actions*,” likening them to “*someone who’s stealing from the cash*  
21 *register*.” The video of that meeting is on Defendant’s website. Director Gaines tenure at TPU was  
22 concluded in 2017 and a new TPU Director, Jackie Flowers took over in 2018.

23 3.69 That Defendant knowingly allowed a “fake bidder”, by the name of “Yomura” to participate  
24 in the final stages of an RFI process that was part of the proposed privatization plan.

25 3.70 That Defendant has not obtained current financial statements, including a balance sheet, for  
26 evaluating the financial qualifications of the proposed acquirer of Click! Network.

27 3.71 Defendant continues to widely portray Click! Network as a “*money losing*” venture

1 IV. CLAIM FOR RELIEF & CAUSES OF ACTION

2 WHEREFORE, Plaintiff hereby amends his complaint, is able to prove all of the additional facts  
3 cited and prays for judgment against Defendant based on the following:

4 4.1 Plaintiff is without an adequate remedy at law to require City council to follow the  
5 requirements of City Charter 4.6 and RCW 35.94 and is entitled to declaratory, injunctive and  
6 mandamus relief prohibiting any sale, lease or disposition of the Click! commercial  
7 telecommunication system unless and until such disposal is approved by a majority vote of the  
8 electors at a municipal election in the manner provided by the city charter and the laws of the state.

9 4.2 There is an actual, present, and existing dispute between the parties as to the legality of  
10 using Click! broadband revenue to subsidize and support general government functions thru  
11 wrongful payment of taxes on broadband services; and, over usage of Tacoma Power and Click!  
12 resources in subsidizing I-Net and general government’s pro-rata share of pole attachment fees,  
13 power usage, undergrounding or relocations of existing plant, ongoing capital funding,  
14 surveillance, monitoring, emergency readiness, repairs and maintenance costs. transport fees,  
15 O&M costs and capital expenses obligations. These “subsidy activities” are attributable to, and  
16 properly allocable to, general government. There is also a dispute over the total dollar value of  
17 these unlawful subsidies provided in covering such general government expenses.

18 4.3 Defendant has willfully violated state and federal prohibitions against taxation of Internet  
19 access, under RCW 35.21.717 and the federal Internet Tax Freedom Act, 47 USC 151 SEC. 1101.  
20 Defendant is unlawfully continuing to divert 7.5% of Click! Network’s gross revenue on broadband  
21 services to benefit the City of Tacoma’s general government account. These payments, which have  
22 exceeded \$2.5 million over the past four years, are in violation of RCW 43.09.210 and represent an  
23 unlawful subsidy, from Tacoma Power and Click! commercial telecommunication customers, to the  
24 City of Tacoma’s general fund.

25 4.4 The Mayor, City Council and Public Utility Board have acted and are acting knowingly and  
26 willfully in causing, authorizing, or allowing Tacoma Power and Click telecommunications  
27 customers to pay unlawful subsidies to general government in violation of RCW 43.09.210, which

1 requires “*all service rendered by . . . one department, public improvement, undertaking, institution,*  
2 *or public service industry to another, shall be paid for at its true and full value.*”.

3 4.5 Plaintiff has a legally cognizable interest in requiring Defendant to determine if Click!  
4 profitable by accounting for Click! activities as an “enterprise,” rather than as a “government entity”;  
5 and, in preserving and protecting communication and electric utility service funds from being  
6 unlawfully diverted to pay for expenses properly attributable and allocable to general government  
7 services, and in obtaining recovery of such unlawful subsidy of general government expenses.

8 4.6 Since the telecommunication system’s inception, over \$100 million has been spent in capital  
9 improvements to the System. Click! customers and Tacoma Power ratepayers have paid for a vast  
10 majority of that overall investment, while general government and I-NET users have paid only  
11 incremental costs and provided little relative financial support for their actual fair “pro-rata share” of  
12 the costs for data transport fees, pole attachment fees, power usage, undergrounding or relocations of  
13 existing plant, ongoing capital funding, surveillance, monitoring, emergency readiness, repairs and  
14 other O&M costs. Failure to pay a “*fair share*” of these costs represents an unlawful subsidy, from  
15 Click! customers and Tacoma Power ratepayers, benefiting general government in violation of RCW  
16 43.09.210, the State Accountancy Statute.

17 4.7 Such expenses and costs have exceeded \$20 million since the inception of the system and are  
18 projected to increase annually for the foreseeable future. Using Click! and Tacoma Power revenues  
19 and credit to subsidize expenses that benefit, or are properly allocable to, general government is a  
20 clear and willful violation of RCW 43.09.210.

21 4.8 TPU follows a “cost recovery” based pricing model, where rates are set in a way to recover  
22 costs of service. Click! Network’s rates were recently increased and are set to increase again in 2020  
23 to cover a “*perceived shortfall*” in revenues. The above-mentioned subsidization of general  
24 government expenses by Click! and Tacoma Power customers results in higher rates for Tacoma  
25 Power and Click! customers. This is a violation of RCW 19.86.020, which prohibits unfair practices.  
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1 4.9 By not paying its pro-rata share of overall capital expenses, repairs, monitoring, surveillance,  
2 emergency readiness or O&M costs associated with the underlying telecommunications plant that  
3 supports I-NET, Defendant is benefiting by diverting TPU ratepayers funds and willfully shifting  
4 general government's costs for such system onto Tacoma Power and Click! customers, who are  
5 thereby forced into paying higher rates as a result of subsidizing these general government operations.  
6 This subsidy is unlawful and in clear violation of RCW 43.09.210 (the Accountancy Statute).

7 4.10 Tacoma Power and Click! Network provides valuable "in-kind" contributions to general  
8 government. None of which are deducted from the 5% statutory cap placed on "franchise fees" paid  
9 on cable television services under federal law<sup>45</sup>. These "in-kind" contributions include both  
10 telecommunications and cable television services, along with waiving costs associate with a fair pro-  
11 rata share of I-Net's repairs, essential technical support and emergency readiness functions, network  
12 monitoring and O&M. Actual pro-rata costs for these services greatly exceed the token amounts  
13 currently paid by the defendant. Failure to deduct these valuable "in-kind" contributions violates  
14 RCW 43.09.210, making a recovery required.

15 4.11 These above cited subsidies are violations of RCW 43.09.210, the State Accountancy Statute,  
16 which negatively impacted the Operational Summaries of Click!, thereby creating inaccurate, and  
17 misleading performance results for Click! Network operations, all of which are harmful to Click!'s  
18 prospects and Plaintiff's right to continue enjoying municipally provided broadband services.

19 4.12 Defendant's willful cancellation and failure to complete City Council's mandated 2016  
20 "audit" allows continuation of this "considerable controversy." City Council's original "significant  
21 concerns," over the of the controversial accounting assumptions and "cost allocation" methodology,  
22 have not been addressed; and, therefore remain at issue. The "*veracity and appropriateness*" of the  
23 methods employed in producing the Click! Operational summaries have not been examined and may  
24 very well be producing the inaccurate, erroneous and misleading information about Click! Network's  
25 performance that Council feared in 2016 and sought to ferret out by its Resolution.  
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<sup>45</sup> See FCC Order 19-08 -THIRD REPORT AND ORDER (2019), re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act

1 4.13 As a “*sub-fund*” of Tacoma Power, traditional financial statements, such as a balance sheet or  
2 income statement, are not prepared for Click!; consequently, there are no statements available that  
3 represent the actual “*product-line profitability*” and performance of the System. Surprisingly, no  
4 actual “income statement” or “balance sheet” has ever been prepared for Click! Network. Despite City  
5 Council’s wishes and Resolution for an “*audit*,” no such verification of Click!’s performance as a  
6 standalone enterprise has ever been prepared by Defendant or its appointees.

7 4.14 Many of the costs appearing on the Click! Operational Summaries are *totally unrelated* to  
8 Click! commercial activities. These “*unrelated costs*” are allocated to Click! Operational Summaries  
9 under Defendant’s “*fully distributed*” allocation model. This allocation method, while not illegal  
10 under state accounting rules, negatively impacts the Operational Summaries of Click! and produces  
11 inaccurate and disparaging results with “*artificial losses*.” The results are not reflective of the  
12 System’s *actual performance or profitability*. These Operational Summaries are, therefore, actually  
13 “*misinformation*” with regard to Click!’s financial performance.

14 4.15 Given the erroneous and disparaging performance results indicated by the Click! Operational  
15 Summaries, combined with the lack of any balance sheet, income statement or other financial  
16 statements possessing the veracity to provide useful information related to Click!’s true financial  
17 performance, *policy makers lack suitable, accurate, reliable information* about the municipal  
18 telecommunications system’s financial performance.

19 4.16 Lacking any such real information and possessing only “misinformation,” City Council and  
20 TPU Board members *have no legitimate basis* by which to properly evaluate the municipal  
21 broadband system’s financial performance; therefore, policymakers are ill-equipped to make an  
22 educated, reasonable or rational decision related to the proposed privatization and disposal of the  
23 System and its related assets.

24 4.17 Despite such lack of information, Defendant has willfully entered into a privatization  
25 agreement for Click! Network *without first obtaining any accurate financial information* related to  
26 the performance or valuation of the System. The Court has the power to prevent additional injury that  
27 might result thru an unfortunate chain of events flowing from a failure to requiring a public vote be

1 held approving the privatization of Click!. If the privatization agreement is accomplished and vesting  
2 of the System occurs without a vote of the people, then all public ownership and control of the  
3 municipal broadband System, including oversight of pricing, would be lost. This result would be  
4 clearly harmful to the plaintiff, and the community. Such an unfortunate and wrongful transfer of the  
5 public’s assets would trigger an actionable negligence claim, given the existence of the four essential  
6 elements for such a claim: duty, breach, proximate cause, and resulting harm. This claim would  
7 burden the court system, with TPU Board members and City Council members facing personal  
8 liability for the breach of their required “*duty of reasonable care to refrain from causing foreseeable*  
9 *harm.*” A similar breach of duty would rest with certain City staff members, who have either willfully  
10 ignored or actively assisted in the wrongful actions leading to the potential privatization of Click!. In  
11 addition to Defendant’s other liability in this case, these individuals and policymakers would  
12 potentially bear personal liability for their wrongful actions under RCW 80.04.440 and under  
13 common law for tortuous and ultra vires conduct in violation of the Tacoma City Charter and  
14 Washington state law. The simplest solution is for the Court to affirm Plaintiff’s right to a public vote  
15 over any privatization, separation or vesting of Click! Network’s commercial operations.

16 4.18 Defendant has participated in a conspiracy to defraud the public of its municipal broadband  
17 system. There has been no appraisal or other estimate of the “value” of the Click! business or the assets  
18 being conveyed in the privatization process. Without any appraisal, or accurate financial statements for  
19 Click!, it is impossible for policymakers or the electorate, who may be called on to vote in approving  
20 the proposed privatization, to evaluate the suitability of any proposed contract. As such, Defendant’s  
21 proposed privatization is a gross violation of Washington State Constitution, Article VIII section 7.  
22 There is also evidence of a fraudulent “RFI process,” which included a “fake bidder,” which was known  
23 to members of city staff and reported to policymakers. Defendant knowingly allowed the fraudulent  
24 process to mislead the public and policymakers by the inclusion of this “fake bidder,” who was  
25 considered a “finalist” in the RFI process. This is a violation of RCW 19.86.030, which protects against  
26 “conspiracies in restraint of trade.” Defendant should be enjoined from carrying out the privatization  
27 goals of this fraudulent process.

1 4.19 Defendant’s proposed candidate (“acquiror”) for privatization of the Click! system has not been  
2 evaluated to determine suitability as an operator of Click! under privatization. Failure to conduct due  
3 diligence is a violation of Tacoma City Municipal Code 16B.02 which requires a financially qualified  
4 operator for such a franchise. No financial statements for the acquiror have been provided in  
5 connection with the transaction. Defendant must review financial statements, including a balance  
6 sheet, to determine the acquiror’s financial qualifications for assuming control over the System.

7 4.20 Plaintiff is without an adequate remedy at law to protect aforesaid interests in preserving,  
8 protecting and obtaining recovery for telecommunication and electric utility funds, and is entitled  
9 to declaratory, injunctive and mandamus relief (i) declaring that Click! telecommunication and  
10 Tacoma Power revenues and funds may not be used to pay for general government expenses or  
11 capital improvements that are attributable or properly allocable to general government services  
12 rather than Tacoma Power electric utility and Click! telecommunication services, (ii) prohibiting  
13 general government from using Click! telecommunication and Tacoma Power funds to subsidize  
14 or pay for general government expenses or capital improvements that are properly allocable and  
15 attributable to general government purposes; or (iii) prohibiting TPU and City Council from  
16 including expenses or capital investments that are properly allocable and attributable to general  
17 government activities in the calculation of Click! rates, and (iv) requiring the City's general fund  
18 to reimburse Tacoma Power and Click! for the wrongful payment of costs for capital  
19 improvements, operational expenses, taxes, franchise fees and other subsidies that have  
20 wrongfully benefited general government, together with prejudgment and post-judgment interest  
21 thereon at the rate of 5% per annum until fully paid; (v) requiring the City to obtain estimates of  
22 the valuation of Click! as an enterprise and evaluate the financial statements of the proposed  
23 acquiror of the municipal broadband system; finally, (vi) permit the people to vote on the  
24 privatization of their public broadband system. This statutorily protected right prevents fraud and  
25 abuse by government and acts as a final measure of protection against a wrongful transfer of  
26 public assets.

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V. ~~IV~~ PRAYER FOR RELIEF

WHEREFORE, plaintiffs prays for judgment against the City 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,<sup>46</sup> Fiber To The Home ("FTTH") Internet services, and advanced metering
- (5) Declaring that a term sheet for negotiating an Indefeasible Right of Use (IRU) for Click! has been approved by City Council and formal contracts are being negotiated between Rainier Connect and the City for the future operation and transfer of control over Click! Network;
- (6) Declaring that the term sheet states "*The Tacoma Power Fiber on Critical Routes is collocated with the fiber optic strands that are used by Click! and are now planned to lease to Rainier Connect under the IRU*<sup>47</sup>";
- (7) Declaring that the IRU proposed in the term sheet with Rainier Connect is a "lease" of Click! system assets;
- (8) Affirming that the term sheet specifically states "*Related Assets will be conveyed to Rainier Connect subject to the terms of an asset purchase agreement ("APA") to be negotiated between the parties*";
- (9) Declaring that the term sheet with Rainier Connect includes an "asset sale";
- (10) Affirming that City Charter 4.6, relating to the "Disposal of Utility Property" requires the "City shall never sell, lease or dispose of any utility system" without a "majority vote of the people";

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<sup>46</sup> Telecommunications Infrastructure Section, on Page 47, Bond Prospectus for CITY OF TACOMA, WASHINGTON \$70,575,000 Electric System Revenue Bonds, Series 2017

<sup>47</sup> Emphasis added to bring attention to the term "lease".

- 1 (11) Affirming that City Charter 4.6 applies to Rainier Connect’s proposal for the  
2 acquisition of Click!; since, it amounts to a lease and/or disposal of the Click! system,  
3 customer accounts, goodwill and ongoing interest in the telecommunications operations;
- 4 (12) Mandating and requiring that the City obtain approval from of a majority vote of  
5 the electors at a municipal election in the manner provided by the city charter prior to  
6 entering into a contract for an IRU, sale or lease of the Click! system to Rainier Connect;
- 7 (13) Prohibiting disposal or transfer of Click! business operations and customer  
8 account information to Rainier Connect.
- 9 (14) Public policy requires citizens have a right to expect the terms of their City Charter to  
10 be followed -especially when it affects an important resource such as public utility control and  
11 oversight on their municipal Internet service<sup>48</sup>.

12 15. Ordering City of Tacoma’s general fund to reimburse Tacoma Power and Click!, for the  
13 wrongful overpayment of taxes, “franchise like” fees, costs for capital improvements,  
14 operational expenses, “*in-kind*” contributions and other subsidies that have wrongfully benefited  
15 general government in violation of RCW 43.09.210, RCW 35.21.717 and 47 U.S.C. § 542<sup>49</sup>

16 16. Declaring Defendant has not evaluated Click!’s financial performance under business  
17 accounting standards; but, instead only used governmental accounting standards. (a) That these  
18 “governmental accounting standards” do not reflect the System’s profitably as an enterprise; and  
19 that City Council must first determine Click!’s true financial “*profitability*”, prior to passage of  
20 any resolution causing Click! to be privatized; and, (b) That privatizing Click! without first  
21 obtaining financial underlying information regarding the System’s actual financial performance  
22 is, or would be, an *arbitrary, capricious, unreasonable and ultra vires* act, in excess of  
23 policymaker’s authority, and a violation of Tacoma City Charter and Washington state law.  
24

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27 <sup>48</sup> Click is the second largest municipal Internet service provider in the nation.

<sup>49</sup> There is a violation of the five percent cap on franchise fees set forth in section 622 of the Act.

1 17. Enjoining and prohibiting Defendant from finalizing any agreement to privatize Click!  
2 Network without, (a) first obtaining a “direct cost” or “product line profitability” analysis, or  
3 other reasonable and accurate measurement of Click!’s financial performance “as an enterprise;”  
4 and, (b) Defendant first obtain an appraisal, from a third party, of the System’s market valuation.

5 18. Enjoining and prohibiting Defendant from finalizing any agreement to privatize Click!  
6 without first (a) publicly providing financial information showing the System’s true income as  
7 an enterprise, so policymakers and citizens can evaluate this information to make an informed  
8 decision in voting on any privatization of the System; and, (b) obtaining the financial statements  
9 of the acquiror, performing such due diligence as required in determining the present financial  
10 condition of the proposed acquiror, as required under Tacoma City Municipal Code 16B.02, and  
11 making that data and those findings available to the public.

12 19. Enjoining and prohibiting Defendant from diverting Click! telecommunication and  
13 Tacoma Power funds for subsidization of Defendant’s share of expenses related to operations,  
14 repairs, monitoring, facilities, maintenance and capital improvements of the telecommunications  
15 system provided by Click! and Tacoma Power, but which are properly allocable or attributable to  
16 general government; **or, in the alternative**, find: (a) That the “incremental accounting” methods  
17 used by Defendant for sharing I-Net related costs are appropriate; and, (b), That **Click! also**  
18 **provides similar public benefits to the community** and using “***incremental accounting***”  
19 allocations must also be required in the preparation of Click!’s financial statements.

20 20. Enjoining and prohibiting Defendant from issuing press releases or presentations  
21 portraying Click! as a “*financial failure*” until an audit or product line profitability analysis has  
22 been performed providing true and accurate information about the System’s profitability.

23 21. Ordering ***Defendant’s general fund to reimburse*** Tacoma Power for the ***overpayment of***  
24 ***taxes***, fees, and subsidies of general government expenses or capital improvements properly  
25 allocable or attributable to general government services rather than Tacoma Power or Click!  
26 services. That all amounts proven at trial, together with prejudgment and post-judgment costs,  
27 bear interest thereon at the rate of 5% per annum until fully paid.

1 22. Declaring Click! Network is a municipal broadband telecommunications system and  
2 public utility providing “vital” and “essential” “broadband Internet access” services to TPU  
3 ratepayers. That these services have a clear “nexus” and “utility purpose” for TPU by “*offsetting*  
4 *necessary communication costs*”, supporting “*demand-response efforts*”, creating “*revenue*  
5 *diversification*,” spurring “*economic growth*” and insuring for “*future communication needs*;”

6 23. Declaring that Click! is at least “any part thereof” in relation to Tacoma Public Utilities  
7 for purposes of RCW 35.94 and a **protective vote of the people** is necessary for final approval  
8 of privatization of the municipal broadband system.

9 24. Declaring that *Defendant’s asserted defense in this action is frivolous* under RCW  
10 4.84.185; and that, Defendant has *long demonstrated an understanding of its duty* to allow a  
11 public vote on privatization of Click! under RCW 35.94, as evidenced by City Council’s passage  
12 of its own resolution citing the “*public vote requirement*” related to vesting the System.

13 25. Awarding attorney fees and costs under RCW 80.04.440 and under the common fund  
14 theory and pursuant to RCW 7.16.260, RCW 7.24.100 and/or other applicable statutes.

15 26. Awarding such other and further relief as the Court may deem just, equitable and proper  
16 under the circumstances.

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20 AS AMENDED 8/6/2019

21 \_\_\_\_\_  
22 Mitchell Shook

23 Plaintiff  
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September 03 2019 3:48 PM

The Honorable Bryan Chushcoff

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COUNTY CLERK  
NO: 19-2-07135-0

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

MITCHELL SHOOK,  
Plaintiff Pro Se,

vs.

CITY OF TACOMA,  
Defendant.

No. 19-2-07135-0

ANSWER TO AMENDED  
COMPLAINT

THOMAS MCCARTHY; and CHRISTOPHER  
T. ANDERSON,

Plaintiffs,

vs.

CITY OF TACOMA,  
Defendant.

COMES NOW Defendant City of Tacoma, appearing by and through William C. Fosbre, Tacoma City Attorney, and M. Joseph Sloan, Deputy City Attorney, and in answer to the Plaintiff's Amended Complaint for Declaratory, Injunctive, Prohibition and Mandamus Relief, hereinafter referred to as the "Complaint", admits, denies and alleges as follows:

ANSWER TO AMENDED COMPLAINT- 1

Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
P. O. Box 11007  
Tacoma, Washington 98411  
Phone 253.502.8348  
Facsimile 253.502.8672

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1. The Plaintiff's paragraphs entitled: "INTRODUCTION-NATURE OF ACTION" contains opinions and conclusions of law for which no response is required. However, because some of the allegations are inaccurate, Defendant denies the allegations contained therein.
2. In answer to Plaintiff's Complaint, paragraph 1 contains legal conclusions that require no response. To the extent a response could be required, Defendant admits that it is a municipal corporation located in Pierce County, Washington, operating as a first class charter city under the laws of the state of Washington. By way of further answer, Defendant lacks sufficient knowledge or information to form a belief as to the truth of the remainder of the allegations contained therein; however, Defendant specifically denies that Tacoma Power operates a business unit known as Click! Network ("Click!"). Rather, Click! is a trade name for an operating unit of Tacoma Power and a multi-service broadband telecommunications provider within Tacoma Power's service area. Defendant admits that Click! provides retail cable television and wholesale high-speed internet services.
3. In answer to paragraph 2.1 of Plaintiff's Complaint, the allegations contained therein are legal conclusions for which no response is required.
4. In answer to paragraph 2.2 of Plaintiff's Complaint, the allegations contained therein are legal conclusions for which no response is required.
5. In answer to paragraph 3.1 of Plaintiff's Complaint, Defendant denies the allegations contained therein. The quotation is incomplete.

- 1 6. In answer to paragraph 3.1.1 of Plaintiff's Complaint, Defendant admits the  
2 allegations contained therein.
- 3 7. In answer to paragraphs 3.2, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.5 and 3.2.6 of  
4 Plaintiff's Complaint, Ordinance No. 25930 speaks for itself; therefore, no  
5 response is required. Furthermore, some provisions cited by the Plaintiff are  
6 incomplete, and the footnotes contain legal conclusions for which no response  
7 is required.
- 8 8. In answer to paragraph 3.2.7 of Plaintiff's Complaint, Initiative Measure 937  
9 and RCW 19.285 each speaks for itself; therefore, no response is required, and  
10 further, the allegations contained therein are legal conclusions for which no  
11 response is required. To the extent that a response is required, Defendant  
12 lacks sufficient knowledge or information to form a belief as to the truth of the  
13 remainder of the allegations contained therein and therefore denies same.
- 14 9. In answer to paragraph 3.2.8 of Plaintiff's Complaint, the allegations contain  
15 legal and factual opinions for which no response is required. To the extent that  
16 a response is required, Defendant lacks sufficient knowledge or information to  
17 form a belief as to the truth of the remainder of the allegations contained therein  
18 and therefore denies same.
- 19 10. In answer to paragraph 3.3 of Plaintiff's Complaint, the allegations contain  
20 conclusions of law for which no response is required. However, if a response is  
21 required, Resolution No. 33668 and Resolution No. U-9258 speak for  
22 themselves. Furthermore, the Plaintiff has misquoted the language of  
23 Resolution No. 33668, and for this reason, the allegation is denied.  
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1 11. In answer to paragraphs 3.3.1, 3.3.2, and 3.3.3 of Plaintiff's Complaint,  
2 Resolution No. 33668 speaks for itself; therefore, no further response is  
3 required.

4 12. In answer to paragraph 3.3.4 of Plaintiff's Complaint, Defendant admits that  
5 Click! is a trade name for an operating unit of Tacoma Power, a division of  
6 Tacoma Public Utilities, a department of the City of Tacoma, however, denies  
7 the remaining allegations contained therein.

8 13. In answer to paragraph 3.3.2 (incorrectly numbered and repeated on page 8 of  
9 Plaintiff's Complaint following paragraph 3.3.4). Defendant admits that Click! is  
10 the trade name for an operating unit of Tacoma Power, a division of Tacoma  
11 Public Utilities, a department of the City of Tacoma. Defendant admits that the  
12 first level of oversight is Click! management; next, the Power Superintendent,  
13 next, the Director of Utilities, then the Utility Board, and finally, the Tacoma City  
14 Council. Defendant denies the remaining allegations contained therein.

15  
16 14. In answer to paragraph 3.3.3 (incorrectly numbered and repeated on page 8 of  
17 Plaintiff's Complaint, following incorrectly numbered paragraph 3.3.2),  
18 Defendant admits that in a declaratory judgment action brought by the City of  
19 Tacoma in Pierce County under Superior Court Cause No. 96-2099380, an  
20 order was issued on May 9, 1997, concluding that the City had authority to  
21 issue electric revenue bonds. Defendant, by way of further answer, responds  
22 that the allegations contain legal conclusions for which no response is required,  
23 and that to the extent a response is required, Defendant denies the remaining  
24 allegations contained therein.  
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15. In answer to paragraph 3.4 of Plaintiff's Complaint, though Defendant admits that it has the technologies described therein; however, because the allegations are not completely accurate, Defendant denies the remaining allegations contained therein.

16. In answer to paragraph 3.5 of Plaintiff's Complaint, inclusive of footnote no. 12, though Defendant admits that it owns a network that includes the use of some of the technologies described, because the allegations are vague and incomplete, Defendant cannot ascertain the truth of the allegations contained therein and therefore, denies same.

17. In answer to paragraph 3.6 of Plaintiff's Complaint, Defendant admits that it has some of the technologies described therein; however, because the allegations are not completely accurate, Defendant denies the allegations contained therein.

18. In answer to paragraph 3.7 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

19. In answer to paragraph 3.8 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

20. In answer to paragraph 3.8.1 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

21. In answer to paragraph 3.8.2 of Plaintiff's Complaint, Ms. Hovis' report speaks for itself, therefore, no response is required.

1 22. In answer to paragraph 3.8.3 of Plaintiff's Complaint, the Declaration In Support  
2 of Defendant's Opposition to Partial Summary Judgment speaks for itself  
3 therefore, no response is required.

4 23. In answer to paragraph 3.8.4 of Plaintiff's Complaint, Defendant lacks sufficient  
5 information to form a belief as to the truth of the matters asserted and therefore,  
6 denies same.

7 24. In answer to paragraph 3.9 of Plaintiff's Complaint, Defendant admits that the  
8 Utility Board is comprised of five members and that they are appointed by the  
9 Mayor and confirmed by the Tacoma City Council. As for Section 4.3 of the  
10 Tacoma City Charter, it speaks for itself. The remaining allegations contain  
11 conclusions of law for which no response is required.

12 25. In answer to paragraphs 3.10 and 3.10.1 of Plaintiff's Complaint, Title 12 of the  
13 Tacoma Municipal Code speaks for itself.

14 26. In answer to paragraph 3.10.2 of Plaintiff's Complaint, Defendant denies the  
15 allegations contained therein. Matters of all utility rates are subject to Utility  
16 Board and City Council review, and if deemed appropriate, are approved.

17 27. In answer to paragraph 3.11 of Plaintiff's Complaint, Defendant denies the  
18 allegations contained therein.

19 28. In answer to paragraphs 3.11.1 and 3.11.2 of Plaintiff's Complaint, Defendant  
20 denies the allegations contained therein, except as to the reference to  
21 Amended Resolution No. U-10879, the document speaks for itself.  
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1 29. In answer to paragraph 3.12 of Plaintiff's Complaint, inclusive of footnote no.  
2 15, because the allegations are not completely accurate, Defendant denies the  
3 allegations contained therein.

4 30. In answer to paragraph 3.13 of Plaintiff's Complaint, Amended Resolution No.  
5 U-10879 speaks for itself; therefore, no response is required.

6 31. In answer to paragraphs 3.14, 3.15 and 3.16 of Plaintiff's Complaint, inclusive  
7 of footnote nos. 16, 17, and 18, Amended Resolution No. U-10879 speaks for  
8 itself; therefore, no response is required; however, because the Plaintiff has  
9 misrepresented the language of the Resolution, Defendant denies the  
10 allegations contained therein.

11 32. In answer to paragraph 3.17 of Plaintiff's Complaint, the Defendant denies the  
12 allegations contained therein.

13 33. In answer to paragraphs 3.18, 3.18.1, inclusive of footnote 19, Resolution  
14 U- 10828 and the Tacoma City Charter speak for themselves; therefore, no  
15 response is required. However, because the provisions quoted are misquoted,  
16 Defendant denies the allegations contained therein.

17 34. In answer to paragraph 3.19, 3.19.1, 3.19.2, 3.19.3, and 3.19.2 (incorrectly  
18 numbered and repeated following correctly numbered paragraph 3.19.3) of  
19 Plaintiff's Complaint and Resolution No. 39347 each speak for itself; therefore,  
20 no response is required.

21 35. In answer to paragraphs 3.20, and 3.20.1 of Plaintiff's Complaint, Defendant  
22 admits the allegations contained therein.  
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1 36. In answer to paragraph 3.20.2, Defendant lacks sufficient knowledge or  
2 information to form a belief as to the truth of the matter asserted, and therefore,  
3 denies same.

4 37. In answer to paragraph 3.20.3 of Plaintiff's Complaint, Defendant admits the  
5 allegations contained therein.

6 38. In answer to paragraph 3.20.4 of Plaintiff's Complaint, RCW 35.92.360 speaks  
7 for itself; therefore, no response is needed.

8 39. In answer to paragraphs 3.21, 3.21.1 and 3.21.2 of Plaintiff's Complaint,  
9 Defendant admits the allegations contained therein.

10 40. In answer to paragraph 3.22 of Plaintiff's Complaint, because this paragraph  
11 incorporates the Plaintiff's footnote that refers to a September 28, 2016,  
12 Amended Resolution, Defendant lacks sufficient information to form a belief as  
13 to the truth of the allegation contained therein, and therefore, denies same.

14 41. In answer to paragraphs 3.23, 3.23.1, 3.23.2 and 3.23.3 of Plaintiff's Complaint,  
15 Defendant denies the accuracy of the events represented in paragraph 3.23;  
16 however, Defendant admits the remaining allegations contained therein.

17 42. In answer to paragraph 3.24 of Plaintiff's Complaint, the referenced "term  
18 sheets" speak for themselves; therefore, no response is required. Because the  
19 entire provision has not been stated, Defendant denies the allegations  
20 contained therein.

21 43. In answer to paragraph 3.25 of the Plaintiff's Complaint, the "term sheet"  
22 speaks for itself.  
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1 44. In answer to paragraph 3.26 of Plaintiff's Complaint, Resolution No. 40272

2 speaks for itself. However, because the provisions of the Resolution have not  
3 been accurately stated, Defendant denies the allegations contained therein.

4 45. In answer to paragraph 3.27 of Plaintiff's Complaint, the "term sheet" speaks for  
5 itself; therefore, no response is required.

6 46. In answer to paragraph 3.28 of Plaintiff's Complaint, the "term sheet" speaks for  
7 itself; therefore, no response is required.

8 47. In answer to paragraph 3.29 of Plaintiff's Complaint, the allegation contains the  
9 Plaintiff's legal opinion for which no response is required. Furthermore, the  
10 "term sheet" speaks for itself, and accordingly, the allegation requires no  
11 response.

12 48. In answer to paragraph 3.30 of Plaintiff's Complaint, the allegation is vague and  
13 ambiguous; furthermore, the Defendant lacks sufficient knowledge or  
14 information in which to form a belief as to the truth of the allegation, and  
15 therefore, denies same.

16 49. In answer to paragraph 3.30.1 of Plaintiff's Complaint, any memo from the TPU  
17 Director to the Tacoma City Council would speak for itself; therefore, no  
18 response is required.

19 50. In answer to paragraph 3.31 of Plaintiff's Complaint, the April 2, 2019, letter  
20 speaks for itself; therefore, no response is necessary.

21 51. In answer to paragraph 3.31.1 of Plaintiff's Complaint, the allegation contains  
22 Plaintiff's legal opinion, and speculation for which no response is required.  
23  
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1 Furthermore, the letter at issue speaks for itself; accordingly, no response is  
2 required.

3 52. In answer to paragraph 3.32 of Plaintiff's Complaint, the allegation contains the  
4 Plaintiff's legal opinion for which no response is required. Furthermore, the  
5 "term sheet" speaks for itself.

6 53. In answer to paragraph 3.32.1 of Plaintiff's Complaint, the allegation contains  
7 the Plaintiff's legal opinion and interpretation of the Statement of Financial  
8 Accounting Standards for which no response is required; furthermore, the  
9 purported standard speaks for itself.

10 54. In answer to paragraph 3.33 of Plaintiff's Complaint, the allegation contains the  
11 Plaintiff's legal opinion and speculation for which no response is required.  
12 Furthermore, the "term sheet" speaks for itself. Accordingly, no response is  
13 required.

14 55. In answer to paragraph 3.34 of Plaintiff's Complaint, to the extent that  
15 paragraph 3.34 is based upon Resolution No. 39577 referenced in footnote 37,  
16 the resolution speaks for itself and no response is required. By way of further  
17 answer, paragraph 3.34 is vague and ambiguous, and accordingly, Defendant  
18 lacks sufficient knowledge or information to form a belief as to the truth of the  
19 allegations contained therein, and therefore, denies same.  
20

21 56. In answer to paragraph 3.35 of Plaintiff's Complaint, the "Institutional Network  
22 Services Agreement between City of Tacoma and Click! Network" speaks for  
23 itself, and therefore, no response is required.  
24

1 57. In answer to paragraph 3.36, 3.37 and 3.8 of Plaintiff's Complaint, the  
2 allegations contain legal opinions and conclusions for which no response is  
3 required. If a response is required, because the allegations are vague,  
4 speculative and ambiguous, Defendant lacks sufficient knowledge or  
5 information to form a belief as to the true of the allegations contained therein  
6 and therefore, denies same.

7 58. In answer to paragraph 3.39 of Plaintiff's Complaint, the allegations contain  
8 legal opinions and conclusions for which no response is required. To the extent  
9 the allegations refer to Tacoma City Council Resolution 39347, the Resolution  
10 speaks for itself. If a response is required, because the allegations are vague  
11 and ambiguous, Defendant lacks sufficient knowledge or information to form a  
12 belief as to the true of the allegations contained therein and therefore, denies  
13 same.  
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15 59. In answer to paragraph 3.40 of Plaintiff's Complaint, the allegations contain a  
16 legal opinion and conclusion for which no response is required, furthermore, the  
17 allegations contained therein are vague and ambiguous, therefore Defendant  
18 lacks sufficient knowledge or information on which to form a belief as to the  
19 truth of the allegations contained therein and therefore, denies same.

20 60. In answer to paragraph 3.41 of Plaintiff's Complaint, Defendant denies the  
21 allegations contained therein.

22 61. In answer to paragraph 3.42 of Plaintiff's Complaint, the allegations are vague  
23 and ambiguous and accordingly, Defendant lacks sufficient knowledge or  
24

1 information with which to form a belief as to the truth of the allegations  
2 contained therein, and therefore denies same.

3 62. In answer to paragraphs 3.43, 3.44, 3.45, 3.46, 3.47, 3.48, and 3.49 of  
4 Plaintiff's Complaint, the allegations contain opinions and conclusions for which  
5 no response is required; however, to the extent a response is required, the  
6 allegations are vague and ambiguous and accordingly, Defendant lacks  
7 sufficient knowledge or information with which to form a belief as to the truth of  
8 the allegations contained therein, and therefore, denies same.

9 63. In answer to paragraph 3.50 of Plaintiff's Complaint, Defendant admits that  
10 2015 Tacoma Public Utilities Report included a statement that,  
11 "Telecommunications expense increased \$5.7 million primarily due to an  
12 updated cost allocation between Power and Click! Previously, allocated costs  
13 were approximately 75% Click! and 25% Power. The cost allocation has been  
14 updated to reflect shared costs of approximately 94% to Click! and 6% to  
15 Power. This change was effective January 1, 2015." By way of further answer  
16 the remaining allegations contain opinions and conclusions for which no  
17 response is required; however, to the extent a response is required, the  
18 allegations are speculative, vague and ambiguous and accordingly, Defendant  
19 lacks sufficient knowledge or information with which to form a belief as to the  
20 truth of the allegations contained therein, and therefore denies same.  
21

22 64. In answer to paragraph 3.51 of Plaintiff's Complaint, Defendant admits that  
23 2015 Tacoma Public Utilities Report included a statement that,  
24 "Telecommunications expense increased \$5.7 million primarily due to an  
25

1 updated cost allocation between Power and Click! Previously, allocated costs  
2 were approximately 75% Click! and 25% Power. The cost allocation has been  
3 updated to reflect shared costs of approximately 94% to Click! and 6% to  
4 Power. This change was effective January 1, 2015.” By way of further answer,  
5 the remaining allegations contain opinions and conclusions for which no  
6 response is required; however, to the extent a response is required, the  
7 allegations are speculative, vague and ambiguous and accordingly, Defendant  
8 lacks sufficient knowledge or information with which to form a belief as to the  
9 truth of the allegations contained therein, and therefore, denies same.

10 65. In answer to paragraphs 3.52, 3.53, 3.54, and 3.55 of Plaintiff’s Complaint, the  
11 allegations contain legal opinions and conclusions for which no response is  
12 required. To the extent a response is required, the referenced “Resolution,” if  
13 any, would speak for itself; furthermore, the allegations are vague, ambiguous,  
14 and accordingly, Defendant lacks sufficient knowledge or information on which  
15 to form a belief as to the truth of the allegations contained therein, and  
16 therefore, denies same.

17  
18 66. In answer to paragraph 3.56 of Plaintiff’s Complaint, Defendant denies that  
19 NEWGEN STRATEGIES, LLC was hired in January 2017 to audit Click!. By  
20 way of further answer, the “contract” speaks for itself therefore, no response is  
21 required.

22 67. In answer to paragraph 3.57 of Plaintiff’s Complaint, the allegations contained  
23 therein contain legal opinions and conclusion for which no response is required;  
24 however, to the extent a response is required, the alleged “Notice of Contract  
25

1 Suspension," if any, would speak for itself, therefore, no response is necessary.  
2 By way of further answer, the allegations are vague and ambiguous, and  
3 accordingly, Defendant lacks sufficient knowledge or information on which to  
4 form a belief as to the truth of the allegations contained therein, and therefore,  
5 denies same.

6 68. In answer to paragraph 3.57 (repeated) of Plaintiff's Complaint, the allegations  
7 contain legal opinions and conclusions for which no response is required,  
8 furthermore, the allegations are vague and ambiguous, and accordingly,  
9 Defendant lacks sufficient knowledge or information on which to form a belief as  
10 to the truth of the allegations contained therein, and therefore, denies same.  
11 Moreover, the City Charter speaks for itself.

12  
13 69. In answer to paragraph 3.58 of Plaintiff's Complaint, the allegations contain  
14 legal opinions and conclusions for which no response is required, furthermore,  
15 the City Charter speaks for itself and no response is required.

16 70. In answer to paragraphs 3.59 and 3.60 of Plaintiff's Complaint, the allegations  
17 therein contain legal opinions and conclusions for which no response is  
18 required, furthermore, the allegations are vague and ambiguous, and  
19 accordingly, Defendant lacks sufficient knowledge or information on which to  
20 form a belief as to the truth of the allegations contained therein, and therefore,  
21 denies same. To the extent a response is required, the allegations refer to a  
22 December 12, 1997 Ray Corpuz memorandum that speaks for itself.

23  
24 71. In answer to paragraphs 3.61 and 3.62 of Plaintiff's Complaint, the allegations  
25 contained therein contain legal opinions and conclusions for which no response

1 is required. To the extent a response is required, because the allegations are  
2 vague and ambiguous, Defendant lacks sufficient knowledge or information with  
3 which to form a belief as to the truth of the allegations therein, and therefore,  
4 denies same.

5 72. In answer to paragraphs 3.63, 3.64, and 3.65 of the Plaintiff's Complaint,  
6 Defendant denies the allegations contained therein.

7 73. In answer to paragraph 3.65 (repeated) of Plaintiff's Complaint, the allegations  
8 contained therein contain legal opinions and conclusions for which no response  
9 is required. To the extent a response is required, the allegations contain vague  
10 references and accordingly, Defendant lacks sufficient knowledge or  
11 information on which to form a belief as to the truth of the allegations contained  
12 therein and therefore, denies same.

13  
14 74. In answer to paragraph 3.66 of Plaintiff's Complaint, Defendant admits that it  
15 intends to deploy a mobile application for customer account management and  
16 self-service provided through the subscriber's cellular data service provider. By  
17 way of further answer, the remaining allegations contain opinions and  
18 conclusions for which no response is required, and to the extent a response is  
19 required, Defendant lacks sufficient knowledge or information on which to form  
20 a belief as to the truth of the allegations contained therein and therefore, denies  
21 same.

22 75. In answer to paragraph 3.67 of Plaintiff's Complaint, the allegations contained  
23 therein contain legal opinions and conclusions for which no response is  
24 required. To the extent a response is required, the allegations contain vague  
25

1 references and accordingly, Defendant lacks sufficient knowledge or  
2 information on which to form a belief as to the truth of the allegations contained  
3 therein and therefore, denies same.

4 76. In answer to paragraph 3.68 of Plaintiff's Complaint, Defendant admits that  
5 Director Gaines tenure at TPU was concluded in 2017 and a new TPU Director,  
6 Jackie Flowers took over in 2018. By way of further answer, the remaining  
7 allegations contained therein contain legal opinions and conclusions for which  
8 no response is required, and to the extent a response is required, the  
9 allegations contain vague references and accordingly, Defendant lacks  
10 sufficient knowledge or information on which to form a belief as to the truth of  
11 the allegations contained therein and therefore, denies same.  
12

13 77. In answer to paragraph 3.69 of Plaintiff's Complaint, Defendant denies the  
14 allegations contained therein.

15 78. In answer to paragraph 3.70 of Plaintiff's Complaint, the allegations contain  
16 legal opinions and conclusions for which no response is required. To the extent  
17 a response is required, the allegations contain vague references and  
18 accordingly, Defendant lacks sufficient knowledge or information which to form  
19 a belief as to the true of the allegations contained therein and therefore, denies  
20 same.

21 79. In answer to paragraph 3.71 of Plaintiff's Complaint, Defendant denies the  
22 allegation contained therein.  
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1 80. In answer to paragraph 4.1, 4.2., 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.9, 4.10, 4.11,  
2 4.12, 4.13, 4.14, 4.15, 4.16, 4.17, 4.18, 4.19 and 4.20 of Plaintiff's Complaint,  
3 Defendant denies the allegations contained therein.

4 AFFIRMATIVE DEFENSES

5 81. In further answer to Plaintiff's Complaint, and as Defendant's FIRST  
6 AFFIRMATIVE DEFENSE, Defendant alleges that the Plaintiff has failed to  
7 state a claim for which relief can be granted.

8 82. In further answer to Plaintiff's Complaint, and as Defendant's SECOND  
9 AFFIRMATIVE DEFENSE, Defendant alleges that the Plaintiff lacks legal  
10 standing to pursue his claim against the Defendant.

11 83. In further answer to Plaintiff's Complaint, and as Defendant's THIRD  
12 AFFIRMATIVE DEFENSE, the Plaintiff's claims are barred by operation of the  
13 legal doctrines of waiver, laches and estoppel.

14 84. In further answer to Plaintiff's Complaint, and as Defendant's FOURTH  
15 AFFIRMATIVE DEFENSE, the Plaintiff's claim for injunctive relief is barred by  
16 the fact that the Plaintiff has the option of pursuing remedies at law.

17 85. In further answer to the Plaintiff's Complaint, and as the Defendant's FIFTH  
18 AFFIRMATIVE DEFENSE, Plaintiff's damages, if any, were the proximate result  
19 of the Plaintiff's comparative or contributory fault.

20 86. In further answer to Plaintiff's Complaint, and as Defendant's SIXTH  
21 AFFIRMATIVE DEFENSE, the Plaintiff's claims are barred, in whole or in part,  
22 by operation of res judicata or collateral estoppel arising from orders issued by  
23  
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1 the Pierce County Superior Court in the matter of *Edward E. Coates, et al. v.*  
2 *City of Tacoma*, Pierce County Cause No. 17-2-08907-4.

3 87. In further answer to Plaintiff's Complaint, and as Defendant's SEVENTH  
4 AFFIRMATIVE DEFENSE, the Plaintiff's claims are not ripe for adjudication.

5 88. In further answer to Plaintiff's Complaint, and as Defendant's EIGHTH  
6 AFFIRMATIVE DEFENSE, to the extent the Plaintiff's relief may include  
7 damages, if any, any such damages are subject to reduction by the Plaintiff's  
8 failure to mitigate such damages.

9 89. In further answer to Plaintiff's Complaint, and as the Defendant's NINTH  
10 AFFIRMATIVE DEFENSE, Section 4.6 of the City Charter, as applied, is  
11 preempted by the Cable Communications Policy Act of 1984 (Pub. L. No. 98-  
12 549, 98 Stat. 2779 (1984)) as amended by the Cable Television Consumer  
13 Protection and Competition Act of 1992 (Pub. L. No. 102-385, 106 Stat. 1460  
14 (1992)) and the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110  
15 Stat. 56 (1996)).

16  
17 90. In further answer to Plaintiff's Complaint, and as Defendant's TENTH  
18 AFFIRMATIVE DEFENSE, RCW Chapter 35.92, as applied, is preempted by  
19 the Cable Communications Policy Act of 1984 (Pub. L. No. 98-549, 98 Stat.  
20 2779 (1984)) as amended by the Cable Television Consumer Protection and  
21 Competition Act of 1992 (Pub. L. No. 102-385, 106 Stat. 1460 (1992)) and the  
22 Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56 (1996)).  
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1 91. In further answer to Plaintiff's Complaint, and as Defendant's ELEVENTH  
2 AFFIRMATIVE DEFENSE, Plaintiff's claims under the Internet Tax Freedom  
3 Act are barred by 47 U.S.C. § 151, note 1106 (ITFA Accounting Rule).

4 92. Defendant reserves the right to amend its answer and assert additional  
5 affirmative defenses, cross-claims, counter claims and third-party claims as  
6 further information becomes known.

7  
8 PRAYER FOR RELIEF

9 Having fully answered the allegations of Plaintiff's Complaint, Defendant prays  
10 for judgment as follows:

- 11 1. That the Plaintiff be denied declaratory relief;
- 12 2. That the Plaintiff be denied injunctive relief;
- 13 3. That the Plaintiff be denied mandamus relief;
- 14 4. That the Plaintiff take nothing by his Complaint;
- 15 5. That judgment be entered for the Defendant;
- 16 6. That the Defendant be awarded attorney's fees and costs; and
- 17 7. For such other and further relief as the Court deems just and equitable.

18 Dated this 3<sup>rd</sup> day of September, 2019.

19  
20 WILLIAM C. FOSBRE, City Attorney

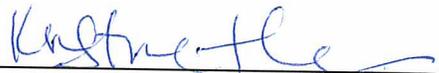
21 By:   
22 M. Joseph Sloan, WSBA #13206  
23 Deputy City Attorney  
24  
25

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date below, I served the Answer, and this Certificate of Service via the method indicated below on counsel of record and Plaintiff Pro Se:

Plaintiff Pro Se:  Mitchell Shook 3626 6 <sup>th</sup> Ave., Ste. C Tacoma, WA 98406  <u>mitch@advancedstream.com</u>	<input checked="" type="checkbox"/> Email <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered
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DATED this 3rd day of September, 2019, in Tacoma, Washington.

  
\_\_\_\_\_  
Kristine Harper, Legal Assistant

September 04 2019 3:56 PM

THE HON. BRYAN CHUSHCOFF  
KEVIN STOCK  
COUNTY CLERK  
NO: 19-2-07135-0

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

Mitchell Shook,  
  
Plaintiff Pro Se,  
  
vs.  
  
CITY OF TACOMA,  
  
Defendant.

NO. 19-2-07135-0  
  
COVER SHEET RE:  
NOTICE OF REMOVAL  
  
**(Clerk's action required)**

Attached hereto is a copy of the Notice of Removal filed in the United States  
District Court, Western District of Washington, at Tacoma.

Dated this 4<sup>th</sup> day of September, 2019.

WILLIAM C. FOSBRE, City Attorney

By: s/ Christopher D. Bacha  
Christopher D. Bacha, WSBA #16714  
Chief Deputy City Attorney  
Office of the City Attorney  
747 Market Street, Room 1120  
Tacoma, WA 98402  
253-591-5626  
cbacha@ci.tacoma.wa.us

CERTIFICATE OF SERVICE

1 The undersigned certifies under penalty of perjury under the laws of the state  
2 of Washington, that on the 4th day of September, 2019, I caused a true and correct  
3 copy of Cover Sheet re: Notice of Removal and this Certificate of Service to be  
4 delivered via regular first class mail to the following:  
5

6 Mitchell Shook  
7 3318 6<sup>th</sup> Avenue  
8 Tacoma, WA 98406

9 3624 6<sup>th</sup> Avenue, Suite C  
10 Tacoma, WA 98406

11 e-mail: mitch@advancedstream.com

12 Dated this 4th day of September, 2019, in Tacoma, Washington.

13 s/ Diane Kubicek  
14 Diane Kubicek, Paralegal

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MITCHELL SHOOK,  
Plaintiff,

vs.

CITY OF TACOMA,  
Defendant.

NO. 3:19-CV-05829

(Superior Court of the State of  
Washington County of Pierce  
No. 19-2-07135-0)

NOTICE OF REMOVAL OF ACTION  
FROM STATE COURT

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON

PLEASE TAKE NOTICE THAT, pursuant to 28 U.S.C. § 1441(a), Defendant  
City of Tacoma hereby removes this action from the Superior Court of the State of  
Washington, County of Pierce, to the United States District Court for the Western  
District of Washington at Tacoma. Defendant appears solely for the purpose of  
removal and for no other purpose, reserving all other defenses available to Defendant  
and alleges on information and belief as follows:

1           1.     The Plaintiff filed the above-captioned action against Defendant City of  
2 Tacoma, in the Superior Court of the State of Washington, County of Pierce, on  
3 April 17, 2019. Subsequently, Defendant was served with a copy of Plaintiff's motion  
4 for leave to amend his complaint on August 6, 2019, which motion was granted by  
5 order of the Court on August 16, 2019, a copy of which is attached hereto as Exhibit  
6 A. Defendant was served with a copy of the amended complaint on August 26, 2019,  
7 a copy of which is attached hereto as Exhibit B.

8           2.     This Notice of Removal is being filed within 30 days after service on the  
9 Defendant, and thus is timely filed pursuant to 28 U.S.C. § 1446(b).

10          3.     Pursuant to 28 U.S.C. § 1446(b)(2)(A), Defendant consents to the  
11 removal of this action to the United States District Court.

12          4.     Removal to the United States District Court for the Western District of  
13 Washington at Tacoma is proper pursuant to 28 U.S.C. § 128(b) and LCR 3(d)  
14 because it is the judicial district embracing Pierce County, which is the place where  
15 this action is pending and Defendant's principal place of business and because the  
16 events alleged to have given rise to the claims occurred in Pierce County.

17          5.     Removal of this action is proper under 28 U.S.C. § 1441(a), which  
18 provides that, "Except as otherwise expressly provided by Act of Congress, any civil  
19 action brought in a State court of which the district courts of the United States have  
20 original jurisdiction, may be removed by the defendant or the defendants, to the  
21 district court of the United States for the district and division embracing the place  
22 where such action is pending." This Court has original jurisdiction pursuant to 28  
23 U.S.C. §§ 1331 and 1332 because this action includes claims arising under the laws  
24  
25

1 of the United States and because Plaintiff's right to relief necessarily depends on  
2 resolution of a substantial question of federal law regarding the preemptive effect of  
3 the Cable Communications Act of 1984 (Pub. L. No. 98-549, 98 Stat. 2779 (1984)), as  
4 amended.

5 6. Pursuant to 28 U.S.C. § 1331, this Court "shall have original jurisdiction  
6 of all civil actions arising under the Constitution, laws, or treaties of the United States."  
7 Plaintiffs amended complaint adds a claim alleging that the Plaintiff is entitled to relief  
8 because Defendant retained taxes collected in violation of the Internet Tax Freedom  
9 Act ("ITFA"), 47 U.S.C. § 151 (1998), as amended. Because this Court has original  
10 jurisdiction over such claims under 28 U.S.C. § 1331, this action is removable  
11 pursuant to 28 U.S.C. § 1441(a).

12 7. Plaintiff has also asserted state law actions implicating federal  
13 preemption under the Cable Communications Act of 1984 (Pub. L. No. 98-549, 98  
14 Stat. 2779 (1984)) as amended by the Cable Television Protection and Competition  
15 Act of 1992 (Pub. L. No. 02-385, 106 Stat. 1460 (1992)), and the Telecommunications  
16 Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56 (1996)), codified at 47 U.S.C.  
17 Defendant requests that all claims be removed from the Superior Court of the State of  
18 Washington, County of Pierce, and that this Court exercise supplemental jurisdiction  
19 over these claims pursuant to 28 U.S.C. § 1367(a) and 28 U.S.C. §1441(c).

20 8. Pursuant to 28 U.S.C. § 1446(a) a copy of the order granting leave to  
21 amend the complaint and a copy of the amended complaint setting forth the claims for  
22 relief upon which such action is based, are attached hereto as Exhibits A and B.  
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**DECLARATION OF SERVICE**

I hereby certify that on September 4, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and will send a true and correct copy of notification of such filing to the following:

**Plaintiff Pro Se**

Mitchell Shook  
3318 6th Avenue  
Tacoma, WA. 98406

3624 6<sup>th</sup> Avenue, Suite C  
Tacoma, WA 98406

e-mail: [mitch@advancedstream.com](mailto:mitch@advancedstream.com)

DATED this 4th day of September, 2019, at Tacoma, Washington.

*s/ Diane Kubicek*

---

Diane Kubicek, Paralegal  
Tacoma City Attorney's Office  
747 Market Street, Suite 1120  
Tacoma, WA 98402  
(253) 591-5268  
Fax: (253) 591-5885

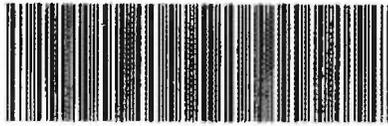
EXHIBIT A

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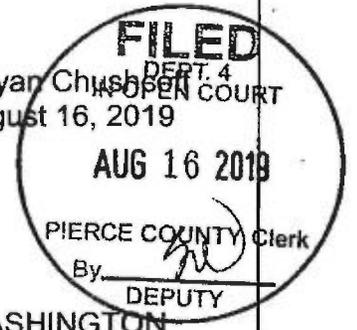
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19-2-07135-0 53728717 ORGLA 08-21-19

The Honorable Bryan Chispen  
Hearing date: August 16, 2019  
Time: 9:00 a.m.



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

MITCHELL SHOOK,

Plaintiff Pro Se,

NO. 19-2-07135-0

vs.

CITY OF TACOMA,

Defendant.

~~ORDER DENYING~~  
**GRANTING**  
ORDER DENYING PLAINTIFF  
MITCHELL SHOOK'S MOTION FOR  
LEAVE TO AMEND COMPLAINT

(Proposed)

THOMAS MCCARTHY; and CHRISTOPHER  
T. ANDERSON,

Plaintiffs,

vs.

CITY OF TACOMA,

Defendant.

ORDER

This matter having come on regularly before this Court on the Motion of Plaintiff Mitchell Shook for Leave to Amend Complaint, and having considered Plaintiff's Motion, the Proposed Amended Complaint for Declaratory, Injunctive, Prohibition and Mandamus Relief attached thereto, and having considered Defendant City of Tacoma's Opposition to Plaintiff Mitchell Shook's Motion to Amend Complaint

ORDER DENYING PLAINTIFF  
MITCHELL SHOOK'S MOTION  
FOR LEAVE TO AMEND COMPLAINT- 1

Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
P. O. Box 11007  
Tacoma, Washington 98411  
Phone 253.502.8348  
Facsimile 253.502.8672

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and the Order Denying Motion for Writ of Prohibition and for Preliminary Injunction attached thereto, and having established due cause, now therefore, it is hereby:

ORDERED, ADJUDGED and DECREED, that Plaintiff's Mitchell Shook's Motion for Leave to Amend Complaint is hereby ~~DENIED~~ <sup>GRANTED</sup>; it is further:

~~ORDERED, ADJUDGED and DECREED, that all parties and to bear their own attorney's fees and costs.~~

*Handwritten:* 49128

Done in open Court this 16<sup>th</sup> day of August.

*Signature of Judge Bryan Chushcoff*  
\_\_\_\_\_  
Judge Bryan Chushcoff

Presented by:

WILLIAM C. FOSBRE  
Tacoma City Attorney

*Signature of Chris Bacha*  
\_\_\_\_\_  
Chris Bacha, WSBA #16714  
Chief Deputy City Attorney



Approved as to form:

*Signature of Mitchell Shook*  
\_\_\_\_\_  
Mitchell Shook, Plaintiff Pro Se

Approved as to form:

PHILLIPS BURGESS, PLLC  
*Signature of Trevor A. Zandell*  
\_\_\_\_\_  
Trevor A. Zandell, WSBA No. 37210  
Kent van Alstyne, WSBA No. 49928  
Attorneys for Plaintiff, McCarthy and Anderson

ORDER DENYING PLAINTIFF  
MITCHELL SHOOK'S MOTION  
FOR LEAVE TO AMEND COMPLAINT- 2

Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
P. O. Box 11007  
Tacoma, Washington 98411  
Phone 253.502.8348  
Facsimile 253.502.8672

EXHIBIT B

August 26 2019 3:53 PM

KEVIN STOCK  
COUNTY CLERK  
**NO: 19-2-07135-0**

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

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9 **IN AND FOR THE COUNTY OF PIERCE**

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12 Mitchell Shook,

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14 Plaintiff Pro Se

15 v.

16 CITY OF TACOMA

17 Defendant

18 AS CONSOLODATED  
19 THOMAS MCCARTHY  
20 AND CHRISTOPHER ANDERSON  
21 PLAINTIFFS

22 vs.

23 CITY OF TACOMA  
24  
25  
26  
27

No. 19-2-07135-0

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

AMENDED COMPLAINT FOR DECLARATORY,  
INJUNCTIVE, PROHIBITION AND MANDAMUS RELIEF

Page 1

Mitchell Shook  
3624 6<sup>th</sup> Ave, Suite C  
Tacoma, Washington 98406  
Phone: 253-627-8000

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AMENDED COMPLAINT

**Plaintiff, Mitchell Shook, hereby amends his Complaint to add facts, causes of action and relief sought. Plaintiff can certainly prove these charges.**

**Additional facts are added starting at “Paragraph 3.34” on page 16, new causes of action are in Section IV beginning with paragraph 4.2 on page 21, and further relief sought is under “Section V” beginning at paragraph 16 on page 21..**

INTRODUCTION -NATURE OF ACTION

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

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

The Click! system was established to *“provide telecommunications services for data transport, high speed internet access, full cable television service, and, among other things, 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”*

The Click! Network telecommunication system continues to fulfill its original mandate, providing wholesale broadband Internet services to over 20,000 Tacoma Public Utilities customers, with a state-

---

<sup>1</sup>The 1997 City Council Resolution No. 33668

1 of-the-art cable modem and Gigabit Fiber To The Home (“FTTH”) system -while delivering  
2 television services to over 12,500 Tacoma Public Utilities customers over the system.

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

6 Tacoma City Charter, Article IV § 4.6, clearly prohibits the disposal of a “utility system” without  
7 a majority vote of the electorate. Similarly, RCW 35.94 requires a vote for any sale, lease or disposal  
8 of “any part” of a municipal utility system.

9 Since Click!’s system is part of Tacoma Public Utility<sup>2</sup>, and no such vote of the people is planned  
10 or provided for, there is an imminent risk that the terms of City charter will be violated.

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

#### 14 1. PARTIES

15 Plaintiff Mitchell Shook is a resident of Tacoma, a Tacoma Public Utilities rate payer, taxpayer to  
16 City of Tacoma’s general government and Click! customer; and, as such, has standing to seek the  
17 relief requested in this petition.

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

#### 23 2. JURISDICTION AND VENUE

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

27 \_\_\_\_\_  
<sup>2</sup> City of Tacoma Resolution 40272

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

3 2.2 Given no other speedy or adequate remedy, RCW 7.16.040 provides the Court  
4 jurisdiction over this matter.<sup>3</sup>

### 5 3. FACTS

6 3.1 Tacoma City Charter Section 4.6 requires "*The City shall never sell, lease or dispose of any*  
7 *utility system*" without a "*majority vote of the electors*".

8 3.1.1 Click is multi-service broadband telecommunications provider and operating section of  
9 Tacoma Power providing retail cable television and wholesale broadband internet services to Tacoma  
10 Power's residential and business customers.

11 3.2 Ordinance NO. 25930 was passed by Tacoma City Council in 1996 and entitled "*AN*  
12 *ORDINANCE of the City of Tacoma, Washington establishing a telecommunications system as*  
13 *part of the Light Division*".

14 3.2.1 The 1996 CITY of Tacoma ORDINANCE NO. 25930 States "*WHEREAS, RCW 35.92.050*  
15 *authorizes cities to construct and operate works and facilities for the purpose of furnishing*  
16 *any persons with electricity and other means of power and to regulate and control the use*  
17 *thereof<sup>4</sup> or lease any equipment or accessories necessary and convenient for the use*  
18 *thereof; and*

19 3.2.2 CITY of Tacoma ORDINANCE NO. 25930 States *WHEREAS, the Utility Board and the*  
20 *Council have determined that it is in the best interest of the City that it install a*  
21 *telecommunications system among all of its Electric System substations in order to improve*  
22 *communications for automatic substation control; and*  
23

24  
25 <sup>3</sup> A writ of review shall be granted by any court, when an inferior tribunal, board or officer, exercising judicial  
26 functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct  
27 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.

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

1 3.2.3 CITY of Tacoma ORDINANCE NO. 25930 States *WHEREAS, the City has determined*  
2 *that it is prudent and economical to provide additional capacity on such*  
3 *telecommunications system to provide the Electric System with sufficient capacity to*  
4 *perform or enhance such functions as automated meter reading and billing, appliance*  
5 *control<sup>5</sup>, and load shaping; and*

6 3.2.4 City of Tacoma ORDINANCE NO. 25930 States *WHEREAS, the Light Division may wish*  
7 *to connect such telecommunications system to individual residences and businesses in its*  
8 *service area or to other providers of telecommunications services; and*

9 3.2.5 The 1996 City of Tacoma ORDINANCE NO. 25930 States *WHEREAS, the City has*  
10 *determined that it should create a telecommunications system as part of the Electric*  
11 *System<sup>6</sup> in order to construct these telecommunications improvements”*

12 3.2.6 Exhibit A to 1996 City of Tacoma ORDINANCE NO. 25930<sup>7</sup> stated the  
13 telecommunications project would include “demand side management (DSM)  
14 functions<sup>8</sup>, CATV and Internet Access.

15 3.2.7 In 2006, Washington voters approved Initiative Measure 937, known as the Energy  
16 Independence Act. The measure, which was codified at RCW 19.285, requires electric  
17 utilities with more than 25,000 customers to take certain measures to conserve energy<sup>9</sup>

18 3.2.8 Demand-side management (DSM) or demand-side response (DSR) is the modification of  
19 consumer demand for energy through various methods -such as financial incentives.

23 \_\_\_\_\_  
24 <sup>5</sup> Emphasis added, for it should be recognized that “appliance control” is not possible without two way  
25 communication between an appliance and the user -as such “appliance control” is an energy related  
26 function.

26 <sup>6</sup> Emphasis added to point out that the telecommunications system is a “part of the electric system”

27 <sup>7</sup> Passed on July 26, 1996 when the telecommunications system was approved

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

<sup>9</sup> Kelley, 120313 WAAGO, AGO 2013-6 2013

1 Demand-side management encourages the consumer to use less energy during peak hours,  
2 or to move the time of energy use to off-peak times such as nighttime and weekends.<sup>10</sup>

3 3.3 The Tacoma City Council approved construction of Click! Network on April 8,1997. The City  
4 Council delegated authority to the Public Utility Board and the Department of Public Utilities  
5 ("TPU"), Light Division (dba "Tacoma Power"), to implement, own and manage a broadband  
6 telecommunications system ("Click! Network" or "Click!"), as authorized through City Council  
7 Substitute Resolution No. 33668, approved April 8, 1997, and Public Utility Board Amended  
8 Substitute Resolution U-9258, which was approved on April 9 1997

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

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

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

27 <sup>10</sup> 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 Utilities, Light Division is hereby authorized to proceed to implement said proposal for a broad  
2 band telecommunications system, and That the proposed broad band telecommunications system  
3 shall be owned, operated and controlled by the City of Tacoma Department of Public Utilities  
4 Light Division<sup>11</sup>

5 3.3.4 Click! operates as part of TPU. Click is one Tacoma Power's 6 business units -which units are  
6 generation; power management; transmission and distribution; rates, planning and analysis; Click  
7 Network; and utility technology services.

8 3.3.2 Click! is not a separate business unit or enterprise fund. It is an organizational unit within the  
9 Power enterprise fund. The first line of Click! oversight is the Power Superintendent and the  
10 Power management team. From there, oversight is provided by, the TPU CEO, the Board, and the  
11 City Council.

12 3.3.3 TPU Revenue Bonds were approved, by a declaratory judgement, to pay for construction of the  
13 Click! system; and, no general fund dollars have been committed to the project.

14 3.4 Approximately 1,500 miles of fiber and coaxial cable have been constructed by Tacoma  
15 Power in the cities of Tacoma, University Place, Fircrest, Lakewood and Fife, and portions of  
16 unincorporated Pierce County, providing Tacoma Power with a state-of-the-art telecommunication  
17 system with which supports transmission and distribution operations, advanced metering, and retail  
18 and wholesale commercial services. The network currently covers approximately 66% of the  
19 households in Tacoma Power's service territory.

20 3.5 The network consists of a hybrid fiber-optic coaxial ("HFC") system, which delivers two-way  
21 signals for cable TV, cable modem,<sup>12</sup> Fiber To The Home ("FTTH") Internet services, and advanced  
22 metering.

23 3.6 In addition, SONET ("Synchronous Optical Network") and Gigabit Ethernet technologies  
24 are used to support communications across Tacoma Power's transmission and distribution system and  
25

26  
27 <sup>11</sup> Emphasis added to highlight fact that system is owned by TPU

<sup>12</sup> Telecommunications Infrastructure Section, on Page 47, Bond Prospectus for CITY OF TACOMA,  
WASHINGTON \$70,575,000 Electric System Revenue Bonds, Series 2017

1 to carry out data transport services for commercial customers. The network was designed and  
2 constructed to meet high telecommunications standards, containing a redundant backbone and  
3 redundant service loops, which seek to ensure uninterrupted signal transport in the event of a network  
4 break.

5 3.7 Commercial telecommunication services were Launched in 1998 under the brand name Click!  
6 Network. Click! provides three commercial telecommunication services to TPU customers; retail  
7 cable television, wholesale broadband transport and wholesale high-speed Internet delivered over  
8 cable modem and FTTH.

9 3.8 In 2017 Click! Network's annual operating revenues were approximately \$26,519,861<sup>13</sup>.

10 3.8.1 Click! ended 2018 with more than 12,500 cable TV customers, 20,000 wholesale  
11 high- speed Internet service customers, and more than 100 wholesale broadband transport  
12 circuits.

13 3.8.2 Click! has "significant goodwill", According to Section 2.3 of the January 23, 2018  
14 presentation by Joann Hovis, of CTC Technology, at the City Council-TPU Board Joint Study  
15 Session. Ms. Hovis' report was titled Strategy Alternatives for Tacoma Click!:

16 3.8.3 "Click! has thousands of customers and considerable goodwill", as confirmed by Click!  
17 Network General Manager, Tenzin Gyaltzen, who stated so in his February 7<sup>th</sup>, 2018, Declaration  
18 In Support Of Defendants Opposition To Partial Summary Judgement -page 3 , Pierce County  
19 Superior Court Case No 17-2-08907-4

20 3.8.4 Click! is the nations second largest municipal CATV and Internet service -behind  
21 Chattanooga TN.

22 3.9 TPU is governed by the City's public utility board, whose five members are appointed by the  
23 mayor and confirmed by the city council. Utility budgets and rates are subject to approval by the city  
24 council. **Section 4.3 of the City charter** provides City council with oversight on rates and the  
25 authority "*to fix and from time to time, revise such rates and charges as it may deem advisable for*  
26 *supplying such utility services the City may provide*".  
27

---

<sup>13</sup> CLICK! NETWORK COMMERCIAL OPERATIONS OPERATIONAL SUMMARY - December 31, 2017

1 3.10 Title 12 “Utilities” of the Tacoma Municipal Code regulates utilities and rates.

2 3.10.1 Click! CATV and wholesale Internet rates are regulated under Title 12 of the Tacoma  
3 Municipal Code, in section 12.13

4 3.10.2 Click! TV and Wholesale Internet rates are approved by the Public Utility Board  
5 (Board) and City Council, the same as Power, Water, and Rail rates.

6 3.11 Over 10,000 TPU electric customers currently have Tacoma Power Gateway meters  
7 installed on their homes. These “gateway meters” operate over Click! Network’s HFC plant.

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

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

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

18 3.13 AMENDED RESOLUTION NO. U-10879, states:” #20. *WHEREAS Tacoma Power has*  
19 *excess power generation capacity within its service territory. In the past, Tacoma Power has*  
20 *benefited greatly by selling this excess capacity in the wholesale power markets to the benefit of all*  
21 *retail electric customers. Over the past few years, wholesale power prices and sales have dropped*  
22 *substantially. In support of Tacoma Power's strategic business plan, Tacoma Power wants to make*  
23 *up this lost revenue by looking at ways to increase its retail power sales through economic growth in*  
24 *the community. Communities across the nation have benefited economically from competitive access*  
25 *to internet services in their communities.*”

26 \_\_\_\_\_  
27 <sup>14</sup> From AMENDED RESOLUTION NO. U-10879 Adopted by TPU Board on 9-28-16

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

1 3.14 AMENDED RESOLUTION NO. U-10879 also states: “*Tacoma Power's continued operation*  
2 *and maintenance of the telecommunications system for internet access purposes assists in making the*  
3 *internet services competitive in Tacoma Power's service area, which increases economic growth that*  
4 *leads to greater retail power sales*”.<sup>16</sup>.

5 3.15 AMENDED RESOLUTION NO. U-10879 stated “WHEREAS The Internet-related uses of  
6 the Click! telecommunications system provide Tacoma Power customers benefits by giving them  
7 access to advanced customer services options such as: power use monitoring, outage reporting,  
8 scheduling of services, bill paying, and electrical appliance control.

9 3.16 AMENDED RESOLUTION NO. U-10879 stated that “WHEREAS In planning for an  
10 uncertain and unknown future<sup>17</sup>, there may be other potential functions related to the supplying of  
11 electricity to customers who might also make energy related usage of the telecommunications system  
12 infrastructure including: cyber security efforts, electric car charging and metering, enhanced “smart  
13 home” uses that allow customers to control power usage by time of day, participate in demand  
14 response programs, behavior-based saving programs, outage communications, energy audits, and  
15 participation in Evergreen Options”<sup>18</sup>

16 3.17 One purpose for creating Click! was to have a telecommunications system sophisticated  
17 enough to enable TPU to compete effectively in the rapidly evolving electric industry.

18 3.18 Amended Resolution U-10828, adopted by the City’s public utility board on December 3,  
19 2015, states “*WHEREAS the broadband telecommunication system is critical infrastructure for*  
20 *Tacoma Power*

21 3.18.1 Amended Resolution U-10828 cites Charter 4.6 as requiring a vote of the people to  
22 before the City may “*lease or dispose of any utility system*”.<sup>19</sup>

26 <sup>16</sup> AMENDED RESOLUTION NO. U-10879 -Page 4, This is Whereas #20

27 <sup>17</sup> AMENDED RESOLUTION NO. U-10879 -Page 4, This is Whereas #17

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

<sup>19</sup> Page one of Amended Resolution U-10828

1 3.19 City Council Resolution #39347 states: “1997, the City of Tacoma, through its electrical  
2 utility, embarked on an effort to construct and operate a state-of-the-art telecommunication system  
3 for the benefit of its electric utility and its electric utility customers”<sup>20</sup>

4 3.19.1 City Council Resolution #39347 states: “WHEREAS the telecommunications  
5 system was constructed and has been in continuous operation since 1999, and has proven to  
6 provide benefits for the City electric utility and electric utility customers located both Inside  
7 and outside City limits”<sup>21</sup>

8 3.19.2 City Council Resolution #39347 states: “WHEREAS the telecommunication system  
9 is now a vital component of the City's electric utility and continued operation and  
10 maintenance of the system is an essential function of the electric utility”

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

23 3.19.2 City Council Resolution #39347 stated: “WHEREAS some benefits of the City's  
24 electric utility telecommunication system include enhancing communication between electric  
25 utility assets and electric utility consumers, and providing electric utility customers a means  
26

27 <sup>20</sup> City Council Resolution #39347 -page 1

<sup>21</sup> City Council Resolution #39347 -page 1

<sup>22</sup> Passed by City Council on December 15 2015

1       to instantly access electric utility accounts information for payment of bills, report outages,  
2       and obtain energy usage and conservation information, and;

3       3.20    That a water heater “demand response project” was recently conducted by Tacoma Power, in  
4       the Salishan housing development neighborhood, under an agreement with the Tacoma Housing  
5       Authority.

6       3.20.1   Data transport for the Salishan demand response hot water heater project utilized Click!  
7       Network’s cable modem system<sup>23</sup>.

8       3.20.2   Demand response technology requires two-way communications.

9       3.20.3   Demand response technology holds potential for load reduction and energy savings<sup>24</sup>.

10      3.20.4   RCW 35.92.360<sup>25</sup> -Energy conservation plan states "The legislature finds that energy  
11      conservation can take many useful and cost-effective forms, and that the types of conservation  
12      projects available to utilities and customers evolve with time as technologies are developed and  
13      market conditions change. In some cases, **electricity conservation projects are most cost-**  
14      **effective when they reduce the total amount of electricity consumed**<sup>26</sup> by an individual  
15      customer, and in other cases they can be cost-effective by reducing the amount of electricity a  
16      customer needs to purchase from an electric utility.

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

19      3.21.1   The Committee was comprised of seven members as follows: Mayor Marilyn Strickland,  
20      City Council Member Marty Campbell, Public Utility Board Member Mark Patterson, Public  
21      Utility Board Member Karen Larkin, industry experts Janine Terrano and Terry Dillon, and  
22      ratepayer advocate Andrea Cobb<sup>27</sup>.

23      3.21.2   The Committee met 16 times between January 22,2016 and August 1,2016.

24  
25      <sup>23</sup> Email from Click! General Manager Tenzin Gyaltsen

26      <sup>24</sup> BPA Salishan Demand Response Water Heater Final Report 2018

27      <sup>25</sup> Findings-Intent-2002 c 276

28      <sup>26</sup> Emphasis added to point out the Nexis between Internet access and the ability to conserve energy

29      <sup>27</sup> CLICK! NETWORK Business Plan -by Click! General Manager Tenzin Gyaltsen. Revised 3-20-17 -Executive  
30      Summary Page 2

1 3.22 Studies by the Click! Engagement Committee and Tacoma Power’s financial analysis  
2 demonstrate that continuing to provide CATV services in support of retail internet services makes the  
3 sale of such services a more competitive overall product and improves the financial sustainability of  
4 Click!<sup>28</sup>

5 3.23 In July 2018, the City Council and Public Utility Board (“Board”) directed Joann Hovis, of  
6 CTC Technology & Energy (“CTC”), to negotiate with Rainier Connect and Wave Broadband, and to  
7 develop formal partnership proposals regarding the operation and use of the Click! Network.

8 3.23.1 Two Public-Private Partnership Term Sheets (“term sheets”) for operation and use of  
9 Click! Network, one from Rainier Connect and one from Wave Broadband, were presented to  
10 the Council and Board, at a Joint Study Session on March 5, 2019.<sup>29</sup>

11 3.23.2 Both of these term sheets proposed a 20-year IRU with two 10-year extensions.

12 3.23.3 The term sheets from Rainier Connect and from Wave Broadband were compared and  
13 evaluated by Joann Hovis of CTC, a consultant hired by the City, who recommended to the  
14 TPU Board and City Council that they should proceed with the term sheet proposed by  
15 Rainier Connect.

16 3.24 The Rainier Connect term sheet<sup>30</sup> presented to City Council states that *“The IRU term will be  
17 20 years (“IRU Term”). On the expiration of the IRU Term, the IRU can be renewed for two  
18 additional periods of 10 years (“Extension IRU Terms”) so long as Rainier Connect is in compliance  
19 with all the terms of its contractual relationships with the City of Tacoma and TPU.”*

20 3.25 The Rainier Connect term sheet (“the term sheet”) states: *“Rainier Connect will be granted use  
21 of other assets currently used by Click! in the provision of cable television and broadband data  
22 services, including equipment used to operate the Network and deliver services to customers,  
23 customer accounts, inventory of spare parts and equipment, prepaid items, and material contracts, in  
24 each case related to the operation of the Network and the provision of products and services*

25 \_\_\_\_\_  
26 <sup>28</sup> AMENDED RESOLUTION NO. U-10879

27 <sup>29</sup> 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

<sup>30</sup> 12. Tacoma Click! -Rainier Connect Public-Private Partnership Term Sheet Presented by JoAnn Hovis on  
March 5, 2019

1 (collectively, "Related Assets"). **The Related Assets will be conveyed to Rainier Connect subject**  
2 **thru the terms of an asset purchase agreement ("APA")<sup>31</sup> to be negotiated between the parties.**"<sup>32</sup>

3 3.26 Further negotiations with Rainier Connect were approved by City council on March 26<sup>th</sup>,  
4 2019, with the passage of Resolution 40272, entitled: "A resolution approving the execution of an  
5 agreement between the Department of Public Utilities, Light Division d.b.a. Tacoma Power, and  
6 Rainier Connect to negotiate in good faith formal partnership contracts related to the operation and  
7 use of the Click! Network"

8 3.27 The term sheet states "Rainier Connect will be granted an indefeasible right of use ("IRU")  
9 for the hybrid fiber-coaxial network assets owned by Tacoma Public Utilities (TPU) and used by  
10 Tacoma Click! ("Click!") to provide cable television and broadband data services to residents and  
11 businesses ("Network") in the existing Click! service area ("Click! Service Area"). The Network  
12 includes the outside plant assets associated with the Click! network, including fiber optics, coaxial  
13 cable, cabinets, splitters, backup powering equipment, and other out-side plant physical assets  
14 including those discussed in 14(b) below"<sup>33</sup>

15 3.28 The term sheet states: "The Tacoma Power Fiber on Critical Routes is collocated with the  
16 fiber optic strands that are used by Click! and are now planned to lease to Rainier Connect under  
17 the IRU."

18 3.29 The term sheet with Rainier Connect does not provide City council any control over TV or  
19 Internet rates.

20 3.30 The term "IRU" has frequently been described as a "Lease" by Tacoma City and TPU policy  
21 makers since the concept of a public-private partnership was first introduced in 2015.

22 3.30.1 In a May 6, 2015 Memo from TPU Director Gaines responding to "Council inquiries  
23 from the March 31, 2015 Joint Study Session" the "IRU" is described as a "Lease".

24 3.31 On April 2, 2019 a Letter of Intent ("LOI") was signed by TPU Director Jackie Flowers with  
25 Rainier Connect. The LOI states "In the proposed transaction, Rainier Connect would obtain an

26  
27 <sup>31</sup> emphasis added to point out the fact of the asset sale.

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

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

1 exclusive indefeasible right to use ("IRU") and operate the hybrid fiber coaxial ("HFC") system that  
2 today the Department of Public Utilities, Light Division ("Tacoma Power") d/b/a/ Click! Network  
3 ("Click") operates to provide wholesale and retail video and broadband products and services to  
4 residents and businesses in the City and in other jurisdictions in which Click! is franchised to  
5 operate".

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

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

10 3.32.1 FASB Statement of Financial Accounting Standards ("SFAS") No. 13, *Accounting for*  
11 *Leases*, and the related interpretations of this standard, provide the relevant GAAP for lease  
12 accounting, including the definition of a lease. This accounting literature defines a lease as an  
13 agreement conveying the right to use property, plant or equipment for a period of time<sup>35</sup>

14 3.33 The term sheet represents significant material changes to the Click! Business model, including  
15 the removal of TPU as the primary operator of Click!, the sale or lease of telecommunications system  
16 equipment or capacity, the outsourcing of work and discontinuance of TPU products and services<sup>36</sup>.

17 3.34 Since its inception in 1996, *Click! has been a part of Tacoma Power* and was initially  
18 financed with Tacoma Power revenues and resources.<sup>37</sup>

19 3.35 Defendant defines TPU's "Communications Network" as "that network **owned, operated,**  
20 **and maintained by Click!**, consisting of redundant fiber optical backbones, redundant fiber optical  
21 service loops and coaxial cable distribution cables on which numerous applications are provided,  
22 which network includes, but is not limited to, Department of Public Utilities' two-way  
23

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24 <sup>34</sup> Public-Private Partnership Term Sheet March 4, 2019

25 <sup>35</sup> 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  
27 Investigations Committee on Financial Services March 21, 2002

<sup>36</sup> 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

<sup>37</sup> Confirmed by Tacoma City Council Resolution No. 39577

1 communications services, commercial retail cable television, wholesale Internet services, wholesale  
2 data transport services, and I-Net services”<sup>38</sup>.

3 3.36 **Click!’s customers**, thru their usage of the telecommunications system’s broadband Internet  
4 access, ethernet transport and cable television services, **have shared in paying for** and offsetting part  
5 of the **capital costs** of constructing *Tacoma Power’s telecommunications system*, as well as in the  
6 **operation and maintenance** (“O&M”) of this infrastructure. By sharing in these costs, Click!’s  
7 operation benefits all Tacoma Power electric customers who otherwise would pay 100% of the capital  
8 and O&M costs.<sup>39</sup>

9 3.37 At least \$100 million dollars has been spent in constructing the telecommunications system  
10 that allows delivery of Click!’s commercial telecommunication services.

11 3.38 On May 12, 2015 Defendant estimated that “approximately \$200 million in historical cost and  
12 approximately \$80 million in book value of the Fiber/Coax system” existed at that time, and “the  
13 initial capitalization date was around 1999.”

14 3.39 Tacoma Power's continued operation of the telecommunications system for provision of  
15 broadband services assists in making Internet services competitive in Tacoma Power's service area.  
16 This benefits Tacoma Power by stimulating and increasing economic growth, which leads to greater  
17 retail power sales. Other benefits include “allowing the utility to continue to efficiently and  
18 effectively meet the demands of new federal regulations relating to reliability of the electrical system,  
19 combating threats from possible cyberterrorism acts, participating in energy transactions and trades to  
20 balance the energy markets in less than 15-minute increments, enhancing communication between  
21 electric utility assets and electric utility consumers, and providing electric utility customers a means  
22 to *instantly access electric utility accounts* information for payment of bills, *report outages*, and  
23 *obtain energy usage and conservation information*.”<sup>40</sup>

24 3.40 No direct cost audit or “*product line profitability*” analysis for Click! has ever been done.  
25  
26

27 <sup>38</sup> Institutional Network Services Agreement between City of Tacoma and Click! Network, 12/21/2009-p. 3

<sup>39</sup> Confirmed in Resolution U-10879. passed by Tacoma Public Utility Board on 9-28-16

<sup>40</sup> Tacoma City Council Resolution 39347, passed on December 15, 2015

1 3.41 In violation of state law, Tacoma Public Utilities is paying 7.5% of Click! Network's  
2 broadband revenues to Defendant's general fund.

3 3.42 In a single month, October 2018, this 7.5% "tax" or B&O "fee" amounted to \$52,297.18.

4 3.43 In distributing shared capital and O&M expenses between Click!'s commercial operations and  
5 Tacoma Power's traditional electrical services, Defendant follows a cost "**allocation methodology**"  
6 with formulas guided by the "*Governmental Accounting Standards Board*" ("GASB").

7 3.44 Defendant's "fully distributed" allocation methodology is based on GASB rules designed to  
8 distribute shared "indirect costs", across City departments, not to determine "profits" in a commercial  
9 sense. Accordingly, many different types of "**general overhead costs**" appear as "expenses" under  
10 various sections of Click!'s Operational Summaries.

11 3.45 Many of these indirect "**overhead costs**" are expenses completely unrelated Click!'s  
12 commercial telecommunications activities whatsoever.

13 3.46 These indirect "**unrelated costs**" include such things, by way of example, as the Tacoma  
14 Mayor's salary and City Council member's salaries.

15 3.47 Given the many unrelated and indirect costs included under GASB rules in the preparation of  
16 Click!'s Operational Summaries, no true and accurate representation of Click!'s "**actual income**" or  
17 true profitability "**as an enterprise**" is provided by these statements. Defendant's governmental  
18 accounting methods are not designed to track "profits," as such.

19 3.48 In preparing Click!'s Operational Summaries, Defendant follows "**not-for-profit accounting**  
20 **and financial reporting principles by governmental entities**," as outlined by GASB. Determining  
21 Click!'s true performance and profitably from business-type "proprietary activities," as an enterprise,  
22 is not the object of GASB rules.

23 3.49 The accounting methodology Defendant uses in preparation of Click! Operational Summaries  
24 artificially increase Click!'s expenses and do not reflect the System's actual "**operating profits or**  
25 **losses**" as an "enterprise."

26 3.50 In 2015 the "**cost allocation formulas**" were significantly updated by TPU management -  
27 resulting in "significant" changes to the allocation methodology. This "significant update" resulted in

1 *shifting costs*, from a previous ratio of approximately 75% to Click! and 25% to Tacoma Power, to a  
2 “**new ratio**” of 94% to Click! and only 6% to Tacoma Power.<sup>41</sup>

3 3.51 The change in the allocation formulas resulted in *\$5.7 million of additional expenses* being  
4 allocated onto Click!. These **additional costs** were retroactively reflected in Click!’s Operational  
5 Summaries beginning on January 1, 2015.

6 3.52 In 2016 Tacoma City Council passed a Resolution recognizing that the internal cost allocation  
7 formulas between Click! and Tacoma Power had changed significantly; and, that TPU management  
8 had “*substantially increased the share of cost allocations borne by Click! Network*”.

9 3.53 In this 2016 Resolution, City Council directed the City Manager to **hire an independent**  
10 **third-party consultant** to “*audit, analyze, and establish a reasonable methodology*” for cost  
11 allocation between Tacoma Power and Click! Network. This audit was never done.

12 3.54 This City Council Resolution specifically cited “*significant concerns*” over the “*veracity*  
13 *and appropriateness*” of the accounting assumptions and “cost allocation” methodology implemented  
14 by Tacoma Power. The Resolution determined that such concerns “*must be resolved.*”

15 3.55 This Council resolution authorized \$100,000 for an independent consultant to audit, analyze,  
16 and establish an *independent cost allocation methodology* between Tacoma Power and Click!.

17 3.56 A third-party consultant, NEWGEN STRATEGIES, LLC (“NewGen”) was hired and a  
18 contract issued in January 2017 to audit Click! pursuant to Council’s direction. The contract specified  
19 NewGen would “**evaluate the methodology used to allocate costs** between Tacoma Power’s electric  
20 and cable (Click!) operations and determine *the extent to which it is reasonable*”<sup>42</sup>.

21 3.57 In March 2017 the City Attorney issued a “Notice of Contract Suspension” to NewGen stating  
22 it is “*in the best interest of the City to suspend the professional services agreement with NewGen*  
23 *dated January 9, 2017.*” **The contract was thus terminated, and the audit never completed.**

24 3.57 The “*significant concerns*” identified by City Council in the 2016 Resolution requiring an  
25 audit were never addressed by NewGen, or in any subsequent audit. The “*veracity and*  
26

27  

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<sup>41</sup> Confirmed by Tacoma Public Utilities 2015 Annual Report

<sup>42</sup> Jan 9<sup>th</sup>, 2017 contract between City of Tacoma and NEWGEN Strategies.

1 *appropriateness*” of the accounting assumptions and “*cost allocation*” methodology remain  
2 *unanswered issues and genuine questions of material fact.*

3 3.58 The City Charter provides that the revenues of utilities owned and operated by the City shall  
4 never be used for any purposes other than the necessary operating expenses thereof, the making of  
5 additions and betterments thereto and extensions thereof, and the reduction of rates and charges for  
6 supplying utility services to consumers.

7 3.59 The City of Tacoma maintains an **Institutional Network** (I-Net) serving the City, schools,  
8 and government agencies. The I-Net system has an agreement with TPU to utilize a portion of TPU’s  
9 telecommunications plant. This agreement includes an “*incremental cost arrangement*,” where the  
10 City only pays for “*incremental costs*,” or those costs “*over and above* the costs that Tacoma Power  
11 would have incurred” for the system to serve Tacoma Power’s own non-I-Net purposes.<sup>43</sup>

12 3.60 Click! Network has no such “*incremental cost arrangement*” with TPU; rather, under the  
13 “*updated cost allocation formulas*,” put into place in 2015, Click! *bears 94% of the costs* associated  
14 with operations and maintenance of the shared telecommunications system.

15 3.61 Click!’s Operational Summaries are negatively impacted by Tacoma Power’s subsidization of  
16 I-Net’s expenses, such as capital costs, engineering, design, conversion work<sup>44</sup>, safety equipment,  
17 power usage, surveillance, monitoring, emergency readiness, O&M expenses, etc. The actual pro-rata  
18 share of these costs should rightfully be allocated to Defendant, as general government costs.

19 3.62 Defendant’s accounting policies shift unrelated I-Net costs, from general government, onto  
20 Click!’s Operational Summaries. This creates a distorted and misleading view of Click!’s financial  
21 performance and conceals the true financial performance of Click!’s operations as an enterprise.

22 3.63 Defendant routinely presents these erroneous Operational Summaries to the media and  
23 policymakers as accurate representations of Click!’s true financial performance as an enterprise.

24 3.64 Defendant has admitted, thru an authorized party-opponent, that these accounting practices  
25 produce a wrongful, inaccurate and disparaging perception of Click!’s performance.  
26

27 \_\_\_\_\_  
<sup>43</sup> Tacoma City Manager, Ray Corpuz, December 12, 1997 memorandum.

<sup>44</sup> Such as undergrounding of telecommunication plant assets

1 3.65 This **wrongful perception** of Click!, as a “*money losing venture*”, poisons the minds of  
2 policymakers and the public alike. This harmful “misconception” is a primary reason for  
3 policymaker’s considering privatization of Click!. More simply stated, if Click! were *properly seen*  
4 *as a successful and profitable venture*, all support for privatization of Click! would cease to exist.

5 3.65 TPU, as a non-profit, municipal public service enterprise, follows a “cost recovery” based  
6 pricing policy. Rates are set to recover costs of service and insure future funding for operations.  
7 Assigning unrelated costs to Click! results in higher rates being paid by customers for Click! services.

8 3.66 Tacoma Power will soon release a “customer service app” providing online customer support  
9 functions for utility customers. Among the features and benefits this “app” will bring are outage  
10 alerts, “leak detection,” real time billing, payment and usage information. The “app” *requires Internet*  
11 *access*. As such, *Internet access has a nexus* to provision of other utility services.

12 3.67 Click! faces competition from commercial, for profit, telecommunications service companies.  
13 These competitors have long opposed the competition created by municipal broadband systems such  
14 as Click!’s. They commonly employ lobbyists to carry out their agenda of destroying and preventing  
15 municipal competition. The lobbyists’ efforts and political contributions are no secret. Their activities  
16 are well organized, well documented and well known to Defendant’s staff and its policymakers.

17 3.68 Public concerns, suspicion and accusations over TPU management’s accounting for Click!’s  
18 costs have been widespread since 2015. On September 22, 2016, at a City Council meeting where the  
19 issue of reappointing TPU Director Bill Gaines was before the City Council, Council Member Ibsen  
20 cited the Director’s “*dishonest actions*,” likening them to “*someone who’s stealing from the cash*  
21 *register*.” The video of that meeting is on Defendant’s website. Director Gaines tenure at TPU was  
22 concluded in 2017 and a new TPU Director, Jackie Flowers took over in 2018.

23 3.69 That Defendant knowingly allowed a “fake bidder”, by the name of “Yomura” to participate  
24 in the final stages of an RFI process that was part of the proposed privatization plan.

25 3.70 That Defendant has not obtained current financial statements, including a balance sheet, for  
26 evaluating the financial qualifications of the proposed acquirer of Click! Network.

27 3.71 Defendant continues to widely portray Click! Network as a “*money losing*” venture

1 IV. CLAIM FOR RELIEF & CAUSES OF ACTION

2 WHEREFORE, Plaintiff hereby amends his complaint, is able to prove all of the additional facts  
3 cited and prays for judgment against Defendant based on the following:

4 4.1 Plaintiff is without an adequate remedy at law to require City council to follow the  
5 requirements of City Charter 4.6 and RCW 35.94 and is entitled to declaratory, injunctive and  
6 mandamus relief prohibiting any sale, lease or disposition of the Click! commercial  
7 telecommunication system unless and until such disposal is approved by a majority vote of the  
8 electors at a municipal election in the manner provided by the city charter and the laws of the state.

9 4.2 There is an actual, present, and existing dispute between the parties as to the legality of  
10 using Click! broadband revenue to subsidize and support general government functions thru  
11 wrongful payment of taxes on broadband services; and, over usage of Tacoma Power and Click!  
12 resources in subsidizing I-Net and general government's pro-rata share of pole attachment fees,  
13 power usage, undergrounding or relocations of existing plant, ongoing capital funding,  
14 surveillance, monitoring, emergency readiness, repairs and maintenance costs. transport fees,  
15 O&M costs and capital expenses obligations. These "subsidy activities" are attributable to, and  
16 properly allocable to, general government. There is also a dispute over the total dollar value of  
17 these unlawful subsidies provided in covering such general government expenses.

18 4.3 Defendant has willfully violated state and federal prohibitions against taxation of Internet  
19 access, under RCW 35.21.717 and the federal Internet Tax Freedom Act, 47 USC 151 SEC. 1101.  
20 Defendant is unlawfully continuing to divert 7.5% of Click! Network's gross revenue on broadband  
21 services to benefit the City of Tacoma's general government account. These payments, which have  
22 exceeded \$2.5 million over the past four years, are in violation of RCW 43.09.210 and represent an  
23 unlawful subsidy, from Tacoma Power and Click! commercial telecommunication customers, to the  
24 City of Tacoma's general fund.

25 4.4 The Mayor, City Council and Public Utility Board have acted and are acting knowingly and  
26 willfully in causing, authorizing, or allowing Tacoma Power and Click telecommunications  
27 customers to pay unlawful subsidies to general government in violation of RCW 43.09.210, which

1 requires “*all service rendered by . . . one department, public improvement, undertaking, institution,*  
2 *or public service industry to another, shall be paid for at its true and full value.*”.

3 4.5 Plaintiff has a legally cognizable interest in requiring Defendant to determine if Click!  
4 profitable by accounting for Click! activities as an “enterprise,” rather than as a “government entity”;  
5 and, in preserving and protecting communication and electric utility service funds from being  
6 unlawfully diverted to pay for expenses properly attributable and allocable to general government  
7 services, and in obtaining recovery of such unlawful subsidy of general government expenses.

8 4.6 Since the telecommunication system’s inception, over \$100 million has been spent in capital  
9 improvements to the System. Click! customers and Tacoma Power ratepayers have paid for a vast  
10 majority of that overall investment, while general government and I-NET users have paid only  
11 incremental costs and provided little relative financial support for their actual fair “pro-rata share” of  
12 the costs for data transport fees, pole attachment fees, power usage, undergrounding or relocations of  
13 existing plant, ongoing capital funding, surveillance, monitoring, emergency readiness, repairs and  
14 other O&M costs. Failure to pay a “*fair share*” of these costs represents an unlawful subsidy, from  
15 Click! customers and Tacoma Power ratepayers, benefiting general government in violation of RCW  
16 43.09.210, the State Accountancy Statute.

17 4.7 Such expenses and costs have exceeded \$20 million since the inception of the system and are  
18 projected to increase annually for the foreseeable future. Using Click! and Tacoma Power revenues  
19 and credit to subsidize expenses that benefit, or are properly allocable to, general government is a  
20 clear and willful violation of RCW 43.09.210.

21 4.8 TPU follows a “cost recovery” based pricing model, where rates are set in a way to recover  
22 costs of service. Click! Network’s rates were recently increased and are set to increase again in 2020  
23 to cover a “*perceived shortfall*” in revenues. The above-mentioned subsidization of general  
24 government expenses by Click! and Tacoma Power customers results in higher rates for Tacoma  
25 Power and Click! customers. This is a violation of RCW 19.86.020, which prohibits unfair practices.  
26  
27

1 4.9 By not paying its pro-rata share of overall capital expenses, repairs, monitoring, surveillance,  
2 emergency readiness or O&M costs associated with the underlying telecommunications plant that  
3 supports I-NET, Defendant is benefiting by diverting TPU ratepayers funds and willfully shifting  
4 general government's costs for such system onto Tacoma Power and Click! customers, who are  
5 thereby forced into paying higher rates as a result of subsidizing these general government operations.  
6 This subsidy is unlawful and in clear violation of RCW 43.09.210 (the Accountancy Statute).

7 4.10 Tacoma Power and Click! Network provides valuable "in-kind" contributions to general  
8 government. None of which are deducted from the 5% statutory cap placed on "franchise fees" paid  
9 on cable television services under federal law<sup>45</sup>. These "in-kind" contributions include both  
10 telecommunications and cable television services, along with waiving costs associate with a fair pro-  
11 rata share of I-Net's repairs, essential technical support and emergency readiness functions, network  
12 monitoring and O&M. Actual pro-rata costs for these services greatly exceed the token amounts  
13 currently paid by the defendant. Failure to deduct these valuable "in-kind" contributions violates  
14 RCW 43.09.210, making a recovery required.

15 4.11 These above cited subsidies are violations of RCW 43.09.210, the State Accountancy Statute,  
16 which negatively impacted the Operational Summaries of Click!, thereby creating inaccurate, and  
17 misleading performance results for Click! Network operations, all of which are harmful to Click!'s  
18 prospects and Plaintiff's right to continue enjoying municipally provided broadband services.

19 4.12 Defendant's willful cancellation and failure to complete City Council's mandated 2016  
20 "audit" allows continuation of this "considerable controversy." City Council's original "significant  
21 concerns," over the of the controversial accounting assumptions and "cost allocation" methodology,  
22 have not been addressed; and, therefore remain at issue. The "*veracity and appropriateness*" of the  
23 methods employed in producing the Click! Operational summaries have not been examined and may  
24 very well be producing the inaccurate, erroneous and misleading information about Click! Network's  
25 performance that Council feared in 2016 and sought to ferret out by its Resolution.  
26

27 \_\_\_\_\_  
<sup>45</sup> See FCC Order 19-08 -THIRD REPORT AND ORDER (2019), re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act

1 4.13 As a “*sub-fund*” of Tacoma Power, traditional financial statements, such as a balance sheet or  
2 income statement, are not prepared for Click!; consequently, there are no statements available that  
3 represent the actual “*product-line profitability*” and performance of the System. Surprisingly, no  
4 actual “income statement” or “balance sheet” has ever been prepared for Click! Network. Despite City  
5 Council’s wishes and Resolution for an “*audit*,” no such verification of Click!’s performance as a  
6 standalone enterprise has ever been prepared by Defendant or its appointees.

7 4.14 Many of the costs appearing on the Click! Operational Summaries are *totally unrelated* to  
8 Click! commercial activities. These “*unrelated costs*” are allocated to Click! Operational Summaries  
9 under Defendant’s “*fully distributed*” allocation model. This allocation method, while not illegal  
10 under state accounting rules, negatively impacts the Operational Summaries of Click! and produces  
11 inaccurate and disparaging results with “*artificial losses*.” The results are not reflective of the  
12 System’s *actual performance or profitability*. These Operational Summaries are, therefore, actually  
13 “*misinformation*” with regard to Click!’s financial performance.

14 4.15 Given the erroneous and disparaging performance results indicated by the Click! Operational  
15 Summaries, combined with the lack of any balance sheet, income statement or other financial  
16 statements possessing the veracity to provide useful information related to Click!’s true financial  
17 performance, *policy makers lack suitable, accurate, reliable information* about the municipal  
18 telecommunications system’s financial performance.

19 4.16 Lacking any such real information and possessing only “misinformation,” City Council and  
20 TPU Board members *have no legitimate basis* by which to properly evaluate the municipal  
21 broadband system’s financial performance; therefore, policymakers are ill-equipped to make an  
22 educated, reasonable or rational decision related to the proposed privatization and disposal of the  
23 System and its related assets.

24 4.17 Despite such lack of information, Defendant has willfully entered into a privatization  
25 agreement for Click! Network *without first obtaining any accurate financial information* related to  
26 the performance or valuation of the System. The Court has the power to prevent additional injury that  
27 might result thru an unfortunate chain of events flowing from a failure to requiring a public vote be

1 held approving the privatization of Click!. If the privatization agreement is accomplished and vesting  
2 of the System occurs without a vote of the people, then all public ownership and control of the  
3 municipal broadband System, including oversight of pricing, would be lost. This result would be  
4 clearly harmful to the plaintiff, and the community. Such an unfortunate and wrongful transfer of the  
5 public's assets would trigger an actionable negligence claim, given the existence of the four essential  
6 elements for such a claim: duty, breach, proximate cause, and resulting harm. This claim would  
7 burden the court system, with TPU Board members and City Council members facing personal  
8 liability for the breach of their required "*duty of reasonable care to refrain from causing foreseeable*  
9 *harm.*" A similar breach of duty would rest with certain City staff members, who have either willfully  
10 ignored or actively assisted in the wrongful actions leading to the potential privatization of Click!. In  
11 addition to Defendant's other liability in this case, these individuals and policymakers would  
12 potentially bear personal liability for their wrongful actions under RCW 80.04.440 and under  
13 common law for tortuous and ultra vires conduct in violation of the Tacoma City Charter and  
14 Washington state law. The simplest solution is for the Court to affirm Plaintiff's right to a public vote  
15 over any privatization, separation or vesting of Click! Network's commercial operations.

16 4.18 Defendant has participated in a conspiracy to defraud the public of its municipal broadband  
17 system. There has been no appraisal or other estimate of the "value" of the Click! business or the assets  
18 being conveyed in the privatization process. Without any appraisal, or accurate financial statements for  
19 Click!, it is impossible for policymakers or the electorate, who may be called on to vote in approving  
20 the proposed privatization, to evaluate the suitability of any proposed contract. As such, Defendant's  
21 proposed privatization is a gross violation of Washington State Constitution, Article VIII section 7.  
22 There is also evidence of a fraudulent "RFI process," which included a "fake bidder," which was known  
23 to members of city staff and reported to policymakers. Defendant knowingly allowed the fraudulent  
24 process to mislead the public and policymakers by the inclusion of this "fake bidder," who was  
25 considered a "finalist" in the RFI process. This is a violation of RCW 19.86.030, which protects against  
26 "conspiracies in restraint of trade." Defendant should be enjoined from carrying out the privatization  
27 goals of this fraudulent process.

1 4.19 Defendant's proposed candidate ("acquiror") for privatization of the Click! system has not been  
2 evaluated to determine suitability as an operator of Click! under privatization. Failure to conduct due  
3 diligence is a violation of Tacoma City Municipal Code 16B.02 which requires a financially qualified  
4 operator for such a franchise. No financial statements for the acquiror have been provided in  
5 connection with the transaction. Defendant must review financial statements, including a balance  
6 sheet, to determine the acquiror's financial qualifications for assuming control over the System.

7 4.20 Plaintiff is without an adequate remedy at law to protect aforesaid interests in preserving,  
8 protecting and obtaining recovery for telecommunication and electric utility funds, and is entitled  
9 to declaratory, injunctive and mandamus relief (i) declaring that Click! telecommunication and  
10 Tacoma Power revenues and funds may not be used to pay for general government expenses or  
11 capital improvements that are attributable or properly allocable to general government services  
12 rather than Tacoma Power electric utility and Click! telecommunication services, (ii) prohibiting  
13 general government from using Click! telecommunication and Tacoma Power funds to subsidize  
14 or pay for general government expenses or capital improvements that are properly allocable and  
15 attributable to general government purposes; or (iii) prohibiting TPU and City Council from  
16 including expenses or capital investments that are properly allocable and attributable to general  
17 government activities in the calculation of Click! rates, and (iv) requiring the City's general fund  
18 to reimburse Tacoma Power and Click! for the wrongful payment of costs for capital  
19 improvements, operational expenses, taxes, franchise fees and other subsidies that have  
20 wrongfully benefited general government, together with prejudgment and post-judgment interest  
21 thereon at the rate of 5% per annum until fully paid; (v) requiring the City to obtain estimates of  
22 the valuation of Click! as an enterprise and evaluate the financial statements of the proposed  
23 acquiror of the municipal broadband system; finally, (vi) permit the people to vote on the  
24 privatization of their public broadband system. This statutorily protected right prevents fraud and  
25 abuse by government and acts as a final measure of protection against a wrongful transfer of  
26 public assets.  
27

V. ~~IV~~ PRAYER FOR RELIEF

WHEREFORE, plaintiffs prays for judgment against the City 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,<sup>46</sup> Fiber To The Home ("FTTH") Internet services, and advanced metering
- (5) Declaring that a term sheet for negotiating an Indefeasible Right of Use (IRU) for Click! has been approved by City Council and formal contracts are being negotiated between Rainier Connect and the City for the future operation and transfer of control over Click! Network;
- (6) Declaring that the term sheet states "*The Tacoma Power Fiber on Critical Routes is collocated with the fiber optic strands that are used by Click! and are now planned to lease to Rainier Connect under the IRU*<sup>47</sup>;
- (7) Declaring that the IRU proposed in the term sheet with Rainier Connect is a "lease" of Click! system assets;
- (8) Affirming that the term sheet specifically states "*Related Assets will be conveyed to Rainier Connect subject to the terms of an asset purchase agreement ("APA") to be negotiated between the parties*";
- (9) Declaring that the term sheet with Rainier Connect includes an "asset sale";
- (10) Affirming that City Charter 4.6, relating to the "Disposal of Utility Property" requires the "City shall never sell, lease or dispose of any utility system" without a "majority vote of the people";

<sup>46</sup> Telecommunications Infrastructure Section, on Page 47, Bond Prospectus for CITY OF TACOMA, WASHINGTON \$70,575,000 Electric System Revenue Bonds, Series 2017

<sup>47</sup> Emphasis added to bring attention to the term "lease".

1 (11) Affirming that City Charter 4.6 applies to Rainier Connect’s proposal for the  
2 acquisition of Click!; since, it amounts to a lease and/or disposal of the Click! system,  
3 customer accounts, goodwill and ongoing interest in the telecommunications operations;

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

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

9 (14) Public policy requires citizens have a right to expect the terms of their City Charter to  
10 be followed -especially when it affects an important resource such as public utility control and  
11 oversight on their municipal Internet service<sup>48</sup>.

12 15. Ordering City of Tacoma’s general fund to reimburse Tacoma Power and Click!, for the  
13 wrongful overpayment of taxes, “franchise like” fees, costs for capital improvements,  
14 operational expenses, “*in-kind*” contributions and other subsidies that have wrongfully benefited  
15 general government in violation of RCW 43.09.210, RCW 35.21.717 and 47 U.S.C. § 542<sup>49</sup>

16 16. Declaring Defendant has not evaluated Click!’s financial performance under business  
17 accounting standards; but, instead only used governmental accounting standards. (a) That these  
18 “governmental accounting standards” do not reflect the System’s profitably as an enterprise; and  
19 that City Council must first determine Click!’s true financial “*profitability*”, prior to passage of  
20 any resolution causing Click! to be privatized; and, (b) That privatizing Click! without first  
21 obtaining financial underlying information regarding the System’s actual financial performance  
22 is, or would be, an *arbitrary, capricious, unreasonable and ultra vires* act, in excess of  
23 policymaker’s authority, and a violation of Tacoma City Charter and Washington state law.  
24

25  
26  
27 <sup>48</sup> Click is the second largest municipal Internet service provider in the nation.

<sup>49</sup> There is a violation of the five percent cap on franchise fees set forth in section 622 of the Act.

1 17. Enjoining and prohibiting Defendant from finalizing any agreement to privatize Click!  
2 Network without, (a) first obtaining a “direct cost” or “product line profitability” analysis, or  
3 other reasonable and accurate measurement of Click!’s financial performance “as an enterprise;”  
4 and, (b) Defendant first obtain an appraisal, from a third party, of the System’s market valuation.

5 18. Enjoining and prohibiting Defendant from finalizing any agreement to privatize Click!  
6 without first (a) publicly providing financial information showing the System’s true income as  
7 an enterprise, so policymakers and citizens can evaluate this information to make an informed  
8 decision in voting on any privatization of the System; and, (b) obtaining the financial statements  
9 of the acquiror, performing such due diligence as required in determining the present financial  
10 condition of the proposed acquiror, as required under Tacoma City Municipal Code 16B.02, and  
11 making that data and those findings available to the public.

12 19. Enjoining and prohibiting Defendant from diverting Click! telecommunication and  
13 Tacoma Power funds for subsidization of Defendant’s share of expenses related to operations,  
14 repairs, monitoring, facilities, maintenance and capital improvements of the telecommunications  
15 system provided by Click! and Tacoma Power, but which are properly allocable or attributable to  
16 general government; **or, in the alternative**, find: (a) That the “incremental accounting” methods  
17 used by Defendant for sharing I-Net related costs are appropriate; and, (b), That **Click! also**  
18 **provides similar public benefits to the community** and using “**incremental accounting**”  
19 allocations must also be required in the preparation of Click!’s financial statements.

20 20. Enjoining and prohibiting Defendant from issuing press releases or presentations  
21 portraying Click! as a “*financial failure*” until an audit or product line profitability analysis has  
22 been performed providing true and accurate information about the System’s profitability.

23 21. Ordering ***Defendant’s general fund to reimburse*** Tacoma Power for the ***overpayment of***  
24 ***taxes***, fees, and subsidies of general government expenses or capital improvements properly  
25 allocable or attributable to general government services rather than Tacoma Power or Click!  
26 services. That all amounts proven at trial, together with prejudgment and post-judgment costs,  
27 bear interest thereon at the rate of 5% per annum until fully paid.

1 22. Declaring Click! Network is a municipal broadband telecommunications system and  
2 public utility providing “vital” and “essential” “broadband Internet access” services to TPU  
3 ratepayers. That these services have a clear “nexus” and “utility purpose” for TPU by “*offsetting*  
4 *necessary communication costs*”, supporting “*demand-response efforts*”, creating “*revenue*  
5 *diversification*,” spurring “*economic growth*” and insuring for “*future communication needs*;”

6 23. Declaring that Click! is at least “*any part thereof*” in relation to Tacoma Public Utilities  
7 for purposes of RCW 35.94 and a **protective vote of the people** is necessary for final approval  
8 of privatization of the municipal broadband system.

9 24. Declaring that *Defendant’s asserted defense in this action is frivolous* under RCW  
10 4.84.185; and that, Defendant has *long demonstrated an understanding of its duty* to allow a  
11 public vote on privatization of Click! under RCW 35.94, as evidenced by City Council’s passage  
12 of its own resolution citing the “*public vote requirement*” related to vesting the System.

13 25. Awarding attorney fees and costs under RCW 80.04.440 and under the common fund  
14 theory and pursuant to RCW 7.16.260, RCW 7.24.100 and/or other applicable statutes.

15 26. Awarding such other and further relief as the Court may deem just, equitable and proper  
16 under the circumstances.

17  
18 

19  
20  
21 AS AMENDED 8/6/2019

22 \_\_\_\_\_  
23 Mitchell Shook  
24 Plaintiff

0122  
2617  
5/19/2020



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WASHINGTON  
OFFICE OF THE CLERK  
AT TACOMA

WILLIAM M. MCCOOL  
CLERK OF COURT  
1717 PACIFIC AVE.  
ROOM 3100  
TACOMA, WA 98402

May 12, 2020

Pierce County Superior Court  
930 Tacoma Ave S  
Room 110  
Tacoma, WA 98402

RE: *Shook et al v. City of Tacoma*  
Case #3:19-cv-05829-BHS

FILED  
IN COUNTY CLERK'S OFFICE

MAY 14 2020

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

Dear Clerk:

Please find enclosed the certified copy of Judge Benjamin H. Settle's *Order Remanding Case to State Court* in the above-referenced case. A certified copy of the docket sheet is also included.

**Please return the copy of this cover letter with the following information:**

*Superior Court Case Number(s):* 19-2-07135-0

*Assigned to Judge:* Dept 4 Shustkoff

*Completed by Deputy Clerk:* [Signature]

Thank you in advance for your cooperation and assistance.

Sincerely,

s/Emerald Rose Ackley,  
*Deputy Clerk*

Enclosures

5/19/2020 2617 0123

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

THOMAS MCCARTHY and CHRISTOPHER  
T. ANDERSON,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant

NO. 3:19-cv-05829-BHS

ORDER OF REMAND

THIS MATTER comes before the Court on the parties' supplemental briefing. Dkts. 45,  
48.

After removal, "[i]f at any time before final judgment it appears that the district court lacks  
subject matter jurisdiction, the case shall be remanded." 28 USC § 1447(c).

Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this matter  
shall be remanded to Pierce County Superior Court for the State of Washington.

DATED this 27th day of April, 2020.



BENJAMIN H. SETTLE  
United States District Judge

CERTIFIED TRUE COPY  
ATTEST: WILLIAM M. MCCOOL  
Clerk, U.S. District Court  
Western District of Washington

By  Deputy Clerk

CLOSED,JURYDEMAND,REMAND

**U.S. District Court  
United States District Court for the Western District of Washington (Tacoma)  
CIVIL DOCKET FOR CASE #: 3:19-cv-05829-BHS**

Shook et al v. City of Tacoma  
Assigned to: Judge Benjamin H. Settle  
Case in other court: Pierce County Superior Court, 19-00002-07135-0  
Cause: 28:1441 Petition for Removal

Date Filed: 09/04/2019  
Date Terminated: 04/27/2020  
Jury Demand: Plaintiff  
Nature of Suit: 490 Cable/Satellite TV  
Jurisdiction: Federal Question

**Plaintiff**

**Mitchell Shook**  
*TERMINATED: 04/20/2020*

represented by **Mitchell Shook**  
E-filing/Service  
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253-961-5900  
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CERTIFIED TRUE COPY  
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Clerk, U.S. District Court  
Western District of Washington

By *[Signature]* Deputy Clerk

**Plaintiff**

**Thomas McCarthy**

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5/19/2020 2617 0124

V.

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**ATTORNEY TO BE NOTICED**

Date Filed	#	Docket Text
09/04/2019	<u>1</u>	

5/19/2020 2:17 0125

0126  
2617  
5/19/2020

		NOTICE OF REMOVAL from Pierce County Superior Court, case number 19-2-07135-0; (Receipt # 0981-5912023) Attorney Christopher D Bacha added to party City of Tacoma (pty:dft), filed by City of Tacoma. (Attachments: # <u>1</u> Exhibit Order Granting Motion for Leave to Amend Complaint, # <u>2</u> Amended Complaint , # <u>3</u> Civil Cover Sheet)(Bacha, Christopher) (Entered: 09/04/2019)
09/05/2019		Judge Benjamin H. Settle added. (ERA) (Entered: 09/05/2019)
09/05/2019	<u>2</u>	LETTER from Clerk re receipt of case from Pierce County Superior Court and advising of WAWD case number and judge assignment. (ERA) (Entered: 09/05/2019)
09/05/2019	<u>3</u>	NOTICE: Plaintiff Mitchell Shook has registered to electronically file and receive electronic service in this case. (PS) (Entered: 09/05/2019)
09/06/2019	<u>4</u>	ORDER REGARDING INITIAL DISCLOSURES, JOINT STATUS REPORT, DISCOVERY, DEPOSITIONS AND EARLY SETTLEMENT: Joint Status Report due by 12/5/2019, FRCP 26f Conference Deadline is 11/21/2019, Initial Disclosure Deadline is 11/29/2019. Signed by Judge Benjamin H. Settle. (MGC) (Entered: 09/06/2019)
09/06/2019	<u>5</u>	NOTICE TO FILER: re <u>1</u> Notice of Removal. <b>Notice of Filing Deficiency</b> <b>** Action Required **</b> See attached letter for more information and instructions. (ERA) (Entered: 09/06/2019)
09/10/2019		Attorney Kent Van Alstyne added for Christopher T Anderson and Thomas McCarthy per <u>1</u> Notice of Removal. (ERA) (Entered: 09/10/2019)
09/18/2019	<u>6</u>	VERIFICATION OF STATE COURT RECORDS 19-2-07135-0 by Defendant City of Tacoma (Attachments: # <u>1</u> Civil Cover Sheet Case cover Sheet, # <u>2</u> Order assigning case schedule, # <u>3</u> Summons Summons, # <u>4</u> Complaint Complaint, # <u>5</u> Notice of Appearance, # <u>6</u> Proof of Service, # <u>7</u> Answer to Complaint, # <u>8</u> Motion for Preemptory Writ, # <u>9</u> Note for Motion, # <u>10</u> Declaration of Mitchell Shool, # <u>11</u> Motion, # <u>12</u> Motion to Strike, # <u>13</u> Note for Motion, # <u>14</u> Opposition, # <u>15</u> Declaration of Tenzin Gyaltzen, # <u>16</u> Response, # <u>17</u> Declaration of Mitchell Shook, # <u>18</u> Declaration of Service, # <u>19</u> Reply to Plaintiff's Resonse, # <u>20</u> Plaintiffs Mitchell Shook's Reply, # <u>21</u> Declaration of Mitchell Shook, # <u>22</u> Notice of Appearance, # <u>23</u> Order Denying Motion to Strike, # <u>24</u> Note for Motion Docket, # <u>25</u> Notice of Limited Apperance, # <u>26</u> Motion for Peremptory Writ, # <u>27</u> Declaration of Plaintiff, # <u>28</u> Clerk's Minute Entry, # <u>29</u> Note for Motion, # <u>30</u> Note for Motion, # <u>31</u> Declaration of M. Joseph Sloan, # <u>32</u> Motion to Consolidate, # <u>33</u> Motion to Strike, # <u>34</u> Motion to Continue, # <u>35</u> Declaration of M. Joseph Stone, # <u>36</u> Motion to Shorten Time, # <u>37</u> Order Shortening Time, # <u>38</u> Opposition, # <u>39</u> Certificate of Mailing, # <u>40</u> Affidavit Declaration in Support, # <u>41</u> Reply, # <u>42</u> Declaration of M. Joseph Sloan, # <u>43</u> Clerks Minute Entry, # <u>44</u> Praecipe, # <u>45</u> Order of Continuance, # <u>46</u> Order Consolidating Cases, # <u>47</u> Note for Motion, # <u>48</u> Motion Affidavit for Temporary Order, # <u>49</u> Declaration of Mitchell Shook, # <u>50</u> Clerks Minute Entry, # <u>51</u> Motion to Shorten Time, # <u>52</u> Declaration of Mitchell Shook, # <u>53</u> Motion to Shorten Time, # <u>54</u> Declaration of Kent Van Alstyne, # <u>55</u> Declaration of Service, # <u>56</u> Motion and Affidavit for Temporary Order, # <u>57</u> Declaration of Mitchell Shook, # <u>58</u> Declaration of Alice Phillips, # <u>59</u> Declaration of Service, # <u>60</u> Order Denying Motion to Shorten Time, # <u>61</u> Order Granting Motion Petition for over-length brief, # <u>62</u> Clerk's Minute Entry, # <u>63</u> Motion for Over-length Brief, # <u>64</u> Copy of Emails, # <u>65</u> Motion for an Over-length Brief, # <u>66</u> Declaration in Support of M. Joseph Sloan, # <u>67</u> Order Extending Briefing Page Limits, # <u>68</u> Notice of Withdrawl of Counsel of Pla Pro Se, # <u>69</u> Opposition to Pltfs Motion for Temp Restraining Order, # <u>70</u> Motion for Preliminary Injunction, # <u>71</u> Declaration of Mitchell Shook, # <u>72</u> Declaration in Support, # <u>73</u> Declaration in Support, # <u>74</u> Reply in Opposition, # <u>75</u> Declaration in Support of Tenzin Gyaltzen, # <u>76</u> Declaration of Tom Morrill, # <u>77</u> Declaration of Service, # <u>78</u> Opposition, # <u>79</u> Mitchell Shooks Response to Motion to Strike, # <u>80</u> Declaration of Thomas C Morrill, # <u>81</u> Declaration of Service, # <u>82</u> Supplemental Dec of Tom Morrill, # <u>83</u> Praecipe, # <u>84</u> Notice of Appearance, # <u>85</u> Declaration of Service, # <u>86</u> Pltf Shooks Reply to Defendants Response, # <u>87</u> Shook Declaration for Reply and Aff of Service, # <u>88</u> City of Tacoma Reply to Pltfs Response to Motion, # <u>89</u> Supplemental Declaration of Plaintiff Shook, # <u>90</u> Declaration of Terry Dillon & Affidavit of Service, # <u>91</u> Plaintiffs Reply

		to Defendants Opposition, # <u>92</u> Declaration of Trevor A Zandell in Reply, # <u>93</u> Declaration of Service, # <u>94</u> Plaintiffs McCarthy & Anderson Reply to Defs Opposition, # <u>95</u> Declaration of Trevor Zandell in Reply to Defs Opposition, # <u>96</u> Declaration of Service, # <u>97</u> Note for Motion, # <u>98</u> Note for Motion, # <u>99</u> Note for Motion, # <u>100</u> Motion for Entry of Order, # <u>101</u> Motion to Present Order and Affidavit, # <u>102</u> Shook Motion for Entry of Order Affidavit, # <u>103</u> Opposition, # <u>104</u> Response, # <u>105</u> Declaration of Service, # <u>106</u> Plaintiff Shook Response to Defendant, # <u>107</u> Shook Reply to Defendant Response on Order, # <u>108</u> Reply, # <u>109</u> Reply, # <u>110</u> Order Denying Motion of Writ of Prohibition, # <u>111</u> Reassignment Letter, # <u>112</u> Note for Motion, # <u>113</u> Note for Motion, # <u>114</u> Declaration in Support, # <u>115</u> Shooks Motion for Reconsideration, # <u>116</u> Shooks Declaration in Motion for Reconsideration, # <u>117</u> Affidavit of Service, # <u>118</u> McCarthy and Andersons Motion for Reconsideration, # <u>119</u> Declaration of Service, # <u>120</u> Mail Returned Unclaimed, # <u>121</u> Notice of Litigant Change of Address, # <u>122</u> Note for Motion, # <u>123</u> Shooks Motion to Amend Complaint, # <u>124</u> Affidavit of Service, # <u>125</u> Mail Returned Unclaimed, # <u>126</u> Opposition, # <u>127</u> Declaration of Service, # <u>128</u> Shooks Reply to Opposition on Leave to Amend, # <u>129</u> Affidavit of Service, # <u>130</u> Copies of emails, # <u>131</u> Order Denying Motion for Reconsideration, # <u>132</u> Reassignment to Dept 4, # <u>133</u> Clerk's Minute Entry, # <u>134</u> Order Granting Plaintiff's Motion to Amend, # <u>135</u> Order Setting Case Schedule, # <u>136</u> Amended Complaint Amended Complaint, # <u>137</u> Affidavit of Service, # <u>138</u> Answer to Amended Complaint, # <u>139</u> Notice to Adverse Party of Removal, # <u>140</u> Civil Cover Sheet Case Information Cover Sheet, # <u>141</u> Order Assigning Case to Judicial Department, # <u>142</u> Summons Summons, # <u>143</u> Complaint Complaint, # <u>144</u> Notice of Appearance, # <u>145</u> Affidavit of Service, # <u>146</u> Declaration of Mailing, # <u>147</u> Answer to Complaint)(Bacha, Christopher) (Entered: 09/18/2019)
09/19/2019	<u>7</u>	DEMAND for JURY TRIAL by Plaintiff Mitchell Shook (Shook, Mitchell) (Entered: 09/19/2019)
10/10/2019	<u>8</u>	MOTION for Partial Summary Judgment , filed by Plaintiff Mitchell Shook. Oral Argument Requested. Noting Date 11/1/2019, (Shook, Mitchell) (Entered: 10/10/2019)
10/10/2019	<u>9</u>	DECLARATION of MITCHELL SHOOK filed by Plaintiff Mitchell Shook re <u>8</u> MOTION for Partial Summary Judgment (Shook, Mitchell) (Entered: 10/10/2019)
10/16/2019	<u>10</u>	MOTION for <b>Temporary Restraining Order Preliminary Injunction</b> , filed by Plaintiff Mitchell Shook. Oral Argument Requested. (Attachments: # <u>1</u> Proposed Order) Noting Date <del>10/16/2019</del> <del>10/18/2019</del> , (Shook, Mitchell) Modified on 10/16/2019 (GMR). (Entered: 10/16/2019)
10/16/2019	<u>11</u>	DECLARATION of MITCHELL SHOOK filed by Plaintiff Mitchell Shook re <u>10</u> MOTION for Preliminary Injunction (Shook, Mitchell) (Entered: 10/16/2019)
10/16/2019		NOTICE of Docket Text Modification and Correction to the Noting Date re <u>10</u> MOTION for <b>Temporary Restraining Order Preliminary Injunction</b> . The docket text has been modified to reflect the actual document attached. The noting date has been corrected per LCR 7(d)(1) to 10/16/2019. (GMR) (Entered: 10/16/2019)
10/16/2019	<u>12</u>	NOTICE of Intent to Oppose Plaintiff's Motion for a TRO re <u>11</u> Declaration, <u>10</u> MOTION for Temporary Restraining Order ; filed by Defendant City of Tacoma. (Sloan, Millard) (Entered: 10/16/2019)
10/17/2019	<u>13</u>	ORDER denying <u>10</u> Plaintiff's Motion for Temporary Restraining Order. Signed by Judge Benjamin H. Settle. (MGC) (Entered: 10/17/2019)
10/21/2019	<u>14</u>	Second MOTION for Temporary Restraining Order , filed by Plaintiff Mitchell Shook. Oral Argument Requested. Noting Date 10/22/2019, (Shook, Mitchell) (Entered: 10/21/2019)
10/21/2019	<u>15</u>	Emergency DECLARATION of MITCHELL SHOOK filed by Plaintiff Mitchell Shook re <u>14</u> Second MOTION for Temporary Restraining Order (Shook, Mitchell) (Entered: 10/21/2019)
10/21/2019	<u>16</u>	RESPONSIVE BRIEF re <u>15</u> Declaration, <u>14</u> Second MOTION for Temporary Restraining Order by Plaintiff Thomas McCarthy. (Van Alstyne, Kent) (Entered: 10/21/2019)

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10/21/2019	<u>17</u>	NOTICE of Intent to Oppose Plaintiff's re <u>14</u> Second MOTION for Temporary Restraining Order ; filed by Defendant City of Tacoma. (Sloan, Millard) (Entered: 10/21/2019)
10/21/2019	<u>18</u>	NOTICE of Hearing on Motion re <u>14</u> Plaintiff's Second MOTION for Temporary Restraining Order: Motion Hearing set for 10/24/2019 at 2:30 PM in Courtroom E before Judge Benjamin H. Settle. (MGC) (Entered: 10/21/2019)
10/22/2019	<u>19</u>	MOTION for Temporary Restraining Order , filed by Plaintiffs Christopher T Anderson, Thomas McCarthy. Oral Argument Requested. (Attachments: # <u>1</u> Proposed Order) Noting Date 10/22/2019, (Van Alstyne, Kent) (Entered: 10/22/2019)
10/22/2019	<u>20</u>	RESPONSE, by Defendant City of Tacoma, to <u>19</u> MOTION for Temporary Restraining Order . (Sloan, Millard) (Entered: 10/22/2019)
10/23/2019	<u>21</u>	RESPONSE, by Defendant City of Tacoma, to <u>14</u> Second MOTION for Temporary Restraining Order . (Bacha, Christopher) (Entered: 10/23/2019)
10/23/2019	<u>22</u>	DECLARATION of Tenzin Gyaltzen filed by Defendant City of Tacoma re <u>14</u> Second MOTION for Temporary Restraining Order (Bacha, Christopher) (Entered: 10/23/2019)
10/23/2019	<u>23</u>	DECLARATION of M. Joseph Sloan filed by Defendant City of Tacoma re <u>14</u> Second MOTION for Temporary Restraining Order (Bacha, Christopher) (Entered: 10/23/2019)
10/23/2019	<u>24</u>	<del>DECLARATION of M. Joseph Sloan</del> Supplemental filed by Defendant City of Tacoma re <u>14</u> Second MOTION for Temporary Restraining Order (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit, # <u>6</u> Exhibit, # <u>7</u> Exhibit, # <u>8</u> Exhibit, # <u>9</u> Exhibit, # <u>10</u> Exhibit, # <u>11</u> Exhibit)(Bacha, Christopher) Modified on 10/24/2019, per counsel's request, to be re-filed correctly (ERA). (Entered: 10/23/2019)
10/23/2019	<u>25</u>	SURREPLY filed by Plaintiff Mitchell Shook re <u>14</u> Second MOTION for Temporary Restraining Order (Shook, Mitchell) (Entered: 10/23/2019)
10/23/2019	<u>26</u>	DECLARATION of MITCHELL SHOOK filed by Plaintiff Mitchell Shook re <u>14</u> Second MOTION for Temporary Restraining Order (Shook, Mitchell) (Entered: 10/23/2019)
10/24/2019	<u>27</u>	Supplemental DECLARATION of M. Joseph Sloan - Supplemental filed by Defendant City of Tacoma re <u>14</u> Second MOTION for Temporary Restraining Order (Attachments: # <u>1</u> Exhibit A-C, # <u>2</u> Exhibit D-G, # <u>3</u> Exhibit H-I, # <u>4</u> Exhibit J - 1, # <u>5</u> Exhibit J - 2, # <u>6</u> Exhibit J - 3, # <u>7</u> Exhibit K-O, # <u>8</u> Exhibit P, # <u>9</u> Exhibit Q - 1, # <u>10</u> Exhibit Q - 2, # <u>11</u> Exhibit R-S)(Bacha, Christopher) (Entered: 10/24/2019)
10/24/2019	<u>28</u>	RESPONSE, by Defendant City of Tacoma, to <u>19</u> MOTION for Temporary Restraining Order . (Bacha, Christopher) (Entered: 10/24/2019)
10/24/2019	<u>31</u>	MINUTE ENTRY for <b>TRO Hearing</b> held on 10/24/2019 before Judge Benjamin H. Settle Plaintiffs' <u>14</u> Second MOTION for Temporary Restraining Order and <u>19</u> MOTION for Temporary Restraining Order - Dep Clerk: <i>Gretchen Craft</i> ; Pla Counsel: <i>Mitchell Shook Pro Se, Kent Van Alstyne for Thomas McCarthy and Christopher Anderson</i> ; Def Counsel: <i>Christopher Bacha, Thomas Morrill, Joseph Sloan</i> ; CR: <i>Barry Fanning</i> ; Time of Hearing: 2:30; Courtroom: <i>E</i> ; Court hears arguments and DENIES the motions, for the reasons stated on the record. The Court will issue an order. (MGC) (Entered: 10/28/2019)
10/25/2019	<u>29</u>	NOTICE of Appearance by attorney Thomas C Morrill on behalf of Defendant City of Tacoma. (Morrill, Thomas) (Entered: 10/25/2019)
10/25/2019	<u>30</u>	NOTICE of Appearance by attorney Millard Joseph Sloan, Jr on behalf of Defendant City of Tacoma. (Sloan, Millard) (Entered: 10/25/2019)
11/01/2019	<u>32</u>	ORDER REQUESTING SUPPLEMENTAL BRIEFING, signed by Judge Benjamin H. Settle. Shook, and McCarthy and Anderson, may submit separate briefs of no more than twelve pages, or a joint brief of no more than fifteen pages, by November 12, 2019. The City may respond with separate briefs (if applicable) of no more than twelve pages each, or a single brief of no more than fifteen pages, by November 19, 2019. (ERA) (Entered: 11/01/2019)

11/04/2019		Noting Date Reset to 11/19/2019 re <u>19</u> MOTION for Temporary Restraining Order. (ERA) (Entered: 11/04/2019)
11/08/2019	<u>33</u>	Stipulated Stipulated MOTION <i>Extend Supplemental Briefing Deadlines</i> , filed by Plaintiff Thomas McCarthy. Noting Date 11/8/2019, (Van Alstyne, Kent) (Entered: 11/08/2019)
11/08/2019	<u>34</u>	ORDER granting <u>33</u> Stipulated Motion Extending Supplemental Briefing Deadlines. Signed by Judge Benjamin H. Settle. (MGC) (Entered: 11/12/2019)
11/13/2019	<u>35</u>	NOTICE of Appearance by attorney Robert Leslie Christie on behalf of Defendant City of Tacoma. (Christie, Robert) (Entered: 11/13/2019)
11/13/2019	<u>36</u>	NOTICE of Appearance by attorney Zachary B Parker on behalf of Defendant City of Tacoma. (Parker, Zachary) (Entered: 11/13/2019)
11/26/2019	<u>37</u>	MEMORANDUM filed by Plaintiff Mitchell Shook re <u>33</u> Stipulated Stipulated MOTION <i>Extend Supplemental Briefing Deadlines Extension -Permission for Leave to Amend</i> (Shook, Mitchell) (Entered: 11/26/2019)
11/27/2019	<u>38</u>	Second Stipulated MOTION <i>Extending Supplemental Briefing Deadlines</i> , filed by Plaintiff Thomas McCarthy. Noting Date 11/27/2019, (Van Alstyne, Kent) (Entered: 11/27/2019)
12/02/2019	<u>39</u>	ORDER granting <u>38</u> Second Stipulated Motion <i>Extending Supplemental Briefing Deadlines</i> , signed by Judge Benjamin H. Settle. Shook, McCarthy, and Anderson's supplemental briefing deadline extended to 1/27/2020. The City's response brief deadline is extended to 2/3/2020. (ERA) (Entered: 12/02/2019)
12/05/2019		Deadlines reset pursuant to the agreement of the parties: FRCP 26f Conference Deadline is 1/23/2020, Initial Disclosure Deadline is 2/21/2020, Joint Status Report due by 2/28/2020. (MGC) (Entered: 12/05/2019)
01/21/2020	<u>40</u>	Joint MOTION to Stay re <u>39</u> Order on Stipulated Motion, Set/Reset Deadlines, <u>32</u> Order, <u>34</u> Order on Stipulated Motion , filed by Defendant City of Tacoma. (Attachments: # <u>1</u> Proposed Order on Motion to Stay) Noting Date 1/31/2020, (Parker, Zachary) (Entered: 01/21/2020)
01/23/2020	<u>41</u>	ORDER granting <u>40</u> Motion to Stay Supplemental Briefing Schedule. Status Report due by 5/23/2020. Signed by Judge Benjamin H. Settle. (MGC) (Entered: 01/23/2020)
03/09/2020	<u>42</u>	NOTICE <i>to the Court</i> re <u>41</u> Order on Motion to Stay, Set Deadlines ; filed by Defendant City of Tacoma. (Attachments: # <u>1</u> Appendix)(Christie, Robert) (Entered: 03/09/2020)
03/26/2020	<u>43</u>	STIPULATION AND PROPOSED ORDER <i>for Supplemental Briefing Schedule</i> by parties re <u>41</u> Order on Motion to Stay, Set Deadlines, <u>32</u> Order, (Christie, Robert) (Entered: 03/26/2020)
03/27/2020	<u>44</u>	ORDER for Supplemental Briefing Schedule re <u>43</u> Stipulation filed by City of Tacoma. Signed by Judge Benjamin H. Settle. (MGC) (Entered: 03/27/2020)
04/10/2020	<u>45</u>	SUPPLEMENT <i>Brief</i> by Plaintiff Thomas McCarthy (Van Alstyne, Kent) (Entered: 04/10/2020)
04/17/2020	<u>46</u>	STIPULATION AND PROPOSED ORDER <i>of Partial Dismissal</i> by parties (Christie, Robert) (Entered: 04/17/2020)
04/20/2020	<u>47</u>	ORDER re <u>46</u> Stipulation of Partial Dismissal, by Judge Benjamin H. Settle. (ERA) (Entered: 04/20/2020)
04/24/2020	<u>48</u>	<i>Supplemental BRIEF</i> re <u>32</u> Order, by Defendant City of Tacoma (Attachments: # <u>1</u> Proposed Order of Remand)(Christie, Robert) (Entered: 04/24/2020)
04/27/2020	<u>49</u>	ORDER to Remand Case Per LCR 3(i), case will be remanded 14 days from the date of this Order, on 5/11/2020. Signed by Judge Benjamin H. Settle. (MGC) (Entered: 04/27/2020)
05/12/2020	<u>50</u>	LETTER to Pierce County Superior Court Remanding Case to back per <u>49</u> Order. (ERA) (Entered: 05/12/2020)

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May 16 2022 8:30 AM

CONSTANCE R. WHITE  
COUNTY CLERK  
NO: 19-2-07135-0

1 The Honorable Judge Bryan Chushcoff  
Department 4  
2 Hearing Date: July 1, 2022, at 9:00 a.m.

3  
4  
5  
6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
7 **IN AND FOR THE COUNTY OF PIERCE**

8 MITCHELL SHOOK,  
9 Plaintiff,

10 v.

11 CITY OF TACOMA,  
12 Defendant.

NO. 19-2-07135-0

**PLAINTIFF ANDERSON'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT**

**[SET FOR CONSIDERATION  
WITHOUT ORAL ARGUMENT]**

13  
14 THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,  
15 Plaintiffs,

16 v.

17 CITY OF TACOMA,  
18 Defendant.

19 **I. INTRODUCTION AND RELIEF REQUESTED**

20 This case presents the question of whether the City of Tacoma's state-of-the-art, carrier-grade,  
21 hybrid fiber coaxial telecommunications network offering gigabit-speed internet access, Fiber To The  
22 Home, and other services to the municipalities of Tacoma, University Place, Fircrest, Lakewood, Fife,  
23 and part of unincorporated Pierce County—commonly known as Click! Network (“Click!” or the  
24 “System”)—can be summarily declared surplus and handed over to a private company by the City of  
25 Tacoma without a vote of the people. As explained further herein, the City's surplus declaration is legally  
26

1 void, and under both the Tacoma City Charter and Chapter 35.94 RCW a vote of the people was required  
2 prior to the City's lease, sale, or disposal of Click!.

3 Plaintiff, CHRISTOPHER ANDERSON ("Anderson"), through his attorney, James P. Grifo of  
4 the Law Office of James P. Grifo, LLC, moves this Court for partial summary judgment and seeks the  
5 following relief:

6 1. A Declaratory Judgment that Click! Network ("Click!" or the "System") is a utility system  
7 and/or an essential part thereof under Tacoma City Charter § 4.6;

8 2. A Declaratory Judgment that Click! is a public utility system and/or a part thereof under  
9 Chapter 35.94 RCW;

10 3. Entry of a judgment voiding City Resolution No. 40467, which declared Click! surplus  
11 pursuant to RCW 35.94.040;

12 4. A Declaratory Judgment that the City should have held a municipal election under  
13 Tacoma City Charter § 4.6 prior to the lease, sale, or disposal of Click!;

14 5. A Declaratory Judgment that the City should have held a municipal election under RCW  
15 35.94.020 prior to the lease, sale, or disposal of Click!; and

16 6. Entry of an order directing further proceedings to determine the necessary and  
17 appropriate legal, equitable, and/or injunctive relief in this case.

18 This motion is made on the grounds that no genuine issues of material fact exist regarding the  
19 issues set forth above, and Anderson is entitled to judgment as a matter of law.

## 20 **II. STATEMENT OF FACTS**

21 In 1996, the Tacoma City Council ("Council") passed Ordinance No. 25930, which established  
22 Click! as part of Tacoma Public Utilities ("TPU"). Declaration of James P. Grifo ("Grifo Decl."), Ex.  
23 A, Ex. 11. In doing so, the City relied on its powers to create separate utility systems, stating that:

24 WHEREAS, the Ordinance provides that the City may create a separate  
25 system as part of the Electric System and pledge that that income of such a  
26 separate system be paid unto the Revenue Fund; and

1 WHEREAS RCW 35A.11.020 authorizes the City to operate and supply utility  
2 and municipal services commonly or conveniently rendered by cities or towns.

3 Id. (Emphasis supplied). The City determined it was “prudent and economical” to provide broadband  
4 Internet access and Ethernet transport services to residential and business customers. Id. The System  
5 was also created for “revenue diversification” for Tacoma Power “through new business lines (i.e.,  
6 internet transport, . . . .” Grifo Decl., Ex. A, Ex. 10. The ordinance also anticipated other benefits  
7 including “automated meter reading and billing, appliance control and load shaping”. Id., Ex. A, Ex.  
8 11. Click!, as one of four operating sections of Tacoma Power, continues to provide those functions  
9 today. Id., Ex. A, Ex. 1(a)-1(e).

10 Tacoma Public Utilities’ commercial telecommunications services were launched in 1998 under  
11 the brand name Click! Network, as a business unit of Tacoma Power. Click! is a state-of-the-art, carrier-  
12 grade, hybrid fiber coaxial telecommunications network offering Gigabit speed Internet access, Fiber To  
13 The Home (“FTTH”), and cable modem services in to the municipalities of Tacoma, University Place,  
14 Fircrest, Lakewood, and Fife, as well as part of unincorporated Pierce County. Id., Ex. A, Ex. 48. Click!  
15 consists of over 1,400 miles of fiber and cable plant constructed by TPU; the network covers  
16 approximately 66% of the homes in Tacoma Power’s service area. Id. Click! has more than 20,000  
17 wholesale high-speed Internet service of customers and 100 wholesale broadband transport circuits. Id.

18 Historically, Click!’s Internet access rates were approved by the Public Utility Board (“PUB”) and  
19 the Council, and were published in Title 12 of the Tacoma Municipal Code (“TMC”), which governs  
20 utilities. *See* Title 12 TMC.

21 On March 5, 2019, term sheets for the private operation and use of Click! were presented at a  
22 joint study session of the Council and PUB. Id., Ex. A, Ex. 39-39(a). One of the term sheets was  
23 submitted by Rainier Connect. Id. The Council and PUB directed the Public Utilities Director to execute  
24 a letter of agreement with Rainier Connect, which would allow the City to retain ownership of the HFC  
25 Network, shift the capital and operating expenses to Rainier Connect, and TPU would cease to provide  
26 wholesale internet access and data transport services (among others) to those in Click’s service area. Id.

1 On November 5, 2019, the Council passed Resolution Nos. 40467 and 40468. Id., Ex. A, Ex. 39-  
2 39(a). Resolution No. 40467 determined that Click! and its Related Assets are not required for continued  
3 public utility service, and formally declared Click! and its Related Assets surplus pursuant to RCW  
4 35.94.040. Id. Resolution No. 40468 authorized city officials to execute the IRU and APA—renamed the  
5 “Click! Business Transaction Agreement” (“BTA”)—once conditions precedent to transfer of  
6 operational control of Click! in the BTA have been met. Id., Ex. A, Ex. 39(a); Grifo Decl., Ex. B.  
7 Resolution No. 40468 does not provide for a municipal election prior to final execution of the BTA and  
8 IRU. Grifo Decl., Ex. A, Ex. 39(a). The City, through TPU, then signed and entered into the BTA with  
9 Rainier Connect. Grifo Decl., Ex. B.

10 Under the BTA, Rainier Connect is to acquire other assets currently used by the System in the  
11 provision of broadband data services referred to as “Related Surplus Assets,” including: equipment used  
12 to create and operate the System and deliver services to customers, customer accounts, inventory of spare  
13 parts and equipment, vehicles, prepaid items, and material contracts. Id. The BTA and IRU do not  
14 purport to provide the Council or PUB with any control over the System’s Internet rates. Id. On April  
15 1, 2020, the City transferred operational control of Click! Network over to Rainier Connect pursuant to  
16 the BTA. Id., Ex. C.

### 17 **III. STATEMENT OF THE ISSUES**

18 The following issues are presented for resolution by the Court:

- 19 1. Whether Anderson is entitled to summary judgment declaring that Click! is a utility system  
20 and/or an essential part thereof under the Tacoma City Charter § 4.6;
- 21 2. Whether Anderson is entitled to summary judgment declaring that Click! is a public utility  
22 system and/or a part thereof under Chapter 35.94 RCW;
- 23 3. Whether Anderson is entitled to summary judgment declaring City Resolution No. 40467,  
24 which declared Click! surplus pursuant to RCW 35.94.040, void;
- 25 4. Whether Anderson is entitled to summary judgment declaring that the City was required to  
26 hold a municipal election under Tacoma City Charter § 4.6 prior to the lease, sale, or disposal

1 of Click!; and

- 2 5. Whether Anderson is entitled to summary judgment declaring that the City was required to  
3 hold a municipal election under RCW 35.94.020 prior to the lease, sale, or disposal of Click!.

4 **IV. EVIDENCE RELIED UPON**

5 This motion is based on all the pleadings and papers filed in this consolidated action, including  
6 the declarations filed in support of this motion, and all attachments thereto, and all of which are  
7 incorporated herein by this reference.

8 **V. LEGAL AUTHORITY AND ARGUMENT**

9 **A. Standard of Review.**

10 This motion is made pursuant to CR 56(a) and (c), which provide in relevant part:

11 **RULE 56. SUMMARY JUDGMENT**

12 **(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross  
13 claim, or to obtain a declaratory judgment may, after the expiration of the period  
14 within which the defendant is required to appear, or after service of a motion for  
summary judgment by the adverse party, move with or without supporting affidavits  
for a summary judgment in the party's favor upon all or any part thereof.

15 **(c) Motion and Proceedings...** The judgment sought shall be rendered forthwith if  
16 the pleadings, depositions, answers to interrogatories, and admissions on file, together  
with the affidavits, if any, show that there is no genuine issue as to any material fact  
and that the moving party is entitled to a judgment as a matter of law.

17 CR 56(a), (c). Summary judgment can be used in the context of a claim for declaratory judgment. *See*  
18 CR 56(a); *see also Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998) (summary  
19 judgment seeking or opposing a declaratory judgment is appropriate).

20 The moving party bears the burden of demonstrating both the absence of a genuine issue of  
21 material fact and entitlement to judgment as a matter of law. *Knox v. Microsoft Corp.*, 92 Wn. App. 204,  
22 207, 962 P.2d 839 (1998). A material fact is one upon which the outcome of a claim depends. *Tran v.*  
23 *State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998). Summary judgment should be granted  
24 when the declarations and affidavits show that there are no genuine issues of material fact and the  
25 moving party is entitled to judgment as a matter of law. *See Knox*, 92 Wn. App. 204, 207 (1998).  
26

1           **B. Summary of Argument.**

2           The fundamental basis of Plaintiffs’ lawsuit is that under the Tacoma City Charter, in addition  
3 to Chapter 35.94 RCW, Sale or Lease of Municipal Utilities, the City was required to hold a municipal  
4 election before it disposed of Click! Network by transferring it to Rainier Connect under the BTA.  
5 The City did not, and never will, hold any such municipal election.

6           Section 4.6 of the City Charter provides:

7           **Disposal of Utility Properties**

8           Section 4.6 – The City shall never sell, lease, or dispose of any utility system, or parts  
9 thereof essential to continued effective utility service, unless and until such disposal is  
10 approved by a majority vote of the electors voting thereon at a municipal election in  
11 the manner provided in this charter and in the laws of this state.

12 Charter § 4.6 (emphasis added). As a result, under the City Charter, if the BTA with Rainier Connect,  
13 as it relates to Click! Network is a (1) sale, lease, or disposal of (2) a utility system or essential part  
14 thereof, then Anderson is entitled to summary judgment declaring that the City was required to hold  
15 a vote of the people pursuant to City Charter Section 4.6 prior to entering into the BTA.

16           Similarly, under Chapter 35.94 RCW, a city may “lease...or sell and convey any public utility  
17 works, plant, or system owned by it or any part thereof,” but only following the specific procedure set  
18 forth in RCW 35.94.020, which requires “submit[tal] to the voters of the city for their approval or  
19 rejection at the next general election...and a majority of the voters voting thereon...approv[ing] it.”

20 RCW 35.94.010, 020 (emphasis added). Unlike the vote requirement in the City Charter—which does  
21 not contain any mechanism for escaping the vote requirement in Section 4.6—the vote requirement  
22 contained in RCW 35.94.020 does not apply if a municipality legally and properly declares the property  
23 to be surplus under RCW 35.94.040. *See* RCW 35.94.040(2) (providing that the municipal vote  
24 requirement does not apply to dispositions authorized by the surplus provision). Thus, under state  
25 law, if the Click! Network BTA is a (1) lease or sale of (2) a utility system or any part thereof, and (3)  
26 the City has not legally declared Click! to be surplus, then Anderson is entitled to summary judgment  
declaring that the City was required to hold a municipal election pursuant to RCW 35.94.020 prior to  
entering into the BTA.

1 As explained in further detail in the following sections, the plain language of the City Charter  
2 and RCW 35.94.010, the history of RCW 35.94.010, the City’s Municipal Code, applicable case law  
3 and attorney general’s opinions, and current and historic treatment of Click! by the City clearly show  
4 that Click! is a public utility system and the BTA constitutes the unlawful sale, lease, and/or disposal  
5 of Click!. Further, proper consideration of the statutory scheme, the language of RCW 35.94.040, and  
6 the legislative history of the surplus provision demonstrates that the resolution declaring Click! surplus  
7 is ultra vires, contrary to law, and arbitrary and capricious. As a result, this Court should grant  
8 Anderson’s summary judgment motion in its entirety, and conclude that the BTA and the Resolutions  
9 preceding it were void *ab initio*.

10 **B. Click! Is a Utility System Under the Plain Language of the City Charter and Chapter**  
11 **35.94 RCW.**

12 Under the plain language of the City Charter and Chapter 35.94 RCW, Click! is a “utility  
13 system.” “Utility system” is not defined under either the City Charter or Chapter 35.94 RCW, so  
14 application of the rules of statutory construction is required. *Harmon v. Dept. of Social and Health Services*,  
15 134 Wn.2d 523, 530, 951 P.2d 770 (1998) (to determine meaning of a statute, courts apply general  
16 principles of statutory construction); *see also City of Seattle v. Auto Sheet Metal Workers Local 387*, 27 Wn.  
17 App. 669, 679, 620 P.2d 119 (1980) (the “[r]ules of statutory construction [are] used in determining [a  
18 city] charter’s meaning”). Under the rules of statutory construction, “Courts generally accord terms  
19 their most plain and ordinary meaning.” *Eyman v. McGehee*, 173 Wn. App. 684, 689, 294 P.3d 847  
20 (2013). To determine the ordinary meaning of an undefined term, “courts look to standard English  
21 language dictionaries.” *North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 48, 17 P.3d 596 (2001).

22 The relevant Merriam-Webster definitions for “utility” include (1) “fitness for some purpose  
23 or worth to some end” (2) “something useful or designed for use” or (3) “a public utility,” (a) “a  
24 service (such as light, power, or water) provided by a public utility” and (b) “equipment or a piece of  
25 equipment to provide such service or comparable service.” *“Utility” Definition*, MERRIAM-  
26 WEBSTER.COM, <https://www.merriam-webster.com/dictionary/utility> (last visited December 12,

1 2020). “Public utility” is further defined as “a business organization (such as an electric company)  
2 performing a public service and subject to special governmental regulation.” “*Public Utility*” Definition,  
3 MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/public%20utility> (last  
4 visited December 12, 2020). “Public service” is further defined as “the business of supplying a  
5 commodity (such as electricity or gas) or service (such as transportation) to any or all members of a  
6 community.” *Public Service Definition*, MERRIAM-WEBSTER.COM, [https://www.merriam-](https://www.merriam-webster.com/dictionary/public%20service)  
7 [webster.com/dictionary/public%20service](https://www.merriam-webster.com/dictionary/public%20service) (last visited December 12, 2020).

8 Thus, read together, a public utility is defined as: a business organization performing the  
9 business of supplying a commodity or service to any or all members of a community and subject to  
10 special governmental regulation. Click! fits squarely within this definition. Click! was a TPU brand  
11 and business organization that supplied wholesale high-speed Internet and data transport services to  
12 any TPU ratepayer who purchased Click!’s services, and was subject to special governmental regulation  
13 both at the local and state levels. Grifo Decl., Ex. A, pp. 1-58, Ex 1-1(e) (detailing Click! cable TV  
14 and high-speed internet services); Chapter 12.13 TMC (listing Click! services and regulating rates of  
15 same); RCW 54.16.330, .340 (providing authorization for public utility districts to create separate utility  
16 systems, to provide telecommunications services like Click!, and containing provisions for petitions to  
17 challenge the rates, terms, and conditions of same); RCW 80.01.110 (authorizing utilities and  
18 transportation commission to oversee petitions challenging rates, terms, and conditions of wholesale  
19 telecommunications services). Thus, under the plain language of the City Charter and RCW 35.94,  
20 Click! is a public utility system.

21 **C. The History of RCW 35.94.010 Conclusively Demonstrates that Telecommunications**  
22 **Systems Such as Click! are Public Utilities Contemplated by the Statute.**

23 Beyond the plain language analysis above, a review of the history and origin of RCW 35.94.010  
24 further reveals that Click! is indeed a utility system as envisioned by Chapter 35.94 RCW. As fully  
25 explained below, the text of Remington’s Revised Statutes (“RRS”) §§ 9512–14, the historical precursor  
26 to the modern-day Chapter 35.94 RCW, informs and indeed controls the meaning and application of

1 RCW 35.94.010. As a result, under Chapter 35.94 RCW, as informed by RRS § 9512, Click! is clearly a  
2 utility system.

- 3 1. RCW 35.94.010 was Recodified into the Revised Code of Washington in 1951 from  
4 Remington’s Revised Statutes § 9512 as Part of the Process of Converting the Previously  
5 Existing Laws of the State of Washington into a Single, Revised, Consolidated, and Codified  
6 Form.

7 In 1917, The Washington Legislature enacted House Bill 337, entitled “Sale or Lease of Public  
8 Utilities Owned by Cities or Towns” (“1917 Law”). *See Grifo Decl., Ex. A, Ex. 81(b).* The 1917 Law was  
9 codified in Remington’s Revised Statutes (“RRS”) at §§ 9512–14. RRS §§ 9512, 9513, and 9514 are the  
10 predecessors to the modern-day RCW 35.94.010, .020, and .030.<sup>1</sup> *Id., Ex. A, Ex. 81(c).* RRS § 9512  
11 provided, in relevant part:

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

18 RRS § 9512; *see Id.* Thus, the text of RRS § 9512 was similar to the current day RCW 35.94.010 – but  
19 even broader – as it contained a nonexclusive illustrative list of utilities, which included “telephone [and]  
20 telegraph plant[s] and lines” and even “any similar or dissimilar utility or system.” *Id.*

21 In the mid-1940’s, the Washington Legislature established and tasked the State Revision and  
22 Recompilation Committee (“Code Committee”) with proposing and submitting to the Legislature  
23 changes, revisions, and recodifications of the existing laws of the State for the purpose of creating the  
24 Revised Code of Washington. *See Id., Ex. A, Ex. 81(d).* As part of the Code Committee’s review and  
25 revision of the existing laws, in 1946 the Code Committee proposed that RRS § 9512 be codified at RCW  
26 80.12.01, with the following rewritten language:

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<sup>1</sup> RCW 35.94.040 and .050 were adopted in 1973 and 1986, respectively.

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

4 Id., Ex. A, Ex. 81(e)-81(f) (Proposed Revised Code of Washington, Volume 2, Title 46 to End (1946), at  
5 80–47). Proposed RCW 80.12.01 is identical to the current RCW 35.94.010.<sup>2</sup> As clearly indicated in the  
6 applicable reviser’s notes, the Code Committee’s change was “rewritten for brevity,” not a substantive  
7 change to the existing law. Id., Ex. A, Ex. 81(e) (Reviser’s Notes for Volume 2, Revised Code of  
8 Washington (1946), at 80–7 (stating that RRS § 9512 was “rewritten for brevity”) (emphasis added).

9 In 1951, the Legislature adopted the Code Committee’s proposed changes, revisions, and  
10 codifications of the existing laws of the State, and enacted for the first time the Revised Code of  
11 Washington. *See* RCW 1.04.010. RRS § 9512 was recodified as RCW 80.48.010, using the Code  
12 Committee’s proposed language for brevity. Id., Ex. A, Ex. 81(f). Subsequently, in 1965, RCW 80.48.010  
13 was recodified without amendment to its current location at RCW 35.94.010.

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

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

19 For two reasons, the history of current RCW 35.94.010, and specifically the text of the original  
20 RRS § 9512, are critical to correctly interpreting the term “public utility” used in RCW 35.94.010. First,  
21 the modification of RRS § 9512 to its current form was done purely to rewrite the statutory language for  
22 brevity; not to change its meaning. Id., Ex. A, Ex. 81(e) (Reviser’s Notes for Volume 2, Revised Code of  
23 Washington (1946), at 80–7 (stating that RRS § 9512 was “rewritten for brevity”) (emphasis added).  
24 Second, when the RCW was first adopted in 1951, the Legislature adopted RCW 1.04.020, which  
25 provides:

26 <sup>2</sup> Notably, proposed RCW 80.12.02 is identical to the current RCW 35.94.020.

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

8 RCW 1.04.020. Thus, the Legislature explicitly provided that the editorial revision and recodification of  
9 previously existing laws, such as RRS § 9512, into the RCW would not “chang[e] the meaning of any such  
10 laws.” RCW 1.04.020. Further, the Legislature explicitly provided that for purposes of statutory  
11 construction, any inconsistency between the formerly existing laws and the amended laws would be  
12 resolved in favor of the previously existing laws. *Id.* As a result, RCW 35.94.010’s meaning explicitly did  
13 not change as a result of its editorial revisions and recodification from RRS § 9512, and this Court must  
14 analyze RRS § 9512 in order to properly determine the meaning of “public utility” under RCW 35.94.010.  
15 The Legislature itself has demanded as such.

16 3. The Inclusion of Telegraph and Telephone Services in RRS § 9512 Demonstrates that  
17 Telecommunications Services, Like Click!, are Public Utilities Under RCW 35.94.010.

18 As explained above, the text of RRS § 9512 (and particularly the illustrative examples of utilities  
19 that were included there), necessarily inform and control the meaning of RCW 35.94.010. Under the  
20 broad language of RRS § 9512, Click! and its provision of Broadband Internet service is clearly a “similar  
21 or dissimilar utility or system” to a “telephone or telegraph plant and lines.” RRS § 9512.

22 As an initial matter, Broadband Internet, telephone, and telegraph services are all  
23 telecommunications services that provide for two-way communication. *See* RCW 80.04.010(27) (defining  
24 telecommunications as the “transmission of information by wire... optical cable, electromagnetic, or other  
25 similar means.”). In many ways, Broadband Internet is just the modern-day telecommunications evolution  
26 of the telegraph and telephone systems that have existed in this country for more than a century. In fact,  
when the Washington legislature first adopted the Telecommunications Act in 1985, it removed all

1 previous references to “Telephone” and “Telegraph” in Title 80 RCW, and replaced them with  
2 “Telecommunications”—a term which clearly encompasses Broadband Internet. *See* 1985 Wash. Sess.  
3 Laws 1978–79; *see also infra* § V(E) (discussing Click!’s status as a telecommunications company providing  
4 telecommunications service). Thus, Broadband Internet service is undoubtedly “similar or dissimilar” to  
5 telegraph and telephone services.

6 Even more importantly, Click!’s status as a public utility under RCW 35.94.010, as informed by  
7 RRS § 9512, is further confirmed by the Washington Supreme Court’s decision in *Bremerton Municipal*  
8 *League v. Bremer*, 15 Wn.2d 231, 130 P.2d 367 (1942). In *Bremer*, the Supreme Court was faced with the  
9 question of whether municipally owned wharves were a public utility under RRS § 9512. *Bremer*, 15 Wn.2d  
10 at 237–39 (1942). Even though none of the illustrative examples of public utilities in RRS § 9512 are  
11 related to ports, docks, or wharves, the Supreme Court still determined that wharves were public utilities  
12 under RRS § 9512. Specifically, the Supreme Court stated:

13 The appellants point out that the statute specifically names a long list of utilities, but does  
14 not specifically mention wharves and docks. But the statute also says ‘or any similar or  
15 dissimilar utility or system.’ This, we think includes any kind of utility in whose operations  
the public has an interest, that is to say, any public utility.

16 *Bremer*, 15 Wn.2d at 237 (1942) (emphasis added). Click! easily meets the *Bremer* test for a public utility as  
17 the public certainly “has an interest” in Click!’s operations. Moreover, in contrast to the wharves in *Bremer*,  
18 which were not related to any of the specific examples in the illustrative statutory list, Click!’s provision  
19 of telecommunications service is directly related to the specifically enumerated examples of telegraph and  
20 telephone systems. Thus, if the *Bremer* court determined that wharves were public utilities under RRS §  
21 9512, there is no question that Click! is also a public utility under RRS § 9512 and RCW 35.94.010.

22 As a result, under RCW 35.94.010, as informed by RRS § 9512 and *Bremer*, Click! is clearly a public  
23 utility system.

24 **D. *City of Issaquah v. Teleprompter Corp.* is Not Controlling Precedent on the Question of**  
25 **Whether Click! is a Public Utility Under RCW 35.94 or the City Charter.**

1 As explained above, the plain language of the statute, the history of RCW 35.94.010, the text  
2 of RRS § 9512, and the *Bremer* decision collectively establish that Click! is a public utility for the  
3 purposes of RCW 35.94.010. The Washington Supreme Court’s decision in *Issaquah v. Teleprompter*  
4 *Corp.*, 93 Wn.2d 567, 611 P.2d 741 (1980), briefly addressed whether cable television was a public  
5 utility under different chapters of the RCW—RCW 35A.80 and RCW 35.92—and concluded that it  
6 was not. *See id.* But, the *Issaquah* decision does not control or inform whether Click! is a utility system  
7 under the statutory provision at issue in this case (RCW 35.94) or the City Charter for the following  
8 reasons:

9 In *Issaquah*, the Washington Supreme Court analyzed whether a city is authorized to acquire,  
10 own, and operate a cable television system within its municipal borders. *Id.*, at 569. The Supreme  
11 Court determined that a city was so authorized. *Id.* As part of the Supreme Court’s analysis, the  
12 Supreme Court analyzed whether cable television was a public utility under RCW 35A.80 and 35.92.  
13 *Id.*, at 573–75. Neither party to the case “provided [the Court] with a definition of utility, nor d[id] the  
14 parties advance any helpful discussion on the distinguishing characteristics of utilities.” *Id.*, at 573–74.  
15 Instead, the Supreme Court relied on the fact that counsel for Teleprompter Corp., the party arguing  
16 to the Supreme Court that cable television was a utility, had “frequent[ly] assert[ed] at trial that cable  
17 television is not a utility.” *Id.*, at 574. Based on the assertion of counsel, the Supreme Court determined  
18 that cable television was not a utility for the purposes of RCW 35.80 and 35.92. *Id.*, at 574–75; Wash.  
19 AGO 2003 NO. 11 (Wash. A.G.), at n. 6 (recognizing that the “*Issaquah* court found that the cable  
20 television system was not a utility (based on the representations of the parties before the court)”).  
21 Thus, the Supreme Court’s holding in *Issaquah* that cable television was not a utility was based virtually  
22 exclusively on the assertion of counsel, and therefore lacks precedential value outside the specific  
23 context of that case.

24 Additionally, the *Issaquah* decision specifically held that “cable television is not a public utility  
25 as contemplated by RCW 35A.80 and 35.92.” *Issaquah*, 93 Wn.2d at 574 (emphasis added). In so  
26 holding, the *Issaquah* court noted that the statutes at issue in the case—Chapters 35A.80 and 35.92

1 RCW—do not “provide a clear definition” of public utility. *Id.* Thus, the *Issaquah* “public utility”  
2 analysis was also predicated upon a lack of a definition or test within the relevant statutory scheme.  
3 *See id.* Here, unlike the statutes at issue in *Issaquah*, Chapter 35.94 RCW, as informed by RRS § 9512,  
4 does contain an illustrative list and test (as set forth by the Supreme Court in *Bremer*) for determining  
5 whether a system qualifies as a public utility. RCW 35.94.010; RRS § 9512. The reasoning contained  
6 in *Issaquah* is therefore inapposite because RCW 35.94.010, RRS § 9512, and the *Bremer* Court provide  
7 specific guidance as to the appropriate meaning of “public utility” in this case.

8 Moreover, the *Issaquah* decision does not explicitly hold anything with regard to the meaning  
9 of “public utility” for the purposes of Chapter 35.94 RCW. *Issaquah*, 93 Wn.2d at 574 (holding that  
10 “cable television is not a public utility *as contemplated by RCW 35A.80 and 35.92*” and never citing RCW  
11 35.94 nor RRS § 9512) (emphasis added). While the *Issaquah* court did not interpret the meaning of  
12 “utility” with respect to RCW 35.94 and RRS § 9512, the *Bremer* Court certainly did. *See Bremer*, 15  
13 Wn.2d at 237–39 (interpreting meaning of “public utility” under RRS §9512). Thus *Bremer*, not  
14 *Issaquah*, is the controlling Supreme Court precedent on the meaning of “public utility” for the  
15 purposes of Chapter 35.94 RCW, and, as explained above, Click! is a “public utility” under the *Bremer*  
16 test.

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

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

1 not impact the question of whether Click! is a public utility under the plain language of the City  
2 Charter.

3 For all these reasons, the *Issaquah* decision does not preclude Click! from being considered a  
4 public utility under Chapter 35.94 RCW and RRS §9512, much less under the City Charter.

5 **E. Click!’s Status as a Telecommunications Business Under State Law Further**  
6 **Demonstrates Click! is a Utility System.**

7 Courts may also interpret terms in a statute by looking to “other statutes dealing with the same  
8 subject matter.” *Harmon v. Dept. of Social and Health Services*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998);  
9 *see also Morpho Detection, Inc. v. State Dept. of Revenue*, 194 Wn. App. 17, 27, 371 P.3d 101 (2016)  
10 (interrelated statutes that relate to the same subject matter must be “read together and harmonized, if  
11 possible”). Here, an examination of Washington laws governing public utility districts (“PUD”) as well  
12 as the treatment of telecommunications businesses like Click! under other provisions of state law  
13 further reinforce the conclusion that Click! is a utility system.

14 Click! is a “telecommunications company” providing “telecommunications” services under  
15 Title 80 RCW, Public Utilities. *See* RCW 54.16.005 (stating that “Telecommunications” has the same  
16 meaning as contained in RCW 80.04.010). Under RCW 80.04.010, telecommunications companies are  
17 defined as “every...city or town owning, operating or managing any facilities used to provide  
18 telecommunications for hire, sale, or resale to the general public.” RCW 80.04.010(28).  
19 Telecommunications, in turn, are defined as the “transmission of information by wire...optical cable,  
20 electromagnetic, or other similar means.” RCW 80.04.010(27). Thus, any city or town that operates or  
21 manages any facilities used for transmission of information by wire, optical cable, or other similar  
22 means is a telecommunications company. RCW 80.04.010(27), (28). This is exactly what Click! is: a  
23 facility for transmission of information by optical cable or similar means that is sold to TPU ratepayers.  
24 *See Grifo Decl., Ex. A, Ex. 10(b); Ex. 27* (identifying the Click! system as a hybrid fiber coaxial network  
25 providing high-speed internet services to the public).  
26

1 Click!'s status as a telecommunications company providing telecommunications services is  
2 significant for two reasons: First, “[t]elecommunications businesses are public utilities and are  
3 regulated by the state to varying degrees.” Wash. AGO 2003 NO. 11 (Wash. A.G.) (emphasis added);  
4 *see also Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011) (attorney general  
5 opinions “entitled to great weight”); Chapter 80.36 RCW (chapter regulating telecommunications laws,  
6 which is contained within Title 80 RCW, Public Utilities); RCW 80.01.110 (*utilities and transportation*  
7 *commission* hears petitions to review rates, terms, and conditions of telecommunications services).  
8 Second, PUDs are specifically authorized to “establish a separate utility system...[to] provid[e]  
9 wholesale or retail telecommunications services.” RCW 54.16.330(3). The City even relied upon this  
10 authorization when it first created Click! *See Grifo Decl., Ex. A, Ex. 11* (reciting that “WHEREAS,  
11 the Ordinance provides that the City may create a separate system” for the City to operate and supply  
12 “utility and municipal services”) (emphasis added).

13 Thus, related statutes: (1) provide authority for PUDs to create separate utility systems, like  
14 Click!, that provide wholesale or retail telecommunications services; and, (2) define  
15 telecommunications businesses providing telecommunications services, like Click!, as utilities.

16 **F. The City has Consistently Labelled and Treated Click! as a Utility System.**

17 Finally, the City has consistently and continuously labelled and treated Click! as a utility system.  
18 As mentioned above, the City relied specifically upon its statutory authorization to create separate  
19 systems to provide utility services in the recitals to the very ordinance that created Click!. *See Id.*  
20 (reciting that “WHEREAS, the Ordinance provides that the City may create a separate system as part  
21 of the Electric System and pledge that that income of such a separate system be paid unto the Revenue  
22 Fund; and WHEREAS RCW 35A.11.020 authorizes the City operate and supply utility and municipal  
23 services”) (emphasis added); *see also Id., Ex. A, Ex. 12(a); Ex. A, Ex. 10* (City repeatedly characterizing  
24 Click! as a “telecommunications system”) (emphasis added). In fact, the City litigated and confirmed  
25 its authority to establish Click! as a “telecommunications system” prior to commencing construction  
26

1 of the network—explicitly relying on the City’s statutory authority as a first-class city to “operat[e] and  
2 supply[]...utilities” under RCW 35A.11.020. *Id.*, Ex. A, Ex. 12(a), 12(b), 13(a). The Light Division of  
3 TPU issued and sold public bonds to finance the entire construction of Click!. *See id.*, Ex. A, Ex. 11.  
4 Moreover, City regulations regarding Click! are contained—to this day—within Title 12 TMC, which  
5 governs utilities within the City. The City also collected a 7.5% “utility tax” on Click! activities,  
6 including broadband revenue. *See id.*, Ex. A., Ex. 56-56(c) (detailing 7.5% utility tax on broadband  
7 revenue and City website explaining that “City Utility tax refers to a tax on public service businesses,  
8 including businesses that engage in telecommunications, supply of electricity and natural gas, and solid  
9 waste collection.”). Finally, until recently and in light of the unlawful BTA, the TPU website displayed  
10 Click! prominently under its services, directly next to its other utilities power, rail, and water. *See id.*,  
11 Ex. A, Ex. 1-1(e).

12 **G. Click! is Also a Part of a Utility System under RCW 35.94.040 and the City Charter.**

13 For all the preceding reasons Click! is a utility system under the City Charter and Chapter 35.94  
14 RCW, and thus a municipal election is required prior to sale, lease, or disposal of Click!. In addition,  
15 however, the procedural requirements to sell or lease a utility system under RCW 35.94.020 also apply  
16 to the sale or lease of “any part” of a utility system. RCW 35.94.020 (emphasis added); *see also* Charter  
17 § 4.6 (election requirement applies to sale, lease, or disposal of “essential part[s]” of utility system). If  
18 it is not a utility system in itself, then Click! is at least “part” of the City’s electric utility, Tacoma Power,  
19 and therefore its lease or sale required a municipal election.

20 **H. Plaintiff Anderson is Entitled to Summary Judgment Declaring Resolution No. 40467,**  
21 **which Declared Click! Surplus Pursuant to RCW 35.94.040, Void.**

22 In an attempt to circumvent the public vote requirement contained in RCW 35.94.020, on  
23 November 5, 2019, the City passed Resolution No. 40467 (“Surplus Resolution”) and formally declared  
24 the entirety of Click! and its Related Assets surplus pursuant to RCW 35.94.040. Grifo Decl., Ex. A, Ex.  
25 39 (resolution surplussing the heart of the Click! network, including the fiber supporting the broadband  
26

1 internet service, its core routers, servers, and other essential electronic equipment). The statutory surplus  
2 provision relied on by the City provides, in relevant part:

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

10 RCW 35.94.040 (emphasis added). Thus, the municipal vote provision of RCW 35.94.020 applies unless  
11 the City properly and legally determines by resolution that Click! is surplus under RCW 35.94.040.<sup>3</sup> *Id.*

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

18 As explained in detail below, the City's surplus of Click! is *ultra vires* and contrary to law because  
19 RCW 35.94.040 does not provide cities authority to surplus entire operating utility systems like Click!. In  
20 addition, the City's determination that Click! is no longer needed for public utility service is arbitrary and  
21 capricious as Click! continues to provide the exact same public utility service despite having now been  
22 transferred to Rainier Connect (a private company). Thus, the City did not have authority to declare Click!  
23 surplus in Resolution No. 40467, and this Court should grant Plaintiff summary judgment and void the  
24 Surplus Resolution.

25  
26 1. The City Cannot Avoid the Public Vote Requirement in the City Charter Using the Surplus  
Provision of RCW 35.94.040.

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

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<sup>3</sup> Significantly, as discussed further below, the municipal vote provision contained in the City Charter § 4.6 is not impacted by a surplus declaration under RCW 35.94.040, regardless of the legality of such a declaration.

1 prevents the need for a municipal election as otherwise required under RCW 35.94.020. *See* RCW  
2 35.94.040(2) (“The provisions of RCW 35.94.020...shall not apply to dispositions authorized by this  
3 section”) (emphasis added). A declaration of surplus under RCW 35.94.040, however, does not obviate  
4 the public vote requirement in the City Charter. Thus, because Click! is a “utility system” or “essential  
5 part thereof” for purposes of the City Charter, the City must hold a municipal election prior to sale, lease,  
6 or disposal of Click!—regardless of whether the City properly declares Click! surplus pursuant to RCW  
7 35.94.040. In other words, even if the Surplus Resolution were lawful and proper, which it was not, City  
8 Charter § 4.6 and its requirement for a vote of the people still applied.

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

11 When the Washington State Legislature adopted the surplus provision, the Legislature granted  
12 cities the power to dispose of property that had become inadequate, obsolete, and was no longer needed  
13 for provision of the utility service in the future without the necessity of a municipal election—consistent  
14 with the analogous surplus power already enjoyed by PUDs under Chapter 54.16 RCW. The Legislature  
15 did not intend to grant municipalities the power to surplus and divest themselves of entire utility systems  
16 without a municipal election, and thereby render the municipal vote requirement in RCW 35.94.020  
17 meaningless. Therefore, the City’s decision to declare Click! surplus is both ultra vires and contrary to law,  
18 and the Surplus Resolution should be declared void. *South Tacoma Way*, 169 Wn.2d at 123; *Marino*, 97  
19 Wn.2d at 317.

20 In order to properly interpret the surplus provision contained in RCW 35.94.040, it must be  
21 viewed in light of the statutory scheme of which it is a part. *See Dept. of Ecology v. Campbell & Gwinn, L.L.C.*,  
22 146 Wn.2d 1, 9–11, 43 P.3d 4 (2002). Prior to enactment of RCW 35.94.040 in 1973, cities could not, under  
23 any circumstances, lease or sell *any part* of a utility system without a municipal election under RCW  
24 35.94.020—language which required a municipal election to approve sale of even broken down and  
25 useless utility service trucks, outdated and no longer operational transformers, or parcels of land originally  
26 acquired for a utility that had never, and would never, be utilized for utility purposes. *See* RCW 35.94.020.

1 Thus, RCW 35.94.040 was enacted to allow cities to more easily dispose of property that was  
2 unserviceable, obsolete, and not required for the continued provision of utility service—*i.e.* surplus.  
3 Indeed, the City of Tacoma even admitted this fact during the consideration of the House and Senate  
4 bills that led to the adoption of RCW 35.94.040. See Grifo Decl., Ex. A, Ex. 33-33(x) (containing a 1973  
5 letter from the City of Tacoma Director of Public Utilities to the Legislature stating the same).

6 But the surplusage provision of RCW 35.94.040 was clearly not intended to empower cities to  
7 dispose of entire utility systems such as Click! without a municipal election—it was merely to allow  
8 disposition of property held by existing utilities that would no longer be necessary for the continued  
9 provision of a utility service. To hold otherwise would frustrate the entire purpose of the statutory scheme  
10 and render meaningless the public vote requirement in RCW 35.94.020, because a city could simply  
11 surplus any and all of its utility systems under RCW 35.94.040 by simply calling it “surplus,” and then  
12 never have to hold a municipal election under RCW 35.94.020 prior to leasing, selling, or disposing of  
13 the utility systems. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (statutes must be interpreted  
14 and construed so that all the language used is given effect, with no portion rendered meaningless or  
15 superfluous). Put another way, if cities had the power to surplus an entire utility system under RCW  
16 35.94.040, then there is no set of circumstances where a city would ever have to hold a public vote prior  
17 to lease, sale, or disposal of a utility system or part thereof. Such an expansive reading of the surplus  
18 provision would swallow entirely the municipal vote requirement based upon the whims of those in  
19 power, and such an interpretation is wholly inconsistent with the foundational principles of statutory  
20 construction. *See id.*

21 Significantly, the legislative history surrounding the promulgation of RCW 35.94.040 strongly  
22 reinforces the interpretation that the surplus provision cannot be used to surplus an entire utility system.  
23 *See State v. Evans*, 177 Wn.2d 186, 199, 298 P.3d 724 (2013) (any ambiguity in meaning of statute may be  
24 resolved by resort to legislative history in order to determine legislative intent). The legislative history of  
25 the surplus provision almost exclusively consists of letters and statements offered by the bill’s principal  
26 proponent, the City of Tacoma (largely by Al Brenninger, of the City of Tacoma Public Utilities). *See*

1 Grifo Decl., Ex. A, Ex. 33(j)-33(k); *See also Lutheran Day Care v. Snohomish Cnty.*, 119 Wn.2d 91, 104–05,  
2 829 P.2d 746 (1992) (court will consider all materials that are sufficiently probative of legislative intent in  
3 determining the same). The City of Tacoma wrote the original letters in support of the bill to both the  
4 House of Representatives and the Senate, in March of 1973. Grifo Decl., Ex. A, Ex. 33(g), (m), (u). Mr.  
5 Brenninger of TPU also presented and explained the bill on the Senate floor, while Paul J. Nolan, Deputy  
6 City Attorney for Tacoma Public Utilities, presented and explained the bill on the floor of the House. Id.  
7 Ex. A, Ex. 33(j), (v). The bill was passed largely without amendment by the legislature that same session.  
8 See id., Ex. A, Ex. 33(x). TPU’s letter in support of the bill stated, in relevant part:

9 Sections 35.94.020 and .030 require a formalized procedure [for disposal of public utility  
10 property] with a confirming approval of the voters on a ballot proposition. Such  
11 procedure is, of course, desirable where in fact all or an integral part of an operating utility  
12 is to be so disposed of. However, the procedure is completely impractical for example in  
13 the disposition of property and equipment, land, substations, and other parts and  
14 segments of facilities no longer required for utility service...Chapter 35.94 RCW as now  
15 enacted unfortunately prevents this.

16 The proposed amendment would accomplish greater procedural flexibility in such  
17 transactions without repealing the formalized procedures in the proper situations... [t]he  
18 flexibility is reasonably consistent with that long enjoyed by Public Utility Districts under  
19 RCW 54.16.180, and investor-owned utilities.

20 Id., Ex. A, Ex. 33(g) (emphasis supplied). Thus, it is evident that the bill was not intended to allow the  
21 surplus provision to “repeal[] the formalized [public vote] procedures in the proper situations...where in  
22 fact all or an integral part of an operating utility” is to be disposed of, but instead to provide flexibility to  
23 cities in surplussing property “consistent with that long enjoyed by Public Utility Districts under RCW  
24 54.16.180.” Id.; see also id., Ex. A, Ex. 33(v) (Tacoma City Attorney stating to the House that bill would  
25 “allow municipal utility districts the same privileges...as other public and private utility districts.”). In  
26 1973, RCW 54.16.180 provided that a PUD:

27 May sell and convey, lease, or otherwise dispose of all or any part of its works, plants,  
28 systems, utilities and properties, after proceedings and approval by the voters of the  
29 district, as provided for the lease or disposition of like properties and facilities owned by  
30 cities and towns. *Provided...* That a district may sell, convey, lease or otherwise dispose of  
31 to any person or public body, any part, either within or without its boundaries, which has

1 become unserviceable, inadequate, obsolete, worn out or unfit to be used in the operation  
2 of the system and which is no longer necessary, material to, and useful in such operations,  
3 without the approval of the voters.

4 196 Wash. Sess. Laws 958 (emphasis supplied); *See also* RCW 54.16.180(1), (2)(a) (containing modern day  
5 language almost identical to provision existing in 1973). In other words, when the Legislature enacted the  
6 surplus provision, it granted cities the power to surplus portions and property of the utility that were  
7 unserviceable, obsolete, and no longer necessary and useful in the operation of the utility, consistent with  
8 the existing power of PUDs to do the same. *See* 196 Wash. Sess. Laws 958. The Legislature did not,  
9 however, grant cities the power to surplus all or an integral part of an operating utility like Click!. As a  
10 result, the Surplus Resolution is ultra vires and contrary to law, because it attempts to exercise a surplus  
11 power that the Legislature never granted the City.

12 The statutory scheme of Chapter 35.94 RCW—properly construed and supported by the  
13 legislative history of the surplus provision—demonstrates that municipalities cannot legally surplus entire  
14 utility systems. Therefore, the Surplus Resolution declaring the entirety of Click! surplus is *ultra vires* and  
15 contrary to law, and void as a matter of law. *South Tacoma Way*, 169 Wn.2d at 123; *Marino*, 97 Wn.2d at  
16 317.

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

19 Under RCW 35.94.040, a city must determine in its declaration of surplus both that the property  
20 to be surplussed is (1) “surplus to the city’s needs,” and (2) “not required for providing continued public  
21 utility service.” RCW 35.94.040 (emphasis added). The City’s determination in the Surplus Resolution  
22 that Click! is not required for providing continued public utility service is clearly arbitrary and capricious,  
23 because Click! is itself a utility system, and Click! and all the equipment associated with Click! continues  
24 to be a utility system, provides the same utility services to the public as it always has, and performs the  
25 same functions notwithstanding the transfer of operational control to Rainier Connect. As a result, the  
26 City’s determination to surplus Click! was arbitrary and capricious, and solely designed to avoid submitting  
to the voters the question of whether to hand Click! over to a private entity. *Marino*, 97 Wn.2d at 317.

1 An examination of typical surplus declarations in the public utility context is helpful for framing  
2 the purpose of RCW 35.94.040, and analyzing whether utility property is required for providing continued  
3 public utility service. Typically, municipalities surplus a used truck previously used in conjunction with  
4 the utility, or a weedwhacker previously used to maintain utility facilities, or an old transformer no longer  
5 to be used in conjunction with the utility. See, e.g., Grifo Decl., Ex. A, Ex. 82 (City of Duvall surplus  
6 declaration). Used trucks, weedwhackers, and an old transformer have two important characteristics in  
7 common: they are equipment and/or pieces of a utility system, and after surplus they will no longer be  
8 used in support of continued provision of a utility service.

9 In contrast, Click! is a standalone, separate utility system, that provides to the public the utility  
10 service of broadband internet access, cost over \$200 million in ratepayer resources to construct, and  
11 provides services to over 35,000 unique customer accounts. Click! still provided the same services to the  
12 public, the City, and TPU that it did when it was first created at the time it was declared to be “surplus.”  
13 See id., Ex. A, Ex. 10 (ordinance creating Click! noting that in addition to cable television and broadband  
14 internet services, the System was created for “revenue diversification” for Tacoma Power and to  
15 promote “economic development” and provide data transport). Unlike a truck that used to service  
16 electrical utility customers but now after surplus will be used for completely different purposes, all the  
17 property, equipment, and appurtenances of Click! continues to be used in support of Click!. A Click!  
18 utility truck, after surplus and sale to Rainier Connect, continues to be a Click! utility truck.

19 Indeed, Click! as a whole continues to be a utility system despite its lease to Rainier Connect,  
20 because Rainier Connect continues to use Click! assets to provide broadband services as a public utility.  
21 See Inland Empire Rural Electrification, Inc. v. Dept. of Public Service of Washington, 199 Wn. 527, 537–38, 92 P.2d  
22 258 (1939) (determination of whether a service is a public utility does not hinge on whether provider of  
23 that service is public or private, but rather on whether the service is designed for public use by the public  
24 as a class). Thus, not only is Click! “required for providing continued public utility service,” it actually  
25 does continue to provide the same public utility service.

26 Rather than surplussing property which will no longer provide utility functions in the future, or

1 will no longer provide support for public utility purposes as contemplated by RCW 35.94.040, Click! and  
2 its Related Assets continue to do both. As a result, the City's Surplus Resolution should be declared void,  
3 since the City's determination that Click! is not required for continuing public utility service is arbitrary  
4 and capricious.

5 **VI. CONCLUSION**

6 For all of the foregoing reasons, Plaintiff Anderson respectfully requests the Court grant  
7 Anderson's Motion for Partial Summary Judgment in its entirety.

8  
9 DATED this 14<sup>th</sup> day of May 2022.

10 The Law Office of James P. Grifo, LLC

11 

12 \_\_\_\_\_  
13 James P. Grifo, WSBA No. 45192  
14 Attorney for Plaintiff Anderson

May 16 2022 8:30 AM

The Honorable Judge Bryan Chushcoff  
Department 4  
COUNTY CLERK  
Hearing Date: July 1, 2022, at 10:00 AM  
NO. 19-2-07135-0

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

MITCHELL SHOOK,  
Plaintiff,

v.

CITY OF TACOMA,  
Defendant.

**NO. 19-2-07135-0**

**DECLARATION OF JAMES P. GRIFO  
IN SUPPORT OF PLAINTIFF'  
ANDERSON'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,  
Plaintiffs,

v.

CITY OF TACOMA,  
Defendant.

I, James P. Grifo, hereby declare as follows:

1. I am the attorney of record for Plaintiff Christopher Anderson in the above-captioned matter.
2. I am over the age of 18, and competent to testify to the following based upon my personal knowledge.
3. Attached hereto as **Exhibit A** is a true and correct copy of the Master Declaration of Mitchell Shook Prepared in Response to Court Order of January 7, 2020, to Organize Declarations as filed in Pierce County Superior Court Cause No. 19-2-11506-3, along with the exhibits and attachments thereto.

1 4. Attached hereto as **Exhibit B** is a true and correct copy of the signed Click! Business Transaction  
2 Agreement between the City of Tacoma and Mashell, Inc., d/b/a Rainier Connect, which I obtained  
3 from the Tacoma Public Utilities website at the following address: <https://www.mytpu.org/wp->  
4 [content/uploads/Approval-Version-CBTAIRU.pdf](https://www.mytpu.org/wp-content/uploads/Approval-Version-CBTAIRU.pdf), which I last visited on December 14, 2020.

5 5. Attached hereto as **Exhibit C** is a true and correct copy of a letter dated February 28, 2020, from  
6 the General Manager of Click! Network to Click! Network customers, which I obtained from the Tacoma  
7 Public Utilities website at the following address: <https://www.mytpu.org/wp->  
8 [content/uploads/Click\\_customer\\_letter\\_Feb\\_2020.pdf](https://www.mytpu.org/wp-content/uploads/Click_customer_letter_Feb_2020.pdf), which I last visited on December 14, 2020.

9 I certify and declare under penalty of perjury under the laws of the State of Washington that the  
10 foregoing is true and correct.

11 Signed this 14<sup>th</sup> day of May 2022, in Nantucket, Massachusetts.

12  
13  
14   
15 \_\_\_\_\_  
16 James P. Grifo, WSBA No. 45192

# **EXHIBIT A**

January 22 2020 9:14 AM

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

The Honorable Judge Shelly K. Speir

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

BOWMAN

Plaintiff,

V

City of Tacoma, Defendant.

MITCHELL SHOOK,

Plaintiff, Pro Se

v.

CITY OF TACOMA, Defendant.

**NO. 19-2-11506-3  
MASTER DECLARATION OF  
MITCHELL SHOOK PREPARED IN  
RESPONSE TO COURT ORDER OF  
JANUARY 7, 2020 TO ORGANIZE  
DECLARATIONS.**

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| <b>4. Shook Declaration 12/12/19 PART 2 Exhibits 67 to 67 (j)</b> | <b>Page 33</b> |
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MASTER DECLARATION  
OF MITCHELL SHOOK

- 1 -

MITCHELL SHOOK  
3624 6<sup>TH</sup> AVE SUITE C  
TACOMA, WA 98406

1 I, Mitchell Shook, declare as follows: I am a resident of Tacoma, ratepayer of Tacoma  
2 Public 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  
4 related to Click! Network and the ISP industry, having 20 years of experience working with  
5 Click! and other open access systems, in my role as Founder and CEO of Advanced Stream, an  
6 Internet Service Provider operating on Click! Network. I have personal knowledge of the matters  
7 set forth below.

8 It is my understanding the Court, in its Order on January 7, 2020, required me to certify,  
9 authenticate and organize my Exhibits in my declarations in this case. I have done so in this  
10 "Master Declaration," which includes my original declarations Shook Decl. 10/30/19, Shook  
11 Decl. 11/1/19, Shook Decl. 12/12/19 (part 1 and 2) and Shook Decl. 12/30/19.

12 I have carefully organized each of the Exhibits attached to my original declarations, and  
13 separated them into identifiable instruments by adding letters to each of the original Exhibit  
14 numbers. This Master Declaration contains the original text from each of my declarations, along  
15 with some additional information, but all of which new language has all been underlined for the  
16 convenience of the Court and the parties.

17 In order to comply with the Court's Order of January 7, 2020, and in response to the City's  
18 Motion to Strike, I have obtained Certificates of Authenticity from various government officials  
19 to authenticate the public records and documents that were attached to my original declarations."

20 In the process of obtaining the Certificates, some of them returned large volumes of  
21 unrelated pages. For example, in Shook Decl. 12/12/19, Exhibit 50, where I cited two pages from  
22 the 1997 "Telecommunication Study," but the Certificate for the document containing the two  
23 pages, Resolution U-9258, contained 501 pages. The entire "Telecommunication Study" for  
24 creating Click! Network was an Exhibit to Resolution U-9258. In such cases, I have not enlarged  
25 the number of pages in my original Exhibit, by adding the full "Telecommunication Study," for  
26 example; rather, I preserved the original two pages and added the Certificate for Resolution U-

1 9258 to the title page of my Shook Decl. 12/12/19, Exhibit 50. I have also identified such  
2 exhibits as “pages from,” or “excerpts of.”

3 Complete copies of all certified documents are available for the Court and any other party to  
4 this lawsuit by contacting plaintiff at the email address on file in this case. In many cases I have  
5 provided direct links to sources of information provided, along with links to “*archived copies*”  
6 preserved on permalink, a service for storing online information. All citations to “archived”  
7 copies are also true and correct copies of the sites and materials they reference and are  
8 incorporated herein and therein by this reference.

9 **Shook Declaration 10-30-19**  
10 **Exhibits 1 to 28**

11 I, Mitchell Shook, declare as follows: I am a resident of Tacoma, ratepayer of Tacoma  
12 Public Utilities, taxpayer to City of Tacoma, and customer of Click!, the municipal broadband  
13 telecommunications system operated by Tacoma Public Utilities. I am an expert in matters  
14 related to Click! Network and the ISP industry, having 20 years of experience working with  
15 Click! and other open access systems, in my role as Founder and CEO of Advanced Stream, an  
16 Internet Service Provider operating on Click! Network. I have personal knowledge of the matters  
17 set forth below.

18 I am over the age of eighteen, competent to testify in this matter, and make this declaration  
19 on my own personal knowledge. All references in the following Declaration to “downloaded,” or  
20 “available at” or from a “website” or a “webpage” are meant to indicate that the Plaintiff in this  
21 cause, “Mr. Shook” is the one who did the downloading and screen captures. All references to  
22 Defendant or “The City” are meant to indicate City of Tacoma and “TPU” is Tacoma Public  
23 Utilities. All references to “I” “me,” and “mine” identify the author of this Declaration, yours  
24 truly, Mitchell Shook.

25 The Exhibits have **the same exhibit numbers**, from the original Shook Declarations  
26 submitted in this matter, with the **addition of letters**, to distinguish the exhibits.

1 1. Attached hereto as **Exhibit 1** and incorporated herein by this reference is a true and correct  
2 copy of a screenshot of the TPU website as visited on 10-29-19. This exhibit shows “About TPU  
3 - Tacoma Public Utilities,” as seen and captured by Mr. Shook’s on June 4, 2019,

4 <https://www.mytpu.org/about-tpu> , also archived and available at <https://perma.cc/76T2-G9EA>.

5 1 (a). Attached hereto as **Exhibit 1 (a)** and incorporated herein by this reference is a true and  
6 correct copy of a screenshot of the TPU website as visited on 10-29-19. 'Our services' Page  
7 listing Power, Water, Rail, and Click! Network as viewed and captured by Mr. Shook’s on June  
8 4, 2019, <https://www.mytpu.org/about-tpu/services>. An archived copy is *available at*  
9 <https://perma.cc/2SKD-F8WG> .

10 1 (b). Attached hereto as **Exhibit 1 (b)** and incorporated herein by this reference is a true and  
11 correct copy of a screenshot of Click!’s Landing Page, <http://click-network.com>, showing  
12 “Products,” as viewed and captured by Mr. Shook’s on June 4, 2019. An archived copy is also  
13 *available at* <https://perma.cc/RZH3-YTCE>

14 1 (c). Attached hereto as **Exhibit 1 (c)** and incorporated herein by this reference is a true and  
15 correct copy of a screenshot of Click!’s products Page -“Internet Service Providers,” as viewed  
16 and captured by Mr. Shook’s on June 4, 2019. An archived copy is also *available at*  
17 <https://perma.cc/2VHC-AD6R>

18 1 (d). Attached hereto as **Exhibit 1 (d)** and incorporated herein by this reference is a true and  
19 correct copy of a screenshot of Click!’s webpage -About Click <https://www.click->  
20 [network.com/about](https://www.click-network.com/about) as viewed and captured by Mr. Shook’s on June 4, 2019. An archived copy is  
21 also *available at:*<https://perma.cc/NP7T-8YXN>

22 1 (e). Attached hereto as **Exhibit 1 (e)** and incorporated herein by this reference is a true and  
23 correct copy of a screenshot of Click! Network’s webpage - “Products - High Speed Internet.”  
24 <https://www.click-network.com/products/internet/> as viewed and captured by Mr. Shook on June  
25 4, 2019. An archived copy is also *available at:* <https://perma.cc/H267-LKUY>  
26

1 2. Attached hereto as **Exhibit 2** and incorporated herein by this reference is a true and correct  
2 copies of the Declaration of Surplus Property, first and last pages of the surplus Resolution U-  
3 11116 and sample pages from the City’s agreement with Buyer to privatize Click!. Now attached  
4 as Exhibit 2 is a true and correct copy of the City of Tacoma’s Declaration of Surplus Property  
5 (DSP), as I downloaded it from the City’s website.

6 2 (a). Attached hereto as **Exhibit 2 (a)** and incorporated herein by this reference is a true and  
7 correct copy of the first and last pages of the surplus Resolution U-11116. which now includes a  
8 signed certification of authenticity for the document from which the attached exhibit is a true and  
9 correct copy of what it purports to be.

10 2 (b). Attached hereto as **Exhibit 2 (b)** and incorporated herein by this reference is a true and  
11 correct copies of the pages of the Click! Business Transaction Agreement, as downloaded from  
12 the City of Tacoma website. These pages are also in the record as “Exhibit H” to Defendant’s 12-  
13 30-19 Declaration Of Christopher D. Bacha In Support Of Defendant’s Response To Plaintiff’s  
14 Partial Summary Judgment Motions.

15  
16 3. Attached hereto as **Exhibit 3** and incorporated herein by this reference is a true and correct  
17 copy of the meeting notice for Declaration of Surplus Property related to Click! Network. The  
18 meeting was on October 30, 2019 and was a Special Meeting Notice for Declaration of Surplus  
19 Property related to Click! Network Resolution U-11116 – Authorize Tacoma Power to Declare  
20 Surplus Utility-owned Property including certain inventory, equipment, and vehicles allocated to  
21 the Click! Network. As downloaded by Mr. Shook from City of Tacoma website.

22 4. Attached hereto as **Exhibit 4** and incorporated herein by this reference is a true and correct  
23 copy of the timeline for the privatization of Click! Network under the Transaction. As taken  
24 from the business transaction agreement. and is listed as “**Exhibit A2 - Transition Plan Gantt**  
25 **Chart**” in Defendant’s 12-30-19 Declaration Of Christopher D. Bacha In Support Of  
26 Defendant’s Response To Plaintiff’s Partial Summary Judgment Motions as “Exhibit H.”

1 5. Attached hereto as **Exhibit 5** and incorporated herein by this reference is a true and correct  
2 copy of the City of Tacoma Charter, as downloaded from City's website by Mr. Shook on  
3 10/29/19. Section 4.1 thru 4.8

4 6. Attached hereto as **Exhibit 6** and incorporated herein by this reference is a true and correct  
5 copy of pages from the TPU Annual report as downloaded by me from TPU's website. The  
6 pages are 15, 16, 47 and 48 from TPU's Tacoma Power Electric System Revenue Bonds, Series  
7 2017 prospectus, as downloaded by me from TPU's website on June 4, 2019, and available at,  
8 <https://www.mytpu.org/wp-content/uploads/2017-tacoma-power.pdf>, an archived copy is also  
9 available at: <https://perma.cc/7EXF-RVRY>.

10 6 (a). Attached hereto as **Exhibit 6 (a)** and incorporated herein by this reference is a true and  
11 correct copy of pages 65 and 66, from 2016 SUPERINTENDENT'S REPORT TACOMA  
12 POWER as downloaded by me from TPU's website on June 4, 2019, and available at,  
13 <https://www.mytpu.org/wp-content/uploads/2016-tacoma-power.pdf>, an archived copy is also  
14 available at: <https://perma.cc/M93K-Y3L5>

15 7. Attached hereto as **Exhibit 7** and incorporated herein by this reference is a true and correct  
16 copy of a Click!'s Annual Report to The City of Tacoma, obtained through my public disclosure  
17 request from Defendant.

18 7 (a). Attached hereto as **Exhibit 7 (a)** and incorporated herein by this reference is a true and  
19 correct copy of Jul-14 Click! Network Plant Totals as obtained from Click! Manager, Pam  
20 Burgess, through my public disclosure request from Defendant.

21 8. Attached hereto as **Exhibit 8** and incorporated herein by this reference is a true and correct  
22 copy of a page from the Tacoma Municipal Utility Code as downloaded by me from City's  
23 website on 10/29/19.  
24  
25  
26

1 9. Attached hereto as **Exhibit 9** and incorporated herein by this reference is a true and correct  
2 copy of a page from the TPU 2018 annual report and the August 2019 Click! operational  
3 summary, with the addition of purple arrows and comments added for emphasis and explanation.  
4 Now Attached as **Exhibit 9** and incorporated herein by this reference is a true and correct copy  
5 of a page from the TPU 2018 annual report.

6  
7 9 (a). Attached hereto as **Exhibit 9 (a)** and incorporated herein by this reference is a true and  
8 correct copy of the August 2019 Click! operational summary, with the addition of purple arrows  
9 and comments added by me for emphasis and explanation, as downloaded by me on 10/29/19,  
10 from City of Tacoma’s website as part of the August 2019 Tacoma Power Financial Statements.

11 *Available at:*

12 [https://www.cityoftacoma.org/UserFiles/Servers/Server\\_6/File/cms/Finance/Financial\\_Reports/](https://www.cityoftacoma.org/UserFiles/Servers/Server_6/File/cms/Finance/Financial_Reports/Monthly/08_19Power.pdf)  
13 [Monthly/08\\_19Power.pdf](https://www.cityoftacoma.org/UserFiles/Servers/Server_6/File/cms/Finance/Financial_Reports/Monthly/08_19Power.pdf), also available at perma.cc archive : <https://perma.cc/638F-57Q9>.

14 10. Attached hereto as **Exhibit 10** and incorporated herein by this reference is a true and  
15 correct copy of TPU 1997 Resolution U-33668, along with parts of the Telecommunication  
16 Study and Business Plan associated with the creation of Click!. Now Attached as **Exhibit 10** and  
17 incorporated herein by this reference is a true and correct copy of TPU 1997 Resolution U-  
18 33668. Resolution U-33668 is also in the record under Defendant’s Exhibit H, in the 11-4-19  
19 Supplemental Declaration of Joseph Sloan in Opposition to Plaintiff’s Motion for Temporary  
20 Restraining Order, in cause # 19-2-11760-1, which is this case, Shook v Tacoma, prior to the  
21 present consolidation with Bowman. See signed **Certificate** as a part of exhibit 10 (a), which the  
22 U-3368 was an attachment to. The entire Telecommunications Study also known as Business  
23 Plan, by Tacoma City Light dated February 18th 1997 which is 486 pages was also attached as  
24 an exhibit to U-9258.

25 10 (a). Attached hereto as **Exhibit 10 (a)** and incorporated herein by this reference is a true  
26 and correct Certified copy of TPU Substitute Resolution U-9258. Now included is a signed

1 Certificate of the custodian of these records that the attached exhibit is a true and correct copy  
2 of what it purports to be.

3 10 (b). Attached hereto as Exhibit 10 (b) and incorporated herein by this reference is a true  
4 and correct copy of parts of the Telecommunication Study and Business Plan created to support  
5 the creation of Click! Network. This Telecommunication Study and Business Plan was attached  
6 to Res. # 33668, which was passed by Tacoma City Council on April 8th 1997. A copy of  
7 Resolution #33668 is included in this case record by Defendant's own 11-4-19 Supplemental  
8 Declaration of Joseph Sloan in Opposition to Plaintiff's Motion for Temporary Restraining  
9 Order, in cause # 19-2-11760-1, which is this same case prior to the present consolidation with  
10 Bowman. See signed certification as a part of exhibit 10 (a),

11 10 (c). Attached hereto as Exhibit 10 (c) and incorporated herein by this reference is a true  
12 and correct copy of a portion of the Telecommunication Study and Business Plan created to  
13 support the creation of Click! Network. This Telecommunication Study and Business Plan  
14 attached to Res. # 33668, which was passed by Tacoma City Council on April 8th 1997. Current  
15 Business market research study - Dethman & Associates. See signed certification as a part of  
16 exhibit 10 (a),

17  
18 11. Attached hereto as **Exhibit 11** and incorporated herein by this reference is a true and  
19 correct copy of Ordinance 25930 for creation of telecommunication system. This document,  
20 Ordinance No. 25930, is also already in the record as Defendant's Exhibit G, in the December  
21 30th 2019 Declaration Of Christopher D. Bacha In Support Of Defendant's Response To  
22 Plaintiff's Partial Summary Judgment Motions. This Ordinance includes an attachment,  
23 Resolution U-9198, which contains the words "WHEREAS by the installation of *additional*  
24 *telecommunications capacity*, this system would have the capability of providing additional  
25 public benefits for the City, and Light Division ratepayers." Now included is a signed  
26 certification from the custodian of these records that the attached exhibit is a true and correct  
copy of what it purports to be.

1 12. Attached hereto as **Exhibit 12** and incorporated herein by this reference is a true and  
2 correct copy of a Court order and brief from 1996 Summary Judgement for creation of  
3 telecommunication system. Now Attached as **Exhibit 12** and incorporated herein by this  
4 reference is a true and correct copy of 1996 Court order Granting CITY OF TACOMA'S  
5 MOTION FOR SUMMARY JUDGMENT.

6 12. (a) Attached hereto as **Exhibit 12 (a)** and incorporated herein by this reference is a true  
7 and correct copy of City of Tacoma's Motion for Summary Judgement -Nov 6 1996  
8 MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S MOTION FOR SUMMARY  
9 JUDGMENT -Case No. 96-2-09938-0.

10 13. Attached hereto as **Exhibit 13** and incorporated herein by this reference is a true and  
11 correct copy of a Court order and brief from 1997 Summary Judgement for creation of  
12 telecommunication system.

13  
14 13. (a) Attached hereto as **Exhibit 13 (a)** and incorporated herein by this reference is a true  
15 and correct copy of City of Tacoma's reply brief dated May 5th 1997 Case No. 96-2-09938-0

16 13. (b) Attached hereto as **Exhibit 13 (b)** and incorporated herein by this reference is a true  
17 and correct copy of Declaration of Steven Klein in support of City's reply 1997 in Ex. 13 (a)  
18

19 14. Attached hereto as **Exhibit 14** and incorporated herein by this reference is a true and  
20 correct copy of City of Tacoma Resolution No. 33668. Now Attached as **Exhibit 14** and  
21 incorporated herein by this reference is a true and correct copy of June 30th 1998 letter from  
22 Mark Crisson, Director, Tacoma Public Utilities to Ray Corpuz, City Manager, City of Tacoma  
23 with an attachment of news article from MSNBC titled "Tacoma Power to give TCI a jolt."

24 15. Attached hereto as **Exhibit 15** and incorporated herein by this reference is a true and  
25 correct copy of City's FCC Transparency Disclosure and sample filing of the City's FCC 499,  
26 477 and 471 Filings. Now Attached as **Exhibit 15** and incorporated herein by this reference is a

1 true and correct copy of City of Tacoma 2019 FCC Form 499-A Telecommunications Reporting  
2 Worksheet (Reporting 2018 Revenues) FCC 499, 477 and 471 Filings Form 477 Filing  
3 Summary

4 15. (a) Attached hereto as **Exhibit 15 (a)** and incorporated herein by this reference is a true  
5 and correct copy of Form 477 filing summary -Aug 20, 2018 11:54:09 -Tacoma Power dba  
6 Click! Network

7  
8 15.(b) Attached hereto as **Exhibit 15 (b)** and incorporated herein by this reference is a true  
9 and correct copy of Description of Services Ordered and Certification Form 471 FCC  
10 Registration Number 0011877545

11 15. (c) Attached hereto as **Exhibit 15 (c)** and incorporated herein by this reference is a true  
12 and correct copy of City of Tacoma Department of Public Utilities, Light Division dba Click!  
13 Network transparency disclosures 6/11/2018 certified by Tenzin Gyaltzen

14  
15 16. Attached hereto as **Exhibit 16** and incorporated herein by this reference is a true and  
16 correct copy of the City's 2018 Tax payments for the System, with the addition of purple  
17 emphasis and explanation. Department of Public Utilities Activity Total Taxes report

18 17. Attached hereto as **Exhibit 17** and incorporated herein by this reference is a true and  
19 correct copy of a Click! Telecommunications System Installation Agreement. (for Multiple  
20 Dwelling Units)

21 18. Attached hereto as **Exhibit 18** and incorporated herein by this reference is a true and  
22 correct copy of a report titled: A Sampling of Municipal Broadband Utilities in the USA  
23 Compiled by Mitchell Shook, June 22, 2019.

24  
25 19. Attached hereto as **Exhibit 19** and incorporated herein by this reference is a true and correct  
26 copy of an October 2019 Surplus Property Resolution from City of Duvall.

1 19. (a) Attached hereto as **Exhibit 19 (a)** and incorporated herein by this reference is a true and  
2 correct copy of Surplus Property Resolution #19-17 from City of Duvall. Passed October 1, 2019  
3 - With Exhibit A

4 20. Attached hereto as **Exhibit 20** and incorporated herein by this reference is a true and  
5 correct copy of AGO 2003 Attorney General Opinion on City Authority to Operate  
6 Telecommunications. Attached hereto as **Exhibit 20** and incorporated herein by this reference is  
7 a true and correct copy of City's Res. No. U-10828 showing, Whereas a Vote of People is  
8 Required and authorizing Click! to prepare a Business Plan to provide retail Voice (VoIP),  
9 commercial broadband and gigabit services. ("Retail Services") AKA "ALL-IN Plan." Exhibit  
10 32, below, contains the Certificate for this inadvertent duplicate of Resolution U-10828.

11 21. Attached hereto as **Exhibit 21** and incorporated herein by this reference is a true and  
12 correct copy of a Report from The Executive Office of the President: COMMUNITY-BASED  
13 BROADBAND -THE BENEFITS OF COMPETITION AND CHOICE FOR COMMUNITY  
14 DEVELOPMENT AND HIGH-SPEED INTERNET ACCESS. (January 2015):

15 22. Attached hereto as **Exhibit 22** and incorporated herein by this reference is a true and  
16 correct copy of pages from A Light in Digital Darkness Public Broadband after Tennessee v.  
17 FCC. 20 YALE J. L. & TECH. 311 (2018).

18 23. Attached hereto as **Exhibit 23** and incorporated herein by this reference is a true and  
19 correct copy of the United States Department of Agriculture's webpage promoting its "Rural  
20 Utilities" program to build and expand broadband networks. I downloaded this on 10/19/19, as  
21 available at: <https://www.rd.usda.gov/programs-services/all-programs/telecom-programs> ; I have  
22 also preserved and *archive copy*, <https://perma.cc/2LLV-HB4B> .

23 24. Attached hereto as **Exhibit 24** and incorporated herein by this reference is a true and  
24 correct copy of pages from Senate Bill 5511. Adopted 04/16/2019, showing new legislation  
25 passed and State of Washington's public policy and legislative intent for promoting Broadband  
26

1 showing new legislation that just passed. It demonstrates the State of Washington's public policy  
2 and legislative intent for promoting Broadband (including by Public Utilities).

3  
4 25. Attached hereto as **Exhibit 18** and incorporated herein by this reference is a true and  
5 correct copy of screen shots I have recently taken of the City of Tacoma Municipal Code and  
6 Purchasing Policy Manual, along with the guidelines for disposing of surplus property as  
7 obtained from the MSRC website. This paragraph contained a mistake in numbering, and the  
8 intended Exhibit is now Attached as **Exhibit 25** and incorporated herein by this reference is a  
9 true and correct copy of City of Tacoma Municipal Code and Purchasing Policy Manual, Section  
10 XXIV. F. SURPLUS PROPERTY AND DISPOSAL

11 25. (a) Attached hereto as **Exhibit 25 (a)** and incorporated herein by this reference is a true  
12 and correct copy of "Practice Tips" for disposing of surplus property as obtained from the MSRC  
13 website. I downloaded this on October 23, 2019 available from: [http://mrsc.org/Home/Explore-](http://mrsc.org/Home/Explore-Topics/Legal/General-Government/Sale-of-Surplus-City-or-Town-Property.aspx)  
14 [Topics/Legal/General-Government/Sale-of-Surplus-City-or-Town-Property.aspx](http://mrsc.org/Home/Explore-Topics/Legal/General-Government/Sale-of-Surplus-City-or-Town-Property.aspx) ; and preserved  
15 an archive copy at: <https://perma.cc/X7QF-SBD7> .

16 26. Attached hereto as **Exhibit 26** and incorporated herein by this reference is a true and  
17 correct copy of Click! Networks Organizational chart as obtained by my public disclosure  
18 request in 2018.

19 27. Attached hereto as **Exhibit 27** and incorporated herein by this reference is a true and  
20 correct copy of pages from the City's slide presentation related to the Transaction as presented  
21 at the TPU Board meeting on October 23, 2019. Now Attached as **Exhibit 27** and incorporated  
22 herein by this reference is a true and correct copy of pages from the City's slide presentation  
23 titled Click! Surplus Declaration as presented at the TPU Board meeting on October 23, 2019.  
24 Public Hearing October 23, 2019. Item #1. This slide presentation is included by Defendant's  
25 own Declaration of Sorum, 12/12/19, In Support Of Defendant's MSJ, Pg. 199/394,  
26

1 28. Attached hereto as **Exhibit 28** and incorporated herein by this reference is a true and  
2 correct copy of the AGO Opinion I downloaded from the AGO office. Now Attached as Exhibit  
3 28 and incorporated herein by this reference is a true and correct copy of AGO Opinion, AGO  
4 2003 No. 11. December 15, 2003, as downloaded from the AGO office.

5 **End Of Shook Declaration 10-30-19**

6 **Shook Declaration 11-1-2019**

7 **Exhibit 29 is 2156 Pages Long and Not Included In This Master Declaration.**

8 I, Mitchell Shook, declare as follows: I am a resident of Tacoma, ratepayer of Tacoma  
9 Public Utilities, taxpayer to City of Tacoma, and customer of Click!, the municipal broadband  
10 telecommunications system operated by Tacoma Public Utilities. I am an expert in matters  
11 related to Click! Network and the ISP industry, with 20 years of experience working with Click!  
12 and other open access systems, in my role as Founder and CEO of Advanced Stream, an Internet  
13 Service Provider operating on Click! Network. I have personal knowledge of the matters set  
14 forth below.

15 1. Attached hereto as **Exhibit 29** and incorporated herein by this reference is a true and  
16 correct copy of the CLICK! BUSINESS TRANSACTION AGREEMENT, Click! Transition  
17 Plan (on page 26), INDEFEASIBLE RIGHT OF USE AGREEMENT (pages 38 – 162) with  
18 Exhibits, as I downloaded them from the TPU website on 10-29-19. This Exhibit 29 also  
19 contains assets identified in the “Execution Copy of the Click! Business Transaction Agreement  
20 (“CBTA”) and IRU, which is in Defendant's Declaration of Chris Bacha, 12/31/19, as Exhibit H.  
21 On page 77/208 of Mr. Bacha’s “Exhibit H,” node maps are cited as being contained on a “USB  
22 Drive” specifically. In Shook’s Decl. 11/1/2019, Exhibit 29, assets identified in the CBTA and  
23 IRU are shown, including Exhibit A2 System Assets, Exhibit A2.1 Fiber Schedule (Pg.  
24 165/2156), Exhibit A2.2 Node Maps (pg. 258/2156), Exhibit A2.3 Equipment Shown in Node  
25 Maps (BOM) (Pg. 406/2156), Exhibit A2.4 Routers and Equipment in Hub Sites (Pg. 916/2156),  
26 Exhibit A3.1 Hub Site Drawings (Pg. 926/2156), Exhibit A4 – Conduit Space License, is Exhibit

1 A2. Exhibit A6.1 Headend Site Drawing (pg 96/2156), Exhibit B1 Critical Routes, Exhibit B2  
2 Non-Critical Routes. Exhibit A6.2 - Head End Equipment, (Pg. 1119/2156)

3 Click!’s System contains “Ancillary Systems,” in Exhibit A3.2. (Shook Decl 11/1/19, (pg.  
4 949/2156), For example, there are Six Air Conditioning systems, 4ea 3-ton Mitsubishi Mr. slims  
5 with ceiling cassette indoor units, Six Fire Suppression Systems, Six backup Generator Sets +  
6 ATS, Cummins OSM11-G4 NR3, Engine ID # 35276711, Tank is 500-gallon model 45066, Six  
7 battery strings and inverter systems.

8 2. There was no Exhibit 30 in this Declaration. Everything was included in Exhibit 29. The  
9 Declaration is 2156 pages long and contains, node maps and essential assets and equipment of an  
10 entire municipal telecommunication system. Attached hereto as **Exhibit 30** and incorporated  
11 herein by this reference is a true and correct copy of the EXHIBITS “B” thru “P” for the Click!  
12 Business Transaction Agreement, as I downloaded them from the TPU website on 10-29-19.

13 **END OF SHOOK DECLARATION 11/1/2019**

14 **Shook Declaration 12-12-19**  
15 **Exhibits 30 To 66 (a)**

16 I, Mitchell Shook, declare as follows: I am a resident of Tacoma, ratepayer of Tacoma  
17 Public Utilities, taxpayer to City of Tacoma, and customer of Click!, the municipal broadband  
18 telecommunications system operated by Tacoma Public Utilities. I am an expert in matters  
19 related to Click! Network and the ISP industry, having over 20 years of experience working with  
20 Click! and other open access systems, in my role as Founder and CEO of Advanced Stream, an  
21 Internet Service Provider that operates on Click! Network. I am over the age of eighteen,  
22 competent to testify in this matter, and make this declaration on my own personal knowledge.

23 1 It is my experience that municipalities, when disposing of property acquired for utility  
24 purposes, to avoid the mandatory “vote” requirement under RCW 35.94.040 follow a process in  
25 Washington state that involves a bidding stage, which follows a surplus declaration and public  
26 hearing. In my experience, such surplus resolutions generally involves things that are no longer  
useful, like old trucks, computers, desks, file cabinets, weed-whackers, copy machines etc.

1 For example, the City of Duvall recently disposed of “Property originally purchased for utility  
2 purposes.” The notice of public hearing cites RCW 35.94.040.

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

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

9 It is proposed that all items be disposed of to the general public by means of direct sales,  
10 sealed bid, trade-in, or auction, as determined to be in the best interests of the City by the  
11 Public Works Director and to the highest, responsible bidder.

12 I participated in that bidding process and found Duvall’s staff to be professional and  
13 courteous. Their actions represented the best practices for disposal of surplus utility property. I  
14 was successful with my winning bid for the hay rake! See my previous declaration in this case,  
15 under Shook Decl. 10/29/19 Ex. 19.

16 1.

17 2. Attached hereto as **Exhibit 30** and incorporated herein by this reference is a true and  
18 correct copy of the City’s April 14, 1997 Memorandum in the case approving establishment  
19 Click!. There were two Exhibit 30s in this record, by mistake. The other Exhibit 30 (was part of  
20 11-1-19 Shook Declaration, representing parts of the IRU agreement).

21 3. Attached hereto as **Exhibit 31** and incorporated herein by this reference is a true and  
22 correct copy of Click fiber plant slides, showing fiber, and tubes from City slide presentation.  
23 And plant totals Total Mileage, PLANT TOTALS from July 2014, as provided to me by the  
24 City. Now Attached as **Exhibit 31** and incorporated herein by this reference is a true and correct  
25 copy of Plant Totals that were provided to me as part of my public disclosure request.

26 3(a). Attached hereto as **Exhibit 31 (a)** and incorporated herein by this reference is a true and  
correct copy of Surplus Property Hearing from October 29th, 2019 Tacoma Council Meeting.

1 3.(b) Attached hereto as **Exhibit 31 (b)** and incorporated herein by this reference is a true and  
2 correct copy of Product Brochure from General Cable Titled: "Connecting the World" as  
3 downloaded from General Cable's website. ([www.generalcable.com](http://www.generalcable.com))

4 3.(c) Attached hereto as **Exhibit 31 (c)** and incorporated herein by this reference is a true and  
5 correct copy of IDC White Paper © 2017 IDC. [www.idc.com](http://www.idc.com) Titled: Digital Age 2025: The  
6 Evolution of Data to Life-Critical - Executive Summary and Conclusion

7  
8 3.(d) Attached hereto as **Exhibit 31 (d)** and incorporated herein by this reference is a true and  
9 correct copy of IDC White Paper Doc# US44413318 Titled The Digitization of the World –  
10 From Edge to Core: Executive Summary, "Mankind is on a quest to Digitize the world - From  
11 Edge to Core".

12 4. Attached hereto as **Exhibit 32** and incorporated herein by this reference is a true and correct  
13 Certified copy of a City of Tacoma of Resolution U-10828 of the Tacoma Public Utility Board  
14 confirming Charter 4.6 requirements for a vote of the people, with “Whereas” In Paragraph 4  
15 related to City Charter 4.6, which now includes a signed Certification of Authenticity stating that  
16 the attached exhibit is a true and correct copy of what it purports to be.

17 5. Attached hereto as **Exhibit 33** and incorporated herein by this reference is a true and correct  
18 copy of letters and legislative for RCW 35.94.040, with the 1972 legislative bill files for SB  
19 2835, including letters from City of Tacoma in support, as provided to me by the Washington  
20 State Archives. Now Attached as Exhibit 33 and incorporated herein by this reference is a true  
21 and correct copy of Certification Of Enrollment Substitute House Bill 2639 Chapter 198, Laws  
22 of 2008 : Amendment to Surplus Property Requirement., in Section (b) Within or without its  
23 boundaries, which has become unserviceable, inadequate, obsolete, worn out or unfit to be used  
24 in he operations of the system and which is no longer necessary, material to, and useful in such  
25 operations. : EFFECTIVE DATE: 06/12/08.

1 Now included and incorporated herein by this reference are true and correct copies of  
2 certificates of authenticity for Exhibits 33 (d) -(x), signed by Steve Excell, Custodian of Records  
3 for the Washington State Archives, and appearing in Exhibit 33 (d).

4 5. (a) Attached hereto as **Exhibit 33 (a)** and incorporated herein by this reference is a true and  
5 correct copy of the Washington State Session Laws, Chapter 390, 1955: Senate Bill 367 related  
6 to RCW 54.16.180 Public Utility Districts Sale, Lease, Conveyance of property.

7  
8 5. (b) Attached hereto as **Exhibit 33 (b)** and incorporated herein by this reference is a true and  
9 correct copy of the Washington State Session Laws, Chapter 143, 1945: House Bill 342 Page  
10 413 § 6 (M) related to Surplus of Municipal utility property Remington 9512-9514.

11 5. (c) Attached hereto as **Exhibit 33 (c)** and incorporated herein by this reference is a true  
12 and correct copy of the Washington State Session Laws, 1917, Chapter 137: House Bill 337 Page  
13 573 Titled: "Sale or Lease of Public Utilities Owned by Cities or Towns." - Approved by the  
14 Governor March 15th 1917.

15 5. (d) Attached hereto as **Exhibit 33 (d)** and incorporated herein by this reference is a true and  
16 correct copy of Report of Standing Committee, March 22nd, 1973. Washington State Senate Bill  
17 No 2835 authorizing an additional method for the disposition of certain property owned by  
18 municipal utilities. **Now included** and incorporated herein by this reference is a true and correct  
19 copy of the Certificate of Authenticity from the Custodian of Records for the Washington State  
20 Archives from Local Government Committee, (14 pages), 1973 Senate Bill No. 2835.

21  
22 5. (e) Attached hereto as **Exhibit 33 (e)** and incorporated herein by this reference is a true  
23 and correct copy of the Senate Bill No 2835 authorizing an additional method for the disposition  
24 of certain property owned by municipal utilities. See signed certificate for the Local Government  
25 Committee 1973 Senate Bill No. 2835, as a part of Exhibit 33 (d).

1 5. (f). Attached hereto as **Exhibit 33 (f)** and incorporated herein by this reference is a true and  
2 correct copy of the Washington State SENATE BILL NO. 2835 Read first time March 14, 1973,  
3 and referred to Committee. See signed Certificate as a part of Exhibit 33 (d)

4 5.(g). Attached hereto as **Exhibit 33 (g)** and incorporated herein by this reference is a true  
5 and correct copy of the Letter 3/20/1973 to: Washington ,State Legislature Re: Senate Bill 2835,  
6 from A. J. Benedetti Director of Tacoma Public Utilities on flexibility "consistent with that long  
7 enjoyed by Public Utility Districts under RCW 54.16.180," See signed Certificate as a part of  
8 Exhibit 33 (d).

9 5. (h) Attached hereto as **Exhibit 33 (h)** and incorporated herein by this reference is a true  
10 and correct copy of the Sign in sheet from March 22nd, 1973 for testifying on Washington State  
11 Senate Bill No. 2835 at the Local Government Committee. Short Title: Municipal Properties  
12 Disposal, See signed Certificate as a part of Exhibit 33 (d).

13 5. (i) Attached hereto as **Exhibit 33 (i)** and incorporated herein by this reference is a true and  
14 correct copy of the Amendment to Washington State Senate Bill 2835 By Senator Guess, See  
15 signed Certificate as a part of Exhibit 33 (d).

16 5.(j) Attached hereto as **Exhibit 33 (j)** and incorporated herein by this reference is a true and  
17 correct copy of the Minutes of the Washington State House Local Government Committee from  
18 April 7, 1973 hearing on ESB2835. *Now included* and incorporated herein by this reference is a  
19 true and correct copy of the Certificate of Authenticity from the Custodian of Records for the  
20 Washington State Archives from Local Government Committee, (20 pages), 1973 Senate Bill  
21 No. 2835.

22 5. (k). Attached hereto as **Exhibit 33 (k)** and incorporated herein by this reference is a true  
23 and correct copy of the REPORT TO Washington State SPEAKER'S OFFICE by Senators  
24 Rasmussen, Gardner, and T. Peterson Authorizing an additional method for the disposition of  
25 certain property owned by municipal utilities. Page2 "This is the same as HB 939 which was  
26

1 passed out of this committee on March 16. This bill offers cities a simpler way of disposing of  
2 property no longer needed for public utility purposes. The public interest is protected by the  
3 hearing process provided for." See signed Certificate as a part of Exhibit 33 (J).

4 5. (l). Attached hereto as **Exhibit 33 (l)** and incorporated herein by this reference is a true and  
5 correct copy of the Report by Washington State Committee on Local Government April 7th 1973  
6 Engrossed Senate Bill 2835 -with Memo re. ESB 2835 -by Steve Lundin. See signed Certificate  
7 as a part of Exhibit 33 (J).

8  
9 5. (m) Attached hereto as **Exhibit 33 (m)** and incorporated herein by this reference is a true  
10 and correct copy of the April 6th, 1973 Letter from James W. Guenther, Executive Secretary,  
11 Washington State Legislative Council, To Representative Joe D. Haussler, Chairman; regarding  
12 Senate Bill 2835. See signed Certificate as a part of Exhibit 33 (J).

13 5. (n). Attached hereto as **Exhibit 33 (n)** and incorporated herein by this reference is a true  
14 and correct copy of the Information regarding Washington State Senate Bill No. 2835 - related to  
15 Municipal utilities property, disposition. The bill will accomplish procedural flexibility in such  
16 transactions without repealing the formalized procedures required in the situations involving  
17 utility operating plant and properties. See signed Certificate as a part of Exhibit 33 (J).

18 5. (o). Attached hereto as **Exhibit 33 (o)** and incorporated herein by this reference is a true  
19 and correct copy of the Certification of Enrolled Enactment. Washington State Senate Bill No  
20 2835. See signed Certificate as a part of Exhibit 33 (J).

21  
22 5. (p). Attached hereto as **Exhibit 33 (p)** and incorporated herein by this reference is a true  
23 and correct copy of the Washington State Senate Record and House Record for engrossed Senate  
24 Bill No 2835. See signed Certificate as a part of Exhibit 33 (J).

25 5. (q). Attached hereto as **Exhibit 33 (q)** and incorporated herein by this reference is a true  
26 and correct copy of the Washington Senate Bill No 2835. First reading March 14th, 1973

1 5. (r). Attached hereto as **Exhibit 33 (r)** and incorporated herein by this reference is a true  
2 and correct copy of the April 7th, 1973 Committee Recommendation by Washington State  
3 Senators Rassmussen, Gardner and Peterson on ESB 2835. Authorizes city legislative  
4 authorities to sell, lease, or convey property originally acquired for public utility purposes which  
5 it determines is surplus to the cities needs and not Required for public utility service. See signed  
6 Certificate as a part of Exhibit 33 (J).

7 5. (s). Attached hereto as **Exhibit 33 (s)** and incorporated herein by this reference is a true  
8 and correct copy of the March 16th 1973 Report of Standing Committee on House Bill 939. *Now*  
9 *included* and incorporated herein by this reference is a true and correct copy of the Certificate of  
10 Authenticity from the Custodian of Records for the Washington State Archives from HOuse of  
11 Representative Local Government Committee, (13 pages), 1973 House Bill No. 2835.

12 5. (t). Attached hereto as **Exhibit 33 (t)** and incorporated herein by this reference is a true and  
13 correct copy of the Report to Speaker's Office by Representative Kelley Regarding RCW 95.94.  
14 See signed Certificate as a part of Exhibit 33 ( s ).

15 5. (u). Attached hereto as **Exhibit 33 (u)** and incorporated herein by this reference is a true  
16 and correct copy of the Letter 3/5/1973 to: Washington ,State Legislature Re: House Bill 939,  
17 from A. J. Benedetti Director of TPU on flexibility "consistent with that long enjoyed by Public  
18 Utility Districts under RCW 54.16.180," See signed Certificate as a part of Exhibit 33 ( s ).

19 5. (v). Attached hereto as **Exhibit 33 (v)** and incorporated herein by this reference is a true  
20 and correct copy of the Minutes from the March 16, 1973 Washington State House Local  
21 Government Committee meeting on House Bill 939 - Municipal Utilities, Property Disposition.  
22 Related to Comments by Mr. Nolan, Deputy City Attorney For Tacoma Public Utilities -with an  
23 explanation that the bill "allows the municipal utility districts the same privileges in this instance  
24 as other public and private utility districts." See signed Certificate as a part of Ex. 33 ( s ).  
25  
26

1 5. (w). Attached hereto as **Exhibit 33 (w)** and incorporated herein by this reference is a true  
2 and correct copy of the March 16th 1973 BILL DIGEST FORM by Washington State  
3 Representative Kelley. See signed Certificate as a part of Exhibit 33 ( s ).

4 5. (x). Attached hereto as **Exhibit 33 (x)** and incorporated herein by this reference is a true  
5 and correct copy of the Washington Session Laws of 1973 Chapter 95 Page 695.

6  
7 6. Attached hereto as **Exhibit 34** and incorporated herein by this reference is a true and correct  
8 copy of the Resolution establishing the Net Neutrality Policy of Tacoma City Council and the  
9 status report for the Open Internet Act, which has passed the House of Congress. Now Attached  
10 as **Exhibit 34** and incorporated herein by this reference is a true and correct Certified copy of  
11 Tacoma City Council Net Neutrality Resolution No. 39902 - "A RESOLUTION related to Click!  
12 Network; urgently requesting the Tacoma Public Utility Board to contractually require all  
13 internet service providers using Click! Network to abide by the Click! Network Open Internet  
14 Policy supporting net neutrality." Now included is a signed certification of the custodian of these  
15 records that the attached exhibit is a true and correct copy of what it purports to be.

16 6.(a) Attached hereto as **Exhibit 34 (a)** and incorporated herein by this reference is a true  
17 and correct copy of the Page from Library of Congress Website, Last Accessed December 11th  
18 2019 regarding H.R. 1644- Save the Internet Act of 2019 OPEN INTERNET ACT PASSES THE  
19 US HOUSE OF REPRESENTATIVES On April 10th 2019.

20 7. Attached hereto as **Exhibit 35** and incorporated herein by this reference is a true and  
21 correct copy of Pages from USDA Broadband Opportunity Council 2015 Report. Now Attached  
22 as **Exhibit 35** and incorporated herein by this reference is a true and correct copy of Pages from  
23 USDA Broadband Opportunity Council 2015 Report and Recommendations, August 20th 2015:  
24 Pursuant to the Presidential Memorandum on Expanding Broadband Deployment and Adoption  
25 by Addressing Regulatory Barriers and Encouraging Investment and Training  
26

1 8. Attached hereto as **Exhibit 36** and incorporated herein by this reference is a true and  
2 correct copy of pages from WA Session Laws of 1911, establishing the Public Service  
3 Commission. Now Attached as **Exhibit 36** and incorporated herein by this reference is a true and  
4 correct copy of Pages from WA Session Laws of 1911, establishing the Public Service  
5 Commission Chapter 117 Public Service Commission Law

6 9. Attached hereto as **Exhibit 37** and incorporated herein by this reference is a true and  
7 correct copy of Pierce County Broadband Connectivity and Access Evaluation. Now Attached as  
8 **Exhibit 37** and incorporated herein by this reference is a true and correct copy of Pierce County  
9 Broadband Connectivity and Access Evaluation Executive Summary 1.2: Background;  
10 Broadband is Essential.

11 10. Attached hereto as **Exhibit 38** and incorporated herein by this reference is a true and  
12 correct copy screen shot of Mason County PUD3, Chelan PUD, Grant County PUD, NoaNet,  
13 WAPUDA, pages from Chattanooga Power Board Annual Report. Now Attached as **Exhibit 38**  
14 and incorporated herein by this reference is a true and correct copy of a Webpage from Kitsap  
15 Public Utility District kpud.org ("KPUD")

16 10. (a) Attached hereto as **Exhibit 38 (a)** and incorporated herein by this reference is a true  
17 and correct copy of a Webpage from Chelan County's website, ChelanPUD.org. Last Accessed  
18 December 11th 2019 "Pick A Service Provider" Webpage

19 10. (b) Attached hereto as **Exhibit 38 (b)** and incorporated herein by this reference is a true  
20 and correct copy of a Webpage from Mason County Public Utility District #3's website,  
21 pub3.org. Last Accessed December 11th 2019.

22 10. (c) Attached hereto as **Exhibit 38 (c)** and incorporated herein by this reference is a true  
23 and correct copy of a Webpage from Grant County Public Utility District's website,  
24 grantpud.org. Last Accessed December 11th 2019.  
25  
26

1 10. (d) Attached hereto as **Exhibit 38 (d)** and incorporated herein by this reference is a true  
2 and correct copy of a Washington Public Utility District Association ("WAPUDA") Image  
3 downloaded from WAPUD website wpuda.org. Last Accessed 12/11/19

4 10. (e) Attached hereto as **Exhibit 38 (e)** and incorporated herein by this reference is a true  
5 and correct copy of a Pages from Annual Report Chattanooga, Tennessee's Electric Power Board  
6 ("EPB")'s website, epb.com. Last Accessed 12/11/19.

7  
8 11. Attached hereto as **Exhibit 39** and incorporated herein by this reference is a true and  
9 correct copy of Resolution 40467 and 40468 CITY COUNCIL DECLARATION OF Surplus as  
10 downloaded from the City's website, which I witnessed City Council pass. Now Attached as  
11 **Exhibit 39** and incorporated herein by this reference is a true and correct copy of Tacoma City  
12 County Resolution 40467 A RESOLUTION relating to surplus utility property;

13 11. (a) Attached hereto as **Exhibit 39 (a)** and incorporated herein by this reference is a true  
14 and correct copy of 40468 TACOMA CITY COUNCIL DECLARAION OF Surplus as  
15 downloaded from the City's website, which Shook witnessed City Council pass

16 12. Attached hereto as **Exhibit 40** and incorporated herein by this reference is a true and  
17 correct copy of Prof. Brown's on Definition of Public Utilities, from his book Business  
18 Essentials.

19  
20 13. Attached hereto as **Exhibit 41** and incorporated herein by this reference is a true and  
21 correct copy of Broadband defined as Utility and Telecommunications by WUTC Website Now  
22 Attached as Exhibit 41 and incorporated herein by this reference is a true and correct copy of  
23 Broadband defined as Utility and Telecommunications as downloaded from data.wa.gov.  
24 Washington Utility and Transportation Commission. Last Accessed 12/11/19.

25 13. (a) Attached hereto as **Exhibit 41 (a)** and incorporated herein by this reference is a true  
26 and correct copy of 2018 Legislative Report of the Community Economic Revitalization Board

1 ("CERB") Washington State Community Economic Revitalization Board Rural Broadband  
2 Program, Washington State Department of Commerce. Downloaded from CERB's website  
3   
board/rural-broadband/ : also archived at, <https://perma.cc/WGX4-JYDV>

5 14. Attached hereto as **Exhibit 42** and incorporated herein by this reference is a true and  
6 correct copy of screenshots I took from the Click! website, displaying broadband Internet  
7 services offerings. Also, a photo I took of the lobby at TPU headquarters in Tacoma about Sept.  
8 2019. Now Attached as **Exhibit 42** and incorporated herein by this reference is a true and correct  
9 copy of Screen shots I took from the Click! website  
10 (<https://www.clickcabletv.com/products/internet/>), displaying broadband Internet services  
11 offerings Last Accessed 12/11/19; also archived at, <https://perma.cc/5WBN-T4S>

12 14. (a) Attached hereto as **Exhibit 42 (a)** and incorporated herein by this reference is a true  
13 and correct copy of Photo of the lobby taken by Mitchell Shook at TPU headquarters in Tacoma  
14 September 2019.

15 14. (b) Attached hereto as **Exhibit 42 (b)** and incorporated herein by this reference is a true  
16 and correct copy of Screenshot of Click! Network's Plans and Pricing webpage, as accessed on  
17 June 6, 2019 and captured from <https://www.clickcabletv.com/plans/>, archived and also available  
18 at <https://perma.cc/8PHC-ZVSE>

19 15. Attached hereto as **Exhibit 43** and incorporated herein by this reference is a true and  
20 correct copy of City's Resolution U-10879, describing Smart City benefits # 16, #17 Uncertain  
21 Future benefit, Economic Development Benefits #20 of Click!; also pages from the Nation  
22 Broadband Report. Also, the Key Elements of the Sept 9, 2016 "All In" Business Plan. Now  
23 Attached as **Exhibit 43** and incorporated herein by this reference is a true and correct copy of  
24 City of Tacoma's Resolution U-10879, A RESOLUTION Relating to Click! Network; approval  
25 of an All-In business and Tacoma Power funding plan to provide retail telecommunication  
26

1 services. Including # 5 Whereas, customers "shared in part of the Capital Costs of constructing  
2 the telecommunications system "Describing Smart City benefits # 16, #17 Uncertain Future  
3 benefit, Economic Development Benefits #20 of Click!. Now included is a signed **Certificate** of  
4 the custodian of these records that the attached exhibit is a true and correct copy of what it  
5 purports to be.

6 15. (a) Attached hereto as **Exhibit 43 (a)** and incorporated herein by this reference is a true  
7 and correct copy of Key Elements of the Sept 9, 2016 "All In" Business Plan City of Tacoma's  
8 Resolution U-10879. See signed **Certificate** as a part of exhibit 43.

9  
10 16. Attached hereto as **Exhibit 44** and incorporated herein by this reference is a true and  
11 correct copy of FCC's Consumer Guide To VoIP Telephone Services. FCC's Lifeline Program  
12 Information. Broadband And Phone Equivalent. Now Attached as **Exhibit 44** and incorporated  
13 herein by this reference is a true and correct copy of Federal Communications Commission :  
14 Consumer and Governmental Affairs Bureau - FCC's Lifeline Program Information. Broadband  
15 And Phone Equivalent, Consumer Guide, Lifeline Support for Affordable Communications,  
16 Voice over Internet Protocol (VoIP), and Enhanced Lifeline Benefits for Tribal lands

17 16. (a) Attached hereto as **Exhibit 44 (a)** and incorporated herein by this reference is a true  
18 and correct copy of Pages from Federal Communications Commission, FCC 19-111, Released:  
19 November 14, 2019, Fifth Report And Order, Memorandum Opinion And Order And Order On  
20 Reconsideration, And Further Notice Of Proposed Rulemaking

21 17. Attached hereto as **Exhibit 45** and incorporated herein by this reference is a true and  
22 correct copy of Diane Lachelle, Government and Community Relations Manager Click!  
23 Network's Letter related to the organized effort to discredit Click! Now Attached as **Exhibit 45**  
24 and incorporated herein by this reference is a true and correct copy of Letter from Diane  
25 Lachelle, Government and Community Relations Manager, August 12, 2004, to Annie Collins  
26 Re: August 12, 2004. Click! Network's Letter related to the organized effort to discredit Click!

1 18. Attached hereto as **Exhibit 46** and incorporated herein by this reference is a true and  
2 correct copy of Casting a Wider Net -How and Why State Laws Restricting Municipal  
3 Broadband Networks Must Be Modified -Jeff Stricker, Washington Law Review. Now Attached  
4 as **Exhibit 46** and incorporated herein by this reference is a true and correct copy of Casting a  
5 Wider Net -How and Why State Laws Restricting Municipal Broadband Networks Must Be  
6 Modified -Jeff Stricker, Washington Law Review Vol. 81:589

7 19. Attached hereto as **Exhibit 47** and incorporated herein by this reference is a true and correct  
8 copy of a News Tribune Editorial describing Rainier Connect's opposition to creation of Click!.  
9 Also, evidence of campaign contributions by Rainier to support Tacoma's current Mayor in her  
10 last campaign. And, evidence of the corporate structure of Rainier, showing control of Tacoma's  
11 Best Internet, as downloaded from the Washington UTC website. Now Attached as **Exhibit 47**  
12 and incorporated herein by this reference is a true and correct copy of Newspaper Page from  
13 Tacoma News Tribune, Tacoma, WA 4/21/08 Page: B05 EDITORIAL: "From critic of Click! to  
14 business partner" Editorial describing Rainier Connect's opposition to creation of Click!

15 19. (a) Attached hereto as **Exhibit 47 (a)** and incorporated herein by this reference is a true and  
16 correct copy of an Organizational chart of Mashell, Inc of Rainier Connect as downloaded from  
17 the Washington State Utility and Telecommunications Website. Evidence of the corporate  
18 structure of Rainier, showing control of Tacoma's Best Internet. : 2018 Mashell Telecom State  
19 USF Petition -Partly Redacted UT-170857

20 19. (b) Attached hereto as **Exhibit 47 (b)** and incorporated herein by this reference is a true  
21 and correct copy of Evidence of campaign contributions by Rainier to support Tacoma's current  
22 Mayor in her last campaign

23 20. Attached hereto as **Exhibit 48** and incorporated herein by this reference is a true and  
24 correct copy of Tacoma Series 2017 Electric System Revenue Bond Offering -Annual Budget  
25 and Description Of Click. 2017 -18 and 2019-2020 and City budget report showing funding for  
26

1 click ! Now Attached as **Exhibit 48** and incorporated herein by this reference is a true and  
2 correct copy of Tacoma Series 2017 Electric System Revenue Bond Offering -Annual Budget  
3 and Description Of Click!. 2017 -18 as downloaded from City of Tacoma's website

4 20. (a) Attached hereto as **Exhibit 48 (a)** and incorporated herein by this reference is a true  
5 and correct copy of Pages from 2016 SUPERINTENDENT'S REPORT TACOMA POWER  
6 From TPU's annual 2016 report as downloaded from the City of Tacoma's Website.

7  
8 20. (b) Attached hereto as **Exhibit 48 (b)** and incorporated herein by this reference is a true  
9 and correct copy of Pages from 2019-2020 and City of Tacoma Operating & Capital Budget  
10 report showing funding for Click! as downloaded from the City of Tacoma's Website -2017-2018  
11 Adopted Budget. As I downloaded from City website, at:

12 [https://cms.cityoftacoma.org/finance/budget/2017-2018/Adopted\\_2017-2018\\_Budget.pdf](https://cms.cityoftacoma.org/finance/budget/2017-2018/Adopted_2017-2018_Budget.pdf)  
13 Archived by permalink available at: <https://perma.cc/C6CC-FEW6>

14 21. Attached hereto as **Exhibit 49** and incorporated herein by this reference is a true and  
15 correct copy of a Brief History of American Telecommunications Regulation, by Tim Wu.

16 Now Attached as **Exhibit 49** and incorporated herein by this reference is a true and correct copy  
17 of a Brief History of American Telecommunications Regulation, by Tim Wu. As I downloaded  
18 this in 2019, Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=965860](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=965860), archived  
19 at: <https://perma.cc/XR5E-A5DZ>

20  
21 22. Attached hereto as **Exhibit 50** and incorporated herein by this reference is a true and  
22 correct copy of Purpose and Conclusion of the 1996 City Broadband Study. Now Attached as  
23 **Exhibit 50** and incorporated herein by this reference is a true and correct copy of Pages from the  
24 Telecommunications Study undertaken by Tacoma Public Utility and attached as Exhibit to  
25 Resolution No 33668, approved April 8th 1997; also, this Telecommunications Study is an  
26 Exhibit to Resolution U-9258, as **Certified** in Exhibit 10 (a) of Shook Decl. 10/30/19.. Purpose  
and Conclusion of the 1996 City Broadband Study. Economic Development in the Greater

1 Tacoma/Pierce County Area, 1997 Report. Produced for Tacoma Public Utilities  
2 Telecommunications Study. APEX Business Solutions Project Team

3 23. Attached hereto as **Exhibit 51** and incorporated herein by this reference is a true and  
4 correct copy of pages from Travis, Hannibal. "WI-FI Everywhere: Universal Broadband Access  
5 as Antitrust and Telecommunications Policy." American University Law Review 55, no.6  
6 (August 2006): 1697-1880. WI-FI Everywhere: Universal Broadband Access as Anti-Trust.  
7 Hannibal Travis.

8 24. Attached hereto as **Exhibit 52** and incorporated herein by this reference is a true and  
9 correct copy of Harvard Study on Broadband Prices, 2018-01-10. Pricing Study. Talbot, David,  
10 Hessekiel, Kira, Kehl, Danielle. Community-Owned Fiber Networks: Value Leaders in America  
11 (January 2018). Available at: cyber.harvard.edu/publications/2018/01/community\_fiber". With an  
12 archive PDF available at, <https://perma.cc/4WX6-S7GX>, also at,  
13 <https://dash.harvard.edu/handle/1/34623859>

14 25. Attached hereto as **Exhibit 53** and incorporated herein by this reference is a true and  
15 correct copy of pages from National Telecommunications & Information Administration report.  
16 accessed on 10/30/19, available at: [https://broadbandusa.ntia.doc.gov/sites/default/files/resource-](https://broadbandusa.ntia.doc.gov/sites/default/files/resource-files/bbusa_why_does_broadband_matter.pdf)  
17 [files/bbusa\\_why\\_does\\_broadband\\_matter.pdf](https://broadbandusa.ntia.doc.gov/sites/default/files/resource-files/bbusa_why_does_broadband_matter.pdf); also archived at: <https://perma.cc/82KS-ZN6S>

18 26. Attached hereto as **Exhibit 54** and incorporated herein by this reference is a true and  
19 correct copy of Pierce County Resolution R2019-74 Declaring Broadband to Be Essential. A link  
20 to the Broadband Report is available at, <https://www.piercecountywa.gov/broadband>, I have  
21 requested Certification of this from Bill Vetter at Pierce County on 1/18/2020,  
22

23 27. Attached hereto as **Exhibit 55** and incorporated herein by this reference is a true and  
24 correct copy of a City of Tacoma's Resolution 39577 containing: WHEREAS the concerns  
25 raised about the current cost allocation methodology are significant and must be resolved and  
26 transcript of council meeting where City Attorney Bill Fosbre answers Council Member

1 Blockers' question about the Coates lawsuit. Now Attached as **Exhibit 55** and incorporated  
2 herein by this reference is a true and correct, certified, copy of Tacoma's Res. 39577 containing:  
3 WHEREAS the concerns raised about the current cost allocation methodology are significant and  
4 must be resolved.

5 27. (a) Attached hereto as **Exhibit 55 (a)** and incorporated herein by this reference is a true  
6 and correct copy of a Tacoma City Council Meeting Remote Broadcast Captioning, 3/26/19, a  
7 transcript of council meeting where City Attorney Bill Fosbre answers Council Member  
8 Blockers' question about the Coates lawsuit. I provide this as additional proof that there was  
9 never an audit of Click!, as requested by City Council's Resolution 39577.

10  
11 28. Attached hereto as **Exhibit 56** and incorporated herein by this reference is a true and  
12 correct copy of Utility Tax Pages from City of Tacoma's Website, also the City's Purchasing  
13 Policy. Now Attached as **Exhibit 56** and incorporated herein by this reference is a true and  
14 correct copy of Utility Tax Pages from City of Tacoma's Website Taxes Click Pays -----  
15 UTILITY TAXES -City Description of Tax Code. UTILITY TAX ON  
16 TELECOMMUNICATIONS as captured from City Website on 11/30/19, available at:  
17 [https://www.cityoftacoma.org/government/city\\_departments/finance/tax\\_and\\_license/city\\_taxes/](https://www.cityoftacoma.org/government/city_departments/finance/tax_and_license/city_taxes/utility_tax)  
18 [utility\\_tax](https://www.cityoftacoma.org/government/city_departments/finance/tax_and_license/city_taxes/utility_tax)

19 28. (a) Attached hereto as **Exhibit 56 (a)** and incorporated herein by this reference is a true  
20 and correct copy of a screenshot of Tax Classifications from the City of Tacoma's Website,  
21 avilible at: <https://www.cityoftacoma.org/cms/One.aspx?portalId=169&pageId=144569> Last  
22 Accessed: October 30th, 2019, archived copy, also available as <https://perma.cc/VG4E-W6TR>

23 28. (b) Attached hereto as **Exhibit 56 (b)** and incorporated herein by this reference is a true  
24 and correct certified copy of Resolution No 39236 authorizing the City to submit a levy for an  
25 additional 1.5% Earnings Tax on Utility Companies to voters.

1 28. (c) Attached hereto as **Exhibit 56 (c)** and incorporated herein by this reference is a true  
2 and correct copy of Pages 10, 15, 19, and 55 from the Tacoma Power 2018 Annual Financial  
3 Report Available at: <https://www.mytpu.org/wp-content/uploads/PowerAnn18-Final.pdf>

4 29. Attached hereto as **Exhibit 57** and incorporated herein by this reference is a true and  
5 correct copy of a page describing Click!. FTTH services. I can testify that Click! provides  
6 “Voice Packages” to the ISP partners. These packages offer prioritization of data packets that  
7 enable telephone services to operate over Click! (ISP Agreement is Confidential and Available  
8 On Court Order). Now Attached as **Exhibit 57** and incorporated herein by this reference is a  
9 true and correct copy of AMENDMENT NO. 7 TO ISP ADVANTAGE AGREEMENT -  
10 Showing Click! Network Role and Responsibilities and ISP Role and Responsibilities. The  
11 original reference was an error. This is Plaintiff’s own business agreement with Defendant.

12 30. Attached hereto as **Exhibit 58** and incorporated herein by this reference is a true and  
13 correct copy of information related to Anacortes, WA broadband program, along with the U.S.  
14 Census Bureau report for 1907 on Telephones Farmer Lines, Coops And Mutual Phone  
15 Companies.

16  
17 30. (a) Attached hereto as **Exhibit 58 (a)** and incorporated herein by this reference is a true  
18 and correct copy of Resolution No 2013 of the City Council of the City of Anacortes concerning  
19 the development of a Fiber-Optic-Based Internet Network Signed by Laurie M Gere, Mayor

20 30. (b) Attached hereto as **Exhibit 58 (b)** and incorporated herein by this reference is a true  
21 and correct copy of Slides from 2019 City of Anacortes Council Meeting, As downloaded on  
22 12/8/19 from:

23 [https://anacortes.granicus.com/MetaViewer.php?view\\_id=&clip\\_id=474&meta\\_id=24966](https://anacortes.granicus.com/MetaViewer.php?view_id=&clip_id=474&meta_id=24966) ; also  
24 acchive copy available at. <https://perma.cc/S824-3WYN> .

25 30. (c) Attached hereto as **Exhibit 58 (c)** and incorporated herein by this reference is a true  
26 and correct copy of "Access - Anacortes Fiber Internet - Frequently Asked Questions accessed

1 on 12-7-19, available at, <https://www.anacorteswa.gov/1106/FAQs> , archived at:  
2 <https://perma.cc/HSY3-EUSC>

3 31. Attached hereto as **Exhibit 59** and incorporated herein by this reference is a true and  
4 correct copy of, Affidavit and Resume of Terry Dillon Confirming Telecommunication System.

5 32. Attached hereto as **Exhibit 60** and incorporated herein by this reference is a true and  
6 correct copy of About NBN Australia, from NBN website. Now Attached as **Exhibit 60** and  
7 incorporated herein by this reference is a true and correct copy of NBN Australia - NBN Co  
8 Corporate Plan 2020-23 as download on 11/30/19, from:

9 [https://www.nbnco.com.au/content/dam/nbnco2/2019/documents/media-centre/corporate-plan-](https://www.nbnco.com.au/content/dam/nbnco2/2019/documents/media-centre/corporate-plan-report-2020-2023.pdf)  
10 [report-2020-2023.pdf](https://www.nbnco.com.au/content/dam/nbnco2/2019/documents/media-centre/corporate-plan-report-2020-2023.pdf) ; archive available at : <https://perma.cc/XJW7-CLTB>

11 33. Attached hereto as **Exhibit 61** and incorporated herein by this reference is a true and  
12 correct copy of pages Striking Telegraph and Telephone and replacing those terms with  
13 Telecommunications, from Laws of 1985. Ch. 450, Sec. 13, Pgs. 1978 -1995..

14 34. Attached hereto as **Exhibit 62** and incorporated herein by this reference is a true and  
15 correct copy of MSA Agreement with CenturyLink and Integra as provided to me by TPU. Now  
16 Attached as **Exhibit 62** and incorporated herein by this reference is a true and correct copy of  
17 Master Communications Service Agreement November 17th, 2008 between City of Tacoma  
18 D.B.A. Click! Network and CenturyTel

19 34. (a) Attached hereto as **Exhibit 62 (a)** and incorporated herein by this reference is a true and  
20 correct copy of Master Communications Services Agreement November 6th, 2002 between City  
21 of Tacoma D.B.A. Click! Network and Integra Telecom

22 35. Attached hereto as **Exhibit 63** Nov. 20, 2019 City Council Action Memorandum, for  
23 Cable TV Franchise Agreement with Rainier Connect. Now Attached as **Exhibit 63** and  
24 incorporated herein by this reference is a true and correct copy of -City Council Action

1 Memorandum, re: Rainier Franchise Ordinance & November 20, 2019 Letter from Jeff Lueders,  
2 Cable Communications & Franchise Services Manager

3 36. Attached hereto as **Exhibit 64** and incorporated herein by this reference is a true and  
4 correct copy of pages from Click! contract with the City of Tacoma Public Library system, with  
5 recent Service Order information. As provided to me in a public record request by Defendant in  
6 2019. Now Attached as **Exhibit 64** and incorporated herein by this reference is a true and correct  
7 copy of Click! Tacoma Public Library Agreement Contract 16-01 Broadband Services  
8 Agreement Click!/Tacoma Public Library Service Orders No. 1, No.2, No. 3, No. 4, No. 5, No.  
9 6, No. 7, No. 8, and No. 9, as provided by my public records request.

10  
11 36. (a) Attached hereto as **Exhibit 64 (a)** and incorporated herein by this reference is a true  
12 and correct copy of Click! Tacoma Public Library Agreement Contract 07-01 Broadband  
13 Services Agreement Click!/Tacoma Public Library

14 37. Attached hereto as **Exhibit 65** and incorporated herein by this reference is a true and  
15 correct copy of pages I downloaded from the American Registry for Internet Numbers (ARIN)  
16 website. I can personally testify to the shortage. I recently sought a small allotment of IP address  
17 from ARIN and the waiting list process, described in this Exhibit 65, took over a year for me to  
18 complete. I diligently pursued my application for a /22 assignment, which is the equivalent of  
19 just 1024 IPv4 addresses. My Initial Request, was submitted on 3/30/2018, and my IP addresses  
20 were finally issued on 9/4/2019. Now Attached as **Exhibit 65** and incorporated herein by this  
21 reference is a true and correct copy of "Web article regarding ARIN IPv4 Free Pool reaches Zero  
22 NTIA Seeks Input FINAL, accessed on December 2nd 2019, available at,  
23 <https://www.arin.net/vault/announcements/2015/20150924.html> ; also archive available at:  
24 <https://perma.cc/6BDT-774H> "

25 37. (a) Attached hereto as **Exhibit 65 (a)** and incorporated herein by this reference is a true and  
26 correct copy of Web article regarding RIPE NCC has run out of IPv4 Addresses. as accessed on

1 December 2nd 2019. available at: [https://www.ripe.net/publications/news/about-ripe-ncc-and-](https://www.ripe.net/publications/news/about-ripe-ncc-and-ripe/the-ripe-ncc-has-run-out-of-ipv4-addresses)  
2 [ripe/the-ripe-ncc-has-run-out-of-ipv4-addresses](https://www.ripe.net/publications/news/about-ripe-ncc-and-ripe/the-ripe-ncc-has-run-out-of-ipv4-addresses) .

3 37. (b) Attached hereto as **Exhibit 65 (b)** and incorporated herein by this reference is a true  
4 and correct copy of Wikipedia Article describing depletion of IPv4 Addresses accessed on:  
5 December 2nd 2019. Available at: [https://en.wikipedia.org/wiki/IPv4\\_address\\_exhaustion](https://en.wikipedia.org/wiki/IPv4_address_exhaustion) also  
6 archive available at: <https://perma.cc/5CMN-C7GQ> .

7  
8 38. Attached hereto as **Exhibit 66** and incorporated herein by this reference is a true and  
9 correct copy of pages from Click! Telecommunication Franchise with Pierce County and  
10 Puyallup. Now Attached as **Exhibit 66** and incorporated herein by this reference is a true and  
11 correct copy of Puyallup Telecommunications Franchise Agreement with Click!

12 38. (a) Attached hereto as **Exhibit 66 (a)** and incorporated herein by this reference is a true  
13 and correct copy of Pierce County Telecommunications Franchise Agreement with Click!

14 **End Of Shook Declaration 12/12/19 Part 1**

15 **Shook Declaration 12/12/19 PART 2**  
16 **Exhibits 67 to 67 (j)**

17 39. Attached hereto, as **Exhibit 67** and incorporated herein by this reference are true and  
18 correct copies of historical Public Service Magazine pages, related to the power struggles at the  
19 time RCW 35.94 was written. These are examples of the Private Power Trusts' Propaganda  
20 efforts to oppose public power and the BONE BILL. I have downloaded these from the Internet.  
21 Also included is historical information on efforts by public power to promote benefits of public  
22 power, including a letter by Honorable Homer T. Bone, obtained from the Library of University  
23 of Puget Sound. Now Attached as **Exhibit 67** and incorporated herein by this reference is a true  
24 and correct copy of Minutes of the Freeholders' Charter Commission November 10th, 1926.

1 39. (a) Attached hereto, as **Exhibit 67 (a)** and incorporated herein by this reference are true  
2 and correct copies of the 1942 photo of Hon. Homer T. Bone, from the Homer T. Bone papers at  
3 the University of Puget Sound Collins Memorial Library, Archives & Special Collections.

4 39. (b) Attached hereto, as **Exhibit 67 (b)** and incorporated herein by this reference are true  
5 and correct copies of Mr. Bone's Speech from 1932 from the Homer T. Bone papers at the  
6 University of Puget Sound Collins Memorial Library, Archives & Special Collections.

7  
8 39. (c) Attached hereto, as **Exhibit 67 (c)** and incorporated herein by this reference are true  
9 and correct copies of, Bone, Honorable Homer Truett (1883 - 1970) HistoryLink.org Essay 5628  
10 Available at: <https://historylink.org/File/5628>, also as archive: <https://perma.cc/H3UT-Q56R>

11 39. (d) Attached hereto, as **Exhibit 67 (d)** and incorporated herein by this reference are true  
12 and correct copies of Public Ownership Magazine September - October 1924 Vol VI.

13 39. (e) Attached hereto, as **Exhibit 67 (e)** and incorporated herein by this reference are true  
14 and correct copies of Pages from a Letter from the Acting Chairman of the Federal Trade  
15 Commission in Response to Senate Resolution No. 83, Seventieth Congress, A Monthly Report  
16 on the Electric Power and Gas Utilities Inquiry. Filed with the Secretary of the Senate, October  
17 15, 1935

18 39. (f) Attached hereto, as **Exhibit 67 (f)** and incorporated herein by this reference are true  
19 and correct copies of Public Service Magazine, January 1919, Notable cartoon appearing on page  
20 30 of magazine.

21  
22 39. (g) Attached hereto, as **Exhibit 67 (g)** and incorporated herein by this reference are true  
23 and correct copies of Public Service Magazine, July 1919

24 39. (h) Attached hereto, as **Exhibit 67 (h)** and incorporated herein by this reference are true  
25 and correct copies of Public Service Magazine, June 1919

26 39. (i) Attached hereto, as **Exhibit 67 (i)** and incorporated herein by this reference are true  
and correct copies of Public Service Magazine, March 1920

1 39. (j) Attached hereto, as Exhibit 67 (j) and incorporated herein by this reference are true  
2 and correct copies of Taunton Municipal Lighting Plant Home page, accessed December 1st  
3 2019. Available at: <http://www.tmlp.com/page.php?content=history#&panel1-1> ; also as  
4 archived at : <https://perma.cc/8VB7-ECVU>

5 **End Of Shook Declaration 12/12/19 Part 2**

6 **Shook Declaration 12-30-19**  
7 **Exhibits 68 to 90**

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

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

1 2. Click! has always been organized as separate entity, or Department, with its own General  
2 Manager and employee organization structure and Organization Chart. The City Finance  
3 Department prepares, and tracks Click!’s income and expenses separately, producing a monthly  
4 and annual “Operational Summary.” It never breaks out the financial numbers, tracking the  
5 performance of any other Tacoma Power divisions. I believe this is more evidence of the fact  
6 Click! provides a unique utility service and is a separate system. I have witnessed many  
7 examples of Click!’s telecommunications products being recognized, offered and operated as a  
8 separate utility within TPU. Click! has its own customer marketing and billing programs,  
9 separate from Tacoma Power and Tacoma Water. Click!’s customer service, customer care and  
10 payments center is provided separately from the TPU utility services, at a different counter,  
11 inside the lobby of TPU. Click! is even more separate than Tacoma Water and Tacoma Power,  
12 who share a common payment counter.

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

17 3. Through my many public records requests, related to Click!’s financial statements, I  
18 have uncovered documentation that shows, in the most recent biennium, Click! was burdened  
19 with an allocation of \$2.7 million in “assessments,” that appear as expenses on Click!’s operation  
20 summaries, but are not directly related to the provision of Click!’s telecommunications services.

21 4. In 2015, the cost allocation formulas, that distributes the direct operational, maintenance  
22 and capital costs for the network, between Tacoma Power and Click!, were revised. This resulted  
23 in shifting costs from Tacoma Power onto Click!. Previously there was an approximate 75% to  
24 25% split of costs, with Click! paying the 75% portions, but that changed in 2015, to a higher  
25 94% burden on Click!. The current ratio for sharing these costs remains at 94% for Click! and  
26 6% to Tacoma Power. The 2015 change in allocation formulas resulted in an additional \$5.7

1 million in annual expenses being shifted onto Click! beginning in 2015. That \$5.7 million  
2 number was reported in the TPU annual report for 2015.

3  
4 **5.** The need for Broadband is generally increasing, in Tacoma and worldwide. Click! users  
5 are transmitting more data, year over year. Click!’s revenue from broadband services is  
6 increasing. For example, in October 2017, Click! generated \$695,919 in Data Transport and  
7 Broadband revenues, increasing to \$768,573 in 2018. I have provided the Operations Summaries  
8 for Oct 17, and Oct. 18, below as Exhibit 76. Since 2015. Click! has returned to profitability,  
9 even with the unrelated interdepartmental “assessments” under governmental accounting  
10 methods, and even with the onerous 94% allocations from the 2015 allocation formulas  
11 adjustments. Additionally, it is my understanding that these formulas unfairly allocated general  
12 government’s costs onto Click!, since I-NET pays no share of the costs for maintaining TPU’s  
13 network, while I-NET uses 36 strands of backbone fiber, and Click!, only uses 12 strands. Yet,  
14 Click! suffers the burden of a 94% allocation.

15 **6.** It is also my understanding that these formulas and policies were put in place by Director  
16 Gaines in 2015 and had the result of disparaging Click!’s performance. I was at the meetings,  
17 where these were policies were implemented and also, later, when the financial results they  
18 produced were presented to City policy makers. The Director was later fired, after caught  
19 including unauthorized “inferred debt” expenses that concocted Click!’s “losses.” The Director  
20 used these losses to support his plan to negotiate a transfer of Click! to a private company, Wave  
21 Broadband, without City Council’s prior approval for such negotiations. Mr. Gaines presented  
22 those (“his”) “losses” to the media and to City Council, as if they were in fact real, and used  
23 them to support of his personal efforts to dispose of to Click!. The financial numbers were not  
24 accurate or real numbers. They were not produced by the City Finance Department. I was a  
25 firsthand witness to these presentations and the consequences.

26 **7.** After Director Gaines was fired, more information about his actions came out. In a 2019  
podcast interview, TPU Board Member Bryan Flint, described Director Gaines accounting

1 methods, and the Director's attempts to disparage Click!, by saying the Director had added in  
2 "everything and the kitchen sink" to make the numbers look bad. As a board member of TPU, I  
3 consider Mr. Flint's statements to be the admission of a party-opponent. I posted a video of  
4 Board Member Flint's comments on YouTube, *available* here: <https://youtu.be/8atnBaxl1Rk> .

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

10 **9.** It is my understanding and firm belief, based on a wide range of firsthand experiences  
11 and evidence I have obtained over many years, evidence much too extensive to list here, that a  
12 conspiracy indeed exists to destroy Click! Network and thereby eliminate municipal competition  
13 from the broadband market in Pierce County. That evidence is beyond the scope of this case, but  
14 worth noting, since it explains the reason why this case is here in the first place. If called on to  
15 explain this, I could easily testify for several days about the nature of the conspiracy, and provide  
16 my extensive firsthand evidence, which is in my possession, related to the scheme and the  
17 financial shenanigans to discredit Click!. This scheme, I should mention, extends to the  
18 backroom RFI process that has led to the privatization plan now before this Court. That process  
19 was particularly tainted by the inclusion of a sham bidder, Yomura Fiber, which my research and  
20 evidence reveals was not a real company with any capability or experience relevant to the RFI  
21 process; yet, City staff falsely represented to policymakers that Yomura as a bonified entity and  
22 viable finalist in the process.

23 **10.** I also know that influential, powerful, local political and private interests have conspired  
24 to destroy Click! for the benefit of their friends, who are in private competition with Click!'s  
25 municipal system, or similar systems now formed, and being formed, across our county. One  
26 example is Michael Crowley, a former mayor of Tacoma, who has opposed Click! for many

1 years. He has told me of his opposition. He is one of the Plaintiffs in the *Coates v City of Tacoma*  
2 case that attempted to shut Click! down. Mr. Crowley is friends with Leo Hindery, a powerful  
3 and influential cable industry pioneer. Mr. Hindery told me, in a personal phone call in 2015, of  
4 his opposition to Click! and public broadband generally. Mr. Hindery is well known to have  
5 opposed Click!, since before its creation. I spoke with Mayor Ebersol about the incident of Mr.  
6 Hindery coming to the Mayor's office and begging the Mayor to stop the creation of Click!  
7 Network. Mayor Ebersol confirmed the visit to his office, and Mr. Hindery's intense opposition  
8 to Click! at the time of its creation. Mr. Hindery was the president of TCI at the time, the  
9 incumbent cable company in Tacoma, which later became Comcast in Tacoma. Municipal  
10 competition represented a real threat to their business prospects. Mr. Steve Klein, who was  
11 Tacoma Power Superintendent during the planning, creation and construction of Click!, and is  
12 often referred to as the "Father of Click! Network" has confirmed my views and understanding  
13 these events on page 8 in his Sept. 26, 2017 deposition taken by David Jurca in connection with  
14 the Coates case. I have provided the pertinent pages of that deposition below, as **Exhibit 74**. In  
15 this deposition, Mr. Klein refers to the fact that he is sometimes considered the "Father of Click!  
16 Network."

17 **11.** In 2016, City Policy Makers declared they were unanimously committed to Click! and  
18 decided to go "All In", with TPU Board Resolution U-10879, passed on Sept 28, 2016.  
19 Subsequently, recognizing that Click! had never been properly audited, as an enterprise, and  
20 citing great uncertainty over the numbers, the City Council voted to conduct and audit, in  
21 Resolution 39577; but, that audit was never conducted or completed. At a City Council meeting  
22 in March 2019, Council Member Blocker asked City Attorney Fosbre why the audit had not been  
23 done. Mr. Fosbre responded by explaining that the audit could show losses greater than expected,  
24 which would be harmful to the City's defense in a lawsuit against the, *Coates v. Tacoma (2017)*,  
25 which was brought by Rate Payers seeking relief under the accountancy act. I consider this an  
26 admission of a party opponent and have posted those comments on YouTube. I also consider this  
another example of the fraud and bad faith surrounding City staff's efforts to disposing of the

1 system. Determining the proper value of the system, is an obvious step in disposing of any  
2 municipal asset. The exchange between Council Member Blocker and the City Attorney occurs  
3 at 47 seconds into this video: <https://youtu.be/s2zOqqLCT4M>

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

14 **13.** In the *Coates v Tacoma* Case, Pierce County Superior Court 17-2-08907-4, the City’s  
15 Attorney, Kari L. Vander Stoep, sought a Stay to prevent immediate enforcement of a partial  
16 summary judgment against the city in Superior Court. That Motion For Entry Of Cr 54(8)  
17 Findings And Final Judgment(S) And A Stay Of Litigation Or New Trial Date was filed on  
18 March 2, 2018. It asked the Court to stay enforcement of the court’s Order until the City's appeal  
19 has run its course. In the Proposed Findings attached to that motion, at Finding #8, there was this  
20 statement: “8). Given the magnitude of the issues in dispute and the ultimate outcome's effect on  
21 the City, Tacoma Power, and Click customers, the Court should also stay enforcement of the  
22 judgment on its Order until the City's appeal has run its course. If City were forced to promptly  
23 shut down Click, there would be an immediate negative impact on Click's customer base, which  
24 includes elderly, low-income, governmental, and student users who would suddenly be without  
25 service. In addition, Click would lose all of its customers, employees, and goodwill.” It is my  
26 understanding that the potential shutting down of Click!, described in this motion, compelled

1 Council to pursue the privatization of Click! Network. My understanding is that privatization  
2 represented a sort of “lifeline” for Click! and the customers, to avoid the dire outcome described  
3 in the City’s March 2, 2018 Motion.

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

10 **15.** I participated in the RFI process and submitted the requested “information,” essential  
11 advising the City to “Stay the Course,” do an audit and collaborate with Pierce County to expand  
12 the network. There was no indication the City was looking for someone to completely take over  
13 the operation of Click! under a total privatization scheme. City officials, and their consultant,  
14 JoAnne Hovis, sought my advice on the best direction forward for Click!, and I provided my  
15 input into that process. The process was identified as an RFI/Q, there was no mention of a “P” or  
16 an “RFP.” The RFI/Q indicated that an RFP might be issued in the future. It was not apparent to  
17 me that City staff was seeking a proposal to take over the enterprise. I was not aware the City  
18 was selling Click!. Michael Lafreniere, who attended the meeting with me, where I presented  
19 my RFI response has signed a declaration saying that he also was unaware the City was  
20 attempting to sell Click! or soliciting offers for its acquisition. In my opinion there has was no  
21 bidding for Click! and the present privatization agreement cannot possibly represent fair value  
22 with a bidding process. There has certainly been no sealed bids or RFP since the surplus  
23 resolutions were passed declaring Click! as surplus. The process was particularly tainted by a  
24 fraudulent misrepresentations. Once example is Click!’s annual revenues in the RFI. The RFI  
25 indicated that Click! only had \$2.2 Million a year in annual revenue, when the actual amount is  
26 ten times that amount. This is more one example of City bad faith in pursuing a legitimate offer

1 or valuation of the System. Another example is that the RFI indicated, on page 5, under the  
2 Network Overview section, that Click! has been allocated 12 fiber strands in TPU's 180-count  
3 network backbone, using eight strands for the HFC network and four strands for commercial  
4 broadband services, yet the final IRU is set to convey 108 strands. Another example of the  
5 fraudulent process is the fact that the IRU waves all pole attachment charges, as I cited for the  
6 Court in my Shook Decl. 11/1/19, Ex. 29 Pg. 115/2156. This fact, that there were no pole  
7 attachment charges, was not disclosed to me. As a participant in this RFI process the fact all the  
8 strands of fiber were being considered for conveyance, and no pole attachment charges were  
9 expected, would have been important to know. This important information was not disclosed.

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

17 **16.** Attached hereto as **Exhibit 68** and incorporated herein by this reference is a true and  
18 correct copy of the American Public Power Association article, Multiservice utilities: A one-stop  
19 shop for communities. As downloaded by me, As seen 12/17/19, Available at:  
20 <https://www.publicpower.org/periodical/article/multiservice-utilities-one-stop-shop-communities>  
21 ; also archived at: <https://perma.cc/FCJ3-XS9U>

22 **17.** Attached hereto as **Exhibit 69** and incorporated herein by this reference is a true and correct  
23 copy of 1.) an Article from the Institute for Local Self Reliance: Comcast Spends Big on Local  
24 Elections: Would Lose Millions in Revenue from Real Broadband Competition, also 2.) Broad-  
25 Banned: The FCC's Preemption Of State Limits On Municipal Broadband Emory Law Journal,  
26 Vol. 68:407; also, 3.) a Law Review article, Measuring Monopsony: Using The Antitrust  
Toolbox William & Mary Law Review Vol. 57:299, also copies of Comcast Time Warner

1 Merger press releases, also a U.S. Dept. of Justice Press Release on Comcast -Time Warner  
2 Merger. Now Attached as Exhibit 69 and incorporated herein by this reference is a true and  
3 correct copy of an Article from the Institute for Local Self Reliance: Comcast Spends Big on  
4 Local Elections: Would Lose Millions in Revenue from Real Broadband Competition, as  
5 downloaded by me and last seen 12/17/19, Available at:

6 [https://muninetworks.org/sites/www.muninetworks.org/files/2017-11-comcast-fort-collins-](https://muninetworks.org/sites/www.muninetworks.org/files/2017-11-comcast-fort-collins-seattle-competition-policy-brief.pdf)  
7 [seattle-competition-policy-brief.pdf](https://muninetworks.org/sites/www.muninetworks.org/files/2017-11-comcast-fort-collins-seattle-competition-policy-brief.pdf) ; also, *archived* at: <https://perma.cc/6DQX-CQN7>

8 17 (a). Attached hereto as **Exhibit 69 (a)** and incorporated herein by this reference is a true  
9 and correct copy of Broad-Banned: The FCC's Preemption Of State Limits On Municipal  
10 Broadband Emory Law Journal, Vol. 68:407; 17. (b)

11 17. (b), Attached hereto as **Exhibit 69 (b)** and incorporated herein by this reference is a true  
12 and correct copy of the a U.S. Dept. of Justice Press Release on Comcast -Time Warner Merger.  
13 I downloaded this from the U.S. Dept. of Justice's website, last seen 12/17/19 and Available at:  
14 [https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-](https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department)  
15 [warner-cable-after-justice-department](https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department); also, I saved an *archived copy* at:  
16 <https://perma.cc/6SM8-5DJK>

17 17 (c). Attached hereto as **Exhibit 69 (c)** and incorporated herein by this reference is a true  
18 and correct copy of a Comcast Press Release from 2014, which I downloaded this from  
19 Comcast's website on 12/17/19 from this URL: [https://www.cmcsa.com/news-releases/news-](https://www.cmcsa.com/news-releases/news-release-details/comcast-and-charter-reach-agreement-divestitures)  
20 [release-details/comcast-and-charter-reach-agreement-divestitures](https://www.cmcsa.com/news-releases/news-release-details/comcast-and-charter-reach-agreement-divestitures) ; also, my *archived copy* at:  
21 <https://perma.cc/C475-NGNX>

22 17 (d). Attached hereto as **Exhibit 69 (d)** and incorporated herein by this reference is a true  
23 and correct copy of William & Mary Law Review: Measuring Monopsony Vol. 57 | Issue 1 2015

24 17. (e) . Attached hereto as **Exhibit 69 (e)** and incorporated herein by this reference is a true  
25 and correct copy of Baller Stokes article on: State Restriction on Community Broadband  
26

1 Services or Other Public Communications Initiatives - July 1, 2019 as seen 12/17/19 and  
2 available at: [Compliance-Memo-July-2019-1.pdf](http://www.baller.com/wp-content/uploads/Baller-Stokes-Lide-Annual-Federal-</a></u><br/>3 <u><a href=) , also my archived copy available at:  
4 <https://perma.cc/5VSE-BX85>

5 18. Attached hereto as **Exhibit 70** and incorporated herein by this reference is a true and correct  
6 copy of a paper: Creating Capacity And Competition In Broadband Telecommunications: The  
7 City Of Tacoma's Initiative, by Dr. William H. Baarsma, University of Puget Sound, School of  
8 Business & Public Administration & Dr. Ross Singleton Department of Economics University of  
9 Puget Sound, April 2000. <https://perma.cc/RW4U-CFTX>, also a Seattle Times Article from  
10 March 17th, 1997, by staff reporter Robert Nelson. Now Attached as Exhibit 70 and  
11 incorporated herein by this reference is a true and correct copy of a paper: Creating Capacity  
12 And Competition In Broadband Telecommunications: The City Of Tacoma's Initiative, by Dr.  
13 William H. Baarsma, University of Puget Sound, School of Business & Public Administration &  
14 Dr. Ross Singleton Dept. of Economics University of Puget Sound, April 2000. Archived copy  
15 available at, <https://perma.cc/RW4U-CFTX>. Including Mayor Baarsma's signed certification of  
16 authenticity that the attached exhibit is a true and correct copy of what it purports to be.

17 18. (a). Attached hereto as **Exhibit 70 (a)** and incorporated herein by this reference is a true  
18 and correct copy of a Seattle Times Article: Tacoma Decides to build its own Network (1997)  
19 seen on, 12/18/2019, at:  
20 <https://archive.seattletimes.com/archive/?date=19970317&slug=2529195> , also archived at:  
21 <https://perma.cc/ZS6V-7TYG> .

22 19. Attached hereto as **Exhibit 71** and incorporated herein by this reference is a true and  
23 correct copy of a Click! Network Financial Performance Review by Price Waterhouse Cooper,  
24 from April 2000. As provided to me by Defendant in a public records request.  
25  
26

1 20. Attached hereto as **Exhibit 72** and incorporated herein by this reference is a true and correct  
2 copy of U-10988 related to the RFI for Click! Network, also a copy of Advanced Stream’s RFI  
3 response, “Stay The Course.” Now Attached as **Exhibit 72** and incorporated herein by this  
4 reference is a true and correct copy of Contract documents related to CTC and the preparation of  
5 a Request for Information for Click! and citing Resolution U-10988 related to the RFI for Click!  
6 Network

7 20 (a). Attached hereto as **Exhibit 72 (a)** and incorporated herein by this reference is a true  
8 and correct copy of City of Tacoma, Tacoma Public Utilities Request for Information and  
9 Qualifications for Partnership Arrangements for Tacoma Power's Click! Network

10 20 (b). Attached hereto as **Exhibit 72 (b)** and incorporated herein by this reference is a  
11 true and correct copy of Advanced Stream’s RFI response, “Stay The Course.”  
12

13 21. I have personally witnessed the Tacoma Public Utilities Board pass a resolution  
14 purchasing a router that cost approximately \$1 million dollars for Click! Network. Attached  
15 hereto as **Exhibit 73** and incorporated herein by this reference is a true and correct copy of the  
16 minutes from TPU Board meeting of Oct. 26, 2016, where such a router was purchased. Now  
17 included is a signed **Certificate** of the custodian of these records that the attached exhibit is a  
18 true and correct copy of what it purports to be..

19 **22.** Attached hereto as **Exhibit 74** and incorporated herein by this reference is a true and  
20 correct copies of pages from TPU Power Superintendent’s Steve Klein’s September 26, 2017  
21 Deposition, also, Mr. Klein’s Declaration from May 5, 1997, in support of City’s Reply Brief in  
22 Case 96-2-09938-0, that approved the funding of Click!. Now Attached as **Exhibit 74** and  
23 incorporated herein by this reference is a true and correct copy of the Declaration of Steven J.  
24 Klein in support of City's Reply, May 5, 1997, Case No 96-2-09938-0.

25 22. (a) Attached hereto as **Exhibit 74 (a)** and incorporated herein by this reference is a true  
26 and correct certified copy of excerpts from the Deposition of TPU Power Superintendent, Steve

1 Klein, from September 26, 2017, in the Pierce County Case No 17-2-08907-4, *Coates v Tacoma*;  
2 and, an email from Yom Litsup confirming this is “already certified”.

3 22. (b) Attached hereto as **Exhibit 74 (b)** and incorporated herein by this reference is a true  
4 and correct copies of Complaint for Declaratory, Injunctive, and Mandamus Relief – Title page  
5 showing Michael Crowley as plaintiff – *Coates v Tacoma*

6  
7 22. (c) Attached hereto as **Exhibit 74 (c)** and incorporated herein by this reference is a true  
8 and correct copies of Newspaper Article 2001 ATT: Don’t be like Tacoma by Joe Estrella, April  
9 1st, 2001 last seen: 12/18/2019 available at: [https://www.multichannel.com/news/att-dont-be-](https://www.multichannel.com/news/att-dont-be-tacoma-151797)  
10 [tacoma-151797](https://www.multichannel.com/news/att-dont-be-tacoma-151797) also *archived at*: <https://perma.cc/A63K-Z73K>

11 23. Attached hereto as **Exhibit 75** and incorporated herein by this reference are true and  
12 correct copies of: ( 1.) a page from Click! Network Asset Study from 2013, that I obtained from  
13 TPU through my public disclosure request. This page came from the Click! Asset and Expense  
14 Allocations, 3/18/13 and was produced by Rates, Planning & Analysis (RPA) along with staff  
15 members of Click! and Utility Technology Services (UTS) who performed a study of the assets  
16 and expense allocations shared between Tacoma Power and Click! and a true and correct copy of  
17 the System’s Capital Budget for the 2017-2018 biennium;.; also, ( 2.) a Click! Network  
18 Operations Update from February 2019, stating “FTTH trim out work installing 135 smart panel  
19 covers at the “Napoleon” were completed and building 5 at “Orchard Street Apartments” had  
20 micro ducts installed”; and also, ( 3.) Click! Network Operations Update from October 25, 2017,  
21 with a statement related to “The Grand” Apartment building on page 1, disclosing “We used  
22 41,000 feet of coax and 41,000 feet of CAT5-E to run 296 strikes into each unit along with  
23 running 1,064 outlets specific to the interior of the units;” also, ( 4.) and finally, is a true and  
24 correct copy, of a Click! Network Operations Update for March 27, 2018. Referring to “creating  
25 records for HFC Distribution optical equipment assets in SAP. An individual record will be  
26 created for each of the 814 optical devices from each of the four HFC hubs and the Headend.”  
These documents were provided to me by the defendant thru my public record request. It is my

1 understanding that a System of this size, if built today, would costs approximately \$900 million;  
2 also, over \$200 MM was spent to construct the System; and, there remained \$8,068,961 in  
3 “book value” of existing capital assets remaining to be depreciated as of 12/31/2018. That  
4 amount was provided to me by TPU in response to my public records request # T003054-  
5 080119; also, I have included the wholesale water and power figures as pages 19 and 20. Now  
6 Attached as **Exhibit 75** and incorporated herein by this reference is a true and correct copy of  
7 Attachment A to a May 12, 2015 Memorandum from Bill Berry, Rates, Planning and Analysis  
8 Manager to Chris Robinson, Tacoma Power Superintendent. Subject: Click! Network Cost  
9 Center Allocation Update. Click! Network Asset Study (2013) Page A-4 of Click Asset and  
10 Expense Allocations 3/18/13.

11 23. (a) Attached hereto as **Exhibit 75 (a)** and incorporated herein by this reference are true  
12 and correct copies of Click! Network Operations Update from February 2019

13 23. (b) Attached hereto as **Exhibit 75 (b)** and incorporated herein by this reference are true  
14 and correct copies of 2019/2020 Tacoma Power Capital Budget

15 23. (c) Attached hereto as **Exhibit 75 (c)** and incorporated herein by this reference are true  
16 and correct copies of Click! Network Operations Update from October 25, 2017

17 23. (d) Attached hereto as **Exhibit 75 (d)** and incorporated herein by this reference are true  
18 and correct copies of Click! Network Operations Update for March 27, 2018

19 23. (e) Attached hereto as **Exhibit 75 (e)** and incorporated herein by this reference are true  
20 and correct copies of 2018 Tacoma Power and Water Superintendent’s report – Wholesale

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.  
23 Also, 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  
25 have carefully reviewed these monthly statements for many years and conducted hundreds of  
26 public record requests to obtain the underlying material that comprises these Operational

1 Summaries; also, a screen shot of the Purple Perks Program for Click! Customers. Now Attached  
2 as **Exhibit 76** and incorporated herein by this reference is a true and correct copy of Click!  
3 monthly Operational Summary for August 2019, as obtained from the City of Tacoma webpage,  
4 at [https://www.cityoftacoma.org/government/city\\_departments/finance/financial\\_reports](https://www.cityoftacoma.org/government/city_departments/finance/financial_reports) , also as  
5 a permalink, available at: <https://perma.cc/638F-57Q9>

6 24 (a). Attached hereto as **Exhibit 76 (a)** and incorporated herein by this reference is a true and  
7 correct copy of the Click! monthly Operational Summary for Sept., 2019. Last accessed  
8 [10/29/19, Available here:](https://www.cityoftacoma.org/UserFiles/Servers/Server_6/File/cms/Finance/Financial_Reports/Monthly/09_19Power.pdf)  
9 [https://www.cityoftacoma.org/UserFiles/Servers/Server\\_6/File/cms/Finance/Financial\\_Reports/](https://www.cityoftacoma.org/UserFiles/Servers/Server_6/File/cms/Finance/Financial_Reports/Monthly/09_19Power.pdf)  
10 [Monthly/09\\_19Power.pdf](https://www.cityoftacoma.org/UserFiles/Servers/Server_6/File/cms/Finance/Financial_Reports/Monthly/09_19Power.pdf) , also Available at archive version: <https://perma.cc/6G5D-3BZP> .

11 24 (b). Attached hereto as **Exhibit 76 (b)** and incorporated herein by this reference is a true  
12 and correct copy of the Click! monthly Operational Summary for Oct. 2019. Available at my  
13 archived version <https://perma.cc/2WLX-T9E6> ; Also, for a year over year comparison, I in this  
14 exhibit, I have also provided a true and correct copy of the Click! monthly Operational Summary  
15 for October, 2018.

16 24 (c). Attached hereto as **Exhibit 76 (c)** and incorporated herein by this reference is a true  
17 and correct copy of a screenshot I took of the Purple Perks Program for Click! Customers.  
18 Available at my archived version, <https://perma.cc/758H-BJ7U> .

19 25. Attached hereto as **Exhibit 77** and incorporated herein by this reference are true and  
20 correct copies of pages FCC’s Connecting America: The National Broadband Plan adopted Mar.  
21 15, 2010. As seen on my visit, on 12/18/2019, which was available then at:  
22 <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf> ; and I preserved  
23 an archive copy, available at: <https://perma.cc/UY85-MVQX> .

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

1 report by Adil Abdela and Marshall Steinbaum "The United States has a Market Concentration  
2 Problem." I have provided this to explain the Herfindahl-Hirschman Index ("HHI"). This is as I  
3 downloaded it on: 12/18/2019, as then available at: [content/uploads/2018/09/The-United-States-has-a-market-concentration-problem-brief-final.pdf](https://rooseveltinstitute.org/wp-</a></u><br/>4 <u><a href=),  
5 I saved an archive copy, available at: <https://perma.cc/4ZFY-J5RX> .

6 26. (a). Attached hereto as **Exhibit 78 (a)** and incorporated herein by this reference are true and  
7 correct copies of FTC and DoJ horizontal merger guidelines Issued: August 19, 2010; as I  
8 downloaded it on: 12/18/2019, as then available at:  
9 <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/hmg.pdf> ; I saved an archive  
10 copy, available at: <https://perma.cc/4EBT-9HE8> .

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

14 **28.** Attached hereto as **Exhibit 80** and incorporated herein by this reference are true and  
15 correct copy of Honorable Homer T. Bone Letter on Power Struggles -as published in the  
16 Congressional Record. This was published in 1944. I have also provided enlargements of  
17 Exhibit 80, for ease of reading. Also, I have included addition papers related to Honorable Judge  
18 Bone, and these are individually identified in sub-parts of this paragraph under Exhibit 80 (a)  
19 through Exhibit 80 (c)

20 28 (a). Attached hereto as **Exhibit 80 (a)** and incorporated herein by this reference is a true  
21 and correct copy of a July 1, 1926 Honorable Homer T. Bone's letter from Judge Bone's  
22 personal papers. This is the "Thorne Interview" and was obtained by me during my personal visit  
23 to the Collins Library at the University of Puget Sound ,Archives & Special Collections room, in  
24 2019. . A description of the library's collection is available online, as last visited on December  
25

1 17, 2019 at: <https://blogs.pugetsound.edu/collinsunbound/from-the-archives-homer-t-bone/>,  
2 also, my archived copy of this webpage is available at: <https://perma.cc/QN5X-HJBP>.

3 28 (b). Attached hereto as **Exhibit 80** (b) and incorporated herein by this reference is a true  
4 and correct copy of Honorable Homer T. Bone’s personal papers, showing a July 13th 1926  
5 memo related to “Norwood Brockett, as obtained by Mitchell Shook's personal visit to the  
6 University of Puget Sound Collins Memorial Library, Archives & Special Collections room in  
7 2019.

8  
9 28 (c). Attached hereto as **Exhibit 80** (c) and incorporated herein by this reference is a true  
10 and correct copy of a memo from Hon. Homer T. Bone’s personal papers June 13th 1926, related  
11 to George Vanderveer’s visit, as obtained by Mitchell Shook's personal visit to the University of  
12 Puget Sound Collins Memorial Library, Archives & Special Collections room in 2019

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

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

1 and permanent laws of the state.” Also, the Letter explains that the “revisors notes” associated  
2 with this effort would have “three columns”, with the first column being “the section number of  
3 the proposed code”, the second column being the “section or sections of Remington’s Revised  
4 Statutes from which each new code section is derived.

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

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

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

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

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

23 Now Attached as **Exhibit 81** and incorporated herein by this reference . On July 5th, 2019 I  
24 visited the Washington State Law Library at the Temple of Justice Building in Olympia,  
25 Washington looking for information related to the history of Chapter 35.94 RCW. All of the  
26 following documents are individually identified in the sub-paragraphs 29 (a) through 29 (f)  
below, which contain Exhibits 81 (a) to 81 (f). On that day, with the expert assistance of Laura

1 Edmonston, Deputy Law Librarian in the Reference Section, I found the origins of RCW 35.94  
2 in the Session Laws of 1917, specifically, in House bill No. 337, entitled “Sale or Lease of  
3 Public Utilities Owned by Cities or Towns.”

4 The Bill was printed in Laws of Washington 1917, as Chapter 137, and became codified as  
5 Remington’s Revised Statutes (“RRS”) 1917 c 137 §§ 9512–14. Attached hereto and  
6 incorporated herein by this reference as **Exhibit 81**, are true and correct copy of an excerpt from  
7 the Laws of 1965 which I understand is related to the History of RCW 35.94.040 Surplus Statute  
8 -- these are the Session Laws History 1965 Ch 7, 1943 Ch 252, 1941 Ch 149 .

9 29 (a), Attached hereto as **Exhibit 81** (a) and incorporated herein by this reference is a true  
10 and correct copy of the State of Washington, Session Law 1945, Ch 233, pg 651.

11 29 (b), Attached hereto as **Exhibit 81** (b) and incorporated herein by this reference is a true  
12 and correct copy of photograph I took of the printed bills of the legislature 15th Session of the  
13 House. House bill No. 337.

14 29 (c), Attached hereto as **Exhibit 81** (c) and incorporated herein by this reference is a true  
15 and correct copy of photographs I took the published version of RRS 1917 c 137 §§ 9512–14.

16 29 (d), Attached hereto as **Exhibit 81** (d) and incorporated herein by this reference is a true  
17 and correct copy (photo) of a letter dated December 1, 1946 from the Code Revision and  
18 Recompilation Committee, with the addition of a purple arrow and yellow highlight, which I  
19 have added to point out the relevant language. It is my understanding that the letter cites  
20 authority granted to the Code Committee, under Chapter 252, Laws of 1943 and Chapter 233,  
21 Laws of 1945, specifically to: “propose and submit to the legislature changes and revisions of the  
22 general and permanent laws of the state.” Also, the Letter explains that the “revisors notes”  
23 associated with this effort would have “*three columns*”, with the first column being “the section  
24 number of the proposed code”, the second column being the “section or sections of Remington’s  
25 Revised Statutes from which each new code section is derived.

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

4 It is my understanding that This December 1st letter, cites an “inability to get paper” and  
5 indicates the “revision work” would be published in two volumes, so part of it could be sent out  
6 and “give “maximum time, preceding the next legislative session, for examination of the work  
7 done”. Also attached is a correct copies (photos) of the Binder of “Volume 2” displaying the  
8 words: “Revised Code of Washington Titles 46-End;

9  
10 29 (e), Attached hereto as **Exhibit 81** (e) and incorporated herein by this reference is a true and  
11 correct copy of photographs of pages from the Revisors Notes for Volume 2, related to  
12 Remington Revised Statutes (“RRS”) §§ 9512–14 “Sale Or Lease Of Municipal Utilities,”  
13 including “column three” adjacent to RRS §9512 with the “reviser’s explanation in parenthesis”  
14 containing the statement “Rewritten for brevity” on Page 80-7; and, the cover of the Revisors  
15 Notes for Volume 2; and, page 80-1 from the Revisors Notes for Volume 2 showing the “three  
16 columns” as described in the above mentioned December 1, 1946 letter; and; page 80-7 from the  
17 Revisors Notes for Volume 2 with the columns related to Remington Revised Statutes (“RRS”)  
18 §§ 9512–14 “Sale Or Lease Of Municipal Utilities,” including “column three” adjacent to RRS  
19 §9512 with the “*revisor’s explanation in parenthesis*” containing the statement “Rewritten for  
20 brevity.”

21 29 (f), Attached hereto as **Exhibit 81** (f) and incorporated herein by this reference is a true and  
22 correct copy of photographs of the Revised Code of Washington Volume 6 1951 Edition  
23 Showing Chapter 80.48 RCW ; and, a photo of me at the table in the library with some of the  
24 many books associated with my research that day. Also attached are copies (photos) of the binder  
25 of the 1951 edition of the Revised Code of Washington Volume 6 Title 79-91, and, a page from  
26 that publication showing the final results of the recodification of Rem. Rev. Stat. 1917 c 137 § 1;  
§9512 into RCW 80.48.010.

1 It was also my intention to include, for the Court's convenience, Chapters 149 Laws of 1941,  
2 Chapter 252 Laws of 1943, Chapter 233 Laws of 1945, related to the establishment of the Code  
3 Committee. But those documents were inadvertently left out of my December 30 2019  
4 Declaration and are available online.

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

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

11 **32.** Attached hereto as **Exhibit 84** and incorporated herein by this reference is a true and  
12 correct copy of City of Tacoma's MOTION to STAY in *Coates* Mar. 2 18 Order -Shut It Down.  
13 Case No.17-2-08907-4

14 **33.** Attached hereto as **Exhibit 85** and incorporated herein by this reference is a true and  
15 correct copy of Tacoma City Council Ordinance 26141., to which I have attached a Certificate. It  
16 includes the attached Organization Chart.

17 **34.** The 12/12/19 Declaration of Tenzin Gyaltzen, Mr. Gyaltzen erroneously indicates, in ¶¶  
18 12 and 13, that there are three ISPs operating over Click! Network, when in fact there are  
19 currently only two independent ISPs, Advanced Stream and Rainier Connect, operating over  
20 Click! Network. Net Venture was an ISP, but their website was taken down when Rainier  
21 Connect acquired operational control of Net Venture in 2015. Click! is aware of this  
22 combination. Attached hereto as **Exhibit 86** and incorporated herein by this reference is a true  
23 and correct copies of screenshots from Rainier Connects website announcing the consolidation  
24 and a letter sent by Tenzin Gyaltzen to Net Venture in October 2015, regarding this issue.  
25  
26

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

3 **36.** Attached hereto as **Exhibit 88** and incorporated herein by this reference are true and  
4 correct copies of the Complaint and other briefs and declarations in the 1996 and 1997 Superior  
5 Court case that established Click! is a utility system. This is provided to support the estoppel  
6 claim and further support the fact that Click! is a communications utility and municipal utility  
7 property, not a service or asset of Tacoma’s general government. Now Attached as **Exhibit 88**  
8 and incorporated herein by this reference is a true and correct copy of Superior Court Pierce  
9 County Case No. 96-2-09938-0. City of Tacoma v The Taxpayers and Ratepayers of the City of  
10 Tacoma. Complaint for Declaratory Judgement

11 **36. (a)** Attached hereto as **Exhibit 88 (a)** and incorporated herein by this reference are true  
12 and correct copies of November 6th 1996. Memorandum in Support of City's MSJ Superior  
13 Court Pierce Co. No. 96-2-09938-0. City of Tacoma v The Taxpayers.

14 **36. (b)** Attached hereto as **Exhibit 88 (b)** and incorporated herein by this reference are true  
15 and correct copies of November 6th 1996. Declaration of Jon Athow in Support of MSJ Superior  
16 Court Pierce County Case No. 96-2-09938-0. City of Tacoma v The Taxpayers.

17 **36. (c)** Attached hereto as **Exhibit 88 (c)** and incorporated herein by this reference are true and  
18 correct copies of December 3rd, 1996. Defendants' Responsive Memorandum in Opposition to  
19 City of Tacoma's MSJ Superior Court Pierce County Case No. 96-2-09938-0. City of Tacoma v  
20 The Taxpayers and Ratepayers of the City of Tacoma.

21 **36. (d)** Attached hereto as **Exhibit 88 (d)** and incorporated herein by this reference are true  
22 and correct copies of December 13th, 1996. Order Granting City of Tacoma's MSJ Superior  
23 Court Pierce County Case No. 96-2-09938-0. City of Tacoma v The Taxpayers and Ratepayers  
24 of the City of Tacoma. This is Certified by the fact it is also included in Defendant’s Sloan  
25 Declaration of 11/22/19, Exhibit E, or Page 99/506.  
26

1 **36. (e)** Attached hereto as **Exhibit 88 (e)** and incorporated herein by this reference are true  
2 and correct copies of April 14th 1997. Memorandum in Support of City of Tacoma's MSJ  
3 Superior Court Pierce County Case No. 96-2-09938-0. *City of Tacoma v The Taxpayers.*

4 **36. (f)** Attached hereto as **Exhibit 88 (f)** and incorporated herein by this reference are true  
5 and correct copies of April 14th, 1997 Memorandum in Support of City of Tacoma's MSJ  
6 Superior Court Pierce County Case No. 96-2-09938-0. *City of Tacoma v The Taxpayers.*

7  
8 **36. (g)** Attached hereto as **Exhibit 88 (g)** and incorporated herein by this reference are true  
9 and correct copies of April 14th, 1997. Second Declaration of Jon Athow in Support of MSJ  
10 Superior Court Pierce County Case No. 96-2-09938-0. *City of Tacoma v The Taxpayers.*

11 **36. (h)** Attached hereto as **Exhibit 88 (h)** and incorporated herein by this reference are true  
12 and correct copies of May 9th, 1997. Defendant's Responsive Memorandum in Opposition to  
13 City of Tacoma's MSJ Superior Court Pierce County Case No. 96-2-09938-0. *City of Tacoma v*  
14 *The Taxpayers and Ratepayers of the City of Tacoma. Hearing Date:*

15 **36. (i)** Attached hereto as **Exhibit 88 (i)** and incorporated herein by this reference are true  
16 and correct copies of May 5th, 1997 City of Tacoma's Reply Brief Superior Court Pierce County  
17 Case No. 96-2-09938-0. *City of Tacoma v The Taxpayers and Ratepayers of the City of Tacoma.*  
18 This is also included in Defendant's Sloan Declaration of 11/22/19, Exhibit E, pg. 102/506.

19  
20 **36. (j)** Attached hereto as **Exhibit 88 (j)** and incorporated herein by this reference are true  
21 and correct copies of May 5th, 1997 Declaration of Steven J. Klein in Support of City's Reply  
22 Superior Court Pierce County Case No. 96-2-09938-0. *Tacoma v Taxpayers of Tacoma.*

23 **36. (k)** Attached hereto as **Exhibit 88 (k)** and incorporated herein by this reference are true  
24 and correct copies of May 9th, 1997 Order Granting City of Tacoma's MSJ-Superior Court  
25 Pierce County Case No. 96-2-09938-0. *City of Tacoma v The Taxpayers Tacoma. Also, this is*  
26 *included in twice in Def.'s Sloan Decl. of 11/22/19, Exhibit F, pg. 109/506.*

1 **36. (L)** Attached hereto as **Exhibit 88 (L)** and incorporated herein by this reference are true  
2 and correct copies of December 9th 1996 City of Tacoma's Reply Brief- Superior Court Pierce  
3 County Case No. 96-2-09938-0. City of Tacoma v The Taxpayers of the City of Tacoma.

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

6 **38.** Attached hereto as **Exhibit 90** and incorporated herein by this reference is a true and  
7 correct copy of *Coates v Tacoma MPSJ ON Motion on Remedy. Case No. 17-2-08907-4.*  
8 *Edward E. (Ted) Coates; Michael Crowley; Mark Bubenik v City of Tacoma.*

9 **38. (a)** Attached hereto as **Exhibit 90 (a)** and incorporated herein by this reference is a true  
10 and correct copy of Superior Court Pierce County Case No. 17-2-08907-4. *Edward E. (Ted)*  
11 *Coates; Michael Crowley; Mark Bubenik v City of Tacoma. [Proposed] Order Granting*  
12 *Defendant's Motion for Partial Summary Judgment on the Nature of Any Mandamus Relief*

13 **39.** If the proposed privatization of Click! Network is allowed to proceed; it is my  
14 understanding that my company, Advanced Stream will be forced out of business and my  
15 customers will be taken away by a direct competitor; also, that Advanced Stream's proprietary  
16 customer list would fall into the hands of Rainier Connect, the only other direct competitor on  
17 Click! Network; also, Rainier Connect would be operating the System and setting Advanced  
18 Stream's rates; also, that this scenario allows Rainier Connect, a direct competitor, to run  
19 Advanced Stream out of business and take Advanced Stream's customers, monopolizing the  
20 public's broadband system for up to 40 years; also, that my customers could lose their Email  
21 addresses and personal webspace, which we provide for them; and, their phone and other  
22 essential services could be disrupted. Some of our customers are on medical equipment, like  
23 heart monitoring devices. An interruption in services could be life threatening.

24 **END OF 12/30/19 DECLARATION OF MITCHELL SHOOK**

1 **CONCLUSION OF SHOOK'S MASTER DECLARAION**

2 In this Mater Declaration I have organized, documented, authenticated and provided  
3 certificates of authenticity for the essential Exhibits in my previous declarations, as cited herein.  
4

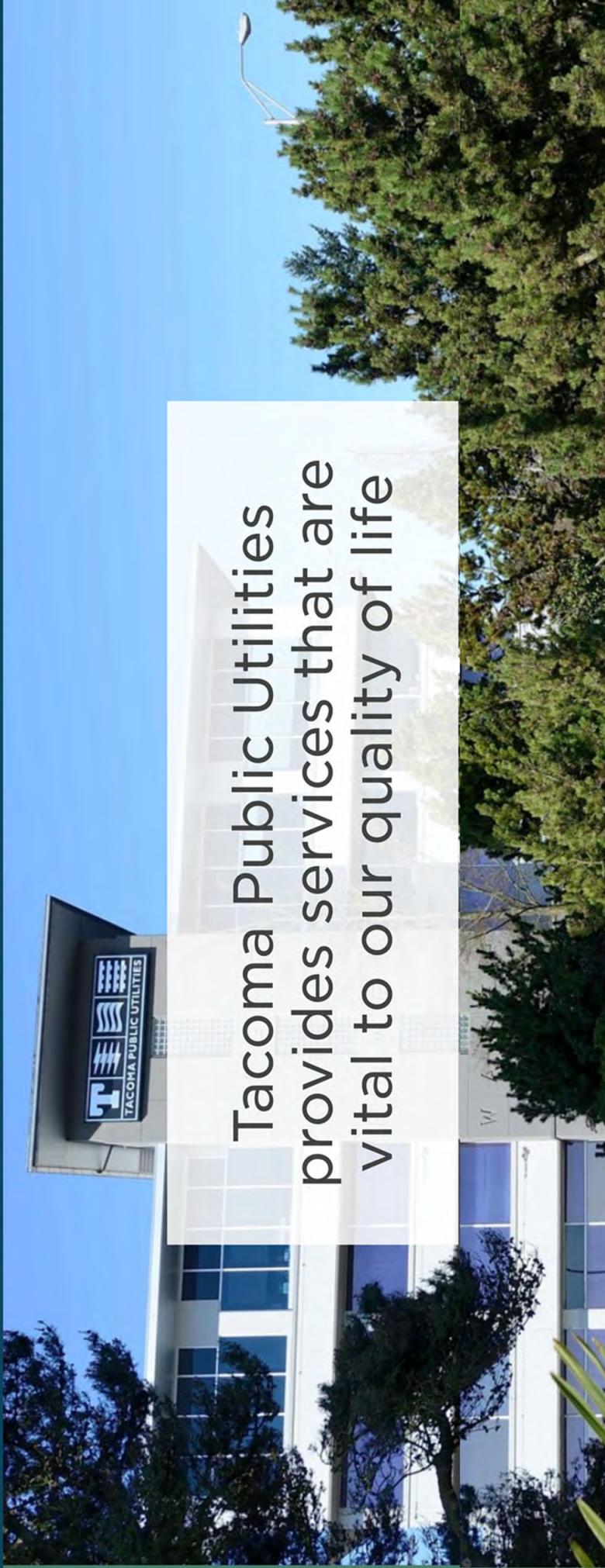
5 I declare under the penalty of perjury under the laws of the State of Washington that the  
6 foregoing is true and correct.

7 DATED this 22<sup>nd</sup> day of January 2020, at Tacoma, Washington.

8 

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10 \_\_\_\_\_  
11 Mitchell Shook  
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# EXHIBIT 1



Tacoma Public Utilities provides services that are vital to our quality of life

## About TPU

[Management Team](#)

[Public Utility Board](#)

[Investors](#)

[TPU Publications](#)

[Latest News](#)

[Events](#)

## Our Services

[Power](#)

[Water](#)

[Rail](#)

[Click! Cable TV](#)

## About Us

Publicly owned since 1893

Largest department in Tacoma City government

Operates entirely from revenues from sale of services, not from taxes

Governed by the Public Utility Board, the members of which appoint the Director of Utilities

# EXHIBIT 1 (a)



[About TPU](#) > Services

[◀ Back](#)

## Services

[Click! Cable TV](#)

[Power](#)

[Water](#)

[Rail](#)

# Our Services

## Power

Tacoma Power provides electric service to the city of Tacoma, Fircrest, University Place, Fife, parts of Steilacoom, Lakewood, Joint Base Lewis-McChord, and unincorporated Pierce County as far south as Roy.

## Water

Tacoma Water provides clean, reliable water to more than 300,000 people throughout Pierce and King counties and is one of the country's oldest municipally owned water systems.

## Rail

Tacoma Rail has provided rail transportation and key freight connections for customers in the greater Tacoma area since 1914. We currently serve 65 customers within three operating districts in Pierce, Thurston, and Lewis counties.

## Click! Cable Network

Click! Network is an operating section of Tacoma Power and a multi-service broadband telecommunications provider within the electric company's service area.

# EXHIBIT 1 (b)

Cable TV

Internet

Business  
Services

# Keeping You Connected

Click!'s Internet Provider partners provide you fast reliable Internet.

INTERNET PLANS

# EXHIBIT 1 (c)

PRODUCTS

Cable TV

Internet

Internet Service Providers

Business Services

## Internet Service Providers

Click! operates an Open Access Network, which is a different business model than traditional telecommunications providers. In an open-access network there is a network owner and operator, and multiple retail service providers that deliver services over the network.

### Click! Powered Internet Gives You

- **Choice** - choose from one of the two local Internet Service Providers
- **Selection** - package options designed for you, no matter how many devices and TVs you want to connect to stream content or play games
- **Bundles** - Internet and phone bundles to fit your needs
- **Customer Service** - Friendly support from locally owned companies

SELECT A TV & INTERNET BUNDLE ONLINE

### Service Providers



Your Hometown Internet Service Provider

#### Advanced Stream

253-627-8000

[www.advancedstream.com](http://www.advancedstream.com)

[info@advancedstream.com](mailto:info@advancedstream.com)



#### Rainier Connect

253-683-4100

[www.rainierconnect.com](http://www.rainierconnect.com)

[customerservice@rainierconnect.com](mailto:customerservice@rainierconnect.com)

# EXHIBIT 1 (d)

# About Click!

## Company

Click! Network is an operating section of Tacoma Power and a multi-service broadband telecommunications provider within the electric company's service area.

## Vision

**To be known for excellence in:**

- People – professionals committed to the highest level of customer service and satisfaction, who create and maintain a team environment in which trust, respect, honesty and dignity are valued.
- Products and services – specifically designed to meet and exceed our customer needs through innovative uses of technology.
- Performance – a technically superior network designed and maintained to serve both current and future telecommunications needs of Tacoma Power and of Click! Network customers.

## Mission

To develop and deliver to all Tacoma Power customers innovative products and services made possible by the convergence of telecommunications and electric technologies.

## Ownership

Click! Network is one of the largest municipally-owned telecommunications systems in the country and part of the City of Tacoma's Department of Public Utilities.

# EXHIBIT 1 (e)

# High Speed Internet, Powered By Click!

Click!'s Internet Service Provider partners provide fast and reliable internet throughout Tacoma and Pierce County. Connect all your devices in every room, with the fast speeds you need.

SELECT INTERNET PLAN



## The Choice is Yours

Click! partners with two local Internet Service Providers to connect your internet service.

**Advanced Stream** and **Rainier Connect** offer a variety of speed and pricing options to best fit your internet needs and the flexibility to select the right plan for you.

SELECT A PROVIDER

## Internet at the Speed of Life

The Click! Network enables speeds up to 100Mbps. With that kind of speed you can quickly and easily download large files and videos, watch movies, or play games, plus connect multiple devices simultaneously, without slowing down.

TEST YOUR INTERNET SPEED



# EXHIBIT 2



# EXHIBIT 2 (a)



## CERTIFICATE

I, Charleen Jacobs, do hereby certify that I am the Clerk of the Public Utility Board of the City of Tacoma, and that record and maintain custody of the official records and minutes of the Public Utility Board.

I further certify that the attached is a full, true, and correct copy of Resolution U-11116 dated October 30, 2019.

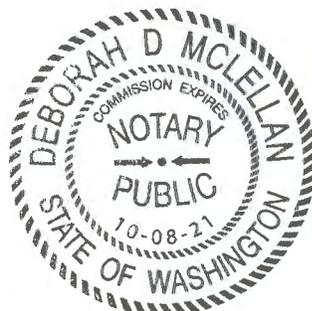
In witness whereof, I have set my hand this 16 day of January 2020.

Charleen Jacobs  
Clerk, Public Utility Board  
Tacoma Public Utilities  
City of Tacoma, Washington

Attachment

State of Washington  
County of Pierce

Subscribed and sworn to before me this 16 day of January 2020.



Deborah D. McLellan  
Notary Public in and for the  
State of Washington, County of Pierce  
My commission expires 10-8-21



## RESOLUTION NO. U-11116

1 A RESOLUTION relating to Tacoma Power; declaring surplus utility-owned property  
2 including certain inventory, equipment and vehicles allocated to the Click!  
3 Network together with the Excess Capacity of the Tacoma Power HFC  
4 Network, part of which is used by what is commonly referred to as the Click!  
5 Agreement by and between Tacoma Power and Mashell, Inc., d/b/a Rainier  
6 Connect and Rainier Connect North LLC.

7 WHEREAS in the mid-1990s, the City of Tacoma, Department of Public  
8 Utilities, Light Division (d.b.a. "Tacoma Power") determined that the best option  
9 to address the shifting advance in telecommunications in the electric utility  
10 industry landscape was to construct a hybrid fiber coaxial ("HFC")  
11 telecommunications network ("HFC Network"), and

12 WHEREAS on July 23, 1996, the Tacoma City Council passed Ordinance  
13 No. 25930, approving Tacoma Power's proposal to establish and create the HFC  
14 Network as part of Tacoma Power's electric utility infrastructure, allowing  
15 Tacoma Power to, among other things, connect its generation, distribution, and  
16 transmission assets and support the eventual adoption of smart meters and  
17 further, to use the excess capacity of the HFC Network to: (1) sell retail cable  
18 television service to Tacoma Power's electric customers, and (2) sell data  
19 transport and wholesale internet access services to Internet Service Providers  
20 ("ISPs") and others, and

21 WHEREAS on March 26, 1997, the Board adopted Amended Substitute  
22 Resolution U-9258, approving Tacoma Power's proposed business plan to  
23 develop a state of the art HFC Network to support enhanced control, reliability,  
24  
25  
26



and efficiency for its electric system and to generate additional revenue through  
1 new business lines (i.e., wholesale internet, cable TV, etc.), and

2 WHEREAS the Board recommended that the City Council approve the  
3 business plan, which it did through Resolution No. 33668, on April 8, 1997,  
4 authorizing Tacoma Power to construct, control, and operate the HFC Network,  
5 with the Board providing oversight and approval, and the City Council remaining  
6 involved in major policy decisions, and  
7

8 WHEREAS since its construction in the late 1990s, the HFC Network has  
9 connected Tacoma Power's distribution and transmission assets and enabled  
10 automated meter reading and billing, distribution automation, and remote turn  
11 on/turn off for electric customers, and  
12

13 WHEREAS in 2004, Tacoma Power also established a pilot project  
14 deploying as many as 16,000 Gateway Meters (Tacoma Power's name for its  
15 initial smart meters) that relay information from its electric customers to Tacoma  
16 Power headquarters via the HFC Network over coaxial cable connected to the  
17 customer premises which interconnects with the fiber network, and  
18

19 WHEREAS within four years following deployment of the gateway meters  
20 Tacoma Power began experiencing substandard performance of the gateway  
21 meters including: meter failures wherein Tacoma Power is unable to  
22 communicate with the meter through the network, read failures wherein the  
23 controller in the meter is not able to read the meter, and remote disconnect  
24 failures, all resulting in: communications errors, failures to measure electrical  
25 consumption, a failure rate of up to 100 meters per month, and increased costs  
26



1 to replace defective meters, perform repairs, troubleshoot errors, and collect  
2 meter data, and

3 WHEREAS by the mid-to-late 2000s, the electric utility industry began to  
4 recognize that wireless technology would take the place of wired  
5 telecommunications systems with respect to smart meter applications, and

6 WHEREAS as a result of the advances in the reliability and efficiency of  
7 interconnecting meters wirelessly with the HFC Network and the substandard  
8 and unreliable performance of the Gateway Meters, Tacoma Power has  
9 terminated the Gateway Meter Program and ended service over the HFC  
10 Network for all Gateway Meters, and

11  
12 WHEREAS the Board has authorized agreements providing for the  
13 installation and operation of licensed spectrum advance meters that will  
14 interconnect wirelessly to that portion of the HFC Network allocated to Tacoma  
15 Power and known and referred to as the Power Control & Operations Network  
16 ("PCON"), and

17  
18 WHEREAS the "Excess Capacity of the HFC Network" is generally  
19 comprised of: (i) coaxial cable, conduit housing only coaxial cable, conduit  
20 installed for service drops (whether or not currently housing coaxial cable), and  
21 coaxial cable service drops installed in the Click! Network service area, (ii)  
22 specific strands of fiber in the Tacoma Power fiber network that are not reserved  
23 for current and future use by Tacoma Power for utility purposes, conduit housing  
24 such fiber along routes that do not include reserved utility fiber, and excess  
25 space in conduit housing such fiber and reserved utility fiber, (iii) electronic  
26



1 equipment and related hardware installed in the HUB sites and in rights-of-way;  
2 and is defined as the "Tacoma Power Commercial System", and is described in  
3 more detail, in the draft proposed Indefeasible Right of Use Agreement attached  
4 hereto as EXHIBIT "C", and

5 WHEREAS certain inventory, equipment and vehicles allocated to Click  
6 Network are described in EXHIBIT "A.1-3" attached hereto and are referred to as  
7 the "Click! Assets", and

8 WHEREAS Click! Network began providing cable television and wholesale  
9 internet access services over the excess capacity in the HFC Network in 1998,  
10 and since that time, technology and consumer demands have changed and  
11 operational costs have significantly increased, and in response to these  
12 challenges, the Board has studied different models for delivery of services, and

13 WHEREAS the Board retained CTC Technology & Energy, to develop an  
14 analysis of business models as an alternative to the legacy business plan under  
15 which Click! Network currently operates, which analysis was presented to the  
16 Board and City Council at the January 23, 2018 joint study session, and

17 WHEREAS the Board on January 24, 2018, adopted Resolution U-10988,  
18 pursuant to which the Board expressed its determination then, and re-affirms and  
19 expands upon now, that while the 1997 business plan achieved many of the  
20 functions envisioned for the HFC Network, the Excess Capacity of the HFC  
21 Network and the inventory, equipment and vehicles allocated to Click! Network  
22 are not needed now or in the future by Tacoma Power for utility purposes and  
23 thus will not be updated or improved or utilized for utility purposes, and are  
24  
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26



1 excess to the needs of Tacoma Power, and that the current Click! Network  
2 business plan and the proposed all-in retail service business model will not  
3 generate sufficient revenues to fully fund operational expenses and the costs of  
4 capital improvements needed to maintain the Excess Capacity of the HFC  
5 Network as a state of the art Network, and that it is prudent and necessary to  
6 revise the business plan, and

7 WHEREAS through Resolution U-10988, the Board further rescinded its  
8 approval of the all-in retail service business model, adopted 12 policy goals to be  
9 maximized through the use and preservation of the Excess Capacity of the HFC  
10 Network, directed the Public Utilities Director to work with the City Manager to  
11 develop a plan to seek information, proposals or qualifications from interested  
12 parties to determine whether the 12 policy goals could be achieved through a  
13 collaboration and/or restructuring of Click! Network, and

14  
15 WHEREAS the PUB and City Council, after review of multiple proposals  
16 from third parties, directed the Public Utilities Director to execute a letter  
17 agreement with Rainier Connect to enter into good faith, negotiation of  
18 agreements through which: (1) the City, through Tacoma Power, will retain  
19 ownership of all of the existing HFC Network, (2) the capital and operating costs  
20 of the Excess Capacity of the HFC Network will be borne by a third party,  
21 (3) Tacoma Power will no longer provide cable television or wholesale internet  
22 access or data transport services, and (4) Rainier Connect would use the Excess  
23 Capacity of the HFC Network to provide broadband information services  
24 consistent with the 12 policy goals adopted by the Board and City Council, and  
25  
26



1 WHEREAS Tacoma Power, under the supervision of the Director and  
2 Rainier Connect, have negotiated the draft proposed Click! Business Transaction  
3 Agreement, attached hereto as EXHIBIT "B", and the draft proposed Indefeasible  
4 Right of Use Agreement, attached hereto as EXHIBIT "C", that collectively  
5 provides for the conveyance of the Click! Assets to Rainier Connect and provides  
6 for Rainer Connect's use but not ownership of the Excess Capacity in the HFC  
7 Network for the term, and pursuant to the terms and conditions of the  
8 Indefeasible Right of Use Agreement, and

9  
10 WHEREAS the consideration proposed to be paid by Rainier Connect for  
11 conveyance of the inventory, equipment and vehicles described in EXHIBIT A.1  
12 is \$294,742.98, as set forth in EXHIBIT A.1, the consideration to be paid by  
13 Rainier Connect for the inventory and equipment described in EXHIBIT A.2 and  
14 A.3, are the contractual obligations of Rainier Connect as set forth in  
15 substantially the form of EXHIBIT "C" (Indefeasible Right of Use Agreement), and  
16 the use of the Excess Capacity in the HFC Network is proposed to be granted to  
17 Rainer Connect in consideration for the obligations of Rainier Connect as set  
18 forth in the EXHIBIT "C", including but not limited to, the annual payments of  
19 \$2,500,000 for year 1, \$2,625,000 for year 2, \$2,750,000 for year 3, \$2,875,000  
20 for year 4, \$3,000,000 for year 5, and for each year after year 5, the annual  
21 payment will increase to reflect the Consumer Price Index Increase as described  
22 in Exhibit "C", and

23  
24  
25 WHEREAS the proposed draft agreements include provisions ensuring,  
26 among other things, that the use and operation of the Excess Capacity in the



1 HFC Network by the new operator will not interfere with, or jeopardize the safety  
2 and security of Tacoma Power's continued use and operation of the Tacoma  
3 Power Control & Operations Network or the City's use and operation of the  
4 Institutional Network, and

5 WHEREAS pursuant to TMC 1.06.273, the Tacoma Public Utilities  
6 Director has recommended that the Board find that the disposal of the Click!  
7 Assets and the grant of the Indefeasible Right of Use of the Excess Capacity in  
8 the HFC Network through a negotiated process with Rainier Connect, pursuant to  
9 agreements in substantially the form of EXHIBITS "B" and "C", are in the best  
10 interests of Tacoma Power, and  
11

12 WHEREAS it is advised that, as a condition of this proposed transaction  
13 and in conformance with the provisions of RCW 35.94.040, the Board find and  
14 declare the Click! Assets and the Excess Capacity in the HFC Network surplus to  
15 the needs of Tacoma Power and the City, and  
16

17 WHEREAS the Tacoma Public Utilities Director has certified, and Tacoma  
18 Power recommends, that the Board find and declare that the Click! Assets and  
19 the Excess Capacity in the HFC Network are not required for, and are not  
20 essential to, continued public utility service or continued effective utility service,  
21 and are surplus to the needs of Tacoma Power and to Tacoma Public Utilities,  
22 and that the sale of the Click! Assets to Rainier Connect and the grant of a  
23 Indefeasible Right of Use of the Excess Capacity in the HFC Network to Rainier  
24 Connect through a negotiated disposition would be in the best interests of  
25 Tacoma Power and the City, and  
26



1 WHEREAS although a declaration that an asset is surplus often proceeds  
2 a decision to sell an asset, there is no requirement that a surplus asset be  
3 sold, and the Board does not intend to recommend or approve for sale the  
4 Excess Capacity in the HFC Network, but rather the City through Tacoma  
5 Power, will retain ownership of the entire HFC Network inclusive of the Excess  
6 Capacity in the HFC Network to ensure that it has control over how the HFC  
7 Network is used through the proposed agreements and to ensure that the entire  
8 HFC Network meets all security requirements and can continue to meet the  
9 needs of Tacoma Power, Tacoma Water, and Tacoma Rail, and  
10

11 WHEREAS the Board, in consideration of the foregoing, the public  
12 comments received during the public hearing of October 23, 2019, and prior  
13 public meetings of the Board, the records and information on file with the Board,  
14 and having been in all matters fully advised, finds that it is in the best interest of  
15 Tacoma Power and Tacoma Public Utilities, to make the following  
16 determinations and recommendation to the City Council; Now, Therefore,  
17

18 BE IT RESOLVED BY PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

19 Sec. 1. That the Click! Assets and Excess Capacity in the HFC Network, as  
20 described in the recitals above, are not required for, and are not essential to,  
21 continued public utility service or continued effective utility service, and pursuant to  
22 applicable law, are properly declared surplus property and excess to Tacoma  
23 Power's needs.  
24

25 Sec. 2 That the sale of the Click! Assets and the grant of an Indefeasible  
26 Right of Use of the Excess Capacity of the HFC Network to Rainier Connect,



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through a negotiated disposition, is in the best interests of Tacoma Power, Tacoma Public Utilities, and the City; and all applicable competitive bidding requirements are hereby waived.

Sec. 3. Tacoma Power will seek City Council's approval of the Board's declaration herein that the Click! Assets and the Excess Capacity of the HFC Network as described herein are surplus to the needs of Tacoma Public Utilities and a declaration that the same are surplus to the needs of the City of Tacoma.

Sec. 4. The Board finds that disposal of the Click! Assets and the grant of the Indefeasible Right of Use of the Excess Capacity in the HFC Network through a negotiated process with Rainier Connect, pursuant to agreements in substantially the form of EXHIBITS "B" and "C", is in the best interests of Tacoma Power and approves such agreements, authorizes the Director of Tacoma Public Utilities to execute all documents necessary to implement such agreements contingent upon their approval by City Council and recommends that the City Council approve agreements that are substantially in the form of EXHIBITS "B" and "C".

Approved as to form and legality:

[Signature]  
Chief Deputy City Attorney

[Signature]  
Chair  
[Signature]  
Secretary

[Signature]  
Clerk

Adopted 10-30-19

# EXHIBIT 2 (b)

**CLICK! BUSINESS TRANSACTION AGREEMENT**

**by and between**

**CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, LIGHT DIVISION,  
D/B/A TACOMA POWER**

**and**

**MASHELL, INC., D/B/A RAINIER CONNECT**

**and**

**RAINIER CONNECT NORTH, LLC**

**Dated as of \_\_\_\_\_, 2019**

**DRAFT**

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(b) the terms defined in the singular have a comparable meaning when used in the plural, and vice versa;

(c) the terms “Dollars” and “\$” mean United States Dollars;

(d) unless the context otherwise requires, references herein to a specific Section, Subsection, Recital, Schedule or Exhibit shall refer, respectively, to Sections, Subsections, Recitals, Schedules or Exhibits of this Agreement;

(e) wherever the word “include,” “includes,” or “including” is used in this Agreement, it shall be deemed to be followed by the words “without limitation”;

(f) references herein to any gender include each other gender;

(g) references herein to any Person include such Person’s heirs, executors, personal representatives, administrators, successors and assigns; provided, however, that nothing contained in this clause (g) is intended to authorize any assignment or transfer not otherwise permitted by this Agreement;

(h) references herein to a Person in a particular capacity or capacities exclude such Person in any other capacity;

(i) references herein to any contract or agreement (including this Agreement) mean such contract or agreement as amended, supplemented or modified from time to time in accordance with the terms thereof;

(j) with respect to the determination of any period of time, the word “from” means “from and including” and the words “to” and “until” each means “to but excluding”;

(k) references herein to any Law or any license mean such Law or license as amended, modified, codified, reenacted, supplemented or superseded in whole or in part, and in effect from time to time; and

(l) references herein to any Law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise.

## **ARTICLE II**

### **TRANSFER OF OPERATIONAL CONTROL OF TACOMA POWER COMMERCIAL SYSTEM AND PURCHASE AND SALE OF RELATED SURPLUS ASSETS**

Section 2.1 Transfer of Operational Control. The Transfer of Operational Control shall take place on the last Business Day of the calendar month in which the conditions set forth in Article VI (other than those conditions that by their nature are to be satisfied at the Transfer of Operational Control but subject to the fulfillment or waiver of those conditions) have been satisfied or waived, unless such conditions have not been so satisfied or waived by the fifth Business Day preceding the last Business Day of such calendar month, in which case the

Transfer of Operational Control shall take place on the last Business Day of the next calendar month or at such other time, date or place as the Parties hereto may mutually agree in writing.

Section 2.2 Purchase and Sale of Related Surplus Assets.

(a) On the terms and subject to the conditions set forth herein, at the Transfer of Operational Control Date, Tacoma Power shall sell, convey, transfer, assign and deliver to Rainier, and Rainier shall purchase from Tacoma Power, the Related Surplus Assets, free and clear of all Encumbrances. The “**Related Surplus Assets**” are comprised of:

(i) All spare customer equipment, and other tangible personal property and assets of Tacoma Power relating to the Click! Business, as set forth on Schedule 2.2(a)(i) (collectively, the “**Equipment**”);

(ii) All fiber optic cabling, coaxial cabling, supplies, tools and inventories of Tacoma Power relating to the Click! Business (the “**Inventory**”), as set forth on Schedule 2.2(a)(ii);

(iii) All vehicles of Tacoma Power relating to the Click! Business (the “**Vehicles**”), as set forth on Schedule 2.2(a)(iii);

(iv) All rights of Tacoma Power under those Contracts listed on Schedule 2.2(a)(iv) (collectively, the “**Transferred Contracts**”);

(v) All Governmental Authorizations listed on Schedule 2.2(a)(v) (the “**Transferred Authorizations**”);

(vi) Click! Business customer deposits and pro-rated customer advanced payments for services;

(vii) Copies of all customer account information and other Click! Business information (the “**Records**”) reasonably requested by Rainier; and

(viii) All defenses, claims, deposits, prepayments, refunds, causes of action, credits, warranties (including manufacturer’s warranties), rights of recovery, rights of set off and rights of recoupment relating to any right, property or asset included in the Related Surplus Assets, or against any party under the Transferred Contracts.

(b) Updated Asset Schedules. On the tenth (10th) Business Day prior to the Transfer of Operational Control, Tacoma Power shall deliver to Rainier revised Schedules 2.2(a)(i), 2.2(a)(iv) and 2.2(a)(v), which shall set forth lists of assets of the type required to be disclosed thereon and relating to the Click! Business that Tacoma Power owns or has the right to own as of such date, including any assets acquired by Tacoma Power after the date hereof (the “**Updated Asset Schedules**”) and a statement indicating the value of the Advanced Customer Payments as defined in Section 2.6(a). No later than five (5) Business Days prior to the Transfer of Operational Control Date, Rainier shall notify Tacoma Power whether it accepts or requires revisions to the Updated Asset Schedules or the statement of Advanced Customer Payments. If Rainier accepts the Updated Asset Schedules and Advanced Customer Payments as delivered by

**EXHIBIT P**  
**TRADEMARK LICENSE AGREEMENT**

THIS AGREEMENT, effective as of \_\_\_\_\_, \_\_\_ is by and between **City of Tacoma, Department of Public Utilities, Light Division**, a municipal corporation of the state of Washington, (“Licensor”) and Rainier Connect North, LLC, a Washington limited liability company (“Licensee”). The parties hereto are hereinafter collectively referred to as the “Parties.” Capitalized terms used herein and not defined shall have the meanings assigned to them in the IRU Agreement.

WHEREAS, Licensor is the owner of two (2) Washington state trademarks, one for “Click! Cable TV” and symbol (Washington trademark registration number 53233 under trademark classifications 35 and 38) and one for “Click! Cable TV” (Washington trademark registration number 54077 under trademark classification 41), shown in **Exhibit P1** hereto (collectively the “Marks”);

WHEREAS, Licensor has used the Marks in connection with the marketing and operation of its retail and wholesale communications business (“Click! 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 Commercial System, to Licensee as of the Effective Date of this IRU Agreement;

WHEREAS, Licensee desires to use the Marks in connection with the use of the Tacoma Power Commercial System in the manner and subject to the terms and conditions set forth in this Agreement and the IRU Agreement; and

NOW, THEREFORE, In consideration of the premises and the mutual covenants and agreement of the Parties set forth herein and other good and valuable consideration, the sufficiency of which is hereby mutually acknowledged, the Parties agree as follows:

1. **GRANT OF LICENSE.** Licensor grants to Licensee an exclusive, royalty-free non-transferable license to use the Marks in connection with the Tacoma Power Commercial System, throughout the Tacoma Power Commercial Service Area depicted in IRU Agreement, Exhibit A1.

2. **USE OF THE MARKS.** Licensee shall comply with the following requirements when using the Marks:

2.1 The use must be accompanied by the following text:

All rights reserved. [Insert Mark] is a trademark of City of Tacoma.

2.2 The use must comply with the applicable provisions of the guidelines set forth in **Exhibit P2** attached hereto.

3. **NO ASSIGNMENT.** This license to use the Marks may not be assigned or otherwise transferred by Licensee, under any circumstances, without the prior, express, written

consent of Licensor. Licensor does not grant, and nothing in this Agreement shall be construed as granting, to Licensee the right to license, sublicense, or authorize others to use the Marks.

#### 4. OWNERSHIP.

4.1 Licensee acknowledges that the Marks are valid, are the exclusive property of Licensor, and can lawfully be used only with the express license or consent of Licensor. Licensee shall not at any time do, or cause to be done, any act or thing contesting or in any way impairing or intending to impair the validity of the Marks and/or Licensor's exclusive rights, title, and interest in and to the Marks.

4.2 Licensee shall not register or apply to register the Marks, either alone or in combination with any other word(s) and/or design(s), in any country, state, or jurisdiction. Licensee shall not in any manner represent that it owns the Marks, and Licensee hereby acknowledges that its use of the Marks shall not convey any rights, title, or interest in or to said Marks in Licensee's favor, but that all use of the Marks by Licensee shall inure to the benefit of Licensor.

4.3 Licensee shall be responsible for all costs associated with maintaining the registration of the Marks, including all fees charged by the Washington Secretary of State associated with renewing the Marks. Licensee shall provide copies of all filings and correspondence related to the Marks to Licensor.

#### 5. TERM AND TERMINATION.

5.1 Unless sooner terminated under the provisions of Section 5.2 below, or by mutual agreement of the Parties in writing, this Agreement shall continue so long as the IRU Agreement is in full force and effect. In the event that the IRU Agreement is terminated, by either Party and for any reason, this Agreement shall automatically terminate.

5.2 If Licensee fails to comply with any of the provisions of this Agreement, Licensor may terminate this Agreement by express written notice to Licensee; provided, however, that if Licensee, within 60 days after Licensor's notice, cures or otherwise corrects such violation or noncompliance to Licensor's reasonable satisfaction, said termination notice shall be of no further force or effect and this Agreement shall be reinstated under all the terms and conditions as existed before the notice of termination.

5.3 Upon termination of this Agreement, Licensee shall permanently discontinue all use of the Marks and refrain from using any other service mark, trademark, trade name, corporate name, or any other designation confusingly similar to any one or all of the Marks.

#### 6. INDEMNITY.

6.1 Licensee shall indemnify and defend Licensor against any loss or losses incurred through claims, actions, or lawsuits by third parties against Licensor involving or arising from the use of the Marks by Licensee, and shall hold Licensor harmless for

# EXHIBIT 3



## **SPECIAL MEETING NOTICE**

### **City of Tacoma Public Utility Board**

**Wednesday, October 30, 2019  
5:30 p.m.  
Ground Floor Auditorium  
Tacoma Public Utilities  
3628 South 35<sup>th</sup> Street  
Tacoma WA 98409**

1. Call to Order
2. Roll Call
3. Resolution U-11116 – Authorize Tacoma Power to declare surplus utility-owned property including certain inventory, equipment, and vehicles allocated to the Click! Network together with the excess capacity of the Tacoma Power HFC Network, part of which is used by what is commonly referred to as the Click! Network; and authorize execution of the Click! Business Transaction Agreement by and between Tacoma Power and Mashell, Inc., d/b/a Rainier Connect and Rainier Connect North LLC.
4. Adjournment

#### **Special meeting materials:**

<https://www.mytpu.org/about-tpu/public-utility-board/2019-agendas-minutes/>

#### **Click! information:**

<https://www.mytpu.org/community-environment/projects/click-network-update/>



The City of Tacoma does not discriminate on the basis of disability in any of its programs, activities, or services. To request this information in an alternative format or to request a reasonable accommodation, please contact the TPU Director's Office at 253-502-8201. TTY or speech to speech users please dial 711 to connect to Washington Relay Services.

# EXHIBIT 4

ID	Outline Nu	Task Name	Start
0	0	<b>Exhibit A2 - Transition Plan Gantt Chart</b>	<b>4/22/19</b>
97	2	<b>Approved date</b>	<b>11/5/19</b>
98	3	<b>Post-Approval (Pre-Close) Period</b>	<b>11/6/19</b>
99	3.1	[LEGAL] Post-Approval Activities	11/6/19
101	3.1.1.1	City of Tacoma Cable Franchise Agreement Establishment	11/6/19
102	3.1.1.2	Other Cities Franchise Agreement Establishment	2/6/20
103	3.1.2	Contract Assignment and Assumption	11/6/19
110	3.1.3	Regulatory Compliance and Reporting Requirements Definition	11/6/19
114	3.1.4.1	Click! Network Vendor and Supplier notifications	11/6/19
115	3.1.4.2	Click! Network Employees notifications	11/6/19
116	3.1.4.3	Click! Network ISP/MSA notifications	11/6/19
117	3.2	<b>[OPERATIONS] Post-Approval Activities</b>	<b>11/6/19</b>
118	3.2.1	Facilities Access and Security Activities	11/6/19
121	3.2.2	Inventory Asset Transfer	11/6/19
124	3.2.3	Billing Conversion Activities	11/6/19
127	3.2.4	Fullfillment Services Transition	2/20/20
134	3.3	<b>[INFRASTRUCTURE] Post-Approval Activities</b>	<b>11/6/19</b>
135	3.3.1	Network Mapping Activities	2/21/20
137	3.3.2	Ancillary Services Contracts	11/6/19
141	3.3.3	Fiber separation activities	11/6/19
150	3.3.4	Network Cut-Over (Interconnection)	1/23/20
152	3.3.5	Infrastructure Contract Administration	11/6/19
155	3.4	<b>[MEDIA &amp; COMMUNICATIONS] Post-Approval Activities</b>	<b>11/6/19</b>
157	3.4.1.1	Rainier Connect Customer Notifications	11/6/19
158	3.4.1.2	Rainier Connect Employee Notifications	11/6/19
160	3.4.2.1	Click! Network Retail Customer notifications	11/6/19
162	3.4.2.3	Click! Network FCC notifications	11/6/19
163	3.4.2.4	Click! Transition General Public Updates	11/6/19
164	3.4.2.5	Click! Transition Ongoing Communications Updates	11/6/19
165	3.5	<b>[FINANCE] Post-Approval Activities</b>	<b>1/29/20</b>
166	3.5.1	A/R & A/P Allocation Determination	1/29/20
169	3.5.2	Asset disposition	2/7/20
171	3.6	<b>[HR] Post-Approval Activities</b>	<b>11/6/19</b>
172	3.6.1	Personnel Activities	11/6/19
174	4	<b>Closing Date</b>	<b>3/6/20</b>
175	5	<b>Post-Close Period</b>	<b>3/6/20</b>

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# EXHIBIT 5

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)

# EXHIBIT 6

## **Construction and Maintenance**

Tacoma Power has a number of established preventive and predictive maintenance programs and continues to develop more. For example, the substation predictive maintenance program can identify substation equipment requiring corrective action before a failure occurs through utilization of infrared, oil sample testing, and dissolved gas analysis. Tacoma Power owns and maintains approximately 49,000 power poles. The Pole Replacement program strategy is to test and treat 9% of the poles annually maintaining an 11-year cycle. Tacoma Power also performs tree trimming around its distribution and transmission lines, maintaining two and four year trimming cycles along with programs to replace dangerous trees with utility friendly trees.

## **Telecommunications Infrastructure**

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

The network consists of a hybrid fiber-optic coaxial ("HFC") system, which delivers two-way signals for cable TV, cable modem Internet services, and advanced metering. In addition, SONET ("Synchronous Optical Network") and Gigabit Ethernet technologies are used to support communications across Tacoma Power's transmission and distribution system and to carry out data transport services for commercial customers. The network was designed and constructed to meet high telecommunications standards, containing a redundant backbone and redundant service loops, which seek to ensure uninterrupted signal transport in the event of a network break. A network surveillance system allows Tacoma Power to monitor the system at all times.

***Commercial Telecommunication Services.*** Launched in 1998 under the brand name Click! Network, Tacoma Power provides three commercial telecommunication services to customers of Tacoma Power: retail cable television, wholesale broadband transport and wholesale high-speed Internet over cable modem. Click! Network is one of several providers of telecommunications services in the Tacoma area.

Click! Network is accounted for as part of the Electric System. In 2016 Click! Network's annual revenues were approximately \$26.6 million, and annual operating expenses plus gross earnings taxes were approximately \$29.7 million.

Cable television is Click! Network's primary retail business. Click! currently has approximately a 15% share of a very competitive local cable television market. Cable TV products available to both residential and business customers include broadcast television, digital and high-definition channels, digital video recording capability, TiVo with access to over-the-top ("OTT") content such as Netflix, Hulu, YouTube and Pandora, TVEverywhere, and a wide variety of video-on-demand services. Video-on-demand services include local programming tied to schools, colleges, local governments and community organizations strengthening Click! Network's brand identity in the communities served.

Under wholesale Master Service Agreements, seven telecommunications carriers provide high capacity last mile data transport circuits to their customers utilizing Click! Network's telecommunications infrastructure. The seven telecommunications carriers provide SONET data services ranging from DS-1 lines to OC-48 lines and customized Metro Ethernet circuits to meet data transport and web access needs of large and small businesses in the Tacoma area.

Also under wholesale Master Service Agreements, two qualified locally based Internet Service Providers ("ISPs") provide high-speed Internet services via cable modems to their customers utilizing Click! Network's telecommunications infrastructure. The ISPs provide a variety of speed packages to meet the needs of the residential

and business consumers in the Tacoma area. As part of the contract, the two ISPs also provide customer service, cable modem installation, customer premise equipment and technical support services to their Internet customers.

Click! ended 2016 with 17,468 cable TV customers, 23,344 wholesale high-speed Internet service customers, and 173 wholesale broadband transport circuits.

Click! also continues to provide the City of Tacoma I-Net services to approximately 190 sites to keep the cost of telecommunications low for many governmental entities.

Click! Network implemented a 12.9% cable TV service rate increase effective March 1, 2017. An additional cable TV rate increase is planned for March 1, 2018. These cable TV rate increases are expected to generate approximately \$7.7 million in additional revenue. A major portion of additional revenue will be used to cover increases in programming costs.

### **CAPITAL IMPROVEMENT PROGRAM**

Tacoma Power has funded its past capital improvement programs from contributions in aid of construction, proceeds of Parity Bonds and subordinate lien revenue bonds, and Revenues of the Electric System. The actual amounts spent during the past five years, together with the sources of funds used, are displayed in the table below.

#### **Historical Sources of Capital Improvement Funds (\$000)**

Source of Funds	2012	2013	2014	2015	2016
Parity and Subordinate Lien Bond Proceeds	\$ 51,730	\$ 35,723	\$ 58,834	\$ 58,003	\$ 50,995
Contributions in Aid of Construction <sup>(1)</sup>	4,716	3,735	3,029	4,777	3,293
Cash Reserves	16,643	23,656	21,160	19,301	30,536
<b>Total</b>	<b>\$73,089</b>	<b>\$63,114</b>	<b>\$83,023</b>	<b>\$82,081</b>	<b>\$84,824</b>

(1) Customer contributions to fund capital projects.  
Source: Tacoma Power

Tacoma Power has a long-term goal to finance an average of 50% of its normal capital requirements from net operating revenues with the balance from contributions in aid of construction received from customers and borrowed funds. However, due to varying water conditions, the amount of the capital improvement program, and periodic cash defeasance of outstanding Parity Bonds, the amount actually financed from net operating revenues varies from year to year. From 2012 to 2016, Tacoma Power financed an average of 66% of its capital improvements from borrowed funds. Tacoma Power's policy is to fund major projects with borrowed funds.

the City Council. The Department's budget is presented to the Board for review and approval and then forwarded to the City Council for approval and inclusion in the City's budget. The Board meets twice monthly.

The Department consists of the Light Division ("Tacoma Power"), Water Division ("Tacoma Water"), and Belt Line Railroad Division ("Tacoma Rail"). The Board has supervision and control over most Department business. In the case of budgets, rates, bond issues, and additions and betterments to a utility system and system expansions, actions approved by the Board must also be approved by the City Council.

The Board appoints the Director of Utilities who is the chief executive officer of the Department. The Board must evaluate the performance of the Director annually and reappoint the Director every two years subject to reconfirmation by the City Council with the next reconfirmation scheduled for 2017. The reappointment of the Director has been approved by the Board and is currently pending before the City Council. William A. Gaines will retire from the position, effective December 2, 2017. The Director, with the concurrence of the Board, has the power to appoint division superintendents.

Utility rates and charges are initiated by the Board and adopted by the City Council, and are not subject to review or approval by any other governmental agency. See "ELECTRIC SYSTEM CUSTOMERS, ENERGY SALES, REVENUES AND RATES—Electric Rates."

The City Charter provides that the revenues of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof, including a reasonable gross earnings tax imposed by the City Council for the benefit of the general fund of the City, 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 service to consumers. The funds of any utility may not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City. See "FINANCIAL INFORMATION—Taxes Imposed on Tacoma Power."

### **Tacoma Power - General**

Tacoma Power is organized into six business units:

- **Generation** operates and maintains Tacoma Power's four hydroelectric generating projects (Cowlitz, Cushman, Nisqually and Wynoochee) and the associated recreational facilities, fish hatcheries and other project lands.
- **Power Management** manages, schedules and directs the power supply portfolio which includes Tacoma Power-owned generation and power supply contracts. Power Management markets bulk and ancillary power supply services, performs power trading activities, plans for and acquires conservation resources, and is responsible for compliance with various state, regional and federal regulatory mandates.
- **Transmission and Distribution** plans, constructs, operates and maintains the transmission and distribution systems including substations, the underground network system, revenue metering facilities and all overhead transmission and distribution systems.
- **Rates, Planning and Analysis** plans for and manages the retail rate process, financial planning activities, operations and capital budget development and monitoring, strategic asset management, construction project management, strategy management, and energy risk management analysis and modeling.
- **Click! Network** plans, constructs, operates and maintains a hybrid fiber coaxial ("HFC") telecommunications network that supports the operation of Tacoma Power's electrical transmission and distribution system, provides retail cable TV, and wholesale high-speed Internet and data transport services to resellers.
- **Utility Technology Services** ("UTS") addresses existing and emerging technology requirements essential to managing Tacoma Power's computing systems. This includes supporting and enhancing utility system operations, communications, metering, cyber security, relevant smart grid applications, and the information technology strategic planning. UTS unifies the planning, design, deployment and maintenance of operational

# EXHIBIT 6 (a)

## **2016 SUPERINTENDENT'S REPORT TACOMA POWER**

### **CLICK!**

#### Financial Status

Click! Network commercial revenues declined from \$27.3 million in 2015 to \$26.7 million in 2016. The retail cable TV customer base dropped 4.6 percent ending the year with 17,468 active customers, and the Internet cable modem customers served by the three wholesale Internet Service Providers (ISPs) - Advanced Stream, Net-Venture, Inc., and Rainier Connect, grew by .4 percent ending the year with 23,344 active customers. Click! provided 173 broadband transport circuits to Click!'s wholesale service providers allowing them to provide an array of telecommunication services to many businesses in the service area. Additionally, Click! continued to provide the City of Tacoma I-Net services to approximately 190 sites, keeping the cost of telecommunications low for many government entities, and also provided support for just over 15,000 gateway power meter connections.

#### Cable TV Rate Adjustments

Because a final policymaker decision regarding Click! Network's long term business plan remained outstanding in 2016, no cable television rate increases were implemented. Although Cable television prices continue to remain under market, the postponement of rate adjustments contributed to the decline in revenues.

#### Channel Additions

During 2016, Click! Network migrated 10 networks from optional service levels to its Broadcast package and migrated Big Ten Network and Sprout from its Sports & Family package to its Click! ON Digital package. Three networks discontinued operations in 2016, Pivot, UWTV, and MundoMax, but TV Tacoma HD was added, bringing the total to 376 video and 65 audio channels. Click! also added a variety of national and local video on demand content for a total offering of over 12,000 hours of content to make the product more competitive. Additionally, Click! added new networks to its Watch TV Everywhere service. Click!'s cable TV customers can now enjoy watching Click! video content from 84 networks on any of their mobile devices with an internet connection.

#### Website Improvements

Click! Network launched a new website in June 2016. Improvements included streamlined navigation, responsiveness to mobile device screen sizes, enhanced TV listings, and an online shopping cart. Click! cable television products, along with ISP internet packages, are now prominently displayed, enabling the potential customer to select services and submit a self-service order online.

### Customer Satisfaction Survey

Customer Satisfaction survey cards were mailed to all new cable TV customers and to all customers who had a service related issue. Click! customer service and technicians representatives received ratings averaging 3.7 and 3.8 respectively on a scale of 1 – 4. In addition, a Customer Satisfaction Survey conducted on Click! Network's behalf by Washington State University's Social & Economic Sciences Research Center (SESRC) showed a mean average overall customer satisfaction score of 8.08 on a 1-10 scale. The results revealed that customers are very satisfied with the services provided by Click! and in particular, recognized the quality of service provided by our Sales and Service Representatives and Service Technicians.

### New Tools

Click! purchased the CPAT Flex Digital Leakage Monitoring System to address concerns about interference from cable leakage in the aeronautical and LTE bands. The CPAT Flex Digital Leakage Monitoring System automates the signal leakage detection process freeing up technicians for other tasks. Since the tool is continuously monitoring the network, signal leakage is quickly detected and repaired.

Click! also purchased the CheetahXD software to replace the former Cheetah Lite version. The CheetahXD software helps Click! network technicians manage the HFC network by providing end-to-end visibility across the HFC operations environment, and enables NOC personnel to proactively isolate network problems, trace root causes, assess potential impacts, and prioritize truck rolls by pinpointing fault and performance issues in real-time. With CheetahXD software, HFC network assurance is simplified, operational costs are reduced, and network performance is improved resulting in enhanced customer satisfaction.

### Spectrum Reclamation

In 2015, Click! fully converted its system from analog to digital and freed up nineteen (19) 6 MHz channel slots. Since then, 6 of those freed up channels have been added to the bank of downstream Internet channels to meet the growth in customers and Internet usage. Therefore leaving 13 channels available for use.

### Network Bandwidth

During 2016, Click! added NETFLIX cache servers to the local network. The addition of these cache servers has reduced bandwidth utilization by as much as 30%. Click! added an additional 10 Gig connection at Downtown South and Downtown North for a total of 30 Gig potential capacity at each location. The Core routers are being upgraded from the Cisco 7600 platform to the Cisco ASR 9912 platform. This will provide the necessary 10 gig ports and throughput to support current and future network growth. The Cable Modem Termination Systems (CMTS) are also being upgraded. The existing Cisco uBR 10000 series CMTSs are going to be replaced with new Cisco cBR-8 CMTSs. The first set of Cisco cBR-8 CMTSs were purchased during 2016. These will support DOCSIS 3.1 Gigabit services and provide higher port and bandwidth capacity for meeting bandwidth demands and subscriber growth.

# EXHIBIT 7

## MEMORANDUM

**TO:** Jeff Lueders  
**FROM:** Pam Burgess  
**DATE:** 2/28/2019  
**SUBJECT:** Click! Network 2018 Cable TV Annual Report



The following information constitutes Click! Network's 2018 Annual Cable TV Report, as required in Section 9.2 of Ordinance No. 27846. The data is accurate as of yearend 2018.

### **A. Gross Revenue Report (attached)**

### **B. Summary of activities within the Tacoma city limits:**

- Total customers for each general category of service:
  - Broadcast: 11,774
  - Standard: 9,522
  - Digital: 3,233
  - Premium: 2,095
- Number of homes passed: 84,554
- Total miles of cable plant: 912.88
- Miles of overhead plant: approximately 71% = 648.55
- Miles of underground cable plant: approximately 29% = 264.34
- Other system facilities and equipment constructed:

During 2018, 4,962 radio frequency leaks were detected and resolved, resulting in reduced interference and improved service performance. An annual fly-over test to assess the system's signal leakage in the aeronautical band was performed in March, resulting in a finding that 99.87% of points passed were within the required tolerance of signal egress.

In 2018, Click! deployed fiber-to-the-premises (FTTP) technology for new plant extension as it is the state of the art technology for modern network architecture and enables reliable and cost efficient delivery of Gigabit internet services. FTTP is currently deployed in The Knolls, a 165 lot subdivision located in University Place. Two multiple dwelling units in Tacoma are currently under construction and being wired for FTTP exclusively. It is anticipated these complexes will be occupant-ready in the 1<sup>st</sup> quarter of 2019. Internet services delivered over FTTP will be symmetrical with same download and upload speeds ranging from 250 Mbps to 1000 Mbps.

Several multiple dwelling unit complexes of under 100 units each were wired for Click! service delivery in 2018. One complex of note was Stadium Apartments, a 147-unit complex that is providing internet access directly through a commercial Ethernet connection over the Click! network.

# EXHIBIT 7 (a)



# EXHIBIT 8

# TITLE 12

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## Utilities

# TITLE 12

## UTILITIES

**Chapters:**

Chapter 12.01	Utility Charges.....	5
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Chapter 12.08	Wastewater and Surface Water Management – Regulation and Rates.....	57
Chapter 12.09	Solid Waste, Recycling, and Hazardous Waste.....	113
Chapter 12.10	Water – Regulations and Rates.....	145
Chapter 12.11	<i>Expired</i> .....	167
Chapter 12.12	<i>Repealed</i> .....	168
Chapter 12.13	CLICK! Network Cable TV Products .....	169

# EXHIBIT 9

CITY OF TACOMA, WASHINGTON  
DEPARTMENT OF PUBLIC UTILITIES  
TACOMA POWER

STATEMENTS OF REVENUES, EXPENSES AND CHANGES IN NET POSITION

	YEAR ENDED DECEMBER 31,	
	2018	2017 (As Restated)
<b>OPERATING REVENUES</b>		
Sales of Electric Energy .....	\$411,393,120	\$401,631,506
Other Operating Revenue .....	18,539,960	18,192,038
Click! Network Operating Revenue .....	25,358,403	26,519,861
Total Operating Revenue .....	455,291,483	446,343,405
<b>OPERATING EXPENSES</b>		
Operations		
Purchased and Interchanged Power .....	134,618,445	135,822,340
Generation .....	16,241,304	23,118,677
Transmission .....	29,394,316	27,562,757
Distribution .....	15,781,781	19,675,524
Other .....	20,140,445	20,077,132
Maintenance .....	31,200,935	30,074,370
Telecommunications Expense .....	22,791,699	25,309,470
Administrative and General .....	43,716,689	43,377,927
Depreciation .....	53,869,012	57,231,313
Taxes .....	21,486,970	20,755,847
Total Operating Expenses .....	389,241,596	403,005,357
Net Operating Income .....	66,049,887	43,338,048
<b>NON-OPERATING REVENUES (EXPENSES)</b>		
Interest Income .....	3,719,705	2,251,477
Contribution to Family Need .....	(100,000)	(100,000)
Other .....	1,776,333	(1,534,389)
Interest on Long-Term Debt (Net of AFUDC).....	(18,834,946)	(18,209,650)
Amortization of Debt Premium .....	1,615,670	4,132,856
Total Non-Operating Expenses.....	(11,823,238)	(13,459,706)
Net Income Before Capital Contributions and Transfers .....	54,226,649	29,878,342
Capital Contributions		
Cash .....	8,771,749	8,806,311
Donated Fixed Assets .....	618,713	149,323
BABs and CREBs Interest Subsidies .....	3,824,135	3,687,700
Transfers		
City of Tacoma Gross Earnings Tax .....	(34,384,956)	(34,141,875)
<b>CHANGE IN NET POSITION</b> .....	33,056,290	8,379,801
<b>TOTAL NET POSITION - BEGINNING OF YEAR</b> .....	830,375,494	821,995,693
<b>TOTAL NET POSITION - END OF YEAR</b> .....	\$863,431,784	\$830,375,494

*The accompanying notes are an integral part of these financial statements.*

**CITY OF TACOMA, WASHINGTON  
DEPARTMENT OF PUBLIC UTILITIES  
TACOMA POWER**

**NOTES TO FINANCIAL STATEMENTS  
YEARS ENDED DECEMBER 31, 2018 AND 2017**

**NOTE 1 OPERATIONS**

**OPERATIONS OF TACOMA POWER** - The Light Division, doing business as Tacoma Power (Tacoma Power or the Division), is a division of the City of Tacoma, Washington (the City), Department of Public Utilities (the Department) and is included as an enterprise fund in the Comprehensive Annual Financial Report (CAFR) of the City. The Department consists of Tacoma Power, Tacoma Water and Tacoma Rail and is governed by a five-member Public Utility Board (the Board) appointed by the City Council. Certain matters relating to utility operations, such as system expansion, issuance of bonds and setting of utility rates and charges, are initiated and executed by the Board, but also require formal City Council approval. Tacoma Power owns and operates the City's electrical generation and distribution facilities and telecommunication infrastructure. Tacoma Power serves approximately 178,000 of retail customers and has 813 employees. Tacoma Power is organized into six business units: Generation, Power Management, Transmission and Distribution, Rates, Planning and Analysis, Click! Network, and Utility Technology Services.

**GENERATION** operates four hydroelectric generating projects (Cowlitz, Cushman, Nisqually and Wynoochee) and the associated recreational facilities, fish hatcheries and other project lands.

**POWER MANAGEMENT** manages the power supply portfolio, markets bulk and ancillary power supply services, schedules and dispatches division-owned generation and contract power supplies and performs power trading and risk management activities. Revenues and the cost of electric power purchases vary from year to year depending on the electric wholesale power market, which is affected by several factors including the availability of water for hydroelectric generation, marginal fuel prices and the demand for power in other areas of the country.

**TRANSMISSION AND DISTRIBUTION** plans, constructs, operates and maintains the transmission and distribution systems including substations, the underground network system, supervisory control and data acquisition (SCADA) systems, revenue metering facilities and all overhead transmission and distribution systems. Electricity use by retail customers varies from year to year primarily because of weather conditions, customer growth, the economy in Tacoma Power's service area, conservation efforts, appliance efficiency and other technology.

**RATES, PLANNING AND ANALYSIS** plans for and manages the retail rate process, financial planning, analysis and modeling, budget strategies, the capital program and risk management.

**CLICK! NETWORK** plans, constructs, operates and maintains a hybrid fiber coaxial (HFC) telecommunications network that supports the operation of Tacoma Power's electrical transmission and distribution system, provides retail cable TV and wholesale high-speed Internet services to residential and business customers, and data transport services to retail customers.

**UTILITY TECHNOLOGY SERVICES (UTS)** maintains communication networks, operational and informational technology systems, and related equipment and infrastructure to optimize utility operations and improve reliability and service quality. This includes a Project Management Office that establishes and leads Tacoma Public Utilities Information Systems project governance process and implements project portfolio management tools. UTS is responsible for all matters related to Tacoma Power's compliance with North American Electric Reliability Corporation (NERC) Reliability Standards, maintains overall responsibility for the NERC Reliability Standards and manages Tacoma Power's Internal Reliability and Compliance Project.

# EXHIBIT 9 (a)

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**

# EXHIBIT 10



City of Tacoma  
Office of the City Clerk

## CERTIFICATE OF CITY CLERK

I, Doris Sorum, City Clerk of the City of Tacoma, Washington, do hereby certify that the attached is a full, true and correct copy of Substitute Resolution No. 33668 adopted by the City Council on April 8, 1997.

Dated this 15<sup>th</sup> day of January 2020.

  
Doris Sorum, City Clerk  
City of Tacoma, Washington





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



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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 APR 08 1997

*Rick Eisenberg*  
Mayor

*Rick Rosenblatt*  
Attest: City Clerk

Approved as to form & legality:

*S. S. Karavites*  
Assistant City Attorney

Requested by Public Utility  
Board Resolution No. U-9258

599c



# REQUEST FOR ORDINANCE OR RESOLUTION

CITY CLERK USE

Request #:  
Ordinance #:  
Resolution #:

Request #:	6366
Ordinance #:	
Resolution #:	33668

1. Date: **March 20, 1997**

Requesting Department/Division/Program	Sponsored By	Phone/Extension
2. <b>Tacoma Public Utilities/Light Division</b>		
Contact Person (for questions):		Phone/Extension
3. <b>Steven J. Klein</b>		502-8203

4. Preparation of Resolution is requested for the City Council meeting of Tuesday April 8, 1997

5. Summary Title/Recommendation: (A concise sentence, as it will appear on the Council Agenda)

Authorize the development of a broad band telecommunications network to improve electric utility service and improve the telecommunications infrastructure available to the community. This would include the business plan for a broad band telecommunications system and the implementation of the telecommunications system.

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?)

The Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment and research on similar activities in other municipalities. It is projected that the cost for the construction and installation of this system will be approximately \$55 million to construct, plus more than \$10 million for startup operations. However, the Light Division believes that the overall benefits to the City, the Light Division and its customers will exceed the projected costs.

In addition to the benefits to the Light Division that the system would deliver through improved communication abilities, the system will also have the ability to transport data, provide high speed Internet access and deliver full cable television service.

7. Financial Impact: (Future impact on the budget.)

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 March 20, 1997	Attached

RECEIVED  
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 CITY CLERK'S  
 OFFICE

9. Funding Source: (Enter amount of funding from each source)

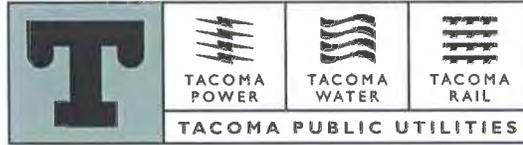
Fund Number & Name:	State \$	City \$	Other \$	Total Amount

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
--	---	--

46

# EXHIBIT 10 (a)



**CERTIFICATE**

I, Charleen Jacobs, do hereby certify that I am the Clerk of the Public Utility Board of the City of Tacoma, and that record and maintain custody of the official records and minutes of the Public Utility Board.

I further certify that the attached is a full, true, and correct copy of Amended Substitute Resolution U-9258 dated April 9, 1997.

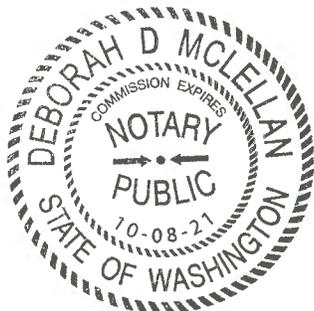
In witness whereof, I have set my hand this 16 day of January 2020.

Charleen Jacobs  
Clerk, Public Utility Board  
Tacoma Public Utilities  
City of Tacoma, Washington

Attachment

State of Washington  
County of Pierce

Subscribed and sworn to before me this 16 day of January 2020.



Deborah D. McLellan  
Notary Public in and for the  
State of Washington, County of Pierce  
My commission expires 10-8-21



AMENDED  
SUBSTITUTE  
**RESOLUTION NO.** U-9258

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3 WHEREAS the City of Tacoma, Department of Public Utilities,  
4 Light Division desires to: (1) develop a state-of-the-art fiber optic system  
5 to support enhanced electric system control, reliability and efficiency;  
6 (2) develop capability to meet the expanding telecommunications  
7 requirements in an evolving competitive electric market, the most critical of  
8 which is real-time, two-way interactive communications with individual  
9 energy consumers, (3) create greater revenue diversification through new  
10 business lines (i.e. internet transport, cable TV, etc.), (4) enhance  
11 traditional products and service, and (5) maximize return on Light Division  
12 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  
Light Division customers are projected to exceed and justify the initial cost,  
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 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: Daryl Hedman Chairman  
G. S. Karavitis Assistant City Attorney Bil Moss Secretary  
Lydia Stevenson Clerk

Adopted April 9, 1997

599d(a)



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



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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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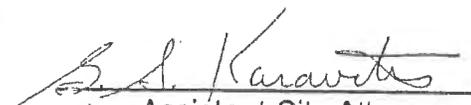
construction contracts, rate setting policies, debt financings, the public rights-of-way use for telecommunications agreements and quarterly reviews.

Adopted April 8, 1997

Mayor

Attest: City Clerk

Approved as to form & legality:

  
Assistant City Attorney

Requested by Public Utility Board Resolution No. U-9258

599c



# RESOLUTION NO.

SUBSTITUTE  
U-9258

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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 technology 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 service, 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 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 systems 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



1 WHEREAS the City Council and Public Utility Board will continue  
 2 to be involved in the future decision-making on this proposal including  
 3 construction contracts, and debt financing approvals, quarterly reviews on  
 4 the project direction during the startup period, approval of agreements for  
 5 use of City rights-of-way for telecommunications purposes which  
 6 agreements will (to the extent required by law) treat the Light Division  
 7 substantially similar to other franchises that the City grants for similar  
 8 businesses, and

9 WHEREAS the Public Utility Board hereby finds and determines  
 10 that the Light Division's proposal for a broad band telecommunications  
 11 system is in the best interests of the City, will serve as a public purpose,  
 12 and should be approved and implemented; Now, therefore,

13 BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

14 That the Board hereby approves the Light Division's proposal  
 15 including the Business Plan for a broad band telecommunications system,  
 16 and the Board recommends that the City Council approve a resolution to  
 17 authorize the Light Division to proceed to implement said proposal for a  
 18 broad band telecommunications system, and the Board recommends that  
 19 the City Council continue to be involved in the major policy decisions  
 20 including construction contracts, debt financings, the public rights-of-way  
 21 use agreements for telecommunications and quarterly reviews.

22 Approved as to form & legality:

23 Mark Bubenik

24 Chief Assistant City Attorney

25 Lydia Stevenson

26 Clerk

Ross Singleton

Acting Chairman

W. J. Barker

Acting Secretary

Adopted 3/26/97

of March 26, 1997

REQUEST FOR RESOLUTION

Date: March 19, 1997

INSTRUCTIONS: File request in the Office of the Director of Utilities as soon as possible but not later than nine working days prior to Board meeting at which it is to be introduced. Completion instructions are contained in Administrative Policy POL-104.

1. Summary title for Utility Board agenda: (not to exceed twenty-five words)  
Authorize the development of a broad band telecommunications network to improve electric utility service and improve the telecommunications infrastructure available to the community.

2. A resolution is requested to: (brief description of action to be taken, by whom, where, cost, etc.)  
Approve the Light Division's proposal including the business plan for a broad band telecommunications system and authorize the Light Division to proceed to implement the telecommunications system.

The Light Division projects that the cost for the construction and installation of this telecommunications system will be approximately \$55 million dollars to construct, plus more than \$10 million dollars for startup operations. However, the Light Division believes that the overall benefits to the City, the Light Division, and its customers will exceed the projected costs.

3. Summarized reason for resolution:  
The Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment, and research on similar activities in other municipalities. Presentations have been made to neighborhood councils, chambers of commerce, local economic development groups, and the Tacoma Public School Board. A public hearing on the proposed telecommunications system was held by the Public Utility Board on March 12, 1997, and another public hearing was held by the City Council on March 18, 1997. Information summarizing the Telecommunications study and our recommendations was made available at the presentations and public hearings.

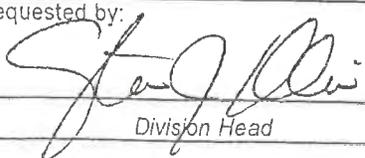
In addition to the benefits to the Light Division that the system would deliver through improved communications abilities, the system will also have the ability to transport data, provide high speed Internet access, and deliver full cable television service.

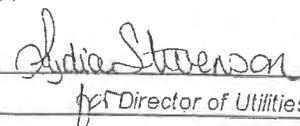
4. Attachments:  
a. Letter to the Public Utility Board and City Council from Mark Crisson

5.  Funds available

6. Deviations requiring special waivers:  None

Initiated by:  
  
Section Head

Requested by:  
  
Division Head

Approved:  
  
Director of Utilities



Mark Crisson  
Director

3628 South 35th Street  
P.O. Box 11007  
Tacoma, WA 98411-0007

Divisions  
Light  
Water  
Belt Line

March 20, 1997

To the Chairman and Members of the Public Utility Board and  
To the Mayor and Members of the City Council

### RESOLUTION NO. U-

#### RECOMMENDATION

The Light Division requests approval by the Public Utility Board and the City Council to develop a broad band telecommunications network as described in the Light Division Telecommunication Study. This action authorizes project implementation and the initiation of design and contract specifications. The Light Division will bring subsequent requests for construction contract and debt issuance approval to the Public Utility Board and City Council as the project progresses. Both policy bodies will also be periodically advised of project status during the development process.

#### BACKGROUND

In preparation for this request, the Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment, and research on similar activities in other municipalities. Staff has made presentations to neighborhood councils, chambers of commerce, local economic development groups, the Tacoma Port Commission, and the Tacoma Public School Board. Two joint Public Utility Board/City Council study sessions were held. A public hearing on the proposed telecommunications system was held by the Public Utility Board on March 12, 1997, and another public hearing was held by the City Council on March 18, 1997. Information summarizing the Telecommunications study and our recommendations was made available at the presentations and public hearings.

The Light Division estimates the cost of this telecommunications system will be approximately \$55 million dollars for construction and installation, plus more than \$10 million dollars for startup operations. The business plan indicates excellent financial potential even under conservative revenue and market penetration assumptions. We recognize the plan's projections are no guarantee of success, but we think the project risks are manageable and justified given the project benefits. These benefits include:

- Improves electric service by enabling distribution system automation, market access, and real-time, interactive communication with customers
- Provides better telecommunications and cable television service sooner and cheaper than other providers will deliver
- Significantly enhances regional economic development and quality of life by creating state-of-the-art telecommunications infrastructure and providing it to all businesses and residences throughout the community
- Creates opportunities for public private partnerships in the wholesale leasing of system capacity to retail telecommunications service providers
- Provides additional revenue to the Light Division and General Government through expansion of the market for telecommunications services

**SUMMARY**

The proposed telecommunications system will strengthen the Light Division's competitive position in the electric power industry through the provision of enhanced electric and telecommunication services to *all* Light Division customers. This system will serve a public purpose and is in the best interests of the City.

Very truly yours,



Mark Crisson  
Director of Utilities



# REQUEST FOR ORDINANCE OR RESOLUTION

CITY CLERK USE

Request #:  
Ordinance #:  
Resolution #:


1. Date: *March 20, 1997*

Requesting Department/Division/Program	Sponsored By	Phone/Extension
2. <i>Tacoma Public Utilities/Light Division</i>		
Contact Person (for questions):		Phone/Extension
3. <i>Steven J. Klein</i>		<i>502-8203</i>

4. Preparation of Resolution is requested for the City Council meeting of Tuesday April 8, 1997

5. Summary Title/Recommendation: (A concise sentence, as it will appear on the Council Agenda)

Authorize the development of a broad band telecommunications network to improve electric utility service and improve the telecommunications infrastructure available to the community. This would include the business plan for a broad band telecommunications system and the implementation of the telecommunications system.

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?)

The Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment and research on similar activities in other municipalities. It is projected that the cost for the construction and installation of this system will be approximately \$55 million to construct, plus more than \$10 million for startup operations. However, the Light Division believes that the overall benefits to the City, the Light Division and its customers will exceed the projected costs.

In addition to the benefits to the Light Division that the system would deliver through improved communication abilities, the system will also have the ability to transport data, provide high speed Internet access and deliver full cable television service.

7. Financial Impact: (Future impact on the budget.)

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 March 20, 1997	Attached
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9. Funding Source: (Enter amount of funding from each source)

Fund Number & Name:	State \$	City \$	Other \$	Total Amount
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If an expenditure, is it budgeted?  Yes  No Where? Org # Acct #

10. <i>Steven J. Klein</i> Department Director/Utility Division Approval	Approved as to Availability of Funds Director of Finance	City Manager/Director Utilities Approval
---	---	--



Mark Crisson  
Director

3628 South 35th Street  
P.O. Box 11007  
Tacoma, WA 98411-0007

Divisions  
Light  
Water  
Belt Line

March 20, 1997

To the Chairman and Members of the Public Utility Board and  
To the Mayor and Members of the City Council

### **RESOLUTION NO. U- 9258**

#### **RECOMMENDATION**

The Light Division requests approval by the Public Utility Board and the City Council to develop a broad band telecommunications network as described in the Light Division Telecommunication Study. This action authorizes project implementation and the initiation of design and contract specifications. The Light Division will bring subsequent requests for construction contract and debt issuance approval to the Public Utility Board and City Council as the project progresses. Both policy bodies will also be periodically advised of project status during the development process.

#### **BACKGROUND**

In preparation for this request, the Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment, and research on similar activities in other municipalities. Staff has made presentations to neighborhood councils, chambers of commerce, local economic development groups, the Tacoma Port Commission, and the Tacoma Public School Board. Two joint Public Utility Board/City Council study sessions were held. A public hearing on the proposed telecommunications system was held by the Public Utility Board on March 12, 1997, and another public hearing was held by the City Council on March 18, 1997. Information summarizing the Telecommunications study and our recommendations was made available at the presentations and public hearings.

The Light Division estimates the cost of this telecommunications system will be approximately \$55 million dollars for construction and installation, plus more than \$10 million dollars for startup operations. The business plan indicates excellent financial potential even under conservative revenue and market penetration assumptions. We recognize the plan's projections are no guarantee of success, but we think the project risks are manageable and justified given the project benefits. These benefits include:

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- Improves electric service by enabling distribution system automation, market access, and real-time, interactive communication with customers
- Provides better telecommunications and cable television service sooner and cheaper than other providers will deliver
- Significantly enhances regional economic development and quality of life by creating state-of-the-art telecommunications infrastructure and providing it to all businesses and residences throughout the community
- Creates opportunities for public private partnerships in the wholesale leasing of system capacity to retail telecommunications service providers
- Provides additional revenue to the Light Division and General Government through expansion of the market for telecommunications services

**SUMMARY**

The proposed telecommunications system will strengthen the Light Division's competitive position in the electric power industry through the provision of enhanced electric and telecommunication services to *all* Light Division customers. This system will serve a public purpose and is in the best interests of the City.

Very truly yours,



Mark Crisson  
Director of Utilities

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# RESOLUTION NO.

SUBSTITUTE  
U-9258

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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 technology 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 service, 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 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 systems 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



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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:

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Chief Assistant City Attorney

\_\_\_\_\_  
Secretary

\_\_\_\_\_  
Clerk

Adopted \_\_\_\_\_

**EXHIBIT 10 (b)**

# Telecommunications Study

by Tacoma City Light

Tacoma City Council  
Public Utility Board  
Joint Study Session  
February 18, 1997

## Why should a Publicly Owned Electric Utility be involved in Telecommunications?

- Board initiated RFP process in 1995
- Enhanced Telecommunication capability vital to the Utility in order to continue to improve service and provide choice to customers in rapidly changing environment.
- Investment in the community that provides a pathway to choice and competition.
- Over 100 years ago, Tacoma took steps to improve vital infrastructure to better serve our citizens.

# Key Operational Advantages to Tacoma City Light

- Electric system control and outage reporting
  - Savings to Tacoma City Light
  - Savings to customers
- Electric system performance monitoring and preventive maintenance
- Providing interactive communication link to customers

## Telecommunications Study Team

- Bruce Campbell, Metro Utility Communications Group
- F. Paul Carlson, Ph.D., Metropolitan Communications Consultants
- Linda Dethman, Dethman & Associates
- Stuart Hauser, Metro Utility Communications Group
- Peggy sue Heath, A.B.D., APEX Business Solutions
- Sandy Hunt, Ph.D., APEX Business Solutions
- Richard C. T. Li, P.E., Metropolitan Communications Consultants
- Bruce Mann, Ph.D., University of Puget Sound
- Catherine Rudolph, APEX Business Solutions
- Susan V. Marr, Metro Utility Communications Group
- Gene Starr and the research team at Market Data Research
- Staff team: Chandra Enos, Lisa Steadmon, and Steve Roberts, P.E.

# Telecommunications Study

## Brief Review of Part One

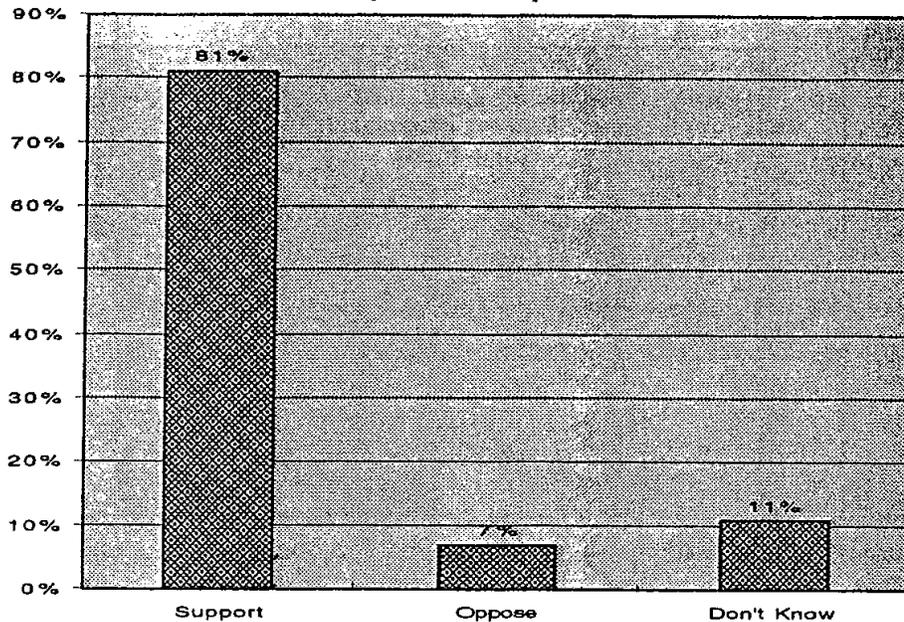
- Telecommunications technology
- Telecommunication companies
- Regulation: Federal, State, and Local
- Other cities and communities
- Local telecommunications history
- Existing telecommunications options in our local communities

## Business Market Research

- Survey of 200 businesses:
  - representing \$5 billion in revenue & 25,000 jobs
  - average of three locations in greater Tacoma area
- Importance of telecommunications links
  - 74% say links are extremely important to their success
  - 62% reported that a link being out one day would cause serious harm to their business; 20% said that it would shut them down
- 61% of businesses use Internet (but with limited access)
- 14% of employees telecommute (increasing to 18% in 2yr)
- Limited Experience with High Speed Lines
  - Two-thirds were not familiar with ISDN lines or T-1 lines

# Support for Tacoma City Light Telecommunications System

To what degree do you support Tacoma City Light building this new communications system to improve service to customers?



## Economic Development Impacts

- Market trends
  - Change in economic base
  - Downtown development activities
- Business Environment
- Telecommunications needs
  - Development activities at military bases
  - The expanding health services industry
  - Professional & financial services
  - Port of Tacoma

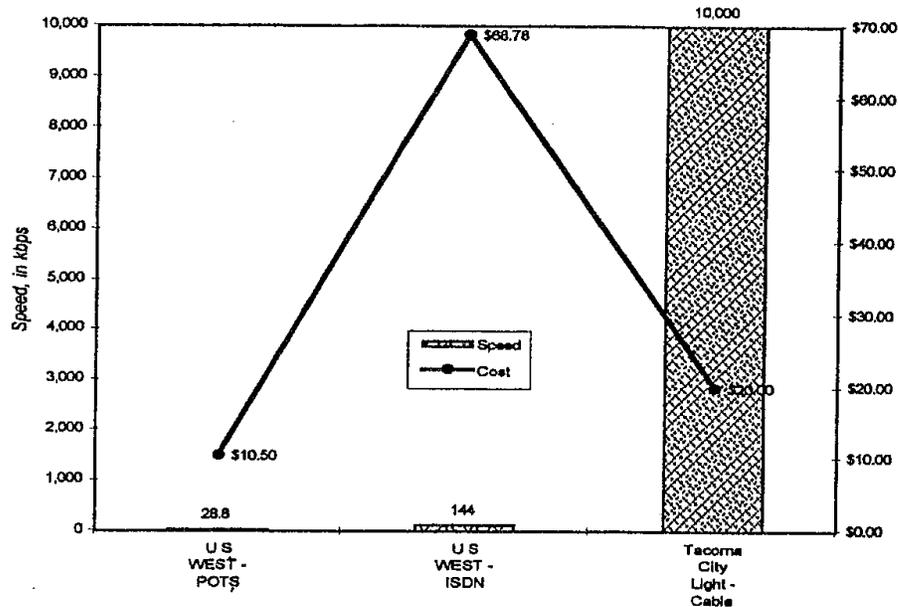
# The Telecommunications System

- Multiple fiber optic rings running throughout Tacoma City Light's service area
  - Secure and redundant fiber optic system
  - SONET electronics
- Fiber rings support two-way 750MHz Hybrid Fiber Coax system in residential areas reaching all homes

## Public-Private Telecommunications Services

- Wholesale data and telephony transport on the fiber optic SONET system
  - Available on a non-discriminatory basis to
    - other carriers (both local and long distance companies)
      - for switched services and dial tone
    - local value added service providers
      - who would customize these high speed lines for businesses that do not maintain a telecommunications staff
    - local businesses that have the technical expertise to use the lines themselves
- High speed Internet data transport for homes and small businesses in partnership with Internet Service Providers (ISPs)
  - Light Division transports the data, the ISPs do all the rest
- Full cable television service direct to local homes by Tacoma City Light

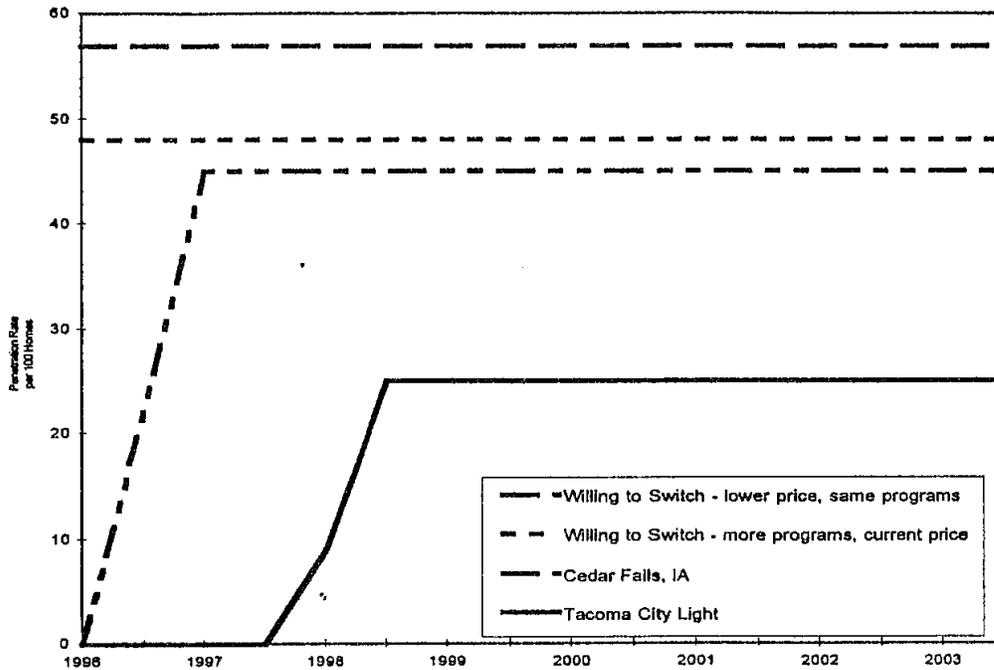
# Data Transport for Internet Access



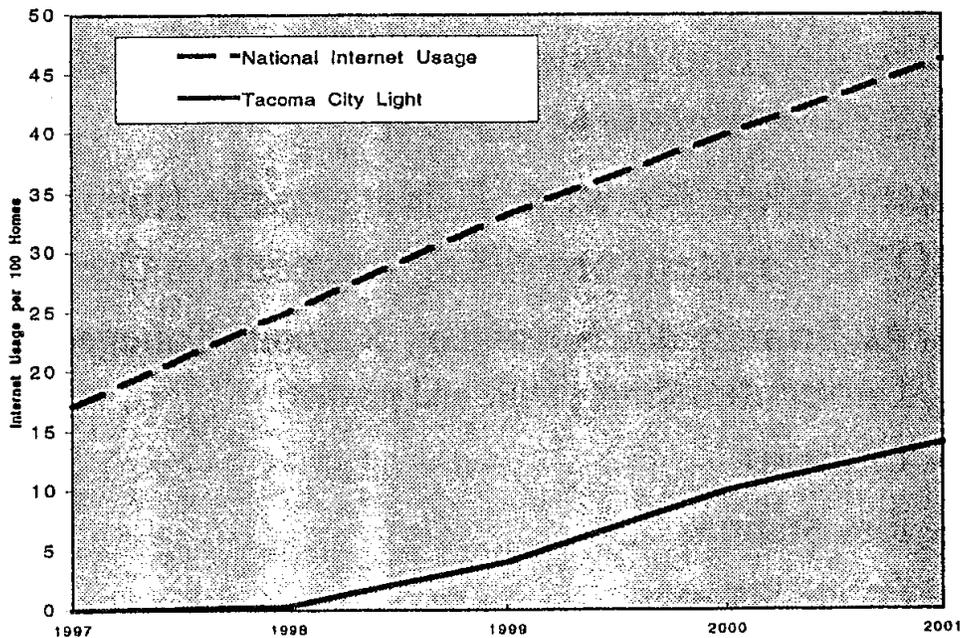
## Contacts with Private Service Providers

- Discussions with a number of private service providers about system options
- Video Providers
  - Talks were not particularly productive, the closest was:
    - Private would provide programming, advertising & billing but would not assume any system financial risk
    - Tacoma City Light would provide everything else including maintenance, cable installation, money, and name
- Other providers do want to make use of transport services to facilitate delivering other services
  - Sprint Spectrum

# Revenue Projections Comparison of Cable TV Penetration



# Revenue Projection Comparison of Internet Usage & Transport



# Taxes and Fees

## Inside Each Franchise Jurisdiction

- Franchise fee (5%) or Institutional Network
- Video gross earnings tax (8.32% in Tacoma)
- Telephone & data transport gross earnings tax (6% in Tacoma)

## Outside the City of Tacoma

- Gross Earning Tax of 6% to City of Tacoma on revenues earned outside the Tacoma City Limits

Note: Pricing in financials is inclusive of all taxes and fees

# Benefits

- Improves Tacoma City Light's competitive position by providing its utility customers with additional services not available from competitors
- Provides a platform for implementing electric system distribution automation, market access, and real-time communication with customers
- Provides better telecommunications and cable television service sooner and cheaper than other providers will deliver
- Provides high speed, low cost transport between Internet Service Providers and homes & small businesses that can't afford dedicated digital lines
- Significant tool for regional economic development by creating a high-tech telecommunications infrastructure
- Additional revenue to Tacoma City Light and subsequently to the General Fund through expansion of the market for telecommunications services and the 6% gross earnings tax on Light activities outside the City of Tacoma (40% of projected telecommunications revenue)

# A Short Window of Opportunity

- Current conditions are uniquely supportive of the creation of a modern telecommunications infrastructure in the Tacoma area
  - US WEST continues to stall on resale leaving the long distance carriers looking for a way to provide local service (they can not afford to build these local systems quickly themselves)
  - US WEST is pushing Internet Service Providers of access fees for existing system
  - DBS has not yet had time to significantly penetrate the local video market despite TCI's limited local offerings
  - TCI has not yet implemented it digital set top box one-way "quick fix"
- Delay will shrink the residential video market which supports this build
  - Once someone invests in a DBS system they are lost as a significant revenue producer (not only for video sales purposes but also for tax purposes)
- Delay may limit the business market as a small number of large users:
  - Invest in their own single user systems, or
  - Are targeted by CAPs that serve limited geographic areas

## RISK FACTORS

- Fail to provide excellent service at a competitive price.
- Fail to operate as a competitive business
- Fail to gain market share
- Fail to move quickly and aggressively
- Incumbent providers competitive response
- Community support disintegrates
- Construction and O&M costs substantially exceed estimates
- Worst Case Scenario

## TELECOMMUNICATIONS PROJECT PRINCIPLES

- The primary purposes for the Light Division financing, constructing and operating a broadband telecommunications system shall be as follows:
  - Provide a state-of-the-art fiber optic technology to support enhanced electric system control, reliability and efficiency.
  - Provide 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.
  - Provide greater revenue diversification through new business lines (i.e., Internet transport, cable TV, etc.), enhance traditional products and services and maximize return on Light Division assets.

## TELECOMMUNICATIONS PROJECT PRINCIPLES

- Important additional community benefits derived from this project are as follows:
  - Promote economic development and business retention.
  - Insure broad community accessibility to high quality, state-of-the-art telecommunication technology.
- The Telecommunications Project, including all infrastructure, and proposed business lines, shall be an integral Light Division operating responsibility and function.
- The Telecommunications Project business lines shall be operated in a business-like manner similar to electric services which are subject to market forces and are not tax supported.

## TELECOMMUNICATIONS PROJECT PRINCIPLES

- In order to avoid and perception of government control of the content of the cable television business line, programming will be determined on the basis of local consumer demand and input.
- The Telecommunications Project construction will reflect the current overhead to underground configuration of the Light Division's electric system. Any significant divergence from this will greatly increase the project costs and jeopardize the viability of the project.
- The Light Division's Telecommunications Project will not proceed unless there is broad and strong policy and community support.

## Public Involvement & Decision Making Process

- February 18:
  - Presentation of plan to joint Tacoma City Council & Public Utility Board study session
- February 19 through March 20:
  - Public meetings and presentations including neighborhood councils, business groups, and anyone else who will take their time to talk about the idea
- March 24
  - Resolution to the City Clerk
- March 26
  - Tacoma Public Utility Board Vote
- April 1
  - Tacoma City Council Vote

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# THE TELECOMMUNICATIONS INDUSTRY

## SUMMARY

The world of telecommunications is complex. Technology, companies, regulations, and communities are all involved. Some would say that telecommunications is too complex for most people to understand, much less make decisions about. Upon closer examination, this appears to be a false premise. Telecommunications is complex, not because any of the pieces is impossible to understand but because there are so many pieces. Fortunately, just like any childhood puzzle, this puzzle can be put together by anyone willing to take the time to examine the pieces and explore how they fit together. This document is designed to bring the pieces together in one place to allow them to be more easily examined and explored.

The first section begins with an exploration of the technologies that are shaping the world of telecommunications today and the latest technological developments that may affect the future of telecommunications.

The telecommunications companies section examines some of the key players in telecommunications, the business models they have historically operated under, the technologies that they are employing, and both their announced and demonstrated strategies. Perhaps more than the latest technology, the companies that provide telecommunications products will influence the services that our communities are likely to see.

The next section discusses the evolving regulatory construct that telecommunications companies operate under. International, Federal, State, and local regulations all affect the provision of telecommunications services and it is in this area, perhaps even more so than in technology, that the greatest changes are taking place.

The overview of the broader telecommunications environment concludes with a review of what is taking place in selected cities around the United States of America with regards to telecommunications and the local forces in each of those communities that are influencing the direction that each community takes.

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## TECHNOLOGY OVERVIEW

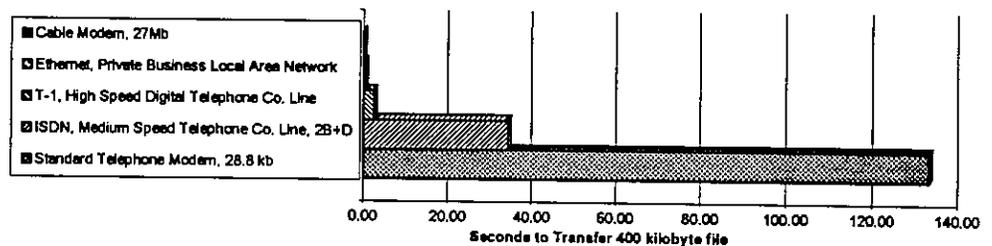
The five keys for evaluating telecommunications technologies are:

**Speed**  
**Bandwidth**  
**Direction**  
**Security**  
**Integrity**

### Speed

The speed of a communications path is measured in bits per second. A bit is a 1 or 0, the basic form of digital data. Speed is the measurement of the flow rate of data. The speed of a communications path or circuit must match the needs of the application, or patience of the users. A voice conversation can be carried on a 64,000 bits per second (64 kbps) line. Businesses lease circuits between buildings or cities to tie their computer Local Area Networks together using 1.5 million bits per second (1.5 Mbps) lines. Within businesses, Local Area Networks connect desktop computers using 10 Mbps lines. Businesses build private networks exclusively for their computers carrying 100 Mbps. Long distance companies operate major ties between cities carrying thousands of voice conversations at 2.4 billion bits per second (2.4 Gbps).

Comparison of Data Speeds

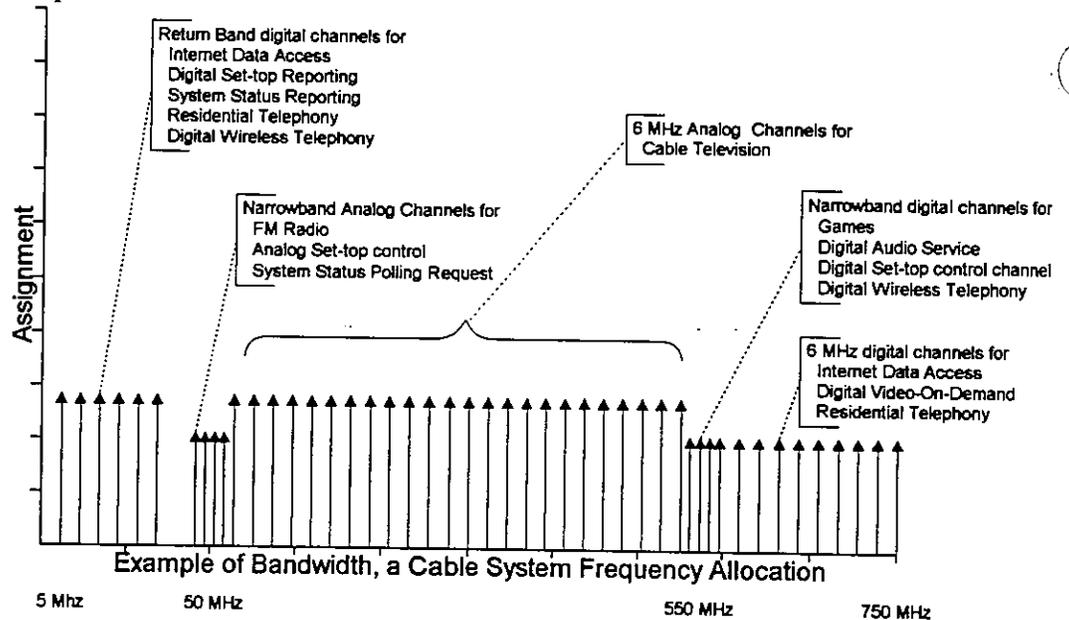


## Bandwidth

Bandwidth measures the radio spectrum available to transmit information. It is measured in Hertz (Hz), or cycles per second. A communications path is often referred to as either a circuit or a channel depending on its use. Each individual channel uses some of the available bandwidth. The total bandwidth of the transmission circuit cannot be exceeded. In the design of a typical broadband hybrid fiber optic coaxial (HFC) system, there is 750 MHz of bandwidth available and channels are assigned in 6 MHz increments. Users of each 6 MHz channel can pack as much information into that channel and operate at as high a speed as they can afford. They can not carry any information outside of their assigned channel's bandwidth since that information would interfere with the use of adjacent channels.

New products have developed to make effective use of bandwidth for transmitting digital information. The speed of signals in a bandwidth has been improved to as high as 8 bits per hertz, from 1 bit per hertz in 1970. Data compression removes unnecessary data without affecting meaning, with ratios now as high as 100 to 1.

### Example of Bandwidth



## Direction — Single or Bi ?

The direction of the flow of information must match the application that the information supports. Television signals are broadcast one-way to all users. Telephone conversations are two-way, carrying the same amount of information in each direction all the time. Because the same amount of information flows in each direction, telephone conversations are said to be symmetrical. Data network connections to homes are expected to be two-way. However, many people in the computer data networking industry believe that the majority of the information will be flowing to homes with relatively little information returning. The ratio of downstream to upstream information is perhaps 10 to 1, decreasing as symmetrical applications such as telephone and videoconferencing grow on the Internet.

Connections that send different amounts of information depending on direction are referred to as asymmetrical. Business communications are typically symmetrical since they are primarily made up of telephone conversations, which are symmetrical, and the peer-to-peer transmission of data between offices, which are also symmetrical. Two-way telecommunications systems capable of transmitting and receiving information at the same time are known as "full duplex systems."

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## Security

Loss of security from eavesdropping on voice or data communications can pose risks for businesses and individuals. As a result, systems offering voice and data privacy have been developed. Some business applications require high security communications to protect the value of their information. Security can be enhanced by:

- Encryption: scrambling the information to make it unintelligible.
- Physical Control: keeping circuits within a controlled area
- Security Monitoring: checking circuits for evidence of security breaches
- Access Control: requiring users to provide passwords when signing onto networks

**Radio signals** are easy to monitor. Communication that takes place over the public radio spectrum can be monitored. Scrambling, digital encoding and encryption can be used to build in security, but they add cost and complexity to systems and slow the transmission of information.

**Copper cables** can be penetrated, allowing circuits to be mechanically tapped. This type of intrusion is difficult to detect automatically.

**Coaxial systems** send the same signal to many customers and create multiple unauthorized monitoring opportunities. The best security measures are the same as for the public radio spectrum — scrambling, digital encoding, and encryption.

**Optical fibers** can be monitored for intrusion. Signal levels can be checked to detect escaped light resulting from an intrusion. Even so, signals can be made more secure with scrambling or encryption.

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## **Integrity**

Errors can occur when transmitting information. A person can often separate the voice of a single speaker from a noisy background but noise makes it difficult to understand all of the words spoken. Similarly, noise can cause errors in computers conducting data transactions. Noise-free communication circuits encourage efficient communications and eliminate time and effort spent correcting errors. Errors in digital communications are measured in Bit Error Rates (BER). Most computer networks require circuits providing a BER of better than 1 errored bit in 1 million bits.

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**The following sections briefly describe telecommunications systems in use:**

**Wireless Systems**

**Wired systems**

**Cable TV**

**Basic Telephone Systems**

**Business Office Communications**

**Internet and**

**Power System Communications**

## **Wireless Systems**

Wireless communications are carried by radio waves through the atmosphere. The radio spectrum is divided, managed and allocated by the Federal Communications Commission (FCC). Many industries, including television broadcasters, AM and FM radio broadcasters, mobile radio users, satellite up links and downlinks, and the military use the public radio spectrum. Industries are allocated specific frequencies for use. Frequencies are re-used in different geographic areas by limiting transmitter power and range. The higher the frequency of a signal, the more it tends to lose signal strength as it travels through the atmosphere. Higher frequency radio signals also tend to follow line of sight paths and can often be blocked by hills and other similar obstructions. New allocations of frequencies tend to be in bandwidths of 30 MHz or less and use higher frequencies that were previously unallocated. For two-way transmission, two frequency bands are used.

Several new wireless systems are planned or under construction. Personal Communications Services (PCS) are described later in this section. The Ricochet Network, under construction by Metricom, is a wireless data network of small data packet transmitters mounted on streetlights and utility poles. Using six radios per square mile, the service obtains a speed roughly the same as a standard modem on a telephone line, but allows users to be mobile. Ricochet is marketed at users of computers, laptops, and pagers. Satellite services used for data transmission to homes are described later in this section.

Wireless networks are the easiest and least expensive networks to construct for services requiring low bandwidths. Many developing countries are building their first telephone networks using wireless cellular technology because copper telephone cable is more expensive to install and maintain.

Wireless systems usually rely on wired infrastructure to complete circuits. Wireless transmitters and receivers are linked to regional controlling switches with high-speed digital lines. Microwave connections are occasionally used for these point-to-point links. Most data and telephone traffic eventually is carried on high-speed land cables.

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## **Wired Systems**

Wired systems use cable to carry the signals that provide most telephone, data and cable television services. Information is carried only in the cable, so no radio spectrum licenses are required. Cable is shielded to prevent interference from wireless systems. Different cable types have different capacities or bandwidth and are capable of carrying varying speeds and amounts of information. Wired systems reduce costs by re-using cables and common central electronics for as many services as possible. Systems can be designed so that signals can travel both downstream and upstream on the same wire. While telephone cables typically have a pair of thin copper wires for each phone serviced, cable television uses a single coaxial cable (one center conductor inside one tubular metallic shield), which carries multiple frequencies to many homes. This allows a single service to use only one frequency band and only one wire yet still be received by many customers.

**Fiber Optics** Optical fibers carry photons of light; metallic wires carry electrons. Light can travel much farther in an optical fiber than electrons can travel in metal wire before a signal is lost. Light is also immune to interference from electromagnetic waves, common from many sources, including radio transmitters. Since optical fibers cannot carry electrons, highly reliable communications in high voltage areas are possible. Light in optical fibers is a superior medium for communications in cases where long distance, high speed and/or high bandwidth are necessary.

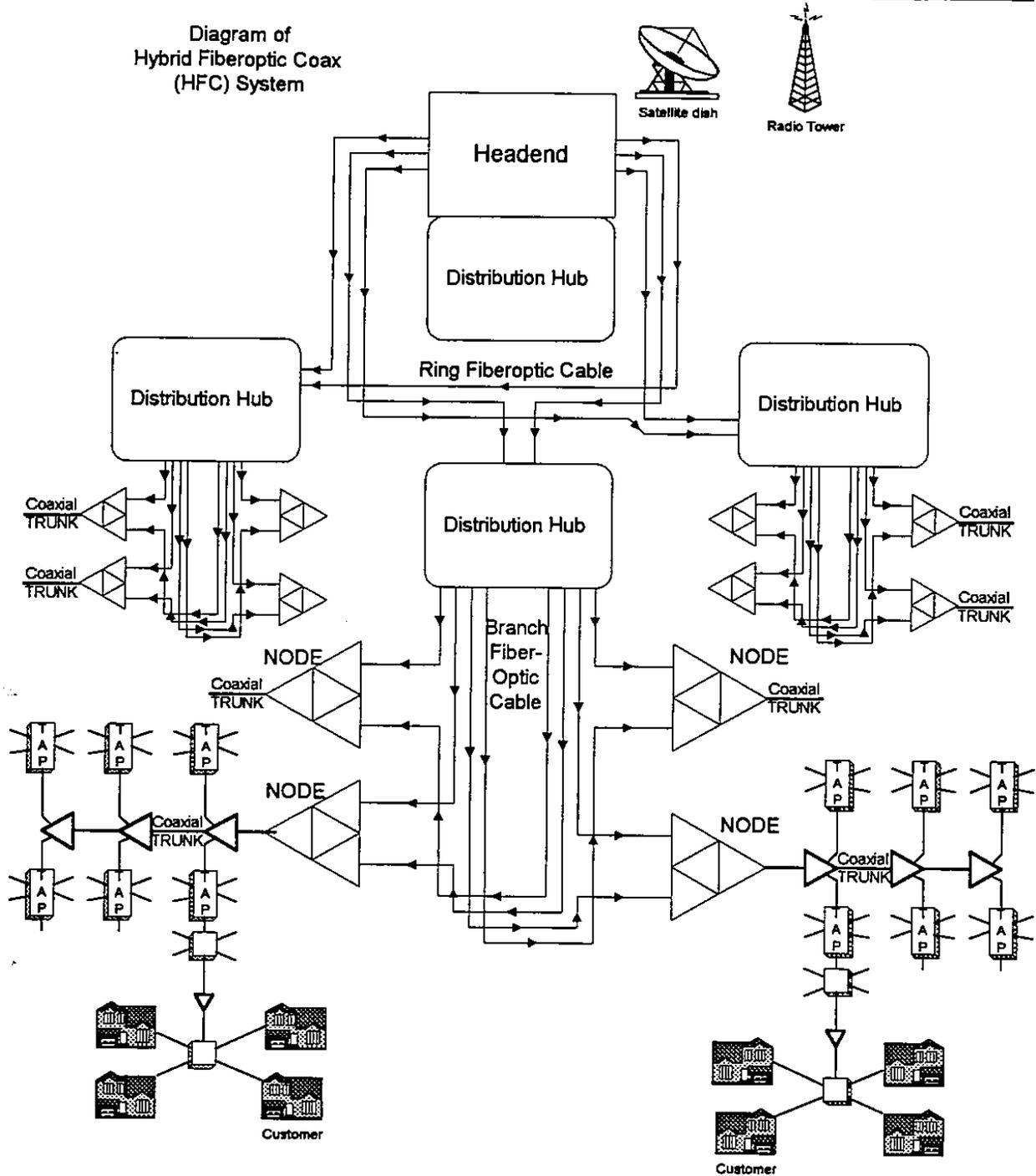
**Fiber optics in cable TV** Cable television companies began widespread installation of fiber technology into the trunk of the cable architecture about four years ago. This immediately improved signal quality and lowered maintenance costs. Since then, the cable industry has installed "fiber trunk and feeder" architecture in many markets. Fiber is now installed all the way to the feeder in most new construction. This allows system operators to re-use frequencies (or channels) by segmenting an existing system into individual serving areas composed of 500 to 2,000 homes. The resulting hybrid fiber coaxial cable networks are capable of delivering a variety of high-bandwidth, interactive services.

**HFC vs. FTTH** If replacing copper coaxial cable trunks with optical fiber improves the signal quality and reduces maintenance, why not replace all coaxial cable with fiber optics to each customer? Some people are expecting that communications services will be delivered all the way to the home on an optical fiber pair, or fiber-to-the-home (FTTH).

Unfortunately, fiber optics to each customer would be prohibitively expensive. This is not because the fiber optic cable is much more expensive than coaxial cable. It is because the optical electronics required to convert the light carried by the fiber onto electrical signals understood by televisions, computers and phones are fairly expensive. These residential devices all currently connect directly to copper cable, but not optical fibers. A single coaxial cable has the capacity to meet the telecommunications needs of 500 or more homes.

While it can be cost-effective to have a single optical to coaxial node serving 500 homes, it has not yet been shown to be cost effective to equip each of the 500 homes with new optical-electronic nodes and optical cable drops. Maintenance and operation alone of the fiber optic cable to each home would be expensive and would be a wider-bandwidth duplication of the existing telephone infrastructure, which is twisted-pair copper wire dedicated from the central office (CO) to each home. It has proven to be very costly to maintain and operate even telephone dedicated paths to each home.

Communications technology is applying fiber optics where appropriate, such as long cable lengths of ultra-high quality signaling or in electrically noisy environments.



**Digital Television**

Most new TV sets are cable-ready, meaning their channel selectors are able to tune in standard frequencies for 80 to 120 analog channels. When TV programs are transmitted digitally, existing television sets will not be able to receive them without additional electronics. A set-top converter, with its own channel selector will be necessary.

**Going digital** The telephone network is gradually becoming digital because digital transmission is high-quality, low-cost and fast. Phones in customers' home are among the last analog devices in the network. Integrated Services Digital Network (ISDN) was invented to bring digital service to homes. As home services become digital, the quality and variety of services the telephone network can deliver increases. ISDN enables many new services, including enhanced displays on your phone, two conversations on the same line, and data speeds two to four times faster than possible with a common analog 28.8 kbps computer modem.

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## **Business Office Communications**

Businesses that have 20 or more telephone lines in use at one time, or that link computer centers to other computers and to Local Area Networks (LANs) in other buildings or cities, use digital circuits. Digital circuits allow businesses to reduce costs by consolidating voice traffic and to create high speed computer links that are impossible to create using "standard" phone lines. Businesses lease digital circuits to the central office, which can carry either switched telephone traffic or dedicated computer traffic. The basic unit of high speed digital circuits is T-1 service, which is a 1.5 megabits per second, two-way circuit, equal in bandwidth to 24 simultaneous voice conversations. The T-1 circuit can be connected to a business telephone switch for grouping telephone conversations at lower cost and higher quality than individual telephone lines. The T-1 circuit can also be connected to a computer "bridge" or "router." For this use the traffic is no longer switched and the T-1 circuit must be dedicated through the central offices to another business in a point-to-point assignment. This is referred to as a "nailed up" circuit. "Frame relay" is a data service that transfers computer data packets among nailed-up circuits that have been assigned exclusively to frame relay.

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## **Internet**

The Internet has emerged as an essential tool for consumers and businesses, providing a variety of entertainment, research, and commercial services. While the Internet remains primarily an informational and entertainment resource, it is also a forum for electronic commerce with orders for goods and services taken on-line and paid for via credit cards or new Internet currencies. As security techniques become more sophisticated and accepted by the public, the Internet may surpass all public markets ever conceived.

The core of the Internet are the Internet Service Providers (ISPs) that own or lease long distance data circuits and manage interconnected data networks on them. Users connect to ISPs using their computer and local telephone circuits. A point-and-click graphical user interface makes access to the services on the WorldWide Web very easy.

**Web sites** are computers accessible from the Internet containing interesting information or providing services for users. There are now many thousands of Web sites and several million Internet users. Applications on the Internet defy description, as they are rapidly growing and changing to meet the needs of users and business. The Internet, and more specifically the Web, has the potential to be an alternative delivery mechanism for most media today, including music, video, games, news, mail, telephone, advertising, catalog sales, shopping, library, encyclopedia, and software delivery. New applications send ever larger quantities of data between users and depend on high-speed data connections between the users.

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## **Cellular Phone Systems**

Cellular phones operate in a licensed radio band at 800 MHz. Radio towers serving these phones are called cell sites. There can be many cell sites per 5-mile radius. Frequencies are re-used among cell sites. A cellular phone notifies the closest cell site that it is there and can take calls. Even though a cellular phone moves from cell to cell, calls can continue by being "handed-off" or passed from cell-to-cell.

**Standards** Two carriers serve each region. Cellular carriers received radio licenses in a lottery, with one assigned to the local telephone system company in each region. At first, the simplest form of radio transmission, analog frequency modulation (FM), was used. As cellular service gained in popularity, many cell sites became saturated with traffic. More cell sites were added to allow re-use of the cellular frequencies more often. Recently, most carriers have adopted digital transmission standards that allow many callers to use the same frequencies in the same cell at the same time — up to 64 callers per frequency and cell. There are two main standards of digital modulation: Time Division Multiple Access (TDMA) and Code Division Multiple Access (CDMA). These standards are mutually exclusive and new digital cellular phones are built to carry one of the digital standards and the old analog standard.

In addition to mobile voice telephone service, cellular carriers are able to carry computer traffic to mobile computer users. By using modems on the analog system, or by leasing continuous access by the megabyte of use, mobile computer users can keep in contact with company computers for dispatch, customer information, e-mail, etc. The speed of service is about the same as on analog telephone or ISDN lines.

## Overview

### TELECOMMUNICATIONS COMPANIES

In the years following the breakup of AT&T in 1984, telecommunications companies were essentially divided into local telephone service providers , long distance service providers, and cable companies. Regional Bell Operating Companies such as US WEST and Ameritech were limited to providing only local telephone services. Firms like AT&T, Sprint, and MCI were restricted to supplying long distance services while cable companies largely focused on delivery of cable television. The Telecommunications Act of 1996 has done much to hasten the elimination of this separation by permitting these different companies to participate in each others' traditional markets. Many who watch the industry believe this removal of barriers will result in competition while others point to increasing company consolidation.

In order to make informed business decisions regarding telecommunications it is vital to identify the key players and review their reactions to changing environments. The section that follows is an overview of each of the major telecommunications industries, including a quick analysis of a few key companies that have the potential to affect the greater Tacoma area.

## Tele-Communications, Inc. (TCI)

Tele-Communications, Inc. (TCI) is the largest cable TV provider in the United States. TCI has nearly \$2 billion in revenues, an operating cash flow of \$533 million, 14 million subscribers in the United States and approximately 32,000 employees.

TCI's size and great influence in the cable TV industry was achieved through its push for growth, acquiring more and more cable systems, and increasing its subscriber base and revenues. In 1996 alone, the cable operator added more than 2.4 million subscribers<sup>34</sup>. However, this acquisition strategy has left the company in a relatively poor financial position. TCI has more than \$14 billion in debt — roughly \$1,000 of debt per subscriber. TCI faces elevated expenses due to its entry into new services, and is attempting to resolve its money crunch by raising rates, cutting capital expenditures, and eliminating 2,500 jobs.

These cutbacks reveal a change in TCI's telecommunications strategy. The company's properties consist mainly of one-way, coaxial cable systems operating at 350 MHz using 20-year-old technology. The company has announced that upgrades to these systems will be deferred, and the focus instead will shift to the deployment of digital set-top boxes. These boxes will deliver more channels using a new compression technology, but will not allow deployment of advanced telecommunications services such as high speed, two-way Internet access or telephony.

Before refocusing on cable TV, TCI was attempting to gain a foothold in other markets besides traditional cable TV service. A commercial telephone network was launched in Hartford, Connecticut, with two other cities scheduled for the service in Illinois and California under the name PeopleLink. The company also has a large stake in the Digital Broadcast Satellite market. In 1994, TCI joined five other cable operators to form Primestar Partners. This DBS service now reaches more than 1.1 million subscribers, and contributed \$200 million to TCI in 1995, with revenues expected to double in 1996. Personal Communications Services are another market TCI has entered. Sprint Spectrum was created by a partnership between Sprint, TCI, Comcast, and Cox Cable. The partnership has licenses to provide Personal Communications Service in 33 Major Trading Areas with a total population of 190 million.

Following the explosive growth of the Internet, TCI set up an on-line service with the help of Microsoft called @Home. The @Home Network provides Internet service to a customer's personal computer through cable lines. Customers receive 24-hour unlimited access to the Internet, a high-speed cable modem, e-mail, Netscape Web browser and community content for \$39.95 a month. This service is currently available in limited areas of California, Connecticut, Florida, Illinois, and Maryland.

## Overview

### REGULATORY ENVIRONMENT

Federal regulation has been streamlined under the 1996 Telecommunications Act. State laws that in the past could have limited access to certain markets have been federally pre-empted or limited. The regulatory environment has greatly improved the ability to enter the telecommunications market. However, some regulatory hurdles remain.

Many provisions of the Telecommunications Act of 1996 direct the Federal Communications Commission (FCC) to come up with regulations that will open local telecommunications markets to competition and remove barriers to entry. These provisions were written in broad strokes, leaving the FCC to fill in the details. In 1997, the FCC must implement the Act's crucial universal service sections, which will determine how telecommunications companies guarantee phone service to poor and rural areas. In addition, the Act requires all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other carriers.

The Regional Bell Operating Companies (RBOCs) and local exchange carriers contend that the FCC has already gone too far, providing discounts for competitors that would undermine their entrenched businesses<sup>1</sup>.

Given the enormous financial interests at stake, many industry interests are not willing to wait for all the details before taking action. As a result, deals are being negotiated that in some cases, are between former competitors.

One thing is clear, municipally owned electric utilities, electric cooperatives and other utilities may enter the communications business *without* obtaining FCC certification or any other prior FCC approval. State requirements vary, but cannot limit utility participation in telecommunications ventures<sup>2</sup>.

This section provides an overview of pertinent Federal laws and regulations related to telecommunications as well as a summary of state legal and regulatory issues that must be considered before entering the telecommunications market.

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## REGULATORY ENVIRONMENT

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### The Communications Act of 1934, The 1992 Cable Act and The Telecommunications Act of 1996

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#### The Communications Act of 1934

Though Congress has amended the Communications Act of 1934 several times since its enactment, today's high-tech communications companies are regulated to some extent by statutory language from the 19<sup>th</sup> century. When the Act of 1934 was adopted, the telegraph was the principle means of electrical communication, mass media meant AM radio, and telephones were considered luxuries. Considering the many new communications technologies that have emerged, the Communications Act has proven a versatile, evolving statute.

The Communications Act of 1934 was first amended in 1992 to reform the monopolistic practices of the cable industry. The Act was again amended when the Telecommunications Act of 1996 was signed into law. This Act of 1996 is regarded as landmark legislation and its implications will be discussed later in this section.

The Act of 1934 and its amendments are divided into three major regulatory subdivisions: **common carrier**, **radio**, and **cable television**. From a regulatory perspective, every form of electronic communication must fit into one of these statutory subdivisions or fall completely outside the scope of the Act. How a new form of communication is regulated depends in part on how it works and how its purveyors choose to have it regulated.<sup>3</sup> From a regulatory view, a communications service usually fits into two basic categories:

1. Who is offering the service?
2. How is the service being transmitted?

Who is offering the service? The answer starts with a definition of "common carrier" as one who serves all potential users without favoring one over another. The customers of a common carrier transmit information of their own design and choosing<sup>4</sup>. On the other hand, private carriers do not allow customers to transmit information of their own design and choosing.

How is the service being transmitted? Does it move through a wire or through the air (wireless)?<sup>5</sup> From a regulatory point of view, the result is a two-by-two matrix:<sup>6</sup>

	<b>Common Carrier (Telecommunications Service Provider)</b>	<b>Non-Common Carrier</b>
<b>Wired</b>	Telephone (land line)	Cable TV
<b>Wireless</b>	Cellular Telephone	Utility Radio Dispatch System

When a new service approaches the market, it must fit into one of the four boxes. Because the rules in one box may be more advantageous to a particular firm, an operator in one box may try to relocate to another box.

Though the fundamentals remain basically the same, the regulatory aspects of each box can, and do change. For example, the two amendments to the Communications Act of 1934 have had a profound affect on various communications industries.

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### **Cable Television Consumer Protection and Competition Act of 1992**

By 1984, Congress had basically deregulated the cable television industry. The 1984 amendments prompted expansion of cable television service throughout the country. Though millions gained access to cable access, customer complaints about escalating rates and poor quality of service attracted Congressional attention. Television stations argued that cable operators must carry their broadcast channels and then argued that operators "stole" their signals by re-transmitting them without paying for them. The Courts resolved this issue by ruling that cable systems were not obligated to carry local TV signals, but if they did, they must pay for the right.

Over time, the cable industry became increasingly concentrated: a relatively small group of executives controlled programming, production and distribution. In effect, cable had become a monopoly and exercised monopolistic power<sup>7</sup>. After several unsuccessful attempts to enact reform, Congress passed the Cable Television Consumer Protection and Competition Act of 1992, commonly referred to as the 1992 Cable Act.

The 1992 Cable Act empowered the FCC to regulate cable rates and service. The FCC responded with thousands of pages of rules, forms, and interpretive decisions that addressed the cable business in minute detail. These rules were adopted in 1993, and are still being fine-tuned in 1997<sup>8</sup>.

In summary, the 1992 Cable Act sought to re-regulate an industry that had begun as an adjunct of broadcast TV and had evolved into an independent, distinct and powerful medium of communications<sup>9</sup>.

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### Telecommunications Act of 1996

On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996 (P.L. 1040104) the most significant and far-reaching amendment to the 1934 Communications Act.

Unlike the 1992 Cable Act, the basic thrust of the 1996 Act is **deregulatory**. Its intent was to eliminate barriers to entry and spur competition. A number of provisions to the 1996 Act will also have a great effect on companies deciding to enter the telecommunications business. For example, if a company decided to provide a "telecommunications service" it would be subject to certain **common carrier** regulations including:

- **Interconnection** The Act of 1996 requires all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other carriers.
- **Universal Service** The Act of 1996 requires that all interstate telecommunications service providers contribute, on an equitable and non-discriminatory basis, to a universal service fund. The 1996 Act codifies, for the first time in the history of the regulation of communications, the concept of "universal service." Universal service is generally understood to mean basic telephone service for all Americans at affordable prices.

Some of the major **deregulatory** aspects Act 1996 include:

- The FCC is empowered to refrain from applying or enforcing any communications statute or rule against any telecommunications carrier or service, or class of telecommunications carriers or services. For this to happen, the FCC must first determine that enforcement is unnecessary to ensure that charges or practices are just and reasonable or to protect consumer interest, and is consistent with the public interest.
- The FCC's tariff filing and review process are streamlined.
- The FCC is authorized to exempt individual carriers from complying with the requirements of Section 214. Under Section 214 of the 1996 Communications Act all carriers are required to seek and obtain FCC approval before building or extending a telecommunications linehead.

The 1996 Act defines "telecommunications service" as:

*The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used*

#### **Interstate Access Charges**

In January of 1997, the FCC adopted a Notice of Proposed Rulemaking to reform its system of interstate access charges to make that system compatible with the pro-competitive deregulatory framework established by the 1996 Act. Two possible approaches have been outlined for addressing reform. The first approach is a market-based approach under which the FCC would rely on potential and actual competition from new facilities-based providers and entrants purchasing unbundled network elements to drive down prices. The second approach is a prescriptive one under which the FCC would specify the nature and timing of changes to the existing rate levels. In addition, the Commission tentatively concluded that information service providers should not be subject to interstate access charges as currently constituted.

#### **Local Exchange Telephone Service**

The 1996 Act eliminates the consent decree that governed the breakup of AT&T. The 1996 Act opens up the local telephone market to new competitors, including long-distance carriers, cable operators and electric utilities. Local exchange telephone service is regulated by state public service commissions and long distance is the FCC's domain.

#### **Long Distance Telephone Service**

The 1996 Act allows Regional Bell Operating Companies (RBOCs) to provide long distance service to customers in their local exchange service areas once they have opened the local exchange market to competitors. They may immediately enter the long distance telephone market outside their local exchange service areas. The RBOC's may also provide telecommunications equipment and manufacture customer equipment.

#### **Video Programming Services by Telephone Companies**

The 1996 Act repeals the statutory ban against telephone companies becoming cable television operators. (Several courts had already ruled this ban unconstitutional.) However, the new law prohibits telephone companies from buying existing cable systems in their home areas - and vice versa, except in certain rural markets and in other limited circumstances<sup>10</sup>. Telephone companies now have four video entry options, each of which has different regulatory consequence and structure, and each of which is treated differently for payment of cable television franchise fees.

The four video options are:

1. Over a radio based system in which case it is regulated under Title III of the Communications Act and not as a cable operator. (A radio based system cannot be charged a cable television franchise fee.)
2. As a common carrier subject to Title II. (A common carrier cannot be charged a franchise fee.)
3. As a cable television operator. (A cable television system can be charged a cable television franchise fee.)
4. As an "open video system" operator subject to limited regulation. An open video system operator must make channel capacity available to unaffiliated programmers without discrimination. Though an open video system operator cannot be charged a cable television franchise fee, it may be required to pay fees based on gross revenues in lieu of franchise fees; it may also have to pay other state and local fees.

Though designed to promote video competition by telephone companies, these video entry options are not limited to telephony companies. Open video systems are of particular interest to companies that are experiencing difficulty obtaining franchises as a result of the long relationship between franchise authorities and incumbent cable television operators. A number of electric utilities are considering becoming open video system operators.

## Overview of Players

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### Congress

Congress passes laws, such as the Communications Act, and exercises oversight of executive agencies that carry out those laws. Congress does this by gathering information, holding hearings, conducting investigations, passing resolutions, and expressing opinions about a wide variety of matters.

The House Commerce Committee and Senate Commerce Committee are the primary committees that investigate and recommend communications policy.

### The Federal Communications Commission (FCC)

The Federal Communications Commission (FCC) is charged with implementing the Telecommunications Act of 1996. The FCC is a board of commissioners appointed by the President of the United States under the authority of the Communications Act of 1934, having the power to

regulate radio, telephone, cable television and all other interstate communication systems.

The FCC exercises its jurisdiction over communications matters through regulations that fall into two broad categories:

1. Regulations Congress expressly directed the FCC to adopt to carry out specific provisions of the Communications Act.
2. Regulations the FCC generated to further its actions in pursuit of the public interest.

Before adopting a rule, the FCC, like most Federal agencies, must initiate a formal rule-making procedure that entails publishing the proposed regulations and soliciting public comments. The FCC fleshes out the particulars of a Congressional enactment through its rule-making process. Interested parties try to alter or temper statutory provisions while the agency is drafting and revising its proposed regulations. If resulting regulations are not to their liking, they may challenge them in court.

The FCC cannot arbitrarily waive any provision of the law. However, the agency may initiate, or consider a request for, waiving rules and regulations based on just cause. By arbitrating individual cases, the FCC establishes precedents for dealing with similar issues. The FCC can also adopt policy statements to deal with situations that are likely to recur. Though less formal rule-making, this method still requires the FCC to explain any variation or deviation from the policy.

On August 8, 1996, the FCC issued its First Report and Order implementing the local competition provisions of the 1996 Act. The Order sets forth the basic regulatory framework for competition in telecommunications. Disputes over various provisions have resulted in court challenges and delayed its implementation. The FCC has also commenced additional rule making to address issues related to state and local authority, pole attachments and access to public rights-of-way.

## **Courts**

The role of the courts is to determine the legality, particularly the constitutionality, of provisions of the Communications Act and actions by the FCC. When telecommunications issues come before the courts, it is usually because a party appeals an FCC decision or policy. The United States District Court of Appeals for the District of Columbia hears the majority of FCC cases.

## **State Public Utility Commissions**

Public utility commissions regulate investor owned electric, gas, water and telephone utilities. They regulate telephone rates as well as terms and conditions of service of local exchange carriers. State commissions often coordinate their activities with the FCC by participating in joint activities, such as the federal-state board currently reviewing the concept of universal service (covered earlier in this section).

### **Washington Utilities and Transportation Commission (WUTC) Requirements**

To do business as a telecommunications company in Washington state, a company must register with the Washington State Utilities and Transportation Commission (WUTC). An applicant must demonstrate its financial and technical competency and provide its proposed tariff package. An attorney usually prepares the necessary documents, with the approval process generally taking 30 days. If a company shows that it is subject to effective competition, it can avoid many of the regulations on rates and services that apply to monopoly providers. According to Tony Cooke, spokesperson for the WUTC, a municipally owned utility is not subject to state rate regulation for the provision of voice and data service, nor is it subject to regulation if it acts as a transport provider or "carrier's carrier" per chapter 80.04.500 of the RCW (Application to Municipal Utilities). This same non-regulation applies to both voice and data transmission. Whether a municipal utility builds a competing network or re-sells another company's service, rate issues are handled at the local level.

## **City Councils and Municipal Legislative Bodies**

State and local authorities have some jurisdiction over telecommunications, but it varies depending on the industry and issues involved. The federal government exercises little jurisdiction over fiber-optic cables. However, if the system meets the definition of a "cable television system," then it will be regulated as a cable television system. If the system operates as a common carrier, it is subject to regulation as a common carrier.

Cities have traditionally exercised jurisdiction over public rights-of-way, most prominently in franchising cable television operators. The 1996 Act grants local authorities primary jurisdiction over basic cable television rates in the absence of effective competition. In addition, the 1996 Act specifically affirmed local jurisdiction over wireless mobile services such as cellular telephones. However, the 1996 Act also limited local jurisdiction over satellite Earth stations and receiving antennas for TV and Multichannel Multipoint Distribution Service, sometimes referred to as "wireless cable."

The 1996 Act also reaffirmed the FCC's authority to preempt any state or local law, regulation or policy that constitutes a barrier to entry into the telecommunications market. This power is apt to be tested "repeatedly and aggressively."<sup>11</sup>

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## **Federal - State Joint Board Recommendations**

### **Universal Service**

In November of 1996, the Federal-State Joint Board on Universal Service released a 422-page Recommended Decision on new universal service support mechanisms required by the 1996 Act. The FCC has until June 1997 to adopt universal service rules based on the Joint Board recommendations and public comments<sup>12</sup>.

### **Private Internal Networks**

Applying this definition, the Federal-State Joint Board recognized that private networks dedicated exclusively to internal communications are not telecommunications providers and are not subject to the 1996 Act's mandatory universal service contribution requirement.

### **Carrier's Carrier Networks**

The Joint Board has not made a recommendation with regard to treatment of fiber that is provided to a third-party telecommunications carrier. There is a strong argument that the provision of fiber alone does not constitute the offering of telecommunications. As unpowered glass, dark fiber would appear to fall outside of the Act's definition of telecommunications as the transmission of information.

### **Information Services**

The Joint Board concluded that information service providers and enhanced service providers are not telecommunications services and are not subject to universal service obligations. Under this interpretation utility automatic meter reading and other energy management systems using telecommunications networks would not be subject to federal universal service requirements. In addition, the provision of Internet services would also appear to be outside of universal service obligations.

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**Endnotes**

<sup>1</sup> Eric Glick, "What's up at the FCC?", *Cable World*, December 1996, p. 96.

<sup>2</sup> Harold K. McCombs, Jr. Esquire, *Current Legal Issues*, American Public Power Association (APPA), Orlando Florida, November 7-8, 1996.

<sup>3</sup> APPA, *Utilities Telecommunications Guidebook*, 1996. p. 65

<sup>4</sup> APPA, *Utilities Telecommunications Guidebook*, 1996. p. 66

<sup>5</sup> APPA, *Utilities Telecommunications Guidebook*, 1996. p. 66

<sup>6</sup> APPA, *Utilities Telecommunications Guidebook*, 1996. p. 66

<sup>7</sup> APPA, *Utilities Telecommunications Guidebook*, 1996. p. 67

<sup>8</sup> APPA, *Utilities Telecommunications Guidebook*, 1996. p. 67

<sup>9</sup> APPA, *Utilities Telecommunications Guidebook*, 1996. p. 68

<sup>10</sup> APPA, *Utilities Telecommunications Guidebook*, 1996. p. 121

<sup>11</sup> APPA, *Utilities Telecommunications Guidebook*, 1996. p. 75

<sup>12</sup> *UTC Information Bulletin*, UTC Legal/Government Affairs Department, November 18, 1996, p.1.

<sup>13</sup> *Cable Television Information Bulletin*, Federal Communications Commission Fact Sheet, October 1996, p. 21.

## Overview

### TELECOMMUNICATIONS ACTIVITY IN OTHER CITIES

A number of cities across the country have made efforts to create modern telecommunications infrastructures. Some have succeeded, some have recently begun to investigate their options, and others have withdrawn. None appear to be outright failures. Five themes have emerged from an examination of these cities:

1. *Smaller communities with experience in operating municipal utilities appear to be more likely to enter the telecommunications field than other communities.* The desire to facilitate new economic growth, keep money in local circulation, and provide alternative services at lower costs are common threads in Glasgow, Kentucky; Paragould, Arkansas; and Morganton, North Carolina. The strong influence of universities in Cedar Falls, Iowa and Blacksburg, Virginia was a significant force as well.
2. *A relative lack of local competition amongst telecommunications providers often prompts community telecommunications efforts.* With no one willing to voluntarily make the significant investment to serve them, many of these cities have taken on the task of soliciting infrastructure builders or creating infrastructure themselves. Harlan, Iowa, and Glasgow, Kentucky, are two small communities willing to take the risks and make the investment in a telecommunications infrastructure with the goal of attracting new business and enhancing the existing community.
3. *Determination and tenacity is a requirement.* Some of these communities have had to face large incumbent telecommunications corporations in protracted legal battles. Perhaps smaller communities have fewer distractions, allowing them to focus on telecommunications and there by compensate for their somewhat limited resources. Morganton, North Carolina had to fight a long court battle with a local cable provider before it could build its own system. On the other hand, fear of court battles caused Jefferson City, Missouri, to abandon its plans for a system.
4. *Public dissatisfaction with local incumbent telecommunications providers often prods communities to actively consider owning and operating their own system.* In both Morganton, Paragould, and Cedar Falls, strong citizen voter support for cities to own and operate their own telecommunications systems prevailed despite aggressive advertising campaigns by incumbents. Even when a community dropped out of the race with a competitor, customers still appeared to have often benefited through reduced rates, improved customer service, and additional cable channels from the incumbent operator.
5. *"First tier" cities are seeing some telecommunications competition.* First tier cities are likely to already be experiencing competition for services targeted at major business users, i.e., those taking service at T-1 levels or higher with a minimum monthly telecommunications expenditure of approximately \$5,000. Even first tier cities are not yet experiencing significant competition targeted at small business or residential users located outside of the business core. Tacoma is viewed as a second tier city by telecommunications providers.

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## TELECOMMUNICATIONS IN THE GREATER TACOMA/PIERCE COUNTY AREA

### SUMMARY

Building on background information about the broader telecommunications industry, this study turns its focus upon the local telecommunications environment. To put today's events in perspective, the first section provides a quick review of the history of telecommunications and utilities in this area.

The study then reviews in more detail the existing telecommunications providers that serve our communities, the telecommunications infrastructures that they employ, and their latest announcements of future plans for this area.

The next section provides a quick overview of the changing local regulatory picture and some of the difficult problems faced by local jurisdictions as they participate in the evolving telecommunications environment.

A review of telecommunications in our local communities analyzes both the residential and business markets for telecommunications services as they stand today. A discussion of how different economic futures are impacted by telecommunications concludes the section.

The role of telecommunications infrastructure and services in economic development is a topic of considerable interest. In order to put the local situation in perspective, the following pages discuss some of the economic development ramifications of telecommunications. This piece was authored by Professor Bruce Mann, Ph.D. with the Department of Economics at the University of Puget Sound; and Peggy sue Heath, A.B.D., with APEX Business Solutions. They conduct an interesting examination of the key role that telecommunications has begun to play in economic development, and what the future might hold for communities that create a communications infrastructure.

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## **Telecommunications and Economic Development**

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**Apex Business Solutions**

### **The Railroad of the 21<sup>st</sup> Century**

There was a time when the simple act of drawing a line on a map could either create a community or force a town into obsolescence. Those were the days of railroad planning. To have access to the rail line meant a chance at prosperity as a "railroad town." Without access, a town would have an uphill battle to be involved in the growing network of trade. Many businesses needed the railway to send their products off to other buyers; other local businesses needed the people traffic the railroad brought to create demand for their products or services. Economic development was synonymous with rail development, and the decisions made on those planning maps fundamentally shaped the face of the entire nation.

Since the first rail tracks were laid, people have continued to improve the transport of physical goods. The last century has seen incredible developments in aeronautics with design and material breakthroughs leading to planes that can take people and products around the world overnight. Even more dramatic, however, have been the developments that allow people to overcome vast geographic differences without needing to leave the room. As we draw near the close of the 20<sup>th</sup> century, many signs indicate that the new railroad towns are "Tele-Communities", communities with a strong communications infrastructure supported by both information technology and telecommunications systems.

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### **Why Does Telecommunications Play a Role in Economic Development?**

Urban planning experts have long emphasized the role of infrastructure to support economic development and an increasing standard of living. As time goes on, telecommunications is key to creating a foundation for economic growth and health. But if telephone has been in existence since Bell's fateful afternoon in 1876, why has it become such a focus now? The answer lies in the changing nature of industry and competition.

The 21<sup>st</sup> century is being characterized as the time of bytes, rather than atoms. While historically trade has been focused on buying, selling, and transferring atoms — physical things — from one geographic area to another, many emerging and changing industries are being driven by the need to transfer “bytes” of information. Some of those industries, such as financial services and medical administration, represent the growing service-based sector in the United States. In most industries competition is driving companies to utilize information technology and telecommunications to compete more effectively.

Ironically, even industries whose focus is on transporting physical goods have begun to incorporate information management as part of their value-added services. For example, some transport companies offer services that track goods with Global Positioning Satellite (GPS) technology. Others use the Internet to provide services that identify the least costly route or shipping method. So even “atom” companies are using “bytes.”

Investments in infrastructure ensure that local communities attract and retain businesses that keep residents in jobs, homes, and with a healthy standard of living. As the industrial base in communities undergoes change, the infrastructure necessary to support that base must change. Telecommunications investments can serve the needs of companies and can also provide tools for local government and the community. Some of the ways telecommunications are already being used are reviewed below.

#### **For companies**

Companies use telecommunications in several ways. For many organizations, telecommunication is used as a link to their markets. One example of this is a 1-800 number used for sales or customer service. Telecommunications can also serve as part of core production process, as when a financial service organization transfers money or transaction information from one location to another. Another key use for telecommunications is as an internal communication device to coordinate work across a number of locations.

#### **For local governments**

Local governments benefit from increased telecommunications by keeping their communities better informed about government activities and issues that affect community members. Improvements in telecommunications can increase economic development by allowing local governments to provide the kind of information necessary for companies and developers to decide to invest in a community. Improvements also meet the needs of current residents through enhanced services, including better fire and police protection.

#### **For local communities**

In the last decade in particular, communities have climbed on the bandwagon through public access networks, community-based web pages, wired libraries and schools, both public and private. Schools in particular

benefit from enhanced telecommunications, through access to remote sources of information. Telecommunications has served as a conduit for courses offered to those who are far from a major university. It has also been used to provide health care between facilities, in particular to those who don't have full access. Local business and economic development groups in California, Illinois, and elsewhere have taken the initiative to use telecommunications to provide communities with information helpful to retain or attract businesses. This information has included local land use and availability, numbers about local markets for certain goods and services, and information on local support services for siting businesses.

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### **What Happens If Communities Aren't *Wired*?**

The emphasis on getting wired has been punctuated by stories of successful telecommunications investments. In Dublin, Ireland, early investment in telecommunication supported a growth plan that brought in advanced technology industries and reduced Ireland's reliance on low-skilled labor industries they were likely to lose to nations with lower labor costs. When it comes to preemptive telecommunications investments, Singapore's plan to place "fiber in every home" is pointed to as one of the more progressive moves a country has made in this decade. Singapore's plan is predicted to have a positive long-term impact on their ability to compete for business, even though they have higher costs compared to some of their Southeast Asian rivals. Successes like these have begun to slowly raise awareness of the role of telecommunications in sustaining economic health.

A weak telecommunications infrastructure will first impact a community's ability to retain and attract commerce, including technology intensive businesses and those companies that co-locate to sell to them. These include primarily financial services, transportation and distribution, and medical administration and provision. Also affected are businesses whose success or failure lies primarily in beating the competitor to the market. These companies often use collaborative work arrangements with individuals all over the world to increase the chances of beating the competitor to market — examples include software development, biotechnology, and other advanced research companies. Additionally, each of these businesses mentioned find themselves a part of a growing group of firms who must compete aggressively for talented people to fill key positions. As more employees focus on the quality of life issues that a career choice represents, information access in their homes and their children's schools may play a larger role in their decisions to locate in one community or another.

In addition to the fundamental inability to sustain an economic base for technology companies, the lack of a modern telecommunications infrastructure can also impact a community on a more social level. Access to information has often been lauded as one equalizer in the disparity between poor and rich. Whereas some communities will have access to a wealth of knowledge with wired libraries, public access networks, and technology support for individual Internet access, those communities without such a base may be left behind in a widening cultural evolution toward the information age.

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### **What Is The Future World Of Tele-Communities?**

Whether or not it chooses to be actively involved in the revolution, a community is impacted by developments in telecommunications. How the revolution will impact each community is part of the mystique surrounding the future of Tele-Communities. Two forces surround telecommunication advances, dispersion and relocation. On one hand, experts have predicted more dispersion or spread in communities as people move away from urban centers, since telecommunications allows individuals to overcome geographic distance without the need for physical proximity. The forces of relocation, however, are more complex. As people relocate to other areas, there are two opposing arguments as to whether this physical distance will be accompanied by social distance as interaction changes. At the heart of matter is whether the forces of telecommunications advances will drive society farther apart or closer together. Further, what role can Tele-Communities play in this revolution?

#### **Dispersion**

First, let us explore some of the basic economic premises to understand why physical dispersion may occur. One of the main reasons for the economic vitality of cities is that highly concentrated, dense, proximate locations reduce the costs of transportation for businesses and households. Lower costs of travel led to more profitable operations and higher real standards of living. Firms locate near suppliers and/or their consumers. Households locate near work, shopping, and/or recreational activities. This packing together of economic activity produces the traditional patterns seen in the urban landscape. However, as the costs of overcoming the "friction" of distance fall, the economic need for individuals or businesses to be in a city declines. One of the most important impacts of the telecommunications revolution will be the change in the urban landscape.

By and large, the ability to conduct business, shop for goods, and visit with other people is significantly enhanced with modern telecommunications. The cost of meeting clients has declined as the

telephone, pager, fax, and Internet have emerged as viable communication media. Many find that shopping takes less time with the telephone, fax, and Internet in comparison to the traditional automobile trip. Getting information, reaching the market, and putting the deal together can be done without the physical act of travel in many cases — just use the modem, surf the net, or fax the document. All of these newer technologies lower the cost of doing business, for the buyer and the seller, the client and the service provider, and the employer and employee.

**Households** Household activities have also been the beneficiary of the modern telecommunications revolution. Television is easier to access and provides more choices. The assumed advantages of traveling to the museum, the theater, or the opera hall have diminished, as improvements in voice and picture have brought these experiences dramatically into the home. Even the activity of just visiting can be done in chat rooms, with a computer e-mail system, or using teleconferencing systems. Accessibility is increased while the need to travel with its attendant costs is reduced.

**Structure Of Cities** The result of reduced travel costs will have profound impacts on the structure of cities. The need to reduce distance is diminished. Telecommuting, long distance meetings, and shopping from home all have implications which suggest the decline of the traditional city landscape. One can live far from the job and still work in the city. One can live far from the shopping center and still buy goods from the city. One can reside miles away from the city and still enjoy urban entertainment. Thus, the economic value of face to face contact and actual presence in physical space is considerably less than it was ten or twenty years ago. Most importantly, these changes are not merely *predicted* to happen. These new methods of interacting have been adopted and embraced by the critical mass of consumers, businesses, and agencies necessary to make a real difference in accepted social norms.

### **Relocation**

If it is true that the need for physical proximity has declined and people can live and work at a considerable distance from each other, the next question is whether we will draw farther apart socially as well. Will there be any relocation of “community”? There are two arguments about how relocation will occur.

The first argument rests on the assumption that the traditional economic reasons for urban life are becoming less and less important. As more people, both as workers and consumers, become comfortable and adopt new telecommunications systems they will move out of the cities of today. The result will not be just suburbanization, but a new urban structure — the city-village, edge cities, or even complete dispersion to non-urban areas. Subsequently, the need for face-to-face contact and more traditional social interaction may lessen as well.

A second argument is more optimistic for cities. This argument has the same basic set of changes. The telecommunications revolution will and does lower the costs of transactions by reducing the need for and expense of travel. By itself, as the first argument has it, this will lead to geographic dispersion. However, a *second effect* also arises due to the lower cost for communications. As the costs of communications fall, people will undertake more communications and this will lead to more total activity. The lower cost of reaching interested consumers over the Internet means that sellers will make more use of the Internet and reach more consumers. Reduced commuting and travel time means that more business can be done during the work day. Lower cost entertainment in the home means more entertainment programs will be consumed. Just as the telephone increased voice contacts and reduced mail volume, just as the railroad expanded land-based shipping and reduced shipments via wagons and barges, and just as the jet plane led to more individual contacts, so the new telecommunications technology will lead to more activity, more network contacts, and quicker delivery of information, some shifting from current forms and some being new to this technology.

This second argument says the social and economic need that cities traditionally fulfilled will continue to exist, but the way in which these needs are fulfilled will change. True, physical activity does not disappear as a place bound reality — only the communications activities “disappear.” The need for location, buildings, face to face contact, and human interaction will still exist. Some of this economic activity will disappear from cities, as the concept of dispersion suggests. But, the second relocation argument recognizes that the need to be somewhere physically will change as overall activity levels increase. The importance of this second argument is that it suggests how economic relocation will occur. Survival and success will ultimately go to those areas which have adapted to the new environment by incorporating successfully the new forms of telecommunications. Successful locations will be where businesses can serve their markets cost effectively using the new forms of telecommunications. Still, labor costs will matter, proximity to natural resources will matter, land based transportation will matter, traditional infrastructure will matter, but now the accessibility and quality of modern telecommunications will also matter. Those places which adopt new approaches to telecommunications and media will be able to capture the expanded activity and benefit from the shifting patterns of behavior.

The forces of dispersion and relocation suggest a pattern of urban change. On the one hand, dispersion implies the existence of fewer densely settled cities. More of the urban landscape will be made up of scattered, fragmented, edge cities. Each of these will be smaller replicas of cities -- predominantly residential and personal service oriented with telecommuting workers. On the other hand, the relocation implies the need for some highly technological urban centers where there is some value in proximity. In the most optimistic case, these urban centers will be catalysts in the new telecommunications revolution. They will be cost

competitive for telecommunications as well as the traditional needs of businesses and households. They will also offer a complete set of urban amenities, both technological and traditional. They will move away from the historical emphasis on being near raw materials or markets and more sensitive to the quality of the overall infrastructure base — telecommunications, education, water, sewer, and electricity. While business services and information processing will be the growth sectors in these new centers, the centers could still capture much of the manufacturing and regional service functions which exist in cities today.

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### Conclusion

John Mayo, the President of AT & T Bell Laboratories, spoke on the technology changes that are driving our evolution:

When I reflect on the future of information technology, I am reminded of the story about the test run of Robert Fulton's strange-looking steamboat, the Clermont. For a few hours the craft kept making a terrible racket, belching smoke and sparks as the engineers tried to get it started. Skeptics in the crowd kept yelling, "She'll never start! She'll never start!" Finally, after a lot of huffing and puffing, the boat began moving up the river. The scoffers were astonished and remained silent for a few moments, and then they started yelling again: "She'll never stop! She'll never stop!"<sup>1</sup>

Like the skeptics reacting to the steamboat that represented a drastic change, we face our own seemingly unstoppable force: the need for advanced telecommunications. In responding to the railroad and other technology shifts, communities have always had the opportunity to be part of the revolution, or to be dragged into the evolution that will naturally follow. The difference may be a choice between mastering one's own destiny or waiting for the train to arrive.

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<sup>1</sup> John S. Mayo, "R & D in the Third Millenium," Research Technology Management, Vol. 35 No. 6 November-December 1992.

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## HISTORICAL OVERVIEW

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### Electricity and Water Supplies

Tacoma City Light was founded on the entrepreneurial spirit of individuals such as Charles B. Wright, the “father of Tacoma.” Wright arrived in Tacoma in July 1883 as one of seven men responsible for choosing the terminus of the Northern Pacific Railroad. Tacoma had a population of 4,000, was ideally situated on a deep-water bay, and was surrounded by abundant timber and other natural resources. The arrival of the first railroad terminus in the Northwest seemed to assure Tacoma’s importance in the commerce of the region and the nation.

At that time, the town’s main drawback was the lack of a dependable water supply. It was obvious that the spring-fed, gravity-flow water system would be inadequate to meet the needs of the rapidly growing community. This came to Wright’s attention soon after his arrival. Within two weeks he had outmaneuvered the existing water supply companies and persuaded the City Council to pass an ordinance granting him the “privilege to supply the city of New Tacoma and its inhabitants with pure and fresh water.”

By June 10, 1884, Charles Wright and General John W. Sprague had incorporated the Tacoma Light & Water Company. By November 1886, the Tacoma Light & Water Company was about ready to enter the streetlighting business. Poles had been placed, wire was being strung and “electric dynamos” were nearly ready for operation. The company generated electricity from a small powerhouse in Galliher’s Gulch, near South 26<sup>th</sup> Street and Pacific Avenue. Service extended three-quarters of a mile along Pacific Avenue by January 1887. Rates were high and generating capacity inadequate.

By 1889, Tacoma needed more than just streetlighting. People were asking for electricity in their homes. Complaints against the company were growing, and even with a new powerhouse completed in 1889 and equipped with a “modern” generator capable of lighting 1,500 lamps, the tide of criticism could not be stemmed.

The lights weren’t bright enough, there weren’t enough of them, and the company was poor in responding to outages and other service issues, customers complained. Support for a municipally owned system was increasing.

By 1892, the idea of a municipally owned light and water system had become *the* political issue of the day. The following year, after extensive study, the City decided the quickest way to own a light and power plant was to purchase Tacoma Light & Water. Wright, tiring of his investment, was interested in selling — for a sum of \$2.1 million. The City Council, however, had calculated the value at \$1.52 million. This fostered a fierce debate over whether or not to buy the company. Finally, a small committee traveled to Philadelphia to bargain with Wright face-to-face. This meeting led to an agreement for the City of Tacoma to purchase the Tacoma Light & Water Company for \$1.75 million.<sup>1</sup>

In March 1893, the Council passed “an ordinance to provide for the purchase of the water works and electric light plant, and all such water supplies, riparian rights, rights of way, lands, lots, personal property and franchises as are now owned and operated by the Tacoma Light & Water Company.” The issue passed the public election, and in July 1893 the the City of Tacoma became the proud owner of a municipal utility.<sup>2</sup>

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## Telephone Services

The first telephone on the West Coast was installed in Tacoma in April 1878, connecting the Telegraph Operator’s Wharf on Second Street and Lighter’s Foundry on Pacific Avenue and 17<sup>th</sup> Street. Tacoma’s first permanent telephone, installed in 1880, connected the Tacoma Mill in Old Tacoma and the Western Union office. The next line linked Dr. Harvey’s home with Bonney’s Drug Store. Tacoma’s first exchange, the second in the Washington Territory, was established in Rebard’s Cigar Store by E.W. Melse and the Sunset Telephone and Telegraph Company in 1884.

By the turn of the century, Tacoma and its telephone service were expanding at a rapid rate. Sunset, however, began to experience competition from its rival, the Telephone Company of Puget Sound. During the next few years, the two firms struggled for customers. Customers wrestled with two separate telephones if they wanted to connect with the rival company’s instruments. Finally, in 1916 the two operations were reassigned to the Pacific Telephone and Telegraph Company.<sup>3</sup>

Telephone service expanded over the next 50 years until it reached virtually every home in the city. Service under Pacific Telephone & Telegraph continued until 1964, when a split in its parent company led to the formation of Pacific Northwest Bell Telephone Company.

With the approval of the State Public Service Commission, Pacific Telephone & Telegraph holdings in Washington, Oregon, and parts of northern Idaho were turned over to Pacific Northwest Bell and more than 30 million shares of common stock in Pacific Northwest Bell were given to Pacific Telephone & Telegraph shareholders. At that time, 90 percent of Pacific Telephone & Telegraph shares were controlled by AT&T.<sup>4</sup> In addition, Pacific Northwest Bell agreed to not pass on the expenses accrued by its formation to their customers, but would maintain current rates for a period of 10 years.<sup>5</sup>

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### Cable Television Services

The year 1965 was important for both the local and national cable movement. The FCC assumed jurisdiction over Community Antenna Television (CATV) systems and began to impose its own regulations. The State Utilities and Transportation Commission called for a legislative investigation to determine whether the monopolistic nature of the industry required the state to regulate rates and services.<sup>6</sup> In addition, Pierce County commissioners began considering franchise applications for providing CATV to the University Place and Lakewood areas where 2,500 potential customers were anxious for the "fix" that would eliminate the "snow" that existed on their screens when using an antenna.<sup>7</sup>

The following year, the county approved the first franchise, but deliberations continued in Tacoma. By the spring of 1966, seven companies had filed requests for franchises within the city limits. Criteria for selection included the company's financial resources, intended scope of service, proposed rates and franchise payments, and the number of free channels provided for public use.<sup>8</sup> Representatives of the only two locally owned companies among the seven applicants urged the awards be made to Tacoma firms. The council also believed that the city "should do business with local people so that you can talk to the local ownership and not rely on information from attorneys representing outside companies," and felt the earnings made by Tacoma companies would remain to support the local economy. City Manager David Rowlands, however, said it was the Finance Department's opinion that two outside companies proposed franchise tax payments that offered the greatest return to the city.<sup>9</sup>

Arguments for local ownership eventually prevailed, and the City Council named Tacoma Cable Company and Cable TV Puget Sound in the initial franchise ordinance of September 1969.<sup>10</sup>

Subsequently, City Manager David Rowlands raised the possibility of the city forming its own utility for CATV. He recommended that "all previous proposals be rejected and that the city manager and his staff be directed to explore the possibility of either accepting new franchise

proposals or investigating in depth the desirability of establishing a city-owned and operated cable television antenna system.”

In response to concerns expressed by officials in the cable industry, he stated: “If the state law is somewhat obscure on the right of a city to engage in a CATV utility, then I am sure that revisions could be passed by the legislature. With Tacoma ... facing a financial crisis in the years ahead, it appears that this could be another source of revenue ... while at the same time keeping the rates for the subscribers to a minimum.”<sup>11</sup>

In January 1970 the two franchises were awarded as initially granted, although the Cable TV Puget Sound franchise was rescinded after only one week. As a result, Tacoma Cable Company was the sole cable television franchise to begin operations in Tacoma, with the second franchise once again open for discussion.<sup>12</sup> A few months later, TelePrompTer Corp. was granted the second franchise, with a third franchise subsequently given to Community Tele-Communication, Inc.<sup>13</sup> Excited about its new opportunity, TelePrompTer Corp. said work on its cable television system would begin soon. The president of the company painted a bright picture of the following five years, which included a two-way cable system which would allow every home on the system to have what amounted to a computer in its living room. He said that “bills will be sent — and perhaps paid — by cable; doctors, lawyers and businessmen can arrange conferences; housewives can browse through a market and shop by television; and school officials can arrange vast changes in curricula by using the systems.”<sup>14</sup> By May 1971, Tacoma Cable Company was taking over the area to the north and west of South 35<sup>th</sup> Street while TelePrompTer took over the south and east. Community Tele-Communications, having only recently received its franchise, had not yet begun hanging cable.<sup>15</sup>

Within two years, the only remaining cable company provider in Tacoma was TelePrompTer. With 480 miles of cable and 7,300 subscribers representing 22,000 viewers, TelePrompTer offered cable service to almost every section of the city. At that time, its \$4 million investment included a system with a 30-channel capacity.

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## Internet Services

The Advanced Research Projects Agency (ARPA)’s Information Processing Technology Office was the initial funding source for computer facilities at 17 sites across the country. Key researchers needed to access these computer resources directly from their offices. The ARPA commissioned construction of an experimental computer network based on a packet-switching technology. This was installed at UCLA in September 1969. After being hooked up to phone lines, the packet switches at four

university sites began to exchange information packets long distance. This was the beginning of the ARPANET.

Growth of the APRANET, particularly for military-related traffic, led the Defense Department to take it over in 1975. Connections were made available only to organizations doing work that fell within Defense Department guidelines. Although many universities, government agencies, and even some computer vendors were qualified, others were not. These outside sources decided to form computer networks of their own. The two most notable were CSNET and BITNET, which were formed by education and research sites.

The growth of the networks outside of the ARPANET created new challenges, in particular they had difficulty connecting to each other because of incompatible communication protocols. As a result, Transmission Control Protocol/Internet Protocol (TCP/IP) was developed to allow the different networks to interconnect and “communicate.” On January 1, 1983, ARPANET and the Defense Department began using TCP/IP and this “network of networks” soon began to be referred to as the “Internet.”

The Internet remained virtually unknown outside research and defense circles until the late 1980s when the growth of personal computers fueled consumer interest. By 1990, many metropolitan area residents owned a computer, modem, and telephone and were using Internet Service Providers to get online. Companies like Software Tool and Die, Panix, Digital Express, and NetCom offered individuals affordable “Internet accounts.” As the number of sites and users grew, the Internet came to resemble an overgrown information jungle — one without signposts or maps. In the late 1980s and early 1990s, bewildered users created tools to locate and index resources. These guideposts helped others in the Internet community find their way, and transformed the Internet into a more user-friendly network.

“archie” was the first to cut through the information undergrowth. Created in 1990, archie enabled users to scan a lists of the Internet’s holdings with a single query. archie was followed by Gopher in 1991 as the first widely-popular “Internet navigator.” It let “information owners” organize data into hierarchical menus. Users could then view, scroll through, and make selections from these menus. But the question was now how to find something in “gopherspace,” since the original Gopher plan did not include a general index.

The answer was called VERONICA. This database held over one million entries from Gopher menus by 1993. VERONICA servers were kept busy performing searches for Internet users around the world. Meanwhile in 1992, in Switzerland, a physicist devised a way to organize the Internet-based information and resources he needed for his physics research. He dubbed his system the World Wide Web. To connect individual pieces of information, he made use of “hypertext,” which allows document owners

to include names and pointers — addresses — to other relevant items. By clicking on a hypertext link, users tell their computers to “get the address associated with this link, and go there.”

An Internet browser called Mosaic, developed in 1993, made the Web and the Internet more user-friendly and accessible. Mosaic let users retrieve and display graphics, images, and sounds with a single mouse click. The combination of the Web and Mosaic — and similar programs such as Netscape Navigator — transformed the look and feel of the Internet. Formerly a world of largely text-based, hard-to-find resources, the Internet became an inviting multimedia information system.

During the past three years, the Internet has become increasingly accessible. Most visibly, the Internet has become a new venue for business. Companies are trying to determine just how this online, “cyberworld” will shape the business products and players of tomorrow. The Internet has become more than an wildly new information exchange; it’s an overwhelming cultural phenomenon.<sup>16</sup>

Access costs, however, are still prohibitive for some segments of society. The issue of universal access has been one of the most controversial issues surrounding the Internet. For communities such as Tacoma, how to make lines, equipment, and services equally available to residential users in all neighborhoods — including homes, schools, and libraries — is an issue that has not been resolved.

## Overview

### EXISTING TELECOMMUNICATIONS OPTIONS IN TACOMA

Is the greater Tacoma area prepared for growth in the area of communications? Do we have the telecommunications resources necessary for businesses that may want to locate in this area? What about growth in telecommuting? How will the explosion of the Internet be accommodated?

US WEST and Tele-Communications, Inc. (TCI) control the only existing wired systems currently available for the telecommunications infrastructure needs of the greater Tacoma area. By examining these companies, the infrastructures they control, and some of the emerging wireless providers, an understanding of the existing options available to meet the needs of an economically vibrant greater Tacoma area can be achieved.

#### US WEST

US WEST is the incumbent provider of local telephone service in the greater Tacoma area. Currently, all requests for new services, installation of advanced or large capacity equipment, and additional phone lines must be completed through US WEST. While the central offices in Tacoma are interconnected with fiber optic cable, the majority of Tacoma's telephone system consists of twisted copper pairs. A limited amount of fiber optic cable has been placed to businesses with large telecommunications budgets. Local businesses have experienced waits of four to five months for digital lines, and some have considered completing the installation of necessary fiber links themselves.

US WEST's residential customers have experienced similar frustrations. A service request for the installation of a second phone line may take more than a month to complete. US WEST's service reputation was a leading factor in Washington regulators' decision to deny US WEST's request to more than double its monthly residential phone rate. Regulators instead ordered the company to *lower* its rates. US WEST officials have responded that without the rate increase, investment in upgrading the local telephone network will not continue and customers may continue to struggle with service.

US WEST is also facing a growing demand placed on its system from increasing numbers made through modems for Internet connections. An average Internet connection lasts approximately 14 times longer than the average voice call that the system is designed for, leading to potential disruption of vital functions such as emergency 911 services.

## TCI

A second candidate to develop an advanced communications infrastructure is the existing cable television operator, Tele-Communications, Inc. TCI maintains a cable plant serving all of Tacoma and a large portion of Pierce County. This cable operator provides residences of the City of Tacoma with 36 channels at 350 MHz, and serves portions of Pierce County with 60 channels through the recent purchase of Viacom's local cable properties. TCI customers are often unhappy with the customer service they receive from TCI, and express frustration about the limited selection of channels and programming. However, the main complaint has been rising cable rates.

The company's increasing rates point to TCI's poor financial position and a need to raise revenue while curbing expenses. In November 1996, TCI announced that it would be "deferring the rebuilding of the balance of the company's cable systems" in most areas and instead would install digital set-top boxes. These boxes deliver more channels and an improved picture quality, but do *not* usually require upgrading the network from coaxial to fiber optic cable. Without an upgrade, the network will not have the capability for two-way communication and will not be able to provide telephony, two-way Internet access, or other advanced telecommunications features. Additionally, set-top boxes require an additional phone line for any pay-per-view ordering, only adding to the demand pressure on the telephone network.

The City of Tacoma is currently undergoing franchise renewal negotiations with TCI. During these negotiations, the City has looked for a commitment from TCI that the upgrades performed on the system will be with fiber optic technology, and not a "quick-fix" solution using the existing coaxial cable network. Before TCI announced a halt to system rebuilds, it had estimated that rebuilding its Tacoma System would take an estimated three to four years.

## EXISTING TELECOMMUNICATIONS OPTIONS IN TACOMA

### US WEST

#### Summary

US WEST's subsidiary, US WEST Communications, is the main provider of local telephone service in the Tacoma area. Although a major player in the telecommunications industry with \$11.7 billion in annual revenues, US WEST Communications has a poor service reputation. This was a key factor behind Washington regulators' decision to deny the company's request for a large rate increase. Further, regulators required the company to reduce its rates. In response, US WEST declared that the company will no longer be able to invest as much money into improving its Washington network, causing service and the important state-wide network to be in danger.

While US WEST's main business suffers, the company has been rapidly diversifying and developing new markets. US WEST has a major stake in the cellular market, recently joining with AirTouch Communications to form the nation's third largest wireless phone company. Another alliance with Bell Atlantic and NYNEX could provide cellular service to as many as 100 million customers. In 1993 it launched a high-profile digital video trial in Omaha, with plans to expand to other major cities. After a year-long market trial, the promised digital television never was introduced, and the project was ended due to technical and financial difficulties. US WEST has also entered into the video market through its recent purchase of Continental Cablevision. It also owns 25 percent of Time Warner Entertainment, controlling the majority of Time Warner Cable, HBO, and Warner Bros.

US WEST's central offices in Tacoma are interconnected with fiber optic cable, but the rest of Tacoma's distribution plant is *not* state-of-the art. A limited number of fiber optic cables have been placed to a few select businesses and waits of four to five months for a high-capacity line are not uncommon. Growing Internet use, which keeps lines in use longer than planned, is making carriers like US WEST nervous. They claim it could lead to the disruption of vital public safety services like 911. This suggests a need for an upgraded public data network.

#### Background

US WEST is the incumbent Local Exchange Carrier (LEC) providing local telephone service in the metropolitan areas of Puget Sound. The company has had a near-monopoly with 25 million customers in 14 western and midwestern states since the establishment of the Regional Bell Operating Companies (RBOCs) at the breakup of AT&T in 1984. Today

US WEST has \$23 billion in assets, \$11.7 billion in annual revenues, 61,500 employees and more than a million shareholders. The company is headquartered in Englewood, Colorado, a Denver suburb.

No RBOC has ventured farther from its basic regulated telephone business than US WEST. This diversification was meant to provide a brighter future for US WEST as deregulation and competition slashed its monopoly telephone profits. However, this diversification is clouding its future and may have been a factor leading to deteriorating phone service.

### **Service Reputation**

US WEST's service reputation has suffered due to the company's record of poor telephone service. US WEST struggles with the largest service territory of all RBOCs, responsible for a 14-state western region. However, customers have little patience with a company incapable of installing a new line within week or sometimes even months — no matter how impressed they might be with how many states US WEST serves.

Federal and state regulators have been requiring US WEST to improve service, especially regarding the installation of new or second phone lines. Emergency rules have been proposed in at least five states in US WEST's territory, establishing voucher systems of \$150 a month for customers waiting for new phone lines. The reason for the ruling in Colorado, according to that state's public utilities director, was that "little, if any, apparent progress is being made toward resolving this problem."<sup>1</sup> The costs of the vouchers are small for US WEST, but they are symptomatic of a growing ill will in state legislatures. In Washington, Governor Mike Lowry vetoed a 1995 US WEST-backed bill that would have maintained a ban on competition from the likes of AT&T and MCI on in-state long distance calls.

### **Rate Reductions**

Poor service was the leading factor behind a rate reduction ordered by Washington regulators in 1996. US WEST had asked for permission to raise average monthly residential phone rates from \$10.75 a month up to \$26.35. Instead, the regulators ordered US WEST to *lower* its rates on residential, business, and long distance service. Further, regulators criticized the company for taking profits outside the state and paying too much in employee bonuses — all at the expense of customer service. After the company requested the rate increase in February 1995, the commission received overwhelming response from US WEST customers opposing the increase. The commissioners said that ordering US WEST to reduce its revenues by about \$91.5 million "gives the company what it needs — fair rates based on the company's actual costs, greatly increased flexibility to lower prices to meet market requirements and meaningful incentives to improve service quality."<sup>2</sup>

### **Investment Jeopardized?**

US WEST's vice president for Washington, Dennis Okamoto, warned that because of the decision the company no longer could invest as much money in the state and that service quality may be jeopardized. Okamoto said US WEST had been investing about a million dollars a day in its local telephone network and, without better earnings, work would not continue. While the commission's order was made in response to poor service and long waits for phone installations, company manager Kathi Willis said the order "could cause service delays to be even greater."<sup>3</sup> US WEST argues the commission has erred in its ruling in three areas: direct costs, laying spare capacity, and calculating depreciation.<sup>4</sup>

### **Cellular**

US WEST is attempting to enter new markets other than local service within its territory. It is building a significant cellular presence, making a number of strategic moves in the last few years toward that goal. In July 1994, US WEST and AirTouch Communications announced a joint venture that combined their domestic cellular operations to create the nation's third largest wireless phone company. Together, US WEST and AirTouch serve more than 1.7 million cellular customers in coverage areas reaching 53 million people

US WEST's 30 percent commitment to this venture was likely sparked by two events. The first was AT&T's \$12.6 billion acquisition of Bellevue, Washington-based McCaw Cellular Communications Inc., the nation's largest cellular company. The second was the auction in December 1994 by the FCC of wireless phone licenses for "personal communications services" which was meant, in part, to bring significant competition to the wireless services industry.

Wanting more clout in the auction, US WEST/AirTouch entered another alliance in October 1994 with Bell Atlantic Corp., and NYNEX Corp. This alliance could provide wireless service to nearly 4 million cellular users and the possibility of up to 100 million customers.<sup>5</sup> Under the name PCS Primeco L.P., the four companies won licenses for communications services in 11 major cities<sup>6</sup>, including Chicago, Dallas, Miami, New Orleans, and Honolulu.

### **Video Trials**

Another of US WEST's new ventures was in the interactive market. In 1993, US WEST announced plans to build combined voice, data, and video networks both outside and within its 14-state territory. In a highly publicized move, US WEST received FCC permission to launch a "video dial-tone" trial in Omaha consisting of a six-month technical trial, followed by a 12-month market trial.<sup>7</sup> One month into construction, US WEST said it would pursue a multi-market rollout of the video dial tone service in Denver, Minneapolis-St. Paul, Portland, and Boise when FCC approval was obtained.<sup>8</sup>

The company launched its 12-month market test in Omaha on August 31, 1995. Marketed as TeleChoice, the service passed nearly 50,000 homes using a hybrid fiber coaxial network.<sup>9</sup> Contrary to its initial announcements, the system began with only analog services and customers had to purchase set-top boxes unless they already owned cable-ready TVs and VCRs. Digital services, such as movies-on-demand and interactive shopping were promised.<sup>10</sup> The basic rate was \$5.95 a month, which included many popular cable channels. Additional packages for sports, family, and news were also to be offered.<sup>11</sup>

By January 1996, US WEST was still "moving closer" to its near-video-on-demand model. The package of analog channels now had more than 8,000 subscribers and testing was "well ahead of schedule." The prospect of a digital system was delayed to a vague "later this year" when the system was working to US WEST's satisfaction.<sup>12</sup>

Less than two months later, US WEST dropped its plans for a digital rollout in Omaha. Essentially the trial was too expensive and did not work.<sup>13</sup> The market trial was officially ended on August 31, 1996. The company says it will continue to offer the analog cable services in Omaha. US WEST's remaining video dial tone market rollouts never moved beyond the planning stage.

### **Cable TV**

Following the conclusion of the digital video market trial in Omaha, US WEST decided to enter the video market by purchasing cable systems in other regions. US WEST's newly formed subsidiary, the US WEST Media Group, was to manage these properties.

In February 1996, US WEST announced the purchase of Continental Cablevision with its 4.2 million cable subscribers for \$11.8 billion. US WEST purchased Continental's stock for \$5.3 billion and assumed its debt, valued at \$6.5 billion.<sup>14</sup>

This deal made US WEST the nation's third largest cable operator. With its Time Warner properties, US WEST Media Group's domestic cable market potential is about 16.2 million homes.<sup>15</sup>

US WEST also owns 25 percent of Time Warner Entertainment, a partnership controlling most of Time Warner's 12 million cable subscribers, HBO and Warner Brothers film studio. Time Warner is seeking to regain control of Warner Brothers and HBO in exchange for shifting much of its capital-intensive cable business to US WEST, along with a significant portion of Time Warner's \$17.5 billion debt load. Talks were expected to accelerate after the completion of the US WEST - Continental merger.<sup>17</sup>

### **Investment Profile**

US WEST Media Group's third-quarter 1996 profits fell 38% from the previous year's quarter to \$18 million — which the company tied to heavy investments in cable and wireless operations.<sup>18</sup> Fitch Investors Service put US WEST Media Group on the ratings agency's credit watch.<sup>19</sup>

### **US WEST in Tacoma**

US WEST operates the switched telephone network in the Tacoma area. This network is based around central offices, each serving 10,000 to 50,000 customers. The central office is the wire center from which all telephone services are provided. It houses the switching center where telephone dialing information is registered and calls are switched to trunks leading to other central offices or long distance providers. All the switches and traffic between offices are digital — to maintain the quality, speed of switching and efficiency of the common network.

Seven central offices serve the Tacoma area. The central office in downtown Tacoma is the largest and most important. It has interconnecting cable to all other central offices in the area and interconnections to other large offices and long distance carriers in the region.

Central offices are interconnected with fiber optic cables. Each cable contains about 144 fibers. High speed digital communications are maintained on the cable, providing DS0, and higher capacity DS1 and DS3 circuits.

While much of the common electronics are dedicated to switched telephone traffic, other equipment is used for leased, point-to-point digital circuits for private telephone and data use. When a circuit is "nailed-up" through the central offices, it is assigned for point-to-point use. Many of the "nailed-up" circuits in Tacoma are routed through the downtown central office, because this office has the tools to provision circuits.

### **Basically Copper**

Each phone customer has at least one pair of copper wires running from his or her telephone to a central office. These wires are wrapped around one another and are referred to as a "twisted pair." The wires start as large bundled cables that branch out from the central offices. Most of this cable in Tacoma is copper for basic telephone service. The typical maximum distance for a telephone circuit is 12,000 to 18,000 feet, depending on the gauge of wire in the cable. For services greater than this distance, Carrier Service Areas (CSAs) are defined. Within these CSAs, compact electronics cabinets are placed to serve cable plant up to another 12,000 cable feet away from the central office. DS1 circuits carry the telephone traffic back to the central office for switching. Business DS1 leased circuits can be nailed-up through the CSAs as well as the central offices. In recent construction, fiber optic cable has been used in cables from the CSAs to the central office.

A limited amount of fiber optic cable has been placed to business buildings in Tacoma. New buildings expected to have three or more DS1 leased circuits, or existing large buildings showing significant growth of high-speed digital communications, have been provided with service on fiber optic cable. However, most business service is delivered on copper telephone cable and little upgrading has been performed to replace copper telephone cable with fiber optics. The business community reports that waits of four to five months for DS1 circuits are not uncommon as US WEST attempts to recondition copper telephone cable to provide the service.

**MONTHLY**

**RATES:<sup>†</sup>**

	<u>Residential</u>	<u>Business</u>
DS0	\$10.50	\$25.00
DS1	\$200.00*	\$200.00*
ISDN	\$68.58	\$68.58 <sup>20</sup>

\*plus a \$616.50 installation charge

<sup>†</sup>not inclusive of all required fees

**Internet Use and the Public Switched Network**

Internet data traffic has exploded and is projected to continue growing at exponential rates. Households with Internet access are expected to grow from 3.1 million today to 27.4 million by the year 2000.<sup>21</sup> Internet business transactions are predicted to grow to \$250 billion in 2000.<sup>22</sup> The public switched telephone network is experiencing traffic growth from data users accessing the Internet. The switched telephone network includes common equipment shared and re-used among all users. The common equipment is expected to be available for re-use based on the average length of a telephone call.

Residential users typically have had two typical methods of connecting to the Internet — standard analog telephone lines and digital ISDN lines, both leased from US WEST. NYNEX, an East Coast RBOC, is reporting 10 percent growth per month (300 percent per year) in Internet access lines. The RBOC provides the circuit from the user to the Internet Service Provider (ISP). The ISP similarly leases business lines to receive those Internet access calls.

**Longer connect times a threat?**

While selling more lines may seem like good news to the RBOCs, they say the new traffic generates calls that last, on an average of 14 times longer than an average business call.<sup>23</sup> During the Internet session, a circuit is tied-up from the user to an ISP. The RBOCs have built the switched network so circuits are re-used among all telephone users, including voice

conversations, faxes, and emergency telephone calls. The average connect time of a call is a key design parameter used to equip the switched telephone network with the proper number of re-usable circuits. Now, with longer connect times, congestion is occurring in the switched network and more common equipment is needed to serve the traffic. A study done by Pacific Telesis in Central California's Silicon Valley found that 16 percent of local calls did not connect, mainly because of high Internet use in that region. Normally, the RBOCs claim that fewer than 1 percent of calls do not connect. The growth in Internet use, with its implications for requiring a re-engineering of the network has the local switched network and the local exchange carriers concerned.

The RBOCs have told state commissions and the FCC that the rapid expansion of Internet traffic threatens network access and could lead to the potential disruption of vital public safety services such as 911 emergency call service.

The RBOCs ask questions such as:

- How about dismantling the existing flat rate phone charge structure?
- Who will fund the expansion?
- Should all telephone users pay more for each telephone line they lease?
- Should the Internet access provider pay a large access fee to receive calls from the local switched network, since the traffic results from a service they are providing?
- Is the local switched network obsolete for growing public *data* traffic? Even though the RBOCs have been extremely vocal about the dangers of overloading the switched telephone network with heavy Internet use, and the potential threat to emergency 911 services, the RBOCs have actively teamed up with others to provide dial-up access. A local example is in the alliance formed between US WEST and the Tacoma News Tribune to provide Internet to consumers and businesses in the South Puget Sound. This service offers access speeds up to 28.8 Kbps, at a price of \$19.95 per month for unlimited access, or \$8.95 for 10 hours of access time.<sup>24</sup>

FCC Chairman Reed Hundt has said that his agency should not regulate Internet telephone or subject it to access charges — at least for now. "We shouldn't be looking for ways to subject new technologies to old rules," he said. "Instead, we should be trying to fix old rules so that if those new technologies really are better, they will flourish in the marketplace." The FCC may resolve the issue through access charge reform which the agency expects to complete in 1997.

RBOCs can upgrade their transmission systems in many ways. The circuits can be monitored for clues that each is carrying data traffic and switched to special facilities for data. Or, the data traffic can be "compressed" to free the circuit while there is silence or idle data between bursts of use.

## Tele-Communications, Inc. (TCI)

### Summary

TCI is the largest cable TV provider in the United States with 14 million subscribers, it also has a reputation for poor service. Customers complain about the company's continuing rate increases — including a 13 percent jump in 1996. The increases fuel TCI's acquisition strategy, a near-frenzy of purchasing designed to keep TCI larger than others in the cable industry. TCI added 2.4 million subscribers in 1996 alone. John Malone heads TCI and is also widely considered the best and brightest mind in the cable industry.

TCI's Tacoma system carries 36 TV channels at 350 MHz; while the recently acquired Pierce County system carries 60 channels. TCI had announced plans to upgrade its networks to hybrid fiber-coax systems, but has instead decided to deploy digital set-top boxes which could make it possible to offer digital TV without upgrading to fiber. This decision stems from TCI's struggling financial position and its huge debt load. The company has halted many equipment deliveries, and is in the midst of trimming expenses, eliminating jobs, and initiating another round of rate increases. TCI's financial troubles have not stopped the company from entering a number of alliances, which have vaulted it into the telephone, digital satellite and on-line businesses.

TCI has nearly \$2 billion in revenues, an operating cash flow of \$533 million, 14 million subscribers in the United States, and 32,000 employees in 49 states.

### Customer Service

TCI has a reputation for poor customer service. TCI's own research has concluded that "subscribers are generally pleased with the technical quality and programming offered and the price they pay for it, but they are unhappy in dealing with the cable system when a problem arises — getting through on the telephone and finding a sympathetic customer service representative."

John Malone, TCI's chairman, acknowledges that TCI has a long way to go and he keeps one particular incident as a reminder: In 1994, when a Connecticut local phone company began offering cable service to TCI subscribers, as many as 20 percent defected at one time.<sup>25</sup> Malone does not want to see that happen again, especially on a nationwide scale.

### Rate Hikes

All the programs in the world do not change the main customer complaint — cable rates. The company has a history of steady rate increases -- including a 13 percent across-the-board increase in 1996. TCI is planning

another round of rate increases for January, 1997 and July, 1997.<sup>26</sup> These planned increases will average 6 percent on the basic tiers, and “modest” increases in the cost of premium services and equipment.<sup>27</sup> Malone attempted to quell analyst reaction by saying the impact of the increases would be softened by adding new networks. In many of TCI’s systems, however, TCI cannot add a new network without removing an existing one from the system. A TCI spokesman could not explain how the company will add services in systems with no extra capacity.<sup>28</sup> The chief reason behind previous rate hikes has been TCI’s drive to acquire other systems. “Our mission in our first 25 years of existence was to become big enough to survive in the marketplace that [TCI founder Magness], Malone and others saw clearly on the horizon,” said one management official.

### Real Estate

TCI’s focus has historically been clear — prime for more growth. Its acquisitions have ranged from mid-sized cable operators serving 740,000 customers<sup>29</sup>, to the relatively small operators serving 31,000 customers.<sup>30</sup>

TCI’s purchasing has left it composed of a patchwork of companies and cable systems that have only recently been woven into a corporate whole. Clustering has become a central strategy for large multiple system operators such as TCI as they prepare to compete with telephone companies, direct broadcast satellite providers and wireless cable operators.

Financial gymnastics are TCI’s trademark. A basic strategy seems to be to use stock — even if the price is depressed — to continue acquiring more systems and to use leverage creatively to do everything else. When asked in a *Business Week* interview how big Malone intended to grow TCI, he responded in part by saying, “The object is not to be the biggest, it’s to be the richest. The biggest is the one that gets investigated by the federal government.”

TCI, already the nation’s largest cable system operator, added more than 2.4 million subscribers to its existing subscribers<sup>31</sup> in 1996, including systems owned by TeleCable, Chronicle, Columbia, and Viacom.<sup>32</sup>

### TCI’s Chief Executive Officer

While TCI has grown to be a very large company, it remains very tightly controlled by its Chief Executive Office, John Malone. TCI’s corporate culture, approach to problems, and activities are so intimately linked with John Malone that attempting to understand TCI without learning something about its CEO becomes a meaningless exercise. Even Vice-president Al Gore has called him a number of imaginative names.<sup>33</sup> But, the 55-year old man who has built the nation’s largest cable TV network has been characterized as either “unemotional, cold or motivated by pure logic”. Others in the cable industry have labeled him as a ruthless monopolist.<sup>34</sup>

Malone is widely considered the best and brightest mind in the cable industry and perhaps the telecommunications industry as a whole.

Malone earned a Ph.D. in Operations Research from Johns Hopkins University in 1967. He began at TCI in 1972 and one year later became president and chief executive officer. By 1982, TCI had grown into the nation's largest cable company due to his aggressive acquisition drive. His empire controls video services to one in four households in America.

Malone seems to have a knack for tough negotiations. For example, he turned off cable service in Vail, Colorado during a franchise dispute with city officials. He also removed HBO from some Texas systems during a renegotiation process with the network. Another Malone ploy used to deny competition in "his" markets involved the Learning Channel in 1990. Lifetime Television Network had offered to buy the Learning Channel. After the sale was negotiated, Malone told Lifetime he planned to drop the Learning Channel from most of TCI's cable systems. Lifetime then withdrew its bid. Four months later, the Discovery Channel, partly owned by TCI, bought the Learning Channel.

When asked, TCI says that it guarantees equal opportunities for all programmers. However, some programmers appear to be more equal than others. In October 1995, TCI raised the leased access rates for The 90's Channel, a progressive network, forcing it off the air. Meanwhile, NET, a conservative network, has maintained easy access and low rates from TCI.

An unusually low profile during 1996 fed rumors that Malone had grown disinterested in the cable business and was distancing himself from TCI. However, in the fall of 1996, Malone resumed his 14-hour workday schedule and active involvement in TCI's operations. "Contrary to rumors, I am not dead, terminally ill, or disinterested in my core business," Malone said.

### **Current Architecture**

For the Tacoma service area, TCI operates a cableTV system carrying 36 television channels at 350 MHz. The headend is in a building on Martin Luther King Ave, near 12<sup>th</sup> Sreet. in the Hilltop area of Tacoma. The majority of television signals are distributed on coaxial cable from this headend. Amplifiers are operated on a trunk and branch architecture with many amplifiers in cascade. TCI has approximately 45,000 subscribers in the City of Tacoma, and passes roughly 78,000 homes.

In Pierce County, TCI operates the former Viacom cable TV system carrying 60 channels. There is capacity on the system to carry 80 channels. Two-way traffic cannot be carried without a major system upgrade. The headend for this system is on 19<sup>th</sup> Sreet near Sprague Avenue in Tacoma. The distribution of television signals from the headend to regions of the Pierce County service territory is most likely by point-to-point microwave radio. Coaxial cable delivers the signals from

regional facilities to the customers in a trunk and branch coaxial architecture.

### **Build-Up Plans**

In the Tacoma - Pierce County area, negotiations for a new franchise between the City of Tacoma and TCI Cable of Tacoma are currently under way. TCI's Tacoma franchise expired in April 1995 but has been extended multiple times during the negotiations. In Tacoma, TCI had announced that it was in the process of shaping its networks into 300-home nodes that eventually would be served by hybrid fiber coax networking at 750 MHz.<sup>35</sup> If undertaken, TCI said the rebuild would be completed in approximately four years.

However, John Malone stated that TCI has suspended equipment shipments from suppliers and will be "deferring upgrading the balance of the company's cable systems." It will focus instead on deploying digital set-top boxes "opportunistically".<sup>36</sup> TCI feels set-top boxes can deliver improved pictures and more channels using compression technology that make it possible to offer digital television service without changing the company's older systems from coaxial wire to fiber.<sup>37</sup> This digital cable service will be deployed once General Instruments Corporation can build enough set-top boxes and digital deployment integration issues are settled.<sup>38</sup>

There are a number of potential problems deploying set-top boxes, as well as a number of benefits for TCI.

#### Potential problems:

- Each TV that receives premium services needs a new set-top box.
- TCI's cost per set-top box would be roughly \$400.
- Any premium ordering by a customer requires an additional phone line or ties up an existing phone line.
- No improvement in existing analog picture quality is provided.
- The trunk and branch architecture remains susceptible to outages.
- No two-way communication, such as Internet access is available.

#### Benefits for TCI:

- It could be priced at an additional \$20 per month, as an-add on to basic cable service.<sup>39</sup>
- Using eight current channels at a 24:1 ratio would allow up to 192 new digital channels in a system.<sup>40</sup>
- New set-top boxes would be needed for premium subscribers only.
- Set-top box could be funded by the subscribers as a lease charge. (The current box rental averages \$2 to \$3 dollars per month, where the new set-top boxes would be rented for approximately \$6 per month).

In addition, the Telecommunications Act of 1996 allows a company like TCI to include expenditures on new set-top boxes in its rate calculations for its lowest tier of service even if subscribers paying for that service do not get the set-top boxes. Essentially, TCI can get paid twice for the new set-top boxes: once through rates and again through lease payments.

The City of Tacoma is trying to get a commitment from TCI that the cable company will perform upgrades using high-quality fiber optics instead of maintaining the current coaxial cable.<sup>41</sup>

The TCI (former Viacom) properties in Pierce County are currently operating as a 450 MHz system. The architecture is somewhat more advanced than the Tacoma properties. The electronics are operated at a 450 MHz capacity, though the amplifiers are spaced at 550 Mhz operation. Upgrading the Pierce County properties would generally involve only the replacement of the electronics to make the system capable of two-way communication.

TCI is also implementing a DBS strategy with Primestar. This strategy would allow TCI to offer a 140-channel, mid-power service and a separate high-power, 80-channel sports and pay-per-view offering compatible with existing cable offerings. This package (named TSAT) will act as a "wireless digital" upgrade and will be marketed as a complement to cable service, giving TCI systems which can not afford digital upgrades a chance to compete with the other DBS providers for subscribers. Another attractive feature of this service, scheduled to begin in February, 1997, will be its 13-inch dishes, which will be the smallest on the market.<sup>42</sup>

### **Investment Profile**

TCI's credit status has been in a downward spiral and its stock price has fallen. Rating agencies such as Moody's and Standard & Poor's have been considering lowering TCI's debt ratings to junk-bond status — currently just one notch above it. TCI has approximately \$14 billion in debt and interest alone, which more than wipes out its operating income<sup>43</sup>, so a further downgrade would be enormously expensive for TCI.

This pressure on TCI has made it tougher for the company to raise money — either through new equity or debt placements — for continued growth. With competition looming from telephone companies, electric utilities, and direct broadcast satellite services, restraints on TCI's ability to grow come at an inopportune time.

TCI agreed that its expenses were "temporarily elevated" in the third quarter of 1996, citing costs from the company's venture into the cable modem and digital television business. John Malone said that in 1997, TCI's capital cable expenditures would be "substantially lower than in the past three or four years." In order to resolve its money crunch, TCI has decided to raise rates and reduce programming costs, capital expenditures, and its debt-to-cash-flow ratio next year. TCI said it is looking at every

expense item to trim costs<sup>44</sup>, which was the driving force behind the company's early December 1996 elimination of 2,500 jobs and freezing salaries.<sup>45</sup> TCI also said that its key subscriber count fell by 70,000 during the third quarter of 1996, raising more questions about the company's ability to survive in a more competitive market.

Having watched TCI miss a number of financial goals, some media analysts say they are going to wait until TCI's plans bear fruit before investing in the company. One investment firm executive said, "They haven't met any targets. It's like the emperor has no clothes." In typical John Malone fashion, the reply from the chief executive was: "If shareholders are really discouraged, I'd be happy to put together a few friends and buy (TCI shares) back from them."<sup>46</sup>

### Other Services Offered

TCI Telephony launched its first commercial network in Hartford, Connecticut. Telephony projects in Arlington Heights, Illinois, and Fremont, California, were scheduled to be launched by the end of 1996.<sup>47</sup> The company probably will not move beyond these three markets for some time, and then will consider other locations on a case-by-case basis. These telephony services can be offered by systems running at 450 MHz, but the systems must have two-way capability.

TCI also plans to offer advertising space on its network. TCI is experimenting with a plan to develop home pages on the World Wide Web for local advertisers. The advertisers would then promote the home pages on a TV commercial bought from the local TCI cable system. Local advertising looks promising to TCI. It foresees a shift in the way local advertisers think about advertising — perhaps re-evaluating newspaper and radio advertising.<sup>48</sup> Some of the more popular segments are aimed at real estate sales, automotive sales, classified listings, personal classifieds and even info-mercial programming.<sup>49</sup>

### Monthly Rates<sup>+</sup>

	<u>Basic</u>	<u>Enhanced</u>	<u>Editor's Choice</u>	<u>Premium</u>
TCI (Tacoma)	\$9.97	\$23.12	\$40.07	\$57.07
TCI (Pierce County)	\$11.56	\$32.33	\$44.50	\$56.28
<i>(approximate - depends on area)</i>				

<sup>+</sup>additional fees including equipment, taxes, etc. apply. (Addressable converters cost \$3.10 per month for example).

### Alliances

In 1994, TCI and five other cable operators (Time Warner, Continental Cablevision, Cox, Comcast and GE Americom) entered the digital satellite business with Primestar Partners. Primestar has grown since 1994 to 1.1 million subscribers, half of whom get bills from TCI, the other half from

the other partners. Primestar contributed \$200 million to TCI's revenues last year which could easily double that this year.<sup>50</sup>

TCI joined with Comcast, Cox Cable and Sprint to create a venture to package long distance, local telephone, wireless and cable services. This venture (named Sprint Spectrum L.P.) includes an all-new, all-digital, nationwide network for Personal Communications Services (PCS).<sup>51</sup>

Microsoft, TCI, and venture capitalists Kleiner Perkins Caufield & Byers have set up a high-speed multimedia on-line service called @Home. @Home would function as the "Internet channel," offering its programming to users over TCI's two-way coaxial cable systems for roughly \$35 a month. The @Home service entered testing in March 1996 in Fremont, California.<sup>52</sup>

### Other Plans

TCI had planned to merge with Bell Atlantic in 1994 to get into the telephony market.<sup>53</sup> However, the \$33 billion merger was called off in March, 1994 due to FCC cable rate rollbacks, TCI's weakening cash flow position, Bell Atlantic's declining stock price and the unwillingness of either company to budge on the pricing issues.<sup>54</sup>

TCI and Microsoft are currently engaged in a cable-based, interactive, utility services trial program in Northern California with Pacific Gas & Electric. This trial started in 1994, is testing application software, hardware, and network components of a system that can read water, gas, and electric meters and provide homeowners with hourly energy consumption reports by device.<sup>55</sup>

TCI owns 49 percent of Teleport, a competitive access provider that links private business networks to long distance carriers.

TCI is experimenting with McCaw Cellular on personal cellular networks in Ashland, Oregon.

## Overview

### THE LOCAL TELECOMMUNICATIONS MARKET

Understanding the local telecommunications market is critical to gaining an understanding of the environment in which telecommunications decisions must be made. This review of the telecommunications market in our local community analyzes both the residential and business markets for telecommunications services as they stand today. A discussion of how different economic futures are impacted by telecommunications concludes the section.

Market research and analysis is a proven method for taking the pulse of the marketplace. The following documents, Current Residential Market, Current Business Market, and Future Markets, faithfully capture the pulse of the telecommunications market in this region, and also relate how a new telecommunications business would impact the economic future of the community.

The future market analysis relates the a telecommunications infrastructure to the regional evolution of economies, in this case from the industrial age to the information age. Being at such a juncture offers communities an opportunity to step back and ask questions such as: What direction is our economic engine heading? What direction do we want it to head? Are we building a base so tracks can be laid in that direction? Based on the answers to those types of questions, communities like ours will make decisions that influence the direction the economic engine heads.

**The Residential Market**  
Research performed by  
**Market Data Research Corporation**  
**Gene Starr, Senior Principal**  
and  
**Dethman & Associates**  
**Linda Dethman**

Analysis by  
**Dethman & Associates**  
**Linda Dethman**

**Summary**

**The Current Market**

To help assess current market support for advanced telecommunications services in the greater Tacoma area, Tacoma City Light pursued two avenues of customer research:

- A random sample survey of 606 residential households (+/- 4% error at 95% confidence), and
- A survey of [+/- 200] businesses with over 25 employees selected from the Tacoma-Pierce County Chamber of Commerce membership and other sources.

Each piece of research addressed two major questions about Tacoma City Light's potential plan to build a broadband communications system to serve its customers:

- How strong is the market demand for services which could be offered through this system?
- How strong is customer support for Tacoma City Light building such a system?

**Market and Policy Support - Residential Market**

**How Strong Is Market Demand?**

Tacoma area households have characteristics which suggest they would be receptive to Tacoma City Light offering them cable TV and other telecommunications services.

Demographics such as a strong base of technical and professional people (29%), as well as retirees (25%), higher educational levels (68% with at least some college), and adequate income are consonant with both types of services.

Over three-quarters of households (78%) already have cable TV, and over half say they need cable to get television reception at all. In addition, many households have all or part of the experience and technology (e.g., 46% with computers, 32% with a modem, 18% using the Internet) to take advantage of other capabilities of an advanced communications system (e.g., data transmission, Internet access).

If a new cable TV provider were to offer lower prices and/or improved programming, three-quarters (73%) of customers say they would be extremely or very likely to switch to that new company. Customers are looking for the best *value, both in terms of cost and programming*, and would welcome the benefits of competition.

Customers also value Tacoma City Light: when asked which of four companies they would choose for cable TV, even if all offered similar services and prices, Tacoma City Light was the leader by far (44%), with the current provider a distant second (15%).

#### **How Strong is Customer Support?**

Most customers have not heard of Tacoma City Light's potential plan to build a new communications infrastructure. Still, when told the basics about the system — including how it would improve electrical service and how it would be financed — the large majority, 81%, supported the venture. Customers cited the benefits of competition, but a notable number also specifically mentioned that Tacoma City Light is a good company and would provide better service, perhaps at a lower cost.

## **Overview and Methods**

### **Residential Customer Survey**

The goals of the residential customer survey on telecommunications were to:

- Assess the demand for an alternative cable television (cable TV) provider in the greater Tacoma area
- Assess market readiness for other telecommunications products and services
- Assess support for Tacoma City Light constructing a broadband communications system

## **Survey Methods**

**Questionnaire Development.** A draft survey was developed and then reviewed during a focus group discussion with 11 residential customers. Results of this focus group revealed that residential customers, while quite sophisticated about cable TV needs and concerns, were less able to discuss other telecommunications services (i.e., the need for Internet access.) Thus, the survey was revised to focus on cable TV issues and support for building the system, and to gather baseline information about household technologies which might signal readiness for other telecommunications services.

**Sample Size and Reliability.** From all indications, the results from this survey provide very reliable data for Tacoma City Light. This sample of 606 randomly selected households reflects Tacoma City Light's entire residential customer base within a + or - 4% margin of error, with 95% confidence.

**Data Gathering.** Survey data were collected through telephone interviews conducted at Market Data Research in Tacoma, Washington, during October and November 1996. Each interview lasted about 15 minutes.

**Data Notes.** Due to rounding, percentages may not total 100%.

**Caveat.** While the greatest care has been taken in all stages of this study, the survey data reflect Tacoma City Light customers at one point in time. Decision-makers should bear in mind that people can and do change their minds and may act differently than survey results indicate.

## Key Findings

### Residential Market

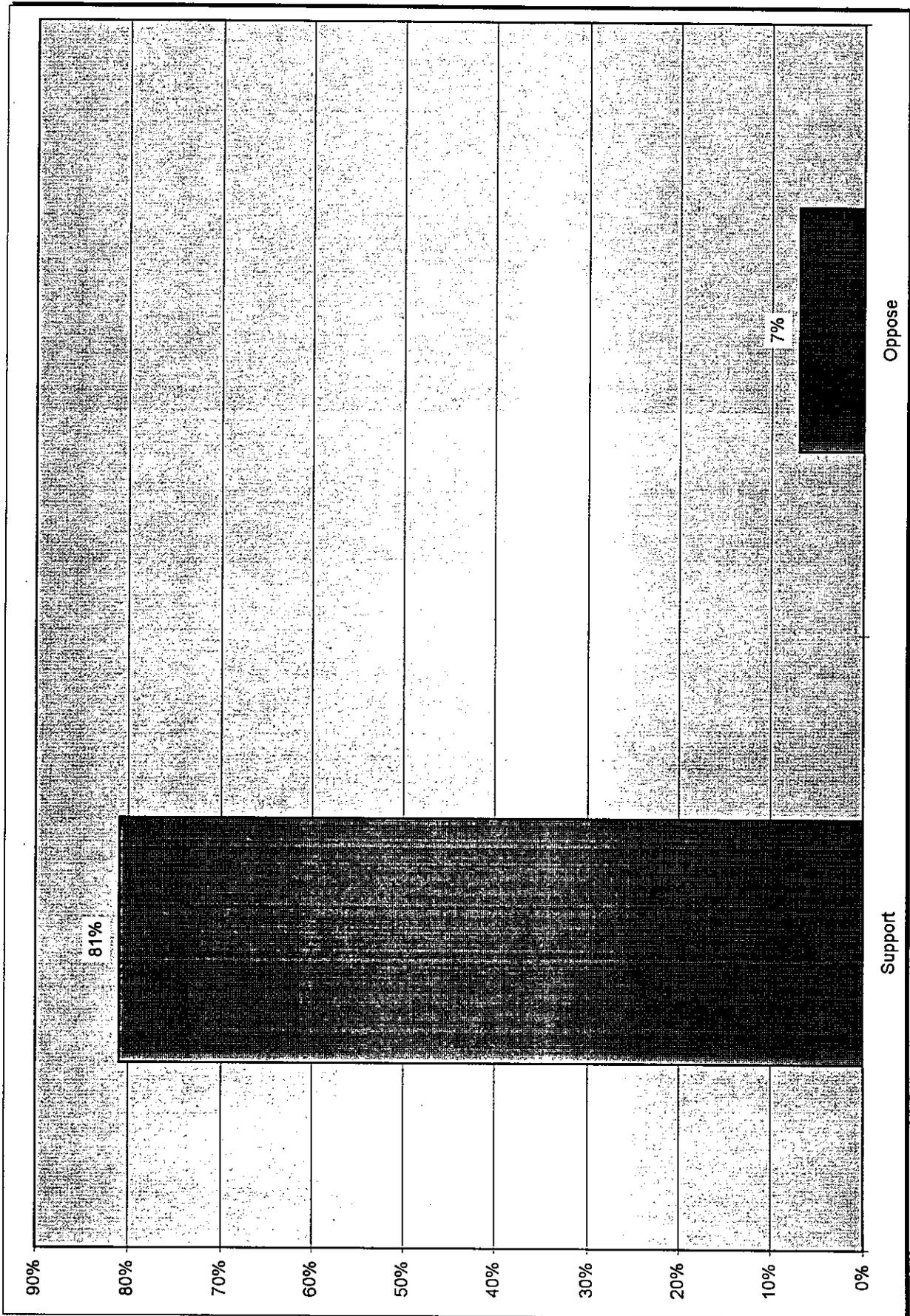
**Household Demographics.** Demographically, Tacoma area households have characteristics which suggest receptivity to cable TV and other telecommunications services, including:

- Substantial percentages of households with professional and technical workers (29%) or retirees (25%);
- Many households with higher educational levels (68% with at least some college); and
- A third of households with incomes of \$40,000 per year or more.

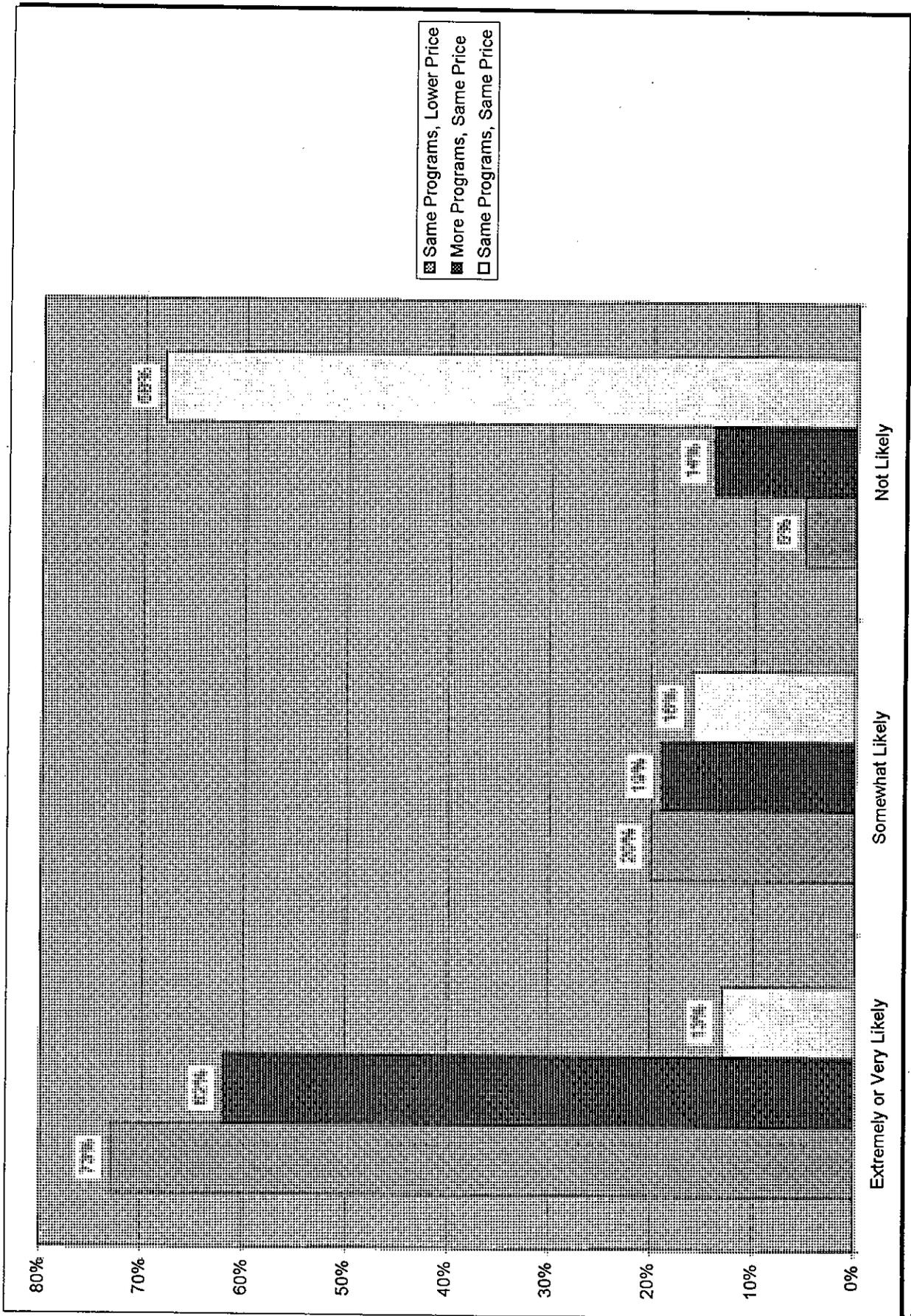
**Cable TV Penetration and Stability.** Most Tacoma area households have cable TV and demand appears to be quite stable. Findings which support these conclusions include:

- 78% of households subscribe to cable TV.
- Over half of cable subscribers (52%) say they need cable to get adequate reception.
- Over half of subscribers (53%) report they like the better and wider program choices that comes with cable, and another 27% say they want to receive specific types of programming or channels.
- Small percentages of respondents currently have mini (2%) or large (1%) satellite dishes .
- A fairly small percentage (6%) say they *intend* to buy a mini dish in the next 12 months.
- Further market penetration (6-12%) might be gained if various changes were made to existing cable services, including lower cost, installing lines to currently unserved areas, and improving programming and customer service.

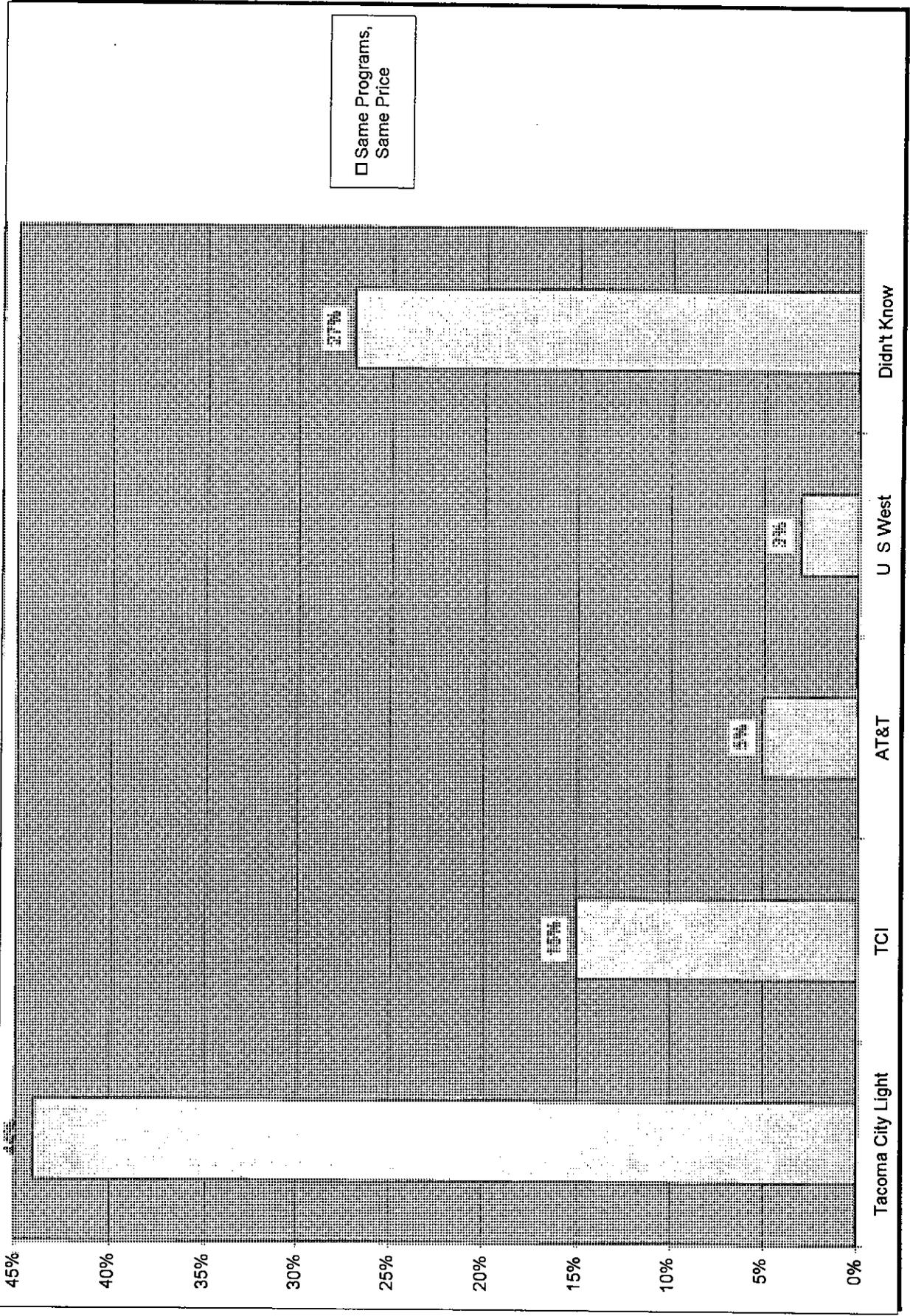
Support for Having Tacoma City Light Build a Modern Telecommunications System



# Willingness to Switch to a New unidentified Cable Television Provider



# Preferred Provider Cable Television Services



# EXHIBIT 10 (c)

## The Current Business Market

Research performed by  
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Analysis by  
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### Summary

#### The Current Business Market

To help assess current business market support for advanced telecommunications services in the greater Tacoma area, Tacoma City Light pursued two avenues of consumer research:

1. An in-depth survey, personalized mail survey of 40 businesses, hand picked as "*Key Customers*" for City Light's telecommunications services. The results of this survey are not discussed in this report.
2. A telephone survey of 200 businesses, with 25 or more employees, selected from the Tacoma-Pierce County Chamber of Commerce membership. This group represents a pool of "*Potential Customers*." The results of this survey are summarized in this report.

Each piece of research addressed this question about Tacoma City Light's potential plan to build a broadband communications system to serve its customers:

**How strong is the market demand for services which could be offered through this system?**

#### Market Demand Summary - *Potential Customer Business Market*

Based upon the results of 200 telephone interviews with medium to large Tacoma area businesses, the Potential Customer business market is on the brink of being ready for advanced telecommunications technologies. The money is there, the needs are forming and increasing, but the familiarity with choices of more advanced telecommunications technologies (i.e., ISDN) and the use of such technologies are fairly low.

On the bright side of the horizon, key findings show these customers account for more than \$5 billion dollars in annual revenues and 25,000 jobs. What's more, they currently spend over \$10 million dollars annually on telecommunications services. They perceive telecommunications links are extremely important to the success of their businesses, and many

believe their telecommunications needs will increase rapidly, particularly for Internet access and local data networks. They are more concerned about reliability than price for their local phone service, and this concern, while not at the top of the list for telecommunications services, is certainly important. They are also very concerned about getting quick response from any telecommunications vendor.

On the more hazy side, however, most are not familiar with, nor do they use, more advanced telecommunications linkages such as ISDN and T-1 lines. They don't necessarily appear to have a wealth of employees with computers or Internet access. They spend the good portion of their communications dollars on local phone service and long distance, not data communications.

Thus, it appears the market will need considerable preparation to make it more receptive to the type of telecommunications services Tacoma City Light is considering for development. Preparing the market means working with customers to accurately inform them about the technologies available and how they can reliably and cost-effectively work for their business applications. Preparing the market also implies significant up-front costs in marketing to increase awareness, interest in, and acceptance of new providers, products, and services.

## Overview and Methods

### Business Market Surveys

The goals of the business market surveys on telecommunications were to:

- Assess market use of, and readiness for, business telecommunications products and services;
- Assess market need and receptivity to a new telecommunications provider; and
- Assess support for Tacoma City Light constructing a broadband communications system.

### Survey Methods

Two survey approaches were used to assess the business telecommunications market, as follows:

*Key Customer Survey.* An in-depth survey was developed for about 40 key companies in the Tacoma area with a strong potential to become telecommunications customers if Tacoma City Light were to install its broadband communications system. These businesses either had substantial telecommunications needs and sophistication and/or were large employers. The instrument was pre-tested in-house at Tacoma City Light, and hand-delivered to respondents during December 1996 with a personal request that they complete the survey and return it by mail to Tacoma City Light. (At the time of this writing, these surveys were still being completed, returned, and analyzed; thus, these results are not discussed below.)

*Potential Customer Survey.* The same in-depth survey used for Key Customers was then reviewed during a focus group discussion with eight businesses which had 25 or more employees and which used telecommunications, but were not among the Key Customer group. Results of this focus group revealed that businesses of this size, while quite dependent on advanced telecommunications for business success, would probably not be able or willing to complete the in-depth survey. Thus, the survey was simplified and rewritten as a telephone survey.

The Tacoma-Pierce County Chamber of Commerce supplied a list of about 400 businesses which were Chamber members and which had 25 or more employees. Survey data were collected from 200 businesses through telephone interviews conducted at Market Data Research in Tacoma, Washington, during January 1996. Each interview lasted 10 to 15 minutes.

## Key Findings

### Potential Customer Market

**Business Characteristics.** While businesses in this sample of 200 companies in the greater Tacoma area vary considerably in both type and size, their annual revenues and number of employees suggest that many are likely to have significant telecommunications needs, either now or in the near future. Taken together, these businesses represent, at a minimum, \$5 billion dollars in annual revenues and 25,000 jobs. In addition, over half serve a statewide or a wider geographic market and, on average, have more than one location in the Tacoma area. Notable characteristics are:

One-third (31%) of businesses surveyed are fairly small in terms of gross annual revenues (less than \$5 million); however, 12% are in the 5-10 million dollar range, 17% in the 10 to 50 million dollar range, and 9% in the over 50 million dollar range. (Note: 31% of business respondents did not give their company's gross revenues.)

On average, each these Tacoma area businesses employ 129 people. A minority of these businesses have fewer than 25 employees (11%), while 37% have 25 to 50 employees, 26% have 51 to 100 employees, and 26% have more than 100 employees.

While just over one-quarter of businesses (28%) defined their primary geographic market area as the Pierce County area, the remainder had wider market horizons. Twenty-one percent defined their market area as western Washington; 22% as Washington or the Pacific Northwest, 8% as the West Coast, 13% as national; and 10% as international.

On average, the businesses surveyed each had just over 3 locations (3.45) in the greater Tacoma area. While two-thirds (69%) have only one business location in the greater Tacoma area, 12% have two locations, 5% have three, and 11% have 4 or more. Only 3% of businesses surveyed did not have a location in the greater Tacoma area.

Based upon length of time in operation, Tacoma area businesses appear to be quite stable: on average, they've each been in business 41 years.

Almost all the businesses interviewed (86%) already are customers of Tacoma City Light.

#### **Importance of Telecommunications Products and Services.**

Qualitative perceptions of the importance of telecommunications services, and the amount of money these companies already spend each year on such services, indicate telecommunications are a mainstay of most of these businesses. Results show that among the 118 businesses which could supply a figure, \$50,000 on average was spent in 1996 on telecommunications. If this average is used for all 200 businesses, these companies spent about \$10 million dollars on telecommunications services last year. Key results include:

Almost three-quarters (74%) say that telecommunications links are *extremely important* to the success of their business, with another 17% saying that such links are *very important*.

When asked "If your telecommunications services were out for one day, how would this impact your business?" 62% replied *it would cause serious harm to business operations*, and another 20% said *it would shut down business operations*.

Of the 118 businesses estimating 1996 telecommunications costs, 29% reported the bill was in excess of \$30,000, 31% said the bill was between \$10,000 and \$30,000, and 40% said the bill was between \$500 and \$10,000 per year. The average yearly bill was about \$50,000.

**Current Telecommunications Characteristics and Decisions.** While the 200 businesses surveyed appear to spend quite a lot on telecommunications, it is probably not being spent on data communications, nor do they tend to rely on advanced telecommunications links such as ISDN and T-1 lines. However, many are encountering new telecommunications needs and review those needs on at least a yearly basis; many are making use of the Internet; and a sizable group say are considering more sophisticated telecommunications links. The following data support these conclusions:

Every business surveyed has at least one computer. However, about half of businesses had less than 25 computers, even though only 11% had 25 or fewer employees. Thus, many businesses do not have computers for every employee.

The majority of businesses have at least one employee with access to the Internet (61%), but usually the proportion of employees with Internet access is small.

Although most companies spend money on each of four types of telecommunications services — local voice telephone lines, long distance lines, cellular phones, and data communication — most telecommunications dollars go toward local telephone service. Long distance services are second, followed by cellular phone and data communications services.

The most frequently used Internet service is e-mail (68% of companies), followed by dial-up access (41%), Web Page hosting (41%), dedicated access (28%), electronic product and service delivery (21%), and electronic customer service (19%).

Two-thirds of business respondents were not familiar with ISDN lines or T-1 lines. Only a handful have an ISDN line (13%), with somewhat more having T-1 lines (23%). However, about 10% of all customers without these lines say they have considered installing them.

Only 11% of these businesses are currently served by fiber optics from U.S. West, although 41% didn't know if their company had this service.

Businesses report that several factors are important when they decide to acquire new telecommunications services, with price (35%), reliability (20%), and customer service (15%) heading the list.

Response time is very important to these businesses when choosing a telecommunications provider: 48% defined "good customer service" as quick response.

**Choosing a Local Phone Company.** Businesses report that reliability is by far the most important consideration among price, reliability, and customer service, if they were choosing between their current local phone company and a new company. No doubt this point of view is influenced by that fact that almost half (48%) report their phone service has been out at least once during the past year. Notably, only 41% would choose their current company (U.S. West) if they had a choice, but few were willing to choose Tacoma City Light as their local phone service provider. Specific findings show:

Almost two-thirds (63%) chose reliability as the most important factor in their choice, compared to 32% choosing price, and 6% choosing customer service.

94% chose reliability as one of their top two deciding factors, compared to 70% choosing price, and 38% choosing customer service.

Less than half (41%) would choose U.S. West as their local phone service provider, 26% would choose AT&T, 5% would choose Tacoma City Light, and 4% would choose Sprint. Notably, however, one-quarter said they didn't know who they would choose.

Almost one-third of businesses report "fair, poor, or terrible" response time from U.S. West in solving problems with their phone lines.

**Future Trends.** Across a series of questions, these 200 companies reported that telecommunications needs were likely to change quite dramatically over the next 2 to 5 years. Telecommuting will increase, and many identify cellular phones, local data network interconnections, and Internet access as essential, fast growing telecommunications needs for the future. In particular:

These businesses report that, on average, 14% of their employees telecommute on a regular basis; they expect this average to increase to 18% of employees over the next 2 years.

The large majority of companies think that cellular phones (71%), local data networks (68%), and Internet access (63%) will be very or somewhat essential to their companies communications needs in the future.

49% of businesses think their company's use of the Internet will double (32%) or more than double (17%) over the next five years.

Almost all of these businesses (85%) think that the amount of time employees spend on the Internet will increase some (45%) or a lot (40%) in the next two years. They also believe the number of employees with Internet access will increase (43% somewhat, 22% a lot).

36% of businesses think their company's use of local data networks will double (27%) or more than double (9%) over the next 5 years.

26% of businesses think their company's use of cellular phones will double (21%) or more than double (5%) over the next five years.

1% or less of these businesses think their use of the Internet, local data networks, and cellular phones will decrease over the next five years.

## Future Market to Serve

Produced by  
APEX Business Solutions

### Purpose

Tacoma, like other communities, has evolved in response to changing economic, social, political, and technical dynamics at work not only in the local area, but in the region, the country, and even the world.

Understanding this change process for a given community is critical due to the reciprocal relationship between these dynamics and the community's economic base.

Over time, existing businesses contract, expand, or change focus in response to these dynamics—for example, the depletion of an area's natural resources, the building of a rail line, or the encroachment of competitors can each lead to change in the community's economic base. In other cases, certain conditions may lead new businesses or whole new industries to relocate in an area—for example, aluminum smelters' need for cheap power. The entrance of these new industries and fundamental changes in existing ones, in turn, contribute to and alter the original dynamics. As a result, reciprocal effects of the choices these businesses make are felt in a community's job mix, education system, infrastructure investments, and more. Based on this evolution, an area's economic base is built with tracks laid for its economic engine to take one route rather than another.

These periods of steady evolution, however, are occasionally punctuated by intervals of rapid revolution, where societies undergo more fundamental changes. We are in one such period now as we move from the industrial age to the information age. Being at such a juncture offers communities an opportunity to step back and ask questions such as: What direction is our economic engine heading? What direction do we want it to head? Are we building a base so tracks can be laid in that direction? Based on the answers to those questions, communities like Tacoma can make changes to influence the direction their economic engine heads.

One of the most significant ways a community and its economic base are intertwined is through an area's infrastructure. As a result, the evolution of a community's economy often depends upon the investments it makes in its transportation system, power system, and—given the shift to the information age—its telecommunication system. To plan for infrastructure needs to support an evolving community requires attention to its possible future states. This study was therefore commissioned to investigate Tacoma's potential economic futures and the inter-relationship between its economic development and telecommunication system investment decisions.

To help ensure Tacoma's telecommunication needs were assessed comprehensively, scenarios are based on information about the current context as well as potential future developments. Information was gathered from a variety of sources. Interviews with key business and civic leaders focused on the goals and efforts of various development activities. Data from published and unpublished sources were examined for insight into economic trends in each of the major sectors.

**Economic engine.** We identified the local economic engine, describing the relationships between sectors that drive economic health, growth and changes in a region. It is not unusual for a community's economic engine to evolve over time. Understanding how and why the engine is changing provides important insights into opportunities and threats that could affect the economic health of a region. Exploring this economic engine requires a historical understanding of a community's development, along with comprehensive review of how each industry sector is evolving in response to local and national pressures.

**Economic interventions.** Most communities have examples of economic development interventions, or deliberate action taken to change or impact economic activity. These interventions can take the form of programs, projects, and initiatives. Interventions often involve the forming of specific groups whose purpose is to design or implement these programs. These groups typically dissolve after the program is implemented. In other cases, long-standing groups have an ongoing purpose of economic intervention and may develop and manage multiple programs.

Interventions can focus on education or training, taxation/regulatory relief, business retention/expansion/recruitment; small business startup/jobs, international trade, government/military, transportation, telecommunications, energy, public safety, housing, culture, tourism/entertainment, investment confidence/image, and various industry sectors.

Each intervention represents a potential change in the economic engine. They either support or enhance the current trajectory, or represent attempts to alter the track a community is on. Each intervention has its own set of assumptions that influence the design of the program, implementation plans, and desired outcomes. The actual outcomes of the program interventions, however, depend on how the program characteristics interact with the local context. Analyzing the intervention requires understanding the local participation in the program, the program's overall purpose, and the validity of the program's assumptions. In this way, we can assess the potential outcomes of the intervention on the economic base in a community.

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**Scenario building.** Not all economic interventions have the same impact. Not all evolution in industries will affect each community the same. Scenario generation involves analyzing each possible trajectory in a community and combining these individual plans into combinations of possible future states in the community. Through scenario analysis, inconsistencies or conflict between economic development activities can be identified. Competing projects or industries can be assessed to determine the more likely candidate for success and survival. Changes in the base of export jobs are assessed against other support industries to ensure that each is evolving in a way that will increase chances of mutual survival. Infrastructure issues around housing, education, transportation, etc. are all analyzed to determine the support for various future states. This complex analysis, when successful, usually yields scenarios that are relatively simple and elegant. In this study, we were fortunate enough to find little direct competition for resources among industries or projects. As such, we were able to filter our analysis down to three key scenarios that we discuss.

**Implications of scenarios.** Each scenario has an implication for the volume and type of growth in the community. Using the Puget Sound Governmental Council and State Office of Financial Management reports as a baseline, adjusted for recent changes in the local economy, growth rates for each scenario were generated from economic modeling. The scenarios also represent a potentially different set of telecommunication needs and may have implications for system architecture design. The study provides a brief overview of telecommunication needs.

In this section we provide an overview of the key outcomes of this study. You will find a more detailed, comprehensive review in Appendix D.

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## Changes in the Economy

### Tacoma's Current Economic Base

The basic economic structure of the Tacoma/Pierce County economy is relatively well defined and easy to characterize. The most important economic sector of the economy is related to *government and military activity*. The major military installations in the county (McChord, Fort Lewis, and Madigan) support almost one half of the basic economic structure. Added to this are significant amounts of employment from state, county, and city as well as federal agencies and offices. Indeed, thirteen of the twenty largest employers in the county are governmental agencies. In addition to this governmental activity, employment related to *health care* and *professional business services* is also important to the local economy. These businesses reflect Pierce County's role as a regional service center for the southwestern portion of the state. Included in this set of activities are hospital

and medical facilities, regional financial services, and the supporting commercial businesses. The third important sector of the local economy revolves around the *Port of Tacoma* and its related activities. This sector includes businesses directly related to the movement of ships and cargo through the port, as well as warehousing, materials handling, and transshipment activities.

#### **Tacoma's Historic Economic Base**

Tacoma's current economic environment emerged as a result of the substantial changes that have occurred over the last 25 years. A quarter of a century ago the Tacoma/Pierce County economy was much more dependent on manufacturing activities than it is today. Such businesses were tied to the natural resources base of agriculture, lumber, and fishing. Declines in those industries have been due to a combination of factors including: cost issues, environmental changes, and shifting patterns of world production. As these historically important economic activities decreased, the area could have suffered severe economic problems. Instead, the local economy was resilient enough that these changes caused only moderate problems and adjustments. This suggests the local economy is flexible and adaptable.

#### **In Support of Development**

The flexibility and adaptability demonstrated through this 25-year restructuring was the result of a number of forces. Two of the most important factors were the *physical environment* and the *business environment*. Over time, the natural beauty of the area's mountains, water, and open spaces as well as the moderate climate have become more important to businesses and individuals for "lifestyle" reasons. In a recent survey on business climate, the overall quality of life and opportunities for cultural experiences are considered to be two of the strongest factors that encourage businesses to locate or remain in Tacoma<sup>1</sup>. Second, the community's business environment has also been a positive draw. Again, the recent survey revealed that half of the businesses (50%) think the City of Tacoma regulations and codes are being fairly enforced<sup>2</sup>. Public-private cooperative initiatives, a healthy labor-management working relationship, attractive infrastructure, and available sites for development all have contributed to a positive atmosphere that was attractive to many firms. A growing population in a large metropolitan region has created a productive and adequate labor force that reduced location costs. Finally, relatively non-restrictive land-use regulations have provided an incentive for development in the Pierce County area. Significantly, some of these forces remain in place today.

Growth prospects for the areas, therefore, continue to remain strong. Tacoma has been recognized nationally as one of the best places for small business start-ups, based on cost structures in the area. The new University of Washington Tacoma campus has enhanced the educational offerings for local residents.

Cooperation among local colleges, technical schools, and employers is strong. Recent initiatives in the urban core have improved the art, cultural, and entertainment offerings in the county. To a large extent these types of activities and advantages were important in the decision of Intel to move into the area, for Boeing to establish a new production facility at Fredrickson, and for Frank Russell to expand downtown operations.

#### **Barriers to Development**

In a recent survey of business climate in Tacoma, half (51%) of the businesses believed the current business environment in Tacoma causes companies to be reluctant to locate or remain in Tacoma<sup>3</sup>. The survey identified the most frequently mentioned 'significant factors contributing to this situation' were all taxes (29%), specifically the B & O tax (21%), regulations (13%), taxes too high for small business (10%), poor image of Tacoma (8%), and crime (8%). Factors that clearly discourage businesses to locate or remain in Tacoma are the crime rate, business and occupation tax rate, and the permitting and land use regulations.

Although amenities and infrastructure are adequate, transportation infrastructure is a problem. Additional road and rail capacity is the most problematic issue. Rail links and road access from the Port will likely be a short term issue that will be resolved with route suggestions posed in a study completed recently by the Port. Longer term solutions are under study for handling freight movement out of the area. Expansion of SeaTac airport is also of concern. Without a third runway, it may be difficult for the airport to compete with Vancouver and San Francisco in securing more international flights. The lack of such flights may impact the Northwest region's ability to attract global businesses.

## DESCRIPTION OF SCENARIOS

During our analysis two key trends were identified that shaped the scenarios we developed:

- As discussed in the last few pages, Tacoma has been and is still experiencing *change in its economic base* as a consequence of industrial changes throughout the United States and globally; and
- The outcome of *downtown Tacoma development* activities will have a significant impact on Tacoma's future economic mix as a whole.

As a result of these two key trends, we used comprehensive analysis to construct three possible scenarios for Tacoma's economic future.

- The first scenario is what will likely occur under the *current economic trajectory*, with few or none of the planned development activities succeeding.
- The second scenario describes a world that enjoys not only the benefits from the first scenario, but also *accelerated growth* from the successful implementation of the International Services Zone.
- The third scenario experiences the benefits of the previous two, along with an *expanded, diversified base* from enhancements in tourism, culture, and entertainment from a "culture cluster."

These scenarios will be briefly reviewed below, including some of the economic development projects and growth impacts linked to each scenario. This is followed by a brief assessment of telecommunication needs.

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### Scenario One: Current Trajectory

Each of the specific economic development activities currently underway in Tacoma face barriers to be successfully implemented. Our first scenario examines the prospect that the current activities to enhance economic development (like the International Services Development Zone effort discussed later in this report) are not implemented, and the financial service sector

evolves along its current trajectory without aid of tax benefits and other direct interventions.

The three drivers of the economy, Government Services, Transportation and Distribution (the Port) and Medical Services would play a major role in this scenario's development. The Port of Tacoma and military bases at Fort Lewis and McChord Air Force Base would remain the drivers of the economy. The military bases presently contribute to roughly 50% of the economic activity in the Pierce County, employing over 32,000 military and civilian workers without taking Washington State National Guard employees at Camp Murray and elsewhere into consideration.

Services to Tacoma's growing medical services industry, including back office support for physician provider groups and insurance operations, are also expected to grow as a result of the criteria described above. Back offices allow service organizations such as hospitals, banks, and brokerage houses to outsource the administrative and record-keeping tasks of doing business. Such services are typically cheaper for companies than doing them in-house, and they allow firms to concentrate on those aspects of the business that make them money. Back offices may be attracted to Tacoma due to lower real estate costs and salary scales.

It is anticipated that intra-state, regional and national transportation services will remain an important component of the local economy, fueled by population growth, increased trade with the Far East, and the trend to consolidate cargo handling at large mega-ports. With its modern port facilities, rail links, proximity to a major interstate and an international airport, Tacoma is an important hub in the state's transportation system. As a result, the transportation sector will continue to provide Tacoma with a source of competitive advantage, if congestion can be controlled. In addition to distribution centers and major shipping lines, Port of Tacoma officials expect light industrial companies to locate more facilities in its service area due to the commercial zoning available.

At the same time, a modest number of computer-related manufacturing units as well as research and development units could arrive in the wake of successful operations at Intel and Matsushita. Some of these would likely provide support to the established computer companies in a technology corridor from Bellevue to Bothell in King County. Quebecor Integrated Media, a major Microsoft supplier, is an example of such a firm. Large tracts of relatively inexpensive land where custom facilities can be built, easy access to most modes of transportation, and an available work force make this prospect likely.

### **Implications for Growth**

The three scenarios must be compared to a basis. For this report the basis is the Puget Sound Governmental Council and State Office of Financial Management reports, adjusted for recent changes in the local economy. Their forecast for population growth in Pierce County is 1.8% per year from 1995 through 2005 and then declines slightly to an annual rate of 1.5% for the subsequent fifteen years. For Tacoma, population growth is predicted to average 1.25% per year through 2005, and then slow to 1.0% annually through 2020. These growth forecasts assume that the current state of the economy remains unchanged. Housing unit growth will increase by the same percentage amounts as per the population. In Pierce County, over the long term, housing units tend to increase at about the same rate as population.

It is reasonable (but not certain) to assume that the basic economic structure will remain unchanged over the medium term horizon (through the year 2020). However, at least two forces will impact the nature of the local area economy. One is the effect of the Growth Management Act requirements. The other is the provision of adequate infrastructure, including telecommunication support. Each of these will be addressed following the scenario descriptions.

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### **Scenario Two: Accelerated Growth**

In addition to the growth occurring naturally from the evolution of different industrial sectors, a second scenario portrays Tacoma/Pierce County as a center for professional services including financial services aimed at an export market. The redevelopment of Tacoma's downtown is a second major trend influencing the economic future of the city. There are several economic development groups with specific projects underway designed to enhance downtown Tacoma. Major projects are reviewed below. Downtown development could take one of several directions, depending on the outcome of these projects.

This scenario would also include a higher rise in advanced technology companies to follow the upgrade in the downtown corridor that would accompany a financial service center. This prospect could result in the greatest change in the nature of the employment base in the Tacoma/Pierce Country area. This vision of the area's economic future rests on the passage of the International Services Development Zone, which would provide tax advantages at the federal and state level to attract international services companies (especially financial services firms) to Tacoma. In addition to financial services firms, the types of businesses attracted under this scenario include professional services such as law and accounting, architecture and engineering, and environmental consulting firms.

### Support for Professional Business Services

*The "Zone"*. In 1994, Tacoma was awarded a \$ 3 million federal Enterprise Community grant, and was designated a state Empowerment Zone. In addition to the funding, the EZ/EC designation carries a number of tax and regulatory advantages. The primary purpose of the EZ/EC programs are to create jobs in distressed urban areas. The TEC has underway a number of significant programs to achieve this goal, including an employment initiative, the Tacoma Business Assistance Center, the Micro Loan program, and the International Services Development Zone (ISDZ). The ISDZ has the potential to significantly change the face of downtown Tacoma.

The strategic mission for the establishment of an *International Services Development Zone* is to contribute to the economic prosperity of Tacoma by bringing financial service and related firms into a state designated empowerment zone within the city. The International Services Development Zone Committee is modeling its ideas on the successful International Financial Services Centre in Dublin, Ireland. The Irish venture has created training opportunities, jobs, and community redevelopment. The ISDZ Committee has the active help of the Irish government in obtaining information on how its program and its technological, educational, and administrative support are structured. The ISDZ initiative hope to achieve similar success in Tacoma, through a three-pronged program: (a) tax relief at the federal, state, and local level, (b) appropriate investment in technology (especially telecommunications) infrastructure, and (c ) coordination of education resources to provide adequately trained employees for sophisticated international service businesses. The primary focus at present is the promotion of tax incentive legislation at the federal, state, and local level.

The organizing committee, consisting of local business leaders, city officials, and other concerned parties, has already contributed toward drafting federal and state legislation. If successfully passed, the legislation will create multiple tax benefits designed to attract businesses. The group has also created committees to ensure completion of plans for facilities, infrastructure, and education to support companies locating to the zone. It is anticipated that state and federal legislation will be passed during the 1997 session. The ISDZ is part of a larger effort by the Tacoma Empowerment Consortium (TEC) designed to provide training and jobs to zone residents and improve the overall economic health of the area within the zone. Other efforts by TEC include a one-stop-shop for capital investments in cooperation with the Small Business Association, a micro-loan program, and a technical assistance center.

### Support for an Urban Retail Core

*City Beautification* If there is to be significant change in the base of professional service businesses, additional retail support will be required. As such, the *Thea Foss Waterway Redevelopment* could be a fundamental part of any downtown renaissance. The City of Tacoma purchased the waterway with the intent to clean-up and revitalize the area. Recently, the City created a Public Development Authority which will issue bonds to underwrite the creation of an Esplanade, walkways, and public parks that should help move the project forward.

The Foss Waterway development could add by the year 2020 between 125,000 and 400,000 sq.ft. of new office space and 100 to 500 new residential units in the redevelopment area. New employment in the area would range from 1,100 to 3,500 over this time period. In addition, the visual appearance of the downtown core will be dramatically enhanced by such a project. This would provide an added attraction both to organizations working on Tacoma's economic development as well as to private developers. Other proposed mixed-used buildings in the redevelopment area could support the growth of professional business services. Possibilities include: class "A" office for ISDZ companies and other firms; government office space; retail and condominium space; as well as a museum complex, public park, and marina.

Enterprises that locate in the ISDZ would blend well with existing financial services firms in the area. They would also provide employment for a highly educated, well-compensated work force. In doing so, they create an upward employment path for workers in existing businesses such as the medical insurance industry, the banking industry, as well as for retiring military personnel who typically have extensive management and/or technical training.

In addition to the growth of computer-related technology companies envisioned under Scenario One, the migration of biosciences firms to the area is also possible. Several factors make this likely. The greater Seattle area is already the sixth largest life sciences center in the country, with growth fed by research at the Fred Hutchinson Cancer Research Center and the University of Washington. Many of these biosciences companies are reaching the end of their research and development cycle and are moving on to the manufacturing and marketing phase. In doing so, they will be in search of custom built laboratory and manufacturing space. Again, available land at a relatively low cost and the prospect of retrofitting existing office or warehouse space make Tacoma/Pierce County a contender. Research institutions and those potential headquarters operations that remain in the Seattle area are located under an hour away by car. The existing medical centers in Tacoma could provide controlled patient testing opportunities. In addition, the new research facility at Madigan Army Medical Center could provide a stream of trained employees as military personnel leave the service. Under this scenario, universities would need to work with new employers to ensure

they graduate an appropriately prepared work force. For example, the University of Washington's nursing program plans to expand its public health management program at the downtown campus would support this scenario.

The impact of one large advanced technology company or a few international professional services firms could have a significant impact on the economic growth of the area. The arrival of such firms would encourage more high and middle income housing to locate in or near the Central Business District, followed by the development of additional retail opportunities. Smaller business districts such as Proctor, Lincoln, Stadium and Sixth Avenue would provide retail support for the newly arrived professionals as they visit restaurants, use local services, and shop for goods. In addition, executive housing in North Tacoma, University Place, Lakewood, Puyallup and the Key Peninsula would also be in greater demand, with concurrent impact on the retail core in those communities.

#### Implications for Growth

The location of another large technology company (following the Intel example) or the successful development of the ISDZ would produce a major employment gain. In this case, growth within Tacoma would increase by 0.75% annually in the early time frame (1995-2005) and by 0.25% in the later frame (2005-2020). A slow down in the acceleration of growth would be due to more attractive non-Tacoma locations. This type of scenario would initially increase annual growth in Pierce County by 0.5% annually, and then slow to 0.75% over the longer time frame. Again, this would reflect better siting opportunities outside of Tacoma.

A recently produced consultant report<sup>4</sup> indicates that if as fully developed as the Dublin project, this could produce about 10,000 jobs in the city — 3,500 for the ISDZ and 7,000 for indirect jobs. The earnings would be \$130 million for the 3,500 direct and \$200 million for the indirect, or total new earnings of \$330 million. The jobs would also provide a large number of entry level, high school education positions with, of course, a mix of higher level professional service type jobs. The site would include about 27 acres, 8 on the water. This would produce about 1,565,000 square feet of new office and commercial space — 20,000 for retail, 1,500,000 for class A office, and 45,000 other.

### **Scenario Three: Accelerated Growth with Culture Cluster**

Adding to the conditions that built scenarios one and two, a third scenario considers the enhancement of tourism, entertainment, and culture industries in Tacoma. If Tacoma makes some significant facilities improvements it would become eligible to bid on larger national and international conventions. Minimally, these include the construction of a second "Business Class" hotel and the expansion of the existing Convention Center. Benefits would reach private convention facilities, such as the Landmark Convention Center and the Sheraton, public facilities like the Tacoma Dome and Cheney Stadium, and retail businesses. For example, the proximity of several large performing stages to one another in the Broadway Theater District creates the opportunity for Tacoma to become an important center for performing arts conferences such as the recent "World Harp Congress."

#### **Support for Increased Tourism and Convention Trade**

In further attempts to bring business into downtown Tacoma, opportunities and venues for new entertainment and cultural locales are being pursued by several interested parties. Such projects could increase visits by tourists and/or conventioners.

*Conventions* The Sheraton Hotel currently provides business accommodations downtown. Tacoma cannot be considered, however, for a specific "class" of convention because it lacks enough space to qualify. To host such conventions requires larger convention center space and more business hotel rooms. Plans to rectify this situation are underway. The Planning and Development Department has already proposed an expansion of the Convention Center and the construction of a second business class hotel within walking distance of the Convention Center

*Museum Complex* Plans are also underway to create a Museum Complex within a larger "culture cluster." This complex will center on a portion of the Thea Foss Waterway and an adjacent portion of Pacific Avenue between 15<sup>th</sup> and 21<sup>st</sup> Avenues. The Washington State Historical Museum on Pacific Avenue anchors this complex and is already open for business. The University of Washington-Tacoma campus, which includes several renovated historical buildings, is located across from the museum and has allocated the Pacific Avenue level for commercial use. The International Museum of Modern Glass is scheduled to open in the year 2000. Other possible tenants in such a "culture cluster" include a relocated Maritime Museum, a Puyallup Tribal Culture Museum, and the Tacoma Art Museum. The recently formed Public Development Authority for the Thea Foss Waterway will undertake long term planning for this area.

*Movie Theaters* To encourage more traffic into the downtown area, the City of Tacoma recently rewrote its theater ordinance to encourage the development of a large, *multiplex movie theater* in downtown Tacoma. Such cineplexes typically include eating and drinking establishments as well as video games complexes and would attract people downtown during evening hours. This would have the added benefit of improving the perception of safety, in that people walking to their transportation say they feel safer when others are around.

*Casino* The Puyallup Tribe of Indians recently opened a *gambling casino*, eventually to be relocated on a riverboat docked on the Blair Waterway. The success of such development efforts should increase the number of evening visitors to the downtown area and have a positive impact on existing retail establishments.

*Rail Connections* The *Train to the Mountain - Park Junction Resort* project is designed to create passenger train service between downtown Tacoma and the entrance to Mount Rainier National Park. Organizers expect the project to eventually include a second spur down to Morton, Washington. The City of Tacoma already owns the tracks from Tacoma to Morton. Park Junction Resort, a private convention and hotel center to be located near the park entrance, will serve as the track's mountain terminus. Tourists will be able to board a train in downtown Tacoma and a short time later step outside to enjoy recreational opportunities in and around the mountain. Transportation plans include shuttle bus service from the terminus to Paradise Lodge and other significant sites inside the park. Board members are proposing to provide service by 1999. The *Three Mountain Tourism Council* has also secured assistance from Microsoft to provide interactive historical and geological information at several sites in the area. This assistance may be coordinated with the Train to the Mountain project as it becomes more developed.

Second, if a "culture cluster" was created in Tacoma's Central Business District, Tacoma could become a tourist destination in its own right. It is anticipated that as tourists explore traditional attractions in the area, such as Point Defiance Park and Mount Rainier National Park, they will learn of the community's cultural attractions located downtown. The Washington State Historical Museum, Tacoma Art Museum, the Broadway Theater District and a possible multiplex movie theater in combination with the International Museum of Modern Glass and other prospective developments on the Thea Foss Waterway would create a downtown destination of interest. Increased tourist traffic would then support the development of additional attractions, for example a maritime museum developed from the existing Maritime Center on Dock Street, an aquarium, a Puyallup Indian Tribal Museum, and additional public parks.

Linkage between these tourist attractions and existing business districts which have developed their own personalities, such as Proctor, Lincoln, Old Town, Stadium and Sixth Avenue, could provide a significant

business boost for these neighborhoods. In addition, increased tourism would lead to opportunities for new and existing Bed & Breakfast and other lodgings.

At minimum, however, a modest expansion of employment in the professional services sector as described under Scenario One would be required for this scenario. Local people with disposable income are needed to support these facilities during the low point in the tourist season. That fact also makes facilities in this scenario more likely to thrive if Scenario Two comes to pass. In addition, Scenario Three would be helped by a well-orchestrated approach to cross-promotional marketing by the various tourist locales.

#### **Implications for Growth**

This scenario would have a significant impact on the moderate term growth outlook for the area would come from the development of an expanded art/cultural and tourist industry. This could happen if the "culture cluster" generates the critical mass of activity needed to attract travelers and put the area on the "map" of destination stops. The effect will be to raise Tacoma's annual growth by 0.1% and Pierce County by 0.2% in the 1995-2005 time frame. Greater growth will occur during the 2005-2020 time frame as infrastructure is developed and earlier impacts are felt, with increases by 0.25% for Tacoma and 0.3% for the county.

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#### **Impact of the Growth Management Act**

An issue that will influence where and how population growth will occur, is the impact of the Growth Management Act based on its Under new regulations, the emphasis is on concentrating growth in the existing urban areas, curbing growth in the unincorporated areas, and avoiding growth in rural areas. As a result, more growth will be channeled into the Tacoma and Puyallup vicinity than in the past. Areas with clear development plans and the ability to provide traditional infrastructure will also see steeper growth. This factor favors areas such as Browns Point, Dash Point, DuPont, and Thun Field.

New housing types will change. Within urban areas, including the central business district, there will be a growth in multi-family housing. The density in the main existing residential areas (e.g., Proctor and Stadium, Lincoln, University Place, Steilacoom) will increase — with a strong possibility of more high rise (two to six story) units. In the county, the expansion will be primarily accommodated through single-family, detached units. Even in the county, however, the pressure will be to consolidate growth into those areas that already have traditional infrastructure.

Growth on the Key Peninsula will be more problematic. Transportation is obviously a problem, and this will favor location there by non-commuters, generating more demand for local retail goods in Gig Harbor. Infrastructure in that area, such as water and sewer will be more expensive and will push up housing prices.

To the extent that the employment growth occurs closer to DuPont than to the current Tacoma boundaries, some housing growth (and population) will occur in Thurston rather than Pierce County. One estimate, by the Thurston County Economic Development Board, expects that almost 70% of the non-DuPont residences of Northwest Landing employees to be in Thurston and only 30% in Pierce. As Thurston grows, however, people will travel to Pierce County for shopping and entertainment. Although a second spill over area could be Auburn in south King County, residential neighborhoods located there are not as attractive as in Thurston County nor is the economic base as diverse.

## TELECOMMUNICATION NEEDS

Our findings suggest that with appropriate investments in infrastructure and a supportive business climate, growth patterns should continue into the future. As a result, Pierce County will continue to be an attractive location for new forms of economic activity. In this section we briefly describe the relationship between each scenario and its telecommunication needs.

### Impact of Telecommunications Infrastructure

Patterns of growth in the major sectors of the local economy are, and will be more so in the future, dependent on the community's telecommunications infrastructure. Many established sectors will also require continued technology investments to remain competitive.

*Government activity* at military installations will continue to be the a significant sector in the local area economy. However, as the size of the public sector in the national economy continues to get smaller (moving toward the promised balanced budget), reductions in the defense budget will become increasingly important. The existing facilities in Pierce County have survived two rounds of base closures, due in part to the fact that they were technologically sound. The future is always uncertain, however. Access to the most modern telecommunications technology will help assure their survival in the local area.

Up-to-date communication and information services are essential to the survival of *health services*. Commercial data management in support of medical services also require a substantial and increasing telecommunications infrastructure. The health care industry is a primary industry in Tacoma Pierce-County and a rich source of potential applications and associated technology drivers. Not only are there a variety of applications driving both applied and fundamental research, but the spectrum of actual operating modes in health care provision systems span a wide range. Provision ranges from elective, non-emergency, monitoring where the patient and provider are together in a well equipped office, to emergency diagnostic and treatment situations where the diagnostic expertise is geographically remote from the patient and the treatment expertise. Remote diagnosis requires high bandwidth, real time connection oriented services which support multiple video and data streams as well as voice communication. The precise telecommunications capability required to support this activity is application specific, but can be analyzed within a distributed communication framework since in general health care providers may be geographically dispersed in multiple locations.

The increasing telecommunications need is also true of other *professional services*, especially in the area of *financial services*.

The financial services are not communications limited in the same sense as remote medical diagnostic services, or shipment status monitoring. While financial service providers at both the institutional level and the consumer level are sophisticated users of information, the financial services industry does not place heavy demand on the design of the telecommunications technology. This somewhat curious situation results from several factors:

1. Most financial information is coded in alphanumeric formats. These formats are very efficient to transmit using a variety of existing telecommunications technology.
2. Humans utilize financial information and services in alphanumeric or rudimentary graphical formats (trend charts).
3. Financial information is semantically "dense", the simple statement "DOW off %5" contains a wealth of information, but is amazingly compact (eight bytes).

So it is clear that need for increased bandwidth is usually not instigated by their need to support more volume. However, the financial services sector in the Tacoma area does have unmet telecommunications needs, as evidenced by the Frank Russell Company, one example of a professional services firm experiencing increased telecommunication needs in order to link its headquarters with its international offices and clients. For these kinds of clients overall bandwidth may not be an issue, but security of the line, speed and direction, and responsiveness of the vendor may be. This is an industry sector where telecommunications is part of the production process — a breakdown in the system can cause the organization itself to cease to function until the system is back on-line. Failure to invest in new technologies, especially communications technologies, would therefore

limit the growth potential of the area. Companies like Frank Russell would be forced to continue to privately construct work around solutions or utilize a remote service center that could supply desired access and services. Other areas looking to attract these types of companies would need to provide access to a sound telecommunication infrastructure. The success of the international services district and the ability to attract new businesses to the redeveloped Foss will depend, to a great degree, on access to low cost, full service telecommunications technologies.

More uncertain, and equally important, will be the information and communication needs of shipping and support activities in the *Port of Tacoma* area. Increase in direct competition to Tacoma's container trade, competition for new shipping lines, just-in-time inventory requirements, and lower labor costs all suggest the provision of telecommunications technologies will be important for this sector of the economy as well. Distribution centers in the Port of Tacoma, with SuperValu as another example, are becoming increasingly dependent on telecommunications for the transfer of data between regional distribution centers, vendors, and the parent company. Customers frequently desire to know the status of shipments which they have sent or are waiting to receive. These shipment status services are often effective differentiators for shipment service providers. In the small package shipment service business competitive pressure drove both FedEx and UPS to offer shipment status services. With the small package shippers, status generally provides pickup time, expected or actual delivery time and other information. With integrated shipment services providers such as the typical port authority, the cargo may be at sea, in the air or with some common carrier trucking firm which makes an accurate and reliable determination of shipment location problems. A possible solution entail utilizing global positioning systems (GPS) and wireless telecommunications technology to update port authority databases on the location and condition of shipments in transit.

In the *retail sector*, increased reliance on computer usage in stores is likely, as inventory costs can more effectively be controlled with timely ordering and control, use of fax and modem transactions is increasing, and the use of things like fingerprint recognition for credit cards or check writing. Successful merchants will need to adapt to these new demands -- a potential large increase in data transmission needs from many small and scattered sites.

The *advanced technology* businesses also can have telecommunication needs. A research based organization will often desire high-speed access to other researchers or their works. In fact, it is the ability to telecommute and connect regionally-located Universities that has fueled some of the dispersion in advanced technology companies to smaller communities.

Culture-based organizations in this scenario are not as technology-dependent as professional and health services, but telecommunications does play an increasing useful role in the tourist/convention category. The Visitor and Convention Bureau anticipates the use of smart cards to allow tourists access to a variety of services from transportation to tickets to shows. That idea would require a well developed communications network in the city and adjacent points of interest. For the conventioneer, satellite conferencing and digital information transfers are of growing importance. In addition, many business travelers expect a computer modem in their hotel rooms to connect with their home office. Museums increasingly use interactive media as an educational tool.

It is not merely the business applications themselves that require infrastructure access. Sophisticated, technology oriented employees of many of these types of firms would expect to have access to their workplace computer system from their home, access to the Internet, high quality cable systems, and eventually new technologies which are only on the drawing board at this time. A failure to invest in the appropriate infrastructure may leave Tacoma out of the running as a location for these types of firms and the employees who work for them.

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## Overview

### A LOCAL TELECOMMUNICATIONS BUSINESS PLAN

This study has reviewed the telecommunications industry both nationally and locally. In reviewing the local situation it is clear that the local market has a growing need for better telecommunications access. Something significant is clearly underway when 18% of the homes in the greater Tacoma area report that they are using the Internet and that use is projected to grow to 24% by the end of 1997. Despite this growth in demand, the incumbent wire line service providers have stated that their investments in the local infrastructure will either slow without significant rate increases or be halted all together. One could hope that other companies would step forward and create a modern telecommunications system through out our community but the prospects for that occurring anytime soon appear dim. While Competitive Access Providers will eventually enter the local market, their focus is almost exclusively on large business users. Other potential systems are either of low capacity or not scheduled to be fully deployed until the next century.

Could Tacoma City Light create an advanced telecommunications system to meet the telecommunications needs of the communities it serves in addition to its own internal communication needs? And, if Tacoma City Light were to create such a system and operate it in a business like manner, would the system generate sufficient revenues to make the system self sustaining? As this section demonstrates, the answer to both questions is yes.

A viable business would be created by:

1. offering products and services that meet customer needs directly and by providing a pathway through which the private sector can meet additional needs,
2. pricing those products and services competitively, and
3. delivering them over a modern, high-speed, high-reliability telecommunications system, a business is created that is viable using conservative revenue projections.

The following subsections outline how such a business could look by providing a review of the Products and Services, the Technology Architecture, the Operating Plan, the Organization, and the pro forma Financials of such a business.

## PRODUCTS AND SERVICES

Three types of telecommunications services would be offered by Tacoma City Light — wholesale high-speed telephony and data transport, Internet data transport, and cable television. Each of these services meet the growing telecommunications needs in the greater Tacoma area and are explored in the following sections.

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### High-Speed Telephony and Data Transport

High-speed telephony and data transport on a fiber optic SONET system would be offered by Tacoma City Light on a wholesale basis to the business community. These high-speed digital lines would be offered from point-to-point in standard DS1, DS3, and higher capacity connections, at an estimated cost of less than half the existing comparable high-speed copper lines. The lines would be open on a non-discriminatory basis to local and long distance carriers, local value-added service providers, and local businesses. The availability of these lines would bring choice and price competition to the greater Tacoma business community.

The network of fiber optic cables would be constructed throughout the area Tacoma City Light serves. The system would interconnect with the offices of major telecommunications providers in the region. The diverse routing of cables in a multi-ring architecture would be used to enhance reliability.

### Business Applications

Lines between offices would be used for teleconferencing, data networking, image transfer, or telephones. New leased lines would be quickly provided to customers. Customers would have low-cost access to new telephone service providers. Competition would exist for transport of telephone and data applications. Individual businesses would benefit from competitive prices and prompt service. Redundant fiber optic paths would be utilized to provide the transport service.

**Private Data Networks** Data network applications are likely to be the most common application on the system, meeting the performance and growth expectations driven by business computer use. The system would meet the reliability and security needs of this critical business application. These lines would support private data networks, which could include Intranet and Extranet links. An Intranet link improves the features of network service among buildings within one company; an Extranet link extends the ease of private information exchange among a few businesses.

**Telephone Access** Access to new telephone service providers is likely to be the second most common application. Lines would be extended directly to inter exchange carriers allowing them to competitively reach customers without using the local exchange carrier. Long distance carriers would have the ability to offer local telephone service directly to customers by providing dial-tone and switching service over the fiber SONET system. These interconnections with regional communications companies would provide more choices to customers. Access to alternate central offices, alternate POPs and other issues of reliability that are of importance to businesses who rely heavily on their phone lines would be met by this system's design.

**Value - Added Services** A provider of a value-added service would be able to obtain transport on high-speed lines and provide custom telecommunications applications. For example, a value-added service provider can design, install and configure a business wide area network, composed of several local area networks linked with routers, which convert local area network signals for transmission on the SONET system.

### **High-Speed Transport Service for Local Schools and Public Safety**

The high speed telephony and data transport network would be constructed to meet the transport needs of schools, public safety offices, and libraries, if franchise authorities so desire. These offices could use the transport facilities to substantially improve their internal communications and their services to the community. Also, the needs of the electrical transmission and distribution sections of Tacoma City Light would also be addressed with transport services to all substations.

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### **Internet Data Transport**

Internet data transport would be offered on the hybrid fiber coax system. Cable modems would be used to provide high-speed Internet access for homes and small businesses, in partnership with Internet service providers. Transport service for cable modems would be provided by Tacoma City Light between customers and Internet service providers.

Customers would use Internet services for entertainment, education, and shopping for other products and services. The delivery of information would be in the form of multimedia text, images, animation, sound and video. Use of this service would reduce reliance on traditional telephone lines for access to the Internet.

### Cable Modems vs. Standard Telephone Lines

Cable modems deliver data up to 1000 times the speed of standard telephone lines. Customers would be able to quickly search and retrieve information such as stock quotes, weather reports, and headline news. Providing high-speed capability removes restrictions of telephone lines on size and complexity of Internet features. Sound, images and better full-motion video can easily be delivered from the Internet on cable modems.

The use of the cable modem frees the telephone line and network for telephone calls. Internet service providers transfer *data packets* which can be individually switched and routed, without the inefficiencies of using switched *circuits*. Increased Internet traffic will eventually force telephone system operators to upgrade their local switched telephone systems in order to maintain its availability for emergency and other telephone use. Cable modems, a new HFC cable plant, and direct transmission to Internet service providers would relieve telephone system operators of this burden. Home computers could be continuously connected to the Internet, performing work without impacting telephone use. Returning the household telephone for traditional use would also preserve the current flat-rate local telephone billing system.

### Cable Modems vs. ISDN

Integrated Services Digital Network (ISDN) was invented to make digital service available in the telephone network to homes. As home services become digital, the quality and variety of services the telephone network can deliver increases. ISDN enables many new telephone services, as well as data speeds of 144 kbps, two to four times the speed of standard telephone modems. As with common telephone lines, ISDN lines are switched circuits, tying-up capacity while the line is in use. ISDN lines have the same inherent impacts that standard telephone lines have on telephone network availability when used for Internet access.

Cable modems provide a data connection directly to an Internet Service Provider, bypassing the telephone network. Cable modems provide approximately 100 times the speed of an ISDN line used for data. Cable modems provide the speeds that should allow new forms of service to prosper on the Internet.

The following graph illustrates the comparable services and costs between a standard telephone line, an ISDN line, and a cable modem.

### **One - Way Cable Systems**

Competing products which deliver high speed data, such as Direct Broadcast Satellite or Cable Data on one-way cable systems, continue to use telephone lines for the return path. Use of such products only exacerbates the already overloaded telephone system.

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### **Cable Television**

Offering full service cable television directly to local homes would bring price, programming, picture quality, and service-level competition to the greater Tacoma area.

The system that delivers Internet data transport service also provides cable television. The use of fiber optics optimizes system operation and performance. Tacoma City Light would offer a wide range of programming, including local broadcast, news and information, sports, arts and entertainment, movies, family, as well as public access, education, and government (PEG channels).

Initially, digital television would not be offered, since the system would offer a multitude of clean and sharp analog channels. Since the channels would be viewable on a cable-ready television without a set-top box, problems that set-top boxes cause with television features like picture-in-picture and VCR functions would be avoided. An 80 channel lineup of television programs provides significant value to the large majority of customers. The digital television business is not yet mature. The risk of offering digital television right now is great, as the digital set-top boxes are not generally available and are expensive, and most program content is available in forms which are expensive to convert for compressed digital transmission to homes. As digital television on cable systems matures, then simple revisions can be made to offer many digital programs.

## TECHNOLOGY ARCHITECTURE

The following key areas are considered in telecommunications architecture decisions:

- Adaptability to easily serve future needs
- Efficiency in serving telecommunications requirements
- Compatibility with other systems
- Future capacity for growth
- Integration of electronic components
- Maintenance and Operations standards and procedures

### Telecommunications System Design

#### Hybrid Fiber Optic Coaxial (HFC)

The basis of many modern, cost effective telecommunications architectures is the hybrid fiber optic coaxial (HFC) structure carrying many radio frequency (RF) channels. Fiber optic cable is used to carry signals from the communication system facilities to the vicinity of subscriber homes, with final delivery on coaxial cable.

HFC systems are the most economical way of transporting vast amounts of information to homes for the following reasons:

- HFC systems make use of commercially proven electronic transmitters and amplifiers in both the optical and coaxial cable transmission of information.
- HFC systems are compatible with communication devices already present in customer homes.
- HFC systems allow new customers to tap into the same main cable used by other customers on the same street, minimizing the cost of providing each customer service.

#### SONET

Wholesale telephony and data transport services differ from residential services. Businesses often require large volumes of transport, which is mostly two-way and concentrated. The fiber optic cables in the HFC infrastructure can be used to transport business telecommunications traffic independently on dedicated optical fibers in the same cables with optical fibers for two-way cable television and Internet data transport. The key to serving business telecommunications is providing high-speed digital transport based on common transmission and connection standards. SONET is a highly standardized system of providing transmission of digital telephone and data circuits. SONET systems are in broad use

today by local exchange carriers, long distance companies, and competitive access providers.

## System Basics

The headend, distribution hubs, and serving area nodes are the three major categories of communications system facilities. Each of these categories correlates to system equipment and geographic areas served.

### Headend

The headend is the control center where incoming television, radio, and satellite signals are amplified, converted, processed and combined for transmission to customers. In advanced systems, the content from other service providers such as video on demand, telephone, and data are also received and inserted into the HFC system. Program content that is broadcast to all subscribers is inserted into the HFC system at the headend. Program content unique to each hub service area can also be inserted into the HFC system at the headend.

SONET digital transmission can be used to bring the advanced services from other facilities, such as telephone switching centers and Internet access centers to the headend for insertion into the HFC cable system.

### Distribution Hubs

Distribution hubs are necessary to provide an insertion point for subscriber specific or narrowcast program content. Without a hub, fibers to neighborhood nodes would have to be cabled directly from the headend. By using as few fibers as possible to transmit common or "broadcast" channels from the headend to the hub, other fibers can be loaded with narrowcast channels. Most growth would likely take place in narrowcast channels which would determine the assignment of the fibers and new hub equipment.

Hubs are also necessary for high-speed telephone and data transport for businesses. The transported signals from customers premises are concentrated at the hubs onto higher speed SONET transport systems for transmission to service providers.

### Nodes

Nodes are terminals in the HFC communication network where signals are combined or re-transmitted. Nodes are also the transition point from optical fibers to coaxial cable. Coaxial cable is the final distribution link to subscriber homes. From nodes, coaxial cable trunks branch out to distribute signals and trunk amplifiers are used to boost signals as distance increases. Node size is chosen to match the number of

narrowcast channels used by subscribers — node serving areas would be divided into smaller areas as customer demand grows.

Within the node serving area are the power supplies with battery backup, trunk amplifiers, branch amplifiers, service taps and coaxial service drops to subscriber homes. All services to subscribers are provisioned from passive electrical devices (taps) to the coaxial cable. The largest portion of overall system cost is in the outside coaxial plant from the node to the customer.

The diagram labeled “Combined Hybrid Fiberoptic Coax and SONET System” outlines the relationship between headend, distribution hubs, and nodes.

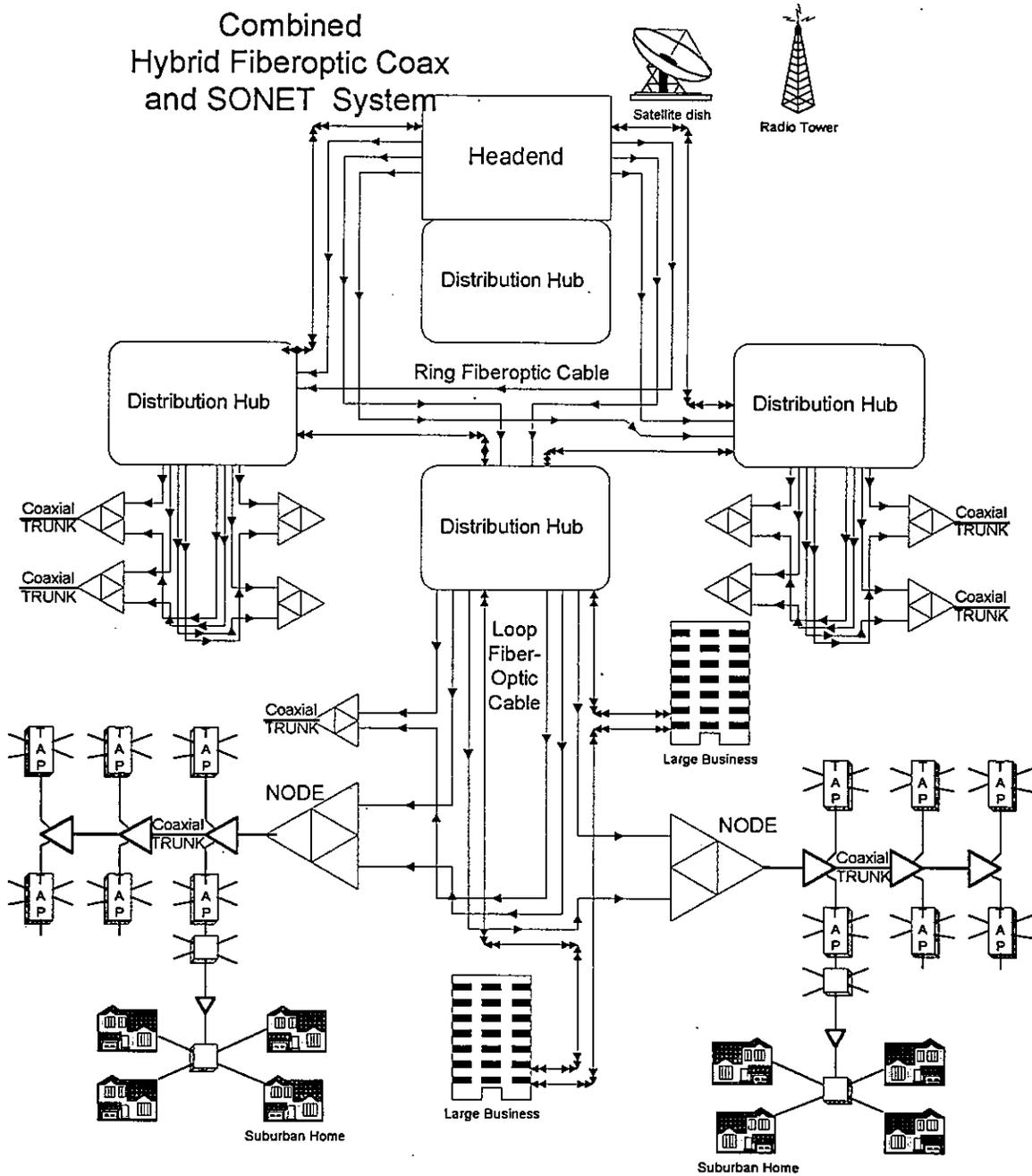
High-speed data and telephone transport for businesses are delivered directly on fiber to the business premises. Cables are shared from the distribution hub, using separate fibers for SONET and for HFC nodes. Nodes are not needed for high-speed data and telephone transport, as the services are carried on fiber optics to the customer. Electronics for the conversion of signals from SONET optical transmission to standard electrical signals are installed for each customer.

### Redundancy

Redundancy ensures that services are not interrupted due to preventative maintenance or component failures. This is particularly important in regard to telephone and data services. Telephone customers have grown accustomed to high reliability, and telephony has earned the distinction of being a “lifeline” service, especially in case of emergency. Redundancy also benefits residential customers of entertainment video. While not as threatened with hardship, loss of video service is annoying. Traditionally, cable television systems have not used redundancy in their services.

Hybrid fiber optic coax (HFC) systems can be constructed with considerable redundancy. The benefits and risks of operating a “bulletproof” telecommunications transmission system must be compared to prevent spending too much on the infrastructure, charging too much for transport on the infrastructure, and to meet the requirements regarding system integrity of each of the services transported.

### Combined Hybrid Fiberoptic Coax and SONET System



## Matching Channels to Service Territory

HFC systems carry radio frequency (RF) signals. All applications are carried within one or more 6 MHz bandwidth RF channels. The allocation of these channels both in frequency assignment and physical coverage area must be managed carefully, because the ability to carry new applications depends on the availability of channels. The capacity of an HFC system to carry unique content to each customer depends on the re-use of frequencies among nodes.

Some channels are identical and are broadcast to all customers, such as basic and enhanced basic cable television. Some channels are broadcast to a smaller geographic area, like the hub serving area. Examples of these channels are public access, education and government (PEG) television channels, or television channels with localized advertising. The remaining channels are those unique to one node, serving 500 to 2,000 customers each.

Each time a channel is assigned to a limited area, the channel frequency assigned can be re-used in other areas. This re-use of frequencies is very important in the conservation of capacity of the HFC system. Advanced digital services are narrowcast. Examples include telephony, cable data networks or Internet access, and video on demand. Advanced services contain two-way information unique for each customer, and must be available on demand.

## The Return Path

New applications for cable television systems are often two-way and therefore use the return communications path. The return path enables billing management, telephone transport, and data network connections. Possible electric utility applications are: remote meter reading, outage notifications, interactive customer communication, and active energy conservation measures.

## A Final System Design

The final system architecture is a tradeoff of technical and economic choices. One architecture is described here, with reasons for recommendation, limitations, and estimated costs. Some alternatives are described, with their benefits, limitations and costs.

Several assumptions were made in order to be able to select a system architecture. First, the system must initially be able to support 50 percent of the cable television subscribers market. Second, the population and residential density in 2010 was the basis for planning the common infrastructure. The initial number of optical nodes is based on 2,000 homes per node, resulting in 82 nodes. Using 1996 residential figures, this results in approximately 1,500 homes per node.

### Headend Program Reception

Six satellite dishes are needed to receive enhanced basic, premium and pay-per-view programs, covering all the satellites serving the west coast of the United States. The headend and satellite dishes work best if co-located at the same facility. The initial recommendation for headend location is Southwest Substation, with alternates at the Tacoma City Light Administrative complex or Cowlitz Substation.

There are ten broadcast television stations, requiring antennas and receiving equipment. This equipment must be located in a prime receiving spot and can be placed in a location remote from the headend facility. Broadcast studios can provide direct feeds to the headend of higher quality than off-air antennas, but unfortunately, most studios are located in Seattle.

Franchise obligations include carrying public access, education and government access (PEG) channels. Content for PEG broadcasts can be delivered to the headend in tape format, or transmitted to the headend on optical fibers from production studios.

Commercial advertising is inserted at the headend. A storage and playback device holds all the commercials to be used in one week, and they are played automatically on queue. Schedules are set and signals are sent within regularly scheduled programs to queue the insertion of commercials.

A major system alternative that could have significant impact on system capacity is the development of digital television. Programming could be delivered as digital channels. Some of the six headend satellite dishes could then be re-used for reception of digital channels, greatly increasing their channel capacity.

Some channels are identical for all customers, such as basic and enhanced basic cable television. Level 1 channels originate at the headend and are broadcast to all hubs, nodes and customers. They will be assigned from 50 to 550 MHz. There are a maximum of 80 channels to allocate to Level 1.

Level 2 channels are targeted to a smaller geographic area, the hub serving area. Each of the five distribution hubs serves an area of 30,000 to 45,000 homes. Examples of Level 2 channels are Public Access, Education and Government (PEG) television channels, or television channels with localized advertising. Each Level 2 channel can re-use the frequency assigned in other hubs. This re-use of frequencies is very important in the conservation of capacity of the HFC system. There are no channels currently allocated to Level 2.

### **Hub Quantity and Locations**

There will be one hub co-located with headend. This headend and hub location is recommended to be Southwest Substation, due to optical performance, service to a major electrical substation, and property availability.

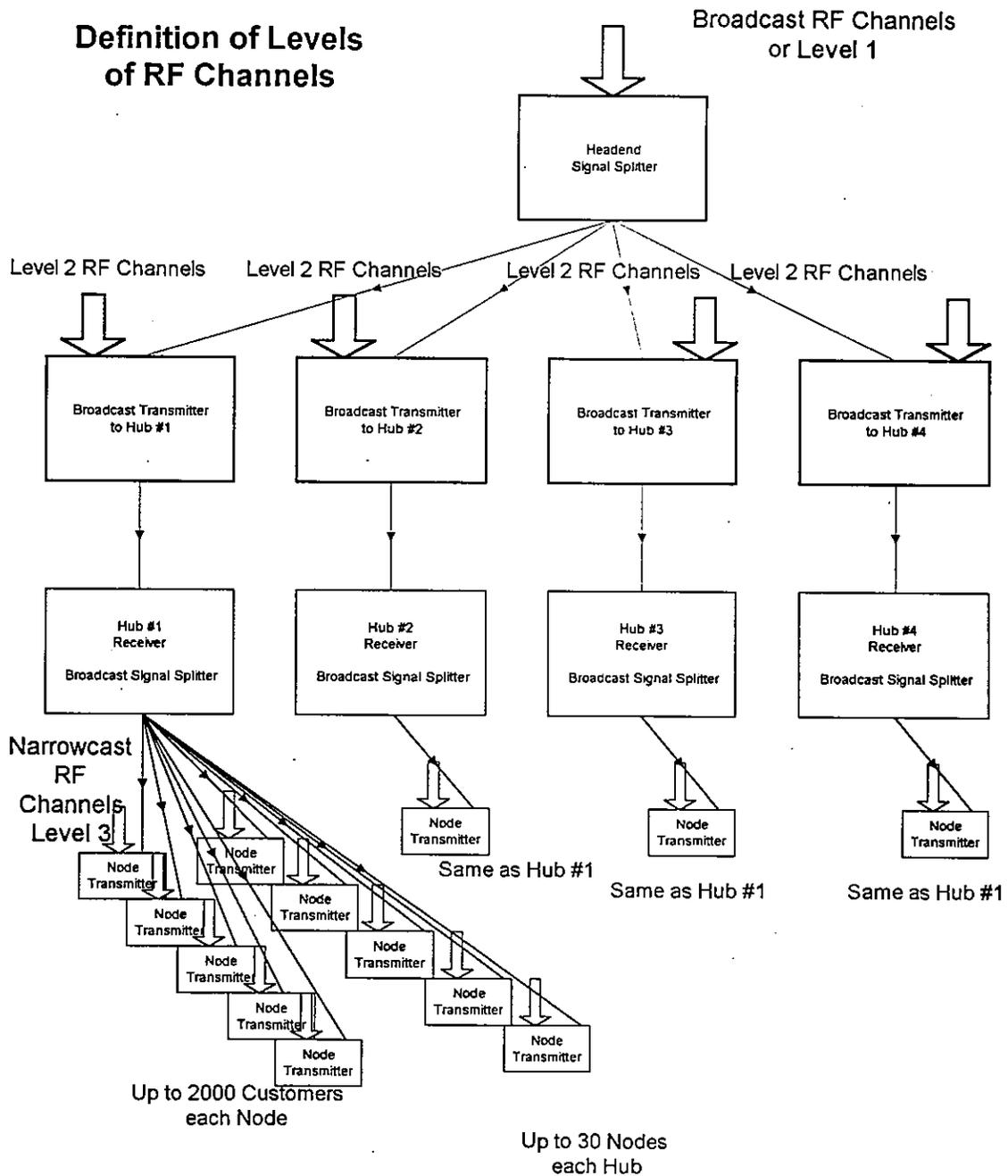
Four remote hubs will each serve within physical boundaries, growing to seven remote hubs if needed. The hubs are initially recommended to be Pearl Substation (with Adams as alternate), Northeast Substation (with Tideflats as alternate), Cowlitz Substation (with Roosevelt as alternate) and Elk Plain Substation. Buildings for hubs must be sized and powered to house future electronics, even if underutilized in the early years of operation.

### **Transmission From Headend to Hubs**

Transmission to distribution hubs will be through optical fibers. Initially concentrating electronics at the headend in order to minimize electronics at the hubs is desirable. Growth in advanced services, such as residential telephony and Internet data transport will eventually increase the electronics at each hub.

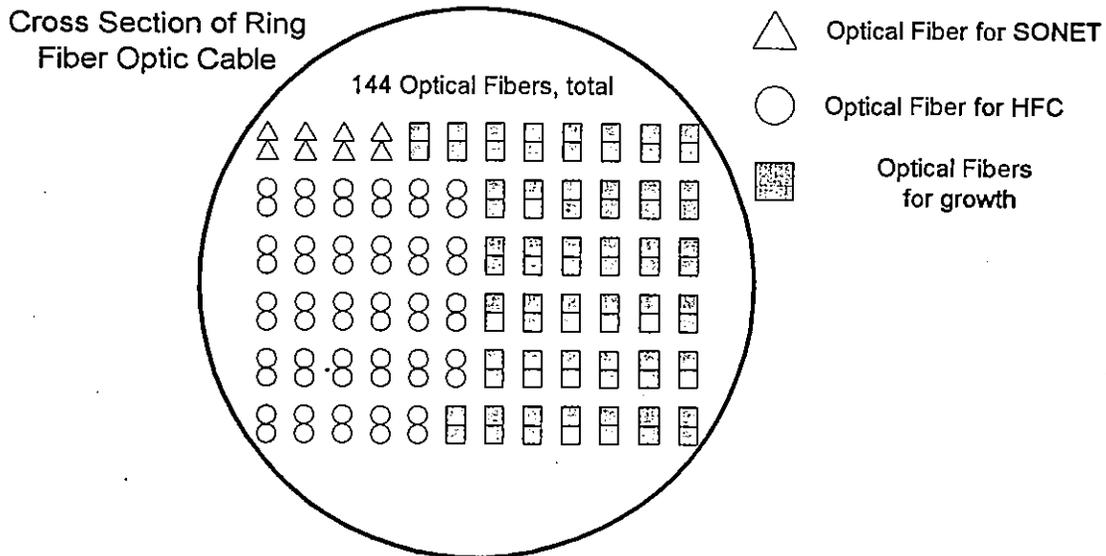
The number of fibers in the ring cable between remote hubs must be large enough to accommodate growth. All optical transmitters chosen for transmission from the headend to the hubs must be of the highest quality (54 dBc carrier to noise ratio) to make up for any signal degradation in the transmission from the hub to node and node to customer.

Transmitters and optical fibers are associated with broadcast and narrowcast of channels. From the headend to the hubs, transmission of RF channels takes place on optical transmitters and optical fibers. Redundant optical transmitters would be used and redundant optical fibers would be routed in diverse paths ensuring continuation of service in the event of fiber cable cuts. See diagram labeled "Ring and Loop Optical Cable" for an example of route redundancy.



## Hub Fiber Optic Ring Cable Plan

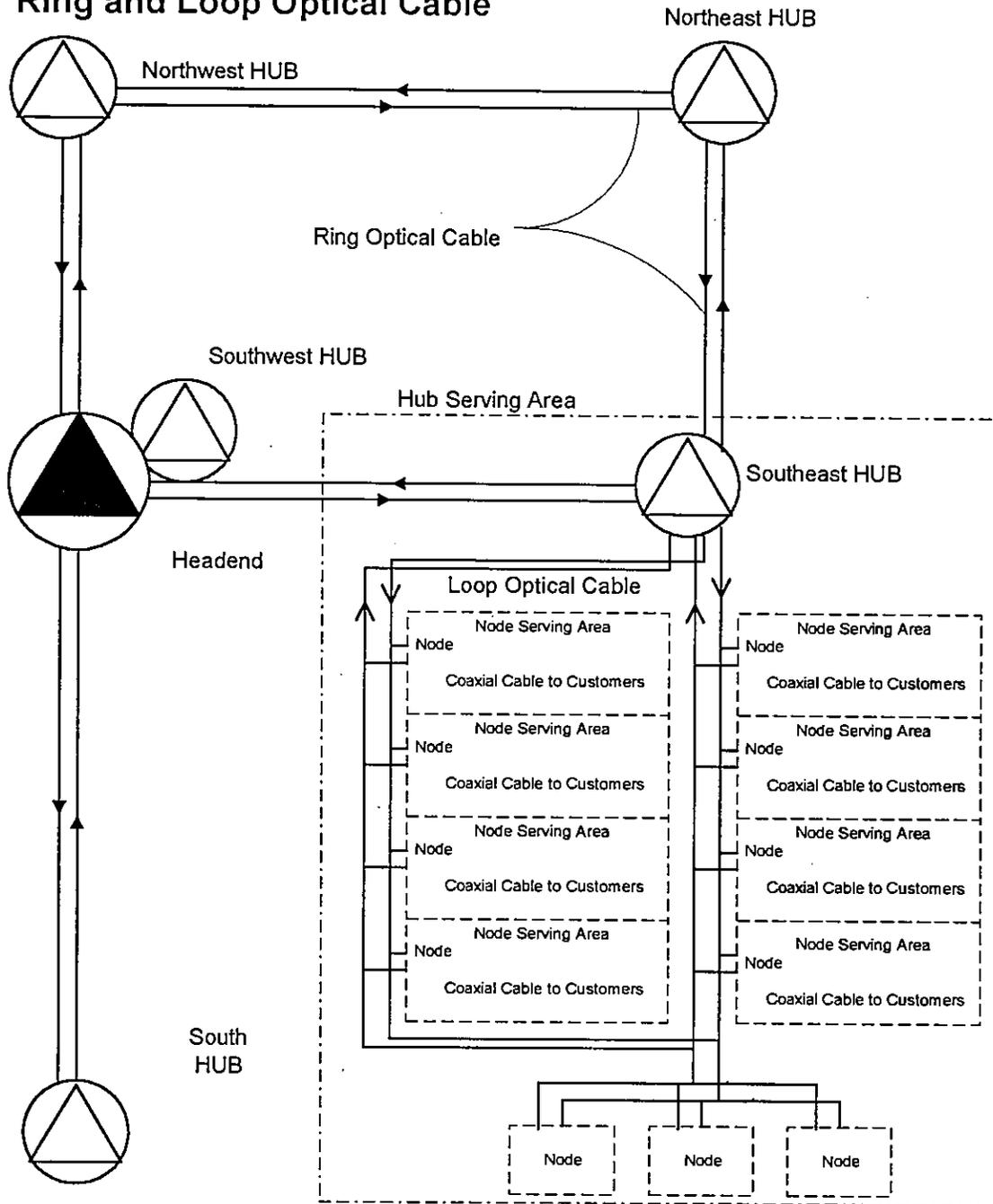
In summary, there are ten optical fibers needed in the ring for Level 1 and Level 2 RF channels, eight for SONET, 28 for Level 3 RF channels, and 20 for return RF channels. The minimum quantity to operate the initial system is 66. Tacoma City Light would build a ring cable plant supporting transmission among hubs for a lifetime of 30 years, which is beyond the traffic predictions trusted today. Optical cables are built in loose tubes of twelve fibers each, with twelve tubes, therefore, the fiber count to be installed would be 144 fibers.



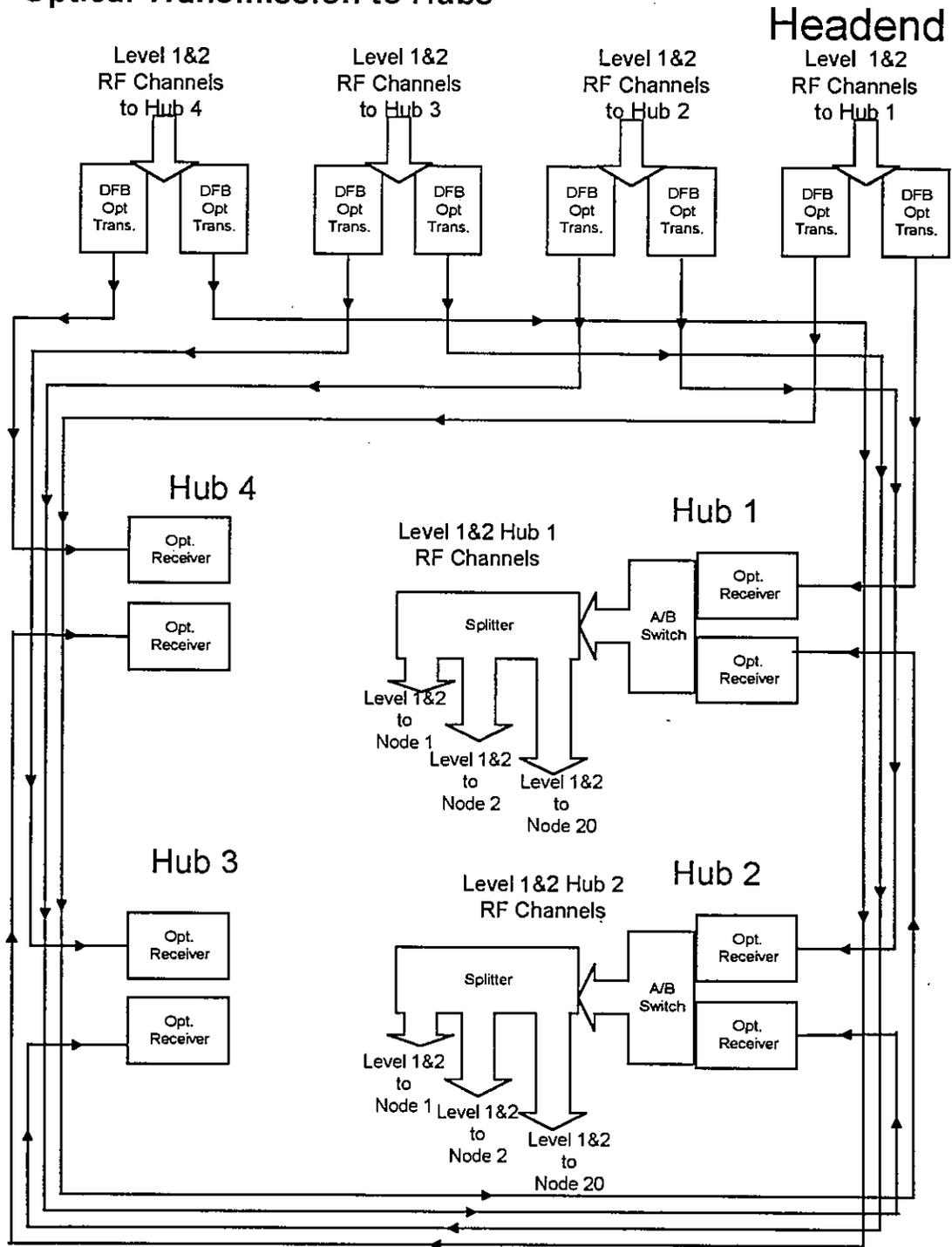
The optical fibers in the ring would support the following design:

- All Level 1 (those reaching all customers), Level 2 (those reaching all customers in a hub only), and Level 3 (those reaching individual nodes only) RF channel modulators are concentrated at the headend.
- Level 1 and Level 2 RF channels can be transported redundantly to each of the four initial hubs using four fibers in the ring and eight each Distributed Feedback lasers at the headend.
- The minimum ring optical fibers reserved to carry Level 1 and Level 2 RF channels to four initial and seven maximum remote hubs is seven fibers. See diagram labeled "Broadcast Optical Transmission to Hubs."

# Ring and Loop Optical Cable



### Broadcast Optical Transmission to Hubs



Level 3 channels are those unique to one node, serving 500 to 2,000 customers each. Level 3 is commonly referred to as narrowcast. Advanced digital services such as telephony, cable data, Internet access, and video-on-demand are assigned to Level 3. These advanced services use RF channels to serve the customers in an area of 500 to 2,000 homes. The channels assigned to Level 3 in one node can be re-assigned in all other nodes. The capacity of an HFC system to carry unique content to each customer depends on the re-use of frequencies among nodes.

Even with re-use of frequencies, HFC systems cannot meet all applications. Business communication systems are concentrated geographically and are high-volume. Such systems cannot share coaxial cable with residences. One solution is to assign extra optical fibers in the cable plant exclusively to business data and telephony transport, and use digital SONET transmission standards.

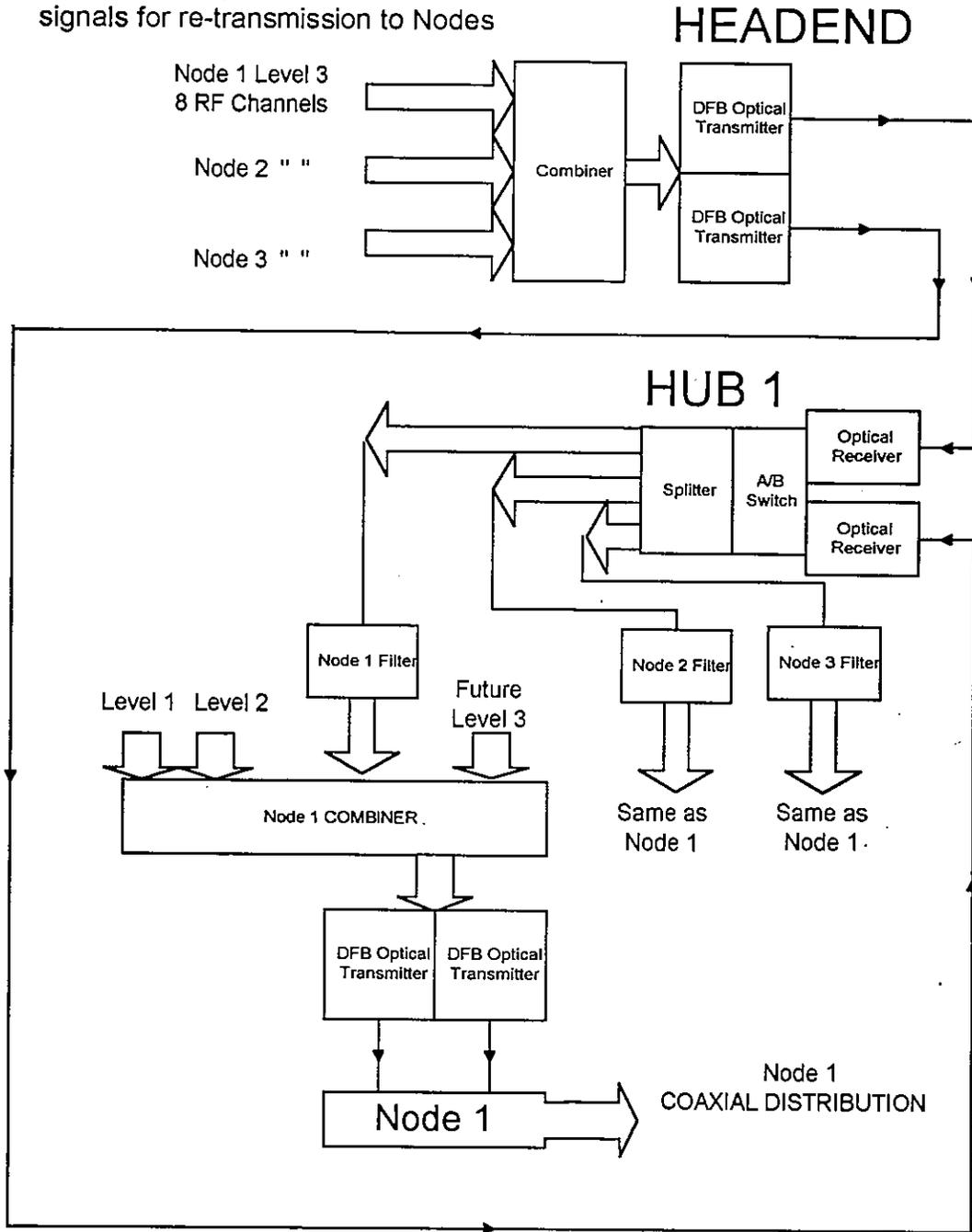
The maximum HFC allocation is for 34 narrowcast Level 3 RF channels to each node. They will be assigned from 550 to 754 MHz. The initial allocation is eight RF channels to Level 3.

- To minimize electronics at the hubs the Level 3 RF channels can originate at the headend. This significantly increases the optical fibers in the ring and optical transmitters/receivers between the hubs. Maintenance and diagnostics of the electronics and transmission system is simplified, however the cost of installation and restoration of fiber optical cable in the ring increases. With a ring of 35 miles circumference and optical fiber expense of \$500 per mile, extra fiber costs \$17,500 each.
- To establish the optimum fiber count, it is assumed that, at start-up, 8 each Level 3 RF channels are transmitted from the headend to the HUB for each node.
- RF channels for multiple nodes can be combined at the headend, transmitted on one optical fiber, and separated at the hub. See the diagram labeled "Narrowcast Optical Transmission to Hubs." The direct savings are \$7,500 for each transmitter and \$17,500 for each fiber, for a total savings of \$25,000. A balancing expense of \$3,000 is for filters to separate the signals, for a net savings of \$22,000 for each fiber saved.

Using this approach, Level 3 RF channels can be transmitted to the hubs using 28 fibers added to the ring.

## Narrowcast Optical Transmission to the Hubs,

Also, combining of broadcast and narrowcast signals for re-transmission to Nodes



Return optical fibers complete the two-way path for services like telephone, data, near video-on-demand, video-on-demand, and utility applications. Each node transmits to the hub on six RF return channels. These can be frequency block converted at least five to one at the hub for retransmission to the headend. Return Level 3 and Level 2 information can be transported redundantly on 20 optical fibers in the ring.

### Limitations

This option cannot effectively carry the full capacity of Level 3 traffic of 34 RF channels each to more than 320 nodes of 500 customers each. It is an economical method of entering into the business, but cannot grow to meet full utilization of HFC capabilities.

Alternative approaches to Level 3 transmission expected to be available to meet growth in advanced services are to use block frequency conversion, optical wavelength division multiplexing, or digital transmission.

SONET will transport digital information for business telephone and data traffic to the hubs efficiently. The final delivery to businesses will share the same cable but remain on separate optical fibers from those used for residential services. Two optical fibers are needed in the ring for each SONET system. Once two or three systems are in operation, if a fourth is needed, all four systems can be combined to operate on a single optical fiber pair. A minimum of four optical pairs, or eight optical fibers are needed for high-speed SONET traffic.

### Optional System Architectures

- Dedicating optical fibers for use in transmitting Level 3 signals from the headend for each node will result in 82 optical fibers used in the ring for Level 3. The direct cost is \$1.4M to add these fibers and optical transmitters. As the system changes from 2,000 homes passed per node to 500 homes passed, the optical fibers needed would grow by four to one, to over 320 fibers from hubs to the headend.
- Additional Level 3 RF channels can be combined onto each fiber and block frequency conversion can re-position each channel to correctly place it in the channel line-up. This adds electronics at the hub and the quality of frequency conversion is not high. This option is not yet priced, but does not meet criteria for simple hub electronics and known high quality.
- Wavelength Division Multiplexing places several light signals on the same optical fiber. While this is applied today for digital transmission networks of high-speed data and telephone, the optical sources for direct application to HFC AM lightwave transmission are not yet available.

- A final Level 3 transmission alternative is to use digital transmission such as SONET to the hubs, and move all Level 3 RF channel modulators to the hubs. This takes advantage of the point that the most Level 3 RF channels carry digital information. Modern high-speed digital transmission schemes can move the data efficiently to and from the hubs. SONET carries standard digital traffic in the same formats businesses predominantly use today. Telephone and data service provider equipment would be installed at the hub, converting the digital traffic from the SONET formats to the cable television format. To allow final combination with Level 2 and Level 1 RF channels at the hubs requires RF channel modulators. This strategy distributes the electronics from the headend to the hubs and does not serve digital television signals well. This approach could be necessary to accommodate growth as nodes are split four to one to reach 500 homes per node, and as Level 3 RF channels increase beyond eight per node.
- Remote hubs could be located following substation service area boundaries. The initial selection of these hubs could be the distribution substations of Union, Adams, Pearl, University, Bridgeport, Custer, Clement, Roosevelt, Polk, Portland, and Tideflats. The site of the headend could be the Administration complex. The beneficial impact is to reduce the branch optical cable length and expense. However, it complicates delivery of Level 2 programming when the hub service area boundaries are not close to the political, school district, library, or city boundaries.

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### Node Cable Plan

Each node is planned to require four optical fibers each. Two fibers downstream and two fibers upstream provide redundancy for television, telephone and data services. The number of nodes would grow from 82 to more than 320 as the nodes are split from 2,000 homes per node into four each, 500 homes per node. Node optical cables are planned in loops to allow redundant paths to hubs. To allow digital data and telephone traffic to be transported independently from the hub on SONET branches to businesses, schools, libraries or substations requires many extra fibers.

From hub to node, redundancy is expensive due to the quantities of optical transmitters, fibers and receivers. Whether the predominant failure mode is electronic failure or optical cable cut has not been resolved. Either type will take significant numbers of customers from service and require emergency restoration.

The redundant optical fibers to the nodes, as well as reserves for growth and business communications services, must be planned for and installed in the initial plan — costs associated with adding redundant fibers later are extremely high.

Future services to be offered on HFC systems are telephony and Internet transport services. Data and Internet residential applications have become integral especially to home-based businesses. The economic impact of service interruptions to home-based and other businesses will grow as the data applications on the HFC systems grow.

Finally, the HFC system will carry several applications simultaneously. The need for reliability is compounded when thousands of customers are receiving all of their telecommunications services on one common system.

Given the importance of redundancy, redundant fiber paths to nodes and fibers for growth have been included in the preliminary system design and supporting financials.

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### **Business Telecommunications**

The telephony and data services typically provided to large businesses differ from residential services. Business traffic predominantly travels on high-speed digital lines, the most common of which are T-1 circuits. T-1 circuits carry 1.5 megabits per second (1.5 Mbps) two-way, symmetrically. They are used for efficient transport of business telephone traffic and corporate data traffic. Some large corporate offices use *many* T-1 circuits for telephone access to the Public Switched Telephone Network (PSTN), or for point-to-point data transport.

The fiber optic cables in the HFC infrastructure can be used to carry business telecommunications traffic independently, with the business traffic on dedicated optical fibers in the same cables with optical fibers for two-way residential services. Optical fibers in the ring between hubs can provide high-speed transport of digital business traffic to the telephone and data switching centers found in the greater Tacoma area, such as national or regional Internet access providers, the long distance carriers, and the local exchange carriers. Optical fibers in the same branch cables from the hubs to the nodes can be extended to businesses. Laying the branch cable out in rings enhances the reliability of the SONET system through the use of redundant optical fibers.

The key to serving business telecommunications is providing high-speed digital transport based on common transmission and connection standards, and doing so in a reliable and efficient manner. SONET is a highly standardized system for providing transport of digital telephone and data circuits. Many manufacturers provide compatible SONET electronics in high volumes, which may be upgraded in speed and capacity. The majority of long distance telecommunications transmission capacity today is provided on SONET systems. SONET multiplexing shelves would be placed in the hubs and at end-user premises. Small SONET shelves at the customer site deliver standardized high-speed digital lines which can be connected to their digital telephone and data network systems.

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### **Planned Changes in System Operation**

Changes are to be expected in system operation during the first ten to fifteen years of operation. The changes would be driven by marketing success, penetration of services, new services added, and population growth and may include the following:

- Migrate Level 3 telephony and data RF channels to SONET transmission and hub video modulation.
  - Migrate to 500 home nodes as needed.
  - Offer PCS carriage using strand-mounted transmitters and receivers.
  - Install SONET electronics and optical cables to business as needed
  - Build additional hubs as optical cables to nodes become filled, or as expansion into neighboring communities is requested by franchise authorities.
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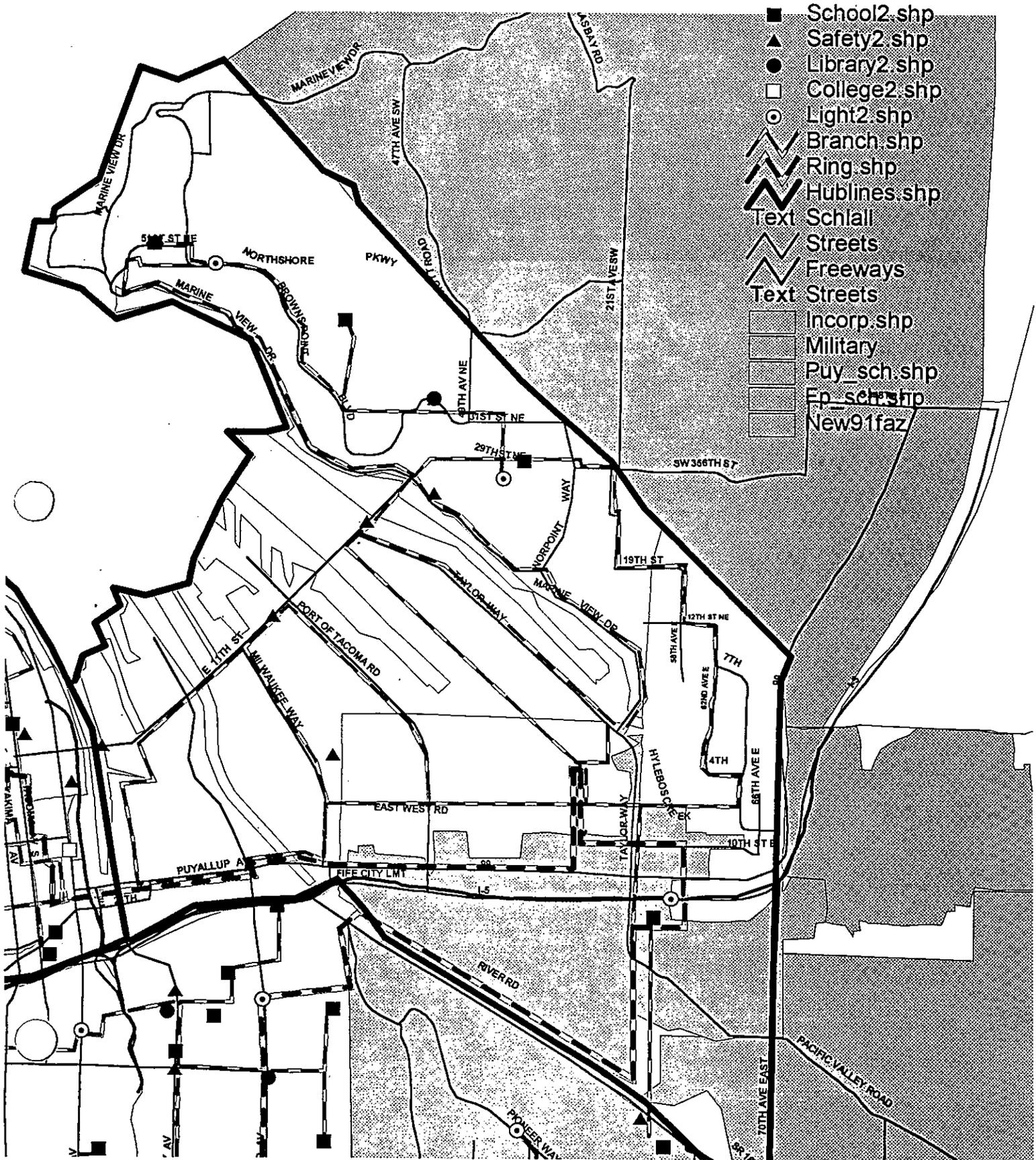
The following maps provide an overview of the fiber optic design of the proposed Hybrid Fiber Coax plant. These maps are divided to display the service areas of four hubs.

Northwest Tacoma Hub  
Franchise Service Areas

- School2.shp
- ▲ Safety2.shp
- Library2.shp
- College2.shp
- ⊙ Light2.shp
- ⚡ Branch.shp
- ⚡ Ring.shp
- Text Schlall
- ⚡ Streets
- ⚡ Freeways
- Text Streets
- ⚡ Hublines.shp
- ▨ Incorp.shp
- ▨ Military
- ▨ Puy\_sch.shp
- ▨ Fp\_sch.shp
- ▨ New91faz



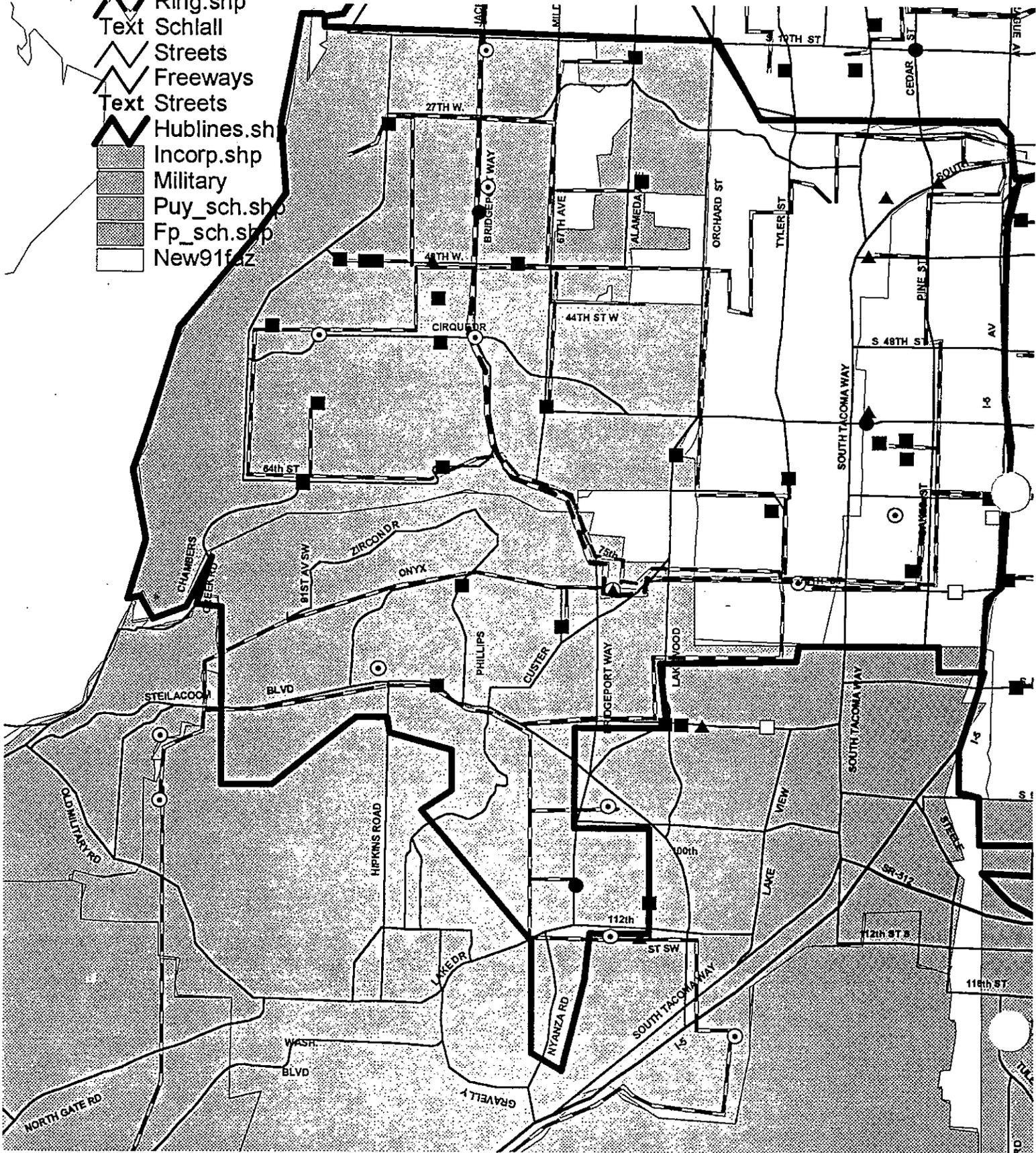
# Northeast Tacoma Hub Franchise Service Areas



- School2.shp
- ▲ Safety2.shp
- Library2.shp
- College2.shp
- Light2.shp
- ▬ Branch.shp
- ▬ Ring.shp
- ▬ Hublines.shp
- Text Schfall
- ▬ Streets
- ▬ Freeways
- Text Streets
- ▨ Incorp.shp
- ▨ Military
- ▨ Puy\_sch.shp
- ▨ Ep\_sch.shp
- ▨ New91faz

Southwest Hub  
Franchise Service Areas

- School2.shp
- ▲ Safety2.shp
- Library2.shp
- College2.shp
- Light2.shp
- ⚡ Branch.shp
- ⚡ Ring.shp
- Text Schlall
- ⚡ Streets
- ⚡ Freeways
- Text Streets
- ⚡ Hublines.shp
- ▨ Incorpor.shp
- ▨ Military
- ▨ Puy\_sch.shp
- ▨ Fp\_sch.shp
- New91faz





## Hybrid Fiber Coax vs. Fiber to the Home (FTTH)

There are expectations that some day communications services will be delivered to the home on a fiber optic pair, or fiber to the home (FTTH.)

FTTH is a wider-bandwidth duplication of the local exchange carrier's existing infrastructure, which is twisted-pair copper wire dedicated from the central office to each home. It has proven to be very costly to maintain and operate dedicated paths to each home.

Delivery of services via coaxial cable is relatively inexpensive for several reasons:

- Costs are shared when many customers are served by common coaxial cables.
- Coaxial cable capacity is very high, allowing service to several customers over the short distance from a single node.
- Physical connections are simple, using standard electrician's tools, hardware, and methods.
- Connections within the home are familiar to most customers who have purchased installation of cable television service.
- Radio frequency amplifiers are common designs, perfected over 40 years of radio and television transmission experience.
- Inexpensive, simple radio-type return transmitters will be used verses relatively expensive and sensitive optical transmitters.
- Intelligent devices are moving into the customer homes, such as MPEG2 digital television compression, cable modems, and customer-premise network interface units (NIU), which allows higher efficiency of the available RF bandwidth in the coaxial cable plant.

Communications technology applies fiber optics where appropriate, such as long cable runs in electrically noisy environments. Optimum communications design today uses a mix of fiber optic and coaxial cables.

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## Interdiction

Interdiction is commonly known as scrambling or blocking, where a specific television signal is rendered unusable. There are two common, current forms of interdicting specific services at the home; traps or filters, and analog set-top boxes.

### Market Penetration Questions:

Will customers have a choice between digital and analog premium channels? Will digital television be marketed as providing more choice, as well as a high quality version of analog programs, and co-exist with the analog equivalents? Or, if any subscriber wants any premium channel, will they be carried only by the digital video provider?

### Conclusion:

Given that digital television is rapidly maturing, install traps and filters initially, and migrate to digital television for premium tiers when feasible. (See Implications of Digital Television, below.)

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### The Return Path

New applications for cable television systems are often two-way, and use the return communications path. The return path enables system monitoring, billing management, telephone transport, and data network connections.

Operating the return path on coaxial cable is a great challenge. Noise can penetrate the system at every customer and tap, it is amplified and combined along the return path, and could mask the actual signals desired. The term used to summarize the problem is "ingress." The return path funnels all returning signals to the node. One noise source, whether a babbling transmitter in a home or a failing coaxial amplifier, can interfere with many customers.

In the 5 to 42 MHz return frequency range, the ingress is higher from 5 to 15 MHz than above, because of noise from electric appliances, motor controls and amateur radio operators. The techniques to minimize ingress are simple and effective, but must be performed throughout the coaxial system. The best materials must be used and installed properly to minimize ingress. The skill of construction technicians must be high to install the cable and tune the amplifiers properly. Each outlet must be filtered to eliminate unwanted return path noise. In-home filtering techniques cannot be expected to be performed by the customer. The cable television technician can install filters to block unwanted return path noise outside the home, either at the pole mounted "tap" or the "demarcation" where the signal splits to each of the outlets.

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### **Implications of Digital Television for HFC Business**

All of the subscribers to basic cable television programs would be served with standard analog channels. Analog delivery of expanded basic and premium channels will require some form of interdiction, or scrambling. This business is mature and the electronic devices are standardized.

Compressed digital television technology allows a much higher utilization of the cable television system. A single analog television channel can be re-used for ten or more compressed digital television programs, with the same or better picture quality. The programs are digitized at the source, and compressed for transmission. The HFC system transports the signals as if they were a standard television signal. The programs are not decompressed and converted from digital back to analog until the viewer selects the program, maintaining high quality throughout the transmission media. The compression technique is standardized, allowing the decompression capability to be placed into many electronic devices.

Near video-on demand and true video-on-demand will offer many choices to customers and will be a valuable service.

The digital set-top is a computerized electronic device. It is addressable, in order to receive a unique setup from a centralized controller. It allows the customer to change what they want to pay for, without expensive visits by cable television technicians.

### **Other Applications of Digital Television Transmission**

Amplitude Modulated (AM) lightwave transmission on fiber optics has performance limits, where the quality of signal is difficult to maintain, especially over long distances combined with wide bandwidths. In particular, when AM lightwave transmission is cascaded, one transmitter and receiver after another, then higher cost laser optical transmitters are used to maintain performance quality of each RF channel within acceptable limits. Since the design for this system does not require long cascades, this is the recommended method for the Tacoma City Light system.

Digital lightwave fiber optic transmission products were considered. At the headend, the RF channels can be converted into digital form and transmitted to the hubs, with or without compression. The transmission via digital lightwave is very high quality, and could be applied for transmission from the headend to the distribution hubs to achieve performance goals. Simplicity and flexibility is sacrificed to gain this quality, however.

These digital lightwave systems for television are typically expensive. The competing digital systems are based on SONET, Fibre Channel, or are proprietary. Only 16 to 32 channels of video can be carried on one digital transmission system, requiring more electronics to carry the same signal as AM lightwave. Only single vendor systems are available for digital transport, reducing competition for upgrades and component replacements (unless SONET broadcast transmission is used). Video modulation of broadcast channels is duplicated in each distribution hub, instead of concentrated at the headend.

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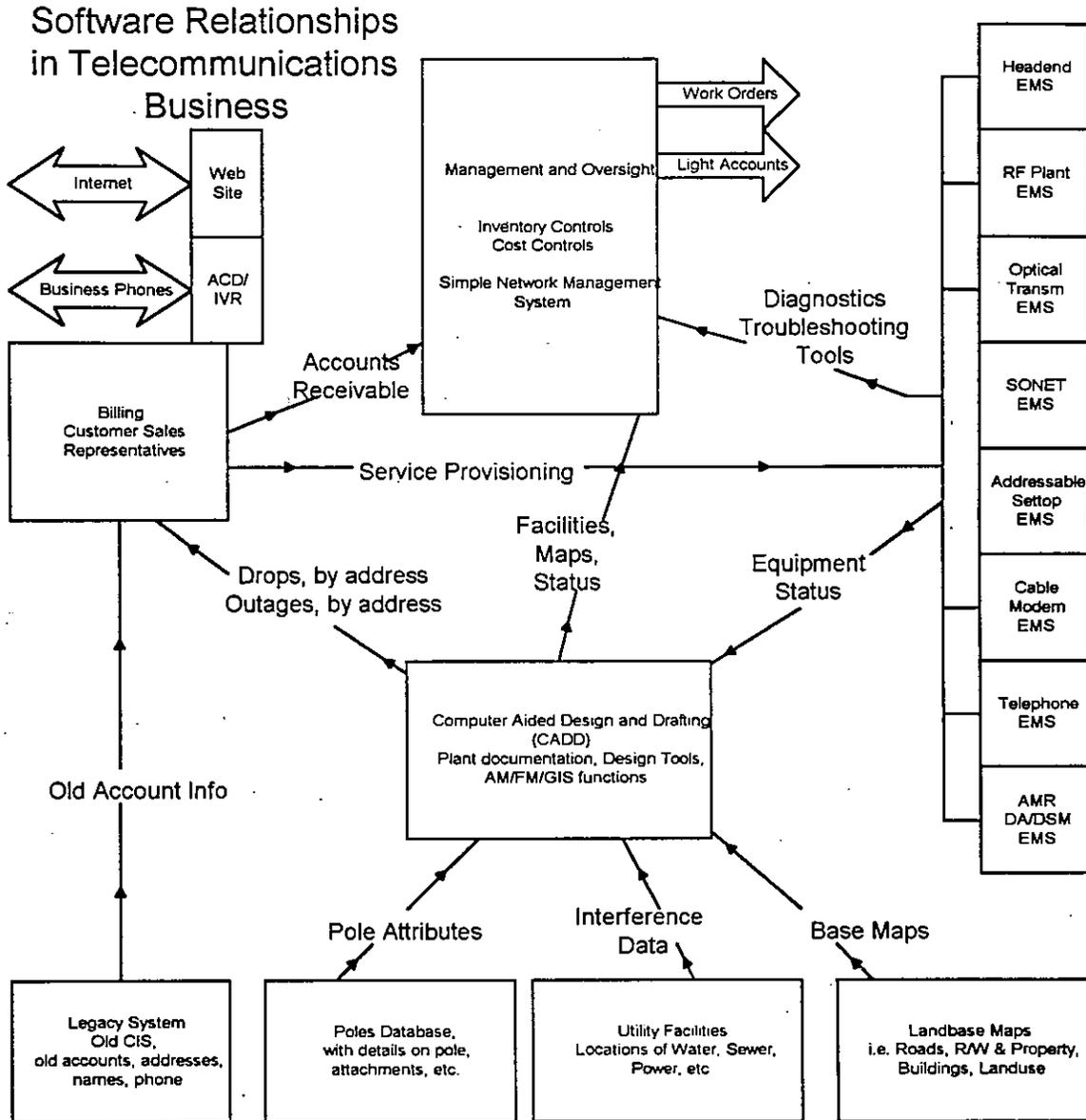
### Network Management

With the construction of a new system, the opportunity will never be better to install high quality tools, diagnostics, equipment and software. Computers and network control systems are necessary to meet these goals. The diagram "Software Relationships in Telecommunications Business" shows their interactivity.

Cable television has not required the sophisticated system monitoring and customer accounting systems that have been necessary in the electrical or telephone business. Telephone companies use sophisticated monitoring and automation systems in providing basic telephone service, and in their operation and maintenance functions. As cable televisions systems begin to deliver advanced telecommunications services, the necessity grows for system monitoring, automation, and sophisticated customer-supporting software systems.

Fortunately, other industries have forced the development of many standardized tools that can be directly applied to a new business operation and infrastructure. Element Management Systems are computers that gather data from a specific group of field devices, and provide information and controls to the operating staff. Several Element Management Systems computers are diagrammed on the right of the following sketch. Higher level software and computers can use this information for their own purposes, and pass commands to field devices through the Element Management System. The higher level software can perform mapping, assist customer sales representatives, or generate operational reports using real and accurate information from the field devices. All of these are based on "Open Systems" which allow them to exchange information through relational databases and standard physical interconnections.

Tacoma City Light has developed a "data model" that defines the relationships among many data files, necessary to create data warehouses. The existence of accurate computerized maps and pole locations will be helpful in the design and construction of all the outside facilities. The new Automated Mapping/Facilities Management/Geographic Information System (AM/FM/GIS) will provide many more tools for efficient operation and management of a telecommunications system.



## OPERATING PLAN

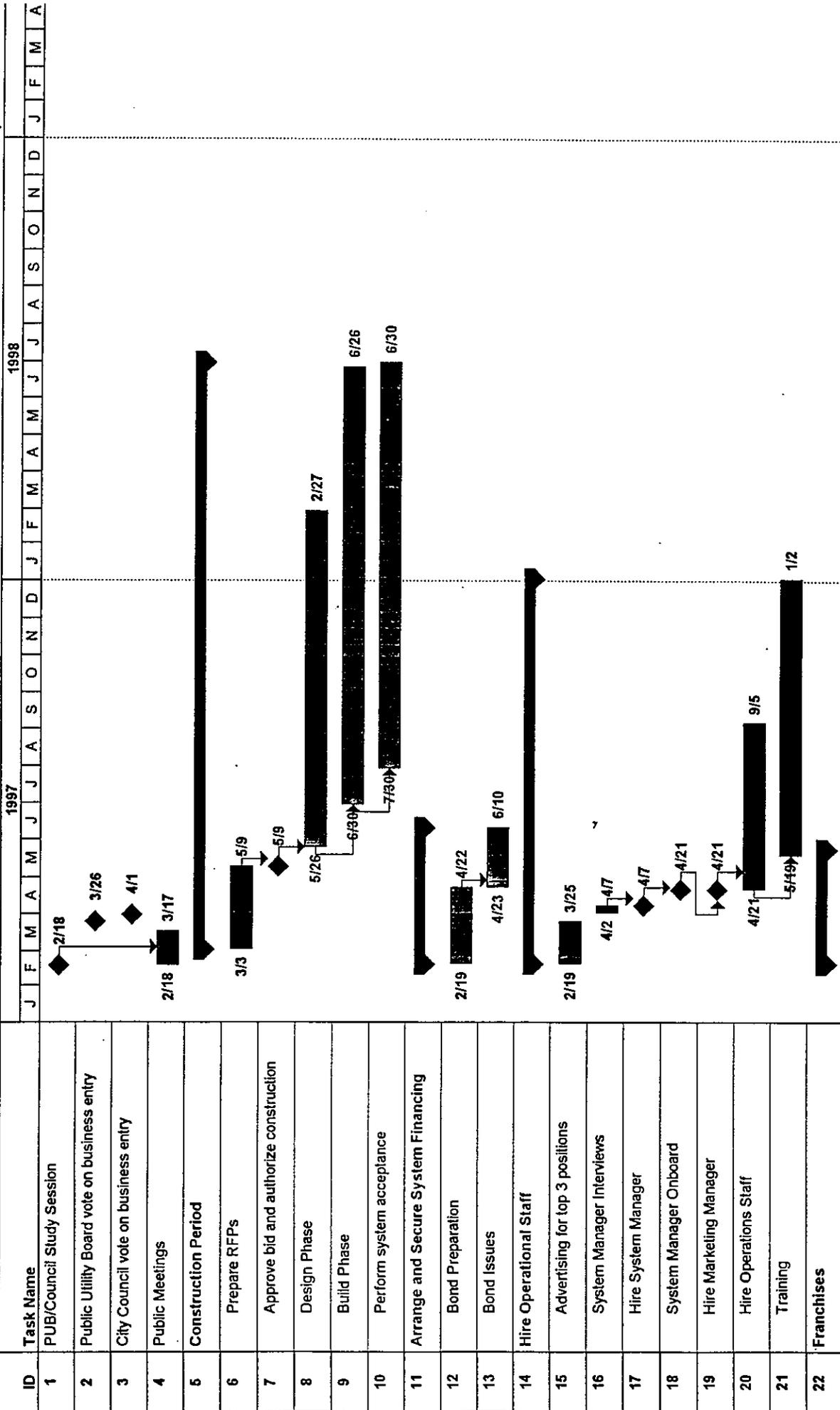
In the provision of telecommunications services, Tacoma City Light would interact with many parties to ensure the cost effective delivery of advanced telecommunication services to the local business and residential market. Some parties will be familiar, such as the electric system operating sections of Tacoma City Light. Others will be new to Tacoma City Light but mature in their own markets, such as the video production and telephone industries. Finally, there will be interaction with companies that are relatively new and growing such as Internet service providers and competitive access providers.

Diagrams have been developed to represent the possible relationships and responsibilities between the parties. There are diagrams representing the businesses of wholesale high-speed digital transport, Internet data transport, and the cable television businesses.

There are many milestones to pass before there is an operational system, before the first customer can be satisfied. Only then does the daily operational plan takes effect to sustain and grow the business.

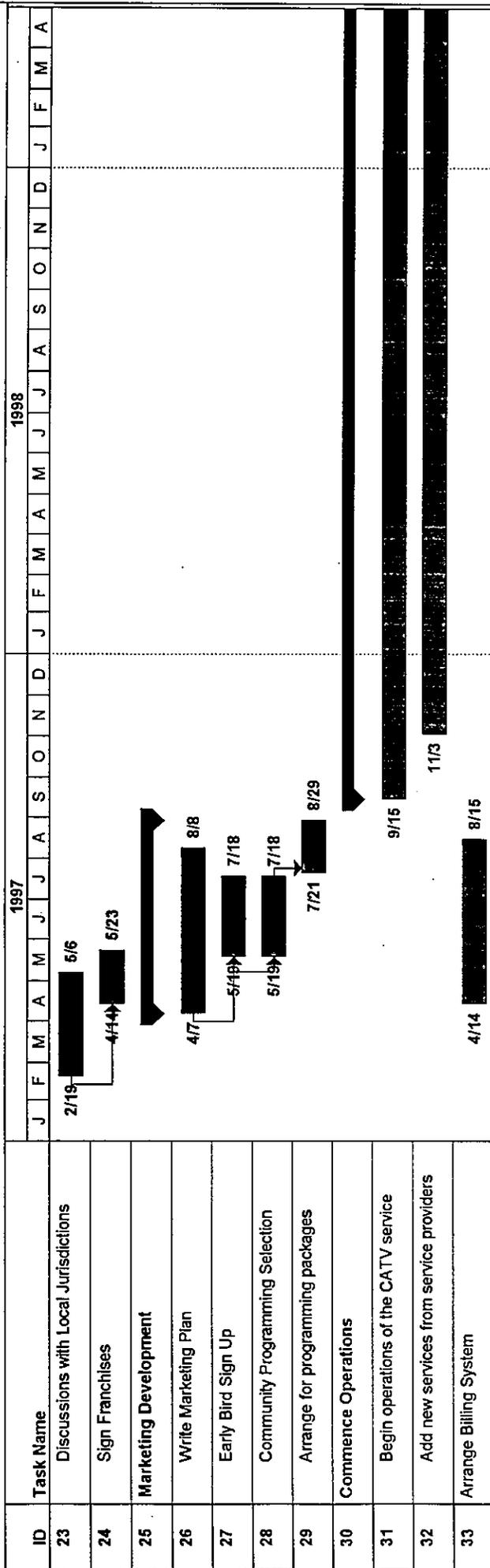
- The final team of experienced employees must be on the job and in control of the process of creating and developing this business.
  - Contracts must be negotiated and signed, to provide the content, design, procurement, and installation that becomes the "system". All contracts must be closely managed and performance of those contracts must be under constant scrutiny.
  - The permanent staff of marketing, technicians, sales and engineering must become familiar with the new system, trained on specialized equipment operation, and be trained in the ways they will need to perform in the highly competitive environment of telecommunications.
  - Installation must proceed in an economical but swift manner, culminating in high performance two-way connections to residences, small businesses, and large telecommunications users and suppliers.
-

# Telecommunication Project Schedule



Milestone  
 Summary  
 Task  
 Rolled Up Task  
 Rolled Up Progress  
 Milestone  
 Summary  
 Task  
 Rolled Up Task  
 Rolled Up Progress

# Telecommunications Project Schedule



Milestone

Task

Progress

Rolled Up Task

Rolled Up Progress

Rolled Up Milestone

## General Operations

A common telecommunications infrastructure will be used for all three of the major lines of business: high speed telephone and data transport, Internet data transport, and cable television. The cost of common operation and maintenance of the plant will be shared.

There are key interactions with telecommunications service providers, directly supporting this business, which must be managed with special contracts, physical standards, and technical relationships. Tacoma City Light would transport content which originates in a few points on the network, supporting all three lines of business. Satellites dishes would receive cable television programs from orbiting satellites. Internet traffic would flow to and from the electronic facilities of Internet Service Providers. Long distance telephone traffic would flow to and from POP facilities.

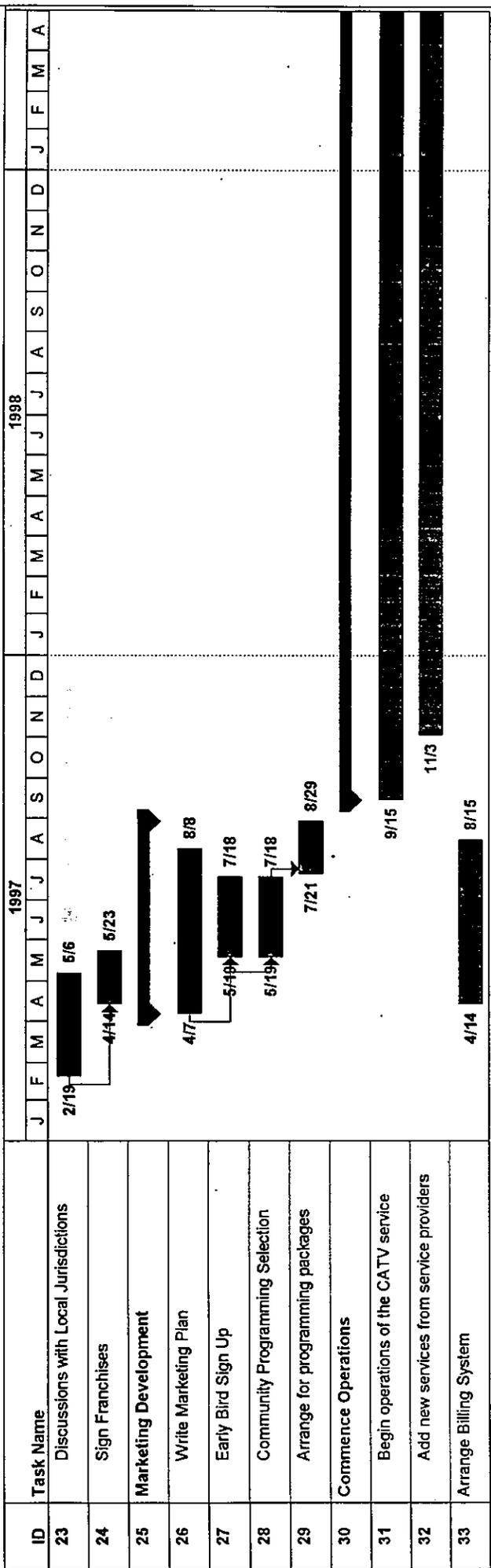
That content, which originates in a few points, would be distributed throughout the Tacoma City Light service territory to wholesale and end-use customers. These customers would to some degree associate all the delivered products with Tacoma City Light, whether or not all the responsibilities of service are Tacoma City Light's. In admitting that, then there would be a role for Tacoma City Light staff in ensuring new systems are installed correctly, and service is prompt and extraordinary.

The aggressive marketing of services and products will determine the success of this new telecommunications system more than any other single factor. Staff would be assigned directly to this activity. Advertising and promotional programs would be the norm and would be performed by ensuring that current information about products and services is always available to the customer/owner.

Operational Support Systems would be in place, providing the tools and information needed by staff to perform their duties efficiently and promptly. As services delivered by the telecommunications system are based on electronics, the facilities themselves would provide information about their own health and status. Computer systems today allow the system support staff to have information and responsibilities that were diversified only a few years ago. Continuous performance monitoring of the communications facilities allows crews to respond quickly to trouble, even before the trouble affects service.

Continuous attention must be paid to developments in communications technology, to continue to serve a changing market. Management and engineering staff will seek to introduce devices on the fiber-optic transmission network that meet the developing needs of new applications for sound, data, images, and television.

# Telecommunications Project Schedule



Milestone  
 Summary  
 Task  
 Milestone  
 Progress  
 Rolled Up Task  
 Rolled Up Milestone  
 Rolled Up Progress

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## Regular Operations

The Regular Operations must be discussed in the context of each business line: high-speed digital transport, Internet data transport and cable television.

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### High Speed Telephone and Data Transport

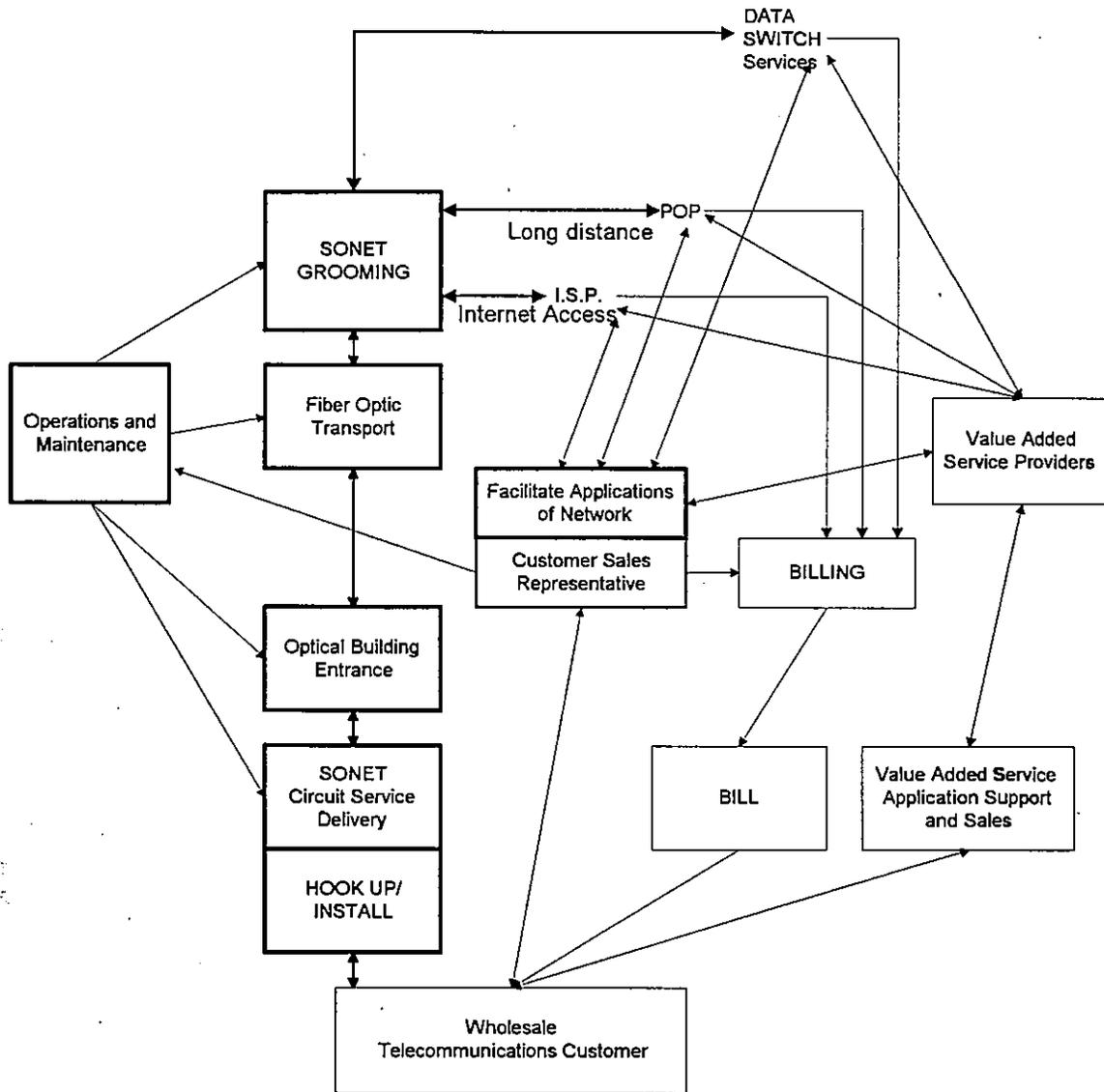
Tacoma City Light would own and operate a communications transmission system, capable of providing wholesale high-speed digital transport circuits for telephone and data transport from point to point throughout its service area. This service would be offered on a non-discriminatory basis for the use by others. This service would be limited to transport only: Staff would not be dedicated to application-specific customer support. That duty would be filled by the private sector value added service providers or individual customers.

Tacoma City Light would sponsor and participate in user groups and forums, in which users can exchange experiences in applying the high-speed data transport, and can be introduced to value-added service providers. Market research indicated that most customers expect a high level of specialization in applying high-speed digital transport for use in the customer's business. Local service providers would craft solutions for the users and would utilize Tacoma City Light's wholesale transport. Forums would likely be held on a bi-monthly schedule. Tacoma City Light would host the forums by arranging for convenient meeting space, publishing meeting notices and agendas, and participating in the discussions as a transport provider and end-user.

Tacoma City Light would install electronics in the users buildings, to create the high-speed pathways. By distributing the electronics, redundancy and reliability of the entire network is increased compared to a centralized office structure. Fiber optic cable would enter buildings, with redundant cable routes available if requested by the customer. Tacoma City Light would operate and maintain all the fiber optic cables and transport electronics.

The high-speed transport circuits would terminate either in the customers buildings, or at the facilities of one of the following: long distance providers, local telephone service providers, or data network service providers. Developing strong and effective business relationships with these providers would be a critical factor in the success of the telecommunications system.

### High Speed Telephone and Data Transport



**BOLD = Tacoma City Light functions and facilities**

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### High-Speed Internet Data Transport

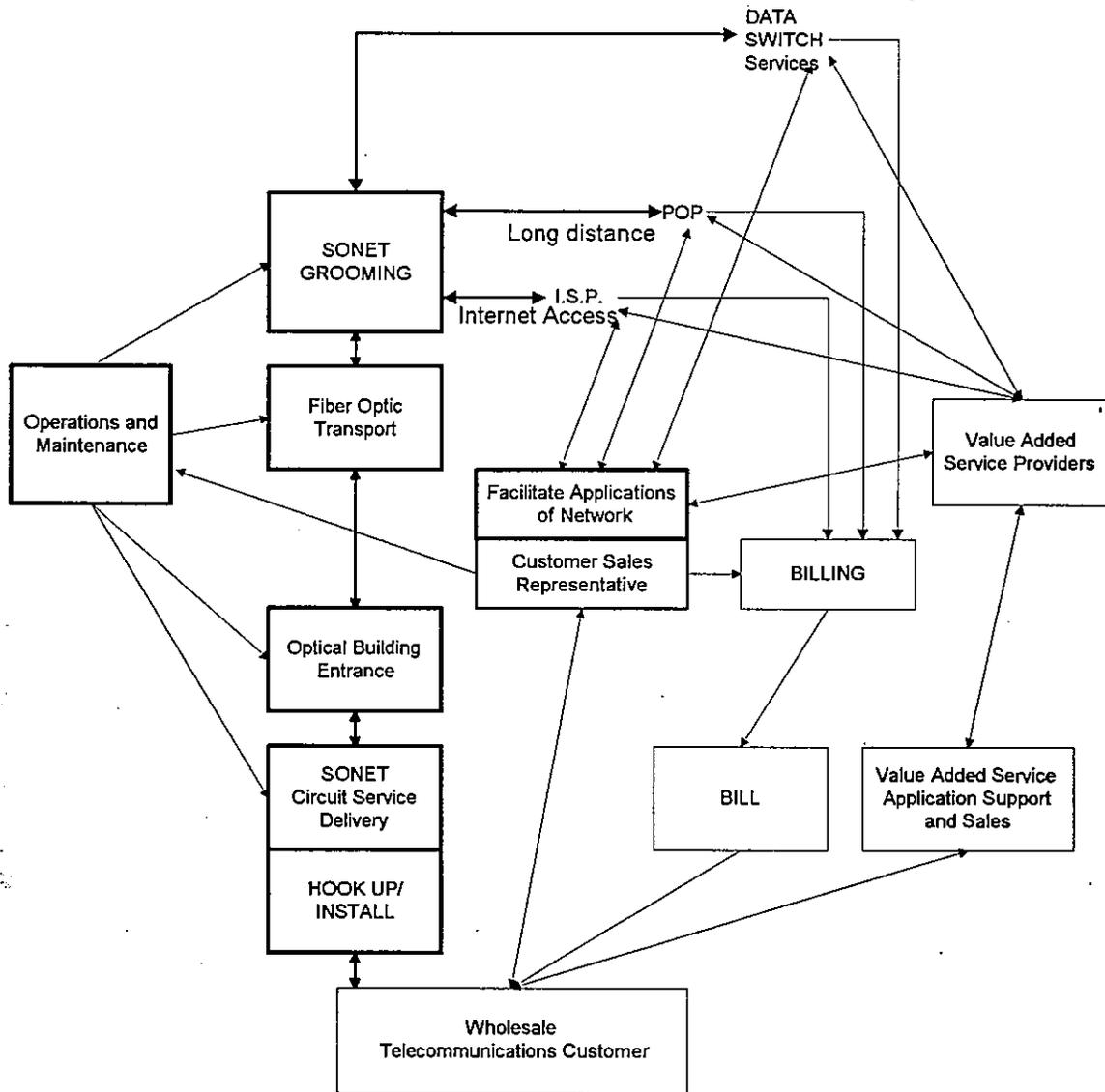
Tacoma City Light would own and operate a hybrid fiber optic - coaxial cable telecommunications system, distributing connectivity throughout the Tacoma City Light service territory. Tacoma City Light would provide transport service for use by Internet Service Providers to provide cable modem - based Internet access to all residents and small businesses.

Internet Service Providers would use Tacoma City Light's digital, fiber optic transport from their centralized facility to the data network routers which convert digital signals into RF channels. Internet Service Providers would be provided transport using Tacoma City Light's RF channels to deliver cable modem signals to and from end-use customers, including both residential and small business users.

Internet Service Providers would partner with Tacoma City Light to ensure the delivery of the highest quality products and services to end-users. Key issues to consider in partnering with Internet Service Providers to deliver the growing Internet traffic are: Internet Service Provider investment in caching computers to serve the common Internet information requests locally; leasing of highest speed interconnections to the national Internet infrastructure; choice of cable modems for efficient use of RF channels in data networking; and the history of responsiveness to customers service and trouble calls.

High-speed Internet data transport is a relatively new application of the Hybrid Fiber Coax cable television infrastructure, providing two-way service on the cable to the home. Extreme care would be placed on the installation of the cable serving end-users. All cable in the home used for two-way services must be of top-quality materials. Electrical noise infiltrating into the return path could affect the service of others and would be eliminated with careful installation and material choices.

### High Speed Telephone and Data Transport

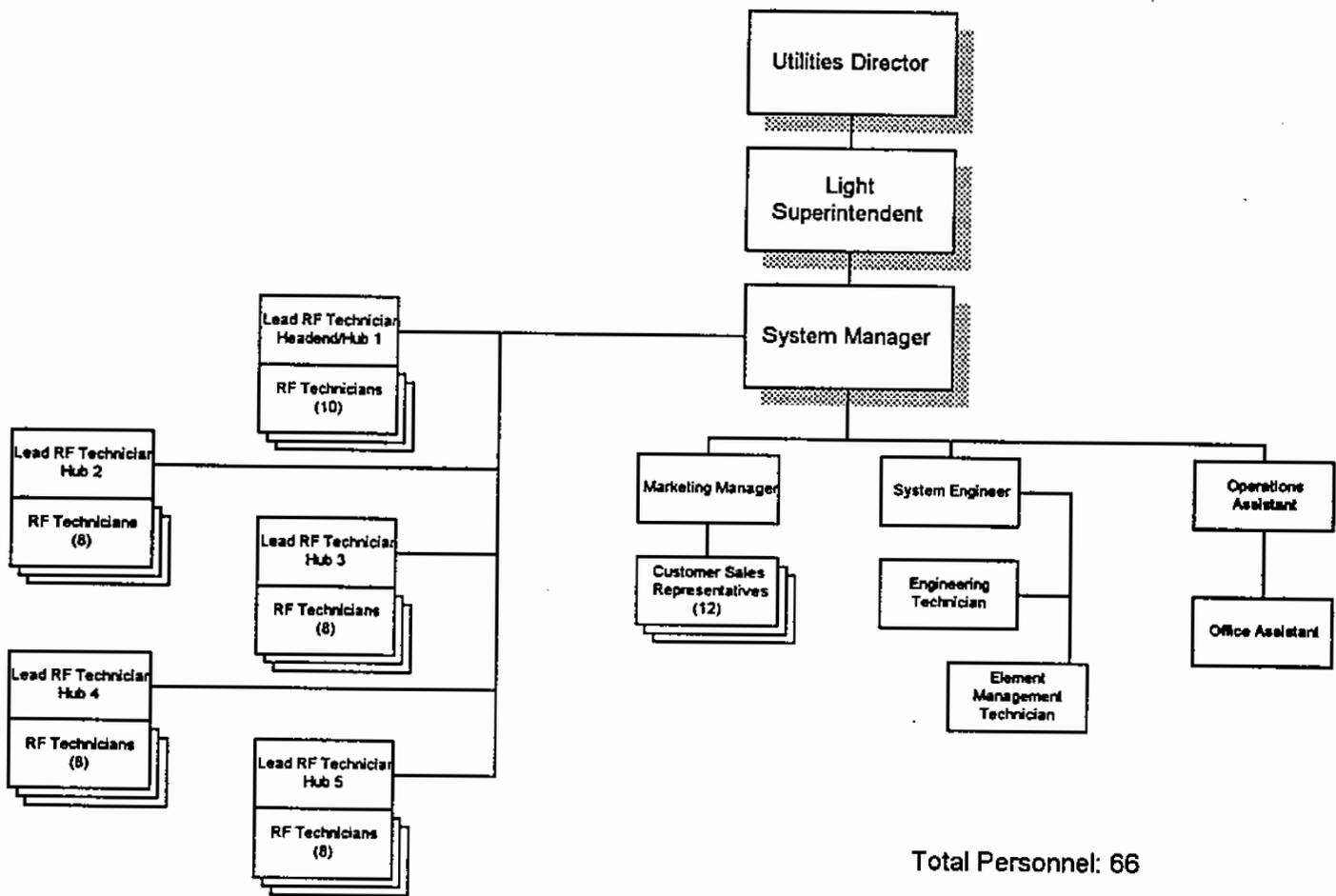


**BOLD = Tacoma City Light functions and facilities**

## ORGANIZATION

Staffing for the Communications Section would include both reallocation of existing personnel and the recruitment of new employees with communications, technical and marketing experience. The Section will also rely on the support of other departments within Tacoma City Light and the City of Tacoma, such as Legal, Fleet, and Accounting.

Telecommunications  
Organization Chart



### NOTES TO FINANCIAL STATEMENTS

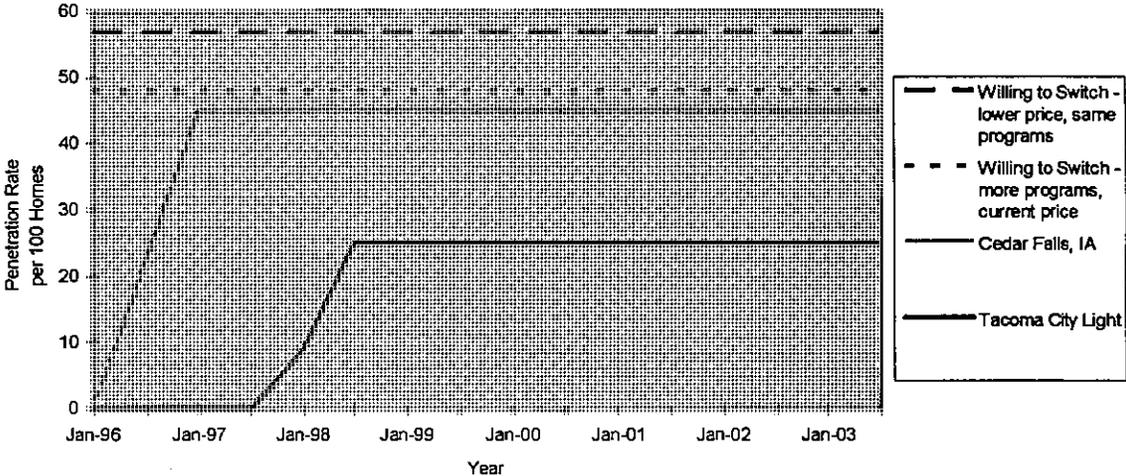
The Light Division (Tacoma City Light) is a division of the City of Tacoma, Department of Public Utilities, which also operates the Water and Belt Line Railroad Divisions. The Telecommunications Project would be a section of the Light Division.

The following is a summary of significant financial notes and is intended to assist the reader in understanding and interpreting the financial statements and other data in this report.

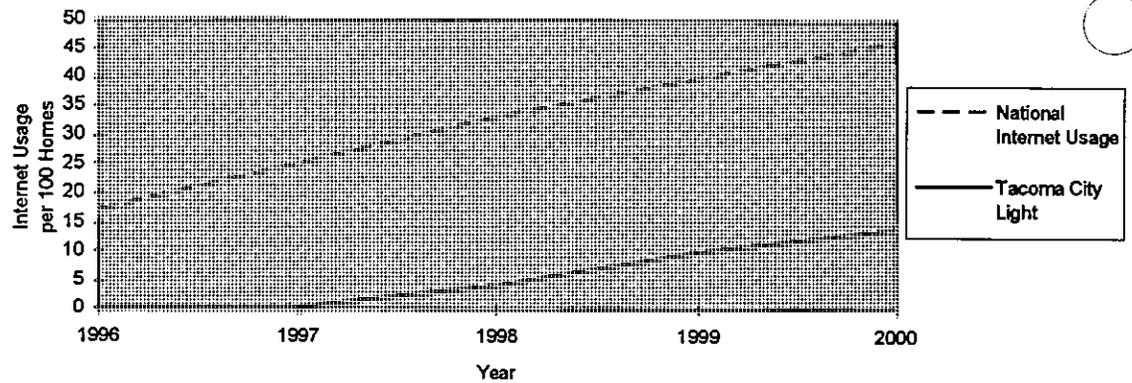
#### NOTE 1 Financial Analyses

Tacoma City Light's financial analyses for the Telecommunications Project are summarized in the Income Statement and Cash Budget. The analysis deliberately understates revenues to give a conservative view. The analyses show that the proposal to build the system is economically feasible if pursued in a business like manner. All amounts are shown in constant 1997 dollars.

*Comparison of Cable TV Penetration* As seen in the graph below, cable television penetration rates have been conservatively estimated at 25 subscribers per 100 homes.



*Comparison of Internet Usage* Compared with the forecasted growth in the national Internet usage rate, Tacoma City Light's projected Internet transport rates are also conservative.



## NOTE 2

### Cost Estimates

Cost estimates are based on unit costs collected in the telecommunications study and from existing telecommunications companies reports and operating statements. The estimates are given in unadjusted Year 1 dollars and should be used only for determining the feasibility of this proposal. Certain costs, including programming and payroll & benefits, have been inflated to account for historic increases above the rate of inflation.

## NOTE 3

### Services Offered To City and Terms

The franchise jurisdictions have goals, interests and needs related to the proposed Telecommunications Project. Tacoma City Light's development plan makes provisions for these goals and interests. These needs are proposed to be addressed through the provision of Public, Educational, and Governmental (PEG) video channels, taxes and fees, and through the construction of an Institutional Network which will provide fiber links to all primary and secondary schools, colleges, universities (both public and private), fire stations and police stations, including SONET electronics to enable the links to be used as soon as possible.

## NOTE 4

### Infrastructure

The infrastructure would be built with a regional headend, 5 hubs, and 82 nodes. Also included are SONET electronics supporting an initial 176 business sites, 8 central offices, and 3 Points of Presence. The system

supports optical coupling, switches and amplifiers. SONET shelves are also included for Tacoma City Light substations and the Institutional Network. The construction total incorporates hardware discounts off list offered on large quantity orders:

**NOTE 5**  
**Financing**

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This project would be funded through the use of insured taxable municipal bonds with interest rates based on U.S. Treasury yields plus a spread of between 35 and 70 basis points depending on term, and capital available from the Light Division. The total financing amount includes operating capital and incurred start-up costs. The bonds would be issued with a range of terms, the maximum of which is calculated at 10 years for the purpose of this analysis.

**NOTE 6**  
**Revenues Generated**

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Tacoma City Light would be the service provider of cable television services. Subscriptions would be offered in a multi-tier selection. Tacoma City Light would charge an installation fee, however, for purposes of this analysis, that charge has been waived until 1999. These financial statements are based on conservation penetration rates in the cable television market.

The telecommunications system would make transport available to service providers of other services including telephony, data transport, and video on demand. These features would be available through partnerships between Tacoma City Light and other service providers. Since Tacoma City Light would only be the transport provider, it would not be involved in rate schedules set by providers for these services. Tacoma City Light would, however, receive revenues from the service provider for carriage on the telecommunications network.

The telecommunications system would also service the needs of the Tacoma City Light. Functions such as distribution automation, substation monitoring, real-time pricing, and customer billing information would be available to the Light Division through the use of this system.

**NOTE 7**  
**Operating Expenses**

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## Conclusions

The study team set out to answer a number of questions at the outset of this project:

- What is happening on the technological front?
- Who are the major telecommunications players, what have they done in the past, and what are they doing now?
- What is happening in the regulatory environment?
- What have other communities done with regard to telecommunications?
- What has happened historically in our community?
- What do the existing telecommunications options look like?
- What kind of market demand for telecommunications exists in our community?
- What are the economic development implications for our community if an advanced telecommunications system is built or fails to be built?
- And finally, could Tacoma City Light build and operate such a system and how would it look?

This study of telecommunications has answered those questions. But there is a final question that must be asked. Should Tacoma City Light create a modern telecommunications infrastructure to serve the local community? The answers to the previous questions are critical to understanding and answering this question.

This study has reviewed telecommunications both nationally and locally. In reviewing the local situation it is clear that the local market has a growing need for better telecommunications access. Despite growing local demand, the incumbent wire line service providers have stated that their investments in the local infrastructure will either slow without significant rate increases or be halted all together. One could hope that other companies would step forward and create a modern telecommunications system through out our community but the prospects for that occurring appear dim. While Competitive Access Providers will eventually enter the local market, their focus is almost exclusively on large business users. Other potential systems are either of low capacity or not scheduled to be fully deployed until the next century.

Tacoma City Light could create an advanced telecommunications system to meet the telecommunications needs of the communities it serves in addition to its own internal communication needs. If Tacoma City Light were to create such a system and operate it in a business like manner, the system would generate sufficient revenues to make the system self sustaining. By offering products and services that either meet customer needs directly and providing a pathway through which the private sector can meet additional needs, pricing those products and services competitively, and delivering them over a modern, high-speed, high-reliability telecommunications system, a

business is created that is viable using conservative revenue projections.

The following principles provide a framework for considering whether Tacoma City Light should enter the telecommunications arena in our community.

1. The primary purposes for Tacoma City Light financing, constructing and operating a broadband telecommunications system shall be as follows:
  - Provide a state-of-the-art fiber optic technology to support enhanced electric system control, reliability and efficiency.
  - Provide 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.
  - Provide greater revenue diversification through new business lines (i.e., Internet transport, cable TV, etc.), enhance traditional products and services and maximize return on Tacoma City Light assets.
2. Important additional community benefits derived from this project are as follows:
  - Promote economic development and business retention.
  - Insure broad community accessibility to high quality, state-of-the-art telecommunication technology.
3. The Telecommunication Project, including all infrastructure, and proposed business lines, shall be an integral Tacoma City Light operating responsibility and function.
4. The Telecommunication Project business lines shall be operated in a business-like manner similar to electric services which are subject to market forces and are not tax supported.
5. In order to avoid the perception of government control of the content of the cable television business line, programming will be determined on the basis of local consumer demand and input.
6. The Telecommunication Project construction will reflect the current overhead to underground configuration of Tacoma City Light's electric system. Any significant divergence from this will greatly increase the project costs and jeopardize the viability of the project.
7. Tacoma City Light's Telecommunication Project will not proceed unless there is broad and strong policy and community support.

Ultimately, the question of whether Tacoma City Light should create a modern telecommunications infrastructure is one that policy makers must answer with the informed input of the community they represent. It is our sincere hope that the communities that Tacoma City Light serves will find the background information contained in this study useful.

## Acknowledgments

The Telecommunications Study Team was a multidisciplinary group made up of both Tacoma City Light staff and outside consultants. There is always a concern when approaching a study of this magnitude, that a single view of the industry and market in question will prevail without rigorously examining alternative viewpoints. In the case of telecommunications, many industry experts have a tendency to view the world with either a telephone or cable perspective. Rather than hire a single consultant under a large contract to work with staff in the development of this report, the decision was made early in the project to hire multiple consultants with diverse perspectives and areas of expertise under small individual contracts. This allowed the team to examine and weigh a wide variety of ideas and perspectives and thereby ensure that the final study incorporated the best ideas and knowledge possible. This approach is not the easiest way of conducting a study of this sort since the discussions that ensue can become quite lively and challenging. Staff would like to thank the following consultants that willingly and vigorously participated in those discussions and the work of preparing this report.

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Linda Dethman, Dethman & Associates  
Stuart Hauser, Metro Utility Communications Group  
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Sandy Hunt, Ph.D., APEX Business Solutions  
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Mel Oyler, APEX Business Solutions  
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Elizabeth Thomas, Preston Gates & Ellis

Many staff members at Tacoma Public Utilities willingly put in extra time to help the team with this study. In particular, the team would like to thank the following people: Mark Bubenik, Linda Carlton, Julie Dahlen, Alex Gebhard, Deborah Hall and the Graphics Services group, David Lerman, James Mack, Glenna Malanca, Peter Richardson, and Sue Veseth.

We would also like to thank the many members of the community that have voluntarily spoken with us about their ideas, desires, and concerns regarding telecommunications. Finally, I would like to thank the staff members on the Telecommunications Study Team:

Chandra Enos  
Steve Roberts, P.E.  
Lisa Steadmon

Their dedication, hard work, willingness to dig beyond the easy answer, and ability to present complex material in a clear and understandable form was the key to this study.

Jon Athow  
Telecommunications Project Manager

Growth on the Key Peninsula will be more problematic. Transportation is obviously a problem, and this will favor location there by non-commuters, generating more demand for local retail goods in Gig Harbor. Infrastructure in that area, such as water and sewer will be more expensive and will push up housing prices.

To the extent that the employment growth occurs closer to DuPont than to the current Tacoma boundaries, some housing growth (and population) will occur in Thurston rather than Pierce County. One estimate, by the Thurston County Economic Development Board, expects that almost 70% of the non-DuPont residences of Northwest Landing employees to be in Thurston and only 30% in Pierce. As Thurston grows, however, people will travel to Pierce County for shopping and entertainment. Although a second spill over area could be Auburn in south King County, residential neighborhoods located there are not as attractive as in Thurston County nor is the economic base as diverse.

#### **Growth Impact of Scenarios**

*Scenario Two* The location of another large technology company (following the Intel example) or the successful development of the ISDZ would produce a major employment gain. In this case, growth within Tacoma would increase by 0.75% annually in the early time frame (1995-2005) and by 0.25% in the later frame (2005-2020). A slow down in the acceleration of growth would be due to more attractive non-Tacoma locations. This type of scenario would initially increase annual growth in Pierce County by 0.5% annually, and then slow to 0.75% over the longer time frame. Again, this would reflect better siting opportunities outside of Tacoma.

*Scenario Three* Another change that would have a significant impact on the moderate term growth outlook for the area would come from the development of an expanded art/cultural and tourist industry. This could happen if the "culture cluster" generates the critical mass of activity needed to attract travelers and put the area on the "map" of destination stops. The effect will be to raise Tacoma's annual growth by 0.1% and Pierce County by 0.2% in the 1995-2005 time frame. Greater growth will occur during the 2005-2020 time frame as infrastructure is developed and earlier impacts are felt, with increases by 0.25% for Tacoma and 0.3% for the county.

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## **IMPACT OF TELECOMMUNICATIONS INFRASTRUCTURE**

Patterns of growth in the major sectors of the local economy are, and will be more so in the future, dependent on the community's telecommunications infrastructure. Many established sectors will also require continued technology investments to remain competitive.

*Government activity* at military installations will continue to be the a significant sector in the local area economy. However, as the size of the public sector in the national economy continues to get smaller (moving toward the promised balanced budget), reductions in the defense budget will become increasingly important. The existing facilities in Pierce County have survived two rounds of base closures, due in part to the fact that they were technologically sound. The future is always uncertain, however. Access to the most modern telecommunications technology will help assure their survival in the local area.

Up-to-date communication and information services are essential to the survival of *health services*. Commercial data management in support of medical services also require a substantial and increasing telecommunications infrastructure. The health care industry is a primary industry in Tacoma Pierce-County and a rich source of potential applications and associated technology drivers. Not only are there a variety of applications driving both applied and fundamental research, but the spectrum of actual operating modes in health care provision systems span a wide range. Provision ranges from elective, non-emergency, monitoring where the patient and provider are together in a well equipped office, to emergency diagnostic and treatment situations where the diagnostic expertise is geographically remote from the patient and the treatment expertise. Remote diagnosis requires high bandwidth, real time connection oriented services which support multiple video and data streams as well as voice communication. The precise telecommunications capability required to support this activity is application specific, but can be analyzed within a distributed communication framework since in general health care providers may be geographically dispersed in multiple locations.

The increasing telecommunications need is also true of other *professional services*, especially in the area of *financial services*. The financial services are not communications limited in the same sense as remote medical diagnostic services, or shipment status monitoring. While financial service providers at both the institutional level and the consumer level are sophisticated users of information, the financial services industry does not place heavy demand on the design of the telecommunications

technology. This somewhat curious situation results from several factors:

1. Most financial information is coded in alphanumeric formats. These formats are very efficient to transmit using a variety of existing telecommunications technology.
2. Humans utilize financial information and services in alphanumeric or rudimentary graphical formats (trend charts).
3. Financial information is semantically "dense", the simple statement "DOW off %5" contains a wealth of information, but is amazingly compact (eight bytes).

So it is clear that need for increased bandwidth is usually not instigated by their need to support more volume. However, the financial services sector in the Tacoma area does have unmet telecommunications needs, as evidenced by the Frank Russell Company, one example of a professional services firm experiencing increased telecommunication needs in order to link its headquarters with its international offices and clients. For these kinds of clients overall bandwidth may not be an issue, but security of the line, speed and direction, and responsiveness of the vendor may be. This is an industry sector where telecommunications is part of the production process — a breakdown in the system can cause the organization itself to cease to function until the system is back on-line. Failure to invest in new technologies, especially communications technologies, would therefore limit the growth potential of the area. Companies like Frank Russell would be forced to continue to privately construct work around solutions or utilize a remote service center that could supply desired access and services. Other areas looking to attract these types of companies would need to provide access to a sound telecommunication infrastructure. The success of the international services district and the ability to attract new businesses to the redeveloped Foss will depend, to a great degree, on access to low cost, full service telecommunications technologies.

More uncertain, and equally important, will be the information and communication needs of shipping and support activities in the *Port of Tacoma* area. Increase in direct competition to Tacoma's container trade, competition for new shipping lines, just-in-time inventory requirements, and lower labor costs all suggest the provision of telecommunications technologies will be important for this sector of the economy as well. Distribution centers in the Port of Tacoma, with SuperValu as another example, are becoming increasingly dependent on telecommunications for the transfer of data between regional distribution centers, vendors, and the parent company. Customers frequently desire to know the status of shipments which they have sent or are waiting to

receive. These shipment status services are often effective differentiators for shipment service providers. In the small package shipment service business competitive pressure drove both FedEx and UPS to offer shipment status services. With the small package shippers, status generally provides pickup time, expected or actual delivery time and other information. With integrated shipment services providers such as the typical port authority, the cargo may be at sea, in the air or with some common carrier trucking firm which makes an accurate and reliable determination of shipment location problems. A possible solution entail utilizing global positioning systems (GPS) and wireless telecommunications technology to update port authority databases on the location and condition of shipments in transit.

In the *retail sector*, increased reliance on computer usage in stores is likely, as inventory costs can more effectively be controlled with timely ordering and control, use of fax and modem transactions is increasing, and the use of things like fingerprint recognition for credit cards or check writing. Successful merchants will need to adapt to these new demands -- a potential large increase in data transmission needs from many small and scattered sites.

The *advanced technology* businesses also can have telecommunication needs. A research based organization will often desire high-speed access to other researchers or their works. In fact, it is the ability to telecommute and connect regionally-located Universities that has fueled some of the dispersion in advanced technology companies to smaller communities.

Culture-based organizations in this scenario are not as technology-dependent as professional and health services, but telecommunications does play an increasing useful role in the tourist/convention category. The Visitor and Convention Bureau anticipates the use of smart cards to allow tourists access to a variety of services from transportation to tickets to shows. That idea would require a well developed communications network in the city and adjacent points of interest. For the conventioneer, satellite conferencing and digital information transfers are of growing importance. In addition, many business travelers expect a computer modem in their hotel rooms to connect with their home office. Museums increasingly use interactive media as an educational tool.

It is not merely the business applications themselves that require infrastructure access. Sophisticated, technology oriented employees of many of these types of firms would expect to have access to their workplace computer system from their home, access to the Internet, high quality cable systems, and eventually new technologies which are only on the drawing board at this

time. A failure to invest in the appropriate infrastructure may leave Tacoma out of the running as a location for these types of firms and the employees who work for them.

---

## Thank You

We would like to extend our thanks to those in the community who were generous in sharing their time and judicious in sharing their opinions about the future economic prospects of Greater Tacoma.

Connie Bacon, Executive Director, World Trade Center Tacoma  
Shawn Bunney, Council Staff, Pierce County Council  
Tom Dickson, President, Tacoma Urban League  
David Graybill, Tacoma/Pierce County Chamber of Commerce  
Hank G. The Port of Tacoma  
David B. Johnson, Structural Engineer, AHBL  
Geoff Hodston, Principal, AHBL Engineering (Australian Citizen)  
Mirriam Kantor-Crutchfield  
Mark Lewington, Graham & Dunn  
Don Meyer, Acting Director, The Port of Tacoma  
Kevin R. Phelps, President, Landmark Convention Center  
George Polich, Public Affairs Officer, Ft. Lewis  
Bob Snyder, Pierce County Airport Planner  
James R. Walton, Deputy City Manager, City of Tacoma  
Nancy Watkins, Executive Director, Tacoma/Pierce County Visitor & Convention Bureau  
Juli Wilkerson, Director, Planning and Development, City of Tacoma

# EXHIBIT 11



City of Tacoma  
Office of the City Clerk

## CERTIFICATE OF CITY CLERK

I, Doris Sorum, City Clerk of the City of Tacoma, Washington, do hereby certify that the attached is a full, true and correct copy of Ordinance No. 25930 passed by the City Council on July 23, 1996.

Dated this 15<sup>th</sup> day of January 2020.

  
\_\_\_\_\_  
Doris Sorum, City Clerk  
City of Tacoma, Washington





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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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1           WHEREAS, the Light Division may wish to connect such telecommunications system  
2 to individual residences and businesses in its service area or to other providers of  
3 telecommunications services; and

4           WHEREAS, the City has determined that it should create a telecommunications system  
5 as part of the Electric System in order to construct these telecommunications improvements;  
6 and

7           WHEREAS, the City by Ordinance No. 23514 passed November 20, 1985 (as  
8 amended and supplemented, the "Ordinance"), authorized Electric System Revenue Bonds (the  
9 "Bonds") of the City to be issued in series, made covenants and agreements in connection with  
10 the issuance of such Bonds and authorized the sale and issuance of the first series of such  
11 Bonds in the aggregate principal amount of \$125,505,000 (the "1985 Bonds") for the purpose  
12 of refunding all of the City's then outstanding light and power revenue bonds; and

13           WHEREAS, the 1985 Bonds were issued under date of December 1, 1985 and are now  
14 outstanding; and

15           WHEREAS, the City has heretofore issued ten additional series of Bonds on a parity  
16 with the 1985 Bonds, which bonds were issued and are now outstanding:

18	Authorizing Ordinance	Bonds Dated	Principal Amount Issued
19	23663	July 1, 1986	\$ 30,000,000
20	24073	May 1, 1988	60,400,000
21	24296	May 1, 1989	48,500,000
22	25004	December 1, 1991	13,800,000
22	25004	December 5, 1991	42,400,000
23	25004	December 5, 1991	42,400,000
23	25089	May 1, 1992	31,295,000
24	25165	September 1, 1992	131,675,000
24	25333	August 1, 1993	3,318,500
25	25489	May 10, 1994	135,665,000

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1 Section 1.1 of the Ordinance, as amended and supplemented by the First, Second, Third,  
2 Fourth, Fifth, Sixth, and Seventh Supplemental Ordinances.

3 B. In this Eighth Supplemental Ordinance:

4 "Arbitrage and Tax Certification" means the certificate executed by the Director of  
5 Finance of the City pertaining to the calculation and payment of any Rebate Amount with  
6 respect to the Bonds.

7 "Bond Sale Resolution" means the resolution to be adopted by the City Council setting  
8 forth the final terms of the Bonds.

9 "Bonds" means the Electric System Revenue Bonds, 199\_\_, of the City issued pursuant  
10 to the Ordinance and this Eighth Supplemental Ordinance.

11 "Code" means the Internal Revenue Code of 1986, as amended, together with  
12 corresponding and applicable final, temporary or proposed regulations and revenue rulings  
13 issued or amended with respect thereto by the United States Treasury or the Internal Revenue  
14 Service, to the extent applicable to the Bonds.

15 "Eighth Supplemental Ordinance" means this Ordinance No. 25930.

16 "Rebate Amount" means the amount, if any, determined to be payable with respect to  
17 the Bonds by the City to the United States of America in accordance with Section 148(f) of the  
18 Code.

19 Section 1.3. Authority for this Eighth Supplemental Ordinance. This Eighth  
20 Supplemental Ordinance is adopted pursuant to the provisions of the laws of the State of  
21 Washington, the Tacoma City Charter and the Ordinance.

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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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1            Section 3.3. Date, Maturities and Interest. The Bonds shall be issued in the aggregate  
2 principal amount of not to exceed \$1,000,000 and shall be dated as of the date provided in the  
3 Bond Sale Resolution and shall bear interest from their dated date to their stated dates of  
4 maturity or prior redemption. The exact principal amount of the Bonds shall be established by  
5 the Bond Sale Resolution. The Bonds shall mature on the dates of the years and in the  
6 principal amounts and shall bear interest payable semiannually on the dates and at the rates per  
7 annum set forth in the Bond Sale Resolution.

8            Section 3.4. Denomination and Numbers. The Bonds shall be issued in fully registered  
9 form in the denominations of \$5,000 or any integral multiple of \$5,000 within a maturity. The  
10 Bonds shall be numbered separately in such manner and with any additional designation as the  
11 Registrar deems necessary for purposes of identification. The Bond Sale Resolution may  
12 provide for the Bonds to be held in book-entry only form.

13            Section 3.5. Redemption Terms. By the Bond Sale Resolution, the City Council may  
14 determine that all or a portion of the Bonds shall be subject to redemption prior to maturity at  
15 the option of the City, in whole or in part, on any date and at the respective redemption prices  
16 specified in the resolution. The City Council may designate certain Bonds as Term Bonds that  
17 will be subject to redemption by operation of the Bond Retirement Account through Sinking  
18 Fund Requirements in the years and amounts set forth in the resolution.

19            Section 3.6. Reservation of Right to Purchase. The City reserves the right to use  
20 money in the Revenue Fund or any other legally available funds at any time to purchase any of  
21 the Bonds in the open market provided there is no deficiency in the accounts within the Bond  
22 Fund. Any purchases of Bonds may be made with or without tenders of Bonds and at either  
23 public or private sale.

24            Section 3.7. Tax Exemption. The City shall comply with the provisions of this section  
25 unless, in the written opinion of nationally-recognized Bond Counsel to the City, such  
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1 compliance is not required in order to maintain the exemption of the interest on the Bonds  
2 from federal income taxation.

3 The City hereby covenants that it will not make any use of the proceeds from the sale  
4 of the Bonds or any other funds of the City which may be deemed to be proceeds of such  
5 Bonds pursuant to Section 148 of the Code and the applicable regulations thereunder which  
6 will cause the Bonds to be "arbitrage bonds" within the meaning of said Section and said  
7 regulations. The City will comply with the applicable requirements of Section 148 of the Code  
8 (or any successor provision thereof applicable to the Bonds) and the applicable regulations  
9 thereunder throughout the term of the Bonds.

10 The City further covenants that it will not take any action or permit any action to be  
11 taken that would cause the Bonds to constitute "private activity bonds" under Section 141 of  
12 the Code.

13 Section 3.8. Arbitrage Rebate. The City will pay the Rebate Amount, if any, to the  
14 United States of America at the times and in the amounts necessary to meet the requirements  
15 of the Code to maintain the federal income tax exemption for interest payments on the Bonds,  
16 in accordance with the Arbitrage and Tax Certification.

#### 17 ARTICLE IV

#### 18 REGISTRATION, FORM AND GENERAL TERMS

19 Section 4.1. Registrar and Paying Agent. The initial Registrar and Paying Agent shall  
20 be the fiscal agencies for the state of Washington in Seattle, Washington, and New York, New  
21 York.

22 Section 4.2. Transfer and Exchange. So long as the Bonds are not in book-entry form,  
23 any Bond may be transferred pursuant to its provisions at the Registrar's principal office for  
24 such purpose by surrender of such Bond for cancellation, accompanied by a written instrument  
25 of transfer, in form satisfactory to the Registrar, duly executed by the registered owner in  
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person or by the registered owner's duly authorized attorney. Upon payment of any applicable tax or governmental charge, the City will execute and the Registrar will authenticate and deliver at the principal office of the Registrar (or send by registered mail to the owner thereof at the owner's expense), in the name of the transferee or transferees, a new Bond or Bonds in authorized denominations of the same interest rate, aggregate principal amount and maturity, dated as of the last interest payment date to which interest has been paid so that there shall result no gain or loss of interest as a result of such transfer. To the extent of authorized denominations, one Bond may be exchanged for several bonds of the same interest rate and maturity, and for a like aggregate principal amount, and several Bonds of the same interest rate and maturity may be exchanged for one or several Bonds, respectively, of the same interest rate and maturity and for a like aggregate principal amount.

In every case of a transfer or exchange of any Bonds, the surrendered Bonds shall be canceled by the Registrar and a certificate evidencing such cancellation shall be promptly transmitted by the Registrar to the City. As a condition of any such transfer or exchange, the City at its option may require the payment of a sum sufficient to reimburse it for any tax or other governmental charge that may be imposed thereon. All Bonds executed, authenticated and delivered in exchange for or upon transfer of Bonds so surrendered shall be valid obligations of the City evidencing the same debt as the Bonds surrendered, and shall be entitled to all the benefits and protection of the Ordinance to the same extent as the surrendered Bonds.

Section 4.3. Limitation on Transfer or Exchange of Bonds. The City shall not be required to (a) issue, transfer, or exchange Bonds after the 15th day of the month prior to any interest payment date therefor, or (b) to register, discharge from registration, transfer or exchange any Bonds which have been designated for redemption within a period of 30 days next preceding the date fixed for redemption.

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Section 4.4. Effect of Payment. All payments of or on account of interest to any registered owner of any Bond, and all payments of or on account of principal to any registered owner of any Bond (or to his or her assigns), shall be valid and effectual and shall be a discharge of the City, the Paying Agent and the Registrar in respect of the liability upon the Bonds or claims for interest, as the case may be, to the extent of the sum or sums paid.

All Bonds upon the payment or redemption thereof shall be canceled and destroyed by the Paying Agent, and a certificate evidencing such payment, cancellation and destruction shall be promptly transferred by the Paying Agent to the City.

Section 4.5. Mutilated, Lost, Stolen or Destroyed Bonds. In case any Bond shall at any time become mutilated or be lost, stolen or destroyed, the City in the case of such mutilated Bond shall, and in the case of such lost, stolen or destroyed Bond in its discretion may, execute and direct the Registrar to authenticate and deliver a new Bond of the same interest rate and maturity and of like tenor and effect in exchange or substitution for and upon surrender and cancellation of such mutilated Bond, or in lieu of or in substitution for such destroyed, stolen or lost Bond. If such stolen, destroyed or lost Bond shall have matured or have been called for redemption, instead of issuing a substitute therefor, the City may without the surrender of such Bond at its option pay the same (in which case the City shall promptly file a certificate to that effect with the Paying Agent and Registrar) or cause the same to be paid by the Paying Agent by a certificate of the City directing such payment filed with the Paying Agent. Except in the case where a mutilated Bond is surrendered, the applicant for the issuance of a substitute Bond shall furnish to the City and the Registrar evidence satisfactory to them of the theft, destruction or loss of the original Bond, and also such security and indemnity as may be required by the City or the Registrar, and no such substitute Bond shall be issued unless the applicant for the issuance thereof shall reimburse the City and the Registrar for the expenses incurred in connection with the preparation, execution, authentication, issuance and

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delivery of the substitute Bond. Any such substitute Bond shall be equally and proportionately entitled to the security of the Ordinance with all other Bonds issued hereunder, whether or not the Bond alleged to have been lost, stolen or destroyed shall be found at any time. The Registrar shall cancel all mutilated Bonds surrendered to it.

Section 4.6. Execution and Authentication of Bonds. The Bonds shall be executed on behalf of the City with the manual or facsimile signature of the Mayor and attested with the manual or facsimile signature of the City Clerk and the seal of the City shall be imprinted or impressed on each of the Bonds. The Bonds shall bear thereon a certificate of authentication, in the form set forth in Section 4.7 of this Eighth Supplemental Ordinance, executed manually by the Registrar. Only such Bonds as shall bear thereon such certificate of authentication shall be entitled to any right or benefit under the Ordinance and no Bond shall be valid or obligatory for any purpose until such certificate of authentication shall have been duly executed by the Registrar. Such certificate of the Registrar upon any Bond executed on behalf of the City shall be conclusive evidence that the Bond so authenticated has been duly authenticated and delivered under the Ordinance and that the owner thereof is entitled to the benefits of the Ordinance.

In case any of the officers who shall have signed or attested any of the Bonds shall cease to be such officers before the Bonds so signed or attested shall have been actually delivered, such Bonds shall be valid nevertheless and may be issued by the City with the same effect as though the persons who had signed or attested such Bonds had not ceased to be such officers.

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Section 4.7. Form of Bonds.

(a) The Bonds shall be in substantially the following form:

UNITED STATES OF AMERICA  
STATE OF WASHINGTON  
CITY OF TACOMA  
ELECTRIC SYSTEM REVENUE BOND, 199\_

No. \_\_\_\_\_ \$ \_\_\_\_\_  
Interest Rate: \_\_\_\_\_ Maturity Date: \_\_\_\_\_ CUSIP No: \_\_\_\_\_  
\_\_\_\_\_% \_\_\_\_\_  
Registered Owner: \_\_\_\_\_  
Principal Amount: \_\_\_\_\_ DOLLARS

The City of Tacoma, a municipal corporation of the State of Washington (hereinafter called the "City"), for value received, hereby promises to pay to the Registered Owner identified above, or registered assigns, on the Maturity Date identified above, the Principal Amount indicated above and to pay interest on such principal amount from the date hereof or the most recent date to which interest has been paid or duly provided for, at the Interest Rate set forth above per annum, payable \_\_\_\_\_, 199\_, and semiannually thereafter on the first day of each \_\_\_\_\_ and \_\_\_\_\_ until payment shall have been made or provided for.

Principal of and interest on this bond are payable solely out of the special fund of the City known as the "Electric System Revenue Bond Fund" created and established by Ordinance No. 23514 of the City (the "Bond Fund"). Both principal of and interest on this bond are payable in lawful money of the United States of America. Interest shall be paid by mailing a check or draft or by wire transfer as provided in the Bond Ordinance (as hereinafter defined) to the registered owner or assigns at the address shown on the bond register as of the 15th day of the month prior to the interest payment date. Principal shall be paid to the registered owner or assigns upon presentation and surrender of this bond at the principal office of the Paying Agent or Agents which initially are the fiscal agencies of the State of Washington in Seattle, Washington, and New York, New York. (Such fiscal agencies also act, and are hereinafter referred to collectively, as the "Bond Registrar").

This bond shall not be valid or become obligatory for any purpose or be entitled to any security or benefit under the Bond Ordinance until the Certificate of Authentication hereon shall have been manually signed by the Bond Registrar.



1 This bond is one of a duly authorized series of bonds aggregating \$ \_\_\_\_\_  
2 in principal amount and designated as "Electric System Revenue Bonds, 199\_." This bond and  
3 the bonds of this series (the "Bonds") are issued under and pursuant to Ordinance No. 23514  
4 as amended and supplemented by Ordinance No. 23663, Ordinance No. 24073, Ordinance No.  
5 24296, Ordinance No. 25004, Ordinance No. 25089, Ordinance No. 25165, Ordinance  
6 No. 25489 and Ordinance No. 25930 of the City (together the "Bond Ordinance"), and under  
7 the authority of and in full compliance with the Constitution and laws of the State of  
8 Washington.

9 The Bonds are issued for the purpose of providing part of the funds necessary for  
10 financing capital improvements to the Electric System. The Bond Ordinance permits the  
11 issuance of Future Parity Bonds payable from the Bond Fund ranking on a parity with the 1985  
12 Bonds, the 1986 Bonds, the 1988 Bonds, the 1989 Bonds, the 1991 Bonds, the 1992 Bonds,  
13 the 1992B Bonds, the 1993 Bonds, the 1994 Bonds and the Bonds and secured by an equal  
14 charge and lien on the Net Revenues and permits the costs associated with certain Contract  
15 Resource Obligations to be included in the Electric System's Operating Expenses (as such  
16 terms are defined in the Bond Ordinance). The 1985 Bonds, the 1986 Bonds, the 1988 Bonds,  
17 the 1989 Bonds, the 1991 Bonds, the 1992 Bonds, the 1992B Bonds, the 1993 Bonds, the  
18 1994 Bonds, the Bonds and any Future Parity Bonds are hereinafter collectively referred to as  
19 the "Parity Bonds."

20 Copies of the Bond Ordinance are on file at the office of the City Clerk and at the  
21 principal office of each Paying Agent for this bond. Reference is hereby made to the Bond  
22 Ordinance and to any and all modifications and amendments thereof for a more complete  
23 description of the Revenues available for the payment of the principal of and interest on the  
24 Bonds and the rights and remedies of the owners of the Bonds with respect thereto, the terms  
25 and conditions upon which the Bonds have been issued, and the terms and conditions upon  
26 which this bond shall no longer be secured by the Bond Ordinance or deemed to be  
outstanding thereunder if money or certain specified securities sufficient for the payment of this  
bond shall have been set aside in a special account and held in trust for the payment thereof.  
Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the  
Bond Ordinance.

Under the Bond Ordinance, the City is obligated to set aside and pay into the Bond  
Fund out of the Revenues of said Electric System certain fixed amounts sufficient to pay the  
principal of and interest and premium, if any, on all Parity Bonds at any time outstanding as the  
same become due and payable, all as is more fully provided in the Bond Ordinance. The Bonds  
and the interest thereon constitute the only charge against the Bond Fund and the amount of  
the Net Revenues pledged to said Bond Fund, as provided in the Bond Ordinance.

In and by the Bond Ordinance, the City covenants to establish, maintain and collect  
rates and charges for electric energy sold through the ownership or operation of the Electric

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System and all other services, facilities and commodities sold, furnished or supplied by the City in connection with the ownership or operation of the Electric System which shall be fair and adequate to provide Revenues sufficient for the payment of the Parity Bonds and all payments which the City is obligated to set aside in the Bond Fund and for the proper operation and maintenance of the Electric System, including payment of certain Contract Resource Obligations, all necessary repairs, replacements and renewals thereof and other costs thereof, as provided in the Bond Ordinance.

The Bonds maturing on and after \_\_\_\_\_ 1, \_\_\_\_\_ are subject to redemption prior to maturity at the option of the City on any date on and after \_\_\_\_\_ 1, 20\_\_ in whole or in part, upon written notice as provided hereinafter, at the redemption prices with respect to each Bond (expressed as a percentage of the principal amount of the Bonds to be redeemed) set forth below, together with the interest, if any, accrued thereon to the date fixed for redemption:

Redemption Period	Redemption Price
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If less than all of the Bonds subject to optional redemption are to be called for redemption, the City shall choose the maturities to be redeemed. In the event that less than all of the Bonds of any maturity are called for redemption, the particular Bonds of such maturity to be redeemed shall be selected by lot by the Bond Registrar, or, so long as the Bonds are held in book-entry form, by the Securities Depository.

The Bonds maturing on \_\_\_\_\_ 1, \_\_\_\_\_ (hereinafter referred to as the "Term Bonds") shall be redeemed prior to maturity by lot, not later than \_\_\_\_\_ 1 in the years \_\_\_\_\_ through \_\_\_\_\_, inclusive, from amounts credited to the Bond Retirement Account in the Bond Fund as sinking fund installments therefor (to the extent such amounts have not been used to redeem or purchase such Bonds as provided below) and in the principal amounts as set forth below, upon written notice as provided hereinafter by payment of the principal amount thereof, together with the interest, if any, accrued thereon to the date fixed for redemption.

Year	Amount
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The City may purchase or redeem the Term Bonds through the application of part or all of the respective sinking fund installments therefor at any time prior to any \_\_\_\_\_ 1 due date.

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Any money not so used to redeem or to purchase such Term Bonds shall be substantially exhausted by application to the redemption of such bonds on such succeeding \_\_\_\_\_ 1. If, as of any \_\_\_\_\_ 1, the principal amount of Term Bonds retired by purchase or redemption from any source exceeds the cumulative requirement for sinking fund installments through such date, such excess may be credited against the sinking fund installment for the next fiscal year.

Written notice of redemption shall be given by first class mail, postage prepaid, not less than 30 days nor more than 60 days before the redemption date to the registered owners of the Bonds to be redeemed in whole or in part at their last addresses, if any, appearing on the Bond Register, but any defect with respect to the redemption of any bond shall not invalidate the redemption of any other bond. Notice of redemption having been given by mailing, as aforesaid, the Bonds so called for redemption shall on the date specified in such notice become due and payable at the applicable redemption price herein provided, and from and after the date so fixed for redemption (except as to any bond, or portion of any bond, not so redeemed in accordance with such call for redemption) interest on said Bonds so called for redemption shall cease to accrue.

A portion of the principal sum of this bond in the amount of \$5,000, or any integral multiple thereof, may be redeemed, and if less than all of the principal sum hereof is to be redeemed, in such case upon the surrender of this bond at the principal office of the Bond Registrar, there shall be issued to the registered owner, without charge therefor, for the then unredeemed balance of the principal sum hereof, fully registered bonds of like series, maturity and interest rate in any of the denominations authorized by the Bond Ordinance.

This bond shall be transferable by the registered owner at the principal offices of the Bond Registrar upon surrender and cancellation of this bond, and thereupon a new registered bond or bonds of the same principal amount and interest rate and maturity will be issued to the transferee as provided in the Bond Ordinance. The City, the Bond Registrar, the Paying Agents and any other person may treat the person in whose name this bond is registered as the absolute owner hereof for the purpose of receiving payment hereof and for all purposes and shall not be affected by any notice to the contrary, whether this bond be overdue or not.

It is hereby certified, recited and declared that all acts, conditions and things required by the Constitution and statutes of the State of Washington to exist, to have happened and to have been performed precedent to and in the issuance of this bond do exist, have happened and

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have been performed in due time, form and manner as prescribed by law, and that the amount of this bond, together with all other obligations or indebtedness of the City, does not exceed any constitutional or statutory limitations of indebtedness.

IN WITNESS WHEREOF, the City of Tacoma, by its City Council, has caused this bond to be executed in its name with the facsimile or manual signature of its Mayor, and attested by the facsimile or manual signature of its Clerk, and the seal of said City to be imprinted or impressed hereon, all as of the \_\_\_\_\_ day of \_\_\_\_\_, 199\_.

CITY OF TACOMA, WASHINGTON

By \_\_\_\_\_  
Mayor

(SEAL)

Attest:

\_\_\_\_\_  
City Clerk

Authentication Date: \_\_\_\_\_

CERTIFICATE OF AUTHENTICATION

This bond is one of the bonds described in the within-mentioned Bond Ordinance and is one of the Electric System Revenue Bonds, 199\_ of the City of Tacoma, Washington, dated \_\_\_\_\_, 199\_.

WASHINGTON STATE FISCAL  
AGENCY, Bond Registrar

By \_\_\_\_\_  
Authorized Officer

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**ASSIGNMENT**

**FOR VALUE RECEIVED, the undersigned hereby sells, assigns and transfers unto**

**PLEASE INSERT SOCIAL SECURITY OR TAXPAYER  
IDENTIFICATION NUMBER OF TRANSFEREE**

[Empty rectangular box for Social Security or Taxpayer Identification Number]

**(Please print or typewrite name and address, including zip code, of Transferee)**

\_\_\_\_\_ the  
within bond and does hereby irrevocably constitute and appoint \_\_\_\_\_  
attorney-in-fact to transfer said bond on the books kept for registration thereof with full power  
of substitution in the premises.

**DATED:** \_\_\_\_\_

**SIGNATURE GUARANTEED:**  
\_\_\_\_\_

**NOTE: The signature on this Assignment must correspond with the name of the registered owner as it appears upon the face of the within bond in every particular, without alteration or enlargement or any change whatever.**

**ARTICLE V**

**APPLICATION OF PROVISIONS OF ORDINANCE TO BONDS**

**Section 5.1. Issuance of Future Parity Bonds. The provisions of Article V of the Ordinance relating to the issuance of Future Parity Bonds shall apply to the Bonds.**

**Section 5.2. Contract Resource Obligations. The provisions of Article VI of the Ordinance relating to Contract Resource Obligations shall apply to the Bonds.**

**Section 5.3. Application of Sections 7.1 through 7.3 of Ordinance Relating to Special Funds and Accounts. Except as otherwise provided below in Section 5.10, the provisions of**

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Sections 7.1 through 7.3 of the Ordinance relating to the Revenue Fund and the accounts therein, the Bond Fund and the accounts therein, the Cumulative Reserve Fund, and the investment of money held for the credit of such Funds shall apply to the Bonds.

Section 5.4. Covenants to Secure Bonds. The provisions of Article IX of the Ordinance setting forth the covenants to secure Bonds, as amended by Article VII of the First Supplemental Ordinance, shall apply to the Bonds.

Section 5.5. Supplemental and Amendatory Ordinances. The provisions of Article X of the Ordinance relating to supplemental and amendatory ordinances shall apply to the Bonds.

Section 5.6. Defaults and Remedies. The provisions of Article XI of the Ordinance relating to defaults and remedies shall apply to the Bonds.

Section 5.7. Amendments and Bondowners' Meetings. The provisions of Article XII of the Ordinance relating to amendments and bondowners' meetings shall apply to the Bonds.

Section 5.8. Miscellaneous. The provisions of Article XIII of the Ordinance relating to the City's contract with the owners of Bonds, money held by the Paying Agent one year after the due date, the benefits of the Ordinance and severability shall apply to the Bonds.

Section 5.9. Rights of AMBAC. The provisions of Article X of the Second Supplemental Ordinance and Article VII of the Fifth Supplemental Ordinance and Article VIII of the Sixth Supplemental Ordinance relating to the rights of AMBAC Indemnity Corporation are incorporated herein by reference and shall be in force and effect so long as any 1988 Bond, 1992 Bond or 1992B Bond, respectively, is Outstanding and insured by the municipal bond guaranty insurance policy therein authorized.

Section 5.10. Reserve Subaccount. There is hereby established within the Reserve Account a special subaccount entitled the "199\_\_ Reserve Subaccount." Funds in such Reserve Subaccount shall be treated in all respects as other funds in the Reserve Account. The City shall make transfers into the Reserve Subaccount from money and investments in the

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1 Reserve Account, from proceeds of the Bonds, or from other available money in amounts  
2 sufficient to satisfy the Reserve Account Requirement with respect to the Bonds.

3 The City is authorized to satisfy the requirements of Section 7.2 of the Ordinance with  
4 respect to the Reserve Account as to the Bonds through the use of Qualified Insurance, or a  
5 Qualified Letter of Credit, which may be purchased on the date of closing of the Bonds or after  
6 the issuance of the Bonds and substituted for amounts in the Reserve Subaccount pursuant to  
7 the provisions of Section 7.2 of the Ordinance.

#### 8 ARTICLE VI

#### 9 DISPOSITION OF BOND PROCEEDS

10 Section 6.1. Construction Account. A special fund of the City has heretofore been  
11 created and designated the "City of Tacoma Electric System Construction Fund" (the  
12 "Construction Fund"). There is hereby created within the Construction Fund a special account  
13 to be known as the "199\_\_ Bonds Construction Account" into which shall be deposited from  
14 the proceeds of sale of the Bonds. Money in the Construction Account shall be used for  
15 paying part of the costs of the acquisition, construction and installation of the additions and  
16 improvements described in Exhibit A, and for paying all expenses incidental thereto (including  
17 but not limited to costs of issuance of the Bonds, engineering, financing, legal or any other  
18 incidental costs) and for repaying any advances heretofore or hereafter made on account of  
19 such costs, and such money or so much thereof as may be necessary be and hereby is  
20 appropriated for such purpose.

21 All proceeds of the Bonds so deposited in the Construction Account shall be  
22 continuously and fully invested to the extent practicable in Permitted Investments. Interest  
23 earned and income or profits derived by virtue of such investments shall remain in the account  
24 and be used for the purposes for which the Bonds are issued or other lawful purposes. Money  
25 in the Construction Account may be transferred to the Bond Fund in such amounts as shall be  
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necessary to pay principal of and interest on Bonds, and may be used to pay any Rebate Amount.

Section 6.2. Disposition of Proceeds. The proceeds of the Bonds are hereby appropriated for the following purposes and shall be deposited as follows:

1. The amount equal to the interest accruing on the Bonds from their dated date to the date of their delivery shall be deposited in the Interest Account in the Bond Fund and invested in Permitted Investments.

2. To the extent permitted by the Code, the amount that when added to other money in the Reserve Account will ensure that the total amount in the Reserve Account equals the Reserve Account Requirement shall be deposited in the Reserve Account in the Bond Fund.

3. The balance of the Bond proceeds shall be deposited in the Construction Account and used for the purposes specified in Sections 6.1, including payment of costs of issuance of the Bonds.

ARTICLE VII

SALE OF BONDS

Section 7.1. Sale of Bonds. The Bonds may be sold by competitive or negotiated sale, which sale shall be approved by the Bond Sale Resolution.

Section 7.2. Official Statement; Insurance. The Director and/or Deputy Director of Utilities are authorized to prepare a preliminary official statement for the marketing of the Bonds and to solicit bids for bond insurance. The Bond Sale Resolution shall approve the preliminary and final official statements and any bond insurance.

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ARTICLE VIII  
MISCELLANEOUS

Section 8.1. Defeasance. In the event that the City, in order to effect the payment, retirement or redemption of any Bond, sets aside in the Bond Fund or in another special account, advance refunding bond proceeds or other money lawfully available or direct obligations of the Department of the Treasury of the United States of America ("Government Obligations"), or any combination of such proceeds, money and/or Government Obligations, in amounts which, together with known earned income from the investment thereof are sufficient to redeem, retire or pay such Bond in accordance with its terms and to pay when due the interest and redemption premium, if any, thereon, and such proceeds, money and/or Government Obligations are irrevocably set aside and pledged for such purpose, then no further payments need be made into the Bond Fund for the payment of the principal of and interest on such Bond, and the owner of such Bond shall cease to be entitled to any lien, benefit or security of the Ordinance except the right to receive payment of principal, premium, if any, and interest from such special account, and such Bond shall be deemed not to be outstanding hereunder.

Section 8.2. Undertaking to Provide Ongoing Disclosure. In the Bond Sale Resolution the City shall undertake to provide certain ongoing disclosure for the benefit of the owners of the Bonds as required by Section (b)(5) of the Securities and Exchange Commission's Rule 15c2-12 under the Securities and Exchange Act of 1934.

Section 8.3. Severability. If any one or more of the provisions of this Eighth Supplemental Ordinance is or are held by any court of competent jurisdiction to be contrary to law, then such provision or provisions shall be null and void and shall be deemed separable from the remaining provisions and shall in no way affect the validity of the other provisions of this Eighth Supplemental Ordinance or the Bonds.

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Section 8.4. Effective Date. This Eighth Supplemental Ordinance shall take effect and be in force thirty days after its passage, approval and publication as required by law. Any actions taken pursuant to this Eighth Supplemental Ordinance before its effective date and after its passage are hereby ratified, approved and confirmed.

INTRODUCED AND READ FOR THE FIRST TIME at a regular meeting of the City Council held the 16th day of July, 1996.

PASSED by the City Council of the City of Tacoma, Washington, and authenticated by its Mayor at a regular meeting of the Council held this 23rd day of July, 1996.

CITY OF TACOMA, WASHINGTON

By *Kevin Gable*  
Mayor

Attest:

*Rick Rosenblatt*  
City Clerk

APPROVED AS TO FORM:

*[Signature]*  
City Attorney, ch. 85 57.

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CLERK'S CERTIFICATE

I, the undersigned, the duly chosen, qualified and ~~acting~~ City Clerk of the City of Tacoma, Washington, and keeper of the records of the City Council (herein called the "Council"), DO HEREBY CERTIFY:

1. That the attached Ordinance No. 25930 (herein called the "Ordinance") is a true and correct copy of an Ordinance of the Council, as finally passed at a regular meeting of the Council held on the 23<sup>rd</sup> day of July, 1996 and duly recorded in my office.

2. That said meeting was duly convened and held in all respects in accordance with law, and to the extent required by law, due and proper notice of such meeting was given; that a legal quorum was present throughout the meeting and a legally sufficient number of members of the Council voted in the proper manner for the passage of said Ordinance; that all other requirements and proceedings incident to the proper adoption of said Ordinance have been duly fulfilled, carried out and otherwise observed, and that I am authorized to execute this certificate.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City as of this 24<sup>th</sup> day of July, 1996.

Rick Rosenblatt  
City Clerk  
City of Tacoma, Washington



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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

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# REQUEST FOR ORDINANCE OR RESOLUTION

CITY CLERK USE

Request #:  
Ordinance #:  
Resolution #:

5957
25930

1. Date: June 21, 1996

Requesting Department/Division/Program	Sponsored By	Phone/Extension
2. Tacoma Public Utilities/Light Division	<i>Steve Klein</i>	<b>8203</b>
Contact Person (for questions):		Phone/Extension
3. Steve Klein		<b>502-8203</b>

4. Preparation of is requested for the City Council meeting of Tuesday July 16, 1996.

5. Summary Title/Recommendation: (A concise sentence, as it will appear on the Council Agenda)

Authorize a Bond Ordinance for City of Tacoma, Washington, Department of Public Utilities, Light Division to clarify its legal authority to develop telecommunication capacity for cable television outside the City limits, certain telecommunications services, and other uses.

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?)

Approval of this Bond Ordinance is necessary to confirm Light Division authority to engage in certain telecommunications activities. This determination will facilitate the decision-making process at the conclusion of the feasibility studies currently underway.

7. Financial Impact: (Future impact on the budget.)

8. List all material available as backup information for the request and indicate where filed:

Source Documents/Backup Material	Location of Document
Proposed Ordinance	Attached
Public Utility Board Resolution U-9198	Attached
Letter to City Council and Public Utility Board dated June 19, 1996.	Attached

9. Funding Source: (Enter amount of funding from each source)

Fund Number & Name:	State \$	City \$	Other \$	Total Amount
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If an expenditure, is it budgeted?  Yes  No      Where? Org #      Acct #

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 10. Department Director/Utility Division Approval	Approved as to Availability of Funds  Director of Finance	 City Manager/Director Utilities Approval
---	---	--



Mark Crisson  
Director

3628 South 35th Street  
P.O. Box 11007  
Tacoma, WA 98411-0007

June 19, 1996

Divisions  
Light  
Water  
Belt Line

To the Mayor and Members of the City Council  
and  
To the Chairman and Members of the Public Utility Board

RE: Proposed Bond Ordinance Approval and Authorization to Proceed  
With a Declaratory Judgment Legal Action to Confirm Authority to  
Construct and Operate a Fiber Optics System With Cable Television  
and Telecommunications Capabilities/Board Resolution U-9198

As we previously discussed with you, the Light Division is proceeding to move forward with a further in-depth analysis of the feasibility of a fiber optics system. We will not move forward with this project until we have reviewed this future analysis with you and obtained your further appropriate approval.

This enabling legislation ordinance is specifically necessary at this time, however, in order to seek and obtain a declaratory judgment by the appropriate Washington State court to clarify the legal authority for certain aspects of the project. Chief Assistant City Attorney Mark Bubenik's confidential memorandum dated June 21, 1996 which has been furnished to each of you delineates the legal issues and procedures involved.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'Mark Crisson'.

Mark Crisson  
Director of Utilities

f/m/cabletv2



**MEMORANDUM**

**To:** Rick Rosenblatt, City Clerk  
**From:** Mark Bubenik, Chief Assistant City Attorney *MB*  
**Date:** June 27, 1996  
**Subject:**

Please place the following proposed resolution(s) ordinance(s) on the agenda for the July 16, 1996 Council Meeting:

U-9198 Authorize approval of a proposed bond ordinance for the City of Tacoma, Light Division to clarify its legal authority to develop telecommunication capacity for cable tv outside the City limits



**RESOLUTION NO. U-9198**

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WHEREAS the Light Division has determined that a telecommunications network system-wide will provide substantial benefits for the Light Division for substation communications, meter reading, demand side management, communications and other beneficial Light Division Electric System uses, and

WHEREAS by the installation of additional telecommunications capacity, this system would have the capability of providing additional public benefits for the City, and Light Division ratepayers, and

WHEREAS for the above-stated purposes it will be necessary to approve a plan and system ordinance declaring the estimated cost thereof providing for the method of financing and providing for the adoption and implementation thereof, and a proposed ordinance providing for the issuance and sale of special obligation bonds of the City of Tacoma consisting of one million dollars (\$1,000,000) of electric system revenue bonds to be issued to provide funds for such purposes, all as more specifically stated in the said proposed ordinance, which by this reference is incorporated herein, and

WHEREAS it is in the best public interest to approve the proposed ordinance and to request its passage by the City Council; Now, therefore,

**BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:**

That the findings, terms and conditions of said proposed ordinance is



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approved and the Council of the City of Tacoma is requested to concur by passing an ordinance substantially in the same form as attached and as approved by the City Attorney.

Approved as to form & legality:

Mark Bubenik

Chief Assistant City Attorney

Lydia Stevenson

Clerk

Carl W. Virgil

Chairman

Bil Moss

Secretary

Acting

Adopted 6/26/96

ASLRA

Ordinance No. 25930

First Reading of Ordinance: JUL 16 1996 (final reading 7/23/96)

Final Reading of Ordinance: JUL 23 1996

Passed: JUL 23 1996

Roll Call vote:

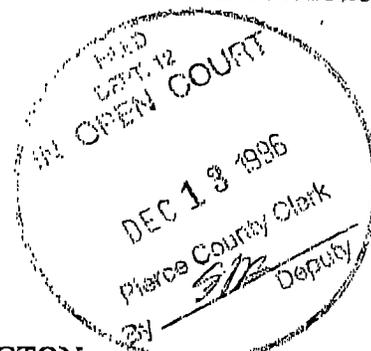
MEMBERS	AYES	NAYS	ABSTAIN	ABSENT
Mr. Baarsma	✓			
Mr. Crowley	✓			
Mr. DeForrest	✓			
Mr. Evans	✓			
Mr. Kirby	✓			
Dr. McGavick	✓			
Mr. Miller	✓			
Dr. Silas	✓			
Mayor Moss	✓			

MEMBERS	AYES	NAYS	ABSTAIN	ABSENT
Mr. Baarsma				
Mr. Crowley				
Mr. DeForrest				
Mr. Evans				
Mr. Kirby				
Dr. McGavick				
Mr. Miller				
Dr. Silas				
Mayor Moss				

# EXHIBIT 12

*Julia Marboe* 12/13  
509-392-5330

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 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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PRESTON GATES & ELLIS  
3000 COLUMBIA CENTER  
701 FIFTH AVENUE  
SEATTLE, WASHINGTON 98104-7078  
TELEPHONE: (206) 623-7380  
FACSIMILE: (206) 623-7022

1 Having considered the documents identified by the parties, the arguments of counsel and the  
2 record herein, the Court concludes that the following order should be entered.

- 3 1. The Court has jurisdiction over the subject matter and parties in this action.
- 4 2. Tacoma City Ordinance No. 25930 (the "Bond Ordinance") was properly enacted.
- 5 3. The City has authority under the laws of the State of Washington and the United  
6 States to provide cable television service in the Light Division service area.

7 4. The City has authority under the laws of the State of Washington and the United  
8 States to lease telecommunications facilities and capacity to telecommunications providers.

9 ~~5. The City has authority under the laws of the State of Washington and the United  
10 States to issue the Bonds for the purposes set for in paragraphs (3) and (4) above and in the manner  
11 set forth in the Bond Ordinance.~~

12 DONE IN OPEN COURT this 13 day of December, 1996.

13  
14 **GRANT L. ANDERSON**

15 JUDGE

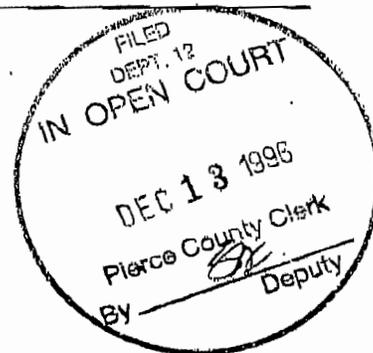
16 Presented by:

17 PRESTON GATES & ELLIS

18  
19 By LSI  
20 Elizabeth Thomas, WSBA # 11544  
21 Laura A. Rosenwald, WSBA # 25722

22 CITY OF TACOMA

23  
24 By LSI  
25 Mark Bubenik, WSBA # 3093  
26 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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# EXHIBIT 12 (a)

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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 MOTION FOR  
SUMMARY JUDGMENT

Plaintiff City of Tacoma ("City") requests that this Court enter a judgment declaring that:

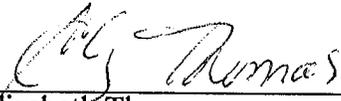
1. The Court has jurisdiction over the subject matter and parties in this action.
2. Tacoma City Ordinance No. 25930 (the "Bond Ordinance") was properly enacted.
3. The City has authority under the laws of the State of Washington and the United States to provide cable television service in the Light 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.



1 Grounds for this motion are set forth in the record in this matter, the accompanying  
2 memorandum in support of motion for summary judgment, and the declaration of Jon Athow.

3 DATED this 5<sup>th</sup> day of November, 1996.

4  
5 PRESTON GATES & ELLIS

6 By   
7 Elizabeth Thomas, WSBA # 11544  
8 Laura A. Rosenwald, WSBA # 25722

9 CITY OF TACOMA

10 By   
11 Mark Bubenik, WSBA # 3093  
12 Chief Assistant City Attorney

13 Attorneys for Plaintiff City of Tacoma  
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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.

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## 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.  
26

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  
23  
24

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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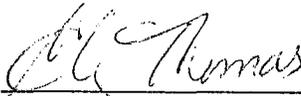
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2 **VI. CONCLUSION**

3 Under its broad powers as a first-class charter city, the City has authority to use a portion of  
4 its Telecommunications System to provide cable television service and to lease a portion of its  
5 Telecommunications System facilities or capacity to other telecommunications service providers.  
6 Federal law expressly bars any requirement that would undercut this authority. Because there is no  
7 dispute over the material facts underlying its authority, the City is therefore entitled to judgment as a  
8 matter of law.

9 DATED this 5<sup>th</sup> day of November, 1996.

10 Respectfully submitted,

11 PRESTON GATES & ELLIS

12  
13 By 

14 Elizabeth Thomas, WSBA # 11544

Laura A. Rosenwald, WSBA # 25722

15  
16 CITY OF TACOMA

17 By 

18 Mark Bubenik, WSBA # 3093

Chief Assistant City Attorney

Attorneys for Plaintiff City of Tacoma  
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26

# EXHIBIT 13

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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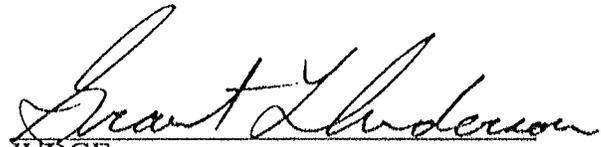
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however the Court is making no finding as to the financial feasibility of the Project or as to the likelihood of any future bond issues. 11/16

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.

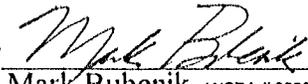
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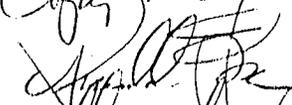
12 Presented by:

13 PRESTON GATES & ELLIS

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15 By   
16 Elizabeth Thomas, WSBA # 11544  
17 Laura A. Rosenwald, WSBA # 25722

18 CITY OF TACOMA

19 By   
20 Mark Bubenik, WSBA # 3003  
21 Chief Assistant City Attorney  
22 Attorneys for Plaintiff City of Tacoma

23 Copy received 9 May 97  
24   
25 Attorney for Putnam  
26 4085

ORDER GRANTING CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 2

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# EXHIBIT 13 (a)

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The Honorable Grant L. Anderson

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SUPERIOR COURT  
ADMINISTRATION

MAY 5 1997

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TED RUTT, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

THOMPSON, KREICH, LAPOINTE

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 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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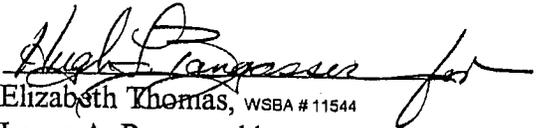
IV. CONCLUSION

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.

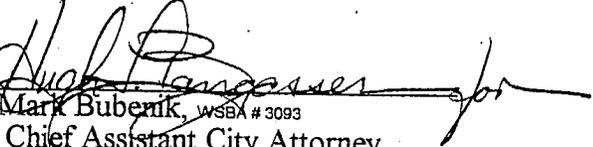
DATED this 5th day of May, 1997.

Respectfully submitted,

PRESTON GATES & ELLIS

By   
Elizabeth Thomas, WSBA # 11544  
Laura A. Rosenwald, WSBA # 25722

CITY OF TACOMA

By   
Mark Bubenik, WSBA # 3093  
Chief Assistant City Attorney  
Attorneys for Plaintiff City of Tacoma

# EXHIBIT 13 (b)

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The Honorable Grant L. Anderson

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PIERCE COUNTY, WASHINGTON  
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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 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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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.

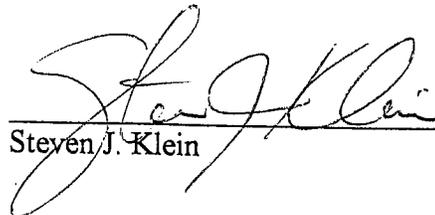
5 14. Light Division staff explained to the City Council our view that even if the  
6 Telecommunications Project's revenues fell short of projections, even to the point of a worst case  
7 scenario (resulting in a 2.5% rate increase), still the City should proceed with the Project in order to  
8 secure 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.

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Steven J. Klein

DECLARATION OF STEVEN J. KLEIN  
IN SUPPORT OF CITY'S REPLY BRIEF- 5

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# EXHIBIT 14



Mark Crisson  
Director

3628 South 35th Street  
P.O. Box 11007  
Tacoma, WA 98411-0007

Divisions  
Light  
Water  
Belt Line

June 30, 1998

Mr. Ray E. Corpuz, Jr.  
City Manager  
Tacoma, Washington

Dear Ray:

I am forwarding for distribution to the Mayor and City Council copies of a recent article from the Internet. MSNBC has written a very informative piece about Tacoma Power's Click!Network. It was written complete with slides of our work in progress. I know the City Council, as well as the Board, will be proud of this national coverage.

Thank you for your assistance in this matter.

Very truly yours,

A handwritten signature in cursive script that reads 'Lydia Stevenson'.

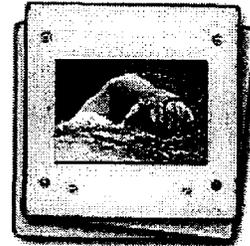
for Mark Crisson  
Director of Utilities

Attachment  
cc: Public Utility Board  
Staff

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Terr Harris / Special to MSNBC

Debra Stewart, ClickNetwork manager, with part of the new fleet of vehicles the utility has acquired.

## Tacoma Power to give TCI a jolt

### Municipal utility prepares to jump into cable

By David Bowermaster  
MSNBC

June 28 — While AT&T officials congratulate themselves on their \$48 billion purchase of Tele-Communications Inc., they might want to keep an eye on the Northwest corner of TCI's sprawling cable empire. Tacoma Power, the city-owned utility of Tacoma, Wash., will soon turn on a \$100 million broadband communications network that will enable it to sell cable TV and Internet access as well as water and electricity — making it a direct competitor to TCI.

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IF THE PROJECT is successful, it is sure to encourage more municipal utilities to take on TCI and other cable monopolies across the country.

The effort is already getting attention from local governments weary of residents' complaints about high prices and poor service from their incumbent cable provider. Tired of waiting for new competitors to shake things up, many cities and towns are thinking about either constructing their own cable network, or encouraging their local utility to do it for them. Tacoma Power's ClickNetwork is the largest such effort to date.

Concerned cable industry officials are launching a public relations counter-offensive, citing studies that question the viability of such projects and complaining that access to public funds give government-backed systems an unfair competitive edge.

"Financially, they just don't work," says Steven Effros, president of the Cable Telecommunications Association in Washington, D.C.

TCI considered ClickNetwork enough of a threat that Leo Hindery, president of the \$7.6 billion cable powerhouse and a Tacoma native, traveled to his old hometown last October to lobby against it.

The visit did not go well. Hindery's first meeting deteriorated into an ugly shouting match when Tacoma City Council members ripped TCI for what they considered its history of abysmal service. And Hindery's offer to work with Tacoma Power (then called Tacoma City Light) and upgrade TCI's cable system to meet the needs of both the city and the utility was disregarded as too little, too late.

"Leo looked us in the eye and said, 'I understand there have been broken promises. I understand there have been a lot of tears. I'm here to make things right,'" recalls city council member Bill Baarsma. "But to have that discussion on the day of the vote created really an impossible situation for us."

By a

Operator-foreman Craig Moore, of Westland Inc., a

Moore, of Westland Inc., a general contractor from Gig Harbor, Wash., uses the "hole hog" to bore a trench in northwest Tacoma prior to placing conduit for ClickNetwork. The neighborhood will be one of the first to receive the new cable service.



Terr Harris / Special to MSNBC

unanimous 9-0 margin, the City Council authorized Tacoma Power to spend \$67 million to get the project under way. The utility will have to go back to the council for approval to spend the additional \$22.4 million needed to finish the job. The funds will come from a cash reserve of more than \$100 million that the

utility has accumulated by aggressively buying and selling power on the open market.

Deb Stewart, a 20-year cable industry veteran recruited to run the show, has pushed an aggressive build-out schedule. An official launch date is not set, but Stewart says cable service will be available to selected Tacoma neighborhoods in a few weeks, and all 200,000 residents will have access to both cable and high-speed Internet access from ClickNetwork by the end of 1999.

From the outset the network will offer somewhere between 75 and 85 channels of video programming. Until recently TCI's 50,000 customers in Tacoma have received just 40 channels, but TCI spokesman Steven Kipp says the company is spending "tens of millions of dollars" on upgrades in Tacoma that are boosting capacity to around 70 channels. The upgrades have reached about 20,000 customers so far and should hit the rest by the end of the year.

TCI is also beta-testing the At Home high-speed Internet access service in Tacoma and should start rolling it out in the fall. Stewart says ClickNetwork will begin offering high-speed Web surfing capabilities at roughly the same time.

Stewart refused to disclose pricing for either service, but says they will be "extremely competitive" with TCI.

### **FRINGE BENEFITS**

Tacoma Power did not have cable on its mind when it first considered building a fiber-optic network three years ago. Rather, the initial plan was to build an internal network that would improve communications between the company's far flung electric, water and railway operations. Deregulation of the power business was looming, and Tacoma Power knew it needed to operate more efficiently in a competitive world.

'The system is not being built as a cable system. We have got a multilayered business model.'

— **DEB STEWART**  
ClickNetwork

Consultants from Stanford Research Institute brought in to review the project told Tacoma Power officials that the utility could vastly improve the economics of the planned network by extending it throughout the city and selling a mix of cable TV, high-speed Internet access and telephone service.

"The system is not being built as a cable system," insists Stewart, general manager of ClickNetwork. "We have got a multilayered business model."

The distinction is an important one, intended to counter arguments that the financial returns of a cable "overbuild" — a new network infrastructure built over the same area as an existing one — can not cover the costs.

A recent study by telecommunications consulting firm The Strategis Group examined the prospects for utility-built cable networks in cities with 5,000 homes, 50,000 homes and 150,000 homes. Even if the municipal utility secured a 50 percent market share and also sold high-speed Internet access services, The Strategis Group concluded that in all cases "an overbuilder would not generate sufficient cash flow from operations of the cable system to pay back its debt."

Carol Mann, one of the study's authors, says the review did not account for potential revenues from telephone service — which ClickNetwork plans to offer eventually — or cost savings from the utility's internal operations. Stewart says those added benefits will enable Click to pay off with just a 25 percent cable market share.

"I would not recommend that any cable operator, or a municipality, do an overbuild just to get a 50 percent market share of cable customers," Stewart says.

#### **WILL EFFORT SPREAD?**

Projects like ClickNetwork are also extremely important to the core business of utilities like Tacoma Power, says Brian Tournier, a municipal bond analyst with A.G. Edwards & Sons, since new communications services will help discourage customers from fleeing to new competitors.

"In almost every case the interest in telecommunications and cable is being driven by the desire to keep their electric services competitive with other electricity providers," Tournier says. Utilities are looking at "whatever they can provide to give them more stability in their customer base," he says.

So far most of the new municipal utility cable projects have been built in small, often remote towns. But if the Tacoma project does well, big cities are likely to jump into the fray as well. If that happens, conflicts with the cable industry are sure to grow in intensity.

"If you're a small municipality, it's likely you can do this and not incite the wrath of the cable industry,"

Utilities are looking at 'whatever they can provide to give them more stability in their customer base.'

— **BRIAN TOURNIER**  
A.G. Edwards & Sons

Tournier says, "but you will see very bitter fights in any large cities where a municipal systems tries to introduce cable service. The existing companies will fight them tooth and nail."

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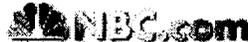
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**No beggars. Only Choosers**

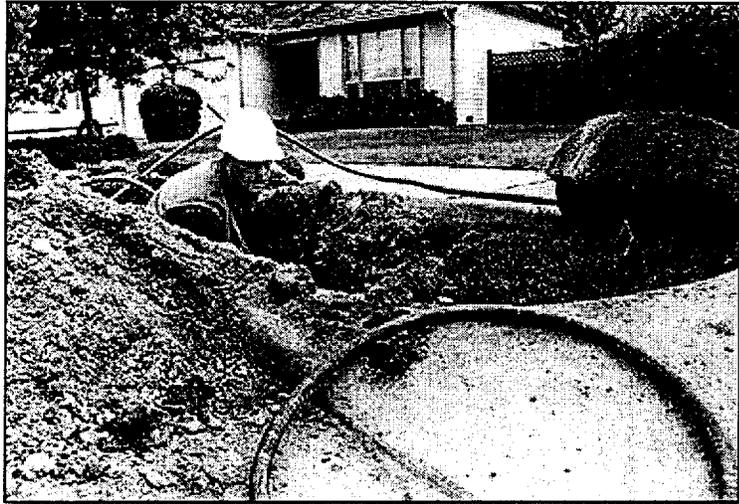
FreeShop Areas

**Over 100 free & trial offers**



**CNBC & The Wall Street Journal. Business**

▷ **Going whole hog**



Tert Harris / Special to MSNBC

Operator/foreman Craig Moore, of Westland Inc., a general contractor from Gig Harbor, Wash., uses the "hole hog" to bore a trench in northwest Tacoma prior to placing conduit for Click!Network. The neighborhood will be one of the first to receive the new cable service.

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◀ ▶ Keeping in touch

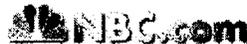


Jan Stacy / Special to MSNBC

Click!Network customer care representatives Josh Newman, left, and Jan Stacy study a Tacoma area map to verify new construction for a customer. Poor customer service from TCI in the past is one reason Click!Network got a go-ahead from city officials.

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# Hotmail is freemail.

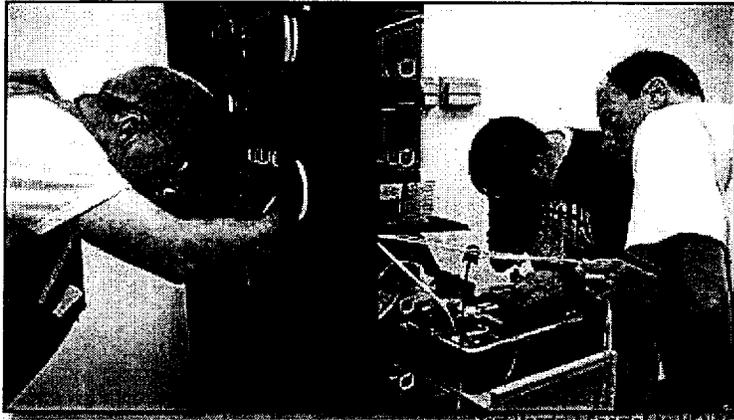
Click Here

R



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## ◀ ▶ Data Splicing



Jeff Harris / Special to MSNBC

Network technicians Craig Taylor, left, Tim Normandin and Tim Hogan splice fiber for incoming data at the Click!Network headend facility. The information will enable technicians to monitor the network's performance.

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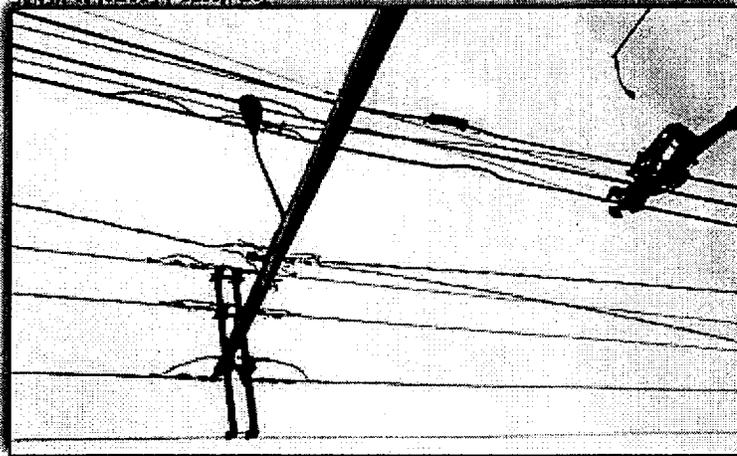




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More Fiber



Tom Harris / Special to MSNBC

Lineman Andrew Hannah, of Florida-based subcontractor Fibre Cable Inc., pulls extra fiber for future expansions of ClickiNetwork. Eighty percent of the installation is overhead work.

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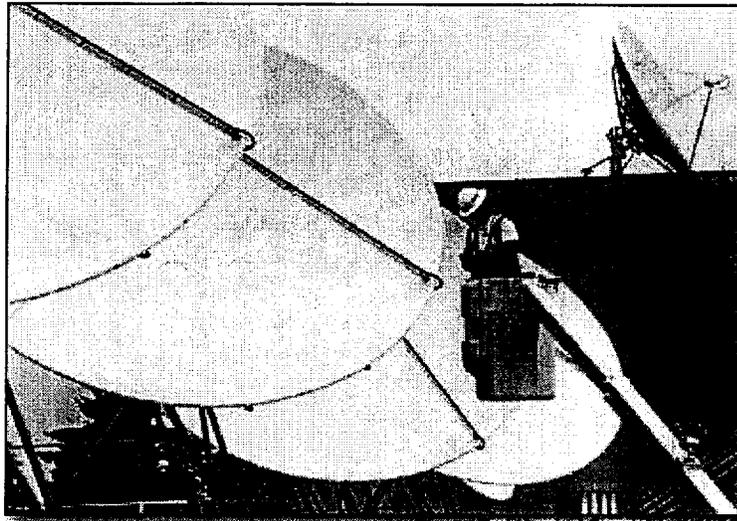
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## ◀ Doing the Dishes



Ken Harris / Special to MSNBC

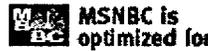
Network technician Craig Taylor checks the alignment on one of the six satellite receiving dishes at Click!Network. Each of the dishes is aligned on a different satellite in geosynchronous orbit 26,000 miles above the earth.

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# EXHIBIT 15

**2019 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting 2018 Revenues)**

Approval by OMB  
3060-0855

>>> Please read instructions before completing. <<<<

Annual Filing -- due April 1, 2019

**Block 1: Contributor Identification Information**

During the year, filers must refile Blocks 1, 2 and 6 if there are any changes in Lines 104 or 112. See Instructions.

101 Filer 499 ID [If you don't know your number, contact the administrator at (888) 641-8722.] **825076**

If you are a new filer, write "NEW" in this block and a Filer 499 ID will be assigned to you.

102 Legal name of filer **City of Tacoma, Dept. of Public Utilities, Light Division**

103 IRS employer identification number [Enter 9 digit number] **91-6001283**

104 Name filer is doing business as **Click! Network**

105 Telecommunications activities of filer [Select up to 5 boxes that best describe the reporting entity. Enter numbers starting with "1" to show the order of importance -- see instructions.]

- Audio Bridging (teleconferencing) Provider
- CAP/CLEC
- Cellular/PCS/SMR (wireless telephony inc. by resale)
- Coaxial Cable
- Incumbent LEC
- Interconnected VoIP
- Interexchange Carrier (IXC)
- Non-Interconnected VoIP
- Operator Service Provider
- Paging & Messaging
- Payphone Service Provider
- Private Service Provider
- Satellite Service Provider
- Shared-Tenant Service Provider / Building LEC
- Toll Reseller
- Wireless Data
- Other Local
- Other Mobile
- Other Toll

If Other Local, Other Mobile or Other Toll is checked, describe carrier type / services provided: **Carrier Carrier last mile transport**

106.1 Affiliated Filers Name/Holding company name (All affiliated companies must show the same name on this line.)  Check if filer has no affiliates

106.2 Affiliated Filers Name/Holding company IRS employer identification number [Enter 9 digit number]

107 FCC Registration Number (FRN) [ https://apps.fcc.gov/cores/userLogin.do ] [Enter 10 digit number] **0007466642**

[For assistance, contact the CORES help desk at 877-480-3201 or CORES@fcc.gov]

108 Management company [if filer is managed by another entity]

109 Complete mailing address of reporting entity corporate headquarters

Street1 **3628 South 35th St** State **WA** Zip (postal code) **98409** Country if not USA **United States**

Street2

Street3

City **Tacoma**

110 Complete business address for customer inquiries and complaints

Street1 **3628 South 35th St** State **WA** Zip (postal code) **98409** Country if not USA **United States**

Street2

Street3

City **Tacoma**

check if same address as Line 109

111 Telephone number for customer complaints and inquiries [Toll-free number if available] ( **253** ) - **502-8900** ext -

112 List all trade names used in the past 3 years in providing telecommunications. Include all names by which you are known by customers.

a	Click! Network	g
b		h
c		i
d		j
e		k
f		l

Use additional sheets if necessary. Each filer must provide all names used for telecommunications activities.

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

Save time, avoid problems -- file electronically at <http://forms.universalservice.org>

FCC Form 499-A / February 2019

**2019 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting 2018 Revenues)**

**Block 2-A: Regulatory Contact Information**

201 Filer 499 ID [from Line 101] 825076

202 Legal name of filer [from Line 102] City of Tacoma, Dept. of Public Utilities, Light Division

203 Person who completed this Worksheet First Pamela MI S Last Burgess

204 Telephone number of this person ( 253 ) - 502-8015 ext -

205 Fax number of this person ( 253 ) - 502-8493

206 Email of this person [not for public release] pburgess@click-network.com

207 Corporate office, attn. name, and mailing address to which future Telecommunications Reporting Worksheets should be sent  
 [not for public release] pburgess@click-network.com Attn First name Pamela MI S Last Burgess  
 Street 1 3628 South 35th St Phone ( 253 ) - 502-8015 ext- Fax ( 253 ) - 502-8493  
 Street 2  
 Street 3  
 City Tacoma State WA Zip (postal code) 98409 Country if not USA United States  
 check if same name as Line 203  
 check if same address as Line 109

208 Billing address and billing contact person  
 [Plan administrators will send bills for contributions to this address. Please attach a written request for alternative billing arrangements.]  
 [not for public release] pburgess@click-network.com Attn First name Pamela MI S Last Burgess  
 Street 1 3628 South 35th St Phone ( 253 ) - 502-8015 ext- Fax ( 253 ) - 502-8493  
 Street 2  
 Street 3  
 City Tacoma State WA Zip (postal code) 98409 Country if not USA United States  
 check if name and address same as Line 207

208.1 Email address pertaining to ITSP regulatory fee issues ||not for public release|| shelley.roberts@click-network.com

**Block 2-B: Agent for Service of Process**

All carriers and providers of interconnected and non-interconnected VoIP must complete Lines 209 through 213. During the year, these filers must refile Blocks 1, 2 and 6 if there are any changes in this section. See Instructions.

209 D.C. Agent for Service of Process Company Attn First name MI Last

210 Telephone number of D.C. agent ( ) - ext -

211 Fax number of D.C. agent ( ) -

212 Email of D.C. agent

213 Complete business address of D.C. agent for hand service of documents  
 Street 1  
 Street 2  
 Street 3  
 City Washington State DC Zip

214 Local/alternate Agent for Service of Process (optional) Company Attn First name MI Last

215 Telephone number of local/alternate agent ( ) - ext -

216 Fax number of local/alternate agent ( ) -

217 Email of local/alternate agent

218 Complete business address of local/alternate agent for hand service of documents  
 Street 1  
 Street 2  
 City State Zip (postal code) Country if not USA

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. § 1001

**2019 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting 2018 Revenues)**

Block 2-C: FCC Registration and Contact Information

Filers must refile Blocks 1, 2 and 6 if there are any changes in this section. See Instructions.

219 Filer 499 ID [from Line 101] **825076**

220 Legal name of filer [from Line 102] **City of Tacoma, Dept. of Public Utilities, Light Division**

221 Chief Executive Officer (or, highest ranking company officer if the filer does not have a chief executive officer)  
 First **Tenzin** MI Last **Gyaltsen**

222 Business address of individual named on Line 221  
 Street 1 **3628 South 35th St**  
 Street 2  
 Street 3  
 City **Tacoma** State **WA** Zip (postal code) **98409** Country if not USA **United States**  
 check if same as Line 109

223 Second ranking company officer, such as Chairman (Must be someone other than the individual listed on Line 221)  
 First **Pamela** MI Last **Burgess**

224 Business address of individual named on Line 223  
 Street 1 **3628 South 35th St**  
 Street 2  
 Street 3  
 City **Tacoma** State **WA** Zip (postal code) **98409** Country if not USA **United States**  
 check if same as Line 109

225 Third ranking company officer, such as President or Secretary (Must be someone other than individuals listed on Lines 221 or 223)  
 First **Carrie** MI Last **Harding**

226 Business address of individual named on Line 225  
 Street 1 **3628 South 35th St**  
 Street 2  
 Street 3  
 City **Tacoma** State **WA** Zip (postal code) **98409** Country if not USA **United States**  
 check if same as Line 109

227 Indicate jurisdictions in which the filer provides service. Include jurisdictions in which service was provided in the past 15 months and jurisdictions in which service is likely to be provided in the next 12 months.

- |   |   |  |   |  |
|---|---|--|---|--|
| <input type="checkbox"/> Alabama              | <input type="checkbox"/> Guam           | <input type="checkbox"/> Massachusetts | <input type="checkbox"/> New York                 | <input type="checkbox"/> Tennessee             |
| <input type="checkbox"/> Alaska               | <input type="checkbox"/> Hawaii         | <input type="checkbox"/> Michigan      | <input type="checkbox"/> North Carolina           | <input type="checkbox"/> Texas                 |
| <input type="checkbox"/> American Samoa       | <input type="checkbox"/> Idaho          | <input type="checkbox"/> Midway Atoll  | <input type="checkbox"/> North Dakota             | <input type="checkbox"/> Utah                  |
| <input type="checkbox"/> Arizona              | <input type="checkbox"/> Illinois       | <input type="checkbox"/> Minnesota     | <input type="checkbox"/> Northern Mariana Islands | <input type="checkbox"/> U.S. Virgin Islands   |
| <input type="checkbox"/> Arkansas             | <input type="checkbox"/> Indiana        | <input type="checkbox"/> Mississippi   | <input type="checkbox"/> Ohio                     | <input type="checkbox"/> Vermont               |
| <input type="checkbox"/> California           | <input type="checkbox"/> Iowa           | <input type="checkbox"/> Missouri      | <input type="checkbox"/> Oklahoma                 | <input type="checkbox"/> Virginia              |
| <input type="checkbox"/> Colorado             | <input type="checkbox"/> Johnston Atoll | <input type="checkbox"/> Montana       | <input type="checkbox"/> Oregon                   | <input type="checkbox"/> Wake Island           |
| <input type="checkbox"/> Connecticut          | <input type="checkbox"/> Kansas         | <input type="checkbox"/> Nebraska      | <input type="checkbox"/> Pennsylvania             | <input checked="" type="checkbox"/> Washington |
| <input type="checkbox"/> Delaware             | <input type="checkbox"/> Kentucky       | <input type="checkbox"/> Nevada        | <input type="checkbox"/> Puerto Rico              | <input type="checkbox"/> West Virginia         |
| <input type="checkbox"/> District of Columbia | <input type="checkbox"/> Louisiana      | <input type="checkbox"/> New Hampshire | <input type="checkbox"/> Rhode Island             | <input type="checkbox"/> Wisconsin             |
| <input type="checkbox"/> Florida              | <input type="checkbox"/> Maine          | <input type="checkbox"/> New Jersey    | <input type="checkbox"/> South Carolina           | <input type="checkbox"/> Wyoming               |
| <input type="checkbox"/> Georgia              | <input type="checkbox"/> Maryland       | <input type="checkbox"/> New Mexico    | <input type="checkbox"/> South Dakota             |  |

228 Year and month filer first provided (or expects to provide) telecommunications in the U.S.  Check if prior to 1/1/1999, otherwise: Year Month

**2019 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting 2018 Revenues)**

**Block 3: Carrier's Carrier Revenue Information**

	Filer 499 ID [from Line 101]	Legal name of filer [from Line 102]	City of Tacoma, Dept. of Public Utilities, Light Division	If breakouts are not book amounts, enter whole percentage estimates		Breakouts			
				Total Revenues (a)	Interstate (b)	International (c)	Interstate Revenues (d)	International Revenues (e)	
Report billed revenues for January 1 through December 31, 2018. Do not report any negative numbers. Dollar amounts may be rounded to the nearest thousand dollars. However, report all amounts as whole dollars.									
See instructions regarding percent interstate & international.									
<b>Revenues from Services Provided for Resale as Telecommunications by Other Contributors to Federal Universal Service Support Mechanisms</b> <i>Fixed local service</i>									
Monthly service, local calling, connection charges, vertical features, and other local exchange service including subscriber line and PICC charges to IXCs									
303.1		Provided as unbundled network elements (UNEs)	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
303.2		Provided under other arrangements	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
<u>Per-minute charges for originating or terminating calls</u>									
304.1		Provided under state or federal access tariff	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
304.2		Provided as unbundled network elements or other contract arrangement	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
<u>Local private line &amp; business data service</u>									
305.1		Provided to other contributors for resale as telecommunications	\$489,626.82	0.00%	0.00%	\$0.00	\$0.00		
305.2		Provided to other contributors for resale as interconnected VoIP	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
306		Payphone compensation from toll carriers	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
307		Other local telecommunications service revenues	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
308		Universal service support revenues received from Federal or state sources	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
<i>Mobile services (i.e., wireless telephony, paging, messaging, and other mobile services)</i>									
309		Monthly, activation, and message charges except toll	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
<u>Toll services</u>									
310		Operator and toll calls with alternative billing arrangements (credit card, collect, international call-back, etc.)	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
311		Ordinary long distance (direct-dialed MTS, customer toll-free (800/888 etc.) service, "10-10" calls, associated monthly account maintenance, PICC pass-through, and other switched services not reported above)	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
312		Long distance private line services	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
313		Satellite services	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
314		All other long distance services	\$0.00	0.00%	0.00%	\$0.00	\$0.00		
315		Total revenues from resale [Lines 303 through 314]	\$489,626.82	0.00%	0.00%	\$0.00	\$0.00		

See section III.C.2 of the instructions for the requirements applicable to revenue reported on this page. These records must be made available to the administrator or the FCC upon request.

# EXHIBIT 15 (a)



(RETAIN FOR YOUR RECORDS)  
Form 477 Filing Summary

FRN: 0007466642 | Data as of: Jun 30, 2018 | Operations: Non-ILEC | Submission Status: Original - Submitted | Last Updated: Aug 20, 2018 11:54:09

### Filer Identification

Section	Question	Response
<b>Filer Information</b>	Provider Name	Tacoma Power dba Click! Network
	Holding Company Name	City of Tacoma
	SAC ID	
	499 ID	825076
<b>Data Contact Information</b>	Data Contact Name	Pam Burgess
	Data Contact Phone Number	(253) 502-8015
	Data Contact E-mail	pburgess@click-network.com
<b>Emergency Operations Contact Information</b>	Emergency Operations Name	Click Network Operations Center
	Emergency Operations Phone Number	(253) 502-8990
	Emergency Operations E-mail	clicknoc@click-network.com
<b>Certifying Official Contact Information</b>	Certifying Official Name	Tenzin Gyaltzen
	Certifying Official Phone Number	(253) 502-8763
	Certifying Official E-mail	tgyaltzen@click-network.com

### Data Submitted

Form Section	File Name	Date & Time	Number of Rows
Fixed Broadband Deployment	FBD_Jan_Jun_2018_Click_Network.txt	Aug 20, 2018 11:48:55	6911
Fixed Broadband Subscription	2018_08_14 Click! Census Tract (do over).txt	Aug 20, 2018 11:51:12	442

### Fixed Broadband Deployment

#### Census Block Counts by State, DBA Name and Technology

State	DBA Name	Technology	Blocks
Washington	ClickCableTV(wholesale)	Cable Modem – DOCSIS 3.0	6701
		Optical Carrier/Fiber to the End User	210
<b>Total</b>			<b>6911</b>

**Fixed  
Broadband  
Subscription**

**Fixed Broadband Subscriptions by State, Technology and End-user Type**

State	Technology	Census Tracts	Subscriptions		
			Consumer	Business / Govt	Total
Washington	Cable Modem	442	21150	1294	22444
<b>Total</b>		<b>442</b>	<b>21150</b>	<b>1294</b>	<b>22444</b>

**Fixed Broadband Subscriptions by Bandwidths and End-user Type**

Downstream Bandwidth (in Mbps)	Upstream Bandwidth (in Mbps)	Consumer	Business / Govt	Total
6.000	1.000	6886	337	7223
12.000	2.000	8486	338	8824
20.000	5.000	3964	68	4032
30.000	6.000	697	200	897
55.000	8.000	302	233	535
100.000	10.000	815	118	933
<b>Total</b>		<b>21150</b>	<b>1294</b>	<b>22444</b>

**Fixed Broadband Subscriptions by Technology, Bandwidths and End-user Type**

Technology	Downstream Bandwidth (in Mbps)	Upstream Bandwidth (in Mbps)	Consumer	Business / Govt	Total
Cable Modem	6.000	1.000	6886	337	7223
	12.000	2.000	8486	338	8824
	20.000	5.000	3964	68	4032
	30.000	6.000	697	200	897
	55.000	8.000	302	233	535
	100.000	10.000	815	118	933
<b>Total</b>			<b>21150</b>	<b>1294</b>	<b>22444</b>

# EXHIBIT 15 (b)



## Description of Services Ordered and Certification Form 471

### FCC Form 471

#### Application Information

<b>Nickname</b>	19TPL-471-C1	<b>Application Number</b>	191019585
<b>Funding Year</b>	2019	<b>Category of Service</b>	Category 1

#### Billed Entity

Tacoma Public Library  
1102 Tacoma Ave S Tacoma WA 98402  
253-292-2001  
cbassett@tponline.org

#### Contact Information

Joseph Pillo  
203-306-1722  
jpillo@eratefirst.com

**Billed Entity Number** 17001842  
**FCC Registration Number** 0011877545  
**Applicant Type** Library System

#### Consulting Firms

Name	Consultant Registration Number	City	State	Zip Code	Phone Number	Email
E-Rate First	16065884	Milford	CT	6460	203-306-1722	jpillo@eratefirst.com

#### Entity Information

##### Library System - Details

BEN	Name	FSCS Code	Urban/Rural	School District Name	School District BEN	Library System Attributes
17001842	Tacoma Public Library		Urban		352041	Public Library System

#### Related Entity Information

##### Related Child Library Entity - Details

BEN	Name	FSCS Code	Locale Code	Urban/Rural	Total Square Footage	School District Name	School District BEN	Library Attributes
115884	MOTTET BRANCH LIBRARY		999	Urban	5025			Public Library
115905	GEORGE O SWASEY BRANCH LIBRARY		999	Urban	9686			Public Library
115925	GRACE R MOORE BRANCH LIBRARY		999	Urban	15487			Public Library

BEN	Name	FSCS Code	Locale Code	Urban/Rural	Total Square Footage	School District Name	School District BEN	Library Attributes
115933	SOUTH TACOMA BRANCH LIBRARY		999	Urban	7475			Public Library
115944	KOBETICH BRANCH LIBRARY		999	Urban	5000			Public Library
115966	FERN HILL BRANCH LIBRARY		999	Urban	7996			Public Library
145280	TACOMA PUBLIC LIBRARY		999	Urban	95727	TACOMA SCHOOL DISTRICT 10	145279	Main Branch; Public Library
189853	WHEELOCK BRANCH		999	Urban	16932			Public Library

### Discount Rate

Associated School District Full-time Enrollment	Associated School District NSLP Count	Associated School District NSLP Percentage	Library Urban/Rural Status	Category One Discount Rate	Category Two Discount Rate
30221	16811	56.0%	Urban	80%	80%

## Funding Request for FRN #1999029534

**Funding Request Nickname:** 19TPL-WAN-CLICK  
**Service Type:** Data Transmission and/or Internet Access  
**What is the FRN number from the previous year ?** 1899031537

## Agreement Information - Contract

<b>Contract Number</b>		<b>Account Number</b>	
<b>Establishing FCC Form 470</b>	160006668	<b>Service Provider</b>	City of Tacoma Dept of Public Utilities Light Division (SPN: 143035981)
<b>Was an FCC Form 470 posted for the product and/or services you are requesting?</b>	Yes	<b>Based on State Master Contract?</b>	No
<b>Award Date</b>	February 26, 2016	<b>Based on a multiple award schedule?</b>	No
<b>How many bids were received for this contract?</b>	1	<b>Includes Voluntary Extensions?</b>	No
<b>What is the service start date?</b>	July 01, 2019	<b>Remaining Voluntary Extensions</b>	
		<b>Total Remaining Contract Length</b>	
		<b>What is the date your contract expires for the current term of the contract?</b>	June 30, 2021

Document Name	Document Description
Signed Click Service Order.pdf	Click IA

## Pricing Confidentiality

**Is there a statute, rule, or other restriction which prohibits publication of the specific pricing information for this contract?** No

**Narrative** 1Gbps of Internet Access, burstable up to 10Gbps delivered via 10G circuit to Library hub, distributed over Library WAN via (7) 1G circuits

**Line Item # 1999029534.001**

**Product and Service Details**

**Purpose** Internet access service with no circuit (data circuit to ISP state/regional network is billed separately)

**Function** Fiber

**Type of Connection** Ethernet

**Bandwidth Speed**

**Upload Speed** 1.0 Gbps **Download Speed** 1.0 Gbps

**Burstable Speed** 10.0

**Connection Information**

**Does this include firewall services?** Yes **Is this a connection between eligible schools, libraries and NIFs (i.e., a connection that provides a “Wide area network”)?** No

**Is this a direct connection to a single school, library or a NIF for Internet access?** Yes

**Cost Calculation for FRN Line Item # 1999029534.001**

<b>Monthly Cost</b>	
Monthly Recurring Unit Cost	\$2,350.00
Monthly Recurring Unit Ineligible Costs	- \$0.00
Monthly Recurring Unit Eligible Costs	= \$2,350.00
Monthly Quantity	x 1
Total Monthly Eligible Recurring Costs	= \$2,350.00
Months of Service	x 12
Total Eligible Recurring Costs	= \$28,200.00

<b>One-Time Cost</b>	
One-time Unit Cost	\$0.00
One-time Ineligible Unit Costs	- \$0.00
One-time Eligible Unit Cost	= \$0.00
One-time Quantity	x 0
Total Eligible One-time Costs	= \$0.00
<b>Summary</b>	
Total Eligible Recurring Costs	\$28,200.00
Total Eligible One-time Costs	+ \$0.00
Pre-Discout Extended Eligible Line Item Cost	= \$28,200.00

# EXHIBIT 15 (c)

**Transparency Disclosures**  
**City of Tacoma, Dept. of Public Utilities, Light Division dba Click! Network**  
**FRN 0007466642**

Type of ISP Service: Click! Network provides wired broadband Internet access service using the Data Over Cable System Interface Specification (DOCSIS) platform, on a wholesale basis for resale by qualified Internet Service Providers

Effective date: June 11, 2018

Submission type: Initial Disclosure

Version History: Original 6/11/2018

Revision 1 - speeds 2/1/2019

Click! Network, a section of Tacoma Power, strives to provide information to customers and end users about all of its services in a transparent manner. Additionally, the Federal Communications Commission (FCC) requires that Click! Network and other providers of broadband Internet access services disclose certain information about those Internet services. The purpose of this document, in addition to the disclosures, terms and conditions posted at [www.clickcabletv.com](http://www.clickcabletv.com), is to assist consumers in finding the information needed to make an informed decision about which services best meet their needs.

Click! Network operates a network consisting of a fiber optic backbone, fiber optic rings, and a hybrid fiber-coaxial (HFC) distribution system throughout Tacoma, University Place, Fircrest, Fife, and portions of Lakewood and unincorporated Pierce County that fall with the service territory of Tacoma Power, a division of Tacoma Public Utilities owned by the City of Tacoma, Washington. These disclosures will be updated as necessary. Questions can be directed to 253-502-8900 or [customercare@click-network.com](mailto:customercare@click-network.com).

Use of broadband Internet access services on the Click! network is governed by:

[Internet Acceptable Use Policy](#)

[Bandwidth and Network Management Policy](#)

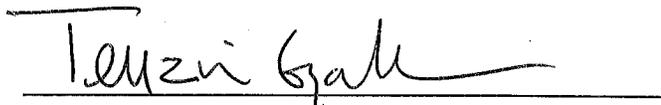
[Open Internet Policy](#)

These policies can be accessed at [www.clickcabletv.com/legal-notices](http://www.clickcabletv.com/legal-notices). In addition, there may be governing policies published by the Internet Service Provider with whom the end user establishes a service account. Please refer to the ISP's disclosure statements and/or website for those details.

Certification of Filing Accuracy

I, Tenzin Gyaltzen, General Manager of Click! Network, hereby certify that I have examined the information contained in the disclosure and that all information contained in the submission is true and correct to the best of my knowledge, information and belief.

Date:

  
Tenzin Gyaltzen, General Manager

## Network Management Practices

### General Summary

Click! Network maintains a system on which the Internet is offered to customers, through authorized and trusted third parties, as an open platform providing customer choice with full access to all lawful content, services, sites, platforms, network compatible types of equipment, and applications. The Click! network is designed for usage by typical residential and commercial users of broadband Internet access services. Bandwidth on the network is a limited, shared resource among Click! Network's customers (including commercial customers, carriers and Click! Network Authorized ISPs/resellers and their customers and end-users) and other users of Click! Network's broadband Internet access service. Click! Network actively manages its network to ensure that activity resulting in excessive or sustained bandwidth consumption, which may burden the network and affect other users, is limited. Accordingly, such usage may be restricted.

Click! Network strives to provide users the best experience when using the network and may use tools and techniques to manage its network, deliver the service, and ensure compliance with its policies. These tools and techniques are dynamic, like the network and its usage, and can and do change frequently. For example, these network management activities may include (i) identifying spam and preventing its delivery to user e-mail accounts, (ii) detecting malicious Internet traffic and preventing the distribution of viruses or other harmful code or content, (iii) limiting speeds during periods of extended congestion, (iv) requiring an upgrade or purchase of a different Internet service and (v) using other tools or techniques that Click! Network may be required to implement in order to meet its goal of delivering the best broadband Internet experience to all users.

Click! Network does not:

- Discriminate among specific uses, or class of uses, on its network
- Impair, degrade or delay VoIP applications or services that compete with its video services or services of its affiliates
- Impair, degrade, delay or otherwise inhibit access by customers to lawful content, applications, services or non-harmful devices, subject to reasonable network management
- Impair free expression by slowing traffic from certain web sites
- Demand pay-for-priority or similar arrangements that directly or indirectly favor certain traffic over other traffic
- Prioritize its own applications, services or devices or those of its affiliates
- Block lawful content, applications, services, or non-harmful devices, subject to reasonable network management

With regard to specific disclosures required by the Federal Communications Commission, Click! Network's practices and policies are as follows:

### Blocking

Click! Network does not block any lawful content or application, subject to reasonable network management practices and Click! Network's Internet Acceptable Use Policy, Bandwidth and Network Policy, and Open Internet Policy.

### Throttling

Click! Network does not discriminate among specific uses, or class of uses, on its network, throttle traffic from certain web sites, or otherwise impair, degrade, delay or otherwise inhibit access by customers to lawful content, applications, services or non-harmful devices, subject to reasonable network management.

### Affiliated Prioritization

Click! Network does not prioritize its own applications, services or devices or those of its affiliates.

### Paid Prioritization

Click! Network does not prioritize any traffic over its network in exchange for consideration.

### Congestion Management

Congestion management on the network is approached from an agnostic perspective and with the objective of ensuring an optimum experience for all users of the network. Click! Network uses industry standard tools and generally accepted best practices to protect its network and customers' experience. Specifically, Click! Network actively monitors activity on its network and takes action as needed to augment capacity, balance usage across network service groups and mitigate excessive use. It is difficult to forecast congestion, so Click! Network cannot describe its frequency; however, Click! Network endeavors to minimize the frequency and extent of congestion to the greatest extent practicable.

The network management tools and techniques employed by Click! Network do not and will not target specific usages or applications (such as peer-to-peer) and instead focus in a content-neutral manner on bandwidth usage in real time, with the goal of providing reasonable and

equitable access to the network for all similarly situated customers. In other words, to the extent that the use of network management practices may affect the performance or other characteristics of Internet service, they are designed to affect all similarly situated customers equally.

Excessive use means bandwidth or data usage that is significantly higher than typical usage for which our network is designed, and will be determined in the sole judgment of Click! Network. Excessive users consume so much data that their usage could negatively impact the service provided to other customers. In order to ensure an optimized Internet experience for all users, data guidelines have been assigned to all Internet services, and are subject to change. Current data usage guidelines are always available at <https://www.clickcabletv.com/about/legal-notice/bandwidth-and-network-policy/>.

If Click! Network in its sole but reasonable discretion determines that a user has exceeded the Excessive Use threshold or is using the service in a manner significantly uncharacteristic of a typical user of the service to which they have subscribed, Click! Network may (a) adjust, suspend, limit or terminate service at any time and without notice; or (b) require the user to upgrade their service level or pay additional fees in accordance with the ISP's then-current, applicable rates and charges for such service; or (c) use any technology to be chosen by Click! Network at its sole discretion to limit the user's service for purposes of conserving bandwidth.

Residential Package	Package Description	Data Guideline per Billing Cycle
10 Mbps	10 Mbps down/1 Mbps up	300 GB
25 Mbps	25 Mbps down/2 Mbps up	300 GB
50 Mbps	50 Mbps down/5 Mbps up	350 GB
75 Mbps	75 Mbps down/8 Mbps up	400 GB
100 Mbps	100 Mbps down/10 Mbps up	500 GB

Commercial Package	Package Description	Data Guideline per Billing Cycle
10 Mbps	10 Mbps down/2 Mbps up	300 GB
25 Mbps	25 Mbps down/5 Mbps up	400 GB
50 Mbps	50 Mbps down/8 Mbps up	500 GB
75 Mbps	75 Mbps down/10 Mbps up	600 GB
100 Mbps	100 Mbps down/10 Mbps up	800 GB

## Application-Specific Behavior

Click! Network does not block or rate control any specific protocols, or modify any protocol field in ways not prescribed by the protocol standard. Certain ports may be blocked in residential packages for the purpose of spam prevention and network security. No functions of the network are designed to inhibit or favor certain applications or classes of applications.

Prioritization is employed in certain Internet package configurations that are designed for voice traffic. The configuration assigns a higher processing priority (QoS) to voice traffic and the cable modem termination system processes that traffic before lesser priority data packets when it detects network congestion. The purpose of this QoS assignment is to maintain voice quality.

Users are expected at all times to comply with Click! Network's Internet Acceptable Use Policy, Bandwidth and Network Policy, and Open Internet Policy, which do prohibit certain activities which the network is not designed to support. For instance, users may not run a server in connection with Click! Network's residential services, nor provide network services to others via Click! Network's residential services. Examples of prohibited uses include, but are not limited to, running servers for mail (pop3 & smtp), http, https, FTP, IRC, DHCP and multi-user interactive forums.

## Device Attachment Rules

Click! Network allows devices to be attached to the network that are CableLabs certified DOCSIS 3.0 or higher, that are fully supported for firmware upgrades by the manufacturer, and that do not harm the network.

## Security

Click! Network manages its network in an effort to provide an optimum experience for its customers by using industry standard tools and generally accepted best practices and policies to protect its network and customer information. Click! Network reserves the right to utilize network tools and practices to prevent harmful or illegal activity, denial of service attacks, viruses or other malicious code, or transfer of unlawful content including copyright infringing files. Click! Network notifies its Internet Service Provider partners when allegations of such activities are received specific to individual end users, and reserves the right to terminate service to end users without notice for repeated allegations of violations. Click! Network cannot guarantee the prevention of spam, viruses, security attacks, or other actions which can affect service. End users are required to take all necessary steps to secure and manage the use of the services received over the Click! network. To prevent such events, Click! Network monitors its

network and will take active measures to minimize the effects of spam, viruses, security attacks, and other actions which could impact an optimum experience for customers.

### Performance Characteristics

#### Service Description and Performance

Click! Network consists of a system of fiber optic and coaxial cabling and associated equipment that enables provision of broadband Internet access service using the DOCSIS 3.0 specification through a cable modem. Click! operates an Open Access Network, whereby service is delivered to end use customers by qualified third party Internet Service Providers, not by Click! Network. Retail pricing of services is set by the Internet Service Providers and therefore cannot be included in these disclosures. Retail pricing information is available directly from each third-party reseller.

Currently authorized third party resellers include:

Advanced Stream

253-627-8000

[www.advancedstream.com](http://www.advancedstream.com)

[info@advancedstream.com](mailto:info@advancedstream.com)

Rainier Connect

253-683-4100

[www.rainierconnect.com](http://www.rainierconnect.com)

[customerservice@rainierconnect.com](mailto:customerservice@rainierconnect.com)

As of the effective date of this Disclosure Notice, the following residential services are made available for resale:

Package	Advertised Download	Advertised Upload	Actual Download	Actual Upload	Latency
Ultimate	100 Mbps	10 Mbps	101.9 Mbps	10.6 Mbps	9 ms
Extreme	75 Mbps	8 Mbps	75.2 Mbps	8.5 Mbps	9 ms
Turbo	50 Mbps	5 Mbps	50.6 Mbps	4.9 Mbps	9 ms
Fast	25 Mbps	2 Mbps	25.6 Mbps	1.94 Mbps	10 ms
Standard	10 Mbps	1 Mbps	10.4 Mbps	1.02 Mbps	9 ms

Actual performance measurements were initially collected in July 2018 and again collected in January 2019. These tests were run using a standard laptop with a 1 Gbps interface. The cable modem used for testing was an Arris CM3200 with 32x8 channel bonding capabilities. The tests were performed from an edge point on the network to an external speed test server located in a city about 35 miles from the network.

## Impact of Non-Broadband Internet Access Service Data Services

Wholesale commercial Ethernet Data Services up to 10 Gbps are delivered over a separate fiber network for resale by data carriers. Interoperability of the Carrier Ethernet grade of products is certified by the Metro Ethernet Forum (MEF). Other services on the network include transmission of data from certain Internet-connected power meters. These power meters transmit data only within the network, never acquire a public IP address, and transmit data on a frequency separate from the commercial broadband Internet access service traffic. The operation of the power meters and carrier Ethernet product have no impact on the performance of the commercial Internet access products.

## Commercial Terms

### General Description

Certain Internet services are configured to provide additional features for use by commercial enterprises. The advertised and actual speed performance of the commercial services are the same as the above residential services. Commercial package configurations allow for running mail servers (pop3 and smtp), http and https, FTP, IRC and DHCP. Static IP addresses are included with commercial packages. Retail services are governed by the policies described above and available at [www.clickcabletv.com/legal-notices](http://www.clickcabletv.com/legal-notices). End users are also bound by the terms of service of the third-party reseller of Click! Network services to which they subscribe.

### Prices

As detailed previously, Click! Network offers retail services exclusively through unaffiliated third-party resellers. Pricing information, including monthly prices, usage-based fees, early termination fees, or other costs for additional services, are not within Click! Network's control and therefore are not included in this disclosure.

### Privacy Policies

Personally identifiable information of Internet service end users is collected as supplied by the Internet Service Providers for use in providing Services to those end users. This information is not used for any non-network management purposes and is not shared with third parties by Click! Network. As a municipal corporation of the state of Washington, Click! Network is subject to the Washington State Public Records Act (Chapter 42.56, R.C.W.). We may disclose personally identifiable information pursuant to a valid request made under the Public Records Act if and as required to do so by the Act and/or pursuant to a court order, subpoena, civil investigative demand or other legal process.

Click! Network does not inspect or store network traffic, except to the extent network tools associate IP address assignments to individual end users as identified by the Internet Service Provider.

#### Redress Options

Informal complaints or questions may be directed to 253-502-8900 or [customercare@click-network.com](mailto:customercare@click-network.com). Informal complaints will be investigated and the results will be communicated to the complainant. Formal complaints may be made in writing, including all pertinent information and the complainant's name, address, telephone number and email address (if applicable) and sent to 3628 S. 35<sup>th</sup> St., Tacoma, WA 98409, or delivered in person to that address during business hours as listed on our website at [www.clickcabletv.com](http://www.clickcabletv.com). Responses to formal, written complaints will be delivered in writing.

# EXHIBIT 16

## Broadband Taxed as Utility

7.5% Tacoma Utilities  
Gross Earning Tax is  
Paid to City of Tacoma  
on Broadband Revenue

Department of Public Utilities Activity	Tax Rate
Power Division	7.5%
Cable Television	8%
Water and Rail Systems	8%

2018 Month	TACOMA CATV			TACOMA Broadband REVENUE	GROSS EARNINGS TAX 8%	TACOMA FRANCHISE FEE 5%	TACOMA P.E.G. Fee 1%	GROSS EARNINGS TAX 7.5%	Total Taxes
	REVENUE	TOTAL CATV REVENUE	REVENUE						
January	1,140,714.97	1,431,421.25	700,067.64	114,513.70	57,035.75	11,407.15	52,505.07	235,461.67	
February	1,130,173.92	1,421,390.40	699,783.26	113,711.23	56,508.70	11,301.74	52,483.74	234,005.41	
March	1,168,449.06	1,471,028.85	703,894.40	117,682.31	58,422.45	11,684.49	52,792.08	240,581.33	
April	1,113,432.02	1,399,888.78	696,299.76	111,991.10	55,671.60	11,134.32	52,222.48	231,019.50	
May	1,140,068.45	1,424,366.84	706,928.02	113,949.35	57,003.42	11,400.68	53,019.60	235,373.05	
June	1,077,906.29	1,350,419.67	703,665.27	108,033.57	53,895.31	10,779.06	52,774.90	225,482.84	
July	1,135,513.59	1,426,190.21	702,165.14	114,095.22	56,775.68	11,355.14	52,662.39	234,888.41	
August	1,092,341.45	1,372,958.52	698,624.15	109,836.68	54,617.07	10,923.41	52,396.81	227,773.97	
September	1,062,114.33	1,335,948.06	702,974.92	106,875.84	53,105.72	10,621.14	52,723.12	223,325.82	
October	1,103,895.21	1,385,088.54	697,295.75	110,807.08	55,194.76	11,038.95	52,297.18	229,337.97	
November	1,069,017.79	1,338,002.74	698,810.78	107,040.22	53,450.89	10,690.18	52,410.81	223,592.10	
December	1,090,564.31	1,365,110.77	685,704.43	109,208.86	54,528.22	10,905.64	51,427.83	226,070.55	
	<b>13,324,191.39</b>	<b>16,721,814.63</b>	<b>8,396,213.52</b>	<b>1,337,745.17</b>	<b>666,209.57</b>	<b>133,241.91</b>	<b>629,716.01</b>	<b>2,766,912.61</b>	

# EXHIBIT 17

**Click! Network**  
**Telecommunications Installation and Services Agreement**

**(For Multiple Dwelling Units)**

This AGREEMENT made effective this 1 day of February 2018 ("Effective Date") by and between The City of Tacoma, Dept. of Public Utilities, Light Division, dba Click! Network (hereinafter referred to as "Click!") and Napoleon Group LLC the title owner of record of, or said owner's duly authorized property manager for, the following described residential real property ("Owner") located at 1515 Tacoma Avenue South, Tacoma, Pierce County, Washington, consisting of 135 Units in One separate building(s), and commonly known as The Napoleon (the "Premises");

**WHEREAS,**

A. Click! is the owner and operator of a telecommunications system for provision of cable television and other communications and data transmission services and desires to provide such services to the Premises subject to the terms and conditions of this Agreement; and

B. Owner desires to make available to the residents of the Premises telecommunications services such as that provided by Click! and is prepared to grant Click! access to the Premises to install Facilities (defined below) and a license for on-going operation of such Facilities subject to the terms and conditions of this Agreement

**NOW, THEREFORE,** in consideration of the foregoing Recitals, the mutual promises herein contained, and for other good and valuable consideration, the receipt and sufficiency of which is hereby expressly acknowledged, the Parties hereby agree to the following covenants, terms and conditions:

**1. Rights Granted:**

A. Access to the Premises to Construct and Install Telecommunications Facilities: Owner grants to Click!, the right to enter and access the Premises for the purpose of installing telecommunications facilities in, at, and upon the Premises including, but not limited to, all wiring, cables, conduits, electronic and other equipment, antennae, switches, amplifiers, filters, traps, signal receiving/scrambling/decoding equipment, key lock box(es) and key(s), and any additional equipment that may be requested or required during the Term of this Agreement for provision of cable television and/or telecommunications services at the Premises ("Facilities" and collectively "Telecommunications System").

B. Access to Operate, Maintain, Repair, Inspect and/or Remove Telecommunications Facilities: Owner further grants to Click! the right, license and privilege, during the Initial Term and any Renewal Term(s), to enter and reasonably access the Premises for the purpose of operating, repairing, maintaining, inspecting and/or removing any and all

Facilities comprising the Telecommunications System installed by Click! at the Premises. Without limiting the foregoing, it is understood that Click! shall be permitted to:

- (1) Make reasonable periodic inspections of the Facilities and the condition of the Premises where those Facilities are located;
- (2) Reasonably advertise and promote telecommunications products and services offerings to residents at the Premises. Such promotion may include the distribution of advertising material, market research surveys, and/or sales of telecommunication services to residents at the Premises. Owner understands that Click! will sell directly to individual residents and contract the same for additional and/or premium telecommunications services; and
- (3) Enter and access the Premises for up to sixty (60) days following expiration or termination of the Term of this Agreement to allow Click! to remove its Facilities from the Premises.

C. Related Rights and Limitations: With respect to the rights granted under this Section 1, it is mutually understood and agreed that Click!'s entry and access rights shall:

- (1) Include any entry and/or access rights held by the Owner pursuant to easement, right-of-way, right-of-entry or license as reasonably needed by Click!.
- (2) Be subject to the prior and continuing right of Owner to access and otherwise use any and all parts of the Premises, rights-of-way, and/or easements concurrently with Click! and/or any other person or persons.
- (3) Be subject to any conditions, covenants, restrictions, or encumbrances affecting the Premises pursuant to deed, easement, or other recorded instrument and/or which Owner has provided written notice of to Click! at the time of Click!'s installation of Facilities.
- (4) Be deemed material obligations of Owner in performance under this Agreement.

## **2. Work to be Performed**

A. Scope of Work. Owner authorizes Click! to install a Telecommunications System in, at and upon the Premises, including all appropriate Facilities for Click!'s use and operation thereof, per the specifications and assumptions stated in the Scope of Work attached hereto as Exhibit A and by this reference incorporated into this Agreement.

B. Work Standards, Coordination of Installations, and Repairs.

- (1) In installing, maintaining, repairing, modifying, upgrading, replacing and removing any of Click!'s Facilities, Click! shall strictly adhere to all current and subsequently adopted building and zoning codes applicable to construction and/or installation of Facilities at the Premises. Click! shall obtain all required permits from the applicable governmental authorities before commencing any work requiring a permit. Click! shall, at its expense, promptly return the buildings, improvements and landscape that have been altered or affected by virtue of any installation, maintenance, repair, modification, upgrade, replacement or removal of Click!'s

facilities to substantially the same state and condition that existed prior to the work, ordinary wear and tear excepted.

- (2) Click! and the Owner, or Owner's authorized agent, will cooperatively coordinate installation work for each Unit on the Premises.
- (3) During the Term of this Agreement, Click! will make all repairs, replacements and improvements to its Facilities as reasonably necessary to maintain such Facilities in good repair and operating condition. In the event of damage to or destruction of Facilities due to and arising from the intentional willful misconduct or gross negligence of the Owner and/or Owner's employees, agents or tenants, the Owner agrees to reimburse Click! for all reasonable expenses of labor and materials incurred by Click! to repair or replace such Facilities.
- (4) All duties specified in this Section are deemed material obligations in performance under this Agreement.

### **3. Ownership and Use of Click! Telecommunications System and related Equipment**

- A. The Telecommunications System serving the Premises, including all Facilities installed and/or subsequently modified by Click!, shall be and will remain the personal property of Click!. No equipment or part of the Facilities comprising the Telecommunications System shall be considered a fixture of the Premises; except that all cables permanently affixed to the Premises by Click! will become part of the realty and will not be removed upon termination. Owner shall not make, or allow any third party to make, any alterations or additions to the Telecommunications System.
- B. Click! shall have the exclusive right to access, use, control, and operate the Click! installed Telecommunications System and all of the Facilities comprising such System. Owner shall not use any Click! owned Facilities to provide telecommunications or other services to or at the Premises via any other system, technology, vendor or distributor.
- C. All rights and duties specified in this Section are deemed material to performance under this Agreement.

### **4. Term of Agreement**

- A. The Initial Term of this Agreement shall commence on the Effective Date first written above and shall continue for five (5) years unless terminated earlier in accordance with the terms of this Agreement.
- B. The Term of this Agreement will be automatically renewed at the end of the Initial Term for an additional one (1) year term ("Renewal Term") and thereafter for additional one (1) year successive Renewal Terms, unless or until a written notice of termination is provided by either Party to the other no earlier than 180 days and no later than 90 days prior to the expiration of the then current Renewal Term.

## **Exhibit A**

### **Scope of Work**

#### **Installation Work**

*Click! and Owner, pursuant to the Telecommunications Installation and Services Agreement to which this Scope of Work is attached, hereby acknowledge and mutually agree to the following specifications and assumptions for Facilities installation work:*

1. Click! Network will pull fiber optic service feeds into and upon the Premises for the purpose of installing telecommunications Facilities for service to multiple dwelling units (MDUs) located at the Premises.
2. Click! Network will pull fiber into building through placed conduit and place conduit from meter room to main demarcation/distribution room. Click! will place an enclosure in building's main demarcation/communications room to house electronics.
3. Click! Network will place fiber services to each floor in owner provided riser duct and place distribution equipment on each/every other floor per building plans. Owner will place backboard for Click! where distribution equipment will be mounted.
4. Click! will install one microduct to each unit and one fiber home run to each unit from demark to each unit outlet hub. Microduct will be installed according to bend radius requirements of manufacturer and coordination of placement will be with project manager.
5. Access into property for installation of system will be coordinated through Owner/project manager.
6. All work is to be completed for reasonable approval by the Owner/Manager.
7. An on-site meeting prior to construction is available upon request for scheduling and coordination of MDU installation work.

Owner will provide access to all areas of the Premises for the installation, maintenance, service and operation of Click! Facilities pursuant to the Agreement.

# EXHIBIT 18

## A Sampling of Municipal Broadband Utilities in the USA

Compiled by Mitchell Shook, June 22, 2019

Below is a sampling of municipal utilities that, in addition to their traditional services of water and power, also provide Broadband as an additional utility function. These are only a few of many such publicly-owned utility systems now offering Broadband in the USA. The descriptions are direct quotes taken from the utility's own websites about their services.

1. Lafayette Utilities System has a long and proud history of serving the people of Lafayette. LUS offers quality electric, water, wastewater and telecommunications services, and because we are customer owned and operated, our customers have the power to control our standard of service. Lafayette enjoys the lowest residential electric utility rates in the state. LUS helps to keep Lafayette taxes low. Approximately \$22 million of in-lieu-of-tax (ILOT) is transferred to the Consolidated Government General Fund each year. This ILOT contribution supports services like police and fire protection, parks and recreation, and community development. Lafayette, LA <https://lus.org/about-lus/history-and-service>

2. Reedsburg Utility Commission, is one of this country's 2,200 public power systems — a utility owned by the people and the community it serves. Reedsburg Utility began its roots in 1894 by providing electric and water to its public-spirited citizens. Today, Reedsburg's public-spirited citizens can also receive Light Speed Internet, TV, and Telephone services from their own hometown team! We are one Utility and one Community, and it's all about service! We live in this community with you. We provide competent, reliable, high quality, courteous, honest, and responsive service. We treat you like a neighbor, because we are your neighbors. Public power systems like Reedsburg Utility Commission are non-profit and have one main purpose — to provide customers with the best services at the lowest possible cost. Reedsburg, Wisconsin. <http://reedsburgutility.com/about-us>

3. Clarksville Department of Electricity (CDE), offers Electricity, Internet, Digital TV and Telephone services., Our world-class Fiber Optic Network keeps electric costs low and allows us to deliver exceptional products and constant innovation. The network provides savings of over \$1 million annually in operating costs and provides over \$5 million annually in income for electrical grid improvements. Additionally, access to our network increases home values by 3% or an average of over \$5,000, according to the Fiber to the Home Council. Based in large part on access to the superior digital products provided by CDE Lightband, Clarksville has been designated a first 50 "Next Century City." Clarksville, Tennessee. <https://cdelightband.com/about-us/>

4. Jackson Energy Authority We provide reliable electric, gas, propane, water, wastewater, and broadband services. Our fiber optic network, owned by our community, provides cable tv, high speed internet, and telephone service to our customers. We serve about 40,000 residences, businesses and industry in Jackson, TN and parts of Madison County. Jackson, Tennessee. <https://www.jaxenergy.com/about/>

5. Since 1942 Spencer Municipal Utilities has provided electric and water services. In 1997, SMU added municipal communications to the utility, for cable, internet, and telephone service, to be owned and operated on behalf of the citizens. <https://smunet.net/about-us/history/>
6. Dalton Utilities has operated as a public utility since 1889. Dalton Utilities provides potable water, electrical, natural gas and wastewater treatment services to the City of Dalton and portions of Whitfield, Murray, Gordon, Catoosa and Floyd counties. Beginning in 1999, Dalton Utilities branched into telecommunications with broadband services to large industrial/commercial customers. In 2003, Dalton Utilities launched its OptiLink family of services and now provides broadband, cable tv, telephone and internet services to area residents and businesses. Dalton Utilities serves approximately 50,000 customers and employs over 300 area residents. <https://www.dutil.com/about/>
7. Longmont Power & Communications (LPC) is the City's not-for-profit electric and internet services utility. Our goal is to deliver outstanding electric and internet service experiences to our customer-owners while providing exceptional value and benefit to our community. For more than 100 years, we have provided innovative service that has kept electric rates low while improving reliability and convenience for Longmont businesses and citizens. <https://www.longmontcolorado.gov/departments/departments-e-m/longmont-power-communications>
8. Vernon's municipal Light & Power Department provides businesses reliable and low-cost utility services. Vernon Light & Power has operated for more than 70 years. Today, it provides electricity, gas, and fiber optic service. <http://www.cityofvernon.org/business/201-powering-business-competitiveness>
9. Coon Rapids Municipal Utilities is a locally owned and locally controlled utility company. We provide electric, natural gas, water, wastewater, and communication products and services. CRMU was created by the community....to serve the community. While many companies exist to turn a profit and earn money for their stockholders, at CRMU, we exist to provide exceptional customer service for our customers and value for the community. CRMU was established in 1937 because the people of Coon Rapids were tired of receiving poor service and paying high prices for electricity. <http://www.crmu.net/>
10. Cedar Falls Utilities. When you live in Cedar Falls, CFU is your utility. The Electric, Water, Gas and Communications Utilities are owned by the community. That means our only focus is providing dependable service at the best possible value to Cedar Falls homes and businesses. Learn more about your Utilities on these pages and through our monthly newsletter. <https://www.cfu.net/utilities/>

11. Welcome to Marshall Municipal Utilities. As a citizen of Marshall and a customer of MMU, you are part owner of a utility company. MMU is municipally owned, so you have a direct and personal interest in our business. As a municipal utility, we have several distinct advantages. Stockholders do not own our electric, water, wastewater, internet, and natural gas transportation utilities - the community does. Not paying dividends or making money for out-of-town investors helps us keep your rates low. Also, local control and management means we make decisions with your best interest in mind.

Marshall, Missouri. <http://www.mmumo.net/about.php>

12. Harlan Municipal Utilities is Harlan's premier provider of Electric, Gas, Water and Telecommunications products and services. Proudly serving Harlan for over 128 years.

<http://www.harlanet.com/>

13. Lenox Municipal Utilities & Communications is a municipally owned entity providing electric and water. In addition, our communication system is state of the art. We provide television, internet, and telephone services to the residents of Lenox, IA.

<https://sites.google.com/lenoxschools.org/lenox-municipal-utilities/home?authuser=0>

14. Waverly Utilities is an award-winning national leader in electric reliability, safety and renewable energy. In 2016, Waverly Utilities became a telecommunications utility offering gigabit speed internet, enhanced cable and digital telephone services. We are committed to serving Waverly with the same neighborly customer service we've been providing since 1904.

<http://www.waverlyutilities.com/>

15. The Russellville Electric Plant Board is a municipal electric power distributor that serves the electrical needs of customers in the vicinity of Russellville, KY with 103.7 miles of line with approximately 39 customers per mile. It began providing wireless Internet service to the greater Russellville area in 2006 and expanded its broadband services to video, telephone and high-speed data service in 2011. It currently serves approximately 4,300 electric customers and more than 2,600 broadband customers. <http://www.epbnet.com/index.php/about/history/>

16. Concord Municipal Light Plant (CMLP) is a municipal-owned, public power utility offering electric and broadband Internet service under the direction of the Town Manager. CMLP offers Concord Light Broadband Internet service delivered through a dedicated fiber line right to homes or businesses. Broadband service is currently available to 95% of Concord residents and many businesses. CMLP offers consistent, guaranteed speeds throughout the day. <https://concordma.gov/464/Municipal-Light-Plant>

17. Welcome to Sebawaing Light and Water – Your Low Cost Dependable Electric Services since 1911. We are proud to be a Public Power organization - owned by the Residents of Sebawaing Village. We provide safe, reliable and environmentally responsible Electric, Water and Internet Utilities to our customers. By operating all three utilities, we are able to provide these services at some of the lowest costs in the area. Sebawaing, Michigan

<http://www.slandw.com>

18. Tullahoma Utilities Board The Tullahoma Utilities Authority (TUA) is located at 901 South Jackson Street in Tullahoma, Tennessee. The contact phone number is (931) 455-4515. TUA is the Tullahoma provider of Electric, Water, and Wastewater as well as Television, Internet, and Telephone <https://www.tub.net/about-us>

19. Pulaski Electric System, Established in 1891, is Tennessee's oldest municipal electric system and the first in the state to receive power from the Tennessee Valley Authority. PES currently provides electric power to nearly 15,000 customers in the City of Pulaski and the communities of Ardmore, Elkton, Goodspring, Lynnville, Minor Hill and Prospect. Operating and maintaining over 1,200 miles of electric line throughout Giles County to deliver 99.98% reliability is our top priority. PES Energize is the only 100% fiber to the home network in Giles County providing high-speed internet, television, and telephone service to residents and businesses in the City of Pulaski, and to educational institutions in Giles County. Pulaski, Tennessee. <https://pesenergize.com/>

20. Bristol Tennessee Essential Services (BTES) is a municipally-owned electric utility that also provides high-speed Internet, telephone, and cable television services over a fiber optic network, as well as water heating services. BTES is in the business of providing reliable, safe and cost-effective electric service to more than 33,000 customers in a 280-square-mile service area in the City of Bristol and Sullivan County, Tennessee. Sixty years after our inception as an electric company, BTES began providing Internet and cable television services in 2005. One year later, the BTES' telephone services were fully operational. BTES now provides some of the fastest Internet speeds available in the United States with speeds of ten Gigabits per second available to every business and home in our service area! Bristol, Tennessee. <http://www.btes.net/>

21. Benton County Public Utility District was organized by a local vote of the people in 1934. Washington's first initiative, passed by voters in 1930, gave citizens of each county the right to form a public utility district (PUD). Benton PUD was organized by a local vote of the people in 1934. PUDs were created to provide electricity, water and sewer services for the benefit of the people of Washington State. Since their conception, the role of public utility districts has expanded to include wholesale broadband telecommunication services. Benton PUD's wholesale broadband network and business structure is based on an "open access" model. This means that any entity may use the system even if they do not own physical infrastructure themselves. The open access model along with a transparent and non-discriminatory rate structure has made Benton PUD's broadband network a key contributor to business recruitment, retention and expansion in our community. Benton County, WA <https://www.bentonpud.org>

22. Chelan Public Utility District. Chelan County is home to world-class, ultra-fast fiber optic internet. Chelan County PUD has laid this high-tech infrastructure throughout most

communities, allowing you to enjoy life at the speed of fiber — which means a more reliable connection and faster connections to entertainment and work. We can help direct you to several Internet Service Providers to choose from who can help you get connected to fiber.

Chelan County, WA

<https://www.chelanpud.org/my-pud-services/residential-services/fiber-optics>

23. Franklin County Public Utility District was founded in 1934 and is headquartered in Pasco, Washington. We are a customer-owned utility, offering electric power and broadband telecommunications services. Franklin PUD is owned and governed by the people and communities we serve. We have an obligation to provide you ownership and control of your utility and to do so reliably, efficiently, and at the lowest reasonable cost. We have been providing Franklin County the benefits of fast, reliable, and secure broadband services since 2001. As a wholesale provider, we work together with local Retail Service Providers (RSP) to bring state of the art communications to businesses and homes in our community by using fiber optics and wireless technologies.

<https://www.franklinpud.com/broadband/retail-service-providers/residential-service/>

24. Grant County Public Utility District, Serving Grant County, WA since 1938. We are a public electric utility serving more than 40,000 customers in Grant County. From Electric City to Royal City and everywhere in between, our affordable, reliable power and fiber continue to drive our county's rapidly expanding economy.

<https://www.grantpud.org/high-speed-network>

25. Mason County PUD 3, Mason County, WA In 1929, the Washington State Grange sent the very first initiative to the Legislature, to allow rural communities to form their own publicly owned utilities. This is our story. In the 1930 election, the measure passed in a landslide. Mason PUD 3 supporters jumped on board in 1934 calling for a countywide PUD. Mason PUD 1 backers had been working on their own district since 1932. On November 6, 1934, local voters approved the formation of both districts. Mason PUD 3's wholesale fiber optic network is a nondiscriminatory, open-access, net neutral service. PUD 3's partners, internet service providers, sell gigabit speed internet, HDTV, special digital circuits, and phone services. The network provides for improved educational opportunities, telehealth services, economic development, and increased property values

<http://www.pud3.org/service/about-us/what-is-a-pud>

26. Electric Power Board of Chattanooga, Powering Chattanooga, EPB is one of America's largest publicly owned electric power providers. We're also the pioneering communications company that surprised the nation with the first Gigabit Internet speeds, crystal clear television and telephone service utilizing a community-wide fiber optic network. But most of all, we're here to serve Chattanooga with the neighbor-to-neighbor local service you've come to expect from us. *Chattanooga, Tennessee* <https://epb.com/>

# EXHIBIT 19



Public Notices

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Posted September 20, 2019

City of Duvall

**CITY OF DUVALL  
NOTICE OF PUBLIC HEARING  
Resolution Declaring Certain  
City Property Surplus**

Notice is hereby given that the City Council of the City of Duvall, Washington will hold 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:

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

It is proposed that all items 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 and to the highest, responsible bidder. To request a copy of the full list of surplus items email; Project Manager, Alana McCoy at [alana.mccoy@duvallwa.gov](mailto:alana.mccoy@duvallwa.gov) or call 425-939-8045.

All persons having an interest in said hearing are invited to comment in person at the hearing or in writing to the City Clerk prior to the hearing. For further information, please contact City Hall, P.O. Box 1300, Duvall, WA 98019; 425-788-1185. Jodi Wycoff, City Clerk.

# EXHIBIT 19 (a)

**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

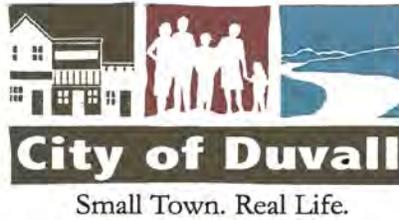
Approved as to form:

  
Rachel Turpin, City Attorney

ATTEST/AUTHENTICATED:

  
Jodi Wycoff, City Clerk

## Exhibit "A"



**Date:** September 9, 2019  
**Re:** Itemized Surplus List for City Council Approval

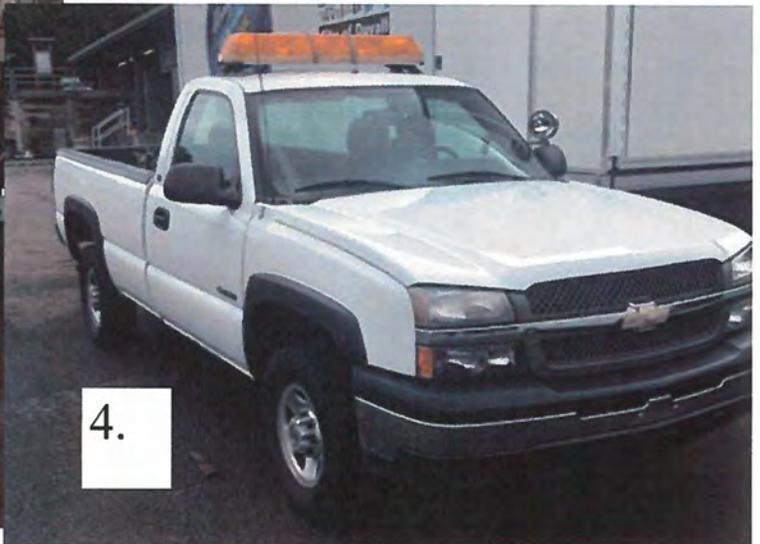
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1. 2011, Dodge Charger, VIN#2B3CL1CT0BH554297.
  - o Miles: 103,414
2. 2012, Dodge Charger, VIN#2C3CDXAT0CH240334.
  - o Miles: 107,848
3. 1996 Chevy Pickup, VIN#1GCEC14WXTZ129848.
  - o Miles: 70,898
4. 2004 Chevy Pickup, VIN#1GCGC24U24Z199486.
  - o 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 20



## AMENDED RESOLUTION NO. U-10828

1 A RESOLUTION relating to Click! Network; authorizing Click! to prepare a  
2 business plan to provide, in addition to retail cable television, retail  
3 internet services including voice over data internet ("VoIP") protocol,  
4 commercial broadband and Gigabit service ("Retail Services").

4 WHEREAS the City Council of Tacoma authorized the Department of  
5 Public Utilities ("TPU"), Light Division (dba "Tacoma Power"), to implement and  
6 manage a broadband telecommunication system ("Click! Network" or "Click!" as  
7 authorized through City Council Substitute Resolution No. 33668, approved  
8 April 8, 1997, and Public Utility Board Amended Substitute Resolution U-9258  
9 approved April 9, 1997), and

10  
11 WHEREAS Tacoma Power provided retail cable TV services to  
12 customers, wholesale internet to independent Internet Service Providers  
13 ("ISPs") who served retail customers and wholesale broadband service to  
14 business customers, and

15  
16 WHEREAS the broadband telecommunication system is critical  
17 infrastructure for Tacoma Power, including the connection of substations,  
18 support of approximately 18,000 Gateway smart meters, as well as providing  
19 support for the City's I-net system, and

20  
21 WHEREAS the City Charter Section 4.6 requires a vote of the people  
22 before the City may sell, lease, or dispose of any utility system, or parts thereof  
23 essential to continued effective utility service, and

24  
25 WHEREAS the presence of Click! Cable TV in the marketplace provided  
26 savings for all cable TV customers, regardless of provider, in the Click! Market



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scheduled basis established by the Committee and Click!. The Public Utility Board and the City Council may consider delegating specific authority in the governance of Click! to the Click! Engagement Committee in the future as the Business Plan is further developed and implemented.

Sec. 4. Prior to implementing the Business Plan contemplated in this resolution, TPU and the City's Legal Department, shall seek a legal opinion or declaratory judgment in Pierce County Superior Court, to confirm that Tacoma Power may operate the City of Tacoma's telecommunications system in accordance with the business plan. The City's Legal Department shall include in its request for a legal opinion or declaratory judgment, those specific components of the business plan necessary to provide the Utility Board and the City Council comfort that they may fully implement the business plan reasonably without threat of disruption by legal challenge. TPU and the City's Legal Department are authorized to utilize the services of third-party legal advisors in connection with this activity.

Sec. 5. Click! shall review and resubmit rate adjustments budgeted and proposed by Click! and approved by the Public Utility Board (previously approved by Board Resolution U-10773 on April 22, 2015), that support the Business Plan and the City Council is requested to approve an ordinance amending Tacoma Municipal Code Chapter 12.13, to authorize said rate adjustments.

Sec. 6. A fiscal note is attached to and incorporated in this Resolution U-10828. The fiscal note estimates the Capital and O&M budget requirements and impacts in addition to the financial gains and losses anticipated over the next five (5) years, in connection with the Click! business plan contemplated herein.

Approved as to form and legality:

William C. Foster  
Chief Deputy City Attorney

Charmaine Jacobs  
Clerk

[Signature]  
Chair

Monique Jeddosh  
Secretary

Adopted 12-3-15

# EXHIBIT 21



# **COMMUNITY-BASED BROADBAND SOLUTIONS**

**THE BENEFITS OF COMPETITION AND CHOICE FOR  
COMMUNITY DEVELOPMENT AND HIGHSPEED  
INTERNET ACCESS**

The Executive Office of the President

January 2015



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## Executive Summary

Affordable, reliable access to high speed broadband is critical to U.S. economic growth and competitiveness. Upgrading to higher-speed broadband lets consumers use the Internet in new ways, increases the productivity of American individuals and businesses, and drives innovation throughout the digital ecosystem. As this report describes, while the private sector has made investments to dramatically expand broadband access in the U.S., challenges still remain. Many markets remain unserved or underserved. Others do not benefit from the kind of competition that drives down costs and improves quality. To help fill the void, hundreds of towns and cities around the country have developed their own locally-owned networks. This report describes the benefits of higher-speed broadband access, the current challenges facing the market, and the benefits of competition – including competition from community broadband networks.

~

Since President Obama took office, the United States has significantly expanded its broadband network and increased access. Investments from the federal government have helped deploy or upgrade more than 78,000 miles of network infrastructure since 2009, and more than 45 million Americans have adopted broadband Internet during the President's time in office. Today, more than 90 percent of Americans can access the Internet on a wired line and 98% by either wired or wireless connection.

Competitive markets have helped drive expansion in telecommunications services as strong infrastructure investments and falling prices have opened up a wide range of new communications products and services. Where there is strong competition in broadband markets today, it drives similar improvements. Unfortunately, competition does not extend into every market and its benefits are not evenly distributed. While the U.S. has an extensive network “backbone” of middle-mile connections (long, intra- or interstate physical fiber or cable network connections) with the capacity to offer high-speed Internet to a large majority of Americans, many consumers lack access to the critical “last-mile” (the last legs of the physical network that connect homes and businesses to the broader system), especially in rural areas. It is these last-mile connections that make higher speeds possible. For example, 94 percent of Americans in urban areas can purchase a 25 Mbps (megabit per second) connection, but only 51 percent of the rural population has access to Internet at that speed.

Competition has also been slow to emerge at higher speeds. Nearly forty percent of American households either cannot purchase a fixed 10 Mbps connection (i.e. a wired, land-based connection), or they must buy it from a single provider. And three out of four Americans do not have a choice between providers for Internet at 25 Mbps, the speed increasingly recognized as a baseline to get the full benefits of Internet access.

Without strong competition, providers can (and do) raise prices, delay investments, and provide sub-par quality of service. When faced with limited or nonexistent alternatives, consumers lack negotiating power and are forced to rely on whatever options are

available. In these situations, the role of good public policy can and should be to foster competition and increase consumer choice.

At the federal level, the government has already taken active steps to support broadband, committing billions of dollars to deploy middle-mile and last-mile infrastructure, and to ensure that our public schools and libraries have high speed broadband connections.

But local governments also have an important role to play. As this report details, communities around the country like Chattanooga, TN and Wilson, NC have developed a variety of strategies for building locally-owned broadband networks and promoting higher-speed Internet access. Over the past few years, these municipal networks have emerged as a critical tool for increasing access, encouraging competition, fostering consumer choice, and driving local and regional economic development. Local investments have also spurred the private sector to compete for customers, improving services, increasing broadband adoption, and providing more choice for consumers.

Not all communities, however, have the choice to pursue a local broadband network. 19 states currently have barriers in place limiting community broadband and protecting incumbent providers from competition. President Obama believes that there should be a level playing field for community-based solutions and is announcing today a series of steps that the Administration will be taking to foster consumer and community choice.

## Economic Benefits of Broadband

In technical terms, broadband refers to a method of transmitting information using many different frequencies, or bandwidths, allowing a network to carry more data. For most Americans, however, the term broadband simply refers to a fast Internet connection—whether fixed or wireless.

Over time, our perceptions of what constitutes a “fast” Internet connection have changed. As consumer and business uses of the Internet evolve, and new applications become more deeply embedded into everyday life, higher speeds frequently shift from being a luxury to a requirement for many users. For example, beginning in 2000 the Federal government defined “broadband” as any service with a download speed of 200 kilobits per second (kbps) or faster.<sup>1</sup> In 2010, the Federal Communications Commission redefined “basic” broadband service as a connection with speeds of at least 4 megabits per second (Mbps) downstream – 20 times faster than the 2000 definition – and at least 1 Mbps upstream.<sup>2</sup>

Today, as everyday experiences for tens of millions of Americans suggest, even these speeds are insufficient for some applications, particularly when a connection is shared by several users. In recognition of the growing need for increased bandwidth, the FCC is considering further revisions to the definition of broadband, and has expressed interest in raising the threshold to 10 or even 25 Mbps downstream and from 1 Mbps to 3 Mbps upstream.<sup>3</sup> The following chart provides a sense of what these definitions mean by showing how long it would take a single user to upload or download different types of content at various connection speeds.

**Time Required for Selected Internet-Based Activities at Different Speeds**

	3 Minute Song <i>5 MB (Download)</i>	2 Hour Movie <i>5 GB (Download)</i>	20 Photographs <i>40 MB (Upload)</i>	5 Minute Video <i>200 MB (Upload)</i>
<b>256 Kbps, 256 Kbps</b> <i>2000 Broadband</i>	2m36s	43h24m	20m50s	1h44m
<b>4 Mbps, 1 Mbps</b> <i>2010 Broadband</i>	10s	2h46m	5m20s	26m40
<b>25 Mbps, 3 Mbps</b> <i>Advanced Broadband</i>	1.6s	26m40s	1m46s	8m53s

Source: CEA Calculations>Note: These numbers assume that the ISP is meeting its advertised speed. Download times may be greater during periods of peak traffic.

Demand for Internet access is growing quickly. Total wired and wireless Internet access revenues in 2013 were \$140 billion, and have increased by about 15 percent per year in real terms since 2005.<sup>4</sup> The rapidly growing demand for bandwidth is driven by new applications of the Internet that effectively require a broadband connection. These applications, which are increasingly central to everyday life for many Americans, include video streaming, which is used for education, entertainment, and communication; teleworking; cloud storage that allows users to store their files on the Internet, share them, and access them from any device; and online games that allow users to interact with one another in a virtual environment.

Economic studies confirm that broadband Internet creates significant value for consumers and makes an important and rapidly growing contribution to GDP. For example, one study of expenditures for Internet access estimates that as of 2006 – before the widespread availability of streaming audio and video – broadband Internet accounted for \$28 billion in U.S. GDP. That study also found that broadband created an additional \$5 to \$7 billion in consumer surplus in 2006, meaning that consumers would have been willing to pay that much more for the service.<sup>5</sup> Another industry-sponsored study from 2009 estimates that broadband creates \$32 billion in annual consumer surplus.<sup>6</sup> While these studies estimate consumer surplus by examining price sensitivity, another approach is to examine the amount of time users spend online, leading to estimates of \$2,500 to \$3,800 in value per-user per-year, which imply total consumer surplus in the hundreds of billions of dollars.

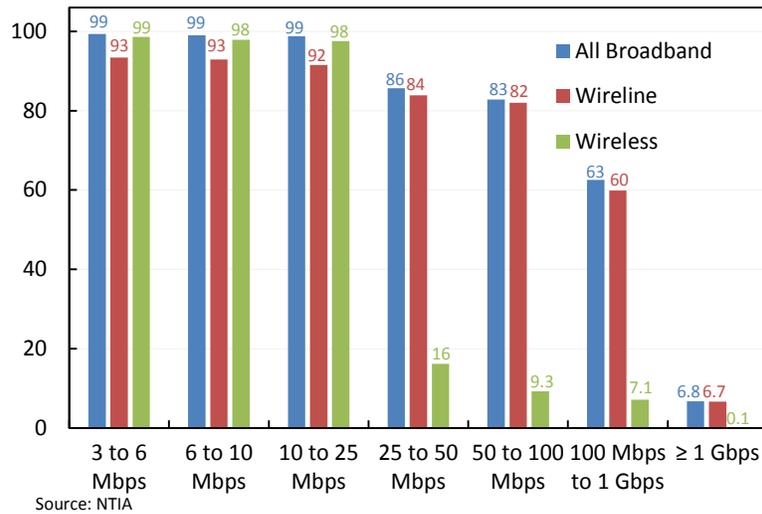
Over the longer term, broadband adoption also fuels a virtuous cycle of Internet innovation. This cycle begins when new applications of the Internet create demand for more bandwidth, resulting in a wave of network-level innovation and infrastructure investment. As more bandwidth becomes available, application-sector innovators find new ways to use that capacity, creating additional demand, leading to another round of network investment, and so on. While it is impossible to know what the next bandwidth-hungry killer application will be – perhaps it will be the “Internet of Things” or immersive virtual reality – both history and economic theory show that this virtuous cycle is a powerful driver of innovation and economic growth.<sup>7</sup>

The recent history of wireless broadband provides a good example of the virtuous cycle of innovation and investment. Industry studies suggest that between 2007 and 2011 mobile applications development grew from almost nothing into a \$20 billion industry, creating 311,000 U.S. jobs in the process.<sup>8</sup> This led to increased demand for wireless broadband, so that by 2013 private investment in new wireless infrastructure was \$34 billion, more than the investments of the big three auto companies combined.<sup>9</sup>

## **Challenges in Broadband Access and Adoption**

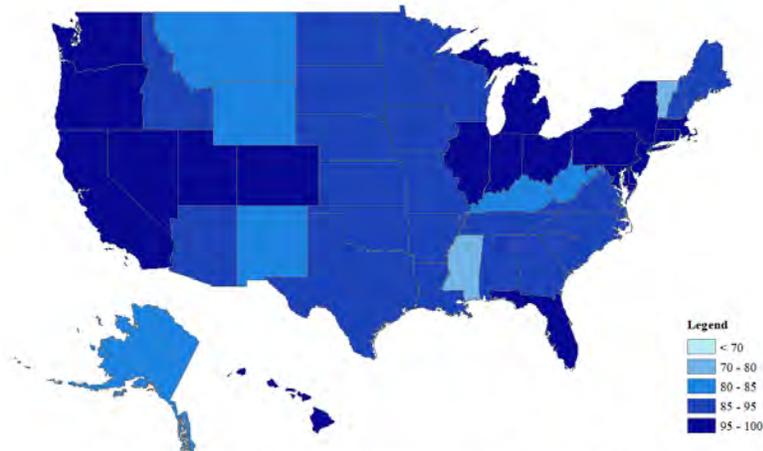
Since the President took office, national broadband availability has increased at all advertised speed levels.<sup>10</sup> Today, about 93 percent of Americans have access to wired broadband speeds of at least 3 Mbps downstream (i.e. broadband that allows a user to download 3 megabits per second), and 99 percent of Americans have access to similarly fast mobile wireless broadband. This increased availability reflects both private and public investment, including the \$4 billion invested through the National Telecommunications and Information Administration’s (NTIA) Broadband Technology Opportunities Program (BTOP) and \$3.5 billion invested through the U.S. Department of Agriculture’s (USDA) Rural Utilities Service Broadband Initiative Program (BIP), both part of the American Recovery and Reinvestment Act of 2009, as well as \$66 million through USDA’s ongoing Community Connect grant program.

**Share of US With Access to Various Download Speeds, 2013**  
Percent of US Population

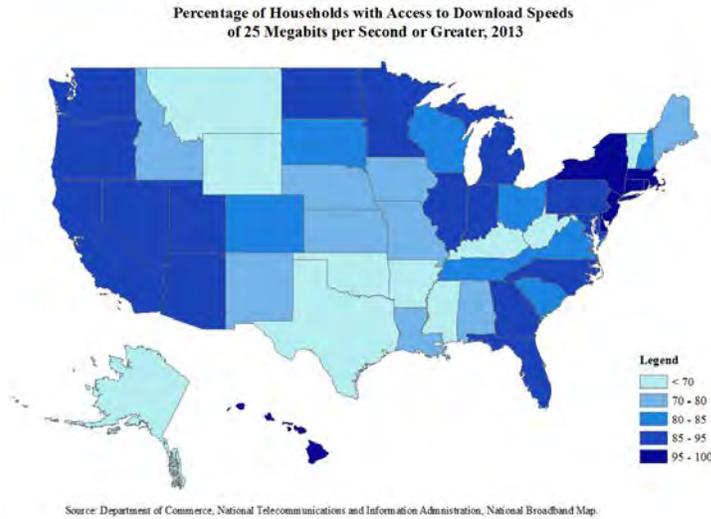


Nevertheless, nearly 51 million Americans cannot purchase a wired broadband connection with download speeds of at least 25 Mbps, and only 63 percent have access to speeds of 100 Mbps or more.<sup>11</sup> Moreover, the costs, benefits, and availability of broadband Internet are not evenly distributed. For example, the following two maps show the state-level availability of broadband with download speeds of at least 3 Mbps, and at least 25 Mbps respectively as of June 2013. The first map shows that most Americans have access to “basic” broadband, though some work remains to fully connect the most rural states. However, there is considerable variation in the availability of 25 Mbps connections between states, with some reaching 95 percent penetration and others offering this high-quality service to less than 70 percent of households.

Percentage of Households with Access to Download Speeds of 3 Megabits per Second or Greater, 2013

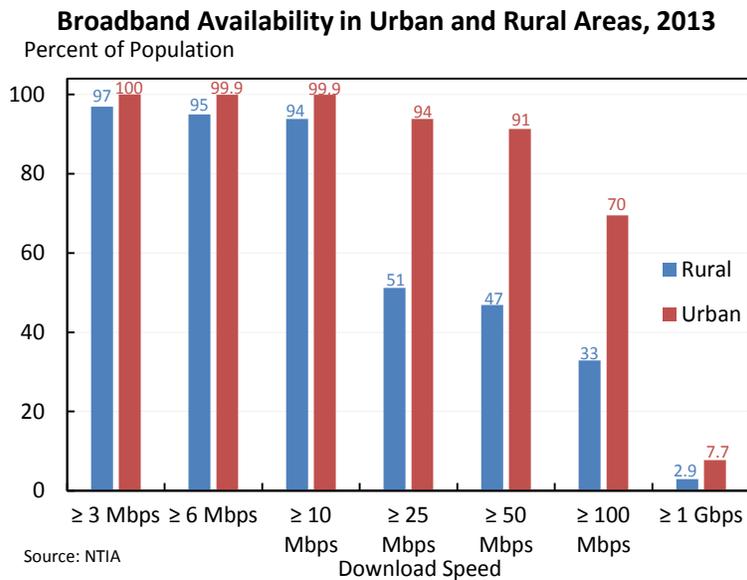


Source: Department of Commerce, National Telecommunications and Information Administration, National Broadband Map.



## ***Urban and Rural Communities***

One factor that creates disparities in broadband access and adoption is the divide between urban and rural communities. While the gap for the most basic broadband speeds has almost closed (nearly 100 percent of urban residents have access to speeds of 6 Mbps or greater compared to 95 percent of rural residents), rural communities still enjoy far less access to higher speeds. The following figure illustrates this point:



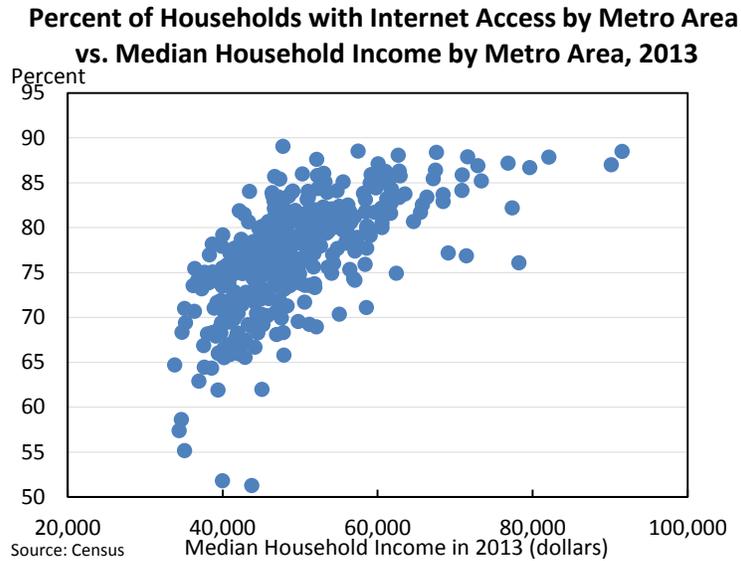
The gap in broadband availability between urban and rural communities is linked to the economics of network investment. The costs of providing a connection increase with distance, and the expected profits increase with the number of customers served. This makes it more economical to serve densely populated urban locations, where shorter wires can serve a larger number of potential customers. While satellite and terrestrial wireless technologies continue to deliver promising improvements, more work is needed to close the urban rural gap in broadband availability.

To address this gap, the USDA, BTOP, and the FCC's Connect America Fund program have all invested in creating the middle-mile infrastructure that provides high-speed access to "anchor institutions" such as schools and libraries in many rural communities. With middle-mile and community infrastructure in place, the remaining challenge is to provide last-mile connections so millions of Americans have access to high-speed broadband. As we describe below, the availability of middle-mile connections creates a significant opportunity for municipalities to increase such access.

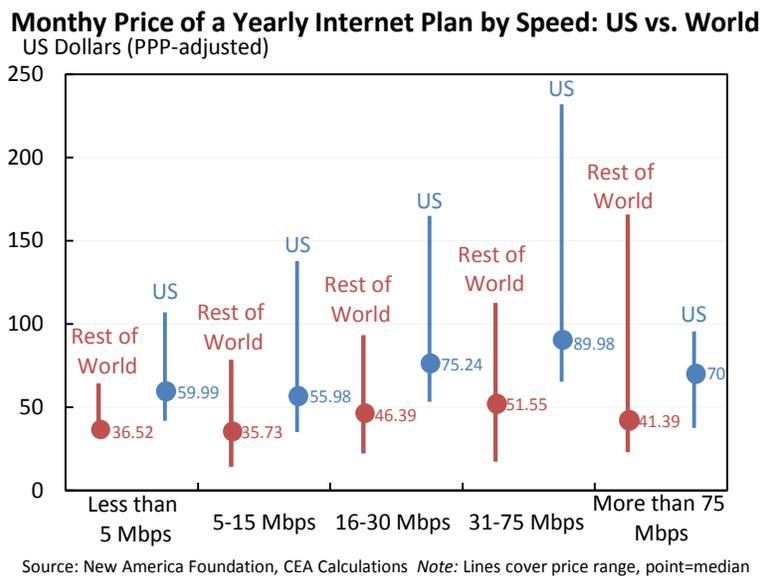
### ***Affordability***

In total, almost 30 percent of American households did not have a home broadband connection as of 2013. One of the main challenges facing increased broadband adoption is price. In a 2010 survey conducted by the FCC, 36 percent of households without a home broadband connection pointed to expense as the major barrier.<sup>12</sup>

Not surprisingly, the cost of broadband represents a greater obstacle for lower-income Americans than middle- and high-income Americans. The NTIA reports that in 2012, 32 percent of families not online with incomes below \$25,000 indicated that the high cost of Internet service prevents them from using broadband at home, compared to less than 22 percent of households not online with annual incomes above \$50,000.<sup>13</sup> Overall Internet use is strongly correlated with household income, as illustrated in the figure below, which plots median income against Internet adoption for a sample of 368 Metropolitan Statistical Areas.



U.S. broadband is also relatively expensive when compared internationally. The next chart uses data from a recent report on broadband prices in 24 U.S. and international cities.<sup>14</sup> While the 24 cities in this study may not be representative of all urban locations in the U.S. or abroad, it is notable that the median monthly price at each speed level is higher in the U.S., often by 50 percent or more. And while it appears that the U.S. has less price variability at speeds above 75 Mbps, this observation actually reflects the fact that fewer U.S. cities even offer a consumer plan at that level.



## Broadband Competition

One proven mechanism for increasing Internet access, quality and affordability is to promote competitive markets. Over the past 30 years, telecommunications policy has consistently attempted to encourage market competition in local, long-distance and Internet access markets. For example, the threat of satellite services pushed cable companies to expand their network capacity, positioning them to challenge phone companies in the market for home Internet access. And the ongoing competition between phone and cable companies has created a positive cycle of investment, as providers in many communities continuously upgrade their networks and improve their offerings.<sup>15</sup>

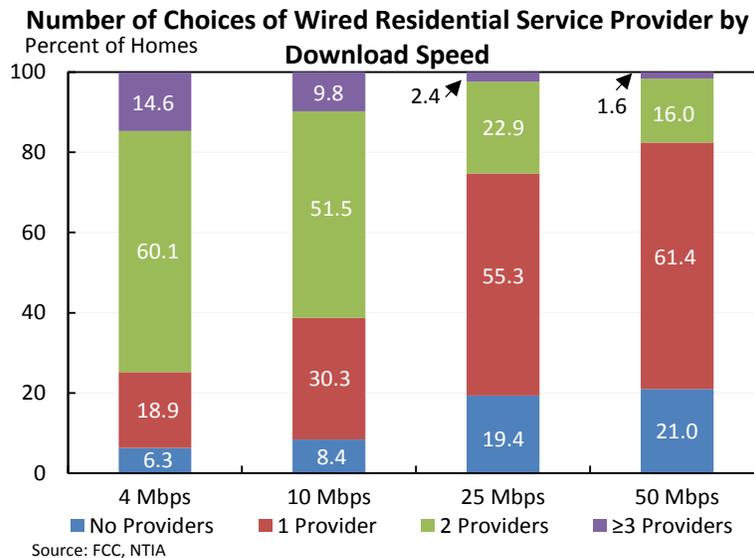
However, the overall national investment picture obscures regional variation. Many local and regional markets today do not have the kind of competition required to continue to ensure affordable access to the higher-speed broadband connections that Americans increasingly require. For example, the following table illustrates the number of choices available to American consumers in fixed and mobile broadband markets. When it comes to wired Internet, which can reliably deliver the highest speeds, the majority of Americans have three choices or less. The situation is somewhat better in wireless markets, although focusing on the number of choices obscures the large share of the market served by a handful of the largest providers. And while competition appears reasonably robust if one focuses on combined choices, it is important to recognize that fixed and wireless Internet are not necessarily substitutes, particularly at speeds of 25 Mbps or higher where there is typically no wireless service available.

**Broadband Choice for American Consumers**

Number of Choices	Share of U.S. Population (%)		
	<i>Fixed</i>	<i>Mobile</i>	<i>Combined</i>
1	9	0	0
2	33	3	1
3	37	5	2
4	13	22	4
5	3	26	10
6	1	22	18
7	0	11	19
8+	0	12	46

Source: NTIA, CEA Calculations

To illustrate the declining level of competition at higher speeds, the following chart shows the number of wired broadband service providers serving American consumers at different speeds. At speeds of 4 Mbps or less, 75 percent of consumers have a choice between two or more fixed providers, and 15 percent can select among three or more ISPs. However, in the market for Internet service that can deliver 25 Mbps downstream – the speed increasingly recognized as a baseline to get the full benefits of Internet access – three out of four Americans do not have a choice between providers.



While increased competition will not necessarily solve all broadband access challenges, basic economics suggests that increased competition leads to a better deal for consumers. For example, a 2014 OECD survey of eleven OECD member countries found that new entrants in wireless markets have a substantial impact on both prices and quality of service. Tellingly, the OECD study indicated that this result occurred even when a market already had three participants – that is, the fourth entrant into a wireless market significantly improved costs and services.<sup>16</sup> As shown above, less than 1 out of 40 American homes has 3 or more choices of providers at speeds in excess of 25 Mbps. Entry also had a positive impact on the market even when the new firm was very small.<sup>17</sup> In the U.S., a 2013 NTIA report found that among those who reported switching their Internet service provider, 38 percent did so to get a better price, and this option is simply unavailable to consumers who are only served by a single Internet Service Provider—or a single provider at the speeds they require.<sup>18</sup>

Even the threat of new competition can lead existing firms to make investments to improve the quality of their goods or services. In the Netherlands, for example, incumbent wireless carriers began offering plans at lower rates in an effort to prevent a new entrant from capturing market share by undercutting existing prices.<sup>19</sup> The U.S. cable television industry also provides an example of the benefits of potential competition. Academic research has shown that during the 2000's U.S. cable television operators were more likely to upgrade their systems to allow two-way communications in cities where the cable operator faced a threat of entry from a local municipal electric utility.<sup>20</sup>

Domestic experiences also show how the threat of competition can produce gains for broadband consumers. When Google announced that Google Fiber was coming to Kansas, speeds on existing networks surged 97 percent—the largest year-over-year jump in bandwidth observed in any state, ever. Likewise, when Google indicated that it would begin offering extremely fast connection speeds in Austin, TX, AT&T responded by announcing its own gigabit network.

## **Community-Based Broadband**

Where the market does not generate the optimal level of competition or investment, the public sector can step in to make investments, encourage competition and provide choice to consumers. For example, government infrastructure investments, such as those made by the Department of Commerce and Department of Agriculture or by Massachusetts (as described below), may be able to put in place the “middle mile” network that lowers costs of entering the “last mile” market. These investments can attract the private sector or provide local governments the opportunity to build their own systems at much lower prices.

Antitrust and telecommunications policies can also promote competition. At the Federal level, the Department of Justice has an important role to play in preventing the unlawful acquisition or abuse of market power. The Telecommunications Act of 1996 also empowers the FCC to regulate service providers in a manner that promotes competition both within and between technology-based platforms such as cable, cellular, satellite, and wireless. The President’s recent call for strong Net Neutrality rules to ensure that no company can act as a gatekeeper to Internet content are fundamentally about preserving access and competition in the digital marketplace. And states have an important role in promoting competition and ensuring fairness in their local communications markets.

But these federal and state initiatives are only part of the solution. Local governments also have a critical role to play. In markets where private competition is anemic, whether because of regulatory barriers to entry or the high fixed costs of infrastructure investment, town and cities can build their own middle-mile networks and offer competitive access to the private sector, as Scott County, MN has done. Or municipalities can provide service directly to consumers, like in Chattanooga, TN. In either case, municipalities are creating more choices for consumers, fostering competition and creating opportunities for economic growth. Municipal broadband is often a logical choice for towns and cities that are already served by a municipal electric utility, since infrastructure costs can be shared across those two services, just as private cable companies leveraged their networks to provide Internet service. Hundreds of towns and cities around the country have experimented with these networks and created tremendous benefits for consumers and businesses. APPENDIX 1 includes a full list of municipal networks around the country.

Today, however, there are barriers to community-owned broadband in 19 states around the country. The Obama Administration believes that consumers should have the option to provide themselves broadband services through local government and locally-owned utilities and that state and local policy should support a level playing field for these community-based solutions. This section considers several detailed case studies of municipal broadband initiatives and their benefits for consumers, businesses and communities.

### **Chattanooga, TN: Gigabit service drives investment, innovation**

In 2007, Chattanooga's Electric Power Board (EPB), a municipally-owned utility, announced a 10 year plan to build out a fiber network to serve all of Chattanooga. Based on their analysis, EPB had determined that investments in the network could both drive a smart grid system that would generate significant savings by increasing the reliability of its electricity and also provide customers with improved communication services. In 2009, EPB began offering its triple-play services—Internet, phone, and cable television. Since 2009, EPB has upgraded the mid-tier consumer service from 15 to 30, from 30 to 50, and from 50 to 100 Mbps, without raising costs. In 2010, EPB announced it would offer the first 1 gigabit per second (Gbps) service in the United States. Today, EPB operates 8,000 miles of fiber for 60,000 residential and 4,500 business customers out of a potential 160,000 homes and businesses.

EPB's efforts have encouraged other telecom firms to improve their own service. In 2008, for example, Comcast responded to the threat of EPB's entrance into the market by investing \$15 million in the area to launch the Xfinity service – offering the service in Chattanooga before it was available in Atlanta, GA. More recently, Comcast has started offering low-cost introductory offers and gift cards to consumers to incentivize service switching. Despite these improvements, on an equivalent service basis, EPB's costs remain significantly lower.

EPB's investments are reshaping Chattanooga's economic landscape. The gigabit broadband service has helped the City attract a new community of computer engineers, tech entrepreneurs and investors. For example, local entrepreneurs have organized Lamp Post, a venture incubator that provides capital and mentorship to startups. Lamp Post now has over 150 employees in a 31,000 square foot office space in downtown Chattanooga. CO.LAB, a local nonprofit organization, provides shared working space, access to investor networks and hosts the annual summer GITANK program, a 14-week business accelerator. The investment community has responded in kind. Since 2009, Chattanooga has gone from close to zero venture capital to at least five organized funds with investable capital of over \$50 million. The growing tech ecosystem has been profiled by the *New York Times*, *Washington Post* and *The Atlantic*.

While the broadband network is opening up new economic pathways, EPB itself remains the most important customer for the fiber network, which it has used to develop one of the nation's leading smart grids. The smart grid, which involves 170,000 intelligent electric meters all reporting every 15 minutes, helps EPB monitor and respond to outages, emergencies, and electricity theft in real time. EPB's smart grid has cut duration of power outages by 60 percent, saving local businesses and industry an estimated \$45 to \$60 million. With the monitoring system in place, EPB crews can also respond in a targeted fashion during emergencies, helping families and businesses cope with tornados and other natural disasters.<sup>21</sup>

### **Wilson, NC: Municipal broadband encourages private competition**

In November of 2006, Wilson's City council voted unanimously to build a fiber-to-the-home (FTTH) network through the town's electricity provider, Greenlight. The City Council issued \$28 million in debt to start construction. Greenlight began offering its

services in 2008 and expanded its network to include triple-play (television, phone, and internet) services citywide by January 2009. In 2010, the city took another \$4.5 million loan from Wells Fargo to improve its network. The subscription base grew steadily in its first few years and numbers over 7000 today –more than a third of Wilson’s 21,000 households.

Greenlight has been a commercial success. Greenlight achieved its first monthly operating profit one year ahead of schedule in October 2010 and made a profit of nearly three-quarters of a million dollars in 2013. However, a 2011 state law prevents municipalities from providing broadband service to other towns outside of its area, limiting further growth.

Greenlight’s introduction of its triple-play service has increased industry competition, which has lowered prices for Wilson’s residents. From 2007 to 2009, Time Warner raised rates for almost all of its services across the board. According to a December 2009 presentation for the House Select Committee on High Speed Internet Access in Rural and Urban Areas, TWC raised rates in non-competitive areas around Wilson while holding Wilson’s rates steady. According to the same report, TWC raised its prices for basic internet service in the North Carolina Research Triangle — as much as 52 percent in Cary — but did not impose any rate hike in Wilson. Moreover, TWC stabilized prices in Wilson for the digital sports and games tier, while Triangle customers paid 41 percent more. The lowered prices in Wilson make a big difference. According to an independent consultant for Wilson, Greenlight saved its residents more than \$1 million each year compared to what Time Warner Cable customers in other areas pay.

Increased competition has also yielded increased speeds for Wilson customers. Greenlight’s system offers speeds of up to 1 gigabit for consumers and businesses. In 2008, Time Warner’s residential Road Runner service in the state offered speeds no higher than 10 Mbps, equivalent to Greenlight’s lowest consumer tier. TWC charged \$57 per month for the service while Greenlight charged \$35. In response, TWC upped its top-tier speed to 15 Mbps "because of the competitive environment," according to a Time Warner spokesperson.<sup>22</sup>

### **Lafayette, LA: Network increases customer savings, strengthens local anchor institutions**

The residents of Lafayette have a long history of supporting local infrastructure initiatives. Recognizing the need to modernize its broadband infrastructure in the early 2000’s, the community voted in 2005 to approve construction of a fiber-to-the-home (FTTH) network. After overcoming serious opposition from local broadband service providers, the publicly-owned Lafayette Utilities System (LUS) started connecting homes and businesses to its LUS Fiber network in 2009. The network seeks to provide equitable access to all of Lafayette’s citizens, and the system was rolled out across high-income and low-income neighborhoods equally. LUS Fiber now offers 100 Mbps speed for all subscribers.

As competing firms adjusted their plans to account for LUS Fiber's market entry, residents who weren't customers of the network started to see lower prices. Cox Communications, a major regional provider which had raised rates six times in four years, kept its rates stable from 2004 to 2007 to account for LUS's possible market entry. Still, LUS's prices have been consistently lower than those offered by Cox. Terry Huval, the director of LUS, estimates that the community saved \$4 million from these deferred rate increases. Using estimates of Cox's average competing discounts and LUS Fiber's lower rates, LUS projects the fiber system will create total savings of between \$90 and \$100 million over the its first 10 years.

The fiber network has brought in companies eager to obtain fast service at lower prices. Pixel Magic brought 100 to 200 jobs when it built an office in Lafayette to accomplish work on the movie "Secretariat". The high-speed capability of the broadband network was a big factor in their eventual decision to maintain their office in Louisiana permanently. The tech startup firm Skyscraper Holding moved from Los Angeles to Lafayette to obtain 100 Mb/s speeds at a fraction of the cost the company was charged on the west coast. The company pays just \$200 a month for more reliable service.

The network has strengthened community anchors as well, delivering greater value and opportunities for connectivity to Lafayette's school and library systems. By mid-2008, all of the schools in the Lafayette Parish School System were able to access 100 Mbps speeds for \$390/month. Not only can students now do more to leverage the Internet for better learning opportunities, this monthly fee saves community tax dollars by being a better value than competitors could offer. Lafayette's public libraries also benefit from the network by sharing a 90 Mbps connection from LUS that was rated as the best value amongst possible providers by the federal E-Rate program.<sup>23</sup>

### **Scott County, MN: Municipal government sees savings for county, school operations**

In the early 2000s, Scott County started exploring options for increasing broadband services for county government buildings and schools. In 2007, the County issued \$3.5 million in bonds to install a high-speed middle-mile network. The network connects all county-owned facilities, including schools, libraries, city halls, police and fire departments and public safety towers. It also connects with the state's high capacity backbone network and with multiple private providers. From the beginning, the project was a joint effort between local and state government and the private sector. While the county paid the upfront costs, the state pays for the network's operating costs in exchange for use of the network. The open architecture of the system allows private companies to offer their own services; private providers, in turn, cover the network's maintenance costs.

The network has achieved significant benefits. Scott County's annual bond payment for the construction of the backbone is \$35,000 less than what the County was paying for leasing private sector lines. Local schools have seen even greater savings. The costs for Scott County's school districts per megabit of Internet service went from an average of \$58.00 to \$6.83 per megabit for all school districts—a cost reduction of nearly 90

percent per megabit. The net effect was a tripling of availability (100 to 300 megabits) while costs fell from \$5,800 to \$2,049 a month. At the state level, the government is saving approximately \$1 million per year from access to the public network.

The network has also helped attract significant private investment and fostered job creation. In 2010, for example, Emerson Process Management was finalizing a decision on where to site a new \$70 million investment that would create 500 jobs. Emerson's two finalist sites were the town of Shakopee in Scott County, Minnesota and Chihuahua, Mexico. Recognizing the savings from the high-speed broadband network, Emerson chose Scott County.<sup>24</sup>

### **Leverett, MA: State and federal programs enable local investment**

In 2008, Massachusetts Governor Deval Patrick created the Massachusetts Broadband Initiative (MBI). MBI was charged with bringing broadband to all residents and businesses in MA within three years. The Broadband Act provided MBI with initial \$40 million in state bond funds. Over the last six years, Massachusetts has built 1,200 miles of new fiber optic cable that provide access to more than 120 communities in Western and North Central Massachusetts.

Of the original state funds, \$25 million were directed to build a broadband network in Western, MA. With the support of additional federal funds, MBI developed "MassBroadband 123", a middle-mile network serving 123 communities in the region. MBI worked closely with the private sector to build the project. Today, MassBroadband 123 is operated by Axia NGNetworks. The network has an open architecture that allows any Internet service provider to purchase wholesale services on the network at the same rates. The network also positions municipalities to focus on putting homes and businesses on the network through last-mile connections.

Leverett, MA saw the opportunity to build its own broadband system. In 2012, Leverett voters approved a modest property tax increase and a \$3.6 million bond to fund the network. Leverett created a publicly controlled Municipal Light Plant (MLP) entity to own and operate its network, named LeverettNet. The town is currently in the process of building the network – which will provide 1 gigabit service – and connecting it to all 630 households in the community.<sup>25</sup>

### **Choctaw Nation Tribal Area, OK: Public private collaboration brings broadband to new communities**

In early 2009, much of the ten Southeastern Oklahoma counties encompassed by the Choctaw Nation's Tribal Area lacked access to reliable broadband service. The low population density (8.3 to 19.7 people per square mile), the high poverty rate (25 percent of the population below the poverty line) and the rugged terrain made the economics of broadband infrastructure very challenging. Initial capital costs to deploy broadband meant that broadband service was limited only to commercially viable areas.

Pine Tele, the service provider offering voice, video, cell, long distance, and high-speed broadband in SE OK applied for and received 4 American Recovery and Reinvestment awards in 2009 and 2010. One grant was to build out fiber to the home in the area already covered by landlines, and the other three were for wireless – advanced 3G technology – to completely unserved areas. As of September 2014 Pine Tele had deployed 324 miles of fiber, 5,500 fiber drops, and 54 tower sites. New or improved broadband service had been made available to 1,757 fiber customers and 1,194 wireless customers. Today, Pine Telephone provides a variety of broadband packages over both their fiber and wireless facilities ranging from 1.5 Mbps to 5 Mbps for download speeds and 384 Kbps to 5 Mbps for upload speeds.

The benefits for the community have been significant. Every school in the 10 county Pine Tele service area is now connected with high-speed fiber optic broadband service. This has created the ability to integrate online educational tools into everyday teaching and assessments of student comprehension. Broken Bow School District is one example. This district serves approximately 1,280 students per day. They have been able to integrate smart boards, iPads, online lesson plans, and the “I-Ready program” to supplement learning. Hundreds of performance tests are now completed online. And family engagement is improved, as parents are increasingly provided online access to records of attendance, assignments, and test scores. The connectivity also allows the Choctaw Nation to multicast educational videos and share messages from Tribal leadership from a central location. For example, the Choctaw School of Language now offers distance learning courses to approximately 14 head starts and 32 high schools within the Choctaw Nation, in addition to several universities.<sup>26</sup>

## **Promoting Broadband that Works**

Last November, the President outlined his plan to keep the Internet open to new competition and innovation by safeguarding net neutrality – which will help ensure no one company can act as a gatekeeper to digital content. But there is more work to do so that every American has access to a free and open internet. This is particularly true in areas where broadband competition is lacking, resulting in high prices and slow service.

High-speed, low-cost broadband is paving the way for economic revitalization not just in Cedar Falls, but in places like Chattanooga, TN and Lafayette, LA – which have Internet speeds up to 100 times faster than the national average and deliver it at an affordable price. To help more communities achieve these results, support economic growth, and promote a level playing field for all competitors, the Obama Administration is:

- **Calling to End Laws that Harm Broadband Service Competition:** Laws in 19 states – some specifically written by special interests trying to stifle new competitors – have held back broadband access and, with it, economic opportunity. Today President Obama is announcing a new effort to support local choice in broadband, formally opposing measures that limit the range of options to available to communities to

spur expanded local broadband infrastructure, including ownership of networks. As a first step, the Administration is filing a letter with the Federal Communications Commission (FCC) urging it to join this effort by addressing barriers inhibiting local communities from responding to the broadband needs of their citizens.

- **Expanding the National Movement of Local Leaders for Better Broadband:** As of today, 50 cities representing over 20 million Americans have joined the Next Century Cities coalition, a nonpartisan network pledging to bring fast, community-supported broadband to their towns and cities. They join 37 research universities around the country that formed the Gig.U partnership to bring fast broadband to communities around their campuses. To recognize these remarkable individuals and the partnerships they have built, in June 2015 the White House will host a Community Broadband Summit of mayors and county commissioners from around the nation who are joining this movement for broadband solutions and economic revitalization.
- **Announcing a New Initiative to Support Community Broadband Projects:** To advance this important work, the Department of Commerce is launching a new initiative, BroadbandUSA, to promote broadband deployment and adoption. Building on expertise gained from overseeing the \$4.7 billion Broadband Technology Opportunities Program funded through the Recovery Act, BroadbandUSA will offer online and in-person technical assistance to communities; host a series of regional workshops around the country; and publish guides and tools that provide communities with proven solutions to address problems in broadband infrastructure planning, financing, construction, and operations across many types of business models.
- **Unveiling New Grant and Loan Opportunities for Rural Providers:** The Department of Agriculture is accepting applications to its Community Connect broadband grant program and will reopen a revamped broadband loan program which offers financing to eligible rural carriers that invest in bringing high-speed broadband to unserved and underserved rural areas.
- **Removing Regulatory Barriers and Improving Investment Incentives:** The President is calling for the Federal Government to remove all unnecessary regulatory and policy barriers to broadband build-out and competition, and is establishing a new Broadband Opportunity Council of over a dozen government agencies with the singular goal of speeding up broadband deployment and promoting adoptions for our citizens. The Council will also solicit public comment on unnecessary regulatory barriers and opportunities to promote greater coordination with the aim of addressing those within its scope.

## Appendix 1: U.S. Municipalities with Broadband Networks<sup>27</sup>

City	State	Name of Network	Type
Ketchikan	AK	KPU Telecommunications	cable
Kotlik	AK	Kotlik	cable
Statewide	AK	Rural Alaska Video E-Health Network (RAVEN)	inet
White Mountain	AK	White Mountain	cable
Opelika	AL	Opelika	fiber
Opp	AL	Opp Cablevision	cable
Scottsboro	AL	Scottsboro EPB	cable
Sylacauga	AL	Sylacauga	cable
Conway	AR	Conway Corporation	cable
Paragould	AR	Paragould Light Water and Cable	cable
Sells	AZ	Tohono O'odham Last-Mile FTTH and Broadband Wireless Network	partial
Anaheim	CA	Anaheim	dark
Anaheim	CA	Anaheim Fiber	inet
Burbank	CA	Burbank Water and Power	partial
Glendale	CA	Glendale	dark
Humboldt County	CA	Digital Redwoods	inet
Loma Linda	CA	Loma Linda	dark
Loma Linda	CA	Loma Linda Connected Community	fiber
Lompoc	CA	City of Lompoc (LompocNet)	inet
Long Beach	CA	Long Beach	dark
Mendocino County	CA	Mendocino Community Network	inet
Palo Alto	CA	Palo Alto Fiber	dark
Pasadena	CA	Pasadena	dark
San Bruno	CA	San Bruno Municipal Cable TV	cable
San Francisco	CA	SF Fiber	question
Santa Clara	CA	Santa Clara	partial
Santa Monica	CA	Santa Monica City Net	partial
Santa Monica	CA	Santa Monica Fiber	partial
Shafter	CA	City of Shafter, California	partial
Truckee	CA	Truckee Donner Public Utility District	dark
Vernon	CA	Vernon Light & Power	fiber
Cortez	CO	Cortez Community Network	partial
Durango	CO	Durango	dark
Glenwood Springs	CO	Glenwood Springs Community Broadband Network (GSCBN)	partial
Longmont	CO	NextLight	fiber

Bristol	CT	Bristol CT	inet
East Hartford	CT	Connecticut Education Network	dark
Manchester	CT	Manchester Wireless	inet
Fort Pierce	FL	FPUAnet Communications	partial
Gainesville	FL	GATOR NET	partial
Hobe Sound	FL	Martin County Dark Fiber	dark
Indiantown	FL	Martin County Dark Fiber	dark
Jacksonville	FL	Jacksonville iNet	inet
Jensen Beach	FL	Martin County Dark Fiber	dark
Jupiter Island	FL	Martin County Dark Fiber	dark
Lakeland	FL	Lakeland	dark
Leesburg	FL	Leesburg	partial
New Smyrna Beach	FL	Utilities Commission, City of New Smyrna Beach	inet
Ocala	FL	Ocala Utility Services	partial
Ocean Breeze Park	FL	Martin County Dark Fiber	dark
Palm Beach County	FL	Palm Beach County	partial
Palm City	FL	Martin County Dark Fiber	dark
Palm Coast	FL	Palm Coast FiberNET	partial
Port Salerno	FL	Martin County Dark Fiber	dark
Quincy	FL	NetQuincy	fiber
Sewall's Point	FL	Martin County Dark Fiber	dark
Stuart	FL	Martin County Dark Fiber	dark
Tallahassee	FL	Tallahassee	dark
Valparaiso	FL	Valparaiso Broadband	cable
Baconton	GA	Community Network Services - Camilla	cable
Baker County	GA	SGRITA Rural Last-mile Infrastructure Project Last-mile	partial
Cairo	GA	Community Network Services - Cairo (Syrup City)	cable
Calhoun	GA	CALNET	partial
Calhoun County	GA	SGRITA Rural Last-mile Infrastructure Project Last-mile	partial
Camilla	GA	Community Network Services - Camilla	cable
Cartersville	GA	Fibercom	partial
Catoosa County	GA	OptiLink	partial
Columbia County	GA	Columbia County Community Broadband Network	partial
Dalton	GA	OptiLink	fiber
Doerun	GA	City of Doerun	cable
Douglasville	GA	Douglas County School System Fiber	inet
Dublin	GA	Dublin	partial

Early County	GA	SGRITA Rural Last-mile Infrastructure Project Last-mile	partial
Elberton	GA	Elberton Utilities	cable
Flintstone	GA	EPB Fiber Optics	fiber
Forsyth	GA	Forsyth Cablenet	cable
LaGrange	GA	LaGrange Telecommunications Department	partial
Miller County	GA	SGRITA Rural Last-mile Infrastructure Project Last-mile	partial
Mitchell County	GA	SGRITA Rural Last-mile Infrastructure Project Last-mile	partial
Monroe	GA	Monroe Utilities Network	cable
Moultrie	GA	Community Network Services - Moultrie	cable
Murray County	GA	OptiLink	partial
Pelham	GA	Community Network Services - Pelham (Pelnet)	cable
Rossville	GA	EPB Fiber Optics	fiber
Sandersville	GA	Sandersville FiberLink	partial
Thomasville	GA	Community Network Services - Thomasville	cable
Tifton	GA	Tifton	dark
Whitfield County	GA	OptiLink	partial
Wildwood	GA	EPB Fiber Optics	fiber
Algona	IA	Algona Municipal Utilities	cable
Alta	IA	Altatec	cable
Bellevue	IA	Bellevue	fiber
Cedar Falls	IA	Cedar Falls Utilities	fiber
Cedar Falls	IA	Cedar Falls Utilities - rural expansion	partial
Coon Rapids	IA	Coon Rapids Municipal Utilities	cable
Grundy Center	IA	Grundy Center Municipal Light & Power	cable
Harlan	IA	Harlan Municipal Utilities	cable
Hartley	IA	The Community Agency	cable
Hawarden	IA	HITEC - Hawarden Integrated Technology, Energy, & Communication	cable
Independence	IA	Independence Light & Power, Telecommunications	cable
Indianola	IA	Indianola	partial
Laurens	IA	Laurens Municipal Power and Communications	cable
Lenox	IA	Lenox	fiber
Manning	IA	Manning Municipal Communication and Television System Utility	cable
Mapleton	IA	Mapleton Communications	cable

Muscatine	IA	MachLink	cable
Osage	IA	Osage Municipal Utilities	cable
Paullina	IA	The Community Agency	cable
Primghar	IA	The Community Agency	cable
Reinbeck	IA	Reinbeck Telecom	cable
Sanborn	IA	The Community Agency	cable
Spencer	IA	Spencer Municipal Utilities	fiber
Webster City	IA	Webster City	dark
Ammon	ID	Ammon	partial
Idaho Falls	ID	Circa	dark
Plummer	ID	Coeur d'Alene Reservation FTTH Project Last-mile Non-remote	partial
Aurora	IL	Onlight Aurora	partial
Aurora	IL	OnLight Aurora	dark
Champaign	IL	Urbana-Champaign Big Broadband UC2B	partial
DeKalb County	IL	DeKalb Advancement of Technology Authority Broadband	partial
Evanston	IL	Evanston	partial
Highland	IL	Highland Communication Services	fiber
LaSalle County	IL	DeKalb Advancement of Technology Authority Broadband	partial
Princeton	IL	Princeton Municipal Utilities	partial
Rochelle	IL	Rochelle Municipal Utilities	partial
Rock Falls	IL	Rock Falls	partial
Urbana	IL	Urbana-Champaign Big Broadband UC2B	partial
Anderson	IN	Anderson Municipal Light and Power	partial
Auburn	IN	Auburn Essential Services	fiber
Lebanon	IN	Lebanon Utilities	cable
Mishawaka	IN	Saint Joe Valley MetroNet	dark
South Bend	IN	Saint Joe Valley MetroNet	dark
Westfield	IN	City of Westfield	partial
Chanute	KS	Chanute	partial
Lenexa	KS	Lenexa Fiber	dark
Ottawa	KS	Ottawa Network	partial
White Cloud	KS	Iowa Tribe of Kansas and Nebraska Fiber- to-the- Premise	partial
Barbourville	KY	Barbourville	cable
Bardstown	KY	Bardstown Cable	cable
Bowling Green	KY	Bowling Green Municipal Utility	partial
Corinth	KY	City of Williamstown	partial
Frankfort	KY	Frankfort Plant Board	cable

Franklin	KY	Franklin Municipal FiberNET	partial
Glasgow	KY	Glasgow Electric Power Board	cable
Grant County	KY	City of Williamstown	partial
Hopkinsville	KY	Energy Net	cable
Monticello	KY	Community Telecom Services	cable
Murray	KY	Murray Electric System	cable
Owen County	KY	City of Williamstown	partial
Owensboro	KY	OMU Online	partial
Paducah	KY	Paducah Power System	partial
Russellville	KY	Russellville EPB SmartNet	fiber
Williamstown	KY	City of Williamstown	cable
Lafayette	LA	Lafayette Utilities System	fiber
Braintree	MA	Braintree Electric Light Department	cable
Chicopee	MA	Chicopee Electric Light	partial
Holyoke	MA	Holyoke Gas & Electric Co.	partial
Leverett	MA	LeverettNet	fiber
Norwood	MA	Norwood Light Broadband	cable
Russell	MA	Russell Municipal Cable	cable
Shrewsbury	MA	Shrewsbury Electric and Cable Operations	cable
South Hadley	MA	Five College Fiber Optic Network	inet
Taunton	MA	Taunton Municipal Lightning Plant	partial
Worcester	MA	Worcester Municipal Fiber Loop	inet
Carroll County	MD	Carroll County Broadband	dark
Columbia	MD	Howard County Fiber Network	dark
Dayton	MD	Howard County Fiber Network	dark
Easton	MD	EastonOnline	cable
Elkridge	MD	Howard County Fiber Network	dark
Ellicot City	MD	Howard County Fiber Network	dark
Fulton	MD	Howard County Fiber Network	dark
Highland	MD	Howard County Fiber Network	dark
Savage	MD	Howard County Fiber Network	dark
Coldwater	MI	CBPU	cable
Crystal Falls	MI	City of Crystal Falls	cable
Holland	MI	Holland Fiber Network	fiber
Negaunee	MI	City of Negaunee Dept. of Public Works	cable
Norway	MI	City of Norway CATV System	cable
Sebewaing	MI	Sebewaing Light & Water	fiber
Wyandotte	MI	Wyandotte	cable
Bagley	MN	Bagley Public Utilities	fiber
Barnesville	MN	Barnesville Municipal Utilities	partial
Belle Plaine	MN	Scott County Fiber Network	dark

Bingham Lake	MN	SMBS - Bingham lake	fiber
Brewster	MN	SMBS - Brewster	fiber
Carver	MN	CarverLink	dark
Chanhausen	MN	CarverLink	dark
Chaska	MN	Chaska.Net	partial
Cologne	MN	CarverLink	dark
Crosslake	MN	Crosslake Communications	fiber
Eagan	MN	Access Eagan	partial
Elko New Market	MN	Scott County Fiber Network	dark
Hamburg	MN	CarverLink	dark
Heron Lake	MN	SMBS - Heron Lake	fiber
Jackson	MN	SMBS - Jackson	fiber
Jordan	MN	Scott County Fiber Network	dark
Lake County	MN	Lake County	partial
Lakefield	MN	SMBS - Lakefield	fiber
Mayer	MN	CarverLink	dark
Monticello	MN	Monticello Fiber Network	fiber
New Germany	MN	CarverLink	dark
New Prague	MN	Scott County Fiber Network	dark
Norwood Young America	MN	CarverLink	dark
Okabena	MN	SMBS - Okabena	fiber
Pine City	MN	Pine City Fiber Optic Backbone	partial
Prior Lake	MN	Scott County Fiber Network	dark
Round Lake	MN	SMBS - Round Lake	fiber
Savage	MN	Scott County Fiber Network	dark
Shakopee	MN	Scott County Fiber Network	dark
Silver Bay	MN	Lake County Fiber Network	partial
St. Louis Park	MN	St. Louis Park	inet
Two Harbors	MN	Lake County Fiber Network	partial
Victoria	MN	CarverLink	dark
Waconia	MN	CarverLink	dark
Watertown	MN	CarverLink	dark
Westbrook	MN	Westbrook Municipal Light & Power	cable
Wilder	MN	SMBS - Wilder	fiber
Windom	MN	Windomnet	fiber
Kahoka	MO	Kahoka	cable
Marshall	MO	Marshall	fiber
North Kansas City	MO	liNKCity	fiber
Poplar Bluff	MO	City of Poplar Bluff Municipal Utilities	cable
Springfield	MO	SpringNet	partial
Collins	MS	Collins Communications	cable

Asheville	NC	ERC Broadband	dark
Chapel Hill	NC	Chapel Hill Fiber Optic Services	inet
Cornelius	NC	MI-Connection	cable
Davidson	NC	MI-Connection	cable
Mooresville	NC	MI-Connection	cable
Morganton	NC	Morganton	cable
Salisbury	NC	Fibrant	fiber
Sylva	NC	BalsamWest FiberNET	partial
Tryon	NC	PANGAEA	partial
Wilson	NC	Greenlight	fiber
South Sioux City	NE	South Sioux City Municipal Network	inet
Cheshire	NH	Fast Roads	dark
Claremont	NH	Fast Roads	dark
Enfield	NH	Fast Roads	partial
Fitzwilliam	NH	Fast Roads	dark
Goshen	NH	Fast Roads	dark
Hanover	NH	Fast Roads	dark
Keene	NH	Fast Roads	dark
Lebanon	NH	Fast Roads	dark
Lyme	NH	Fast Roads	dark
Marlow	NH	Fast Roads	dark
New London	NH	Fast Roads	dark
Newport	NH	Fast Roads	dark
Orford	NH	Fast Roads	dark
Richmond	NH	Fast Roads	dark
Rindge	NH	Fast Roads	partial
Springfield	NH	Fast Roads	dark
Sunapee	NH	Fast Roads	dark
Swanzey	NH	Fast Roads	dark
Glassboro	NJ	Glassboro Municipal Area Network	inet
Vineland	NJ	Vineland Metropolitan Area Network	inet
Churchill	NV	CC Communications	fiber
Bristol Center	NY	Axcess Ontario	dark
Bristol Springs	NY	Axcess Ontario	dark
Canandaigua	NY	Axcess Ontario	dark
Cheshire	NY	Axcess Ontario	dark
Clifton Springs	NY	Axcess Ontario	dark
East Bloomfield	NY	Axcess Ontario	dark
Farmington	NY	Axcess Ontario	dark
Fishers	NY	Axcess Ontario	dark
Geneva	NY	Axcess Ontario	dark

Gorham	NY	Axcess Ontario	dark
Hogansburg	NY	St. Regis Mohawk Tribe Connect (Economic Development for the 21st Century)	partial
Honeoye	NY	Axcess Ontario	dark
Hopewell	NY	Axcess Ontario	dark
Manchester	NY	Axcess Ontario	dark
Naples	NY	Axcess Ontario	dark
New York City	NY	New York City Wireless Network NYCWiN	inet
Phelps	NY	Axcess Ontario	dark
Rushville	NY	Axcess Ontario	dark
Stanley	NY	Axcess Ontario	dark
Victor	NY	Axcess Ontario	dark
West Bloomfield	NY	Axcess Ontario	dark
Akron	OH	OneCommunity	partial
Ashtabula	OH	OneCommunity	partial
Barberton	OH	OneCommunity	partial
Bryan	OH	Bryan Municipal Utilities	cable
Butler County	OH	Butler County	inet
Canton	OH	OneCommunity	partial
Cincinnati	OH	Hamilton County	inet
Cleveland	OH	OneCommunity	partial
Cleveland Heights	OH	OneCommunity	partial
Dover	OH	Dover Technology	dark
Dublin	OH	Dublink+	partial
Eastlake	OH	OneCommunity	partial
Elyria	OH	OneCommunity	partial
Gahanna	OH	Gahanna	inet
Hamilton	OH	Hamilton Miami U	inet
Lorain	OH	OneCommunity	partial
Mayfield Village	OH	OneCommunity - Mayfield Village	partial
Medina County	OH	Medina County	dark
Mentor	OH	OneCommunity	partial
Middletown	OH	Middletown Miami U	inet
New Albany	OH	BlueAlbany	partial
Sandusky	OH	OneCommunity	partial
Wadsworth	OH	City of Wadsworth Electric & Communications Dept.	cable
Wadsworth	OH	OneCommunity	dark
Woodsfield	OH	Woodsfield Municipal Power	cable
Wooster	OH	OneCommunity	partial
Ponca City	OK	Ponca City Technology Services	partial

Sallisaw	OK	DiamondNet	fiber
Ashland	OR	Ashland Fiber Network	cable
Canby	OR	Clackamas Broadband Express	dark
Damascus	OR	Clackamas Broadband Express	dark
Douglas County	OR	Oregon South Central Regional Fiber Consortium Lighting the Fiber Middle-mile Project	partial
Estacada	OR	Clackamas Broadband Express	dark
Eugene	OR	Eugene	dark
Gladstone	OR	Clackamas Broadband Express	dark
Government Camp	OR	Clackamas Broadband Express	dark
Happy Valley	OR	Clackamas Broadband Express	dark
Independence	OR	MINET	fiber
Klamath County	OR	Oregon South Central Regional Fiber Consortium Lighting the Fiber Middle-mile Project	partial
Lane County	OR	Oregon South Central Regional Fiber Consortium Lighting the Fiber Middle-mile Project	partial
Milwaukie	OR	Clackamas Broadband Express	dark
Molalla	OR	Clackamas Broadband Express	dark
Monmouth	OR	MINET	fiber
Mulino	OR	Clackamas Broadband Express	dark
Oregon City	OR	Clackamas Broadband Express	dark
Sandy	OR	SandyNet	partial
Sherwood	OR	Sherwood Fiber	partial
Springfield	OR	Springfield Utility Board	dark
The Dalles	OR	Q-Life Network	partial
Wilsonville	OR	Clackamas Broadband Express	dark
Beaver County	PA	Beaver County Fiber	inet
Kutztown	PA	Hometown Utilicom	fiber
Pitcairn	PA	Pitcairn Power/Community Cable	cable
Hartsville	SC	Hartsville	question
Oconee County	SC	Oconee FOCUS (Fiber Optics Creating Unified Solutions)	partial
Orangeburg County	SC	Orangeburg	partial
Aberdeen	SD	CityNet (Dakota Interconnect)	inet
Beresford	SD	Beresford Municipal Telephone/Cablevision	cable
Brookings	SD	Swiftel	fiber
Bristol	TN	Bristol TN Essential Services	fiber
Chattanooga	TN	EPB Fiber Optics	fiber
Clarksville	TN	Clarksville CDE Lightband	fiber

Columbia	TN	CPWS Broadband	cable
East Ridge	TN	EPB Fiber Optics	fiber
Erwin	TN	Erwin Utilities	partial
Fayetteville	TN	Fayetteville Public Utilities	cable
Jackson	TN	Jackson Energy Authority	fiber
Johnson City	TN	BVU OptiNet	partial
Lookout Mountain	TN	EPB Fiber Optics	fiber
Morristown	TN	FiberNET	fiber
Nashville	TN	NESNet	dark
Pulaski	TN	PES Energize	fiber
Red Bank	TN	EPB Fiber Optics	fiber
Ridgeside	TN	EPB Fiber Optics	fiber
Signal Mountain	TN	EPB Fiber Optics	fiber
Tullahoma	TN	Tullahoma Utilities Board	fiber
Greenville	TX	GEUS	cable
Lindon	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA)	partial
Brigham City	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA)	fiber
Centerville	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA) HQ	fiber
Layton	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA)	partial
Midvale	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA)	partial
Murray	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA)	partial
Orem	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA)	partial
Payson	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA)	partial
Perry	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA)	partial
Spanish Fork	UT	Spanish Fork Community Network	cable
Tremonton	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA)	fiber
West Valley City	UT	Utah Telecommunications Open Infrastructure Agency (UTOPIA) HQ	partial
Abingdon	VA	BVU OptiNet	fiber
Arlington County	VA	ConnectArlington	dark
Atkins	VA	BVU OptiNet	partial
Bluefield	VA	BVU OptiNet	partial

Bristol	VA	BVU OptiNet	fiber
Castlewood	VA	BVU OptiNet	partial
Cedar Bluff	VA	BVU OptiNet	partial
Chillhowie	VA	BVU OptiNet	partial
Clay Pool Hill	VA	BVU OptiNet	partial
Cleveland	VA	BVU OptiNet	partial
Clinchco	VA	BVU OptiNet	partial
Clintwood	VA	BVU OptiNet	partial
Damascus	VA	BVU OptiNet	partial
Danville	VA	nDanville	partial
Duffield	VA	LENOWISCO Planning District Commission	partial
Eastern Virginia	VA	Eastern Shore of Virginia Broadband Authority	question
Emery-Meadow View	VA	BVU OptiNet	partial
Galax	VA	Wired Road	partial
Glad Spring	VA	BVU OptiNet	partial
Grundy	VA	BVU OptiNet	partial
Haysi	VA	BVU OptiNet	partial
Hiltons	VA	BVU OptiNet	fiber
Honaker	VA	BVU OptiNet	partial
Independence	VA	BVU OptiNet	partial
Lebanon	VA	BVU OptiNet	partial
Luray	VA	Page County Broadband Project	partial
Marion	VA	BVU OptiNet	partial
Martinsville	VA	Martinsville Information Network - MINET	partial
Nelson County	VA	Nelson County Virginia Broadband Project	partial
Page County	VA	Page County Broadband Project	partial
Richlands	VA	BVU OptiNet	partial
Rockbridge County	VA	Connect the Dots: Rockbridge Broadband Initiative	partial
Rural Retreat	VA	BVU OptiNet	partial
Saltville	VA	BVU OptiNet	partial
Shenandoah	VA	Page County Broadband Project	partial
St Paul	VA	BVU OptiNet	partial
Stanley	VA	Page County Broadband Project	partial
Staunton	VA	Staunton	dark
Sugar Grove	VA	BVU OptiNet	partial
Tazewell	VA	BVU OptiNet	partial
Troutdale	VA	BVU OptiNet	partial
Vansant	VA	BVU OptiNet	partial

Wytheville	VA	BVU OptiNet	partial
Barnard	VT	ECFibernet (East Central Vermont Community Fiber Network)	partial
Bethel	VT	ECFibernet (East Central Vermont Community Fiber Network)	partial
Braintree	VT	ECFibernet (East Central Vermont Community Fiber Network)	partial
Brookfield	VT	ECFibernet (East Central Vermont Community Fiber Network)	partial
Hancock	VT	ECFibernet (East Central Vermont Community Fiber Network)	dark
North Randolph	VT	ECFibernet (East Central Vermont Community Fiber Network)	partial
Pomfret	VT	ECFibernet (East Central Vermont Community Fiber Network)	partial
Reading	VT	ECFibernet (East Central Vermont Community Fiber Network)	dark
Rochester	VT	ECFibernet (East Central Vermont Community Fiber Network)	dark
Royalton	VT	ECFibernet (East Central Vermont Community Fiber Network)	partial
Sharon	VT	ECFibernet (East Central Vermont Community Fiber Network)	partial
Stockbridge	VT	ECFibernet (East Central Vermont Community Fiber Network)	dark
Aberdeen	WA	Grays Harbor PUD	partial
Ardenvoir	WA	Chelan PUD	partial
Bauer's Landing	WA	Douglas County Community Network	inet
Benton City	WA	Benton PUD Broadband	partial
Benton County	WA	Benton PUD Broadband	partial
Blewett	WA	Chelan PUD	partial
Bridgeport	WA	Douglas County Community Network	inet
Bridgeport Bar	WA	Douglas County Community Network	inet
Burlington	WA	Mt Vernon Fiber Optic Services	partial
Cashmere	WA	Chelan PUD	fiber
Chelan	WA	Chelan PUD	partial
Chelan County	WA	Chelan PUD	fiber
Cheney	WA	Cheney Fiber Network	partial
Chumstick	WA	Chelan PUD	partial
Clallam County	WA	Clallam PUD	partial
Coulee City	WA	Grant PUD	partial
Coulee Dam	WA	Grant PUD	partial

Desert Aire	WA	Grant PUD	fiber
Desert Canyon	WA	Douglas County Community Network	inet
Douglas County	WA	Douglas County Community Network	inet
Dryden	WA	Chelan PUD	fiber
East Wenatchee	WA	Douglas County Community Network	inet
Edmonds	WA	City of Edmonds	dark
Entiat	WA	Chelan PUD	partial
Ephrata	WA	Grant PUD	partial
Franklin County	WA	Franklin PUD Broadband	partial
Grand Coulee	WA	Grant PUD	fiber
Grant County	WA	Grant PUD	fiber
Hartline	WA	Grant PUD	fiber
Kennewick	WA	Benton PUD Broadband	fiber
Kitsap County	WA	Kitsap PUD	fiber
Leavenworth	WA	Chelan PUD	fiber
Mansfield	WA	Douglas County Community Network	inet
Mason County	WA	Mason County PUD3	partial
Mattawa	WA	Grant PUD	fiber
Meritt	WA	Chelan PUD	partial
Monitor	WA	Chelan PUD	fiber
Moses Lake	WA	Grant PUD	partial
Mt Vernon	WA	Mt Vernon Fiber Optic Services	partial
Newport	WA	Pend Oreille County Public Utility District (PUD) Broadband Network	partial
Okanogan County	WA	Okanogan PUD	fiber
Orondo	WA	Douglas County Community Network	inet
Pacific County	WA	Pacific County PUD#2	partial
Pasco	WA	Franklin PUD Broadband	fiber
Pend Oreille County	WA	Pend Oreille PUD	fiber
Peshastin	WA	Chelan PUD	fiber
Port of Skagit County	WA	Mt Vernon Fiber Optic Services	partial
Prosser	WA	Benton PUD Broadband	fiber
Quincy	WA	Grant PUD	fiber
Royal City	WA	Grant PUD	fiber
Sequim	WA	Clallam PUD	partial
Shelton	WA	Mason County Public Utilities District	partial
Soap Lake	WA	Grant PUD	fiber
Sun Cove	WA	Douglas County Community Network	inet
Tacoma	WA	Click! Network	cable
Warden	WA	Grant PUD	fiber

Waterville	WA	Douglas County Community Network	inet
Wenatchee	WA	Chelan PUD	fiber
Wilson Creek	WA	Grant PUD	fiber
Yodelin	WA	Chelan PUD	partial
Eau Claire	WI	Chippewa Internetworking Consortium (CINC)	inet
Oconto	WI	Oconto Falls Municipal Utilities	cable
Platteville	WI	Chippewa Internetworking Consortium (CINC)	partial
Reedsburg	WI	Reedsburg Utility Commission	fiber
Reedsburg	WI	Reedsburg Utility Commission - rural expansion	partial
Shawano	WI	Shawano Municipal Utilities	fiber
Sun Prairie	WI	Sun Prairie Utilities	partial
Superior	WI	Chippewa Internetworking Consortium (CINC)	partial
Wausau	WI	Chippewa Internetworking Consortium (CINC)	partial
Philippi	WV	Philippi Communications System	fiber
Powell	WY	Powell Fiber Optic Network	fiber

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- <sup>8</sup>Mandel, Dr. Michael. 2012. "Where the Jobs Are: The App Economy." February 2.  
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(Mexico), Amsterdam (Netherlands), Bucharest (Romania), Seoul (South Korea), Zurich (Switzerland), and London (UK). Some of these cities are omitted from the data underlying the chart below, as the plans included in NAF's dataset are not all annual contracts.

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<sup>27</sup> The Institute for Local Self-Reliance, data provided to NEC/CEA upon request.

# EXHIBIT 22

**A Light in Digital Darkness: Public Broadband after  
Tennessee v. FCC**

Mikhail Guttentag<sup>1</sup>

20 YALE J. L. & TECH. 311 (2018)

*Ten years ago, the city of Chattanooga, Tennessee built its own high-speed Internet network, and today Chattanooga's publicly owned Internet infrastructure ("public broadband" or "municipal broadband") is faster and more affordable than almost anywhere else in the world. In this Article, I make the case for why other communities currently underserved by private broadband providers should consider building their own high-speed broadband networks and treating Internet as an essential public service akin to water or electricity, and I explore means by which these communities can overcome the legal and political hurdles they may face along the way.*

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<sup>1</sup> J.D., Yale Law School. My deepest thanks for the guidance of professors Alvin Klevorick, David Schleicher, and Gordon Silverstein; for the feedback and encouragement of Olevia Boykin, Ariel Dobkin, Paul Henderson, Lina Khan, and Theodore Rostow; for the editing of the *Yale Journal of Law and Technology*, particularly editors Anderson Christie, Allison Douglass, and Aislinn Klos; and for Mayor Andy Berke of Chattanooga, Tennessee, who warmly answered a law student's cold e-mail and invited him to check out his city. This Article is dedicated to my former students and coworkers at Heights High School in Houston, Texas, who bring light to darkness, digital and otherwise, and inspire this work. All errors are my own.

**INTRODUCTION:  
PUBLIC BROADBAND AND PUBLIC POWER**

*“Failure to provide broadband to rural areas of America is a death sentence for those communities. They cannot compete economically without access to broadband.”*

—United States Senator Angus King  
(I-ME)<sup>2</sup>

*“We see broadband in the 21st century as electricity was in the 20th.”*

—Danna Bailey (Vice President,  
Chattanooga EPB)<sup>3</sup>

Internet can be delivered like other publicly funded services, such as water, electricity, sewers, and roads.<sup>4</sup> To date, Internet provision is left almost entirely to the private sector, leaving many places without affordable or high-speed service. However, there are a growing number of municipalities in the United States who have built their own high-speed Internet networks and offer it like a public utility. More cities should join them.

Many communities currently underserved by Internet providers—rural areas especially—were once underserved by private electricity providers that offered electricity to big cities and wealthy customers but left the rest of the country behind.<sup>5</sup> These communities formed locally owned electric utilities to

<sup>2</sup> Mal Leary, *Angus King, Senators Want Improved Rural Broadband*, ME. PUB. (July 13, 2016), <http://mainepublic.org/post/angus-king-senators-want-improved-rural-broadband> [<http://perma.cc/HHT5-N77K>].

<sup>3</sup> Henry Grabar, *Republicans Are Coming Around to This Public Internet Idea*, SLATE (Sept. 1, 2016, 1:05 PM), [http://www.slate.com/blogs/future\\_tense/2016/09/01/public\\_broadband\\_is\\_a\\_bipartisan\\_issue\\_now.html](http://www.slate.com/blogs/future_tense/2016/09/01/public_broadband_is_a_bipartisan_issue_now.html) [<http://perma.cc/ML84-6XZA>].

<sup>4</sup> See 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, 614 (2013) (“The only unique feature of telecommunications service provision by a government entity as compared to other government-provided services (such as electricity, water, sewers, and roads) is that the telecommunications industry is today predominantly administered by the private sector.” (footnote omitted)).

<sup>5</sup> See D. Stan O’Loughlin, *Preemption or Bust: Fear and Loathing in the Battle over Broadband*, 28 CARDOZO L. REV. 479, 482-83 (2006) (“Beginning in the 1880s, electric power in the United States was provided primarily by large, private electric companies . . . private power companies did not consider rural electrification to be economically feasible and focused their resources on the more profitable urban market, leaving most of the country’s smaller cities and rural areas underserved or totally without access to electricity.” (footnotes omitted)).

Chattanooga, and others, and build their own high-speed broadband networks. I look at how the Supreme Court's 2004 *Missouri Municipal League* decision emboldened ISPs to lobby states to restrict the growth of public broadband, and revisit Justice Stevens' lone dissent, a position which today looks increasingly prescient. The specter of *Missouri Municipal League* haunts efforts to build publicly owned broadband, and in light of the *Tennessee v. FCC* decision, I argue that *Missouri Municipal League* is due for review and reconsideration.

I conclude by arguing that advocates for public broadband should engage on all fronts to lift unnecessary restrictions on the public provision of broadband. Like electricity, broadband has become an essential service, and no community should be left in digital darkness.

### I. THE COSTS OF LIMITING CITIES TO PRIVATE BROADBAND

*“Here in Seattle, we don’t rely on for-profit companies to provide our water or electricity. The Internet shouldn’t be any different.”*

—Upgrade Seattle<sup>32</sup>

Like roads, broadband Internet is essential infrastructure for the modern economy.<sup>33</sup> Without utility-style regulation or public provision in areas where the private market for broadband has failed, communities will continue to fall behind.

Like electricity in the late nineteenth century, the provision of Internet service today largely follows the profit motives of private providers.<sup>34</sup> These profit motives disfavor providing affordable high-speed service to less profitable poor or rural populations when compared to denser, higher-income neighborhoods.<sup>35</sup> Some scholars have argued that these market

<sup>32</sup> See UPGRADE SEATTLE, <http://www.upgradeseattle.com> [<http://perma.cc/YB83-K6UA>].

<sup>33</sup> PENNY PRITZKER & TOM VILSAK, U.S. DEP’T OF AGRIC. & U.S. DEP’T OF COMMERCE, BROADBAND OPPORTUNITY COUNCIL REPORT AND RECOMMENDATIONS 12 (2015), [http://obamawhitehouse.archives.gov/sites/default/files/broadband\\_opportunity\\_council\\_report\\_final.pdf](http://obamawhitehouse.archives.gov/sites/default/files/broadband_opportunity_council_report_final.pdf) [<http://perma.cc/UT6S-HZP3>] (“Broadband has steadily shifted from an optional amenity to a core utility for households, businesses and community institutions. Today, broadband is taking its place alongside water, sewer and electricity as essential infrastructure for communities.”).

<sup>34</sup> See, e.g., Stricker, *supra* note 4, at 620 (“Broadband deployment is analogous to the deployment of electricity in the United States in the early twentieth century. In the 1880s, most electricity in the United States was supplied by large, private companies that did not view extending service to less densely populated areas as profitable or feasible and thus chose to ignore them in favor of urban markets.” (footnote omitted)).

<sup>35</sup> The basic thinking behind this approach is that in most cases, the more

The lack of broadband bears repeating: nearly four in ten Americans living in rural areas, and one in ten Americans overall, currently have no option—at any price—to subscribe to broadband access where they live.<sup>61</sup>

These digital divides—most pronounced among poor and rural communities, tribal areas, and senior citizens—represent a challenge and an opportunity for state and local governments hoping to bring residents and local businesses online to reap the numerous expected educational, economic, and social benefits of broadband access.<sup>62</sup>

Many communities who are still waiting for market competition to deliver universal, affordable broadband access should consider whether that approach has failed. The need for that service is urgent. To bridge these digital divides and deliver affordable, high-speed broadband, those communities should take a closer look at networks in cities like Chattanooga, Tennessee, as well as the nearly one hundred other local governments that provide public broadband.<sup>63</sup>

## II. THE PUBLIC BROADBAND ALTERNATIVE

*“I might call the right of people to own and operate their own utility something like this: a ‘birch rod’ in the cupboard to be taken out and used only when the ‘child’ gets beyond the point where a mere scolding does no good.”*

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<http://www.pressherald.com/2013/01/14/googles-ultra-fast-internet-creates-silicon-prairie/> [<http://perma.cc/Z8XM-Y2PC>] (“The advantage [of high-speed Internet] for startups is simple: A fast Internet pipe makes it easier to handle large files and eliminates buffering problems that plague online video, live conferencing and other network-intensive tasks.”).

<sup>61</sup> FED. COMM’NS COMM’N, *supra* note 13, at 38 tbl.6.

<sup>62</sup> *See, e.g.*, Stricker, *supra* note 4, at 595-96 (“The benefits of high-speed Internet to both ordinary citizens and businesses are numerous and linked directly to broadband’s greater speeds. For individuals, broadband performs critical functions such as assisting people in finding employment and facilitating communication and education in addition to offering great convenience and entertainment value. Broadband also gives businesses the ability to expand their operations globally, find more and better customers and suppliers, streamline operations, advertise more efficiently, and recruit employees. The result is a substantial net benefit to the community, as communities with high-quality broadband networks are more likely to attract and retain businesses, offer greater educational opportunities, provide government services more efficiently, and attract tourists. Speed is key, as slower, non-broadband Internet connections render most of these benefits unobtainable either because of the time required to access the benefits or because the Internet products and services cannot be transmitted to users lacking broadband access.”).

<sup>63</sup> *Community Broadband Networks*, INST. FOR LOC. SELF-RELIANCE (Jan. 2015), <http://ilsr.org/wp-content/uploads/2015/02/cbbmap-fact-sheet.pdf> [<http://perma.cc/E2K8-6QPQ>].

change, and perhaps in a few years a “Dragonslayer” will again head the agency and take up this cause. If she does, she should encourage Congress to clarify the meaning of “any entity” in section 253 to include municipally owned utilities. She could ask Congress for an up-or-down vote on whether or not the statute provides the FCC authority to preempt non-neutral state laws that prohibit local governments from providing broadband. Given the widespread bipartisan public support for the right to offer public broadband, national attention could help.

Even if Congress does not take a vote, a recent federal court ruling upholding Title II reclassification of broadband service suggests growing public recognition of the essential nature of broadband service.<sup>286</sup> For this reason, the FCC may have more success if it again uses section 253 to selectively preempt state laws that unfairly restrict public broadband. If brought to court, the agency could follow a different approach than it did before the Sixth Circuit. Instead of distinguishing *Missouri Municipal League*, the agency should admit it made a mistake when it denied the Missouri Municipals’ preemption petition in 2004. Given broadband’s subsequent concentration into an oligopoly of providers, and a “crazy quilt” where only some cities can offer broadband and others cannot, the FCC should ask the Court to join the agency in reversing the legacies its twenty-year-old decisions have left.

Like electricity, broadband has grown from a luxury to an essential part of public life. Like electricity, citizens should have the right to choose to pool their resources and entrust their local government to provide it. There are many forms of public broadband, and cities should be able to choose the model that best fits their needs.

When Franklin D. Roosevelt campaigned for Americans’ right to own their own electric utilities, he argued that every big public electric project “will be forever a national yardstick to prevent extortion against the public and to encourage the wider use of that servant of the people— electric power.”<sup>287</sup> Publicly funded broadband networks can be the new yardstick to prevent extortion against the public and encourage wider

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<sup>286</sup> See, e.g., Rebecca R. Ruiz & Steve Lohr, *F.C.C. Approves Net Neutrality Rules, Classifying Broadband Internet Service as a Utility*, N.Y. TIMES (Feb. 26, 2015), <http://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-internet-utility.html> [<http://perma.cc/T225-7MYA>] (upholding the FCC’s classification of broadband providers as “common carriers” under Title II); see also WU, *supra* note 162, at 58 (“At the heart of common carriage is the idea that certain businesses are either so intimately connected, even essential, to the public good, or so inherently powerful—imagine the water or electric utilities—that they must be compelled to conduct their affairs in a nondiscriminatory way.”).

<sup>287</sup> Roosevelt, *supra* note 7.

Internet use.

So far, public broadband networks have shown that they can deliver high-speed broadband at affordable rates. In areas where a broadband market failed to materialize, it may be time for communities to realize that Roosevelt's "birch rod"<sup>288</sup> is a better solution than waiting for the private market to improve on its own.

Public power did not come easy. Public broadband will not come easy, either. But as the number of successful public networks grows, combined with widespread bipartisan public support for these efforts, public broadband advocates have plenty of reasons to see a bright future ahead.

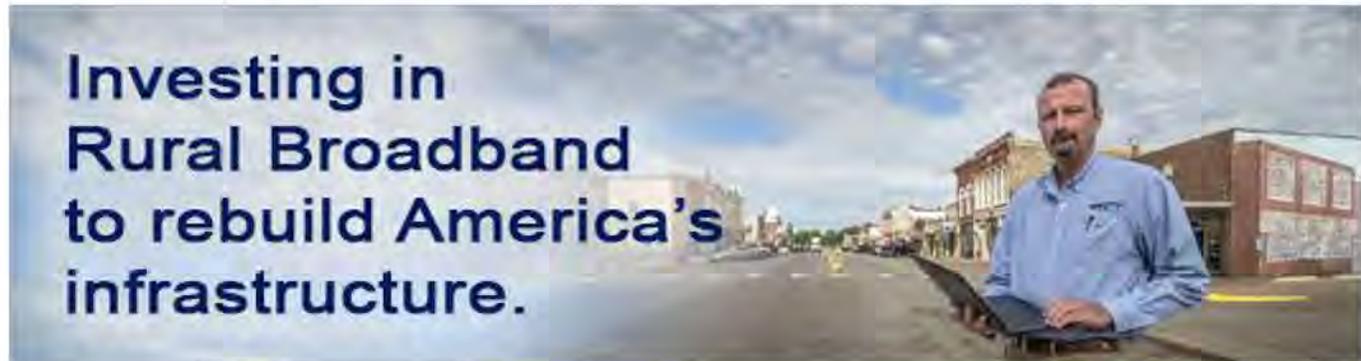
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<sup>288</sup> *Id.*

# EXHIBIT 23



## Telecom Programs



**Announcement** : For information about the broadband pilot program (ReConnect Program) authorized in the Consolidated Appropriations Act, 2018 please log into : <https://reconnect.usda.gov>

USDA is investing in Rural Broadband to rebuild America's infrastructure. [Read more.](#)

Access to broadband has become essential for the social and economic benefits it provides to American residents, businesses, governments and communities. Broadband is crucial for increased health, educational and economic opportunities, as well as for job and business creation and growth. Broadband can help close the digital divide between rural and urban communities.

USDA Rural Development's Rural Utilities Programs provide a variety of loans and grants to build and expand broadband networks. Loans to build broadband networks and deliver service to rural households and businesses, provide capital for rural telecommunications companies and broadband providers. Grants are reserved for communities with the highest need.

### **Telecommunications Loan and Grant Programs offered are:**

1. Community Connect Grants
2. Distance Learning and Telemedicine Grants
3. Rural Broadband Access Loan and Loan Guarantee
4. Telecommunications Infrastructure Loans and Guarantees

Eligible applicants include for-profit and non-profit entities, tribes, municipalities and cooperatives. USDA particularly encourages investments in tribal and economically disadvantaged areas.

Once funds are awarded, Rural Development monitors the projects to make sure they are completed, meet all program requirements and are making efficient use of Federal resources.

Each program has different applicant and project eligibility requirements and program objectives.

**Contact:** [Chad Parker](#), Assistant Administrator, Telecom Program, at (202) 720-9556

**Announcement** : [OPEN LETTER FROM THE ASSISTANT ADMINISTRATOR](#) regarding reorganizations of Awardee's companies for the Broadband Initiatives Program ("BIP") Awardees ("Awardees").

### **Functional Structure is focused on Customer Service**

The RUS Telecom Program is comprised of three divisions: the [Loan Origination and Approval Division \(LOAD\)](#), [Portfolio Management and Risk Assessment Division \(PMRAD\)](#), and the [Policy and Outreach Division \(POD\)](#).

### **Where a Loan or Grant Application Starts, is Completed and Submitted**

# EXHIBIT 24

**2SSB 5511** - H COMM AMD

By Committee on Capital Budget

**ADOPTED 04/16/2019**

1 Strike everything after the enacting clause and insert the  
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature finds that:

4 (1) Access to broadband is critical to full participation in  
5 society and the modern economy;

6 (2) Increasing broadband access to unserved areas of the state  
7 serves a fundamental governmental purpose and function and provides a  
8 public benefit to the citizens of Washington by enabling access to  
9 health care, education, and essential services, providing economic  
10 opportunities, and enhancing public health and safety;

11 (3) Achieving affordable and quality broadband access for all  
12 Washingtonians will require additional and sustained investment,  
13 research, local and community participation, and partnerships between  
14 private, public, and nonprofit entities;

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

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

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

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

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

31 (5) Extensive investments have been made by the  
32 telecommunications industry and the public sector, as well as

1 policies and programs adopted to provide affordable broadband  
2 services throughout the state, that will provide a foundation to  
3 build a comprehensive statewide framework for additional actions  
4 needed to advance the state's broadband goals; and

5 (6) Providing additional funding mechanisms to increase broadband  
6 access in unserved areas is in the best interest of the state. To  
7 that end, this act establishes a grant and loan program that will  
8 support the extension of broadband infrastructure to unserved areas.  
9 To ensure this program primarily serves the public interest, the  
10 legislature intends that any grant or loan provided to a private  
11 entity under this program must be conditioned on a guarantee that the  
12 asset or infrastructure to be developed will be maintained for public  
13 use for a period of at least fifteen years.

14 NEW SECTION. **Sec. 2.** A new section is added to chapter 43.330  
15 RCW to read as follows:

16 The definitions in this section apply throughout this section and  
17 sections 3 through 6 of this act unless the context clearly requires  
18 otherwise.

19 (1) "Board" means the public works board established in RCW  
20 43.155.030.

21 (2) "Broadband" or "broadband service" means any service  
22 providing advanced telecommunications capability and internet access  
23 with transmission speeds that, at a minimum, provide twenty-five  
24 megabits per second download and three megabits per second upload.

25 (3) "Broadband infrastructure" means networks of deployed  
26 telecommunications equipment and technologies necessary to provide  
27 high-speed internet access and other advanced telecommunications  
28 services to end users.

29 (4) "Department" means the department of commerce.

30 (5) "Last mile infrastructure" means broadband infrastructure  
31 that serves as the final connection from a broadband service  
32 provider's network to the end-use customer's on-premises  
33 telecommunications equipment.

34 (6) "Local government" includes cities, towns, counties,  
35 municipal corporations, public port districts, public utility  
36 districts, quasi-municipal corporations, special purpose districts,  
37 and multiparty entities comprised of public entity members.

1 (7) "Middle mile infrastructure" means broadband infrastructure  
2 that links a broadband service provider's core network infrastructure  
3 to last mile infrastructure.

4 (8) "Office" means the governor's statewide broadband office  
5 established in section 3 of this act.

6 (9) "Tribe" means any federally recognized Indian tribe whose  
7 traditional lands and territories included parts of Washington.

8 (10) "Unserved areas" means areas of Washington in which  
9 households and businesses lack access to broadband service, as  
10 defined by the office, except that the state's definition for  
11 broadband service may not be actual speeds less than twenty-five  
12 megabits per second download and three megabits per second upload.

13 NEW SECTION. **Sec. 3.** A new section is added to chapter 43.330  
14 RCW to read as follows:

15 (1) The governor's statewide broadband office is established. The  
16 director of the office must be appointed by the governor. The office  
17 may employ staff necessary to carry out the office's duties as  
18 prescribed by this act, subject to the availability of amounts  
19 appropriated for this specific purpose.

20 (2) The purpose of the office is to encourage, foster, develop,  
21 and improve affordable, quality broadband within the state in order  
22 to:

23 (a) Drive job creation, promote innovation, improve economic  
24 vitality, and expand markets for Washington businesses;

25 (b) Serve the ongoing and growing needs of Washington's education  
26 systems, health care systems, public safety systems, industries and  
27 business, governmental operations, and citizens; and

28 (c) Improve broadband accessibility for unserved communities and  
29 populations.

30 NEW SECTION. **Sec. 4.** A new section is added to chapter 43.330  
31 RCW to read as follows:

32 (1) The office has the power and duty to:

33 (a) Serve as the central broadband planning body for the state of  
34 Washington;

35 (b) Coordinate with local governments, tribes, public and private  
36 entities, nonprofit organizations, and consumer-owned and investor-  
37 owned utilities to develop strategies and plans promoting deployment

# EXHIBIT 25

## A. Overview

Unless otherwise authorized or prohibited by state law and the City's Purchasing Code, the following standards and procedures apply to the disposition of surplus personal property owned by the City.

Surplus personal property with commercial value will be disposed of in an efficient manner that achieves the highest resale proceeds for the City of Tacoma. Surplus property with little or no commercial value or when disposal and sales efforts are judged more costly than estimated net proceeds, may be transferred in the order as stipulated in TMC 1.06.278, and eventually disposed of through salvage contracts or other efficient means if not so transferred. Items that are broken, unusable, and have no commercial, salvage or donation value may be declared as "trash" and efficiently disposed of as such. Regulatory or special disposal requirements shall be followed when applicable (e.g., hazard metals, cathode ray tubes). The dollar values referenced in this policy are the estimated current commercial or resale value of the property at the time the property is declared surplus, *not* the original acquisition value, as determined by the owning department/division and/or as determined by a knowledgeable third party hired by the owning department/division.

## B. Highlights

1. In addition to City website postings for disposal of surplus personal property, advertising, promotional and resale assistance through a third party contracted by the City may also be appropriate.
2. Traditional surplus disposal procedures are inefficient and costly to the City for items that are broken, unusable, and have no commercial salvage or donation value. Departments may declare and dispose of such items themselves as trash.
3. City employees are permitted in limited situations to participate in the surplus property program.
4. This policy does **not** apply to surplus real property, that is, real estate transactions.

## C. General Requirements

1. Declaration of Surplus Property (DSP) Form. This form can be found on the Purchasing website. The DSP form is used for declaring surplus property and must be completed for **all** disposal situations, including real property and "trash" items. Except for "trash" items, the form must be submitted to Purchasing prior to **initiating** the surplus property disposal process. For "trash" disposals, the form need not be submitted to the Purchasing Division, but is maintained by the owning department for accountability purposes for a period of two years after the disposal of "trash" items.
2. For personal property with estimated values over \$200,000, follow the sealed solicitation procedures for requests for bids outlined in Section XV. of the Purchasing Policy Manual unless a negotiated disposition process has been authorized per TMC 1.06.273 A. See subsection C. 19. below for additional guidance applicable to disposition of utility specific surplus personal property owned by TPU.

3. Surplus personal property with an estimated value between \$25,001 and \$200,000 shall follow the informal solicitation procedures for requests for bids outlined in Section XII. of the Purchasing Policy Manual. However, some items may be appropriate for on-line auctioning due to general public appeal, collector value and/or broader exposure of unique items for sale. Such requests may be approved by the Procurement and Payables Division manager on a case-by-case basis when on-line auctioning is anticipated to be more successful.
4. Surplus personal property with estimated values between \$1,001 and \$25,000 will be posted to the City website for a minimum of 10 business days, supplemented by posting announcements to the Association of Washington Cities surplus property website. Departments/divisions may post and distribute notices to their own mailing list or potential interested parties. In lieu of the above, the department/division may request on-line auctioning approval from Purchasing.
5. Surplus personal property with estimated values between \$250 and \$1,000 will be posted to the City website. After 10 business days, items not sold will be disposed of through salvage contracts or transferred in the order specified in TMC 1.06.278. If desired by the owning department/division, on-line auctioning may be requested. However, on-line auctioning approval from Purchasing for lower valued items may not be granted if special requirements render the process not cost-effective. For example, if special disclaimer or legal language (other than the standard) must be researched and incorporated with the posting, or if special posting, bidding or payment arrangements are needed that require the standard City set-up with the on-line auction company to be modified. These situations are not cost-effective for an item with estimated value of \$350, but may be for items valued at \$750.
6. Surplus personal property with estimated values less than \$250 may be transferred or disposed of in the order specified in TMC 1.06.278, on a first come-first requested basis. Items will be posted to the City website and items will become available to the next eligible group after a set period (5 business days unless otherwise specified) expires. Items valued less than \$199 may also be sold/transferred through "[2good2toss.com](http://2good2toss.com)", a waste reduction/recycling exchange website sponsored by the State Department of Ecology and other governmental entities including the City of Tacoma.
7. "Trash" Items. Surplus property that is broken, unusable, or has no commercial, salvage or donation value and no special disposal requirements (e.g., hazardous metals), may be declared as "trash" by the owning department/division by completing a Declaration of Surplus Property (DSP) form and disposing of the items themselves, using whatever method that is efficient (garbage, landfill, etc.). Purchasing does not need to be involved and these "trash" items are not handled through normal surplus procedures. Purchasing will pursue citywide contracts with salvage and junk dealers to aid in timely and environmentally proper disposal where practicable. **Please note that cathode ray tubes (CRTs) are banned from disposal as garbage by state regulations.** CRT containing devices include computer monitors, televisions or other items that contain a picture tube.

# EXHIBIT 25 (a)

## Practice Tips

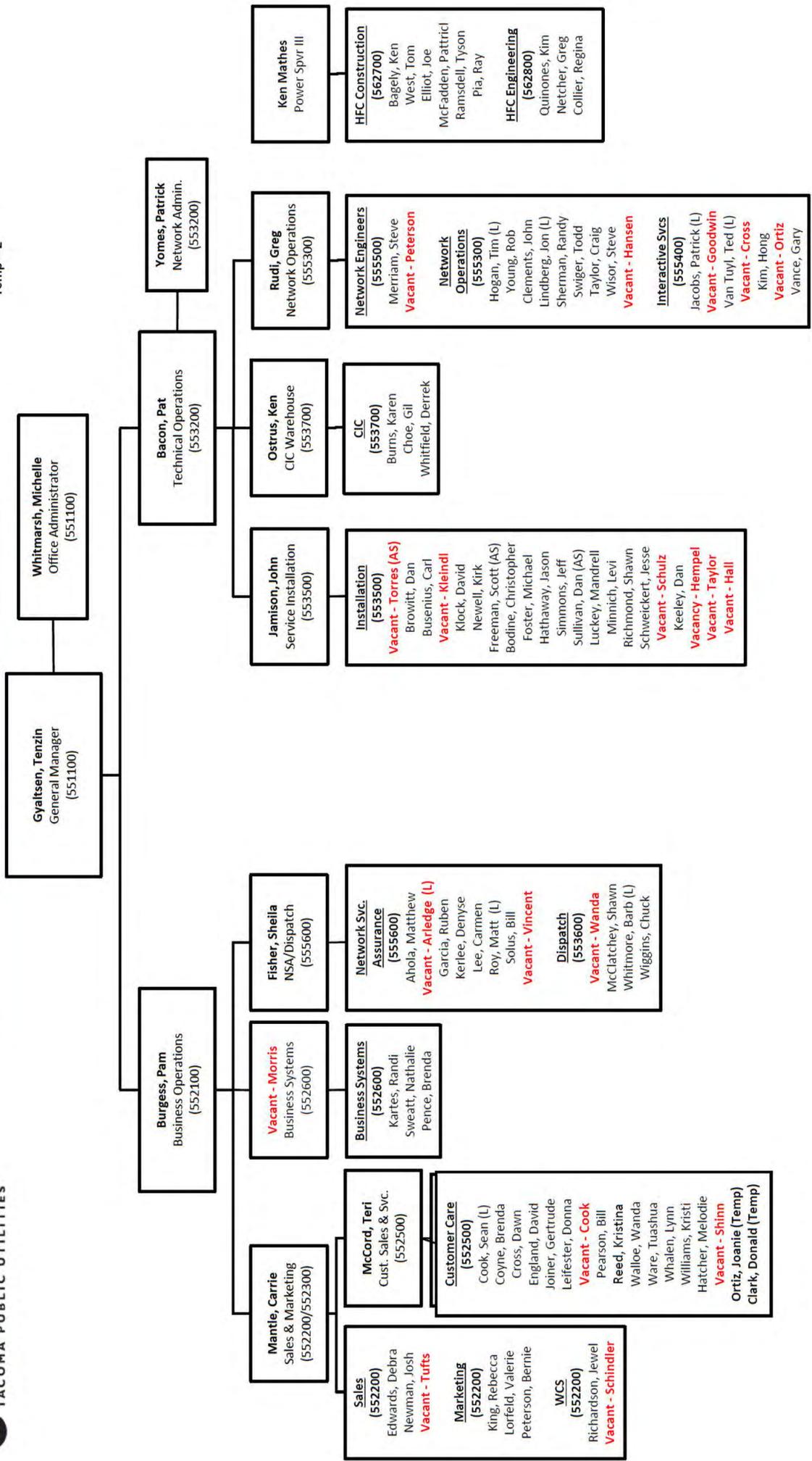
- **Prior to sale, always determine the fair market value of the item to be sold.** If you sell it for less, you may be violating the "gift clause," in Article VIII, Sec. 7 of the State Constitution, which states that "No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation." But see [RCW 39.33.010](#) mentioned in the list of statutes above.
- **Hold a public hearing**, if required by [RCW 39.33.020](#) or [RCW 35.94.040](#). [AGO 1997 No. 5](#) concludes that the public hearing requirement in [RCW 39.33.020](#) only applies to intergovernmental transfers of property.
- **Pass a resolution** declaring the property to be surplus, and specifying how the property is to be sold, or delegating that task to a particular administrative official.
- **Proceed with sale as required by the town or city council, or in any commercially reasonable way.** Sale can be by auction, private sale, sealed bid, through a broker or agent, etc.
- **City officials and certain administrative officers may be restricted from purchasing surplus property due to conflict of interest concerns.** The general rule is that those who are involved in the decision to surplus property (the council) and those in charge of administering the sale (mayor, city manager, or other city officer responsible for the sale) should not purchase the property. General city employees can purchase surplus city property.
- **Consider adopting policies concerning sale of city property.** For examples, see the [Policies](#) section below.

# EXHIBIT 26

## Click! Organization Chart

Effective: 03/13/2018

Click! Budgeted FTEs = 92  
 T&D HFC Budgeted FTEs = 10  
 Total Budgeted FTEs = 102  
 Vacancies = 19  
 Active FTEs = 83  
 Temp = 2



# EXHIBIT 27



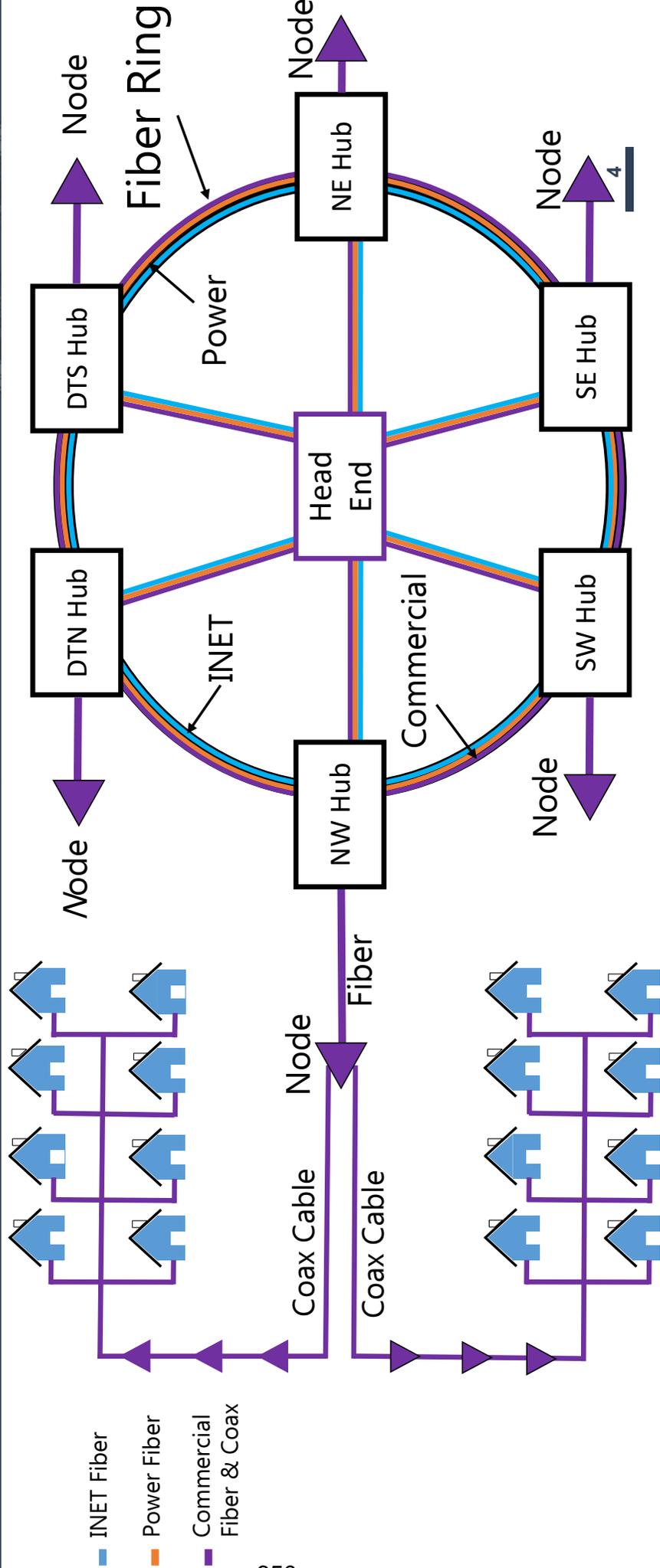
# Click! Surplus Declaration

Tacoma Public Utility Board

Public Hearing  
October 23, 2019  
Item No. One



# The Network Layout



**Surplus declaration of the Commercial Network (purple) only.**

# Network Ownership & Operators (Current)

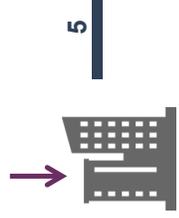
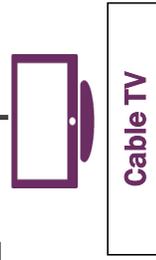
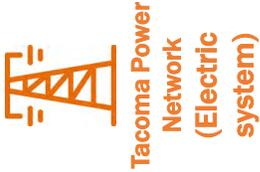
Tacoma Public Utilities

Tacoma Power - Network Owner

City of Tacoma - Operator

Tacoma Power - Operator

Click! Network - Operator

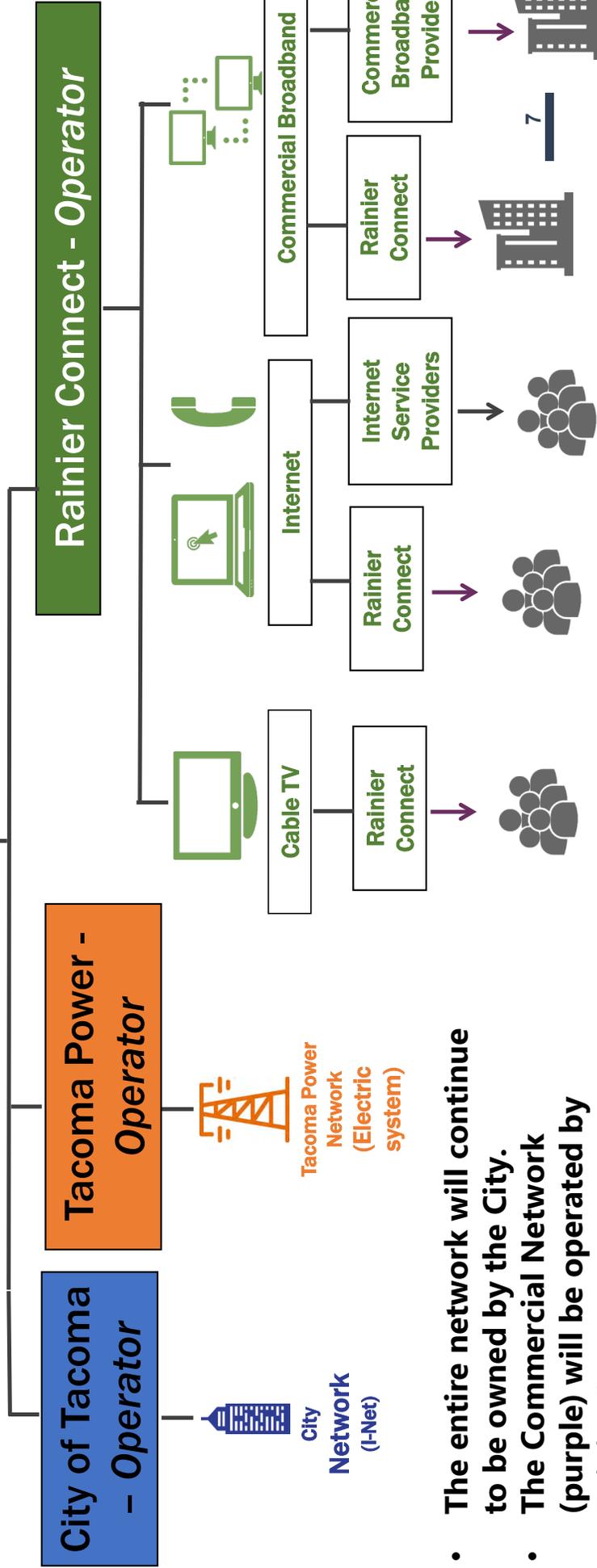


- The entire network will continue to be owned by the City.
- The Commercial Network (purple) will be operated by Rainier Connect.

# Network Ownership & Operators (Future)

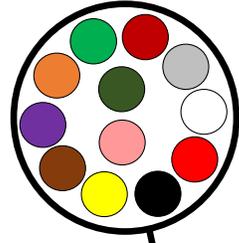
Tacoma Public Utilities

Tacoma Power - Network Owner

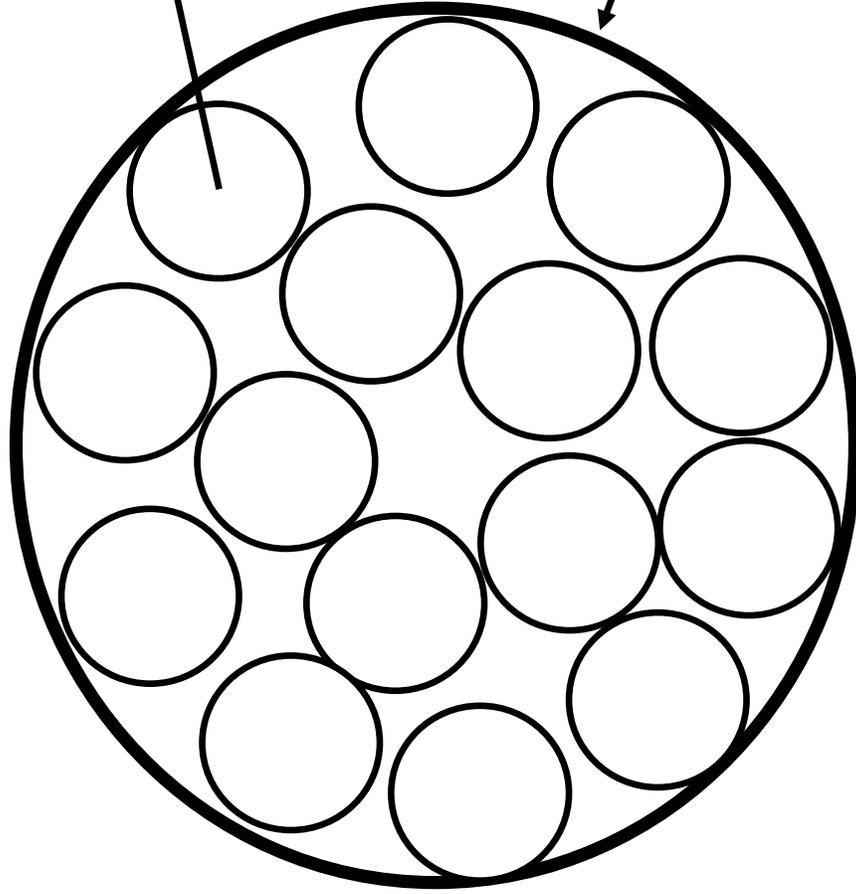


- The entire network will continue to be owned by the City.
- The Commercial Network (purple) will be operated by Rainier Connect.

# 180 Count Backbone Fiber (Current)

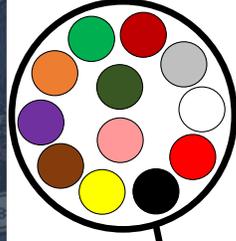
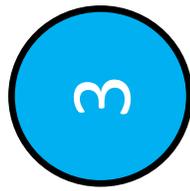


12 Fibers

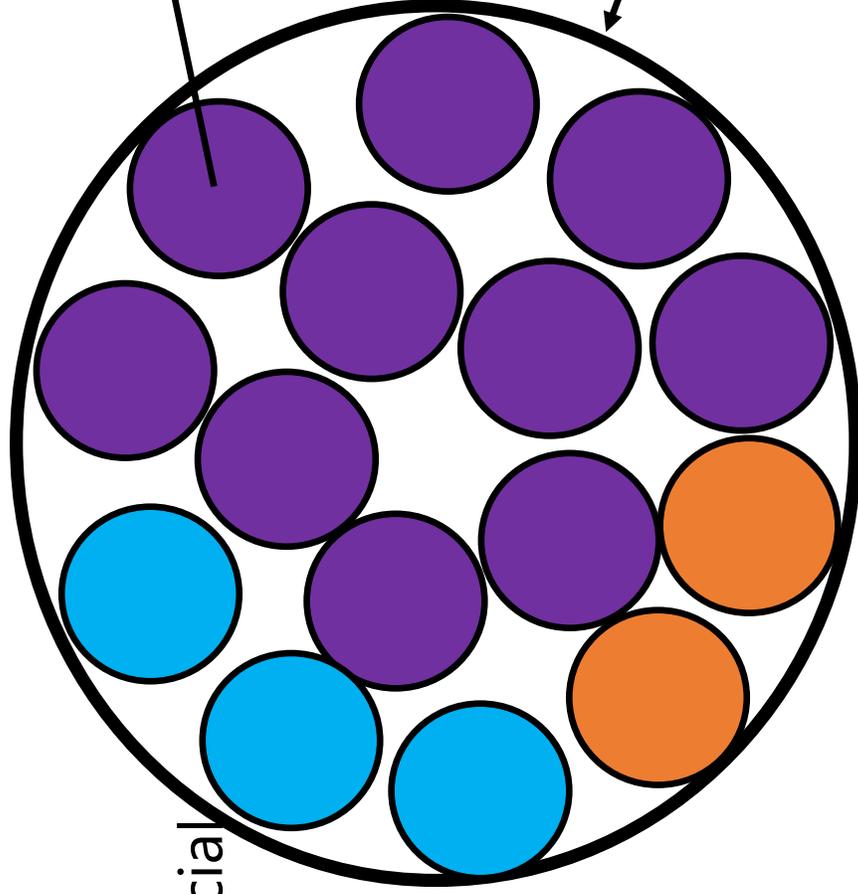


15 Tubes

# 180 Count Backbone Fiber (Current)



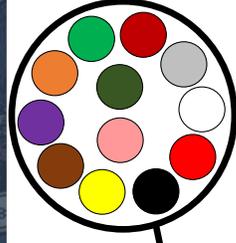
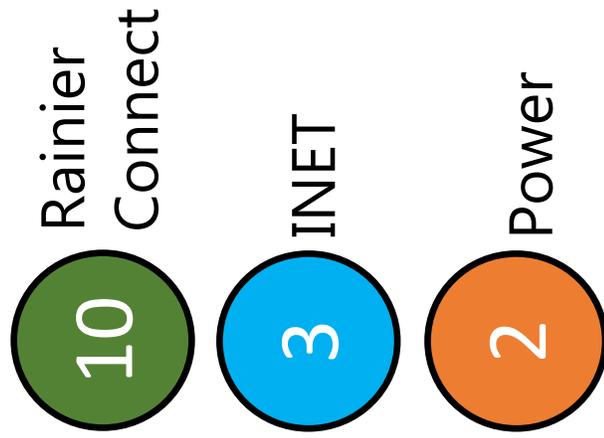
12 Fibers



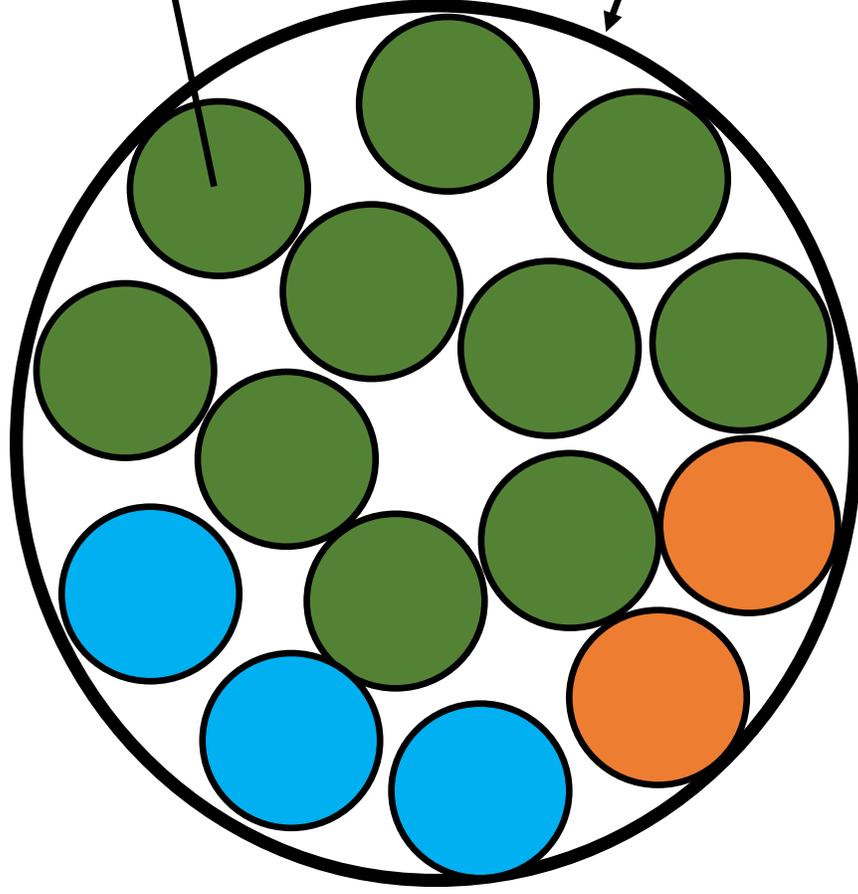
15 Tubes

**Surplus declaration of the Commercial Network (purple) only.**

# 180 Count Backbone Fiber (Future)



12 Fibers



15 Tubes

**Surplus declaration of the Commercial Network (purple) only.**

# Surplus Declaration



## THE SURPLUS PROPERTY DECLARATION

# Surplused Assets



## What assets of Tacoma Power will be declared surplus?

- Inventory, equipment and vehicles used by [Click!](#) that will be conveyed to Rainier Connect
- Excess Capacity of the HFC Network

# Proposed Disposal



## What methods of disposal are proposed in the contract documents?

- Inventory, equipment and vehicles: Title is proposed to be conveyed to Rainier Connect in consideration for contract obligations and value assigned to certain property.
- Excess Capacity of HFC Network: Operational rights proposed to be transferred pursuant to the terms of the indefeasible right of use agreement for a term of 20 years with two additional 10 year extensions.
- Ownership: City will retain ownership of the Excess Capacity

# EXHIBIT 28

AGO 2003 No. 11.

**Washington Attorney General Opinions**

**2003.**

**AGO 2003 No. 11.**

December 15, 2003

COUNTIES --- CITIES AND TOWNS - TELECOMMUNICATIONS --- Authority of cities, towns, and counties to provide telecommunications services.

Those counties and cities that have "home rule" powers (that is, charter counties, first class cities, and cities operating under the Optional Municipal Code) have authority to provide telecommunications services to their residents; other cities, towns, and counties lack this authority.

The Honorable Jeff Morris  
State Representative, 40th District  
P.O. Box 40600  
Olympia, WA 98504-0600

Cite As: AGO 2003 No. 11

Dear Representative Morris,

By letter previously acknowledged, you have requested an opinion on the following paraphrased question:

Do cities, towns, and counties have the authority to provide telecommunications services to their residents?

Specifically, you ask for a review and an update to AGO 53-55 No. 273, which concluded that a city was not authorized to own or operate a telephone system.(fn1)

**BRIEF ANSWER**

The answer to your question depends on the extent to which a municipal government may exercise "home rule" powers. First-class and code cities and charter counties may offer telecommunications services to their residents to the extent not specifically barred by state statute. These municipalities, often described as having "home rule" powers, do not need express or implied statutory authority to enact local legislation. Other classes of cities, towns, and counties are limited to those powers granted by statute, and since there is no statute providing authority to provide telecommunications services, they lack statutory authority to provide telecommunications services to the public. We overrule AGO 1953-55 No. 273 to the extent it is inconsistent with this opinion.

**ANALYSIS**

**A. Definition Of "Telecommunications"**

In your question, you ask whether municipalities (specifically to cities, towns, and counties) are authorized to be in the telecommunications business. To answer your question, we first must address the meaning of "telecommunications."

For purposes of regulating telecommunications companies, state law broadly defines "telecommunications" as:

[T]he transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. As used in this definition, "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.

RCW 80.04.010 (defining "telecommunications" for purposes of laws regulating telecommunications companies).(fn2) For ease of reference, we will adopt this definition of the term.

#### B. General Rules Regarding The Authority Of Cities, Towns, And Counties

As a preliminary matter, there are several classifications of cities, towns, and counties under Washington law. There are first class cities, second class cities, code cities, unclassified cities, and towns. The classification of cities stems from the Washington Constitution, which provides, in relevant part:

Any city containing a population of ten thousand inhabitants, or more, shall be permitted to frame a charter for its own government, consistent with and subject to the Constitution and laws of this state[.]

Const. art XI, § 10. First class cities are those that have adopted a charter pursuant to this provision. RCW 35.01.010. Second-class cities and towns do not have their own charters but are governed by a statutory scheme set forth primarily in RCW Title 35.(fn3) Unclassified cities include those created by special charter prior to adoption of the state constitution (RCW 35.30.010) and statutory enactments supplement the powers they derive from their territorial charters. Finally, "code cities" are those which were incorporated, or have re-incorporated, under an Optional Municipal Code originally enacted in 1967. Laws of 1967, Ex. Sess., ch. 119, codified as RCW Title 35A.

Counties also vary as to the extent of their local legislative powers. The Washington Constitution allows any county to "frame a 'Home Rule' charter" for its own government subject to the Constitution and laws of this state". Const. art. XI, § 4.(fn4) Those counties that have not adopted charters are governed by a statutory framework which is primarily codified in RCW Title 36.

With respect to all municipal corporations, the general rule is that they are limited to those powers expressly granted by statute, those powers necessarily or fairly implied in or incident to powers expressly granted, and those powers essential to the declared purposes and objects of the corporation. *Port of Seattle v. Wash. Utils. & Transp. Comm'n*, 92 Wn.2d 789, 794-95, 597 P.2d 383 (1979). "If there is a doubt as to whether the power is granted, it must be denied." *Id.* at 795 (citations omitted).

However, this general rule does not apply to cities and counties that have adopted charters pursuant to the Washington Constitution (Const. art. XI, §§ 4, 10) or to cities operating under the optional municipal code ("code cities"). RCW 35A.11.020.(fn5) These cities and counties (first class cities, code cities, and charter counties) have legislative powers analogous to those of the state, except they cannot contravene any constitutional provision or state statute. *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 622, 328 P.2d 873 (1958). These municipalities, often described as having "home rule" powers, do not need express or implied statutory authority to enact local

legislation.

Despite their broad powers, the Washington Supreme Court has held that first class and code cities are not exempt from legislative control:

[A]t least when the interest of the State is paramount to or joint with that of the municipal corporation, the municipal corporation has no power to act absent a delegation from the legislature.

*Massie v. Brown*, 84 Wn.2d 490, 492, 527 P.2d 476 (1974) (citations omitted). In addition, a first class or code city's authority is preempted when the Legislature adopts a law concerning a particular interest, unless the Legislature has left room for concurrent jurisdiction. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 560, 29 P.3d 709 (2001). A city ordinance will be invalid (1) if a general statute preempts city regulation of the subject or (2) if the ordinance directly conflicts with a statute. *Id.* at 561.

The scope of a municipal corporation's powers also may depend on whether the powers are governmental or proprietary. *Hite v. Pub. Util. Dist. 2*, 112 Wn.2d 456, 459, 772 P.2d 481 (1989). Proprietary powers are more broadly defined than governmental powers. Where a municipal corporation is authorized to conduct a business, it may exercise its business functions in much the same way as a

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entity. *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 694, 743 P.2d 793 (1987). The provision of a product or service to the public--such as water, electricity, natural gas, or telecommunications--is a proprietary, rather than a governmental, function of a city or county. *Id.* at 694.

### **C. Authority Of "Home Rule" Cities And Counties To Provide Telecommunications Services**

As stated above, "home rule" cities and counties have broad, though not unlimited, legislative powers. The Washington Constitution states that providers of telephone services are common carriers subject to control by the Legislature. Const. art. XII, § 19. Telecommunications businesses are public utilities and are regulated by the state to varying degrees. RCW 80.01.040(3). Thus, the state has enacted statutes regulating telecommunications services. However, these statutes neither expressly permit nor expressly prohibit cities and counties from providing such services. The Legislature has authorized cities and towns to provide certain utilities such as electricity, gas, water, sewerage, and solid waste services. See RCW 35.92.010 (any city or town may provide water to end users); 35.92.020 (city or town authorized to provide sewerage and solid waste services to end users); 35.92.050 (city or town authorized to provide electricity and gas to end users); RCW 35A.80.010 (code city may provide utility service to extent authorized by general laws). Counties are authorized to provide a number of services to their residents, including transportation (RCW 36.57 and 36.57A), solid waste disposal (RCW 36.58), hospitals (RCW 36.62), and water-sewerage-drainage systems (RCW 36.94).

Neither cities, towns, nor counties are specifically authorized to provide telecommunications services. The question also arises whether the list of permitted utilities set forth in statute is exclusive, creating the inference that the Legislature did not intend for cities or counties to provide

any services beyond those authorized by various statutes.

This point was considered in *City of Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 611 P.2d 741 (1980), in which Issaquah, a city operating under the Optional Municipal Code, had established and operated a cable television system serving the city's residents, taking over franchises previously held by a

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cable company. The cable company challenged the city's acts, and the state supreme court upheld the city. The court found that providing cable television service was of appropriate local concern to be the subject of city legislation, and that the state had not preempted the field by declaring it a paramount state concern. *Id.* at 572-575.(fn6) The court also rejected several other statutory and constitutional objections. *Issaquah* establishes that "home rule" cities and counties do not need express statutory authority to exercise their legislative authority.

As to "home rule" governments, then, the question is whether the state has enacted a "general law" that supersedes or controls the exercise of legislative authority. None of the Legislature's enactments purport to prohibit cities or counties from providing telecommunications services, and none are so sweeping and comprehensive as to leave no room for local legislation. We note also that courts in two other jurisdictions have upheld the authority of "home rule" local governments to provide telecommunications services. *GTE Northwest, Inc. v. Oregon Pub. Util. Comm'n*, 179 Ore. App. 46, 39 P.3d 201(2002); *In re Application of Lincoln Elec. Sys.*, 655 N.W.2d 363 (2003). The Oregon case involved a county with "home rule" powers, and the Nebraska case involved a charter city with "home rule powers."(fn7) Therefore, we conclude that "home rule" cities and counties may provide telecommunications services except as may be limited by specific statutory language governing particular services.

In AGO 1953-55 No. 273, we concluded that first class cities lacked authority to provide telephone service to their residents. Although the opinion specifically noted that first class cities were under discussion, it included no analysis of the effect of first class "home rule" powers on the question. To the extent that AGO 1953-55 No. 273 is inconsistent with this opinion, we overrule it.

#### **D. Authority Of Second Class Cities, Towns, And Non-Charter Counties To Provide Telecommunications Service**

As noted above, the Legislature has not expressly authorized such entities to engage in such business, nor is the provision of telecommunications necessarily implied or incident to the provision of authorized services. In addition, the authority of second class cities and towns is more limited than the authority of first class and code cities. Like most municipal corporations (and unlike the home-rule governments discussed above), second-class cities, towns, and non-charter counties cannot exercise powers except those expressly granted by the Legislature or those necessarily implied from granted powers. *See, e.g., Sundquist Homes, Inc. v. Snohomish Cy. Pub. Util. Dist. 1*, 140 Wn.2d 403, 997 P.2d 915 (2000); *Town of Othello v. Harder*, 46 Wn.2d 747, 284 P.2d 1099 (1955). Therefore, in the absence of any express legislation authorizing these categories of municipal corporations to provide telecommunications services, we conclude that they may not lawfully do so.(fn8)

We trust that the foregoing will prove useful to you.

Sincerely,  
SHANNON E. SMITH  
Assistant Attorney General

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Footnotes:

1. Your original question was whether municipalities had authority to "be in the telecommunications business." This is a very broad term, and it potentially covered many unlikely possibilities. From the context of your letter and from general knowledge about proposals municipalities have considered, we limit our analysis to cities or counties seeking to provide telecommunications services to the general public rather than other forms of "telecommunications business."
2. This definition also applies to those statutes authorizing public utility districts and port districts to construct and operate telecommunications facilities for wholesale. RCW 53.08.005(2); 54.16.005(2). Port districts and public utility districts are authorized to construct and operate telecommunications facilities for their own use and for wholesale. RCW 53.08.370; 54.16.330. In granting this authority, the Legislature expressly provided that neither port districts nor public utility districts may provide telecommunications services to end users. *Id.*
3. RCW 35.23 contains provisions applying specifically to second-class cities, and RCW 35.27 contains provisions applying to towns.
4. A county and one or more cities may also form a combined city-county government (with "home rule" powers) through a constitutional charter process. Const. art. XI, § 16. However, as of this date, no city-county governments have been created under this provision.
5. Code cities with a population of 10,000 or more may adopt a charter, but they are not required to do so. RCW 35A.01.030.
6. The plaintiff in the *Issaquah* case argued that "home rule" cities could not operate any utilities beyond those listed in statute. *Issaquah*, 93 Wn.2d at 574. The *Issaquah* court found that the cable television system was not a utility (based on the representations of the parties before the court) and thus did not reach the question whether a city could operate a utility other than those specifically authorized by statute. *Id.* at 574-575. The court's decision did not appear to turn on this point, however. We conclude that the analysis is the same whether the provision of a particular telecommunications service is a utility or not.
7. The Nebraska court also found that a federal statute independently provides a basis for a municipality to provide telecommunications service and that this law preempts any contrary state law. Courts and other tribunals have differed on whether the federal statute barring states from prohibiting "any entity" to provide telecommunications services preempts state laws that preclude municipalities from providing such services. See, e.g., *City of Abilene, Texas v. F.C.C.*, 164 F.3d 49 (D.C. Cir. 1999); *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999); *City of Bristol v. Earley*, 145 F. Supp.2d 741 (W.D. Va. 2001). Whether "any entity" includes municipalities is thus not a settled question and will not be addressed here. Certiorari has been granted by the United States Supreme Court on this issue in *Nixon v. F.C.C.*, U. S. Supreme Court Docket No.

02-1386.

8. Of course, the Legislature is free to expand or limit the powers of cities, towns, and counties in the area, should it choose to do so. For reasons discussed in the main text, any limitations on the powers of "home rule" municipalities would need to be spelled out in statute. As to "non home rule" governments, new statutory language would be needed to authorize and define the services such governments would be allowed to provide.

December 12 2019 4:15 PM

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

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

BOWMAN

Plaintiff,

V

City of Tacoma,

Defendant.

MITCHELL SHOOK,

Plaintiff,

v.

CITY OF TACOMA,

Defendant.

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

**DECLARATION OF  
MITCHELL SHOOK**

I, Mitchell Shook, declare as follows: I am a resident of Tacoma, ratepayer of Tacoma Public Utilities, taxpayer to City of Tacoma, and customer of Click!, the municipal broadband telecommunications system operated by Tacoma Public Utilities. I am an expert in matters related to Click! Network and the ISP industry, having over 20 years of experience working with Click!

1 and other open access systems, in my role as Founder and CEO of Advanced Stream, an Internet  
2 Service Provider that operates on Click! Network. I am over the age of eighteen, competent to  
3 testify in this matter, and make this declaration on my own personal knowledge.  
4

5 1 It is my experience that municipalities, when disposing of property acquired for utility  
6 purposes, to avoid the mandatory “vote” requirement under RCW 35.94.040 follow a process in  
7 Washington state that involves a bidding stage, which follows a surplus declaration and public  
8 hearing. In my experience, such surplus resolutions generally involves things that are no longer  
9 useful, like old trucks, computers, desks, file cabinets, weed-whackers, copy machines etc.

10 For example, the City of Duvall recently disposed of “Property originally purchased for  
11 utility purposes.” The notice of public hearing cites RCW 35.94.040.

12 Notice is hereby given that the City Council of the City of Duvall, Washington  
13 will hold Public Hearing at the Riverview Educational Service Center, 15510  
14 1st Ave NE, Duvall, WA. at 7:00 p.m. or as soon as possible thereafter on  
15 October 1, 2019 regarding:

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

19 It is proposed that all items be disposed of to the general public by means of  
20 direct sales, sealed bid, trade-in, or auction, as determined to be in the best  
21 interests of the City by the Public Works Director and to the highest,  
22 responsible bidder.

23 I participated in that bidding process and found Duvall’s staff to be professional and courteous.  
24 Their actions represented the best practices for disposal of surplus utility property. I was successful  
25 with my winning bid for the hay rake! See my previous declaration in this case, under Shook Decl.  
26 10/29/19 Ex. 19.

1.

2. Attached hereto as **Exhibit 30** and incorporated herein by this reference is a true and  
correct copy of the City’s April 14, 1997 Memorandum in the case approving establishment Click!.

3. Attached hereto as **Exhibit 31** and incorporated herein by this reference is a true and  
correct copies of Click fiber plant slides, showing fiber, and tubes from City slide presentation. And

1 plant totals Total Mileage, PLANT TOTALS from July 2014, as provided to me by the City.

2 4. Attached hereto as **Exhibit 32** and incorporated herein by this reference is a true and  
3 correct copy of a City of Tacoma Resolution confirming knowledge of Charter 4.6 requirements for  
4 a vote of the people, under “Whereas.”

5 5. Attached hereto as **Exhibit 33** and incorporated herein by this reference is a true and  
6 correct copy of letters and legislative for RCW 35.94.040, with the 1972 legislative bill files for SB  
7 2835, including letters from City of Tacoma in support, as provided to me by the Washington State  
8 Archives.

9 6. Attached hereto as **Exhibit 34** and incorporated herein by this reference is a true and  
10 correct copy of the Resolution establishing the Net Neutrality Policy of Tacoma City Council and  
11 the status report for the Open Internet Act, which has passed the House of Congress.

12 7. Attached hereto as **Exhibit 35** and incorporated herein by this reference is a true and  
13 correct copy of Pages from USDA Broadband Opportunity Council 2015 Report.

14 8. Attached hereto as **Exhibit 36** and incorporated herein by this reference is a true and  
15 correct copy of pages from WA Session Laws of 1911, establishing the Public Service Commission.

16 9. Attached hereto as **Exhibit 37** and incorporated herein by this reference is a true and  
17 correct copy of Pierce County Broadband Connectivity and Access Evaluation.

18 10. Attached hereto as **Exhibit 38** and incorporated herein by this reference is a true and  
19 correct copy screen shot of Mason County PUD3, Chelan PUD, Grant County PUD, NoaNet,  
20 WAPUDA, pages from Chattanooga Power Board Annual Report.

21 11. Attached hereto as **Exhibit 39** and incorporated herein by this reference is a true and  
22 correct copy of Resolution 40467 and 40468 CITY COUNCIL DECLARAION OF Surplus as  
downloaded from the City’s website, which I witnessed City Council pass.

23 12. Attached hereto as **Exhibit 40** and incorporated herein by this reference is a true and  
24 correct copy of Prof. Brown’s on Definition of Public Utilities, from his book Business Essentials.

25 13. Attached hereto as **Exhibit 41** and incorporated herein by this reference is a true and  
26 correct copy of Broadband defined as Utility and Telecommunications by WUTC Website

1 14. Attached hereto as **Exhibit 42** and incorporated herein by this reference is a true and  
2 correct copy of screen shots I took from the Click! website, displaying broadband Internet services  
3 offerings. Also, a photo I took of the lobby at TPU headquarters in Tacoma about Sept. 2019.

4 15. Attached hereto as **Exhibit 43** and incorporated herein by this reference is a true and  
5 correct copy of City's Resolution U-10879, describing Smart City benefits # 16, #17 Uncertain  
6 Future benefit, Economic Development Benefits #20 of Click!; also pages from the Nation  
7 Broadband Report. Also, the Key Elements of the Sept 9, 2016 "All In" Business Plan.

8 16. Attached hereto as **Exhibit 44** and incorporated herein by this reference is a true and  
9 correct copy of FCC's Consumer Guide To VoIP Telephone Services. FCC's Lifeline Program  
10 Information. Broadband And Phone Equivalent

11 17. Attached hereto as **Exhibit 45** and incorporated herein by this reference is a true and  
12 correct copy of Diane Lachelle, Government and Community Relations Manager Click! Network,'s  
13 Letter related to the organized effort to discredit Click!

14 18. Attached hereto as **Exhibit 46** and incorporated herein by this reference is a true and  
15 correct copy of Casting a Wider Net -How and Why State Laws Restricting Municipal Broadband  
16 Networks Must Be Modified -Jeff Stricker, Washington Law Review.

17 19. Attached hereto as **Exhibit 47** and incorporated herein by this reference is a true and  
18 correct copy of News Tribune Editorial describing Rainier Connect's opposition to creation of  
19 Click!. Also, evidence of campaign contributions by Rainier to support Tacoma's current Mayor in  
20 her last campaign. And, evidence of the corporate structure of Rainier, showing control of Tacoma's  
21 Best Internet, as downloaded from the Washington UTC website.

22 20. Attached hereto as **Exhibit 48** and incorporated herein by this reference is a true and  
23 correct copy of Tacoma Series 2017 Electric System Revenue Bond Offering -Annual Budget and  
24 Description Of Click. 2017 -18 and 2019-2020 and City budget report showing funding for click !

25 21. Attached hereto as **Exhibit 49** and incorporated herein by this reference is a true and  
26 correct copy of a Brief History of American Telecommunications Regulation, by Tim Wu.

22. Attached hereto as **Exhibit 50** and incorporated herein by this reference is a true and

1 correct copy of Purpose and Conclusion of the 1996 City Broadband Study.

2 23. Attached hereto as **Exhibit 51** and incorporated herein by this reference is a true and  
3 correct copy of pages from Travis, Hannibal. “WI-FI Everywhere: Universal Broadband Access as  
4 Antitrust and Telecommunications Policy.” American University Law Review 55, no.6 (August  
5 2006): 1697-1880. WI-FI Everywhere: Universal Broadband Access as Anti-Trust. Hannibal  
6 Travis.

7 24. Attached hereto as **Exhibit 52** and incorporated herein by this reference is a true and  
8 correct copy of Harvard Study on Broadband Prices, 2018-01-10. Pricing Study. Talbot, David,  
9 Hessekiel, Kira, Kehl, Danielle. Community-Owned Fiber Networks: Value Leaders in America (January  
10 2018).

11 25. Attached hereto as **Exhibit 53** and incorporated herein by this reference is a true and  
12 correct copy of pages from National Telecommunications & Information Administration report.

13 26. Attached hereto as **Exhibit 54** and incorporated herein by this reference is a true and  
14 correct copy of Pierce County Resolution R2019-74 Declaring Broadband to Be Essential.

15 27. Attached hereto as **Exhibit 55** and incorporated herein by this reference is a true and  
16 correct copy of a City of Tacoma’s Resolution 39577 containing: WHEREAS the concerns raised  
17 about the current cost allocation methodology are significant and must be resolved and transcript of  
18 council meeting where City Attorney Bill Fosbre answers Council Member Blockers’ question  
19 about the Coates lawsuit.

20 28. Attached hereto as **Exhibit 56** and incorporated herein by this reference is a true and  
21 correct copy of Utility Tax Pages from City of Tacoma's Website, also the City’s Purchasing Policy.

22 29. Attached hereto as **Exhibit 57** and incorporated herein by this reference is a true and  
23 correct copy of a page describing Click!. FTTH services. I can testify that Click! provides “Voice  
24 Packages” to the ISP partners. These packages offering prioritization of data packets that enable  
25 telephone services to operate over Click! (ISP Agreement is Confidential and Available On Court  
26 Order).

30. Attached hereto as **Exhibit 58** and incorporated herein by this reference is a true and

1 correct copy of information related to Anacortes, WA broadband program, along with the U.S.  
2 Census Bureau report for 1907 on Telephones Farmer Lines, Coops And Mutual Phone Companies.

3 31. Attached hereto as **Exhibit 59** and incorporated herein by this reference is a true and  
4 correct copy of, Affidavit and Resume of Terry Dillon Confirming Telecommunication System.

5 32. Attached hereto as **Exhibit 60** and incorporated herein by this reference is a true and  
6 correct copy of About NBN Australia, from NBN website.

7 33. Attached hereto as **Exhibit 61** and incorporated herein by this reference is a true and  
8 correct copy of pages Striking Telegraph and Telephone and replacing those terms with  
9 Telecommunications, from Laws of 1985. Ch. 450, Sec. 13, Pgs. 1978 -1995..

10 34. Attached hereto as **Exhibit 62** and incorporated herein by this reference is a true and  
11 correct copy of MSA Agreement with Century Link and Integra as provided to me by TPU.

12 35. Attached hereto as **Exhibit 63** Nov. 20, 2019 City Council Action Memorandum, for  
13 Cable TV Franchise Agreement with Rainier Connect.

14 36. Attached hereto as **Exhibit 64** and incorporated herein by this reference is a true and  
15 correct copy of pages from Click! contract with City of Tacoma Public Library system, with recent  
16 Service Order information. As provided to me in a public record request by Defendant in 2019.

17 37. Attached hereto as **Exhibit 65** and incorporated herein by this reference is a true and  
18 correct copy of pages I downloaded from the American Registry for Internet Numbers (ARIN)  
19 website. I can personally testify to the shortage. I recently sought a small allotment of IP address  
20 from ARIN and the waiting list process, described in this Exhibit 65, took over a year for me to  
21 complete. I diligently pursued my application, for a /22 assignment, which is the equivalent of just  
22 1024 IPv4 addresses. My Initial Request, was submitted on 3/30/2018, and my IP addresses were  
23 finally issued on 9/4/2019.

24 38. Attached hereto as **Exhibit 66** and incorporated herein by this reference is a true and  
25 correct copy of pages from Click! Telecommunication Franchise with Pierce County and Puyallup.

26 39. Attached hereto, as **Exhibit 67** and incorporated herein by this reference are true and  
correct copies of historical Public Service Magazine pages, related to the power struggles at the time

1 RCW 35.94 was written. These are examples of the Private Power Trusts' Propaganda efforts to  
2 oppose public power and the BONE BILL. I have downloaded these from the Internet. Also  
3 included is historical information on efforts by public power to promote benefits of public power,  
4 including a letter by Honorable Homer T. Bone, obtained from the Library of University of Puget  
5 Sound.

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 12<sup>st</sup> day of December 2019, at Tacoma, Washington.

9  
10 

11  
12 \_\_\_\_\_  
13 Mitchell Shook

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AFFIDAVIT OF SERVICE

1 I declare under penalty of perjury of the laws of the State of Washington that on Dec. 12, 2019,

2 I served true and correct copies of:

3 1). PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGEMENT GRANTING  
4 DECLARATORY RELIEF

5 2). MITCHELL SHOOK’S DECLARATION IN SUPPORT OF MOTION FOR PARTIAL  
6 SUMMARY JUDGEMENT. Part One and Part Two.

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

10 Dated December 12, 2019

11 

12 Mitchell Shook, Plaintiff

# EXHIBIT 29 IS

Found in Shook Declaration  
11/1/19. It is 2156 Pages  
Long and Not Included Here

# EXHIBIT 30

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SUPERIOR COURT  
ADMINISTRATION

Honorable Grant L. Anderson

FILED  
IN COUNTY CLERK'S OFFICE

A.M. APR 14 1997 P.M.

PIERCE COUNTY, WASHINGTON  
TED RUTT, COUNTY CLERK

BY \_\_\_\_\_ DEPUTY

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APR 14 1997

THOMPSON, KRILICH, LAPORTE  
TACOMA, WASH. WEST INC., P.S.

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. WEST 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 been 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

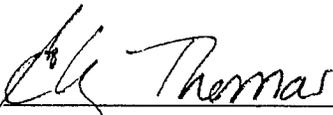
23 <sup>1</sup> *Accord Rowan v. Convention Center*, 78 Wn. App. 322, 329 (1995) (if municipal corporation's  
24 actions come within purpose and object of enabling statute and no express limitations apply, court  
25 leaves choice of means used in operating corporation to discretion of municipal authorities, 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,

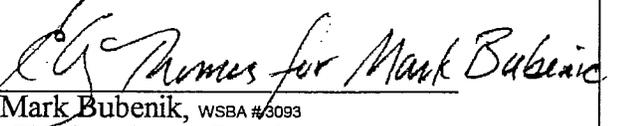
11 PRESTON GATES & ELLIS

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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The Honorable Grant L. Anderson

SUPERIOR COURT  
ADMINISTRATION

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THOMPSON, KRILICH, LAPORTE  
ATTORNEYS AT LAW

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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 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

COPY 680

1           3.     The Light Division produced a Business Plan for the telecommunications system as a  
2 key element of its Telecommunications Study.

3           4.     The Telecommunications Study was unanimously approved by the Tacoma Public  
4 Utility Board on March 26, 1997. A copy of the Board's Substitute Resolution No. U-9258  
5 approving the Business Plan is attached as Exhibit A.

6           5.     On April 8, 1997 the Tacoma City Council held a public hearing on the proposed  
7 development of the telecommunications system and on the Business Plan. Public testimony was taken  
8 and the Council debated the matter for over two hours. Earlier the same day, the Council had  
9 conducted a three-hour workshop.

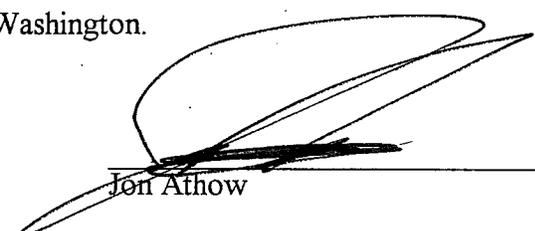
10          6.     The Telecommunications Study was unanimously approved by the Tacoma City  
11 Council on April 8, 1997. A copy of City Council Substitute Resolution No. 33668 approving the  
12 Telecommunications Study and authorizing implementation is attached as Exhibit B.

13          7.     On April 9, 1997 the Public Utility Board adopted Amended Substitute Resolution No  
14 U-9258 to conform the language of its resolution to City Council Substitute Resolution No. 33668.  
15 A copy of this Board Resolution is attached as Exhibit C.

16          8.     The Telecommunications Study is attached as Exhibit D. The Business Plan is  
17 comprised of all material contained behind the eleventh through sixteenth tabs.

18           I swear under the penalty of perjury of the laws of the State of Washington that the foregoing  
19 is true and correct.

20           Dated: April 11, 1997 at Tacoma, Washington.

21  
22   
23 \_\_\_\_\_  
24 Jon Athow  
25  
26



# 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**

1  
2 WHEREAS the City of Tacoma, Department of Public Utilities, Light  
3 Division desires to: (1) develop a state-of-the art fiber optic system to  
4 support enhanced electric system control, reliability and efficiency; (2)  
5 develop capability to meet the expanding telecommunications requirements  
6 in an evolving competitive electric market, the most critical of which is real-  
7 time, two-way interactive communications with individual energy consumers,  
8 (3) create greater revenue diversification through new business lines (i.e.  
9 internet transport, cable TV, etc.), (4) enhance traditional products and  
10 services, and (5) maximize return on Light Division assets, and

11 WHEREAS these desired capabilities can be provided with a broad  
12 band telecommunications system for all of the Light Division's service area,  
13 and

14 WHEREAS a broad band telecommunications system will have  
15 available capacity for future City Light Division needs and will also have the  
16 capacity to provide telecommunications services for data transport, high  
17 speed internet access, full cable television service, and other uses, and

18 WHEREAS the Light Division has retained consultants to review and  
19 analyze the feasibility of a broad band telecommunications system for the  
20 Light Division's service area, and a business plan has been prepared for  
21 this purpose (copies are on file with the Clerk), and

22 WHEREAS the cost of constructing, installing and commencing to  
23 operate a broad band telecommunications system will be approximately \$65  
24 million dollars, but the benefits to the Light Division, the City and the Light  
25 Division customers are projected to exceed and justify the initial cost, and  
26

27 **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

# EXHIBIT 31

PLANT TOTALS												
Fiber Rings					Jul-14			Coax & Homes				
Ring	Footage	Mileage	Count	Unused	Nodes	List of Nodes	Franchise	Homes	Footage	Mileage	Hrs/Mi	Sq Miles
Backbone	218,592	41.4	180	55				91,344	4,634,584	877.76	104.1	62.34
NW Ring 1	49,014	9.3	96	28	11	6,7,8,13S1,13S2,14,15S1,15S2,10,5,43	Tacoma	13,098	803,336	152.15	86.1	8.56
NW Ring 2	48,658	9.2	96	34	12	2S1,12S2,16S1,16S2,17,18S1,18S2,44,11S1,11S2,3	University Place	2,739	182,817	34.62	79.1	1.57
NW Ring 3	73,151	13.9	108	42	9	23S1,23S2,22,19,20,37,36,24,21	Lakewood	8,428	530,971	100.56	83.8	
NW Ring 4	83,705	15.9	144	36	16	31S1,31S2,34S1,34S2,38,45,39,46,42,40,41,35,33,32,30,29	Fife	2,983	283,498	58.48	51.0	5.83
NW Ring 5	47,999	9.1	96	22	8	2,28,27,26,25,1S1,1S2,4	P.C.N.	15,075	1,516,617	174.43	86.4	
5		98.7			56							
NE Ring 1	110,627	21.0	132	58	10	9,5,4,1,2,3,6,7,8,13	Plant Ext. 2009	2,602	89,865	17.02		
NE Ring 2	46,384	8.8	72	48	0	would be 12	Plant Ext. 2010	361	39,547	7.49		
NE Ring 3	54,000	10.2	72	24	2	11,10	Plant Ext. 11-12	634	28,512	5.40		
NEF Ring 4	62,865	11.9	132	84	7	14,15,16,17,18,19,20	Plant Ext. 13-14	1,198	26,030	4.93		
4		51.9			19							
SE Ring 1	45,842	8.7	96	44	8	17,14,4,2,13,12,15,16	Plant Ext. 15-16					
SE Ring 2	66,140	12.5	108	44	8	18,25,20,24,23,22,9,19	Plant Ext. 17-18					
SE Ring 3	65,390	12.4	96	44	8	11,8,7,6,1,5,3,10	Plant Ext. 19-20					
SEC Ring 4	131,300	24.9	132	92	7	37,36,44,40,45,41,42	Total Ext.	138,462	8,135,777	1432.85		
SEC Ring 5	83,700	15.9	96	60	7	32,31,35,39,34,33	Plant Rtrmt 11-12		15,559	2.95		
SEC Ring 6	109,902	20.8	96	58	7	29,26,27,46,28,30,38	Plant Rtrmt 13-14		22,811	4.32		
Loveland Ring	71,332	13.5		48			Plant Rtrmt 15-16					
7		108.6			45		Plant Rtrmt 17-18					
SW Ring 1	68,546	13.0	132	64	12	6,5,4,3,2,1,7,9,8,11,10,43S1,43S2,SW Annex2	Plant Rtrmt 19-20					
SWU Ring 2	122,000	23.1	132	76	17	23,26,22,21,24,25,19,20,17,18,13,14,16,15,27,28,29	Total Rtrmt	-	38,370	7.27		
SWL Ring 3	103,600	19.6	132	98	10							
Military Loop												
SCADA Ring	84,055	15.9	36	24								
4		71.6			39							
Downtown Network	108,240	20.5	144	Not Counted								
Business Ring DTN	61,248	11.6	36	Not Counted								
Business Ring DTS	34,320	6.5	36	Not Counted								
3		38.6										
23			2400	1083		Unused fiber as of June 2012						
				0.496		Percentage not used minus uncounted DTWN				29.4		
Total	1,950,610	369.4			159	152 w/out split nodes		138,462	8,097,407	1,426		

# EXHIBIT 31 (a)



# Surplus Property Hearing

Tacoma City Council Meeting

Public Hearing  
October 29, 2019



## PURPOSE



**Purpose:** This hearing is required pursuant to RCW 35.94.040. The purpose of this hearing is to take public testimony regarding a proposal to surplus property of Tacoma Power acquired for public utility purposes.

**Why is the property surplus:** In 1998, Tacoma Power built excess capacity in its HFC network for future anticipated utility needs. The Tacoma Public Utility Board has determined that this excess capacity together with certain property used by Click! Network are no longer needed by Tacoma Power for utility purposes and are surplus to Tacoma Power.

# Surplused Assets



## What Property will be Included in the Surplus Declaration?

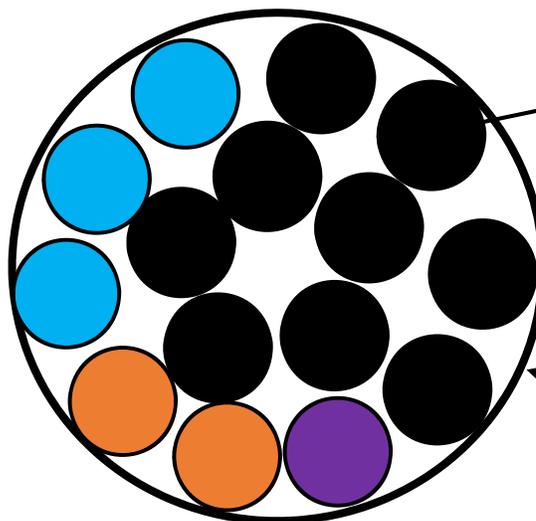
- Inventory, equipment and vehicles used by Click! Network that may be conveyed to Rainier Connect and which are described in the Click! Business Transaction Agreement and Indefeasible Right of Use Agreement
- Excess Capacity of the Tacoma Power HFC Network which includes the Click! Network and Dark Fiber as described in the Indefeasible Right of Use Agreement

3

## TACOMA POWER HFC NETWORK FIBER



- 1 Commercial
- 9 Dark
- 3 INET
- 2 Power

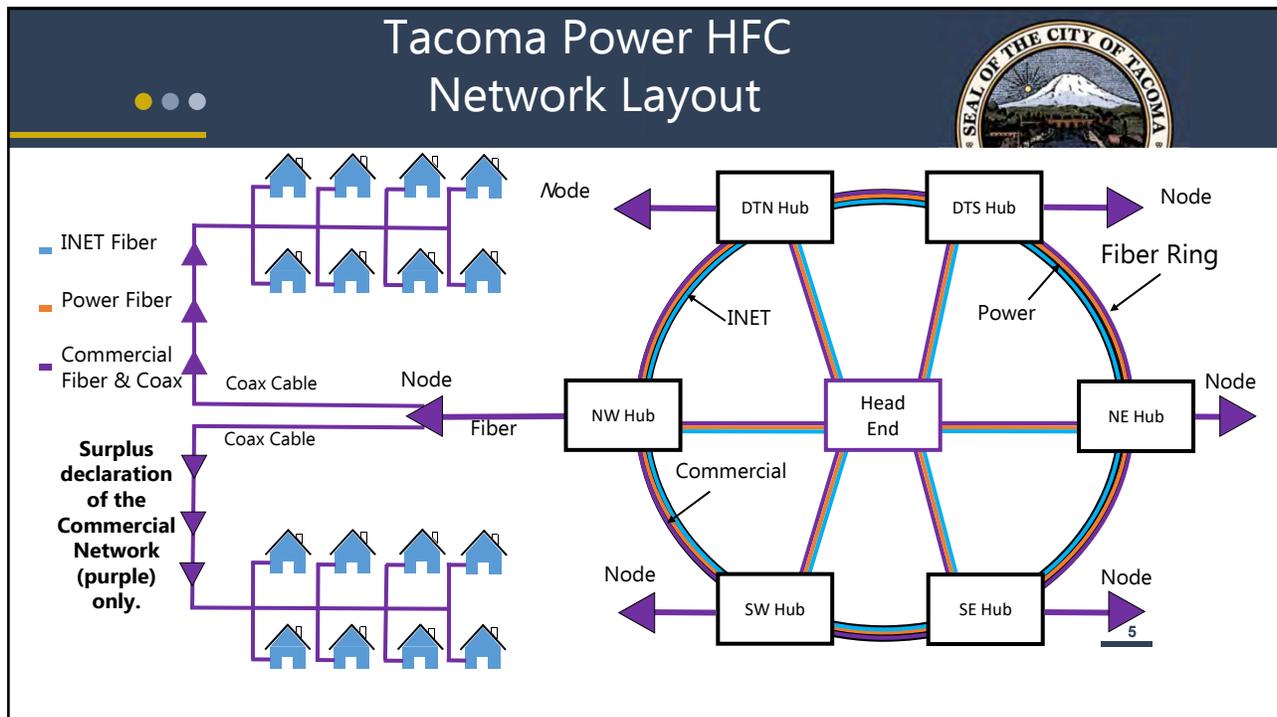


12 Fibers

Surplus declaration of the Commercial Network (purple and black) only.

15 Tubes

4



## TIMING

**When will the Board and City Council take action?**

- **BOARD.** The Tacoma Public Utility Board has scheduled a special meeting for Wednesday October 30<sup>th</sup> to consider a resolution recommending that the City Council declare the property surplus and approving the Click! Business Transaction Agreement.
- **CITY COUNCIL.** The City Council will at its November 5<sup>th</sup> regular City Council Meeting consider approval of a resolution declaring the property surplus and approving the Click! Business Transaction Agreement.

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# EXHIBIT 31 (b)

# One Company Connecting The World™

## POWERFUL PRESENCE · PRODUCTS PERFORMANCE · PEOPLE

General Cable has been a wire and cable innovator for over 170 years, always dedicated to connecting and powering people's lives. Today, with approximately 14,000 employees and approaching \$6 billion in revenues, we are one of the largest wire and cable manufacturers in the world.

Our company serves customers through a network of 38 manufacturing facilities in our core markets and has worldwide sales representation and distribution. We are dedicated to the production of high-quality aluminum, copper and fiber optic wire and cable and systems solutions for the energy, construction, industrial, specialty and communications sectors. With a vast portfolio of products to meet thousands of diverse application requirements, we continue to invest in research and development in order to maintain and extend our technology leadership by developing new materials, designing new products, and creating new solutions to meet tomorrow's market challenges.

In addition to our strong brand recognition and strengths in technology and manufacturing, General Cable is also competitive in such areas as distribution and logistics, marketing, sales and customer service. This combination enables us to better serve our customers globally and as they expand into new geographic markets.

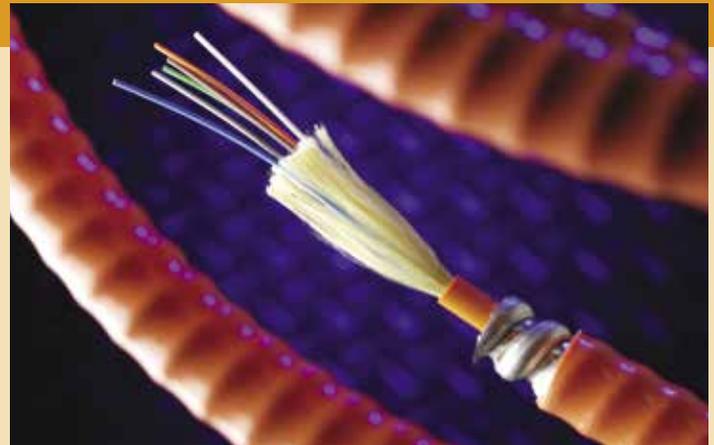
**General Cable offers our customers all the strengths and value of a large company, but our people give us the agility and responsiveness of a small one. We service you globally and locally.**



Visit our Website at  
[www.generalcable.com](http://www.generalcable.com)

## Optical Fiber

General Cable, Corning® Optical Fiber. Names that are synonymous with cable and fiber combine to create the ultimate in fiber optics. General Cable partners with Corning Optical Fiber to deliver the world's most reliable and technologically advanced optical fiber cables.



### Singlemode

#### Standard

General Cable utilizes Corning® SMF-28e+™ fiber as its standard singlemode offering. This is a full-spectrum fiber that is fully backward-compatible with legacy singlemode fiber. It enables increased optical launch power of legacy singlemode fiber, improved macrobend specifications from 0.05 dB to 0.03 dB, and tighter zero dispersion wavelength ( $\lambda_0$ ) tolerance from a range of  $\pm 10$  nm to  $\pm 7$  nm. This fiber supports all broadband applications and complies with the most stringent industry standards, such as:

- ITU-T G.652 (Tables A, B, C and D)
- IEC 60793-2-50 Type B1.3
- ISO 11801 052
- TIA/EIA 492-CAAB
- Telecordia GR-20-CORE

#### Long-Haul

For long-haul applications, rely on General Cable's long history of cable experience and the technology of Corning® LEAF® fiber. This is the most widely deployed non-zero dispersion shifted (NZ-DSF) fiber in the world and the first low water peak NZ-DSF fiber. Its large effective area and industry-leading polarization mode dispersion (PMD) specifications enable 10 Gb/s and 40 Gb/s network systems of the future.

#### ClearCurve® ZBL

General Cable, utilizing Corning® ClearCurve® ZBL Optical Fiber, delivers the best macrobending performance in the industry while maintaining compatibility with current optical fibers, equipment, practices and procedures. This full-spectrum singlemode optical fiber, when subjected to smaller radii bends, experiences virtually no signal loss. ClearCurve fiber exceeds the most stringent bend performance requirements of ITU-T Recommendations G.657.B3 while remaining fully compliant with ITU-T Recommendation G.652.D and the installed base of Corning SMF-28e® and SMF-28e+® fiber.

### Multimode

#### ClearCurve® Multimode Fiber

Corning® ClearCurve® ultra-bendable laser-optimized™ multimode optical fiber delivers the best macrobending performance in the industry while maintaining compatibility with current optical fibers, equipment, practices and procedures. ClearCurve OM3/OM4 multimode fiber is designed to withstand tight bends and challenging cable routes with substantially less signal loss than conventional multimode fiber.

These fibers have superior measurement technology and manufacturing control, and industry-leading CPC® coatings for superior microbend and environmental performance. ClearCurve fiber performance is ensured by minEMBc, the industry's leading standards-approved bandwidth measurement for OM3 fibers. ClearCurve fibers are the only ones to use this measurement to ensure 10 Gb/s performance.

#### 50 micron

These fibers support data rates of 10 Gb/s at 850 nm. They also comply with the most stringent industry standards, such as:

- ISO/IEC 11801, type OM2, OM3 and OM4\* fibers
- IEC 60793-2-10, type A1a.1, A1a.2 and A1a.3\* fibers
- TIA/EIA, 492AAAB, 492AAAC-A and 492AAAD

\* Assumes IEC draft standard is harmonized with 492AAAD, which was approved by TIA

#### 62.5 micron

These fibers support data rates of 1 Gb/s in both the 850 nm and 1300 nm windows. They comply with the most stringent industry standards, such as:

- ISO/IEC 11801, type OM1 fiber
- IEC 60793-2-10, type A1b fiber
- TIA/EIA, 492AAAA-A

# Color Coding Charts

## Color coding in compliance with TIA/EIA 598 C.3

### LOOSE TUBE BUFFER COLOR CODING

POSITION NUMBER	BASE COLOR AND TRACER	ABBREVIATION
1	Blue	BL
2	Orange	OR
3	Green	GR
4	Brown	BR
5	Slate	SL
6	White	WH
7	Red	RD
8	Black	BK
9	Yellow	YL
10	Violet	VI
11	Rose	RS
12	Aqua	AQ
13	Blue with Black Tracer	D/BL <sup>1</sup>
14	Orange with Black Tracer	D/OR
15	Green with Black Tracer	D/GR
16	Brown with Black Tracer	D/BR
17	Slate with Black Tracer	D/SL
18	White with Black Tracer	D/WH
19	Red with Black Tracer	D/RD
20	Black with Yellow Tracer	D/BK
21	Yellow with Black Tracer	D/YL
22	Violet with Black Tracer	D/VI
23	Rose with Black Tracer	D/RS
24	Aqua with Black Tracer	D/AQ

1) "D/" denotes a dashed mark or tracer. That is, D/BL is Dash-Blue, meaning blue with a tracer.

### TIGHT BUFFER COLOR CODING

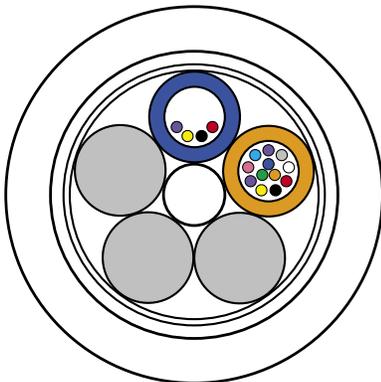
POSITION NUMBER	BASE COLOR AND TRACER	ABBREVIATION
1	Blue	BL
2	Orange	OR
3	Green	GR
4	Brown	BR
5	Slate	SL
6	White	WH
7	Red	RD
8	Black	BK
9	Yellow	YL
10	Violet	VI
11	Pink	PK
12	Aqua	AQ
13	Blue with Black Tracer	D/BL <sup>1</sup>
14	Orange with Black Tracer	D/OR
15	Green with Black Tracer	D/GR
16	Brown with Black Tracer	D/BR
17	Slate with Black Tracer	D/SL
18	White with Black Tracer	D/WH
19	Red with Black Tracer	D/RD
20*	Black with Black Tracer	D/BK
21	Yellow with Black Tracer	D/YL
22	Violet with Black Tracer	D/VI
23	Rose with Black Tracer	D/RS
24	Aqua with Black Tracer	D/AQ

1) "D/" denotes a dashed mark or tracer. That is, D/BL is Dash-Blue, meaning blue with a tracer.

\* Black tracer is visible on black buffer tube.

### JACKET COLOR CODING

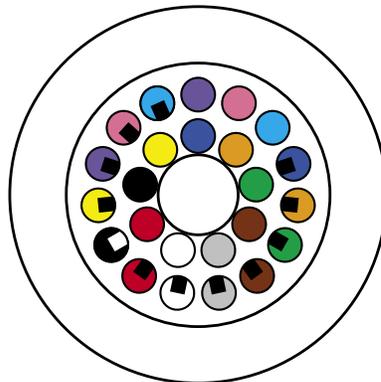
CONSTRUCTION	FIBER TYPE	JACKET COLOR
TIGHT BUFFER	Multimode	Orange
	10 G Multimode	Aqua
	Singlemode	Yellow
	Hybrid	Black
LOOSE TUBE	Multimode	Black
	10 G Multimode	
	Singlemode	
	Hybrid	



For loose tube hybrid cable constructions, cables containing both singlemode (SM) and multimode (MM), the first tubes in the TIA/EIA 598 color-coded tubes will contain singlemode, and the remaining tubes will contain multimode.

#### Ordering Part Number Example

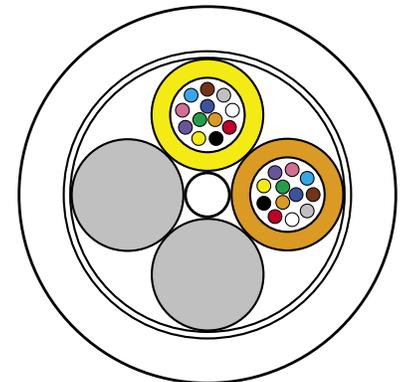
AQ012/BE0124M1A-DWB



For tight buffered single pass hybrid cable constructions ( $\leq 24$  fibers), cables containing both singlemode and multimode, the first buffers in the TIA/EIA 598 color-coded tubes will contain singlemode, and the remaining buffers will contain multimode.

#### Ordering Part Number Example

AP012/BE0121PNU



For tight buffered subunit hybrid cable constructions ( $\geq 24$  fibers), cables containing both singlemode and multimode, the singlemode subunit tubes will be yellow and numerically marked, 62.5  $\mu$  multimode subunit tubes will be orange and numerically marked, and 50  $\mu$  multimode subunit tubes will be aqua and numerically marked.

#### Ordering Part Number Example

AP012/BE0121P1R

# EXHIBIT 31 (c)

# Data Age 2025:

The Evolution of Data to Life-Critical

Don't Focus on Big Data; Focus on the Data That's Big

## EXECUTIVE SUMMARY

We are fast approaching a new era of the Data Age. From autonomous cars to humanoid robots and from intelligent personal assistants to smart home devices, the world around us is undergoing a fundamental change, transforming the way we live, work, and play.

Imagine being awoken and tended to by a virtual personal assistant that advises you on what clothing from your wardrobe is best suited to the weather report and your schedule for the day or being transported by your self-driving car. Or perhaps you won't need to commute to an office at all as technology will allow you to conjure workspaces out of thin air using interactive surfaces, and holographic teleconferencing becomes the norm for communicating virtually with colleagues. Weekends may involve browsing new furniture through an augmented reality app and seeing how a sofa looks in your living room before placing an order. As you relax on the new sofa, Saturday night's takeout will be a pizza made by a robot and delivered in record time by a drone.

Data has become critical to all aspects of human life over the course of the past 30 years; it's changed how we're educated and entertained, and it informs the way we experience people, business, and the wider world around us. It is the lifeblood of our rapidly growing digital existence. This digital existence, as defined by the sum of all data created, captured, and replicated on our planet in any given year is growing rapidly, and we call it the "*global datasphere*". In just the past 10 years society has witnessed the transition of analog to digital. What the next decade will bring using the power of data is virtually limitless.

While we as consumers will enjoy the benefits of a digital existence, enterprises around the globe will be embracing new and unique business opportunities, powered by this wealth of data and the insight it provides. Extracting and delivering simplicity and convenience from the complexity of many billions of bytes – be it through

robotics, 3D printing, or some other yet-to-come technological innovation – will be the order of the day. The opportunities already seem limitless, as does the sheer volume of data these connected devices and services will create.

From power grids and water systems to hospitals, public transportation, and road networks, the growth of real-time data is remarkable for its volume and criticality. Where once data primarily drove successful business operations, today it is a vital element in the smooth operation of all aspects of daily life for consumers, governments, and businesses alike.

In this white paper, sponsored by Seagate, IDC looks at the trends driving growth in the global datasphere from now to 2025. We look at their implications for people and businesses as they manage, store, and secure their most critical data.

IDC forecasts that by 2025 the global datasphere will grow to 163 zettabytes (that is a trillion gigabytes). That's ten times the 16.1ZB of data generated in 2016. All this data will unlock unique user experiences and a new world of business opportunities.

Data Age 2025 describes five key trends that will intensify the role of data in changing our world:

- **The evolution of data from business background to life-critical.** Once siloed, remote, inaccessible, and mostly underutilized, data has become essential to our society and our individual lives. In fact, IDC estimates that by 2025, nearly 20% of the data in the global datasphere will be critical to our daily lives and nearly 10% of that will be hypercritical.
- **Embedded systems and the Internet of Things (IoT).** As standalone analog devices give way to connected digital devices, the latter will generate vast amounts of data that will, in turn, allow us the chance to refine and improve our systems and processes in previously unimagined ways. Big Data and metadata (data about data) will eventually touch nearly every aspect of our lives — with profound consequences. By 2025, an average connected person anywhere in the world will interact with connected devices nearly 4,800 times per day — basically one interaction every 18 seconds.

## Conclusion

There is a massive opportunity for data to affect positive change on all of human society. Not only is data making business more effective, but it is in the process of transforming every aspect of the individual's life. Not only do new-paradigm services like those from Uber and Netflix depend on data, but the same is true for our cities, hospitals, stores, businesses of all type, and soon every single aspect of human society. We are finding ways for data to make our lives better that we didn't imagine even a few years ago.

The way society uses data is going through a fundamental shift:

- From entertainment to productivity
- From business focused to hyperpersonal
- From structured to unstructured
- From selective to ubiquitous
- From retrospective to here and now
- From life-enhancing to life-critical

As computing power becomes increasingly distributed, moving to the cloud and into the everyday IoT devices and infrastructure that surround us, data will continue to drive fundamental improvements to businesses, industries, our processes, and our everyday lives. These trends are causing the total amount of all data on the planet, the global datasphere, to grow exponentially. With three-quarters of the world's population soon to be connected, digital data will affect the life of nearly every human being, essentially becoming the lifeblood of our increasing digital existence.

The use and integration of data in businesses and our lives are quickly moving to real time. As such, data is delivered to not only inform but also determine actions — sometimes autonomously. While entertainment remains an important driver of data creation and consumption, it is ceding share to productivity data that will bring more efficiency and automation to not only business workflows but also the everyday stream of life. Therefore, the stakes are rising and, with them, the critical importance of our data's veracity and timeliness.

The lessons embodied in the forecast and analysis of our data-driven world include the following:

- As data becomes more life critical, business critical, real time, and mobile, the entities that manage and store it will need to develop measured approaches to increasing reliability, lowering latency, and increasing security. This process may start with audits but will need to be backed up with investment, coherent strategies, and top-notch IT talent.
- The migration of analytics from a post-activity event to a real-time and predictive enterprise will demand a step-function increase in the use of analytics for evidence-based decision making. This means not just digital transformation of an organization's processes but also the culture and organizational structure of the organization. Analytics will become a competitive advantage.
- The security and privacy challenges cannot be underplayed. Data breaches can put companies out of business, targeted attacks can halt operations, and hacking can compromise trade secrets. The business, IT, and security professionals in an organization must continually emphasize throughout the organization that security is not simply an IT technical problem with a purely technical solution. Rather, it is an organizational need requiring the participation of employees at all levels.
- The IoT will drive — or force — merged operations between the business leaders and IT departments accustomed to supporting back-office and financial functions and those that run operational systems — labs, operating rooms, factory floors, electrical grids, cable headends, and so forth — as all digital activity migrates to IP networks. Since IoT is one of the fundamental technology pillars of business improvement in the decades to come, optimized use of associated data is one of the key drivers of business success starting today. Leadership and technical integration will be critical to making the best use of IoT technology or at least avoiding chaos.
- The aggregate effect of the trends driving the global datasphere to new zettabyte levels is to make digital transformation an all-hands-on-deck effort for organizations to navigate the next decade successfully. It will also drive increasing reliance on third parties, from cloud providers and software firms to the baseline technology suppliers. Thus vendor selection will better be seen as a leadership function and partnering function rather than a procurement function. The organization will depend on it.

The 163ZB global datasphere projected in Data Age 2025 is only the beginning as we anticipate the increasingly connected and data-driven world. A decade in technology years can, and likely will, bring about unforeseen advancements, use cases, businesses, and life-changing services that rely on the digital lifeblood called data. The storage industry and all its participants will find no lack of customers looking to store their precious bits, which will help drive even the most intimate parts of our businesses and lives across the globe and make up part of our global datasphere.

## IDC Headquarters

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www.idc.com

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## About IDC

International Data Corporation (IDC) is the premier global provider of market intelligence, advisory services, and events for the information technology, telecommunications and consumer technology markets. IDC helps IT professionals, business executives, and the investment community make fact-based decisions on technology purchases and business strategy. More than 1,100 IDC analysts provide global, regional, and local expertise on technology and industry opportunities and trends in over 110 countries worldwide. For 50 years, IDC has provided strategic insights to help our clients achieve their key business objectives. IDC is a subsidiary of IDG, the world's leading technology media, research, and events company.

# EXHIBIT 31 (d)

## Executive Summary

# Mankind is on a quest to digitize the world

The focus of this digitization is anything and everything that intersects our business workflows and personal streams of life.

This process of digitization is often referred to as digital transformation, and it is profoundly changing the shape of business today, impacting companies in every industry and consumers around the world. Digital transformation is not about the evolution of devices (though they will evolve), it is about the integration of intelligent data into everything that we do.

The data-driven world will be always on, always tracking, always monitoring, always listening, and always watching – because it will be always learning. What we perceive to be randomness will be bounded into patterns of normality by sophisticated artificial intelligence algorithms that will deliver the future in new and personalized ways. Artificial intelligence

will drive even more automation into businesses and feed processes and engagements that will deliver new levels of efficiency and products that are tailored to business outcomes and individual customer preferences.

Traditional paradigms will be redefined (like vehicle or white goods ownership) and ethical, moral and societal norms will be challenged as genomics and advanced DNA profiling influence healthcare directives, insurance premiums, and spousal choices. Entertainment will literally be transformed before our eyes as virtual reality technologies transport us into new digital realities and augmented reality will dramatically change the service industry as we know it today.

The data-driven world will be **always on, always tracking, always monitoring, always listening** and **always watching – because it will be always learning.**

Data is at the heart of digital transformation, the lifeblood of this digitization process. Today, companies are leveraging data to improve customer experiences, open new markets, make employees and processes more productive, and create new sources of competitive advantage – working toward the future of tomorrow.

### Global Datasphere expansion is never-ending

IDC has defined three primary locations where digitization is happening and where digital content is created: the core (traditional and cloud datacenters), the edge (enterprise-hardened infrastructure like cell towers and branch offices), and the endpoints (PCs, smart phones, and IoT devices). The summation of all this data, whether it is created, captured, or replicated, is called the Global Datasphere, and it is experiencing tremendous growth. IDC predicts that the Global Datasphere will grow from 33 Zettabytes (ZB) in 2018 to 175 ZB by 2025.

To keep up with the storage demands stemming from all this data creation, IDC forecasts that over 22 ZB of storage capacity must ship across all media types from 2018 to 2025, with nearly 59% of that capacity supplied from the HDD industry.

### An enterprise renaissance is on the horizon

The enterprise is fast becoming the world's data steward...again. In the recent past,

consumers were responsible for much of their own data, but their reliance on and trust of today's cloud services, especially from connectivity, performance, and convenience perspectives, continues to increase while the need to store and manage data locally continues to decrease. Moreover, businesses are looking to centralize data management and delivery (e.g., online video streaming, data analytics, data security, and privacy) as well as to leverage data to control their businesses and the user experience (e.g., machine-to-machine communication, IoT, persistent personalization profiling). The responsibility to maintain and manage all this consumer and business data supports the growth in cloud provider datacenters. As a result, the enterprise's role as a data steward continues to grow, and consumers are not just allowing this, but expecting it. Beginning in 2019, more data will be stored in the enterprise core than in all the world's existing endpoints.

IDC predicts that the Global Datasphere will grow from **33 Zettabytes** in 2018 to **175 Zettabytes** by 2025

## Cloud is the new core

One of the key drivers of growth in the core is the shift to the cloud from traditional datacenters. As companies continue to pursue the cloud (both public and private) for data processing needs, cloud datacenters are becoming the new enterprise data repository. In essence, the cloud is becoming the new core. In 2025 IDC predicts that 49% of the world's stored data will reside in public cloud environments.

## Introducing the world's first data readiness condition (DATCON) index

Not all industries are prepared for their digitally transformed future. So, to help companies understand their level of data readiness, IDC developed a DATCON (DATA readiness CONdition) index, designed to analyze various industries regarding their own Datasphere, level of data management, usage, leadership, and monetization capabilities. IDC examined four industries as part of its DATCON analysis: financial services, manufacturing, healthcare, and media and entertainment. Manufacturing's Datasphere is by far the largest given its maturity, investment in IoT, and 24x7 operations, and we found that

manufacturing and financial services are the leading industries in terms of maturity, with media and entertainment most in need of a jump start.

## China's Datasphere on pace to becoming the largest in the world

Every geographic region has its own Datasphere size and trajectories that are impacted by population, digital transformation progress, IT spend and maturity, and many other metrics. For example, China's Datasphere is expected to grow 30% on average over the next 7 years and will be the largest Datasphere of all regions by 2025 (compared to EMEA, APJxC, U.S., and Rest of World) as its connected population grows and its video surveillance infrastructure proliferates. (APJxC includes Asia-Pacific countries, including Japan, but not China.)

## Consumers are addicted to data, and more of it in real-time

As companies increase the digitization of their business and drive consistent and better customer experiences, consumers are embracing these personalized real-time

In 2025  
IDC predicts  
that

49%

of the world's stored  
data will reside in public  
cloud environments

engagements and resetting their expectations for data delivery. As their digital world overlaps with their physical realities, they expect to access products and services wherever they are, over whatever connection they have, and on any device. They want data in the moment, on the go, and personalized. This places greater demand on both the edge and the core to be able to produce the precise data consumers require, often in real-time. IDC predicts that due to the infusion of data into our business workflows and personal streams of life, that nearly 30% of the Global Datasphere will be real-time by 2025. Enterprises looking to provide superior customer experience and grow share must

have data infrastructures that can meet this growth in real-time data.

Today, more than 5 billion consumers interact with data every day – by 2025, that number will be 6 billion, or 75% of the world's population. In 2025, each connected person will have at least one data interaction every 18 seconds. Many of these interactions are because of the billions of IoT devices connected across the globe, which are expected to create over 90ZB of data in 2025.

## About this study

This study is based on IDC's ongoing Global DataSphere research and market sizing models. Industry and specific geographic DataSphere research was conducted in September 2018 by IDC. In addition, 2,400 enterprise decision makers were surveyed, and in-depth interviews were conducted with senior IT executives at a variety of industries to inform this study. The survey was with decision makers who had responsibility for or knowledge of their organization's use, management, and storage of data leveraging advanced technologies including Internet of Things, real-time analytics, and AI/machine learning. The survey spanned several countries and regions including the United States, China, EMEA, APJxC, and others.



# Global Datasphere Expansion is Never-ending

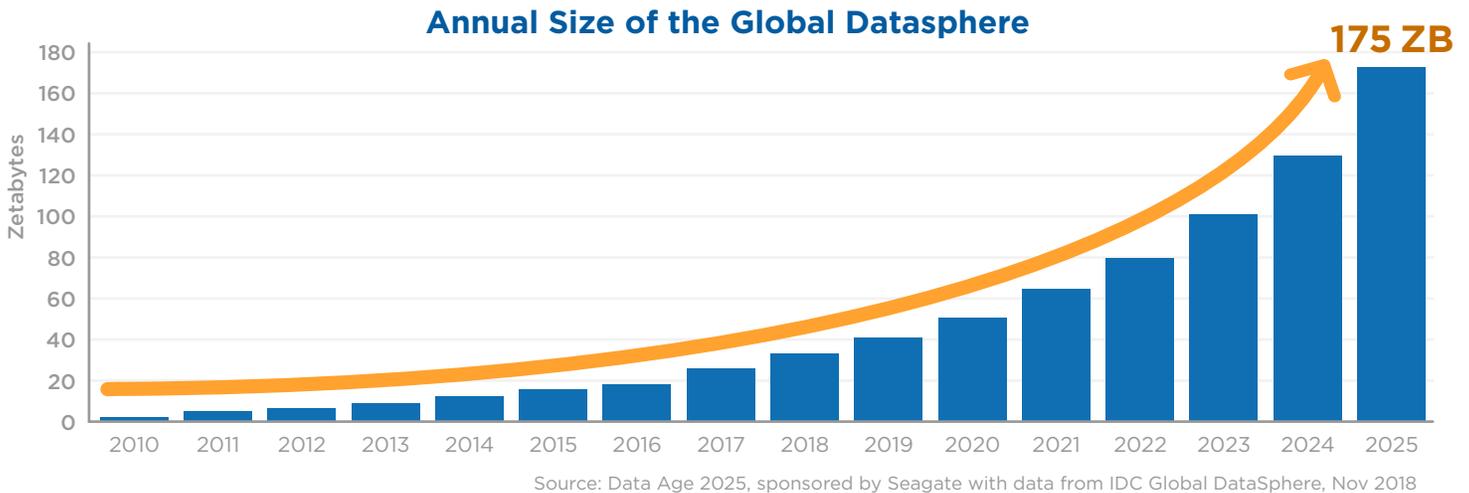
The use of data today is transforming the way we live, work, and play. Businesses in industries around the world are using data to transform themselves to become more agile, improve customer experience, introduce new business models, and develop new sources of competitive advantage. Consumers are living in an increasingly digital world, depending on online and mobile channels to connect with friends and family, access goods and services, and run nearly every aspect of their lives, even while asleep.

Much of today's economy relies on data, and this reliance will only increase in the future as

companies capture, catalog, and cash in on data in every step of their supply chain; enterprises collect vast sums of customer data to provide greater levels of personalization; and consumers integrate social media, entertainment, cloud storage, and real-time personalized services into their streams of life.

The consequence of this increasing reliance on data will be a never-ending expansion in the size of the Global Datasphere. Estimated to be 33 ZB in 2018, IDC forecasts the Global Datasphere to grow to 175 ZB by 2025. (Figure 1). See Appendix for methodology and data/device categories.

Figure 1 - Annual Size of the Global Datasphere



MRI image creation is driving storage requirements significantly. The trend is more images with thinner slices and 3D capability. We've gone from 2,000 images to over 20,000 for an MRI of a human head, and stronger magnets and higher resolution pictures means more data stored.

- Senior Director in IT, Major Healthcare Provider

# EXHIBIT 32



CERTIFICATE

I, Charleen Jacobs, do hereby certify that I am the Clerk of the Public Utility Board of the City of Tacoma, and that record and maintain custody of the official records and minutes of the Public Utility Board.

I further certify that the attached is a full, true, and correct copy of Amended Resolution U-10828 dated December 3, 2015.

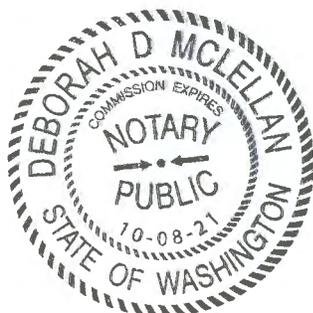
In witness whereof, I have set my hand this 16 day of January 2020.

Charleen Jacobs  
Clerk, Public Utility Board  
Tacoma Public Utilities  
City of Tacoma, Washington

Attachment

State of Washington  
County of Pierce

Subscribed and sworn to before me this 16 day of January 2020.



Deborah D. McLellan  
Notary Public in and for the  
State of Washington, County of Pierce  
My commission expires 10-8-21



## AMENDED RESOLUTION NO. U-10828

1 A RESOLUTION relating to Click! Network; authorizing Click! to prepare a  
2 business plan to provide, in addition to retail cable television, retail  
3 internet services including voice over data internet ("VoIP") protocol,  
4 commercial broadband and Gigabit service ("Retail Services").

5 WHEREAS the City Council of Tacoma authorized the Department of  
6 Public Utilities ("TPU"), Light Division (dba "Tacoma Power"), to implement and  
7 manage a broadband telecommunication system ("Click! Network" or "Click!" as  
8 authorized through City Council Substitute Resolution No. 33668, approved  
9 April 8, 1997, and Public Utility Board Amended Substitute Resolution U-9258  
10 approved April 9, 1997), and

11 WHEREAS Tacoma Power provided retail cable TV services to  
12 customers, wholesale internet to independent Internet Service Providers  
13 ("ISPs") who served retail customers and wholesale broadband service to  
14 business customers, and

15 WHEREAS the broadband telecommunication system is critical  
16 infrastructure for Tacoma Power, including the connection of substations,  
17 support of approximately 18,000 Gateway smart meters, as well as providing  
18 support for the City's I-net system, and

19 WHEREAS the City Charter Section 4.6 requires a vote of the people  
20 before the City may sell, lease, or dispose of any utility system, or parts thereof  
21 essential to continued effective utility service, and

22 WHEREAS the presence of Click! Cable TV in the marketplace provided  
23 savings for all cable TV customers, regardless of provider, in the Click! Market  
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territory as compared to other Puget Sound market areas to an estimated average savings of \$10 million dollars a year, between 2004 and 2008, and

WHEREAS Click! services currently reaches 26.2% of the customers in the service territory with one or more of its services (Cable TV only, Internet only or Cable TV and Internet) according to Click! customer counts, and

WHEREAS 61% of those polled in May of 2015 said that it would be a good idea for Click! to provide internet service directly to customers, and

WHEREAS Click! infrastructure could provide Gigabit internet speeds to customers in the entire service territory with capital investment, and

WHEREAS customers' use of internet is increasing and use of Cable TV is decreasing, just as the cost for Cable TV is increasing significantly for the Click! network, and

WHEREAS Click!'s current business model creates future potential financial losses that may require the use of Tacoma Power ratepayer funds, and

WHEREAS the Public Utility Board has determined that the most reasonable path to meeting community objectives and financial sustainability is to pursue a business model where Click! offers additional retail products directly to its customers, including retail cable TV, Internet, voice over Internet (VoIP), and commercial broadband services ("All-In Retail model"); Now, therefore,

BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

Sec. 1. Definitions.



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- a. "Click! or Click! Network" shall mean the telecommunication section of the Light Division of the Department of Public Utilities for the City of Tacoma, as established and described in Public Utility Board Amended Substitute Board Resolution U-9258 and City Council Substitute Resolution No. 33668.
- b. "Tacoma Power" shall mean the Light Division (doing business as Tacoma Power), of the Department of Public Utilities, for the City of Tacoma, as established by the City of Tacoma Charter Section 4.10.
- c. "Tacoma Public Utilities" shall mean the Department of Public Utilities (doing business as TPU), for the City of Tacoma, as established by the City of Tacoma Charter Article 4.
- d. "Retail Services" shall mean cable television and retail internet services including voice over data internet protocol, retail and commercial broadband, Gigabit service and related and enhanced services offered to customers from time to time as new technologies and services become available.
- e. "Expenditures" shall mean capital (including debt service) and operations and maintenance ("O&M") expenses determined on a "cash flow" basis incurred by Click! after January 1, 2016. "Expenditures" shall not include, and Click! shall not be charged Click! past physical plant and capital related costs made by Tacoma Power on behalf of Click! prior to January 1, 2016.

Sec. 2. Click! shall work with consultants as appropriate to develop a detailed business, financial and marketing plan (the "Business Plan") to provide customers the Retail Services and other aspects of the Business Plan contemplated herein. The goal will be for Click! to present to the Public Utility Board and the City Council an initial detailed Business Plan on or near April 7<sup>th</sup>, 2016. The goal will be for the Public Utility Board and City Council to approve the initial detailed Business Plan within 60 days thereafter.

- a. The Business Plan shall include annual, biennial and longer term goals, benchmarks and measures of financial progress and success, including
  - i. building customer counts and increasing market penetration
  - ii. financial projection and benchmarks
  - iii. designing and implementing rates that support customers count goals while providing revenue to pay Expenditures



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- iv. achievement of revenues that exceed Expenditures to the extent reasonably feasible
  - v. capital expenditure planning, including debt financing where appropriate
  - vi. charging just and proper proportions of the cost and expenses of other departments or offices of the City rendering service to Click!, as required under City Charter section 4.5.
- b. The Business Plan shall also include annual, biennial and longer term goals, benchmarks and measures of progress and success for non-financial achievement, including
- i. coordination with goals and strategic plans of TPU and the City of Tacoma
  - ii. promotion of market competition
  - iii. fostering and enhancing educational opportunity and economic activity in Tacoma and Pierce County
  - iv. ensuring just access to internet service regardless of economic condition, social barriers and physical challenges.
- c. The Business Plan will make adapting to changing market conditions and increased competition a priority, including necessary capital investments to improve technologies and stay competitive.
- d. The Business Plan will authorized, but not obligate, Click! to enter into negotiations for new contracts with internet services providers using its network on terms and conditions economically acceptable to Click! and consistent with the Business Plan, including authority to purchase the businesses of the existing private internet service providers using its network. Click! will be authorized to utilize the services of third-party business valuation consultants, acceptable to all parties, in connection with such negotiations.
- e. The Business Plan will include analysis and action plans for the structure of the Click! workforce, including the negotiation with the relevant labor organizations when necessary, to meet the requirements of the Business Plan.
- f. The Business Plan shall require a separate enterprise fund (subaccount) within the Tacoma Power fund to account for Click! revenues and Expenditures.
- g. Subject to the outcome of the legal analysis authorized under Sec. 4, from January 1, 2016, going forward if Expenditures made on behalf of



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Click! by Tacoma Power exceed Click! revenues during any month, such "Excess Expenditures" shall constitute a loan or advance from Tacoma Power to Click!, which shall be reimbursed as follows:

- i. "Target Date" means December 31, 2021 or a date when the cumulative Excess Expenditures reach \$31.6 million, whichever occurs first.
- ii. Click! shall reimburse the loans or advances from revenue exceeding Expenditures as soon as possible.
- iii. If Click! revenue in excess of Expenditures is insufficient to reimburse loans or advances in full by the Target Date, Click! revenue shall be supplemented with City of Tacoma non-utility revenue that, together with Click! revenue, will be sufficient to provide full reimbursement of cumulative loans or advances accrued prior to the Target Date within ten (10) years of the Target Date.
- iv. The Utility Board and the City Council may, at any time, fulfill their obligation to reimburse the cumulative loans or advances by applying the proceeds from a transaction (license, lease, sale, etc.) transferring some or all of the City's telecommunications system business to a private third-party. The Business Plan shall require Public Utility Board and City Council approval of budgets, expenditures, rates, and charges necessary to implement the business plan contemplated herein as part of the regular Tacoma Power budgeting, contract, and rates approval processes.

h. The Business Plan shall require Public Utility Board and City Council approval of budgets, expenditures, rates, and charges necessary to implement the business plan contemplated herein as part of the regular Tacoma Power budgeting, contract, and rates approval processes.

i. The Business Plan shall provide quarterly and annual reports to the Public Utility Board and to the City Council to monitor Click!'s actual performance relative to the approved business plan. Such reports shall include financial gains and losses and the balance of the loan account described below.

Sec. 3. The Public Utility Board and the City Council shall, upon adoption of this Resolution, appoint a Click! Engagement Committee to provide oversight and assistance to Click! in the development and implementation of the Business Plan. The Click! Engagement Committee shall be comprised of two (2) Public Utility Board Members, two (2) City Council members, two (2) members of the public who have experience in the broadband industry, and one (1) Tacoma Power ratepayer at large appointed by the City Council. The Click! Engagement Committee shall meet to consult with Click! on a regularly



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scheduled basis established by the Committee and Click!. The Public Utility Board and the City Council may consider delegating specific authority in the governance of Click! to the Click! Engagement Committee in the future as the Business Plan is further developed and implemented.

Sec. 4. Prior to implementing the Business Plan contemplated in this resolution, TPU and the City's Legal Department, shall seek a legal opinion or declaratory judgment in Pierce County Superior Court, to confirm that Tacoma Power may operate the City of Tacoma's telecommunications system in accordance with the business plan. The City's Legal Department shall include in its request for a legal opinion or declaratory judgment, those specific components of the business plan necessary to provide the Utility Board and the City Council comfort that they may fully implement the business plan reasonably without threat of disruption by legal challenge. TPU and the City's Legal Department are authorized to utilize the services of third-party legal advisors in connection with this activity.

Sec. 5. Click! shall review and resubmit rate adjustments budgeted and proposed by Click! and approved by the Public Utility Board (previously approved by Board Resolution U-10773 on April 22, 2015), that support the Business Plan and the City Council is requested to approve an ordinance amending Tacoma Municipal Code Chapter 12.13, to authorize said rate adjustments.

Sec. 6. A fiscal note is attached to and incorporated in this Resolution U-10828. The fiscal note estimates the Capital and O&M budget requirements and impacts in addition to the financial gains and losses anticipated over the next five (5) years, in connection with the Click! business plan contemplated herein.

Approved as to form and legality:

William C. Foster  
Chief Deputy City Attorney

[Signature]  
Chair

[Signature]  
Secretary

[Signature]  
Clerk

Adopted 12-3-15



TACOMA PUBLIC UTILITIES  
 3628 South 35th Street  
 Tacoma, Washington 98409-3192

**To:** Chair and Members of the Public Utility Board  
**From:** William A. Gaines, Director of Utilities/CEO  
**Date:** November 25, 2015  
**Subject:** Financial Impact of Authorizing Click! to Provide Retail Internet Service Including Gigabit Internet Service, Voice over Internet Protocol Service and Commercial Broadband Service, and Approving a Five Year Business Plan

Background:

A variety of business models have been developed and presented to policymakers, including a base case or status quo model and prospective models for Click! offering retail internet and cable television services, Click! offering wholesale-only internet (no video) and Click! entering into a private use contract involving Tacoma Power/Click! facilities. The financial models considered both low and high growth assumptions. This report addresses the fiscal impact of authorizing Click! to provide retail Internet service including Gigabit Internet service, Voice over Internet Protocol Service and Commercial Broadband Service ("All-In Retail with Gigabit model") along with cable television services. The All-In Retail with Gigabit model anticipates a loss of 1,916 Cable customers under the low growth option and a gain of 1,152 Cable customers under the high growth option in five years. It also anticipates a gain of between 6,412 and 12,124 Internet customers, and a gain of between 5,168 and 7,563 Voice over Internet Protocol customers, low and high respectively. Table 1 below shows the financial metrics of the All-In Retail with Gigabit option.

Table 1

	All-In Retail w/Gigabit Low Option	All-In Retail w/Gigabit High Option
Revenue	\$181.4	\$207.1
O&M Expenditures	\$185.3	\$206.3
Capital Investment	\$27.7	\$28.8
Cumulative Cash Flow	(\$31.6)	(\$28.0)

Fiscal Impact:

The impact of pursuing the All-In Retail with Gigabit option is that the City will incur deficit spending in the range of \$28 million to \$31.6 million over the five-year business plan period, as shown in Table 1. However, as noted in Table 2 below, the Retail All-In with Gigabit model begins to produce positive cash flow in Year 8 under the high growth option.

Table 2

	LOW OPTION		HIGH OPTION	
	Cash Flow	Cumulative Cash Flow	Cash Flow	Cumulative Cash Flow
2016	(\$13,375,861)	(\$13,375,861)	(\$14,141,034)	(\$14,141,034)
2017	(4,894,538)	(18,270,399)	(4,728,564)	(18,869,598)
2018	(5,064,295)	(23,334,693)	(4,541,133)	(23,410,731)
2019	(4,430,859)	(27,765,552)	(2,866,053)	(26,276,783)
2020	(3,829,670)	(31,595,222)	(1,750,548)	(28,027,331)
2021	(3,482,159)	(35,077,381)	(945,919)	(28,973,250)
2022	(3,832,725)	(38,910,106)	(608,528)	(29,581,779)
2023	(3,114,794)	(42,024,900)	480,572	(29,101,207)
2024	(2,877,105)	(44,902,005)	1,146,032	(27,955,175)



# EXHIBIT 33

# The State of Washington



Office of the Secretary of State  
Kim Wyman, Secretary of State

## Certificate

I, *Steve Excell*, in accordance with the provisions of Chapter 40.14, Revised Code of Washington, certify that I have compared the attached copy, or specific part thereof, listed below, with the records in our custody, and that the same, or each of the same, is a true and correct copy of the Record in the Official Custody of the State Archivist of the State of Washington.

FROM THE RECORDS OF:

SECRETARY OF STATE,

Washington State Legislature

Senate

Local Government Committee

1973 Senate Bill No. 2835

(14 pages)



WASHINGTON STATE  
ARCHIVES

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the Office of the State Archivist of the State of Washington.

Steve Excell

Monday, January 17, 2020

A handwritten signature in black ink, appearing to read "Steve Excell", written over a horizontal line.

Washington State Archivist

# The State of Washington



## Office of the Secretary of State

Kim Wyman, Secretary of State

## Certificate

I, *Steve Excell*, in accordance with the provisions of Chapter 40.14, Revised Code of Washington, certify that I have compared the attached copy, or specific part thereof, listed below, with the records in our custody, and that the same, or each of the same, is a true and correct copy of the Record in the Official Custody of the State Archivist of the State of Washington.

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Steve Excell

Monday, January 17, 2020

A handwritten signature in black ink, appearing to read "Steve Excell", written over a horizontal line.

Washington State Archivist

CERTIFICATION OF ENROLLMENT

**SUBSTITUTE HOUSE BILL 2639**

Chapter 198, Laws of 2008

60th Legislature  
2008 Regular Session

RENEWABLE RESOURCES--PROCUREMENT--PUBLIC AGENCIES

EFFECTIVE DATE: 06/12/08

Passed by the House March 8, 2008  
Yeas 93 Nays 0

FRANK CHOPP

\_\_\_\_\_  
**Speaker of the House of Representatives**

Passed by the Senate March 6, 2008  
Yeas 46 Nays 2

BRAD OWEN

\_\_\_\_\_  
**President of the Senate**

Approved March 27, 2008, 4:08 p.m.

CHRISTINE GREGOIRE

\_\_\_\_\_  
**Governor of the State of Washington**

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2639** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

\_\_\_\_\_  
**Chief Clerk**

FILED

March 28, 2008

**Secretary of State  
State of Washington**

1 professional service and whose certificate of formation sets forth that  
2 it is a professional limited liability company subject to RCW  
3 25.15.045.

4 (11) "Professional service" means the same as defined under RCW  
5 18.100.030.

6 (12) "State" means the District of Columbia or the Commonwealth of  
7 Puerto Rico or any state, territory, possession, or other jurisdiction  
8 of the United States other than the state of Washington.

9 **Sec. 5.** RCW 54.16.180 and 1999 c 69 s 1 are each amended to read  
10 as follows:

11 (1) A district may sell and convey, lease, or otherwise dispose of  
12 all or any part of its works, plants, systems, utilities and  
13 properties, after proceedings and approval by the voters of the  
14 district, as provided for the lease or disposition of like properties  
15 and facilities owned by cities and towns(~~(:—PROVIDED, That)~~). The  
16 affirmative vote of three-fifths of the voters voting at an election on  
17 the question of approval of a proposed sale, shall be necessary to  
18 authorize such a sale(~~(:—PROVIDED FURTHER, That)~~).

19 (2) A district may, without the approval of the voters, sell,  
20 convey, lease, or otherwise dispose of all or any part of the property  
21 owned by it(~~(7)~~) that is located:

22 (a) Outside its boundaries, to another public utility district,  
23 city, town or other municipal corporation (~~(without the approval of the~~  
24 ~~voters)~~); or (~~(may sell, convey, lease, or otherwise dispose of to any~~  
25 ~~person or public body, any part, either)~~)

26 (b) Within or without its boundaries, which has become  
27 unserviceable, inadequate, obsolete, worn out or unfit to be used in  
28 the operations of the system and which is no longer necessary, material  
29 to, and useful in such operations, (~~(without the approval of the~~  
30 ~~voters:—PROVIDED FURTHER, That)~~) to any person or public body.

31 (3) A district may sell, convey, lease or otherwise dispose of  
32 items of equipment or materials to any other district, to any  
33 cooperative, mutual, consumer-owned or investor-owned utility, to any  
34 federal, state, or local government agency, to any contractor employed  
35 by the district or any other district, utility, or agency, or any  
36 customer of the district or of any other district or utility, from the  
37 district's stores without voter approval or resolution of the

# EXHIBIT 33 (a)

## CHAPTER 390.

[ S. B. 367. ]

## PUBLIC UTILITY DISTRICTS.

AN ACT relating to powers of public utility districts and amending section 1, chapter 143, Laws of 1945, as last amended by sections 1 and 2, chapter 209, Laws of 1951 and RCW 54.16.010 through 54.16.190.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. Section 1, chapter 143, Laws of 1945, as last amended by sections 1 and 2, chapter 209, Laws of 1951 (heretofore codified as RCW 54.16.010 through 54.16.190) is divided and amended as set forth in sections 2 through 20 of this act.

Division and amendment.

SEC. 2. (RCW 54.16.010) A district may make a survey of hydroelectric power, irrigation, and domestic water supply resources within or without the district, and compile comprehensive maps and plans showing the territory that can be most economically served by the various resources and utilities, the natural order in which they should be developed, and how they may be joined and coordinated to make a complete and systematic whole.

Enacted without amendment.

Survey authorized.

SEC. 3. (RCW 54.16.020) A district may construct, condemn and purchase, purchase, acquire, lease, add to, maintain, operate, develop, and regulate all lands, property, property rights, water, water rights, dams, ditches, flumes, aqueducts, pipes and pipe lines, water power, leases, easements, rights of way, franchises, plants, plant facilities, and systems for generating electric energy by water power, steam, or other methods; plants, plant facilities, and systems for developing, conserving, and distributing water for domestic use and irrigation; buildings, structures, poles and pole lines, and cables and conduits and any and all other facilities; and may exercise the right of eminent domain to effectuate the foregoing purposes or for the acquisition and

Enacted without amendment.

Powers of district.

Right of appeal to supreme court.

the property of the appellant. In the same manner as provided with reference to cities of the first class an appeal shall lie to the supreme court from the judgment of the superior court, as in other cases, if taken within fifteen days after the date of the entry of the judgment in the superior court. Engineering, office, and other expenses necessary or incident to the improvement shall be borne by the public utility district: *Provided*, That when a municipal corporation included in the public utility district already owns or operates a utility of a character like that for which the assessments are levied hereunder, all such engineering and other expenses shall be borne by the local assessment district.

Expenses.

Enacted without amendment.

SEC. 18. (RCW 54.16.170) When an improvement is ordered hereunder, payment for which shall be made in part from assessments against property specially benefited, not more than fifty percent of the cost thereof shall ever be borne by the entire public utility district, nor shall any sum be contributed by it to any improvement acquired or constructed with or by any other body, exceed such amount, unless a majority of the electors of the district consent to or ratify the making of such expenditure.

Limitation on cost burden.

Enacted without amendment.

SEC. 19. (RCW 54.16.180) A district may sell and convey, lease, or otherwise dispose of all or any part of its works, plants, systems, utilities and properties, after proceedings and approval by the voters of the district, as provided for the lease or disposition of like properties and facilities owned by cities and towns: *Provided*, That the affirmative vote of three-fifths of the voters voting at an election on the question of approval of a proposed sale, shall be necessary to authorize such sale: *Provided further*, That a district may sell, convey, lease, or otherwise dispose of all or any part of the property owned by it, located outside its boundaries, to an-

Sale, lease, conveyance of property authorized; vote on proposed sale.

other public utility district, city, town, or other municipal corporation without the approval of the voters; or may sell, convey, lease, or otherwise dispose of to any person or public body, any part, either within or without its boundaries, which has become unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the system and which is no longer necessary, material to, and useful in such operations, without the approval of the voters. Public utility districts are municipal corporations for the purpose of this section and the commission shall be held to be the legislative body and the president and secretary shall have the same powers and perform the same duties as the mayor and city clerk and the resolutions of the districts shall be held to be ordinances within the meaning of the statutes governing the sale, lease, or other disposal of public utilities owned by cities and towns.

Public utility districts—municipal corporations.

SEC. 20. (RCW 54.16.190) The commission of a district may adopt general resolutions to carry out the purposes, objects, and provisions of this title.

Enacted without amendment. General resolutions.

Passed the Senate March 9, 1955.

Passed the House March 8, 1955.

Approved by the Governor March 22, 1955.

**EXHIBIT 33 (b)**

## CHAPTER 143.

[ H. B. 342. ]

## PUBLIC UTILITY DISTRICTS.

AN ACT relating to public utility districts; providing for the sale of certain properties by said districts to other public utility districts, municipal corporations and public agencies in the state without an election; relating to the covenants of resolutions authorizing the issue of revenue bonds or warrants; amending section 6, chapter 1, Laws of 1931 (section 11610, Remington's Revised Statutes, also Pierce's Perpetual Code 833-11); and section 3, chapter 182, Laws of 1941 (section 11611-3, Remington's Revised Statutes, also Pierce's Perpetual Code 833-29).

*Be it enacted by the Legislature of the State of Washington:*

Amenu-  
ments.

SECTION 1. Section 6, chapter 1, Laws of 1931 (section 11610, Remington's Revised Statutes, also Pierce's Perpetual Code 833-11), is amended to read as follows:

Section 6. All public utility districts organized under the provisions of this act shall have power:

Powers of  
public utility  
districts.

(a) To make a survey of hydro-electric power, irrigation and domestic water supply resources within or without the district, and to compile comprehensive maps and plans showing the territory that can be most economically served by the various resources and utilities, the natural order in which they should be developed, and how they may be joined and co-ordinated to make a complete and systematic whole.

(b) To construct, condemn and purchase, purchase, acquire, lease, add to, maintain, operate, develop and regulate all lands, property, property rights, water, water rights, dams, ditches, flumes, aqueducts, pipes and pipe lines, water power, leases, easements, rights of way, franchises, plants, plant facilities and systems for generating electric energy by water power, steam or other methods, plant, plant facilities and systems for developing, conserving and distribut-

expenses necessary or incident to said improvement shall be borne by the public utility district: *Provided*, That where any municipal corporation included within such public utility district already owns or operates a utility of like character for which such assessments are levied hereunder, then all such engineering and other expenses mentioned above shall be borne by the local assessment district.

Whenever any improvement shall be ordered hereunder, payment for which shall be made in part from assessments against property specially benefited, not more than fifty per cent (50%) of the cost thereof shall ever be borne by the entire public utility district, nor shall any sum be contributed by it to any improvement acquired or constructed with or by any other body, exceed such amount, unless a majority of the electors of such district shall consent to or ratify the making of such expenditure.

Powers of  
public utility  
districts.

(m) It is, and shall be lawful for any public utility district organized hereunder to sell and convey, lease or otherwise dispose of all or any part of the works, plants, systems, utilities and properties authorized by this act and owned by it after proceedings and approval by the voters of the district as provided for in chapter 137, Laws of 1917, (sections 9512, 9513 and 9514 of Remington's Revised Statutes of Washington): *Provided*, That the affirmative vote of three-fifths ( $\frac{3}{5}$ ) of the voters voting at an election on the question of approval of such proposed sale, shall be necessary to authorize such sale: *Provided further*, That any public utility district may sell, convey, lease or otherwise dispose of all or any part of the property owned by it, located outside its boundaries, to any other public utility district, city, town or other municipal corporation without the approval of the voters; or may sell, convey, lease or otherwise dispose of, to any person, firm, corporation or public body, any part either

# EXHIBIT 33 (c)

upon such delinquent assessments prior to the making of such an application for the cancellation as herein provided, shall be; for the purpose of this act, considered as belonging to the city within which such local improvement district is located, whether the taxes be cancelled by the city or town or by the county.

Passed the Senate March 1, 1917.

Passed the House March 6, 1917.

Approved by the Governor March 15, 1917.

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## CHAPTER 137.

[H. B. 337.]

### 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.

Notice  
calling for  
bids.

Bids.

Acceptance  
by legislative  
authority.

Referendum  
of ordinance  
to popular  
vote.

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.

SEC. 3. Upon the taking effect of any such ordinance the mayor and 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.

Execution of  
lease or  
conveyance.

Acceptance  
of lessee  
or grantee.

Passed the House March 3, 1917.

Passed the Senate March 6, 1917.

Approved by the Governor March 15, 1917.

# EXHIBIT 33 (d)

# The State of Washington



Office of the Secretary of State  
Kim Wyman, Secretary of State

## Certificate

I, *Steve Excell*, in accordance with the provisions of Chapter 40.14, Revised Code of Washington, certify that I have compared the attached copy, or specific part thereof, listed below, with the records in our custody, and that the same, or each of the same, is a true and correct copy of the Record in the Official Custody of the State Archivist of the State of Washington.

FROM THE RECORDS OF:

SECRETARY OF STATE,

Washington State Legislature

Senate

Local Government Committee

1973 Senate Bill No. 2835

(14 pages)



WASHINGTON STATE  
ARCHIVES

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the Office of the State Archivist of the State of Washington.

Steve Excell

Monday, January 17, 2020

Washington State Archivist

REPORT OF STANDING COMMITTEE

March 22, 1973.

SENATE BILL NO. 2835, authorizing an additional method for the  
disposition of certain property owned by municipal utilities.

(reported by Committee on Local Government):

\_\_\_\_\_ recommendation: **DO PASS AS AMENDED**

Senate Committee Amendments to Senate Bill No. 2835  
By Committee on Local Government

In section 1, line 7, after "any" and before  
"lands" strike "unimproved"

In section 1, line 7 after "lands," and before  
"property" strike "unusable"

In section 1, line 11, after "resolution"  
and before "may" insert "and after a public  
hearing"

Walgren  
Whetzel

Booth Gardner

*Dan Jolly*  
Dan Jolly

*R. H. (Bob) Lewis*  
R. H. (Bob) Lewis

*John S. Murray*  
John S. Murray

*Don L. Talley*  
Don L. Talley

*Gordon L. Walgren*  
Gordon L. Walgren

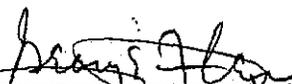
*Jonathan Whetzel*  
Jonathan Whetzel

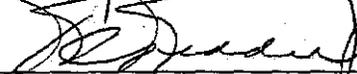
Passed to Committee on Rules for second reading.

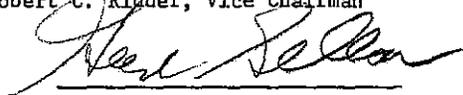
DO NOT WRITE ABOVE THIS LINE

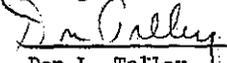
(If ALL members of committee sign,  
leave above line blank.)

Signed by: Senators
Fleming, Chairman;
Ridder, V. Chairman
Connor
Gardner
Jolly
Lewis, R. H.
Murray
Sellar
Talley
Walgren
Whetzel

  
George Fleming, Chairman

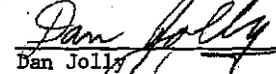
  
Robert C. Ridder, Vice Chairman

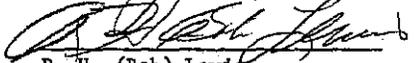
  
George L. Sellar

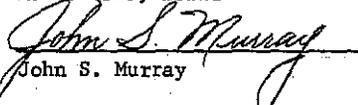
  
Don L. Talley

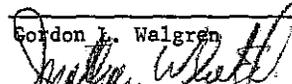
  
Frank T. Connor

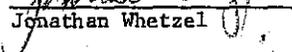
  
Booth Gardner

  
Dan Jolly

  
R. H. (Bob) Lewis

  
John S. Murray

  
Gordon L. Walgren

  
Jonathan Whetzel

Passed to Committee on Rules for second reading.

# EXHIBIT 33 (e)

Senate Committee Amendments to Senate Bill No. 2835  
By Committee on Local Government

1. In section 1, line 7, after "any" strike "unimproved"  
and after "lands," strike "unusable"

---

2. In section 1, line 11, after "resolution" and before  
"may" insert "and after a public hearing"

1. *Strikes two words that are indefinable and superfluous language — they were inadvertently included in drafting the bill.*
2. *Assures a public hearing in conjunction with the disposition of property no longer required for providing continued public utility service.*

# EXHIBIT 33 (f)

SENATE BILL NO. 2835

State of Washington  
43rd Legislature  
1st Extraordinary Session

By Senators Rasmussen, Gardner  
and Peterson (Ted)

Read first time March 14, 1973, and referred to Committee on LOCAL GOVERNMENT.

1 AN ACT Relating to the sale or lease of municipal utilities; and  
2 adding a new section to chapter 35.94 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. Section 1. There is added to chapter 35.94 RCW  
5 a new section to read as follows:

6 Whenever a city shall determine, by resolution of its  
7 legislative authority, that any unimproved lands, unusable property,  
8 or equipment originally acquired for public utility purposes is  
9 surplus to the city's needs and is not required for providing  
10 continued public utility service, then such legislative authority by  
11 resolution may cause such lands, property, or equipment to be leased,  
12 sold, or conveyed. Such resolution shall state the fair market value  
13 or the rent or consideration to be paid and such other terms and  
14 conditions for such disposition as the legislative authority deems to  
15 be in the best public interest.

16 The provisions of RCW 35.94.020 and 35.94.030 shall not apply  
17 to dispositions authorized by this section.

**EXHIBIT 33 (g)**

DIVISIONS

Light  
Water  
Belt Line



*City of Tacoma*  
WASHINGTON

DEPARTMENT OF PUBLIC UTILITIES  
A. J. Benedetti, Director

March 20, 1973

Please address reply to:  
City of Tacoma  
Department of Public Utilities  
P. O. Box 11007  
Tacoma, Washington 98411

Attention:

Washington State Legislature  
The Senate  
Committee on Local Government  
Chairman and Committee Members

Re: Senate Bill 2835

Dear Sirs:

This letter is in reference to the subject bill recently introduced and referred to your committee and which should be promptly enacted in the best public interest. The background of the need for this amendatory legislation has been previously discussed with and furnished to the sponsors, Senators Rasmussen, Gardner and Peterson (Ted), and is restated herein for your full consideration.

During the routine course of ownership of a municipally owned public utility, various types of plant and properties are acquired for additions and betterments to the utility system. Some of these properties in turn become surplus to the utility needs and nonessential to continued effective utility service. The orderly procedure for the disposition of such properties under the general powers of cities of the first class (RCW 35.22.280(3)) has been clouded by the authority and procedure regarding the lease and/or sale of public utility works set forth in Chapter 35.94 RCW. Sections 35.94.020 and .030 require a formalized procedure with a confirming approval of the voters on a ballot proposition. Such procedure is, of course, desirable where in fact all or an integral part of an operating utility is to be so disposed of. However, the procedure is completely impractical for example in the disposition of property and equipment, lands, substations, and other parts and segments of facilities no longer required for utility service. Where surplus lands are to be leased or sold the purchaser may require substantial title insurance and/or require warranty of title and the right to convey protecting secondary financing for his projected improvements. Chapter 35.94 RCW as now enacted unfortunately prevents this. Thus, more flexibility of procedure is desirable and in the best public interest.

The proposed amendment would accomplish greater procedural flexibility in such transactions without repealing

Washington State  
Legislature

-2-

March 20, 1973

the formalized procedures in the proper situations. The proposed amendment merely adds a new section providing that upon finding and determination, expressed in a resolution adopted by the Legislative authority of the City, that the property is surplus and nonessential to continued effective utility service, it can be leased or sold in such manner and on such terms as are in the best public interest for the orderly disposition of the same.

The flexibility sought is reasonably consistent with that long enjoyed by Public Utility Districts under RCW 54.16.180, and investor-owned utilities. In many situations the local taxing entity will receive additional revenues when the surplus properties are returned to taxable status.

In summary then, for all these reasons, this is legally sound, desirable, necessary and helpful legislation and should be promptly enacted in the best public interest.

Thank you for your assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read 'A. J. Benedetti', with a horizontal line extending to the right across the end of the signature.

A. J. Benedetti  
Director of Utilities

## DIVISIONS

Light  
Water  
Belt Line



# City of Tacoma

WASHINGTON

DEPARTMENT OF PUBLIC UTILITIES  
A. J. Benedetti, Director

March 20, 1973

Please address reply to:  
City of Tacoma  
Department of Public Utilities  
P. O. Box 11007  
Tacoma, Washington 98411

Attention:

Washington State Legislature  
The Senate  
Committee on Local Government  
Chairman and Committee Members

Re: Senate Bill 2835

Dear Sirs:

This letter is in reference to the subject bill recently introduced and referred to your committee and which should be promptly enacted in the best public interest. The background of the need for this amendatory legislation has been previously discussed with and furnished to the sponsors, Senators Rasmussen, Gardner and Peterson (Ted), and is restated herein for your full consideration.

During the routine course of ownership of a municipally owned public utility, various types of plant and properties are acquired for additions and betterments to the utility system. Some of these properties in turn become surplus to the utility needs and nonessential to continued effective utility service. The orderly procedure for the disposition of such properties under the general powers of cities of the first class (RCW 35.22.280(3)) has been clouded by the authority and procedure regarding the lease and/or sale of public utility works set forth in Chapter 35.94 RCW. Sections 35.94.020 and .030 require a formalized procedure with a confirming approval of the voters on a ballot proposition. Such procedure is, of course, desirable where in fact all or an integral part of an operating utility is to be so disposed of. However, the procedure is completely impractical for example in the disposition of property and equipment, lands, substations, and other parts and segments of facilities no longer required for utility service. Where surplus lands are to be leased or sold the purchaser may require substantial title insurance and/or require warranty of title and the right to convey protecting secondary financing for his projected improvements. Chapter 35.94 RCW as now enacted unfortunately prevents this. Thus, more flexibility of procedure is desirable and in the best public interest.

The proposed <sup>bill</sup> amendment would accomplish greater procedural flexibility in such transactions without repealing

Washington State  
Legislature

-2-

March 20, 1973

the formalized procedures in the proper situations. The proposed amendment merely adds a new section providing that upon finding and determination, expressed in a resolution adopted by the Legislative authority of the City, that the property is surplus and nonessential to continued effective utility service, it can be leased or sold in such manner and on such terms as are in the best public interest for the orderly disposition of the same.

The flexibility sought is reasonably consistent with that long enjoyed by Public Utility Districts under RCW 54.16.180, and investor-owned utilities. In many situations the local taxing entity will receive additional revenues when the surplus properties are returned to taxable status.

In summary then, for all these reasons, this is legally sound, desirable, necessary and helpful legislation and should be promptly enacted in the best public interest.

Thank you for your assistance.

Very truly yours,

  
A. J. Benedetti  
Director of Utilities

# EXHIBIT 33 (h)



# EXHIBIT 33 (i)

Amendment to Senate Bill 2835  
By Senator Guess

On page 1, add a new section following section 1 as follows:

"NEW SECTION. Section 2. In the event that the property contained in section one of this act is real property (including lands, improvements thereon, and any interests or estates) and such real property is to be sold, the following additional procedures shall be followed: A written notice particularly describing the property to be sold and the time and place of the sale shall be posted in three public places in the city where the sale is to take place, for a period of not less than four weeks prior to the date of the proposed sale. Further, there shall be notice of the proposed sale published in a display advertisement of no less than two column by two inch or one column by four inch size in any daily or weekly legal newspaper of general circulation published in the county in which the real property to be sold is situated. This advertisement shall appear in the legal notices section and the real estate classified section. This publication shall appear for a period of not less than four weeks prior to the proposed sale and the notice shall particularly describe the property to be sold and the time and place of the proposed sale: PROVIDED, That if there is no legal newspaper published in this county, then such notice shall be published in the legal newspaper published in this state nearest to the place of sale."

PROPOSED AMENDMENT TO S.B. 2835

On line 7 after "any" delete  
the word "unimproved" and  
after "lands", delete the  
word "unusable".

# EXHIBIT 33 (j)

# The State of Washington



## Office of the Secretary of State

Kim Wyman, Secretary of State

## Certificate

I, *Steve Excell*, in accordance with the provisions of Chapter 40.14, Revised Code of Washington, certify that I have compared the attached copy, or specific part thereof, listed below, with the records in our custody, and that the same, or each of the same, is a true and correct copy of the Record in the Official Custody of the State Archivist of the State of Washington.

FROM THE RECORDS OF:

SECRETARY OF STATE,

Washington State Legislature

House of Representatives

Local Government Committee

1973 Senate Bill No. 2835

(20 pages)



WASHINGTON STATE  
ARCHIVES

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the Office of the State Archivist of the State of Washington.

Steve Excell

Monday, January 17, 2020

A handwritten signature in black ink, appearing to read "Steve Excell", written over a horizontal line.

Washington State Archivist

Chairman Joe D. Haussler called the meeting to order at 8:15 a.m. Saturday, April 7 in House Office Building 431. He thanked the members of the committee and the subcommittee chairmen for their concern and attention during the past session of the Legislature in Local Government committee measures. Rep. Amen expressed the appreciation of the committee for Chairman Haussler's fair and able chairmanship.

HEARING: Chairman Haussler turned the first portion of the agenda over to Subcommittee Chairman Jeff Douthwaite, and requested that those speaking limit their testimony to one pro and one con on each issue.

SB 2388 Annexation resolutions, final action. Provides that a petition or resolution to call an annexation election that is filed with the legislative authority shall be valid for 1 year, and if final action is not taken by the expiration of that time, the resolution shall be considered null and void.

Chairman Douthwaite called on Jim Guenther to explain the bill, and he stated that there had previously been no time requirement on it. Questions from the committee expressed concern over the possibility of the same group re-signing again at the end of the year, and whether an amendment should be added to preclude that possibility. Jim Guenther spoke of the lateness of time and the remote possibility of this happening.

Rep. North inquired if another group could file a petition within the year, and the reply was negative.

EXECUTIVE:

Rep. Zimmermen offered an amendment to add the word "petition" in two places: on line 24, page 1, and line 14, page 2 to make it consistent with the previous language. The amendment was adopted.

Representative Kalich moved SB 2388 out DO PASS AS AMENDED. The motion was seconded and carried.

HEARING:

ESB 2835 Municipal utilities property, disposition

Chairman Douthwaite asked Mr. Al Brenninger, Tacoma Public Utilities, to explain the bill. He stated that it was an amendatory legislation to formal procedures for the disposition of public utility properties, that it had the approval of the Association of Washington Cities, and is basically similar to HB 939, previously passed out of the committee. He proposed an amendment which would delete all of section 2, and which had been distributed to the committee members.

Mr. Brenninger stated that this deletes the requirement that notice of sale be posted and published in a certain manner. He also pointed out that utility property presently must be disposed of the same as other property, with the final approval by the voters, and that this bill pertained only to the disposition of utility property.

EXECUTIVE:

Rep. Adams moved the adoption of an amendment to delete Section 2 from Engrossed SB 2835.

After discussion, the amendment was adopted.

Rep. Zimmerman moved ESB 2835 out DO PASS AS AMENDED. The motion was seconded by Rep. Adams and carried.

HEARING: Subcommittee Chairman Hugh Kalich, presiding

ESB 2584 Diking dist. commissioners, compensation. Provides that diking district commissioners may receive \$8 compensation per day for meeting attendance, and shall receive the same compensation as similar labor does for all other necessary work or services performed in connection with their duties. Provides that such compensation shall not exceed \$1,000 per year, except during emergencies.

Representative Haussler explained that this was a district set up by the people themselves, and they tax themselves in order to operate; previously there had been some state matching money, but it was principally paid for by the people.

In answer to a question from the committee, Mr. Jim Guenther explained that there were three commissioners on a diking district commission, and that there were 97 diking and irrigation districts in the state.

EXECUTIVE:

Representative noted the misspelled word in the Engrossed bill, and moved the adoption of an amendment to correct it to read "declare" instead of "delare". The amendment was adopted (although spelled correctly in the Senate amendment).

Rep. Adams moved out ESB 2584 DO PASS AS AMENDED. The motion was seconded and carried.

HEARING:

Chairman Haussler presided over the last item on the agenda:

SSB 2554 Humane societies, county authority. This bill authorizes a county legislative authority to grant to one or more qualified corporations the authority to enforce the chapter on prevention of cruelty to animals. This authority is for a period of up to three years.

Rep. Frances North, sponsor of a similar House Bill (750) spoke briefly explaining that this bill now allows other humane societies to organize under the RCW.

Virginia Knouse, of PAWS, spoke for the bill, bringing out the fact that many of these first-incorporated humane societies no longer function properly to accomplish the desired goal of preventing cruelty to animals. The law says that they shall have the authority regardless of their effectiveness. Allowing more than one such organization would insure that the job got done. She felt it was a start in the right direction, as it was an expensive and large problem.

Mr. Charles H. McConnell, Washington State Dog Owners Assn. Inc., spoke against

# EXHIBIT 33 (k)

REPORT TO SPEAKER'S OFFICE

(Confidential - Please Deliver in Envelope)

BILL NO. E.S.B. 2835 BY Senators Rasmussen, Gardner, and T. Peterson

BRIEF TITLE Authorizing an additional method for the disposition of certain property owned by municipal utilities

REPORTED BY: Committee on Local Government (20)

COMMITTEE RECOMMENDATION: Do Pass as Amended (15)  
(Indicate number signing report)

- A. EXISTING LAW: Utility property presently must be disposed of the same as other property, that is with final approval by the voters.
  
- B. PURPOSE OF BILL AND EFFECT ON EXISTING LAW:  
Authorizes city legislative authorities to sell, lease, or convey property originally acquired for public utility purposes which it determines is surplus to the city's needs and not required for public utility service. Provides for a public hearing.  
Requires the authorizing resolution to state the fair market value or consideration to be paid and other terms in the best public interest.  
Provides that present statutory requirements for closed bid procedures, and approval by the legislative authority and the voters shall not apply to such disposition.  
Provides for the posting and publishing of notices when the sale of real property is involved. Provides that real property offered for sale under the provisions of this section, but not sold, may be sold by negotiation after advertisement.
  
- C. EFFECT OF AMENDMENT(S): Strikes the second section of the bill (the Senate floor amendment). Deletes requirements that notice of sale be posted and published in a certain manner.

FISCAL IMPACT:  
none

BILL SUBSTANTIALLY SIMILAR: (if any)  
No. --

Rep. Joe D. Haussler  
Chairman

(Distribution: 1 copy, with copy of Bill Digest and amendments attached, to Speaker's Office)

DRAFTER: Code Reviser: \_\_\_\_\_

Other: \_\_\_\_\_

PRINCIPAL PROPONENTS: (Individuals and Organizations)

Al Brenninger, City of Tacoma, Department of Public Utilities

PRINCIPAL OPPONENTS: (Individuals and Organizations)

None

PRINCIPAL ARGUMENTS:

FOR: This is the same as HB 939 which was passed out of this committee on March 16. This bill offers cities a simpler way of disposing of property no longer needed for public utility purposes. The public interest is protected by the hearing process provided for.

AGAINST: none

# EXHIBIT 33 (I)

Report of Standing Committee

HOUSE OF REPRESENTATIVES

Olympia, Washington

4/7/73  
(date)

Engrossed Senate Bill

No. 2835

(Type in House or Senate Bill, Resolution, or Memorial)

Authorizing an additional method for the disposition of certain property owned by  
(Type in brief title) municipal utilities

reported by Committee on Local Government (20)

Majority recommendation: Do pass with the following amendment:

House Committee Amendment to Engrossed Senate Bill No. 2835  
by Committee on Local Government

On page 1, beginning on line 18 of the engrossed bill, strike  
all of section 2, added by the amendment by Senator Guass as  
amended by Senator Rasmussen

Signed by  
Representatives

- 1. *John Haussler*  
Haussler Chairman
- 2. *Jeff Douthett*  
Douthett Subcommittee Chairman
- 3. *John Johnson*  
Johnson Subcommittee Chairman
- 4. *John Kalich*  
Kalich Subcommittee Chairman
- 5. *Acams*  
Acams
- 6. *Otto Amen*  
Amen
- 7. *Scott Blair 4/7/73*  
Blair
- 8. *Boeckel*  
Boeckel
- 9. *Gene Laughlin*  
Laughlin
- 10. *Cliff*  
Cliff

- 11. *McGee*
- 12. *Paul Nelson*  
Nelson
- 13. *Frank North*  
North, F.
- 14. *Lois North*  
North, L.
- 15. *Oliver*
- 16. *Will Paris*  
Paris
- 17. *Ed Patterson*  
Patterson
- 18. *Spang*
- 19. *Spang*  
Spang
- 20. *David Zimmerman*  
Zimmerman

ESB 2835 is substantially similar to HB 939, which we passed out of committee on March 16. Section 1 of ESB 2835 includes our two amendments-- namely striking out "unimproved" before "lands" on page 1, line 7; and striking out "unusable" before "property" on page 1, line 7. The Senate also added an amendment calling for public hearings before the property may be sold.

ESB 2835 also adds a section 2, which requires both published and posted notices of sales for real property. The final paragraph of this section is not precisely written. It is not clear whether real property, after the posting and publishing of notices has occurred, which has not been sold, must be re-advertised before it may be sold by negotiation, or may just be sold by negotiation without re-advertising.

Steve Lundin  
Legal Aide

# EXHIBIT 33 (m)

STATE OF WASHINGTON  
LEGISLATIVE COUNCIL  
LEGISLATIVE BUILDING  
OLYMPIA

MEMORANDUM

TO: Representative Joe D. Haussler, Chairman  
Local Government Committee

DATE: April 6, 1973

FROM: James W. Guenther  
Executive Secretary

SUBJECT: Senate Bill 2835 - Docks, certain family residences

Authorizes the city, by resolution, to dispose of land, property, or equipment which was originally acquired for public utility purposes when it is deemed to be a surplus by the city. It is required that such resolution shall state the fair market value and the conditions for such disposition of the equipment.

Under the existing law, there is a long, detailed requirement for the calling of bids, passing of resolutions and all this appears to be rather cumbersome for the purpose of disposing of surplus properties. This act, however, was amended in the Senate so as to set forth some detail as to where the notices should be posted and the requirements of publications, so as to assure adequate notice to the public of the availability of such lands or equipment which is to be disposed of.

JWG:pf

Attention:



# City of Tacoma

## WASHINGTON

DEPARTMENT OF PUBLIC UTILITIES  
A. J. Benedetti, Director

March 20, 1973

Washington State Legislature  
The Senate  
Committee on Local Government  
Chairman and Committee Members

Re: Senate Bill 2835

Dear Sirs:

This letter is in reference to the subject bill recently introduced and referred to your committee and which should be promptly enacted in the best public interest. The background of the need for this amendatory legislation has been previously discussed with and furnished to the sponsors, Senators Rasmussen, Gardner and Peterson (Ted), and is restated herein for your full consideration.

✓ During the routine course of ownership of a municipally owned public utility, various types of plant and properties are acquired for additions and betterments to the utility system. Some of these properties in turn become surplus to the utility needs and nonessential to continued effective utility service. The orderly procedure for the disposition of such properties under the general powers of cities of the first class (RCW 35.22.280(3)) has been clouded by the authority and procedure regarding the lease and/or sale of public utility works set forth in Chapter 35.94 RCW. Sections 35.94.020 and .030 require a formalized procedure with a confirming approval of the voters on a ballot proposition. Such procedure is, of course, desirable where in fact all or an integral part of an operating utility is to be so disposed of. However, the procedure is completely impractical for example in the disposition of property and equipment, lands, substations, and other parts and segments of facilities no longer required for utility service. Where surplus lands are to be leased or sold the purchaser may require substantial title insurance and/or require warranty of title and the right to convey protecting secondary financing for his projected improvements. Chapter 35.94 RCW as now enacted unfortunately prevents this. Thus, more flexibility of procedure is desirable and in the best public interest.

✓ The proposed amendment would accomplish greater procedural flexibility in such transactions without repealing

Washington State  
Legislature

-2-

March 20, 1973

the formalized procedures in the proper situations. The proposed amendment merely adds a new section providing that upon finding and determination, expressed in a resolution adopted by the Legislative authority of the City, that the property is surplus and nonessential to continued effective utility service, it can be leased or sold in such manner and on such terms as are in the best public interest for the orderly disposition of the same.

✓ The flexibility sought is reasonably consistent with that long enjoyed by Public Utility Districts under RCW 54.16.180, and investor-owned utilities. In many situations the local taxing entity will receive additional revenues when the surplus properties are returned to taxable status.

In summary then, for all these reasons, this is legally sound, desirable, necessary and helpful legislation and should be promptly enacted in the best public interest.

Thank you for your assistance.

Very truly yours,



A. J. Benedetti  
Director of Utilities

# EXHIBIT 33 (n)

INFORMATION RE: SENATE BILL NO. 2835

Municipal utilities property, disposition

SENATE BILL 2835 is amendatory legislation to formal procedures for the disposition of Public Utility properties contained in RCW Ch. 35.94. It ~~authorizes~~ <sup>authorizes</sup> the sale or lease of lands, property or equipment of a city-owned Public Utility found by resolution of its legislative authority to be surplus to the city's needs, and not required for providing continued effective public utility service, at the fair market value, rent or consideration stated in the resolution and subject to such other terms and conditions as the local legislative authority deems to be in the best public interest.

This is with the approval of the AWC and at the request of cities owning and operating Public Utilities to provide greater flexibility for disposition of such surplus properties <sup>Needed</sup> to properly clear all title and warranty clouds; to return the properties to taxable status; and to provide authority similar to that authorized for public utility districts and inherent in privately-owned companies.

This <sup>bill</sup> ~~proposed amendment~~ will accomplish procedural flexibility in such transactions without repealing the formalized procedures required in the situations involving utility operating plant and properties. (RCW Ch. 35.94)

*Senate committee amendment assures public hearing in conjunction with the disposition of such properties.*

SENATE BILL NO. 2835

State of Washington  
43rd Legislature  
1st Extraordinary Session

By Senators Rasmussen, Gardner  
and Peterson (Ted)

Read first time March 14, 1973, and referred to Committee on LOCAL  
GOVERNMENT.

1 AN ACT Relating to the sale or lease of municipal utilities; and  
2 adding a new section to chapter 35.94 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. Section 1. There is added to chapter 35.94 RCW  
5 a new section to read as follows:

6 Whenever a city shall determine, by resolution of its  
7 legislative authority, that any unimproved lands, unusable property,  
8 or equipment originally acquired for public utility purposes is  
9 surplus to the city's needs and is not required for providing  
10 continued public utility service, then such legislative authority by  
11 resolution may cause such lands, property, or equipment to be leased,  
12 sold, or conveyed. Such resolution shall state the fair market value  
13 or the rent or consideration to be paid and such other terms and  
14 conditions for such disposition as the legislative authority deems to  
15 be in the best public interest.

16 The provisions of RCW 35.94.020 and 35.94.030 shall not apply  
17 to dispositions authorized by this section.

**EXHIBIT 33 (o)**

IN THE LEGISLATURE  
of the  
STATE OF WASHINGTON



CERTIFICATION OF ENROLLED ENACTMENT

SENATE BILL NO. 2835

CHAPTER NO. \_\_\_\_\_

Passed the Senate April 3, 19 73

Yeas 44 Nays 2

Passed the House April 13, 19 73

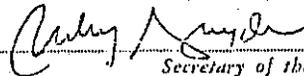
as Amended  
Yeas 94 Nays 0

The Senate concurred in the House amendment and passed the bill as amended April 13, 1973.

Yeas 47 Nays 0

CERTIFICATE

I, Sidney R. Snyder, Secretary of the Senate of the State of Washington do hereby certify that the attached is enrolled Senate Bill No. 2835 as passed by the Senate and the House of Representatives on the dates hereon set forth.

  
Secretary of the Senate

2835  
Enrolled 4/13/73 m.w.

ENGROSSED SENATE BILL NO. 2835

State of Washington  
43rd Legislature  
1st Extraordinary Session

By Senators Rasmussen, Gardner  
and Peterson (Ted)

Read first time March 14, 1973, and referred to Committee on LOCAL  
GOVERNMENT.

1 AN ACT Relating to the sale or lease of municipal utilities; and  
2 adding a new section to chapter 35.94 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. Section 1. There is added to chapter 35.94 RCW  
5 a new section to read as follows:

6 Whenever a city shall determine, by resolution of its  
7 legislative authority, that any lands, property, or equipment  
8 originally acquired for public utility purposes is surplus to the  
9 city's needs and is not required for providing continued public  
10 utility service, then such legislative authority by resolution and  
11 after a public hearing may cause such lands, property, or equipment  
12 to be leased, sold, or conveyed. Such resolution shall state the  
13 fair market value or the rent or consideration to be paid and such  
14 other terms and conditions for such disposition as the legislative  
15 authority deems to be in the best public interest.

16 The provisions of RCW 35.94.020 and 35.94.030 shall not apply  
17 to dispositions authorized by this section.

Passed the Senate April 13, 1973.

*John A. Barbera*  
President of the Senate.

Passed the House April 13, 1973.

*Samuel H. Hays*  
Speaker of the House.

**EXHIBIT 33 (p)**

ENGROSSED  
SENATE BILL NO. 2835

BY

SENATORS Rasmussen, Gardner  
and Peterson (Ted)

BRIEF TITLE

Authorizing an additional  
method for the disposition  
of certain property owned by  
municipal utilities.

SENATE RECORD

Filed with the Secretary of the Senate  
3/14/73 for introduction  
3/14/73 Read first time  
ordered printed and referred to Committee  
on LOCAL GOVERNMENT

Reported back by  
Committee with recommendation  
DO PASS AS AMENDED (10)  
Passed to Second Reading

4/3/1973 Read second time and

AMENDED  
ORDERED ENGROSSED  
Advanced to Third Reading  
Under Suspension of Rules

4/3/1973 Read third time and

PASSED Yeas 44, Nays 2  
4/3/73 Title agreed to  
4/3/73 Sent to House  
s/s SIDNEY R. SNYDER  
Secretary of Senate.

HOUSE RECORD

APR 4 1973 Received from Senate  
Read first time and referred to Committee  
on LOCAL GOVERNMENT  
APR 8 73 Reported back by

Committee with the recommendation  
Do Pass Amended (15)  
Passed to Committee on  
RULES  
For Second Reading

APR 13 73 Read second time and

Amended  
Advanced to third reading  
under suspension of rules

APR 13 73 Read third time and

PASSED AS  
AMENDED Yeas 94, Nays 0  
APR 13 73 Title agreed to  
APR 13 73 Returned to Senate

Jean R. Foster  
Secretary of Senate

APR 13 1973

The Senate concurred in the House  
Amendments and PASSED AS  
AMENDED Yeas 47 Nays 0

John A. Boyle  
Secretary

Enrolled

Signed by the President of the Senate

Signed by the Speaker of the House

By the Governor

# EXHIBIT 33 (q)

ENGROSSED SENATE BILL NO. 2835

State of Washington  
43rd Legislature  
1st Extraordinary Session

By Senators Rasmussen, Gardner  
and Peterson (Ted)

Read first time March 14, 1973, and referred to Committee on LOCAL GOVERNMENT.

1 AN ACT Relating to the sale or lease of municipal utilities; and SB -6  
2 adding a new section to chapter 35.94 RCW. 2835;  
3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON: 002  
4 NEW SECTION. Section 1. There is added to chapter 35.94 RCW PARTA  
5 a new section to read as follows: ;001  
6 Whenever a city shall determine, by resolution of its 7  
7 legislative authority, that any lands, property, or equipment 8  
8 originally acquired for public utility purposes is surplus to the 9  
9 city's needs and is not required for providing continued public 9  
10 utility service, then such legislative authority by resolution and 10  
11 after a public hearing may cause such lands, property, or equipment 11  
12 to be leased, sold, or conveyed. Such resolution shall state the 12  
13 fair market value or the rent or consideration to be paid and such 13  
14 other terms and conditions for such disposition as the legislative 14  
15 authority deems to be in the best public interest. 14  
16 The provisions of RCW 35.94.020 and 35.94.030 shall not apply 15  
17 to dispositions authorized by this section. 16  
18 NEW SECTION. Section 2. In the event that the property 17  
19 contained in section one of this act is real property (including 18  
20 lands, improvements thereon, and any interests or estates) and such 19  
21 real property is to be sold, the following additional procedures 19  
22 shall be followed: A written notice particularly describing the 20  
23 property to be sold and the time and place of the sale shall be 21  
24 posted in three public places in the city where the sale is to take 22  
25 place, for a period of not less than four weeks prior to the date of 22  
26 the proposed sale. Further, there shall be notice of the proposed 23  
27 sale published in a display advertisement of no less than two column 24

1 by two inch or one column by four inch size in any daily or weekly 24  
2 legal newspaper of general circulation published in the county in 25  
3 which the real property to be sold is situated. This advertisement 26  
4 shall appear in the legal notices section and the real estate 27  
5 classified section. This publication shall appear once a week for 27  
6 four consecutive weeks prior to the proposed sale and the notice 28  
7 shall particularly describe the property to be sold and the time and 29  
8 place of the proposed sale: PROVIDED, That if there is no legal 29  
9 newspaper published in this county, then such notice shall be 30  
10 published in the legal newspaper published in this state nearest to 31  
11 the place of sale. 31  
12 Real property offered for sale but not sold, under the 32  
13 provisions of this section may be sold after advertisement, by 33  
14 negotiations. 33

# EXHIBIT 33 (r)

Brief Title: Authorizing an additional method for the disposition of certain property owned by municipal utilities.

Reported By: Committee on Local Government (20)

Committee Recommendation: Do Pass as Amended (15)

(Indicate number, signing report)

Authorizes city legislative authorities to sell, lease, or convey property originally acquired for public utility purposes which it determines is surplus to the city's needs and not required for public utility service. Provides for a public hearing.

Requires the authorizing resolution to state the fair market value or consideration to be paid and other terms in the best public interest.

Provides that present statutory requirements for closed bid procedures, and approval by the legislative authority and the voters shall not apply to such disposition.

Provides for the posting and publishing of notices when the sale of real property is involved. Provides that real property offered for sale under the provisions of this section, but not sold, may be sold by negotiation after advertisement.

**COMMITTEE AMENDMENT:** Strikes the second section of the bill (the Senate floor amendment). Deletes requirements that notice of sale be posted and published in a certain manner.

} Digester S. Lundin

Approved Rep. Joe D. Haussler  
Committee Chairman

Date April 7, 1973

(Distribution: House Majority Caucus - 6 copies)

House Committee Amendment to Engrossed Senate Bill No. 2835  
By Committee on Local Government

*LR*

On page 1, beginning on line 18 of the engrossed bill, strike all of section 2, thus striking the amendment by Senator Guess as amended by Senator Rasmussen.

# EXHIBIT 33 (s)

# The State of Washington



Office of the Secretary of State  
Kim Wyman, Secretary of State

## Certificate

I, *Steve Excell*, in accordance with the provisions of Chapter 40.14, Revised Code of Washington, certify that I have compared the attached copy, or specific part thereof, listed below, with the records in our custody, and that the same, or each of the same, is a true and correct copy of the Record in the Official Custody of the State Archivist of the State of Washington.

FROM THE RECORDS OF:

SECRETARY OF STATE,

Washington State Legislature  
House of Representatives  
Local Government Committee  
1973 House Bill No. 939

(13 pages)



WASHINGTON STATE  
ARCHIVES

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the Office of the State Archivist of the State of Washington.

Steve Excell

Monday, January 17, 2020

A handwritten signature in black ink, appearing to read "Steve Excell", written over a horizontal line.

Washington State Archivist

# Report of Standing Committee

## HOUSE OF REPRESENTATIVES

Olympia, Washington

3/16/73  
(date)

House Bill

No. 939

(Type in House or Senate Bill, Resolution, or Memorial)

Authorizing an additional method for the disposition of certain property owned by

(Type in brief title)

municipal utilities.

reported by Committee on Local Government (20)

Majority recommendation: Do pass with the following amendment:

House Committee Amendment to House Bill No. 939  
by Committee on Local Government

In section 1, line 7, after "any" strike "unimproved" and  
after "lands," strike "unusable"

ok  
LR

Signed by  
Representatives

- |  |   |
|--|---|
| 1. <u>Joe H. Haussler</u><br>Haussler, Chairman                | 11. <u>Guadine McCormick</u><br>McCormick |
| 2. <u>Jeff Douthwaite</u><br>Douthwaite, Subcommittee Chairman | 12. <u>Hugh Jackson</u><br>Jackson        |
| 3. <u>Don Johnson</u><br>Johnson, Subcommittee Chairman        | 13. <u>Frank North</u><br>North, F.       |
| 4. <u>Walt Kalich</u><br>Kalich, Subcommittee Chairman         | 14. _____<br>North, I.                    |
| 5. <u>Adams</u>  | 15. _____                                 |
| 6. <u>Otto Amen</u>  | 16. _____                                 |
| 7. <u>Scott Blair</u> 3/16/73                                  | 17. <u>Patterson</u><br>Patterson         |
| 8. <u>Kuehnle</u>  | 18. _____                                 |
| 9. <u>Laughlin</u>   | 19. <u>Sommers</u><br>Sommers             |
| 10. <u>Martinez</u>  | 20. <u>Linderman</u><br>Linderman         |

SENATE BILL NO. 2835

State of Washington  
43rd Legislature  
1st Extraordinary Session

By Senators Rasmussen, Gardner  
and Peterson (Ted)

Read first time March 14, 1973, and referred to Committee on LOCAL  
GOVERNMENT.

1 AN ACT Relating to the sale or lease of municipal utilities; and  
2 adding a new section to chapter 35.94 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. Section 1. There is added to chapter 35.94 RCW  
5 a new section to read as follows:

6 Whenever a city shall determine, by resolution of its  
7 legislative authority, that any unimproved lands, unusable property,  
8 or equipment originally acquired for public utility purposes is  
9 surplus to the city's needs and is not required for providing  
10 continued public utility service, then such legislative authority by  
11 resolution may cause such lands, property, or equipment to be leased,  
12 sold, or conveyed. Such resolution shall state the fair market value  
13 or the rent or consideration to be paid and such other terms and  
14 conditions for such disposition as the legislative authority deems to  
15 be in the best public interest.

16 The provisions of RCW 35.94.020 and 35.94.030 shall not apply  
17 to dispositions authorized by this section.

# EXHIBIT 33 (t)

REPORT TO SPEAKER'S OFFICE  
(Confidential - Please Deliver in Envelope)

BILL NO. H. B. 939

BY Representative Kelley

BRIEF TITLE Authorizing an additional method for the disposition of certain property owned by municipal utilities

REPORTED BY: Committee on Local Government (20)

COMMITTEE RECOMMENDATION: Do Pass as Amended (16)

(Indicate number signing report)

A. EXISTING LAW: See RCW 35.94.

B. PURPOSE OF BILL AND EFFECT ON EXISTING LAW:

Authorizes city legislative authorities to sell, lease, or convey property originally acquired for public utility purposes which it determines is surplus to the city's needs and not required for public utility service.

Requires the authorizing resolution to state the fair market value or consideration to be paid and other terms in the best public interest.

Provides that present statutory requirements for closed bid procedures, and approval by the legislative authority and the voters shall not apply to such dispositions.

C. EFFECT OF AMENDMENT(S):

Refines language with regard to what property may be disposed of in this manner; deletes unnecessary adjectives.

FISCAL IMPACT:

none

BILL SUBSTANTIALLY SIMILAR: (if any)

No. ---

Rep. Joe D. Haussler

Chairman

(Distribution: 1 copy, with copy of Bill Digest and amendments attached, to Speaker's Office)

DRAFTER: Code Reviser: Jim Kaeding

Other: \_\_\_\_\_

PRINCIPAL PROPONENTS: (Individuals and Organizations)

Bob Bartel, Assn of Wash Cities

Paul J. Nolan, Tacoma Public Utilities

PRINCIPAL OPPONENTS: (Individuals and Organizations)

none

PRINCIPAL ARGUMENTS:

FOR: SEE ATTACHMENT.

AGAINST: None

# EXHIBIT 33 (u)

DIVISIONS

Light  
Water  
Belt Line



*City of Tacoma*  
WASHINGTON

DEPARTMENT OF PUBLIC UTILITIES

A. J. Benedetti, Director

March 5, 1973

Please address reply to:  
City of Tacoma  
Department of Public Utilities  
P. O. Box 11007  
Tacoma, Washington 98411

Attention:

Washington State Legislature  
House of Representatives  
Committee on Local Government  
Chairman and Committee Members

Re: House Bill 939

Dear Sirs:

This letter is in reference to the subject bill recently introduced and referred to your committee and which should be promptly enacted in the best public interest. The background of the need for this amendatory legislation has been previously discussed with and furnished to the sponsor, Representative Kelly, and is restated herein for your full consideration.

During the routine course of ownership of a municipally owned public utility, various types of plant and properties are acquired for additions and betterments to the utility system. Some of these properties in turn become surplus to the utility needs and nonessential to continued effective utility service. The orderly procedure for the disposition of such properties under the general powers of cities of the first class (RCW 35.22.280(3)) has been clouded by the authority and procedure regarding the lease and/or sale of public utility works set forth in Chapter 35.94 RCW. Sections 35.94.020 and .030 require a formalized procedure with a confirming approval of the voters on a ballot proposition. Such procedure is, of course, desirable where in fact all or an integral part of an operating utility is to be so disposed of. However, the procedure is completely impractical for example in the disposition of property and equipment, unimproved lands, substations, and other parts and segments of facilities no longer usable. Where unimproved surplus lands are to be leased or sold the purchaser may require substantial title insurance and/or require warranty of title and the right to convey protecting secondary financing for his projected improvements. Chapter 35.94 RCW as now enacted unfortunately prevents this. Thus, more flexibility of procedure is desirable and in the best public interest.

The proposed amendment would accomplish greater procedural flexibility in such transactions without repealing the formalized procedures in the proper situations.

Washington State  
Legislature

-2-

March 5, 1973

The proposed amendment merely adds a new section providing that upon a finding and determination, expressed in a resolution adopted by the Legislative authority of the city, that the property is surplus and nonessential to continued effective utility service, it can be leased or sold in such manner and on such terms as are in the best public interest for the orderly disposition of the same.

The flexibility sought is reasonably consistent with that long enjoyed by Public Utility Districts under RCW 54.16.180, and investor-owned utilities. In many situations the local taxing entity will receive additional revenues when the surplus properties are returned to taxable status.

In summary then, for all these reasons, this is legally sound, desirable, necessary and helpful legislation and should be promptly enacted in the best public interest.

Thank you for your assistance.

Very truly yours,



A. J. Benedetti  
Director of Utilities

# EXHIBIT 33 (v)

Chairman Haussler called the meeting to order and called the committee's attention to two bills which had had previous hearings: HB 564 and HB 685.

EXECUTIVE SESSION:

HB 564 - Annexation elections, petitioning - Rep. Patterson moved that we reconsider HB 564 for the purpose of the adoption of the amendment. Motion carried.

The chairman called on Mr. Bob Bartel of the Association of Washington Cities who wished to restore some of the original language in the law, which involved deleting a portion of the amendment previously proposed. The changes in the amendment were placed in the members' books.

Rep. Nelson moved that the committee adopt the three amendments which had been distributed. Rep. Blair moved an amendment to the amendment to strike the reference to county commissioners and substitute the wording "legislative authority". The motions carried and the amendments adopted.

Rep. Patterson moved the bill out DO PASS AS AMENDED. Motion carried.

HB 685 Fire protection, adjacent state lands - Rep. Patterson moved that we reconsider HB 685 for the purpose of the adoption of an amendment. Motion was seconded and carried.

Rep. Kuehnle moved the amendment. He explained the wording. Rep. Douthwaite raised a question with regard to the language, referring to the University of Washington, and his concern, as noted at the previous hearing. Rep. Kuehnle explained this measure would have no bearing on agencies inside the city.

Chairman Haussler asked Mr. Ernie Swanson, Washington Fire Commissioner's Assoc., to speak to this point. He explained that they do not have any jurisdiction within any incorporated area whatsoever. He further stated that small institutions within a town might contract with a town, but this would be an exception.

Rep. Frances North asked about fiscal impact. Mr. Swanson stated the reason for not having it was because they were not asking for any particular amount of money. He stated this was so they could negotiate first hand.

Rep. Zimmerman asked if the rules could be suspended so they could go back for one further amendment. Rep. Kuehnle moved an amendment to the amendment, placing an effective date of July 1, 1974. The motion carried.

Rep. Kalich moved HB 685 out DO PASS AS AMENDED. The motion was seconded and carried.

Subcommittee Chairman Jeff Douthwaite chaired the next item on the agenda:

HB 939 Municipal utilities, property disposition - Authorizes city legislative

authorities to sell, lease, or convey property originally acquired for public utility purposes which it determines is surplus to the city's needs and not required for public utility service.

Requires the authorizing resolution to state the fair market value or consideration to be paid and other terms in the best public interest.

Provides that present statutory requirements for closed bid procedures, and approval by the legislative authority and the voters shall not apply to such dispositions.

The committee amendment refines language with regard to what property may be disposed of in this manner; deletes unnecessary adjectives.

Chairman Douthwaite called on Mr. Paul J. Nolan, Deputy City Attorney for the Tacoma Public Utilities, who had distributed a letter to the members of the committee setting forth his favorable position on the proposed legislation. He stated it was an amendatory bill and outlined the existing law. He stated this would place property back on the tax rolls, and provided a modern and conservative way to dispose of the property. He stated he had talked with the city attorney of Seattle who agrees with him in the need for this bill, which is an amendatory bill which allows the municipal utility districts the same privileges in this instance as other public and private utility districts.

#### EXECUTIVE SESSION:

Bob Bartel of the Ass'n of Washington Cities, supported the bill. Rep. Kuehnle suggested a word change on Page 1, Sec. 1, Line 7. Rep. Adams moved the adoption of this amendment. It was seconded and carried. Rep. Kuehnle moved HB 939 and DO PASS AS AMENDED.

HB 812 Cities, six year street program - Rep. Kraabel, prime sponsor, explained that this removes the requirement that cities with urban areas must have a six year program for arterial street construction, as well as the requirement that each county having an urban area must have a six year program for arterial road construction. It repeals certain sections, as well as the requirement for urban arterial board to report to the highway commission and the joint committee on highways about the development of these six year programs.

Rep. Kraabel passed out material and suggested an amendment to the bill which would reinstate certain material deleted in the measure. He referred to Page 2, lines 18, 22, and 23, and felt they should no longer be stricken. A great deal of discussion followed regarding the possibility of removing this bill from the Local Government Committee and placing it in the Transportation Committee. Chairman Haussler suggested hearing the people who had planned to testify. A motion on removal of the bill from the committee was withdrawn by Rep. Laughlin.

Opposing the bill was Mr. Roger Polzin of the Urban Arterial Board, who spoke at length on the need for reinstating the deleted lines, and feared lawsuits from those areas who anticipated the continuance of the program. The balance of the funds in the program was announced as approximately eleven million dollars out of the original allotment of two hundred million dollars.

House Committee Amendment to House Bill No. 939  
by Committee on Local Government

oh  
LR

In section 1, line 7, after "any" strike "unimproved" and  
after "lands," strike "unusable"

# EXHIBIT 33 (w)

BILL DIGEST FORM

By Representative Kelley

Bill No. H. B. 939

Brief Title: Authorizing an additional method for the disposition of certain property owned by municipal utilities

Reported By: Committee on Local Government (20)

Committee Recommendation: Do Pass as Amended (16)

(Indicate number signing report)

Authorizes city legislative authorities to sell, lease, or convey property originally acquired for public utility purposes which it determines is surplus to the city's needs and not required for public utility service.

Requires the authorizing resolution to state the fair market value or consideration to be paid and other terms in the best public interest.

Provides that present statutory requirements for closed bid procedures, and approval by the legislative authority and the voters shall not apply to such dispositions.

COMMITTEE AMENDMENT: Refines language with regard to what property may be disposed of in this manner; deletes unnecessary adjectives.

Digester S. Lundin

Approved Rep. Joe D. Haussler  
Committee Chairman

Date March 16, 1973

(Distribution: House Majority Caucus - 6 copies)  
(Include or attach any amendments)

BILL DIGEST FORM

By Representative Kelley

Bill No. H. B. 939

Brief Title: Authorizing an additional method for the disposition of certain property owned by municipal utilities

Reported By: Committee on Local Government (20)

Committee Recommendation:

(Indicate number signing report)

Authorizes city legislative authorities to sell, lease, or convey property originally acquired for public utility purposes which it determines is surplus to the city's needs and not required for public utility service.

Requires the authorizing resolution to state the fair market value or consideration to be paid and other terms in the best public interest.

Provides that present statutory requirements for closed bid procedures, and approval by the legislative authority and the voters shall not apply to such dispositions.

Digester S. Lundin

Approved \_\_\_\_\_  
Committee Chairman

Date \_\_\_\_\_

(Distribution: House Majority Caucus - 6 copies)  
(Include or attach any amendments)

# EXHIBIT 33 (x)

new section to chapter 9.45 RCW; and prescribing penalties.  
 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. There is added to chapter 9.45 RCW a new section to read as follows:

Any person who intentionally and knowingly obtains broadcast signals from a cable antenna television system by making any connection by wire to the cable, excepting from the wall outlet to the set, and who makes the connection without the consent of the operator of the system and in order to avoid payment to the operator shall be guilty of a misdemeanor.

Passed the Senate April 3, 1973.

Passed the House April 14, 1973.

Approved by the Governor April 20, 1973.

Filed in Office of Secretary of State April 23, 1973.

-----  
 CHAPTER 95

[ Engrossed Senate Bill No. 2835 ]

MUNICIPAL UTILITIES--SURPLUS  
 PROPERTY DISPOSAL AUTHORITY

AN ACT Relating to the sale or lease of municipal utilities; and adding a new section to chapter 35.94 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. There is added to chapter 35.94 RCW a new section to read as follows:

Whenever a city shall determine, by resolution of its legislative authority, that any lands, property, or equipment originally acquired for public utility purposes is surplus to the city's needs and is not required for providing continued public utility service, then such legislative authority by resolution and after a public hearing may cause such lands, property, or equipment to be leased, sold, or conveyed. Such resolution shall state the fair market value or the rent or consideration to be paid and such other terms and conditions for such disposition as the legislative authority deems to be in the best public interest.

The provisions of RCW 35.94.020 and 35.94.030 shall not apply to dispositions authorized by this section.

Passed the Senate April 13, 1973.

Passed the House April 13, 1973.

Approved by the Governor April 20, 1973.

Filed in Office of Secretary of State April 23, 1973.

# EXHIBIT 34



City of Tacoma  
Office of the City Clerk

## CERTIFICATE OF CITY CLERK

I, Doris Sorum, City Clerk of the City of Tacoma, Washington, do hereby certify that the attached is a full, true and correct copy of Resolution No. 39902 adopted by the City Council on December 19, 2017.

Dated this 16<sup>th</sup> day of January 2020.



Doris Sorum, City Clerk  
City of Tacoma, Washington





**RESOLUTION NO. 39902**

1 BY REQUEST OF MAYOR STRICKLAND AND COUNCIL MEMBERS CAMPBELL,  
2 IBSEN, AND MELLO

3 A RESOLUTION related to Click! Network; urgently requesting the Tacoma  
4 Public Utility Board to contractually require all internet service providers  
5 using Click! Network to abide by the Click! Network Open Internet Policy  
6 supporting net neutrality.

7 WHEREAS the City of Tacoma, Department of Public Utilities, Light  
8 Division (d.b.a. "Tacoma Power") owns a hybrid fiber-coaxial ("HFC")  
9 communications network that delivers cable television, broadband internet, and  
10 other services within Tacoma Power's service area through its  
11 Telecommunications Section, Click! Network (d.b.a. "Click! Network"), and

12 WHEREAS, as a result of prior policy decisions, Tacoma Power provides  
13 wholesale broadband internet service to local Internet Service Provider ("ISP")  
14 companies, which, in turn, retail the broadband internet service to end-use  
15 customers, and

16 WHEREAS Click! Network has adopted an Open Internet Policy  
17 supporting the principles of net neutrality; specifically, Click! Network does not:  
18

- 19 • Discriminate among specific uses, or class of uses, on its network
- 20 • Impair, degrade, or delay VoIP applications or services that compete  
21 with its video services or services of its affiliates
- 22 • Impair, degrade, delay or otherwise inhibit access by customers to  
23 lawful content, applications, services, or non-harmful devices
- 24 • Impair free expression by slowing traffic from certain websites
- 25 • Demand pay-for-priority or similar arrangements that directly or  
26 indirectly favor certain traffic over other traffic



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- Prioritize its own applications, services, or devices or those of its affiliates
- Block lawful content, applications, services, or non-harmful devices, subject to reasonable network management as defined below and in its Acceptable Use Policy, and

WHEREAS the United States Federal Communications Commission (“FCC”) has repealed existing federal regulations requiring ISPs to abide by net neutrality principles, and

WHEREAS the City Council fully supports the Click! Network Open Internet Policy and wants to ensure that ISPs using Click! Network are contractually bound to abide by the Click! Network Open Internet Policy to ensure that users of Click! Network are not adversely impacted by the actions taken by the FCC; Now, Therefore,

**BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TACOMA:**

Section 1. That the City Council hereby urgently requests that the Tacoma Public Utility Board require Click! Network to include in all contracts with current and future ISPs, as a condition to use Click! Network, that the ISPs abide by the Click! Network Open Internet Policy.



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Section 2. That the proper officers of the City are hereby authorized to enter into contracts with ISPs to implement the intent of this resolution.

Adopted DEC 19 2017

  
\_\_\_\_\_  
Mayor

Attest:  
  
\_\_\_\_\_  
City Clerk

Approved as to form:  
  
\_\_\_\_\_  
City Attorney

# EXHIBIT 34 (a)

# CONGRESS.GOV

## All Information (Except Text) for H.R.1644 - Save the Internet Act of 2019

116th Congress (2019-2020) | [Get alerts](#)

[« Back to this bill](#)

**Sponsor:** [Rep. Doyle, Michael F. \[D-PA-18\]](#) (Introduced 03/08/2019)

**Committees:** House - Energy and Commerce

**Committee Reports:** [H. Rept. 116-34](#)

**Latest Action:** Senate - 04/29/2019 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 74. ([All Actions](#))

**Roll Call Votes:** There have been [5 roll call votes](#)

**Tracker:** Introduced **Passed House** Passed Senate To President Became Law

There are 4 versions of this bill. [View text »](#)

Click the check-box to add or remove the section, click the text link to scroll to that section.

[Titles](#)  [Actions Overview](#)  [All Actions](#)  [Cosponsors](#)  [Committees](#)  [Related Bills](#)  [Subjects](#)  [Latest Summary](#)  All Summaries

### Titles (4)

#### Short Titles

Short Titles - House of Representatives

#### Short Titles as Passed House

Save the Internet Act of 2019

#### Short Titles as Reported to House

Save the Internet Act of 2019

#### Short Titles as Introduced

Save the Internet Act of 2019

#### Official Titles

Official Titles - House of Representatives

#### Official Title as Introduced

To restore the open internet order of the Federal Communications Commission.

### Actions Overview (3)

#### Date

04/10/2019 Passed/agreed to in House: On passage Passed by the Yeas and Nays: 232 - 190 ([Roll no. 167](#)).

04/05/2019 Reported (Amended) by the Committee on Energy and Commerce. [H. Rept. 116-34](#).

03/08/2019 Introduced in House

### All Actions (71)

Date	Chamber	
04/29/2019	Senate	Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 74.
04/11/2019	Senate	Received in the Senate. Read the first time. Placed on Senate Legislative Calendar under Read the First Time.

# EXHIBIT 35



# **Broadband Opportunity Council Report and Recommendations**

**Pursuant to the Presidential Memorandum on  
Expanding Broadband Deployment and Adoption by  
Addressing Regulatory Barriers and Encouraging  
Investment and Training**

**August 20, 2015**

**Co-Chairs:**

**Secretary Penny Pritzker, U.S. Department of Commerce  
Secretary Tom Vilsack, U.S. Department of Agriculture**

# Broadband Opportunity Council

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## Executive Summary

*“Access to high-speed broadband is no longer a luxury; it is a necessity for American families, businesses, and consumers. Affordable, reliable access to high-speed broadband is critical to U.S. economic growth and competitiveness. High-speed broadband enables Americans to use the Internet in new ways, expands access to health services and education, increases the productivity of businesses, and drives innovation throughout the digital ecosystem.” – President Barack Obama*

The United States continues to experience unprecedented growth and innovation in broadband and in the advanced applications and services it enables. While the benefits of increased broadband access and adoption are widespread, barriers like income and geography keep many Americans from taking advantage of the economic, educational and social benefits of broadband access. To make sure that the Federal government does everything within its power to support broadband deployment and adoption, on March 23, 2015, President Obama signed a Presidential Memorandum (Memorandum) “Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training.”<sup>1</sup> The Memorandum created the Broadband Opportunity Council (Council) and tasked it to produce specific recommendations to increase broadband deployment, competition and adoption through executive actions within the scope of existing Agency programs, missions and budgets. This Report responds to that directive.

The Council presents four overarching recommendations:

1. Modernize Federal programs to expand program support for broadband investments.
2. Empower communities with tools and resources to attract broadband investment and promote meaningful use.
3. Promote increased broadband deployment and competition through expanded access to Federal assets.
4. Improve data collection, analysis and research on broadband.

To pursue these objectives, Federal Agencies will take dozens of actions over the next 18 months. These include commitments to:

- Modernize Federal programs valued at approximately \$10 billion to include broadband as an eligible program expenditure, such as the Department of Agriculture’s (USDA) Community Facilities (CF) program, which will help communities around the country bring broadband to health clinics and recreation centers;
- Create an online inventory of data on Federal assets, such as Department of the Interior (DOI) telecommunications towers, that can help support faster and more economical broadband deployments to remote areas of the country;
- Streamline the applications for programs and broadband permitting processes to support broadband deployment and foster competition; and
- Create a portal for information on Federal broadband funding and loan programs to help communities easily identify resources as they seek to expand access to broadband.

The Council proposes continuing actions in support of its mission, including monitoring agencies’ progress in implementing the action items in the Report and exploring additional steps to further the goals set forth in the Presidential Memorandum.

# Broadband Opportunity Council

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## 1. Introduction

### Progress to Date

Day by day, access to broadband, and the advanced applications it facilitates, becomes more integral to the daily lives of Americans and to the mission and work of the Federal government and its Agencies. Broadband drives the provision of services across nearly all government functions and across many of the activities that are key to advancement and opportunity for all Americans.

- Broadband enables greater civic participation, provides tools for open government and streamlines government processes.
- Broadband enables changes in how we access educational resources, collaborate in the educational process, conduct research and continue to learn anytime, anyplace and at any pace.
- Broadband enables improved healthcare access, treatments and information.
- Broadband enables new business models, creates business efficiencies, drives job creation, and connects manufacturers and store-fronts to clients and partners worldwide.
- Broadband can also help bring communities together and improve public safety, create a greener planet, and make our transportation systems more resilient and efficient.

Additionally, broadband provides a foundation for many of the advancements we will see across industry sectors in the coming years.<sup>2</sup>

That's why the Obama Administration has focused over the past six years on expanding broadband access for all Americans. Under the Obama Administration's leadership, the United States has experienced unprecedented growth and innovation in broadband networks and services. Since 2009, nearly 45 million more Americans have adopted broadband.<sup>3</sup> Today, 84 percent of Americans are "Internet users," up from 76 percent 5 years ago.<sup>4</sup> Tens of millions of households have seen their home broadband speeds more than double without paying significantly more for monthly service. Communities around the country are beginning to reap the benefits of gigabit speed fiber networks. And while other countries are just beginning to deploy fourth-generation wireless networks to scale, over 98 percent of Americans now have access to 4G mobile broadband.<sup>5</sup>

A combination of robust private investment and targeted Federal policy has driven these remarkable strides in broadband access and adoption. Through the American Recovery and Reinvestment Act (Recovery Act), USDA and the Department of Commerce (DOC) invested nearly \$7.5 billion in broadband networks to help connect under-served areas around the country:

- The Commerce Department's National Telecommunications and Information Administration (NTIA) awarded approximately \$4 billion in grants under the Broadband Technology Opportunities Program (BTOP) and approximately \$293 million in grants under the State Broadband Initiative (SBI) program. Grantees deployed more than 114,500 miles of new or upgraded network miles; connected more than 25,500 community anchor institutions; installed or upgraded more than 47,100 personal computers in public access centers; and prompted more than 670,000 people to subscribe to broadband services. SBI grantees mapped broadband availability in all 50 states and 6 territories and supported well over 200 local broadband planning teams across the country.
- USDA's Rural Utilities Service (RUS) expanded its existing telecommunications programs with an additional \$3.5 billion in loans and grants as part of the Broadband Infrastructure Program (BIP). The awards went to 285 last mile providers, 12 middle mile providers, and 4

## 4. Recommendations and Agency Actions

The Council was charged with making recommendations for actions that can be implemented within the scope of existing Agency programs, missions and budgets. The Council makes recommendations in four areas where Federal actions can strengthen broadband deployment, foster competition and promote broadband adoption:

1. Modernize Federal programs to expand program support for broadband investments.
2. Empower communities with tools and resources to attract broadband investment and promote meaningful use.
3. Promote increased broadband deployment and competition through expanded access to Federal assets.
4. Improve data collection, analysis and research on broadband.

Milestones reflect the Federal fiscal year calendar which begins October 1. Please see Appendix A for a list of Agencies and acronyms. Recommended next steps for the Broadband Opportunity Council are summarized in Section 5.

### 4.1 Modernize Federal programs to expand program support for broadband investments

Broadband has steadily shifted from an optional amenity to a core utility for households, businesses and community institutions. Today, broadband is taking its place alongside water, sewer and electricity as essential infrastructure for communities.

However, not all Federal programs fully reflect the changing social, economic and technological conditions that redefined the need for and benefits of broadband. In some cases, programs that can support broadband deployment and adoption lack specific guidelines to promote its use. Other programs have not integrated funding for broadband commensurate with its importance and role in program execution and mission.

**RECOMMENDATION: All relevant Federal programs, especially those supporting economic development, infrastructure and housing programs, will use rulemakings or guidance to open financing resources for broadband investments.**

To implement this recommendation, Council members will take the following initial 13 actions. Cumulatively, these actions will open up or clarify the potential uses for \$10 billion in Federal grants and loans for broadband-related activities.

- USDA: Update guidance for the Rural Development Community Facility Program: Rural Housing Service - Community Facilities (CF), which represents an estimated \$2.3 billion in FY16 funding, will develop and promote new funding guidance making broadband projects eligible.
  - Key Milestones:

# EXHIBIT 36

# SESSION LAWS

OF THE

# STATE OF WASHINGTON

TWELFTH SESSION

Convened January 9; Adjourned March 9

# 1911

COMPILED IN CHAPTERS WITH MARGINAL NOTES

—BY—

I. M. HOWELL

SECRETARY OF STATE

PUBLISHED BY AUTHORITY

OLYMPIA, WASH.  
E. L. BOARDMAN, PUBLIC PRINTER  
1911.

## CHAPTER 117.

[S. S. B. 102.]

## PUBLIC SERVICE COMMISSION LAW.

AN ACT relating to public service properties and utilities, providing for the regulation of the same, fixing penalties for the violation thereof, making an appropriation and repealing certain acts.

*Be it enacted by the Legislature of the State of Washington:*

## ARTICLE I.

## PUBLIC SERVICE COMMISSION—GENERAL PROVISIONS.

SECTION 1. *Short Title.*

This act shall be known as the "Public Service Commission law," and shall apply to the public services herein described and the commission hereby created.

SEC. 2. *Public Service Commission: Appointment; Term; Removal.*

There shall be and there is hereby created, a public service commission consisting of three persons, one of whom shall be elected as chairman, to be appointed by the governor, by and with the advice and consent of the senate. The terms of the commissioners first appointed under the provisions of this act shall be, one for the term of six years, one for the term of four years, and one for the term of two years; and thereafter the term of each commissioner shall be six years from and after the expiration of the term of his predecessor. Each commissioner shall hold office until his successor shall have been appointed and qualified.

The governor may remove any commissioner for inefficiency, neglect of duty or misconduct in office, giving to him a copy of the charges against him, and an opportunity of being publicly heard in person or by counsel in his own defense, upon not less than ten days' notice. If such commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and his

[This act specifically repeals §§8627 to 8661, inclusive, and §§8691 to 8716, inc., Rem.-Bal. See §109 *infra* for repeal. By implication, §§8682, 8684, 8688, 8689, 8690, 9305, 9306, Rem.-Bal. are repealed.]

Name.

Commission of three persons.

Removal.

Electrical  
company.

The term "electrical company," when used in this act, includes any corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad company generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others), and every city or town owning, operating or managing any electric plant for hire within this state.

Transportation of  
property.

The term "transportation of property," when used in this act, includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property transported, and the transmission of credit.

Transportation of  
persons.

The term "transportation of persons," when used in this act, includes any service in connection with the receiving, carriage and delivery of the person transported and his baggage and all facilities used, or necessary to be used in connection with the safety, comfort and convenience of the person transported.

Service.

The term "service," is used in this act in its broadest and most inclusive sense.

Telephone  
company.

The term "telephone company," when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, operating or managing any telephone line or part of telephone line used in the conduct of the business of affording telephonic communication for hire within this state.

Telephone  
line.

The term "telephone line," when used in this act, includes conduits, ducts, poles, wires, cables, cross-arms, receivers, transmitters, instruments, machines, appliances, instrumentalities and all devices, real estate, easements, apparatus, property and routes used, operated, owned or controlled by any telephone company to facilitate the business of affording telephonic communication.

Telegraph.

The term "telegraph company," when used in this act, includes every corporation, company, association, joint

stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any telegraph line or part of telegraph line used in the conduct of the business of affording for hire communication by telegraph within this state.

The term "telegraph line," when used in this act, includes conduits, poles, wire, cables, cross-arms, instruments, machines, appliances, instrumentalities and all devices, real estate, easements, apparatus, property and routes used, operated or owned by any telegraph company to facilitate the business of affording communication by telegraph.

Telegraph  
line.

The term "water system," when used in this act, includes all real estate, easements, fixtures, personal property, dams, dikes, head gates, weirs, canals, reservoirs, flumes or other structures or appliances operated, owned, used or to be used for or in connection with or to facilitate the supply, storage, distribution, sale, furnishing, diversion, carriage, apportionment or measurement of water for power, irrigation, reclamation, manufacturing, municipal, domestic or other beneficial uses for hire.

Water  
system.

The term "water company," when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, controlling, operating or managing any water system for hire within this state.

Water  
company.

The term "vessel," when used in this act, includes every species of water craft, by whatsoever power operated, for the public use in the conveyance of persons or property for hire over and upon the waters within this state (excepting row boats and sailing boats under twenty gross tons burden, open steam launches of five tons gross and under, and vessels under five gross tons propelled by gas, fluid, naphtha or electric motors).

Vessel.

The term "steamboat company," when used in this act, includes every corporation, company, association, joint

Steamboat  
company.

stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, controlling, leasing, operating or managing any vessel over and upon the waters of this state.

Dock,  
wharf.

The term "dock" or "wharf," when used in this act, includes any and all structures at which any steamboat, vessel or other water craft lands for the purpose of receiving or discharging freight from or for the public, together with any building or warehouse used for storing such freight for the public for hire.

Warehouse.

The term "warehouse," when used in this act, includes any building or structure in which freight is received for storage from the public for hire, intended for shipment or discharged by any water craft.

Wharfinger.

The term "wharfinger" or "warehouseman," when used in this act, includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, operating or managing any dock, wharf or structure where steamboats, vessels or other water craft land for the purpose of discharging freight for the public, and where such freight is received on such dock, wharf or structure for the public for hire within this state.

Public  
service  
company.

The term "public service company," when used in this act, includes every common carrier, gas company, electrical company, water company, telephone company, telegraph company, wharfinger and warehouseman as such terms are defined in this section.

## ARTICLE II.

### PROVISIONS RELATING TO COMMON CARRIERS.

#### SEC. 9. *Charges; Duties of Common Carriers.*

Charges.

All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier, or by any two or more common carriers, shall be just, fair, reasonable and sufficient.

Every common carrier shall construct, furnish, maintain and provide safe, adequate and sufficient service fa-

tract or agreement or any rule or regulation or any privilege or facility except such as are specified in its schedule filed and in effect at the time, and regularly and uniformly extended to all persons and corporations under like circumstances for like or substantially similar service.

Franks and passes.

No telephone company or telegraph company subject to the provisions of this act shall, directly or indirectly, give any free or reduced service or any free pass or frank for the transmission of messages by either telephone or telegraph between points within this state, except to its officers, employees, agents, pensioners, surgeons, physicians, attorneys-at-law, and their families, and persons and corporations exclusively engaged in charitable and eleemosynary work, and ministers of religion, Young Men's Christian Associations, Young Women's Christian Associations; to indigent and destitute persons, and to officers and employees of other telephone companies, telegraph companies, railroad companies and street railroad companies.

SEC. 41. *Unjust Discrimination.*

Uniform compensation.

No telegraph or telephone company shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to communication by telegraph or telephone or in connection therewith, except as authorized in this act than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to communication by telegraph or telephone under the same or substantially the same circumstances and conditions.

SEC. 42. *Unreasonable Preference.*

Unreasonable preference.

[See § 9306, Rem.-Bal.]

No telegraph company or telephone company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

# EXHIBIT 37



# 1. Executive Summary

## 1.1 The Digital Imperative

The future of regional success is one of resiliency, diversity, sustainability, and connectedness built on an infrastructure that anticipates the current and future needs of populations. In our increasingly digital age, local governments are recognizing the need to mitigate the risks posed by the “digital divide”<sup>1</sup> by taking the opportunity to plan for initiatives that aim to improve quality of life, expand economic development, and equip governments with improved technologies.

*Pierce County is well-positioned to realize substantial economic gains from targeted investments in broadband infrastructure.* By linking its cities, natural assets, and rural areas with broadband, the County can attract investment, create economic opportunities, and operate more efficiently and effectively. Broadband and other digital technology directly enable transformation in business, education, health, transportation and other areas that make for great places, happy people, and vital enterprises. County government can be a catalyst for such transformation by making targeted investments in public infrastructure to reduce internal costs and improve operations. Such investment must align with and promote private investment, too. The keys to success are clear vision, committed leadership, and a solid plan.

## 1.2 Background

*Broadband is essential*, much like education, electricity, and water or sewer. It has become a primary enabler of economic mobility and prosperity, a “fourth utility” that is relied on by residents, businesses, and governments alike. Early in the digital revolution of the 1990s, communities realized they could not depend solely on private enterprise for internet access and began thinking forward about how to expand access to this new utility. Local governments like Pierce County now consider broadband a critical enabler of success in communities, playing a role in such issues as:

- **Attracting and retaining highly skilled talent**, particularly those in well-paid industries who can live most anywhere, with great quality of life that includes connectivity
- **Automating local government operations**, sharing applications among municipalities to reduce costs and increase impact
- **Monitoring and managing natural resources** while sustainably utilizing them for agriculture, industry, recreation, and utilities
- **Expanding value creation among existing businesses and developing new private enterprises**, especially those that fit the distinct character and resource base of the area, and create high-paying jobs
- **Improving skill development and housing mobility** as well as economic opportunities for residents

<sup>1</sup> “Digital Divide” refers to the gap between populations with access to internet and those whose occupational, educational, and social opportunities are negatively affected by lack of access to the internet. The term is often associated with rural or lower income communities.

# EXHIBIT 38



*Video: Expanding Broadband Services in Kitsap County*



**BROADBAND SERVICES**

PUDs were formed in 1930 to provide equitable access to modern utilities for Washington's communities. Today, this includes broadband telecommunications. Watch our video to see how Kitsap PUD is continuing the mission and working to bring this essential utility to all of Kitsap's communities.

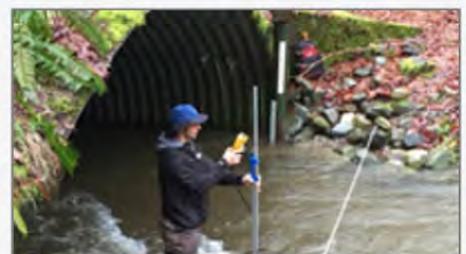
[WATCH & READ MORE >>](#)



**HYDRO DATA**

HYDROLOGY is the study of the movement, distribution, and quality of water, including the hydrologic cycle, water resources and environmental watershed sustainability. The PUD gathers and compiles extensive hydrological data in order to accurately monitor water resources.

[READ MORE >>](#)



**KITSAP WATER 101**

What do the Olympic Mountains have to do with your drinking water? How does your septic system potentially help salmon? How might your lawn be harming our aquifers? Take a five minute tour of this "story map" and learn these and other interesting things about Kitsap's water resources.

[READ MORE >>](#)

# EXHIBIT 38 (a)

## Pick a Service Provider

Here are links to our local authorized service providers to help you determine which provider best meets your needs. for your home/business. To make a Fiber Connection Request, please select a Service Provider before proceeding.



**To make a Fiber Connection Request please select a Service Provider:**

Service Provider	Website	Phone	Services Provided
<input type="radio"/> Noel Communications	<a href="http://www.noelcomm.com">www.noelcomm.com</a>	509-575-4780	
<input type="radio"/> Level 3 Communications	<a href="http://www.level3.com">www.level3.com</a>	720-888-1000	
<input type="radio"/> NCI DataCom	<a href="http://www.ncidata.com">www.ncidata.com</a>	509-826-0300	
<input type="radio"/> LocalTel & NWInternet	<a href="http://www.localtel.net">www.localtel.net</a>	509-888-8888	
<input type="radio"/> GCI	<a href="http://www.connectmd.com">www.connectmd.com</a>	866-221-4841	
<input type="radio"/> Native Network	<a href="http://www.nativenetwork.com">www.nativenetwork.com</a>	877-857-2288	
<input type="radio"/> iFiber Communications	<a href="http://www.ifiber.tv">www.ifiber.tv</a>	509-663-2600	
<input type="radio"/> Skyline Network	<a href="http://www.skylin3.net">www.skylin3.net</a>	509-293-7257	
<input type="radio"/> Zayo Bandwidth	<a href="http://www.zayo.com">www.zayo.com</a>	509-661-2000	



509-575-4780

[www.noelcomm.com](http://www.noelcomm.com)



720-888-1000

[www.level3.com](http://www.level3.com)



509-826-0300

[www.ncidata.com](http://www.ncidata.com)



509-888-8888

[www.localtel.net](http://www.localtel.net)



866-221-4841

[www.connectmd.com](http://www.connectmd.com)



877-857-2288

[www.nativenetwork.com](http://www.nativenetwork.com)



509-663-2600

[www.ifiber.tv](http://www.ifiber.tv)



509-293-7257

[www.skylin3.net](http://www.skylin3.net)



509-661-2000

[www.zayo.com](http://www.zayo.com)



# EXHIBIT 38 (b)



# PUD 3 Fiber Optic Retailers

Home > Services > PUD 3 Fiber Optic Network > PUD 3 Fiber Optic Retailers

PUD 3 Fiber Optic Retailers

Fiberhoods  
GIG SPEEDS

**PUD 3 Fiber Optic Retailers**

Vibratory Plow

Background of PUD 3's Fiber Network

Hosting & Colocation

Bringing Fiber to Your Home

Overhead Fiber Conduits

## PUD 3 Fiber Optic Retailers

WE PROVIDE THE PIPE, THEY PROVIDE THE SERVICES.

PUD 3 has retail service providers that are committed to bridging the digital divide in our community. Contact one of the retailers listed to learn more about their services.

### RETAIL PROVIDER



[mason.advancedstream.com](http://mason.advancedstream.com)

### SERVICES



### PHONE

360.871.8100

## Retailers

Fiberhoods

GIG SPEEDS

**PUD 3 Fiber Optic Retailers**

Vibratory Plow

Background of PUD 3's Fiber Network

Hosting & Colocation

Bringing Fiber to Your Home

Overhead Fiber Service

Underground Fiber Service

Underground Fiber

Distribution Construction



Outdoor Lighting



Saving Tips & Tools

WE PROVIDE THE PIPE, THEY PROVIDE THE SERVICES.

PUD 3 has retail service providers that are committed to bridging the digital divide in our community. Contact one of the retailers listed to learn more about their services.

RETAIL PROVIDER	SERVICES	PHONE
 <a href="http://mason.advancedstream.com">mason.advancedstream.com</a>		360.871.8100
 <a href="http://www.hcc.net/internet/pud3">www.hcc.net/internet/pud3</a>		360.898.2481
 <a href="http://www.ifiber.tv/internet/mason-county">www.ifiber.tv/internet/mason-county</a>		360.427.4000
 <a href="http://www.noanet.net">www.noanet.net</a>		866.662.6380
 <a href="http://www.silverstartelecom.com">www.silverstartelecom.com</a>		360.868.6070

# EXHIBIT 38 (c)

# SERVICE PROVIDERS

CONNECT TO GRANT COUNTY PUD'S HIGH SPEED NETWORK

## 1 click Network

27 Basin St. SW, Ephrata, WA 98823  
oneclicknetwork.com



*Se Habla Español*  
509-398-8900

## NCI Datacom

626 Okoma Drive, Omak WA 98841  
ncidata.com



888-317-7624

## Aspeedynet

2623-A Euclid, Wenatchee, WA 98801  
aspeedynet.net



*Se Habla Español*  
509-667-2413

## Nighthawk Networking

PO Box 2393, Mattawa, WA 99349  
nighthawknet.net



*Se Habla Español*  
866-424-4144

## Basin Networking

9 Basin St SW Ste 103B, Ephrata, WA 98823  
basin-networking.net



509-750-0672

## Noel Communications Inc.

901 E. Pitcher St, Yakima, WA 98901  
noelcomm.com



800-800-5347

## Coulee Internet Services

223 Main St, Grand Coulee WA 99133  
couleeinternet.com



509-720-7627

## Northland Fiber Direct

254 Fig St N, Moses Lake WA 98837  
northlandfiberdirect.com



509-765-6151

## CU Online

402 N Columbia, Coulee Dam WA 99116  
cdfcu.com/services/additional-services/internet-service-provider/



800-572-5678

## Odessa Office Equipment

PO Box 489, Odessa WA 99159  
accima.com



509-982-2898

## Donobi

7109 Timberlake Rd Ste 201  
Lynchburg VA 24502  
donobi.com



888-271-9672

## Saddle Mountain Wireless

PO Box 2087, Mattawa WA 99349  
smwireless.net



*Se Habla Español*  
509-932-5088

## Grant County Powernet

236 S Ash, Moses Lake WA 98837  
gcpower.net



509-766-1345

## Spectrum Online Services

500 Lasco Lane, Ste 211  
Moses Lake WA 98837  
sosml.net



*Se Habla Español*  
509-766-2767

## iFiber Communications

135 Basin St SW, Ephrata, WA 98823  
ifiber.tv



*Se Habla Español*  
509-754-2600

## Startouch Broadband

1354 Pacific Pl, Ste 102, Ferndale WA 98248  
startouch.com



888-733-0203

## LocalTel

223 E. Broadway, Moses Lake, WA 98837  
localtel.net



*Se Habla Español*  
509-707-7777



High Speed Internet



Telephone



Wireless Internet



Television

# EXHIBIT 38 (d)

# Counties Served by Public Utility Districts



- |   |  |
|---|--|
| <span style="display: inline-block; width: 15px; height: 15px; background-color: yellow; border: 1px solid black;"></span> Electricity PUDs                               | <span style="display: inline-block; width: 15px; height: 15px; background-color: gray; border: 1px solid black;"></span> Electricity, Water, Sewer and Telecommunications PUDs |
| <span style="display: inline-block; width: 15px; height: 15px; background-color: lightblue; border: 1px solid black;"></span> Water PUDs                                  | <span style="display: inline-block; width: 15px; height: 15px; background-color: cyan; border: 1px solid black;"></span> Water and Sewer PUDs                                  |
| <span style="display: inline-block; width: 15px; height: 15px; background-color: teal; border: 1px solid black;"></span> Electricity and Water PUDs                       | <span style="display: inline-block; width: 15px; height: 15px; background-color: orange; border: 1px solid black;"></span> Water and Telecommunications                        |
| <span style="display: inline-block; width: 15px; height: 15px; background-color: red; border: 1px solid black;"></span> Electricity and Telecommunications PUDs           | <span style="display: inline-block; width: 15px; height: 15px; background-color: lightgreen; border: 1px solid black;"></span> Water, Sewer and Telecommunications PUDs        |
| <span style="display: inline-block; width: 15px; height: 15px; background-color: brown; border: 1px solid black;"></span> Electricity, Water and Sewer PUDs               | <span style="display: inline-block; width: 15px; height: 15px; background-color: white; border: 1px solid black;"></span> Not served by a PUD                                  |
| <span style="display: inline-block; width: 15px; height: 15px; background-color: purple; border: 1px solid black;"></span> Electricity, Water and Telecommunications PUDs |  |

# EXHIBIT 38 (e)

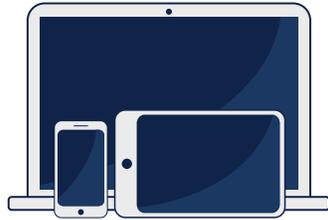
# EPB FIBER OPTICS

## 4K ULTRA HD TV

EPB BECAME ONE OF THE FIRST IN THE U.S. TO OFFER 4K ULTRA HD CHANNELS

### MORE THAN 100 EPB2GO NETWORKS

EPB customers can access more than 100 networks anywhere they go on any mobile device.



### GREW TOTAL FIBER OPTICS CUSTOMERS TO 91,411



**7,155**

COMMERCIAL CUSTOMERS



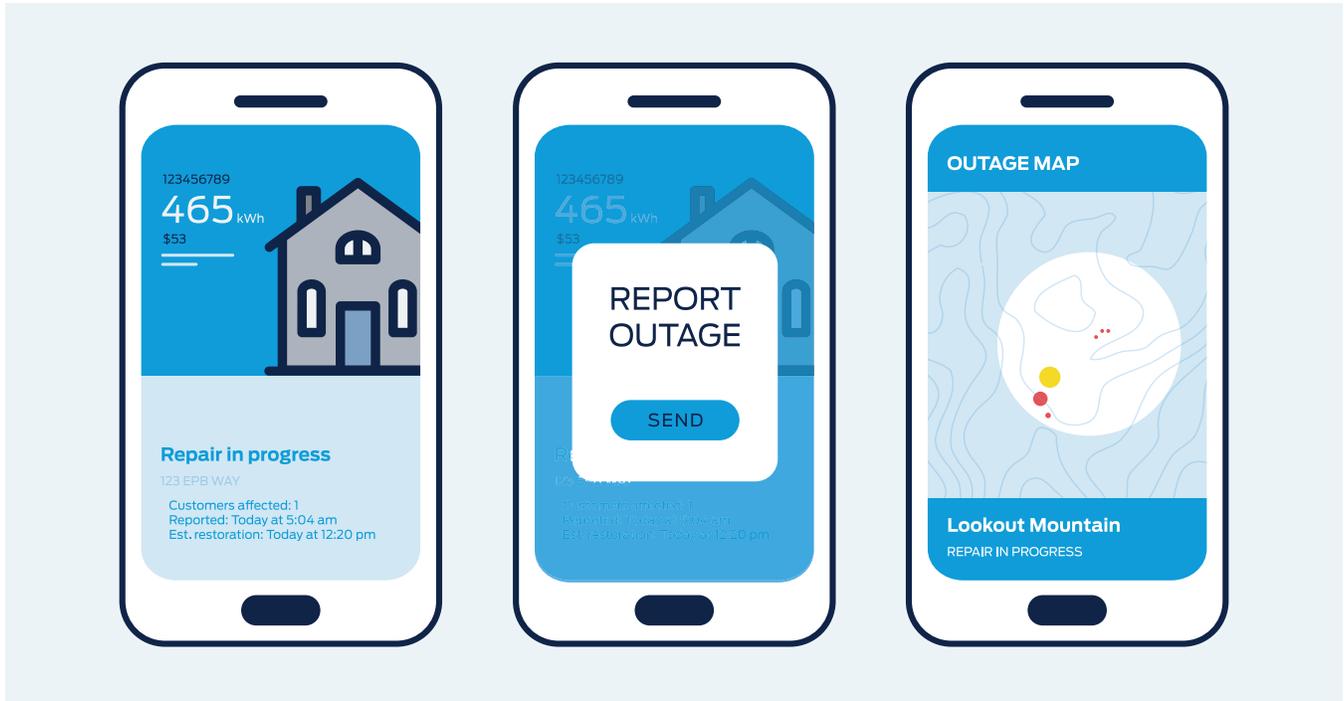
**84,256**

RESIDENTIAL CUSTOMERS



More than 9,800 of our EPB Fiber Optics customers had subscribed to 1-gigabit and higher Internet and data services, as of the end of fiscal year 2016-2017.

# THE POWER OF YOUR HOME'S ENERGY USE IN THE PALM OF YOUR HAND.



These days, you can access just about everything you do right from your mobile device. And now, that includes monitoring your home’s electric service. Last year, EPB developed myEPB, a mobile app that gives customers real-time access to their energy use data by the hour, day or month – anytime, anywhere. In addition to monitoring their power use, customers can report power outages and receive push notifications on outages and restorations in their area. And, future plans include convenient access to both electric and fiber optics account summaries, mobile bill pay and more. The myEPB App is compatible with iOS and Android devices and is available for download free at the App Store.

# TV WITH GREATER FLEXIBILITY.



Today’s consumers want products that can be tailored to meet their unique needs and lifestyle. In July of 2016, EPB Fiber Optics unveiled Fi TV Select, offering customers better choices and options for customizing their TV viewing experience.

**WITH FI TV SELECT, CUSTOMERS CHOOSE THE CHANNELS PACKAGE AND FEATURES PACKAGE THEY LIKE BEST. EVERYONE GETS HD AND VIDEO ON DEMAND TITLES. AND NOW THERE’S THE OPTION OF ADDING PREMIUM CHANNELS OR ADDITIONAL CHANNELS TO ANY PLAN.**

We also enhanced the viewing experience with new available features like the ability to rewind/replay live TV, a DVR that can record up to six HD channels at one time and an even sharper high definition picture with 4K Ultra HD quality. Thanks to the launch of Fi TV Select, EPB was one of the few television distributors in the nation to offer customers the opportunity to watch the Summer Olympics in 4K.

Combined with anytime mobile streaming on EPB2Go, Fi TV Select represents one more way EPB is responding to the ever changing landscape of entertainment options. In fact, Fi TV Select now accounts for nearly 13,000 of our more than 59,000 total television customers – including more than 6,300 legacy customers who’ve converted to the new platform.

# HOSTED PHONE SOLUTIONS: INSTALLED 25,000<sup>TH</sup> OUTSIDE LINE.



EPB Fiber Optics commercial sales team achieved a significant Hosted Phone Solution milestone in 2017. With 1,600 Hosted Phone customers choosing EPB as their provider, we installed our 25,000<sup>th</sup> Hosted Phone line this year. This achievement makes EPB the 15<sup>th</sup> largest customer in the world for our third-party vendor, MetaSwitch. One secret to our success? Unlike other local providers, EPB is the area’s only “one-stop shop” for everything it takes to set up and maintain a commercial phone system – plus the training and ongoing support to help customers do business, even better.

# PIONEERING THE SMART GRID OF THE FUTURE.

EPB'S SMART GRID DEVELOPMENT TEAM HAS PARTNERED WITH OAK RIDGE NATIONAL LABORATORY SCIENTISTS SINCE OCTOBER 2014 TO PIONEER THE ELECTRIC SYSTEM OF THE FUTURE.



Our living laboratory is Chattanooga's smart grid, a 9,000 mile fiber optic network connecting thousands of automated switches, sensors and smart devices that generate trillions of data points annually. This partnership enables us to participate in the Grid Modernization Lab Consortium, a U.S. Department of Energy initiative that leverages the resources from all of the national laboratories to develop and enhance the nation's electric system.

Our team is conducting research in a number of areas. First, we're working with state-of-the-art batteries to develop ways of reducing the community's peak energy demand while enhancing power quality and reliability. We have also developed a software algorithm that stabilizes voltage to customers. Additionally, EPB is testing a variety of low cost sensors that we have deployed in some of EPB's substations. The goal is to identify the best devices and practices to help ensure our electric system is operating at peak reliability and efficiency. These sensors also give EPB the ability to identify potential equipment failures and security issues in real time.

# STRONG FINANCIAL RESULTS.



Both of EPB's divisions delivered strong financial results during the 2016-2017 Fiscal Year. EPB Electric Power performed better than budget and the prior year with a positive net change in position of \$7.4 million, which was \$1.9 million better than budget. The division's capital investment to build electrical infrastructure in support of new housing and business construction exceeded budget by \$3.7 million; however, since these capital expenditures are driven by strong, local economic growth, they will translate into higher revenues in future years.

EPB Fiber Optics continued to outperform budget driven by continuing net increases in new subscribers for fiber optic services. In fact, the total number of EPB Fiber Optics customers grew to 91,411 households and businesses, a 9% increase over last fiscal year. As a result, EPB Fiber Optics revenues grew by more than 11% to \$150.1 million, driving a change in net position of \$27.9 million for the fiscal year.

# HIGHLIGHTS OF FINANCIAL PERFORMANCE:



**STRONG DEBT MANAGEMENT:** EPB Fiber Optics is now debt-free. In addition, for the use of the fiber-to-the-home network, EPB Fiber Optics pays EPB Electric Power access fees and allocations that more than cover the cost of the electric system's capital debt service on an annual basis.

**LOWER POWER RATES:** Because EPB Fiber Optics pays such substantial allocations and access fees to EPB Electric Power, the electric system has been able to avoid a significant electric rate increase. As a result, all electric customers are enjoying lower electric rates regardless of whether they are EPB Fiber Optics customers or not.

**LARGEST LOCAL TAX PAYER:** EPB paid a combined total of \$19.4 million to local governments, making EPB the largest contributor to local tax coffers.

# EXHIBIT 39



## RESOLUTION NO. 40467

1 A RESOLUTION relating to surplus utility property; declaring surplus pursuant to  
2 RCW 35.94.040 certain utility-owned property, including certain inventory,  
3 equipment, and vehicles allocated to the Click! Network together with the  
4 Excess Capacity of the Tacoma Power HFC Network, part of which is the  
5 Click! Commercial Network.

6 WHEREAS, in the mid-1990s, the City of Tacoma, Department of Public  
7 Utilities, Light Division (d.b.a. "Tacoma Power") determined that the best option to  
8 address the shifting advance in telecommunications in the electric utility industry  
9 landscape was to construct a hybrid fiber coaxial ("HFC") telecommunications  
10 network ("HFC Network"), and

11 WHEREAS, on July 23, 1996, the City Council passed Ordinance No. 25930,  
12 approving Tacoma Power's proposal to establish and create the HFC Network as  
13 part of Tacoma Power's electric utility infrastructure, allowing Tacoma Power to,  
14 among other things, connect its generation, distribution, and transmission assets  
15 and support the eventual adoption of smart meters, and further, to use the excess  
16 capacity of the HFC Network to: (1) sell retail cable television service to Tacoma  
17 Power's electric customers, and (2) sell data transport and wholesale internet  
18 access services to Internet Service Providers ("ISPs") and others, and

19 WHEREAS the Public Utility Board ("PUB") adopted Amended Substitute  
20 Resolution No. U-9258, approving Tacoma Power's proposed business plan to  
21 develop a state-of-the-art HFC Network to support enhanced control, reliability, and  
22 efficiency for its electric system and to generate additional revenue through new  
23 business lines (i.e., wholesale internet, cable TV, etc.), and  
24  
25  
26



1 WHEREAS, pursuant to Substitute Resolution No. 33668, the City Council  
2 authorized Tacoma Power to construct, control, and operate the HFC Network, and  
3 approved the PUB business plan to develop a state-of-the-art HFC Network to,  
4 among other things, create revenue diversification to maximize the return on  
5 Tacoma Power's investment in the HFC Network by offering new business lines  
6 providing cable television and internet transport using the available (excess)  
7 capacity of the HFC Network, and

8 WHEREAS the City Council determined that the new business line of  
9 Tacoma Power would be subject to substantially the same franchise agreements as  
10 the City grants for other similar businesses, and that the City Council would remain  
11 involved in major policy decisions, and

12 WHEREAS, since its construction in the late 1990s, the HFC Network has  
13 connected Tacoma Power's distribution and transmission assets and enabled  
14 automated meter reading and billing, distribution automation, and remote turn  
15 on/turn off for electric customers, and

16 WHEREAS, in 2004, Tacoma Power also established a pilot project  
17 deploying as many as 18,000 Gateway Meters (Tacoma Power's name for its initial  
18 smart meters) that relay information from its electric customers to Tacoma Power  
19 headquarters via the HFC Network over coaxial cable connected to the customer  
20 premises which interconnects with the fiber network, and

21 WHEREAS, within four years following deployment of the Gateway Meters,  
22 Tacoma Power began experiencing substandard performance of the Gateway  
23 Meters, including meter failures wherein Tacoma Power was unable to  
24  
25  
26



1 communicate with the meter through the network, read failures wherein the  
2 controller in the meter was not able to read the meter, and remote disconnect  
3 failures, all resulting in communications errors, failures to measure electrical  
4 consumption, a failure rate of up to 100 meters per month, and increased costs to  
5 replace defective meters, perform repairs, troubleshoot errors, and collect meter  
6 data, and

7 WHEREAS, by the mid-to-late 2000s, the electric utility industry began to  
8 recognize that wireless technology would take the place of wired  
9 telecommunications systems with respect to smart meter applications, and  
10

11 WHEREAS, in 2019, as a result of the advances in the reliability and  
12 efficiency of interconnecting meters wirelessly with the HFC Network and the  
13 substandard and unreliable performance of the Gateway Meters, Tacoma Power  
14 terminated the Gateway Meter Program and ended service over the HFC Network  
15 for all Gateway Meters, and  
16

17 WHEREAS the PUB has authorized agreements providing for the installation  
18 and operation of licensed spectrum advance meters that will interconnect wirelessly  
19 to that portion of the HFC Network allocated to Tacoma Power, known and referred  
20 to as the Power Control & Operations Network ("PCON"), and  
21

22 WHEREAS the "Excess Capacity of the HFC Network" is generally  
23 comprised of: (i) coaxial cable, conduit housing only coaxial cable, conduit installed  
24 for service drops (whether or not currently housing coaxial cable), and coaxial cable  
25 service drops installed in the Click! Network service area; (ii) specific strands of  
26 fiber in the Tacoma Power fiber network that are not reserved for current and future



1 use by Tacoma Power for utility purposes, conduit housing such fiber along routes  
2 that do not include reserved utility fiber, and excess space in conduit housing such  
3 fiber and reserved utility fiber; and (iii) electronic equipment and related hardware  
4 installed in the HUB sites and in rights-of-way, all of which is described in more  
5 detail, and defined as the "Tacoma Power Commercial System", in the draft  
6 proposed Click! Business Transaction Agreement, attached hereto as Exhibit "B,"  
7 and

8 WHEREAS certain inventory, equipment, and vehicles allocated to  
9 Click! Network are described in Exhibit "A.1-3," attached hereto, all of which are  
10 collectively referred to as the "Click! Assets," and  
11

12 WHEREAS, in 1998, Click! Network, a trade name used by Tacoma Power,  
13 began operating as a cable service provider over excess capacity of the HFC  
14 Network providing primarily cable television and wholesale cable modem (internet  
15 access) services, and  
16

17 WHEREAS, since that time, technology and consumer demands have  
18 changed with consumers shifting from predominantly consuming cable  
19 programming services to predominantly consuming internet access services, and  
20

21 WHEREAS operational costs for the Click! Network have significantly  
22 increased since 1998 while the Click! Network business model has become  
23 outdated and unable to respond quickly or efficiently to changes in the market place  
24 or provide the capacity to make capital investments necessary to upgrade the  
25 network and compete with the private sector, and  
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WHEREAS, in response to these challenges, the PUB began to study alternative Click! Network business models and, after many years of study, the PUB, in collaboration with the City Council, retained the services of CTC Technology & Energy (“CTC”) to assist in this analysis, and

WHEREAS, at the January 23, 2018, Joint Study Session of the PUB and City Council, CTC presented its report examining which of the following five alternative business models would best meet 12 Click! Network policy goals later adopted by the PUB and City Council:

- Continue finding ways to reduce costs and streamline operations;
- Become a retail internet service provider (“ISP”) and potentially eliminate cable TV operations;
- Upgrade the Click! Network to fiber-to-the-premises in an effort to better compete with incumbents in the market;
- Cease internet and cable operations and abandon the related parts of the network;
- Seek a partner willing to take on operating and other obligations and costs while agreeing to conditions that would preserve Click!’s significant policy achievements, and

WHEREAS CTC reported that the 12 policy goals could best be met through a business model in which the City retained ownership of the entire HFC Network, including the Click! Network, with a third party providing Cable TV and/or internet access services and covering the capital and operating costs associated with providing those services, and

WHEREAS, under this model, Tacoma Power would no longer provide cable television or wholesale internet access services, and the third party would provide cable television, video, and internet access services directly to the public, and



1 WHEREAS the PUB, pursuant to its prior Resolution No. U-10988,  
2 expressed its determination that while the 1997 business plan achieved many of the  
3 functions envisioned for the HFC Network, the Excess Capacity of the HFC  
4 Network and the inventory, equipment, and vehicles allocated to Click! Network are  
5 not needed now or in the future by Tacoma Power for utility purposes, and thus, will  
6 not be updated or improved or utilized for utility purposes, and are excess to the  
7 needs of Tacoma Power, and that the current Click! Network business plan and the  
8 proposed all-in retail service business model will not generate sufficient revenues to  
9 fully fund operational expenses and the costs of capital improvements needed to  
10 maintain the Excess Capacity of the HFC Network as a state-of-the art Network,  
11 and  
12

13 WHEREAS, through PUB Resolution No. U-10988 and City Council  
14 Resolution No. 39930, the PUB and City Council rescinded their approval of the  
15 all-in retail service business model; adopted 12 policy goals to be maximized  
16 through the use and preservation of the Excess Capacity of the HFC Network; and  
17 directed the Public Utilities Director and City Manager to work collaboratively to  
18 develop a plan to seek information, proposals, or qualifications from interested  
19 parties to determine whether the 12 policy goals could be achieved through a  
20 collaboration and/or restructuring of Click! Network, and  
21  
22

23 WHEREAS, at the August 21, 2018, Joint Study Session of the PUB and  
24 City Council, CTC recommended that the PUB and City Council authorize  
25 negotiation of term sheets with Rainier Connect and Wave Broadband, and  
26



1 WHEREAS the City Council and PUB, after a presentation by CTC and  
2 review of proposals from third parties at the March 5, 2019, Joint Study Session of  
3 the PUB and City Council, directed the Public Utilities Director to execute a letter  
4 agreement with Rainier Connect to enter into good faith negotiation of agreements  
5 through which: (1) the City, through Tacoma Power, would retain ownership of all  
6 of the existing HFC Network; (2) the capital and operating costs of the Excess  
7 Capacity of the HFC Network would be borne by a third party; (3) Tacoma Power  
8 would no longer provide cable television or wholesale internet access or data  
9 transport services; and (4) Rainier Connect would use the Excess Capacity of the  
10 HFC Network to provide cable, video, and internet access services consistent with  
11 the 12 policy goals adopted by the City Council and PUB, and  
12

13 WHEREAS negotiations with Rainier Connect commenced in April 2019, and  
14 the Click! Business Transaction Agreement is now complete, and  
15

16 WHEREAS, on October 23, 2019, the PUB held a public hearing and took  
17 public testimony regarding the proposed surplus of the Click! Assets and the  
18 Excess Capacity of the HFC Network, and  
19

20 WHEREAS, on October 29, 2019, the City Council held a public hearing and  
21 took public testimony regarding the proposed surplus of the Click! Assets and the  
22 Excess Capacity of the HFC Network, and  
23

24 WHEREAS, on October 30, 2019, the PUB adopted Resolution  
25 No. U-11116, declaring the Click! Assets and the Excess Capacity of the HFC  
26 Network surplus to the needs of Tacoma Power and Tacoma Public Utilities and not  
required for continued public utility services, recommending that the City Council



1 declare the above-referenced property surplus to the needs of the City, and  
2 approving the Click! Business Transaction Agreement conditioned upon approval  
3 by the City Council, and

4 WHEREAS the consideration proposed to be paid by Rainier Connect for  
5 conveyance of the inventory, equipment, and vehicles described in Exhibit A.1 is  
6 \$294,742.98, as set forth in Exhibit A.1; the consideration to be paid by Rainier  
7 Connect for the inventory and equipment described in Exhibits A.2 and A.3 are the  
8 contractual obligations of Rainier Connect as set forth in substantially the form of  
9 Exhibit "B" (Click! Business Transaction Agreement), and the use of the Excess  
10 Capacity in the HFC Network is proposed to be granted to Rainer Connect in  
11 consideration for the obligations of Rainier Connect as set forth in Exhibit "B,"  
12 including, but not limited to, annual payments of \$2,500,000 for year one,  
13 \$2,625,000 for year two, \$2,750,000 for year three, \$2,875,000 for year four, and  
14 \$3,000,000 for year five, and for each year after year five, the annual payment will  
15 increase to reflect the Consumer Price Index Increase as described in Exhibit "B,"  
16 and  
17

18 and  
19 WHEREAS, although a declaration that an asset is surplus often proceeds a  
20 decision to sell an asset, there is no requirement that a surplus asset be sold,  
21 and the City does not intend to recommend or approve for sale the Excess Capacity  
22 in the HFC Network, but rather the City, through Tacoma Power, will retain  
23 ownership of the entire HFC Network inclusive of the Excess Capacity in the HFC  
24 Network to ensure that it has control over how the HFC Network is used through the  
25 proposed agreements and to ensure that the entire HFC Network meets all security  
26



requirements and can continue to meet the needs of Tacoma Power, Tacoma  
1 Water, and Tacoma Rail, and

2 WHEREAS, on October 30, 2019, the PUB considered and adopted PUB  
3 Resolution No. U-11116, declaring that the Click! Assets and the Excess Capacity  
4 of the HFC Network, as described therein, are surplus to the needs of Tacoma  
5 Power and Tacoma Public Utilities, and  
6

7 WHEREAS the City Council, having considered the foregoing, the public  
8 comments received during the public hearing of October 29, 2019, and prior public  
9 meetings of the City Council and PUB, and the City records and files related to the  
10 construction, installation, and operation of the Click! Network, and having been in all  
11 matters fully advised, finds that it is in the best interest of the public to declare  
12 surplus to the needs of Tacoma Power and the City the Click! Assets and Excess  
13 Capacity of the HFC Network; Now, Therefore,  
14

15 BE IT RESOLVED BY COUNCIL OF THE CITY OF TACOMA:  
16

17 Section 1. That the City Council does hereby find and concur with the  
18 Tacoma Public Utility Board's determination and declaration pursuant to PUB  
19 Resolution No. U-11116, that the Click! Assets and the Excess Capacity of the HFC  
20 Network, as described therein, are surplus to the needs of Tacoma Power and  
21 Tacoma Public Utilities.  
22

23 Section 2. That, consistent with RCW 35.94.040 and Section 4.6 of the City  
24 Charter, the City Council does hereby find and determine that the Click! Assets and  
25 Excess Capacity in the HFC Network, as described in the recitals above, are not  
26 required for, and are not essential to, continued public utility service or continued



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effective utility service and, pursuant to applicable law, are properly declared surplus property and excess to the needs of Tacoma Power, Tacoma Public Utilities, and the City.

Section 3. That the procedural requirements of the Tacoma Municipal Code and the Purchasing Policy Manual for declaring the Click! Assets and the Excess Capacity in the HFC Network surplus to the needs of Tacoma Power and the City are hereby waived to the extent of non-compliance therewith.

Adopted \_\_\_\_\_

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk

Approved as to form:

\_\_\_\_\_  
Chief Deputy City Attorney



**EXHIBIT "A.1"**

(Click! Asset Purchase List)

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**APA Exhibit A, Schedule 2.2.a(i), Equipment, Inventory, Vehicles**

Item Description	suggested price	quantity	actual price	totals
<b>Set-Top Boxes</b>				
Set-Top Boxes	\$ 12,361.71	bulk	\$ 12,361.71	
			<b>sub-total:</b>	<b>\$ 12,361.71</b>
<b>Test Equipment</b>				
MPEG Test System	\$ 1,000.00	1	\$ 1,000.00	
MPEG Transport Stream Monitor (QAM)	\$ 100.00	1	\$ 100.00	
MPEG Transport Stream Monitor (GigE/ASI)	\$ 100.00	1	\$ 100.00	
MPEG Transport Stream Monitor (QAM)	\$ 100.00	1	\$ 100.00	
MPEG Transport Stream Monitor (8VSB)	\$ 100.00	1	\$ 100.00	
MPEG Transport Stream Monitor (GigE)	\$ 100.00	1	\$ 100.00	
DSAM	\$ 250.00	9	\$ 2,250.00	
CATV Meter	\$ 2,500.00	4	\$ 10,000.00	
Ethernet Link Assistant (Metroscope)	\$ 100.00	1	\$ 100.00	
Ethernet Link Assistant (Etherscope)	\$ 100.00	1	\$ 100.00	
Bandwidth Analysis	\$ 100.00	1	\$ 100.00	
CATV Sweep Meter Setup	\$ 2,810.50	16	\$ 44,968.00	
			<b>sub-total:</b>	<b>\$ 59,018.00</b>
<b>Portable Generator</b>				
Honda EU2001i	\$ 500.00	5	\$ 2,500.00	
			<b>sub-total:</b>	<b>\$ 2,500.00</b>
<b>Vehicles</b>				
CHEV EXPRESS CARGO VAN	\$ 12,236.00	5	\$ 61,180.00	
FORD E350 VAN ARL 29 FT VERSALIFT	\$ 17,368.00	1	\$ 17,368.00	
FORD TRANSIT VAN VERSALIFT 29' ARL	\$ 28,170.00	1	\$ 28,170.00	
CHEV COLORADO XC 4X4 PU	\$ 6,088.00	1	\$ 6,088.00	
FORD E350 VAN ARL TEREX HI-RANGER	\$ 12,966.00	3	\$ 38,898.00	
FORD ELDORADO 13-PASS SHUTTLE VAN	\$ 2,000.00	1	\$ 2,000.00	
			<b>sub-total:</b>	<b>\$ 153,704.00</b>
<b>Warehouse Inventory</b>				
Click Warehouse Inventory 110	\$ 32,471.16	1	\$ 32,471.16	
Click Warehouse Inventory 120	\$ 697.59	1	\$ 697.59	
Click Warehouse Inventory 121	\$ 19,349.24	1	\$ 19,349.24	
Click Warehouse Inventory 122	\$ 4,641.29	1	\$ 4,641.29	
Dead Stock 2014	\$ -	1	\$ -	
			<b>sub-total:</b>	<b>\$ 57,159.27</b>
<b>Software (for test equipment)</b>				
Effigis (CPAT Leakage detection system)	\$83.33	12	\$ 1,000.00	
Path track	\$0.00	1	\$ -	
Sunrise	\$0.00	1	\$ -	
Trilithic	\$0.00	1	\$ -	
Cable Plant Monitoring	\$9,000.00	1	\$ 9,000.00	
			<b>sub-total:</b>	<b>\$ 10,000.00</b>
<b>Grand Total:</b>				<b>\$ 294,742.98</b>



**Exhibit "A.2"**

(Head End Equipment)

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Exhibit A6.2

Headend Equipment				
Description	Serial Number	Object Type	Manufacturer	
XMA VOD Server - VOD On Demand	RQNNABV	EG001315 - Aud/Video Server	Arris	
Disney/ESPN Catcher Server	Dis/ESPN	EG001315 - Aud/Video Server	HP	
MC Management Console	KQDMMVWV	EG001315 - Aud/Video Server	IBM	
VOD Server Chassis Nvision #1	Nvision #1	EG001315 - Aud/Video Server	Arris	
VOD Server Chassis Nvision #2	Nvision #2	EG001315 - Aud/Video Server	Arris	
VOD Server Chassis Nvision #3	Nvision #3	EG001315 - Aud/Video Server	Arris	
VOD Server Chassis Nvision #4	Nvision #4	EG001315 - Aud/Video Server	Arris	
VOD Server Chassis Nvision #5	Nvision #5	EG001315 - Aud/Video Server	Arris	
VOD Server Local On-Demand	FM 644220098	EG001315 - Aud/Video Server	Sun Microsystems	
CMC Digital Data Receiver	F9999999	EG001136 - Receiver	International DataCasting	
CMC Digital Data Receiver	F9999999	EG001136 - Receiver	International DataCasting	
Video Satellite Rcvr - Velocity HD	F9999999	EG000830 - Optical Receiver	Arris	
Video Satellite Rcvr - ShoNext HD	F9999999	EG000830 - Optical Receiver	Motorola	
Matrix HE - Environmental Monitor	HE - Webmon	EN000040 - Master Controller	Dantel	
Advance Rcvr Transcoder - NBC Univer	F9999999	EG001136 - Receiver	Cisco	
Advance Rcvr Transcoder - Sundance HD	F9999999	EG001136 - Receiver	Cisco	
Pro Sat Rcvr - ShoTime/TMC HD	F9999999	EG001136 - Receiver	Motorola	
Advance Rcvr Transcoder - HGTV/Food HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Sat Rcvr - Encore Esp	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Rcvr - Nat Geo HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Rcvr - Pixl HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Rcvr - Discovery HD	F9999999	EG001136 - Receiver	Motorola	
Advance Rcvr Transcoder - Travel HD	F9999999	EG001136 - Receiver	Cisco	
TWC SD Intellistar Receiver	F9999999	EG001136 - Receiver	Intellistar	
Spare - Satellite Receiver	F9999999	EG001136 - Receiver	Motorola	
Commercial Integrated Sat Rcvr	F9999999	EG001136 - Receiver	Arris	
Satellite Rcvr Video Cipher	F9999999	EG001136 - Receiver	Scientific Atlanta	
Satellite Rcvr Multiplex/Decrypter	F9999999	EG001136 - Receiver	General Instruments	
Satellite Integrated Rcvr/Transcoder	F9999999	EG001136 - Receiver	Motorola	
Advanced Rcvr/Transcoder QVC HD	F9999999	EG001136 - Receiver	Cisco	
Advanced Rcvr/Transcoder Outside TV	F9999999	EG001136 - Receiver	Cisco	
Advanced Rcvr/Transcoder A&E HD	F9999999	EG001136 - Receiver	Cisco	
Advanced Rcvr/Transcoder A&E SD	F9999999	EG001136 - Receiver	Cisco	
Pro Satellite Receiver - ESPN HD	F9999999	EG001136 - Receiver	Motorola	
Advanced Rcvr/Transcoder Root HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver - ESPN SD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - ESPN2	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - ESPN News	F9999999	EG001136 - Receiver	Motorola	
Advanced Rcvr/Transcoder AMC HD	F9999999	EG001136 - Receiver	Cisco	
Multi Decryption Receiver - AMC SD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver - FX HD	F9999999	EG001136 - Receiver	Motorola	
Advanced Rcvr/Transcoder Starz	F9999999	EG001136 - Receiver	Motorola	
Commercial Integrated Sat Rcvr	F9999999	EG001136 - Receiver	Arris	
TWC SD Intellistar Receiver	F9999999	EG001136 - Receiver	Intellistar	
Sat Receiver Multiplex/Decrypter	F9999999	EG001136 - Receiver	Motorola	
Advanced Rcvr/Transcoder Hallmark SD	F9999999	EG001136 - Receiver	Cisco	
Program Receiver	F9999999	EG001136 - Receiver	Scientific Atlanta	
Advanced Rcvr/Transcoder Golf HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Sat Receiver Multiplex/Decrypter	F9999999	EG001136 - Receiver	Motorola	
HDTV Receiver/Decoder	F9999999	EG001136 - Receiver	KTECH	
Pro Satellite Receiver - SyFy HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - BET SD	F9999999	EG001136 - Receiver	Motorola	
Integrated Receiver/Decoder	F9999999	EG001136 - Receiver	Harmonic	
Advanced Rcvr/Transcoder CBUT HD	F9999999	EG001136 - Receiver	Cisco	
Network Transport Receiver	F9999999	EG001136 - Receiver	Cisco	
Pro Satellite Receiver	F9999999	EG001136 - Receiver	Motorola	
Program Receiver - Classic Arts	F9999999	EG001136 - Receiver	Scientific Atlanta	
Program Receiver - Fox Business SD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver - Fox Business HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - Fox HD	F9999999	EG001136 - Receiver	Motorola	
Program Receiver - QVC SD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Multi Decryption Receiver - Intl Net	F9999999	EG001136 - Receiver	Cisco	
Advanced Rcvr/Transcoder Golf HD	F9999999	EG001136 - Receiver	Cisco	
Advanced Rcvr/Transcoder Lifetime & LMN HD	UA 5987780-6	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver - Discovery HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - ABC SD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - Disney SD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - Disney HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - CBS Sports SD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - Big Ten HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - BET Soul HD/MTV2	2054812109005730	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - HBO HD	F9999999	EG001136 - Receiver	Arris	
Pro Satellite Receiver - FS1 HD	F9999999	EG001136 - Receiver	Motorola	
Program Receiver - Fox News SD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver - Fox News HD	F9999999	EG001136 - Receiver	Motorola	
Advanced Program Receiver - WGN SD	36138021976	EG001136 - Receiver	Cisco	
Advanced Program Receiver - TVN PPV	F9999999	EG001136 - Receiver	Cisco	
Multi Decryption Receiver - Fox Sports HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Program Receiver - HSN HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver	F9999999	EG001136 - Receiver	Arris	
Program Receiver - Golf HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Multi Decryption Receiver - Hallmark HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Adv Receiver Transcoder - E! HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Satellite Receiver	F9999999	EG001136 - Receiver	Arris	
Program Receiver - KSTW SD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
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Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	

TWC SD Intellistar Receiver	F9999999	EG001136 - Receiver	Chaparral
Commercial Integrated Sat Rcvr	F9999999	EG001136 - Receiver	Motorola
Satellite Receiver Video Cipher	F9999999	EG001136 - Receiver	Cisco
Satellite Receiver Multiplex/Decrypter	F9999999	EG001136 - Receiver	Motorola
Sat Integrated Receiver/Transcoder	F9999999	EG001136 - Receiver	Scientific Atlanta
Advanced Receiver/Transcoder - QVC HD	F9999999	EG001136 - Receiver	Motorola
Advanced Recv/Transcoder - Outside TV	F9999999	EG001136 - Receiver	Motorola
Advanced Receiver/Transcoder - A&E HD	F9999999	EG001136 - Receiver	Arris
Advanced Receiver/Transcoder - A&E SD	F9999999	EG001136 - Receiver	Cisco
Pro Satellite Receiver - ESPN HD	F9999999	EG001136 - Receiver	Cisco
Adv Receiver Transcoder - Root HD	F9999999	EG001136 - Receiver	Cisco
Adv Receiver Transcoder - Pac 12 NAT	F9999999	EG001136 - Receiver	Cisco
Pro Satellite Rcvr - Starz HD	F9999999	EG001136 - Receiver	Motorola
Satellite Demodulator	F9999999	EG000740 - Modulator	Scientific Atlanta
Pro Satellite Receiver - Starz HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - MLB HD	F9999999	EG001136 - Receiver	Motorola
Satellite Receiver - Dest America HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - Fox Deportes HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - Fox Sports2 HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - Nat Geo SD/HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - ENC Action HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - IndieFlex HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - Cinemax HD	F9999999	EG001136 - Receiver	Motorola
Advanced Recvr Transcoder - Fusion HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - ESPN Deportes SD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - MoviePlex HD	F9999999	EG001136 - Receiver	Motorola
Satellite Demodulator	F9999999	EG000740 - Modulator	Scientific Atlanta
OneNet SE EAS Receiver	F9999999	EG001136 - Receiver	Monroe Electronics
Emergency Alert System Server	F9999999	EG001315 - Aud/Video Server	IBM
Adv Receiver Transcoder - Reelz Channel	F9999999	EG001136 - Receiver	Cisco
Acterna - Stealth Sweep Transceiver	F9999999	EZ000140 - Test Equip	Acterna
Program Receiver - KCMS FM	F9999999	EG001136 - Receiver	Scientific Atlanta
Digital Tuner - 948 KING FM	F9999999	EG001136 - Receiver	Bogen
Universal Encoder - Audio Encoder	F9999999	EG001361 - Sequencer	Scopus
Digital Tuner - 951 KWJZ	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - 957 KIRO	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - 956 KXXD	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - 953 KKWF	F9999999	EG001136 - Receiver	Bogen
Universal Encoder - Audio Encoder	F9999999	EG001361 - Sequencer	Scopus
AM/FM Stereo Tuner - 958 KRWM	F9999999	EG001136 - Receiver	Toa Electronics
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Universal Encoder - Audio Encoder	F9999999	EG001361 - Sequencer	Scopus

Digital Tuner - 949 KPLU	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - 950 KUOW	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - 960 KUTI	F9999999	EG001136 - Receiver	Bogen
Digital Aud/Vid Encoder/Decoder	F9999999	EG001361 - Sequencer	Radiant
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
XMS Ad Splicer - Server 1	F9999999	EG000110 - Network Server	Arris
XMS Ad Splicer - Server 2	F9999999	EG000110 - Network Server	Arris
EGT Encoder 1 - TVC/QVC	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 2 - Reelz/NASA/KIRO	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 3 - FXX/Big Ten	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 4 - TVW/TV Tacoma	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 5 - KCTS/KING	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 6 - KCPQ/PCTV	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 7 - KOMO/KSTW	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 8 - KUNS/Disney	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 9 - Test/Classic Arts	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 10 - Spare	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 11 - Spare	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 12 - Spare	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 13 - Spare	F9999999	EG001361 - Sequencer	EGT
Network Performance Tool Server	F9999999	EG001315 - Server Aud/Vid	Dell
Satellite Receiver - KLS 2	KLS 2	EG001136 - Receiver	General Instruments
Satellite Receiver - KLS 1	KLS 1	EG001136 - Receiver	General Instruments
Network Controller - 1	F9999999	EN000010 - Controller	Motorola
Network Controller - 2	F9999999	EN000010 - Controller	Motorola
Digital Addressable Controller (DAC)	F9999999	EN000040 - Master Controller	Motorola
CASMR - Conditional Access System	F9999999	EN000040 - Master Controller	HP
Avocent Autoview 3008	F9999999	EN000010 - Controller	Avocent
Modular Receiver/Decoder	F9999999	EG001136 - Receiver	Sencore
Satellite Receiver - KCPQ Ch. 13	F9999999	EG001136 - Receiver	Tandberg
Pro Receiver/Decoder - KOMO	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - KIRO	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - KING	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - KSTW	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - KONG	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - KZJO	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - Spare	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - NASA	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - KUNS	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - KUNS2/Mundo	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - KWPX	F9999999	EG001136 - Receiver	KTECH
ASI Splitter	F9999999	EG000217 - Combiner	MegaHertz
Smartstream Device Manager	F9999999	EG001315 - Server	Arris
Remote Addressable DANIS/DLS (RADD)	F9999999	EG001315 - Server	CSS/RADD
KLS 3000/CPMS	F9999999	EG001315 - Server	KLS 3000
Pro Receiver/Decoder - TV Tacoma	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - PCTV	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - Spare	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - Spare	F9999999	EG001136 - Receiver	KTECH
Satellite Receiver - KCPQ Ch. 13	F9999999	EG001136 - Receiver	Tandberg
Pro Receiver/Decoder - Spare	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - Spare	F9999999	EG001136 - Receiver	KTECH
APEX Edge QAM - 1	F9999999	EG000100 - Switch	Motorola
APEX Edge QAM - 2	F9999999	EG000100 - Switch	Motorola
APEX Edge QAM - 3	F9999999	EG000100 - Switch	Motorola
APEX Edge QAM - 4	F9999999	EG000100 - Switch	Motorola
MPEG Transport Stream Monitor	F9999999	EG000760 - Multiplexer	Tetronix
Vecima - IP to Analog Edge Decoder 1	F9999999	EG000740 - Modulator	Vecima - 1
Vecima - IP to Analog Edge Decoder 2	F9999999	EG000740 - Modulator	Vecima - 2
Vecima - IP to Analog Edge Decoder 3	F9999999	EG000740 - Modulator	Vecima - 3
HE Redundant Amplifier System - UP	F9999999	EG000120 - Amplifier	QRF - 1
HE Redundant Amplifier System - UP Pr	F9999999	EG000120 - Amplifier	QRF - 2
He Redundant Amp System - UP Bkup	F9999999	EG000120 - Amplifier	QRF - 3
CPAT - Dual Band Signal Generator	F9999999	EG001575 - Test Generator	Effigis
TelVue HyperCaster B-100 IPTV	F9999999	EG000120 - Amplifier	TelVue
Pro Satellite Receiver - SHO/SHO2	F9999999	EG001136 - Receiver	Motorola
TelVue HyperCaster B-100 IPTV	F9999999	EG000120 - Amplifier	TelVue
Remote Service Analyzer RSAM	F9999999	EZ000140 - Test Equip	JDSU
MPEG Video Probe Analyzer	F9999999	EZ000140 - Test Equip	JDSU
Advanced Rcvr Transcoder - Oxygen SD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - Sprout SD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - Bravo SD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - CNBC HD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - SyFy HD	F9999999	EG001136 - Receiver	Cisco

Advanced Rcvr Transcoder - USA HD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - NFL Redzone HD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - NFL HD	F9999999	EG001136 - Receiver	Cisco
Adv Program Receiver - MBC Korea SD	F9999999	EG001136 - Receiver	Motorola
Advanced Rcvr Transcoder - NBC Univesal	F9999999	EG001136 - Receiver	Cisco
MPEG Transport Stream Monitor	F9999999	EG000760 - Multiplexer	Tektronix
Sunrise Telecom Spectrum Analyzer	F9999999	EZ000140 - Test Equip	Sunrise Telecom
Sunrise Telecom Spectrum Analyzer	F9999999	EZ000140 - Test Equip	Sunrise Telecom
Multicom Optical Transmitter	F9999999	EG000850 - Optical Transmitter	Multicom
Pro Satellite Receiver - SHORTS HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - HSN SD	F9999999	EG001136 - Receiver	Scientific Atlanta
Adv Rcvr Transcoder - YouTooAmerica	F9999999	EG001136 - Receiver	Cisco
Adv Rcvr Transcoder - FYI HD	F9999999	EG001136 - Receiver	Cisco
Adv Rcvr Transcoder - MTV/Spike HD	F9999999	EG001136 - Receiver	Cisco
Adv Rcvr Transcoder - CMT HD	F9999999	EG001136 - Receiver	Cisco
Adv Rcvr Transcoder - VH1/Comedy HD	F9999999	EG001136 - Receiver	Cisco
Adv Rcvr Transcoder - NICK HD	F9999999	EG001136 - Receiver	Cisco
Satellite Receiver - HITS 14	F9999999	EG001136 - Receiver	General Instruments
RF L-Band Splitter (Active)	F9999999	EG000217 - Combiner	Quintech
RF L-Band Splitter (Passive)	F9999999	EG000217 - Combiner	Quintech
RF L-Band Splitter (Passive)	F9999999	EG000217 - Combiner	Quintech
Splitter/Combiner Directional Coupler	F9999999	EG000217 - Combiner	ADC Telecommunications
Splitter/Combiner Directional Coupler	F9999999	EG000217 - Combiner	ADC Telecommunications
Splitter/Combiner Directional Coupler	F9999999	EG000217 - Combiner	ADC Telecommunications
LNB Power Supply	F9999999	ED000250 - UPS	Quintech
Satellite Receiver - MoviePlex SD/Starz	F9999999	EG001136 - Receiver	Arris
Pro Satellite Rcvr - ESPN Classics	F9999999	EG001136 - Receiver	Motorola
Combiner - IP to ASI Convertor	F9999999	EG000217 - Combiner	Advanced Digital Inc
Adv Rcvr TrnsCoder - Life/Mil HD	F9999999	EG001136 - Receiver	Cisco
Program Receiver - The Word HD	F9999999	EG001136 - Receiver	Scientific Atlanta
Satellite Receiver - Destination America	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - OWN HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - Disney Jr HD	F9999999	EG001136 - Receiver	Motorola
Satellite Receiver - Food Net/HGTV HD	F9999999	EG001136 - Receiver	General Instruments
Satellite Receiver - Playboy HD	F9999999	EG001136 - Receiver	Motorola
Integrated Receiver/Decoder - Music Choice	F9999999	EG001136 - Receiver	Harmonic
LADI - Music Choice Inserter	F9999999	EG001315 - Server Aud/Vid	EAS System
Program Receiver - Jewelry SD	25806144	EG001136 - Receiver	Scientific Atlanta
Digital Media Receiver	F9999999	EG001136 - Receiver	Wegener
Program Receiver - Jewelry Spare Recvr	F9999999	EG001136 - Receiver	Scientific Atlanta
CherryPicker Application Platform #6	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Application Platform #1	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Application Platform #8	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform #9	F9999999	EG00760 - Multiplexer	Motorola
Cherry Picker Applications Platform #10	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform Spare	F9999999	EG00760 - Multiplexer	Motorola
Multiple Decryption Rcvr - TNT/Toons SD	F9999999	EG001136 - Receiver	Scientific Atlanta
Advanced Rcvr Transcoder - TV Japan	F9999999	EG001136 - Receiver	Cisco
MPEG/IRD Satellite Receiver - HD Net HD	F9999999	EG001136 - Receiver	Wegener
Pro Satellite Receiver - HRTV HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - CSPAN2 HD	F9999999	EG001136 - Receiver	Motorola
Broadband Multimedia Service Router #2	F9999999	EG001230 - Router (Net App)	BigBand
CherryPicker Applications Platform #2	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform #3	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform #7	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform #4	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform #5	F9999999	EG00760 - Multiplexer	Motorola
QAM Edge Encryptor Modulator #7	F9999999	EG00740 - Modulator	Motorola
QAM Edge Encryptor Modulator #1	F9999999	EG00740 - Modulator	Motorola
QAM Edge Encryptor Modulator #2	F9999999	EG00740 - Modulator	Motorola
QAM Edge Encryptor Modulator #3	F9999999	EG00740 - Modulator	Motorola
QAM Edge Encryptor Modulator #4	F9999999	EG00740 - Modulator	Motorola
SMU Control Server - Primary	F9999999	EG001315 - Server	Arris
SMU Control Server - Backup	F9999999	EG001315 - Server	IBM
Broadband Multimedia Service Router #1	F9999999	EG001230 - Router (Net App)	BigBand

Demodulator Convertor #1	2722035	EG000280 - Demodulator	Wel IAV
Demodulator Convertor #2	2722063	EG000280 - Demodulator	Wel IAV
Demodulator Convertor #3	2722069	EG000280 - Demodulator	Wel IAV
Dish 1 serial 1005910	4.5 meter dishes	Brand Scientific Atlanta model 8345	
Dish 2 serial 1007240	4.5 meter dishes	Brand Scientific Atlanta model 8346	
Dish 3 serial 1006545	4.5 meter dishes	Brand Scientific Atlanta model 8347	
Dish 4 serial 1005880	4.5 meter dishes	Brand Scientific Atlanta model 8348	
Dish 5 serial 100655? The last digit is un-readable	4.5 meter dishes	Brand Scientific Atlanta model 8349	

The dishes on the roof are a mix of 3.7 meter Loral Skynet or DH, and 3.8 meter Patriot. Plus the steerable dish which I think is a 3.7 meter Chaparral but again no markings.

3813522	Patriot 3.8 had a decal with a Part number of PRT-380
3814298	Patriot 3.8 had a decal with a Part number of PRT-380
24'x13'6" Aircscreen AeroPro Pro system including:	
inflatable outdoor movie screen	
inflatable frame, lower panel	
front projection surface	
screen bungee ties	
high pressure blower	
black nylon high tension tethers	
heavy duty carry bag	
four steel stakes	
deluxe repair kit	
manual	
Aeropro Pro HD console & sound system	
heavy duty ATA rated road case	
triple screen LCD monitor	
BlueRay and progresive scan DVD players	
HD video switcher	
pro quality rack mounted audio mixer with iPod dock	
power conditioner and surge protector with two lamps	
microphone	
audio and video cables	
PRO speaker system	

Projector w/case and stand



**Exhibit "A.3"**  
(Set-Top Boxes)

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Exhibit A7

Set Top Boxes	
Model	quantity (in home)
DCX3200	7281
DCX3510	1094
MG1	722
Mini	871
MG2	485

# EXHIBIT 39 (a)



## RESOLUTION NO. 40468

1 A RESOLUTION relating to Click! Network; authorizing execution of the Click!  
2 Business Transaction Agreement by and between Tacoma Power and  
3 Mashell, Inc., d/b/a Rainier Connect and Rainier Connect North LLC.

4 WHEREAS, in 1998, Click! Network, a trade name used by Tacoma Power,  
5 began operating as a cable service provider over excess capacity of the  
6 HFC Network, providing primarily cable television and wholesale cable modem  
7 (internet access) services, and

8 WHEREAS, since that time, technology and consumer demands have  
9 changed, with consumers shifting from predominantly consuming cable  
10 programming services to predominantly consuming internet access services, and  
11

12 WHEREAS operational costs for the Click! Network have significantly  
13 increased since 1998 while the Click! Network business model has become  
14 outdated and unable to respond quickly or efficiently to changes in the market  
15 place or provide the capacity to make capital investments necessary to upgrade  
16 the network and compete with the private sector, and  
17

18 WHEREAS, in response to these challenges, the Public Utility  
19 Board ("PUB") began to study alternative Click! Network business models and,  
20 after many years of study, the PUB, in collaboration with the City Council, retained  
21 the services of CTC Technology & Energy ("CTC") to assist in this analysis, and  
22

23 WHEREAS, at the January 23, 2018, Joint Study Session of the PUB and  
24 City Council, CTC presented its report examining which of the following five  
25 alternative business models would best meet 12 Click! Network policy goals later  
26 adopted by the PUB and City Council:



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- Continue finding ways to reduce costs and streamline operations;
- Become a retail internet service provider (“ISP”) and potentially eliminate cable TV operations;
- Upgrade the Click! Network to fiber-to-the-premises in an effort to better compete with incumbents in the market;
- Cease internet and cable operations and abandon the related parts of the network;
- Seek a partner willing to take on operating and other obligations and costs while agreeing to conditions that would preserve Click!’s significant policy achievements, and

WHEREAS CTC reported that the 12 policy goals could best be met through a business model in which the City retained ownership of the entire HFC Network, including the Click! Network, with a third party providing Cable TV and/or internet access services and covering the capital and operating costs associated with providing those services, and

WHEREAS, under this model, Tacoma Power would no longer provide cable television or wholesale internet access services, and the third party would provide cable television, video, and internet access services directly to the public, and

WHEREAS the PUB, pursuant to its prior Resolution No. U-10988, expressed its determination that while the 1997 business plan achieved many of the functions envisioned for the HFC Network, the Excess Capacity of the HFC Network and the inventory, equipment, and vehicles allocated to Click! Network are not needed now or in the future by Tacoma Power for utility purposes, and thus, will not be updated or improved or utilized for utility purposes, and are excess to the needs of Tacoma Power, and that the current Click! Network business plan and



1 the proposed all-in retail service business model will not generate sufficient  
2 revenues to fully fund operational expenses and the costs of capital improvements  
3 needed to maintain the Excess Capacity of the HFC Network as a state-of-the art  
4 Network, and

5 WHEREAS, through PUB Resolution No. U-10988 and City Council  
6 Resolution No. 39930, the PUB and the City Council rescinded their approval of  
7 the all-in retail service business model; adopted 12 policy goals to be maximized  
8 through the use and preservation of the Excess Capacity of the HFC Network; and  
9 directed the Public Utilities Director and City Manager to work collaboratively to  
10 develop a plan to seek information, proposals, or qualifications from interested  
11 parties to determine whether the 12 policy goals could be achieved through a  
12 collaboration and/or restructuring of Click! Network, and

14 WHEREAS, at the August 21, 2018, Joint Study Session of the PUB and  
15 City Council, CTC recommended that the PUB and City Council authorize  
16 negotiation of term sheets with Rainier Connect and Wave Broadband, and

18 WHEREAS the City Council and PUB, after a presentation by CTC and  
19 review of proposals from third parties at the March 5, 2019, Joint Study Session of  
20 the PUB and City Council, directed the Public Utilities Director to execute a letter  
21 agreement with Rainier Connect to enter into good faith negotiation of agreements  
22 through which: (1) the City, through Tacoma Power, would retain ownership of all  
23 of the existing HFC Network; (2) the capital and operating costs of the Excess  
24 Capacity of the HFC Network would be borne by a third party; (3) Tacoma Power  
25 would no longer provide cable television or wholesale internet access or data  
26



transport services; and (4) Rainier Connect would use the Excess Capacity of the  
1 HFC Network to provide cable, video, and internet access services consistent with  
2 the 12 policy goals adopted by the City Council and PUB, and

3           WHEREAS negotiations with Rainier Connect commenced in April 2019,  
4 and the Click! Business Transaction Agreement is now complete, and

5           WHEREAS, on October 30, 2019, the PUB adopted Resolution  
6 No. U-11116, declaring the Click! Assets and the Excess Capacity of the HFC  
7 Network surplus to the needs of Tacoma Power and Tacoma Public Utilities and  
8 not required for continued public utility services, recommending that the City  
9 Council declare the above-referenced property surplus to the needs of the City,  
10 and approving the Click! Business Transaction Agreement conditioned upon  
11 approval by the City Council and

12           WHEREAS the City Council, pursuant to Resolution No. 40467, declared  
13 the Excess Capacity of the HFC Network and the Click Assets, as those terms are  
14 defined therein, surplus to the needs of Tacoma Power, Tacoma Public Utilities,  
15 and the City, and no longer required for continued public utility service, and

16           WHEREAS, pursuant to TMC 1.06.273, the Tacoma Public Utilities Director  
17 has recommended that the City Council find that disposal of the Click! Assets and  
18 the Excess Capacity in the HFC Network as defined Resolution No. 40467 be  
19 conveyed and leased through a negotiated process with Rainier Connect pursuant  
20 to agreements in substantially the form of the Click! Business Transaction  
21 Agreement on file with the City Clerk, and

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1 WHEREAS approval of the Click! Business Transaction Agreement will  
2 allow use of the excess capacity of the HFC Network and ownership of related  
3 inventory, equipment, and vehicles to be transferred to Rainier Connect and will,  
4 among other things, continue use of the Click! Network to provide cable, video, and  
5 broadband internet access to families and businesses in Tacoma; maintain  
6 ownership of the Click! Network; require private capital to be used to operate,  
7 maintain, and upgrade the network to one gigabit speeds in competition with other  
8 providers; ensure that such services are provided in an equitable manner with like  
9 services and prices throughout the City; and, provide for reduced-cost internet  
10 access under the federal lifeline subsidy and to households eligible for TPU's  
11 electric service low-income program, and  
12

13 WHEREAS the Click! Business Transaction Agreement further provides that  
14 Rainier Connect will make annual payments to Tacoma Power of \$2,500,000 for  
15 year one, \$2,625,000 for year two, \$2,750,000 for year three, \$2,875,000 for year  
16 four, and \$3,000,000 for year five, and for each year after year five, the annual  
17 payment will increase to reflect the Consumer Price Index Increase, and further  
18 provides that Rainier Connect will invest a minimum of \$1.5 million annually in the  
19 network, adjusted annually to reflect the Consumer Price Index Increase, and  
20

21 WHEREAS the City Council, having considered the foregoing, the public  
22 comments received during the public hearing of October 29, 2019, and prior public  
23 meetings of the City Council and PUB, and the City records and files related to the  
24 construction, installation, and operation of the Click! Network, and having been in  
25  
26



all matters fully advised, finds that it is in the best interest of the public to approve  
1 the Click! Business Transaction Agreement; Now, Therefore,

2 BE IT RESOLVED BY COUNCIL OF THE CITY OF TACOMA:

3 Section 1. That the City Council does hereby find and concur with the  
4 Tacoma Public Utility Board's determination and recommendation that the  
5 conveyance of the Click! Assets and the grant of an indefeasible right of use of the  
6 Excess Capacity of the HFC Network to Rainier Connect through a negotiated  
7 disposition pursuant to the terms and conditions of the Click! Business Transaction  
8 Agreement, in substantially the form on file on the office of the City Clerk, is in the  
9 best interests of Tacoma Power, Tacoma Public Utilities, and the City, and all  
10 applicable competitive bidding and selection requirements are hereby waived.  
11  
12

13 Section 2. That the appropriate City officials are authorized to execute the  
14 Click! Business Transaction Agreement, in substantially the form on file in the  
15 office of the City Clerk, and that upon a joint determination by the City Manager  
16 and Public Utilities Director that the conditions precedent to transfer of operational  
17 control of the Tacoma Power Commercial Network to Rainier Connect have been  
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met, or waived, the Mayor of the City of Tacoma, together with all other appropriate City officials, are authorized to execute the Indefeasible Right of Use Agreement, in substantially the form on file in the office of the City Clerk.

Passed \_\_\_\_\_

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk

Approved as to form:

\_\_\_\_\_  
Chief Deputy City Attorney

# EXHIBIT 40

## AUTHOR

**Richard E. Brown** is the Senior Vice President of Operations and co-founder of Quanta Technology, a firm specializing in technical and management consulting for utilities and utility-related industries. Dr. Brown has been on the leadership team of three successful startup organizations, and has provided consulting services to most major utilities in the United States and many around the world. He is a frequent instructor, has taught courses in eleven countries, and is an adjunct professor at North Carolina State University.

Dr. Brown has published more than 90 technical papers related to asset management and performance management, and is also author of the book *Electric Power Distribution Reliability*. In 2007, he was elected to the grade of Fellow by the Institute of Electrical and Electronics Engineers (IEEE), which is conferred by the IEEE Board of Directors for an extraordinary record of industry accomplishments.

Dr. Brown earned his BSEE, MSEE, and PhD degrees from the University of Washington in Seattle, and his MBA degree from the University of North Carolina at Chapel Hill. He is a registered professional engineer.

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## **PREFACE**

This is a book for utility engineers. Typical readers will have studied engineering in college, received an engineering degree, and somehow ended up pursuing a career within a utility or taken a job associated with utilities. Academic credentials for most of these readers will include advanced mathematics, probability, statistics, chemistry, physics, and materials science. Most will have further specialized in a specific area such as electrical engineering, mechanical engineering, or civil engineering. These types of readers are well-educated and intelligent, an assumption made by the author when presenting material, sometimes difficult material, throughout the book.

Utilities have many challenging engineering problems to be solved. New customers must be served. Old equipment must be maintained. New technologies must be assessed and adopted. To solve these challenges, engineers find themselves responsible for planning, engineering, system analysis, system design, equipment specification, maintenance management, operations, and a host of other functions.

Whatever their role, utility engineers make many decisions. Some of these decisions result from extensive and careful analyses. Others are made quickly during everyday activities. In virtually all cases, decisions have cost

# 1

## UTILITIES

*Public utilities* provide essential services to society. Because of their importance, legal precedent has upheld the need for specialized government oversight of these businesses to ensure that safe and reliable utility services are widely available for rates that are reasonable and non-discriminatory.

The types of public utilities considered in this book require large investments in fixed infrastructure, typically extending to the premises of end-use customers. Examples of these *infrastructure utilities* include electric utilities, gas utilities, telephone utilities, water utilities, and wastewater utilities. Sometimes public transportation facilities are also considered public utilities (e.g., railroads, buses, subways), called *transportation utilities*. Much of this book is relevant to both infrastructure utilities and transportation utilities, but there are certain aspects of infrastructure utilities that require special consideration. Most people use the terms public utility and utility interchangeably. Therefore, unless otherwise stated, the remainder of this book uses the term *utility* to refer to a public utility that relies heavily on fixed infrastructure to provide an essential utility service.

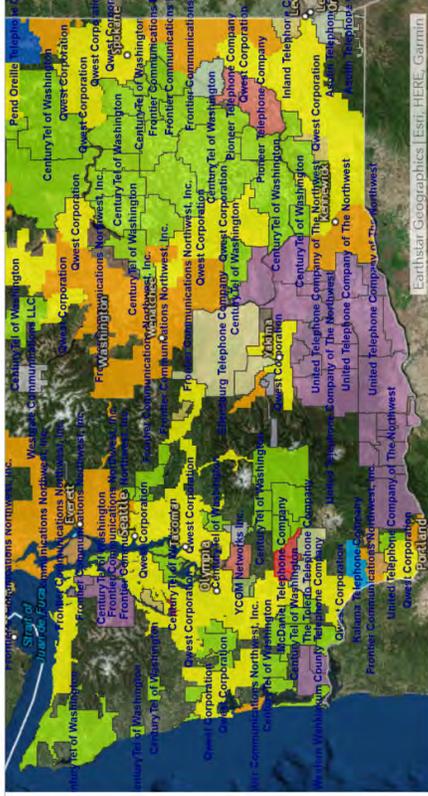
Many of the business topics in this book apply to all industries. However,

# EXHIBIT 41



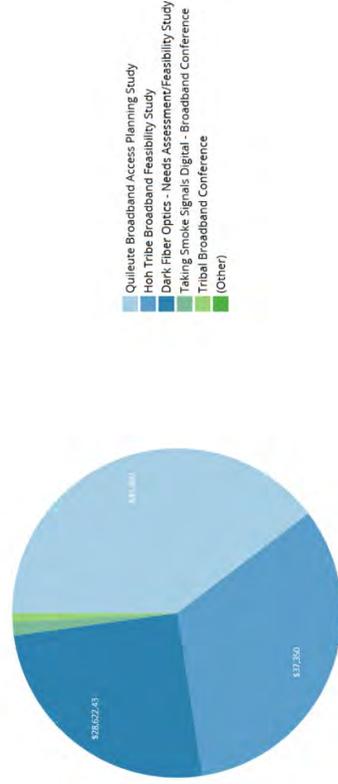
# UTC

## Washington Utilities and Transportation Commission



### State investment

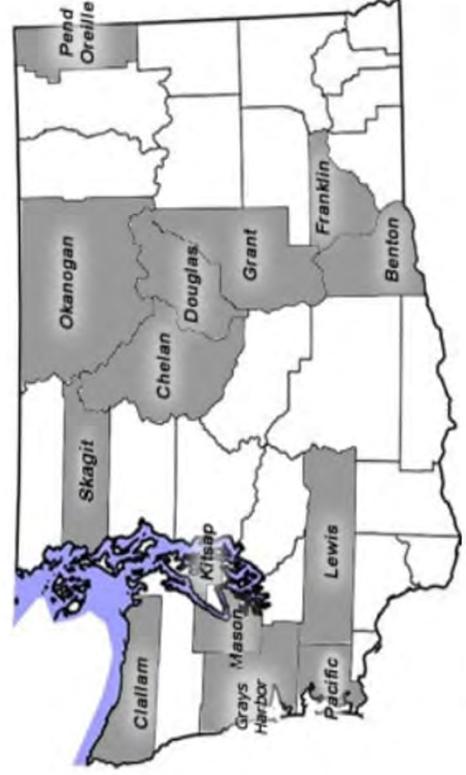
With the exception of CERB projects, the state of Washington's direct investments in broadband in the past five years have been confined to one-off projects using re-purposed funds, feasibility studies and services, as illustrated by this chart from the Department of Commerce.



### Local public utilities

Many of Washington's communities have established local customer-owned Public Utility Districts (PUD's) that offer a variety of utility services, sometimes including wholesale broadband infrastructure.

As of 2017, 14 PUD's were offering telecommunications services, with an aggregate infrastructure investment of \$509 million.



Benton | Chelan | Clallam | Douglas | Franklin | Grant  
Grays Harbor | Kitsap | Lewis | Mason #3  
Okanogan | Pacific | Pend Oreille | Skagit

source: Washington PUD Association

# EXHIBIT 41 (a)

**Washington State  
Community Economic  
Revitalization Board**



# Rural Broadband Program

## **2018 LEGISLATIVE REPORT**

2017-19 Biennium



## Table of Contents

Message from the Chair .....	3
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Program Opportunities.....	5
Program Outreach .....	7
Community and Economic Development.....	10
Awarded Projects .....	12
Project Highlights: Port of Skagit County.....	14
Project Life Cycle .....	15
Feedback from Communities .....	16
ATNI Resolution .....	18
CERB Members.....	Back Cover

Rural Broadband Proviso Language: ESSB 6095 H-5170.3 Section 1008  
CERB Enabling Legislation: RCW 43.160

### **Washington State Department of Commerce**

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PO Box 42525  
Olympia, WA 98504

**Brian Bonlender**  
Director

**Mark Barkley**  
Assistant Director  
Local Government Division

**Cecilia Gardener**  
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INVESTING IN WASHINGTON'S ECONOMIC FUTURE

## Community Economic Revitalization Board

1011 Plum Street SE • PO Box 42525 • Olympia, WA 98504-2525 • (360) 725-3151

I am pleased to introduce the 2018 Rural Broadband Legislative Report for the Washington State Community Economic Revitalization Board (CERB). This report highlights activities and outcomes from the 2018 calendar year.

In March 2018, the supplemental capital budget passed (ESSB 6095 H-5170.3). Section 1008 included the CERB Administered Rural Broadband Program. The proviso language included a \$10 million appropriation for fiscal year 2019.

The Rural Broadband Program has changed the conversation for many of our rural communities and Tribes. This program allows communities and Tribes to build and own the broadband infrastructure, and to collaborate with Independent Service Providers (ISPs) to provide retail service, which will allow more options for the end-user at a lower cost.

Since this program has changed the conversation, CERB has seen many communities come forward for planning projects for broadband. These planning projects are building a pipeline for future construction projects. Even more exciting, these conversations are bringing everyone to the table for collaboration: counties, cities, ports, PUDs, special purpose districts, Tribes, and ISPs.

Because this is a new program, the CERB Policy Committee and staff worked diligently designing policies, procedures, program materials, and conducting stakeholder outreach. The supplemental capital budget was passed on March 9, and CERB approved the program's policies, procedures, and materials on May 17. The accelerated timeline allowed staff to be out in the communities conducting workshops, attending speaking engagements, giving technical assistance, and educating communities and Tribes about the new Rural Broadband Program. Between May and June, staff spoke at 20 individual workshops and speaking engagements, reaching over 700 community members.

The first round of projects were awarded in September 2018 with far reaching impact:

- 3 Projects were awarded - \$2,816,649 CERB Investment
- The projects reached into 13 Communities
- 2,427 Connections are planned from the projects
- Cost per connection: \$1,161
- 100% Increase in Internet Speed
- Estimated increase from 6 to 17 ISPs

The Rural Broadband Program aligns with CERB's application and meeting date cycle. Applications are accepted on a first-come, first-served basis, and the Board meets every two months to review projects.

CERB members are committed Washington citizens and professionals with a passion for economic development. The investments that CERB has made, and the return on these investments, are a testament to this dedication. On behalf of CERB, I thank you for your continued support of this essential resource for growing Washington's economy.

Randy Hayden  
Community Economic Revitalization Board Chair

# Introduction to CERB

## COMMUNITY ECONOMIC REVITALIZATION BOARD

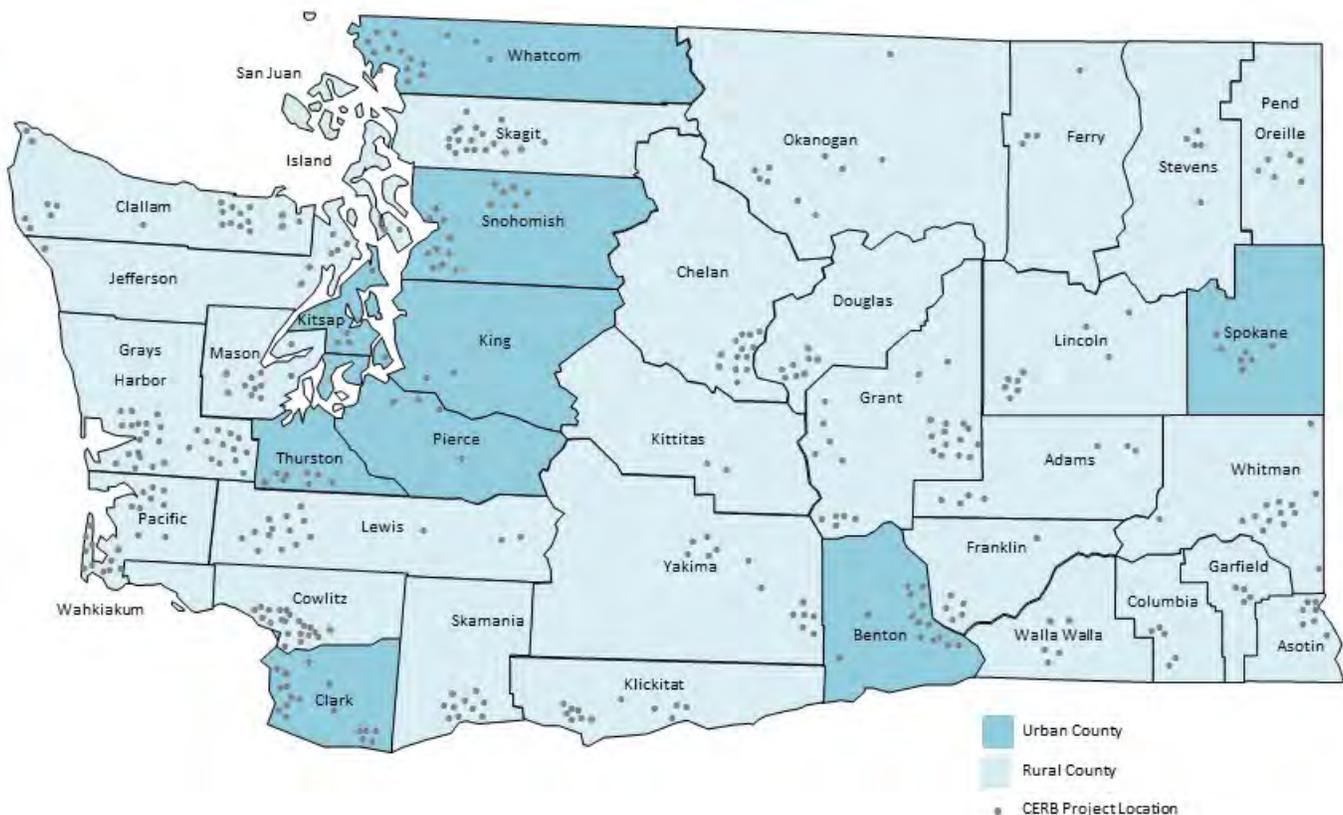
The Community Economic Revitalization Board (CERB) is a unique statewide economic development resource. CERB assistance is valued because it helps communities:

- Respond rapidly to immediate business siting and expansion needs
- Build feasible industrial sites for future business development
- Target expansions in manufacturing, food processing, assembly, warehousing, industrial distribution, advanced technology, and other key sectors
- Spur creation and retention of higher wage jobs

Since 1982, CERB has encouraged new development and expansion in areas where growth is desired. The Legislature created CERB to provide low-interest loans (and in unique circumstances, grants) to help finance the local public economic development infrastructure necessary to develop or retain stable business and industrial activity. These improvements include industrial water, general-purpose industrial buildings and port facilities, sanitary and storm sewers, industrial wastewater treatment facilities, railroad spurs, telecommunications, electricity, natural gas, roads, and bridges. CERB investments have been made in 37 counties since the program began.

The 20-member Board represents private and public sectors from across the state, as designated in statute. The Board sets policy and selects projects to receive CERB financing assistance. Administrative support to CERB is provided within the Local Government Division of the Department of Commerce. CERB's statutory authority is codified in Chapter 43.160 RCW.

### CERB Funded Projects in Washington State, 1982-2018



# Program Opportunities

## CERB Investment and Returns

CERB will track the following outcomes:

- Number of connections: households, businesses, and anchor institutions.
- Number of ISPs available for consumers.
- Internet speed being offered to consumers.

## Staff Assistance

CERB staff delivers program management, contract management, Board support, community and economic development for local projects, and works with applicants to develop and present projects for CERB review.

**Technical assistance**—Staff help each applicant identify project barriers, evaluate project feasibility, and develop funding and implementation strategies when the project is ready to proceed. Many times this involves convening a tech team with the applicant and other funders, to develop a project action plan.

**Project advocacy**—Staff prepare a comprehensive analysis of each project with recommendations to CERB. This analysis identifies the relative community and economic benefits of the project to the local community, the project dynamics, and areas of merit and/or controversy. The analysis of the project’s community and economic development goals and outcomes includes specific projections of the number of connections (households, businesses, and anchor institutions), speed service to the

end users, and number of ISPs available to the end user.

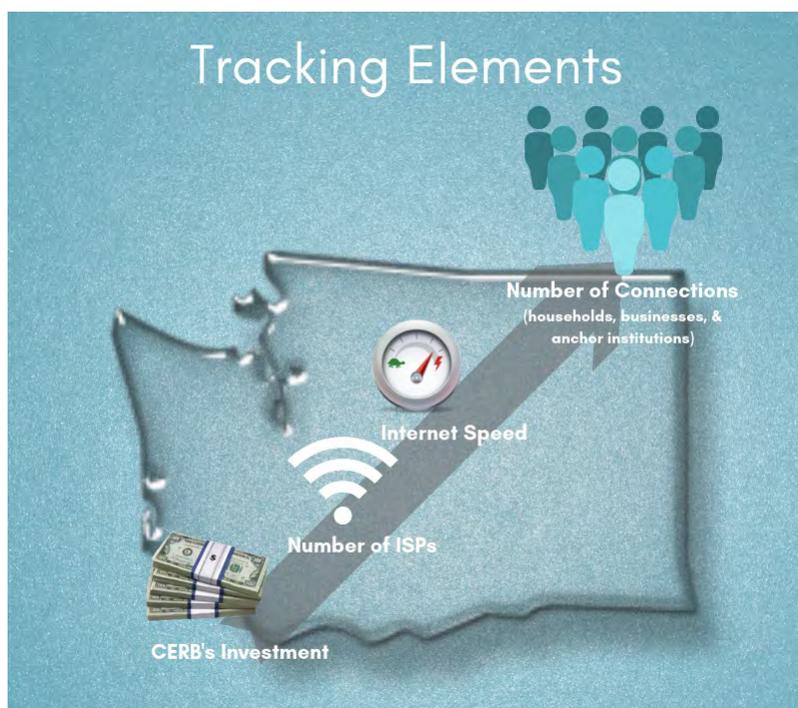
**Project monitoring**—Staff help local governments work out emergent problems during contract development and project implementation. Following construction of the public infrastructure project, project outcomes are tracked by CERB staff for five years. These outcomes include number of connections (households, businesses, and anchor institutions), speed service to the end users, and number of ISPs available to the end user. This tracking process links CERB investment to actual community and economic development outcomes.

## Key Successes

In March 2018, the Supplemental Capital Budget passed, which included the CERB Administered Rural Broadband Program. This proviso language included a \$10 million appropriation for FY 2019.

Timeline:

- **March - April:** CERB policy committee designed program policies, procedures, and program materials.
- **March - April:** Staff conducted Stakeholder Outreach Meetings (21 Entities)
- **May:** CERB approved the Rural Broadband Program policies, procedures, and program materials.
- **May 21:** 1st Rural Broadband application cycle opened.
- **May - June:** CERB staff held six rural broadband workshops across the state, and also took part in many speaking events to educate about the Rural Broadband Program.
- **July 16:** 1st due date for Rural Broadband applications.
- **September 20:** CERB approved three Rural Broadband construction projects - \$2.8 million.



# EXHIBIT 42

# High Speed Internet, Powered By Click!

Click!'s Internet Service Provider partners provide fast and reliable internet throughout Tacoma and Pierce County. Connect all your devices in even the most remote areas. Choose from speeds up to 100 Mbps to fit your needs.

887

SELECT INTERNET PLAN

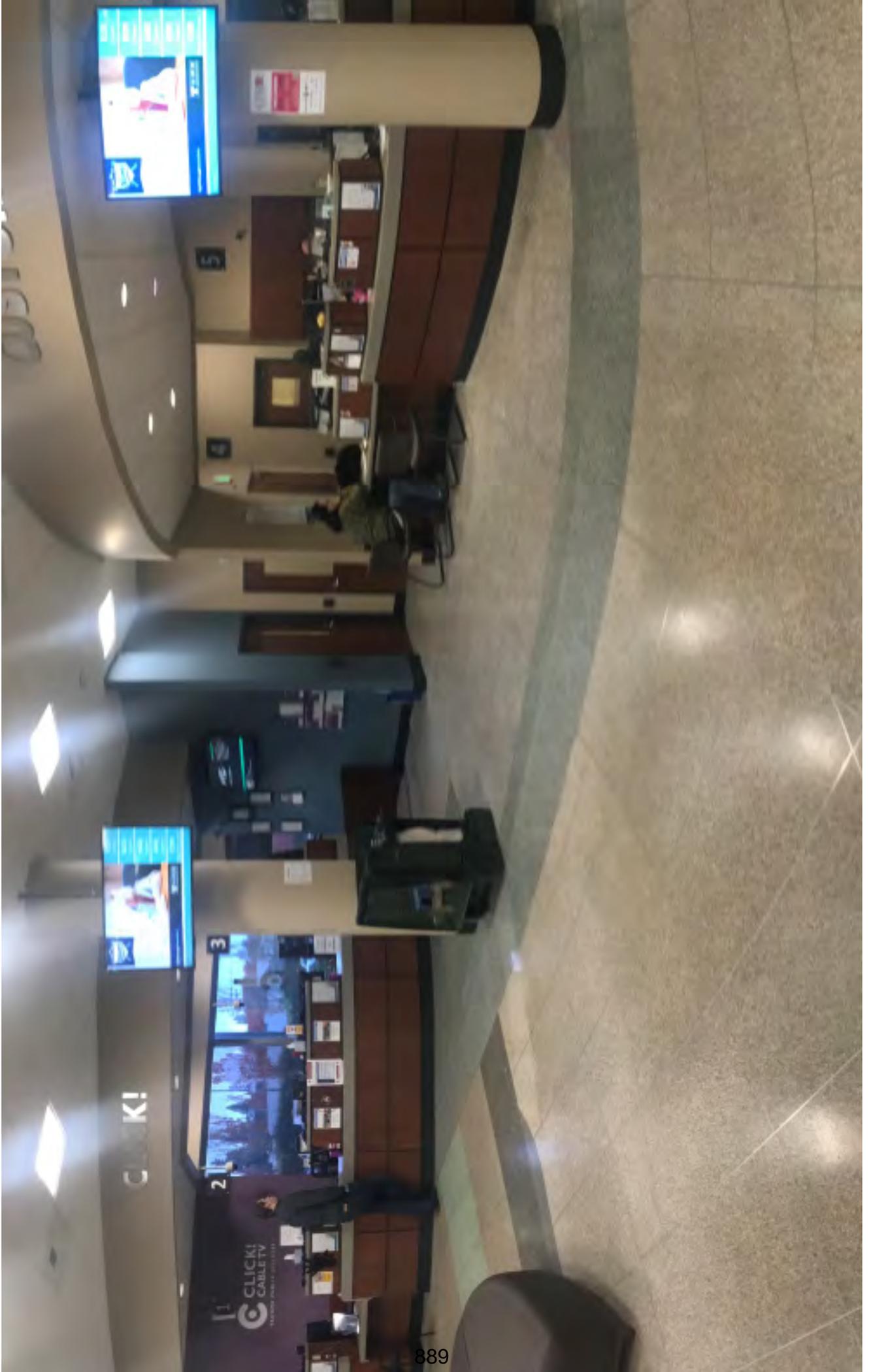


## The Choice is Yours

Click! partners with two local Internet Service Providers to connect your internet needs. Choose from **Advanced Stream** and **Rainier Connect** offer a variety of speed and pricing options to fit your internet needs and the flexibility to select the right plan for you.

SELECT A PROVIDER

# EXHIBIT 42 (a)



**EXHIBIT 42 (b)**

# Plans and Pricing

Cable TV & Internet    Cable TV    **Internet**

Available residential plans and special offers based on your address [Change Address](#)

PACKAGE	SPEED	BEST FOR	PRICE
<b>SPECIAL OFFER</b> <b>Extreme</b>	<b>75/8</b> Mbps Speed Range	<ul style="list-style-type: none"> <li>Video surveillance or "smart" home technology</li> <li>Stream movies and use online applications at the same time</li> <li>Supports household of 3 - 4 people</li> </ul>	Starting at: <b>\$59.99/mo</b> <a href="#">Pricing Details</a>
<b>SPECIAL OFFER</b> <b>Turbo</b>	<b>50/5</b> Mbps Speed Range	<ul style="list-style-type: none"> <li>Stream high-definition video on multiple devices</li> <li>Online gaming and videos at the same time on multiple devices</li> <li>Supports household of 3 - 4 people</li> </ul>	Starting at: <b>\$49.99/mo</b> <a href="#">Pricing Details</a>
<b>SPECIAL OFFER</b> <b>Fast</b>	<b>25/2</b> Mbps Speed Range	<ul style="list-style-type: none"> <li>High definition video calls</li> <li>Online gaming with multiple devices</li> <li>Supports household of 2 - 3 people</li> </ul>	Starting at: <b>\$44.95/mo</b> <a href="#">Pricing Details</a>
<b>SPECIAL OFFER</b> <b>Starter</b>	<b>10/1</b> Mbps Speed Range	<ul style="list-style-type: none"> <li>Basic web browsing &amp; email</li> <li>Stream music &amp; videos</li> <li>Supports household of 1 - 2 people</li> </ul>	Starting at: <b>\$34.95/mo</b> <a href="#">Pricing Details</a>

CHOOSE PLAN

CHOOSE PLAN

CHOOSE PLAN

CHOOSE PLAN

Cable TV & Internet

Cable TV

Internet

Available residential plans and special offers based on your address [Change Address](#)

PACKAGE

CHANNELS

INTERNET

EXTRAS

PRICE

SPECIAL OFFER

**Standard TV + Free HD + 25 Mbps**

[Learn More](#) +

**244**

[View Channels](#)

**25/2**

**Mbps**  
Speed  
Range

- Free HD receiver
- TV Everywhere
- Video On Demand
- Stream movies on multiple devices
- High definition video calls

Starting at:

**\$110.82/mo**

[Pricing Details](#)

CHOOSE PLAN

SPECIAL OFFER

**Broadcast TV + Free HD + 100 Mbps**

[Learn More](#) +

**123**

[View Channels](#)

**100/10**

**Mbps**  
Speed  
Range

- TV Everywhere
- Video On Demand
- Free HD receiver
- Internet supports multiple devices
- Remote supercomputing

Starting at:

**\$111.57/mo**

[Pricing Details](#)

CHOOSE PLAN

SPECIAL OFFER

**Broadcast TV + Free HD + 10 Mbps**

[Learn More](#) +

**123**

[View Channels](#)

**10/1**

**Mbps**  
Speed  
Range

- Primetime TV
- TV Everywhere
- Video On Demand
- Basic web browsing
- Stream music & videos

Starting at:

**\$56.57/mo**

[Pricing Details](#)

CHOOSE PLAN

# Plans and Pricing



Click! provides transport services to two Internet Service Providers (ISPs) allowing them to offer customers a number of different products and packages. Each ISP determines their own retail pricing, depending on package level. Price does not include taxes, fees, installation or additional equipment fees and are subject to change. The ISP you select will bill you directly each month for Internet service. Special offer is for new Advanced Stream customers only and is good for one year. Expires 12/31/19.

SPECIAL OFFER

Turbo

50/5 Mbps

Speed Range

- Stream high-definition video on multiple devices
- Online gaming and videos at the same time on multiple devices
- Supports household of 3 - 4 people

Starting at:

**\$49.99/mo**

Pricing Details

CHOOSE PLAN

SPECIAL OFFER

Fast

25/2 Mbps

Speed Range

- High definition video calls
- Online gaming with multiple devices
- Supports household of 2 - 3

Starting at:

**\$44.95/mo**

Pricing Details

CHOOSE PLAN

# EXHIBIT 43



CERTIFICATE

I, Charleen Jacobs, do hereby certify that I am the Clerk of the Public Utility Board of the City of Tacoma, and that record and maintain custody of the official records and minutes of the Public Utility Board.

I further certify that the attached is a full, true, and correct copy of Amended Resolution U-10828 dated December 3, 2015.

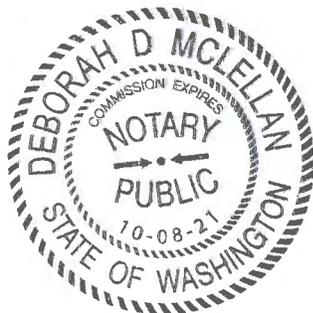
In witness whereof, I have set my hand this 16 day of January 2020.

Charleen Jacobs  
Clerk, Public Utility Board  
Tacoma Public Utilities  
City of Tacoma, Washington

Attachment

State of Washington  
County of Pierce

Subscribed and sworn to before me this 16 day of January 2020.



Deborah D. McLellan  
Notary Public in and for the  
State of Washington, County of Pierce  
My commission expires 10-8-21



## AMENDED RESOLUTION NO. U-10828

1 A RESOLUTION relating to Click! Network; authorizing Click! to prepare a  
2 business plan to provide, in addition to retail cable television, retail  
3 internet services including voice over data internet ("VoIP") protocol,  
4 commercial broadband and Gigabit service ("Retail Services").

5 WHEREAS the City Council of Tacoma authorized the Department of  
6 Public Utilities ("TPU"), Light Division (dba "Tacoma Power"), to implement and  
7 manage a broadband telecommunication system ("Click! Network" or "Click!" as  
8 authorized through City Council Substitute Resolution No. 33668, approved  
9 April 8, 1997, and Public Utility Board Amended Substitute Resolution U-9258  
10 approved April 9, 1997), and

11 WHEREAS Tacoma Power provided retail cable TV services to  
12 customers, wholesale internet to independent Internet Service Providers  
13 ("ISPs") who served retail customers and wholesale broadband service to  
14 business customers, and

15 WHEREAS the broadband telecommunication system is critical  
16 infrastructure for Tacoma Power, including the connection of substations,  
17 support of approximately 18,000 Gateway smart meters, as well as providing  
18 support for the City's I-net system, and

19 WHEREAS the City Charter Section 4.6 requires a vote of the people  
20 before the City may sell, lease, or dispose of any utility system, or parts thereof  
21 essential to continued effective utility service, and

22 WHEREAS the presence of Click! Cable TV in the marketplace provided  
23 savings for all cable TV customers, regardless of provider, in the Click! Market  
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territory as compared to other Puget Sound market areas to an estimated average savings of \$10 million dollars a year, between 2004 and 2008, and

WHEREAS Click! services currently reaches 26.2% of the customers in the service territory with one or more of its services (Cable TV only, Internet only or Cable TV and Internet) according to Click! customer counts, and

WHEREAS 61% of those polled in May of 2015 said that it would be a good idea for Click! to provide internet service directly to customers, and

WHEREAS Click! infrastructure could provide Gigabit internet speeds to customers in the entire service territory with capital investment, and

WHEREAS customers' use of internet is increasing and use of Cable TV is decreasing, just as the cost for Cable TV is increasing significantly for the Click! network, and

WHEREAS Click!'s current business model creates future potential financial losses that may require the use of Tacoma Power ratepayer funds, and

WHEREAS the Public Utility Board has determined that the most reasonable path to meeting community objectives and financial sustainability is to pursue a business model where Click! offers additional retail products directly to its customers, including retail cable TV, Internet, voice over Internet (VoIP), and commercial broadband services ("All-In Retail model"); Now, therefore,

BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

Sec. 1. Definitions.



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- a. "Click! or Click! Network" shall mean the telecommunication section of the Light Division of the Department of Public Utilities for the City of Tacoma, as established and described in Public Utility Board Amended Substitute Board Resolution U-9258 and City Council Substitute Resolution No. 33668.
- b. "Tacoma Power" shall mean the Light Division (doing business as Tacoma Power), of the Department of Public Utilities, for the City of Tacoma, as established by the City of Tacoma Charter Section 4.10.
- c. "Tacoma Public Utilities" shall mean the Department of Public Utilities (doing business as TPU), for the City of Tacoma, as established by the City of Tacoma Charter Article 4.
- d. "Retail Services" shall mean cable television and retail internet services including voice over data internet protocol, retail and commercial broadband, Gigabit service and related and enhanced services offered to customers from time to time as new technologies and services become available.
- e. "Expenditures" shall mean capital (including debt service) and operations and maintenance ("O&M") expenses determined on a "cash flow" basis incurred by Click! after January 1, 2016. "Expenditures" shall not include, and Click! shall not be charged Click! past physical plant and capital related costs made by Tacoma Power on behalf of Click! prior to January 1, 2016.

Sec. 2. Click! shall work with consultants as appropriate to develop a detailed business, financial and marketing plan (the "Business Plan") to provide customers the Retail Services and other aspects of the Business Plan contemplated herein. The goal will be for Click! to present to the Public Utility Board and the City Council an initial detailed Business Plan on or near April 7<sup>th</sup>, 2016. The goal will be for the Public Utility Board and City Council to approve the initial detailed Business Plan within 60 days thereafter.

- a. The Business Plan shall include annual, biennial and longer term goals, benchmarks and measures of financial progress and success, including
  - i. building customer counts and increasing market penetration
  - ii. financial projection and benchmarks
  - iii. designing and implementing rates that support customers count goals while providing revenue to pay Expenditures



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- iv. achievement of revenues that exceed Expenditures to the extent reasonably feasible
  - v. capital expenditure planning, including debt financing where appropriate
  - vi. charging just and proper proportions of the cost and expenses of other departments or offices of the City rendering service to Click!, as required under City Charter section 4.5.
- b. The Business Plan shall also include annual, biennial and longer term goals, benchmarks and measures of progress and success for non-financial achievement, including
- i. coordination with goals and strategic plans of TPU and the City of Tacoma
  - ii. promotion of market competition
  - iii. fostering and enhancing educational opportunity and economic activity in Tacoma and Pierce County
  - iv. ensuring just access to internet service regardless of economic condition, social barriers and physical challenges.
- c. The Business Plan will make adapting to changing market conditions and increased competition a priority, including necessary capital investments to improve technologies and stay competitive.
- d. The Business Plan will authorized, but not obligate, Click! to enter into negotiations for new contracts with internet services providers using its network on terms and conditions economically acceptable to Click! and consistent with the Business Plan, including authority to purchase the businesses of the existing private internet service providers using its network. Click! will be authorized to utilize the services of third-party business valuation consultants, acceptable to all parties, in connection with such negotiations.
- e. The Business Plan will include analysis and action plans for the structure of the Click! workforce, including the negotiation with the relevant labor organizations when necessary, to meet the requirements of the Business Plan.
- f. The Business Plan shall require a separate enterprise fund (subaccount) within the Tacoma Power fund to account for Click! revenues and Expenditures.
- g. Subject to the outcome of the legal analysis authorized under Sec. 4, from January 1, 2016, going forward if Expenditures made on behalf of



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Click! by Tacoma Power exceed Click! revenues during any month, such "Excess Expenditures" shall constitute a loan or advance from Tacoma Power to Click!, which shall be reimbursed as follows:

- i. "Target Date" means December 31, 2021 or a date when the cumulative Excess Expenditures reach \$31.6 million, whichever occurs first.
- ii. Click! shall reimburse the loans or advances from revenue exceeding Expenditures as soon as possible.
- iii. If Click! revenue in excess of Expenditures is insufficient to reimburse loans or advances in full by the Target Date, Click! revenue shall be supplemented with City of Tacoma non-utility revenue that, together with Click! revenue, will be sufficient to provide full reimbursement of cumulative loans or advances accrued prior to the Target Date within ten (10) years of the Target Date.
- iv. The Utility Board and the City Council may, at any time, fulfill their obligation to reimburse the cumulative loans or advances by applying the proceeds from a transaction (license, lease, sale, etc.) transferring some or all of the City's telecommunications system business to a private third-party. The Business Plan shall require Public Utility Board and City Council approval of budgets, expenditures, rates, and charges necessary to implement the business plan contemplated herein as part of the regular Tacoma Power budgeting, contract, and rates approval processes.

h. The Business Plan shall require Public Utility Board and City Council approval of budgets, expenditures, rates, and charges necessary to implement the business plan contemplated herein as part of the regular Tacoma Power budgeting, contract, and rates approval processes.

i. The Business Plan shall provide quarterly and annual reports to the Public Utility Board and to the City Council to monitor Click!'s actual performance relative to the approved business plan. Such reports shall include financial gains and losses and the balance of the loan account described below.

Sec. 3. The Public Utility Board and the City Council shall, upon adoption of this Resolution, appoint a Click! Engagement Committee to provide oversight and assistance to Click! in the development and implementation of the Business Plan. The Click! Engagement Committee shall be comprised of two (2) Public Utility Board Members, two (2) City Council members, two (2) members of the public who have experience in the broadband industry, and one (1) Tacoma Power ratepayer at large appointed by the City Council. The Click! Engagement Committee shall meet to consult with Click! on a regularly



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scheduled basis established by the Committee and Click!. The Public Utility Board and the City Council may consider delegating specific authority in the governance of Click! to the Click! Engagement Committee in the future as the Business Plan is further developed and implemented.

Sec. 4. Prior to implementing the Business Plan contemplated in this resolution, TPU and the City's Legal Department, shall seek a legal opinion or declaratory judgment in Pierce County Superior Court, to confirm that Tacoma Power may operate the City of Tacoma's telecommunications system in accordance with the business plan. The City's Legal Department shall include in its request for a legal opinion or declaratory judgment, those specific components of the business plan necessary to provide the Utility Board and the City Council comfort that they may fully implement the business plan reasonably without threat of disruption by legal challenge. TPU and the City's Legal Department are authorized to utilize the services of third-party legal advisors in connection with this activity.

Sec. 5. Click! shall review and resubmit rate adjustments budgeted and proposed by Click! and approved by the Public Utility Board (previously approved by Board Resolution U-10773 on April 22, 2015), that support the Business Plan and the City Council is requested to approve an ordinance amending Tacoma Municipal Code Chapter 12.13, to authorize said rate adjustments.

Sec. 6. A fiscal note is attached to and incorporated in this Resolution U-10828. The fiscal note estimates the Capital and O&M budget requirements and impacts in addition to the financial gains and losses anticipated over the next five (5) years, in connection with the Click! business plan contemplated herein.

Approved as to form and legality:

William C. Foster  
Chief Deputy City Attorney

[Signature]  
Chair

[Signature]  
Secretary

[Signature]  
Clerk

Adopted 12-3-15



TACOMA PUBLIC UTILITIES  
 3628 South 35th Street  
 Tacoma, Washington 98409-3192

**To:** Chair and Members of the Public Utility Board  
**From:** William A. Gaines, Director of Utilities/CEO  
**Date:** November 25, 2015  
**Subject:** Financial Impact of Authorizing Click! to Provide Retail Internet Service Including Gigabit Internet Service, Voice over Internet Protocol Service and Commercial Broadband Service, and Approving a Five Year Business Plan

Background:

A variety of business models have been developed and presented to policymakers, including a base case or status quo model and prospective models for Click! offering retail internet and cable television services, Click! offering wholesale-only internet (no video) and Click! entering into a private use contract involving Tacoma Power/Click! facilities. The financial models considered both low and high growth assumptions. This report addresses the fiscal impact of authorizing Click! to provide retail Internet service including Gigabit Internet service, Voice over Internet Protocol Service and Commercial Broadband Service ("All-In Retail with Gigabit model") along with cable television services. The All-In Retail with Gigabit model anticipates a loss of 1,916 Cable customers under the low growth option and a gain of 1,152 Cable customers under the high growth option in five years. It also anticipates a gain of between 6,412 and 12,124 Internet customers, and a gain of between 5,168 and 7,563 Voice over Internet Protocol customers, low and high respectively. Table 1 below shows the financial metrics of the All-In Retail with Gigabit option.

Table 1

	All-In Retail w/Gigabit Low Option	All-In Retail w/Gigabit High Option
Revenue	\$181.4	\$207.1
O&M Expenditures	\$185.3	\$206.3
Capital Investment	\$27.7	\$28.8
Cumulative Cash Flow	(\$31.6)	(\$28.0)

Fiscal Impact:

The impact of pursuing the All-In Retail with Gigabit option is that the City will incur deficit spending in the range of \$28 million to \$31.6 million over the five-year business plan period, as shown in Table 1. However, as noted in Table 2 below, the Retail All-In with Gigabit model begins to produce positive cash flow in Year 8 under the high growth option.

Table 2

	LOW OPTION		HIGH OPTION	
	Cash Flow	Cumulative Cash Flow	Cash Flow	Cumulative Cash Flow
2016	(\$13,375,861)	(\$13,375,861)	(\$14,141,034)	(\$14,141,034)
2017	(4,894,538)	(18,270,399)	(4,728,564)	(18,869,598)
2018	(5,064,295)	(23,334,693)	(4,541,133)	(23,410,731)
2019	(4,430,859)	(27,765,552)	(2,866,053)	(26,276,783)
2020	(3,829,670)	(31,595,222)	(1,750,548)	(28,027,331)
2021	(3,482,159)	(35,077,381)	(945,919)	(28,973,250)
2022	(3,832,725)	(38,910,106)	(608,528)	(29,581,779)
2023	(3,114,794)	(42,024,900)	480,572	(29,101,207)
2024	(2,877,105)	(44,902,005)	1,146,032	(27,955,175)



# EXHIBIT 43 (a)



CERTIFICATE

I, Charleen Jacobs, do hereby certify that I am the Clerk of the Public Utility Board of the City of Tacoma, and that record and maintain custody of the official records and minutes of the Public Utility Board.

I further certify that the attached is a full, true, and correct copy of Amended Resolution U-10879 dated September 28, 2016.

In witness whereof, I have set my hand this 17 day of January 2020.

Charleen Jacobs  
Clerk, Public Utility Board  
Tacoma Public Utilities  
City of Tacoma, Washington

Attachment

State of Washington  
County of Pierce

Subscribed and sworn to before me this 16 day of January 2020.



Deborah D. McLellan  
Notary Public in and for the  
State of Washington, County of Pierce  
My commission expires 10-8-21



## AMENDED RESOLUTION NO. U-10879

1 A RESOLUTION relating to Click! Network; approval of an All-In business and  
2 Tacoma Power funding plan to provide retail telecommunication  
3 services.

4 #1. WHEREAS the City Council of Tacoma delegated authority to the  
5 Public Utility Board and the Department of Public Utilities ("TPU"), Light Division  
6 (dba "Tacoma Power"), to implement and manage a broadband  
7 telecommunications system ("Click! Network" or "Click!", as authorized through  
8 City Council Substitute Resolution No. 33668, approved April 8, 1997, and  
9 Public Utility Board Amended Substitute Resolution U-9258, approved April 9,  
10 1997), and

11 #2. WHEREAS the 1997 business plan contemplated that the revenues  
12 associated with telecommunications services related to city government  
13 communications, cabletelevision ("CATV") service, transport of signals to  
14 service providers offering telecommunications services, and internet access  
15 services would pay for the costs of such services and would provide an  
16 additional revenue stream to Tacoma Power to help offset the construction and  
17 operations costs associated with the telecommunications system, and

18 #3. WHEREAS many of the functions of the telecommunications system  
19 envisioned in the 1997 business plan have been achieved in their entirety since  
20 the infrastructure improvements were completed in 1999 including: conventional  
21 substation communication functions, distribution automation, city government  
22 communications functions, CATV service, and transport of signals for service  
23 providers offering telecommunications services (the last three functions are  
24 "Click!") and internet access services (through third-party providers), and  
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#4. WHEREAS other contemplated functions have been partially achieved for certain electric customers through the Gateway meter program, which include: remote turn on/off for electric customers, automated meter reading (electric), and provision of information to customers that is relevant to their energy purchasing decisions, and

#5. WHEREAS the customers of the fully implemented uses of the telecommunications system (city government communications functions ("I-Net"), CATV service, and transport of signals for service providers offering telecommunications services) have shared in part of the capital costs of constructing the telecommunications system as well as the operation and maintenance of the infrastructure to the benefit of electric customers who would have paid 100% of these costs, and

#6. WHEREAS the telecommunications system continues to provide interconnectivity, advanced control, and power management between electrical substations, which provide safe, reliable, and efficient use of electrical resources for the benefit of all Tacoma Power customers, and

#7. WHEREAS the existing business plan and current cost allocations for Click! functions do not generate sufficient revenues to fund current expenses and capital improvement costs related to these functions, and

#8. WHEREAS, on an ongoing basis, Tacoma Power will continue to use portions of the telecommunications system for conventional substation and other communications, distribution automation, etc., and



1 #9. WHEREAS, for a period of time, portions of the telecommunications  
2 system will continue to be utilized by Tacoma Power to support the Gateway  
3 meter program, which serves over 15,000 Tacoma Power customers, and

4 #10. WHEREAS future advanced meter infrastructure may use portions  
5 of the fiber network facilities of the telecommunications system and may, in  
6 part, rely on the hybrid fiber-coaxial ("HFC") infrastructure to fully implement the  
7 remaining functions described in the 1997 business plan, and that if and when  
8 such future uses occur, Tacoma Power should pay a share of the costs of the  
9 telecommunications system related to such uses, and

10 #11. WHEREAS, following a nine-month review by the Click!  
11 Engagement Committee (a committee comprised of representatives of the City,  
12 TPU, and citizens appointed by the City), the Engagement Committee  
13 described the community benefits of an enhanced Click! telecommunications  
14 system and an outline of the features of such a system, and

15 #12. WHEREAS Tacoma Power has determined, in part as a result of  
16 the Click! Engagement Committee work, that to increase revenues, Click!'s  
17 retail products must be enhanced to include retail internet services and voice-  
18 over internet phone services that can be bundled with the current CATV  
19 services (Click! would continue offering wholesale data transport services and  
20 city governmental communications functions), and

21 #13. WHEREAS the studies by the Click! Engagement Committee and  
22 Tacoma Power's financial analysis demonstrate that continuing to provide  
23 CATV services in support of retail internet services makes the sale of such  
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1 services a more competitive overall product and improves the financial  
2 sustainability of Click!, with estimations that Click! customers cover over 90% of  
3 the cost of service, and

4 #14. WHEREAS the studies of the Click! Engagement Committee,  
5 Tacoma Power's financial analysis, and industry experts conclude that high-  
6 speed internet access of 1 gigabit will be the standard for the next generation.  
7 Click! needs to make capital improvements to the current telecommunications  
8 system infrastructure to achieve these or greater speeds and to keep the  
9 competitiveness of Click! internet services in the community, and  
10

11 #15. WHEREAS all financial models studied by the Click! Engagement  
12 Committee and Tacoma Power nonetheless show that the market price that can  
13 be charged for these enhanced Click! services and the market penetration that  
14 can be achieved will be insufficient to cover all of the costs associated with the  
15 operations and maintenance of the telecommunications system and the capital  
16 improvements necessary to update the HFC to allow for 1 gigabit service, and  
17

18 #16. WHEREAS the internet-related uses of the current Click!  
19 telecommunications system and an enhanced Click! telecommunications  
20 system would provide Tacoma Power customers benefits by giving them  
21 access to advanced customer services options such as: power use monitoring,  
22 outage reporting, scheduling of services, bill paying, and electrical appliance  
23 control, and  
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25 #17. WHEREAS, in planning for an uncertain and unknown future, there  
26 may be other potential functions related to the supplying of electricity to



1 customers not considered in the existing business plan that might also make  
2 use of the telecommunications system infrastructure including: cyber security,  
3 electric car charger locations and metering, and enhanced customer information  
4 products (power usage by time of day, behavior-based saving programs,  
5 outage communications, energy audits, and participation in Evergreen Options),  
6 and  
7

8 #18. WHEREAS the Board has a duty to ensure that Tacoma Power  
9 ratepayers pay in their power rates only those costs that are directly and  
10 reasonably related to the provision of electric service, and  
11

12 #19. WHEREAS the Board has a duty to ensure that Tacoma Power and  
13 Click! are in compliance with legal and statutory requirements, and  
14

15 #20. WHEREAS Tacoma Power has excess power generation capacity  
16 within its service territory. In the past, Tacoma Power has benefited greatly by  
17 selling this excess capacity in the wholesale power markets to the benefit of all  
18 retail electric customers. Over the past few years, wholesale power prices and  
19 sales have dropped substantially. In support of Tacoma Power's strategic  
20 business plan, Tacoma Power wants to make up this lost revenue by looking at  
21 ways to increase its retail power sales through economic growth in the  
22 community. Communities across the nation have benefited economically from  
23 competitive access to internet services in their communities. Tacoma Power's  
24 continued operation and maintenance of the telecommunications system for  
25 internet access purposes assists in making the internet services competitive in  
26



1 Tacoma Power's service area, which increases economic growth that leads to  
2 greater retail power sales, and

3 #21. WHEREAS, in order to preserve the functionality and value of the  
4 telecommunications system for the benefit of Power customers, the Board has  
5 determined there should be a supplemental level of funding from Power to the  
6 telecommunications system based on direct services reasonably related to the  
7 provision of electric services as enumerated herein, and

9 #22. WHEREAS the Board nonetheless finds it wasteful and  
10 unproductive to abandon or leave unutilized the HFC components, which are  
11 currently used to provide Click! functions (including CATV and internet access  
12 services) and, in order to preserve the functionality and value of the Click!  
13 telecommunications system, the Board determines it prudent to provide a  
14 supplemental level of funding from Tacoma Power to the telecommunications  
15 system for a limited period of time until a stable source of funding from an  
16 alternate source can be secured, and

18 #23. WHEREAS the Board has determined that along with enhanced  
19 product offerings, the new business plan should also grant Click! management  
20 flexibility to change product offerings, prices, and marketing strategies,  
21 excluding the leasing of the entire network, without prior Board or Council  
22 approval so as to effectively compete with private companies offering similar  
23 products and services, and  
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#24. WHEREAS the Board finds it to be in the best interests of its electric customers and the citizens of Tacoma that a new business plan be approved for Click! functions; Now, therefore,

BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

Sec. 1. Click!'s proposed high-level "All-In" business plan (the "Business Plan"), attached as Exhibit A to this resolution, is approved.

Sec. 2. The Clerk of the Board is directed to forward this Resolution and the Business Plan to the City Council for immediate consideration. The Board requests, due to budget timing constraints, that the City Council make its decision in a timely manner. Upon approval of the Business Plan, funding, and other provisions of this resolution by Council, TPU staff is directed to complete the more detailed aspects of the Business Plan and then implement that plan.

Sec. 3. TPU's request that Click! management be delegated authority to make changes to products and service offerings, prices (within the limitations set forth in the Click! rates/charges ordinance approved by the Board and Council), and marketing strategies contained within the Business Plan without further approval by the Board and City Council is approved, and the Council is requested to concur in such approval. All significant material changes to the Business Plan that would remove TPU as the primary operator of Click! including, but not limited to, the sale or lease of telecommunications system equipment or capacity, outsourcing of work, permanent discontinuance of products or services, etc. shall be brought to the Board and City Council for approval. Such delegation includes approval of contracts allowing third parties to use surplus portions of the network to supply services to their customers so long as such use does not materially interfere with Click!'s operations of the network or Click!'s ability to implement its Business Plan and achieve its goals and objectives. Click! shall continue to bring contracts for the purchase of goods, services, and materials in excess of \$200,000 to the Board for approval.

Sec. 4. Tacoma Power's request to transfer an annual amount to the Click! fund from Tacoma Power electric revenues, to appropriately compensate Power's past, current and future beneficial uses of the telecommunications system infrastructure, which shall be used to pay Click! operating, maintenance, taxes, capital costs and debt, is approved. Tacoma Power's transfer from electric revenues under this Section 4 shall be a minimum of \$6 Million annually, and in the event Click!'s costs exceed \$6 Million for the year, Tacoma Power is approved to transfer additional funds not to exceed \$10 Million per year. Click! may use these transferred funds to make capital improvements and



1 purchase equipment as necessary to meet the objectives of the All-In Business  
2 plan.

3 Sec. 5. Staff will present, not less than annually, to the Board and  
4 Council on Click!'s status relative to its business plan objectives and any  
5 changes made to the business plan and business outlook for Click!. In 2020  
6 and 2025, staff will prepare a report to the Board and Council detailing business  
7 plan objective achievements and financial status of Click! to determine any  
8 adjustments in future funding. Staff reports will describe the past, current, and  
9 future expected use of the telecommunications network by Tacoma Power.

10 Sec. 6. The Board directs staff to identify business efficiencies and  
11 savings that can be made through staff reorganization, looking at both  
12 represented and non-represented positions. Staff will negotiate with appropriate  
13 union representatives to collaboratively identify opportunities for efficiencies and  
14 savings.

15 Approved as to form and legality:

16 William C. Foshe

17 Chief Deputy City Attorney

18 Charleen Jacobs  
19 Clerk

20 Mark Patten

21 Chair

22 Woodrow Jones

23 Secretary

24 Adopted 9-28-16

Exhibit A

## Click! All-In Compete Business Plan

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### Key Business Plan Elements:

- Click! is expected to provide retail cable modem internet, voice over internet protocol, commercial broadband services, and other advanced telecommunications services in addition to retail cable television service to residential and commercial customers.
- Click! is expected to provide bundled service of cable television, internet and phone services.
- The Click! network is expected to continue operating as an Open Access Network.
- Click! is expected to maintain its existing wholesale relationships with the Internet Service Providers (ISP), including Rainier Connect, Net-Venture and Advanced Stream. No buy out of the ISPs' businesses is assumed. Wholesale internet pricing offered to ISPs will need to be addressed.
- Click! is expected to maintain its existing wholesale relationships with the Master Service Agreement (MSA) holders, including Rainier Connect, Optic Fusion, twtelecom, Integra, CenturyLink, Spectrum Networks and Noel Communications. No buyout of the MSAs' businesses is assumed. Wholesale broadband pricing offered to ISPs will need to be addressed.
- Click! is expected to remain a unit of Tacoma Power within Tacoma Public Utilities and be governed by the Tacoma Public Utilities Board. More independent and flexible governance is a key element of the plan.
- Tacoma Power is expected to pay 6% of the total O&M costs as its proportionate share for utilizing the telecommunications network. Tacoma Power's proportionate share of O&M costs may change over time as its use of the telecommunications network changes.
- Click! is expected to upgrade its hybrid fiber coaxial (HFC) network to 1 Gigahertz, deploy DOCSIS 3.1 technology, and, over time, build new plant extension with fiber-to-the-home (FTTH) technology.
- Click! is expected to offer Gigabit and multi-Gigabit service to residential customers.
- Click! is expected to continue offering Gigabit and multi-Gigabit Metro Ethernet services to commercial customers.
- Click! is expected to continue maintaining and supporting the City's Institutional Network (I-Net).
- Click! is expected to offer discounted residential Cable TV and Phone services to payment challenged customers based on existing Federal poverty guidelines (up to 100% of the income threshold) that have been adopted by Tacoma Public Utilities.
- Click! is expected to offer a \$14.95 internet service for qualified low income customers, of which \$9.25 of the charge is expected to be covered by the new Federal Lifeline program leaving a customer out-of-pocket cost of \$5.70 per month.
- Click! is expected to achieve labor cost and operating savings by negotiating work rule changes, providing employee training and contracting out new and certain existing functions.
- Click! is expected to conduct door-to-door Sales Burst campaigns during the first and third years of the new business plan period, which are expected to generate between 4,000 and 6,000 new customers.

## Click! All-In Compete Business Plan

### Financial and Customer Summary (Low/High Growth):

Base - Assumptions		Year 2 - 2017	Year 5 - 2020	Year 10 - 2025
Homes Passed		113,950	113,950	113,950
# of Retail Internet Customers	L	10,416	26,215	31,379
	H	10,750	28,919	35,713
# of Wholesale Internet Customers	L	17,333	5,695	3,754
	H	17,333	4,556	3,003
Internet Market share	L	24.4%	28.0%	30.8%
	H	24.6%	29.4%	34.0%
# of Phone Customers	L	1,800	4,566	5,399
	H	2,173	6,058	7,557
Phone Market share	L	1.6%	4.0%	4.7%
	H	1.9%	5.3%	6.6%
# of Cable Customers	L	19,035	18,544	13,831
	H	19,185	19,378	15,136
Cable Market share	L	16.7%	16.3%	12.1%
	H	16.8%	17.0%	13.3%
# of employees	L	89	101	104
	H	91	106	110
Cumulative Capital investment	L	\$16.0M	\$29.5M	\$49.3M
	H	\$16.1M	\$30.0M	\$50.2M
Annual Cash Flow/Subsidy	L	(\$19.5M)	(\$4.9M)	(\$5.7M)
	H	(\$19.6M)	(\$4.4M)	(\$4.2M)
Cumulative Cash Flow	L	(\$19.5M)	(\$39.5M)	(\$65.6M)
	H	(\$19.6M)	(\$38.6M)	(\$58.7M)
NPV	LH	(\$19.5M)	(\$36.6M)	(\$56.5M)
		(\$19.6M)	(\$35.9M)	(\$51.2M)

- It is anticipated that Click! will continue to operate in a deficit situation for the foreseeable future.
- The viability of this business plan is contingent upon securing external funding.

# Click! All-In Compete Business Plan

---

## Key Business Plan Elements:

- Click! is expected to provide retail cable modem internet, voice over internet protocol, commercial broadband services, and other advanced telecommunications services in addition to retail cable television service to residential and commercial customers.
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- Click! is expected to offer a \$14.95 internet service for qualified low income customers, of which \$9.25 of the charge is expected to be covered by the new Federal Lifeline program leaving a customer out-of-pocket cost of \$5.70 per month.
- Click! is expected to achieve labor cost and operating savings by negotiating work rule changes, providing employee training and contracting out new and certain existing functions.
- Click! is expected to conduct door-to-door Sales Burst campaigns during the first and third years of the new business plan period, which are expected to generate between 4,000 and 6,000 new customers.

# EXHIBIT 44

## Voice over Internet Protocol (VoIP)

Voice over Internet Protocol (VoIP) is a technology for communicating using "Internet protocol" instead of traditional analog systems. Some VoIP services need only a regular phone connection, while others allow you to make telephone calls using an Internet connection instead. Some VoIP services may allow you only to call other people using the same service, but others may allow you to call any telephone number - including local, long distance, wireless and international numbers.

### How VoIP works

VoIP converts the voice signal from your telephone into a digital signal that can travel over the Internet. If you are calling a regular telephone number, the signal is then converted back at the other end. VoIP calls can be made from a computer, a special VoIP phone, a traditional phone with or without an adapter, or using a wireless phone, depending on the type of VoIP service you subscribe to.

Here is one example of how VoIP service works:



### What equipment do I need?

Depending on the VoIP service you purchase, you may need a computer, a special VoIP telephone or a regular telephone with an adapter. If you are calling a regular telephone number, the person you are calling does not need any special equipment: just a telephone.

### Are there special considerations for using VoIP?

If you're considering replacing your traditional telephone service with VoIP, be aware that:

- Some VoIP service providers may have limitations to their 911 service. For more information on VoIP and 911 services, see the FCC's guide at [www.fcc.gov/guides/voip-and-911-service](http://www.fcc.gov/guides/voip-and-911-service).
- Some VoIP services don't work during power outages and the service provider may not offer backup power.
- VoIP providers may or may not offer directory assistance/white page listings.

Always check with potential VoIP service providers to confirm any limitations to their service, including 911 service.

## With VoIP, is there a difference between making a local and a long distance call?

Some VoIP providers do not charge for calls to other subscribers to the service. Some VoIP providers charge for a long distance call to a number outside your calling area. Other VoIP providers permit you to call anywhere at a flat rate for a fixed number of minutes. Your VoIP provider may permit you to select an area code for your VoIP service that is different from the area code in which you live.

## How does the FCC regulate VoIP?

- **911 Services:** Providers of "interconnected" VoIP services – which allow users generally to make calls to and receive calls from the regular telephone network – do have 911 service obligations; however, 911 calls using VoIP are handled differently than 911 calls using your regular telephone service.
- **Portability:** The FCC requires interconnected VoIP providers and telephone companies to comply with Local Number Portability (LNP) rules. (See our guide on Portability [www.fcc.gov/consumers/guides/porting-keeping-your-phone-number-when-you-change-providers](http://www.fcc.gov/consumers/guides/porting-keeping-your-phone-number-when-you-change-providers)).
- **Calling Records:** The FCC limits interconnected VoIP providers' use of customer proprietary network information such as your telephone calling records, and requires interconnected VoIP providers to protect it from disclosure.
- **Universal Service:** The FCC requires interconnected VoIP providers to contribute to the Universal Service Fund, which supports communications services in high-cost areas and for income-eligible telephone subscribers.
- **Accessibility:** Interconnected VoIP providers must contribute to the Telecommunications Relay Services Fund used to support the provision of telecommunications services to persons with speech or hearing disabilities and offer 711 abbreviated dialing for access to relay services. Providers and equipment manufacturers also must ensure their services are available to and usable by individuals with disabilities, if such access is achievable. (See our guide about TRS [www.fcc.gov/consumers/guides/telecommunications-relay-service-trs](http://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs).)

## Filing a complaint

If you have concerns about an interconnected VoIP provider's handling of your 911 calls or telephone calling records, making services available to and usable by individuals with disabilities, or porting your telephone number, first try to resolve the matter with your service provider. If you can't resolve the matter directly, you have multiple options for filing a complaint with the FCC:

- File a complaint online at <https://consumercomplaints.fcc.gov>
- By phone: 1-888-CALL-FCC (1-888-225-5322); TTY: 1-888-TELL-FCC (1-888-835-5322) ; ASL: 1-844-432-2275
- By mail (please include your name, address, contact information and as much detail about your complaint as possible):

Federal Communications Commission  
Consumer and Governmental Affairs Bureau  
Consumer Inquiries and Complaints Division  
445 12th Street, S.W.  
Washington, DC 20554

## Alternate formats

To request this article in an accessible format - braille, large print, Word or text document or audio - write or call us at the address or phone number above, or send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov).

Last Reviewed: 1/27/17



## Lifeline Support for Affordable Communications

Lifeline is the FCC's program to help make communications services more affordable for low-income consumers. Lifeline provides subscribers a discount on monthly telephone service, broadband Internet access service, or voice-broadband bundled service purchased from participating providers.

### How Lifeline Works

Lifeline typically provides up to a \$9.25 monthly discount on service for eligible low-income subscribers. Subscribers may receive a Lifeline discount on either a wireline or a wireless service, but they may not receive a discount on both services at the same time. Lifeline also supports broadband Internet access service and broadband-voice bundles. FCC rules prohibit more than one Lifeline service per household.

Lifeline is available to eligible low-income consumers in every state, commonwealth, territory, and on Tribal lands. The Lifeline program is administered by the Universal Service Administrative Company (USAC). USAC is responsible for data collection and maintenance, support calculation, disbursements, and assisting consumers with Lifeline eligibility and enrollment for the program. USAC's website (<https://www.usac.org/lifeline/>) provides additional information regarding the program, including program requirements.

To participate in the Lifeline program, consumers must either have an income that is at or below 135% of the Federal Poverty Guidelines (<https://aspe.hhs.gov/poverty-guidelines>) or participate in certain federal assistance programs, such as the Supplemental Nutrition Assistance Program or Medicaid. You can see if you are eligible by reviewing the information available at [lifelinesupport.org](http://lifelinesupport.org) (see "Do I Qualify?").

### National Verifier for Lifeline Eligibility

To apply for Lifeline, a consumer must use the National Verifier application system at: <https://www.checklifeline.org/lifeline>. The National Verifier is a centralized system established by the FCC and operated by USAC that verifies Lifeline applicants' eligibility and recertifies subscriber eligibility annually.

There are some states that may not use the National Verifier yet. You can check whether your state is already active here: <https://www.usac.org/lifeline/eligibility/national-verifier/>. If you are in a state that does not use the National Verifier or if you would like a service provider to assist you when you apply, you can use the "Companies Near Me" tool at <https://data.usac.org/publicreports/CompaniesNearMe/Download/Report> to locate a Lifeline program service provider near you.

### Program Rules

Key rules include the following:

- Lifeline is available only to subscribers whose eligibility can be verified by checking a program eligibility database or by submitting documentation demonstrating their eligibility.
- Only one Lifeline benefit is permitted per household. Federal rules prohibit subscribers from receiving more than one Lifeline service. If a subscriber or his or her household currently has more than one Lifeline-discounted service, they must de-enroll from other Lifeline services immediately or be subject to penalties.
- Only low-income subscribers who have been found to be eligible are qualified to enroll.
- Subscribers must recertify their eligibility every year and should respond to any requests from the National Verifier's or state Lifeline administrator to recertify eligibility. Subscribers who fail to recertify their eligibility will be de-enrolled from the Lifeline program.

## Enhanced Lifeline Benefits for Tribal lands

Because telephone subscribership levels on Tribal lands are the lowest in the country, enhanced Lifeline benefits are available to low-income residents of Tribal lands. You can find out more about which areas are eligible Tribal lands by visiting this site: <https://www.lifelinesupport.org/additional-support-for-tribal-lands/>.

Link Up, another federal benefit program, reduces the initial installation or activation fees of certain Lifeline providers offering telephone service on Tribal lands.

### What benefits are available through the Lifeline program's support for Tribal lands?

For low-income consumers living on Tribal lands, Lifeline provides a monthly discount of up to \$34.25 off the cost of telephone service, broadband Internet access service, or bundled services (either wireline or wireless). This discount consists of up to \$9.25 (which is available to all eligible low-income subscribers across the United States) plus up to an additional \$25 in enhanced support (which is available only to eligible low-income subscribers living on Tribal lands). This discount may also vary from state to state, depending on whether the state has its own Lifeline program.

Tribal Lands Link Up provides qualified subscribers living on Tribal lands with a one-time discount of up to \$100 on the initial installation or activation of telephone service at their primary residence. Tribal Lands Link Up also enables subscribers to pay the remaining amount that they owe on a deferred schedule, interest-free. Qualifying subscribers may be eligible for Link Up again only after moving to a new primary residence. Tribal Link Up support is only offered to carriers who are building out infrastructure on Tribal lands, so not all carriers may be discounting their activation fee.

### What limitations are there on Lifeline and Link Up?

Federal rules prohibit qualifying low-income consumers from receiving more than one Lifeline service at the same time. For instance, low-income subscribers who qualify may receive a Lifeline discount on either a home telephone or a wireless telephone service, but they may not receive a Lifeline discount on both services at the same time.

Additionally, only one Lifeline service may be obtained per household. "Household" is defined as any individual or group of individuals who live together at the same address as one economic unit. An "economic unit" is defined as "all adult individuals contributing to and sharing in the income and expenses of a household."

Lifeline support is available to eligible low-income subscribers living in group living facilities. Lifeline applicants may demonstrate when initially enrolling in the program that any other Lifeline recipients residing at their residential address are part of a separate household. Similarly, federal rules prohibit qualifying low-income consumers from receiving more than one Tribal Link Up discount at a primary residence.

## Frequently Asked Questions

### What is the current benefit under the Lifeline program?

The Lifeline discount for eligible subscribers is up to \$9.25 per month for monthly telephone service - wireline or wireless - or broadband or bundled service.

### What is the enhanced benefit amount for Tribal Lands?

Up to \$25 in enhanced support, in addition to up to \$9.25 for traditional Lifeline service, is available to eligible low-income subscribers living on Tribal lands.



# EXHIBIT 44 (a)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
)
Bridging the Digital Divide for Low-Income ) WC Docket No. 17-287
Consumers )
)
Lifeline and Link Up Reform and Modernization ) WC Docket No. 11-42
)
Telecommunications Carriers Eligible for Universal ) WC Docket No. 09-197
Service Support )

FIFTH REPORT AND ORDER, MEMORANDUM OPINION AND ORDER AND ORDER ON
RECONSIDERATION, AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: October 30, 2019

Released: November 14, 2019

Comment Date: (30 days after publication in the Federal Register)

Reply Comment Date: (60 days after publication in the Federal Register)

By the Commission: Chairman Pai issuing a statement; Commissioners Rosenworcel and Starks
concurring in part, dissenting in part, and issuing separate statements.

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**I. INTRODUCTION**

1. The Commission’s Lifeline program plays a critical role in closing the digital divide for low-income Americans. Abuse of the program, however, continues to be a significant concern and undermines the Lifeline program’s integrity and effectiveness. Strengthening the accountability of the program is therefore essential to ensuring that it effectively and efficiently helps qualifying low-income Americans obtain the communications services they need to participate in the digital economy.

2. For years, the Commission has been taking steps to address waste, fraud, and abuse in the program, including through the establishment of a National Lifeline Eligibility Verifier. Today, we continue that work to strengthen the Lifeline program’s enrollment, recertification, and reimbursement processes so that limited Universal Service Fund (USF or Fund) dollars are directed only toward qualifying low-income consumers. Specifically, we restore the states’ proper role in designating eligible telecommunications carriers (ETCs) to participate in the Lifeline program, clarify the obligations of participating carriers, and take targeted steps to improve compliance by Lifeline ETCs and reduce waste, fraud, and abuse in the program. We also clarify several of the program’s rules in response to petitions for reconsideration and requests for clarification. Further, we seek comment on appropriate program goals and metrics for a modernized Lifeline program and additional improvements to program integrity.

**II. BACKGROUND**

3. The Lifeline program was originally established in 1985 to ensure that low-income consumers had access to affordable, landline telephone service.<sup>1</sup> Today, the Lifeline program provides qualifying low-income consumers discounts on voice or broadband Internet access service, as well as on bundled service, to ensure that all Americans can take advantage of the benefits that voice and broadband Internet access service bring, including being able to connect to jobs, family, education, health care providers, and emergency services.<sup>2</sup> Currently, qualifying low-income consumers receive a standard \$9.25 monthly discount on Lifeline-supported voice or broadband Internet access service or bundled service that satisfies the Commission’s minimum service standards, and those who reside on Tribal lands can receive up to a \$34.25 monthly discount on Lifeline service that satisfies the minimum service standards. Consumers can qualify for the Lifeline program by participating in a qualifying assistance program (i.e., Medicaid, Supplemental Nutrition Assistance Program, Supplemental Security Income, Federal Public Housing Assistance, or Veterans and Survivors Pension Benefit) or by having an income at or below 135% of the Federal Poverty Guidelines. Residents of Tribal lands<sup>3</sup> can also qualify for the Lifeline program by meeting the aforementioned criteria or by participating in a qualifying Tribal-specific

<sup>1</sup> See *MTS and WATS Market Structure, and Amendment of Parts 67 & 69 of the Commission’s Rules and Establishment of a Joint Board*, Report and Order, 50 Fed. Reg. 939 (Jan. 8, 1985).

<sup>2</sup> See 47 CFR § 54.400(n) (“Voice Telephony services and broadband Internet access services are supported services for the Lifeline program.”).

<sup>3</sup> See 47 CFR § 54.400(e) (defining Tribal lands for purposes of the Lifeline program).

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS  
CONCURRING IN PART AND DISSENTING IN PART**

Re: *Bridging the Digital Divide for Low-Income Consumers*, WC Docket No. 17-287; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42; *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 09-197.

A few short months ago, I stepped through the doors of Miriam’s Kitchen, a social services organization working to end chronic homelessness here in Washington, D.C. This organization is located just blocks away from pricey restaurants, a private university and elite law firms. The people who visit this organization’s facility look to gain access to warmth in the winter, food to nourish their bodies, and some genuine interaction from smiling employees looking to lend a helping hand.

I sat down at a folding table alongside six people experiencing homelessness as they shared with me that the only way they can access the internet or make a call through a device that they themselves own is through the Lifeline program. It was there that I heard what it actually means for them to have a phone: one person uses it to speak directly with her doctor and arranges appointments over the phone; another needed it for job applications; and virtually all of them spoke of the isolation of homelessness, and how a phone is essential to connecting with family and friends.

For those who were Lifeline subscribers, they were grateful that the government steps in to ensure people who are in unforeseen and unfortunate circumstances have access to communications services. That gratitude was even expressed while they identified significant flaws with our program such as their wait time to obtain a Lifeline phone, their troubles with customer service representatives, or even difficulties figuring out how best to ration their precious and limited data.

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The crux of our decision today is this: do we aim to strengthen the underutilized Lifeline program and build up some of our most marginalized citizens; or do we aim to deflate the program and further burden its recipients? I know which side I’m on.

If we truly seek to increase broadband adoption, then I do not believe the elimination of the Lifeline Broadband Provider designation would assist in this process. The *2016 Lifeline Order* asserted the Commission’s authority to designate ETCs for the purpose of offering broadband internet service providers in the Lifeline program as a method to “unlock the Lifeline program to new innovative service providers and robust broadband offerings for the benefit of low-income consumers.”<sup>1</sup> Commenters pointed out in that *Order* that the streamlining of the process and the cutting of red tape lessens the burden on both small and large carriers, thus causing increased service provider participation.<sup>2</sup> There are approximately 40 companies with pending LBP designations, many of which have applied to provide service in several states with high rates of poverty. With our actions today, we will never find out how much carrier participation would increase, and how many people could have easier access to life-changing health services, jobs, and connections.

Additionally, I am deeply troubled by many toxic questions asked by the *FNPRM*. It seeks comments on whether the Commission should “ask Lifeline applicants whether they would be able to afford their Lifeline-supported service without the Lifeline discount,” and asserts that some consumers

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<sup>1</sup> *Lifeline and Link Up Reform and Modernization et al.*, WC Docket Nos. 11-42, 09-197, and 10-97, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4044 para. 231 (2016) (*2016 Lifeline Order*).

<sup>2</sup> See *2016 Lifeline Order*, 31 FCC Rcd at 4047, para. 236 (citing comments by Cox Communications, the Benton Foundation, and the Telecommunications Board of Puerto Rico supporting a streamlined, national ETC designation process).

may be willing to “purchase some level of broadband service even in the absence of a Lifeline benefit” because they “may value broadband access so highly.” It goes on to ask questions about a fee in exchange for receiving a handset or device in-person at enrollment, and about program integrity recommendations as it relates to usage requirements.

To the best of my research, I don’t believe we’ve ever probed elderly Medicare recipients on how much they actually value their medical services; nor should we probe vulnerable, Lifeline recipients on how much they value their connectivity. These are government programs and services designed and targeted for the benefit of particular citizens, and frankly our chief concern should be exploring how to make sure that they are fully utilized. With regard to a fee, I heard firsthand from subscribers at the Larkin Street Youth Services center in San Francisco, California that they see the device alongside the voice and broadband service as inextricably linked. We shouldn’t even articulate the possibility of placing yet another barrier to participation in front of these communities. Regarding USAC check-ins and data use records, I stand opposed. These amount to unnecessary additional burdens on recipients, and in the case of data use records, a real risk of oversurveillance of low-income communities and communities of color.

Finally, I do believe that there are some common-sense measures in this item that prevent waste, fraud, and abuse and that is why I concur in part. As a former enforcement bureau official, I do believe that we have to preserve the integrity of this program such as triple checking that there are no ETC’s claiming and seeking reimbursement for deceased subscribers.

However, despite the efforts I agree with to save the integrity of this program, I find that it is packaged in a way that continues to create uncertainty in the lives of low-income people who are working to put clothing on their back and food on the table. Ultimately, I fear that much of today’s item will negatively impact the people I met at Miriam’s Kitchen and the Larkin Street Youth Services center.

# EXHIBIT 45

From: Lachel, Diane  
Sent: Thursday, August 12, 2004 4:46 PM  
To: 'Annie Collins'  
Subject: Click!'s response to SBC's report

Annie,

Feel free to use any of this information on your web site.

As you know, there has been an organized effort by private industry to discredit municipal telecommunication networks. The information about Click! Network in SBC's report ("Failed Municipal Fiber Networks") is the same old, tired, out-of-context story from previous industry sponsored reports. Here's the real story:

1. Tacoma Power constructed a telecommunications network for their own needs (to connect 65 substations to a centrally located Energy Control Center for the purpose of monitoring the electric system, managing energy load, automatically reading meters, automatically connecting and disconnecting meters, etc.) because the incumbent telephone company and incumbent cable TV company could not provide the capacity the utility required. During the design phase of the network, Tacoma Power decided to add other capacity (for cable TV, data transport and Internet services) on the advice of Stanford Research Institute when their conclusive research showed the Tacoma area was underserved.
2. Arthur Anderson and the Washington Institute Foundation (both cited in the SBC report) based their analysis on an initial planning document (revised after telecom experts were hired) which was one of many elements the policy makers used to authorize the utility to move forward with building Click! Network. The \$40 million cited in the SBC report was never adopted as the budget. Instead, \$92 million was approved by the Utility Board and City Council over a two biennium period to fund the network. SBC continues to perpetuate inaccuracies from two flawed reports.
3. According to the Public Utility Board, the Tacoma City Council, the Tacoma Pierce County Chamber of Commerce, the Economic Development Board, The News Tribune and thousands of residential and business customers – Click! Network is a huge success.
4. SBC's link between Tacoma Power's rate increase and Click! Network has no basis in fact. Public utilities follow a very detailed rate case process, complete with public input. SBC's report shows a lack of understanding of the industry they attempt to discredit. The rate increase (the first in 5 years) was related solely to the energy crisis of 2000-01. Today, Tacoma Power customers pay some of the lowest rates for electricity in the country.
5. In the cities where Click! Network services are available (Tacoma, University Place and Fircrest) prices for cable TV and high-speed Internet are 20 – 25% lower than areas where competition does not exist.

6. Since Click! began providing services, both the incumbent telephone provider and the incumbent cable TV provider have rebuilt their networks, something that hadn't been done in the previous 25 years.

7. Since Click! began providing services, the timeframe for making business fiber connections decreased from 18 months (quoted by US West in 1997) to 30 days (quoted by Click!).

I hope SBC didn't invest too much on the report. It appears they didn't get their money's worth, if accuracy was a goal.

Diane R. Lachel  
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Click! Network / Tacoma Power  
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# EXHIBIT 46

## NOTE

### Casting a Wider 'Net: How and Why State Laws Restricting Municipal Broadband Networks Must Be Modified

*Jeff Stricker\**

#### ABSTRACT

*One of Congress's purposes in passing the Telecommunications Act of 1996 was to encourage the widespread deployment of broadband Internet. As municipalities began constructing their own broadband networks, private sector Internet service providers, alarmed at the prospect of competing with these public networks, pushed back with lobbying campaigns encouraging states to enact laws prohibiting these municipal networks. This, in turn, slowed broadband deployment, particularly in areas that private providers believed to be unprofitable (and thus left unserved). Municipalities challenged these laws under the Telecommunications Act, arguing that the Act preempted the state laws, but the Supreme Court in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), upheld the state prohibitions, clearing the way for even more states to adopt such prohibitions. Today, twenty-one states have statutes restricting municipal networks, leaving many Americans without affordable broadband Internet access.*

*This Note argues that Congress should amend the Telecommunications Act to overcome *Missouri Municipal League* and preempt state laws restricting municipal broadband network deployment. Through preemption, state legislatures will be forced to revise or repeal overly restrictive statutes, paving the way for more reasonable restrictions that balance the importance of af-*

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\* J.D., expected May 2013, The George Washington University Law School; B.A., Political Science, 2008, The George Washington University. My thanks to Professor Mandy Hitchcock and Jason Madden for their guidance and encouragement in crafting this Note.

*fordable broadband with the need to protect private companies from direct competition with publicly funded entities. This Note next analyzes selected provisions of current state laws and proposes either to eliminate them as overly restrictive, modify them to be less restrictive, or retain them. The result is a framework of a balanced state law that protects private sector interests while also encouraging broadband deployment.*

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## INTRODUCTION

A few years ago, Michael and Amy Tiemann decided to build and operate a cutting-edge recording studio in Pittsboro, North Carolina,<sup>1</sup> a rural town of 3,555 people.<sup>2</sup> In addition to the high startup costs of the studio, such as sophisticated equipment, Mr. Tiemann discovered that establishing a broadband Internet connection to the studio was one of the greatest challenges of the project because the area around the studio lacked broadband infrastructure.<sup>3</sup> “I spent more than two years begging Time Warner [Cable] to sell me a service that costs 50 times more than it should,” he explained, “and that’s after I agreed to pay 100 percent of the installation costs for more than a mile of fiber [optic cable].”<sup>4</sup> Mr. Tiemann was fortunate enough that his career path as a pioneer in computer software development provided him with the capital necessary to afford such installation.<sup>5</sup> But most Pittsboro residents do not have the same financial resources as Mr. Tiemann, given that the median family annual income is merely \$63,411.<sup>6</sup>

Mr. Tiemann and others like him faced immense difficulty in obtaining broadband in part because North Carolina passed House Bill 129, titled “Level Playing Field/Local Government Competition,” in May 2011.<sup>7</sup> Without that law, Mr. Tiemann and other businesses and residents of Pittsboro might have worked together with their local government to find a solution to their lack of broadband access, possibly by way of a municipal broadband network that could provide service at an affordable rate.

The North Carolina statute “essentially barr[ed] [municipal broadband networks] from the consumer market,” leaving Mr. Tiemann and others similarly situated across North Carolina with no al-

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<sup>1</sup> Monica Chen, *Chapel Hill’s High Hopes for Broadband Quashed by Law*, TRIANGLE BUS. J. (June 17, 2011), <http://www.bizjournals.com/triangle/print-edition/2011/06/17/chapel-hills-high-hopes-for-broadband.html?page=all>.

<sup>2</sup> U.S. CENSUS BUREAU, *2006-2010 American Community Survey 5-Year Estimates: Demographic and Housing Estimates*, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_10\\_5YR\\_DP05](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP05) (last visited July 25, 2012).

<sup>3</sup> Chen, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *About Us*, MANIFOLD RECORDING, <http://www.manifoldrecording.com/people.php#michael> (last visited Jan. 11, 2013). While Mr. Tiemann’s finances are not discussed, based on his impressive career it is safe to assume that Mr. Tiemann possessed sufficient resources to accomplish his goals.

<sup>6</sup> U.S. CENSUS BUREAU, *2006-2010 American Community Survey 5-Year Estimates: Selected Economic Characteristics*, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_10\\_5YR\\_DP03](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP03) (last visited July 31, 2012).

<sup>7</sup> H.B. 129, Gen. Assemb., 2011 Sess. (N.C. 2011), 2011 N.C. Sess. Laws 84 (codified at N.C. GEN. STAT. § 160A-340 (2012)).

ternative but to continue to beg Time Warner and other Internet service providers (“ISPs”) for service, usually at great cost to the consumer.<sup>8</sup> Where, as in Mr. Tiemann’s case, the local telecommunications provider is clearly reluctant to enter a small unserved market at a reasonable price for consumers, a public network might be able to provide broadband Internet at an affordable rate.

Mr. Tiemann’s problem is not unique to North Carolina. In fact, when North Carolina’s bill passed in May 2011,<sup>9</sup> nineteen states already had enacted legislation restricting or banning municipal broadband networks to the detriment of underserved communities.<sup>10</sup> Such legislation has been a point of contention between private telecommunications companies and residents and businesses in underserved communities with, or seeking to build, municipal broadband networks. In North Carolina, Governor Bev Perdue declined to take a concrete position on the bill when she refused to sign or veto it (resulting in its enactment).<sup>11</sup> Governor Perdue explained, “My concern with House Bill 129 is that the restrictions the General Assembly has imposed on cities and towns who want to offer broadband services may have the effect of decreasing the number of choices available to their citizens,” and she urged the legislature to reconsider the law.<sup>12</sup>

State restrictions similar to North Carolina’s leave underserved municipalities caught in a bind: the private sector is unwilling or unable to provide sufficient broadband access at an affordable price, but the municipality is effectively prohibited from building its own network to compensate for the private sector’s refusal to enter the market. Consequently, residents and businesses in the vast majority of these municipalities are denied broadband Internet access, severely limiting their ability to conduct business and enjoy the many benefits broadband Internet offers.<sup>13</sup>

This Note argues that many current state laws which prohibit or effectively prohibit municipal broadband networks will continue delaying high-speed Internet access to individuals and businesses in un-

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<sup>8</sup> Chen, *supra* note 1.

<sup>9</sup> 2011 N.C. Sess. Laws 84.

<sup>10</sup> John Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 YALE J.L. & TECH. 85, 110 (2009).

<sup>11</sup> Rob Christensen, *Perdue Urges Rethinking of New Broadband Law*, NEWS & OBSERVER (Raleigh, NC), May 21, 2011, at 3B.

<sup>12</sup> Press Release, Office of Governor Bev Perdue, Governor Perdue’s Statement on House Bill 129 (May 20, 2011), <http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemID=1861>.

<sup>13</sup> See *infra* Part I.B.

derserved communities, causing negative social and economic impacts.<sup>14</sup> To reduce delays in broadband deployment, state regulations should reasonably protect the private sector from government-funded competitors when such competition is likely to take place, but should also granting municipalities leeway to construct broadband networks when the private sector is unable or unwilling to provide service at reasonable rates.

This Note proposes specific provisions that states choosing to regulate municipal broadband networks should include in their regulations to protect private industry. This Note also highlights some existing state law provisions that should be stricken because they are overly protective of the private sector to the detriment of consumers.

To effect timely modification of overly restrictive state laws, this Note further proposes that the federal government take action. The most effective means of changing existing state rules is to use § 253(a) of the Telecommunications Act of 1996<sup>15</sup> to preempt state laws which prohibit or effectively prohibit municipalities from operating broadband networks. In order to overcome preemption, states with overly burdensome regulations would be forced to revise their laws to be less restrictive. However, the Supreme Court has interpreted § 253(a) in such a way that preemption is impossible at present.<sup>16</sup> Thus, this Note proposes that Congress amend § 253(a) with language making clear its application to laws targeting municipal entities (and not just private entities).

Part I of this Note sets the stage for the discussion by defining key technical terms, laying out the parameters of the substantive debate, and explaining the present state of affairs at both the federal and state levels. Part II presents this Note's two-pronged solution: Section A addresses how federal preemption can compel states to repeal or revise overly restrictive laws, and Section B evaluates existing state laws, highlighting some that should be modified or repealed. Part III contains additional justifications for this Note's proposed solutions beyond those presented in Part II, including the economic and social benefits of municipal broadband and how municipally-sponsored broadband deployment mirrors other successful municipal infrastructure deployments in this nation's history. Finally, Part IV identifies and rebuts potential counterarguments to the proposed solution.

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<sup>14</sup> See *infra* Part I.B.

<sup>15</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 101, 110 Stat. 56, 70 (codified at 47 U.S.C. § 253(a) (2006)).

<sup>16</sup> See *infra* Part I.F.

## I. THE LEXICON, LIMITS, AND LAW OF THE DEBATE

### A. Terminology and Availability of Broadband

Before exploring the substantive issues, some fundamental terminology must be defined and parameters must be established. “Broadband” is a relatively vague term without a generally accepted definition. Commonly thought of as Internet connections faster than dial-up, broadband is often understood in terms of speed. In 1999, the Federal Communications Commission (“FCC”) defined broadband as an Internet connection capable of minimum speeds of 200 kilobits per second for both download (from the Internet to the user’s computer) and upload (from the user’s computer to the Internet).<sup>17</sup> Eleven years later, the FCC decided the prior definition was outdated and adopted a new definition requiring download speeds of at least four megabits per second and upload speeds of at least one megabit per second.<sup>18</sup> The FCC considers these speed benchmarks to be the “minimum speed required to stream a high-quality . . . video while leaving sufficient bandwidth for basic web browsing and email,” or, put another way, the FCC now considers this standard Internet usage.<sup>19</sup>

Under such a definition, the FCC estimates that out of 3230 counties in the United States, 1024 of them completely lack broadband service, resulting in about 24 million Americans without broadband access.<sup>20</sup> Moreover, these unserved areas, often rural, are typically far less densely populated than the national average population density.<sup>21</sup> The FCC concluded that “broadband is not being deployed to all Americans in a reasonable and timely fashion,” and, most critically, that “market forces alone are unlikely to ensure that the unserved minority of Americans will be able to obtain the benefits of broadband anytime in the near future.”<sup>22</sup>

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<sup>17</sup> Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 25 FCC Rcd. 9556, 9558 (July 20, 2010).

<sup>18</sup> *Id.* at 9559. Using the International System of Units, one megabit is the equivalent of 1,000 kilobits, i.e., one megabit per second is the equivalent of 1,000 kilobits per second. See *The NIST Reference on Constants, Units, and Uncertainty*, NAT’L INST. OF STANDARDS & TECH., <http://physics.nist.gov/cuu/Units/prefixes.html> (last visited Jan. 12, 2013).

<sup>19</sup> 25 FCC Rcd. at 9559.

<sup>20</sup> *Id.* at 9570.

<sup>21</sup> *Id.* at 9571–72 (explaining that the average household density of the unserved counties is 46.8 households per square mile as compared to the average U.S. county, which has a household density of 108.2 households per square mile).

<sup>22</sup> *Id.* at 9574.

### B. *The Need to Stay Wired*

While wireless networks are one option in broadband deployment, this Note only considers wire-based networks for three reasons. First, wired networks tend to offer faster speeds and more reliable connections than wireless systems because the shortage of wireless spectrum prevents wireless systems from offering connections with comparable speed and reliability.<sup>23</sup> Second, wireless broadband networks are subject to greater FCC regulation than wired networks, making them more difficult to build and operate.<sup>24</sup> Third, municipal wireless broadband can serve as both a primary and secondary source of broadband access and in many cases has taken on the latter character.<sup>25</sup> Such secondary source public networks are immaterial to this Note because they exist as a feature of convenience for residents in areas that already have broadband access.<sup>26</sup> For these reasons and others, wired systems are preferable even considering the greater cost in bringing them to unserved communities.<sup>27</sup>

The benefits of high-speed Internet to both ordinary citizens and businesses are numerous and linked directly to broadband's greater speeds. For individuals, broadband performs critical functions such as assisting people in finding employment and facilitating communication and education in addition to offering great convenience and entertainment value.<sup>28</sup> Broadband also gives businesses the ability to expand their operations globally, find more and better customers and

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<sup>23</sup> See Alex Goldman, *The FCC Decision and the Use of White Spaces*, WIRELESS INTERNET SERV. PROVIDERS ASS'N (Oct. 12, 2010, 8:30 AM), <http://web.archive.org/web/20110718180958/http://www.wispa.org/?p=3146> (accessed by searching for <http://wispa.org/?p=3146> in the Internet Archive index) (explaining that lack of radio spectrum availability and interference from nearby spectrum pose great challenges for companies seeking to offer wireless broadband); see also *WiMAX Offers Less Bang Than Fiber, Panelists Say*, COMM'NS DAILY, Mar. 31, 2009, available at 2009 WLNR 6205749 [hereinafter *WiMAX Offers Less Bang*] (explaining that wireless broadband cannot support a large number of users without losing speed and reliability).

<sup>24</sup> See Goldman, *supra* note 23 (discussing impact of FCC's power usage restrictions and "height above average terrain" antenna restrictions on wireless Internet services providers).

<sup>25</sup> Catherine A. Middleton, *A Framework for Investigating the Value of Public Wireless Networks* 10 (Aug. 15, 2007) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2118153](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118153).

<sup>26</sup> See *id.* at 16–17. Because wireless broadband is technologically inferior to wired Internet options, those who are willing to pay for Internet connectivity are "highly unlikely to subscribe to public Wi-Fi as their primary source of Internet connectivity if other options are available." *Id.* See generally Sharon E. Gillett, *Municipal Wireless Broadband: Hype or Harbinger?*, 79 S. CAL. L. REV. 561 (2006) (discussing municipal wireless broadband networks).

<sup>27</sup> See *WiMAX Offers Less Bang*, *supra* note 23.

<sup>28</sup> *The Benefits of Broadband*, OFFICIAL ST. OF MICH. WEBSITE, [http://www.michigan.gov/broadband/0,1607,7-250-48184\\_48185--,00.html](http://www.michigan.gov/broadband/0,1607,7-250-48184_48185--,00.html) (last visited Aug. 26, 2012).

suppliers, streamline operations, advertise more efficiently, and recruit employees.<sup>29</sup> The result is a substantial net benefit to the community, as communities with high-quality broadband networks are more likely to attract and retain businesses, offer greater educational opportunities, provide government services more efficiently, and attract tourists.<sup>30</sup> Speed is key, as slower, non-broadband Internet connections render most of these benefits unobtainable either because of the time required to access the benefits or because the Internet products and services cannot be transmitted to users lacking broadband access.<sup>31</sup>

### C. *The Expense of Expansion*

Although broadband is critical to individuals and businesses nationwide, Internet Service Providers (“ISPs”) are reluctant to enter more remote or less populated markets.<sup>32</sup> Put simply, it is quite expensive to build out a wired broadband network.<sup>33</sup> The nature of wired broadband deployment requires large up-front costs of construction, essentially capital expenditures,<sup>34</sup> as broadband connections require running wires to customers’ homes or businesses.<sup>35</sup> However, once these up-front deployment costs are paid, the network is relatively cheap to operate.<sup>36</sup> Thus private ISPs price their service above transmission costs so as to recoup their capital outlay.

From a business standpoint, this sort of capital expenditure is more easily justified in densely populated areas, as the more densely populated an area is, the more customers there are within range of the network and available to pay for it.<sup>37</sup> Consequently, major metropolitan areas tend to have multiple private ISPs offering broadband ser-

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Getting Broadband*, FED. COMM’N. COMM., <http://www.fcc.gov/guides/getting-broadband> (last visited Nov. 8, 2012).

<sup>32</sup> Richard Bennett & Robert D. Atkinson, *ITIF Analysis of FCC Broadband Deployment Report*, INFO. TECH. & INNOVATION FOUND. (July 21, 2010), <http://www.itif.org/publications/itif-analysis-fcc-broadband-deployment-report>.

<sup>33</sup> *Id.* (discussing “the high cost of bringing wireline broadband to remote areas,” and explaining “[i]t’s very difficult to justify a ten mile trench or hundreds of new telephone poles just to reach a single cattle ranch”).

<sup>34</sup> See David Clark, *A Simple Cost Model for Broadband Access: What Will Video Cost? 2* (Aug. 27, 2008) (unpublished manuscript), <http://cfp.mit.edu/publications/docs/DDC.Cost.analysis.TPRC.R1.pdf>.

<sup>35</sup> See *id.* at 6 (estimating the costs of connecting the ISP to the user’s premises).

<sup>36</sup> See *id.* at 7 (estimating that data transmission costs, exclusive of network connection, might fall somewhere in the ten to twenty cents per gigabyte range).

<sup>37</sup> See Bennett & Atkinson, *supra* note 32.

vice, because ISPs can more quickly recover their fixed costs of construction from the larger customer base.<sup>38</sup>

However, in less densely populated areas, the fixed costs will either take longer to offset<sup>39</sup> or require that a higher price be charged to customers.<sup>40</sup> Using these principles, private ISPs can calculate the likely profitability of expanding to unserved markets and determine whether it is worth expanding to serve the market.<sup>41</sup> Unfortunately, the more isolated and less densely populated the area, the less likely it is that the fixed costs of construction will ever be recouped, and thus such areas remain unserved.<sup>42</sup>

#### *D. The New Hope of Municipal Broadband*

Faced with these unforgiving economic realities, municipalities with large unserved areas began developing plans to create broadband networks, embracing their potential to “help bridge the digital divide” where private ISPs refused to offer service.<sup>43</sup>

One particularly successful municipal broadband project is in Cedar Falls, Iowa, where the local public utility, Cedar Falls Utilities (“CFU”), began selling fiber-optic broadband service in 1996.<sup>44</sup> While the project took eight years to become relatively cash-flow neutral,<sup>45</sup> in both 2008 and 2009, CFU’s communications network had operating income of approximately \$2.37 million, a figure which climbed to nearly \$3 million in 2010.<sup>46</sup>

While one city’s example is no guarantee that all municipal networks will enjoy financial success, successful projects like CFU indicate that the municipal broadband idea is at least economically feasible. The benefits of affordable broadband access are so important to a community that making a profit should not be the overarch-

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<sup>38</sup> *See id.*

<sup>39</sup> This assumes a smaller customer base paying the same price as a large customer base.

<sup>40</sup> *See Bennett & Atkinson, supra note 32.*

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See Blevins, supra note 10, at 105 (internal quotation marks omitted).*

<sup>44</sup> MICHAEL J. BALHOFF & ROBERT C. ROWE, BALHOFF & ROWE, LLC, MUNICIPAL BROADBAND: DIGGING BENEATH THE SURFACE 35–36 (Sept. 2005), <http://www.balhoffrowe.com/pdf/Municipal%20Broadband—Digging%20Beneath%20the%20Surface.pdf>.

<sup>45</sup> *Id.* at 36.

<sup>46</sup> Balance Sheet, Mun. Commc’ns Util. of the City of Cedar Falls, Iowa 1 (2011), <http://auditor.iowa.gov/reports/1123-0046-C000.pdf>. CFU provided both cable television and broadband Internet services over its network. *Id.*

ing goal.<sup>47</sup> The main purpose of municipal broadband should be to provide an increasingly necessary public service, not turn a profit.

*E. The Private Sector Strikes Back to Curb Municipal Broadband*

Fearing encroachment upon their traditional territorial domination, their ability to expand at their own pace, and their ability to choose which customers they will serve, private ISPs were quick to begin an aggressive campaign against municipal networks.<sup>48</sup> The campaign included lobbying for state laws restricting or banning such municipal networks as well as lawsuits to stifle their development.<sup>49</sup>

While all of the private ISPs' efforts are too extensive to list here, two are worth noting. First, the Wisconsin legislature approved a state-sponsored broadband network planned primarily for educational purposes.<sup>50</sup> The University of Wisconsin was supposed to manage the network and sell service to other schools throughout the state.<sup>51</sup> However, before the build-out of the network got very far, a group of thirty independent incumbent Wisconsin private ISPs (the same ISPs that declined to serve many potential customers for the state-sponsored project) filed multiple lawsuits and petitioned the Governor to delay and prevent the network's construction.<sup>52</sup> Delayed for over a year now, the project remains trapped in administrative and judicial limbo.<sup>53</sup>

The second example comes from Pennsylvania where private ISPs staged a massive lobbying campaign that amassed nearly \$5.3 million in fees for registered lobbyists between 2003 and 2004.<sup>54</sup> Of that sum, over \$3.1 million came from Verizon Communications, Inc. alone.<sup>55</sup> The lobbying effort paid off for the private ISPs: in late 2004 the state legislature passed a law prohibiting new municipal broadband projects<sup>56</sup> subject only to certain highly restrictive exceptions.<sup>57</sup>

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<sup>47</sup> See *infra* Part II.B.

<sup>48</sup> See Blevins, *supra* note 10, at 107–08.

<sup>49</sup> See *id.* at 107 (“Simply put, incumbent broadband providers used law to stifle municipal broadband in its infancy.”).

<sup>50</sup> See *Wisconsin Local Operators Seek to Block Stimulus Funded Broadband Project*, COMM’NS DAILY, Aug. 31, 2011, available at 2011 WLNR 17510498.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> D. Stan O’Loughlin, *Preemption or Bust: Fear and Loathing in the Battle over Broadband*, 28 CARDOZO L. REV. 479, 491 (2006).

<sup>55</sup> *Id.* Verizon had previously spent less than \$500,000 politicking during the prior three state election cycles. *Id.*

<sup>56</sup> 66 PA. CONS. STAT. § 3014(h) (2012).

In addition to Pennsylvania and Wisconsin, private ISPs were successful in persuading a number of other states to pass laws preventing municipalities from constructing broadband networks.<sup>58</sup> The watershed battle in the fight to legislate municipal broadband out of existence took place in Missouri.

#### F. Missouri Municipal League *and* § 253(a) Preemption

In 1997, Missouri passed a law which effectively<sup>59</sup> prohibited a “political subdivision” of the state from selling telecommunications services or facilities to public or private ISPs.<sup>60</sup> In response, a group of Missouri municipalities, municipally-owned utilities, and municipal organizations petitioned the FCC for a declaration that the statute was preempted by § 253 of the Telecommunications Act of 1996.<sup>61</sup>

Specifically, the petitioners asked the FCC to find that the Missouri statute violated § 253(a) of the Telecommunications Act, which states, “No State or local statute . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>62</sup> Under § 253(d), the FCC is empowered to “preempt the enforcement of such statute . . . to the extent necessary to correct such violation or inconsistency” with § 253(a).<sup>63</sup>

The FCC determined that the Telecommunications Act did not preempt the Missouri statute because the term “any entity,” as used in the statute, was not intended to include Missouri’s own political subdivisions.<sup>64</sup> Although the FCC found in favor of the state, the FCC made it clear that its decision was only following binding legal precedent.<sup>65</sup> Perhaps more importantly, the FCC’s opinion stated that the policy behind the Missouri statute was in conflict with the goal of the

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<sup>57</sup> See *infra* Part II.B.3.

<sup>58</sup> See Blevins, *supra* note 10, at 109–10.

<sup>59</sup> One of the exceptions is that a municipality may sell telecommunications service only to private ISPs on a “nondiscriminatory, competitively neutral basis, and at a price which covers cost” as though the municipal network were acting as a private, for-profit entity. MO. REV. STAT. § 392.410(7) (2012). However, due to the narrowness of the exceptions and the fact that the law effectively foreclosed municipalities from building broadband networks, the Supreme Court deemed these exceptions “not pertinent” in preemption analysis. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 129 n.1 (2004).

<sup>60</sup> MO. REV. STAT. § 392.410(7) (2012).

<sup>61</sup> *Mo. Mun. League*, 541 U.S. at 129.

<sup>62</sup> 47 U.S.C. § 253(a) (2006).

<sup>63</sup> *Id.* § 253(d).

<sup>64</sup> *Mo. Mun. League*, 16 FCC Rcd. 1157, 1158 (2001), *vacated*, 299 F.3d 949, 952 (8th Cir. 2002), *rev’d*, 541 U.S. 125 (2004).

<sup>65</sup> *Id.* at 1162.

Telecommunications Act to promote broadband deployment, especially in rural areas.<sup>66</sup>

The municipalities scored a victory, though, when their appeal to the Eighth Circuit resulted in a unanimous reversal of the FCC's decision.<sup>67</sup> The appellate court held that the plain meaning of the words "any entity" included municipalities, despite the heightened standards imposed when federal law preempts a state's regulation of its own political subdivisions.<sup>68</sup>

But the victory was short lived: less than two years later, the Supreme Court overturned the Eighth Circuit and upheld the Missouri statute's validity for four reasons.<sup>69</sup> First, a state law regulating municipalities cannot be preempted because the municipality is not a separate entity from the state under the meaning of "entity" in § 253.<sup>70</sup> Second, even if the Missouri statute were preempted, municipalities would not inherently have the authority to build telecommunications networks absent a grant of such authority from the state.<sup>71</sup> The first and second reasons lead to the third: even if the statute was preempted and authority to build the network existed, the state could simply cut off funding for the network's construction or maintenance via budgeting decisions.<sup>72</sup>

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<sup>66</sup> *Id.* ("[T]he legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition . . . . The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." (footnotes omitted)).

<sup>67</sup> The procedure of preempting a statute under § 253(a) begins with a party petitioning the FCC for preemption. The FCC then renders a decision on preemption which is reviewable by the applicable United States Circuit Court of Appeals for the jurisdiction in which the state law was challenged. In this case, that Circuit Court was the Eighth Circuit. *See Mo. Mun. League*, 299 F.3d 949, 951–52.

<sup>68</sup> *Id.* at 952–53.

<sup>69</sup> *See Mo. Mun. League*, 541 U.S. at 128–29.

<sup>70</sup> *Id.* at 134 ("[W]hen a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command.").

<sup>71</sup> *Id.* at 135 ("But what if the FCC did preempt the restriction? The municipality would be free of the statute, but freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business.").

<sup>72</sup> *Id.* at 136 ("Surely there is no contention that the Telecommunications Act of 1996 by its own force entails a state agency's entitlement to unappropriated funds from the state treasury, or to the exercise of state bonding authority.").

Finally, the Court expressed concern that preemption would create a “national crazy quilt” of states where such networks were legal in some states and illegal in others.<sup>73</sup> States that had previously granted municipalities the authority to build such networks would be preempted if they tried to revoke that authority by legislation, but states that had never granted such authority in the first place could validly ban municipal networks.<sup>74</sup> The “crazy quilt” would not only be confusing, but would also be the product of federal law as opposed to “free political choices” at the state level.<sup>75</sup>

In the aftermath of *Missouri Municipal League*, the private sector intensified its efforts to eliminate municipal broadband networks. ISPs initiated enforcement actions in states with existing legislation regulating municipal broadband networks and increased lobbying efforts to have regulations passed in states without them.<sup>76</sup> Private ISPs also launched a publicity campaign, using media outlets to portray municipal networks as anticompetitive.<sup>77</sup> More importantly, the timing of these efforts (and the new legislation which resulted) was significant for the private ISPs, as many municipalities were in the process of planning and financing broadband projects nationwide.<sup>78</sup>

Thanks in large part to the substantial lobbying effort discussed above, at least twenty-one states have some sort of legislative barrier to municipal broadband networks.<sup>79</sup> Of these twenty-one, Arkansas,<sup>80</sup> Missouri,<sup>81</sup> Nebraska,<sup>82</sup> and Texas<sup>83</sup> have total prohibitions on new municipal networks. And while all of the states’ restrictions vary in their comprehensiveness, they all limit the availability of reliable

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 137 (“A State or municipality could give the power, but it could not take it away later[.] . . . for the law expressing the government’s decision to get out [of the telecommunications business] would be preempted.”).

<sup>75</sup> *Id.* at 136.

<sup>76</sup> Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 98 (2009).

<sup>77</sup> See O’Loughlin, *supra* note 54, at 490.

<sup>78</sup> See Blevins, *supra* note 10, at 109.

<sup>79</sup> See *id.* at 110 (noting that at least nineteen state legislatures have created barriers to entry on municipal broadband). Since Blevins wrote in 2009, two other states have enacted restrictions on municipal broadband. See 2011 N.C. Sess. Laws 84; 2012 S.C. Acts 284.

<sup>80</sup> ARK. CODE ANN. § 23-17-409(b) (2012). This statute provides a small exception for pre-existing city-owned electric utilities or “television signal distributors” to operate data networks. *Id.* § 23-17-409(b)(2).

<sup>81</sup> MO. REV. STAT. § 392.410(7) (2012).

<sup>82</sup> NEB. REV. STAT. § 86-594 (2012).

<sup>83</sup> TEX. UTIL. CODE ANN. § 54.201 (West 2011).

broadband Internet access to citizens in their respective underserved communities.<sup>84</sup>

## II. THE TWO-PRONGED SOLUTION

Though this Note does not dispute that the free market should govern when ISPs are willing to compete, ISPs should not be able to suppress competition in markets they have no intention of entering even if that competition comes from a public entity. But the line between cases where the ISPs are legitimately nervous about their ability to compete with municipal networks or where they simply want to suppress any and all forms of competition is often difficult to discern. In the municipal broadband context, there has been a strong lobby led by the private ISPs against municipal networks expressing a legitimate fear that the private sector will be unable to compete effectively with publicly subsidized or funded broadband networks.<sup>85</sup> But there has been a relatively strong outcry against state laws prohibiting municipal networks from both ordinary citizens<sup>86</sup> and the federal government.<sup>87</sup> For example, in May 2011 FCC Commissioner Michael Copps spoke at a telecommunications conference in North Carolina, imploring all states to stop and reverse the trend of prohibiting municipal broadband networks.<sup>88</sup>

Despite no clear consensus regarding the value of direct competition between the private sector and municipalities in the consumer broadband market, there is a workable compromise that will quickly get underserved communities municipal broadband Internet access while protecting private ISPs' economic interests. This Note highlights new and amended statutory provisions that would further two critical purposes of municipal broadband networks: (1) to incentivize private ISPs to expand their networks more rapidly, alleviating the need for municipal networks, and (2) to fill the remaining gaps in service that the private ISPs are unwilling to enter even when faced with the prospect of losing potential customers to municipal networks. To achieve this goal, legislation should make municipal networks permissible when circumstances are such that the private sector is unwilling to provide broadband service at reasonable rates.

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<sup>84</sup> See *infra* Part II.B.

<sup>85</sup> See *supra* Part I.E.

<sup>86</sup> See, e.g., Chen, *supra* note 1.

<sup>87</sup> Ted Gotsch, *Copps Calls on States to Allow Municipalities to Offer Broadband*, TR DAILY, May 10, 2011, available at 2011 WLNR 9347480.

<sup>88</sup> *Id.*

This Note proposes a two-pronged solution. At the federal level, Congress should amend § 253 so that it applies expressly to public entities, thus overruling *Missouri Municipal League* by granting the FCC the power to declare overly restrictive state laws preempted. Such federal action would force state legislatures either to reconsider their laws or simply stand by as the overly burdensome state laws are preempted. At the state level, this Note identifies provisions of current state laws which have particularly important effects on municipalities' ability to construct and operate broadband networks and discusses how those provisions should be modified or eliminated.

A. *The Federal Prong: Amending § 253 per Missouri Municipal League*

Because the industry lobby has proven so strong even in the face of public opposition,<sup>89</sup> it is unlikely that states will suddenly begin resisting lobbying efforts and reverse their restrictive laws. Thus, proposals for modifying state laws alone are insufficient to exact any meaningful change. Accordingly, the best way to compel states to reconsider their statutes is to have federal law preempt those state laws which effectively prohibit public entities from providing telecommunications services. However, in light of *Missouri Municipal League*, federal action is now necessary for preemption to occur.

There are two viable options to overcoming *Missouri Municipal League*: the Supreme Court could overturn its own precedent or Congress could amend § 253 to meet the requirements set out by *Missouri Municipal League* and reach the state statutes in question. Although either remedy would suffice, this Note focuses on the congressional solution.<sup>90</sup>

1. *The Proposed Amendment to § 253(a)*

Congress should amend § 253(a) so that it expressly applies to states and their own political subdivisions. To illustrate this point, consider the following (the bold text is added to the current language

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<sup>89</sup> North Carolina is a prime example, as the issue was so contentious that the Governor refused to sign or veto the bill. *See supra* Introduction.

<sup>90</sup> The fact is that eight Justices felt the language of § 253 is not clear enough to hold that preemption applied to statutes affecting public entities, so it is unlikely the Court would change its tune and side with Justice Stevens if the matter arose again. Given the relative ease with which Congress could remedy the statute's flaw to the Court's satisfaction, a congressional solution is best. Moreover, a discussion arguing the merits of overturning the Court's majority opinion would require delving into an entirely separate area of law, state sovereignty, which would detract from the primary focus of this Note.

of § 253(a)): “No State or local statute . . . may prohibit or have the effect of prohibiting the ability of any entity, INCLUDING PUBLIC ENTITIES, to provide any interstate or intrastate telecommunications service.”<sup>91</sup> Including some form of the term “public entities” in the statute, a phrase borrowed from *Missouri Municipal League*,<sup>92</sup> would overcome the Court’s conclusion that “Congress used ‘any entity’ with a limited reference to any private entity,” and thus expressly include the state laws discussed in this Note under the “preemption net” of § 253.<sup>93</sup>

## 2. *The Need for an Amendment to § 253(a)*

Amending § 253 in this way would likely sway the votes of at least two members of the majority still on the Court today, Justices Scalia and Thomas, who concurred in the judgment because § 253(a) “simply does not provide the clear statement which would be required . . . for a statute to limit the power of States to restrict the delivery of telecommunications services by their political subdivisions.”<sup>94</sup> The two even agreed with the majority’s conclusion that preemption “would have several unhappy consequences” but did not feel “that the avoidance of unhappy consequences is adequate basis for interpreting a text.”<sup>95</sup>

The majority opinion also put heavy emphasis on this state sovereignty issue and the statutory language necessary to overcome it.<sup>96</sup> Though it also relied on policy justifications, the majority opinion concluded “that § 253(a) is hardly forthright enough” due to “[t]he want of any ‘unmistakably clear’ statement” in § 253(a) that it applies to public entities.<sup>97</sup>

In his dissenting opinion, Justice Stevens argued that such an amendment is unnecessary, as he found the majority’s conclusion that “any entity” includes all entities except for “*municipally owned* entities” incorrect.<sup>98</sup> Justice Stevens argued that the majority’s interpreta-

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<sup>91</sup> 47 U.S.C. § 253(a) (2006). The bold text is not part of the statute and was added merely for illustrative purposes. It is not intended to be any sort of formal or concrete proposal for how exactly to amend the language of § 253(a).

<sup>92</sup> *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132–33 (2004).

<sup>93</sup> *See id.* (stating in part that “public and private” is often used “when both are meant to be covered”).

<sup>94</sup> *Id.* at 141 (Scalia, J., concurring).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 140–41.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 143 (Stevens, J., dissenting).

tion had to be based on one of the assumptions that either Congress did not know public utilities existed or that it purposefully disregarded public utilities in drafting § 253, and that both assumptions are “manifestly implausible” based on the great number of public utilities in the country.<sup>99</sup>

Justice Stevens pointed out another flaw in the majority’s reasoning, highlighting another section of the Telecommunications Act of 1996 that contains a more narrowly tailored definition of “utility.”<sup>100</sup> The Pole Attachments Act<sup>101</sup> specifically excludes entities “owned by the Federal Government or any State” from its definition of “utility,”<sup>102</sup> and the term “State” includes “any political subdivision, agency, or instrumentality,” of the state.<sup>103</sup> It is thus unlikely that Congress intended to restrict § 253 not to apply to public entities because elsewhere in the Telecommunications Act Congress specifically addressed public entities when it wished to treat them differently.<sup>104</sup>

While Justice Stevens’s argument is compelling, it is of little help as a practical matter given that the other eight Justices felt differently.<sup>105</sup> Thus, an amendment to § 253 is necessary if there is to be a significant chance for state-level reform via preemption. However, even if § 253 is amended, it is possible that the Supreme Court might invalidate the amended version on policy grounds, as the six-Justice majority opinion also expressed a number of concerns with the potential efficacy of such an amendment in practice<sup>106</sup>—concerns now ripe for discussion.

### 3. Responding to Further Preemption Concerns

An amendment to § 253 might still face difficulties in the Supreme Court, as the six-Justice majority opinion went beyond the textual issue, reasoning that there would be minimal positive effects from preemption because states would remain free to restrict municipal networks by denying municipalities the authority to construct them.<sup>107</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 143–44.

<sup>101</sup> 47 U.S.C. § 224 (2006).

<sup>102</sup> *Id.* § 224(a)(1).

<sup>103</sup> *Id.* § 224(a)(3).

<sup>104</sup> *Mo. Mun. League*, 541 U.S. at 143–44 (Stevens, J., dissenting).

<sup>105</sup> *See generally id.* at 128–41 (majority opinion).

<sup>106</sup> *See id.* at 133–40 (discussing hypothetical scenarios and criticizing the dissent’s positions).

<sup>107</sup> *See id.* at 134 (“[P]reempting a ban on government utilities would not accomplish much if the government could not point to some law authorizing it to run a utility in the first place.”).

Even without a law banning such networks, municipalities would still need the power to build them, as “freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business.”<sup>108</sup>

However, this argument is insufficient as a basis for refusing to allow preemption for two reasons. First, as Justice Stevens pointed out in his dissenting opinion, § 253(a) preempts laws that impinge on the “ability” of an entity to enter the telecommunications business, and the state laws at issue here most certainly inhibit the ability of municipalities to enter the market even in the absence of authority to enter (because even should that authority be granted, the law would prohibit entry).<sup>109</sup> Justice Stevens then extended this argument to say that § 253 prevents states from revoking authority already granted to municipalities, as such revocation would be equally prohibitive of an entity’s ability to enter the market as would a law banning municipal networks.<sup>110</sup> But those states which had not yet granted municipalities the authority to construct or operate broadband networks would be under no obligation to do so as a result of § 253, even in its hypothetically amended version.<sup>111</sup>

This leads to one of the majority’s primary policy arguments: that the result of preemption would be a “national crazy quilt” of states, some of which would permit municipal networks and others that did not grant municipalities authority to operate such networks.<sup>112</sup> Justice Stevens countered this argument with the simple yet astute observation that failure to preempt statutes prohibiting municipal networks has the same effect, as a “national crazy quilt” of states with and without such inhibitive statutes would be allowed to exist.<sup>113</sup> As Justice Stevens put it, “That the ‘crazy quilt’ . . . is the product of political choices made by Congress rather than state legislatures renders it no more absurd than the ‘crazy quilt’ that will result from leaving the matter of municipal entry entirely to individual States’ discretion.”<sup>114</sup> Indeed Justice Stevens’s prediction has proven quite accurate, as the

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<sup>108</sup> *Id.* at 135.

<sup>109</sup> *See id.* at 145 (Stevens, J., dissenting).

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> *Id.* at 136 (majority opinion).

<sup>113</sup> *Id.* at 145–46 (Stevens, J., dissenting).

<sup>114</sup> *Id.* at 146 (citation omitted).

twenty-one states that have passed such legislation vary greatly in their levels of prohibition.<sup>115</sup>

Moreover, the majority's practical assessment of the situation is contrary to that of the FCC, as even the majority recognized that the FCC "denounced the policy behind the Missouri statute" because it "substantially disserved the policy behind the Telecommunications Act."<sup>116</sup> The majority opinion intentionally "put[s] aside" the position of the FCC in this regard, though, as "it does not follow that preempting state or local barriers to governmental entry into the market would be an effective way to draw municipalities into the business," and the value of municipal broadband is not relevant to the resolution of the issues presented in the case.<sup>117</sup>

The policy arguments the majority opinion advances are difficult to embrace due to the opinion's conscious disregard for the benefits of municipal broadband. Furthermore, even the majority's legal policy arguments (e.g., the national crazy quilt) are unavailing. Justice Stevens recognized the majority's mistake in this regard when he noted that preemption under § 253 is not automatic but rather hinges on a case-by-case determination to be made by the FCC.<sup>118</sup> The FCC's role in preemption determinations would avoid the majority's "hypothetical absurd results"<sup>119</sup> because the FCC can consider all the issues of each case (including both the general and legal policy issues) before making a determination. Justice Stevens argued, "Rather than assume that the FCC will apply . . . [§ 253] improperly," the better solution is to allow preemption of state laws applying to public entities and permit the FCC to make its determinations.<sup>120</sup>

With preemption as a possible available remedy, the next Section addresses the second prong of the proposed solution: the substantive analysis of existing state law provisions and how to modify them to achieve the purposes of municipal broadband networks.

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<sup>115</sup> See *supra* text accompanying notes 79–84. See generally *infra* Part II.B (discussing various approaches and laws which restrict municipal broadband networks).

<sup>116</sup> See *Mo. Mun. League*, 541 U.S. at 130–31. The position of the FCC was that municipal broadband networks would "further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential." *Id.* at 131.

<sup>117</sup> *Id.* at 131–32.

<sup>118</sup> See *id.* at 147 (Stevens, J., dissenting).

<sup>119</sup> *Id.*

<sup>120</sup> See *id.* at 147–48.

## B. *The State Prong*

With many state laws restricting municipal broadband networks in different ways and to different degrees, a comprehensive, one-size-fits-all solution to meet any one state's particular circumstances is a pipedream. Instead, this Note focuses on a number of specific provisions contained in some states' laws, explaining how those provisions can be improved or why they should be done away with entirely. To clarify how each provision discussed should be treated, this Section is subdivided into three subparts: (1) provisions to eliminate, (2) provisions to modify, and (3) provisions to retain.

The provisions to eliminate include outright bans and wholesale service restrictions. The provisions to modify include those raising municipal entry costs, those restricting public financing, those mandating referenda, those restricting pricing and cross subsidies, and those imposing a number of other operating restrictions. Those provisions which should be retained in essentially their current form include those mandating feasibility studies before construction, those mandating appeals to the private sector to provide broadband service before construction, and those exempting unserved areas from many of the restrictions.

### 1. *Provisions to Eliminate*

There are two major restrictions present in state laws that should be phased out entirely from any legislation regulating municipal broadband: outright bans on municipal networks and restrictions limiting municipal networks to only wholesale service sales. These restrictions are overly prohibitive of municipal entry to the broadband consumer market and thus should not be included in legislation.

#### a. *Outright Bans*

Arkansas, Missouri, Nebraska, and Texas all have total bans on municipal networks.<sup>121</sup> Such total bans are patently repugnant to the spread of broadband service, as they remove municipalities from the list of potential entrants to the market. Or, in § 253's framework, total bans are the most prohibitive of an entity's ability to enter the market.<sup>122</sup> Therefore, such total bans should be entirely eliminated.

The impact of a total ban is twofold. First, the ban prevents municipalities from providing the critical broadband service their citizens

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<sup>121</sup> See *supra* notes 80–83.

<sup>122</sup> 47 U.S.C. § 253 (2006).

demand and may even require. Second, the ban may delay the expansion of private ISP broadband networks to unserved areas by removing municipalities as potential entrants to the broadband market.<sup>123</sup> Laws preventing the entire class of public entities from entering the broadband market discourage private ISPs from expanding more aggressively, if they choose to expand at all, because there is no threat that a municipal provider will be first to reach an untapped market.<sup>124</sup> Thus, such total bans should be scrapped in their entirety.

*b. Wholesale Service Restrictions*

Another troubling type of restriction that should be eliminated is found in Washington and Nevada, where public utilities are only allowed to sell telecommunications service wholesale, not to end users.<sup>125</sup> Although the law in Nevada prohibits cities with populations exceeding 25,000 from selling telecommunication service to the “general public,” municipalities below 25,000 are apparently free to construct their own networks.<sup>126</sup> In theory, even those cities governed by the statute can construct and maintain certain telecommunication facilities so long as the services those facilities provide are not sold to the general public.<sup>127</sup> The theory behind this type of restriction is that the municipality invests in the infrastructure and maintains it but must then contract out the retail sale of such service to private parties.<sup>128</sup> The goal is to keep the private sector involved and allow for some competition between retailers to help keep prices reasonable for consumers.<sup>129</sup>

However, such restrictions have proven contrary to the quest for broadband expansion. While the municipal infrastructure can be helpful, the additional steps between investment and service provision

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<sup>123</sup> Mo Xiao & Peter F. Orazem, *Entry Threat and Entry Deterrence: The Timing of Broadband Rollout* 25 (NET Institute, Working Paper No. 07-09, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1025121](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1025121) (“[T]he mere threat of entry may alleviate market power associated with oligopolistic market structure . . .”).

<sup>124</sup> *See id.* (“In industries such as telecommunications services, our results imply that policies encouraging entry will play an important role in determining the timing of the provision of new services to local markets.”).

<sup>125</sup> WASH. REV. CODE § 54.16.330 (2012); NEV. REV. STAT. § 268.086 (2012).

<sup>126</sup> NEV. REV. STAT. § 268.086.

<sup>127</sup> *See* William Lehr et al., *Broadband Open Access: Lessons from Municipal Network Case Studies 10–13* (Sept. 2004) (unpublished manuscript), [http://people.csail.mit.edu/wlehr/Lehr-Papers\\_files/Lehr%20Sirbu%20Gillett%20Broadband%20Open%20Access.pdf](http://people.csail.mit.edu/wlehr/Lehr-Papers_files/Lehr%20Sirbu%20Gillett%20Broadband%20Open%20Access.pdf) (explaining the options available to a municipality in wholesale-only jurisdictions and their implications for competition).

<sup>128</sup> *See id.*

<sup>129</sup> *See id.*

add uncertainty and expense to the mix, which can make the project less appealing to municipalities.<sup>130</sup> In fact, Washington's legislature is currently considering proposed legislation to permit public entities to sell telecommunications services directly to consumers.<sup>131</sup> The bill explains that unserved and underserved areas have persisted under the roughly seven years of the wholesale-only restriction and that the aim in removing the restriction is to speed the deployment of broadband service to those areas.<sup>132</sup> The bill grants municipalities the ability to operate networks with a great deal of autonomy and limited restraints and is currently under active consideration with hearings held as recently as mid-January 2012.<sup>133</sup>

While such wholesale-only restraints have apparently failed in Washington, there may be valid reasons for a municipality to impose such a restraint on itself in building a network in some cases. Just as there should not be a requirement that municipalities only sell broadband service wholesale, there also should be no requirement that they only sell broadband service at retail. Instead, each municipality should remain free to weigh its options in light of its unique circumstances, as in some cases a municipality's self-imposed restraint of wholesale-only sales may be appropriate. Such a self-imposed restraint may be useful in enticing private ISPs' cooperation in the project, rather than having the private ISPs view the project as a threat and seek to block it. Using such a self-imposed restraint as an incentive for cooperation with the private sector could avoid much of the fighting that tends to derail or increase the cost of municipal broadband projects. Despite this provision's potential utility in some municipal contexts, a statewide requirement that all municipal networks sell service only wholesale is overly broad and restrictive. Consequently, these bans should be removed leaving the choice to municipalities.

## 2. *Provisions to Modify*

This Section presents five categories of restrictions that certain states have enacted that, with some modifications, are not unduly re-

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<sup>130</sup> See *id.* at 27 ("Open access can only work if private companies find it in their interest to act as 3rd-party service providers . . .").

<sup>131</sup> See *Bill Information: HB 1711*, WASH. ST. LEGISLATURE, <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1711&year=2011> (last visited Jan. 16, 2013).

<sup>132</sup> H.B. 1711, 62d Leg., 1st Spec. Sess. (Wash. 2011) ("In an effort to reach those areas of the state that are unserved or underserved, it is the intent of the legislature to grant public utility districts the authority to provide retail telecommunications services, including broadband . . .").

<sup>133</sup> See *Bill Information: HB 1711*, *supra* note 131.

restrictive of municipal networks: (1) restrictions which raise municipal entry costs into the broadband market, (2) restrictions on the use of public financing, (3) mandatory referenda, (4) restrictions on pricing and cross-subsidies, and (5) operating restrictions.

*a. Raising Municipal Entry Costs*

One legislative tactic to impede municipal networks is to add procedural requirements to the approval process that require time and expense to complete, thus raising the costs for a municipality attempting to construct a network. For example, Pennsylvania only allows municipalities to build their own networks if they obtain permission to do so from local incumbent telecommunications service providers.<sup>134</sup> If the incumbent declines to provide the requested service, the municipality may then construct its network.<sup>135</sup> Based on the terms of the statute, though, a local incumbent could theoretically delay the project by as much as fourteen months without successfully providing comparable service.<sup>136</sup>

The danger here is the potential for delay. At a minimum, a private incumbent not interested in providing service can simply run the clock for two months before the municipality can advance its planning and construction. Such delays can erode popular support for the public network or allow the incumbent additional time to exert political pressure at varying levels to derail the project. Worse still, the lack of penalties for incumbents who fail to provide the promised service leaves the door open for incumbents to act in bad faith. With the potential for delays and interference so great, the power over potential municipal networks in Pennsylvania has shifted almost fully to the incumbent private companies (even those not currently providing broadband service).

The likelihood of delays and hardships in dealing with the incumbents in this all-or-nothing way significantly raises entry costs for municipalities. Asking an incumbent for permission seems counterproductive, as it essentially asks the incumbent to give up some of its potential customers in the future, an unlikely outcome. Thus, the re-

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<sup>134</sup> 66 PA. CONS. STAT. § 3014(h) (2012).

<sup>135</sup> *See id.* § 3014(h)(2).

<sup>136</sup> *See id.* After a municipality submits a written request to the local incumbent, the incumbent has two months to opt to provide the data speeds requested to the area. Should the incumbent opt to provide the service requested, it has fourteen months from the date the request was made in which to build out the network. The statute makes no mention of penalties or other repercussions for incumbents who choose to provide the service and fail to do so within the fourteen months.

quirement of permission from a local incumbent should be done away with and replaced with something more like North Carolina's mandatory appeal to the private sector.<sup>137</sup>

Florida's law raises entry costs for municipalities by requiring that each municipality develop a detailed business plan to "ensure that revenues exceed operating expenses and payment of principal and interest on debt within 4 years."<sup>138</sup> But four years is a relatively short period in which to turn cash-flow positive given the great expense of investing in infrastructure and the relatively long life such telecommunications systems are expected to serve.<sup>139</sup>

Moreover, the goal of municipal networks is to provide a critical service that the private sector has failed to provide, and thus, like other critical public services, the focus should be on delivering the service quickly, even if this means it takes longer to become cash-flow positive. How a municipality chooses to prioritize recoupment of its investment (i.e., the length of time, if ever, over which it expects to become cash-flow positive) should be determined by the municipality based on the exigencies of its particular situation.

However, the requirement of a business plan is not a provision that should be eliminated altogether. This requirement forces a municipality to look critically and objectively at the economic realities its network will impose upon the municipality, and requires the city to come up with a plan that will provide the service at a bearable cost. Thus, while the four-year restriction is overly burdensome, mandating that municipalities present some sort of a business plan (such as the feasibility studies Utah requires<sup>140</sup>) is a provision worth maintaining.

#### *b. Restrictions on Public Financing*

Restrictions on public financing for municipal networks are another tool used to impede the spread of municipal networks. For example, one of Florida's restraints requires special votes by elected representatives to approve the issuance of debt if the debt is to mature after fifteen years.<sup>141</sup> A more onerous example exists in North Carolina, where at least two public hearings must be held on the project before the municipality may apply to the state for permission to use

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<sup>137</sup> See *infra* Part II.B.3.b.

<sup>138</sup> FLA. STAT. § 350.81(2)(c)(4) (2012).

<sup>139</sup> Cf. *supra* Part I.D (explaining the Cedar Falls, Iowa case and its eight-year path to cash-flow neutrality).

<sup>140</sup> See *infra* Part II.B.3.a.

<sup>141</sup> FLA. STAT. § 350.81(2)(e)(2).

public financing.<sup>142</sup> The state then conducts an independent review of the application before deciding whether to approve it.<sup>143</sup> As part of the review process, the public entity bears the burden of persuasion on all relevant issues, and the state will consider the “probable net revenues” of the project and issue a written report on the “reasonableness of the [public entity’s] revenue projections.”<sup>144</sup> These requirements in North Carolina are in addition to the municipality prevailing in a special election on whether the city should build the network in the first place.<sup>145</sup>

While there is certainly good reason for states to hold municipalities accountable for the debt they plan to incur, requirements that are as procedurally complex and difficult to navigate as North Carolina’s serve largely to defeat the ability of municipalities to build networks. Florida’s fifteen-year restriction, while somewhat arbitrary, is at least reasonable in that it simply requires an elected board to approve long-term debt without unduly restricting shorter-term debt. North Carolina, though, puts numerous hurdles between a municipality and its ability to build a network, including multiple public hearings, a referendum, and an application to the state. As discussed earlier,<sup>146</sup> even if successful on all the substantive matters, the delays a municipality faces in navigating the approval processes can be fatal to a network plan.

Consequently, states must walk a fine line when crafting legislation. While at face value North Carolina’s restrictions seem harmless and well-intentioned in calling for public involvement and multiple levels of review, such redundancy and excessive scrutiny has tremendous efficiency costs and makes building municipal networks far less feasible. And while a bright line is difficult to draw, the Florida restraint is certainly preferable to North Carolina’s in furthering the purposes of municipal broadband. Ideally states would go no further than a requirement that debt plans be included in some sort of overall business plan or feasibility study that must be presented prior to the municipality’s governing body voting on whether to go forward with construction.<sup>147</sup>

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<sup>142</sup> N.C. GEN. STAT. § 159-175.10 (2012).

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

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* § 160A-340.4. See *infra* Part II.B.2.c for further discussion of these referenda.

<sup>146</sup> See *supra* Part II.B.2.a.

<sup>147</sup> Compare *supra* Part II.B.2.a, with *infra* Part II.B.3.a.

c. *Mandatory Referenda*

Some states have forced municipalities to prove that their citizens are on board with the network project before the project can proceed via mandatory local referenda. In addition to North Carolina,<sup>148</sup> Louisiana<sup>149</sup> and Colorado<sup>150</sup> are two such jurisdictions. Louisiana requires that, absent local rules to the contrary, a petition calling for a vote—signed either by fifteen percent of or ten thousand qualified electors, whichever is less—must be submitted within 180 days of submission of the project’s feasibility study.<sup>151</sup> Alternatively, Colorado requires only that the ballot describe the “nature of the proposed service, the role that the local government will have in provision of the service, and the intended subscribers of such service.”<sup>152</sup>

Here, again, arises the problem of excessive procedural hurdles. The only unique feature of telecommunications service provision by a government entity as compared to other government-provided services (such as electricity, water, sewers, and roads) is that the telecommunications industry is today predominantly administered by the private sector.<sup>153</sup> Therefore, where municipal governments see their entry as beneficial to the public interest in the telecommunications realm, the municipalities should not be subject to additional burdensome proofs of public approval above those the municipality would face in undertaking a project in any of the other aforementioned areas.

If local government is competent to make decisions in those other fields without state-level interference, there appears to be no good reason for a state to require a referendum in the telecommunications field.<sup>154</sup> These referenda serve only to further delay and potentially derail a project, as they present a prime opportunity for the private sector lobby to court voters. Special rules mandating referenda that

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<sup>148</sup> See *supra* text accompanying notes 142–44.

<sup>149</sup> LA. REV. STAT. ANN. § 45:844.50 (2012).

<sup>150</sup> COLO. REV. STAT. § 29-27-201 (2012).

<sup>151</sup> LA. REV. STAT. ANN. § 45:884.50(G)(1).

<sup>152</sup> COLO. REV. STAT. § 29-27-201(2).

<sup>153</sup> O’Loughlin, *supra* note 54, at 484. One could argue that Internet service is a service best provided by local government, just as these other services already are. See *id.* at 487–88 (“According to proponents of ‘municipal broadband,’ these community-owned networks are a natural outgrowth of traditional municipal functions such as the building and maintaining of infrastructure and the providing of public services.”).

<sup>154</sup> In fact, the North Carolina statute considers the local government competent enough to determine when the public network should be sold or shut down, as the public entity “shall not be required to obtain voter approval . . . prior to the sale or discontinuance of the city’s communications network.” N.C. GEN. STAT. § 160A-340.1(b) (2012).

apply only to municipal broadband are thus inappropriate, but if a state has legislation that requires a referendum for any major municipal infrastructure project the referendum would not necessarily be unfair. In deciding whether to require a referendum, laws should treat municipal broadband projects the same as any other municipal infrastructure project.

*d. Pricing and Cross-Subsidy Restrictions*

State regulations can also include two key financial constraints on municipal networks, namely that service must be priced at or above cost and that the municipality may not cross-subsidize the public network via other city revenue sources. Both Florida<sup>155</sup> and North Carolina<sup>156</sup> have adopted such restrictions. The price restraints are designed to keep prices in line with what a private entity would charge so that municipalities cannot price out private competitors.<sup>157</sup> The cross-subsidy prohibition furthers the goal of preserving fair competition by preventing cost reductions (which could translate into price cuts) with revenues not associated with the service.<sup>158</sup>

While both of these restraints serve a critical function in preserving private ISPs' ability to compete effectively, they also impede public network construction by making the public network less financially viable.<sup>159</sup> Assuming private ISPs refuse to enter the market because they do not believe they can provide service at a profit, or even at a break-even point, no municipality would be able to enter an unserved market given these restraints. The entire reason for municipal networks in unserved markets is to overcome the private sector's unwillingness to enter the market. These restraints preventing cross-subsidies force cities to make the networks at least cash-flow neutral within a certain time, as otherwise the funding for the network's operation would run dry. Similarly, forcing prices up to the levels of cash-flow neutrality would price out many potential customers, thus depriving them of the benefit the municipality seeks to provide.

Instead of imposing such requirements up front and indefinitely, the more prudent course of action is to impose these restraints only when private competition is reasonably certain to enter the market.

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<sup>155</sup> FLA. STAT. § 350.81(2)(f) (2012).

<sup>156</sup> N.C. GEN. STAT. § 160A-340.1(a)(7).

<sup>157</sup> See O'Loughlin, *supra* note 54, at 488–89.

<sup>158</sup> See *id.*

<sup>159</sup> See Hannibal Travis, *Wi-Fi Everywhere: Universal Broadband Access as Antitrust and Telecommunications Policy*, 55 AM. U. L. REV. 1697, 1771 (2006).

One solution is thus to amend these provisions to apply only upon a private ISP notifying the municipality that it plans to provide service in the relevant market along with proof of such intent and a plan with an estimate of when entry is expected. The municipality would then face a deadline to bring its prices in line with costs and to eliminate cross-subsidies so that once a private ISP enters the picture, the competition between the two is fair. Such a solution allows for maximum broadband distribution yet also preserves the private sector's ability to penetrate markets served by public entities.

*e. Other Operating Restrictions*

An additional two key operating restraints face municipal networks in some states: advertising restrictions and tax collection requirements. North Carolina imposes both.<sup>160</sup> First, North Carolina municipalities cannot advertise public network service on “a public, educational, or governmental access channel if the city requires another communications service provider to carry the channel,” nor can they use resources not accounted for in the public network's books to promote the services.<sup>161</sup> Second, North Carolina's public networks must collect all applicable taxes and fees that a private ISP would collect and pay them to the relevant authorities, including the city's own general fund.<sup>162</sup>

As with price and cross-subsidy restrictions,<sup>163</sup> imposing advertising and tax restrictions is best reserved until competition appears reasonably certain. While the advertising restriction alone is relatively minor, it is still an impediment to efficient distribution of service, as it needlessly adds costs in unserved markets. The local government should be able to take advantage of its unique resources, such as public-access channels, to distribute the service more cost-effectively because it more efficiently furthers the goal of the public network to provide an otherwise unavailable yet critically important service in high-speed Internet.

That same logic translates to tax collection. While the municipality should reasonably expect to collect and pass along taxes and fees to other authorities (such as the state and federal governments), there seems to be little purpose served in requiring the city to pay taxes to itself other than to benefit private ISPs by raising municipal networks'

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<sup>160</sup> See N.C. GEN. STAT. § 160A-340.1(a).

<sup>161</sup> *Id.* § 160A-340.1(a)(6).

<sup>162</sup> *Id.* § 160A-340.1(a)(9).

<sup>163</sup> See *supra* Part II.B.2.d.

costs. Instead of collecting this revenue to pay to itself, it makes more sense to permit the city to pass along those tax savings to customers as a price reduction to encourage adoption (if the city so chooses). However, should a private ISP announce its intent and ability to enter the market, fairness dictates that the city begin collecting the relevant taxes in the interest of fair competition.

### 3. *Provisions to Retain*

The following three types of provisions are worth keeping mostly unchanged because they offer the private sector a fair level of protection from public competition without unfairly delaying or otherwise inhibiting municipal networks. The first restriction, which requires municipalities to conduct feasibility studies before beginning construction, forces cities to think critically and obtain an objective analysis of the various impacts, both positive and negative, that the project will likely have. The second seeks to avoid battles between the private sector and municipalities by requiring municipalities to solicit broadband service from the private sector before building its own network. The third provision is unique from those previously discussed in that it creates a safe harbor from the restrictions imposed for municipalities that qualify as unserved.

#### a. *Mandatory Feasibility Studies*

One rather beneficial procedural obstacle that Utah has adopted is the mandatory feasibility study.<sup>164</sup> Utah's law requires that an outside consultant be retained to conduct a feasibility study, which plays a central role in the city's decision-making process.<sup>165</sup> The feasibility study must meet certain requirements, such as explanations of the impact the city's provision of telecommunications service will have on competition in the market,<sup>166</sup> whether a private party would provide the service if the city failed to do so,<sup>167</sup> the costs of construction,<sup>168</sup> projected demand growth for the service,<sup>169</sup> and projected revenues and expenses for the next five years.<sup>170</sup>

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<sup>164</sup> UTAH CODE ANN. § 10-18-202(2) (LexisNexis 2012).

<sup>165</sup> *Id.* § 10-18-203.

<sup>166</sup> *Id.* § 10-18-203(2)(a)(ii).

<sup>167</sup> *Id.* § 10-18-203(2)(b)(ii).

<sup>168</sup> *Id.* § 10-18-203(2)(c)(i)–(ii).

<sup>169</sup> *Id.* § 10-18-203(2)(d)(ii).

<sup>170</sup> *Id.* § 10-18-203(2)(e)–(f).

Contrasted with requirements for cash-flow positivity, as exemplified by Florida's law,<sup>171</sup> Utah's feasibility study seems greatly preferable because its mission is to educate the municipality's decision-makers about the potentially harsh realities the city will face in its endeavor, rather than to impose onerous requirements on the project that may serve to undermine the project's prospects for success. Insofar as Utah's requirement meets this educational goal, it should be retained.

The key difference between the Florida approach and the Utah approach is the impact each has on the prospects for the municipal network's success in providing service. The Florida approach sets a high bar for the project to meet in order to avoid some form of termination, whereas the Utah approach lays out specific factors that the study must examine so that a better-informed decision can be made in the first place. This leaves the ultimate decision in the city's hands, as Utah only requires that the feasibility study result in a finding that the project can generate sufficient revenues to operate cash-flow neutral in the mid- to long-run.<sup>172</sup> While Utah's requirement of cash-flow neutrality may not be ideal, its imposition of a feasibility study remains a worthwhile one. Designed as an instrument to facilitate rational decision-making, the feasibility study is a highly valuable tool that states should require municipalities to invest in prior to deciding to construct a network.

*b. Mandatory Private Sector Appeals*

An innovative approach to resolving the public-private debate over municipal broadband is found in North Carolina's requirement that municipalities issue a request for proposals to private ISPs as part of the approval process.<sup>173</sup> Specifically, the city must make clear the nature and scope of broadband service it wants provided and explain what actions the municipality is prepared to take in facilitating service provision (e.g., subsidies, rights-of-way, tax incentives, etc.).<sup>174</sup> The municipality must then review the proposals it receives, considering "any relevant factors" including, but not limited to, technical matters, the proposer's experience in the market, and costs.<sup>175</sup>

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<sup>171</sup> See *supra* Part II.B.2.a.

<sup>172</sup> UTAH CODE ANN. § 10-18-202(3) (LexisNexis 2012).

<sup>173</sup> N.C. GEN. STAT. § 160A-340.6(a) (2012).

<sup>174</sup> *Id.* § 160A-340.6(b).

<sup>175</sup> *Id.* § 160A-340.6(d).

A defining characteristic of North Carolina's system is that the municipality is then entitled to negotiate contracts with "any responsible proposer," bargaining over the relevant factors in order to ascertain which proposal will best suit the city's demands.<sup>176</sup> Once the city concludes its negotiations with all proposers and selects the most favorable proposal, a sixty-day window opens during which the city and that private company must finalize a contract, after which the city may open negotiations with the next-best proposer.<sup>177</sup> Should the municipality fail to reach an agreement with the next-best proposer, it may build its own network.<sup>178</sup>

On the one hand, this system suffers from the all-too-common flaw of adding procedural hurdles to the project, giving private ISPs the opportunity to needlessly delay the project simply by interacting for the sake of wasting time.<sup>179</sup> However, the negotiations permitted during this time make this system far superior to the requests for permission to build, as in Pennsylvania.<sup>180</sup> Such negotiations go to the heart of what the private ISPs want—the ability to provide service for profit—while allowing the municipality a chance to bring in the broadband Internet service at an affordable rate, perhaps via various forms of public subsidies. If successful, such negotiations will end in a compromise in which both sides get what they want, eliminating the need for protracted legal or public opinion battles. In the end, if the city still opts to build its own network, its actions will be out of necessity as the private sector will have opted not to enter the market on acceptable terms.

While this provision is quite reasonable as a middle ground, it in no way alleviates the need to reform other provisions in state laws, including North Carolina's. Other burdensome provisions weigh heavily against a municipality in its negotiations with private ISPs. In the context of this particular provision, the more difficult it is for a city to build a network, the less flexible private ISPs are likely to be in negotiations as they can be confident that even if negotiations fail the public network may still never materialize.

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* § 160A-340.6(f).

<sup>178</sup> *Id.*

<sup>179</sup> *See supra* Part II.B.2.a–d.

<sup>180</sup> *See supra* Part II.B.2.a (describing Pennsylvania's requirement that incumbent ISPs have time to consider entering the market).

*c. The Unserved Area Exemption*

Recognizing the hardships faced by citizens in rural areas, some states have adopted the unserved area exemption, which protects municipalities deemed “unserved” by the private sector from the requirements of the statute. For example, North Carolina’s version defines an unserved area as “a census block . . . in which at least fifty percent (50%) of households either have no access to high-speed Internet service or have access to high-speed Internet service only from a satellite provider.”<sup>181</sup> Municipalities seeking this exemption must petition the North Carolina Utilities Commission for a determination that the area is unserved, at which time private ISPs may also object to the petition on any grounds that argue against the city’s eligibility to be deemed unserved.<sup>182</sup>

This form of exemption is absolutely critical to broadband deployment, especially in light of the FCC’s findings that deployment is proceeding more slowly than desired.<sup>183</sup> Unserved communities like those specified in North Carolina’s statute are exactly the sort of municipalities likely to crave a public network to fill the lack of broadband service. Those same communities are also likely to be viewed by the private sector as unprofitable and thus private ISPs are unlikely to enter the market. Consequently, municipal networks are the only real hope of broadband access for citizens in those areas, and imposing the restraints discussed in this Note would likely obliterate the prospects of a public network coming to fruition. The modified provisions discussed in Part II.B.2 are designed to protect ISPs’ interests in expanding into new markets. However, these procedural hurdles are not necessary in small rural communities because ISPs are unlikely to expend the resources necessary to serve these remote and sparsely populated areas.

### III. JUSTIFICATIONS FOR THE STATE-LEVEL PRONG

The primary justification for the state-level prong is that it facilitates broadband penetration in both unserved and underserved areas. The FCC expressed this view in its analysis of the circumstances of *Missouri Municipal League*.<sup>184</sup> Simply put, municipalities are entities

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<sup>181</sup> N.C. GEN. STAT. § 160A-340.2(b).

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

<sup>183</sup> See *supra* Part I.A and I.C for discussions of the FCC’s position on broadband deployment rates.

<sup>184</sup> See *Nixon v. Mo. Mun. League*, 541 U.S. 125, 142 (2004) (Stevens, J. dissenting) (“[M]embers of the Federal Communications Commission . . . have taken the view that municipi-

that can provide broadband Internet service and, in some cases, may be the only entity willing to take on the expense of providing such service. Thus, restrictions on municipalities' ability to provide that service, whether procedural hurdles or cost-raising measures, inhibit the national availability of broadband service.

Broadband deployment is analogous to the deployment of electricity in the United States in the early twentieth century. In the 1880s, most electricity in the United States was supplied by large, private companies that did not view extending service to less densely populated areas as profitable or feasible and thus chose to ignore them in favor of urban markets.<sup>185</sup> In 1889, Detroit was the first municipality to create its own power company, which was successful in cutting costs to customers.<sup>186</sup> Over the next few decades, following Detroit's example, over 3,000 municipalities formed their own power companies.<sup>187</sup> One commentator identified three major impacts of these developments: (1) Congress passed the Rural Electrification Act of 1936, which provided federal assistance for electricity service deployment to rural areas; (2) public companies put added pressure on private companies to operate more efficiently, lowering costs and igniting innovation; and (3) unserved municipalities were able to remain economically viable by taking matters into their own hands and building their own power systems.<sup>188</sup>

The similarities between the electricity and Internet markets in this context are striking. FCC Commissioner Copps pointed directly to rural electricity expansion in his praise for municipal broadband projects.<sup>189</sup> A scholar notes that private ISPs are acting the same way that private power companies did in lobbying strongly in opposition to public entities entering the market.<sup>190</sup> Thus, there is reason to believe that, with widespread municipal broadband, the result would be similar in that broadband service would become far more widely available and arguably at higher quality. Such a similarly positive result is not certain, as broadband technology continues to evolve relatively quickly as compared to plumbing or paving, but history indicates that

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pal entry 'would further the goal of the [Telecommunications Act of 1996] to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential.').

<sup>185</sup> O'Loughlin, *supra* note 54, at 483.

<sup>186</sup> *Id.*

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

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

<sup>189</sup> Gotsch, *supra* note 87.

<sup>190</sup> O'Loughlin, *supra* note 54, at 490.

municipalities stand a good chance of satisfactorily filling the role of service provider. Moreover, this Note is more concerned with unserved communities, as most areas populated enough to have private ISP broadband service available have no need—and thus little, if any, desire—to construct a municipal network that would compete directly with the private sector.

Another justification for municipal broadband is that municipal networks combat the private sector's tendency toward monopolistic or oligopolistic behavior, keeping prices reasonable and quality of service high.<sup>191</sup> Similarly, consolidation in the telecommunications industry is concentrating control over the Internet in the hands of a few private companies.<sup>192</sup> Municipalities serve as competitive threats to the established private ISPs, forcing them to keep prices down and quality high. Laws that restrict municipal entry into the market degrade the efficacy of this deterrent effect and thus should be minimized.

#### IV. COUNTERARGUMENTS TO THE STATE-LEVEL PRONG

The most prominent argument against municipal networks is that they are likely to fail under their own expenses and debt burdens. However, this counterargument has been addressed throughout the proposed solution, as debt management is an integral part of the proposed solution via feasibility studies.<sup>193</sup>

A novel counterargument to this Note's proposed solution is that some state laws may not actually apply to broadband networks at all, as broadband is technically classified as an "information service."<sup>194</sup> But this counterargument is speculative at best, as it is largely semantic and lacks any verifiable evidence that such an interpretation has ever been applied.<sup>195</sup> Moreover, the author advancing this argument, John Blevins, focused his research on the signaling and chilling effects of municipal broadband regulation, agreeing that the restrictions "have played a key role in stifling municipal services," and thus in

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<sup>191</sup> See *id.* at 483.

<sup>192</sup> See Craig Dingwall, *Municipal Broadband: Challenges and Perspectives*, 59 *FED. COMM. L.J.* 67, 76–77 (2006).

<sup>193</sup> See *supra* Part II.B.3.a.

<sup>194</sup> Blevins, *supra* note 10, at 110–11 ("Indeed, several of the state laws never applied to broadband, or stopped applying after the FCC reclassified broadband access as an 'information service,' which . . . arguably limits the scope of some states' restrictions on municipal broadband," as some laws restrict "telecommunications services.").

<sup>195</sup> *Id.* at 111.

stifling broadband deployment.<sup>196</sup> Therefore, Blevins's argument does not obviate the need for this Note's proposed solution.

Another counterargument addresses the problem of broadband deployment by instead using federal funds to subsidize private construction of broadband networks in rural areas. For example, in October 2011, the FCC approved a plan to expand the purpose of the \$4.5 billion Universal Service Fund ("USF") from helping deploy only telephone service to rural areas to deploying broadband to rural areas.<sup>197</sup> In July 2012, the FCC announced \$115 million in public funding would be disbursed from the Connect America Fund (created via the USF's modernization) to deliver broadband service to about 400,000 customers in rural areas within three years.<sup>198</sup>

However, this sort of solution is insufficient given the still-significant lack of broadband deployment, especially in rural areas.<sup>199</sup> The USF and similar public funds are not enough to fill the gaps quickly and municipalities, which are vastly more responsive to their own economic needs and limits than public funds, are in a far better position to assess their respective situations. While subsidies of this sort are helpful, they do not go far enough, as unserved communities remain at the mercy of a large entity for help in obtaining broadband service (albeit a federal one rather than a private ISP) rather than having the power to take matters into their own hands and fix the problem quickly.

Another argument made against municipal networks is that they are anticompetitive to the point of creating antitrust liability for their owners. While the state action doctrine shielding state-sanctioned enterprises from federal antitrust law likely does not apply to municipalities,<sup>200</sup> this argument still fails because the proposed solution includes

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<sup>196</sup> *Id.*

<sup>197</sup> Whitney Burdette, *FCC Approves Plan to Reform Universal Service Fund*, ST. J. (Dec. 12, 2011), <http://www.statejournal.com/story/15915426/fcc-approves-plan-to-reform-universal-service-fund>.

<sup>198</sup> News Release, FCC, FCC Kicks-Off 'Connect America Fund' with Major Announcement: Nearly 400,000 Unserved Americans in Rural Communities in 37 States Will Gain Access to High-Speed Internet Within Three Years (July 25, 2012), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0725/DOC-315413A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0725/DOC-315413A1.pdf).

<sup>199</sup> See News Release, FCC, FCC Broadband Report Finds Significant Progress in Broadband Deployment, but Important Gaps Remain (Aug. 21, 2012), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0821/DOC-315866A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0821/DOC-315866A1.pdf) (finding that 19 million Americans still lack access to fixed broadband service, 14.5 million of whom live in rural areas).

<sup>200</sup> See *Parker v. Brown*, 317 U.S. 341, 350–51 (1943) ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."). The state action doctrine may not apply to municipal broadband, though, because *Parker v. Brown* requires the state to affirma-

safeguards to prevent the municipal network from using its public resources to anticompetitive ends.<sup>201</sup>

Furthermore, as a matter of economic policy, the ISP with the greatest advantage in just about any market will be the incumbent (i.e., the first entrant to the market). Professor Hannibal Travis observed that “[t]he market for local access to broadband tends to be a ‘natural monopoly,’ at least in its stages of ‘growth,’” as “large economies of scale . . . favor monopolists over new entrants” regardless of whether the entity that first served the market is owned privately or publicly.<sup>202</sup> Considering the safeguards included in this Note’s proposed solution and the nature of the broadband market, any monopolistic advantage a municipal network enjoys would be the product of natural market forces. Any private ISP would enjoy the same advantages if it were to take advantage of this Note’s proposal to require a private sector appeal before constructing a municipal broadband network.<sup>203</sup>

A counterargument from the extreme end of the pro-municipal network spectrum is that this Note’s proposed solution does not go far enough and that municipalities should seize control of the “last mile”<sup>204</sup> of broadband infrastructure, leaving private ISPs to handle the “backhaul.”<sup>205</sup> The argument is efficiency-based, as it asserts that separating the backhaul from the last mile will encourage the separate entities to innovate and improve in their specific fields while cutting the excess costs associated with each ISP having to build its own lines in both the last mile and the backhaul.<sup>206</sup>

However, even the author of this argument admits that it might be an “unworkable” solution designed to educate regulators by aiding their understanding of “core issues with the current regulatory struc-

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tively sanction the action, in this case the construction of municipal broadband networks. For further discussion of the state action doctrine in the municipal context, see generally Donald Gene Kalfen, *Municipal Antitrust: An Overview*, 60 CHI.-KENT L. REV. 349 (1984).

<sup>201</sup> See *supra* Part II.B.2.d–e (providing, among other things, that some advantages municipalities enjoy in constructing and operating broadband networks which private ISPs lack cannot be used by the municipality once private ISPs declare their intent to enter the market).

<sup>202</sup> See Travis, *supra* note 159, at 1715–16.

<sup>203</sup> See *supra* Part II.B.3.b.

<sup>204</sup> The “last mile” includes the wires run from the utility pole to the home. Myles Roberts, Note, *Opening the Last Mile to Competition*, 4 VA. SPORTS & ENT. L.J. 309, 310–11 (2005).

<sup>205</sup> “Backhaul” includes the more centralized data processing and delivery equipment into which the “last mile” is connected. See Rural Broadband Report, 24 FCC Rcd. 12,791, 12,828 (Oct. 19, 2009).

<sup>206</sup> See Roberts, *supra* note 204, at 331–33, 336–37.

ture” in hopes of facilitating a “major regulatory overhaul.”<sup>207</sup> While the proposal is bold and well-articulated, it is impractical in its scope and ambition as well as dangerous in creating a monopolist in every market that would lack incentive to innovate over the last mile. In contrast, this Note’s proposed solution is far more practical in that its suggestions are more politically palatable and less jarring to the status quo.

Another potential response to this Note’s proposed solution is to encourage municipalities to subsidize advanced wireless Internet service (e.g., individual wireless Internet computer plug-in devices from Verizon Wireless) wholesale from private ISPs for the benefit of residents and businesses. While this would save the municipality a great deal of money and time, it is ultimately an insufficient response to the core problems this Note seeks to resolve. Aside from wireless broadband’s present inferiority to wired networks in both speed and reliability,<sup>208</sup> this solution still relies on private ISPs to provide service to isolated and unserved rural areas, a prospect of questionable profitability for the private ISPs. The subsidization plan also commits the municipality to dedicating its resources to a budget expense indefinitely, without the prospect of recovering the costs in the long run through the operation of a profitable ISP business or via sale of the municipal network to a private entity in the future.

#### CONCLUSION

State legislatures are in the unenviable position of having to balance the sometimes competing interests of their various constituencies, and that is the case in the municipal broadband context. Many states have put too much emphasis on the private ISPs’ concerns by effectively prohibiting municipal broadband networks. While the private ISPs’ concerns about direct competition with public entities for customers are legitimate, states should not take the drastic step of prohibiting public entities from entering the broadband market entirely. Instead, states should carefully construct laws that are designed to facilitate municipal broadband in underserved communities because of the great benefits these communities derive from broadband. These laws, though, should also reasonably protect the private sector’s interests in expanding its networks to these same areas.

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<sup>207</sup> *Id.* at 310.

<sup>208</sup> *See supra* Part I.B.

In light of the tremendous industry pressure the private sector exerts on state legislatures, the federal government must force states to relax their laws impeding municipal broadband. The most effective way for the federal government to do so is by amending section 253(a) of the Telecommunications Act of 1996 to expressly apply to public entities. Amending the law would grant the FCC authority to examine the impact of state laws on a case-by-case basis, declaring those statutes which effectively prohibit municipal broadband to be preempted.

Above all, policymakers at both the state and federal levels need to look past the economics of this debate and see the real impact the lack of broadband access has on people's everyday lives. The prospect of a home lacking electricity or telephone service today is unthinkable to most Americans, but this was not always the case. Federal, state, and local governments all played integral and often direct roles in ensuring that Americans in all areas of this expansive nation would have access to these critical services at affordable prices. As the Internet's role in daily American life continues to grow, the need for reliable and affordable high-speed Internet access will only become more pressing. Federal and state legislators should follow in their electricity-focused predecessors' footsteps by embracing municipal broadband as a means to illuminate the information technology darkness in which those without affordable broadband are forced to live.

# EXHIBIT 47

# From critic of Click! to business partner

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*April 21, 2008 Publication: News Tribune, The (Tacoma, WA) Page: B05 Word Count: 399*

Editor's note: This originally appeared on the Inside the Editorial Page blog: [blogs.thenewstribune.com/oped](http://blogs.thenewstribune.com/oped)

Times do change. Pierce County telecom entrepreneur Brian "Skip" Haynes once hated the very idea of Tacoma Power's Click!Network.

Now his rapidly growing company, Rainier Connect, is using the utility's fiber-optic network to expand its business and is building a new headquarters in Tacoma's Brewery District.

The irony is not lost on the folks at Tacoma Power, although there was no trace of it in the announcement by Click! last week. The news: Rainier Connect, the 98-year-old, family-owned firm formerly known as Mashell Telecom, has signed to become the fourth private company, or ISP, providing broadband Internet services via cable modem to Click! customers.

Rainier Connect has been using the city's fiber-optic network since 2001 to provide phone and data service.

No small irony here. Back in 1996, when the City Council debated whether to allow Tacoma Power to build the network and provide a cable-TV alternative to widely detested cable monopoly Viacom (later TCI, now Comcast), Haynes objected loudly.

Haynes authored an oped piece for The News Tribune arguing that government had no business competing with private telecom companies. But Viacom's reputation for lousy service was so bad that the public clamored for any reasonable alternative to the cable monopoly, even if it was Tacoma Power. The council vote was unanimous.

There's no disgrace in Rainier Connect's new hookup with Click! Network. The company, based in Eatonville for most of its history, has prospered serving the rural market and built a reputation for responsive service. It was one of the first small, independent firms to take advantage of telecom deregulation to offer "bundled" products.

Now Haynes and Rainier Connect are ready to compete with Comcast and the three ISPs that operate over the Click! Network. And the winners are the Click! customers who have far more telecom alternatives to choose from than most U.S. consumers.

We haven't talked to Haynes lately. But he probably would admit that he never foresaw the competitive opportunities that Click! ultimately opened up for his own business.

Times do change.

Read more here: <http://blog.thenewstribune.com/opinion/2008/04/17/if-you-cant-beat-em/#storylink=cpy>

## **EDITORIAL: From critic of Click! to business partner**

(News Tribune, The (Tacoma, WA) (KRT) Via Thomson Dialog NewsEdge) Apr. 21--Times do change. Pierce County telecom entrepreneur Brian "Skip" Haynes once hated the very idea of Tacoma Power's Click!Network.

Now his rapidly growing company, Rainier Connect, is using the utility's fiber-optic network to expand its business and is building a new headquarters in Tacoma's Brewery District.

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No small irony here. Back in 1996, when the City Council debated whether to allow Tacoma Power to build the network and provide a cable-TV alternative to widely detested cable monopoly Viacom (later TCI, now Comcast), Haynes objected loudly.

*(Correction: TCI, not Viacom, was the unpopular cable giant serving Tacoma at the time. As the commenter notes, -TCI CEO Leo Hindery, a Bellarmine grad, showed up to lobby strenuously against the Tacoma Power proposal.)*

Haynes authored an oped piece for The News Tribune arguing that government had no business competing with private telecom companies. But Viacom's reputation for lousy service was so bad that the public clamored for any reasonable alternative to the cable monopoly, even if it was Tacoma Power. The council vote was unanimous.

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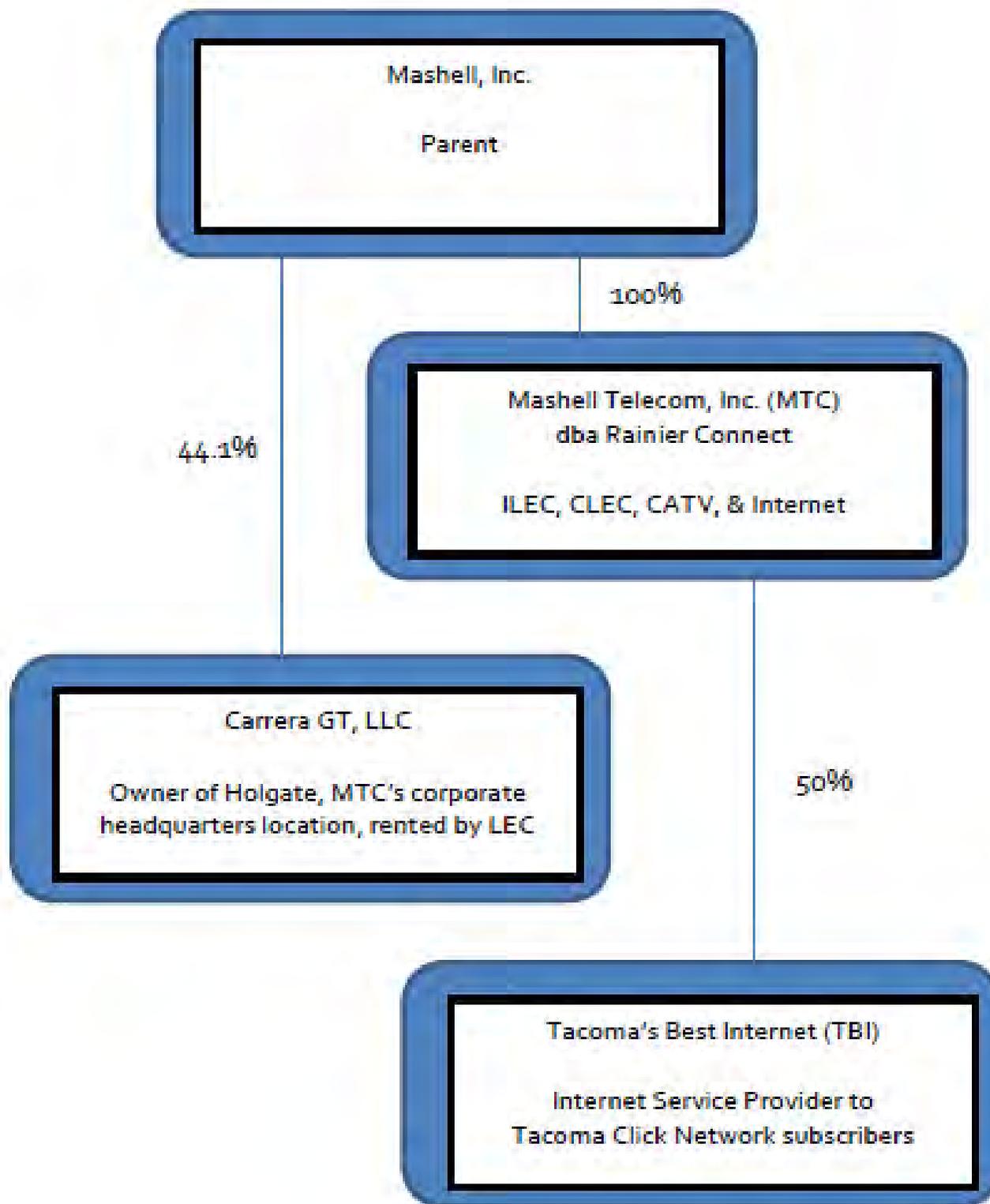
We haven't talked to Haynes lately. But he probably would admit that he never foresaw the competitive opportunities that Click! ultimately opened up for his own business.

Times do change.

To see more of The News Tribune, or to subscribe to the newspaper, go to <http://www.TheNewsTribune.com>.

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# EXHIBIT 47 (a)



**EXHIBIT 47 (b)**

# ALLIANCE FOR TACOMAS BRIGHTER FUTURE, 2017

[Overview](#)
[Contributions](#)
[Expenditures](#)
[Loans](#)
[Pledges](#)
[Debt](#)
[Reports](#)

**Cash contributions:** \$56,500.00

## Top 45 contributors to this campaign

Amounts shown are aggregate totals of cash and in-kind contributions.

NAME	CITY	STATE	CASH/IN-KIND	AMOUNT
TOTE MARITIME ALASKA INC.	TACOMA	WA	Cash	\$15,000.00
US OIL AND REFINING CO.	TACOMA	WA	Cash	\$15,000.00
COHEN LOREN	RUSTON	WA	Cash	\$10,000.00
RAINIER CONNECT	TACOMA	WA	Cash	\$3,750.00
TACOMA'S BEST INTERNET	TACOMA	WA	Cash	\$3,750.00
URBAN ACCESSORIES INC.	TACOMA	WA	Cash	\$2,500.00
THOMPSON CONSULTING GROUP INC.	TACOMA	WA	Cash	\$2,500.00
WASHINGTON BEVERAGE ASSN PAC	OLYMPIA	WA	Cash	\$2,000.00
SIMON HERB	TACOMA	WA	Cash	\$1,000.00
WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES PAC	EVERETT	WA	Cash	\$1,000.00

# ALLIANCE FOR TACOMAS BRIGHTER FUTURE, 2017

All expenditures made by this campaign or committee.

RECIPIENT NAME	DATE	DESCRIPTION	AMOUNT	REPORT
COLUMBIA COMMUNICATIONS LLC	10/10/2017	CONSULTING	\$10,000.00	C4
COLUMBIA COMMUNICATIONS LLC	10/23/2017	MAIL OPP MERRITT TACOMA MAYOR SUBVENDORS JOHNSON COX, TEKS SVS, L2 DATA, MILLENNIUM DESIGN	\$16,497.67	C4
COLUMBIA COMMUNICATIONS LLC	10/30/2017	MAIL SUP. WOODARDS TACOMA MAYOR VENDORS JOHNSON COX, TEKS SVS, L2 DATA, MILLENNIUM DESIGN	\$10,993.59	C4
COLUMBIA COMMUNICATIONS LLC	11/14/2017	CONSULTING	\$4,000.00	C4
COLUMBIA COMMUNICATIONS LLC	10/31/2017	MAILING OPPOSING MERRITT TACOMA MAYOR- SUBVENDOR JOHNSON COX PRINTING, USPS	\$11,332.48	C4
EXPENSES OF \$50 OR LESS	09/01/2017		\$30.00	C4
EXPENSES OF \$50 OR LESS	10/17/2017		\$30.00	C4
EXPENSES OF \$50 OR LESS	10/31/2017		\$30.00	C4
SEATTLE CFO LLC	11/30/2017	ACCOUNTING/COMPLIANCE	\$1,586.26	C4
SEATTLE CFO LLC	11/14/2017	ACCOUNTING/COMPLIANCE	\$2,000.00	C4

## EXHIBIT 2

### AFFILIATED TRANSACTIONS

Mashell Telecom, Inc. rents office space, utilized as corporate headquarters and network operations center, from its affiliate, Carrera GT, LLC. This leased property facilitates both the ILEC and CLEC operations of the business and is appropriately allocated between regulated and nonregulated operations using Part 64 factors and recorded in account 6121-3, Land & Building Expense-Rents.

During 2015, the Company along with another Click Preferred ISP, NetVenture, transferred all Click Network Subscribers to an affiliate Tacoma's Best Internet, LLC. This transfer provided the Company with a 50% membership equity in TBI. The Company entered into a management agreement with TBI to provide support to TBI's entire subscriber base. This agreement applies only to CLEC operations and all associated expenses and revenue are properly allocated to nonregulated operations.

Certain shareholders holding five percent or more of the stock, directly or indirectly, of the Company are also employees of the Company and receive from the Company employment compensation together with employment-associated benefits in accordance with benefit plans that are in place.

# EXHIBIT 48

## **Construction and Maintenance**

Tacoma Power has a number of established preventive and predictive maintenance programs and continues to develop more. For example, the substation predictive maintenance program can identify substation equipment requiring corrective action before a failure occurs through utilization of infrared, oil sample testing, and dissolved gas analysis. Tacoma Power owns and maintains approximately 49,000 power poles. The Pole Replacement program strategy is to test and treat 9% of the poles annually maintaining an 11-year cycle. Tacoma Power also performs tree trimming around its distribution and transmission lines, maintaining two and four year trimming cycles along with programs to replace dangerous trees with utility friendly trees.

## **Telecommunications Infrastructure**

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

The network consists of a hybrid fiber-optic coaxial ("HFC") system, which delivers two-way signals for cable TV, cable modem Internet services, and advanced metering. In addition, SONET ("Synchronous Optical Network") and Gigabit Ethernet technologies are used to support communications across Tacoma Power's transmission and distribution system and to carry out data transport services for commercial customers. The network was designed and constructed to meet high telecommunications standards, containing a redundant backbone and redundant service loops, which seek to ensure uninterrupted signal transport in the event of a network break. A network surveillance system allows Tacoma Power to monitor the system at all times.

**Commercial Telecommunication Services.** Launched in 1998 under the brand name Click! Network, Tacoma Power provides three commercial telecommunication services to customers of Tacoma Power: retail cable television, wholesale broadband transport and wholesale high-speed Internet over cable modem. Click! Network is one of several providers of telecommunications services in the Tacoma area.

Click! Network is accounted for as part of the Electric System. In 2016 Click! Network's annual revenues were approximately \$26.6 million, and annual operating expenses plus gross earnings taxes were approximately \$29.7 million.

Cable television is Click! Network's primary retail business. Click! currently has approximately a 15% share of a very competitive local cable television market. Cable TV products available to both residential and business customers include broadcast television, digital and high-definition channels, digital video recording capability, TiVo with access to over-the-top ("OTT") content such as Netflix, Hulu, YouTube and Pandora, TVEverywhere, and a wide variety of video-on-demand services. Video-on-demand services include local programming tied to schools, colleges, local governments and community organizations strengthening Click! Network's brand identity in the communities served.

Under wholesale Master Service Agreements, seven telecommunications carriers provide high capacity last mile data transport circuits to their customers utilizing Click! Network's telecommunications infrastructure. The seven telecommunications carriers provide SONET data services ranging from DS-1 lines to OC-48 lines and customized Metro Ethernet circuits to meet data transport and web access needs of large and small businesses in the Tacoma area.

Also under wholesale Master Service Agreements, two qualified locally based Internet Service Providers ("ISPs") provide high-speed Internet services via cable modems to their customers utilizing Click! Network's telecommunications infrastructure. The ISPs provide a variety of speed packages to meet the needs of the residential

and business consumers in the Tacoma area. As part of the contract, the two ISPs also provide customer service, cable modem installation, customer premise equipment and technical support services to their Internet customers.

Click! ended 2016 with 17,468 cable TV customers, 23,344 wholesale high-speed Internet service customers, and 173 wholesale broadband transport circuits.

Click! also continues to provide the City of Tacoma I-Net services to approximately 190 sites to keep the cost of telecommunications low for many governmental entities.

Click! Network implemented a 12.9% cable TV service rate increase effective March 1, 2017. An additional cable TV rate increase is planned for March 1, 2018. These cable TV rate increases are expected to generate approximately \$7.7 million in additional revenue. A major portion of additional revenue will be used to cover increases in programming costs.

### **CAPITAL IMPROVEMENT PROGRAM**

Tacoma Power has funded its past capital improvement programs from contributions in aid of construction, proceeds of Parity Bonds and subordinate lien revenue bonds, and Revenues of the Electric System. The actual amounts spent during the past five years, together with the sources of funds used, are displayed in the table below.

#### **Historical Sources of Capital Improvement Funds (\$000)**

Source of Funds	2012	2013	2014	2015	2016
Parity and Subordinate Lien Bond Proceeds	\$ 51,730	\$ 35,723	\$ 58,834	\$ 58,003	\$ 50,995
Contributions in Aid of Construction <sup>(1)</sup>	4,716	3,735	3,029	4,777	3,293
Cash Reserves	16,643	23,656	21,160	19,301	30,536
<b>Total</b>	<b>\$73,089</b>	<b>\$63,114</b>	<b>\$83,023</b>	<b>\$82,081</b>	<b>\$84,824</b>

(1) Customer contributions to fund capital projects.  
Source: Tacoma Power

Tacoma Power has a long-term goal to finance an average of 50% of its normal capital requirements from net operating revenues with the balance from contributions in aid of construction received from customers and borrowed funds. However, due to varying water conditions, the amount of the capital improvement program, and periodic cash defeasance of outstanding Parity Bonds, the amount actually financed from net operating revenues varies from year to year. From 2012 to 2016, Tacoma Power financed an average of 66% of its capital improvements from borrowed funds. Tacoma Power's policy is to fund major projects with borrowed funds.

the City Council. The Department's budget is presented to the Board for review and approval and then forwarded to the City Council for approval and inclusion in the City's budget. The Board meets twice monthly.

The Department consists of the Light Division ("Tacoma Power"), Water Division ("Tacoma Water"), and Belt Line Railroad Division ("Tacoma Rail"). The Board has supervision and control over most Department business. In the case of budgets, rates, bond issues, and additions and betterments to a utility system and system expansions, actions approved by the Board must also be approved by the City Council.

The Board appoints the Director of Utilities who is the chief executive officer of the Department. The Board must evaluate the performance of the Director annually and reappoint the Director every two years subject to reconfirmation by the City Council with the next reconfirmation scheduled for 2017. The reappointment of the Director has been approved by the Board and is currently pending before the City Council. William A. Gaines will retire from the position, effective December 2, 2017. The Director, with the concurrence of the Board, has the power to appoint division superintendents.

Utility rates and charges are initiated by the Board and adopted by the City Council, and are not subject to review or approval by any other governmental agency. See "ELECTRIC SYSTEM CUSTOMERS, ENERGY SALES, REVENUES AND RATES—Electric Rates."

The City Charter provides that the revenues of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof, including a reasonable gross earnings tax imposed by the City Council for the benefit of the general fund of the City, 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 service to consumers. The funds of any utility may not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City. See "FINANCIAL INFORMATION—Taxes Imposed on Tacoma Power."

### **Tacoma Power - General**

Tacoma Power is organized into six business units:

- **Generation** operates and maintains Tacoma Power's four hydroelectric generating projects (Cowlitz, Cushman, Nisqually and Wynoochee) and the associated recreational facilities, fish hatcheries and other project lands.
- **Power Management** manages, schedules and directs the power supply portfolio which includes Tacoma Power-owned generation and power supply contracts. Power Management markets bulk and ancillary power supply services, performs power trading activities, plans for and acquires conservation resources, and is responsible for compliance with various state, regional and federal regulatory mandates.
- **Transmission and Distribution** plans, constructs, operates and maintains the transmission and distribution systems including substations, the underground network system, revenue metering facilities and all overhead transmission and distribution systems.
- **Rates, Planning and Analysis** plans for and manages the retail rate process, financial planning activities, operations and capital budget development and monitoring, strategic asset management, construction project management, strategy management, and energy risk management analysis and modeling.
- **Click! Network** plans, constructs, operates and maintains a hybrid fiber coaxial ("HFC") telecommunications network that supports the operation of Tacoma Power's electrical transmission and distribution system, provides retail cable TV, and wholesale high-speed Internet and data transport services to resellers.
- **Utility Technology Services** ("UTS") addresses existing and emerging technology requirements essential to managing Tacoma Power's computing systems. This includes supporting and enhancing utility system operations, communications, metering, cyber security, relevant smart grid applications, and the information technology strategic planning. UTS unifies the planning, design, deployment and maintenance of operational

# EXHIBIT 48 (a)

## **2016 SUPERINTENDENT'S REPORT TACOMA POWER**

### **CLICK!**

#### Financial Status

Click! Network commercial revenues declined from \$27.3 million in 2015 to \$26.7 million in 2016. The retail cable TV customer base dropped 4.6 percent ending the year with 17,468 active customers, and the Internet cable modem customers served by the three wholesale Internet Service Providers (ISPs) - Advanced Stream, Net-Venture, Inc., and Rainier Connect, grew by .4 percent ending the year with 23,344 active customers. Click! provided 173 broadband transport circuits to Click!'s wholesale service providers allowing them to provide an array of telecommunication services to many businesses in the service area. Additionally, Click! continued to provide the City of Tacoma I-Net services to approximately 190 sites, keeping the cost of telecommunications low for many government entities, and also provided support for just over 15,000 gateway power meter connections.

#### Cable TV Rate Adjustments

Because a final policymaker decision regarding Click! Network's long term business plan remained outstanding in 2016, no cable television rate increases were implemented. Although Cable television prices continue to remain under market, the postponement of rate adjustments contributed to the decline in revenues.

#### Channel Additions

During 2016, Click! Network migrated 10 networks from optional service levels to its Broadcast package and migrated Big Ten Network and Sprout from its Sports & Family package to its Click! ON Digital package. Three networks discontinued operations in 2016, Pivot, UWTV, and MundoMax, but TV Tacoma HD was added, bringing the total to 376 video and 65 audio channels. Click! also added a variety of national and local video on demand content for a total offering of over 12,000 hours of content to make the product more competitive. Additionally, Click! added new networks to its Watch TV Everywhere service. Click!'s cable TV customers can now enjoy watching Click! video content from 84 networks on any of their mobile devices with an internet connection.

#### Website Improvements

Click! Network launched a new website in June 2016. Improvements included streamlined navigation, responsiveness to mobile device screen sizes, enhanced TV listings, and an online shopping cart. Click! cable television products, along with ISP internet packages, are now prominently displayed, enabling the potential customer to select services and submit a self-service order online.

### Customer Satisfaction Survey

Customer Satisfaction survey cards were mailed to all new cable TV customers and to all customers who had a service related issue. Click! customer service and technicians representatives received ratings averaging 3.7 and 3.8 respectively on a scale of 1 – 4. In addition, a Customer Satisfaction Survey conducted on Click! Network's behalf by Washington State University's Social & Economic Sciences Research Center (SESRC) showed a mean average overall customer satisfaction score of 8.08 on a 1-10 scale. The results revealed that customers are very satisfied with the services provided by Click! and in particular, recognized the quality of service provided by our Sales and Service Representatives and Service Technicians.

### New Tools

Click! purchased the CPAT Flex Digital Leakage Monitoring System to address concerns about interference from cable leakage in the aeronautical and LTE bands. The CPAT Flex Digital Leakage Monitoring System automates the signal leakage detection process freeing up technicians for other tasks. Since the tool is continuously monitoring the network, signal leakage is quickly detected and repaired.

Click! also purchased the CheetahXD software to replace the former Cheetah Lite version. The CheetahXD software helps Click! network technicians manage the HFC network by providing end-to-end visibility across the HFC operations environment, and enables NOC personnel to proactively isolate network problems, trace root causes, assess potential impacts, and prioritize truck rolls by pinpointing fault and performance issues in real-time. With CheetahXD software, HFC network assurance is simplified, operational costs are reduced, and network performance is improved resulting in enhanced customer satisfaction.

### Spectrum Reclamation

In 2015, Click! fully converted its system from analog to digital and freed up nineteen (19) 6 MHz channel slots. Since then, 6 of those freed up channels have been added to the bank of downstream Internet channels to meet the growth in customers and Internet usage. Therefore leaving 13 channels available for use.

### Network Bandwidth

During 2016, Click! added NETFLIX cache servers to the local network. The addition of these cache servers has reduced bandwidth utilization by as much as 30%. Click! added an additional 10 Gig connection at Downtown South and Downtown North for a total of 30 Gig potential capacity at each location. The Core routers are being upgraded from the Cisco 7600 platform to the Cisco ASR 9912 platform. This will provide the necessary 10 gig ports and throughput to support current and future network growth. The Cable Modem Termination Systems (CMTS) are also being upgraded. The existing Cisco uBR 10000 series CMTSs are going to be replaced with new Cisco cBR-8 CMTSs. The first set of Cisco cBR-8 CMTSs were purchased during 2016. These will support DOCSIS 3.1 Gigabit services and provide higher port and bandwidth capacity for meeting bandwidth demands and subscriber growth.

### Asset Management Program

During 2016, Click! continued to build its asset list and has developed its registries for the Router, HFC Distribution, and Headend Equipment asset classes, and is prepared to participate in the Tacoma Power's Strategic Asset Management program. Click! also developed a Network Maturity Model, to more effectively manage its asset lifecycles and plan future capital expenditures.

### Safety and Work Practices

In 2016, Click! continued to make improvements to its safety management practices. Improvements included: (i) Focusing on reviewing past performance; (ii) improvements in the oversight of injured worker claims; and (iii) increased review of leading indicators such as near misses and non-medical injury reports. Additional training was provided on Home Safety and how the employees and their families can be impacted by the activities we engage in outside of our work life. Safety posters and bulletin board messages were utilized to promote safety awareness. Each business unit held monthly safety meetings and the Click! Safety Committee met quarterly to improve safety related communications.

## **GENERATION**

### Hydroelectric Projects

Tacoma Power's hydro plants were available 99.83 percent of the time in 2016 except for scheduled maintenance outages.

### Cowlitz

Construction is wrapping up on the Cowlitz Falls North Shore Collector for collection of downstream migrating smolts from the upper Cowlitz River. The collector, located at Lewis County Public Utility District Cowlitz Falls Dam, will improve natural fish runs in the Cowlitz River and help Tacoma Power meet its Federal Energy Regulatory Commission (FERC) license obligations. The \$35 million construction project is scheduled for final commissioning and operation in April, 2017. The 70 ton head gate for unit 51 was removed for the first time in 48 years and rehabilitated.

### Cushman

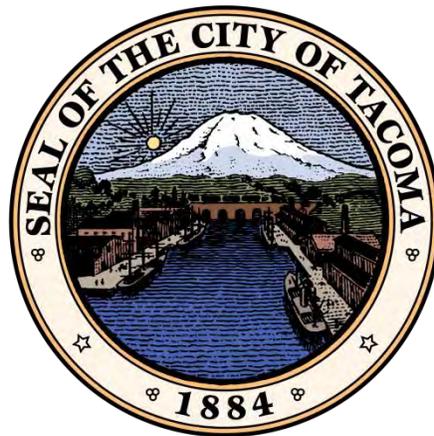
Construction on both of the new Cushman fish hatcheries were completed and began operation in 2016. One Cushman unit was modified to allow for synchronous condensing operation which will allow Power Management to supply and sell capacity without consuming water. The 20-year-old exciters for all three generators at Cushman 2 were replaced. Construction of recreation improvements in the Staircase area were completed and opened to the public during 2016.

### Nisqually

The 20-year-old exciters were replaced on four units at LaGrande and one governor was upgraded.

**EXHIBIT 48 (b)**

City of Tacoma, WA  
2017-2018 Adopted Biennial  
**Operating & Capital  
Budget**



**CITY MANAGER**

T.C. Broadnax

**PREPARED BY**

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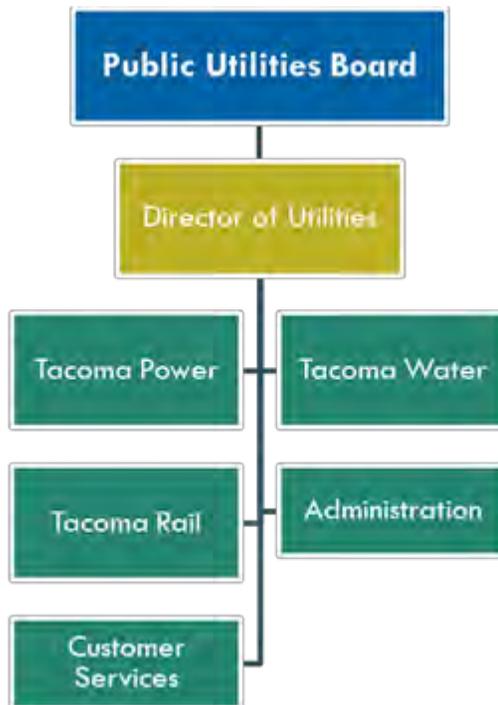
# Tacoma Public Utilities

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## Mission

Tacoma Public Utilities (TPU) provides services that are vital to our quality of life.

## Key Function Organization Chart



## Department Services

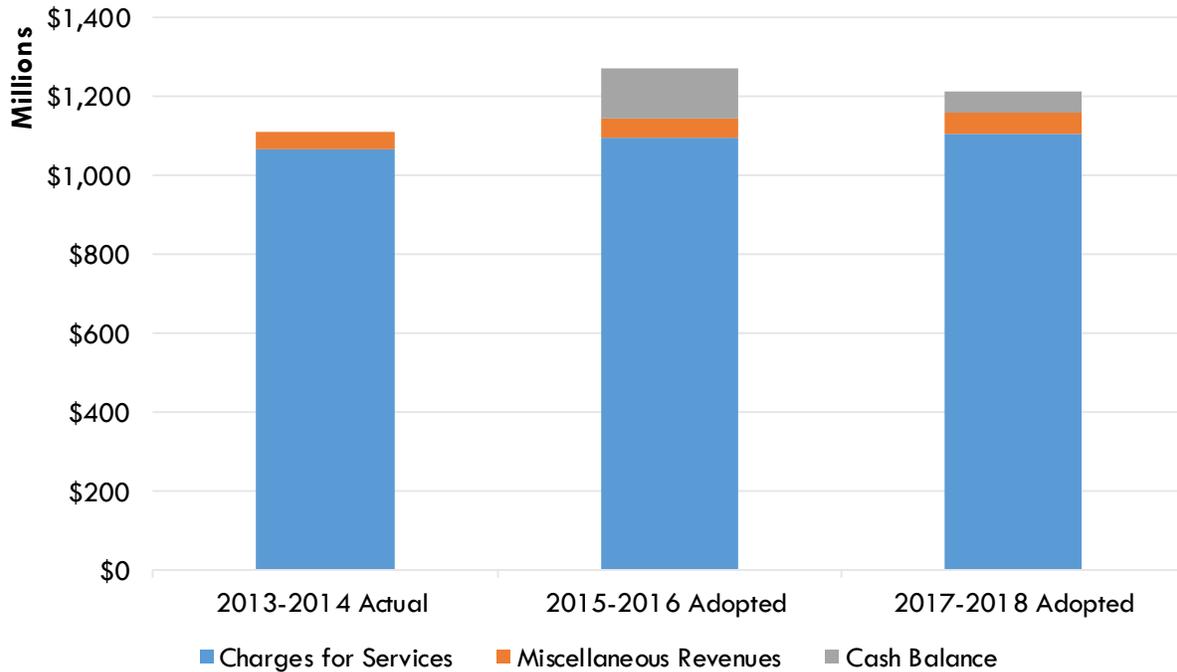
TPU is comprised of all the services of Tacoma Power (including Click! Network), Tacoma Water, and Tacoma Rail. Customer Services and Administration are internal service providers assisting the utilities in fulfilling their mission.

### Tacoma Power

Tacoma Power is a citizen-owned electric utility that generates, transmits, and distributes electricity and provides energy and telecommunications services in an increasingly competitive marketplace. Tacoma Power is committed to providing high-value, competitively-provided products and services to its customers through the quality of its employees and the responsiveness that results from local ownership.

Tacoma Power serves more than 170,000 customers over a 180-square mile area, both inside and outside the city of Tacoma. A first-class environmental steward, almost 100% of power supplied to Tacoma Power customers is from carbon-free and renewable hydroelectric resources. Tacoma Power is also a leader in conservation and maintains some of the lowest power rates in the region.

## Tacoma Public Utilities Funding by Category



	2013-2014 Actuals	2015-2016 Adopted	2017-2018 Adopted
Charges for Services	1,064,888,850	1,093,146,470	1,103,608,079
Miscellaneous Revenues	45,623,135	49,534,563	57,119,803
Cash Balance		128,230,160	51,383,527
<b>Grand Total</b>	<b>\$1,110,511,985</b>	<b>\$1,270,911,193</b>	<b>\$1,212,111,409</b>

## Funding Summary

TPU is comprised of enterprises, including Tacoma Power, Tacoma Water, and Tacoma Rail, which are primarily funded through customer charges for services provided. Services include the provision of electricity, telecommunications, Click! Network, and water to homes and businesses, as well as short-line rail services. Cash in the 2015-2016 biennium was higher than typical due to Tacoma Power paying off long-term debt using cash reserves.

## 2017-2018 Utilities Capital Spending Plan

Project Title	New 2017-2018	Previously Appropriated	Total Funding
<b>Tacoma Power</b>	<b>178,384,000</b>	<b>182,660,440</b>	<b>361,044,440</b>
<b>CLICK! Network</b>	<b>6,139,000</b>	<b>5,224,000</b>	<b>11,363,000</b>
CLICK! provides data-transfer to improve the reliability of the Tacoma Power electric system, fiber-optic cable access, and high-speed telecommunication. Sample projects include system capacity enhancements and internet bandwidth infrastructure growth.			
<b>General Plant</b>	<b>11,928,000</b>	<b>7,020,440</b>	<b>18,948,440</b>
General Plant projects include additions, replacements and modifications to general facilities and equipment including office buildings, warehouses, parking areas and the SAP system.			
<b>Power Generation</b>	<b>47,124,000</b>	<b>66,071,000</b>	<b>113,195,000</b>
Power Generation projects include work at Tacoma Power's four hydroelectric generating projects (Cowlitz, Cushman, Nisqually, and Wynoochee Projects) and the associated recreational facilities, fish hatcheries and other project lands.			
<b>Power Management</b>	<b>28,850,000</b>	<b>22,538,000</b>	<b>51,388,000</b>
Power Management manages Tacoma Power's long and short term power supply portfolio to meet customer needs. Energy conservation is the primary project. This is an ongoing program.			
<b>T&amp;D Projects</b>	<b>52,391,000</b>	<b>59,180,000</b>	<b>111,571,000</b>
Transmission & Distribution Projects include those associated with electrical transmission lines, distribution lines and related substations. Some sample projects include 230 kV System reliability improvements and downtown infrastructure development.			
<b>Utility Technology Services</b>	<b>31,952,000</b>	<b>22,627,000</b>	<b>54,579,000</b>
Smart Grid projects include those associated with networks, communications, operational systems and other utility business systems. Sample projects include enhancements of communication systems and equipment such as telecommunications and digital radio.			
<b>Tacoma Rail</b>	<b>5,660,000</b>	<b>10,538,000</b>	<b>16,198,000</b>
<b>Communications</b>	<b>235,000</b>	<b>500,000</b>	<b>735,000</b>
Upgrading Tacoma Rail's radio system with a radio repeater system and installing more remote health and location monitoring systems on locomotives.			
<b>Facility Upgrades</b>	<b>1,025,000</b>	<b>1,100,000</b>	<b>2,125,000</b>
Replacing Tacoma Rail's West end track pans and storm water treatment and filtration and upgrading the secondary fueling facility and Tacoma Rail's portion of the Tideflats Intelligent Transportation System.			
<b>Rail Equipment/Vehicles</b>	<b>1,000,000</b>	<b>2,665,000</b>	<b>3,665,000</b>
Locomotive repowers to continue to modernize Tacoma Rail's locomotive fleet.			
<b>Track Improvements</b>	<b>3,400,000</b>	<b>6,273,000</b>	<b>9,673,000</b>
Multiple track relays, switch replacements, and rail rehabilitation projects.			

## 2017-2018 Capital Budget Funding Detail Report

Funding Source	New 2017-2018 Funding	Total Confirmed Funding	Total Requested Funding
<b>Grant-State</b>	<b>2,500,000</b>	<b>14,903,330</b>	<b>14,903,330</b>
Prairie Line Trail Historic Interpretation Project		400,000	400,000
Prairie Line Trail Phase I		53,330	53,330
Puyallup Bridge F16A & F16B Replacement		11,950,000	11,950,000
Taylor Way Rehabilitation	2,500,000	2,500,000	2,500,000
<b>Other-Local Contribution</b>	<b>1,500,000</b>	<b>3,062,320</b>	<b>3,847,320</b>
Central Park Phase II		115,000	900,000
E 29th Street Roundabout & Extension	1,500,000	1,500,000	1,500,000
NCS Teen Home		250,000	250,000
NCS Youth Drop In Overnight Center		250,000	250,000
Prairie Line Trail Phase I		360,000	360,000
Puyallup Bridge F16A & F16B Replacement		500,000	500,000
Waterway Park		87,320	87,320
<b>Other-Property Owner Contribution</b>	<b>56,750</b>	<b>893,943</b>	<b>893,943</b>
2014 Sidewalk Reconstruction Project		136,150	136,150
LID 8660- Alley Paving	43,006	198,157	198,157
LID 8662R - Bennett Street	13,744	196,636	196,636
Sidewalk Abatement Program		363,000	363,000
<b>Utility_Funds-Rail</b>	<b>5,660,000</b>	<b>16,198,000</b>	<b>31,198,000</b>
Communications	235,000	735,000	1,735,000
Facility Upgrades	1,025,000	2,125,000	4,125,000
Raily Equipment/Vehicles	1,000,000	3,665,000	11,665,000
Track Improvements	3,400,000	9,673,000	13,673,000
<b>Utility_Funds-Solid Waste</b>	<b>3,920,500</b>	<b>10,857,500</b>	<b>19,585,000</b>
Solid Waste Management Facilities Upgrades and Maintenance	3,920,500	10,857,500	19,585,000
<b>Utility_Funds-Surface Water</b>	<b>24,866,441</b>	<b>48,992,741</b>	<b>93,551,223</b>
Facilities Projects	113,816	6,113,816	10,666,179
Prairie Line Trail Phase I		300,000	300,000
Schuster Parkway Promenade		206,300	256,300
Surface Water Collection System Projects	17,030,678	30,080,678	65,096,789
Treatment and Low Impact Projects	7,721,947	12,291,947	17,231,955
<b>Utility_Funds-Tacoma Power</b>	<b>178,384,000</b>	<b>361,044,440</b>	<b>690,079,440</b>
CLICK! Network	6,139,000	11,363,000	21,433,000
General Plant	11,928,000	18,948,440	55,956,440
Power Generation	47,124,000	113,195,000	178,750,000
Power Management	28,850,000	51,388,000	92,688,000
T&D Projects	52,391,000	111,571,000	246,449,000
Utility Technology Services	31,952,000	54,579,000	94,803,000

# EXHIBIT 49

## **A Brief History of American Telecommunications Regulation**

Tim Wu

While the history of governmental regulation of communication is at least as long as the history of censorship, the modern regulation of long-distance, or “tele,” communications is relatively short and can be dated to the rise of the telegraph in the mid-19<sup>th</sup> century. The United States left the telegraph in private hands, unlike countries and as opposed to the U.S. postal system, and has done the same with most of the significant telecommunications facilities that have been developed since. The decision to allow private ownership of telecommunications infrastructure has led to a rather particularized regulation of these private owners of public infrastructure -- similar to other laws governing “regulated industries,” yet also influenced by the U.S. First Amendment and antitrust law.

### *Prototypes for Regulation*

Broadly speaking, the regulations have been of three main types: 1) common carriage requirements; 2) interconnection requirements; and 3) scarcity management. Each of these types of regulation can be illustrated through the examples of the three main telecommunications industries of the Nineteenth and early Twentieth century: the telegraph, the telephone and broadcast radio.

The first commercial telegraph was constructed in 1839 in Great Britain. In the United States, by the 1850s the industry was intensely competitive, with multiple carriers frequently serving identical routes. The lack of integration between systems and the low profits for providers prompted a process of consolidation that culminated in Western Union’s gaining a monopoly on long-distance telegraph service by 1866. At the time, no federal antitrust law was available as a tool for regulation, so Congress responded to criticisms of Western Union by

passing the United States' first telecommunication regulatory statute, the Telegraph Act of 1866. The Telegraph Act was intended to foster competition by allowing any company to erect telegraph lines along post roads, and it also included a provision whereby the United States could buy out telegraph companies if it so chose. In practice, the Telegraph Act had little practical effect, as it failed to create effective competition for Western Union, and Congress never exercised its option to buy out the company and nationalize the industry. As a result, through the latter half of the Nineteenth century, Western Union was able to charge monopoly prices, support a newswire monopoly (the Associated Press) and discriminate against disfavored customers through its pricing. The firm was also able to use its monopoly to exert substantial political influence by, among other things, refusing to give certain news organizations access to its system to transmit their reporting. For example, in the contested Presidential Election of 1876, Western Union's backing of Presidential candidate Rutherford Hayes gave the candidate important advantages both in reaching newspaper and detecting the plans of his rival.

In the Mann-Elkins Act of 1910, Congress declared both telegraph and telephone companies (including AT&T, which at the time not only owned Western Union but also had its own monopoly in long-distance telephone lines) to be common carriers. The act placed communications, for the first time, under the jurisdiction a federal agency: the Interstate Commerce Commission (ICC). Being a common carrier meant that telephone and telegraph companies had to offer their services without discrimination to all willing customers who were able to pay, and that they had to charge reasonable rates set by the ICC. In return, the telegraph and telephone companies received certain benefits, such as immunity from liability for the content they carried. The "common carriage" concept, originally a product of English common law remains the basis for the regulation of telephone carriers today.

Shortly after the Mann-Elkins Act, the United States addressed a different but related aspect of AT&T's business practices. In addition to its long-distance monopoly, AT&T provided local phone service, where it faced competition in local markets. In an attempt to eliminate this competition, AT&T routinely refused to allow non-affiliated local carriers to use its long-distance lines, thereby limiting the value of the services they could provide. In response to pressure from the Justice Department, in 1913 AT&T entered into what became known as the "Kingsbury Commitment," which required it to allow competing local providers to interconnect with AT&T's long-distance services.

While important, the Kingsbury Commitment was not a full anti-discrimination remedy. It did not require that AT&T, for instance, connect its local service to that of its competitors, nor did it require AT&T to interconnect its long distance or local networks with competing long-distance carriers, should they arise in the future. The Kingsbury Commitment did not hinder AT&T from creating the phone service monopoly that it enjoyed for most of the Twentieth century, and in the view of many, it represented the U.S. acceptance of an AT&T monopoly.

Scarcity management, the third major form of communications regulation in the United States, became an issue with the rise of broadcast radio in the 1920s. The first commercial station in the country, KDKA in Pittsburgh, Pennsylvania, began broadcasting in 1920. By 1924, the United States had over 1,000 radio stations broadcasting in a state of anarchy under the *ad hoc* supervision of Herbert Hoover, the then-Secretary of Commerce. Throughout the mid-1920's, Hoover managed the station's mutual interference by making case-by-case decisions to have broadcasters either shift their frequencies or share them by operating only limited hours in a day. Ultimately, the courts held that Hoover lacked the legal authority to

impose even this minimal level of order, and the ensuing broadcast free-for-all prompted Congress to pass the Radio Act of 1927.

Because the broadcast spectrum is a physically scarce commodity, the Radio Act made plain that the spectrum would be publicly owned, that the government would regulate entry into the business of broadcasting, and that it would grant broadcasting licenses only “if public convenience, interest or necessity will be served thereby.” To this end, the Radio Act established a commission charged with dividing the spectrum into different classes of stations and issuing licenses to broadcast at particular frequencies, times, locations and power levels. The law also barred the government from censoring broadcasts and required any broadcaster who gave time to a political candidate to “afford equal opportunities to all other such candidates for that office.” The newly created Federal Radio Commission would also declare the first version of what would be called the “Fairness Doctrine”-- requiring that broadcasters give notice and time for advocates on both sides of an issue to be heard.

The provisions of the Radio Act of 1927 were folded into the Communications Act of 1934, which established the Federal Communications Commission and gave the Commission authority to regulate not only radio but interstate and international telegraph and telephone services as well. Its authority eventually extended to broadcast and cable television, as well as internet services. The Communications Act continues to this day to form the foundation for the regulation of these industries.

At the time of the Communications Act, and indeed as early as the Kingsbury Commitment, regulators generally believed that telephone services were a natural monopoly. That is, they thought that even if there were competition in the market, the nature of the underlying technology and business were such that it was highly likely that a dominant firm

would emerge to control the industry and, moreover, that this was the most efficient result. Rather than insist on what was viewed as detrimental competition in the industry, then, until the 1970s regulators supervised the Bell monopoly and regulated matters such as the rates it could charge, the quality of services it provided, and its areas of service coverage.

### *The Era of Deregulation*

For most of the 20th century the main telecommunications carriers were classic regulated industries. Monopoly was tolerated, and even encouraged, by government limits on market entry and exit. In exchange government set prices at reasonable rates of return, and imposed various public interest duties (such as the fairness doctrine discussed above). However, beginning in the late 1960s and continuing through the 2000s, a deregulatory movement transformed telecommunications policy.

By the 1920s the AT&T telephone monopoly was complete enough that the company was able to control vertically integrated markets. For instance, AT&T in the 1930s promulgated a tariff that precluded consumers from attaching any device to their phone lines that was not specifically approved by the company. This “foreign attachments” rule effectively extended AT&T’s phone service monopoly into the market for phones themselves, with the result that customers could only obtain equipment from AT&T. While this vertical integration may have represented a high watermark for AT&T’s monopoly, it became the site of the first cracks in the company’s monopoly.

In the word of Richard Vietor, “deregulation began more or less with a rubber cup.” In the 1950s a company called Hush-a-Phone contested AT&T’s foreign attachments rule, seeking permission to market what a special cup that attached to a phone and made conversations more private. The FCC, at the behest of AT&T, precluded the sale of the attachment, but the

Court of Appeals for the District of Columbia reversed the decision and set forth, for the first time, the rule that a consumer had a “right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental.” In 1968, in the *Carterphone* decision, the FCC adopted this principle, and over time promulgated the Part 68 Rules, which allowed users to connect whatever they wanted to the system as long as it did not harm either the network or other users. While it would take until 1981 for the FCC to create a full consumer right to attach devices to the network, the *Carterfone* and *Hush-a-Phone* decisions represented the first introduction of competition against AT&T, and the first limiting of its extended monopoly. Eventually, the *Carterfone* decision was extended into a general quarantine on AT&T’s involvement in consumer equipment. It also, importantly, led to rules that forced AT&T to allow others to provide “information services” over its phone lines (which would later mean “internet services”) and to support the rise of the internet service provider industry.

At the same time, several other deregulatory initiatives were underway. In the 1970s, the firm Microwave Communications Inc. (MCI) took advantage of regulatory loopholes and non-enforcement to begin offering limited long-distance services between St. Louis and Chicago, offering AT&T the first long-distance competition it had faced in decades. AT&T took various measures to try to destroy and block its rival, leading to MCI filing an important private antitrust suit. On November 20, 1974, the Justice Department began its own antitrust action against AT&T, alleging that it monopolized the markets for a broad range of telecommunications services and equipment. While the Justice Department had brought antitrust actions against AT&T previously, this suit for the first time sought as a remedy the actual break-up of the company, and in particular the divestiture of the Regional Bell Operating Companies (RBOCs) from AT&T.

On January 8, 1982, AT&T and William Baxter of the U.S. Justice Department reached an agreement that forced AT&T to divest the RBOCs by January 1, 1984. Thus as of that date the twenty-two RBOCs were formed into seven regional holding companies (Bell Atlantic, NYNEX, BellSouth, Ameritech, U.S. West, Pacific Telsis, and Southwestern Bell). These divested companies were not allowed to provide long-distance services in their territories or manufacture telecommunication equipment, both of which were businesses that remained with AT&T. Likewise, AT&T was precluded from providing local telephone service in competition with the RBOCs and from acquiring stock in any of the RBOCs.

The history of cable television has the same pattern of regulation and reregulation. The early cable systems were known as “Community Antennas,” and were constructed in the late 1940s to capture broadcast television signals and transmit them to consumers in remote towns where the broadcasts would not have reached otherwise. By the late 1950s, cable systems had grown into a potential competitor to broadcast televisions, and the broadcasters launched an effort to protect their markets against cable using state and federal lawsuits. After the lawsuits failed, the broadcasters turned to the FCC and convinced it to assert jurisdiction over cable in 1962. The broadcasters argued that cable systems would fragment the audience for broadcast television, destroy the economic viability of free television, and also, by importing distant signals, threaten the values of “localism.” Agreeing with the broadcasters, the FCC placed effective limits on cable’s growth in the late 1960s by requiring that cable operators receive special permission to enter urban markets, effectively blocking the further development of cable television. The hostile approach to cable changed during the deregulatory period of the 1970s, many of the most onerous restrictions on cable were gradually relaxed, in part due to an exchange for new copyright royalties payable to broadcasters.

Another chapter in the deregulatory movement of the 1970s and 1980s was the FCC's controversial repeal of the fairness doctrine, described above. First set forth by the FRC in 1928, and codified in 1949, the fairness doctrine had been upheld against a First Amendment challenge by the Supreme Court in the *Red Lion v. FCC*. However, in the mid-1980s the FCC stopped enforcing the fairness doctrine and eventually repealed most of it. The FCC argued that, *Red Lion* notwithstanding, the fairness doctrine was a violation of the First Amendment, and also claimed it failed to promote speech in the public's interest. Since that time Congress and numerous groups have attempted to have the Fairness Doctrine reinstated, but have not succeeded.

In the 1990s, the FCC also took its first steps away from the traditional model of spectrum management it had employed since the 1930s. Whereas previously the FCC allocated licenses either by lottery or to whomever it believed would "best serve the public interest," in 1994 it conducted the first spectrum auctions, granting the licenses to the highest bidder. While not free from controversy, the auctions have generally been thought to have been a success, as they led both to the market entry of new cellular phone firms, such as long-distance provider Sprint, and proved to be a more streamlined way of awarding licenses, which has encouraged the timely building of networks. The FCC has conducted several other spectrum auctions since 1994, frequently at Congress's direct command.

### *The Contemporary Regulatory Framework*

The Telecommunications Act of 1996, the first major revision of the country's telecommunications laws since the Communications Act of 1934, altered some features of the basic telecommunications system just described. One of the foremost goals of the 1996 Act was to promote competition in local telephone service. AT&T was allowed to return to the local

service market, while local Bell phone companies were allowed to enter the long-distance market and to merge with each other. In addition, the 1996 law created a “line sharing” scheme whereby market entrants would purchase the rights to use the “local loop” facilities owned by the local Bell companies and sell competitive local services. The 1996 Act also preempted all state and local barriers to entering the local phone service market, and since the passage of the 1996 Act the FCC has forborne from enforcing any restrictions on building or acquiring long-distance lines. Despite these substantial changes to the law, most believe the 1996 Act’s effort to create local service competition was a failure. Whether due to the economics of local competition, or foot-dragging on the part of the local Bell company, few viable local phone service companies have emerged since the passage of the Act.

The 1996 Act also failed to address the challenge of internet and broadband internet services. Pursuant to existing rules, telephone companies have long been regulated as common carriers, as discussed above. That meant that providers of DSL service – which runs over phone lines – were common carriers, while the status of cable operators who sell broadband services remained unclear. In 2002 FCC deemed cable broadband an unregulated “information service” not subject to common carriage rules, and it later classified DSL broadband similarly. In 2005, in the case of *FCC v. Brand X*, the United States Supreme Court upheld the FCC’s right to categorize cable broadband providers as “information services.” The practical import of these technical classifications has been to release broadband services from most anti-discrimination, common carriage or line-sharing obligations.

The arrival of broadband in the 2000s led to the rise of the issue of “network neutrality” on the internet, and the more general topic of internet regulation. The Internet’s technologies were born mainly out of government-funded research in the 1960s and 1970s.

While no specific regime governed the internet, in the 1980s and 1990s, new “internet service providers” took advantage of quarantines placed on the Bells to offer dial-up internet services independent of the Bell system. In the early 2000s, as cable and DSL broadband providers replaced dialup ISPs, the issue of Bell and cable control over the vertical internet markets again arose. In the mid-2000s, the center of the network neutrality debate is a debate over the merits or problems with discriminatory carriage -- favoring some content or applications over others. Ironically, today’s debates over network neutrality and discriminatory carriage echo the same concerns that first prompted calls to regulate telegraph companies in the 19th century.

# EXHIBIT 50

## ECONOMIC DEVELOPMENT IN THE GREATER TACOMA/PIERCE COUNTY AREA

### PURPOSE

Tacoma, like other communities, has evolved in response to changing economic, social, political, and technical dynamics at work not only in the local area, but in the region, the country, and even the world. Understanding this change process for a given community is critical due to the reciprocal relationship between these dynamics and the community's economic base.

Over time, existing businesses contract, expand, or change focus in response to these dynamics — for example, the depletion of an area's natural resources, the building of a rail line, or the encroachment of competitors can each lead to change in the community's economic base. In other cases, certain conditions may lead new businesses or whole new industries to relocate in an area — for example, aluminum smelters' need for cheap power. The entrance of these new industries and fundamental changes in existing ones, in turn, contribute to and alter the original dynamics. As a result, reciprocal effects of the choices these businesses make are felt in a community's job mix, education system, infrastructure investments, and more. Based on this evolution, an area's economic base is built with tracks laid for its economic engine to take one route rather than another.

These periods of steady evolution, however, are occasionally punctuated by intervals of rapid revolution, where societies undergo more fundamental changes. We are in one such period now as we move from the industrial age to the information age. Being at such a juncture offers communities an opportunity to step back and ask questions such as: What direction is our economic engine heading? What direction do we want it to head? Are we building a base so tracks can be laid in that direction? Based on the answers to those questions, communities like Tacoma can make changes to influence the direction their economic engine heads.

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

## Conclusions

The study team set out to answer a number of questions at the outset of this project:

- What is happening on the technological front?
- Who are the major telecommunications players, what have they done in the past, and what are they doing now?
- What is happening in the regulatory environment?
- What have other communities done with regard to telecommunications?
- What has happened historically in our community?
- What do the existing telecommunications options look like?
- What kind of market demand for telecommunications exists in our community?
- What are the economic development implications for our community if an advanced telecommunications system is built or fails to be built?
- And finally, could Tacoma City Light build and operate such a system and how would it look?

This study of telecommunications has answered those questions. But there is a final question that must be asked. Should Tacoma City Light create a modern telecommunications infrastructure to serve the local community? The answers to the previous questions are critical to understanding and answering this question.

This study has reviewed telecommunications both nationally and locally. In reviewing the local situation it is clear that the local market has a growing need for better telecommunications access. Despite growing local demand, the incumbent wire line service providers have stated that their investments in the local infrastructure will either slow without significant rate increases or be halted all together. One could hope that other companies would step forward and create a modern telecommunications system through out our community but the prospects for that occurring appear dim. While Competitive Access Providers will eventually enter the local market, their focus is almost exclusively on large business users. Other potential systems are either of low capacity or not scheduled to be fully deployed until the next century.

Tacoma City Light could create an advanced telecommunications system to meet the telecommunications needs of the communities it serves in addition to its own internal communication needs. If Tacoma City Light were to create such a system and operate it in a business like manner, the system would generate sufficient revenues to make the system self sustaining. By offering products and services that either meet customer needs directly and providing a pathway through which the private sector can meet additional needs, pricing those products and services competitively, and delivering them over a modern, high-speed, high-reliability telecommunications system, a

# EXHIBIT 51

2006

## WI-FI Everywhere: Universal Broadband Access as Antitrust and Telecommunications Policy

Hannibal Travis

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# WI-FI EVERYWHERE: UNIVERSAL BROADBAND ACCESS AS ANTITRUST AND TELECOMMUNICATIONS POLICY

HANNIBAL TRAVIS\*

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connections, but failed.<sup>92</sup> Only after the debut of cable modem service in their territories, starting in the mid-1990s, did the Baby Bells make DSL service available in communities where cable modem access had been offered, and at comparable prices.<sup>93</sup>

The Baby Bells, cable companies, and a variety of commentators have argued that the adoption of residential broadband since 1996 has been rapid, reflecting faster dissemination of a new communications technology than occurred with broadcast or cable television.<sup>94</sup> Such comparisons, however, are often rigged to ignore the long period between the invention of broadband in the 1970s or 1980s and its commercialization, which only picked up in the late 1990s.<sup>95</sup> The undue lag between the technological feasibility of residential broadband and its commercial availability may have artificially inflated the adoption rate for the technology during the late 1990s and early 2000s.<sup>96</sup> Moreover, the relatively low adoption rates for analog technologies such as television or VCRs may be an inappropriate comparison; a better yardstick may be the high adoption rates for digital technologies, such as dial-up Internet access, the World Wide Web, e-mail, and Wi-Fi, all of which spread faster than broadband.<sup>97</sup>

### C. *Natural Monopoly and Network Industry Characteristics of Broadband*

The market for local access to broadband tends to be a “natural monopoly,” at least in its stages of “growth,” as compared to more

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92. See Shelanski, *supra* note 90, at 111. One sign of this failure is that there were only a few hundred thousand DSL subscribers in the entire United States in 1999. LATHEN, *supra* note 91, at App.B, ch.2 (Oct. 1999).

93. See LATHEN, *supra* note 91, at 27 (noting that the Baby Bells only began offering DSL service once faced with losing potential customers to cable). Time Warner Cable began cable modem trials in California in 1996. Katie Hafner, *Living the Broadband Life*, N.Y. TIMES, July 15, 2004, at G1.

94. This claim buttresses the Baby Bells’ deregulatory arguments that forcing the sharing of their networks with competitors, or allowing subsidies for municipal broadband, are unnecessary and probably harmful disruptions of a dynamic industry characterized by rapid growth and popularization. See, e.g., *Industrial Competition and Consolidation: The Telecom Marketplace Nine Years After the Telecom Act: Oversight Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 32 (2005) (statement of Michael Kellogg on behalf of U.S. Telecom Association) (arguing that U.S. broadband “penetration has increased at record rates” since FCC embraced deregulatory approach and abandoned broadband “unbundling” (or open access) policies).

95. See FERGUSON, *supra* note 5, at 141 (suggesting, instead, a comparison of adoption rates from the time of invention to the time of commercialization).

96. See *id.* (“[R]apid diffusion may be a response to pent-up demand and excessive delays in commercialization.”).

97. See *id.* (explaining that because analog technologies improve at a slower rate than digital, a comparison of the two is inappropriate).

“matur[e]” markets.<sup>98</sup> In a natural monopoly, a single provider may satisfy consumer demand at lower average cost than two or more providers.<sup>99</sup> In a more mature market, a city or neighborhood may support two or more methods of accessing the Internet over broadband, such as DSL, cable, fiber optic lines, satellite, Wi-Fi, or broadband over power lines.<sup>100</sup> Nevertheless, large economies of scale in connecting the “last mile” of wires to subscribers favor monopolists over new entrants, who must incur exorbitant fixed costs in order to challenge incumbent providers.<sup>101</sup> Thus, the marginal and average total costs of delivering broadband to the millionth user of an existing broadband network will tend to be much lower than to the tenth user to a newly constructed network.<sup>102</sup>

Broadband is also an industry characterized by network effects, and is therefore frequently described as a “network industry.”<sup>103</sup> Network effects characterize the broadband industry because the value of a broadband Internet connection increases dramatically as more Internet users have broadband, and as content providers make high-

98. Gerald Faulhaber & Christiaan Hogendorn, *The Market Structure of Broadband Telecommunications*, 48 J. OF INDUS. ECON. 305, 323 (2000).

99. Richard Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969); Neil Hamilton & Anne Caulfield, *The Defense of Natural Monopoly in Sherman Act Monopolization Cases*, 33 DEPAUL L. REV. 465, 465 (1984); Lemley & McGowan, *supra* note 41, at 484. Industries characterized by natural monopoly are often subject to economies of scale that are proportional or at least tied to the extent of consumer demand. See Joskow & Noll, *supra* note 58, at 1251 (providing examples of natural monopoly industries whose economies reflect consumer demand, such as local distribution networks in electricity, telephone and gas service).

100. See HIGH-SPEED ACCESS INQUIRY 1999, *supra* note 76, at 2423-24; Kathleen Q. Abernathy, *Extending Broadband to all Americans* (Jan. 13, 2005), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-256079A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256079A1.pdf) (encouraging the deregulation and development of cable wireline networks, wireless networks and satellite broadband providers).

101. See Lemley & McGowan, *supra* note 41, at 546-49 (finding that the telephone industry’s natural monopoly characteristics prevented new networks from competing, and regulation did little to ameliorate the situation); Aronowitz, *supra* note 30, at 890-91 (explaining that the costs associated with developing a telecommunications network render the creation of several competing networks inefficient).

102. See Dennis Carlton & J. Mark Klammer, *The Need for Coordination Among Firms, With Special Reference to Network Industries*, 50 U. CHI. L. REV. 446, 451 (1983) (explaining that creating a new network involves large initial costs, whereas using an existing network continuously decreases marginal costs); Lemley & McGowan, *supra* note 41, at 484 (finding that in a natural monopoly, the marginal and average costs of production decline as the demand increases in a given market).

103. See, e.g., Robert Crandall, *Broadband Communications*, 2 THE HANDBOOK OF TELECOMMUNICATIONS ECONOMICS (Martin Cave et al. eds., 2003); CPB NETHERLANDS BUREAU FOR ECONOMIC POLICY ANALYSIS, DO MARKET FAILURES HAMPER THE PERSPECTIVES OF BROADBAND? (Dec. 2005), *available at* <http://www.cpb.nl/nl/pub/cpbreeksen/document/102/doc102.pdf>. (finding that broadband shares characteristics typical of networks, including “network infrastructure, essential facility and economies of scale”).

bandwidth multimedia files and applications available.<sup>104</sup> For broadband, as for other “markets with network effects, the incumbent’s large installed base makes it difficult for new entrants to dislodge the incumbent.”<sup>105</sup>

Networks regulated solely by private property rights tend towards monopoly exploitation due to the “network effects” inherent in selling access to telecommunications facilities.<sup>106</sup> Access to the network is valuable in proportion to the number of devices hooked up to it, such as telephones or Internet-ready computers, so a new network with few subscribers may struggle to attract the “critical mass” it needs to compete.<sup>107</sup> Small upstart networks, as a consequence of “network externalities,” or benefits accruing to existing or potential subscribers from the connecting of a new subscriber to a network, may not always be able to challenge dominant networks effectively.<sup>108</sup> Dominant firms in network

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104. Cf. William Kolasky, *Network Effects: A Contrarian View*, 7 GEO. MASON L. REV. 577, 579 (1999) (“As defined in the economics literature, network effects exist . . . when a product becomes more valuable as greater numbers of customers use it. The most obvious examples are communications networks, where the value to each customer increases exponentially the more ‘friends and family’ are on the same network.”); A. Douglas Melamed, *Network Industries and Antitrust*, 23 HARV. J.L. & PUB. POL’Y 147, 148 (1999) (“the defining characteristic . . . of network industries is that they involve products that are more valuable to purchasers or consumers to the extent that those products are widely used. This phenomenon is known as a ‘network effect’ or ‘demand-side economy of scale’”); Lemley & McGowan, *supra* note 41, at 484 (“network effects are demand-side rather than supply-side effects: the shape of the demand curve is affected by existing demand”).

105. Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation* (Sept. 20, 2005), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=812991](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=812991) (follow Social Science Research Network “New York, USA” hyperlink to download document).

106. See Aronowitz, *supra* note 30, at 890-91 (“Creating multiple physical last mile connections for DSL or cable modem service would be . . . inefficient . . . . Thus, the first company to install the last mile enjoys a natural monopoly over the connection that makes the open access question particularly pressing.”); see also Carl Shapiro, *Antitrust In Network Industries* (Jan. 25, 1996), <http://www.usdoj.gov/atr/public/speeches/0593.htm> (“[O]nce achieved, the network effects that helped create dominance may make it more difficult for new entrants to dislodge the market leader than in other industries lacking network characteristics.”); Kolasky, *supra* note 104, at 579, 583 (warning that enforcement agencies in both the United States and Europe have become increasingly vigilant in monitoring network effects).

107. Carl Shapiro, *Exclusivity in Network Industries*, 7 GEO. MASON L. REV. 673, 675 (1999); see Aronowitz, *supra* note 30, at 890-91 (explaining that the costs associated with wiring the “last mile” discourage competing networks from entering the market); Lemley & McGowan, *supra* note 41, at 546 (noting that a network monopoly may be more efficient than competition due to cost advantages of dense networks, and bandwagon effects of compatibility and interconnection).

108. See Michael Kende, *The Digital Handshake: Connecting Internet Backbones* 3, 22-23 (Sept. 2000), [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp32.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf) (suggesting also that dominant networks may refuse to connect their subscribers with those of the smaller networks, “squeeze” prices or engage in non-price

industries also deploy a host of predatory tactics to suppress new entry, such as mergers and acquisitions, refusals to provide access, exclusive dealing, monopoly leveraging, contrived incompatibility, preemptive announcements of new services or pricing, lawsuits based on invalid patents or trademarks, multi-product bundling, and below-cost pricing to win standards wars.<sup>109</sup>

Both the cable and the telephone networks are characterized by local monopolies, which carry over into broadband.<sup>110</sup> The local telephone and residential cable networks are natural monopolies in the sense that competing with the dominant firms typically requires building additional wiring and infrastructure, which would be wasteful and duplicative in many, if not most, local markets.<sup>111</sup> Fixed

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discrimination by, for example, degrading interconnections with those other networks).

109. See Shapiro 1996, *supra* note 107 (stating that, although some of these tactics may be legitimate for firms with small shares in the market, use of same tactics by incumbent firms may be anticompetitive, by closing networks to upstart firms); Daniel Rubinfeld, *Competition, Innovation, and Antitrust Enforcement In Dynamic Network Industries* 4, 12 (Mar. 24, 1998), available at <http://www.usdoj.gov/atr/public/speeches/1611.htm>.

For example, the U.S. government has charged Verizon, the nation's dominant Baby Bell prior to the merger of SBC and AT&T in 2006, with a variety of anticompetitive tactics, including merging with Bell Atlantic, GTE, and now MCI in order to reduce competition in local telephone and Internet service markets. Private parties have complained of Verizon's refusals to deal, contrived incompatibility with competing service providers, and bundling of DSL service with telephone service. See, e.g., *United States v. Verizon Commc'ns, Inc.*, No. 1:05CV02103 (D.D.C. complaint filed Oct. 27, 2005) (examining Verizon's acquisition of MCI); *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp.*, 305 F.3d 89, 107-08 (2d Cir. 2002), *rev'd sub nom. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398 (2004) (examining refusals to deal with competing telephone service provider and monopoly leveraging); *Twombly v. Bell Atl.*, 425 F.3d 99, 104 (2d Cir. 2005) (examining refusals to deal with competing Internet service providers); *Greco v. Verizon Commc'ns, Inc.*, 2005 U.S. Dist. LEXIS 4434, at \*3-6 (S.D.N.Y. Mar. 17, 2005) (examining bundling). Plaintiffs have also charged Bell Atlantic, another large Baby Bell, with refusals to deal, contrived incompatibility, predatory pricing and price "squeezing," falsely pre-announcing DSL service availability, and bringing bad faith patent litigation. See *Covad Commc'ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005) (examining refusal to deal, price squeezing and patent litigation).

110. See FERGUSON, *supra* note 5, at 146, 59 (noting that the telephone and cable markets compete only in providing certain services, such as low-speed residential broadband and asymmetric services, and that the two industries are quite similar in certain aspects, including their inability to provide effective competition).

111. See, e.g., *Verizon Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 535 U.S. 467, 475-76 (2002) (noting that "persistently monopolistic local [telephone] markets" have long been regarded as "the root of natural monopoly in the telecommunications industry"); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 412-16 (1999) (Breyer, J., concurring in part and dissenting in part) (explaining that the Telecommunications Act of 1996 "recognizes that actual local [telephone] competition might not prove practical" because such competition could result in "wasteful duplication of resources"); *United States v. W. Elec. Co.*, 673 F. Supp. 525, 537-38 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990) (finding that the "natural monopoly" characteristics of local telephone networks

costs associated with network development and installation are relatively high, while the marginal and average total costs reflecting the burden of adding more users are relatively low.<sup>112</sup> High barriers to entry in the cable and telephone industries prevent potential competitors from undercutting high prices in many instances.<sup>113</sup> The cable and telephone companies have built large networks under the protection of exclusive government franchises, “and therefore have first-mover advantages and scope economies not available to other new entrants . . . .”<sup>114</sup> Other barriers to entry in the telephone market, which most likely affect the cable market as well, include

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mean that duplication of them “would require an enormous and prohibitive capital investment”); *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 126 (7th Cir. 1982) (Posner, J.) (finding that cable television may be a natural monopoly because “[t]he cost of the cable grid appears to be . . . largely invariant to the number of subscribers the system has,” so that “the average cost of cable television would be minimized by having a single company in any given geographical area”); James Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1089 (2004) (“Cable television service, like local telephony, has long been considered a natural monopoly service. Fixed costs are high; multiple wires to the home risks stranded investment; economies of both scale and density apply.”); Aditya Bamzai, Comment, *The Wasteful Duplication Thesis in Natural Monopoly Regulation*, 71 U. CHI. L. REV. 1525, 1530-32 (2004) (stating that a “natural” monopoly may exist where two providers serving same local area would require duplicative wiring, instruments, and billing) (citing 2 ALFRED KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 123 (1971)).

112. See, e.g., *Omega Satellite Prods.*, 694 F.2d at 126 (noting that the cost of installing cable grid is greater than the cost of adding more users); Bamzai, *supra* note 111, at 1528-29 (arguing that in the telecommunications industry, “large fixed expenses” result in “declining average costs” as number of users increases).

113. See, e.g., *United States Telecom Ass’n v. Fed. Commc’ns Comm’n*, 359 F.3d 554, 572 (D.C. Cir. 2004) (discussing substantial barriers to entry into local telephone service identified by FCC, such as sunk costs and ILEC absolute cost advantages); FED. COMM’NS COMM’N, ANNUAL ASSESSMENT OF THE STATUS OF COMPETITION IN MARKETS FOR THE DELIVERY OF VIDEO PROGRAMMING, FOURTH ANNUAL REPORT, 13 F.C.C.R. 1034, 1043 (1998) (“Local markets for the delivery of . . . [cable television] programming generally remain highly concentrated and . . . characterized by some barriers to entry . . .”).

114. FED. COMM’NS COMM’N, REPORT AND ORDER ON REMAND AND FURTHER NOTICE OF PROPOSED RULEMAKING, REVIEW OF THE SECTION 251 UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS, 18 F.C.C.R. 16978, 17046 (2003) [hereinafter SECTION 251 ORDER] (referring to cable industry); see *id.* at 17028-41 (making similar findings regarding barriers to entry into local telephone industry); *Turner Broad. Sys. v. Fed. Commc’ns Comm’n*, 512 U.S. 622, 634 (1994) (The U.S. “cable industry is characterized by horizontal concentration, with many cable operators sharing common ownership,” which has “resulted in greater ‘barriers to entry for new programmers’”) (quoting Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(4), Pub. L. No. 102-385, 106 Stat. 1460); U.S. Telecom Ass’n, 359 F.3d at 572 (listing barriers to entry into local telephone industry, including “sunk costs,” incumbent telephone company “cost advantages,” “first-mover advantages,” and “operational barriers to entry” controlled by incumbent telephone companies); FMEA, *supra* note 3, at 11 (explaining that state and local governments created monopolies in telephone and cable television industry by granting “exclusive franchises . . . to serve a particular geographic area,” which protected private companies like BellSouth or Comcast from competition while they built “large networks with economies of scale and scope”).

“bottlenecks, entrenched customer preferences, the regulatory process, large capital requirements, access to technical information, and disparities in risk.”<sup>115</sup>

*D. The Lack of Effective Competition in Many Broadband Markets*

Consumers’ options in selecting high-speed Internet service have been very limited until recently. Some commentators describe the broadband market as a “cable-phone duopoly.”<sup>116</sup> By 2004, the FCC reported that close to forty percent of all U.S. zip codes either had monopoly or duopoly broadband access, or none at all.<sup>117</sup> “Thus, nearly half of all consumers lack meaningful choice in broadband providers.”<sup>118</sup> For the rest, a single DSL provider is typically the only effective competition to the dominant local cable provider in the market for residential broadband access.<sup>119</sup> These estimates actually overstate the extent of competition, because the FCC requires only that an entity has one subscriber in an entire zip code to be counted as a provider throughout that area.<sup>120</sup> In fact, when consumers were polled in 2004 regarding the availability of broadband in their area, nearly a tenth reported that it was not available in their area at all,

115. *United States v. AT&T*, 524 F. Supp. 1336, 1348 (D.D.C. 1981).

116. Rob Pegoraro, *Broadband Is Too Important to Be Left to Cable-Phone Duopoly*, WASH. POST, Aug. 14, 2005, at F07; see also Mike Langberg, *S.F. Wifi Proposal Out on a Tech Limb*, SAN JOSE MERCURY NEWS, Aug. 19, 2005, at 1D, available at [http://www.siliconvalley.com/mld/siliconvalley/business/columnists/mike\\_langberg/12425371.htm](http://www.siliconvalley.com/mld/siliconvalley/business/columnists/mike_langberg/12425371.htm) (discussing the “broadband duopoly” and various cities’ plans to award bidding companies the sole or shared right to build such a citywide network, providing Internet access to homes).

117. FED. COMM’NS COMM’N, INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, WIRELESS COMPETITION BUREAU, FEDERAL COMMUNICATIONS COMMISSION RELEASES DATA ON HIGH-SPEED SERVICES FOR INTERNET ACCESS, tbl.12 (June 2004), [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/hsp\\_d0604.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hsp_d0604.pdf) (finding that in 2003 14.9% of zip codes had one provider, 17.1% had two providers and 6.8% had none at all).

118. Network Neutrality: Hearings Before the U.S. Senate Committee on Commerce, Science, and Transportation, 109th Cong., 2d Sess. (2006), 2006 WL 282062 (statement of Vint Cerf, Vice President and Chief Internet Evangelist, Google Inc.), <http://commerce.senate.gov/pdf/cerf-020706.pdf>.

119. See FERGUSON, *supra* note 5, at 132, 136 (asserting that the residential broadband market is a duopoly between local telephone and cable monopolies); see also Bruce Fein, *Choking Broadband Competition*, BROAD. & CABLE, Mar. 28, 2005, at 74 (explaining that in many places, where cable and DSL are the only options, broadband access is costly and of a low quality due to the incumbents’ stronghold on the market).

120. See Michael J. Copps, Commissioner, Fed. Commc’ns Comm’n, RE: Aug. 6, 2003 Wireline Competition Bureau Report on the Growth of Subscriberhip to High-Speed Service During the Last Three Years (Aug. 6, 2003), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-237388A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-237388A3.pdf) (“Finding one high-speed subscriber in a zip code and counting it as service available throughout is not a credible way to proceed.”).

and one in six said that only one monopoly broadband provider served their area.<sup>121</sup>

The market for local broadband service is extraordinarily concentrated by economic measures,<sup>122</sup> and is in need of substantial reform to become fully competitive.<sup>123</sup> In 2005, the top six providers claimed ninety percent of cable broadband subscribers, while the top four DSL providers claimed nearly ninety percent of DSL subscribers.<sup>124</sup> Using the economic methodology employed by the U.S. Department of Justice (i.e., the Herfindahl-Hirschman Index or “HHI”),<sup>125</sup> the local broadband sector is “highly concentrated.”<sup>126</sup> In fact, the typical local broadband market has an HHI concentration level of 5,000,<sup>127</sup> three times what the Department of Justice considers to be highly concentrated.<sup>128</sup> Judged by its HHI, local broadband was five times as concentrated in 2001 as the print media, radio and television broadcasting, or film production and distribution,<sup>129</sup> and

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121. PEW INTERNET PROJECT, BROADBAND PENETRATION ON THE UPSWING: 55% OF ADULT INTERNET USERS HAVE BROADBAND AT HOME OR WORK 6 (Apr. 19, 2004), [http://www.pewInternet.org/PPF/r/121/report\\_display.asp](http://www.pewInternet.org/PPF/r/121/report_display.asp) (follow “View PDF of Report” hyperlink).

122. See FED. COMM’NS COMM’N, PROVISION OF FIXED AND MOBILE BROADBAND ACCESS, EDUCATIONAL AND OTHER ADVANCED SERVICES IN THE 2150-2162 AND 2500-2690 MHZ BANDS ET AL., 18 F.C.C.R. 6722, 6775 (2003) (asserting that, with a HHI of between approximately 5000 and 5400, the “typical broadband Internet market is very highly concentrated”).

123. See Pegoraro, *supra* note 116, at F07 (suggesting that the FCC encourage true competition by creating more meaningful regulations, better enforcing its current regulations and easing the way for progress in other forms of broadband).

124. Leichtmann Research Group, *Over 40 Million Subscribe to Broadband Internet in the U.S.* (Nov. 14, 2005), [http://www.leichtmanresearch.com/press/111405\\_release.html](http://www.leichtmanresearch.com/press/111405_release.html) (reporting that Comcast, Time Warner, Cox, Charter, Adelphia, and Cablevision claim twenty-one out of twenty-three million cable broadband subscribers, while SBC, Verizon, Bell South, and Qwest claim fifteen out of seventeen million DSL broadband subscribers).

125. An industry’s HHI is derived by adding up the squares of each nontrivial industry participant’s market share. U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 1.5 (Apr. 2, 1992), [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/15.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/15.html).

126. The Department of Justice considers an industry with an HHI in excess of 1,800 to be “highly concentrated.” *Id.*; see also Application of Echostar Communications Corp., 17 F.C.C.R. 20559, 20614 (2002) (asserting that where a post-merger HHI exceeds 1800 and the HHI increases by more than 100 points, the merger will likely enhance the firm’s market power).

127. See Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 243, 291-92 (2005) (basing this analysis on a residential and small business market consisting of the ILEC provider, one non-ILEC provider, and one cable provider, the HHI is 5200).

128. *Id.* at 292.

129. Eli Noam, *The Internet: Still Wide Open and Competitive?*, at 3-6 (Sept. 2003), [http://tprc.org/papers/2003/200/noam\\_TPRC2003.pdf](http://tprc.org/papers/2003/200/noam_TPRC2003.pdf).

more than twice as concentrated as new media, such as home video and cable television, or the Internet industry.<sup>130</sup>

Broadband is much less competitive than the non-broadband Internet sector, which many small start-up ISPs entered with relative ease.<sup>131</sup> For every 100,000 users of the dial-up Internet, there were fewer than two broadband providers as of 2002, compared to about fifteen dial-up ISPs.<sup>132</sup> Many consumers have only one broadband choice to make: between a single DSL and a single cable broadband provider.<sup>133</sup> Cable providers accounted for two-thirds of broadband households in 2001, a lead that narrowed to fifty-six percent of households in 2003.<sup>134</sup>

130. *Id.* at 6. The Internet industry is here defined to include the Internet backbone, Internet service providers, Web browsers and media players, and Internet search engines and Web portals. *See id.* at 2 (listing the “infrastructure components underlying the Internet’s basic functioning”).

131. *See id.* at 9 (demonstrating that the top ten companies’ revenue made up about sixty-five percent of the Internet industry’s total revenue in 2001/2002). Over ninety-two percent of Americans “had access by a short local phone call to seven or more ISPs by 1998.” Shane Greenstein, *Commercialization of the Internet*, in 1 INNOVATION, POLICY AND THE ECONOMY 165 (Adam Jaffe et al. eds., 2001). Even rural Internet users could select from among at least four to seven ISPs on average by the late 1990s, while urban users could select from among literally hundreds of providers. *See* Karen Charman, *Recasting the Web: Information Commons to Cash Cow*, EXTRA!, Aug. 26, 2002, at 22, 24, available at <http://www.alternet.org/story/13929> (quoting CEO of Earthlink) (stating that Internet users in small towns and rural areas can select from at least four ISPs, whereas users in cities can choose from hundreds); *Broadband: Competition and Consumer Choice in High Speed Internet Services and Technologies: Hearing Before the Sen. Comm. on the Judiciary*, 106th Cong. 31-38 (July 14, 1999) (statement of Bill Schrader, Chairman & Chief Executive Officer, PSINet Inc.) (“[A]pproximately [ninety-six] percent of Americans today have a choice of at least four ISP’s within their local calling area.”).

132. CONSUMER FEDERATION OF AMERICA, THE IMPORTANCE OF ISPs IN THE GROWTH OF THE COMMERCIAL INTERNET 28 (2002), <http://www.consumerfed.org/pdfs/ispstudy070102.pdf>.

133. S. DEREK TURNER, BROADBAND REALITY CHECK: THE FCC IGNORES AMERICA’S DIGITAL DIVIDE 15 (Aug. 2005), available at [http://www.hearusunow.org/fileadmin/sitecontent/broadband\\_report\\_optimized.pdf](http://www.hearusunow.org/fileadmin/sitecontent/broadband_report_optimized.pdf).

134. A NATION ONLINE, *supra* note 18, at Executive Summary; *see* U.S. Telecom Ass’n v. Fed. Commc’ns Comm’n, 359 F.3d 554, 585 (finding, in 2004, that cable companies provided nearly sixty percent of all high-speed lines). Cable has heretofore enjoyed several advantages over DSL in the United States, including coaxial cable’s superior bandwidth capacity and greater range than DSL, which is tied to central telephone switching office. *See* Dibadj, *supra* note 91, at 272-74 (explaining the technological constraints of DSL); Tongue, *supra* note 31, at 1104 (noting that the performance of DSL transmissions decreases as the customer’s distance from the central office grows and that DSL quality varies with the condition of the copper wires and the quality of the other equipment). In addition, between 1996 and 2004, the cable industry spent about \$95 billion, or \$1,300 per customer, in rebuilding its infrastructure to provide digital channels, telephone, broadband, and on-demand services. The amount spent specifically on broadband, however, is usually not broken out, precluding a focused examination of returns on broadband investments to date. *See* NAT’L CABLE & TELECOMMS. ASS’N, THE VIDEO MARKET IS FULLY COMPETITIVE: ALMOST 26 MILLION CONSUMERS NOW SUBSCRIBE TO CABLE’S COMPETITORS 5 (July 2004), <http://www.heartland.org/pdf/16369.pdf>; U.S. GEN.

Unlike other Internet and broadband providers such as AOL or Covad, which generally compete with one another by offering broadband on a national basis, the Baby Bells and the cable companies generally compete only in their specific local service areas.<sup>135</sup> The Baby Bells typically offer broadband Internet service “only within their geographical monopoly telephone service areas.”<sup>136</sup> Cable providers resemble the Baby Bells in exercising “geographical monopoly control over a local distribution bottleneck,” and in making slow progress in offering high-speed Internet access on a nationwide basis or at prices most consumers can afford.<sup>137</sup> The cable companies have resisted matching reduced introductory prices (i.e. about \$15 per month) for slower broadband service offered by Baby Bells such as Verizon and SBC Communications (now AT&T again<sup>138</sup>), even though broadband is bundled with cable television and/or telephone service, as Verizon and SBC/AT&T have bundled broadband with local and long-distance telephone service.<sup>139</sup> Now it appears that these same Baby Bells may recoup their foregone subscriber fees by charging Internet service providers such as Google for the privilege of being accessible to DSL subscribers, prompting fears of pervasive censorship and a pay-to-play Internet.<sup>140</sup>

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ACCOUNTING OFFICE, ISSUES RELATED TO COMPETITION AND SUBSCRIBER RATES IN THE CABLE TELEVISION INDUSTRY 4, 25 (Oct. 2003), <http://www.gao.gov/new.items/d048.pdf> (noting that programming and upgrading costs incurred by cable companies have increased on average by thirty-four percent, with the cable industry having spent over \$75 billion between 1996 and 2002).

135. The only national residential broadband network is owned by Covad, which is neither a Baby Bell nor a cable company. See Covad, *Covad Public Policy* (2005), <http://www.covad.com/companyinfo/publicpolicy/index.shtml>.

136. FERGUSON, *supra* note 5, at 108 (emphasis omitted).

137. *Id.* at 146.

138. See *SBC-AT&T Merger Costs Trigger \$866M Charge*, SAN FRANCISCO BUSINESS TIMES, Jan. 26, 2006, available at <http://sanfrancisco.bizjournals.com/sanfrancisco/stories/2006/01/23/daily51.html> (reporting the SBC-AT&T merger).

139. Jessica Marmor, *Telecom*, WALL STREET JOURNAL ONLINE (Feb. 28, 2006), <http://online.wsj.com/article/SB114107868866084626-search.html?KEYWORDS=broadband&COLLECTION=wsjie/6month>; Marguerite Reardon, *Bells Slash Prices to Lure Broadband Customers*, CNET NEWS.COM, Aug. 23, 2005, [http://news.com.com/Bells+slash+prices+to+lure+broadband+customers/2100-1034\\_3-5842279.html](http://news.com.com/Bells+slash+prices+to+lure+broadband+customers/2100-1034_3-5842279.html) (reasoning that cable companies have resisted lowering their prices, instead focusing on providing better speeds, usability, and reliability).

140. See Glenn Fleishmann, *Advocates of Wi-Fi in Cities Learn Art of Politics*, N.Y. TIMES, Jan. 19, 2006, at C1 (explaining that in response to a suggested “pay-to-play” plan, advocates and community groups complained to state politicians); Associated Press, *Intel Joins Group In Favor of Internet Legislation*, SAN JOSE MERCURY NEWS, Apr. 26, 2006, available at [http://www.mercurynews.com/mld/mercurynews/news/local/states/california/northern\\_california/14435374.htm](http://www.mercurynews.com/mld/mercurynews/news/local/states/california/northern_california/14435374.htm) (describing Intel’s appeal to Congress to pass legislation that ensures that the Internet will remain “open and neutral”).

Lack of competition in the price of high-speed Internet service has been a significant problem. Monthly fees averaged \$50 in many areas on a consistent basis from 1998 to 2003 for service at one to two Mbps downstream and much less than that upstream.<sup>141</sup> This price stability presented a stark contrast to the much more rapidly increasing quality and plummeting prices of computers and other digital technologies during the same period.<sup>142</sup> With cable in control of nearly seventy percent of the broadband industry, there was “no real competition” in most local markets during that period, according to a spokesperson for a large Baby Bell, SBC.<sup>143</sup> The bursting of the telecommunications bubble starting in 2000 further entrenched many dominant broadband providers by destroying many telecommunications companies, wiping out \$2 trillion of stock market value,<sup>144</sup> and enabling the Baby Bells to slash investment in infrastructure in favor of exploiting their existing networks as long as possible.<sup>145</sup>

The divergence in the pace of price cuts and new innovations between broadband and other digital technologies may be due to mixed incentives facing diversified broadband providers. Robust

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141. See FERGUSON, *supra* note 5, at 67-68, 141 (stating that in 1998, ADSL prices decreased to a range from thirty dollars per month in some regions to fifty dollars in the majority of areas, where they remained until 2003). *But cf.* Scott J. Savage & Donald M. Waldman, *United States Demand for Internet Access*, 3 REV. OF NETWORK ECON. 228, 229, 236 (2004) (reporting that a nationwide survey of residences conducted during 2003 found mean prices for cable and DSL broadband to be \$37.70 and \$43.92, respectively). As of 2005, the price of cable and DSL broadband continued to hover near \$50 per month once the costs of subscribing to tied services such as cable television or wireline telephone service were included. Gene Kimmelman, *Statement on Behalf of Consumers Union and the Consumer Federation of America on SBC-AT&T and Verizon-MCI Mergers Remaking the Telecommunications Industry*, 13 COMMLAW CONSPECTUS 1, 2 & n.4 (2005) (explaining that although cable broadband costs about \$ 45 per month, and DSL broadband about \$30 per month, most providers also require consumers to “buy extra services—DSL tied to local phone service, or cable modem service tied to a cable video package. In order to get the benefits of this ‘bundle-only’ competition, the average household must double or triple its spending.”).

142. See FERGUSON, *supra* note 5, at 141 (comparing the pace of DSL deployment to the pace of deployment of other digital technologies, such as dial-up access, the Web, and Wi-Fi).

143. Tom Mainelli, *DSL Service Falters as Providers Crumble*, PC WORLD, Aug. 15, 2001, available at <http://pcworld.about.com/news/Aug152001id58344.htm> (claiming that DSL providers are allies against cable).

144. See Michael Powell, Speech at the Goldman Sachs Communicopia XI Conference (Oct. 2, 2002), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226929A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226929A1.pdf) (explaining that the telecommunications industry is suffering from not only financial loss but also nearly 500,000 lost jobs, corporate scandals and, in some markets, hyper-competition).

145. See FMEA, *supra* note 3, at 8, 10 (citing BellSouth and Verizon, who both reduced their investment spending by thirty-nine percent, or \$9.5 billion, from 2000 to 2003); see also FERGUSON, *supra* note 5, at 58-59 (stating that Baby Bells “reduced network capital investment sharply between 2001 and 2003”).

competition from the Internet threatens to destroy the cable and telephone companies' revenue base as Internet telephony captures the voice communication market, and as webcasting and digital delivery of entertainment content render cable television less necessary.<sup>146</sup> Conscious of this threat, most Baby Bells have heretofore refused to sell DSL to customers who do not also purchase local telephone service, giving rise to allegations of anticompetitive product tying, in violation of antitrust law.<sup>147</sup> Verizon's wireless broadband service is only available to a third of Americans, at \$60 per month for a two-year commitment plus a "qualifying voice plan."<sup>148</sup> Moreover, Baby Bells such as SBC/AT&T have indicated that they may refuse to connect DSL subscribers to their choice of Internet telephony services.<sup>149</sup> For their part, cable broadband providers have sought to shield their multichannel video businesses from Internet competition by prohibiting their subscribers from downloading excessive multimedia content or utilizing interactive video game servers, among other high-bandwidth activities.<sup>150</sup>

146. See FERGUSON, *supra* note 5, at 27 (predicting that a competitive broadband industry would advance the merging of cellular, broadcasting, and data delivery services with Internet services).

147. See *Greco v. Verizon Commc'ns, Inc.*, 2005 U.S. Dist. LEXIS 4434, at \*12-15 (S.D.N.Y. Mar 22, 2005) (explaining that Verizon admitted refusing to sell "stand-alone DSL service" in most markets, offering it only as part of a limited technical trial in some states for a period of only eight months); *Z-TEL Commc'ns, Inc. v. SBC Commc'ns, Inc.*, 331 F. Supp. 2d 513, 543-48 (E.D. Tex. 2004) (denying motion to dismiss claim that SBC Communications unlawfully tied DSL service to local telephone service); *Levine v. Bellsouth Corp.*, 302 F. Supp. 2d 1358, 1371 (S.D. Fla. 2004) (noting that Bellsouth "has never offered" DSL "on a standalone basis"); *BellSouth Telecommunications, Inc. v. Cinergy Commc'ns Co.*, 297 F. Supp. 2d 946, 954 (E.D. Ky. 2003) (finding "substantial evidence" to support the Kentucky Public Service Commission's conclusion that BellSouth had a "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers"); *Covad Commc'ns Co. v. Pac. Bell*, No. C 98-1887 SI, 2000 U.S. Dist. LEXIS 21267, \*12-\*15 (N.D. Cal. May 8, 2000) (reaffirming dismissal of antitrust challenge to Pacific Bell's alleged practice of tying DSL data service to voice line service); Alex Salkever, *Will Naked DSL Chill the Cable Guys?*, BUS. WK. ONLINE, Feb. 27, 2004, [http://www.businessweek.com/technology/content/feb2004/tc20040227\\_8296\\_tc047.htm](http://www.businessweek.com/technology/content/feb2004/tc20040227_8296_tc047.htm) (describing how Baby Bells have insulated their businesses from profit volatility by declining to offer customers DSL without bundled local telephone service).

148. Verizon Wireless BroadbandAccess Service Overview, <http://www.verizonwireless.com/b2c/mobileoptions/broadband/serviceoverview.jsp> (last visited May 26, 2006).

149. See Anush Yegyzarian, *A Gated Internet*, THE WASH. POST Online, Feb. 3, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/02/AR2006020200160.html> (describing how these service providers promote selected content by prioritizing service to preferred sites).

150. See, e.g., FERGUSON, *supra* note 5, at 145-46 (reviewing content providers' incentives to avoid providing easy access to Internet services that would compete with

# EXHIBIT 52

# Community-Owned Fiber Networks: Value Leaders in America

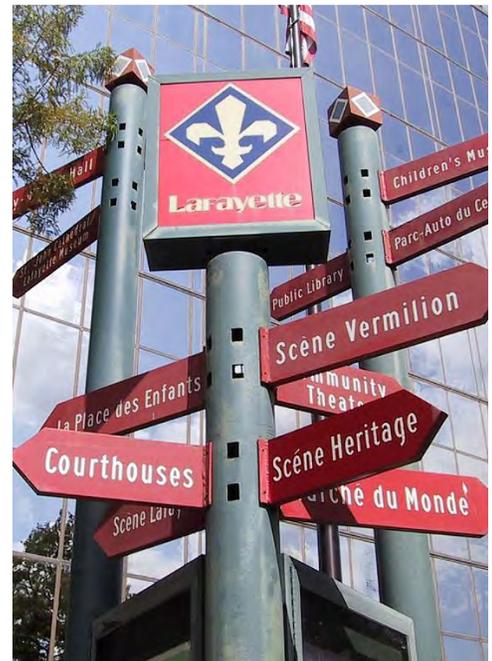
## Pricing Review Shows They Provide Least-Expensive Local "Broadband"

Our examination of advertised prices shows that community-owned fiber-to-the-home (FTTH) networks in the United States generally charge less for entry-level broadband service than do competing private providers, and don't use initial low "teaser" rates that sharply rise months later. We also found that Comcast varies its pricing by region. Our study was constrained by the lack of standardization in Internet service offerings and a shortage of available data on broadband pricing in the United States. The U.S. Federal Communications Commission doesn't comprehensively collect or make available data from internet service providers on prices advertised or charged, service availability by address, or consumer adoption by address.

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January 2018

Community fiber networks in Sandy, Oregon (bottom left); Opelika, Alabama (top right); and Lafayette, Louisiana are among those offering the lowest local prices for service meeting the FCC's "broadband" threshold (25 Mbps download, 3 Mbps upload).



## ABSTRACT

We collected advertised prices for residential data plans offered by 40 community-owned (typically municipally owned) Internet service providers (ISPs) that offer fiber-to-the-home (FTTH) service. We then identified the least-expensive service that meets the federal definition of broadband—at least 25 Mbps download and 3 Mbps upload—and compared advertised prices to those of private competitors in the same markets. We found that most community-owned FTTH networks charged less and offered prices that were clear and unchanging, whereas private ISPs typically charged initial low promotional or “teaser” rates that later sharply rose, usually after 12 months. We were able to make comparisons in 27 communities. We found that in 23 cases, the community-owned FTTH providers’ pricing was lower when averaged over four years. (Using a three year-average changed this fraction to 22 out of 27.) In the other 13 communities, comparisons were not possible, either because the private providers’ website terms of service deterred or prohibited data collection or because no competitor offered service that qualified as broadband. We also made the incidental finding that Comcast offered different prices and terms for the same service in different regions.

## KEY FINDINGS

- When considering entry-level broadband service—the least-expensive plan that provides at least 25/3 Mbps service—23 out of 27 community-owned FTTH providers we studied charged the lowest prices in their community when considering the annual average cost of service over a four-year period, taking into account installation and equipment costs and averaging any initial teaser rates with later, higher, rates. This is based on data collected in late 2015 and 2016.
- In these 23 communities, prices for the lowest-cost program that met the current definition of broadband were between 2.9 percent and 50 percent less than the lowest-cost such service offered by a private provider (or providers) in that market. In the other four cases, a private provider's service cost between 6.9 percent and 30.5 percent less.
- While community-owned FTTH providers' pricing is generally clear and unchanging, private providers almost always offer initial "teaser" prices and then raise the monthly price sharply. This price hike in the communities we studied ranged between \$10 (20 percent) and \$30 (42.8 percent) after 12 months, both imposed by Comcast, but in different communities. Only one community-owned FTTH provider employed this marketing practice for a data-only plan. This exception was a student discount offered by the MINET network in Oregon.
- Language in the website "terms of service" (TOS) of some private ISPs strongly inhibits research on pricing. The TOS for AT&T, Verizon, and Time Warner Cable (now owned by Charter), were particularly strong in deterring such efforts; as a result, we did not record data from these three companies.
- While the United States has 40 community networks offering broadband FTTH service (many of them serving more than one municipality), we did not make comparisons with private competitors in 13 cases, either because the TOS prohibited data collection or because no competing broadband service existed in the community network's home community.
- We noted that Comcast varied its teaser rates and other pricing details from region to region. Our sample size was small; just seven of the communities we studied were served by Comcast. Understanding Comcast's pricing practices and their consumer impacts across the United States would require much deeper study.
- In general we found that making comprehensive pricing comparisons among U.S. Internet service plans is extraordinarily difficult. The U.S. Federal Communications Commission (FCC) does not disseminate pricing data or track broadband availability by address. Additionally, service offerings follow no standard speed tiers or definitions (such as the specifics of video or phone service bundles). We focused on comparing entry-level broadband plans in part because of these complexities.

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## MAIN FINDING

### COMMUNITY FIBER NETWORKS OFFER BETTER ENTRY-LEVEL BROADBAND VALUES AND CLEARER, TEASER-FREE PRICING

Our major finding is that in 23 out of 27 communities where comparisons were possible, entry-level broadband service from a community-owned FTTH network—meaning the lowest-cost service that met the FCC's definition of broadband (at least 25 Mbps download, 3 Mbps upload)—was less expensive, when considering the average annual cost of service over four years,<sup>8</sup> than such service offered by a private competitor.

The benefits ranged from a savings of 2.9 percent, or \$19, annually in Tullahoma, Tennessee, to more than 50 percent, or \$600, annually in Lafayette, Louisiana. Twelve of the community-owned FTTH providers beat their private competitors' prices by 20 percent or more for entry-level broadband service. In four communities, a private provider beat the community-owned FTTH network. In such cases, the benefits ranged from a 6.9 percent, or \$50, saving for users of Charter Spectrum in Jackson, Tennessee, to about a 30.5 percent, or \$298, saving, also for users of Charter Spectrum, in Churchill, Nevada.

The lowest-speed tier that met the broadband minimum varied from provider to provider. In 13 cases, the private provider's lowest-cost plan that met the broadband threshold offered higher speeds than did the lowest-cost broadband service of community-owned FTTH networks. In six cases, the reverse was true; in five cases, the speeds were the same.

Our secondary finding was that community-owned providers furnish consumers with dramatically clearer pricing. Of the 35 private Internet access plans we encountered in our data collection, 25 offered low-cost initial promo-

tional (or "teaser") rates and then increased the rate substantially at the conclusion of the initial period (typically 12 months). By contrast, we encountered only three examples of promotional pricing among the community-owned ISPs we studied. And MINET, in the towns of Monmouth and Independence, Oregon, was the only one to offer such a deal on a plan offering Internet access only, in the form of a special promotion for students.<sup>9</sup> The private providers' price increases at the expiration of the promotional period ranged from 20 percent, or \$10 monthly (Comcast Xfinity in Longmont, Colorado), to 42.8 percent, or \$30.04 monthly (Comcast Xfinity in Concord, Massachusetts).

We do not know what fraction of broadband subscribers take data-only plans as opposed to bundles. However, surveys of U.S. consumers by the Pew Research Center indicate a trend toward "cord cutting" (the practice of canceling a cable TV subscription and merely taking a data plan). In late 2015 Pew reported that about 15 percent of Americans were cord cutters and that another nine percent had never taken a TV subscription.<sup>10</sup> Younger people appear more likely to do without bundles. Pew's most recent survey, in September of 2017, found that 60 percent of people aged 18–29 said they mainly watched TV by using services such as Netflix.<sup>11</sup>

Our study, though limited in scope, contains a clear finding: community-owned FTTH networks tend to provide lower prices for their entry-level broadband service than do private telecommunications companies, and are clearer about and more consistent in what they charge. They may help close the "digital divide" by providing broadband at prices more Americans can afford.

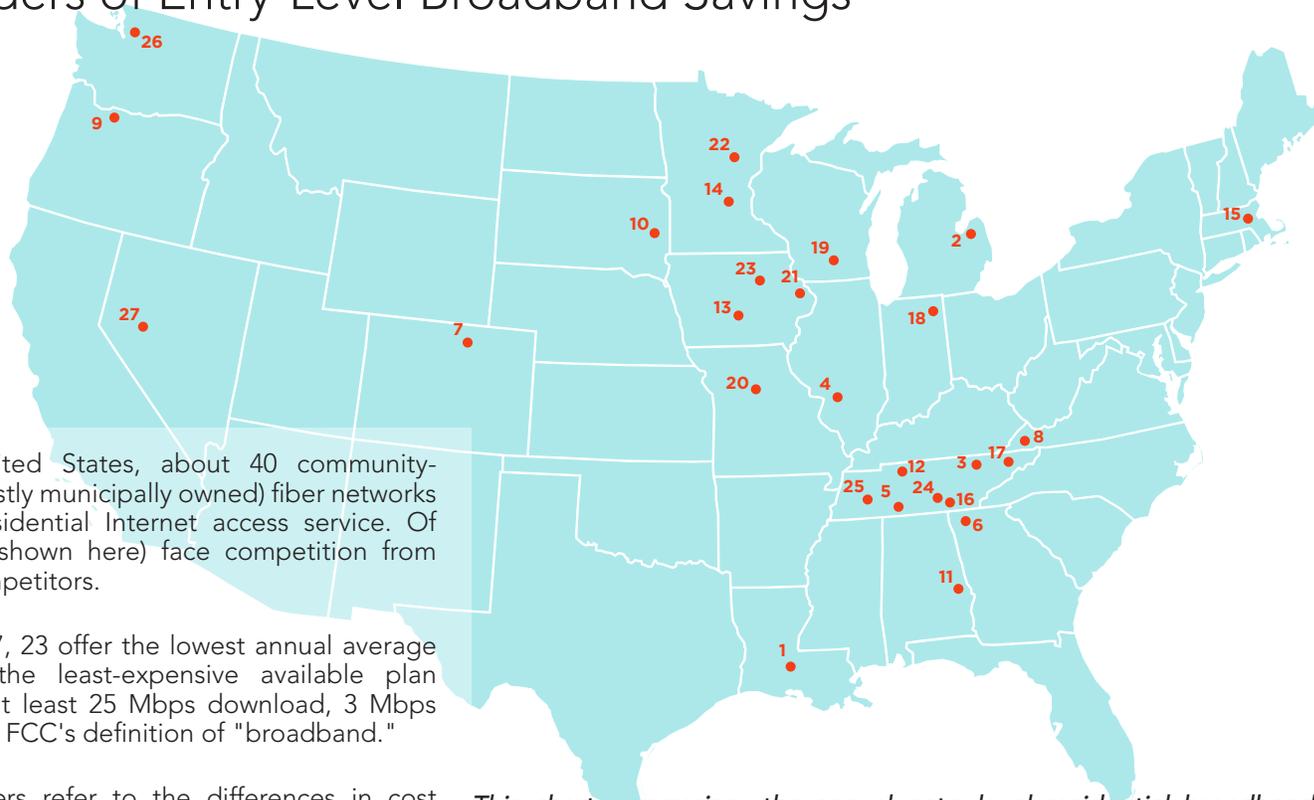
8 As part of our analysis we also ran the numbers for a three-year average, a method that would make private providers appear less expensive, given that they tend to use low initial "teaser" rates, typically for 12 months. Only one of the community-owned FTTH networks that were less expensive over four years became more expensive when a three-year term was considered: Cedar Falls, Iowa. See methods section for more details.

9 MINET's promotional pricing option is only available to area students and offers them a six-month discounted price. Because MINET did not have any competitors offering broadband-minimum speeds, we did not include this or their other plan offerings in our analyses. Additionally, community-owned FTTH networks in Lafayette, Louisiana, and Bristol, Virginia, offered bundled services (as opposed to the entry-level broadband plans we studied) having an initial promotional rate of one year.

10 Maeve Duggan & John B. Horrigan, One-in-Seven Americans Are Television "Cord Cutters," Pew Research Center (Dec. 21, 2015), <http://www.pewinternet.org/2015/12/21/4-one-in-seven-americans-are-television-cord-cutters/>.

11 Lee Rainie, About 6 in 10 Young Adults in U.S. Primarily Use Online Streaming to Watch TV, Pew Research Center (Sept. 13, 2017), <http://www.pewresearch.org/fact-tank/2017/09/13/about-6-in-10-young-adults-in-u-s-primarily-use-online-streaming-to-watch-tv/>.

# Community Fiber Networks: Providers of Entry-Level Broadband Savings



In the United States, about 40 community-owned (mostly municipally owned) fiber networks provide residential Internet access service. Of these, 27 (shown here) face competition from private competitors.

Of these 27, 23 offer the lowest annual average price for the least-expensive available plan providing at least 25 Mbps download, 3 Mbps upload, the FCC's definition of "broadband."

The numbers refer to the differences in cost per year, averaged over a four-year period, as advertised on the providers' websites during our review in late 2015 and 2016. The full dataset we generated is available at this address:

<http://dx.doi.org/10.7910/DVN/HHTTF1>

Some providers' entry-level broadband services offer higher speeds than others; the industry doesn't follow any standard speed tiers. We focused on the plan that minimally met the FCC definition, regardless of exact advertised speed.

Our analysis is limited in scope. A deeper study would require comprehensive data to be made available on advertised prices, actual prices charged, and service availability and adoption by address.

*This chart summarizes the annual entry-level residential broadband price savings (or premium) offered by community FTTH networks relative to private competitors. See the next two pages for full details.*

	Community network	Annual cost savings (or premium) relative to private competitor(s)	Community network	Annual cost savings (or premium) relative to private competitor(s)
1	Lafayette, LA	\$600.00	14	Monticello, MN
		\$311.36		\$122.74
2	Sebewaing, MI	\$352.15	15	Concord, MA
				\$38.34
3	Morristown, TN	\$324.12	16	Chattanooga, TN
		\$259.23		\$107.25
4	Highland, IL	\$295.23	17	Bristol, TN
				\$79.22
5	Pulaski, TN	\$237.24	18	Auburn, IN
				\$92.76
6	Dalton, GA	\$216.98	19	Reedsburg, WI
				\$62.97
7	Longmont, CO	\$172.74	20	Marshall, MO
		\$301.45		\$25.90
8	Bristol, VA	\$199.23	21	Bellevue, IA
		\$126.74		\$35.52
9	Sandy, OR	\$170.00	22	Crosslake, MN
				\$37.25
10	Brookings, SD	\$163.13	23	Cedar Falls, IA
		\$148.60		\$24.88
11	Opelika, AL	\$139.23	24	Tullahoma, TN
				\$19.22
12	Clarksville, TN	\$138.75	25	Jackson, TN
				(\$50.13)
13	Indianola, IA	\$130.39	26	Issaquah Highland, WA
				(\$100.48)
				(\$108.10)
			27	Churchill, NV
				(\$298.28)

# Cheapest Tiers Meeting Broadband Definition

## Community Fiber Networks Tend to Beat Private Competitors

This table reviews advertised broadband prices in 27 communities served by community-owned FTTH networks and one or two private providers. The dollar figures present average cost per year over four years and takes into account all fees and recurring costs.

Rank	Community	Entry-level broadband offering from community FTTH network Provider Download/upload speed (mbps) Avg. service cost per year for first 4 years	Entry-level broadband offering from private competitor Provider Download/upload speed (mbps) Avg. service cost per year for first 4 years	Annual savings or (premium)	Percentage savings or (premium)	Key (see next page)
1	Lafayette, LA	Lafayette Utilities Systems 60/60, \$599.40	KTC Pace 50/5, \$1,199.40	\$600.00	50.0%	1, 6
			Cox Communications 50/5, \$910.76	\$311.36	34.2%	1, 6
2	Sebewaing, MI	Sebewaing Light & Water 30/30, \$451.25	Comcast Xfinity 25/5, \$803.41	\$352.15	43.8%	1
3	Morristown, TN	FiberNET 30/30, \$419.40	Comcast Xfinity 75/5-10, \$743.52	\$324.12	43.6%	1, 4
			Charter Spectrum 60/4, \$678.63	\$259.23	38.2%	1, 4
4	Longmont, CO	NextLight 25/25, \$479.40	Comcast Xfinity 25/5, \$625.14	\$172.74	23.3%	
			Centurylink 40/5, \$780.85	\$301.45	38.6%	5, 6
5	Highland, IL	Highland Communication Services 40/40, \$383.30	Charter Spectrum 60/4, \$678.63	\$295.23	43.5%	4
6	Pulaski, TN	PES Energize 25/6.5, \$441.39	Charter Spectrum 60/4, \$678.63	\$237.24	35.0%	4
7	Dalton, GA	Optilink 25/10, \$461.65	Charter Spectrum 60/4, \$678.63	\$216.98	32.0%	4
8	Bristol, VA	Bristol Virginia Utility Optinet 30/5, \$479.40	Charter Spectrum 60/4, \$678.63	\$199.23	29.4%	
			Comcast Xfinity 25/5, \$606.14	\$126.74	20.9%	
9	Sandy, OR	SandyNet 100/100, \$504.40	Wave 55/5, \$674.40	\$170.00	25.2%	
10	Brookings, SD	Swiftel 30/5, \$616.28	Interstate Telecommunications Cooperative 30/5, \$779.40	\$163.13	20.9%	3, 4, 6
			Mediacom Cable 50/5, \$764.88	\$148.60	19.4%	3, 4, 6
11	Opelika, AL	Opelika Power Services 30/15, \$539.40	Charter Spectrum 60/4, \$678.63	\$139.23	20.5%	4
12	Clarksville, TN	Clarksville CDE Lightband 50/50, \$539.88	Charter Spectrum 60/4, \$678.63	\$138.75	20.4%	1
13	Indianola, IA	Indianola Municipal Utilities 25/10, \$634.49	Mediacom Cable 50/5, \$764.88	\$130.39	17.0%	
14	Monticello, MN	Monticello Fiber Network 50/50, \$640.29	TDS Telecom 25/10, \$763.03	\$122.74	16.1%	6
			Charter Spectrum 60/4, \$678.63	\$38.34	5.6%	6
15	Concord, MA	ConcordNet 25/25, \$649.40	Comcast Xfinity 25/5, \$764.52	\$115.12	15.1%	2
16	Chattanooga, TN	EPB Fiber Optics 100/100, \$695.88	Comcast Xfinity 25/5, \$803.40	\$107.25	13.4%	1
17	Bristol, TN	Bristol TN Essential Services 30/5, \$599.40	Charter Spectrum 60/4, \$678.63	\$79.23	11.7%	4

18	Auburn, IN	Auburn Essential Services 25/6, \$731.64	Mediacom Cable 50/5, \$824.40	\$92.76	11.3%	1, 4
19	Reedsburg, WI	Reedsburg Utility Commission 50/5, \$615.65	Charter Spectrum 60/4, \$678.63	\$62.97	9.3%	
20	Marshall, MO	Marshall Municipal Utilities 40/20, \$552.50	Zito Media 100/10, \$578.40	\$25.90	4.5%	1, 4
21	Bellevue, IA	Bellevue iVue Internet Services 25/25, \$863.88	Bernard Telephone & Communications Inc. 30/30, \$899.40	\$35.52	3.9%	
22	Crosslake, MN	Crosslake Communications 30/20, \$1,030.40	Emily Cooperative Telephone Company 30/30, \$1,067.65	\$37.25	3.5%	7
23	Cedar Falls, IA	Cedar Falls Utilities FiberNet 50/25, \$740.00	Mediacom Cable 50/5, \$764.88	\$24.88	3.3%	
24	Tullahoma, TN	Tullahoma Utilities Board 30/5, \$659.40	Charter Spectrum 60/4, \$678.63	\$19.22	2.8%	1, 4
25	Jackson, TN	Jackson Energy Authority 60/10, \$728.75	Charter Spectrum 60/4, \$678.63	-\$50.13	-6.9%	1
26	Issaquah Highland, WA	Highland Fiber Network 100/100, \$782.59	Comcast Xfinity 25/5, \$682.02	-\$100.48	-12.8%	6, 8
			Wave 55/5, \$674.40	-\$108.10	-13.8%	6
27	Churchill, NV	CC Communications 35/5, \$976.90	Charter Spectrum 60/4, \$678.63	-\$298.28	-30.5%	3

NOTE: The websites of some private providers did not display upload speeds to prospective customers. Upload speeds were added to this table after the fact for two providers, Charter Spectrum and Comcast Xfinity, by consulting with customer service representatives and independent reports.

## KEY

- 1: This community may also be served by AT&T. We did not collect data from AT&T because of prohibitions contained in the terms of service posted on AT&T's website.
- 2: This community may also be served by Verizon DSL service. We did not collect data from Verizon because of prohibitions contained in the terms of service posted on Verizon's website.
- 3: Because this community ISP offered only bundled phone/data, we used the phone/data price in place of a data-only price and did not attempt to subtract the value of the phone service.
- 4: This community provider also offered a higher speed that was closer to the entry-level speed of the private provider. However, we only compared the cheapest possible plans that met broadband definitions. We also did not attempt to verify actual delivered speeds for any ISP.
- 5: Longmont, CO, has a DSL provider whose website does not prohibit data collection and that offers broadband speeds. In this one case, we collected the pricing information in March of 2017.
- 6: Seven of the 27 communities were served by two private ISPs providing at least 25/3 Mbps service, resulting in the split row containing two sets of prices.
- 7: In August of 2016, Crosslake Communications was bought by Tri-Co Technologies, a partnership of three private companies. We collected our data before this occurred.
- 8: The Highland Fiber Network serves a community called Issaquah Highlands, a neighborhood within Issaquah, WA. It does not serve the larger municipality of Issaquah.

## CONCLUSION

Studying the pricing practices of U.S. Internet service providers is challenging. Many ISPs deter data collection, service plans and pricing strategies aren't standardized, and regulators don't collect and release enough relevant data. Against this backdrop, we did our best over more than 18 months to manually gather and harmonize data to explore whether community-owned FTTH networks or private providers offered the best values in providing a service that minimally met the FCC's definition of broadband.

We found that in 23 out of 27 communities where comparisons were possible, entry-level broadband service from a community-owned FTTH network was indeed less expensive than comparable service offered by a private competitor when considering the annual cost of service averaged over four years. What's more, the community providers were generally far clearer in how they presented pricing—steering clear of initial teaser rates that later rise sharply.

But the unavailability of comprehensive data leaves many fundamental questions unanswered. These include: What does broadband service actually cost consumers in the United States? To what extent do carriers actually charge the rates set forth in price lists? How many consumers attempt to renegotiate after teaser rates expire, and how many pay higher prices for many more years? Exactly how sensitive are consumers to price when choosing to adopt broadband service? Are publicly owned FTTH networks a better value overall than private ones? Do companies frequently vary pricing of the same service in different regions, and does this have a disparate impact on different demographic groups? Do municipally or other community-owned sys-

tems put downward price pressure on private company offerings?

Existing efforts at regulatory data collection fall far short of what would be needed to answer such questions. While the FCC collects data about advertised speed tiers and other service offerings through a telecom industry reporting document called Form 477, it does not comprehensively collect data on pricing. (It does collect some pricing data in specific circumstances, such as from schools and libraries that participate in the E-rate program, which subsidizes Internet access to those institutions.<sup>22</sup>)

The FCC also only collects data by census block, not address. The FCC recently sought comment on proposals to expand the scope of data collection under Form 477 and specifically asked whether collecting data at the street-address level would be beneficial.<sup>23</sup> Having gone through this data-collection exercise, we can report that the answer is yes. Street-address-level data, if available for study, would speak most clearly about the state of broadband service, price, and competition in the United States.

Some existing resources aren't useful in practice. The National Telecommunications and Information Administration (NTIA) in 2009 created a National Broadband Map, but among other problems with this resource, it provides no information about pricing, and data collection for the map ceased in June of 2014. The Commerce Department collects and publishes aggregate data about the state of broadband competition in the United States, but it does so only at the level of census blocks. In general, data is not collected in a coordinated manner, is often incomplete, and omits critical information like price.<sup>24, 25</sup> Other independent organizations have attempted to fill

22 Report and Order and Further Notice of Proposed Rulemaking in the Matter of Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184 (Jul. 23, 2014). See also Danielle Kehl, What's Inside the FCC's E-rate Order?, New America's Open Technology Institute (Aug. 4, 2014), <https://www.newamerica.org/oti/blog/whats-inside-the-fccs-e-rate-order-2/>.

23 Federal Communications Commission, WC Docket No. 11-10, Modernizing the FCC Form 477 Data Program (Aug. 4, 2017), <https://ecfsapi.fcc.gov/file/08041199205324/FCC-17-103A1.pdf>.

24 The National Broadband Map is missing a lot of data on smaller ISPs, including municipally owned networks. At the same time, it over-represents the state of competition in many areas because it includes ISPs that only offer commercial or enterprise service. In essence, according to the map it appears that someone who lives on a block that is in reality only served by one residential provider actually has other competitors to choose from.

25 The FCC, for example, has previously declined to collect pricing information from any broadband providers through the annual Form 477 reporting requirements it imposes on Internet access providers, and has itself conceded that it does not have the "reliable data as to the actual prices consumers pay for these services" that it would need to conduct substantial analysis on the impact of price. See, e.g., Patrick Lucey, FCC Prioritizes Incumbent Protection in Data Collection Order, Community Broadband Networks (Jul. 17, 2013), <http://muninetworks.org/content/fcc-prioritizes-incumbent-protection-data-collection-order>; 2016 Broadband Progress Report, Federal Communications Commission (Jan. 29, 2016) at para. 103.

# EXHIBIT 53

Why does

# BROADBAND

matter?



Broadband is the link that ties your community together and connects it to the world. It doesn't matter if your community is in an urban center or a remote plain; high-speed Internet access is the tool that will help your community members and institutions thrive.

## Education



K-12 schools **spend** more than **\$7 billion a year** on textbooks



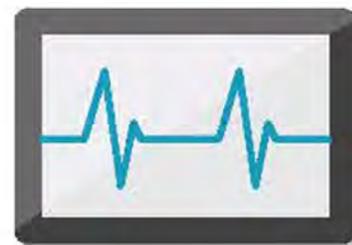
Going digital can **save** schools as much as **\$600 per student** per year

Broadband helps schools reallocate funds to resources and activities that **enrich student learning**.

## Telehealth



Hospitals without electronic health records will spend **\$371 billion** more



Telehealth reduces hospital admissions by **25 percent** and

Broadband enables **quick access to emergency services** so that first responders can **save lives**.

## Community



Communities with adoption rates below 80 percent have **2,000 fewer businesses** than their counterparts



Broadband access can increase home values by an average of **3.1 percent**

Broadband is a pillar for **community sustainability and growth**.

**Want to learn more about how broadband can help your community?**

BroadbandUSA provides technical assistance, resources and support to get your community connected.

Visit our website to learn more: <http://www.ntia.doc.gov/broadbandusa>

Contact us today at: [BroadbandUSA@ntia.doc.gov](mailto:BroadbandUSA@ntia.doc.gov) | 202-482-2048



**BROADBANDUSA**  
CONNECTING AMERICA'S COMMUNITIES

# EXHIBIT 54

1 Sponsored by: Councilmembers Derek Young, Dave Morell, Douglas G. Richardson,  
2 Marty Campbell, and Pam Roach  
3 Requested by: Pierce County Council  
4  
5  
6  
7

## 8 **RESOLUTION NO. R2019-74**

9

### 10 **A Resolution of the Pierce County Council Declaring Broadband to Be** 11 **Essential Infrastructure; Expressing Council Intent to Direct** 12 **Resources to Advance Broadband Internet Access within** 13 **Pierce County; and Identifying Actions for Further Evaluation** 14 **by the Council.** 15 16 17

18 **Whereas**, the term “broadband” commonly refers to high-speed internet access  
19 that is always on and significantly faster than traditional dial-up access; and  
20

21 **Whereas**, the Federal Communications Commission (FCC) defines broadband  
22 internet access as twenty-five megabytes per second downstream and three megabytes  
23 per second upstream (25/3 Mbps); and  
24

25 **Whereas**, by 2020, with an estimated four billion people worldwide connected to  
26 the internet, using over twenty-five million different applications, over fifty trillion  
27 gigabytes of data generated, and continuous technological innovations and  
28 advancements, future demand for access to high-speed internet will not only continue to  
29 increase exponentially, but become synonymous with a modernized standard of living;  
30 and  
31

32 **Whereas**, community broadband networks are essential for education,  
33 healthcare, market competition, consumer choice, economic development, and  
34 universal, affordable internet access; and  
35

36 **Whereas**, the economic health of municipalities depends on public and private  
37 investment to connect their communities; and  
38

39 **Whereas**, Pierce County wishes to promote broadband access at gigabit speed  
40 (1000 Mbps) in the urban area and at least 100 Mbps in the rural area as it believes  
41 speeds at these levels are necessary to fully access the capabilities and services  
42 needed and desired by citizens, institutions, and businesses within the community; and  
43  
44



1       **Whereas**, pursuant to the 2017 Pierce County Budget, the Pierce County  
2 Council requested a review and analysis of Countywide connectivity and access to high-  
3 speed internet; and

4  
5       **Whereas**, the Pierce County Broadband and Access Evaluation was completed  
6 by the Performance Audit Committee and its contractor, Magellan Advisors, in April  
7 2019; and

8  
9       **Whereas**, the evaluation identifies several goals and initiatives and a series of  
10 specific recommendations and action steps for Pierce County to prioritize, incentivize  
11 and advance the buildout of a Countywide broadband network; and

12  
13       **Whereas**, it is imperative to both the prosperity of individual residents and the  
14 overall economic success and future vitality of Pierce County to have reliable,  
15 affordable, high-speed internet access available throughout all of Pierce County; and

16  
17       **Whereas**, the Pierce County Council finds that it is in the public's interest to  
18 prioritize County resources to advance a Countywide broadband network to make  
19 reliable, affordable, high-speed internet available to all Pierce County residents;

20 **Now Therefore**,

21  
22       **BE IT RESOLVED by the Council of Pierce County:**

23  
24       Section 1. The Pierce County Council hereby declares that wireline and wireless  
25 communications providing abundant capacity which supports high-speed, advanced  
26 digital communications, referred to generically as "broadband" – forms the basis of an  
27 essential 21st Century infrastructure in our digital world and economy. It is vital to the  
28 economic development and quality of life for the residents, businesses and institutions  
29 of Pierce County and throughout Washington. The desired access speeds are at least  
30 one gigabit per second in the urban area and at least 100 megabytes per second in the  
31 rural area.  
32



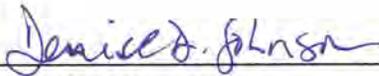
1        Section 2. The Pierce County Council declares its intent to direct resources to  
2 advance broadband access within Pierce County and identifies the following high  
3 priority items for action by the Council within 90 days of the passage of this Resolution:  
4

- 5 • Procurement of services by the Office of the Pierce County Council to support the  
6 development of a broadband strategic plan. (Broadband Strategic Plan)  
7
- 8 • Initiate a broadband stakeholder process to solicit the opinions, needs, and expertise  
9 of community members, business, broadband providers, institutions, and other  
10 stakeholders. (Stakeholder Engagement)  
11
- 12 • Revise existing County policies, standards, and code to remove barriers to  
13 broadband delivery. (Broadband Friendly Policies and Standards)  
14

15  
16        ADOPTED this 2nd day of July, 2019.  
17

18 ATTEST:

PIERCE COUNTY COUNCIL  
Pierce County, Washington

19  
20  
21  
22 

23 **Denise D. Johnson**  
24 Clerk of the Council  
25



**Douglas G. Richardson**  
Council Chair



# EXHIBIT 55



City of Tacoma  
Office of the City Clerk

## CERTIFICATE OF CITY CLERK

I, Doris Sorum, City Clerk of the City of Tacoma, Washington, do hereby certify that the attached is a full, true and correct copy of Amended Resolution No. 39577 adopted by the City Council on November 1, 2016.

Dated this 21<sup>st</sup> day of January 2020.

  
Doris Sorum, City Clerk  
City of Tacoma, Washington





## RESOLUTION NO. 39577

1 BY REQUEST OF COUNCIL MEMBERS BLOCKER, IBSEN, MCCARTHY, AND  
2 WOODARDS

3 A RESOLUTION directing the City Manager to hire an independent third-party  
4 consultant or consultants to audit, analyze, and establish a reasonable  
5 methodology for cost allocation between Tacoma Power and Click!  
6 Network and evaluate the expansion of Click! Network; authorizing the  
7 execution of professional services agreements, as necessary, which outline  
8 the scope and deliverables; and authorizing the use of up to \$100,000,  
9 budgeted from the City Council Contingency Fund, to pay the costs  
10 associated therewith, pending reimbursement from Click! Network.

11 WHEREAS, on December 15, 2015, the City Council approved Resolution  
12 No. 39347, which required Tacoma Power to develop a business, financial, and  
13 marketing plan to provide Click! Network ("Click!") customers with retail cable  
14 television, voice, and internet services, and

15 WHEREAS, following a nine-month review, the Click! Engagement  
16 Committee ("Committee") described the community benefits of an enhanced Click!  
17 telecommunications system and an outline of the features of such a system, and

18 WHEREAS, on September 28, 2016, pursuant to Resolution No. U-10879  
19 ("Resolution"), the Tacoma Public Utility Board ("Board") approved the Click!  
20 "All-In" Business Plan ("Plan"), and

21 WHEREAS, since its inception in 1996, Click! has been part of Tacoma  
22 Power's telecommunications system and was initially financed with Tacoma  
23 Power electric revenues, and

24 WHEREAS, since that time, the internal cost allocation between Click! and  
25 Tacoma Power has changed significantly and, over time, Tacoma Power has  
26 substantially increased the cost allocation borne by Click!, and



1 WHEREAS the most recent shift in cost allocation is supported by an  
2 accountant assessment which relies predominantly upon the cost-accounting  
3 recommendations of Tacoma Power, and

4 WHEREAS this dramatic change in cost allocation has been the key driver  
5 underlying the debate over the future of Click!, and has encouraged considerable  
6 public scrutiny as to the veracity and appropriateness of the current accounting  
7 assumptions and methodology implemented by Tacoma Power, and

8 WHEREAS the concerns raised about the current cost allocation  
9 methodology and the implications of said methodology on the Plan are significant  
10 and must be resolved, and

11  
12 WHEREAS, at the October 25, 2016, City Council Study Session, Council  
13 Member McCarthy shared a Council Consideration Request directing the City  
14 Manager to hire an independent third-party consultant or consultants to audit,  
15 analyze, and establish an independent cost allocation methodology between  
16 Tacoma Power and Click! and evaluate the expansion of the telecommunications  
17 system contemplated by the proposed Plan in the context of an evolving  
18 broadband telecommunications industry, and, further, to authorize the use of up to  
19 \$100,000 of City Council Contingency Funds for said purposes, and

20  
21 WHEREAS the purpose of the proposed audit is to provide the City Council  
22 with the best analysis and information available for its deliberations on the  
23 proposed Plan, and to encourage the public's confidence in both the process and  
24 underlying assumptions of the Plan, and

25  
26



1 WHEREAS Ordinance No. 22569 requires an affirmative vote of not less  
2 than six members of the Council in order to withdraw moneys from the City  
3 Council Contingency Fund; Now, Therefore,

4 BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TACOMA:

5 Section 1. That the City Manager is hereby directed to hire an  
6 independent third-party consultant or consultants to audit, analyze, and establish  
7 a reasonable methodology for cost allocation between Tacoma Power and Click!  
8 Network, and evaluate the expansion of Click! Network.

9 Section 2. That the City Manager is hereby authorized to execute  
10 professional services agreements, as necessary, which outline the scope and  
11 deliverables necessary to perform the work described in Section 1.

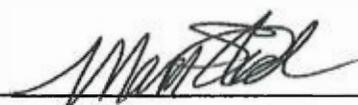
12 Section 3. That the use of up to \$100,000, budgeted from the City Council  
13 Contingency Fund, is hereby authorized to pay the costs associated with the work  
14 authorized herein, pending reimbursement from Tacoma Power.  
15  
16

17 Section 4. Concurrent with the third-party consultant review requested by  
18 the City Council, Tacoma Public Utilities staff will complete the more detailed  
19 aspects of the Business and Marketing Plan for the "All-In" Business Plan ("Plan")  
20  
21  
22  
23  
24  
25  
26

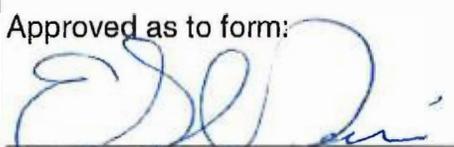


1 consistent with the direction provided in City Council Resolution No. 39347. This  
2 Plan will be reviewed and revised based upon the findings of our third-party audit.

3  
4 Adopted NOV 01 2016

5  
6   
7 Mayor

8 Attest:  
9   
10 City Clerk

11 Approved as to form:  
12   
13 City Attorney

14  
15  
16  
17  
18  
19  
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22  
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25  
26

# EXHIBIT 55 (a)

CITY OF TACOMA  
CITY COUNCIL MEETING  
REMOTE BROADCAST CAPTIONING  
TUESDAY, MARCH 26, 2019

Services provided by:  
QuickCaption, Inc.  
4927 Arlington Avenue  
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Fax Number - 951-779-0980  
[quickcaption@gmail.com](mailto:quickcaption@gmail.com)  
[www.quickcaption.com](http://www.quickcaption.com)

\* \* \* \* \*

This text is being provided in a rough draft format.  
Communication Access Realtime Translation (CART) is provided in  
order to facilitate communication accessibility and may not be  
totally verbatim record of the proceedings.

\* \* \* \* \*

that with revenue from the internet.

That's essentially what we're faced with today.

We have the service provision in cable that is dramatically changing.

We heard from several people tonight that talked about cutting the cord.

That's the phenomenon we're wrestling with by being the retail provider.

>> Mayor Woodards: Council Member Blocker.

>> K. Blocker: Thank you mayor and director flowers for your detailed description of the history where we got to the place where today.

My question is for our city attorney.

We've mentioned that we are currently in litigation with individuals or groups that feel as though the City of Tacoma, our utilities is subsidizing the rates for Click!

Can you explain to the public where we are at with that litigation and how it may impact the City of Tacoma and the general fund budget?

>> The lawsuit was filed in 2018.

The plaintiffs ratepayers that will the city power department has been subsidizing the Click! loss to the tune of \$21 million -- loss to the tune of \$21 million if they're entitled to interest on those amounts which could be as high

as 12%.

They'd be asking for \$128 million.

Our reserve account is roughly \$35 million.

If we were hit with judgment, if we lose the appeal, they'd be asking for that money immediately.

We'd have to raise property taxes or essentially drain the general fund or layoff general fund staff, police, fire, legal department, finance.

>> K. Blocker: Thank you for that.

Based off your professional judgment, that will is not a risk that we want to take which is why we move towards the direction of working with a private entity?

>> The council in early 2018, they abandoned the all-in plan that because that would have required more public funds it provide the services and that was a substantial risk to all of city services if they were to be added on top of potential judgment that is out there.

Outstanding right now if we don't win the appeal.

>> And just one more question, people have raised concerns about the City of Tacoma not performing audit we've heard from deputy -- sorry, Director Flowers that we've done our own internal analysis but we planned to hire an outside consultant at that do an audit for us.

Is that correct?

Why didn't we move forward with that process?

>> As Director Flowers talked about a little bit, that came about the at the same time as the board passed two resolutions.

One recommending a third party lease and one recommending the all-in plan.

Both came to council.

Following a review, there was a request to look at number to analyze and review not necessarily an audit because as a subfund, it doesn't have its own financials per se.

You can't look at it like a separate enterprise fund, at the point that the all-in plan was abandoned and we were going to pursue the review of the 12 policy goals and public/private partnership, the idea of doing an audit didn't make any sense so at that point it was ended because we'd gone flew the moss Adams.

>> K. Blocker: If we were to do an audit at this point, what impact would it have object judgment that's been come down from the courts?

>> Well, we're still appealing that particular ruling.

Doing an independent audit of the finances today would potentially provide more information for the plaintiffs to use against the city and against Tacoma Power related to their allegations that we're illegally subsidizing the funds.

The audit could show we're not allocating enough Tacoma Power costs to the Click! customers and we're possibly using more power funds than we originally thought we were.

>> K. Blocker: It could hurt our case and put us at more risk.

>> Yes, more risk on the city.

>> K. Blocker: Thank you.

>> Mayor Woodards: Council Member Hunter.

>> L. Hunter: Thank you.

I want to also appreciate the questions of my colleagues here because I think that with those questions, you've been able to provide some clarity Director Flowers to some of the concerns we've heard here this evening.

I appreciate the work that you've been doing since arrived eight months ago and I appreciate the works of the TPU board of directors and in my first year here, steep learning curve of many aspects.

But the number of times that we've had mutual board meetings where we've been together ask analyzed and reviewed and gone over this, this has not been a capricious process.

What I want to do is just to point out that this, as has been said, Click! has been operating as a public and private partnership since its inception.

We have other examples where we have valuable assets that

# EXHIBIT 56

[HOME](#)[Print Friendly](#)

The City Utility tax refers to a tax on public service businesses, including businesses that engage in telecommunications, supply of electricity and natural gas, and solid waste collection. Utility tax is a gross receipts tax that is measured on the value of products or services, gross proceeds of sales, or gross income of business.

The tax is in lieu of the business and occupation (B&O) tax but is consistent with B&O tax. Utility tax is calculated on the gross income from activities. This means there are no deductions from the Utility taxable income for labor, materials, or other costs of doing business.

### **How to Report**

The Utility tax is reported and paid monthly. Monthly returns are due by the end of the month following the close of the tax period.

Communications/electricity/solid waste collection businesses with gross income of less than \$20,000 per month, as indicated by billings and/or charges to or for service to Tacoma customers, may request to report and pay the Utility tax quarterly.

If your business gross income is less than \$20,000 per month and you would prefer to report on a quarterly basis send an email to [taxinfo@cityoftacoma.org](mailto:taxinfo@cityoftacoma.org) with your City Account Number and request to change your filing frequency. Change in filing frequency can only be done at the start of a quarter (January, April, July, October).

### **Tax Classifications & Rates**

All business activity is reported under a certain tax classification and each classification has its own tax rate.

### **Deductions and Exemptions**

There may be deductions or exemptions available for the following types of businesses that engage in public service businesses. The information can be found in the Tacoma Municipal Code Subtitle 6A. Please follow the link below for more information.

Communications [TMC 6A.40.090](#)

Electricity and Solid Waste Collection [TMC 6A.50.060](#)

## **Utility Tax**

### **Telephone/Cellular Phone Charges**

The utility tax is levied on the utility company, however, many companies will include the City tax on their customers bill. An explanation of some local charges that may be on your phone bill can be found [here](#).

# EXHIBIT 56 (a)

## Tax Classifications

Business income is reported under a tax classification depending on the type of business activity. If you conduct multiple activities, it may be necessary to report under several B&O tax classifications. Review the definitions of [tax classifications](#). If you need assistance, [contact us](#).

## Tax Rates

<b>Business &amp; Occupation Tax Classification</b>	<b>Prior to 2003</b>	<b>2003 - current</b>
Retailing	0.00153	0.00153
Wholesaling	0.00102	0.00102
Service & Other Apportionment	0.0042	0.004
Manufacturing	0.0011	0.0011
International Investment Services	0.00165	0.00055
Retail Service	N/A	0.004

<b>Utility Tax Classification</b>	<b>Prior to March 2016</b>	<b>Current</b>
Telephone Business	6.0%	7.5%
Cellular or Pager	6.0%	7.5%
Natural Gas	6.0%	7.5%
Cable Service	8.0%	8.0%
Franchise Fee (Cable)	5.0%	5.0%
PEG Fee (Cable)	1.0%	1.0%
Solid Waste Collection	8.0%	8.0%
Electricity	6.0%	7.5%
Water	8.0%	8.0%

**EXHIBIT 56 (b)**



City of Tacoma  
Office of the City Clerk

## CERTIFICATE OF CITY CLERK

I, Doris Sorum, City Clerk of the City of Tacoma, Washington, do hereby certify that the attached is a full, true and correct copy of Amended Resolution No. 39236 adopted by the City Council on July 14, 2015.

Dated this 21<sup>st</sup> day of January 2020.

  
Doris Sorum, City Clerk  
City of Tacoma, Washington





## RESOLUTION NO. 39236

1 BY REQUEST OF MAYOR STRICKLAND

2 A RESOLUTION providing for the submission of a proposition to the electors of  
3 the City of Tacoma, at the General Election to be held on November 3,  
4 2015, authorizing the City to levy an additional 1.5 percent earnings tax on  
5 utility companies, and a levy lid lift of \$0.20/\$1,000 in assessed value over  
6 a period of ten years, for the sole purpose of funding repair and  
7 maintenance improvements for residential and arterial streets, freight  
8 access, and bike and pedestrian mobility in the City of Tacoma; setting  
9 forth the ballot proposition; requiring an annual progress report; and  
10 directing the City Clerk to transmit to the Pierce County Auditor a certified  
11 copy of this resolution.

12 WHEREAS the City Council has identified infrastructure improvement as  
13 one of its Strategic Goals, and

14 WHEREAS adequate and dedicated funding to preserve and maintain City  
15 streets continues to be a significant challenge for the City, and

16 WHEREAS the City Council and Council-appointed task forces have  
17 consistently identified the issue of sustainable, dedicated funding for basic  
18 maintenance of City and neighborhood streets and road safety upgrades, pothole  
19 repairs, repaving of streets and arterials, safety improvements at intersections,  
20 sidewalks and crosswalks near schools, and bridged maintenance and safety  
21 repairs as a top priority, and

22 WHEREAS RCW 35.22.280 permits first-class cities to levy a tax on the  
23 privilege of conducting utility businesses such as electrical energy, natural gas,  
24 or telephone business, and RCW 35.21.870 limits imposition of such taxes to a  
25 rate of six percent in the absence of approval by a majority of the voters of the  
26 City, and



1           WHEREAS RCW 84.55.050 provides for the levy of regular property taxes  
2 in an amount exceeding the limitations specified in Chapter 84.55 RCW if such  
3 increased levy is authorized by a proposition approved by a majority of the voters  
4 at the general election held within the taxing district (a "levy lid lift"), and  
5

6           WHEREAS RCW 84.55.050 further provides that the proposition may limit  
7 the time period and purpose for which the increased levy is to be made and that,  
8 unless otherwise stated in the proposition, subsequent levies shall be computed as  
9 if the proposition had not been approved and the City had made levies at the  
10 maximum rates which would otherwise have been allowed, and  
11

12           WHEREAS, if approved by the voters, the funds raised by a 1.5 percent  
13 increase in the utility earnings tax and levy lid lift of \$0.20/\$1,000 in assessed  
14 value over a period of ten years would be used exclusively to finance Citywide  
15 street maintenance improvements and safety upgrades, and  
16

17           WHEREAS the City Council deems it necessary to submit to the qualified  
18 electors a proposed tax increase of 1.5 percent earnings tax on utility companies,  
19 and a levy lid lift of \$0.20/\$1,000 in assessed value over a period of ten years, to  
20 generate total revenues of \$130,000,000, for the sole purpose of funding street  
21 maintenance improvements and safety upgrades as described herein, and  
22

23           WHEREAS transparency and accountability of how funds are spent, the  
24 budgets of the projects, leverage of funds achieved and demonstration of  
25 progress made are critical to delivering the improvements promised to voters,  
26 and



1           WHEREAS, if the voters approve this proposition, the City Manager is  
2 directed to prepare an annual progress report to be made available to the public  
3 through the Transportation Commission to ensure transparency and  
4 accountability, and

5           WHEREAS, in furtherance of transparency and accountability of how the  
6 newly generated funds will be spent, it is the intent of the City to establish new  
7 and separate funds to segregate the revenues collected as a result of this  
8 measure, and to restrict the use of these funds for the purposes set forth in this  
9 measure; Now, Therefore,

10           BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TACOMA:

11           Section 1. That the Pierce County Auditor, as *ex officio* supervisor of  
12 elections in Pierce County, Washington, is hereby requested to submit to the  
13 qualified electors of the City of Tacoma, for their approval or rejection at the  
14 General Election to be held on November 3, 2015, a proposition authorizing an  
15 additional 1.5 percent earnings tax on utility companies, and a levy lid lift of  
16 \$0.20/\$1,000 in assessed value over a period of ten years, to generate total  
17 revenues of \$130,000,000, for the sole purpose of financing street maintenance  
18 improvements and safety upgrades in the City of Tacoma.  
19

20           Section 2. The City shall submit a proposition to the electorate of the City  
21 of Tacoma in the form substantially as follows:  
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**CITY OF TACOMA  
PROPOSITION NO. 3**

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The Tacoma City Council adopted Amended Resolution No. 39236 concerning levy rate and gross earnings tax increases for street improvements. If passed, Proposition No. 3 would authorize the City to increase the City's regular property tax levy by \$0.20 per \$1,000 of assessed value for collection for ten years beginning in 2016, and levy an additional 1.5% earnings tax on natural gas, electric, and phone companies for ten years, beginning 2016, to fund street repair, maintenance and safety improvements for residential streets, arterials, and freight access, including resurfacing, pothole repair, pedestrian safety improvements, school crossing beacons, and sidewalk improvements.

Should this proposition be approved?

Yes. . . . .   
No . . . . .

Section 3. That, prior to August 4, 2015, the City Clerk shall send to the Pierce County Auditor, as *ex officio* supervisor of elections, a certified copy of this resolution, together with a proposition substantially in the form set forth above, for the November 3, 2015, General Election.

Section 4. That, should the voters approve this proposition, the City Manager is directed to work with the Public Works Department to deliver an annual progress report to the public through the Transportation Commission so that citizens may easily understand the improvements made and budget and leverage achieved, among other indicators, important for transparency and accountability of these public resources.

Section 5. That the City Manager is directed to bring forward an ordinance establishing dedicated and restricted funds to ensure that any revenue



generated as a result of this measure is used solely as outlined in the initiative

proposal.

Adopted JUL 14 2015

  
\_\_\_\_\_  
Mayor

Attest:

  
\_\_\_\_\_  
City Clerk

Approved as to form:

  
\_\_\_\_\_  
Deputy City Attorney

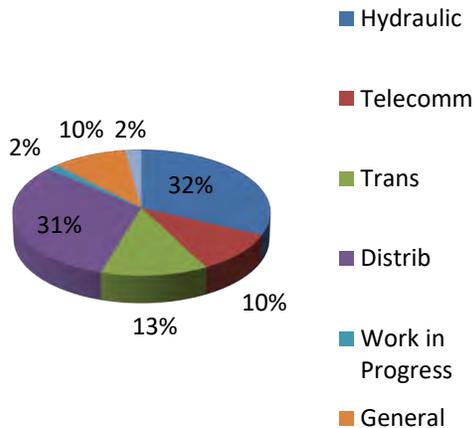
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**EXHIBIT 56 (c)**

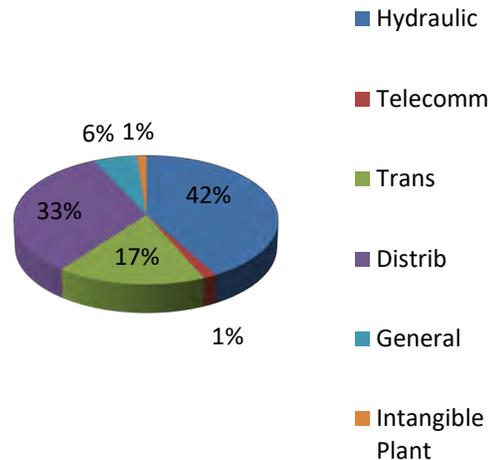
Additions to Intangible Plant in 2018 were \$1.6 million which primarily included an IT service management tool. Additions to Hydraulic Plant in 2018 were \$6.4 million, which mainly included replacement for generation breakers at Cushman, the boat ramp at Mossyrock, security upgrade at Alder Park, and replacements of hydro exciters, hydro governors, turbines, and generators.

Transmission additions were \$11.8 million, which included Pearl Cushman upgrades, Henderson Bay Tower replacement, and replacements of circuits, high-voltage switches, and other devices. Distribution additions were \$31 million, which included construction of Taylor substation, LED street lights, addition and replacement programs for new services, pole and cable, road related additions and replacements, distribution transformers and meters and devices. Regional Transmission additions were \$11.5 million, which primarily included EMS Hardware and Software. Additions to General Plant were \$6.5 million, which included the permanent decant facility, pay station kiosks, Voice Solutions system, security system in the administration building and parking lots, and other servers and systems. Click! additions were \$2.1 million, which included aerial and underground coax cables, enhancements and replacements of network infrastructure, and upgrades of security and network.

**2017 UTILITY PLANT**



**2017 PLANT ADDITIONS**



Additions to Hydraulic plant in 2017 were \$22.8 million, which included the Cowlitz license implementation and the hydro governor and exciter replacement program. Distribution plant additions were \$17.9 million, which included addition and replacement programs for new services, pole and cable, road related additions and replacements, distribution transformers and meters and devices. Transmission plant additions were \$9.2 million, which included Potlatch system ring bus, substation additions and replacements, Henderson Bay tower replacement, Pearl Cushman upgrade and protection and controls additions and replacements.

CITY OF TACOMA, WASHINGTON  
DEPARTMENT OF PUBLIC UTILITIES  
TACOMA POWER

STATEMENTS OF REVENUES, EXPENSES AND CHANGES IN NET POSITION

	YEAR ENDED DECEMBER 31,	
	2018	2017 (As Restated)
<b>OPERATING REVENUES</b>		
Sales of Electric Energy .....	\$411,393,120	\$401,631,506
Other Operating Revenue .....	18,539,960	18,192,038
Click! Network Operating Revenue .....	25,358,403	26,519,861
Total Operating Revenue .....	455,291,483	446,343,405
<b>OPERATING EXPENSES</b>		
Operations		
Purchased and Interchanged Power .....	134,618,445	135,822,340
Generation .....	16,241,304	23,118,677
Transmission .....	29,394,316	27,562,757
Distribution .....	15,781,781	19,675,524
Other .....	20,140,445	20,077,132
Maintenance .....	31,200,935	30,074,370
Telecommunications Expense .....	22,791,699	25,309,470
Administrative and General .....	43,716,689	43,377,927
Depreciation .....	53,869,012	57,231,313
Taxes .....	21,486,970	20,755,847
Total Operating Expenses .....	389,241,596	403,005,357
Net Operating Income .....	66,049,887	43,338,048
<b>NON-OPERATING REVENUES (EXPENSES)</b>		
Interest Income .....	3,719,705	2,251,477
Contribution to Family Need .....	(100,000)	(100,000)
Other .....	1,776,333	(1,534,389)
Interest on Long-Term Debt (Net of AFUDC).....	(18,834,946)	(18,209,650)
Amortization of Debt Premium .....	1,615,670	4,132,856
Total Non-Operating Expenses.....	(11,823,238)	(13,459,706)
Net Income Before Capital Contributions and Transfers .....	54,226,649	29,878,342
Capital Contributions		
Cash .....	8,771,749	8,806,311
Donated Fixed Assets .....	618,713	149,323
BABs and CREBs Interest Subsidies .....	3,824,135	3,687,700
Transfers		
City of Tacoma Gross Earnings Tax .....	(34,384,956)	(34,141,875)
<b>CHANGE IN NET POSITION</b> .....	33,056,290	8,379,801
<b>TOTAL NET POSITION - BEGINNING OF YEAR</b> .....	830,375,494	821,995,693
<b>TOTAL NET POSITION - END OF YEAR</b> .....	\$863,431,784	\$830,375,494

*The accompanying notes are an integral part of these financial statements.*

**CITY OF TACOMA, WASHINGTON  
DEPARTMENT OF PUBLIC UTILITIES  
TACOMA POWER**

**NOTES TO FINANCIAL STATEMENTS  
YEARS ENDED DECEMBER 31, 2018 AND 2017**

**NOTE 1 OPERATIONS**

**OPERATIONS OF TACOMA POWER** - The Light Division, doing business as Tacoma Power (Tacoma Power or the Division), is a division of the City of Tacoma, Washington (the City), Department of Public Utilities (the Department) and is included as an enterprise fund in the Comprehensive Annual Financial Report (CAFR) of the City. The Department consists of Tacoma Power, Tacoma Water and Tacoma Rail and is governed by a five-member Public Utility Board (the Board) appointed by the City Council. Certain matters relating to utility operations, such as system expansion, issuance of bonds and setting of utility rates and charges, are initiated and executed by the Board, but also require formal City Council approval. Tacoma Power owns and operates the City's electrical generation and distribution facilities and telecommunication infrastructure. Tacoma Power serves approximately 178,000 of retail customers and has 813 employees. Tacoma Power is organized into six business units: Generation, Power Management, Transmission and Distribution, Rates, Planning and Analysis, Click! Network, and Utility Technology Services.

**GENERATION** operates four hydroelectric generating projects (Cowlitz, Cushman, Nisqually and Wynoochee) and the associated recreational facilities, fish hatcheries and other project lands.

**POWER MANAGEMENT** manages the power supply portfolio, markets bulk and ancillary power supply services, schedules and dispatches division-owned generation and contract power supplies and performs power trading and risk management activities. Revenues and the cost of electric power purchases vary from year to year depending on the electric wholesale power market, which is affected by several factors including the availability of water for hydroelectric generation, marginal fuel prices and the demand for power in other areas of the country.

**TRANSMISSION AND DISTRIBUTION** plans, constructs, operates and maintains the transmission and distribution systems including substations, the underground network system, supervisory control and data acquisition (SCADA) systems, revenue metering facilities and all overhead transmission and distribution systems. Electricity use by retail customers varies from year to year primarily because of weather conditions, customer growth, the economy in Tacoma Power's service area, conservation efforts, appliance efficiency and other technology.

**RATES, PLANNING AND ANALYSIS** plans for and manages the retail rate process, financial planning, analysis and modeling, budget strategies, the capital program and risk management.

**CLICK! NETWORK** plans, constructs, operates and maintains a hybrid fiber coaxial (HFC) telecommunications network that supports the operation of Tacoma Power's electrical transmission and distribution system, provides retail cable TV and wholesale high-speed Internet services to residential and business customers, and data transport services to retail customers.

**UTILITY TECHNOLOGY SERVICES (UTS)** maintains communication networks, operational and informational technology systems, and related equipment and infrastructure to optimize utility operations and improve reliability and service quality. This includes a Project Management Office that establishes and leads Tacoma Public Utilities Information Systems project governance process and implements project portfolio management tools. UTS is responsible for all matters related to Tacoma Power's compliance with North American Electric Reliability Corporation (NERC) Reliability Standards, maintains overall responsibility for the NERC Reliability Standards and manages Tacoma Power's Internal Reliability and Compliance Project.

CITY OF TACOMA, WASHINGTON  
DEPARTMENT OF PUBLIC UTILITIES  
TACOMA POWER

TAXES AND EMPLOYEE WELFARE CONTRIBUTIONS  
FOR THE YEAR 2018

**FEDERAL**

Power Social Security (FICA) .....	\$7,250,486	
Total .....		\$7,250,486

**STATE OF WASHINGTON**

Retail Sales and Use Taxes .....	4,084,377	
Power Utilities and Business Operations Tax .....	14,439,066	
Power State Employment Security .....	159,282	
Total .....		18,682,725

**COUNTY**

Lewis County - In Lieu of Taxes .....	1,593,920	
Mason County - In Lieu of Taxes .....	191,704	
Pierce County School Support - Eatonville .....	7,000	
White Pass School Support .....	127,074	
Mossyrock School Support .....	110,491	
Morton School Support .....	3,105	
Lewis County Fire Protection District .....	11,123	
Pierce County Fire Protection District .....	22,271	
Pierce County Drainage District .....	19,480	
Thurston County .....	2,051	
Total .....		2,088,219

**MUNICIPALITIES**

City of Tacoma Power Gross Earnings Tax .....	32,417,495	
Click!Network Gross Earnings Tax/Franchise Fees ....	3,122,181	
City of Fife Power Franchise Fee .....	1,256,990	
City of University Place Power Franchise Fee .....	1,182,082	
City of Lakewood Power Franchise Fee .....	1,090,176	
City of Fircrest Power Franchise Fee .....	269,940	
City of Steilacoom Power Franchise Fee .....	5,770	
Total .....		39,344,634
TOTAL TAXES .....		\$67,366,064

Taxes as a % of Operating Revenues of \$ 455,291,483 .. 14.80%

**EMPLOYEE WELFARE CONTRIBUTIONS**

Power Industrial Insurance and Medical Aid.....	\$1,387,904	
Power City of Tacoma Pension Fund .....	10,298,298	
Power Medical/Life Insurance .....	17,553,605	
TOTAL EMPLOYEE WELFARE CONTRIBUTIONS .....		\$29,239,807

# EXHIBIT 57

## AMENDMENT NO. 7 TO ISP ADVANTAGE AGREEMENT

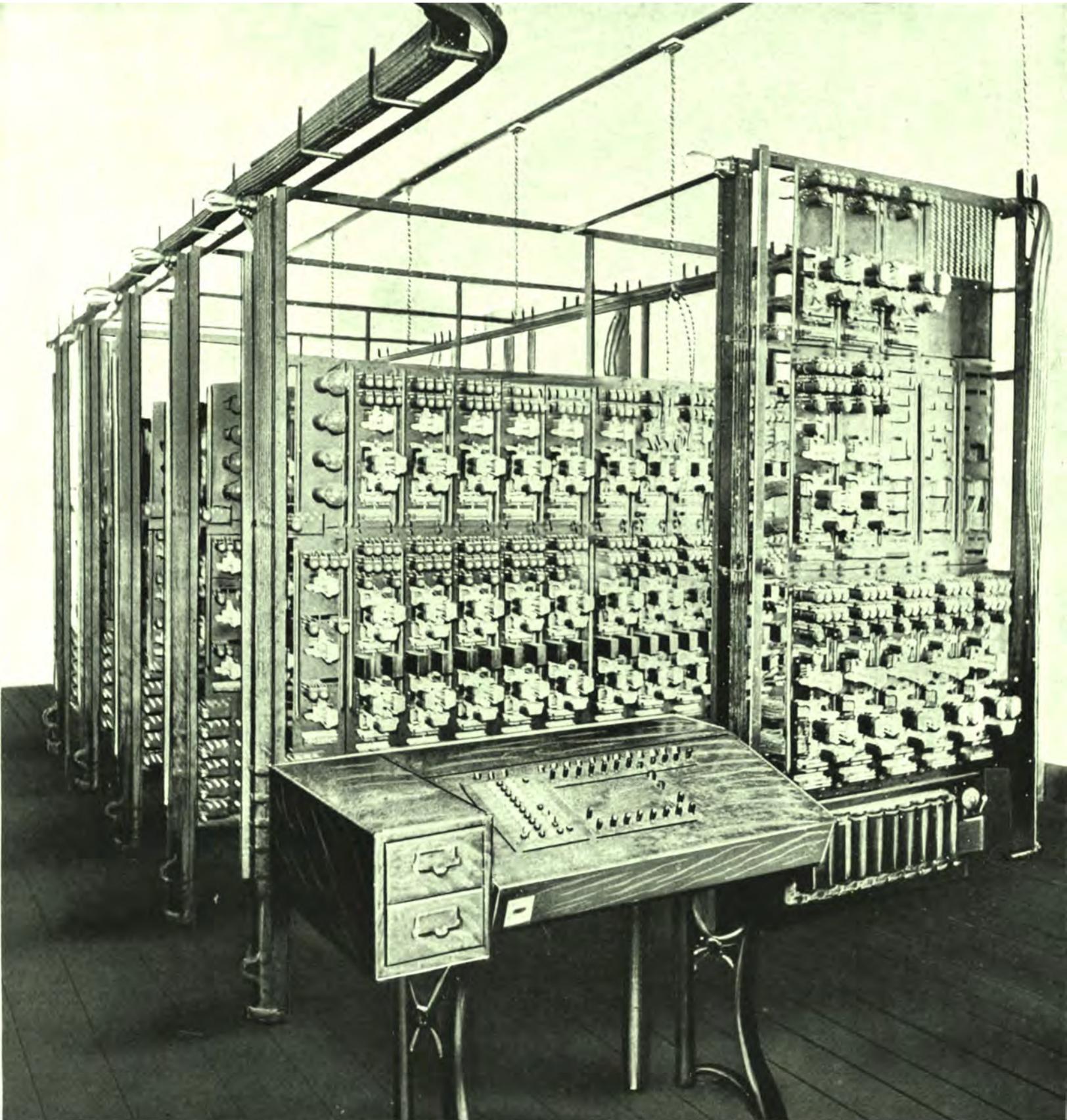
### Click! Network Role and Responsibilities

- A. Install, operate and maintain the Network equipment to make FTTP technology operational
- B. Notify ISP of new FTTP deployments and anticipated release dates
- C. Release all new FTTP addresses to ISP upon completion
- D. Determine the make and model of the ONT, which shall be capable of data, telephony, and video services. Models that are appropriate for outdoor mounting, indoors mounting, requiring powering and non-AC powered, and Wi-Fi capable shall be made available
- E. Purchase, own and install ONT equipment in End User premises or in a common connection location such as a communications closet where wiring can be extended directly to End User premises
- F. Provide dynamic and static IP address space
- G. Provision ONT according to the Fiber Service Plan indicated on ISP installation order
- H. Retain sole ability to provision and surveil the Network and ONT equipment. The provisioning platform cannot partition the End Users on the Network between ISPs, and therefore Click! Network shall bear no responsibility for any costs associated with the development of such functionality.
- I. Receive telephone calls or trouble tickets from ISP or End Users experiencing trouble with Fiber Service; perform troubleshooting
- J. Perform service call to correct trouble
- K. Assume no liability for the merchantability or functionality or reliability of any ISP provided services such as telephony and any other value-added services such as 911, E911, etc. over the FTTP Network that are not directly provided by Click! Network to the ISPs
- L. Fiber Service Plans are best effort services and therefore advertised speeds are not guaranteed
- M. Bill ISP for Fiber Service Plans, as per the Agreement, on a monthly basis.

### ISP Role and Responsibilities

- A. Establish up to three packages as defined in the Fiber Service Plans section above
- B. Establish standard, published, non-promotional retail rates for the Fiber Service Plan packages ("Retail Rate Schedule")
- C. Provide the Retail Rate Schedule for the Fiber Service Plans to Click! Network
- D. Promote and market Fiber Service Plans only in locations where Click! Network has constructed FTTP and Fiber Service Plans are made available
- E. If End User Subscriber is a data service only Subscriber, then ISP shall specify the type of ONT required on the installation order.
- F. Establish installation, move, and disconnection appointments for End Users in the online appointment scheduling application
- G. Coordinate with Click! Network for completion of installation and repair orders as necessary
- H. Open and transmit a trouble ticket to Click!, refer End User or transfer call to Click! Network for troubleshooting and repair of Network or ONT related trouble
- I. Remit payment to Click! Network, as per the Agreement, on a monthly basis. ISP remains solely responsible for all charges billed to it by Click! Network whether or not it collects those charges from End Users.

# EXHIBIT 58



# *Telephones: 1907*

United States. Bureau of the Census, William Mott Stuart, Thomas Commerford Martin, Franklin H. Reed

DEPARTMENT OF COMMERCE AND LABOR  
BUREAU OF THE CENSUS  
E. DANA DURAND, DIRECTOR

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SPECIAL REPORTS

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TELEPHONES: 1907



WASHINGTON  
GOVERNMENT PRINTING OFFICE  
1910

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# TELEPHONES.

## CHAPTER I.

### INTRODUCTION.

*Classes of telephone systems included.*—The extensive use of the telephone has developed a number of different business methods for the organization and conduct of the industry. This census report covers all commercial and mutual or cooperative telephone systems, and also all independent farmer or rural lines that were in operation in the United States during any part of the year ending December 31, 1907; but does not include private lines used exclusively for communication between different rooms or departments of manufacturing or mercantile establishments, hotels, or private residences, systems operated for the benefit of Federal, state, and municipal governments, or those owned or leased by steam or electric railroads and operated by them for their own exclusive use. The companies for which statistics were collected have been divided into the following two classes:

(1) The American Telephone and Telegraph Company, and its subsidiary companies, commonly known as the "Bell system."

(2) Companies and systems operated independently of the Bell system and denominated "independent (non-Bell)" throughout this report.

All of the Bell companies have been considered as commercial, and the statistics for the entire system were obtained from the central office of the parent company at Boston, Mass.

The independent companies are divided into the following three classes:

(a) Commercial systems operated primarily for revenue.

(b) Mutual systems, or cooperative associations and companies, operated not primarily for revenue, but for the convenience of the patrons, who are assessed to pay expenses of maintenance, operation, and extensions. Many systems doing business on the mutual basis are organized as incorporated companies under the laws of the states in which they operate.

(c) Independent farmer or rural lines, which have no regular exchanges or centrals of their own, but which may or may not be connected with the exchange of a Bell or of a commercial or mutual system.

The term "independent," as used in connection with farmer or rural lines, does not relate to the distinction between Bell and independent (non-Bell) systems, but rather to a distinction between the farmer or rural lines and the lines owned by commercial and

mutual companies. The practice of establishing short telephone lines connecting two or more houses in the rural districts has increased very rapidly during the past ten years. Frequently these lines have no distinctive names, and their existence is known only to the persons in their immediate vicinities. They are extended gradually as other persons desire to be connected and, if they are in the neighborhood of a telephone exchange, it frequently happens that arrangements are made for exchange service. The extension of the farmer lines by additions or consolidations leads gradually to the establishment of exchange systems and the formation of mutual or commercial systems. This method of development makes it difficult to establish a line of demarcation between farmer or rural lines and mutual systems and between mutual and commercial systems.

Some companies operate on a combined commercial and mutual basis. This is due to the fact that the lines were constructed under a mutual arrangement and that later additional subscribers were taken on a revenue basis. In such cases if the assessment income for the census year exceeded the revenue income, the companies are classed as mutual; but if the revenue income exceeded the assessment income, they are classed as commercial.

A statistical line of demarcation between the independent farmer or rural lines and the small mutual systems can not be established with a degree of accuracy that will enable a comparison of the statistics for 1907 with those for 1902. At the census of 1902 the statistics obtainable for these small lines were rather incomplete, and practically all of the farmer or rural lines that operated switchboards were counted, without regard to size or amount of business, either as commercial or as mutual companies. The fact that a switchboard was operated was found to be of little assistance in establishing the line of separation, and therefore for the census of 1907 a different policy has been adopted. In this report there are included in the class of independent farmer or rural lines systems operated on a combined mutual and revenue basis, where the combined income and assessments for the full census year amounted to less than \$1,000, and small systems owned by individuals or firms and apparently operated for revenue having an income of less than \$500 for the full year.

The contract agreements for exchange facilities between different companies or between companies and farmer or rural lines are made to meet local conditions. In some cases the company owning the exchange obtains virtual ownership or control of the connecting lines; in some a fixed rental per month or year is paid to the owning company; while in some the compensation depends upon the number of stations connected, and in others it depends upon the number of messages transmitted. In making the census report the actual ownership of each line is used, so far as possible, to determine whether to include it as a member of the Bell system or as one of the several forms of associations operated independently of the Bell system. The statistics for the Bell system, therefore, represent only the lines and stations reported by the company as owned by it or by its subsidiary companies. In addition, however, the American Telephone and Telegraph Company (Bell system) reported the number of stations on the lines that have contract agreements for service at its various exchanges.

At the census of 1902 great difficulty was experienced in securing a satisfactory enumeration of the small independent commercial and mutual telephone companies and systems and of the independent farmer or rural lines. Therefore a special effort was made at the present census to enumerate all lines of this character. In the first instance a card index was prepared containing the names and addresses of all telephone companies and independent farmer lines known to the Census Bureau. The basis of this index or list was the reports made at the census of 1902. But in order to make it complete other sources of information were utilized; the postmasters throughout the country were required to furnish the names and addresses of all telephone companies and of the owners of individual farmer or rural lines operating in their cities or immediate vicinities; state officials were requested to furnish lists of the telephone companies in their respective states, and fairly complete lists were received from most of the states; county officials were requested to furnish lists of the names and addresses of the owners of farmer or rural telephone lines in their respective counties, and a great deal of information was obtained from them; all of the independent telephone associations were requested to furnish the names and addresses of their members, of any other companies in the same neighborhood, and of the proprietors of near-by independent farmer or rural lines known to them; and the names and addresses of telephone companies were obtained from the city directories for all cities having a population of 50,000 or over, and from lists kindly furnished by the publishers of *Telephony's* Directory of the telephone industry.

Blank schedules soliciting the statistics required for the census were mailed to all the companies and to representatives of each of the independent farmer or rural lines named on the lists prepared from these

sources, and in addition each company or person addressed was requested to give the names and addresses of all connecting farmer or rural lines and of all other companies or lines in the vicinity. Many additional names were secured by this means. The preliminary lists prepared from these various sources contained in the neighborhood of 35,000 names, a total which, of course, included quite a large number of duplications that had to be eliminated from the perfected card index. The Census Bureau, however, not yet satisfied that it had a complete list, divided the United States into eighty-four enumeration districts for making a personal canvass, and assigned one or more special agents to do the work in each district. They were given the names and addresses of all the telephone companies and of the proprietors of the independent farmer or rural lines located in their respective districts, and they were instructed not only to secure reports from each company or line whose name they had, but also to make careful inquiry for any other companies and lines in operation in the district during any portion of the year 1907.

It is believed that as a result of these efforts, returns were secured from practically every company or line that was in operation during any portion of the census year.

*Period covered.*—The statistics cover the year ending December 31, 1907, or the business year of each company which most nearly conforms to that calendar year. All statistics taken for a fixed date, such as cash on hand, number of telephones or stations, and wire mileage, are reported as of the last day of the business year covered by the report taken for each company. When possible, comparative data for the census year ending December 31, 1902, and for prior censuses are presented in connection with the data for 1907.

Since during the year 1907 many companies were organized and many systems were installed, and a number abandoned or absorbed by other companies, the statistics do not represent a full year's operation for every company reported. As the census can not be taken instantaneously and the number of telephones in operation changes daily, the numbers given in the annual reports of many companies do not agree with the number reported to the census for the date on which its report was obtained. These conditions should be considered in comparing the census figures with those compiled for other purposes.

*Limitations of the statistics.*—As small commercial systems owned by individuals and firms, many mutual systems, and the farmer or rural lines generally have no statistics concerning capitalization, and as many could furnish no data in regard to income and expenses, number of employees, salaries, wages, and some other subjects that are covered in the reports of the larger companies, it is impossible to compile for the entire industry totals showing all of the detail called for by the inquiries of the census schedule. In fact, the number

of telephones and the miles of wire are the only facts that could be collected for a great many of the independent farmer or rural lines and the small mutual systems. Statistics of capitalization, income, expenses, number of employees, salaries, wages, and other features presented in the detailed tables have been secured only for the commercial companies and the more important mutual systems. Therefore the statistics on these subjects do not represent all of the interests operating the 12,999,369 miles of wire and the 6,118,578 stations or telephones reported for all classes of companies, systems, and lines.

In the cases of some companies which keep no account books from which exact statistics concerning their incomes and expenses during the year could be obtained, estimates have been resorted to for approximate data. The employees of some of the smaller companies and systems do not devote their entire time to the telephone business, and so the wages reported by these companies are necessarily much lower than the wages reported by companies whose employees are paid for a full term of service.

The telephone companies do not limit their operations to the state, county, or city in which their principal offices are located, but extend their lines irrespective of the political subdivisions of the country. In compiling the statistics it is impossible, in many instances, to assign to each state the amount of capital, income, expenses, salaries, and wages that are incident to the operation of the wires and telephones within its limits. As a rule, the total for all items of this character is credited to the state in which the general office is located, but an exception is made in the case of the American Telephone and Telegraph Company, which segregated the statistics so as to assign to each state a portion of each item commensurate with the equipment located in it.

*Systems or lines.*—Throughout this report the designations "company," "system," and "line" are frequently used as synonymous terms. They represent

a statistical unit, the connotation of which varies slightly to meet the requirements of the different methods of bookkeeping of the various companies and the practice of the office in the compilation of the data. There is an increasing tendency to bring independent telephone lines under one ownership and direct their operations from a central office. The industry is constantly undergoing changes in this respect. New companies are being organized and old systems consolidated or reorganized. On the whole these changes increase the number of cases in which several lines are considered as a single system.

As a rule, distinct ownership marks the separation of the statistical units, and all exchanges and lines operated under the same ownership are counted as a single system. Where several lines are combined under one ownership, or several properties have been brought under one management by purchase or stock control, they are counted as one system. The subsidiary companies of the American Telephone and Telegraph Company are, of course, counted as separate units, as are the subsidiary companies of some other large companies which furnished separate reports for their subsidiary companies. Each independent farmer or rural line and each independent commercial or mutual company, however small, also is counted as a separate system. The "number of lines" in the tabulation therefore represents consistently the number of separate ownerships, without regard to the character of the ownership, and does not represent the number of circuits or pole lines.

Since the meaning of the terms "system" and "line" is not always the same, the number is no indication of the magnitude of the interests nor is it a true guide as to the number of exchanges. The process of consolidation may have resulted in an actual decrease in the number of companies, but at the same time the number of exchanges, miles of wire, number of telephones, and amount of business transacted may have increased.

TELEPHONES.

TABLE 11.—COMMERCIAL SYSTEMS, MUTUAL SYSTEMS, AND INDEPENDENT FARMER OR RURAL LINES—COMPARABLE ITEMS: 1907 AND 1902.

	NUMBER OF SYSTEMS OR LINES.			MILES OF WIRE.			NUMBER OF STATIONS OR TELEPHONES.			PER CENT OF TOTAL.					
	1907	1902	Per cent of increase.	1907	1902	Per cent of increase.	1907	1902	Per cent of increase.	Number of systems or lines.		Miles of wire.		Number of stations or telephones.	
										1907	1902	1907	1902	1907	1902
All systems and lines.....	22,971	9,136	151.4	12,999,369	4,900,451	165.3	6,118,578	2,371,044	158.1	100.0	100.0	100.0	100.0	100.0	100.0
Commercial systems.....	4,901	3,157	55.2	12,418,042	4,779,571	159.8	5,426,973	2,225,981	143.8	21.3	34.6	95.5	97.5	88.7	93.9
Mutual systems and independent farmer or rural lines.....	18,070	5,979	202.2	581,327	120,880	380.9	691,605	145,063	376.8	78.7	65.4	4.5	2.5	11.3	6.1
Mutual systems.....	368	904	( <sup>1</sup> )	95,033	70,915	( <sup>1</sup> )	125,956	89,316	( <sup>1</sup> )	1.6	10.9	0.7	1.4	2.1	3.8
Independent farmer or rural lines.....	17,702	4,985	( <sup>1</sup> )	486,294	49,965	( <sup>1</sup> )	565,649	55,747	( <sup>1</sup> )	77.1	54.6	3.7	1.0	9.2	2.4

<sup>1</sup> Increase or decrease not comparable.

Table 12 gives the statistics for the rural lines, by classes and by geographic divisions, for the censuses of 1907 and 1902. The classes comprise the rural lines owned by the commercial systems, together with all mutual systems (which are practically without exception rural lines), and all independent farmer or rural lines.

TABLE 12.—RURAL LINES, CLASSIFIED AS COMMERCIAL, MUTUAL, AND INDEPENDENT FARMER OR RURAL—NUMBER OF LINES, MILES OF WIRE, AND NUMBER OF STATIONS OR TELEPHONES, BY GEOGRAPHIC DIVISIONS: 1907 AND 1902.

DIVISION.	Census.	NUMBER OF LINES.				MILES OF WIRE.				NUMBER OF STATIONS OR TELEPHONES.			
		Total.	Commercial lines.	Mutual systems.	Independent farmer or rural lines.	Total.	Commercial lines.	Mutual systems.	Independent farmer or rural lines.	Total.	Commercial lines.	Mutual systems.	Independent farmer or rural lines.
United States.....	1907	124,847	106,777	1,368	17,702	1,591,240	1,009,913	95,033	486,294	1,464,773	773,168	125,956	565,649
	1902	21,577	15,598	1,994	4,985	259,306	138,426	70,915	49,965	260,968	121,905	89,316	55,747
North Atlantic.....	1907	19,749	18,391	15	1,343	180,445	141,259	6,687	32,499	164,932	112,601	8,725	43,606
	1902	1,151	947	119	85	18,069	14,152	2,985	932	18,706	12,499	4,656	1,551
South Atlantic.....	1907	5,201	4,221	15	965	87,520	47,207	7,456	32,857	64,149	25,542	12,273	26,334
	1902	1,195	674	73	448	17,824	7,629	4,549	5,646	11,268	3,822	3,995	3,451
North Central.....	1907	83,566	71,876	316	11,374	1,086,263	701,485	75,142	309,636	1,057,043	562,545	99,272	395,226
	1902	18,069	13,186	712	4,171	205,600	108,475	57,837	39,348	226,606	100,856	77,004	48,746
South Central.....	1907	9,926	7,195	13	2,718	146,548	71,827	2,925	71,796	115,905	41,143	3,603	71,159
	1902	958	634	69	255	13,889	6,564	3,699	3,626	7,829	3,546	2,492	1,791
Western.....	1907	6,405	5,094	9	1,302	90,464	48,135	2,823	39,506	62,744	31,337	2,083	29,324
	1902	204	157	21	26	3,864	1,606	1,845	413	2,559	1,182	1,169	208

<sup>1</sup> Mutual companies reported 12,378 party lines.

<sup>2</sup> Mutual companies reported 9,258 party lines.

The wire mileage and the number of telephones of the commercial rural lines are included in the wire mileage and the number of telephones given in other tables for the commercial systems. The statistics for the mutual systems and for the independent farmer or rural lines present in full the number of systems, the wire mileage, and the number of telephones for each class. Mutual systems reported 12,378 party lines in 1907 and 9,258 party lines in 1902, and the statistics for these lines would be analogous in the main to those for the rural lines owned by the commercial systems and to those for the independent farmer and rural lines. However, they would not include the total wire mileage and the total number of telephones reported for the mutual systems, as many of the tele-

phones are on single lines. Hence, as in the report for the census of 1902, the total number of mutual systems is used as the basis of comparison.

From Table 12 it appears that the greatest development of the rural telephone service of the country has been reached in the North Central states. By the end of 1907 these states contained 68.3 per cent of the wire and 72.2 per cent of the telephones employed in the rural service. While larger percentages of increase during the past five years are shown for other geographic divisions, the amounts involved are not so large.

Table 13 compares the statistics for the six states in which rural lines have had the greatest development.

# EXHIBIT 58 (a)



## RESOLUTION NO. 2013

### A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ANACORTES CONCERNING THE DEVELOPMENT OF A FIBER-OPTIC-BASED INTERNET NETWORK

**Whereas** the City of Anacortes has constructed a fiber optic network linking the Water Treatment Plant, the Wastewater Treatment Plant, and the various pump stations and other facilities that support the water and wastewater utilities for the purpose of telemetry and control of utility systems;

**Whereas** the City of Anacortes has connected that telemetry fiber network to other city facilities, including City Hall;

**Whereas** more than 1500 residents have responded to a City survey and shown overwhelming support for the City to move forward with a municipal fiber network;

**Whereas** the City published a Request for Qualifications for Internet Service Providers interested in leveraging a future City-owned fiber optic network to supply Internet access to residential and commercial customers within the city;

**Whereas** the Federal Communications Commission has recently repealed rules requiring "net neutrality," i.e., the principle that Internet service providers should treat all data on the Internet the same, not discriminating or charging differentially by user, content, website, platform, application, type of attached equipment, or mode of communication;

**Whereas** the City has accepted a \$205,000 grant (Interlocal #262) from Skagit County through the Port of Skagit to support a countywide fiber optic network, wherein the Port agreed not to offer dark fiber leases or internet services west of the Swinomish Channel;

**NOW THEREFORE BE IT RESOLVED** by the City Council of the City of Anacortes:

**Section 1. Findings.** The City Council finds that:

1. Information technology generally, and internet access specifically, plays an enormous role in our community today, and its impact to how we live, work, learn, and play, will continue to grow throughout the 21<sup>st</sup> century.
2. Businesses, and some residents, have an *existing* need for internet access at symmetric gigabit or higher speeds.
3. Businesses, residents, and the City will have an ever-growing need for high-speed, low-latency internet access in the future, given expected technological developments, e.g., ultra-high-resolution streaming television, ultra-high-resolution medical imaging, Smart Cities Initiatives, Internet of Things, 5G wireless, and self-driving vehicles.

4. Businesses and residents currently have few options for internet access, with most options at various performance tiers available from only a single provider.
5. World-class technology infrastructure, such as fiber-optic-based internet, helps communities attract invaluable human talent and capital, economic investment; create jobs; expand educational opportunities; improve telemedicine options, advance public safety, and position the community to take advantage of future technological innovation.
6. Fiber optic networks are widely considered “future proof” because they transmit signals at the speed of light and are constrained only by the electronics that manage the system.
7. Redundancy and resiliency of a fiber network is a critical part of making the City attractive to investment and economic development.
8. Fiber optic internet access is currently provided by private entities in the City of Anacortes but is prohibitively expensive due to the high cost of deploying infrastructure and lacks a redundant loop to the Internet backbone.
9. Private investment in capital-intensive technology infrastructure tends to converge around major metropolitan areas and population centers and is unlikely to occur organically in small cities like Anacortes.
10. A City-owned fiber-optic-based network would promote competition among Internet service providers that can both provide low-cost connectivity options for those with low incomes and offer commercial and residential stakeholders connectivity options superior to existing choices.
11. There is value in public ownership of critical infrastructure and utility services, like fiber-optic-based internet.

**Section 2. Objectives.** In implementing the directives below, the City Council intends that the City will accomplish the following objectives:

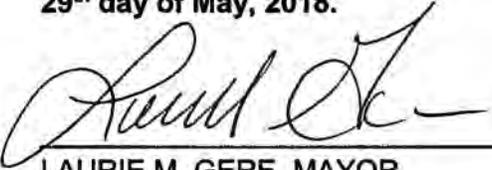
1. Offer “future proof” fiber-optic-based internet access to City residences and businesses.
2. Increase the resiliency of fiber-optic-based internet access throughout the County.
3. Provide affordable access to fiber-optic-based internet access to City residences and businesses.
4. Improve opportunities for economic development that utilizes and requires reliable and resilient fiber-optic-based networks.
5. Improve quality of life and property values for residents that would connect to fiber-optic-based internet, especially as the need grows for higher-bandwidth internet connections.

**Section 3. Directives.** The City Council authorizes and directs the preparation of a business plan to implement the following:

1. Build a redundant loop of fiber-optic-based internet access for the city.
2. Build a fiber-optic-based network throughout the city capable of delivering symmetrical internet and other network services.

3. Consider lease of dark fiber to other entities and businesses that require additional capacity or resiliency.
4. Ensure net neutrality for all internet access provided by the City.
5. Track revenues and expenses for the fiber optic system on its own balance sheet.
6. Operate the fiber optic system in a self-sustaining way without unreimbursed subsidy from general fund revenues.
7. Prioritize build out of the network within the City and its urban growth area, with intent to ultimately expand to serve the remainder of Fidalgo Island.

**PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF ANACORTES on this 29<sup>th</sup> day of May, 2018.**

  
\_\_\_\_\_  
LAURIE M. GERE, MAYOR

Approved as to form and legality:

  
\_\_\_\_\_  
Darcy Swetham, WSBA #40530  
City Attorney

ATTEST:

  
\_\_\_\_\_  
Steve D. Hoglund, City Clerk/Treasurer

**EXHIBIT 58 (b)**

# **CUSTOMER SIGN-UPS**

## **Through Early November 2019**

### **CENTRAL BUSINESS DISTRICT**

31 small business pre-orders

### **RESIDENTIAL CUSTOMERS**

193 orders

### **POINT-TO-POINT ETHERNET TRANSPORT**

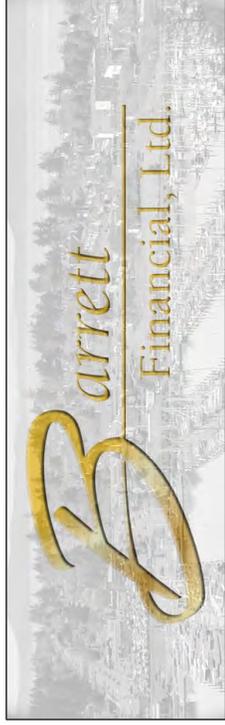
NoaNet – 1 Gbps, 5-year term, begins July 1, 2020

### **DARK FIBER LEASE INQUIRY**

Three circuits, term to be determined

# CUSTOMER SIGN-UPS

## Through Early November 2019



**FIRST EXTERNAL CUSTOMER**

**1 Gbps INTERNET SERVICE**

**FIRST DAY OF SERVICE: Oct 25, 2019**

# ACTIVE NETWORK STATUS

Through Early November 2019

	<u>Specified</u>	<u>Ordered</u>	<u>Deployed</u>	<u>Configured</u>
<b>GPON Optical Line Terminal</b>	✓	✓	✓	50%
<b>Core Layer 3 Router</b>	✓	✓	✓	✓
<b>Application Servers</b>	✓	✓	✓	✓
<b>Console Server</b>	✓	✓	✓	✓
<b>Customer Premise Equipment</b>				
Residential Internet	✓	✓		
Business class Internet	✓	✓		
Dedicated Internet Access				
Ethernet circuits				

# MISCELLANEOUS

## Through Early November 2019

### **INTERCONNECTION WITH CITY OF MOUNT VERNON**

*City of Mount Vernon will bring fiber to CoA Water Treatment Plant*

*Will allow CoA to connect Skagit County sites in Anacortes to sites in Mt Vernon*

*CoA Public Safety access to Spillman Technologies through CoA fiber*

*Will allow CoA to connect to upstream Internet providers with presence in Mt Vernon*

*Will allow CoA to connect sites in Anacortes to sites in Mount Vernon*

### **SECOND UPSTREAM INTERNET CONNECTION WITH WAVE**

*Blue Heron reservoir to Water Treatment Plant fiber complete*

*Makes CoA's Internet service more reliable*

# EXHIBIT 58 (c)

## FAQs

### Access - Anacortes Fiber Internet - Frequently Asked Questions

**Q: When will Access Fiber Internet be available in my neighborhood?**

A: Currently, we are scheduled to perform installations in the Central Business District in January 2020. Old Town is tentatively planned for Q1 of 2020 and our M Ave pilot area (24th to 32nd St.) in Q3 of 2020 as the attempt to cover the entire footprint of the city by 2023. While no other neighborhoods are scheduled yet, we are accepting orders city-wide.

**Q: If I place an order now, do I have to get service or face a fee?**

A: No. Placing an order now allows us to see where service is in high demand, and which plan is most popular. This helps us to plan and forecast more accurately as we grow our network. When we enter a neighborhood with several awaiting orders we will first contact the customers to confirm the order and the service requested. There is no penalty for changing your mind before an installation date is agreed upon and scheduled.

**Q: Do I need to rally my neighbors to get service to my neighborhood in Anacortes?**

A: We are already planning to make Access Fiber Internet available to every home and business in Anacortes, so you don't have to canvas your neighborhood. That being said, when all other factors are equal, a neighborhood that has far more orders than an equivalent neighborhood may get connected earlier.

**Q: How do I get billed?**

A: Residents that currently receive a utility bill will see Fiber Internet as a new line item on their existing account bill. Customers that don't currently have a utility billing account with the city of Anacortes will have one created.

**Q: How do I pay my bill?**

A: You can pay online at the city of Anacortes Online Payment page or in person at City Hall.

**Q: Will my bill go up after a promotional introductory period?**

A: No. Prices were established and approved by Anacortes City Council. Rates do not fluctuate and would only change with direct action from City Council through their usual public proceedings.

**Q: How much will I be charged in taxes on my bill?**

A: Since Internet alone is an information service, it is not taxed, therefore we do not have to charge any taxes on your service. No really. No taxes.

**Q: Is there a fee to have Fiber Internet connected at my home or business?**

A: There is a one-time Installation fee of \$100 after a representative has performed a walk through and an installation has been scheduled, which will appear on your first bill.

**Q: What does the installation process look like?**

A: In general, installation looks a bit like a traditional cable or DSL Internet installation. If you are in a location where the fiber is connected to telephone poles we would drop a line to your building, penetrate a wall to get the fiber inside, and terminate the fiber in the home. If you are in an area where utilities are underground, we bore or trench to the home and then follow the same steps as an aerial installation.

**Q: Will my router work with the Fiber Internet service?**

A: Yes, however routers that are more than a couple years old may not meet the newer WiFi standard which would limit your WiFi Internet performance. If desired, we can provide a router that we manage for an additional monthly cost of \$10.

**Q: What about modems?**

A: With Fiber Internet, an Optical Network Terminal (ONT) is roughly equivalent to a cable modem. This device transfers your Internet signal from the optical domain to the electrical. At installation, we will place an ONT inside the home or business. If you have a City Managed WiFi plan, the ONT will be integrated with router technology in order to provide a WiFi signal. If you do not have a City Managed WiFi plan, we will place a basic ONT in the site which can be connected to your router via an ethernet cable. There is no fee for the latter ONT device.

**Q: Why would I want a Managed WiFi plan?**

A: With a Managed WiFi plan, we will provide a high-end router at installation that our department can prepare and troubleshoot. Additionally, customers on a Managed WiFi plan that have larger floor plans will be issued a WiFi extender to ensure wireless coverage throughout the home, at no additional expense. If you provide your own router and have a connection issue that is determined to be outside of our network and hardware, we will not be able to troubleshoot a router or other equipment we have not issued.

**Q: If I want to provide my own router, how much should I expect to pay for a decent one?**

A: Routers range widely in price and specifications, but you can expect to spend anywhere between \$50-\$300.

**Q: If I start on one service plan, may I move to another plan without penalty?**

A: Yes, customers may change plans to accommodate their usage. Billing will be prorated.

**Q: How long do I have to keep the service?**

A: Residential customers will be on a month to month contract that they may cancel at any time without penalty. Business customers must pay for service for an initial 12 month period before their contract becomes month to month.

**Q: Do you cap or limit my data usage?**

A: No. There are no data caps on our service.

**Q: When can I cancel my former service?**

A: We recommend that you keep your existing service provider until Fiber Internet service has successfully been installed, in order to prevent any gaps in service.

**Q: If I rent or lease a property do I need to get permission from my landlord to get Fiber Internet service?**

A: Yes, we will contact the property owner on your behalf in order to get permission to install fiber.

**Q: If I live in a condo that gets a bulk-rate contract to provide service to all the units and is paid by the condo association, will Anacortes Fiber do the same?**

A: We can provide a bulk contract so that all of the bills are paid by the condo association, however we do not offer a discount. We are confident in our competitiveness, since our service is already a great price for the speed and we feel that bulk-rate discounts would not be fair to other residents.

**Q: What makes Fiber Optic Internet so great?**

A: Fiber Optic Internet infrastructure is future-proof, because once data hits the fiber optic cable it is moving at the speed of light.

**Q: My email is through my current Internet provider. Will Anacortes Fiber provide my new email?**

A: Anacortes Fiber Internet does not offer email accounts, but there are numerous options (Gmail, Yahoo, Outlook, Zoho, etc.) that offer free email services.

**Q: Won't 5G make Fiber Optic Internet obsolete?**

A: 5G may be great for mobile data, however it will rely on fiber optic infrastructure to the 5G towers and will be used in conjunction with fiber rather than replace it.

**Q: Is everyone in Anacortes required to get Internet from the city?**

A: No. Access will be available to businesses and residents in Anacortes, but service is not mandated.

## Have More Questions?

**Contact Us**

**Phone:** (360) 588-8361

**Email:** [broadband@cityofanacortes.org](mailto:broadband@cityofanacortes.org)

**Visit:** City Hall 904 6th St. Anacortes, WA 98221

# EXHIBIT 59

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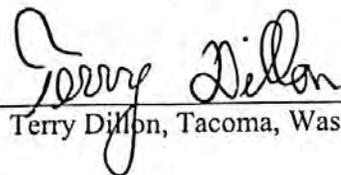
I Terry Dillion declare as follows:

I am over the age of 18, a resident of Tacoma, Washington.

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

1. That the Email attached hereto as Exhibit A, is a true and correct copy of an email I sent to Mitchell Shook on June 20, 2019.
2. That Exhibit B is a true and correct copy of my resume
3. That, by definition, Click! is a network that provides telecommunication products, and CATV is one of those telecommunication products.
4. That Telecommunication is the transmission of signs, signals, messages, words, writings, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems. Telecommunication occurs when the exchange of information between communication participants includes the use of technology. It is transmitted through a transmission media, such as over physical media, for example, over electrical cable, or via electromagnetic radiation through space such as radio or light. Such transmission paths are often divided into communication channels which afford the advantages of multiplexing. Since the Latin term communication is considered the social process of information exchange, the term telecommunications is often used in its plural form because it involves many different technologies.

Signed at Tacoma, Washington this 26<sup>th</sup> day of June 2019

  
Terry Dillon, Tacoma, Wasington

**From:** [Terry Dillon](#)  
**To:** [mitch@advancedstream.com](mailto:mitch@advancedstream.com)  
**Cc:**  
**Subject:** Re: response...  
**Date:** Thursday, June 20, 2019 9:48:05 AM

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Coax cable, fiber cable, coax/ fiber redundant rings and satellite dish farms are Telecommunication network infrastructure mediums (physical material).

Outside plant nodes, residential/business modems, settop boxes, routers, servers, switches, sonet multiplexers, digital cross connect systems, network interface units are Telecommunications network infrastructure electronic transport devices which connect to the chosen infrastructure medium (see above).

TV channels, DS1's, DS3's, OC1's, OC3's, residential/business broadband services (Internet), 10 Mb/s Ethernet, 50 Mb/s Ethernet, 100 Mb/s Ethernet, 1 Gb/s Ethernet are revenue generating Telecommunication services which are carried on electronic transport infrastructure devices (see above) across the chosen physical medium (see above).

Click! Network has multiple Telecommunication networks; Acorn (Power), I-net (COT), cable modem, cable television, business data services, broadband services (ie, direct services to COT Library system, etc.), internal LAN.

Click! Network is a Telecommunication Network selling Telecommunications services is a Telecommunications Network!

P.S. - The Washington "Utilities" commission regulates CenturyLink, which is a Telecommunications company. The reason the UTC regulates them is they consider CenturyLink a Utility.

Sent from my iPad

On Jun 20, 2019, at 6:49 AM, <[mitch@advancedstream.com](mailto:mitch@advancedstream.com)> <[mitch@advancedstream.com](mailto:mitch@advancedstream.com)> wrote:

Here is the sort of nonsense they are throwing at me...  
Now I have sort all this out for the Judge by Monday..  
Mitch

**Mitchell Shook**  
Founder - CEO  
Advanced Stream Broadband  
P.O. Box 7641  
Tacoma, WA 98417  
Office (253) 627-8000  
[Mitch@Advancedstream.com](mailto:Mitch@Advancedstream.com)  
<[Shook Opposition Reply.pdf](#)>

## Summary

A seasoned telecommunications professional skilled in management and technical disciplines. Major strengths in network management, organization, planning and supervision. Additional skills as a technical instructor, internal auditor, network security specialist, and a telecommunications technician. A dependable, thorough, and well-organized leader who communicates effectively and is a strong team player.

## Business Experience

*Retired*

2012 To Present

### **Click! Network Tacoma, WA**

*Network Operations Manager*

2004 – 2012

- Member of the Click! Network senior leadership team.
- Assembled organization; hired, supervised and mentored staff.
- Supervised and directed engineering staff responsible for Internet, broadband, video, INET and business data networks design, implementation and maintenance.
- Managed multiple Click! Networks; Cable modem Termination System (CMTS), Hybrid fiber Coax (HFC), Institutional (INET), Element Management System (EMS), Fiber Optic Cable, Synchronous Optical, Metro Ethernet.
- Management of Click! video headend facility.
- Responsible for Network Operations Center.
- Answerable for network and service quality assurance.
- Developed and maintained highly reliable, redundant Internet bandwidth Architecture.
- Accountable for annual capital and expense budgets.
- Internet, broadband, video, business data service customer interface and sales and marketing support.
- Internet, broadband, video, business data network vendor acquisition and management.
- Acquisition and growth of Internet and broadband carrier partnerships.
- Primary administrative and technical interface for City departments; City of Tacoma IT, Tacoma Police, Tacoma Fire, Tacoma Library System, etc.
- Technical and support interface for ISP (Internet Services Providers) and MSA (Master service Agreement) partners.
- Responsible for administration of Communications Assistance for Law Enforcement Act (CALEA) requests.
- Representative on Click! Networks new product development team.

*Broadband Services Manager*

1998 – 2004

- Assembled organization, hired staff and produced and maintained budget.
- Directed engineering staff responsible for Internet, broadband network design, implementation and maintenance.
- Supervised broadband services technicians responsible for installation and maintenance of business Internet, broadband digital networks and associated customer services.
- Managed extensive Internet Protocol Metropolitan Area Network.
- Answerable for 7x24 Internet/broadband network surveillance.
- Accountable for annual capital and expense budgets.
- Customer interface, sales and marketing support.
- Broadband services vendor acquisition and management.
- Development and growth of Carrier partnerships.
- Member of broadband product development team.
- Charter member Tacoma Technology Consortium.

**Century Communications Gig Harbor, WA**

*Circuit Design Engineer*

1997 – 1998

- Access carrier, special services, broadband and private line circuit design.
- Customer and marketing circuit design interface.
- Management of the facility equipment database.
- Provided technical assistance to employees as it relates to the circuit design function.

**U S WEST Communications Seattle, WA**

*Network Executive Staff; Internal Auditor, Manager*

1995 – 1997

- Performed internal operational audits for Network organization.
- Reviewed departmental compliance with policies and procedures.
- Evaluated existing business controls and their use.
- Recommended additional controls when appropriate.
- Determined extent to which company assets were protected and safeguarded.
- Audit findings and recommendations successfully supported process change
- Acted as a catalyst for continuous improvement.

*Business and Government Services Center, Manager*

1995

## Terry Dillon

---

- Supervised 24 technicians responsible for maintenance of broadband digital services in Washington, Oregon, and Colorado.
- Direct customer interface to remedy service problems.
- Acted as customer advocate with staff, engineering, and line management.
- Successfully facilitated occupational/management conflict resolution teams.

### *Network Executive Staff; Network Security Specialist, Manager* 1992-1995

- Administered corporate Information Asset Protection policy for 14 state Network organization and approximately 25,000 employees.
- Developed and implemented Information Asset Protection awareness program.
- Directed network security programs.
- Conducted regional network element and intellectual property security reviews.
- Advised network employees on network element and intellectual property security.

### *Digital Systems Operations Center; Field Work Group Manager* 1990 – 1992

- Effectively supervised 18 technicians.
- Conditioned and maintained 130 subscriber loop carrier systems.
- Arranged and supported broadband digital systems at customer premise locations.
- Provisioned 3,500 broadband carrier service orders annually.
- Managed the U S WEST-Boeing broadband network, annual revenue \$20M.
- Successfully managed broadband digital equipment for 16 central offices.

### *Digital Systems Operations Center; Provisioning and Restoration Manager* 1988 -1990

- Supervised 15 technicians and 3 clerks responsible for center.
- Successfully processed 7,000 broadband service orders per year.
- Facility Alarm Surveillance manager for Western Washington.
- Responsible for test equipment acquisition and inventory control for center.
- Organizational training coordinator.

### *Technical Course Development / Instruction, Manager* 1985 –1988

- Developed and delivered technical courses on broadband digital transmission system.
- Actively interfaced with internal, client, and vendor groups to successfully plan and deliver current technical training.
- Delivered first course offering and trained other technical instructors.
- Determined if local course development was cost justified; if not, arranged for vendor training.

**Pacific Northwest Bell Tacoma / Seattle, WA**  
1979 – 1985

*Facility Maintenance Center Field Technician*

- Installed and maintained first Fiber Optic transmission systems in Washington State.
- Accountable for extensive broadband digital network.
- Conditioned and sustained various digital technologies including broadband, pair-gain, asynchronous/synchronous fiber optic, digital cross connect systems and fiber optic cable termination equipment.
- Provisioned and maintained customer circuits; voice, toll grade, low speed data, high capacity broadband circuits and central office trunking.
- Responsible for multiple vendor environments.
- Member of the Communications Workers of America.

**Pacific Telephone San Francisco Bay Area, CA**

1967 – 1979

*Digital Network Center Field Technician*

- Installed, provisioned and maintained inter-office and last mile broadband digital communications systems and services.
- Member of the Communications Workers of America.

May 18 2022 8:30 AM

The Honorable Judge Bryan Chushcoff  
CONSTANCE R. WHITE  
Department 4  
COUNTY CLERK  
Hearing Date: July 1, 2022, at **NO. 19-2-07135-0**

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

MITCHELL SHOOK,  
Plaintiff,

v.

CITY OF TACOMA,  
Defendant.

**NO. 19-2-07135-0**

**DECLARATION OF JAMES P. GRIFO  
IN SUPPORT OF PLAINTIFF'  
ANDERSON'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT –  
PART TWO**

THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,  
Plaintiffs,

v.

CITY OF TACOMA,  
Defendant.

# EXHIBIT 60

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## About NBN Co

### Who we are

**NBN Co is the company building and operating the nation's wholesale, local access broadband network. By providing access to fast, reliable and affordable broadband services, NBN Co is helping Australian homes and businesses realise the social and economic benefits that high-speed broadband can unlock.**

NBN Co's purpose is to lift the digital capability of Australia.

NBN Co is accountable to the Commonwealth Government and is working to deliver a National Broadband Network that meets the government's Statement of Expectations<sup>1</sup>, 24 August 2016.

The Company is working to complete the network build and ensure that all Australians have access to fast broadband as soon as possible, at affordable prices, and at least cost to taxpayers.

In addition to building and maintaining a network that is resilient and secure, NBN Co is committed to delivering access to peak wholesale download speeds of at least 25 megabits per second (Mbps) to all premises, and at least 50Mbps to 90 per cent of the fixed-line premises<sup>2</sup>. NBN Co will ensure that upgrade paths are available for the network's multi-technology mix as required.

As the network wholesaler, NBN Co provides access to all Retail Service Providers (RSPs) on a non-discriminatory basis. This approach is intended to level the playing field in the Australian telecommunications industry, enhancing competition and providing greater choice for customers<sup>3</sup> across the country. It is through RSPs that customers connect to the **nbn**<sup>™</sup> network for access to high-speed internet.

NBN Co is delivering high-speed broadband to customers across Australia over an area of more than seven million square kilometres. The Company is committed to working with Delivery Partners, RSPs and stakeholder groups to help more Australians use the network to drive positive benefits for themselves and their communities.

1 <https://www.communications.gov.au/publications/nbnstatementofexpectations>

2 This will be achieved at the end of co-existence, which refers to the period where there are active Telstra services running over the parts of the legacy Telstra network that NBN Co has acquired from Telstra.

3 Final downstream customers to NBN Co's Retail Service Providers (RSPs).

## Delivering on our commitment

1

NBN Co's purpose

2

What are NBN Co's goals?

To lift the digital capability of Australia

Complete the build by 30 June 2020<sup>1</sup>

Enhance the network capability over time to meet the growing and diverse needs of Australian homes and businesses

<sup>1</sup> NBN Co's build completion commitment is that all standard installation premises in Australia are able to connect to the nbn™ access network as at the build completion date. This excludes premises in future new developments which will be an ongoing activity for the Company beyond the build completion date. It also excludes a small proportion of premises defined as 'complex connections' - which includes properties that are difficult to access, culturally significant areas and heritage sites - where connection depends on factors outside of NBN Co's control such as permission from traditional owners, and where network construction to allow such premises to connect will be an ongoing activity of NBN Co beyond the build completion date.

3

## What are NBN Co's priorities?



Ensure all Australians have access to **high-speed, resilient and secure broadband**



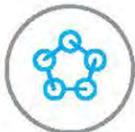
Keep NBN Co a great place to work, **underpinned by a customer-led culture**



Deliver a customer experience that drives **satisfaction, use and network preference**



Develop a product and pricing portfolio that **addresses our customers' diverse needs**



Strengthen relationships with government, industry and community to **optimise customer benefits**



Build capabilities for the future and grow profitability to **enable re-investment to benefit our customers**

4

## Supported by

**6,400<sup>1</sup>**  
NBN Co staff

**More than 100**  
Retail Service Providers selling services over the **nbn<sup>TM</sup>** access network

<sup>1</sup> This figure includes NBN Co employees and contractors.

## Board and Management message

**Construction of the nbn™ access network is one of the largest infrastructure projects ever undertaken in our nation's history, one that aims to lift Australia's digital capability by fundamentally changing the way we learn, do business and connect with each other.**

To date, NBN Co and its Delivery Partners have rolled out more than 280,000 kilometres of fibre-optic cable across Australia, and re-purposed and upgraded existing Hybrid Fibre Coaxial (HFC) and copper technologies, bringing fast broadband at scale to many parts of metropolitan Sydney, Melbourne, Brisbane, Adelaide and Perth. The company has built a Fixed Wireless network comprising some 2,200 towers and approximately 13,000 cells, providing coverage of approximately 250,000 square kilometres, as well as launching two satellites which overlook seven million square kilometres of this great continent.

Building this vast piece of critical network infrastructure has been a complex task. As we continue to improve the way we roll out the network and run the business, we must constantly balance a range of objectives for our company, the telecommunications industry, and the connectivity goals of our nation.

Firstly, we must meet the Statement of Expectations from the Commonwealth Government to complete the build, connect Australian homes and businesses to this network, and deliver a high quality, fast broadband experience. We forecast to achieve a 3.2 per cent return on the Commonwealth's investment of \$29.5 billion.

Secondly, we need to work with the telecommunications industry to create the right conditions that will allow us all to thrive and prosper in the long term. For NBN Co, this means reaching a positive annual cash flow, anticipated to be from FY23, so we can continue to reinvest in our network, our business and our products as technology and customer needs change in the decade ahead.

And most importantly – we need to ensure that we deliver the best possible experience for customers once they are connected to services over the nbn™ access network and increasingly incorporate online experiences into their daily lives.

Ten years since the formation of the National Broadband Network was first announced, we can proudly say that we have made extraordinary progress, but with lots of heavy lifting still ahead, as we strive to meet these objectives.

### Progress

Over the last 12 months we have seen improving customer service yield good results. We have improved the connection and service quality of our HFC network, scaled the rollout of our Fibre-to-the-Curb (FTTC) network, launched wholesale products designed for businesses that are capable of delivering Gigabit speeds<sup>1</sup>, and put in place better wholesale pricing options so more customers can experience higher speeds with reduced congestion during busy hours.

We have also continued to meet our construction targets with FY19 being the company's single biggest year for build and activations. On 30 June 2019, almost 10 million homes and businesses were made Ready to Connect (RTC) with more than 5.5 million premises connecting to a service over the nbn™ access network. This produced record revenue of \$2.8 billion in FY19. If NBN Co's revenue continues to grow beyond \$5 billion annually as forecast, it will underwrite our future investments into customer experience and a high-speed, resilient and secure network that can help enable Australia's digital needs.

Of course, as we edge closer to making 11.5 million homes and businesses ready to connect by the end of June 2020, we know we still have much work to do.

These construction and operational objectives will always be critical to our success, and connecting homes and businesses as quickly and seamlessly as possible remains core to what we do. But providing access to quality and affordable services that our customers – the people living in Australian homes and working in Australian businesses – need and deserve will be what drives us through the next phase of our evolution.

### Customer led

Over the period of this Corporate Plan, we will continue to work in collaboration with our Retail Service providers (RSPs), the industry, regulators and the government to better understand customers' needs and their experience with our services. We have made strong progress over the past financial year but recognise that there is always more to do to delight customers, address negative consumer sentiment, and in doing so enhance overall customer satisfaction.

Certain things are not completely within the control of NBN Co and require us to work closely with the telecommunications industry to help ensure that the products we deliver to the market meet the expectations of all Australians – from entry-level broadband customers to business enterprises. This we are committed to do, to produce the best possible customer experience we can.

We will also continue to focus on the future, to keep up with the latest technological trends and innovations to ensure our network can be enhanced and upgraded in a cost-effective and timely manner to meet the growing and diverse connectivity needs of Australian homes and businesses.

1 Regardless of the retail service you purchase, the actual wholesale speeds delivered by the **nbn**<sup>™</sup> Enterprise Ethernet product will be less than 1000 Mbps due to equipment and network limitations. Your experience, including the speeds actually achieved over the **nbn**<sup>™</sup> network, depends on some factors outside our control (like your equipment quality, software, and how your service provider designs its network). If your service provider has not selected a bandwidth in the highest of three classes of service available for **nbn**<sup>™</sup> Enterprise Ethernet, the speeds you experience may be affected by contention on the **nbn**<sup>™</sup> network, particularly in busy periods.

# EXHIBIT 61

light, heat, or power for hire; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.

"Electrical company" includes any corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad company generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others), and every city or town owning, operating or managing any electric plant for hire within this state. "Electrical company" does not include a company or person employing a cogeneration facility solely for the generation of electricity for its own use or the use of its tenants or for sale to an electrical company, state or local public agency, municipal corporation, or quasi municipal corporation engaged in the sale or distribution of electrical energy, but not for sale to others, unless such company or person is otherwise an electrical company.

"LATA" means a local access transport area as defined by the commission in conformance with applicable federal law.

"Private telecommunications system" means a telecommunications system controlled by a person or entity for the sole and exclusive use of such person, entity, or affiliate thereof, including the provision of private shared telecommunications services by such person or entity. "Private telecommunications system" does not include a system offered for hire, sale, or resale to the general public.

"Private shared telecommunications services" includes the provision of telecommunications and information management services and equipment within a user group located in discrete private premises in building complexes, campuses, or high-rise buildings, by a commercial shared services provider or by a user association, through privately owned customer premises equipment and associated data processing and information management services and includes the provision of connections to the facilities of a local exchange and to interexchange telecommunications companies.

"((Telephone)) Telecommunications company" includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, operating or managing any ((telephone line or part of telephone line used in the conduct of the business of affording telephonic communication)) facilities used to provide telecommunications for hire, sale, or resale to the general public within this state.

"((Telephone line" includes)) "Facilities" means lines, conduits, ducts, poles, wires, cables, cross-arms, receivers, transmitters, instruments, machines, appliances, instrumentalities and all devices, real estate, easements, apparatus, property and routes used, operated, owned or controlled by any ((telephone)) telecommunications company to facilitate the ((business of

affording telephonic communication)) provision of telecommunications service.

~~(( "Telegraph company" includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any telegraph line or part of telegraph line used in the conduct of the business of affording for hire communication by telegraph within this state.~~

~~"Telegraph line" includes conduits, poles, wire, cables, cross-arms, instruments, machines, appliances, instrumentalities and all devices, real estate, easements, apparatus, property and routes used, operated or owned by any telegraph company to facilitate the business of affording communication by telegraph:))~~

"Telecommunications" is the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. As used in this definition, "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.

"Water system" includes all real estate, easements, fixtures, personal property, dams, dikes, head gates, weirs, canals, reservoirs, flumes or other structures or appliances operated, owned, used or to be used for or in connection with or to facilitate the supply, storage, distribution, sale, furnishing, diversion, carriage, apportionment or measurement of water for power, irrigation, reclamation, manufacturing, municipal, domestic or other beneficial uses for hire.

"Water company" includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, controlling, operating, or managing any water system for hire within this state: PROVIDED, That it shall not include any water system serving less than sixty customers where the average annual gross revenue per customer does not exceed one hundred twenty dollars per year.

"Cogeneration facility" means any machinery, equipment, structure, process, or property, or any part thereof, installed or acquired for the primary purpose of the sequential generation of electrical or mechanical power and useful heat from the same primary energy source or fuel.

"Public service company" includes every gas company, electrical company, ~~((telephone))~~ telecommunications company, ~~((telegraph company))~~ and water company. Ownership or operation of a cogeneration facility does not, by itself, make a company or person a public service company.

The term "service" is used in this title in its broadest and most inclusive sense.

NEW SECTION. Sec. 3. Telecommunications companies may petition to be classified as competitive telecommunications companies under section 4 of this act or to have services classified as competitive telecommunications

Sec. 17. Section 80.36.030, chapter 14, Laws of 1961 and RCW 80-36.030 are each amended to read as follows:

Such (~~((telegraph or telephone))~~) telecommunications company may appropriate so much land as may be actually necessary for its telecommunications line (~~((of telegraph or telephone))~~), with the right to enter upon lands immediately adjacent thereto, for the purpose of constructing, maintaining and operating its line and making all necessary repair. Such (~~((telegraph or telephone))~~) telecommunications company may also, for the purpose aforesaid, enter upon and appropriate such portion of the right-of-way of any railroad company as may be necessary for the construction, maintenance and operation of its (~~((telegraph or telephone))~~) telecommunications line: PROVIDED, That such appropriation shall not obstruct such railroad of the travel thereupon, nor interfere with the operation of such railroad.

Sec. 18. Section 80.36.040, chapter 14, Laws of 1961 and RCW 80-36.040 are each amended to read as follows:

Any (~~((telegraph or telephone corporation or))~~) telecommunications company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary telecommunications lines (~~((of telegraph or telephone))~~) for public traffic along and upon any public road, street or highway, along or across the right-of-way of any railroad corporation, and may erect poles, posts, piers or abutments for supporting the insulators, wires and any other necessary fixture of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters: PROVIDED, That when the right-of-way of such corporation has not been acquired by or through any grant or donation from the United States, or this state, or any county, city or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of right of eminent domain, as provided by law: PROVIDED FURTHER, That where the right-of-way as herein contemplated is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such (~~((telegraph or telephone))~~) telecommunications lines can be erected thereon.

Sec. 19. Section 80.36.050, chapter 14, Laws of 1961 and RCW 80-36.050 are each amended to read as follows:

Every railroad operated in this state, and carrying freight and passengers for hire, or doing business in this state, is and shall be designated a "post road," and the corporation or company owning the same shall allow (~~((telegraph and telephone))~~) telecommunications companies to construct and maintain (~~((telegraph and telephone))~~) telecommunications lines on and along the right-of-way of such railroad.

In case of the refusal or neglect of any railroad company or corporation to comply with the provisions of this section, said company or corporation shall be liable for damages in the sum of not less than one thousand

dollars nor more than five thousand dollars for each offense, and one hundred dollars per day during the continuance thereof.

Sec. 20. Section 80.36.060, chapter 14, Laws of 1961 and RCW 80.36.060 are each amended to read as follows:

Any person who wilfully and maliciously does any injury to any (~~telegraph or telephone~~) telecommunications property mentioned in RCW 80.36.070, is liable to the (~~corporation or~~) company for five times the amount of actual damages sustained thereby, to be recovered in any court of competent jurisdiction.

Sec. 21. Section 80.36.070, chapter 14, Laws of 1961 and RCW 80.36.070 are each amended to read as follows:

Any person who injures or destroys, through want of proper care, any necessary or useful fixtures of any (~~telegraph or telephone corporation or~~) telecommunications company, is liable to the (~~corporation or~~) company for all damages sustained thereby. Any vessel which, by dragging its anchor or otherwise, breaks, injures or destroys the subaqueous cable of a (~~telegraph or telephone corporation or~~) telecommunications company, subjects its owners to the damages hereinbefore specified.

No (~~telegraph or telephone corporation or~~) telecommunications company can recover damages for the breaking or injury of any subaqueous (~~telegraph~~) telecommunications cable, unless such (~~corporation or~~) company has previously erected on either bank of the waters under which the cable is placed, a monument indicating the place where the cable lies, and publishes for one month, in some newspaper most likely to give notice to navigators, a notice giving a description and the purpose of the monuments, and the general course, landings and termini of the cable.

Sec. 22. Section 80.36.080, chapter 14, Laws of 1961 and RCW 80.36.080 are each amended to read as follows:

All rates, tolls, contracts and charges, rules and regulations of (~~telephone and telegraph~~) telecommunications companies, for messages, conversations, services rendered and equipment and facilities supplied, whether such message, conversation or service to be performed be over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable and sufficient, and the service so to be rendered any person, firm or corporation by any (~~telephone or telegraph~~) telecommunications company shall be rendered and performed in a prompt, expeditious and efficient manner and the facilities, instrumentalities and equipment furnished by it shall be safe, kept in good condition and repair, and its appliances, instrumentalities and service shall be modern, adequate, sufficient and efficient.

Sec. 23. Section 80.36.090, chapter 14, Laws of 1961 and RCW 80.36.090 are each amended to read as follows:

~~((telephone company or telegraph))~~ telecommunications company refund or remit, directly or indirectly, any portion of the rate or charge so specified, nor extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are specified in its schedule filed and in effect at the time, and regularly and uniformly extended to all persons and corporations under like circumstances for like or substantially similar service.

No ~~((telephone company or telegraph))~~ telecommunications company subject to the provisions of this title shall, directly or indirectly, give any free or reduced service or any free pass or frank for the transmission of messages by ~~((either telephone or telegraph))~~ telecommunications between points within this state, except to its officers, employees, agents, pensioners, surgeons, physicians, attorneys at law, and their families, and persons and corporations exclusively engaged in charitable and eleemosynary work, and ministers of religion, Young Men's Christian Associations, Young Women's Christian Associations; to indigent and destitute persons, and to officers and employees of other ~~((telephone companies, telegraph))~~ telecommunications companies, railroad companies, and street railroad companies.

Sec. 28. Section 80.36.140, chapter 14, Laws of 1961 and RCW 80-36.140 are each amended to read as follows:

Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any ~~((telegraph company or telephone))~~ telecommunications company for the transmission of messages by ~~((telegraph or telephone))~~ telecommunications, or for the rental or use of any ~~((telegraph line, telephone line or any telegraph))~~ telecommunications line, instrument, wire, appliance, apparatus or device or any ~~((telephone))~~ telecommunications receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device, or any ~~((telephone))~~ telecommunications extension or extension system, or that the rules, regulations or practices of any ~~((telegraph company or telephone))~~ telecommunications company affecting such rates, charges, tolls, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of law, or that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force, and fix the same by order as provided in this title.

Whenever the commission shall find, after such hearing that the rules, regulations or practices of any ~~((telegraph company or telephone))~~ telecommunications company are unjust or unreasonable, or that the equipment, facilities or service of any ~~((telegraph company or telephone))~~ telecommunications company is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate

# EXHIBIT 62

## MASTER COMMUNICATIONS SERVICES AGREEMENT

THIS MASTER COMMUNICATIONS SERVICES AGREEMENT ("Agreement") is made and entered into this 17th day of November, 2008, by and between City of Tacoma, Department of Public Utilities, Light Division, d.b.a. and herein after called Click! Network, 3628 South 35th Street, Tacoma, Washington 98407-9192 ("Service Provider") and CenturyTel Long Distance, LLC, a Louisiana limited liability company doing business in the State of Washington, with offices located at 8102 Skansie Avenue, Gig Harbor, Washington, 98332 ("Customer")

### WITNESSETH:

**WHEREAS**, Service Provider owns and operates communications facilities and is in the business of providing dedicated transport services; and

**WHEREAS**, Customer desires Service Provider to provide such communications services to Customer; and

**WHEREAS**, Service Provider desires to provide dedicated transport services to Customer on Service Provider facilities pursuant to certain terms and conditions set forth in this Agreement;

**NOW, THEREFORE**, in consideration of the mutual promises and covenants herein contained, the Parties hereby mutually agree as follows:

### ARTICLE 1 - DEFINITIONS

**1.1** The terms used in this Agreement shall have their normal or common meaning, except that the following terms shall have the following meanings for the purpose of this Agreement:

(a) Acceptance or Accepted. Customer will be deemed to have given its "Acceptance" or to have "Accepted" a Circuit on the earliest date of: (i) when testing pursuant to Article 3.0 of Appendix 1 has been successfully completed; (ii) when Customer puts the Circuit into revenue producing service; (iii) five (5) business days past the scheduled due date for Customer's notifying Service Provider of Circuit Acceptance, if no such notice has been provided and no notice of non-acceptance has been provided; and (iv) in the event of an expedited order, the scheduled due date for Customer's notifying Service Provider of its Acceptance if no such notice has been provided and no notice of non-acceptance has been provided.

(b) Access Service Request ("Service Request" or "ASR") shall mean the capacity order for Service, executed by Customer and Service Provider, which delineates the type of Service, quantity of Circuits, location served, Point of Termination, protocols, Circuit term, requested Start of Service Date and other information necessary for the Service Provider to provide Service to the Customer. A blank ASR form is attached hereto as Exhibit A.

(c) Agreement. "Agreement" shall mean this Master Communications Services Agreement, including the attached Schedules, Appendices and Exhibits.

- (d) Chronic Trouble. "Chronic Trouble" shall mean a situation in which a particular Circuit has experienced the same type of Trouble twice or more within a thirty (30) day period, for which trouble tickets have been opened, and the Trouble is found not to be on the Customer's side of the Point of Termination.
- (e) Circuit. "Circuit" shall mean the individual telecommunications facility included as part of the Service.
- (f) Emergency Maintenance. "Emergency Maintenance" shall mean maintenance which if not accomplished promptly by Service Provider, could result in a serious degradation or loss of service to the Customer or the End User.
- (g) End-User. "End User" shall mean a user to whom Customer will provide telecommunications services utilizing, in part, the telecommunications Services provided by Service Provider to Customer under this Agreement.
- (h) Interconnection Facilities. "Interconnection Facilities" shall mean all local access facilities between Customer's Point of Presence, the local exchange carrier's central office, the long-distance carrier's point of presence and the End-User sites.
- (i) Mid-Span Meet Interconnection Arrangement. "Mid-Span Meet Interconnection Arrangement" shall mean a method of facilities interconnection in which Service Provider and Customer connect their respective outside plant facilities at a common cable splice point(s). Service Provider and Customer shall each be responsible for providing, controlling, operating and maintaining their respective optronic, electronic and other equipment necessary to support this method of interconnection.
- (j) Network. "Network" shall mean the telecommunications network of one of the Parties, as the context of the provision requires or as contemplated under this Agreement.
- (k) Network Interface. "Network Interface" shall mean the point of connection between communication facilities and terminal equipment. The network interface or demarcation point shall be located on the subscriber's side of the terminal equipment.
- (l) Network Interface Unit. "Network Interface Unit" shall mean a semi-intelligent device that serves as the point of physical and logical demarcation between the Customer and their end user business premise. It also allows the carrier to conduct an automated loopback test, which tests the integrity of the electrically-based, twisted pair, local loop.
- (m) On Net Services. "On-Net Services" shall mean those services that connect two locations served by Service Provider's network and will include termination at an End User's premises. On-Net Services are provided entirely by Service Provider.
- (n) Planned Service Outage. "Planned Service Outage" shall mean any Service Outage caused by scheduled maintenance or planned enhancements or upgrades to the Network as described in Appendix No. 2.

Customer's and End Users' reasonable rules regarding access to its/their Premises, provided, such rules are provided to Service Provider in advance.

**7.3** Notwithstanding any provision of this Agreement to the contrary, if Customer provides its own telecommunications equipment, Service Provider shall have no obligation to install, maintain or repair such Customer equipment.

**7.4** Neither Party shall adjust, align, or attempt to repair the other Party's telecommunications equipment except as expressly authorized in advance in writing by the other Party. Neither Party's telecommunications equipment shall be removed or relocated by the other Party.

**7.5** Except as provided in Article 12.1, Service Provider shall be liable for any loss or damage to Customer's and/or End-User's telecommunications equipment arising from Service Provider's gross negligence, intentional act, or unauthorized maintenance, within the reasonable control of Service Provider, its employees or agents. In the event of any loss or damage to the telecommunications equipment for which Service Provider is liable, Service Provider shall reimburse Customer and/or End-User for the reasonable cost of repair or replacement thereof within ninety (90) days after receipt by Service Provider of a written request for such reimbursement and a determination of responsibility by Service Provider.

**7.6** Except as provided in Article 12.1, Customer shall be liable for any loss or damage to Service Provider's telecommunications equipment arising from the negligence, gross negligence, intentional act, or unauthorized maintenance or other cause, including theft, by Customer or their contractors, employees or agents. In the event of any loss or damage to the telecommunications equipment for which Customer is liable, Customer shall reimburse Service Provider for the reasonable cost of repair or replacement thereof within thirty (30) days after receipt by Customer of a written request for such reimbursement.

**7.7** Service Provider's telecommunications equipment shall remain the sole and exclusive property of Service Provider or its assignee, and nothing contained herein shall give or convey to Customer (and/or Customer's End Users) any right, title or interest whatever in such telecommunications equipment, which shall at all times be and remain personal property notwithstanding that it may be or become attached to or embedded in realty. When Customer's equipment is installed along with Service provider's equipment, then both shall prominently affix identifying plates, tags or labels on such telecommunications equipment showing Customer's and Service Provider's ownership thereof. Neither party shall tamper with, remove or conceal such identifying plates, tags or labels.

## **ARTICLE 8 - WARRANTIES AND NETWORK STANDARDS FOR ON-NET SERVICES**

**8.1** Service Provider represents and warrants to Customer that it has the right to provide Customer the Service specified herein, and that it is an entity, duly organized, validly existing and in good standing under the laws of its origin, with all requisite power to enter into and perform its obligations under this Agreement in accordance with its terms.

**8.2** The Customer represents and warrants that it is an entity, duly organized, validly existing and in good standing under the laws of its origin, with all requisite power to enter into and perform its obligations under this Agreement in accordance with its terms.

**8.3** Service Provider represents and warrants to Customer that all Service rendered by it hereunder shall be designed, produced, installed, furnished and in all respects provided and maintained in conformance and compliance with applicable federal, state and local laws, administrative and regulatory requirements and any other authorities having jurisdiction over the subject matter of this Agreement and it shall be responsible for applying for, obtaining and maintaining all registrations and certifications which may be required by such authorities.

**8.4** The Parties agree that if any Party, in its sole discretion, determines that an emergency action is necessary to protect its own Network, that Party may block any transmission path over its Network by the other Party where transmissions do not meet the requirements of Telcordia Technical Publications and Appendix No. 1. The Parties further agree that none of their respective obligations to one another under this Agreement shall be affected by any such blockage except that the Party affected by such blockage shall be relieved of all obligations to make payments for charges relating to such Service which is so blocked and that no Party shall have any obligation to the other Party for any claim, judgment or liability resulting from such blockage.

**8.5** Service Provider represents and warrants to Customer that (i) the Service provided over its Network hereunder shall meet the service standards set forth in Appendix 1, other than for reasons of Planned Service Outages (scheduled maintenance) or reasons set forth in Articles 12 and 16 hereof; and (ii) the Circuits connecting two locations shall have a physically diverse serve and protect path (except with respect to laterals off the backbone and building entrances). In the event the standard established in the prior sentence is not met in a given month, upon written request of Customer, Service Provider will investigate the circumstances in order to isolate and remedy the cause.

**8.6** The warranties and remedies set forth in this Agreement constitute the only warranties and remedies with respect to this Agreement. SUCH WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR USE.

## **ARTICLE 9 – INTERCONNECTION OF FACILITIES**

**9.1** Service Provider and Customer shall interconnect their respective networks utilizing a Mid-Span Meet Interconnection Arrangement at the CenturyTel hand hole vault at the east side of the Narrows Bridge. The purpose of such interconnection shall be for the exchange of access traffic between the Parties. Such traffic exchanges will occur at transmission speeds that shall include, but may not be limited to, 10/100/1000 Megabit Ethernet services determined by the parties to supply the initial capacity for the Mid-Span Meet Interconnection Arrangement. In general, the transmission capacity established for the Mid-Span Meet Interconnection Arrangement shall be available to and shared by the Parties on an equal basis. Each Party shall have the authority to designate carrier facility assignments (CFAs) on its respective share of such transmission capacity. If one Party should require the use of additional transmission capacity beyond its initial allocation of fifty percent (50%) of the available capacity, said Party must submit a notice of such requirement to the other Party. In the event that such a notice of a requirement for additional transmission capacity is submitted, such additional capacity shall be installed and made available to the party requiring additional capacity within sixty (60) days from the submittal of such notice. At

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

**SERVICE PROVIDER**

City of Tacoma, Department of Public Utilities,  
Light Division, d.b.a. Click! Network

By: *Cynthia Wikstrom*  
Its: *General Manager*  
Date: *11/20/08*

**CUSTOMER**

CenturyTel Long Distance, LLC

By: *Jin Shi*  
Its: *General Mgr*  
Date: *11/17/08*

Approved as to form and legality:

*Ward Gause*  
Assistant City Attorney

Approved:

*Bob Biles*  
Bob Biles, Finance Director or Designee

# EXHIBIT 62 (a)

## APPENDIX NO. 1 SERVICE STANDARDS

### 1.0 INTERFACE REQUIREMENTS

#### 1.1 10BT Interface Requirements

The Network Interface and Customer Interface will be at an Ethernet port set at a maximum of 10 million bits per second (Mbps) or commonly called 10Megs of bandwidth. This is a standard electrical hand off. Optical hand-off can be accommodated on an individual case basis (ICB) and may require additional cost.

#### 1.2 100BT Interface Requirements

The Network Interface and Customer Interface will be at an Ethernet port set at a maximum of 100 million bits per second (Mbps) or commonly called 100Megs of bandwidth. This is a standard electrical hand off. Optical hand-off can be accommodated on an individual case basis (ICB) and may require additional cost.

#### 1.3 1000BT (GigE) Interface Requirements

The Network Interface and Customer Interface will be at an Ethernet port set at a maximum of 1000 million bits per second (Mbps) or commonly called 1000Megs of bandwidth. This is a standard electrical hand off. Optical hand-off can be accommodated on an individual case basis (ICB) and may require additional cost.

### 2.0 TRANSMISSION PERFORMANCE SPECIFICATION

2.1	Availability Objective per month:	10BT - 99.9%
		100BT - 99.9%
		1000BT - 99.9%

### 3.0 SYSTEM ACCEPTANCE CRITERIA

- 3.1 End-to-end system performance is performed with Ethernet test equipment. We run three RFC – 2544 compliant industry standard tests identified below.
- 3.2 Throughput – the actual amount of useful and non-redundant information which is transmitted or processed; the end result of a data call. It may only be a small part of what was pumped in at the other end. The relationship of what

- (i) Electronic Restoration. In the event of an electronic failure, Service Provider shall use its best efforts to restore service within 2 hours of arrival of maintenance personnel on site.
  - (ii) Cable Restoration. In the event of a cable failure, Service Provider shall begin cable restoral within two (2) hours after the faulty cable is identified. Service Provider shall use its best efforts to restore the cable no later than four (4) hours after failure.
- 2.6 Service Provider shall maintain a twenty-four (24) hours a day, seven (7) days a week point-of-contact for Customer to report to Service Provider system Troubles.
- 2.7 Equipment Spares. Service Provider will provide all maintenance spares plus repair and return Service of defected parts. In general, Customer will not provide equipment storage space in Customer facilities over and above storage space available in Service Provider's equipment racks.
- 2.8 Scheduled Maintenance.
- 2.8.1 Scheduled routine maintenance will be performed during specified Customer maintenance windows and will be coordinated between Service Provider and Customer.
  - 2.8.2 Maintenance which may place the system in jeopardy or require system down time will normally be performed during the "Maintenance Window" of 12:00 midnight and 6:00 a.m. or a time mutually agreed to by Customer and Service Provider. Jeopardy and down time must be requested from the Customer surveillance system operations, 72 hours prior to the requested maintenance time unless otherwise agreed to by Customer.
  - 2.8.3 Service Provider maintenance personnel will notify Customer prior to beginning scheduled maintenance work and must receive concurrence, which shall not be unreasonably withheld, to proceed. Service Provider personnel will notify Customer upon completion of scheduled maintenance work and receive concurrence that all Service is fully operational.
  - 2.8.4 Customer shall have the right to be present during Service Provider equipment testing, and during scheduled and non-scheduled maintenance and repair activity. Customer will notify Service Provider in advance of such requests.

## APPENDIX NO. 3

### ORDERING PROCEDURES FOR ON-NET SERVICES

1. Building Lists

Service Provider shall provide building list, including LEC COs and IXC POPs, to Customer's Access Management group on a quarterly basis. Building lists shall include buildings that are considered on the Service Provider's network (On-Net), and also include planned building addresses. Building list information will include street addresses, names of buildings, city and state, end office CLLI. Service Provider will provide information to Customer in a mutually agreeable format.

2. Ordering Vehicle

If an electronic format is available to transmit Access Service Requests (ASR) from Customer to Service Provider, this vehicle will be used. If an electronic format is utilized, Service Provider will follow any OBF standards for use thereof. If an electronic format cannot be utilized, Customer will transmit ASR to Service Provider via facsimile. Facsimile information will be provided to Customer and updated as needed.

3. Contacts and Escalation

Service Provider will provide a complete list of contacts for the On-Net service provided to Customer. In addition, Service Provider will provide an escalation list to Customer for purposes of escalation to the Network Service Assurance (NSA) and/or escalation to Click! Network's management structure.

4. Service Order Intervals

As used in this paragraph 4, use of "shall" and "will" with respect to the performance of Service Provider shall mean "use its best efforts to".

4.1 ASR Issuance - Upon receipt of an ASR from the Customer, Service Provider will provide a response to Customer pertaining to any corrections or clarifications required to process the ASR. This will be completed by the Service Provider by the end of the next business day following the receipt of the ASR.

4.2 Firm Order Commitment (FOC) - Service Provider will provide a firm order commitment to Customer within three (3) business days of receipt of a complete and accurate ASR. If the order is considered off-net, then the service provider will provide a firm order commitment within two (2) business days from the time of receipt of the off-net providers FOC or pending order commitment (POC). The firm order commitment will provide any necessary service intervals as well as a committed Start of Service Date.

4.3 Design Layout Record (DLR) - Service Provider will provide DLR information within three (3) business days of the due date or Start of Service Date that was provided to Customer in the FOC. If the order is considered off-net, then the service provider will provide DLR information within four (4) business days from the time of receipt of the off-net providers DLR. The interval of providing off-net DLR information will be based on off-net providers intervals. If the in-service date requested by the Customer is less than five (5) business days and a complete and accurate ASR has been received by the Service Provider, DLR issuance will be negotiated between Customer and Service Provider.

5. Installation Intervals

Ethernet 10/100

The standard installation interval, if equipment is installed and capacity is available, for all On-Net services Ethernet 10/100 will be established at fifteen (15) business days. It is understood between Customer and Service Provider that Service Provider will provide service on an individual case basis based on the requirements and expectations of the Customer.

Ethernet 1000

The standard installation interval for Ethernet 1000 On-Net services will be thirty (30) business days depending on availability of equipment. It is understood between Customer and Service Provider that Service Provider will provide service on an individual case basis based on the requirements and expectations of the Customer.

Off-Net Services

Off-net services terms and conditions, including intervals, FOC, and DLR will be negotiated on an individual case basis (ICB) dependent upon the standard intervals of 15 and 30 business days depending if both end locations are LIT with Ethernet, have enough capacity and whether or not construction is required.

Expedite Fees

If a shorter installation interval is required that is less than the standard 15 or 30 business days, Service Provider will make reasonable efforts to meet the expected Start of Service Date, and if Service Provider cannot meet expected Service date, then Service Provider will make reasonable efforts to negotiate in good faith the earliest Start of Service date possible with Customer. An expedite fee may be incurred by the Customer anytime the Customer wants the service installed on a date prior to the standard 15 and 30 business day due date. All expedite requests for service will incur a one-time five hundred-dollar (\$500.00) fee.

## APPENDIX NO. 4

### **ETHERNET TRANSPORT SERVICES SERVICE DESCRIPTIONS FOR ON-NET AND OFF-NET SERVICES**

#### **1.0 ETHERNET 10/100/1000**

Ethernet Transport Service is a shared service. It is VLAN configurable which allows the customer's data to be tagged so that it is segregated from all other data. The end user can also further use encryption to keep the data private and secure. The Customer must educate the end user that their VLAN configuration and any other configuration or encryption is part of their allowed bandwidth. The amount of configuration will decrease the allowable maximum bandwidth on throughput.

We, like other service providers implement over subscription on our transport service rings relative to the amount of bandwidth provisioned on the service ring. The rationale behind this industry practice is that typically an end user does not fully utilize the amount of bandwidth requested; also Ethernet protocols help manage traffic flow across a network. We monitor the bandwidth usage on the network. We have thresholds set on our network management platform to alert us when usage reaches a designated threshold. We then take appropriate actions to prevent impact to end users.

#### **2.0 ETHERNET 1000 – PRIVATE**

Ethernet Transport Service can be provided at a dedicated private level of service. It is VLAN configurable which allows the customer's data to be tagged so that it is segregated from all other data. The end user can also further use encryption to keep the data private and secure. The private arrangement ensures the only user of this dedicated service is by the end user. Therefore, the cost is greater to dedicate a portion within the network for these private Ethernet 1000BT customers. These services are offered on an (ICB) individual case basis and due date determined based on ordering equipment and possible construction and any upgrades required in our network to provide the service.

#### **3.0 POINT-TO-POINT**

Ethernet Transport Services are available between Customer-designated locations on a point-to-point basis. Service may be ordered between the Customer's POP and End User (EU) location, between two Customer POP's, or between two EU locations.

#### **4.0 OFF-NET SERVICES**

Two Point Service allows for two Customer designated locations to be connected by one shared or dedicated transport service. The service terminated at both locations must be the same speed/capacity. This connection is maintained and monitored by Click!. The MSA only bills for the circuit and is the point of contact for the end user.

APPENDIX NO. 5

**ETHERNET TRANSPORT SERVICE PRICING**

**1. MONTHLY RECURRING SERVICE FEES and NON-RECURRING SERVICE FEES**

**1a. Service Included**

Ethernet 10/100/1000 Shared

Ethernet 1000 Private

Terms are 1 - 5 years

**1b. Monthly Recurring Fee**

These rates are also found in a separate Wholesale Pricing Sheet.

Ethernet 10BT	12 month	24 month	36 month	48 months	60 months
Monthly	\$ 700.00	\$ 665.00	\$ 603.00	\$ 595.00	\$ 560.00

monthly fee is per leg; 3 or more legs is ICB

Tiering below 10BT is possible with VLANs by customer and MSA

Ethernet 100 BT	12 month	24 month	36 month	48 months	60 months
Monthly	\$ 950.00	\$ 902.50	\$ 855.00	\$ 807.50	\$ 760.00

monthly fee is per leg; 3 or more legs is ICB

Tiering above 100BT is ICB

GigE Shared	12 month	24 month	36 month	48 months	60 months
Monthly	\$ 2,880.00	\$ 2,808.00	\$ 2,400.00	\$ 1,875.00	\$ 1,550.00

monthly fee is per leg; 3 or more legs is ICB

GigE Private	12 month	24 month	36 month	48 months	60 months
Monthly	\$ 3,200.00	\$ 3,120.00	\$ 2,592.00	\$ 2,000.00	\$ 1,700.00

monthly fee is per leg; 3 or more legs is ICB

**1c. Non-Recurring Charge (Installation)**

The install fee covers all year terms.

ETHERNET	10BT	100BT	1000BT
SHARED	\$250.00	\$250.00	\$750.00
PRIVATE	N/A	N/A	\$1,000.00

**1d. Volume Discounts:**

Volume Discounts will be issued as a percentage off of the total monthly recurring bill. These discounts will be calculated manually in the form of a monthly credit. "Customer" must inform "Provider" on a monthly basis what volume has been achieved for these credits.

<b>1e. Monthly Recurring Amount</b> (At the end of monthly billing cycle)	<b>Additional Percentage Discount</b>
\$5,001 to 10,000	2%
\$10,001 to \$15,000	3%
\$15,001 to \$20,000	4%
\$20,001 +	5%

## MASTER SERVICES AGREEMENT II-A

This Master Services Agreement II-A (the "Agreement") made and effective this 6th day of November, 2002 ("Effective Date") sets forth the mutual agreement between the City of Tacoma, Department of Public Utilities, Tacoma Power Division doing business as "Click! Network" (hereafter referred to as "Service Provider") and Integra Telecom of Washington, Inc. an Oregon Corporation its principal place of business 20435 72<sup>nd</sup> Ave S, Suite 150, Kent, Washington, 98032-2358 (hereafter referred to as "Customer").

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in this Agreement and of other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

### 1. SCOPE OF SERVICE

- a. Customer wants Service Provider to provision dedicated transport services to End Users on Service Provider facilities pursuant to certain terms and conditions set forth in this agreement and as more specifically set forth in Appendix No. 3. The parties hereby mutually agree that the Service Provider owns and operates communications facilities and is in the business of providing dedicated transport services.
- b. Service Provider agrees to provide to Customer and Customer agrees to accept and pay for the telecommunications services described in this Agreement consisting of providing Customer access to Click! Network's telecommunications system, (which, including without limitation all Equipment as defined below is hereinafter referred to as the "System"), upon the terms and conditions described herein and pursuant to the specific service orders in the form attached hereto as Exhibit B hereto (the "Services").
- c. Following the Effective Date, Click! Network will work with Customer to coordinate the engineering, site survey, System configuration, and other services that are necessary in order to provide Customer access to the Services (such activities collectively the "Engineering and installation Services"). Engineering and Installation Services shall be provided up to the date that the Service testing is completed based on Click! Network's customary testing procedure and the Service is available to the Customer (such date, the "Service Acceptance Date")
- d. Customer shall order Service from Service Provider by following the "Ordering Procedures For On-Net Services" set forth in Appendix No. 2. The applicable non-recurring and recurring charges shall be as set forth in Appendix No. 4. If the Service Provider accepts the ASR, each such ASR shall form part of this Agreement, subject to all terms and conditions herein. Service to On-Net locations shall include normal maintenance, inspection, repair and testing as provided in Section 5 and 6 herein.
- e. The payment for the cost of any special interface equipment or facilities necessary to achieve compatibility, if required because of End-User equipment, between telecommunications equipment of Service Provider and facilities of the

## MASTER SERVICES AGREEMENT II-A

End-User shall be at Customer's expense unless otherwise agreed. Service Provider may, but shall not be required, to provide any such equipment.

### 2. TERM

- a. The term of this Agreement shall commence on the date this Agreement is made and entered into, terminating five (5) years thereafter. This Agreement shall be automatically renewed in successive one-year periods unless terminated by written notice by one of the Parties at least sixty (60) days prior to the end of the five-year term or subsequent one-year term. Provided, however, that in the event the period of time for a particular Service or Services to be provided by Service Provider to Customer pursuant to the ordering provisions described in Appendix No. 2 herein extends beyond the effective date of termination, such Services(s) shall remain in effect for the agreed upon time of Service, subject to all of the terms and conditions of this Agreement as if it were still in effect with respect to such Service or Services.
- b. With respect to each Circuit provided to Customer under this Agreement, the term shall be as specified in the ASR for each Circuit but in no event less than one (1) year for both On-Net and Off-Net Circuits, unless otherwise agreed. If no term is specified in an ASR, it shall be one (1) year.

### 3. RATES AND CHARGES

- a. Subject to section 3.c. hereof, Customer will pay Service Provider the charges in the amounts set forth in Appendix No. 4 for services rendered at various times after the Effective Date as follows:
  1. Rates and charges with respect to the Engineering and Installation Services shall commence on the Effective Date. As compensation for the Services provided by Service Provider, Customer shall pay the recurring and non-recurring rates and charges set forth herein and/or in the ASR beginning on the Start of Service Date. Customer agrees to pay the undisputed monthly charges for the Services, at the address provided for herein, on or before thirty days (30) after the invoice is mailed. The Parties shall provide one another with reasonably requested information for bill validation including, but not limited to, the number of circuits and charges for each dedicated transport Service. The Parties will cooperate to enable Service Provider to provide its billing information in a diskette format. Service Provider represents that the rates and charges are in compliance with all laws and governmental regulations. Service Provider shall bill for all services rendered within one hundred eighty (180) days of the scheduled billing date. Service Provider will not apply late fees to the delayed billing amounts if the delay was the fault of the Service Provider.
  2. Undisputed charges remaining unpaid as of the date that is 30 days from the date of any invoice shall be considered past due amounts. Integra Telecom will not be assessed a late charge until 45 days after date of invoice described in this paragraph. Past due amounts owed by Customer to Click! shall be assessed a late charge of the lesser of one and one half percent (1 1/2%) or the maximum rate permitted under the applicable

**MASTER SERVICES AGREEMENT II-A**

level, the customer must then revert to individual contracts at the retail rate for 6 months before the customer can then renegotiate for the variable master service agreement pricing incentives and is not guaranteed that the incentives would remain the same.

- f. The customer may always do business with Click! Network. The customer has the choice to meet the requirements of the variable master service agreement or to purchase circuits at direct retail rate with individual retail contracts.
- g. Pricing Incentive (Table-1) Example. Full retail rates apply on all circuits if designated revenue levels are not met.

**TABLE-1: PRICING INCENTIVES**

<b>Wholesale Rate</b>	<b>% Monthly Discount</b>	<b>Time Period</b>	<b>Required Monthly Revenue</b>	<b>Required Total Revenue (set point)</b>
\$140.00	N/A	0 – 90 days	\$700.00	\$2,525.00
\$120.00	N/A	0 – 90 days	\$1,540.00	\$3,465.00
\$120.00	N/A	Over 90 days	\$1,540.00	\$3,465.00
\$120.00	2%	One-time	\$3,080.00	\$10,000.00
\$120.00	3%	2 months	\$6,160.00	\$31,500.00
\$120.00	5%	One-time	\$12,320.00	\$50,800.00
\$120.00	7%	2 months	\$24,640.00	\$100,000.00
\$120.00	10%	One-time	\$37,000.00	N/A
\$120.00	15%	N/A	\$50,000.00	N/A
\$90.00	N/A	1 year	\$55,000.00	N/A
\$90.00	N/A	Ongoing	\$59,500.00	N/A

When the customer successfully produces revenue amounts above the threshold levels represented in the table, Click! Network may allow the customer an audience to negotiate for additional incentives. Click! Network is not required to provide additional incentives above the discounts listed in the pricing table in this Master Service Agreement - II.

MASTER COMMUNICATION SERVICES AGREEMENT CONTRACT AMENDMENT  
NO. 2

The Master Service Agreement II-A between Integra Telecom of Washington, Inc. an Oregon Corporation and the City of Tacoma, Department of Public Utilities, Light Division (d.b.a. Click! Network) dated November, 2002 is hereby amended as follows:

4. EQUIPMENT AND EQUIPMENT INSTALLATION RESPONSIBILITIES is amended to add subsection (i) on a second interconnection to read as follows:
- i. Service Provider and Customer shall interconnect their respective networks utilizing an agreed upon arrangement. The purpose of the interconnection shall be for the exchange of access traffic between the Parties. Such traffic exchanges will occur at transmission speeds of 10 megabits or above as determined by the Parties over an initial OC-3 connection. If Customer requires additional transmission capacity to serve additional end users, such capacity shall be requested by Customer and mutually agreed upon. Capacity shall be installed and made available by Service Provider within sixty (60) days from the submittal of such notice. Service Provider and Customer shall each be responsible for upgrading and enhancing their own networks as related to such requested additional transmission capacity, and each shall be responsible for the costs associated with the upgrade or enhancement of its own network. Customer also shall be responsible for any expedite fees or other extraordinary costs incurred by Service Provider for supplying such additional transmission capacity, if that capacity is needed within a time frame earlier than 60 days.

All the rest and remainder of said agreement of November 2002, shall remain in full force and effect.

Agreed this 17 day of May 2005

City of Tacoma  
Department of Public Utilities  
Tacoma Light Division  
Click! Network

Integra Telecom of Washington, Inc.

*(CW)*

BY: Dana A. Toulson  
Name: Dana A. Toulson  
Title: General Manager  
Address: 3628 S. 35<sup>th</sup> St.  
Tacoma, WA 98409

BY: Mark Bloch  
Name: MARK BLOCH  
Title: Senior Vice President  
Address: 20435 72<sup>nd</sup> Ave S.  
SUITE 150  
Kent WA 98032

Approved as to form & legality

S. S. Karavites  
Sr. Assistant City Attorney

Amendment to Integra Telecom MSA Agreement of November 2002  
05-11-05

**MASTER COMMUNICATION SERVICES AGREEMENT CONTRACT AMENDMENT  
NO. 1**

**APPENDIX NO. 5**

**DEDICATED TRANSPORT SERVICE PRICING 06/01/03**

**1. PRICING INCENTIVES**

- g. Pricing Incentive (TABLE-1) Example. Full retail rates apply on all circuits if the minimum designated revenue levels are not met.

**TABLE-1: PRICING INCENTIVES AND VOLUME DISCOUNTS**

<b>Monthly Recurring Amount</b>	<b>Monthly Percentage Discount</b>
\$0 - \$700 (Revenue Level)	N/A
\$701 - \$5000	N/A
\$5,001 - \$10,000	4%
\$10,001 - \$15,000	5%
\$15,001 - \$20,000	6%
\$20,001 - \$25,000	7%
\$25,001 - \$35,000	10%
\$35,001 - \$45,000	12%
\$45,001 - \$50,000	15%

- h. Wholesale pricing by circuit type example (TABLE-2) – rates must be confirmed at time of order and by Click! Network on an Individual Case Basis (ICB).

**TABLE-2: WHOLESALE MONTHLY AND INSTALL PRICING BY CIRCUIT TYPE**

<b>Circuit Type</b>	<b>Wholesale Monthly Rate</b>	<b>Install (Lit) Building</b>	<b>Install (Non-Lit) Building</b>	<b>COMMENTS</b>
DS-1	\$140.00	\$375.00	ICB	Rate applied for new MSA-II partner
DS-1	\$120.00	\$375.00	ICB	Rate applied if revenue level met
DS-3	\$1,068.75	\$650.00	ICB	Rate applied for new MSA-II partner
DS-3	\$900.00	\$650.00	ICB	Rate applied if revenue level met
OC-3	\$2,208.75	ICB	ICB	Rate applied for new MSA-II partner
OC-3	\$1,860.00	ICB	ICB	Rate applied if revenue level met
OC-12	\$7,125.00	ICB	ICB	Rate applied for new MSA-II partner
OC-12	\$6,000.00	ICB	ICB	Rate applied if revenue level met
OC-48	\$17,812.50	ICB	ICB	Rate applied for new MSA-II partner
OC-48	\$15,000.00	ICB	ICB	Rate applied if revenue level met

# EXHIBIT 63



**TO:** Elizabeth Pauli, City Manager  
**FROM:** Jeff Lueders, Cable Communications & Franchise Services Manager, CMO/MCO  
Tanisha Jumper, MCO  
**COPY:** City Council and City Clerk  
**SUBJECT:** Ordinance – Cable TV Franchise Agreement with Rainier Connect North, LLC – City Council meeting 12/10/19  
**DATE:** November 20, 2019

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**SUMMARY:**

The purpose of the memo is to request that the City Council review and consider for approval the Ordinance regarding a Cable TV Franchise Agreement between Rainier Connect North, LLC, and the City of Tacoma. Given the current transition with Click and the fact that the Cable TV Franchise-like agreement with Click is expiring at the end of 2019 (December 31), Staff and Outside Counsel have reviewed the situation and determined this is the best course of action. We then engaged in negotiations with Rainier Connect and their Counsel and have come to terms on this agreement. We are requesting your approval of this Ordinance.

**STRATEGIC POLICY PRIORITY:**

- Ensure all Tacoma residents are valued and have access to resources to meet their needs - This agreement enables another Cable TV Provider to enter the community and in doing so creates a competitive marketplace and allows our residents and businesses to have a choice, it also allows the City of Tacoma to continue to collect Franchise and PEG Fees per Federal Law which go directly into our Communications efforts.
- Foster a vibrant and diverse economy with good jobs for all Tacoma residents – This agreement allows another Cable TV provider into the community to offer their services, creating a competitive marketplace, and additional jobs in the community.
- Cultivate a vibrant cultural sector that fosters a creative, cohesive community – Through the negotiated terms of this agreement we will continue to provide Educational and Government Access channels in HD and the funding provided will allow for continued programming efforts such as Art town, Business Matters, and CityLine, which provide ample opportunities for the creative sectors of our community to share information about what they are doing.
- Assure outstanding stewardship of the natural and built environment - Through this agreement we regulate the proper use of the City's Right of Way and in doing so protect residents and businesses.

**BACKGROUND:**

The City of Tacoma has been fortunate to have two Cable TV Providers over the past 20 years (Comcast and Click). With Click's departure it is necessary for the City of Tacoma to have a Cable TV Franchise with the new provider, Rainier Connect North, LLC.

The Government Performance and Finance Committee considered this request for Ordinance at their November 5, 2019 meeting and approved this to be brought forward to the entire City Council for consideration and approval.



**ISSUE:**

This new 20 year agreement coincides with the IRU that Rainier Connect North, LLC is signing with the City of Tacoma/Tacoma Public Utilities to lease the TPU Commercial Network. This agreement preserves all of our rights as set forth in Federal Law under the Cable Act, State Law, and Municipal Code (Title 16A).

**ALTERNATIVES:**

If the City of Tacoma did not agree to a Cable TV Franchise Agreement with Rainier Connect North, LLC, we would then be in conflict with Federal Law Requirements. In addition, we would lose annual revenue of approximately \$992,032 in Franchise Fees and EG Fees.

**RECOMMENDATION:**

Staff recommends approval of this request for Ordinance for a Cable TV Franchise Agreement between the City of Tacoma and Rainier Connect North, LLC. The approval of this Ordinance will allow the seamless transition from Click to Rainier Connect North, LLC, for Cable TV Services which will allow the City of Tacoma to continue to Regulate our Right of Way protecting our Residents and Businesses along with continuing to receive Franchise Fees and EG Fees which allow the continued operation of the communications office.

**FISCAL IMPACT:**

Franchise Fee Revenues are based on a 5% gross earnings and an additional 1% for PEG Fees, which is directly impacted by the number of cable TV customers. PEG fees directly support capital purchases related to cable TV communication related infrastructure.

**REVENUES:**

FUNDING SOURCE	COST OBJECT (CC/WBS/ORDER)	COST ELEMENT	TOTAL AMOUNT
1431 – MCO & TV Tacoma	638140	4315351	\$820,000
1431 - PEG	638500	4315750	\$172,032
<b>TOTAL</b>			<b>\$992,032</b>

**FISCAL IMPACT TO CURRENT BIENNIAL BUDGET: \$992,032**

**ARE THE EXPENDITURES AND REVENUES PLANNED AND BUDGETED? Yes**

# EXHIBIT 64

ATTACHMENT 1

Contract No. Tacoma Public Library 16-01  
(Original contract dated 01-08-08)

SO Date TBD

SERVICE ORDER NO. 1

Site A - Location: 1111 Altheimer St.  
Site Z - Location: 1102 Tacoma Ave S. – Main Branch  
**Circuit: KFFN.000867..CKNW (not part of VLAN cloud)**  
Service to be installed: 1,000Mbps IP (Internet Protocol) + HSRP (Hot Standby Routing Protocol at Main branch); BURST up to 10Gig @ \$2.00/Meg after initial 1Gig – based on 95<sup>th</sup> percentile  
Term: 60 months (5 Years)  
Monthly Charges: \$2,350.00 (Billing by Journal Entry)  
Non-Recurring Charges: N/A (Covered in previous intermediate upgrade - ICB)  
Billing Name: Tacoma Public Library  
Billing Point of Contact: Sue Calhoun  
Phone: 253.292.2001 X1210  
Billing Address: 1102 Tacoma Ave S. Tacoma WA 98402  
Site Contact: Stephen Hjelmstad  
Phone: 253.292.2001 X1520

Click! Signature  Date: 3/10/16

Customer Signature  Date: 2/26/16

Confidential

ATTACHMENT 1

Contract No. Tacoma Public Library 16-01  
(Original contract dated 01-08-08)

SO Date TBD

**SERVICE ORDER NO. 2**

Site A - Location: 1102 Tacoma Ave S. – Main Branch

Site Z - Location: 1102 Tacoma Ave S. – Main – Transport Only  
**Circuit: KFFN.000868A..CKNW**

Service to be installed: 10Gig Port, Transport only in VLAN cloud; Upgrade from 1,000Mbps transport only

Term: 60 months (5 Years)

Monthly Charges: \$2,250.00 (Billing by Journal Entry)

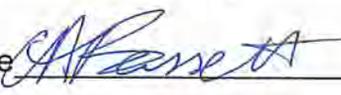
Non-Recurring Charges: N/A (Covered in previous intermediate upgrade - ICB)

Billing Name: Tacoma Public Library  
Billing Point of Contact: Sue Calhoun  
Phone: 253.292.2001 X1210  
Billing Address: 1102 Tacoma Ave S. Tacoma WA 98402

Site Contact: Stephen Hjelmstad  
Phone: 253.292.2001 X1520

Click! Signature 

Date: 3/10/16

Customer Signature 

Date: 2/26/16

Confidential

ATTACHMENT 1

Contract No. Tacoma Public Library 16-01  
(Original contract dated 01-08-08)

SO Date TBD

**SERVICE ORDER NO. 3**

Site A - Location: 1102 Tacoma Ave S. – Main  
Site Z - Location: 215 S. 56<sup>th</sup> St. - Moore Branch  
**Circuit: KFFN.000868B..CKNW**

SPECIAL NOTE: Moore branch is the designated back up branch in case of a major event. The second port of the 2-port switch will be provisioned as the main branch and turned down or set as agreed so that the port can be turned up in a 24 hour time period in case of a major event.

Service to be installed: 1,000Mbps Transport only in VLAN cloud; Upgrade from 100Mbps transport only

Term: 60 months (5 Years)

Monthly Charges: \$950.00 (Billing by Journal Entry)

Non-Recurring Charges: N/A (Covered in previous intermediate upgrade - ICB)

Billing Name: Tacoma Public Library  
Billing Point of Contact: Sue Calhoun  
Phone: 253.292.2001 X1210  
Billing Address: 1102 Tacoma Ave S. Tacoma WA 98402

Site Contact: Stephen Hjelmstad  
Phone: 253.292.2001 X1520

Click! Signature  Date: 3/10/16

Customer Signature  Date: 2/26/16

Confidential

ATTACHMENT 1

Contract No. Tacoma Public Library 16-01  
(Original contract dated 01-08-08)

SO Date TBD

**SERVICE ORDER NO. 4**

Site A - Location: 1102 Tacoma Ave S. – Main

Site Z - Location: 765 S. 84<sup>th</sup> St. – Fern Hill Branch  
**Circuit: KFFN.000868C..CKNW**

Service to be installed: 1,000Mbps Transport only in VLAN cloud; Upgrade from 100Mbps transport only

Term: 60 months (5 Years)

Monthly Charges: \$950.00 (Billing by Journal Entry)

Non-Recurring Charges: N/A (Covered in previous intermediate upgrade - ICB)

Billing Name: Tacoma Public Library  
Billing Point of Contact: Sue Calhoun  
Phone: 253.292.2001 X1210  
Billing Address: 1102 Tacoma Ave S. Tacoma WA 98402

Site Contact: Stephen Hjelmstad  
Phone: 253.292.2001 X1520

Click! Signature  Date: 3/10/16

Customer Signature  Date: 2/26/16

Confidential

ATTACHMENT 1

Contract No. Tacoma Public Library 16-01  
(Original contract dated 01-08-08)

SO Date TBD

**SERVICE ORDER NO. 5**

Site A - Location: 1102 Tacoma Ave S. – Main  
Site Z - Location: 212 Browns Point Blvd NE – Kobetich Branch  
**Circuit: KEFN.000868D..CKNW**  
Service to be installed: 1,000Mbps Transport only in VLAN cloud; Upgrade from 100Mbps transport only  
Term: 60 months (5 Years)  
Monthly Charges: \$950.00 (Billing by Journal Entry)  
Non-Recurring Charges: N/A (Covered in previous intermediate upgrade - ICB)  
Billing Name: Tacoma Public Library  
Billing Point of Contact: Sue Calhoun  
Phone: 253.292.2001 X1210  
Billing Address: 1102 Tacoma Ave S. Tacoma WA 98402  
Site Contact: Stephen Hjelmstad  
Phone: 253.292.2001 X1520

Click! Signature  Date: 3/10/16

Customer Signature  Date: 2/20/16

Confidential

ATTACHMENT 1

Contract No. Tacoma Public Library 16-01  
(Original contract dated 01-08-08)

SO Date TBD

SERVICE ORDER NO. 6

Site A - Location: 1102 Tacoma Ave S. – Main

Site Z - Location: 3722 N. 26<sup>th</sup> St. – Wheelock Branch  
**Circuit: KFFN.000868E..CKNW**

Service to be installed: 1,000Mbps Transport only in VLAN cloud; Upgrade from 100Mbps transport only

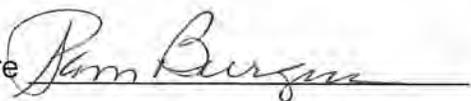
Term: 60 months (5 Years)

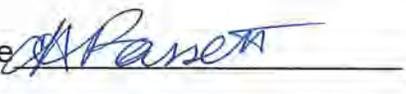
Monthly Charges: \$950.00 (Billing by Journal Entry)

Non-Recurring Charges: N/A (Covered in previous intermediate upgrade - ICB)

Billing Name: Tacoma Public Library  
Billing Point of Contact: Sue Calhoun  
Phone: 253.292.2001 X1210  
Billing Address: 1102 Tacoma Ave S. Tacoma WA 98402

Site Contact: Stephen Hjelmstad  
Phone: 253.292.2001 X1520

Click! Signature  Date: 3/10/16

Customer Signature  Date: 2/26/16

Confidential

ATTACHMENT 1

Contract No. Tacoma Public Library 16-01  
(Original contract dated 01-08-08)

SO Date TBD

**SERVICE ORDER NO. 7**

Site A - Location: 1102 Tacoma Ave S. – Main  
Site Z - Location: 3523 East G St. - Mottet Branch  
**Circuit: KFFN.000868F..CKNW**  
Service to be installed: 1,000Mbps Transport only in VLAN cloud; Upgrade from 10Mbps transport only  
Term: 60 months (5 Years)  
Monthly Charges: \$950.00 (Billing by Journal Entry)  
Non-Recurring Charges: N/A (Covered in previous intermediate upgrade - ICB)  
Billing Name: Tacoma Public Library  
Billing Point of Contact: Sue Calhoun  
Phone: 253.292.2001 X1210  
Billing Address: 1102 Tacoma Ave S. Tacoma WA 98402

Site Contact: Stephen Hjelmstad  
Phone: 253.292.2001 X1520

Click! Signature  Date: 3/10/16

Customer Signature  Date: 2/24/16

Confidential

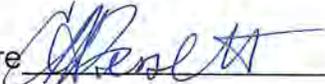
ATTACHMENT 1

Contract No. Tacoma Public Library 16-01  
(Original contract dated 01-08-08)

SO Date TBD

SERVICE ORDER NO. 8

Site A - Location: 1102 Tacoma Ave S. – Main  
Site Z - Location: 3411S. 56<sup>th</sup> St. – South Tacoma Branch  
**Circuit: KFFN.000868G..CKNW**  
Service to be installed: 100Mbps Transport only in VLAN cloud; Upgrade from 10Mbps transport only  
Term: 60 months (5 Years)  
Monthly Charges: \$950.00 (Billing by Journal Entry)  
Non-Recurring Charges: N/A (Covered in previous intermediate upgrade - ICB)  
Billing Name: Tacoma Public Library  
Billing Point of Contact: Sue Calhoun  
Phone: 253.292.2001 X1210  
Billing Address: 1102 Tacoma Ave S. Tacoma WA 98402  
Site Contact: Stephen Hjelmstad  
Phone: 253.292.2001 X1520

Click! Signature  Date: 3/10/16  
Customer Signature  Date: 2/26/16

Confidential

ATTACHMENT 1

Contract No. Tacoma Public Library 16-01  
(Original contract dated 01-08-08)

SO Date TBD

SERVICE ORDER NO. 9

Site A - Location: 1102 Tacoma Ave S. – Main  
Site Z - Location: 7001 6<sup>th</sup> Ave. - Swasey Branch  
**Circuit: KFFN.000868H..CKNW**  
Service to be installed: 1,000Mbps Transport only in VLAN cloud; Upgrade from 100Mbps transport only  
Term: 60 months (5 Years)  
Monthly Charges: \$950.00 (Billing by Journal Entry)  
Non-Recurring Charges: N/A (Covered in previous intermediate upgrade - ICB)  
Billing Name: Tacoma Public Library  
Billing Point of Contact: Sue Calhoun  
Phone: 253.292.2001 X1210  
Billing Address: 1102 Tacoma Ave S. Tacoma WA 98402  
Site Contact: Stephen Hjelmstad  
Phone: 253.292.2001 X1520

Click! Signature  Date: 3/10/16

Customer Signature  Date: 2/26/16

Confidential

# EXHIBIT 64 (a)

Contract No. Tacoma Public Library 07- 01

BROADBAND SERVICES AGREEMENT

*(12)* This Broadband Services Agreement (the "Agreement") made and effective this 5 day of January, 2008 sets forth the mutual agreement between the City of Tacoma, Department of Public Utilities, Light Division doing business as "Click! Network" ("Click! Network") and **Tacoma Public Library**, its principal place of business at 1102 Tacoma Ave S., Tacoma, WA 98402 (hereafter referred to as "Customer").

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in this Agreement and of other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. SCOPE OF SERVICE

- a. Click! Network agrees to provide to Customer and Customer agrees to accept and pay for the telecommunications services described in this Agreement consisting of providing Customer access to Click! Network's telecommunications system, (which, including without limitation all Equipment as defined below is hereinafter referred to as the "System"), upon the terms and conditions described herein and in Exhibit A hereto (the "Services").
- b. Following the Effective Date, Click! Network will work with Customer to coordinate the engineering, site survey, System configuration, and other services that are necessary in order to provide Customer access to the Services (such activities collectively the "Engineering and Installation Services"). Engineering and Installation Services shall be provided up to the date that the Service testing is completed based on Click! Network's customary testing procedure and the Service is available to the Customer (such date, the "Service Acceptance Date).

2. TERM

This Agreement shall remain in full force and effect for a minimum period of 36 full calendar months following the Service Acceptance Date (such period including the first partial month, if any, and such full calendar months, the "Initial Term"). Customer shall be liable for charges at the times and in the manner described in section 3 hereof from and after the Effective Date. At the end of the Initial Term, this Agreement shall continue in effect on a calendar month-to-month basis upon the terms and conditions set forth in this Agreement, until terminated pursuant to Section 9 hereof (such period during which Service is provided following the Initial Term is referred to herein as the "Extended Term")

and the Initial Term and the Extended Term together are referred to herein as the "Term").

### 3. RATES AND CHARGES

- a. Subject to section 3.b. hereof, Customer will pay Click! Network the charges in the amounts set forth in Exhibit A for services rendered at various times after the Effective Date as follows:
  - i. Rates and charges with respect to the Engineering and Installation Services shall commence on the Effective Date.
  - ii. Rates and charges with respect to Service shall commence on the Service Delivery Date.
  - iii. The Customer agrees to pay Click! Network the charges described in section 3.a. and other amounts payable hereunder within thirty days from the date of invoice in accordance with the instructions contained in such invoice. Charges remaining unpaid as of the date that is 30 days from the date of any invoice shall be considered past due amounts. Past due amounts owed by Customer to Click! Network shall be assessed a late charge of the lesser of one and one half percent (1 1/2%) or the maximum rate permitted under the applicable laws of the State of Washington per calendar month (or any partial month) on the past due amount balance.
- b. In the event of billing disputes, the Customer shall notify Click! Network in writing, providing the bill date, the amount in dispute with applicable taxes and an explanation for the dispute. The Customer shall pay all charges not disputed within the period specified above. No charges may be disputed more than one year after the date such charges are invoiced. The parties will cooperate in good faith to resolve any such disputes within a sixty-day period after the dispute is submitted to Click! Network. If the dispute is not resolved during this period, then the parties shall resolve the dispute as outlined in paragraph 12.f.
- c. In addition to the amounts described in section 3.a. and 3.b. Customer will pay all applicable value added, sales, use, excise and other taxes, duties, imposts, fees or charges (collectively "Taxes") levied or imposed on it by a duly constituted and authorized taxing or other governmental authority with respect to the Services or Customer's use of the System or Click! Network's Equipment whether or not such amounts are required to be collected by Click! Network under applicable law. In addition, Click! Network will invoice and Customer will pay all state, local and federal taxes and franchise, tariff, and agreement fees (if any), imposed upon Click! Network with respect to its activities contemplated under this

Agreement in the event that any authority with jurisdiction imposes a tax on any aspect of the transactions contemplated hereunder including but not limited to taxes imposed pursuant to Chapter 82.29A of the Revised Code of Washington, Customer agrees to be responsible for and pay such tax, and Customer agrees to indemnify, and save harmless Click! Network from and against such taxes or other Taxes and any penalties and interest thereon or costs associated with any attempts to collect the same.

#### 4. EQUIPMENT AND EQUIPMENT INSTALLATION RESPONSIBILITIES

- a. All equipment owned by Click! Network as of the Effective Date and equipment purchased by Click! Network after the Effective Date that is not sold to Customer pursuant to a specific invoice specifically describing such equipment resale shall remain the sole and exclusive property of Click! Network (all such equipment, the "Equipment"), its lessors or assigns, and nothing contained herein shall give or convey to Customer any right, title or interest whatever in Click! Network Equipment, which shall at all times be and remain personal property, notwithstanding that it may be or become attached to or embedded in realty. Click! Network shall be entitled, at any time, to affix to Click! Network Equipment a label indicating the interest of Click! Network or any lessor or assignee of Click! Network.
- b. No Liens. Customer will use reasonable efforts to ensure that any party using the Services through it takes reasonable care of Click! Network Equipment at each location and does not sell it, keep it, encumber it, allow it to become subject to a mechanics or other lien, use it as security for any loan or allow it to be seized in satisfaction of a debt of Customer.
- c. No Removal. Customer will use reasonable efforts to ensure that Click! Network Equipment at each location is not removed or caused to be removed by any person, other than Click! Network or any persons authorized by Click! Network or without Click! Network's prior written consent, from the place at which it is installed without Click! Network's prior written permission or, after notice to Click! Network, pursuant to court order.
- d. Proper Environment. Customer shall use reasonable efforts to keep Click! Network's Equipment at each location in the proper environment as specified and described by Click! Network to Customer.
- e. Click! Network and/or its contractor will perform all installation associated with the Services to connect the System to the Customer's equipment located at Customer's premises. In addition to the undertaking to pay the charges set forth in section 3.a.i. with respect to the period from the Effective Date to the Service Acceptance Date, Customer will also be

liable for and will reimburse Click! Network for all costs incurred by Click! Network with respect to its Engineering and Installation Services during such period, including the costs of materials, supplies, and equipment used or included in the installation activity relating to Customer's premises, other than Equipment that is actually removed pursuant to section 9.d.2. hereof. This cost will not exceed \$750.00. Nothing in this section 4.e. will require Customer to pay Click! Network for costs incurred directly by Customer during the period up to the Service Acceptance Date. Customer agrees to pay Click! Network for its costs incurred with respect to Click's connection installation which will extend to a premise termination interconnect cabinet or rack owned and supplied by Click! Network located in Customer- provided and designated telecommunications room or other agreed upon location. Customer shall provide a duct system into his/her premises to the designated telecommunications room or other agreed upon location. Customer agrees to exercise due care and caution to protect Click's equipment from the weather, vandalism and other potential problems. Customer shall be liable for any loss or damage to Click! Network Equipment at any location arising from Customer's negligence, intentional act, unauthorized maintenance or other cause within the reasonable control of Customer, its employees or agents. Click! shall be liable for any loss or damage to Customer's Equipment at any location arising from Click!'s negligence, intentional act, unauthorized maintenance or other cause within the reasonable control of Click!, its employees or agents. In the event of any loss or damage to either party's equipment for which the other party is liable, the party shall reimburse the other party for the lesser of (i) the reasonable cost of repair or (ii) the actual cost of replacement.

- f. Customer will only connect to the System using industry standard equipment, which complies and is compatible with the service specifications set forth in applicable technical publications. Notwithstanding the undertaking of Customer in the prior sentence, if, in Click! Network's reasonable opinion, the technical integrity of the System or the Services being provided over the System to Customer or any other third party is being jeopardized or is likely to be jeopardized as a result of the connection of any Customer premises equipment to the System by Customer or by any other activity for which Customer is responsible, Click! Network may suspend the provision of the affected Service to any connection so affected. Following remedial action by Customer satisfactory to Click! Network, Click! Network will reinstate the Service provided through that connection as soon as possible.
- g. Premises Security. On or before the Service Acceptance Date, Customer and Click! Network shall reach agreement on guidelines relating to site security and password protection.

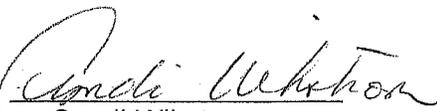
- h. Click! Network may from time to time issue technical instructions on the use of the System and Service to ensure the proper functioning of the Services or the protection of the System from damage or deterioration. Technical instructions will be observed by Customer.
- i. Where Click! Network Equipment is to be installed at a location, Customer shall, at its own expense:
  - 1. Obtain all necessary consents for the installation and use of Click! Network Equipment in the building, including consents for necessary alterations to buildings;
  - 2. Ensure that any floor loading limits will not be exceeded;
  - 3. Provide suitable accommodations, foundations and an environment to meet the environmental specification for Click! Network Equipment as agreed between Customer and Click! Network, including all necessary trunking, conduits and cable trays;
  - 4. Provide suitable electric power and any other utilities needed by Click! Network to install, test and/or maintain Click! Network's Equipment;
  - 5. Provide a suitable and safe working environment for Click! Network's personnel, including an environment safe from environmental hazards; and
  - 6. Take up or remove, in time to allow Click! Network to carry out installation as scheduled, any fitted or fixed floor coverings, ceiling tiles, suspended ceilings and partition covers, and carry out afterwards any making good or decorator's work required.
- j. Click! Network shall provide Customer with such information as is necessary for Customer to meet these obligations as part of the planning process for installation of Click! Network's Equipment.
- k. Customer shall provide Click! Network or other persons authorized by Click! Network with access (on both a routine and emergency basis) to each Customer location within the normal business hours (or as otherwise agreed) of each such location for the implementation of all services contemplated to be provided by Click! Network including without limitation the Service. After the Service Acceptance Date for a connection, Customer will provide Click! Network reasonable access to the Customer premises where any Click! Network Equipment is installed. Click! Network shall not be responsible for any faults on the System or any failure to perform the provisions of this Agreement to the extent that Click! Network, in good faith, requires access, and any such faults or failures or the continuation thereof are a result of the failure of Customer to provide access to the place at each location where Click! Network Equipment is installed supporting the failing Service or connection.

g. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to constitute one and the same agreement.

**IN WITNESS WHEREOF**, the parties have, through their authorized representatives executed this Agreement effective as of the date first above written:

City of Tacoma  
Department of Public Utilities  
Light Division d/b/a Click! Network

Tacoma Public Library  
1102 Tacoma Ave S  
Tacoma, WA 98402

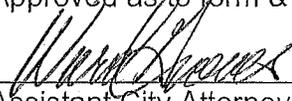
BY:   
Name: Cyndi Wikstrom  
Title: General Manager  
Address: 3628 South 35<sup>th</sup> Street  
Tacoma, Washington 98409

BY:   
Name  
Title:  
Address:

Date: 2/11/08

Date: 1/5/08

Approved as to form & legality:

  
Assistant City Attorney

# EXHIBIT 65

[Menu](#)

# ARIN IPv4 Free Pool Reaches Zero

**Posted: Thursday, 24 September 2015**

On 24 September 2015, ARIN issued the final IPv4 addresses in its free pool. ARIN will continue to process and approve requests for IPv4 address blocks. Those approved requests may be fulfilled via the [Wait List for Unmet IPv4 Requests \(/resources/request/waiting\\_list.html\)](/resources/request/waiting_list.html), or through the [IPv4 Transfer Market \(/resources/transfers/index.html\)](/resources/transfers/index.html).

Exhaustion of the ARIN Free Pool does trigger changes in ARIN's Specified Transfer policy (NRPM 8.3 (</policy/nrpm.html#eight3>)) and Inter-RIR Transfer policy (NRPM 8.4 (</policy/nrpm.html#eight4>)). In both cases, these changes impact organizations that have been the source entity in a specified transfer within the last twelve months:

"The source entity (-ies within the ARIN Region (8.4)) will be ineligible to receive any further IPv4 address allocations or assignments from ARIN for a period of 12 months after a transfer approval, or until the exhaustion of ARIN's IPv4 space, whichever occurs first."

Effective today, because exhaustion of the ARIN IPv4 free pool has occurred for the first time, there is no longer a restriction on how often organizations may request transfers to specified recipients.

In the future, any IPv4 address space that ARIN receives from IANA, or recovers from revocations or returns from organizations, will be used to satisfy approved requests on the Waiting List for Unmet Requests. If we are able to fully satisfy all of the requests on the waiting list, any remaining IPv4 addresses would be placed into the ARIN free pool of IPv4 addresses to satisfy future requests.

ARIN encourages customers with questions about IPv4 availability to contact [hostmaster@arin.net](mailto:hostmaster@arin.net) (<mailto:hostmaster@arin.net>) or the Registration Services Help Desk at +1.703.227.0660.

# EXHIBIT 65 (a)

<https://access.ripe.net/?originalUrl=https%3A%2F%2Fwww.ripe.net%2Fpublications%2Fnews%2Fabout-ripe-ncc-and-ripe%2Fthe-ripe-ncc-has-run-out-of-ipv4-addresses>

# The RIPE NCC has run out of IPv4 Addresses

Today, at 15:35 (UTC+1) on 25 November 2019, we made our final /22 IPv4 allocation from the last remaining addresses in our available pool. We have now run out of IPv4 addresses.

Our announcement will not come as a surprise for network operators - IPv4 run-out has long been anticipated and planned for by the RIPE community. In fact, it is due to the community's responsible stewardship of these resources that we have been able to provide many thousands of new networks in our service region with /22 allocations after we reached our last /8 in 2012.

## Recovered IPv4 Addresses and the Waiting List

Even though we have run out, we will continue to recover IPv4 addresses in the future. These will come from organisations that have gone out of business or are closed, or from networks that return addresses they no longer need. These addresses will be allocated to our members (LIRs) according to their position on a new waiting list that is now active.

While we therefore expect to be allocating IPv4 for some time, these small amounts will not come close to the many millions of addresses that networks in our region need today. Only LIRs that have never received an IPv4 allocation from the RIPE NCC (of any size) may request addresses from the waiting list, and they are only eligible to receive a single /24 allocation.

LIRs that have submitted an IPv4 request can see their position on the waiting list in the LIR Portal. A [new graph](https://www.ripe.net/manage-ips-and-asns/ipv4/ipv4-waiting-list) (<https://www.ripe.net/manage-ips-and-asns/ipv4/ipv4-waiting-list>) has also been published that shows the number of requests on the waiting list and the number of days that the LIR at the front of the queue has been waiting.

## Call for Greater Progress on IPv6

This event is another step on the path towards global exhaustion of the remaining IPv4 addressing space. In recent years, we have seen the emergence of an IPv4 transfer market and greater use of Carrier Grade Network Address Translation (CGNAT) in our region. There are costs and trade-offs with both approaches and neither one solves the underlying problem, which is that there are not enough IPv4 addresses for everyone.

Without wide-scale IPv6 deployment, we risk heading into a future where the growth of our Internet is unnecessarily limited - not by a lack of skilled network engineers, technical equipment or investment - but by a shortage of unique network identifiers. There is still a long way to go, and we call on all stakeholders to play their role in supporting the IPv6 roll-out.

# IPv4 Waiting List

ARIN's free pool depleted in [September 2015](#)

(<https://www.arin.net/vault/announcements/2015/20150924.html>). The IPv4 Waiting List is one of several ways an organization may request IPv4 addresses from ARIN. Other available options are to [transfer resources](#) ([/resources/registry/transfers/](#)), or request IPv4 addresses from pools reserved specifically for micro-allocations ([NRPM 4.4](#) ([/participate/policy/nrpm/#4-4-micro-allocation](#))) or Dedicated IPv4 block to facilitate IPv6 Deployment ([NRPM 4.10](#) ([/participate/policy/nrpm/#4-10-dedicated-ipv4-block-to-facilitate-ipv6-deployment](#))).

## Waiting List Process

If an IPv4 Waiting List request meets current policy requirements, the organization will be placed on the IPv4 Waiting List for their approved block size. The qualifying organization must specify the smallest block size they would be willing to accept to fulfill their request. Receipt of IPv4 space in any amount via IPv4 Waiting List, 8.3 Specified Recipient Transfer, or 8.4 Inter-RIR Transfer removes the organization from the IPv4 Waiting List.

As IPv4 addresses become available, typically through revocations due to non-payment, they will be used to fill requests on a first-approved basis, subject to the size of each available address block.

Please note the following:

- An organization may only have one request on the IPv4 Waiting List at a time.
- Once a request is added to the IPv4 Waiting List, the smallest acceptable block size may be adjusted by the requestor at any time, however the maximum block size cannot be changed. To request a larger block, the organization must close their existing IPv4 Waiting List ticket and submit a new request for the larger block. The new request will be added to the IPv4 Waiting List in the order in which it is approved.
- If an organization declines to accept a block that becomes available, ARIN will consider the request fulfilled and will remove the request from the IPv4 Waiting List.
- Organizations must be current on all fees at the time a block becomes available. Organizations with an existing ARIN billing account will be notified of any past due fees and may remain on the IPv4 Waiting List, but will not be eligible to receive IPv4 addresses.

- If an organization's account is revoked for non-payment, their ticket will be removed from the IPv4 Waiting List. If the account is later reinstated and returned to good standing with ARIN, the organization must submit a new request, and the new request will be added to the IPv4 Waiting List in the order in which it is approved.
- Per [ARIN policy \(/participate/policy/nrpm/#4-1-8-arin-waitlist\)](/participate/policy/nrpm/#4-1-8-arin-waitlist), when an organization's IPv4 Waiting List request has been filled, the organization must wait 90 days after receiving said distribution before applying for additional space. This restriction applies to all organizations unless a waiver is requested and granted in accordance with policy requirements.
- Per [ARIN policy \(/participate/policy/nrpm/#4-1-8-arin-waitlist\)](/participate/policy/nrpm/#4-1-8-arin-waitlist), any IPv4 address space distributed from the waitlist cannot be transferred to another organization for 60 months. After 60 months, the space can be transferred.
- When an organization is notified that an IPv4 block is available, ARIN's Financial Services will request a [Registration Services Agreement \(RSA\)](/about/corporate/agreements/rsa.pdf) and/or [registration fees \(/resources/fees/fee\\_schedule/\)](/resources/fees/fee_schedule/) when applicable.

Additional information and instructions for submitting an IPv4 request for placement onto the IPv4 Waiting List can be found on the [Request IPv4 Addresses page \(/resources/guide/ipv4/request/\)](/resources/guide/ipv4/request/).

## Waiting List Status Report

The table below represents the current state of the Waiting List for Unmet Requests. This list is provided in chronological order beginning with the oldest waiting list request. The wait listed date column represents the date and time that the request was placed on the waiting list.

This table is **not** indicative of the order in which requests will be filled. That order depends entirely upon the order, size, and quantity of IPv4 address blocks that ARIN receives and places back into its IPv4 inventory. For some example scenarios, visit the [How Waiting List Requests Work \(/resources/guide/ipv4/waiting\\_list/scenarios/\)](/resources/guide/ipv4/waiting_list/scenarios/) page.

### Status Report for the IPv4 Waiting List

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**Request's Position on Waiting List:** 1

---

**Date and Time Added to Waiting List:** Thu, 02 May 2019 11:28:26 EDT

---

**Maximum Approved Prefix Size:** /22

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**Minimum Acceptable Prefix Size:** /22

---

# How Waiting List Requests Work

## ARIN Board Suspends Waiting List Issuance Policy

**07 February 2019:** We will continue to accept and process IPv4 requests according to NRPM 4.1.8, and organizations may be added to the waiting list while waiting list issuance is suspended. All future IPv4 address space issued under this policy is subject to the outcome of pending policy review.

**Details are available in the [recent announcement \(/announcements/20190207\\_waitlist/\)](/announcements/20190207_waitlist/).**

When a block of IPv4 addresses becomes available, ARIN examines the oldest request on the waiting list to determine whether or not the newly available block can fill it. ARIN then continues to the next oldest request as necessary. Waiting list request fulfillment is determined by the size of the available block(s) and the approved maximum and specified minimum acceptable block sizes for each organization. A table showing the current status of the waiting list is available on the [IPv4 Waiting List page \(/resources/guide/ipv4/waiting\\_list/\)](/resources/guide/ipv4/waiting_list/).

Below are some example scenarios to help illustrate how the waiting list works in practice.

## Scenario 1: Single Block Fills a Single Request

### IPv4 Waiting List: Scenario 1

---

**Request's Position on Waiting List:** 1

---

**Date and Time Added to Waiting List:** Mon, 03 Aug 2015 12:51:06 EDT

---

**Maximum Approved Prefix Size:** 16

---

**Minimum Acceptable Prefix Size:** 17

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**Request's Position on Waiting List:** 2

---

**Date and Time Added to Waiting List:** Mon, 10 Aug 2015 15:04:56 EDT

---

**Maximum Approved Prefix Size:** 20

---

**Minimum Acceptable Prefix Size:** 22

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**EXHIBIT 65 (b)**

# IPv4 address exhaustion

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**IPv4 address exhaustion** is the depletion of the pool of unallocated IPv4 addresses. Because the original Internet architecture had fewer than 4.3 billion addresses available, depletion has been anticipated since the late 1980s, when the Internet started experiencing dramatic growth. This depletion is one of the reasons for the development and deployment of its successor protocol, IPv6. IPv4 and IPv6 coexist in the Internet.

The IP address space is managed globally by the Internet Assigned Numbers Authority (IANA), and by five regional Internet registries (RIRs) responsible in their designated territories for assignment to end users and local Internet registries, such as Internet service providers. The main market forces that accelerated IPv4 address depletion included the rapidly growing number of Internet users, always-on devices, and mobile devices.

The anticipated shortage has been the driving factor in creating and adopting several new technologies, including network address translation (NAT), Classless Inter-Domain Routing (CIDR) in 1993, and IPv6 in 1998.<sup>[1]</sup>

The top-level exhaustion occurred on 31 January 2011.<sup>[2][3][4][5]</sup> All RIRs have exhausted their address pools, except those reserved for IPv6 transition; this occurred on 15 April 2011 for the Asia-Pacific (APNIC),<sup>[6][7][8]</sup> on 14 September 2012 for Europe, Middle East and Central Asia (RIPE NCC), on 10 June 2014 for Latin America and the Caribbean (LACNIC),<sup>[9]</sup> and on 24 September 2015 for North America (ARIN),<sup>[10]</sup> and on 21 April 2017 for Africa (AfrinIC). ARIN and RIPE have exhausted their entire pool.<sup>[11]</sup> These RIRs still allocate recovered addresses or addresses reserved for a special purpose. Individual ISPs still have pools of unassigned IP addresses, and could recycle addresses no longer needed by subscribers.

## Contents

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### Address depletion

### Mitigation efforts

### Exhaustion dates and impact

- Regional exhaustion

  - Impact of APNIC RIR exhaustion and LIR exhaustion

- Notable exhaustion advisories

### Post-exhaustion mitigation

- Reclamation of unused IPv4 space

- Markets in IP addresses

- Transition mechanisms

### Long-term solution

### See also

### References

### External links

## IP addressing

---

Every node of an Internet Protocol (IP) network, such as a computer, router, or network printer, is assigned an IP address for each network interface, used to locate and identify the node in communications with other nodes on the network. Internet Protocol version 4 provides  $2^{32}$  (4,294,967,296) addresses. However, large blocks of IPv4 addresses are reserved for special uses and are unavailable for public allocation.

The IPv4 addressing structure provides an insufficient number of publicly routable addresses to provide a distinct address to every Internet device or service. This problem has been mitigated for some time by changes in the address allocation and routing infrastructure of the Internet. The transition from classful network addressing to Classless Inter-Domain Routing delayed the exhaustion of addresses substantially. In addition, network address translation (NAT) permits Internet service providers and enterprises to masquerade private network address space with only one publicly routable IPv4 address on the Internet interface of a main Internet router, instead of allocating a public address to each network device.

## Address depletion

---

While the primary reason for IPv4 address exhaustion is insufficient capacity in the design of the original Internet infrastructure, several additional driving factors have aggravated the shortcomings. Each of them increased the demand on the limited supply of addresses, often in ways unanticipated by the original designers of the network.

### Mobile devices

As IPv4 increasingly became the *de facto* standard for networked digital communication and the cost of embedding substantial computing power into hand-held devices dropped, mobile phones have become viable Internet hosts. New specifications of 4G devices require IPv6 addressing.

### Always-on connections

Throughout the 1990s, the predominant mode of consumer Internet access was telephone modem dial-up. The rapid increase in the number of the dial-up networks increased address consumption rates, although it was common that the modem pools, and as a result, the pool of assigned IP addresses, were shared amongst a large customer base. By 2007, however, broadband Internet access had begun to exceed 50% penetration in many markets.<sup>[12]</sup> Broadband connections are always active, as the gateway devices (routers, broadband modems) are rarely turned off, so that the address uptake by Internet service providers continued at an accelerating pace.

### Internet demographics

The developed world consists of hundreds of millions of households. In 1990, only a small fraction of these had Internet access. Just 15 years later, almost half of them had persistent broadband connections.<sup>[13]</sup> The many new Internet users in countries such as China and India are also driving address exhaustion.

### Inefficient address use

Organizations that obtained IP addresses in the 1980s were often allocated far more addresses than they actually required, because the initial classful network allocation method was inadequate to reflect reasonable usage. For example, large companies or universities were assigned class A address blocks with over 16 million IPv4 addresses each, because the next smaller allocation unit, a class B block with 65,536 addresses, was too small for their intended deployments.

Many organizations continue to utilize public IP addresses for devices not accessible outside their local network. From a global address allocation viewpoint, this is inefficient in many cases, but scenarios exist where this is preferred in the organizational network implementation strategies.

Due to inefficiencies caused by subnetting, it is difficult to use all addresses in a block. The host-density ratio, as defined in RFC 3194, is a metric for utilization of IP address blocks, that is used in allocation policies.

## Mitigation efforts

Efforts to delay address space exhaustion started with the recognition of the problem in the early 1990s, and the introduction of a number of stop-gap refinements to make the existing structure operate more efficiently, such as CIDR methods and strict usage-based allocation policies.

The Internet Engineering Task Force (IETF) created the Routing and Addressing Group (ROAD) in November 1991 to respond to the scalability problem caused by the classful network allocation system in place at the time.<sup>[14][1]</sup>

IPv6, the successor technology to IPv4, was designed to address this problem. It supports approximately  $3.4 \times 10^{38}$  network addresses.<sup>[15]</sup> Although as of 2008 the predicted depletion was already approaching its final stages, most providers of Internet services and software vendors were just beginning IPv6 deployment at that time.<sup>[16]</sup>

Other mitigation efforts and technologies include:

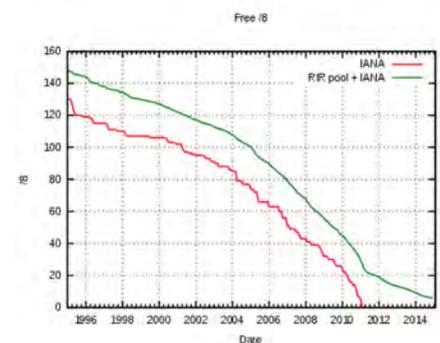
- use of network address translation (NAT)<sup>[17]</sup> which allows a private network to use one public IP address and permitting private addresses in the private network;
- use of private network addressing;<sup>[18]</sup>
- name-based virtual hosting of web sites;
- tighter control by regional Internet registries on the allocation of addresses to local Internet registries;
- network renumbering and subnetting to reclaim large blocks of address space allocated in the early days of the Internet, when the Internet used inefficient classful network addressing.<sup>[17]</sup>

## Exhaustion dates and impact

On 31 January 2011, the last two unreserved IANA /8 address blocks were allocated to APNIC according to RIR request procedures. This left five reserved but unallocated /8 blocks.<sup>[6][19][20]</sup> In accord with ICANN policies, IANA proceeded to allocate one of those five /8s to each RIR, exhausting the IANA pool,<sup>[21]</sup> at a ceremony and press conference on 3 February 2011.

The various legacy address blocks with administration historically split among the RIRs were distributed to the RIRs in February 2011.<sup>[22]</sup>

APNIC was the first regional Internet registry to run out of freely allocated IPv4 addresses, on 15 April 2011. This date marked the point where not everyone who needed an IPv4 address could be allocated one. As a consequence of this exhaustion, end-to-end connectivity as required by specific applications will not be universally available on the Internet until IPv6 is fully implemented. However, IPv6 hosts cannot directly communicate with IPv4 hosts, and have to communicate using special gateway services. This means that general-purpose computers must still have IPv4 access, for example through NAT64, in addition to the new IPv6 address, which is more effort than just supporting IPv4 or IPv6. The demand for IPv6 is expected to become pervasive over three to four years.<sup>[23]</sup>



Exhaustion of IPv4 addresses since 1995

# EXHIBIT 66

**ORDINANCE NO. 3148**

**AN ORDINANCE OF THE CITY OF PUYALLUP, WASHINGTON, GRANTING TO CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES LIGHT DIVISION, D.B.A. CLICK! NETWORK AND ITS AFFILIATES, SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE FOR TEN YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A TELECOMMUNICATIONS NETWORK, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW CERTAIN DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF PUYALLUP, WASHINGTON.**

WHEREAS, City of Tacoma, Department of Public Utilities Light Division, dba. Click! Network (the “Franchisee”) has requested that the City Council grant a nonexclusive franchise (this “Franchise”), and

WHEREAS, the City Council has the authority to grant Franchises for the use of its streets and other public properties pursuant to RCW 35A.47.040, NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF PUYALLUP, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1 Franchise Granted.

Section 1.1 Pursuant to RCW 35A.47.040, the City of Puyallup, a Washington municipal corporation (hereinafter the “City”), hereby grants to City of Tacoma, Department of Public Utilities Light Division, dba. Click! Network, its affiliates, heirs, successors, legal representatives and assigns, subject to the terms and conditions hereinafter set forth, a Franchise for a period of ten (10) years, beginning on the effective date of this ordinance, set forth in Section 40 herein.

Section 1.2 This Franchise ordinance grants Franchisee the right, privilege, and authority to construct, operate, maintain, replace, acquire, sell, lease and use all necessary Facilities for a telecommunications network, in, under, on, across, over, through, along or below the public Rights-of-Ways located in the City of Puyallup, as approved pursuant to City permits issued pursuant to this Franchise. Public “Rights-of-Way” means the surface of, and the space above and below, any public street, highway, freeway, bridge, land path, alley, court, boulevard, sidewalk, lane, public way, drive, circle, pathways, spaces, or other public right of way which,

#### Section 4 Location of Telecommunications Network Facilities.

Section 4.1 Franchisee is maintaining a telecommunications network, consisting of Facilities within the City. Franchisee may locate its Facilities anywhere within the Franchise Area consistent with the City's Public Works Engineering and Construction Standards and subject to the City's applicable permit requirements. The City reserves the right to prescribe the location of Franchisee's Facilities within the Franchise Area and the time and manner of Franchisee's activities through the permitting process. Franchisee shall not be required to amend this Franchise to construct or acquire Facilities within the Franchise Area, provided that Franchisee does not expand its Services beyond those described in Section 2.

Section 4.2 To the extent that any Rights-of-Way within the Franchise Area are part of the state highway system ("State Highways") and are governed by the provisions of Chapter 47.24 RCW and applicable Washington State Department of Transportation ("WSDOT") regulations, Franchisee shall comply fully with said requirements in addition to local ordinances and other applicable regulations. Without limitation of the foregoing, Franchisee specifically agrees that:

(a) any pavement trenching and restoration performed by Franchisee within State Highways shall meet or exceed applicable WSDOT requirements;

(b) any portion of a State Highway damaged or injured by Franchisee shall be restored, repaired and/or replaced by Franchisee to a condition that meets or exceeds applicable WSDOT requirements; and

(c) without prejudice to any right or privilege of the City, WSDOT is authorized to enforce in an action brought in the name of the State of Washington any condition of this Franchise with respect to any portion of a State Highway.

#### Section 5 Relocation of Telecommunications Network Facilities.

Section 5.1 Franchisee agrees and covenants to protect, support, temporarily disconnect, relocate, or remove from any Rights-of-Way any of its Facilities when reasonably required by the City by reason of traffic conditions or public safety, dedications of new Rights-of-Way and

# EXHIBIT 66 (a)



# Pierce County

Office of the County Council

930 Tacoma Avenue South, Room 1046

Tacoma, Washington 98402-2176  
(253) 798-7777  
FAX (253) 798-7509  
1-800-992-2456

May 20, 2005

Diane R. Lachel  
Government and Community Relations Manager  
Click! Network  
3628 South 35<sup>th</sup> Street  
Tacoma, WA 98409-3192

Dear Ms. Lachel:

Enclosed is a copy of the recorded version of Ordinance No. 2004-43 for your records. The 12-digit number below the bar code is the recording number that was assigned by the Office of the Pierce County Auditor at the time of recording.

If you have any questions, please contact me at (253) 798-6065.

Sincerely,

*Patricia R. Face, for*

Denise D. Johnson  
Clerk of the Council

c: Jerry West (w/recorded Proposal)

Enclosure



Printed on recycled paper

1 FILE NO. 80-A

PROPOSAL NO. 2004-43

2 Sponsored by: Councilmember Shawn Bunney

3 Requested by: County Executive

4  
5  
6 **ORDINANCE NO. 2004-43**

7  
8 **AN ORDINANCE OF THE PIERCE COUNTY COUNCIL FINDING THE PROPOSED NON-**  
9 **EXCLUSIVE TELECOMMUNICATIONS FRANCHISE TO THE CITY OF**  
10 **TACOMA, DEPARTMENT OF PUBLIC UTILITIES, LIGHT**  
11 **DIVISION, FOR A TELECOMMUNICATIONS NETWORK IN PIERCE**  
12 **COUNTY TO BE IN THE PUBLIC INTEREST; SETTING FORTH**  
13 **TERMS AND CONDITIONS ACCOMPANYING THE GRANTING OF THE**  
14 **TELECOMMUNICATIONS FRANCHISE; PROVIDING FOR THE**  
15 **REGULATION OF CONSTRUCTION, OPERATION, MAINTENANCE,**  
16 **AND USE OF THE NETWORK; PRESCRIBING REMEDIES FOR THE**  
17 **VIOLATION OF THE PROVISIONS OF THE FRANCHISE; AND**  
18 **AUTHORIZING THE COUNTY EXECUTIVE TO ENTER INTO THE**  
19 **FRANCHISE AGREEMENT.**

20  
21 WHEREAS, The City of Tacoma, Department of Public Utilities,  
22 Light Division, doing business in the State of Washington, has  
23 applied for a non-exclusive telecommunications franchise to  
24 construct, operate, and maintain telecommunications facilities  
25 upon, in, under, across, along, and over certain County roads,  
26 highways, and other County property in Pierce County, Washington as  
27 hereinafter set forth; and

1           WHEREAS, Said application came on regularly for hearing before  
2 the Pierce County Council on the date set forth below under the  
3 provisions of Chapter 36.55, Revised Code of Washington and Chapter  
4 12.34, Pierce County Code; and

5  
6           WHEREAS, It appears to the Council that notice of said hearing  
7 has been duly given as required by law and that it is in the public  
8 interest to grant the Franchise; NOW, THEREFORE,

9  
10           BE IT ORDAINED by the Council of Pierce County:

11  
12           Section 1. The Pierce County Council hereby finds that the  
13 Telecommunications Franchise, a copy of which is attached hereto  
14 and incorporated herein as Exhibit "A" to the City of Tacoma,  
15 Department of Public Utilities, Light Division, is in the public  
16 interest.

17  
18           Section 2. The Pierce County Council hereby authorizes the  
19 County Executive to enter into the attached franchise agreement,  
20 authorizing the City of Tacoma, Department of Public Utilities,  
21 Light Division to construct, operate, and maintain a  
22 telecommunications facilities system in, across, under, upon,  
23 along, and over County roads, rights-of-way, highways, and County  
24 property in Pierce County, Washington as described below:

1 All County roads lying within Townships 19 North through  
2 22 North, inclusive, of Range 1 West, Willamette  
3 Meridian, and all County roads lying within Townships 15  
4 North through 22 North, inclusive, of Ranges 1 East  
5 through Range 9 East, Willamette Meridian, and lying  
6 within the boundaries of Pierce County, Washington.

7  
8 PASSED this 4th day of December, 2004.

9  
10 ATTEST:

PIERCE COUNTY COUNCIL  
PIERCE COUNTY, Washington

11  
12 Kate Kennedy for  
Denise D. Johnson  
13 Clerk of the Council

Harold G. Moss  
Councilmember Harold Moss  
Council Chair

14 Approved As To Form Only:

PIERCE COUNTY EXECUTIVE

15  
16 [Signature]  
Deputy Prosecuting Attorney

[Signature]  
John W. Ladenburg

Approved  Vetoed   
this 6 day of Dec,  
2004.

17  
18  
19 Date of Publication of  
20 Notice of Public Hearing: November 24 + December 1, 2004

21 Effective Date of Ordinance: December 26, 2004

ARTICLE II - FRANCHISE

Section 1. Grant of Broadband Telecommunications Franchise.

A. Grant of Franchise. Subject to obtaining any permits as might be required under the County's Charter or Code or other applicable Laws (and subject to Grantee obtaining any additional necessary agreements, approvals or authorizations from any entity which owns poles or any other third party rights), the County hereby grants on a non-exclusive basis as provided in Pierce County Code 12.34.420 authorization for Grantee to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace Facilities within the Rights-of-Way in unincorporated Pierce County for the purposes of providing Services to Persons located within or without the limits of the County. Exhibit I represents the initial phase of the location of the network which grantee intends to install. Any work performed pursuant to the rights granted under this Franchise may, at the County's option, be subject to the prior review and approval of the Director of Public Works and Utilities. During the term of this Franchise, the location of Facilities installed by Grantee or its designee shall be disclosed, in writing, to the County by Grantee within ten days before its installation, removal, or relocation. Such disclosures shall be incorporated in Exhibit I by way of a modification to this Franchise Agreement and shall not change except upon submittal of a revised Exhibit I, and a written request for a modification



1 Section 11. Authorization.

2 The undersigned respectively represent and warrant that its  
3 signatory is duly authorized and empowered to sign this Franchise  
4 Agreement.

5  
6 IN WITNESS WHEREOF, the parties hereto have caused this Franchise  
7 Agreement to be executed as of the 31 day of January,  
8 2005

COUNTY OF PIERCE

By [Signature]  
its COUNTY EXECUTIVE

12 Attest:

13 [Signature]  
14 Steven J. Klein  
15 Superintendent, Tacoma Power

Grantee \_\_\_\_\_

16 Attest:

17 [Signature]  
18 Mark Crisson  
19 Director of Utilities

By \_\_\_\_\_

Its \_\_\_\_\_

Dated \_\_\_\_\_

Approved As To Form & Legality:

[Signature]  
Chief Asst. City Attorney



# Pierce County

Office of the County Council

930 Tacoma Avenue South, Room 1046  
Tacoma, Washington 98402-2176  
(253) 798-7777  
FAX (253) 798-7509  
1-800-992-2456

## PIERCE COUNTY COUNCIL PUBLIC MEETING NOTICE

PROPOSAL NO. 2004-43, AN ORDINANCE OF THE PIERCE COUNTY COUNCIL FINDING THE PROPOSED NON-EXCLUSIVE TELECOMMUNICATIONS FRANCHISE TO THE CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, LIGHT DIVISION, FOR A TELECOMMUNICATIONS NETWORK IN PIERCE COUNTY TO BE IN THE PUBLIC INTEREST; SETTING FORTH TERMS AND CONDITIONS ACCOMPANYING THE GRANTING OF THE TELECOMMUNICATIONS FRANCHISE; PROVIDING FOR THE REGULATION OF CONSTRUCTION, OPERATION, MAINTENANCE, AND USE OF THE NETWORK; PRESCRIBING REMEDIES FOR THE VIOLATION OF THE PROVISIONS OF THE FRANCHISE; AND AUTHORIZING THE COUNTY EXECUTIVE TO ENTER INTO THE FRANCHISE AGREEMENT.

**MEETING DATE:** Tuesday, December 14, 2004

**TIME:** 5 p.m.

**\*PLACE:** County Council Chambers, Room 1045  
County-City Building  
930 Tacoma Avenue South  
Tacoma, Washington

**CONTACT:** Steve Gross, Deputy Legal Counsel, (253) 798-7579 or the Council Office at (253) 798-7777.

This proposal is scheduled for final consideration at this meeting. The Council encourages public participation. Public testimony will be taken. Written comments are welcome as well.

\* Each year the Council holds at least one evening meeting in each Council District.

Council meetings are audio recorded. Audio equipment is available for the Hearing Impaired. Please contact the Receptionist for assistance.

Dated: November 19, 2004



*AB sent to  
she attached  
on 11/22/04  
DS*

# EXHIBIT 67

R 34336

MINUTES OF MEETING  
OF  
FREEHOLDERS' CHARTER COMMISSION

Held November 10, 1926

Pursuant to notification by the County Auditor of Pierce County of their election to the office of Freeholder, the following Freeholders assembled at the Council Chambers at the City Hall:

- |                 |                    |                      |
|-----------------|--------------------|----------------------|
| Homer T. Bone   | G. W. Osgood       | Dr. M. J. McNerthney |
| Louis J. Muscek | C. B. Hurley       | Mary C. Hutchinson   |
| J. A. Eves      | F. P. Haskell, Jr. | Kathryn E. Malstrom  |
| E. K. Murray    | Fred Shoemaker     | Robert B. Abel       |

The above named Freeholders took their respective oaths of office before Genevieve Martin, City Clerk of the City of Tacoma, Washington. Whereupon the Freeholders were called to order with Homer T. Bone presiding as temporary chairman.

Nominations were declared open for the office of Chairman. Homer T. Bone was nominated. It was thereupon moved and seconded that the nominations be closed and Mr. Bone be declared unanimously elected. Mr. J. A. Eves presided as temporary Chairman and put the motion to the Freeholders assembled, which was unanimously carried.

Nominations were declared open for the office of Vice-Chairman. Mr. J. A. Eves was nominated. It was thereupon moved and seconded that the nominations be closed and Mr. J. A. Eves declared unanimously elected. Upon motion being put to the Freeholders assembled, it was unanimously carried.

Nominations were declared open for the office of Secretary. Robert B. Abel was nominated. It was properly moved and seconded that the nominations be closed and Mr. Abel declared unanimously elected. Upon motion being put to the Freeholders assembled, the motion was carried unanimously.

Thereupon Mr. Homer T. Bone, as Chairman of the Charter Revision Commission, called the Committee to order for the transaction of business at the hour of 7:30 p. m. Wednesday, November 10, 1926.

The following Freeholders being present:

Homer T. Bone	G. W. Osgood	Dr. M. J. McNerthney
Louis J. Muscek	C. B. Hurley	Mary C. Hutchinson
J. A. Eves	F. P. Haskell, Jr.	Kathryn E. Malstrom
E. K. Murray	Fred Shoemaker	Robert B. Abel
Dr. H. J. Whitacre		

The first business to come before the Committee was the consideration of the raising of funds to meet necessary expenses. It was properly moved and seconded that the Secretary write a letter to the City Council requesting an appropriation of not less than \$500 to defray stenographic and other expenses of the Committee. Motion carried.

It was moved by Mr. Osgood and properly seconded that the executive sessions of this Committee be held at the Public Library and that open meetings be held at the City Council Chambers at the City Hall; that the regular meetings of the Committee be held on Monday and Thursday evening of each week at 7:30 p. m. Motion carried.

It was moved by Mr. Murray and seconded by Mrs. Hutchinson that the following standing Committees be appointed:

- R 34336
- 23
1. Rules
  2. Revenue and Taxation
  3. Civil Service
  4. Accounting and Finance
  5. Harbor, Tidelands and Docks
  6. Utilities
  7. Public and Local Improvements
  8. Engineering
  9. Elections
  10. Officers, Employes, Salaries and Departmental Functions
  11. Contracts, Awards and Purchasing
  12. Miscellaneous provisions
  13. Health and Sanitation
  14. Franchises

After discussion, this motion was carried.

It was moved by Mr. Haskell and seconded by Mr. Shoemaker that each department of the City Council be requested to file in writing any suggestions in the change of the present city charter. Carried.

It was moved by Mrs. Malstrom and seconded by Mr. Shoemaker that this Board make a study of the different forms of municipal government. Carried.

It was moved by Dr. Whitacre and seconded by Mrs. Hutchinson that a committee of three be appointed to report on the different forms of municipal government at the next meeting of this Commission. Motion carried.

The following committee was appointed by the Chair:

Mrs. Hutchinson  
Mr. Shoemaker  
Dr. Whitacre

It was moved by Dr. Whitacre and seconded by Mr. Shoemaker that the motion of Mr. Murray for fourteen committees be stricken and that five committees of three each with proper grouping of subjects be worked out at a later date. Motion carried.

It was moved by Mr. Murray and seconded by Mr. Shoemaker, that the Chair appoint a committee of five to report back at the next meeting on organization and standing committees. No action was taken upon this motion.

It was moved by Mr. Haskell and properly seconded that the committee rescind their action on the motions of Mr. Murray for fourteen committees and Dr. Whitacre for five committees of three each and that the Commission as a whole proceed to the grouping of subjects and appointments of committees. Motion carried.

It was properly moved and seconded that the following standing committees be approved:

1. Utilities; Franchises; Public and Local Improvements; Miscellaneous
 

E. K. Murray, Chairman	Louis J. Muscek
Homer T. Bone	J. A. Eves
F. P. Haskell	
  
2. Revenue and Taxation; Accounting and Finance
 

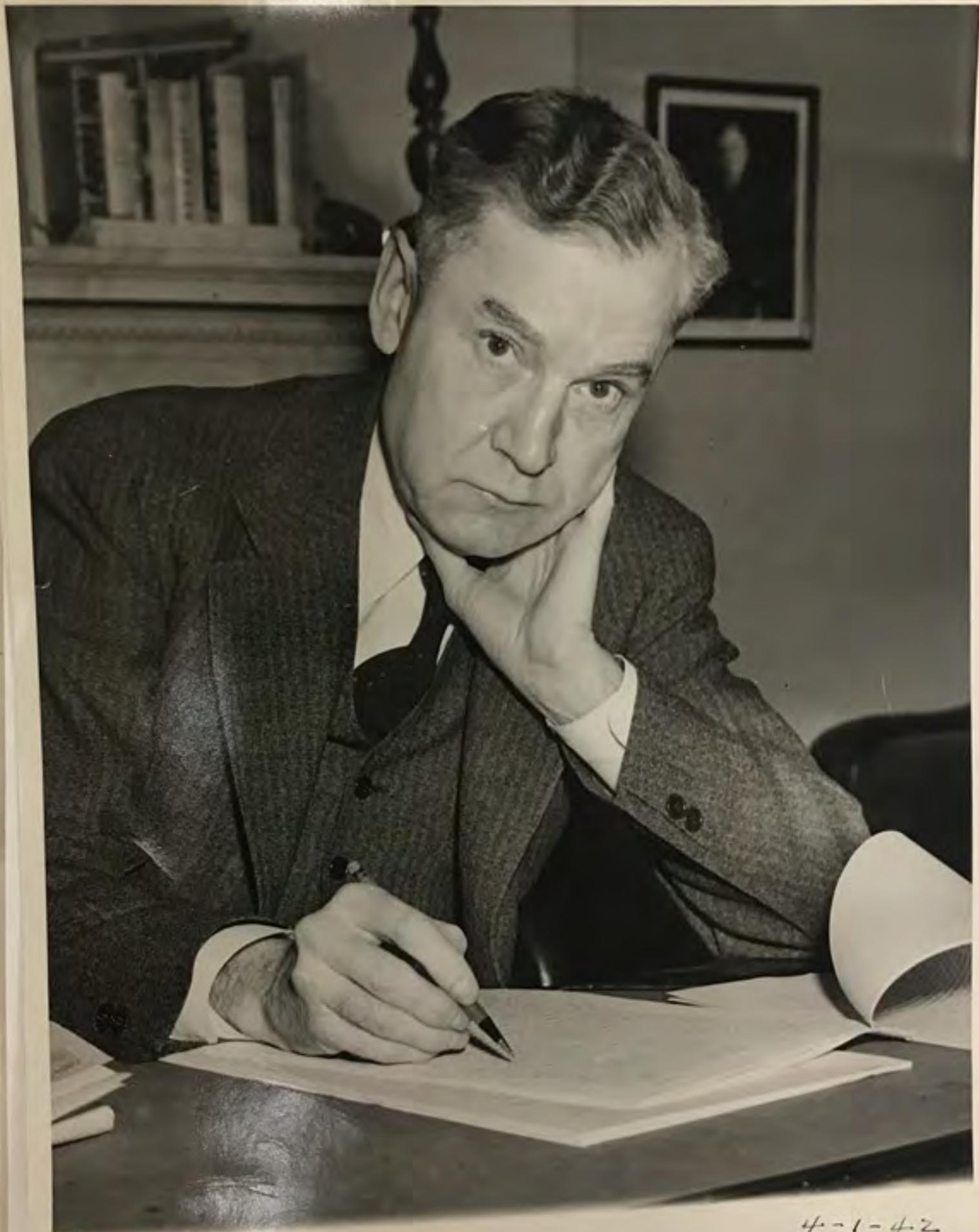
Fred Shoemaker, Chairman	J. A. Eves
F. P. Haskell, Jr.	E. K. Murray
  
3. Civil Service; Officers, Employees, Salaries and Departmental Functions; Elections.
 

Mary C. Hutchinson, Chairman	Louis J. Muscek
J. F. Hickey	Kathryn E. Malstrom
Dr. H. J. Whitacre	
  
4. Engineering; Harbors, Tidelands and Docks; Contracts and Awards
 

G. W. Osgood, Chairman	Ralph Shaffer
C. B. Hurley	Robert B. Abel
Dr. M. J. McNerthney	
  
5. Health and Sanitation
 

Dr. H. J. Whitacre, Chairman	Dr. H. J. McNerthney
Kathryn E. Malstrom	

# EXHIBIT 67 (a)



4-1-42

327 Senate Office Bldg.

**EXHIBIT 67 (b)**

*Speech file*Mr. Bone's Speech -

The conscience of the people at a time of grave national problems has called into being a new attitude of mind toward these problems born of the nation's awakened sense of justice. The great body of progressive minded citizens who are now bringing to the democratic party a new spirit of liberalism are dedicating themselves to the fulfillment of the duty laid upon them--the duty to maintain that government of the people, by the people and for the people, whose foundations were laid by those before us. This country belongs to the people who inhabit it. It is now time to set public welfare in the first place. Political parties exist to secure responsible government and to execute the will of the people. Too often the major parties have deliberately turned aside from such a task. The time is here to face the fact that behind the outward forms of government sits enthroned an invisible government, owing no allegiance and acknowledging no responsibility to the people. The time is here for the people to destroy this invisible government and to dissolve the unholy alliance between corrupt business and corrupt politics. That should be

Page 2.

the first task of the statesmanship of the day.

During the past twelve years we have witnessed the fatal incapacity of the Republican Party to deal with the new issues of the new time. This form of incapacity has compelled the people to forge new instruments of government through which to give effect to their will. We see that exemplified in the adoption of weapons of popular government like the Initiative, the Referendum, and the Recall in the State of Washington. I compliment the people of this state for their courage and vision in securing to themselves these weapons of popular government.

The direct primary is an instrument of control which the people should zealously guard. If it is ever impaired or destroyed, popular government will disappear and in its place will come control by corrupt business interests that live and prosper by brutal exploitation of the people. The voters should be ruthless in dealing with those who would assail the direct primary. Its function should be broadened rather than restricted. To destroy the direct primary would be to assault the foundations upon which rests the principles and ideals of Thomas Jefferson.

The supreme duty of the nation is the conservation of human resources through a vastly enlarged measure of social and industrial justice. I believe in the principle of minimum wage standard for women in industry. Child labor is a social crime and should be outlawed as fully and completely as was human slavery. There can be no safety for any one under the American flag so long as we confront the sordid spectacle of millions of idle adults while children labor in industry. The American people must set themselves resolutely to the task of eradicating this scourge.

The water power resources of this nation belong to the people. It would be a calamity of the greatest magnitude for them to part with this, one of the greatest heritages that ever came to any people. The right of the people to develop under public ownership this great resource is beyond challenge. The remarkable thing is that this natural right has ever been subjected to challenge. We would regard it as a social crime of the first magnitude to give to a private corporation the control of the air by virtue of which it might compel citizens to

Page 4.

wear meters and buy the air they breathe by the cubic foot. And yet, we have complacently permitted private corporations to seize upon as vital an essential--the waters of the nation and subject them to private exploitation. Were it possible to seize upon and control the rainfall and parcel it out to farmers at rates fixed by a rain trust, the same interests would do that very thing.

The power trust of this nation has junked every standard of decency in its dealings with the public. It has debauched our institutions of learning and our legislative bodies. It has brazenly gouged the pocketbooks of the people to maintain a flood of propaganda calculated to deceive the public mind. Its victims have been compelled to pay for the flood of corruption it has loosed upon the country. It has set up a long train of abuses and usurpations of power, pursuing invariably the same object which is reducing the American people to a state of vassalage to the greatest instrument of plunder the world has yet produced. The people must not only destroy the power of this insolent organization, but write into the laws of the land new guards for future security against such monstrous invasions of

Page 5.

their rights. One need only look at the record of the Washington State Legislature to perceive how completely a public body can be dominated by a power trust lobby. The thing has become a stench in the nostrils of decency in the state of Washington which led the people of this great state to rise in their wrath and pass the Grange Power measure by a big majority in 1930. We have seen the principle of state regulation of power companies become a farce. When we adopted the principle of regulation, these companies simply plunged into politics and with their vast financial resources wrung from the pockets of consumers, ~~and~~ set about to control the politics of the state and thereby were enabled to very effectively regulate their regulators. The moment we permitted a private corporation to own this great natural resource which belongs to the people and should have been developed under public ownership, that very moment we enthroned corruption in government--we deliberately invited it.

We have seen the collapse of a monstrous bubble of power trust finance in the crash of the Insull power combine which now presents the spectacle of the greatest receivership in history. Private

Page 6.

power combines have floated huge aggregations of stock which represent a neverending opportunity to exploit the people of this country. Naturally they took advantage of this power and abused it, and I bluntly assert that the entire system of private ownership of power is a deliberate invitation to abuse.

We live in the richest country in the richest period of the world's history. Today, the average American worker, with the aid of modern machinery, can produce twenty times what his grandsire could, and yet, in the face of this marvelous productive capacity, millions of decent Americans find themselves in a death grapple with destiny itself. The American worker is the marvel of this age of industrial miracles. For the first time in human history the worker <sup>is living</sup> ~~has lived~~ in a period when the genius of man has so completely harnessed the forces of nature that they have become tireless toilers for the human race, and these instrumentalities of science have made it possible, for the first time, to abolish poverty. What shall we think of an economic and social set-up which dooms millions to involuntary poverty when the instrumentalities for the liberation of mankind are all about us?

# EXHIBIT 67 (c)

## Bone, Homer Truett (1883-1970)

By Frank Chesley  
Posted 12/28/2003  
HistoryLink.org Essay 5628

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**H**omer T. Bone, a Democratic senator representing Washington in the United States Congress (1932-1944) and later a Judge in the United States Ninth Circuit Court of Appeals (1944-1956), has been dubbed the Pacific Northwest's "father of public power." Bone was a pragmatic populist who vociferously championed public ownership of utilities while damning big business, especially the utility trusts. He was ousted from the Socialist Party in 1916 for being too moderate and later forayed into politics under the Republican and Farmer-Labor banners before alighting as a Democrat. Among Democratic Party loyalists, suspicions of apostasy would dog him his entire career. As a senator, he pushed the bills to build the Bonneville and Grand Coulee dams as well as that creating the National Cancer Institute. He was progenitor of a coterie of progressive politicians who would further nourish his vision and indelibly flavor Washington state's socio-political character for decades. Senator Warren G. Magnuson (1905-1989) was his most notable political descendent.

### Hardscrabble Childhood

Homer Bone was born in Franklin, Indiana, on January 25, 1883, to James M. and Margaret Bone, and he came by his populism and abhorrence of war naturally. His father had never really recovered from a brutal imprisonment during the Civil War and his mother's first husband had died in battle. Homer's middle name came from a prison mate of his father. His ancestors had served and suffered as well, he recalled, in wars going back to the American Revolution.

The Bones, left destitute by the Panic of 1893, moved to Tacoma in 1899 to seek a better life. The family survived on whatever young Homer could earn and his father's \$20 a month pension. Homer's formal education had ended in the eighth grade and he worked variously in a grocery store, a furniture store, and for the postal service. But he was ambitious and came from a family of some accomplishment in Indiana politics. A cousin, Scott C. Bone, had been editor of the *Seattle Post-Intelligencer* and was Alaska's territorial governor from 1921 to 1925. (It was Governor Bone who ordered a relay of dog teams to transport diphtheria antitoxin to Nome in 1925 to thwart a threatened epidemic, a mission now memorialized by the Iditarod sled dog race.)

## Self-educated Lawyer

Bone studied law at night and passed the bar in 1911, at age 28. Like many self-educated men, he remained a voracious reader all his life. He specialized in labor law, became a special deputy prosecuting attorney in 1912, served as corporation counsel for the Port of Tacoma from 1918 to 1932, and as attorney for Tacoma City Light.

On January 25, 1919, his birthday, he married Blanche Slye, a 1918 University of Washington journalism graduate whose first interview subject was the longshoremen's union attorney, Homer T. Bone. A son, Homer T. Bone Jr., was born in 1922.

Homer Bone was a "Debsian socialist" -- a rather mainstream type of socialist not unusual for the day, a member of the Socialist Party led by Eugene V. Debs (1855-1926). Bone first discovered the public-private power battle in 1908. He recalled later in a letter to a researcher: "I wonder what would have happened to me had I not been so vigorously stirred by the attacks on the patriotism of men whose only purpose was to have their city produce power for its own municipal system."

Bone became politically active, running unsuccessfully for prosecuting attorney and for mayor of Tacoma as a Socialist at a time when conservative Republicans firmly controlled the state. He ran for the Third District congressional seat as a Farmer-Labor candidate, but lost in the 1920 Warren G. Harding (1865-1923) landslide.

He was slight -- five feet, six inches tall and 135 pounds -- but his impassioned oratory and tart tongue quickly established him as the major Pacific Northwest voice for public power. He allied himself with other public-power visionaries of the time, among them Rufus Woods (1878-1950), publisher of *The Wenatchee World* who dreamed of harnessing the Columbia River, and James Delmage Ross (1872-1939), the "father of Seattle City Light." His opponents called him a radical, a demagogue, and a Bolshevik, among other epithets.

## Stormy Start

He finally won his state House seat in 1922 as a Farmer-Labor candidate, though his district was strongly conservative. He immediately submitted the "Bone Bill," which would give municipal electrical utilities -- such as Seattle's and Tacoma's -- the power to sell their service beyond the city limits. The two-month session, one of the stormier in legislative history, escalated the simmering public vs. private power battle and catapulted Bone into the political spotlight. "The power lobbyists were as thick as bees around a hive," Bone recalled. The Bone Bill did not pass until 1933.

Bone also served as counsel for the state Grange ("a virile and progressive group," Bone said) and, in 1928, helped the organization draft the Grange Bill, which would give counties the power to create public utility districts. It also gave PUDs the right of eminent domain over private power properties. The 1929 Legislature

declined to take action on the bill and it was submitted to voters at the November 4, 1930, state general election. It passed (with 152,487 votes in favor and 130,901 against), becoming Chapter 1, Laws of 1931, which is codified as RCW Title 54, Public Utility Districts.

Bone again ran for Congress in 1928, as a Republican, and again lost.

### **Senator Homer T. Bone**

For the third time, Bone ran for Congress in 1932, now as a Democrat, and easily won a U.S. Senate seat in the Democratic landslide led by President-elect Franklin D. Roosevelt (1881-1945). Bone's campaign was managed by Saul Haas (1896-1972), who became a power in state Democratic Party politics, a key member of the Bone-Magnuson circle, and a broadcast magnate with KIRO, Inc.

At this time the Depression was approaching bottom and Bone easily ousted Wesley Jones, who had held the seat since 1908. During the campaign, Bone hammered away at the numbers, particularly Tacoma's, which boasted the lowest electricity rates in the nation. He told a Wenatchee audience on October 10 that Tacoma "sells electricity for less than any other city in America and yet makes a profit." If Tacoma charged as much as the private utilities, he said, "there would be no need for taxes" (*Seattle P-I*).

The global arms race also was an issue and Bone flashed his isolationist credentials early. "Keep to America but Keep America Safe" was a slogan he offered during an October 1932 campaign speech in Port Angeles. He charged that the Olympic Peninsula was "glaringly unprotected" in the event of war in the Pacific.

Newspapers of that day made no pretense of fairness or balance and most of the state's papers, including *The Seattle Times*, viewed public power as Socialist nonsense and Bone as a radical or worse. The Hearst-owned *Seattle Post-Intelligencer* and the Scripps papers, including the *Seattle Star*, however, were Bone champions. Two weeks before the election, the *P-I* ran a gushing, five-part series, "Life Story of Homer T. Bone, Career Marked By Battles for People," accompanied by sidebars liberally quoting the candidate on the campaign issues.

Saul Haas was 34 when he managed Bone's campaign, but already had established a controversial reputation, particularly as managing editor of the *Seattle Union Record*. Haas spent 18 months in Washington, D.C., as Bone's administrative assistant, but made time to explore the Federal Radio Commission, further grounding himself for a future in broadcasting. Both Bone and Magnuson quickly learned to use radio, the new communications phenomenon.

Roosevelt, with an overwhelming mandate and a compliant Congress, immediately launched his New Deal, a massive, progressive effort to lift the country out of the worst Depression in its history. The package included banking reform, agricultural reform, jobless pay, Social Security, and huge public works projects such as the Columbia River dams and the Tennessee Valley Authority to create jobs and wealth.

Bone became chair of the Senate Committee on Patents, a low-profile post, but easily shifted his public

power fight to the national stage, with the enthusiastic support of Roosevelt. Bone saw the Columbia River as a mighty public resource and was instrumental in promoting construction of Grand Coulee and Bonneville dams. Bone introduced the Bonneville bill soon after he took office and construction on Bonneville Dam, as well as the Grand Coulee Dam, began in 1933.

While acknowledging his role in public power, he was most proud of his bill creating the National Cancer Institute, first introduced in 1937 and another revolutionary direction for government.

### **Bone and Boeing**

Bone was an isolationist, though not a pacifist. He began exercising his anti-military muscle on the Senate floor in 1934, lambasting early manifestations of the military-industrial complex and citing Boeing by name.

Boeing had yet to become a local sacred cow, but was the state's largest employer, with 1,000 on its payroll. Consistent with his position on public power, Bone wanted military wares produced by government-owned facilities to thwart profiteering. He charged that Boeing had made 68 percent profit on Navy business and 90 percent on Army contracts. He also railed against Boeing's new \$25,000-a-year executive hired to hustle federal business. The Seattle press, however, was now supporting military preparedness and ignored Bone's polemics.

Bone also supported an amendment proposed by Rep. Louis L. Ludlow (1873-1950), D-Ind., that mandated a popular referendum before the United States could go to war, but it was opposed by Roosevelt and defeated in 1938 (Kirkendall).

Bone's convictions earned him a seat on the Senate Munitions Investigating Committee, chaired by Gerald Nye (1892-1971), a progressive North Dakota Republican and an America First supporter. (The America First Committee -- now the America First Party -- was generally nationalist, anti-war, anti-imperialist, populist, and isolationist.) The munitions committee accused the nation's bankers (mostly Morgan) and munitions industry (mostly DuPont) of war profiteering and lobbying the United States into World War I. But after a two-year investigation, the committee's conclusions about profiteering were lost in the growing war fever as World War II approached.

A curious footnote: The committee's legal assistant was Alger Hiss (1904-1996), a bureaucrat who would rise through the ranks and become one of the Cold War's more controversial figures, accused of spying for the Soviet Union.

### **New Deal Woes**

By 1937, Roosevelt's New Deal juggernaut was slowed by conservative courts and an increasingly recalcitrant Congress, including some isolationist Democrats. Homer T. Bone was among them and Harold Ickes (1874-1952), Roosevelt's interior secretary, had lost faith in him. Bone did not fully support the president's controversial effort to reorganize the federal government and the Supreme Court. Ickes and Bone also disagreed over management of Bonneville Dam, but it was the failure of "[c]ertain so-called

liberals" to fully support Roosevelt's government reorganization bill -- what the critics were calling his "court-packing" bill -- that really angered Ickes. He singled out Bone for particular scorn, calling him "a liberal of the very soft variety" (Ickes, 349).

Ickes "was glad to hear" that Roosevelt's White House also was "looking for a candidate to run against Senator Bone," in the 1938 election, because "he abjectly follows Senator [Burton K.] Wheeler (1882-1975)," one of the most outspoken America Firsters in Congress (Ickes, 416).

The White House apparently didn't find a challenger because in 1938 Bone won re-election easily. Nationally syndicated columnist Drew Pearson praised Bone's campaign, especially the "astute organization work of Saul Haas," and noted that Haas and Bone were inseparable.

### **Power Struggles**

The public vs. private power battle, meanwhile, had not abated. In 1937, the offices of Bone and Rep. Martin Smith, D-Wa., had submitted bills that would create a permanent Columbia Power Authority. Both bills gave the organization the authority to buy private power companies. In 1940, private power forces in Washington state offered Initiative 139, which sought a citizen vote whenever a public utility district offered revenue bonds under the Grange Bill, on the assumption that such bonds were evidence of public debt which must be repaid by taxes.

The campaign was fronted by the "Let the People Vote League," but in a letter to a constituent, Bone said, "This league is a sham front for private power companies -- nothing else." On May 22, 1940, Bone even interrupted Senate debate on the defense program to declare that, "At this very moment, the federal power program in Washington state was confronted with a cold and deliberate attack."

The initiative lost, but another battle followed in late 1940 over purchase of Puget Sound Power & Light's Seattle territory under condemnation proceedings allowed in the Bonneville bill. PSP&L (now part of Puget Sound Energy) admitted spending more than \$670,000 fighting the effort and the tug of war lasted until 1951, when Seattle City Light bought out the private utility's Seattle service for \$27.8 million. At one point in the debate, Bone asked the Securities and Exchange Commission to investigate the "remarkable rise" in the value of Puget preferred stock.

### **Judge Bone**

In 1944, another election was looming, but Bone had broken a hip in 1939 and, despite two operations, was virtually crippled. He was 61, had lost some of his fire, and was considering retirement and returning to Tacoma to practice law. But Roosevelt, despite whatever residual animosity remained from earlier skirmishes, nominated Bone on April 1, 1944, to the Ninth Circuit Court of Appeals.

The Senate unanimously approved the nomination the same day, but Bone delayed resigning from the Senate until November 13 to prevent Republican governor Arthur B. Langlie (1900-1966) from appointing a Republican to the seat. Bone's heir-apparent, popular, four-term Rep. Warren G. Magnuson, ran for the seat,

defeating Harry P. Cain (1906-1979). Langlie was forced to name Magnuson to the seat, which gave him a seniority advantage over Arkansas' William Fulbright.

Blanche Bone died in San Francisco in 1955. Bone retired from the bench as a full-time judge in 1956, but served intermittently until 1968, when he returned to Tacoma. He died on April 12, 1970, a day when University of Washington students rioted against the Vietnam War. The public-private power battle was no longer front-page news, but war was still making headlines.

Bone was cremated and his ashes interred at Oakwood Cemetery, beside the remains of his father and mother. *The Seattle Times*, one-time Bone nemesis, noted with regret in a eulogistic editorial on March 13, 1970, that "No public power dam in this country ever was named for Homer Truett Bone."

**This essay made possible by:**  
Henry M. Jackson Foundation



**Homer T. Bone (1883-1970), March 22, 1943**

Courtesy Library of Congress



**Homer T. Bone, 1932**

Courtesy *Seattle Post-Intelligencer*

**Sources:**

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**Note:** This essay was corrected on September 29, 2009.

# EXHIBIT 67 (d)

DOUBLE NUMBER—SEPTEMBER-OCTOBER

# PUBLIC OWNERSHIP

UNIVERSITY OF CALIFORNIA

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Devoted to Public Utility Problems and Social Progress

Vol. VI.

September-October, 1924.  
Monthly, \$2.00 per Year

Nos. 9 and 10.

## *Washington Number*

### Superpower for Washington

by Carl D. Thompson

### The Bone Power Bill

by Homer T. Bone

### Seattle Municipal Light and Power System

by J. D. Ross

## NEWS AND NOTES

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**PUBLIC OWNERSHIP LEAGUE OF AMERICA**

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CARL D. THOMPSON, Editor

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Vol. VI.

September-October, 1924.

Nos. 9 and 10.

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## Superpower for Washington

**Bone Power Bill, Initiative Measure No. 25, Next Step in Development of  
Existing Public Superpower System in Washington**

By Carl D. Thompson

The state of Washington already has a public superpower system. It is the first one in the United States and second only to the great public superpower system of Ontario.

The Bone Power bill which goes to referendum vote of the people of the state at the general election on November 4th this year if adopted opens the way for the development of this existing organization into a state-wide, public superpower system with service at cost thruout the state.

### The Existing System

In these matters Seattle, the largest city in the state has led the way. It has gradually developed its municipal hydro-electric and steam power plants until today it has the greatest municipally owned power system in the United States. It is operated upon the principle of "service at cost" instead of "all the traffic will bear", as is the case with all private power companies. The rates are among the lowest, the service the best and the system the greatest in the country.

This great city stands ready and eager to extend and to cooperate with the other cities and the rural communities of the state in extending this power service at cost into every section of the state.

### Great Cities Ready to Cooperate

Tacoma, the third city in size in the state, having the second largest and in some respect the most remarkably successful power system in the country, also operated on the principle of "service at cost", has joined forces with Seattle, interconnected its splendid hydro-electric power system with the steam and hydro plants of Seattle and is supporting her in the present proposal. Tacoma also stands ready and eager to help extend the public—"service at cost"—power system across the state.

Last spring Aberdeen, in the Grays Harbor county, observing the amazing advantages of the public power system of Seattle and Tacoma, passed a bond issue of \$2,000,000 with which to construct hydro-electric power plants. These also are to be operated upon the principle of "public power service at cost". Aberdeen will tie in and cooperate with Seattle and Tacoma. Thus Aberdeen is offering its aid and cooperation to the other cities and the rural communities of the state in the development and extension of a public power system.

#### **Greatest Superpower System in the States**

Meanwhile Seattle is just completing a power system up in the Skagit river county near the Canadian border which when finished will be the greatest hydro-electric power system on the continent second only to the Ontario system at Niagara. Its total potential development will be over a half million horse-power. And this service will be brought down over the transmission lines thru cities, towns and villages and intervening rural communities, serving all who care to avail themselves of its power possibilities, and delivering its power into Seattle and into the general public power system.

Thus we have in this Seattle system together with the Tacoma and Aberdeen developments a public superpower system in Washington with a total transmission system of over 200 miles covering practically, or capable of covering, the entire western half of the state, serving the people at cost and offering its assistance and cooperation to every city, town, village and rural community in developing a general, state-wide, public power system.

#### **Fifteen Washington Cities Own Power Systems**

Besides Seattle, Tacoma and Aberdeen there are twelve other municipalities in the state that own and operate electric power plants. These are Blaine, at the extreme northwestern part of the state; Port Angeles, on the Puget Sound; Steilacoom, Centralia and Eatonville, south of Tacoma; Index and Skykomish, just east of Seattle; Waterville, Cashmere, Wilson Creek and Ellensburg, in the Great Bend section; and Chewelah, in the north-eastern part.

Thus there are fifteen cities in the state of Washington committed to, and conducting their power systems upon the principle of "service at cost".

#### **Two Government Plants**

And, finally, besides these fifteen "public service" cities the United States Government owns and operates two hydro-electric power projects in the state of Washington in connection with the Reclamation Service. One of these is located at Okanogan in the extreme northern part of the state and the other in the Yakima district in the central southern part. These plants, too, are established and operated by the United States Government not for profit but for service. They would therefore naturally fall into line as units of the public service system cooperating to mutual advantage all around.

#### **Washington's Superpower Opportunity**

Here, then, are all the elements of a supreme opportunity for the people of the state of Washington. First of all the state has by far the greatest water power and hydro-electric resources of any state in the Union. Twenty-one million horsepower of potential hydro-electric energy are possible of development upon the Columbia river and its tributaries. The greater por-

tion of these possibilities lie within the state of Washington. The public, service-at-cost system is already established and in operation. Two cities, one the largest and the other the third largest in the state have led the way. A third is nearly ready to join. Twelve other cities and two government plants are available for further inter-connection and cooperation. And all this achieved in spite of bitter and relentless opposition and an interminable fight by the private power companies; and, also in spite of restrictive laws that tie the hands and feet of the cities of the state while the private power companies are given every privilege and advantage. The cities of Washington are denied the simple right of selling current outside their limits. Private companies can sell current anywhere and everywhere. The cities may not—at least not in Washington. The cities of other state—Iowa and Missouri for example—have this right and have had it for many years. But the cities of Washington have not.

That shows how the state legislature of the state has been controlled by the private power companies so as to hog-tie and ham-string the cities of the state while giving the private power companies every opportunity and advantage to develop their private monopoly of the power of the state.

#### **Unshackle the Cities**

One thing is needed now to make possible the rapid extension of a public power system with service at cost thruout the state—just one thing: Unshackle the cities; give the cities of Washington the rights that the cities of other states have—the rights that the private power companies have—the right to sell their power service anywhere within the state, to interconnect their power systems, to extend their transmission lines and cooperate with each other; and with that right the great cities that have already developed their “service at cost” systems will quickly get into cooperation with the twelve other cities that have public plants and with the government systems; and finally these cities cooperating with the rural communities will speedily extend the system thruout the state.

#### **Look at the Map**

On the inside cover page will be found a map of the state of Washington showing the existing publicly owned superpower system, the location of the municipally owned plants, the government plants and the proposed extensions and interconnections that will constitute the state-wide system when completed.

The passage of the Bone Power bill will give the cities the simple right and power that will make these things possible.

#### **What “Service at Cost” Means**

And here just a word about what “service at cost” means: Private power companies are forever over-capitalizing their enterprises. That compels them to charge high rates for the service to earn their interest on the capital. Then, too, the private companies must have 8 or 10 per cent on their capital account including watered stock and fictitious values. And finally they never retire or amortize their capital account so the burden is there forever. In fact it is always increasing. So a private power monopoly means an ever increasing burden upon the people of the state.

On the other hand a public service at cost system such as the cities of Seattle and Tacoma have, such as the Province of Ontario has reverses all these

burdensome tendencies. The public system never waters its stock. The public can borrow money at 5 and even 4 per cent while the private company pays 8 and 10. And, finally, and most important of all, the public system gradually pays off, eliminates, amortizes the capital account. At the end of 30, or at most 40, years the capital account is all retired and there is no interest burden at all to carry after that.

No less an authority than Guy E. Tripp, Chairman of the Board of the Westinghouse Electric and Manufacturing Co. declares that four fifths of the cost of producing electric power by water power is due to the capital charges.<sup>(1)</sup> Therefore by amortizing and thus eliminating the capital account, as the public system alone can do, it will be possible to reduce the cost of electric service to one half, one third and finally to one fifth of what the private power monopoly must charge.

This has been fully and strikingly demonstrated by the experience of Seattle and Tacoma as well as by many other cities thruout the country. It has been still more strikingly and fully demonstrated by the 275 cities and 77 rural communities operating this very system in Ontario for the last 14 years. Write to the Public Ownership League, 127 N. Dearborn St., Chicago, for full information and the facts concerning this wonderful system. A very excellent story of its achievements may be found in Harper's Magazine for September on "Niagara Milks the Cows" by Robert Bruere, pages 480 to 490. Copies may be secured at any good news stand or publisher.

### What the System Will Do

This system by reducing rates as it has done elsewhere will make it possible ultimately to electrify every home in the state—not only in the cities, towns and villages, but in the rural communities as well.

It will enable the cities to offer such low rates for power that industries of every sort will spring up, expand and multiply and others will be drawn into the state. These industries, made possible by cheap power, will work up the raw materials of the state, especially the mineral resources available in the eastern part that will make of that section a Pittsburgh of the north west. In short, this system will open a new era of industrial, commercial and civic progress and prosperity such as no one here-to-fore has dared to prophecy.

### Power and Prosperity for the Farmer

This system is the only possible hope of the farmers of the state to get electric power on the farms. The cost of transmitting the electric current thru sparsely settled rural communities is too great to interest the private power companies who are seeking profits only. As in the rural free delivery service of the postal department—"it doesn't pay". Not in dollars and cents. Not in huge profits to private interests. Therefore only the public "service at cost" system will ever reach the farmer with adequate electric power.

This system will reach the farmers of Washington. And it will be the greatest boon, the greatest helpful service ever rendered to them. It will make the use of electricity possible in the farmer's home, bringing an infinite relief to the farmer's wife and brightening the home life and increasing the comfort and convenience, the attractiveness and the efficiency of the homes of the farms. It will put into the farmer's hands the greatest power and helpful agency the farm has ever had, and do it at cost. And what is most important

(1) "Superpower as an Aid to Progress" by Guy E. Tripp, Knickerbocker Press, New York, 1924, p. 11.

of all the tremendous industrial expansion that is certain to follow the development of this system will enormously increase the demand for farm products. This will stabilize the farmer's market and open a new era of agricultural progress and prosperity otherwise impossible.

Nothing—absolutely nothing that can now be conceived, means so much to the future of the state; so much of progress, prosperity and human betterment; so much to the homes, the municipalities, the agriculture, the industrial and commercial expansion of the state as the public power service system at cost.

And the first next step towards such a system is the passage of the Bone Power Bill, Initiative Measure No. 25.

And remember this: Either the people of the state of Washington will develop, own and control a **public service at cost superpower system**, such as we have described above, or the private power companies of Washington will develop, own and control a **private superpower monopoly operated for private profit**.

A monopoly of the power system is inevitable and unescapable. Shall it be superpower for public service or superpower for private profit?

The passage of the Bone Bill means an immediate advance all along the line, thruout the state towards a public superpower system for public service. The defeat of the Bone Bill means another victory for the power trust and a further tightening of the grip of private monopoly upon the vital resources, industries, municipalities and agriculture of the state.

To prevent this disaster: to win the victory of a power system for public service; to secure the passage of this Bone Bill Initiative Measure No. 25 on November 4th is a matter of such tremendous importance that if the people on the farms, in the cities in the forests, upon the railroads—everywhere, did nothing else from now until the votes were counted at the close of the ballot boxes on November 4th but to work for the passage of this measure it would repay them a thousand fold—they and their children and their children's children after them, in the larger, better, freer, happier lives of the people for generations to come.

### Will Help the Nation

Moreover, the carrying of this measure and the rapid development of a public service power system that is sure to follow in the state of Washington will have a very helpful and stimulating influence thruout the nation. For everywhere the struggle is on to save to the people the one remaining natural resource that God has given them that has not been monopolized and exploited for private profit viz.: the water power. And everywhere in every city and state and at the national capital there are heroic groups of public spirited people and their leaders valiantly battling for the conservation of our national resources, for their utilization in the public service and the larger, better, nobler life of the nation that such a service will make possible. To win this victory in Washington will strenghten these forces in every other state not only by sustaining the public service system that we already have in Washington and extending and enlarging it; not only by multiplying the power of the demonstration already made by the cities of Seattle and Tacoma; but also by the courage and hope that it will inspire in the hearts of those in every city and state and at the nation's capital who are struggling for the conservation of our natural resources, for the constructive development of the public service and the largest possible degree of social, industrial and civic progress and prosperity for the American people.

# The Bone Power Bill

By Hon. Homer T. Bone, Author of the Bill

The State of Washington is the richest state in the Union in hydro electric resources. One-sixth of all hydro electric power in the country is to be found in this state. This magnificent prize very naturally stimulates the cupidity of the power interests, and desperate efforts have been made to prevent public ownership and development of this resource.

The State of Washington has been the victim of ruthless exploitation. A certain land grant railroad has taken up such enormous areas of coal, timber and farm lands that it has become a veritable scandal. The wonderful timber resources of the state are controlled entirely by private individuals, and afford no revenue to the State of Washington except a comparatively small tax paid on standing timber. Of all the wonderful resources Nature has given us with such a bountiful hand, all that remains open to public development is the water power. The battle to control this is now tearing the state wide open in what promises to be the most savage political battle ever waged in this state.

## The Struggle for Public Ownership

On the one hand are the three private power corporation of this state, and all of them are working in perfect co-ordination and harmony. On the other hand are arrayed the public ownership forces that are gathering strength every day.

The last declaration on the subject of public ownership is to be found in the platform of the Democratic Party of the State of Washington, adopted at its State Convention May 2, 1924, in the City of Seattle, and which is a ringing challenge:

**"The State of Washington contains one-sixth of the potential water power of the United States. This is the bounty with which nature has endowed us to compensate for the absence of the deposits of oil and mineral that make the wealth of other states. This great resource is the most enduring and, under our modern civilization, the most valuable of natural endowments and should be held and developed under conditions that will never permit private monopoly or greed to limit or hamper its fullest and freest use by the people who inhabit the State.**

**"With respect to water power, we are reaching the point where we must choose one of two paths. We must either adopt a permanent policy of conservation and public development, or resign ourselves definitely to private exploitation. We do not believe the enlightened people of the State of Washington will follow the latter course. Twice have they voted down, by striking majorities, certificate-of-necessity laws, passed by pliant Republican legislatures. But they will not be content with this negative action. They demand a positive and affirmative program of public development, and, in line with their aspirations, we recommend a**

declaration of policy by the Democratic Party of this state, favoring the retention by the state of complete control of its water power, and the development of this power by the state itself in its corporate capacity as the needs of its people require for their use in city and in town, in hamlet and on the farm.

"We condemn the Reed bill as a measure favorable to the private power interests. On the other hand, we heartily favor the enactment of initiative bill No. 52, known as the 'free power (Bone) bill'".



**HON. HOMER T. BONE**  
Author of the "Bone Power Bill"

### **The Public Will Decide November 4th**

This declaration is the culmination of years of struggle against the aggressions of a selfish power monopoly that has sought to and has successfully controlled the legislature of this state for years past. For the first time the people of this state have been able to get the battle out of the legislature and before the public in the form of Initiative No. 52, commonly called the Bone bill.

This bill permits the cities of the State of Washington that own their own light and power plants, to tie them together freely in a super power system

and to sell electric current freely from their inter-city power lines, and to surrounding communities. The private power companies are using every resource at their command to defeat this bill. Every country newspaper that that will accept advertising is being swung into line thru this means. The campaign promises to become as intense as was the campaign in California in 1922, where the power companies spent an enormous sum of money in an effort to defeat public ownership. In Washington we are somewhat better off in that one of the great political parties has seen fit to take up the cudgels for public ownership.

When the power plants of Seattle, Tacoma and Aberdeen are fully developed, these three cities will have in excess of one million horsepower of hydro energy to put on the market, and this means the end of the private power monopoly in the entire Western half of this great state.

#### **Tacoma's Great System and Low Rates**

The City of Tacoma today has established power rates that are the cheapest in the United States, and yet its plant is enormously profitable. The writer used one hundred and seventy-eight kilowatt hours of service in his small home in March of 1924, at a cost of \$2.90, or at the rate of one and six-tenths cent per kilowatt hour. The City of Spokane, Washington, supplied by the private power trust, is said to give about the lowest rate given by a private company to any city in the country. The same bill in Spokane would have been \$6.14. It would have been \$8.34 in a city near Tacoma, which is also supplied by a private company. This will give readers an idea of what a wonderful graft the private power interests have in the control of the water power.

The City of Tacoma is now engaged in developing a new power site which will produce one hundred and forty thousand horsepower. It is known as the Cushman development, and promises to be one of the finest power plants in the United States. When that plant is finished, Tacoma will have a total maximum output of one hundred and eighty-four thousand horsepower. This whole power development is being built by utility bonds, payable solely from the revenues of the plant, and they can never be a burden upon the taxpayers. The first issue of the Cushman bonds will be paid off in fourteen years, a portion of the issue being retired each year, and this wonderful power system will then be the property of the City of Tacoma, without having cost the taxpayers one cent. This was the method of financing the Nisqually plant of the City of Tacoma, which has proven so profitable.

#### **Keep Your Eyes on Washington**

The City of Tacoma is a wonderful and outstanding example of how successfully a city may conduct a power business. It should be an inspiration to every other city in the United States that can possibly acquire her own power plant. Many of our public streets are great "white ways" that make Tacoma one of the best lighted cities in the world.

The people of the United States should keep their eyes on Washington, for this state is going to lock horns with the private power trust in a battle that will determine once and for all the policy to be pursued in respect to water power. The big financial interests of the East are expected to finance much of the fight, and it is very generally understood that millions of dollars will be poured into Washington, if necessary, to stem the tide in favor of public ownership.

# The Seattle Municipal Light and Power System

Address by J. D. Ross,  
Superintendent and Chief Engineer.



J. D. ROSS

Seattle's politics twenty years ago were dominated by the Seattle Electric Company, a Stone and Webster Corporation. Mayors and Councilmen were made and unmade, for monopoly means the usurping of the functions of Government. This company still dominates state politics, and, thru the state, strikes at the city power systems with telling results. Self preservation for the cities and rural districts must come thru the initiative and referendum, and through the tireless building of public plants welding the whole by tie lines into a great network.

For twenty years Seattle has so struggled until today in an addition to her Cedar Power Hydro, and a modern steam plant, she is preparing to bring in 50,000 H. P. additional, the first unit of the greatest power development any city has ever undertaken, the third step of a system rising toward 750,000 h. p. in the coming years.

### The Seattle System

The Seattle System now serves about 72,000 customers with light and power, besides all city buildings, streets and grounds. The street lighting is claimed to be the best in the world.

The private company is serving about 23,000 customers and competition has reached the stage of a gigantic struggle, its effects reaching not only to the confines of the state, but all over the nation.

Our City-owned Light and Power plant was one of the very first transmission systems in the world. It was built in 1902 and 1903. The highest voltage by which power was transmitted at that time was 30,000. This was raised to 45,000 for the Seattle lines.

The first plant consisted of two 1250 k. w. machines. The call for a City-owned plant was the natural outcome of high rates and the company's apathy toward the public. The city felt that a little competition would work wonders, and it did. Seattle was then a city of about 75,000 people. Today it is growing very rapidly and is variously estimated at from 350,000 to 375,000 population.

The City had launched the greatest undertaking of its kind in America. Her citizens were glad to vote for it but slow with their patronage, the one thing that could make it a financial success. The suburban districts with their small residence loads were willing to swing to their own plant, but not one in ten of the business men was willing to risk the new service.

This introduced a troublesome problem. The cost of distribution is the greatest item of expense and lines must be ready at all points to take on the business. Heavy costs with only ten per cent of the business, widely scattered, would be ruinous.

Necessity is the mother of invention and we solved the problem. Instead of using the present day system with its heavy cables and expensive voltage regulators the power was distributed directly from 15,000 volt lines. At that time this was the highest voltage for which any concern would build outdoor transformers. This system has been later extended and modified, the final system using 15,000 volts to ground in a three phase Star connection. This system of distribution will be the greatest factor in further reducing our residence rate. It gives vastly better regulation without regulators, and the largest wire required on the streets in almost every case, is No. 2, about the size of a lead pencil. No secondary substations are needed and very heavy loads at any distant point are welcome. Simplicity gives safety to life, and assures good service.

### Making a Million a Year

The first year and a half of operation showed us in the red. Then we began to pay back our debt and since that time have returned to our institution over \$5,000,000.00 profit and \$3,000,000.00 more marked off for depreciation. These sums have been used to retire bonds and to extend our lines and plants. This year out of \$2,800,000.00 gross receipts we will make a round million in profit after paying all operating costs and interests and after marking off \$300,000.00 as depreciation.

The City plant is in the hottest competition with Stone and Webster, who have gradually been driven to the heart of the city, where cost of distribution is lower and loads larger and more profitable, the cream of the business. The fight has been very bitter and soon developed into personal attacks in the usual way and with the usual rubbish printed in company newspapers, about

burdensome tendencies. The public system never waters its stock. The public can borrow money at 5 and even 4 per cent while the private company pays 8 and 10. And, finally, and most important of all, the public system gradually pays off, eliminates, amortizes the capital account. At the end of 30, or at most 40, years the capital account is all retired and there is no interest burden at all to carry after that.

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(1) "Superpower as an Aid to Progress" by Guy E. Tripp, Knickerbocker Press, New York, 1924, p. 11.

# EXHIBIT 67 (e)

*U.S. Federal Trade Commission*  
**UTILITY CORPORATIONS**

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**LETTER**

FROM

**THE ACTING CHAIRMAN OF  
THE FEDERAL TRADE COMMISSION**

TRANSMITTING

**IN RESPONSE TO SENATE RESOLUTION NO. 83,  
SEVENTIETH CONGRESS, A MONTHLY  
REPORT ON THE ELECTRIC POWER  
AND GAS UTILITIES INQUIRY**

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**No. 81**

**Northern Natural Gas Company System  
Utilities Power & Light Corporation (Schedule E)  
Granite Trading Corporation  
Federal Water Service Corporation  
Power, Gas & Water Securities Corporation**

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*Filed with the Secretary of the Senate  
October 15, 1935*



**UNITED STATES  
GOVERNMENT PRINTING OFFICE  
WASHINGTON : 1936**

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**SENATE RESOLUTION NO. 112**

Submitted by Mr. NORRIS

IN THE SENATE OF THE UNITED STATES,  
*September 9 (calendar day, September 11), 1929.*

*Resolved*, That as a part of its reports to the Senate, pursuant to Senate Resolution 83, Seventieth Congress, first session, the Federal Trade Commission be required expeditiously to transmit duplicates, or true copies, of all exhibits introduced into its record in hearings held and to be held pursuant to said resolution, and that they be printed as parts of said reports, to accompany the respective parts thereof printed in accordance with Senate Resolution 221 of May 3, 1928; except that as to copyrighted books, bulky volumes, and other lengthy exhibits only such descriptions thereof and pertinent extracts therefrom shall be printed as the Federal Trade Commission may indicate and transmit with such exhibits for that purpose.

Attest:

EDWIN P. THAYER,  
*Secretary.*

**SENATE RESOLUTION NO. 221**

Reported by Mr. SHIPSTEAD

IN THE SENATE OF THE UNITED STATES,  
*May 3, 1928.*

*Resolved*, That the reports submitted to the Senate, or which may hereafter be filed with the Secretary of the Senate, pursuant to Senate Resolution 83, current session, relative to the investigation by the Federal Trade Commission of certain electric power and gas utility companies, be printed, with accompanying illustrations, as a document.

Attest:

EDWIN P. THAYER,  
*Secretary.*  
By JOHN C. CROCKETT,  
*Chief Clerk.*

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## LETTER OF SUBMITTAL

OCTOBER 15, 1935.

*To the Senate of the United States:*

Pursuant to Senate Resolution 83, Seventieth Congress, first session, approved February 15, 1928 (as extended by S. J. Res. 115, 73d Cong., 2d sess., approved June 26, 1934), directing the investigation of certain classes of holding and operating electric and gas companies, and associated engineering, finance, management, and construction companies, upon other matters specified in the resolution, and directing that the Commission "report to the Senate within each 30 days after the passage of the resolution and finally on the completion of the investigation", and that it transmit therewith the stenographic report of the evidence taken, this eighty-first interim report covering the period from September 16 to October 15, 1935, inclusive, is respectfully submitted.

Public hearings were held September 26 and 27, and October 7, 9, and 10, 1935.

Reports and testimony presented at the above hearings related to the following companies and matters:

Northern Natural Gas Co. and subsidiaries.

Utilities Power & Light Corporation (schedules E).

Granite Trading Corporation (formerly known as "G. L. Ohrstrom & Co., Inc.").

Federal Water Service Corporation (of Ohrstrom group).

Power, Gas & Water Securities Corporation (of Ohrstrom group).

Further evidence re Cleveland municipal system.

Further evidence as to British thermal unit content of gas.

The witnesses, of the Commission's staff, were H. H. Carter; Arthur E. Lundvall; Thomas W. Mitchell; Arthur C. Harper; John H. Crabtree; A. M. McDermott; Elmer R. Weaver, chemist of United States Bureau of Standards; Edward James Kenealy, electrical engineer, Cleveland municipal plant; John F. Merriam, assistant secretary Northern Natural Gas Co.

The reports and exhibits put into the record were—

Extensive excerpts from minutes of meetings of stockholders, boards of directors and executive committees, and of various journal entries, income accounts, balance sheets, annual reports, charters, bylaws, and other material of various companies of the Niagara-Hudson group. (Not sent for printing.) (Exhibits 6341 to 6360 and subnumbers, both inclusive)

Report by Harry H. Carter (Federal Trade Commission) on the interstate transmission of gas by the Northern Natural Gas Co. system, exhibit 6361).

Report by Andrew W. Wilcox (Federal Trade Commission) on the examination of the accounts and records of Northern Natural Gas Co. and subsidiaries, with exhibits and appendixes. Exhibits 6362 to 6364, both inclusive.

Extracts from schedules E furnished by the Utilities Power & Light Corporation (exhibit 6365).

Letters concerning conference on report of operations of G. L. Ohrstrom & Co., Inc., and reply (exhibits 6366 A and B).

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The companies of the American Power & Light group operate in the States of Arizona, Florida, Idaho, Kansas, Minnesota, Montana, eastern Nebraska, Oregon, Texas, and Washington.

For the 2 years ending December 31, 1928, and December 31, 1929, the officers of the Electric Bond & Share Co. were the same as those of the American Power & Light Co., with one exception. In 1928 C. E. Groesbeck was a vice president of the Electric Bond & Share Co. and president of the American Power Light Co. In addition to having officers in common, three of the directorships of the American Power & Light Co. were held by the Electric Bond & Share Co.<sup>18</sup>

Many of the officers of the American Power & Light Co. were holding executive positions with the national associations, National Electric Light Association, American Gas Association, and joint committee of National Utilities Association. S. Z. Mitchell, president of the Electric Bond & Share Co., and of the American Power & Light Co., was a member of the joint committee of National Utilities Association, of the public-policy committee of the National Electric Light Association, and of the advisory council of the American Electric Railway Association. C. E. Groesbeck, vice president of Electric Bond & Share Co. and president of the American Power & Light Co., was a member of the joint committee of National Utilities Association and of the public-policy committee of National Electric Light Association; Vice President H. C. Abell, of Electric Bond & Share Co. and of American Power & Light Co., was a member of the joint committee and a member of the executive board of American Gas Association; H. T. Sands, vice president Electric Bond & Share Co. and of American Power & Light Co., was president of National Electric Light Association in 1927-28.<sup>19</sup>

In 1932, when the public-policy committee of National Electric Light Association was abolished and its work taken over by the advisory council, S. Z. Mitchell and C. E. Groesbeck were members of the newly formed advisory council. In January 1933, when the National Electric Light Association ceased to exist and the Edison Electric Institute was organized, the board of trustees governing the institute was composed of men representing the dominant groups in the electric and gas industries. C. E. Groesbeck was one of these trustees.<sup>20</sup>

#### Activities Concerning Legislative Matters

In the States of Oregon and Washington committees were organized within the electrical industry for the purpose of opposing the passage of laws considered detrimental to the proper development of the industry.<sup>21</sup>

Referring to the contributions made by the Northwestern Electric Co. of Portland, Oreg., to State political campaigns in 1924, the sum of \$500 was paid to the Washington committee on public-utility information, to be expended by that committee to oppose the passage in the State of Washington of a bill then before its voters, known as the "Bone bill", which this company "considered detrimental to the proper development of the electrical industry in the State of Washington." The sum of \$100 was paid by this company to the business men's committee for income-tax repeal in the State of Oregon.

<sup>18</sup> Pt. 20, p. 53.

<sup>19</sup> Pt. 71 A, pp. 410, 419, appendices 5, 7.

<sup>20</sup> Pt. 71 A, pp. 416, 417, 418.

<sup>21</sup> Ex. 4916, pt. 35, p. 215.

In 1926 this company paid \$3,837.40 to the Oregon Public Utility Committee and \$1,100 to a committee of utility employees, to be expended by those committees to oppose the passage of a constitutional amendment known as the "Housewives' council water and power amendment." For the same purpose there was also expended \$156.83 for postage and stationery and \$13.85 for the rental of a school auditorium in which was held a meeting of the employees of the company. The total expended by this company in 1926 amounted to \$6,108.08.<sup>22</sup>

Before the elections held in November 1930 this company expended, chiefly for pamphlets and advertising in opposition to the initiative measures known as the "Grange public-utility and power district bills" before the electorate of those States, the sum of \$273.37 in Oregon and \$1,866.17 in Washington. The sum of \$273.37 was exclusive of \$5,979.50 contributed to the utility taxpayers' committee for the purpose of opposing the measure in Oregon referred to above. There was also an additional contribution of \$173.46 collected by the committee against initiative no. 1 in Washington.<sup>23</sup>

District power bill initiative no. 1 was also opposed by the Washington Water Power Co. This total expenditure by this company was \$33,435.15. A large part of this sum was devoted to advertising in opposition to the measure, but contributions to committees and expenses of individuals also represented a great portion of this total expenditure.<sup>24</sup>

The Washington Water Power Co. in January 1933 was planning to send a representative to Olympia to represent the company while the legislature was in session.<sup>25 26</sup>

In 1924 the Pacific Power & Light Co. also made a contribution of \$19,496.84 to the Washington Committee on Public Utility Information, the major portion of which was expended by that committee to oppose the passage of the Bone bill, which this company "considered detrimental to the proper development of the electrical industry in the State of Washington."<sup>27</sup>

In 1926 there was paid by this company to the Oregon Public Utility Committee \$3,442.56 to be expended in opposition to the passage of a constitutional amendment then before the voters, known as the "housewives' council water and power amendment."<sup>28</sup>

Prior to the elections in November 1930 this company, like the Northwestern Electric Co., expended funds chiefly for pamphlets and advertising in opposition to the measures known as the "Grange public-utility and power district bills." The sums of \$2,796.45 in Oregon and \$4,635.57 in Washington were spent for this purpose.<sup>29</sup>

In addition to the sums mentioned in the preceding paragraph, there was also contributed by this company the sum of \$2,973 to the utility taxpayers' committee and expended by it in opposing the measure in Oregon and \$2,865 was contributed by the committee against initiative no. 1 and expended in opposing the measures in Washington.

<sup>22</sup> Ex. 4915, pt. 35, p. 214; ex. 4691, pt. 25, p. 923.

<sup>23</sup> Ex. 4916, pt. 35, p. 215.

<sup>24</sup> Ex. 4789, pt. 29, pp. 234-247; pt. 29, p. 54.

<sup>25</sup> Ex. 6100, pt. 70, p. 981.

<sup>26</sup> See Stone & Webster section post under subhead Lobbying.

<sup>27</sup> Ex. 4915, pt. 35, p. 214; ex. 5923, pt. 65, p. 429.

<sup>28</sup> Ex. 4915, pt. 35, p. 214.

<sup>29</sup> Ex. 4916, pt. 35, p. 215.

From January 30, 1924, to May 13, 1924, correspondence relating to the Bone and Erickson bills was passing between the Pacific Power & Light Co. and the Electric Bond & Share Co., which latter company was circulating the information and material in the East and among members of the other affiliated companies.

On January 30, 1924, F. G. Sykes, vice president of the American Power & Light Co., wrote to Guy W. Talbot, president of the Pacific Power & Light Co., acknowledging receipt of two copies of the "proposed Erickson bill and two copies of a digest of the same." He forwarded the letter to Messrs. Silliman, Groesbeck, and Odlum, the latter two of whom were officers of the National Power & Light Co., which is also an affiliated company of the Electric Bond & Share Co.<sup>20</sup>

On April 21, 1924, A. W. Flor, of the Electric Bond & Share Co., wrote to George L. Myers, assistant to the president of the Electric Power & Light Co., thanking him for copies of the Bone bill and commenting on some new features appearing in this bill:

I am moved to wonder at the basis for the rather unusual wording of section 3. However, whatever the reason may be, this new bill impressed me as a very sedulous affair and one which probably offers as much, if not more, opportunity for a real fight than did the original Erickson bill.<sup>21</sup>

Mr. Flor immediately wrote M. H. Aylesworth, managing director National Electric Light Association, on April 22, 1924, sending him a copy of the Bone bill, which had been recently substituted for the Erickson bill. He stated, with reference to the utility activities in the State of Washington:

The officials of certain of the companies in the Northwest have lately been busy in getting together a complete argument against the Bone bill for distribution in pamphlet form to approximately 100,000 voters. This pamphlet, it is expected, will be available within the next few days.<sup>22</sup>

On May 7, 1924, Mr. Myers wrote again to Mr. Flor mailing 25 copies of the pamphlet containing the essential argument against the Bone-Erickson bill. He stated:

This is the bill I wrote you about which is being circulated for the necessary signatures in the State of Washington to provide that electric light and power companies, municipally owned and operated may extend their services to communities outside of present incorporated limits within which they operate.

If for any reason you should wish additional copies of the pamphlet, I will be glad to see that you get them.<sup>23</sup>

In a letter from Samuel P. MacFadden, manager of the Western Public Service Co., Scottsbluff, Nebr., on December 17, 1925, to Stone & Webster, Boston, Mass., the following comment is made concerning the municipal ownership situation in Nebraska and the opposition to it in the legislature:

Mr. K. R. MacKinnon, general superintendent of the Nebraska Power Co., in Omaha, an Electric Bond & Share Co., also attended the meeting and after the meeting came on up here with Mr. Parks and me. From him, I learned that in the past, bills facilitating municipal ownership presented in the State legislature had been fought successfully by the Electric Bond & Share and Insull, but that during the last year or two Insull had more or less withdrawn his support, leaving the Electric Bond & Share to carry the entire load.

Omaha is the home of Senator Howell, one of the prominent municipal ownership advocates of the country, and his activities in and around Omaha have

<sup>20</sup> Ex. 5923, pt. 65 p. 428.

<sup>21</sup> Ex. 5923, pt. 65, p. 429.

<sup>22</sup> Idem. p. 429.

<sup>23</sup> Ex. 5923, pt. 63, p. 429.

The record further bears evidence of a loan made by Mr. Knight to a member of the Florida Railroad Commission. Commissioner A. D. Campbell wrote Mr. Knight on December 20, 1923, asking for a loan of \$2,000, and Mr. Knight acknowledged the request on December 24 by stating:

It so happens that at the present time I do not have it myself, but I have been able to get it locally for you, even though I must endorse the note.<sup>80</sup>

Mr. Knight sent Mr. Campbell's letter on to the Boston office on the same date, accompanying it with the remark:

Of course we must take care of this matter;<sup>81</sup>  
with which decision Mr. Wetterer was in full agreement, as witness has reply:

I can understand how necessary it is to take care of this request in the manner that you have arranged.<sup>82</sup>

#### Political Activities in the State of Washington

*Erickson and Bone bills.*—The city of Seattle, Wash., is the headquarters of the Puget Sound Light & Power Co. which in output is by far the largest unit of the Stone & Webster group. In its schedule E filed with the Commission, the Puget Sound Co. reported the expenditure of approximately \$100,000 in 1924 in opposing the so-called "Erickson and Bone bills."<sup>83</sup>

The Erickson bill as proposed in 1923 provided for the formation of power districts, State-wide or less in extent, and permitted such districts to purchase or condemn the existing light and power properties, or to construct properties of their own, among other things. Upon its proposal the Stone & Webster interests immediately got in touch with the National Electric Light Association in New York, as evidenced by the following excerpt from a letter from Mr. E. T. Steel to Mr. M. H. Aylesworth, of the National Electric Light Association, under date of August 28, 1923:

Letters and clippings received from Mr. Leonard at Seattle give a vivid idea of the activities of Messrs. Thompson and Erickson in organizing the Washington campaign for State ownership of water powers.<sup>84</sup>

In a letter dated the next day, Mr. Aylesworth proposed to Mr. Steel a plan of campaign. He suggested:

What our people need to do in Washington \* \* \* is to organize through various organizations other than public utility groups a definite campaign against the proposed agitation. \* \* \*

My experience has led me to believe that we should always be the aggressors and lay out plans for future electrical development and make them public rather than assume the position of the defense and answer the other fellow's statements.<sup>85</sup>

In an interoffice communication at the Stone & Webster headquarters in Boston, November 10, Mr. Steel made further suggestions to Mr. W. H. Blood, Jr.:

Mr. Leonard recommends that the Washington situation should be presented at a meeting of the public policy committee of the National Electric Light Association and their assistance definitely secured to the point, not only of giving financial assistance, but also securing as soon as possible one or more high-grade, capable publicity men and sending them out to Washington. \* \* \* Probably 90 percent of the newspapers in the State will oppose State ownership, and a lot of

<sup>80</sup> Pt. 70, p. 404.

<sup>81</sup> Idem.

<sup>82</sup> Ex. 6014, not printed.

<sup>83</sup> Pt. 70, p. 930.

<sup>84</sup> Pt. 70, p. 1005.

<sup>85</sup> Idem.

good work, could be done with these papers by the right kind of publicity which we have not the capacity for getting at at the present time.<sup>86</sup>

The campaign against the Erickson and Bone bills was handled by the Washington Committee on Public Utility Information. Mr. Norwood Brackett, of the Northwest Power & Light Association, testified that the committee expended \$175,000 in the campaign,<sup>87</sup> most of which was contributed by the power companies in the regions affected. The Puget Sound Co. was by far the largest contributor, its \$100,000 accounting for almost 60 percent of the total.

The committee's elaborate plan of campaign was summarized in a report of October 16, 1923, to Mr. Leonard, chairman of the committee as well as president of the Puget Sound Co. The committee decided:

That we should immediately begin an active campaign among the business interests. \* \* \*

Mr. W. B. Henderson was employed for this work. Through his long association with the chamber of commerce he has an intimate acquaintance with the business men of this state. \* \* \* His method of procedure is to bring the question to the attention of the president and secretary of each association. They then call a meeting of the executive committee of their association when the matter is fully explained, either by Mr. Henderson or myself. \* \* \*

These organizations then send out a letter prepared by us on their own stationery to each member of their organization, calling their attention to the dangers of this bill and urging them to do everything they can to defeat it.<sup>88</sup>

As a means of obtaining publicity the committee engaged—

the services of Mr. Wood to prepare special articles which are distributed by our company through Strang & Prosser to the newspapers in our territory and which are also sent to each electric light and power company in the State for publication by the papers in their territory.

As a preliminary to the publicity work, Mr. Mattison and Mr. Wood are visiting all of the newspapers of this State. \* \* \* Mr. Wood is visiting them as the representative of the Portland Oregonian and Mr. Mattison as secretary of the Republican State central committee.

During the course of their conversation it is not difficult for them to get an expression as to how they feel toward this bill and to discuss the bill with them. This should give us a very definite line on the papers which will publish the articles we desire. This work is not as yet completed but from the editors so far seen we are safe in assuming that 80 percent of them are against the Erickson bill.<sup>89</sup>

The report continues:

The bill as drawn is, in my opinion, subject to a successful attack in many of the provisions. It cannot be filed, however, with the Secretary of State as an initiative measure until after January 1, 1924. When once filed, its provisions cannot be changed. We are very much in hopes that no changes in the bill will be made prior to its being filed, but we believe that if we should at this time start pointing out its worst features that they would amend the bill and that our work would simply result in the filing of a bill which would be more difficult to defeat.<sup>90</sup>

The Puget Sound Power & Light Co. was prepared to do its part in addition to the committee's efforts in opposing the Erickson bill. An excerpt from a memorandum of managers' and staff officers' meeting of the company, October 16, 1923, reads:

Classes on the company's business totalling 250 employees are being held in the various districts, and out of these he expects to get 40 who will talk to 50,000 people in 1924. The talks will be from 30 to 40 minutes and the speakers will answer questions for perhaps an hour, principally before farmers' grange meetings.<sup>91</sup>

<sup>86</sup> Pt. 70, pp. 1003-1004.

<sup>87</sup> Pt. 13, p. 39.

<sup>88</sup> Pt. 70, pp. 1000-1001.

<sup>89</sup> Pt. 70, p. 1001.

<sup>90</sup> Pt. 70, p. 1002.

<sup>91</sup> Pt. 70, p. 1006.

When it was decided to send a representative to Ontario to get arguments against State ownership and operation of electric utilities, the Portland Oregonian gave the Washington committee its cooperation. Mr. Norwood W. Brockett, of the Puget Sound Power & Light Co. and also secretary of the Washington committee, wrote Mr. Leonard on October 24, 1923:

The Portland Oregonian finally decided that it would disrupt their Washington news service if Mr. Wood went to Ontario at this time. They readily agreed however, to have Mr. Cowen go in his place and appeared to have every confidence in him. Mr. Cowen, as you will remember, is the man who was suggested by the Spokesman's Review.<sup>92</sup>

The Washington committee printed 100,000 copies of the Erickson bill together with an analysis of its provisions which they mailed out to registered voters within the State.<sup>93</sup> Mr. Brockett testified that the copies cost approximately a cent apiece. As a result of the efforts of the power companies the bill was abandoned by its sponsors.

Then came the Bone bill, giving to cities owning and operating producing plants the right to sell electric current outside their corporate limits, and to condemn properties of the privately owned light and power companies. It appeared on a referendum ballot to be submitted to the voters at the general election in November 1924. Mr. Brockett admitted on the witness stand that the power companies advertised extensively to prevent signatures being obtained to the petitions necessary in order that the measure might be included on the ballot.<sup>94</sup>

Under the committee's direction, there were organized in various communities throughout the State citizens' committees composed of citizens opposed to the legislation. They advertised extensively in the newspapers against the measure, but while the advertisements appeared over their signatures, the bills were paid by the utility bureau. Their principal expense consisted of letters gotten up and signed by members of the citizens' committee in the various communities and sent to the people living in their vicinity. Mr. Brockett estimated that the letters cost approximately \$15,000.<sup>95</sup> In addition to the letters, in the city of Seattle, pamphlets were circulated by the citizens' committees, and these also were paid for by the power companies.

Mr. Brockett testified further that probably 75 percent of the advertising against the Bone bill was placed through Strang & Prosser,<sup>96</sup> and that company filed with the Commission statements of such advertising paid by the utilities, amounting to more than \$16,300.<sup>97</sup> Strang & Prosser also sent out cartoons against the measure as a gratis service which were reproduced by the newspapers. However, most of the cartoons were sent to newspapers direct from the committee and, as in the case of the ads and letters, carried no indications that they were put out by the power companies.<sup>98</sup>

The Puget Sound Co. approached the problem of beating the Bone bill from other angles. On May 6, 1924, President Leonard wrote Mr. F. S. Pratt of the Boston office of Stone & Webster:

I went to Spokane, and with Huntington, left Spokane at 8 o'clock, Tuesday, for Pullman to discuss with the president and a few of the faculty of Pullman

<sup>92</sup> Pt. 70, p. 1006.

<sup>93</sup> Pt. 13, p. 37.

<sup>94</sup> Pt. 13, p. 38.

<sup>95</sup> Pt. 13, p. 41.

<sup>96</sup> Pt. 13, p. 42.

<sup>97</sup> Pt. 13, pp. 627-632.

<sup>98</sup> Pt. 13, p. 43.

College the question of organizing in the State of Washington a committee on the relation of electricity to agriculture.<sup>9</sup>

Another quotation from the same letter throws light on the occasion for organizing such a committee:

I believe the sentiment in eastern Washington \* \* \* is quite general against the Bone and Erickson measures. However, the farmers are not in very good shape financially, especially in the wheat district, and they may possibly lean somewhat more toward radicalism between now and November than at present.

The president of Pullman College favored the idea of setting up such a committee but thought it should not be appointed until after the November election.<sup>1</sup>

On October 11, 1924, Mr. D. C. Barnes, district manager in Boston for the Puget Sound Power & Light Co., telegraphed Mr. Leonard:

Aylesworth talked with Mr. Pratt and Mr. Bradlee by telephone this morning and feels that it would be desirable to circulate broadly Hoover's speech, which is available in the pamphlet form from National Electric Light Association or could be printed locally in Seattle, if desired.<sup>2</sup>

The Washington State situations had national repercussions, as indicated in a confidential letter dated February 11, 1924, from Mr. Pratt to Mr. Leonard:

Sometime ago you wrote me a letter speaking of how the backers of the Bone bill and the Reed bill were representatives of the radical and more conservative wings of the Republican Party in the State of Washington and that the fight over these two bills was likely to split the party. You suggested that the president or his organization ought to know about this \* \* \*.

I told him [Mr. Frank Stearns] that it probably meant the expenditure of greater money and effort in the State of Washington in order to elect Coolidge \* \* \*.

Mr. Stearns asked me to write him a memorandum, which need not be signed, outlining in general this situation \* \* \*. I will get you to do this for me.<sup>3</sup>

In 1930 the people of Washington voted on the district power bill, initiative measure no. 1, known as the "Grange bill", which permitted districts to be created for engaging in power development and distribution. According to their schedule E, the Puget Sound Power & Light Co. contributed approximately \$124,000 in that year to the Washington Committee on Public Utility Information in the interest of defeating the measure.<sup>4</sup>

Communications between the Boston and Puget Sound offices of Stone & Webster indicate an ingenious device for covering the State through the aid of outside agencies, viz., the insurance companies. On September 20, 1930, Mr. D. C. Barnes wired Mr. Leonard in Seattle:

Paul Clapp has asked that representative of national fire-insurance companies have someone call on you to offer assistance in initiative campaign.

To which Mr. Leonard responded, September 27:

Fire-insurance companies today notified their special agents, numbering 30, who travel continuously over State interviewing local agents, to stress importance of defeat Grange bill. Automobile club today breaking all precedents authorized turning over list 12,000 members to us to send copy of proposed bill in automobile club envelopes.<sup>5</sup>

<sup>9</sup> Pt. 70, p. 1007.

<sup>1</sup> Idem.

<sup>2</sup> Pt. 70, p. 1009.

<sup>3</sup> Ex. 6159, not printed.

<sup>4</sup> Pt. 70, p. 930.

<sup>5</sup> Pt. 70, p. 1011.

The Western Public Service Co. spent a high in 1927 of \$25,900 for advertising, and a low in 1925 of \$5,400; for newspaper advertising, \$14,000 in 1929 and \$2,000 in 1925. Engineers Public Service Co., the top company for most of the operating subsidiaries, spent \$19,300 for all advertising in 1931, and \$600 in 1926; for advertising in newspapers in 1931, \$19,000, and in 1926, \$400.

Motion picture advertising cost Stone & Webster, Inc., \$10,500 during the period covered by schedules E; Stone & Webster Engineering Corporation spent \$2,300 for that purpose; Virginia Electric & Power Co., \$9,000; Western Public Service Co., \$1,000; Puget Sound Power & Light Co., \$8,400; and various other subsidiaries, smaller amounts. Radio advertising cost the Sierra Pacific Power Co., \$2,300; the Savannah Electric & Power Co., \$2,200; the Gulf States Utilities Co., \$5,300; and the Western Public Service Co., \$4,300.

*Contributions and dues to trade associations.*—The Puget Sound Power & Light Co. reports by far the highest sum contributed in 1 year to local trade associations throughout the entire system, \$154,600 in 1930. That was the year in which the Washington State private utility interests united to fight the "District power bill." In 1924, also, the Puget Sound Co. contributed a very large amount mainly in support of the fight against the "Bone bill", \$125,984. Its lowest total of expenditures to local associations was \$10,500 in 1919. The same company also contributed the highest amount to national associations in a single year, \$14,000 in 1930, with less than \$800 contributed in 1918. Its "other contributions" totaled something under \$20,000 in 1931, and something over \$2,300 in 1917.

Stone & Webster, Inc.'s total for "all other contributions" came to almost \$27,000 in 1925, and in 1933 had dropped to \$1,650. It contributed \$3,500 to national associations in 1931, and only \$750 the next year; \$1,650 to local bodies in 1928, and \$420 in 1933.

Virginia Electric & Power Co. made similar contributions in sizeable amounts: To local associations, \$15,000 in 1929 and \$4,200 in 1925; to national bodies, \$13,600 in 1929, and \$4,200 in 1924, and to "all others", \$20,000 in 1933 and \$2,000 in 1924.

The Gulf States Utilities Co. contributions are comparable in amount: \$12,000 to local bodies in 1931 and \$500 in 1925; \$5,600 to national associations in 1931 and \$1,300 in 1926; \$8,300 for all other purposes in 1928 and \$230 in 1925.

The Western Public Service Co. contributions "for all other purposes" jumped to a high of \$6,600 in 1933, and were only \$31 in 1925; its local contributions amounted to \$4,000 in 1932 and \$18 in 1925; its national, \$2,200 in 1927, and \$50 in 1925.

Stone & Webster Engineering Corporation contributed \$9,200 for "other purposes" in 1931; the Northern Texas Traction Co., \$7,800 in 1927. The amounts noted comprise the significant figures for the system.

In contributions to the Joint Committee of National Utility Associations, Virginia Electric & Power Co. ranks first, with \$6,800 in 1930 and \$3,000 in 1927, a total of \$9,800. Next comes the Puget Sound Co. with a total of \$8,400 for 3 years; then the Gulf States Utilities Co. with a total of \$2,700 for a 3-year period. The Savannah Electric & Power Co. contributed \$2,000 in 3 years, and the El

Paso Electric Co. \$1,300 in 2 years. Joint Committee contributions for other companies in the system come to much smaller totals.

*Attorney payments.*—The Stone & Webster top company's payments to attorneys ran to sizable figures in 1929, \$328,800, while in 1920 it spent only \$500. Stone & Webster & Blodget, the finance company of the set-up, in 1929 spent \$101,600 in legal fees as against \$7,400 in 1932. Virginia Electric & Power Co. spent a high of \$95,000 in 1925 and a low of \$43,600 in the preceding year. Puget Sound Power & Light Co. spent \$87,500 in 1931 as against \$33,500 in 1917; Western Public Service Co. \$74,000 in 1930, from a low of \$645 in 1925; Savannah Georgia Power Co. \$50,000 in 1926 and \$7,100 in 1927; and other companies in the system smaller amounts.

*Contributions to educators and schools.*—Stone & Webster, Inc., contributed \$30,000 to the Massachusetts Institute of Technology over the 3-year period, 1923 to 1926; \$2,000 to Harvard University, 1923 to 1925; \$3,500 to Drexel Institute, 1924 to 1926; \$2,000 to the college of William and Mary in 1926; and \$500 to Simmons College in 1923. A contribution of \$5,000 was made to Whitman College at Walla Walla, Wash., in 1925, concerning which the assistant to the chairman wrote Mr. Pratt of the same company on December 15 of that year:

With respect to the Whitman College contribution Mr. Stone asked me to say that he was anxious to have this appear not as a joint facilities charge, but as an expense of the operating division, inasmuch as he looked upon this gift as an expense incurred in furthering the public relations of our interest in the north-west territory, and therefore a proper deduction against such earnings as the management fee of the Puget Sound Co.<sup>67</sup>

Stone & Webster & Blodget, Inc., kept the dean of the College of Business Administration, College of the City of New York, Dr. George W. Edwards, on their pay roll over the period 1927 to 1933, inclusive, during which period Dr. Edwards was paid a total of \$37,390. The Stone & Webster Engineering Corporation made contributions to the Massachusetts Institute of Technology from 1929 to 1933, inclusive, totaling \$25,000. Virginia Electric & Power Co. gave the Medical College of Virginia \$2,125 from 1926 to 1930, the University of Richmond \$2,500 from 1927 to 1930, and the State Teachers College \$550 from 1927 to 1929. Puget Sound Power & Light Co. gave the University of Washington \$3,820 between 1923 and 1932; the School of Utilitarian Economics \$850 from 1923 to 1927; Auburn Academy \$450 in 1931 and 1932; and various smaller schools a total of \$840 over the 10 years 1923 to 1933. Other companies in the system report small contributions to schools.

*Newspaper stock ownership or loans.*—Stone & Webster & Blodget, Inc., reported ownership of 3,960 shares of stock in the Boston-Herald Traveler in 1929 with a value of \$149,057.50; 2,350 shares in 1930, value, \$84,913.64; 1,632 shares in 1931 with a written-down value of \$1,380.50, after which no such stock ownership was reported. Virginia Electric & Power Co. in 1933 advanced \$500 to the Suffolk News Co. "with the understanding that it was to cover prepaid advertising."

<sup>67</sup> Pt. 70, p. 1014.

The Western Public Service Co. reported ownership of 5 shares of voting stock in the Alvin Sun, Alvin, Tex., valued at \$500 in 1925. In 1929 the stock was sold to Gulf States Utilities Co. which disposed of it in the next year. Puget Sound Power & Light Co. made advertising payments in advance totaling over \$10,000, to various Washington newspapers in the years 1928 to 1933, inclusive, the company reporting "the monthly bills for advertising being applied to the prepayment as advertising space was used." Most of the accounts were closed at the date of reporting.

On November 15, 1928, the Puget Sound Co. purchased 25 shares of stock valued at \$2,500 from the Seattle Broadcasting Co. In a letter of August 22, 1933, Mr. McLaughlin, president of the power company, advised this commission:

The subscription was made with the understanding that the company, if it so desired, could appropriate the amount paid for the stock as an advertising fund and that the Seattle Broadcasting Co. would allow it 33¼ percent discount on all advertising until the full amount paid for the stock was used.<sup>68</sup>

<sup>68</sup> Pt. 70, 1015.

- Owens, Robert L., ex-Doherty employee—Continued.  
 Testimony re Cities Service Co., Topeka office publicity, pt. 70, pp. 60-79.
- Oxford County Citizen, The, N. Eng. Pub. Serv. Co. payments for advertising, pt. 42, p. 663.
- Oxford, Nebr., municipal plant, Western Public Service Co. expenses, pt. 70, p. 923.
- Oxley, G. F., N. E. L. A.: pt. 64, pp. 1085, 1086, 1097, 1108-1112:  
 Director, department of public information, U. G. I. Co., pt. 51, p. 700.  
 Letter to A. W. Thompson re "Alladdin U. S. A.", pt. 51, pp. 355 699, 700.  
 To send copy of Wyer report to each Member of Congress, pt. 51, p. 338.  
 Uniform Public Utilities Act, recommended to company executives, pt. 22, pp. 1185-1188.
- Ozark Distributing Co. (*see also* Siebenthaler, A. L.), contribution to Pierce City Chamber of Commerce, "Good public relations", pt. 70, pp. 136, 492.

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- Pace, H. M., Letter from W. J. Baldwin re Dr. Thomas, pt. 79, p. 292.
- Pacific Coast Gas Association. Contribution from U. G. I. Co., pt. 51, p. 680.
- Pacific Coast Geographic Division, N. E. L. A. Payments from N. E. L. A., pt. 61, p. 189.
- Pacific Gas & Electric Co.:  
 Diesel engine competition in municipal plants, N. E. L. A., letter re, pt. 64, p. 1097.  
 Government ownership of public utilities, pt. 61, p. 133.  
 P. U. R. underwriter, pt. 42, pp. 995-996, 998.
- Pacific Power & Light Co.:  
 Advertising—motion pictures, newspapers, radio, pt. 25, p. 929; pt. 65, p. 327.  
 Attorney payments, pt. 25, p. 929; pt. 65, p. 328.  
 Contributions to schools, pt. 25, p. 929; pt. 65, p. 328.  
 Contributions to trade associations and political campaigns, pt. 25, p. 929; pt. 65, p. 328.  
 Expenditures to combat grange public utility and power dist. bills, Oregon and Washington, 1930, pt. 35, p. 215.  
 Expenditures to combat Washington "Bone bill", 1924 and Oregon const. amend., 1926, pt. 35, p. 213.  
 Leighton, M. O., assists in securing license, pt. 25, p. 948.
- Pack, R. F., V. P., Northern States Power Co., pt. 25, p. 125:  
 Formerly president, National Electric Light Association, pt. 25, p. 125.  
 Questions wisdom of Foshay Co. purchasing newspapers, pt. 25, pp. 126-127, 462.
- Page, A. W., U. G. I. contributions to political campaign, 1905, pt. 55, p. 213.
- Page, R. M., editor, Columbus Ledger receives Muscle Shoals editorials from Starr, Ga. P. Co., pt. 28, pp. 52, 343.
- Paget, J. H., Carolina P. & Lt. Co., public addresses, pt. 26, p. 45; pt. 65, p. 354.

- Public Service Co. of New Hampshire:  
 Advertising, pt. 60, p. 138.  
 Contribution to Tilton School, pt. 60, pp. 138, 602.  
 Contribution to trade associations, pt. 60, p. 138.  
 Employees delivering public addresses, pt. 60, p. 138.
- Public Service Co. of Northern Illinois:  
 Contribution to Univ. of Ill., pt. 50, p. 445.  
 Foreign Language Newspaper Service Corp., pt. 62, pp. 214, 738, 740.  
 P. U. R. underwriter, pt. 42, pp. 995, 997.  
 Stock in Radio Broadcasting Co., pt. 60, p. 171.  
 Stock in Utilities Research Commission, Inc., pt. 60, pp. 166, 634.
- Public Service Co. of Oklahoma:  
 Advertising—motion pictures, newspapers, radio, pt. 60, pp. 142, 612.  
 Attorneys' fees, pt. 60, p. 613.  
 Acquisition of municipal plants, pt. 60, pp. 143, 613.  
 Contributions to trade associations, pt. 60, pp. 142, 612.  
 Contribution to the University of Tulsa, pt. 60, pp. 143, 613.  
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 Miscellaneous contributions, pt. 60, pp. 142, 143.  
 Political activities, pt. 60, pp. 702, 703.  
 Public relations, pt. 70, p. 458.  
 Record Democrat, cost of extra editions, pt. 60, p. 703.  
 Wagoner, Okla., report of L. P. Arnold, pt. 60, pp. 702, 703.  
 Westville, Okla., report of Thos. P. Gilmer re, pt. 68, pp. 329, 330.
- Public Service Commission of Colorado, approval of "selective standards" for gas, pt. 77, p. 67.
- Public Serv. Corp. of N. J., P. U. R. underwriter, pt. 42, pp. 995, 996, 998.
- Public Serv. Corp. of Va., urged to support Gadsden for U. S. Chamber of Commerce, pt. 51, p. 337.
- Pub. Serv. El. & G. Co. of N. J., donation to provide college with P. U. R., pt. 42, p. 1011.
- Public Service Magazine (*see also* Gonden, H. J., Wootan, J. B.):  
 Am. G. & El. Co. distributes to colleges, pt. 22, pp. 469, 1183.  
 Agreement to undertake municipal ownership investigation, pt. 65, pp. 72, 537, 538.  
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# Public Service

Vol. XXVI No. 1

January, 1919

Fourteenth Year

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Let us talk it over

## Purpose of this Magazine

**T**HE purpose of this magazine is to present the facts about public utilities, both privately and governmentally owned; to inform its readers about these important industries in which all citizens are vitally interested.

Dedicated to the public service, to the highest good of the taxpayer, this magazine is opposed to government ownership and operation of public utilities because it believes paternalism is the antithesis of industrial freedom and independence.

In steam and electric railways, in telegraphy and telephony, in electric and gas lighting, heating and power, the United States leads the world as the result of the genius, thrift and economy of individual initiative and private enterprise.

Political conditions in this country, as experience proves, defeat economic and the most efficient operation of public utilities by city, state or federal government. Experience also proves that government operation of public utilities burdens the taxpayers with great economic waste.

Experience convinces this magazine that the public can secure the best possible service at the lowest possible cost by leaving the ownership and operation of steam and electric railways, electric light and power, gas, water and telephone properties to individuals of technical knowledge and practical training under such governmental regulation as will best protect the interests both of the public and the companies.

The sinking of the ships surrendered by Germany would be altruism carried to the point of self-defeat.

“Thank God, the government at Washington still lives,” seems to lose its fervor with the president, the secretary of state and George Creel in far-off France.

Mayor Hylan appointed W. R. Hearst chairman of the New York committee to welcome our homecoming soldiers. The precedent having been established by our largest city, it is now in order to appoint Victor Berger as the head of the Milwaukee reception committee. While it is yet time, we want to suggest to Bill and Victor that the proper dress for occasions of this kind may include a plug hat and a frock coat, but certainly not a red cravat.

## Protecting Public Utilities

To the everlasting credit of the *thousands* of public utility operators of this country it may be said that *only two or three* of them have joined the socialistic movement for municipal ownership. During the past three or four years and at this time, with operating expenses sky-high and with capital charges almost prohibitive, the operation of a public utility has been nothing less than a big job for a big man. And the biggest part of the job calling for the biggest part of the man has been to keep the utility out of the bankruptcy courts. The selling prices of utilities cannot be raised at the will of the operators to meet advanced costs—and it has required the utmost in intelligent, patient, yet vigorous, effort to secure from some reluctant state commissions and city councils and some slow-going courts the legal authority to fit rates to costs. It should be said here that some state commissions and some city councils have granted just relief promptly, but even with these the burden of proof was carried by the utility operators.

The public should know, and it does in most cases, that no increase in rates has been sought for the purpose of adding to the profits of the owners of the property. In every case the effort has been to secure only such an increase as would cover the advanced operating expenses and fixed charges, including only such return on investment as was necessary to maintain the property in efficient operation and development.

In these trying times for the utility operators there have been and are three courses for them to pursue.

First—To keep the utilities in experienced and competent hands and thus assure the best possible service to the public; to make an honest and energetic effort for such fair and reasonable compensation as will protect the service for the public and the property for its owners.

Second—To turn the utilities over to the bankruptcy courts and force the public to pay such rates for the service as the courts may find it necessary to order.

Third—To unload the utilities, with all their responsibilities, on the municipalities and let the taxpayers pay the losses.

Of these three courses, over 99 per cent of the utility operators have chosen the first, which is the most difficult, and in this they have shown an unselfish devotion to the public interest. The road to bankruptcy or to municipal ownership is much

-and be fair about it.

easier, but to take it means deterioration of the service to the public and either higher rates or the saddling of heavy losses upon the taxpayers. The two or three utility operators who have sought to unload their properties on the municipalities have had but one desire—and that was to save their investors' money.

Again we say it is to the everlasting credit of the utility operators of this country that over 99 per cent of them have stood and are standing firmly against the waste, extravagance and inefficiency of bankrupt and municipally owned and operated public utilities.

### *A Mighty Reform Impends*

For twelve years this magazine has been pointing to the Sanitary District of Chicago as the greatest sink-hole for taxes existent in this country. The Sanitary District was created many years ago for the primary purpose of building and maintaining a drainage canal to divert sewage from Lake Michigan and thus remove the contamination of Chicago's water supply. The legislation necessary for its creation was put through with the understanding at the time that the canal could be built for \$20,000,000 and the cost of its maintenance and administration would be covered by the revenue from the sale of its water power and the lease of lands abutting the canal.

Like all other municipal undertakings the cost of the canal exceeded the preliminary estimate—in this case the excess being a trifle of about \$80,000,000. Instead of making the expenses of maintenance and administration out of the sale of water power and land leases, as promised at the beginning, the drainage district trustees are taking it out of the taxpayers at the rate of over a million dollars a year, the hydro-electric power generated by the district being sold for less money than it costs to operate the generating and distributing plant and the lands owned by the district being allowed mostly to remain in idle waste.

This gigantic sink-hole for the taxpayers' money has been built up and elaborated by the usual political methods of patronage. It has been considered the first political duty of the trustees, of whom there are nine elected by popular vote, to use the tax resources of the district for the support of a large army of what Col. George Harvey aptly terms "the salaried unemployed."

Last November three republicans were elected as members of the drainage district board over three democratic candidates for re-election. Before this

election there were five republican and four democratic members; now there are eight republicans and only one democrat on the board. During the recent campaign the five republican members of the board put out a signed statement, which said, in part:

Since 1912 the sanitary district of Chicago has been under the control of greedy and incompetent democratic spoilsmen.

Under the reign of the spoilsmen, of which the three present democratic candidates were ringleaders, jobs were peddled at wholesale as political plums to unprincipled and incompetent henchmen at enormous cost to the taxpayers. Pay rolls were topheavy with aids of ward bosses and kin of the trustees. Political contractors waxed rich at the expense of the people. Rapacity was rampant and the district was easy plucking.

Against candidates of such malodorous repute the republicans have nominated for trustees three men of unusually clean records for high ability and unimpeachable integrity.

This statement comes from the five members composing the majority of the board since 1915 and the question naturally arises: Why have they not, during the past three years, wiped out the evils they complain of? Maybe their majority of only one was not sufficient to carry out such a great reform. But now that the republicans have a majority of eight to one we may look for speedy and drastic reform.

We confidently expect to see hundreds of democratic names dropped from the pay rolls—and the names of republicans inserted therefor.

What "suckers" we taxpayers are!

### *Administering the Anaesthetic*

Governmental operation of the railroads became necessary as a war measure because political interference with the railroads for a great many years had prevented men of experience and ability from bringing and keeping our great carrier systems up to that standard of efficiency required to meet the unusual transportation demands of a nation at war. The truth of this assertion is admitted by the government in its action of doing with the railroads nearly everything which it had previously prohibited by law or denied by regulatory authority. If the railroad companies had not been subjected for a great many years to the harassing "political" control of the federal and all the state governments and if they had been permitted to charge for transportation an amount sufficient to provide increased wages for their employes and the maintenance of a credit for necessary extensions and improvements, no doubt they would have been in condition to render the maximum service required during the past two years.

In the face of the undeniable fact that years of governmental regulation impaired, rather than improved, the efficiency of the railroads, comes Di-

rector General McAdoo with the amazing proposition to extend the period of governmental operation for five years in order to give it a fair trial. Governmental regulation, on trial for decades, has failed, and it has failed not on account of any misunderstanding of railway economics on the part of the regulators, *but on account of political interference.*

Knowing that political interference is the sole cause of the failure of governmental regulation, the public is not ready to accept the hazards of government *ownership and operation* of railroads at this time, nor will it be ready in the fall of 1920. Nor will astute politicians be ready to go before the people in the fall of 1920 with a declaration favoring outright governmental *ownership* of railroads. No, indeed. It will be much safer for them to appeal for "a fair trial"—say five years—of governmental *operation*. We all know the American people are kindly disposed toward "fair trials."

### *Ignorance Is a Dangerous Leader*

Where private enterprise actually fails to render proper public utility service it is the duty of the municipal government to consider municipal ownership, and in doing so, it should investigate and determine these questions:

1. Is the failure of private enterprise to render satisfactory service the fault of the company rendering the service?

2. Assuming that the failure is the fault of the company, is such failure due to a willful and avaricious purpose to disregard public requirements? or.

3. Is such failure due to the conditions imposed by the franchise—or regulating conditions under which it is compelled to operate being such that it cannot—financially or otherwise—render satisfactory service?

4. If it appears that the franchise conditions are too stringent should the city undertake municipal ownership under similar rates and conditions; or, should the city prescribe rates and conditions of operation that will make it possible for the private concern to perform good service.

5. Assuming that the city cannot succeed without increasing rates and making for itself more favorable conditions—such as long term bonds and higher service rates—is it wise for the city to undertake municipal ownership; or, would it not be wiser to allow private ownership the same terms and conditions which the city would have to put into effect if it undertook municipal ownership?

The mere fact that private enterprise has failed to supply satisfactory service does not indicate that municipal ownership would certainly meet public requirements. In fact, municipal service might be less satisfactory than private ownership. Municipal governments are not always successful in perform-

ing even their imperative duties—health, police, street and alley cleaning. In fact, foreign students of American governmental conditions assert that the great failure in civic affairs in America is the incompetency and corruption of municipal governments.

Too often, men who are not well informed—who do not know the principles that govern—men who are addicts of passion and prejudice—men who seek for profit for themselves—propose and promise impossible benefits from municipal ownership. Ignorance is a dangerous leader in civic affairs.

### *Stop, Look, Listen*

A good many taxpayers in Chicago do not look with disfavor upon municipal ownership propaganda. They drifted into this mental attitude at a time when they were made to believe that if the city owned the street railways fare-rates would be reduced, lines extended, and revenue turned into the city treasury that would operate to reduce the burdens of taxation on real and personal property. It is unfortunate that real estate agents and property owners do not take cognizance of the fact that at this time there is strenuous agitation in favor of buying the traction lines and paying for them with bonds based upon the general credit of the city of Chicago. This would mean that unless the traction properties took care of themselves and earned enough to pay interest that taxes would have to be levied to make up the deficiency.

At the present time the municipal government of Chicago is running behind nearly five million dollars a year. To some extent this is due to diminishing receipts from saloon licenses. Before the November election there were twenty-eight dry states. November 5, four states voted for prohibition—making thirty-two states which, presumably, will vote in favor of the dry amendment to the Federal constitution. In addition, five states that were classed as "wet" have already adopted the national dry amendment. This makes thirty-seven states which, in all reason, may be counted upon to support the amendment. Thirty-six states are all that are required to adopt the amendment. In addition to the foregoing states may be counted, at least as probable, Illinois and New York. All of this is highly germane to the taxation system in Chicago. It means that, in all probability, within a year or so, Chicago will be deprived of more than one-fourth of its total revenues for municipal purposes. This will have to be made up, in whole or in part, from increased taxes upon real and personal property.

At the present time Chicago is in debt for money expended for its ordinary operating expenses about ten million dollars and most of this indebtedness is in the form of judgment notes in the hands of bankers, which can be taken into court when due, and the

judgment obtained, and a special tax levy ordered in addition to the regular legal tax rate. When this is done—and it is almost certain to be done—the tax rate will be increased about fifty per cent. Notwithstanding these financial embarrassments confronting Chicago, municipal ownership propagandists, as already explained, are persistent and insistent that the legislature, at its coming session, enact legislation that will enable the issuance of bonds to pay for the traction properties, plunging the city into a new maelstrom of financial complications.

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### *Why Deceive the Public*

In an interview published in the Chicago Evening Post Donald R. Richberg, special counsel in gas litigation, made the following statement:

“At the outset the commissions were organized to protect the public from the utility corporations. Now, however, the pendulum is swinging the other way, and we find the utility corporations appealing to the commissions for permission to add to the burdens of the public on the plea of rising cost of labor and material due to the war.”

This is from a lawyer! It shows how people are being deceived by the attorney hired by the city council and paid for out of taxpayers' money. The fact is the public utility commissions were created to establish justice; and, not to save anybody from anybody else. The commissions came in as the best device that could be provided after city councils had failed to properly regulate rates and conditions of public utility service. As a matter of fact, at the time when the public utility commissions were organized, all of the courts—state and national—were cluttered with cases arising out of the attempts of city councils to make political capital out of rate regulation. The commissions came in and, taking the work away from the city councils, proceeded to uniformize regulation of rates and service by establishing similar rules for all.

Mr. Richberg's statement that the commissions were organized to protect the public from the utility corporations is true, but it is not *all* the truth, for the commissions were established, also, to protect the utility corporations' investors from political transient adventurers who try to perpetuate themselves by deceiving the people—just as Mr. Richberg seeks to do.

The most efficient of the state public utility commissions—those doing most *for the benefit of the public*—have declared in many recent cases that a utility rate may be unjust and unreasonable because it is too low on the very same principle that a rate may be unjust and unreasonable because it is too high.

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One of the things of small consequence which we cannot understand is how Professor Edward W.

Bemis has so far escaped being drafted into the Wilson administration. Perhaps they are reserving the professor to take the management of the telephone and telegraph systems, a job for which he is particularly unfitted.

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A copy of this magazine addressed, in printing, to Sioux Falls, S. Dak., was returned by the post-office with the notation “No such office in state named.” If we are to believe the postoffice department the metropolis of South Dakota is without postal service. Somehow or other, we can't believe it.

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According to the political writer on the *Daily Journal* the principal result of the recent local election in Chicago was the shifting of several thousand pay-roll positions from “deserving democrats” to “deserving republicans.” Come on, you taxpayers—pay, pay, pay.

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That sure was a pat caption Col. Harvey put under the pictures of General Leonard Wood and Col. Theodore Roosevelt in a recent issue of the *War Weekly*. It read: “He kept *us* out of war.”

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The postoffice department, having almost completed the failure, financially and otherwise, of the postal service, is now ready to lend its talents in that direction to the telephone and telegraph service.

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Taxpayers, beware of the public utility operator who advocates municipal ownership—he is simply tired of the job of discharging his obligations to the public.

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### **Hughes on Public Ownership**

In commenting on a recent speech by Charles E. Hughes at Columbia University, the *North American Review's War Weekly* says:

“Regarding the respective merits of private and Government ownership and operation of public utilities, Mr. Hughes but puts in words the result of all but universal experience when he says that such Government ownership and operation mean inefficiency for one thing, and for another, the deadly danger to a Republic of vast bodies of organized political office-holders and job-holders. But Government Ownership is not the question which now concerns the country. It is not up for decision by the American people. What is before the people, and before them in ominously aggressive form, is whether the country shall be dragooned and tricked into a policy of Government Ownership without having an opportunity to say whether it wants it or not. It is that dragooning and chicanery process to which we are now being subjected. It is for the promotion of that Government Ownership policy in the interests of scheming politicians and Socialistic faddists that that temporary authority, granted under the impulse of generous patriotism, is now being exploited to ends never contemplated when it was granted.”

# Municipal Electric Lighting in Massachusetts

## Dr. Lincoln of Harvard University, in a New Book, Concludes There Is No Reason Why a Municipality Should Invest in an Electric Plant

"The Results of Municipal Electric Lighting in Massachusetts," by Edmond Earle Lincoln, M. A. (Oxon.) Ph. D. 484 pp. Published by Houghton, Mifflin Company. Sold by Utilities Publication Co., Chicago; price \$3.00.

The author of this book, Edmond Earle Lincoln, who is an instructor in economics at Harvard University, approaches his subject with a rare appreciation of its importance and a will to make his work informative. Therefore he makes no guesses, but enters upon a laborious investigation which brings out all of the facts essential to show "The results of municipal electric lighting in Massachusetts." It is by gathering these facts and presenting them in well ordered classifications that he brings about an inevitable conclusion:

**"Under such effective regulation of the electric light and power business as is found in Massachusetts at present, there is no reason whatever why a municipality should invest in an electric plant. \* \* \* No real economies are likely to be thereby effected and the possibility of loss is great."**

Before this conclusion is stated there are chapters devoted to a survey and criticism of the literature on the subject of municipal electric lighting in the United States, the Massachusetts laws and the work of the Board of Gas and Electric Light Commissioners of that state, physical statistics, analyses and comparisons regarding municipal and private electric plants in Massachusetts, financial statistics of generating and purchasing plants, the local survey and the local background. There is also a very interesting chapter on miscellaneous considerations, including labor and wages, labor legislation, valuation of estates and tax rates and the financial condition of municipalities owning electric plants.

"The object of the present study," says the author, "is

to determine as nearly as may be the results of municipal electric lighting in Massachusetts, viewed not merely from one or two angles, but from all angles. \* \* \* Though balance sheets, operating accounts and rates have been usually zealously invoked in researches on this subject, they *alone* can indicate but a limited portion of the real issues involved for they are *relative* rather than *fundamental* considerations. They are the results of other factors not so easily discoverable, but in many cases far more significant."

So Dr. Lincoln goes thoroughly into the "other factors," even into such matters as the proximity of the generating plants to navigable waterways and to sources of fuel supply, whether equipment is all owned or partially leased, the topography of the district served, the traits and traditions of the inhabitants, the character of the local government and labor legislation and conditions. In important details he goes much farther than any other writer on the subject has ever attempted.

The research covers 18 municipal generating plants, 21 municipal purchasing plants, 17 company generating plants and 16 company purchasing plants: a comparison of municipal with company plants being necessary to show the net results of municipal ownership and operation. Dr. Lincoln explains that in selecting the private plants he found it necessary to choose "the smallest and in many cases the more poorly managed" because only such could be fairly compared with the municipal plants, all of which, excepting Holyoke, are small. Therefore "the results of municipal electric lighting in Massachusetts," in this work, are not drawn from any comparison with such efficient private operation as prevails in Boston, Lowell, Worcester, Springfield, New Bedford and other large cities of the Bay State. As the author states, "*Existing circumstances have made it necessary to compare public business as*

### Profits That Failed to Materialize

From "Results of Municipal Lighting in Massachusetts."  
By Edmond E. Lincoln.

In 1897, a special investigating committee, appointed by the city of Holyoke to look into the subject of municipal electric lighting, reported that, under public ownership, there would result a saving of more than 25 percent in the rates, and that after five years the city would own its plant, debt free. Holyoke has done well, and the rates are low; but the outstanding liabilities, current and funded, together with the appropriations from the tax levy for debt payments, at present amount to about \$1,200,000, though the plant still confines its operations to its own narrow territory, and probably a large investment in a new station will soon be needed.

Sixteen years later, another special committee, having made a careful investigation with the assistance of a trained engineer, reported to the selectmen of South Hadley that, if the town would take over the plant of the South Hadley Falls Electric Company, there would, in one year, be effected a saving to the municipality of \$4,250, and the street lights, which had been costing \$5,800, could thus be secured for \$1,550. The plant was bought, and under the first year of public management, the actual cost of the street lights, allowing for taxes lost, was between \$6,500 and \$7,000, or one-sixth higher than when the service was supplied by private enterprise.

**Municipal plants should be required, by law if necessary, to be conducted exactly as if they were commercial enterprises. In no other way can the public be made to understand clearly what they are gaining or losing as a result of municipal ownership.**

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*we find it with private business in many cases at its worst.* Consequently, if municipal ownership shall appear to hold its own, the reader can rest assured that it has been given the benefit of any doubt which might arise, and if the results are found to be unfavorable, the case against municipalization as a general policy will be thereby the stronger."

#### **Municipal Plants Not Progressive**

In his concluding chapter, Dr. Lincoln says:

"In the first place, it appears that the conditions under which the municipal generating plants are operating, both natural and artificial, are far more favorable to success than is the case in the corresponding group of companies. They serve a more densely populated territory, in which relatively more manufacturing is done than in the districts supplied by the other group. Nor does their history indicate that they have in general been instrumental in promoting the higher industrial development here found.

"When the pragmatic test is applied, it becomes evident that, from the physical, financial and developmental point of view, when due allowances have been made, this group of public plants (Holyoke excepted) have, in the more important respects, usually lagged somewhat behind the private plants studied. They seem not to be serving their more favorable territory so adequately as are the latter, nor have they made any attempt to develop new territory. They have probably tended to be too conservative in their extension policy, and, with a very few exceptions, have taken little thought regarding the future development of business, in so far as their station equipment is concerned. Their aim seems to have been to follow rather than to lead the growth of industry and the new demands for service. This, however, may be a far more correct policy for public industry to pursue than one of reckless expansion which sometimes characterizes the conduct of private enterprise.

"In a financial way they have recently, for the most part, been doing reasonably well—a condition of affairs due to over-conservation rather than to superior efficiency. The operating accounts and balance sheets make a much better showing for municipal ownership than do the physical features of the business, which are not so easily discovered, but which, when properly studied, furnish us with far more accurate tests than can be applied by means of a superficial survey of rates and balance sheets. Though the earlier deficits are generally being made good, the quality of the service rendered has, in many cases, appeared to suffer as a result.

"Upon the whole, while this group of plants have by no means been altogether failures, it cannot be truthfully asserted that, when all elements in the problem are considered, they have been any conspicuous success. With one or two exceptions they seem simply to be performing for themselves, with little or no return except the satisfaction derived from their exertions, those services which might have been rendered equally well, if not better, by private enterprise.

"Fortunately, these municipal plants have been in the main comparatively free from most of the sinister influences which frequently beset public business of this kind. Yet barring Holyoke, careful investigation has revealed the fact that the larger the city having its own plant, the greater is the danger from "politics" and "graft." In at least one unusually important case the conditions have been disgusting beyond relief, while in two other large plants, in the past at

any rate, the situation has been, to say the least, highly unpleasant.

"Nor is the outlook a propitious one. Not a municipal generating plant has been installed since 1904, though 18 purchasing plants have begun operation since 1907. There is a marked tendency in both groups in favor of purchasing current from large private concerns and doing only a distributing business. Already three of the companies studied for the year 1914-15 have ceased the generation of current, but within the same time seven municipal plants have, for the present, and probably for all time, stopped the production of current. And, in spite of the great loss which will result to the community if a public plant be 'scrapped,' and notwithstanding the greatly increased cost of street lighting which must be borne, it would probably be far more economical in many cases to follow this policy than to overhaul the old plants and equip them for future needs.

"In some respects a marked contrast is afforded by the municipal plants which operate only a distributing system. For them the conditions seem to be in large measure reversed. They have, in many instances, commenced operation in districts which could offer small inducement to private concerns, and it might appear that they would accordingly have little possibility of success. Yet, as a result of the united public sentiment back of them, and by reason of the careful supervision of the board in countless details, they have made an unusually good showing as contrasted with the purchasing companies.

"As would naturally be the case by reason of their more recent installation, this group of public plants is burdened with a far lower investment than are the private plants. As they have never generated any current, they have had no opportunity to accumulate a larger proportion of 'dead assets.' In fact, the relations existing between the two in this regard are such that it seems almost futile to attempt comparisons. But, measured by the tests which it is customary to apply, they appear to have been making a better record, under less favorable geographical and business conditions, than have the other plants. To be sure, they have not really made anything in a financial way—they have, upon the whole, simply kept even with the game. They are still young, and in the years to come, when repairs and renewals become urgent, the operating expenses can be expected to mount rapidly. A good share of their success also is due to the fact that they are dependent upon private enterprise for that portion of the business which is most difficult to be handled by public officials and employees. All credit is due them, however, inasmuch as they have been rendering, at a comparatively low cost, service which would in many cases have been difficult if not impossible to secure from private concerns.

"Finally, the writer believes that, under such effective regulation of the electric light and power business as is found in Massachusetts at present, there is no reason whatever why a municipality should invest in an electric plant, certainly not in a generating plant. No real economies are likely to be thereby effected, and the possibility of loss is great. There may be instances in which public ownership of merely a distributing system is highly desirable. Yet, this form of ownership also, from an economic point of view is justified only when private business cannot be induced to enter the field except at prohibitive rates. The day has long passed when there is no alternative between unrestricted private industry on the one hand, and public ownership on

**Whether under private ownership or under public control, there probably never has been and never will be a time when the best results can be attained if those methods which make for efficiency, those stimuli to individual initiative which are the basis of industrial and social development, are cast into the discard. From an economic point of view, the more nearly public business conforms to the well known canons of the best private enterprise, the more successful it is bound to be.**

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the other. There now seems to be no valid reason for using the taxpayers' money for the sake of doing what can be as well done without adding to the ever-increasing municipal debt. The burden of proof clearly rests upon those who would, under the circumstances, advocate a further municipalization of the industry in this state."

\* \* \* \* \*

#### **Good Business Methods Urged**

"Finally, and far more important from an economic point of view, the municipal plants should be required, by law if necessary, to be conducted exactly as if they were commercial enterprises. In no other way can the public be made to understand clearly what they are gaining or losing as a result of municipal ownership. Only by subjecting these publicly owned plants to the same tests that are applied to private business can we reach any definite conclusions as to their real efficiency.

"This means that they should sell street lighting service to their municipalities at what appears to be a fair price, and that they should in turn pay taxes at the usual rate. They should either own all of their property, or, if municipal real estate be utilized, they should pay an equitable rental therefor. Further, the services rendered by any public official should be estimated and charged at the true value of that service. Probably not a single appropriation should be made from the tax levy for any purpose whatever in connection with a municipalized commercial enterprise, after it has become 'seasoned.' Such an industry should be given every opportunity that is afforded to private business, and it would, in addition, have the advantage of securing its capital at a lower than usual rate of interest. But here the public financial responsibility should end.

"If publicly owned commercial business were carried on as here suggested, the writer will venture to predict that, while many municipalities would be dissuaded from plunging into ills that they know not of, those which have already acquired an industry or which, under the new conditions, do make the experiment, will be encouraged to bring their business to the highest degree of efficiency. Whatever may be our conclusions regarding the desirability of public ownership for other than financial reasons, there seems to the writer to be no disputing the fact that if the attempt is made, it should be done in the most effective manner possible. Whether under private ownership or under public control, there probably never has been and never will be a time when the best results can be attained if those methods which make for efficiency, those stimuli to individual initiative which are the basis of industrial and social development, are cast into the discard. From an economic point of view, the more nearly public business conforms to the well-known canons of the best private enterprise, the more successful it is bound to be.

"In parting, what further light does the present study throw upon the broader problems of public ownership? The stress of the present war is greatly hastening a tendency which was already strongly pronounced in the electric light and power business throughout the country, i. e., the shutting down of small and wasteful generating plants, and the consequent development of a comparatively few large cen-

tral stations—hydroelectric wherever possible—which can keep pace with the economic growth of the industry, and thereby conserve for other uses our supplies of fuel. The electrification of practically all means of transportation is probably not far distant; the use of electric current will eventually, no doubt, displace other methods of heating; our factories will depend for motive power almost solely upon central station generation. We are on the threshold of marvelous possibilities in the art.

"But in the meantime much experimentation will be necessary, great risks must be run, many failures will ensue. The problem is fundamentally too vast to be bounded by the confines of any municipality, with its petty demagoguery and the jealousy of its neighbors. No unit smaller than the state could possibly deal with the situation. But would the state prove equal to the task? We fear not, so long as human nature remains as it now is. Under democratic institutions, the larger the governmental body, the less economic and the more political it becomes, and the more energy is wasted in accomplishing little. To blaze the trail is the work of a select few, not of the people en masse. The electrical industry, as all industries which reach their perfection, will be developed by personal genius and individual effort urged on by the desire to serve, no doubt, but more potently stimulated by the prospect of material rewards.

"What part the state and the national government will play in our future industrial life cannot well be foretold. The more primitive stages of civilization were marked by minute regulation of private affairs. The individual was submerged, while the ruler, or his representatives, was the chief entrepreneur. Such an extension of state activity to commercial undertakings does not appear to be compatible with freedom and growth. The most autocratic of civilized government has until recently also been the most active in industrial enterprises. Could it be otherwise? The present world struggle is forcing others to follow suit. Will the coming of peace bring with it a fuller realization of the dreams of the socialist, or will the former conditions be restored? Public ownership of some producers' goods may eventually become more general. We must not, however, be unmindful of the fact that, when the war is over, people will again be actuated by the old individual motives; most of the existing urgent incentives to unselfish group action will cease. Business now carried to a reasonable degree of perfection by the public powers will, if retained in public hands, be in danger of rapid stagnation. Whatever the sequel may be, this modest study, as well as most careful and unbiased investigations, points to the conclusion that as a rule only the simplest and the 'well-seasoned' enterprises are at all suitable for public operation; and even these are in grave danger of becoming less efficient than they would be in private hands. Though political expediency or social necessity may sometimes momentarily outweigh all economic considerations, it still seems inherent in the nature of things that private industry must continue to show the way."

**See advertisement of Dr. Lincoln's new book on  
Page 31 of this number of Public Service.**



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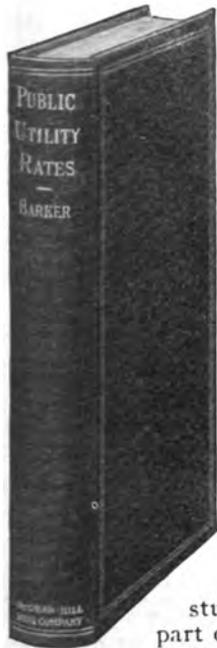
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one-half of their earnings in dividends. The other half they passed to their surplus accumulation. The Comptroller's Report says further:

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It is not designed to find fault with the earnings of national, or other, banks, but it is worth while to ask the question, Why should there be restraints and criticisms of public service concerns because they earn, maybe, less than one-half as much as the national banks? And, too, it should, also, be considered that banks are not at any time liable to lose their entire investment by the expiration of their franchises, but can organize and proceed with their business. The more one considers the liberality and fairness with which governments—state and national—have dealt with the banks the more one is compelled to wonder why the same policy cannot be pursued toward investments which built up the physical and taxable values of cities.

## "The Public Be Damned"

A good many years ago one of the Vanderbilts was accused of saying "The public be damned!" He never said it, but how Vanderbilt was abused because of the rumor that he did say it!

It was charged that he said it in connection with the railroad business. But now that the government has charge of the railroads, how perfectly it carries out a policy of "The public be damned!" A gentleman tells me that in New Orleans he wanted to buy a railroad ticket. He took his place in a line and waited fifty-five minutes before he could transact his business. And when he finally reached a clerk, he was told he was lucky to be waited on in fifty-five minutes.

This is the railroad "reform" we have accomplished after years of effort. And rates are 25 per cent higher than under private ownership, with a tremendous deficit looming up.

Some of our wisest men say the proposed league of nations is a similar "reform."

That is the trouble with us fool Americans: we scream and agitate for a certain thing, claiming it will solve our problems, and then discover it isn't what we needed—that all our work for reform has been wasted.—From Ed Howe's Monthly.

## Weighed and Found Wanting

[From Harvey's Weekly]

THE President's Socialistic dreams seem doomed to a rude awakening. Three recent, or current, incidents have given them a shock from which we shall not expect to see them easily recover. For the American people are practical. They judge things by their results. And when those results directly concern the popular welfare, in both cost and efficiency of service, they will not be ignored, and no idealistic talk of voices in the air will seduce the people from the paths of judgment. This nation is quite willing to pay high prices for good service. It never complains of increasing cost when there is a commensurate increase in quality. It also is quite willing to let the management and control of utilities be vested in whatever hands can manage and control them best.

But the American people will not permanently consent to higher prices for inferior service, or to transfer of control to less efficient hands.

The railroads are one case in point. They are under dictatorial government control; and the Administration is trying its utmost to keep them there in perpetuity. What is the result? February, 1918, was the worst month down to that time in the history of American railroads. For that there was a reason. There was a scarcity of coal, and the weather was extraordinarily inclement. But February, 1919, proved to be a still worse month for the railroads. Conditions were reversed. There was plenty of coal and the weather was extraordinarily mild and pleasant. Moreover, freight rates had been considerably increased. Yet the net operating income of the roads was less by \$2,225,000 in February, 1919, than in the disastrous February of 1918. Rates were increased about 25 per cent, but the income decreased 14 per cent, and the service was slower. Nor was that month singular. The net operating income in January was \$37,000,000 below the average of three years. The deficits thus created must, of course, be met out of taxation. In 1918 the deficit averaged \$17,000,000 a month.

This year it has thus far averaged \$37,000,000 a month. Expert figurers and account-mongers may juggle with these facts as they please. The facts which appeal beyond all contradiction to the public mind are these:

The railroad service is poorer than it has been before in this generation. The trains are slower, less frequent and less trustworthy.

The cost of the service to the immediate patrons of the roads is higher than it has been before in this generation. Passenger fares are higher; freight rates are higher.

The people are being taxed as never before in this generation, through inquisitorial incomes, stamp and other taxes, to meet a deficit of hundreds of millions of dollars a year in railroad accounts.

In brief, government control of the railroads has meant, and now increasingly means, poorer service at higher cost.

The food supply is another case in point. Early in the war there was formed what was substantially a government food trust. The government assumed the power of fixing prices of wheat and other important staples, and of regulating their distribution. The result is that with larger stocks of food products on hand than ever before in our history, the cost of food to the people remains at famine figures. Here is the situation: The supply of wheat in hand today is about three times as great as it was a year ago; the prospect for this year's crop enormously exceeds the greatest ever before recorded. The winter wheat crop is estimated at about 900,000,000. That is many millions of bushels more than both the winter and spring crops put together ever were, save in two or three years. It is more than both those crops were in the bumper year of 1914, when farmers were glad to sell at 70 or 80 cents a bushel. And now, with this perfectly unprecedented crop in prospect on top of a plethoric present supply, they are holding wheat back from the market in order if possible to force

(Continued on page 136.)

# The Tribulations of Public Operation

By ELLIOTT CHURCH

THERE are people who have really believed that public ownership and operation would result in better service and lower cost to the public. These people were delighted when the war resulted in the Government taking over the operation of one utility after another. Rates were going to come down right away and the service was going to be better. Any of these people who have been forced to patronize any of the government operated utilities have not found it easy to keep their enthusiasm up to the high pitch that it was when the Government first began operations.

The railroads were the first to be taken over. It is true that this was a war measure and that the public could not expect the service that it had received. Nevertheless it was deceived by announcements made by government officials into the belief that better service would be rendered. It was announced that the "Public be damned" policy of the railroads would cease and that henceforth the policy would be "The public be pleased." This public be pleased policy was carried out by cutting down the number of passenger trains to the minimum, side tracking those which were run to give long fast freights the right of way, and holding up the shipments, or even refusing to take the shipments of private shippers. There is one thing very certain. The railroads under private operation could not have put through such practices under the slogan "The public be pleased."

At no time in the whole history of the American railroads have they been operated under a "public be damned" policy to the same degree that they have been during the time that they have been operated under the Government. There is no question but that this was necessary. The railroads have not been operated and it was not the intention of the Government when taking over the railroads to operate them under a "public be pleased" policy. From the very start they were operated under a "help win the war" policy. This was right and proper. They were taken over largely because it was felt that the "public be pleased" policy of private operation, the only policy that makes private ownership a success, would not result in the fastest possible movement of war supplies. The fact nevertheless that the Government did advertise a "public be pleased" policy and then not only failed to back up this advertising but operated on the opposite policy shows its inability to make a success of railroad operation under normal times. The public has become too much accustomed to the courtesy, good service and comfort of pre-war American railroad travel to take kindly to the sort of service that can be expected from government operation.

The method of standardization put into operation by the Government, though a good war measure, would if continued for any length of time result in reducing the efficiency of the railroad systems and very materially hold back progress. Standardization is all very well for quantity production, but quantity production does not spell progress. If all our automobiles had been manufactured in highly standardized factories, they would not have all the comforts and conveniences to be found in them today. This fact is demonstrated by an examination and comparison of those cars which have not been standardized to any great extent in the production processes and those which for many years have been manufactured where quantity pro-

duction and standardization are the main features of the factories.

Railroad rates instead of coming down have steadily advanced and the service has steadily depreciated. Today we have to pay much more and we get much less than we did under private ownership. If this was confined to the railroads we might be persuaded that the railroads are a special case but in everything that the Government operated the cost has mounted. It is hardly possible that it could have mounted as fast under private operation.

For years we have been accustomed to look upon the telephone and the telegraph service to be as reliable as the rising and the setting of the sun. Labor troubles were handled in such a way as not to seriously interfere with the service rendered to the patrons. Today my telephone is dead. It is of no use to me. No one can call me and I can call no one. I am still paying rates but am receiving no service. Why is this? Simply because the governmental powers now operating the telephones have not been able to handle the labor situation as satisfactorily as were the men who did this work under private operation. All commercial, industrial and social activities have come to depend to so great an extent upon the telephone that this is a real catastrophe. There is promise that continued government operation will result in placing our telephone service in the same class of that of other countries where government ownership and operation of telephones and telegraphs is in the hands of the Government. Up to the time that the Government took over the operation of these systems, the United States had the best and the most efficient systems in the world. They were dependable and the modern business man found it greatly to his advantage to make use of them.

The cost of using the telegraph lines is constantly rising and the increases are greater than at least one man whose experience in building up a great system should qualify him to know, claims is necessary. The public is being given poor and poorer service and it would almost seem is being mulcted at the same time.

The post office is held up as a shining example of the efficiency of government operation. Yet this service has not demonstrated its ability to meet emergencies any better than have privately operated utilities. The cost of the service has been increased and the quality and reliability decreased. This decrease in quality of service appears to become greater as the Government takes over the operation of more and more utilities. It would appear that when railroads were privately operated they tended to maintain the mail service on a high standard. Although government bookkeeping is such that it is rather difficult to get at the true condition of affairs it is quite evident that the post office service is not self-sustaining. It is also evident that at least a part, and this a goodly part, is due to the abuse of the franking system. It costs the Government thousands and thousands of dollars to carry free though the mails political propaganda that should and no doubt would under private operation have to pay its way. There is no question about a private corporation being able to render better service and to render it at lower cost than the Government is now doing in the mail service.

Free service rendered by large private corporations is being condemned by the Government but government operation means a greater and greater extension of free service

to politicians and a great and greater expense to the taxpayer. Why should and why does the Government permit abuses that it condemns in the case of private operation?

Some states have attempted to enter the insurance field. The state of Wisconsin organized a state life insurance company. The object of this company was to render life insurance service at a lower rate than do the privately operated companies. The government ownership visionaries expected this undertaking to show up the profiteering of the private companies. This undertaking was launched and started out with some promise of success. Within a few years, however, business fell off rapidly while expenses increased. Recently the time came when it would be necessary to very considerably increase the rates or re-insure the policy holders in a private company. The only satisfactory solution was to re-insure the policy holders. The state could not give the service rendered by the private companies and do it at as low a cost unless a deficit was made up by the taxpayers.

State and national governmental departments have usually been considered better qualified to operate big enterprises than municipal governments are to operate them. This idea is based upon the assumption that men of greater ability hold the state and national offices and that when the control is thus centralized, politics does not enter into the operation to so great an extent as when the government is strictly local in nature. Whether or not this is true, the state and the national governments have already demonstrated beyond every question of doubt that politicians, no matter how great their political ability, cannot operate business enterprises as efficiently and as satisfactorily as business men can operate them. Politics requires a certain sort of ability and business another. Successful business men do not ordinarily make great successes in politics and our politicians are not making a great success in business.

### A Public Ownership Sink Hole

Toronto's white elephant, the civic abattoir, continues to drain the city's finances at an alarming rate, and is now a quarter of a million dollars in the hole. Last year the cost of operating the institution amounted to 104,662, while the revenue was so small that a loss of \$75,000 was shown. The situation will be even worse this year, as the cost of operation will be larger. Including the civic cattle market, there will be a loss this year on the two enterprises of little short of 100,000—truly a costly price to pay in a single year for the satisfaction of supporting the public ownership fetish.

Even the most ardent advocates of public ownership in the city council are admitting that the situation looks bad, and at this week's meeting it was decided to set a committee to work to make a thorough investigation of the whole business. It is a foregone conclusion just what the result will be. Already Finance Commissioner Bradshaw, who for one does not believe in saddling the whole population of a city with the cost of operating undertakings for the benefit of the few, has expressed the expert view that it is impossible to make the enterprise remunerative, even if the city had power to force every butcher outside of the packing interests to slaughter all animals at the abattoir.

And to talk of the city plunging deeper into the morass, with the addition of a dead meat business, shows an infatuation on the part of Toronto's will-o'-the-wisp chasers that should be promptly dealt with by the citizens.

The city of Wheeling, W. Va., has lost more than \$1,000,000 on its municipal gas plant. It has closed down that plant now and the total loss may reach an additional \$500,000.

### Weighed and Found Wanting.

(Continued from page 134.)

the price up to the \$3.50 a bushel which the Administration itself anticipates. They are already refusing to sell at prices considerably higher than the minimum guaranteed by the government. But the government price-fixing system, which guarantees a minimum price which the farmer shall receive for his wheat, has either no power or no inclination to fix the maximum price which the people must pay for their bread.

Under the government food trust, the more plentiful food is the more costly it is.

The third current example is seen in the steel market. There also government control has been established, for the purpose of "stabilizing prices"—a sounding and glittering phrase. What is the result? The Industrial Board of the Department of Commerce fixed the prices which were to be paid for steel rails and other foundry products. And the Director-General of Railroads refuses to pay such prices and demands that the "stabilizing" business shall be thrown into the discard and that steel shall be thrown into an open market, free from government control. Explain it as anyone may, the simple fact of the case is this:

The government would not pay the prices which it had itself prescribed.

We have said that there are these three noteworthy current examples. There is a fourth, which we might mention, which is both current and of long-standing; in some respects the most flagrant of them all. That is, the extension of government control over the telephones, telegraphs and cables. But we hesitate to refer to it because of the difficulty of doing so in language befitting general circulation in polite society. Let us dismiss it with the restrained observation that services which were formerly inexpensive have been made much more costly, and that services which were formerly singularly efficient have been made so grotesquely bad that to mention "efficiency" in relation to them seems an offensive contradiction of terms.

Let not this criticism be misunderstood. We are not disputing the desirability, perhaps even the necessity, of making some of these arrangements as war-time expedients. We do not believe even that would have been necessary or desirable if affairs had been properly managed before the war. For example, if the government had not for years been apparently trying to starve the railroads to death, the war would not have found them in so inefficient a condition as to call for government intervention. The simple fact is that the government itself was chiefly responsible for the poor condition of the railroad service, and it is notorious that as soon as it took control of the railroads it immediately did with the roads the very things which it had refused to let them do for themselves. Only, if it had let them do those things for themselves, the service would have been improved, while, when the government itself did them, the service was not improved but impaired.

Nevertheless, let us concede that at least some of these extensions of government control were necessary as war measures. It was only as such that they could be justified, and the results to date are nothing short of a "horrible example" to warn us against continuing such control in time of peace. That is the great object-lesson before the American nation today—a lesson so striking and so beneficial as to be worth all its enormous cost to the nation, if only the nation will heed it and learn it and act upon it. Government control has meant and means less efficiency and greater cost; it has meant and means higher prices for the necessities of life. It has been weighed in the balance of practical experience and has been found wanting in profit to the public welfare.

# Some Present Problems of Public Utilities

## Address by Samuel Insull at the Annual Meeting of the Illinois Gas Association

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WHILST sitting here and enjoying the good-fellowship of the occasion, I could not help thinking what a fortunate people we are. Here at the close of the greatest war the world has ever known, before peace is declared, we go back to our ordinary avocations and pleasures, scarcely scarred, in proportion to our population and resources, by loss of life or sacrifice of national wealth; whilst other nations, after meeting the brunt of the awful conflict for nearly four years and grief stricken by appalling losses of life, are doomed to carry enormous burdens for generations.

And what a change has come within the year!

If we had met a year ago the air would have been charged with apprehension of the great German military machine which was to be let loose in a few days for its supreme effort; and instead of indulging in hilarity, we would have been fearful of the consequences of that effort, now ended so gloriously for the arms of the Allies and of the United States.

But notwithstanding our lightheartedness tonight, we in the utilities business have many grave problems before us. We are living in extraordinary times; we face conditions and problems calling for our best thought; and I ask you to pause in the pleasures of the evening to consider some of them.

As utilities men, we must carry our share of the after-the-war reconstruction burden; we must conserve the properties for which we are responsible to their owners, the stockholders; and in doing this we must not fail to maintain and extend the service which these properties render to the public, because maintenance and extension of service is both a duty to investors and to the public and a factor in the state's reconstruction tasks. To meet these obligations adequately, we need to take the broadest possible view of our obligations.

In the very first place we must see to it that the men who went from our service to war, with banners flying, do not have to look for a job when they return. Our duty to the communities in which we live and to the properties which we manage is to place those men on the payroll first and find them jobs afterwards; to see to it that every man who went from our service to serve his country gets as good a position as he had when he left and if possible a better one.

The public utilities business as a whole has been hard hit by the war, with selling prices of its products fixed by ordinance, by contract, or by commission order, and with prices of labor and material steadily advancing over a period of several years. The difficulties in that side of the business represented in this room have been very greatly increased by the still greater difficulties of other kinds of utilities, particularly the street and interurban railways. Their situation has at times frightened our security holders, who have failed to differentiate between the positions of gas and electric companies on one hand and street railways on the other. In the street railway business, labor is a far more important item of expense than any other. Great advances in wages (in many cases by governmental action) without any relative advance in price of service, have brought street railway properties to a dangerous position. Unless we can convince the public that we are not as seriously affected, we will suffer sympathetically as much as the street railways actually suffer.

This situation raises another disquieting question, namely, whether public utilities of any class can depend upon the governing powers for the calm, scientific and just treatment which is so essential both to the maintenance of good service and to the protection of investors in utility properties. This question is emphasized by the positive statement in the newspapers that the Chicago surface lines are to receive no relief whatever from the Public Utilities Commission, and by the hurried re-opening of the Peoples Gas Light & Coke Company's case before the commission, while that company is in the midst of applying recent orders of the commission. And with this discussion comes the further question, voiced in a leading newspaper only a few days ago, asking whether problems of utilities regulation were being considered from the viewpoint of service cost and fair return to the investor, or whether they were being considered with one eye on the Chicago mayoralty campaign and the other eye on the legislative chamber at Springfield.

Gentlemen, regulation of public utilities by state authority—non-political, scientific, just regulation—is on trial at this moment in Illinois.

If state regulation is to be a success, that regulation must be divorced absolutely from politics and administered without reference to the popular favor or prejudice of the moment; if the Public Utilities Commission's existence is to be justified, its decisions must be wholly on the basis of cost of service rendered and a fair wage for capital as well as a fair wage for labor.

I have some right to discuss this subject. I was the first man in the utilities business in this state, I believe, to advocate the regulation of public utilities. In 1868, as president of the National Electric Light Association, I urged regulation in place of competition as a means of stabilizing the utility business, developing service adequate to the needs of the public and lowering the cost of that service.

Regulation has shown, wherever given a fair trial, that it is sound in theory and workable in practice. Whenever given a fair trial it has worked better from year to year. But regulation will not work unless applied justly, in complete harmony with the fundamentals of the theory of regulation.

The right to regulate must carry with it the obligation to protect; and this obligation to protect is not subject to reservations or evasions. The Public Utilities Commission of Illinois was created, and clothed with full regulatory powers, for the protection of the citizens of the state, whether those citizens be producers of utility service or users of utility service. To sacrifice the interests and rights of either class to those of the other is equally reprehensible and unjust; and when injustice enters anarchy is at the threshold.

Whether the utility to be regulated is an individual or a corporate creature of the state, corporation and individual are equally entitled to protection, just as the smallest user of gas or electricity or other public service is entitled to protection; and until we can show the citizenship of the state that justice is not done unless we, as well as our customers, are treated justly, we will have failed in our mission as public utilities men.

Permitting political expediency to color the work of a state regulatory body will destroy that body's usefulness to

the people, and the evil consequences of that destruction will reach far beyond the utilities directly concerned.

Take Illinois as an example. How many people—how many of us utility men, even—realize the importance of this subject to the state as a whole?

The electric light and power, gas, and street and electric railway companies of Illinois represent \$850,000,000 of invested capital. They have a gross income of \$175,000,000 a year.

The new capital expenditures of these Illinois companies in this year of 1919, according to the budgets that have already been made, will be between \$65,000,000 and \$70,000,000; will be that is, *PROVIDED their credit is maintained* (by means of adequate rates) *on a basis that will permit them to secure the necessary funds.*

Think of what that one item means to the reconstruction problems of the state and to the task of providing work during an anticipated period of acute unemployment in general industry.

Let me make a comparison. We have heard much of the state's road building program as a factor in reconstruction and in providing employment; yet the state has provided only \$60,000,000 for road building and its plans provide for spreading expenditure of that sum over not less than a five-year period. In those five years, the public utilities will spend for new capital work in this state, provided their credit is maintained, not \$60,000,000, but probably all of \$450,000,000.

These companies have 45,000 employes, of whom 8,000 to 10,000 were in the fighting forces of the country during the war. They have, it is estimated, upwards of 35,000 stockholders, of whom 25,000 are citizens of Illinois, and there is probably an equal number of the holders of our senior securities, or a total of 50,000 stockholders and bondholders, who are citizens of this state.

The gas and electric companies of the state serve 1,700,000 customers. The street and electric railways carry 2,000,000,000 passengers each year.

In the light of these figures, no words of mine are needed to emphasize the importance of these public utility properties in the commercial, industrial and social fabric of the state. Unless these properties can live and prosper there will be no prosperity in Illinois.

Whilst the protection of this great public utility interest is, therefore, or should be, a matter of concern to all of the people of the state, it is the particular concern of us who manage these properties. Think what it will mean to us if we can bring home, to the communities in which we operate, the significance of the figures I have just given you.

Now it is our special job to get at the people of those communities; to get at our own 45,000 employes, our own 50,000 stockholders and bondholders, our own 1,700,000 customers, and the customers of the electric railways—the people we serve and who know whether our service is good or bad.

We ought to bring home to them that rate making in our business is not a simple matter of fixing a flat price for a product or a service; that a proper system of rates has to be adjusted to varying classes of service and to the conditions under which that service is rendered; that proper systems of rates cannot be worked out scientifically when politics enters, and that an enormous field for development will be opened alike to industry and to ourselves by proper systems of rates.

One of my young men—I do not know whether he was dreaming, or figuring, or just happened to put the decimal point in the wrong place—has worked out the conclusion that the Peoples Gas Light & Coke Co. would be doing an industrial gas business of \$90,000,000 a year if it were supplying gas to all the industries in Chicago that can use it to advantage. That may seem a wild dream. But I know

that the Commonwealth Edison Co., notwithstanding its large business, is doing less than one-third of the possible electrical business in Chicago, and that it would be entirely possible to do \$90,000,000 of electrical business a year instead of \$28,000,000, as this year, if we could get all of the available business and the plant to take care of it.

If that is so, the same figures are likely to apply eventually in the gas business, as the industrial field is more generally developed and we are permitted to work out rates that bear a closer relation to the actual service rendered to each customer, with the charge to him based upon the service rendered.

I am a great believer in publicity. I believe it is our duty to the properties we manage, to the stockholders who own them, and to the communities they serve that we should enlighten those communities on the situation. I believe in doing it not in any gum-shoe way, but openly and boldly. I believe in presenting the facts to the employes, whose interest is just as vital as that of the managers; to the citizens of the state who are owners of the properties; to every customer of a gas company, an electric light and power company or a street railway.

The public utilities have the means of getting at their customers, of getting at nearly every household in the state. If that is done, often enough and vigorously enough and fairly enough, you will find the newspapers taking notice of the facts. If that is done, the politician in quest of votes, whether as a candidate for mayor or other local office, or as a candidate for the legislature or for the highest executive office in the state, will be forced to discuss utility questions on the basis of the economic facts and not by drawing on his imagination to create prejudice against a great industry.

I am discussing this, gentlemen, because to my mind it is vital to our business at this time. I see here many who are in both gas and electric business. We are on the fortunate side of the public utilities business. The electric business has suffered some during the war; the gas business has suffered more; both are recovering and can look forward to years of substantial progress. The street railway business is in a very serious condition, especially in Chicago and the larger cities where heavy wage advances have been made by the federal war labor boards. It is up to us to do our part in presenting the facts, not only of our own business, but of the street railway business, so that justice may be done and promptly done. A great English statesman once said, "Justice delayed is justice denied." That is undoubtedly the case of the street railways today.

Control of public utilities by means of state regulation is at a crisis in Illinois. It must weather this crisis if it is going to establish itself in a way that is fair alike to the public and to investors and so become a permanent and respected function of our state government. And if we, openly and boldly, do our share in this crisis by challenging the fallacies and misrepresentations uttered against the public utilities business, we shall be doing a service to the whole state and to future generations of its citizens.

### Six Cents in Spokane

Following the hearing in Spokane, Wash., before the Public Service Commission on April 2, on the application of the Spokane Traction Company and the Spokane & Inland Empire Railroad for 7-cent fares the commission issued an order making a 6-cent fare effective immediately for a ninety-day period. The new rate was set to go into effect on all lines on April 6. No change in the present transfer or school-ticket system is made. It was proposed to supply conductors with strips of five tickets to be sold for 30 cents, as an accommodation to those not wanting to handle pennies.

# How Taxpayers Who Do Not Use Hydro Are Made to Bear Burden of Below-Cost Service

## Expenditures Paid by Province at Large as Indicated by Clarkson Report But One Instance of Unsound System

THE Clarkson report reveals that in order to show a surplus of \$174,919, Sir Adam Beck's Hydro Commission charged up the Province at large with \$1,117,433 of power general expenses—a deficit of \$942,514 is thus actually indicated.

Here is an outstanding example of how hydro projects, in order to kill private opposition, are financed at the expense of the ratepayers of the Province. Yet *The Financial Post* alone calls attention to the fact. Where are these servants of the people—the newspapers? Do they represent the interests of the ratepayers of the Province as a whole or only those who are users of Hydro power?

Sir Adam would undoubtedly argue that these expenditures were for the good of all citizens of the Province. But such arguments could not be “put over” on the people were it not that they are condoned by the newspapers. The T. Eaton Co. might just as well argue that its advertising expenditures are for the good of the city of Toronto and get the city council to pay the bills. The cases are parallel. There is just as much logic behind the idea that Toronto citizens who do not shop at Eaton's should pay for the running of the store for the benefit of those who do as there is behind the system by which the Hydro Commission spends the tax revenues from citizens who do not use Hydro for the benefit of consumers—and glorification of the name of Beck.

### Sinking Fund Responsibilities

And that is only one item in the count against the soundness of Hydro financing. Take the sinking fund situation as revealed by the Clarkson report. Charges for the first five years have not been deferred—in accordance with sound interpretation of the Act—but have been wiped out. Common business sense demands that sinking fund charges should be set aside every year. If the Hydro has not made proper allowances—and the investigations at Hamilton and St. Catharines have indicated that it has not—then eventually and inevitably the bill must be paid by someone and that someone is the general taxpayer of the Province.

Here, again, methods which only a public ownership project with the people's funds for backing and a public purse to draw upon have been used to crush the private companies and destroy the property of investors. But the piper must be paid at the end of the dance and it will not be the dancers alone who will pay. Not only is the burden upon the users of Hydro but also upon the general provincial taxpayer who does not.

Why are the ratepayers of the Province kept in ignorance of this state of affairs? Who are the newspapers serving?

### Those Rebates of Duty

Take, again, the claim of the Hydro chairman for a rebate of duties paid upon Hydro equipment. Here are the same tactics of demanding discrimination against the private companies which must pay the tariff charges imposed by the Dominion Government. On behalf of the users of Hydro-Electric, Sir Adam asks the national government to turn over to his commission funds which have been collected according to act of Parliament. Hydro customers

would, therefore, get the benefit of this refund while the amount was added to the burden of general taxpayers throughout Canada.

And if this is not done Sir Adam threatens to raise the rates for Hydro.

### Instances of Discrimination

Speaking further on this question of tax exemptions for the benefit of Beck ambitions and Hydro consumers we have recently heard a disquieting rumor that further concessions will be sought by legislation during the present session of the Provincial Legislature. And let it be said in passing that the usual procedure is to bring down these measures at the eleventh hour when they can be rushed through by the aid of the “big stick”—the voting power represented by the Hydro municipal ring—which Sir Adam has learned to wield so effectively.

In August, 1917, the Hydro Commission purchased the stock of the Ontario Power Co., a company generating about 160,000 horsepower, and formerly owned by Buffalo capitalists. The township of Stamford and the city of Niagara Falls have collected large sums for taxes each year from this company. The township gave this company a fixed assessment for 21 years from its inception, which covers all taxes except for school purposes. For school purposes the property is assessed at a small fraction of the amount for which it was valued at the time of the sale of the capital stock to the Hydro Commission. Now, so says the report, the Hydro Commission will seek to relieve itself of all these taxes because the stock of the company is owned by the Hydro.

The Hydro does not own the plant; it owns the stock, subject to the various bond mortgages of the Ontario Power Co. covering the plant. There is no reason why the Hydro Commission should not pay Stamford and Niagara the same rate of taxes as is charged to the other companies.

Having been able for the five-year period to pass sinking fund obligations and at the same time charge general expenses to the Province at large, Sir Adam is now evidently finding it necessary to discover some other means of camouflaging Hydro finances if he is not to charge the consumers what the service is costing. Otherwise he will have to raise the rates; he has threatened it himself. And why, we repeat, should he not do so? Why should his ambitious and fantastically financed schemes be placed as a burden upon the general ratepayer?

### The Vote of Hamilton.

The Hamilton situation is a case in point which illustrates the methods of public ownership finance. The figures of independent experts appointed by the Canadian Society of Civil Engineers proved conclusively that the Port Credit-St. Catharines line could not be made to pay. Yet Sir Adam “put it over.” He had to do so to find a market for the power which he is developing at the expensive Chippewa plant, and the Chippewa project represents, in the first place, justification of Sir Adam's overtures to the Niagara Park Commission for all the available water supply for the people's enterprise—an argument which was

# Facts on Municipal Ownership in 336 Towns and Cities

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**Adair, Ia.**—Having failed of successful operation, the city sold its electric light plant to the Iowa Railway & Light Company, and quit municipal ownership.

**Alexandria, Va.**—The municipal electric light plant was built in 1889, costing \$17,000. It was sold in 1906 for \$3,500, which included a 30-year franchise. The company which bought the plant made a contract for street lights at \$75 per lamp per year, a saving of \$28 per lamp, and made many important extensions of service.

**Allegheny, Pa.**—The municipal plant began operations in 1890, giving city service only. The cost was \$562,000. Investigators for the National Civil Federation call the plant "poorly designed, inefficient and expensive to operate," and state that appropriations for equipment had been neglected to such an extent that "the electrician had to build his own switchboard out of such junk as he could collect from machine shop yards." They state that the payroll could be reduced 15 to 18 per cent, and criticize the use of the plant for political employment.

**Allerton, Ia.**—The municipal electric plant, which has been running at a loss for some time, was sold by practically unanimous popular consent to the Centreville Light & Traction Company.

**Ames, Ia.**—The engineering experiment station of Iowa State College issued data showing: "In a number of Iowa towns the waterworks (municipal systems) are not self-supporting." It showed, as a result of an investigation, that in many towns pumping costs, operating expenses and fixed charges brought the cost of water up to 75 cents per 1,000 gallons, yet the towns, in many cases, were charging only 50 to 66.7 cents per 1,000 gallons, throwing the remainder of the costs onto the taxpayers. The investigation also revealed waste and inefficiency in leaky valves, clogged wells, unsuitable machinery, and deficient underground flow.

**Amherst, Ohio.**—In 1912 the council abandoned the municipal electric plant and have since purchased current from a private company. The machinery was so worn out that the town could not sell it at any price, and in 1914 it was still standing idle in the plant.

**Appleton, Minn.**—The city finally got tired of the burden of its municipal electric plant and sold it to the Otter Tail Power Company.

**Arcanum, Ohio.**—A very exhaustive report on the municipal light and water plant for one year showed a deficit of \$5,397. Total revenue from all sources was \$11,674, operating expenses and fixed charges were \$17,072. The deficit amounted to over \$3.50 per capita.

**Arlington, Ohio.**—In one year the municipal electric plant turned up a deficit of \$4,048. The deficit equalled about 225 per cent of the total revenue from private consumers. To break even, the rate should have been 32½ cents per kilowatt hour instead of the 10 cents which was in force.

**Ashley, Ill.**—The municipal electric plant was sold at auction.

**Atchison, Kan.**—Superintendent E. C. Willits, of the State Orphans' Home, estimated that it cost the state two or three times as much to make its own power as it would have from a private company, so the public plant was shut down and a contract made with the Atchison Railway & Light Company.

**Athens, Ohio.**—The people voted to sell the municipal electric plant in 1914. With a registration of over 2,000, only 14 votes were cast in favor of retaining the plant. It had been losing money for years, even though high rates were in force, and the service was very poor. Lamp renewals cost the customers a great deal on account of the irregular voltage.

**Attalla, Ala.**—After a few years' operation of the municipal electric plant it was leased and afterward sold for less than \$25,000, though it cost \$50,000 in 1892. The city could not make the plant pay.

**Audubon, Ia.**—Arthur H. Grant states that a municipal electric light plant at this place was sold or abandoned prior to 1918.

**Bainbridge, Ohio.**—The village water and light plant had a deficit of \$4,926 in a single year. The figures showed this to be about twice as much as the total revenue from customers. This would have made necessary a rate of 24 cents per kilowatt hour for electricity and 75 cents per 1,000 gallons of water to make ends meet.

**Baltimore, Md.**—An audit of the books of the waterworks in 1911 showed that the department was operating at an annual loss of \$400,000, and that an increase in rates averaging 30 per cent was necessary.

**Ballard, Wash.**—After five years the municipal electric light plant, which cost \$10,600 in 1897, was leased for fifty years to a private company for \$3,800. The plant was leased because the income was about a third of the operating expenses.

**Barberton, Ohio.**—The waterworks had a deficit of \$4,175.35 in 1913, according to a report to the state auditor. Serious irregularities in conducting the business were also reported; among them were allowing accounts to run two or three years, and failure to collect penalties for non-payment of bills within a specified time.

**Batavia, O.**—The city's reports showed total income for its water and electric light plant of \$5,924 for the year, expenditures of \$5,602, leaving an apparent profit of \$312. But these "expenditures" included nothing for interest, sinking fund, depreciation and lost taxes, which totaled \$6,992. That converts the "profit" into a loss of \$1,068.

**Bay City, Mich.**—The municipal electric plant was shut down in 1919 and a contract made with a private company for current.

**Beatrice, Neb.**—The municipal electric street lighting plant showed a loss of \$6,051 for the year ending April 30, 1916, according to the report of J. M. McTaggart, expert accountant of Kansas City, who was engaged to investigate the records. In submitting his report Mr. McTaggart said: "Owing to the incomplete condition of the records, we were unable to obtain the necessary data as accurately as is usually available in accounts of private corporations and partnerships, where efficiency in every department is absolutely essential to their very existence."

**Bellefontaine, Ohio.**—An investigation into the water, gas and electric plants, made in 1914, showed that the gas cost \$2.25 per thousand feet to manufacture, while the deficit on the waterworks, including interest and other fixed charges, was \$10,077.31 in 1913. The electric plant was so run down that it could not give adequate services, and at least a third of the street lights had to be left off every night until enough people went to bed to permit the generators to carry the street lighting load.

**Berea, Ohio.**—After the town had built a waterworks, getting its supply from the seepage of an abandoned stone quarry, the State Board of Health forbade the officials to turn on the water until an ordinance was passed forbidding the citizens to use city water for drinking purposes.

**Berkeley, Cal.**—This city bought an electric plant in 1889. After ten years the plant was so worn out that it was not worth operating and was leased to the Berkeley Electric Lighting Company.

**Bethel, Ohio.**—The town council failed to pay the bills of the municipal electric plant in the winter of 1913-14, and the Board of Public Affairs turned off the street lights until the bills were approved. The 1913 deficit amounted to nearly 100 per cent of the total revenue from commercial customers.

**Beverly, Ohio.**—The municipal electric plant was sold in May, 1907, to Messrs. Walker and George. Reason for selling: Poor service, high rates, losses in operation.

**Birmingham, Ala.**—The North Birmingham waterworks, owned by the municipality, was shut down and abandoned in 1911 as the authorities considered it a menace to public health. Water was thereafter taken from the Birmingham Waterworks Company, a private corporation. An epidemic of typhoid was traced to the municipal plant before it was abandoned.

**Blacksburg, S. C.**—The municipal electric lighting plant was shut down in 1913 because it was cheaper to buy current than to make it. The plant was not a financial success.

**Blaine, Wash.**—The municipal electric light plant was shut down and abandoned in 1911 after three years' operation. Current has since been purchased from a private company. The service of the municipal plant was both costly and unsatisfactory.

**Blanchester, Ohio.**—The 1913 deficit of the municipal electric plant was \$701.77 short of making operating expenses. Interest and other fixed charges increased the deficit to \$6,085.10.

**Bloomington, Ill.**—The street lighting plant was made to show low operating cost by making no allowance for deprecia-

tion. The plant had to be entirely rebuilt in 1906, at a cost of \$40,000. The old machinery was sold for \$3,300, though the plant had cost \$87,000. A contract could be made with a traction company which would save the city \$10,000 to \$15,000 a year over the present cost of running the plant.

**Blue Island, Ill.**—J. B. Gobet, in 1907, when mayor, said the plant had been grossly mismanaged and that it cost twice as much to make current as it cost the North Shore Electric Company, with whom the municipal plant was in competition. The city made a contract with the Sanitary District of Chicago for a bulk supply of current, shutting down the generating plant, but did not pay their bills; so the Sanitary District, in 1912, had to threaten to shut down the plant unless it got its money—about \$30,000.

**Bowling Green, Ky.**—In 1914 the city abandoned its municipal electric street lighting plant and made a contract for service with the local company, resulting in lower cost and greatly improved service. It was the inefficiency and expense of the municipal plant which led to the change.

**Bowling Green, Ohio.**—The city went into the gas business about 1895, and sold out at \$6,000 in 1899. The original investment was \$60,000. In addition there were losses in operation estimated at \$50,000, making the total loss to the city for five years of municipal ownership \$104,000.

**Bradner, Ohio.**—Though but a village of about 900, this place was able in 1913 to maintain a municipal water and light plant that produced a deficit for the year of \$3,313. This was 130 per cent of the total revenue from private consumers. To offset it light rates should have been 18½ cents per kilowatt hour, instead of 8 cents and water basing rates of \$11.50 instead of \$5 for domestic use.

**Brainerd, Minn.**—The city got in debt to itself to the extent of \$6,000 for street lighting from its own plant and the lights were turned off. The people tired of darkness and demanded lights. The city council ordered the lights turned on. The lighting board refused until it could find a way of settling the \$6,000, the plant not producing income sufficient to meet the demand. A compromise was reached, but no way was found of making the plant an economic success.

**Brandon, Manitoba.**—The municipal street railway lost for the taxpayers \$33,868 in 1916, which with a 1915 deficit made a total deficit on January 1, 1917, of \$79,159. Quoting from the official report issued by the city treasurer, G. F. Sykes, we have this statement:

Deficit as at Jan. 1, 1917.....	\$45,290.98
Loss for the period as above (1916).....	33,868.60
<b>Total .....</b>	<b>\$79,159.58</b>
Less adjustment of depreciation charges....	\$12,233.80
Less contribution from city general account..	20,322.48
<b>Total .....</b>	<b>\$32,556.28</b>
<b>Total deficit .....</b>	<b>\$46,603.30</b>

So while the railway lost \$33,868 in 1916, it began the year 1917 with a deficit of \$46,603, even after allowing for the \$20,322 taken out of the general tax fund to help along. As a matter of fact, this \$20,000 comes from the taxpayer's pocket and not from the earnings of the street railway. It is interesting to note from the official report that in the six classes of tickets issued by the city's railways there were decreases in the proceeds from all except one and that was in miscellaneous, which showed an increase of but \$16 for the year.

**Brookfield, Mo.**—The municipal waterworks lost money for the city every year for at least five years as follows, according to the report of Marwick, Mitchell, Peat & Co., chartered accountants of St. Louis, employed by the city to go over affairs: 1911, \$1,242; 1912, \$1,651; 1913, \$1,126; 1914, \$829; 1915, \$1,785. Interest on bonds and the contribution for the sinking fund were paid from taxes. The accountants showed the amounts for these items paid each year from taxes. Interest for five years totalled \$4,429, sinking fund \$6,259.

**Brookfield, Mo.**—The city bought a theater for \$10,000, issuing bonds for the amount. The theater proceeded to lose a nice sum of money for the city, and, according to a local newspaper, "since the theater became the property of the city it has been going to the had."

**Braidwood, Ill.**—In 1910 the town sold its municipal electric plant to the Public Service Company of Northern Illinois. In 1909 the total income of the plant was \$3,578, while the expenses were \$5,700, leaving a deficit of \$2,122, according to a statement prepared by Alderman J. B. Howatt, chairman of the lighting committee. The tax levy for 1910 was exactly one-half what it was for the year previous, when the town had to meet lighting deficits.

**Brighton, La.**—The gas supply from the municipal plant is so bad that none of the city officials will use it. One of the councilmen is agent for a company selling individual gas systems, and is replacing the city service with these as fast as possible—an easy matter when service from the city plant is poor and gas costs \$1.75 per 1,000 feet.

**Brownstone, Ind.**—The municipal water and light plants were sold in 1908 to the Brownstone Water & Light Co., in order to get the plants out of politics.

**Brunswick, Mo.**—Debt was the only thing that this city got out of municipal ownership of water and lights. After ten years' operation the plant was sold for one-third its cost. The mayor is quoted as saying, "You could not give Brunswick such a plant under condition that the city run the business."

**Bucklin, Kan.**—The city abandoned its municipal electric light plant in December, 1915, deciding by a five to one vote at a popular election to buy current from a private corporation. The operating expenses and cost of repairs, not to speak of the fixed charges of the city's plant, exceeded the income and at that gave service only part of the night. The burden became unbearable to the taxpayers.

**Buffalo, Minn.**—The municipal plant was closed down and put on the market and the city made a contract for service with the St. Cloud Public Service Company.

**Burlington, Vt.**—The municipal light plant is a huge financial failure. Its report for 1911 shows a "gain" of \$1,321.81 for the year, but in another place the commissioners state that a law suit begun "more than a year ago is still lagging on and has cost the city thus far many thousands of dollars to end it." There is no mention of the "many thousands" in the accounts of the plant. The taxpayers, users and non-users of electric light alike, pay that money.

The suit mentioned is an injunction against spending money to rebuild the plant. The depreciation of the plant has not been properly charged off. The plant is completely worn out, though the depreciation fund amounts to only one-seventh of the cost of the plant. In other words, there is an investment of \$124,085.33 not represented by depreciation which must be written off with the exception of \$16,975.03, which represents land and buildings.

**Butler, Mo.**—H. M. Cannon, manager of the municipal electric plant, wrote, in 1914, as follows: "I have had enough experience with municipal ownership to know it is a dismal failure. I have figures to show that our plant has always been a failure and an expense to the people. The trouble with municipal ownership lies, in the fact that in the larger cities it soon drifts into public corruption and favoritism, and in smaller cities, where the council changes every year, the men and management never know what to depend upon, have no interest in the business other than their wages, and let things go to rack."

**Butler, Ohio.**—The municipal electric plant consumed so much fuel that in 1914 the council turned off the street lights on all nights but Saturdays. The tax levy for street lighting, however, was just as high as before. The deficit for 1913 was about 100 per cent of the revenue from private consumers.

**Caldwell, Ohio.**—This village of 1,800 has municipal water and electric light plants, against which \$44,500 in bonds had been issued up to the close of 1914, when the plant probably could have been reproduced for \$30,000. There was a loss on the plant for 1914 of \$5,844, or 175 per cent of the total revenue from private consumers. On that basis electric rates should have been 22.8 cents instead of 8 cents, while a certain water rate for homes should have been \$55.58 instead of \$19.50.

**Calgary, Canada.**—The municipal street railway system, with its 2½-cent fare, proved a failure. In 1914 its actual income was \$702,531 and expenses paid were \$698,698. The funded debt of the system was \$2,280,210, upon which there was an annual interest charge of \$106,359. The depreciation charge was \$29,299 in 1914, or less than 1½ per cent, which, of course, was absurdly low. Five per cent would be as little as conditions warranted. If the city had allowed 4 per cent depreciation, its loss for the year would have been \$58,000, net.

**Canal Dover, Ohio.**—The people started out to build a municipal electric light plant in 1908. They voted \$35,000 as the cost. It took three years and \$60,000 to get the plant in operation and this \$60,000 did not, of course, include expenses for election, litigation, preliminary reports, etc. In one year the light plant produced a loss of \$11,850. And that was not the first nor the second year of its operation, either. This loss was almost 100 per cent of the total revenue from private consumers. It was found necessary to increase the city's tax rate 10 per cent.

**Carthage, Ohio.**—When the town was annexed to Cincinnati the water and electric plant was abandoned, most of the equipment being sold for junk, and the electric pole line sold to the Union Gas & Electric Co.

**Casselton, N. D.**—The municipal electric light plant was installed in 1897 and sold in 1903 at about one-third of its cost.

There was a large deficit each year under municipal ownership.

**Cedar Rapids, Ia.**—In a decision of the Iowa Supreme Court in 1913, the court pointed out that municipal ownership was very costly to the people of Cedar Rapids. The people voted to buy the water works with the understanding that the rates would be reduced. The rates were not reduced, but, instead, a special tax levy is made to meet expenses connected with the plant which cannot be met from the revenue of the plant.

**Central City, Neb.**—Finding that municipal ownership was too costly, the city sold its electric plant to the Central Power Company.

**Chardon, Ohio.**—The municipal electric light plant has been such an expense that the people have four times voted down the proposition to establish a municipal waterworks. The books have not been kept accurately, and an investigation showed that the deficit in 1913 was \$1,860.83.

**Chariton, Ia.**—In 1914 the people voted to sell the electric plant because the town had no more money to spend on it.

**Chehalis, Wash.**—The municipal electric plant was leased to a private company about 1906, because it could not be made to pay. There were also serious accusations against the city officials in charge of the plant while under municipal management.

**Cheraw, S. C.**—In April, 1912, the voters authorized the town council to sell the municipal electric light plant to the Blewitt Falls Power Company, the purpose being to get cheaper and better service.

**Chicago, Ill.**—The loss on the municipal electric light plant operated by the Sanitary District of Chicago amounted to \$19,781.10 in 1911. The total losses during the four years of operation up to that time amount to over \$600,000. The actual expenses of the electric department of the Sanitary District for 1911 were \$901,723.47, while the total income from the sale of electric current amounted to \$701,942.37. In order to make a showing more favorable than the above the officials have charged part of the investment costs to other departments, and have neglected to make adequate provision for depreciation. On Jan. 8, 1914, the Chicago Tribune, always a defender of the Sanitary District administration, said: "The demonstrable fact is that the present cost of producing electricity is at least twice as high as it should be. This excessive cost is due to three general conditions: unsystematic engineering plans, grossly padded payroll costs, unbalanced consumption of the power of the plant. These three faults are all due to politics."

The waterworks has been run at a loss for years. Dabney H. Maury, consulting engineer for the "Merriam Commission," reported in 1911 that the plant was obsolete, and large sums were needed to put it in good condition. Aldermen place this sum at \$15,000,000. The leakage is astounding, being over 70 per cent. A water famine is a regular summer affair, owing to inefficient pumping and water waste. The rates are far too low. On account of the poor character of the service it is estimated by insurance engineers that the people of Chicago pay about \$1,500,000 annually in extra insurance premiums. In addition to water rates the property owners have to pay, in many cases, special assessments, for construction. In 1910 these amounted to \$152,436.76. It is impossible to estimate the millions of dollars invested in pumps which are necessary in all buildings over three stories high. In regard to actual cost the commissioner says in his 1910 report: "Nobody knows. The necessary accounting is not done."

**Chickopee, Minn.**—On Oct. 1, 1912, the city shut down its municipal electric plant, where the station operating expense alone was over 9 cents per kilowatt hour, and made a contract with the Minneapolis General Electric Company for service. The high generating cost was due to the discontinuance of electric service by some of the large power customers because the service was too unsatisfactory and unreliable.

**Chicopee, Mass.**—C. W. Whiting, consulting engineer for the Municipal Light Commission of Chicopee, made an examination of the plant in 1911, and found the equipment, which had cost \$65,000, to be worn out and practically useless. He found it would be necessary to spend \$90,000 to put the plant in condition adequately to serve the city. The report recommended a revision of rates, as a customer using 150 kilowatt hours can save \$1.40 by having one more kilowatt hour. The allowance for depreciation had been made a bookkeeping charge only.

**Chilton, Wis.**—This city attempted to establish a municipal electric plant in competition with the Calumet Service Company, but was prevented from doing so by the Supreme Court of Wisconsin. The decision (made in 1912) says:

"During the latter part of the 10-year period of the Bink franchise, the owner became financially weak and did not efficiently maintain the plant and give altogether satisfactory service, though largely or wholly because of defendants' (the city's) fault. The latter, ostensibly because of such poor service, refused to deal with such owner; whereupon the latter offered to comply fully with the franchise, or sell to the city,

or meet any competition, but said city refused all advances in that regard and invoked the Railroad Commission, Dec. 23, 1907, to grant a certificate of public convenience and necessity, authorizing another public utility in the city. The proceedings were dismissed because of the existing public utility and defendant's failure to proceed in reference thereto as contemplated by the public utility law.

"Notwithstanding the refusal to deal with plaintiff's predecessor, under the public utility law or the old franchise, public and private lighting was continued until January 17, 1908, though payment for public service and recognition of there being any existing privilege in the matter were refused. Hostility by the city, its efforts to have the claimed privilege superseded, as indicated, or by proceedings, by the attorney general, destroyed the then company's credit, caused its legitimate business to drop and forced it to temporarily suspend. However, it continued all reasonable endeavors to make some sort of arrangement with the city and failed in that regard."

Concerning the Public Utilities Law it says:

"That one of the principal mischiefs sought to be remedied by the new system, was elimination of the conditions promotive of hostilities between municipalities and public utility companies, after making large investment by permission and invitation to serve the public directly as well as indirectly—bitter controversies, sometimes for good reasons and sometimes not, but in any event at the expense of consumer of the product—seem quite certain.

"It likewise seems certain that one of the major means for attaining the desired end was elimination of excessive investments, and excessive expenses caused by two or more public utilities, each with its separate property and fixed charges, where the need of the consumers only required one, and elimination of risk to investors by encroachments, or threatened encroachments, upon an occupied field of public service without any public necessity therefor. Doubtless an unvarying and invariable economic law was squarely faced and appreciated, that all such subjects for elimination represent waste, which if not avoided would, in the main, fall on the product, increasing the cost of service per unit and be paid by the consumers. It was the interests of consumers which was the prime subject of legislative solicitude; such object to be conserved without injustice to others.

"In the situation pictured it could not have escaped legislative consideration and, necessarily, would not have been considerably left unguarded against that in the cities and villages of the state; in general, public utility service at the lowest practicable rates with the highest practicable efficiency is impossible without combining the municipal service with that to others.

"Further, it could not well have escaped appreciation and been left unguarded against, that one of the fruitful sources of waste to ultimately fall, largely, if not wholly, on consumers, and fruitful sources of wasteful controversies and injustice to owners of existing investments, many of whom were bondholders as in this case, was opportunity for municipalities to unreasonably menace existing investments by threatening to displace, or actually displacing, in whole or in part, existing public utilities in cases where proper regulation would secure efficient operation—ample efficient service in the whole field, thus creating waste in many ways and to a large amount in the aggregate, to the impairment of efficiency in general, and enhancement in cost per unit of service to the consumer, contrary to the purpose of the act."

**Christianburg, Va.**—The municipal electric plant was established in 1900. In 1907 the generating plant was shut down and power purchased from a private company. In 1908 the distributing system was sold to a private company which promised to make extensions and improvements which the city could not afford.

**Cincinnati, Ohio.**—The Madisonville municipal electric plant is a mystery to the people of Cincinnati. They are unable to get any facts regarding it. An investigation made in 1914 disclosed the fact that even the city officials themselves had never collected any comprehensive data regarding the plant. There is a discrepancy of hundreds of dollars between different reports of the same transactions. The city electrician reported a surplus of income over bare operating expenses of \$490.98 for 1913. Fixed charges turn this surplus into a deficit of \$15,698.70.

**Clarion, Ia.**—On July 9, 1910, the municipal lighting plant was sold. The plant had been a persistent loser, and was practically depreciated out of existence.

**Cleveland, Ohio.**—The municipal electric plant has been a consistent money loser ever since its establishment. A complete plant, which was to give cheap light to every citizen, was estimated by F. W. Ballard to cost not over \$2,000,000. Up to 1919 the municipal plant had as customers less than one-sixth of the actual users of electricity in Cleveland, the rest being supplied by a private company. It supplied only one-third of

the street lights, the company supplying the remainder. Its total plant capacity was rated at 17,000 kilowatts, while that of the company was 135,000 kilowatts.

Mr. Ballard, the plant's original manager, and one of its founders, stated, in 1915, shortly before his resignation, that "We expect to make \$200,000 surplus for the year 1915." The plant actually lost \$58,219 in that year, as established by Nau, Rusk, & Swearingen, certified public accountants, of Cleveland, who were employed by Mayor Newton D. Baker to report on the exact financial condition of the plant and settle some of the controversies which centered about it. They devoted about ten months to the investigation. This was evidently considered by the accountants as an unusually long period, for they said in their report: "The delay in rendering this report and the almost inexplicable length of time it has taken to prepare the statements herein must be entirely attributed to the chaotic conditions of the bookkeeping records for the year 1915." About seventy pages of the report were given over to corrections of errors found in the bookkeeping. The accountants found and reported that during 1915 the plant had capitalized one-half of its bond interest. The total amount of bonds outstanding was \$2,817,000 (on \$70,000 of these half the interest was not so capitalized) and the total investment in the plant \$3,667,688. In November, 1916, another bond issue of \$1,750,000 was voted, making the total bonds more than \$4,500,000. Originally they were \$2,770,000. The report further showed receipts for 1915 to have been \$548,574.72, operating expenses \$428,669.74, leaving \$119,904.98. From this the report shows the following deductions: Funded debt interest, \$112,655.90; other interest, \$9,545.48; interest on city investment, \$24,229.32, and taxes foregone, \$31,693.72, making a total of \$178,124.42. This exceeds the gross income by \$58,219.44. It was shown that the project could not have been financed at an interest rate of 4.5 per cent if the entire credit of the city had not been behind it.

**Cleveland, Ohio.**—The State Bureau of Inspection and Supervision of Public Offices examined the books of the South Brooklyn municipal electric plant for the three years ending 1908 and showed the following costs per arc lamp: 1906, \$81.10; 1907, \$73.15; 1908, \$69.25. Compare these with the claims of the municipal manager—1906, \$58.25; 1907, \$73.37; 1908, \$48.13. Compare them further with the prices paid by the city of Cleveland to the Cleveland Electric Illuminating Company for lights in areas not covered by the municipal plant—1906, \$69.72 per lamp; 1907, \$67.92; 1908, \$54.96. During the four years ending 1909 the lights furnished by the municipal plant cost \$133,000. If these lights had been furnished by the Cleveland Electric Illuminating Company they would have cost \$109,000, showing a loss to the city of \$24,000 on the small proportion of lighting done by the municipal plant.

Public Service Director Lea, in July, 1910, said of the two municipal light plants owned by the city of Cleveland: "For weeks accountants have been trying to arrive at a correct posting of the records of the two plants so as to enable us to tell whether they are paying or losing. I am satisfied that both plants have never earned a cent, if depreciation is figured in. Figures already compiled tell us this, but the system of bookkeeping employed has not been detailed enough to give us an accurate accounting."

**Coal City, Ill.**—In August, 1911, the municipal lighting plant was sold to the Public Service Company of Northern Illinois. The town had been losing money on its operation for fifteen years. The first cost of the plant was 20 per cent above the estimates. William E. Somerville, president of the board, says: "Depreciation was never figured on while we were running the plant. It should have been, of course, and many other things should have been figured on, too, for that matter, but they weren't. Under municipal ownership our plant was never run on a business basis, and from a business standpoint it was run at a steady loss. We corrected the evil, however, when we sold the plant, and as a result we now get much more satisfactory service at less money."

The original estimate of the cost of the plant was \$12,000, but this was too low, and \$15,000 was spent before the plant was completed, an increase of 25 per cent over the estimate.

**Columbia, Ala.**—The municipal electric plant was in existence two years, being sold in 1908 because the town could not afford to meet the losses in operation.

**Columbiana, Ohio.**—The State Inspector reported, under date of March 29, 1913, as follows: "The village owns and operates a water and light plant. Said plant is not self-supporting, as transfers amounting to \$6,000 have been made from the service fund to the water and light fund during the period covered by this audit."

**Columbiana, Ohio.**—The State Bureau for the Supervision of Public Offices examined the water and electric plants a few years ago, reporting the physical condition bad, and the financial condition worse. "Grave irregularities" were reported,

such as the issue of vouchers in such sums as to cause overdrafts of public funds and the failure of the clerk to keep any record of the water and light funds in his appropriation ledger.

**Columbus, Ohio.**—The Bureau of Municipal Research, of New York, examined the municipal electric plant, and reported in part as follows:

"The statement of bonds outstanding does not agree with the records of the sinking fund trustees, owing to the omission of a series of electric lighting supply (4 per cent) bonds amounting to \$18,000, issued in 1905, due 1915.

"Unless the rates are very carefully adjusted to take this fact into account, those utilizing city power for private residential lighting will receive a portion of this service at the expense of the taxpayer of the city."

There was an apparent profit for the year of \$216.41. However, the expert found that this took no account of sinking fund and interest. Sinking fund amounted to \$20,000 and interest to at least that much more. Taking \$40,000 or more from \$216 did not leave much "profit."

The experts stated in their report that the accounting system of this plant management was bad and needed replacing by an "efficient method." They also condemned the "politics and vascillating policy" of the management. They recommended that the management of the city water and light plants be combined, taken out of the hands of the city council and turned over to "specialized commissioners."

This plant was built originally in 1898 with \$68,000 raised by bonds, which amount the promoters said would be sufficient. It was only the starter. In 1901 the plant was reconstructed and then began successive bond issues, leading up to \$910,500 by 1915, aside from \$50,000 subscribed and paid for by the sinking fund commission. The net cost of the plant to the city in 1913 was \$245,751, instead of \$125,659, as reported by the lighting department. This plant has been the source of continual trouble, turning up its share of costly investigations and prosecutions, practicing favoritism and unbusinesslike methods in letting contracts and hiring employees. In 1916, when as a means of helping the city to meet a deficit, the light plant management suggested curtailing service, the Daily Citizen of Columbus observed: "Had the light plant been operated efficiently the last few years, there would be no need for retrenchment in the matter of street lighting today."

**Columbus, Ohio.**—The 1910 report of the municipal electric plant said: "It is necessary to call your attention to some of the conditions existing at the light plant at the beginning of January, 1908, and what was done to eliminate them.

"There was a lack of information and records giving the costs, location and number of poles, lamps and a map showing the location of lines, etc. The overhead lines were in poor condition; every wind that came up broke the leading wires at the lamps, and wires falling down on wires of other companies. This resulted in poor service and a very large maintenance cost.

"The current supplied was 6.6 amperes and should have been 6.9.

"Switchboard meters were never calibrated, and it was necessary to recalibrate them and send same to factory for repairs before any accurate record could be obtained.

"Boilers were very scaly, coal conveyor in poor condition, a very poor grade of coal was being used and the amount of coal burned was excessive."

**Columbus Grove, Ohio.**—When in 1902 this village started in to buy its electric plant from a private company it incurred legal expenses to the amount of \$4,000 in the process, but this \$4,000 was paid from general taxes and never charged to the cost of the property, which was put down at \$15,000. This is a common practice of municipal ownership. In one year the plant's gross income from private consumers was \$7,828 and credit for public service \$2,155, making \$9,983. Its operating expenses alone were \$8,404, to which was added fixed charges of \$7,300, making total expenses \$15,704 and the deficit, therefore, \$5,721.

**Concord, Mass.**—The report of the Electric Light Board for 1910 says, regarding the law requiring that depreciation be charged in municipal plants: "Reference was made to this law in our report of last year, and the town took no action in the matter. We again call the attention of the town to Section 21 of Chapter 34 of the revised laws, as amended by Section 1, Chapter 411, of the Acts of 1906. We respectfully refer the consideration of this matter to the town." Depreciation has never been charged off by this town. In 1910 it would have been, according to law, \$4,320 (3 per cent of \$144,021), and would have created a deficit, as the cash balance was only \$1,645.21. The city appropriated \$5,000 for operating expenses, and spent \$20,000 in 1909, a large part of which went for replacing worn-out equipment which had not been charged off to depreciation.

**Council Bluffs, Ia.**—Municipal ownership has not lowered water rates, but it has increased taxes by at least 5 mills.

according to a report of the State Examiner of Public Accounts made early in 1914. The meter rates for water are the same under municipal ownership as under the old company. The flat rates are higher. Under private ownership the people were taxed 2 mills to pay for hydrant rental. Now they are taxed 2 mills on account of water bonds, and 5 mills additional to meet running expenses.

**Crawfordsville, Ind.**—In 1910 Prof. J. W. Esterline, of Purdue University, was engaged to examine the municipal electric light plant with a view to rehabilitation. He recommended that the entire plant be scrapped, as it was worn out and obsolete. He estimated the cost of a new plant at \$93,000.

**Cuba, Ill.**—The city council has decided to sell the municipal electric light plant. Bids for the plant will be received by Virgil Durand, city clerk, until Aug. 13.—*Electrical World*, June 22, 1912.

**Cumberland, Wis.**—The State Railroad Commission ordered the municipal lighting plant to increase its rates in 1909 because the plant was losing money. The 1900 deficit was \$961.65.

**Cuyahoga Falls, Ohio.**—The municipal water and light plants piled up a deficit of \$14,057.24 in 1913, according to an investigator, who also found that the plant is ready for the scrap heap, and that political interference prevented the plant from being run economically.

**Dana, Ind.**—Municipal electric light plant sold to the Clinton Light & Power Co. for \$6,700.

**De Graff, Ohio.**—This village of 1,000 population has paid dearly for municipal ownership. It built its own electric light plant in 1893. Its deficit in one year amounted to \$3,188.36 and for more than twenty years it kept taxes so high as to discourage facing further debts for new ventures. In the summer of 1913 fire gutted the heart of the town, entailing a loss of about \$100,000. This could undoubtedly have been prevented, but for the lack of water. The town had no waterworks. Its electric plant absorbed all surpluses, by continuously creating deficits, which might otherwise have been invested in a waterworks.

**Decatur, Ill.**—When the people got an estimate on the cost of municipal lighting plant the figure was \$52,000. Later it was thought well to add more lamps, so the figure rose to \$60,000. Then the figure went to \$75,000 in order to provide high grade equipment. The real cost was \$90,000.

**Delta, Iowa.**—The municipal gas plant was disposed of in 1908. The new owner reduced the price of gas and relieved the taxpayers of the losses they had had to meet under municipal ownership.

**Dexter, Mo.**—The municipal electric plant was leased to B. F. Eicholtz in 1905 and later sold to him.

**Dubuque, Iowa.**—In 1907 the scandals surrounding the operation of the waterworks came to a head. The plant had then been municipally owned seven years. It was purchased for \$545,000, the idea being to take the plant out of politics, to extend the system, reduce taxes from "profits," reduce the "robber rates" which "oppressed" the manufacturers and domestic consumers. It was necessary to levy taxes to meet interest and sinking fund payments. Taxes to the amount of \$46,000 were raised. The city had paid the company \$12,000 for hydrants and other charges, so the increase in taxes used for water purposes was \$34,000. Large debts were incurred and kept a secret as long as possible. The trustees, manager and several employes were forced to resign and it was hard to get responsible citizens to act on account of their fear of besmirching their characters.

**Dunkirk, Ind.**—This city tried municipal ownership of electric light for three years, beginning 1901. In 1904 the city lost the plant to the bondholders, paying them \$2,300, besides meeting the operating losses during the period of municipal ownership.

**East Chicago, Ind.**—The operation of the municipal electric plant was so unsuccessful during the first three years (1900-1903) that a receiver was appointed. The plant was sold to a private company for a fraction of its cost in 1907.

**East Grand Forks, Minn.**—The municipal electric plant began operation in 1902. In 1907 it burned. Five days afterward the people held a mass meeting and decided unanimously not to rebuild. A contract was made with the company in Grand Forks, N. D., which is still in effect (1912).

**East Point, Ga.**—In 1914 the city shut down its generating plant and has since purchased electricity from a private company, reducing the deficit by over \$500 a month.

**East Portland, Ore.**—When the city consolidated with Portland it was not considered worth while to continue the year-old municipal electric plant so it was sold.

**Easton, Pa.**—The municipal street lighting plant has been the subject of criticism by city officials and citizens for many years. The manager, in his report dated April 1, 1911, recommends the purchase of current for part of the service, and says "a saving would be effected."

**Edgewood, Ga.**—The municipal electric plant had been in operation only a year when it was shut down in 1908 and sold,

the citizens getting their light from the Georgia Ry. & Light Co.

**Edmonton, Alberta.**—According to the statement of W. T. Woodroffe, superintendent of the municipal street railway, there was a deficit of \$26,495 during the year 1912. The *Official Gazette*, the city's publication, reports that the loss on the municipal street railway up to Jan 1, 1914, was \$405,394.

**Elgin, Ill.**—The municipal plant was turned over to a private company in 1904, after sixteen years of unsuccessful operation, during which time the loss is estimated to have been at least \$100,000. In 1911 the city tried to sell its generating machinery (which the company had found too antiquated to operate) and, although this machinery had cost the city \$50,000 twelve years before, the only bid received was an offer of \$1,000, delivered at Chicago. Depreciation, it is therefore evident, was at the rate of over 8 per cent, for which no allowance had ever been made during the time the city operated the plant.

**Ellensburg, Wash.**—Rates of the municipal light and water plants were raised, after several years of losses, in an attempt to make the plants pay. The rates for lighting were advanced, for instance, beyond those paid a private company by the neighboring town of North Yakima.

**Ellisville, Miss.**—In April, 1912, the people voted by an overwhelming majority to ratify the aldermen's action in selling the municipal lighting plant to the Laurel Railway, Light and Power Company.

**Ellwood City, Pa.**—The municipal generating station was unable to carry the load after three years' operation, so, in 1904, it was shut down and has been idle ever since, the city purchasing electricity from the Pennsylvania Power Company.

**Elk Rapids, Mich.**—The municipal electric plant did not pay and was sold in 1908 to the Elk Electric Company.

**Elma, Ia.**—By popular vote the city abandoned its municipal electric plant because it could not be operated without loss.

**El Paso, Tex.**—When the city bought the waterworks a rate of 20 cents per thousand gallons was put in effect. This was found to be such a heavy loser that the rates under municipal ownership had to be increased to 30 cents.

**Emaus, Pa.**—In 1895 the borough sold its electric plant, five years old, for one-third its original cost. The reason for selling was high cost of operation. A company supplied light at a much lower cost.

**Emporia, Kan.**—After leasing the municipal electric plant to a private company in 1912 the number of customers grew from less than 500 to over 1,300 in a year's time, showing that the plant was not properly managed under municipal ownership. It was freely admitted at the time the lease was made that the city's books had been so confused that it was impossible to tell the true financial condition of the plant.

**English, Ind.**—Seven years after the municipal electric plant started it was sold on account of the large losses incurred. The plant was sold in 1907 for about one-third its original cost.

**Escanaba, Mich.**—Only five years after the municipal electric plant started the finance committee of the council recommended that it be sold on account of inefficient management and losses. This was in 1905. The plant was not sold, but in 1908 the generating plant was abandoned and current purchased from a private company. Complaints of service are common among the citizens and in the newspapers.

**Fairbury, Neb.**—The city has light and water plants which it bought for \$135,000 with 5 per cent bonds, \$10,000 of which have been redeemed. The plants do not pay anything from earnings for bond redemption or interest. The city makes a direct tax levy for both annually.

**Falls City, Neb.**—Both the municipal water and light plants were economic failures and in 1916 an examination showed an absence of systematic records. The city engineer run the plants and a water and light commissioner made collections. There was some sentiment and a move toward selling the light plant.

**Farmington, Utah.**—Owing to unsuccessful operation, the city offered its electric light plant for sale to the highest bidder. The income from the plant, with the rates it charged, was not enough to pay interest on investment and depreciation, so the city gave up the effort.

**Fayette, Ia.**—After eight years of municipal ownership the people voted to abandon the city electric light plant and grant a franchise for the service to the Turkey River Power Company.

**Fayetteville, N. C.**—The municipal electric plant shut down its generating station in 1908, after six years' operation, and has since been purchasing power from the Carolina Power & Light Company for less than it cost the city to make its own power.

**Fergus Falls, Minn.**—At an election April 2, 1912, the citizens defeated the proposition to rebuild the city's waterpower dam, which had insufficient storage capacity to give steady service. Current is purchased now from a private power company.

**Findlay, Ohio.**—This city tried municipal ownership of a gas plant, but ran heavily in debt and sold the plant in 1899, the outstanding obligations at that time being over \$60,000. When

Findlay went into municipal ownership it purchased the plant from a private company for \$75,000. An additional investment of \$40,000 was made immediately after the purchase and from time to time money was spent until the total obligations amounted to over \$310,000 at one time. When the natural gas wells gave out in 1899 the city had no available funds for the construction of a \$150,000 artificial gas plant and therefore decided to sell. Instead of increasing rates to cover an expenditure of this sort, the plant was sold to the Citizens Gas Light and Coke Company for \$150,000. This company is still furnishing natural gas in Findlay. When asked about the plant, the former superintendent of the municipal plant said:

"When the city owned the plant unnecessary expenditures were constantly being made, while in many cases necessary improvements were ignored. The pipe line, some of which was thirty years old or more, was in very bad shape. A large amount would have been necessary to put the plant into shape by the city. It was therefore sold. The company immediately set to work to remedy the defects in the old plant, so that now practically all of the pipe lines in the city are new. No city can own and properly operate a gas plant."

**Florence, Neb.**—This little city, seven miles north of Omaha, Neb., is the site of the Omaha Metropolitan (municipal) water works' chief reservoir and pumping station. Under private ownership, Florence got most of its tax revenue from this plant. Under municipal ownership it reported to the Nebraska state authorities its inability to redeem \$3,000 Florence school bonds past due, giving as the reason, "the withdrawal of the water plant from the tax rolls."

**Forest Grove, Ore.**—In 1909 a municipal light and water plant was built, bonds being voted on the promise of low rates. In the summer of 1910 the rates were raised to a higher point than those paid by customers of private companies in nearby towns. Customers were also forced to buy their own electric light and water meters. In 1912 the plant was shut down and sold to the Independent Electric Co.

**Ft. Wayne, Ind.**—H. P. Page, certified public accountant, made an investigation of the municipal electric plant in 1910 which showed that the plant lost \$29,784.47 between Sept. 1, 1908, and Jan. 1, 1910.

**Ft. Worth, Tex.**—In 1911 the city abandoned its electric street lighting generating plant and has since purchased power from a private company. In 1911 there were 446 arcs and 500 incandescent lights supplied from the municipal generating station. In 1912, a year after beginning to take current from the private company, there were 700 arcs and 1,150 60-watt mazda lamps, yet the cost with privately owned supply was almost identical with the cost of the much smaller installation which had been supplied from the municipal plant.

**Fostoria, Ohio.**—One of the worst ventures the city ever made was to embark in the establishment of a natural gas plant in 1885. It soon found this out and disposed of the losing plant.

**Frankfort, N. Y.**—The municipal electric plant was sold to the Utica Gas and Electric Company in 1907 because it could sell current for less than the operating cost of the municipal plant. The plant was then four years old.

**Fremont, Neb.**—Both the municipal water and electric light plants were shown to be economic failures by the engineering firm of Harold Almert of Chicago, engaged by the city to examine the plants and records. The light plant had been operated by the city for twenty years and had never paid a penny of fixed charges from earnings, sloughing off the whole amount every year upon the taxpayers. The two plants together to date (spring of 1916) stood the city \$627,062 and could, the engineers showed, be replaced for \$477,099. In the last three years, 1913, 1914, 1915, they had lost for the city \$21,590, besides having \$23,090 in bad and uncollected bills and an overdrawn bank account of \$8,365. The net losses for the light plant alone for 1913, 1914, 1915, respectively, were \$12,584, \$12,306, \$5,093. The last loss was less because, the engineers explained, the city had taken on a number of new buildings erected the previous year and had begun properly to bill for merchandise sold, which it had not done before. Yet there was a net loss of \$5,093. The taxpayers had sunk, all told, more than \$340,000 in their light plant alone.

**Fulda, Minn.**—The municipal electric light plant lost about \$1,000 a year, according to the mayor, so it was given away in 1902.

**Gaffney, S. C.**—In 1913 the municipal electric light plant was shut down. It had always lost money. Current is now purchased from the South Carolina Light, Power & Railways Company.

**Galena, Ill.**—The municipal electric light plant was started in 1898, costing \$18,000. It was sold March 6, 1906, to the Tri-State Light & Power Co. for \$13,000, including franchises. The city secured twice the lighting from the company at an increase of

only 10 per cent over the amount of the old bills. Service was so bad that at times there was no street lighting at all.

**Galesburg, Ill.**—In the winter of 1910-1911 the city was in darkness for a month, owing to inefficiency of the municipal water and light plant. The boilers were in such poor condition that both water and light service could not be maintained. The steam was therefore used to maintain water pressure and the lights were not operated. Later the plant was shut down completely and a contract made with the Galesburg Railway, Light & Power Company.

**Galva, Ill.**—The receipts of the municipal water and light plant for the year ending March 31, 1910, were \$4,258.76. The operating expenses were \$4,191.33, to which are added interest (5 per cent on \$18,000) \$900, and depreciation (7 per cent) \$1,260, and sinking fund (2 per cent) \$360, making a total deficit of \$2,452.27, or more than half the total income from both plants.

**Galveston, Tex.**—The new 200 K. W. steam turbine plant was shut down in 1911, and a contract made with the Brush Electric Light & Power Co. for current for street lighting. The change was primarily due to faulty designing of the municipal undertaking, the lighting plant being in the same room as the high pressure water pumps. This resulted in a 10-cent excess premium being placed on all insured property in Galveston. It was cheaper to abandon the new electric plant than to pay the insurance, so the move met with universal approval.

**Garden City, Kan.**—The city sold its telephone plant to the Arkansas Valley Telephone Company because of unsuccessful operation.

**Garretson, S. D.**—In 1912 the municipal acetylene gas plant blew up putting the system out of business.

**Georgetown, Ohio.**—The municipal electric plant has never paid operating expenses. The plant cost \$27,000, though the people were assured in advance that it would cost only \$15,000. The 1913 deficit, including fixed charges, was over 77 per cent of the total revenue.

**Germantown, Ohio.**—After twenty years of trying to make municipal ownership pay its own way the city sold its electric plant to the Dayton Power & Light Company in 1919.

**Gilroy, Cal.**—The municipal gas plant was leased to a private company in 1908, after municipal ownership had been tried for six years. The plant had, to use the words of a council resolution, "been conducted at a large loss to the city," and was in poor physical condition. The new managers practically rebuilt the plant in order to give adequate service. An investigation of the water and electric plants, made in 1912 by Charles Remington, showed a loss of \$13,635.39 for the year 1911. In 1916 the city grew weary of trying to make its electric plant come out even, and leased it to private parties for a period of ten years.

**Girard, Ill.**—Poor service and poorer earnings led the people to sell their municipal electric light plant in 1912. The vote in favor of selling was ten to one.

**Gloucester, Ohio.**—An investigation into the municipal water and electric plants made in 1914 showed that it cost 64 cents per kilowatt hour to make electricity in 1913. In a town of 3,500 population there are only 35 electric light customers. The water supply from 1898 to 1913 was mine drip, and could not be used for drinking purposes.

**Goldboro, N. C.**—In 1912 the municipal electric light plant was sold to the Carolina Power and Light Company, a contract being made at the same time for the operation of the city pumping plant by electricity. The high cost of operating the steam plants is given as the reason for giving up municipal ownership.

**Grand Ledge, Mich.**—The municipal electric plant was sold in 1908 to the Commonwealth Power Company, thereby getting lower rates and better service than could be obtained under municipal ownership.

**Grand Island, Neb.**—Hanford & Stone, public accountants, report that bond interest on the electric plant is paid from taxes, and not from earnings of the plant, and that the taxpayers have been assessed \$18,677 for light improvements and \$61,116 for water improvements on account of the insufficiency of the bond issues made for these purposes.

**Granville, Ohio.**—An investigation in 1914 showed that the cost of 250-watt mazda street lights furnished by the municipal street lighting plant, and burning only until midnight on a moonlight schedule, cost \$48.64 each in 1913.

**Gravesend, N. Y.**—The municipal electric plant, built in 1899, was never put in operation. When Gravesend was consolidated with Brooklyn the plant, which cost \$120,000, was sold for \$31,000.

**Greenwich, Ohio.**—Though a place of less than 1,000 inhabitants, the village has a municipal water and light plant able to show up a loss in a single year of \$3,693. This was 100 per cent of the gross income from private consumers, indicating that to make ends meet the electricity rate should have been 17 cents

instead of 8 cents per kilowatt hour and the water rate 45 cents per 1,000 gallons instead of 20 cents.

**Greenwood, S. C.**—The light and water plant was built in 1898, but was shut down in 1907, as it was cheaper to buy power from a private company. None of the bonds have been paid, nor is there any sinking fund provided.

**Griffin, Ga.**—On August 27, 1911, the municipal generating station was shut down, and power purchased from the Georgia Power Company. The report for 1911 shows that the water plant's receipts failed to pay operating expenses alone by nearly \$1,000, exclusive of all fixed charges. Without any allowance for interest, depreciation, sinking fund, or lost taxes, the combined water and light plants were overdrawn \$2,309.46 on Jan. 1, 1912. The above fixed charges, figuring interest at 5 per cent, depreciation at 7 per cent, and sinking fund at 2 per cent, making no allowance for lost taxes, would make the total deficit for the year \$12,809.46.

**Grove City, Pa.**—The deficit of \$1,433.11 in the municipal lighting plant during 1909 resulted in the removal of the street commissioner and a policeman.

**Hagerstown, Ind.**—The State Examiner reported, in 1913, that the electric light receipts for four years—1909, 1910, 1911, 1912—were \$5,445.58, and the operating expenses for the same period were \$8,668.29, leaving a deficit of \$3,222.71. "In addition to the above," the report continues, "there was paid from Jan. 1, 1909, to Dec. 31, 1912, for meters, borrowed money, engine repairs, cement and lumber, \$1,989.14. During this period there were net transfers from the general fund to the electric light fund of \$4,161.19. This, however, is not included in the statement of receipts. Municipal ownership has not proved a success in Hagerstown."

**Hamilton, O.**—The municipal water, gas and electric plants have all been disastrous failures. In 1906 a report made to the state auditor said: "The administration of the board of public service extending over the period stated heretofore, is marked with evidence of mismanagement, extravagance and unbusiness-like methods in the operation of public properties placed in their hands." The city reports do not include interest, depreciation, lost taxes or legal expenses and therefore purport to show a profit which quickly disappears and becomes a large deficit in the case of each plant when the total cost to the taxpayers is included. C. S. Metcalf, state examiner for the Bureau of Inspection and Supervision of Public Offices, examined the municipal water, gas and electric plants in 1911 and found them all losing money. His figures on the gas plant for 1909 are as follows: Actual revenue, \$46,277.80; total actual expense, \$71,108.81; loss in taxes (\$161,000 value, 40 per cent of value at 3.45 per cent), \$2,221.80; loss to city, \$27,052.01. The utilities owned by the city of Hamilton are reputed to be the worst operated in America, and have been subject to severe criticism by state and city official investigators for years. In his report Mr. Metcalf said:

"Two and a half years ago, the electric light plant, which was built in 1903, was a complete wreck, and the figures obtained from careful examination into the cost from bond issue and from transfer from tax levy, showed for the life of this plant, fifteen years, a cost per arc lamp of \$113.33, while other cities furnished by private plants showed a cost of from \$55 to \$75; therefore, it is the opinion, that inasmuch as the price per arc can be regulated by the council to a great extent, the problem of municipal ownership of this plant has not so far been a decided success.

"It is admitted by many that such is the case and we should accent the situation as follows:

"The old electric light plant is conceded to have been a failure, and the condition should be the same as any bankrupt company, but such is not the case; the money is gone and the taxpayer will never be repaid and the interest on the money he has in the old plant must be charged up forever. The situation has been that for the privilege of municipal ownership the taxpayer has paid the interest on the bonds, the sinking fund levy for the retirement of the bonds, and stood a tax levy each year for street lighting nearly as great as the levy would have been had the city purchased its electric current from a private corporation.

"Of course, it cannot be helped now; the money is gone and the only purpose in setting forth this argument is to warn the citizens of Hamilton that bond issues submitted to popular vote should be given careful consideration and that it is within the power of council to regulate the charges made by public utilities."

An investigation made in 1914 disclosed the fact that, although the city had abandoned its gas manufacturing plant, which is a pitiful wreck, and purchases natural gas, the losses in 1913 on this service came to over \$40,000, while the losses on the electric plant were \$23,956.27, and on the waterworks they were \$55,580.80. This means a loss of nearly \$400 a day to the taxpayers of Hamilton on account of the city's venture into municipal ownership.

**Hampshire, Ill.**—In 1907 the municipal electric plant was called "unprofitable to and a burden upon said village" in the ordinance under which the plant was sold for about two-thirds of its original cost.

**Hart, Mich.**—The generating station of the municipal electric plant was cut down in 1908 and current purchased from a company. The saving amounts to about 25 per cent.

**Harvard, Ill.**—Just before the municipal electric plant was sold in 1907 it was estimated that arc lamps cost over \$150 a year. The plant had been in operation twelve years, and was in bad condition.

**Hastings, Neb.**—With a municipal electric lighting plant generally regarded in the city as a fine physical enterprise, the taxpayers have always footed the bills for interest, depreciation and other fixed charges. "Never," said A. T. Bratton, city clerk, who keeps close tab on the plant, in answer to a question if the plant paid its fixed charges from earnings. The plant was valued in 1916 at \$190,000 in round figures. It was established in 1901. In 1916 it had not a pound of its original machinery or equipment. Every pound of this had been scrapped at a complete loss, never a penny being put aside for depreciation or replacement.

**Herington, Kan.**—The municipal electric plant was so badly operated that the loss amounted to \$3 per capita. The plant was sold, but as soon as it began to show a profit under private management, the people tried to get the profits by buying the plant back, with the usual result that all excess income disappeared.

**Hickman, Ky.**—The municipal water and electric plant was leased to a private company in 1906 in order to get rid of the deficits which were piling up under municipal ownership.

**High Point, N. C.**—In 1902 the generating plant of the municipal electric system was sold. Current was purchased at a price lower than the cost of operating the municipal station. Even with no generating problems the city plant cannot make money.

**Holgate, O.**—After fifteen years of municipal ownership of electric light and water works, the town went over to private service, making a contract with and granting a franchise to the North Western Ohio Light Company for transmission of current from its Leipsic plant.

**Hubbard, Ohio.**—The municipal electric plant burned twice and was rebuilt. Then it was so mismanaged that the town got better service and saved money by shutting it down and buying current from a company in 1912.

**Hudson, Mass.**—In 1911 the receipts of the plant were \$22,030.46 from sale of energy. The total cash spent during the year was \$27,792.72, not including any allowance for depreciation. The report for 1911 shows the loss on the plant since establishment to be \$20,924.94. The State Commission on Gas and Electric Light gives the loss as \$21,443.51. The average lighting rate is 12 cents per kilowatt hour. In towns adjoining, the private companies charge a maximum of 10 cents per kilowatt hour. The large manufacturers refuse to patronize the city plant because of high power rates.

**Hudson, Ohio.**—An investigation into the municipal water and electric plants in 1914 disclosed the fact that the electric generating plant had been abandoned in 1913 after only two years' operation. The plant was given to the town without cost by a philanthropic millionaire, but, without figuring anything for interest or sinking fund, the expenses in 1913 were 644 per cent of the gross revenue.

**Hudson, Wis.**—While the municipality built a lighting plant in 1888 it has always been able to lease it on better terms than the cost of municipal operation, so the city has never run its plant.

**Huntington, Tenn.**—By leasing the municipal electric plant the town is able to save on street lighting and get better service than it did when the plant was municipally operated. It was first leased in 1905 and has been run by lessees ever since.

**Huntsville, Mo.**—After buying the municipal electric plant from a company, and running it for several years, the city sold it again on July 1, 1913. The plant cost \$38,000, according to the McGraw Electrical Directory. It was sold for \$5,150, which included the cost of holding the special election. The sale practically amounted to a gift, the purchaser merely agreeing to pay off the outstanding bonds. The plant was so badly run down that it had to be rebuilt.

**Huron, Ohio.**—The municipal electric light plant was built in 1898, but an investigator in 1914 found that there is no record of its cost on the city books. In 1909 the original plant was abandoned and the machinery installed in the waterworks which was built in that year. The 1912 deficit was \$7,717.61, that of 1913 was \$11,506.78 and for the first half of 1914 was \$4,596.69. The deficits for 1912-13 and January-June, 1914, average about 150 per cent of the gross revenue from private consumers during that time, after making a proper credit for street lighting and hydrants.

**Ionia, Mich.**—Dr. Geo. P. Winchell states that the plant is a heavy loser. No depreciation account is carried, and the interest and sinking fund are paid by taxes. Dr. Winchell estimates the annual loss at \$2,000 or more.

**Independence, Mo.**—Judgments amounting to \$50,000 against the city for personal injuries to men connected with the municipal electric plant were pending in 1914, but the city had no money, and had to levy a special tax to make payment.

**Itaska, Tex.**—According to M. J. Francisco, the municipal electric plant operated about six months at a loss of \$100 a month. The mayor was then authorized to sell the plant, which he did at a loss.

**Iuka, Miss.**—The municipal electric plant is leased to J. N. Graham. The city could not keep a competent manager and found operation unsuccessful.

**Jackson, Ga.**—The generating station of the municipal electric plant was shut down in 1912 and power purchased from the Central Georgia Power Co., according to "Public Service." Even though it was necessary to spend \$12,000 to build a new sub-station, it was cheaper to purchase power than run the old station.

**Jacksonville, Fla.**—Up to 1912 the municipal electric plant demanded a minimum of \$2.00 a month, or \$24.00 per year, from all consumers, whether they used that much current or not. Thus a customer using 10 kilowatt hours in a month paid 20c per kilowatt hour, although the advertised rate was only 7c. In 1912 this was modified by abandoning the minimum and substituting a "service charge" of 50c per month which must be paid in addition to the cost of current. A customer using 10 kilowatt hours pays 50c service charge plus 70c current charge, or \$1.20, making the true cost per kilowatt hour 12c. A special cooking rate of 2c per kilowatt hour has been much advertised, but current under this rate is not available between 5 p. m. and 10 p. m. So its use is very limited. Customers using this rate must also pay all installation costs. This expense, which is very high, also tends to preclude a wide use of this rate. The city has also always paid the municipal plant for street lights at rates higher than those generally in force in other cities of similar size.

**Johnstown, O.**—An investigation made in 1914 disclosed the fact that the operating expenses for 1913 were \$3,873.31, while the revenue from private consumers was \$1,473.40, making a deficit on operation alone of \$2,399.91. Allowing a credit of \$675 for street lights and hydrants, and including the fixed charges in the expense makes the actual deficit \$4,837.41.

**Joliet, Ill.**—The municipal gas plant, established in 1857, was sold in 1859 to a private company, on account of the losses which had been incurred under municipal ownership.

**Jonesboro, Ind.**—This town tried municipal ownership in 1902, but could not meet expenses and the bondholders took over the plant.

**Kalamazoo, Mich.**—In 1912 the citizens had to vote \$125,000 to rebuild the municipal lighting plant, which was worn out. No depreciation fund was available.

**Kansas City, Mo.**—An investigation by the council in 1910 showed the following conditions: "We find that the management of the Quindaro plant is characterized by carelessness, shiftlessness and incompetency. The machinery and plant generally are dirty, and particularly the basement, and machinery therein is clogged with filth. Valuable tools are thrown about in outhouses and are uncared for. We believe that a complete reorganization of the force at this plant is absolutely essential and necessary to bring about the efficiency and safety of the source of water supply for this city, and we recommend that steps be taken immediately to put this plant in thorough repair, and that all machinery therein be put through a thorough overhauling."

**Kendallville, Ind.**—The municipal electric plant is not large enough to carry the load, having lost efficiency through depreciation. The council did not want to sink any money in new construction, so a contract has been made with the Toledo & Chicago Interurban Railroad Co. to furnish current for all customers which the municipal plant is unable to supply.

**Kent, Wash.**—Because it could not be made to pay after ten years' operation the municipal electric plant was sold in 1902 for \$2,500.

**Kinmundy, Ill.**—The municipal electric light plant was sold in 1909. The present owner writes as follows: "City's reason for selling—they could not make it go. The reason they could not, I believe, was principally because the committee did not know anything about running a lighting system. Every two years they had new committee men on the job, and being paid no salary, they would not look after the plant. As is usual in councils, every new man thinks his way is right. When they first had a plant here they used alternating current. Then a new board came along and said it should be direct current, so they sold the A. C. machinery and put in D. C. The voltage at the plant was 250 and at the end of the line it was 150. When they

did get a good man, they all thought they knew more than he did and did not keep him. When I took the plant, I told them about Tungsten lamps and they laughed and said, 'We have them now and they are no good.' I took one from the line and found it a 250-volt lamp. I tested the line and found that the voltage was 178. I am now using Mazda lamps exclusively. They sold me the plant for \$10,000. I pay for it in city lighting, a thousand dollars a year."

**La Crosse, Wis.**—In 1911 the citizens had to appeal to the state railroad commission to force their own officials to bring the water plant to a state of efficiency. The plant was so run down that it required \$250,000 to put it into shape. The water was so poor that it could not be used at all for domestic purposes. Several disastrous fires have been due to poor pressure.

**La Grange, Ill.**—In a letter to Arthur H. Grant, the village president made the following statement:

"The water and light plant in this village was erected by a private corporation under a thirty-year franchise. At the end of the first ten-year period the village exercised the privilege which it had under the franchise, and bought the entire plant. The original cost is not known; we paid (or agreed to pay) the sum of \$160,000 for it. Municipal control and ownership were not successful, and after a few years it was sold to a branch of the Edison Company, the consideration being that the purchaser assume all obligations standing against the plant and put it in good order. Nothing had been paid on the principal by the village.

"The cost to the village for incandescent street lights under the original franchise was ten dollars a year; under municipal administration no one can tell, as the plant ran down so greatly that the new purchaser has paid over \$168,000 so far to put it in good order and is not through yet. Contract price at present again ten dollars a year.

"Reasons for selling—the village could not raise the money necessary to rehabilitate the plant. Under our law we could not pledge the corporate credit, but only the plant itself; the prospect that the village could manage it successfully was not attractive to capital."

The plant was in operation about 4 years: at the end of which time, it had depreciated to the extent of about \$60,000, although the Public Service Company of Northern Illinois has spent about \$200,000 since the plant was purchased by it in 1905. The superintendent of the plant was in favor of selling and in his report thereon he said:

"Respecting the rates for light, both for public use (street lighting purposes and other municipal purposes) and for domestic consumption, I beg to say that the rates, as set forth in the proposed ordinance and agreement, are the same in price which we have now, but under which provisions both the village and the consumers will derive more current and service for the same money as heretofore paid. I recommend the passage of this ordinance and the signing of the contracts and the adoption of said rates. The present condition of the plant is such that I cannot conceive how it can be operated longer by the village without the expenditure of large sums of money, and the incurring of many obligations."

**Lake City, Minn.**—Writing to the Wisconsin Railroad Commission for information, J. Cole Doughty, representing the board of water and light commissioners, concluded thus: "Our plant under aldermanic lack of management was permitted to run down to what might have been bankruptcy in an individually-owned concern."

**Lakewood, Ohio.**—The municipal electric plant was installed in 1897, the total cost to 1906 being about \$60,000. Expert accountants found the cost of street lights on moonlight schedule to be \$129.56 per year in 1905. The plant was sold in 1906 and a street lighting contract made at \$55 per year.

**Lancaster, Pa.**—The Lancaster Examiner, referring to the "profitable" city waterworks, says: "At the end of the fiscal year 1910-1911 there was an apparent balance in the city treasury of \$113,371.46, but as only \$19,354.93 was carried forward in the estimates for the succeeding year, it is presumed that the balance of over a hundred thousand dollars was largely fictitious, and that the actual amount left over was \$19,354.93. The system of city bookkeeping is a peculiar one, and it takes a full-fledged journeyman in that particular system to understand its vagaries. If there was a balance in the treasury of \$113,371.46, it is mighty bad municipal bookkeeping if the city could not build a new boiler house, costing but \$30,000, without borrowing the money."

**Laurens, S. C.**—The generating station of the municipal electric plant was shut down in 1908 on account of the cost of operation, and current has since been purchased from the Reedy River Power Co.

**Langdon, N. D.**—The cost of the municipal electric plant, including purchase price and improvements, was \$17,500. After four and a half years' operation the plant was sold for \$9,000. The loss on operation was \$2,000 a year, making a total loss

during the time the city owned the plant of \$17,500. The plant was sold in 1906.

**Lawrence, Mich.**—The village gas plant has been an expensive investment. The taxpayers have to pay interest, sinking fund, depreciation, and make up the lost taxes, besides contributing cash for paying operating expenses. Gas is sold for \$1.25 per thousand cubic feet, and the operating expenses alone come to \$1.37 per thousand cubic feet.

**Lebanon, Ohio.**—The city bought a gas plant from private parties, paying \$5,500 for it. The city issued \$15,000 of bonds with the proceeds of which it paid for the plant and made extensions and improvements. The income of the plant at the time of this examination was a little over \$2,500. Interest on the \$15,000 alone was \$1,500, not to speak of sinking fund, depreciation and displaced taxes, while the operating expenses were \$2,000 a year.

The city built its water works in 1892 and first turned on the water four years later. What went on in the meantime seems hard to find out. In 1913, taken as an average year, the receipts of the plant from private customers were \$5,477, expenses as published by the city, \$6,172. But this bill of expense included none of the fixed charges. Interest amounted to \$1,575, depreciation at 4 per cent would have been \$2,080 and lost taxes \$676. And as \$3,500 of bonds were paid off during the year from general funds, that should have gone down in the report for sinking fund. With an income of \$6,752 for private custom and city service combined and a total expense bill of \$13,493, it is evident the city had a deficit from its water plant that year of \$6,740.

The municipal electric light and power plant produced a total income from the year of \$13,441, with expenses, as set forth by the city of \$12,825. But these expenses included no fixed charges, except \$550 for bond redemption. Fixed charges, which came from taxes, convert the apparent "profit" into a deficit of \$2,240.

**Lebanon, Tenn.**—The generating plant of the municipal electric system has been shut down since 1906 when it was found cheaper to purchase current than to take it.

**Lehigh, Pa.**—The municipal lighting plant was given to J. J. Blakely in 1900, he assuming the bonds. The plant could not operate without loss. The year before the city gave up the plant the loss was \$2,500.

**Leon, Ia.**—While the city owned the electric plant its affairs were in a constant tangle. In 1903 the city had to issue \$5,000 in bonds to meet operating expenses. Finally, in 1905, the plant was sold for one-third its cost, and the city still had \$3,000 of outstanding bills.

**Lethbridge, Alberta.**—The municipal street car lines of this city, like those of other western Canada cities, showed up with snug losses in 1916, as they had done in preceding years. The deficit for the Lethbridge lines in 1916 amounted to \$27,924.89, as shown from the official statement given out March 1, 1917, by M. Freeman, commissioner of railways for the city. Their total revenue was \$49,639.54, total operating expenses \$41,535.04, leaving an operating profit of \$8,104.50. But interest, sinking fund, taxes, insurance and bank commissions totalling \$36,029.39, wipe out this and give a deficit or loss for the year of \$27,924.89, with nothing mentioned for depreciation.

**Lewisburg, Tenn.**—The municipal electric plant, after five years' operation, was sold in 1908 for half its cost.

**Linneus, Mo.**—In order to get continuous and reliable service, the municipal electric plant shut down in 1913, and current has since been purchased from a company. The plant had been in operation only eight years when it was abandoned.

**Lisbon, Ia.**—The service given by the municipal electric light plant was so poor that the people became disgusted and sold the plant in 1912 to W. S. Tasker.

**Lisbon, Ohio.**—A council committee found, on investigation, that the city was furnishing water at from 25 per cent to 50 per cent less than cost, according to the character of the service.

**Lockport, Ill.**—The village electric plant passed from the hands of the village authorities to the Sanitary District of Chicago in 1907. The superintendent said, at that time: "We are running about \$300 to \$350 in debt every month, due to political handling."

**Logansport, Ind.**—An investigation into the operation of the municipal electric light plant in 1913 disclosed the fact that in the 17 years' operation of the plant there was a surplus in only one year, and it is claimed this surplus was secured by failure to maintain the plant properly. This claim is borne out by the fact that the deficit was twice as much in 1911, the year following the year of the supposed surplus, as it was in 1909. The total deficits from 1895 to 1911, inclusive, amounted to \$309,869. Deducting the 1910 surplus of \$12,000 leaves a net deficit of \$297,869 as the result of municipal ownership.

**London, Ohio.**—The municipal electric light plant was to have cost \$15,000, but before its erection \$20,000 of bonds had been

issued. In eighteen years the town has installed four sets of street lights. Including fixed charges and a proper credit for street lighting, the financial statement for a year stood: Revenues \$13,722, expenses \$20,502, loss \$6,780. This was about 60 per cent of the revenue from private consumption.

**Los Angeles, Cal.**—The Los Angeles Municipal News, an idealistic municipally owned newspaper, was discontinued in 1913, after less than a year's existence. The expected advertising patronage did not materialize and the loss was in the neighborhood of \$35,000 before the people voted to discontinue publication.

**Loudonville, Ohio.**—The municipal water and electric plant had a deficit of \$8,522.46 in 1913, and in addition the people had to issue \$20,000 of bonds to repair the plants.

**Lowell, Ind.**—When the municipal electric plant was sold in 1907, it was worth about \$1,500 as junk. The purchaser of the plant, who got a 25-year franchise, sold all the equipment of the old plant and built a new one. The plant was in operation by the city for only seven years but was unable to operate without loss. The town had been run into debt so far that it could not finance the rebuilding of the old plant, and so private parties were called in to take the burden off its hands.

**Lowellville, Ohio.**—The municipal electric plant was shut down in 1911 and current has since been purchased from a private company. The machinery was in such poor condition that the town has not been able to sell it to anybody.

**Lynchburg, Ohio.**—The water and electric plant had a deficit of \$2,127.86 in 1913. The plant is nearly worn out and the building is full of cracks. The roof has sagged to such an extent that it is highly dangerous. The distributing system is in bad condition.

**Lyons, Ia.**—When the village of Lyons was annexed to Clinton in 1902 it was decided to abandon the municipal electric light plant in order to obtain superior and cheaper service from the company operating in Clinton.

**Madison, Ind.**—The municipal electric plant was abandoned in 1898 after being in operation about two years. The city thereby saved about \$20 per year per lamp on street lighting.

**Madison, Wis.**—After the burning of the capitol, the state railroad commission put a pressure gage on a hydrant and then turned in a fire alarm. It was forty-two minutes before direct pressure was given by the municipal waterworks. Madison is surrounded by lakes, any one of which could be purified and made available for unlimited use.

**Manitoba (Province), Canada.**—The first year's operation of the telephone system under government ownership (1911) resulted in a deficit of \$50,000, despite an advance in rates over the former charges of the Bell company. The Government, when agitating for public ownership, promised reductions in rates averaging over 50 per cent. Instead of keeping these promises it was found that the Government could not operate, even at the old Bell rates, and there has been an advance in many of the rates, instead of a reduction. Government officials are flooded with complaints of deterioration in service since the province took over the system.

**Mansfield, La.**—The municipal electric plant was sold in 1908 because the city had no funds with which to pay the plant's bills.

**Marblehead, Mass.**—Because of inadequate depreciation charges, the city paid more for reconstructing the municipal electric plant in 1910 than the original cost of construction. The light board's report is so incomplete as to be unintelligible, but appears to show receipts just about equal to expenditures, without any allowance for fixed charges.

**Marceline, Mo.**—This town had one of the first municipal electric plants, but it did not pay. The city operated it at a loss until it burned. Sentiment was so strong against municipal ownership that the plant was not rebuilt.

**Marengo, Ill.**—In a letter to Arthur H. Grant, in 1908, the mayor said, regarding the leasing of the municipal electric plant: "Our reason for doing this is that we consider municipal management a complete failure and the less there is of it the better for all parties concerned."

**Marietta, Ohio.**—A recent investigation showed that the cost of street lights as supplied by the municipal street lighting plant on a moonlight schedule was \$69.25 in 1913. The lights were off completely for several months after the 1913 flood, while the officials were haggling over the question of rebuilding. Hardly a year has gone by when the lights have not been put out by high water, owing to the poor location of the plant. A private company offered to do the lighting for \$55 per lamp with deductions for outages, so the city is losing at least \$14.25 per lamp through municipal ownership.

**Marion, Ind.**—The generating station of the municipal electric plant was abandoned in 1910. The result is summarized in the mayor's annual report as follows: "A saving of exactly \$22.05 per lamp per year for street lighting, or a little over \$6,000 per year on the 278 lamps now in use, and a decrease of eight cents

in the city tax levy over last year." The report of the board of public works says: "The cost to produce current alone at the old city light plant for the year 1910, as per bills on file, show the following:

Cost of coal, freight and drayage, repairs to plant, supplies for plant, telephone, extra and relief men in plant.....	\$4,699.52
Regular labor in plant.....	2,980.00
Total .....	\$7,679.52

Or \$35.88 per lamp per year for current alone. The cost for current alone under the new contract is \$22.05 per lamp per year, making a saving to the city of \$13.83 per lamp per year, in addition to the reduced rate for commercial lighting."

**Martin's Ferry, Ohio.**—An investigation in 1914, covering the operation of the municipal electric plant from 1908 to 1913 inclusive, showed the deficits to be nearly 50 per cent of the total revenue from private consumers. The total deficits during the six years investigated amounted to \$68,860, in addition to the payments of \$6,000 to \$8,000 a year made by the city for street lighting. The waterworks was also found to be losing money.

**Mayville, N. D.**—In 1912 it was found necessary to rebuild the electric plant, for which bonds had to be issued, as there was no money to meet depreciation.

**McAdoo, Pa.**—After losing money for nine years, the municipal electric plant was leased, in 1908, for 25 years. The council thus stated the situation:

"The borough is now owner of a certain municipal electric light in the said borough, and in the operation thereof has encountered certain losses to such an extent that the cost of operation and maintenance together with the interest on the bonded indebtedness incurred by reason of the erection of such municipal plant, exceeds the income derived therefrom."

**McArthur, Ohio.**—After allowing over \$50 each for the street lights, which burn only until midnight on a moonlight schedule, the deficit on the operation of the electric plant in 1913 was over 200 per cent of the income from consumers.

**McKinney, Texas.**—Tiring of the inefficient service and uneconomic operation of its municipal electric light plant, the city sold the plant to the Texas Power & Light Company.

**McRae, Ga.**—The municipal water plant was spending \$3,500 a year more than it was taking in. In an effort to improve things, the city took the management away from the regular city government and put it in the hands of a board of business men.

**Menasha, Wis.**—The city refused to make a report to the state railroad commission on its waterworks. Finally the commission had to serve notice that unless the report was forthcoming the commission would send a man to make an investigation at the expense of the city. Water is pumped from Lake Winnebago without any treatment whatever, even though the lake catches all the sewage from its watershed.

**Mendon, Mich.**—When it was found that the municipal steam generating plant of the electric system was costing over \$1,200 a year more than the revenue of the plant, it was decided to abandon the plant in 1911 and take current from a private company.

**Miamisburg, Ohio.**—A municipal electric light plant was built in 1890-92. It at once became a financial burden to the taxpayers, who desired to build also a city water plant. It was fourteen years, though, before they could do this, owing to the unprofitable operation of the light plant. Regardless of the fact that the town paid usual rates for its water and light, both plants were losers up to the last investigation. The original electric light plant was scrapped and a new one installed in 1904, but the last bond of the original plant ran on until 1910—six years after the plant had been scrapped. Up to June, 1913, \$37,000 in bonds had been issued against the light plant, \$94,000 against the water works. In addition to these obligations, the "department of public service" raised extra money by notes, aggregating \$26,150 at 6 per cent from August, 1905, to 1914, much of which money went to these two plants. A report from the records of the lighting plant for 1913 showed a deficit of \$9,942.

**Middleboro, Mass.**—The municipal gas plant has always lost money. The most favorable accounting shows that there was a loss of \$1,719 in 1911, and previous to that time the losses had been much greater, amounting to over \$3,000 a year. The loss is nearly half the total operating expenses, without any allowance whatever for fixed charges, which are very high on account of the reconstruction of the plant during 1910. The loss on the combined gas and electric plants amounts to \$2,279.70 in 1911.

**Middletown, Pa.**—In a letter to Arthur H. Grant, regarding the abandonment of the municipal electric plant in 1907, the chief Burgess says:

"Concerning shutting down our plant and taking up York

Haven power is because the York Haven people can furnish light much cheaper than we could run our plant, so we felt justified in making the change."

**Milan, Ohio.**—After vainly trying to make a success of a municipal electric plant, it was shut down in 1914 and current purchased from a nearby company.

**Milford Centre, Ohio.**—In 1907 the municipal electric and water plants were sold at auction. They had been losing money at the rate of about \$1,200 per year.

**Mineral City, Ohio.**—The municipal lighting plant has been offered for sale to the highest bidder on account of the huge deficits. The plant has never earned more than half its expenses.

**Minerva, Ohio.**—This municipal plant claims to have earned a "surplus" of \$30,000 for its municipal electric plant, but there was so little real money available at the beginning of 1919 that the rates had to be increased nearly 20 per cent. Investigators are not permitted to examine the books, it is reported.

**Mitchell, Ind.**—Early in 1911 the municipal electric plant was sold to S. D. Rowland for \$7,103, the price including a waterworks franchise. The electric plant had been running twelve years, constantly losing money.

**Modesto, Cal.**—The city shut down its electric generating station about 1906, and leased the poles and wires to a power company. The plant was worn out, as no depreciation had been allowed for, and the city got cheaper service from the power company. The waterworks was also found to be losing money and was disposed of.

**Mohawk, N. Y.**—The deficit on the municipal light plant from 1897 to 1904 was over \$3,000 per year. In 1904 the plant was leased to a company at a saving of about \$4,000 per year.

**Moline, Ill.**—The city was able to save over \$35 per lamp per year, in addition to getting improved lamps, by giving up its municipal electric plant and making a contract for street lamps. The plant cost \$25,000 and was sold for \$7,900.

**Montpelier, Ind.**—The electric light plant was built by the city in 1901 and sold for \$1.00 in 1905. It cost \$38,000. The plant was completely worn out.

**Montpelier, Ohio.**—The municipality built a water and light plant in 1895, which imposed heavy burdens upon it every year. Aside from many bond issues for money with which to make repairs, it has been necessary to contribute several thousand dollars a year from taxes to keep the plant going. The tax rate has been steadily going up. From 1913 to 1914 it rose from \$1.34 to \$1.40. It became necessary after thirteen years to reconstruct the plant. As depreciation had not been provided for by the plant, \$30,000 more bonds had to be issued when the old plant was scrapped. So far as the water plant, proper, is concerned, it was impossible to find out much about its financial condition, beyond the fact that the plant was a steady loser, because of the loose methods of accounting. For nineteen years the excess of expenditure over income for this plant amounted to about \$8,000 yearly.

**Monroeville, Ohio.**—The municipal electric plant, according to reports of officials, was a losing proposition, so in 1917 it was shut down and current purchased from a private company.

**Mooreville, N. C.**—The Southern Power Company sells power cheaper than the municipal plant could make it. Therefore the municipal generating plant was shut down and sold as junk.

**Mountain Lake, Minn.**—The municipal gas works, which cost \$3,000, has been offered for sale. Price \$500.

**Mt. Serling, Ohio.**—This village of 1,500 population built its own water and light plant in 1895, and it proved a loser every year. Despite continuous contributions from the tax fund to meet operating expenses, it is seldom the plant's account is not overdrawn. An investigation for one year, taking the city's fund ledger figures as basis, showed loss of \$6,675, which was more than 110 per cent of the total revenue from private consumers, indicating a cost of 21 cents per kilowatt hour for generating service and 50 cents per 1,000 gallons of water. For the first eleven months in 1914 the deficit was \$4,777, or 90 per cent of the total revenue from private consumers.

**Muncie, Ind.**—The municipal electric plant was shut down in 1906, and the machinery sold for scrap, the dismantled building still remaining in the hands of the city. During the fourteen years' operation the cost per street lamp practically doubled. The plant was considered a "white elephant" to use the words of the councilman, and the city was able to obtain much cheaper street lighting from the local electric company.

**Murray, Ky.**—Total water receipts for year, \$2,040; total expense, \$5,854; total loss, \$3,450.

**Murray City, Utah.**—The city officials failed to inform the people of the condition of the plant in 1914, and a local newspaper made an investigation which showed that the plant, estimated to have cost \$60,000, had cost \$85,459.08, and that \$15,000 to \$25,000 would be required to complete the plant. The

receipts for the first six months, including payments for street lights, were \$2,000, and the expenses, including interest but no other fixed charges, were \$8,774.28, making a loss of \$6,774.28 during a period of six months.

**Muskogee, Okla.**—An investigation made by the Muskogee Times-Democrat disclosed the fact that the revenue of the city waterworks for 1913, including hydrants, was \$87,203.70, while the expenses were \$123,575. The deficit was \$36,371.23. The excessive payroll was given by the paper as the chief reason for the deficit.

**Napoleon, Ohio.**—The town has a municipal water and electric light plant, which began operation in 1895. The electrical equipment was renewed in 1904 and again in 1911, showing enormous depreciation. The joint plants turned up a deficit for the year 1913 of \$10,650.

**Nashville, Ark.**—The municipal gas plant was abandoned in 1908 because it could not be made to pay. The price of gas was \$3.00 per thousand feet—the cost of manufacturing was \$6.00 per thousand.

**Needham, Mass.**—The municipal electric distributing system was sold in 1908 for reasons of economy. It was found cheaper to have a company do the lighting.

**Nelsonville, Ohio.**—An investigation into the water and electric plants in 1914 showed that the deficit for 1913 on the waterworks was \$9,851.11 or nearly 200 per cent of the total income from consumers, while the electric plant lost \$9,106.14 in addition to the payments made by the city for hydrants and street lights.

**Newark, Ohio.**—An investigation into the municipal street lighting plant in 1914 disclosed the fact that there were \$21,000 of bonds outstanding under names which gave no clue to the fact that they were electric light bonds. In estimating the cost of service, these bonds have heretofore never been included. The plant was worn out, and the boiler capacity was not enough to carry the street lighting load. Although the city got \$5,000 worth of gas free in 1913, the cost per lamp for 6.6-ampere arcs was \$57.69 on a moonlight schedule. If Newark had had to pay for its fuel, as any other city would have to, the cost per lamp would have been \$69.71, which is among the highest rates paid in the state of Ohio.

**Newburgh, N. Y.**—The water board early in 1912 decided at a special meeting that it would be necessary to increase the water rates 20 per cent in order to make the plant less of a drain on the taxpayers.

**New London, Ohio.**—A village of 1,700 people has a municipal electric light plant with an annual deficit of \$1,235. At least that was the record when our investigation was made. While the officeholders in charge of the plant advanced the claim that the plant was meeting its bond redemption obligations, the books showed that in one year sinking fund requirements amounted to \$1,367, of which \$385 was paid from the plant's revenues. The remainder, or \$982, was paid from the village's general fund.

**Newport, Ky.**—In July, 1910, a special committee appointed by the mayor to investigate the municipal waterworks found conditions to be "deplorable and a menace to public health."

The report also says: "Your committee visited the Newport reservoir July 8 and the condition that met its gaze was alarming. On the bottom of the basin there lay, festering in the July sun, a puddle of muddy water, fringed with a border of pasty mud, and on the southeast end of the reservoir there was started a rank vegetable growth.

" \* \* \* The foundation for the new pumping machinery was begun in September, 1909; the machine was to be running by January 15, 1910; contractors were granted an extension of 30 days; the machine is not finished yet.

"Should council refuse to grant funds for that purpose (expert engineering) your committee feels compelled to raise such funds by private subscription."

**New Richmond, Ohio.**—The 1913 deficit on the municipal water and electric plant was \$3,708.49. The electric distribution system is dilapidated and falling down in places, one of the pumps in the waterworks will not work, and there is still in use a "temporary" wall for one side of the station building; this wall was erected in 1902 to replace the three-year-old brick wall which collapsed on account of faulty construction.

**New York, N. Y.**—Up to December 31, 1912, according to the New York Sun, the two municipal ferries in New York had cost \$15,354,257.02 more than they had brought in. One ferry had been in operation seven years, the other six years.

The city tried to light the Williamsburg Bridge from a municipal light plant using garbage as fuel. After about a year's trial the plant was abandoned in 1907, and the lighting was purchased from a private company at less than half the cost under municipal ownership.

**Niles, Ohio.**—The city installed its own water and electric plants in 1891 or 1892, at what cost no one can tell, for bonds were issued promiscuously, the proceeds being applied indis-

criminately, depending upon which plant was in need at the time. The water works was completely rebuilt once since originally established. The electric plant passed first through a stage of partial municipal ownership. At first it did only street lighting. Then it went through a stage of complete municipal ownership, doing both street and commercial lighting and finally it lapsed into a stage of private ownership. The city found a private company that could transmit current from a distance of six miles and deliver it for less money than the municipal plant could make it.

**Norristown, Pa.**—The municipal street lighting plant reports a cost of street lamps at \$39 per year in 1911, which looks very good until it is discovered the repairs during 1908-1909 were capitalized instead of being charged to operating expenses and that the repairs those years amounted to \$57.70 per lamp.

**North Bend, Ind.**—With the condition of the plant running down and expenses up, netting annual losses to the town, the municipal electric plant was abandoned after many years of operation in 1916.

**North Vancouver, British Columbia.**—The funds of the municipally owned ferries were overdrawn \$25,216.00 in March, 1913.

**Northville, Mich.**—The city got enough of municipal ownership and by a popular vote of ten to one sold its electric light plant for \$36,000 to the Detroit Edison Company.

**Norwood, Ohio.**—An investigation in 1914 disclosed the fact that the municipal water and electric plant had signally failed to keep up with the growth of the city. The electric plant was overloaded about 30 per cent and the voltage is so poor and irregular that the people must choose between having good light and high lamp renewal cost or miserable light if the lamps are of high enough voltage to withstand the sudden jumps to which the system is subject. There have been many serious shortages in the water supply. The 1913 deficit on the electric plant was \$12,972.76, and on the water plant was over \$36,000, after giving credit for such public service as was given by the plants.

**Osborn, Ohio.**—The municipal electric plant was sold in 1916 to a private company in order to stop increasing taxes.

**Oxford, Ohio.**—After spending large sums for improvements in an effort to make the municipal electric plant pay, it was sold in 1918.

**Painesville, Ohio.**—In the summer of 1911 the Warren Bicknell Co. of Cleveland was employed by the Council to examine and report on the electric light system. The report said:

"The present equipment is long since out of date and in no sense modern. Although it may continue to generate current for years to come, it will do so with extremely poor generating efficiency, and at high cost per unit of output.

"The switchboard equipment and layout is poor.

"The distributing system is poor and at many points even dangerous. Your arc lighting system should be thoroughly overhauled. In places the poles are too far apart, and many should be replaced on account of age. The arc light conducting wire is at many points dangerously near the ground, and at any moment the city may be liable for the death of any of its unsuspecting residents.

"There are many other details that might be referred to but the above statements should be sufficient to show the general condition of the plant."

**Paris, Tenn.**—Here is a municipal electric light plant generally reputed as among the most successful of its kind. Its superintendent, M. W. Younkin, in February, 1916, made the statement: "No allowance is made in any way for sinking fund or interest; no allowance is made for taxes lost through displacement of private ownership," and added that as for depreciation it was "taken care of in maintenance." The plant's alleged "profits" for the year were \$10,434. Its valuation was \$119,367. Bond interest and sinking fund, depreciation and taxes figured out, as should have been, on that amount would more than wipe out any "profits" of \$10,434.

**Peabody, Mass.**—The annual report of the electric light commissioners of the town of Peabody for 1910 says: "The Commission feels that the financial condition of the plant is understood by few of the citizens of the town. It is their intention, therefore, to state as clearly as possible, the true condition, and to recommend such changes in policy as the welfare of the plant demands. A financial statement of the assets and liabilities, as figured in the Massachusetts State Gas and Electric Commissioners' Report, shows a deficit of \$28,964.26, January 15, 1911. All figures used in this computation are taken from the report of the manager and must be correct. The assets are \$160,433.00 and the liabilities \$189,397.26. This means the plant is \$28,964.26 in debt, and that the operation of the plant has cost the town \$28,964.26 more than has been annually appropriated. The actual cost of the municipal lights, therefore, has exceeded the apparent cost by the amount of this accumulated deficit, according to the Massachusetts State Commissioners' report."

**Pelham, Ga.**—In return for street lighting concessions, the municipal water and electric plant was leased in 1908 to the Pelham Public Utilities Co.

**Pepperell, Mass.**—The town sold its municipal electric distributing system to the Shirley Electric Company. The municipal plant has charged high rates but could not make money. The company reduced the rates and made a profit.

**Philadelphia, Pa.**—Probably the most colossal failure of municipal ownership in America is that of the Philadelphia Gas Works. The plant was leased to the United Gas Improvement Co. in 1908. Prior to the lease, the city lost about \$400,000 a year. The city now secures an annual income of over \$3,000,000 as its share of the plant's income under the lease. For years the municipal gas works was the most corrupting influence in Philadelphia politics.

**Pierce City, Mo.**—This city tried municipal ownership for fifteen years; then it sold its electric plant to the Ozark Power Co.

**Pittsfield, Ill.**—In "Defunct Municipal Lighting Plants," the mayor is quoted as follows: "Cheaper to pay the Pittsfield Electric Company than do it ourselves. We ran it ourselves for several years, and have had it run by contract at least five years, saving money by contracting it to outsiders."

**Pontotoc, Miss.**—The municipal electric plant, after two years' operation, failed to pay expenses, so it was sold in 1907 at about two-thirds of its cost.

**Poplarville, Miss.**—Dissatisfaction with municipal ownership led the citizens to vote in 1912 to lease the municipal electric plant to J. G. Rouse with an option of purchase within five years.

**Portsmouth, Ohio.**—The municipal electric plant was first leased to the street railway company, who offered to do the lighting cheaper than the city could, and was sold to the railway company about 1905.

**Price, Utah.**—By leasing the municipal light plant in 1914 the town turned a deficit of over \$3,000 a year into a net income of \$1,200 a year, and in addition gets a considerable amount of free public lighting. The plant had been in operation only four years.

**Pulaski, Va.**—In 1912 the municipal electric light plant was sold to a private company. At the time of the sale the plant was very much run down, the service was a subject of general complaint, and the city was losing money.

**Pullman, Wash.**—The city council, in 1907, in its resolution to sell the municipal light plant at less than half its cost, said: "The electric light plant owned by the city of Pullman has proven to be a burden to the taxpayers of the city, and the same cannot be operated by such city so as to repay the cost and expense of operation."

**Raton, N. M.**—The city voted \$400,000 for a municipal water works, then had to go to court to find out whether it really owned the works or not. One thing it did not need legal light on was the fact that in one year, as a result of the bond issue, its taxes were doubled. City taxes in 1914 were \$15,368; in 1915, \$30,212.

**Reading, Mass.**—This town has owned its electric light plant for some time, but when it was proposed to go into municipal ownership of a gas plant the people voted, on June 20, 1911, by a majority of 123 to 28, not to go into municipal ownership of the gas plant, but to give a franchise to a private company. The electric plant has been very aggressive, yet the receipts from customers last year amounted to only \$33,962.38, while the cost of running the plant was \$45,125.09. With the exception of the money received for rent of poles, and for scrap, the taxpayers had to make up the losses. This has not been to their liking.

**Reading, Ohio.**—Failure to include fixed charges in the accounts of the municipal water and electric plants misled the people for many years into thinking the plants were successful. An investigation made in 1914 showed that the losses of the plants, after interest, sinking fund, depreciation and lost taxes were included, amounted to \$12,505.91 in 1913.

**Red Bud, Ill.**—In reply to a request for a report of the municipal light plant, the following was received in 1911: "Expense of plant from May 1, 1909, to May 1, 1910, including electrician's salary (\$1,140), \$4,660.36. Income for fiscal year, \$1,988.58. We have no published itemized report. This was published in City Clerk's (bulk) report last May."

**Regina, Sask., Canada.**—The municipal street railways of this city, rolled up a deficit for the taxpayers in 1916 of \$76,145.03. This was, however, much less than the deficit of the previous year, 1915, which amounted to \$115,919.29. The comparative figures of volume of business, income and expenses, as issued in the city's annual report of 1916 and given out by D. W. Houston, superintendent of the street railway system, are as follows:

	1916.	1915.
Passengers carried .....	4,671,402	3,661,177
Passenger revenue .....	\$197,188.00	\$156,200.00
Miscellaneous revenue .....	15,602.19	16,004.98
Total revenue .....	\$212,790.19	\$172,204.98
Operating expenses .....	191,359.68	180,410.34
Operating surplus .....	\$ 21,430.51	
Deficit .....		\$ 8,205.36
Debt service—Interest and sinking fund charges.....	97,575.54	107,713.93
Total deficit .....	\$ 76,145.03	\$115,919.29

**Richmond, Mich.**—The municipal electric plant was sold to a company in 1912, because in that way the people could get 24-hour service which the management of the municipal plant said was impossible under municipal ownership. There were only eleven votes in favor of having the municipal plant kept in operation.

**Richmond, Va.**—The municipal gas plant of Richmond is an example of large claimed profits which do not stand up under investigation. The profits are arrived at by charging operating expense to capital and paying interest out of taxes. A report made a few years ago by a council committee read:

"1. The chief causes for dissatisfaction among our customers are insufficient manufacturing capacity and holder storage, inadequate main system, lack of proper treatment of gas before it leaves the works and entire lack of system in maintaining the mains, services and meters, in regulating pressures and in following up and permanently removing sources of individual complaints.

"3. In reporting on the cost of production our management has heretofore omitted many items which should have been included.

"8. Our expert reports that the gross cost of distributing our gas has been phenomenally low, but declares that this economy has been at the expense of good service to the consumer, and by failing to provide for further extensions and repairs to the plant. As he declares: 'To give proper service to the public and properly maintain your property, your costs for general expense, distribution, etc., would be nearer 18 cents per 1,000 cubic feet than the present figure of 11 cents.'

"It has been the policy to cut down expenditures for such purposes to a minimum, making a show of apparently large returns, with the ultimate result that we find ourselves facing the necessity for a large outlay for replacement and extension."

**Romeo, Mich.**—Twelve years the town owned an electric plant. It could not be made to pay and the people were glad to accept the offer of the Eastern Michigan Edison Company to purchase the property. A thirty-year franchise was given. The Edison company gives continuous service, while the municipal plant did street lighting only until midnight and had no day service.

**Sabina, Ohio.**—Although the municipal light plant was found to be in good physical condition, it was not economically successful. Accounts taken from the town clerk's fund ledger showed a deficit of \$4,933 for the period from January 1, 1912, to November 30, 1914. An investigator was given the assistance of every town official from the mayor down in searching for a record of the bonds, but without avail. The 1912 and 1913 deficits were practically 80 per cent of the total income. This indicated that the rate should have been 11 cents instead of what it was, 6 cents per kilowatt hour.

**Sabina, Ohio.**—The municipal water works in 1912 and 1913 lost 80 per cent of its gross income, indicating the rate should have been 27 cents instead of 15 cents per 1,000 gallons.

**St. Bernard, Ohio.**—The State Inspector has found evidences of loose bookkeeping in the municipal water and light plants several times. There is no complete record of the deposits which have been made by customers as security for payment of bills. The equipment has always been second-hand and expensive to operate. For the first time in its history the plant was equipped with new machinery in 1914. Street lights are out frequently and there are serious interruptions of service. The 1913 deficit was \$21,223.81, more than 100 per cent of the total revenue from consumers for water and electricity.

**St. Charles, Mo.**—According to local opinion, St. Charles changed from one of the most poorly lighted towns in Missouri to one of the best when it abandoned municipal ownership and voted a franchise to the St. Charles Light & Power Co. in 1914.

**St. Paris, Ohio.**—Municipal electric light plant producing a loss of \$5,303 a year for a village of 1,250 population. To overcome this loss, which was almost 75 per cent of the total revenue from private customers, the rate should have been 14 cents per kilowatt hour instead of what it was, 8 cents.

**St. Peter's Minn.**—The city's electric distributing plant broke down and, pending repair, the city hooked up for current from the Northern States Power Company. Finding the service so much more economical and efficient than its own, the municipality continued it rather than resume operation of the city plant.

**San Francisco, Cal.**—A grand jury examined the operation of the municipal street railway in 1911 and found the books so tangled as to be unintelligible, the payroll stuffed for political purposes, and much equipment stolen. Both incompetence and dishonesty were discovered.

**Santa Clara, Cal.**—The generating plant of the municipal electric system was shut down about 1907, after ten years' operation, because it was cheaper to buy current from a company than to make it in the municipal plant.

**Santa Cruz, Cal.**—An inquiry for a report of the municipal light plant of Santa Cruz, made in 1912, brought the following reply from J. L. Wright, City Clerk: "I beg to say that we have no published reports."

**Seattle, Wash.**—In order to make a showing of apparent profit at low rates, the city charges itself exorbitant rates for street lighting, the highest in the United States in large cities.

In 1911 the Taxation Committee of the Seattle Chamber of Commerce reached the following conclusions and embodied them in a report: The plant collects direct from the taxpayers an average of \$181 per kilowatt per year for street lighting, while private consumers are getting service at from \$45 to \$80 per kilowatt per year. The street lighting requires 12 per cent of the maximum demand at the power plant, and the taxpayers pay 32 per cent of the total gross receipts of the plant. The plant cost \$3,500,000, and is not making enough to pay operating expenses and fixed charges, even though the city itself contributes a third of the gross revenue.

In 1912 the private company in Seattle offered to do the street lighting at the same rate at which they furnished current to commercial customers. This would have resulted in a saving of \$127,000 a year, but was rejected. The management of the municipal plant publicly admits that it grants discriminatory rates to those in a position to demand them.

**Sebewaing, Mich.**—When the village went into municipal ownership in 1911 it was stated that \$10,000 would build a suitable plant. The cost was \$17,000, and the tax rate was advanced from three-fourths of one per cent to 1¼ per cent the year after the plant started operation.

**Sharon, Wis.**—In a case affecting the municipal water and light plants of Sharon, before the Railroad Commission of Wisconsin, decided January 11, 1912, the commission says:

"With respect to the rates for water and gasoline gas, the statement of earnings and expenditures shows that after paying the expenses of operation, excluding interest charges upon the funded indebtedness, there is a large deficit in both the gas and water departments for each of the three years given. Inspection of the expenditures discloses that no allowance for depreciation, as such, has ever been made by the village.

"Owing to the absence of meters, and especially to the failure of the utility to keep the accounts and records as required by the Public Utilities Law, the information available at present is insufficient as a basis for rate schedules."

**Shepherd, Mich.**—Early in 1913 the village closed down its municipal electric generating station and has since purchased power from a private company. The village thereby got 24-hour service, and effected a considerable saving as well.

**Shepherdstown, W. Va.**—In a letter to Arthur H. Grant, the mayor says:

"The town electric plant was installed in 1901 at a cost of \$4,800, and sold for \$3,200. Reasons for selling were that no fund was accumulated for depreciation, and the town could not afford to pay for its property superintendence, and almost every year there was a change of officials. The rates were too low."

The plant was sold in 1907.

**Silverton, Colo.**—After spending twice as much as the estimates called for on a municipal electric plant, the city shut down its generating plant and purchased current from a private company at a considerable saving.

**Souderton, Pa.**—After spending large sums for enlarging the municipal light plant the authorities closed down the generating station and made a contract with the Excelsior Light, Heat & Power Co., which has been supplying current since 1907.

**South Lyon, Mich.**—In March, 1912, the taxpayers voted to sell the municipal lighting plant to the Eastern Michigan Edison Company, thereby saving a considerable sum on street lighting, as well as improving service and reducing rates to private consumers.

**South Pittsburgh, Tenn.**—After two years' operation and an expenditure in excess of \$12,000 the municipal electric plant was sold in 1907, payment being made in lighting. The reason for selling was high operating cost and lack of up-keep.

**Spokane, Wash.**—An investigation made in 1913 disclosed the fact that the waterworks deficit for 1912 was \$225,329.71, which did not include services of other city departments, legal expense, of which there was a great deal, or lost taxes. The gross revenue, including running services, was \$472,972.75, while the cost of operation, including interest, depreciation and sinking fund, came to \$698,302.46. The deficit is largely due to the practice of issuing bonds to meet the cost of operation and depreciation, and to the political influences which governed the plant for many years.

**Springfield, Ill.**—In 1914, J. E. Dalby, superintendent of the municipal electric plant, made the following statement: "The outage records at the plant which are very carefully kept, show that one or another of the light circuits have been off forty times during the past year. When a circuit is off it means that about 75 street lights are off. Despite a close daily inspection, we have frequent cases of burned out coils, grounded coils, grounded commutators and other mishaps, each of which causes from 75 to 150 lamps to be out for periods ranging from five minutes to several hours."

**Stockton, Kan.**—The municipal electric plant here was one of the first in operation, but was sold only two years after it was built on account of the difficulty of securing competent management. The plant lost money while the city owned it.

**Swift Current, Saskatchewan.**—The municipal electric plant in 1914 had to increase its base rate 12 cents per kilowatt hour in order to meet operating expenses.

**Sycamore, Ohio.**—In 1913 the municipal water and light plant produced a loss of \$6,558, according to the figures in the city clerk's fund ledger. The plants were practically put out of business early in 1914 on account of depreciation of equipment, for which they had from their earnings made no provision. Then reconstruction began at the general taxpayer's expense.

**Tiffin, Ohio.**—The city built a natural gas plant with \$500,000 worth of bonds and after operating the plant at a loss sold it to Kerlin Bros. of Toledo for \$27,000, still having to pay interest on and redeem the bonds.

**Tippecanoe City, Ohio.**—The village established jointly a water and electric light plant in 1897, issuing bonds of \$18,000 against the water plant and \$7,000 against the light plant, although as events proceed no distinction is made in appropriations and accounts for the two plants. In 1913 they stood on the books at a value of \$40,000, with a deficit for the year of \$5,420. The total income that year was \$12,072, total operating expenses \$10,573. The interest on investment—5 per cent on \$40,000—was \$2,000; depreciation \$2,400 and lost taxes \$520, making total expenditures of \$17,493 as against total income of \$12,072.

**Toledo, Ohio.**—The municipal water works, Director of Public Service Goodwillie reported, showed a loss in 1916 at the rate of \$100,000 when "proper allowance is made for deterioration." The director pointed out that the plant wasted and "gave away" water, which led the Toledo Times to remark: "It is an old trick of the bosses to exchange municipal favors for political influence, leaving the taxpayers to foot the bill."

**Toledo, Ohio.**—The million-dollar failure of municipal ownership in Toledo is one of the worst this country has seen. The city went into the natural gas business, but the wells shortly gave out, and the city was left with a useless investment of \$1,500,000. Finally the city lines were leased, and the lines outside the city sold for \$102,000. Most of the bonds are still unpaid and the people are paying interest on them.

**Toronto, Canada.**—The city auditor, reporting on the operation of the municipal electric distribution system, which purchases power from the Ontario Government Hydro-Electric System, found that, at the close of business June 30, 1912, the system had lost \$290,639.65 after about two years' operation. Too low rates and too many employees are given as the reasons for the shortage.

**Townsend, Mont.**—Early in 1912 an election was held for the purpose of deciding whether the town should sell the municipal lighting plant to the Butte Electric & Power Co. Only one vote was cast against the sale.

**Trenton, Mich.**—In 1907 the people voted 142 to 18 to sell the municipal electric plant, which had been losing about \$500 a year and was in very poor physical condition.

**Troy, Kan.**—The city had its own lighting plant, but gave up the ghost when the losses continued to roll in. It hooked up with several other neighboring towns to the lines of the Atchison Railway Light & Power Co.

**Troy, Ohio.**—Political interference caused the municipal electric plant to lose some of its best power customers in 1913, with the result that there was a deficit of \$3,097.22 on the year's operation.

**Ukiah, Cal.**—The generating station of the municipal electric plant was operated at heavy expense until 1908, when it was abandoned and current purchased from the Snow Mountain Water & Power Co.

**University Place, Neb.**—After trying municipal operation for three years, the generating station of the municipal electric plant was shut down in 1907 and power has since been purchased from the Lincoln Traction Company.

**Upper Sandusky, Ohio.**—This city acquired its own natural gas plant in 1889 for \$80,000, represented by bonds issued. It sold the plant in 1902 for \$8,000, just one-tenth of this sum. Nor did the plant ever produce a penny from its earnings for bond interest or redemption. All of this came from the general taxpayer's pocket.

**Urbana, Ohio.**—In 1890 the city issued \$250,000 6 per cent general municipal bonds maturing from ten to twenty years with which to acquire a natural gas plant. The plant was so unsuccessful that eight years later the city sold part of the property for \$15,000 and leased the distributing plant to a private company for \$3,000 a year. All fixed charges were paid, not from the plant's earnings, but from general tax funds. In 1897, a year before it disposed of the plant, the city defaulted on this bond interest and compromised with the bondholders by getting them to cut the rate from 6 to 4½ per cent. Between 1903 and 1909 \$55,000 bonds maturing had to be refunded. The last \$5,000 of these bonds was paid in 1916.

**Vancouver, Wash.**—In June, 1902, the municipal electric plant, costing \$70,000, was sold for \$11,000, including a franchise in which the purchasers agreed to give lower rates than had ever been given by the city. Even with high prices, the plant had always lost money.

**Versailles, Mo.**—The people voted in 1906, by a majority of 218 to 12, to shut down the generating station of the municipal electric plant and buy current from the local company, as the company's price was lower than the cost to the city in using its own plant.

**Versailles, Ohio.**—A village of 1,700 with a municipal light and water plant producing a loss of \$7,092 a year—in 1913. This deficit amounted to 90 per cent of the revenue from private consumption.

**Waddington, N. Y.**—The municipal electric plant was sold, after five years' use, for less than half its cost. The service was extremely bad.

**Wadesboro, N. C.**—The municipal electric plant was sold in 1912 to the Yadkin River Power Company on account of poor service and financing.

**Wakefield, Mass.**—According to the report of the municipal gas and electric department for 1911, the town has always paid more out of taxes for the maintenance of the municipal plants than it would have had to pay for lighting by a private company. The average annual amount taken from taxes up to 1903 was \$13,074, while the cost of lighting by a private company is estimated at \$8,500 a year. From 1907 to 1911 the average taken from the tax levy amounted to \$15,540 per year. In 1913 the town decided to shut down its electric plant and purchase current.

**Waynesville, Ohio.**—The municipal electric plant was sold in 1919 because the city officials had never been able to make it come out even.

**Westerville, Ohio.**—The municipal electric plant was shut down in 1914 because the cost per kilowatt hour was about five times the price at which current could be purchased from a private company. The town got 24-hour service and lower rates through the abandonment of its generating plant. Arrangements have also been made for the operation of the waterworks by electricity purchased from the private company at a considerable saving over steam operation.

**Wheaton, Ill.**—The electric plant was started in 1890. In 1904 the generating plant was shut down and current purchased from the Aurora, Elgin & Chicago Railway Company. The generating plant was worn out and no money was available. Later the city found it cheaper to sell the distributing system to the Western United Gas & Electric Co., which now does the lighting.

**Wheeling, W. Va.**—Municipal gas plant closed down March 31, 1916, because it proved a complete and costly failure. It lost several thousand dollars a year for the taxpayers. In June of 1915 alone it lost \$1,900. Its rates were double those of natural gas. It was unable to compete with the electric light company.

**Whitehall, Mich.**—The deficit of the municipal water and electric plant in 1912 was \$1,127 and in 1913 it was \$1,597, although the town contributed over \$3,000 a year as payment for street lights and hydrants. It is understood that the town also has paid the fixed charges in addition to the charge for street lights and hydrants.

**Williamsburg, Ohio.**—The municipal electric plant has been run by inexperienced men during the nine years of its existence. The plant was improperly constructed in the beginning, and much of the distribution system had to be rebuilt. The 1913 deficit was \$3,695.03, after allowing credit for street lights.

**Willoughby, Ohio.**—In 1910 the municipal electric plant, after only a few years' operation, broke down and left the town in darkness for months. It was found that the plant was worn out and not worth repairing. A contract was therefore made with the Cleveland, Painesville & Eastern Traction Co. The town's loss through municipal ownership was about \$75,000.

**Wilmington, Ohio.**—The municipal light plant was sold in 1903, after ten years' operation, for \$12,000. There had been \$110,000 spent on the plant, but it was a "complete wreck" and was giving only intermittent service. The people were so disgruntled that they refused to sanction further expenditure. The popular vote in favor of the sale was 896 to 34.

**Winfield, Kan.**—The report of the municipal electric plant for 1911 shows total receipts for current amounting to \$25,573.72 and expenses amounting to \$27,574.26, without any allowance for interest, depreciation or sinking fund. A book charge of \$6,739.90 is made for depreciation, but no money is provided to take care of the charge.

**Winnetka, Ill.**—While it is difficult to obtain information about this plant, the superintendent having said, "I would not even let a taxpayer look through our books and records," it is known that the losses to the village amount to at least \$3,000 a year. The revenue from all sources is about \$15,000 a year and the expenses are known to be at least \$18,000 a year.

**Winnipeg, Manitoba.**—The government telephones of Manitoba have proved a huge economic failure and inferior in service to the Bell system which they displaced. From a comprehensive investigation made by James Mavor, Ph.D., professor of political economy in the University of Toronto, who published a book setting forth the results of his discoveries, the following facts are presented:

The system, begun in 1908, represented a loss of \$1,000,000 to the people at the time of this investigation.

In 1909 the government proclaimed a profit of \$271,797, while there was instead a deficit of \$15,593.

In 1915 the government proclaimed a profit when the actual facts showed a deficit of \$97,629.

Payrolls are badly padded. "Men were forced upon foremen by members of the provincial legislature; cabinet members made 'recommendations' over the telephone," and "the whole running of the system has been permeated with politics."

There has been a good deal of labor trouble, despite the oft-made claim that public ownership does away with this.

The author says the Bell service and rates were satisfactory, and the government took over the telephones simply "to promote the political interest of the government party in such a way as to contribute to keep the government in power."

He also says:

"It is a compelling and fearless narrative of the true record of an American government in the management of a great commercial business. It tells what happened to the rates and what happened to the finances, what happened to the consumer and what happened to the taxpayer. It is essentially a vivid narrative of political intrigue and carries a lesson to every patriotic American.

"From the beginning of public ownership, the telephone system was used for political purposes, sometimes overtly, at other times furtively, but always with a cynical disregard for the interests of the public.

"The unsound financial policy and the management of the government brought the telephone system to the pass that either the revenue had to be increased or the system had to be permitted to gravitate rapidly into hopeless insolvency."

It has not reduced, but in some cases has raised, the rates of service.

**Winthrop, Mass.**—A committee of five was appointed by the town moderator under a vote passed at town meeting, held March 11, 1912, and this committee immediately entered upon a thorough investigation of the question of municipal ownership. Their report is illuminating in the thorough and competent way in which the investigation was handled.

The committee found that if the town operated its own plants it would be necessary to raise the price of gas and electricity from the present rate of 90 cents per 1,000 cubic feet of gas and 11 cents per kilowatt hour for electricity to approximately \$1.30 and 14 cents, respectively.

As at none of the public hearings which were held were any complaints registered on account of the character of the service furnished by the company, and as the committee found that the cost of gas and electricity would be considerably greater under municipal ownership, their recommendation was that the town should not purchase or acquire the gas or electric lighting plants and that the town should enter into a new contract with the gas and electric company for municipal lighting.

The following is a quotation from the conclusion of the committee's report:

"If your committee had been able to find from its investigation that the town could sell electricity at 11 cents per kilowatt hour and gas at 90 cents per thousand cubic feet, or if your committee could have found by its investigation that under municipal ownership electricity could be sold to private consumers a cent per kilowatt hour cheaper than it could be obtained from the company, such a slight advantage as that would not seem to justify the hazard and risk and the upsetting of town affairs that would be incident to the years of litigation which would follow the vote for municipal ownership."

**Woodsfield, Ohio.**—The municipal electric plant sells current for 7 cents a kilowatt hour. It costs 17½ cents to make. The taxpayers foot the bill.

**Woodville, Ohio.**—The municipal electric plant, started about 1896, was abandoned in 1911, and energy has since been purchased from the local interurban company. The plant was obsolete and the town could not afford to rebuild it. The interurban company made an offer which reduced the cost of current material, and so the municipal plant was shut down. It has been for sale ever since, but no purchaser has been found.

**Wyandotte, Mich.**—This plant has never paid interest or sinking fund on its bonds, has been rebuilt several times during its life of 22 years, the reconstruction funds in each case coming out of bond issues instead of being charged to operating expenses, and has been subject to political influences most of the time, according to the statement of a former official, made in 1913. He also states that the plant was not a success as a business proposition.

**Wymore, Neb.**—According to City Attorney A. D. McCandless, municipal ownership is responsible for all this city's financial troubles. He states the tax rate is the highest in Nebraska because the taxpayers have to contribute over \$12,000 a year to support the city electric plant, which never pays any of its fixed charges.

**Xenia, Ohio.**—The municipal light plant was sold in 1896 for \$2,500—about one-tenth of its original cost. After the plant was sold a contract was made for street lighting which effected a saving of \$40 per year per lamp.

**Ypsilanti, Mich.**—Concerning the waterworks Mayor Tracy L. Towner said in his 1912 inaugural address: "The installation of the plant cost in round figures \$143,000. Of this amount bonds were issued in the sum of \$125,000, drawing interest at 4 per cent per annum. These bonds will mature in the year 1919, at which time the city will have paid in interest alone the sum of \$150,000. Not one cent of the principal due on these bonds will have been paid and the issue will have to be refunded. Of the interest on water bonds, amounting to \$110,000 since the installation of the plant, but \$23,030 was raised from the receipts of the waterworks, the remainder being raised by direct taxation."

**Yorkville, S. C.**—In October, 1911, it was necessary to make material advances in both water and light rates because the income was not sufficient to meet the expenses.

**Zeeland, Mich.**—By a popular vote of over 87 per cent the people authorized the sale of its electric light plant to the Consumers Power Company.

## Home Rule and Other Utility Legislation

By B. P. ALSCHULER

*This is a plea made by Mr. Alschuler before the senate and assembly committees of the Illinois legislature against the passage of bills to reduce the powers of the State Public Utilities Commission and place the regulation of rates and service with local commissions, city councils and village trustees. As similar legislation has been attempted in many other states, Mr. Alschuler's argument for state control is of general interest throughout the country.—Editor.*

I HAVE been delegated by the Fox River Valley Manufacturers' Association to represent them at this meeting, but I also address you as a holder of public utility securities and as a holder of life insurance policies in old line companies which invest in public utility securities, and as a bank director and stockholder, banks being interested as holders and dealers in public utility securities. And it has been my fortune in the practice of the law to represent municipalities on occasion, and at other times to be opposed to municipalities; likewise, I have been employed by and against utility corporations. Of late years it has fallen to my lot to represent and work with and for utility corporations and I believe that I have had as much occasion as almost any other attorney in the state of Illinois to appear before our Public Utilities Commission, in consequence of which I feel that I am in a fairly good position to judge not only of the Public Utilities Commission law, but of its administration as well.

Obviously, the home rule advocate will at once remark that because I represent corporations, I naturally favor the law as it stands. This does not follow as a matter of course because from a purely selfish standpoint I can see my work greatly increased by the adoption of any of the bills now under consideration and I know that I can safely say that there is no unanimity of opinion in this regard among public utility companies. It has been my experience that a public utility company appearing before the Commission does not get the relief it may ask unless it is in a position to show that it is entitled thereto.

The state, by the creation of the public utilities law, sought to control the activities of the quasi-public corporations, which are the creatures of the state. We must not forget that the public utilities corporation owes its existence

to state law, not to local law, and should be amendable to state control of its activities with far greater show of reason in the last analysis than it should be to local control.

The time-honored and smooth-sounding phrase, "Home Rule," appeals to the agitator and to the man who does not give serious thought to the causes which may create dissatisfaction and to the effects which may result from the adoption of home rule legislation.

One of the principal problems that confronts all of us at the present day is that of reconstruction and provision for employment of the unemployed. It strikes me that rather than to curtail and hamper industry, it should be the object of everybody to foster and to aid. The proposed legislation can do nothing else than curtail and hamper public utility companies, and I will address myself to that thought at greater length further on in this discussion.

I listened with considerable of interest, at the hearing before your committee on April 24th, to advocates of the passage of the so-called Home Rule Bill and their reasons why the bill should pass. I did not hear any discussion of the bill itself and by that I mean House Bill 200, introduced by Mr. Wanless. I did hear considerable talk concerning the beauties of home rule and I also heard the complaints of those who had at some time been unsuccessful in litigation before the Public Utilities Commission.

The principal discussion and arguments offered, however, were of an entirely different tone from those made by the proponents of the bills before the Senate committee because the Supreme Court in its recent opinion in the Springfield case has held that part of the utilities law eliminating cities from its operation is unconstitutional, as a result of which the city fathers who have been a law unto themselves in the management of their city owned and operated utilities, must

now conduct their plants on an entirely businesslike basis and not as a political proposition. They must now justify their rates to their patrons, give service supervised by experts and keep their accounts as they should be kept. We will have no more low rates for political effect with deficits made up by taxpayers, but if you or I wish to know anything of the affairs of our municipally owned plants, the uniform system of accounting of the utilities commission will readily show us what we may want to know. The wonder to me is that these enthusiasts have not already had presented and have not appeared before you advocating the abolition of the Supreme Court.

#### **Municipal Accounting Uncertain**

I do not know how the accounts of the Springfield municipal electric plant or similar water or electric plants throughout the state are kept, but it is safe to assert that in most cases accounts are not properly kept. For instance, do water plants charge fire departments with hydrant rental as privately owned companies do and should do? If not, then the taxpayer gets the benefit at the expense of the water user, because water pumped must be paid for. If municipally owned utilities are controlled by our Commission, rates will be fair, will not be arbitrarily fixed by those who would use their actions in that regard for political capital, and the public at large will reap the benefit. I may have dwelt at too great length on this discussion, prompted as it is by the previous arguments before this committee, but the reason is obvious. The bills under consideration do not return this control to the cities and the discussion in that particular is beside the issue unless we seriously consider the bill to repeal the law. That bill, however, does not have the unanimous support of the proponents of amendatory legislation and I don't believe requires serious discussion. Some of these gentlemen have stated that they do not favor repeal, others favor it, and before the Senate committee others favored municipal ownership of all utilities, which of course might be brought about in any city under our present laws.

I want to say to you frankly that I have appeared in a great many cases before our Public Utilities Commission and not with a uniform degree of success as viewed by my clients. I have made it my practice to assert and claim those things which I thought were right, and I have not always found the Commission ready to agree with me. At the same time, I have been of that possibly peculiar temperament that I have been disposed to concede that possibly there may be two sides to a question and that it might even be possible that I was wrong in my contention, and I have always had the opportunity of recourse to the courts if I saw fit so to do to remedy the errors, if such there were, of the Utilities Commission.

The principal burden of complaint of most of the speakers seems to be that they feared that injustice was being done to municipalities. I say to you, gentlemen, that if such is the fact, then the fault cannot be ascribed to the principles of the utilities law nor to shortcomings of our commissioners, but rather to the frailty of human judgment which may and does err at times even in our trial courts and in the highest court of the state. We might as well contend that because errors of judgment will creep into the decisions of the courts, therefore the courts should be abolished and the people be a law unto themselves.

I represent, among other clients, several gas companies, at least two of which operate in different municipalities. It is also my fortune to represent almost every other kind of utility subject to Commission control. The proposed legislation provides, among other things, in Section 89, for the creation of municipal commissions. By its terms, a municipality that withdraws from state regulation may provide for a local public utility commission which shall, in general,

have the power to hear complaints, receive applications for changes in rates and charges, inquire into facts, make investigations, but shall have no power to decide anything, having power only, after doing the delegated things, to report to the city council or board of trustees. In other words, the larger and richer communities may and would create some additional political offices at the expense of the public, such additional officers having no real powers, and great expense will be incurred in the employment of such municipal commissioners, engineers, accountants, stenographers, investigators, lawyers, and all others who go to make up the machinery of an adequate commission, and such expenditure will be necessary if such commission will fairly and properly do its work, because we must not presume that any municipality or municipal commission would deal unfairly, either with the public or the utility corporation. Indeed, the complaint of these city officials who appeared here before you seems to be that they want to see to it that justice is dealt, they to do the dealing. On the question of rates, for example, would they not, if rendering real justice, employ competent engineers and competent accountants, competent investigators and competent lawyers, so that a thorough and complete investigation of the affairs of the particular utility involved may be made so that this even-handed justice may be rendered? But, of course, the answer to this may be that the amendment does not say that a public utility commission must be created in each municipality, it leaving it entirely to the discretion of the particular municipality to determine whether or not it shall have such commission.

#### **Lacking in Safeguards**

The proposed law would give to local authority control over practically everything that a utility company may do or may not do within a city or village, except the matter of the issuance of securities, and while a municipality may have a commission whose sole and ultimate authority is but to report, the decision of all questions involving public utilities is left to the discretion and tender mercies of the common council or board of trustees, as the case may be, without any safeguard as to actual investigation or appeal to the courts.

In cities like Springfield, for example, where we find a municipally owned electric light plant competing with a privately owned plant, we would find this situation: The privately owned plant, constructed and operated under public grant and authority, in which, because of such grant and authority, investors have placed their money, would find its rates and service controlled arbitrarily by those men who operate the competing plant and not be disinterested and impartial men. Springfield may be an exception in that political or ulterior motives might not actuate the minds of its commissioners in so regulating the privately owned utility. I do not have the pleasure of personal acquaintance with any of the men. But I cannot help but feel that however honest a man placed in such position may be, he cannot act as impartially as one entirely without interest in the matter.

In addressing myself to you gentlemen, I am proceeding on the theory that utility corporations have rights that must be protected, and at the same time I argue that the public have rights which must be protected, and I insist that when the utility company is eternally harrassed and embarrassed in manner such as must necessarily follow from the adoption of such law as the one proposed, not only will the utility company, its stockholders, bondholders, creditors and employes be seriously embarrassed, but a like degree of embarrassment must necessarily result to the public.

Let us, for the sake of argument, suppose that a city has withdrawn from the operation of the utility law, that its council has passed an ordinance fixing the rates, determining

**EXHIBIT 67 (g)**

# Public Service

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# Let us talk it over

## Purpose of this Magazine

**T**HE purpose of this magazine is to present the *facts* about public utilities, both privately and governmentally owned; to inform its readers about these important industries in which all citizens are vitally interested.

Dedicated to the public service, to the highest good of the taxpayer, this magazine is opposed to government ownership and operation of public utilities because it believes paternalism is the antithesis of industrial freedom and independence.

In steam and electric railways, in telegraphy and telephony, in electric and gas lighting, heating and power, the United States leads the world as the result of the genius, thrift and economy of individual initiative and private enterprise.

Political conditions in this country, as experience proves, defeat economic and the most efficient operation of public utilities by city, state or federal government. Experience also proves that government operation of public utilities burdens the taxpayers with great economic waste.

Experience convinces this magazine that the public can secure the best possible service at the lowest possible cost by leaving the ownership and operation of steam and electric railways, electric light and power, gas, water and telephone properties to individuals of technical knowledge and practical training under such governmental regulation as will best protect the interests both of the public and the companies.

### *Supreme Court on Competition*

**THE SUPREME COURT** of Illinois recently gave an important decision concerning the protection of private public service enterprises from municipal competition. The question was whether or not a municipality in Illinois owning and operating an electric light plant for the production of electricity for municipal uses could sell its excess product at rates far below what it was possible for a private corporation to supply the same service. The suit was brought by the Springfield Gas & Electric Company against the City of Springfield to protect the company from destructive competition.

The City of Springfield contended that it was expressly excepted from the operation of the public utilities act of Illinois, which defines a public utility to be "every corporation owning or operating a plant used for the production, transmission or sale of electricity, except such public utilities as are or

may hereafter be owned by any municipality in Illinois." The company contended that this exception could not possibly be made to apply to the business of the City in furnishing electricity to private consumers; because, to so apply it would be a violation of the limitation of the provision in the Illinois constitution, which prohibits the legislature from passing any local or special privileges; and, also that it would be in violation of the fourteenth amendment to the federal constitution which prohibits states from denying to any person "the equal protection of the law."

In deciding the case the Supreme Court of Illinois, with great clarity, pointed out that in operating an electric light plant to supply private users a municipality is not exercising its governmental powers; but, that it is exercising only private, or proprietary rights, and that its duties and liabilities are the same as those imposed by law upon individuals engaged in the same business. The court said:

"There is no doubt that the exception of municipalities owning or operating public utilities from the operation of the public utilities act, which applies to every other corporation, association or individual, grants to such corporations a special privilege which such other corporations do not enjoy, and is therefore obnoxious to the provision of the state constitution against special laws unless there exists some reasonable basis, having reference to the object of the legislation, for placing such municipalities in a class by themselves."

The court does not find that there is any condition making municipalities a class by themselves; and the tenor of the decision is altogether to the effect that it would not be possible to do so. It further points out that "the purpose of the public utilities act was to prevent extortionate charges and unjust discrimination by public utilities"; and, all concerns supplying public utility service are placed under the Public Utilities Commission, which is required to regulate rates and prevent unjust discrimination. Therefore, as the court indicates, it is the duty of the Public Utilities Commission to establish reasonable rates for the Springfield electric light company and that the same rates must be charged by any competitor that enters the field against it.

There is an aspect of this matter which the court does not touch upon, probably because it is not germane to the essential features of the case, and it is this: In such conditions as the Springfield case discloses it appears that the major portion of the public are compelled to obtain service from the public utility corporation at the reasonable rate necessary to

# Dead and Buried Municipally Owned Lighting Plants

Following is a list of municipally owned lighting plants which are dead and buried. They have gone out of business as losing propositions and the taxpayers—the small home owner and renter, as well as the wealthy merchant—have had to pay for the losses. Frequently the tax burdens have lasted for years after the abandonment of the plants. No figures are necessary. The fact of abandonment speaks for itself.

- Adair, Ia. (electric plant sold)  
Afton, Ia. (electric plant shut down)  
Alexandria, Va. (electric plant sold, 1906)  
Allenhurst, N. J. (plant sold)  
Allerton, Ia. (electric plant sold)  
Amherst, Ohio. (electric plant shut down, 1912)  
Appleton, Minn. (electric plant sold)  
Ashley, Ill. (electric plant sold)  
Argenta, Ark. (electric plant shut down, 1913)  
Athens, Ohio. (electric plant sold)  
Attala, Ala. (electric plant sold)  
Audubon, Ia. (electric plant sold, 1898)  
Ballard, Wash. (electric plant leased)  
Barnesville, Ga. (electric plant shut down)  
Batesburg, S. C. (electric plant leased)  
Bay City, Mich. (electric plant shut down, 1919)  
Bergen, N. Y. (electric plant shut down)  
Berkeley, Cal. (electric plant leased)  
Beverly, Ohio. (electric plant sold, 1907)  
Blacksburg, S. C. (electric plant shut down)  
Blaine, Wash. (electric plant shut down)  
Boscobel, Wis. (electric plant shut down, 1914)  
Bourbon, Ind. (built, never operated)  
Bowling Green, Ky. (electric plant abandoned, 1914)  
Bowling Green, Ohio. (gas plant abandoned)  
Bradford, Ohio. (electric plant burned, rebuilt by company)  
Braidwood, Ill. (electric plant sold, 1910)  
Brownstone, Ind. (electric plant sold)  
Brunswick, Mo. (electric plant sold)  
Buckley, Ill. (electric plant sold, 1913)  
Bucklin, Kan. (electric plant abandoned)  
Buena Vista, Va. (electric plant sold)  
Buffalo, Minn. (electric plant shut down)  
Burlington, N. C. (electric plant sold, 1904)  
Burlington Junction, Mo. (electric plant sold, 1916)  
Burlington, Vt. (power plant abandoned)  
Butler, Ind. (electric plant abandoned)  
Cape Vincent, N. Y. (electric plant sold, 1915)  
Carrollton, Ga. (electric plant abandoned)  
Carthage, Ohio. (electric plant abandoned)  
Casselton, N. D. (electric plant sold, 1903)  
Central City, Neb. (electric plant shut down, 1916)  
Chariton, Ia. (electric plant sold, 1914)  
Charlotte, Mich. (electric plant sold, 1907)  
Charlotte, N. Y. (electric plant sold, 1913)  
Chehalis, Wash. (electric plant abandoned)  
Cheraw, S. C. (electric plant shut down)  
Chester, S. C. (electric plant sold, 1908)  
Chikopee, Minn. (electric plant shut down, 1912)  
Christianburg, Va. (electric plant sold, 1908)  
Churubusco, Ind. (electric plant sold)  
Clarion, Ia. (electric plant sold, 1910)  
Clayton, Ill. (electric plant sold, 1913)  
Coal City, Ill. (electric plant sold)  
Colfax, Ia. (electric plant sold)  
Columbia, Ala. (electric plant leased, 1908)  
Concord, N. C. (electric plant shut down)  
Cridersville, Ohio. (electric plant sold)  
Crystal Springs, Miss. (water and light plant leased)  
Cuba, Ill. (electric plant sold, 1912)  
Cuba City, Wis. (electric plant shut down)  
Cumberland, Md. (electric plant shut down)  
Dalton, Ga. (electric plant abandoned, 1913)  
Dana, Ind. (electric plant sold)  
Dayton, Tenn. (electric plant abandoned)  
Delano, Minn. (electric plant abandoned)  
Delta, Ia. (gas plant abandoned)  
Dexter, Mich. (electric plant sold)  
Dexter, Mo. (electric plant sold, 1910)  
Duluth, Minn. (gas plant abandoned)  
Dunkirk, Ind. (electric plant sold)  
Durant, Okla. (electric plant abandoned)  
Earlville, Ia. (electric plant shut down)  
East Chicago, Ind. (electric plant sold, 1907)  
East Dubuque, Ill. (electric plant abandoned)  
East Grand Forks, Minn. (electric plant abandoned)  
East Point, Ga. (electric plant shut down)  
East Portland, Ore. (electric plant sold)  
Easton, Pa. (electric plant abandoned)  
East Tawas, Mich. (electric plant sold)  
Edgewood, Ga. (electric plant shut down)  
Elbow Lake, Minn. (electric plant sold)  
Elgin, Ill. (electric plant leased)  
Ellisville, Miss. (electric plant sold)  
Elwood City, Pa. (electric plant shut down)  
Emaus, Pa. (electric plant sold)  
Emporia, Kan. (electric plant leased)  
England, Ark. (electric plant leased)  
English, Ind. (electric plant sold)  
Escanaba, Mich. (electric plant shut down)  
Fayette, Ia. (electric plant sold)  
Fayetteville, N. C. (electric plant shut down)  
Fergus Falls, Minn. (electric plant abandoned)  
Findlay, Ill. (electric plant sold)  
Findlay, Ohio. (gas plant sold)  
Forest Grove, Ore. (light and water plant sold)  
Fort Deposit, Ala. (electric plant leased, 1916)  
Fort Worth, Tex. (electric plant shut down)  
Fort Francis, Ont. (electric plant shut down)  
Forty Fort, Pa. (electric plant sold)  
Fostoria, Ohio. (gas plant abandoned)  
Frankfort, N. Y. (electric plant abandoned)  
Fredericksburg, Va. (water and electric plant leased)  
Fremont, Mich. (electric plant abandoned, 1915)  
Fried, Neb. (electric plant shut down)  
Fulda, Minn. (electric plant given away)  
Gaffney, S. C. (electric plant shut down)  
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Galesburg, Ill. (electric plant shut down, 1916)  
Galveston, Tex. (electric plant shut down)  
Garden City, Kan. (telephone system sold)  
Garretson, S. D. (gas plant blew up)  
Gastonia, N. C. (electric plant shut down, 1905)  
Georgetown, O. (electric plant shut down)  
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Gilroy, Cal. (gas and electric plants leased)  
Girard, Ill. (electric plant sold)  
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Goodland, Ind. (electric plant sold, 1912)  
Graceville, Minn. (electric plant sold)  
Grand Ledge, Mich. (electric plant sold, 1908)  
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Green Island, N. Y. (electric plant abandoned)

Greenwood, S. C. (power plant shut down)  
 Griffin, Ga. (electric plant shut down, 1912)  
 Grimes, Ia. (electric plant shut down)  
 Hamilton, Ohio. (gas plant abandoned)  
 Hampshire, Ill. (electric plant sold, 1908)  
 Hampton, Neb. (electric plant shut down, 1914)  
 Hanover, Kan. (electric plant abandoned, 1914)  
 Harrisville, W. Va. (gas plant leased)  
 Hart, Mich. (electric plant sold)  
 Harvard, Ill. (electric light plant sold, 1907)  
 Hempstead, N. Y. (electric plant sold)  
 Hickman, Ky. (water and electric plants leased)  
 High Point, N. C. (electric plant shut down)  
 Hillsboro, Ore. (electric and water plant sold)  
 Holgate, O. (electric plant shut down)  
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 Hubbard, O. (electric plant shut down, 1912)  
 Hudson, O. (electric plant shut down)  
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 Hull, Mass. (electric plant sold, 1915)  
 Huntington, Tenn. (electric plant leased)  
 Huntsville, Mo. (electric plant sold, 1913)  
 Iberville, P. Q. (electric plant sold, 1916)  
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 Neponset, Ill. (electric plant sold, 1913)  
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 New Richmond, Wis. (electric plant shut down, 1897)  
 New Westminster, B. C. (electric plant shut down, 1905)  
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 North Branch, Mich. (electric plant abandoned)  
 Northfield, Vt. (electric plant abandoned)  
 North Bend, Ind. (electric plant abandoned, 1916)  
 Northville, Mich. (electric plant leased)  
 Norwich, Conn. (electric plant abandoned)  
 Oglesby, Ill. (electric plant discontinued)  
 Osborn, O. (electric plant sold, 1914)  
 Oxford, O. (electric plant sold, 1918)  
 Paynesville, Minn. (electric plant sold, 1915)  
 Pelham, Ga. (electric plant leased, 1908)  
 Perham, Minn. (electric plant sold)  
 Pepperell, Mass. (electric plant sold)  
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 Philadelphia, Pa. (gas plant leased, 1897)  
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 Upper Sandusky, O. (natural gas plant sold, 1902)  
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 Valley, Neb. (electric plant sold, 1905)  
 Victoria, B. C. (electric plant abandoned)  
 Vancouver, Wash. (electric plant sold, 1902)  
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 Waddington, N. Y. (electric plant sold)  
 Wadesboro, N. C. (electric plant sold, 1912)  
 Wakefield, Mass. (electric plant shut down, 1913)  
 Walkerton, Ind. (electric plant shut down)  
 Wappingers Falls, N. Y. (electric plant sold, 1910)  
 Washburn, Wis. (electric plant sold, 1908)  
 Waterville, Wash. (electric plant abandoned)  
 Weiser, Ida. (electric plant shut down)  
 Westerville, O. (electric plant shut down, 1914)  
 West Newton, Pa. (electric plant sold, 1910)  
 West Springfield, Mass. (electric plant sold, 1914)  
 West Tampa, Fla. (electric plant sold)  
 Wheaton, Ill. (electric plant shut down, 1904)  
 Wheeling, W. Va. (gas plant abandoned shut down, 1916)  
 Willoughby, O. (electric plant abandoned)  
 Wilmington, O. (electric plant sold, 1903)  
 Winchester, Tenn. (electric plant leased)  
 Winder, Ga. (electric plant abandoned, 1915)  
 Winnebago, Minn. (electric plant sold, 1915)  
 Wood River, Neb. (electric plant abandoned)  
 Woodstock, N. B. (electric plant abandoned, 1906)  
 Wytheville, Va. (electric plant abandoned)  
 Waynesville, O. (electric plant sold, 1919)  
 Westerville, O. (electric plant shut down, 1914)  
 Woodville, O. (electric plant abandoned, 1911)  
 Xenia, O. (electric plant sold, 1896)  
 Yarmouth, N. S. (electric plant abandoned, 1912)  
 Zeeland, Mich. (electric plant sold, 1915)

## Service-at-Cost in Boston

By T. DAVID ZUKERMAN

New York Bureau of Municipal Research.  
 Reprinted from National Municipal Review.

THE electric railway industry is today the "sick man of business." It has come out of the war in much worse shape than other staple industries and is still facing a crisis. A material portion of the street railway mileage of the country is in the hands of receivers; not a little has been abandoned and sold for junk; and both processes are being continued. That the situation is no worse than it actually is can be ascribed to the mildness of the winter through which we have just passed as well as to the ending of the war.

The traction managers and investors are clearly at a loss as to the solution for the problems they are facing. When the need for additional revenues became insistent, apparently the one method of meeting it that appealed to the traction interests was an increase in fares. The evils of the industry were attributed to the fixed price at which transportation was being supplied. Now, however, that the companies operating in nearly four hundred communities throughout the country have been granted increases in fare—in many cases two or three times—ranging from 20 per cent to 100 per cent, it is becoming more and more evident that the fare increase in itself is not a panacea for the ills from which the street railways are suffering. The results are distinctly disappointing. That such is the case is frankly admitted by prominent traction managers and financiers.

### Service-at-Cost Franchise the Proposed Solution

The last hope of railway men for private ownership and management seems to be the service-at-cost franchise,

which furnishes that public co-operation which they now confess is vitally necessary for successful operation. The legislature of Massachusetts has taken the most radical steps to find a solution for the situation by passing a general service-at-cost act of which any company in the state may avail itself. That body went much further, however, in the case of the Boston Elevated Railway Company, which serves the metropolitan area of Boston. The Boston Elevated Act, passed in 1918, provides not only for automatic adjustments in the rate of fare to furnish the revenues necessary to cover all legitimate operating costs, including adequate maintenance and depreciation and a guaranteed dividend; it also provides for payment by the state of any deficits that may nevertheless be incurred.

The troubles of the Boston Elevated were but intensified by war conditions. The company was facing financial difficulties even before the outbreak of the war. The situation became so acute in 1913 that the Boston transit commission and the state public service commission sat as a joint board to consider the company's affairs. Again in 1914, the public service commission made a complete investigation at the request of the legislature.

### Special Commission of 1916.

Two years later the directors appealed to the governor of Massachusetts for a special commission of inquiry to suggest possible legislative remedies for the difficulties confronting the company. Reaffirming their belief that the fare charged was inadequate, they insisted on the necessity for a radical increase in revenue. The governor transmitted

If I were the trouble man I would try to render the customer the best service possible. I would do my work quickly and accurately, and try to create the impression that the company was interested in the proper operation of the customer's gas and electric equipment. I would be a firm believer in gas and electric labor saving appliances for the home, and would co-operate with the sales department by not "knocking" any appliances that might be giving trouble in the customer's home. I would try to acquire the salesman's point of view that a satisfied customer is the company's most valuable asset.

If I were a wireman I would strive to be a first class wireman. When working in a customer's home I would try to make as little muss as possible. I would always use drop cloths wherever possible, so as to avoid getting plaster or dirt on the rugs, or furnishings, of the home. When necessary to remove base boards or flooring I would try to avoid splitting them, and would see that they were replaced in as good condition as when I found them. I would do my work so well that the customer would be pleased and would recommend us to his friends.

If I were a salesman I would know my line so thoroughly that a customer could not ask me a question about my goods that I did not know. I would have a thorough understanding of the company's rates for service and a general knowledge of the business as a whole. I would be careful of my appearance, always clean shaven and well groomed. I would never misrepresent my goods, and would always try to satisfy my customers so that they would feel that it was a pleasure to deal with me and would refer their friends who were in need of gas and electric appliances to me.

If I were a sales clerk in the store, in addition to having a thorough knowledge of the goods I was selling I would make a study of merchandising methods and try to learn the best methods of displaying and selling goods. I would keep the stock clean and in good order. I would dress plainly and neatly. I would never call to another clerk across the room. I would not address a fellow employe by his given name, or use such terms as "Dearie," or "Gerlie." I would not chew gum or use tobacco while on duty. I would treat the customer with the utmost courtesy and respect, and would try to create the impression in the customer's mind that we appreciated his business and that it would receive our most careful attention.

If I were the head of the department I would not think of it as "My Department," but would think of it as a part of the company, and would so try to conduct the department that it would run smoothly in close cooperation with all the other departments of the company.

If I were the superintendent and you did not do your work properly, I would tell you about it. If you still persisted in making mistakes I would—but I must close as my space is limited.

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### Scaife Company Opens Chicago Office

Wm. B. Scaife & Sons Company of Pittsburgh announces the opening on July 1st of a Chicago sales and engineering office at 38 South Dearborn Street, with Charles F. O'Hagan, formerly chief engineer of the company at Pittsburgh, as resident engineer and manager. This company is the oldest manufacturing concern west of the Allegheny mountains. During the more than one hundred years since their business was founded, they have from time to time as conditions arose, added to their manufacturing facilities. They now manufacture black or galvanized, riveted, brazed or welded steel tanks for air, gas and liquids, steel shipping drums, range boilers, steel structures, also the well known We-Fu-Go and Scaife water softeners and filtering equipment.

## PRIVATE OWNERSHIP THE BEST

By F. G. R. Gordon in N. E. L. A. Bulletin.

It is always easy for a municipality to do what someone else has already done. A gas or an electric lighting plant can be run by a city after the individual has solved the problem, but no one ever heard of a city initiating anything, except higher and higher costs for city government.

The theory of the municipal Socialists is that a municipality or a state can perform any service better than a private corporation or an individual.

The whole history of public ownership proves this theory to be false the world over. In order to make out a case for municipal or state ownership, a few places are picked out here and there which, owing to their superior location near coal fields, or vast water powers, are offered as illuminating examples of the alleged success of public ownership. But even in these cases it is generally found that only a part of the truth is shown. Almost always such overhead charges as depreciation, part of the cost for capital account, loss of taxes, etc., etc., are ignored.

And if all the costs are taken into consideration the alleged "profits" and "successes" are often turned into losses and failure. As a matter of fact it is losses and failure for nearly all the public-owned enterprises all over the world.

The United States Census proves that public ownership is much more costly than private ownership. Another point often overlooked is the fact that whenever you find a city that has plunged into public ownership you will find high taxes and a very great increase in the municipal debt.

For instance, the story has been published a hundred times over that Cumberland, Md., which owns its electric lighting plant, has street lighting for an average cost of \$34.06 per light per year. But an investigation proved that this price was secured without reckoning the depreciation on plant of some \$40,000 a year and the loss of taxes. If these two items were reckoned into the actual cost, it would have shown a net loss to the city of \$15,564.91 a year. What is more, a private company offered to light the city at a cost of \$7,500 a year, a saving over the socialistic price of more than 30 per cent.

In connection with this let us ask: Will public ownership decrease taxes? No. In 90 per cent of cases it has increased taxes as the history of public ownership will prove.

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Pearly Morse, the author of the "A. B. C. of Government," says in the *Forum*: "No human being knows what the Government owns or how much it is worth; no department keeps a satisfactory record of depreciation—a thing is worth what it costs until it is thrown away, and precious little is thrown away on government books. And because the Government does not know what it costs to do business it never knows the exact expenses of any purchase or products." Of course this is true, and everybody who has taken the time to investigate knows that it's true.

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The report of the Investment Bankers' Association committee on railroads says: "According to reliable authorities, the records of public ownership the world over show decreased efficiency, increased expenses, lessened initiative, political interference and economic waste. We find nothing in the experience of our own country in the field of public ownership which encourages the hope that we can profitably extend its sphere." This is exactly what every intelligent investigation will show, and yet we have several million citizens led by men like William R. Hearst and Senator LaFollette, who want to extend public ownership, not only to the railroads but to the wire systems, gas and electric lighting plants and coal mines, and so on.

# EXHIBIT 67 (h)

# Public Service

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Fifteenth Year

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It has been shown very clearly by Mr. Pardee that in the matter of production alone the electric utilities play a big part. It is just as true that the electric roads and all the other utilities—gas plants, electric light plants and telephone companies—play parts of equal importance in virtually every phase of our modern life.

Thinking men can not but reach the conclusion that to hamper the development and operation of public utilities is to hamper the growth and development of the communities in which they operate, and that unreasoning prejudice, incited by demagogues in public life against the utilities, amounts to cutting off the public nose to spite the public utility face.

### HANSON UPHOLDS PRIVATE CONTROL

#### Former Seattle Mayor Points Out Fallacy of Municipal Ownership

Ole Hanson, former mayor of Seattle, knows about municipal ownership. His city tried it and still is trying to make its municipal street car system pay expenses. And as the result of that experiment Mr. Hanson has been converted. He no longer believes that municipal ownership is the universal panacea for utility ills. Here is what he says:

"I cannot believe from my experience that the public utility that employs any large number of men or where a large amount of capital is necessary can or will function as efficiently as a public operated utility as a private corporation which has individual reward at the end of the day. Nor do I believe that the cities of this nation or the government of this nation will ever be willing to pay for brains.

"Brains are the cheapest thing there is in the government and you are driving the men of brains away because of poor recompense. When you do get brains you cannot keep them. I think that is the main fault with our government ownership and municipal ownership.

"The time has come, it seems to me, to speak plainly. It is of no use to pussyfoot any longer. We have got to come out and tell the truth to the people and let them understand that the government of the United States is not a self-perpetuating Christmas tree for the benefit of anyone. It seems to me that the time has come to protect the great body of men and women who put their money in public utilities and who during the war have had their entire capital cut in two and you have never heard a murmur from them.

"The man who invested \$10,000 in a railroad bond seven or eight years ago or five or six years ago simply has his \$5,000 today, figuring on the meat and clothing and house rent basis. We must see to it, if we are honorable men that these men get a run for their money or else we are thieves. If we want to make the American government a kind of pickpocket the way to do is just to confiscate these great properties throughout the country."

### Third of Wealth in Utilities

Figures compiled by the Illinois Committee on Public Utility Information show that more than one-third of the total wealth of the country aside from real estate is now invested in public utility companies. If real estate, farm equipment and products and personal belongings such as clothing, furniture and vehicles are deducted, the utility companies account for approximately half the remaining wealth.

"In one way or another," says the committee's bulletin, "every economic activity now depends on the public utilities and if they are managed wrongly nobody can escape the consequences."

### REVEAL MUNICIPAL INEFFICIENCY

#### Indiana Commission Uncovers Public Ownership Faults at Anderson

Conditions not at all uncommon in the management and operation of municipally-owned utilities were brought to light early last year by the Indiana Public Service Commission's investigation of the publicly-owned water and electric plants at Anderson, an important manufacturing city of about 30,000 population.

The commission's engineers and accountants found that the large water and electric properties at Anderson, in which hundreds of thousands of the taxpayers' money had been invested, were being managed and operated with less efficiency than one would expect to find in the direction of a peanut stand. Of course the engineers and accountants made no reference to a peanut stand in their official reports, but they did say:

*"With our form of government, politics are necessary in certain places, but not in the public utility organization, and people who wish to pay their water bills and their electric light bills should not be compelled to run into political conditions in order to meet their public utility obligations."*

They found there were no means by which the management of these big business properties could find out what it cost to produce the service sold, no means for accurately measuring the sales and no means for correct collection of the accounts receivable. Here the reader may be reminded that any ten-year-old boy in the peanut business would know exactly what his product cost him, would make an accurate measurement of his sales and would know how to collect every penny of his revenue.

The commission found that the plant needed more boilers, that the equipment was sadly in need of repair, that no adequate record had been kept of meters installed and no tests made to see whether they were registering properly and the plant officials had no record of the amount of coal burned. The commission's accountants reported that the accounting methods were inefficient and should be revised completely.

These conditions, due solely to the mismanagement resulting from municipal ownership and its attendant political interference in utility affairs, were ordered corrected by the commission.

### Competition Disastrous to Public

Public utility men everywhere know that competition in the utility field is ruinous to the companies and detrimental to the public in the long run. That this view is not shared by the general public is due largely to the fact that political demagogues mislead the people by declaring that a municipal utility, placed in competition with the privately owned one will result in forcing the private utility to reduce rates, the inference being, invariably, that the existing rates are unreasonably high.

The fallacy is gradually being disproved, however, and commissions who inquire deeply into public utility affairs are daily discovering that such is not the case.

For instance, in a recent decision, the Public Service Commission for the Second District of New York refused to permit the Ausable Forks Electric Company to construct a generating plant which would enable the company to compete with the Northern Adirondack Power Company, the companies both having vested interests and being unable to reach an agreement to merge. The commission, in its decision, declared that "competition, while it works to the temporary advantage of the public, is, in the long run, disastrous to the public and to both companies."

# Municipal Plant Burden to Taxpayers

## Too Low Rates Causes Big Deficit in Rock Hill, S. C., Water and Light Plant

It is distinctly unpleasant even to consider what the mental attitude of the citizens of Rock Hill, S. C., would be toward municipal ownership if the rates of their municipal water and light plant were increased to the point where the plant would become a profitable investment for the taxpayers of that little city.

For the year ending March 31, 1919, the municipal plant saddled the taxpayers of Rock Hill with a deficit of more than \$24,000, amounting to about 65 per cent of the total revenue of the plant. To break even, rates would have to be increased about that much and municipal ownership's favorite argument—cheap service—would vanish.

The situation existing at Rock Hill shows very clearly the results of inefficient political management of a public utility. For instance, after taking over the electric plant from the private company in 1911, the city abandoned the generating station and erected a new one. A year later this plant was abandoned and the city began buying current from a private company.

After purchasing the plant the city installed a new street lighting system. Shortly after this decision was reached the council changed its mind and decided to replace the new system with lights of a different type.

Municipal ownership was rather forced upon the inhabitants of Rock Hill. Under private ownership the service was bad and there was continual war between the public service company and the council. This situation was found intolerable but the company can hardly be blamed for not making extensive improvements in the midst of a hot agitation for municipal ownership, and in the unfriendly circumstances which manifested themselves at every turn. The people voted for the construction of a badly needed sewer system but when someone suggested that construction of sewers would increase the volume of water used and thereby increase the revenue of the water company, the council held off construction of the sewers for several years, merely to spite the corporation. In the year following this decision there were 53 cases of typhoid with 17 deaths due entirely to the crude sanitation then in force.

After purchasing the light and water plants the city established rates about 20 per cent lower than those of the private corporation but the losses each year have been considerably more than 20 per cent of the gross revenue with the result that the service is costing the city considerably more than it did under private ownership.

The accounts of the municipal utilities of Rock Hill, while incomplete, are in far better condition than those of the average municipal plant. All city departments are charged at regular established rates for service and bills are rendered to the city for street lights and hydrant rental. Interest on the bonded debt is charged against the plants. Omitted items include rent of office in the city building, lost taxes on basis of taxation of old company, services of other city departments in helping manage and operate the property, interest on such proportion of the 1914 funding bond issue as is chargeable to water and light, and sinking fund requirements for the retirement of the original bond issues when they mature, as well as the proper proportion of the 1914 issue. The plant makes a charge for depreciation, but it is inadequate. For the year ending March 31, 1919, the plant charged off \$4,150 as depreciation but this amount is ridiculously small. The plant charged off \$1,000 as extraordinary depreciation (against an abandoned well purchased from the old com-

pany) and \$3,150 as depreciation of machinery and equipment. The maintenance of the properties has not been up even to the average and depreciation figures covering a great many properties show that with even average maintenance the depreciation rate is at least 7 per cent on electric properties and from 4 to 5 per cent on water properties, particularly in growing communities like Rock Hill, where new and larger water mains must frequently be laid to replace mains which have been outgrown. A fair depreciation charge, including depreciation chargeable against old company property purchased and junked, is certainly 7 per cent, which would make the depreciation, based on the reported plant value of \$256,819.03, amount to \$17,977.33 instead of only \$3,150, which was charged in 1919.

Making this correction in the accounting and including the charge for rent in the city hall, lost taxes, services of other departments, interest and sinking fund, we have:

Earnings water dept.....	\$18,152	
Earnings electric dept.....	36,858	
Joint earnings.....		\$55,010
Expenses water dept.....	\$10,389	
Expenses electric dept.....	16,934	
Joint expenses .....		\$27,323
Surplus earnings over expenses.....		\$27,687
Joint general expenses .....	\$ 7,611	
Bond interest .....	11,750	
Tools and supplies deficit.....	28	
Depreciation reserve .....	4,150	
		\$23,539
Net profit .....		\$ 4,148

The following items are chargeable against the net profit above not included in the city's accounting:

Office rent (estimated) .....	\$ 600
Lost taxes (on basis of valuation).....	2,863
*Services other city depts.....	1,200
**Depreciation .....	14,825
***Interest additional .....	1,125
Sinking fund requirement.....	7,685
	28,298
Deducted reported net profit.....	4,148
Net loss .....	\$24,150

This deficit amounts to slightly more than 65 per cent of the total revenue from water and lighting customers and would indicate that rates must be raised by that amount in order to make the plant break even. This would make the initial rate for water 44.5 cents per thousand gallons net, with a minimum bill of 82 cents net.

Municipal ownership in Rock Hill was justifiable as an escape from the intolerable condition which had arisen on account of the differences between the company and the city officials, but if it was entered into with any hope of profit, that phase of the situation must be a serious disappointment to the people.

\*Includes services of mayor, council, city attorney, city treasurer, police service in reporting trouble, etc.

\*\*This sum is 7 per cent normal depreciation less the auditor's nominal depreciation charge of \$3,150. Deep well depreciation is extraordinary.

\*\*\*Interest on one-half of funding bond issue of 1914 chargeable to water and light department. The issue was for \$45,000, for the purpose of funding the city debt and a considerable part of this debt if not all of it was incurred on account of the water and light plants.

# EXHIBIT 67 (i)

# Public Service

Vol. XXVIII, No. 3

March, 1920

Fifteenth Year

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# What Public Ownership Did to Taunton, Mass.

## Epidemic of Municipal Ills Directly Traceable to High Cost of Operating City's Light Plant

**T**AXPAYERS of the important industrial city of Taunton, Mass., of 38,000 people, are receiving a liberal education in the school of municipal ownership. The tuition fee in this school for the year 1919 was more than \$66,000, the amount of the deficit piled up by the municipal electric light plant. In addition to this drain upon the public purse, the consumers are paying higher rates than are in force in any comparable city in the state and, because of the inadequacy of the plant, 65 per cent of the industries upon which the city depends for prosperity have been forced to obtain their current from isolated plants.

Probably the greatest ill suffered by Taunton has been this effect of municipal ownership on industry. About 65 per cent of the power used in the industries of the city is generated in individually owned plants and although the municipal plant is called upon to carry only 35 per cent of the power load of the community, it is heavily overloaded and the management is endeavoring to obtain an appropriation for a new 4,000 KW. generating unit.

The municipal electric plant at Taunton has always required appropriations from general taxes, which have been considered in the light of payment for street lighting service, though the relation between the two has not always been very apparent. Today the domestic lighting rate, as well as other rates, take place as the highest in similar cities in Massachusetts.

In spite of the \$100,000 bond issue for operating expenses in 1919, and other bond issues, of which it is certain part of the proceeds were used for operating expenses, the plant is in a serious state of deterioration. The resident superintendent feelingly describes it as "rotten!"

The city tried municipal management from 1897 on, but in the summer of 1919 the city officials threw up their hands and turned the solving of the problem over to a committee of citizens, composed chiefly of men who were large users of the municipal power and large taxpayers as well. Their most important step was the employment of an outside engineering firm to act as operating managers, with no supervision or interference from the city officials. The engineering firm has a resident manager, who devotes his entire time to the plant. A significant fact is that the engineering firm receives about three times as much to act as manager as did the politically appointed superintendents preceding. Taunton has apparently learned a lesson, albeit belatedly, that cheap help is the most expensive.

### Demand Exceeds Capacity

The municipal electric plant has never adopted a progressive policy of expansion. The demand for electricity has always been ahead of the capacity of the plant, with the result that overloaded and neglected equipment has been subject to frequent breakdowns.

The expense of maintaining the electric plant is undoubtedly a contributing cause to the unsatisfactory condition of other public works, such as sewers, paving and park development. The sewer system was put in ten years ago, but has never been completed and is considered by many to be a serious menace to the health of the community. Owing to the scattered character of the city—an area of 50 square miles for a population of 38,000—there are many unpaved streets though the paving which is installed is in fair condition. There are only two city parks, aggregating about

two acres, and of these only one is improved. There are 28 grade schools and one high school in which crowded conditions prevail and there is an urgent need for new buildings.

Prior to July, 1919, the municipal electric plant was operated by a superintendent, appointed by the mayor, and directly responsible to him. The salary was \$1,800 a year. The term was for four years. Since 1903 there have been five superintendents, the changes being political in each instance. The action in July, 1919, was to take the electric plant out of politics and insure some sort of business supervision. In line with this effort, a special act was secured, calling for the creation of an Electric Light Commission of three members to be appointed by the mayor. Naturally the first commission, appointed at a time when the affairs of the plant were at a crisis, is composed of men who will, during their tenure of office, keep the plant out of politics; but it is a matter for the future to determine whether the injection of political influence into future commissions will not occur just as appointment of past superintendents has been a matter of politics. The commissioners receive \$300 a year each, with an additional \$200 for the chairman. This is hardly enough permanently to attract high grade men who will give the necessary time to supervising the management of an important public utility.

The crisis which brought about the attempt to reform the administration of the plant was not because of operating deficits, which have always been the rule, rather than the exception—it was not on account of the rates, though power rates had been increased by a 25 per cent fuel surcharge in September, 1918. It was on account of the fact that the service had become so poor and was so subject to interruption that the manufacturing interests of the community could not tolerate the condition any longer.

The management estimates that about 20 per cent. of the houses in the city are wired, with 3,400 meters in service. The plant furnishes about 35 per cent of the power used in the city, the remainder being furnished by isolated steam, oil and gas engine plants. The small percentage of houses wired for electric light again indicates the unprogressive nature of the municipally owned undertaking, and shows in a striking manner the unfairness of municipal ownership, where all the residents are taxed to pay operating deficits from which only 20 per cent of the families derive benefit.

A significant feature of the electric lighting situation in Taunton is shown by the fact that 50 per cent of the gas company's business is lighting business, even though the cost of gas is \$1.30 per thousand feet—an increase of 40 cents over pre-war prices.

The electric plant now carries a considerable overload, running as high as 50 per cent at times. On account of this overloaded condition the plant will accept no more power business, but makes an effort to connect up new residence customers within two or three days after application is filed, provided the customer is directly on the existing lines. No line extensions will be made until the new generating unit is purchased and installed.

### Electric Plant Statistics

The plant was purchased in 1897. The present generating station was built in 1902.

The real estate consists of 6,900 square feet of land on

which the original plant was situated, purchased from the old company in 1897, and valued at \$4,000, and 78,454 square feet of land on which the present generating station is located. This land belonged to the city and has never been paid for by the plant. It is valued at \$9,500. Since 1897 there have been eleven bond issues, ranging in size from \$125,000 to \$3,000 and bringing the total bonds issued to \$603,000. Of this sum, \$16,000 has been paid, bringing total bonds outstanding to \$587,000 on which the interest charge for 1920 will amount to \$24,760.

The official report for the year ending November 30, 1919, shows an operating deficit of \$3,939, as follows:

Earnings—	
Commercial and domestic light.....	\$129,842
Contract incandescents.....	542
Power.....	130,547
Municipal buildings.....	6,556
Cooking and heating.....	1,265
Street lighting.....	30,000
	\$298,552
Expenses—	
Station operation.....	\$259,460
Distribution.....	22,248
General.....	20,783
	\$302,491
Operating deficit.....	\$ 3,939

The above figures do not include the charges for depreciation, interest, bad debt and jobbing losses allowed in the official profit and loss account for 1919, which were as follows:

Depreciation.....	\$20,287
Interest.....	19,789
Bad debts.....	2,376
Loss on jobbing.....	238
	\$42,700
Add operating deficit.....	3,939
Year's deficit officially shown.....	\$46,639

The official accounting allows nothing whatever for lost taxes—the amount of tax revenue that would be derived by the city if this property were in private instead of municipal ownership. It is estimated that at least \$20,000 yearly in taxes would have to be paid on this property were it in private hands. So, without taking into consideration the decreased value of the dollar or adding anything to the above official depreciation charge to make up for it, but by merely adding \$20,000 for lost taxes to the officially acknowledged deficit of \$46,639, we find that municipal ownership and operation of an electric plant actually resulted in a loss of \$66,639 to the city of Taunton for the year of 1919.

The rates of the Taunton plant would have to be increased 23 per cent. to make the earnings cover the actual operating and fixed charges. The present maximum lighting rate is 15 cents per KWH. with a minimum of 13 cents; power rates range from 8.75 cents to 2.5 cents. The minimum monthly charge for lighting is 75 cents and for power a minimum of 75 cents for the first horsepower connected is charged with a 50 cent charge for each additional horsepower. The commercial charge, as reported to the State Board of Gas and Electric Light Commissioners, is “an operating charge of 5 cents a KWH. and a standing charge of 7 cents a KWH. divided by the hours a day of full load consumption, with a discount of 10 per cent of the gross charge if the bill is paid on or before the 15th of the month.”

This charge is now subject to a 25 per cent surcharge on account of war conditions.

Summed up briefly, municipal ownership in Taunton has accomplished the following results: (1) it has hampered industrial growth by failing to provide adequate power facilities; (2) forced consumers to pay more for light and power service than their neighbors; (3) saddled on the taxpayers, only 20 per cent of whom are consumers, a debt of more than half a million dollars, of which only \$16,000 has been paid and interest on which for 1920 will total approximately \$25,000; (4) piled up an annual deficit which for 1919 is computed at more than \$66,000; (5) cost the

city \$20,000 annually in lost taxes; (6) has given such poor service as the result of political interference that outside help had to be procured at great public expense to run the plant; (7) retarded necessary public improvements and (8) provided the city of Taunton with a plant which its own superintendent describes as “rotten,” and able to supply, even when overloaded, considerably less than half the power requirements of the city.

Taunton furnishes a shining example of the fact that an electric light plant cannot be successfully operated politically.

## PUBLIC DUTY TO UTILITIES

### Development of Public Utility Corporations Is for General Public Interest

There is frequent discussion in the newspapers and by politicians of the service the public utility owes the public, but it is rarely that the other side of the case is heard and one learns that the public also owes something to the utility which supplies it with service.

This is well illustrated by the testimony given before the public utilities commission of California recently with regard to the development of hydro-electric power.

In this particular case the witness, a banker, expressed the opinion that it would be fairer and more to the interest of the general public to promote the development of the utility company than for the people to listen to the bickerings of the politicians and quibble over differences in the proposed rates for service amounting only to a fraction of a cent. In support of his contention the witness cited the San Joaquin valley. This valley is one of the garden spots of California. Only one-fifth of it, he said, had been developed. Development of the other four-fifths depended absolutely on the development of hydro-electric power. The witness wondered what profit the residents of the San Joaquin could expect to gain by combining to force the power companies to charge rates that would give them little, or practically no return for the money invested. The valley, he said, could not develop without power; power could not be developed and the facilities of the public utility expanded to provide more power without credit; and credit could not be obtained unless the corporation could show where the company could earn money to pay off its creditors.

The banker's position was well taken. He knew what the public does not know, or rather what the public often-times chooses to disregard—that capital, other things being equal, will gravitate toward investments that promise the highest return. This is so true that it amounts to an economic law. And the public, by allowing itself to be duped into believing that public utilities are in the robber baron class, only work injury to the public. The public often wrecks the utility, but it suffers in turn. Failure to provide money for expansion results in no expansion and insufficient expansion means that the progress of the community is seriously hampered.

### Lost Forever

Edith—So that rich old bachelor didn't propose?

Madge—No, he ate six meals at that summer hotel where they advertised home cooking and decided to stay single.—Boston Transcript.

The “reds” seem blue because America proved to be not as green as they thought.—Pittsburgh Gazette-Times.

# EXHIBIT 67 (j)

## TMLP History

When Taunton Municipal Lighting Plant (**TMLP**) began operating as a municipal electric utility in 1897, it already had 15 years experience providing electricity to customers in the business section of Taunton.

TMLP's predecessor, the Taunton Electric Lighting Company, was created as a business venture by several Taunton entrepreneurs who provided the funding for a 100' x 75' wooden structure on Mechanics Lane which contained a 60-horsepower engine, boiler and dynamo machines to illuminate 35 to 40 lights in the Main Street/City Square area.

Service began on a small scale, with 22 customers with one, two or three arc lights. Electricity was available from one hour before sunset until 10 p.m. each night except Saturday when electricity was provided until 11 p.m. By September 1892, 18 stores around the Green had electricity and streetlights were lit on Broadway, Main Street and City Square.

Taunton Electric Lighting Company made it possible for the first electric cars to start service from the Green to Whittenton and back on April 30, 1893. Service was later extended to Weir Street and back. By then, the company was generating enough power to illuminate 84 streetlights and 2000 incandescent lights throughout the city.

Demand for electricity increased and an addition to the generating station was constructed in 1890. As the demand for electricity increased, so, too, did the company's debt. In December 1896, the stockholders voted to sell the company.

The city of Taunton came to the rescue in 1897, and decided to purchase the floundering company, making it a publicly-owned electric utility. In June 1897, the city of Taunton purchased the electric light company for a total \$125,000.

Renamed Taunton Municipal Lighting Plant, the utility continued to generate power at the Mechanics Lane Service Station. The Mayor appointed a Board of Commissioners to help govern the utility. By 1918, TMLP was in financial disarray due to the lack of a permanent manager or commission. With the insistence of the Taunton Central Labor Union and the Taunton Chamber of Commerce, the state legislature passed a bill that created a three-person commission to oversee TMLP. Governor Calvin Coolidge signed a bill establishing the Taunton Municipal Lighting Plant Commission in April 1919.

Today, TMLP provides electric service to 34,000 customers in Taunton, Berkley, Raynham, and sections of Dighton, Lakeville and Bridgewater. TMLP is governed by a three-member Board of Commissioners, which is elected by the citizens of Taunton.

TMLP employs 165 associates and has an office location at 55 Weir Street and the Cleary-Flood Generating Station at 1314 Somerset Ave, Taunton, Massachusetts. The Generating Station, which has two units (#8 and #9), is capable of generating 136 mW. Unit #8 burns fuel oil (#6), and Unit 9 is a combined-cycle unit that burns natural gas and #6 fuel oil.

In late 1997, TMLP began offering Internet service for its customers as TMLP Online. TMLP Online today provides Internet and network service to residential, commercial, industrial, and municipal customers in the area, including the entire Taunton school system as well as Morton Hospital and its associated medical facilities.

TMLP and its associates are active members in regional and national organizations such as the Northeast Public Power Association, American Public Power Association and the Municipal Electric Association of Massachusetts. Locally, our employees sit on a number of Boards and participate with civic organizations including the Taunton Chamber of Commerce, Taunton Area School to Career, Taunton Boys and Girls Club, Rotary, Project Best, United Way and American Cancer Society.

# EXHIBIT 68



[\(https://www.publicpower.org/\)](https://www.publicpower.org/)

*Powering Strong  
Communities*

(TFI 20)

TOPICS

MEMBERS

## COMMUNITY

# Multiservice utilities: A one-stop shop for communities

May 9, 2018

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

[Home \(/\)](#) / [Periodical](#) / [Article](#) / [Multiservice utilities: A one-stop shop for communities](#)

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.

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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](#).

# EXHIBIT 69 (a)

# **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.

**EXHIBIT 69 (b)**

**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

# EXHIBIT 69 (c)



## **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.



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

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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

# EXHIBIT 69 (d)

# 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

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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

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

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

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.wsgre.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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# EXHIBIT 69 (e)

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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

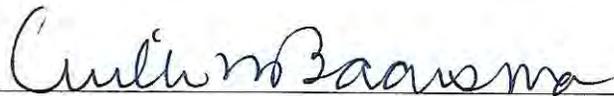
1  
2  
3 CERTIFICATION OF AUTHENTICITY  
4

5 I make the following statements under penalty of perjury under the laws of the State of  
6 Washington. I am over 18 years of age and competent to testify. I am one of the authors of the paper  
7 entitled Creating Capacity And Competition In Broadband. I understand that a party seeks to introduce  
8 the following document into evidence in a case pending in Pierce County Superior Court.

- 9 1. Creating Capacity And Competition In Broadband, published in April 2000, which is Exhibit 70  
10 in Shook's 12/30/19 Declaration.

11 I have reviewed the document described above and attest that such is a true and correct copy of  
12 what the document purport to be.  
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15 Signed on this 10 day of January 2020 in TACOMA, Washington.

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# 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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- [3] Gaebler, Ted and Osborne, David. Reinventing Government. Reading, Mass.: Addison-Wesley, 1992.
- [4] Grove, Andy, Chairman of Intel Corp., Live Internet E\*Trade Interview, Nov. 14, 1998.
- [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.
- [9] Tacoma City Power. Preliminary Official Statement Relating to \$37,065,000 Electric System Revenue and Refunding Bonds, 1999, p. 16.
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- [12] The News Tribune, "High Tech is Clicking in Tacoma," Dec. 5, 1999.
- [13] The News Tribune, "On Cable TV, It's A Tale of Two Cities," Editorial, Dec. 29, 1998.
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# EXHIBIT 70 (a)

# 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

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# Tacoma decides to build its own fiber-optics network

BY 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 businesses demand.

In the 1970s, 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 — 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.

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# EXHIBIT 71

Tacoma Public Utilities

# Click! Network Financial Performance Review

April 24, 2000

**PRICEWATERHOUSECOOPERS** 

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San Francisco, California 94105

EXHIBIT 3  
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DATE: 9-26-19  
Mindi L. Pettit, RPR, CCR #2519

TAC\_PRA\_HF\_0016987

PricewaterhouseCoopers LLP  
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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.

(4)

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.

\* \* \* \* \*

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.

# EXHIBIT 72 (a)



**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.

**EXHIBIT 72 (b)**



**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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## **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			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			
Sales and Marketing	Marketing				X				XX
	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.

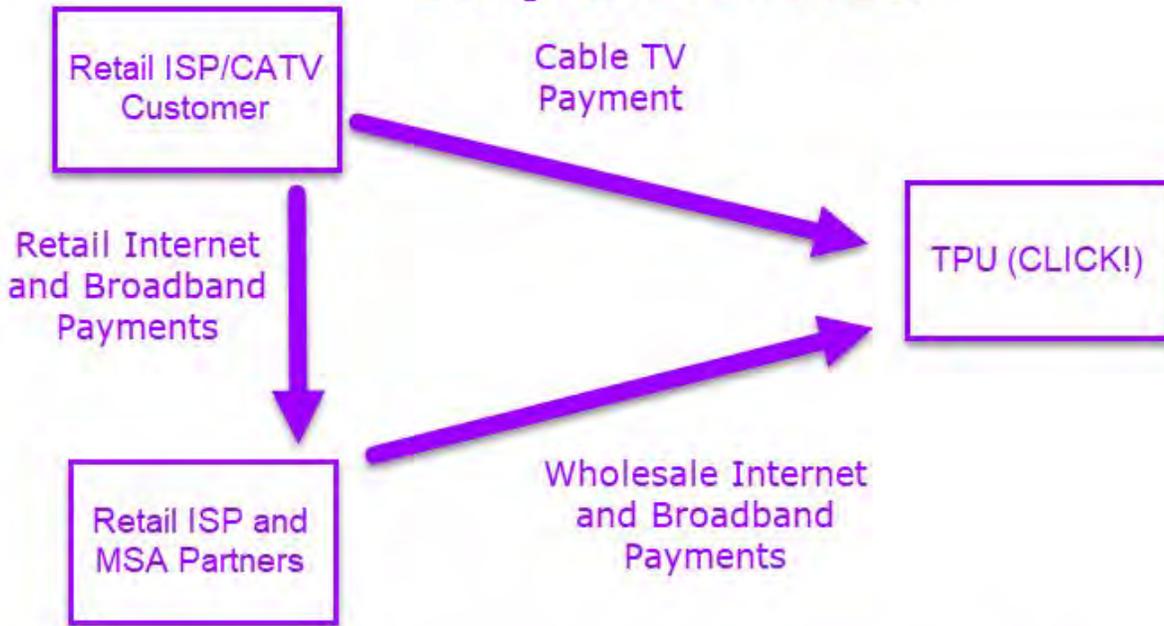
**Provide network status information (for tier 2 support):** The wholesale ISP partners and Click! will be responsible for their own network status reporting. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non 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.

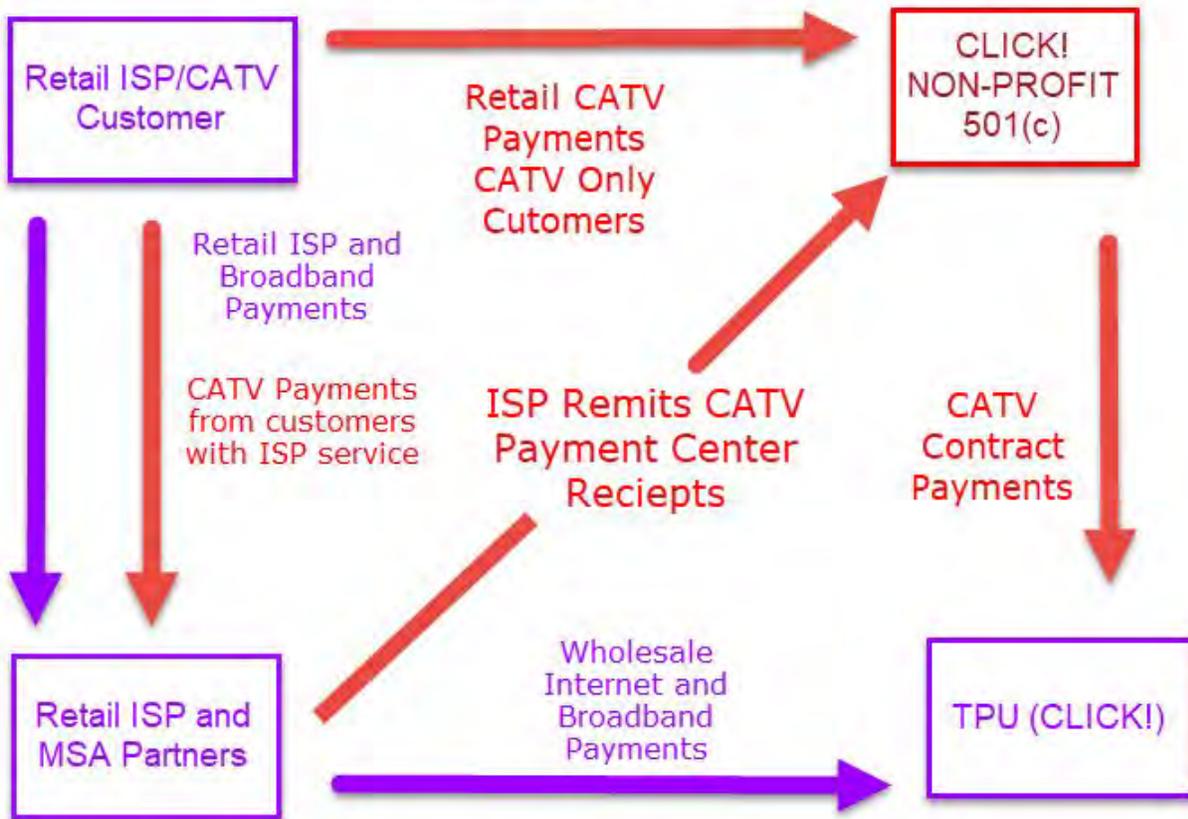
**Provide monthly sales and leads reports:** The wholesale ISP partners and Click! will be responsible for their own sales and leads reporting. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, 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>
<b>ISP +\$2.5</b>													
<b>TV +\$5</b>													
<b>Year 2</b>													
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	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	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	
Wholesale ISP	\$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	\$114,193	\$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>\$2,573,001</b>	<b>\$2,580,681</b>	<b>\$2,588,361</b>	<b>\$2,596,041</b>	<b>\$2,603,721</b>	<b>\$2,690,336</b>	<b>\$2,698,016</b>	<b>\$2,705,696</b>	<b>\$2,713,376</b>	<b>\$2,721,056</b>	<b>\$2,728,736</b>	<b>\$2,736,416</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	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$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>\$2,636,984</b>	<b>\$2,636,984</b>	<b>\$2,636,984</b>	<b>\$2,636,984</b>	<b>\$2,636,984</b>	<b>\$2,653,196</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>\$37,140</b>	<b>\$44,820</b>	<b>\$52,500</b>	<b>\$60,180</b>	<b>\$67,860</b>	<b>\$75,540</b>	<b>\$83,220</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



CERTIFICATE

I, Charleen Jacobs, do hereby certify that I am the Clerk of the Public Utility Board of the City of Tacoma, and that record and maintain custody of the official records and minutes of the Public Utility Board.

I further certify that the attached is a full, true, and correct copy of the Tacoma Public Utility Board study session and regular meeting minutes of October 26, 2016.

In witness whereof, I have set my hand this 17 day of January 2020.

Charleen Jacobs  
Clerk, Public Utility Board  
Tacoma Public Utilities  
City of Tacoma, Washington

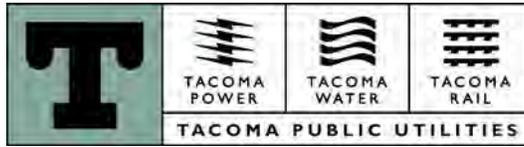
Attachment

State of Washington  
County of Pierce

Subscribed and sworn to before me this 16 day of January 2020.



Deborah D. McLellan  
Notary Public in and for the  
State of Washington, County of Pierce  
My commission expires 10-8-21



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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The Honorable Grant L. Anderson

97 MAY -5 PM 3:20

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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, 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, )

No. 96-2-09938-0

Plaintiff, )

DECLARATION OF STEVEN J. KLEIN  
IN SUPPORT OF CITY'S REPLY

v. )

THE TAXPAYERS AND THE RATEPAYERS  
OF THE CITY OF TACOMA, )

Defendants. )

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.

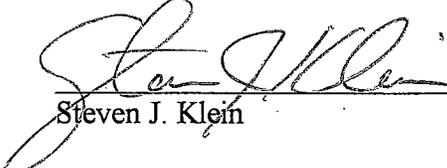
5 14. Light Division staff explained to the City Council our view that even if the  
6 Telecommunications Project's revenues fell short of projections, even to the point of a worst case  
7 scenario (resulting in a 2.5% rate increase), still the City should proceed with the Project in order to  
8 secure 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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# EXHIBIT 74 (a)

**From:** [Litsup YOM](#)  
**To:** [mitch@advancedstream.com](mailto:mitch@advancedstream.com)  
**Subject:** RE: Certified Copy of Klein Deposition  
**Date:** Tuesday, January 21, 2020 9:58:03 AM  
**Attachments:** [image001.png](#)

---

Hi Mitch,

Every copy that is sent from off our offices are already certified (provided there is a reporter certificate attached). The copy that was attached is a certified digital transcript.

Please let me know if you should have any questions or should need anything else!

Thank you,

**CAROLYN LEE**  
**Client Services – Pacific Northwest**

---

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**From:** [mitch@advancedstream.com](mailto:mitch@advancedstream.com) <[mitch@advancedstream.com](mailto:mitch@advancedstream.com)>  
**Sent:** Friday, January 17, 2020 11:11 AM  
**To:** Litsup YOM <[litsup-YOM@veritext.com](mailto:litsup-YOM@veritext.com)>  
**Subject:** Certified Copy of Klein Deposition

This message has originated from an **External Source**. Please use proper judgment and caution when opening attachments, clicking links, or responding to this email.

Can you please certify this attached Steve Klein deposition?

Thanks,

Mitch

Thanks,

**Mitchell Shook**  
Founder - CEO  
Advanced Stream Broadband  
P.O. Box 7641  
Tacoma, WA 98417

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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). )

---

30(b)(6) Deposition Upon Oral Examination of  
 CITY OF TACOMA  
 STEVEN J. KLEIN

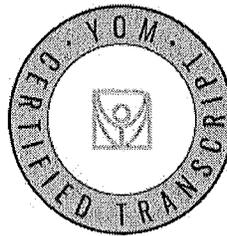
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9:56 a.m.

September 26, 2017

1001 Fourth Avenue, Suite 4200

Seattle, Washington



REPORTED BY: Mindi L. Pettit, RPR, CCR #2519



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 production@yomreporting.com  
 www.yomreporting.com

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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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 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

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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

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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.

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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.

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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  
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13 city council that you mentioned somehow caused the  
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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

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.

**EXHIBIT 74 (b)**

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

**EXHIBIT 74 (c)**

# 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:

# EXHIBIT 75 (a)

## 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.

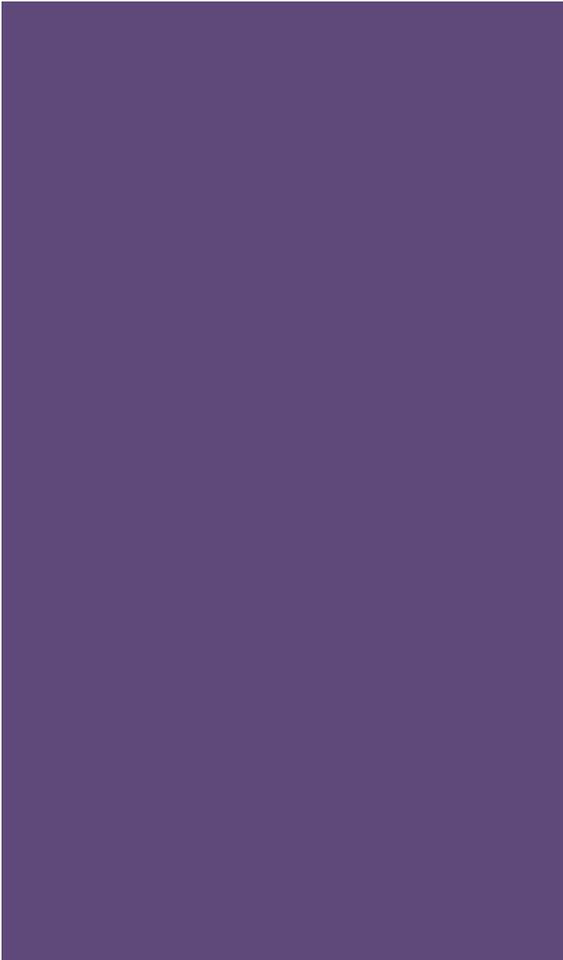
	Jan	Feb
Cable TV	14,467	14,441
ISP	21,807	21,739
Phone Calls	5,490	4,949
Call Handling	90%	95%

## 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.

**EXHIBIT 75 (b)**

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>		

# EXHIBIT 75 (c)

## In This Issue

- Technical Operations Update
  - Service/Installation
  - Converter Inventory Control
  - Network Operations
  - Engineering
  - Broadband
  - Technical Administrator
- Business Operations Update
  - Customer Care
  - Sales
  - 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.

# EXHIBIT 75 (d)

## 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.

# EXHIBIT 75 (e)

## 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**

# EXHIBIT 76 (a)

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>

**EXHIBIT 76 (b)**

City of Tacoma, Washington  
 Department of Public Utilities  
 Click! Network  
 Commercial Operations  
 Operational Summary (Unaudited)  
 October 31, 2019

	October 2019
<b>TELECOMMUNICATIONS REVENUE</b>	
CATV	\$1,324,858
Broadband	80,228
ISP	688,345
Interdepartmental	22,293
Total Operating Revenue	2,115,724
<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	1,362,141
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	306,949
Total Telecommunications Expense	1,669,090
Net Revenues (Expenses) Before Taxes and Depreciation and Amortization	446,634
Taxes	287,462
Depreciation and Amortization	142,210
	429,672
<b>NET OPERATING REVENUES (EXPENSES)</b>	<b>\$16,962</b>

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)

**EXHIBIT 76 (c)**

# 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.



# EXHIBIT 78 (a)

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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 incipency 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,

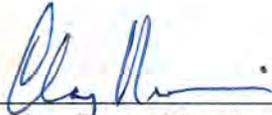
Clay Norris  
Tacoma Power – Power Manager

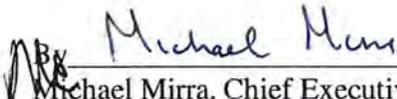
City of Tacoma, Department of  
Public Utilities, Light Division

Tacoma Housing Authority

Accepted:

Accepted:

By:   
Clay Norris – Power Manager

  
Michael Mirra, Chief Executive Officer

Date: 8-24-17

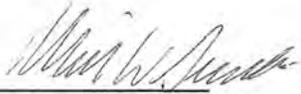
Date: 8.14.17

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.

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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.

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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.

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 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.

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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

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# EXHIBIT 80 (a)

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 mat ter". 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, Davisson, 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?

---

*7/3/26 - Thorne phoned this morning - Brockett will be here in about a week and will see me.*

---

May 18 2022 8:30 AM

The Honorable Judge Bryan Chushcoff  
CONSTANCE R. WHITE  
Department 4  
COUNTY CLERK  
Hearing Date: July 1, 2022, at **NO. 19-2-07135-0**

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

MITCHELL SHOOK,  
Plaintiff,

v.

CITY OF TACOMA,  
Defendant.

**NO. 19-2-07135-0**

**DECLARATION OF JAMES P. GRIFO  
IN SUPPORT OF PLAINTIFF'  
ANDERSON'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT -  
PART THREE**

THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,  
Plaintiffs,

v.

CITY OF TACOMA,  
Defendant.

**EXHIBIT 80 (b)**

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 <sup>there</sup> ~~was~~ 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.

**EXHIBIT 80 (c)**

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-

# EXHIBIT 81 (a)

## 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.

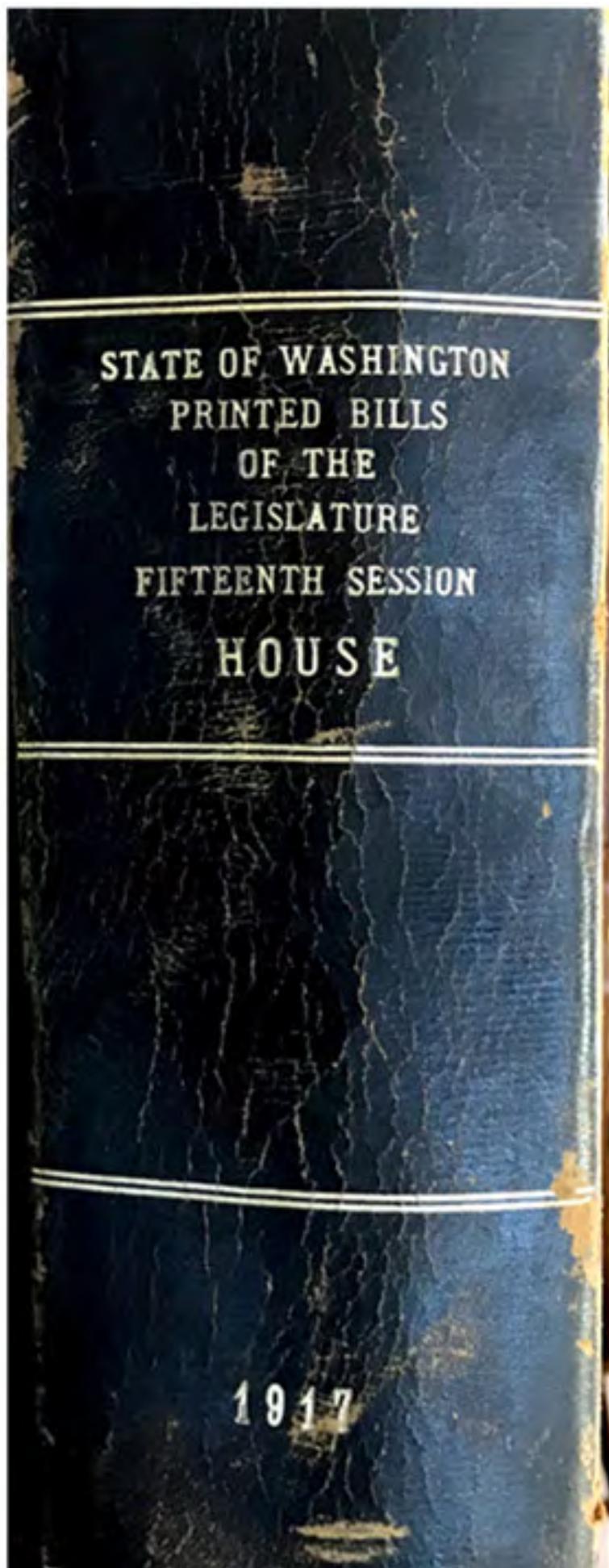
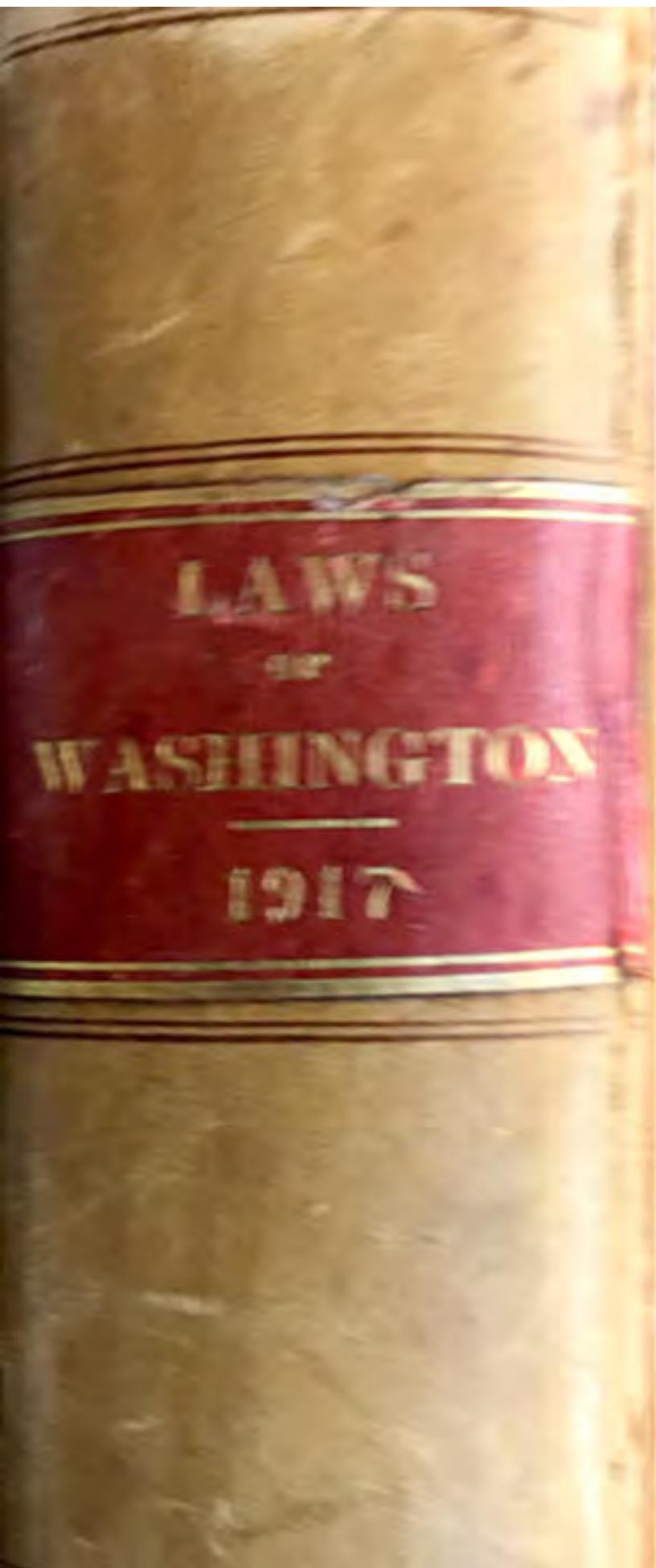
*Be it enacted by the Legislature of the State of Washington:*

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.

Recom-  
mendations.

Copies of  
proposals  
distributed.



**EXHIBIT 81 (b)**

# 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.

**EXHIBIT 81 (c)**

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.

# EXHIBIT 81 (d)

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**

# EXHIBIT 81 (e)

**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

# EXHIBIT 81 (f)



## 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.

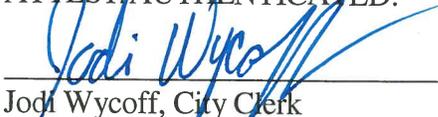
CITY OF DUVALL

  
Mayor Amy Ockerlander

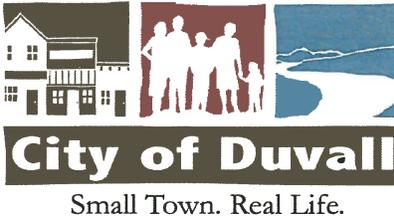
Approved as to form:

  
Rachel Turpin, City Attorney

ATTEST/AUTHENTICATED:

  
Jodi Wycoff, City Clerk

## Exhibit "A"



**Date:** September 9, 2019

**Re:** Itemized Surplus List for City Council Approval

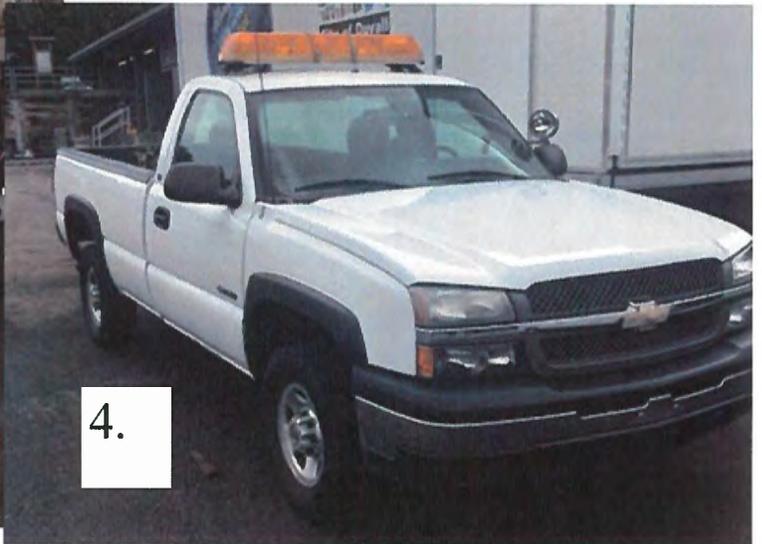
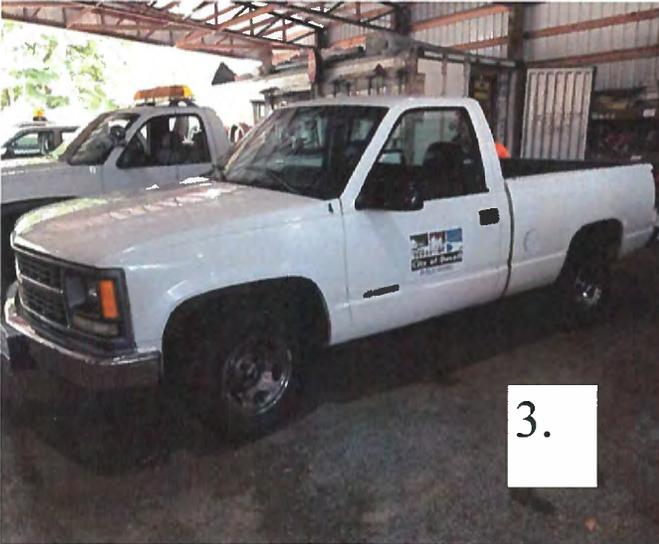
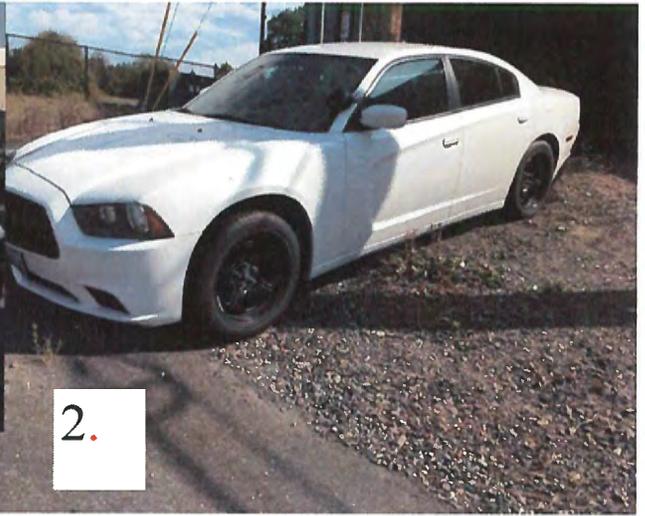
---

1. 2011, Dodge Charger, VIN#2B3CL1CT0BH554297.
  - o Miles: 103,414
2. 2012, Dodge Charger, VIN#2C3CDXAT0CH240334.
  - o Miles: 107,848
3. 1996 Chevy Pickup, VIN#1GCEC14WXTZ129848.
  - o Miles: 70,898
4. 2004 Chevy Pickup, VIN#1GCGC24U24Z199486.
  - o 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

- 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)

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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

**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

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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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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

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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

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# EXHIBIT 85



City of Tacoma  
Office of the City Clerk

## CERTIFICATE OF CITY CLERK

I, Doris Sorum, City Clerk of the City of Tacoma, Washington, do hereby certify that the attached is a full, true and correct copy of Substitute Ordinance No. 26141 passed by the City Council on October 28, 1997.

Dated this 21<sup>st</sup> day of January 2020.

  
Doris Sorum, City Clerk  
City of Tacoma, Washington





**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  
5 Telecommunications Project and declaring a fiscal emergency to allow  
6 this amendment.

7 BE IT ORDAINED BY THE CITY OF TACOMA:

8 Section 1. That the biennial budget for the Light Division for the years  
9 1997/1998 be and the same is hereby amended by adding thereto and authorizing  
10 the appropriation of the sum of \$69,411,000, which includes a 5% construction  
11 contingency, or so much thereof as may be necessary to design, build, and  
12 operate the Telecommunications Project.

13 Section 2. That at the time the 1997/1998 biennial budget for the Light  
14 Division was approved and adopted, the Telecommunications Project was not  
15 sufficiently developed to include in the budget authorization. Since that time the  
16 Project was approved to proceed and permanent Project funding is now  
17 necessary. Therefore, pursuant to RCW 35.34.150, this situation is declared to  
18 create a fiscal emergency necessitating this additional budget authorization in the  
19 estimated amount of \$69,411,000, which includes a 5% construction contingency.

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  
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nothing in this ordinance shall in any way be construed to authorize the incurring of general indebtedness by the City in respect to the Telecommunications Project.

Passed OCT 28 1997

*Rick Rumbolt*

Attest: City Clerk

*R. E. ...*  
Mayor

Approved as to form and legality:

*John Jenkins*  
\_\_\_\_\_  
City Attorney

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# 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

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**1997/1998 PRELIMINARY BUDGET**

**CITY OF TACOMA**

**TACOMA PUBLIC UTILITIES**

**LIGHT DIVISION**

**TELECOMMUNICATIONS SECTION**

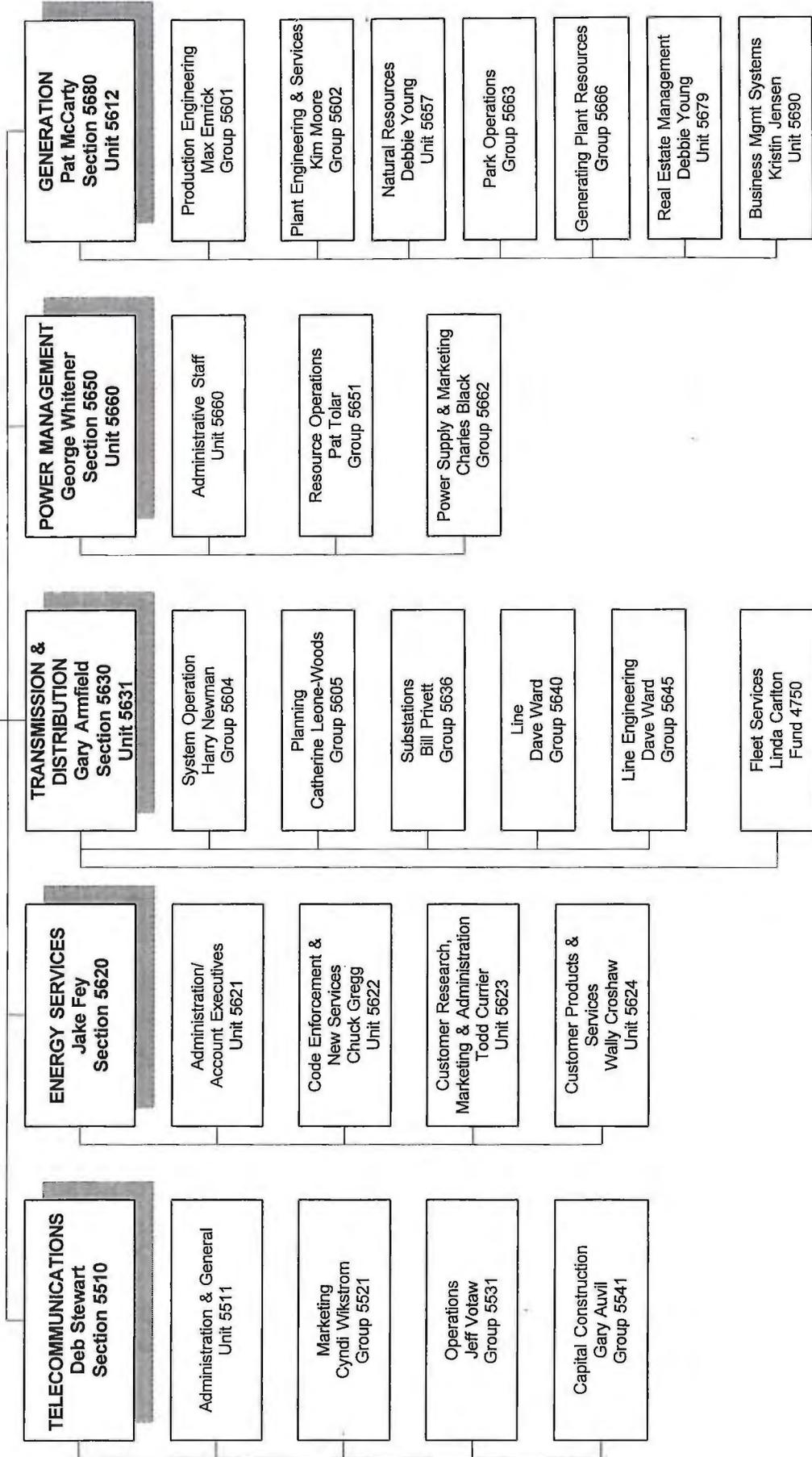
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# LIGHT DIVISION 1997/1998 BUDGET HIERARCHY

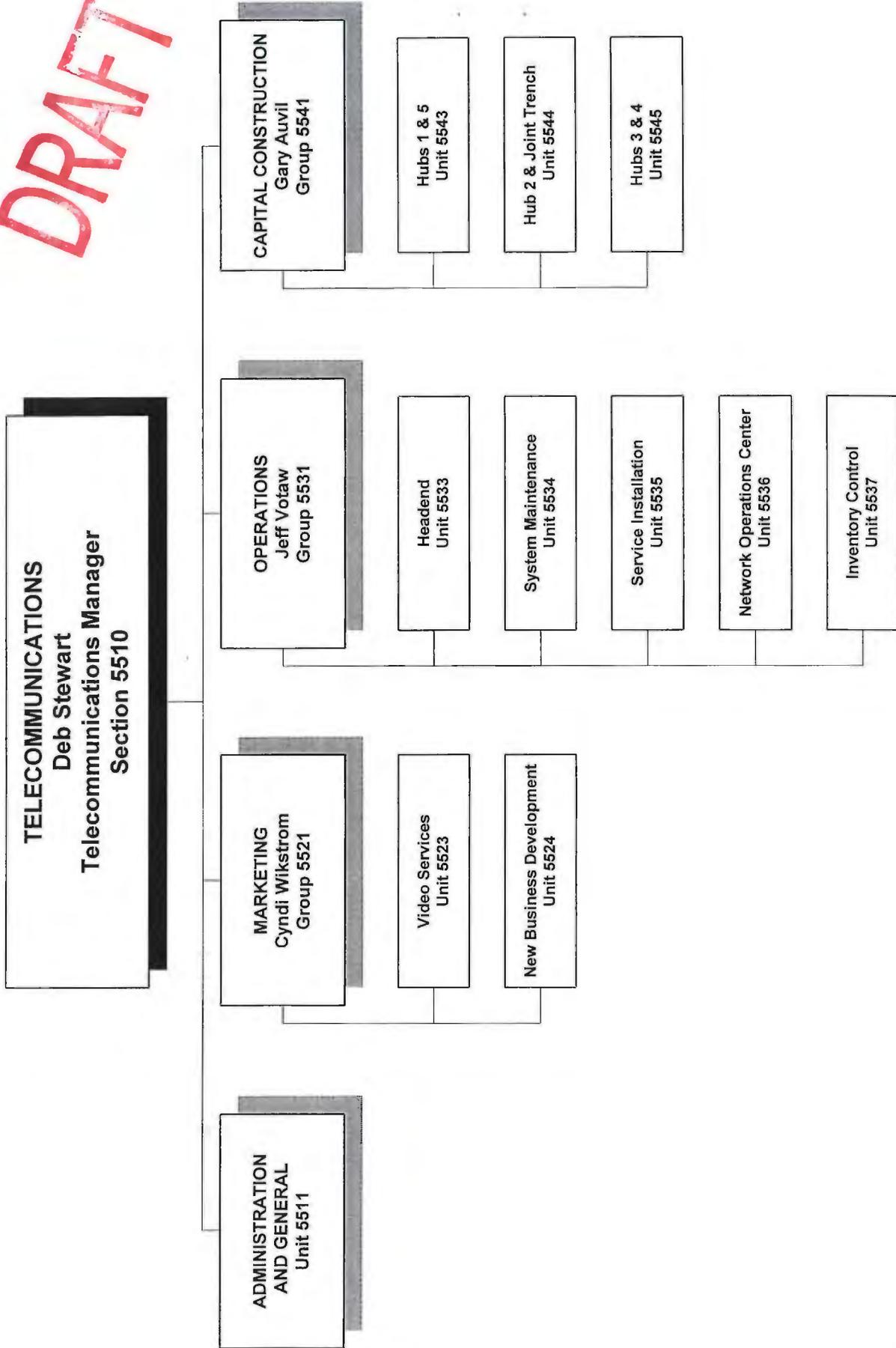
**DRAFT**

**SUPERINTENDENT'S OFFICE**  
 Steve Klein  
 Deputy Director  
 Section 5609 Units 5610/5611



# TELECOMMUNICATIONS 1997/1998 BUDGET HIERARCHY

**DRAFT**



7.2

**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>

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DEPARTMENT	DIVISION	ITEM
Public Utilities	Light	Capital Outlay

**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**

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<b>DEPARTMENT</b> Public Utilities - Light Division Telecommunications Section	<b>ITEM</b>  Taxes
--	--------------------------

**Budget  
Biennium  
Appropriation  
1997/1998**

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**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>
--------------------	--------------------

**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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<b>FUND</b> 4700 <b>SECTION 5510</b>	<b>DIVISION</b> Light <b>Telecommunications</b>	<b>ITEM</b> Personnel Costs <b>Position Requirements</b>
--	---	--

Positions Budget 1996	Positions Budget 1997	Positions Budget 1998	Budget 1996	Budget 1997	Budget 1998
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Code No.	Classification Title	-	1.00	1.00	-	33,810	105,656
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>		-	42.00	82.00	-	<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>

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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](mailto: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](mailto: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.

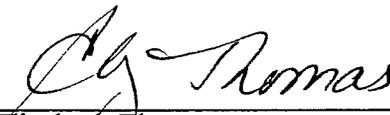
25 5. A judgment declaring that:  
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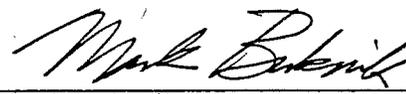
- a. The Court has jurisdiction over the subject matter and parties in this action.
- b. The Bond Ordinance was properly enacted.
- c. The City has authority under the laws of the State of Washington and the United States to utilize the Telecommunications System to provide cable television service in 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

# EXHIBIT 88 (a)

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IN COUNTY CLERK'S OFFICE

REC'D BY  
SUPERIOR COURT  
ADMINISTRATION

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

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

23  
24  
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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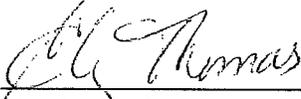
**VI. CONCLUSION**

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

**EXHIBIT 88 (b)**

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The Honorable Grant L. Anderson

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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  
26  
**DECLARATION OF JON ATHOW IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT - 4**



**EXHIBIT 88 (c)**

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

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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  
26



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.

7  
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).

17  
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 As set forth above in Section 1, the Tacoma City Charter has it's own set of checks and  
18 balances. The City cannot place the ratepayers and taxpayers into debt without voter approval.  
19 The City has not done the legwork to define the telecommunication system project in order to  
20 determine that the ratepayers and taxpayers would not be subject to indebtedness as a result of  
21 this project. The City does not have authority under the Tacoma City Ordinance to issue bonds  
22 under the current set of facts and the City's Motion for Summary Judgment should be denied.  
23

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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 examining 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).

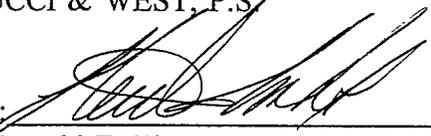
The City has prematurely brought this declaratory action with the court requesting preliminary authority to use a portion of its hypothetical telecommunication system to provide cable television service and to lease a portion of its facilities to other telecommunication service providers. At this point, 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.

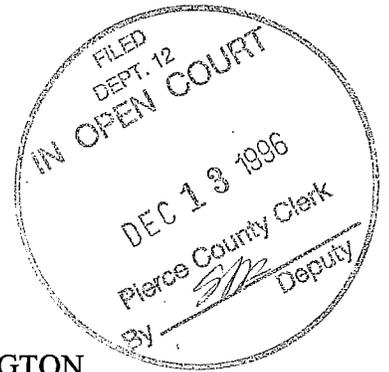
9  
10 THOMPSON, KRILICH, LA PORTE,  
TUCCI & WEST, P.S.

11  
12 By: 

13 Ronald E. Thompson, WSB #4005  
14 Heidi E. Imhof, WSB #23083  
15 Attorneys for Defendants  
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# EXHIBIT 88 (d)

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.

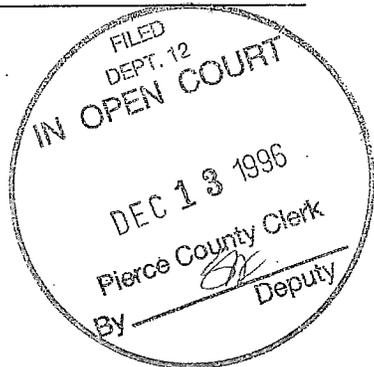
**GRANT L. ANDERSON**

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

# EXHIBIT 88 (e)

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Honorable Grant L. Anderson

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THOMPSON, KRILICH, LAPORTE  
TACOMA, WASH. WEST INC., P.S.

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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~~THOMPSON, KRILICH, LAPORTE  
TACOMA, WASH. WEST 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,  
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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  
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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*  
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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.  
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17 In *City of Bremerton v. Kitsap County Sewer District*, 71 Wn. 2d 689 (1967), the court  
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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  
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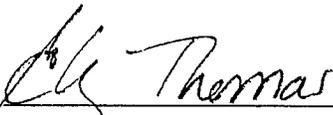
23 <sup>1</sup> *Accord Rowan v. Convention Center*, 78 Wn. App. 322, 329 (1995) (if municipal corporation's  
24 actions come within purpose and object of enabling statute and no express limitations apply, court  
25 leaves choice of means used in operating corporation to discretion of municipal authorities, 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,

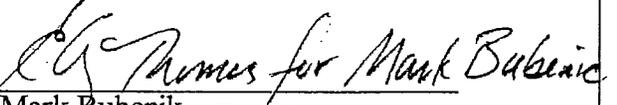
11 PRESTON GATES & ELLIS

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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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

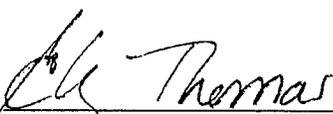
23 <sup>1</sup> *Accord Rowan v. Convention Center*, 78 Wn. App. 322, 329 (1995) (if municipal corporation's  
24 actions come within purpose and object of enabling statute and no express limitations apply, court  
25 leaves choice of means used in operating corporation to discretion of municipal authorities, 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,

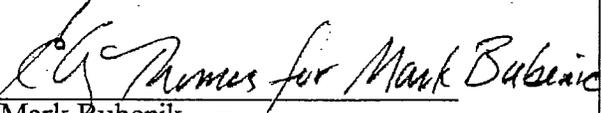
11 PRESTON GATES & ELLIS

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

19  
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MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 7

**EXHIBIT 88 (g)**

RETURN COPY

RECEIVED BY

97 APR 14 AM 8:40

The Honorable Grant L. Anderson

SUPERIOR COURT  
ADMINISTRATION

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FILED  
IN COUNTY CLERK'S OFFICE

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

~~RECEIVED~~

~~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

J:\LAR\24624-00.015\ATHOW2.DOC

COPY

PRESTON GATES & ELLIS LLP  
5000 COLUMBIA CENTER  
701 FIFTH AVENUE  
SEATTLE, WASHINGTON 98104-7078  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1           3.       The Light Division produced a Business Plan for the telecommunications system as a  
2 key element of its Telecommunications Study.

3           4.       The Telecommunications Study was unanimously approved by the Tacoma Public  
4 Utility Board on March 26, 1997. A copy of the Board's Substitute Resolution No. U-9258  
5 approving the Business Plan is attached as Exhibit A.

6           5.       On April 8, 1997 the Tacoma City Council held a public hearing on the proposed  
7 development of the telecommunications system and on the Business Plan. Public testimony was taken  
8 and the Council debated the matter for over two hours. Earlier the same day, the Council had  
9 conducted a three-hour workshop.

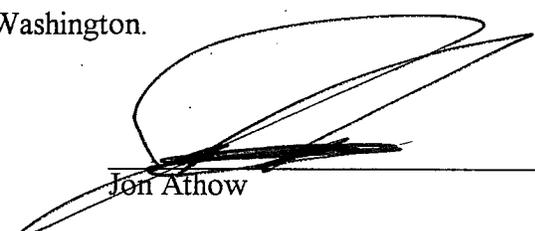
10          6.       The Telecommunications Study was unanimously approved by the Tacoma City  
11 Council on April 8, 1997. A copy of City Council Substitute Resolution No. 33668 approving the  
12 Telecommunications Study and authorizing implementation is attached as Exhibit B.

13          7.       On April 9, 1997 the Public Utility Board adopted Amended Substitute Resolution No  
14 U-9258 to conform the language of its resolution to City Council Substitute Resolution No. 33668.  
15 A copy of this Board Resolution is attached as Exhibit C.

16          8.       The Telecommunications Study is attached as Exhibit D. The Business Plan is  
17 comprised of all material contained behind the eleventh through sixteenth tabs.

18           I swear under the penalty of perjury of the laws of the State of Washington that the foregoing  
19 is true and correct.

20           Dated: April 11, 1997 at Tacoma, Washington.

21  
22   
23 \_\_\_\_\_  
24 Jon Athow  
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26



# RESOLUTION NO.

SUBSTITUTE  
U-9258

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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 technology 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 service, 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 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 systems 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



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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**

1  
2 WHEREAS the City of Tacoma, Department of Public Utilities, Light  
3 Division desires to: (1) develop a state-of-the art fiber optic system to  
4 support enhanced electric system control, reliability and efficiency; (2)  
5 develop capability to meet the expanding telecommunications requirements  
6 in an evolving competitive electric market, the most critical of which is real-  
7 time, two-way interactive communications with individual energy consumers,  
8 (3) create greater revenue diversification through new business lines (i.e.  
9 internet transport, cable TV, etc.), (4) enhance traditional products and  
10 services, and (5) maximize return on Light Division assets, and

11 WHEREAS these desired capabilities can be provided with a broad  
12 band telecommunications system for all of the Light Division's service area,  
13 and

14 WHEREAS a broad band telecommunications system will have  
15 available capacity for future City Light Division needs and will also have the  
16 capacity to provide telecommunications services for data transport, high  
17 speed internet access, full cable television service, and other uses, and

18 WHEREAS the Light Division has retained consultants to review and  
19 analyze the feasibility of a broad band telecommunications system for the  
20 Light Division's service area, and a business plan has been prepared for  
21 this purpose (copies are on file with the Clerk), and

22 WHEREAS the cost of constructing, installing and commencing to  
23 operate a broad band telecommunications system will be approximately \$65  
24 million dollars, but the benefits to the Light Division, the City and the Light  
25 Division customers are projected to exceed and justify the initial cost, and  
26

27 **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

Adopted April 9, 1997

500d(a)

# EXHIBIT 88 (h)

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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

**COPY** 8/20

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

hei13605\Response.sj

THOMPSON, KRILICH, LA PORTE,  
TUCCI & WEST, P.S.  
ATTORNEYS AT LAW  
524 TACOMA AVE. SO.

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  
11 The municipal bond issue is extremely important. The credit rating of cable  
12 companies is normally substandard and risky, and the city of Tacoma has not even  
13 considered the affect of a lower credit rating for their municipal bonds. (Declaration of W.  
14 Cary Deaton) The City of Tacoma has been proceeding full speed ahead with this project  
15 with a blind eye towards the legality of issuing bonds on this project. Mr. Steve Klein, City  
16 Light Superintendent, still doesn't know how much the project will cost or where exactly the  
17 money is coming from or what it is being spent on. (Excerpts from City Council meeting  
18 dated 4/8/97)

19  
20 If and when this telecommunications system is finished, only 3% of the revenues to  
21 pay for the system will come from utility services. This project cannot be paid for without  
22 cable television and internet services. Yet, on page three (3) of the City's own motion they  
23 state only that they "may . . . provide cable television service."

24  
25 Even with providing cable television services, the City's financial plan is seriously

26  
DEFENDANT'S RESPONSIVE MEMORANDUM IN  
OPPOSITION TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT- 4

hei\13605\Response.sj

THOMPSON, KRILICH, LA PORTE,  
TUCCI & WEST, P.S.  
ATTORNEYS AT LAW  
524 TACOMA AVE. SO.  
TACOMA, WASHINGTON 98402-5112

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

heil136051Response.sj

THOMPSON, KRILICH, LA PORTE,  
TUCCI & WEST, P.S.  
ATTORNEYS AT LAW  
524 TACOMA AVE. SO.

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

hei13605\Response.sj

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524 TACOMA AVE. SO.  
TACOMA, WASHINGTON 98402-5116

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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THOMPSON, KRILICH, LA PORTE,  
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TACOMA, WASHINGTON 98402-5416

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)

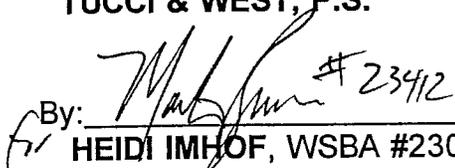
24 The cable television service and the telephony services are not incidental to the City's  
25

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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# EXHIBIT 88 (i)

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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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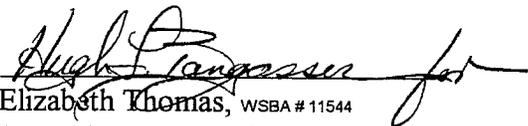
IV. CONCLUSION

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.

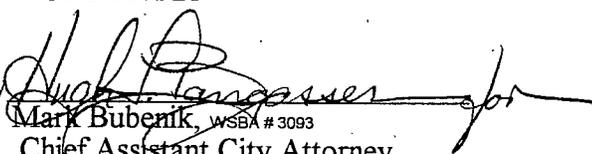
DATED this 5th day of May, 1997.

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

# EXHIBIT 88 (j)

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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, )

No. 96-2-09938-0

Plaintiff, )

DECLARATION OF STEVEN J. KLEIN  
IN SUPPORT OF CITY'S REPLY

v. )

THE TAXPAYERS AND THE RATEPAYERS )  
OF THE CITY OF TACOMA, )

Defendants. )

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.

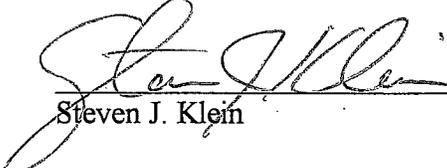
5 14. Light Division staff explained to the City Council our view that even if the  
6 Telecommunications Project's revenues fell short of projections, even to the point of a worst case  
7 scenario (resulting in a 2.5% rate increase), still the City should proceed with the Project in order to  
8 secure 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

# EXHIBIT 88 (k)

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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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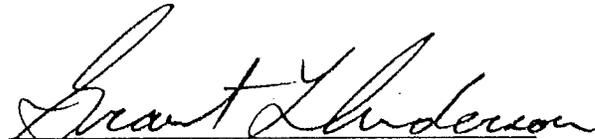
1/11 however the court is making no finding as to the financial feasibility of the Project or as to the legality of any future bond issues. 11/6

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 <sup>and Steven J. Klein</sup> 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.

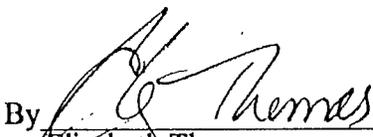
5 The City has authority under the laws of the State of Washington and the United States to  
6 <sup>B 1 million of revenue</sup> issue the Bonds for the purposes set forth in paragraphs (3) and (4) in this Court's Order dated  
7 December 13, 1996 and in the manner set forth in the Bond Ordinance.

8 DONE IN OPEN COURT this 9<sup>th</sup> day of May, 1997.

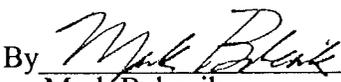
9  
10   
11 JUDGE

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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# EXHIBIT 88 (L)

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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## II STATEMENT OF ISSUES

1. Whether issues raised by the City in its Summary Judgment Motion concerning the City's authority to provide cable television service and lease telecommunications facilities and capacity, and to issue bonds for such purposes, are ripe for review by this Court.

2. Whether the City's authority to issue general obligation bonds to finance the Telecommunications System is before this Court.

3. Whether the City has satisfactorily demonstrated that it can conveniently provide telecommunications services to customers of the Light Division service area.

## III ARGUMENT

### A. The Issues Raised by the City are Ripe for Review.

Defendants assert that this action is untimely because the City does not have a business plan or written proposal for its Telecommunications System. Defendants' Responsive Memorandum in Opposition to Motion for Summary Judgment at 2. Defendants appear to misunderstand the purpose of RCW Chapters 7.24 and 7.25, which permit a declaratory judgment action to test the validity of a bond ordinance as soon as the ordinance has been enacted. The purpose of these chapters is to settle the issue of municipal authority at the early stages of a project or to remove an uncertainty (RCW 7.24.050) in order to avoid jeopardizing the integrity of municipal finance.

The Washington courts have recognized that by providing for such actions, the statute designates municipal bonding controversies ripe as soon as a bond ordinance has been passed. As the Washington Supreme Court stated in *City of Spokane v. Taxpayers*, 111 Wn.2d 91 (1988):

Under RCW 7.25, a city may initiate a declaratory judgment action against its taxpayers in order to determine the validity of a bond issue. This would appear to be a determination that such actions would constitute a judicable controversy.

111 Wn.2d at 95 (internal citations omitted). If controversies over the validity of bonds were not ripe 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.

22  
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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  
76, 80 (1968).

25 <sup>2</sup> The Defendants contend that Mr. Athow is not an authorized spokesperson for either the City or the Light Division.  
26 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

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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.

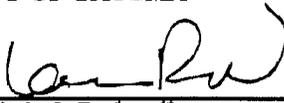
DATED this 9<sup>th</sup> day of December, 1996.

Respectfully submitted,

PRESTON GATES & ELLIS

By   
Elizabeth Thomas, WBSA # 11544  
Laura A. Rosenwald, WBSA # 25722

CITY OF TACOMA

By  per telephone authorization  
Mark Bubenik, WBSA # 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.

---

<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

KEVIN STOCK  
COUNTY CLERK  
2018-2-08907-4

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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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# EXHIBIT 96

Here, for example, is Mr. Moynihan on the perspective in which such progress toward common justice as has already been made should be viewed:

"The fact is that with respect to Negro Americans we have seen incredible progress since, roughly, the *Brown v. Board of Education* decision of 1954 and President Eisenhower's subsequent decision to send Federal troops to Little Rock, thus commencing the second Reconstruction. . . . Yet it was only after that effort had begun, and had been under way for some time, that it became possible to see the true horror of the situation white America had forced on black America and the deep disabilities that came about in consequence. The first to see this, of course, were the blacks themselves. . . . Large numbers of middle-class, educated blacks, especially young ones, have come to see American society as hateful and illegitimate, lacking any true claim on their allegiance. Well they might."

Mr. Moynihan, however, does not regard this perception of injustice or the feelings which flow from it as the main source of the trouble or as the appropriate target for administration heavy-fire:

"The essence of the Negro problem in America at this time is that despite great national commitments, and great progress, a large mass of the black population remains poor, disorganized, and discriminated against."

Mr. Moynihan's recommendations included "dissolving" this Negro lower class—"the low income, marginally employed, poorly educated, disorganized slum dwellers." Had he used another verb such as "assisting" or "saving" or "helping" (which is what that section of his memo describes) he might have got a little more credit for what he said. But one can hardly be sure of that, since so many accounts of his argument have stood his principal thesis regarding the black lower class on its head.

We have in mind Mr. Moynihan's observation that "like such groups everywhere," this group is "unstable and essentially violent," and his conclusion: "This fact of lower class violence has nothing to do with race. It is purely a matter of social class." We have added the emphasis because this, unaccountably, is the part of Mr. Moynihan's memo that appears to have caused the most trouble, suggesting to some that, despite the explicit confirmation of the responsibility of racism for the black slum-dweller's plight that runs through this memo, Mr. Moynihan does not think race has anything to do with that plight. The (widely missed) point is that in characterizing black slum violence as a manifestation of class attitudes rather than racial ones, as an outgrowth of class conditions rather than characteristics of race, Mr. Moynihan was making what has always been regarded as the indispensable liberal and/or enlightened argument in these matters. It is generally applauded by Mr. Moynihan's critics when it is otherwise stated as the fact that black slum-dwellers tend to violent behavior because they are poor and misused, not because they are black. That racial discrimination ("centuries of barbarism") accounts for their poverty and misuse is stated with such clarity in Mr. Moynihan's memo that it seems incredible for his point about race-versus-class to have got so distorted in the retelling.

At the outset we remarked there were several things to be said about this memo; but setting its arguments straight seemed to come first. We mean to get around to a second aspect of this whole affair—namely, the manner in which these leaked documents have been promoted and transformed in such a way as to suggest that we are present at a public hanging. But that—and a great deal of head-scratching over the merits and dangers of the leak—will come later.

#### DEATH OF FORMER SENATOR HOMER T. BONE

Mr. MAGNUSON. Mr. President, with a sense of great sorrow I announce to the Senate the passing yesterday of a former distinguished Member of this body, Homer T. Bone of the State of Washington. He was 87 years old. He served here for two terms with great distinction. I am sure those who served with him would agree with me that he was one of the most brilliant men ever to grace this body.

He was a determined advocate of the development of power through the use of natural resources, particularly hydroelectric development. Out in the Pacific Northwest we considered him to be the father of public power, and also the Rural Electrification Administration.

Mr. President, untold millions of people have benefited by his early leadership in this field. I recall an incident many years ago in which he participated. I was a member of my State legislature in 1933. The late Senator Bone had been a member of the State legislature prior to that time. He had fought long and valiantly to reduce power rates in the State of Washington and in the entire Pacific Northwest, through the development of public power, which led to the great powerplant of Seattle City Light, and many other city powerplants throughout the country. He ran into a sort of roadblock in those days with the private power people. It became a considerable political fight, although it is not any more. Private and public power in the Pacific Northwest now work together aided by what is known as the Bonneville Power Administration.

Homer T. Bone had been trying to have passed in the State legislature what was known as the Bone power bill. My colleagues will remember that the city of Seattle was served by a municipal powerplant. Outside the city limits service came from a private power group. In those days the city limits of Seattle were at 85th Street. All of that area has grown up, but that was the city limit. It was found that the people on the city side were paying one-half the amount for city light as compared to those who lived on the other side.

The bill that was introduced caused more furor in our part of the country than anything I have ever known. It would allow the Seattle City Light Co. to service people outside the city limits. The bill was passed. I was in the legislature when it was passed and I had the privilege of managing the bill on the floor of the house. From thereon we had lower power rates, and we have in our area now a combination of public and private power interest.

As far as I am concerned he was the father of public power developed by our great natural resources in the Pacific Northwest. He left the Senate in 1944. He had had a mishap in which he had fallen down and broken his hip and some other bone troubles and he did not want to campaign again for the Senate that year. He often said he did not want to go out on the campaign trail with crutches. He was a great friend of Franklin D. Roose-

velt. Roosevelt was persuaded, because of his brilliant mind and brilliant career, to recommend him for the Ninth Circuit Court of Appeals. He was made a judge. He served with great distinction on the circuit court of appeals for over 10 years. He retired from the circuit court and continued to live at the site of the court in San Francisco where he participated in many decisions. He was called in on numerous cases and worked until almost 3 or 4 years ago. However, he had persistent trouble with bone problems and decided to retire completely and go back to his hometown in Tacoma.

Among other things, he wrote some great decisions on the circuit court of appeals, so lawyers tell me. They were masterpieces in the law. My colleague and I would agree that he was one of the most articulate men we ever knew. He was brief and to the point, and his speeches and opinions were brilliant. One did not have to guess about any of his meanings. He meant what he said and he said it clearly with almost classic use of English. He was a close personal friend of mine for over 40 years. As a matter of fact, I succeeded Homer Bone in the Senate. I agree with his many friends who have also lost a friend and a great American.

His sole survivor is his son, Homer T. Bone, Jr. He has a brother-in-law in Tacoma, John Coffee, who served in the other body with distinction for many years.

There are many Senators who served with Homer T. Bone and who would probably believe we have located a new or popular issue with our rhetoric in the so-called military-industrial complex. Homer T. Bone was known here during the period of World War II for calling attention to those who profited during the course of World War II from military contracts and industry. It was his voice that first called attention to some of the abuses that can occur during a large and great war, as occurred in World War II.

We will all miss him but all remember Homer T. Bone.

I yield to my colleague from Washington.

Mr. JACKSON. Mr. President, I wish to associate myself with the fine remarks made by my senior colleague in connection with the passing of Senator Homer T. Bone.

He was indeed one of the most colorful persons in public life in the Pacific Northwest in the 1920's, the 1930's, and the 1940's.

He was a person of singular purpose. He made it a point to take on one issue and stay with that issue year in and year out. This was especially true of the public power program. But his interests transcended that particular program.

After he came to the Senate, it would be my guess that one of the accomplishments in which he took greatest pride was the passage of legislation that made possible the National Cancer Institute. My distinguished senior colleague (Mr. MAGNUSON) was a cosponsor of that particular measure in the House of Representatives at the time.

Senator Bone was a man of great in-

March 13, 1970

CONGRESSIONAL RECORD — SENATE

tegrity and, as my colleague has mentioned, he was extremely articulate. He was a most effective advocate. He was a loyal friend. He was a man who could be depended upon.

He distinguished himself during the period of his service on the circuit court of appeals from 1944 to 1956.

He leaves a son, Homer T. Bone, Jr., and a grandson, Gregory Scott Bone, both of California; and a brother-in-law and a sister-in-law, Mr. and Mrs. John M. Coffee, of Tacoma, Wash. Mr. Coffee was formerly a U.S. Representative from Washington.

I convey to them my deepest sympathy in the passing of a great public figure and an outstanding jurist.

Mr. MAGNUSON. I thank my colleague.

Mr. MANSFIELD. Mr. President, will the Senator yield?

Mr. MAGNUSON. I yield to the distinguished majority leader.

Mr. MANSFIELD. Mr. President, I want to join both Senators from Washington in expressing my sorrow on the passing of a former colleague of this body, Senator Homer T. Bone. Senator Bone used to come to Montana quite often in company with Senator Murray, and it was a joy and a pleasure to listen to him and to visit with him and to be the beneficiary of his wise advice and counsel.

There comes a time for all of us, and even though it may be anticipated and expected, it nevertheless comes as shock when the time comes for someone close to pass on.

As a Member of this body from a sister State of the Northwest, I want to join Senators MAGNUSON and JACKSON in expressing my feelings, and I am sure the feelings of the people of the country as a whole, in the passing of a man who made his mark in this body and in the country.

I propose reduction, termination or restructuring of 57 programs which are obsolete, low priority or in need of basic reform. These program changes would save a total of \$2.5 billion in the fiscal year 1971. Of this amount, \$1.1 billion saving require Congressional action—roughly the equivalent of the amount by which the 1971 budget is in surplus.

No government program should be permitted to have a life of its own, immune from periodic review of its effectiveness and its place in our list of national priorities.

Too often in the past, "sacred cows" that have outlived their usefulness or need drastic revamping have been perpetuated because of the influence of special interest groups. Others have hung on because they were "too small" to be worthy of attention.

At a time when every dollar of government spending must be scrutinized, we cannot afford to let mere inertia drain away our resources.

Some of these programs are the objects of great affection by the groups they benefit. But when they no longer serve the general public interest, they must be repealed or reformed.

No program should be too small to escape scrutiny, a small item may be termed a "drop in the bucket" of a \$200.8 billion budget, but these drops have a way of adding up. Every dollar was sent to the Treasury by some taxpayer who has a right to demand that it be well spent.

As an extreme example, the government since 1897 has had a special board of tea-tasters. At one time in the dim past, there may have been good reason to single out tea for such special taste tests; but that reason no longer exists. Nevertheless, a separate tea-tasting board has gone right along, at the taxpayer's expense, because nobody up to now took the trouble to take a hard look at why it was in existence. The general attitude was: It did not cost much, it provided a few jobs, so why upset the teacart?

That attitude should have no place in this government. The taxpayer's dollar deserves to be treated with more respect.

Mr. MANSFIELD subsequently said: Mr. President, I ask unanimous consent that the bill introduced by the Senator from Delaware (Mr. WILLIAMS) be re-

# **EXHIBIT B**

**CLICK! BUSINESS TRANSACTION AGREEMENT**

**by and between**

**CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, LIGHT DIVISION,  
D/B/A TACOMA POWER**

**and**

**MASHELL, INC., D/B/A RAINIER CONNECT**

**and**

**RAINIER CONNECT NORTH, LLC**

**Dated as of \_\_\_\_\_, 2019**

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**CLICK! BUSINESS TRANSACTION AGREEMENT**

THIS CLICK! BUSINESS TRANSACTION AGREEMENT, dated as of \_\_\_\_\_, 2019, is by and between the **City of Tacoma, Department of Public Utilities, Light Division**, a municipal corporation of the State of Washington (d/b/a and hereinafter referred to as “**Tacoma Power**”), and **Mashell, Inc., d/b/a Rainier Connect**, a Washington corporation, and its designated operating subsidiary, **Rainier Connect North, LLC**, a Washington limited liability company (hereinafter collectively referred to as “**Rainier**”). Tacoma Power and Rainier shall each individually be referred to as a “**Party**” and together constitute the “**Parties**”.

**W I T N E S S E T H:**

WHEREAS, Tacoma Power owns a hybrid fiber-coaxial network consisting of fiber optic cable and coaxial cable and related network facilities (the “**Tacoma Power Network**”);

WHEREAS, Click! Network, a business unit of Tacoma Power, currently uses a portion of the Tacoma Power Network (the “**Tacoma Power Commercial System**”) to provide cable television services to residents and businesses; to serve as a wholesale provider to internet service providers that provide broadband data services for residential and business customers; and provide Metro Ethernet circuits to businesses within its service area in competition with other providers (the “**Click! Business**”);

WHEREAS, desiring to reduce operational costs while maximizing the community benefits of continuing operation of and investment in the Tacoma Power Commercial System, the City of Tacoma and Tacoma Public Utilities adopted twelve (12) policy goals and issued a Request for Information and Qualifications (“**RFI/Q**”) seeking interest from public or private entities to take over operational control of the Tacoma Power Commercial System and the delivery of services to the community under terms and conditions consistent with the 12 policy goals;

WHEREAS, Mashell, Inc. was selected as a result of the competitive RFI/Q process;

WHEREAS, Tacoma Power and Mashell, Inc. have negotiated the terms of this Agreement and the Exhibits in order to effectuate the transfer of operational control of the Tacoma Power Commercial System through, among other things, an Indefeasible Right of Use Agreement, and the sale of Related Surplus Assets connected with the Click! Business, as more particularly set forth herein (the “**Transaction**”);

WHEREAS, Mashell, Inc. has formed an operating subsidiary, Rainier Connect North, LLC, which it has designated to enter into the Transaction with Tacoma Power;

WHEREAS, Tacoma Power is willing to enter into the Transaction with Rainier Connect North, LLC provided that Mashell, Inc. guarantees the performance of Rainier Connect North, LLC;

WHEREAS, Mashell, Inc. is willing to guarantee the performance of Rainier Connect North, LLC; and

WHEREAS, the Parties have mutually agreed to cooperate to ensure a smooth and seamless transition of the Click! Business as set forth in the Transition Plan attached hereto as Exhibit A.

NOW, THEREFORE, in consideration of the promises and the mutual representations, warranties, covenants and undertakings contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto, intending to be legally bound, agree as follows:

## ARTICLE I

### DEFINITIONS AND TERMS

Section 1.1 Certain Definitions. As used in this Agreement, the following terms have the meanings set forth below:

“Click! Business” has the meaning set forth in the Recitals.

“Advanced Subscriber Payments” has the meaning set forth in Section 2.6(a).

“Affiliate” means, with respect to any Person, any other Person directly or indirectly controlling, controlled by, or under common control with, such Person as of the date on which, or at any time during the period for which, the determination of affiliation is being made. For purposes of this definition, the term “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of such Person, whether through equity interest, board membership, LLC interest, contract, charter, statute, regulation, or otherwise.

“Agreement” means this Click! Business Transaction Agreement.

“Ancillary Agreements” means the Indefeasible Right of Use Agreement and other instruments and other agreements and Transfer of Operational Control documents required to be delivered pursuant to this Agreement, including any Bill of Sale and Assignment and Assumption Agreement.

“Assumed Liabilities” has the meaning set forth in Section 2.4.

“Bill of Sale” means an agreement in form and substance reasonably acceptable to Tacoma Power and Rainier, transferring the tangible personal property included in the Related Surplus Assets.

“Business Day” means any day other than Saturday or a legal holiday as defined by RCW 1.16.050.

“Click! Marks” has the meaning set forth in Section 5.9.

“Consideration” has the meaning set forth in Section 2.6(a).

“Customer Proprietary Information” means, to the extent contained in the billing system that is used to bill existing customers of the Click! Business, that portion of the non-technical, non-public information that is owned by Tacoma Power as of the Transfer of Operational Control Date, is used in the Click! Business as of the Transfer of Operational Control Date, and comprises personal information of an existing customer of the Click! Business that was provided by such customer in connection with provision of services to that customer and all information about such customer’s subscription and account, including, without limitation, such customer’s name, mailing address, email address, telephone number, category of subscription services, and billing and payment information which Tacoma Power is not prohibited by law or contract from transferring to Operator.

“Excluded Liabilities” has the meaning set forth in Section 2.4.

“Employees” means all employees employed by Tacoma Power in connection with the Click! Business and any replacement of such employees between the date hereof and Transfer of Operational Control Date.

“Encumbrance” means any lien, pledge, charge, security interest, option, right of first refusal, mortgage, easement, right-of-way, lease, sublease, license, sublicense, adverse claim, title defect, encroachment, other survey defect, or other encumbrance of any kind, including, with respect to real property, any covenant or restriction relating thereto. For purposes of this Agreement, a Person shall be deemed to own subject to an Encumbrance any asset that it has acquired or holds subject to the interest of a vendor or lessor under any conditional sale agreement, capital lease or other title retention agreement relating to such asset.

“Environmental Law” means any Law (including common law), Governmental Authorization or agreement with any Government Entity or third party relating to (i) the protection of the environment or human health and safety (including air, surface water, ground water, drinking water supply, and surface or subsurface land or structures), (ii) the exposure to, or the use, storage, recycling, treatment, generation, transportation, processing, handling, labeling, management, release or disposal of, any Hazardous Substance or (iii) noise, odor or electromagnetic emissions.

“Equipment” has the meaning set forth in Section 2.2(a)(i).

“Excluded Assets” has the meaning set forth in Section 2.3.

“Excluded Taxes” means any Taxes imposed with respect to the Tacoma Power Commercial System, Click! Business, or any Related Surplus Assets related thereto or any income or gain derived with respect thereto, in each case. For the avoidance of doubt, Excluded Taxes shall include any income Tax liability payable by Tacoma Power or its subsidiaries in respect of the Transaction.

“FCC” means the Federal Communications Commission.

“Franchise” means, with respect to the Click! Business, each franchise granted by a Government Entity authorizing the construction, upgrade, maintenance or operation of any part of the Tacoma Power Commercial System that is part of the Click! Business.

“Funding Commitment Letters” has the meaning set forth in Section 6.3(1).

“Governmental Authorizations” means, with respect to the Click! Business, all licenses (including cable television relay service, business radio and other licenses issued by the FCC or any other Government Entity), permits (including construction permits), certificates, consents, Franchises (including similar authorizations or permits), other actions by, and notices, filings, registrations, qualifications, declarations and designations with, and other authorizations and approvals primarily related to the Click! Business and issued by or obtained from a Government Entity.

“Government Entity” means any federal, state or local court, administrative body or other governmental or quasi-governmental entity with competent jurisdiction.

“Inventory” has the meaning set forth in Section 2.2(a)(ii).

“Law” means any law, statute, ordinance, rule, regulation, code, order, judgment, injunction or decree enacted, issued, promulgated, enforced or entered by a Government Entity.

“Liabilities” means any and all indebtedness, losses, claims, charges, demands, actions, damages, obligations, payments, costs and expenses, sums of money, bonds, indemnities and similar obligations, covenants, contracts, controversies, omissions, make whole agreements and similar obligations, and other liabilities, including all contractual obligations, whether due or to become due, fixed, contingent or absolute, inchoate or otherwise, matured or unmatured, liquidated or unliquidated, accrued or not accrued, asserted or not asserted, known or unknown, determined, determinable or otherwise, whenever or however arising, including, those arising under any Law, principles of common law (including out of any contract or tort based on negligence or strict liability) action, threatened or contemplated action (including the costs and expenses of demands, assessments, judgments, settlements and compromises relating thereto and attorneys’ fees and any and all costs and expenses (including allocated costs of in-house counsel and other personnel), whatsoever reasonably incurred in investigating, preparing or defending against any such actions or threatened or contemplated actions), order or consent decree of any Government Entity or any award of any arbitrator or mediator of any kind, and those arising under any contract, commitment or undertaking, whether or not the same would be required to be recorded or reflected in financial statements or disclosed in the notes thereto.

“Material Adverse Effect” means (i) a material adverse effect on the Related Surplus Assets, or (ii) a material impairment or delay of Tacoma Power’s ability to effect the Transfer of Operational Control or to perform its obligations under this Agreement or any Ancillary Agreement to which it is a party; provided, however, that Material Adverse Effect shall not include the effect of any event change, circumstance or development arising out of or attributable to: (A) any change in Law or accounting standards or interpretations thereof that is of general application; (B) any change in general economic or business conditions or industry-wide or financial market conditions generally; (C) any adverse effect as a result of the execution or

announcement of this Agreement, the Ancillary Agreements, the Transaction or the transactions contemplated by the Ancillary Agreements; or (D) any loss of Subscribers.

“Ordinary Course” or “Ordinary Course of Business” means with respect to the Click! Business, the conduct of such Click! Business as a going concern in accordance with Tacoma Power’s normal day-to-day customs, practices and procedures.

“Person” means an individual, a corporation, a partnership, an association, a limited liability company or other entity or organization.

“Purchase Price” has the meaning set forth in Section 2.6(a).

“Records” has the meaning set forth in Section 2.2(a)(vii).

“Related Surplus Assets” has the meaning set forth in Section 2.2(a).

“Subscriber” means, with respect to the Click! Business, a customer who has been installed and who currently subscribes to at least the lowest level of cable service offered by such Click! Business.

“Tacoma Power” has the meaning set forth in the Preamble.

“Tacoma Power Commercial System” has the meaning set forth in the Recitals.

“Taxes” means all taxes, fees, levies, imposts, duties, charges or withholdings of any nature (including, without limitation, gross receipts taxes, leasehold excise taxes and franchises, license and/or permit fees) together with any penalties, fines, assessments or interest thereon, imposed by any federal, state or local government, regulatory body or other public taxing authority of competent jurisdiction.

“Tax Law” means the Internal Revenue Code, final, temporary or proposed Treasury regulations, published pronouncements of the U.S. Treasury Department or U.S. Internal Revenue Service, court decisions or other relevant binding legal authority (and similar provisions, pronouncements, decisions and other authorities of state, local and foreign Law).

“Tax Return” shall mean any report, return or other information (including any attached schedules or any amendments to such report, return or other information) required to be supplied to or filed with a Government Entity with respect to any Tax, including an information return, claim for refund, amended return, declaration or estimated Tax returns in connection with the determination, assessment, collection or administration of any income Tax.

“Transaction” has the meaning set forth in the Recitals.

“Transfer of Operational Control” means pursuant to Section 2.1 of this Agreement, the assumption by Rainier of all operational control over the Tacoma Power Commercial System pursuant to the IRU Agreement.

“Transfer of Operational Control Date” means the Effective Date of the IRU Agreement.

“Transferred Authorizations” has the meaning set forth in Section 2.2(a)(v).

“Transferred Contracts” has the meaning set forth in Section 2.2(a)(iv).

“Updated Asset Schedules” has the meaning set forth in Section 2.2(b).

“Updated IRU Exhibits” has the meaning set forth in Section 5.6(b).

“Vehicles” has the meaning set forth in Section 2.2(a)(iii).

Section 1.2 Other Interpretive Provisions. Unless the express context otherwise requires:

(a) the words “hereof,” “herein,” and “hereunder” and words of similar import, when used in this Agreement, shall refer to this Agreement as a whole and not to any particular provision of this Agreement;

(b) the terms defined in the singular have a comparable meaning when used in the plural, and vice versa;

(c) the terms “Dollars” and “\$” mean United States Dollars;

(d) unless the context otherwise requires, references herein to a specific Section, Subsection, Recital, Schedule or Exhibit shall refer, respectively, to Sections, Subsections, Recitals, Schedules or Exhibits of this Agreement;

(e) wherever the word “include,” “includes,” or “including” is used in this Agreement, it shall be deemed to be followed by the words “without limitation”;

(f) references herein to any gender include each other gender;

(g) references herein to any Person include such Person’s heirs, executors, personal representatives, administrators, successors and assigns; provided, however, that nothing contained in this clause (g) is intended to authorize any assignment or transfer not otherwise permitted by this Agreement;

(h) references herein to a Person in a particular capacity or capacities exclude such Person in any other capacity;

(i) references herein to any contract or agreement (including this Agreement) mean such contract or agreement as amended, supplemented or modified from time to time in accordance with the terms thereof;

(j) with respect to the determination of any period of time, the word “from” means “from and including” and the words “to” and “until” each means “to but excluding”;

(k) references herein to any Law or any license mean such Law or license as amended, modified, codified, reenacted, supplemented or superseded in whole or in part, and in effect from time to time; and

(l) references herein to any Law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise.

## ARTICLE II

### TRANSFER OF OPERATIONAL CONTROL OF TACOMA POWER COMMERCIAL SYSTEM AND PURCHASE AND SALE OF RELATED SURPLUS ASSETS

Section 2.1 Transfer of Operational Control. The Transfer of Operational Control shall take place on the last Business Day of the calendar month in which the conditions set forth in Article VI (other than those conditions that by their nature are to be satisfied at the Transfer of Operational Control but subject to the fulfillment or waiver of those conditions) have been satisfied or waived, unless such conditions have not been so satisfied or waived by the fifth Business Day preceding the last Business Day of such calendar month, in which case the Transfer of Operational Control shall take place on the last Business Day of the next calendar month or at such other time, date or place as the Parties hereto may mutually agree in writing.

#### Section 2.2 Purchase and Sale of Related Surplus Assets.

(a) On the terms and subject to the conditions set forth herein, at the Transfer of Operational Control Date, Tacoma Power shall sell, convey, transfer, assign and deliver to Rainier, and Rainier shall purchase from Tacoma Power, the Related Surplus Assets, free and clear of all Encumbrances. The “Related Surplus Assets” are comprised of:

(i) All spare customer equipment, and other tangible personal property and assets of Tacoma Power relating to the Click! Business, as set forth on Schedule 2.2(a)(i) (collectively, the “**Equipment**”);

(ii) All fiber optic cabling, coaxial cabling, supplies, tools and inventories of Tacoma Power relating to the Click! Business (the “**Inventory**”), as set forth on Schedule 2.2(a)(i);

(iii) All vehicles of Tacoma Power relating to the Click! Business (the “**Vehicles**”), as set forth on Schedule 2.2(a)(i);

(iv) All rights of Tacoma Power under those Contracts listed on Schedule 2.2(a)(iv) (collectively, the “**Transferred Contracts**”);

(v) All Governmental Authorizations listed on Schedule 2.2(a)(v) (the “**Transferred Authorizations**”);

(vi) Click! Business Subscriber deposits and Advanced Subscriber Payments;

(vii) Copies of all Customer Proprietary Information reasonably requested by Rainier on or before the tenth (10th) Business Day prior to the Transfer of Operational Control (the “**Records**”); and

(viii) All defenses, claims, deposits, prepayments, refunds, causes of action, credits, warranties (including manufacturer’s warranties), rights of recovery, rights of set off and rights of recoupment relating to any right, property or asset included in the Related Surplus Assets, or against any party under the Transferred Contracts.

(b) Updated Asset Schedules. On the tenth (10th) Business Day prior to the Transfer of Operational Control, Tacoma Power shall deliver to Rainier revised Schedules 2.2(a)(i), 2.2(a)(iv) and 2.2(a)(v), which shall set forth lists of assets of the type required to be disclosed thereon and relating to the Click! Business that Tacoma Power owns or has the right to own as of such date, including any assets acquired by Tacoma Power after the date hereof (the “Updated Asset Schedules”) and a statement indicating the value of the Advanced Subscriber Payments as defined in Section 2.6(a). No later than five (5) Business Days prior to the Transfer of Operational Control Date, Rainier shall notify Tacoma Power whether it accepts or requires revisions to the Updated Asset Schedules or the statement of Advanced Subscriber Payments. If Rainier accepts the Updated Asset Schedules and Advanced Subscriber Payments as delivered by Tacoma Power, then the Updated Asset Schedules shall amend, in their entirety, the corresponding schedules attached to this Agreement as of the date hereof, and the Consideration shall be calculated using the stated value of the Advanced Subscriber Payments.

Section 2.3 Excluded Assets. Notwithstanding anything herein to the contrary, from and after the Transfer of Operational Control, Tacoma Power shall retain, and there shall be excluded from the sale, conveyance, assignment or transfer to Rainier hereunder, all assets of Tacoma Power that are not Related Surplus Assets (the “**Excluded Assets**”).

Section 2.4 Assumption of Liabilities. At the Transfer of Operational Control, Rainier shall assume and discharge or perform when due all of the Liabilities that accrue after the Transfer of Operational Control with respect to operation of the Click! Business pursuant to the IRU Agreement and ownership of the Related Surplus Assets (the “**Assumed Liabilities**”). With respect to operation of the Tacoma Power Commercial System and ownership of the Related Surplus Assets, any Liabilities that accrue before the Transfer of Operational Control shall not be assumed by Rainier (“**Excluded Liabilities**”). The determination of the Excluded Liabilities and the Assumed Liabilities shall be prorated between Tacoma Power and Rainier as of 11:59 p.m. of the Transfer of Operational Control Date, the proration to be made and paid, insofar as feasible, on the Transfer of Operational Control Date, with a final settlement no later than sixty (60) days after the Transfer of Operational Control Date.

Section 2.5 Excluded Liabilities. Tacoma Power shall retain and be responsible for all Excluded Liabilities. Notwithstanding anything to the contrary in this Agreement, Rainier shall not assume, and Rainier shall have no Liability for, any Liability of Tacoma Power that is not expressly assumed by Rainier pursuant to Section 2.4.

Section 2.6 Purchase Price. The aggregate amount to be paid to Tacoma Power by Rainier hereunder shall be the agreed price for the Related Surplus Assets as set forth in

Schedule 2.2 (“Purchase Price”), less the amount of the pro-rated advanced Subscriber payments for services to be rendered after the Transfer of Operational Control received by Tacoma Power as of the 10th (tenth) Business Day (“Advanced Subscriber Payments”) prior to the Transfer of Operational Control (the “Consideration”). On the terms and subject to the conditions set forth herein, in consideration of the sale and delivery of the Related Surplus Assets, at the Transfer of Operational Control, Rainier shall:

- (i) assume the Assumed Liabilities; and
- (ii) pay the Consideration by wire transfer of immediately available funds; and
- (iii) execute the Ancillary Agreements.

Section 2.7 Allocation of Revenues and Prepaid Expenses. Operation of the Click! Business and the Tacoma Power Commercial System, and the revenues, expenses and liabilities attributable thereto through 11:59 p.m. on the Transfer of Operational Control Date shall be for the account of Tacoma Power. Revenues and any prepaid or deferred items, shall be prorated between Tacoma Power and Rainier as of 11:59 p.m. of the Transfer of Operational Control Date, the proration to be made and paid within ninety (90) days after the Transfer of Operational Control Date.

Section 2.8 Deliveries by Rainier. At the Transfer of Operational Control, Rainier shall deliver to Tacoma Power:

- (a) the Consideration plus the first monthly installment of the IRU Fee required by Section 5 of the IRU Agreement, by wire transfer of immediately available funds to an account which has been designated by Tacoma Power at least two Business Days prior to the Transfer of Operational Control Date;
- (b) a duly executed counterpart of one or more Assignment and Assumption Agreements;
- (c) the certificate to be delivered pursuant to Section 6.3(m);
- (d) duly executed counterparts of such other customary instruments of transfer, assumptions, filings or documents, in form and substance reasonably satisfactory to Rainier and Tacoma Power, as may be reasonably required to give effect to this Agreement;
- (e) Copies of the performance assurances and funding commitments required by Section 12 of the IRU Agreement and Section 6.3(l) of this Agreement;
- (f) the certification required by Sections 6.3(e) of this Agreement;
- (g) the certification required by Section 6.3(f) of this Agreement;
- (h) a list of the names of all Persons with an ownership interest of Five Percent (5%) or greater in Rainier Connect North, LLC;

- (i) a duly executed counterpart of each Ancillary Agreement; and
- (j) copies of the approvals for the transfers of each of the Franchises from the jurisdictions in which Tacoma Power has Franchises for the Click! Business, or copies of the Franchises Rainier Connect North, LLC has entered into to serve such jurisdictions, as required by Section 6.3(k).

Section 2.9 Deliveries by Tacoma Power. At the Transfer of Operational Control, Tacoma Power shall deliver to Rainier:

- (a) a duly executed counterpart of one or more Bills of Sale;
- (b) a duly executed counterpart of one or more Assignment and Assumption Agreements;
- (c) the Records that are Related Surplus Assets;
- (d) the certificate to be delivered pursuant to Section 6.2(d);
- (e) duly executed counterparts of such other customary instruments of transfer, assumptions, filings or documents, in form and substance reasonably satisfactory to Rainier and Tacoma Power, as may be reasonably required to give effect to this Agreement; and
- (f) a duly executed counterpart of each Ancillary Agreement.

### ARTICLE III

#### REPRESENTATIONS AND WARRANTIES OF TACOMA POWER

Tacoma Power represents and warrants to Rainier that as of the date hereof and as of the Transfer of Operational Control:

Section 3.1 Organization and Qualification. Tacoma Power is a Division of Tacoma Public Utilities, a Department of the City of Tacoma, a municipal corporation duly organized, validly existing and in good standing under the laws of the State of Washington and the City of Tacoma.

Section 3.2 Municipal Authorization.

(a) Tacoma Power has full municipal power and authority to execute and deliver this Agreement and to perform its obligations hereunder. The execution, delivery and performance by Tacoma Power of this Agreement and the Ancillary Agreements have been duly and validly authorized by the Tacoma Public Utility Board and the Tacoma City Council, and no additional authorization or consent is required in connection with the execution, delivery and performance by Tacoma Power of this Agreement. Notwithstanding the foregoing, the Parties are aware of the pending litigation set forth in Section 6.1(d). In the event that, prior to Transfer of Operational Control, a court of competent jurisdiction in any of the matters set forth in Section 6.1(d), issues an order nullifying or invalidating the IRU Agreement or restraining or enjoining

either Party from executing the IRU Agreement or exercising any rights accruing to either party under the IRU Agreement, either Party shall have the right to terminate this Agreement, which shall be Party's sole remedy. Alternatively, the Parties may suspend the obligations under this Agreement for such period of time and upon such conditions as the Parties may mutually agree.

(b) Tacoma Power has or prior to the Transfer of Operational Control will have full municipal power and authority to execute and deliver each Ancillary Agreement or Transfer of Operational Control document to which it is (or will be) a party and to perform its obligations thereunder. The execution, delivery and performance by Tacoma Power of each Ancillary Agreement to which it is (or will be) a party has been or prior to the Transfer of Operational Control will have been duly and validly authorized by the Tacoma Public Utility Board and the Tacoma City Council, and no additional authorization or consent will be required in connection with the execution, delivery and performance by Tacoma Power of the Ancillary Agreements or Transfer of Operational Control documents to which Tacoma Power will be a party or signatory.

Section 3.3 Non-Contravention. The execution, delivery and performance by Tacoma Power of this Agreement and the Ancillary Agreements, and the consummation of the transactions contemplated hereby and thereby, do not and will not violate any provision of Tacoma Power's charter.

Section 3.4 Binding Effect. This Agreement and each of the Ancillary Agreements will constitute, when executed and delivered by Tacoma Power and by Rainier and the other parties thereto, a valid and legally binding obligation of Tacoma Power, enforceable against Tacoma Power in accordance with their respective terms. Each of the unexecuted Ancillary Agreements to be entered into on or prior to the Transfer of Operational Control Date, when executed and delivered by Tacoma Power and by Rainier and the other parties thereto, will constitute a valid and legally binding obligation of Tacoma Power, enforceable against Tacoma Power in accordance with its terms.

Section 3.5 Assets. At the Transfer of Operational Control (after giving effect to the Transaction), Rainier will have good and marketable title to the Related Surplus Assets free and clear of any Encumbrances, other than those created by Rainier or its Affiliates.

Section 3.6 Finders' Fees. There is no investment banker, broker, finder or other intermediary that has been retained by or is authorized to act on behalf of Tacoma Power who might be entitled to any fee or commission in connection with the Transaction.

Section 3.7 No Default. Other than the litigation referenced in Section 6.1(d), there is no action, suit, proceeding, or investigation at law or in equity before or by any court, public board or body pending against or affecting the Party, challenging or affecting the performance of the Party's obligations hereunder.

Section 3.8 Condition of Related Surplus Assets. NOTWITHSTANDING ANY EXAMINATION OR INSPECTION MADE BY RAINIER AND WHETHER OR NOT ANY PATENT OR LATENT DEFECT OR CONDITION WAS REVEALED OR DISCOVERED THEREBY, THE RELATED SURPLUS ASSETS ARE CONVEYED TO

RAINIER UNDER THIS AGREEMENT IN THEIR “AS IS” CONDITION WITH ALL FAULTS AS OF THE EFFECTIVE DATE. EXCEPT AS SET FORTH IN THIS AGREEMENT, TACOMA POWER MAKES NO WARRANTY TO RAINIER OR ANY OTHER ENTITY, WHETHER EXPRESS, IMPLIED OR STATUTORY, AS TO THE INSTALLATION, DESCRIPTION, QUALITY, MERCHANTABILITY, USEFUL LIFE, FUTURE ECONOMIC VIABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF RELATED SURPLUS ASSETS, OR AS TO ANY OTHER MATTER, ALL OF WHICH WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED.

Section 3.9 No Other Representations or Warranties. Except for the representations and warranties contained in this Article III, neither Tacoma Power nor any other Person makes any other express or implied representation or warranty on behalf of Tacoma Power.

## ARTICLE IV

### REPRESENTATIONS AND WARRANTIES OF RAINIER

Rainier represents and warrants to Tacoma Power that as of the date hereof and as of the Transfer of Operational Control:

Section 4.1 Organization and Qualification.

(a) Rainier is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Washington. Rainier has all requisite power and authority to own and operate its assets and to carry on its business as currently conducted.

Section 4.2 Corporate Authorization.

(a) Rainier has full corporate power and authority to execute and deliver this Agreement and to perform its obligations hereunder. The execution, delivery and performance by Rainier of this Agreement have been duly and validly authorized and no additional authorization or consent is required in connection with the execution, delivery and performance by Rainier of this Agreement.

(b) Rainier has or prior to the Transfer of Operational Control will have full power and authority to execute and deliver each of the Ancillary Agreements to which it will be a party and to perform its obligations thereunder. The execution, delivery and performance by Rainier of each of the Ancillary Agreements to which it will be a party has been or prior to the Transfer of Operational Control will have been duly and validly authorized and no additional authorization or consent will be required in connection with the execution, delivery and performance by Rainier of any of the Ancillary Agreements to which it will be a party.

Section 4.3 Consents and Approvals. No consent, approval, waiver, authorization, notice or filing is required to be obtained by Rainier, or to be given by Rainier, or made by Rainier with, any Person in connection with the execution, delivery and performance by Rainier of this Agreement and the Ancillary Agreements to which it is a party, other than the

consents, approvals, waivers, authorizations, notices or filings the failure of which to obtain, give or make would not, individually or in the aggregate, reasonably be expected to have a material impairment or delay of Rainier's ability to effect the Transfer of Operational Control or to perform its obligations under this Agreement or any Ancillary Agreement to which it is a party.

Section 4.4 Non-Contravention. Rainier is not a party to any contract, agreement or other instrument or condition which materially restricts, limits or in any manner materially adversely affects the transactions contemplated hereby. The execution, delivery and performance of this Agreement and the Ancillary Agreements contemplated hereby by Rainier do not violate any provision of law applicable to Rainier or conflict with, result in the termination or breach of any term, condition or provision of, or constitute a material default under, the governing corporate formation documents of Rainier, or of any contract, lease agreement or other instrument.

Section 4.5 Binding Effect. This Agreement and each of the Ancillary Agreements will constitute, when executed and delivered by Rainier and by Tacoma Power and the other parties thereto, a valid and legally binding obligation of Rainier, enforceable against Rainier in accordance with their respective terms.

Section 4.6 Finders' Fees. There is no investment banker, broker, finder or other intermediary that has been retained by or is authorized to act on behalf of Rainier or any Affiliate of Rainier who might be entitled to any fee or commission in connection with the Transaction.

Section 4.7 No Default. Other than the litigation referenced in Section 6.1(d), there is no action, suit, proceeding, or investigation at law or in equity before or by any court, public board or body pending against or affecting the Party, challenging or affecting the performance of the Party's obligations hereunder.

Section 4.8 Acceptance of Surplus Related Assets. RAINIER ACCEPTS THE SURPLUS RELATED ASSETS "AS IS" AND WITH ALL FAULTS. RAINIER HEREBY WAIVES AND RELEASES ANY CLAIM OR ACTION AGAINST TACOMA POWER IN RESPECT OF OR RELATED TO THE CONDITION OF THE RELATED SURPLUS ASSETS, INCLUDING ANY DEFECTS OR ADVERSE CONDITIONS NOT DISCOVERED OR OTHERWISE KNOWN BY RAINIER AS OF THE EFFECTIVE DATE

Section 4.9 No Other Representations or Warranties. Except for the representations and warranties contained in this Article IV, neither Rainier nor any other Person makes any other express or implied representation or warranty on behalf of Rainier.

## ARTICLE V

### COVENANTS

Section 5.1 Access and Information. From the date hereof until the Transfer of Operational Control subject to applicable Laws, Tacoma Power shall (i) afford Rainier and its authorized representatives reasonable access, during regular business hours, upon reasonable advance notice, to the Employees, the Tacoma Power Commercial System, and the Related

Surplus Assets, and (ii) furnish, or cause to be furnished, to Rainier any financial and operating data and other information with respect to the Click! Business or in furtherance of this Transaction as Rainier from time to time reasonably requests.

Section 5.2 Conduct of Business. Except with respect to the actions consistent with the contemplated Transfer of Operational Control, during the period from the date hereof to the Transfer of Operational Control, Tacoma Power shall conduct the operations of and maintain the Tacoma Power Commercial System in the Ordinary Course of Business and in accordance with applicable material Laws (including, fulfilling installation requests) and use its commercially reasonable efforts to preserve the Click! Business and its relationship with its customers, suppliers, and creditors.

Section 5.3 Commercially Reasonable Efforts. Tacoma Power and Rainier shall cooperate and use their respective commercially reasonable efforts to fulfill as promptly as practicable the conditions precedent to the other Party's obligations hereunder and shall use their respective commercially reasonable efforts to fulfill as promptly as practicable the conditions precedent to their obligations hereunder to the extent they have the ability to control the satisfaction of such obligations. Without limiting the generality of the foregoing, Tacoma Power and Rainier shall (i) make all filings and submissions required by Laws, and promptly file any additional information requested as soon as practicable after receipt of such request therefor and promptly file any other information that is necessary, proper or advisable to permit consummation of the Transaction; ; and (ii) use commercially reasonable efforts to perform the tasks set forth in the Transition Plan.

(a) Each of the Parties hereto agrees to execute and deliver such other documents, certificates, agreements and other writings and to take such other commercially reasonable actions as may be necessary or desirable in order to evidence, consummate or implement expeditiously the transactions contemplated by this Agreement and to vest in Rainier good and marketable title to the Related Surplus Assets to the same extent as held by Tacoma Power, free and clear of all Encumbrances.

(b) In furtherance and not in limitation of the foregoing, each of Rainier and Tacoma Power agrees to make as promptly as practicable, (i) appropriate filings with the FCC, and (ii) all other necessary filings with other Government Entities relating to the Transaction, and to use commercially reasonable efforts to cause the receipt of approvals under such other Laws or from such authorities or third parties as soon as practicable.

(c) Each of Tacoma Power and Rainier shall give (or shall cause their respective Affiliates to give) any notices to third parties, and use, and cause their respective Affiliates to use, commercially reasonable efforts to obtain any third party (excluding Government Entities) consents related to or required in connection with the Transaction.

Section 5.4 Compensation and Benefits; Employees.

(a) Compensation and Benefits. The Parties hereto hereby acknowledge and agree that no provision of this Agreement shall be construed to create any right to any compensation or benefits whatsoever on the part of any Employee or other future, present or former

employee of Tacoma Power. Nothing in this Section 5.4 or elsewhere in this Agreement shall be deemed to make any employee of the Parties or their respective Affiliates a third party beneficiary of this Section 5.4 or any rights relating hereto.

(b) Employees. None of the provisions contained in this Agreement shall be interpreted as obligating Rainier to make an offer of employment to any of the Employees, provided, however, that Rainier agrees to make a good faith commitment to consider the existing Employees for employment when filling vacancies associated with its operations pursuant to the IRU Agreement. Rainier will evaluate each Employee for employment based on its own hiring criteria. In the event that Rainier does extend an offer of employment to an Employee, such offer will contain Rainier's standard terms and conditions of employment.

Section 5.5 Tax Matters.

Notwithstanding any provision in this Agreement to the contrary, to the extent any of the following apply, any real property excise or transfer tax, sales tax, use tax, or other similar tax imposed on the transactions contemplated by this Agreement shall be borne by Rainier Connect North, LLC.

Section 5.6 IRU Agreement The IRU Agreement attached as Exhibit 5.6 hereto includes the IRU Agreement and Exhibits, including near final drafts of Exhibits A2.1, A2.2, A2.3, A2.4, and A7.

(b) Updated IRU Agreement Exhibits. On the tenth (10th) Business Day prior to the Transfer of Operational Control, Tacoma Power shall deliver to Rainier revised IRU Exhibits A2.1, A2.2, A2.3, A2.4, and A7 which shall set forth lists of assets of the type required to be disclosed thereon and relating to the Tacoma Power Commercial System as of such date, including any changes to the Tacoma Power Commercial System assets after the date hereof (the "Updated IRU Exhibits"). No later than five (5) Business Days prior to the Transfer of Operational Control Date, Rainier shall notify Tacoma Power whether it accepts or requires revisions to the Updated IRU Exhibits. If Rainier accepts the Updated IRU Exhibits as delivered by Tacoma Power, then the Updated IRU Exhibits shall amend, in their entirety, the corresponding exhibits attached to the IRU Agreement as of the date hereof.

(c) As of the Transfer of Operational Control Date, Rainier and Tacoma Power shall each execute and deliver the IRU Agreement substantially in the form attached hereto as Exhibit 5.6, including any Updated IRU Exhibits.

Section 5.7 Post-Transfer of Operational Control Consents. Subsequent to the Transfer of Operational Control, Tacoma Power and Rainier shall continue to use commercially reasonable efforts to obtain in writing as promptly as possible any consent, authorization or approval necessary or commercially advisable in connection with the Transaction which was not obtained on or before the Transfer of Operational Control in form and substance reasonably satisfactory to Rainier.

Section 5.8 Environmental Matters If at any time prior to the Transfer of Operational Control, any material environmental investigation, study, audit, test, review or other

analysis in relation to any Related Surplus Asset is conducted, Tacoma Power shall (a) promptly notify Rainier thereof and (b) subject to applicable Law, keep Rainier informed as to the progress of any such proceeding.

Section 5.9 Name of Business To the extent that the names, marks, logos or indicia of Click! Business, (the “**Click! Marks**”), are incorporated in or on the Related Surplus Assets, Rainier may continue to use the Click! Marks pursuant to the terms of the license set forth in Exhibit P to the IRU Agreement. Rainier acknowledges and agrees that except as expressly set forth in Exhibit P to the IRU Agreement, it shall have no rights in and to any trade names, trademarks, service marks, Internet domain names or logos owned by Tacoma Power or any trade names, trademarks, service marks, Internet domain names or logos confusingly similar thereto.

## ARTICLE VI

### CONDITIONS TO TRANSFER OF OPERATIONAL CONTROL

Section 6.1 Conditions to the Obligations of Rainier and Tacoma Power. The obligations of the Parties hereto to effect the Transfer of Operational Control are subject to the satisfaction (or waiver by both parties) prior to the Transfer of Operational Control of the following conditions:

(a) No Prohibition. No Law shall be in effect prohibiting the Transaction.

(b) Consents and Approvals. All Governmental Authorizations (other than Franchises) that are set forth on Schedule 6.1(b) hereto shall have been obtained, in each case in form and substance reasonably satisfactory to both parties.

(c) No Default. Other than the litigation referenced in Section 6.1(d), there is no action, suit, proceeding, or investigation at law or in equity before or by any court, public board or body pending against or affecting the Party, challenging the validity or enforceability of this Agreement or any other documents relating hereto or the performance of the Party’s obligations hereunder.

(d) The pending litigation is: Edward E. (Ted) Coates, et al. v. City of Tacoma (Wa. Sup. Ct, Case No. 17-2-08907); Mitchell Shook v. City of Tacoma (U.S. Dist. Ct, Wa. W. Dist., Case No. 3:19cv05794BHS); Mitchell Shook v. City of Tacoma; Thomas McCarthy and Christopher T. Anderson v. City of Tacoma (Wa. Sup. Ct., Case No 19-2-07135-0); Darrel Bowman v City of Tacoma (Wa. Sup. Ct., Case No. 19-2-11506-3); Mitchell Shook v City of Tacoma (Wa. Sup. Ct., Case No. 19-2-11760-1); City of Tacoma v. Comcast Cable Communications, LLC; Comcast Cable Communications Management, LLC (Wa. Sup. Ct., Case No. 19-2006715-8).

Section 6.2 Conditions to the Obligation of Rainier. The obligation of Rainier to effect the Transfer of Operational Control is subject to the satisfaction (or waiver by Rainier) prior to the Transfer of Operational Control of the following conditions:

(a) Representations and Warranties. The representations and warranties of Tacoma Power in Article III that are qualified as to materiality or Material Adverse Effect shall be true and correct and all other representations and warranties of Tacoma Power in Article III not so qualified shall be true and correct in all material respects, in each case, at the time made and as of the Transfer of Operational Control Date as if made at and as of such time (except, in each case, to the extent expressly made as of an earlier date, in which case as of such earlier date).

(b) Covenants. Each of the covenants and agreements of Tacoma Power to be performed on or prior to the Transfer of Operational Control shall have been duly performed in all material respects.

(c) Ancillary Agreements. Tacoma Power shall have executed and delivered the Ancillary Agreements to which it is a party.

(d) Certificate. Rainier shall have received a certificate, signed on behalf of Tacoma Power by a duly authorized officer of Tacoma Power, dated the Transfer of Operational Control Date, to the effect that the conditions set forth in this Section 6.2 have been satisfied.

(e) No Encumbrances. As of the Transfer of Operational Control, there shall be no Encumbrances on any of the Related Surplus Assets, other than Encumbrances that, individually or in the aggregate, would not reasonably be expected to have a Material Adverse Effect.

(f) No Material Adverse Change. Since the date of this Agreement, no event or condition has occurred that, individually or in the aggregate, has had or would reasonably be expected to have a Material Adverse Effect

(g) Rainier shall have received a certificate, signed on behalf of Tacoma Power by a duly authorized officer of Tacoma Power, dated the Transfer of Operational Control Date, to the effect that the Rainier's privacy policy and net neutrality policy are in compliance with the requirements of Exhibits J and K of the IRU Agreement, respectively.

Section 6.3 Conditions to the Obligation of Tacoma Power. The obligation of Tacoma Power to effect the Transfer of Operational Control is subject to the satisfaction (or waiver by Tacoma Power) prior to the Transfer of Operational Control of the following conditions:

(a) Representations and Warranties. The representations and warranties of Rainier in Article IV that are qualified by materiality or material adverse effect shall be true and correct and all other representations and warranties of Rainier in Article IV not so qualified shall be true and correct at the time made and as of the Transfer of Operational Control Date as if made at and as of such time (except, in each case, to the extent expressly made as of an earlier date, in which case as of such earlier date).

(b) Covenants. Each of the covenants and agreements of Rainier to be performed on or prior to the Transfer of Operational Control shall have been duly performed in all material respects.

(c) Ancillary Agreements. Rainier shall have executed and delivered the Ancillary Agreements to which it is a party.

(d) Published Rates and Services. Rainier shall have published its rates and services on its website as required by Exhibits G to the IRU Agreement.

(e) Lifeline Certification. Rainier shall have provided Tacoma Power with a signed certification attesting that it is a certified Lifeline provider and that it will offer the federal Lifeline subsidy as required by Exhibit H to the IRU Agreement..

(f) Reduced-Cost Service. Rainier shall have provided Tacoma Power with a signed certification that it will offer the substantially reduced-cost service contemplated by Exhibit H to the IRU Agreement.

(g) Local Office. Rainier shall have established a local office in the City of Tacoma and posted the address on its website as required by Exhibit I to the IRU Agreement

(h) Customer Privacy. Rainier shall have conspicuously published its privacy policy on its website as required by Exhibit J to the IRU Agreement.

(i) Net Neutrality. Rainier's net neutrality policy shall be conspicuously posted on its website as required by Exhibit K to the IRU Agreement

(j) Open Access Program. Rainier shall have provided Tacoma Power with a copy of its Open Access Program as required by Exhibit L to the IRU Agreement.

(k) Franchises. Rainier shall have either obtained approval for the transfer of each of the Franchises from the jurisdictions in which Tacoma Power has Franchises for the Click! Business as of the date of this Agreement, or will have entered into its own Franchises to serve such jurisdictions.

(l) Funding Commitment Letter(s). In order to demonstrate its ability to meet its obligations under this IRU Agreement, Rainier shall have delivered funding commitment letter(s), in a form reasonably acceptable to Tacoma Power, in the amount of four million five hundred thousand Dollars (\$4,500,000) covering the first three (3) years of the Initial Term ("Funding Commitment Letter(s)").

(m) Certificate. Tacoma Power shall have received a certificate, signed on behalf of Rainier by a duly authorized officer of Rainier, dated the Transfer of Operational Control Date, to the effect that the conditions set forth in this Section 6.3 have been satisfied.

## ARTICLE VII

### TERMINATION AND DEFAULT

Section 7.1 Termination by Mutual Consent. This Agreement may be terminated at any time prior to the Transfer of Operational Control by mutual written agreement of Tacoma Power and Rainier.

Section 7.2 Termination by Either Rainier or Tacoma Power. This Agreement may be terminated at any time prior to the Transfer of Operational Control by Rainier or Tacoma Power, by giving written notice of termination to the other Party, if (a) the Transfer of Operational Control shall not have occurred on or before 180 days from the date of this Agreement so long as the Party proposing to terminate has not breached in any material respect any of its representations, warranties, covenants or other agreements under this Agreement, in any manner that shall have proximately contributed to the failure of the Transfer of Operational Control to so occur, or (b) pursuant to Section 7.3 hereof, or (c) pursuant to Section 3.2(a).

Section 7.3 Material Breaches. A Party shall be deemed to be in default under this Agreement only if such Party has materially breached or failed to perform its obligations hereunder, and non-material breaches or failures shall not be grounds for declaring a Party to be in default, postponing the Transfer of Operational Control, or terminating this Agreement. For purposes of this Agreement, a Party's failure or refusal to execute any of the Ancillary Agreements shall constitute a material breach.

(b) If Tacoma Power or Rainier believes the other to be in default hereunder, the Party believing a default has occurred shall provide the other with written notice specifying in reasonable detail the nature of such default. If the default has not been cured by the earlier of: (a) the Transfer of Operational Control Date, or (b) within ten (10) business days after delivery of that notice (or such additional reasonable time as the circumstances may warrant provided the Party in default undertakes diligent, good faith efforts to cure the default within such ten (10) day period and continues such efforts thereafter), then the Party giving such notice may terminate this Agreement and/or exercise the remedies available to such Party pursuant to this Agreement.

Section 7.4 Effect of Termination.

(a) In the event of the termination of this Agreement in accordance with this Article VII, this Agreement shall thereafter become void and have no effect, and no Party hereto shall have any Liability to the other Party hereto or their respective Affiliates, except that nothing in this Section 7.4 shall relieve any Party from liability for any willful breach of this Agreement that arose prior to such termination.

**ARTICLE VIII**

**MISCELLANEOUS**

Section 8.1 Notices. All notices, requests, demands, approvals, consents and other communications hereunder shall be in writing and shall be deemed to have been duly given and made if served by personal delivery upon the Party for whom it is intended or on the third day following mailing, postage prepaid, certified mail, return receipt requested to the Person at the address set forth below:

**Tacoma Power:**

Tacoma Public Utilities

3628 South 35th Street  
Tacoma, WA 98409  
Attention: TPU Contract Administrator

**With a copy to:**

City of Tacoma  
747 Market Street  
Tacoma, WA 98402  
Attention: City Attorney

**Rainier:**

Rainier Connect North, LLC  
104 Washington Ave. N.  
P.O. Box 639  
Eatonville, WA 98328  
Attn: Manager

**With a copy to:**

Richard A. Finnigan  
2112 Black Lake Blvd. SW  
Olympia, WA 98512

Either Party may change the address to which notices shall be sent by notice to the other Party by providing thirty (30) days' written notice of the change of address.

Section 8.2 Amendment; Waiver. Any provision of this Agreement may be amended, waived or suspended if, and only if, such amendment or waiver is in writing and signed, in the case of an amendment, by Rainier and Tacoma Power, or in the case of a waiver, by the Party against whom the waiver is to be effective. No failure or delay by any Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided shall be cumulative and not exclusive of any rights or remedies provided by Law except as otherwise specifically provided in Article VII.

Section 8.3 No Assignment or Benefit to Third Parties. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors. No Party to this Agreement may assign any of its rights or transfer or delegate any of its obligations under this Agreement, and this Agreement may not be assigned to any third parties.

Section 8.4 Entire Agreement. This Agreement (including all Schedules and Exhibits) executed as of the date hereof contain the entire agreement between the parties hereto with respect to the subject matter hereof and thereof and supersede all prior agreements and understandings, oral or written, with respect to such matters, including but not limited to the Letter

of Intent that was executed on April 2, 2019 by and between Tacoma Power and Mashell Telecom Inc.

Section 8.5 Publicity. Notwithstanding anything to the contrary contained herein, no press release or similar public announcement or communication shall be made or caused to be made relating to this Agreement and the Transaction unless specifically approved in advance by both parties hereto, except that a Party hereto may issue any press release or make any public announcement or communication relating to this Agreement and the Transaction that may be required by any applicable Law (including any listing requirement) without such approval if, to the extent practicable, such Party has used commercially reasonable efforts to obtain the approval of the other Party before issuing such press release or making such public announcement or communication.

Section 8.6 Expenses. Except as otherwise expressly provided in this Agreement, whether or not the Transfer of Operational Control occurs, all costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby shall be borne by the Party incurring such costs and expenses.

Section 8.7 Bulk Sales. Tacoma Power and Rainier agree to waive compliance with Article 6 of the Uniform Commercial Code as adopted in each of the jurisdictions in which any of the Related Surplus Assets are located to the extent that such Article is applicable to the transactions contemplated hereby.

Section 8.8 Governing Law. Any action related to this Agreement shall be governed the laws of the State of Washington (except that body of law controlling conflict of laws) and the United Nations Convention on the International Sale of Goods will not apply. Any suit or proceeding arising out of or relating to this Agreement will be brought in the applicable federal or state court located in Pierce County, Washington, and each Party irrevocably submits to the jurisdiction and venue of such courts.

Section 8.9 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which shall constitute one and the same Agreement.

Section 8.10 Headings. The heading references herein and the table of contents hereof are for convenience purposes only, and shall not be deemed to limit or affect any of the provisions hereof.

Section 8.11 Severability. The provisions of this Agreement shall be deemed severable and the invalidity or unenforceability of any provision shall not affect the validity or enforceability of the other provisions hereof. If any provision of this Agreement, or the application thereof to any Person or any circumstance, is invalid or unenforceable, (a) a suitable and equitable provision shall be substituted therefor in order to carry out, so far as may be valid and enforceable, the intent and purpose of such invalid or unenforceable provision and (b) the remainder of this Agreement and the application of such provision to other Persons or circumstances shall not be affected by such invalidity or unenforceability, nor shall such invalidity or unenforceability affect the validity or enforceability of such provision, or the application thereof, in any other jurisdiction.

Section 8.12 Confidentiality.

(a) Definition. “**Confidential Information**” means information concerning a Party’s (or its Affiliates’) products, plans, methods, processes, business opportunities, vendors, customers, finances, personnel and other information related to the business of such Party and the terms of this Agreement. “Confidential Information” does not include any information which: (a) the receiving Party rightfully knew before the disclosing Party disclosed it to the receiving Party; (b) has become publicly known through no wrongful act of the receiving Party; or (c) the receiving Party developed independently and without the use of any Confidential Information, as evidenced by appropriate documentation.

(b) Nondisclosure. All Confidential Information remains the property of the disclosing Party, and no license or other right in any Confidential Information is granted hereby. The receiving Party shall not disclose any Confidential Information to any third party or otherwise, and shall take all reasonable precautions to prevent its unauthorized dissemination, during the pendency of this Agreement. The receiving Party shall limit its internal distribution of Confidential Information to its employees and agents who have a need to know, and shall take steps to ensure that dissemination is so limited. The receiving Party shall not use any Confidential Information for its own benefit or for the benefit of anyone other than the disclosing Party. Upon disclosing Party’s written request, the receiving Party shall return to the disclosing Party all Confidential Information in the receiving Party’s custody or control. All information disclosing Party provides is provided “AS IS” and without any warranty, express, implied or otherwise, regarding its accuracy or performance.

(c) Confidential or Proprietary Records Must be Marked. If Rainier provides Tacoma Power with records that Rainier considers confidential or proprietary, Rainier must mark all applicable pages of said record(s) as “Confidential” or “Proprietary.” If Rainier fails to so mark record(s), then (1) Tacoma Power, upon request, may release said record(s) without the need to satisfy the notice requirements above; and (2) Rainier expressly waives its right to allege any kind of civil action or claim against Tacoma Power pertaining to the release of said record(s).

(d) Public Disclosure. This Agreement and documents provided to Tacoma Power by Rainier hereunder are deemed public records subject to disclosure under the Washington State Public Records Act, Chapter 42.56 RCW (“**Public Records Act**”). Thus, Tacoma Power may be required, upon request, to disclose this Agreement and documents related to it unless an exemption under the Public Records Act or other laws applies. In the event Tacoma Power receives a request for such disclosure, determines in its legal judgment that no applicable exemption to disclosure applies, and Rainier has complied with the requirements herein to mark all content considered to be confidential or proprietary, Tacoma Power agrees to provide Rainier ten (10) days’ written notice of impending release. Should legal action thereafter be initiated by Rainier to enjoin or otherwise prevent such release, all expense of any such litigation shall be borne by Rainier, including any damages, attorneys’ fees or costs awarded by reason of having opposed disclosure. Tacoma Power shall not be liable for any release where notice was provided and Rainier took no action to oppose the release of information. Notice of any proposed release of information pursuant to Chapter 42.56 RCW, shall be provided to Rainier according to the “Notices” provision herein.

Section 8.13 Time of Essence. Time is of the essence in this agreement and each provision hereof in which time of performance is established.

Section 8.14 No Gratuities. Tacoma Power shall not offer or give any Rainier employee or agent any gratuity, payment, or other personal benefit or inducement with a view toward securing business from Rainier or influencing the terms, conditions, or performance of this Agreement or any statement of work or purchase order.

Section 8.15 Further Assurances. In connection with this Agreement and the transactions contemplated hereby, each Party will execute and deliver any additional documents and instruments and perform any additional acts that may be commercially reasonable, necessary, or appropriate, or reasonably requested by the other Party, to effectuate and perform the Parties' obligations under this Agreement and the transactions contemplated hereby.

Section 8.16 Non-Discrimination. Rainier agrees to take all steps necessary to comply with all federal, state, and Tacoma City laws and policies regarding non-discrimination and equal employment opportunities. Rainier shall not discriminate in any employment action because of race, religion, creed, color, national origin or ancestry, sex, gender identity, sexual orientation, age, marital status, familial status, veteran or military status, the presence of any sensory, mental or physical disability or the use of a trained dog guide or service animal by a disabled person. In the event of non-compliance by Rainier with any of the non-discrimination provisions of this Agreement, Tacoma Power shall be deemed to have cause to terminate this Agreement, in whole or in part.

Section 8.17 Relationship of the Parties. The relationship between the Parties will not be that of partners, agents, or joint venture parties for one another, and nothing contained in this Agreement will be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to, tax purposes. No employment relationship is created by this Agreement. Neither Party will make any commitment, by contract or otherwise, binding upon the other or represent that it has any authority to do so. In performing any of their obligations hereunder, each Party will be an independent contractor or independent Party and shall use its discretion in discharging its contractual obligations at its own risk.

Section 8.18 Conflict of Interest. No officer, employee, or agent of Tacoma Power, nor any member of the immediate family of any such officer, employee, or agent as defined by City ordinance, shall have any personal financial interest, direct or indirect, in this Agreement, either in fact or in appearance. Rainier shall comply with all federal, state, and City conflict of interest laws, statutes, and regulations. Rainier represents that it presently has no interest and shall not acquire any interest, direct or indirect, in the program to which this Agreement pertains which would conflict in any manner or degree with the performance of Rainier's services and obligations hereunder. Rainier further covenants that, in performance of this Agreement, no person having any such interest shall be employed. Rainier also agrees that its violation of the City's Code of Ethics contained in Chapter 1.46 of the Tacoma Municipal Code shall constitute a breach of this Agreement subjecting this Agreement to termination.

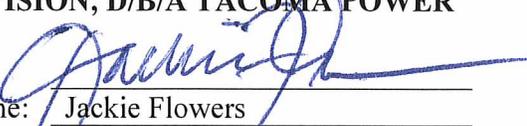
Section 8.19 Representation. Both Parties acknowledge that they have each been represented by counsel and this Agreement and every provision hereof has been freely and fairly

negotiated. All provisions of this Agreement will be interpreted according to their fair meaning and will not be strictly construed against any Party.

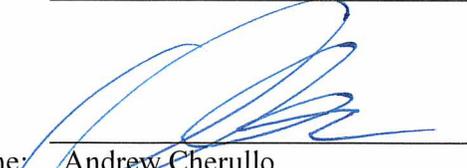
**[SIGNATURE PAGES TO FOLLOW]**

IN WITNESS WHEREOF, the parties have executed or caused this Agreement to be executed as of the date first written above.

**CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, LIGHT DIVISION, D/B/A TACOMA POWER**

By:   
Name: Jackie Flowers  
Title: Director of Utilities

By:   
Name: Elizabeth A. Pauli  
Title: City Manager

By:   
Name: Andrew Cherullo  
Title: Finance Director

**MASHELL, INC., D/B/A RAINIER CONNECT**

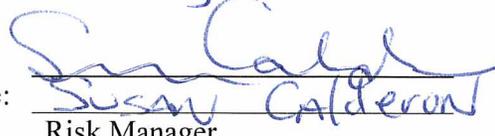
By:   
Name: Brian L. Hayes  
Title: CEO

**RAINIER CONNECT NORTH, LLC**

By:   
Name: Brian L. Hayes  
Title: CEO

**APPROVED AS TO FORM:**

By:   
Name: Chris Bacha  
Title: City Attorney

Chief Deputy  
By:   
Name: Susana Calderon  
Title: Risk Manager  
FOR

Category	Activity	Description	Owner	Required at Closing?	Post-Approval Activity	Post-Close Activity
Legal	City of Tacoma Cable Franchise Agreement Establishment	Attainment of an agreement between Rainier Connect and the City of Tacoma to continue cable television service provision that Click! formerly provided.	Rainier Connect	yes	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Legal	Other Cities Franchise Agreement Establishment	Attainment of a franchise agreement between Rainier Connect and each of the cities where it will be providing cable television service.	Rainier Connect	yes	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Legal	Contracts Assignment and Assumption	Changes to in-force programming agreements to end TPU post-close financial obligations. Includes Rainier Connect's acquisition of all necessary programming rights.	Tacoma, Rainier Connect	yes	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Legal	Regulatory Compliance and Reporting Requirements Definition	Description of the regulatory requirements for the City of Tacoma post-close.	Tacoma	no	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Legal	Click! Network Vendor and Supplier Notifications	Communication from Click! to existing Click! vendors informing them of the network operation change, key transition dates, request for assignment, and contact information.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Legal	Click! Network Employee Notifications	Provision of separation notices from the City to existing Click! employees informing them of network operation change date, and other post-employment information. This includes bargaining unit notifications.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Legal	Click! Network ISP/MSA Notifications	Communication from Click! to ISP/MSA agreement parties, informing them of the network operation change, relevant legal notices, key transition dates, and contact information.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Operations	Facility Access and Security Activities	Provision of keys, access cards, codes, and other permissions to permit authorized Rainier Connect technical personnel entry to network sites that the agreement covers.	Tacoma	yes	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Category	Activity	Description	Owner	Required at Closing?	Post-Approval Activity	Post-Close Activity
Operations	Inventory Asset Transfer	Activities related to handing over Click! assets which Rainier Connect will acquire, including staging them for movement to Rainier Connect facilities.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Operations	Billing Conversion Decision	Decision from Rainier Connect on its intended approach, timeline, and transition needs for post-close customer billing including data provision.	Rainier Connect	yes	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Operations	Fulfillment Services Transition	Changeover of fulfillment activities from Click! to Rainier Connect based on the agreed-upon schedule and conditions.	Tacoma, Rainier Connect	yes	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Infrastructure	Network Mapping Activities	Completion of activities to enable Rainier Connect to establish a baseline of Tacoma Power’s network map and the VPN connection to TPU’s mapping system to communicate updates based on its mutually agreed-upon changes.	Tacoma, Rainier-Connect	yes	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Infrastructure	Ancillary Services Contract Setup	Establishment of post-close billable network-related activities which Rainier Connect may elect Tacoma Power to perform. This includes service definition, service provision terms and conditions, and pricing information.	Tacoma	yes	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Infrastructure	Fiber Separation Activities	Modifications to fiber plant terminations to enable Rainier Connect technical staff access to non-critical network fiber optic paths while physically isolating nearby Tacoma Power-allocated fiber optic paths.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Infrastructure	Network Cutover (Interconnection)	Completing activities to reflect the post-close network configuration changes that Rainier Connect requires to operate the Click! network and that Tacoma Power needs to have for its connectivity to external networks.	Tacoma	yes	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Infrastructure	Infrastructure Contract Administration	Establishing the roles and related processes to carry out ongoing activities for the IRU and I-Net agreements according to their terms and conditions.	Tacoma	yes	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

Category	Activity	Description	Owner	Required at Closing?	Post-Approval Activity	Post-Close Activity
Media and Communications	Rainier Connect Customer Notifications	Communication from Rainier Connect to existing Click! customers notifying them of the operational change, key transition dates, and contact information.	Rainier Connect	no	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Media and Communications	Rainier Connect Employee Notifications	Communication from Rainier Connect to existing Click! employees providing post-close employment offers with Rainier Connect.	Rainier Connect	no	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Media and Communications	Click! Network Retail Customer Notifications	Communication from Click! to existing Click! customers informing them of the network operation change, key transition dates, and contact information.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Media and Communications	Click! Network FCC Notifications	Communication from Click! to the FCC, informing them of the network operation change, relevant legal notices, key transition dates, and contact information.	Tacoma	no	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Media and Communications	Click! Transition General Public Updates	Provide transition status update information via the TPU website, with an intended audience of the general public.	Tacoma	no	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Media and Communications	Click! Transition Ongoing Communication Updates	Establishment and execution of the overall communication plan, based on transition progress and related events.	Tacoma	no	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Finance	A/R and A/P Allocation Determination	Determination and application of criteria to divide outstanding receivables and payables balances between Click! and Rainier Connect at the agreement close date.	Tacoma		<input type="checkbox"/>	<input checked="" type="checkbox"/>
Finance	Asset Disposition	Execution of the financial activities and disposition of Click! assets by surplusing and by operational transfer to Rainier Connect.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Human Resources	Personnel Activities	Execution of human resource activities, which may include employment related notifications, layoff process initiation, severance payments, and retention disbursements.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Operations	Billing Conversion	Identification of the timing and sequence of events to transition billing activities from Click!'s source GLDS instance to Rainier Connect's identified target system.	Rainier Connect	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

Category	Activity	Description	Owner	Required at Closing?	Post-Approval Activity	Post-Close Activity
Operations	Customer Support Transfer	Changeover of customer support activities from Click! to Rainier Connect based on the predefined schedule and conditions.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Operations	IP Circuit Transfer	Handover of responsibility and administration of IP circuits supporting Click! network operation from Tacoma Power to Rainier Connect.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Operations	Head End Management and Shutdown	Provision of the services at the network's head end location during the agreed-upon time interval, and the orderly winding down of those services and return of control to Tacoma Power once Rainier Connect has migrated from linear video distribution to streaming.	Tacoma	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Infrastructure	Coaxial Network Maintenance	Provision of the break-fix service to keep the coaxial-based network paths in good operating order and to restore service after problem identification under agreed-upon conditions.	Tacoma	no	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Infrastructure	Fiber Network Maintenance	Provision of the service to keep the critical fiber-based network paths in good operating order, to restore service after problem identification within agreed-upon conditions, and to support network extensions based on predefined terms and conditions.	Tacoma	no	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Infrastructure	Network Interconnect Implementation	Implementation of the network interconnect changes at Tanawax and Optic Fusion to complete the network operational cutover from Click! to Rainier Connect. This work will take place after completion of fiber separation activities.	Tacoma	yes	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

Exhibit A2 - Transition Plan Gantt Chart

ID	% Complete	Outline Num	Task Name	Start	Finish	Chart
0	81%	0	<b>Exhibit A2 - Transition Plan Gantt Chart</b>	Mon 4/22/19	Fri 5/1/20	Chart
94	0%	2	<b>Approved date</b>	Tue 11/5/19	Wed 11/6/19	Approved date   11/6
95	0%	3	<b>Post-Approval (Pre-Close) Period</b>	Wed 11/6/19	Tue 3/10/20	Post-Approval (Pre-Close) Period
96	0%	3.1	<b>[LEGAL] Post-Approval Activities</b>	Wed 11/6/19	Thu 3/5/20	Post-Approval Activities
98	0%	3.1.1.1	City of Tacoma Cable Franchise Agreement Establishment	Wed 11/6/19	Wed 11/13/19	Franchise Agreement Establishment   11/13
99	0%	3.1.1.2	Other Cities Franchise Agreement Establishment	Thu 2/6/20	Thu 3/5/20	Franchise Agreement Establishment   3/5
100	0%	3.1.2	Contract Assignment and Assumption	Wed 11/6/19	Wed 2/5/20	Assignment and Assumption
107	0%	3.1.3	Regulatory Compliance and Reporting Requirements Definition	Wed 11/6/19	Wed 11/6/19	Requirements Definition   11/6
111	0%	3.1.4.1	Click! Network Vendor and Supplier notifications	Wed 11/6/19	Wed 11/13/19	Supplier notifications   11/13
112	0%	3.1.4.2	Click! Network Employees notifications	Wed 11/6/19	Wed 11/13/19	Employees notifications   11/13
113	0%	3.1.4.3	Click! Network ISP/MSA notifications	Wed 11/6/19	Tue 2/18/20	ISP/MSA notifications   2/18
114	0%	3.2	<b>[OPERATIONS] Post-Approval Activities</b>	Wed 11/6/19	Thu 3/5/20	Post-Approval Activities
115	0%	3.2.1	Facilities Access and Security Activities	Wed 11/6/19	Wed 12/4/19	Access and Security Activities
118	0%	3.2.2	Inventory Asset Transfer	Wed 11/6/19	Thu 3/5/20	Inventory Asset Transfer
121	0%	3.2.3	Billing Conversion Activities	Wed 11/6/19	Wed 1/15/20	Conversion Activities
124	0%	3.2.4	Fullfillment Services Transition	Thu 2/20/20	Thu 3/5/20	Fullfillment Services Transition   3/5
131	0%	3.3	<b>[INFRASTRUCURE] Post-Approval Activities</b>	Wed 11/6/19	Fri 3/6/20	Post-Approval Activities
132	0%	3.3.1	Network Mapping Activities	Fri 2/21/20	Fri 3/6/20	Network Mapping Activities
134	0%	3.3.2	Ancillary Services Contracts	Wed 11/6/19	Wed 1/1/20	Ancillary Services Contracts
138	0%	3.3.3	Fiber separation activities	Wed 11/6/19	Thu 3/5/20	Fiber separation activities
147	0%	3.3.4	Network Cut-Over (Interconnection)	Thu 1/23/20	Thu 2/6/20	Cut-Over (Interconnection)
149	0%	3.3.5	Infrastructure Contract Administration	Wed 11/6/19	Wed 11/6/19	Contract Administration
152	0%	3.4	<b>[MEDIA &amp; COMMUNICATIONS] Post-Approval Activities</b>	Wed 11/6/19	Wed 1/15/20	Post-Approval Activities
154	0%	3.4.1.1	Rainier Connect Customer Notifications	Wed 11/6/19	Wed 12/4/19	Customer Notifications   12/4
155	0%	3.4.1.2	Rainier Connect Employee Notifications	Wed 11/6/19	Wed 12/4/19	Employee Notifications   12/4
157	0%	3.4.2.1	Click! Network Retail Customer notifications	Wed 11/6/19	Wed 11/13/19	Customer notifications   11/13
159	0%	3.4.2.3	Click! Network FCC notifications	Wed 11/6/19	Wed 11/13/19	Network FCC notifications   11/13
160	0%	3.4.2.4	Click! Transition General Public Updates	Wed 11/6/19	Wed 11/13/19	General Public Updates   11/13
161	0%	3.4.2.5	Click! Transition Ongoing Communications Updates	Wed 11/6/19	Wed 1/15/20	Communications Updates   1/15
162	0%	3.5	<b>[FINANCE] Post-Approval Activities</b>	Wed 1/29/20	Tue 3/10/20	Post-Approval Activities
163	0%	3.5.1	A/R & A/P Allocation Determination	Wed 1/29/20	Wed 2/12/20	A/P Allocation Determination
166	0%	3.5.2	Asset disposition	Fri 2/7/20	Tue 3/10/20	Asset disposition
169	0%	3.6	<b>[HR] Post-Approval Activities</b>	Wed 11/6/19	Wed 12/4/19	Post-Approval Activities
170	0%	3.6.1	Personnel Activities	Wed 11/6/19	Wed 12/4/19	Personnel Activities
172	0%	4	<b>Closing Date</b>	Fri 3/6/20	Fri 3/6/20	Closing Date   3/6
173	0%	5	<b>Post-Close Period</b>	Fri 3/6/20	Fri 5/1/20	Post-Close Period

**SCHEDULE 2.2(a)(i)**  
**EQUIPMENT, INVENTORY, VEHICLES**

**CBTA Schedule 2.2.a(i), Equipment, Inventory, Vehicles**

Item Description	suggested price	quantity	actual price	totals
<b>Set-Top Boxes</b>				
Set-Top Boxes	\$ 12,361.71	bulk	\$ 12,361.71	
			<b>sub-total:</b>	<b>\$ 12,361.71</b>
<b>Test Equipment</b>				
MPEG Test System	\$ 1,000.00	1	\$ 1,000.00	
MPEG Transport Stream Monitor (QAM)	\$ 100.00	1	\$ 100.00	
MPEG Transport Stream Monitor (GigE/ASI)	\$ 100.00	1	\$ 100.00	
MPEG Transport Stream Monitor (QAM)	\$ 100.00	1	\$ 100.00	
MPEG Transport Stream Monitor (8VSB)	\$ 100.00	1	\$ 100.00	
MPEG Transport Stream Monitor (GigE)	\$ 100.00	1	\$ 100.00	
DSAM	\$ 250.00	9	\$ 2,250.00	
CATV Meter	\$ 2,500.00	4	\$ 10,000.00	
Ethernet Link Assistant (Metroscope)	\$ 100.00	1	\$ 100.00	
Ethernet Link Assistant (Etherscope)	\$ 100.00	1	\$ 100.00	
Bandwidth Analysis	\$ 100.00	1	\$ 100.00	
CATV Sweep Meter Setup	\$ 2,810.50	16	\$ 44,968.00	
			<b>sub-total:</b>	<b>\$ 59,018.00</b>
<b>Portable Generator</b>				
Honda EU2001i	\$ 500.00	5	\$ 2,500.00	
			<b>sub-total:</b>	<b>\$ 2,500.00</b>
<b>Vehicles</b>				
CHEV EXPRESS CARGO VAN	\$ 12,236.00	5	\$ 61,180.00	
FORD E350 VAN ARL 29 FT VERSALIFT	\$ 17,368.00	1	\$ 17,368.00	
FORD TRANSIT VAN VERSALIFT 29' ARL	\$ 28,170.00	1	\$ 28,170.00	
CHEV COLORADO XC 4X4 PU	\$ 6,088.00	1	\$ 6,088.00	
FORD E350 VAN ARL TEREX HI-RANGER	\$ 12,966.00	3	\$ 38,898.00	
FORD ELDORADO 13-PASS SHUTTLE VAN	\$ 2,000.00	1	\$ 2,000.00	
			<b>sub-total:</b>	<b>\$ 153,704.00</b>
<b>Warehouse Inventory</b>				
Click Warehouse Inventory 110	\$ 32,471.16	1	\$ 32,471.16	
Click Warehouse Inventory 120	\$ 697.59	1	\$ 697.59	
Click Warehouse Inventory 121	\$ 19,349.24	1	\$ 19,349.24	
Click Warehouse Inventory 122	\$ 4,641.29	1	\$ 4,641.29	
Dead Stock 2014	\$ -	1	\$ -	
			<b>sub-total:</b>	<b>\$ 57,159.27</b>
<b>Software (for test equipment)</b>				
Effigis (CPAT Leakage detection system)	\$83.33	12	\$ 1,000.00	
Path track	\$0.00	1	\$ -	
Sunrise	\$0.00	1	\$ -	
Trilithic	\$0.00	1	\$ -	
Cable Plant Monitoring	\$9,000.00	1	\$ 9,000.00	
			<b>sub-total:</b>	<b>\$ 10,000.00</b>
<b>Grand Total:</b>				<b>\$ 294,742.98</b>

**SCHEDULE 2.2(a)(iv)  
TRANSFERRED CONTRACTS**

***[TO BE PROVIDED WHEN FINAL]***

**SCHEDULE 2.2(a)(v)**  
**TRANSFERRED AUTHORIZATIONS**

1. FCC C-Band License E980465 (FCC File No. SES-REG-20180615-01512), Expires June 15, 2033.
2. Franchises in the following jurisdictions: Fife, Fircrest, Lakewood, Pierce County, University Place.

**EXHIBIT 5.6**

**INDEFEASIBLE RIGHT OF USE AGREEMENT**

**by and between**

**CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES, LIGHT DIVISION,  
D/B/A TACOMA POWER  
and  
RAINIER CONNECT NORTH, LLC**

**Dated as of \_\_\_\_\_, 20\_\_\_\_**

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EXHIBITS

## INDEFEASIBLE RIGHT OF USE AGREEMENT

**THIS INDEFEASIBLE RIGHT OF USE AGREEMENT (“IRU Agreement”)** is by and between the **City of Tacoma, Department of Public Utilities, Light Division**, a municipal corporation of the State of Washington (d/b/a and hereinafter referred to as “**Tacoma Power**”), and **Rainier Connect North, LLC**, a Washington limited liability company (hereinafter referred to as “**Operator**”). Tacoma Power and Operator shall each individually be referred to as a “**Party**” and together constitute the “**Parties.**”

**WHEREAS**, Tacoma Power owns the Tacoma Power Commercial System, as defined below;

**WHEREAS**, Operator wishes to obtain access to and use the Tacoma Power Commercial System; and

**WHEREAS**, subject to the terms and conditions set forth in this IRU Agreement and Exhibits, Tacoma Power is willing to grant Operator the right to use the Tacoma Power Commercial System.

**NOW THEREFORE**, in consideration of the mutual promises set forth below, the Parties hereby agree as follows:

### 1. DEFINITIONS

Unless otherwise defined in this IRU Agreement, capitalized terms used in this IRU Agreement, all Exhibits, and amendments thereto shall have the meaning set forth below:

(a) “**Affiliate**” means, with respect to any Person, any other Person directly or indirectly controlling, controlled by, or under common control with, such Person as of the date on which, or at any time during the period for which, the determination of affiliation is being made. For purposes of this definition, the term “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of such Person, whether through equity interest, board membership, LLC interest, contract, charter, statute, regulation or otherwise.

(b) “**After-Installed Assets**” means any asset used or useful in the ongoing operation of the Tacoma Power Commercial System installed in or used in the operation of the Tacoma Power Commercial System, any extension, expansion, improvement or addition to, replacement of, upgrade or overbuild of the Tacoma Power Commercial System made after the Effective Date of this IRU Agreement within the Tacoma Power Commercial Service Area. The term does not include any assets of Operator or any of its Affiliates located outside the Tacoma Power Commercial Service Area even if such assets are used to provide Shared Network Services or fiber Operator installs within the Tacoma Power Commercial Service Area to connect its network to the Tacoma Power Commercial System..

(c) “**Annual Report**” is defined in Section 6(c) of this IRU Agreement.

- (d) “**Annual Reporting Date**” means July 1.
- (e) “**Applicable Standards**” is defined in Exhibit D to this Agreement.
- (f) “**Business Day**” means any day other than Saturday or a legal holiday as defined by RCW 1.16.050.
- (g) “**Capital Expenditures**” is defined in Exhibit F to this IRU Agreement.
- (h) “**Capital Expenditures Minimum**” is defined in Exhibit F to this IRU Agreement.
- (i) “**Capital Expenditures Period**” is defined in Exhibit F to this IRU Agreement.
- (j) “**Catch-Up Capital Expenditures**” is defined in Exhibit F to this IRU Agreement.
- (k) “**Catch-Up Period**” is defined in Exhibit F to this IRU Agreement.
- (l) “**Change of Control**” and “**Change of Working Control**” are defined in Exhibit N to this IRU Agreement.
- (m) “**Chronic Failure**” is defined in Exhibit C to this IRU Agreement.
- (n) “**City**” means the City of Tacoma, Washington.
- (o) “**Click! Network**” means the business unit of Tacoma Power providing services over the Tacoma Power Commercial System prior to the Effective Date.
- (p) “**Compliance Evaluation**” is defined in Section 4(c) of this IRU Agreement.
- (q) “**Confidential Information**” is defined in Section 32(a) of this IRU Agreement.
- (r) “**Consumer Price Index Increase**” means the increase in the Consumer Price Index for All Urban Consumers (“**CPI-U**”) of the Seattle-Tacoma-Bellevue area, as computed and published by the U.S. Bureau of Labor Statistics. The increase shall be calculated using the annual percentage change as defined as the average of the 12 most recently published months of the Consumer Price Index. In the event that the U.S. Bureau of Labor Statistics ceases publishing such data during the Term, Tacoma Power may designate a different commercially reputable source that regularly computes and publishes the Consumer Price Index.
- (s) “**Controversy**” is defined in Section 21(a) of this IRU Agreement.
- (t) “**Credit**” is defined in Exhibit F to this IRU Agreement.
- (u) “**Critical Routes**” is defined in Exhibit B to this IRU Agreement.
- (v) “**Default**” is defined in Section 20(b) of this IRU Agreement.

- (w) “**Due Date**” is defined in Section 5(c) of this IRU Agreement.
- (x) “**Effective Date**” means \_\_\_\_\_.
- (y) “**Escalation List**” is defined in Exhibit C to this IRU Agreement.
- (z) “**ETC**” is defined in Exhibit H to this IRU Agreement.
- (aa) “**Exhibits**” means the exhibits attached hereto, and any amendments, modifications and supplements to these Exhibits.
- (bb) “**Facilities-Based Entity**” is defined in Exhibit N to this IRU Agreement.
- (cc) “**Fault**” is defined in Exhibit C to this IRU Agreement.
- (dd) “**FCC**” is defined in Exhibit H to this IRU Agreement.
- (ee) “**Fiber Maintenance**” is defined in Exhibit B to this IRU Agreement.
- (ff) “**Fiber System**” is defined in Exhibit C to this IRU Agreement.
- (gg) “**Fiber Unavailability**” is defined in Exhibit C to this IRU Agreement.
- (hh) “**Final Period**” is defined in Exhibit F to this IRU Agreement.
- (ii) “**Final Period Minimum**” is defined in Exhibit F to this IRU Agreement.
- (jj) “**Force Majeure Event**” is defined in Section 31(a) of this IRU Agreement.
- (kk) “**Gigabit Service**” is defined in Exhibit E to this IRU Agreement.
- (ll) “**Hub Sites**” are locations where Tacoma Power Commercial Equipment is installed and in service as listed in Exhibit A3.
- (mm) “**Initial Period**” is defined in Exhibit F to this Agreement.
- (nn) “**Initial Period Minimum**” is defined in Exhibit F to this Agreement.
- (oo) “**Indefeasible Right of Use**” or “**IRU**” is defined in Section 2(a) of this IRU Agreement.
- (pp) “**IRU Fee**” is defined in Section 5(a) of this IRU Agreement.
- (qq) “**Maintenance**” is defined in Exhibit D to this IRU Agreement.
- (rr) “**MTTR**” is defined in Exhibit C to this IRU Agreement.
- (ss) “**Non-Critical Route**” is defined in Exhibit B to this IRU Agreement.

- (tt) “**Non-Renewal Notice Window**” is defined in Section 4(c) of this IRU Agreement.
- (uu) “**Normal Business Hours**” is defined in Exhibit I to this IRU Agreement.
- (vv) “**Normal Operating Conditions**” is defined in Exhibit I to this IRU Agreement.
- (ww) “**Open Access Program**” is defined in Exhibit L to this IRU Agreement.
- (xx) “**Operator Network**” means the communications network owned by Operator or its Affiliates outside of the Tacoma Power Commercial Service Area.
- (yy) “**Person**” means an individual, a corporation, a partnership, an association, a limited liability company or other entity or organization.
- (zz) “**Post-Termination Period**” is defined in Exhibit O to this IRU Agreement.
- (aaa) “**Public Records Act**” is defined in Section 32(d) of this IRU Agreement.
- (bbb) “**Renewal Terms**” is defined in Section 4(b) of this IRU Agreement.
- (ccc) “**Reserved Capacity**” is defined in Section 9(a) of this IRU Agreement.
- (ddd) “**Respond**” is defined in Exhibit C to this IRU Agreement.
- (eee) “**Scheduled Maintenance**” is defined in Exhibit C to this IRU Agreement.
- (fff) “**Senior Representative**” is defined in Section 24 of this IRU Agreement.
- (ggg) “**Shared Network Services**” means centralized services utilizing (a) information technology assets and related rights and/or (b) network and related physical assets, in each case that are owned and operated by Operator or any of its Affiliates and used to support both the operation and use of the Operator Network and the operation and use of the Tacoma Power Commercial System by Operator in accordance with the terms of this IRU Agreement.
- (hhh) “**Successor Operator**” is defined in Exhibit O to this IRU Agreement.
- (iii) “**Shortfall**” is defined in Exhibit F to this IRU Agreement.
- (jjj) “**Tacoma Power Commercial Coax**” means the coaxial cable, conduit housing only coaxial cable, conduit installed for service drops (whether or not currently housing coaxial cable), and coaxial cable service drops installed in the Tacoma Power Commercial Service Area, as of the Effective Date, as identified in Exhibit A2.2 to this IRU Agreement.
- (kkk) “**Tacoma Power Commercial Equipment**” means the equipment installed in the rights-of-way and in Hub Sites as of the Effective Date, as shown in Exhibits A2.2, A2.3 and A2.4.

(lll) “**Tacoma Power Commercial Fiber**” means the specific strands of fiber identified and designated for the use of Operator in Exhibit A2.1 to this IRU Agreement and conduit housing such fiber on Non-Critical Routes as identified in Exhibit A2.2 of this IRU Agreement.

(mmm) “**Tacoma Power Commercial Service Area**” means the service area of Click! Network as of the Effective Date as shown in Exhibit A1.

(nnn) “**Tacoma Power Commercial System**” means Tacoma Power Commercial Coax, Tacoma Power Commercial Fiber, Tacoma Power Commercial Equipment and After-Installed Assets.

(ooo) “**Tacoma Power Management**” is defined in Section 17(c) of this IRU Agreement.

(ppp) “**Tacoma Power Service Area**” is defined in Exhibit A1 to this IRU Agreement.

(qqq) “**Taxes**” shall mean all taxes, fees, levies, imposts, duties, charges or withholdings of any nature (including, without limitation, gross receipts taxes, leasehold excise taxes, and franchises, license and/or permit fees) together with any penalties, fines, assessments or interest thereon, imposed upon the Tacoma Power Commercial System by any federal, state or local government, regulatory body or other public taxing authority of competent jurisdiction.

(rrr) “**Term**” is defined in Section 4(b) of this IRU Agreement.

(sss) “**Transfer**” is defined in Exhibit N to this IRU Agreement.

(ttt) “**Unauthorized Transfer**” is defined in Exhibit N to this IRU Agreement.

(uuu) “**Underlying Rights**” is defined in Section 7(a) of this IRU Agreement.

(vvv) “**Unscheduled Maintenance**” is defined in Exhibit C to this IRU Agreement.

(www) “**Upgrade**” is defined in Exhibit E to this IRU Agreement.

(xxx) “**Use Restrictions**” is defined in Section 7(c) of this IRU Agreement.

(yyy) “**Utility Fiber**” is defined in Exhibit B to this IRU Agreement.

## 2. INDEFEASIBLE RIGHT OF USE

(a) **IRU.** This IRU Agreement sets forth the terms and conditions under which Tacoma Power agrees to grant an indefeasible right of use to Operator and Operator agrees to use the **Tacoma Power Commercial System** comprised of the following (the “**IRU**”):

- (1) Tacoma Power Commercial Fiber,
- (2) Tacoma Power Commercial Coax,

- (3) Tacoma Power Commercial Equipment, and
- (4) After-Installed Assets.

(b) In connection with the IRU, Tacoma Power grants Operator a non-exclusive license to use space in the Hub Sites, subject to the terms of Exhibit A3, and a non-exclusive license to use spare conduit space, subject to the terms of Exhibit A4.

(c) In connection with the IRU, Tacoma Power will assign IPv4 addresses to Operator from CIDR 131.191.0.0/17 and 192.173.160.0/20. The IP addresses assigned by Tacoma Power to Operator are dedicated to Operator usage for customers on the Tacoma Power Commercial System and are not shared with others or used on other networks. Tacoma Power reserves certain IP addresses for Tacoma Power's use. Operator shall have exclusive responsibility to advertise above referenced CIDR objects to the public Internet, and allocate Tacoma Power reserved CIDRs. The IP addresses assigned to Operator by Tacoma Power will continue to be proprietary to Tacoma Power. Upon termination of the IRU Agreement, Operator must return Tacoma Power-assigned IP addresses. Operator must also return the IP addresses in the event that Operator has used such addresses in violation of this IRU Agreement or the IP Acceptable Use Policy in Exhibit A5. Operator may return the IP addresses at any time upon notice to Tacoma Power.

(d) In connection with the IRU, Tacoma Power grants Operator a non-exclusive license to use space in the headend site, subject to the terms of Exhibit A6 (Headend License). Further, Tacoma Power sells, conveys, transfers, assigns and delivers to Operator, and Operator purchases from Tacoma Power, the headend equipment installed in above-mentioned headend site and listed in Exhibit A6.2 ("Headend Equipment"), free and clear of all encumbrances, and in an "as is" condition with all faults and without warranties of any kind.

(e) In connection with the IRU, Tacoma Power also sells, conveys, transfers, assigns and delivers to Operator, and Operator purchases from Tacoma Power, the customer premises equipment installed in Click! Business customer premises and listed in Exhibit A7 ("Installed Customer Premises Equipment"), free and clear of all encumbrances, and in an "as is" condition with all faults and without warranties of any kind.

(f) Except for the Tacoma Power Commercial Equipment, the Headend Equipment, and the Installed Customer Premises Equipment, Tacoma Power is not supplying nor is Tacoma Power obligated to supply to Operator any optronics or electronics or optical or electrical equipment or other facilities under this IRU Agreement, all of which are the sole responsibility of Operator, nor is Tacoma Power responsible for performing any work in connection with Operator's use of the Tacoma Power Commercial System other than as specified in this IRU Agreement.

### 3. OWNERSHIP OF AFTER-INSTALLED ASSETS

(a) **Ownership.** The Parties agree as follows: (i) Operator intends to finance acquisition of After-Installed Assets in whole or in part through capital lease financing in which the After-Installed Assets are initially the property of the lender. Operator agrees that any After-Installed Assets that it constructs, replaces or upgrades as part of the Tacoma Power Commercial System within the Tacoma Power Commercial Service Area during the Term shall, upon completion of the construction, replacement or upgrade and acquisition of title by Operator pursuant to the terms of the capital lease financing agreement, become the property of Tacoma Power. Operator agrees that it will provide any documents or other evidence of transfer of title to Tacoma Power as may be reasonably required to effect the transfer of ownership. (ii) Operator may, in the alternative, finance After-Installed Assets through conventional bank financing. In that case, Operator agrees that with respect to these After-Installed Assets, Operator will request permission from the lender to transfer ownership to Tacoma Power subject to the security interest of the lender. If lender does not grant such permission, Operator shall transfer ownership of the After-Installed Assets upon removal of the security interest of the lender. (iii) Operator shall give a copy to the City of any notice from the lender of Operator's default under any financing agreement encumbering any After-Installed Assets as soon as practicable, but no later than five (5) days of Operator's receipt of such notice; provided further that, Operator shall upon knowledge of lender's transfer of any such financing agreements, immediately provide notice to the City of such transfer.

(b) Operator will own any asset it acquires during the Term of this IRU Agreement that is not an After-Installed Asset.

### 4. TERM

(a) **Initial Term.** This IRU Agreement commences as of the Effective Date and remains in full force and effect for a term (i) expiring twenty (20) years from the Effective Date of this IRU Agreement (the "**Initial Term**"), unless earlier terminated pursuant to the terms of this IRU Agreement.

(b) **Renewals.** This IRU Agreement may be renewed upon the same terms and conditions for up to two additional terms of ten (10) years each (each a "**Renewal Term**") according to the process set forth in (c) below. The "**Term**" shall be inclusive of the Initial Term and any Renewal Terms.

(c) **Procedure.** In order to terminate this IRU Agreement, Operator must send Tacoma Power a notice of non-renewal no greater than twenty-four (24) and no less than eighteen (18) months prior to the expiration of the Initial Term or, if already renewed, of the first Renewal Term ("**Non-Renewal Notice Window**"). If Operator sends no notice of non-renewal during the Non-Renewal Notice Window, Operator agrees to give Tacoma Power full access to information and facilities sufficient for Tacoma Power to determine Operator's compliance with this IRU Agreement during the Term then concluding ("**Compliance Evaluation**"). Tacoma Power shall complete the Compliance Evaluation no later than twelve (12) months prior to expiration of the then-current Term,

and promptly provide a copy of the Compliance Evaluation to Operator, along with a Notice of Default, if warranted, with respect to any and all Defaults of this IRU Agreement, then existing. In the event that the Parties are unable to resolve all Defaults pursuant to Section 24, or if Operator does not invoke Section 24, Operator must cure such Defaults no later than six (6) months prior to the expiration of the then-current Term. In the event that Operator cannot or will not cure such Defaults to Tacoma Power's satisfaction within such period, Tacoma Power may elect not to renew this IRU Agreement by giving a notice of termination in writing and this IRU Agreement shall terminate at the end of the then-current Term; provided that such notice of termination may only be given by Tacoma Power after completing the process in Section 21(g).

## 5. PAYMENT TERMS

(a) **IRU Fee.** Operator agrees to pay to Tacoma Power an annual fee (“**IRU Fee**”) in accordance with the following amounts:

First Year of the Term:	\$2,500,000
Second Year of the Term:	\$2,625,000
Third Year of the Term:	\$2,750,000
Fourth Year of the Term:	\$2,875,000
Fifth Year of the Term:	\$3,000,000

Each subsequent year of the Term following the Fifth Year, the IRU Fee shall be adjusted on the anniversary of the Effective Date to reflect the Consumer Price Index Increase. If there is no Consumer Price Index Increase (i.e., there is deflation during the relevant period), there shall be no reduction in the IRU Fee from the prior year.

(b) **Schedule.** Commencing on the Effective Date, Operator shall pay the IRU Fee, together with any applicable leasehold excise taxes, to Tacoma Power on a monthly basis in twelve (12) equal instalments in each of the first three (3) years of the Term, and on a quarterly basis in four (4) equal instalments for each year of the Term thereafter. Invoices for any other amounts due to Tacoma Power under this IRU Agreement or the Exhibits (for example, for splicing services performed by Tacoma Power for Operator pursuant to **Exhibit B**) will be sent separately from time to time.

(c) **Due Date.** Unless otherwise specifically stated elsewhere, Operator will tender payment for the IRU Fee in advance on the fifteenth (15th) day of the month for the installment period in which the IRU Fee payment is due. Any other amounts due to Tacoma Power under this IRU Agreement or the Exhibits shall be paid within thirty (30) days of the date that Operator receives the invoice (“**Due Date**”).

(d) **Late Payment Fee.** A late payment fee of Ten Percent (10%) per annum shall apply to all undisputed fees received after the Due Date.

(e) **Disputed Billing.** In the event Operator disputes any billing by Tacoma Power, Operator will (a) pay all charges not disputed, and (b) notify Tacoma Power of the dispute in writing, providing the invoice number and an explanation of the issue in dispute, within thirty (30) days of receipt of the disputed invoice. Tacoma Power will

advise Operator of the results of the completed investigation and will make any adjustments mutually agreed to by the Parties. If the Parties are unable to resolve the billing dispute within such 30-day period, the Parties will attempt to resolve the dispute pursuant to Section 24 (Senior Representatives - Dispute Resolution). Payment will not prejudice Operator's right to dispute charges, so long as they are disputed in the manner specified in this Section. If both Parties agree that a disputed amount is a legitimate charge or the charge is determined to be legitimate under Section 24, Operator will pay such amount within ten (10) days of such determination. Pending resolution of the issues(s), Operator's non-payment of the disputed items shall not constitute Default by Operator and shall not entitle Tacoma Power to exercise any rights it may otherwise have to suspend or delay its obligations under this IRU Agreement or pursue any right or remedy it may have under this IRU Agreement, at law or in equity.

(f) **Taxes and Accounting.** Operator shall pay before delinquency all applicable leasehold excise, gross earnings, business and occupation and other applicable Taxes, assessments, licenses and charges on its use and operations of the Tacoma Power Commercial System for which an exemption is not available. If leasehold excise tax is applicable, Operator shall remit the amount of leasehold excise tax then due and owing concurrent with its payment of the IRU Fee to Tacoma Power. Operator is responsible for the payment of all charges and Taxes applicable to the services performed under this IRU Agreement, and Operator agrees to comply with all applicable laws regarding the reporting of income, maintenance of records and all other requirements and obligations imposed pursuant to applicable law. If Tacoma Power is assessed, made liable or responsible in any manner for such charges or Taxes, Operator holds Tacoma Power harmless from such costs, including attorneys' fees.

(g) **Tax Exemption.** When applicable, for any request of exemption from Taxes, Operator will furnish Tacoma Power a valid and properly executed tax exemption/resale certificate(s), including copies of such supporting documentation as may be reasonably requested by Tacoma Power for purposes of compliance with its legal obligations to taxing and regulatory authorities. Tacoma Power will not bill Operator for any Taxes covered by an exemption/resale certificate or any Taxes relating to or arising out of Tacoma Power's indemnification obligations herein.

(h) **Audits.** Operator and Tacoma Power agree to make reasonable efforts to cooperate with each other and coordinate their mutual efforts concerning audits, or other such inquiries, filings, reports, etc., as may relate solely to activities or transactions arising from or under this IRU Agreement, which may be required or initiated by Operator or Tacoma Power as a result of an inquiry or audit from any duly authorized governmental authority relating to Taxes.

## 6. CONTRACT ADMINISTRATION

(a) **Single Point of Contact.** To facilitate the timely and compliant performance of the obligations in this IRU agreement and Exhibits, the Parties shall each appoint a representative that shall serve as the primary contact person and contract administrator.

(b) **Authorities of the TPU Contract Administrator.** The TPU Contract Administrator shall have the authority to administer this IRU Agreement and Exhibits with respect to the rights, duties and obligations of Tacoma Power, including but not limited to the following:

- (1) Determine the form of certifications and reports required by this IRU Agreement and the Exhibits.
- (2) Investigate Controversies and Defaults, and issue Notices of Default and Compliance Evaluations.
- (3) Accept and review reports and certifications for completeness.
- (4) Schedule and attend status review meetings.
- (5) Order tests and verification procedures to be performed as required by this IRU Agreement.
- (6) Develop and sign off on compliance plans.
- (7) Make determinations to assess or waive liquidated damages.
- (8) Make a determination if a Tacoma Power Force Majeure Event has occurred.

(c) **Annual Report.** Each year on the Annual Reporting Date, Operator shall provide a report to Tacoma Power and the City of Tacoma City Council of its operations, the status of the Tacoma Power Commercial System and the state of the 12 policy goals adopted by the Utility Board and City Council (“**Annual Report**”). The Annual Report shall include, at a minimum, the annual reports and certifications specified by the Exhibits and listed for convenience in the checklist in **Exhibit R**.

(d) **Liquidated Damages.** Unless otherwise specified in this IRU Agreement or Exhibits, Operator shall submit the Annual Report on the Annual Reporting Date. In the event that Operator fails to timely provide the Annual Report required by Section 6(c), Operator shall pay Tacoma Power liquidated damages in the amount of Two Thousand Five Hundred Dollars (\$2,500.00) per day until it has provided such Annual Report.

(e) **Status Review Meetings.** In addition to any other obligations to meet set forth in this IRU Agreement, on a periodic basis to be mutually agreed by the Parties, but not less than once annually, Operator and Tacoma Power will meet to review Operator’s operations, the status of the Tacoma Power Commercial System and the state of the commitments to the 12 policy goals adopted by the Tacoma City Council as embodied in various Exhibits to this IRU Agreement.

## 7. TACOMA POWER UNDERLYING RIGHTS

(a) **Securing Underlying Rights.** Tacoma Power represents that it has secured (or will have secured by the commencement of operations by Operator) with respect to the Tacoma Power Commercial System, all rights, licenses, contracts, permits, authorizations, franchises, rights of way, easements, collocation agreements, leases and other approvals that are necessary for Tacoma Power to obtain, in order to permit Tacoma Power to own and maintain the Tacoma Power Commercial System in accordance with this IRU Agreement and to convey the IRU to Operator to utilize the Tacoma Power Commercial System under this IRU Agreement (the “**Underlying Rights**”).

(b) **Continuing Underlying Rights Obligation.** Tacoma Power will cause the Underlying Rights to remain effective through the Term and will, at its sole cost, exercise any renewal rights thereunder, and acquire any and all extensions, additions or replacements as are necessary to cause the Underlying Rights to continue through the Term.

(c) **Use Restrictions.** It is expressly understood that the Underlying Rights may contain limitations, restrictions or reservations which must be adhered to by Tacoma Power (collectively, “**Use Restrictions**”). Tacoma Power therefore agrees to notify Operator in writing of any Use Restriction that applies to the Tacoma Power Commercial System as soon as practicable once that Use Restriction is applied, expressly specifying the practical ramifications of the Use Restriction, the part of the Tacoma Power Commercial System impacted by the Use Restriction, the name of the third party imposing the Use Restriction and whether Operator will be entitled to attempt to resolve the issue directly with such third party and any other information necessary for a complete assessment of the impact of the Use Restriction, including supporting documentation relating thereto. As of the Effective Date, there are no Use Restrictions.

## 8. OPERATOR REQUIRED RIGHTS

(a) Except as provided in Section 7, Operator at its sole cost and expense, shall obtain and maintain any and all necessary easements, licenses and building access agreements, as well as all governmental permits, licenses, easements, franchises and approvals that may lawfully be required by federal, state or local law, statute, regulation or ordinance, including a City of Tacoma business license, and shall continuously comply with all such laws, statutes, regulations or ordinances as may now or in the future be applicable to: (1) its operation or use of the Tacoma Power Commercial System; (2) Operator’s connection, installation, maintenance and operation of Tacoma Power Commercial Equipment; and (3) Operator’s other rights and obligations under this Agreement.

## 9. ACCESS AND USE OF TACOMA POWER COMMERCIAL SYSTEM

(a) **Reserved Capacity.** Notwithstanding anything to the contrary herein, Tacoma Power hereby reserves for its own use the capacity on the Tacoma Power Commercial System defined herein as “Reserved Capacity” until such time as Tacoma Power, in its

sole discretion, determines that the Reserved Capacity is no longer needed as evidenced by a surplus declaration duly authorized by the City, or successor authority. The “**Reserved Capacity**” shall be defined as the optical spectrum wavelengths, bandwidth or future technological capacity that is used for the transmission of meter data directly between Tacoma Power and customers with Stark meters within the Tacoma Power Utility Service Area and shall not include any tangible Tacoma Power Commercial System facilities subject to the IRU.

(b) **Interconnection.** Subject to and in accordance with this IRU Agreement, the Exhibits and the Underlying Rights, Operator may connect, including the right to cross-connect, the Tacoma Power Commercial System to other telecommunications systems or facilities including its own network at any points of Operator’s choosing (if so required by Operator).

(c) **Permitted Use of Tacoma Power Commercial System.** Operator may use the Tacoma Power Commercial System only in accordance with the terms of this IRU Agreement and the Exhibits. Operator shall be responsible for all acts or omissions of any third party using the Tacoma Power Commercial System through Operator, as if such acts or omissions were those of Operator directly.

(d) **Compliance.** The Parties agree to cooperate with and support each other in complying with any requirements applicable to the IRU by any governmental or regulatory agency or authority, or Tacoma Power of an Underlying Right. The Parties agree to execute such further instruments as may be necessary or appropriate to carry out the intent of this IRU Agreement with respect to such compliance.

(e) **No Liens.** Tacoma Power shall not cause or permit the portion of the Tacoma Power Commercial System on any Route(s) or any of Operator’s rights under this IRU Agreement to become subject to any liens. If Tacoma Power breaches its obligations under this Section, it will immediately notify Operator in writing, and Tacoma Power will promptly take all steps needed to cause such lien to be discharged and released of record without cost to Operator. Operator shall not cause or permit any of the Tacoma Power Commercial System under this IRU Agreement to become subject to any liens, security interest or any encumbrance of any kind; provided that, After-Installed Assets may be subject to a lien or other security interest as provided in Section 3(a). If Operator breaches its obligations under this Section, it will immediately notify Tacoma Power in writing, and promptly take all steps needed to cause such lien to be discharged and released of record without cost to Tacoma Power.

## 10. MAINTENANCE RESPONSIBILITIES

(a) **Safeguarding Tacoma Power’s Use of Critical Utility Fiber.** The Parties agree that Tacoma Power shall have responsibility for Maintenance of Tacoma Power Commercial Fiber on Critical Routes as described in **Exhibit B** hereto.

(b) **Service Level Agreement.** The Parties agree that the Service Level Agreement in **Exhibit C** hereto shall apply to Tacoma Power’s Maintenance obligations.

(c) **Operator Maintenance.** The Parties agree that Operator shall have responsibility for Maintenance of the Tacoma Power Commercial System, as described in **Exhibit D** hereto.

**11. ADDITIONAL CONDITIONS RELATED TO USE OF THE TACOMA POWER COMMERCIAL SYSTEM**

(a) **Tacoma Power Commercial System Upgrades.** Operator agrees to make Tacoma Power Commercial System upgrades in accordance with the terms of **Exhibit E** hereto.

(b) **Capital Expenditures Commitment.** Operator agrees to make Capital Expenditures to the physical assets of the Tacoma Power Commercial System as specified in **Exhibit F** hereto.

(c) **Equitable Access.** Operator agrees to the equitable access commitments in **Exhibit G** hereto.

(d) **Affordable Access.** Operator agrees to the affordable access commitments in **Exhibit H** hereto.

(e) **Customer Service Commitments.** Operator agrees to the customer service commitments in **Exhibit I** hereto.

(f) **Customer Privacy.** Operator agrees to the customer privacy commitments in **Exhibit J** hereto.

(g) **Net Neutrality.** Operator agrees to the net neutrality commitments in **Exhibit K** hereto.

(h) **Open Access to Telecommunications Assets.** Operator agrees to the open access commitments in **Exhibit L** hereto.

(i) **Economic Development and Educational Opportunities.** Operator agrees to the economic development and educational opportunities commitments in **Exhibit M** hereto.

(j) **Preserve Competition Among Providers.** Operator agrees to certain restrictions on Transfers as more fully detailed in **Exhibit N** hereto.

(k) **Continuity of Services.** The obligations and rights of the Parties with respect to the transition of the Tacoma Power Commercial System upon the termination of this IRU Agreement are contained in **Exhibit O** hereto and Section 21(f) (Survival of Certain Provisions) of this IRU Agreement.

(l) **Labor Relations.** Operator agrees that, pursuant to Section 7 of the National Labor Relations Act (29 U.S.C. § 157), all employees used in the operation of the Tacoma Power Commercial System shall have the right to self-organization, to form,

join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and to engage in other activities protected under 29 U.S.C. § 157.

(m) **Intellectual Property.** Tacoma Power grants to Operator a personal, limited, non-transferable, non-exclusive, royalty-free license set forth in **Exhibit P** to use certain “Click!” trademarks for marketing, advertising and branding purposes in connection with its use of the Tacoma Power Commercial System.

## 12. PERFORMANCE ASSURANCES AND PERFORMANCE GUARANTEE

(a) **Annual Financial Assurances.** Operator shall submit to Tacoma Power, as of the Effective Date, and on an annual basis on the Annual Reporting Date, a report in a form reasonably acceptable to Tacoma Power, demonstrating Operator’s financial health and Operator’s ability to pay the IRU Fee and all other ongoing financial obligations associated with this IRU Agreement. The report shall include the information described in **Exhibit S**.

(b) **Performance Guarantee.** As of the Effective Date, Operator shall cause Mashell, Inc. to deliver a performance guarantee, in the form of **Exhibit T**, unconditionally guaranteeing the timely and full performance of any and all obligations of Operator under this IRU Agreement for the Term.

## 13. RELOCATION

(a) Tacoma Power will give Operator at least ninety (90) days’ prior written notice (or longer if Tacoma Power becomes aware sooner) of any relocation of any portion of the Tacoma Power Commercial System in the event Tacoma Power becomes aware of the need of such relocation. If Tacoma Power becomes aware of the need of a relocation less than ninety (90) days in advance of the scheduled date for such relocation, then Tacoma Power shall provide Operator with as much advance notice as is reasonably practicable under the circumstances. Operator will cooperate in good faith with Tacoma Power to facilitate such relocation, provided that such relocation is required by a governmental agency or third party acting pursuant to condemnation or similar authority.

(b) Responsibility for performing the relocation and any costs and expenses incurred in connection with any such relocation, shall be borne by the Party that has responsibility for Maintenance as provided in **Exhibits B, C and D** hereto.

## 14. POST-TRANSITION SERVICES

(a) In the event that Operator requires support services (“**Post-Transition Services**”) after the Transfer of Operational Control Date, it shall provide Tacoma Power written notice of the services it requires, and, subject to meeting the conditions in this Section, Operator and Tacoma Power shall within a reasonable time thereafter enter into a services agreement for the Post-Transition Services requested (“**Agreement for Post-Transition Services**”). The Agreement for Post-Transition Services shall be on Tacoma

Power's standard terms and conditions and will also describe in detail the service, project scope, fees and term for the Post-Transition Services. Tacoma Power's obligation to enter into an Agreement for Post-Transition Services and to provide Post-Transition Services is expressly contingent on Tacoma Power having adequate staffing and resources to provide the Transition Services requested, as determined by Tacoma Power in its sole discretion. Operator agrees to use its reasonable efforts to reduce or eliminate its dependency on the Post-Transition Services as soon as is reasonably practicable. Operator's right to request Post-Transition Services shall expire on the first (1st) anniversary of the Effective Date.

## 15. REPRESENTATIONS & WARRANTIES OF BOTH PARTIES

(a) **General Warranties.** Each Party, with respect to this IRU Agreement: (i) has taken all corporate and/or governmental action necessary for the authorization, execution and delivery of such agreements and to make such agreements legal, valid and binding; (ii) has no agreement or understanding with any third party that interferes with or will interfere with its performance of the Party's obligations under such agreements; and (iii) is not interfering with any other party's rights or contracts, or violating the terms of any agreements with other parties, by entering into and/or performing under the terms of this IRU Agreement.

(b) **Compliance with Laws.** Each Party's performance under this IRU Agreement shall be in compliance with all applicable federal, state and local laws and government rules and regulations.

(c) **No Default.** Other than the litigation referenced in Section 15(e), there is no action, suit, proceeding, or investigation at law or in equity before or by any court, public board or body pending against or affecting the Party, challenging the validity or enforceability of this IRU Agreement or any other documents relating hereto or the performance of the Party's obligations hereunder.

(d) **Non-Infringement.** Each Party represents, warrants and covenants to the other Party that it shall perform its responsibilities under this IRU Agreement in a manner that does not infringe, or constitute an infringement or misappropriation of, any intellectual property rights of any third party.

(e) **Pending Litigation.** Edward E. (Ted) Coates, et al. v. City of Tacoma (Wa. Sup. Ct, Case No. 17-2-08907); Mitchell Shook v. City of Tacoma (U.S. Dist. Ct, Wa. W. Dist., Case No. 3:19cv05794BHS); Mitchell Shook v. City of Tacoma; Thomas McCarthy and Christopher T. Anderson v. City of Tacoma (Wa. Sup. Ct., Case No 19-2-07135-0); Darrel Bowman v City of Tacoma (Wa. Sup. Ct., Case No. 19-2-11506-3); Mitchell Shook v City of Tacoma (Wa. Sup. Ct., Case No. 19-2-11760-1); City of Tacoma v. Comcast Cable Communications, LLC; Comcast Cable Communications Management, LLC (Wa. Sup. Ct., Case No. 19-2006715-8).

## 16. ADDITIONAL REPRESENTATIONS & WARRANTIES OF OPERATOR

Operator hereby represents and warrants to Tacoma Power as follows:

(a) Operator is a limited liability company organized and existing under the laws of the State of Washington, is duly qualified to transact business and is in good standing in the State of Washington;

(b) Prior to the execution and delivery of this IRU Agreement, Operator has had ample opportunity and access to the Tacoma Power Commercial System, Tacoma Power employees and related information, and has fully examined the condition of the Tacoma Power Commercial System; and

(c) Operator has the financial, technical and legal capability to perform its obligations under this IRU Agreement and the Exhibits.

**17. NO WARRANTIES AS TO CONDITION OF TACOMA POWER COMMERCIAL SYSTEM**

(a) NOTWITHSTANDING ANY EXAMINATION OR INSPECTION MADE BY OPERATOR AND WHETHER OR NOT ANY PATENT OR LATENT DEFECT OR CONDITION WAS REVEALED OR DISCOVERED THEREBY, OPERATOR UNDERSTANDS IT IS OBTAINING USE OF THE TACOMA POWER COMMERCIAL SYSTEM UNDER THIS IRU AGREEMENT “AS IS” IN ITS CONDITION AS OF THE EFFECTIVE DATE. OPERATOR HEREBY WAIVES AND RELEASES ANY CLAIM OR ACTION AGAINST TACOMA POWER IN RESPECT OF OR RELATED TO THE CONDITION OF THE SYSTEM ASSETS, INCLUDING ANY DEFECTS OR ADVERSE CONDITIONS NOT DISCOVERED OR OTHERWISE KNOWN BY OPERATOR AS OF THE EFFECTIVE DATE.

(b) EXCEPT AS SET FORTH IN THIS IRU AGREEMENT, TACOMA POWER MAKES NO WARRANTY TO OPERATOR OR ANY OTHER ENTITY, WHETHER EXPRESS, IMPLIED OR STATUTORY, AS TO THE INSTALLATION, DESCRIPTION, QUALITY, MERCHANTABILITY, USEFUL LIFE, FUTURE ECONOMIC VIABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY FIBERS, THE TACOMA POWER COMMERCIAL SYSTEM, OR ANY EQUIPMENT, GOODS, OR SERVICE PROVIDED HEREUNDER OR DESCRIBED HEREIN, OR AS TO ANY OTHER MATTER, ALL OF WHICH WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED.

(c) Tacoma Power Management has disclosed all known defects to the best of its knowledge. “**Tacoma Power Management**” shall mean and refer to the Tacoma Power Superintendent.

**18. INDEMNIFICATION**

(a) Operator shall indemnify, defend and hold harmless Tacoma Power, its officials, officers, agents, employees and volunteers, from any and all claims, demands, damages, lawsuits, liabilities, losses, liens, expenses and costs arising out of the subject matter of this IRU Agreement; provided that this provision shall not apply to the extent that damage or injury results from the sole negligence of Tacoma Power, or its officers, agents or employees. This indemnification shall extend to and include attorneys’ fees and

the cost of establishing the right of indemnification hereunder in favor of Tacoma Power. This indemnification shall survive the termination of this IRU Agreement.

(b) Operator specifically assumes potential liability for actions brought by its own employees against Tacoma Power and, solely for the purpose of this indemnification and defense, Operator specifically waives any immunity under the state industrial insurance law, Title 51 RCW. OPERATOR RECOGNIZES THAT THIS WAIVER WAS THE SUBJECT OF MUTUAL NEGOTIATION.

## 19. LIMITATION OF LIABILITY

(a) **DIRECT DAMAGES ONLY.** IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER PARTY (OR ANY INDIVIDUAL OR ENTITY CLAIMING THROUGH SUCH PARTY) FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES OF ANY KIND OR NATURE WHATSOEVER, INCLUDING BUT NOT LIMITED TO ANY LOST PROFITS, LOST REVENUES, LOST SAVINGS, LOSS OF DATA OR HARM TO BUSINESS.

(b) **CAP ON LIABILITY.** IN NO EVENT SHALL TACOMA POWER'S LIABILITY TO OPERATOR FOR THE BREACH OF THIS IRU AGREEMENT OR CLAIMS RELATED TO OR CONNECTED IN ANY WAY WITH THIS IRU AGREEMENT, EXCEED, IN THE AGGREGATE, THE LESSER OF (I) DIRECT DAMAGES; OR (II) THE IRU FEES PAID PRIOR TO THE BREACH OF THIS IRU AGREEMENT.

(c) **NO LIMIT.** IN NO EVENT SHALL THIS SECTION (I) LIMIT ANY INDEMNIFICATION OBLIGATIONS FOR CLAIMS BASED ON DAMAGE CAUSED THROUGH WILLFUL MISCONDUCT OR GROSS NEGLIGENCE OR (II) SERVE AS A LIMITATION ON ANY INSURANCE EITHER PARTY IS REQUIRED UNDER THIS IRU AGREEMENT TO PROVIDE FOR.

## 20. INSURANCE

Operator will maintain insurance coverages in the amounts and in the manner specified in the City of Tacoma Insurance Requirements. The City of Tacoma Insurance Requirements documents are attached hereto as **Exhibit Q**.

## 21. DEFAULT AND TERMINATION

(a) **Communication and Discussion.** The Parties are fully committed to working with each other throughout the Term of this IRU Agreement, and agree to communicate regularly with each other at all times so as to avoid or minimize disputes, differences of opinion or controversies (each a "**Controversy**") arising in connection with this IRU Agreement. The Parties agree to act in good faith to prevent and resolve potential sources of conflict before they escalate into a Controversy and shall attempt to resolve Controversies arising in connection with this IRU Agreement through good faith discussions between the contract administrators of both Parties to arrive at an agreeable resolution. In the event that the contract administrators are unable to resolve a

Controversy after at least one discussion and the Controversy is alleged to be a default of an obligation under this IRU Agreement, the Party asserting the default may issue a Notice of Default as provided for in this IRU Agreement.

(b) **Defaults.** If either Party fails to perform an obligation under this IRU Agreement or an Exhibit (“**Default**”), the other Party may consider the non-performing Party to be in Default unless the Default is excused by a Force Majeure Event.

(c) **Notice of Default.** Unless otherwise provided in this IRU Agreement, or an exhibit thereto, the non-defaulting Party may assert a Default claim by giving the defaulting Party a written and detailed notice of default (“**Notice of Default**”). Unless the defaulting party timely submits a written request for dispute resolution pursuant to Section 24 of this IRU Agreement, the defaulting Party will have thirty (30) days after receipt of the Notice of Default to either (i) cure such Default and provide written evidence of such cure; or (ii) submit a proposed compliance plan to correct the Default, if the defaulting Party believes in good faith that it will not be able to cure said Default within such timeframe; provided that, the time period to cure or submit a proposed compliance plan shall be limited to ten (10) days for a Notice of Default alleging a failure to timely provide a report or certification listed on **Exhibit R**. The contents of the compliance plan shall specify the steps that the defaulting Party will take to correct the Default and bring itself into compliance with its obligations and the time period over which the correction will occur. The non-defaulting Party will review the proposed compliance plan and the Parties will work in good faith to mutually agree on its final contents and timeframe for implementation within a further thirty (30) days from receipt by the non-defaulting Party. The non-defaulting Party must act reasonably in determining whether a cure plan is acceptable and must make good faith and collaborative efforts to agree upon a mutually acceptable cure plan. The defaulting Party will begin implementing the cure plan immediately after receipt of notice by the other Party that it approves the cure plan. In the event that the Parties are unable to mutually agree upon a compliance plan, either Party may invoke the dispute resolution procedures in Section 24 of this IRU Agreement.

(d) **Action on Failure to Cure.** Subject to the provisions of Section 24 of this IRU Agreement, upon the failure by the defaulting Party to cure any Default within the time specified in paragraph (c), the non-defaulting Party may, except as may be otherwise provided in this IRU Agreement: (i) assess liquidated damages as provided in this IRU Agreement, (ii) pursue any other remedies it may have under this IRU Agreement, applicable law or in equity relating to such Default; and (iii) suspend or delay performance of its obligations under this IRU Agreement.

(e) **Compensation for Prior Performance.** Notwithstanding the foregoing, no termination of this IRU Agreement shall affect the rights or obligations of any Party hereto with respect to any payment hereunder for performance rendered, refunds, or set-offs accruing or due prior to the effective date of termination.

(f) **Survival of Certain Provisions.** The expiration or termination of this IRU Agreement, including due to non-renewal, will not affect the rights or obligations of

either Party hereto with respect to matters or claims arising or accruing prior to or as of expiration of this IRU Agreement, or pursuant to any other provisions of this IRU Agreement that, by their sense and context, are intended to survive the expiration or termination of this IRU Agreement, including but not limited to Indemnification, Limitation of Liability, Taxes, Confidentiality and Continuity of Service Commitments (**Exhibit O**).

(g) **Termination.** In the event that the Parties are unable to resolve a Default pursuant to the provisions of Section 24 and the Default is one for which termination is a remedy under this IRU Agreement, the non-defaulting Party may give notice of its intent to terminate this IRU Agreement upon a date set forth in the notice which date shall be no less than one hundred eighty (180) days following the date of receipt of the notice; provided that:

(1) Tacoma Power, shall prior to giving notice of intent to terminate complete the following process:

(i) The Public Utility Board shall determine if termination of this IRU Agreement is, in the opinion of the Board, warranted. The Public Utility Board may consider such facts and circumstances that are relevant to the Default when determining whether or not to terminate this IRU Agreement.

(ii) If the Public Utility Board determines that termination is warranted, such determination shall not be final until the City Council concurs in the decision of the Public Utility Board. The Parties acknowledge that a decision to terminate this IRU Agreement is not a land use decision subject to appeal pursuant to the Land Use Petition Act (Chapter 36.70C RCW).

(2) Any notice of termination given by Operator shall be signed by its manager.

(h) **Uncured Default.** In the event that any Default remains uncured one hundred eighty (180) days after a Notice of Default has been issued, and the uncured status is not excused as a Force Majeure Event, or because the Parties are engaged in arbitration, dispute resolution, implementation of a compliance plan or other mutually agreed resolution of the Default, the non-defaulting Party shall have the right to give notice to terminate this IRU Agreement pursuant to Section 21(g) of this IRU Agreement.

## 22. LIQUIDATED DAMAGES

(a) **Liquidated Damages as a Remedy.** The Parties explicitly represent that it will be impractical and/or difficult to ascertain or quantify the amount of damages which may be incurred by Tacoma Power as a result of the failure by Operator to comply, or maintain compliance, with certain provisions of this IRU Agreement or the Exhibits as enumerated therein, and further acknowledge and agree that Tacoma Power will be damaged as a result of such non-compliance. Therefore, Tacoma Power and Operator

agree that the liquidated damages set forth in the enumerated provisions of this Agreement and the Exhibits are reasonable estimates of the damages resulting from non-compliance of those provisions of this IRU Agreement or Exhibit.

(b) **Exclusive Remedy.** If a Party exercises its right to impose liquidated damages, such damages shall be the Party's sole and exclusive remedy for recovery of the loss resulting from such non-compliance. Nothing in this subsection is intended to preclude the Party from exercising any other right or remedy with respect to other losses not compensated by liquidated damages.

(c) **Adjustment.** The Parties agree that all liquidated damages specified herein shall be adjusted annually on the anniversary of the Effective Date to reflect the Consumer Price Index Increase. If there is no Consumer Price Index Increase (i.e., there is deflation during the relevant period), there shall be no reduction in the liquidated damages from the prior year.

(d) **Assessment of Liquidated Damages.** The Parties agree that liquidated damages may be assessed as a remedy only in the event that the Party in Default has failed to cure in conformance with Section 21(c) of this IRU Agreement or the Parties have been unable to resolve the Default pursuant to the dispute resolution provisions of Section 24 of this IRU Agreement. In the event that liquidated damages are assessed as a remedy under this IRU Agreement against a defaulting Party in connection with a Default pursuant to this IRU Agreement, the non-defaulting Party shall send the defaulting Party an invoice specifying the amounts assessed and the time period subject to assessment of liquidated damages, which may not include any period prior to delivery of the Notice of Default that is the subject of assessment of liquidated damages

## 23. SPECIFIC PERFORMANCE

In recognition that the IRU cannot be readily obtained in the open market, and a suitable Successor Operator may not be readily available, and therefore, that the Parties will be irreparably injured if this IRU Agreement cannot be specifically enforced, each Party shall be entitled, in addition to bringing suit at law or equity for monetary or other damages, to obtain specific performance to order implementation of the IRU contemplated by this IRU Agreement. In any action to enforce the provisions of this IRU Agreement, the Parties both hereby irrevocably and forever waive the defense that there is an adequate remedy at law and hereby irrevocably agree that the other Party shall have the right to obtain specific performance of the obligations contemplated by this IRU Agreement.

## 24. DISPUTE RESOLUTION

In the event that a Party has issued a Notice of Default and the defaulting Party disputes that it is in Default, such defaulting Party shall, within ten calendar days of receipt of said notice, submit to the other Party a written request for dispute resolution. Upon receipt of a timely request for dispute resolution, the cure period in the Notice of Default is tolled. Each Party shall designate a senior representative ("**Senior Representative**") and the

Senior Representatives for the Parties shall meet as soon as conveniently possible, but in no case later than thirty (30) days after such a request is made, to attempt to resolve the Controversy. Prior to any meetings between the Senior Representatives, the Parties will exchange relevant information that will assist the Parties in resolving the dispute. If the dispute cannot be resolved through dispute resolution within a reasonable time, not to exceed thirty (30) days, then the Parties shall be free to, (i) assess liquidated damages as provided in this IRU Agreement, (ii) pursue any other remedies it may have under this IRU Agreement, applicable law or in equity relating to such Default; and (iii) suspend or delay performance of its obligations under this IRU Agreement.

## **25. GOVERNING LAWS**

Any action related to this IRU Agreement shall be governed the laws of the State of Washington (except that body of law controlling conflict of laws) and the United Nations Convention on the International Sale of Goods will not apply. Any suit or proceeding arising out of or relating to this IRU Agreement will be brought in the applicable federal or state court located in Pierce County, Washington, and each Party irrevocably submits to the jurisdiction and venue of such courts.

## **26. RELATIONSHIP OF THE PARTIES**

The relationship between the Parties will not be that of partners, agents or joint venture parties for one another, and nothing contained in this IRU Agreement will be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to, tax purposes. No employment relationship is created by this Agreement. Neither Party will make any commitment, by contract or otherwise, binding upon the other or represent that it has any authority to do so. In performing any of their obligations hereunder, each Party will be an independent contractor or independent Party and shall use its discretion in discharging its contractual obligations at its own risk.

## **27. NOTICES**

Except for routine operational communications (which may be delivered personally or by mail or transmitted by electronic mail), all notices and invoices required hereunder shall be in writing and shall be considered properly delivered when personally delivered, or on the third day following mailing, postage prepaid, certified mail, return receipt requested to the Parties at the following addresses:

### **Tacoma Power:**

Tacoma Public Utilities  
3628 South 35th Street  
Tacoma, WA 98409  
Telephone: (253) 502 8600

Attention: TPU Contract Administrator

**With a copy to:**

City of Tacoma  
747 Market Street  
Tacoma, WA 98402  
Telephone: (253) 591-5000

Attention: City Attorney

**Operator:**

Rainier Connect North, LLC  
P.O. Box 639  
104 Washington Ave. N.  
Eatonville, WA 98328  
Attn: Manager (for all communications except invoices)  
Attn: Accounts Payable (for invoices)

**With a copy to:**

Richard A. Finnigan  
2112 Black Lake Blvd. SW  
Olympia, WA 98512

Either Party may change the address to which notices shall be sent by notice to the other Party by providing thirty (30) days' written notice of the change of address.

**28. NO WAIVER**

No failure, forbearance, neglect or delay by a Party in regard to enforcing this IRU Agreement or exercising any rights contained in this IRU Agreement, in whole or in part, will affect or limit such Party's right to strictly enforce same, and no such failure, forbearance, neglect or delay will constitute or be implied as a waiver of any right to enforce same in the future.

**29. ASSIGNMENTS & TRANSFERS**

(a) In addition to the limitations on its transfer and assignment rights set forth in **Exhibit N**, Operator will not mortgage, pledge, hypothecate, grant a security interest in or deed of trust or charge of any kind upon, its interest under this IRU Agreement or the Tacoma Power Commercial System, or, except as provided in Section 3(a), any portion thereof including After-Installed Assets, without the prior written consent of Tacoma Power.

(b) Nothing in this Agreement will in any manner prohibit Tacoma Power from (i) selling, assigning, transferring or conveying (including as security) all or any part of its interest in the Tacoma Power Commercial System, or (ii) selling, assigning, transferring

or conveying this IRU Agreement. In the event Tacoma Power sells, assigns, transfers or conveys its entire ownership in the Tacoma Power Commercial System, Tacoma Power will be relieved of and released from all further obligations under this IRU Agreement other than pending claims not assumed by the successor; provided that this IRU Agreement shall be binding upon such successor.

(c) The covenants, conditions and agreements contained in this IRU Agreement will inure to the benefit of and be binding upon Tacoma Power and its successors and assigns, and will be binding upon Operator, its successors and assigns, and inure to the benefit of Operator, and only such assigns of Operator to whom the assignment by Operator has been consented to by Tacoma Power as provided in this Section and **Exhibit N**.

### **30. SUBCONTRACTING**

(a) Any delegation or subcontracting by Tacoma Power will not operate to relieve Tacoma Power of its responsibilities and obligations under this IRU Agreement.

(b) Any delegation or subcontracting by Operator will not operate to relieve Operator of its responsibilities and obligations under this IRU Agreement.

### **31. FORCE MAJEURE EVENT**

(a) **Performance Excused by Force Majeure Event.** Neither Party will be deemed in violation of any provision of this IRU Agreement if it is prevented from performing any of the obligations under this IRU Agreement (excluding payment obligations) in whole or in part by reason of any event or circumstance, or combination of events or circumstances, arising after the Effective Date and beyond the reasonable control of, and not the result of the negligent or intentional actions or omissions of, or caused by, the Party that seeks to excuse, in whole or in part, that Party's performance of this IRU Agreement and its obligations hereunder, and that is unavoidable or could not be prevented or overcome by the reasonable efforts and due diligence, (a "**Force Majeure Event**"). In such event, subject to Section 30(b), the non-performing Party shall be excused from further performance of the obligation(s) so affected for as long as such circumstances prevail and such Party continues to use reasonable efforts to recommence performance whenever and to whatever extent possible without delay. In the event of a Force Majeure Event, unless otherwise specified in an applicable Exhibit, the non-performing Party's performance obligation shall be extended on a day by day basis. Events that may give rise to a Force Majeure Event may include acts of God, natural disasters, extreme weather and storms, lightning, floods, fires, earthquakes or other natural occurrences; civil disturbances; strikes or other labor unrest (unless they only concern the Party claiming Force Majeure); catastrophic power failures; terrorist activity, riots, war, nuclear or other civil or military emergencies; acts of legislative, judicial, executive or administrative authorities; or any other circumstances that are not within the reasonable control of, or the result of the negligence of, the claiming Party, and which, by the exercise of due diligence, the claiming Party is unable to overcome or avoid or cause to be avoided. A Force Majeure Event shall not, however, include actions of a government authority with respect to a Party's compliance with applicable laws,

franchises, authorizations or permits; any failure by a Party to obtain or maintain any franchise, authorization or permit it is required to obtain or maintain; and any act, omission, delay, default or failure (financial or otherwise) of a subcontractor to a Party.

(b) **Notification.** In the event of a Force Majeure Event, the Party who first becomes aware of the event shall promptly give written notice to the other Party of such event. When either Party becomes aware of the end of the Force Majeure event, it shall give prompt written notice to the other Party.

## 32. CONFIDENTIALITY

(a) **Definition.** “**Confidential Information**” means information concerning a Party’s (or its Affiliates’) products, plans, methods, processes, business opportunities, vendors, customers, finances, personnel and other information related to the business of such Party and the terms of this IRU Agreement. “Confidential Information” does not include any information which: (a) the receiving Party rightfully knew before the disclosing Party disclosed it to the receiving Party; (b) has become publicly known through no wrongful act of the receiving Party; or (c) the receiving Party developed independently and without the use of any Confidential Information, as evidenced by appropriate documentation.

(b) **Nondisclosure.** All Confidential Information remains the property of the disclosing Party, and no license or other right in any Confidential Information is granted hereby. The receiving Party shall not disclose any Confidential Information to any third party or otherwise, and shall take all reasonable precautions to prevent its unauthorized dissemination, both during and after the Term of this IRU Agreement. The receiving Party shall limit its internal distribution of Confidential Information to its employees and agents who have a need to know, and shall take steps to ensure that dissemination is so limited. The receiving Party shall not use any Confidential Information for its own benefit or for the benefit of anyone other than the disclosing Party. Upon disclosing Party’s written request, the receiving Party shall return to the disclosing Party all Confidential Information in the receiving Party’s custody or control. All information disclosing Party provides is provided “AS IS” and without any warranty, express, implied or otherwise, regarding its accuracy or performance.

(c) **Confidential or Proprietary Records Must be Marked.** If Operator provides Tacoma Power with records that Operator considers confidential or proprietary, Operator must mark all applicable pages of said record(s) as “Confidential” or “Proprietary.” If Operator fails to so mark record(s), then (1) Tacoma Power, upon request, may release said record(s) without the need to satisfy the notice requirements above; and (2) Operator expressly waives its right to allege any kind of civil action or claim against Tacoma Power pertaining to the release of said record(s).

(d) **Public Disclosure.** This IRU Agreement and documents provided to Tacoma Power by Operator hereunder are deemed public records subject to disclosure under the Washington State Public Records Act, Chapter 42.56 RCW (“**Public Records Act**”). Thus, Tacoma Power may be required, upon request, to disclose this IRU Agreement and documents related to it unless an exemption under the Public Records Act or other laws

applies. In the event Tacoma Power receives a request for such disclosure, determines in its legal judgment that no applicable exemption to disclosure applies, and Operator has complied with the requirements herein to mark all content considered to be confidential or proprietary, Tacoma Power agrees to provide Operator ten (10) days' written notice of impending release. Should legal action thereafter be initiated by Operator to enjoin or otherwise prevent such release, all expense of any such litigation shall be borne by Operator, including any damages, attorneys' fees or costs awarded by reason of having opposed disclosure. Tacoma Power shall not be liable for any release where notice was provided and Operator took no action to oppose the release of information. Notice of any proposed release of information pursuant to Chapter 42.56 RCW, shall be provided to Operator according to the "Notices" provision herein.

**33. NO PUBLICITY**

Except as specifically authorized in **Exhibit P** of this IRU Agreement, neither Party will issue any press releases or announcements, or any marketing, advertising or other promotional materials, related to this IRU Agreement or referencing or implying the other Party or its trade names, trademarks or service marks, without the prior written approval of the other Party.

**34. TIME IS OF THE ESSENCE**

TIME IS OF THE ESSENCE IN THIS AGREEMENT AND EACH PROVISION HEREOF IN WHICH TIME OF PERFORMANCE IS ESTABLISHED.

**35. NO THIRD PARTY BENEFICIARIES**

Each of Tacoma Power and Operator agrees that (a) their respective representations, warranties, covenants and agreements set forth herein are solely for the benefit of the other Party hereto, in accordance with and subject to the terms of this Agreement, and (b) this Agreement is not intended to, and does not, confer upon any Person other than the Parties hereto any rights or remedies hereunder, including the right to rely upon the representations and warranties set forth herein.

**36. EXHIBITS**

The Exhibits listed below are hereby incorporated into this IRU Agreement and made a part hereof. In interpreting this IRU Agreement and resolving any ambiguities, the language in the Exhibits takes precedence over language in this IRU Agreement.

Exhibit A – Tacoma Power Commercial System

Exhibit A1 – Service Areas Map

Exhibit A2 – System Assets

Exhibit A2.1 Fiber Schedule

- Exhibit A2.2 Node Maps
- Exhibit A2.3 Equipment Shown in Node Maps (BOM)
- Exhibit A2.4 Equipment in Hub Sites
- Exhibit A3 – Hub Sites License
  - Exhibit A3.1 Hub Site Drawings
  - Exhibit A3.2 Ancillary Systems
- Exhibit A4 – Conduit Space License
  - Exhibit A4.1 – Excluded Conduit (Downtown)
  - Exhibit A4.2 – Excluded Conduit (South)
- Exhibit A5 – IP Acceptable Use Policy
- Exhibit A6 – Headend License
  - Exhibit A6.1 Headend Site Drawing
  - Exhibit A6.2 Headend Equipment
- Exhibit A7 – Installed Customer Premises Equipment
- Exhibit B – Safeguarding Tacoma Power’s Use of the Fiber System
  - Exhibit B1 Critical Routes
  - Exhibit B2 Non-Critical Routes
- Exhibit C – Service Level Agreement
- Exhibit D – Access to and Maintenance of Tacoma Power Commercial System by Operator
  - Exhibit D1 – Access Process
    - Exhibit D1.1 – Pole Attachment Request Form
- Exhibit E – Tacoma Power Commercial System Upgrades
- Exhibit F – Capital Expenditures Commitment
- Exhibit G – Equitable Access
- Exhibit H – Affordable Access to Telecommunications Services

Exhibit I – Customer Service Commitments

Exhibit J – Customer Privacy

Exhibit J1 – Council Resolution Regarding Customer Privacy

Exhibit K – Net Neutrality

Exhibit L – Open Access to Telecommunications Assets

Exhibit M – Economic Development and Educational Opportunities

Exhibit N – Preserve Competition Among Providers

Exhibit O – Continuity of Services Commitment

Exhibit P – Trademark License

Exhibit P1- Marks

Exhibit P2 – Guidelines

Exhibit Q – City of Tacoma Insurance Requirements

Exhibit R – Checklist of Report and Certification Requirements

Exhibit S – Annual Financial Report

Exhibit T – Form of Guarantee

### **37. NO GRATUITIES**

Tacoma Power shall not offer or give any Operator employee or agent any gratuity, payment or other personal benefit or inducement with a view toward securing business from Operator or influencing the terms, conditions or performance of this IRU Agreement or any statement of work or purchase order.

### **38. FURTHER ASSURANCES**

In connection with this IRU Agreement and the transactions contemplated hereby, each Party will execute and deliver any additional documents and instruments and perform any additional acts that may be commercially reasonable, necessary or appropriate, or reasonably requested by the other Party, to effectuate and perform the Parties' obligations under this IRU Agreement and the transactions contemplated hereby.

### **39. RECORDS RETENTION**

Operator shall establish and maintain records in accordance with requirements prescribed by Tacoma Power, with respect to all matters related to the performance of this IRU

Agreement. Except as otherwise authorized by Tacoma Power, Operator shall retain such records in perpetuity.

**40. NON-DISCRIMINATION**

Operator agrees to take all steps necessary to comply with all federal, state and Tacoma City laws and policies regarding non-discrimination and equal employment opportunities. Operator shall not discriminate in any employment action because of race, religion, creed, color, national origin or ancestry, sex, gender identity, sexual orientation, age, marital status, familial status, veteran or military status, the presence of any sensory, mental or physical disability or the use of a trained dog guide or service animal by a disabled person. In the event of non-compliance by Operator with any of the non-discrimination provisions of this IRU Agreement, Tacoma Power shall be deemed to have cause to terminate this IRU Agreement, in whole or in part.

**41. CONFLICT OF INTEREST**

No officer, employee or agent of Tacoma Power, nor any member of the immediate family of any such officer, employee or agent as defined by City ordinance, shall have any personal financial interest, direct or indirect, in this IRU Agreement, either in fact or in appearance. Operator shall comply with all federal, state and City conflict of interest laws, statutes and regulations. Operator represents that it presently has no interest and shall not acquire any interest, direct or indirect, in the program to which this IRU Agreement pertains which would conflict in any manner or degree with the performance of Operator's services and obligations hereunder. Operator further covenants that, in performance of this IRU Agreement, no person having any such interest shall be employed. Operator also agrees that its violation of the City's Code of Ethics contained in Chapter 1.46 of the Tacoma Municipal Code shall constitute a breach of this IRU Agreement subjecting this IRU Agreement to termination.

**42. ENTIRE AGREEMENT**

This IRU Agreement, including the Exhibits hereto, contains all the terms, conditions and obligations of the Parties with respect to the grant of the IRU and related matters contemplated in this IRU Agreement, and supersedes any and all other agreements and representations whether oral or in writing relative to the subject matter of this IRU Agreement, including but not limited to the Letter of Intent that was executed on April 2, 2019 by and between Tacoma Power and Mashell Telecom Inc.

**43. INTERPRETATION**

Both Parties acknowledge that they have each been represented by counsel and this IRU Agreement and every provision hereof has been freely and fairly negotiated. All provisions of this IRU Agreement will be interpreted according to their fair meaning and will not be strictly construed against any Party.

**44. MISCELLANEOUS**

- (a) Except as otherwise expressly provided, the rights and remedies set forth in this IRU Agreement are in addition to, and cumulative of, all other rights and remedies at law or equity.
- (b) The headings in this IRU Agreement are strictly for convenience and do not amplify or limit any of the terms, provisions or conditions hereof.
- (c) In the event any provision of this IRU Agreement is held invalid, illegal or unenforceable, in whole or in part, neither the validity of the remaining part of such provision nor the validity of the remaining provisions of this IRU Agreement will be in any way affected. The Parties will cooperate in trying to replace the invalid, illegal or unenforceable provision with a valid provision that attempts to achieve the same result.
- (d) This IRU Agreement may be amended only by a written instrument executed by the Parties.
- (e) This IRU Agreement may be executed in multiple counterparts, all of which taken together constitute one and the same instrument.

**[SIGNATURE PAGES TO FOLLOW]**

**IN WITNESS WHEREOF**, each Party has caused this IRU Agreement to be executed by its duly authorized representative as of the date indicated below, and effective as of the Effective Date.

**CITY OF TACOMA, DEPARTMENT  
OF PUBLIC UTILITIES, LIGHT  
DIVISION, D/B/A TACOMA POWER**

**RAINER CONNECT NORTH, LLC**

By: \_\_\_\_\_  
Name: Victoria R. Woodards  
Title Mayor  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: Jackie Flowers  
Title Director of Utilities  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: Elizabeth A. Pauli  
Title City Manager  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: Andrew Cherullo  
Title Finance Director  
Date: \_\_\_\_\_

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title City Attorney  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title Risk Manager  
Date: \_\_\_\_\_

**EXHIBIT A**

**SYSTEM**

**SERVICE AREAS MAP (Exhibit A1), SYSTEM ASSETS (Exhibit A2), HUB SITES LICENSE (Exhibit A3), CONDUIT SPACE LICENSE (Exhibit A4), IP ACCEPTABLE USE POLICY (Exhibit A5), HEADEND LICENSE (Exhibit A6), AND CUSTOMER PREMISES EQUIPMENT (Exhibit A7)**

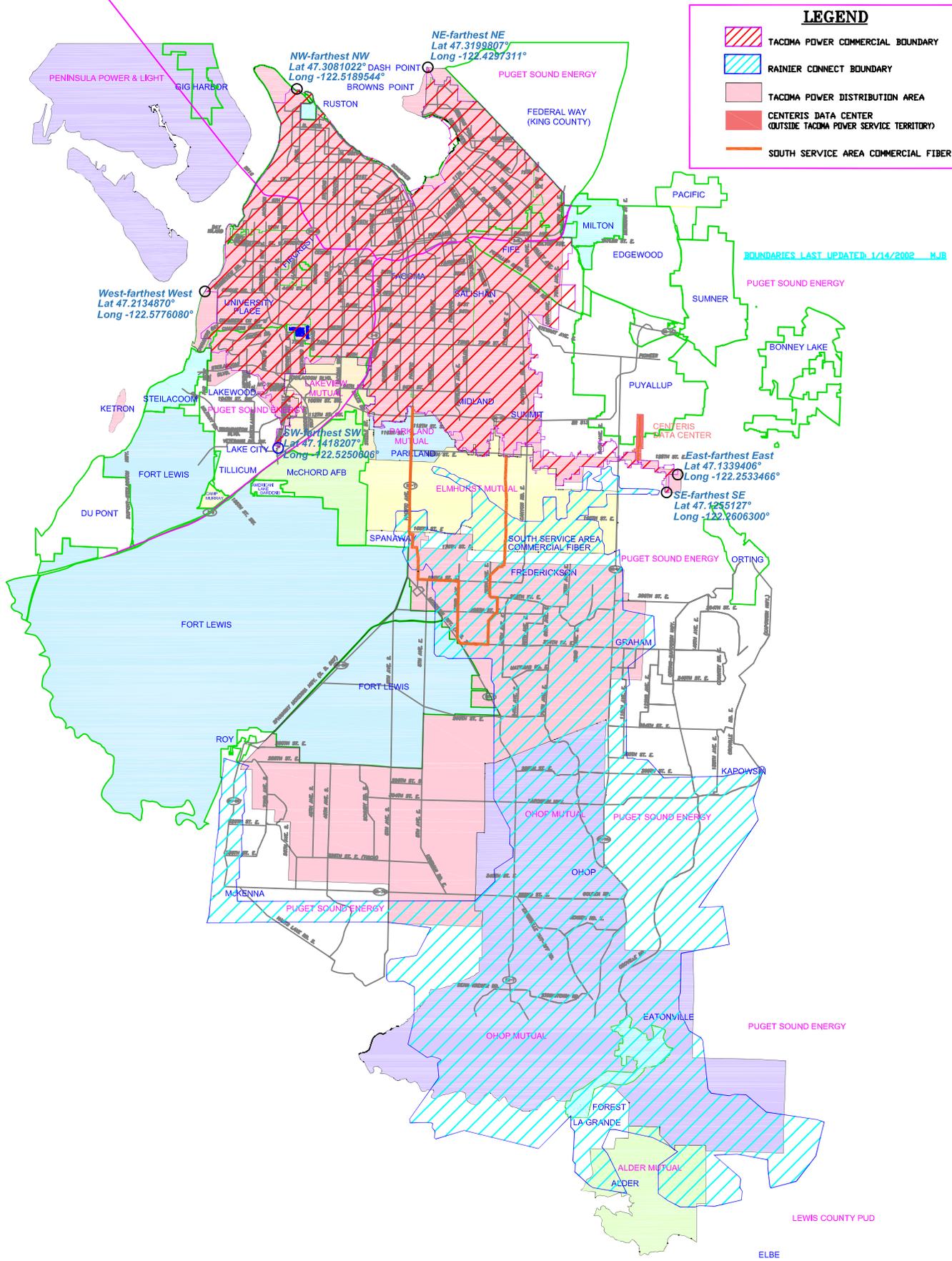
## **EXHIBIT A1**

### **SERVICE AREAS AS OF EFFECTIVE DATE**

Tacoma Power Commercial Service Area, Tacoma Power Utility Service Area, and Operator Service Area as of the Effective Date are each depicted in **Exhibit A1**.

Tacoma Power Commercial Service Area in the City of Puyallup is limited to the transiting fiber route to the Centeris Data Center and does not include any retail service area. Tacoma Power Commercial Service Area in Pierce County (Loveland) is limited to the transiting fiber route to interconnect with Wave and Operator and does not include any retail service area.

# SERVICE AREA MAP



**LEGEND**

- TACDMA POWER COMMERCIAL BOUNDARY
- RAINIER CONNECT BOUNDARY
- TACDMA POWER DISTRIBUTION AREA
- CENTERIS DATA CENTER (OUTSIDE TACDMA POWER SERVICE TERRITORY)
- SOUTH SERVICE AREA COMMERCIAL FIBER

BOUNDARIES LAST UPDATED: 1/14/2002 MJB

## **EXHIBIT A2**

### **TACOMA POWER COMMERCIAL SYSTEM ASSETS INCLUDED IN IRU AS OF EFFECTIVE DATE**

#### **Tacoma Power Commercial Fiber**

The fiber counts in the various segments that comprise the Tacoma Power Commercial Fiber are identified in **Exhibit A2.1**.

The Tacoma Power Commercial Fiber is as shown in **Exhibit A2.2**.

#### **Tacoma Power Commercial Coax**

The Tacoma Power Commercial Coax is as shown in **Exhibit A2.2**.

#### **Tacoma Power Commercial Equipment in Rights of Way**

The Tacoma Power Commercial Equipment in Rights-of-Way and associated with Tacoma Power Commercial Fiber and Tacoma Power Commercial Coax is shown in **Exhibit A2.2** and listed by node in **Exhibit A2.3**.

#### **Tacoma Power Commercial Equipment at Hub Sites**

Tacoma Power Commercial Equipment at Hub Sites is listed in **Exhibit A2.4**.

**EXHIBIT A2.1**

**TACOMA POWER COMMERCIAL FIBER COUNTS**

*[CONTENT ON ACCOMPANYING USB DRIVE]*

**EXHIBIT A2.2**

**NODE MAPS**

*[CONTENT ON ACCOMPANYING USB DRIVE]*

**EXHIBIT A2.3**  
**SYSTEM EQUIPMENT (BOM)**

*[CONTENT ON ACCOMPANYING USB DRIVE]*

**EXHIBIT A2.4**  
**HUB SITE EQUIPMENT**

Exhibit A2.4 - Hub Site Equipment

Description	Hub Location	Serial Number/Model #
CNDTN9912A - DTN Core Router	C-DTN	F999999
CNDTS9912A - DTS Core Router	C-DTS	F999999
CNSW 10012A CMTS Router	C-BBS-SW	SPE121001GC
CNNW - CMTS Router CBR 8	C-BBS-NW	FXS2028Q44Y
CNSE 10012A CMTS Router	C-BBS-SE	SPE12290247
CNNE 10012A CMTS Router	C-BBS-NE	SPE132801G0
NE NSG-40G EdgeQAM	C-BBS-NE	F999999
NE Hub DTI TimeCreator	C-BBS-NE	F999999
SE NSG9000-1 EdgeQam	C-BBS-SE	151113677
SE NSG9000-2 EdgeQam	C-BBS-SE	F999999
SE Hub DTI TimeCreator	C-BBS-SE	F999999
SW NSG 40G -#1	C-BBS-SW	F999999
SW NSG 40G -#2	C-BBS-SW	F999999
SW Hub TimeCreator DTI	C-BBS-SW	F999999

Exhibit A2.4 - Hub Site Equipment

NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: FXS2028Q44Y
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3CE
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3CE
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E34E
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2039E3ZX
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E166
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E685
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3BC
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3BC
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E1S5
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E2X1
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E163
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E1SN
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3DN
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3DN
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E1PP
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E07A
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E134
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E1XH
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3CC
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3CC
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E34P
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E4B1
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E169
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E0FM
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2036E1P1
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2036E1P1
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: MSA20320M4M
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2038E0UD
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E1H3
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: FLJ1920K00B
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: FLJ1920K00C
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E3K9
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2039E3AF
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2039E3AF
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: MSA20320M1X
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2039E393
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E1B8
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: AV801VN
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CSSLRH30252
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E3CD
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3HM
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3HM
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E08A
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E04Q

Exhibit A2.4 - Hub Site Equipment

NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E14A
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E0EF
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E39W
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E39W
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E04G
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E1RU
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E136
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E3YK
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3E6
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3E6
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E00V
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E03D
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E164
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E1Y7
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3HR
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E3HR
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E01E
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E032
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2044E165
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2042E176
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: DTM202800G5
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: DTM202800G0
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: DTM202800G1
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: DTM202800FZ
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: DTM202800G3
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: FXS203605YB
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: FXS203605Z1
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: FXS203605R2
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: FXS203605WH
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: FXS203605RP
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: FXS202600D4
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E2R9
NW DTN CBR8 - CMTS Router	C-BBS-NW	SN: CAT2043E2P2

Exhibit A2.4 - Hub Site Equipment

CNSE 10012A CMTS Router	C-BBS-SE	SN: SPE12290247
CNSE 10012A CMTS Router	C-BBS-SE	SN: CD160218013
CNSE 10012A CMTS Router	C-BBS-SE	SN: 13253104
CNSE 10012A CMTS Router	C-BBS-SE	SN: 13253092
CNSE 10012A CMTS Router	C-BBS-SE	SN: 13253116
CNSE 10012A CMTS Router	C-BBS-SE	SN: 13254664
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1834E0LR
CNSE 10012A CMTS Router	C-BBS-SE	SN: 07A40F03EC775CD4
CNSE 10012A CMTS Router	C-BBS-SE	SN: UNIGEN-000008016
CNSE 10012A CMTS Router	C-BBS-SE	SN: CD160218014
CNSE 10012A CMTS Router	C-BBS-SE	SN: 13253104
CNSE 10012A CMTS Router	C-BBS-SE	SN: 13253092
CNSE 10012A CMTS Router	C-BBS-SE	SN: 13253116
CNSE 10012A CMTS Router	C-BBS-SE	SN: 13254664
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT831E05H
CNSE 10012A CMTS Router	C-BBS-SE	SN: 07A302035113DBB7
CNSE 10012A CMTS Router	C-BBS-SE	SN: UNIGEN-000006989
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1252F04W
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1247E0WQ
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30531
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT110854SH
CNSE 10012A CMTS Router	C-BBS-SE	SN: FNS0830K310
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT11115DDG
CNSE 10012A CMTS Router	C-BBS-SE	SN: MDDSGTJ3036
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1449E0J2
CNSE 10012A CMTS Router	C-BBS-SE	SN: MG80T2734
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1441E1CP
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1413E0DW
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1510F098
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1424E0CH
CNSE 10012A CMTS Router	C-BBS-SE	SN: MDDSGTJ3028
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT10305YX9
CNSE 10012A CMTS Router	C-BBS-SE	SN: FNS0830K303
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1243E0NB
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30045
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1318E077
CNSE 10012A CMTS Router	C-BBS-SE	SN: XAN12D548566
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1552E0WP
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30445
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30619
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30587
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1647E0LO
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30243
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30711
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30779
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1644E18V

Exhibit A2.4 - Hub Site Equipment

CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30668
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30760
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30745
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1530E0LS
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30041
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30586
CNSE 10012A CMTS Router	C-BBS-SE	SN: CSGETG30568
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1716E05W
CNSE 10012A CMTS Router	C-BBS-SE	SN: XAN173274781
CNSE 10012A CMTS Router	C-BBS-SE	SN: XAN173274783
CNSE 10012A CMTS Router	C-BBS-SE	SN: CAT1716E03C
CNSE 10012A CMTS Router	C-BBS-SE	SN: XAN12D548562
CNSE 10012A CMTS Router	C-BBS-SE	SN: XAN12D548554
CNSE 10012A CMTS Router	C-BBS-SE	SN
CNSE 10012A CMTS Router	C-BBS-SE	SN
CNSE 10012A CMTS Router	C-BBS-SE	SN

Exhibit A2.4 - Hub Site Equipment

CNSW 10012A CMTS Router	C-BBS-SW	SN: SPE121001GC
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1633F0D8
CNSW 10012A CMTS Router	C-BBS-SW	SN:
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1523F0FT
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1523F0FT
CNSW 10012A CMTS Router	C-BBS-SW	SN:
CNSW 10012A CMTS Router	C-BBS-SW	SN:
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1320F046
CNSW 10012A CMTS Router	C-BBS-SW	SN: JAB112903K0
CNSW 10012A CMTS Router	C-BBS-SW	SN: KNJOHN94515
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1413E06U
CNSW 10012A CMTS Router	C-BBS-SW	SN: FNS1016K036
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1246E07A
CNSW 10012A CMTS Router	C-BBS-SW	SN: MDDSGTJ3021
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1432E07V
CNSW 10012A CMTS Router	C-BBS-SW	SN: AGM124523M5
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1422E0PH
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1443E084
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1421F0B8
CNSW 10012A CMTS Router	C-BBS-SW	SN: JAE114201JB
CNSW 10012A CMTS Router	C-BBS-SW	SN: NHRZR00025
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT11065L4U
CNSW 10012A CMTS Router	C-BBS-SW	SN: XAN12D548555
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1231E0KH
CNSW 10012A CMTS Router	C-BBS-SW	SN: MDDSGTJ3030
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1510E0ZK
CNSW 10012A CMTS Router	C-BBS-SW	SN: 12WR03202292
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1644E17Y
CNSW 10012A CMTS Router	C-BBS-SW	SN: XAN12D548557
CNSW 10012A CMTS Router	C-BBS-SW	SN: GR1307189574
CNSW 10012A CMTS Router	C-BBS-SW	SN: XAN12D548565
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1647E0GV
CNSW 10012A CMTS Router	C-BBS-SW	SN: CSGETG30026
CNSW 10012A CMTS Router	C-BBS-SW	SN: XAN12D548556
CNSW 10012A CMTS Router	C-BBS-SW	SN: XAN12D548570
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1647E0G1
CNSW 10012A CMTS Router	C-BBS-SW	SN: CSGETG30706
CNSW 10012A CMTS Router	C-BBS-SW	SN: CSGETG30641
CNSW 10012A CMTS Router	C-BBS-SW	SN: XAN173274787
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1448E09S
CNSW 10012A CMTS Router	C-BBS-SW	SN: MDDSGTJ3024
CNSW 10012A CMTS Router	C-BBS-SW	SN: MDDSGTJ3033
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1716E00A
CNSW 10012A CMTS Router	C-BBS-SW	SN: XAN12D548564
CNSW 10012A CMTS Router	C-BBS-SW	SN: XAN12D548553
CNSW 10012A CMTS Router	C-BBS-SW	SN: CAT1716E04M

Exhibit A2.4 - Hub Site Equipment

CNSW 10012A CMTS Router	C-BBS-SW	SN: MG80T3053
CNSW 10012A CMTS Router	C-BBS-SW	SN: MA1C5TPJL2389
CNSW 10012A CMTS Router	C-BBS-SW	SN:
CNSW 10012A CMTS Router	C-BBS-SW	SN:
CNSW 10012A CMTS Router	C-BBS-SW	SN:

Exhibit A2.4 - Hub Site Equipment

CNDTN9912A - DTN Core Router	C-DTN	SN: FOC2020N1TX
CNDTN9912A - DTN Core Router	C-DTN	SN: FCO2020N1T2
CNDTN9912A - DTN Core Router	C-DTN	SN: FOC2019NADG
CNDTN9912A - DTN Core Router	C-DTN	SN: 00000MTC1021002F
CNDTN9912A - DTN Core Router	C-DTN	SN: FNS0830J882
CNDTN9912A - DTN Core Router	C-DTN	SN: FNS1014K01V
CNDTN9912A - DTN Core Router	C-DTN	SN: FNS1011R2ER
CNDTN9912A - DTN Core Router	C-DTN	SN: MDDSGTJ3032
CNDTN9912A - DTN Core Router	C-DTN	SN: CSGETG30790
CNDTN9912A - DTN Core Router	C-DTN	SN: AGS1028L44M
CNDTN9912A - DTN Core Router	C-DTN	SN: 00000MTC102102KR
CNDTN9912A - DTN Core Router	C-DTN	SN: AGS1020L00E
CNDTN9912A - DTN Core Router	C-DTN	SN: AGM1116Q1EZ
CNDTN9912A - DTN Core Router	C-DTN	SN: AGS1028L448
CNDTN9912A - DTN Core Router	C-DTN	SN: AGS1025L0T9
CNDTN9912A - DTN Core Router	C-DTN	SN: AGS1028L447
CNDTN9912A - DTN Core Router	C-DTN	SN: AGM114721R8
CNDTN9912A - DTN Core Router	C-DTN	SN: AGM124525KW
CNDTN9912A - DTN Core Router	C-DTN	SN: FNS0830K302
CNDTN9912A - DTN Core Router	C-DTN	SN: EOPGAM550357
CNDTN9912A - DTN Core Router	C-DTN	SN: CSSLRGC1325
CNDTN9912A - DTN Core Router	C-DTN	SN: CD160627361
CNDTN9912A - DTN Core Router	C-DTN	SN: CD160817014
CNDTN9912A - DTN Core Router	C-DTN	SN: FOC2019NAEA
CNDTN9912A - DTN Core Router	C-DTN	SN: FNS1016J0J6
CNDTN9912A - DTN Core Router	C-DTN	SN: FNS1016J0F6
CNDTN9912A - DTN Core Router	C-DTN	SN: 00000MTC102102MY
CNDTN9912A - DTN Core Router	C-DTN	SN:MDDSGTJ3029
CNDTN9912A - DTN Core Router	C-DTN	SN: AGS101252KN
CNDTN9912A - DTN Core Router	C-DTN	SN: XAN173274789
CNDTN9912A - DTN Core Router	C-DTN	SN: EOPGAM550353
CNDTN9912A - DTN Core Router	C-DTN	SN: CSSLRGC1334
CNDTN9912A - DTN Core Router	C-DTN	SN: CD160627356
CNDTN9912A - DTN Core Router	C-DTN	SN: CD160817015
CNDTN9912A - DTN Core Router	C-DTN	SN: FOC2019NACM
CNDTN9912A - DTN Core Router	C-DTN	SN: EOPGAM550354
CNDTN9912A - DTN Core Router	C-DTN	SN: CD160817017
CNDTN9912A - DTN Core Router	C-DTN	SN: CD160627360
CNDTN9912A - DTN Core Router	C-DTN	SN: CSSLRH30297
CNDTN9912A - DTN Core Router	C-DTN	SN: FOC2232NTTT
CNDTN9912A - DTN Core Router	C-DTN	SN: G1806127892
CNDTN9912A - DTN Core Router	C-DTN	SN: G1806127891

Exhibit A2.4 - Hub Site Equipment

CNDTS9912A - DTS Core Router	C-DTS	SN: FOC2020N1U4
CNDTS9912A - DTS Core Router	C-DTS	SN: FOC2020N1U6
CNDTS9912A - DTS Core Router	C-DTS	SN: FOC2019NADF
CNDTS9912A - DTS Core Router	C-DTS	SN: XAN1BE967227
CNDTS9912A - DTS Core Router	C-DTS	SN: FNS11362179
CNDTS9912A - DTS Core Router	C-DTS	SN: ASZX00885
CNDTS9912A - DTS Core Router	C-DTS	SN: ASZX00905
CNDTS9912A - DTS Core Router	C-DTS	SN: XAN173274784
CNDTS9912A - DTS Core Router	C-DTS	SN: XAN1C7D33430
CNDTS9912A - DTS Core Router	C-DTS	SN: AGS1025LOTC
CNDTS9912A - DTS Core Router	C-DTS	SN: AGM114721SH
CNDTS9912A - DTS Core Router	C-DTS	SN: MG8072283
CNDTS9912A - DTS Core Router	C-DTS	SN: 12WR03202299
CNDTS9912A - DTS Core Router	C-DTS	SN: XAN12D548560
CNDTS9912A - DTS Core Router	C-DTS	SN: FNS1016J0J2
CNDTS9912A - DTS Core Router	C-DTS	SN: FR1307189575
CNDTS9912A - DTS Core Router	C-DTS	SN: MDDSGTJ3035
CNDTS9912A - DTS Core Router	C-DTS	SN: FR1307189578
CNDTS9912A - DTS Core Router	C-DTS	SN: FNSRMYPHQ2NTR
CNDTS9912A - DTS Core Router	C-DTS	SN: EOPGAM550358
CNDTS9912A - DTS Core Router	C-DTS	SN: CD160817020
CNDTS9912A - DTS Core Router	C-DTS	SN: CD160627354
CNDTS9912A - DTS Core Router	C-DTS	SN: CD160817019
CNDTS9912A - DTS Core Router	C-DTS	SN: FOC2019NACH
CNDTS9912A - DTS Core Router	C-DTS	SN: MDDSGTJ3025
CNDTS9912A - DTS Core Router	C-DTS	SN: XAN12D548552
CNDTS9912A - DTS Core Router	C-DTS	SN: FNS1016J0J4
CNDTS9912A - DTS Core Router	C-DTS	SN: FNS0830K316
CNDTS9912A - DTS Core Router	C-DTS	SN: FNS0829R6BS
CNDTS9912A - DTS Core Router	C-DTS	SN: EOPGAM550355
CNDTS9912A - DTS Core Router	C-DTS	SN: CSSLRH30247
CNDTS9912A - DTS Core Router	C-DTS	SN: CD160627357
CNDTS9912A - DTS Core Router	C-DTS	SN: CD160627359
CNDTS9912A - DTS Core Router	C-DTS	SN: FOC2019NABZ
CNDTS9912A - DTS Core Router	C-DTS	SN: CD160817016
CNDTS9912A - DTS Core Router	C-DTS	SN: CD160817018
CNDTS9912A - DTS Core Router	C-DTS	SN: CD160627358
CNDTS9912A - DTS Core Router	C-DTS	SN: CD160720588
CNDTS9912A - DTS Core Router	C-DTS	SN: FOC2118NG9X

Exhibit A2.4 - Hub Site Equipment

CNNE 10012A CMTS Router	C-BBS-NE	SN: SPE132801G0
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1424F05T
CNNE 10012A CMTS Router	C-BBS-NE	SN:
CNNE 10012A CMTS Router	C-BBS-NE	SN:
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1442F06N
CNNE 10012A CMTS Router	C-BBS-NE	SN:
CNNE 10012A CMTS Router	C-BBS-NE	SN:
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1619FOR2
CNNE 10012A CMTS Router	C-BBS-NE	SN: JAE12034XFQ
CNNE 10012A CMTS Router	C-BBS-NE	SN: FNS12021CS9
CNNE 10012A CMTS Router	C-BBS-NE	SN: FNS11362166
CNNE 10012A CMTS Router	C-BBS-NE	SN: ACNXCSZJL1207
CNNE 10012A CMTS Router	C-BBS-NE	SN: ASZX00906
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1424E0AX
CNNE 10012A CMTS Router	C-BBS-NE	SN: FNSRMYPHQ2NTN
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1318E0AM
CNNE 10012A CMTS Router	C-BBS-NE	SN: XAN12D548563
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1337E0SY
CNNE 10012A CMTS Router	C-BBS-NE	SN: FNS0830K311
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1451E09B
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1444E0FL
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1503F08U
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1219E05Q
CNNE 10012A CMTS Router	C-BBS-NE	SN: MDDSGTJ3031
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1219E073
CNNE 10012A CMTS Router	C-BBS-NE	SN: MDDSGTJ3019
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1219E18P
CNNE 10012A CMTS Router	C-BBS-NE	SN: XAN1BE967226
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1216E0X1
CNNE 10012A CMTS Router	C-BBS-NE	SN: XAN12D548561
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1816E06V
CNNE 10012A CMTS Router	C-BBS-NE	SN: XAN1BE967225
CNNE 10012A CMTS Router	C-BBS-NE	SN: XAN1BE967345
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1605E0QZ
CNNE 10012A CMTS Router	C-BBS-NE	SN: CAT1331E0KX
CNNE 10012A CMTS Router	C-BBS-NE	SN:
CNNE 10012A CMTS Router	C-BBS-NE	SN:
CNNE 10012A CMTS Router	C-BBS-NE	SN:

## EXHIBIT A3

### HUB SITES LICENSE

#### Section 1: Locations subject to License:

##### SW Hub – 4102 South 74<sup>th</sup> Street, Tacoma WA 98409

4,446 Sq. Ft fenced area.  
800 Sq. Ft building with HVAC system and generator backup power.

##### SE Hub – 6301 East “N” Street, Tacoma WA 98404

2,783 Sq. Ft fenced area.  
800 Sq. Ft building with HVAC system and generator backup power.

##### NW Hub – 2402 Pearl Street, Tacoma WA 98406

13,363 Sq. Ft fenced area.  
800 Sq. Ft building with HVAC system and generator backup power.

##### NE Hub – 2431 Alexander Ave E., Fife WA 98424

2,175 Sq. Ft fenced area.  
800 Sq. Ft building with HVAC system and generator backup power.

##### DTS Hub – 2422 Commerce Street, Tacoma WA 98402

15,912 Sq. Ft fenced area.  
1080 Sq. Ft building with HVAC system and generator backup power.

##### DTN Hub – 1111 South Altheimer & S. Tacoma Way, 98405

7,024 Sq. Ft fenced area.  
882 Sq. Ft building with HVAC system and generator backup power.

#### Section 2: Access and Permitted Use

(a) Operator shall have independent, 24-hour access from the nearest public right-of-way over Tacoma Power’s real property to each of the six secured Hub Site locations and buildings listed in Section 1 above. The Hub Site locations are located adjacent to Tacoma Power’s substations and can be entered through a locked gate without entering the substations. The Hub Site buildings are accessed through a locked card key access door. Operator employees and contractors will need authorization from Tacoma Power to obtain card keys for access.

(b) Operator may use parking within the fenced area of a Hub Site location if it is available. Operator may also use off-street parking on Tacoma Power real property immediately outside the fenced area if available to temporarily park vehicles when accessing the Hub Site locations.

(c) Operator shall use the Hub Sites solely for the purpose of maintaining and utilizing existing Tacoma Power Commercial Fiber, Tacoma Power Commercial Coax, and Tacoma Power Commercial Equipment and other personal property made available to Operator, for the installation, maintenance and use of After-Installed Assets pursuant to the terms of this Exhibit and the IRU Agreement, and to fulfil its maintenance obligations under Section 3 below. These Hub Sites shall not be used for storage of materials or tools or decommissioned or failed equipment or for co-location of third-party equipment.

(d) Operator shall have use of all existing racks in the Hub Site, other than those reserved for the City of Tacoma Institutional Network and Tacoma Power. Racks reserved for City of Tacoma Institutional Network and for Tacoma Power, as well as the numbered racks available for Operator's use, are identified for each Hub Site on **Exhibit A3.1**. Operator may add racks within each of the Hub Sites in the open areas shown in **Exhibit A3.1**. Each Party shall have joint use of the Hub Sites and shall use appropriate lockable racks for housing of equipment it uses or install a secure cage. In either event, each Party shall be responsible for the security of the equipment it uses only.

(e) Operator shall not interfere, or allow the operation of Tacoma Power Commercial Equipment it uses to interfere, with Tacoma Power or any other occupants of the Hub Sites.

### **Section 3: Maintenance Responsibilities**

(a) Tacoma Power shall be responsible for maintaining, at its cost, the Hub Site exterior fence, the grounds of the fenced area, the structural elements of the buildings, and the exterior and roof of buildings as well as the electrical and any plumbing systems serving the building, the secured access system, security cameras and door and fire alarms which are monitored by Tacoma Power's contract security team.

(b) Operator shall not make physical alterations to the structural elements of the fences or buildings or alter the external paint color scheme without the prior written consent from Tacoma Power.

(c) Operator shall be responsible for maintaining according to manufacturers' specifications, and replacing, at its cost, the following ancillary systems and equipment at the Hub Sites:

(i) HVAC sufficient to maintain an ambient temperature of 65° F and relative noncondensing humidity. Operator's maintenance will include recorded periodic HVAC inspection, filter replacement, equipment repair or replacement as needed.

(ii) Fire suppression system, either sprinkler system or other system that conforms to local, state, and federal laws and regulations.

(iii) Backup batteries, power supplies, or emergency generation to support all users of the Hub Site, including Tacoma Power and the City of Tacoma Institutional Network. Operator will be responsible for ongoing fueling, operations, maintenance, monitoring, repair, and replacement of this equipment. If Operator needs to perform upgrades to back up power equipment outside of any Hub Site building requiring more space than currently utilized within the Hub Site location, it will notify Tacoma Power. The Parties will work together to accommodate a solution that is both secure and accessible to Operator.

**Exhibit A3.2** lists the existing ancillary systems and equipment at the Hub Sites.

(a) Operator shall be responsible for general maintenance within the Hub Site buildings including lighting and bulb replacement, janitorial services, waste removal and sweeping, mopping, and polishing of floors to maintain cleanliness. Operator shall further be responsible for replacing or repairing, to the reasonable satisfaction of Tacoma Power, any damage caused to the Hub Sites arising from the activities of Operator.

#### **Section 4: Commercial Power**

(a) The Hub Sites have the power feeds depicted in **Exhibit A3.1**.

(b) Operator shall be responsible for the cost of commercial power for the Hub Site buildings and equipment pursuant to a separate power service contract with Tacoma Power. If Operator needs additional power or any changes to existing power feeds at any Hub Site, such requests shall be made pursuant to that separate power service contract.

#### **Section 5: Term.**

This license is coterminous with the IRU Agreement. Upon the termination of the license, any and all improvements made by Operator (including any replacements of ancillary systems and equipment) shall become the property of Tacoma Power.

**Section 6: Defaults.** Failure to comply with this Exhibit A3 is a Default.

**EXHIBIT A3.1**  
**HUB SITE DRAWINGS**

*[CONTENT ON ACCOMPANYING USB DRIVE]*

**EXHIBIT A3.2**  
**HUB SITE ANCILLARY SYSTEMS**

## Exhibit A3.2 - Ancillary Systems

### Hub Sites & Head End

Hub	Item	Description	Note
C-BBS-NW	AC Unit	4ea 3 ton Mitsubishi Mr. slims with ceiling cassette indoor units	
C-DTN	AC Unit	2ea 6 ton bards with 1ea 2 ton Trane HP as backup	
C-DTS	AC Unit	2ea 3 ton Mitsubishi Mr. slims with wall mount indoor units	
C-BBS-SE	AC Unit	2ea 2 ton Trane HP	
C-BBS-SW	AC Unit	2ea 2 ton Trane Hp	
C-BBS-NW	Fire Suppression System	Fike, Model 10-063 Series	
C-DTN	Fire Suppression System	Fike, Model 10-063 Series	
C-DTS	Fire Suppression System	Fike, Model 10-063 Series	
C-BBS-SE	Fire Suppression System	Fike, Model 10-063 Series	
C-BBS-SW	Fire Suppression System	Fike, Model 10-063 Series	
C-BBS-NW	Generator Set + ATS	CAT D50P1	
C-DTN	Generator Set + ATS	CAT D50P1	
C-DTS	Generator Set + ATS	CAT D50P1	
C-BBS-SE	Generator Set + ATS	CAT D50P1	
C-BBS-SW	Generator Set + ATS	CAT D50P1	
Head End	Generator Set	Cummins OSM11-G4 NR3, Engine ID # 35276711, Tank is 500 gallon model 45066	pdf contains more detail
Head End	Fire Suppression System	Chemetron Micro-1012 Fire System ID 09572 (serial number NA)	
Head End	Fire Suppression System	FIKE Model 10-052 Series, Fire system ID 09573 serial number 971040005	
Head End	LAF Exide GT-31		One Flooded Battery String
C-DTN	VRLA GNB Absolyte IIP 24-90A13	Hub String #1	external battery
C-DTN	VRLA GNB Absolyte IIP 24-90A13	Hub String #2	external battery
C-DTN	VRLA GNB Absolyte IIP 24-90A13	Hub String #3	external battery
C-DTS	VRLA GNB Absolyte IIP 520AH 24-90A13	Hub String #1	external battery
C-DTS	VRLA GNB Absolyte IIP 520AH 24-90A13	Hub String #2	external battery
C-BBS-NE	VRLA GNB Absolyte IIP 24-90A13	Click! NE Hub String #1	external battery
C-BBS-NE	VRLA GNB Absolyte IIP 24-90A13	Click! NE Hub String #2	external battery
C-BBS-NW	VRLA GNB Absolyte IIP 24-90A13	Click! NW Hub String #1	external battery
C-BBS-NW	VRLA GNB Absolyte IIP 24-90A13	Click! NW Hub String #2	external battery
C-BBS-NW	VRLA GNB Absolyte IIP 24-90A13	Click! NW Hub String #3	external battery
C-BBS-SE	VRLA GNB Absolyte IIP 24-90A13	Click! SE Hub String #1	external battery
C-BBS-SE	VRLA GNB Absolyte IIP 24-90A13	Click! SE Hub String #2	external battery
C-BBS-SW	VRLA GNB Absolyte IIP 24-90A13	Click! SW Hub String #1	external battery
C-BBS-SW	VRLA GNB Absolyte IIP 24-90A13	Click! SW Hub String #2	external battery
C-DTN	INEX 48V 1.5K VA-1200W/Cordex CXRF 48-3.6kW 208-277 VAC		Invertor/Rectifier
C-DTS	INEX 48V 1.5K VA-1200W/Cordex CXRF 48-3.6kW 208-277 VAC		Invertor/Rectifier

Exhibit A3.2 - Ancillary Systems

C-BBS-NE	INEX 48V 1.5K VA-1200W/Cordex CXRF 48-3.6kW 208-277 VAC		Invertor/Rectifier
C-BBS-NW	INEX 48V 1.5K VA-1200W/Cordex CXRF 48-3.6kW 208-277 VAC		Invertor/Rectifier
C-BBS-SE	INEX 48V 1.5K VA-1200W/Cordex CXRF 48-3.6kW 208-277 VAC		Invertor/Rectifier
C-BBS-SW	INEX 48V 1.5K VA-1200W/Cordex CXRF 48-3.6kW 208-277 VAC		Invertor/Rectifier
Head End	INEX 48V 1.5K VA-1200W/Cordex CXRF 48-3.6kW 208-277 VAC		Invertor/Rectifier

**EXHIBIT A4**  
**CONDUIT SPACE LICENSE**

Capitalized terms used herein but not defined shall have the meanings assigned to them in the IRU Agreement.

**BACKGROUND**

- A. Tacoma Power is the owner of existing conduit located on real property and within public rights-of-way which is occupied in whole or in part by the Tacoma Power Commercial System or which is unoccupied but located within the Tacoma Power Commercial Service Area, all as depicted in Exhibit A2.2 to the IRU Agreement (“Conduit System”).
- B. Pursuant to the IRU Agreement, Operator has been granted an IRU in those portions of the Conduit System that are specified in the definitions of Tacoma Power Commercial Coax and the Tacoma Power Commercial Fiber.
- C. In connection with the grant of the IRU described in the IRU Agreement, Tacoma Power is willing to provide Operator with a non-exclusive license to occupy and use the unoccupied space in the portions of the Conduit System on Critical Routes, except for those portions of the Conduit System described in **Exhibits A4.1** and **A4.2** hereto (“Excluded Conduit”) for the purposes described hereinbelow (“Licensed Conduit Space”).

**ARTICLE 1**

**LICENSE**

1.1 Tacoma Power grants Operator a non-exclusive license (“License”) to occupy and make use of the Licensed Conduit Space in order to install After-Installed Assets and otherwise to fulfill its obligations set forth in the IRU Agreement. A separate license shall be required for Operator to occupy or use the Licensed Conduit Space for any purpose not specifically contemplated by this License or the IRU Agreement.

1.2 It is understood and agreed that Tacoma Power shall maintain legal title to the Conduit System, subject to the License granted herein in the Licensed Conduit Space, and the terms of the IRU Agreement. This License is not intended to nor shall it be interpreted to create or vest in Operator any leasehold, easement, or any other property rights or interests in the Licensed Conduit Space, the Conduit System, or any part thereof.

## **ARTICLE 2**

### **TERM**

2.1 This License is coterminous with the IRU Agreement. Upon the termination of this License, all rights of Operator to use the Licensed Conduit Space, or any part thereof, shall cease except to the extent allowed during the Post-Termination Period pursuant to the Continuity of Services Commitments in Exhibit O to the IRU Agreement.

## **ARTICLE 3**

### **LICENSED CONDUIT SPACE ACCESS AND USE**

3.1 Access to Licensed Conduit Space for installation and maintenance of any After-Installed Assets placed in Licensed Conduit Space is governed by the terms and conditions set forth in Exhibits B, C and D of the IRU Agreement.

3.2 Operator agrees to use the Licensed Conduit Space only in a manner consistent with the Underlying Rights and Use Restrictions, and that its rights shall in all respects be subject to the terms and conditions of the Underlying Rights and Use Restrictions. Operator agrees not to cause or allow to be caused any default under the Underlying Rights or Use Restrictions.

3.3 Operator shall not use the Licensed Conduit Space in a way that interferes in any way with or adversely affects the use of the fibers or cable of any other person using the Conduit System. Operator acknowledges that the Conduit System includes or will include other participants, including Tacoma Power and other owners and users of telecommunication systems.

3.4 Operator shall be responsible for the proper design of its cable and other equipment that occupies the Licensed Conduit Space.

3.5 Except as provided in Section 7 of the IRU Agreement, Operator at its sole cost and expense, shall obtain and maintain any and all necessary easements, licenses, and building access agreements, as well as all governmental permits, licenses, easements, franchises and approvals that may lawfully be required by federal, state or local law, statute, regulation or ordinance and shall continuously comply with all such laws, statutes, regulations, or ordinances as may now or in the future be applicable to (1) its use of the Licensed Conduit Space; and (2) Operator's other rights and obligations under this License.

3.6 Tacoma Power's right to relocate all or any portion of the Conduit System, or any of the facilities used or required in providing Operator with this License, shall be governed by Section 13 of the IRU Agreement.

## **ARTICLE 4**

### **LICENSED CONDUIT SPACE**

4.1 Operator may not transfer or assign all or any part of its interest in this License or in the Licensed Conduit Space, in whole or in part, except in connection with the transfer or assignment of the IRU Agreement and subject to the requirements of Section 29 of the IRU Agreement.

## **ARTICLE 5**

### **DEFAULTS**

5.1 Failure to comply with this Exhibit A4 is a Default.

## **ARTICLE 6**

### **NO WARRANTIES**

6.1 NOTWITHSTANDING ANY EXAMINATION OR INSPECTION MADE BY OPERATOR AND WHETHER OR NOT ANY PATENT OR LATENT DEFECT OR CONDITION WAS REVEALED OR DISCOVERED THEREBY, OPERATOR UNDERSTANDS IT IS OBTAINING USE OF THE LICENSED CONDUIT SPACE UNDER THIS LICENSE "AS IS" IN ITS CONDITION AS OF THE EFFECTIVE DATE. OPERATOR HEREBY WAIVES AND RELEASES ANY CLAIM OR ACTION AGAINST TACOMA POWER IN RESPECT OF OR RELATED TO THE CONDITION OF THE CONDUIT SYSTEM, INCLUDING ANY DEFECTS OR ADVERSE CONDITIONS NOT DISCOVERED OR OTHERWISE KNOWN BY OPERATOR AS OF THE EFFECTIVE DATE.

6.2 TACOMA POWER MAKES NO WARRANTY TO OPERATOR OR ANY OTHER ENTITY, WHETHER EXPRESS, IMPLIED, OR STATUTORY, AS TO THE INSTALLATION, DESCRIPTION, QUALITY, MERCHANTABILITY, USEFUL LIFE, FUTURE ECONOMIC VIABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY LICENSED CONDUIT SPACE, OR AS TO ANY OTHER MATTER, ALL OF WHICH WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED.

**EXHIBIT A4.1**  
**EXCLUDED CONDUIT (DOWNTOWN)**

Conduit housing Tacoma Power Commercial Fiber in the downtown corridor which is accessed via energized vaults as shown in Exhibit A4.1.

*[CONTENT ON ACCOMPANYING USB DRIVE]*

**EXHIBIT A4.2**  
**EXCLUDED CONDUIT (SOUTH)**

Innerduct and conduit in the Pacific fiber link portion of the Loveland (South) route as shown in Exhibit A4.2.

*[CONTENT ON ACCOMPANYING USB DRIVE]*

## **EXHIBIT A5 IP ACCEPTABLE USE POLICY**

### **Prohibited End User Activity**

Operator will use commercially reasonable efforts to create, maintain, publish and enforce a Customer Acceptable Use Policy for any of its customers who are permitted to use the IP addresses. Operator's Customer Acceptable Use Policy will require (i) end users connect systems to the Tacoma Power Commercial Network are free from viruses and other malware, (ii) end users will not use the assigned IP addresses to send unsolicited bulk or commercial messages, (iii) end users do not engage in activity that will improperly restrict or inhibit any other end user's normal use of the services, (iv) end users do not resell, share, or otherwise distribute the service or any portion thereof to any third party outside the physical location where the service is provided, (v) end users do not provide Internet access to others through a dial up connection, hosting of shell accounts over the Internet, distribution through wireless services, providing e-mail or news services, or news feeds, (vi) end users do not run programs or servers, which provide network services to others via the Tacoma Power Commercial Network, and (vii) end users do not host multi-user interactive services such as Web Hosting, E-mail hosting, or game servers or forums, etc.

### **Prohibited Use or Inquiries**

Operator will receive and respond to incoming abuse or network inquiries associated with the IP addresses assigned under the IRU. Incoming abuse or network inquiry may be delivered to Operator by e-mail or by other means and inquiries may include but not be limited to:

1. Copyright infringement allegations
2. Spam allegations
2. Non-impacting but potentially malicious activity (for example, port scanning or botnet participation)
3. Network impacting activity
4. Subpoena / warrant information requests

Operator will daily monitor for incoming abuse or network inquiries. Operator will respond to any incoming abuse allegations with a system of escalation for each subscriber beginning with a warning, then continuing to blockings (soft disconnects) and culminating with disconnection of service for end users who are not complying with the corrective actions requested by Operator.

Subpoena/warrant information requests will be completed and returned to the requesting agency by Operator under the Operator's standard procedures acceptable to receipt of such documents, but will be returned no later than in the time allotted by the requesting agency (provided the proper documents have been submitted in the proper form and manner).

Operator will assume all responsibility for loss of use or interruption of use of Tacoma Public Utilities or City of Tacoma's Class B IP Address range arising out of Operator's use of the IP addresses assigned under the IRU Agreement under Section 2(c) of the IRU Agreement.

**Return of IP Addresses**

Use of the assigned IP addresses is coterminous with the IRU Agreement, unless use of IP addresses is terminated early pursuant to Section 2(c) of the IRU Agreement. The IP Acceptable Use obligations contained in this Exhibit will terminate upon return to and receipt by Tacoma Power of all of the IP addresses assigned under the IRU Agreement.

**Defaults.**

Failure to comply with this Exhibit A5 is a Default.

**EXHIBIT A6  
HEADEND LICENSE**

**ARTICLE I**

**DEFINITIONS**

1.1 Definitions. Capitalized terms not otherwise defined in the text of this Exhibit will have the meanings ascribed to them in the IRU Agreement.

**ARTICLE II**

**TERM**

2.1 Term. The term of the license granted by this Exhibit (the "Term") shall commence on the Effective Date and continue for a period of five (5) years, unless earlier terminated by either Party in accordance with the terms of this Exhibit.

**ARTICLE III**

**LICENSE TO USE HEADEND SITE**

3.1 Headend Site. During the Term, TACOMA POWER grants OPERATOR a license to use and occupy the 1412 Sq. Ft building located at 3628 S. 35th St., Tacoma, WA 98409 and rooftop access to satellite dishes depicted in **Exhibit A6.1** hereto ("Headend Site") solely for the purpose of operating and maintaining the Headend Equipment listed in **Exhibit A6.2**, subject to the terms and conditions of this Exhibit.

3.2 OPERATOR shall have 24-hour access to the Headend Site in accordance with the standard access and security policies and procedures established by TACOMA POWER.

3.3 OPERATOR shall have use of all existing space in the Headend Site, except for Comm Shop Room separated and designated for use by TACOMA POWER. The Headend Site shall not be used for storage of tools, supplies or decommissioned or failed equipment.

3.4 Maintenance Responsibilities

3.4.1 TACOMA POWER shall be responsible for maintaining, at its cost, the exterior of the Headend Site as well as security cameras and doors and fire alarms which are monitored by TACOMA POWER's contract security team.

3.4.2 TACOMA POWER shall be responsible for maintaining backup batteries, power supplies, or emergency generation to support all users of the Headend Site. TACOMA POWER will be responsible for ongoing fueling, operations, maintenance, monitoring, repair, and replacement of this power equipment, including any upgrades to back up power equipment.

3.4.3 OPERATOR shall not make physical alterations to the structural elements of the Headend Site or alter the external paint color scheme.

3.4.4 OPERATOR shall be responsible for maintaining, at its cost, the following at the Headend Site:

- (i) HVAC sufficient to maintain an ambient temperature of 65° F and relative noncondensing humidity.
- (ii) Fire suppression system, either sprinkler system or other system that conforms to local, state, and federal laws and regulations.

3.5 OPERATOR's maintenance of the Headend Site will include recorded periodic HVAC inspection, filter replacement, equipment repair or replacement as needed.

3.6 OPERATOR's maintenance of the Headend Site will include general maintenance of floors such as sweeping, mopping and polishing to maintain cleanliness.

### 3.7 Default and Termination

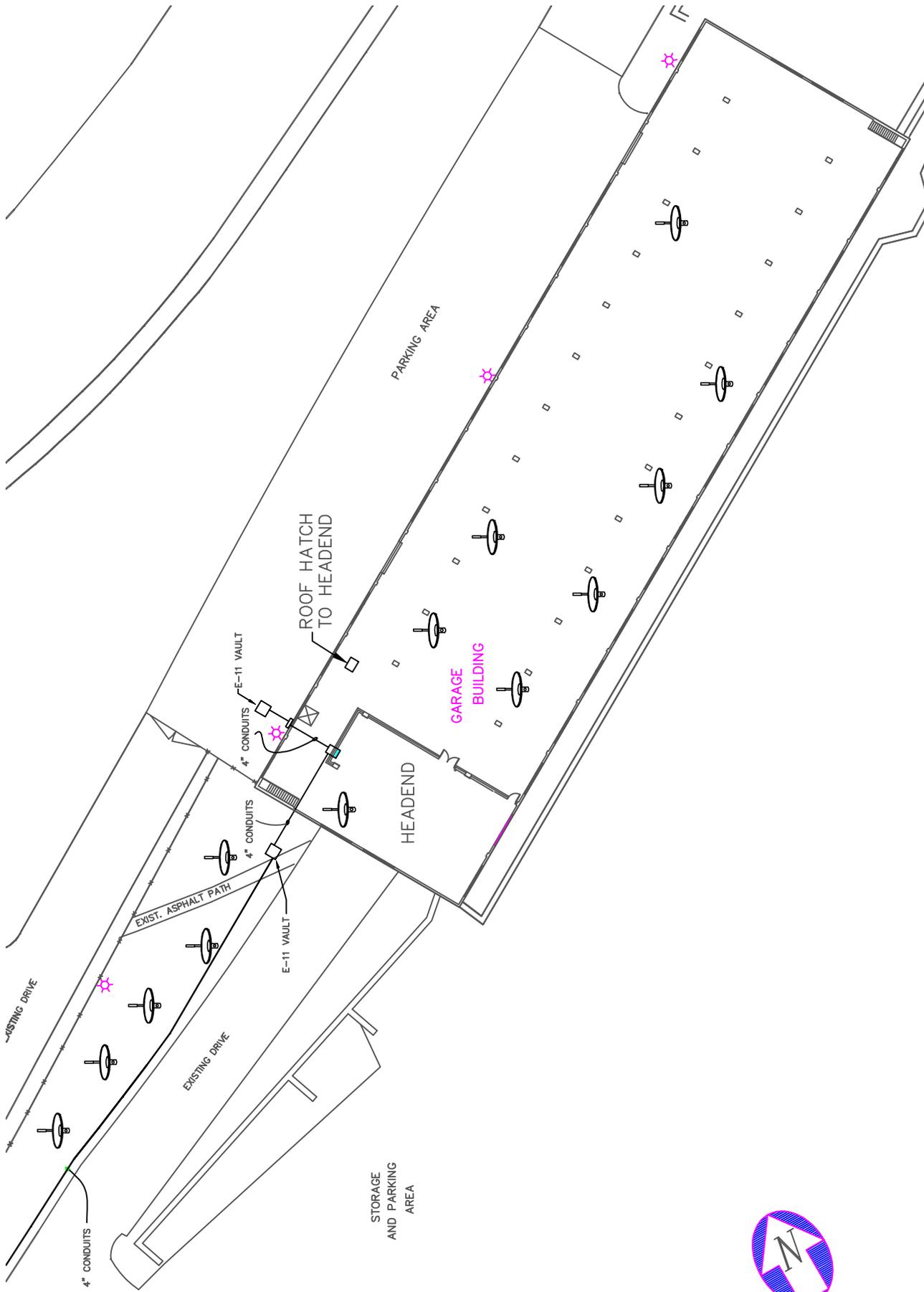
3.7.1 Events of Default. Failure to comply with this Exhibit is a Default.

3.7.2 Action on Failure to Cure. Upon the failure by the defaulting Party to cure any Default, the non-defaulting Party may: (i) pursue any remedies it may have under the IRU Agreement or applicable law or in equity relating to such Default; and (ii) terminate the license granted by this Exhibit.

3.7.3 Termination by Operator. OPERATOR may terminate the license granted by this Exhibit upon thirty (30) calendar days' written notice to TACOMA POWER.

3.8 Removal of Headend Equipment. Upon termination of the license granted by this Exhibit for any reason, OPERATOR shall safely remove all Headend Equipment (excluding racks, enclosures and satellite dishes) and leave the Headend Site clear of any debris or damage, reasonable wear and tear excepted.

**EXHIBIT A6.1**  
**HEADEND SITE DRAWING**



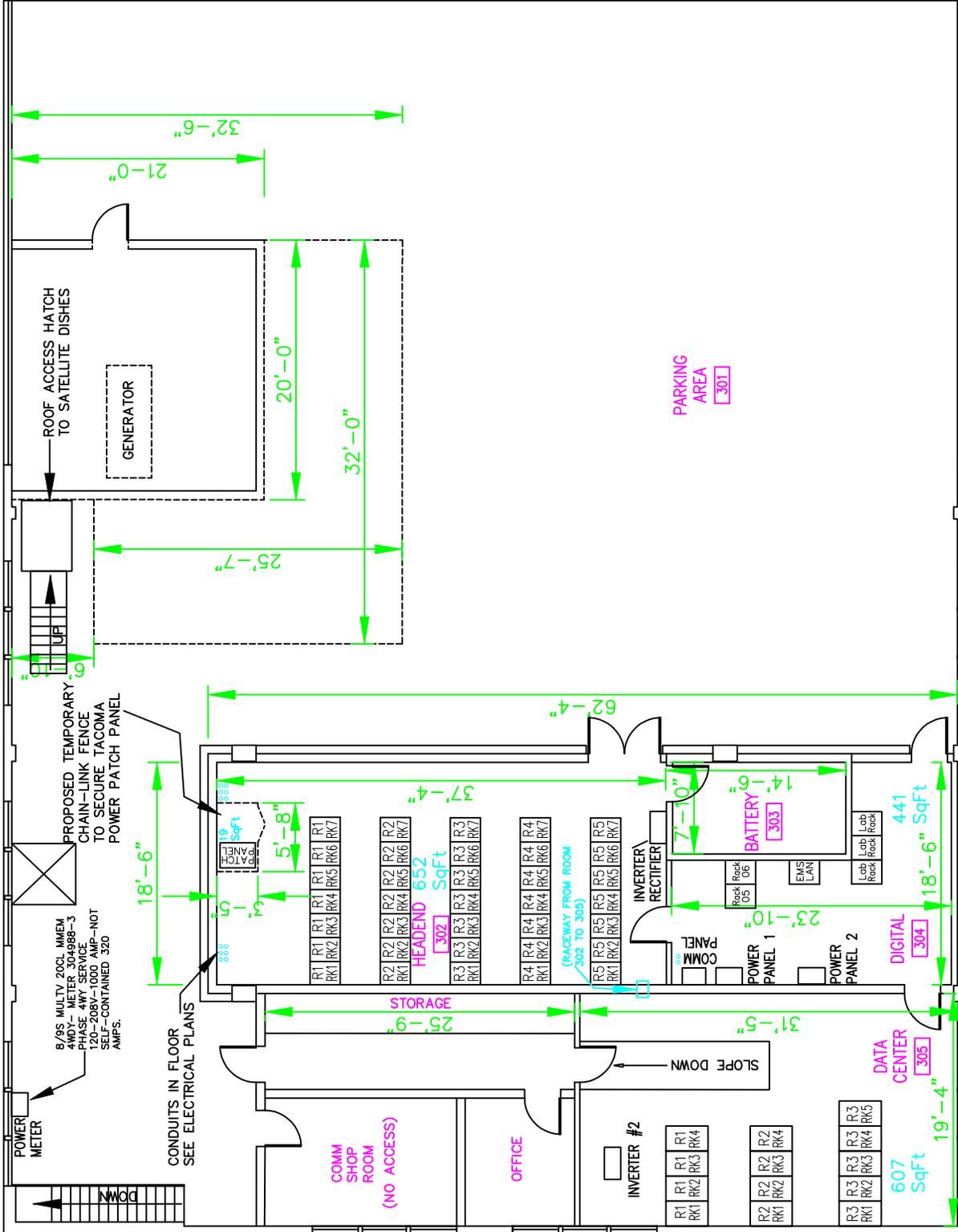
Headend  
Property View

 TACOMA PUBLIC UTILITIES	DATE	CIP	MODE	POWER REF D
	09/10/19			





# THIRD FLOOR



## Headend Building View

TACOMA POWER TACOMA PUBLIC UTILITIES	DATE 09/10/19	DRAWN	CIP	NODE	POWER REF D
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**EXHIBIT A6.2  
HEADEND EQUIPMENT**

# Exhibit A6.2 - Headend Equipment

Headend Equipment				
Description	Serial Number	Object Type	Manufacturer	
XMA VOD Server - VOD On Demand	RQNNABV	EG001315 - Aud/Video Server	Arris	
Disney/ESPN Catcher Server		EG001315 - Aud/Video Server	HP	
MC Management Console	KQDMMVWV	EG001315 - Aud/Video Server	IBM	
VOD Server Chassis Nvision #1	Nvision #1	EG001315 - Aud/Video Server	Arris	
VOD Server Chassis Nvision #2	Nvision #2	EG001315 - Aud/Video Server	Arris	
VOD Server Chassis Nvision #3	Nvision #3	EG001315 - Aud/Video Server	Arris	
VOD Server Chassis Nvision #4	Nvision #4	EG001315 - Aud/Video Server	Arris	
VOD Server Chassis Nvision #5	Nvision #5	EG001315 - Aud/Video Server	Arris	
VOD Server Local On-Demand	FM 644220098	EG001315 - Aud/Video Server	Sun Microsystems	
CMC Digital Data Receiver	F9999999	EG001136 - Receiver	International DataCasting	
CMC Digital Data Receiver	F9999999	EG001136 - Receiver	International DataCasting	
Video Satellite Rcvr - Velocity HD	F9999999	EG000830 - Optical Receiver	Arris	
Video Satellite Rcvr - ShoNext HD	F9999999	EG000830 - Optical Receiver	Motorola	
Matrix HE - Environmental Monitor	HE - Webmon	EN000040 - Master Controller	Dantel	
Advance Rcvr Transcoder - NBC Univer	F9999999	EG001136 - Receiver	Cisco	
Advance Rcvr Transcoder - Sundance HD	F9999999	EG001136 - Receiver	Cisco	
Pro Sat Rcvr - ShoTime/TMC HD	F9999999	EG001136 - Receiver	Motorola	
Advance Rcvr Transcoder - HGTV/Food HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Sat Rcvr - Encore Esp	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Rcvr - Nat Geo HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Rcvr - Pixl HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Rcvr - Discovery HD	F9999999	EG001136 - Receiver	Motorola	
Advance Rcvr Transcoder - Travel HD	F9999999	EG001136 - Receiver	Cisco	
TWC SD Intellistar Receiver	F9999999	EG001136 - Receiver	Intellistar	
Spare - Satellite Receiver	F9999999	EG001136 - Receiver	Motorola	
Commercial Integrated Sat Rcvr	F9999999	EG001136 - Receiver	Arris	
Satellite Rcvr Video Cipher	F9999999	EG001136 - Receiver	Scientific Atlanta	
Satellite Rcvr Multiplex/Decrypter	F9999999	EG001136 - Receiver	General Instruments	
Satellite Integrated Rcvr/Transcoder	F9999999	EG001136 - Receiver	Motorola	
Advanced Rcvr/Transcoder QVC HD	F9999999	EG001136 - Receiver	Cisco	
Advanced Rcvr/Transcoder Outside TV	F9999999	EG001136 - Receiver	Cisco	
Advanced Rcvr/Transcoder A&E HD	F9999999	EG001136 - Receiver	Cisco	
Advanced Rcvr/Transcoder A&E SD	F9999999	EG001136 - Receiver	Cisco	
Pro Satellite Receiver - ESPN HD	F9999999	EG001136 - Receiver	Motorola	
Advanced Rcvr/Transcoder Root HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver - ESPN SD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - ESPN2	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - ESPN News	F9999999	EG001136 - Receiver	Motorola	
Advanced Rcvr/Transcoder AMC HD	F9999999	EG001136 - Receiver	Cisco	
Multi Decryption Receiver - AMC SD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver - FX HD	F9999999	EG001136 - Receiver	Motorola	
Advanced Rcvr/Transcoder Starz	F9999999	EG001136 - Receiver	Motorola	
Commercial Integrated Sat Rcvr	F9999999	EG001136 - Receiver	Arris	
TWC SD Intellistar Receiver	F9999999	EG001136 - Receiver	Intellistar	
Sat Receiver Multiplex/Decrypter	F9999999	EG001136 - Receiver	Motorola	
Advanced Rcvr/Transcoder Hallmark SD	F9999999	EG001136 - Receiver	Cisco	
Program Receiver	F9999999	EG001136 - Receiver	Scientific Atlanta	
Advanced Rcvr/Transcoder Golf HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Sat Receiver Multiplex/Decrypter	F9999999	EG001136 - Receiver	Motorola	
HDTV Receiver/Decoder	F9999999	EG001136 - Receiver	KTECH	
Pro Satellite Receiver - SyFy HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - BET SD	F9999999	EG001136 - Receiver	Motorola	
Integrated Receiver/Decoder	F9999999	EG001136 - Receiver	Harmonic	
Advanced Rcvr/Transcoder CBUT HD	F9999999	EG001136 - Receiver	Cisco	
Network Transport Receiver	F9999999	EG001136 - Receiver	Cisco	
Pro Satellite Receiver	F9999999	EG001136 - Receiver	Motorola	
Program Receiver - Classic Arts	F9999999	EG001136 - Receiver	Scientific Atlanta	
Program Receiver - Fox Business SD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver - Fox Business HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - Fox HD	F9999999	EG001136 - Receiver	Motorola	
Program Receiver - QVC SD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Multi Decryption Receiver - Intl Net	F9999999	EG001136 - Receiver	Cisco	
Advanced Rcvr/Transcoder Golf HD	F9999999	EG001136 - Receiver	Cisco	
Advanced Rcvr/Transcoder Lifetime & LMN HD	UA 5987780-6	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver - Discovery HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - ABC SD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - Disney SD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - Disney HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - CBS Sports SD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - Big Ten HD	F9999999	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - BET Soul HD/MTV2	2054812109005730	EG001136 - Receiver	Motorola	
Pro Satellite Receiver - HBO HD	F9999999	EG001136 - Receiver	Arris	
Pro Satellite Receiver - FS1 HD	F9999999	EG001136 - Receiver	Motorola	
Program Receiver - Fox News SD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver - Fox News HD	F9999999	EG001136 - Receiver	Motorola	
Advanced Program Receiver - WGN SD	36138021976	EG001136 - Receiver	Cisco	
Advanced Program Receiver - TVN PPV	F9999999	EG001136 - Receiver	Cisco	
Multi Decryption Receiver - Fox Sports HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Program Receiver - HSN HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Pro Satellite Receiver	F9999999	EG001136 - Receiver	Arris	
Program Receiver - Golf HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Multi Decryption Receiver - Hallmark HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Adv Receiver Transcoder - E! HD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Satellite Receiver	F9999999	EG001136 - Receiver	Arris	
Program Receiver - KSTW SD	F9999999	EG001136 - Receiver	Scientific Atlanta	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
Splitter/Combiner Directional Coupler	F9999999	EG000760 - Multiplexer	Universal	
TWC SD Intellistar Receiver	F9999999	EG001136 - Receiver	Chaparral	
Commercial Integrated Sat Rcvr	F9999999	EG001136 - Receiver	Motorola	

# Exhibit A6.2 - Headend Equipment

Satellite Receiver Video Cipher	F9999999	EG001136 - Receiver	Cisco
Satellite Receiver Multiplex/Decrypter	F9999999	EG001136 - Receiver	Motorola
Sat Integrated Receiver/Transcoder	F9999999	EG001136 - Receiver	Scientific Atlanta
Advanced Receiver/Transcoder - QVC HD	F9999999	EG001136 - Receiver	Motorola
Advanced Recv/Transcoder - Outside TV	F9999999	EG001136 - Receiver	Motorola
Advanced Receiver/Transcoder - A&E HD	F9999999	EG001136 - Receiver	Arris
Advanced Receiver/Transcoder - A&E SD	F9999999	EG001136 - Receiver	Cisco
Pro Satellite Receiver - ESPN HD	F9999999	EG001136 - Receiver	Cisco
Adv Receiver Transcoder - Root HD	F9999999	EG001136 - Receiver	Cisco
Adv Receiver Transcoder - Pac 12 NAT	F9999999	EG001136 - Receiver	Cisco
Pro Satellite Rcvr - Starz HD	F9999999	EG001136 - Receiver	Motorola
Satellite Demodulator	F9999999	EG000740 - Modulator	Scientific Atlanta
Pro Satellite Receiver - Starz HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - MLB HD	F9999999	EG001136 - Receiver	Motorola
Satellite Receiver - Dest America HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - Fox Deportes HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - Fox Sports2 HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - Nat Geo SD/HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - ENC Action HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - IndieFlex HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - Cinemax HD	F9999999	EG001136 - Receiver	Motorola
Advanced Recvr Transcoder - Fusion HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - ESPN Deportes SD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - MoviePlex HD	F9999999	EG001136 - Receiver	Motorola
Satellite Demodulator	F9999999	EG000740 - Modulator	Scientific Atlanta
OneNet SE EAS Receiver	F9999999	EG001136 - Receiver	Monroe Electronics
Emergency Alert System Server	F9999999	EG001315 - Aud/Video Server	IBM
Adv Receiver Transcoder - Reelz Channel	F9999999	EG001136 - Receiver	Cisco
Acterna - Stealth Sweep Transceiver	F9999999	EZ000140 - Test Equip	Acterna
Program Reciver - KCMS FM	F9999999	EG001136 - Receiver	Scientific Atlanta
Digital Tuner - 948 KING FM	F9999999	EG001136 - Receiver	Bogen
Universal Encoder - Audio Encoder	F9999999	EG001361 - Sequencer	Scopus
Digital Tuner - 951 KWJZ	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - 957 KIRO	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - 956 KXND	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - 953 KKWF	F9999999	EG001136 - Receiver	Bogen
Universal Encoder - Audio Encoder	F9999999	EG001361 - Sequencer	Scopus
AM/FM Stereo Tuner - 958 KRWM	F9999999	EG001136 - Receiver	Toa Electronics
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Universal Encoder - Audio Encoder	F9999999	EG001361 - Sequencer	Scopus

# Exhibit A6.2 - Headend Equipment

Digital Tuner - 949 KPLU	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - 950 KUOW	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - 960 KUTI	F9999999	EG001136 - Receiver	Bogen
Digital Aud/Vid Encoder/Decoder	F9999999	EG001361 - Sequencer	Radiant
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
Digital Tuner - Spare	F9999999	EG001136 - Receiver	Bogen
XMS Ad Splicer - Server 1	F9999999	EG000110 - Network Server	Arris
XMS Ad Splicer - Server 2	F9999999	EG000110 - Network Server	Arris
EGT Encoder 1 - TVC/QVC	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 2 - Reelz/NASA/KIRO	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 3 - FXX/Big Ten	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 4 - TVW/TV Tacoma	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 5 - KCTS/KING	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 6 - KCPQ/PCTV	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 7 - KOMO/KSTW	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 8 - KUNS/Disney	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 9 - Test/Classic Arts	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 10 - Spare	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 11 - Spare	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 12 - Spare	F9999999	EG001361 - Sequencer	EGT
EGT Encoder 13 - Spare	F9999999	EG001361 - Sequencer	EGT
Network Performance Tool Server	F9999999	EG001315 - Server Aud/Vid	Dell
Satellite Receiver - KLS 2	KLS 2	EG001136 - Receiver	General Instruments
Satellite Receiver - KLS 1	KLS 1	EG001136 - Receiver	General Instruments
Network Controller - 1	F9999999	EN000010 - Controller	Motorola
Network Controller - 2	F9999999	EN000010 - Controller	Motorola
Digital Addressable Controller (DAC)	F9999999	EN000040 - Master Controller	Motorola
CASMR - Conditional Access System	F9999999	EN000040 - Master Controller	HP
Avocent Autoview 3008	F9999999	EN000010 - Controller	Avocent
Modular Receiver/Decoder	F9999999	EG001136 - Receiver	Sencore
Satellite Receiver - KCPQ Ch. 13	F9999999	EG001136 - Receiver	Tandberg
Pro Receiver/Decoder - KOMO	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - KIRO	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - KING	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - KSTW	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - KONG	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - KZJO	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - Spare	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - NASA	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - KUNS	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - KUNS2/Mundo	F9999999	EG001136 - Receiver	KTECH
Pro Receiver /Decoder - KWPX	F9999999	EG001136 - Receiver	KTECH
ASI Splitter	F9999999	EG000217 - Combiner	MegaHertz
Smartstream Device Manager	F9999999	EG001315 - Server	Arris
Remote Addressable DANIS/DLS (RADD)	F9999999	EG001315 - Server	CSS/RADD
KLS 3000/CPMS	F9999999	EG001315 - Server	KLS 3000
Pro Receiver/Decoder - TV Tacoma	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - PCTV	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - Spare	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - Spare	F9999999	EG001136 - Receiver	KTECH
Satellite Receiver - KCPQ Ch. 13	F9999999	EG001136 - Receiver	Tandberg
Pro Receiver/Decoder - Spare	F9999999	EG001136 - Receiver	KTECH
Pro Receiver/Decoder - Spare	F9999999	EG001136 - Receiver	KTECH
APEX Edge QAM - 1	F9999999	EG000100 - Switch	Motorola
APEX Edge QAM - 2	F9999999	EG000100 - Switch	Motorola
APEX Edge QAM - 3	F9999999	EG000100 - Switch	Motorola
APEX Edge QAM - 4	F9999999	EG000100 - Switch	Motorola
MPEG Transport Stream Monitor	F9999999	EG000760 - Multiplexer	Tetronix
Vecima - IP to Analog Edge Decoder 1	F9999999	EG000740 - Modulator	Vecima - 1
Vecima - IP to Analog Edge Decoder 2	F9999999	EG000740 - Modulator	Vecima - 2
Vecima - IP to Analog Edge Decoder 3	F9999999	EG000740 - Modulator	Vecima - 3
HE Redundant Amplifier System - UP	F9999999	EG000120 - Amplifier	QRF - 1
HE Redundant Amplifier System - UP Pr	F9999999	EG000120 - Amplifier	QRF - 2
He Redundant Amp System - UP Bkup	F9999999	EG000120 - Amplifier	QRF - 3
CPAT - Dual Band Signal Generator	F9999999	EG001575 - Test Generator	Effigis
TelVue HyperCaster B-100 IPTV	F9999999	EG000120 - Amplifier	TelVue
Pro Satellite Receiver - SHO/SHO2	F9999999	EG001136 - Receiver	Motorola
TelVue HyperCaster B-100 IPTV	F9999999	EG000120 - Amplifier	TelVue
Remote Service Analyzer RSAM	F9999999	EZ000140 - Test Equip	JDSU
MPEG Video Probe Analyzer	F9999999	EZ000140 - Test Equip	JDSU
Advanced Rcvr Transcoder - Oxygen SD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - Sprout SD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - Bravo SD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - CNBC HD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - SyFy HD	F9999999	EG001136 - Receiver	Cisco

# Exhibit A6.2 - Headend Equipment

Advanced Rcvr Transcoder - USA HD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - NFL Redzone HD	F9999999	EG001136 - Receiver	Cisco
Advanced Rcvr Transcoder - NFL HD	F9999999	EG001136 - Receiver	Cisco
Adv Program Receiver - MBC Korea SD	F9999999	EG001136 - Receiver	Motorola
Advanced Rcvr Transcoder - NBC Univesal	F9999999	EG001136 - Receiver	Cisco
MPEG Transport Stream Monitor	F9999999	EG000760 - Multiplexer	Tektronix
Sunrise Telecom Spectrum Analyzer	F9999999	EZ000140 - Test Equip	Sunrise Telecom
Sunrise Telecom Spectrum Analyzer	F9999999	EZ000140 - Test Equip	Sunrise Telecom
Multicom Optical Transmitter	F9999999	EG000850 - Optical Transmitter	Multicom
Pro Satellite Receiver - SHORTS HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - HSN SD	F9999999	EG001136 - Receiver	Scientific Atlanta
Adv Rcvr Transcoder - YouTooAmerica	F9999999	EG001136 - Receiver	Cisco
Adv Rcvr Transcoder - FYI HD	F9999999	EG001136 - Receiver	Cisco
Adv Rcvr Transcoder - MTV/Spike HD	F9999999	EG001136 - Receiver	Cisco
Adv Rcvr Transcoder - CMT HD	F9999999	EG001136 - Receiver	Cisco
Adv Rcvr Transcoder - VH1/Comedy HD	F9999999	EG001136 - Receiver	Cisco
Adv Rcvr Transcoder - NICK HD	F9999999	EG001136 - Receiver	Cisco
Satellite Receiver - HITS 14	F9999999	EG001136 - Receiver	General Instruments
RF L-Band Splitter (Active)	F9999999	EG000217 - Combiner	Quintech
RF L-Band Splitter (Passive)	F9999999	EG000217 - Combiner	Quintech
RF L-Band Splitter (Passive)	F9999999	EG000217 - Combiner	Quintech
Splitter/Combiner Directional Coupler	F9999999	EG000217 - Combiner	ADC Telecommunications
Splitter/Combiner Directional Coupler	F9999999	EG000217 - Combiner	ADC Telecommunications
Splitter/Combiner Directional Coupler	F9999999	EG000217 - Combiner	ADC Telecommunications
LNB Power Supply	F9999999	ED000250 - UPS	Quintech
Satellite Receiver - MoviePlex SD/Starz	F9999999	EG001136 - Receiver	Arris
Pro Satellite Rcvr - ESPN Classics	F9999999	EG001136 - Receiver	Motorola
Combiner - IP to ASI Converter	F9999999	EG000217 - Combiner	Advanced Digital Inc
Adv Rcvr Trnscoder - Life/Mil HD	F9999999	EG001136 - Receiver	Cisco
Program Receiver - The Word HD	F9999999	EG001136 - Receiver	Scientific Atlanta
Satellite Receiver - Destination America	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - OWN HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - Disney Jr HD	F9999999	EG001136 - Receiver	Motorola
Satellite Receiver - Food Net/HGTV HD	F9999999	EG001136 - Receiver	General Instruments
Satellite Receiver - Playboy HD	F9999999	EG001136 - Receiver	Motorola
Integrated Receiver/Decoder - Music Choice	F9999999	EG001136 - Receiver	Harmonic
LADI - Music Choice Inserter	F9999999	EG001315 - Server Aud/Vid	EAS System
Program Receiver - Jewelry SD	25806144	EG001136 - Receiver	Scientific Atlanta
Digital Media Receiver	F9999999	EG001136 - Receiver	Wegener
Program Receiver - Jewelry Spare Recvr	F9999999	EG001136 - Receiver	Scientific Atlanta
CherryPicker Application Platform #6	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Application Platform #1	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Application Platform #8	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform #9	F9999999	EG00760 - Multiplexer	Motorola
Cherry Picker Applications Platform #10	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform Spare	F9999999	EG00760 - Multiplexer	Motorola
Multiple Decryption Recvr - TNT/Toons SD	F9999999	EG001136 - Receiver	Scientific Atlanta
Advanced Recvr Transcoder - TV Japan	F9999999	EG001136 - Receiver	Cisco
MPEG/IRD Satellite Receiver - HD Net HD	F9999999	EG001136 - Receiver	Wegener
Pro Satellite Receiver - HRTV HD	F9999999	EG001136 - Receiver	Motorola
Pro Satellite Receiver - CSPAN2 HD	F9999999	EG001136 - Receiver	Motorola
Broadband Multimedia Service Router #2	F9999999	EG001230 - Router (Net App)	BigBand
CherryPicker Applications Platform #2	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform #3	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform #7	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform #4	F9999999	EG00760 - Multiplexer	Motorola
CherryPicker Applications Platform #5	F9999999	EG00760 - Multiplexer	Motorola
QAM Edge Encryptor Modulator #7	F9999999	EG00740 - Modulator	Motorola
QAM Edge Encryptor Modulator #1	F9999999	EG00740 - Modulator	Motorola
QAM Edge Encryptor Modulator #2	F9999999	EG00740 - Modulator	Motorola
QAM Edge Encryptor Modulator #3	F9999999	EG00740 - Modulator	Motorola
QAM Edge Encryptor Modulator #4	F9999999	EG00740 - Modulator	Motorola
SMU Control Server - Primary	F9999999	EG001315 - Server	Arris
SMU Control Server - Backup	F9999999	EG001315 - Server	IBM
Broadband Multimedia Service Router #1	F9999999	EG001230 - Router (Net App)	BigBand

Demodulator Converter #1	2722035	EG000280 - Demodulator	Wel IAV
Demodulator Converter #2	2722063	EG000280 - Demodulator	Wel IAV
Demodulator Converter #3	2722069	EG000280 - Demodulator	Wel IAV
Dish 1 serial 1005910	4.5 meter dishes	Brand Scientific Atlanta model 8345	
Dish 2 serial 1007240	4.5 meter dishes	Brand Scientific Atlanta model 8346	
Dish 3 serial 1006545	4.5 meter dishes	Brand Scientific Atlanta model 8347	
Dish 4 serial 1005880	4.5 meter dishes	Brand Scientific Atlanta model 8348	
Dish 5 serial 1006557 The last digit is un-readable	4.5 meter dishes	Brand Scientific Atlanta model 8349	

The dishes on the roof are a mix of 3.7 meter Loral Skynet or DH, and 3.8 meter Patriot. Plus the steerable dish which I think is a 3.7 meter Chaparral but again no markings.

3813522	Patriot 3.8 had a decal with a Part number of PRT-380
3814298	Patriot 3.8 had a decal with a Part number of PRT-380
24'x13'6" Aircree AeroPro Pro system including:	
inflatable outdoor movie screen	
inflatable frame, lower panel	
front projection surface	
screen bungee ties	
high pressure blower	
black nylon high tension tethers	
heavy duty carry bag	
four steel stakes	
deluxe repair kit	
manual	
Aeropro Pro HD console & sound system	
heavy duty ATA rated road case	
triple screen LCD monitor	
BlueRay and progressive scan DVD players	
HD video switcher	
pro quality rack mounted audio mixer with iPod dock	
power conditioner and surge protector with two lamps	
microphone	
audio and video cables	
PRO speaker system	

# Exhibit A6.2 - Headend Equipment

Projector w/case and stand

**EXHIBIT A7**  
**INSTALLED CUSTOMER PREMISES EQUIPMENT**

**Exhibit A7 - Customer Premises Equipment**

<b>Set Top Boxes</b>	
<b>Model</b>	<b>quantity (in home)</b>
DCX3200	7281
DCX3510	1094
MG1	722
Mini	871
MG2	485

**EXHIBIT B**  
**SAFEGUARDING TACOMA POWER'S USE OF CRITICAL UTILITY FIBER**

**1. DEFINITIONS**

(a) "Critical Route" means any route of Tacoma Power Commercial Fiber that includes Utility Fiber in the same sheath or fiber bundle anywhere along the route and any route of Tacoma Power Commercial Coax that includes Utility Fiber in the same conduit. Critical Routes as of the Effective Date are provided in **Exhibit B1**.

(b) For the purposes of Exhibits B and C, "Fiber Maintenance" means any activities undertaken to maintain the fiber in working order and to make use of the fiber, including but not limited to regular patrol of the fiber; maintenance of a "Call-Before-You-Dig" program and all required and related locates; maintenance of sign posts along the Tacoma Power Commercial System with the number of the local "Call-Before-You-Dig" organization; infrastructure repair; splicing; emergency restoration; pole transfers; road projects and overhead-underground conversions; cable restoration; reattachment; moves; make-ready compliance; route-relocation; and other standard processes undertaken by communications infrastructure owners. The term includes replacement of Tacoma Power Commercial Fiber only under the limited circumstances described in Sections 6 and 7 of Exhibit C.

(c) "Non-Critical Route" means a route of the Tacoma Power Commercial Fiber that does not share a fiber bundle or sheath with Utility Fiber at any point along the route and any route of Tacoma Power Commercial Coax that does not include Utility Fiber in the same conduit. Non-Critical Routes as of the Effective Date are identified in **Exhibit B2**.

(d) "Utility Fiber" means the fiber in the Fiber System that provides substantial and essential support for Tacoma Power's communications functions and assets as an electrical power utility, and includes both dark and lit fibers.

**2. MAINTENANCE OF TACOMA POWER COMMERCIAL FIBER ON CRITICAL ROUTES.**

(a) The Parties agree that Operator shall not have access to the Tacoma Power Commercial Fiber or After-Installed Assets in conduit on Critical Routes except as provided in this **Exhibit B**.

(b) With respect to any components of the Tacoma Power Commercial Fiber on Critical Routes, Operator will not provide Fiber Maintenance. Rather, solely Tacoma Power, at its cost (except as provided herein), will provide all Fiber Maintenance during the Term in accordance with the Service Level Agreement attached hereto as Exhibit C.

(c) In the event that Tacoma Power ceases using Utility Fiber on a Critical Route and wants to re-designate the route, the Parties agree to negotiate in good faith to develop a plan for expanding Operator's access to the Tacoma Power Commercial Fiber and reducing Tacoma Power's Fiber Maintenance obligations.

(d) All other rights and obligations with respect to the Tacoma Power Commercial System maintenance on Critical Routes are addressed in **Exhibit D**.

### **3. SPLICING SERVICES FOR TACOMA POWER COMMERCIAL FIBER IN THE SAME SHEATH OR FIBER BUNDLE WITH UTILITY FIBER/SERVICES FOR REMOVAL OR REPLACEMENT OF FIBER/COAX CABLE IN CONDUIT ON CRITICAL ROUTES**

(a) Operator shall not access splice panels or fiber access points for Tacoma Power Commercial Fiber on Critical Routes. Rather, Tacoma Power will provide qualified staff to Operator upon request to provide splicing services and services for removal or replacement of fiber/coax cable in conduit on Critical Routes.

(b) If Operator chooses to build new splicing access points for its own use for Tacoma Power Commercial Fiber on Critical Routes so as to separate Tacoma Power Commercial Fiber access points from Tacoma Power Utility Fiber access points, Tacoma Power will provide qualified staff to provide this construction service to Operator upon request.

(c) All requests for splicing services pursuant to this Section 3 shall be in writing and provide at least ten (10) Business Days' notice of the desired service date. Services will be performed at a time of mutual agreement between Tacoma Power and Operator.

(d) Operator will be invoiced for splicing services based on the price schedule in Section 5 of this Exhibit and shall pay invoices within thirty (30) days of receipt.

### **4. WORK IN ENERGIZED VAULTS**

(a) For safety and regulatory compliance reasons, only qualified Tacoma Power staff may access Tacoma Power Commercial Fiber splice cases that are contained within energized vaults (estimated as approximately 4% of total access points in the Tacoma Power Commercial System). In the event that Operator needs to access assets in energized vaults, Tacoma Power will provide qualified staff to provide access services to Operator upon request.

(b) All requests for access pursuant to this Section 4 shall be in writing and provide at least five (5) Business Days' notice of the desired access date. Access will be provided at a time of mutual agreement between Tacoma Power and Operator.

(c) Operator will be invoiced for access services based on the price schedule in Section 5 of this Exhibit and shall pay invoices within thirty (30) days of receipt.

### **5. TACOMA POWER'S PRICE SCHEDULE**

The rates described below are for work performed in 2019. All amounts listed below are calculated using Tacoma Power's 2019 SAP loaded rates with equipment and materials. The Parties recognize and agree that Tacoma Power may adjust the below amounts periodically to reflect future changes in Tacoma Power's SAP loaded rates with equipment and materials, or any future methodology commonly used by Tacoma Power for calculation of loaded rates with equipment and materials. Operator will be provided thirty (30) days' written notice of any such changes.

Work Item	Description	Measured By	Cost
<b>1. Fusion Fiber Splicing (Existing Splice Case)</b>	Labor, materials and equipment required for fusion splicing, including dress and storage of unspliced fibers within the splice tray. A minimum of 24 fiber splices will be performed at each location. Provide electronic documentation and analysis of each splice. Includes installation of splice cases and storage loops with snowshoes, grounding and bonding of all equipment. Encapsulate and flash test as required. Support and secure per manufacture's specifications.	Per fiber splice, tested and documented	\$37.00
<b>2. Fusion Fiber Splicing (Mid-Entry, Create Splice Case)</b>	All labor, materials and equipment costs necessary to de-lash and re-lash system up to 1000', retrieve fiber storage, prepare mid-entry case, fusion splicing, including dress and storage of unspliced fibers within the splice tray. A minimum of 24 fiber splices will be performed at each location. Provide electronic documentation and analysis of each splice. Includes installation of splice cases and storage loops with snowshoes, grounding and bonding of all equipment. Encapsulate and flash test as required. Support and secure per manufacture's specifications. Includes all safety measures and traffic control.	Per fiber splice, tested and documented	\$77.00

Work Item	Description	Measured By	Cost
<b>3. Fusion Fiber Splicing (at Hub Site and Headend Buildings)</b>	All costs associated with the labor, materials and equipment necessary for fusion splicing to be performed at hub and headend locations, including dress and storage of unspliced fibers within the splice tray. A minimum of 96 fiber splices will be performed at each location. Provide electronic documentation and analysis of each splice. Includes installation of splice cases and storage loops, grounding and bonding of all equipment. Encapsulate and flash test as required. Support and secure per manufacturer's specifications.	Per fiber splice, tested and documented	\$16.00
<b>4. Access Management – Access Energized Power Vaults</b>	All costs for labor, materials and equipment to provide escorted access to Tacoma Power energized vaults in the downtown business network. This unit includes a composite crew of Wire and HFC personnel, who would perform work.	Time and Materials (Per hour, five-Person Crew)	\$541.00
<b>5. Remove or Replace Fiber/Coax Cable in Shared Critical Route Conduit</b>	All costs for labor and equipment to remove existing cables or pull new customer provided cables in existing critical route shared conduits. This unit includes a composite crew of HFC personnel, who would perform work on behalf of partner.	Time and Equipment (Per hour, four-Person Crew)	\$365.00

## 6. REMEDIES FOR NON-COMPLIANCE

(a) Operator's sole remedy for any violation of Section 2 of this Exhibit by Tacoma Power is limited to the liquidated damages specified in the Service Level Agreement (Exhibit C).

(b) In the event that Tacoma Power discovers a Default of an obligation in this Exhibit by Operator that poses an imminent public safety concern or threat to the safety of Tacoma Power operations, Tacoma Power may take corrective action to address the Default without prior notice to Operator, and invoice Operator for the cost of such corrective action.

(c) In the event that Operator commits repeated Defaults of this Exhibit, Tacoma Power shall have the right to give notice to terminate this IRU Agreement pursuant to Section 21(g) of this IRU Agreement.

**EXHIBIT B1**  
**MAP OF CRITICAL ROUTES AS OF EFFECTIVE DATE**

*[CONTENT ON ACCOMPANYING USB DRIVE]*

**EXHIBIT B2**  
**BOOK OF NON-CRITICAL ROUTES AS OF EFFECTIVE DATE**

*[CONTENT ON ACCOMPANYING USB DRIVE]*

**EXHIBIT C**  
**SERVICE LEVEL AGREEMENT (“SLA”)**

**Section 1**      Fiber Maintenance

a) Tacoma Power will perform all Fiber Maintenance for Tacoma Power Commercial Fiber on Critical Routes, including Scheduled Maintenance and Unscheduled Maintenance, as defined herein. Operator shall have access to the Tacoma Power Commercial Fiber, consistent with the IRU Agreement and Exhibits, during the performance of any Scheduled Maintenance or Unscheduled Maintenance so long as this requirement does not interfere with Tacoma Power’s ability to perform its obligations under this SLA.

b) Planned, non-emergency and routine Maintenance ("**Scheduled Maintenance**") will be performed at the times determined by Tacoma Power in its sole discretion, except if it is reasonably expected to produce any signal discontinuity for Tacoma Power Commercial Fiber, in which case the schedule shall be coordinated with Operator pursuant to Section 4 below.

c) Tacoma Power will perform unplanned, emergency or non-routine Maintenance, demand call-out, and repair ("**Unscheduled Maintenance**") for Tacoma Power Commercial Fiber on the Critical Routes, subject to the terms of this SLA. Unscheduled Maintenance includes the following activities:

- i. Respond to troubleshooting requests from Operator.
- ii. Respond to any notification from Operator or notification from any third party of a Fault (as defined below) on the Critical Routes, or any event imminently likely to cause a Fault on Critical Routes or demand maintenance requested by Operator.
- iii. Respond to any potential service-affecting situation to prevent any Fault on Critical Routes.
- iv. Operator shall immediately report the need for Unscheduled Maintenance to Tacoma Power in accordance with procedures promulgated by Tacoma Power from time to time. Tacoma Power shall log the time of Operator’s report, verify the problem and dispatch personnel to take corrective action in accordance with this SLA.

**Section 2**      Time to Respond

a) Tacoma Power personnel shall dispatch maintenance and repair personnel to handle and repair problems detected in the Tacoma Power Commercial Fiber on Critical Routes: (i) upon notification by Operator to Tacoma Power, or (ii) upon notification by a third party. Tacoma Power’s Fiber Maintenance services shall be available for dispatch twenty-four (24) hours a day, seven (7) days a week. Tacoma Power shall acknowledge receipt of a notification under (i) or (ii) by telephone (“Respond”) as soon as possible but in no event shall the annual Mean Time to Respond ("**MTTR**") for Unscheduled Maintenance activity be more than one (1) hour, unless delayed by a Force Majeure Event, including electrical restoration or the establishment of a safe work zone for telecommunication work to commence, or other circumstances beyond the reasonable control of Tacoma Power.

b) Hourly Updates. In all cases of Unscheduled Maintenance, Tacoma Power shall provide Operator with hourly updates of the progress of the Unscheduled Maintenance until the Unscheduled Maintenance is complete.

### **Section 3**      Cooperation and Coordination

a) Tacoma Power shall provide Operator with a contact/escalation list (“**Escalation List**”) to aid in trouble reporting and resolution. The current Escalation List shall be made available to Operator and may be revised by Tacoma Power from time to time by written notice. In performing Maintenance, Tacoma Power shall take workmanlike care to prevent impairment to the signal continuity and performance of the Tacoma Power Commercial Fiber. The precautions to be taken by Tacoma Power shall include notifications to Operator when there may be service-affecting Fiber Maintenance. In addition, Tacoma Power shall reasonably cooperate with Operator in sharing information and analyzing the impairments regarding the Tacoma Power Commercial Fiber. If any Fiber Maintenance requires a reconfiguration involving fibers, electronic equipment, or regeneration or other facilities that are Tacoma Power Commercial System facilities that are the Maintenance responsibility of Operator, then Operator shall, at Tacoma Power’s reasonable request, make such personnel of Operator available as may be necessary to accomplish such Maintenance, which personnel shall coordinate and cooperate with Tacoma Power in performing such Fiber Maintenance

### **Section 4**      Maintenance Window

a) For any Scheduled Maintenance which is reasonably expected to produce any signal discontinuity, Tacoma Power and Operator must coordinate to determine the appropriate time for that Scheduled Maintenance. Generally, this work should be scheduled after 11:00 p.m. and before 6:00 a.m. local time and on certain weekends (the “Maintenance Window”). Scheduled Maintenance scheduled to be performed during a Maintenance Window must be completed by the end of the Maintenance Window. If any Scheduled Maintenance goes beyond the end of the Maintenance Window and the Tacoma Power Commercial Fiber is unavailable, a period of Fiber Unavailability as defined in Section 10 shall commence and Operator may be entitled to liquidated damages under Section

b) Tacoma Power and Operator shall agree upon a detailed Maintenance Window calendar. Major system work, such as fiber rolls and hot cuts, shall be scheduled for Maintenance Window weekends. The intent is to avoid jeopardy work on high-traffic holidays.

c) Tacoma Power shall notify Operator of any Scheduled Maintenance to be performed during a Maintenance Window. If Scheduled Maintenance is cancelled or delayed for whatever reason as previously notified, Tacoma Power shall notify Operator at its earliest opportunity but no later than one (1) hour after such cancellation or delay.

### **Section 5**      Testing and Restoration of the Tacoma Power Commercial Fiber

a) Tacoma Power shall respond to any failure, interruption, impairment in the operation of, or unavailability of the Tacoma Power Commercial Fiber on Critical Routes. (“**Fault**”) as quickly as possible following commencement of the Fault (allowing for delays caused by Force Majeure Events and other circumstances beyond the reasonable control of Tacoma Power) in accordance with the procedures set forth in Section 2. A Fault commences

upon the earlier of (i) Operator's notification to Tacoma Power or (ii) when indicated by network control information actually or reasonably known to Tacoma Power. Each Fault terminates upon restoration of the Tacoma Power Commercial Fiber as evidenced by appropriate splicing tests by Tacoma Power and confirmed by Operator as to network functionality and availability.

b) Tacoma Power shall maintain sufficient capability to teleconference with Operator during Unscheduled Maintenance in order to provide hourly communications during the restoration process. When correcting or repairing fiber optic cable discontinuity or damage, including but not limited to an event of Unscheduled Maintenance, Tacoma Power shall use commercially reasonable efforts to repair traffic-affecting discontinuity or damage of the affected Tacoma Power Commercial Fiber within six (6) hours of learning of discontinuity or damage after power restoration has been completed and the work site has been made safe. In order to accomplish such objective, it is acknowledged that the repairs so effected may be temporary in nature. In such event, within twenty-four (24) hours after completion of any such Unscheduled Maintenance, Tacoma Power shall commence its planning for permanent repair and thereafter promptly notify Operator of such plans, and shall implement such permanent repair within an appropriate time thereafter. Restoration of Tacoma Power Commercial Fiber on fiber strands not immediately required for service shall be completed on a mutually agreed-upon schedule.

c) During restoration, Tacoma Power and Operator agree to work together to restore all traffic as quickly as possible.

d) In performing permanent repairs, Tacoma Power shall comply with industry standards (ANSI/TIA/EIA-568 B.3) and when possible Operator's standard splicing specifications. Tacoma Power shall provide to Operator any modifications to these specifications as may be necessary or appropriate in any particular instance for Operator's approval, which approval shall not be unreasonably withheld.

e) Tacoma Power's representatives that are responsible for initial restoration of a cut fiber optic cable shall carry on their vehicles the typical appropriate equipment that would enable a temporary splice, with the objective of restoring operating capability in as little time as possible. Tacoma Power shall maintain and supply an inventory of spare fiber optic cable in storage facilities supplied and maintained by Tacoma Power at strategic locations to facilitate timely restoration.

f) Upon permanent restoration, Tacoma Power shall perform appropriate testing on the Tacoma Power Commercial Fiber in accordance with Tacoma Power's then current preventative maintenance procedures, which shall not substantially deviate from standard industry practice.

## **Section 6**     Fiber Replacement

a) In the event that all or any part of the Tacoma Power Commercial Fiber on a Critical Route is required by Operator to be replaced, such replacement shall be made as soon as reasonably practical by Tacoma Power using fiber to be provided by Operator and credited toward Operator's Capital Expenditures. Operator must light at least ninety percent (90%) of available fiber in the relevant Tacoma Power Commercial Fiber Backbone, Service Ring or Service Drop, as applicable, before being entitled to make any request to Tacoma Power to install replacement fiber hereunder.

**Section 7**      Chronic Failure

a)      In the event a portion of the Tacoma Power Commercial Fiber on a Critical Route suffers from a Fault (i) lasting more than 48 hours in the aggregate during any calendar month, (ii) lasting more than 24 hours consecutively in any three of the past 12 consecutive calendar months, or (iii) occurring on two or more separate occasions of more than 12 hours each in the aggregate in any calendar month, such a Fault will be considered a chronic failure (“**Chronic Failure**”). In the event of a Chronic Failure, at Operator’s written request, Tacoma Power shall present a remediation plan to Operator to address the Chronic Failure. Following the parties’ mutual agreement of a plan to solve the Chronic Failure, Tacoma Power shall implement and complete, if capable of completion, the plan within thirty (30) days. In the event that Tacoma Power Commercial Fiber requires replacement under the agreed remediation plan, Tacoma Power will replace the fiber using fiber to be provided by Operator and credited toward Operator’s Capital Expenditures. Operator must light all available dark fiber available in the affected Tacoma Power Commercial Fiber Backbone, Service Ring or Service Drop, as applicable, before being entitled to make any request to Tacoma Power to present or implement a remediation plan hereunder.

**Section 8**      Notifications and Liquidated Damages

a)      Notifications required of Tacoma Power by Section 2 shall be provided to the Operator NOC. Operator shall be entitled to liquidated damages in accordance with the following table for each failure of Tacoma Power to Respond as set forth below:

Service Level Failure	Amount
Notification	\$120/initial failure to Respond
Response	\$120 for each hour in excess of the annual MTTR of 1 hour

**Section 9**      Fiber Availability

a)      Fiber Availability Commitment. Tacoma Power shall use commercially reasonable efforts to maintain availability of the Tacoma Power Commercial Fiber one hundred percent (100%) of the time. Fiber Unavailability shall exist when unavailability of Tacoma Power Commercial Fiber causes disruption in service (“**Fiber Unavailability**”). Fiber Unavailability duration is measured from the time Tacoma Power detects Fiber Unavailability or Tacoma Power or Operator opens a trouble ticket until the time Operator confirms that the Fiber Unavailability has been remediated, which confirmation shall be prompt. Tacoma Power shall have a 12-hour grace period from the detection by Tacoma Power or opening of a trouble ticket before liquidated damages apply. Beginning with the 13<sup>th</sup> hour of Fiber Unavailability, every hour of Fiber Unavailability shall result in liquidated damages of One Hundred and Twenty (\$120) per hour per route, owed by Tacoma Power to Operator. Fiber Unavailability payments shall be capped 720 hours per Fiber Unavailability event. To claim payment, Operator must provide Tacoma Power with a written request

before the sixth (6th) Business Day of the month following the month in which Fiber Unavailability occurred.

b) Terrestrial Fiber Commitment. Tacoma Power commits to maintain attenuation levels not to exceed an overall end to end dB loss as set out in industry standards (See, ANSI/TIA/EIA-568 B.3). End to end dB loss shall be calculated by adding together the loss from each of the segments on the Tacoma Power System.

c) Liquidated Damages Unavailable in Some Circumstances. Liquidated damages shall not be available to Operator under this Exhibit in circumstances where the issue arises from (a) the acts or omissions of Operator or its employees, contractors, agents or end-users; (b) the failure, malfunction, or limitation of throughput of equipment, network, software, applications or systems not owned or directly controlled by Tacoma Power; (c) circumstances or causes beyond the control of TPU, such as Force Majeure Events and third-party attacks on the Tacoma Power Commercial Fiber; (d) Scheduled Maintenance performed within the Maintenance Window for that Scheduled Maintenance; or (e) Unscheduled Maintenance when Tacoma Power Responds as set out in this Agreement.

**EXHIBIT D**  
**ACCESS TO AND MAINTENANCE OF TACOMA POWER COMMERCIAL SYSTEM**  
**BY OPERATOR**

The terms and conditions of this Exhibit D shall govern Operator's maintenance obligations and access rights with regards to the Tacoma Power Commercial System to the extent not already addressed in Exhibits A, B and C. Capitalized terms used herein but not defined herein shall have the meanings assigned to them in Exhibit A, B, C, or the IRU Agreement.

**1. GENERAL**

(a) For the purposes of this Exhibit D, "Maintenance" means any activities undertaken to maintain the Tacoma Power Commercial System in working order and to make use of the Tacoma Power Commercial System, including but not limited to regular patrol of the Tacoma Power Commercial System; maintenance of a "Call-Before-You-Dig" program and all required and related locates; maintenance of sign posts along the Tacoma Power Commercial System with the number of the local "Call-Before-You-Dig" organization; infrastructure repair; splicing; emergency restoration; pole transfers; replacement; road projects and overhead-underground conversions; cable restoration; reattachment; moves; make-ready compliance; route-relocation; and other standard processes undertaken by communications infrastructure owners. The term excludes Fiber Maintenance as defined in Exhibit B which is to be performed exclusively by Tacoma Power pursuant to Exhibits B and C.

(b) Maintenance Costs. All of the Maintenance shall be performed by Operator and all Maintenance costs shall be borne by Operator, except those Fiber Maintenance activities (and costs responsibility) reserved for Tacoma Power pursuant to Exhibits B and C.

(b) Energy Costs. Operator's use of energy provided by Tacoma Power is not included in this IRU Agreement. Operator shall, notwithstanding the City's joint use of the Hub Sites, procure and pay for such energy under separate agreement consistent with Tacoma Power's standard commercial pricing.

(c) Compliance with Applicable Standards. In connection with the performance of the Maintenance and any other work and in the operation of equipment pursuant to this IRU Agreement, Operator shall comply and shall ensure that the equipment, the Maintenance and any other work, and all of Operator's suppliers and contractors (of any tier) comply with all Applicable Standards. "**Applicable Standards**" has the meaning in the then-current Master Pole Attachment Agreement between Tacoma Power and Operator.

(d) Cooperation. To the extent permitted by applicable law, Tacoma Power will work with Operator to support efficient and expeditious applications for permits, consistent with City of Tacoma policy and practices and with the appropriate franchise agreement(s) to be separately negotiated. To the extent permitted by applicable law, Tacoma Power will also work with Operator to efficiently and expeditiously issue permits, consistent with Tacoma Power's policy and practices and with the then-current Master Pole Attachment Agreement between Tacoma Power and Operator. The commitments in this paragraph are not intended to imply, predetermine or assure any particular outcome of the City's or Tacoma Power's processing of any applications for permits by Operator. Further, nothing in this paragraph is intended or shall be construed to

require that the City exercise its discretionary authority under its regulatory ordinances to further a project permit application, nor does this paragraph bind the City of Tacoma to do so.

(e) During the first thirty-six (36) months following the Effective Date of the IRU Agreement, the technical teams for the Parties will meet on a monthly basis for purposes of sharing information, data, and plans regarding upcoming construction and upgrades, so as to enable the Parties to plan accordingly based on shared expectations. The Parties anticipate that these monthly meetings will serve to provide predictability and enable the Parties to facilitate supporting the needs of the other, as well as to plan appropriately for staffing and other upcoming efforts. Following the first thirty-six (36) months (or at another time of mutual agreement), the meetings will be held on a quarterly rather than monthly basis.

(f) Monthly Reporting. On or before the fifteenth (15th) day of each month, following the Effective Date, Operator shall provide Tacoma Power with a report including as-built drawings indicating construction type, routes, and strand count for any new construction, upgrades, or other efforts on both Critical Routes and Non-Critical Routes over the previous calendar month. The data shall be provided in .DWG format, or such successor format as may be designated from time to time by Tacoma Power in its reasonable discretion.

(g) Inspection Rights. In order to determine Operator's compliance with this Exhibit, Tacoma Power shall have the right to visually inspect any part of the Tacoma Power Commercial System at any time with or without notice to Operator.

## **2. MAINTENANCE OF TACOMA POWER COMMERCIAL SYSTEM COMPONENTS**

(a) Except as may be otherwise agreed to in writing by the Parties, Operator will be responsible for performing all Maintenance on the Tacoma Power Commercial Coax as needed. This includes Tacoma Power Commercial Coax on Critical Routes and Non-Critical Routes. These tasks may include RF level measurements, noise measurements, and industry standard troubleshooting or regular maintenance tasks. If needed, Operator shall repair or replace active or passive Tacoma Power Commercial Coax components when necessary to eliminate service impairment or outages. Performance of Maintenance must comply with the standards and procedures set forth in the then-applicable Master Pole Attachment Agreement between Tacoma Power and Operator.

(b) Except as provided in **Exhibit B and C**, Operator will be responsible for performing all Maintenance of Tacoma Power Commercial Fiber. This includes any Tacoma Power Commercial Fiber on Non-Critical Routes and any Tacoma Power Commercial Fiber not in the same sheath or bundle with Utility Fiber on Critical Routes.

(c) Operator will be responsible for all Maintenance of all After-Installed Assets, except to the extent covered by Exhibits B and C.

(d) Operator must hold a Master Pole Attachment Agreement with Tacoma Power during the Term of this IRU Agreement.

## **3. INSTALLATION OF NEW FIBER**

(a) Operator may not overlash or delash fiber to the Tacoma Power Commercial System or attach new fiber optic plant to Tacoma Power poles within the Tacoma Power Commercial Service Area without the prior written consent of Tacoma Power. To request consent, Operator must

follow the procedure in its then-current Master Pole Attachment Agreement with Tacoma Power, and additionally submit the supplemental form in **Exhibit D-1**.

(b) Operator may not overlash or delash fiber to any portions of the Tacoma Power Commercial Fiber installed on poles not owned by Tacoma Power without the prior written consent of Tacoma Power and the pole owner.

(c) Operator is solely responsible for obtaining permits to make any attachments to poles not owned solely by Tacoma Power, notwithstanding the fact that Tacoma Power may have power or communications facilities on the same poles.

#### **4. REMEDIES FOR NON-COMPLIANCE**

(a) In the event that Tacoma Power discovers a Default of an obligation in this Exhibit by Operator that poses an imminent public safety concern or threat to the safety of Tacoma Power operations, Tacoma Power may take corrective action to address the Default without prior notice to Operator, and invoice Operator for the cost of such corrective action.

(b) In the event that Operator commits repeated Defaults of this Exhibit, Tacoma Power shall have the right to (i) assume responsibility for the performance of the obligations of this Exhibit indefinitely at Operator's cost; or (ii) give notice to terminate this IRU Agreement pursuant to Section 21(g) of the IRU Agreement.

## EXHIBIT D1

### PROCESS FOR OVERLASHING, DELASHING OR ATTACHING NEW CABLES WITHIN THE TACOMA POWER COMMERCIAL SYSTEM

Prior to any Overlash, Delash or attachment of new Cables to those Tacoma Power poles which are part of the Tacoma Power Commercial System and subject to the IRU Agreement (“IRU”), Operator must have a current Master Pole Attachment Agreement (“MPAA”) with Tacoma Power and submit an IRU Pole Attachment Request to Tacoma Power. IRU Pole Attachment Requests shall be in the format shown in **Exhibit D1.1**. Capitalized terms used herein but not defined shall have the meanings assigned to them in the MPAA.

Any Overlash, Delash or attachment of new Cables to Tacoma Power poles subject to the IRU shall be governed by the terms of Operator’s then current MPAA and all Addendums thereto **except as follows**:

**Make Ready Work:** Make Ready Work shall be performed by Tacoma Power or Tacoma Power’s contractor at no charge to Operator.

**Review and Approval:** Tacoma Power’s review and approval process will begin upon Operator’s submission of a complete IRU Pole Attachment Request.

**Inventory:** IRU Pole Attachment Requests do not require the submission of Attachment inventories.

**Photographs:** IRU Pole Attachment Requests do not require the submission of photographs.

**Fees:** IRU Pole Attachment Requests are not governed by the Fees provision of Operator’s then current MPAA. Only the Application Fees, actual costs for engineering review and field inspections and any additional charges for electricity supplied by Tacoma Power will be charged.

**Tags:** Attachments approved pursuant to an IRU Pole Attachment request must be identified by a tag approved by Tacoma Power confirming the Attachment is subject to this IRU.

**Billing:** Overlash, Delash or attachment of new Cables to Tacoma Power poles subject to this IRU are not subject to the Billing provision of Operator’s then current MPAA. Only Application, engineering review and field inspection fees will be billed.

**Liability, Indemnification and Exculpation:** To the extent there is any conflict or inconsistency between the sections of Operator’s then current MPAA entitled **Liability, Indemnification and Exculpation** the terms of the IRU are controlling over Overlash, Delash or attachment of new Cables to those Tacoma Power poles subject to the IRU.

**Worker’s Compensation, Insurance and Bonds:** To the extent there is any conflict or inconsistency between the sections of Operator’s then current MPAA entitled **Worker’s Compensation, Insurance and Bonds** the terms of this IRU are controlling over Overlash, Delash or attachment of new Cables to those Tacoma Power poles subject to this IRU.

**EXHIBIT D1.1**

**IRU POLE ATTACHMENT REQUEST FORM**



**Exhibit D1.1**  
**IRU Pole Attachment Request**  
**Form Instructions**

<b>1</b>	IRU agreement between Tacoma Power and Rainier Connect (Operator) must be fully executed before request will be processed.
<b>2</b>	If utilizing sub-contractors, Rainier Connect must provide a letter authorizing sub-contractors to perform work on their behalf.
<b>3</b>	All shaded areas are REQUIRED to be completed. Failure to provide complete information can result on a delay to process your request and/or denial to attach. No approval, survey or review work will be performed until a complete and accurate request has been submitted.
<b>4</b>	If Electrical Services will be required, make sure to include request on "Electrical Services Information" field.
<b>5</b>	Application for communication enclosures and/or miscellaneous equipment must include specification sheet(s) including weight, dimensions, and configuration of equipment.
<b>6</b>	Proposed attached method means: NEW DIRECT, OVERLASH, REMOVAL, or OTHER.
<b>7</b>	Proposed attachment height must be specific and in feet and inches. <b>Approximate height is not acceptable.</b>
<b>8</b>	Attachments must meet all applicable requirements of the NESC and Tacoma Power Construction Standards including but not limited to the following clearances: Support Clearances - Communication cables to supply cables: 40" - Between communication cables and CenturyLink attachment: 12" - Between communication cables and any other communication cable: 6" Span Clearances - Communication cables to supply cables: 30" - Between communication cables: 4"
<b>9</b>	Two full sets of the request must be mailed to Tacoma Power. An electronic copy must also be emailed to pwrjointutilities@cityoftacoma.org. The request sets must contain the following documents: - Filled in and signed Application (Tab 1) - Filled in Detail Pole Attachment Data (Tab 2) - Legible map(s) of all poles on route and pole height block (Tab 3 example). Streets must be clearly identified and labeled. Map(s) must include existing pole attachments and attachment heights, and any required make-ready for each pole on the application. - Existing attachments must be listed in order from top to bottom and include attachment heights in feet and inches. - Existing attachments must include Attachee name or assigned cable identification tag number. (see Tacoma Power Standard, C-OH-1060, for a current list of tag assignments.)
<b>10</b>	Construction needs to be completed within 180 days unless a permit extension is granted by Tacoma Power.
<b>11</b>	A final construction inspection by Tacoma Power is required.

# Exhibit D1.1 - IRU Pole Attachment Request Form



Rainier Connect (Operator)  
IRU Pole Attachment Request

Permit # \_\_\_\_\_

Application Date \_\_\_\_\_

INSTRUCTIONS: This cover sheet must be completed for each application request. Complete all shaded areas. Any fields left blank may result in return of incomplete request.

\_\_\_\_\_  
Name of Attaching Company

\_\_\_\_\_  
Name of Applicant (Contractor)

\_\_\_\_\_  
Attaching Company Contact Person

\_\_\_\_\_  
Applicant Contact Person

\_\_\_\_\_  
Attaching Company Telephone Number

\_\_\_\_\_  
Applicant Contact Telephone Number & Email Address

\_\_\_\_\_  
Attaching Company Address

\_\_\_\_\_  
Applicant Address

\_\_\_\_\_  
City, State, ZIP

\_\_\_\_\_  
City, State, ZIP

**Project Information:**

\_\_\_\_\_  
Site Address:

\_\_\_\_\_  
Company's Reference Number:

Total # of New Contacts: \_\_\_\_\_

Total # of Removals: \_\_\_\_\_

Total # of Overlapping \_\_\_\_\_

Total # of Other: \_\_\_\_\_

Total # of Affected Poles: \_\_\_\_\_

**Electrical Services Information (if applicable):**

Requires Electrical Service  YES  NO

**Detailed Description of work:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Expedited Overlash Process:**

Indicate by checking this box if the Application is submitted under the Expedited Overlash Process set forth in Addendum to MPAA

**Placing Attachments Across a Railroad:**

Operator has received the appropriate authorizations or approvals required for railroad crossings.

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed Name & Title

\_\_\_\_\_  
Email Address

**\*\*Failure to supply requested information may delay acceptance of the application\*\***

**For Internal Use Only:**

Applicant has a valid Franchise Agreement and/or other required agreements are in effect to operate within the franchise jurisdiction.

# Exhibit D1.1 - IRU Pole Attachment Request Form



## Detail Pole/Attachment Data

Permit # \_\_\_\_\_

1	2	3	4	5	6		7	8	9	10	11	
Tacoma Power's Pole Number	RC's Pole Number (if applicable)	RC's Map/Drawing Number	Proposed Attachment Method (see key below)	Size/Type of Attachments (see key below)	Cable Type (messenger, fiber, etc.)	Diameter (inches to third decimal)	Design Tension (lbs)	Number of guys to be installed	Attachnig to existing anchor (Y/N)	Make Ready (Y / N)	Height of Attachment on Pole (Feet & Inches)	Include Original Permit # for removals
1												
2												
3												
4												
5												
6												
7												
8												
9												
10												
11												
12												
13												
14												
15												

1. Tacoma Power Pole Number, can be up to 5 digits, obtained from TPU.
2. Rainier Connect's Pole Number, if applicable.
3. List drawing number of Rainier Connect's map that shows this pole.
4. Enter proposed attachment method from key below.
5. Enter appropriate letters from key below.
6. Enter proposed attachment specifications (if design tension unknown, 60% of Rated breaking strength (RBS) will be used)
7. Enter the number of down guys that will be attached after construction.
8. Enter Yes or No if you will be attaching to an existing TPU anchor.
9. Make Ready work that Rainier Connect has identified.
10. Enter specific height of proposed attachment. Approximate height is NOT acceptable.
11. If removing an existing attachment, include the original TPU issued permit number.

**Proposed Attachment Method:**

- NEW = New Direct Attachment
- OVL = Overlapping (overlapping onto an existing wire/cable owned by the company)
- REM = Removal
- OOO = Other

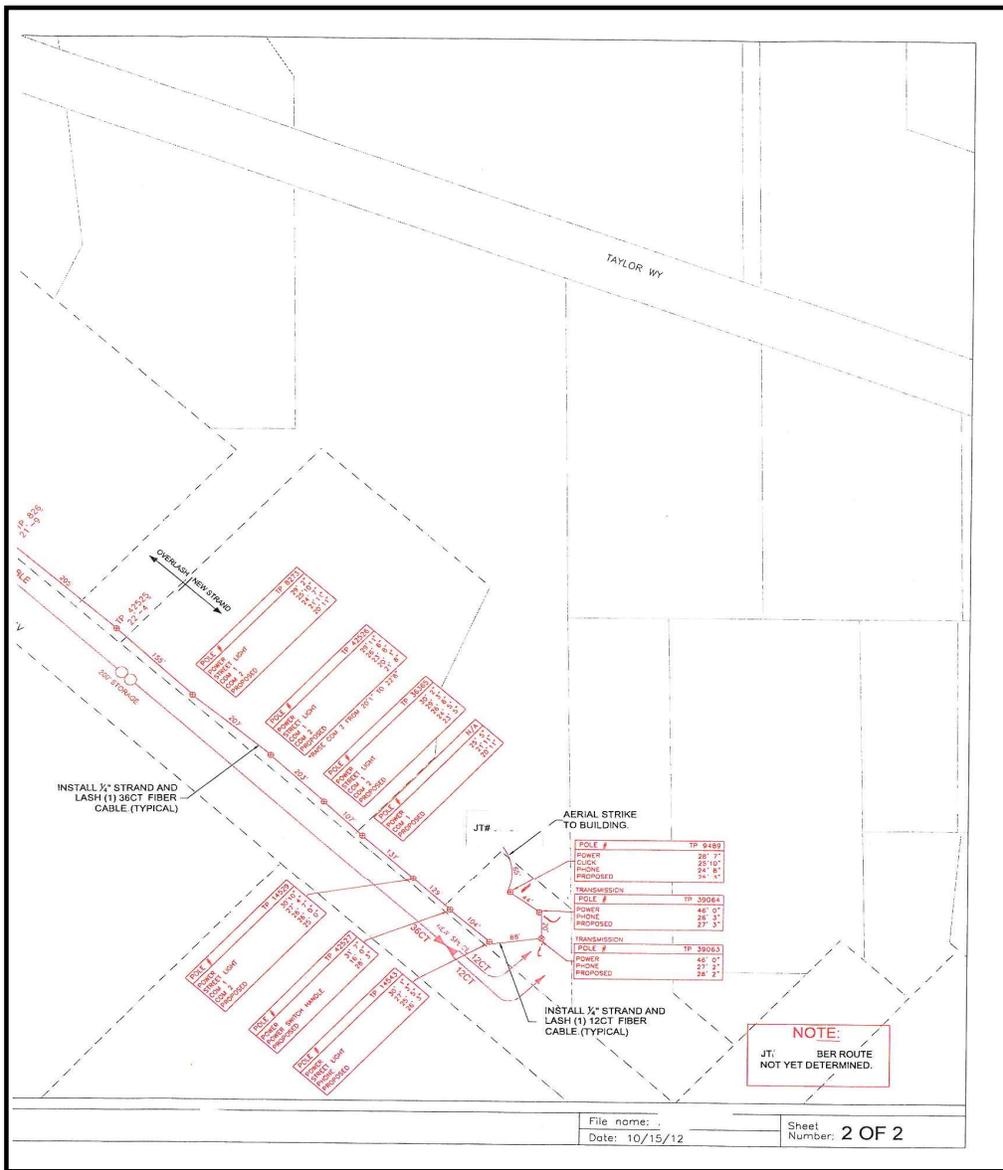
**Attachment Type Key:**

- A. Amplifier
- B. Enclosure
- C. Slack Box
- D. Splice Box
- E. Power Supply
- F. Risers
- G. Other (please specify)

Company/Contractor's Name: \_\_\_\_\_

Attachment Site: \_\_\_\_\_

Exhibit D1.1 - IRU Pole Attachment Request Form



**EXHIBIT E**  
**TACOMA POWER COMMERCIAL SYSTEM UPGRADES**

**1. SERVICE COMMITMENTS—CONTINUITY**

- (a) For a period of six (6) months following the Effective Date, Operator commits to offer residential broadband internet access services at speeds similar to those available on the Tacoma Power Commercial System immediately prior to the Effective Date. Nothing in this commitment is meant to prevent Operator from offering faster speeds.
- (b) For a period of six (6) months following the Effective Date, Operator commits to offer residential cable services similar to those available on the Tacoma Power Commercial System immediately prior to the Effective Date.
- (c) Nothing in this Exhibit or the IRU Agreement is intended to prevent Operator from offering the services described in Section 1(a) or (b) for a longer period.
- (d) Except as provided in this Exhibit and in Exhibit H (Affordable Access to Telecommunications Services), nothing in this IRU Agreement or the Exhibits limits or controls Operator's authority to determine the types of services it will to offer the public via the Tacoma Power Commercial System; provided that Operator complies with the service-related requirements of the IRU Agreement and the Exhibits, including Exhibits G through L.

**2. TACOMA POWER COMMERCIAL SYSTEM UPGRADE TO DOCSIS 3.1**

(a) **DOCSIS 3.1.** Operator agrees to make such capital expenditures and upgrades as are necessary to migrate the Tacoma Power Commercial System to DOCSIS 3.1 and to make gigabit speed internet service available as described in items 1 and 2 below (the "Upgrade"), which expenditures shall count towards Operator's Capital Expenditures Minimum to the extent they fall within the definition of Capital Expenditure in Exhibit F.

1. Operator will ensure availability of a 1000/10 Mbps service (the "Gigabit Service") at a passing, as evidenced by speed test results at peak usage time measured at the tap at the passing location. The DOCSIS 3.1 upgrade engineering and design shall be completed by the first anniversary of the Effective Date. The Gigabit Service shall be available at 40% of passings by the second anniversary of the Effective Date, and 100% of passings by the third anniversary of the Effective Date.
2. Operator will provide DOCSIS 3.1 modems to all new customers and replace customer modems with DOCSIS 3.1 modems for all existing customers who upgrade to services that require DOCSIS 3.1. Any new or replacement modems will be provided at Operator's terms and fees in effect at the time of provisioning.

(b) Operator further agrees to make available the upgraded services contemplated by this Section in accordance with the equity principles enumerated in Exhibit G.

### 3. TACOMA POWER COMMERCIAL SYSTEM UPGRADE PLAN AND VERIFICATION

(a) **Quarterly Reports.** Operator shall provide quarterly reports on the status of the Upgrade.

(b) **Annual Certification.** Operator shall provide a certification to Tacoma Power within thirty (30) days after each period identified in Section 2(a)(1) above, signed by one of its corporate officers certifying compliance with the Upgrade requirement for the reporting period and cumulatively as of the date of the certification.

(c) **Verification Procedure.** Tacoma Power may perform tests to confirm compliance with Section 2(a)(1) above. Operator will facilitate and enable Tacoma Power to test the Tacoma Power Commercial System once a month at up to five test points chosen by Tacoma Power. Tacoma Power will conduct such speed tests with results measured at the node at peak and other usage times, at its discretion with prior notice to Operator.

### 4. OBLIGATION TO MAKE FUTURE UPGRADES

(a) Operator shall upgrade the Tacoma Power Commercial System as new broadband technologies are developed for traditional cable television networks utilizing hybrid fiber/coaxial architecture. Operator will upgrade the Tacoma Power Commercial System to keep pace and parity with the hybrid fiber/coaxial networks operated by the cable broadband providers in the Seattle-Tacoma metropolitan area. As of the Effective Date of this IRU Agreement, those networks are operated by Comcast Cable and Wave Broadband. Future, upgraded network architectures for cable broadband networks that are currently hybrid fiber/coaxial may include newer versions of DOCSIS, deeper fiber architecture such as a node plus 0 cascade depth, increased upstream and downstream cable system capacity, or fiber-to-the-premises. Nothing in the foregoing language is meant to imply that Operator is limited to using a hybrid fiber/coaxial network throughout the Term of this IRU Agreement.

(b) As the networks currently operated by Comcast and Wave in the Seattle-Tacoma metropolitan area are upgraded to new technologies, Operator shall upgrade the Tacoma Power Commercial System to the same technologies or to similar technologies capable of delivering equivalent services.

(c) The upgrade commitments in this Exhibit assume that the Tacoma Power Commercial System will remain a wireline network architecture with the same number of homes passed as of the Effective Date (approximately one hundred and fifteen thousand (115,000)) or larger numbers of homes passed by the physical plant within the Tacoma Power Commercial Service Area throughout the Term. However, should Operator determine that there are new technologies available for future upgrades that would require a smaller wireline network footprint in order to maintain a system that meets the requirements of this Section for delivering services to the Tacoma Power Commercial Service Area, Operator may submit a written proposal to Tacoma Power for its evaluation. Tacoma Power shall have no obligation to accept such proposal.

(d) Any such upgrades that qualify as Capital Expenditures shall be part of and not in addition to the Capital Expenditures Minimum set out in Exhibit F.

## **5. REPORTING ON FUTURE UPGRADES AND VERIFICATION**

(a) On the first Annual Reporting Date following completion of the Upgrade as specified in Operator's final annual certification submitted pursuant to Section 3(b), and on each Annual Reporting Date thereafter, Operator shall submit a report to Tacoma Power on the status and capabilities of the Tacoma Power Commercial System. Based on publicly available information, Operator shall include a comparison to service as provided by wireline broadband providers in the Seattle-Tacoma metropolitan region.

(b) Beginning in the seventh year of the Term of the IRU Agreement, Tacoma Power shall have the right to perform a technical audit and test the Tacoma Power Commercial System to determine whether its capabilities meet the requirements of Section 4. Testing may include, but is not limited to, a review of network configurations and diagrams, site visits, and network testing at random locations in the field. Such technical audits shall take place no more frequently than once every three (3) years. This requirement shall not limit the verification that Tacoma Power may perform under Section 3(c).

## **6. REMEDIES FOR FAILURE TO TIMELY UPGRADE TACOMA POWER COMMERCIAL SYSTEM OR REPORT**

(a) Failure to timely provide the certification required in Section 3(b) is a Default. Liquidated damages in the amount of Two Hundred and Fifty Dollars (\$250) per day shall accrue from the date of receipt of a Notice of Default until the Default is cured.

(b) In the event that Operator does not cure or resolve a Default of a requirement contained in Section 2 within the timeframes established pursuant to Section 21(c) or 24 of this IRU Agreement, liquidated damages in the amount of Seven Hundred Fifty Dollars (\$750) per day will accrue until the Default is cured.

(c) If Tacoma Power provides a Notice of Default to Operator related to the requirements in Section 4, any cure, including the submittal of a compliance plan, shall not relieve Operator from its obligations in Section 4.

**EXHIBIT F**  
**CAPITAL EXPENDITURES COMMITMENT**

**1. CAPITAL EXPENDITURES MINIMUM**

(a) Operator shall make such Capital Expenditures (as defined below) to the physical assets of the Tacoma Power Commercial System on an ongoing basis, as are customary to maintain the Tacoma Power Commercial System and its associated services in a technological state comparable to that of other providers of cable/broadband services in the Seattle, Washington metropolitan area as described in Exhibit E.

(b) In no event shall Operator make Capital Expenditures in any full calendar year (“**Capital Expenditures Period**”) during the Term of the IRU Agreement totaling less than One Million Five Hundred Thousand Dollars (\$1,500,000.00), as may be adjusted pursuant to Section 1(e) below (“**Capital Expenditures Minimum**”).

(c) During the period from the Effective Date until December 31, 2019 (“**Initial Period**”), Operator’s Capital Expenditures commitment shall be the amount determined by multiplying the number of days in the Initial Period by Four Thousand One Hundred and Ten Dollars (\$4,110) (“**Initial Period Minimum**”).

(d) During the period from January 1 of the last year of the IRU Agreement until the date the IRU Agreement expires (“**Final Period**”), Operator’s Capital Expenditures commitment shall be the amount determined by multiplying the number of days in the Final Period by the amount calculated by dividing the Capital Expenditures Minimum applicable in the immediately prior Capital Expenditure Period by 365 days (“**Final Period Minimum**”).

(e) Tacoma Power may adjust the Capital Expenditure Minimum once during each Capital Expenditure Period based on changes in the Consumer Price Index.

**2. CALCULATING AND REPORTING QUALIFYING CAPITAL EXPENDITURES**

(a) In order to count towards the Capital Expenditures Minimum, including the Initial Period Minimum and the Final Period Minimum, an outlay must be a “Capital Expenditure”. The term includes, but is not limited to, expenditures on upgrades of coaxial cable to optical fiber, upgrades in system capacity, reallocation of system capacity from downstream to upstream, system extensions, upgrades of equipment and other materials to enable or support successive generations of DOCSIS, and expenditures on upgrades to fiber-to-the-premises. To qualify, any improvements made due to an expenditure must become physical assets of the Tacoma Power Commercial System owned by Tacoma Power upon installation, subject to the IRU Agreement. The term does not include: (i) any funds spent by Operator on physical assets that do not become part of the Tacoma Power Commercial System; (ii) expenditures on physical assets (whether they become part of the Tacoma Power Commercial System or not) that are *not* related to provision of wireline services. For example, expenditures on wireless communications facilities, including wireless facility attachments to enable deployment of small cell, and

distributed antenna systems, will not be Capital Expenditures. Labor costs may be included if directly attributable to capital and not operations.

(b) Operator shall, on each Annual Reporting Date, submit to Tacoma Power a report on Capital Expenditures, with descriptions and dollar amounts, it has made since the most recent such report, or in the case of the first such annual report, in the Initial Period. The report shall identify if Capital Expenditures include any Credits (as defined below) from any prior Capital Expenditure Period. The report shall include Operator's supporting documentation necessary to demonstrate compliance for the reported Capital Expenditures, including the following:

1. Invoices for all contracted labor, with accompanying certification by Operator management that the claimed labor costs were directly attributable to Capital Expenditures, not operating expenses;
2. Work orders for internal labor associated with capital upgrades, with accompanying certification by Operator management that the claimed labor costs were directly attributable to Capital Expenditures, not operating expenses;
3. Bills of sale and inventory documentation for all materials and equipment purchased as part of Operator's Capital Expenditures obligation; and
4. As-built maps documenting outside plant construction and upgrades.

(c) For the Final Period, the report shall be submitted to Tacoma Power within sixty (60) days after the IRU Agreement expires or terminates.

(d) For any period in which After-Installed Assets are subject to financing arrangements described in Section 3 of the IRU Agreement, the report on Capital Expenditures shall also include a current status report on the ownership interests in and liens to which the After-Installed Assets are subject.

### **3. CREDITS AND SHORTFALLS**

(a) If the report submitted pursuant to Section 2(b) demonstrates that Operator's Capital Expenditures were in excess of the Capital Expenditures Minimum (or if applicable, the Initial Period Minimum), the difference shall be considered a "Credit" and shall be credited toward the Capital Expenditures for the Capital Expenditures Period or Periods that follow (including the Final Period).

(b) If the report submitted pursuant to Section 2(b) demonstrates that Operator's Capital Expenditures (including any Credits from prior Capital Expenditure Periods, including the Initial Period) were less than the Capital Expenditure Minimum (or if applicable, the Final Period Minimum), the difference shall be considered a "Shortfall" and Tacoma Power shall have the remedy described in Section 5 below.

#### 4. AUDIT RIGHTS

(a) Tacoma Power shall have the right no more than once every three (3) years to audit those Operator's books, records, and finances that relate to the IRU Agreement, upon reasonable notice to Operator and during normal business hours, in order to determine Operator's compliance with the Capital Expenditures Minimum.

#### 5. REMEDIES FOR NON-COMPLIANCE

(a) If Operator submits a report, other than the report for the Final Period, showing a Shortfall, it will have an additional twelve (12) month period following the end of the Capital Expenditure Period showing the Shortfall ("**Catch-Up Period**") in which to make Capital Expenditures to be credited towards the Shortfall ("**Catch-Up Capital Expenditures**"). At the end of the Catch-Up Period, Operator shall submit a report on the Catch-Up Capital Expenditures in the same form as the annual report described in Section 2. If the report shows Operator has failed to make Catch-Up Capital Expenditures equivalent to the Shortfall during the Catch-Up Period, Operator will remit a payment, along with the report in the amount of the Shortfall, less the Catch-Up Expenditures, if any.

(b) If Operator submits a report for the Final Period showing a Shortfall, Operator will remit a payment, along with the report in the amount of the Shortfall.

(c) A late fee in the amount of Twelve Percent (12%) per annum shall be due and payable in the event that Operator has not paid the Shortfall within thirty (30) days after its due date.

**EXHIBIT G**  
**EQUITABLE ACCESS**

**1. EQUITY IN PRICING AND SERVICE LEVELS.**

(a) Operator agrees to offer like services at like prices to residential customers throughout the Tacoma Power Commercial Service Area.

(b) The Upgrade contemplated by Exhibit E hereto, as well as subsequent upgrades pursuant to Section 4 of Exhibit E, will be undertaken on a ubiquitous basis to 100% of the Tacoma Power Commercial System.

(b) Operator's goal is to roll out all upgrades in an equitable manner to ensure that neighborhoods with different levels of household income, neighborhoods with different mixes of race or ethnicity, and different council districts within the City of Tacoma all benefit from the upgrades on comparable deployment schedules.

**2. EQUITY IN ACCESS TO SERVICE.**

(a) Operator agrees that it will not decline service to any customer in good standing and that its services will be available on an equitable basis throughout the Tacoma Power Commercial Service Area. Consistent with its existing practices, Operator shall reinstate service for delinquent customers so long as they pay outstanding balances including late fees, if any, and remain current.

**3. EQUITY COMMITMENTS.**

(a) Operator will actively work to eliminate racial and socioeconomic disparities as it upgrades the Tacoma Power Commercial System across the Tacoma Power Commercial Service Area and beyond.

(b) Operator commits to purposeful citizen outreach and engagement with diverse community partners to better understand the needs of historically underserved populations. Through this, Operator will provide access based on the best available technology to serve the unique needs of any particular area or population.

(c) Operator will work with community partners and businesses from all parts of the Tacoma Power Commercial Service Area to promote and track equity and inclusion of services within Tacoma, Washington and throughout the region. This will allow Operator to quantify measurable improvements as they relate to broadband and telecommunication access in the community.

(d) As it does in its other service areas, Operator will provide guidance, education, and assistance to any subscriber requesting such assistance to help achieve equitable service outcomes as it relates to broadband and telecommunications offerings.

(e) Operator commits to being transparent and collaborative with individuals and community groups, holding itself accountable for measurable improvements and outcomes as it relates to equitable penetration of telecommunications and broadband services in the Tacoma Power Commercial Service Area.

**4. PUBLICATION OF RATES AND SERVICES**

(a) Operator shall publish its rates and services for residential customers on its website. This obligation shall not apply to enterprise customers.

## **5. ANNUAL CERTIFICATION.**

(a) Operator shall provide annually to Tacoma Power, on the Annual Reporting Date, a certification signed by a corporate officer certifying that it has complied with the requirements of Sections 1 and 2 of this Exhibit G. Such certification shall also include report on activities that Operator has undertaken pursuant to this Exhibit G, including its specific efforts to meet the obligations contained in Section 3(a)-(e) of this Exhibit.

## **6. REMEDIES FOR NON-COMPLIANCE**

(a) Failure of Operator to publish its rates and services on its website as required by Section 4 of this Exhibit is a Default. Liquidated damages in the amount of Two Hundred and Fifty Dollars (\$250) per day shall accrue from the date of receipt of Notice of Default until the Default is cured; provided that, the liquidated damages amount shall increase to five hundred dollars (\$500) per day if the Default is not cured within ninety (90) days following the date of receipt of the Notice of Default.

(b) In the event that Tacoma Power provides a Notice of Default to Operator related to the requirements contained in Section 1 or 2 of this Exhibit, any cure, including submittal of a compliance plan pursuant to Section 21(c) of this IRU Agreement, shall include rebates or refunds to customers who have overpaid and periodic reporting on compliance plan implementation.

(c) In the event that Operator does not cure or resolve a Default of a requirement contained in Section 1 or 2 of this Exhibit within the timeframes established pursuant to Sections 21(c) or 24 of this IRU Agreement, liquidated damages will accrue until the Default is cured and maintained for three consecutive months. Liquidated damages of Ten Thousand Dollars (\$10,000) will accrue for the first month, increasing by Five Thousand Dollars (\$5,000) each month thereafter until compliance is maintained for three consecutive months; provided that no liquidated damages will accrue or be payable for the three consecutive months of compliance. Operator agrees that, until compliance is maintained for three (3) consecutive months, it will provide Tacoma Power with a monthly report setting forth its efforts to implement the compliance plan together with a certification as to the status of its compliance.

**EXHIBIT H**  
**AFFORDABLE ACCESS TO TELECOMMUNICATIONS SERVICES**

**1. LIFELINE**

(a) Operator represents that it is designated by the State of Washington or the Federal Communications Commission (“FCC”) as an eligible telecommunications carrier (“ETC”) and meets the program requirements to serve as a Lifeline services provider as of the Effective Date of the IRU Agreement and that it will maintain such ETC designation and participate in Lifeline or any available successor program, subject to the rules of the FCC, throughout the Term of this IRU Agreement.

(b) Operator shall offer the federal Lifeline subsidy to those customers within the Tacoma Power Commercial Service Area that qualify for the Lifeline subsidy according to the rules and policies of the FCC.

(c) In furtherance of the requirements in this Section 1, Operator agrees to: (i) publish the availability of its Lifeline program on its website; (ii) provide to Tacoma Power a copy of its redacted FCC Form 481, the Carrier Annual Reporting Data Collection Form (or comparable reports if modified by FCC in future) on the Annual Reporting Date each year and its FCC Form 555, the Annual Lifeline Eligible Telecommunications Carrier Certification Form; (iii) provide Tacoma Power with a certification annually on the Annual Reporting Date, certifying that it is in compliance with Section 1(b), and including a report of the annual aggregate statistics regarding customer enrollment in the Lifeline program served by the Tacoma Power Commercial System; and (iv) manage its Lifeline program in good faith at all times.

**2. REDUCED-COST BROADBAND PROGRAM**

(a) For the Term of the IRU Agreement, Operator shall offer a substantially reduced-cost broadband internet access service, at or above the FCC definition of broadband (as established periodically in FCC Broadband Deployment Reports, or similar reports) to households that are eligible for Tacoma Power’s electric service low-income program and shall periodically evaluate the offering of higher speed service at the reduced-cost service rate. Operator has represented that its initial program will consist of 30/10 (30 megabits download and 10 megabits upload). This plan may change over time.

(b) In furtherance of the requirements in this Section 2, Operator agrees to: (i) publish the availability of its reduced-cost broadband service on its website, in a manner that prominently advertises the service where Operator’s other services and pricing for the Tacoma Power Commercial System are advertised; (ii) establish a verification process for applicants that is non-onerous to customers; (iii) provide Tacoma Power with a certification signed by a corporate officer on an annual basis on the Annual Reporting Date, certifying that it is offering reduced-cost service, and including a report of the annual aggregate statistics regarding customer enrollment in the program; and (iv) manage its program in good faith at all times.

**3. FREE BROADBAND SERVICE TO QUALIFYING ENTITIES**

(a) Operator shall provide free broadband internet access service (either wired or Wi-Fi service at Operator’s option) to at least 30 locations passed by the Tacoma Power Commercial System within the Tacoma Power Commercial Service Area, that provide services to low-income

members of the community, as a means of facilitating broadband internet access for those who cannot access it elsewhere.

(b) Tacoma Power shall determine which categories of locations qualify for such free service and communicate the categories in writing to Operator. Within ninety (90) days thereafter, Operator must have the program in place so that qualifying entities can submit requests to Operator for processing and approval by both parties.

(c) Operator and Tacoma Power will try cooperatively to process and approve or deny requests within thirty (30) days of receipt.

(d) Operator shall provide the service contemplated in Section 3(a) within a reasonable time period, not to exceed thirty (30) days, following approval, unless the parties mutually agree to a longer period.

(e) Operator shall be excused from meeting the thirty (30) location target if there is insufficient demand from qualifying entities.

(f) In furtherance of the requirements in this Section 3, Operator agrees to: (i) publish the availability of its program on its website; (ii) provide Tacoma Power with a certification signed by a corporate officer on an annual basis on the Annual Reporting Date, certifying that it is offering the service, and including a report listing the locations receiving service under the program; and (iii) manage its program in good faith at all times.

**EXHIBIT I**  
**CUSTOMER SERVICE COMMITMENTS**

**1. CUSTOMER SERVICE CONTACTS**

(a) Operator agrees to maintain a local or toll-free telephone line for taking customer calls and will provide other forms of customer contact that will be available twenty-four (24) hours per day, seven (7) days per week, including on holidays. During hours and days during which most similar businesses in Tacoma are open to serve customers, which currently includes Saturday mornings (“**Normal Business Hours**”), company representatives will be available to respond to customer inquiries. After Normal Business Hours, Operator may make provision for electronic response pending opportunity the following day for a response by a company representative. A company representative will respond to inquiries received after Normal Business Hours on the next business day.

(b) Under normal operating conditions that are within the control of Operator (“**Normal Operating Conditions**”), calls and other forms of customer contacts will be answered by a company representative within thirty (30) seconds after the connection is made. If the call or contact is transferred, the transfer time will not exceed thirty (30) seconds. These standards will be met at least ninety percent (90%) of the time, measured quarterly. Under Normal Operating Conditions, customers will receive a busy signal no more than three percent (3%) of the time. Normal Operating Conditions include special promotions and normal system maintenance and upgrades, but do not include natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions.

**2. SERVICE CALLS**

(a) Operator will schedule appointments for installations and other service calls either at a specific time or, at a maximum, during a four-hour time block during normal business hours. Operator may also schedule service calls outside of normal business hours for the convenience of the customer. Operator will not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment. If the service technician is running late and will not meet the specified appointment time, Operator will contact the customer and reschedule the appointment at the convenience of the subscriber.

(b) Standard installations that are located up to One Hundred and Twenty Five (125) feet from the existing distribution system will be performed within seven (7) days after an order has been accepted.

(c) Except during an event of Force Majeure, Operator will begin working on a service interruption no later than twenty-four (24) hours after being notified of the problem. Working is meant to denote that Operator has begun to address the matter.

(d) These standards concerning installations, outages and service calls will be met under normal operating conditions at least ninety-five percent (95%) of the time, measured quarterly.

**3. BILLING PRACTICES**

Thirty days advance notice will be given to subscribers of any changes in rates or services if the change is within the control of Operator. Refunds will be issued no later than either the customer's next billing cycle or thirty (30) days following resolution of the request, whichever is

earlier, or upon the return of equipment when service is terminated. Credits will be issued no later than the billing cycle following the determination that a credit is warranted.

#### **4. PHYSICAL PRESENCE**

Operator will maintain a physical presence in the City of Tacoma, including a store that will be open during all Normal Business Hours, where consumers can transact business in person with Operator staff-persons. The address of Operator's store shall be posted on its website. Operator will maintain some of its customer service staff in Tacoma.

#### **5. QUARTERLY REPORTS**

(a) Operator will provide Tacoma Power a report on its compliance with these customer service standards on a quarterly basis within thirty (30) days of the end of each calendar quarter.

(b) After the first three (3) years of the Term, if Operator has been in compliance, then future reporting shall be reduced to an annual basis. If reports are required annually, such report shall be submitted on the Annual Reporting Date, and in the event of a Default, Section 7(b) shall not apply; instead Section 6 of the IRU Agreement shall apply.

#### **6. ANNUAL CERTIFICATION**

Operator shall annually submit to Tacoma Power, on the Annual Reporting Date, a certification signed by a corporate officer certifying Operator's compliance with Section 4 of this Exhibit.

#### **7. REMEDIES FOR NON-COMPLIANCE**

(a) In the event that Operator does not cure or resolve a Default of a requirement of Section 4 of this Exhibit within the timeframes established pursuant to Sections 21(c) or 24 of this IRU Agreement, liquidated damages in the amount of Two Hundred and Fifty Dollars (\$250) per day will accrue until the Default is cured.

(b) Failure of Operator to timely submit any report required by Section 5 to Tacoma Power is a Default. Liquidated damages in the amount of Two Hundred and Fifty Dollars (\$250) per day shall accrue from the date of receipt of a Notice of Default until the Default is cured.

(c) In the event that Tacoma Power provides a Notice of Default related to the submittal of a report pursuant to Section 5 which demonstrates that Operator has failed to meet any of the customer service standards contained in this Exhibit, any cure, including submittal of a compliance plan shall include a requirement that Operator report to Tacoma Power, on a monthly basis, until such compliance plan is completely implemented and Operator is in compliance with all of the customer service standards in this Exhibit for three (3) consecutive months.

#### **8. SCOPE OF OBLIGATIONS**

(a) For the avoidance of doubt, the obligations in this Exhibit are the minimum obligations that may be imposed on Operator by Tacoma Power pursuant to this IRU Agreement with respect to customer service. Operator must also comply with any other obligations it may have with respect to customer service, including but not limited to, obligations in any franchise agreements or in municipal, state or federal laws or regulations, as they exist as of the Effective Date, or as they may be adopted or amended in the future.

(b) Nothing in this Exhibit should be construed to prevent or prohibit: (i) the City of Tacoma, acting in its capacity as a franchising authority, and Operator from agreeing to customer service

requirements that exceed the standards set forth in this Exhibit; (ii) the City of Tacoma, acting in its capacity as a franchising authority, from enforcing pre-existing customer service requirements that exceed the standards set forth in this Exhibit; (iii) the City of Tacoma, acting in its capacity as a franchising authority, from enacting or enforcing any consumer protection law; or (iv) the establishment or enforcement of any ordinance or regulation by the City of Tacoma concerning customer service that imposes customer service requirements that exceed, or address matters not addressed by, the standards set forth in this Exhibit.

**EXHIBIT J  
CUSTOMER PRIVACY**

**1. PRIVACY**

(a) Consistent with its existing policy and practice, Operator agrees to comply with City Council Resolution No. 39702 regarding privacy, a copy of which is attached hereto as **Exhibit J1**. This Resolution prohibits Internet Service Providers that serve as retail broadband data providers on the Tacoma Power Commercial System from collecting or selling personal information from a customer's use of the Internet without express written approval.

(b) Operator agrees to implement compliance with Resolution No. 39702 into its own broadband data service offerings delivered using the Tacoma Power Commercial System.

(c) Operator agrees to implement compliance with Resolution No. 39702 into any agreements it enters into with Internet Service Providers that serve as retail broadband data service providers on the Tacoma Power Commercial System.

**2. PUBLICATION OF POLICY AND ANNUAL CERTIFICATION**

(a) Operator shall conspicuously publish its privacy policy on its website.

(b) This privacy policy shall not limit subscribers' rights to seek judicial remedies.

(c) Operator shall annually submit to Tacoma Power, on the Annual Reporting Date, a certification signed by a corporate officer certifying Operator's compliance with this Exhibit. The annual certification shall include a copy of Operator's privacy policy.

**3. REMEDIES FOR NON-COMPLIANCE**

(a) In the event that Operator does not cure or resolve a Default of the requirement to conspicuously publish its privacy policy on its website within the timeframes established pursuant to Sections 21(c) or 24 of this IRU Agreement, liquidated damages will accrue in the amount of Five Hundred Dollars (\$500) per day, until such time as the Default is cured.

(c) In the event that Operator does not cure or resolve a Default of the requirement in Section 1(b) of this Exhibit within the timeframes established pursuant to Sections 21(c) or 24, liquidated damages in the amount of Seven Hundred Fifty Dollars (\$750) per day will accrue until the Default is cured by posting on its website a privacy policy compliant with Section 1(b) of this Exhibit.

**4. SCOPE OF OBLIGATIONS**

(a) For the avoidance of doubt, the obligations in this Exhibit are the minimum obligations that may be imposed on Operator by Tacoma Power pursuant to this IRU Agreement with respect to customer privacy. Operator must also comply with any other obligations it may have with respect to customer privacy, including but not limited to, obligations in any franchise agreements or in municipal, state or federal laws or regulations, as they exist as of the Effective Date, or as they may be adopted or amended in the future.

(b) Nothing in this Exhibit should be construed to prevent or prohibit: (i) the City of Tacoma, acting in its capacity as a franchising authority, and Operator from agreeing to customer privacy requirements that exceed the standards set forth in this Exhibit; (ii) the City of Tacoma, acting in

its capacity as a franchising authority, from enforcing pre-existing customer privacy requirements that exceed the standards set forth in this Exhibit; (iii) the City of Tacoma, acting in its capacity as a franchising authority, from enacting or enforcing any consumer privacy law; or (iv) the establishment or enforcement of any ordinance or regulation by the City of Tacoma concerning customer privacy that imposes customer privacy requirements that exceed, or address matters not addressed by the standards set forth in this Exhibit.

**EXHIBIT J1**  
**COUNCIL RESOLUTION REGARDING CUSTOMER PRIVACY**

RESOLUTION NO. 39702

BY REQUEST OF MAYOR STRICKLAND AND COUNCIL MEMBERS CAMPBELL, IBSEN, AND MELLO

A RESOLUTION relating to protecting the privacy and security of Click Network! internet users.

WHEREAS, in 1997, the City, through its electrical utility, embarked on an effort to construct and operate a state-of-the-art telecommunication system for the benefit of its electric utility and electric utility customers, and

WHEREAS the telecommunications system (“Click! Network”) was constructed and has been in continuous operation since 1999, and WHEREAS Click! Network has entered into agreements with private internet service providers (“ISPs”) to use the Click! Network to provide internet services to approximately 25,000 retail customers, and

WHEREAS Click! Network and the ISPs have the ability to collect personal information resulting from their customers’ use of the internet, including (a) financial information; (b) health information; (c) information pertaining to children; (d) social security numbers; (e) precise geolocation information; (f) content of communications; (g) call detail information; and (h) web browsing history, application usage history, and the functional equivalents of either, from the users of their services, and

WHEREAS, in 2016, the United State Federal Communications Commission (“FCC”) proposed rules that would have required Click! Network and the ISPs to receive permission from their customers prior to collecting and selling such personal information, and

WHEREAS, on April 3, 2017, President Trump signed a United States congressional resolution that overturned the FCC internet privacy protections related to Click! Network and the ISPs collecting and selling personal information resulting from internet use, and

WHEREAS the Washington State Legislature has proposed legislation (“HB 2200 and SB 5919”) that would institute similar protections included in the prior FCC internet privacy rules; however, it is unlikely that such protections will be enacted into law before the current legislative session ends, and

WHEREAS protecting the privacy and security of Click! Network customers is of vital concern to the City Council, and the City Council desires that the Tacoma Public Utility Board (“Board”) prohibit Click! Network and its ISPs from collecting or selling their customers’ personal information without prior written permission, or refusing to serve customers who do not approve the collection or sale of their personal information;

Now, Therefore, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TACOMA:

Section 1. That the City Council hereby requests that the Tacoma Public Utility Board (“Board”) prohibit internet service providers (including Click! Network pursuant to an “All-In” Retail Business Plan) who have entered into agreements with Tacoma Power to use Click! Network from collecting or selling personal information from a customer resulting from the customer’s use of the internet without express written approval from the customer.

Section 2. That the City Council hereby requests that the Board prohibit its internet service providers (including Click! Network pursuant to an “All-In” Retail Business Plan) from refusing to provide services to a customer on the grounds that the customer has not approved the collection or sale of the customer’s personal information.

Section 3. That the City Council hereby requests that in the event that Click! Network is sold or leased, the prohibitions as set forth in Sections 1 and 2 above be included as condition of the sale or lease.

Section 4. That the prohibitions requested in this resolution shall remain in effect until such time as either the federal government or the state of Washington enacts the same or broader privacy and security protections for internet users.

## **EXHIBIT K NET NEUTRALITY**

### **1. NET NEUTRALITY**

(a) Consistent with its longtime policy and practice, Operator shall operate the Tacoma Power Commercial System on a net neutral basis. Specifically, Operator commits to operate the Tacoma Power Commercial System consistent with the following principles:

(i) **Transparency:** Operator will fully and publicly disclose accurate information about its services, including technical characteristics, performance characteristics, and network management practices, so consumers can make informed choices.

(ii) **No throttling:** Operator shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service or use of a non-harmful device, subject to reasonable network management.

(iii) **No blocking:** Subject to reasonable network management, Operator shall not block lawful content, websites, resources, applications, services, or non-harmful devices.

(iv) **No discrimination against lawful network traffic:** All lawful traffic, including encrypted traffic, will receive similar treatment. No traffic will receive preferential treatment based on affiliation, the identity of the end user, the content of the information, the provider of content, or the type of service being provided.

(v) **No paid prioritization:** Operator shall not engage in paid prioritization. Paid Prioritization refers to the management of a network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management either in exchange for monetary or other consideration from a third party, or to benefit an affiliated entity.

(vi) **Reasonable network management** is any practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the service.

(b) In furtherance of the requirements in Section 1(a), Operator agrees to conspicuously post and continuously maintain on its website a copy of its net neutrality policy.

### **2. ANNUAL CERTIFICATION AND PERIODIC TESTING**

(a) On an annual basis, Operator shall by the Annual Reporting Date, provide the Tacoma Power Contract Administrator with a certification signed by a corporate officer certifying Operator's ongoing compliance with Section 1. Such certification shall include a copy of the policy posted on Operator's website.

(b) To confirm that Operator is operating the Tacoma Power Commercial System in compliance with Section 1, Tacoma Power may periodically test the Tacoma Power Commercial System for compliance.

(i) Tacoma Power Commercial Tacoma Power may use any testing tool to monitor net neutrality compliance, including but not limited to online tools, network scanners, and local servers; provided that, the Parties may mutually agree to use of a specific testing tool or methodology to monitor net neutrality compliance. At Tacoma Power's request, Operator will provide network documentation and configuration data to prove that it is not throttling, slowing, promoting, or otherwise treating specific traffic in ways that are impermissible under Operator's net neutrality obligations. Tacoma Power may also make unscheduled site visits to conduct on-site testing up to four times per year and Operator will grant access and opportunity to test on those occasions.

(ii) Tacoma Power may change its technical approach to net neutrality testing and verification in its sole discretion based on technological changes and changes in the use of broadband services.

### **3. REMEDIES FOR NON-COMPLIANCE**

(a) Failure of Operator to conspicuously post its net neutrality policy on its website is a Default. Liquidated damages in the amount of Five Hundred Dollars (\$500) per day shall accrue from the date of receipt of Notice of Default until the Default is cured.

(b) In the event that Tacoma Power provides a Notice of Default to Operator alleging that the tests required in Section 2(b) of this Exhibit K revealed that the Tacoma Power Commercial System is not being operated in compliance with Section 1, any such Notice of Default shall include a copy of the tests showing the Default with full documentation as how the tests were conducted, including, but not limited to, date, time of day, location and methodology. In the event that, (i) Tacoma Power implements a testing tool or methodology not mutually agreed to by the Parties to monitor net neutrality compliance, which test results in a determination that Operator is not in compliance with Section 1 of this Exhibit K, (ii) Tacoma Power issues a Notice of Default based upon such determination, and (iii) the Operator seeks dispute resolution pursuant to Section 24 of the IRU Agreement and disputes the accuracy or reliability of the results of application of such test results, Operator may request that a neutral third party with knowledge and experience regarding the subject of the Dispute, conduct a review of the tests conducted by Tacoma Power and provide a report regarding the accuracy and reliability of the test results, and such other matters as the Parties deem relevant to the review. This report and the conclusions contained therein shall be presumptively conclusive as to this Disputed issue. The independent third party shall be mutually agreed to by the Parties and the parties shall equally bear the costs of such neutral third party. If the Parties are unable to mutually agree to the selection of the neutral third party within a reasonable period of time, the Parties shall each select a neutral third party who collectively shall select a third neutral third party to conduct the review and issue the report.

(c) In the event that Operator does not cure a Default of a requirement contained in Section 1 of this Exhibit within the timeframes established pursuant to Section 21(c) of this IRU Agreement or, the Parties are unable to determine pursuant to Section 24 of this IRU Agreement that there is no Default, Tacoma Power shall have the right to perform testing on the Tacoma Power Commercial System for compliance with Section 1 at any frequency it chooses. Operator shall bear the costs of such tests if the tests demonstrate it is in default.

(d) Test results obtained pursuant to Section 3(c) will be evaluated on a weekly basis and, if applicable, liquidated damages will accrue as follows:

(i) During the first week following the timeframes established pursuant to Sections 21(c) or 24 of this IRU Agreement, if testing on the Tacoma Power Commercial System reveals that the Tacoma Power Commercial System is not in compliance with Section 1, liquidated damages will accrue in the amount of Ten Thousand Dollars (\$10,000).

(ii) If testing on the Tacoma Power Commercial System during the second week following the timeframes established pursuant to Sections 21(c) or 24 of this IRU Agreement reveals that the Tacoma Power Commercial System is still not in compliance with Section 1, liquidated damages will accrue in the amount of Fifteen Thousand Dollars (\$15,000).

(iii) The aforementioned liquidated damages will accrue at an increased rate of Five Thousand Dollars (\$5,000) per week for every week thereafter where tests reveal the Tacoma Power Commercial System is still not in compliance with Section 1, until such time as Operator has achieved compliance and remains in compliance for twelve (12) consecutive weeks; provided that no liquidated damages will accrue or be payable for the twelve (12) consecutive weeks of compliance.

(d) If in the judgment of Tacoma Power the severity of the breach of Section 1 so warrants, Tacoma Power may perform a technical audit to review the Tacoma Power Commercial System at Operator's cost, in addition to or as an alternative to compliance testing.

#### **4. SCOPE OF OBLIGATIONS**

(a) For the avoidance of doubt, the obligations in this Exhibit are the minimum obligations that may be imposed on Operator by Tacoma Power pursuant to this IRU Agreement with respect to net neutrality. Operator must also comply with any other obligations it may have with respect to net neutrality, including but not limited to, obligations in any franchise agreements or in municipal, state or federal laws or regulations, as they exist as of the Effective Date, or as they may be adopted or amended in the future.

(b) Nothing in this Exhibit should be construed to prevent or prohibit: (i) the City of Tacoma, acting in its capacity as a franchising authority, and Operator from agreeing to net neutrality requirements that exceed the standards set forth in this Exhibit; (ii) the City of Tacoma, acting in its capacity as a franchising authority, from enforcing pre-existing net neutrality requirements that exceed the standards set forth in this Exhibit; (iii) the City of Tacoma, acting in its capacity as a franchising authority, from enacting or enforcing any net neutrality law; or (iv) the establishment or enforcement of any ordinance or regulation by the City of Tacoma concerning net neutrality that imposes net neutrality requirements that exceed, or address matters not addressed by the standards set forth in this Exhibit.

**EXHIBIT L**  
**OPEN ACCESS TO TELECOMMUNICATIONS ASSETS**

**1. OPEN ACCESS PROGRAM**

(a) Operator shall provide wholesale services over the Tacoma Power Commercial System to other telecommunications providers (but not to Operator's Affiliates except with the prior written approval of Tacoma Power) consistent with its practices and policies in other geographic areas in which it provides wholesale services, to the extent appropriate ("**Open Access Program**"). All terms and conditions of the Open Access Program shall be determined by the Operator.

(b) In furtherance of the requirements in Section 1(a), Operator agrees to conspicuously post and continuously maintain on its website a copy of its Open Access Program.

**2. ANNUAL REPORT**

(a) Operator shall provide Tacoma Power with a copy of its Open Access Program on an annual basis on the Annual Reporting Date.

**3. REMEDIES FOR NON-COMPLIANCE**

(a) Failure of Operator to maintain its Open Access Program posted on its website is a Default. Liquidated damages in the amount of Two Hundred and Fifty Dollars (\$250) per day shall accrue from the date of receipt of Notice of Default until the Default is cured.

**EXHIBIT M**  
**ECONOMIC DEVELOPMENT AND EDUCATIONAL OPPORTUNITIES**

**1. INTERNSHIP PROGRAM**

Operator agrees to develop an internship program to provide work opportunity and training for students and residents of Tacoma, Washington, including veterans.

**2. BUSINESS DEVELOPMENT**

Operator will work directly with Tacoma Power to assist the Tacoma's economic development department to support efforts to attract businesses to Tacoma and to provide marketing information about Operator's commercial service offerings that can be provided to businesses considering locating in Tacoma.

**3. TIMING**

(a) Operator shall implement the internship program contemplated by Section 1 of this Exhibit within twenty-four (24) months of the Effective Date of this IRU Agreement. Operator shall provide notice to Tacoma Power when it has established and implemented the program required by Section 1, together with a copy of the program summary.

(b) Operator shall continue to offer the internship program, or a similar program, during the Term of the IRU Agreement. If Operator ceases to offer an internship program, it must provide written notice to Tacoma Power within thirty (30) days of cessation.

**4. ANNUAL REPORT**

(a) Operator shall annually submit to Tacoma Power, on the Annual Reporting Date, a report detailing the activities that Operator has undertaken to comply with this Exhibit since the most recent such report, or in the case of the first such annual report, since the Effective Date of this IRU Agreement.

**5. REMEDIES FOR NON-COMPLIANCE**

(a) Failure to timely provide any notice required by Section 3 is a Default. Liquidated damages in the amount of Two Hundred and Fifty Dollars (\$250) per day shall accrue from the date of receipt of Notice of Default until the Default is cured.

(b) In the event that Operator fails to develop and implement the internship program as required by Section 1 of this Exhibit by the deadline in Section 3(a), Operator shall pay Ten Thousand Dollars (\$10,000) annually beginning on the Annual Reporting Date immediately following the deadline in Section 3(a). The payment shall be made either to Tacoma Power to be placed in a Tacoma Power program for workplace training or to another internship program as directed and chosen by Tacoma Power. Payments shall continue to be due annually until such time as Operator establishes an internship program in compliance with this Exhibit.

(c) In the event that Operator establishes a program and then ceases to implement it as required by Section 1 of this Exhibit, Operator shall pay Ten Thousand Dollars (\$10,000) annually beginning on the Annual Reporting Date following Operator's cessation of the program. The payment shall be made either to Tacoma Power to be placed in a Tacoma Power program for workplace training or to another internship program as directed and chosen by Tacoma Power.

Payments shall continue to be due annually until such time as Operator re-establishes an internship program in compliance with this Exhibit.

**EXHIBIT N**  
**PRESERVE COMPETITION AMONG PROVIDERS**

**1. RESTRICTIONS ON TRANSFERS**

(a) Operator represents and warrants that as of the Effective Date, it is a Washington limited liability company that is a wholly owned subsidiary of Mashell, Inc., a Washington corporation.

(b) Operator acknowledges Tacoma Power's goal of preserving and promoting competition in the local telecommunications industry. To that end, Rainier covenants that it will not sell, grant, assign, delegate, or otherwise transfer (whether voluntarily, by operation of law or otherwise) any of its rights or obligations under this IRU Agreement to any entity (a "Transfer") without the prior written consent of Tacoma Power. Any Change of Control or Change of Working Control shall be deemed a Transfer for the purposes of this provision. A "Change of Control" means the sale of all or substantially all the assets of Operator; any merger, consolidation or acquisition of Operator with, by or into another corporation, entity or person; or any change in the ownership of more than fifty percent (50%) of the voting rights in Operator through one or more related transactions. A "Change of Working Control" means any change in the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of Operator, whether through the ownership of voting securities, by contract or otherwise. Notwithstanding the foregoing, written consent shall not be required for transfer of ownership made by testamentary provisions or the laws of descent.

(c) Further, Operator agrees not to sell, grant, assign, delegate, or otherwise transfer its rights or obligations under the IRU Agreement to any Facilities-Based Entity that has residential broadband or data service market share of twenty-five percent (25%) or more of the Tacoma Power Commercial Service Area. A "Facilities-Based Entity" means an entity that provides residential services primarily via wireline fiber and/or coaxial cable facilities.

**2. ANNUAL OWNERSHIP REPORT & CERTIFICATION**

(a) Operator agrees to provide to Tacoma Power, annually on the Annual Reporting Date, a current list of the names of all persons and entities with voting rights and ownership interests of Five Percent (5%) or greater in Operator.

(b) Operator agrees to provide to Tacoma Power, annually on the Annual Reporting Date, a certification signed by a corporate officer certifying that Working Control of Operator has not changed without Tacoma Power's consent.

**3. TRANSFER REQUESTS**

(a) Operator may request Tacoma Power's consent to a Transfer no less than six (6) months prior to the proposed effective date of the Transfer.

(b) Consent to the Transfer may be withheld by Tacoma Power in the event that Tacoma Power determines after an evaluation of the request for consent, that the Transfer would violate any of the 12 policy goals adopted by the Tacoma Public Utilities Utility Board and City of Tacoma Council regarding Tacoma Power Commercial, or the entity will not have adequate legal, technical, and/or financial capacity to perform Operator's obligations under this IRU Agreement.

(c) Any consent to a Transfer to a new legal entity granted by Tacoma Power shall be conditioned on the new legal entity entering into a written acceptance, in form and content approved by the City Attorney, agreeing that all acts and omissions of Operator with respect to the IRU Agreement occurring prior to the Transfer will continue to be deemed to be those of the new entity and committing to comply with all the terms of this IRU Agreement. Operator shall not be relieved of its obligations under the IRU Agreement unless and until Tacoma Power receives such written acceptance.

#### **4. REMEDIES FOR NON-COMPLIANCE**

(a) Any attempted or purported assignment, delegation or other transfer not in conformance with this Exhibit (“Unauthorized Transfer”) shall be voidable at Tacoma Power’s option provided that Tacoma Power provides notice of voidance within six (6) months from the date Tacoma Power has actual notice of the Unauthorized Transfer. Subject to the foregoing, the IRU Agreement shall be binding on the Parties’ successors and assigns.

(c) In the event of an Unauthorized Transfer, the IRU Fee due and payable by Operator shall be doubled, effective the date the Unauthorized Transfer and continuing until such time as Tacoma Power voids the Unauthorized Transfer pursuant to Section 4(a). If Tacoma Power elects not void the Transfer, at the end of the six (6) month period, the IRU Fee due and payable going forward shall no longer be doubled.

**EXHIBIT O**  
**CONTINUITY OF SERVICES COMMITMENT**

**1. COOPERATION**

(a) In the event that the IRU Agreement between the Parties is terminated for any reason (including expiration), the parties will cooperate in good faith to transition the Tacoma Power Commercial System to Tacoma Power or to an entity of Tacoma Power's choosing (the "Successor Operator") in accordance with the following principles

(i) Continue the provision of services and minimize disruption to Tacoma Power Commercial System customers;

(ii) Preserve the value of the Tacoma Power Commercial System as a going concern;

(iii) Protect the physical integrity of the Tacoma Power Commercial System; and

(iv) Complete the transition within no more than six (6) months (the "**Post-Termination Period**").

**2. RIGHT OF USE**

(a) During the Post-Termination Period, Tacoma Power shall have an unrestricted right of access to and use of any equipment and other assets and inventory in use to support operations of the Tacoma Power Commercial System and Associated Property, so as to enable continuity of services and seamless migration to the Successor Operator. This right of access and use shall not include physical access to the Operator Network.

(b) During the Post-Termination Period, Operator will continue to operate the Tacoma Power Commercial System in accordance with the requirements of the IRU Agreement, except as those requirements may be modified consistent with this Exhibit, the Continuity of Services Plan, and as directed by Tacoma Power as necessary to effect the seamless transition to the Successor Operator.

**3. ACCESS TO DATA, PERSONNEL AND RECORDS**

(a) During the Post-Termination Period, Operator shall provide Tacoma Power with access to personnel and all records and information necessary for Tacoma Power to transition operation of the Tacoma Power Commercial System in a seamless manner, including customer accounts and customer data, and maps and data regarding the Tacoma Power Commercial System and its use.

(b) During the Post-Termination Period, Operator shall fully cooperate in the assignment of customer contracts, content and services contracts, and any other third-party arrangements necessary to effect the seamless transition.

**4. REVENUES AND EXPENSES**

(a) During the Post-Termination Period, Operator shall be responsible for all operating expenses and shall be entitled to all of the revenues generated by the Tacoma Power Commercial System, subject to Section 4(c) below.

(b) During the Post-Termination Period, Operator shall have no obligation to pay the IRU Fee or make Capital Expenditures.

(c) During the Post Termination Period, Operator shall pay to Tacoma Power five percent (5%) of its gross revenue generated from its operations on the Tacoma Power Commercial System. "Gross Revenues" means all revenues derived from operation of the Tacoma Power Commercial System.....

#### **5. PERFORMANCE GUARANTEE**

(a) During the Post-Termination Period, the Performance Guarantee provided by Operator pursuant to the IRU Agreement shall be maintained in full force and effect and may be relied upon by Tacoma Power if Operator fails to comply with the obligations in this Exhibit or any related agreements.

#### **6. DEVELOPMENT OF CONTINUITY OF SERVICES PLAN**

(a) On the second Annual Reporting Date following the Effective Date of the IRU Agreement, Operator will submit to Tacoma Power for its review and approval a Continuity of Services Plan to replace the Continuity of Services Commitment contained in this Exhibit. The plan shall at a minimum: (1) require the Parties to exercise best efforts and cooperation to effect an orderly and efficient transition to the Successor Operator; (2) identify the major components of the transition, including but not limited to: (i) separation of the Tacoma Power Commercial System from the Operator Network; (ii) network operations and management; (iii) accounting and recordkeeping; and (iv) regulatory compliance; and (3) specify the anticipated timeframe and sequence for transferring customers, contracts, equipment and responsibilities for each component of operations described in the Continuity of Services Plan.

(b) The Parties agree to review the Continuity of Services Plan in good faith no more frequently than once every three (3) years during the Term, but no less frequently than every five (5) years during the Term and make any necessary revisions.

#### **7. OPERATOR'S CONTINUED RETAIL OPERATIONS**

(a) Tacoma Power understands that Operator will be serving customers currently served by Net-Venture and Mashell Telecom, Inc. under their existing ISP Advantage Agreements with Tacoma Power. In the event that the IRU Agreement between the Parties is terminated for any reason (including expiration) and Tacoma Power takes over operation of the Tacoma Power Commercial System, or transfers the Tacoma Power Commercial System to a Successor Operator, Tacoma Power or the Successor Operator shall be obligated to have an Open Access Program as described in Exhibit L to the IRU Agreement.

**EXHIBIT P**  
**TRADEMARK LICENSE AGREEMENT**

THIS AGREEMENT, effective as of \_\_\_\_\_, 20\_\_ is by and between **City of Tacoma, Department of Public Utilities, Light Division**, a municipal corporation of the state of Washington, (“Licensor”) and Rainier Connect North, LLC, a Washington limited liability company (“Licensee”). The parties hereto are hereinafter collectively referred to as the “Parties.” Capitalized terms used herein and not defined shall have the meanings assigned to them in the IRU Agreement.

WHEREAS, Licensor is the owner of two (2) Washington state trademarks, one for “Click! Cable TV” and symbol (Washington trademark registration number 53233 under trademark classifications 35 and 38) and one for “Click! Cable TV” (Washington trademark registration number 54077 under trademark classification 41), shown in **Exhibit P1** hereto (collectively the “Marks”);

WHEREAS, Licensor has used the Marks in connection with the marketing and operation of its retail and wholesale communications business (“Click! 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 Commercial System, to Licensee as of the Effective Date of this IRU Agreement;

WHEREAS, Licensee desires to use the Marks in connection with the use of the Tacoma Power Commercial System in the manner and subject to the terms and conditions set forth in this Agreement and the IRU Agreement; and

NOW, THEREFORE, In consideration of the premises and the mutual covenants and agreement of the Parties set forth herein and other good and valuable consideration, the sufficiency of which is hereby mutually acknowledged, the Parties agree as follows:

1. GRANT OF LICENSE. Licensor grants to Licensee an exclusive, royalty-free non-transferable license to use the Marks in connection with the Tacoma Power Commercial System, throughout the Tacoma Power Commercial Service Area depicted in IRU Agreement, Exhibit A1.

2. USE OF THE MARKS. Licensee shall comply with the following requirements when using the Marks:

2.1 The use must be accompanied by the following text:

All rights reserved. [Insert Mark] is a trademark of City of Tacoma.

2.2 The use must comply with the applicable provisions of the guidelines set forth in **Exhibit P2** attached hereto.

3. NO ASSIGNMENT. This license to use the Marks may not be assigned or otherwise transferred by Licensee, under any circumstances, without the prior, express, written

consent of Licensor. Licensor does not grant, and nothing in this Agreement shall be construed as granting, to Licensee the right to license, sublicense, or authorize others to use the Marks.

#### 4. OWNERSHIP.

4.1 Licensee acknowledges that the Marks are valid, are the exclusive property of Licensor, and can lawfully be used only with the express license or consent of Licensor. Licensee shall not at any time do, or cause to be done, any act or thing contesting or in any way impairing or intending to impair the validity of the Marks and/or Licensor's exclusive rights, title, and interest in and to the Marks.

4.2 Licensee shall not register or apply to register the Marks, either alone or in combination with any other word(s) and/or design(s), in any country, state, or jurisdiction. Licensee shall not in any manner represent that it owns the Marks, and Licensee hereby acknowledges that its use of the Marks shall not convey any rights, title, or interest in or to said Marks in Licensee's favor, but that all use of the Marks by Licensee shall inure to the benefit of Licensor.

4.3 Licensee shall be responsible for all costs associated with maintaining the registration of the Marks, including all fees charged by the Washington Secretary of State associated with renewing the Marks. Licensee shall provide copies of all filings and correspondence related to the Marks to Licensor.

#### 5. TERM AND TERMINATION.

5.1 Unless sooner terminated under the provisions of Section 5.2 below, or by mutual agreement of the Parties in writing, this Agreement shall continue so long as the IRU Agreement is in full force and effect. In the event that the IRU Agreement is terminated, by either Party and for any reason, this Agreement shall automatically terminate.

5.2 If Licensee fails to comply with any of the provisions of this Agreement, Licensor may terminate this Agreement by express written notice to Licensee; provided, however, that if Licensee, within 60 days after Licensor's notice, cures or otherwise corrects such violation or noncompliance to Licensor's reasonable satisfaction, said termination notice shall be of no further force or effect and this Agreement shall be reinstated under all the terms and conditions as existed before the notice of termination.

5.3 Upon termination of this Agreement, Licensee shall permanently discontinue all use of the Marks and refrain from using any other service mark, trademark, trade name, corporate name, or any other designation confusingly similar to any one or all of the Marks.

#### 6. INDEMNITY.

6.1 Licensee shall indemnify and defend Licensor against any loss or losses incurred through claims, actions, or lawsuits by third parties against Licensor involving or arising from the use of the Marks by Licensee, and shall hold Licensor harmless for

any damages, attorney fees, or other costs that Licensor may be required to pay as a result of any such claims, actions, or lawsuits being asserted against Licensor.

6.2 If Licensee brings to Licensor's attention an unauthorized third party use of the Marks, Licensor shall take steps to abate such use at Licensor's expense if Licensor, after investigation and evaluation of such unauthorized use, concludes that such use constitutes an infringement of its rights and that there is a reasonable probability of success in taking action to abate such infringement.

7. NOTICES.

Except for routine operational communications, which may be delivered personally or transmitted by electronic mail all notices required hereunder shall be in writing and shall be considered properly delivered when received if personally delivered, or on the third day following mailing, postage prepaid, certified mail, return receipt requested to the Parties at the following addresses:

**Licensor:**

Tacoma Public Utilities  
3628 South 35th Street  
Tacoma, WA 98409  
Attn: TPU Contract Administrator

With a copy to:

City of Tacoma  
747 Market Street, Suite 1120  
Tacoma, WA. 98402  
Attention: City Attorney

**Licensee:**

Rainier Connect North, LLC  
P.O. Box 639  
104 Washington Ave. N.  
Eatonville, WA 98328  
Attn: Manager

With a copy to:

Richard A. Finnigan  
2112 Black Lake Blvd. SW  
Olympia, WA 98512

8. BINDING EFFECT. This Agreement shall be effective as of the date first above written and shall be binding upon and inure to the benefit of the Parties hereto and their respective successors or assigns as permitted by this Agreement.

[SIGNATURE PAGES TO FOLLOW]

**IN WITNESS WHEREOF**, each Party has caused this License Agreement to be executed by its duly authorized representative as of the date indicated below.

**CITY OF TACOMA, DEPARTMENT  
OF PUBLIC UTILITIES, LIGHT  
DIVISION, D/B/A TACOMA POWER**

**RAINER CONNECT NORTH, LLC**

By: \_\_\_\_\_  
Name: Jackie Flowers  
Title Director of Utilities  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title \_\_\_\_\_  
Date: \_\_\_\_\_

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title City Attorney  
Date: \_\_\_\_\_

**EXHIBIT P1  
MARKS**

UNITED STATES OF AMERICA

The State of  Washington

Secretary of State

I, **KIM WYMAN**, Secretary of State of the State of Washington and custodian of its seal, hereby issue this certificate that according to records on file in this office, trademark:

THE WORD "CLICK!" AND THE WORDS "CABLE TV" AND A SYMBOL CONSISTING OF THE LETTER "C" WITH AN EXCLAMATION MARK, WHEREBY THE EXCLAMATION MARK IS LOCATED IN THE MIDDLE OF THE LETTER "C" AND THE EXCLAMATION TAIL IS LOCATED ABOVE.

registered in the State of Washington to

CITY OF TACOMA/TPU

with home jurisdiction of (if any) WASHINGTON and business address of (if any) 3628 S 35TH ST, TACOMA, WA 98409-3115, USA

I certify that such trademark with registration # 53233 was renewed on 04/01/2019 and will expire on 03/31/2024.

I further certify that the classification number(s) of the trademark is/are 35,38 and the actual goods or services with which the trademark is used are: 35 - Advertising & Business, 38 - Telecommunications.

The date the trademark was first used anywhere is 06/01/2007 and the date the trademark was first used in Washington is 06/01/2007.



Given under my hand and the Seal of the State of Washington at Olympia, the State Capital

Kim Wyman, Secretary of State

Date Issued: 04/01/2019

UNITED STATES OF AMERICA

The State of  Washington

Secretary of State

I, **KIM WYMAN**, Secretary of State of the State of Washington and custodian of its seal, hereby issue this certificate that according to records on file in this office, trademark:

**CLICK! CABLE TV**

registered in the State of Washington to

**CITY OF TACOMA**

with home jurisdiction of (if any) WASHINGTON and business address of (if any) 3628 S 35TH ST, TACOMA, WA 98409, USA

I certify that such trademark with registration # 54077 was issued on 07/07/2010 and will expire on 07/07/2015.

I further certify that the classification number(s) of the trademark is/are 41 and the actual goods or services with which the trademark is used are: 41 - Education & Entertainment.

The date the trademark was first used anywhere is 01/01/2009 and the date the trademark was first used in Washington is 01/01/2009.



Given under my hand and the Seal of the State of Washington at Olympia, the State Capital

A handwritten signature in blue ink that reads "Kim Wyman".

Kim Wyman, Secretary of State

Date Issued: 08/21/2019

**EXHIBIT P2  
GUIDELINES**

**Click! is the cable TV service satisfaction leader.** A division of Tacoma Power, Click! Network is a local company dedicated to local needs. Through Click! Cable TV, we deliver all the cable channel variety you want, better customer service from conscientious local experts and simple, straightforward plans.

We give local residents the best possible blend of reliability, accountability and value for their dollar.

**CLICK!, THE BRAND**

In our ongoing efforts to demonstrate the inherent value that Click! has to offer, we have focused on reshaping our brand. In doing so, we have created a strategy that will allow us to build our awareness and our customer base. We have always focused on quality and service and will continue to do so. The cornerstone to this new strategy is to adequately and accurately deliver this message to our customers, both new and existing. We are truly a local company that can deliver programming that is on par with the big cable companies and can offer unique regional programming they cannot. Not only can we deliver a quality product, but we can deliver it at a lower price point. We are THE local choice for cable, in quality, service and price.

In order to solidify this message to our customers, we are adding new layers to the Click! brand. The first step is creating the branded service Click! Cable TV. This provides clear messaging about who and what Click! is, and is the first step in a series of branded services and ultimately an umbrella brand for Click! The road map below will provide insight into where Click!, the brand, is headed.

**DIVISION OF PUBLIC UTILITY**



**CURRENTLY IN USE.**  
**MAINTAIN FOR B2B-LEVEL CORRESPONDENCE AND "CORPORATE"-LEVEL COMMUNICATIONS**

**POTENTIAL UMBRELLA BRAND FOR SERVICES**



**STEP 2. SUITE OF SERVICES**  
 BUILD OUT A BRANDED UMBRELLA BRAND THAT COVERS THE SUITE OF SERVICES.  
 THIS UMBRELLA BRAND WILL ALLOW FOR EFFORTS THAT ARE FOCUSED AROUND POTENTIAL BUNDLED SERVICE OFFERINGS AND SOLUTIONS.

**STEP 1. THE "SHORTCUT"**

BUILD OUT BRANDED SERVICE LINE FIRST WITH CLICK! CABLE TV AS THE LEAD SERVICE OFFERING.

THIS PROVIDES THE "SHORTCUT" TO THE "WHO" AND "WHAT" WE ARE. FIRMLY ESTABLISH THE "CLICK!" BRAND PRESENCE.

**BRANDED SERVICE IMMEDIATE NEED**



**POSSIBLE FUTURE BRANDED SERVICES**



**CLICK! NETWORK CORPORATE IDENTITY**

The identity shown below represents the corporate identity of Click! Network. The Click! Network corporate identity (shown here in positive and reverse) should be the first choice for any company wide communications such as business papers, fax forms, payroll, etc. If space is limited, alternate versions (shown on pages C.3 and C.4) may be used.



**SPECIFICATIONS**

**CLICK! NETWORK CORPORATE IDENTITY**

**Size**

This is the preferred version of the Click! Network corporate identity. It can be used at any size 1" in width or greater.

**Clear space**

A clear space should be maintained around the identity. The size of this area depends on the size of the identity in a given application. A distance equal to the width of the top of the "exclamation point" (indicated by "x"—see diagram) should be maintained on all sides.

**Color**

The Click! Network corporate identity uses PMS 2593 and black. This identity should be used only on white or very light backgrounds. When the identity appears on a colored background, the one-color version should be used (see page C.3).

**CLICK! NETWORK CORPORATE IDENTITY, REVERSED**

When the Click! Network corporate identity appears on a black or very dark background, the reversed version should be used for maximum readability.

**CLICK! NETWORK CORPORATE IDENTITY**

When the Click! Network corporate identity appears on a photograph or on a colored field, or when printing limitations make it necessary, the one-color version should be used. The one-color identity can be used in either black or white (no other colors), whichever provides the higher contrast against the background.



**CLICK! NETWORK**  
T A C O M A P O W E R



**CLICK! NETWORK**  
T A C O M A P O W E R



**CLICK! NETWORK**  
T A C O M A P O W E R

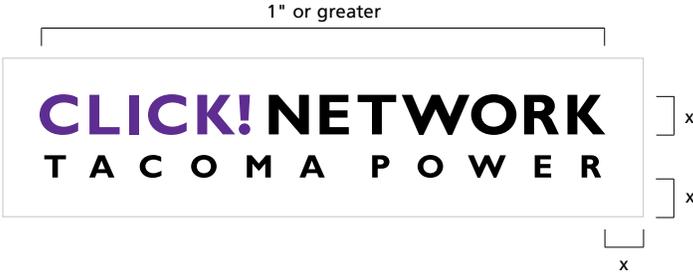
**SPECIFICATIONS**

**ONE-COLOR CLICK! NETWORK CORPORATE IDENTITY**

Note that when the Click! Network corporate identity appears in only one color, all artwork is solid color (there are no halftones).

**HORIZONTAL CLICK! NETWORK CORPORATE IDENTITY (LOGOTYPE ONLY)**

In situations where the primary Click! Network corporate identity will not work, the horizontal configuration may be used, either on its own or in conjunction with the logo mark (see page C.7).



**SPECIFICATIONS**

**Size**  
This identity may be used at any size 1" in width or greater.

**Clear space**  
Maintain a clear space equal to the height of the "Click! Network" logotype (indicated by "x"—see diagram) on all sides.

**Color**  
This identity uses PMS 2593 and black. It should be used only on white or very light backgrounds. When it appears on a black or very dark background, the reversed version should be used for maximum readability. When the identity appears on a colored background, the one-color version should be used.

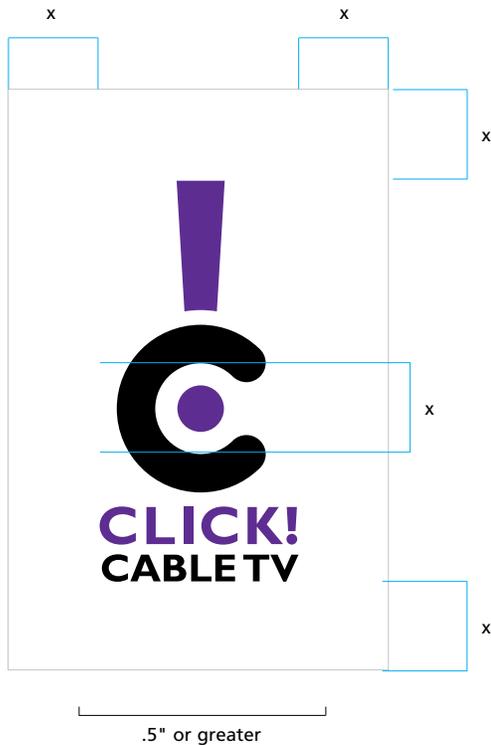
**Introducing our new branded  
service: Click! Cable TV**



## CLICK! CABLE TV IDENTITY

The identity shown below represents the core brand of Click! Cable TV. All offers and product lines within Click! Cable TV should use this identity.

The Click! Cable TV identity in positive and reverse should be the first choice for any given application. The one-color identity is the second choice.



### SPECIFICATIONS

#### CLICK! CABLE TV IDENTITY

##### Size

This is the preferred version of the Click! Cable TV identity. It can be used at any size .5" in width or greater.

##### Clear space

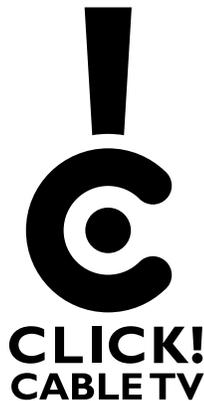
A clear space should be maintained around the identity. The size of this area depends on the size of the identity in a given application. A distance equal to the height of the center negative space of the "C" (indicated by "x"—see diagram) should be maintained on all sides.

##### Color

The Click! Cable TV identity uses PMS 2593 and black. This identity should be used only on white or very light backgrounds. When the identity appears on a colored background, the one-color version should be used.

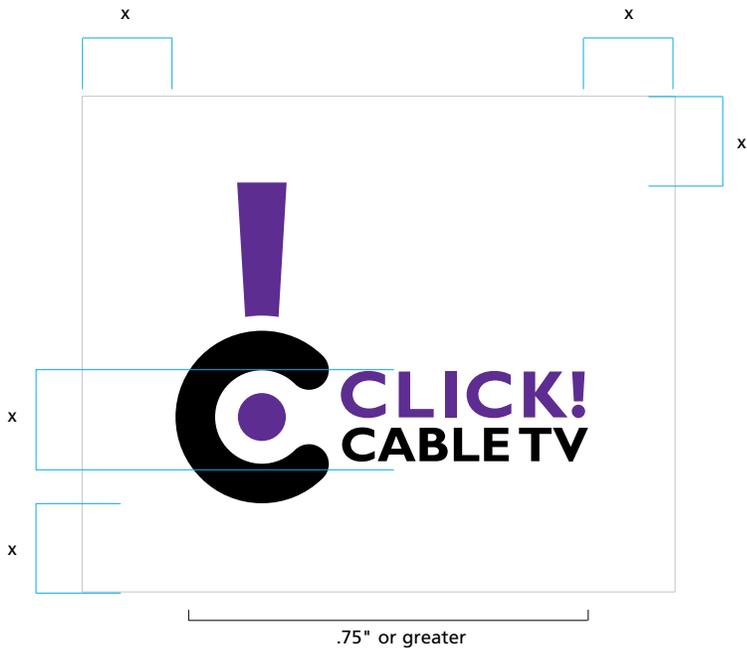
#### CLICK! CABLE TV IDENTITY, REVERSED

When the Click! Cable TV identity appears on a black or very dark background, the reversed version should be used for maximum readability.



## CLICK! CABLE TV IDENTITY

The horizontal Click! Cable TV identity (shown here in positive and reverse) is an alternative to the preferred vertical version.



## SPECIFICATIONS

### CLICK! CABLE TV IDENTITY

#### Size

This is the horizontal version of the Click! Cable TV identity. It can be used at any size .75" in width or greater.

#### Clear space

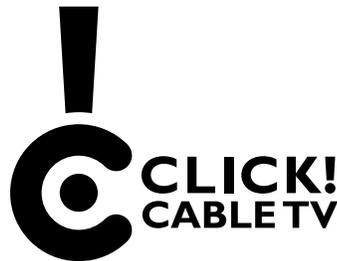
A clear space should be maintained around the identity. The size of this area depends on the size of the identity in a given application. A distance equal to the height of the center negative space of the "C" (indicated by "x"—see diagram) should be maintained on all sides.

#### Color

The Click! Cable TV identity uses PMS 2593 and black. This identity should be used only on white or very light backgrounds. When the identity appears on a colored background, the one-color version should be used.

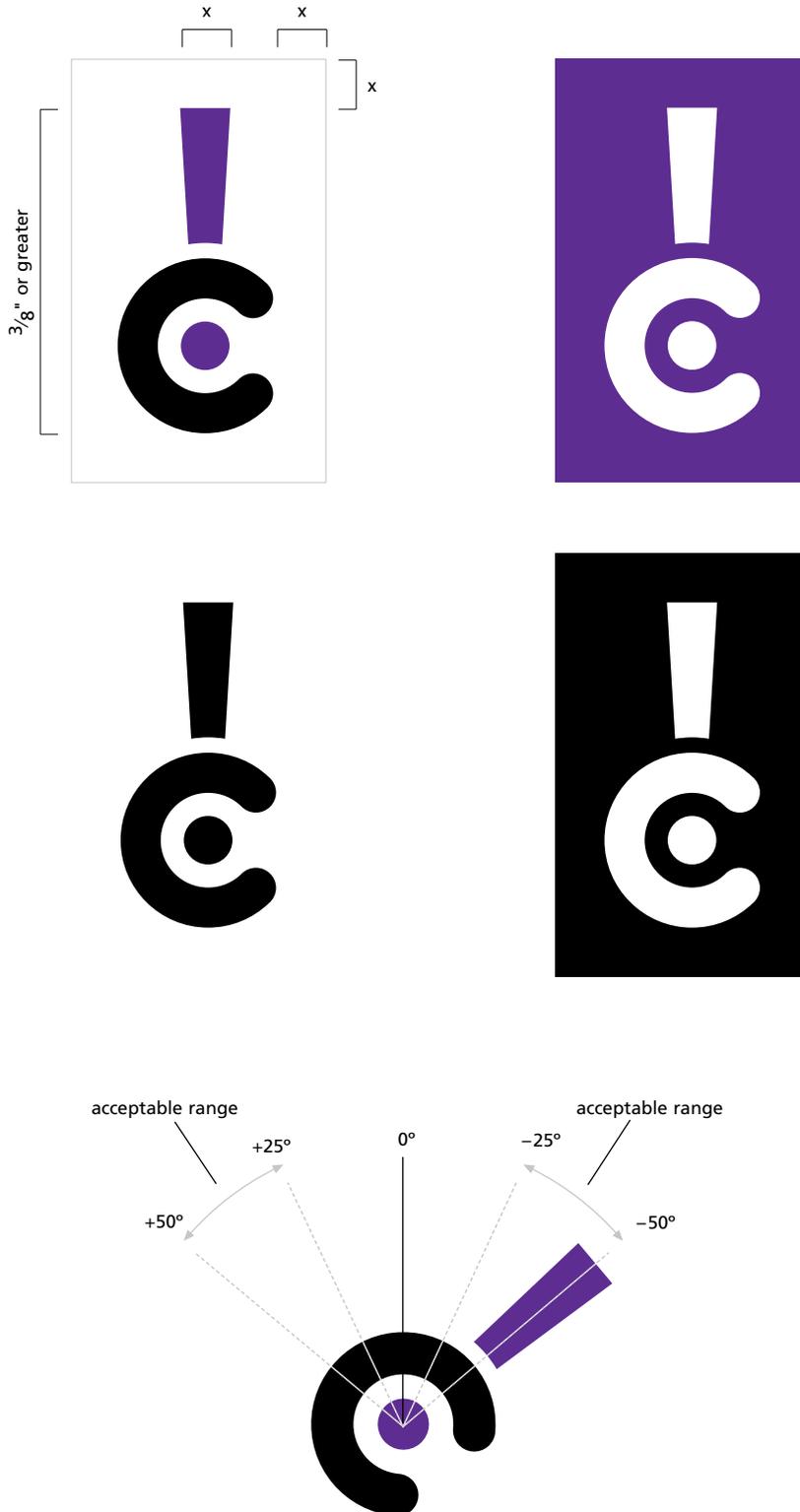
### CLICK! INTERNET IDENTITY, REVERSED

When the Click! Cable TV identity appears on a black or very dark background, the reversed version should be used for maximum readability.



## CLICK! LOGO—MARK ONLY

The Click! logo mark may be separated from the logotype for the purpose of creating engaging artwork, animations, or for layout considerations. Because the logo mark does not incorporate the name of the company, it is important that it be accompanied by either the full Click! Network identity (page C.6), the logotype (page C.4) or one of the branded services identities somewhere in the layout.



### SPECIFICATIONS

#### Size

The Click! logo mark may be used at any size  $\frac{3}{8}$ " in height or greater.

#### Clear space

Maintain a clear space equal to the top of the "exclamation point" (indicated by "x"—see diagram) on all sides.

#### Color

This identity uses PMS 2593 and black. It should be used only on white or very light backgrounds. When it appears on a black or very dark background, the reversed version should be used for maximum readability. When the identity appears on a colored background, the one-color version should be used.

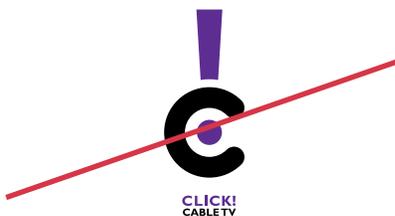
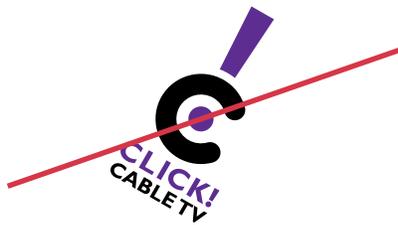
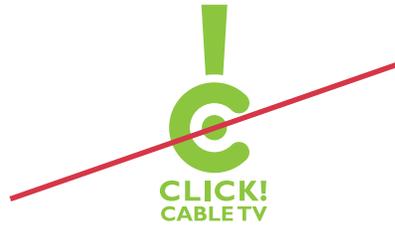
#### Rotation

The Click! logo mark may be rotated to create interesting and engaging layouts, or for animations, but it is important to follow these guidelines when doing so:

1. When the rotated mark appears on its own (not part of a series or animation), the rotation angle should fall between  $\pm 25^\circ$  and  $\pm 50^\circ$  (see diagram).
2. When rotated and cropped, the logo mark should maintain enough of its original form to be recognized easily. (See business cards, page C.19, for an example.)
3. When animated, or used in a series, the mark may be rotated to any angle.

## UNACCEPTABLE USES OF CLICK! NETWORK IDENTITIES

The different Click! Network identities allow for a wide variety of uses. However, to present a consistent image of Click! Network, Click! Cable TV and Tacoma Public Utilities, it is important to use the identities properly. Below are some examples of unacceptable use of the identities. If you have any questions about proper use, please contact the Graphics section.



### SPECIFICATIONS

#### Incorrect scaling

The identities should never be stretched vertically or horizontally.

#### Incorrect background

The color versions of the Click! Network identities should never appear on fields of color. When an identity must appear on a colored background, use the one-color version.

#### Incorrect color

The Click! Network identities should only appear in the color configurations shown previously. Never substitute other colors for any part of the identity.

#### Incorrect rotation

Do not rotate the Click! Network identities (logo mark and logotype together).

#### Incorrect configuration

The Click! Network identities should only appear in the configurations shown previously.

## POSITIONING LINE

The positioning statement is a key element in establishing Click! Cable TV as a competent local choice. When used in tandem with the Click! Cable TV identity, and Click! offers, it provides an additional layer of reinforcement in the consumer's mind to choose Click!.

# Your local choice.

Preferred color PMS Cool Gray 11. Positioning line minimum size is 7 pt. or .75".

# Your local choice.

Alternate color PMS 2593.

# Your local choice.

Alternate color black.

# Your local choice.

Alternate color white.



## SPECIFICATIONS

### POSITIONING LINE

#### Size

There is no specific point size for the positioning line as it will vary per the communication material created. There is a minimum point size of 7 pt.

#### Clear space

There is no specific clear space dedicated to the positioning line, but it should follow any recommended clear space requirements for the Click! Cable TV identity or third party logos.

#### Color

The positioning can be used in multiple color options depending on the communication material created. The preferred color is PMS Cool Gray 11 or 75% tint of black on a white background.

The alternate colors for the positioning line are PMS 2593 and black. These colors should only be used when the positioning line is not in close proximity to a Click! branded service logo, such as Click! Cable TV. Additionally, these colors should be used only on white or very light backgrounds. When it appears on a black or very dark background, the reversed version should be used for maximum readability.

#### Size relationship

The positioning line has a size relationship that maps to the size of the Click! branded service logo as illustrated to the left. It should never be larger than the cap height of "CLICK!" when used in close proximity of the logo. When it is used separately, it has no set maximum size. In all cases the minimum size for the positioning line always applies.

C.10

# COLOR

The color palette for the Click! brand is focused on delivering maximum impact through owning the color purple. The primary color is PMS 2593 or the Click! purple blend. These colors should be used whenever possible to help build equity into the brand. There is a secondary palette that can be used for accent colors.

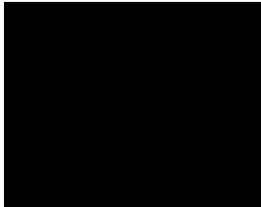
## PRIMARY PALETTE



**Click! Purple**  
PMS 2593  
c79 m100 y100 k0  
r102 g51 b153



**Click! Gray**  
PMS Cool Gray 11  
c0 m0 y0 k75  
r102 g102 b102



**Click! Black**  
PMS Black  
c0 m0 y0 k100  
r0 g0 b0



**Light Purple**  
PMS 2563  
c41 m55 y100 k0  
r178 g153 b204

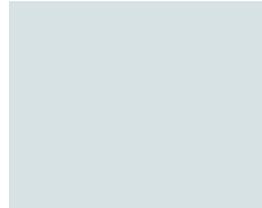


**Dark Purple**  
PMS 2593  
c79 m100 y100 k0  
r102 g51 b153

## SECONDARY PALETTE— WEB SITE ONLY



**Orange**  
PMS 180  
c0 m50 y98 k3  
r233 g143 b7



**Teal**  
PMS 621  
c15 m5 y8 k0  
r218 g230 b231

# BRAND ELEMENTS

## CLICK! CABLE TV SUPPORTING GRAPHICS

There are several elements that are used to create the Click! Cable TV brand presence. These elements include a Mt. Rainier illustration, vibrant purple blend of color, a cable, and distinctive typographic treatments. These elements provide a flexible canvas in which to create compelling, offer-centric advertisements and communication materials with strong continuity.



### SPECIFICATIONS

#### CLICK! PURPLE BLEND

The Click! purple blend is one of the key supporting graphics. It provides a strong backdrop for messaging, and a cohesive visual bond between all Click! communications. The strength of the new Click! purple should be leveraged whenever possible.

#### MT. RAINIER ILLUSTRATION

The Mt. Rainier illustration is an optional supporting graphic. This element provides an additional visual layer that ties back to the local community and region. It should only appear in a subtle fashion and never conflict with the primary messaging or offer. It should be used as a layer on top of the Click! purple blend. The layer setting is set to "Screen" and has a transparency of 60-80%.

#### CLICK! CABLE ILLUSTRATION

The Click! cable graphic is an optional supporting graphic. This element provides a strong visual link to the cable industry vertical, while also functioning as a layout tool. The cable provides a clean break between the purple background and the signoff area for other key elements such as the positioning line or logo.

The cable has a black shadow set to 65% with a blur of .1 inch.

An alternate graphic with the cable is the "cable box" graphic. This graphic creates a clean area for the logo. The graphic should bleed off the left or right side of the page or screen. If this is not possible it may bleed off from the top of the page or screen. The cable box has a rounded corner of 0.15 inch and a black shadow set to 65% with a blur with a range of .1 -.07 inch.

# TYPOGRAPHY

Integrity, accountability and accessibility are the values inherent in the Tacoma Public Utilities brand. We want to project these qualities in our printed and electronic materials.

We are using Frutiger and Bembo—two classic, timeless, and easy-to-read type families—to establish hierarchy, to allow flexibility, and to maintain consistency in the presentation of information. To acquire the brand fonts, contact the Graphics section.

## PRIMARY TYPE FAMILY: FRUTIGER

Use the typefaces in this family for headlines and short amounts of body copy. They may also be used for captions and for text callouts.

<p>A B C D E F G H I J K L M N O P Q R S T U V W X Y Z a b c d e f g h i j k l m n o p q r s t u v w x y z 1 2 3 4 5 6 7 8 9 0</p>	<p><b>Frutiger Light</b> Use this typeface for large headlines. Do not use it for large blocks of text or in very small point sizes.</p>
<p>A B C D E F G H I J K L M N O P Q R S T U V W X Y Z a b c d e f g h i j k l m n o p q r s t u v w x y z 1 2 3 4 5 6 7 8 9 0</p>	<p><b>Frutiger Roman</b> Use this typeface for short headlines and for caption text. Use this typeface or Frutiger Bold in signage applications.</p>
<p><i>A B C D E F G H I J K L M N O P Q R S T U V W X Y Z a b c d e f g h i j k l m n o p q r s t u v w x y z 1 2 3 4 5 6 7 8 9 0</i></p>	<p><b>Frutiger Italic</b> Use this typeface to stress certain words in headline or caption text.</p>
<p><b>A B C D E F G H I J K L M N O P Q R S T U V W X Y Z a b c d e f g h i j k l m n o p q r s t u v w x y z 1 2 3 4 5 6 7 8 9 0</b></p>	<p><b>Frutiger Bold</b> Use this typeface for caption titles, text callouts, and small-type headlines. Do not use this weight of Frutiger for large-type headlines or for body text. Use this typeface or Frutiger Roman in signage applications.</p>
<p><b>A B C D E F G H I J K L M N O P Q R S T U V W X Y Z a b c d e f g h i j k l m n o p q r s t u v w x y z 1 2 3 4 5 6 7 8 9 0</b></p>	<p><b>Frutiger Black</b> Use this typeface for special situations when the Bold weight is not heavy enough (for instance, when printing limitations require a heavier weight).</p>

**SECONDARY TYPE FAMILY: BEMBO**

Use the typefaces in this family to change typographic emphasis—for example, to differentiate between headlines and body copy. Bembo, a serif type family, is more suitable for large blocks of text, but it may be used for headlines or captions when Frutiger would be unsuitable.

<p>A B C D E F G H I J K L M N O P Q R S T U V W X Y Z a b c d e f g h i j k l m n o p q r s t u v w x y z 1 2 3 4 5 6 7 8 9 0</p>	<p><b>Bembo Regular</b> Use this typeface mainly for large blocks of text.</p>
<p><i>A B C D E F G H I J K L M N O P Q R S T U V W X Y Z a b c d e f g h i j k l m n o p q r s t u v w x y z 1 2 3 4 5 6 7 8 9 0</i></p>	<p><b>Bembo Italic, Old Style Figures</b> Use this typeface to separate and differentiate lines within body copy.</p>
<p>A B C D E F G H I J K L M N O P Q R S T U V W X Y Z 1 2 3 4 5 6 7 8 9 0</p>	<p><b>Bembo Small Caps</b> Use small capitals for text callouts and for headlines when Frutiger doesn't produce the desired visual effect.</p>
<p>A B C D E F G H I J K L M N O P Q R S T U V W X Y Z a b c d e f g h i j k l m n o p q r s t u v w x y z 1 2 3 4 5 6 7 8 9 0</p>	<p><b>Bembo Semibold, Old Style Figures</b> Use this typeface for caption headlines or small-type headlines when Frutiger doesn't produce the desired effect. Generally, this typeface should be used at small point sizes.</p>
<p><b>A B C D E F G H I J K L M N O P Q R S T U V W X Y Z a b c d e f g h i j k l m n o p q r s t u v w x y z 1 2 3 4 5 6 7 8 9 0</b></p>	<p><b>Bembo Bold, Old Style Figures</b> Use this typeface for special situations when the Semibold weight is not heavy enough (for instance, when printing limitations require a heavier weight).</p>

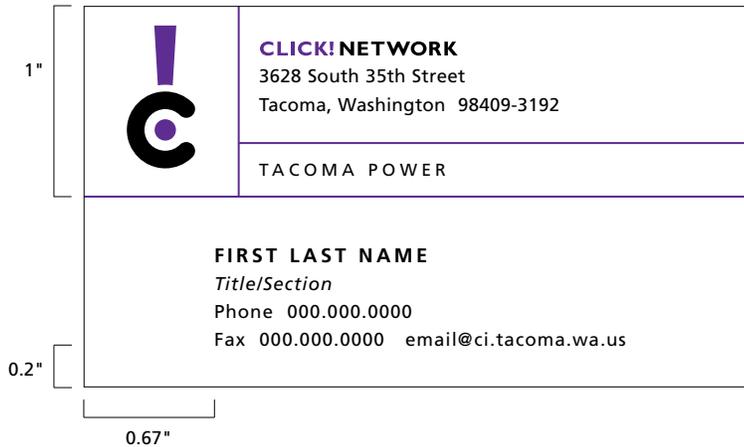
## CLICK! NETWORK CORPORATE BUSINESS CARDS

To order Click! Network business cards, contact the Graphics section.

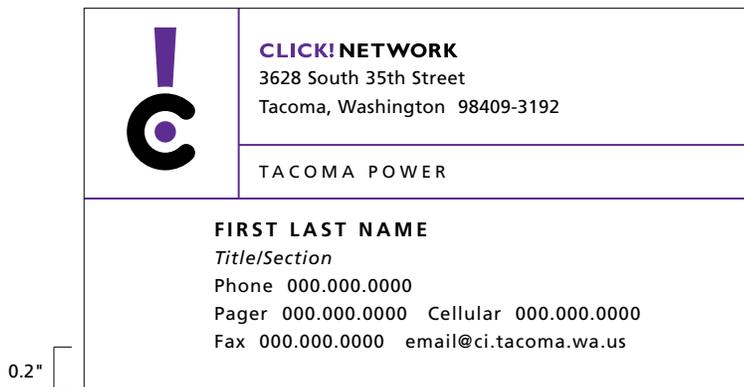
The address block will include the Click! Network logotype, appropriate street address, city, state, ZIP code and the "Tacoma Power" sign-off.

The employee block will include employee name, title and/or section (where applicable), telephone and fax numbers, and e-mail address. If necessary, up to two additional contact numbers can be listed.

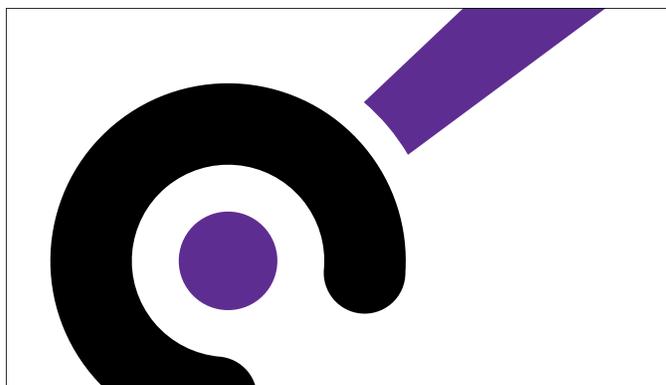
### 4-LINE CONFIGURATION



### 5-LINE CONFIGURATION



### BACK SIDE



0.2"

### SPECIFICATIONS

#### Size

2" x 3 1/2"

#### Color

The Click! Network corporate identity uses PMS 2593 U and black. All rules are PMS 2593 U; all type is black. The back of the card uses PMS 2593 U and black.

#### Paper

Approved paper stock is Gilbert Cover Recycled White Wove 80-lb.

#### Typography

"Click! Network"

Use logotype artwork.

Address

Font: Frutiger Roman

Point size: 7

Leading: 11

Tracking: 3

"Tacoma Power"

Font: Frutiger Roman, all caps

Point size: 6.5

Tracking: 45

Employee name

Font: Frutiger Bold, all caps

Point size: 7.5

Leading: 10.5

Tracking: 30

Title/Section

Font: Frutiger Italic

Point size: 7

Leading: 10.5

Tracking: 10

Contact information

Font: Frutiger Roman

Point size: 7

Leading: 10.5

Tracking: 10

#### Rules

Rule weight is .75 pt.

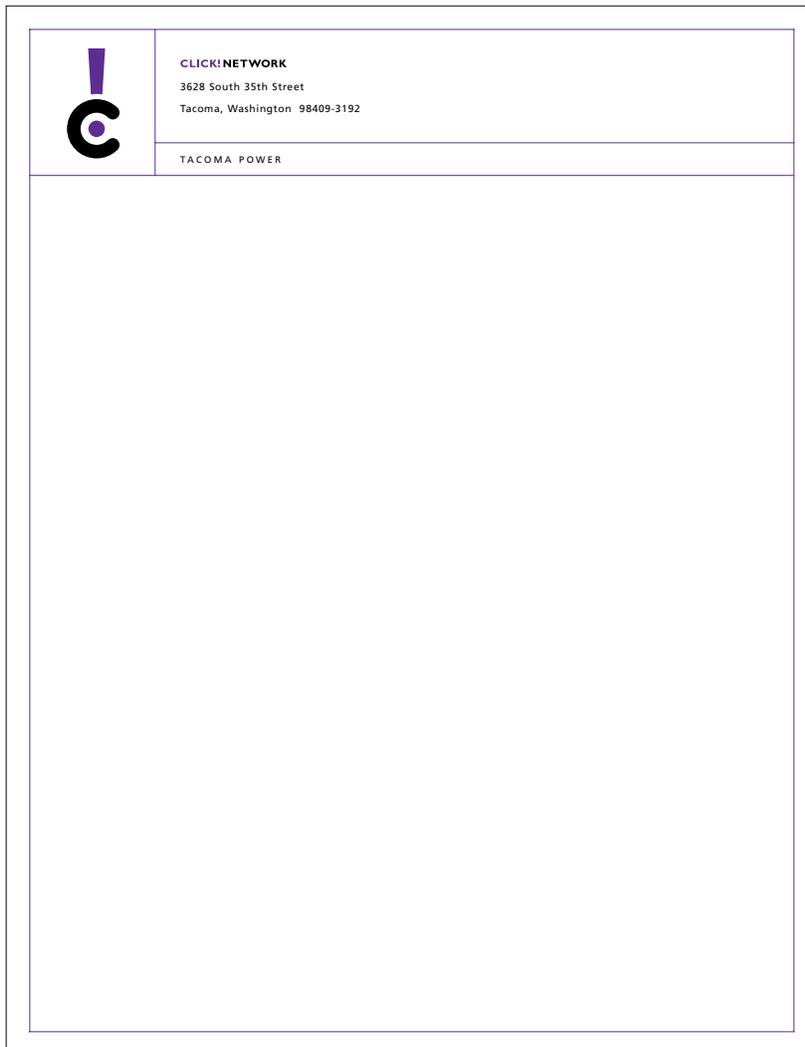
#### Logo mark on back of card

Rotation angle: 50° clockwise

C.15

## CLICK! NETWORK CORPORATE LETTERHEAD

All Click! Network sections and product lines should use this letterhead. To order Click! Network corporate letterhead, contact the Graphics section.



### SPECIFICATIONS

#### Size

8 1/2" x 11"

#### Color

The Click! Network corporate identity uses PMS 2593 U and black. All rules are PMS 2593 U; all type is black.

#### Paper

Approved paper stock is Torchglow Pearl White, 60-lb. Text, Vellum Finish.

#### Typography

"Click! Network"

Use logotype artwork.

Address

Font: Frutiger Roman

Point size: 7.75

Leading: 17

Tracking: 11

"Tacoma Power"

Font: Frutiger Roman, all caps

Point size: 7

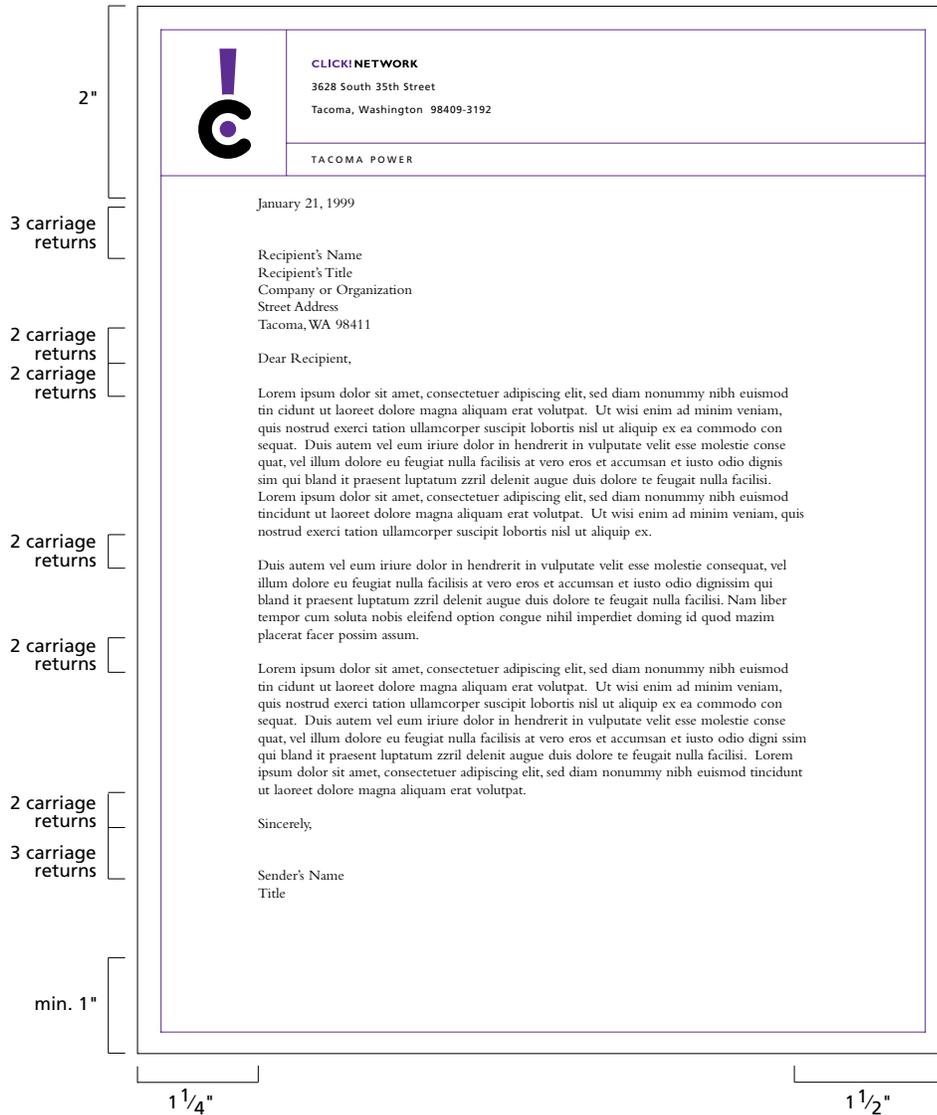
Tracking: 45

#### Rules

Rule weight is .75 pt.

# CLICK! NETWORK CORPORATE STANDARD LETTER FORMAT

Customers will see our identity most frequently on stationery, which means how each document is formatted becomes a critical part of our identity program. Please use this format when typing your correspondence, and follow the same format on all pages.



## SPECIFICATIONS

**Typing standards**  
 Font: Times New Roman or equivalent serif typeface  
 Alignment: flush left, ragged right  
 Point size: 11  
 Line spacing: single-spaced (11-point leading)  
 Upper and lower case

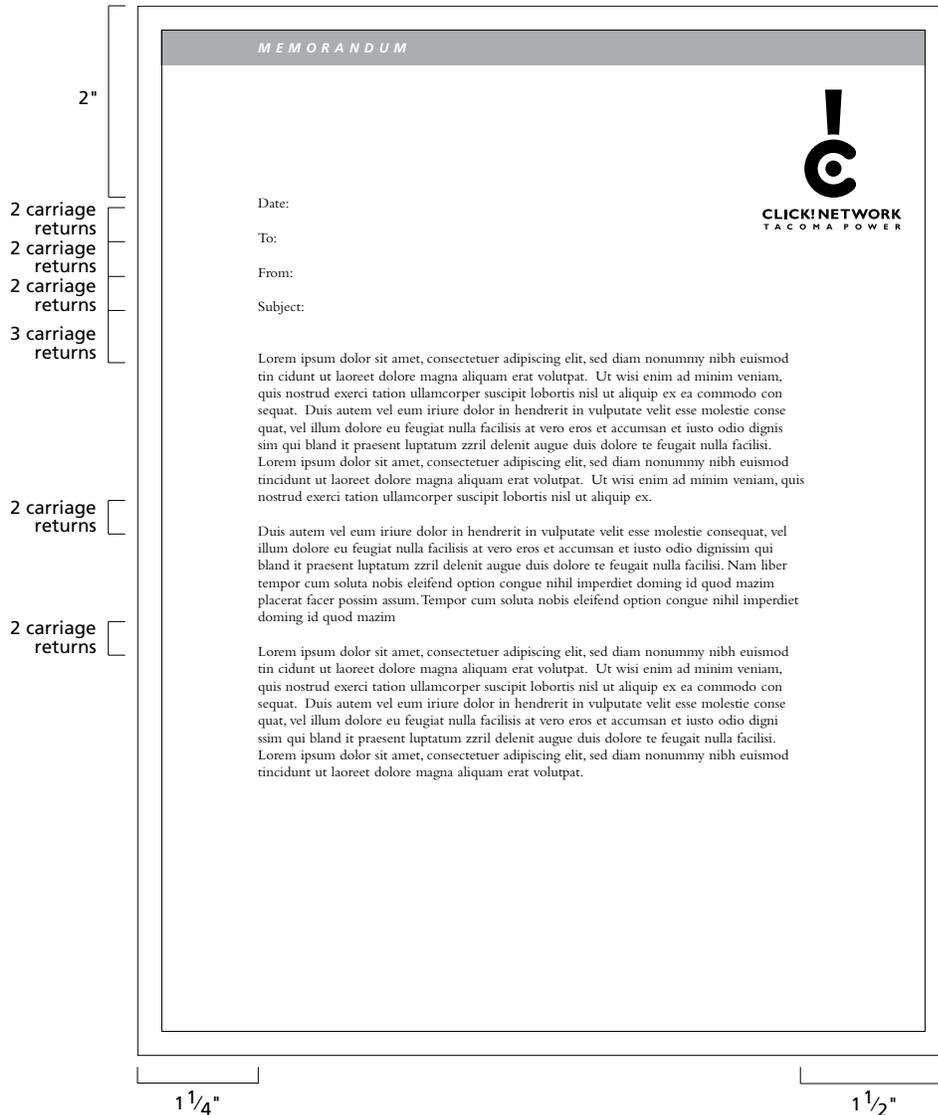
**Position**  
 Left margin: 1 1/4"  
 Right margin: 1 1/2"  
 Top margin: 2"  
 Bottom margin: 1"

**Personalized correspondence**  
 Employees may personalize letters by entering name, position, and phone number, following these guidelines:  
 Alignment: flush left  
 Left margin: 1 1/8"  
 Position: 2 returns after date

**Additional pages**  
 For correspondence longer than one page, use blank sheets of the same stock used for the first page. After page 1, top margin becomes 1 1/4".

## CLICK! NETWORK MEMORANDUM AND STANDARD MEMO FORMAT

Memos should be set on the one-color Click! Network corporate memorandum form shown below. Margins and type specifications for body text on these forms should be consistent with the Click! Network corporate standard letter format shown on page C.21, with the exceptions noted below. A digital Microsoft Word version of this document is also available. Contact the Graphics section.



### SPECIFICATIONS

#### Gray bar

Bar across top of page is a 60% screen of black and should be printed at no less than 80 lpi.

#### Position

Margin guides are the same as for the Click! Network corporate standard letter format, shown on page C.21. Use the format shown at left for the "Date" through "Subject" lines.

#### Typing standards

Typing standards for body text are the same as for the Click! Network corporate standard letter format, shown on page C.21.

# CLICK! NETWORK CORPORATE FAX TRANSMITTAL COVER SHEET

This form should be used to send official Click! Network fax messages. It should be filled out by hand; there is room at the bottom to include comments or notes.

	<b>CLICK! NETWORK</b> 3628 South 35th Street Tacoma, Washington 98409-3192
	TACOMA POWER

**FAX TRANSMITTAL**

> To: ..... > From: .....

Company: ..... Department/Section: .....

Fax Number: ..... Phone No. or Ext: .....

Date: ..... Fax Number: .....

Pages (including cover): .....

## SPECIFICATIONS

### Size

8<sup>1</sup>/<sub>2</sub>" x 5<sup>1</sup>/<sub>2</sub>"

### Color

All artwork, rules and type are black.

### Paper

Any white bond or fax paper.

### Typography

"Click! Network"

Use logotype artwork.

### Address

Font: Frutiger Roman

Point size: 8.5

Leading: 19

Tracking: 20

"Tacoma Power"

Font: Frutiger Roman, all caps

Point size: 8

Tracking: 55

"Fax Transmittal"

Font: Frutiger Bold, all caps

Point size: 15

Leading: 30

Tracking: 40

### Sender/recipient information

Font: Frutiger Roman

Point size: 8

Leading: 30

Tracking: 11

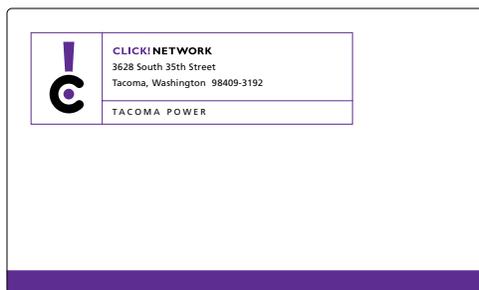
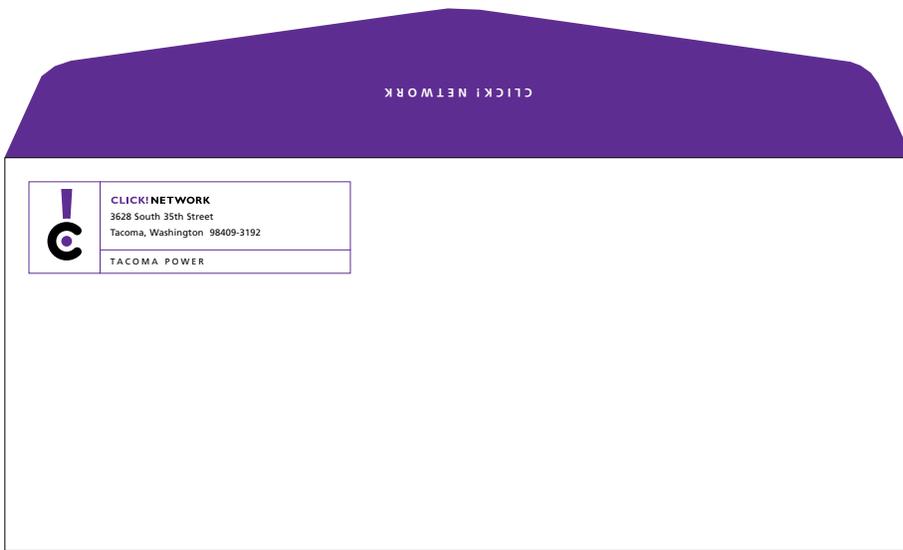
### Rules

Rules surrounding address box are .75 pt.

Rules below content lines are .5 pt dotted lines.

## CLICK! NETWORK CORPORATE #10 ENVELOPE AND MAILING LABEL

Use the #10 envelope for general correspondence. Use a mailing label for parcels or for envelopes larger than #10 size.



50% of actual size

### SPECIFICATIONS

#### #10 ENVELOPE

##### Size

4 1/8" x 9 1/2"

##### Color

The Click! Network corporate identity uses PMS 2593 U and black. All rules are PMS 2593 U; all type in address block is black. The words "Click! Network" reverse out of PMS 2593 U on flap.

##### Paper

Approved paper stock is Torchglow Pearl White, 60-lb. Text, Vellum Finish.

##### Typography

"Click! Network"

Use logotype artwork.

Address

Font: Frutiger Roman

Point size: 7

Leading: 12

Tracking: 3

"Tacoma Power"

Font: Frutiger Roman, all caps

Point size: 6.5

Tracking: 45

##### Rules

Rule weight is .75 pt.

#### MAILING LABEL

##### Size

5" x 4"

##### Color

The Click! Network corporate identity uses PMS 2593 U and black. Rules and color band are PMS 2593 U; all type is black.

##### Paper

Use any bright white, text weight, uncoated, crack 'n' peel stock, 1/8" radius kiss cut die.

*Typography and rules are the same as for the #10 envelope.*

C.20

**CLICK! CABLE TV EXAMPLES**

The following examples illustrate how to assemble the key supporting graphics to build cohesive Click! Cable TV branded communications.

**MORE NEW CHANNELS  
HD PROGRAMMING  
FREE ON-DEMAND  
NO PRICE HIKE.**

**WE DO IT. THEY DON'T.**

**502-8900** Your local choice.  
[clickcabletv.com](http://clickcabletv.com)

**CLICK!  
CABLETV**

**Digital Cable with more than 130 channels for just \$31.99.\***  
(Limited time offer.)

**MORE NEW CHANNELS**  
Sure, there are lots of channels out there, but we have the ones you want. We've recently added loads of new channels including Superstation WGN—home of Lou Piniella and the Chicago Cubs. And for the kids, Boomerang has everything from Huckleberry Hound to Super Friends.

**MORE HD PROGRAMMING**  
Just get a new HD TV? Then you've probably noticed that your favorite sports programs, movies and nature programs look amazing. Want more? Well, look no further. We have all the top HD channels including ESPN, HD Net and Discovery HD Theater.

**MORE FREE ON-DEMAND**  
No time to watch your favorite TV shows? No problem. We have hours of FREE on-demand programming. The kids will love PBS Kids Sprout, while you can check out free programming from CNN, HGTV or The Speed Channel. Best of all, we're adding new content all the time.

**MORE FROM YOUR LOCAL CABLE COMPANY.**  
How can we give you more than the other guys? It's simple—we're local and have been since we opened our doors nearly 10 years ago. That means we don't care about what people in New York or Peoria want to watch. We spend all our time thinking about Tacoma, University Place, Fircrest, Fife and Lakewood. It also means when you pay your bill, your money stays right here, so we can continue to provide you the kind of programming and services you've been asking for.

Say goodbye to operator #63115 in who-knows-where and get more by making a local call to Click! And, because we're neighbors, we'll give you free installation on two outlets and get you connected in just a few days.

Call today at 502-8900  
or visit: [clickcabletv.com](http://clickcabletv.com)

**CLICK!  
CABLETV**

Sunday Insert

**HOW SWEET IT IS.  
MORE LOU  
ALL SEASON LONG.**

**WE HAVE IT. THEY DON'T.**

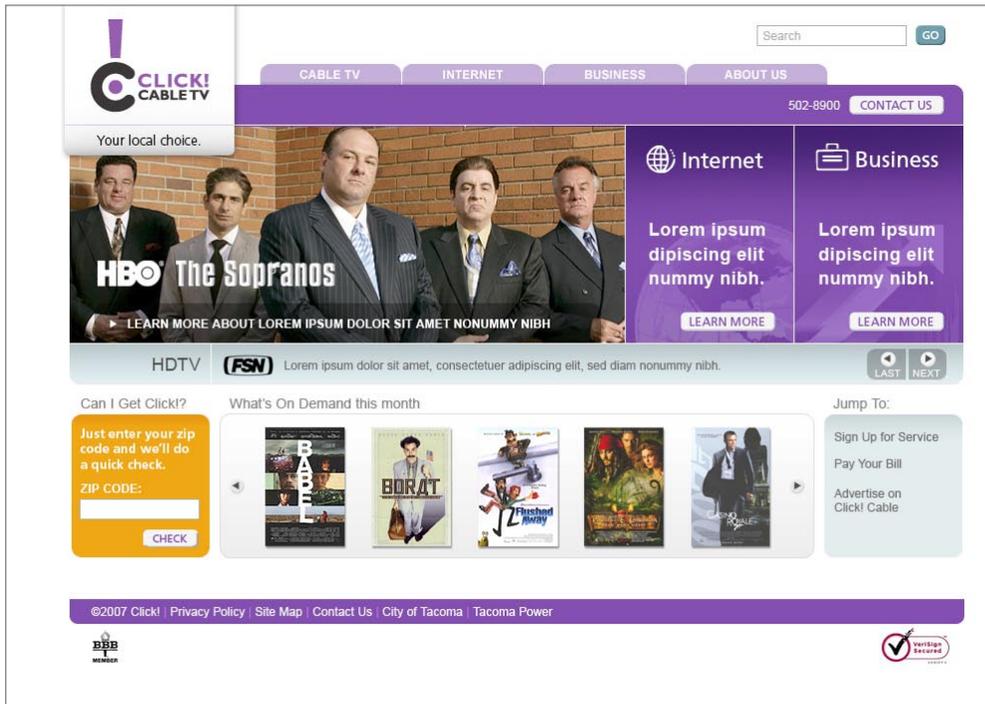
**502-8900** Your local choice.  
[clickcabletv.com](http://clickcabletv.com)

**CLICK!  
CABLETV**

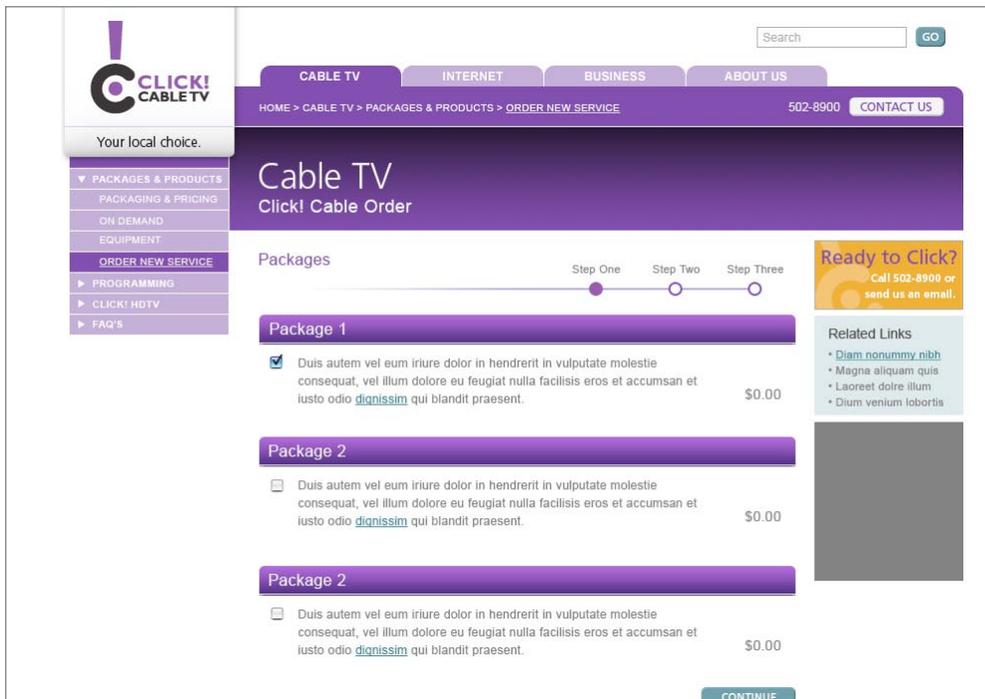
Outdoor Billboard

## CLICK! CABLE TV EXAMPLES

The following examples illustrate how to assemble the key supporting graphics to build cohesive Click! Cable TV branded communications.



Web site—Home page



Web site—Interior page

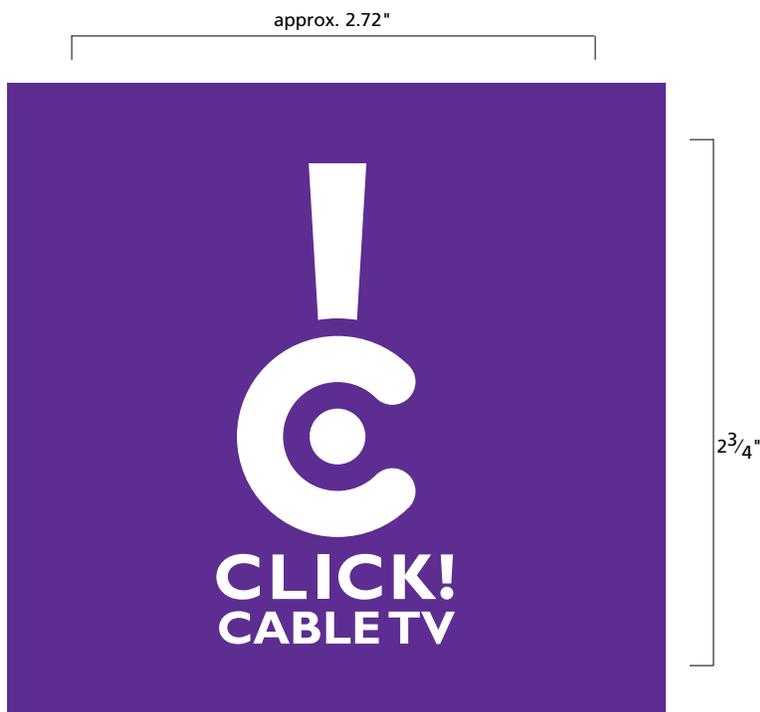
## CLICK! CABLE TV POLO SHIRT

Applications for promotional products need to adhere to graphic standards. For assistance, contact the Click! Marketing Department or Community/Media Services.



### SPECIFICATIONS

Recommended polo shirt fabric is purple colored, dark enough to allow clear contrast against for the white Click! logo. Artwork should be reproduced in embroidery. Refer to this drawing when positioning artwork.



ACTUAL SIZE



The Operator shall obtain and maintain the minimum insurance set forth below. By requiring such minimum insurance, the City of Tacoma (City) shall not be deemed or construed to have assessed the risk that may be applicable to Operator under this IRU Agreement. Operator shall assess its own risks and, if it deems appropriate and /or prudent, maintain greater limits and/or broader coverage.

**1. GENERAL REQUIREMENTS**

The following General Requirements apply to Operator performing services or activities pursuant to the terms of this IRU Agreement. Operator acknowledges and agrees to the following insurance requirements applicable to Operator:

- 1.1. City reserves the right to approve or reject the insurance provided based upon the insurer, terms and coverage, the Certificate of Insurance, and/or endorsements.
- 1.2. The insurance must be written by companies licensed in the State of Washington pursuant to RCW 48 with an (A-) VII or higher in the A.M. Best's Key Rating Guide [www.ambest.com](http://www.ambest.com).
- 1.3. Operator shall keep this insurance in force during the entire term of the IRU Agreement and for thirty (30) calendar days after completion of all work required by the IRU Agreement, unless otherwise provided herein.
- 1.4. Policies of Insurance, *such as Commercial General Liability or Commercial Auto Liability or Excess Liability*, required under this IRU Agreement that name City as Additional Insured shall:
  - 1.4.1. Be considered primary and non-contributory for all claims.
  - 1.4.2. Contain a "Severability of Insureds", "Separation of Interest", or "Cross Liability" provision and a "Waiver of Subrogation" clause in favor of City.
- 1.5. A Waiver of Subrogation in favor of City for General Liability and Automobile Liability.
- 1.6. Insurance limits shown below may be written with an excess policy that follows the form of an underlying primary liability policy or an excess policy providing the required limit.
- 1.7. Insurance policy(ies) shall be written on an "occurrence" form, except for Cyber/Privacy and Security.
- 1.8. If coverage is approved and purchased on a "Claims-Made" basis, Operator warrants continuation of coverage, either through policy renewals or by the purchase of an extended reporting period endorsement as set forth below.
- 1.9. Operator shall provide City notice of any cancellation or non-renewal of this required insurance within 30 calendar days.
- 1.10. Operator shall not allow any insurance to be cancelled or lapse during any term of this IRU Agreement, otherwise it shall constitute a material breach of the IRU Agreement, upon which City may, after giving thirty (30) business days' notice to Operator to correct the breach, immediately terminate the IRU Agreement or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith; with any sums so expended to be repaid to City by Operator upon demand, or at the sole discretion of City, offset against funds due Operator from City.



- 1.11. Operator shall be responsible for all premiums, deductibles and self-insured retentions. All deductibles and self-insured retained limits shall be shown on the Certificates of Insurance. Any deductible or self-insured retained limits in excess of Ten Thousand Dollars (\$10,000) must be approved by City Risk Management Division.
- 1.12. Insurance coverages specified in this IRU Agreement are not intended and will not be interpreted to limit the responsibility or liability of Operator.
- 1.13. City reserves the right to review insurance requirements and request that reasonable adjustments be made.
- 1.14. City, including its officers, elected officials, employees, and agents, shall be named as additional insured(s) by endorsement for all liability insurance policies set forth below. No specific person or department should be identified as the additional insured.
- 1.15. Operator shall deliver a Certificate of Insurance for each policy of insurance meeting the requirements set forth herein when Operator delivers the signed IRU Agreement to City. Operator shall deliver copies of any applicable Additional Insured, Waiver of Subrogation, and primary and non-contributory endorsements.
- 1.16. Failure by City to identify a deficiency in the insurance documentation provided by Operator or failure of City to demand verification of coverage or compliance by Operator with these insurance requirements shall not be construed as a waiver of Operator's obligation to maintain such insurance.

**2. SUBCONTRACTORS**

It is Contractor's responsibility to ensure that each subcontractor obtain and maintain adequate liability insurance coverage. Contractor shall provide evidence of such insurance upon City's request.

**3. REQUIRED INSURANCE AND LIMITS**

The insurance policies shall provide the minimum coverages and limits set forth below. Providing coverage in these stated minimum limits shall not be construed to relieve Operator from liability in excess of such limits.

**3.1. Commercial General Liability (CGL) Insurance**

The CGL insurance policy must provide limits not less than One Million Dollars (\$1,000,000) each occurrence and Two Million Dollars (\$2,000,000) annual aggregate.

The CGL policy shall be written on an Insurance Services Office (ISO) form CG 00 01 (04-13) or its equivalent. The CGL policy shall be endorsed to include:

- 3.1.1 Contractual Liability-Railroad using ISO form CG 24 17 (10-01) or equivalent if Operator is performing work within fifty (50) feet of a City railroad right of way.
- 3.1.2 City as additional insured using ISO form endorsements CG 20 10 (04-13) and CG 20 37 (04-13) or equivalent for ongoing and completed operations, or using ISO form endorsement CG 20 26 (04-13) or equivalent for Facility Use Agreements. Neither additional insured provisions within an insurance policy form, nor blanket additional insured endorsements will be accepted in lieu of the endorsements specified herein.

**3.2 Commercial Automobile Liability (CAL) Insurance**

Operator shall obtain and keep in force during the term of the IRU Agreement, a policy of CAL



## Exhibit Q

# CITY OF TACOMA INSURANCE REQUIREMENTS

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insurance coverage, providing bodily injury and property damage coverage for owned (if any), non-owned, hired, or leased vehicles.

Operator must also maintain an MCS 90 endorsement or equivalent and a CA 9948 endorsement or equivalent if "Pollutants" are to be transported. CAL policies must provide limits not less than One Million Dollars (\$1,000,000) each accident for bodily injury and property damage. Must use ISO form CA 0001 or equivalent.

### 3.3 Workers' Compensation

Operator shall comply with Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

### 3.4 Employers' Liability (EL) (Stop-Gap) Insurance

Operator shall maintain EL coverage with limits not less than One Million Dollars (\$1,000,000) each employee, One Million Dollars (\$1,000,000) each accident, and One Million Dollars (\$1,000,000) policy limit.

### 3.5 Excess or Umbrella Liability (UL) Insurance

Operator shall provide Excess or UL coverage at limits of not less than Ten Million Dollars (\$10,000,000) per occurrence and in the aggregate. This coverage shall apply, at a minimum, in excess of primary underlying Commercial General Liability and Automobile Liability if required herein.

### 3.6 Employee Theft (ET) Insurance

Operator shall maintain an Employee Dishonesty policy with a limit not less than One Million Dollars (\$1,000,000) per occurrence. Such policy shall include City as Loss Payee.

### 3.7 Cyber/Privacy and Security (CP&S) Insurance

Operator shall maintain CP&S insurance with coverage of not less than One Million Dollars (\$1,000,000) per claim and Two Million Dollars (\$2,000,000) general aggregate that includes, but is not limited to, coverage for first party costs and third-party claims. Coverage shall include loss resulting from data security/privacy breach, unauthorized access, denial of service attacks, introduction of virus and malicious code, network security failure, dissemination or destruction of electronic data, business interruptions, privacy law violation, and disclosure of non-public, personal and confidential information, and failure to disclose breaches as required law or contract. Coverage shall include notifications and other expenses incurred in remedying a privacy breach as well as costs to investigate and restore data. Coverage shall also include communications liability (e.g., infringement of copyrights, title, slogan, trademark, trade name, trade dress, service mark, or service name in the policy holders covered material).

### 3.8 Commercial Property (CP) Insurance

Operator shall provide CP for loss or damage to any and all equipment owned by City while in the care, custody, or control of Operator, or its agents. The coverage shall be provided on an ISO special form Causes of Loss form or equivalent and shall provide full replacement cost coverage. The deductible shall not exceed Two Thousand Five Hundred Dollars (\$2,500). Operator shall be responsible for paying the deductible for the applicable coverage.

**EXHIBIT R**  
**Reports and Certifications**

To comply with Section 6(c) of the IRU Agreement, Operator shall submit the following reports and certifications to Tacoma Power on an annual basis.

<b>Policy Goal</b>	<b>Report</b>	<b>Source</b>
Continued public ownership of the infrastructure assets	Cert. of requisite portion of DOCSIS 3.1 upgrade (first three years only)	Ex. E, Section 3(b)
	Status/capabilities of the Tacoma Power Commercial System (post-upgrade)	Ex. E, Section 5(a)
Maintain financial stability of the telecommunications business operations	Capital Expenditures report	Ex. F, Section 2(b)
	Financial report from CPA	Ex. S/IRU Section 12(a)
Ensure equitable access	Compliance with equitable access requirements and equity commitments	Ex. G, Section 5(a)
Low-income affordable access	FCC Form 481 (redacted) and FCC Form 555	Ex. H, Section 1(c)
	Cert. of offering Lifeline subsidy	Ex. H, Section 1(c)
	Lifeline enrollment stats	Ex. H, Section 1(c)
	Cert. of offering reduced-cost broadband	Ex. H, Section 2(b)
	Reduced-cost broadband enrollment stats	Ex. H, Section 2(b)
	Cert. of offering free broadband	Ex. H, Section 3(f)
	Locations receiving free broadband	Ex. H, Section 3(f)
Preserve Click! goodwill	Cert. of physical presence in Tacoma	Ex. I, Section 6
Protect customer privacy	Cert. of customer privacy compliance, with copy of policy	Ex. J, Section 2(c)
Net neutrality	Cert. of net neutrality compliance with copy of policy	Ex. K, Section 2(a)

<b>Policy Goal</b>	<b>Report</b>	<b>Source</b>
Open access to telecommunications assets	Copy of Open Access Program	Ex. L, Section 2(a)
Promote economic development and educational opportunities	Report of activities for economic development and educational opportunities	Ex. M, Section 4(a)
Preserve competition among telecommunications providers	List of names of persons/entities with voting rights and ownership interests in RC	Ex. N, Section 2(a)
	Cert. that working control of RC has not changed	Ex. N, Section 2(b)

The following periodic reports and certifications must also be submitted to Tacoma Power, at the frequencies listed for each report and certification.

<b>Policy Goal</b>	<b>Report</b>	<b>Source</b>
Continued public ownership of the infrastructure assets	Continuity of Services Plan (second Annual Reporting Date only, parties to review every 3-5 years and revise if necessary)	Ex. O, Section 6(a)
Maintain financial stability of the telecommunications business operations	Final Period Capital Expenditures (within 60 days after IRU expires/terminates)	Ex. F, Section 2(c)
	Catch-Up Capital Expenditures (end of Catch-Up Period, only applies if there is a Shortfall)	Ex. F, Section 5(a)
Safeguard municipal use of telecommunications services	New construction and upgrades on Critical and Non-Critical Routes (monthly)	Ex. D, Section 1(f)
Continued public ownership of the infrastructure assets	Status of the Upgrade (quarterly)	Ex. E, Section 3(a)
Preserve Click! goodwill	Customer service report (quarterly, reduced to annual after 2 years if RC has been in compliance)	Ex. I, Section 5(a)

## **Exhibit S Annual Financial Report**

Section 1. The annual financial report must be prepared by a qualified CPA firm<sup>1</sup> based on audited financial statements. The report shall include at minimum the debt service coverage ratio (“DSCR”) of Operator. DSCR shall mean and refer to, as of any date of determination, Operator’s Net Operating Income divided by Mandatory Debt Service, in each case of the four fiscal quarters then ended. The term “Net Operating Income” shall mean and refer to, for any period, Operator's net income before interest expense, income taxes, and depreciation and amortization expense for such period. The term “Mandatory Debt Service Payments” shall mean and refer to the total of all principal and interest payments required to be made by Borrower during the accounting period reported on.

The CPA shall consider the following in addition to Operator’s audited financial statements (balance sheet, cash flow statement, and income statement):

- Ownership history, including any acquisitions, sales, or other transfers of ownership interests.
- The flow of funds between any and all affiliate, parent, sister, and subsidiary companies.
- The company’s current assets, liabilities, and net working capital.
  - Examine subsidiary and parent company.
- If applicable, any filings with the U.S. Securities and Exchange Commission for at least the prior two years.
- Any past, pending, or resolved litigation with the company in its current form.
- The obligations of Operator set forth in the IRU Agreement.

Section 2. The Parties understand that new lease accounting standards will be implemented by the Financial Accounting Standards Board during the term of this lease that will affect the calculation of DSCR. Upon written request from either party, the Parties agree to enter into good faith negotiations to revise and amend this Exhibit S to adjust the definition of DSCR to take into account such changes to the lease accounting standards, and more specifically to ensure that “cash-out” with respect to a lease is not double counted. The City of Tacoma Finance Director, or designee, is authorized to approve such an amendment to this Exhibit S on behalf of Tacoma Power.

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<sup>1</sup> The CPA firm must be the same firm that completed Operator’s latest audit, or if not available, a firm that is:

- Licensed CPA in the State of Washington
- CPA firm experienced in the telecommunications/broadband industry, and
- CPA firm proposed by Operator to be approved by Tacoma Power.

**Exhibit T**  
**Form of Guarantee**

**PERFORMANCE GUARANTEE**

THIS GUARANTEE is made with reference to the following facts and circumstances:

- A. Mashell Inc. (“GUARANTOR”) is a corporation organized under the laws of the State of Washington.
- B. Rainier Connect North, LLC (“OPERATOR”) is a limited liability company organized under the laws of the State of Washington, whose Governing Entity is GUARANTOR.
- C. OPERATOR has negotiated that certain Indefeasible Right of Use Agreement with City of Tacoma, Department of Public Utilities, Light Division, a municipal corporation of the State of Washington (d/b/a and hereinafter referred to as “TACOMA POWER”) (such agreement, as it may be amended, modified or waived from time to time, the “IRU Agreement”). A copy of the IRU Agreement is incorporated herein by this reference.
- D. It is a requirement of the IRU Agreement, and a condition to TACOMA POWER’s entering into the IRU Agreement, that GUARANTOR guarantee OPERATOR’s performance of the IRU Agreement.
- E. GUARANTOR is providing this Guarantee to induce TACOMA POWER to enter into the IRU Agreement.

NOW, THEREFORE, in consideration of the foregoing, GUARANTOR agrees as follows:

- 1. Guarantee of the IRU Agreement. GUARANTOR hereby irrevocably and unconditionally guarantees to TACOMA POWER the complete and timely performance, satisfaction and observation by OPERATOR of each and every term and condition of the IRU Agreement which OPERATOR is required to perform, satisfy or observe. In the event that OPERATOR fails to perform, satisfy or observe any of the terms or conditions of the IRU Agreement, GUARANTOR will promptly and fully perform, satisfy or observe them in the place of the OPERATOR. Without limiting the generality of the foregoing, GUARANTOR hereby guarantees prompt payment to TACOMA POWER of each and every sum due from OPERATOR to TACOMA POWER under the IRU Agreement, as and when due from time to time, and the prompt performance of every other task and duty required to be performed by the OPERATOR under the IRU Agreement.
- 2. GUARANTOR’s Obligations Are Absolute. The obligations of the GUARANTOR hereunder are direct, immediate, absolute, continuing, unconditional and unlimited and, with respect to any payment obligation of OPERATOR under the IRU Agreement, shall constitute a guarantee of payment and not of collection, and are not conditioned upon the genuineness, validity, regularity or enforceability of the IRU Agreement.

3. Waivers and Subordination.

- (A) The GUARANTOR shall have no right to terminate this Guarantee or to be released, relieved, exonerated or discharged from its obligations under Section 1 hereof for any reason whatsoever, including, without limitation: (1) the insolvency, bankruptcy, reorganization or cessation of existence of the OPERATOR; (2) any amendment, modification or waiver of any provision of the IRU Agreement or the extension of its Term (as defined in the IRU Agreement); (3) the actual or purported rejection of the IRU Agreement by a trustee in bankruptcy, or any limitation on any claim in bankruptcy resulting from the actual or purported termination of the IRU Agreement; (4) any waiver, extension, release or modification with respect to any of the obligations of the IRU Agreement guaranteed hereunder or the impairment or suspension of any of TACOMA POWER's rights or remedies against OPERATOR; or (5) any merger or consolidation of the OPERATOR with any other organization, or any sale, lease or transfer of any or all the assets of the OPERATOR.
- (B) The GUARANTOR hereby waives any and all rights to require TACOMA POWER to (a) proceed against OPERATOR, (b) proceed against or exhaust any security or collateral TACOMA POWER may hold now or hereafter hold, or (c) pursue any other right or remedy for GUARANTOR's benefit, and agree that TACOMA POWER may proceed against GUARANTOR for the obligations guaranteed herein without taking any action against OPERATOR or any other guarantor or pledgor and without proceeding against or exhausting any security or collateral TACOMA POWER may hold now or hereafter hold. TACOMA POWER may unqualifiedly exercise in its sole discretion any or all rights and remedies available to it against OPERATOR or any other guarantor or pledgor without impairing TACOMA POWER's rights and remedies in enforcing this Guarantee.
- (C) The GUARANTOR hereby waives and agrees to waive at any future time at the request of TACOMA POWER, to the extent now or then permitted by applicable law, any and all rights which the GUARANTOR may have or which at any time hereafter may be conferred upon it, by statute, regulation or otherwise, to avoid any of its obligations under, or to terminate, cancel, quit or surrender this Guarantee.
- (D) Without limiting the generality of the foregoing, it is agreed that the occurrence of any one or more of the following shall not affect the liability of the GUARANTOR hereunder: (a) at any time or from time to time, without notice to the GUARANTOR, the time for OPERATOR's performance of or compliance with any of its obligations under the IRU Agreement is extended, or such performance or compliance is waived; (b) the IRU Agreement is modified or amended in any respect; (c) any other indemnification with respect to OPERATOR's obligations under the IRU Agreement or any security therefor is released or exchanged in whole or in part or otherwise dealt with; (d) any assignment of the IRU Agreement is effected which does not require TACOMA POWER's approval; or (e) any termination or suspension of the IRU Agreement arising by reason of a default by OPERATOR.
- (E) The GUARANTOR hereby expressly waives diligence, presentment, demand for payment or performance, protest and all notices whatsoever, including, but not limited to, notices of non-payment or non-performance, notices of protest, notices of any breach or default, and notices of acceptance of this Guarantee. If all or any portion of the obligations guaranteed hereunder are paid or performed, GUARANTOR's obligations

hereunder shall continue and remain in full force and effect in the event that all or any part of such payment or performance is avoided or recovered directly or indirectly from TACOMA POWER as a preference, fraudulent transfer or otherwise, irrespective of (a) any notice of revocation given by GUARANTOR or OPERATOR prior to such avoidance or recovery, or (b) payment in full of any obligations then outstanding. The GUARANTOR expressly subordinates and waives its rights to subrogation, reimbursement, contribution or indemnity with respect to performance by GUARANTOR of the obligations of OPERATOR guaranteed hereby, until such time as TACOMA POWER receives payment or performance in full of all such obligations.

4. Term. This Guarantee is not limited to any period of time, but shall continue in full force and effect until all of the terms and conditions of the IRU Agreement have been fully performed by OPERATOR, and GUARANTOR shall remain fully responsible under this Guarantee without regard to the acceptance by TACOMA POWER of any performance bond or other collateral to assure the performance of OPERATOR's obligations under the IRU Agreement. GUARANTOR shall not be released of its obligations hereunder unless and until all of the following conditions have been met: (i) the IRU Agreement is terminated; (ii) all obligations that survive termination of the IRU Agreement as set out in Section 21(f) have been fully performed by OPERATOR; and (iii) there are no claims by TACOMA POWER against OPERATOR arising out of the IRU Agreement based on OPERATOR's failure to perform which have not been settled or discharged.

5. No Waivers by TACOMA POWER. No delay on the part of TACOMA POWER in exercising any rights under this Guarantee or failure to exercise such rights shall operate as a waiver of such rights. No notice to or demand on GUARANTOR shall be a waiver of any obligation of GUARANTOR or right of TACOMA POWER to take other or further action without notice or demand. No modification or waiver by TACOMA POWER of any of the provisions of this Guarantee shall be effective unless it is in writing and signed by TACOMA POWER and by GUARANTOR, nor shall any waiver by TACOMA POWER be effective except in the specific instance or matter for which it is given.

6. Attorney's Fees. In addition to the amounts guaranteed under this Guarantee, GUARANTOR agrees to pay actual attorney's fees and all other costs and expenses incurred by TACOMA POWER in enforcing this Guarantee, or in any action or proceeding arising out of or relating to this Guarantee, including any action instituted to determine the respective rights and obligations of the parties hereunder.

7. Governing Law; Jurisdiction. This Guarantee is and shall be deemed to be a contract entered into in and pursuant to the laws of the State of Washington and shall be governed and construed in accordance with the laws of Washington without regard to its conflicts of laws rules for all purposes, including, but not limited to, matters of construction, validity and performance. As the IRU Agreement is made and performed in Pierce County, GUARANTOR agrees that any action brought by TACOMA POWER to enforce this Guarantee may be brought in any Pierce County Superior Court and GUARANTOR consents to personal jurisdiction over it by such courts.

8. Severability. If any portion of this Guarantee is held to be invalid or unenforceable, such invalidity shall have no effect upon the remaining portions of this Guarantee, which shall be severable and continue in full force and effect.

9. Binding on Successors. This Guarantee shall inure to the benefit of TACOMA POWER and its successors and shall be binding upon GUARANTOR and its successors, including a successor entity formed by a merger or consolidation, a transferee of substantially all of its assets, and its shareholders in the event of its dissolution or insolvency.

10. Authority. GUARANTOR represents and warrants that it has the corporate power to give this guarantee, that its execution of this Guarantee has been authorized by all necessary action under its Articles of Incorporation and by-laws, and that the person signing this Guarantee on its behalf has authority to do so.

11. Notices. Notice shall be given in writing, deposited in the U.S. mail, registered or certified, first class postage prepaid, addressed as follows:

To TACOMA POWER:

Tacoma Public Utilities  
3628 South 35th Street  
Tacoma, WA 98409  
Attention: TPU Contract Administrator

With a copy to:

City of Tacoma  
747 Market Street, Suite 1120  
Tacoma, WA. 98402  
Attention: City Attorney

To GUARANTOR:

Mashell, Inc.  
104 Washington Avenue North  
P.O. Box 639  
Eatonville WA 98328

With a copy to:

Richard A. Finnigan  
2112 Black Lake Blvd. SW  
Olympia, WA 98512

The parties may change the address to which notice is to be sent by giving the other party notice of the change as provided in this Section.

**IN WITNESS WHEREOF, GUARANTOR has executed this Guarantee on the**  
**\_\_\_\_\_ day of \_\_\_\_\_ in the year 20\_\_.**

**MASHELL INC.**

By:

\_\_\_\_\_ {Insert name}  
\_\_\_\_\_ {Insert title}

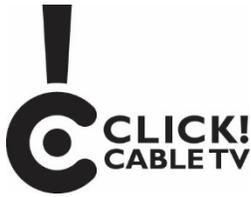
By:

\_\_\_\_\_ {Insert name}  
Corporate Secretary

**SCHEDULE 6.1(b)**  
**GOVERNMENTAL AUTHORIZATIONS (OTHER THAN FRANCHISES)**

- 1) The FCC's unconditional written consent to the assignment of C-BAND License E980465 (FCC File No. SES-REG-20180615-01512) from Tacoma Power to Operator, as requested on FCC Form 312.

# **EXHIBIT C**



3628 South 35th Street  
Tacoma, WA 98409

February 28, 2020

Dear Click! Cable TV Customer,

During 2019, we provided you with two separate notices of our intent to transfer operational control of Click! Cable TV ("Click!") to Rainier Connect North, LLC ("Rainier Connect"). This is to provide formal notice that Click! is transferring operational control to Rainier Connect effective April 1, 2020. As such, beginning April 1, 2020, Rainier Connect will be your cable television service provider.

Information you need to know about your service beginning April 1, 2020 is as follows:

Here is what will stay the same:

- Your service will continue to work just as it does today
- Channel line-up
- Billing date
- Bill amount
- Payment remittance address

Here is what will change, and a few things you will want to verify:

- Whom to contact for support:  
Rainier Connect  
www.rainierconnect.com  
253-683-4100
- Where to make in-person payments:  
2516 Holgate Street  
Tacoma WA, 98402  
Lobby Hours: Monday – Friday 8:30 a.m. - 5:00 p.m.
- All payments after March 31, 2020 should be sent to Rainier Connect
- Unless you discontinue cable service on or before March 31<sup>st</sup>, your cable service and cable account information will be transferred to Rainier Connect, with the exception of your credit card information
- Provide Rainier Connect your credit card information for recurring payments; credit card information provided to Click! Cable TV will not be transferred to Rainier Connect
- Visit Rainier Connect's website at [www.rainierconnect.com/welcome-click-customers](http://www.rainierconnect.com/welcome-click-customers) for additional details and link to their online payment feature
- If you are paying by check or using a bill pay service, you will need to change the payee to Rainier Connect; the remittance address need not be changed

To learn more about the selection of Rainier Connect as the successor to Click!, please visit our information portal at <http://www.mytpu.org/clickupdate>.

From the entire Click! team, thank you for being a Click! customer. We have enjoyed the privilege of serving you and the greater Tacoma area for the last twenty years. Rainier Connect is a long established, locally owned and operated company whom we trust will serve you well into the future.

Sincerely,

Tenzin Gyaltsen  
Click! General Manager

June 07 2022 10:20 AM

The Honorable Judge Bryan Chushcoff  
CONSTANCE R. WHITE  
Department 4  
COUNTY CLERK  
Hearing Date: August 26, 2022, at **NO. 19-2-07135-0**

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

MITCHELL SHOOK,  
Plaintiff,

v.

CITY OF TACOMA,  
Defendant.

**NO. 19-2-07135-0**

**DECLARATION REGARDING RE-  
NOTING OF MOTION**

THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,  
Plaintiffs,

v.

CITY OF TACOMA,  
Defendant.

I, James P. Grifo, counsel for Plaintiff, Christopher Anderson, hereby declare as follows:

On May 14, 2022, Plaintiff Anderson filed and served Plaintiff Anderson's Motion for Partial Summary Judgment and supporting documents, and set the matter for consideration on July 1, 2022, at 9:00 a.m. Defendant City of Tacoma subsequently requested the hearing date be set for August 26, 2022, at 9:00 a.m., and Plaintiff Anderson has agreed to re-note Anderson's pending Motion for Partial Summary Judgment for that date and time.

1 Plaintiff Anderson has re-noted Plaintiff Anderson's Motion for Partial Summary Judgment (including all  
2 documents filed in support thereof) as filed on May 14, 2022, for consideration on August 26, 2022 at  
3 9:00 a.m.  
4

5 I declare under the penalty of perjury under the laws of the State of Washington that the foregoing  
6 is true and correct to the best of my knowledge and belief.  
7

8 Signed this 7<sup>th</sup> day of June 2022 in Nantucket, Massachusetts.

9   
10 \_\_\_\_\_  
11 James P. Grifo, WSBA No. 45192  
12 Attorney for Plaintiff Anderson  
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July 29 2022 2:21 PM

THE HONORABLE BRYAN CHUSTICE  
COUNTY CLERK  
NO. 19-2-07135-0

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

MITCHELL SHOOK,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant

No. 19-2-07135-0

DEFENDANT CITY OF  
TACOMA'S MOTION FOR  
SUMMARY JUDGMENT

**Noted for Consideration:  
August 26, 2022  
Oral Argument Requested**

THOMAS MCCARTHY and CHRISTOPHER  
T. ANDERSON,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant

**I. INTRODUCTION**

The identity of the plaintiffs in this lawsuit has changed over time. Mitchell Shook filed the original Complaint pro se. Messrs. McCarthy and Anderson joined in. Shook is now gone

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1 from this case, leaving Mr. McCarthy and Mr. Anderson – with only Mr. Anderson now  
2 represented by counsel - standing alone.

3 Mr. McCarthy and Mr. Anderson are citizens of the City of Tacoma and have brought this  
4 suit seeking to compel a public vote to authorize a transaction that has already been approved and  
5 effectuated by the Tacoma City Council in a series of resolutions. The McCarthy/Anderson suit  
6 is identical in every way to a separate lawsuit that Mr. Shook filed pro se under cause number 19-  
7 2-11506-3, that was assigned to Judge Shelly Speir. Another Tacoma resident, Darrell Bowman,  
8 also filed an identical Complaint to the McCarthy/Anderson Complaint, which was consolidated  
9 before Judge Speir (referred to hereafter as the Shook/Bowman suit).

10 This Court is familiar with the substance of the McCarthy/Anderson suit. On July 19,  
11 2019, the Court entered an Order denying McCarthy's/Anderson's motion for a writ of prohibition  
12 or preliminary injunction. On August 14, 2019, this Court entered an Order denying  
13 McCarthy's/Anderson's motion for reconsideration.

14 Mr. Shook thereafter amended his allegations in the McCarthy/Anderson suit to assert  
15 federal claims, prompting the City to remove the case on September 4, 2019 to U.S. District Court,  
16 assigned to Judge Settle. Mr. Shook has since dismissed his claims, including his federal claims,  
17 and Judge Settle remanded the McCarthy/Anderson suit back to this Court on May 11, 2020.

18 Meanwhile, on February 7, 2020, Judge Speir, after full briefing and extensive oral  
19 argument, granted the City of Tacoma's Motion for Summary Judgment, dismissing the  
20 Shook/Bowman suit. Specifically, Judge Speir ruled:

21 The plaintiffs have failed to raise genuine issues of material facts on  
22 this issue of whether the City's decisions were arbitrary or

1 capricious. The Court has no basis to invalidate the City's decision,  
2 and as such, the City's resolutions must stand.

3 Because the City [has] determined that CLICK!'s assets and the  
4 excess capacity are surplus and not essential, the public vote  
5 requirements in RCW 35.94.040 and Tacoma City Charter Section  
6 4.6 are not triggered.

7 (Christie Decl., Ex. A, p. 77:12-20.)

8 Judge Speir entered an Order reflecting her ruling on February 28, 2020. (Christie Decl.,  
9 Ex. B.) Judge Speir's Order was appealed to Division II of the Court of Appeals under cause  
10 number 5493030-1. On June 6, 2020 the parties executed a stipulated order dismissing the appeal.  
11 The Court of Appeals terminated review of Judge Speir's Order on July 7, 2020. (*Id.*, Ex. C.)

12 Following remand, on June 1, 2020, the City filed a motion for summary judgment. This  
13 Court denied the motion citing concerns about the City's utility meters and its potential use of the  
14 Click! Network for these meters. (*Id.*, Ex. D, pp. 9:25-12:22.) The Court noted how it needed more  
15 information on whether the system supporting the Gateway Meter Project was retained by the City  
16 and stated that this information could be provided by an affidavit. (*Id.*; *see also* Ex. E.) The  
17 information previously sought by the Court has been provided. (Gyaltzen Decl.; Gyaltzen Supp.  
18 Decl.)

19 This Court should now dismiss this Complaint on the grounds that this Complaint is barred  
20 by the doctrine of res judicata. Judge Speir dismissed virtually identical Complaints. Mr.  
21 McCarthy and Mr. Anderson are acting in the same legal capacity as Mr. Shook and Mr. Bowman  
22 and have the same legal interest as the participants in the Shook/Bowman suit. Because of this  
concurrency of identity, this present suit should be dismissed as a matter of law. Further, this matter  
should also be dismissed in light of the facts presented by the City in response to this Court's

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1 earlier questions concerning the metering projects and in light of the controlling decision issued  
2 by the Court of Appeals in *Coates v. City of Tacoma*, 11 Wn. App.2d 688, 457 P.3d 1160 (2019).

3 **II. RELIEF REQUESTED**

4 Defendant City of Tacoma (“the City”), pursuant to CR 56(c) respectfully requests this  
5 Court dismiss the plaintiffs’ Complaint on grounds of res judicata. In addition, the City requests  
6 this Court dismiss the plaintiffs’ Complaint on the basis of the undisputed facts presented through  
7 this motion, and the binding decision of the Court of Appeals in *Coates*.

8 **III. STATEMENT OF MATERIAL FACTS**

9 Mr. McCarthy and Mr. Anderson filed this Complaint on May 15, 2019. (Compl. for  
10 Declaratory J., and Inj., Relief and Pets. for Writs of Prohibition and Mandamus, *McCarthy, et ano.*  
11 *v. City of Tacoma*, 19-2-07873-7.) This Complaint was then consolidated with a substantially similar  
12 complaint filed by Mitchell Shook on June 10, 2019. (Order Granting Def. Mot. to Consolidate.) Mr.  
13 Shook amended his complaint on August 26, 2019. (Am. Compl. for Declaratory, Inj., Prohibition  
14 and Mandamus Relief.) In it, Mr. Shook asserted certain federal claims, and the City removed the  
15 case to Federal Court. (Notice to Adverse Party of Removal of Action to U.S. Dist.)

16 The City of Tacoma filed a motion for summary judgment to completely dismiss the  
17 Shook/Bowman suits. Shook/Bowman filed cross motions for partial summary judgment (Pl. Shook’s  
18 Mot. Partial Summ. J., Pl. Bowman’s Mot. Partial Summ. J., Def. City of Tacoma’s Mot. Partial  
19 Summ. J., *Bowman v. City of Tacoma*, 19-2-11506-3.) Due to the substantially similar issues in the  
20 Shook/Bowman suit and the instant case, the parties stipulated to staying the federal deadlines in  
21 McCarthy/Anderson until Judge Speir decided the cross-motions for summary judgment in the  
22 Shook/Bowman suit. (Dkt. #38, *Shook v. City of Tacoma*, W.D. Wash. No. 3:19-cv-05829-BHS.)

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1 On February 7, 2020, after hours of oral argument, Judge Speir denied Mr. Shook’s and Mr.  
2 Bowman’s cross-motions, granted the City’s Motion for Summary Judgment, and dismissed both  
3 complaints with prejudice. (Ex. A to Decl. of Christie.) Judge Speir signed the Order on her ruling  
4 on February 28, 2020. (Ex. B to Decl. of Christie.)

5 The factual allegations in the McCarthy/Anderson suit, as well as the first cause of action, are  
6 near word-for-word identical to those in the Bowman suit.<sup>1</sup> Indeed, the same lawyer for Bowman  
7 drafted the McCarthy/Anderson suit. (*Compare* Compl. for Declaratory J., and Inj., Relief and Pets.  
8 for Writs of Prohibition and Mandamus, *McCarthy, et ano. v. City of Tacoma*, 19-2-07873-7 with  
9 Compl. for Declaratory J., and Inj., Relief and Pets. for Writs of Prohibition and Mandamus, *Bowman*  
10 *v. City of Tacoma*, 19-2-11506-3.)

11 On July 24, 2020, this Court denied the City’s previous motion for summary judgment without  
12 prejudice. (Christie Decl., Ex. D, p. 19:22-24.) The Court indicated that it was interested in the  
13 Gateway Metering Project and that it was unclear whether that program was part of the lease of the  
14 HFC network or if the system supporting the Gateway metering project was retained by the City. (*Id.*,  
15 p. 12:8-16.) The Court made clear that if the system supporting the Gateway project was “retained  
16 by the city” then there was no problem and the motion should be granted. (*Id.*) Specifically, the  
17 Court stated that:

18  
19 \_\_\_\_\_  
20 <sup>1</sup> In fact, every factual allegation is identical with the exception of Bowman paragraph 2.25 (below  
21 in bold). That paragraph is different because Bowman’s Complaint was filed on October 16, 2019,  
22 whereas the McCarthy Complaint was filed on May 15, 2019. Thus, the allegation could not have  
been made by McCarthy at the time. “**2.25 On or about October 15, 2019, the Council passed  
Resolution No. 40446, setting a public hearing on October 29, 2019 to determine whether the  
System is surplus to the City's needs and not required for providing continued public utility  
service, and to approve the lease and/or sale of the System to Rainier Connect.**”

1 I mean, maybe it can be done on summary judgment if we had the affidavits. I don't  
2 know what was in front of Judge Speir about that. I guess my concern is, if the  
3 Gateway Meter Project -- if the telecommunications aspect of the Gateway Meter  
Project was retained by the City, then at least -- it seems to me that the rest of the sale  
is fine, and then there's no problem.

4 *Id.*

5 Moreover, the Court stated that “[i]f [the Gateway meter project] has been phased out entirely,  
6 I suppose this is a moot point. If it is still in existence, I don't know to what extent it has been phased  
7 out or maybe they changed their mind and didn't phase it out.” (*Id.* at 19:5-10.) Lastly, during the  
8 hearing on the City's Motion for Summary Judgment, Mr. McCarthy made mention of an industrial  
9 meter program run by Tacoma Power Utility (TPU), which he called “Stark Meters.” (*Id.* at 14:10-  
10 11.) The Court indicated that it would like some clarifications about those meters as well. (*Id.* at  
11 19:24-20:3.)

12 1. On August 3, 2020, Tenzin Gyaltsen testified in a declaration regarding both metering  
13 programs.<sup>2</sup> (*See* Gyaltsen Decl.) Mr. Gyaltsen is the current Utility Technology Services Manager  
14 for TPU, and for nine years, including in July 2019, he held the position of Power Section Manager  
15 and General Manager for Click! Network. (Gyaltsen Decl. at ¶2.) Mr. Gyaltsen unequivocally  
16 testified that on August 31, 2019 the Gateway Metering program was formally ended, and no TPU  
17 customer is using the Gateway meters. (Gyaltsen Decl. at ¶3.) Thus, that metering system has been  
18 entirely phased out. He also testified that the Stark metering program was fully removed from the  
19 Click! Network. (Gyaltsen Decl. at ¶4.) Lastly, he testified that there is no TPU customer who is  
20

21 \_\_\_\_\_  
22 <sup>2</sup> Also attached to Mr. Gyaltsen's declaration as Exhibit A is the request to formally terminate the  
Gateway pilot metering program and the request to formally remove the commercial/industrial  
meters that utilized Stark software from the Click! HFC network.

1 relying on any part of the Click! HFC Network for any of their TPU utility service, and neither  
2 metering services were sold or transferred when Click! network was leased to Rainer Connect.  
3 (Gyaltsen Decl. at ¶5.) Mr. Gyaltsen also testified that, as of April 2020, no TPU customers are relying  
4 on any part of the Tacoma Power Commercial System for any TPU service, the City's meters,  
5 including the now phased out Gateway Metering Project, do not rely on the Tacoma Power  
6 Commercial System, and that Rainier Connect is not providing or supporting any TPU services, other  
7 than as an ordinary commercial customer of services that it pays Rainier Connect to receive and that  
8 it previously paid Click! to receive. (Supp. Gyaltsen Decl., ¶¶4-9)

9 **IV. ISSUES PRESENTED**

- 10 1. Whether this Complaint should be dismissed pursuant to the doctrine of res judicata  
11 when the same very same issues have already been fully litigated in another case?  
12 2. Whether this Complaint should be dismissed because the Gateway metering system  
13 was phased out and no metering system was leased to Rainer Connect?  
14 3. Whether this Complaint should be dismissed when Mr. McCarthy's and Mr.  
15 Anderson's arguments that Click! is a separate utility have already been rejected by the  
16 Court of Appeals.

17 **V. EVIDENCE RELIED UPON**

18 This motion is based on the pleadings already on record in this case, the filings pertaining to  
19 the motions for summary judgment pending in the Shook/Bowman case under cause number 19-2-  
20 11506-3, and on the following materials filed in conjunction with this motion:

- 21 1. Declaration of Robert L. Christie, with exhibits.  
22 2. Declaration of Tenzin Gyaltsen, with exhibits.

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1 3. Supplemental Declaration of Tenzin Gyaltzen.

2 **VI. ARGUMENT AND AUTHORITIES**

3 **A. Summary Judgment Standard**

4 Summary judgment is appropriate if there are no genuine issues of material fact and the  
5 moving party is entitled to judgment as a matter of law. *Zonnebloem, LLC v. Blue Bay Holdings,*  
6 *LLC*, 200 Wn. App. 178, 182, 401 P.3d 468 (2017); CR 56(c). A genuine issue of material fact  
7 exists if reasonable minds could disagree on the conclusion of a factual issue. *Id.* at 182-83. Courts  
8 view all facts and reasonable inferences drawn from those facts in the light most favorable to the  
9 nonmoving party. *Id.* at 182.

10 **B. Res Judicata Prohibits Re-Litigation of These Claims.**

11 “The broad general rule of res judicata suggests that a party is always prohibited from  
12 litigating a claim or issue that could have been raised in any earlier suit.” *Eugster v. Washington*  
13 *State Bar Ass’n*, 198 Wn. App. 758, 786, 397 P.3d 131 (2017). “Under Washington law, for the  
14 doctrine of res judicata to apply, a prior judgment must have a concurrence of identity with a  
15 subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the  
16 quality of the persons for or against whom the claim is made.” *Id.*; *See also Rains v. State*, 100  
17 Wn.2d 660, 663, 674 P.2d 165 (1983); *Berschauer Phillips Construction Co. v. Mutual of*  
18 *Enumclaw Insurance Co.*, 175 Wn. App. 222, 227-28, 308 P.3d 681 (2013). Res judicata also  
19 requires that the prior judgment be final. *Leija v. Materne Brothers, Inc.*, 34 Wn. App. 825, 827,  
20 664 P.2d 527 (1983). “A grant of summary judgment at a prior proceeding is considered a final  
21 judgment on the merits.” *Emeson v. Dep’t of Corrections*, 194 Wn. App. 617, 626, 376 P.3d 430  
22 (2016); *see also DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 891-92, 1 P.3d 587 (2000).

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1 Mr. McCarthy and Mr. Anderson’s only argument on this issue can be that they are not Mr.  
2 Shook or Mr. Bowman. However, nominally different parties may have sufficiently identical  
3 interests to satisfy the “identity of parties” inquiry. That is particularly true where the plaintiffs in  
4 separate cases asserting identical claims are doing so in the same legal capacity as citizen voters.  
5 For example, in *Snyder v. Munro*, 106 Wn.2d 380, 383–84, 721 P.2d 962 (1986) the petitioners  
6 challenged the constitutionality of a statute establishing certain state legislative districts. Different  
7 named parties had challenged the same statute on the same constitutional grounds in federal court  
8 and lost. The court held that the petitioners were barred by res judicata from relitigating the  
9 constitutionality of the statute in state court. *Snyder*, 106 Wn.2d at 384. “The identity of the  
10 parties is not a mere matter of form, but is one of substance; the court will look to the legal effect  
11 of the identity of the parties even though they may be nominally different.” *Id.* at 383-84; *see also*  
12 *Rains*, 100 Wn.2d at 674. The court reasoned that the petitioners, though different persons, had  
13 the same legal interests as all citizens of the state. *Snyder*, 106 Wn.2d at 384. The court concluded,  
14 therefore, that there was sufficient identity of parties for purposes of res judicata. *Id.* at 384; *see*  
15 *also City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340–41, 78 S. Ct. 1209, 2 L. Ed. 2d  
16 1345 (1958) (holding final judgment against the State barred subsequent action by citizens because  
17 citizens' public rights were represented by the State in the earlier proceeding).

18 The Washington State Supreme Court addressed the doctrine of res judicata in the context  
19 of four citizen lawsuits filed to contest the outcome of the 2004 governor’s election. *In Re Coday*,  
20 156 Wn.2d 485, 130 P.3d 809 (2006), The Court explained that a prior judgment will bar litigation  
21 of a subsequent claim if the prior judgment has “a concurrence of identity with [the] subsequent  
22 action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the

1 person for or against whom the claim is made.” *Id.* at 500-01 (quoting *Loveridge v. Fred Meyer,*  
2 *Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995)), The voter challenge claims in the underlying  
3 claims in *Coday* were, as here, identical in subject matter. Focusing on the “concurrence of  
4 identity” element, the Court stated:

5 [W]here ‘nominally different parties’ pursue causes of action as voters, on behalf  
6 of the body politic generally, such parties have been found to “have sufficiently  
7 identical interests to satisfy the ‘identity of parties’ inquiry” because they possess  
8 “the same legal interests as all citizens of the state.” [citations omitted] While Karr  
[the plaintiff in one of the cases] was not a participant in the *Borders* case, she is  
acting in the same capacity, and has the same legal interest, as the participants in  
that case.”

9 *In Re Coday*, 156 Wn.2d 485, 501, 130 P.3d 809 (2006).

10 Here, Mr. McCarthy and Mr. Anderson assert an identical legal challenge to the same  
11 resolutions adopted by the Tacoma City Council. Indeed, the findings and conclusions in this  
12 Court’s Order of July 19, 2019, while at an earlier stage of the litigation, tracks precisely with  
13 Judge Speir’s oral ruling on summary judgment. There is no conceivable difference between the  
14 legal positions taken on the part of Mr. Shook and Mr. Bowman, citizens of Tacoma seeking a  
15 public vote, from that of Mr. McCarthy and Mr. Anderson seeking identical relief on identical  
16 legal grounds. Indeed, Mr. Bowman had the benefit of excellent written and oral advocacy of  
17 attorney Kent Van Alstyne, the same attorney that drafted the McCarthy/Anderson Complaint but  
18 has now withdrawn from this case. There is nothing that Mr. McCarthy and Mr. Anderson can  
19 now present by way of argument that has not been fully evaluated and rejected.

20 Accordingly, given the concurrence of identity between the plaintiffs in the Shook/Bowman  
21 suit and the plaintiffs in the McCarthy/Anderson suit, as well as the final judgment in the form of  
22 Judge Speir’s order granting the City’s motion for summary judgment, all of the requirements of

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1 res judicata have been established and this Court should now dismiss this suit with prejudice.

2 **C. The Issues Related to the Metering Systems Are Moot.**

3 Upon ruling on the City’s earlier motion for summary judgment, the Court raised concerns  
4 about the metering projects and questioned whether the projects were a part of the lease of the HFC  
5 network or if the metering projects were retained by the City. If the metering projects were not a part  
6 of the lease, then the Court implied that it would grant the City’s motion. The Court also made clear  
7 that if the Gateway project had been phased out, the City’s motion should be granted.

8 As is made clear by Mr. Gyaltsen’s declarations, the Gateway project has ended and been  
9 phased out. Accordingly, that issue is now moot. Moreover, Mr. Gyaltsen testified that neither of the  
10 metering projects relied on systems that were a part of the lease with Rainer Connect. Therefore,  
11 Rainer Connect has no connection with or control of any of the metering projects, and Mr. McCarthy  
12 and Mr. Anderson’s assertions to the contrary are incorrect. Thus, the City has demonstrated that all  
13 of this Court’s concerns about the metering systems are moot. For this additional reason, and in  
14 conjunction with the City’s *res judicata* argument, this Court should dismiss Mr. McCarthy’s and Mr.  
15 Anderson’s Complaint with prejudice.

16 **D. The Court of Appeals Has Already Held that the Click! Network was not a Separate  
17 Utility from the City’s Electrical Grid and Does Not Violate the Tacoma City Charter.**

18 Mr. McCarthy and Mr. Anderson also argue the Click! Network is a separate utility from the  
19 City’s electrical grid. However, Plaintiff ignores controlling case law that is directly on-point. *Coates*  
20 *v. City of Tacoma*, 11 Wn. App.2d 688, 457 P.3d 1160 (2019). The Court of Appeals held that that  
21 “Click! and Tacoma Power’s electric utility are one undertaking for purposes of RCW 43.09.210(3).”  
22 *Id.* at 697. In determining that Click! Network is not a separate utility, the Court reasoned that “[a]

1 separate project carried out by an entity can constitute a separate undertaking but not a separate  
2 department, public improvement, institution, or public service industry. But here, Click! is simply  
3 using the excess capacity of the electric utility’s infrastructure. When reading the entire list in context,  
4 it is clear that providing an additional service using the utility’s existing infrastructure is not a separate  
5 undertaking.” *Id.*

6 Further, and even more directly on-point, the Court of Appeals noted “[t]he parties dispute  
7 whether Click! is a separate ‘utility’ from Tacoma Power’s electric utility or whether it is simply a  
8 “betterment” of the utility.” *Id.* at 698. The court concluded that “. . . Click! was merely intended  
9 as a betterment to Tacoma Power’s telecommunications system in an effort to maximize a resource  
10 and ‘reduc[e] . . . rates and charges.’ Tacoma City Charter art. IV, sec. 4.5. That structure has not  
11 changed.” *Id.* Thus, the Court held that “[b]ecause Click! is a betterment of Tacoma Power, . . . it  
12 does not violate the Tacoma City Charter.” *Id.* at 699. Accordingly, Plaintiff’s arguments that Click!  
13 is a separate utility under RCW 35.94.010 and that it violates the Tacoma City Charter were  
14 considered and rejected by the Court of Appeals in *Coates*. This Court should also reject Mr.  
15 McCarthy’s and Mr. Anderson’s arguments that were previously rejected by the Court of Appeals.

## 16 **VII. CONCLUSION**

17 Mr. McCarthy and Mr. Anderson have a concurrence of identity with Mr. Shook and Mr.  
18 Bowman. The subject matter and causes of action in the Complaints, drafted by the same lawyer,  
19 are identical in all key respects. The person – the City of Tacoma – against whom the claims are  
20 made is identical. Moreover, the metering projects either no longer exist and/or were not a part  
21 of the system leased to Rainer Connect. Further, Mr. McCarthy’s and Mr. Anderson’s arguments  
22

1 about the legality of Click! have already been rejected by the Court of Appeals in *Coates*. Thus,  
2 this Court should apply the doctrine of res judicata and dismiss this lawsuit with prejudice.

3 Respectfully submitted this 29<sup>th</sup> day of July, 2022.

4 CHRISTIE LAW GROUP, PLLC

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10 WILLIAM C. FOSBRE, City Attorney

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17 Phone: 253-502-8348  
18 Email: cbacha@ci.tacoma.wa.us

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 29, 2022, I electronically filed the foregoing with the Clerk of  
3 the Court using the LINX system. I also hereby certify that I have mailed by US Postal Service  
4 the document to the following non-LINX participants:

4 Thomas McCarthy  
5 801 S. Cushman Avenue  
6 Tacoma, WA 98405  
7 Email: Tmccarthy253@gmail.com;  
8 *Plaintiff Pro Se*

7 James P. Grifo, WSBA #45192  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
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MITCHELL SHOOK,

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DECLARATION OF ROBERT L.  
CHRISTIE IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

THOMAS MCCARTHY and CHRISTOPHER  
T. ANDERSON,

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Defendant

I, ROBERT L. CHRISTIE, hereby declare as follows:

1. I am over the age of eighteen years and am a citizen of the United States. I have

DECLARATION OF ROBERT L. CHRISTIE IN  
SUPPORT OF DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT  
(19-2-07135-0) - 1

**CHRISTIE LAW GROUP, PLLC**  
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1 personal knowledge of the facts herein and am competent to testify to them.

2 2. I am an attorney at Christie Law Group and one of the attorneys of record for  
3 defendant City of Tacoma.

4 3. Attached as **Exhibit A** is a true and correct copy of the Verbatim Transcript of  
5 Proceedings of the February 7, 2020 hearing on cross-summary judgment motions in Pierce County  
6 Superior Court cause number 19-2-11506-3. The Court's ruling on the motions begins on p. 69.

7 4. Attached as **Exhibit B** is a true and correct copy of the Order Granting Defendant City  
8 of Tacoma's Motion for Summary Judgment in Pierce County Superior Court, cause number 19-2-  
9 11506-3.

10 5. Attached as **Exhibit C** is a true and correct copy of the Ruling Dismissing Appeal  
11 filed on July 7, 2020 in *Darrel Bowman v. City of Tacoma*, Court of Appeals of the State of  
12 Washington, Division II, Cause No. 54930-1-II.

13 6. Attached as **Exhibit D** is a true and correct copy of Verbatim Transcript of  
14 Proceedings of the July 24, 2020 hearing on Defendant City of Tacoma's motion for Summary  
15 Judgment in this case.

16 7. Attached as **Exhibit E** is a true and correct copy of the Order Denying Defendant City  
17 of Tacoma's Motion for Summary Judgment filed in this case on June 1, 2020.

18 I declare under penalty of perjury under the laws of the State of Washington that the foregoing  
19 is true and correct to the best of my knowledge and belief.

20 ///

21 ///

22 ///

DECLARATION OF ROBERT L. CHRISTIE IN  
SUPPORT OF DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT  
(19-2-07135-0) - 2

**CHRISTIE LAW GROUP, PLLC**  
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1 SIGNED in Seattle, Washington this 20<sup>th</sup> day of July, 2020.

2 CHRISTIE LAW GROUP, PLLC

3 By: /s/Robert L. Christie

4 ROBERT L. CHRISTIE, WSBA #10895

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DECLARATION OF ROBERT L. CHRISTIE IN  
SUPPORT OF DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT  
(19-2-07135-0) - 3

**CHRISTIE LAW GROUP, PLLC**  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 29, 2022, I electronically filed the foregoing with the Clerk of  
3 the Court using the LINX system. I also hereby certify that I have mailed by US Postal Service  
4 the document to the following non-LINX participants:

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DECLARATION OF ROBERT L. CHRISTIE IN  
SUPPORT OF DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT  
(19-2-07135-0) - 4

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# EXHIBIT A



1 BE IT REMEMBERED that on Friday, February 7, 2020,  
2 the above-captioned cause came on duly for hearing before  
3 the **HONORABLE SHELLY K. SPEIR**, Judge of the Superior Court  
4 in and for the County of Pierce, State of Washington; the  
5 following proceedings were had, to wit:

6  
7 <<<<<< >>>>>>

8  
9 THE COURT: Welcome to our members of the press.  
10 I just wanted to give a couple of notices to  
11 everyone. You've probably seen my visual aids that are  
12 posted throughout the courtroom. This is because I am now  
13 doing drug court. And so I would just ask that you be  
14 careful on your way through the courtroom that you try not  
15 to bump into them or erase them. They are part of ongoing  
16 proceedings.

17 And this display over here on the side is  
18 particularly important; those are names of people who have  
19 been lost to drug addiction. So try to take care of that  
20 one.

21 The other announcement I have is that I have  
22 another matter on my docket this afternoon involving an  
23 interpreter. He's out working in the hallway right now and  
24 so we may have to interrupt these proceedings to allow the  
25 interpreter to come take care of that case because they are

1 on the clock. And so I want to be efficient with that.

2 So I see you've got all set up. I hope that  
3 Mr. Shanstrom advised you of the time limits. Ten minutes  
4 per party per motion. So, any questions?

5 MR. SHOOK: I do have a question about how that  
6 works, Your Honor. Which motion would go first and will we  
7 be able to reserve time of our ten minutes?

8 THE COURT: You absolutely can reserve rebuttal.  
9 You just need to tell me how much you want. I thought we  
10 would start in the order that I had them filed. So  
11 Mr. Shook, you would go or you can defer to Bowman.

12 MR. VAN ALSTYNE: I'm happy to go first.

13 THE COURT: And then we could end with the City.

14 MR. SHOOK: And then I had just one other  
15 question, Your Honor. I don't know. Some of my  
16 certificates of authenticity continue to trickle in. If the  
17 Court wants those now, I have the Anacortes resolution  
18 created their broadband utility certified. I also have the  
19 Collins library for the Homer T. Bone papers certified. And  
20 then I've got the Pierce County certification for their  
21 broadband study talking about the broadband being  
22 essentially a utility.

23 So if the Court would like those, I can add those  
24 to the record, all my others are certified previously. But  
25 these trickled in after I filed my consolidated declaration.

1 THE COURT: Is there any objection from the City  
2 as to these?

3 MR. CHRISTIE: No objection to the timing of them  
4 being filed. And we would just stand by the written  
5 objection that we made to his first declaration. I didn't  
6 attempt to redo that based on his new filing. Authenticity  
7 may well not be appropriate. There were other objections  
8 beyond that, and so I didn't duplicate that effort, Your  
9 Honor.

10 THE COURT: Okay. I'm willing to accept those  
11 today, so if you want to hand those up to my judicial  
12 assistant.

13 MR. SHOOK: Thank you, Your Honor.

14 THE COURT: I'm just making sure I know which ones  
15 these go to.

16 MR. SHOOK: It should indicate the exhibit numbers  
17 on the --

18 THE COURT: You've got Exhibits 58, 67, 80.

19 MR. SHOOK: That's correct.

20 THE COURT: And then you've got another resolution  
21 here.

22 MR. SHOOK: That's the Anacortes resolution.

23 THE COURT: All right. Okay. All right. Thank  
24 you.

25 MR. VAN ALSTYNE: Your Honor, one more question,

1 which is in terms of the ten minutes, does that mean I'll  
2 have ten minutes to present first and then...

3 THE COURT: If you would like to reserve, for  
4 example, two minutes, you would have eight minutes to  
5 present and then two minutes for your rebuttal. So total of  
6 ten minutes.

7 MR. VAN ALSTYNE: I see. And then I will also get  
8 ten minutes to respond to Mr. Shook's motion?

9 THE COURT: Correct. The clock starts over on  
10 each motion.

11 MR. VAN ALSTYNE: Okay. Thank you.

12 THE COURT: Okay. So we're starting with  
13 Mr. Bowman's motion?

14 MR. VAN ALSTYNE: Yes, I believe I'll start, Your  
15 Honor.

16 THE COURT: And I guess I should probably formally  
17 call the case.

18 We're here on Bowman versus City of Tacoma, Cause  
19 No. 19-2-11506-3. There are, by my count, three motions  
20 pending plus a mandatory review hearing for this afternoon.

21 So with that, we're going to start with  
22 Mr. Bowman's motion for partial summary judgement.

23 MR. VAN ALSTYNE: Thank you, Your Honor.

24 My name's Ken Van Alstyne, for the record. I'm  
25 here for plaintiff Bowman. The Court is tasked here today

1 with determining whether the City's multimillion dollar  
2 state-of-the-art carrier-grade hybrid fiber coaxial  
3 telecommunications network, which has over 1,400 miles of  
4 cable over 20,000 customers, whether that system can be  
5 summarily disposed of by declaring it surplus and handing it  
6 over to a private entity without a vote of the people. We  
7 respectively submit that it cannot, Your Honor.

8 I think there are three -- two important questions  
9 that the Court has to answer here today to determine who  
10 will prevail on the summary judgement motions. The first  
11 question is whether CLICK! is itself a stand-alone utility  
12 system. And if it is, in fact, a stand-alone utility system  
13 under the city charter specifically, the analysis should end  
14 there because there is no surplus provision under the city  
15 charter and, therefore, if it is a stand-alone utility  
16 system under the city charter, that should end the analysis.

17 THE COURT: Isn't there a requirement that it be  
18 essential?

19 MR. VAN ALSTYNE: The charter is phrased in terms  
20 of an "or," Your Honor, and the first piece of that or is  
21 utility system. The second part is or essential part  
22 thereof -- part thereof essential to continue utility  
23 service.

24 So if it is, in fact, a utility system, the first  
25 part before the or, then Bowman should prevail. In

1 addition, if Your Honor thinks it satisfies the second  
2 portion after the or, then Bowman should also prevail on  
3 that basis alone and we don't have to get to the question of  
4 whether or not the public surplus statute.

5 On that first question, if it is a stand-alone  
6 utility system under the RCW, specifically RCW 35.94, then  
7 we need to proceed to the next question and determine  
8 whether or not the surplus provision was properly exercised  
9 by the City, which brings me to the second major question  
10 that the Court must answer, assuming that it's not finding  
11 for Mr. Bowman on the charter provision, which is that can  
12 CLICK! be legally surplus under .040 in the manner that  
13 the City has done. And we respectively submit to the Court  
14 that regardless of whether CLICK! is a stand-alone utility  
15 system or only a part of Tacoma Power, the surplus provision  
16 was not -- does not give the City of Tacoma the power that  
17 it attempts to exercise under the surplus provision, aka, to  
18 surplus an entirety of an operating utility system or a  
19 continually operating part of a utility system.

20 Moving on to those two points and starting with  
21 the question of whether CLICK! is a stand-alone public  
22 utility system. You're going to hear a lot of argument from  
23 the City today regarding why CLICK! is not a utility system.  
24 And you're going to hear references to a lot of different  
25 statutes. You'll probably hear references to 35.92 RCW.

1 You'll also hear references to federal law to Supreme Court  
2 cases in Washington that interpret other provisions of the  
3 RCWs in the provision that's in here and you'll also likely  
4 hear argument with regard to *Coates* which is a decision that  
5 interprets different provisions.

6           However, none of those arguments that the City has  
7 brought and none of the cases that the City has cited  
8 actually interpret RCW 35.94.010. The only party who has  
9 brought forth any authority specific to RCW 35.94.010 is  
10 Bowman, and specifically two arguments: Bowman has argued  
11 that the plain language of the term utility system in the  
12 current-day version of 35.94.010 encompasses CLICK! and  
13 Bowman has also argued that there's a statutory test  
14 embedded in .010 via the 1917 revised Remington Statute  
15 Section 9512, which provides the Court with an illustrative  
16 list of things that constitute public utilities under the  
17 statute including relevant analysis here of telegraph or  
18 telephone plant and lines or any similar or dissimilar  
19 utility system. So I want to make that upfront very clear.  
20 Bowman's the only one who's advanced the argument or cited  
21 cases that actually even interpret the provision at issue  
22 before the Court, and for that reason alone I believe  
23 Bowman's argument should carry the day.

24           Rather than go through every single argument  
25 presented in the brief, Your Honor, I'm going to stick to

1 what I think are the most important central arguments here  
2 that support Bowman's case, and specifically I'm going to  
3 start with the 1917 Remington Statute Section 9512. That  
4 provision controls the meaning of modern-day RCW 35.94.010.  
5 And I'm going to now lead the Court through the series of  
6 enactments and changes and revisions to the law which make  
7 that clear.

8 So I'll start off with the initial language of  
9 Remington Revised Code 9512. The initial language says, "It  
10 is and shall be lawful for any city or town in this state  
11 now or hereafter owning any water works, gasworks,  
12 electrical light and power plant, steam plant, street  
13 railway line, street railway plant, telephone or telegraph  
14 plant and lines, or any system embracing all or any one or  
15 more of such works or plants or any similar or dissimilar  
16 utility or system to lease under the provisions of the  
17 chapter," one of those provisions being the public vote  
18 provision. That's the original language and that was as it  
19 existed in 1917.

20 Now the code reviser's committee, as Your Honor's  
21 aware, is tasked with revising and rewriting the existing  
22 Remington Statutes and the other previously preexisting laws  
23 in the '40s. And in the process of revising specifically  
24 RRF 9512 the provision I read, they rewrote that section and  
25 they specifically rewrote it for brevity not to change the

1 content of that section. And that rewrite for brevity made  
2 RRF 9512 morphed it and changed it into the exact same  
3 language that is currently found under RCW 35.94.010. They  
4 rewrote it for brevity not to change the meaning.

5 And just as significantly, RCW 104.020, which was  
6 the original RCW that was enacted at the time that the code  
7 advisors committee did this, says that "Nothing in these new  
8 RCWs shall be construed as changing the meaning of any laws.  
9 And as a rule of construction in the case of any omissions  
10 or inconsistency between any of the provisions of the  
11 revised code and the laws existing immediately preceding the  
12 enactment, the previously existing laws shall control."

13 Therefore when the code committee rewrote it and  
14 when the provision was put into the RCWs in 1951, it still  
15 contained the illustrative list that was originally in 9512.

16 Now, much has been -- and I should mention one  
17 more thing before I go on, which is that, it was then  
18 revised and codified at RCW 80.48.010, which is key because  
19 this is a step the City is overlooking in its analysis of  
20 this provision. It was actually codified in 1951 into the  
21 RCWs as edited.

22 In 1965, the key thing happened which is relevant  
23 to both parties' arguments here. In 1965, every single law  
24 in the state of Washington that had to do with cities and  
25 towns was re-codified into Chapter 30 -- into Title 35

1 governing cities and towns.

2 At that point, in that re-codification, the  
3 provision that was then at 80.48.010 with the exact same  
4 language as the current statute was repealed and re-codified  
5 at its current-day location in 35.94.010. And there was a  
6 savings clause that was in the 1965 act which said the  
7 provisions of this title insofar as they are substantially  
8 the same as statutory provisions repealed by this chapter  
9 and relating to this same subject matter shall be construed  
10 as restatements and continuations and not as new enactments.  
11 And that's the key here because the language at the time the  
12 law in 1965 was passed, the language of the operable  
13 provision here was identical to its language after it was  
14 re-codified in 35.94.010.

15 THE COURT: You've got two minutes left if you  
16 want to save those for rebuttal.

17 MR. VAN ALSTYNE: Thank you, Your Honor. I will  
18 not save those for rebuttal. Thank you.

19 Now, now that we've established that the 1917 law  
20 carries forward into the present-day language, this case  
21 becomes relatively simple along those lines because it  
22 included a list -- this illustrative list includes telephone  
23 and telegraph plant or system and any similar or dissimilar  
24 utility. I think there's very -- there's little question  
25 that that includes a modern-day telecommunications network

1 for many of the reasons we've already put in the brief,  
2 brought by an Internet and telecommunications are the  
3 modern-day purple hub -- well, exactly the  
4 telecommunications network that were in that illustrative  
5 list in the first place, telephone and telegraph.

6 And then to remove any existing doubt, we also  
7 have the *Bremer* case, Your Honor, which is the supreme case  
8 the case that I referenced that actually interprets the  
9 provision at issue here. In *Bremer* the question was whether  
10 a municipal wharf was a public utility under that  
11 illustrative language. And a wharf, respectively, is not  
12 even close to any of the terms that is on that statutory  
13 list. It's much further away from any of the channels in  
14 the statutory list than a telecommunications network is and  
15 yet still *Bremer* determined that a public municipal wharf  
16 was, in fact, a public utility system under the statute.

17 And that really is the crux of our argument here,  
18 Your Honor. There are many other supporting arguments that  
19 we've brought in from other RCWs, Title 80, various  
20 positions the City has taken with respect to these laws in  
21 the past, but that should settle the question in our mind,  
22 Your Honor, is this illustrative list that came from 1917  
23 and was imported into the current-day statute.

24 THE COURT: That's your ten minutes.

25 MR. VAN ALSTYNE: Thank you.

1 THE COURT: Mr. Shook, would you like to reserve  
2 any -- actually --

3 MR. SHOOK: Yes, Your Honor.

4 THE COURT: You get your full ten.

5 MR. SHOOK: Two minutes. I'll reserve eight  
6 minutes.

7 THE COURT: When it's time for your motion I'll  
8 let you reserve. But right now since you're responding, you  
9 can have the whole ten minutes.

10 MR. SHOOK: I have a whole ten minutes and I don't  
11 break it up.

12 THE COURT: Nope. You can go all the way through.

13 MR. SHOOK: Okay. Well, let them do their turn  
14 then I'll follow after he goes with his ten minutes so I can  
15 focus on the things that need to be focused on.

16 THE COURT: When it's your turn for your motion  
17 you can do that, but right now you're responding to  
18 Mr. Bowman's motion.

19 MR. SHOOK: All right. So I'm going to use all my  
20 whole ten minutes.

21 THE COURT: You can use the whole ten minutes.

22 MR. SHOOK: Well, I wasn't planning on doing that.

23 THE COURT: You don't have to if you don't want  
24 to.

25 MR. SHOOK: I wanted to kick off with a minute or

1 two and then reserve eight minutes. But if I have to go,  
2 I'll just go, but it's going to require me switching my  
3 computer over. So let me give it a try, Your Honor.

4 Want to start that clock here.

5 THE COURT: All right. Here we go.

6 MR. SHOOK: Okay. Well, thank you, Your Honor.  
7 May I be seated while I present here today?

8 THE COURT: Yes.

9 MR. SHOOK: Thank you.

10 So, Your Honor, let me get my computer turned on  
11 here, if I could. This is Charter 4.86 and it does require,  
12 you know, that it either be a system, which it is a system.  
13 And you'll see that all the ordinances that created CLICK!  
14 the 25670 in 1996 and in '97 they created a separate system.  
15 They account for all their numbers separately with their  
16 operational summaries. They have an incredible  
17 organizational chart that, you know, that defines its  
18 operations as a system. Here's the organizational chart.  
19 And all these -- these are business units that we have, you  
20 know, sales and marketing and dispatch and installation of  
21 warehouses like any organization or any system would have.  
22 That is your system.

23 And so, you know, we have a system. Under the  
24 charter that's what the charter talks about is a system. We  
25 have that. But it's also a utility service.

1 Telecommunication being a named utility on the long list of  
2 utilities that was provided for us in 1917. And let's  
3 remember, that was the progressive era. These laws were not  
4 written idly. There was very specific intent in the  
5 creation of these laws, Your Honor, and the father of public  
6 power, Homer T. Bone, if you read the exhibits I've provided  
7 on the death of Homer T. Bone, Senator Magnuson provided a  
8 statement in the Congressional record there calling him the  
9 father of public power.

10 Judge Bone also provided a statement in 1944 when  
11 he left the senate and became a ninth circuit judge that  
12 talked about these power struggles and why these laws were  
13 written and the fact that he was appointed unanimously to be  
14 the chairman of this charter committee and why these laws  
15 needed to be written, because of the lobbyist and the money  
16 that flowed and it became a stench in the nostrils of the  
17 society is what he called it. It was incumbent upon the  
18 people to stop this.

19 And so it is the case, Your Honor, that these laws  
20 have a purpose. And here today, you know, the disposal of  
21 the telecommunication utility, it's essential to itself.  
22 You can't provide the essential -- you can't provide the  
23 utility service. Telecommunications obviously it's a named  
24 utility. It's the second utility ever regulated in our  
25 state beginning in 1907 under the Railroad Commission, Your

1 Honor, well before electricity was regulated in 1911. In  
2 1911 when they created the public service commission, Your  
3 Honor, the definition for telecommunication was right there  
4 as a utility. It exists today in our RCW. The identical  
5 language exists today. And I'd like to show that to you  
6 here.

7 When you see in this language, this is Title 80  
8 and this is what they talk about right here under 28, what  
9 is telecommunications. Well, that's CLICK! Obviously came  
10 with cable and wire and there's 10,000 volts and 2,000 miles  
11 of wire it telecommutes -- your phones here today are  
12 running over voiceover IP is more similar than dissimilar.  
13 It's an identical service. It's even funded by the FCC as  
14 a, you know, substitute to telephone. You can get the  
15 lifeline provisions from the FCC and they'll pay \$10 of your  
16 phone bill to help people get voiceover IP.

17 So it is a telecommunication system and, you know,  
18 and every City and town right here, and that goes back to  
19 1907, 1911 when they created the language -- I can show that  
20 to you if you want to see it, Your Honor -- CLICK!'s a  
21 telecommunications company. When you go to their own  
22 service -- and you go to their own service their own page,  
23 and this would be TPU talking about our services. Here they  
24 are. For these services to continue, you need the public  
25 ownership of this network. It is a multiservice broadband

1 telecommunication provider. These are our services. This  
2 is the TPU website, Your Honor, and it's just, you go right  
3 to it and you can see what the services are. They provide  
4 power, water, rail, and telecommunications. Nothing wrong  
5 with being a multiservice provider. It happens commonly  
6 across America. I presented to you a sample of 25 cities  
7 and municipalities that are now offering this essential  
8 utility. It's an information highway. And it's similar to  
9 the toll roads of the years gone by where we decided to  
10 build our own roads and make them public highways. We  
11 created an Internet state highway system in the 1950's  
12 that's a public highway. And the nation of Australia has  
13 established a national broadband network. I expect someday  
14 we'll see something similar in America.

15 But there it is. That's what CLICK! is. That's  
16 about CLICK! We are a telecommunications provider. That's  
17 a named utility. For you to find that this is not essential  
18 to be continuing its service, you'll have to find that  
19 telecommunications is not a utility. Anacortes would be  
20 interested in that finding and so would 14 public utility  
21 districts that provide telecommunication services to their  
22 citizens, Your Honor.

23 So this is what CLICK! is. It's from their own  
24 website. I've just put some tabs here on my browser to show  
25 you what they do. They operate an open-access network now.

1 That's an impartial operated. They set the rates. City  
2 council approves those rates under their utility code.  
3 That's under the City Charter Title 12. You can look that  
4 up. I have that here somewhere. But, you know, all through  
5 the RCWs telecommunications is provided as a utility.

6 Here is the actual section from the public utility  
7 districts where they provide this as a utility. That's what  
8 the public utility districts are. They were created out the  
9 of the Homer T. Bone era and they called them farmer  
10 utilities at first, but now they have this authority to  
11 provide utility service and it's defined. They even have  
12 direct retail authority now.

13 So, you know, I've said in the past I could sum  
14 this up in a minute or two. It's a named utility. It's a  
15 service that we provide as a city. It's a municipal  
16 utility. For that service to contend, you'll require the  
17 network and what is that network. Well, Your Honor,  
18 probably the easiest thing -- I talk about purring like a  
19 kitten, you know, purring like kittens, and that's just a  
20 reference to walking into the hub building, we have six hub  
21 buildings that were built to run this network. When you  
22 walk in, there's cages and racks of routers and servers that  
23 make this thing run. And the sound of those servers  
24 running, which they're running today. And I might point out  
25 that this network was surplusd in November of last year but

1 it's still running today, so I don't know how you could  
2 consider that surplus. It's delivering Internet to our  
3 customers and the citizens rely on that. Our rates are half  
4 the price here in Tacoma compared to Seattle, you know,  
5 thank goodness.

6 It's the case that, you know, there's very little  
7 to talk about. It's black letter law that this is the laws  
8 of 1917. They were clearly continued. They themselves now  
9 argue that they were continued. In the railroad case they  
10 sold a railroad without even a public hearing. We're before  
11 Judge Costello on that next Friday. And there wasn't even a  
12 public hearing on that railroad sale. But in that case they  
13 argued, and it's part of my amended reply to the motion for  
14 a preliminary injunction their own pleading in there,  
15 they've argued that the laws of 1917 were continued because  
16 they want to try to limit it to street railroads. Good  
17 luck.

18 But, yeah, the laws were continued. They were  
19 continued through the abbreviations into 1951's title.  
20 Title 80 they were continued in 1965. You know, we have --  
21 there's never been a legislative intent to change. The best  
22 legislative intent on surplus, Your Honor, is found in these  
23 public utility laws because they were both regulated under  
24 Remington 9512 in the beginning. In 1945 they said, okay,  
25 we're going to regulate the utility. You can sell your

1 utilities with a vote of the people, but under the standards  
2 of Remington 9512. And everything's the same as the City's.  
3 Your commissioners have the same authority as mayors and  
4 they tied the two together.

5 So what we have from 1973 with the surplus  
6 authority that we, you know, got here in the City, Director  
7 Benedetti went and wrote those letters to the legislators  
8 and the senators in the house and they went down and spoke  
9 on that. You know, they wanted the same authority that the  
10 public utility districts had and that was a convenient  
11 method of disposing of old generators and worn out and  
12 obsolete things. That's the only modification that's ever  
13 been done to this language. That's the legislative intent,  
14 Your Honor, for surplus.

15 So this is certainly not worn out or obsolete.  
16 This is absolutely a state-of-the-art system. You can see  
17 that in Pam Burgess's annual report that was just filed, the  
18 annual report of CLICK! and how many miles are underground  
19 and the conduit and the fact that they're installing fiber  
20 to the home right now. They just set up this building down  
21 here at 1515 Tacoma Avenue, the Napoleon Apartments. I mean  
22 they're going to have -- it's not related to the surplus  
23 smart meter program. That didn't happen until ten years  
24 after CLICK! was created and it only went for four years and  
25 they abandoned it over ten years ago. But they're still out

1       there wiring apartment buildings today with fiberoptic  
2       gigabit service today. They're turning on new buildings.  
3       We just finished the Frank Toby Jones building and the  
4       senior citizens there in the new buildings have, you know,  
5       gigabit fiberoptic service. It was never even to do with  
6       the failed smart meter program. Ratepayers are going to  
7       need this to communicate with their smart homes in the  
8       future to watch their thermostat. Oh, I forgot to turn off  
9       my heater. On the way to work, you can turn your heater  
10      off. You can participate in demand response in the future.  
11      But this two- way communication and having access to the  
12      Internet, it is an essential utility. Telecommunications is  
13      a utility, Your Honor. Thank you.

14               THE COURT: Thank you. Nice timing. Right on the  
15      dot.

16               MR. CHRISTIE: Good afternoon, Your Honor. Bob  
17      Christie on behalf of the City. The arguments that have  
18      been presented fundamentally miss the mark.

19               Division Two held in December that in the *Coates*  
20      case that CLICK! is not a separate utility. It held that  
21      what it is is it's a betterment. It's something that runs  
22      on and this is the language from *Coates* -- "The excess  
23      capacity of Tacoma Power's telecommunications system."  
24      Something that currently operates in a manner that the Court  
25      characterized as incidental. Everyone knows, everyone in

1 this room knows that Tacoma Power is an electric utility  
2 that provides power to the citizens of Tacoma.

3 The relevant statute is the one I'm showing here.  
4 It's RCW -- it's right -- I've got it on this lower screen  
5 so we didn't have to compete.

6 The relevant statute is RCW 35.94.040. And it  
7 contains the language that the Court called out to counsel.

8 If something is surplus to the City's needs and  
9 is not required for providing continued public utility  
10 service, then it can be surplus through the exact  
11 procedure that was followed by the City here. This statute  
12 dictates that the legislative body here, the Tacoma Public  
13 Utility Board and the City Council what they must do in  
14 order to follow the procedure for declaring surplus certain  
15 property that they no longer are using. And under this  
16 statute, and I've highlighted the section, the provisions of  
17 RCW 35.94.020, the public vote statute, does not apply if  
18 they're exercising authority under this statute. That much  
19 is clear. It's undisputed. It's straightforward in the  
20 language.

21 Now, there is a second legal authority that has  
22 been referenced and that's the charter. And what does the  
23 charter provide. It has the language that you highlighted,  
24 Your Honor. "The City shall never sell, lease, dispose of  
25 any utility system or a part thereof."

1 I respectively disagree with counsel's effort to  
2 strike the essential to continued effective utility service  
3 and limit that to some portion of this. It's any utility  
4 system or part thereof. It has to be essential to the  
5 continued effective utility service.

6 What is the utility service of Tacoma Power. It's  
7 providing power. It is not providing Internet. Here,  
8 Tacoma Power and the board went through a lengthy process  
9 that resulted in a presentation to the City Council of why  
10 this 12 strands contained in one tube -- this is the fiber  
11 map that I think is relevant for our discussion so we make  
12 sure we know what we're talking about -- there are nine  
13 tubes that have been never been used, that's called the dark  
14 -- the dark fiber. Never been used. There's one tube that  
15 has 12 strands and some switching gears associated which is  
16 the CLICK! Network. None of that is essential to Tacoma  
17 Power for continuing to provide power to its citizens.

18 There is a key document in this case that I would  
19 ask that the Court keep in mind as we're discussing that,  
20 and that is this resolution. This is Resolution RU-11116.  
21 It's Exhibit I to Mr. *Coates* -- excuse me, to Mr. Bacha's  
22 declaration. This is the October 30, 2019 resolution that  
23 went through a lengthy, lengthy recitation process, factual  
24 recitation based on information from Tacoma Power as to  
25 whether or not they have any need in their operations to

1 deliver power, any need for these 12 strands, and they  
2 concluded they do not. It is surplus. It is non-  
3 essential. We don't need it.

4 And so the factual findings in that declaration  
5 have never been challenged in this lawsuit. No one is  
6 challenging anything that the Public Utility Board  
7 determined and that the Council determined in this process.

8 There is a legal basis to challenge the decision  
9 made by the City Council. You can challenge that under the  
10 standard of arbitrary and capricious. And this Court's very  
11 familiar with that standard. The standard recognizes that  
12 the legislative body is vested with discretion. And that if  
13 that discretion is abused in a way that can be called  
14 arbitrary or capricious, that decision making process can be  
15 overturned.

16 Now, in their briefs, you will see mouthed the  
17 words arbitrary and capricious, but they never undertake an  
18 analysis of that, nowhere in any of the briefs. Instead  
19 they immediately jump to an argument, well, this is  
20 ultravirus. It's fundamentally illegal to do what the City  
21 Council has done. So they never go through an analysis of  
22 arbitrary and capricious.

23 Our summary judgement motion obviously overlaps  
24 this one, and so to some extent I'm overlapping in my  
25 response here.

1           The bottom line is simple and straightforward.  
2           The relevant statute is RCW 35.94.040. The same concept is  
3           presented in the Council Charter Section 4.6.

4           If this property this portion of a  
5           telecommunications network just what Division Two called it,  
6           if that is not essential to providing power, if it is  
7           surplused to the City's needs for providing continued public  
8           utility service, not Internet service, Tacoma Power is in  
9           the business of providing power, it is surplused and it is  
10          not needed.

11          That one statute and that language in Section 4.6  
12          dictate the outcome of this case unless it's challenged on  
13          an arbitrary and capricious standard, which they have not  
14          undertaken to do.

15          Now, there isn't any dispute about the process  
16          that the City went through in terms of it fulfilling the  
17          requirements of that statute. It ultimately selected one of  
18          the applicants for a contract to lease this CLICK! Network  
19          and to provide Internet services however it deems fit.  
20          Curiously and somewhat ironically, Advance Stream,  
21          Mr. Shook's company was one of the applicants for that  
22          process, a process they now claim is fundamentally flawed  
23          and it was not a successful bidder in that process.

24          In the time I have remaining in this presentation,  
25          I'd like to talk a little bit more about the *Coates* case and

1 show you a couple other provisions in that that I think are  
2 significant.

3 This is language out of *Coates* referencing a  
4 different section of the City Charter but the same argument  
5 as to whether or not CLICK! and Tacoma Power are separate  
6 utilities. They said they are not separate utilities and  
7 they are not separate utilities.

8 Another portion of that statute, which I think has  
9 been abused here, is the recitation of the rules of  
10 statutory construction. These are the rules, happen to be  
11 cited in *Coates* but they're repeated in many of these cases  
12 that you should apply here to the extent that you get into a  
13 statutory interpretation argument.

14 I struggled a bit to understand counsel's argument  
15 about the 1917 statute and how that currently comes into  
16 play. And I actually undertook to map it out, and so this  
17 is my map. The top portion of it is the 1917 statute  
18 highlighting the language that counsel relies upon. The  
19 language that says, "telephone or telegraph plant or lines."  
20 That's in the 1917 statute. Of course the relevant portion  
21 of the statute is the 1965 statute, "authority to sell or  
22 lease."

23 So counsel's argument, as I understand it, is that  
24 you take the 1917 statute, which has the words "telephone or  
25 telegraph," you modify that by the 1985 Telecommunications

1 Act, which substituted telecommunications for telephone and  
2 telegraph -- that's the statute passed 20 years after the  
3 1965 statute -- and then you add to that his proclamation  
4 and his proclamation is, well, telephone --  
5 telecommunications includes Internet. That's not in any  
6 statute. That's his proclamation. And once you have the  
7 language telecommunications and you add the proclamation,  
8 then you re-insert it into the 1965 statute and you read the  
9 language, "public utility works, plant, or system to include  
10 Internet."

11 The best definition of what is a utility, and then  
12 I'll close for this portion --

13 THE COURT: You've got about 15 seconds.

14 MR. CHRISTIE: Thank you -- is contained in a law  
15 review article. The classic that we cited. The classic  
16 public utility is a business engaged in providing goods or  
17 services so essential to communal and economic life that  
18 securing their adequate supply is ultimately a government  
19 responsibility.

20 No court in Washington anywhere has said that  
21 Internet provided publically by the government is a utility  
22 and is essential and can't be otherwise obtained from the  
23 five other services that I could connect to as a citizen of  
24 Tacoma today.

25 Their motion needs to be denied. And I'll speak

1 more to it, Your Honor, when I address our motion.

2 THE COURT: Thank you.

3 Because these motions are all very interrelated,  
4 what I'm going to do is not rule until the very end because  
5 I realize I'm putting these artificial time limits on you,  
6 but you may have additional arguments that could potentially  
7 apply to multiple motions. So I'm just going to go straight  
8 through and let everybody argue and then I'll rule at the  
9 end.

10 MR. CHRISTIE: Thank you, Your Honor. I'll get  
11 out of the way for Mr. Shook.

12 THE COURT: Actually, let's you guys take a rest  
13 for a moment. I'm going to call my other case.

14 (Proceedings at recess while Court takes another  
15 case.)

16 THE COURT: Are we ready back on the Shook matter?

17 MR. SHOOK: Yes, Honor.

18 THE COURT: Whenever you're ready and do you want  
19 to reserve rebuttal on this one?

20 MR. SHOOK: I would like, Your Honor, just use  
21 four minutes and then reserve six if I may.

22 THE COURT: Okay. All right. Ready.

23 MR. SHOOK: Well, thank you, Your Honor. So I  
24 think maybe the confusion here with the defendant's  
25 perception of this telecommunication utility is the fact

1 that they view themselves as an Internet provider, but  
2 they're not an Internet provider, Your Honor. They have  
3 ISPs that are the Internet provider. The ISPs own the  
4 modems. All broadband happens to be a telecommunication and  
5 that is the service that Tacoma Public Utilities provides,  
6 not Tacoma Power. It's Tacoma Public Utilities. And we  
7 need to remember that because it's a multiservice utility  
8 provider.

9           During the break I walked out the hallway here  
10 just to look out over that library, 'cause I always go to  
11 all the libraries, have these gigabit circuits and there's  
12 still years to go left on those contracts, but right here  
13 out the door, you see this little building here, that's  
14 Google Maps, but here's a picture I took on the break.  
15 That's the Alzheimer hub, Your Honor. That's one of the six  
16 hubs. We call that downtown north. You can see the green  
17 -- it's not a good picture there, but that green -- that  
18 concrete building. And the easier way to see it is, I have  
19 included it in my -- here it is, Your Honor, actually, one  
20 of the blueprints. Now, this is our exhibit, my master  
21 declaration, and it's the 11 of 1 exhibit. So that's the  
22 Alzheimer hub. You can look right out the window and see  
23 it. And that's where the equipment is purring like a  
24 kitten. And what equipment is there. Million dollar  
25 router, Your Honor. And I have the resolution that approved

1 the purchase by Pat Bacon making that speech that that CBRA  
2 is a million dollar router, and it's not surplus. It's  
3 running right now. Currently purchased for a utility  
4 purpose: To run our libraries, to allow the ISP partners to  
5 provide that Internet service. They're a telecommunications  
6 utility. That's what they are. It's what they established.  
7 It's what they show themselves as providing on their own  
8 website, our services. They define themselves on their own  
9 website as a telecommunication utility.

10 And when you look in these hubs, that hub across  
11 the street has ancillary systems. This is also their own  
12 exhibit. This is Bacha's exhibit from his December 30th,  
13 Exhibit H. There's air conditioning systems in here, and  
14 they're not minor expenses. These are significant expenses.  
15 There's fire suppression systems in there, Your Honor.  
16 There's generators with backup fuel supplies, battery  
17 streams that keep it all running. That's a Cummings  
18 generator right there. There's equipment here that keeps  
19 all this running. You can see it right out your window,  
20 Your Honor. None of it's surplus.

21 And the thing about it is, you read the IRU and  
22 the business transaction agreement, they've got exclusive  
23 possession and control. Right there you know it's a lease  
24 when you have the keys to lock your cage up. When you're  
25 responsible for taking out the trash and mopping the floors

1 and changing the light bulbs, all of which is in these  
2 agreements, and I can show those to you if you're interested  
3 in seeing them.

4 So, you know, there's your hubs, none of which was  
5 surplus, all of which was acquired for utility purpose,  
6 none of which is obsolete, worn out or by any means surplus,  
7 Your Honor. It's essential to the continuation of the  
8 telecommunication service that they provide.

9 It's essential to the libraries. It's essential  
10 to our hospitals, our students, our elderly, our phone  
11 services that are provided, heart monitoring devices. It's  
12 a communication system. And, you know, I would say to you,  
13 Your Honor, that it's a system to its own. They obviously  
14 account for it. That wasn't the standard in *Coates*. They  
15 weren't looking -- all they had to meet was the standard of  
16 a part of to avoid the --

17 THE COURT: Your time is up.

18 MR. SHOOK: My time's up. Thank you, Your Honor.

19 THE COURT: Thank you.

20 Let's see. Mr. Bowman, is there going to be a  
21 response for Mr. Bowman?

22 MR. VAN ALSTYNE: Yes, there is.

23 THE COURT: Okay. I'll just give you the ten  
24 minutes and you can take as much of it as you need.

25 MR. VAN ALSTYNE: I appreciate it. Thank you.

1 One second to plug in my...

2 THE COURT: Sure.

3 MR. VAN ALSTYNE: Thank you, Your Honor. I'm  
4 ready.

5 Opposing counsel would have us add or subtract a  
6 comma to Section 4.6 to achieve the reading that he desires,  
7 which is, the City shall never sell, lease, dispose of any  
8 utility system, comma, or parts thereof essential to  
9 continued effective utility service, comma. Opposing  
10 counsel wants to say that the utility system must be  
11 essential for continued effective utility service in  
12 addition to the part thereof that's essential to continue  
13 effective utility service.

14 With due respect, the plain language of the  
15 provision is clear. The words "essential to continued  
16 effective utility service" only modify the term parts  
17 thereof, they do not modify the term utility system. If you  
18 were to remove that, comma, then maybe the term essential to  
19 continued effective utility service would, in fact, modify  
20 utility system. Or if you added a comma after "parts  
21 thereof" again, you might achieve the reading opposing  
22 counsel wants to. But as written, it clearly only applies  
23 to the parts thereof being essential. The utility system if  
24 it's a stand-alone utility system, the charter applies.

25 Let's talk about the surplus provision, Your

1 Honor. Again, before we specifically parse the terms here,  
2 Your Honor, I want to make the point that if CLICK! is a  
3 utility system under the City Charter or it is a part of a  
4 utility system essential to providing continued utility  
5 service under the charter, we don't need to go here at all.  
6 That ends the case there. However, since we've argued  
7 significantly about 35.94.010 as well, it is important to  
8 parse the meaning of .040 here.

9 Now, to start with the standard of review  
10 applicable to surplus decisions and that Your Honor's  
11 applying here is important. There are two standards of  
12 review that are significant here that Mr. Bowman is arguing.  
13 One is the arbitrary and capricious standard, which opposing  
14 counsel has referenced. The arbitrary and capricious  
15 standard applies to the City's determination that it must  
16 make under this section. There are two determinations that  
17 the City must make under this section.

18 One, it must determine that it has surplus the  
19 City's needs; and two, it must determine that it is not  
20 required for providing continued public utility service. I  
21 agree with opposing counsel that the City's decisions in  
22 those two respects are subject to arbitrary and capricious  
23 review. I don't agree that we haven't argued the City's  
24 determinations in that respect for arbitrary and capricious.

25 But before you even get to those two specific

1 determinations by the City that are subject to arbitrary and  
2 capricious review, Bowman is arguing that the surplus  
3 provision as written and as intended by the legislature,  
4 this entire provision was not intended to give the City  
5 power to (one) surplus an entire utility system and (two) to  
6 surplus things that are not inadequate, obsolete and  
7 otherwise essentially unusable.

8 And Bowman's arguments in that respect are  
9 arguments of statutory construction. It's not a question of  
10 reviewing the City's determinations under the surplus  
11 provision. Those are questions of statutory construction  
12 and those questions are not subject to arbitrary and  
13 capricious review. That's why Bowman has argued that the  
14 City's actions here in how they've used the surplus statute  
15 in this case are ultravirus and contrary to law. And that's  
16 the other piece of the other standard that we're talking  
17 about. Now --

18 THE COURT: Would you agree -- sorry to interrupt.  
19 Would you agree, though, that assuming that the City's  
20 decisions were not ultravirus, were not arbitrary and  
21 capricious, that they determined equipment was surplus and  
22 not essential, that under subsection 2 the City would be  
23 relieved of the vote requirement?

24 MR. VAN ALSTYNE: Yes, Your Honor, I do agree with  
25 that. Again, the vote requirement in the statutory scheme,

1 not in the charter.

2 THE COURT: That was my hypothetical.

3 MR. VAN ALSTYNE: Correct. So why is the City's  
4 application of this provision ultravirus and contrary to  
5 law. It's ultravirus and contrary to law because as Bowman  
6 has already argued CLICK! is itself a stand-alone utility  
7 system. If the surplus provision here can be used to  
8 surplus an entire utility system and not require a public  
9 vote for surplus of an entire utility system, then there  
10 is no situation where a City would ever have to hold a  
11 public vote in any manner. It could surplus its water, the  
12 entire water utility, the entire electric utility, the  
13 entire telecommunications utility, and so long as it said  
14 they were surplus and determined those two things, then it  
15 could avoid the public vote requirement elsewhere in this  
16 statutory scheme in every instance. And that is why this  
17 section cannot be read to allow -- to give us any power to  
18 surplus the entire utility system. That's why we're saying  
19 it's ultravirus and contrary to law. That's reason one.

20 The second reason is the legislative history of  
21 this provision. The legislative history of this provision,  
22 uniquely and much to my surprise, consists of statements  
23 actually made by City of Tacoma officials in the first  
24 place, which is ironic if nothing else.

25 Specifically the portions that I'm talking about

1 here that are relevant to the Court's analysis of what power  
2 the surplus provision gives the City is the letter that was  
3 sent by Benedetti the director of the Department of Public  
4 Utilities of the City of Tacoma to the legislature, he was  
5 the sponsor of the bill. And the key line here, which backs  
6 up my previous argument about how you can't surplus an  
7 entire utility system is this line: "The procedure  
8 requiring a formalized procedure or confirming approval of  
9 the voters on a ballot proposition is, of course," quote,  
10 "desirable where, in fact, all or an integral part of an  
11 operating utility is to be so disposed of."

12 And respectively, Your Honor, that only further  
13 confirms what the statutory analysis we previously did does,  
14 which is that you can't surplus under this provision an  
15 entirety utility system.

16 The second provision that's key here is the  
17 statement that he made in the legislative history which is  
18 quote, "The flexibility here sought is reasonably consistent  
19 with that long enjoyed by public utility districts under RCW  
20 54.16.180." And I bring that up because 54.16.180 at the  
21 time that this provision was enacted said -- essentially had  
22 a surplus provision that allowed for surplus when of those  
23 pieces of utility which had become, quote, unserviceable  
24 inadequate, obsolete, worn out or unfit to be used in the  
25 operations of the system and which is no longer necessary

1 material to and useful in such operations.

2 That is what the legislature intended to grant  
3 cities the power to do with .040. And the City has not made  
4 any argument to date that CLICK! is unserviceable,  
5 inadequate, obsolete, worn out or unfit or that it's not at  
6 least useful in operations.

7 And so before we even get to the arbitrary and  
8 capricious standard and City's determinations in this case,  
9 there's a question as a matter of law of what power the  
10 surplus statute gave the City and did not give the City the  
11 power to surplus CLICK! in this instance.

12 Getting to the arbitrary and capricious standard  
13 and now the two findings that the City made here, Your Honor  
14 referenced in a previous hearing that she was interested in  
15 hearing what surplus meant. So I pulled the Blacks Law  
16 dictionary of surplus, which I've highlighted at the top  
17 here. And the definition is -- and I'll read it out loud  
18 because I apologize because it's not quite clear from there.  
19 "An amount of something that is more than what is required  
20 or used. The residue or excess." And the word I'm  
21 focussing in on here is used. An amount of something that  
22 is more than what is used.

23 In this case, CLICK! is still being used. It is  
24 being used now months after the surplus declaration  
25 occurred. It's going to continue to be used even after the

1 City's transferred operational control onward to Rainier  
2 Connect.

3 So the question of -- when I say the decision to  
4 surplus it was arbitrary and capricious, it was arbitrary  
5 and capricious because they are getting rid of something and  
6 surplus something that is currently in use and will  
7 continue to be in use. And that, to us, is what surplus  
8 means in that statute.

9 Additionally, going back to the second prong  
10 that's necessary for providing a public utility service,  
11 CLICK! is clearly necessary for providing continued public  
12 utility service if the Court agrees that telecommunications  
13 services are public utility services, which even I believe  
14 under the City's interpretation, CLICK! is at least a  
15 service of a public utility. It's a service provided by  
16 Tacoma Power. And, therefore, even under the City's  
17 understanding of what CLICK! is, which is a service provided  
18 by Tacoma Power, it's necessary for continuing to provide  
19 the public utility service it is now providing and always  
20 has provided.

21 And so for those reasons, we believe that the  
22 City's use of the surplus provision is not an ultravirus for  
23 the statutory construction reasons and the legislative  
24 history reasons but also the decisions within it that are  
25 subject to arbitrary and capricious review are also

1 arbitrary and capricious in this case.

2 Your Honor, may I ask how much time I have left.

3 THE COURT: Nine seconds.

4 MR. VAN ALSTYNE: Nine seconds. Perfect. Thank  
5 you, Your Honor.

6 THE COURT: Okay.

7 MR. CHRISTIE: Thank you, Your Honor.

8 THE COURT: You ready?

9 MR. CHRISTIE: Yes. It sounded like a response to  
10 my motion as opposed to anything supporting Mr. Shook's  
11 motion, but let me address the points that were raised.

12 First of all, with respect to the interplay  
13 between Section 4.6 -- and maybe we can put up my -- with  
14 respect to Section 4.6 and the RCW 35.94.040, the State  
15 Constitution authorizes first class cities to adopt a City  
16 charter that provides that no provisions of a charter can  
17 conflict with state law. So it's black letter law that  
18 Washington -- in Washington that a state law supersedes the  
19 provisions of a City charter if the City charter is in  
20 conflict with state law.

21 The relevant statute and the only statute that  
22 governs what we are here for today is 35.94.040. .020 is  
23 not subsumed in that. And the Court is correct. .020 does  
24 not apply if the City operates under .040. And it's not  
25 just a question of being surplus. It has to be surplus

1 and not necessary for the public utility.

2 So Mr. Shook accuses the City of being confused.  
3 We have no confusion nor does Division Two have confusion  
4 that CLICK! is simply using the excess capacity.

5 THE COURT: I don't know if Mr. Shook wanted to  
6 look at the screen. He's using the screen up here if you  
7 wanted to see it.

8 MR. SHOOK: Thank you, Your Honor.

9 MR. CHRISTIE: That CLICK! is simply using the  
10 excess capacity of the electric utility's existing  
11 infrastructure. That's Division Two.

12 We're talking about an electric utility that  
13 provides electric power and it has determined in Exhibit I  
14 the Resolution 11116 articulates at great length why it has  
15 determined that to deliver electric power, the utility's  
16 function, to its customers it does not need the 12 strands  
17 of CLICK! nor does it need the nine tubes that contain some  
18 108 additional strands in this fiber cable because they have  
19 never been used, ever been used for delivering electric  
20 utility services.

21 THE COURT: So you're saying when I do the  
22 essential analysis, that relates to the utility as a whole  
23 not the specific part.

24 MR. CHRISTIE: Absolutely. I mean, what -- we  
25 have an electric utility, electric utility that provides

1 powers to customers. The whole history of how they -- why  
2 they even had a fiberoptic network is articulated at great  
3 length and detail in that resolution. And so apparently  
4 there is an arbitrary and capricious standard, which you  
5 would expect, would have expert testimony where someone  
6 would come in and say there's no way you can effectively run  
7 an electric utility and deliver power without having the 12  
8 fibers contained in that one tube. You can't do it. That's  
9 not so and there is no such evidence in this record.  
10 There's no challenge to any of the factual recitations  
11 contained in that resolution, all of which were made through  
12 a process approved and presented to the City Council.

13 So, and by the way, none of the hubs that  
14 Mr. Shook referenced sitting on buildings, none of those  
15 have been surplus. They have nothing to do with the  
16 network or the issues presented here to you.

17 If we look at -- if we look beyond the language  
18 here, what the City has always said is that CLICK! is a  
19 business unit and it is absolutely a business unit of Tacoma  
20 Power, but it has determined that it is not essential. So  
21 let me bring us back to the language that really drives the  
22 outcome of this case in our opinion respectively.

23 It is a pure legal question as to whether or not  
24 the 12 fibers that provide the CLICK! network and the  
25 associated switches, which have been deemed surplus and

1 unnecessary, whether that infrastructure is a stand-alone  
2 public utility. No court in Washington has ever ruled on  
3 that. In fact, the court in Washington that has ruled to  
4 the direct contrary is sitting down the street from us.

5 So you would have to find based on what we submit  
6 is improper statutory construction, and this was addressed  
7 in detail in our briefing and I'm not going to recite it in  
8 the limited time we have here, you would have to find that  
9 CLICK! those 12 strands and the associated switching are a  
10 stand-alone -- a stand-alone public utility. And that's why  
11 I'm going to come back to this definition that I talked  
12 about earlier, this definition of what is a public utility.

13 The classic public utility is a business engaged  
14 in providing goods or services so essential to communal and  
15 economic life that securing their adequate supply is  
16 ultimately government responsibility.

17 We talked in our briefing about the monopolistic  
18 character of what have been called public utilities. And if  
19 you look at the statute, the statutory scheme that was  
20 adopted in 1965, the same year as the statute we're looking  
21 at, which is 35.92, it lists what our municipal utilities,  
22 power, sewer, solid waste removal, storm drain. These are  
23 things over which they have control. They are things that  
24 fit this definition of a business or -- a service or good  
25 that is so essential to community and economic life.

1           Right now you can probably order Internet from  
2 three different providers Internet service providers here in  
3 Tacoma, and that has always been the case. There is no  
4 monopolistic nature to the 12 strands that make up the  
5 CLICK! network. It is simply not a public utility.

6           But it is obvious why they have to argue that.  
7 They have to have you find as a matter of law that CLICK! is  
8 a stand-alone public utility, because if you don't, they  
9 know they lose because it has been properly surplused and  
10 can withstand the test of whether or not that decision-  
11 making process was arbitrary and capricious based on this  
12 record before you.

13           And so they have to have you, through a very  
14 circular argument, say, well, of course it's essential  
15 because it's still being used, therefore it's essential.  
16 Why? Because it's still being used. Everyone needs  
17 Internet. Everyone doesn't need CLICK! If CLICK! doesn't  
18 provide Internet service, there are options available to the  
19 citizens of Tacoma.

20           Fundamentally, and this is, again, in the  
21 resolution, which is really the factual core of all of this.  
22 Fundamentally CLICK! was created, as defined in that  
23 resolution, for a limited purpose: To facilitate meter  
24 reading and some things associated with the delivery of  
25 electric service to customers. Through the advancements in

1 technology, the hardwire meter system is not in use. Meters  
2 are read wirelessly. The City doesn't need this.

3 The City has gone through an extensive process and  
4 in the meantime, CLICK! employees have left, have been moved  
5 elsewhere. There isn't a second option here. This is  
6 surplus. And the City is not going to, no matter what  
7 eventually happens in the Court of Appeals on this case, the  
8 City is not going to be in the business of providing  
9 wholesale Internet. They simply are not going to do it. It  
10 is money-losing venture. And under this record they have  
11 determined to surplus it. They're not giving it away.  
12 They're leasing it. A multi-year lease that the City has  
13 determined to be in its best financial interest.

14 So there is great irony in the arguments that are  
15 being put forth here because ultimately if this is held up  
16 and prevented from going forward on the path that it's at,  
17 there is no second option. There is no force that can  
18 compel the City of Tacoma to become a public supplier of the  
19 utility of Internet. That is not going to happen and there  
20 is no legal support for making that happen.

21 By my count, I have 12 seconds.

22 THE COURT: I have a little more, but go ahead.

23 MR. CHRISTIE: That's all right.

24 So Mr. Shook's motion, which is consistent with  
25 the motion that's been put forth by Mr. Bowman, they're both

1 partial motions, they should be denied.

2 THE COURT: All right. Thank you.

3 MR. CHRISTIE: I think I still have the floor,  
4 because I now am prepared to argue my motion.

5 THE COURT: Well, he reserved time for rebuttal.

6 MR. CHRISTIE: You're right.

7 THE COURT: So we're going to go back to Mr. Shook  
8 as soon as I can reset my clock.

9 And, Mr. Shook, you wanted six minutes; is that  
10 correct.

11 MR. SHOOK: Yeah. Let me turn on my tablet here.

12 THE COURT: Yes. Go ahead.

13 MR. SHOOK: Okay. Your Honor, I'm ready.

14 THE COURT: Go ahead.

15 MR. SHOOK: Thank you. Okay. So I think the  
16 confusion still lays in that they think they're Internet  
17 providers but they're not. They are a telecommunication  
18 utility and it's going to continue because they have  
19 contracts to continue providing it to the library for years  
20 into the future. It's not going anywhere. The tube that's  
21 being used is not surplus. We're not here to talk about the  
22 dark fiber. I believe it'll be used within ten years by my  
23 estimation with the growth of the Internet of things and the  
24 project -- the continued explosions in the use of the  
25 internet. But regardless that's not what this motion's

1 about. It's about the one purple tube that we spent  
2 \$200 million building, Your Honor.

3 So, you know, we can talk about what was created  
4 and I think it's real important to remember what was  
5 created, and we do have Mayor Baarsma's declaration now  
6 authenticating his study, and he tells us what was included.  
7 But for purposes, let me go right back to the -- in this  
8 court in 1997, orders were sought. And this is the  
9 declaration of Jon Athrow. He worked with Steven Klein and  
10 they created the system and this is what they -- they talked  
11 about in all three of these declarations you'll hear about  
12 this business plan. And this business plan we now know is  
13 500 pages and they created a telecommunications system based  
14 on that plan and it was originally budgeted for \$15 million  
15 but then they thought, well, you know what, look at this.  
16 We could -- for a -- you know, additional 65 million was  
17 their first estimate, they went over budget and became 89  
18 million -- but you know, for this extra money we can create  
19 this additional capacity and give Internet broadband  
20 telecommunications and Internet service to the community  
21 where the incumbent provider wasn't going to do it.

22 They flew into town. They were very upset, Leo  
23 Henry, very upset and knocked over the mayor's chair that  
24 day on the day of the vote, please don't build this. We'll  
25 give you anything you want. But they weren't building it.

1 They were way in debt and the community needed this. With  
2 the telecommunication act of 1996, it became something that  
3 we could do and we did. And we spent the money for this  
4 additional capacity.

5 So when you look at the resolutions that created  
6 it, this is where they came back and funded it. You know  
7 they created a telecommunications system with 89 -- 65  
8 million dollars was the estimate right here. And so the  
9 City Council was supposed to stay involved and get rates and  
10 they did. But this business plan is really the one that  
11 tells the story because when you look at that business plan,  
12 it tells it's a 500-page study and it tells what they built  
13 and why: Wholesale data, telephone transport, fiberoptic  
14 sonic system, they needed to do it and that's what they paid  
15 for.

16 These are the benefits that brought to our  
17 community and there's the original note of plan part of that  
18 business plan. It represents the document you see before  
19 you today what they're surplusing except now it's going to  
20 be private company. These are the conclusions. One could  
21 hope that another -- you know, this was likened to the  
22 railroads of the previous century in that they needed this  
23 to promote their economic development. It wasn't about  
24 providing electricity, Your Honor. This has nothing to do  
25 with electricity. This is a telecommunication system. It

1 stands alone as a telecommunications system. It wasn't the  
2 issue before *Coates* and they didn't need to reach the  
3 standard to finding out if it was or not. They were able to  
4 determine there was no liability to the general government  
5 or abuse of ratepayer funds illegal use of a violation of  
6 the Accountancy Act by finding that it was a part of. That  
7 wasn't the standard that they needed to determine.

8 What we're telling you here today, Your Honor, is  
9 that this certainly is a system and it's certainly at least  
10 a part thereof, and that's all that the laws of 1917 require  
11 when it gives the broad emphatic language of similar or  
12 dissimilar. Those are the progressive era, you know, words  
13 that were brought -- left for us and it was intentional.  
14 That's what we see in *Bremer*. *Bremerton* talks about that.

15 And so, Your Honor, when you look at this  
16 additional capacity, this is so important the ordinance that  
17 created it, they actually did create a separate system. You  
18 can go right here and see yourself the Article 2 of that  
19 ordinance, 25930. It created what? A telecommunications  
20 project, a separate system adoption of the plan and the  
21 system were creating this system to be known as the  
22 telecommunications system.

23 Now, it's not been popular, the powers that be  
24 never wanted to let it stand up and be that telephone pole,  
25 you know, that we see in the cartoon of 1919 and there's

1 reasons for that. Steve Klein told us in his depositions  
2 you can see the language that he accused, you know, Leo  
3 Henry and Mayor Crowley and others of never allowing it to  
4 be stood up on its own where we could see how profitable it  
5 is. It makes \$600 million a year, Your Honor. And they've  
6 admitted in their own answer to my complaint, they admitted  
7 there's been no audit. They admit that there's been no  
8 financial determination on its profitability. They even  
9 admitted that at the Division Two argument when the judge  
10 asked them, are there any disputed issues. Well, of course,  
11 we dispute losses. So it's a money making business, but  
12 it's been disparaged as such and that's part of the scheme  
13 and I called it a conspiracy to privatize this network.

14 And so arbitrary and capricious, Your Honor, you  
15 know, when you violate a statute black letter law on a named  
16 utility to dispose of a system, that's -- it's an ultravirus  
17 act, Your Honor, and it's ultravirus because it's  
18 procedurally ultravirus. We've worked out the deal. Great.  
19 But now it has to go to the vote of the people. They needed  
20 to work out this deal so they can put it on the ballot.  
21 That's a necessary step. But procedurally it's ultravirus,  
22 Your Honor.

23 And is there a part of this that you would like  
24 help that I should focus on going forward in my last ten  
25 minutes?

1 THE COURT: Actually, you're out of time.

2 MR. SHOOK: Thank you. Thank you, Your Honor. Do  
3 I get ten more minutes later?

4 THE COURT: We're going to switch to the City's  
5 motion.

6 MR. SHOOK: Because if there's a part you want me  
7 to focus on, I don't know if I need to --

8 THE COURT: I'll just blurt it out.

9 MR. SHOOK: All right. Thank you.

10 THE COURT: So this is the final motion. So would  
11 you like to reserve any time?

12 MR. CHRISTIE: Yes, I would, Your Honor. I'd like  
13 to reserve three minutes if I may, please.

14 THE COURT: All right.

15 MR. CHRISTIE: May it please the Court, the City's  
16 motion for summary judgement seeks complete dismissal today  
17 of the entirety of these two lawsuits brought by Mr. Bowman  
18 and Mr. Shook. Our motion seeks dismissal of those  
19 complaints entirely with prejudice.

20 It clearly our motion overlaps with things that  
21 you've heard about and I want to be real fair with the  
22 Court's time today and not just unduly repetitious. This is  
23 the language in *Coates* that is certainly informative of the  
24 arguments that have been made to you by opposing counsel and  
25 by Mr. Shook. This is exactly what is set forward in the

1 resolution. "The City designed and implemented the  
2 telecommunication system to facilitate Tacoma Power's  
3 ability to distribute electricity effectively and  
4 efficiently. Tacoma Power is a utility, an electric utility  
5 that provides power. This, it could be said, the way it  
6 currently operates is incidental to maximizing the system's  
7 benefits."

8 The Public Utility District determined factually  
9 that because of changes in technology, that the ten fibers  
10 that are purple with black hatches and the one fiber that  
11 contains 12 strands over which CLICK! flows is absolutely  
12 not necessary. It is not essential. It is surplus. It is  
13 not necessary for them to continue to provide effective  
14 public utility service, specifically the delivery of  
15 electricity to the citizens of Tacoma.

16 The argument that was just made by Mr. Shook is  
17 clearly a factual argument to try to undercut the findings  
18 and the determinations by the Public Utility District and  
19 adopted and set forth in the resolution. The problem is,  
20 it's made improperly. It's not a persuasive argument to  
21 throw up documents that were created at the outset of the  
22 building of this hybrid fiber cable and argue now that  
23 somehow what the City determined was inappropriate. There  
24 is nothing in this record respectively that would permit you  
25 to find that the City Council in its adoption of that

1 resolution based upon the determination by the utility board  
2 has acted in a manner that is arbitrary and capricious.

3 And in that respect, we did cite the Court to a  
4 recent case decided in December, the *King County versus King*  
5 *County Water District* case, that is clearly parallel in  
6 terms of recognizing the breadth of authority by the  
7 legislative body to make determinations about what is in the  
8 best interest of the utility and specifically what is in the  
9 best interest of the City.

10 That determination was made. If I can show the  
11 Court a couple of different sections of the resolution.  
12 This is a portion of the findings in terms of what the  
13 director has certified. This is in Exhibit I for the  
14 record. It's on page 10. "The CLICK! assets and the excess  
15 capacity of the network are not required for and are not  
16 essential to continued public utility service or continued  
17 effective utility service and are surplus to the needs of  
18 Tacoma Power and the Tacoma Public Utilities."

19 They go on to conclude that it would be in the  
20 best interest of Tacoma Power and the City to surplus that.  
21 Surplus it not by giving it away; by entering into a  
22 long-term lease. A long-term lease that will give Rainier  
23 Connect as the selected company the operational control over  
24 not any portion of this fiber that feeds the library or that  
25 is used as part of the Pecon (phonetic) system. That's not

1 part of this at all. It's the excess capacity that has  
2 never been used and it is the 12 fibers that make up CLICK!  
3 That is not needed anymore.

4 Our motion can only respectively be denied by you  
5 determining -- and I will repeat this and then stop -- you  
6 determining that despite everything that is in the  
7 documents, the resolutions that have been put forward by  
8 you, despite the language in *Coates* that the City of Tacoma  
9 has undertaken to create a stand-alone utility and that it  
10 is essential to the public interest to gain access to  
11 Internet for the City to have that stand-alone utility.

12 And then you would have to further find, through  
13 interpretation of these statutes, that we're not under  
14 Section .040; that somehow we are under Section .020.

15 The phrase that counsel keeps repeating that is  
16 found nowhere in any statute is this phrase, entire utility  
17 system. He's repeated that multiple times. That CLICK! is  
18 an entire utility system. I don't know where that language  
19 comes from. It's from his own creation. CLICK! is not an  
20 entire utility system. It is exactly what Division Two  
21 described it as being. It is an add-on. It is a  
22 betterment. It was created as part of the original process  
23 of ensuring the efficient delivery of electricity.

24 And so quite simply, and then I'll sit down  
25 because I want to save my last three minutes, quite simply,

1 it is not a utility and a stand-alone basis. It is what  
2 Division Two said it is. And the way it has been disposed  
3 of by leasing it to Rainier Connect was done appropriately  
4 and certainly withstands the standard of arbitrary and  
5 capriciousness.

6 So we ask that both of these complaints and all of  
7 the claims including the Consumer Protection Act claim that  
8 was added in, and we'll stand on our briefing on that,  
9 should be dismissed with prejudice today.

10 THE COURT: Thank you.

11 MR. CHRISTIE: Thank you. I'll reserve the  
12 balance of my time.

13 THE COURT: Okay. All right. So who would like  
14 to go next?

15 MR. VAN ALSTYNE: I'll defer to Mr. Shook to go  
16 next.

17 MR. SHOOK: Thank you, Your Honor. I'll let my  
18 monitor come up here.

19 So where we left off, Your Honor, was the creation  
20 of the system as a separate system. It's a  
21 telecommunication system based on the 500-page study, based  
22 on the \$65 million that was spent by this resolution that  
23 created this system. It provides telecommunications  
24 services, Your Honor.

25 What I'm suggesting is for you to find that it's

1 not a utility system, you'll have to find that  
2 telecommunications is not a utility or a utility service.  
3 And given this right here, I'll call this out, Your Honor,  
4 given this additional capacity that was spent by the people  
5 for that utility service for this broadband  
6 telecommunication system, for this service, this utility  
7 service to continue, which is more and more commonly  
8 provided by municipalities across America, and I gave you  
9 the sample of 25 such utilities, but Chattanooga's now  
10 passed this, we're still the second largest in America.  
11 It's a common function for a municipal utility to provide  
12 broadband telecommunication access.

13 And so it is the case that we've created this  
14 additional capacity and I think the counsel misspoke.  
15 Libraries are part of that purple tube, Your Honor. That's  
16 transport. We have a hundred customers that rely on data  
17 transport services. It is a function of the library. Those  
18 checks from the library are going to be cashed by the  
19 private company that would acquire this system. Here's the  
20 library contract if you want to see it. It's in my  
21 documents under Exhibit 64 and you can see the contract  
22 right here. This is out across the street. That circuit  
23 goes out and it carries out to the internet. But all the  
24 libraries are served by CLICK! Network directly by CLICK!  
25 Network.

1 I would suggest, Your Honor, that all we're asking  
2 you to declare is what they themselves have declared in  
3 their own resolution. This is their resolution when they  
4 were prepared to go all in, their very controversial  
5 resolution, compelled an audit. Council member McCarthy  
6 called for an audit. They delayed it. Coates lawsuit came  
7 and they had to go all out. So this is where they  
8 themselves in their own resolution signed by the mayor and  
9 the Council. I mean, they all signed it. This is their own  
10 resolution, Your Honor, signed by the utility board here.  
11 And you can see that in 2015, that they themselves know  
12 this. It's been commonly known around the City. Mayor  
13 Baarsma was the one that told me they couldn't to this.  
14 This is why I'm here, Your Honor.

15 So basically what we're talking about is a system  
16 that was established as a system and is operated as a system  
17 with a separate set of books and a hundred contracts that  
18 comprise this system. It's a controversial issue in America  
19 today. It's illegal in 19 states. Your Honor, you can read  
20 my broadband exhibits. My book's full of the history of the  
21 struggle between municipal, MO, municipal ownership of  
22 services that compete with the private sector. And that's  
23 what this whole debate's about here today, Your Honor. And  
24 that's the struggle. The endless money that flows from  
25 lobbyists to influence these policymakers, that they don't

1 have unbridled authority to dispose of utility -- municipal  
2 utility assets, thanks to the laws of 1917 and what was the  
3 legacy left for us here today. So it's not the case that  
4 they have absolute discretion to just dispose of utility  
5 assets to the largest campaign contributors.

6 I mean, now, if you set a precedent here today,  
7 any one of the public utility districts three commissioners  
8 generally operate those. You buddy up to three of those  
9 guys somewhere, private party can acquire a  
10 telecommunications system elsewhere in our state. And  
11 that's what it's always been about.

12 THE COURT: Can I ask you question?

13 MR. SHOOK: Please.

14 THE COURT: You presented the Court with a lot of  
15 data.

16 MR. SHOOK: Yes.

17 THE COURT: At some point prior to today have you  
18 quote, unquote, made your case to the City? Have you  
19 participated in the process and let them know all of this?

20 MR. SHOOK: Well, you know, I go three minutes at  
21 a time to every council meeting and that's all I've ever  
22 been allowed to do, Your Honor. If you want I can show you  
23 some of those. That's all they ever let me do. Their  
24 mind's made up. The money's been paid. The fix is in, I  
25 would tell you, Your Honor. And, you know, that's what the

1 laws are here to protect and stop. But yes, I've made my  
2 case. They know it themselves already. That's why, that's  
3 probably why we're going to win today, I hope, because they  
4 know it themselves, you know.

5 And so, but I've made a case. They talked about  
6 me participating in that RFI, and I did, Your Honor, but we  
7 didn't know they were bidding on anything. They wanted the  
8 best solution. I called it stay the course. Look at your  
9 -- do your accounting. Look at your audit and see how much  
10 money this thing's making. I can show them every month it's  
11 making \$6 million a year and it's paying off all kinds of  
12 unrelated expenses and its a very profitable thing. But  
13 that's part of the conspiracy is to keep it as a self-funded  
14 power and allocate all sorts of costs onto it that are  
15 unrelated to telecommunications business and make it appear  
16 that it's a money losing venture and as a result, you know,  
17 they could privatize it. This has been going on for  
18 20 years. It's a small town. I think everybody knows about  
19 this.

20 Your Honor, I would also bring your attention to  
21 the lawsuit to the attorney general. I'm not sure what they  
22 were arguing about the limitation on the authority to  
23 provide utilities. I think they were talking about 35.92.  
24 That's not a limitation, Your Honor. We've had clear  
25 authority as a home rule city to provide these services and

1 we do so believe when it was confirmed by this court in '96  
2 and '97 with two court orders. So there's no question about  
3 our ability to provide this.

4 They talk about essential. Well, for millennia  
5 people have lived, I mean, since the dawn of mankind, since  
6 the stone age we've lived without water services. The  
7 Romans brought it successfully. But electricity, you know,  
8 we did without that. And then in the 1930's farmers were  
9 churning butter by hand.

10 You know, so the fact that they're trying to claim  
11 that telecommunications is not a utility, I don't know where  
12 that comes from because it is absolutely essential. There's  
13 only two wires going down my street and most of these homes  
14 and most of the cities in America there's one wire. They  
15 live under monopolies or a company's control of this  
16 telecommunication in our country.

17 So, you know, it is the case, Your Honor. If you  
18 have any questions, I can show you the studies that created  
19 it. I can talk to you about Director Benedetti's letter  
20 when he went down, he wrote this letter what they were  
21 seeking was the flexibility as enjoined by the public  
22 utility districts. And that's 1973 when they created the  
23 law. That's what they wanted. And they agreed that the  
24 formal procedures were proper, in proper situations that it  
25 was a good idea to have a vote of the people. And of course

1 that's not what they were -- they were going to, you know,  
2 what they were going to try and sell entire systems but, you  
3 know, the formal process is good. You got to have that.  
4 It's desirable when all or an integral part of an operating  
5 utility is to be disposed. Our telecommunication utility's  
6 on the ropes today, Your Honor.

7 And I will tell you that the proposed -- I'm still  
8 learning my iPad here, but I want to call this out for you.  
9 This was what they were looking for, procedural flexibility  
10 that was enjoined by the public utility districts. If you  
11 go to look at the public utility districts, you will  
12 understand that that authority is obsolete, outdated, of no  
13 use to anybody. There is the law that they were talking  
14 about at that time. This is the similar authority that they  
15 were seeking that they wanted to have that same authority.  
16 This is the PUD laws.

17 And so I mean, I may have to go to the next page,  
18 but convey or dispose of this property. And you then you  
19 can find here what is unserviceable, obsolete, inadequate,  
20 worn out. And you know what, that has only been modified  
21 twice. They gained that authority in 1955. Prior to that  
22 they shared Remington 9512. And it was modified one more  
23 time in 2008 and at that point it added even stronger  
24 emphatic language "of use to nobody."

25 So if you can declare this utility surplus, Your

1 Honor, nothing stops them from declaring a pipeline from  
2 Greenwater or an extra surplus pipeline we're going to need  
3 it in 50 years. They've got it now. They can declare a  
4 dam. Maybe we don't need cushion anymore because we're  
5 selling all that electric utility overnight into the  
6 California market. Is that surplus? It was acquired for a  
7 utility purpose. Telecommunications is exactly the same  
8 situation that we have here today, Your Honor.

9 So I would simply suggest that with my last minute  
10 if there's questions that you have, if there's anything that  
11 I could after offer. I wanted to try and bring up Mayor  
12 Baarsma's letter. Maybe begin with a little Homer T. Bone.  
13 But I don't know what you want to know about, Your Honor.  
14 I'm happy to answer any questions that you have with my  
15 final minute.

16 THE COURT: I think you answered my question.

17 MR. SHOOK: Thank you, Your Honor. It's been with  
18 pleasure finally having our day in court. I will tell you  
19 that, you know, their speculative concept of this services  
20 being discontinued, you know, is pure speculation. I know  
21 these services will continue and I know that this is  
22 engineered capacity not surplus capacity. I do know that  
23 this is a telecommunications service and I do know that they  
24 themselves are aware that the vote of the people is  
25 essential in the disposal of such municipal utility assets.

1 Thank you, Your Honor.

2 THE COURT: Thank you.

3 Okay. Response from Mr. Bowman.

4 MR. VAN ALSTYNE: Thank you, Your Honor. Again,  
5 to be respectful of the Court's time, I'm not going to go  
6 through our entire argument again, but rather pick on  
7 specific arguments that the City has brought up in either  
8 their motion here or in their other responses.

9 The City makes much of the fact that we are  
10 attempting to -- that the City will do what it's going to do  
11 no matter what. That argument falls flat though because we  
12 aren't arguing that the City can't lease this system to  
13 Rainier Connect. We're only arguing that it can't lease the  
14 system to Rainier Connect without getting an approving vote  
15 of the people. It's not that we're saying the City cannot  
16 lease or do what it wants to do with this system, it just  
17 has to have voter approval as required in both the charter  
18 and in their RCW.

19 There's another argument made that there was some  
20 sort of a conflict between the surplus provision in .040 and  
21 the city charter. I'm not quite sure what that argument is  
22 saying, but I don't see that -- there's nothing in .040  
23 which directly conflicts with anything in the City Charter.  
24 There's just additional provisions in state law that aren't  
25 in the charter. But there's no direct conflict. It'd be

1 one thing if the City Charter said you can't surplus this  
2 under the provisions of .040 under the City Charter. That  
3 would be a direct conflict with state law that would, in  
4 fact, be trumped by state law, but we don't have that here.

5 In addition, the 1917 laws, there was a comment  
6 early on that in order to cobble together our timeline, you  
7 need to take pieces out of time from the 1980's and import  
8 them back through time into the 1960's. No. Our argument  
9 is very simple. This is a continuous line of law from 1917  
10 -- 1917 through 1951 when it was revised all the way up to  
11 1965 when it was amended and restated and has not changed  
12 since then. It's a relatively simple argument at its face  
13 and doesn't require a lot of -- it doesn't require importing  
14 anything. It's a one continuous line that brings us to  
15 today.

16 To address the monopolistic character argument,  
17 with respect, there is no authority anywhere that has been  
18 cited in their brief nor mentioned here in oral argument  
19 that ever uses the word monopolistic to describe a utility  
20 as something necessary. In fact, the only place they're  
21 getting that from is a law review article which cannot be  
22 controlling on this court when compared with Supreme Court  
23 opinions and a statutory test.

24 And the monopolistic character is even more of a  
25 red herring because the *Bremer* case shut the door on that

1 argument. The *Bremer* case, as I've described before, had to  
2 do with a public wharf. The public wharf was not a  
3 monopoly. In fact, the plaintiff operated a private wharf  
4 right next to the public wharf. And the court found that  
5 that public wharf was a utility under the 1917 Remington  
6 code.

7 If monopolistic character were necessary, the  
8 court could not have found that because it was literally  
9 right next to a private competitor. So that argument has  
10 been as much -- as counsel wants to continue to bring it  
11 up -- that argument has been closed by *Bremer* which is the  
12 applicable Supreme Court precedent here.

13 I'll briefly address the interplay of 35.92 RCW,  
14 35.94 RCW which was mentioned here, though I believe it  
15 requires a bit more detail than I can say orally which is  
16 why we spent quite a bit of time in our brief discussing  
17 that. RCW 35.92 and .94 were not enacted at the same time  
18 as opposing counsel states. They were amended and restated  
19 at the same time in 1965, but they were not enacted in 1965.  
20 In fact, they were originally enacted back in the late  
21 1800's at different times in different bills.

22 There are specific municipal utilities called out  
23 in Chapter 35.92. That listing of municipal utilities in  
24 35.92 shows the Court what must be a municipal utility under  
25 35.94. But it does not limit the municipal utilities either

1 in 35.92 for that matter or for the purposes of the public  
2 vote provision in 35.94 to those listed utilities. There is  
3 an attorney general's opinion which is directly on point in  
4 this regard that specifically says that first class cities  
5 like the City of Tacoma may provide telecommunication  
6 services and telecommunication services provided by cities  
7 are public utilities. And that again should resolve the  
8 matter.

9 Additionally, as we went into length in the  
10 briefs, Chapter 35.92 and Chapter 35.94, the list of  
11 municipal utilities in 35.92 has never been the same as the  
12 utilities that the public vote requirement applies to under  
13 35.94.010. When they were first adopted, they were very  
14 different. There was street railways. There were all sorts  
15 of things in the initial 35.92 or the precursor to the  
16 35.92. But simply put, I won't spend any more time, I'll  
17 just generalize, but simply put, the provisions of the  
18 municipal utilities in 35.92 have never been conterminous  
19 with the surplus -- or excuse me, the provision in  
20 35.94.010. They're just not the same.

21 There's also been several discussions both by  
22 Mr. Shook and by the opposing parties about the City's  
23 intent when it first started this system. And while the  
24 City's intent is instructive because it's the opposite of  
25 what the City now claims it's doing, respectively the City's

1 intent of whether it was creating or not creating a  
2 municipal utility for the purposes of Chapter 35.94, its  
3 chartered, is simply irrelevant. The City does not get to  
4 choose whether it creates a municipal utility simply by  
5 saying, we didn't create a municipal utility here or saying  
6 on the other hand, we did create a municipal utility here.  
7 The intent in creation is not relevant to this Court.

8 Finally, I will cite a provision of RCW 80.04.050,  
9 which I'd like to bring up on the screen. Title 80 is the  
10 title that deals with public utilities outside of the  
11 municipal context. However, Title 80 has this provision in  
12 it. This provision says, application to municipal utilities  
13 and provides that nothing in this title, aka, Title 80,  
14 authorizes the public utility commission to make or enforce  
15 any order affecting rates, tolls, yadda, yadda, yadda,  
16 affecting any telecommunications line, gas plant, electrical  
17 plant system, sewage or water system owned and operated by  
18 any city or town or to make or enforce any order relating to  
19 the city of any telecommunications line, same list. But all  
20 other provisions enumerated here and applied to public  
21 utilities owned by any city or town.

22 The Supreme Court has interpreted this section to  
23 mean that the utilities -- the commission under this title  
24 does not apply to municipal utilities, aka, the things that  
25 are listed in this section, one of which is

1 telecommunications. And respectively, Your Honor, you don't  
2 even need to get here because again this doesn't control  
3 over 35.94.010 and Remington 1917. This is just further  
4 evidence that that's the case.

5 To sum up with my remaining time, Your Honor, I'd  
6 just say this: The Court has a simple statutory test that  
7 is in the current-day RCW 35.94.010 to apply. That test, as  
8 relevant here, means that anything is a public utility if it  
9 is similar or dissimilar to a telegraph plant -- telegraph  
10 or telephone plant or lines. Respectively, there's no way  
11 out of that definition for the City, which is why they've  
12 tried so hard to minimize it throughout their briefing and  
13 here today, that definition is the applicable definition in  
14 the RCW and it trumps every citation to authority that the  
15 City's cited because none of the other -- nothing else  
16 interprets the statute. In fact, the City hasn't even cited  
17 anything that interprets .040, the provision that it relies  
18 on. There's simply nothing cited by the City that  
19 interprets the relevant statutory pieces here. We have  
20 cited those and those support Mr. Bowman and Mr. Shook's  
21 motions for summary judgement.

22 And based on that, we request that the Court grant  
23 our motions, our partial motions for summary judgement, and  
24 deny the City's in its entirety. Thank you.

25 THE COURT: Thank you. Okay. I think you

1 reserved three minutes.

2 MR. CHRISTIE: I did, Your Honor. Thank you.

3 THE COURT: Let me know when you're ready.

4 MR. CHRISTIE: I'm ready.

5 THE COURT: All right. Go ahead.

6 MR. CHRISTIE: This is the statute that dictates  
7 the outcome of this motion, and it is RCW 35.94.040, which I  
8 talked about at the outset.

9 The language in .040 is not ambiguous and no one  
10 has asserted otherwise. It refers to any property. Any  
11 means all. No limitations. The test in .040 is that this  
12 property must be deemed surplus and no longer necessary, and  
13 that is what has been determined in this case and there is  
14 not evidence in this record that would permit you to  
15 determine that that decision was arbitrary and capricious.

16 I want to point out as well that CLICK! is not the  
17 asset. CLICK! is a business unit. It is a business unit of  
18 Tacoma Power. The Utility Board and the City Council have  
19 decided that they are going to end that business unit. The  
20 City Council and the Utility Board have the discretion to  
21 make exactly that decision.

22 If CLICK! ceases operation, what utility would  
23 still exist? The court got it right in *Coates*. They  
24 characterized exactly what these fibers are. They are  
25 surplus. They are excess. They were originally used

1 because they were additions -- they added value to the  
2 delivery of electric utility services. They're no longer  
3 needed for that. They have been deemed surplus and non-  
4 essential.

5 In terms of relevant case law, the *Bremer* decision  
6 is not the case to look at. *Bremer* was decided 30 years  
7 before RCW 35.94.040 was enacted. The statutory language at  
8 issue in *Bremer* is far broader than the language anywhere in  
9 35.94.020 or .040. And specifically in that case had  
10 language that talked about, quote, any similar or dissimilar  
11 utility or system. That's in the *Bremer* case. It has  
12 nothing to do with the analysis here.

13 The *Issaquah versus Teleprompter* case held that  
14 cable was not a utility. CLICK! is a cable network, even if  
15 CLICK! is a utility, it's the property that is being deemed  
16 surplus and .040 is the relevant statute to apply and  
17 evaluate. Thank you, Your Honor.

18 THE COURT: Thank you.

19 This is a decision that has weighed heavily on me  
20 for at least a couple of weeks going back and forth. And I  
21 wanted to explain a little bit in more depth the basis for  
22 my ruling because we do have media and members of the public  
23 present and I think it's important for people to understand  
24 what's happening in their court. So I'm going to do my best  
25 to give my full basis for the decision today.

1           This matter comes before the Court on the parties'  
2 motions for full or partial summary judgement. Summary  
3 judgement motions have the potential to end a case without a  
4 trial. So the standard that the parties must meet in order  
5 for such motions to be granted is very high.

6           Under CR 56, the rule governing summary judgement,  
7 a party must establish that no genuine issues of material  
8 fact exist that must be preserved for trial or the court  
9 must deny the motion.

10           The Court has reviewed hundreds if not thousands  
11 of pages in preparation for today's hearing. This includes  
12 multiple statutes, portions of the City Charter, relevant  
13 case law, and numerous briefs and supporting documents  
14 provided by the parties. The Court has also now heard oral  
15 argument by the parties.

16           Based on the Court's document review and the  
17 parties' oral arguments, the Court has come to some general  
18 legal conclusions. And this is more along the lines of a  
19 summary of the state of the law.

20           No. 1. First class charter cities such as Tacoma,  
21 have broad discretion when it comes to the exercise of their  
22 proprietary powers. These cities may exercise their  
23 business functions in much the same way as private entities.  
24 The operation of a public utility would be an exercise of a  
25 city's proprietary power.

1           No. 2. Applicable statutes and cases do not  
2 expressly define the term public utility.

3           No. 3. Current law does not expressly allow or  
4 prohibit first class charter cities such as Tacoma to  
5 provide telecommunication services.

6           No. 4. Current law also does not expressly  
7 require that cities provide telecommunication services only  
8 in the form of public utilities. In theory, cities could  
9 offer telecommunication services in the form of a municipal  
10 service pursuant to RCW 35A.11.020.

11           No. 5. The Tacoma City Charter Section 4.1,  
12 provides that the City shall possess all the powers granted  
13 to cities by state law to operate public utilities for  
14 supplying water, light, heat, power, transportation, and  
15 sewage and refuse collection. No expressed authorization to  
16 provide telecommunications services as a public utility is  
17 included in the charter.

18           No. 6, the Court of Appeals Division Two recently  
19 issued its unpublished decision in the case of *Coates*,  
20 *C-o-a-t-e-s, versus City of Tacoma* 2019 Westlaw, 671, 6311,  
21 this court notes that because the decision is unpublished,  
22 it is not mandatory authority. However, it can be  
23 considered as persuasive authority.

24           No. 7. In *Coates*, the Court of Appeals determined  
25 that the CLICK! Network is using the excess capacity of the

1 electric utility's existing infrastructure and is not a  
2 separate utility from the electric utility. The Court of  
3 Appeals characterized the CLICK! Network as a quote, unquote  
4 betterment of Tacoma Power.

5 No. 8. RCW 35.94.040 provides that when a City  
6 determines that any property originally acquired for public  
7 utility purposes is surplus to the City's needs and is not  
8 required for providing continued public utility service.  
9 The City, after a hearing, cause such property to be leased  
10 without the public vote that would otherwise be required  
11 under RCW 35.94.020.

12 No. 9. The Tacoma City Charter Section 4.6  
13 provides that the City shall never lease any utility system  
14 or parts thereof essential to continued effective utility  
15 service unless and until such disposal is approved by a  
16 majority vote. The Court must apply this law such as it is  
17 to the facts that have been presented.

18 The first question that must be addressed is  
19 whether the CLICK! Network is, in fact, a public utility.  
20 This issue was vigorously argued by all parties. Based on  
21 the Court's review of the evidence and hearing the oral  
22 argument that has been presented, the Court finds as  
23 follows:

24 No. 1. There is no dispute that TPU is a public  
25 utility.

1           No. 2. There is no dispute that the CLICK!  
2 Network is a telecommunications system that operates on the  
3 excess capacity of TPU's electric utilities existing  
4 infrastructure.

5           No. 3. There is no dispute that the CLICK!  
6 Network was never formally dedicated as a public utility.

7           No. 4. There is also no dispute that according to  
8 the City of Tacoma Ordinance 25930 the City's purposes in  
9 creating the CLICK! Network were to improve substation  
10 communications, automated meter reading, automated billing,  
11 automated bill payment, demand side management functions,  
12 provision of information to customers, distribution  
13 automation, remote turn on/turn off for electric and water  
14 customers, and City government communication functions, and  
15 to provide cable TV service, transport of signals for  
16 service providers offering telecommunication services, video  
17 on demand, high speed data and wired and wireless  
18 telecommunication services and internet access service. The  
19 first nine purposes are specifically related to provision of  
20 electric and water utility services.

21           No. 5. Ordinance 25930 cites directly to RCW  
22 35.92.050 for the City's authority to, quote, construct and  
23 operate works and facilities for the purpose of furnishing  
24 any persons with electricity and other means of power and to  
25 regulate and control the use thereof or lease any equipment

1 or accessories necessary and convenient for the use thereof.  
2 End quote.

3 No. 6. The components and equipment used to  
4 create the CLICK! Network were paid for with utility bonds.

5 No. 7. If the City had created CLICK! as a  
6 stand-alone public utility, it would have violated the City  
7 Charter Section 4.1.

8 Based on these findings, the Court concludes as a  
9 matter of law that the CLICK! Network is not a stand-alone  
10 utility.

11 The Court concludes as a matter of law that the  
12 CLICK! Network is property originally acquired for public  
13 utility purposes under RCW 35.94.040 and a part of a utility  
14 system under Tacoma City Charter Section 4.6.

15 The analysis does not end here.

16 Under RCW 35.94.040, in order for the City to be  
17 able to lease property originally acquired for public  
18 utility purposes without triggering a public vote, the  
19 property must be surplus to the City's needs and must not  
20 be required for continued public utility service.

21 Similarly, under the City Charter Section 4.6, in  
22 order for the City to be able to lease property that is a  
23 part of a utility system without triggering the public vote,  
24 the property must not be essential to continued effective  
25 utility service.

1           In this case, the City of Tacoma has already  
2 passed resolutions 40467, 40468, and U11116 finding that  
3 CLICK! is surplus and not essential.

4           And I want to be very clear on this, because the  
5 City has already passed these resolutions, the Court cannot  
6 simply substitute its judgement for that of the City  
7 Council's. The Court can only review the City's decisions  
8 using the arbitrary and capricious standard. In other  
9 words, the Court must decide if the council's decisions were  
10 willful and unreasoning or without consideration of and in  
11 disregard of facts or circumstances.

12           In all three of the resolutions, the City  
13 acknowledged that within four years following deployment of  
14 smart meters the meters began to fail causing communication  
15 errors, increased costs, increased repairs, and failures to  
16 measure electrical consumption. The City acknowledged that  
17 in the mid to late 2000's wireless technology overtook wire  
18 communication in the electric utility industry. More  
19 importantly for CLICK!, the City acknowledged that consumers  
20 shifted from predominantly cable programming services to  
21 internet access services while operational costs for CLICK!  
22 increased significantly. Put simply, the CLICK! Network had  
23 become outdated.

24           Based on these considerations, the City opted to  
25 change its business model essentially turning the operation

1 of the CLICK! Network over to a third-party cable TV and/or  
2 Internet access provider. The City declared that CLICK!'s  
3 assets and the excess capacity of the HFC Network were  
4 surplus to the needs of Tacoma Power and Tacoma Public  
5 Utilities and were not required for or essential to  
6 continued public utility service or effective utility  
7 service.

8 Resolution 40468 repeated many of the City's  
9 findings including the finding that CLICK!'s assets in the  
10 excess capacity of the HFC network were surplus to the  
11 needs of Tacoma Power, Tacoma Public Utilities and the City  
12 and were no longer required for continued public utility  
13 service.

14 The Court notes that before passing these  
15 resolutions, the City considered an analysis done by CTC  
16 Technology and Energy, held public hearings and took public  
17 testimony including testimony from Mr. Shook. The City  
18 argues that its resolutions were reasonable.

19 On the other hand, plaintiff Shook provides  
20 evidence taken from the City's 2017 to 2018 adopted budget  
21 stating that Tacoma Public Utilities provided services that  
22 are, quote, vital to our quality of life, unquote. TPU's  
23 mission statement specifically mentions the CLICK! Network  
24 and the telecommunication services that it provides.

25 Plaintiff Bowman argues that the City's decisions

1 are arbitrary and capricious because the CLICK! Network once  
2 it is turned over to the third party will continue to offer  
3 the same exact telecommunication services as it does now  
4 thus demonstrating that it is not surplus.

5 The Court finds that the plaintiffs have not  
6 presented any evidence that the City did not consider these  
7 and similar arguments in passing its resolutions. There has  
8 been no evidence presented that the City's decisions were  
9 willful or unreasoning or that the City made its decision  
10 without consideration of and in disregard of facts and  
11 circumstances.

12 The plaintiffs have failed to raise genuine issues  
13 of material facts on this issue of whether the City's  
14 decisions were arbitrary or capricious. The Court has no  
15 basis to invalidate the City's decisions, and as such, the  
16 City's resolutions must stand.

17 Because the City is determined that CLICK!'s  
18 assets and the excess capacity are surplus and not  
19 essential, the public vote requirements in RCW 35.94.040 and  
20 Tacoma City Charter Section 4.6 are not triggered.

21 On the subject of Mr. Shook's Consumer Protection  
22 Act, the City correctly points out that the act does not  
23 apply to municipal corporations. The Court would direct the  
24 parties to the case of *Washington Natural Gas Company versus*  
25 *Public Utility District No. 1 of Snohomish County*. That is

1 found at 77 Wn.2d pages 98 through 99.

2 The Court must dismiss the CPA claim and based on  
3 the foregoing, the Court will grant the City's motion and  
4 deny the plaintiffs' motions.

5 If the parties could please work on some proposed  
6 orders.

7 MR. CHRISTIE: Your Honor, we submitted, with our  
8 motion, proposed orders very simple and straightforward. I  
9 think it lists everything. I'll show it to counsel. The  
10 recitation at the end is that the defendant City of Tacoma's  
11 motion for summary judgment is granted and plaintiffs'  
12 claims against defendant are dismissed with prejudice in  
13 their entirety is the simple conclusion. But I'll show it  
14 to counsel.

15 MR. VAN ALSTYNE: Your Honor, with respect, we  
16 would like a more detailed order that includes all of the  
17 findings that you made from the bench.

18 MR. CHRISTIE: Your Honor, I'm going to say this  
19 with respect to that: Certainly what you have said is very  
20 instructive and helpful, all of which has been taken down  
21 and I'm sure would be part of any appellate record. The  
22 appeals court, because they review this de novo, are not  
23 fond of having lengthy findings and conclusions necessarily  
24 set forward in the simple order reflecting the outcome.

25 So respectfully, I think that what you've said is

1 well documented, would be part of any record, and would be  
2 considered for whatever weight the court might give it, but  
3 I don't think it's appropriate to put in an order.

4 MR. VAN ALSTYNE: Your Honor, your exact  
5 rationales for granting or denying these motions and the  
6 pieces thereof are highly relevant to an appellate review  
7 hearing and I think that Your Honor went to such a great  
8 extent to carefully lay out her reasoning here, that should  
9 be reflected in the order. We can simply get the transcript  
10 and then a week or two from now submit the order of  
11 presentation hearing that exactly tracks what Your Honor  
12 said here.

13 MR. SHOOK: Your Honor, I agree with Bowman  
14 attorney also, Your Honor. Specifically I think it's very  
15 important that we document the things that you said  
16 especially about City Charter 4.1 because there is the  
17 language not limited to there that appears. And so those  
18 findings are going to need to find their way to the  
19 appellate court and they're going to have to decide if  
20 telecommunications is a utility still in our state. So I  
21 think that if we could get a copy of what you were reading  
22 from perhaps we could prepare that order for you and present  
23 it.

24 MR. CHRISTIE: May I address that, Your Honor.

25 THE COURT: Certainly.

1 MR. CHRISTIE: Clearly a reporter is taking down  
2 everything you said. I'm sure it will be ordered. There  
3 could be a reference line in the order simply saying  
4 "transcript attached." But I submit respectfully it is not  
5 appropriate or necessary in the order to recite all of what  
6 you've said in the form of an order.

7 THE COURT: I've actually looked at case law on  
8 this, and I would prefer to do it the way that has been  
9 proposed by the City. I think the appropriate way to handle  
10 this, if you're gearing up for an appeal, would be to enter  
11 an order in as simple form as possible and then just have a  
12 transcript provided to the Court of Appeals. And we know  
13 all about transcripts here.

14 MR. CHRISTIE: That is what this order reflects.  
15 So I'll share it with counsel and Mr. Shook.

16 MR. VAN ALSTYNE: Thank you, Your Honor.

17 THE COURT: Thank you all. I did appreciate  
18 everyone's advocacy. I know you went to great lengths to  
19 put on your presentation today. I appreciate that. I also  
20 have a lot of paper here. Do you folks recycle?

21 MR. CHRISTIE: Yeah, you can leave it.

22 THE COURT: Mr. Shook, can I ask you a quick  
23 question? The new declarations or certifications that you  
24 provided today, have they been filed with the court?

25 MR. SHOOK: No. I could file them as a

1 supplement.

2 THE COURT: We can do that right now. We want  
3 those to be in the record.

4 Folks, before you go, can I ask the attorneys a  
5 question. Mr. Shook needs to file these certifications that  
6 he presented to the Court at the very beginning of the  
7 hearing. He doesn't have cover sheets on them. They're not  
8 appropriate for the clerk to accept. Does anyone have an  
9 objection to him taking them somewhere so he can put a cover  
10 sheet on and then filing either today or maybe Monday at the  
11 latest?

12 MR. CHRISTIE: No objection.

13 JUDICIAL ASSISTANT: If you can provide a cover  
14 sheet to me today, this stamp will satisfy that and we don't  
15 need to --

16 THE COURT: I think it --

17 JUDICIAL ASSISTANT: Because you e-file it and  
18 it's after 4:30, it's going to say that you filed it Monday.

19 THE COURT: I think I said at the beginning of the  
20 hearing that I would want to consider that, so it's in the  
21 record. But I just wanted to make sure you knew what was  
22 going to happen with the documents.

23 MR. VAN ALSTYNE: In terms of this order, Your  
24 Honor, I'm trying to fill in all the documents that you  
25 relied on in support of the order. Is there anything you

1 did not rely on?

2 THE COURT: No. I did not grant -- I know there  
3 was a motion to strike and I did not grant that.

4 MR. VAN ALSTYNE: Okay.

5 MR. CHRISTIE: Your Honor, if we can get agreement  
6 on the concluding language, and perhaps I can hand that up,  
7 then I think I can work with counsel and Mr. Shook to make  
8 sure that the order that we will submit to you lists  
9 everything so that the Court of Appeals doesn't have a doubt  
10 about that. I think there is agreement on that. And I'll  
11 hand it up to the Court. I read it earlier, but...

12 MR. VAN ALSTYNE: Mr. Shook hasn't looked at it  
13 yet on the language, but otherwise I am fine with it.

14 MR. SHOOK: You can't add stuff later after the  
15 judge signs it. You know, we got to get this right, Bob.

16 MR. CHRISTIE: To make it clear, Your Honor, I'm  
17 suggesting that you approve the concluding language and the  
18 only thing that would change in the form of the order is the  
19 listing of all the materials. But we could sit here and do  
20 that as well.

21 THE COURT: It's up to you. I'm still here.

22 MR. SHOOK: So can we present it next Friday, Your  
23 Honor?

24 MR. CHRISTIE: No. I'm going to be out of the  
25 country.

1 MR. VAN ALSTYNE: Can we present it ex parte?

2 MR. CHRISTIE: I would like to get this wrapped up  
3 today in terms of at least signing off on the language that  
4 is going to be entered, the only difference being the  
5 listing of materials.

6 MR. VAN ALSTYNE: I am fine with signing off on  
7 the concluding language and listing the materials later.

8 THE COURT: Well, I think what he's saying is  
9 you're not signing today, just letting it be on the record  
10 what the end of the order says. And then you all will go  
11 work through what declarations and so forth were considered;  
12 and then if you're all in agreement, you can present ex  
13 parte a signed copy of everything.

14 MR. CHRISTIE: That's what I'd like to do. I just  
15 don't want any disagreement over the concluding language.  
16 So if Mr. Shook will look at that and we'll have you review  
17 it, then we can just read it in the record and be done with  
18 it in peace.

19 THE COURT: I'm good with the ending, if you all  
20 can fill in the middle.

21 MR. CHRISTIE: So the ending will say after  
22 listing the materials, "Having heard the argument of parties  
23 and being otherwise fully advised in this matter, it is  
24 further ordered, adjudged, and decreed that the defendant  
25 City of Tacoma's motion for summary judgement is granted and

1 plaintiffs' claims against defendant are dismissed with  
2 prejudice in their entirety." I think we have agreement on  
3 that.

4 Anticipating a motion for reconsideration. I am  
5 leaving tomorrow morning for Mumbai. I will be back on  
6 April 22nd and I would respectfully respect given time that  
7 nothing be noted or re-noted before I return.

8 MR. VAN ALSTYNE: Sorry. What was the return  
9 date?

10 MR. CHRISTIE: I get back on April 22nd.

11 THE COURT: Given that he's postponed his vacation  
12 already once, I think that's probably a reasonable request.

13 MR. VAN ALSTYNE: My main concern there is that  
14 the proposed vesting date is before his return.

15 THE COURT: Well, but my recollection of the rules  
16 as long as you get the motion filed, you can note it for way  
17 out. It just has to be filed is my recollection.

18 MR. VAN ALSTYNE: Right. More of a practical  
19 consideration that the subject matter of this lawsuit will  
20 already -- like the final vesting date will already have  
21 happen at the time that it's noted for is what I'm saying in  
22 that situation which would essentially to some degree -- I  
23 don't think it would actually moot out -- it would some  
24 degree moot out the relief we'd be requesting if we were to  
25 file such a motion.

1 MR. CHRISTIE: That's exactly why we're here is to  
2 get it done before I left.

3 THE COURT: Yeah. And I don't want to give you  
4 any legal advice. Obviously rules of the appellate  
5 procedure come into play. And there's the issue of a bond  
6 and I don't know what you would do about that.

7 MR. SHOOK: Your Honor, would you certify this  
8 decision then as a final decision, I suppose for the --

9 THE COURT: Well, you have other appeal as a  
10 matter of right.

11 MR. SHOOK: It's a prejudice so it's a final  
12 decision.

13 MR. CHRISTIE: Yes.

14 MR. SHOOK: So, you know, I did good on my last  
15 motion for reconsideration. I'll have to think about where  
16 I'm going, if we're going to the appellate court.

17 When are you back, Mr. Christie?

18 MR. CHRISTIE: April 22nd.

19 MR. SHOOK: Wow. Okay.

20 MR. VAN ALSTYNE: My concern without looking at  
21 the rules of appellate procedure, I don't know the answer to  
22 this question, but my concern is that...

23 MR. SHOOK: It's just different than what he said  
24 last time, Your Honor. He was only going to be gone until  
25 later in the month.

1 THE COURT: He was going to be gone today.

2 MR. SHOOK: Yeah and then gone on the --

3 MR. CHRISTIE: And my wife landed a few hours  
4 before we started.

5 MR. SHOOK: Yeah. So I thought it was  
6 February 28th. You were going to be back late February. So  
7 now it just seems like they have a lot of attorneys on a  
8 motion for reconsideration, Your Honor. It looked like your  
9 decision had been written before we talked about a lot of  
10 this today. Maybe some of that made a difference. I  
11 clearly have a few things I'd like to help, you know, the  
12 Court understand. The motion for reconsideration may be our  
13 only chance. Is if Mr. Bacha's been able to argue. Zack's  
14 been very capable. They have a team of attorneys. Isn't  
15 there any way that we could possibly have that  
16 reconsideration heard?

17 MR. VAN ALSTYNE: My concern is the interplay of a  
18 motion for reconsideration deadline and how that affects our  
19 requirements in terms of filing a notice of appeal.

20 THE COURT: I get it. I can't give you any legal  
21 advice on that. I mean, I don't know even know when  
22 anything would be noted.

23 MR. SHOOK: Right. Right. So you're not making a  
24 ruling that we have to wait for them. Okay.

25 THE COURT: I don't know what's happening. But

1        what he's saying is, I think he's asking for some  
2        professional courtesy.

3                MR. SHOOK:  And, Your Honor, in this case, given  
4        the magnitude of this decision, you know, based on the fact  
5        that that decision was written before you heard a lot of  
6        what was said --

7                THE COURT:  That's not what happened.

8                MR. SHOOK:  That's not what happened.

9                THE COURT:  No.

10               MR. SHOOK:  Okay.  Alright.  Well, I just would  
11        like to, you know, have the opportunity to have this heard  
12        because it seems fairly essential that we do it before it's  
13        disposed of, Your Honor.

14               THE COURT:  I'll let you go talk amongst  
15        yourselves and look at the rules.

16               MR. CHRISTIE:  Your Honor, I may have misspoken.  
17        I'm going to be back February -- if I said April, I'm very  
18        sorry.  I'm very sorry.  It's been a long day.  I'll be back  
19        February 22nd.

20               MR. VAN ALSTYNE:  In that case, no objection.

21               MR. CHRISTIE:  I'm very sorry.  February 26th.

22               THE COURT:  Thank you.  That's a good  
23        clarification.

24               MR. CHRISTIE:  I apologize.

25               THE COURT:  So if you can come to an agreement,

1 all you would need to do is e-mail your final order to  
2 Mr. Shanstrom and he can take that and file it and  
3 distribute copies. You don't have to come back to court  
4 again.

5 Thank you everyone. The Court will be at recess.

6 (Proceedings at recess.)  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

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DARREL BOWMAN, )  
 )  
 Plaintiff, )  
 )  
 vs. ) Superior Court  
 ) No. 19-2-11506-3  
 CITY OF TACOMA, )  
 )  
 Defendant, )  
 )  
 \_\_\_\_\_ )  
 MITCHELL SHOOK, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CITY OF TACOMA, )  
 )

---

REPORTER'S CERTIFICATE

---

STATE OF WASHINGTON )  
 ) ss  
 COUNTY OF PIERCE )

I, Jennifer Flygare, Official Court Reporter in the State of Washington, County of Pierce, do hereby certify that the forgoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

Dated this 27th day of February 2020



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JENNIFER FLYGARE, RPR  
Official Court Reporter

# EXHIBIT B

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

FILED  
DEPT 5  
IN OPEN COURT  
FEB 28 2020  
PIERCE COUNTY Clerk  
By *[Signature]*  
DEPUTY

DARREL BOWMAN,  
Plaintiff,

NO. 19-2-11506-3

v.  
CITY OF TACOMA,  
Defendant.

ORDER GRANTING DEFENDANT  
CITY OF TACOMA'S MOTION FOR  
SUMMARY JUDGMENT

MITCHELL SHOOK,  
Plaintiff,

v.  
CITY OF TACOMA,  
Defendant.

THIS MATTER having come on regularly before this Court on cross-motions for summary judgment, the parties appearing by and through counsel or self-represented, the Court having reviewed the pleadings and files in this matter, specifically the following:

- 1. Defendant City of Tacoma's Motion for Summary Judgment;

ORDER GRANTING DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT - 1

Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
P. O. Box 11007  
Tacoma, Washington 98411  
Phone 253.502.8348  
Facsimile 253.502.8672

- 1 2. Declaration of Zachary B. Parker in Support of Defendant's Motion for Summary  
2 Judgment, with exhibits attached;
- 3 3. Declaration of Doris Sorum, with exhibits attached;
- 4 4. Declaration of Tenzin Gyalsten in Support of Defendant's Motion for Summary  
5 Judgment, with exhibit attached;
- 6 5. Plaintiff Mitchell Shook's Response to Defendant's Motion for Summary Judgment;
- 7 6. Declaration of Mitchell Shook in Support of Response to Defendant's Motion for  
8 Summary Judgment, with exhibits attached;
- 9 7. Plaintiff Bowman's Response to Defendant City of Tacoma's Motion for Summary  
10 Judgment;
- 11 8. Declaration of Kent Van Alstyne in Support of Plaintiff Bowman's Response to  
12 Defendant City of Tacoma's Motion for Summary Judgment, with exhibits attached;
- 13 9. Defendant City of Tacoma's Reply to Mr. Bowman's Response to Its Motion for  
14 Summary Judgment;
- 15 10. Defendant City of Tacoma's Reply to Mr. Shook's Response to the City's Motion for  
16 Summary Judgment;
- 17 11. Plaintiff Darrel Bowman's Motion for Partial Summary Judgment;
- 18 12. Plaintiff Mitchell Shook's Motion for Partial Summary Judgment;
- 19 13. Master Declaration of Mitchell Shook Prepared in Response to Court Order of January  
20 7, 2020 to Organize Declarations.
- 21 14. Defendant City of Tacoma's Response to Plaintiffs Bowman's and Shook's Motions  
22 for Partial Summary Judgment;
- 23 15. Declaration of Christopher D. Bacha in Support of Defendant's Response to Plaintiffs'  
24 Partial Summary Judgment Motions, with exhibits attached;
16. Plaintiff Bowman's Reply to Defendant's Response to Bowman's Motion for Partial  
Summary Judgment;
17. Declaration of Kent Van Alstyne in Support of Plaintiff Bowman's Reply to  
Defendant's Response to Bowman's Motion for Partial Summary Judgment, with  
exhibits attached;
18. Plaintiff Shook's Reply in Support of Motion for Partial Summary Judgement (sic)  
Granting Declaratory Relief;

- 1 19. Corrected Declaration of Mitchell Shook in Support of Reply to Defendant's Motion  
2 for Summary Judgment, with exhibits attached;  
3 20. Defendant City of Tacoma's Motion to Strike Declarations of Mitchell Shook (dated  
4 December 31, 2019);  
5 21. Plaintiff Mitchell Shook's Response to the Motion to Strike and Motion for Sanctions  
6 Pursuant to CR 11 (dated January 7, 2020);  
7 22. Plaintiff Bowman's Response to Defendant City of Tacoma's Motion to Strike  
8 Declarations of Mitchell Shook (dated January 7, 2020); and  
9 23. All other pleadings and papers filed in this action, with the exception of: (1) Mr.  
10 Shook's October 30, 2019 Declaration (subsequently refiled on December 11, 2019  
11 with his Motion for Partial Summary Judgment); (2) Mr. Shook's November 1, 2019  
12 Declaration (subsequently refiled on December 11, 2019 with his Motion for Partial  
13 Summary Judgment); (3) Declaration of Mitchell Shook, filed on December 12, 2019  
14 Declaration; (4) Declaration of Mitchell Shook Part II With Exhibit 67, filed on  
15 December 12, 2019;

16 having heard the argument of parties; and being otherwise fully advised in this matter;

17 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant City of  
18 Tacoma's Motion for Summary Judgment is GRANTED, and Plaintiff Bowman's and Plaintiff  
19 Shook's respective motions for partial summary judgment are DENIED.

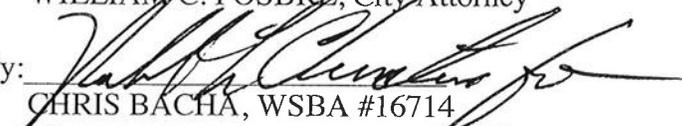
20 IT IS FURTHER ORDERED, ADJUDGED AND DECREED Plaintiffs' claims against  
21 defendant are dismissed with prejudice in their entirety.

22 SIGNED IN OPEN COURT/CHAMBERS this 28<sup>th</sup> day of February, 2020.

23   
24 HONORABLE SHELLY SPEIR

Presented by:

WILLIAM C. FOSBRE, City Attorney

By: 

CHRIS BACHA, WSBA #16714

M. JOSEPH SLOAN, WSBA #13206

Attorneys for Defendant City of Tacoma

ORDER GRANTING DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT - 3

FILED  
DEPT 5  
IN OPEN COURT

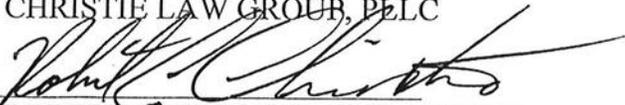
FEB 28 2020

PIERCE COUNTY Clerk  
By  DEPUTY

Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
P. O. Box 11007  
Tacoma, Washington 98411  
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Attorneys for Plaintiff Bowman

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24 ORDER GRANTING DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT - 4

Office of the City Attorney  
Department of Public Utilities  
3628 South 35<sup>th</sup> Street  
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# EXHIBIT C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DARREL BOWMAN

Appellant,

v.

CITY OF TACOMA,

Respondent.

No. 54930-1-II

RULING DISMISSING APPEAL

BY  DEPUTY  
STATE OF WASHINGTON

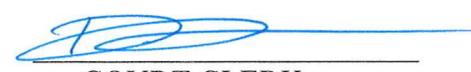
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FILED  
COURT OF APPEALS  
DIVISION II

COUNSEL for the parties have stipulated that all the issues in this matter have been fully settled and that the cause may be dismissed without cost to any party. Accordingly, it is

ORDERED that this appeal is dismissed without cost to any party.

DATED this 7 day of July, 2020.



COURT CLERK

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**Page -2- Bowman v. City of Tacoma, COA #54930-1-II  
Stipulated Ruling of Dismissal**

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# EXHIBIT D

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

---

MITCHELL SHOOK, )  
 Plaintiff, )  
 vs. ) No. 19-2-07135-0  
 CITY OF TACOMA, )  
 Defendant. )

---

THOMAS MCCARTHY and CHRISTOPHER )  
 T. ANDERSON, )  
 Plaintiffs, )  
 vs. )  
 CITY OF TACOMA, )  
 Defendant. )

---

VERBATIM REPORT OF PROCEEDINGS  
 July 24th, 2020

---

APPEARANCES:

FOR THE PLAINTIFF:            THOMAS MCCARTHY  
    CHRISTOPHER ANDERSON  
    Pro se litigants

FOR THE DEFENDANT:            ZACHARY B. PARKER  
    Attorney at Law

Katrina Smith, CSR                            Official Court Reporter  
 930 Tacoma Avenue South                    Dept. 4, Superior Court  
 Tacoma, Washington 98402                    (253) 798-7432

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INDEX

Page No.

Summary Judgment Motion

3

1           BE IT REMEMBERED that on July 24th, 2020, the  
2 above-captioned cause came on for hearing before the  
3 Honorable Bryan Chushcoff, Judge of the Superior Court  
4 in and for the County of Pierce, State of Washington;  
5 the following proceedings were had, to wit:

6                           \* \* \* \* \*

7           THE COURT: Shook v. City of Tacoma, Cause  
8 No. 19-2-07135-0. It's No. 9 on our docket. Is  
9 anybody here on the line for the plaintiff?

10           MR. McCARTHY: This is Tom McCarthy, co-plaintiff  
11 pro se litigant, with my co-plaintiff,  
12 Christopher Anderson.

13           THE COURT: Okay. Great.

14           Is anyone here on behalf of the City? Is  
15 Mr. Christie on the line? Or Mr. Parker? Mr. Bacha?

16                           (No response.)

17           Well, I don't know what the deal is here. We seem  
18 to have lost a significant number of our folks here.

19           Hold on. We are going to try to get connected up.  
20 Those folks indicated that they were trying to be on  
21 our line.

22                           (Off the Record - Discussion.)

23           THE COURT: Is Mr. Parker on the line now?

24           MR. PARKER: Yes. This is Zachary Parker on  
25 behalf of the City.

1 THE COURT: We have Mr. McCarthy and Mr. Anderson  
2 on the line as well still. Gentlemen, is that right?

3 MR. McCARTHY: That is correct, Your Honor.

4 THE COURT: Great. Is there anybody else on this  
5 matter on the line?

6 (No response.)

7 THE COURT: Mr. Parker, I believe this is your --

8 THE MODERATOR: Your Honor, just both counsel.

9 THE COURT: I'm sorry. Say that again?

10 THE MODERATOR: It's just both counsel.

11 THE COURT: So, Mr. Parker, this is your motion.  
12 Proceed.

13 MR. PARKER: I don't want to correct the  
14 moderator, but I do believe that Mr. Anderson is also  
15 on the phone, if I'm not mistaken.

16 THE COURT: Yeah.

17 MR. ANDERSON: That's correct.

18 MR. PARKER: Okay. I just wanted the record to be  
19 clear.

20 Your Honor, as you've seen by our moving brief and  
21 by our reply brief as well, I think that we believe  
22 this is a very narrow issue. Do you have any specific  
23 questions for me before I begin my argument?

24 THE COURT: Well, I think I get this a little bit.  
25 Let me ask you a question here: Back when I still had

1 this case before it went to federal court and then back  
2 again, there was an aspect of this case that I had  
3 reserved sort of making a ruling about. This had to do  
4 with the Gateway Meter Project. Are you familiar with  
5 what I'm talking about?

6 MR. PARKER: Yes.

7 THE COURT: When I made my order in July of 2019,  
8 I said, well, we don't know whether or not the Gateway  
9 Meter Project infrastructure, if you will, associated  
10 with that -- so much of it has dealt with Click! -- was  
11 going to be part of the sales transaction or whether it  
12 was going to be retained. It just wasn't known at that  
13 point in time. The City was claiming that it was  
14 intending to retain, at least for some period of time,  
15 all of the Click! infrastructure associated with that.  
16 I don't know whether or not that wound up being the  
17 final result or not.

18 MR. PARKER: And I apologize, Your Honor, for my  
19 connection. I did not hear a lot of what you just  
20 said.

21 THE COURT: Well, I'll repeat it.

22 MR. PARKER: I do apologize. I promise it's just  
23 our connection.

24 THE COURT: Sure. It's not your fault. I mean,  
25 that's the technology we have now. I suppose if I had

1 stopped the sale, we would have a better connection  
2 now.

3 MR. PARKER: I fully disagree, Your Honor. I  
4 would move to strike that.

5 THE COURT: Well, Mr. McCarthy and Mr. Anderson  
6 might agree with me about that point at least.

7 What I was saying was --

8 MR. McCARTHY: Certainly do, Your Honor.

9 THE COURT: Well, what I was saying was, is that  
10 in July of 2019 when I declined the opportunity to  
11 enjoin the sale, I did allow one aspect of this, which  
12 was the Gateway Meter Project was something that used  
13 some of the Click! infrastructure to provide water  
14 meter reading or electrical meter reading or both for  
15 the City via the Click! Network. It wasn't clear to me  
16 to what extent that was being sold. Or if it was going  
17 to be sold, it was going to be retained, and so on. I  
18 don't know what happened with that.

19 Can you advise about that, Mr. Parker?

20 MR. PARKER: I don't mean to sound like a broken  
21 record, Your Honor. I'm hearing about every third word  
22 you say, and I apologize about that. I don't fully  
23 know what you asked me.

24 THE COURT: It sounds like my dog.

25 MR. PARKER: Is there someone else who could go

1 before us? And maybe I can call on a different line.  
2 Is there another matter?

3 THE COURT: I will move on to another case for the  
4 moment.

5 MR. PARKER: Moderator, if you can hear me, I'm  
6 going to call on a different line and just advise the  
7 judge whenever he is done with the next matter that, in  
8 fact, I've joined.

9 THE MODERATOR: Of course.

10 MR. PARKER: Okay. I'll call right back.  
11 Thank you, Your Honor.

12 (Off the Record - Recess.)

13 THE COURT: This is 19-2-07135-0.

14 Mr. Parker, you're on the line?

15 MR. PARKER: Yes. This is Zach Parker for the  
16 City of Tacoma.

17 THE COURT: Can you hear me better now?

18 MR. PARKER: Currently, I can. I apologize if  
19 something goes awry.

20 THE COURT: It's not your fault.

21 Is Mr. McCarthy and Mr. Anderson on the line?

22 MR. MCCARTHY: Yes, Your Honor, we are. And if we  
23 can just say, there are numerous members of the public  
24 who would like to follow along with this hearing, but  
25 the live stream seems to be offline.

1           THE COURT: That's because this is a CourtCall  
2 proceeding and not a Zoom proceeding. You can  
3 certainly turn the volume of the thing up as loud as  
4 you would like.

5           It sounds like everybody is here.

6           Mr. Parker, you asked me -- you said, this is  
7 fairly straightforward and did I have any questions,  
8 and I did.

9           My question was -- that you couldn't hear  
10 before -- that in July of 2019, when I denied the  
11 injunction that was previously sought by the citizens  
12 here, I said but it wasn't clear to me what the status  
13 was with respect to the negotiations to sell the Click!  
14 Network as it related to the Gateway Meter Project,  
15 which was a part of the Tacoma Public Utilities. They  
16 used part of the Click! fiberoptic system to make that  
17 work. They claimed that they were -- the City claimed  
18 at the time that they were phasing that out over the  
19 next few years. It wasn't clear to me whether they  
20 were going to retain ownership of that, whether they  
21 were going to lease it back, or what the deal was on  
22 that. I don't know how that ever was resolved.

23           So my question is, did the Gateway Meter Project  
24 continue to be part of this transaction? I mean, in  
25 other words, was the fiberoptic space that was

1 dedicated for that use sold along with everything else?

2 UNIDENTIFIED SPEAKER: (Inaudible.)

3 MR. PARKER: Sorry. Was someone asking a  
4 question?

5 THE COURT: I asked my question of you,  
6 Mr. Parker.

7 MR. PARKER: Sorry, Your Honor. I heard your  
8 question. I didn't mean to interrupt you. I thought  
9 that I heard somebody else asking a question.

10 THE COURT: I thought that I heard something too,  
11 but go ahead and answer now. Ignore that.

12 MR. PARKER: So, Your Honor, I will defer to our  
13 briefing in the Shook motion. I believe, in fact -- I  
14 don't want to represent anything that is not correct.  
15 I believe that was sold as a portion of it. I'm not  
16 confident, so I can go back to our briefing and I can  
17 give you supplemental briefing.

18 But as stated in our moving brief, again, we  
19 really believe that the entire Complaint that both  
20 Mr. McCarthy and Mr. Anderson have brought are, in  
21 fact -- they should be dismissed due to res judicata.  
22 They are identical to the previous claim that  
23 Judge Spier dismissed. It is really -- that's entirely  
24 our argument in this case.

25 THE COURT: Sure. It is my understanding that

1 there's a couple of things here. One is, if she  
2 granted summary judgment, her reasoning is not  
3 explained. As I understood it as best that I could,  
4 she simply decided, look, the City has the right under  
5 the statute to designate whatever they designate as  
6 surplus property, and, you know, they've exercised  
7 discretion reasonably as far as I know. Therefore,  
8 Plaintiffs lose.

9 The reason why I ruled the way that I ruled was  
10 that I held that the Click! Network in general as a  
11 telecommunications network is not a utility. And  
12 because even though it's owned by a utility in the  
13 sense that it was operated by Tacoma Power, that  
14 doesn't make it a utility, and utilities can operate  
15 all kinds of other businesses that are not utility  
16 businesses.

17 The Issaquah case from the 1980s or so made it  
18 pretty clear to me that this was -- that at least the  
19 telecommunications aspect of Click! was not a utility.  
20 However, the utility did use some part of the  
21 fiberoptic network for the Gateway Meter Project. It  
22 seemed to me that if that was sold or attempted to be  
23 sold as opposed to being retained, that -- or at some  
24 kind of sale or lease back, or whatever it might be,  
25 that that would implicate the idea of whether or not

1 this constituted sufficient sale of the utility that  
2 gave rise to a requirement to have a vote.

3 I don't know that you can decide that on summary  
4 judgment without some kind of hearing or testimony  
5 about the dimension of what that represented. I  
6 realized at the time there was some issue that -- if  
7 memory serves, it was something like 18,000 homes that  
8 were serviced by the Gateway Meter Project. A year or  
9 so ago, it being phased out. I don't know how  
10 significant or insignificant it is now. That, as I  
11 understood it, does not constitute all of the meters  
12 that the project has, at least it's certainly not all  
13 of the meters within the City of Tacoma, for that  
14 matter, much less its service area; but, nevertheless,  
15 it constituted a not insignificant number of meters.

16 To me, it is a different -- potentially, it's a  
17 different issue or at least maybe one that I disagree  
18 with.

19 MR. PARKER: Certainly, when you say that you  
20 disagree, are you saying that you disagree with the  
21 order itself or are you agreeing with me?

22 THE COURT: Well, I'm disagreeing that you can --  
23 I don't know what was put in front of Judge Spier to  
24 know whether or not she knew all of that stuff about  
25 the Gateway Meter Project and whether or not she

1 reviewed all of that and found against the plaintiffs  
2 on that or not. I mean, I just don't have any of that  
3 information. I just have a flat ruling that they lose.  
4 I just don't think given that our rationalès were  
5 different, and my rationalè was that this may well be a  
6 significant division of or alienation of utility  
7 property -- and in order to determine that, one would  
8 have to have some testimony about it potentially -- I  
9 mean, maybe it can be done on summary judgment if we  
10 had the affidavits. I don't know what was in front of  
11 Judge Spier about that.

12 I guess my concern is, if the Gateway Meter  
13 Project -- if the telecommunications aspect of the  
14 Gateway Meter Project was retained by the City, then at  
15 least -- it seems to me that the rest of the sale is  
16 fine, and then there's no problem. If it was sold by  
17 the City, then I have to have some kind of information  
18 that explains to me at least that this was considered  
19 by Judge Spier, and I don't have that information. I  
20 don't know that the issues are the same is what I'm  
21 trying to tell you. If the issues aren't the same,  
22 then there's no res judicata.

23 MR. MCCARTHY: Your Honor, this is Tom McCarthy.  
24 Can I make a comment?

25 THE COURT: Let me let Mr. Parker, and then I will

1 certainly go to you, Mr. McCarthy.

2 MR. McCARTHY: Very good.

3 THE COURT: Mr. Parker.

4 MR. PARKER: Thank you, Your Honor.

5 So I guess my response would be -- I have two  
6 responses to what you just said. The first would be  
7 that Judge Spier did, in fact, review thousands of  
8 documents by Mr. Shook as well as Mr. Bowman regarding  
9 the Gateway Meter Project and other, currently -- and I  
10 apologize. I don't have my client on the phone. My  
11 client would be able to answer that question slightly  
12 better to what exactly happened to that project. I  
13 believe it was phased out. It sounds like Mr. McCarthy  
14 or Mr. Anderson wants to answer that.

15 That also being said, Judge Spier either in our --  
16 in a declaration attached to -- and, rather, in  
17 Mr. Christie's declaration or in the record, the  
18 transcript of Judge Spiers' order, which I would  
19 respectfully say is not, you know -- it wasn't curt.  
20 She very specifically -- she looked at every single  
21 document, and she describes exactly why, in fact, she  
22 dismissed the Complaint with prejudice. I just want --  
23 I want to point that out for the record.

24 Again, I can provide additional briefing as well  
25 as potentially a declaration from my client describing

1 exactly what happened to the Gateway Meter Project, if  
2 that would help the Court.

3 THE COURT: It might.

4 Mr. McCarthy, you wanted to say something.

5 MR. McCARTHY: Yes, Your Honor. First of all,  
6 it's not at all clear to my co-plaintiff and I that  
7 those meters are no longer in use. That is to say that  
8 the nexus that you've discussed in that earlier court  
9 ruling is not still established.

10 Furthermore, you know, the industrial customers  
11 use Stark meters. Those meters continue to be in use.  
12 I would also add that, you know, since our earlier  
13 Court issues, which was about a temporary injunction,  
14 we have refined our understanding of this issue  
15 somewhat and see it a little bit differently.

16 We would challenge that the Issaquah case applied  
17 in this at all because Issaquah was about cable TV,  
18 which is a one-way system. Telecommunication systems  
19 are two ways. In 1972, the telecommunications were  
20 completely different. There wasn't such thing as  
21 internet at that time.

22 THE COURT: Can I weigh in on that just a bit?

23 MR. McCARTHY: My co-plaintiff, Chris Anderson,  
24 would like to add something, if he might.

25 THE COURT: Well, before he does -- I would

1 certainly be glad to hear from Mr. Anderson. Before he  
2 does, I want to mention one thing about the one-way  
3 versus two-way business.

4 When there was a motion to reconsider my July  
5 order, the issue of two-way communications versus  
6 one-way communication was raised for the first time. I  
7 discussed that in my ruling in a couple of ways. It  
8 seemed to me what I said -- if memory serves, it was  
9 something like, first of all, I have no reason to  
10 believe that a cable television system is a purely  
11 one-way communication. It is different from telephone.  
12 It is different from the internet, but I can order a  
13 movie on my cable television system. In order to do  
14 that, the communication has to go the other direction.  
15 It isn't clear to me that the cable television is  
16 purely a one-way communication item.

17 No. 2, the Issaquah case -- the Supreme Court did  
18 not analyze that problem in an idea of a one-way versus  
19 two-way communication sort of way.

20 Of course, the third problem was, at least for  
21 purposes of the motion to reconsider was, that that had  
22 never been raised in any of the prior pleadings or  
23 argument or anything else until the motion to  
24 reconsider. It was entirely new and not supported by  
25 any particular evidence. As I say, given that I think

1 that I can order a television movie through my cable  
2 television system, it seems to me, that, of itself,  
3 suggests that it's more than a one-way communication  
4 system.

5 Now, having said that, I will be glad to hear from  
6 Mr. Anderson.

7 MR. ANDERSON: Hi, Judge. Thank you very much.

8 My name is Chris Anderson. I have been in IT for  
9 about 25 years. I'm considered a subject matter expert  
10 in IT and telecommunications for my separate career.  
11 One of the things is, there's been evolution of use  
12 even for cable TV. The predominant use is actually  
13 internet. Internet itself is the basis for how all  
14 telecommunication companies do their back call and also  
15 provide last-mile service. Whether it be Comcast,  
16 whether it be Click!, whether it be CenturyLink, it has  
17 to go through copper somewhere. In this particular  
18 medium, there is an RF network, which is a radio  
19 frequency network which, when it's delivering the  
20 signal, it's just the medium for which to provide  
21 telecommunications.

22 I think that the issue is getting confused by  
23 other parties here to kind of stretch it to be too  
24 literal and not looking at the change of use of the  
25 medium to something that's evolved where it is merely

1 riding upon that medium versus the actual connectivity.

2 When you look at the definition of  
3 telecommunications, it specifically speaks about  
4 electromagnetic frequency and signaling as  
5 telecommunications -- as part of that  
6 telecommunications concept. Again, it talks about  
7 basically the medium of where we are taking it to the  
8 end user.

9 As we look at what is going on with the pandemic  
10 right now, it is clear now that -- how the internet  
11 connects and how it is being used and how Click! is  
12 being used. As for me, my myself, as a customer, it's  
13 absolutely telecommunication because I would not be  
14 able to do my job, my wife would not be able to teach  
15 at Bates, TCC. It's all telecommunications. It's done  
16 to transmit image, voice, and communication in a  
17 two-way method. It is merely a medium, and I feel like  
18 in previous -- they don't represent us -- cases failed  
19 to address this fact. So that's the basis of my  
20 argument with the Issaquah statement. I can go on to  
21 further detail, if you wish.

22 THE COURT: No. I really don't at this point.  
23 Part of this is philosophical. Part of this has to do  
24 with why these laws got created in the first place.

25 If we are reading the teleprompter case too

1           literally and the statute too literally, it's because  
2           that's what we are supposed to do.  If the statute has  
3           gotten out of date, if you will, your remedy is to go  
4           back to the legislature.

5           Keep in mind, the reason these laws got passed in  
6           the first place so many decades ago was because of the  
7           prospect that somebody could bribe, if you will, the  
8           City, get the utilities sold to somebody, then they  
9           would have a monopoly on water service to everybody in  
10          the city, and they could raise the price to whatever  
11          they would want.  Obviously, that was not in the  
12          citizens' best interest.  The result was that they had  
13          laws like this restricting the alienation of utility  
14          problems.  They defined utilities.  Initially, they  
15          defined them far more broadly than they do now.  One of  
16          the points that was made on the motion to reconsider  
17          back in July of last year or so -- or August of last  
18          year -- was that citing the prior language which would  
19          refer to telephone and telegraph and that sort of  
20          stuff, that -- the statute got amended many years later  
21          in the 1950s or so.  All that language got dropped.  
22          There was a reason it got dropped.

23                 MR. PARKER:  Well, Your Honor --

24                 THE COURT:  I won't argue that point.  In the  
25                 meantime, one of -- what my ruling is going to be is

1           this: I'm going to deny the motion without prejudice.  
2           I have to have some more information with respect to  
3           the Gateway Meter Project. At the time, I was told it  
4           was going to be phased out in three or four years.  
5           That was a year ago. If it has been phased out  
6           entirely, I suppose this is a moot point. If it is  
7           still in existence, I don't know to what extent it has  
8           been phased out or maybe they changed their mind and  
9           didn't phase it out. I don't know. And I don't know  
10          whether or not the Gateway Meter Project is a product  
11          of this or not because Mr. Parker is not sure. I don't  
12          know that the issues are identical between what  
13          Judge Spier and what I did or what I am being asked to  
14          do. At this point in time, I will deny the motion.

15                 MR. PARKER: Your Honor, we would suggest that the  
16          Gateway issue was never addressed, to our knowledge --  
17          to the best of our knowledge, the Gateway issue was  
18          never addressed by the Superior Court.

19                 THE COURT: And that might be the case. In which  
20          case, we are going to still have some conversations  
21          about this.

22                 In the meantime, we are going to have another  
23          conversation about it because I'm denying the motion  
24          for summary judgment, as I say, without prejudice. You  
25          are going to have to convince me that the Gateway Meter

1 Project at least -- and now Anderson and McCarthy have  
2 raised issues with respect to some other kind of  
3 metering project for industrial users. I don't know  
4 anything about that, so I won't comment on it any  
5 further.

6 My understanding is that some of --

7 MR. PARKER: Your Honor --

8 THE COURT: My understanding is that some --

9 MR. PARKER: I didn't mean to interrupt.

10 THE COURT: My understanding is that some of the  
11 metering now is not being done through the fiber  
12 optics, but through the internet and basically through  
13 wireless communications. I don't know whether that  
14 applies to these industrial users or not.

15 In any event, for the moment, I'm simply denying  
16 this motion without prejudice. I don't think I've got  
17 an order denying it here. I will gin something else.

18 MR. PARKER: Thank you, Your Honor. I understand  
19 that you have made your order and all of that. I just  
20 want -- I want to make two quick points, if that's  
21 okay.

22 THE COURT: Sure.

23 MR. PARKER: Again, the Complaint that both  
24 Mr. McCarthy and Mr. Anderson made is truly identical  
25 to that of Mr. Bowman as well as Mr. Shook. And as

1 such, that Complaint was, in fact, summarily dismissed  
2 by Judge Spier. They don't make an actual claim  
3 against the gateway project. In fact, it is only one  
4 paragraph that they even mention said gateway project.  
5 I will get you a declaration one way or the other as to  
6 what happened. That's kind of my first point.

7 My second point is, I want to clarify one thing  
8 with you, which is, if I get a declaration from my  
9 client saying that, in fact, the gateway project was  
10 phased out or was not phased out, I'm just curious --  
11 you seem to hint how you will -- would you rule one way  
12 or the other if my client said one way or the other  
13 that it was phased out or was not phased out?

14 THE COURT: First of all --

15 MR. McCARTHY: Your Honor, if I could just  
16 interject --

17 THE COURT: Who is speaking?

18 MR. McCARTHY: I don't mean to interrupt.

19 THE COURT: Who is speaking?

20 MR. McCARTHY: This in Tom McCarthy. I apologize.

21 THE COURT: Go ahead, Mr. McCarthy.

22 MR. McCARTHY: I would say where the defendant is  
23 taking that is entirely inappropriate. If we are going  
24 to argue res judicata, then we should argue that. We  
25 certainly feel that it does not apply in case. There

1 has not been a final resolution in the Court of  
2 Appeals. Certainly, the Court is not bound by another  
3 Superior Court ruling, and there is no concurrence of  
4 identity.

5 I would say, it seems like we should -- if  
6 Your Honor is predisposed to deny this motion, let's  
7 deny the motion. And if they come out with further  
8 information, then we can --

9 THE COURT: And I don't know. If the fiber optic  
10 portion of the Gateway Meter Project wasn't even  
11 included in the sale, then I would probably grant  
12 summary judgment, not on the basis of res judicata, but  
13 on the basis of the Issaquah case, which is that the  
14 property that was sold is not a utility. I don't know  
15 any of those things now.

16 I will deny -- as I say, I will simply deny the  
17 motion at this point, and we will see what new  
18 information is and make a ruling based on the new  
19 information whatever it might be.

20 Thank you, everybody.

21 MR. PARKER: Thank you, Your Honor.

22 MR. McCARTHY: Thank you, Your Honor.

23 THE COURT: You're welcome, everybody.

24 (Proceedings Concluded.)  
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\*\*\*\*\*CERTIFICATE\*\*\*\*\*

I, Katrina A. Smith, do hereby certify that the foregoing transcript entitled Verbatim Report of Proceedings, July 24th, 2020, was taken by me stenographically and reduced to the foregoing, and that the same is true and correct as transcribed.

DATED at Tacoma this 24th day of August 2020.

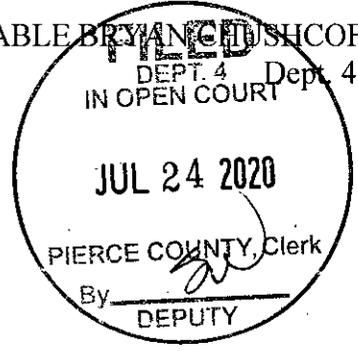
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KATRINA A. SMITH  
2390

# EXHIBIT E

0002  
3244  
7/28/2020



THE HONORABLE BRYAN C. SHCOFF  
DEPT. 4 Dept. 4  
IN OPEN COURT



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

MITCHELL SHOOK,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant

No. 19-2-07135-0

~~PROPOSED~~

ORDER ~~GRANTING~~ DENYING  
DEFENDANT CITY OF  
TACOMA'S MOTION FOR  
SUMMARY JUDGMENT ON  
GROUNDS OF RES JUDICATA

THOMAS MCCARTHY and CHRISTOPHER  
T. ANDERSON,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant

THIS MATTER having come on regularly before this Court on Defendant City of Tacoma's Motion for Summary Judgment on Grounds of Res Judicata, the parties appearing by and through counsel or self-represented, the Court having reviewed the pleadings and files in this matter, specifically the following:

~~ORDER GRANTING~~ **DENYING**  
DEFENDANT CITY OF  
TACOMA'S MOTION FOR SUMMARY  
JUDGMENT ON GROUNDS OF RES  
JUDICATA (19-2-07135-0)- 1

**CHRISTIE LAW GROUP, PLLC**  
2100 WESTLAKE AVENUE N., SUITE 206  
SEATTLE, WA 98109  
206-957-9669

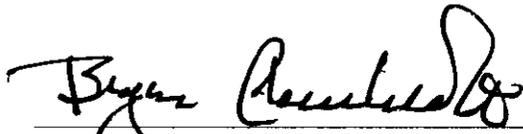
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- 1 1. Defendant City of Tacoma's Motion for Summary Judgment on Grounds of Res  
Judicata;
- 2
- 3 2. Declaration of Robert L. Christie in Support of Defendants' Motion for Summary  
Judgment with Exhibits A-B;
- 4
- 5 3. Plaintiffs McCarthy and Anderson's Response to Defendant's Motion for Summary  
Judgment;
- 6
- 7 4. Plaintiffs McCarthy and Anderson's Declaration to Defendant's Motion for Summary  
Judgment;
- 8
- 9 5. Defendant City of Tacoma's Reply in Support of Motion for Summary Judgment.

8 having heard the argument of parties; and being otherwise fully advised in this matter;

9 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant City of  
 10 Tacoma's Motion for Summary Judgment on Grounds of Res Judicata is ~~GRANTED~~ **DENIED WITHOUT PREJUDICE**. Plaintiffs'  
 11 ~~claims against Defendant City of Tacoma are hereby dismissed in their entirety with prejudice.~~

12 DONE IN OPEN COURT/CHAMBERS this 24 day of July, 2020.

13  
 14   
 15 HONORABLE BRYAN CHUSHCOFF  
 PIERCE COUNTY SUPERIOR COURT JUDGE

17 Presented by:  
 18 CHRISTIE LAW GROUP, PLLC  
 19 By: /s/Robert L. Christie  
 20 ROBERT L. CHRISTIE, WSBA #10895  
 ZACHARY B. PARKER, WSBA #53373  
 21 Attorneys for Defendant City of Tacoma

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**FILED**  
 DEPT. 4  
 IN OPEN COURT  
 JUL 24 2020  
 PIERCE COUNTY, Clerk  
 By   
 DEPUTY

ORDER GRANTING DEFENDANT CITY OF TACOMA'S MOTION FOR SUMMARY JUDGMENT ON GROUNDS OF RES JUDICATA (19-2-07135-0)- 2

CHRISTIE LAW GROUP, PLLC  
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1  
2 WILLIAM C. FOSBRE, City Attorney

3 By: /s/Christopher D. Bacha  
4 CHRIS BACHA, WSBA #16714  
5 M. JOSEPH SLOAN, WSBA #13206  
6 Attorneys for Defendant City of Tacoma  
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ORDER GRANTING DEFENDANT CITY OF  
TACOMA'S MOTION FOR SUMMARY  
JUDGMENT ON GROUNDS OF RES  
JUDICATA (19-2-07135-0)- 3

**CHRISTIE LAW GROUP, PLLC**  
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SEATTLE, WA 98109  
206-957-9669

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7/28/2020

July 29 2022 2:27 PM

THE HONORABLE BRYAN CHUSHCOFF  
COUNTY CLERK  
NO. 19-2-07135-0

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

THOMAS MCCARTHY and CHRISTOPHER  
ANDERSON,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

NO. 19-2-07135-0

DECLARATION OF TENZIN  
GYALSTEN

TENZIN GYALSTEN declares and states as follows:

1. I am over the age of eighteen years and am a citizen of the United States. I have personal knowledge of the facts herein and am competent to testify to them.

2. I am the Utility Technology Services Manager for Tacoma Power Utilities (TPU). In July 2019 I held the position of Power Section Manager and General Manager for Click! Network, a position I held for 9 years.

3. Attached as **Exhibit A** is a true and correct copy of a memorandum authored by Joe

DECLARATION OF TENZIN GYALTSSEN - 1

**CHRISTIE LAW GROUP, PLLC**  
2100 WESTLAKE AVENUE N., SUITE 206  
SEATTLE, WA 98109  
206-957-9669

1 Tellez, Chief Technology Officer & Advanced Meter Program Advisor to Chris Robinson, Power  
2 Superintendent/COO for Tacoma Power on July 9, 2019 requesting approval to formally terminate  
3 the Gateway pilot metering program. I received a copy of this memorandum. The “DRAFT”  
4 watermark was on the document when sent out, but it was treated as a final document for purposes of  
5 acting on the request. That request was granted and on August 31, 2019 that program was formally  
6 ended. No TPU customer is using the Gateway meters.

7 4. Attached as **Exhibit B** is a true and correct copy of a memorandum that I authored to  
8 Chris Robinson on July 18, 2019 requesting approval to remove the then approximately 300  
9 commercial/industrial meters read utilizing the Stark software from the Click! HFC network. Again,  
10 a “DRAFT” watermark was placed on the memo, but it was treated as a final document for purposes  
11 of acting on the request. That request was also granted. All commercial/industrial meters were  
12 removed from the Click! Network.

13 5. There is no TPU customer who is relying on any part of the Click! HFC Network for  
14 any of their TPU utility service. These aforementioned metering services were not sold or transferred  
15 when Click! network was leased to Rainer Connect.

16 I declare under penalty of perjury under the laws of the state of Washington that the foregoing  
17 is true and correct.

18 SIGNED in Tacoma, Washington this 3rd day of August, 2020.

19  
20 By: Tenzin Gyaltzen  
21 Tenzin Gyaltzen  
22

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 29, 2022, I electronically filed the foregoing with the Clerk of  
3 the Court using the LINX system. I also hereby certify that I have mailed by US Postal Service  
4 the document to the following non-LINX participants:

4 Thomas McCarthy  
5 801 S. Cushman Avenue  
6 Tacoma, WA 98405  
7 Email: Tmccarthy253@gmail.com;  
8 *Plaintiff Pro Se*

7 James P. Grifo, WSBA #45192  
8 The Law Office of James P. Grifo, LLC,  
9 164 Dougherty Lane, Friday Harbor, WA 98250,  
10 Email: jpg@grifolaw.com;  
11 *Attorney for Plaintiff Christopher T. Anderson*

12 CHRISTIE LAW GROUP, PLLC

13 By: /s/Robert L. Christie  
14 ROBERT L. CHRISTIE, WSBA #10895  
15 STUART A. CASSEL, WSBA #49808  
16 Attorneys for Defendant City of Tacoma  
17 2100 Westlake Avenue N., Suite 206  
18 Seattle, WA 98109  
19 Telephone: (206) 957-9669  
20 Facsimile: (206) 352-7875  
21 Email: [bob@christielawgroup.com](mailto:bob@christielawgroup.com)  
22 [stu@christielawgroup.com](mailto:stu@christielawgroup.com)

# EXHIBIT A



3628 South 35<sup>th</sup> Street

Tacoma, Washington 98409-3192

TACOMA PUBLIC UTILITIES

DATE: July 9, 2019  
TO: Chris Robinson - Power Superintendent / COO  
FROM: Joe Tellez – Chief Technology Officer & Advanced Meter Program Advisor  
CC: Steven Hatcher – Customer Services Manager  
Joseph Wilson – Transmission & Distribution Section Manager  
Tenzin Gyaltzen – Utility Technology Services Section Manager  
Andre Pedefferri – Advanced Meter Program Manager  
SUBJECT: Termination of the Gateway Metering Pilot in Preparation for Advanced Meter Deployment

In preparation for the deployment of advanced meters per TPU's Advanced Meter Program and to alleviate on-going risks presented by Gateway technology obsolescence, I am requesting approval to formally terminate the Gateway metering pilot effective August 31, 2019. The following is an explanation and justification of the business drivers behind this request and proposed timeline for terminating the Gateway pilot.

**Ending the Gateway metering pilot will allow for implementation of an efficient bulk conversion process and stop the future expenditure of higher than normal operating costs associated with responding to Gateway metering failures. No supplier on the market today is available to cost effectively sustain Gateway meters.**

The current population of Gateway meters was initially manufactured beginning in 2003 and ending in 2007. From the beginning of deployment, the meters suffered from a number of technical problems within the meter resulting in communications failures (inability to communicate with the meter through the Click! HFC network), read failures (the controller in the meter is not able to read the meter), or remote disconnect (switching on/off) failures. Most of the communications failures result from the use of poor quality RF tuners within cable modem package manufactured within the meters. Communications errors were particularly high for early meter populations with failure rates of up to ten percent (10%) following initial installation. This resulted in several follow-on site visits by both metering and communications staff to troubleshoot problems which usually involved replacing the meter outright. Read failures, which began to appear approximately four years into the pilot program and have continued to grow, are usually caused by a failure in the circuitry that provides power to the display within the meter. The result of this failure is that the meter no longer functions to measure electrical consumption. Remote disconnect failures are most often caused by a failure of a capacitor within the switch circuitry which prevents the full operation of the switch. Switch failures can also result from problems within the cryptologic code used to encode switching commands sent to the meter.

Communications and read failures create problems for account billing due to missing consumption data. When consumption data is missing, it must be estimated which could erode confidence customers have about the accuracy of electric billing. To correct data issues, staff from multiple sections within the utility are required to troubleshoot problems resulting in higher operating costs in sustaining the remaining population of Gateway meters.

Communications and switch failures create problems where the electrical service cannot be restored or is left inappropriately energized (to either a delinquent account or to a vacated residence). Both cases result in higher operating costs resulting from unbilled delivery of power or the need to send utility crews to the residence to troubleshoot and/or replace the meter. Recent meter failure rates have averaged around one hundred (100) meters per month. Failures that occur at non pre-payment account customer residences are corrected by removing the Gateway pilot meter and installing a normal manually read meter. Because of the high failure rates and the impacts to metering, communications, and customer services resources required to respond to failures, along with the fact that alternative suppliers of coax wired smart meters are nonexistent; a coordinated effort has been made recently to convert remaining Gateway pilot meters to function as manually read meters within the utility's billing system. Currently the utility is converting approximately one hundred (100) meters per week utilizing a mostly manual process. A method is being developed to automate the conversion process to increase the rate of conversion.

**Ending the Gateway metering pilot removes the risk that a computing systems hardware failure could result in impacts to customers due to the inability to read meters or remotely connect services.**

The computing systems and software required to support reading meters are beyond end of life. The original server equipment installed to support reading the meters was installed in 2003, the majority of the system continues to run on this legacy hardware due to technical limitations in the custom developed meter reading software. Because of the age of the equipment and unavailability of warranted replacement equipment on the market, when hardware failures occur, Tacoma Power has to rely on alternative sourcing strategies to find replacement parts which are generally provided as previously used parts sold without warranty.

**Ending the Gateway metering pilot removes the risk that a cybersecurity incident within the metering systems could impact customers due to the inability to read meters or remotely connect service. This also removes a potential risk to other computing systems at the city of Tacoma.**

The Meter Control System (MCS) software which is used to send commands to the meters to acquire reads and operate the remote disconnect switch in the meter collar was developed internally within Tacoma Power. The highly customized code was written by a former employee utilizing a non-standard programming language and there are no current employees of Tacoma Power with any experience coding applications with this language. The code was written as a 32-bit Microsoft Windows application which utilizes several low level memory mapping techniques which have prevented the application from being successfully operated on modern operating systems and hardware. As a result, Tacoma Power has had to expend significant effort to maintain the operation of legacy software and operating systems with known cybersecurity vulnerabilities. Most of the cybersecurity vulnerabilities identified in these systems have been previously published in the public domain including documented exploitation code and tactics. This potentially presents a large cybersecurity risk not only to Gateway metering pilot systems, but to other systems at the City of Tacoma.

**Ending the Gateway metering pilot removes the risk that the host name resolution service could be utilized to potentially identify the actual physical address of Gateway metering endpoints or other proprietary customer information.**

In 2017, Click! employees made modifications to the configuration of the host name resolution service used to identify the network address of all endpoints on the network including all broadband customers and the Gateway metering devices. The configuration change was made to protect customer privacy when it was discovered that the prior hostname addressing scheme could allow the identification of the actual physical address of an endpoint device. The configuration change could not be applied to the Gateway metering endpoints since this methodology was central to how the Meter Control System software operated.

**Ending the Gateway metering pilot is considered a dependent task in preparation for the deployment of new advanced meters per the TPU Advanced Meter Program.**

Placing the remaining Gateway meter population on manual read routes directs critical staff time in UTS, T&D Meter Relay, and Customer Services from sustaining obsolete Gateway meters to critical deployment planning as part of the Advanced Meter Program. The program recognizes the need to continue to sustain the 180 or so customers on the existing pre-pay payment program and is committed to exploring methods to bridge the gap between the end of the Gateway meter pilot and the deployment of a new advanced meter for this specific customer population and will evaluate options / recommendations.

**Proposed Timeline.**

Over the course of the next three months beginning July 15, 2019, T&D Meter Relay and Customer Services will coordinate efforts to place the remaining Gateway meter population on a manual read route. Absent any unforeseen events, the Gateway pilot will terminate on August 31, 2019.

# EXHIBIT B



3628 South 35<sup>th</sup> Street  
Tacoma, Washington 98409-3192

TACOMA PUBLIC UTILITIES

DATE: July 18, 2019  
TO: Chris Robinson - Power Superintendent / COO  
FROM: Tenzin Gyaltzen – Utility Technology Services Section Manager  
CC: Joe Wilson – Transmission & Distribution Section Manager  
Daniel Drennan – Marketing & Development Manager  
SUBJECT: Removal of Commercial/Industrial Meters from Click! HFC Network

The Utility Technology Services section has the responsibility to identify and manage cybersecurity risks related to the use of utility specific technologies. To alleviate on-going risks presented by Commercial/Industrial (C&I) meters connected to the Click! HFC infrastructure, I am recommending that all C&I meters connected to the Click! HFC network have their installation updated to use a modern secure data channel. The following is an explanation and justification of the business drivers behind this request.

**Removing electric meters read by the Stark software from the Click! HFC network minimizes the risks that a cybersecurity incident could impact large commercial and industrial customers due to the inability to read meters or loss of metering data. This also removes a potential risk to other computing systems at the city of Tacoma.**

**Background:**

There are currently approximately three hundred (300) commercial/industrial meters read by the Stark software. Most of the Stark meters connected to the Click! HFC plant were initially installed between 2000 and 2004. The Stark meters include meters measuring energy/demand for major commercial and industrial customers as well as meters located within Tacoma Power substations used to measure load on individual distribution feeders. The Stark software includes the capability to communicate with meters by utilizing either standard TCP/IP Ethernet protocols or dial-up. Currently there are three transport methods being utilized to communicate with the existing meters: Verizon private cellular network (Ethernet), Click! HFC network (Ethernet), and dial-up.

**Risks:**

Click! HFC connected meters utilize a serial data connection to a serial to Ethernet adapter which is then connected to a DOCSIS 1.1 cable modem. There are known security vulnerabilities associated with both devices (the serial to Ethernet adapter and the cable modem) which if compromised could allow someone to interrupt or alter the collection of data from the meters. The serial to Ethernet adapters contain a vulnerability that allows attackers to retrieve the setup configuration of the devices including the Telnet password in plaintext by simply sending a malformed request on a specific port. A Metasploit module for manipulating this vulnerability has been available since 2012. The DOCSIS 1.1 standard used a weak 56-bit Data Encryption Standard within the Baseline Privacy Interface intended to allow cable service operators to refuse service to uncertified cable modems and unauthorized users. Successful attacks often occur when current Cable Modem Termination Systems are configured for backwards compatibility with early DOCSIS standards. Through cable modem cloning or hacking this could also create a threat to the system that reads the meters and the rest of the city of Tacoma network.

**Impacts**

Electrical rates and metering of services for large commercial and industrial customers is significantly more complicated than a typical residential service. The metering for these customers is designed to not only measure electrical consumption but also instantaneous and reactive demand. A significant portion of the costs billed to these customers results from charges based upon measured demand. Disruptions or loss of metering data can therefore result in significant financial impacts to both the utility and its large commercial and industrial customers which may not be easily recovered.

**Mitigation**

The level of effort required to mitigate these vulnerabilities will be specific to each installation and may require some coordination with the customer. To improve security and promote efficiency in managing both the technologies and related vendor contracts, it is recommended that Tacoma Power standardize the technology utilized to remotely read commercial/industrial meters to either the Verizon secure private cellular network or dial-up for locations where cellular signal is not available. This will also position Tacoma Power for the eventual replacement of these meters as part of the Advanced Metering project by identifying meters that can be replaced and added to the new wireless AM network from meters which will continue to require additional communications infrastructure at the premise.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

THOMAS MCCARTHY and CHRISTOPHER  
ANDERSON,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

NO. 19-2-07135-0

SUPPLEMENTAL DECLARATION  
OF TENZIN GYALSTEN

TENZIN GYALSTEN declares and states as follows:

1. I am over the age of eighteen years and am a citizen of the United States. I have personal knowledge of the facts herein and am competent to testify to them.

2. I am the Utility Technology Services Manager for Tacoma Power Utilities (TPU). In July 2019, I held the position of Power Section Manager and General Manager for Click! Network, a position I held for 9 years. I am familiar with and was directly involved in the negotiation of the agreements leading to the transfer of the Tacoma Power Commercial System (also referred to as the

SUPPLEMENTAL DECLARATION OF  
TENZIN GYALSTEN - 1

**CHRISTIE LAW GROUP, PLLC**  
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SEATTLE, WA 98109  
206-957-9669

1 Click! Network) to Rainier Connect North, LLC (Rainier Connect) and termination of the use of the  
2 Tacoma Power Commercial System to transmit data for Tacoma Power and Tacoma Water Gateway  
3 and Stark meters.

4 3. This declaration supplements my declaration dated August 3, 2020.

5 4. On March 31, 2020 the City of Tacoma and Rainier Connect fully executed the  
6 Indefeasible Right of Use (IRU) agreement for an initial 20 year term, granting Rainier Connect an  
7 indefeasible right of use of the Tacoma Power Commercial System together with certain rights to use  
8 the Hub Sites, assigned IP addresses, and the headend site, and conveying certain customer premises  
9 equipment. The term Tacoma Power Commercial System, often referred to as the “Click! HFC  
10 Network” or “Click! Network”, includes among other things, all Tacoma Power Commercial Coaxial  
11 cable and all Tacoma Power Commercial Fiber, as those terms are defined in the IRU agreement.

12 5. Effective at midnight on April 1, 2020, full operational control over the Tacoma  
13 Power Commercial System was transferred to Rainier Connect and Rainier Connect begin providing  
14 programming and internet access services to all (former) Click! Network residential and  
15 commercial/industrial customers as the service provider.

16 6. This is the third year of the initial term of the IRU agreement and Rainier Connect  
17 remains in operational control of the Tacoma Power Commercial System and is making progress in  
18 meeting the requirements of all terms and conditions of the IRU agreement.

19 7. Tacoma Public Utilities, prior to the transfer of operational control of the Tacoma  
20 Power Commercial System to Rainier Connect on April 1, 2020, ended its use of the Tacoma Power  
21 Commercial System for transmission of data collected from Gateway and Stark meters. This  
22 included, shutting down the Gateway meter server and reading Gateway meters manually, using a

SUPPLEMENTAL DECLARATION OF  
TENZIN GYALTSEN - 2

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SEATTLE, WA 98109  
206-957-9669

1 wireless network to transmit data from Stark meters, and reading Stark meters manually when a  
2 wireless connection could not be made to a Stark meter. This action was in line with the decision by  
3 Tacoma Public Utilities to implement an Advanced Meter Program and ended any business or  
4 operational need for use of the Tacoma Power Commercial System for the Tacoma Power and  
5 Tacoma Water Divisions of Tacoma Public Utilities. Until all meters are replaced with Sensus  
6 meters, Tacoma Power will continue to read the existing meters manually or use a wireless network  
7 to transmit data.

8 8. Under the Advanced Meter Program, all power and water meters will be replaced with  
9 a meter manufactured by Sensus. Sensus meters are capable of providing advanced remote meter  
10 reading services to customers and do not require use of the Tacoma Power Commercial System to  
11 transmit data. Many of the legacy Gateway and Stark meters have already been replaced with Sensus  
12 brand meters under the Advanced Meter program with the goal of replacing all meters with Sensus  
13 meters.

14 9. As of the April 1, 2020 date of transfer of operational control of the Tacoma Power  
15 Commercial System to Rainier Connect, no Tacoma Public Utilities customer is relying on any part  
16 of the Tacoma Power Commercial System for any Tacoma Public Utilities service and Rainier  
17 Connect is not providing or supporting any Tacoma Public Utilities services, other than as an ordinary  
18 commercial customer of services that it pays Rainier Connect to receive and that it previously paid  
19 Click! to receive.

20 I declare under penalty of perjury under the laws of the state of Washington that the foregoing  
21 is true and correct.

22 SIGNED in Tacoma, Washington this 29th day of July, 2022.

SUPPLEMENTAL DECLARATION OF  
TENZIN GYALTSEN - 3

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By: Tenzin Gyaltzen  
Tenzin Gyaltzen  
Utility Technology Services Manager  
Tacoma Public Utilities

SUPPLEMENTAL DECLARATION OF  
TENZIN GYALTSSEN - 4

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SEATTLE, WA 98109  
206-957-9669

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 29, 2022, I electronically filed the foregoing with the Clerk of  
3 the Court using the LINX system. I also hereby certify that I have mailed by US Postal Service  
4 the document to the following non-LINX participants:

4 Thomas McCarthy  
5 801 S. Cushman Avenue  
6 Tacoma, WA 98405  
7 Email: Tmccarthy253@gmail.com;  
8 *Plaintiff Pro Se*

7 James P. Grifo, WSBA #45192  
8 The Law Office of James P. Grifo, LLC,  
9 164 Dougherty Lane, Friday Harbor, WA 98250,  
10 Email: jpg@grifolaw.com;  
11 *Attorney for Plaintiff Christopher T. Anderson*

12 CHRISTIE LAW GROUP, PLLC

13 By: /s/Robert L. Christie  
14 ROBERT L. CHRISTIE, WSBA #10895  
15 STUART A. CASSEL, WSBA #49808  
16 Attorneys for Defendant City of Tacoma  
17 2100 Westlake Avenue N., Suite 206  
18 Seattle, WA 98109  
19 Telephone: (206) 957-9669  
20 Facsimile: (206) 352-7875  
21 Email: bob@christielawgroup.com  
22 stu@christielawgroup.com

SUPPLEMENTAL DECLARATION OF  
TENZIN GYALTSEN - 5

**CHRISTIE LAW GROUP, PLLC**  
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SEATTLE, WA 98109  
206-957-9669

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CONSTANCE R. WHITE  
COUNTY CLERK  
**NO: 19-2-07135-0**

The Honorable Judge Brian Chushcoff  
Hearing Date: August 26, 2022

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

MITCHELL SHOOK,

Plaintiff Pro Se,

**NO. 19-2-07135-0**

v.

**Plaintiffs McCarthy's**

CITY OF TACOMA,

Defendant.

**Motion For Summary Judgement**

THOMAS MCCARTHY; and  
CHRISTOPHER T. ANDERSON,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

**PLAINTIFFS MOTION FOR SUMMARY JUDGEMENT**

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**I. RELIEF REQUESTED**

COME NOW the Plaintiff TOM MCCARTHY (“McCarthy”) to move this Court, Pro Se, for the following relief:

1. That the court make a factual determination confirming of the actual status of Tacoma Public Utilities Click! Network (“Click!”) as a Telecommunication system, rather than as a “cable television” system. A factual determination of Click! Network’s technical designation and status will guide the Court in reaching a just decision. The factual question of whether Click! is a telecommunication system or cable television system is important, for if Click! is a telecommunication system then Click! is clearly a “utility” and the “public vote” protections of Tacoma City Charter and state law apply to the system’s disposal.<sup>1</sup> Plaintiff is willing to waive oral argument in this case, if the Defendant will stipulate to the fact that Click! is a “Telecommunications System.” This would clarify the issue of Click’s status as a telecommunication system vs. a cable television system.

2. To make a finding and legal determination on the issue of law, of whether the telecommunications system serves a public purpose and is a utility.<sup>2</sup>

3. To make a finding and legal determination on the issue of law, whether Tacoma City Council acted beyond its legal authority, and in violation of City Charter Section 4.6 and RCW 35.94.020, in approving the sale and lease of the TPU’s municipal telecommunications system to Rainier Connect absent the approving vote of the electorate.

4. Issue an order annulling Tacoma City Council’s *ultra-vires* divesture of the municipal

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<sup>1</sup> Telecommunications being named as a municipal utility provided with protection from sale, lease or disposal, by the public vote sine 1917 —under RRS 9512. Also, having first been regulated as a utility in Washington State by the Railroad Commission in 1907.

<sup>2</sup> The System, admittedly, was created to serve a “public purpose” as a municipal utility.

1 telecommunication system (the “System”) and declare the Asset Purchase Agreement (“APA”) and  
2 Indefeasible Right of Use (“IRU”) underlying the wrongful transfer of ownership and operational  
3 control of the System as *void ab initio* and thereby restoring the telecommunication system to the  
4 control of Tacoma Public Utilities, the Tacoma City Council and the citizens of Tacoma.

## 5 **II. STATEMENT OF FACTS**

6 In 1996 the Tacoma City Council (“Council”) passed Ordinance No. 25930, which  
7 established a telecommunication system as part of Tacoma Public Utilities (“TPU”). (Compl., ¶  
8 2.2). In doing so, the City determined it was “prudent and economical” to provide  
9 telecommunications services, including broadband Internet access and Ethernet transport  
10 services, to the municipal utilities residential and business customers. (First Decl. of M. Shook,  
11 filed 5/22/19 Ex. 1 [pg. 14/399], 2 [pg. 22/399]). The municipal telecommunication system was  
12 branded as “Click! Network” and was operated by TPU for 20 years —as one of four municipal  
13 utility services provided (water, rail, power and telecommunications). On April 1, 2020, the  
14 telecom System was sold to a private company, Rainier Connect, and changed hands  
15 (“Privatization”). All operational control of the System was vested in the private company and  
16 the System now continues to provide those same telecommunications services, to the same utility  
17 customers, today —only under exclusive private control, including rates changes.

18 TPU’s telecommunication system is a state-of-the-art, carrier-grade, hybrid fiber coaxial  
19 telecommunications network offering Gigabit speed Internet access, Fiber To The Home (“FTTH”),  
20 and cable modem services to the municipalities of Tacoma, University Place, Fircrest, Lakewood,  
21 and Fife, as well as part of unincorporated Pierce County. (Compl., ¶¶ 2.6, 2.9). The System  
22 consists of over 1,400 miles of fiber and cable plant constructed by TPU; the network covers  
23 approximately 66% of the homes in Tacoma Power’s service area. (First Decl. of M. Shook, filed  
24 5/22/19, File # 3311070, Ex. 10, pg. 109/399). Click! had more than 20,000 wholesale high-speed  
25 Internet service of customers and 100 wholesale broadband transport circuits. (*Id.*). Prior to the  
26 April 1, 2020 privatization of the System, Click’s rates were approved by the Public Utility Board  
 (“PUB”) and the City Council, and published under authority of Title 12 of the Tacoma Municipal

Code (“TMC”), which governs utilities. (See TMC Title 12).

Under the terms of the APA and IRU, Rainier Connect has been granted exclusive control over the telecommunications system for an initial term of 20 years, with two 10-year extensions. (Declaration of James P. Grifo, Part Three Correct, filed on 5/18/22, see Ex. B, 219/428).

Rainier Connect has been granted use of all the System’s assets necessary in providing broadband telecommunication services. These assets, referred to as “Related Assets,” include equipment used to create and operate the System and deliver services to customers, customer accounts, inventory of spare parts and equipment, prepaid items, and material contracts. (Id., ¶ See Original Exhibit A2 (at Pg 293/428). The Released Assets were sold to Rainier Connect through an asset purchase agreement (“APA”). (Id.). For an idea of how much equipment was “surplused” (yet remains in use today) see 5/18/22 Declaration of James P. Grifo, Part Three Ex. B, 297/428 —Hub Site Equipment)

Under the terms of the APA and IRU, Tacoma City Council and TPU Board PUB no longer have any control over establishing the System’s rates. All control has been vested in Rainier Connect, including all the electronic equipment, such as core routers, provisioning systems, DNS servers, DHCP servers, switches, gateways, hubs, nodes, IP addresses and many other plant assets. (Id.). The commercial and residential telecommunications services provided by the system are essential to those customers of the utility who rely on the System for remote learning, telecommuting and telemedicine. (Id., ¶¶ 8–15).

Plaintiff is a resident of the City of Tacoma and residential customer and ratepayer of Tacoma Power. McCarthy was a user of the Click Telecommunication System until Rainier Connect took control and raised his rates by 80% in September of 2020. (Declaration of Thomas McCarthy, filed 7/29/22, Ex. A.)

### **III. STATEMENT OF THE ISSUES**

The following issues are presented for resolution by the Court:

1. Issue of Fact: Whether Click! Network is a telecommunication system, protected under the law from sale or lease by the statutory requirement for a popular vote of the

1 Tacoma City electorate, or is it a cable television system —and therefor consequent  
2 lacking in such protection from privatization?

- 3 2. Issue of Law: Whether Tacoma City Council exceeded its legal authority by divesting  
4 of the City’s municipal telecommunication system without a vote of the people?

5 **IV. EVIDENCE RELIED UPON**

6 This motion is based on the declarations, pleadings and papers filed under this cause.

7 **V. LEGAL AUTHORITY AND ARGUMENT**

8 **A. Creation of the Telecommunication System by Tacoma Public Utilities Created a**  
9 **Municipal Utility.**

10 Tacoma Public Utilities telecommunication system was authorized by TPU Board  
11 Resolution 33668, as seen as Exhibit 1 in Mr. Shook’s May 22, 2019 Declaration in this case —  
12 on page 15/399. This Resolution 33668 shows the system would be built to “serve a public  
13 purpose” of providing broadband telecommunications to the municipal Utilities customers.<sup>3</sup> This  
14 is a function the System continues to serve —only now under the complete control of a private  
15 company. Rates and policies for the System are no longer established by the Council or the  
16 Board for the benefit of ratepayers.

17 **B. McCarthy Has a Clear Legal and Equitable Right Under the City Charter and State**  
18 **Law to Vote in a Municipal Election to Decide Whether the City Should Enter into**  
19 **the Proposed IRU and APA.**

20  
21 <sup>3</sup> The relevant Merriam-Webster definitions for “utility” are (1) “a public utility”, or (2) “a service (such  
22 as light, power, or water) provided by a public utility.” *“Utility” Definition*, MERRIAM-WEBSTER.COM,  
23 <https://www.merriam-webster.com/dictionary/utility> (last visited June 26, 2019). “Public utility” is further  
24 defined as “a business organization (such as an electric company) performing a public service and subject  
25 to special governmental regulation.” *Public Utility Definition*, MERRIAM-WEBSTER.COM,  
26 <https://www.merriam-webster.com/dictionary/public%20utility> (last visited June 26, 2019). “Public  
service” is further defined as “the business of supplying a commodity (such as electricity or gas) or  
service (such as transportation) to any or all members of a community.” *Public Service Definition*,  
MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/public%20service> (last visited  
June 26, 2019). Thus, read together, a utility is defined as a business organization performing the business  
of supplying a commodity or service to any or all members of a community and subject to special  
governmental regulation.

1 The fundamental basis of Plaintiffs’ lawsuit is that under both the City Charter and  
2 Chapter 35.94 RCW, Sale or Lease of Municipal Utilities, the City must hold a municipal  
3 election prior to consummating and vesting the System via an IRU and APA and the City did not  
4 hold such a municipal election. Section 4.6 of the City Charter provides as follows:

5 **Disposal of Utility Properties**

6 Section 4.6 – The City *shall never sell, lease, or dispose of any*  
7 *utility system, or parts thereof essential to continued effective*  
8 *utility service, unless and until such disposal is approved by a*  
9 *majority vote of the electors voting thereon at a municipal election*  
10 *in the manner provided in this charter and in the laws of this state.*

11 Charter § 4.6 (emphasis added). Thus, under the City Charter, if the proposed IRU and APA of  
12 Click! is a (1) *sale, lease, or disposal* of a (2) *utility system or essential part thereof*, Plaintiffs  
13 must prevail on the merits of their claims.

14 Similarly, under Chapter 35.94 RCW, a city may “*lease...or sell and convey any public*  
15 *utility works, plant, or system owned by it or any part thereof,*” but only following the specific  
16 procedure for doing so as provided in RCW 35.94.020, which requires “*submit[al] to the voters*  
17 *of the city for their approval or rejection at the next general election...and a majority of the*  
18 *voters voting thereon...approv[ing] it.*” RCW 35.94.010, 020 (emphasis added). Under state law,  
19 if the proposed IRU and asset sale of Click! is a (1) *lease or sale* of a (2) *utility system or any*  
20 *part thereof*, Plaintiffs must prevail on the merits of their claims.

21 The plain language of the City Charter and RCW 35.94.020, the City’s Municipal Code,  
22 applicable case law and attorney general’s opinions, and current and historic treatment of  
23 Click!’s telecommunication system by the City clearly show that the System is a utility system,  
24 or at least a part thereof, and the IRU and APA are a sale, lease, and/or disposal of a municipal  
25 utility. As a result, Plaintiffs have a clear legal and equitable right to the relief requested.

26 1. The Telecommunications System Is a Utility System Under the City Charter and  
Chapter 35.94 RCW.

Under the plain language of the City Charter and Chapter 35.94 RCW, Click! is a “utility  
system.” Tacoma Municipal Code Section 12.13 —Utilities lists Click! services, regulating the

1 rates of same; RCW 54.16.330, .340, provides for public utility districts to provide  
2 telecommunications services like Click! and contain provisions for petitions to challenge rates,  
3 terms, and conditions of same; RCW 80.01.110 authorizes utilities and transportation  
4 commission to oversee petitions challenging rates, terms, and conditions of wholesale  
5 telecommunications services. Thus, under the plain language of the City Charter, state law and  
6 RCW 35.94, Click! is a utility system.

7 2. City's Operation of a Telecommunications Business Under State Law Further  
8 Demonstrates the Telecommunication System is a Utility System.

9 Beyond plain meaning, courts may also interpret terms in a statute by looking to “other  
10 statutes dealing with the same subject matter.” Harmon v. Dept. of Social and Health Services,  
11 134 Wn.2d 523, 530, 951 P.2d 770 (1998); see also, Morpho Detection, Inc. v. State Dept. of  
12 Revenue, 194 Wn. App. 17, 27, 371 P.3d 101 (2016) (interrelated statutes that relate to the same  
13 subject matter must be “read together and harmonized, if possible”). Here, an examination of the  
14 treatment of telecommunications businesses like Click! under other provisions of state law  
15 further reinforces the conclusion that Click! is a utility system.

16 As an initial matter, Click! is a “telecommunications company” providing  
17 “telecommunications” services under Title 80 RCW, public utilities. Under RCW 80.04.010,  
18 telecommunications companies are defined as “every...city or town owning, operating or  
19 managing any facilities used to provide telecommunications for hire, sale, or resale to the general  
20 public.” RCW 80.04.010(28). Telecommunications, in turn, are defined as the “transmission of  
21 information by wire...optical cable, electromagnetic, or other similar means.” RCW  
22 80.04.010(27). Thus, any city or town that operates or manages any facilities used for  
23 transmission of information by wire, optical cable, or other similar means is a  
24 telecommunications company. RCW 80.04.010 (27), (28). This is exactly what Click!’s  
25 telecommunications system is: a facility for transmission of information by optical cable or  
26 similar means that is sold to TPU ratepayers. (See First Decl. of M. Shook, Ex. 10, 13

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

3 Click!’s status as a telecommunications company is significant because  
4 “[t]elecommunications businesses are public utilities and are regulated by the state to varying  
5 degrees.” Wash. AGO 2003 NO. 11 (Wash. A.G.) (emphasis added); see also Five Corners  
6 Family Farmers v. State, 173 Wn.2d 296, 308, 268 P.3d 892 (2011) (attorney general opinions  
7 “entitled to great weight”); RCW 80.36 (chapter regulating telecommunications laws, which is  
8 contained within Title 80 RCW, Public Utilities); RCW 80.01.110 (*utilities and transportation*  
9 *commission* hears petitions to review rates, terms, and conditions of telecommunications  
10 services); RCW 35.96.020 (defining “communication utility” for the purposes of that chapter as  
11 any “utility engaged in the business of affording telephonic, telegraphic, cable television or other  
12 communication service to the public”). Thus, related statutes which encompass Click! within the  
13 definition of a telecommunications business further confirm the Click! telecommunication  
14 System is a “public utility” under City Charter and Chapter 35.94 RCW.

15 3. The City Has Consistently Labelled and Treated Click! as a Utility System.

16 Finally, the City has consistently and continuously labelled and treated Click! as a utility  
17 system. As an initial matter, the City relied specifically upon its statutory authorization to  
18 provide utility services in the recitals to the very ordinance that created Click!. See First Decl. of  
19 M. Shook, 5/22/19, Ex. 2 [pg. 23/399] (reciting that “WHEREAS RCW 35A.11.020 authorizes  
20 the City operate and supply utility and municipal services”). Additionally, the City litigated and  
21 confirmed its authority to establish Click! as a “telecommunications system” prior to  
22 commencing construction of the network—explicitly relying on the City’s statutory authority as  
23 a first-class city to “operat[e] and supply[.]...*utilities*” under RCW 35A.11.020. (Fourth Decl. of  
24 M. Shook filed on 6/4/19, Ex. 58 [pg. 11/334], 60 [pg. 41/334], 61 ][pg. 70/334.) Moreover, City  
25 regulations regarding Click! are contained—to this day—within Title 12 TMC, which governs  
26

1 utilities within the City. Finally, the TPU website displayed Click! prominently under its  
2 services, directly next to its other municipal utilities —power, rail, and water.

3 4. Click! is a Part of a Utility System Under RCW 35.94.020.

4 The definition of “public utility” is found in the Laws of 1917, House Bill 337, or  
5 Remington RRS § 9512 -9514, (“§ 9512”) now Chapter 35.94 RCW, titled: “An Act  
6 authorizing cities and towns to lease or sell any municipally-owned” utilities.<sup>4</sup> Providentially,  
7 Legislators provided a list of “utilities” protected from privatization by the public vote. The  
8 long list included “telegraph and telephone lines and plants and any other . . . system similar or  
9 dissimilar in character.”

10 Section 1 of the 1917 Act provided:

11 It is and shall be lawful for any city or town in this state now or  
12 hereafter owning any water works, gas works, electric light and power  
13 plant, steam plant, street railway line, street railway plant, **telephone or**  
14 **telegraph plant and lines**, or any system embracing all or any one or  
15 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. . . (emphasis  
added)

16 In 1945, this long list of municipally-owned utilities was “rewritten for brevity” by the  
17 Code Committee.<sup>5</sup> This “abbreviation” removed “telephone or telegraph plant and lines,”  
18 along with the long list and the emphatic language, “any similar or dissimilar utility.”<sup>6</sup>

19 Even broader language was substituted, with “any public utility works, plant or system  
20 owned by it or any part thereof. . .” With this one abbreviation, the “Laws of 1917” entered the  
21 RCW under Chapter 80, see image below. That language remains unchanged today.

22 Defendant has substituted its judgment upon matters within the province of the City’s  
23 Freeholders and State Legislators, who long ago determined the right to dispose of Tacoma’s

24 \_\_\_\_\_  
25 <sup>4</sup> Passed by the Senate on March 6, 1917 and approved by the Governor March 15, 1917.

26 <sup>5</sup> Laws of 1942, Ch. 252, Sec. 1. “continuing Code Committee with full power of revision and  
codification of the laws.”

<sup>6</sup> Important to note, because “Telegraph and Telephone” later becomes “Telecommunication” and the  
Ordinance creating Click!, and 1996 and 1997 Superior Court cases approving it, created a  
“Telecommunication System.”

1 municipal utility assets rests in the electorate. There is no justification for Defendant’s attempt  
2 to circumvent laws placing an express limitation on City’s authority.

3 Citizens of Tacoma are not unique in reserving the right to vote on disposal of their  
4 municipal utility assets, *see Clark v. City of South Haven*, 8 Mich. App. 74 (1967), 153 N.W.2d  
5 669

6 [W]hen the voters of South Haven granted the privilege to generate power,  
7 they were not content to divest themselves of every managerial function  
8 normally associated with the operation of a business concern. By their city  
9 charter they have retained express power over the discontinuance of their  
public utility. The contract in question has the effect of violating section 13.5  
of the charter for the city of South Haven and is therefore void unless approved  
by the voters as required by the charter.”

10 Click! (“System”) was created and funded as a “utility.” The City’s detailed 1996 plan,  
11 for a municipally-owned advanced telecom system, was a revolutionary and controversial  
12 concept. Authority to establish and fund the utility was blessed by two Court Orders.<sup>7</sup> Click!  
13 was born, built, bought, and paid for as a utility system.<sup>8</sup>

14 For all the preceding reasons Click!, as a telecommunications system, is a utility system  
15 under the City Charter and Chapter 35.94 RCW, and thus a municipal election is required prior  
16 to sale, lease, or disposal of Click!. The procedural requirements to sell or lease of a utility  
17 system under RCW 35.94.020 also apply to the sale or lease of “*any part*” of a utility system.  
18 RCW 35.94.020 (emphasis added); see, also Charter § 4.6 (election requirement applies to sale,  
19 lease, or disposal of “essential part[s]” of utility system). Click! is at least “part” of the City’s  
20 electric utility, Tacoma Power, and therefore lease or sale of the same requires a municipal  
21 election.

22 <sup>7</sup> In *City of Tacoma v. Taxpayers and Ratepayers of Tacoma*, 96-2-09938-0. Superior Court issued two  
23 orders, one authorizing the System (1996 Order), the other authorizing utility bonds to fund it (1997  
24 Order). Taxpayers argued Click! was general government’s obligation, and a public vote was required to  
fund the System. City prevailed, arguing the System was a utility and must be funded by utility bonds.  
Relying on that decision, for 20 years, the City is now legally and equitably estopped from alleging  
otherwise.

25 <sup>8</sup> The enabling City of Tacoma Ordinance #25930, that created Click!, cited authority in RCW  
26 35.95.020. Also, the Ordinance, in Section 1.3, cited the “Utilities” section of the City Charter as  
authority for funding Click! as a “utility.” (specifically “Charter § 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”).

1 Property owned by a utility system is a “part” of a utility system. See Okeson and the  
2 example of art work loaned to by the Seattle City Light to Seattle City general government.

3 Bremerton Municipal League v. Bremer, 15 Wn.2d 231, 237–39, 130 P.2d 367 (1942),  
4 the Supreme Court found that two wharves in the harbor area were part of a utility system  
5 because they were a portion of the public docks. See *Bremer*, at 237, as *Bremer* states, “these  
6 sections of our statutes provide the only procedure by which the city can lawfully sell or lease  
7 municipal wharves.”

8 Chapter 35.94 RCW (RRS §§ 9512 at the time) was interpreted by the Washington  
9 Supreme Court in *Bremerton Municipal League v. Bremer*, 15 Wn.2d 231, 130 P.2d 367  
10 (1942). The court found that a public vote was mandatory in disposing of “*any kind of utility* in  
11 whose operations the public has an interest.” *Bremer*, at 237. The definition of utility under  
12 *Bremer* was even interpreted to include “wharves and docks.”

13 *Bremer* states, regarding “the provisions of Chapter 137, Laws of 1917, p. 573, Rem. Rev.  
14 Stat., §§ 9512-9514. We are of the opinion that these sections of our statutes provide the only  
15 procedure by which the city can lawfully sell or lease municipal wharves.” *Bremer*, 237.

16 Privatization of the municipal telecommunication system absent the required public vote  
17 violates the law and is substantively and procedurally *ultra vires*. As stated in by the *Bremer* court:

18 The appellants point out that the statute specifically names a long list of  
19 utilities, but does not specifically mention wharves and docks. But the  
20 statute also says, '*or any similar or dissimilar utility or system.*' This, we  
21 think includes any kind of utility in whose operations the public has an  
22 interest, that is to say, any public utility. (emphasis added)

23 *See Bremer*, 15 Wn.2d at 237

24 Telecommunications is a public utility under federal, state and local law.<sup>9</sup> Telecom has  
25 been a regulated public utility since 1909 in Washington.<sup>10</sup> Even longer than electric power.<sup>11</sup>

26 <sup>9</sup> In 47 U.S. Code Title 47, state at Chapter 80.36 RCW, local in Tacoma Municipal Code Title 16 B.

<sup>10</sup> Session Laws of 1909, Ch. 93. Sec. 3 Pg. 192, 196, (“authorize the commission to regulate telephone  
and telegraph companies and their rates and charges, to prevent discrimination and extortion by such  
companies; and to authorize the Railroad Commission of Washington to make all necessary rules.”).

<sup>11</sup> Electricity regulated by Laws of 1911, Ch. 117, Pg. 538.

1 Telecommunications (“Telecom”) companies are “utilities,” with authority rooted in  
2 Washington’s Constitution, Article XII, Section 19: Telegraph And Telephone Companies. “The  
3 right of eminent domain is hereby extended to all telegraph and telephone companies.”<sup>12</sup>

4 Telecommunications is defined as a “public utility” by name, in the statute itself, in the long  
5 list of protected utilities found in RRS § 9512, which is the unabbreviated (but still intact)  
6 version of RCW 35.94.020.<sup>13</sup> The Code Committee’s abbreviation of RRS § 9512, found in the  
7 Laws of 1951, which substituted the long list of utilities with the all-encompassing, “any public  
8 utility works, plant or system owned by it or any part thereof,” did *not* remove or change the  
9 definition of public utility. Telecommunications is still a utility and Click! is a  
10 telecommunications system.

11 RRS § 9512 was simply “rewritten for brevity,” there was no change in the law, as RCW  
12 1.04.020 confirms “The previously existing laws shall control.”<sup>14</sup> In *Arnott v. Spokane*, 6 Wash.  
13 442, (1893):

14 [W]here the mode of contracting is expressly provided by law, no other mode  
15 can be adopted which will bind the corporation. This principle results from the  
16 fact that municipal corporations derive all their powers from their charters.<sup>15</sup>

17 City is free to negotiate a sale/lease of Click!, but the statutory requirement for a public  
18 vote is inalienable. As *Arnott* says, the “mode of contracting,” is “expressly provided” — in  
19 Click!’s case that “mode” is found in RCW 35.94.

20 Click! is a municipal utility system and therefore disposal of the System requires a vote  
21 of the electorate per RCW 35.94.020.

#### 22 5. The IRU and APA are a Lease, Sale, and/or Disposal of Click!

23 <sup>12</sup> In 1985, the term “Telecommunications” widely replaced “telephone” and “telegraph” in Title 80  
24 RCW *See generally* Laws of 1985, Ch. 450, Sec. 13, Pgs. 1978 -1995.

25 <sup>13</sup> “If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative  
26 intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained  
consequences. *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

<sup>14</sup> Laws of 1951 (“rule of rule of construction, in case of any omissions or inconsistency between any of  
the revised code as so supplemented or modified and the laws existing immediately preceding this  
enactment, the previously existing laws shall control”).

<sup>15</sup> *Arnott v. City of Spokane*, 6 Wash. 442, (1893) citing 1 Dill. Mun. Corp. (4th Ed.) 449, (373;).

1 Section 4.6 of the City Charter applies if the proposed IRU and APA are a “lease, sale, or  
2 disposal” of Click! Similarly, the procedural requirements of RCW 35.94.020 apply if the  
3 proposed IRU and APA are a “lease” or “sale” for purposes of that statute. None of these terms  
4 are defined under the City Charter or Chapter 35.94 RCW, so the Court must resort to a  
5 dictionary to determine their ordinary meanings. See North Pacific Ins. Co. v. Christensen, 143  
6 Wn.2d 43, 48, 17 P.3d 596 (2001) (internal quotations omitted).

7 A “lease” is broadly defined as “a contract by which one conveys real estate, equipment,  
8 or facilities for a specified term and for a specified rent.” *Lease Definition*, MERRIAM-  
9 WEBSTER.COM, <https://www.merriam-webster.com/dictionary/lease> (last visited June 12, 2019).  
10 This is precisely what the IRU and APA have done —vested ownership and control over the  
11 telecommunications facilities and operations in Rainier Connect and conveyed specific  
12 equipment and facilities to Rainier Connect for a specified period of time. See First Decl. of M.  
13 Shook 5/22/19, Ex. 5 (pg.54/399) & Ex. 17 (pg 148/399) (stating that Click!’s “Related Assets  
14 will be conveyed to Rainier Connect subject to the terms of the asset purchase agreement”).  
15 Tellingly, the proposed IRU also specifically uses the term lease to define its terms. See id.,  
16 (referring to the IRU fee as a “Direct Lease Fee” and conceding that “[t]he Tacoma Power Fiber  
17 on Critical Routes is collocated with the fiber optic strands that are used by Click! and are now  
18 planned to *lease to Rainier Connect under the IRU*”) (emphasis added). In sum, there is no  
19 question that the IRU and APA are a lease and sale or disposal, respectively, for purposes of the  
20 City Charter and RCW 35.94.010.

21 **C. The Public’s Strong Interest in Protecting its Right to Vote in a Municipal Election**  
22 **Heavily Weighs in Favor of Issuance of a Preliminary Injunction in this Case.**

23 The Tacoma voting public has a strong interest in enforcing its right to vote in a  
24 municipal election. As a general matter, the right to vote is a fundamental right. See Madison v.  
25 State, 161 Wn.2d 85, 98, 163 P.3d 757 (2007). Infringement of the Tacoma voting public’s right  
26 to vote on lease or disposal of utility systems is therefore both a uniquely public issue, in  
addition to an issue touching on fundamental rights. No identified equitable interests support the

1 City's decision to violate its own Charter by approving the IRU and APA asset sale for the  
2 municipal telecommunications system. As a result, the Court should consider the significant  
3 public interest in protecting municipally owned utility assets, by requiring a municipal election  
4 on the matter, and resolve this case in the plaintiff's favor.

5 Tacoma's electorate possess a clear right to approve the sale of their city's municipal  
6 telecommunication system. City Council can substitute their judgement for that of Tacoma's  
7 voters. Absent voter approval, Council's contract for disposal is *ultra vires*. No valid contract  
8 can be created. A municipality's action is void, if contrary to law.

9 As stated in *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 695 (1987):

10 Tacoma's municipal utility authority has limits. In exercising its  
11 proprietary power, Tacoma may not act beyond the purposes of the  
12 statutory grant of power, *State ex rel. PUD 1 v. Wylie*, 28 Wash.2d 113,  
13 182 P.2d 706 (1947), or contrary to express statutory or constitutional  
14 limitations. *Metropolitan Seattle v. Seattle*, 57 Wash.2d 446, 459-60,  
15 357 P.2d 863 (1960); 12 E. McQuillin, *supra* at § 35.35.52<sup>16</sup>

16 There is an absolute want of power on the part of the municipality to contract.<sup>17</sup> Without a  
17 legal title, no legal conveyance can begin to issue. To convey a legitimate title, Defendant must  
18 obtain voter approval. City Charter § 4.6 cannot be ignored.

19 A municipality does not have unbounded discretion to dispose of utility property without  
20 voter approval. Council has acted beyond its authority. A municipal election cannot be avoided  
21 in conveying the citizens' telecommunication system. *South Tacoma Way, LLC v. State*, 169  
22 Wn.2d 118, 123, 233 P.3d 871 (2010) (governmental acts without authority are *ultra vires*).

23 **D. The History of RCW 35.94.010 Conclusively Demonstrates that Telecommunications  
24 Services are Public Utilities under the Statute.**

25 The Court has indicated that the case *City of Issaquah v. Teleprompter Corp.*, 93 Wn.2d  
26 567, 574-75, 611 P.2d 741 (1980), compels a determination that TPU's telecommunication system

<sup>16</sup> *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 695, 743 P.2d 793 (1987).

<sup>17</sup> *State v. City of Pullman*, 23 Wash. 583, 63 P. 265, (1900).

1 is not a utility for purposes of Chapter 35.94 RCW. However, a review of the history and origin of  
2 RCW 35.94.010 compels the conclusion that the System is indeed a utility as contemplated by  
3 RCW 35.94.010.

- 4 1. RCW 35.94.010 was Recodified into the Revised Code of Washington in 1951 from  
5 Remington’s Revised Statutes § 9512 as Part of the Process of Converting the  
6 Previously Existing Laws of the State of Washington into a Single, Revised,  
7 Consolidated, and Codified Form.

8 In 1917, The Washington Legislature enacted House Bill 337, entitled “Sale or Lease of  
9 Public Utilities Owned by Cities or Towns” (“1917 Law”). (Zandell Decl. 7-29-19, Ex. A.) The  
10 1917 Law was codified in Remington’s Revised Statutes (“RRS”) at §§ 9512–14. RRS §§ 9512,  
11 9513, and 9514 are the predecessors to the modern-day RCW 35.94.010, .020, and .030.<sup>18</sup> (Id.) RRS  
12 § 9512 provided, in relevant part:

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

21 RRS § 9512; see 7-29-19 Decl. of T. Zandell, Ex. A. Thus, the text of RRS § 9512 was similar to  
22 the current day RCW 35.94.010, but even broader in that it contained a nonexclusive illustrative list  
23 of utilities, which included “telephone [and] telegraph plant[s] and lines” and even “any similar or  
24 dissimilar utility or system.” Id.

25 In the mid-1940’s, the Washington Legislature established and tasked the State Revision and  
26 Recompilation Committee (“Code Committee”) with proposing and submitting to the Legislature  
changes, revisions, and recodifications of the existing laws of the State for the purpose of creating

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<sup>18</sup> RCW 35.94.040 and .050 were adopted in 1973 and 1986, respectively.

1 the Revised Code of Washington. (See 7-29-19 Zandell Decl., Ex. B. Pg. 8/18) As part of the Code  
2 Committee’s review and revision of the existing laws, in 1946 the Code Committee proposed that  
3 RRS § 9512 be codified at RCW 80.12.01, with the following rewritten language:

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

7 Proposed Revised Code of Washington, Volume 2, Title 46 to End (1946), at 80-47; Zandell 7-29-  
8 19 Decl., Ex. B. (pg8/18). The Proposed RCW 80.12.01 is identical to the current RCW  
9 35.94.010.<sup>19</sup> As clearly indicated in the applicable reviser’s notes, the Code Committee’s change  
10 was a “rewrite for brevity”, not a substantive change to the existing law. Reviser’s Notes for  
11 Volume 2, Revised Code of Washington (1946), at 80-7 (stating that RRS § 9512 was “*rewritten for*  
12 *brevity*”) (emphasis added); Zandell Decl. 7-29-19, Ex. C.

13           In 1951, the Legislature adopted the Code Committee’s proposed changes, revisions, and  
14 codifications of the existing laws of the State, and enacted for the first time the Revised Code of  
15 Washington. See RCW 1.04.010. RRS § 9512 was recodified as RCW 80.48.010, using the Code  
16 Committee’s proposed language for brevity. Subsequently, in 1965, RCW 80.48.010 was recodified  
17 without amendment to its current location at RCW 35.94.010. (Zandell 7-29-19 Decl., Ex. D.)

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

21  
22           2. The Recodification of RRS § 9512 into the RCW and Associated Revisions of the  
23 Provision were Solely for Brevity, and Explicitly Not Intended to Alter Its Meaning.

24           For two reasons, the history of current RCW 35.94.010, and specifically the text of the  
25 original RRS § 9512, are critical to correctly interpreting the term “public utility” as used in RCW  
26

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<sup>19</sup> Similarly, proposed RCW 80.12.02 is identical to the current RCW 35.94.020.

1 35.94.010. First, the modification of RRS § 9512 to its current form was done purely to rewrite the  
2 statutory language for brevity, not to change its meaning. Reviser’s Notes for Volume 2, Revised  
3 Code of Washington (1946), at 80-7 (stating that RRS § 9512 was “*rewritten for brevity*”)  
4 (emphasis added); Zandell 7-29-19 Decl., Ex. C. (pg. 11/18) Second, when the RCW was first  
5 adopted in 1951, the Legislature adopted RCW 1.04.020, which provides:

6 1.04.020. Code as evidence of the law--Rule of construction--Effect  
7 of amendment

8 The contents of the Revised Code of Washington...shall establish  
9 the laws of this state of a general and permanent nature in effect on  
10 January 1, 1951; *except, that nothing herein shall be construed as*  
11 *changing the meaning of any such laws and, as a rule of*  
12 *construction, in case of any omissions or any inconsistency between*  
*any of the provisions of the revised code as so supplemented or*  
*modified and the laws existing immediately preceding this*  
*enactment, the previously existing laws shall control.* (emphasis  
added)

13 RCW 1.04.020. Thus, the Legislature explicitly provided that the editorial revision and  
14 recodification of previously existing laws, such as RRS § 9512, into the RCW would not “chang[e]  
15 the meaning of any such laws.” RCW 1.04.020. Further, the Legislature explicitly provided that for  
16 purposes of statutory construction, any inconsistency between the formerly existing laws and the  
17 amended laws would be resolved *in favor of the previously existing laws*. *Id.* As a result, RCW  
18 35.94.010’s meaning explicitly did not change as a result of its editorial revisions and recodification  
19 from RRS § 9512, and this Court must analyze RRS § 9512 in order to determine the meaning of  
20 “public utility” under RCW 35.94.010.  
21

22  
23 3. The Inclusion of Telegraph and Telephone Services in RRS § 9512 Demonstrates that  
Telecommunications Services are Public Utilities Under RCW 35.94.010.

24 As fully explained above, the text of RRS § 9512, and particularly the illustrative examples  
25 of utilities that were included there, inform and control the meaning of RCW 35.94.010. Under the  
26 broad language of RRS § 9512, the municipal telecommunication system, and its provision of

1 Broadband Internet service, is clearly a “similar or dissimilar utility or system” to a “telephone or  
2 telegraph plant and lines.” RRS § 9512.

3 As an initial matter, Broadband Internet, telephone, and telegraph services are all  
4 telecommunications services that provide for two-way communication. See RCW 80.04.010(27)  
5 (defining telecommunications as the “transmission of information by wire...optical cable,  
6 electromagnetic, or other similar means.”). In many ways, Broadband Internet is just the modern-  
7 day telecommunications evolution of the telegraph and telephone systems that have existed in this  
8 country for more than a century. Thus, Broadband Internet service is certainly “similar or  
9 dissimilar” to telegraph and telephone services.  
10

11 Even more importantly, the System’s status as a public utility under RCW 35.94.010, as  
12 informed by RRS § 9512, is further confirmed by the Washington Supreme Court’s decision in  
13 Bremerton Municipal League v. Bremer, 15 Wn.2d 231, 130 P.2d 367 (1942). In Bremer, the  
14 Supreme Court was faced with the question of whether municipally-owned wharves were a public  
15 utility under RRS § 9512. Bremer, 15 Wn.2d at 237-39. Despite the fact that none of the illustrative  
16 examples of public utilities in RRS § 9512 are even related to ports, docks, or wharves, the Supreme  
17 Court still determined that wharves were public utilities under RRS § 9512. Specifically, the  
18 Supreme Court stated:  
19

20 The appellants point out that the statute specifically names a long list  
21 of utilities, but does not specifically mention wharves and docks. But  
22 the statute also says ‘or any similar or dissimilar utility or  
23 system.’ This, *we think includes any kind of utility in whose  
operations the public has an interest*, that is to say, any public utility.

24 Bremer, 15 Wn.2d at 237 (emphasis added). Click! easily meets the Bremer test for a public utility  
25 as the public certainly “has an interest” in the municipal telecommunications system’s operations.  
26 Moreover, in contrast to the wharves in Bremer, which were not related to any of the specific

1 examples in the illustrative statutory list, Tacoma Public Utilities’ provision of telecommunications  
2 service is directly related to the specifically enumerated examples of telegraph and telephone  
3 systems. Thus, if the Bremer court determined that wharves were public utilities under RRS § 9512,  
4 there is no question that Click! is also a public utility under RRS § 9512 and RCW 35.94.010.

5 As a result, under RCW 35.94.010, as informed by RRS § 9512 and Bremer, Click! is a  
6 utility, and this Court should reconsider its Order on that basis.

7 //

8 **E. *City of Issaquah v. Teleprompter Corp.* is Not Controlling Precedent on Whether Click!  
9 is a Public Utility Under RCW 35.94.**

10 As explained above, the history of current RCW 35.94.010, the text of RRS § 9512, and  
11 the Bremer decision collectively demonstrate that the telecommunications system is a public  
12 utility for purposes of RCW 35.94.010. Issaquah v. Teleprompter Corp., 93 Wn.2d 567, 611 P.2d  
13 741 (1980) has no bearing on a telecommunication system as a public utility for several reasons.

14 To begin with, the Issaquah decision specifically held that “cable television is not a  
15 public utility *as contemplated by RCW 35A.80 and 35.92.*” Issaquah, 93 Wn.2d at 574 (emphasis  
16 added). In so holding, the Issaquah court noted that the statutes at issue in the case—Chapters  
17 35A.80 and 35.92 RCW—do not “provide a clear definition” of public utility. Id. Thus, the  
18 Issaquah “public utility” analysis was predicated upon a lack of a definition or test within the  
19 relevant statutory scheme. See id. Here, unlike the statutes at issue in Issaquah, Chapter 35.94  
20 RCW, as informed by RRS § 9512, does contain an illustrative list and test for determining  
21 whether a system qualifies as a public utility. RCW 35.94.010; RRS § 9512. The reasoning  
22 contained in Issaquah is therefore inapposite because RCW 35.94.010 and RRS § 9512 provide  
23 *specific guidance* as to the appropriate meaning of “public utility.”  
24  
25  
26

1 Moreover, the Issaquah decision does not explicitly hold anything with regard to the  
2 meaning of “public utility” for the purposes of Chapter 35.94 RCW. Issaquah, 93 Wn.2d at 574  
3 (holding that “cable television is not a public utility *as contemplated by RCW 35A.80 and 35.92*”  
4 and never citing RCW 35.94 nor RRS § 9512) (emphasis added). While the Issaquah court did  
5 not interpret the meaning of “utility” with respect to RCW 35.94 and RRS § 9512, the Bremer  
6 Court certainly did. See Bremer, 15 Wn.2d at 237–39 (interpreting meaning of “public utility”  
7 under RRS §9512). Thus Bremer, not Issaquah, is the controlling Supreme Court precedent on  
8 the meaning of “public utility” for the purposes of Chapter 35.94 RCW, and, as explained above,  
9 Tacoma Public Utilities’ telecommunications system is a “public utility” under the Bremer test.  
10

11 Cable television only provides for one-way transmission of information, in contrast to  
12 telegraph, telephone, and telecommunications, each of which provide for two-way  
13 communication. Thus, cable television is not as “similar” to the listed utilities under RRS § 9512  
14 as is Broadband Internet service. The Issaquah decision does not dictate or inform whether  
15 telecommunications services are “similar or dissimilar” to the listed public utilities under RRS  
16 §9512.  
17

18 For all these reasons, the Issaquah decision does not operate to disqualify a municipal  
19 telecommunications System as a public utility under Chapter 35.94 RCW and RRS §9512.  
20

21 Conclusion: The City Has Acted in Absence or in Excess of its Jurisdiction.

22 The City has acted in a manner inconsistent with the requirements of both the City  
23 Charter and Chapter 35.94 RCW, by selling, leasing, and/or disposing of Click! without first  
24 holding a municipal election to approve the same.  
25  
26

1 Telecommunications is not a luxury. You cannot add a “rooftop antenna” and get it.<sup>20</sup> The  
2 flow of such “information” requires a “pipeline,” a fiber optic backbone, for transferring  
3 customer’s data.<sup>21</sup> Click! Network’s telecommunication system is the community’s ’ public  
4 data pipeline, or “information highway.” As a municipal telecommunication “utility,” the  
5 additional capacity and fibers, paid for by the municipal utility, are the equivalent of “lanes” on  
6 a public telecom highway.

7 Defendant’s characterization of the System as a cable television system, and complete  
8 disregard for telecommunications as a “utility,” returns us to an era of monopolization and  
9 privatization. This Court must over turn Council’s *ultra-vires* act. Allowing the disposal of a  
10 functional, municipally-owned, utility asset to be sold without a mandatory public vote sets a  
11 dangerous precedent. Could water, power or rail facilities be next?

12 In the City Charter, the people have reserved unto themselves the power of “ownership” and  
13 the electorate is solely vested with authority to provide final approval over privatization of this  
14 municipal telecommunications system. This Court must remind Defendant that City Council’s  
15 role is simply that of a trustee in managing the disposal of the peoples’ municipal utilities.

16 City Charter § 4.6 requires an approving vote of the electorate. This public vote is the only  
17 procedure by which the City can lawfully sell the citizens’ functional municipal utility property.  
18  
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26 <sup>20</sup> *City of Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 574–75, 611 P.2d 741 (1980), “It’s  
something you can do with a rooftop antenna. In that sense, it’s not a utility.”

<sup>21</sup> 5G networks of the future, for example, require an underlying fiber network, like Click!, to function.

AFFIDAVIT OF SERVICE

1  
2 I declare under penalty of perjury of the laws of the State of Washington that on July 29, 22 I  
3 served true and correct copies of:

4 1). Motion For Summary Judgement.

5 2). Declaration of Tom McCarthy

6 These documents were delivered via the Court's e-serve system and additionally thru Email  
7 to the Attorneys for the Defendant's Council, Robert Christie.  
8

9 Dated this 29 day of July 2022

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11 Tom McCarthy, Plaintiff  
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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE**

MITCHELL SHOOK,

Plaintiff,

v.

CITY OF TACOMA,

Defendant.

NO. 19-2-11760-1

DECLARATION OF  
THOMAS MCCARTHY

I, Thomas McCarthy, declare as follows: I am a resident of Tacoma, ratepayer of Tacoma Public Utilities, taxpayer to City of Tacoma, and customer of Click!, the municipal broadband telecommunications system operated by Tacoma Public Utilities. I am over the age of eighteen, competent to testify in this matter, am endowed with the capacity of reason, am unschooled in legal sophistries and make this declaration on my own personal knowledge.

1 That as I have been an advocate for Click Network! and maintaining its public control for the  
2 benefit for Tacoma citizens in maintaining it as a public utility to increase competition and better  
3 service, in addition to creating an economic advantage for our economy as has been the case for  
4 Chattanooga, TN.  
5

6 1. I affirm that I maintained service with Click until my provider was forced from serving  
7 Click! Customers, and once my year's subscription expires, and Rainier Connect raised  
8 my rates from 80% for the same level of service (from \$300/year to \$45/month), at which  
9 time, I was forced to seek service with Centurylink at \$50/month, but with higher gigabyte  
10 speed service. (See Exhibit A) Neither Rainier Connect nor Centurylink provided  
11 anywhere near the level of customer service that my initial provider did prior to the  
12 Tacoma City Council illegally privatizing Click! to Rainier Connect. Customer service is  
13 much poorer, involving failure to even reach tech support after hours of waiting and effort.  
14

15 2. I also affirm that having reliable internet service has been critical during the coronavirus for  
16 my wife, a managing social worker at the Veterans Administration, who worked online at  
17 home full time, and to my business, which often requires me to work from home online.  
18 Furthermore, since all schooling was forced online and at home during the pandemic,  
19 telecommunications was critical for their education. And during the pandemic, my only  
20 option in participating in several court hearings was to do so via Zoom via internet. If  
21 there was any iota of doubt or unclarity that access to internet via telecommunications  
22 systems constituted a utility, that question has been erased. There can be no doubt  
23 whatsoever that there is a clear public interest in telecommunications as articulated by the  
24 Washington State Supreme Court in Bremerton Municipal League v. Bremer (1942), a  
25 case of controlling precedence that has never been over rule and binds lower courts, as law  
26

1 enacted in the 1917 Act it ruled under remain fully in force.

2 3. I affirm, as a student of history, the understanding that in that period over one hundred years  
3 ago when public municipalities were nascent the motive of this law was to create a  
4 firewall against privatizing utilities which were owned by the citizens' polity, held in the  
5 public interest, which would otherwise be liable to privatization of public assets by  
6 corruptible elected officials in favor of their benefactors, private for-profit interests. Then,  
7 as now, private for-profit corporations do not want to compete with the public sector in  
8 providing utility services. Whether private power companies, or private  
9 telecommunications firms, eliminating public utilities from essential services guarantees  
10 large profits with little to no competition. Eliminating Click! as a public utility certainly  
11 met the policy goals of companies like Comcast, Centurylink, and even a bit player like  
12 Rainier Connect buying out or eliminating its two rivals within Click.  
13  
14

15 4. I affirm that the mayor of the City of Tacoma, who benefitted from over \$100,000 in  
16 political donations by Rainier Connect via direct and indirect means in her first run for  
17 mayor, immediately after election declared that people are tired at dealing with Click!, and  
18 moved quickly to privatize Tacoma's publicly owned telecommunications system...which  
19 was awarded to Rainier Connect for a tiny fraction of the \$200 million investment by the  
20 citizens of Tacoma for a paltry lease amount of \$2.5 million/year. The bidding process  
21 was transparently fixed towards its intended recipient, Rainier Connect. And elected  
22 officials  
23

24 5. Attached hereby as Exhibit C is a true and correct copy of the brief of Mitchell Shook,  
25 from his request for accelerated review of Pierce County Case NO. 19-2-11506-3. I  
26 offer this exhibit, since I recognize the Court considers that cable tv may possess some

1 similarity to two-way communications, as the subscriber must select the programing to  
2 be viewed. However, federal, state and local statues differentiate the technologies and  
3 make it crystal clear that cable tv is NOT two way communications. I Mr. Shook's brief  
4 goes into great detail in distinguishing the issue of two-way communication as it relates  
5 to cable television.  
6

7  
8  
9 I declare under the penalty of perjury under the laws of the State of Washington that the  
10 foregoing in true and correct.

11 DATED this 29<sup>st</sup> day of July, 2022, at Tacoma, Washington.  
12  
13

14  
15 \_\_\_\_\_  
16 Thomas McCarthy  
17  
18

19 1. Attached hereto as **Exhibit A** and incorporated herein by this reference is a true and  
20 correct copy of a screen shot of a Facebook post I authored as visited on 7/29/22.  
21  
22  
23  
24  
25  
26

# EXHIBIT A



Click! Network Fan Club



Tom McCarthy

September 2, 2020 · 🌐



For those that can get Centurylink at Gigabit speed, there is a deal right now. While Rainier Connect must honor my pre-paid service deal with Advanced Stream, when that ends they will jack my rates to \$45 a month. With kid's school online, I am seeing a better deal. Anyone else pledge to switch?

# Fiber Gigabit

No contract. No bundling.

# \$50/mo

**Online only:**

Free modem. Free installation.

Speed may not be available in your area. Maximum download/upload speeds of up to 640 Mbps via a wired connection. Prepay required.

For more info, visit [www.centurylink.com](http://www.centurylink.com)



CenturyLink®

# EXHIBIT B

1 2. Attached hereto as **Exhibit B** and incorporated herein by this reference is a true and  
2 correct screen shot of an article by the South Sound Business periodical referencing Conor  
3 McCarthy leaving his position as a member of the Tacoma City Council to take up the position as  
4 lobbyist for Comcast, a private, for-profit competitor of Click! Network.  
5

6 **SOUTH SOUND BUSINESS** | News | Profiles | Lifestyle | Opinion | Events | Store | Advertise | Subscribe | In P

7 **Tacoma Councilman McCarthy Resigning to Join**  
8 **Comcast**

9 John Stearns Jun 10, 2022

10 f t e p u b in

11 Tacoma City Councilman Conor McCarthy is resigning  
12 from his at-large seat after almost seven years to become  
13 the new director of government and regulatory affairs for  
14 Comcast in Washington state.

15 He will step down from the Council June 22 and start at  
16 Comcast a week later.

17 "I am excited for this opportunity, but leaving the Council is  
18 a tough decision for me, and not one I take lightly,"  
19 McCarthy said in a statement, adding he was proud and  
20 grateful for what Tacomans have accomplished together.

21 With more than 17 years of experience as a lawyer, real estate manager, and councilman,  
22 McCarthy will develop and implement the strategy for government affairs and public policy  
23 issues, and foster relationships on Comcast's behalf with elected officials, business leaders,  
24 and community influencers, Comcast said in a news release.

25   
26 Conor McCarthy  
Courtesy of Comcast



**TRENDING**

- 1 Duke's Seafood Way Sold
- 2 New 'Do Not El Effect

3. Attached hereto as **Exhibit C** and incorporated herein as a true and accurate

# EXHIBIT C

BEFORE THE SUPREME COURT OF THE STATE OF  
WASHINGTON

---

DARREL BOWMAN,

Appellant,

v.

CITY OF TACOMA,

Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY  
NO. 19-2-11506-3 (consolidated with 19-2-11760-1)

The Honorable Shelly K. Speir

---

PETITIONER SHOOK'S RESPONSE IN SUPPORT OF PETITIONER  
BOWMAN'S MOTION FOR ACCELERATED REVIEW

---

MITCHELL SHOOK  
PLAINTIFF PRO SE  
3624 6<sup>th</sup> Ave  
Tacoma, Washington 98406  
253-627-8000

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## I. INTRODUCTION

Darrel Bowman and Mitchell Shook (“Appellants”) appeal the February 28, 2020 decision of the Pierce County Superior Court denying Appellants’ Motion for Partial Summary Judgment, granting Respondent City of Tacoma’s (“City” or “Respondent”) Motion for Summary Judgment, and dismissing Appellants’ claims in their entirety. This response is provided to join in and support Mr. Bowman’s Motion for Accelerated Review.

This lawsuit is about the separation, disposal and “privatization” of the City of Tacoma’s municipal telecommunications utility, Click! Network (“Click!”), without voter approval, as explicitly required under state law, Chapter 35.94.020, and under Tacoma’s City Charter § 4.6.

Municipal telecommunications utilities are protected from such disposal by Chapter 35.94 RCW, or the Laws of 1917, House Bill 337, Remington RRS § 9512 -9514, (“§ 9512”): “An Act authorizing cities and towns to lease or sell any municipally-owned” utilities. In 1917 Legislators provided a long list of utilities protected from privatization by the public vote. “Telegraph and telephone lines” and any other . . . system “similar or dissimilar” were among the utilities protected. *See App. Pg. 40.*

In 1945 this list of utilities was “rewritten for brevity” by the Code Committee, providing the statutes current language of “any public utility works, plant or system owned by it or any part thereof. ..” This abbreviated version of the “Laws of 1917” was codified into RCW 80.48 in 1951. That language remains unchanged today.<sup>1</sup> *See App. Pg. 68.*

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<sup>1</sup> A savings clause was added at RCW 1.04.020 to ensuring the laws were unchanged by the code revisor’s abbreviation.

For a detailed explanation of RRS § 9512 -9514 evolution into Chapter 35.94 RCW, please *see* App. Pgs.28-30 , Shook’s MSJ. Also, *see* App. Pgs. 66 – 68 Shook’s Reply in the MSJ.

Click! (the “System”) is a state-of-the-art advanced telecommunication system and enterprise, owned and operated by Tacoma Public Utilities (“TPU”), supporting the community’s needs for data transport and broadband services. It serves over 35,000 active TPU utility customer accounts.

TPU provides four distinct public services; water, power, rail and telecommunications under four brand names: Tacoma Water, Tacoma Power, Tacoma Rail and Click! Network. TPU’s website prominently displays Click! as one of “Our Services: Power, Water, Rail, Click!.”<sup>2</sup>

The Telecommunications System serves public institutions, such as Tacoma Public Libraries and Pierce County’s Sheriff, Planning and Public Works, Tax Assessor/Treasurer, Courts and Auditors Department. The System also supports over 1,000 commercial and institutional accounts, including hospitals and universities. The System has been in operation for over 20 years and revenues exceeded \$25 million in 2019.

Privatization of the System is a public issue involving a fundamental and urgent issue. Conveying an entire municipal telecommunications enterprise, along with exclusive possession and control of the underlying fiberoptic infrastructure, intellectual property, equipment and improvements, as a going

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<sup>2</sup> See App. Pg. 2 TPU “Our Services” .

concern, for a period of up to 40 years, is of broad public import and requires prompt and ultimate determination.<sup>3</sup>

The City of Tacoma's municipal telecommunications system was constructed at public expense, costing over \$200 million in public utility funds, and includes 1,500 miles of fiberoptic and coaxial cable, situated in underground conduits and attached overhead to 10,000 telephone poles. The System passes 120,000 of TPU's customers' homes and business locations. TPU's website describes Click!'s as, "one of the largest municipally owned telecommunications systems in the country." <sup>4</sup>

The separation, transfer and disposal of the municipal telecommunications system, without the mandatory vote of the people, is being accomplished via the Click! Business Transaction Agreement ("CBTA"), which Tacoma City Council approved in November of 2019. Conveyance and transfer of operational control is expected to occur on April 1, 2020. The System's essential employees are generally being reassigned to other jobs within the City and the Utility.

The CBTA conveys to the buyer, a private company, all proprietary operational control and total authority over setting rates for the municipal utility's wholesale telecommunications services. The System's rates are currently set by City Council, in accordance with the Tacoma's Municipal

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<sup>3</sup> RCW 43.330.530(3) "Broadband infrastructure" means networks of deployed telecommunications equipment and technologies necessary to provide high-speed internet access and other advanced telecommunications services to end users.

<sup>4</sup> RCW 43.330.530 (2) "Broadband" or "broadband service" means any service providing advanced telecommunications capability and internet access with transmission speeds that, at a minimum, provide twenty-five megabits per second download and three megabits per second upload.

Utility Code TMC Title 12. All public control and oversight of operations and rate setting for the System are separated under the terms of the CBTA.

Telecommunications is a utility. Chapter 35.94 RCW requires voter approval for disposal of a municipal utility works, plant, or system owned by it, or *any part thereof*, or any equipment or appurtenances. (emphasis added).<sup>5</sup>

Tacoma's City Charter 4.6 ("Charter") contains a similar directive, requiring approval by "a majority vote of the electors."

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.

Tacoma City Council ("Council") circumvented the voter approval required under City and State law, by declaring the entire Telecommunication System "surplus" under RCW 35.94.040. This surplus declaration is an ultra vires application of the City's surplus authority.<sup>6</sup>

Council flaunts Article I, Section I of the Washington Constitution, which provides: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed." Voters of Tacoma granted the City a privilege of operating the Department of Public Utilities;

---

<sup>5</sup> Railroads were the first regulated utility in Washington State, in 1905, under the Railroad Commission. Telecommunication was the second utility to be regulated, in 1909, also under the Railroad Commission See App. Pg. 20, Shook's MSJ.. As the modern extension of telegraph and telephone, Telecommunications has been regulated as a public utility since the Pacific Telegraph Act of 1860.

<sup>6</sup> See App. Pg. 30, Shook MSJ. "Legislative Intent of Surplus and Plain Language of Municipal Utility Surplus Clause."

but, they were not content to divest themselves of every managerial function normally associated with the operation of a business concern. By charter, the people retain express power over disposal of their proprietary interest in the community's municipal public utility property.

The people have reserved full power and exclusive authority to provide final approval over privatization of their telecommunications system. Council's role, essentially, is that of the people's trustee, limited to negotiating the CBTA agreement and then presenting the contract to voters for approval at the ballot—a mandatory step in the privatization process..

Chapter 35.94.040 RCW's statutory definition of surplus, as "not required for providing continued public utility service," was simply ignored—for Click! is being vested turnkey, as a going concern, and the System will continue providing the same proprietary telecommunications services, to the same utility customers, under the same brand, over the same infrastructure, only with a private company controlling rates and cashing customers' checks.

The utility System is not surplus. The System's assets and customers are simply "changing hands," lock, stock, barrel and brand. This state-of-the-art fiberoptic municipal utility system, delivering essential public utility telecommunications services, will continue providing the same services to the same loyal utility customers. Such a disposal does not reflect the Legislature's intent for "surplus." (*See App. Pg. 30, Shook's MSJ*)

In privatizing the community's pubic broadband system, essential assets are being separated. The "last mile infrastructure" is a single wire, a "data

pipeline,” to a customer’s home or business.<sup>7</sup> The “middle mile infrastructure,” of over 1,500 miles of fiber, cable, conduits, vaults, easements and equipment, is required for essential communication services.<sup>8 9</sup>

Recognizing the monopolistic nature of the industry, with huge fixed costs and barriers to entry, federal, state and local laws have fiercely protected consumers from anti-competitive consolidation of assets and ownership in the telecommunications industry for over 100 years.<sup>10</sup>

For over 20 years, the City has owned, operated and regulated Click! as a municipal-utility, establishing service levels, rates and even setting net neutrality policies. State laws and federal policies support and encourage such public, non-profit, “municipal” utility systems. Such utility systems now operate in Washington state, across the USA and around the world.<sup>11</sup>

For these reasons, Petitioner Shook respectfully requests that this Court grant Mr. Bowman’s request for accelerated disposition of this matter.

---

<sup>7</sup> RCW 43.330.530 (5) "Last mile infrastructure" means broadband infrastructure that serves as the final connection from a broadband service provider's network to the end-use customer's on-premises telecommunications equipment.

<sup>8</sup> RCW 43.330.530 (7) "Middle mile infrastructure" means broadband infrastructure that links a broadband service provider's core network infrastructure to last mile infrastructure.

<sup>9</sup> RCW 43.330.532 Findings: "The legislature finds that: (1) Access to broadband is critical to full participation in society and the modern economy"

<sup>10</sup> See 2015 Open Internet Order, 30 FCC Rcd at 5631, para. 81 n.134 (“data suggests that meaningful alternative broadband options may be largely unavailable to many Americans, further limiting the ability to switch providers. Based on the submissions from various commenters, it appears that between 65% and 70% of households have at most two options for high speed Internet access.”); see also 2010 Open Internet Order, 25 FCC Rcd at 17923, para. 32; Appendix C, Section II.A.1., Table 1 (showing that, nationwide, 97 percent of households have two or fewer providers of BIAS at download speeds of 25 Mbps).

<sup>11</sup> Tacoma Council even has its own bright-line (net neutrality) regulation.

Delay in resolution of this issue will indefinitely deprive affected constituents of their right to vote, result in the loss of institutional knowledge associated with Click! Network's terminated employees, and subject customers to suffer the potential monopolization of the public utility; In addition, pending lawsuits in state and federal courts contain virtually identical issues to this appeal, and accelerated review of this case will prevent inconsistent decisions at the trial court level and promote judicial efficiency.

For these reasons, Petitioner respectfully requests that this Court accelerate disposition of this matter.

## **II. IDENTITY OF THE PARTY**

This response is presented by one of the Appellants, Mitchell Shook.

## **III. STATEMENT OF RELIEF SOUGHT**

Appellant requests the Court grant Mr. Bowman's Motion to accelerate the disposition of this appeal pursuant to RAP 18.8 and 18.12.

## **IV. FACTS RELEVANT TO MOTION**

### **A. Establishment Of A Municipal Telecommunications System.**

In 1996, TPU commissioned a "Telecommunications Study."<sup>12</sup> The "study team" set out to determine if TPU might benefit from establishing "a modern telecommunications infrastructure." The study asked if the greater Tacoma area has the "telecommunications resources necessary for business that may want to locate in the area?" It even cited "telecommuting" and asked,

---

<sup>12</sup> For a detailed history, see App. Pg. 18-19, Shook's MSJ. "Creation of Municipal Utility's Telecommunication System and Service."

“How will the explosion in the Internet be handled?” The Study explained why the System would be built:<sup>13</sup>

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

In 1996 Council approved Ordinance 25930 establishing a “A SEPARATE SYSTEM.” Article II provided for: “Establishment Of The Telecommunications Project As A Separate System; And Adoption Of Plan And System”:<sup>14</sup>

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. (emphasis added).

“Exhibit A” of the Ordinance, included commercial broadband “Internet Access Service” and “high speed data” transport services.

In July of 1996, prior to funding construction of the System, the City sought declaratory judgement in Pierce County Superior Court to confirm

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<sup>13</sup> See App. Pg. 129 – 132, Shook MSJ.

<sup>14</sup> See App. Pg. 13 -15 for discussion of Ordinance 25930, also the Ordinance itself on App. Pgs, 83-106 see App. Pg. 106. “Ex A “Telecommunications Project.”

authority for TPU to establish a municipal telecommunication utility system, funded by TPU bonds, to provide commercial telecommunications services.

In the City's November 1996 Memorandum In Support of Summary Judgment, the City cited RCW 35.96.030 as authority for municipal funding of the communication utility.<sup>15</sup> The City also cited authority for commercial telecommunications services in RCW 80.36.300 (5), to "Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state."<sup>16</sup> The City's Memorandum also cited its statutory power to provide telecommunications utility services—as a first-class charter city with all powers not denied by law, "including operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns." RCW 35A.11.020.<sup>17</sup>

The City prevailed and two Orders were issued by Pierce County Superior Court confirming TPU's authority to fund and operate the telecommunications utility.

City Council approved TPU's final plan for establishing the System in Resolution No. 33668.<sup>18</sup>

Click! became operational in 1998. Shortly thereafter, in April of 2000, Tacoma's Mayor, Professor Baarsma, and Dr. Singleton, of University of Puget Sound, authored a learned paper reviewing the creations of Click! Network. Their scholarly study, attached as App. Pgs. 134 - 138, is entitled "Creating Capacity And Competition In Broadband Telecommunications: The City Of Tacoma's

---

<sup>15</sup> App. Pgs. 146-150. The 1996 Memorandum In Support of City Of Tacoma's MSJ,

<sup>16</sup> App Pg. 148

<sup>17</sup> App. Pg. 148.

<sup>18</sup> App. Pg. 108 -109 the 1997 Resolution 33668.

Initiative.” This paper will provide an understanding of what Click! Network is, and why the community created it as a public utility. *see* App. Pgs. 51 -52 for Appellant Shook’s citations from that study, as presented in a previous brief.

This study cites the community’s need for an advanced telecommunications system with broadband capability and why it was viewed as essential. The project brought benefits in revenue diversification and economic growth, which, in turn, increased revenue from additional sales of TPU’s other utilities, water and power.<sup>19</sup>

#### **B. Disposal of City’s Municipal Telecommunication System.**

In the process leading up to pending privatization of Click! Network, there has been no appraisal of the System’s market value. There has also been no audit of the System’s profitability as a commercial enterprise. There was never a Request for Proposal (“RFP”) or any bidding for the System’s “surplus” assets. The entire privatization process has occurred in backrooms, out of the public eye, with the terms for privatization, including the vast assets that would be vested, which include valuable IP addresses and all available dark fiber, being made known only to the private company, Rainier Connect.

Appellant Bowman’s Motion correctly identifies most of the elements that create urgency for accelerated review. However, one issue Bowman fails to cite is the potential monopolization of the System by the private acquirer.

Click! is currently operated as an “Open Access” system, with TPU providing standardized wholesale rates and “packages” to the competing Internet Service Providers (“ISPs”). The ISPs then compete by reselling those

---

<sup>19</sup> App. Pgs. 134 - 138, Dr. Baarsma’s Study of Click! creation.

broadband packages to retail customers over the System. Since authority over the System is being vested in one of these ISPs, the private buyer Rainier Connect, it will allow Rainier Connect to destroy its competitor, Advanced Stream. Advanced Stream is Rainier’s only remaining competitor on the System. Rainier Connect has already acquired the other two ISPs. This conveyance will potentially facilitate a monopolization of Tacoma’s public broadband services over the municipal telecommunications system.<sup>20</sup> While the CBTA requires Rainier Connect to continue operating the system under open access policies, the definition of open access is left to Rainier Connect’s interpretation of those terms. While the outcome is not clear, Rainier Connect may attempt monopolization of the system on April 1, 2020.<sup>21</sup>

### **C. Legal Issues and Procedural History**

Appellant Shook agrees with the Appellant Bowman’s presentation of the legal issues and procedural history.

## **V. GROUNDS FOR RELIEF AND ARGUMENT**

Appellant Shook supports Appellant Bowman’s motion and agrees that RAP 18.12 provides the Court authority to “set any review proceeding for accelerated disposition.” Appellant Bowman is especially correct to cite

---

<sup>20</sup> The ISP Advanced Stream is a company owned by Appellant Mr. Shook. Advanced Stream provides ISP services, including VoIP and Email service, to over 9,000 customers and has operated on the System for over 20 years.

<sup>21</sup> See App. Pg. 154, City of Tacoma “Notice” to Advanced Stream customers, also App. Pg. 152, Rainier Connect’s mailers to the same customers advertising “no waiting for the “Cable Guy”—which is possible since Advanced Stream’s customers are on the same System (no truck roll or visit from the Cable Guy is required. The Advanced Stream customers are being switched over to Rainier Connect with a simple phone call under this promotion. If Rainier Connect’s first act, in assuming operational control, is to destroy its only competitor and monopolize the System, this does not portend well for the future.

RAP 18.8(a), for this case is a time “when it is necessary for the court to act swiftly, particularly in matters relating to affairs of the state or local government, or when irreparable harm to a party would result from delay.” *See* 3 Wash. Prac., Rules Practice, RAP 18.12 (7th ed.).

Privatization of a municipal utility system, in violation of the public’s right to vote, is appropriately accelerated for prompt and expeditious review.

There can be no doubt that Click! is a telecommunications system. By definition of RCW 80.04.010 (27): A "Telecommunications Company" is “every city or town owning, operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the public”. *See* RCW 80.04.010 (28). As a municipal utility, the System is protected from privatization by the public vote requirements of RCW 35.94.020.

Justice delayed is justice denied. A review on standard appellate timelines will be harmful and: (1) deny the electorate their right to vote for an indefinite time and potentially render Appellant’s claims for injunctive relief moot; (2) create a risk of monopolization over the System by Rainier Connect; (3) result in loss of institutional knowledge in the operation of Click! from the termination and loss of the System’s municipal employees; (4) result in disclosure of confidential customer account information to a private party; (5) increase risk of inconsistent decisions and/or delay in similar ongoing lawsuits in state and federal court. For these reasons accelerated review should be granted. RAP 18.12.

**A. Accelerated Review is Necessary Because Transfer Operational Control Over the System Deprives the Electorate from Exercising Their Right to Vote for an Indefinite Time.**

Voters have a right to approve execution of conveyance of their public telecommunication utility system under RCW 35.94 and City Charter § 4.6. The City refuses to hold a municipal election, and intends to execute the CBTA imminently—on April 1, 2020. The City’s actions compel expedited review of Appellant’s claims.

Accelerated review is necessary to resolve the question of whether Respondent is depriving residents of the City their right to vote on the privatization of Click!. City’s actions will violate voters’ fundamental rights for an extended period of time. This is an important public policy question, with over 200,000 people living and reside in the City, Washington’s third largest, and tens of thousands of residents’ voting rights would be compromised by a delay of the right to vote during the appellate process.

Privatization will remove all rate control over wholesale broadband internet and telecommunications services. Such rates are now set by City Council under the City’s municipal utility code. Vesting such authority for setting rates solely in a private company would damage each interested voter in the City for the duration of appellate review.

Thus, consistent with other appeals regarding the public’s right to vote, accelerated review should be granted. *See In re February 14, 2017, Special Election on Moses Lake School District No. 161 Proposition 1, 2 Wn. App. 2d 689, 413 P.3d 577 (2018)* (accelerating review on whether constituents were denied opportunity to vote to approve a school district bond); *see also Global Neighborhood v. Respect Washington, 7 Wn. App.2d 354, 385, 434 P.3d 1024 (2019)*.

**B. Terminating Click! Employees Will Result in the Loss of Institutional Knowledge. Time is Of The Essence.**

If Appellant prevails, the CBTA will be void. Without accelerated review it becomes more difficult if for the City to recover previously terminated employees necessary for the operation of Click!. As a result, accelerated review is warranted. RAP 18.12. Click! is a technically complex system, with equipment such as core routers, provisioning systems, DNS servers, DHCP servers, switches, gateways, hubs, nodes, and many other plant assets. The institutional knowledge of Click! employees is essential to operating the system. Click! employees may more easily return after only a few months, rather than a longer period—if this Court were to ultimately rule in the Appellant’s favor on the traditional timeline. Thus, accelerated review should be granted to resolve the issues in this appeal.

**C. Destruction of Competition May Occur With Additional Loss Of Institutional Knowledge Held By Other ISP, Advanced Stream.**

Click! operates as an “Open Access” system, with TPU providing standardized wholesale rates and “packages” to two competing Internet Service Providers (“ISPs”), Rainier Connect and Advanced Stream.

These ISPs now compete on a level playing field, reselling Click!’s broadband “packages” to retail customers over the System. With authority over the System vested in Rainier Connect, Advanced Stream—Rainier’s only competitor on the System—could be ruined. A destruction of Advanced Stream would result in a loss of the support services to Advanced Stream’s

over 9,000 broadband customers and a monopolization of broadband services over the municipal telecommunications system.<sup>22</sup>

The CBTA requires Rainier Connect to operate the System under Open Access Policies. The definition of “open access” seems left open to Rainier Connects’ interpretation.<sup>23</sup> An abuse of such power could potentially result in monopolize the System on April 1, 2020.<sup>24</sup> The loss of Advanced Stream’s employees’ institutional knowledge will be irreparable if too much time passes. Additionally, if Rainier Connect does in fact monopolize the System, customers of Advanced Stream may lose their essential email address and telephone services—which are now provided by Advanced Stream as part of ISP services. Time truly is of the essence in this appeal.

## VI. CONCLUSION

Appellant respectfully requests the Court grant accelerated disposition.

Respectfully submitted this 23<sup>rd</sup> day of March 2020.

By: /s/ Mitchell Shook  
Mitchell Shook, Plaintiff, Pro Se

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<sup>22</sup> The ISP Advanced Stream is a company owned by Appellant Mr. Shook. Advanced Stream provides ISP services, including VoIP and Email service, to over 9,000 customers and has operated on the System for over 20 years.

<sup>23</sup> App. Pg. 155 – 156 . Pages from the CBTA relating to Open Access Program.

<sup>24</sup> See App. Pg. 154, City of Tacoma “Notice” to Advanced Stream customers, also Rainier Connects mailers to the same customers advertising “no waiting for the “Cable Guy” —which is only possible since Advanced Stream’s customers are on the same System (no truck roll or visit from the Cable Guy is required. The Advanced Stream customers are being switched over to Rainier Connect with a simple phone call under this promotion. If Rainier Connect’s first act, in assuming operational control, is to destroy its only competitor and monopolize the System, this does not portend well for the future.

## Appendix

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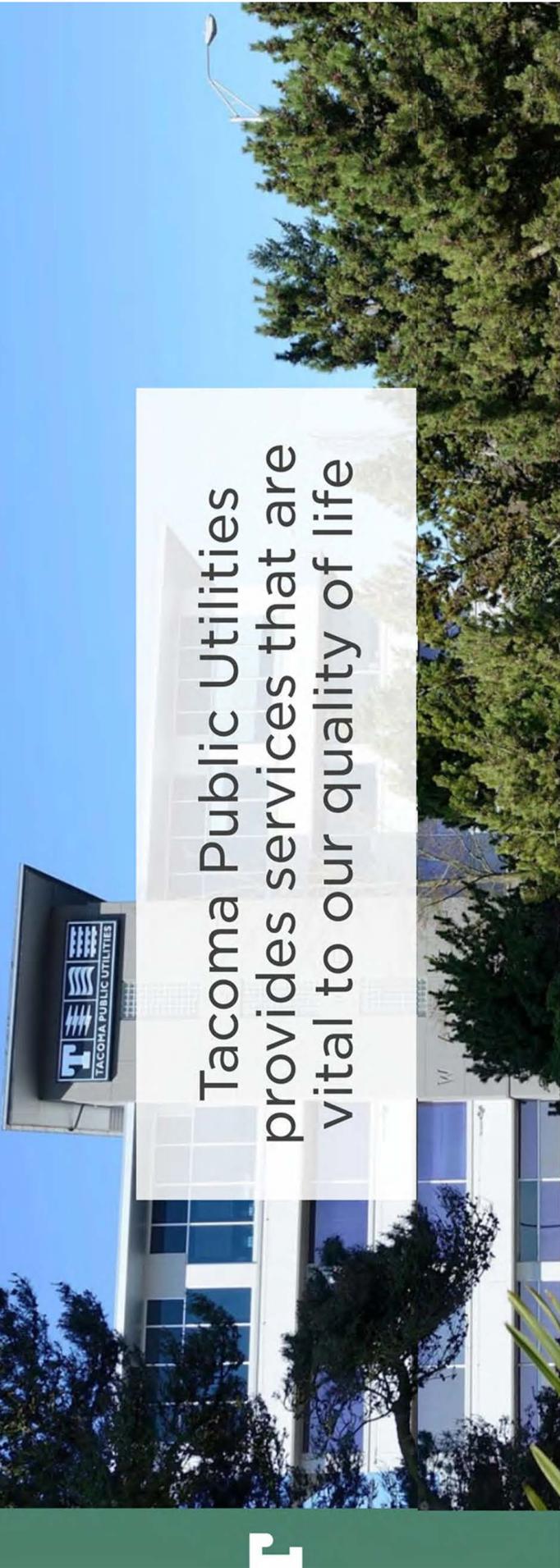
PAYMENT & BILLING

OUTAGES & SAFETY

WAYS TO SAVE

COMMUNITY & ENVIRONMENT

CUSTOMER SERVICE



Tacoma Public Utilities provides services that are vital to our quality of life

## About TPU

- [Management Team](#)
- [Public Utility Board](#)
- [Investors](#)
- [TPU Publications](#)
- [Latest News](#)
- [Events](#)

## Our Services

- [Power](#)
- [Water](#)
- [Rail](#)
- [Click! Cable TV](#)

## About Us

Publicly owned since 1893

Largest department in Tacoma City government

Operates entirely from revenues from sale of services, not from taxes

Governed by the Public Utility Board, the members of which appoint the Director of Utilities



[About TPU](#) > Services

[◀ Back](#)

## Services

[Click! Cable TV](#)

[Power](#)

[Water](#)

[Rail](#)

# Our Services

## [Power](#)

Tacoma Power provides electric service to the city of Tacoma, Fircrest, University Place, Fife, parts of Steilacoom, Lakewood, Joint Base Lewis-McChord, and unincorporated Pierce County as far south as Roy.

## [Water](#)

Tacoma Water provides clean, reliable water to more than 300,000 people throughout Pierce and King counties and is one of the country's oldest municipally owned water systems.

## [Rail](#)

Tacoma Rail has provided rail transportation and key freight connections for customers in the greater Tacoma area since 1914. We currently serve 65 customers within three operating districts in Pierce, Thurston, and Lewis counties.

## [Click! Cable Network](#)

Click! Network is an operating section of Tacoma Power and a multi-service broadband telecommunications provider within the electric company's service area.

Cable TV

Internet

Business  
Services

# Keeping You Connected

Click!'s Internet Provider partners provide you fast reliable Internet.

INTERNET PLANS

PRODUCTS

Cable TV

Internet

Internet Service Providers

Business Services

# Internet Service Providers

Click! operates an Open Access Network, which is a different business model than traditional telecommunications providers. In an open-access network there is a network owner and operator, and multiple retail service providers that deliver services over the network.

## Click! Powered Internet Gives You

- **Choice** - choose from one of the two local Internet Service Providers
- **Selection** - package options designed for you, no matter how many devices and TVs you want to connect to stream content or play games
- **Bundles** - Internet and phone bundles to fit your needs
- **Customer Service** - Friendly support from locally owned companies

[SELECT A TV & INTERNET BUNDLE ONLINE](#)

## Service Providers



Advanced Stream

253-627-8000

[www.advancedstream.com](http://www.advancedstream.com)

[info@advancedstream.com](mailto:info@advancedstream.com)



Rainier Connect

253-683-4100

[www.rainierconnect.com](http://www.rainierconnect.com)

[customerservice@rainierconnect.com](mailto:customerservice@rainierconnect.com)

# About Click!

## Company

Click! Network is an operating section of Tacoma Power and a multi-service broadband telecommunications provider within the electric company's service area.

## Vision

**To be known for excellence in:**

- People – professionals committed to the highest level of customer service and satisfaction, who create and maintain a team environment in which trust, respect, honesty and dignity are valued.
- Products and services – specifically designed to meet and exceed our customer needs through innovative uses of technology.
- Performance – a technically superior network designed and maintained to serve both current and future telecommunications needs of Tacoma Power and of Click! Network customers.

## Mission

To develop and deliver to all Tacoma Power customers innovative products and services made possible by the convergence of telecommunications and electric technologies.

## Ownership

Click! Network is one of the largest municipally-owned telecommunications systems in the country and part of the City of Tacoma's Department of Public Utilities.



# Internet Service Providers

Click! operates an Open Access Network, which is a different business model than traditional telecommunications providers. In an open-access network there is a network owner and operator, and multiple retail service providers that deliver services over the network.

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- **Bundles** - Internet and phone bundles to fit your needs
- **Customer Service** - Friendly support from locally owned companies

# High Speed Internet, Powered By Click!

Click!'s Internet Service Provider partners provide fast and reliable internet throughout Tacoma and Pierce County. Connect all your devices in every room, with the fast speeds you need.

SELECT INTERNET PLAN



## The Choice is Yours

Click! partners with two local Internet Service Providers to connect your internet service.

**Advanced Stream** and **Rainier Connect** offer a variety of speed and pricing options to best fit your internet needs and the flexibility to select the right plan for you.

SELECT A PROVIDER

## Internet at the Speed of Life

The Click! Network enables speeds up to 100Mbps. With that kind of speed you can quickly and easily download large files and videos, watch movies, or play games, plus connect multiple devices simultaneously, without slowing down.

TEST YOUR INTERNET SPEED



December 12 2019 4:20 PM

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

The Honorable Judge Shelly K. Speir  
Hearing Date: January 10, 2019  
Oral Argument Requested

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

DARREL BOWMAN,

Plaintiff,

v.

CITY OF TACOMA,

Defendant.

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

**PLAINTIFF MITCHELL SHOOK'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

MITCHELL SHOOK,  
Plaintiff Pro Se,

v.

CITY OF TACOMA,

Defendant.

**I. Nature of The Action and Summary of Argument**

This lawsuit is about privatization of Click! Network ("Click!"), Tacoma Public Utilities' fiber-optic municipal telecommunications system, without voter approval, as explicitly required by state law and Tacoma's City Charter. Privatization conveys the municipal utility's entire

1 public broadband infrastructure and enterprise, as a going concern, including all proprietary  
2 operational control and authority over the municipal utility's rate setting functions.<sup>1</sup>

3 Click! (the "System") is an advanced telecommunication system, owned and operated by  
4 Tacoma Public Utilities ("TPU"), serving over 35,000 active utility customer accounts. The  
5 System's revenues exceeded \$25 million in 2018. (Shook Decl. 10/30/19 Ex. 9).

6 TPU's website describes Click!'s commercial telecommunications operations as, "one of the  
7 largest municipally owned telecommunications systems in the country and part of the City of  
8 Tacoma's Department of Public Utilities" (Shook Decl. 10/30/19 Ex. 1, Pg. 5).<sup>2</sup>

9 Article I, Section I of the Washington Constitution provides: "All political power is inherent  
10 in the people, and governments derive their just powers from the consent of the governed."

11 The people have reserved full power and exclusive authority to provide final approval over  
12 privatization of their telecommunications system. Council's role, essentially, is that of the  
13 people's trustee, limited to negotiating the agreement and presenting the contract to voters.

14 Chapter 35.94 RCW requires voter approval for disposal of any public utility works, plant,  
15 or system owned by it or any part thereof, or any equipment or appurtenances.

16 Tacoma's City Charter's ("Charter" or "the Charter") contains a similar directive, requiring  
17 approval by "a majority vote of the electors." (Shook Decl. 10/30/19 Ex. 5).

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

21 The City has circumvented the voter approval process and declared Click!'s entire system  
22 "surplus," under RCW 35.94.040. Tacoma City Council ("Council" or "City") approved a  
23 Declaration of Surplus Property ("DSP") and conveyance of ownership and control is set to  
24 occur in March of 2020. (Shook Decl 10/30/19 Ex. 2).

25 The City also approved the "Click! Business Transaction Agreement" ("CBTA"), privatizing  
26 Click!'s enterprise and conveying the utilities' customer accounts, Mr. Shook's home services  
included. All public control over operation and rate setting for the System is lost for 40 years.

---

<sup>1</sup> RCW 43.330.530(3) "Broadband infrastructure" means networks of deployed telecommunications equipment and technologies necessary to provide high-speed internet access and other advanced telecommunications services to end users.

<sup>2</sup> RCW 43.330.530 (2) "Broadband" or "broadband service" means any service providing advanced telecommunications capability and internet access with transmission speeds that, at a minimum, provide twenty-five megabits per second download and three megabits per second upload.

1 Ironically, the City acknowledges lack of authority for disposal absent voter approval. The  
2 City has admitted voters alone are vested with express power to approve separation of the  
3 municipal utility's public broadband enterprise. (Shook Decl. 12/12/19 Ex. 32, Pg. 1, Ln 20)

4 Despite knowing<sup>3</sup> it lacked authority, the City nevertheless abrogated voters' rights, with an  
5 ultra vires declaration of surplus designed to circumvent the requirements of Chapter 35.94 RCW  
6 and Charter Section 4.6. (Shook Decl. 12/12/19 Ex. 32, Pg. 1, "Whereas 4.6 Requires a vote. . "

7 The statutory definition of surplus, as "not required for providing continued public utility  
8 service," was simply ignored. Vested turnkey, as a going concern, Click! will continue providing  
9 the same proprietary services, to the same utility customers, under the same brand, over the same  
10 infrastructure, only with a private company controlling rates and cashing customers' checks.<sup>4 5</sup>

11 The utility System is not surplus. The System's assets, trademarks and customers are simply  
12 "changing hands," lock, stock, barrel and brand. A state-of-the-art fiber optic municipal utility  
13 system, delivering essential public utility services, continuing to providing the same services to  
14 the same loyal utility customers, does not reflect the Legislature's intent for "surplus."<sup>6</sup>

15 Voters of Tacoma granted the City a privilege of operating the Department of Public  
16 Utilities, they were not content to divest themselves of every managerial function normally  
17 associated with the operation of a business concern. By charter, the people retain express power  
18 over disposal of their proprietary interest in the community's municipal public utility property.

19 Disposal of Click!'s equipment, infrastructure and enterprise, all acquired for the purpose of  
20 providing telecommunication services, and required for continuing those same services, violates  
21 section Charter 4.6. Such a sale is ultra vires and void, unless approved by the voters.

22 In privatizing the community's public broadband system, essential assets are separated,  
23 including "last mile infrastructure," that single wire or "data pipeline" to a customer's home or  
24 business,<sup>7</sup> and the public's "middle mile infrastructure," of over 1,500 miles of fiber, cable,

25 <sup>3</sup> "Knowingly" is a statutorily defined term. RCW 9A.08.010(1)(b)(i) states a person "acts knowingly . . .  
26 when . . . he [or she] is aware of a fact, facts, or circumstances

<sup>4</sup> A buyer that is one of the mayor's largest campaign contributors!~ Shook Decl. 12/12/19, Ex. 47, Pg. 6.

<sup>5</sup> The Business Transaction Agreement provides "WHEREAS, the Parties have mutually agreed to  
cooperate to ensure a smooth and seamless transition of the Click! Business." Shook Decl. 11/1/19 Pg. 6

<sup>6</sup> The transaction includes use of the Click! trademark and brand name. Shook Decl. 10/30/19 Ex. 2.

<sup>7</sup> (5) "Last mile infrastructure" means broadband infrastructure that serves as the final connection from a  
broadband service provider's network to the end-use customer's on-premises telecommunications  
equipment.

1 conduits, vaults, easements and equipment, all required for accessing the services and  
2 applications critical for modern society.<sup>8 9</sup>

3 Recognizing the monopolistic nature of the industry, with huge fixed costs and barriers to  
4 entry, federal, state and local laws have fiercely protected consumers from anti-competitive  
5 consolidation of assets and ownership in the telecommunications industry for over 100 years.<sup>10</sup>

6 For over 20 years, the City has owned, operated and regulated Click! as a municipal-utility,  
7 establishing service levels, rates and even setting net neutrality policies. State laws and federal  
8 policies support and encourage such public, non-profit, "municipal" utility systems. Many such  
9 systems operate in Washington, across the USA and around the world.<sup>11</sup>

10 As the modern extension of telegraph and telephone, Click! is a utility system.  
11 Telecommunications has been a public utility since the Pacific Telegraph Act of 1860.<sup>12</sup>

12 No material issues of fact exist. This matter is properly resolved on summary judgment.<sup>13</sup>

## 13 **II. Relief Requested and Statement of the Issue**

14 This motion seeks partial summary judgment for declaratory relief, pursuant to CR 54(b).  
15 Plaintiff asks the Court to rule, as a matter of law, on the following questions:

16 1. Are telecommunication assets of a municipal utility governed by Chapter 35.94 RCW or  
17 Tacoma City Charter 4.6 ?

18 2. Does a surplus resolution facilitating privatization of an operational municipal utility  
19 telecommunication enterprise defeat the legislative intent for "surplus" in RCW 35.94.040, when  
20 the enterprise and its assets continue providing the same telecommunication services, to the same  
21 public utility customers, post-privatization?

22 <sup>8</sup> (7) "Middle mile infrastructure" means broadband infrastructure that links a broadband service  
23 provider's core network infrastructure to last mile infrastructure.

24 <sup>9</sup> RCW 43.330.532 Findings: "The legislature finds that: (1) Access to broadband is critical to full  
25 participation in society and the modern economy"

26 <sup>10</sup> See 2015 Open Internet Order, 30 FCC Rcd at 5631, para. 81 n.134 ("data suggests that meaningful  
alternative broadband options may be largely unavailable to many Americans, further limiting the ability  
to switch providers. Based on the submissions from various commenters, it appears that between 65% and  
70% of households have at most two options for high speed Internet access."); see also 2010 Open  
Internet Order, 25 FCC Rcd at 17923, para. 32; Appendix C, Section II.A.1., Table 1 (showing that,  
nationwide, 97 percent of households have two or fewer providers of BIAS at download speeds of 25  
Mbps).

<sup>11</sup> Council even has its own bright-line (net neutrality) regulation. Shook Decl. 12/12/19 Ex. 34

<sup>12</sup> Regulation over such communication was transferred from the Interstate Commerce Commission to  
Federal Communications Commission in 1934, 47 U.S. Code § 151, § 601.

<sup>13</sup> Affirmation of electorates' right to vote is curative of all ills and eliminates unnecessary litigation.

1 3. When the legislative authority of a city deems it advisable to lease, sell or dispose of a  
2 municipal utility’s operational telecommunications enterprise and system, or useful and  
3 functional in-service equipment, appurtenances, betterments and essential parts thereof, does  
4 RCW 35.94.020 or Charter 4.6 require voter approval of the proposed transaction?

5 **III. Background Facts**

6 The following facts are in the declarations of Plaintiff, Mitchell Shook (“Mr. Shook”), a  
7 taxpayer of the City, ratepayer of TPU and Click! customer, with standing to bring this action.

8 **A. Tacoma Public Utilities Ownership and Creation of Click! Network**

9 The Department of Public Utilities was established under City Charter (“Charter”) Section  
10 4.1. TPU is one of the largest municipally owned utilities in the Pacific Northwest.<sup>14 15</sup>

11 The Utility provides four distinct public services; water, power, rail and telecommunications  
12 under four brand names: Tacoma Water, Tacoma Power, Tacoma Rail and Click! Network.

13 TPU’s website prominently displays Click! as one of “Our Services: Power, Water, Rail,  
14 Click!.” *see* Shook Decl. 10/30/19, Ex. 1, Pg. 7 -about TPU.

15 Owned and operated by TPU, Click! is an “advanced telecommunication system,” delivering  
16 commercial services under its own organizational structure, to approximately 35,000 TPU  
17 customer accounts. The System’s services were launched in 1998.<sup>16</sup>

18 Click!’s state-of-the-art, carrier-grade, telecommunications system, delivers Gigabit speed  
19 BIAS, (“Broadband Internet Access Service”) over Fiber To The Home (“FTTH”) technology,  
20 VoIP prioritized DOCSIS 3.1 cable modem service, commercial “Metro Ethernet” data-transport  
21 services and cable television to customers in the in Tacoma, Fircrest, Fife, University Place,  
22 Lakewood and unincorporated Pierce County.<sup>17 18</sup>

23 The System passes 66% of the homes in Tacoma Power’s service area with 1,500 miles of fiber  
24 and cable plant.<sup>19</sup> The City describes Click! as: “This state-of-the-art technology for modern  
25 network architecture enables reliable and cost-efficient delivery of Gigabit internet services”.<sup>20</sup>

26 <sup>14</sup> Shook Decl. 10/30/19, Ex. 5.

<sup>15</sup> Official Statement: City of Tacoma Series 2017 Electric System Revenue Bond, p.1.

<sup>16</sup> “Broadband” is defined as “advanced telecommunications services” by RCW 54.16.420.

<sup>17</sup> TPU Annual Report p. 26 (Shook Decl. 12/12/19, Ex. 48, Also shows continues investment.

<sup>18</sup> Defendant’s Answer ¶23, admits point-to-point metro Ethernet broadband services.

<sup>19</sup> Defendant’s Answer ¶19. Pg. 4. Total mileage, admits 1,800.

<sup>20</sup> Admitted in Defendant’s Answer, Pg. 5, ¶22. Shook Decl. 10/30/19, Ex. 7 Click! Network 2018 Cable TV Annual Report -Pam Burgess to Jeff Leuders 2/28/19. See Shook Decl. 12/12/19, Ex. 57 for FTTH.

1 Like the City’s water and power utilities, Click!’s rates are set by Council and published under  
2 Title 12, the “Utilities” section of the Tacoma Municipal Code. Charter 4.3 allows Council to  
3 “revise such rates and charges as it may deem advisable for supplying such utility services.”<sup>21</sup>

4 Revenues and expenses for the System are accounted for separately, from other TPU  
5 operations, and appear as “Telecommunications” on TPU financial statements.

6 **B. Purpose in Creation of Click! Network -The Community’s Need For Broadband.**

7 In 1996, TPU commissioned a “Telecommunications Study.” The “study team” set out to  
8 determine if TPU might benefit from establishing “a modern telecommunications infrastructure.”  
9 The study asked if the greater Tacoma area has the “telecommunications resources necessary for  
10 business that may want to locate in the area?” It even cited “telecommuting” and asked, “How  
11 will the explosion in the Internet be handled?” Shook Decl 10/30/19 Ex. 10, Pg. 92 of 389.<sup>22</sup>

12 The Study explained why the System would be built:

13 One of the most significant ways a community and its *economic base* are intertwined is  
14 through an area's infrastructure, As a result, the evolution of a community's economy  
15 often depends upon the investments it makes in its transportation system, power  
16 system, and-given the *shift to the information age-its telecommunication system*, This  
17 study was therefore commissioned to investigate Tacoma's potential *economic futures*  
18 and the inter-relationship between its *economic development* and potential  
19 *telecommunication system investments*, (emphasis added).<sup>23</sup>

20 A “Telecommunications Business Plan” was part of the study and proposed:

21 Three types of **telecommunications services** would be offered by Tacoma City Light  
22 - wholesale high-speed telephony and **data transport, Internet data transport**, and  
23 cable television. Each of these services meet the **growing telecommunications needs**  
24 in the greater Tacoma area. . . . (emphasis added)

25 The conclusion lamented, “one could hope *that other companies would step forward.*”<sup>24</sup>

26 [T]he local market has a *growing need for better telecommunications access*. Despite  
growing local demand, the incumbent wire line service providers have stated that their  
investments in the local infrastructure will either slow without significant rate  
increases or be halted all together. *One could hope that other 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)<sup>25</sup>

On June 21, 1996, TPU issued a “Request for Ordinance or Resolution” seeking to:

<sup>21</sup> Defendant’s Answer, Pg. 4, ¶21 -City Council approve rates. *Also see* Shook Decl. 10/30/19, Ex. 8.

<sup>22</sup> The Purpose and Conclusion is at Shook Decl. 12/12/19, Ex. 50.

<sup>23</sup> Shook Decl. 10/30/19, Ex. 10, at Pg. 142 of 398 in PDF.

<sup>24</sup> Local Telecommunications Business Plan. Shook Decl. 10/30/19. Ex. 10, at Pg. 142 of 398

<sup>25</sup> Shook Decl. 10/30/19, Ex. 10, at Pg. 186 of 398 in PDF.

1 Authorize a Bond Ordinance for City of Tacoma, Washington, Department of Public  
2 Utilities, Light Division to clarify its legal authority to develop telecommunication  
capacity for . . . certain telecommunications services,<sup>26</sup>

3 On June 26, 1996, the Board approved funding the telecommunication business plan.<sup>27</sup> On July  
4 23,1996, Council approved Ordinance 25930 establishing a “A SEPARATE SYSTEM.”  
5 Ordinance 25930 included Article II: “Establishment Of The Telecommunications Project As A  
6 Separate System; And Adoption Of Plan And System”:<sup>28</sup>

7 Section 2.1. Establishment of **Telecommunication System**. The City hereby creates *a*  
8 *separate system* of the City's Light Division to be known as the telecommunications  
9 system (the "**Telecommunications System**"). The public interest, welfare, convenience  
10 and necessity require the creation of the **Telecommunications System**, contemplated by  
11 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).

12 This “Exhibit A” of the Ordinance, included commercial broadband “Internet Access Service”  
13 and “high speed data” transport services.

14 **C. Summary Judgements Confirmed Authority to Establish Telecommunication System.**

15 In July of 1996, prior to funding construction of the System, the City sought declaratory  
16 judgement in Pierce County Superior Court to confirm authority for TPU to establish a  
17 telecommunication system to provide commercial telecommunications services. Two Orders  
were issued, confirming TPU’s authority to do so.<sup>29 30</sup>

18 In the City’s November 1996 Memorandum In Support of Summary Judgment”, the City  
19 cited RCW 35.96.030, which provides authority for municipal funding of communication utilities,  
20 as authority for the City’s proposed municipal utility telecommunication system.

21 In creating Click!, the City also cited authority for commercial BIAS services in the policy  
22 statement of RCW 80.36.300 (5), to “Promote diversity in the supply of telecommunications  
23 services and products in telecommunications markets throughout the state.”

24 <sup>26</sup> Signed by Superintendent Klein Shook Decl. 10/30/19, Ex. 11, Pg. 28, at 224 of 389 in PDF.

25 <sup>27</sup> Resolution U-9198. Shook Decl. 10/30/19 Ex. 11, Pg. 31 or Pg. 227 of 389 total pages in PDF.

26 <sup>28</sup> See Ordinance 25930 Shook Decl. 10/30/19, Ex. 11, Pg. 197 of 389 A “Separate System.”

<sup>29</sup> The 12/13/96 Order determined Ordinance No. 25930 (the "Bond Ordinance") was properly enacted.  
The 5/9/97 Order approved authority to fund the System and carry out the business plan for offering  
wholesale telecommunication service, including retail cable tv services. Shook Decl. 10/30/19 Ex. 12, 13.

<sup>30</sup> The 5/20/97 Request for Ordinance stated: “Authorize the development of a broad band  
telecommunications network to improve electric utility service and improve the telecommunications  
infrastructure available to the community. This would include the business plan for a broad band  
telecommunications system and the implementation of the telecommunications system.

1 On March 20, 1997, in support of Res# 33668 to establish the System, TPU Director Mark  
2 Crisson wrote Council, outlining the System’s goals, saying the “Telecommunications System”  
3 would "Provide additional revenue to the Light Division and General Government through  
4 expansion of the market for telecommunications services.”<sup>31</sup>

5 "Significantly enhances regional economic development and quality of life by creating  
6 state-of-the-art telecommunications infrastructure and providing it to all businesses and  
7 residences throughout the community."

8 On April 8, 1997, Council approved Res. 33668. The Board followed with Resolution U-  
9 9258, finding provision of broadband Internet to be “prudent and economical,” stating:

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

13 WHEREAS, the Public Utility Board hereby finds and determines that the Light  
14 Division's proposal for a **broad band telecommunications system** is in the best  
15 interests of the City, **will serve as a public purpose**, and should be approved.

16 BE IT RESOLVED BY THE PUBLIC UTILITY BOARD.

17 That the Board hereby **approves the Light Division's proposal** including the  
18 Business Plan for a **broad band telecommunications system**, and the Board  
19 recommends that the City Council approve a resolution to authorize the Light  
20 Division to proceed to implement said proposal for a **broad band  
21 telecommunications system..** (emphasis added). (Shook Decl. 12/12/19, Ex. 75)

22 Resolution 33668 identified other “utility purposes,” or benefits, that would be accomplished  
23 by creating Click!’s broadband system. These included revenue diversification and economic  
24 development, both having an important “nexus” to Tacoma Power’s role of producing energy.<sup>32</sup>

25 One year later, as the project gained national attention, TPU Director Mark Crisson proudly  
26 wrote the Tacoma City Manager, and forwarded a national news article and stating:

“MSNBC has written a very informative piece about Tacoma Power's Click! Network.  
It was written complete with slides of our work in progress. I know the City Council,  
as well as the Board, will be proud of this national coverage.”<sup>33</sup>

**D. Click! Network’s Commercial Telecommunication System and Operations Today**

In 2018 Click!’s total revenue exceeded \$25 Million. In August 2019, Click!’s monthly  
sales were \$2,116,912, with a \$40,070 profit after all allocations, taxes and depreciation.<sup>34</sup>

<sup>31</sup> Shook Decl. 10/30/19, Ex. 10, Pg. 4. (or Pg. 50, of 389 in PDF).

<sup>32</sup> Shook Decl. 12/12/19, Ex. 75. See first “Whereas” in Amended Resolution U-9258.

<sup>33</sup> Shook Decl. 10/30/19, Ex. 14 Pg.2 -Importantly, see the quote on Pg. 6: “The system is not being built  
as a cable system. We have got a multilayered business model.” - Deb Stewart Click Network.

<sup>34</sup> Shook Decl. 10/30/19, Ex. 9, Tacoma Power Statement 12/31/18, Click! Operational Summary 8/19

1 Click! is an FCC registered telecommunications provider, with Federal Registration Number  
2 (“FRN”) FRN 0007466642,<sup>35</sup> filing Form 499 and Form 477,<sup>36</sup> and publishing a “Transparency  
3 Disclosure,” as mandated by the FCC.<sup>37</sup> Click! provides gigabit data “*transport only*” services  
4 to the Tacoma City Library System and files FCC Form 471, allowing libraries participate in the  
5 Universal Service Administrative Company (“USAC”) “E-rate Program.” Click!’s USAC  
6 Service Provider Number (“SPN”) is SPN 143035981.<sup>38</sup> See Shook Decl. 12/12/19 Ex. 64.

7 Click! enters into “Master Service Agreements” (“MSA”) to install “dedicated transport  
8 services” over the System’s municipal “communications facilities,” often in large commercial  
9 buildings. Examples, including CenturyTel’s, are provided in Shook Decl. 12/12/19, Ex. 62.

10 “Telecommunications Installation and Service Agreements,” with multifamily dwellings,  
11 allow installation of “Telecommunications System” for providing “telecommunication services.”

12 Owner grants Click! the right to enter and access the Premises for the **purpose of**  
13 **installing telecommunications facilities** in, at and upon the Premises including, but not  
14 limited to, all wiring, cables, conduits, electronic and other equipment, antennae,  
15 switches, amplifiers, filters, traps, signal receiving/scrambling/decoding equipment, key  
16 lock box(es) and key(s), and any additional equipment that may be requested for  
17 provision of . . .telecommunication services at the Premises (“Facilities” and collectively  
18 “**Telecommunication System**”). (emphasis added) (Shook Decl.10/30/19, Ex. 17).

19 Click! holds a Franchise Agreements for Pierce County and the Cities of Tacoma, Fife,  
20 Lakewood, Fircrest, University Place and Puyallup. (Shook Decl. 12/12/19, Ex. 30).

21 Click!’s Pierce County “Telecommunications Franchise” is Ordinance No. 2004-43:  
22 Telecommunication Franchise To The City Of Tacoma, . . . Light Division, For A  
23 Telecommunications Network In Pierce County To Be In The Public Interest;

24 The Puyallup Telecommunications Ordinance grants City of Tacoma rights:

25 To Construct, Maintain, Operate, Replace And Repair A Telecommunications  
26 Network, In, Across, Over, Along, Under, Designated Public Rights-Of-Way.<sup>39</sup>

27 **E. Planned Conveyance of Click! Network’s Commercial Telecommunication System.**

28 On Nov. 5, 2019, Council approved the CBTA and Indefeasible Right of Use (“IRU”)

29 <sup>35</sup> Click! Network Disclosure and FRN, *se*, Pg. 283/389 of PDF.

30 <sup>36</sup> Shook Decl. 10/30/19, Ex. 15 All facilities-based 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>

31 <sup>37</sup> Click! FCC Form 477 *see* Shook Decl 10/30/19 Ex. 15, *also available at* <https://perma.cc/9T9T-L4FL>

32 <sup>38</sup> Shook Decl. 10/30/19 Ex. 15, Pg. 7, Library Funding info *at* <https://www.usac.org/sl/default.aspx>

33 <sup>39</sup> Shook Decl. 12/??/2019 Ex. 79

1 agreement (the “Agreements”) to privatize Click! by transferring ownership and operations of the  
2 enterprise to Rainier Connect, a private company.<sup>40</sup> see Shook Decl. 12/12/19 Ex. 39.

3 Privatization transfers an active, in-service, municipal utility enterprise. It vests all proprietary  
4 operational interests in the System. Assets essential for continued provision of BIAS services to  
5 TPU’s customers would be separated and conveyed for up to 40 years.

6 All franchises agreements, contracts, warranties, operating rights, active customer account  
7 information, billing and bank payment details would be vested. All electronic equipment, software,  
8 provisioning systems, DNS servers, DHCP servers,<sup>41</sup> Caching servers, routers, hubs, nodes,  
9 trademarks, IP addresses, head end equipment, customer premise equipment, trucks, brand name,  
10 other critical assets and infrastructure are included. (Shook Decl. 11/1/19, Pg. 12)

11 It is undisputed that privatization removes all Council control over the System’s rates going  
12 forward, leaving the System’s customers without protection from future rate increases.

#### 12 IV. Argument

13 This motion is based on the pleadings, declarations and evidence filed under this cause.

14 **Summary Judgement Standard:** With only questions of law, summary judgment is appropriate  
15 under CR 56(b). When moving party shows “no issue as to a material fact,” *Scott v. Pacific West*  
16 *Mountain Resort*, 119 Wn.2d 484, 502-03 (1992), “the burden shifts to the non-moving party” to  
17 establish facts to be proven at trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225  
18 (1989). The non-moving party must offer specific facts, not bare allegations. *Baldwin v. Sisters*  
19 *of Providence*, 112 Wn. 2d 127, 132 (1989). Conclusory assertions do not preclude summary  
20 judgment. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 2d 355, 359-60 (1988).

#### 21 A. Click! is A Municipal Utility System Providing Municipal Utility Service.

22 By resorting to RCW 35.95.040, to surplus Click!, the City admits the System is a municipal  
23 utility, regulated by Chapter 35.94. The plain meaning of the terms “utility” and “system” seem  
24 obvious; but, if further definition is desired, courts may “look to standard English language  
25 dictionaries.” *North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 48, 17 P.3d 596 (2001)

26 \_\_\_\_\_  
<sup>40</sup> Ironically, to say the least, Rainier opposed Click!’s creation in 1996. Shook Decl. 12/12/19 Ex. 47.  
Also, a hearing on an Ordinance to convey the Click! Franchise Agreement was held on 12/10/19. Shook  
Decl. 12/12/19, Ex. 63

<sup>41</sup> DNS is Domain Name Service and Domain Name Servers, DHCP, Dynamic Host Configuration  
Protocol) The automatic assigning of IP addresses

1 Black's Law Dictionary's defines "*public utility*" as, "a company that provides necessary  
2 services to the public, such as telephone lines and service, electricity and water."<sup>42 43</sup>

3 Merriam Webster provides, "*system*" is "a regularly interacting or interdependent group of  
4 items forming a unified whole." Click! assets, represented by over 2000 pages in the CBTA and  
5 IRU Agreements,<sup>44</sup> constitute a telecommunication system. Click! is a "Public Utility System."

6 U.S. Code and Washington State statutory definitions confirm Click! is a municipal "utility"  
7 The 1996 Telecommunications Act provides, at 47 USC § 224(a)(1): "Utility."

8 The term "utility" means any person who is a local exchange carrier or an electric,  
9 gas, water, steam, or other public utility, and who owns, or controls poles, ducts,  
10 conduits, or rights-of-way used, in whole or in part, for any wire communications.

11 Our State Supreme Court's defines "public utility" as a service that will "subserve a *public*  
12 *use*." Also, "The crucial and final test is, does the use--utility--subserve a public purpose; does it  
13 furnish a natural need of the city or its citizens; does it contribute to his comfort, prosperity, or  
14 happiness?" *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 328 P.2d 873, (1958). Under  
15 *Winkenwerder*'s "crucial and final test," Click! is undoubtedly a utility.

16 In *Bremer*, the high court defines utility:

17 [T]he statute specifically names a long list of utilities, but does not specifically  
18 mention wharves and docks. But the statute also says, '*or any similar or*  
19 *dissimilar utility or system.*' This, we think includes any kind of utility in whose  
20 operations the public has an interest, that is to say, any public utility"  
21 see *Bremerton v Bremer*, supra

## 22 **B. Creation of Municipal Utility's Telecommunication System and Service.**

23 The term "Telecommunications" replaced "telephone" and "telegraph" in Title 80 RCW  
24 under the Laws of 1985. See Ch. 450, Sec. 13, Pgs. 1978 -1995, or Shook Decl. 12/12/19 Ex. 61.

25 Click!'s municipal telecommunications system<sup>45</sup> was carefully conceived, constructed and  
26 paid for by TPU, for the express purpose of providing broadband services to TPU customers.

<sup>42</sup> *Black's Law Dictionary* Eleventh Edition 2019 P. 1859

<sup>43</sup> Click! enables "telephone service." The transmitting and receiving ordinary-language messages is widely accomplished with Voice Over IP Protocol (VoIP) service, a disruptive technology rapidly replacing traditional switched telephone technologies. Click! offers a "Voice Package", or VoIP with QoS ("quality or service" features). that prioritize "data packets." Click!'s telecommunication system allows services that are the modern equivalent of the "telephone." Shook Decl. 12/12/19, Ex. 44

<sup>44</sup> Shook Decl. 11/1/2019, Ex. 29

<sup>45</sup> Click! is a "telecommunication system" see Shook Decl 12/12/19 Ex. 59 Decl. of Terry Dillon.

1 City's Ordinance No. 25930 created Click! upon municipal authority to supply "utility  
2 services." The City intended to establish utility services. The Ordinance provides, "WHEREAS  
3 RCW 35A.11.020 authorizes the City to operate and supply utility and municipal services  
4 commonly or conveniently rendered by cities or towns." <sup>46</sup> (Shook Decl. 10/30/19, Ex. 11, Pg. 4)

5 Prior to constructing Click!, to confirm legal authority for commercial municipal utility  
6 telecommunication services, the City brought suit for declaratory judgement in Pierce County  
7 Superior Court and succeeded, in 1996 and 1997, in obtaining two approving Orders. <sup>47 48</sup>

8 In all the briefing supporting the proposed system, City cited federal, state, and local  
9 statutory and judicial authority, as allowing construction and operation of a municipal utility  
10 "Telecommunications System" The "Introduction" of the City's brief stated:

11 The City of Tacoma (the "City") brought this declaratory judgment class action  
12 under RCW 7.24 and 7.25 and CR 23(8)(2) to confirm its authority to issue bonds  
13 for the purpose of constructing and operating a telecommunications system  
14 consisting of a hybrid fiber coaxial network (the "Telecommunications System").

14 The City's April 14, 1997 Memorandum in Support of Summary Judgment shows the City  
15 created a "Telecommunication System" as a municipal utility. *See* Shook Decl. 12/12/19 Ex. 30

16 Click!'s a "Telecommunications Company," operating a municipal *telecommunication*  
17 *system*, providing *telecommunication services*. RCW 80.04.010 (27). A "Telecommunications  
18 Company" is "every city or town owning, operating or managing any facilities used to provide  
19 telecommunications for hire, sale, or resale to the public". *See* RCW 80.04.010 (28). <sup>49 50</sup>

20 Thus, any city or town operating facilities used for transmission of information by wire, or  
21 optical cable, is a telecommunications company. This is exactly what Click! Network is: "*a*  
22 *facility for transmission of information by optical cable or similar means.*" <sup>51</sup>

23 <sup>46</sup> The bond was payable solely by TPU (not general government). Shook Decl. 10/30/19 Ex.11

24 <sup>47</sup> Pierce County Case No. 96-2-09938-0, City Of Tacoma v Taxpayers and Ratepayers of Tacoma.

25 <sup>48</sup> City's 11/5/96 Memorandum In Support Of Motion For Summary Judgment. Shook Decl 10/30/19, Ex.  
26 12, Ex. 13. *See* Section I, of the City's brief. These Summary Judgement Orders confirmed City's  
authority to establish a "Telecommunication System."

<sup>49</sup> The Public Service Commission, now the UTC, regulates utilities with strong police powers under  
RCW 80.04.470: "Commission to enforce public service laws. Police power."

<sup>50</sup> *see* RCW 54.16.005 "Telecommunications" has the same meaning as contained in RCW 80.04.010.

<sup>51</sup> RCW 35.99.010 "**Telecommunication Systems**" are not cable service or cable television systems..  
Telecommunication systems are operated under Master Permits. Section (3) "Master permit" "A master  
permit does not include cable television franchises" (7) "Telecommunications service" means the  
transmission of information by wire, radio, optical cable, electromagnetic, or other similar means.

1     1.     Telecommunications Companies are Public Utilities.

2           Common law and statutory definitions of “Public utilities” are synonymous with “public  
3 service.” By all definitions, Click! is a “public utility” and a “public service company.”

4           Click! is a "public utility" under RCW 36.87.140:

5                   The term "public utility" as used in this section shall include utilities owned,  
6                   operated, or maintained by every gas company, electrical company, telephone  
7                   company, telegraph company, and water company whether or not such  
8                   company is privately owned or owned by a governmental entity.

9           Public utility and “public service company” share the same definition:

10                   RCW 80.04.010 (23) ““Public service company" includes every gas company,  
11                   electrical company, telecommunications company, wastewater company, and  
12                   water company.”<sup>52</sup>

13           The Public Service Commission Law, defined a “public service company.”<sup>53</sup>

14                   Rem.Rev.Stat. §10344, **The term 'service' is used in its broadest and most  
15                   inclusive sense.** The term 'public service company' includes every common carrier,  
16                   gas company, electrical company, water company, **telephone company, telegraph  
17                   company, wharfinger and warehouseman, as such terms are further defined . . .**  
18           *Inland Empire Rural Electrification . v. Department of Public Service*, 199 Wash. 527, (1939)

19           Click! is a “utility,” as a “communications utility, with its vast underground infrastructure:

20                   "Communication utility" means any utility engaged in the business of affording  
21                   telephonic, telegraphic, cable television or other communication service to the  
22                   public in all or part of the conversion area and includes telephone companies and  
23                   telegraph companies as defined by RCW 80.04.010. (Quoting RCW 35.96.020)

24     3.     Telecommunications Has Been Defined as A Public Utility in Washington Since 1909.

25           Railroads were the first regulated utility in Washington State, in 1905, under the Railroad  
26           Commission.<sup>54</sup> Telecommunication was the second utility to be regulated, in 1909, also under  
27           the Railroad Commission.<sup>55</sup>

28           The Railroad Commission became the “Public Service Commission” in 1911, with a "Public  
29           service company" including every “gas company, electrical company, water company, telephone  
30           company, telegraph company.” *See* Session Laws of 1911, Ch. 117, Pg.538.<sup>56</sup>

31           <sup>52</sup> Municipal utilities are except from Title 80 RCW -“Public Utilities” Tacoma enjoys “home-rule.”

32           <sup>53</sup> 1911, Ch. 117, Pg 546, *also* Shook Decl. 12/12/19 Ex. 35, Pg 5.

33           <sup>54</sup> Railroad Commission was established by the Session Laws of 1905, Ch. 81, Pg. 145.

34           <sup>55</sup> The U.S. Interstate Commerce Act of 1887 regulated railroads and preceded Washington state’s Laws  
35           of 1909, Ch. 93. Sec. 3 Pg. 192, 196, which did: “authorize the commission to regulate telephone and  
36           telegraph companies and their rates and charges, to prevent discrimination and extortion by such  
37           companies; and to authorize the Railroad Commission of Washington to make all necessary rules.””

38           <sup>56</sup> Since 1961 UTC has regulated utilities an under Title 80. RCW. *See* 1961 c 14 § 80.01.010

1 As an advanced “telecommunication system” and “enterprise” of TPU, generating over \$25  
2 million in revenue, providing a necessary “public service” to over 35,000 TPU utility accounts,  
3 Click! meets every definition of a “*public utility system*.”

4 4. An Attorney General’s Opinion, Professor Brown’s Definition and Eminent Domain.

5 The AGO finds “Telecommunications businesses are public utilities.” See Authority Of  
6 Cities, Towns, And Counties To Provide Telecommunications Services. AGO 2003 No. 11<sup>57</sup>

7 Consider Professor Richard E. Brown’s definition of public utilities. He wrote the book on  
8 public utilities, Business Essentials for Utility Engineers, and is a Fellow of the Institute of  
9 Electrical and Electronics Engineers (IEEE), with BSEE, MSEE and PhD degrees from the  
10 University of Washington in Seattle, an MBA degree from the University of North Carolina at  
11 Chapel Hill, and as a registered professional engineer, Prof. Brown defines “public utility” as:

12 *Public utilities* provide essential services to society. Because of their  
13 importance, legal precedent has upheld the need for specialized government  
14 oversight of these businesses to ensure that safe and reliable utility services  
15 are widely available for rates that are reasonable and non-discriminatory.<sup>58</sup>

16 Public utility services are often established via eminent domain and possess natural  
17 monopoly characteristics, with “pricing power,” thus creating a need for regulation.<sup>59 60 61</sup>

18 Click! fits the definition of “public utility,” with a brand is organized as a “system,” holding  
19 itself out<sup>62</sup> to supply telecommunication and data transport services to a class of TPU ratepayers,  
20 subject to special governmental regulation, both at the local and state levels.<sup>63 64</sup>

21 <sup>57</sup> Attorney General Opinions are “entitled to great weight.” See *Five Corners Family Farmers v. State*,  
22 173 Wn.2d 296, 308, 268 P.3d 892 (2011)

23 <sup>58</sup> Dr. Brown has provided consulting services to most major utilities in the United States and many  
24 around the world, is a frequent instructor, having taught courses in eleven countries, and is an adjunct  
25 professor at North Carolina State University. Shook Decl. 12/12/19 Ex. 40 Pg. 4

26 <sup>59</sup> Large fixed costs are associated with establishing public-utilities, like a telecommunication system, act  
as a barrier to entry, creating a “natural monopoly” with “pricing power” -or the ability to unfairly raise  
rates, since demand is “inelastic.” Buyers, needing the service, have little choice but to pay .

<sup>60</sup> Telecommunication companies are regulated in Washington State under Chapter 80.36 RCW; however,  
in deference to municipal control, RCW 80.04.500 expressly provides Tacoma with home-rule authority  
for most of the provisions of Title 80 RCW. As a result, rates and policy for Click! are set by Council.

<sup>61</sup> Broadband service is generally a monopoly in the USA. Shook Decl. 12/??/19, Ex. 46, also “market for  
local access to broadband tends to be a “natural monopoly.” See WI-FI Everywhere: Universal  
Broadband Access as Antitrust and Telecommunications Policy Hannibal Travis American University  
Law Review, Vol.55 Issue 6 (2006) Shook Decl. 12/12/19, Ex. 51

<sup>62</sup> See Shook Decl. 12/12/19 Ex. 42 Click! holds itself out as providing Broadband Telecommunications  
services. Also see RCW 54.16.005 (4) as “the provision of telecommunications services or facilities for  
resale by an entity authorized to provide telecommunications services to the general public and internet  
service providers.”

<sup>63</sup> Council fixes Click! rates and policies. The State also regulates broadband under RCW 19.385.020.

1 Constructed upon 140 years of the City’s municipal infrastructure, established under broad  
2 eminent domain authority, as represented in the many easements, conduits, vaults and facilities  
3 underlying the utility system, Click! further fits the definition of a utility.<sup>65</sup>

4 The City has broad power, “to condemn land and other property and damage the same for  
5 such and for any other public use.” As a utility, City “may acquire, construct, purchase, condemn  
6 and purchase, own, operate, control, add to and maintain lands, easements, rights-of-way.” As a  
7 telecommunication company, “The right of eminent domain is hereby extended to all  
8 telecommunications companies organized or doing business in this state.”<sup>66</sup>

9 To sum it up, a “municipal public-utility” is a non-profit enterprise, holding itself out under a  
10 brand or system to supply a “public service” to a specific class of customers, subject to special  
11 governmental regulations that insure equitable, non-discriminatory, prices and practices.<sup>67</sup>

12 5. Invention of Broadband and Reemergence of Municipal Communications Utilities.

13 At the dawn of the telecommunication age, municipal communication utilities were very  
14 commonplace. In 1907 the U.S. Census Bureau did a Special Report on Telephones and found  
15 over 580,000 non-profit community lines operated by “Mutual Systems,” “Cooperative  
16 Associations” and “Farmer Lines” across the nation.<sup>68</sup> History shows AT&T crushed such  
17 competition and monopolized this industry, but was broken up in 1984. With subsequent federal,  
18 state and local governmental support, the public is regaining control of essential communication  
19 facilities.<sup>69</sup> A revival of municipal ownership of telecommunication utilities is unfolding.<sup>70</sup>

20 Anacortes, Washington, is an example of a municipal telecommunication utility regaining  
21 control of such services. Anacortes now offers retail broadband utility service alongside their  
22 water utility. Their first customer was recently installed. (Shook Decl. 12/12/19 Ex. 58, Pg. 8)

24 <sup>64</sup> Answer, Pg. 6 ¶33. Admits Click! “partners” with local ISP “partners” to provide internet service.

25 <sup>65</sup> Transferring City’s “police power” of eminent domain, *juris privati*, is likely unconstitutional.

26 <sup>66</sup> Eminent domain authority for a City is found in the Session Laws of 1893, Ch. 84, Sec.1, Pg. 189, now  
RCW 8.12.030, for a utility in RCW 35.84.020, and a “telecommunications company,” RCW 80.36.010.

<sup>67</sup> A “public service” is a service “holding itself out, expressly or impliedly, to supply its service or  
product for use either by the public as a class or by that portion of it that can be served by the utility”  
*Inland Empire Rural Elect. v. Dept. of Public Service of Wash.*, 199 Wash. 527, 537, 92 P.2d 258 (1939)

<sup>68</sup> Shook Decl. Ex. 58, Pg.1 Department Of Commerce: The Census on Telephones: 1907

<sup>69</sup> Shook Decl. 12/12/19, Ex. 49. A Brief History of American Telecommunications Regulation.

<sup>70</sup> The Telecommunications Act of 1996 created broad opportunities for municipal ownership.

1 Click! is a public utility, by common language definitions, regulatory statutes, numerous  
2 municipal utility examples, the Attorney General’s opinion, 500 years of case/common law, all  
3 of which confirm that a municipal telecommunications business, affected with a public interest,  
4 subserving a public need, exercising police power of eminent domain and rate setting, standing at  
5 the gateway of commerce, subject to public regulation, holding itself out expressly for supplying  
6 essential public services, devoted to public use and operated for the common good and benefit of  
7 Tacoma Public Utility ratepayers, is subject to an approving vote of the people. As the high court  
8 found, in *State v. Kuykendall*, 137 Wash. 602, 243 P. 834, (1926)<sup>71</sup>

9 [I]f in the beginning or during its subsequent operation the pipe line was devoted  
10 by its owner to public use, and if the right thus extended to the public has not  
11 been withdrawn, there can be no doubt that the pipe line is a public utility.

12 6. Additional Utility Functions, Utility Purpose and Utility Benefits.

13 Click! offsets TPU’s telecommunication costs, provides revenue diversification,<sup>72</sup> and spurs  
14 economic development, all of which increases revenues for TPU’s other utilities,<sup>73</sup> increasing  
15 profits and lowering rates for all Power customers. Click! is a utility with a true nexus to Tacoma  
16 Power’s primary purpose.<sup>74 75</sup>

17 The community, at large, benefits from lower broadband rates due to competition in the  
18 market for broadband services. Competition between Click!’s Internet Service Providers  
19 (“ISPs”) partners, over Click!’s open access system, results in fierce competition for Comcast.  
20 This results in lower rates for the region. All of which spurs economic growth and serves to  
21 benefit TPU’s other utility purposes.<sup>76 77 78</sup>

22 <sup>71</sup> Drawing on *Budd v. People*, 12 S.Ct. 468, 143 U.S. 517, 36 L.Ed. 247 (1892), quoting *Munn v. Illinois*,  
23 94 U.S. 113, 24 L.Ed. (1877).

24 <sup>72</sup> Similarly, Chattanooga’s Electric Power Board (“EPB”) experiences savings. In the 2017 annual report,  
25 EPB announced: “Lower Power Rates: Because EPB Fiber Optics pays such substantial allocations and  
26 access fees to EPB Electric Power, the electric system has been able to avoid a significant electric rate  
increase. As a result, all electric customers are enjoying lower electric rates regardless of whether they are  
EPB Fiber Optics customers or not.” Shook Decl 12/12/19 Ex. 38.

<sup>73</sup> This provides a “sufficiently close nexus to the purpose and object” of TPU’s non-telecommunication  
utilities, water and power. *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 696 (1987).

<sup>74</sup> The threshold for nexus is quite low. Utility buying art to beautify its own facilities was sufficient nexus;  
but, utility could not buy art to benefit the general public. “Such projects beautify employee workspaces and  
customer service areas and thereby helped increase the efficiency of workplace operations and acted to the  
benefit of City Light.” *Okeson v. City of Seattle*, 130 Wash. App. 814, 125 P.3d 172 (2005) (Okeson II).

<sup>75</sup> Chattanooga, Tennessee operates an electric provider known as the Electric Power Board (EPB). In re  
City of Wilson, North Carolina, 30 FCC Rcd. 2408, 2015 WL 1120113, at \*7 (2015)

<sup>76</sup> Shook Decl. 12/12/19, Ex. 52, see Harvard Study on Broadband confirming lower prices.

1 **C. Municipal Utilities Commonly Provide Telecommunication Utility Services**

2 “The municipal corporation is allowed to go into the business only on the theory that thereby  
3 the public welfare will be subserved.” *Springfield Gas & Elec. Co. v. Springfield*, 257 US 66 -  
4 Supreme Court 1921. Municipal communication systems, owned and operated by non-profit,  
5 community entities, commonly provide broadband services in the modern era.<sup>79</sup>

6 Mr. Shook’s report, A Sampling of Municipal Broadband Utilities in the USA (2019),  
7 reviews 25 such utilities, with a short “description” of each utility’s services, taken directly from  
8 each utility’s own website. **Please See** Shook Decl. 10/30/19 Ex. 18.

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

12 Kansas has a long history of municipal utility operation. When private business  
13 would not or could not serve the utility needs of its citizens, city governments  
14 stepped up to provide essential utility needs – electric, gas, water, wastewater,  
15 stormwater, **and telecommunication services**. These community-owned  
16 utilities are municipal by choice. (Emphasis added)<sup>80</sup>

17 1. Washington’s Public Utility Districts Operate Telecommunication Utilities.<sup>81</sup>

18 Courts may interpret a statute by looking to “other statutes dealing with the same subject  
19 matter.” The PUD statutes are related statutes and helpful when “read together and harmonized.”  
20 *Harmon v. Dept. of Social and Health Services*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998)

21 Municipal ownership and operation of telecommunication systems is common in Washington  
22 State. Public Utility Districts (“PUDs”) are non-profit municipal corporations organized to

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23 <sup>77</sup> Defendant’s Answer, Pg. 6, ¶33. admits competition between local Internet Service Providers.

24 <sup>78</sup> See *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections*  
25 *160A-340 et seq. et al.*, Memorandum Opinion and Order, 30 FCC Rcd 2408, 2434, paras. 52-54 (2015)  
26 (*Municipal Broadband Preemption Order*) (finding Time Warner Cable’s rates lower in Wilson than in  
other areas of North Carolina and that Time Warner Cable improved its BIAS speed offerings after  
Wilson entered the market)

<sup>79</sup> The Executive Office of the President: Community-Based Broadband Solutions The Benefits Of  
Competition And Choice For Community Development And Highspeed Internet Access. (2015) Shook  
Decl. 10/30/19 Exhibit 21, Pg. 14, 15.

<sup>80</sup> KMU website, last accessed 11/19/19, available at <https://www.kmunet.org/page/Benefits?> Also  
available at Perma Link <https://perma.cc/8FDZ-XX8D> and as Shook Decl. 10/??/19 Ex.

<sup>81</sup> See RCW 54.04; also *Wash. Natural Gas Co. v. PUD 1*, 77 Wn.2d 94, 97, 459 P.2d 633 (1969).

1 provide public utility services. With less authority than charter cities like Tacoma, fourteen  
2 PUDs currently operate telecommunication “utility” systems across our state.<sup>82 83 84</sup>

3 Washington’s UTC considers broadband a “utility.”<sup>85</sup> (Shook Decl. 12/12/19 Ex. 41 Pg.1).

4 PUDs recognize broadband is “utility service,” vital to education, economic growth and  
5 employment.”<sup>86</sup> Kitsap County PUD calls “Broadband” a “utility.”

6 PUDs were formed in 1930 to provide equitable access to modern utilities for  
7 Washington's communities. Today, this *includes broadband*  
8 *telecommunications*. Watch our video to see how Kitsap PUD is continuing  
9 the mission and working to bring *this essential utility* to all of Kitsap's  
10 communities. (emphasis added).

11 Municipal broadband utilities are defined in Title 54, RCW -Public Utility Districts, in RCW  
12 54.16.420 “Retail internet service.” (1)(a) "Broadband" means high-speed internet access and  
13 other advanced telecommunications services.<sup>87</sup> (b) "Broadband network" means networks of  
14 deployed telecommunications equipment and technologies necessary to provide broadband.

15 PUDs are regulated, under RCW 54.16.420(15): “A public utility district providing retail  
16 internet service must separately account for any revenues and expenditures.” RCW 54.16.330,  
17 rates may not be “discriminatory or preferential,”: Provision of Telecommunications Services:

18 (2) A public utility district providing **wholesale or retail telecommunications services**  
19 shall ensure that rates, terms, and conditions for such services are not unduly or  
20 unreasonably discriminatory or preferential.

21 Regulation of PUD broadband utilities demonstrates Click! is also a utility, providing  
22 essential utility services. Chapter 35.94 RCW applies to such municipal utility assets.<sup>88</sup>

23 **D. The City’s Telecommunication System Provides Essential Utility Services.**

24 <sup>82</sup> See RCW 54.16.330(1)(a) A public utility district . . . may construct, purchase, acquire, develop . . .  
25 operate, and maintain any telecommunications facilities . . .

26 <sup>83</sup> First class cites conferred with an omnibus grant of power under RCW 35.22.570 .

<sup>84</sup> “district is publicly owned and operated and that it has no profit motive.” *Snohomish County Pub. Util.*  
*Dist. 1 v. Broadview Television.*, 91 Wn.2d 3, 8-9, 586 P.2d 851 (1978)

<sup>85</sup> The Australia’s Commonwealth has funded a National Broadband Network. Every Australian will have  
access to 100 Mbps service. 11 million homes are now ready to connect. Shook Decl. 12/12/19 Ex. 60.

<sup>86</sup> Shook Decl. 12/12/19 Ex. 38. Washington PUD Association (“WPUDA”) website, last accesses on  
11/23/19 “Widely available and reliable access to broadband service is important to our state’s economic  
health, access to education and essential services, and quality of life. Public utility districts play an  
important role in connecting communities by providing access to high-speed broadband service.”

<sup>87</sup> See 47 U.S. Code § 1302 (d)(1) The term “advanced telecommunications capability” is defined, without  
regard to any transmission media or technology, 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>88</sup> Click! services were conceived as a “utility purpose.” Shook Decl. 12/12/19, Ex. 30, Pg. 10, 11.

1 Broadband is commonly considered an essential utility.<sup>89</sup> State, federal and local public policy  
2 support broadband as a municipal utility service.<sup>90</sup> The City describes its own “Mission” in  
3 provision of these services as “vital to our quality of life.” (Shook Decl. 12/12/19, Ex 48, Pg. 8).

4 Washington state’s “Broadband Office,” established in 2019, with “AN ACT Relating to  
5 expanding affordable, resilient broadband service to enable economic development, public  
6 safety, health care, and education” *see* RCW 43.330.532 Broadband office—Established:<sup>91</sup>

7 The legislature finds that: (1) Access to broadband is critical to full participation in  
8 society and the modern economy provides a public benefit to the citizens of  
9 Washington by enabling access to health care, education, and essential services,  
10 providing economic opportunities, and enhancing public health and safety. *Id.*

11 In RCW 43.330.400 the Legislature found broadband technology advancements:

12 [E]nhance economic development and public safety . . . improved health care,  
13 access to consumer and legal services, increased educational and civic participation  
14 opportunities, and a better quality of life for the state's residents.

15 In July 2019, Pierce County Council passed a Resolution stating:

16 "Broadband" - forms the basis of an essential 21st Century infrastructure in our  
17 digital world and economy. It is vital to the economic development and quality of  
18 life for the residents, businesses and institutions of Pierce County and throughout  
19 Washington. (*see* Shook Decl. 12/12/2019 Ex. 37, and for Resolution *see* Ex. 54)

20 Pierce County Council’s 2019 Broadband Study concluded:

21 Broadband is essential, much like education, electricity, and water or sewer. It has  
22 become a primary enabler of economic mobility and prosperity, a “*fourth utility*” *Id*

23 Federal policy supports municipal communications.<sup>92</sup> Benefits are widely known and broadly  
24 promoted. Like roads, broadband is essential infrastructure for a modern economy. Broadband is  
25 a core utility for households, businesses and community institutions.<sup>93 94</sup>

26 <sup>89</sup> *See* 47 U.S. Code § 1301 (2) “Continued progress in the deployment . . . of broadband technology is  
vital to ensuring that our Nation . . . continues to create business and job growth.

<sup>90</sup> RCW 80.36.630 (c) "Broadband service" means any service providing advanced telecommunications  
capability, including internet access and access to high quality voice, data, graphics, or video.

<sup>91</sup> *See* RCW 43.330.532 – Findings 2019 c 365 The legislature finds Broadband (2) “serves a fundamental  
governmental purpose and function and provides a public benefit to the citizens of Washington. Also,

<sup>92</sup> *See* 47 U.S. Code § 1301 (4) “The Federal Government should also recognize and encourage  
complementary State efforts to improve the quality and usefulness of broadband data and should  
encourage . . . the continued growth of broadband services . . . for the . . . the Nation.

<sup>93</sup> Shook Decl. 10/30/19, Ex. 21, *see generally* Report from the executive office of the president:  
Community-Based Broadband -The Benefits Of Competition And Choice For Community Development  
And Highspeed Internet Access. (January 2015).

<sup>94</sup> Shook Decl. 10/30/19 Ex. 22, Pg. 3 -*see generally* A Light in Digital Darkness: Public Broadband after  
Tennessee v. FCC 20 Yale J. L. & Tech. 311 (2018).

1 “Today, **broadband** is taking its place alongside water, sewer and electricity as essential  
2 infrastructure for communities”. Quoting USDA Report (Shook Decl. 10/30/19, Ex. 23).<sup>95</sup>

3 **Broadband is crucial for increased health, educational and economic opportunities,**  
4 **as well as for job and business creation and growth.** Broadband can help close the  
5 digital divide between rural and urban communities. (USDA Rural Development’s  
6 Rural Utilities Programs website, *last visited* 10/30/19)

7 **E. Click! is a Municipal Utility “System Requiring a Vote under Charter 4.6**

8 Charter 4.6 requires a vote upon disposal of a “System.” Click!’s services are not general,  
9 sovereign, government functions, provided for the common good of the general public at large,  
10 to customers who do not request service. Click! is a municipal utility enterprise, providing  
11 proprietary public utility services for the benefit of the Utility and its customers.

12 That Click! is a “System,” operating under an “organizational structure,” with a general  
13 manager providing oversight, is important to note.<sup>96</sup> The “proprietary” services Click! provides  
14 define Click! as an “enterprise.” An enterprise is a system.<sup>97</sup> (Shook Decl 12/12/19, Ex.26)

15 Click!’s services are provided, as a proprietary function, to the Utility’s customers.

16 In the context of utilities, the focus is on whether the utility "operates for the benefit of  
17 its customers, not the general public," or, stated differently, whether it "will [provide  
18 service] to a customer that does not request service." Okeson, 150 Wn.2d at 550. If it  
19 operates to serve customers, a utility is serving a proprietary function.

20 *City of Wenatchee v. Chelan County Public Utility District*, 181 Wn.App. 326, (Div. 3 2014)

21 Washington decisions have held that the operation of a water system or other utility  
22 serving billed customers is a proprietary function. *Russell v. City of Grandview*, 39  
23 Wn.2d 551, 553, 236 P.2d 1061 (1951)

24 **F. The City Confirms Click! is Part of a Utility by Taxing it as a Utility.**

25 Further admission is found in the City’s organization, labeling, treatment and Taxation of  
26 Click!, which show the City has consistently demonstrated its expressed intention that Click! is a  
public utility “system.”<sup>98</sup>

The Washington Constitution provides, in Article VII Section 5: Taxes, How Levied, that “  
every law imposing a tax shall state distinctly the object of the same to which only it shall be

<sup>95</sup> Shook Decl. 10/30/19, Ex. 23. USDA Rural Utilities Service - Telecommunications Programs:

<sup>96</sup> Shook Decl. 10/30/2019, Ex. 9, Pg. 3

<sup>97</sup> “Enterprise” is a “a business organization,” also, “a systematic purposeful activity.” “Systematic” is  
“relating to or consisting of a system. Merriam-Webster.com Dictionary Accessed 11 December 2019

<sup>98</sup> Shook Decl. 10/30/19, Ex. 17, Showing the \$629,716. The City Website states: “City Utility Tax”  
refers to a tax on public service businesses, including businesses that engage in telecommunications

1 applied.” The City’s collects a 7.5% “utility tax” on Click! activities, including broadband  
2 revenue, as a “public utility.” In 2018 this tax amounted to \$629,716 on broadband alone.<sup>99</sup>

3 The City’s taxation of Click! as a public utility, shows an express intent that Click! is a  
4 public utility. The City’s taxation policy, City Charter 4.4, allows taxation “upon any of the City-  
5 operated utilities.” By collecting the City’s B&O “utility tax” on Click!’s broadband services,  
6 City demonstrates for the Court that Click! is a utility in Tacoma. (Shook Decl. 10/30/19, Ex. 9).

7 Tacoma’s utility tax rate increased, from 6% to 7.5%, by Proposition 3. It was a “utility tax  
8 increase,” and Click!’s tax rate increased accordingly. More evidence that Click! is seen as a  
9 utility. (Shook Decl. 12/12/19 Ex. 56, Pgs. 3, 4, 6) (Shook Decl. 10/30/19 Ex. 16).

10 Tacoma’s website provides: “Tax Classifications: Business income is reported under a tax  
11 classification *depending on the type of business activity*.” Click!’s “Business Activity” is a  
12 “*utility*” under the City Tax Code. (Shook Decl. 12/12/19 Ex. 56, Pg. 3).

13 **G. Laws of 1917 and Origin of Right To Vote on Separation of Municipal Utility Assets.**

14 Struggles between private and public interests over municipal utility assets are nothing new.  
15 The instant case is a good example of why the laws of 1917 were established. Private interests,  
16 who might benefit from privatizing municipal utilities, are held in check by the vote.

17 The contemporaneous events, surrounding enactment of the 1917 statute, inform the Court  
18 of the Legislature's intent in requiring voter approval for privatization. A central figure in the  
19 “public power struggles,” between public and private utilities, was the Honorable Homer T.  
20 Bone, Chairman of the 1925 Tacoma City Charter Committee that provided Charter 4.6’s  
21 protective vote. His speech, during his 1932 senate campaign, provides context for interpreting  
22 RCW 35.94 and Charter 4.6.<sup>100</sup> (Shook Decl. 12/12/19, Ex. 67, Pg. 6).

23 The power trust of this nation has junked every standard of decency in its dealing  
24 with the public. It has debauched our institutions of learning and our legislative  
25 bodies. It has brazenly gouged the pocketbooks of the people to maintain a flood  
26 of propaganda calculated to deceive the public mind. Its victims have been  
compelled to pay for the flood of corruption it has loosed upon the country. It has  
set up a long train of abuses and usurpation of power pursuing invariably the

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<sup>99</sup> Pursuant to City Charter 4.4, which permits tax “upon any of the City-operated utilities.” This defines Click! as a utility, given its taxation of as a utility. Res.# 39236 “earnings tax on utility companies.”

<sup>100</sup> Homer Truett Bone, In the early 1920s served as attorney for Port of Tacoma and Tacoma City Light, the city’s municipally owned utility. U.S. Senator, 1932-1944; judge, U.S. Circuit Court of Appeals, Ninth Circuit, San Francisco, 1945-1954.. Shook Decl. 12/12/19, Ex. 67 Pg. 12.

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same object which is reducing the American people to a state of vassalage to the greatest instrument of plunder the world has yet produced.

The people must not only destroy the power of this insolent organization, but *write into the laws of the land* new guards for future security against such monstrous invasions of their rights.

One only need look at the record of the Washington State Legislature to perceive how completely a public body can be dominated by a power trust lobby. The thing has become a stench in the nostrils of decency in the state of Washington which *led to the people of this great state to rise in their wrath and pass the Grange Power measure by a big majority in 1930.* (emphasis added). (Shook Decl. 12/12/19 -Part II Ex. 67 )

RCW 35.94, the Laws of 1917, originally codified as Remington’s Revised Statutes (“RRS”) 1917 c 137 §§ 9512–14, included “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.*” That legislative intent remains today, unchanged. (Shook Decl. 12/12/19 Ex. 33, Pg. 8)

The consequences of privatizing municipal utility property without an approving vote of the public was memorialized in 1942, by our high court’s finding that two wharves, which had been privatized, were “part of” a municipal utility. *Bremerton Municipal League v. Bremer*, 15 Wn.2d 231, 237–39, 130 P.2d 367 (1942). *Bremer*, cited RRS § 9512 thus:

'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.'

The appellants point out that the statute specifically names a long list of utilities, but does not specifically mention wharves and docks. But the statute also says, '*or any similar or dissimilar utility or system.*' This, we think includes any kind of utility in whose operations the public has an interest, that is to say, any public utility.<sup>101</sup>

In 1917, the legislature included a list of public services considered municipal utilities for protection under RCW 35.94. This list was left dramatically open. The Legislators could have simply said “not limited to,” instead, with the emphatic phrase of “*any similar or dissimilar utility or system,*” Legislators were assertive in issuing the inhabitants of a city the right to vote over disposal of their municipal utility property.

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<sup>101</sup> Such struggles continue, now between public broadband and private “broadband trusts,” to this day. Click! is target with equivalent tactics. Shook Decl. 12/12/19, Ex. 45. See Ms. Lachelle letter.

1 *Bremer* found a frivolous “abandonment,” done in anticipation of making the lease in  
2 question, had the “appearance of having *been made to circumvent the provisions* of sections  
3 9512-9514, inclusive, of the statutes.” (Emphasis added). As the *Bremer* court stated:

4 The appellants urge that the wharves had been abandoned. . . .As we read the  
5 record, the Front street wharf was not abandoned--or if so, only in anticipation of  
6 making the lease in question, for the ordinance approving the lease was passed on  
7 first reading by the city commission . . . it may well be doubted whether an  
8 abandonment would be approved which has the appearance of having been made  
9 to circumvent the provisions of sections 9512-9514, inclusive, of the statutes. *Id.*

10 The System telecommunication functionality is not just “similar or dissimilar” to the  
11 communication functionality contemplated in Chapter 35.94, it is identical. The System enables  
12 phone calls, using interconnected VoIP service. A lifesaving 911 call can be made over the  
13 System. The FCC’s Lifeline program subsidizes broadband as an advanced telecommunication  
14 service, with VoIP and broadband treated on the basis as traditional POTS service.<sup>102 103</sup>

15 Low-income consumers receive a standard \$9.25 monthly discount on Lifeline-supported  
16 VoIP or broadband Internet access service (Shook Decl. 12/12/19 Ex. 44).

17 1. Legislative Intent of Surplus and Plain Language of Municipal Utility Surplus Clause

18 RCW 35.94.040 was adopted in 1973, the legislative history shows the City was keenly  
19 interested in the bill. Senator “Slim” Rasmussen, 29<sup>th</sup> District, sponsored the bill, and  
20 Representative R. J. Kelley, Tacoma’s 28<sup>th</sup> District introduced it in the House.<sup>104</sup> TPU Director A. J.  
21 Benedetti, wrote supportive letters and testified on the need for the bill. In his March 5, 1973 letter  
22 to the House of Representatives, and his March 20, 1973 letter to the Chairman and Committee  
23 Members of the Senate Committee on Local Government, the Director acknowledged and agreed

24 <sup>102</sup> See 47 CFR § 54.400 (n) *Supported services*. Voice Telephony services and broadband Internet access  
25 services are supported services for the Lifeline program. The services are recognized equally under the  
26 FCC’s Lifeline program, providing subscribers a discount on monthly telephone service, broadband  
Internet access service, or voice-broadband bundled service. *Also* FCC Order 19-111 Released: November  
14, 2019 Bridging the Digital Divide. *also see* Shook Decl. 12/12/19 Ex. 44, Pg. 3

<sup>103</sup> See 47 CFR § 9.3 Interconnected VoIP service: Enables real-time, two-way voice communications and  
permits users generally to receive calls that originate on the public switched telephone network and to  
terminate calls to the public switched telephone network. VoIP capability includes *Automatic Number  
Identification* (“ANI”). A system that identifies the billing account for a call. For 911 systems, the ANI  
identifies the calling party and may be used as a call back number.

See 47 CFR § 54.400(m) Voice telephony service. “Voice telephony service” is defined as voice grade  
access to the public switched network or its functional equivalent; . . . access to the emergency services  
provided by local government or other public safety organizations, such as 911 and enhanced 911. . .

<sup>104</sup> House Bill 939, and Senate Bill 2835 Shook Decl. 12/12/19, Ex. 33, Pgs. 23, 31

1 with the importance of “*the confirming approval of the voters*” for surplus of “*operating*” utility  
2 assets.<sup>105</sup>

3 Director Benedetti assured Legislators that, “*Such procedure, of course, is desirable* when in  
4 fact all or *an integral part of an operating utility* is to be so disposed of.” The Director added:

5 This bill will accomplish procedural flexibility in such transactions without  
6 repealing the formalized procedures required in the situations involving utility  
operating plant and properties. (*see* Shook Decl. 12/12/19, Ex. 33, Pgs. 5, 6).

7 The Local Government Committee took up the matter. In an April 6, 1973 memo, Legislative  
8 Executive Secretary J.W. Gunther wrote Chairman Rep. Haussler, explaining the purpose of the bill.

9 Under the existing law, there is a long, detailed requirement for the calling of bids,  
10 passing of resolutions and all this appears to be rather cumbersome for the purpose  
of disposing of surplus properties. (*see* Shook Decl. 12/12/19, Ex. 33, Pg. 18)

11 At the first reading of the bill in the Senate, on March 14, 1973, surplus assets were defined by  
12 the term “*unusable property*,” and real estate defined as “unimproved lands.” In a hand written  
13 note, the terms “unusable” and “unimproved” were identified for removal as “*superfluous*,”  
14 indicating the word “surplus” was clear enough.<sup>106</sup> (Shook Decl. 12/12/19, Ex. 33, Pg. 3)

15 On March 16, 1973, Mr. Nolan, Deputy City Attorney for TPU, spoke to the House Local  
16 Government committee and assured Legislators this bill would simply allow TPU “*the same*  
17 *privileges*” for surplus enjoyed by Public Utility Districts. (Shook Decl. 12/12/19 Ex. 33, Pg. 38)

18 A direct comparison to the PUD “*privileges*,” and assurance of seeking identical limitations on  
19 surplus authority, was also cited in Director Benedetti’s letters. The Director confirmed for the  
20 Legislators, that the authority to surplus was “consistent with that *long enjoyed by the Public Utility*  
21 *Districts* under RCW 54.16.180.” (Shook Decl. 12/12/19 Ex. 33, Pg. 18 ).

22 The Director’s comparison was fair. PUDs and “cities and towns” are municipal corporations  
23 with “the same powers” and “same duties” for disposal of utility assets. RCW 54.16.180 (9)

24 ***Districts are municipal corporations for the purposes of this section.*** A commission  
25 shall be held to be the legislative body, a president and secretary shall have the same  
26 powers and perform the same duties as a mayor and city clerk, and the district resolutions  
shall be held to be ordinances ***within the meaning of statutes governing the sale, lease,  
or other disposal of public utilities owned by cities and towns.*** (emphasis added).

Which makes sense, given both surplus statutes, RCW 35.94.040 and RCW 54.16.180(2)(b),

<sup>105</sup> Shook Decl. 12/12/19, Ex. 33, Pgs. 5, 6.

<sup>106</sup> Shook Decl. 12/12/19, Ex. 33, Pgs. 22. - terms “unusable” and “unimproved” as superfluous.

1 share a common origin, *in the Laws of 1917* and the same protective statues in RRS §§ 9512 -9514.

2 From 1945 to 1955, the City and PUDs shared identical statutory authority for disposal of their  
3 utility property. Surplus was regulated in *exactly the same way*, under *exactly the same laws*. The  
4 Laws of 1945. House Bill 342, Chapter 143, Section 6(m), Page 413, specifically linked PUD's and  
5 the City's process for the sale, lease or disposal of the people's assets.<sup>107</sup>

6 It is, and shall be lawful for any public utility district organized hereunder to sell and  
7 convey, lease or otherwise dispose of all or any part of the works, plants, systems,  
8 utilities and properties authorized by this act and owned by it after proceedings and  
9 approval by the voters of the district as provided for in chapter 137, Laws of 1917,  
(sections 9512, 9513 and 9514 of Remington's Revised Statutes of Washington).

10 Only two amendments have ever been made to the surplus language in the 1945 statute. The  
11 first came in 1955, when PUDs gained "flexibility in procedure," with surplus authority, With the  
12 newly created RCW "chapter and section" numbering system, PUDs were regulated under Title 54,  
13 when Legislators first modified RRS §§ 9512 -9514's cumbersome process for disposal of surplus  
14 utility property in the Laws of 1955, Senate Bill 367. Thus was created RCW 54.16.180. <sup>108</sup>

15 To this day, RCW 54.16.180 represents the unmistakable legislative intent regarding the term  
16 "surplus" in relationship to municipal utility property under RRS §§ 9512 -9514.

17 It would be 18 more years until Tacoma gained surplus authority. During that time, the PUDs  
18 surplus statue remained unchanged. In 1973 RCW 54.16.180 was the template for the same  
19 surplus authority Tacoma now sought for improving the same "rather cumbersome" process.<sup>109</sup>

20 The Tacoma Utility Director and two Tacoma City Attorneys testified that the surplus  
21 authority they sought was "the same privilege," "consistent with that long enjoyed by the Public  
22 Utility Districts under RCW 54.16.180." <sup>110</sup> Here is RCW 54.16.180 as it appeared in 1973. This  
23 is the surplus authority Tacoma sought. Legislative intent for surplus under RRS § 9512 is here.

24 That a district may sell, convey, lease, or otherwise dispose of all *or any part of the*  
25 *property owned by it*, may sell, convey, lease, or otherwise dispose of to any person or  
26 public body, any part, either within or without its boundaries, which has become  
unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the  
system and which is no longer necessary, material to, and useful in such operations,  
without the approval of the voters. (*see* Laws of 1955, Ch. 390, Pg. 1685.) (emph. added)

<sup>107</sup> The Laws of 1945, Ch. 143 Pg. 413. Shook Decl. 12/12/19, Ex. 33, Pg. 5.

<sup>108</sup> See the Laws of 1955, Ch. 390, S.B. 367, Section 19, Pg. 1685. Shook Decl. 12/12/19, Ex. 33, Pg. 4

<sup>109</sup> Shook Decl. 12/12/19, Ex. 33, Pg. 18 – Legislative Executive Secretary J.W. Gunther wrote Chairman  
Rep. Haussler, explaining the purpose of the bill.

<sup>110</sup> Quoting Director Benedetti's letters, *surpa..* All of this represents legislative intent for surplus.

1 This 1973 version of RCW 54.16.180 shows the legislative intent for “surplus” under RCW  
2 35.94.040. This is the very statute which RCW 35.94.040 was intended to replicate. It was  
3 presented to Legislators, as a direct comparison and a basis for their unanimous adoption of  
4 RCW 35.94.040. It represents what Legislators intended to accomplish, in 1973, by modifying  
5 the 55-year old legacy of RRS §§ 9512 -9514. Legislative intent for “surplus” under RCW  
6 35.95.040 is revealed for the Court in this 1973 version of RCW 54.16.180.

7 Understanding the legislative intent behind RCW 35.94.040 provides context for statutory  
8 interpretation of “surplus” in the instant case. The statutes terms, such as “obsolete,” “worn out,”  
9 “unserviceable,” “no longer useful” or “unfit to be used” in the operation of the system, do not  
10 describe a state-of-the-art fiber optic system, earning \$25 million a year, and being “leased” for 40  
11 years, with a reversionary interest. The Court cannot substitute its judgement for that of the  
12 legislators. Click!’s status, as an operational enterprise, simply does not meet the Legislator’s intent  
13 of the term “surplus.” When considering the meaning of “surplus,” associated words placed in the  
14 statute control the meaning of a word. *Cito v. Rios*, 3 Wn. App. 2d 748, 759, 418 P.3d 811, review  
15 denied, 191 Wn.2d 1017, 426 P.3d 747 (2018).

16 Only one other change has ever been made to the 1955 version of RCW 54.16.180. That came  
17 in 2008, with the Laws of 2008, Ch. 198, Pg. 8, Sec. 5, and further confirms legislative intent over  
18 disposal of surplus assets. Legislators made “surplus” even clearer, by adding the emphatic phrase,  
19 “**no longer useful in such operations, to any person or public body**.” The statute reads today: <sup>111</sup>

20 RCW 54.16.180 (2) A district may, without the approval of the voters, sell, convey, lease,  
21 or otherwise dispose of all or any part of the property . . . which has become  
22 unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the  
23 system and which is no longer necessary, material to, **and useful in such operations, to  
24 any person or public body.** (emphasis added).

25 The words, “**useful in such operations to any person or public body**” shows legislative intent to  
26 protect assets from “**any person**” that would use productive public utility assets to continue  
providing the same utility service, or “such operations.”<sup>112</sup> In Click!’s case, the System is absolutely  
“**useful.**” The private buyer will provide exactly the same “**operations,**” for the next 40 years.

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<sup>111</sup> Substitute House Bill 2639

<sup>112</sup> Consider a water pipeline, or water system, for example. The phrase “**useful in such operations**” would prohibit “surplus” from being applied to assets being sold to someone who would use them to continue supplying water. They pipeline could be salvaged for scrap, but not continue in public service.

1 “In resolving the meaning of a statutory term, we adopt the interpretation that best advances the  
2 legislative purpose.” *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, 184  
3 Wn.2d 428, 437, 359 P.3d 753 (2015), and find the statutes plain meaning as “derived from the  
4 context of the entire act as well as any ‘related statutes which disclose legislative intent about the  
5 provision in question.’” *Jametsky*, 179 Wn.2d at 762 (quoting *Dep’t of Ecology v. Campbell &*  
6 *Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

7 **H. Click! Serves a Useful Purpose and Disposal by Surplus is Substantive Ultra Vires..**

8 Click!’s fiber optic cable is used for data transport. All of the “fiber” is sheathed within one  
9 “outer jacket.” It is essentially one pipe consisting of a number of “tubes,” with each tube having  
10 a specific number of fiber “strands.” *See* (Shook Decl. 12/12/19 Ex. 31, Pg. 3)

11 On Click!’s system, there are 12 fiber optic strands in each “tube.” ***Click! currently uses one***  
12 ***“tube” for all Click!’s commercial services.*** There are *15 additional* “tubes” of dark fiber,  
13 representing the communities’ potential for future use. Click!’s current use of this fiber optic  
14 “backbone” is shown in “purple” on the City’s slide presentation from October 29, 2019.<sup>113</sup>

15 Privatization not only transfers complete control over the twelve strands of fiber currently  
16 used by Click!, but also vests complete control all over the ***additional 9 tubes, or 108 additional***  
17 ***strands of dark fiber***, needed for the community’s access to broadband services in the future.  
18 Explosive growth in data usage and broadband telecommunications is upon us. The community  
19 will require all this infrastructure and more. (Shook Decl. 12/12/19 Ex. 31, Pg. 14).

20 Equally as important are the DNS servers, DHCP servers, Caching servers, routers, switches,  
21 hubs, nodes, and intellectual property that enable the system. A most notable example an asset  
22 that is obviously not surplus is the IPv4 address, included in the CBTA. The agreement provides,  
23 in connection with the IRU, Tacoma Power will assign IPv4 addresses to Operator from CIDR  
24 131.191.0.0/17 and 192.173.160.0/20.”<sup>114</sup>

25 IP Addresses are numbers owned by the City and assigned to each customer device via  
26 Click!’s DHCP server, allowing devices to connect directly to the world wide web. The world

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<sup>113</sup> *See* Shook Decl. 12/12/19 Ex. 31, Pg. 3 All required in increasingly digital world, to connect with friends and family, access goods and services. The IDC predicts the Global Datasphere, estimated to be 33 ZB in 2018, will grow to 175 ZB by 2025.

<sup>114</sup> The City owns the valuable IPv4 addresses included in the IRU. These are not “surplus.” All devices that connect to the Internet require an Internet Protocol (IP) address and IP addresses are a valuable commodity. Demand has exhausted the global supply of IPv4 addresses.

1 supply of IPv4 address is exhausted. They are a precious and valuable commodity, with a long  
2 waiting list of over a year. *See* Shook Decl. 12/12/19 Ex. 65.<sup>115</sup>

3 Defendant admits Click! is part of a municipal utility, providing a public service. These  
4 services are “municipal utility services.” If portions of Click! qualify as the “works, plant, *or*  
5 *system* owned by it or ***any part thereof***,” then vesting via surplus is ultra vires. A direct violation of  
6 statute. *Finch v. Matthews*, 74 Wash.2d 161, 172, 443 P.2d 833 (1968)

7 Property “originally acquired for public utility purposes” is not surplus, when that property  
8 continues providing “public utility service.” All the assets being conveyed were “originally  
9 acquired for public utility purposes.” The System was established to deliver telecommunication  
10 services to TPU customers, diversify TPU revenue, drive economic growth and offset costs for  
11 TPU. The property is not idle, or its operations discontinued. If privatized, the System would  
12 continue providing TPU customers with the same services. A property is not surplus, when  
13 continuing to provide the same municipal utility services.<sup>116 117</sup>

14 The City’s Resolution 40467, declaring surplus utility-owned property, inventory,  
15 equipment, and vehicles allocated to Click! Network, enables Resolution 40468, which  
16 authorizing execution of the CBTA to convey ownership of Click!. Together these Resolutions  
17 circumvent the public vote requirement in RCW 35.94.020. No bidding has been occurred in the  
18 surplus process, as is generally seen. (Shook Decl. 12/12/19, ¶ 1, and City Policy Ex. 54, Pg. 4)

19 A municipality does not have unbounded discretion to declare a utility surplus. *South Tacoma*  
20 *Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010) (governmental acts without authority  
21 are *ultra vires*). A municipality’s action is void, if contrary to law.

22 City’s “Declaration of Surplus Property” does not meet the standard of “surplus” under RCW  
23 35.94.040, which applies to property “not required for providing continued public utility  
24 service.” Since Click!’s “surplus” property will continue providing the same public utility  
25 broadband services to the same public utility customers, Council’s surplus Resolutions is an ultra  
26 vires application of the statute. A “contract contrary to the terms and policy of a legislative  
enactment is illegal and unenforceable. *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233

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<sup>115</sup> Cable modem customers receive 5 routable IP addresses with service, and FTTH users get 1,

<sup>116</sup> Imagine a public school being declared as “surplus” and privatized; but, in fact students still in attendance, only forced to pay whatever tuition of lunch program charges the private company requires.

<sup>117</sup> Under RCW 35.94.040, the System itself is required for “providing continued public utility service.”

1 P.3d 871 (2010) , *Hederman v. George*, 35 Wash.2d 357, 362, 212 P.2d 841 (1949); *State v. Nw.*  
2 *Magnesite Co.*, 28 Wash.2d 1, 26-27, 182 P.2d 643 (1947).

3 The City’s authority in exercising its proprietary power is limited. Tacoma may not act  
4 beyond the purposes of the statutory grant of power, *State ex rel. PUD 1 v. Wylie*, 28 Wash.2d  
5 113, 182 P.2d 706 (1947), or contrary to express statutory or constitutional limitations.  
6 *Metropolitan Seattle v. Seattle*, 57 Wash.2d 446, 459-60, 357 P.2d 863 (1960);

7 "Ultra vires acts are those done wholly without legal authorization or in direct violation of  
8 existing statutes." *Metro. Park Dist. of Tacoma v. State*, 85 Wash.2d 821, 825, 539 P.2d 854 (1975)

9 Click!’s public broadband system provides a valuable and “effective” way for TPU customers  
10 to connect to the Internet. Without Click!, “continued effective utility service” is impossible.  
11 Circumventing this process is a substantive violation of the statute and *ultra vires* act., rendering the  
12 contract void ab initio. *Faylor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wash.2d 488, 499,  
13 886 P.2d 147 (1994) This “right to vote” prevents corrupt disposal of public assets. Failure to allow  
14 the vote is an ultra vires action.

15 “Historically, the unauthorized contracts of both corporate and governmental  
16 entities, which by their nature represent the interests of groups of individuals,  
17 have been rendered void and unenforceable under the ultra vires doctrine.” *Noel*  
18 *v. Cole*, 98 Wash.2d 375, 655 P.2d 245 (1982).

19 Also, “where the procedure followed has not been in accordance with law, proceedings had  
20 thereunder must be held void,,” *Jones v. City of Centralia*, 157 Wash. 194, 289 P. 3, (1930), and,  
21 “the lease here in question was void ab initio, and that the warrants issued in payment  
22 therefor are invalid, because both the making of the lease and the issuance of the  
23 warrants, without the assent of the voters, were ultra vires of the town council.” See  
24 *State v. Town of Newport*, 70 Wash. 286, 126 P. 637, (1912)

25 The doctrine of ultra vires applies to governmental action to "protect the citizens and taxpayers  
26 from unjust, ill-considered, or extortionate contracts, or those showing favoritism" see *10 E.*  
*McQuillin*, Municipal Corporations § 29.02, at 200 (3d ed. 1981)

27 A municipal election cannot be avoided in conveying a going concern. Vesting a municipal  
28 utility’s telecommunications system, with in-service assets, active customer accounts, under  
29 surplus, is fundamentally a legal question of statutory interpretation. No factual issues require  
30 determination. Privatization removes all public oversight of operations and rates. As a sale,  
31 lease, and/or disposal of Click! Mr. Shook is entitled to the relief requested.

32 **I. Good Public Policy Prevents Ultra Vires Act Circumventing People Right to Vote.**

1 The right to vote is curative of all ills and the fundamental basis of all democracy.. See  
2 *Madison v. State*, 161 Wn.2d 85, 98, 163 P.3d 757 (2007). A vote is mandatory in this case.  
3 Preventing the ultra vires destruction of that right is good public policy.

4 Council’s authority is expressly limited, by extraordinary Charter and state statutory  
5 requirements for a public vote. Express authority is in the electorate. Circumventing the law  
6 cannot be validated. The matter must be “submitted to the voters of the city for their approval or  
7 rejection at the next general election.”

8 If Click! is surplus, any private company could pilfer the public treasury by deploying large  
9 campaign contributions to sway policymakers into privatizing utility assets. No such loophole  
10 should be opened by the Court. Protecting the people’s property from plunder and preserving  
11 them for the people who paid for them, is the purpose of the policies in RCW 35.94. The Court  
12 would be well informed by taking judicial notice of the fact that municipal utility ownership  
13 (“MO”) has always faced fierce opposition and criticism from entrenched powerful private  
14 interests facing municipal competition. <sup>118</sup> (Shook Decl. 12/12/19, -Part II, Ex. 67 )

15 When all the facts are considered together, the business plan, the Ordinance establishing  
16 Click!, the abundant statutory and judicial authority cited in City’s 1996 and 1997 Memorandum  
17 for the Summary Judgement, the legislative intent and history of RRS §9512 in Chapter 35.94  
18 RCW, the common definitions of “system,” “utility,” the bare fact Click! is owned and operated  
19 by a utility, taxed as a utility, provides essential service to 35,000 active accounts, earns \$25  
20 Million annually in revenue, has significant brand recognition, for all these reasons, Click! is  
21 obviously a municipal utility system providing the same services for which it was established.

22 The surplus resolution has every *appearance of having been made to circumvent the*  
23 *provision of Chapter 35.94 RCW*. It is procedurally *ultra vires*. The public’s investment in these  
24 assets must be protected, especially from the very same powerful private interests who opposed  
25 the creation of the system in the first place and would profit from privatization of these assets.<sup>119</sup>

26 <sup>118</sup> Consider the contemporary opposition, in 1917 and 1925, from private municipal rail, gas, telephone,  
water and power companies at the time Chapter 35.94 RCW and the Tacoma City Charter were written.  
Propaganda published at the time demonstrate the lobbying tactics, and motives, of those opposing to the  
hated “MO” (municipal ownership). For examples, see Shook Decl., 12/12/19 PART II Ex. 67.

<sup>119</sup> Thanks in large part to substantial lobbying efforts, twenty-one states have legislative barrier to  
municipal broadband networks Shook Decl. 12/12/19, Ex. 46, Pg. 601. Casting a Wider Net: How And  
Why State Laws Restricting Municipal Broadband Networks Must Be Modified. Many Communities see  
existing broadband offerings not meeting needs and are building municipal broadband networks.

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When private companies cannot, or will not, deliver the essential infrastructure required for participating in modern society, municipalities must have the right to take such important matters into their own hands, as the citizens of Tacoma did, over 20 years ago, by creating, arguably, the nation’s first municipal broadband public utility system.

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

Defendant’s surplus declaration skirts the law and this Court must prevent disposal of an entire utility system without a vote of the people. Such a determination supports important public policy and protects voter rights.<sup>120</sup>

The laws of 1917 plainly encompass telecommunication systems such as Click!. On its face, the statute is not ambiguous. The people’s assets are serving a useful public purpose and require protection from wrongful privatization. Government officials are “trustees” and the electorate’s right to vote ensures accountability. Privatization requires a vote of the people.

**Conclusion**

For the forgoing reasons, the Court should grant Mr. Shook’s motion and declare City’s surplus resolution ultra vires

Respectfully submitted this 12<sup>th</sup> day of December 2019.



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Mitchell Shook  
Plaintiff

<sup>120</sup> Fortunately, the CBTA anticipates nullification of the IRU Agreement by the Court: There is no harm. The Agreement provides “In the event that, prior to Transfer of Operational Control, a court of competent jurisdiction issues an order nullifying or invalidating the IRU Agreement or restraining or enjoining either Party from executing the IRU Agreement . . . either Party shall have the right to terminate this Agreement, which shall be Party’s sole remedy.

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

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

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

DARREL BOWMAN,  
Plaintiff,  
v.  
CITY OF TACOMA,  
Defendant.

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

**PLAINTIFF MITCHELL SHOOK'S  
RESPONSE TO DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT**

MITCHELL SHOOK,  
Plaintiff Pro Se,  
v.  
CITY OF TACOMA,  
Defendant.

I. INTRODUCTION

The definition of “public utility” is found in the Laws of 1917, House Bill 337, or Remington RRS § 9512 -9514, (“§ 9512”) now Chapter 35.94 RCW, titled: “An Act authorizing cities and towns to lease or sell any municipally-owned” utilities.<sup>1</sup> Providentially, Legislators provided a list of “utilities” protected from privatization by the public vote. The long list included “telegraph and telephone lines and plants and any other . . . system similar or dissimilar in character.”<sup>2</sup>

CHAPTER 137.

[H. B. 337.]

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.

Section 1 provided:

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. . . (emphasis added)

In 1945, this long list of municipally-owned utilities was “rewritten for brevity” by the Code Committee.<sup>3</sup> This “abbreviation” removed “telephone or telegraph plant and lines,” along with the long list and the emphatic language, “any similar or dissimilar utility.”<sup>4</sup>

Even broader language was substituted, with “any public utility works, plant or system owned by it or any part thereof. . .” With this one abbreviation, the “Laws of 1917” entered the RCW under Chapter 80, see image below. That language remains unchanged today.

<sup>1</sup> Passed by the Senate on March 6, 1917 and approved by the Governor March 15, 1917.  
<sup>2</sup> Shook Decl. 12/30/19, Ex.81, Reviser's Notes Volume 2, Revised Code of Washington, 1946, At 80-7, (stating RRS § 9512 was "rewritten for brevity.")  
<sup>3</sup> Shook Decl. 12/30/19, Ex. 81, Laws of 1942, Ch. 252, Sec. 1. (“continuing Code Committee with full power of revision and codification of the laws.”)  
<sup>4</sup> Important to note, because “Telegraph and Telephone” later becomes “Telecommunication” and the Ordinance creating Click!, and Court cases approving it, created a “Telecommunication System.”

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

In 1985, the terms “*Telegraph and telephone*” were broadly replaced by the modern term “*Telecommunications*.”<sup>5</sup> Consequently, Chapter 35.94 (“Laws of 1917”) now encompass “Telecommunication,” as a municipal “utility.” Click! is a “*municipally-owned*” telecommunication (“Telecom”) system, hence protected from privatization by the public vote.

WASHINGTON LAWS, 1985

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Sec. 17. Section 80.36.030, chapter 14, Laws of 1961 and RCW 80-36.030 are each amended to read as follows:

Such (~~telegraph or telephone~~) telecommunications company may appropriate so much land as may be actually necessary for its telecommunications line (~~of telegraph or telephone~~), with the right to enter upon lands

Try as they may to recast the facts, Defendant’s attempt to convert a cancelled pilot meter program into a surplus declaration over Click!’s entire telecommunication enterprise runs headlong into the undisputed material fact that Click! was expressly created, designed and built to fulfill the community’s pressing need for an advanced “Telecommunication System.”

Click!’s services would continue under privatization, therefore Click! is “*required for providing continued public utility service*.”<sup>6</sup> Given Click!’s system is “useful” and “*required*” for continued service, Click! is not surplus. Privatization requires a vote of the people.<sup>7</sup>

The careful planning and construction of Click! included costly investments to secure “Additional Capacity,” which Click! utilizes and relies on today. Click! paid for these improvements, and continues to pay more than its share.<sup>8</sup> Defendant asserts Click! was built for Tacoma Power’s (“Power’s”) abandoned pilot meter program. This is misleading and wrong.

<sup>5</sup> Shook Decl. 12/12/19, Ex. 61, (examples of substitution). See Shook’s MPSJ, Pg. 10. See also Laws of 1985, Ch. 450, Senate Bill No. 3305, Pgs. 1978 -1995 (examples).

<sup>6</sup> RCW 35.94.040 limits surplus, with: “and is not required for providing continued public utility service.”

<sup>7</sup> Legislative intent for surplus under the Laws of 1917 is found in the PUD laws of 1945.

<sup>8</sup> See Shook Decl. 12/30/19, ¶ 1, (shared costs), E.g. Ex. 76, Operational Summaries (depreciation costs).

1 Defendant has substituted its judgment upon matters within the province of the City's  
2 Freeholders and State Legislators, who long ago determined the right to dispose of Tacoma's  
3 municipal utility assets rests in the electorate. There is no justification for Defendant's attempt to  
4 circumvent laws placing an express limitation on City's authority.

5 Citizens of Tacoma are not unique in reserving the right to vote on disposal of their municipal  
6 utility assets, *see Clark v. City of South Haven*, 8 Mich. App. 74 (1967), 153 N.W.2d 669

7 [W]hen the voters of South Haven granted the privilege to generate power, they  
8 were not content to divest themselves of every managerial function normally  
9 associated with the operation of a business concern. By their city charter they  
10 have retained express power over the discontinuance of their public utility. The  
11 contract in question has the effect of violating section 13.5 of the charter for the  
12 city of South Haven and is therefore void unless approved by the voters as  
13 required by the charter."

14 Click! ("System") was created and funded as a "utility." The City's detailed 1996 plan, for a  
15 municipally-owned advanced telecom system, was a revolutionary and controversial concept.  
16 Authority to establish and fund the utility was blessed by two Court Orders.<sup>9</sup> Click! was born,  
17 built, bought and paid for as a utility system.<sup>10</sup> Municipal competition was divisive when first  
18 proposed.<sup>11</sup> It remains controversial across our nation today.<sup>12</sup> Power Superintendent at the  
19 time, Steve Klein, described the opposition in those early days,

20 My sense -- and this is my sense when I was there, and it's fairly accurate -- is the  
21 people in Click were wonderful. The service was wonderful. It was a local  
22 utility trying to do and doing good. How do you attack something like that? And  
23 so basically the opposition came up with, well, how do you attack it? You make  
24 people feel like they're being ripped off. And so every so many years, this theme  
25 would build up again, and here -- here it was again. (Shook Decl, Ex. 75, Pg. 19)

26 <sup>9</sup> In *City of Tacoma v. Taxpayers and Ratepayers of Tacoma*, 96-2-09938-0. Superior Court issued two  
orders, one authorizing the System (1996 Order), the other authorizing utility bonds to fund it (1997  
Order). Taxpayers argued Click! was general government's obligation, and a public vote was required to  
fund the System. City prevailed, arguing the System was a utility and must be funded by utility bonds.  
Relying on that decision, for 20 years, City is legally and equitably estopped from alleging otherwise.

<sup>10</sup> Shook Decl. 10/30/19, ex. 11, The enabling Ordinance 25930, creating Click!, cited authority in RCW  
35.95.020. Also, in Section 1.3, it cited the City Charter (as authority for funding Click! as a "utility."  
("Charter § 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").

<sup>11</sup> Nineteen states have laws restricting municipalities to from establishing telecommunication utilities,  
such as Click!. The Supreme Court confirmed state authority to preempt municipal competition in *Nixon v.*  
*Mo. Mun. League*, 541 U.S. 125, 140-41 (2004). The FCC attempted to preempt such state laws, but was  
overruled in *Tennessee v. FCC*, 832 F.3d 597, 610 (6th Cir. 2016).

<sup>12</sup> Shook Decl. 12/30/19, Ex. 69, Broad-Banned: The FCC's Preemption of State Limits on Municipal  
Broadband, Vol. 68 Emory L.J. 407 (2018). Municipal utilities threaten incumbent monopoly's profits  
("Broadband Trusts"), The Broadband Trusts lobby fiercely to preserve their entrenched market power.

1 Presenting no issue of material fact, feigning confusion over the meaning of utility, Defendant  
2 urges we harmonize Chapter 35.94 RCW’s clear language with Chapter 35.92, and search in vain  
3 for imagined support in three unrelated cases, *Issaquah, King County* and *Clark*.<sup>13</sup> Yet, the  
4 meaning of “public utility” and Charter §4.6 is fully well known to Defendant, as confirmed by  
5 Defendants’ own Resolution U-10828 citing the vote requirement, here: <sup>14</sup>

6  **AMENDED RESOLUTION NO. U-10828**  
7 1 A RESOLUTION relating to Click! Network; authorizing Click! to prepare a  
8 2 business plan to provide, in addition to retail cable television, retail  
9 3 internet services including voice over data internet (“VoIP”) protocol,  
10 20 commercial broadband and Gigabit service (“Retail Services”).  
11 21 WHEREAS the City Charter Section 4.6 requires a vote of the people  
12 22 before the City may sell, lease, or dispose of any utility system, or parts thereof  
13 essential to continued effective utility service, and

11 Defendant knows the definition of utility, and that the laws protecting municipally-owned  
12 utility assets from disposal require a public vote.<sup>15</sup> This Court can do justice, by upholding the  
13 law and reminding them of their solemn duty on this crucial public policy matter. *See Fondren* <sup>16</sup>

## 14 II. COUNTERSTATEMENT OF FACTS

15 Shook incorporates herein by this reference all facts set forth in this Motion and Declaration  
16 in Support, and in Plf.[’s] Motion for Partial Summary Judgment (“MPSJ”), and Mo. for TRO,  
17 and all declarations filed in this matter. Following is a summary of facts relevant to Def[’s]  
18 arguments in response to Defendant’s cross MPSJ.

19 Click! is a self-described “Telecommunications System,” providing competitive Telecom  
20 services, as shown in this 2001Click! press release:<sup>17</sup>

21 **July 24, 2001**  
22 Click! Network is an operating section of Tacoma Power and is the nation’s largest municipally  
23 owned telecommunications system. Click! provides competitive telecommunications services in  
24 the City of Tacoma, including cable television, high-speed data transport and Internet services.  
More information about Click! services is available at [www.click-network.com](http://www.click-network.com)  
or by calling 253-502-8900.  
**Contact:** Diane Lachel, 253-502-8537; Cyndi Wikstrom, 253-502-8763

25 <sup>13</sup> Def.[’s] MSJ, Pg. 14. *Issaquah v. Teleprompter, Inc.*, 93 Wn.2d 567 (1980), *King County v. King*  
*County Water Districts et. al.*, Wash. No. 96360-6, Slip Op. (December 5, 2019). *Clark v. Olson*, 177  
26 Wash. 237 (1934).

<sup>14</sup> Shook Decl. 12/12/19, Ex. 32. Pg. 1, Ln. 20. ( Def.[’s] Resolution citing public right to vote. ).

<sup>15</sup> “we do not construe a statute that is unambiguous.” *Food Servs. of Am. v. Royal Heights, Inc.*, 123  
Wn.2d 779, 784-85, (1994).

<sup>16</sup> *Fondren v. Klickitat County*, 79 Wn. App. 850, 856, 905 P.2d 928 (1995) (decisions of the State  
Supreme Court are binding on all lower state courts). *See also, Bremerton Municipal League v. Bremer*,  
130 P.2d 367, 15 Wn.2d 231 (Wash. 1942).

<sup>17</sup> Shook Decl. 12/30/19, Ex. 83. (taken from Click! website).

1 Click! was carefully built, based on an extensive “Telecommunications Study” and Business  
2 Plan to provide crucial telecommunication services for the community. Click!’s vital services are  
3 not rendered “surplus” by a failed pilot meter program.

4 Considerable investment was made in the additional equipment and infrastructure needed for  
5 Click!’s essential system, to create the vital services the community relies on. Over \$69 million  
6 was appropriated in 1997 alone.<sup>18</sup> Approximately \$200 million in historical costs are invested in  
7 Click!’s System.<sup>19</sup> *E.g.* Some of Click!’s core routers cost over \$1 million each.<sup>20</sup>

8 Click!’s services are enjoyed by governmental, commercial and residential customers alike.<sup>21</sup>

9 Before embarking on this major undertaking, Tacoma Power pulled together a  
10 panel of fourteen experts from an array of disciplines to review and pass on a final  
11 business plan. That plan, which was given the stamp of approval by the panel,  
12 called for retail and wholesale applications.<sup>22</sup>

13 As the Telecommunication Study concluded, “*One could hope. . .*”<sup>23</sup>

14 [T]he local market has a growing need for better telecommunications access.  
15 Despite growing local demand, the incumbent wire line service providers have  
16 stated that their investments in the local infrastructure will either slow without  
17 significant rate increases or be halted all together. *One could hope* that other  
18 companies would step forward and create a modem telecommunications system  
19 throughout our community but the prospects for that occurring appear dim.

20 Click! was built out of necessity, as an alternative to the incumbent monopoly, who refused  
21 to upgrade their “*crummy*” system and provide the telecom services Tacoma’s policymakers  
22 believed were required for economic growth in the information age.<sup>24</sup>

23 Click! provides “lit” wholesale telecommunication service.<sup>25</sup> It enables retail ISP partners to  
24 provide BIAS.<sup>26</sup> Cable modems are owned by Click!’s ISP partners, or by the ISP’s customers,  
25 the “end-users.”<sup>27</sup> <sup>28</sup> On Click!’s DOCSIS, coaxial, portion of telecom platform, Click! installs

26 <sup>18</sup> Shook Decl. 12/30/19, Ex. 85 Tacoma Ord.#26141, 10/28/97, ( additional \$67 million funding ).

27 <sup>19</sup> Shook Decl. 12/30/19, Ex. 75, Pg. 1 Click! Asset Study, 3/18/13, by Rates, Planning & Analysis Dept.

28 <sup>20</sup> Shook Decl. 12/30/19, ¶ 2. Ex. 73. (Board’s Cisco CRB-8 Resolution U-10884, router \$1,034,100).

29 <sup>21</sup> Shook Decl. 12/12/19 Ex. 64 ( Click! provides data-transport and broadband to Tacoma’s Libraries).

30 <sup>22</sup> Shook Decl. 12/30/19 Ex. 70, (“Creating Capacity and Competition in Broadband Telecommunications:  
31 The City of Tacoma’s Initiative,” April 2000. Mayor Baarsma and Prof. Ross Singleton. ).

32 <sup>23</sup> Shook Decl. 10/30/19. Ex. 10, at Pg. 186 of 398, (Conclusions of Telecommunications Business Plan).

33 <sup>24</sup> Shook Decl. 12/30/19, Ex. 74. Pg. 12 (Superintendent Klein’s comment on “*crummy* system” and  
34 monopoly’s TCI’s attitude that City must consent to TCI’s terms or go “Jump in the Lake.” ).

35 <sup>25</sup> “Lit” means Click! provides all electronics, systems and technology required for the telecommunication  
36 system to transport data to and from all endpoints on the Internet for the ISPs customers.

<sup>26</sup> “BIAS” is Broadband Internet Access Service. Click! is “telecommunications inputs” or “transmission  
facilities” used to access the Internet. *Nat’l Cable & Telecom. v. Brand X.*, 54 U.S. 967, (2005)

<sup>27</sup> There are only two remaining ISPs operating on Click!, Advanced Stream and Rainier Connect.

<sup>28</sup> Click! provides wholesale FTTP, DOCSIS and Ethernet services. DOCSIS is “Data Over Cable Service  
Interface Specification”, a telecommunication standard for broadband data transfer over coaxial cables.

1 end-users' data outlets, provides network monitoring, maintenance, hosting and provisioning of  
2 DHCP services, assigns and manages IP addresses and DNS services, among many other things.

3 The ISPs provide their customers, the "end-users," tech support, Email, VoIP, web-hosting,  
4 spam and virus filtering, managed Wi-Fi services, and process customer's monthly payments.

5 Click! also provides a fully lit wholesale FTTP service. This symmetrical fiber optical Gigabit  
6 speed service uses no coaxial cable facilities.<sup>29</sup> With FTTP, Click! installs, operates and  
7 maintains all customer premise equipment required to make the FTTP services operational.<sup>30</sup>

8 Click! also provides Tacoma Public Libraries, and 100 other institutional customers, with  
9 Metro Ethernet service.<sup>31</sup> This provides a transparent data path, and involves no "change in the  
10 form or content of the information as sent and received."<sup>32</sup> It is a pure data transport service.

11 1. Click! is A "Telecommunications System" Not a Cable TV System.

12 Every Ordinance, Resolution, Franchise, Court Case, Contract, Federal, State and Municipal  
13 Code relating to the System, recognizes Click! is a "Telecom System."<sup>33</sup> See 47 U.S.C. Sec 153  
14 (53) "telecommunications services are treated as telecommunications services regardless of the  
15 facility used to provide them." Defendant's comparison of Click! to cable TV and citation to TV  
16 statutes and *Issaquah*, are irrelevant and outdated.<sup>34</sup> Telecom is NOT cable television.<sup>35</sup>

17 Click! is a telecom system, with two-way communication, capable of sending and receiving  
18 data, of the user's choosing, to and from all "end points" of the World Wide Web.<sup>36</sup>

19 Cable TV ("cable system") is a closed-off, "one way" system, with "closed transmission  
20 paths."<sup>37</sup> One-way capability is not telecom.<sup>38</sup> Compare 47 U.S.C. § 522(7), with 47 USC §  
21 153(50). Click!'s physical infrastructure, "the pipes," is a wire "communication system."<sup>39</sup>

22 <sup>29</sup> Fiber to the Premises, is fiber optic telecommunications directly to customers' premises.

23 <sup>30</sup> Shook Decl. 12/12/19, Ex. 57, Pg. 326/423. (Click! Network Role and Responsibilities).

24 <sup>31</sup> Shook Decl. 12/12/19, Ex. 64, Pgs.1, 2-9 (Tacoma Public Library Contract No. 16-01 ). Click also  
25 provides retail BIAS to the Libraries, which maybe a breach of the ISP's non-compete clause.

26 <sup>32</sup> 47 U.S.C. Sec 153(50) "the transmission, between or among points specified by the user, of information  
of the user's choosing, without change in the form or content of the information as sent and received."

27 <sup>33</sup> Shook Decl. 10/30/19, Ex. 6, (TPU Annual Report, describes "telecommunications system"), Ex. 11,  
28 (Ordinance creating Click!), Ex. 12, 13, (1996 and 1997 Orders affirming System and utility funding), Ex.  
29 17, (Installation Contract). Shook Decl. 12/12/19 Ex. 62, (Century Link Contract) Ex. 64 (Library  
30 Contract) Ex. 65. (County Franchise) *E.g.*, RCW 35.99.010 (1) ("Cable television service" means the one-  
31 way transmission to subscribers of video programming and other programming service and subscriber  
32 interaction, if any, that is required for the selection or use of the video programming. . .).

33 <sup>34</sup> See Def.[']s] SJM, Pgs. 13, 14, 15, 17, 18, and 21.

34 <sup>35</sup> *E.g.* RCW 82.04.065 (27) ("Telecommunications service" does not include television and video  
programming service). RCW 80.36.630 (State Law mirrors federal code. "Telecommunications" has the  
same meaning as defined in 47 U.S.C. Sec. 153.) Television is also expressly distinguished.

35 <sup>36</sup> Shook Decl. 12/12/19 Ex. 59, (Telecommunications definition by Mr. Dillon, retired Click! Manager).

1 As a telecom system, with vast underground facilities, as seen in the IRU, Shook Decl.  
2 11/1/19, Ex 29, 30. Click! is a “communication utility” by RCW 35.96.020’s definition,

3 **RCW 35.96.020**

4 “Communication utility” means any utility engaged in the business of affording telephonic,  
5 telegraphic, cable television or other communication service to the public in all or part of the conversion  
6 area and includes telephone companies and telegraph companies as defined by RCW 80.04.010.

7 RCW 35.96.020 provides “as defined by” RCW 80.04.010, where we see Click! is a utility. A  
8 Telecommunication Company,” to be precise, includes “every city or town.”

9 (28) “Telecommunications company” includes every corporation, company, association, joint stock  
10 association, partnership and person, their lessees, trustees or receivers appointed by any court  
11 whatsoever, and every city or town owning, operating or managing any facilities used to provide  
12 telecommunications for hire, sale, or resale to the general public within this state.

13 2. The Defendant’s “Pilot Meter” Program Is A Red Herring.

14 Click!’s assets are not rendered “surplus,” or “excess capacity” by Power’s abandoned meter  
15 program. That failed pilot program is unrelated to the community’s vital need for, and increasing  
16 usage of, Click!.<sup>40</sup> Data usage and revenues are rising. Click! generated \$695,919 in Data  
17 Transport and Broadband revenues in October 2018, increasing to \$768,573 by Oct. of 2019.<sup>41</sup>

18 The primary objective in creating Click! was to fulfill the community’s need for an alternative  
19 to the incumbent monopoly provider.<sup>42</sup> The pilot meter program was an afterthought, only  
20 developed in “the mid-2000s,” nearly 10 years after policymakers first envisioned the  
21 community’s pressing need for Click!’s system.<sup>43</sup> The community’s needs are only increasing.

22 Click!’s facilities continue fulfilling the original mandate, providing a competitive, publicly  
23 owned and operated alternative to the incumbent monopoly, TCI (now Comcast). Over 35,000  
24 loyal government, business and residential customer accounts continue to rely on Click! every  
25 day, including Pierce County, Tacoma Public Libraries and over 100 institutional customers.

26 <sup>37</sup> 47 U.S.C. § 522(7). (Cable System: a facility, consisting of closed transmission paths).

<sup>38</sup> 47 U.S.C. § 522(6). (Cable Service is one-way transmission to subscribers of video programming, and  
subscriber interaction for the selection or use of such video programming or programming service).  
*Compare with*, 47 USC § 153(50) telecommunications” means the transmission, between or among points  
specified by the user, of information of the user’s choosing.

<sup>39</sup> 47 USC § 153(59) “wire communication” or “communication by wire” means the transmission of ...  
pictures, and sounds of all kinds by aid of wire, cable, or like connection.”

<sup>40</sup> Shook Decl. 12/30/19, ¶ 4, Ex. 76. (Data usage and revenues over the System are increasing).

<sup>41</sup> Shook Decl. 12/30/19, ¶ 4., Ex. 76 (Operational Summaries for Oct 2018 and Oct 2019).

<sup>42</sup> Shook Decl. 12/30/19 Ex. 70. Mayor Baarsma and Professor Singleton’s Paper on Click! “Creating  
Capacity” (“The City built a broadband telecommunications system with the express purpose of providing  
competitive telecommunications services to businesses and residents within the City”).

<sup>43</sup> Tenzin Gyaltzen Decl. Pg. 3, ¶ 7. (“During the mid-2000s, Tacoma Power developed” smart meters.)

1 Click!'s enterprise and facilities are not surplus. They are functional, useful "additional  
2 capacity." <sup>44</sup> These are valuable, vital municipal assets. The sophisticated equipment, software,  
3 switches, fiber-optics, franchises, intellectual property, trademarks, IP addresses, customer  
4 accounts, contracts and "data pipes" are not "excess capacity." See, Shook Decl. 12/30/19 Ex. 70  
5 ("Additional Capacity" created). Also, Ex. 74 Pg. 3, ¶¶ 7, 8, and 9. (the business plan).

6 **§ 9512. Sale or Lease of Public Utilities.**

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

15 Right to vote was settled under *Bremerton Municipal League v. Bremer*, 15 Wn.2d 231 (1942);  
16 *Bremer* guides the Court, under *Fondren v. Klickitat County*, 79 Wn. App. 850, 856, 905 P.2d  
17 928 (1995) (decisions of the State Supreme Court are binding on all lower state courts).

18 **III. ISSUES PRESENTED**

19 1. Are a municipal utility's functional telecommunications assets subject to the public vote  
20 requirements of Chapter RCW 35.94.020 ? Yes.

21 2. Is legislative intent in RCW 35.94.040 destroyed by City declaring a municipal  
22 telecommunication system "surplus," when such system is a going concern achieving revenues  
23 of \$25 million a year, and will be leased, turn key, to a private company for continuing the same  
24 utility services, to same utility customers, for up to 40 years, while City maintains reversionary  
25 interest in the valuable surplus utility assets? Yes.

26 **IV. EVIDENCE RELIED UPON**

This Response to Defendant's Motion for Summary Judgment is based upon all the pleadings  
and filings of record in the above-captioned matter, and including without limitation:

1). The 10/30/19 Motion for TRO and Declaration of Mitchell Shook; 2). The 11/1/2019  
Declaration of Mitchell Shook; 3). Shook's 12/12/19 MSJ and Declaration; 4). 12/30/19 Declaration  
of Mitchell Shook in Support of this Summary Judgement Motion.

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<sup>44</sup> Shook Decl. 12/30/19, Ex. 85 Tacoma Ord.#26141, 10/28/97, providing additional \$67 million funding.

## V. ARGUMENT AND AUTHORITIES

Telecommunications is a public utility under federal, state and local law.<sup>45</sup> Telecom has been a regulated public utility since 1909 in Washington.<sup>46</sup> Even longer than electric power.<sup>47</sup>

Telecommunications (“Telecom”) companies are “utilities,” with authority rooted in Washington’s Constitution, Article XII, Section 19: Telegraph And Telephone Companies. “The right of eminent domain is hereby extended to all telegraph and telephone companies.”<sup>48</sup>

Defendant has conceded the public’s statutory right to vote, in Council’s own resolution.<sup>49</sup> *Lenci v City of Seattle*, 36 Wn. 664, 668 (1964). Cf. RCW 35.94.020.<sup>50</sup> (Council findings are presumed valid). Two decades ago Defendant argued Click! was a utility, in securing two Court Orders to build it; and, recently in *Coates*. City is equitably estopped from arguing otherwise.<sup>51</sup>

### **A. Telecommunication Assets are Public Utilities Under Chapter 35.94 RCW.**

Defendant argues the word “utility” and the term “public utility” are not “statutorily defined,” and urges us to harmonize RCW Ch 35.94 with Ch 35.92.”<sup>52</sup>

But the definition of “public utility” is provided by name, in the statute itself, in the long list of protected utilities.<sup>53</sup> The Committee’s abbreviation of § 9512, substituting that long list with the all-encompassing, “any public utility works, plant or system owned by it or any part thereof,” did *not* remove or change the definition of public utility. It’s still there, when you dig a bit.

Simply “rewritten for brevity,” there was no change in the law, as RCW 1.04.020 confirms “The previously existing laws shall control.”<sup>54</sup> In *Arnott v. Spokane*, 6 Wash. 442, (1893):

<sup>45</sup> In 47 U.S. Code Title 47, state at Chapter 80.36 RCW, local in Tacoma Municipal Code Title 16 B.

<sup>46</sup> Session Laws of 1909, Ch. 93. Sec. 3 Pg. 192, 196, (“authorize the commission to regulate telephone and telegraph companies and their rates and charges, to prevent discrimination and extortion by such companies; and to authorize the Railroad Commission of Washington to make all necessary rules.”).

<sup>47</sup> Electricity regulated by Laws of 1911, Ch. 117, Pg. 538, *See also* Shook Decl. 12/12/19 Ex. 36, Pg. 2.

<sup>48</sup> In 1985, the term “Telecommunications” widely replaced “telephone” and “telegraph” in Title 80 RCW *See generally* Laws of 1985. Ch. 450, Sec. 13, Pgs. 1978 -1995, *E.g.*, Shook Decl. 12/12/19 Ex. 61.

<sup>49</sup> Shook Decl. 12/12/19, Ex. 32. Pg. 1, Ln. 20. ( Def.[’s] own Resolution citing public right to vote. )

<sup>50</sup> Requires a public vote. “We will not read a statute in such a way as to render a provision meaningless. *Community Telecable V. City Of Seattle* 164 Wn.2d 35 (Wash. 2008).

<sup>51</sup> Shook Decl. 12/12/19, Ex. 32. Pg. 1, Ln. 20. Resolution is an express admission of a party-opponent, and assurance of promised of future action, with the government then failing to carry out those acts. *Munich v. Skagit Emergency Commc’ns Ctr.*, 175 Wn.2d 871, 288 P.3d 328, (2012)

<sup>52</sup> Def.[’s] MSJ., 12/12/19, Pg. 16, Ln.10.

<sup>53</sup> “If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

<sup>54</sup> Laws of 1951 (“rule of rule of construction, in case of any omissions or inconsistency between any of the revised code as so supplemented or modified and the laws existing immediately preceding this enactment, the previously existing laws shall control”).

1 [W]here the mode of contracting is expressly provided by law, no other mode can  
2 be adopted which will bind the corporation. This principle results from the fact  
3 that municipal corporations derive all their powers from their charters.<sup>55</sup>

4 City is free to negotiate a sale/lease of Click!, but the statutory requirement for a public vote  
5 is inalienable. As *Arnott* says, the “mode of contracting,” is “expressly provided” in RCW 35.94.

6 1. Telecommunications And Electric Power Are Two Types of Utilities.

7 Power and Telecommunications (“Telecom”) are distinct utility services, often provided,  
8 managed and organized by a single municipal entity. The American Public Power Association,  
9 the “voice of community-owned utilities” that power 2,000 towns and cities nationwide, labels  
10 these entities as “Multiservice Utilities.”<sup>56</sup> TPU is a “multiservice provider,” with four utility  
11 services; water, power, rail and telecommunication. (Shook Decl. 12/30/19, Ex. 68, Pg.1).

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

17 Physically, Click!’s “*commercial network*” and TPU’s “*power communication network*” share  
18 a common fiber optic backbone, but even this “backbone” *is separated* into discrete “tubes,”  
19 with unique fibers separating the infrastructure of the two utility systems.<sup>57</sup>

20 Click!’s telecom system and Power’s electrical system offer distinct services, separate in  
21 both a physical and organizational sense, with distinct brands, websites, organizational  
22 structures, financial reports, monthly invoicing, employee newsletters and customer loyalty  
23 programs, etc. Even federal, state and local regulations differentiate the two systems.<sup>58</sup>

24 Click! was established for more than TPU’s needs.<sup>59</sup> By sharing common infrastructure,  
25 easements and rights of way, Click! and Tacoma Power maximize the value of their assets,  
26 generating operational synergies.<sup>60</sup> This was the original purpose of the System.<sup>61</sup>

24 <sup>55</sup> *Arnott v. City of Spokane*, 6 Wash. 442, (1893) citing 1 Dill. Mun. Corp. (4th Ed.) 449, (373);.

25 <sup>56</sup> APPA website ( Multiservice utilities: A one-stop shop for communities). <https://perma.cc/BF37-FN29>

25 <sup>57</sup> See Shook MPSJ, Pg. 26, discussion of fibers and “tubes.” *Also see*, Shook Decl. 12/12/19 Ex. 31, Pg. 4)

26 <sup>58</sup> Shook Decl. 10/30/19, Ex. 26 (Organizational Chart), Ex. 75 (Employee Newsletter), Ex. 76 (Financial Statements and Purple Perks Program). FCC regulates Click! and FERC regulates Power. As municipal utilities, Power and Click! are regulated under distinct sections of Tacoma’s Municipal Utilities Code.

<sup>59</sup> Shook Decl. 12/30/19 Ex. 70, -(City of Tacoma’s Initiative, April 2000. Mayor Baarsma).

<sup>60</sup> Shook Decl. 10/30/19, Ex. 12. *See also*, Shook’s MPSJ, Pg. 15, Ln. 12. ( Click!’s Nexus to power, diversifying TPU revenue, driving economic growth, offsetting costs for a system TPU needs anyway ).

<sup>61</sup> Shook Decl. 10/30/19, Ex. 12, Pg. 9, Memo. In Support Of City Of Tacoma’s MPSJ. ( “revenue to help offset the costs of constructing and operating the Telecommunications System.” )

1 **B. Creation of Click!. The Community's Need for a Telecommunication Utility System.**

2 Click! was established as a municipal communication utility, with a clear mandate to  
3 provide commercial communication services. The extensive Telecommunication Study and  
4 Business Plan prepared in creating Click!, and other historical evidence, demonstrate Click! was  
5 created for much more than supporting Tacoma Power's aborted pilot meter program.<sup>62</sup>

6 The circumstances and events surrounding the creation of Click! reveal Tacoma's desperate  
7 need for a municipal telecommunication utility and explain why Click! was established.

8 The significance of the utility system's creation is revealed in a 1998 letter, from TPU  
9 Director Crisson to City Council, along with his attached MSNBC article describing the City's  
10 communications project. Director Crisson said, "I know the City Council, as well as the Board,  
11 will be proud of this national coverage." The MSNBC article was titled, "*Tacoma Power to give  
12 TCI a jolt. Municipal utility prepares to jump into cable.*"<sup>63</sup> Some excerpts:

13 While AT&T officials congratulate themselves on their \$48 billion purchase of Tele-  
14 Communications Inc., they might want to keep an eye on the Northwest corner of  
15 TCI's sprawling cable empire. Tacoma Power, the city-owned utility of Tacoma,  
16 Wash. will soon turn on **a \$100 million broadband communications network** that  
17 will enable it to sell cable TV and Internet access as well as water and electricity -  
18 making it a direct competitor to TCI.

19 IF THE PROJECT is successful, it is sure to encourage more municipal utilities to  
20 take on TCI and other cable monopolies across the country. The effort is already  
21 getting attention from local governments weary of residents' complaints about **high  
22 prices and poor service from their incumbent cable provider**. Tired of waiting for  
23 new competitors to shake things up, many cities and towns are thinking about either  
24 constructing their own cable network, or encouraging their local utility to do it for  
25 them. Tacoma Power's Click! Network is the largest such effort to date.

26 **Concerned cable industry officials** are launching a public relations counter-offensive,  
citing studies that question the viability of such projects and complaining that access  
to public funds give government-backed systems an unfair competitive edge.

Click! was established for more than supporting Tacoma Power's pilot meter program. The  
news article's very premise, "it is sure to **encourage more municipal utilities** to take on TCI and  
other cable monopolies across the country," shows Click! was not simply supporting a future  
pilot meter program. That "**Concerned cable industry officials** are launching a public relations

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<sup>62</sup> Shook's MPSJ., Section B, pages 5, 6 and 7.(Additional not "excess" Capacity). Shook Decl. 10/10/19, Ex. 10, (Excerpts from Business Plan and Telecommunication Study).

<sup>63</sup> Shook Decl. 10/30/19 Ex. 14. (Mr. Crisson's Letter to City Manager Corpuz, MSNBC Article).

1 counter-offensive,” demonstrates Click! was controversial for, famously, pioneering the public  
2 broadband movement now sweeping our nation and the world. <sup>64</sup> So much more than meters. <sup>65</sup>

3 In April 2000, Mayor Baarsma and Dr. Singleton, of University of Puget Sound, authored a  
4 paper on Click!, Creating Capacity And Competition In Broadband Telecommunications: The  
5 City Of Tacoma's Initiative. <sup>66</sup> Excerpts from their paper show Click! was not about meters: <sup>67</sup>

6 ABSTRACT: This paper describes the process by which the City of Tacoma,  
7 Washington came to build an open access, broadband telecommunications system  
8 designed to promote effective competition in the provision of Internet and other  
9 telecommunications services.

10 The City of Tacoma has designed and built a broadband telecommunications  
11 system with the *express purpose of providing* competitive telecommunications  
12 services to businesses and residents within the City.

13 But before making the multi-million-dollar investment, the utility's director  
14 requested that Tacoma Power's citizen oversight body, the Utility Board, authorize  
15 an outside review by a consultant group--the Stanford Research Institute.

16 The Board approved and soon SRI's consultants came back with an interesting  
17 idea: Why not *invest more dollars* to expand the fiber optic pipe? Then Tacoma  
18 Power could offer its customers an array of services--cable television, competitive  
19 Internet access, telephony and data transport. The Telecommunications Act signed  
20 into law by President Bill Clinton in 1996 had, in fact, given Tacoma Power this  
21 option by eliminating barriers to entry into the telecommunications market. This  
22 led Tacoma Power's superintendent to proclaim: "The new law afforded us the  
23 opportunity to embark on a broader strategy. . ."

24 The next step was to conduct a marketing survey. The findings . . . forecast over  
25 33,000 cable customers in three years of operation. Within ten years time, the  
26 entire investment of \$100 million would be paid off. . . . 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.

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:

<sup>64</sup> Shook Decl. Ex. 74, Pgs. 18, 20. Mr. Klein (political attacks on Click! formation -Hendery & Crowley).

<sup>65</sup> See, e.g., Shook Decl. 10/30/19, Ex. 18, A Sampling of Municipal Broadband Utilities in the USA. See also Shook Decl. 10/30/19 Ex. 21, Pg. 20 Appendix 1: (U.S. Municipalities with Broadband Networks, Report from The Executive Office of the President. Benefits Of Competition And Choice For Community Development And Highspeed Internet Access. (January 2015)). Compare with, Shook Decl. 12/12/19, Ex. 60, (Australia's NBN, open access project passes 11 million homes).

<sup>66</sup> Mayor Baarsma was a professor at the University of Puget Sound and on City Council at the time, even voting on the creation of Click! in 1996. Shook Decl. 10/30/19, Ex. 11 Pg. 33, or 229/389.

<sup>67</sup> Shook Decl. 12/30/19 Ex. 70, "Creating Capacity and Competition in Broadband Telecommunications: The City of Tacoma's Initiative," April 2000. Even the title indicates Click! was "created capacity."

1 "(Tacoma's policy makers should)...pause and let the euphoria of the benefits you  
2 may now expect be replaced by a realistic appreciation of the *pitfalls and risks*  
3 *associated with municipal ownership* of what is traditionally an entertainment  
4 service provided by private enterprise." After numerous public hearings, two  
5 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. (emphasis added).

6 The Professors' Paper shows the System's primary objective was a "broader strategy," the  
7 community's need for advanced telecommunication services. The prospect of \$100 million in  
8 Additional Capacity creating municipal competition was alarming to the incumbent, TCI, who  
9 warned Tacoma of "the *pitfalls and risks* associated with municipal ownership."<sup>68</sup> (*supra*)

10 In preparing the Business Plan, a detailed "Marketing Survey" was conducted, to study "The  
11 Current Business Market."<sup>69</sup> This Survey excerpt shows Click! was more than meters:

12 To help assess current business market support for advanced telecommunications  
13 services in the greater Tacoma area, Tacoma City Light pursued two avenues of  
14 consumer research: A telephone survey of 200 businesses, with 25 or more  
employees. . . This group represents a pool of "Potential Customers."

15 Based upon the results of 200 telephone interviews with medium to large Tacoma  
16 area businesses, the Potential Customer business market is on the brink of being  
17 ready for advanced telecommunications technologies. The money is there,. . .key  
18 findings show these customers account for more than \$5 billion dollars in annual  
19 revenues and 25,000 jobs. What's more, they currently spend over \$10 million  
dollars annually on telecommunications services. They perceive telecommunications  
links are extremely important to the success of their businesses, and many believe  
their telecommunications needs will increase rapidly, particularly for Internet access  
and local data networks.

20 As the Business Plan and Marketing Survey indicate, Click!'s creation was seen as vital for  
21 Tacoma to remain economically competitive and prosper.<sup>70</sup> Like the arrival of the Northern  
22 Pacific railroad in Tacoma in the 1870's, such infrastructure was considered essential for success  
23 in the digital era. A monopoly existed in Tacoma and policymakers wanted a better system and  
24 service. This was the primary reason for establishing Click!.

25 <sup>68</sup> Shook Decl. 12/30/19, Ex. 74, Pgs. 25, 28 ( TCI, later AT&T, President Leo Hindery opposed Click!'s  
26 creation, publicly scolded Superintended Klein and sponsored studies to discredit Click!

<sup>69</sup> See Shook Decl. 10/30/19, Ex. 10, Pg. 115/389, ( Market Demand Summary -Potential Market They are  
more concerned about reliability than price for their local phone service, and very concerned about getting  
quick response from any telecommunications vendor.).

<sup>70</sup> Shook Decl. 10/30/19, Ex. 10, ( "One of the most significant ways a community and its economic base  
are intertwined is through an area's infrastructure. As a result, the evolution of a community's economy  
often depends upon the investments it makes in its transportation system, power system, and-given the  
shift to the information age-its telecommunication system." (emphasis added).).

1 Defendant's MacGuffin, a failed pilot meter project, conceals the true purpose behind the  
2 creation of Click!'s System. In April 2000, five years before the pilot meter program, Price  
3 Waterhouse prepared a "Performance Review" for Click!, and said:<sup>71</sup>

4 Click! continues to be at the forefront among public and private utility  
5 telecommunications efforts. This position has brought considerable national  
6 recognition to Tacoma, and also significant tangible benefits. From a review of local  
7 press clippings, at least 400 new jobs, five building renovation projects, enhanced  
8 University of Washington and UPS academic programs, and several development  
9 projects are all linked to the development and presence of Click!. Establishing Click!  
10 prompted AT&T (TCI and Excite @home) to upgrade services to Tacoma residents  
11 much earlier than otherwise would have happened.

12 The success of Click! and its continuing value to the community depends on a team  
13 effort among business, civic and education leaders to create a unique region with  
14 considerable growth potential. The fiber/coax network is literally and figuratively the  
15 thread that ties them together and enables this potential. Working together, this team  
16 can leverage the Click! asset to attract major new businesses, create jobs, attract  
17 students to programs that provide the skills for those jobs and generally enhance the  
18 whole community.

19 This Review cites "significant tangible benefits" from leveraging Click! "to attract major  
20 new businesses, create jobs, attract students to programs that provide the skills for those jobs and  
21 generally enhance the whole community." Even telecommuting was cited in the original plan.<sup>72</sup>

22 There is no mention of Power's pilot meter program. In the revolutionary excitement of  
23 creating "America's Most Wired City," meters were not cited in the Performance Review,  
24 Business Plan, Marketing Study or other documentation relating to the creation of Click!.

25 Click! was revolutionary in 1996. All media reports, scholarly papers and professional  
26 evaluations, show that creating an advanced telecommunication utility system for the community  
was Click!'s primary purpose.<sup>73</sup> Click! was never "excess capacity." Click!'s assets were  
"additional capacity," purchased and installed to enable vital services. They remain essential for  
continuing to provide these same telecom ("utility") services today.

Notably, Tacoma's visionary investment in the System occurred 12 years before Congress  
made broadband a national priority with the Broadband Data Improvement Act in 2008, and

<sup>71</sup> Shook Decl. 12/30/19, Ex. 71, Pgs. 16, 17. ( Click! Network Financial Performance Review ).

<sup>72</sup> *E.g.*, Today Tacoma maintains a robust Commute Trip Reduction Program. Tacoma Municipal Code Section 13.15.020 (Z). "Teleworking/telecommuting" means the use of . . . technology to permit an employee to work from home. *See also* RCW 70.94.521 (automotive traffic is the major source of emissions of air contaminants), (reduce single-occupant vehicle commuting.) RCW 28B.130.005 (Intent. Telecommuting -mitigate the adverse . . . effects of auto dependency and traffic congestion.)

<sup>73</sup> Shook Decl. 12/30/19, Ex. 70 (Mayor's paper and newspaper article.) *also* Ex. 71, (Auditors Review).

1 providing §101 of the Act, codified in 47 U.S.C. § 1301.:

2 (1) The deployment and adoption of broadband technology has resulted in enhanced  
3 economic development and public safety for communities across the Nation,  
4 improved health care and educational opportunities, and a better quality of life for all  
5 Americans.

6 (2) [P]rogress in the deployment and adoption of broadband technology is vital to  
7 ensuring that our Nation remains competitive and continues to create business and  
8 job growth.

9 **C. Click! is Built on “Additional Capacity” Not “Surplus Capacity”.**

10 Click! was established as a “separate system” and is a separate “department.”<sup>74</sup> Click! has its  
11 own unique brand, loyal customers, annual sales of \$25 million a year, and assets coveted by a  
12 private entity. The City has every right to organize its utility departments as a “multiservice  
13 utility.”<sup>75</sup> For organizational convenience, Click! is a department of Tacoma Power.

14 Ignoring Click!’s vibrant and successful enterprise, Defendant argues Click! is “excess  
15 capacity,” claiming Click! is not essential for Tacoma Power’s purposes.<sup>76</sup> *But*, Power’s needs  
16 are not the issue. Click! was never intended to be “*essential*” for Power’s purposes.

17 In TPU’s lobby, Click! has a separate customer service counter. Click! is a separate  
18 department and system, with a life and brand of its own. Click! is essential to Click! end-users.<sup>77</sup>

19 The enabling Ordinance 25930 provides: “The City **hereby creates** a separate system of . . .  
20 City Light.”<sup>78</sup> Click! was born as a “Separate System.” Click! is “Telecommunication System.”

21 **ARTICLE II**  
22 **FINDINGS; ESTABLISHMENT OF THE TELECOMMUNICATIONS PROJECT AS A**  
23 **SEPARATE SYSTEM; AND ADOPTION OF PLAN AND SYSTEM**  
24 **Section 2.1. Establishment of Telecommunication System.** The City hereby creates a  
25 separate system of the City's Light Division to be known as the telecommunications system  
26 (the "Telecommunications System"). The public interest, welfare, convenience and necessity

Click!’s “separate system” is essential to Click! users, who depend on the infrastructure in  
everyday life.<sup>79</sup> Click! was established to fulfill the community’s need for an advanced telecom

<sup>74</sup> Finance Dept, does not track performance of other Power divisions. Shook Decl. 12/30/19, ¶ 2.

<sup>75</sup> Tacoma has broad authority in organizing its utilities; but, cannot sell them without public vote.

<sup>76</sup> “Shouts” is more accurate, since the “Excess” phrase appears capitalized 35 times in Defendant’s brief.

<sup>77</sup> Shook Decl. 12/12/19, Ex. 42, Pg. 2.

<sup>78</sup> Shook Decl. Ex. 11, Pg. 8 (Article II creates a separate system, adopts Click! business plan.”

<sup>79</sup> RCW 43.330.532 [B]roadband is critical to full participation in society and the modern economy . . . by enabling access to health care, education, and essential services, providing economic opportunities, and enhancing public health and safety. *Also*, Shook Decl. 10/30/19, Ex. 21, Shook Decl. 12/12/2019 Ex. 37

1 system.<sup>80</sup> It is a municipal alternative to the incumbent monopoly provider, who, at the time,  
2 “could care less” about Tacoma.<sup>81</sup>

3 In 1996, when Click! was first proposed to Council, the incumbent monopoly, TCI (now  
4 Comcast), had no interest in upgrading their system. After repeated requests by the City, TCI’s  
5 attitude was, “*go jump in the lake.*” Power Superintendent Steve Klein recalled TCI’s attitude:<sup>82</sup>

6 [C]ity council, they're having a heck of a problem with the incumbent  
7 cable provider who still has the crummy system, refuses to upgrade it.  
8 And they don't come to the table to negotiate the franchise agreement.  
9 They can just tell the city government to jump in the lake. And if you  
10 don't like it, we'll just shut it -- we'll shut it down.

11 Monopoly incumbents can afford such cavalier arrogance.<sup>83</sup> Most consumers have no  
12 alternative for access. Monopoly and oligopoly control of broadband in America is the norm.  
13 FCC data shows nearly 85 percent of Americans have either one choice or no choice for speeds  
14 in excess of 100 Mbps.<sup>84</sup> This is why the FCC, FTC and DOJ closely regulate mergers of the  
15 powerful telecommunication conglomerates.<sup>85</sup>

16 Click!’s costly construction was never “excess capacity.” Council prudently and specifically  
17 resolved to provide “Additional Capacity,” with additional, incremental investment, funding  
18 equipment, abundant optical fiber, including dark fiber, and the skilled staff to cobble it all  
19 together.<sup>86</sup> required to create Click!’s essential services.<sup>87</sup> Click! was built to accommodate the  
20 community’s anticipated, ever-increasing, need for the data flow and for the explosive growth  
21 projected in the future.

22 On Click!’s website, Power Superintendent Steve Klein, the “Father of Click! Network,”  
23 explained the project’s origins and cited the “further review” that led to the additional investment  
24 in additional capacity for “expanding the network.” (Shook Dec. 12/12/19, Ex. 74, Pg. 8.)

25 <sup>80</sup> See generally, Shook Decl. 10/30/19, Ex. 23 (“[B]roadband is taking its place alongside water, sewer  
26 and electricity as essential infrastructure for communities”. Quoting USDA Report).

<sup>81</sup> Section 706(d)(1) defines “advanced telecommunications 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>82</sup> Shook Decl. 12/30/19, Ex. 74, Pg. 12. (Power Superintendent’s Steve Klein deposition).

<sup>83</sup> Shook Decl. 12/30/19 Ex. 78, (monopoly power closely monitored. DOJ and FTC guidelines.)

<sup>84</sup> FCC, Annual Internet Access Services Report (2018), see also, FCC Fact Sheet Communications  
Marketplace Report GN Docket No. 18-231 Report; GN Docket No. 18-231 Ex. D-3.

<sup>85</sup> See AT&T-DIRECTV Order, 30 FCC Rcd at 9141, para. 20, 21; Comcast-NBCU Order, 26 FCC Rcd at  
4248, para. 24, (The FCC and DOJ, consider market power of incumbent and barriers to entry).

<sup>86</sup> Shook Decl. 12/30/19, Ex. 85 (City’s 1997 Emergency Res. for \$69 Million, includes telecom team).

<sup>87</sup> Shook Decl. 10/30/19, Ex. 21, Pg. 4, Ord.# 25930 (“WHEREAS, the City has determined that it is  
prudent and economical to provide *additional capacity* on such telecommunications system”).

1 Tacoma Power originally planned to build a fiber-optic network to control its  
2 substations. Further review indicated that expanding the network and offering a wide  
3 range of telecommunications services would benefit our customers and our  
4 community.<sup>88</sup>

5 Fiber must be activated, or “lit,” before it can be used to provide communication services.  
6 At great expense, TPU invested tremendous “additional” public treasury in providing the optical  
7 equipment, modulating electronics, equipment and staff necessary to light this fiber and make it  
8 capable of carrying services. There is nothing “excess” or surplus in Click!’s enterprise or fiber.

9 Power’s incremental investment to establish Click!, created a functional telecom system,  
10 addressing the community’s need for Broadband services. The “lit” fiber, and the currently  
11 unused dark fiber, are not “excess” capacity. These assets were intentionally included, as  
12 “*additional capacity*” in the original Ordinance and Business Plan. It is worth remembering  
13 Mayor Baarsma and Professor Singleton’s Paper, which described that incremental investment:<sup>89</sup>

14 *Why not invest more dollars to expand the fiber optic pipe?* Then Tacoma  
15 Power could offer its customers an array of services--cable television,  
16 competitive Internet access, telephony and data transport.

17 Click!’s assets are performing their intended purpose and function. They are useful and  
18 required for Click’s current and future needs in delivering essential services to the community.

19 The fact Click!’s fiber, both lit and dark, are included in the scheme, in exchange for \$2.5  
20 million a year, shows these are valuable assets. These fibers are not obsolete or surplus.<sup>90</sup>

21 Telecommunications has been a regulated public utility since the Pacific Telegraph Act of  
22 1860.<sup>91</sup> AT&T monopolized the industry for most of the 20<sup>th</sup> century.<sup>92</sup>

23 The Communications Act of 1934 created the FCC. AT&T’s monopoly was broken up by  
24 1983.<sup>93</sup> Congress recognizes telecom is an essential public utility.<sup>94</sup> In Section 706(a) of the

25 <sup>88</sup> Shook Decl. 12/30/19, Ex. 83, (“About us” description of Click! and historical screen shots of Click!’s  
26 website form the Wayback Machine, digital archive of the World Wide Web.).

<sup>89</sup> Shook Decl. 12/30/19 Ex. 70, Creating Capacity and Competition in Broadband Telecommunications.

<sup>90</sup> Click Business Transaction Agreement, Indefeasible Right of Use, or “Privatization Agreements.”

<sup>91</sup> See C. 137, U.S. Statutes 36th Congress, 1st Session, June 16, 1860, *also*, The FCC, formed by the  
Comm. Act of 1934. 47 U.S. Code § 151, § 601, took over wire communication regulation from the ICC.

<sup>92</sup> Shook Decl. 12/12/19, Ex. 49 Pg. 3. (Kingsbury Commitment did not hinder AT&T).

<sup>93</sup> Judge Greene’s opinion, *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1983).

<sup>94</sup> See generally, Shook Decl. 12/12/19, Ex. 31, Pg. 8, (We are approaching a new era of the Data Age,  
autonomous cars, humanoid robots, intelligent personal assistants, smart home devices, the world is  
undergoing a fundamental change, transforming our lives. Broadband connects us with friends and family,  
allows access to education, goods and services, and affects nearly every aspect of life.).

1 Telecom Act, 1996 (P.L. 104-104), Congress directs the FCC to encourage deployment of  
2 advanced telecom capabilities to all Americans on a timely basis.

3 Defendant argues Power is the only “real utility,” and Click! is just a silly old “cable TV”  
4 system, best viewed in the context of *Issaquah*. While Power did initially breathe life into the  
5 System, by funding Click!’s creation, Click! is a utility in its own right. Not a cable TV system.<sup>95</sup>

6 **D. Telecommunications is a Utility. A Monopoly or Separate Undertaking is Not Required.**

7 Defendant asserts the public has NO right to vote, if Click! is not a monopoly, a “separate  
8 undertaking,” or Title II regulated facility. All baseless arguments. *Contra*, Such “last mile”  
9 systems are effective “gateways,” with “bottleneck monopoly power” and all the “dangers this  
10 power poses.” *Turner Broadcasting System, Inc. v. FCC*, 512 US 622, 661 (1994)

11 This “monopoly power” was one of the reasons Click! was built. *See ante* Pg. 16, and Mr.  
12 Klein’s “Go Jump in The Lake” comment. Also, see Mr. Klein comment on limited pole space.<sup>96</sup>

13 1. Monopoly is Not a Prerequisite to Public Vote on Disposal of Community’s Assets.

14 Defendant argues Click! is not “a monopoly” and, therefore NOT deserving of the protective  
15 vote under RCW 35.94. Def. MSJ, Pg. 17. *Contra*, “Cable operators possess a local monopoly  
16 over cable households.” *Turner Broadcasting v. FCC*, 520 U.S. 180, 197 (1997).

17 Defendant argues public’s statutory right to vote is forfeited if Click! has a competitor. *But*  
18 *see* “[T]he question of whether or not a monopoly actually existed is not a controlling feature.”  
19 *State v. Kuykendall*, 137 Wash. 602, 609 (1926). *Cf.*, “It will readily be seen, then, that it makes  
20 ***no difference whether a monopoly existed.***” *Id.* at 610. (emphasis added).

21 Monopoly status is not a controlling feature in determining citizen’s right to vote. The Laws  
22 of 1917 provide a protective vote, regardless of a “monopoly.” Legislators knew from firsthand  
23 experiences, fresh in their minds, of dirty tactics deployed by private “Power Trusts,” who  
24 devoted armies of lobbyists and vast resources in destroying municipal utilities.”

25 Click! is protected by a public vote because its assets were paid for by the people and its  
26 property is devoted to public use. And because Legislators purposefully provided the Laws of  
1917 protected municipal utility property.<sup>97</sup>

<sup>95</sup> Shook Decl. 12/12/19, Ex. 59, Declaration of Terry Dillon.

<sup>96</sup> Shook Decl. 12/30/19, Ex. 24, Pg. 23 (US West and TCI had used up all available pole space.)

<sup>97</sup> Similarly, just as “purposefully,” policymakers provided “Additional Capacity” in building Click!. This investment must not be confused by defendant’s claim such investment was ever “excess capacity.”

1 Judge Bone explains why in his Letter, as reprinted in the Congressional Record in 1944. See  
2 generally Shook Decl. 12/30/19 Ex. 80.<sup>98</sup>

3 Tugboats, towboats, barges, silos, wharfs, warehouses, taxi cabs and pipelines are all “public  
4 utilities” because they are “devoted to public use,” not because they are monopolies.<sup>99</sup> Click!’s  
5 wires are *data pipelines*, “and no doubt” a public utility. In *State v. Kuykendall* it was found:<sup>100</sup>

6 [I]f in the beginning or during its subsequent operation the pipe line was devoted  
7 by its owner to public use, and if the right thus extended to the public has not been  
8 withdrawn, there can be no doubt that the pipe line is a public utility. *Kuykendall*,  
9 at 834

10 [T]he question of whether or not a monopoly actually existed is not a controlling  
11 feature; nor can courts know what considerations were pressed upon the  
12 Legislature to justify the passage of the act. It is enough for us to follow the  
13 holding in *Munn v. Illinois*, supra, where the court said: 'For our purposes we  
14 must assume that, if a state of facts could exist that would justify such legislation,  
15 it actually did exist when the statute now under consideration was passed. For us  
16 the question is one of power, not of expediency. If no state of circumstances could  
17 exist to justify such a statute, then we may declare this one void, because in  
18 excess of the legislative power of the state; but, if it could, we must presume it  
19 did.' As to the *propriety of legislation* in force within the scope of the legislative  
20 power the Legislature is the exclusive judge. (emphasis added).

21 Likewise, this Court must not question “*the propriety of legislation*” in § 9512, providing a  
22 protective public vote, preventing potential privatization of public utilities. It is a legislative  
23 prerogative. Neither can the Court question legislative intent in the definition of “surplus,” as  
24 “unserviceable, inadequate, obsolete, worn out or unfit to be used.”<sup>101</sup> Shook Decl. 12/30/19, Ex.  
25 80. Pg. 22 (“Power fight”).

26 Nothing in the statute requires a monopoly, although one nearly exists.<sup>102</sup> Property simply  
needs to be owned by the municipal utility and “useful.” Click!, with \$25 million a year in  
revenue is clearly performing that telecommunication purpose.

Consolidation in the telecom industry is highly scrutinized by the DOJ, FTC and the FCC to  
prevent market concentration.<sup>103</sup> Comcast’s 2015 bid for Time Warner Cable would have

<sup>98</sup> Shook Decl 12/30/19, Ex. 80, Pg. 7 (Homer T. Bone Letter, from Congressional Record, citing 1913  
“manipulation” of legislation by private power trusts, and Rep. Heinly’s “two lines” added to irrigation bill  
repealing City’s right to sell power outside the City limits). Pg. 23, (Judge Bone’s “Thorn Interview”.)

<sup>99</sup> *State v. Kuykendall*, 137 Wash. 602, 611 243 P. 834, (1926), “taxicab company was a public utility.”

<sup>100</sup> *Kuykendall*, at 611, Drawing on *Budd v. People*, 12 S.Ct. 468, 143 U.S. 517, 36 L.Ed. 247 (1892),  
quoting *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. (1877). As briefed in Plf. Shook’s MPSJ, Pg. 15.

<sup>101</sup> RCW 54.16.180 (represents clear legislative intent and definition of “surplus” for municipally-owned  
utility property.) See Shook’s MPSJ., Pgs. 24, 25, (detailed history of surplus statute).

<sup>102</sup> Tacoma suffers oligopoly, with two alternatives for BIAS, generally. Because of Click!’s existence.

1 consolidated 30 million subscribers.<sup>104</sup> Comcast unilaterally offered to divest nearly 4 million  
2 customers just in hopes of gaining approval for the deal. It was killed by DOJ scrutiny, anyway,  
3 seen as creating an “unavoidable gatekeeper for Internet-based services.”

4 2. A Separate Entity or Undertaking is Not Required For the Right To Vote.

5 Organizing Click! as a “Department” under Tacoma Power, or providing multiple utility  
6 services under one entity, does not destroy the public’s right to vote under RCW 35.94. The City  
7 has full discretion over organizing its utility departments.<sup>105</sup> Click! is still a utility asset.

8 Many public power utilities provide more than electric service for their communities, “they  
9 might also manage the area’s water, wastewater, internet, waste, gas, and *telecommunications*  
10 *services*,” says the American Public Power Association, who refers to such entities as  
11 “Multiservice Utilities.” Such organization structure are common.<sup>106</sup>

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

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

22 Defendant asserts *Coates v. Tacoma* prevents this Court from finding Click! is anything other  
23 than “part of” a public utility.<sup>107</sup> Perfect! “Part of ” is sufficient to win the right to vote.

24 Not that it matters, but Click! is more than a “part of.” Click! is a “Department” and System  
25 in its own right. The issues, evidence and arguments in *Coates* were entirely different. An  
26 accountancy act violation, compared with a right to vote.

27 *Coates* does not cut in defendants’ favor. Plaintiff claimed Click! was not a utility, was losing  
28 money, violated the accountancy act and any losses are general government’s obligation<sup>108 109</sup>

29 <sup>103</sup> Shook Decl. 12/30/19 Ex. 69, Pgs. 38, 39, (DOJ 4/24/15 DOJ Press release “significant concerns that  
30 the merger would make Comcast an unavoidable gatekeeper for Internet-based services that rely on a  
31 broadband connection to reach consumers.” ). See also Pg. 39 (Comcast’s divestiture offer).

<sup>104</sup> Shook Decl. 12/30/19 Ex. 69 (30 million subscribers, also 30 % of the total United States market).

<sup>105</sup> *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 695, (“ court leaves the choice of means used in  
operating the utility to the discretion of municipal authorities.”).

<sup>106</sup> Shook Decl. 12/30/19, Ex. 68, Pg.1. (Info from American Public Power Association website).

<sup>107</sup> *Coates v. Tacoma*, Division II, Unpublished Decision No. 51695 12/10/19 (Alleged City violated  
Washington’s local government accounting statute, RCW 43.09.210.)

1 City defended, arguing Click! was a utility and part of Tacoma Power. City was right, and  
2 prevailed. The court found, “Therefore, we conclude that Click! and Tacoma Power's electric  
3 utility are one undertaking for purposes of RCW 43.09.210(3).” *Coates*, at Pg. 9.

4 As “one undertaking,” *Coates* establishes Click! is, at least, “any part thereof,” triggering the  
5 mandatory vote in RCW 35.94 and § 4.6. Any other reading leads to absurd results.

6 The *Coates* “part of” finding is a thoughtful solution. It avoided a long trial over  
7 controversial accounting methodology.<sup>110</sup> It preserved federal and state policy goals furthering  
8 municipal broadband.<sup>111</sup> Shook Decl. 10/30/19, Ex. 21 (White House Report).

9 Charter § 4.6 has no surplus clause.<sup>112</sup> The *Coates* finding triggers a vote, regardless of  
10 surplus. With Judge Bone Chairman of the 1926 Charter Committee, the intent of §4.6 is clear. <sup>113</sup>

11 RCW 35.94.040 reads, “equipment originally acquired for public utility purposes.” Thus, it is  
12 the ownership of the property, not the definition of the assets’ function, that compels a public  
13 vote. When a utility buys an asset, with a “nexus” to the utilities purpose, it’s statutorily  
14 protected by the vote, unless surplus. Even artwork, that brighten employees’ day. <sup>114</sup>

15 Power and Click! are “one undertaking” under *Coates*, which establishes Click! is a bona-  
16 fide “utility,” and not a general government obligation. Since Click! is a “system,” by common  
17 definition, and *Coates*’ confirms Click! is part of a “municipal utility,” organizational  
18 convenience and institutional naming aside, the right to vote is mandatory. <sup>115</sup>

19 3. An FCC Designation Is not A Controlling Factor Over People’s Right to Vote.

20 Defendant raises unrelated issues, of cable TV “regulation” and the FCC’s politically  
21 inspired Restoring Internet Freedom (“RIF”) order. <sup>116</sup>Title I or Title II designation of BIAS does  
22 not preempt state laws the right to vote on disposal of a public communication system. <sup>117</sup>

23 <sup>108</sup> *E.g.* City of Tacoma’s 4/20/19 MPSJ. on The Nature or Mandamus Relief, *Coates v City of Tacoma*,  
Pierce County Superior Court 17-2-08907-4., Page-3.

24 <sup>109</sup> Losses were disputed issue and no finding on losses was ever made.

25 <sup>110</sup> Shook Decl. 12/12/19, Ex. 55 (Council Resolution for an Audit of controversial Click! accounting.)

26 <sup>111</sup> RCW 43.330.532, (Access to broadband critical to full participation in society and modern economy).

<sup>112</sup> Shook Decl. 12/30/19, Ex. 89 (Tacoma City Charter Article 4 -Utilities.)

<sup>113</sup> Shook Decl. Part Two 12/12/19, Ex. 67 Pg. 3 (Judge Bone elected Chair of Charter Committee).

<sup>114</sup> *E.g.* Shook’s MPSJ., Pg. 15, Fn. 74. (utility purpose, nexus to power, and *Okeson* line of cases).

<sup>115</sup> “If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent.  
In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences.”  
*State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

<sup>116</sup> FCC’s Restoring Internet Freedom Order (“RIF”) restored Title I regulation of BIAS. *Protecting and  
Promoting the Open Internet*, 30 FCC Rcd 5601, 5757-77 ¶¶ 355-387 (2015) (*Title II Order*).

1           *Mozilla* vacated the FCC’s RIF “Preemption Directive,” which would have prohibited state  
2 “bright-line” consumer protection regulation of net neutrality.<sup>118</sup> Washington State’s own net  
3 neutrality laws support broadband’s vital role as an essential utility.<sup>119</sup>

4           If Defendant’s argument is accepted, that Title II regulation of information flowing over the  
5 physical facilities defines a utility, then our State’s identical Title II bright-line regulations, in  
6 RCW 19.385.020, confirm Click!’s utility-status.<sup>120</sup> RCW 19.385’s “Open Internet Act,”  
7 preserved Title II’s bright-line regulations in Washington State, preempting the authority sought  
8 by the FCC in reclassifying BIAS to Title I.<sup>121</sup>

9           The Communication Act of 1934 expressly grants states authority to promote and regulate  
10 “telecommunications services, and safeguard the rights of consumers.”<sup>122</sup>

11           All “information services” are accessed via telecommunications.” Click! is a physical  
12 telecommunications system.<sup>123</sup>

13           Municipal ownership of Click!’s infrastructure, fibers, routers, servers, switches, pipes, poles  
14 and customer accounts is what triggers the right to vote, not the FCC’s shifting regulatory  
15 authority, or “non-authority,” in regulating data flow, or activity, over the physical infrastructure.  
16 Such regulation has no bearing on voter’s inalienable right to approve conveyance of Click!’s  
17 property.

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18  
19 <sup>117</sup> See generally “nowhere in the general charge to “promote competition in the telecommunications  
20 market” is a directive to do so by preempting a state’s allocation of powers between itself and its  
21 subdivisions.” *Tennessee V. FCC*, 832 F. 3d 597 - Court of Appeals, 6th Circuit (2016).

22 <sup>118</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1, 63 (D.C. Cir. 2019), “ Commission lacked the legal authority to  
23 categorically abolish all fifty States’ statutorily conferred authority to regulate intrastate communications.  
24 For that reason, we vacate the Preemption Directive, 2018 Order ¶¶ 194–204.” *Mozilla*, at 86, The court  
25 rejected the FCC’s preemption efforts, finding the FCC has no authority to regulate BIAS under Title I,  
26 and, hence no authority to tell states they cannot regulate it. The FCC, by arguing BIAS was not subject to  
FCC regulation, in effect, deprived itself of any authority to preempt state regulation.

<sup>119</sup> *Mozilla*, in rejecting FCC preemption, confirmed Washington State’s authority for bright-line regulation  
of BIAS. *Mozilla*, at 62, stated “the harms from blocking and throttling during a public safety emergency  
are irreparable. People could be injured or die.” Also finding “arbitrary and capricious the Commission’s  
failure to consider the implications for public safety” and “the 2018 Order was arbitrary and capricious in  
this respect, we remand” *Mozilla v FCC, Dist. of Col.* 2019 USCA Case #18-1051.

<sup>120</sup> The City of Tacoma and Washington state have their own bright-line regulation, of “No blocking; no  
throttling; no paid prioritization.” A *Title II* designation of BIAS would have provided federal authority.

<sup>121</sup> Chapter 19.385 RCW (may not: Block content, Impair internet traffic or Engage in paid prioritization).

<sup>122</sup> As amended by the Telecom. Act of 1996. See 47 U.S. Code § 253 (b) (shall not affect ability State to . . .  
protect public safety and welfare, ensure telecommunications services, safeguard rights of consumers).

<sup>123</sup> 47 USC § 153(50): transmission between points specified by the user, of information of user’s choosing.

1 Congress removed barriers, in 1996, authorizing the FCC to encourage the development of  
2 such systems. <sup>124</sup> The City even cited the Telecom Act, in seeking this Court's authority to  
3 establish Click! in 1996. <sup>125</sup>

4 [T]he thrust of the Telecommunications Act is to encourage the availability and  
5 affordability of telecommunications services. . . Tacoma is well positioned to make  
6 telecommunications services available to the public at a competitive price, thereby  
7 furthering this federal policy. (Shook Decl. 10/30/19 Ex. 12, pg. 10)<sup>126</sup>

8 Also, in this same 1996 Brief, at Pg. 12, ¶ B ( 3.), City cited its authority to provide "utilities,"

9 3. The City Has Authority Under Washington Statutes To Provide Telecommunications  
10 Services.

11 The City's statutory powers include the authority to provide telecommunications services.  
12 First, the City, as a first class charter city having code city powers as well, has all powers not denied  
13 by law, "including operating and supplying of utilities and municipal services commonly or  
14 conveniently rendered by cities or towns." RCW 35A.11.020. Tacoma may conveniently render

15 Tacoma may conveniently render telecommunications services because the Light  
16 Division has an existing citywide electric system of connections to customers'  
17 homes, because it has existing billing relationships with customers, and because  
18 it can provide services economically. Second, there is no express statutory  
19 prohibition against city provision of municipal telecommunications services.  
20 *Winkenwerder*, supra. To the contrary, the Legislature has acknowledged that  
21 cities provide communications services through enacting a statute providing for  
22 the burying of city-owned communications facilities. RCW 35.96.030. Finally,  
23 the Legislature has determined that competitive markets for telecommunications  
24 services serve the public interest. RCW 80.36.300; *In re Electric Lightwave, Inc.*,  
25 123 Wn.2d 530, 538-39 (1994) (noting that "it is the state's policy to promote  
26 diversity in the supply of telecommunications services and products in  
telecommunications markets throughout the state"). The City's provision of  
telecommunications services will make the market more competitive, thus  
furthering the public interest recognized by the Legislature.

27 Defendant argues cable modem service is not telecommunications, citing *Brand X*.<sup>127</sup> But,  
28 FCC designations aside, information service still requires telecommunications. Under USC 47  
29 153( 23) "information service" is the acquiring of "information via telecommunications." It's  
30 these physical facilities the people have a right to vote over. "[T]elecommunications is part and

<sup>124</sup> Under 47 U.S.C. § 1302(a), the Federal Communications Commission is charged with "encouraging the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," Congress also entrusted this responsibility to state commissions.

<sup>125</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 253, 110 Stat. 70 (1996).

<sup>126</sup> 1996 Memorandum In Support Of City's Summary Judgement. See Shook Decl. 10/30/19 Ex. 12.

<sup>127</sup> *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 54 U.S. 967 (2005)

1 parcel of cable modem service ”*Community Telecable V. City Of Seattle* 164 Wn.2d 35 (Wash.  
2 2008). *See also, Brand X*, at 1006. “the high-speed data transmission (telecommunications) that  
3 is an input used to provide this service”. Click! is still a communication utility. An FCC  
4 regulation does not magically convert it into a library, pizza store or pet shop. Click!’s physical  
5 transmission facilities, components and other assets are not surplus.

6 Click! is not an ISP. Click! is a pure telecom system providing wholesale FTTP, Metro  
7 Ethernet and lit data transport services, with established wholesale rates.<sup>128</sup> The retail ISP  
8 partners provide the end-user cable modem services, troubleshooting and maintaining their  
9 modems and competing in delivering retail BIAS services to the community.

10 This free market competition keeps end-user rates low. Privatizing Click! removes  
11 Council’s oversight of wholesale rate. End users include elderly, low-income, governmental and  
12 student customers, who could be harmed by unreasonable price increases, if Click! is sold to a  
13 private company.

14 Click!’s wholesale telecom operations are comparable to TPU’s wholesale water and power  
15 operations, where wholesale rates are also set by Council. In 2018 TPU earned over \$50 million  
16 in wholesale water and power sales. (Shook Decl. 12/30/19, ¶ 1, Ex. 75, Pgs. 19, 20.).

17 Privatization is both substantively and procedurally ultra vires.<sup>129</sup> Procedurally, there was no  
18 “RFP” issued for the sale of Click!, as Defendant alleges. Only an “RFI/Q”, for “information.”<sup>130</sup>  
19 Council never audited Click!’s financial performance.<sup>131</sup> They voted to go “All-In,” to expand  
20 Click!. The *Coates* lawsuit dashed those hopes, forcing Council to change direction.<sup>132</sup>

21 No bidding or appraisal has occurred in this process of privatization. Bidding typically  
22 follows a “surplus property declaration.” Council has no basis for determining a fair valuation of  
23 the System’s assets.<sup>133</sup> Fortunately, “the public vote is curative of all ills.”

24 <sup>128</sup> Shook Decl. 12/12/19, Ex. 57, Pg. 326/423. (Click! FTTP Role and Responsibilities). Ex. 64, Pgs.2-9, (Tacoma Public Library Broadband Agreement).

25 <sup>129</sup> Substantive ultra vires briefed in Pl. Shook’s MSJ., Pgs. 26, 27 and 28.

26 <sup>130</sup> Def.[’s] 12/12/19 MSJ., Pg. 6, Ln. 10. Def. deceptively adds a (“P”) in describing the RFI process. City did NOT prepare a RFP. It was an RFI and NOT an “RFI/Q/P.” The City issued an RFI. There was no “P”, Shook Decl. 12/30/19, ¶ 15, *also* Ex. 72. This is not “Wheel of Fortune,” Def. can’t just, “give me a P!”

<sup>131</sup> Shook Decl. 12/30/19, ¶¶ 1, 2, 3, and 13. No audit, disputed losses, no bidding, no valuation. Only basis for privatization was fear of adverse decision in *Coates*, *also* Ex. 72. Advanced Stream’s RFI response.

<sup>132</sup> *Edward E. Coates, et. al., v. City of Tacoma*, Division II, No. 51695-1 Unpublished decision, 12/10/19, see Shook Decl. 12/30/19, ¶¶10, 11 (explanation and evidence of switch from “All In, to “All-Out.”). Plaintiff’s in that suit, Mr. Crowley, have opposed Click! since before its creation.

<sup>133</sup> Shook Decl. 12/30/19, Ex. 82 Shook’s Email to Council, informing them of failure to follow process.

1 Plaintiff's CPA claim should not be dismissed. Naturally the CPA does not apply to City's  
2 "legitimate acts." Cities necessarily operate monopolies and enjoy sovereign immunity from CPA  
3 claims for doing so. But, tortious acts, and conspiracy with a private party, in restraint of trade are  
4 not legitimate ministerial functions.<sup>134</sup> The CPA claim involves many facts. Discovery and a trial  
5 could be required.<sup>135</sup> If justice prevails, the CPA claim will soon be moot and can be withdrawn,  
6 when the Court upholds the people's right to vote. The right to vote being "curative of all ills."<sup>136</sup>

7 Finally, telecommunications is not a luxury. You can't add a "rooftop antenna" and get it.<sup>137</sup>  
8 The flow of such "information" requires a "pipeline," a fiber optic backbone, for transferring  
9 customer's data.<sup>138</sup> Click! Network is our community's ' public data pipeline, that "information  
10 highway." It is a utility. The additional capacity and fibers, paid for by the people, are the  
11 equivalent of lanes on this advanced public highway. Defendant's definitions of "utility" and  
12 "surplus" would return us to an era of private "toll roads," and allow any municipally-owned  
13 utility asset to be sold, to large campaign contributors, without a public vote. Could a water,  
14 power or rail facility be next?

## 14 VI. Conclusion

15 For the forgoing reasons, the Court should deny Defendants Motion for Summary Judgement  
16 and grant Mr. Shook's Motion and declare City's surplus resolution ultra vires.

17 Respectfully submitted this 30<sup>th</sup> day of December 2019.

18  
19  
20  


21 Mitchell Shook  
22 Plaintiff

23  
24 <sup>134</sup> *Miotke v. Spokane* 101 Wn.2d 307, 336 (1984) citing RCW 4.96.010 All political subdivisions,  
25 municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or  
26 proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious  
conduct of their officers, agents or employees to the same extent as if they were a private person or  
corporation

<sup>135</sup> Defendant misquotes the CPA, removing the word "corporations," in their MSJ on page 24, ln. 6. The  
complete statement in RCW 19.86.010 (1) "Person" shall include, where applicable, natural persons,  
corporations, trusts, unincorporated associations and partnerships.

<sup>136</sup> Quoting Hon. Homer T. Bone, handwritten letter, University of Puget Sound Crocker Library Archive.

<sup>137</sup> *Issaquah*, at 574, "It's something you can do with a rooftop antenna. In that sense, it's not a utility."

<sup>138</sup> 5G networks of the future, for example, require an underlying fiber network, like Click! to function.

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**NO: 19-2-11506-3**

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

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

DARREL BOWMAN,  
  
Plaintiff,  
  
v.  
  
CITY OF TACOMA,  
  
Defendant.

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

PLAINTIFF SHOOK'S REPLY IN SUPPORT  
OF MOTION FOR PARTIAL SUMMARY  
JUDGEMENT GRANTING DECLARATORY  
RELIEF

MITCHELL SHOOK,  
Plaintiff Pro Se,  
  
v.  
  
CITY OF TACOMA,  
  
Defendant.

Plaintiff Shook's Reply In Support Of  
Motion for Partial Summary Judgment

Mitchell Shook, Plaintiff  
3624 6<sup>th</sup> Ave Suite C, Tacoma, WA 98406

- 0 -

1 As the Court considers this motion, please keep in mind *two* important observations:

2 *First*, Plaintiff’s motion only asks the Court to declare what the City’s own legislative body,  
3 *has already said*: An approving “vote of the people” is required to “sell, lease or dispose” of any  
4 utility property *essential for continued* utility services.<sup>1</sup>

5 *Second*, Click! provides advanced telecommunications “*services*,” using the public’s municipal  
6 utility *assets* and *appurtenances*. The public’s “assets” are *essential for continued* provision of  
7 Click!’s vital public telecom services.<sup>2</sup> The law requires a vote for the disposal of public utility  
8 “*assets*,” not just utility “*systems*,” as Defendant continues to mischaracterize this case.

9 As seen here, in the City’s own Click! Resolution, the City’s own finding cites the people’s  
10 right-to-vote under Charter §4.6: *See also*, Shook Dec. 12/12/19, Ex. 32, Pg. 1:20.

11 20 || WHEREAS the City Charter Section 4.6 requires a vote of the people  
12 21 || before the City may sell, lease, or dispose of any utility system, or parts thereof

13 Defendant admits that “telegraph and telephone,” now known as “telecommunications” or  
14 “telecom,” was one of the protected utilities, on the *long-list* of municipal utilities requiring a  
15 vote of the people, in the original version of RCW 35.94, the “Laws of 1917.”<sup>3</sup>

16 As a result, City’s only remaining opposition boils down to one main argument, that the  
17 Laws of 1917 were “repealed” in 1965, eliminating the “long-list” and any vote of the people  
18 requirement for the public’s telecom assets.<sup>4</sup> As seen here, page 10, line 17 of Def.’s Response:<sup>5</sup>

19 17 || of the statute as it existed in 1917. However, it is unnecessary for the Court to decide this question  
20 18 || because Chapter 137 of the Laws of 1917, including the reference to telephone plant and lines,  
21 19 || was repealed in its entirety in 1965.

22 Defendant erroneously asserts, “reference to telephone plant and lines, was repealed in its  
23 entirety in 1965.” That is not true. The Law of 1917 was “repealed and replaced,” in its *entirety*.

24  
25 <sup>1</sup> Shook Decl. 12/12/19, Ex. 32. Pg. 1, Ln. 20, ¶ 4. (Def.’s own Res. U-10828 citing public’s right to vote.).  
26 <sup>2</sup> As evidenced by over 2,100 pages of essential assets listed in the Click! IRU privatization agreement, without  
which Click!’s telecom services cannot continue in operation. Shook Decl. 11/1/19, Ex. 29, 30.  
<sup>3</sup> Def’s Resp., Pg. 14:10, (“cable modem and metro-ethernet services are a form of telecommunications”).  
<sup>4</sup> “Laws of 1917” refer to the RRS §§9512-9514, “Sale or Lease of Public Utilities Owned by Cities.”  
<sup>5</sup> Def.’s Response, Pg. 10:17, Defendant states: “the Laws of 1917, including the reference to telephone plant  
and lines, was repealed in its entirety in 1965.”

1 The Laws of 1917 did not change in 1965 and a search for a definition of “utility” is not  
2 required. The statute defines telecom as the utility. Since Click! is owned by a city, and it doesn’t  
3 matter which Department of the city owns it, the popular vote requirement survives.

4 **A. The People’s Right to Vote was Not Extinguished by the Laws of 1965.**

5 The City’s main argument, that the Laws of 1917 were “repealed” in 1965, is easily dispelled,  
6 by examining 1951’s inaugural Chapter 80.48, incorporated as Chapter 35.94 in 1965.<sup>6</sup>

7 The 1951 version is identical to the statute today. Nothing was changed in 1965.<sup>7</sup> Seen here is  
8 RCW 80.48.010 as it appeared in 1951; and, as it remains today: Shook Dec. 1/6/20, Ex. 92:

9 **Chapter 80.48**  
10 **SALE OR LEASE OF MUNICIPAL UTILITIES**  
11 **Sections**  
12 80.48.010 Authority to sell or let.  
13 80.48.020 Procedure.  
14 80.48.030 Execution of lease or conveyance.  
15 **80.48.010 Authority to sell or let.** A city may lease for any term  
16 of years or sell and convey any public utility works, plant, or sys-  
17 tem owned by it or any part thereof, together with all or any equip-  
18 ment and appurtenances thereof. [1917 c 137 § 1; RRS § 9512.]

19 Today’s Title 35 version is identical to the Title 80 version from 1951. The 1965 enactment of  
20 Chapter 35 RCW did not “repeal” or change the previous Chapter 80.48 RCW. Since the statutes  
21 were identical, before and after the 1965 enactment of Title 35, the law falls under Chapter 35.98’s  
22 “Construction” statement, in RCW 35.98.010, which provides, “The provisions of this title . . . shall  
23 be construed as restatements and continuations, and not as new enactments.” Chapter 35.94’s  
24 enactment was, simply, “restatements and continuations” of the law, with no change in the law.  
25 Thus, it remains intact as originally enacted.

26 **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 provi-  
sions repealed by this chapter, and relating to the same subject  
matter, shall be construed as restatements and continuations, and  
not as new enactments.

<sup>6</sup> Shook Decl. 1/6/20, Ex. 95 (Laws of 1965 savings clause, and Laws of 1951 with the statute as it existed at the inception of the RCW, as Chapter 80.48 RCW, showing RCW 35.94 was never changed.

<sup>7</sup> “Laws of 1917” were RRS §§9512-9514, “Sale or Lease of Public Utilities Owned by Cities or Towns.”

1 As a “Continuation of existing law,” the language in RCW 35.94.020 necessarily still  
2 encompasses “telegraph and telephone plants and lines, **or any system embracing all or any one**  
3 **or more of such works or plant or any similar or dissimilar utility system.**”<sup>8</sup> (Emphasis added).

4 Click!’s telecommunication system is the modern equivalent of “telegraph and telephone plants  
5 and lines,” and it is also a “similar or dissimilar” system. Thus, the protective popular vote-of-the-  
6 people requirement remains in effect under current statutory language.

7 So the City has negotiated the terms of the IRU, Business Agreement and Ordinance to assign  
8 the Click! Franchise. The statute requires City do those things. But there is a final step, which the  
9 statute requires, with a *clear statement* that the “ordinance shall not take effect until it has been  
10 submitted to the voters of the city for their approval or rejection at the next general election.”<sup>9</sup>

### 11 **1. Continuation of the Laws of 1917 into the 1951 Inauguration of RCW**

12 It is worth remembering the Laws of 1917 were “abbreviated” prior to codification into RCW  
13 80.48 in 1951.<sup>10</sup> A savings clause was added at RCW 1.04.020.<sup>11</sup>

14 When the statute was “Rewritten for brevity,” the long-list of utilities, with “telegraph and  
15 telephone,” was shortened to a generality encompassing “any public utility works, plant, or system  
16 owned by it or any part thereof, together with all or any equipment and appurtenances thereof.”

17 In 1946, the Code Revision & Recompilation Committee provided a letter, which explained that  
18 all “major changes in the course of revision” would be documented in a “third column,” with a  
19 “catch-line” containing the “reviser’s explanation in parenthesis.” The original letter can be found  
20 in Shook Decl. 12/30/19, Ex. 81 pg. 15 (pg. 330 of 507). Seen here, is an excerpt from that letter:<sup>12</sup>

21 **The third column contains the catch-line of each section as set**  
22 **forth in the revision itself, together with the reviser's explan-**  
23 **ation in parenthesis of the major changes made in the course of**

24 \_\_\_\_\_  
25 <sup>8</sup> Shook Decl. 1/6/20, Ex. 95. *Also see* Laws of 1965, Ch. 7, Page 444.

26 <sup>9</sup>A “contract contrary to the terms and policy of a legislative enactment is illegal and unenforceable. *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 *Hederman v. George*, 35 Wash.2d 357, 362, 212 P.2d 841 (1949); *State v. Nw. Magnesite Co.*, 28 Wash.2d 1, 26-27, 182 P.2d 643 (1947).

<sup>10</sup> Fully briefed on page 1 of Plaintiff Shook’s Motion, and in Plaintiff Bowman’s MPSJ on Pages 9-12.

<sup>11</sup> “nothing herein shall be construed as changing the meaning of any such laws.”

<sup>12</sup> Shook Decl. 12/30/19, Ex.81, Reviser's Notes Volume 2, Revised Code of Washington, 1946, At 80-7, (stating RRS § 9512 was "rewritten for brevity.")

1 Thus, the emphatic “similar and dissimilar” language was retired, not by legislative action, but  
2 by a code reviser’s revision for “brevity,” as shown in the “reviser’s explanation, seen here:<sup>13</sup>

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.

3  
4  
5  
6 **B. Telecommunications Service is Not a Cable TV Service.”**

7 In City’s other argument against the public vote, which I call the “Hail Mary,” for being sillier  
8 than surplus, Defendant admits Click! is a telecommunication system, providing telecom services;  
9 yet denies they ever “intended” Click! to be a telecommunication system.<sup>14</sup>

10 All “intentions” aside, the argument is flawed. First, it’s false. Second, the City is legally and  
11 equitably estopped from asserting that it is not a telecom system because it has previously taken  
12 the position that it is.

13 Click! is owned by the City’s public utility, it provides telecom services and this case is not  
14 about “intentions.” Defendant’s own pleadings and business plans, in the 1996 case confirming  
15 authority for utility funding of Click!, prove Defendant’s “intention” was to establish a commercial  
16 telecom system, as part of the public utility, to deliver municipal telecom services.<sup>15</sup> Furthermore,  
17 Defendant admits Click! is a “telecommunications network” and its services are “a form of  
18 telecommunications.”<sup>16</sup> As seen the Response, on Page 14:10.

19 | defendant does not dispute that Click! Network operates over a network that meets the definition  
20 | of telecommunications. The HFC Network was built as a telecommunications network, and cable  
21 | television, cable modem and metro-ethernet services are a form of telecommunications.

22 Defendant urges viewing Click! as a “one-way” TV system, as in *Issaquah*.<sup>17</sup> The  
23 distinctions between TV and Click! was briefed in Plaintiff’s Response on Pages 6-7.

24  
25 <sup>13</sup> Decl. 12/30/19, Ex. 81 pg.19, or page 334/507 in the PDF. (reviser’s note rewritten for brevity)

26 <sup>14</sup> City’s Resp., Pg. 20:13, (“City had no intention of allowing Click! to operate as a telecommunications utility”).

<sup>15</sup> Shook Decl., 12/30/19 Ex. 88, *City of Tacoma v. Taxpayers and Ratepayers of Tacoma*,

<sup>16</sup> 47 USC § 153(53) The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

<sup>17</sup> *Issaquah v. Teleprompter, Inc.*, 93 Wn.2d 567 (1980).

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**1. Telecommunications is Easily Distinguished From Cable TV**

Since Click! is a “communication system,” Defendant’s argument is moot under the Laws of 1917, which require a vote, and under federal, state and local statutes, and case law, which *all* fully distinguish cable TV from telecom.<sup>18</sup>

The legalities and complexities of advanced telecommunications technology and regulations can be perplexing, but some recent cases are helpful. *Community Telecable’s* ruling differentiates cable TV from Click!’s “two-way” telecommunications.<sup>19</sup> The Oregon State Supreme Court distinguishes cable TV and telecom systems, in explaining why Comcast’s cable modem services should be taxed as telecom and not cable TV.<sup>20</sup> As seen in *City of Eugene v. Comcast*, here:

Thus, considering the Telecommunications Act in context, we conclude that it created a regulatory scheme that focuses on the function of the service provided rather than on the communications facility used to provide it. Within that scheme, telecommunications services are generally treated as telecommunications services and cable services as cable services, regardless of who provides the service or how. *Id.* at 551

The FCC has recognized that, as it relates to distinguishing cable, telecommunications, and information services, none of those classifications “rests on the particular types of facilities used. Rather, each rests on the function that is made available.” *In re Inquiry Concerning High-Speed Access to the Internet*, 17 FCC Rcd 4798 at 4821; *see also* 47 USC § 522(6) (defining “cable services”); 47 USC § 153(53) (defining “telecommunications service”); 47 USC § 153(24) (defining “information service”). That is expressly the case for “telecommunications service,” which the Act defines as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used.*” 47 USC § 153(53) (emphasis original) *Id.* at 551.

**C. City Charter and Franchise Agreement do Not Prohibit Telecommunications Business.**

Defendant’s disingenuous and ill-conceived contention that City Charter Section 4.1 prohibits the City from providing telecom services is deeply insulting to the legacy of Tacoma’s own

<sup>18</sup> *E.g. Community Telecable V. City Of Seattle* 164 Wn.2d 35 (Wash. 2008) differentiates TV from Telecom. *See also*, 47 USC § 153(50) *compare with* 47 U.S.C. § 522(6), *E.g.* RCW 82.04.065 (27), Tacoma Municipal Code Title 16 B. (“Telecom service” does not include television and video programming service).

<sup>19</sup> *E.g. Community Telecable V. City Of Seattle* 164 Wn.2d 35 (Wash. 2008) differentiates TV from Telecom. *See also*, 47 USC § 153(50) *compare with* 47 U.S.C. § 522(6), *E.g.* RCW 82.04.065 (27), Tacoma Municipal Code Title 16 B. (“Telecommunications service” does not include television and video programming service).

<sup>20</sup> *City of Eugene v. Comcast of Oregon II, Inc.*, 359 Or. 528, 375 P.3d 446 (2016)

1 Honorable Judge Homer T. Bone, who authored that language. It places no such limitation on the  
2 types of utility services the City may “sell and deliver.” It affords “all the powers granted to cities  
3 by “state law,” and specifically provides “not by way of limitation.” As seen here,:

4 **Article IV**  
**PUBLIC UTILITIES<sup>13</sup>**

**General Powers Respecting Utilities**

5 **Section 4.1** – The City shall possess all the powers granted to cities by state law to construct, condemn  
6 and purchase, purchase, acquire, add to, maintain, and operate, either within or outside its corporate  
7 limits, including, but not by way of limitation, public utilities for supplying water, light, heat, power,  
8 transportation, and sewage and refuse collection, treatment, and disposal services or any of them, to the  
9 municipality and the inhabitants thereof; and also to sell and deliver any of the utility services above  
10 mentioned outside its corporate limits, to the extent permitted by state law.

11 The Charter’s history is fascinating, not only for the strong protection it affords citizens, with  
12 Section 4.6’s right to vote in protecting utility assets from wrongful privatization, but also for the  
13 fact it contains contributions by Hon. Judge Bone, the “Father of Public Power.”<sup>21</sup> Judge Bone was  
14 Chairman of the City’s Freeholder Charter Committee in 1926.<sup>22</sup> In Judge Bone’s personal letter,  
15 published in the 1944 Congressional Record, he describes his leadership role in creating Tacoma’s  
16 City Charter. *see* Shook Decl. 12-30-19, Ex. 80 pg. 5.

17 In 1926 a charter revision commission was elected by the people of Tacoma  
18 for the purpose of revising the city charter. I was elected to that commission,  
19 receiving many thousands more votes than anyone else who had been a  
20 candidate, and without objection was made chairman of the charter revision  
21 commission. Naturally, I made every effort to see that the revised (and  
22 present) city charter which was the outgrowth of the work of this commission,  
23 contained suitable provisions respecting franchises for private utilities. I  
24 wrote, and had incorporated into the new charter, a provision authorizing a  
25 referendum on any franchise which might be granted a private utility.

26 **D. Status as “System” or Departmental Organization is Unrelated to Right to Vote.**

Defendant describe the dispute as whether “Click! Network is a separate public utility from  
Tacoma Power.”<sup>23</sup> Also, that Click! was “intended” to be a municipal service. But “separate utility”

<sup>21</sup> Shook Decl. 1/6/20 Ex.96 Death Of Former Senator Homer T. Bone Congressional Record- Senate Mr.  
Magnuson. Mr. President, with a sense of great sorrow I announce to the Senate the passing yesterday of a  
former distinguished Member of this body, Homer T. Bone of the State of Washington. He was 87 years old.  
He served here for two terms with great distinction. . . . he was one of the most brilliant men ever to grace  
this body. He was a determined advocate of the development of power through the use of natural resources,  
particularly hydro-electric development. Out in the Pacific Northwest *we considered him to be the father of  
public power*, and also the Rural Electrification Administration.

See also, In 2016 Homer T. Bone Award went to Congressman Norm Dicks, last accessed 1/5/20, at  
<https://www.vnf.com/norm-dicks-recipient-of-homer-t-bone-award>, *also*, <https://perma.cc/Y5X2-SF5J> .

<sup>22</sup> Shook Decl. Part Two 12/12/19, Ex. 67 Pg. 3 (Judge Bone Chairman of 1926 Freeholders Charter  
Commission, and Member of the Utilities, Franchises; Public and Local Improvements Committee.)

<sup>23</sup> Quoting Def.’s Response Pg. 3:6.

1 is not the issue, or the standard for triggering the public vote.<sup>24</sup> Click!’s assets and appurtenances,  
2 by virtue of their public ownership, are “*any part thereof*” of a utility, triggering the vote.<sup>25</sup> In  
3 Shook’s Motion, under “Relief Requested” Shook asks, "Are telecom *assets* of a municipal utility”  
4 protected by the laws. Seen here, Page 3, of Shook’s MPSJ, here:

5 15 || 1. Are telecommunication assets of a municipal utility governed by Chapter 35.94 RCW or  
6 16 || Tacoma City Charter 4.6 ? ||

7 Defendant admits the assets and appurtenances were acquired for utility purpose.<sup>26</sup> Unless  
8 these assets are obsolete, worn out and no longer useful in performing the public purpose for which  
9 they were acquired, i.e. “surplus,” which they are not, they are protected by law. Defendant does  
10 not deny the assets are useful and valuable for the very same utility purposes for which they were  
11 acquired, nor can they deny it, given the assets are now earning \$25 million a year in revenue and  
12 will continue doing so under privatization.<sup>27</sup>

13 **1. Organizational Status Does Not Affect Click!’s Status as a Communication Utility.**<sup>28</sup>

14 Defendant’s theory that City created Click! to provide “municipal services,” not to create a  
15 “utility,” is irrelevant. As *Seen* here, from Defendant’s Response, pg. 19. In 9:<sup>29</sup>

16 Converting Click!’s ownership, from the Department of Utilities (“TPU”), to place it under  
17 general government’s control, does not magically convert the System into some other type of  
18 municipal service, such as a library, theater or ball park. Click! will never be anything other than a  
19 communications utility, regardless of administrative organization or “naming.”

20 <sup>24</sup> Plaintiff’s “Any Part Thereof” arguments are in the Plaintiff’s 10/30/19 Motion for TRO, hereby  
21 incorporated, *see* Pages 17-18 for the “Any Part Thereof” standard and threshold for triggering a public  
22 vote. *See also*, Page 12 where plaintiff cites the City of Duvall’s process for surplus property, as an  
23 example of best practices adhering to the surplus property requirements of RCW 35.94.040, *See also* Shook  
24 Decl. 10/30/19, Ex. 19. (Seattle Classified ad), *See also*, Shook’s “Email to Tacoma City Council” on  
25 Duvall process, Shook Decl. 12/30/19, Exhibit 82. Informs the Court and explains why Shook’s “any Part  
26 Thereof” resolves this case.

<sup>25</sup> See Shook moving brief, Pg. 27, Ln 3. If portions of Click! qualify as the “works, plant, *or system* owned  
by it or *any part thereof*,” then vesting via surplus is *ultra vires*.

<sup>26</sup> Def’s Response Pg. 22:10 (“The City does not dispute that the entire HFC Network was acquired for  
public utility purposes—nor, that operation of Click! Network was also for public utility purposes, i.e.”)

<sup>27</sup> For the full briefing on the history of RCW 35.94.040 and the legislative intent of “surplus,” see  
Shook’s Motion, on Pages 23-25. Surplus and “any part thereof,” are the issues before this Court.  
They determine the vote of the people over disposal of our assets.

<sup>28</sup> Click! is a “communication utility” by statutory definition RCW 35.96.020. Also RCW 80.04.010(28)  
Click! is a utility and “Telecommunication Company,”

<sup>29</sup> Defendant discusses authority under RCW 35A.11.020 and claims Click! was not “intended to be a utility.

1 Institutional naming and organizational convenience aside, it doesn't matter if the utility is an  
2 obligation of TPU or general government. Calling it a "municipal service," does not destroy the  
3 Laws of 1917 that have protected municipal telecom from privatization for over 100 years.<sup>30</sup>

4 TPU initiated the creation of Click!, not general government. TPU funded Click!, with approved  
5 of Council at the request of the TPU Board. TPU management saw a need to upgrade infrastructure  
6 and hired consultants to study the prospect of a telecom system. The consultants advised TPU of  
7 efficiencies and benefits that could be realized by increasing the original budget by an additional  
8 \$50 million, to include "*additional capacity*." Defendant has stated, "The original cost estimate for  
9 the network was \$15 million and the consultant's recommendation made to the city was to spend  
10 more and also bring telecommunications services to customers."<sup>31</sup> The additional capacity was  
11 costly; "The approved cost estimate for the network was **\$65 million**, but by the time Click! was  
12 launched to customers in July 1998 the cost grew to **\$89 million**."<sup>32</sup> (emphasis added.)

13 The community's need for an advanced telecom system with broadband capability was viewed  
14 as essential and projected to yield benefits in revenue diversification and economic growth, which,  
15 in turn, would increase sales of other utilities. Council approved TPU's plan, in Resolution No.  
16 33668 establishing the System:<sup>33</sup> Council determined, "the City Light Division's broadband  
17 telecommunications proposal is in the best interests of the City, will serve a public purpose and . . .  
18 that the proposed broadband telecommunications system shall be owned, operated and controlled  
19 by the City of Tacoma Department of Public Utilities Light Division." Click! is a utility asset.<sup>34</sup>

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20 <sup>30</sup> Click! is a municipal "communication utility." RCW 35.94 makes no distinction based on what  
21 "department" a city places its utilities in. The protective public vote emanates from the fact Click! is a  
22 telecom system and named utility, protected on the "long-list" of utilities, in the Laws of 1917; plus, that  
23 right to vote was confirmed in *Bremer* by our Supreme Court. *see Bremerton Municipal League v.*  
24 *Bremer*, 15 Wn.2d 231 (1942); *Bremer* guides the Court, under *Fondren v. Klickitat County*, 79 Wn. App.  
25 850, 856, 905 P.2d 928 (1995) (Supreme Court binding on state courts).

26 <sup>31</sup> Shook Decl. 1/6/20, Ex. 93, Pg. 5. (Click! Network Business Plan Revised 3-20-17 Tenzin Gyalzen.)  
<sup>32</sup> *Id.* at 5 ("The approved cost estimate for the network was **\$65 million**, but by the time the Click! was  
launched to customers in July 1998 the cost grew to **\$89 million**.").

<sup>33</sup> Shook Decl. 10/30/19, Ex. 10:4 Res. 33668, also, Ex. 11 Ordinance 25930 (creating System.) Ex. 50  
(Conclusions of Business Plan for establishing Click!) 12/30/19, Ex. 74 Klein deposition and statements. Ex.  
70 (Baarsma Singleton Paper on Creating Capacity.), Ex. 83, historical website statements, press releases  
and news articles about Click! creation. Ex. 85 incremental cost to construct System, Ex. 88 briefs from '96  
and '97 case approving Click!.

<sup>34</sup> Click! was built and paid for by TPU and is a municipal utility protected by the public vote  
under the Laws of 1917. A separate department or designation as a "system" is not required to  
trigger the public vote. Click!'s services compels the public vote.

1           Instead of disputing Plaintiff’s facts, which they cannot, City pretends they never “intended”  
2 Click! to be a telecom system, that it was just another “municipal service;” and that departmental  
3 naming magically extinguishes citizens’ “right to vote,” allowing Defendant to surplus Click!.  
4 Defendant cites Click!’s cable TV franchise, an agreement with themselves, as proof that Click! is  
5 just a “municipal service” and not really a part of TPU, a municipal utility. Defendant goes on to  
6 compare Click! with and old worn out service vehicle or work truck.<sup>35</sup>

7           Not so fast! Some long-lost progressive era policymakers, Judge Bone among them, still have a  
8 say about privatization here, via their City Charter and the Laws of 1917. Bless their souls, for they  
9 knew about such things, having endured their own impossible scandals, over 100 years ago. The  
10 protections they provided, in clear, emphatic, language, from wrongful privatization, in case  
11 anything “similar or dissimilar” should ever happen again, survive today.<sup>36</sup>

12           Defendant admits Click! is a telecom system providing telecom services; but claims citizens  
13 have no right to vote over its disposal, since it is not a “separate” utility system. There is no law that  
14 requires the City to organize Click! more separately than it already has. Click!’s organization, as a  
15 sub-fund of Tacoma Power, is not precluded by law. The City accounts for Click! revenue and  
16 expenses appropriately. Furthermore, the City’s chosen and convenient method for organizing  
17 Click! under TPU recently passed judicial scrutiny in *Coates v Tacoma*.<sup>37</sup>

18           **2. Assets Will Continue Performing Utility Purpose For Which They Were Acquired.**

19           The Court need not find Click! is a “separate system,” rather, only that its assets are “any part  
20 thereof, and whether those assets are “property, or equipment originally acquired for public utility  
21 purposes,” which they were.<sup>38</sup> Then, are the assets surplus, which they are not; since they continue  
22

23 <sup>35</sup> Def’s Response, Page 20:21, (“For instance, if the City surplused a work vehicle, ostensibly it would still  
24 be continuing on in the same capacity as a vehicle.”)

25 <sup>36</sup> See Shook Decl. 12/30/19, Ex. 80 (Honorable Homer T. Bone’s Letter in the 1944 Congressional Record,  
26 published upon Judge Bone’s departure from the Senate, having been appointed a Judge to the Ninth Circuit.  
Also, “similar or dissimilar” is a play on that emphatic phrase, found in the Laws of 1917. It just shows how  
serious these legislators were about making their intentions clear.

<sup>37</sup> And why not? Click! supports Power’s purpose, of efficiently providing electrical power, and has a true  
nexus to such purpose, by offsetting costs, increasing revenue thru economic growth and diversifying  
revenues. Institutional naming, or organizational departmentalizing, do not turn Click! into a non-utility  
“municipal service,” such as a public gathering facility, service, a ball park, library or luxury TV service.

<sup>38</sup> Direct quote from RCW 35.94.040. (Lease or sale of property originally acquired for utility purposes.)

1 providing the same “utility purpose” for which they were acquired.<sup>39</sup> Thus, the assets are not  
2 surplus under the clear statement in RCW 35.94. The meaning of the term “surplus” is found in the  
3 legislative history that show the intent of RCW 35.94.040<sup>40</sup>

4 Furthermore, under the City Charter, there is no “surplus” clause at all. A vote is required  
5 regardless of surplus. The fact that the assets themselves are essential is obvious. Without them  
6 there is no municipal Click! telecommunication service available for the community.

7 Click!’s essential assets will continue serving the same customers with the same services, which  
8 Defendant does not deny, for it’s true. Click!’s assets are not surplus. Defendant maintains a  
9 reversionary interest in the assets and fiber optic network.

10 In Defendant’s example of a surplus work truck, Defendant argues the truck, once sold,  
11 continues performing the same function, that of a work truck. Perhaps, but not for TPU; nor in  
12 performing the very “utility purpose” for which the truck was acquired.<sup>41</sup>

13 Imagine a water truck, acquired by TPU to deliver customers’ water. The truck and water  
14 enterprise cannot be sold to a private party, to continue delivering water to the same customers,  
15 with the same truck, only with the private company then setting rates for customers’ water service.  
16 Selling a truck, or Click!, this way, violates the spirit of the surplus statute, which limits surplus  
17 to useless assets “not required for providing continued public utility service,”<sup>42</sup> and defines the  
18 items as “unserviceable, inadequate, obsolete, worn out or unfit to be used.”<sup>43</sup>

19 Also, when TPU sells a surplus truck, it retains no reversionary interest, requiring the truck be  
20 returned after 20 years. When something is surplus, the asset is “disposed of.” Cities do not retain  
21 reversionary interests when disposing of surplus assets under RCW 35.94.040.

22 <sup>39</sup> A detailed analysis of proper procedures for conveying public property, is available on MRSC : at  
23 <http://mrsc.org/Home/Explore-Topics/Legal/General-Government/Sale-of-Surplus-City-or-Town-Property.aspx> Also at- <https://perma.cc/XY4T-UQLS> None of which Defendant has, admittedly, followed;  
24 as Defendant cites authority for gifting of public funds via “ negotiated disposition of surplus TPU assets if  
25 approved” by the Board” See Def’s MJS, Pg. 22.

26 <sup>40</sup> See Shook’s moving brief, page 23. Defendant has not disputed that the assets are not actually  
surplus, nor do they deny the legislative history and intent of surplus, for they cannot. Click! assets  
are valuable and not “obsolete” or “useless.”

<sup>41</sup> Defendant’s work truck example is irrelevant. Service vehicles are not named in the “long-list” of utilities  
protected by the Laws of 1917, and do not bear the distinction of being the second “pubic utility” ever  
regulated in Washington State, as was “telephone and telegraph,” under the Railroad Commission.

<sup>42</sup> Quoting RCW 35.94.040.

<sup>43</sup> RCW 54.16.180 (showing clear legislative intent and definition of “surplus” for municipally-owned utility  
property.) See Shook’s moving brief., Pgs. 24, 25, (detailed history of surplus statute).

1 Defendant is conveying, unforgivably, the community’s broadband system, and the beloved  
2 Click! brand and trademark. Privatization is an offensive gift of public funds; a lending of the  
3 good name, and credit, of the government to a private party, a most basic gifting violations.<sup>44</sup>

4 **3 Cable TV Franchise is Irrelevant and Does Not Limit Authority for Telecom Services.**

5 Federal statutes distinguish TV from Telecom. The City’s self-issued cable TV franchise only  
6 requires Click! obtain a separate telecom license. It does not convert Click! into a cable TV system.  
7 All modern cable television franchise agreements are careful to distinguish telecom as a separate  
8 activity. This is done, not to prevent the provision of broadband services, but so TV revenues are  
9 not confused with such services or telecommunications, which are generally exempt from taxation  
10 under the ITFA. By specifying that the agreement does not cover telecommunications, cities avoid  
11 creating unnecessary difficulty in collecting their 5% cable TV franchise fee. The City’s references  
12 to cable TV regulations do not apply to telecommunications, under 47 USC § 541(b)(3)(A)(ii). *City*  
*of Eugene v. Comcast*, is again helpful:

13 “If a cable operator \* \* \* is engaged in the provision of telecommunications  
14 services, \* \* \* the provisions of *this subchapter* shall not apply to such cable  
15 operator or affiliate for the provision of telecommunications services.” 47 USC  
16 § 541(b)(3)(A)(ii) (emphasis added). That provision is best read as establishing  
17 that telecommunications services are not to be regulated as cable services, and  
not subject to cable franchising requirements, merely because those  
telecommunications services are provided over a cable system.

18 **E. Reply to Miscellaneous Citations in Defendant’s Response**

19 Defendant cites *Clark, Issaquah* and *King County*.<sup>45</sup> *King County* is cited simply to show  
20 “*Issaquah* is still good law,” the silly implication being Click!’s advanced telecom network is the  
21 equivalent to an old cable TV system, which *Issaquah* considered a “luxury,” or “something you can  
22 do with a rooftop antenna.”<sup>46</sup> Both *Clark* and *Issaquah* support plaintiff’s case. *Clark*’s definition of  
23 “utility” is broad enough to include the butcher, the baker and the broadband-maker.<sup>47</sup> More than

24 <sup>44</sup> *Port of Longview V. Taxpayers* 85 Wn.2d 216, at 222, 1974 (municipality borrowing money in its own  
name in form of municipal bond, and loaning that same money to a private corporation.)

25 <sup>45</sup> Def.[’s] MSJ, Pg. 14. *Issaquah v. Teleprompter, Inc.*, 93 Wn.2d 567 (1980), *King County v. King County*  
*Water Districts et. al.*, Wash. No. 96360-6, Slip Op. (Dec. 5, 2019). *Clark v. Olson*, 177 Wash. 237 (1934).

26 <sup>46</sup> *Issaquah*, at 574, “It’s something you can do with a rooftop antenna. In that sense, it’s not a utility.”

<sup>47</sup> *Clark* provides that a “dedication to a public use” constitutes a utility. *Clark* also explains “public  
use” or “public utility” are established by “implication” and accommodation. *Clark* provided many  
examples of how “public use was implied.”<sup>47</sup> Those examples can be translated to Click!, further  
establishing Click!’s status as a municipally owned “utility.” Under *Clark*, Click! is a utility because

1 implying Click! is a utility, Defendant admits taxing Click! as a utility, on page 22 of their response,  
2 at line 17, seen here:

3 17 || TPU. Thus, because Click! Network generates revenue accruing by reason of transaction of  
4 18 || business, it is taxed under the GET as a business unit of TPU. Therefore, Mr. Shook's argument

5 *Issaquah* defines Click! as a “communication utility,” properly citing RCW 35.96.020, “a  
6 statute dealing with the conversion of electric and communication facilities to underground  
7 facilities in cities and towns,” and recognizing that Cable TV did not fit that definition. Since Click!  
8 is admittedly a communication system, indubitably Click! fits the standard of RCW 35.96.020.<sup>48</sup>

### 9 **Right to Vote is Constitutionally Protected**

10 In a free and democratic society, the power to vote is a fundamental right afforded citizens.  
11 The Washington State Constitution, Article I, Section 19 provides, “No power, civil or military,  
12 shall at any time interfere to prevent the free exercise of the right of suffrage.”<sup>49</sup>

13 Defendant's freewheeling disposal of Click! destroys citizens' fundamental Constitutional  
14 right to vote on the disposal of their valuable municipal utility assets. The right to vote, “in a free  
15 and unimpaired manner is preservative of other basic civil and political rights, any alleged  
16 infringement of the right of citizens to vote must be carefully and *meticulously scrutinized*.”  
(emphasis added) *Reynolds v. Sims*, 377 U.S. 533, 561-62, (1964).

17 When citizens of Tacoma granted City officials the privilege of managing their utilities, they  
18 were not content to divest themselves of every managerial function normally associated with the  
19 operation of a business concern. By their charter they have retained express power over the  
20 divestiture of their functional public utility property, or “*any part . . . any equipment and*  
21 *appurtenances thereof*.” The contract in question has the effect of violating the charter for the  
22 City of Tacoma and is therefore void unless approved by the voters as required by the charter.<sup>50</sup>

23 \_\_\_\_\_  
24 “public use was implied” by Click! holding itself out as a utility, by providing services to a certain class of  
25 the public, by Council setting rates, by funding and organizing Click! within the Dept. of Utilities, by the  
26 System being installed under the right of eminent domain, by Click! holding FCC licenses, by entering into  
telecom franchises agreements and contracts, by sharing lobby space within TPU headquarters for customer  
service purposes, and by City's treatment and taxation of Click! as a utility.

<sup>48</sup> *Issaquah*, at 574, cited the definition of “communication utility” in RCW 35.96.020, calling it “a statute  
dealing with the conversion of electric and communication facilities to underground facilities in cities and  
towns”. Cable TV did not fit that definition, but Click! certainly does.

<sup>49</sup> *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007)

<sup>50</sup> Drawing inspiration from *Clark v. City of South Haven*, 8 Mich. App. 74 (1967), 153 N.W.2d 669.

Plaintiff Shook's Reply In Support Of  
Motion for Partial Summary Judgment

Mitchell Shook, Plaintiff  
3624 6<sup>th</sup> Ave Suite C, Tacoma, WA 98406

1 The facts set forth in plaintiff's motion have not been refuted, for they are true.<sup>51</sup> Finally,  
2 please note, as stated in *Tacoma v. Taxpayers of Tacoma*,

3 Tacoma's municipal utility authority has limits. In exercising its proprietary power,  
4 Tacoma may not act beyond the purposes of the statutory grant of power, *State ex*  
5 *rel. PUD 1 v. Wylie*, 28 Wash.2d 113, 182 P.2d 706 (1947), or contrary to express  
6 statutory or constitutional limitations. *Metropolitan Seattle v. Seattle*, 57 Wash.2d  
7 446, 459-60, 357 P.2d 863 (1960); 12 E. McQuillin, *supra* at § 35.35.<sup>52</sup>

#### 8 F. Conclusion

9 For the foregoing reasons, the Court should deny Defendant's Motion and grant Plaintiff's  
10 motion for partial summary judgement by declaring council's actions to dispose of Click! by  
11 surplus ultra vires and require the matter be put to a vote of the people, as required under City  
12 Charter 4.6 and RCW 35.94.020.

13 Respectfully submitted this 6<sup>th</sup> day of January 2020.

14 

15 \_\_\_\_\_  
16 Mitchell Shook, Plaintiff

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20 <sup>51</sup> These undisputed facts encompass the historical information of Click! showing, the "Telecommunication  
21 Business Plan," the "Study Team," the original goals behind Click!'s creation, the funding, construction,  
22 marketing, and promotion, that resulted in an enterprise with \$25 million in annual revenue, a separate  
23 organizational chart and structure, expenses accounted for separately, growing profits and revenues,  
24 delivering Gigabit speed Broadband Internet Access Service, Fiber To The Home ("FTTH"), VoIP  
25 prioritized DOCSIS 3.1 modem and "Metro Ethernet" services, over *state-of-the-art technology*, with  
26 expansive operations, serving 35,000 residential, institutional and governmental customer accounts,  
including Tacoma's Public Libraries, holding telecom licenses, franchises and agreements; paying City's  
public utility Gross Earning Tax on telecom revenue, as a telecom utility, owning essential routers, servers,  
hubs, nodes, and IP addresses, that are not surplus and will *continue* providing the same utility services, to  
the Utility's same customers; with wholesale rates set by Council, published in Title 12-Utilities in the  
Municipal Code; privatization eliminating Council control over rates; Click! held out as one of four utility  
services; water, power, rail and telecommunications, under four distinct brand names: Tacoma Water,  
Tacoma Power, Tacoma Rail and Click! Network, sharing common customer service facilities in the lobby  
space of TPU's headquarters, appearing together on TPU's website as "Our Services: Power, Water, Rail,  
Click!." Not insignificant facts; yet, all undisputed.

<sup>52</sup> *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 695, 743 P.2d 793 (1987)



City of Tacoma  
Office of the City Clerk

### CERTIFICATE OF CITY CLERK

I, Doris Sorum, City Clerk of the City of Tacoma, Washington, do hereby certify that the attached is a full, true and correct copy of Ordinance No. 25930 passed by the City Council on July 23, 1996.

Dated this 15<sup>th</sup> day of January 2020.

  
\_\_\_\_\_  
Doris Sorum, City Clerk  
City of Tacoma, Washington





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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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WHEREAS, the Light Division may wish to connect such telecommunications system to individual residences and businesses in its service area or to other providers of telecommunications services; and

WHEREAS, the City has determined that it should create a telecommunications system as part of the Electric System in order to construct these telecommunications improvements; and

WHEREAS, the City by Ordinance No. 23514 passed November 20, 1985 (as amended and supplemented, the "Ordinance"), authorized Electric System Revenue Bonds (the "Bonds") of the City to be issued in series, made covenants and agreements in connection with the issuance of such Bonds and authorized the sale and issuance of the first series of such Bonds in the aggregate principal amount of \$125,505,000 (the "1985 Bonds") for the purpose of refunding all of the City's then outstanding light and power revenue bonds; and

WHEREAS, the 1985 Bonds were issued under date of December 1, 1985 and are now outstanding; and

WHEREAS, the City has heretofore issued ten additional series of Bonds on a parity with the 1985 Bonds, which bonds were issued and are now outstanding:

Authorizing Ordinance	Bonds Dated	Principal Amount Issued
23663	July 1, 1986	\$ 30,000,000
24073	May 1, 1988	60,400,000
24296	May 1, 1989	48,500,000
25004	December 1, 1991	13,800,000
25004	December 5, 1991	42,400,000
25004	December 5, 1991	42,400,000
25089	May 1, 1992	31,295,000
25165	September 1, 1992	131,675,000
25333	August 1, 1993	3,318,500
25489	May 10, 1994	135,665,000

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WHEREAS, after due consideration, it appears to the City Council and the Public Utility Board (the "Board") that it is in the best interest of the City to create and construct a telecommunications system and to issue Electric System Revenue Bonds to finance a portion of the costs of such construction and that the exact amount of Bonds and terms of the Bonds shall be determined by resolution of the Council; and

WHEREAS, Section 10.1 of the Ordinance provides that the City may, without the consent of the owners of any Bonds, adopt an ordinance supplemental to or amendatory of the Ordinance to provide for the issuance of Future Parity Bonds and to prescribe the terms and conditions pursuant to which such Bonds may be issued, paid or redeemed; and

WHEREAS, the City desires to provide that the issuance and sale of the Bonds will be issued and secured under the Ordinance as amended and supplemented by Ordinance No. 23663, Ordinance No. 24073, Ordinance No. 24296, Ordinance No. 25004, Ordinance No. 25089, Ordinance No. 25165, Ordinance No. 25333, Ordinance No. 25489 and this Ordinance;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF TACOMA:

ARTICLE I

DEFINITIONS AND AUTHORITY

Section 1.1. Supplemental Ordinance. This Ordinance No. 25930 is supplemental to and is adopted in accordance with Section 5.1 and Article X of the Ordinance and shall be known as the Eighth Supplemental Electric System Revenue Bond Ordinance (the "Eighth Supplemental Ordinance").

Section 1.2. Definitions.

A. All terms that are defined in Section 1.1 of the Ordinance shall have the same meanings, respectively, in this Eighth Supplemental Ordinance as such terms are given in

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Section 1.1 of the Ordinance, as amended and supplemented by the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Supplemental Ordinances.

B. In this Eighth Supplemental Ordinance:

"Arbitrage and Tax Certification" means the certificate executed by the Director of Finance of the City pertaining to the calculation and payment of any Rebate Amount with respect to the Bonds.

"Bond Sale Resolution" means the resolution to be adopted by the City Council setting forth the final terms of the Bonds.

"Bonds" means the Electric System Revenue Bonds, 199\_\_, of the City issued pursuant to the Ordinance and this Eighth Supplemental Ordinance.

"Code" means the Internal Revenue Code of 1986, as amended, together with corresponding and applicable final, temporary or proposed regulations and revenue rulings issued or amended with respect thereto by the United States Treasury or the Internal Revenue Service, to the extent applicable to the Bonds.

"Eighth Supplemental Ordinance" means this Ordinance No. 25930.

"Rebate Amount" means the amount, if any, determined to be payable with respect to the Bonds by the City to the United States of America in accordance with Section 148(f) of the Code.

Section 1.3. Authority for this Eighth Supplemental Ordinance. This Eighth Supplemental Ordinance is adopted pursuant to the provisions of the laws of the State of Washington, the Tacoma City Charter and the Ordinance.

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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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The applicable limitations contained in Section 5.2 of the Ordinance having been complied with in the issuance of the Bonds, the Bonds will have a lien upon the Net Revenues of the Electric System for the payment of principal thereof and interest thereon equal in priority to the lien upon the Net Revenues of the Electric System for the payment of the principal of and interest on the 1985 Bonds, the 1986 Bonds, the 1988 Bonds, the 1989 Bonds, the 1991 Bonds, the 1992 Bonds, the 1992B Bonds, the 1993 Bonds and the 1994 Bonds.

Section 2.4. Due Regard. The Council and Board hereby find and determine that due regard has been given to the cost of the operation and maintenance of the Electric System and that it has not obligated the City to set aside into the Bond Fund for the account of the Bonds a greater amount of the revenues and proceeds of the Electric System than in its judgment will be available over and above such cost of maintenance and operation.

Section 2.5. Findings. The Council and Board hereby find it to be necessary and in the best interests of the City to issue the Bonds in order to provide part of the funds necessary to finance the Telecommunications Project.

ARTICLE III

AUTHORIZATION OF BONDS

Section 3.1. Principal Amount, Designation and Series. Pursuant to the provisions of the Ordinance, a series of Bonds of the City entitled to the benefit, protection and security of such provisions is hereby authorized in the aggregate principal amount of not to exceed \$1,000,000. Such Bonds shall be designated as, and shall be distinguished from the Bonds of all other series by the title, "City of Tacoma, Washington Electric System Revenue Bonds, 199\_."

Section 3.2. Purpose. The purpose of the Bonds is to provide part of the funds necessary to finance the Telecommunications Project, make any necessary deposit to the Reserve Account and to pay the costs of issuance and sale of the Bonds.

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Section 3.3. Date, Maturities and Interest. The Bonds shall be issued in the aggregate principal amount of not to exceed \$1,000,000 and shall be dated as of the date provided in the Bond Sale Resolution and shall bear interest from their dated date to their stated dates of maturity or prior redemption. The exact principal amount of the Bonds shall be established by the Bond Sale Resolution. The Bonds shall mature on the dates of the years and in the principal amounts and shall bear interest payable semiannually on the dates and at the rates per annum set forth in the Bond Sale Resolution.

Section 3.4. Denomination and Numbers. The Bonds shall be issued in fully registered form in the denominations of \$5,000 or any integral multiple of \$5,000 within a maturity. The Bonds shall be numbered separately in such manner and with any additional designation as the Registrar deems necessary for purposes of identification. The Bond Sale Resolution may provide for the Bonds to be held in book-entry only form.

Section 3.5. Redemption Terms. By the Bond Sale Resolution, the City Council may determine that all or a portion of the Bonds shall be subject to redemption prior to maturity at the option of the City, in whole or in part, on any date and at the respective redemption prices specified in the resolution. The City Council may designate certain Bonds as Term Bonds that will be subject to redemption by operation of the Bond Retirement Account through Sinking Fund Requirements in the years and amounts set forth in the resolution.

Section 3.6. Reservation of Right to Purchase. The City reserves the right to use money in the Revenue Fund or any other legally available funds at any time to purchase any of the Bonds in the open market provided there is no deficiency in the accounts within the Bond Fund. Any purchases of Bonds may be made with or without tenders of Bonds and at either public or private sale.

Section 3.7. Tax Exemption. The City shall comply with the provisions of this section unless, in the written opinion of nationally-recognized Bond Counsel to the City, such

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compliance is not required in order to maintain the exemption of the interest on the Bonds from federal income taxation.

The City hereby covenants that it will not make any use of the proceeds from the sale of the Bonds or any other funds of the City which may be deemed to be proceeds of such Bonds pursuant to Section 148 of the Code and the applicable regulations thereunder which will cause the Bonds to be "arbitrage bonds" within the meaning of said Section and said regulations. The City will comply with the applicable requirements of Section 148 of the Code (or any successor provision thereof applicable to the Bonds) and the applicable regulations thereunder throughout the term of the Bonds.

The City further covenants that it will not take any action or permit any action to be taken that would cause the Bonds to constitute "private activity bonds" under Section 141 of the Code.

Section 3.8. Arbitrage Rebate. The City will pay the Rebate Amount, if any, to the United States of America at the times and in the amounts necessary to meet the requirements of the Code to maintain the federal income tax exemption for interest payments on the Bonds, in accordance with the Arbitrage and Tax Certification.

ARTICLE IV

REGISTRATION, FORM AND GENERAL TERMS

Section 4.1. Registrar and Paying Agent. The initial Registrar and Paying Agent shall be the fiscal agencies for the state of Washington in Seattle, Washington, and New York, New York.

Section 4.2. Transfer and Exchange. So long as the Bonds are not in book-entry form, any Bond may be transferred pursuant to its provisions at the Registrar's principal office for such purpose by surrender of such Bond for cancellation, accompanied by a written instrument of transfer, in form satisfactory to the Registrar, duly executed by the registered owner in

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1 person or by the registered owner's duly authorized attorney. Upon payment of any applicable  
2 tax or governmental charge, the City will execute and the Registrar will authenticate and  
3 deliver at the principal office of the Registrar (or send by registered mail to the owner thereof  
4 at the owner's expense), in the name of the transferee or transferees, a new Bond or Bonds in  
5 authorized denominations of the same interest rate, aggregate principal amount and maturity,  
6 dated as of the last interest payment date to which interest has been paid so that there shall  
7 result no gain or loss of interest as a result of such transfer. To the extent of authorized  
8 denominations, one Bond may be exchanged for several bonds of the same interest rate and  
9 maturity, and for a like aggregate principal amount, and several Bonds of the same interest rate  
10 and maturity may be exchanged for one or several Bonds, respectively, of the same interest  
11 rate and maturity and for a like aggregate principal amount.

12 In every case of a transfer or exchange of any Bonds, the surrendered Bonds shall be  
13 canceled by the Registrar and a certificate evidencing such cancellation shall be promptly  
14 transmitted by the Registrar to the City. As a condition of any such transfer or exchange, the  
15 City at its option may require the payment of a sum sufficient to reimburse it for any tax or  
16 other governmental charge that may be imposed thereon. All Bonds executed, authenticated  
17 and delivered in exchange for or upon transfer of Bonds so surrendered shall be valid  
18 obligations of the City evidencing the same debt as the Bonds surrendered, and shall be entitled  
19 to all the benefits and protection of the Ordinance to the same extent as the surrendered  
20 Bonds.

21 Section 4.3. Limitation on Transfer or Exchange of Bonds. The City shall not be  
22 required to (a) issue, transfer, or exchange Bonds after the 15th day of the month prior to any  
23 interest payment date therefor, or (b) to register, discharge from registration, transfer or  
24 exchange any Bonds which have been designated for redemption within a period of 30 days  
25 next preceding the date fixed for redemption.  
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Section 4.4. Effect of Payment. All payments of or on account of interest to any registered owner of any Bond, and all payments of or on account of principal to any registered owner of any Bond (or to his or her assigns), shall be valid and effectual and shall be a discharge of the City, the Paying Agent and the Registrar in respect of the liability upon the Bonds or claims for interest, as the case may be, to the extent of the sum or sums paid.

All Bonds upon the payment or redemption thereof shall be canceled and destroyed by the Paying Agent, and a certificate evidencing such payment, cancellation and destruction shall be promptly transferred by the Paying Agent to the City.

Section 4.5. Mutilated, Lost, Stolen or Destroyed Bonds. In case any Bond shall at any time become mutilated or be lost, stolen or destroyed, the City in the case of such mutilated Bond shall, and in the case of such lost, stolen or destroyed Bond in its discretion may, execute and direct the Registrar to authenticate and deliver a new Bond of the same interest rate and maturity and of like tenor and effect in exchange or substitution for and upon surrender and cancellation of such mutilated Bond, or in lieu of or in substitution for such destroyed, stolen or lost Bond. If such stolen, destroyed or lost Bond shall have matured or have been called for redemption, instead of issuing a substitute therefor, the City may without the surrender of such Bond at its option pay the same (in which case the City shall promptly file a certificate to that effect with the Paying Agent and Registrar) or cause the same to be paid by the Paying Agent by a certificate of the City directing such payment filed with the Paying Agent. Except in the case where a mutilated Bond is surrendered, the applicant for the issuance of a substitute Bond shall furnish to the City and the Registrar evidence satisfactory to them of the theft, destruction or loss of the original Bond, and also such security and indemnity as may be required by the City or the Registrar, and no such substitute Bond shall be issued unless the applicant for the issuance thereof shall reimburse the City and the Registrar for the expenses incurred in connection with the preparation, execution, authentication, issuance and

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delivery of the substitute Bond. Any such substitute Bond shall be equally and proportionately entitled to the security of the Ordinance with all other Bonds issued hereunder, whether or not the Bond alleged to have been lost, stolen or destroyed shall be found at any time. The Registrar shall cancel all mutilated Bonds surrendered to it.

Section 4.6. Execution and Authentication of Bonds. The Bonds shall be executed on behalf of the City with the manual or facsimile signature of the Mayor and attested with the manual or facsimile signature of the City Clerk and the seal of the City shall be imprinted or impressed on each of the Bonds. The Bonds shall bear thereon a certificate of authentication, in the form set forth in Section 4.7 of this Eighth Supplemental Ordinance, executed manually by the Registrar. Only such Bonds as shall bear thereon such certificate of authentication shall be entitled to any right or benefit under the Ordinance and no Bond shall be valid or obligatory for any purpose until such certificate of authentication shall have been duly executed by the Registrar. Such certificate of the Registrar upon any Bond executed on behalf of the City shall be conclusive evidence that the Bond so authenticated has been duly authenticated and delivered under the Ordinance and that the owner thereof is entitled to the benefits of the Ordinance.

In case any of the officers who shall have signed or attested any of the Bonds shall cease to be such officers before the Bonds so signed or attested shall have been actually delivered, such Bonds shall be valid nevertheless and may be issued by the City with the same effect as though the persons who had signed or attested such Bonds had not ceased to be such officers.

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Section 4.7. Form of Bonds.

(a) The Bonds shall be in substantially the following form:

UNITED STATES OF AMERICA  
STATE OF WASHINGTON  
CITY OF TACOMA  
ELECTRIC SYSTEM REVENUE BOND, 199\_

No. \_\_\_\_\_ \$ \_\_\_\_\_  
Interest Rate: \_\_\_\_\_ Maturity Date: \_\_\_\_\_ CUSIP No: \_\_\_\_\_  
\_\_\_\_\_% \_\_\_\_\_  
Registered Owner: \_\_\_\_\_  
Principal Amount: \_\_\_\_\_ DOLLARS

The City of Tacoma, a municipal corporation of the State of Washington (hereinafter called the "City"), for value received, hereby promises to pay to the Registered Owner identified above, or registered assigns, on the Maturity Date identified above, the Principal Amount indicated above and to pay interest on such principal amount from the date hereof or the most recent date to which interest has been paid or duly provided for, at the Interest Rate set forth above per annum, payable \_\_\_\_\_, 199\_, and semiannually thereafter on the first day of each \_\_\_\_\_ and \_\_\_\_\_ until payment shall have been made or provided for.

Principal of and interest on this bond are payable solely out of the special fund of the City known as the "Electric System Revenue Bond Fund" created and established by Ordinance No. 23514 of the City (the "Bond Fund"). Both principal of and interest on this bond are payable in lawful money of the United States of America. Interest shall be paid by mailing a check or draft or by wire transfer as provided in the Bond Ordinance (as hereinafter defined) to the registered owner or assigns at the address shown on the bond register as of the 15th day of the month prior to the interest payment date. Principal shall be paid to the registered owner or assigns upon presentation and surrender of this bond at the principal office of the Paying Agent or Agents which initially are the fiscal agencies of the State of Washington in Seattle, Washington, and New York, New York. (Such fiscal agencies also act, and are hereinafter referred to collectively, as the "Bond Registrar").

This bond shall not be valid or become obligatory for any purpose or be entitled to any security or benefit under the Bond Ordinance until the Certificate of Authentication hereon shall have been manually signed by the Bond Registrar.

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This bond is one of a duly authorized series of bonds aggregating \$ \_\_\_\_\_ in principal amount and designated as "Electric System Revenue Bonds, 199\_." This bond and the bonds of this series (the "Bonds") are issued under and pursuant to Ordinance No. 23514 as amended and supplemented by Ordinance No. 23663, Ordinance No. 24073, Ordinance No. 24296, Ordinance No. 25004, Ordinance No. 25089, Ordinance No. 25165, Ordinance No. 25489 and Ordinance No. 25930 of the City (together the "Bond Ordinance"), and under the authority of and in full compliance with the Constitution and laws of the State of Washington.

The Bonds are issued for the purpose of providing part of the funds necessary for financing capital improvements to the Electric System. The Bond Ordinance permits the issuance of Future Parity Bonds payable from the Bond Fund ranking on a parity with the 1985 Bonds, the 1986 Bonds, the 1988 Bonds, the 1989 Bonds, the 1991 Bonds, the 1992 Bonds, the 1992B Bonds, the 1993 Bonds, the 1994 Bonds and the Bonds and secured by an equal charge and lien on the Net Revenues and permits the costs associated with certain Contract Resource Obligations to be included in the Electric System's Operating Expenses (as such terms are defined in the Bond Ordinance). The 1985 Bonds, the 1986 Bonds, the 1988 Bonds, the 1989 Bonds, the 1991 Bonds, the 1992 Bonds, the 1992B Bonds, the 1993 Bonds, the 1994 Bonds, the Bonds and any Future Parity Bonds are hereinafter collectively referred to as the "Parity Bonds."

Copies of the Bond Ordinance are on file at the office of the City Clerk and at the principal office of each Paying Agent for this bond. Reference is hereby made to the Bond Ordinance and to any and all modifications and amendments thereof for a more complete description of the Revenues available for the payment of the principal of and interest on the Bonds and the rights and remedies of the owners of the Bonds with respect thereto, the terms and conditions upon which the Bonds have been issued, and the terms and conditions upon which this bond shall no longer be secured by the Bond Ordinance or deemed to be outstanding thereunder if money or certain specified securities sufficient for the payment of this bond shall have been set aside in a special account and held in trust for the payment thereof. Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Bond Ordinance.

Under the Bond Ordinance, the City is obligated to set aside and pay into the Bond Fund out of the Revenues of said Electric System certain fixed amounts sufficient to pay the principal of and interest and premium, if any, on all Parity Bonds at any time outstanding as the same become due and payable, all as is more fully provided in the Bond Ordinance. The Bonds and the interest thereon constitute the only charge against the Bond Fund and the amount of the Net Revenues pledged to said Bond Fund, as provided in the Bond Ordinance.

In and by the Bond Ordinance, the City covenants to establish, maintain and collect rates and charges for electric energy sold through the ownership or operation of the Electric

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System and all other services, facilities and commodities sold, furnished or supplied by the City in connection with the ownership or operation of the Electric System which shall be fair and adequate to provide Revenues sufficient for the payment of the Parity Bonds and all payments which the City is obligated to set aside in the Bond Fund and for the proper operation and maintenance of the Electric System, including payment of certain Contract Resource Obligations, all necessary repairs, replacements and renewals thereof and other costs thereof, as provided in the Bond Ordinance.

The Bonds maturing on and after \_\_\_\_\_ 1, \_\_\_\_\_ are subject to redemption prior to maturity at the option of the City on any date on and after \_\_\_\_\_ 1, 20\_\_\_\_, in whole or in part, upon written notice as provided hereinafter, at the redemption prices with respect to each Bond (expressed as a percentage of the principal amount of the Bonds to be redeemed) set forth below, together with the interest, if any, accrued thereon to the date fixed for redemption:

Redemption Period	Redemption Price
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If less than all of the Bonds subject to optional redemption are to be called for redemption, the City shall choose the maturities to be redeemed. In the event that less than all of the Bonds of any maturity are called for redemption, the particular Bonds of such maturity to be redeemed shall be selected by lot by the Bond Registrar, or, so long as the Bonds are held in book-entry form, by the Securities Depository.

The Bonds maturing on \_\_\_\_\_ 1, \_\_\_\_\_ (hereinafter referred to as the "Term Bonds") shall be redeemed prior to maturity by lot, not later than \_\_\_\_\_ 1 in the years \_\_\_\_\_ through \_\_\_\_\_, inclusive, from amounts credited to the Bond Retirement Account in the Bond Fund as sinking fund installments therefor (to the extent such amounts have not been used to redeem or purchase such Bonds as provided below) and in the principal amounts as set forth below, upon written notice as provided hereinafter by payment of the principal amount thereof, together with the interest, if any, accrued thereon to the date fixed for redemption.

Year	Amount
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The City may purchase or redeem the Term Bonds through the application of part or all of the respective sinking fund installments therefor at any time prior to any \_\_\_\_\_ 1 due date.



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Any money not so used to redeem or to purchase such Term Bonds shall be substantially exhausted by application to the redemption of such bonds on such succeeding \_\_\_\_\_ 1. If, as of any \_\_\_\_\_ 1, the principal amount of Term Bonds retired by purchase or redemption from any source exceeds the cumulative requirement for sinking fund installments through such date, such excess may be credited against the sinking fund installment for the next fiscal year.

Written notice of redemption shall be given by first class mail, postage prepaid, not less than 30 days nor more than 60 days before the redemption date to the registered owners of the Bonds to be redeemed in whole or in part at their last addresses, if any, appearing on the Bond Register, but any defect with respect to the redemption of any bond shall not invalidate the redemption of any other bond. Notice of redemption having been given by mailing, as aforesaid, the Bonds so called for redemption shall on the date specified in such notice become due and payable at the applicable redemption price herein provided, and from and after the date so fixed for redemption (except as to any bond, or portion of any bond, not so redeemed in accordance with such call for redemption) interest on said Bonds so called for redemption shall cease to accrue.

A portion of the principal sum of this bond in the amount of \$5,000, or any integral multiple thereof, may be redeemed, and if less than all of the principal sum hereof is to be redeemed, in such case upon the surrender of this bond at the principal office of the Bond Registrar, there shall be issued to the registered owner, without charge therefor, for the then unredeemed balance of the principal sum hereof, fully registered bonds of like series, maturity and interest rate in any of the denominations authorized by the Bond Ordinance.

This bond shall be transferable by the registered owner at the principal offices of the Bond Registrar upon surrender and cancellation of this bond, and thereupon a new registered bond or bonds of the same principal amount and interest rate and maturity will be issued to the transferee as provided in the Bond Ordinance. The City, the Bond Registrar, the Paying Agents and any other person may treat the person in whose name this bond is registered as the absolute owner hereof for the purpose of receiving payment hereof and for all purposes and shall not be affected by any notice to the contrary, whether this bond be overdue or not.

It is hereby certified, recited and declared that all acts, conditions and things required by the Constitution and statutes of the State of Washington to exist, to have happened and to have been performed precedent to and in the issuance of this bond do exist, have happened and

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have been performed in due time, form and manner as prescribed by law, and that the amount of this bond, together with all other obligations or indebtedness of the City, does not exceed any constitutional or statutory limitations of indebtedness.

IN WITNESS WHEREOF, the City of Tacoma, by its City Council, has caused this bond to be executed in its name with the facsimile or manual signature of its Mayor, and attested by the facsimile or manual signature of its Clerk, and the seal of said City to be imprinted or impressed hereon, all as of the \_\_\_\_ day of \_\_\_\_\_, 199\_.

CITY OF TACOMA, WASHINGTON

By \_\_\_\_\_  
Mayor

(SEAL)

Attest:

\_\_\_\_\_  
City Clerk

Authentication Date: \_\_\_\_\_

CERTIFICATE OF AUTHENTICATION

This bond is one of the bonds described in the within-mentioned Bond Ordinance and is one of the Electric System Revenue Bonds, 199\_ of the City of Tacoma, Washington, dated \_\_\_\_\_, 199\_.

WASHINGTON STATE FISCAL  
AGENCY, Bond Registrar

By \_\_\_\_\_  
Authorized Officer

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ASSIGNMENT

FOR VALUE RECEIVED, the undersigned hereby sells, assigns and transfers unto

PLEASE INSERT SOCIAL SECURITY OR TAXPAYER  
IDENTIFICATION NUMBER OF TRANSFEREE

[Empty box for Social Security or Taxpayer Identification Number]

(Please print or typewrite name and address, including zip code, of Transferee)

\_\_\_\_\_ the  
within bond and does hereby irrevocably constitute and appoint \_\_\_\_\_  
attorney-in-fact to transfer said bond on the books kept for registration thereof with full power  
of substitution in the premises.

DATED: \_\_\_\_\_

SIGNATURE GUARANTEED:  
\_\_\_\_\_

NOTE: The signature on this Assignment must correspond with the name of the registered owner as it appears upon the face of the within bond in every particular, without alteration or enlargement or any change whatever.

ARTICLE V

APPLICATION OF PROVISIONS OF ORDINANCE TO BONDS

Section 5.1. Issuance of Future Parity Bonds. The provisions of Article V of the Ordinance relating to the issuance of Future Parity Bonds shall apply to the Bonds.

Section 5.2. Contract Resource Obligations. The provisions of Article VI of the Ordinance relating to Contract Resource Obligations shall apply to the Bonds.

Section 5.3. Application of Sections 7.1 through 7.3 of Ordinance Relating to Special Funds and Accounts. Except as otherwise provided below in Section 5.10, the provisions of

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1 Sections 7.1 through 7.3 of the Ordinance relating to the Revenue Fund and the accounts  
2 therein, the Bond Fund and the accounts therein, the Cumulative Reserve Fund, and the  
3 investment of money held for the credit of such Funds shall apply to the Bonds.

4 Section 5.4. Covenants to Secure Bonds. The provisions of Article IX of the  
5 Ordinance setting forth the covenants to secure Bonds, as amended by Article VII of the First  
6 Supplemental Ordinance, shall apply to the Bonds.

7 Section 5.5. Supplemental and Amendatory Ordinances. The provisions of Article X  
8 of the Ordinance relating to supplemental and amendatory ordinances shall apply to the Bonds.

9 Section 5.6. Defaults and Remedies. The provisions of Article XI of the Ordinance  
10 relating to defaults and remedies shall apply to the Bonds.

11 Section 5.7. Amendments and Bondowners' Meetings. The provisions of Article XII  
12 of the Ordinance relating to amendments and bondowners' meetings shall apply to the Bonds.

13 Section 5.8. Miscellaneous. The provisions of Article XIII of the Ordinance relating  
14 to the City's contract with the owners of Bonds, money held by the Paying Agent one year  
15 after the due date, the benefits of the Ordinance and severability shall apply to the Bonds.

16 Section 5.9. Rights of AMBAC. The provisions of Article X of the Second  
17 Supplemental Ordinance and Article VII of the Fifth Supplemental Ordinance and Article VIII  
18 of the Sixth Supplemental Ordinance relating to the rights of AMBAC Indemnity Corporation  
19 are incorporated herein by reference and shall be in force and effect so long as any 1988 Bond,  
20 1992 Bond or 1992B Bond, respectively, is Outstanding and insured by the municipal bond  
21 guaranty insurance policy therein authorized.

22 Section 5.10. Reserve Subaccount. There is hereby established within the Reserve  
23 Account a special subaccount entitled the "199\_\_ Reserve Subaccount." Funds in such  
24 Reserve Subaccount shall be treated in all respects as other funds in the Reserve Account. The  
25 City shall make transfers into the Reserve Subaccount from money and investments in the  
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Reserve Account, from proceeds of the Bonds, or from other available money in amounts sufficient to satisfy the Reserve Account Requirement with respect to the Bonds.

The City is authorized to satisfy the requirements of Section 7.2 of the Ordinance with respect to the Reserve Account as to the Bonds through the use of Qualified Insurance, or a Qualified Letter of Credit, which may be purchased on the date of closing of the Bonds or after the issuance of the Bonds and substituted for amounts in the Reserve Subaccount pursuant to the provisions of Section 7.2 of the Ordinance.

ARTICLE VI

DISPOSITION OF BOND PROCEEDS

Section 6.1. Construction Account. A special fund of the City has heretofore been created and designated the "City of Tacoma Electric System Construction Fund" (the "Construction Fund"). There is hereby created within the Construction Fund a special account to be known as the "199\_\_ Bonds Construction Account" into which shall be deposited from the proceeds of sale of the Bonds. Money in the Construction Account shall be used for paying part of the costs of the acquisition, construction and installation of the additions and improvements described in Exhibit A, and for paying all expenses incidental thereto (including but not limited to costs of issuance of the Bonds, engineering, financing, legal or any other incidental costs) and for repaying any advances heretofore or hereafter made on account of such costs, and such money or so much thereof as may be necessary be and hereby is appropriated for such purpose.

All proceeds of the Bonds so deposited in the Construction Account shall be continuously and fully invested to the extent practicable in Permitted Investments. Interest earned and income or profits derived by virtue of such investments shall remain in the account and be used for the purposes for which the Bonds are issued or other lawful purposes. Money in the Construction Account may be transferred to the Bond Fund in such amounts as shall be

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necessary to pay principal of and interest on Bonds, and may be used to pay any Rebate Amount.

Section 6.2. Disposition of Proceeds. The proceeds of the Bonds are hereby appropriated for the following purposes and shall be deposited as follows:

1. The amount equal to the interest accruing on the Bonds from their dated date to the date of their delivery shall be deposited in the Interest Account in the Bond Fund and invested in Permitted Investments.

2. To the extent permitted by the Code, the amount that when added to other money in the Reserve Account will ensure that the total amount in the Reserve Account equals the Reserve Account Requirement shall be deposited in the Reserve Account in the Bond Fund.

3. The balance of the Bond proceeds shall be deposited in the Construction Account and used for the purposes specified in Sections 6.1, including payment of costs of issuance of the Bonds.

ARTICLE VII  
SALE OF BONDS

Section 7.1. Sale of Bonds. The Bonds may be sold by competitive or negotiated sale, which sale shall be approved by the Bond Sale Resolution.

Section 7.2. Official Statement; Insurance. The Director and/or Deputy Director of Utilities are authorized to prepare a preliminary official statement for the marketing of the Bonds and to solicit bids for bond insurance. The Bond Sale Resolution shall approve the preliminary and final official statements and any bond insurance.

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ARTICLE VIII  
MISCELLANEOUS

Section 8.1. Defeasance. In the event that the City, in order to effect the payment, retirement or redemption of any Bond, sets aside in the Bond Fund or in another special account, advance refunding bond proceeds or other money lawfully available or direct obligations of the Department of the Treasury of the United States of America ("Government Obligations"), or any combination of such proceeds, money and/or Government Obligations, in amounts which, together with known earned income from the investment thereof are sufficient to redeem, retire or pay such Bond in accordance with its terms and to pay when due the interest and redemption premium, if any, thereon, and such proceeds, money and/or Government Obligations are irrevocably set aside and pledged for such purpose, then no further payments need be made into the Bond Fund for the payment of the principal of and interest on such Bond, and the owner of such Bond shall cease to be entitled to any lien, benefit or security of the Ordinance except the right to receive payment of principal, premium, if any, and interest from such special account, and such Bond shall be deemed not to be outstanding hereunder.

Section 8.2. Undertaking to Provide Ongoing Disclosure. In the Bond Sale Resolution the City shall undertake to provide certain ongoing disclosure for the benefit of the owners of the Bonds as required by Section (b)(5) of the Securities and Exchange Commission's Rule 15c2-12 under the Securities and Exchange Act of 1934.

Section 8.3. Severability. If any one or more of the provisions of this Eighth Supplemental Ordinance is or are held by any court of competent jurisdiction to be contrary to law, then such provision or provisions shall be null and void and shall be deemed separable from the remaining provisions and shall in no way affect the validity of the other provisions of this Eighth Supplemental Ordinance or the Bonds.

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Section 8.4. Effective Date. This Eighth Supplemental Ordinance shall take effect and be in force thirty days after its passage, approval and publication as required by law. Any actions taken pursuant to this Eighth Supplemental Ordinance before its effective date and after its passage are hereby ratified, approved and confirmed.

INTRODUCED AND READ FOR THE FIRST TIME at a regular meeting of the City Council held the 16th day of July, 1996.

PASSED by the City Council of the City of Tacoma, Washington, and authenticated by its Mayor at a regular meeting of the Council held this 23rd day of July, 1996.

CITY OF TACOMA, WASHINGTON  
By *Paul Egan*  
Mayor

Attest:  
*Rick Rosenblatt*  
City Clerk

APPROVED AS TO FORM:  
*[Signature]*  
City Attorney, ch. 15.57.

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CLERK'S CERTIFICATE

I, the undersigned, the duly chosen, qualified and ~~acting~~ City Clerk of the City of Tacoma, Washington, and keeper of the records of the City Council (herein called the "Council"), DO HEREBY CERTIFY:

1. That the attached Ordinance No. 25930 (herein called the "Ordinance") is a true and correct copy of an Ordinance of the Council, as finally passed at a regular meeting of the Council held on the 23<sup>rd</sup> day of July, 1996 and duly recorded in my office.

2. That said meeting was duly convened and held in all respects in accordance with law, and to the extent required by law, due and proper notice of such meeting was given; that a legal quorum was present throughout the meeting and a legally sufficient number of members of the Council voted in the proper manner for the passage of said Ordinance; that all other requirements and proceedings incident to the proper adoption of said Ordinance have been duly fulfilled, carried out and otherwise observed, and that I am authorized to execute this certificate.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City as of this 24<sup>th</sup> day of July, 1996.

Rick Rosenblatt  
City Clerk  
City of Tacoma, Washington



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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

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City of Tacoma  
Office of the City Clerk

## CERTIFICATE OF CITY CLERK

I, Doris Sorum, City Clerk of the City of Tacoma, Washington, do hereby certify that the attached is a full, true and correct copy of Substitute Resolution No. 33668 adopted by the City Council on April 8, 1997.

Dated this 15<sup>th</sup> day of January 2020.

  
Doris Sorum, City Clerk  
City of Tacoma, Washington





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



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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 APR 08 1997

*Rick Eisenberg*  
Mayor

*Rick Rosenblatt*  
Attest: City Clerk

Approved as to form & legality:

*B. S. Karavites*  
Assistant City Attorney

Requested by Public Utility Board Resolution No. U-9258

599c



# REQUEST FOR ORDINANCE OR RESOLUTION

CITY CLERK USE

Request #:	6366
Ordinance #:	
Resolution #:	33668

1. Date: **March 20, 1997**

Requesting Department/Division/Program	Sponsored By	Phone/Extension
2. <b>Tacoma Public Utilities/Light Division</b>		
Contact Person (for questions):		Phone/Extension
3. <b>Steven J. Klein</b>		502-8203

4. Preparation of Resolution is requested for the City Council meeting of Tuesday April 8, 1997

5. Summary Title/Recommendation: (A concise sentence, as it will appear on the Council Agenda)

Authorize the development of a broad band telecommunications network to improve electric utility service and improve the telecommunications infrastructure available to the community. This would include the business plan for a broad band telecommunications system and the implementation of the telecommunications system.

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?)

The Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment and research on similar activities in other municipalities. It is projected that the cost for the construction and installation of this system will be approximately \$55 million to construct, plus more than \$10 million for startup operations. However, the Light Division believes that the overall benefits to the City, the Light Division and its customers will exceed the projected costs.

In addition to the benefits to the Light Division that the system would deliver through improved communication abilities, the system will also have the ability to transport data, provide high speed Internet access and deliver full cable television service.

7. Financial Impact: (Future impact on the budget.)

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 March 20, 1997	Attached
--	----------

RECEIVED  
 97 MAR 27 AM 11:37  
 CITY CLERK'S  
 OFFICE

9. Funding Source: (Enter amount of funding from each source)

Fund Number & Name:	State \$	City \$	Other \$	Total Amount
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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
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CERTIFICATE

I, Charleen Jacobs, do hereby certify that I am the Clerk of the Public Utility Board of the City of Tacoma, and that record and maintain custody of the official records and minutes of the Public Utility Board.

I further certify that the attached is a full, true, and correct copy of Amended Substitute Resolution U-9258 dated April 9, 1997.

In witness whereof, I have set my hand this 16 day of January 2020.

Charleen Jacobs  
Clerk, Public Utility Board  
Tacoma Public Utilities  
City of Tacoma, Washington

Attachment

State of Washington  
County of Pierce

Subscribed and sworn to before me this 16 day of January 2020.



Deborah D. McLellan  
Notary Public in and for the  
State of Washington, County of Pierce  
My commission expires 10-8-21



AMENDED  
SUBSTITUTE  
U-9258

**RESOLUTION NO.**

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3 WHEREAS the City of Tacoma, Department of Public Utilities,  
4 Light Division desires to: (1) develop a state-of-the-art fiber optic system  
5 to support enhanced electric system control, reliability and efficiency;  
6 (2) develop capability to meet the expanding telecommunications  
7 requirements in an evolving competitive electric market, the most critical of  
8 which is real-time, two-way interactive communications with individual  
9 energy consumers, (3) create greater revenue diversification through new  
10 business lines (i.e. internet transport, cable TV, etc.), (4) enhance  
11 traditional products and service, and (5) maximize return on Light Division  
12 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  
Light Division customers are projected to exceed and justify the initial cost,  
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 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: Daryl Hedman  
Chairman

G. S. Karavitis Bil Moss  
Assistant City Attorney Secretary

Lydia Stevenson Adopted April 9, 1997  
Clerk

589d(a)



SUBSTITUTE

**RESOLUTION NO. 33668**

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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 April 8, 1997

Mayor

Attest: City Clerk

Approved as to form & legality:

B. A. Karavatos  
Assistant City Attorney

Requested by Public Utility Board Resolution No. U-9258

599c



# RESOLUTION NO.

SUBSTITUTE  
U-9258

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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 technology 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 service, 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 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 systems 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



1 WHEREAS the City Council and Public Utility Board will continue  
 2 to be involved in the future decision-making on this proposal including  
 3 construction contracts, and debt financing approvals, quarterly reviews on  
 4 the project direction during the startup period, approval of agreements for  
 5 use of City rights-of-way for telecommunications purposes which  
 6 agreements will (to the extent required by law) treat the Light Division  
 7 substantially similar to other franchises that the City grants for similar  
 8 businesses, and

9 WHEREAS the Public Utility Board hereby finds and determines  
 10 that the Light Division's proposal for a broad band telecommunications  
 11 system is in the best interests of the City, will serve as a public purpose,  
 12 and should be approved and implemented; Now, therefore,

13 BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

14 That the Board hereby approves the Light Division's proposal  
 15 including the Business Plan for a broad band telecommunications system,  
 16 and the Board recommends that the City Council approve a resolution to  
 17 authorize the Light Division to proceed to implement said proposal for a  
 18 broad band telecommunications system, and the Board recommends that  
 19 the City Council continue to be involved in the major policy decisions  
 20 including construction contracts, debt financings, the public rights-of-way  
 21 use agreements for telecommunications and quarterly reviews.

22 Approved as to form & legality:

23 Mark Bubenik  
 24 Chief Assistant City Attorney

25 Lydia Stevenson  
 26 Clerk

Ross Singleton  
 Acting Chairman

W. J. Barker  
 Acting Secretary

Adopted 3/26/97

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Request for Board meeting

CITY OF TACOMA  
DEPARTMENT OF PUBLIC UTILITIES

U-9258

of March 26, 1997

REQUEST FOR RESOLUTION

Date: March 19, 1997

INSTRUCTIONS: File request in the Office of the Director of Utilities as soon as possible but not later than nine working days prior to Board meeting at which it is to be introduced. Completion instructions are contained in Administrative Policy POL-104.

1. Summary title for Utility Board agenda: (not to exceed twenty-five words)  
Authorize the development of a broad band telecommunications network to improve electric utility service and improve the telecommunications infrastructure available to the community.

2. A resolution is requested to: (brief description of action to be taken, by whom, where, cost, etc.)  
Approve the Light Division's proposal including the business plan for a broad band telecommunications system and authorize the Light Division to proceed to implement the telecommunications system.

The Light Division projects that the cost for the construction and installation of this telecommunications system will be approximately \$55 million dollars to construct, plus more than \$10 million dollars for startup operations. However, the Light Division believes that the overall benefits to the City, the Light Division, and its customers will exceed the projected costs.

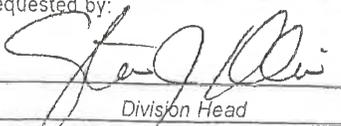
3. Summarized reason for resolution:  
The Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment, and research on similar activities in other municipalities. Presentations have been made to neighborhood councils, chambers of commerce, local economic development groups, and the Tacoma Public School Board. A public hearing on the proposed telecommunications system was held by the Public Utility Board on March 12, 1997, and another public hearing was held by the City Council on March 18, 1997. Information summarizing the Telecommunications study and our recommendations was made available at the presentations and public hearings.

In addition to the benefits to the Light Division that the system would deliver through improved communications abilities, the system will also have the ability to transport data, provide high speed Internet access, and deliver full cable television service.

4. Attachments:  
a. Letter to the Public Utility Board and City Council from Mark Crisson

5.  Funds available

6. Deviations requiring special waivers:  None

Initiated by:  _____ Section Head	Requested by:  _____ Division Head	Approved:  _____ Director of Utilities
---	---	--

REQRES.DOC



Mark Crisson  
Director

3628 South 35th Street  
P.O. Box 11007  
Tacoma, WA 98411-0007

Divisions  
Light  
Water  
Belt Line

March 20, 1997

To the Chairman and Members of the Public Utility Board and  
To the Mayor and Members of the City Council

### RESOLUTION No. U-

#### RECOMMENDATION

The Light Division requests approval by the Public Utility Board and the City Council to develop a broad band telecommunications network as described in the Light Division Telecommunication Study. This action authorizes project implementation and the initiation of design and contract specifications. The Light Division will bring subsequent requests for construction contract and debt issuance approval to the Public Utility Board and City Council as the project progresses. Both policy bodies will also be periodically advised of project status during the development process.

#### BACKGROUND

In preparation for this request, the Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment, and research on similar activities in other municipalities. Staff has made presentations to neighborhood councils, chambers of commerce, local economic development groups, the Tacoma Port Commission, and the Tacoma Public School Board. Two joint Public Utility Board/City Council study sessions were held. A public hearing on the proposed telecommunications system was held by the Public Utility Board on March 12, 1997, and another public hearing was held by the City Council on March 18, 1997. Information summarizing the Telecommunications study and our recommendations was made available at the presentations and public hearings.

The Light Division estimates the cost of this telecommunications system will be approximately \$55 million dollars for construction and installation, plus more than \$10 million dollars for startup operations. The business plan indicates excellent financial potential even under conservative revenue and market penetration assumptions. We recognize the plan's projections are no guarantee of success, but we think the project risks are manageable and justified given the project benefits. These benefits include:

- Improves electric service by enabling distribution system automation, market access, and real-time, interactive communication with customers
- Provides better telecommunications and cable television service sooner and cheaper than other providers will deliver
- Significantly enhances regional economic development and quality of life by creating state-of-the-art telecommunications infrastructure and providing it to all businesses and residences throughout the community
- Creates opportunities for public private partnerships in the wholesale leasing of system capacity to retail telecommunications service providers
- Provides additional revenue to the Light Division and General Government through expansion of the market for telecommunications services

**SUMMARY**

The proposed telecommunications system will strengthen the Light Division's competitive position in the electric power industry through the provision of enhanced electric and telecommunication services to *all* Light Division customers. This system will serve a public purpose and is in the best interests of the City.

Very truly yours,



Mark Crisson  
Director of Utilities



# REQUEST FOR ORDINANCE OR RESOLUTION

CITY CLERK USE

Request #:  
Ordinance #:  
Resolution #:


1. Date: *March 20, 1997*

2. Requesting Department/Division/Program <i>Tacoma Public Utilities/Light Division</i>	Sponsored By	Phone/Extension
3. Contact Person (for questions): <i>Steven J. Klein</i>		Phone/Extension <i>502-8203</i>

4. Preparation of Resolution is requested for the City Council meeting of Tuesday April 8, 1997

5. Summary Title/Recommendation: (A concise sentence, as it will appear on the Council Agenda)

Authorize the development of a broad band telecommunications network to improve electric utility service and improve the telecommunications infrastructure available to the community. This would include the business plan for a broad band telecommunications system and the implementation of the telecommunications system.

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?)

The Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment and research on similar activities in other municipalities. It is projected that the cost for the construction and installation of this system will be approximately \$55 million to construct, plus more than \$10 million for startup operations. However, the Light Division believes that the overall benefits to the City, the Light Division and its customers will exceed the projected costs.

In addition to the benefits to the Light Division that the system would deliver through improved communication abilities, the system will also have the ability to transport data, provide high speed Internet access and deliver full cable television service.

7. Financial Impact: (Future impact on the budget.)

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 March 20, 1997	Attached

9. Funding Source: (Enter amount of funding from each source)

Fund Number & Name:	State \$	City \$	Other \$	Total Amount

If an expenditure, is it budgeted?  Yes  No      Where? Org #      Acct #

 Department Director/Utility Division Approval	Approved as to Availability of Funds Director of Finance	City Manager/Director Utilities Approval
---	---	--



Mark Crisson  
Director

3628 South 35th Street  
P.O. Box 11007  
Tacoma, WA 98411-0007

Divisions  
Light  
Water  
Belt Line

March 20, 1997

To the Chairman and Members of the Public Utility Board and  
To the Mayor and Members of the City Council

### RESOLUTION NO. U- 9258

#### RECOMMENDATION

The Light Division requests approval by the Public Utility Board and the City Council to develop a broad band telecommunications network as described in the Light Division Telecommunication Study. This action authorizes project implementation and the initiation of design and contract specifications. The Light Division will bring subsequent requests for construction contract and debt issuance approval to the Public Utility Board and City Council as the project progresses. Both policy bodies will also be periodically advised of project status during the development process.

#### BACKGROUND

In preparation for this request, the Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment, and research on similar activities in other municipalities. Staff has made presentations to neighborhood councils, chambers of commerce, local economic development groups, the Tacoma Port Commission, and the Tacoma Public School Board. Two joint Public Utility Board/City Council study sessions were held. A public hearing on the proposed telecommunications system was held by the Public Utility Board on March 12, 1997, and another public hearing was held by the City Council on March 18, 1997. Information summarizing the Telecommunications study and our recommendations was made available at the presentations and public hearings.

The Light Division estimates the cost of this telecommunications system will be approximately \$55 million dollars for construction and installation, plus more than \$10 million dollars for startup operations. The business plan indicates excellent financial potential even under conservative revenue and market penetration assumptions. We recognize the plan's projections are no guarantee of success, but we think the project risks are manageable and justified given the project benefits. These benefits include:

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- Improves electric service by enabling distribution system automation, market access, and real-time, interactive communication with customers
- Provides better telecommunications and cable television service sooner and cheaper than other providers will deliver
- Significantly enhances regional economic development and quality of life by creating state-of-the-art telecommunications infrastructure and providing it to all businesses and residences throughout the community
- Creates opportunities for public private partnerships in the wholesale leasing of system capacity to retail telecommunications service providers
- Provides additional revenue to the Light Division and General Government through expansion of the market for telecommunications services

**SUMMARY**

The proposed telecommunications system will strengthen the Light Division's competitive position in the electric power industry through the provision of enhanced electric and telecommunication services to *all* Light Division customers. This system will serve a public purpose and is in the best interests of the City.

Very truly yours,



Mark Crisson  
Director of Utilities

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## **RESOLUTION NO.**

SUBSTITUTE  
U-9258

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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 technology 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 service, 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 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 systems 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



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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:

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Chief Assistant City Attorney

\_\_\_\_\_  
Secretary

\_\_\_\_\_  
Clerk

Adopted \_\_\_\_\_

# EXHIBIT 10 (b)

# Telecommunications Study

by Tacoma City Light

Tacoma City Council  
Public Utility Board  
Joint Study Session  
February 18, 1997

## Why should a Publicly Owned Electric Utility be involved in Telecommunications?

- Board initiated RFP process in 1995
- Enhanced Telecommunication capability vital to the Utility in order to continue to improve service and provide choice to customers in rapidly changing environment.
- Investment in the community that provides a pathway to choice and competition.
- Over 100 years ago, Tacoma took steps to improve vital infrastructure to better serve our citizens.

## Key Operational Advantages to Tacoma City Light

- Electric system control and outage reporting
  - Savings to Tacoma City Light
  - Savings to customers
- Electric system performance monitoring and preventive maintenance
- Providing interactive communication link to customers

## Telecommunications Study Team

- Bruce Campbell, Metro Utility Communications Group
- F. Paul Carlson, Ph.D., Metropolitan Communications Consultants
- Linda Dethman, Dethman & Associates
- Stuart Hauser, Metro Utility Communications Group
- Peggy sue Heath, A.B.D., APEX Business Solutions
- Sandy Hunt, Ph.D., APEX Business Solutions
- Richard C. T. Li, P.E., Metropolitan Communications Consultants
- Bruce Mann, Ph.D., University of Puget Sound
- Catherine Rudolph, APEX Business Solutions
- Susan V. Marr, Metro Utility Communications Group
- Gene Starr and the research team at Market Data Research
- Staff team: Chandra Enos, Lisa Steadmon, and Steve Roberts, P.E.

# Telecommunications Study

## Brief Review of Part One

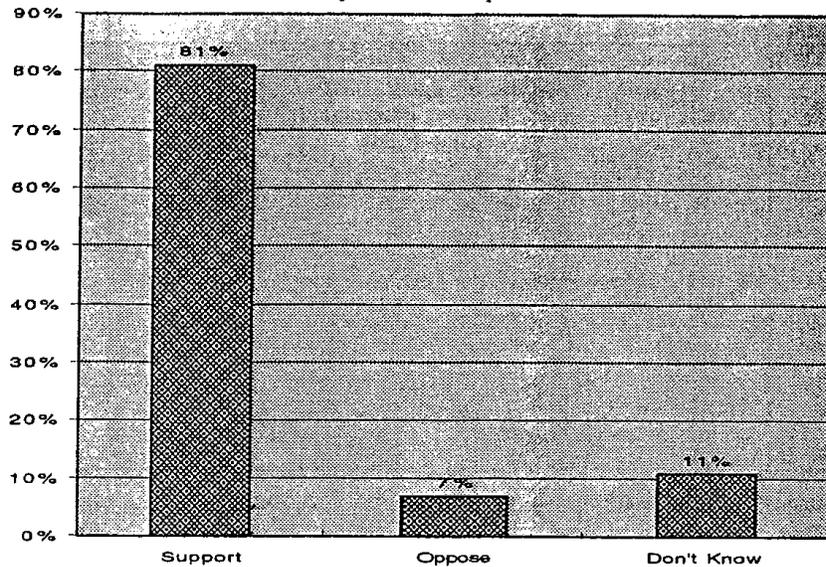
- Telecommunications technology
- Telecommunication companies
- Regulation: Federal, State, and Local
- Other cities and communities
- Local telecommunications history
- Existing telecommunications options in our local communities

## Business Market Research

- Survey of 200 businesses:
  - representing \$5 billion in revenue & 25,000 jobs
  - average of three locations in greater Tacoma area
- Importance of telecommunications links
  - 74% say links are extremely important to their success
  - 62% reported that a link being out one day would cause serious harm to their business; 20% said that it would shut them down
- 61% of businesses use Internet (but with limited access)
- 14% of employees telecommute (increasing to 18% in 2yr)
- Limited Experience with High Speed Lines
  - Two-thirds were not familiar with ISDN lines or T-1 lines

## Support for Tacoma City Light Telecommunications System

To what degree do you support Tacoma City Light building this new communications system to improve service to customers?



## Economic Development Impacts

- Market trends
  - Change in economic base
  - Downtown development activities
- Business Environment
- Telecommunications needs
  - Development activities at military bases
  - The expanding health services industry
  - Professional & financial services
  - Port of Tacoma

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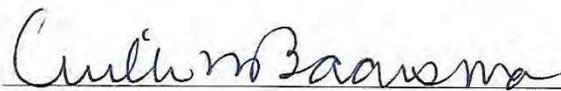
CERTIFICATION OF AUTHENTICITY

I make the following statements under penalty of perjury under the laws of the State of Washington. I am over 18 years of age and competent to testify. I am one of the authors of the paper entitled Creating Capacity And Competition In Broadband. I understand that a party seeks to introduce the following document into evidence in a case pending in Pierce County Superior Court.

1. Creating Capacity And Competition In Broadband, published in April 2000, which is Exhibit 70 in Shook's 12/30/19 Declaration.

I have reviewed the document described above and attest that such is a true and correct copy of what the document purport to be.

Signed on this 10 day of January 2020 in TACOMA, Washington.



William H. Baarsma

# CREATING CAPACITY AND COMPETITION IN BROADBAND TELECOMMUNICATIONS: THE CITY OF TACOMA'S INITIATIVE

*William H. Baarsma*  
*University of Puget Sound*  
*School of Business & Public Administration*  
*1500 North Warner*  
*Tacoma, WA 98416*  
*Phone: 253-879-3393*  
*Fax: 253-879-3156*  
*Email: wbaarsma@ups.edu*

*Ross Singleton*  
*University of Puget Sound*  
*Department of Economics*  
*1500 North Warner*  
*Tacoma, WA 98416*  
*Phone: 253-879-3591*  
*Fax: 253-879-3500*  
*Email: singleton@ups.edu*

## 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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- [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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- [12] The News Tribune, "High Tech is Clicking in Tacoma," Dec. 5, 1999.
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- [14] The News Tribune, "Open Cable Lines Benefit Consumers," Dec. 9, 1999.

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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 THE RATEPAYERS  
OF THE CITY OF TACOMA,  
Defendants.

No. 96 2 09938 0  
CITY OF TACOMA'S MOTION FOR  
SUMMARY JUDGMENT

Plaintiff City of Tacoma ("City") requests that this Court enter a 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.

CITY OF TACOMA'S MOTION FOR SUMMARY JUDGMENT - 1

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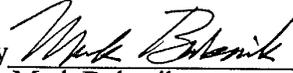
Grounds for this motion are set forth in the record in this matter, the accompanying memorandum in support of motion for summary judgment, and the declaration of Jon Athow.

DATED this 5<sup>th</sup> day of November, 1996.

PRESTON GATES & ELLIS

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Laura A. Rosenwald, WSBA # 25722

CITY OF TACOMA

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The Honorable Grant L. Anderson

IN THE SUPERIOR COURT OF WASHINGTON  
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CITY OF TACOMA, a municipal corporation,  
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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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MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 2

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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**

- 7
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.
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**IV. EVIDENCE RELIED UPON**

17 The City believes that the following facts are undisputed in every material respect. These  
18 facts are contained in the Declaration of Jon Athow in Support of the City's Motion for Summary  
19 Judgment ("Athow Decl.").

20 Plaintiff, the City of Tacoma, is a municipal corporation and a city of the first class of the  
21 State of Washington. The Defendants herein are taxpayers of the City of Tacoma and ratepayers of  
22 its electrical utility, which is known as the Light Division of the Department of Public Utilities (the  
23 "Light Division"). Harold E. Nielsen, Jr., the taxpayer and ratepayer representative, is a resident and  
24 taxpayer of the City and a customer of the Light Division. The City currently owns and operates,  
25 through its Light Division, an electric utility (the "Electric System") for the purpose of providing  
26 electricity and other energy services throughout the City and other portions of Pierce County.

27 The Telecommunications System will be used to improve the speed and capability of the  
28 existing real-time communications among certain Electric System substations, and to extend such  
29 real-time communications to the remaining substations. In addition, the Telecommunications System  
30 may be used to enhance such existing energy services as demand management, identification of  
31 outages, meter reading, billing and payment, and resource dispatch. The Telecommunications System  
32 may be used to perform similar functions for the City's provision of water service. The City's  
33 authority to issue the Revenue Bonds to finance the purposes discussed in this paragraph is not at  
34 issue.

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MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 4

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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,  
343 (1983).

24 In light of these constitutional and statutory provisions, the Washington Supreme Court has  
25 held that "the only limitation on the power of cities of the first class is that their action cannot  
26

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.

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MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 9

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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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MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 10

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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,

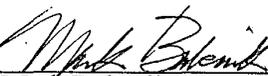
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Chief Assistant City Attorney

Attorneys for Plaintiff City of Tacoma

MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 11

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\*Terms & Conditions: Offer valid through 3/31/20 to new residential customers on the Click! Network and only in areas serviceable by Rainier Connect. Must not have been a Rainier Connect customer in the last 60 days. Prices do not include taxes, surcharges and additional fees. Rates will remain as long as customer remains in good standing and does not make changes to services. Services and pricing subject to change. Services are subject to Rainier Connect terms and conditions. High Speed Internet service is limited to a single outlet. Speeds may vary based on customer equipment. Customer equipment must meet minimum requirements. Must have a DOCSIS 3.0 certified modem. Routers may affect performance depending on model and type. All Internet Services are subject to our Internet Service Acceptable-Use Policy.

|||||  
 \*\*\*\*\*  
 AUTO\*\*\*SCH 5-DIGIT 98464 20  
 Dear Neighbor  
 8429 S 18th St  
 Tacoma WA 98465-1016



TACOMA PUBLIC UTILITIES  
3628 South 35th Street  
Tacoma, Washington 98409-3192

**IMPORTANT ACCOUNT  
INFORMATION ENCLOSED**

ADVANCED STREAM CUSTOMER



PSRRTED STD  
U.S. POSTAGE PAID  
TACOMA, WA  
PERMIT NO. 2



March 13, 2020

**SECOND NOTICE OF POTENTIAL CHANGE IN SERVICE EFFECTIVE MARCH 31**

Dear Advanced Stream Customer:

On March 31, 2020, Click! Network, an operating entity of Tacoma Public Utilities, will transfer operational control of Click! Network to Rainier Connect, an existing ISP on Click! Network. As such, beginning April 1, 2020, Rainier Connect will become the operator of what is currently Click! Network and begin providing cable television services, Internet access services, and other related telecommunications services. Additional information on this event is available at <https://www.mytpu.org/community-environment/projects/click-network-update/>.

Advanced Stream provides your Internet access service through an agreement with Click! Network. In December of 2019, Click! Network gave notice to Advanced Stream that its ISP Advantage agreement with Click! Network will expire on March 30, 2020. This is our second notice to inform you that after March 30, there is a possibility that Advanced Stream will not continue to be an Internet service provider (ISP) on Click! Network. However, it is our understanding that Advanced Stream and Rainier Connect are in discussions regarding a new agreement that would allow Advanced Stream to continue providing internet access service after March 30.

If Advanced Stream and Rainier Connect are unable to reach an agreement, then Advanced Stream will no longer be your internet access service provider after March 30. If that happens Click! Network and Rainier Connect have agreed to continue providing internet access services to former Advanced Stream customers for a limited time after March 30. This grace period will give you time to transfer your internet access services.

If you have questions about your current service, please contact Advanced Stream. Alternatively, you are free to contact Rainier Connect, the other ISP on the Click! Network for information about their Internet access service offerings. Rainier Connect can be reached at [www.rainierconnect.com](http://www.rainierconnect.com) or by call at 253-683-2200.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jackie Flowers', is written in a cursive style.

Jackie Flowers, Director  
Tacoma Public Utilities

(c) **Operator Maintenance.** The Parties agree that Operator shall have responsibility for Maintenance of the Tacoma Power Commercial System, as described in Exhibit D hereto.

**11. ADDITIONAL CONDITIONS RELATED TO USE OF THE TACOMA POWER COMMERCIAL SYSTEM**

(a) **Tacoma Power Commercial System Upgrades.** Operator agrees to make Tacoma Power Commercial System upgrades in accordance with the terms of Exhibit E hereto.

(b) **Capital Expenditures Commitment.** Operator agrees to make Capital Expenditures to the physical assets of the Tacoma Power Commercial System as specified in Exhibit F hereto.

(c) **Equitable Access.** Operator agrees to the equitable access commitments in Exhibit G hereto.

(d) **Affordable Access.** Operator agrees to the affordable access commitments in Exhibit H hereto.

(e) **Customer Service Commitments.** Operator agrees to the customer service commitments in Exhibit I hereto.

(f) **Customer Privacy.** Operator agrees to the customer privacy commitments in Exhibit J hereto.

(g) **Net Neutrality.** Operator agrees to the net neutrality commitments in Exhibit K hereto.

(h) **Open Access to Telecommunications Assets.** Operator agrees to the open access commitments in Exhibit L hereto.

(i) **Economic Development and Educational Opportunities.** Operator agrees to the economic development and educational opportunities commitments in Exhibit M hereto.

(j) **Preserve Competition Among Providers.** Operator agrees to certain restrictions on Transfers as more fully detailed in Exhibit N hereto.

(k) **Continuity of Services.** The obligations and rights of the Parties with respect to the transition of the Tacoma Power Commercial System upon the termination of this IRU Agreement are contained in Exhibit O hereto and Section 21(f) (Survival of Certain Provisions) of this IRU Agreement.

(l) **Labor Relations.** Operator agrees that, pursuant to Section 7 of the National Labor Relations Act (29 U.S.C. § 157), all employees used in the operation of the Tacoma Power Commercial System shall have the right to self-organization, to form,

**EXHIBIT L**  
**OPEN ACCESS TO TELECOMMUNICATIONS ASSETS**

**1. OPEN ACCESS PROGRAM**

(a) Operator shall provide wholesale services over the Tacoma Power Commercial System to other telecommunications providers (but not to Operator's Affiliates except with the prior written approval of Tacoma Power) consistent with its practices and policies in other geographic areas in which it provides wholesale services, to the extent appropriate ("**Open Access Program**"). All terms and conditions of the Open Access Program shall be determined by the Operator.

(b) In furtherance of the requirements in Section 1(a), Operator agrees to conspicuously post and continuously maintain on its website a copy of its Open Access Program.

**2. ANNUAL REPORT**

(a) Operator shall provide Tacoma Power with a copy of its Open Access Program on an annual basis on the Annual Reporting Date.

**3. REMEDIES FOR NON-COMPLIANCE**

(a) Failure of Operator to maintain its Open Access Program posted on its website is a Default. Liquidated damages in the amount of Two Hundred and Fifty Dollars (\$250) per day shall accrue from the date of receipt of Notice of Default until the Default is cured.

AFFIDAVIT OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on March 23, 2020, I served true and correct copies of:

1). PETITIONER SHOOK'S RESPONSE IN SUPPORT OF PETITIONER BOWMAN'S MOTION FOR ACCELERATED REVIEW

This document was delivered via the Washington State Appellate Courts' Secure Portal Electronic Filing system to all Council appearing in this case, and additionally thru Email to the Attorneys for the Respondent: Zachary B Parker, at zach@christielawgroup.com, Robert L. Christie, at bob@christielawgroup.com, 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., and Appellant Bowman's attorney, Kent Roland Van Alstyne at kvanalstyne@phillipsburgesslaw.com

Dated March 23, 2020



Mitchell Shook,  
Appellant, Pro Se

August 01 2022 4:28 PM

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COUNTY CLERK  
NO: 19-2-07135-0

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

MITCHELL SHOOK,

Plaintiff,

v.

CITY OF TACOMA,

Defendant.

**NO. 19-2-07135-0**

DECLARATION OF  
THOMAS MCCARTHY

I, Thomas McCarthy, declare as follows: I am a resident of Tacoma, ratepayer of Tacoma Public Utilities, taxpayer to City of Tacoma, and customer of Click!, the municipal broadband telecommunications system operated by Tacoma Public Utilities. I am over the age of eighteen, competent to testify in this matter, am endowed with the capacity of reason, am unschooled in legal sophistries and make this declaration on my own personal knowledge.

That as I have been an advocate for Click Network! and maintaining its public control for the benefit for Tacoma citizens in maintaining it as a public utility to increase competition with respect to price and better service, in addition to creating an advantage for our economy as has been the case for Chattanooga, TN.

1. Attached hereto as **Exhibit A** and incorporated herein by this reference is a true and

1 correct copy of a screen shot of a Facebook post I authored as visited on 7/29/22;  
2 furthermore, I affirm that I maintained service with Click until my provider was forced from  
3 serving Click! customers, and once my year's subscription expired, and Rainier Connect  
4 raised my rates from 80% for the same level of service (from \$300/year at Advanced Stream  
5 to \$45/month at Rainier connect), at which time, I was forced to seek service with  
6 CenturyLink at \$50/month, but with much higher gigabyte speed service. (See Exhibit A)  
7 Neither Rainier Connect nor Centurylink provided anywhere near the level of customer  
8 service that my initial provider did prior to the Tacoma City Council illegally privatizing  
9 Click! to Rainier Connect. Customer service is much poorer with Rainier Connect and  
10 Centurylink, involving failure to even reach tech support after hours of waiting and effort.  
11  
12

- 13  
14 2. I also affirm that having reliable internet service has been critical during the coronavirus for  
15 my wife, a managing social worker at the Veterans Administration, who worked online at  
16 home full time, and to my business, which often requires me to work from home online.  
17 Furthermore, since all schooling was forced online and at home during the pandemic,  
18 telecommunications was critical for our childrens' education. And during the pandemic, my  
19 only option in participating in several court hearings was to do so via Zoom via internet. If  
20 there was any iota of doubt or unclarity that access to internet via telecommunications  
21 systems constituted a utility, that question has been eliminated. There can be no doubt  
22 whatsoever that there is a clear public interest in telecommunications as articulated by the  
23 Washington State Supreme Court in Bremerton Municipal League v. Bremer (1942), a case  
24 of controlling precedence that has never been over-ruled and binds lower courts, as law  
25 enacted in the 1917 Act it ruled under remain fully in force.  
26

1 3. I affirm, as a student of history, the understanding that in that period over one hundred years  
2 ago when public municipalities were nascent, the motive of this law was to create a firewall  
3 against privatizing utilities which were owned by the citizens' polity, held in the public  
4 interest, which would otherwise be liable to privatization of public assets by corruptible  
5 elected officials in favor of their benefactors, private for-profit interests. Then, as now,  
6 private for-profit corporations do not want to compete with the public sector in providing  
7 utility services. Whether private power companies, or private telecommunications firms,  
8 eliminating public utilities from essential services guarantees large profits with little to no  
9 competition. Eliminating Click! as a public utility certainly met the policy goals of  
10 companies like Comcast, Centurylink, and even a bit player like Rainier Connect buying out  
11 or eliminating its two rivals within Click.

12  
13  
14 4. I affirm that the mayor of the City of Tacoma, who benefitted from over \$100,000 in  
15 political donations by Rainier Connect via direct and indirect means in her first run for  
16 mayor, immediately after election declared that people are tired at dealing with Click!, and  
17 moved quickly to privatize Tacoma's publicly owned telecommunications system...which  
18 was awarded to Rainier Connect for a tiny fraction of the \$200 million investment by the  
19 citizens of Tacoma for a paltry lease amount of \$2.5 million/year. The bidding process was  
20 transparently fixed towards being awarded to its intended recipient, Rainier Connect. The  
21 concerns that drove the 1917 Act to safeguard the public interest with regards to privatizing  
22 public utilities has not changed in relevance since the days of Homer T. Bone, an early and  
23 legendary Tacoma advocate of public utilities.

24  
25 5. Attached hereto as **Exhibit B** and incorporated herein by this reference is a true and correct  
26 screen shot of an article by the South Sound Business periodical referencing Conor



AFFIDAVIT OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on August, 1  
2022 I served true and correct copies of:

A). Amended Declaration of Tom McCarthy

This document was delivered via the Court's e-serve system and additionally thru Email to  
the Attorneys for the Defendant: Robert Christie.

Dated this First day of August 2022

/s/ TOM McCARTHY

Tom McCarthy, Plaintiff

# EXHIBIT A



Click! Network Fan Club



Tom McCarthy

September 2, 2020 · 🌐



For those that can get Centurylink at Gigabit speed, there is a deal right now. While Rainier Connect must honor my pre-paid service deal with Advanced Stream, when that ends they will jack my rates to \$45 a month. With kid's school online, I am seeing a better deal. Anyone else pledge to switch?

# Fiber Gigabit

No contract. No bundling.

# \$50/mo

**Online only:**

Free modem. Free installation.

Speed may not be available in your area. Maximum download/upload speeds of up to 640 Mbps via a wired connection. Prepay required.

Additional terms, fees and restrictions apply.



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# EXHIBIT B

# Tacoma Councilman McCarthy Resigning to Join Comcast

John Stearns Jun 10, 2022



Tacoma City Councilman Conor McCarthy is resigning from his at-large seat after almost seven years to become the new director of government and regulatory affairs for Comcast in Washington state.

He will step down from the Council June 22 and start at Comcast a week later.

"I am excited for this opportunity, but leaving the Council is a tough decision for me, and not one I take lightly," McCarthy said in a [statement](#), adding he was proud and grateful for what Tacomans have accomplished together.

With more than 17 years of experience as a lawyer, real estate manager, and councilman, McCarthy will develop and implement the strategy for government affairs and public policy issues, and foster relationships on Comcast's behalf with elected officials, business leaders, and community influencers, Comcast said in a news release.



Conor McCarthy  
Courtesy of Comcast



## TRENDING

- 1 Duke's Seafood Way Sold
- 2 New 'Do Not Effect

# EXHIBIT C

BEFORE THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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DARREL BOWMAN,

Appellant,

v.

CITY OF TACOMA,

Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY  
NO. 19-2-11506-3 (consolidated with 19-2-11760-1)

The Honorable Shelly K. Speir

---

PETITIONER SHOOK'S RESPONSE IN SUPPORT OF PETITIONER  
BOWMAN'S MOTION FOR ACCELERATED REVIEW

---

MITCHELL SHOOK  
PLAINTIFF PRO SE  
3624 6<sup>th</sup> Ave  
Tacoma, Washington 98406  
253-627-8000

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## I. INTRODUCTION

Darrel Bowman and Mitchell Shook (“Appellants”) appeal the February 28, 2020 decision of the Pierce County Superior Court denying Appellants’ Motion for Partial Summary Judgment, granting Respondent City of Tacoma’s (“City” or “Respondent”) Motion for Summary Judgment, and dismissing Appellants’ claims in their entirety. This response is provided to join in and support Mr. Bowman’s Motion for Accelerated Review.

This lawsuit is about the separation, disposal and “privatization” of the City of Tacoma’s municipal telecommunications utility, Click! Network (“Click!”), without voter approval, as explicitly required under state law, Chapter 35.94.020, and under Tacoma’s City Charter § 4.6.

Municipal telecommunications utilities are protected from such disposal by Chapter 35.94 RCW, or the Laws of 1917, House Bill 337, Remington RRS § 9512 -9514, (“§ 9512”): “An Act authorizing cities and towns to lease or sell any municipally-owned” utilities. In 1917 Legislators provided a long list of utilities protected from privatization by the public vote. “Telegraph and telephone lines” and any other . . . system “similar or dissimilar” were among the utilities protected. *See App. Pg. 40.*

In 1945 this list of utilities was “rewritten for brevity” by the Code Committee, providing the statutes current language of “any public utility works, plant or system owned by it or any part thereof. ..” This abbreviated version of the “Laws of 1917” was codified into RCW 80.48 in 1951. That language remains unchanged today.<sup>1</sup> *See App. Pg. 68.*

---

<sup>1</sup> A savings clause was added at RCW 1.04.020 to ensuring the laws were unchanged by the code revisor’s abbreviation.

For a detailed explanation of RRS § 9512 -9514 evolution into Chapter 35.94 RCW, please *see* App. Pgs.28-30 , Shook’s MSJ. Also, *see* App. Pgs. 66 – 68 Shook’s Reply in the MSJ.

Click! (the “System”) is a state-of-the-art advanced telecommunication system and enterprise, owned and operated by Tacoma Public Utilities (“TPU”), supporting the community’s needs for data transport and broadband services. It serves over 35,000 active TPU utility customer accounts.

TPU provides four distinct public services; water, power, rail and telecommunications under four brand names: Tacoma Water, Tacoma Power, Tacoma Rail and Click! Network. TPU’s website prominently displays Click! as one of “Our Services: Power, Water, Rail, Click!.”<sup>2</sup>

The Telecommunications System serves public institutions, such as Tacoma Public Libraries and Pierce County’s Sheriff, Planning and Public Works, Tax Assessor/Treasurer, Courts and Auditors Department. The System also supports over 1,000 commercial and institutional accounts, including hospitals and universities. The System has been in operation for over 20 years and revenues exceeded \$25 million in 2019.

Privatization of the System is a public issue involving a fundamental and urgent issue. Conveying an entire municipal telecommunications enterprise, along with exclusive possession and control of the underlying fiberoptic infrastructure, intellectual property, equipment and improvements, as a going

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<sup>2</sup> See App. Pg. 2 TPU “Our Services” .

concern, for a period of up to 40 years, is of broad public import and requires prompt and ultimate determination.<sup>3</sup>

The City of Tacoma's municipal telecommunications system was constructed at public expense, costing over \$200 million in public utility funds, and includes 1,500 miles of fiberoptic and coaxial cable, situated in underground conduits and attached overhead to 10,000 telephone poles. The System passes 120,000 of TPU's customers' homes and business locations. TPU's website describes Click!'s as, "one of the largest municipally owned telecommunications systems in the country." <sup>4</sup>

The separation, transfer and disposal of the municipal telecommunications system, without the mandatory vote of the people, is being accomplished via the Click! Business Transaction Agreement ("CBTA"), which Tacoma City Council approved in November of 2019. Conveyance and transfer of operational control is expected to occur on April 1, 2020. The System's essential employees are generally being reassigned to other jobs within the City and the Utility.

The CBTA conveys to the buyer, a private company, all proprietary operational control and total authority over setting rates for the municipal utility's wholesale telecommunications services. The System's rates are currently set by City Council, in accordance with the Tacoma's Municipal

---

<sup>3</sup> RCW 43.330.530(3) "Broadband infrastructure" means networks of deployed telecommunications equipment and technologies necessary to provide high-speed internet access and other advanced telecommunications services to end users.

<sup>4</sup> RCW 43.330.530 (2) "Broadband" or "broadband service" means any service providing advanced telecommunications capability and internet access with transmission speeds that, at a minimum, provide twenty-five megabits per second download and three megabits per second upload.

Utility Code TMC Title 12. All public control and oversight of operations and rate setting for the System are separated under the terms of the CBTA.

Telecommunications is a utility. Chapter 35.94 RCW requires voter approval for disposal of a municipal utility works, plant, or system owned by it, or *any part thereof*, or any equipment or appurtenances. (emphasis added).<sup>5</sup>

Tacoma's City Charter 4.6 ("Charter") contains a similar directive, requiring approval by "a majority vote of the electors."

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.

Tacoma City Council ("Council") circumvented the voter approval required under City and State law, by declaring the entire Telecommunication System "surplus" under RCW 35.94.040. This surplus declaration is an ultra vires application of the City's surplus authority.<sup>6</sup>

Council flaunts Article I, Section I of the Washington Constitution, which provides: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed." Voters of Tacoma granted the City a privilege of operating the Department of Public Utilities;

---

<sup>5</sup> Railroads were the first regulated utility in Washington State, in 1905, under the Railroad Commission. Telecommunication was the second utility to be regulated, in 1909, also under the Railroad Commission See App. Pg. 20, Shook's MSJ.. As the modern extension of telegraph and telephone, Telecommunications has been regulated as a public utility since the Pacific Telegraph Act of 1860.

<sup>6</sup> See App. Pg. 30, Shook MSJ. "Legislative Intent of Surplus and Plain Language of Municipal Utility Surplus Clause."

but, they were not content to divest themselves of every managerial function normally associated with the operation of a business concern. By charter, the people retain express power over disposal of their proprietary interest in the community's municipal public utility property.

The people have reserved full power and exclusive authority to provide final approval over privatization of their telecommunications system. Council's role, essentially, is that of the people's trustee, limited to negotiating the CBTA agreement and then presenting the contract to voters for approval at the ballot—a mandatory step in the privatization process..

Chapter 35.94.040 RCW's statutory definition of surplus, as "not required for providing continued public utility service," was simply ignored—for Click! is being vested turnkey, as a going concern, and the System will continue providing the same proprietary telecommunications services, to the same utility customers, under the same brand, over the same infrastructure, only with a private company controlling rates and cashing customers' checks.

The utility System is not surplus. The System's assets and customers are simply "changing hands," lock, stock, barrel and brand. This state-of-the-art fiberoptic municipal utility system, delivering essential public utility telecommunications services, will continue providing the same services to the same loyal utility customers. Such a disposal does not reflect the Legislature's intent for "surplus." (*See App. Pg. 30, Shook's MSJ*)

In privatizing the community's pubic broadband system, essential assets are being separated. The "last mile infrastructure" is a single wire, a "data

pipeline,” to a customer’s home or business.<sup>7</sup> The “middle mile infrastructure,” of over 1,500 miles of fiber, cable, conduits, vaults, easements and equipment, is required for essential communication services.<sup>8 9</sup>

Recognizing the monopolistic nature of the industry, with huge fixed costs and barriers to entry, federal, state and local laws have fiercely protected consumers from anti-competitive consolidation of assets and ownership in the telecommunications industry for over 100 years.<sup>10</sup>

For over 20 years, the City has owned, operated and regulated Click! as a municipal-utility, establishing service levels, rates and even setting net neutrality policies. State laws and federal policies support and encourage such public, non-profit, “municipal” utility systems. Such utility systems now operate in Washington state, across the USA and around the world.<sup>11</sup>

For these reasons, Petitioner Shook respectfully requests that this Court grant Mr. Bowman’s request for accelerated disposition of this matter.

---

<sup>7</sup> RCW 43.330.530 (5) "Last mile infrastructure" means broadband infrastructure that serves as the final connection from a broadband service provider's network to the end-use customer's on-premises telecommunications equipment.

<sup>8</sup> RCW 43.330.530 (7) "Middle mile infrastructure" means broadband infrastructure that links a broadband service provider's core network infrastructure to last mile infrastructure.

<sup>9</sup> RCW 43.330.532 Findings: "The legislature finds that: (1) Access to broadband is critical to full participation in society and the modern economy"

<sup>10</sup> See 2015 Open Internet Order, 30 FCC Rcd at 5631, para. 81 n.134 (“data suggests that meaningful alternative broadband options may be largely unavailable to many Americans, further limiting the ability to switch providers. Based on the submissions from various commenters, it appears that between 65% and 70% of households have at most two options for high speed Internet access.”); see also 2010 Open Internet Order, 25 FCC Rcd at 17923, para. 32; Appendix C, Section II.A.1., Table 1 (showing that, nationwide, 97 percent of households have two or fewer providers of BIAS at download speeds of 25 Mbps).

<sup>11</sup> Tacoma Council even has its own bright-line (net neutrality) regulation.

Delay in resolution of this issue will indefinitely deprive affected constituents of their right to vote, result in the loss of institutional knowledge associated with Click! Network's terminated employees, and subject customers to suffer the potential monopolization of the public utility; In addition, pending lawsuits in state and federal courts contain virtually identical issues to this appeal, and accelerated review of this case will prevent inconsistent decisions at the trial court level and promote judicial efficiency.

For these reasons, Petitioner respectfully requests that this Court accelerate disposition of this matter.

## **II. IDENTITY OF THE PARTY**

This response is presented by one of the Appellants, Mitchell Shook.

## **III. STATEMENT OF RELIEF SOUGHT**

Appellant requests the Court grant Mr. Bowman's Motion to accelerate the disposition of this appeal pursuant to RAP 18.8 and 18.12.

## **IV. FACTS RELEVANT TO MOTION**

### **A. Establishment Of A Municipal Telecommunications System.**

In 1996, TPU commissioned a "Telecommunications Study."<sup>12</sup> The "study team" set out to determine if TPU might benefit from establishing "a modern telecommunications infrastructure." The study asked if the greater Tacoma area has the "telecommunications resources necessary for business that may want to locate in the area?" It even cited "telecommuting" and asked,

---

<sup>12</sup> For a detailed history, see App. Pg. 18-19, Shook's MSJ. "Creation of Municipal Utility's Telecommunication System and Service."

“How will the explosion in the Internet be handled?” The Study explained why the System would be built:<sup>13</sup>

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

In 1996 Council approved Ordinance 25930 establishing a “A SEPARATE SYSTEM.” Article II provided for: “Establishment Of The Telecommunications Project As A Separate System; And Adoption Of Plan And System”:<sup>14</sup>

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. (emphasis added).

“Exhibit A” of the Ordinance, included commercial broadband “Internet Access Service” and “high speed data” transport services.

In July of 1996, prior to funding construction of the System, the City sought declaratory judgement in Pierce County Superior Court to confirm

---

<sup>13</sup> See App. Pg. 129 – 132, Shook MSJ.

<sup>14</sup> See App. Pg. 13 -15 for discussion of Ordinance 25930, also the Ordinance itself on App. Pgs, 83-106 see App. Pg. 106. “Ex A “Telecommunications Project.”

authority for TPU to establish a municipal telecommunication utility system, funded by TPU bonds, to provide commercial telecommunications services.

In the City's November 1996 Memorandum In Support of Summary Judgment, the City cited RCW 35.96.030 as authority for municipal funding of the communication utility.<sup>15</sup> The City also cited authority for commercial telecommunications services in RCW 80.36.300 (5), to "Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state."<sup>16</sup> The City's Memorandum also cited its statutory power to provide telecommunications utility services—as a first-class charter city with all powers not denied by law, "including operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns." RCW 35A.11.020.<sup>17</sup>

The City prevailed and two Orders were issued by Pierce County Superior Court confirming TPU's authority to fund and operate the telecommunications utility.

City Council approved TPU's final plan for establishing the System in Resolution No. 33668.<sup>18</sup>

Click! became operational in 1998. Shortly thereafter, in April of 2000, Tacoma's Mayor, Professor Baarsma, and Dr. Singleton, of University of Puget Sound, authored a learned paper reviewing the creations of Click! Network. Their scholarly study, attached as App. Pgs. 134 - 138, is entitled "Creating Capacity And Competition In Broadband Telecommunications: The City Of Tacoma's

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<sup>15</sup> App. Pgs. 146-150. The 1996 Memorandum In Support of City Of Tacoma's MSJ,

<sup>16</sup> App Pg. 148

<sup>17</sup> App. Pg. 148.

<sup>18</sup> App. Pg. 108 -109 the 1997 Resolution 33668.

Initiative.” This paper will provide an understanding of what Click! Network is, and why the community created it as a public utility. *see* App. Pgs. 51 -52 for Appellant Shook’s citations from that study, as presented in a previous brief.

This study cites the community’s need for an advanced telecommunications system with broadband capability and why it was viewed as essential. The project brought benefits in revenue diversification and economic growth, which, in turn, increased revenue from additional sales of TPU’s other utilities, water and power.<sup>19</sup>

#### **B. Disposal of City’s Municipal Telecommunication System.**

In the process leading up to pending privatization of Click! Network, there has been no appraisal of the System’s market value. There has also been no audit of the System’s profitability as a commercial enterprise. There was never a Request for Proposal (“RFP”) or any bidding for the System’s “surplus” assets. The entire privatization process has occurred in backrooms, out of the public eye, with the terms for privatization, including the vast assets that would be vested, which include valuable IP addresses and all available dark fiber, being made known only to the private company, Rainier Connect.

Appellant Bowman’s Motion correctly identifies most of the elements that create urgency for accelerated review. However, one issue Bowman fails to cite is the potential monopolization of the System by the private acquirer.

Click! is currently operated as an “Open Access” system, with TPU providing standardized wholesale rates and “packages” to the competing Internet Service Providers (“ISPs”). The ISPs then compete by reselling those

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<sup>19</sup> App. Pgs. 134 - 138, Dr. Baarsma’s Study of Click! creation.

broadband packages to retail customers over the System. Since authority over the System is being vested in one of these ISPs, the private buyer Rainier Connect, it will allow Rainier Connect to destroy its competitor, Advanced Stream. Advanced Stream is Rainier’s only remaining competitor on the System. Rainier Connect has already acquired the other two ISPs. This conveyance will potentially facilitate a monopolization of Tacoma’s public broadband services over the municipal telecommunications system.<sup>20</sup> While the CBTA requires Rainier Connect to continue operating the system under open access policies, the definition of open access is left to Rainier Connect’s interpretation of those terms. While the outcome is not clear, Rainier Connect may attempt monopolization of the system on April 1, 2020.<sup>21</sup>

### **C. Legal Issues and Procedural History**

Appellant Shook agrees with the Appellant Bowman’s presentation of the legal issues and procedural history.

## **V. GROUNDS FOR RELIEF AND ARGUMENT**

Appellant Shook supports Appellant Bowman’s motion and agrees that RAP 18.12 provides the Court authority to “set any review proceeding for accelerated disposition.” Appellant Bowman is especially correct to cite

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<sup>20</sup> The ISP Advanced Stream is a company owned by Appellant Mr. Shook. Advanced Stream provides ISP services, including VoIP and Email service, to over 9,000 customers and has operated on the System for over 20 years.

<sup>21</sup> See App. Pg. 154, City of Tacoma “Notice” to Advanced Stream customers, also App. Pg. 152, Rainier Connect’s mailers to the same customers advertising “no waiting for the “Cable Guy”—which is possible since Advanced Stream’s customers are on the same System (no truck roll or visit from the Cable Guy is required. The Advanced Stream customers are being switched over to Rainier Connect with a simple phone call under this promotion. If Rainier Connect’s first act, in assuming operational control, is to destroy its only competitor and monopolize the System, this does not portend well for the future.

RAP 18.8(a), for this case is a time “when it is necessary for the court to act swiftly, particularly in matters relating to affairs of the state or local government, or when irreparable harm to a party would result from delay.” *See* 3 Wash. Prac., Rules Practice, RAP 18.12 (7th ed.).

Privatization of a municipal utility system, in violation of the public’s right to vote, is appropriately accelerated for prompt and expeditious review.

There can be no doubt that Click! is a telecommunications system. By definition of RCW 80.04.010 (27): A "Telecommunications Company" is “every city or town owning, operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the public”. *See* RCW 80.04.010 (28). As a municipal utility, the System is protected from privatization by the public vote requirements of RCW 35.94.020.

Justice delayed is justice denied. A review on standard appellate timelines will be harmful and: (1) deny the electorate their right to vote for an indefinite time and potentially render Appellant’s claims for injunctive relief moot; (2) create a risk of monopolization over the System by Rainier Connect; (3) result in loss of institutional knowledge in the operation of Click! from the termination and loss of the System’s municipal employees; (4) result in disclosure of confidential customer account information to a private party; (5) increase risk of inconsistent decisions and/or delay in similar ongoing lawsuits in state and federal court. For these reasons accelerated review should be granted. RAP 18.12.

**A. Accelerated Review is Necessary Because Transfer Operational Control Over the System Deprives the Electorate from Exercising Their Right to Vote for an Indefinite Time.**

Voters have a right to approve execution of conveyance of their public telecommunication utility system under RCW 35.94 and City Charter § 4.6. The City refuses to hold a municipal election, and intends to execute the CBTA imminently—on April 1, 2020. The City’s actions compel expedited review of Appellant’s claims.

Accelerated review is necessary to resolve the question of whether Respondent is depriving residents of the City their right to vote on the privatization of Click!. City’s actions will violate voters’ fundamental rights for an extended period of time. This is an important public policy question, with over 200,000 people living and reside in the City, Washington’s third largest, and tens of thousands of residents’ voting rights would be compromised by a delay of the right to vote during the appellate process.

Privatization will remove all rate control over wholesale broadband internet and telecommunications services. Such rates are now set by City Council under the City’s municipal utility code. Vesting such authority for setting rates solely in a private company would damage each interested voter in the City for the duration of appellate review.

Thus, consistent with other appeals regarding the public’s right to vote, accelerated review should be granted. *See In re February 14, 2017, Special Election on Moses Lake School District No. 161 Proposition 1, 2 Wn. App. 2d 689, 413 P.3d 577 (2018)* (accelerating review on whether constituents were denied opportunity to vote to approve a school district bond); *see also Global Neighborhood v. Respect Washington, 7 Wn. App.2d 354, 385, 434 P.3d 1024 (2019)*.

**B. Terminating Click! Employees Will Result in the Loss of Institutional Knowledge. Time is Of The Essence.**

If Appellant prevails, the CBTA will be void. Without accelerated review it becomes more difficult if for the City to recover previously terminated employees necessary for the operation of Click!. As a result, accelerated review is warranted. RAP 18.12. Click! is a technically complex system, with equipment such as core routers, provisioning systems, DNS servers, DHCP servers, switches, gateways, hubs, nodes, and many other plant assets. The institutional knowledge of Click! employees is essential to operating the system. Click! employees may more easily return after only a few months, rather than a longer period—if this Court were to ultimately rule in the Appellant’s favor on the traditional timeline. Thus, accelerated review should be granted to resolve the issues in this appeal.

**C. Destruction of Competition May Occur With Additional Loss Of Institutional Knowledge Held By Other ISP, Advanced Stream.**

Click! operates as an “Open Access” system, with TPU providing standardized wholesale rates and “packages” to two competing Internet Service Providers (“ISPs”), Rainier Connect and Advanced Stream.

These ISPs now compete on a level playing field, reselling Click!’s broadband “packages” to retail customers over the System. With authority over the System vested in Rainier Connect, Advanced Stream—Rainier’s only competitor on the System—could be ruined. A destruction of Advanced Stream would result in a loss of the support services to Advanced Stream’s



## Appendix

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PAYMENT & BILLING

OUTAGES & SAFETY

WAYS TO SAVE

COMMUNITY & ENVIRONMENT

CUSTOMER SERVICE



About TPU

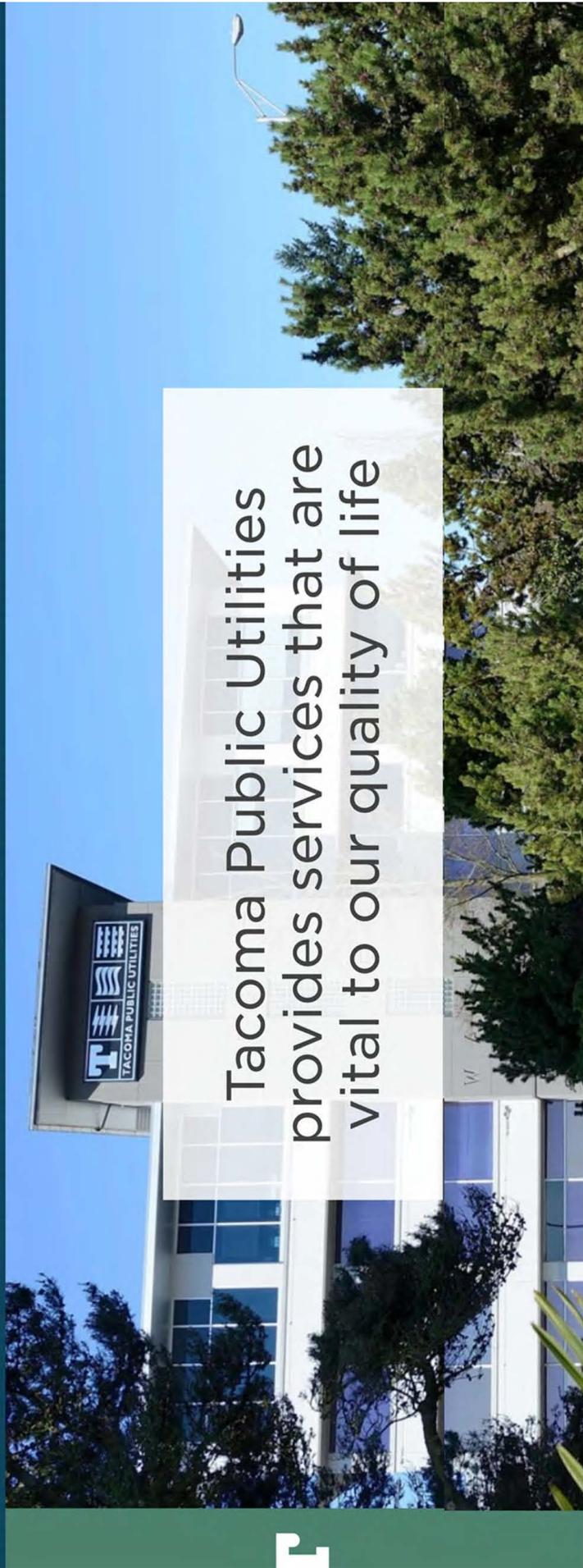
MyAccount

Contact

Careers



ENGLISH



Tacoma Public Utilities provides services that are vital to our quality of life

## About TPU

[Management Team](#)

[Public Utility Board](#)

[Investors](#)

[TPU Publications](#)

[Latest News](#)

[Events](#)

## Our Services

[Power](#)

[Water](#)

[Rail](#)

[Click! Cable TV](#)

## About Us

Publicly owned since 1893

Largest department in Tacoma City government

Operates entirely from revenues from sale of services, not from taxes

Governed by the Public Utility Board, the members of which appoint the Director of Utilities



[About TPU](#) > Services

[◀ Back](#)

## Services

[Click! Cable TV](#)

[Power](#)

[Water](#)

[Rail](#)

# Our Services

## [Power](#)

Tacoma Power provides electric service to the city of Tacoma, Fircrest, University Place, Fife, parts of Steilacoom, Lakewood, Joint Base Lewis-McChord, and unincorporated Pierce County as far south as Roy.

## [Water](#)

Tacoma Water provides clean, reliable water to more than 300,000 people throughout Pierce and King counties and is one of the country's oldest municipally owned water systems.

## [Rail](#)

Tacoma Rail has provided rail transportation and key freight connections for customers in the greater Tacoma area since 1914. We currently serve 65 customers within three operating districts in Pierce, Thurston, and Lewis counties.

## [Click! Cable Network](#)

Click! Network is an operating section of Tacoma Power and a multi-service broadband telecommunications provider within the electric company's service area.

Cable TV

Internet

Business  
Services

# Keeping You Connected

Click!'s Internet Provider partners provide you fast reliable Internet.

INTERNET PLANS

PRODUCTS

Cable TV

Internet

Internet Service Providers

Business Services

# Internet Service Providers

Click! operates an Open Access Network, which is a different business model than traditional telecommunications providers. In an open-access network there is a network owner and operator, and multiple retail service providers that deliver services over the network.

## Click! Powered Internet Gives You

- **Choice** - choose from one of the two local Internet Service Providers
- **Selection** - package options designed for you, no matter how many devices and TVs you want to connect to stream content or play games
- **Bundles** - Internet and phone bundles to fit your needs
- **Customer Service** - Friendly support from locally owned companies

[SELECT A TV & INTERNET BUNDLE ONLINE](#)

## Service Providers



Advanced Stream

253-627-8000

[www.advancedstream.com](http://www.advancedstream.com)

[info@advancedstream.com](mailto:info@advancedstream.com)



Rainier Connect

253-683-4100

[www.rainierconnect.com](http://www.rainierconnect.com)

[customerservice@rainierconnect.com](mailto:customerservice@rainierconnect.com)

# About Click!

## Company

Click! Network is an operating section of Tacoma Power and a multi-service broadband telecommunications provider within the electric company's service area.

## Vision

**To be known for excellence in:**

- People – professionals committed to the highest level of customer service and satisfaction, who create and maintain a team environment in which trust, respect, honesty and dignity are valued.
- Products and services – specifically designed to meet and exceed our customer needs through innovative uses of technology.
- Performance – a technically superior network designed and maintained to serve both current and future telecommunications needs of Tacoma Power and of Click! Network customers.

## Mission

To develop and deliver to all Tacoma Power customers innovative products and services made possible by the convergence of telecommunications and electric technologies.

## Ownership

Click! Network is one of the largest municipally-owned telecommunications systems in the country and part of the City of Tacoma's Department of Public Utilities.

# Internet Service Providers

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- **Bundles** - Internet and phone bundles to fit your needs
- **Customer Service** - Friendly support from locally owned companies

# High Speed Internet, Powered By Click!

Click!'s Internet Service Provider partners provide fast and reliable internet throughout Tacoma and Pierce County. Connect all your devices in every room, with the fast speeds you need.

SELECT INTERNET PLAN



## The Choice is Yours

Click! partners with two local Internet Service Providers to connect your internet service.

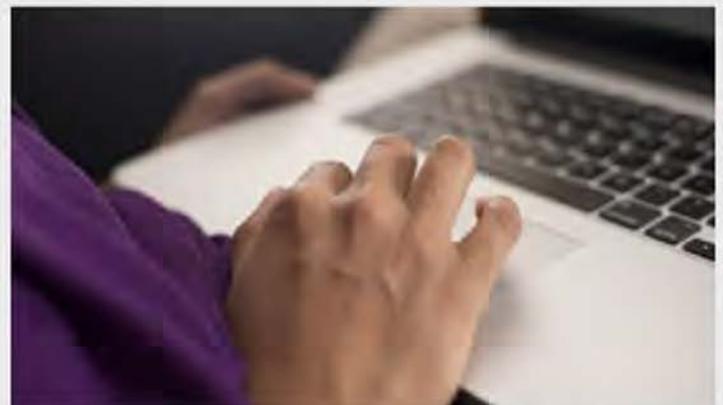
**Advanced Stream** and **Rainier Connect** offer a variety of speed and pricing options to best fit your internet needs and the flexibility to select the right plan for you.

SELECT A PROVIDER

## Internet at the Speed of Life

The Click! Network enables speeds up to 100Mbps. With that kind of speed you can quickly and easily download large files and videos, watch movies, or play games, plus connect multiple devices simultaneously, without slowing down.

TEST YOUR INTERNET SPEED



December 12 2019 4:20 PM

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

The Honorable Judge Shelly K. Speir  
Hearing Date: January 10, 2019  
Oral Argument Requested

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

DARREL BOWMAN,

Plaintiff,

v.

CITY OF TACOMA,

Defendant.

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

**PLAINTIFF MITCHELL SHOOK'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

MITCHELL SHOOK,  
Plaintiff Pro Se,

v.

CITY OF TACOMA,

Defendant.

**I. Nature of The Action and Summary of Argument**

This lawsuit is about privatization of Click! Network ("Click!"), Tacoma Public Utilities' fiber-optic municipal telecommunications system, without voter approval, as explicitly required by state law and Tacoma's City Charter. Privatization conveys the municipal utility's entire

1 public broadband infrastructure and enterprise, as a going concern, including all proprietary  
2 operational control and authority over the municipal utility's rate setting functions.<sup>1</sup>

3 Click! (the "System") is an advanced telecommunication system, owned and operated by  
4 Tacoma Public Utilities ("TPU"), serving over 35,000 active utility customer accounts. The  
5 System's revenues exceeded \$25 million in 2018. (Shook Decl. 10/30/19 Ex. 9).

6 TPU's website describes Click!'s commercial telecommunications operations as, "one of the  
7 largest municipally owned telecommunications systems in the country and part of the City of  
8 Tacoma's Department of Public Utilities" (Shook Decl. 10/30/19 Ex. 1, Pg. 5).<sup>2</sup>

9 Article I, Section I of the Washington Constitution provides: "All political power is inherent  
10 in the people, and governments derive their just powers from the consent of the governed."

11 The people have reserved full power and exclusive authority to provide final approval over  
12 privatization of their telecommunications system. Council's role, essentially, is that of the  
13 people's trustee, limited to negotiating the agreement and presenting the contract to voters.

14 Chapter 35.94 RCW requires voter approval for disposal of any public utility works, plant,  
15 or system owned by it or any part thereof, or any equipment or appurtenances.

16 Tacoma's City Charter's ("Charter" or "the Charter") contains a similar directive, requiring  
17 approval by "a majority vote of the electors." (Shook Decl. 10/30/19 Ex. 5).

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

21 The City has circumvented the voter approval process and declared Click!'s entire system  
22 "surplus," under RCW 35.94.040. Tacoma City Council ("Council" or "City") approved a  
23 Declaration of Surplus Property ("DSP") and conveyance of ownership and control is set to  
24 occur in March of 2020. (Shook Decl 10/30/19 Ex. 2).

25 The City also approved the "Click! Business Transaction Agreement" ("CBTA"), privatizing  
26 Click!'s enterprise and conveying the utilities' customer accounts, Mr. Shook's home services  
included. All public control over operation and rate setting for the System is lost for 40 years.

<sup>1</sup> RCW 43.330.530(3) "Broadband infrastructure" means networks of deployed telecommunications equipment and technologies necessary to provide high-speed internet access and other advanced telecommunications services to end users.

<sup>2</sup> RCW 43.330.530 (2) "Broadband" or "broadband service" means any service providing advanced telecommunications capability and internet access with transmission speeds that, at a minimum, provide twenty-five megabits per second download and three megabits per second upload.

1 Ironically, the City acknowledges lack of authority for disposal absent voter approval. The  
2 City has admitted voters alone are vested with express power to approve separation of the  
3 municipal utility's public broadband enterprise. (Shook Decl. 12/12/19 Ex. 32, Pg. 1, Ln 20)

4 Despite knowing<sup>3</sup> it lacked authority, the City nevertheless abrogated voters' rights, with an  
5 ultra vires declaration of surplus designed to circumvent the requirements of Chapter 35.94 RCW  
6 and Charter Section 4.6. (Shook Decl. 12/12/19 Ex. 32, Pg. 1, "Whereas 4.6 Requires a vote. . "

7 The statutory definition of surplus, as "not required for providing continued public utility  
8 service," was simply ignored. Vested turnkey, as a going concern, Click! will continue providing  
9 the same proprietary services, to the same utility customers, under the same brand, over the same  
10 infrastructure, only with a private company controlling rates and cashing customers' checks.<sup>4 5</sup>

11 The utility System is not surplus. The System's assets, trademarks and customers are simply  
12 "changing hands," lock, stock, barrel and brand. A state-of-the-art fiber optic municipal utility  
13 system, delivering essential public utility services, continuing to providing the same services to  
14 the same loyal utility customers, does not reflect the Legislature's intent for "surplus."<sup>6</sup>

15 Voters of Tacoma granted the City a privilege of operating the Department of Public  
16 Utilities, they were not content to divest themselves of every managerial function normally  
17 associated with the operation of a business concern. By charter, the people retain express power  
18 over disposal of their proprietary interest in the community's municipal public utility property.

19 Disposal of Click!'s equipment, infrastructure and enterprise, all acquired for the purpose of  
20 providing telecommunication services, and required for continuing those same services, violates  
21 section Charter 4.6. Such a sale is ultra vires and void, unless approved by the voters.

22 In privatizing the community's public broadband system, essential assets are separated,  
23 including "last mile infrastructure," that single wire or "data pipeline" to a customer's home or  
24 business,<sup>7</sup> and the public's "middle mile infrastructure," of over 1,500 miles of fiber, cable,

25 <sup>3</sup> "Knowingly" is a statutorily defined term. RCW 9A.08.010(1)(b)(i) states a person "acts knowingly . . .  
26 when . . . he [or she] is aware of a fact, facts, or circumstances

<sup>4</sup> A buyer that is one of the mayor's largest campaign contributors!~ Shook Decl. 12/12/19, Ex. 47, Pg. 6.

<sup>5</sup> The Business Transaction Agreement provides "WHEREAS, the Parties have mutually agreed to  
cooperate to ensure a smooth and seamless transition of the Click! Business." Shook Decl. 11/1/19 Pg. 6

<sup>6</sup> The transaction includes use of the Click! trademark and brand name. Shook Decl. 10/30/19 Ex. 2.

<sup>7</sup> (5) "Last mile infrastructure" means broadband infrastructure that serves as the final connection from a  
broadband service provider's network to the end-use customer's on-premises telecommunications  
equipment.

1 conduits, vaults, easements and equipment, all required for accessing the services and  
2 applications critical for modern society.<sup>8 9</sup>

3 Recognizing the monopolistic nature of the industry, with huge fixed costs and barriers to  
4 entry, federal, state and local laws have fiercely protected consumers from anti-competitive  
5 consolidation of assets and ownership in the telecommunications industry for over 100 years.<sup>10</sup>

6 For over 20 years, the City has owned, operated and regulated Click! as a municipal-utility,  
7 establishing service levels, rates and even setting net neutrality policies. State laws and federal  
8 policies support and encourage such public, non-profit, "municipal" utility systems. Many such  
9 systems operate in Washington, across the USA and around the world.<sup>11</sup>

10 As the modern extension of telegraph and telephone, Click! is a utility system.  
11 Telecommunications has been a public utility since the Pacific Telegraph Act of 1860.<sup>12</sup>

12 No material issues of fact exist. This matter is properly resolved on summary judgment.<sup>13</sup>

## 13 **II. Relief Requested and Statement of the Issue**

14 This motion seeks partial summary judgment for declaratory relief, pursuant to CR 54(b).  
15 Plaintiff asks the Court to rule, as a matter of law, on the following questions:

16 1. Are telecommunication assets of a municipal utility governed by Chapter 35.94 RCW or  
17 Tacoma City Charter 4.6 ?

18 2. Does a surplus resolution facilitating privatization of an operational municipal utility  
19 telecommunication enterprise defeat the legislative intent for "surplus" in RCW 35.94.040, when  
20 the enterprise and its assets continue providing the same telecommunication services, to the same  
21 public utility customers, post-privatization?

22 <sup>8</sup> (7) "Middle mile infrastructure" means broadband infrastructure that links a broadband service  
23 provider's core network infrastructure to last mile infrastructure.

24 <sup>9</sup> RCW 43.330.532 Findings: "The legislature finds that: (1) Access to broadband is critical to full  
25 participation in society and the modern economy"

26 <sup>10</sup> See 2015 Open Internet Order, 30 FCC Rcd at 5631, para. 81 n.134 ("data suggests that meaningful  
alternative broadband options may be largely unavailable to many Americans, further limiting the ability  
to switch providers. Based on the submissions from various commenters, it appears that between 65% and  
70% of households have at most two options for high speed Internet access."); see also 2010 Open  
Internet Order, 25 FCC Rcd at 17923, para. 32; Appendix C, Section II.A.1., Table 1 (showing that,  
nationwide, 97 percent of households have two or fewer providers of BIAS at download speeds of 25  
Mbps).

<sup>11</sup> Council even has its own bright-line (net neutrality) regulation. Shook Decl. 12/12/19 Ex. 34

<sup>12</sup> Regulation over such communication was transferred from the Interstate Commerce Commission to  
Federal Communications Commission in 1934, 47 U.S. Code § 151, § 601.

<sup>13</sup> Affirmation of electorates' right to vote is curative of all ills and eliminates unnecessary litigation.

1 3. When the legislative authority of a city deems it advisable to lease, sell or dispose of a  
2 municipal utility’s operational telecommunications enterprise and system, or useful and  
3 functional in-service equipment, appurtenances, betterments and essential parts thereof, does  
4 RCW 35.94.020 or Charter 4.6 require voter approval of the proposed transaction?

5 **III. Background Facts**

6 The following facts are in the declarations of Plaintiff, Mitchell Shook (“Mr. Shook”), a  
7 taxpayer of the City, ratepayer of TPU and Click! customer, with standing to bring this action.

8 **A. Tacoma Public Utilities Ownership and Creation of Click! Network**

9 The Department of Public Utilities was established under City Charter (“Charter”) Section  
10 4.1. TPU is one of the largest municipally owned utilities in the Pacific Northwest.<sup>14 15</sup>

11 The Utility provides four distinct public services; water, power, rail and telecommunications  
12 under four brand names: Tacoma Water, Tacoma Power, Tacoma Rail and Click! Network.

13 TPU’s website prominently displays Click! as one of “Our Services: Power, Water, Rail,  
14 Click!.” *see* Shook Decl. 10/30/19, Ex. 1, Pg. 7 -about TPU.

15 Owned and operated by TPU, Click! is an “advanced telecommunication system,” delivering  
16 commercial services under its own organizational structure, to approximately 35,000 TPU  
17 customer accounts. The System’s services were launched in 1998.<sup>16</sup>

18 Click!’s state-of-the-art, carrier-grade, telecommunications system, delivers Gigabit speed  
19 BIAS, (“Broadband Internet Access Service”) over Fiber To The Home (“FTTH”) technology,  
20 VoIP prioritized DOCSIS 3.1 cable modem service, commercial “Metro Ethernet” data-transport  
21 services and cable television to customers in the in Tacoma, Fircrest, Fife, University Place,  
22 Lakewood and unincorporated Pierce County.<sup>17 18</sup>

23 The System passes 66% of the homes in Tacoma Power’s service area with 1,500 miles of fiber  
24 and cable plant.<sup>19</sup> The City describes Click! as: “This state-of-the-art technology for modern  
25 network architecture enables reliable and cost-efficient delivery of Gigabit internet services”.<sup>20</sup>

26 <sup>14</sup> Shook Decl. 10/30/19, Ex. 5.

<sup>15</sup> Official Statement: City of Tacoma Series 2017 Electric System Revenue Bond, p.1.

<sup>16</sup> “Broadband” is defined as “advanced telecommunications services” by RCW 54.16.420.

<sup>17</sup> TPU Annual Report p. 26 (Shook Decl. 12/12/19, Ex. 48, Also shows continues investment.

<sup>18</sup> Defendant’s Answer ¶23, admits point-to-point metro Ethernet broadband services.

<sup>19</sup> Defendant’s Answer ¶19. Pg. 4. Total mileage, admits 1,800.

<sup>20</sup> Admitted in Defendant’s Answer, Pg. 5, ¶22. Shook Decl. 10/30/19, Ex. 7 Click! Network 2018 Cable TV Annual Report -Pam Burgess to Jeff Leuders 2/28/19. See Shook Decl. 12/12/19, Ex. 57 for FTTH.

1 Like the City’s water and power utilities, Click!’s rates are set by Council and published under  
2 Title 12, the “Utilities” section of the Tacoma Municipal Code. Charter 4.3 allows Council to  
3 “revise such rates and charges as it may deem advisable for supplying such utility services.”<sup>21</sup>

4 Revenues and expenses for the System are accounted for separately, from other TPU  
5 operations, and appear as “Telecommunications” on TPU financial statements.

6 **B. Purpose in Creation of Click! Network -The Community’s Need For Broadband.**

7 In 1996, TPU commissioned a “Telecommunications Study.” The “study team” set out to  
8 determine if TPU might benefit from establishing “a modern telecommunications infrastructure.”  
9 The study asked if the greater Tacoma area has the “telecommunications resources necessary for  
10 business that may want to locate in the area?” It even cited “telecommuting” and asked, “How  
11 will the explosion in the Internet be handled?” Shook Decl 10/30/19 Ex. 10, Pg. 92 of 389.<sup>22</sup>

12 The Study explained why the System would be built:

13 One of the most significant ways a community and its *economic base* are intertwined is  
14 through an area's infrastructure, As a result, the evolution of a community's economy  
15 often depends upon the investments it makes in its transportation system, power  
16 system, and-given the *shift to the information age-its telecommunication system*, This  
17 study was therefore commissioned to investigate Tacoma's potential *economic futures*  
18 and the inter-relationship between its *economic development* and potential  
19 *telecommunication system investments*, (emphasis added).<sup>23</sup>

20 A “Telecommunications Business Plan” was part of the study and proposed:

21 Three types of **telecommunications services** would be offered by Tacoma City Light  
22 - wholesale high-speed telephony and **data transport, Internet data transport**, and  
23 cable television. Each of these services meet the **growing telecommunications needs**  
24 in the greater Tacoma area. . . . (emphasis added)

25 The conclusion lamented, “one could hope *that other companies would step forward.*”<sup>24</sup>

26 [T]he local market has a *growing need for better telecommunications access*. Despite  
growing local demand, the incumbent wire line service providers have stated that their  
investments in the local infrastructure will either slow without significant rate  
increases or be halted all together. *One could hope that other 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)<sup>25</sup>

On June 21, 1996, TPU issued a “Request for Ordinance or Resolution” seeking to:

<sup>21</sup> Defendant’s Answer, Pg. 4, ¶21 -City Council approve rates. *Also see* Shook Decl. 10/30/19, Ex. 8.

<sup>22</sup> The Purpose and Conclusion is at Shook Decl. 12/12/19, Ex. 50.

<sup>23</sup> Shook Decl. 10/30/19, Ex. 10, at Pg. 142 of 398 in PDF.

<sup>24</sup> Local Telecommunications Business Plan. Shook Decl. 10/30/19. Ex. 10, at Pg. 142 of 398

<sup>25</sup> Shook Decl. 10/30/19, Ex. 10, at Pg. 186 of 398 in PDF.

1 Authorize a Bond Ordinance for City of Tacoma, Washington, Department of Public  
2 Utilities, Light Division to clarify its legal authority to develop telecommunication  
capacity for . . . certain telecommunications services,<sup>26</sup>

3 On June 26, 1996, the Board approved funding the telecommunication business plan.<sup>27</sup> On July  
4 23,1996, Council approved Ordinance 25930 establishing a “A SEPARATE SYSTEM.”  
5 Ordinance 25930 included Article II: “Establishment Of The Telecommunications Project As A  
6 Separate System; And Adoption Of Plan And System”:<sup>28</sup>

7 Section 2.1. Establishment of **Telecommunication System**. The City hereby creates *a*  
8 *separate system* of the City's Light Division to be known as the telecommunications  
9 system (the "**Telecommunications System**"). The public interest, welfare, convenience  
10 and necessity require the creation of the **Telecommunications System**, contemplated by  
11 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).

12 This “Exhibit A” of the Ordinance, included commercial broadband “Internet Access Service”  
13 and “high speed data” transport services.

14 **C. Summary Judgements Confirmed Authority to Establish Telecommunication System.**

15 In July of 1996, prior to funding construction of the System, the City sought declaratory  
16 judgement in Pierce County Superior Court to confirm authority for TPU to establish a  
17 telecommunication system to provide commercial telecommunications services. Two Orders  
were issued, confirming TPU’s authority to do so.<sup>29 30</sup>

18 In the City’s November 1996 Memorandum In Support of Summary Judgment”, the City  
19 cited RCW 35.96.030, which provides authority for municipal funding of communication utilities,  
20 as authority for the City’s proposed municipal utility telecommunication system.

21 In creating Click!, the City also cited authority for commercial BIAS services in the policy  
22 statement of RCW 80.36.300 (5), to “Promote diversity in the supply of telecommunications  
23 services and products in telecommunications markets throughout the state.”

24 <sup>26</sup> Signed by Superintendent Klein Shook Decl. 10/30/19, Ex. 11, Pg. 28, at 224 of 389 in PDF.

25 <sup>27</sup> Resolution U-9198. Shook Decl. 10/30/19 Ex. 11, Pg. 31 or Pg. 227 of 389 total pages in PDF.

26 <sup>28</sup> See Ordinance 25930 Shook Decl. 10/30/19, Ex. 11, Pg. 197 of 389 A “Separate System.”

<sup>29</sup> The 12/13/96 Order determined Ordinance No. 25930 (the "Bond Ordinance") was properly enacted.  
The 5/9/97 Order approved authority to fund the System and carry out the business plan for offering  
wholesale telecommunication service, including retail cable tv services. Shook Decl. 10/30/19 Ex. 12, 13.

<sup>30</sup> The 5/20/97 Request for Ordinance stated: “Authorize the development of a broad band  
telecommunications network to improve electric utility service and improve the telecommunications  
infrastructure available to the community. This would include the business plan for a broad band  
telecommunications system and the implementation of the telecommunications system.

1 On March 20, 1997, in support of Res# 33668 to establish the System, TPU Director Mark  
2 Crisson wrote Council, outlining the System’s goals, saying the “Telecommunications System”  
3 would "Provide additional revenue to the Light Division and General Government through  
4 expansion of the market for telecommunications services.”<sup>31</sup>

5 "Significantly enhances regional economic development and quality of life by creating  
6 state-of-the-art telecommunications infrastructure and providing it to all businesses and  
7 residences throughout the community."

8 On April 8, 1997, Council approved Res. 33668. The Board followed with Resolution U-  
9 9258, finding provision of broadband Internet to be “prudent and economical,” stating:

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

13 WHEREAS, the Public Utility Board hereby finds and determines that the Light  
14 Division's proposal for a **broad band telecommunications system** is in the best  
15 interests of the City, **will serve as a public purpose**, and should be approved.

16 BE IT RESOLVED BY THE PUBLIC UTILITY BOARD.

17 That the Board hereby **approves the Light Division's proposal** including the  
18 Business Plan for a **broad band telecommunications system**, and the Board  
19 recommends that the City Council approve a resolution to authorize the Light  
20 Division to proceed to implement said proposal for a **broad band  
21 telecommunications system..** (emphasis added). (Shook Decl. 12/12/19, Ex. 75)

22 Resolution 33668 identified other “utility purposes,” or benefits, that would be accomplished  
23 by creating Click!’s broadband system. These included revenue diversification and economic  
24 development, both having an important “nexus” to Tacoma Power’s role of producing energy.<sup>32</sup>

25 One year later, as the project gained national attention, TPU Director Mark Crisson proudly  
26 wrote the Tacoma City Manager, and forwarded a national news article and stating:

“MSNBC has written a very informative piece about Tacoma Power's Click! Network.  
It was written complete with slides of our work in progress. I know the City Council,  
as well as the Board, will be proud of this national coverage.”<sup>33</sup>

**D. Click! Network’s Commercial Telecommunication System and Operations Today**

In 2018 Click!’s total revenue exceeded \$25 Million. In August 2019, Click!’s monthly  
sales were \$2,116,912, with a \$40,070 profit after all allocations, taxes and depreciation.<sup>34</sup>

<sup>31</sup> Shook Decl. 10/30/19, Ex. 10, Pg. 4. (or Pg. 50, of 389 in PDF).

<sup>32</sup> Shook Decl. 12/12/19, Ex. 75. See first “Whereas” in Amended Resolution U-9258.

<sup>33</sup> Shook Decl. 10/30/19, Ex. 14 Pg.2 -Importantly, see the quote on Pg. 6: “The system is not being built  
as a cable system. We have got a multilayered business model.” - Deb Stewart Click Network.

<sup>34</sup> Shook Decl. 10/30/19, Ex. 9, Tacoma Power Statement 12/31/18, Click! Operational Summary 8/19

1 Click! is an FCC registered telecommunications provider, with Federal Registration Number  
2 (“FRN”) FRN 0007466642,<sup>35</sup> filing Form 499 and Form 477,<sup>36</sup> and publishing a “Transparency  
3 Disclosure,” as mandated by the FCC.<sup>37</sup> Click! provides gigabit data “*transport only*” services  
4 to the Tacoma City Library System and files FCC Form 471, allowing libraries participate in the  
5 Universal Service Administrative Company (“USAC”) “E-rate Program.” Click!’s USAC  
6 Service Provider Number (“SPN”) is SPN 143035981.<sup>38</sup> See Shook Decl. 12/12/19 Ex. 64.

7 Click! enters into “Master Service Agreements” (“MSA”) to install “dedicated transport  
8 services” over the System’s municipal “communications facilities,” often in large commercial  
9 buildings. Examples, including CenturyTel’s, are provided in Shook Decl. 12/12/19, Ex. 62.

10 “Telecommunications Installation and Service Agreements,” with multifamily dwellings,  
11 allow installation of “Telecommunications System” for providing “telecommunication services.”

12 Owner grants Click! the right to enter and access the Premises for the **purpose of**  
13 **installing telecommunications facilities** in, at and upon the Premises including, but not  
14 limited to, all wiring, cables, conduits, electronic and other equipment, antennae,  
15 switches, amplifiers, filters, traps, signal receiving/scrambling/decoding equipment, key  
16 lock box(es) and key(s), and any additional equipment that may be requested for  
17 provision of . . .telecommunication services at the Premises (“Facilities” and collectively  
18 “**Telecommunication System**”). (emphasis added) (Shook Decl.10/30/19, Ex. 17).

19 Click! holds a Franchise Agreements for Pierce County and the Cities of Tacoma, Fife,  
20 Lakewood, Fircrest, University Place and Puyallup. (Shook Decl. 12/12/19, Ex. 30).

21 Click!’s Pierce County “Telecommunications Franchise” is Ordinance No. 2004-43:  
22 Telecommunication Franchise To The City Of Tacoma, . . . Light Division, For A  
23 Telecommunications Network In Pierce County To Be In The Public Interest;

24 The Puyallup Telecommunications Ordinance grants City of Tacoma rights:

25 To Construct, Maintain, Operate, Replace And Repair A Telecommunications  
26 Network, In, Across, Over, Along, Under, Designated Public Rights-Of-Way.<sup>39</sup>

27 **E. Planned Conveyance of Click! Network’s Commercial Telecommunication System.**

28 On Nov. 5, 2019, Council approved the CBTA and Indefeasible Right of Use (“IRU”)

29 <sup>35</sup> Click! Network Disclosure and FRN, *se*, Pg. 283/389 of PDF.

30 <sup>36</sup> Shook Decl. 10/30/19, Ex. 15 All facilities-based 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>

31 <sup>37</sup> Click! FCC Form 477 *see* Shook Decl 10/30/19 Ex. 15, *also available at* <https://perma.cc/9T9T-L4FL>

32 <sup>38</sup> Shook Decl. 10/30/19 Ex. 15, Pg. 7, Library Funding info *at* <https://www.usac.org/sl/default.aspx>

33 <sup>39</sup> Shook Decl. 12/??/2019 Ex. 79

1 agreement (the “Agreements”) to privatize Click! by transferring ownership and operations of the  
2 enterprise to Rainier Connect, a private company.<sup>40</sup> *see* Shook Decl. 12/12/19 Ex. 39.

3 Privatization transfers an active, in-service, municipal utility enterprise. It vests all proprietary  
4 operational interests in the System. Assets essential for continued provision of BIAS services to  
5 TPU’s customers would be separated and conveyed for up to 40 years.

6 All franchises agreements, contracts, warranties, operating rights, active customer account  
7 information, billing and bank payment details would be vested. All electronic equipment, software,  
8 provisioning systems, DNS servers, DHCP servers,<sup>41</sup> Caching servers, routers, hubs, nodes,  
9 trademarks, IP addresses, head end equipment, customer premise equipment, trucks, brand name,  
10 other critical assets and infrastructure are included. (Shook Decl. 11/1/19, Pg. 12)

11 It is undisputed that privatization removes all Council control over the System’s rates going  
12 forward, leaving the System’s customers without protection from future rate increases.

#### 12 IV. Argument

13 This motion is based on the pleadings, declarations and evidence filed under this cause.

14 **Summary Judgement Standard:** With only questions of law, summary judgment is appropriate  
15 under CR 56(b). When moving party shows “no issue as to a material fact,” *Scott v. Pacific West*  
16 *Mountain Resort*, 119 Wn.2d 484, 502-03 (1992), “the burden shifts to the non-moving party” to  
17 establish facts to be proven at trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225  
18 (1989). The non-moving party must offer specific facts, not bare allegations. *Baldwin v. Sisters*  
19 *of Providence*, 112 Wn. 2d 127, 132 (1989). Conclusory assertions do not preclude summary  
20 judgment. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 2d 355, 359-60 (1988).

#### 21 A. Click! is A Municipal Utility System Providing Municipal Utility Service.

22 By resorting to RCW 35.95.040, to surplus Click!, the City admits the System is a municipal  
23 utility, regulated by Chapter 35.94. The plain meaning of the terms “utility” and “system” seem  
24 obvious; but, if further definition is desired, courts may “look to standard English language  
25 dictionaries.” *North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 48, 17 P.3d 596 (2001)

26 \_\_\_\_\_  
<sup>40</sup> Ironically, to say the least, Rainier opposed Click!’s creation in 1996. Shook Decl. 12/12/19 Ex. 47.  
Also, a hearing on an Ordinance to convey the Click! Franchise Agreement was held on 12/10/19. Shook  
Decl. 12/12/19, Ex. 63

<sup>41</sup> DNS is Domain Name Service and Domain Name Servers, DHCP, Dynamic Host Configuration  
Protocol) The automatic assigning of IP addresses

1 Black's Law Dictionary's defines "*public utility*" as, "a company that provides necessary  
2 services to the public, such as telephone lines and service, electricity and water."<sup>42 43</sup>

3 Merriam Webster provides, "*system*" is "a regularly interacting or interdependent group of  
4 items forming a unified whole." Click! assets, represented by over 2000 pages in the CBTA and  
5 IRU Agreements,<sup>44</sup> constitute a telecommunication system. Click! is a "Public Utility System."

6 U.S. Code and Washington State statutory definitions confirm Click! is a municipal "utility"  
7 The 1996 Telecommunications Act provides, at 47 USC § 224(a)(1): "Utility."

8 The term "utility" means any person who is a local exchange carrier or an electric,  
9 gas, water, steam, or other public utility, and who owns, or controls poles, ducts,  
10 conduits, or rights-of-way used, in whole or in part, for any wire communications.

11 Our State Supreme Court's defines "public utility" as a service that will "subserve a *public*  
12 *use*." Also, "The crucial and final test is, does the use--utility--subserve a public purpose; does it  
13 furnish a natural need of the city or its citizens; does it contribute to his comfort, prosperity, or  
14 happiness?" *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 328 P.2d 873, (1958). Under  
15 *Winkenwerder*'s "crucial and final test," Click! is undoubtedly a utility.

16 In *Bremer*, the high court defines utility:

17 [T]he statute specifically names a long list of utilities, but does not specifically  
18 mention wharves and docks. But the statute also says, '*or any similar or*  
19 *dissimilar utility or system.*' This, we think includes any kind of utility in whose  
20 operations the public has an interest, that is to say, any public utility"  
21 see *Bremerton v Bremer*, supra

## 22 **B. Creation of Municipal Utility's Telecommunication System and Service.**

23 The term "Telecommunications" replaced "telephone" and "telegraph" in Title 80 RCW  
24 under the Laws of 1985. See Ch. 450, Sec. 13, Pgs. 1978 -1995, or Shook Decl. 12/12/19 Ex. 61.

25 Click!'s municipal telecommunications system<sup>45</sup> was carefully conceived, constructed and  
26 paid for by TPU, for the express purpose of providing broadband services to TPU customers.

<sup>42</sup> *Black's Law Dictionary* Eleventh Edition 2019 P. 1859

<sup>43</sup> Click! enables "telephone service." The transmitting and receiving ordinary-language messages is widely accomplished with Voice Over IP Protocol (VoIP) service, a disruptive technology rapidly replacing traditional switched telephone technologies. Click! offers a "Voice Package", or VoIP with QoS ("quality or service" features). that prioritize "data packets." Click!'s telecommunication system allows services that are the modern equivalent of the "telephone." Shook Decl. 12/12/19, Ex. 44

<sup>44</sup> Shook Decl. 11/1/2019, Ex. 29

<sup>45</sup> Click! is a "telecommunication system" see Shook Decl 12/12/19 Ex. 59 Decl. of Terry Dillon.

1 City's Ordinance No. 25930 created Click! upon municipal authority to supply "utility  
2 services." The City intended to establish utility services. The Ordinance provides, "WHEREAS  
3 RCW 35A.11.020 authorizes the City to operate and supply utility and municipal services  
4 commonly or conveniently rendered by cities or towns." <sup>46</sup> (Shook Decl. 10/30/19, Ex. 11, Pg. 4)

5 Prior to constructing Click!, to confirm legal authority for commercial municipal utility  
6 telecommunication services, the City brought suit for declaratory judgement in Pierce County  
7 Superior Court and succeeded, in 1996 and 1997, in obtaining two approving Orders. <sup>47 48</sup>

8 In all the briefing supporting the proposed system, City cited federal, state, and local  
9 statutory and judicial authority, as allowing construction and operation of a municipal utility  
10 "Telecommunications System" The "Introduction" of the City's brief stated:

11 The City of Tacoma (the "City") brought this declaratory judgment class action  
12 under RCW 7.24 and 7.25 and CR 23(8)(2) to confirm its authority to issue bonds  
13 for the purpose of constructing and operating a telecommunications system  
14 consisting of a hybrid fiber coaxial network (the "Telecommunications System").

15 The City's April 14, 1997 Memorandum in Support of Summary Judgment shows the City  
16 created a "Telecommunication System" as a municipal utility. *See* Shook Decl. 12/12/19 Ex. 30

17 Click!'s a "Telecommunications Company," operating a municipal *telecommunication*  
18 *system*, providing *telecommunication services*. RCW 80.04.010 (27). A "Telecommunications  
19 Company" is "every city or town owning, operating or managing any facilities used to provide  
20 telecommunications for hire, sale, or resale to the public". *See* RCW 80.04.010 (28). <sup>49 50</sup>

21 Thus, any city or town operating facilities used for transmission of information by wire, or  
22 optical cable, is a telecommunications company. This is exactly what Click! Network is: "*a*  
23 *facility for transmission of information by optical cable or similar means.*" <sup>51</sup>

24 <sup>46</sup> The bond was payable solely by TPU (not general government). Shook Decl. 10/30/19 Ex.11

25 <sup>47</sup> Pierce County Case No. 96-2-09938-0, City Of Tacoma v Taxpayers and Ratepayers of Tacoma.

26 <sup>48</sup> City's 11/5/96 Memorandum In Support Of Motion For Summary Judgment. Shook Decl 10/30/19, Ex.  
12, Ex. 13. *See* Section I, of the City's brief. These Summary Judgement Orders confirmed City's  
authority to establish a "Telecommunication System."

<sup>49</sup> The Public Service Commission, now the UTC, regulates utilities with strong police powers under  
RCW 80.04.470: "Commission to enforce public service laws. Police power."

<sup>50</sup> *see* RCW 54.16.005 "Telecommunications" has the same meaning as contained in RCW 80.04.010.

<sup>51</sup> RCW 35.99.010 "**Telecommunication Systems**" are not cable service or cable television systems..  
Telecommunication systems are operated under Master Permits. Section (3) "Master permit" "A master  
permit does not include cable television franchises" (7) "Telecommunications service" means the  
transmission of information by wire, radio, optical cable, electromagnetic, or other similar means.

1     1. Telecommunications Companies are Public Utilities.

2     Common law and statutory definitions of “Public utilities” are synonymous with “public  
3 service.” By all definitions, Click! is a “public utility” and a “public service company.”

4     Click! is a "public utility" under RCW 36.87.140:

5         The term "public utility" as used in this section shall include utilities owned,  
6         operated, or maintained by every gas company, electrical company, telephone  
7         company, telegraph company, and water company whether or not such  
8         company is privately owned or owned by a governmental entity.

9     Public utility and “public service company” share the same definition:

10         RCW 80.04.010 (23) ““Public service company" includes every gas company,  
11         electrical company, telecommunications company, wastewater company, and  
12         water company.”<sup>52</sup>

13     The Public Service Commission Law, defined a “public service company.”<sup>53</sup>

14         Rem.Rev.Stat. §10344, **The term 'service' is used in its broadest and most  
15         inclusive sense.** The term 'public service company' includes every common carrier,  
16         gas company, electrical company, water company, **telephone company, telegraph  
17         company, wharfinger and warehouseman, as such terms are further defined . . .**  
18     *Inland Empire Rural Electrification . v. Department of Public Service*, 199 Wash. 527, (1939)

19     Click! is a “utility,” as a “communications utility, with its vast underground infrastructure:

20         "Communication utility" means any utility engaged in the business of affording  
21         telephonic, telegraphic, cable television or other communication service to the  
22         public in all or part of the conversion area and includes telephone companies and  
23         telegraph companies as defined by RCW 80.04.010. (Quoting RCW 35.96.020)

24     3. Telecommunications Has Been Defined as A Public Utility in Washington Since 1909.

25     Railroads were the first regulated utility in Washington State, in 1905, under the Railroad  
26     Commission.<sup>54</sup> Telecommunication was the second utility to be regulated, in 1909, also under  
27     the Railroad Commission.<sup>55</sup>

28     The Railroad Commission became the “Public Service Commission” in 1911, with a "Public  
29     service company" including every “gas company, electrical company, water company, telephone  
30     company, telegraph company.” *See* Session Laws of 1911, Ch. 117, Pg.538.<sup>56</sup>

31     <sup>52</sup> Municipal utilities are except from Title 80 RCW -“Public Utilities” Tacoma enjoys “home-rule.”

32     <sup>53</sup> 1911, Ch. 117, Pg 546, *also* Shook Decl. 12/12/19 Ex. 35, Pg 5.

33     <sup>54</sup> Railroad Commission was established by the Session Laws of 1905, Ch. 81, Pg. 145.

34     <sup>55</sup> The U.S. Interstate Commerce Act of 1887 regulated railroads and preceded Washington state’s Laws  
35     of 1909, Ch. 93. Sec. 3 Pg. 192, 196, which did: “authorize the commission to regulate telephone and  
36     telegraph companies and their rates and charges, to prevent discrimination and extortion by such  
37     companies; and to authorize the Railroad Commission of Washington to make all necessary rules.””

38     <sup>56</sup> Since 1961 UTC has regulated utilities an under Title 80. RCW. *See* 1961 c 14 § 80.01.010

1 As an advanced “telecommunication system” and “enterprise” of TPU, generating over \$25  
2 million in revenue, providing a necessary “public service” to over 35,000 TPU utility accounts,  
3 Click! meets every definition of a “*public utility system*.”

4 4. An Attorney General’s Opinion, Professor Brown’s Definition and Eminent Domain.

5 The AGO finds “Telecommunications businesses are public utilities.” See Authority Of  
6 Cities, Towns, And Counties To Provide Telecommunications Services. AGO 2003 No. 11<sup>57</sup>

7 Consider Professor Richard E. Brown’s definition of public utilities. He wrote the book on  
8 public utilities, Business Essentials for Utility Engineers, and is a Fellow of the Institute of  
9 Electrical and Electronics Engineers (IEEE), with BSEE, MSEE and PhD degrees from the  
10 University of Washington in Seattle, an MBA degree from the University of North Carolina at  
11 Chapel Hill, and as a registered professional engineer, Prof. Brown defines “public utility” as:

12 *Public utilities* provide essential services to society. Because of their  
13 importance, legal precedent has upheld the need for specialized government  
14 oversight of these businesses to ensure that safe and reliable utility services  
15 are widely available for rates that are reasonable and non-discriminatory.<sup>58</sup>

16 Public utility services are often established via eminent domain and possess natural  
17 monopoly characteristics, with “pricing power,” thus creating a need for regulation.<sup>59 60 61</sup>

18 Click! fits the definition of “public utility,” with a brand is organized as a “system,” holding  
19 itself out<sup>62</sup> to supply telecommunication and data transport services to a class of TPU ratepayers,  
20 subject to special governmental regulation, both at the local and state levels.<sup>63 64</sup>

21 <sup>57</sup> Attorney General Opinions are “entitled to great weight.” See *Five Corners Family Farmers v. State*,  
22 173 Wn.2d 296, 308, 268 P.3d 892 (2011)

23 <sup>58</sup> Dr. Brown has provided consulting services to most major utilities in the United States and many  
24 around the world, is a frequent instructor, having taught courses in eleven countries, and is an adjunct  
25 professor at North Carolina State University. Shook Decl. 12/12/19 Ex. 40 Pg. 4

26 <sup>59</sup> Large fixed costs are associated with establishing public-utilities, like a telecommunication system, act  
as a barrier to entry, creating a “natural monopoly” with “pricing power” -or the ability to unfairly raise  
rates, since demand is “inelastic.” Buyers, needing the service, have little choice but to pay .

<sup>60</sup> Telecommunication companies are regulated in Washington State under Chapter 80.36 RCW; however,  
in deference to municipal control, RCW 80.04.500 expressly provides Tacoma with home-rule authority  
for most of the provisions of Title 80 RCW. As a result, rates and policy for Click! are set by Council.

<sup>61</sup> Broadband service is generally a monopoly in the USA. Shook Decl. 12/??/19, Ex. 46, also “market for  
local access to broadband tends to be a “natural monopoly.” See WI-FI Everywhere: Universal  
Broadband Access as Antitrust and Telecommunications Policy Hannibal Travis American University  
Law Review, Vol.55 Issue 6 (2006) Shook Decl. 12/12/19, Ex. 51

<sup>62</sup> See Shook Decl. 12/12/19 Ex. 42 Click! holds itself out as providing Broadband Telecommunications  
services. Also see RCW 54.16.005 (4) as “the provision of telecommunications services or facilities for  
resale by an entity authorized to provide telecommunications services to the general public and internet  
service providers.”

<sup>63</sup> Council fixes Click! rates and policies. The State also regulates broadband under RCW 19.385.020.

1 Constructed upon 140 years of the City’s municipal infrastructure, established under broad  
2 eminent domain authority, as represented in the many easements, conduits, vaults and facilities  
3 underlying the utility system, Click! further fits the definition of a utility.<sup>65</sup>

4 The City has broad power, “to condemn land and other property and damage the same for  
5 such and for any other public use.” As a utility, City “may acquire, construct, purchase, condemn  
6 and purchase, own, operate, control, add to and maintain lands, easements, rights-of-way.” As a  
7 telecommunication company, “The right of eminent domain is hereby extended to all  
8 telecommunications companies organized or doing business in this state.”<sup>66</sup>

9 To sum it up, a “municipal public-utility” is a non-profit enterprise, holding itself out under a  
10 brand or system to supply a “public service” to a specific class of customers, subject to special  
11 governmental regulations that insure equitable, non-discriminatory, prices and practices.<sup>67</sup>

12 5. Invention of Broadband and Reemergence of Municipal Communications Utilities.

13 At the dawn of the telecommunication age, municipal communication utilities were very  
14 commonplace. In 1907 the U.S. Census Bureau did a Special Report on Telephones and found  
15 over 580,000 non-profit community lines operated by “Mutual Systems,” “Cooperative  
16 Associations” and “Farmer Lines” across the nation.<sup>68</sup> History shows AT&T crushed such  
17 competition and monopolized this industry, but was broken up in 1984. With subsequent federal,  
18 state and local governmental support, the public is regaining control of essential communication  
19 facilities.<sup>69</sup> A revival of municipal ownership of telecommunication utilities is unfolding.<sup>70</sup>

20 Anacortes, Washington, is an example of a municipal telecommunication utility regaining  
21 control of such services. Anacortes now offers retail broadband utility service alongside their  
22 water utility. Their first customer was recently installed. (Shook Decl. 12/12/19 Ex. 58, Pg. 8)

24 <sup>64</sup> Answer, Pg. 6 ¶33. Admits Click! “partners” with local ISP “partners” to provide internet service.

25 <sup>65</sup> Transferring City’s “police power” of eminent domain, *juris privati*, is likely unconstitutional.

26 <sup>66</sup> Eminent domain authority for a City is found in the Session Laws of 1893, Ch. 84, Sec.1, Pg. 189, now  
RCW 8.12.030, for a utility in RCW 35.84.020, and a “telecommunications company,” RCW 80.36.010.

<sup>67</sup> A “public service” is a service “holding itself out, expressly or impliedly, to supply its service or  
product for use either by the public as a class or by that portion of it that can be served by the utility”  
*Inland Empire Rural Elect. v. Dept. of Public Service of Wash.*, 199 Wash. 527, 537, 92 P.2d 258 (1939)

<sup>68</sup> Shook Decl. Ex. 58, Pg.1 Department Of Commerce: The Census on Telephones: 1907

<sup>69</sup> Shook Decl. 12/12/19, Ex. 49. A Brief History of American Telecommunications Regulation.

<sup>70</sup> The Telecommunications Act of 1996 created broad opportunities for municipal ownership.

1 Click! is a public utility, by common language definitions, regulatory statutes, numerous  
2 municipal utility examples, the Attorney General's opinion, 500 years of case/common law, all  
3 of which confirm that a municipal telecommunications business, affected with a public interest,  
4 subserving a public need, exercising police power of eminent domain and rate setting, standing at  
5 the gateway of commerce, subject to public regulation, holding itself out expressly for supplying  
6 essential public services, devoted to public use and operated for the common good and benefit of  
7 Tacoma Public Utility ratepayers, is subject to an approving vote of the people. As the high court  
8 found, in *State v. Kuykendall*, 137 Wash. 602, 243 P. 834, (1926)<sup>71</sup>

9 [I]f in the beginning or during its subsequent operation the pipe line was devoted  
10 by its owner to public use, and if the right thus extended to the public has not  
been withdrawn, there can be no doubt that the pipe line is a public utility.

11 6. Additional Utility Functions, Utility Purpose and Utility Benefits.

12 Click! offsets TPU's telecommunication costs, provides revenue diversification,<sup>72</sup> and spurs  
13 economic development, all of which increases revenues for TPU's other utilities,<sup>73</sup> increasing  
14 profits and lowering rates for all Power customers. Click! is a utility with a true nexus to Tacoma  
15 Power's primary purpose.<sup>74 75</sup>

16 The community, at large, benefits from lower broadband rates due to competition in the  
17 market for broadband services. Competition between Click!'s Internet Service Providers  
18 ("ISPs") partners, over Click!'s open access system, results in fierce competition for Comcast.  
19 This results in lower rates for the region. All of which spurs economic growth and serves to  
20 benefit TPU's other utility purposes.<sup>76 77 78</sup>

21 <sup>71</sup> Drawing on *Budd v. People*, 12 S.Ct. 468, 143 U.S. 517, 36 L.Ed. 247 (1892), quoting *Munn v. Illinois*,  
22 94 U.S. 113, 24 L.Ed. (1877).

23 <sup>72</sup> Similarly, Chattanooga's Electric Power Board ("EPB") experiences savings. In the 2017 annual report,  
24 EPB announced: "Lower Power Rates: Because EPB Fiber Optics pays such substantial allocations and  
access fees to EPB Electric Power, the electric system has been able to avoid a significant electric rate  
increase. As a result, all electric customers are enjoying lower electric rates regardless of whether they are  
EPB Fiber Optics customers or not." Shook Decl 12/12/19 Ex. 38.

25 <sup>73</sup> This provides a "sufficiently close nexus to the purpose and object" of TPU's non-telecommunication  
26 utilities, water and power. *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 696 (1987).

<sup>74</sup> The threshold for nexus is quite low. Utility buying art to beautify its own facilities was sufficient nexus;  
but, utility could not buy art to benefit the general public. "Such projects beautify employee workspaces and  
customer service areas and thereby helped increase the efficiency of workplace operations and acted to the  
benefit of City Light." *Okeson v. City of Seattle*, 130 Wash. App. 814, 125 P.3d 172 (2005) (Okeson II).

<sup>75</sup> Chattanooga, Tennessee operates an electric provider known as the Electric Power Board (EPB). In re  
City of Wilson, North Carolina, 30 FCC Rcd. 2408, 2015 WL 1120113, at \*7 (2015)

<sup>76</sup> Shook Decl. 12/12/19, Ex. 52, see Harvard Study on Broadband confirming lower prices.

1 **C. Municipal Utilities Commonly Provide Telecommunication Utility Services**

2 “The municipal corporation is allowed to go into the business only on the theory that thereby  
3 the public welfare will be subserved.” *Springfield Gas & Elec. Co. v. Springfield*, 257 US 66 -  
4 Supreme Court 1921. Municipal communication systems, owned and operated by non-profit,  
5 community entities, commonly provide broadband services in the modern era.<sup>79</sup>

6 Mr. Shook’s report, A Sampling of Municipal Broadband Utilities in the USA (2019),  
7 reviews 25 such utilities, with a short “description” of each utility’s services, taken directly from  
8 each utility’s own website. **Please See** Shook Decl. 10/30/19 Ex. 18.

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

12 Kansas has a long history of municipal utility operation. When private business  
13 would not or could not serve the utility needs of its citizens, city governments  
14 stepped up to provide essential utility needs – electric, gas, water, wastewater,  
15 stormwater, **and telecommunication services**. These community-owned  
16 utilities are municipal by choice. (Emphasis added)<sup>80</sup>

17 1. Washington’s Public Utility Districts Operate Telecommunication Utilities.<sup>81</sup>

18 Courts may interpret a statute by looking to “other statutes dealing with the same subject  
19 matter.” The PUD statutes are related statutes and helpful when “read together and harmonized.”  
20 *Harmon v. Dept. of Social and Health Services*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998)

21 Municipal ownership and operation of telecommunication systems is common in Washington  
22 State. Public Utility Districts (“PUDs”) are non-profit municipal corporations organized to

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23 <sup>77</sup> Defendant’s Answer, Pg. 6, ¶33. admits competition between local Internet Service Providers.

24 <sup>78</sup> See *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections*  
25 *160A-340 et seq. et al.*, Memorandum Opinion and Order, 30 FCC Rcd 2408, 2434, paras. 52-54 (2015)  
26 (*Municipal Broadband Preemption Order*) (finding Time Warner Cable’s rates lower in Wilson than in  
other areas of North Carolina and that Time Warner Cable improved its BIAS speed offerings after  
Wilson entered the market)

<sup>79</sup> The Executive Office of the President: Community-Based Broadband Solutions The Benefits Of  
Competition And Choice For Community Development And Highspeed Internet Access. (2015) Shook  
Decl. 10/30/19 Exhibit 21, Pg. 14, 15.

<sup>80</sup> KMU website, last accessed 11/19/19, available at <https://www.kmunet.org/page/Benefits?> Also  
available at Perma Link <https://perma.cc/8FDZ-XX8D> and as Shook Decl. 10/??/19 Ex.

<sup>81</sup> See RCW 54.04; also *Wash. Natural Gas Co. v. PUD 1*, 77 Wn.2d 94, 97, 459 P.2d 633 (1969).

1 provide public utility services. With less authority than charter cities like Tacoma, fourteen  
2 PUDs currently operate telecommunication “utility” systems across our state.<sup>82 83 84</sup>

3 Washington’s UTC considers broadband a “utility.”<sup>85</sup> (Shook Decl. 12/12/19 Ex. 41 Pg.1).

4 PUDs recognize broadband is “utility service,” vital to education, economic growth and  
5 employment.”<sup>86</sup> Kitsap County PUD calls “Broadband” a “utility.”

6 PUDs were formed in 1930 to provide equitable access to modern utilities for  
7 Washington's communities. Today, this *includes broadband*  
8 *telecommunications*. Watch our video to see how Kitsap PUD is continuing  
9 the mission and working to bring *this essential utility* to all of Kitsap's  
10 communities. (emphasis added).

11 Municipal broadband utilities are defined in Title 54, RCW -Public Utility Districts, in RCW  
12 54.16.420 “Retail internet service.” (1)(a) "Broadband" means high-speed internet access and  
13 other advanced telecommunications services.<sup>87</sup> (b) "Broadband network" means networks of  
14 deployed telecommunications equipment and technologies necessary to provide broadband.

15 PUDs are regulated, under RCW 54.16.420(15): “A public utility district providing retail  
16 internet service must separately account for any revenues and expenditures.” RCW 54.16.330,  
17 rates may not be “discriminatory or preferential,”: Provision of Telecommunications Services:

18 (2) A public utility district providing **wholesale or retail telecommunications services**  
19 shall ensure that rates, terms, and conditions for such services are not unduly or  
20 unreasonably discriminatory or preferential.

21 Regulation of PUD broadband utilities demonstrates Click! is also a utility, providing  
22 essential utility services. Chapter 35.94 RCW applies to such municipal utility assets.<sup>88</sup>

23 **D. The City’s Telecommunication System Provides Essential Utility Services.**

24 <sup>82</sup> See RCW 54.16.330(1)(a) A public utility district . . . may construct, purchase, acquire, develop . . .  
25 operate, and maintain any telecommunications facilities . . .

26 <sup>83</sup> First class cites conferred with an omnibus grant of power under RCW 35.22.570 .

<sup>84</sup> “district is publicly owned and operated and that it has no profit motive.” *Snohomish County Pub. Util.*  
*Dist. 1 v. Broadview Television.*, 91 Wn.2d 3, 8-9, 586 P.2d 851 (1978)

<sup>85</sup> The Australia’s Commonwealth has funded a National Broadband Network. Every Australian will have  
access to 100 Mbps service. 11 million homes are now ready to connect. Shook Decl. 12/12/19 Ex. 60.

<sup>86</sup> Shook Decl. 12/12/19 Ex. 38. Washington PUD Association (“WPUDA”) website, last accesses on  
11/23/19 “Widely available and reliable access to broadband service is important to our state’s economic  
health, access to education and essential services, and quality of life. Public utility districts play an  
important role in connecting communities by providing access to high-speed broadband service.”

<sup>87</sup> See 47 U.S. Code § 1302 (d)(1) The term “advanced telecommunications capability” is defined, without  
regard to any transmission media or technology, 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>88</sup> Click! services were conceived as a “utility purpose.” Shook Decl. 12/12/19, Ex. 30, Pg. 10, 11.

1 Broadband is commonly considered an essential utility.<sup>89</sup> State, federal and local public policy  
2 support broadband as a municipal utility service.<sup>90</sup> The City describes its own “Mission” in  
3 provision of these services as “vital to our quality of life.” (Shook Decl. 12/12/19, Ex 48, Pg. 8).

4 Washington state’s “Broadband Office,” established in 2019, with “AN ACT Relating to  
5 expanding affordable, resilient broadband service to enable economic development, public  
6 safety, health care, and education” *see* RCW 43.330.532 Broadband office—Established:<sup>91</sup>

7 The legislature finds that: (1) Access to broadband is critical to full participation in  
8 society and the modern economy provides a public benefit to the citizens of  
9 Washington by enabling access to health care, education, and essential services,  
10 providing economic opportunities, and enhancing public health and safety. *Id.*

11 In RCW 43.330.400 the Legislature found broadband technology advancements:

12 [E]nhance economic development and public safety . . . improved health care,  
13 access to consumer and legal services, increased educational and civic participation  
14 opportunities, and a better quality of life for the state's residents.

15 In July 2019, Pierce County Council passed a Resolution stating:

16 "Broadband" - forms the basis of an essential 21st Century infrastructure in our  
17 digital world and economy. It is vital to the economic development and quality of  
18 life for the residents, businesses and institutions of Pierce County and throughout  
19 Washington. (*see* Shook Decl. 12/12/2019 Ex. 37, and for Resolution *see* Ex. 54)

20 Pierce County Council’s 2019 Broadband Study concluded:

21 Broadband is essential, much like education, electricity, and water or sewer. It has  
22 become a primary enabler of economic mobility and prosperity, a “*fourth utility*” *Id*

23 Federal policy supports municipal communications.<sup>92</sup> Benefits are widely known and broadly  
24 promoted. Like roads, broadband is essential infrastructure for a modern economy. Broadband is  
25 a core utility for households, businesses and community institutions.<sup>93 94</sup>

26 <sup>89</sup> *See* 47 U.S. Code § 1301 (2) “Continued progress in the deployment . . . of broadband technology is  
vital to ensuring that our Nation . . . continues to create business and job growth.

<sup>90</sup> RCW 80.36.630 (c) "Broadband service" means any service providing advanced telecommunications  
capability, including internet access and access to high quality voice, data, graphics, or video.

<sup>91</sup> *See* RCW 43.330.532 – Findings 2019 c 365 The legislature finds Broadband (2) “serves a fundamental  
governmental purpose and function and provides a public benefit to the citizens of Washington. Also,

<sup>92</sup> *See* 47 U.S. Code § 1301 (4) “The Federal Government should also recognize and encourage  
complementary State efforts to improve the quality and usefulness of broadband data and should  
encourage . . . the continued growth of broadband services . . . for the . . . the Nation.

<sup>93</sup> Shook Decl. 10/30/19, Ex. 21, *see generally* Report from the executive office of the president:  
Community-Based Broadband -The Benefits Of Competition And Choice For Community Development  
And Highspeed Internet Access. (January 2015).

<sup>94</sup> Shook Decl. 10/30/19 Ex. 22, Pg. 3 -*see generally* A Light in Digital Darkness: Public Broadband after  
Tennessee v. FCC 20 Yale J. L. & Tech. 311 (2018).

1 “Today, **broadband** is taking its place alongside water, sewer and electricity as essential  
2 infrastructure for communities”. Quoting USDA Report (Shook Decl. 10/30/19, Ex. 23).<sup>95</sup>

3 **Broadband is crucial for increased health, educational and economic opportunities,**  
4 **as well as for job and business creation and growth.** Broadband can help close the  
5 digital divide between rural and urban communities. (USDA Rural Development’s  
6 Rural Utilities Programs website, *last visited* 10/30/19)

7 **E. Click! is a Municipal Utility “System Requiring a Vote under Charter 4.6**

8 Charter 4.6 requires a vote upon disposal of a “System.” Click!’s services are not general,  
9 sovereign, government functions, provided for the common good of the general public at large,  
10 to customers who do not request service. Click! is a municipal utility enterprise, providing  
11 proprietary public utility services for the benefit of the Utility and its customers.

12 That Click! is a “System,” operating under an “organizational structure,” with a general  
13 manager providing oversight, is important to note.<sup>96</sup> The “proprietary” services Click! provides  
14 define Click! as an “enterprise.” An enterprise is a system.<sup>97</sup> (Shook Decl 12/12/19, Ex.26)

15 Click!’s services are provided, as a proprietary function, to the Utility’s customers.

16 In the context of utilities, the focus is on whether the utility "operates for the benefit of  
17 its customers, not the general public," or, stated differently, whether it "will [provide  
18 service] to a customer that does not request service." Okeson, 150 Wn.2d at 550. If it  
19 operates to serve customers, a utility is serving a proprietary function.

20 *City of Wenatchee v. Chelan County Public Utility District*, 181 Wn.App. 326, (Div. 3 2014)

21 Washington decisions have held that the operation of a water system or other utility  
22 serving billed customers is a proprietary function. *Russell v. City of Grandview*, 39  
23 Wn.2d 551, 553, 236 P.2d 1061 (1951)

24 **F. The City Confirms Click! is Part of a Utility by Taxing it as a Utility.**

25 Further admission is found in the City’s organization, labeling, treatment and Taxation of  
26 Click!, which show the City has consistently demonstrated its expressed intention that Click! is a  
public utility “system.”<sup>98</sup>

The Washington Constitution provides, in Article VII Section 5: Taxes, How Levied, that “  
every law imposing a tax shall state distinctly the object of the same to which only it shall be

<sup>95</sup> Shook Decl. 10/30/19, Ex. 23. USDA Rural Utilities Service - Telecommunications Programs:

<sup>96</sup> Shook Decl. 10/30/2019, Ex. 9, Pg. 3

<sup>97</sup> “Enterprise” is a “a business organization,” also, “a systematic purposeful activity.” “Systematic” is  
“relating to or consisting of a system. Merriam-Webster.com Dictionary Accessed 11 December 2019

<sup>98</sup> Shook Decl. 10/30/19, Ex. 17, Showing the \$629,716. The City Website states: “City Utility Tax”  
refers to a tax on public service businesses, including businesses that engage in telecommunications

1 applied.” The City’s collects a 7.5% “utility tax” on Click! activities, including broadband  
2 revenue, as a “public utility.” In 2018 this tax amounted to \$629,716 on broadband alone.<sup>99</sup>

3 The City’s taxation of Click! as a public utility, shows an express intent that Click! is a  
4 public utility. The City’s taxation policy, City Charter 4.4, allows taxation “upon any of the City-  
5 operated utilities.” By collecting the City’s B&O “utility tax” on Click!’s broadband services,  
6 City demonstrates for the Court that Click! is a utility in Tacoma. (Shook Decl. 10/30/19, Ex. 9).

7 Tacoma’s utility tax rate increased, from 6% to 7.5%, by Proposition 3. It was a “utility tax  
8 increase,” and Click!’s tax rate increased accordingly. More evidence that Click! is seen as a  
9 utility. (Shook Decl. 12/12/19 Ex. 56, Pgs. 3, 4, 6) (Shook Decl. 10/30/19 Ex. 16).

10 Tacoma’s website provides: “Tax Classifications: Business income is reported under a tax  
11 classification *depending on the type of business activity*.” Click!’s “Business Activity” is a  
12 “*utility*” under the City Tax Code. (Shook Decl. 12/12/19 Ex. 56, Pg. 3).

13 **G. Laws of 1917 and Origin of Right To Vote on Separation of Municipal Utility Assets.**

14 Struggles between private and public interests over municipal utility assets are nothing new.  
15 The instant case is a good example of why the laws of 1917 were established. Private interests,  
16 who might benefit from privatizing municipal utilities, are held in check by the vote.

17 The contemporaneous events, surrounding enactment of the 1917 statute, inform the Court  
18 of the Legislature's intent in requiring voter approval for privatization. A central figure in the  
19 “public power struggles,” between public and private utilities, was the Honorable Homer T.  
20 Bone, Chairman of the 1925 Tacoma City Charter Committee that provided Charter 4.6’s  
21 protective vote. His speech, during his 1932 senate campaign, provides context for interpreting  
22 RCW 35.94 and Charter 4.6.<sup>100</sup> (Shook Decl. 12/12/19, Ex. 67, Pg. 6).

23 The power trust of this nation has junked every standard of decency in its dealing  
24 with the public. It has debauched our institutions of learning and our legislative  
25 bodies. It has brazenly gouged the pocketbooks of the people to maintain a flood  
26 of propaganda calculated to deceive the public mind. Its victims have been  
compelled to pay for the flood of corruption it has loosed upon the country. It has  
set up a long train of abuses and usurpation of power pursuing invariably the

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<sup>99</sup> Pursuant to City Charter 4.4, which permits tax “upon any of the City-operated utilities.” This defines Click! as a utility, given its taxation of as a utility. Res.# 39236 “earnings tax on utility companies.”

<sup>100</sup> Homer Truett Bone, In the early 1920s served as attorney for Port of Tacoma and Tacoma City Light, the city’s municipally owned utility. U.S. Senator, 1932-1944; judge, U.S. Circuit Court of Appeals, Ninth Circuit, San Francisco, 1945-1954.. Shook Decl. 12/12/19, Ex. 67 Pg. 12.

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same object which is reducing the American people to a state of vassalage to the greatest instrument of plunder the world has yet produced.

The people must not only destroy the power of this insolent organization, but *write into the laws of the land* new guards for future security against such monstrous invasions of their rights.

One only need look at the record of the Washington State Legislature to perceive how completely a public body can be dominated by a power trust lobby. The thing has become a stench in the nostrils of decency in the state of Washington which *led to the people of this great state to rise in their wrath and pass the Grange Power measure by a big majority in 1930.* (emphasis added). (Shook Decl. 12/12/19 -Part II Ex. 67 )

RCW 35.94, the Laws of 1917, originally codified as Remington’s Revised Statutes (“RRS”) 1917 c 137 §§ 9512–14, included “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.*” That legislative intent remains today, unchanged. (Shook Decl. 12/12/19 Ex. 33, Pg. 8)

The consequences of privatizing municipal utility property without an approving vote of the public was memorialized in 1942, by our high court’s finding that two wharves, which had been privatized, were “part of” a municipal utility. *Bremerton Municipal League v. Bremer*, 15 Wn.2d 231, 237–39, 130 P.2d 367 (1942). *Bremer*, cited RRS § 9512 thus:

'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.'

The appellants point out that the statute specifically names a long list of utilities, but does not specifically mention wharves and docks. But the statute also says, '*or any similar or dissimilar utility or system.*' This, we think includes any kind of utility in whose operations the public has an interest, that is to say, any public utility.<sup>101</sup>

In 1917, the legislature included a list of public services considered municipal utilities for protection under RCW 35.94. This list was left dramatically open. The Legislators could have simply said “not limited to,” instead, with the emphatic phrase of “*any similar or dissimilar utility or system,*” Legislators were assertive in issuing the inhabitants of a city the right to vote over disposal of their municipal utility property.

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<sup>101</sup> Such struggles continue, now between public broadband and private “broadband trusts,” to this day. Click! is target with equivalent tactics. Shook Decl. 12/12/19, Ex. 45. See Ms. Lachelle letter.

1            *Bremer* found a frivolous “abandonment,” done in anticipation of making the lease in  
2 question, had the “appearance of having *been made to circumvent the provisions* of sections  
3 9512-9514, inclusive, of the statutes.” (Emphasis added). As the *Bremer* court stated:

4            The appellants urge that the wharves had been abandoned. . . .As we read the  
5 record, the Front street wharf was not abandoned--or if so, only in anticipation of  
6 making the lease in question, for the ordinance approving the lease was passed on  
7 first reading by the city commission . . . it may well be doubted whether an  
8 abandonment would be approved which has the appearance of having been made  
9 to circumvent the provisions of sections 9512-9514, inclusive, of the statutes. *Id.*

10           The System telecommunication functionality is not just “similar or dissimilar” to the  
11 communication functionality contemplated in Chapter 35.94, it is identical. The System enables  
12 phone calls, using interconnected VoIP service. A lifesaving 911 call can be made over the  
13 System. The FCC’s Lifeline program subsidizes broadband as an advanced telecommunication  
14 service, with VoIP and broadband treated on the basis as traditional POTS service.<sup>102 103</sup>

15           Low-income consumers receive a standard \$9.25 monthly discount on Lifeline-supported  
16 VoIP or broadband Internet access service (Shook Decl. 12/12/19 Ex. 44).

17           1. Legislative Intent of Surplus and Plain Language of Municipal Utility Surplus Clause

18           RCW 35.94.040 was adopted in 1973, the legislative history shows the City was keenly  
19 interested in the bill. Senator “Slim” Rasmussen, 29<sup>th</sup> District, sponsored the bill, and  
20 Representative R. J. Kelley, Tacoma’s 28<sup>th</sup> District introduced it in the House.<sup>104</sup> TPU Director A. J.  
21 Benedetti, wrote supportive letters and testified on the need for the bill. In his March 5, 1973 letter  
22 to the House of Representatives, and his March 20, 1973 letter to the Chairman and Committee  
23 Members of the Senate Committee on Local Government, the Director acknowledged and agreed

24 <sup>102</sup> See 47 CFR § 54.400 (n) *Supported services*. Voice Telephony services and broadband Internet access  
25 services are supported services for the Lifeline program. The services are recognized equally under the  
26 FCC’s Lifeline program, providing subscribers a discount on monthly telephone service, broadband  
Internet access service, or voice-broadband bundled service. *Also* FCC Order 19-111 Released: November  
14, 2019 Bridging the Digital Divide. *also see* Shook Decl. 12/12/19 Ex. 44, Pg. 3

<sup>103</sup> See 47 CFR § 9.3 Interconnected VoIP service: Enables real-time, two-way voice communications and  
permits users generally to receive calls that originate on the public switched telephone network and to  
terminate calls to the public switched telephone network. VoIP capability includes *Automatic Number  
Identification* (“ANI”). A system that identifies the billing account for a call. For 911 systems, the ANI  
identifies the calling party and may be used as a call back number.

See 47 CFR § 54.400(m) Voice telephony service. “Voice telephony service” is defined as voice grade  
access to the public switched network or its functional equivalent; . . . access to the emergency services  
provided by local government or other public safety organizations, such as 911 and enhanced 911. . .

<sup>104</sup> House Bill 939, and Senate Bill 2835 Shook Decl. 12/12/19, Ex. 33, Pgs. 23, 31

1 with the importance of “*the confirming approval of the voters*” for surplus of “*operating*” utility  
2 assets.<sup>105</sup>

3 Director Benedetti assured Legislators that, “*Such procedure, of course, is desirable* when in  
4 fact all or *an integral part of an operating utility* is to be so disposed of.” The Director added:

5 This bill will accomplish procedural flexibility in such transactions without  
6 repealing the formalized procedures required in the situations involving utility  
operating plant and properties. (*see* Shook Decl. 12/12/19, Ex. 33, Pgs. 5, 6).

7 The Local Government Committee took up the matter. In an April 6, 1973 memo, Legislative  
8 Executive Secretary J.W. Gunther wrote Chairman Rep. Haussler, explaining the purpose of the bill.

9 Under the existing law, there is a long, detailed requirement for the calling of bids,  
10 passing of resolutions and all this appears to be rather cumbersome for the purpose  
of disposing of surplus properties. (*see* Shook Decl. 12/12/19, Ex. 33, Pg. 18)

11 At the first reading of the bill in the Senate, on March 14, 1973, surplus assets were defined by  
12 the term “*unusable property*,” and real estate defined as “unimproved lands.” In a hand written  
13 note, the terms “unusable” and “unimproved” were identified for removal as “*superfluous*,”  
14 indicating the word “surplus” was clear enough.<sup>106</sup> (Shook Decl. 12/12/19, Ex. 33, Pg. 3)

15 On March 16, 1973, Mr. Nolan, Deputy City Attorney for TPU, spoke to the House Local  
16 Government committee and assured Legislators this bill would simply allow TPU “*the same*  
17 *privileges*” for surplus enjoyed by Public Utility Districts. (Shook Decl. 12/12/19 Ex. 33, Pg. 38)

18 A direct comparison to the PUD “*privileges*,” and assurance of seeking identical limitations on  
19 surplus authority, was also cited in Director Benedetti’s letters. The Director confirmed for the  
20 Legislators, that the authority to surplus was “consistent with that *long enjoyed by the Public Utility*  
21 *Districts* under RCW 54.16.180.” (Shook Decl. 12/12/19 Ex. 33, Pg. 18 ).

22 The Director’s comparison was fair. PUDs and “cities and towns” are municipal corporations  
23 with “the same powers” and “same duties” for disposal of utility assets. RCW 54.16.180 (9)

24 ***Districts are municipal corporations for the purposes of this section.*** A commission  
25 shall be held to be the legislative body, a president and secretary shall have the same  
26 powers and perform the same duties as a mayor and city clerk, and the district resolutions  
shall be held to be ordinances ***within the meaning of statutes governing the sale, lease,  
or other disposal of public utilities owned by cities and towns.*** (emphasis added).

Which makes sense, given both surplus statutes, RCW 35.94.040 and RCW 54.16.180(2)(b),

<sup>105</sup> Shook Decl. 12/12/19, Ex. 33, Pgs. 5, 6.

<sup>106</sup> Shook Decl. 12/12/19, Ex. 33, Pgs. 22. - terms “unusable” and “unimproved” as superfluous.

1 share a common origin, *in the Laws of 1917* and the same protective statues in RRS §§ 9512 -9514.

2 From 1945 to 1955, the City and PUDs shared identical statutory authority for disposal of their  
3 utility property. Surplus was regulated in *exactly the same way*, under *exactly the same laws*. The  
4 Laws of 1945. House Bill 342, Chapter 143, Section 6(m), Page 413, specifically linked PUD's and  
5 the City's process for the sale, lease or disposal of the people's assets.<sup>107</sup>

6 It is, and shall be lawful for any public utility district organized hereunder to sell and  
7 convey, lease or otherwise dispose of all or any part of the works, plants, systems,  
8 utilities and properties authorized by this act and owned by it after proceedings and  
9 approval by the voters of the district as provided for in chapter 137, Laws of 1917,  
(sections 9512, 9513 and 9514 of Remington's Revised Statutes of Washington).

10 Only two amendments have ever been made to the surplus language in the 1945 statute. The  
11 first came in 1955, when PUDs gained “flexibility in procedure,” with surplus authority, With the  
12 newly created RCW “chapter and section” numbering system, PUDs were regulated under Title 54,  
13 when Legislators first modified RRS §§ 9512 -9514's cumbersome process for disposal of surplus  
14 utility property in the Laws of 1955, Senate Bill 367. Thus was created RCW 54.16.180. <sup>108</sup>

15 To this day, RCW 54.16.180 represents the unmistakable legislative intent regarding the term  
16 “surplus” in relationship to municipal utility property under RRS §§ 9512 -9514.

17 It would be 18 more years until Tacoma gained surplus authority. During that time, the PUDs  
18 surplus statue remained unchanged. In 1973 RCW 54.16.180 was the template for the same  
19 surplus authority Tacoma now sought for improving the same “rather cumbersome” process.<sup>109</sup>

20 The Tacoma Utility Director and two Tacoma City Attorneys testified that the surplus  
21 authority they sought was “the same privilege,” “consistent with that long enjoyed by the Public  
22 Utility Districts under RCW 54.16.180.”<sup>110</sup> Here is RCW 54.16.180 as it appeared in 1973. This  
23 is the surplus authority Tacoma sought. Legislative intent for surplus under RRS § 9512 is here.

24 That a district may sell, convey, lease, or otherwise dispose of all *or any part of the*  
25 *property owned by it*, may sell, convey, lease, or otherwise dispose of to any person or  
26 public body, any part, either within or without its boundaries, which has become  
unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the  
system and which is no longer necessary, material to, and useful in such operations,  
without the approval of the voters. (*see* Laws of 1955, Ch. 390, Pg. 1685.) (emph. added)

<sup>107</sup> The Laws of 1945, Ch. 143 Pg. 413. Shook Decl. 12/12/19, Ex. 33, Pg. 5.

<sup>108</sup> See the Laws of 1955, Ch. 390, S.B. 367, Section 19, Pg. 1685. Shook Decl. 12/12/19, Ex. 33, Pg. 4

<sup>109</sup> Shook Decl. 12/12/19, Ex. 33, Pg. 18 – Legislative Executive Secretary J.W. Gunther wrote Chairman  
Rep. Haussler, explaining the purpose of the bill.

<sup>110</sup> Quoting Director Benedetti's letters, *surpa..* All of this represents legislative intent for surplus.

1 This 1973 version of RCW 54.16.180 shows the legislative intent for “surplus” under RCW  
2 35.94.040. This is the very statute which RCW 35.94.040 was intended to replicate. It was  
3 presented to Legislators, as a direct comparison and a basis for their unanimous adoption of  
4 RCW 35.94.040. It represents what Legislators intended to accomplish, in 1973, by modifying  
5 the 55-year old legacy of RRS §§ 9512 -9514. Legislative intent for “surplus” under RCW  
6 35.95.040 is revealed for the Court in this 1973 version of RCW 54.16.180.

7 Understanding the legislative intent behind RCW 35.94.040 provides context for statutory  
8 interpretation of “surplus” in the instant case. The statutes terms, such as “obsolete,” “worn out,”  
9 “unserviceable,” “no longer useful” or “unfit to be used” in the operation of the system, do not  
10 describe a state-of-the-art fiber optic system, earning \$25 million a year, and being “leased” for 40  
11 years, with a reversionary interest. The Court cannot substitute its judgement for that of the  
12 legislators. Click!’s status, as an operational enterprise, simply does not meet the Legislator’s intent  
13 of the term “surplus.” When considering the meaning of “surplus,” associated words placed in the  
14 statute control the meaning of a word. *Cito v. Rios*, 3 Wn. App. 2d 748, 759, 418 P.3d 811, review  
15 denied, 191 Wn.2d 1017, 426 P.3d 747 (2018).

16 Only one other change has ever been made to the 1955 version of RCW 54.16.180. That came  
17 in 2008, with the Laws of 2008, Ch. 198, Pg. 8, Sec. 5, and further confirms legislative intent over  
18 disposal of surplus assets. Legislators made “surplus” even clearer, by adding the emphatic phrase,  
19 “**no longer useful in such operations, to any person or public body**.” The statute reads today: <sup>111</sup>

20 RCW 54.16.180 (2) A district may, without the approval of the voters, sell, convey, lease,  
21 or otherwise dispose of all or any part of the property . . . which has become  
22 unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the  
23 system and which is no longer necessary, material to, **and useful in such operations, to  
24 any person or public body.** (emphasis added).

25 The words, “**useful in such operations to any person or public body**” shows legislative intent to  
26 protect assets from “**any person**” that would use productive public utility assets to continue  
providing the same utility service, or “such operations.”<sup>112</sup> In Click!’s case, the System is absolutely  
“**useful.**” The private buyer will provide exactly the same “**operations,**” for the next 40 years.

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<sup>111</sup> Substitute House Bill 2639

<sup>112</sup> Consider a water pipeline, or water system, for example. The phrase “**useful in such operations**” would prohibit “surplus” from being applied to assets being sold to someone who would use them to continue supplying water. They pipeline could be salvaged for scrap, but not continue in public service.

1 “In resolving the meaning of a statutory term, we adopt the interpretation that best advances the  
2 legislative purpose.” *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, 184  
3 Wn.2d 428, 437, 359 P.3d 753 (2015), and find the statutes plain meaning as “derived from the  
4 context of the entire act as well as any ‘related statutes which disclose legislative intent about the  
5 provision in question.’” *Jametsky*, 179 Wn.2d at 762 (quoting *Dep’t of Ecology v. Campbell &*  
6 *Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

7 **H. Click! Serves a Useful Purpose and Disposal by Surplus is Substantive Ultra Vires..**

8 Click!’s fiber optic cable is used for data transport. All of the “fiber” is sheathed within one  
9 “outer jacket.” It is essentially one pipe consisting of a number of “tubes,” with each tube having  
10 a specific number of fiber “strands.” *See* (Shook Decl. 12/12/19 Ex. 31, Pg. 3)

11 On Click!’s system, there are 12 fiber optic strands in each “tube.” ***Click! currently uses one***  
12 ***“tube” for all Click!’s commercial services.*** There are *15 additional* “tubes” of dark fiber,  
13 representing the communities’ potential for future use. Click!’s current use of this fiber optic  
14 “backbone” is shown in “purple” on the City’s slide presentation from October 29, 2019.<sup>113</sup>

15 Privatization not only transfers complete control over the twelve strands of fiber currently  
16 used by Click!, but also vests complete control all over the ***additional 9 tubes, or 108 additional***  
17 ***strands of dark fiber***, needed for the community’s access to broadband services in the future.  
18 Explosive growth in data usage and broadband telecommunications is upon us. The community  
19 will require all this infrastructure and more. (Shook Decl. 12/12/19 Ex. 31, Pg. 14).

20 Equally as important are the DNS servers, DHCP servers, Caching servers, routers, switches,  
21 hubs, nodes, and intellectual property that enable the system. A most notable example an asset  
22 that is obviously not surplus is the IPv4 address, included in the CBTA. The agreement provides,  
23 in connection with the IRU, Tacoma Power will assign IPv4 addresses to Operator from CIDR  
24 131.191.0.0/17 and 192.173.160.0/20.”<sup>114</sup>

25 IP Addresses are numbers owned by the City and assigned to each customer device via  
26 Click!’s DHCP server, allowing devices to connect directly to the world wide web. The world

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<sup>113</sup> *See* Shook Decl. 12/12/19 Ex. 31, Pg. 3 All required in increasingly digital world, to connect with friends and family, access goods and services. The IDC predicts the Global Datasphere, estimated to be 33 ZB in 2018, will grow to 175 ZB by 2025.

<sup>114</sup> The City owns the valuable IPv4 addresses included in the IRU. These are not “surplus.” All devices that connect to the Internet require an Internet Protocol (IP) address and IP addresses are a valuable commodity. Demand has exhausted the global supply of IPv4 addresses.

1 supply of IPv4 address is exhausted. They are a precious and valuable commodity, with a long  
2 waiting list of over a year. *See* Shook Decl. 12/12/19 Ex. 65.<sup>115</sup>

3 Defendant admits Click! is part of a municipal utility, providing a public service. These  
4 services are “municipal utility services.” If portions of Click! qualify as the “works, plant, *or*  
5 *system* owned by it or ***any part thereof***,” then vesting via surplus is ultra vires. A direct violation of  
6 statute. *Finch v. Matthews*, 74 Wash.2d 161, 172, 443 P.2d 833 (1968)

7 Property “originally acquired for public utility purposes” is not surplus, when that property  
8 continues providing “public utility service.” All the assets being conveyed were “originally  
9 acquired for public utility purposes.” The System was established to deliver telecommunication  
10 services to TPU customers, diversify TPU revenue, drive economic growth and offset costs for  
11 TPU. The property is not idle, or its operations discontinued. If privatized, the System would  
12 continue providing TPU customers with the same services. A property is not surplus, when  
13 continuing to provide the same municipal utility services.<sup>116 117</sup>

14 The City’s Resolution 40467, declaring surplus utility-owned property, inventory,  
15 equipment, and vehicles allocated to Click! Network, enables Resolution 40468, which  
16 authorizing execution of the CBTA to convey ownership of Click!. Together these Resolutions  
17 circumvent the public vote requirement in RCW 35.94.020. No bidding has been occurred in the  
18 surplus process, as is generally seen. (Shook Decl. 12/12/19, ¶ 1, and City Policy Ex. 54, Pg. 4)

19 A municipality does not have unbounded discretion to declare a utility surplus. *South Tacoma*  
20 *Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010) (governmental acts without authority  
21 are *ultra vires*). A municipality’s action is void, if contrary to law.

22 City’s “Declaration of Surplus Property” does not meet the standard of “surplus” under RCW  
23 35.94.040, which applies to property “not required for providing continued public utility  
24 service.” Since Click!’s “surplus” property will continue providing the same public utility  
25 broadband services to the same public utility customers, Council’s surplus Resolutions is an ultra  
26 vires application of the statute. A “contract contrary to the terms and policy of a legislative  
enactment is illegal and unenforceable. *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233

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<sup>115</sup> Cable modem customers receive 5 routable IP addresses with service, and FTTH users get 1,

<sup>116</sup> Imagine a public school being declared as “surplus” and privatized; but, in fact students still in attendance, only forced to pay whatever tuition of lunch program charges the private company requires.

<sup>117</sup> Under RCW 35.94.040, the System itself is required for “providing continued public utility service.”

1 P.3d 871 (2010) , *Hederman v. George*, 35 Wash.2d 357, 362, 212 P.2d 841 (1949); *State v. Nw.*  
2 *Magnesite Co.*, 28 Wash.2d 1, 26-27, 182 P.2d 643 (1947).

3 The City’s authority in exercising its proprietary power is limited. Tacoma may not act  
4 beyond the purposes of the statutory grant of power, *State ex rel. PUD 1 v. Wylie*, 28 Wash.2d  
5 113, 182 P.2d 706 (1947), or contrary to express statutory or constitutional limitations.  
6 *Metropolitan Seattle v. Seattle*, 57 Wash.2d 446, 459-60, 357 P.2d 863 (1960);

7 "Ultra vires acts are those done wholly without legal authorization or in direct violation of  
8 existing statutes." *Metro. Park Dist. of Tacoma v. State*, 85 Wash.2d 821, 825, 539 P.2d 854 (1975)

9 Click!’s public broadband system provides a valuable and “effective” way for TPU customers  
10 to connect to the Internet. Without Click!, “continued effective utility service” is impossible.  
11 Circumventing this process is a substantive violation of the statue and *ultra vires* act., rendering the  
12 contract void ab initio. *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wash.2d 488, 499,  
13 886 P.2d 147 (1994) This “right to vote” prevents corrupt disposal of public assets. Failure to allow  
14 the vote is an ultra vires action.

15 “Historically, the unauthorized contracts of both corporate and governmental  
16 entities, which by their nature represent the interests of groups of individuals,  
17 have been rendered void and unenforceable under the ultra vires doctrine.” *Noel*  
18 *v. Cole*, 98 Wash.2d 375, 655 P.2d 245 (1982).

19 Also, “where the procedure followed has not been in accordance with law, proceedings had  
20 thereunder must be held void,,” *Jones v. City of Centralia*, 157 Wash. 194, 289 P. 3, (1930), and,  
21 “the lease here in question was void ab initio, and that the warrants issued in payment  
22 therefor are invalid, because both the making of the lease and the issuance of the  
23 warrants, without the assent of the voters, were ultra vires of the town council.” *See*  
24 *State v. Town of Newport*, 70 Wash. 286, 126 P. 637, (1912)

25 The doctrine of ultra vires applies to governmental action to "protect the citizens and taxpayers  
26 from unjust, ill-considered, or extortionate contracts, or those showing favoritism" *see 10 E.*  
27 *McQuillin*, Municipal Corporations § 29.02, at 200 (3d ed. 1981)

28 A municipal election cannot be avoided in conveying a going concern. Vesting a municipal  
29 utility’s telecommunications system, with in-service assets, active customer accounts, under  
30 surplus, is fundamentally a legal question of statutory interpretation. No factual issues require  
31 determination. Privatization removes all public oversight of operations and rates. As a sale,  
32 lease, and/or disposal of Click! Mr. Shook is entitled to the relief requested.

33 **I. Good Public Policy Prevents Ultra Vires Act Circumventing People Right to Vote.**

34 Plaintiff Mitchell Shook’s Motion For Partial  
35 Summary Judgement. NO. 19-2-11506-3

Mitchell Shook, Plaintiff  
3624 6<sup>th</sup> Ave Suite C, Tacoma, WA 98406

1 The right to vote is curative of all ills and the fundamental basis of all democracy.. See  
2 *Madison v. State*, 161 Wn.2d 85, 98, 163 P.3d 757 (2007). A vote is mandatory in this case.  
3 Preventing the ultra vires destruction of that right is good public policy.

4 Council’s authority is expressly limited, by extraordinary Charter and state statutory  
5 requirements for a public vote. Express authority is in the electorate. Circumventing the law  
6 cannot be validated. The matter must be “submitted to the voters of the city for their approval or  
7 rejection at the next general election.”

8 If Click! is surplus, any private company could pilfer the public treasury by deploying large  
9 campaign contributions to sway policymakers into privatizing utility assets. No such loophole  
10 should be opened by the Court. Protecting the people’s property from plunder and preserving  
11 them for the people who paid for them, is the purpose of the policies in RCW 35.94. The Court  
12 would be well informed by taking judicial notice of the fact that municipal utility ownership  
13 (“MO”) has always faced fierce opposition and criticism from entrenched powerful private  
14 interests facing municipal competition. <sup>118</sup> (Shook Decl. 12/12/19, -Part II, Ex. 67 )

15 When all the facts are considered together, the business plan, the Ordinance establishing  
16 Click!, the abundant statutory and judicial authority cited in City’s 1996 and 1997 Memorandum  
17 for the Summary Judgement, the legislative intent and history of RRS §9512 in Chapter 35.94  
18 RCW, the common definitions of “system,” “utility,” the bare fact Click! is owned and operated  
19 by a utility, taxed as a utility, provides essential service to 35,000 active accounts, earns \$25  
20 Million annually in revenue, has significant brand recognition, for all these reasons, Click! is  
21 obviously a municipal utility system providing the same services for which it was established.

22 The surplus resolution has every *appearance of having been made to circumvent the*  
23 *provision of Chapter 35.94 RCW*. It is procedurally *ultra vires*. The public’s investment in these  
24 assets must be protected, especially from the very same powerful private interests who opposed  
25 the creation of the system in the first place and would profit from privatization of these assets.<sup>119</sup>

26 <sup>118</sup> Consider the contemporary opposition, in 1917 and 1925, from private municipal rail, gas, telephone,  
water and power companies at the time Chapter 35.94 RCW and the Tacoma City Charter were written.  
Propaganda published at the time demonstrate the lobbying tactics, and motives, of those opposing to the  
hated “MO” (municipal ownership). For examples, see Shook Decl., 12/12/19 PART II Ex. 67.

<sup>119</sup> Thanks in large part to substantial lobbying efforts, twenty-one states have legislative barrier to  
municipal broadband networks Shook Decl. 12/12/19, Ex. 46, Pg. 601. Casting a Wider Net: How And  
Why State Laws Restricting Municipal Broadband Networks Must Be Modified. Many Communities see  
existing broadband offerings not meeting needs and are building municipal broadband networks.

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When private companies cannot, or will not, deliver the essential infrastructure required for participating in modern society, municipalities must have the right to take such important matters into their own hands, as the citizens of Tacoma did, over 20 years ago, by creating, arguably, the nation’s first municipal broadband public utility system.

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

Defendant’s surplus declaration skirts the law and this Court must prevent disposal of an entire utility system without a vote of the people. Such a determination supports important public policy and protects voter rights.<sup>120</sup>

The laws of 1917 plainly encompass telecommunication systems such as Click!. On its face, the statute is not ambiguous. The people’s assets are serving a useful public purpose and require protection from wrongful privatization. Government officials are “trustees” and the electorate’s right to vote ensures accountability. Privatization requires a vote of the people.

**Conclusion**

For the forgoing reasons, the Court should grant Mr. Shook’s motion and declare City’s surplus resolution ultra vires

Respectfully submitted this 12<sup>th</sup> day of December 2019.



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Mitchell Shook  
Plaintiff

<sup>120</sup> Fortunately, the CBTA anticipates nullification of the IRU Agreement by the Court: There is no harm. The Agreement provides “In the event that, prior to Transfer of Operational Control, a court of competent jurisdiction issues an order nullifying or invalidating the IRU Agreement or restraining or enjoining either Party from executing the IRU Agreement . . . either Party shall have the right to terminate this Agreement, which shall be Party’s sole remedy.

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**NO: 19-2-11506-3**

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

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

DARREL BOWMAN,  
Plaintiff,  
v.  
CITY OF TACOMA,  
Defendant.

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

**PLAINTIFF MITCHELL SHOOK'S  
RESPONSE TO DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT**

MITCHELL SHOOK,  
Plaintiff Pro Se,  
v.  
CITY OF TACOMA,  
Defendant.

I. INTRODUCTION

The definition of “public utility” is found in the Laws of 1917, House Bill 337, or Remington RRS § 9512 -9514, (“§ 9512”) now Chapter 35.94 RCW, titled: “An Act authorizing cities and towns to lease or sell any municipally-owned” utilities.<sup>1</sup> Providentially, Legislators provided a list of “utilities” protected from privatization by the public vote. The long list included “telegraph and telephone lines and plants and any other . . . system similar or dissimilar in character.”<sup>2</sup>

CHAPTER 137.

[H. B. 337.]

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.

Section 1 provided:

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. . . (emphasis added)

In 1945, this long list of municipally-owned utilities was “rewritten for brevity” by the Code Committee. <sup>3</sup> This “abbreviation” removed “telephone or telegraph plant and lines,” along with the long list and the emphatic language, “any similar or dissimilar utility.” <sup>4</sup>

Even broader language was substituted, with “any public utility works, plant or system owned by it or any part thereof. . .” With this one abbreviation, the “Laws of 1917” entered the RCW under Chapter 80, see image below. That language remains unchanged today.

<sup>1</sup> Passed by the Senate on March 6, 1917 and approved by the Governor March 15, 1917.  
<sup>2</sup> Shook Decl. 12/30/19, Ex.81, Reviser's Notes Volume 2, Revised Code of Washington, 1946, At 80-7, (stating RRS § 9512 was "rewritten for brevity.")  
<sup>3</sup> Shook Decl. 12/30/19, Ex. 81, Laws of 1942, Ch. 252, Sec. 1. (“continuing Code Committee with full power of revision and codification of the laws.”)  
<sup>4</sup> Important to note, because “Telegraph and Telephone” later becomes “Telecommunication” and the Ordinance creating Click!, and Court cases approving it, created a “Telecommunication System.”

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

In 1985, the terms “*Telegraph and telephone*” were broadly replaced by the modern term “*Telecommunications*.”<sup>5</sup> Consequently, Chapter 35.94 (“Laws of 1917”) now encompass “Telecommunication,” as a municipal “utility.” Click! is a “*municipally-owned*” telecommunication (“Telecom”) system, hence protected from privatization by the public vote.

**WASHINGTON LAWS, 1985**

**Ch. 450**

Sec. 17. Section 80.36.030, chapter 14, Laws of 1961 and RCW 80-36.030 are each amended to read as follows:

Such (~~telegraph or telephone~~) telecommunications company may appropriate so much land as may be actually necessary for its telecommunications line (~~of telegraph or telephone~~), with the right to enter upon lands

Try as they may to recast the facts, Defendant’s attempt to convert a cancelled pilot meter program into a surplus declaration over Click!’s entire telecommunication enterprise runs headlong into the undisputed material fact that Click! was expressly created, designed and built to fulfill the community’s pressing need for an advanced “Telecommunication System.”

Click!’s services would continue under privatization, therefore Click! is “*required for providing continued public utility service*.”<sup>6</sup> Given Click!’s system is “useful” and “*required*” for continued service, Click! is not surplus. Privatization requires a vote of the people.<sup>7</sup>

The careful planning and construction of Click! included costly investments to secure “Additional Capacity,” which Click! utilizes and relies on today. Click! paid for these improvements, and continues to pay more than its share.<sup>8</sup> Defendant asserts Click! was built for Tacoma Power’s (“Power’s”) abandoned pilot meter program. This is misleading and wrong.

<sup>5</sup> Shook Decl. 12/12/19, Ex. 61, (examples of substitution). See Shook’s MPSJ, Pg. 10. See also Laws of 1985, Ch. 450, Senate Bill No. 3305, Pgs. 1978 -1995 (examples).

<sup>6</sup> RCW 35.94.040 limits surplus, with: “and is not required for providing continued public utility service.”

<sup>7</sup> Legislative intent for surplus under the Laws of 1917 is found in the PUD laws of 1945.

<sup>8</sup> See Shook Decl. 12/30/19, ¶ 1, (shared costs), E.g. Ex. 76, Operational Summaries (depreciation costs).

1 Defendant has substituted its judgment upon matters within the province of the City's  
2 Freeholders and State Legislators, who long ago determined the right to dispose of Tacoma's  
3 municipal utility assets rests in the electorate. There is no justification for Defendant's attempt to  
4 circumvent laws placing an express limitation on City's authority.

5 Citizens of Tacoma are not unique in reserving the right to vote on disposal of their municipal  
6 utility assets, *see Clark v. City of South Haven*, 8 Mich. App. 74 (1967), 153 N.W.2d 669

7 [W]hen the voters of South Haven granted the privilege to generate power, they  
8 were not content to divest themselves of every managerial function normally  
9 associated with the operation of a business concern. By their city charter they  
10 have retained express power over the discontinuance of their public utility. The  
11 contract in question has the effect of violating section 13.5 of the charter for the  
12 city of South Haven and is therefore void unless approved by the voters as  
13 required by the charter."

14 Click! ("System") was created and funded as a "utility." The City's detailed 1996 plan, for a  
15 municipally-owned advanced telecom system, was a revolutionary and controversial concept.  
16 Authority to establish and fund the utility was blessed by two Court Orders.<sup>9</sup> Click! was born,  
17 built, bought and paid for as a utility system.<sup>10</sup> Municipal competition was divisive when first  
18 proposed.<sup>11</sup> It remains controversial across our nation today.<sup>12</sup> Power Superintendent at the  
19 time, Steve Klein, described the opposition in those early days,

20 My sense -- and this is my sense when I was there, and it's fairly accurate -- is the  
21 people in Click were wonderful. The service was wonderful. It was a local  
22 utility trying to do and doing good. How do you attack something like that? And  
23 so basically the opposition came up with, well, how do you attack it? You make  
24 people feel like they're being ripped off. And so every so many years, this theme  
25 would build up again, and here -- here it was again. (Shook Decl, Ex. 75, Pg. 19)

26 <sup>9</sup> In *City of Tacoma v. Taxpayers and Ratepayers of Tacoma*, 96-2-09938-0. Superior Court issued two  
orders, one authorizing the System (1996 Order), the other authorizing utility bonds to fund it (1997  
Order). Taxpayers argued Click! was general government's obligation, and a public vote was required to  
fund the System. City prevailed, arguing the System was a utility and must be funded by utility bonds.  
Relying on that decision, for 20 years, City is legally and equitably estopped from alleging otherwise.

<sup>10</sup> Shook Decl. 10/30/19, ex. 11, The enabling Ordinance 25930, creating Click!, cited authority in RCW  
35.95.020. Also, in Section 1.3, it cited the City Charter (as authority for funding Click! as a "utility."  
("Charter § 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").

<sup>11</sup> Nineteen states have laws restricting municipalities to from establishing telecommunication utilities,  
such as Click!. The Supreme Court confirmed state authority to preempt municipal competition in *Nixon v.*  
*Mo. Mun. League*, 541 U.S. 125, 140-41 (2004). The FCC attempted to preempt such state laws, but was  
overruled in *Tennessee v. FCC*, 832 F.3d 597, 610 (6th Cir. 2016).

<sup>12</sup> Shook Decl. 12/30/19, Ex. 69, Broad-Banned: The FCC's Preemption of State Limits on Municipal  
Broadband, Vol. 68 Emory L.J. 407 (2018). Municipal utilities threaten incumbent monopoly's profits  
("Broadband Trusts"), The Broadband Trusts lobby fiercely to preserve their entrenched market power.

1 Presenting no issue of material fact, feigning confusion over the meaning of utility, Defendant  
2 urges we harmonize Chapter 35.94 RCW’s clear language with Chapter 35.92, and search in vain  
3 for imagined support in three unrelated cases, *Issaquah, King County* and *Clark*.<sup>13</sup> Yet, the  
4 meaning of “public utility” and Charter §4.6 is fully well known to Defendant, as confirmed by  
5 Defendants’ own Resolution U-10828 citing the vote requirement, here: <sup>14</sup>

6  **AMENDED RESOLUTION NO. U-10828**  
7 1 A RESOLUTION relating to Click! Network; authorizing Click! to prepare a  
8 2 business plan to provide, in addition to retail cable television, retail  
9 3 internet services including voice over data internet (“VoIP”) protocol,  
10 20 commercial broadband and Gigabit service (“Retail Services”).  
11 21 WHEREAS the City Charter Section 4.6 requires a vote of the people  
12 22 before the City may sell, lease, or dispose of any utility system, or parts thereof  
13 essential to continued effective utility service, and

11 Defendant knows the definition of utility, and that the laws protecting municipally-owned  
12 utility assets from disposal require a public vote.<sup>15</sup> This Court can do justice, by upholding the  
13 law and reminding them of their solemn duty on this crucial public policy matter. *See Fondren* <sup>16</sup>

## 14 II. COUNTERSTATEMENT OF FACTS

15 Shook incorporates herein by this reference all facts set forth in this Motion and Declaration  
16 in Support, and in Plf.[’s] Motion for Partial Summary Judgment (“MPSJ”), and Mo. for TRO,  
17 and all declarations filed in this matter. Following is a summary of facts relevant to Def[’s]  
18 arguments in response to Defendant’s cross MPSJ.

19 Click! is a self-described “Telecommunications System,” providing competitive Telecom  
20 services, as shown in this 2001Click! press release:<sup>17</sup>

21 **July 24, 2001**  
22 Click! Network is an operating section of Tacoma Power and is the nation’s largest municipally  
23 owned telecommunications system. Click! provides competitive telecommunications services in  
24 the City of Tacoma, including cable television, high-speed data transport and Internet services.  
More information about Click! services is available at [www.click-network.com](http://www.click-network.com)  
or by calling 253-502-8900.  
**Contact:** Diane Lachel, 253-502-8537; Cyndi Wikstrom, 253-502-8763

25 <sup>13</sup> Def.[’s] MSJ, Pg. 14. *Issaquah v. Teleprompter, Inc.*, 93 Wn.2d 567 (1980), *King County v. King*  
*County Water Districts et. al.*, Wash. No. 96360-6, Slip Op. (December 5, 2019). *Clark v. Olson*, 177  
26 Wash. 237 (1934).

<sup>14</sup> Shook Decl. 12/12/19, Ex. 32. Pg. 1, Ln. 20. ( Def.[’s] Resolution citing public right to vote. ).

<sup>15</sup> “we do not construe a statute that is unambiguous.” *Food Servs. of Am. v. Royal Heights, Inc.*, 123  
Wn.2d 779, 784-85, (1994).

<sup>16</sup> *Fondren v. Klickitat County*, 79 Wn. App. 850, 856, 905 P.2d 928 (1995) (decisions of the State  
Supreme Court are binding on all lower state courts). *See also, Bremerton Municipal League v. Bremer*,  
130 P.2d 367, 15 Wn.2d 231 (Wash. 1942).

<sup>17</sup> Shook Decl. 12/30/19, Ex. 83. (taken from Click! website).

1 Click! was carefully built, based on an extensive “Telecommunications Study” and Business  
2 Plan to provide crucial telecommunication services for the community. Click!’s vital services are  
3 not rendered “surplus” by a failed pilot meter program.

4 Considerable investment was made in the additional equipment and infrastructure needed for  
5 Click!’s essential system, to create the vital services the community relies on. Over \$69 million  
6 was appropriated in 1997 alone.<sup>18</sup> Approximately \$200 million in historical costs are invested in  
7 Click!’s System.<sup>19</sup> *E.g.* Some of Click!’s core routers cost over \$1 million each.<sup>20</sup>

8 Click!’s services are enjoyed by governmental, commercial and residential customers alike.<sup>21</sup>

9 Before embarking on this major undertaking, Tacoma Power pulled together a  
10 panel of fourteen experts from an array of disciplines to review and pass on a final  
11 business plan. That plan, which was given the stamp of approval by the panel,  
12 called for retail and wholesale applications.<sup>22</sup>

13 As the Telecommunication Study concluded, “*One could hope. . .*”<sup>23</sup>

14 [T]he local market has a growing need for better telecommunications access.  
15 Despite growing local demand, the incumbent wire line service providers have  
16 stated that their investments in the local infrastructure will either slow without  
17 significant rate increases or be halted all together. *One could hope* that other  
18 companies would step forward and create a modem telecommunications system  
19 throughout our community but the prospects for that occurring appear dim.

20 Click! was built out of necessity, as an alternative to the incumbent monopoly, who refused  
21 to upgrade their “*crummy*” system and provide the telecom services Tacoma’s policymakers  
22 believed were required for economic growth in the information age.<sup>24</sup>

23 Click! provides “lit” wholesale telecommunication service.<sup>25</sup> It enables retail ISP partners to  
24 provide BIAS.<sup>26</sup> Cable modems are owned by Click!’s ISP partners, or by the ISP’s customers,  
25 the “end-users.”<sup>27</sup> <sup>28</sup> On Click!’s DOCSIS, coaxial, portion of telecom platform, Click! installs

26 <sup>18</sup> Shook Decl. 12/30/19, Ex. 85 Tacoma Ord.#26141, 10/28/97, ( additional \$67 million funding ).

27 <sup>19</sup> Shook Decl. 12/30/19, Ex. 75, Pg. 1 Click! Asset Study, 3/18/13, by Rates, Planning & Analysis Dept.

28 <sup>20</sup> Shook Decl. 12/30/19, ¶ 2. Ex. 73. (Board’s Cisco CRB-8 Resolution U-10884, router \$1,034,100).

29 <sup>21</sup> Shook Decl. 12/12/19 Ex. 64 ( Click! provides data-transport and broadband to Tacoma’s Libraries).

30 <sup>22</sup> Shook Decl. 12/30/19 Ex. 70, (“Creating Capacity and Competition in Broadband Telecommunications:  
31 The City of Tacoma’s Initiative,” April 2000. Mayor Baarsma and Prof. Ross Singleton. ).

32 <sup>23</sup> Shook Decl. 10/30/19. Ex. 10, at Pg. 186 of 398, (Conclusions of Telecommunications Business Plan).

33 <sup>24</sup> Shook Decl. 12/30/19, Ex. 74. Pg. 12 (Superintendent Klein’s comment on “*crummy* system” and  
34 monopoly’s TCI’s attitude that City must consent to TCI’s terms or go “Jump in the Lake.” ).

35 <sup>25</sup> “Lit” means Click! provides all electronics, systems and technology required for the telecommunication  
36 system to transport data to and from all endpoints on the Internet for the ISPs customers.

<sup>26</sup> “BIAS” is Broadband Internet Access Service. Click! is “telecommunications inputs” or “transmission  
facilities” used to access the Internet. *Nat’l Cable & Telecom. v. Brand X.*, 54 U.S. 967, (2005)

<sup>27</sup> There are only two remaining ISPs operating on Click!, Advanced Stream and Rainier Connect.

<sup>28</sup> Click! provides wholesale FTTP, DOCSIS and Ethernet services. DOCSIS is “Data Over Cable Service  
Interface Specification”, a telecommunication standard for broadband data transfer over coaxial cables.

1 end-users' data outlets, provides network monitoring, maintenance, hosting and provisioning of  
2 DHCP services, assigns and manages IP addresses and DNS services, among many other things.

3 The ISPs provide their customers, the "end-users," tech support, Email, VoIP, web-hosting,  
4 spam and virus filtering, managed Wi-Fi services, and process customer's monthly payments.

5 Click! also provides a fully lit wholesale FTTP service. This symmetrical fiber optical Gigabit  
6 speed service uses no coaxial cable facilities.<sup>29</sup> With FTTP, Click! installs, operates and  
7 maintains all customer premise equipment required to make the FTTP services operational.<sup>30</sup>

8 Click! also provides Tacoma Public Libraries, and 100 other institutional customers, with  
9 Metro Ethernet service.<sup>31</sup> This provides a transparent data path, and involves no "change in the  
10 form or content of the information as sent and received."<sup>32</sup> It is a pure data transport service.

11 1. Click! is A "Telecommunications System" Not a Cable TV System.

12 Every Ordinance, Resolution, Franchise, Court Case, Contract, Federal, State and Municipal  
13 Code relating to the System, recognizes Click! is a "Telecom System."<sup>33</sup> See 47 U.S.C. Sec 153  
14 (53) "telecommunications services are treated as telecommunications services regardless of the  
15 facility used to provide them." Defendant's comparison of Click! to cable TV and citation to TV  
16 statutes and *Issaquah*, are irrelevant and outdated.<sup>34</sup> Telecom is NOT cable television.<sup>35</sup>

17 Click! is a telecom system, with two-way communication, capable of sending and receiving  
18 data, of the user's choosing, to and from all "end points" of the World Wide Web.<sup>36</sup>

19 Cable TV ("cable system") is a closed-off, "one way" system, with "closed transmission  
20 paths."<sup>37</sup> One-way capability is not telecom.<sup>38</sup> Compare 47 U.S.C. § 522(7), with 47 USC §  
21 153(50). Click!'s physical infrastructure, "the pipes," is a wire "communication system."<sup>39</sup>

22 <sup>29</sup> Fiber to the Premises, is fiber optic telecommunications directly to customers' premises.

23 <sup>30</sup> Shook Decl. 12/12/19, Ex. 57, Pg. 326/423. (Click! Network Role and Responsibilities).

24 <sup>31</sup> Shook Decl. 12/12/19, Ex. 64, Pgs.1, 2-9 (Tacoma Public Library Contract No. 16-01 ). Click also  
25 provides retail BIAS to the Libraries, which maybe a breach of the ISP's non-compete clause.

26 <sup>32</sup> 47 U.S.C. Sec 153(50) "the transmission, between or among points specified by the user, of information  
of the user's choosing, without change in the form or content of the information as sent and received."

27 <sup>33</sup> Shook Decl. 10/30/19, Ex. 6, (TPU Annual Report, describes "telecommunications system"), Ex. 11,  
28 (Ordinance creating Click!), Ex. 12, 13, (1996 and 1997 Orders affirming System and utility funding), Ex.  
29 17, (Installation Contract). Shook Decl. 12/12/19 Ex. 62, (Century Link Contract) Ex. 64 (Library  
30 Contract) Ex. 65. (County Franchise) *E.g.*, RCW 35.99.010 (1) ("Cable television service" means the one-  
31 way transmission to subscribers of video programming and other programming service and subscriber  
32 interaction, if any, that is required for the selection or use of the video programming. . .).

33 <sup>34</sup> See Def.[']s] SJM, Pgs. 13, 14, 15, 17, 18, and 21.

34 <sup>35</sup> *E.g.* RCW 82.04.065 (27) ("Telecommunications service" does not include television and video  
programming service). RCW 80.36.630 (State Law mirrors federal code. "Telecommunications" has the  
same meaning as defined in 47 U.S.C. Sec. 153.) Television is also expressly distinguished.

35 <sup>36</sup> Shook Decl. 12/12/19 Ex. 59, (Telecommunications definition by Mr. Dillon, retired Click! Manager).

1 As a telecom system, with vast underground facilities, as seen in the IRU, Shook Decl.  
2 11/1/19, Ex 29, 30. Click! is a “communication utility” by RCW 35.96.020’s definition,

3 **RCW 35.96.020**

4 “Communication utility” means any utility engaged in the business of affording telephonic,  
5 telegraphic, cable television or other communication service to the public in all or part of the conversion  
6 area and includes telephone companies and telegraph companies as defined by RCW 80.04.010.

7 RCW 35.96.020 provides “as defined by” RCW 80.04.010, where we see Click! is a utility. A  
8 Telecommunication Company,” to be precise, includes “every city or town.”

9 (28) “Telecommunications company” includes every corporation, company, association, joint stock  
10 association, partnership and person, their lessees, trustees or receivers appointed by any court  
11 whatsoever, and every city or town owning, operating or managing any facilities used to provide  
12 telecommunications for hire, sale, or resale to the general public within this state.

13 2. The Defendant’s “Pilot Meter” Program Is A Red Herring.

14 Click!’s assets are not rendered “surplus,” or “excess capacity” by Power’s abandoned meter  
15 program. That failed pilot program is unrelated to the community’s vital need for, and increasing  
16 usage of, Click!.<sup>40</sup> Data usage and revenues are rising. Click! generated \$695,919 in Data  
17 Transport and Broadband revenues in October 2018, increasing to \$768,573 by Oct. of 2019.<sup>41</sup>

18 The primary objective in creating Click! was to fulfill the community’s need for an alternative  
19 to the incumbent monopoly provider.<sup>42</sup> The pilot meter program was an afterthought, only  
20 developed in “the mid-2000s,” nearly 10 years after policymakers first envisioned the  
21 community’s pressing need for Click!’s system.<sup>43</sup> The community’s needs are only increasing.

22 Click!’s facilities continue fulfilling the original mandate, providing a competitive, publicly  
23 owned and operated alternative to the incumbent monopoly, TCI (now Comcast). Over 35,000  
24 loyal government, business and residential customer accounts continue to rely on Click! every  
25 day, including Pierce County, Tacoma Public Libraries and over 100 institutional customers.

26 <sup>37</sup> 47 U.S.C. § 522(7). (Cable System: a facility, consisting of closed transmission paths).

<sup>38</sup> 47 U.S.C. § 522(6). (Cable Service is one-way transmission to subscribers of video programming, and  
subscriber interaction for the selection or use of such video programming or programming service).  
*Compare with*, 47 USC § 153(50) telecommunications” means the transmission, between or among points  
specified by the user, of information of the user’s choosing.

<sup>39</sup> 47 USC § 153(59) “wire communication” or “communication by wire” means the transmission of ...  
pictures, and sounds of all kinds by aid of wire, cable, or like connection.”

<sup>40</sup> Shook Decl. 12/30/19, ¶ 4, Ex. 76. (Data usage and revenues over the System are increasing).

<sup>41</sup> Shook Decl. 12/30/19, ¶ 4., Ex. 76 (Operational Summaries for Oct 2018 and Oct 2019).

<sup>42</sup> Shook Decl. 12/30/19 Ex. 70. Mayor Baarsma and Professor Singleton’s Paper on Click! “Creating  
Capacity” (“The City built a broadband telecommunications system with the express purpose of providing  
competitive telecommunications services to businesses and residents within the City”).

<sup>43</sup> Tenzin Gyaltzen Decl. Pg. 3, ¶ 7. (“During the mid-2000s, Tacoma Power developed” smart meters.)

1 Click!'s enterprise and facilities are not surplus. They are functional, useful "additional  
2 capacity." <sup>44</sup> These are valuable, vital municipal assets. The sophisticated equipment, software,  
3 switches, fiber-optics, franchises, intellectual property, trademarks, IP addresses, customer  
4 accounts, contracts and "data pipes" are not "excess capacity." See, Shook Decl. 12/30/19 Ex. 70  
5 ("Additional Capacity" created). Also, Ex. 74 Pg. 3, ¶¶ 7, 8, and 9. (the business plan).

6 **§ 9512. Sale or Lease of Public Utilities.**

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

15 Right to vote was settled under *Bremerton Municipal League v. Bremer*, 15 Wn.2d 231 (1942);  
16 *Bremer* guides the Court, under *Fondren v. Klickitat County*, 79 Wn. App. 850, 856, 905 P.2d  
17 928 (1995) (decisions of the State Supreme Court are binding on all lower state courts).

18 **III. ISSUES PRESENTED**

19 1. Are a municipal utility's functional telecommunications assets subject to the public vote  
20 requirements of Chapter RCW 35.94.020 ? Yes.

21 2. Is legislative intent in RCW 35.94.040 destroyed by City declaring a municipal  
22 telecommunication system "surplus," when such system is a going concern achieving revenues  
23 of \$25 million a year, and will be leased, turn key, to a private company for continuing the same  
24 utility services, to same utility customers, for up to 40 years, while City maintains reversionary  
25 interest in the valuable surplus utility assets? Yes.

26 **IV. EVIDENCE RELIED UPON**

This Response to Defendant's Motion for Summary Judgment is based upon all the pleadings  
and filings of record in the above-captioned matter, and including without limitation:

1) The 10/30/19 Motion for TRO and Declaration of Mitchell Shook; 2) The 11/1/2019  
Declaration of Mitchell Shook; 3) Shook's 12/12/19 MSJ and Declaration; 4) 12/30/19 Declaration  
of Mitchell Shook in Support of this Summary Judgement Motion.

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<sup>44</sup> Shook Decl. 12/30/19, Ex. 85 Tacoma Ord.#26141, 10/28/97, providing additional \$67 million funding.

## V. ARGUMENT AND AUTHORITIES

Telecommunications is a public utility under federal, state and local law.<sup>45</sup> Telecom has been a regulated public utility since 1909 in Washington.<sup>46</sup> Even longer than electric power.<sup>47</sup>

Telecommunications (“Telecom”) companies are “utilities,” with authority rooted in Washington’s Constitution, Article XII, Section 19: Telegraph And Telephone Companies. “The right of eminent domain is hereby extended to all telegraph and telephone companies.”<sup>48</sup>

Defendant has conceded the public’s statutory right to vote, in Council’s own resolution.<sup>49</sup> *Lenci v City of Seattle*, 36 Wn. 664, 668 (1964). *Cf.* RCW 35.94.020.<sup>50</sup> (Council findings are presumed valid). Two decades ago Defendant argued Click! was a utility, in securing two Court Orders to build it; and, recently in *Coates*. City is equitably estopped from arguing otherwise.<sup>51</sup>

### **A. Telecommunication Assets are Public Utilities Under Chapter 35.94 RCW.**

Defendant argues the word “utility” and the term “public utility” are not “statutorily defined,” and urges us to harmonize RCW Ch 35.94 with Ch 35.92.”<sup>52</sup>

But the definition of “public utility” is provided by name, in the statute itself, in the long list of protected utilities.<sup>53</sup> The Committee’s abbreviation of § 9512, substituting that long list with the all-encompassing, “any public utility works, plant or system owned by it or any part thereof,” did *not* remove or change the definition of public utility. It’s still there, when you dig a bit.

Simply “rewritten for brevity,” there was no change in the law, as RCW 1.04.020 confirms “The previously existing laws shall control.”<sup>54</sup> In *Arnott v. Spokane*, 6 Wash. 442, (1893):

<sup>45</sup> In 47 U.S. Code Title 47, state at Chapter 80.36 RCW, local in Tacoma Municipal Code Title 16 B.

<sup>46</sup> Session Laws of 1909, Ch. 93. Sec. 3 Pg. 192, 196, (“authorize the commission to regulate telephone and telegraph companies and their rates and charges, to prevent discrimination and extortion by such companies; and to authorize the Railroad Commission of Washington to make all necessary rules.”).

<sup>47</sup> Electricity regulated by Laws of 1911, Ch. 117, Pg. 538, *See also* Shook Decl. 12/12/19 Ex. 36, Pg. 2.

<sup>48</sup> In 1985, the term “Telecommunications” widely replaced “telephone” and “telegraph” in Title 80 RCW *See generally* Laws of 1985. Ch. 450, Sec. 13, Pgs. 1978 -1995, *E.g.*, Shook Decl. 12/12/19 Ex. 61.

<sup>49</sup> Shook Decl. 12/12/19, Ex. 32. Pg. 1, Ln. 20. ( Def.[’s] own Resolution citing public right to vote. )

<sup>50</sup> Requires a public vote. “We will not read a statute in such a way as to render a provision meaningless. *Community Telecable V. City Of Seattle* 164 Wn.2d 35 (Wash. 2008).

<sup>51</sup> Shook Decl. 12/12/19, Ex. 32. Pg. 1, Ln. 20. Resolution is an express admission of a party-opponent, and assurance of promised of future action, with the government then failing to carry out those acts. *Munich v. Skagit Emergency Commc’ns Ctr.*, 175 Wn.2d 871, 288 P.3d 328, (2012)

<sup>52</sup> Def.[’s] MSJ., 12/12/19, Pg. 16, Ln.10.

<sup>53</sup> “If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

<sup>54</sup> Laws of 1951 (“rule of rule of construction, in case of any omissions or inconsistency between any of the revised code as so supplemented or modified and the laws existing immediately preceding this enactment, the previously existing laws shall control”).

1 [W]here the mode of contracting is expressly provided by law, no other mode can  
2 be adopted which will bind the corporation. This principle results from the fact  
3 that municipal corporations derive all their powers from their charters.<sup>55</sup>

4 City is free to negotiate a sale/lease of Click!, but the statutory requirement for a public vote  
5 is inalienable. As *Arnott* says, the “mode of contracting,” is “expressly provided” in RCW 35.94.

6 1. Telecommunications And Electric Power Are Two Types of Utilities.

7 Power and Telecommunications (“Telecom”) are distinct utility services, often provided,  
8 managed and organized by a single municipal entity. The American Public Power Association,  
9 the “voice of community-owned utilities” that power 2,000 towns and cities nationwide, labels  
10 these entities as “Multiservice Utilities.”<sup>56</sup> TPU is a “multiservice provider,” with four utility  
11 services; water, power, rail and telecommunication. (Shook Decl. 12/30/19, Ex. 68, Pg.1).

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

17 Physically, Click!’s “*commercial network*” and TPU’s “*power communication network*” share  
18 a common fiber optic backbone, but even this “backbone” *is separated* into discrete “tubes,”  
19 with unique fibers separating the infrastructure of the two utility systems.<sup>57</sup>

20 Click!’s telecom system and Power’s electrical system offer distinct services, separate in  
21 both a physical and organizational sense, with distinct brands, websites, organizational  
22 structures, financial reports, monthly invoicing, employee newsletters and customer loyalty  
23 programs, etc. Even federal, state and local regulations differentiate the two systems.<sup>58</sup>

24 Click! was established for more than TPU’s needs.<sup>59</sup> By sharing common infrastructure,  
25 easements and rights of way, Click! and Tacoma Power maximize the value of their assets,  
26 generating operational synergies.<sup>60</sup> This was the original purpose of the System.<sup>61</sup>

24 <sup>55</sup> *Arnott v. City of Spokane*, 6 Wash. 442, (1893) citing 1 Dill. Mun. Corp. (4th Ed.) 449, (373);.

25 <sup>56</sup> APPA website ( Multiservice utilities: A one-stop shop for communities). <https://perma.cc/BF37-FN29>

25 <sup>57</sup> See Shook MPSJ, Pg. 26, discussion of fibers and “tubes.” *Also see*, Shook Decl. 12/12/19 Ex. 31, Pg. 4)

26 <sup>58</sup> Shook Decl. 10/30/19, Ex. 26 (Organizational Chart), Ex. 75 (Employee Newsletter), Ex. 76 (Financial Statements and Purple Perks Program). FCC regulates Click! and FERC regulates Power. As municipal utilities, Power and Click! are regulated under distinct sections of Tacoma’s Municipal Utilities Code.

<sup>59</sup> Shook Decl. 12/30/19 Ex. 70, -(City of Tacoma’s Initiative, April 2000. Mayor Baarsma).

<sup>60</sup> Shook Decl. 10/30/19, Ex. 12. *See also*, Shook’s MPSJ, Pg. 15, Ln. 12. ( Click!’s Nexus to power, diversifying TPU revenue, driving economic growth, offsetting costs for a system TPU needs anyway ).

<sup>61</sup> Shook Decl. 10/30/19, Ex. 12, Pg. 9, Memo. In Support Of City Of Tacoma’s MPSJ. ( “revenue to help offset the costs of constructing and operating the Telecommunications System.” )

1 **B. Creation of Click!. The Community's Need for a Telecommunication Utility System.**

2 Click! was established as a municipal communication utility, with a clear mandate to  
3 provide commercial communication services. The extensive Telecommunication Study and  
4 Business Plan prepared in creating Click!, and other historical evidence, demonstrate Click! was  
5 created for much more than supporting Tacoma Power's aborted pilot meter program.<sup>62</sup>

6 The circumstances and events surrounding the creation of Click! reveal Tacoma's desperate  
7 need for a municipal telecommunication utility and explain why Click! was established.

8 The significance of the utility system's creation is revealed in a 1998 letter, from TPU  
9 Director Crisson to City Council, along with his attached MSNBC article describing the City's  
10 communications project. Director Crisson said, "I know the City Council, as well as the Board,  
11 will be proud of this national coverage." The MSNBC article was titled, "*Tacoma Power to give  
12 TCI a jolt. Municipal utility prepares to jump into cable.*"<sup>63</sup> Some excerpts:

13 While AT&T officials congratulate themselves on their \$48 billion purchase of Tele-  
14 Communications Inc., they might want to keep an eye on the Northwest corner of  
15 TCI's sprawling cable empire. Tacoma Power, the city-owned utility of Tacoma,  
16 Wash. will soon turn on **a \$100 million broadband communications network** that  
17 will enable it to sell cable TV and Internet access as well as water and electricity -  
18 making it a direct competitor to TCI.

19 IF THE PROJECT is successful, it is sure to encourage more municipal utilities to  
20 take on TCI and other cable monopolies across the country. The effort is already  
21 getting attention from local governments weary of residents' complaints about **high  
22 prices and poor service from their incumbent cable provider**. Tired of waiting for  
23 new competitors to shake things up, many cities and towns are thinking about either  
24 constructing their own cable network, or encouraging their local utility to do it for  
25 them. Tacoma Power's Click! Network is the largest such effort to date.

26 **Concerned cable industry officials** are launching a public relations counter-offensive,  
citing studies that question the viability of such projects and complaining that access  
to public funds give government-backed systems an unfair competitive edge.

Click! was established for more than supporting Tacoma Power's pilot meter program. The  
news article's very premise, "it is sure to **encourage more municipal utilities** to take on TCI and  
other cable monopolies across the country," shows Click! was not simply supporting a future  
pilot meter program. That "**Concerned cable industry officials** are launching a public relations

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<sup>62</sup> Shook's MPSJ., Section B, pages 5, 6 and 7.(Additional not "excess" Capacity). Shook Decl. 10/10/19, Ex. 10, (Excerpts from Business Plan and Telecommunication Study).

<sup>63</sup> Shook Decl. 10/30/19 Ex. 14. (Mr. Crisson's Letter to City Manager Corpuz, MSNBC Article).

1 counter-offensive,” demonstrates Click! was controversial for, famously, pioneering the public  
2 broadband movement now sweeping our nation and the world. <sup>64</sup> So much more than meters. <sup>65</sup>

3 In April 2000, Mayor Baarsma and Dr. Singleton, of University of Puget Sound, authored a  
4 paper on Click!, Creating Capacity And Competition In Broadband Telecommunications: The  
5 City Of Tacoma's Initiative. <sup>66</sup> Excerpts from their paper show Click! was not about meters: <sup>67</sup>

6 ABSTRACT: This paper describes the process by which the City of Tacoma,  
7 Washington came to build an open access, broadband telecommunications system  
8 designed to promote effective competition in the provision of Internet and other  
9 telecommunications services.

10 The City of Tacoma has designed and built a broadband telecommunications  
11 system with the *express purpose of providing* competitive telecommunications  
12 services to businesses and residents within the City.

13 But before making the multi-million-dollar investment, the utility's director  
14 requested that Tacoma Power's citizen oversight body, the Utility Board, authorize  
15 an outside review by a consultant group--the Stanford Research Institute.

16 The Board approved and soon SRI's consultants came back with an interesting  
17 idea: Why not *invest more dollars* to expand the fiber optic pipe? Then Tacoma  
18 Power could offer its customers an array of services--cable television, competitive  
19 Internet access, telephony and data transport. The Telecommunications Act signed  
20 into law by President Bill Clinton in 1996 had, in fact, given Tacoma Power this  
21 option by eliminating barriers to entry into the telecommunications market. This  
22 led Tacoma Power's superintendent to proclaim: "The new law afforded us the  
23 opportunity to embark on a broader strategy. . ."

24 The next step was to conduct a marketing survey. The findings . . . forecast over  
25 33,000 cable customers in three years of operation. Within ten years time, the  
26 entire investment of \$100 million would be paid off. . . . 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.

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:

<sup>64</sup> Shook Decl. Ex. 74, Pgs. 18, 20. Mr. Klein (political attacks on Click! formation -Hendery & Crowley).

<sup>65</sup> See, e.g., Shook Decl. 10/30/19, Ex. 18, A Sampling of Municipal Broadband Utilities in the USA. See also Shook Decl. 10/30/19 Ex. 21, Pg. 20 Appendix 1: (U.S. Municipalities with Broadband Networks, Report from The Executive Office of the President. Benefits Of Competition And Choice For Community Development And Highspeed Internet Access. (January 2015)). Compare with, Shook Decl. 12/12/19, Ex. 60, (Australia's NBN, open access project passes 11 million homes).

<sup>66</sup> Mayor Baarsma was a professor at the University of Puget Sound and on City Council at the time, even voting on the creation of Click! in 1996. Shook Decl. 10/30/19, Ex. 11 Pg. 33, or 229/389.

<sup>67</sup> Shook Decl. 12/30/19 Ex. 70, "Creating Capacity and Competition in Broadband Telecommunications: The City of Tacoma's Initiative," April 2000. Even the title indicates Click! was "created capacity."

1 "(Tacoma's policy makers should)...pause and let the euphoria of the benefits you  
2 may now expect be replaced by a realistic appreciation of the *pitfalls and risks*  
3 *associated with municipal ownership* of what is traditionally an entertainment  
4 service provided by private enterprise." After numerous public hearings, two  
5 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. (emphasis added).

6 The Professors' Paper shows the System's primary objective was a "broader strategy," the  
7 community's need for advanced telecommunication services. The prospect of \$100 million in  
8 Additional Capacity creating municipal competition was alarming to the incumbent, TCI, who  
9 warned Tacoma of "the *pitfalls and risks* associated with municipal ownership."<sup>68</sup> (*supra*)

10 In preparing the Business Plan, a detailed "Marketing Survey" was conducted, to study "The  
11 Current Business Market."<sup>69</sup> This Survey excerpt shows Click! was more than meters:

12 To help assess current business market support for advanced telecommunications  
13 services in the greater Tacoma area, Tacoma City Light pursued two avenues of  
14 consumer research: A telephone survey of 200 businesses, with 25 or more  
15 employees. . . This group represents a pool of "Potential Customers."

16 Based upon the results of 200 telephone interviews with medium to large Tacoma  
17 area businesses, the Potential Customer business market is on the brink of being  
18 ready for advanced telecommunications technologies. The money is there,. . .key  
19 findings show these customers account for more than \$5 billion dollars in annual  
20 revenues and 25,000 jobs. What's more, they currently spend over \$10 million  
21 dollars annually on telecommunications services. They perceive telecommunications  
22 links are extremely important to the success of their businesses, and many believe  
23 their telecommunications needs will increase rapidly, particularly for Internet access  
24 and local data networks.

25 As the Business Plan and Marketing Survey indicate, Click!'s creation was seen as vital for  
26 Tacoma to remain economically competitive and prosper.<sup>70</sup> Like the arrival of the Northern  
Pacific railroad in Tacoma in the 1870's, such infrastructure was considered essential for success  
in the digital era. A monopoly existed in Tacoma and policymakers wanted a better system and  
service. This was the primary reason for establishing Click!.

<sup>68</sup> Shook Decl. 12/30/19, Ex. 74, Pgs. 25, 28 ( TCI, later AT&T, President Leo Hindery opposed Click!'s creation, publicly scolded Superintended Klein and sponsored studies to discredit Click!

<sup>69</sup> See Shook Decl. 10/30/19, Ex. 10, Pg. 115/389, ( Market Demand Summary -Potential Market They are more concerned about reliability than price for their local phone service, and very concerned about getting quick response from any telecommunications vendor.).

<sup>70</sup> Shook Decl. 10/30/19, Ex. 10, ( "One of the most significant ways a community and its economic base are intertwined is through an area's infrastructure. As a result, the evolution of a community's economy often depends upon the investments it makes in its transportation system, power system, and-given the shift to the information age-its telecommunication system." (emphasis added).).

1 Defendant's MacGuffin, a failed pilot meter project, conceals the true purpose behind the  
2 creation of Click!'s System. In April 2000, five years before the pilot meter program, Price  
3 Waterhouse prepared a "Performance Review" for Click!, and said:<sup>71</sup>

4 Click! continues to be at the forefront among public and private utility  
5 telecommunications efforts. This position has brought considerable national  
6 recognition to Tacoma, and also significant tangible benefits. From a review of local  
7 press clippings, at least 400 new jobs, five building renovation projects, enhanced  
8 University of Washington and UPS academic programs, and several development  
9 projects are all linked to the development and presence of Click!. Establishing Click!  
10 prompted AT&T (TCI and Excite @home) to upgrade services to Tacoma residents  
11 much earlier than otherwise would have happened.

12 The success of Click! and its continuing value to the community depends on a team  
13 effort among business, civic and education leaders to create a unique region with  
14 considerable growth potential. The fiber/coax network is literally and figuratively the  
15 thread that ties them together and enables this potential. Working together, this team  
16 can leverage the Click! asset to attract major new businesses, create jobs, attract  
17 students to programs that provide the skills for those jobs and generally enhance the  
18 whole community.

19 This Review cites "significant tangible benefits" from leveraging Click! "to attract major  
20 new businesses, create jobs, attract students to programs that provide the skills for those jobs and  
21 generally enhance the whole community." Even telecommuting was cited in the original plan.<sup>72</sup>

22 There is no mention of Power's pilot meter program. In the revolutionary excitement of  
23 creating "America's Most Wired City," meters were not cited in the Performance Review,  
24 Business Plan, Marketing Study or other documentation relating to the creation of Click!.

25 Click! was revolutionary in 1996. All media reports, scholarly papers and professional  
26 evaluations, show that creating an advanced telecommunication utility system for the community  
was Click!'s primary purpose.<sup>73</sup> Click! was never "excess capacity." Click!'s assets were  
"additional capacity," purchased and installed to enable vital services. They remain essential for  
continuing to provide these same telecom ("utility") services today.

Notably, Tacoma's visionary investment in the System occurred 12 years before Congress  
made broadband a national priority with the Broadband Data Improvement Act in 2008, and

<sup>71</sup> Shook Decl. 12/30/19, Ex. 71, Pgs. 16, 17. ( Click! Network Financial Performance Review ).

<sup>72</sup> *E.g.*, Today Tacoma maintains a robust Commute Trip Reduction Program. Tacoma Municipal Code Section 13.15.020 (Z). "Teleworking/telecommuting" means the use of . . . technology to permit an employee to work from home. *See also* RCW 70.94.521 (automotive traffic is the major source of emissions of air contaminants), (reduce single-occupant vehicle commuting.) RCW 28B.130.005 (Intent. Telecommuting -mitigate the adverse . . . effects of auto dependency and traffic congestion.)

<sup>73</sup> Shook Decl. 12/30/19, Ex. 70 (Mayor's paper and newspaper article.) *also* Ex. 71, (Auditors Review).

1 providing §101 of the Act, codified in 47 U.S.C. § 1301.:

2 (1) The deployment and adoption of broadband technology has resulted in enhanced  
3 economic development and public safety for communities across the Nation,  
4 improved health care and educational opportunities, and a better quality of life for all  
5 Americans.

6 (2) [P]rogress in the deployment and adoption of broadband technology is vital to  
7 ensuring that our Nation remains competitive and continues to create business and  
8 job growth.

9 **C. Click! is Built on “Additional Capacity” Not “Surplus Capacity”.**

10 Click! was established as a “separate system” and is a separate “department.”<sup>74</sup> Click! has its  
11 own unique brand, loyal customers, annual sales of \$25 million a year, and assets coveted by a  
12 private entity. The City has every right to organize its utility departments as a “multiservice  
13 utility.”<sup>75</sup> For organizational convenience, Click! is a department of Tacoma Power.

14 Ignoring Click!’s vibrant and successful enterprise, Defendant argues Click! is “excess  
15 capacity,” claiming Click! is not essential for Tacoma Power’s purposes.<sup>76</sup> *But*, Power’s needs  
16 are not the issue. Click! was never intended to be “*essential*” for Power’s purposes.

17 In TPU’s lobby, Click! has a separate customer service counter. Click! is a separate  
18 department and system, with a life and brand of its own. Click! is essential to Click! end-users.<sup>77</sup>

19 The enabling Ordinance 25930 provides: “The City **hereby creates** a separate system of . . .  
20 City Light.”<sup>78</sup> Click! was born as a “Separate System.” Click! is “Telecommunication System.”

21 **ARTICLE II**  
22 **FINDINGS; ESTABLISHMENT OF THE TELECOMMUNICATIONS PROJECT AS A**  
23 **SEPARATE SYSTEM; AND ADOPTION OF PLAN AND SYSTEM**  
24 **Section 2.1. Establishment of Telecommunication System.** The City hereby creates a  
25 separate system of the City's Light Division to be known as the telecommunications system  
26 (the "Telecommunications System"). The public interest, welfare, convenience and necessity

Click!’s “separate system” is essential to Click! users, who depend on the infrastructure in  
everyday life.<sup>79</sup> Click! was established to fulfill the community’s need for an advanced telecom

<sup>74</sup> Finance Dept, does not track performance of other Power divisions. Shook Decl. 12/30/19, ¶ 2.

<sup>75</sup> Tacoma has broad authority in organizing its utilities; but, cannot sell them without public vote.

<sup>76</sup> “Shouts” is more accurate, since the “Excess” phrase appears capitalized 35 times in Defendant’s brief.

<sup>77</sup> Shook Decl. 12/12/19, Ex. 42, Pg. 2.

<sup>78</sup> Shook Decl. Ex. 11, Pg. 8 (Article II creates a separate system, adopts Click! business plan.”

<sup>79</sup> RCW 43.330.532 [B]roadband is critical to full participation in society and the modern economy . . . by enabling access to health care, education, and essential services, providing economic opportunities, and enhancing public health and safety. *Also*, Shook Decl. 10/30/19, Ex. 21, Shook Decl. 12/12/2019 Ex. 37

1 system.<sup>80</sup> It is a municipal alternative to the incumbent monopoly provider, who, at the time,  
2 “could care less” about Tacoma.<sup>81</sup>

3 In 1996, when Click! was first proposed to Council, the incumbent monopoly, TCI (now  
4 Comcast), had no interest in upgrading their system. After repeated requests by the City, TCI’s  
5 attitude was, “*go jump in the lake.*” Power Superintendent Steve Klein recalled TCI’s attitude:<sup>82</sup>

6 [C]ity council, they're having a heck of a problem with the incumbent  
7 cable provider who still has the crummy system, refuses to upgrade it.  
8 And they don't come to the table to negotiate the franchise agreement.  
9 They can just tell the city government to jump in the lake. And if you  
10 don't like it, we'll just shut it -- we'll shut it down.

11 Monopoly incumbents can afford such cavalier arrogance.<sup>83</sup> Most consumers have no  
12 alternative for access. Monopoly and oligopoly control of broadband in America is the norm.  
13 FCC data shows nearly 85 percent of Americans have either one choice or no choice for speeds  
14 in excess of 100 Mbps.<sup>84</sup> This is why the FCC, FTC and DOJ closely regulate mergers of the  
15 powerful telecommunication conglomerates.<sup>85</sup>

16 Click!’s costly construction was never “excess capacity.” Council prudently and specifically  
17 resolved to provide “Additional Capacity,” with additional, incremental investment, funding  
18 equipment, abundant optical fiber, including dark fiber, and the skilled staff to cobble it all  
19 together.<sup>86</sup> required to create Click!’s essential services.<sup>87</sup> Click! was built to accommodate the  
20 community’s anticipated, ever-increasing, need for the data flow and for the explosive growth  
21 projected in the future.

22 On Click!’s website, Power Superintendent Steve Klein, the “Father of Click! Network,”  
23 explained the project’s origins and cited the “further review” that led to the additional investment  
24 in additional capacity for “expanding the network.” (Shook Dec. 12/12/19, Ex. 74, Pg. 8.)

25 <sup>80</sup> See generally, Shook Decl. 10/30/19, Ex. 23 (“[B]roadband is taking its place alongside water, sewer  
26 and electricity as essential infrastructure for communities”. Quoting USDA Report).

<sup>81</sup> Section 706(d)(1) defines “advanced telecommunications 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>82</sup> Shook Decl. 12/30/19, Ex. 74, Pg. 12. (Power Superintendent’s Steve Klein deposition).

<sup>83</sup> Shook Decl. 12/30/19 Ex. 78, (monopoly power closely monitored. DOJ and FTC guidelines.)

<sup>84</sup> FCC, Annual Internet Access Services Report (2018), see also, FCC Fact Sheet Communications  
Marketplace Report GN Docket No. 18-231 Report; GN Docket No. 18-231 Ex. D-3.

<sup>85</sup> See AT&T-DIRECTV Order, 30 FCC Rcd at 9141, para. 20, 21; Comcast-NBCU Order, 26 FCC Rcd at  
4248, para. 24, (The FCC and DOJ, consider market power of incumbent and barriers to entry).

<sup>86</sup> Shook Decl. 12/30/19, Ex. 85 (City’s 1997 Emergency Res. for \$69 Million, includes telecom team).

<sup>87</sup> Shook Decl. 10/30/19, Ex. 21, Pg. 4, Ord.# 25930 (“WHEREAS, the City has determined that it is  
prudent and economical to provide *additional capacity* on such telecommunications system”).

1 Tacoma Power originally planned to build a fiber-optic network to control its  
2 substations. Further review indicated that expanding the network and offering a wide  
3 range of telecommunications services would benefit our customers and our  
4 community.<sup>88</sup>

5 Fiber must be activated, or “lit,” before it can be used to provide communication services.  
6 At great expense, TPU invested tremendous “additional” public treasury in providing the optical  
7 equipment, modulating electronics, equipment and staff necessary to light this fiber and make it  
8 capable of carrying services. There is nothing “excess” or surplus in Click!’s enterprise or fiber.

9 Power’s incremental investment to establish Click!, created a functional telecom system,  
10 addressing the community’s need for Broadband services. The “lit” fiber, and the currently  
11 unused dark fiber, are not “excess” capacity. These assets were intentionally included, as  
12 “*additional capacity*” in the original Ordinance and Business Plan. It is worth remembering  
13 Mayor Baarsma and Professor Singleton’s Paper, which described that incremental investment:<sup>89</sup>

14 *Why not invest more dollars to expand the fiber optic pipe?* Then Tacoma  
15 Power could offer its customers an array of services--cable television,  
16 competitive Internet access, telephony and data transport.

17 Click!’s assets are performing their intended purpose and function. They are useful and  
18 required for Click’s current and future needs in delivering essential services to the community.

19 The fact Click!’s fiber, both lit and dark, are included in the scheme, in exchange for \$2.5  
20 million a year, shows these are valuable assets. These fibers are not obsolete or surplus.<sup>90</sup>

21 Telecommunications has been a regulated public utility since the Pacific Telegraph Act of  
22 1860.<sup>91</sup> AT&T monopolized the industry for most of the 20<sup>th</sup> century.<sup>92</sup>

23 The Communications Act of 1934 created the FCC. AT&T’s monopoly was broken up by  
24 1983.<sup>93</sup> Congress recognizes telecom is an essential public utility.<sup>94</sup> In Section 706(a) of the

25 <sup>88</sup> Shook Decl. 12/30/19, Ex. 83, (“About us” description of Click! and historical screen shots of Click!’s  
26 website form the Wayback Machine, digital archive of the World Wide Web.).

<sup>89</sup> Shook Decl. 12/30/19 Ex. 70, Creating Capacity and Competition in Broadband Telecommunications.

<sup>90</sup> Click Business Transaction Agreement, Indefeasible Right of Use, or “Privatization Agreements.”

<sup>91</sup> See C. 137, U.S. Statutes 36th Congress, 1st Session, June 16, 1860, *also*, The FCC, formed by the  
Comm. Act of 1934. 47 U.S. Code § 151, § 601, took over wire communication regulation from the ICC.

<sup>92</sup> Shook Decl. 12/12/19, Ex. 49 Pg. 3. (Kingsbury Commitment did not hinder AT&T).

<sup>93</sup> Judge Greene’s opinion, *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1983).

<sup>94</sup> *See generally*, Shook Decl. 12/12/19, Ex. 31, Pg. 8, (We are approaching a new era of the Data Age,  
autonomous cars, humanoid robots, intelligent personal assistants, smart home devices, the world is  
undergoing a fundamental change, transforming our lives. Broadband connects us with friends and family,  
allows access to education, goods and services, and affects nearly every aspect of life.).

1 Telecom Act, 1996 (P.L. 104-104), Congress directs the FCC to encourage deployment of  
2 advanced telecom capabilities to all Americans on a timely basis.

3 Defendant argues Power is the only “real utility,” and Click! is just a silly old “cable TV”  
4 system, best viewed in the context of *Issaquah*. While Power did initially breathe life into the  
5 System, by funding Click!’s creation, Click! is a utility in its own right. Not a cable TV system.<sup>95</sup>

6 **D. Telecommunications is a Utility. A Monopoly or Separate Undertaking is Not Required.**

7 Defendant asserts the public has NO right to vote, if Click! is not a monopoly, a “separate  
8 undertaking,” or Title II regulated facility. All baseless arguments. *Contra*, Such “last mile”  
9 systems are effective “gateways,” with “bottleneck monopoly power” and all the “dangers this  
10 power poses.” *Turner Broadcasting System, Inc. v. FCC*, 512 US 622, 661 (1994)

11 This “monopoly power” was one of the reasons Click! was built. *See ante* Pg. 16, and Mr.  
12 Klein’s “Go Jump in The Lake” comment. Also, see Mr. Klein comment on limited pole space.<sup>96</sup>

13 1. Monopoly is Not a Prerequisite to Public Vote on Disposal of Community’s Assets.

14 Defendant argues Click! is not “a monopoly” and, therefore NOT deserving of the protective  
15 vote under RCW 35.94. Def. MSJ, Pg. 17. *Contra*, “Cable operators possess a local monopoly  
16 over cable households.” *Turner Broadcasting v. FCC*, 520 U.S. 180, 197 (1997).

17 Defendant argues public’s statutory right to vote is forfeited if Click! has a competitor. *But*  
18 *see* “[T]he question of whether or not a monopoly actually existed is not a controlling feature.”  
19 *State v. Kuykendall*, 137 Wash. 602, 609 (1926). *Cf.*, “It will readily be seen, then, that it makes  
20 ***no difference whether a monopoly existed.***” *Id.* at 610. (emphasis added).

21 Monopoly status is not a controlling feature in determining citizen’s right to vote. The Laws  
22 of 1917 provide a protective vote, regardless of a “monopoly.” Legislators knew from firsthand  
23 experiences, fresh in their minds, of dirty tactics deployed by private “Power Trusts,” who  
24 devoted armies of lobbyists and vast resources in destroying municipal utilities.”

25 Click! is protected by a public vote because its assets were paid for by the people and its  
26 property is devoted to public use. And because Legislators purposefully provided the Laws of  
1917 protected municipal utility property.<sup>97</sup>

<sup>95</sup> Shook Decl. 12/12/19, Ex. 59, Declaration of Terry Dillon.

<sup>96</sup> Shook Decl. 12/30/19, Ex. 24, Pg. 23 (US West and TCI had used up all available pole space.)

<sup>97</sup> Similarly, just as “purposefully,” policymakers provided “Additional Capacity” in building Click!. This investment must not be confused by defendant’s claim such investment was ever “excess capacity.”

1 Judge Bone explains why in his Letter, as reprinted in the Congressional Record in 1944. See  
2 generally Shook Decl. 12/30/19 Ex. 80.<sup>98</sup>

3 Tugboats, towboats, barges, silos, wharfs, warehouses, taxi cabs and pipelines are all “public  
4 utilities” because they are “devoted to public use,” not because they are monopolies.<sup>99</sup> Click!’s  
5 wires are *data pipelines*, “and no doubt” a public utility. In *State v. Kuykendall* it was found:<sup>100</sup>

6 [I]f in the beginning or during its subsequent operation the pipe line was devoted  
7 by its owner to public use, and if the right thus extended to the public has not been  
8 withdrawn, there can be no doubt that the pipe line is a public utility. *Kuykendall*,  
9 at 834

10 [T]he question of whether or not a monopoly actually existed is not a controlling  
11 feature; nor can courts know what considerations were pressed upon the  
12 Legislature to justify the passage of the act. It is enough for us to follow the  
13 holding in *Munn v. Illinois*, supra, where the court said: 'For our purposes we  
14 must assume that, if a state of facts could exist that would justify such legislation,  
15 it actually did exist when the statute now under consideration was passed. For us  
16 the question is one of power, not of expediency. If no state of circumstances could  
17 exist to justify such a statute, then we may declare this one void, because in  
18 excess of the legislative power of the state; but, if it could, we must presume it  
19 did.' As to the *propriety of legislation* in force within the scope of the legislative  
20 power the Legislature is the exclusive judge. (emphasis added).

21 Likewise, this Court must not question “*the propriety of legislation*” in § 9512, providing a  
22 protective public vote, preventing potential privatization of public utilities. It is a legislative  
23 prerogative. Neither can the Court question legislative intent in the definition of “surplus,” as  
24 “unserviceable, inadequate, obsolete, worn out or unfit to be used.”<sup>101</sup> Shook Decl. 12/30/19, Ex.  
25 80. Pg. 22 (“Power fight”).

26 Nothing in the statute requires a monopoly, although one nearly exists.<sup>102</sup> Property simply  
needs to be owned by the municipal utility and “useful.” Click!, with \$25 million a year in  
revenue is clearly performing that telecommunication purpose.

Consolidation in the telecom industry is highly scrutinized by the DOJ, FTC and the FCC to  
prevent market concentration.<sup>103</sup> Comcast’s 2015 bid for Time Warner Cable would have

<sup>98</sup> Shook Decl 12/30/19, Ex. 80, Pg. 7 (Homer T. Bone Letter, from Congressional Record, citing 1913  
“manipulation” of legislation by private power trusts, and Rep. Heinly’s “two lines” added to irrigation bill  
repealing City’s right to sell power outside the City limits). Pg. 23, (Judge Bone’s “Thorn Interview”.)

<sup>99</sup> *State v. Kuykendall*, 137 Wash. 602, 611 243 P. 834, (1926), “taxicab company was a public utility.”

<sup>100</sup> *Kuykendall*, at 611, Drawing on *Budd v. People*, 12 S.Ct. 468, 143 U.S. 517, 36 L.Ed. 247 (1892),  
quoting *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. (1877). As briefed in Plf. Shook’s MPSJ, Pg. 15.

<sup>101</sup> RCW 54.16.180 (represents clear legislative intent and definition of “surplus” for municipally-owned  
utility property.) See Shook’s MPSJ., Pgs. 24, 25, (detailed history of surplus statute).

<sup>102</sup> Tacoma suffers oligopoly, with two alternatives for BIAS, generally. Because of Click!’s existence.

1 consolidated 30 million subscribers.<sup>104</sup> Comcast unilaterally offered to divest nearly 4 million  
2 customers just in hopes of gaining approval for the deal. It was killed by DOJ scrutiny, anyway,  
3 seen as creating an “unavoidable gatekeeper for Internet-based services.”

4 2. A Separate Entity or Undertaking is Not Required For the Right To Vote.

5 Organizing Click! as a “Department” under Tacoma Power, or providing multiple utility  
6 services under one entity, does not destroy the public’s right to vote under RCW 35.94. The City  
7 has full discretion over organizing its utility departments.<sup>105</sup> Click! is still a utility asset.

8 Many public power utilities provide more than electric service for their communities, “they  
9 might also manage the area’s water, wastewater, internet, waste, gas, and *telecommunications*  
10 *services*,” says the American Public Power Association, who refers to such entities as  
11 “Multiservice Utilities.” Such organization structure are common.<sup>106</sup>

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

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

22 Defendant asserts *Coates v. Tacoma* prevents this Court from finding Click! is anything other  
23 than “part of” a public utility.<sup>107</sup> Perfect! “Part of ” is sufficient to win the right to vote.

24 Not that it matters, but Click! is more than a “part of.” Click! is a “Department” and System  
25 in its own right. The issues, evidence and arguments in *Coates* were entirely different. An  
26 accountancy act violation, compared with a right to vote.

*Coates* does not cut in defendants’ favor. Plaintiff claimed Click! was not a utility, was losing  
money, violated the accountancy act and any losses are general government’s obligation<sup>108 109</sup>

103 Shook Decl. 12/30/19 Ex. 69, Pgs. 38, 39, (DOJ 4/24/15 DOJ Press release “significant concerns that the merger would make Comcast an unavoidable gatekeeper for Internet-based services that rely on a broadband connection to reach consumers.” ). See also Pg. 39 (Comcast’s divestiture offer).

104 Shook Decl. 12/30/19 Ex. 69 (30 million subscribers, also 30 % of the total United States market).

105 *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 695, (“ court leaves the choice of means used in operating the utility to the discretion of municipal authorities.”).

106 Shook Decl. 12/30/19, Ex. 68, Pg.1. (Info from American Public Power Association website).

107 *Coates v. Tacoma*, Division II, Unpublished Decision No. 51695 12/10/19 (Alleged City violated Washington’s local government accounting statute, RCW 43.09.210.)

1 City defended, arguing Click! was a utility and part of Tacoma Power. City was right, and  
2 prevailed. The court found, “Therefore, we conclude that Click! and Tacoma Power's electric  
3 utility are one undertaking for purposes of RCW 43.09.210(3).” *Coates*, at Pg. 9.

4 As “one undertaking,” *Coates* establishes Click! is, at least, “any part thereof,” triggering the  
5 mandatory vote in RCW 35.94 and § 4.6. Any other reading leads to absurd results.

6 The *Coates* “part of” finding is a thoughtful solution. It avoided a long trial over  
7 controversial accounting methodology.<sup>110</sup> It preserved federal and state policy goals furthering  
8 municipal broadband.<sup>111</sup> Shook Decl. 10/30/19, Ex. 21 (White House Report).

9 Charter § 4.6 has no surplus clause.<sup>112</sup> The *Coates* finding triggers a vote, regardless of  
10 surplus. With Judge Bone Chairman of the 1926 Charter Committee, the intent of §4.6 is clear. <sup>113</sup>

11 RCW 35.94.040 reads, “equipment originally acquired for public utility purposes.” Thus, it is  
12 the ownership of the property, not the definition of the assets’ function, that compels a public  
13 vote. When a utility buys an asset, with a “nexus” to the utilities purpose, it’s statutorily  
14 protected by the vote, unless surplus. Even artwork, that brighten employees’ day. <sup>114</sup>

15 Power and Click! are “one undertaking” under *Coates*, which establishes Click! is a bona-  
16 fide “utility,” and not a general government obligation. Since Click! is a “system,” by common  
17 definition, and *Coates*’ confirms Click! is part of a “municipal utility,” organizational  
18 convenience and institutional naming aside, the right to vote is mandatory. <sup>115</sup>

19 3. An FCC Designation Is not A Controlling Factor Over People’s Right to Vote.

20 Defendant raises unrelated issues, of cable TV “regulation” and the FCC’s politically  
21 inspired Restoring Internet Freedom (“RIF”) order. <sup>116</sup>Title I or Title II designation of BIAS does  
22 not preempt state laws the right to vote on disposal of a public communication system. <sup>117</sup>

23 <sup>108</sup> *E.g.* City of Tacoma’s 4/20/19 MPSJ. on The Nature or Mandamus Relief, *Coates v City of Tacoma*,  
Pierce County Superior Court 17-2-08907-4., Page-3.

24 <sup>109</sup> Losses were disputed issue and no finding on losses was ever made.

25 <sup>110</sup> Shook Decl. 12/12/19, Ex. 55 (Council Resolution for an Audit of controversial Click! accounting.)

26 <sup>111</sup> RCW 43.330.532, (Access to broadband critical to full participation in society and modern economy).

<sup>112</sup> Shook Decl. 12/30/19, Ex. 89 (Tacoma City Charter Article 4 -Utilities.)

<sup>113</sup> Shook Decl. Part Two 12/12/19, Ex. 67 Pg. 3 (Judge Bone elected Chair of Charter Committee).

<sup>114</sup> *E.g.* Shook’s MPSJ., Pg. 15, Fn. 74. (utility purpose, nexus to power, and *Okeson* line of cases).

<sup>115</sup> “If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent.  
In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences.”  
*State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

<sup>116</sup> FCC’s Restoring Internet Freedom Order (“RIF”) restored Title I regulation of BIAS. *Protecting and  
Promoting the Open Internet*, 30 FCC Rcd 5601, 5757-77 ¶¶ 355-387 (2015) (*Title II Order*).

1           *Mozilla* vacated the FCC’s RIF “Preemption Directive,” which would have prohibited state  
2 “bright-line” consumer protection regulation of net neutrality.<sup>118</sup> Washington State’s own net  
3 neutrality laws support broadband’s vital role as an essential utility.<sup>119</sup>

4           If Defendant’s argument is accepted, that Title II regulation of information flowing over the  
5 physical facilities defines a utility, then our State’s identical Title II bright-line regulations, in  
6 RCW 19.385.020, confirm Click!’s utility-status.<sup>120</sup> RCW 19.385’s “Open Internet Act,”  
7 preserved Title II’s bright-line regulations in Washington State, preempting the authority sought  
8 by the FCC in reclassifying BIAS to Title I.<sup>121</sup>

9           The Communication Act of 1934 expressly grants states authority to promote and regulate  
10 “telecommunications services, and safeguard the rights of consumers.”<sup>122</sup>

11           All “information services” are accessed via telecommunications.” Click! is a physical  
12 telecommunications system.<sup>123</sup>

13           Municipal ownership of Click!’s infrastructure, fibers, routers, servers, switches, pipes, poles  
14 and customer accounts is what triggers the right to vote, not the FCC’s shifting regulatory  
15 authority, or “non-authority,” in regulating data flow, or activity, over the physical infrastructure.  
16 Such regulation has no bearing on voter’s inalienable right to approve conveyance of Click!’s  
17 property.

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20 <sup>117</sup> See generally “nowhere in the general charge to “promote competition in the telecommunications  
21 market” is a directive to do so by preempting a state’s allocation of powers between itself and its  
22 subdivisions.” *Tennessee V. FCC*, 832 F. 3d 597 - Court of Appeals, 6th Circuit (2016).

23 <sup>118</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1, 63 (D.C. Cir. 2019), “ Commission lacked the legal authority to  
24 categorically abolish all fifty States’ statutorily conferred authority to regulate intrastate communications.  
25 For that reason, we vacate the Preemption Directive, 2018 Order ¶¶ 194–204.” *Mozilla*, at 86, The court  
26 rejected the FCC’s preemption efforts, finding the FCC has no authority to regulate BIAS under Title I,  
and, hence no authority to tell states they cannot regulate it. The FCC, by arguing BIAS was not subject to  
FCC regulation, in effect, deprived itself of any authority to preempt state regulation.

<sup>119</sup> *Mozilla*, in rejecting FCC preemption, confirmed Washington State’s authority for bright-line regulation  
of BIAS. *Mozilla*, at 62, stated “the harms from blocking and throttling during a public safety emergency  
are irreparable. People could be injured or die.” Also finding “arbitrary and capricious the Commission’s  
failure to consider the implications for public safety” and “the 2018 Order was arbitrary and capricious in  
this respect, we remand” *Mozilla v FCC, Dist. of Col.* 2019 USCA Case #18-1051.

<sup>120</sup> The City of Tacoma and Washington state have their own bright-line regulation, of “No blocking; no  
throttling; no paid prioritization.” A *Title II* designation of BIAS would have provided federal authority.

<sup>121</sup> Chapter 19.385 RCW (may not: Block content, Impair internet traffic or Engage in paid prioritization).

<sup>122</sup> As amended by the Telecom. Act of 1996. See 47 U.S. Code § 253 (b) (shall not affect ability State to . . .  
protect public safety and welfare, ensure telecommunications services, safeguard rights of consumers).

<sup>123</sup> 47 USC § 153(50): transmission between points specified by the user, of information of user’s choosing.

1 Congress removed barriers, in 1996, authorizing the FCC to encourage the development of  
2 such systems.<sup>124</sup> The City even cited the Telecom Act, in seeking this Court's authority to  
3 establish Click! in 1996.<sup>125</sup>

4 [T]he thrust of the Telecommunications Act is to encourage the availability and  
5 affordability of telecommunications services. . . Tacoma is well positioned to make  
6 telecommunications services available to the public at a competitive price, thereby  
7 furthering this federal policy. (Shook Decl. 10/30/19 Ex. 12, pg. 10)<sup>126</sup>

8 Also, in this same 1996 Brief, at Pg. 12, ¶ B ( 3.), City cited its authority to provide "utilities,"

9 3. The City Has Authority Under Washington Statutes To Provide Telecommunications  
10 Services.

11 The City's statutory powers include the authority to provide telecommunications services.  
12 First, the City, as a first class charter city having code city powers as well, has all powers not denied  
13 by law, "including operating and supplying of utilities and municipal services commonly or  
14 conveniently rendered by cities or towns." RCW 35A.11.020. Tacoma may conveniently render

15 Tacoma may conveniently render telecommunications services because the Light  
16 Division has an existing citywide electric system of connections to customers'  
17 homes, because it has existing billing relationships with customers, and because  
18 it can provide services economically. Second, there is no express statutory  
19 prohibition against city provision of municipal telecommunications services.  
20 *Winkenwerder*, supra. To the contrary, the Legislature has acknowledged that  
21 cities provide communications services through enacting a statute providing for  
22 the burying of city-owned communications facilities. RCW 35.96.030. Finally,  
23 the Legislature has determined that competitive markets for telecommunications  
24 services serve the public interest. RCW 80.36.300; *In re Electric Lightwave, Inc.*,  
25 123 Wn.2d 530, 538-39 (1994) (noting that "it is the state's policy to promote  
26 diversity in the supply of telecommunications services and products in  
telecommunications markets throughout the state"). The City's provision of  
telecommunications services will make the market more competitive, thus  
furthering the public interest recognized by the Legislature.

27 Defendant argues cable modem service is not telecommunications, citing *Brand X*.<sup>127</sup> But,  
28 FCC designations aside, information service still requires telecommunications. Under USC 47  
29 153( 23) "information service" is the acquiring of "information via telecommunications." It's  
30 these physical facilities the people have a right to vote over. "[T]elecommunications is part and

<sup>124</sup> Under 47 U.S.C. § 1302(a), the Federal Communications Commission is charged with "encouraging the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," Congress also entrusted this responsibility to state commissions.

<sup>125</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 253, 110 Stat. 70 (1996).

<sup>126</sup> 1996 Memorandum In Support Of City's Summary Judgement. See Shook Decl. 10/30/19 Ex. 12.

<sup>127</sup> *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 54 U.S. 967 (2005)

1 parcel of cable modem service ”*Community Telecable V. City Of Seattle* 164 Wn.2d 35 (Wash.  
2 2008). *See also, Brand X*, at 1006. “the high-speed data transmission (telecommunications) that  
3 is an input used to provide this service”. Click! is still a communication utility. An FCC  
4 regulation does not magically convert it into a library, pizza store or pet shop. Click!’s physical  
5 transmission facilities, components and other assets are not surplus.

6 Click! is not an ISP. Click! is a pure telecom system providing wholesale FTTP, Metro  
7 Ethernet and lit data transport services, with established wholesale rates.<sup>128</sup> The retail ISP  
8 partners provide the end-user cable modem services, troubleshooting and maintaining their  
9 modems and competing in delivering retail BIAS services to the community.

10 This free market competition keeps end-user rates low. Privatizing Click! removes  
11 Council’s oversight of wholesale rate. End users include elderly, low-income, governmental and  
12 student customers, who could be harmed by unreasonable price increases, if Click! is sold to a  
13 private company.

14 Click!’s wholesale telecom operations are comparable to TPU’s wholesale water and power  
15 operations, where wholesale rates are also set by Council. In 2018 TPU earned over \$50 million  
16 in wholesale water and power sales. (Shook Decl. 12/30/19, ¶ 1, Ex. 75, Pgs. 19, 20.).

17 Privatization is both substantively and procedurally ultra vires.<sup>129</sup> Procedurally, there was no  
18 “RFP” issued for the sale of Click!, as Defendant alleges. Only an “RFI/Q”, for “information.”<sup>130</sup>  
19 Council never audited Click!’s financial performance.<sup>131</sup> They voted to go “All-In,” to expand  
20 Click!. The *Coates* lawsuit dashed those hopes, forcing Council to change direction.<sup>132</sup>

21 No bidding or appraisal has occurred in this process of privatization. Bidding typically  
22 follows a “surplus property declaration.” Council has no basis for determining a fair valuation of  
23 the System’s assets.<sup>133</sup> Fortunately, “the public vote is curative of all ills.”

24 <sup>128</sup> Shook Decl. 12/12/19, Ex. 57, Pg. 326/423. (Click! FTTP Role and Responsibilities). Ex. 64, Pgs.2-9, (Tacoma Public Library Broadband Agreement).

25 <sup>129</sup> Substantive ultra vires briefed in Pl. Shook’s MSJ., Pgs. 26, 27 and 28.

26 <sup>130</sup> Def.[’s] 12/12/19 MSJ., Pg. 6, Ln. 10. Def. deceptively adds a (“P”) in describing the RFI process. City did NOT prepare a RFP. It was an RFI and NOT an “RFI/Q/P.” The City issued an RFI. There was no “P”, Shook Decl. 12/30/19, ¶ 15, *also* Ex. 72. This is not “Wheel of Fortune,” Def. can’t just, “give me a P!”

<sup>131</sup> Shook Decl. 12/30/19, ¶¶ 1, 2, 3, and 13. No audit, disputed losses, no bidding, no valuation. Only basis for privatization was fear of adverse decision in *Coates*, *also* Ex. 72. Advanced Stream’s RFI response.

<sup>132</sup> *Edward E. Coates, et. al., v. City of Tacoma*, Division II, No. 51695-1 Unpublished decision, 12/10/19, see Shook Decl. 12/30/19, ¶¶10, 11 (explanation and evidence of switch from “All In, to “All-Out.”). Plaintiff’s in that suit, Mr. Crowley, have opposed Click! since before its creation.

<sup>133</sup> Shook Decl. 12/30/19, Ex. 82 Shook’s Email to Council, informing them of failure to follow process.

1 Plaintiff's CPA claim should not be dismissed. Naturally the CPA does not apply to City's  
2 "legitimate acts." Cities necessarily operate monopolies and enjoy sovereign immunity from CPA  
3 claims for doing so. But, tortious acts, and conspiracy with a private party, in restraint of trade are  
4 not legitimate ministerial functions.<sup>134</sup> The CPA claim involves many facts. Discovery and a trial  
5 could be required.<sup>135</sup> If justice prevails, the CPA claim will soon be moot and can be withdrawn,  
6 when the Court upholds the people's right to vote. The right to vote being "curative of all ills."<sup>136</sup>

7 Finally, telecommunications is not a luxury. You can't add a "rooftop antenna" and get it.<sup>137</sup>  
8 The flow of such "information" requires a "pipeline," a fiber optic backbone, for transferring  
9 customer's data.<sup>138</sup> Click! Network is our community's ' public data pipeline, that "information  
10 highway." It is a utility. The additional capacity and fibers, paid for by the people, are the  
11 equivalent of lanes on this advanced public highway. Defendant's definitions of "utility" and  
12 "surplus" would return us to an era of private "toll roads," and allow any municipally-owned  
13 utility asset to be sold, to large campaign contributors, without a public vote. Could a water,  
14 power or rail facility be next?

## 14 VI. Conclusion

15 For the forgoing reasons, the Court should deny Defendants Motion for Summary Judgement  
16 and grant Mr. Shook's Motion and declare City's surplus resolution ultra vires.

17 Respectfully submitted this 30<sup>th</sup> day of December 2019.

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27 Mitchell Shook  
28 Plaintiff

24 <sup>134</sup> *Miotke v. Spokane* 101 Wn.2d 307, 336 (1984) citing RCW 4.96.010 All political subdivisions,  
25 municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or  
26 proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious  
conduct of their officers, agents or employees to the same extent as if they were a private person or  
corporation

<sup>135</sup> Defendant misquotes the CPA, removing the word "corporations," in their MSJ on page 24, ln. 6. The  
complete statement in RCW 19.86.010 (1) "Person" shall include, where applicable, natural persons,  
corporations, trusts, unincorporated associations and partnerships.

<sup>136</sup> Quoting Hon. Homer T. Bone, handwritten letter, University of Puget Sound Crocker Library Archive.

<sup>137</sup> *Issaquah*, at 574, "It's something you can do with a rooftop antenna. In that sense, it's not a utility."

<sup>138</sup> 5G networks of the future, for example, require an underlying fiber network, like Click! to function.

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

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

DARREL BOWMAN,  
  
Plaintiff,  
  
v.  
  
CITY OF TACOMA,  
  
Defendant.

**NO. 19-2-11506-3**  
  
PLAINTIFF SHOOK'S REPLY IN SUPPORT  
OF MOTION FOR PARTIAL SUMMARY  
JUDGEMENT GRANTING DECLARATORY  
RELIEF

MITCHELL SHOOK,  
Plaintiff Pro Se,  
  
v.  
  
CITY OF TACOMA,  
  
Defendant.

Plaintiff Shook's Reply In Support Of  
Motion for Partial Summary Judgment

Mitchell Shook, Plaintiff  
3624 6<sup>th</sup> Ave Suite C, Tacoma, WA 98406

- 0 -

1 As the Court considers this motion, please keep in mind *two* important observations:

2 *First*, Plaintiff’s motion only asks the Court to declare what the City’s own legislative body,  
3 *has already said*: An approving “vote of the people” is required to “sell, lease or dispose” of any  
4 utility property *essential for continued* utility services. <sup>1</sup>

5 *Second*, Click! provides advanced telecommunications “*services*,” using the public’s municipal  
6 utility *assets* and *appurtenances*. The public’s “assets” are *essential for continued* provision of  
7 Click!’s vital public telecom services.<sup>2</sup> The law requires a vote for the disposal of public utility  
8 “*assets*,” not just utility “*systems*,” as Defendant continues to mischaracterize this case.

9 As seen here, in the City’s own Click! Resolution, the City’s own finding cites the people’s  
10 right-to-vote under Charter §4.6: *See also*, Shook Dec. 12/12/19, Ex. 32, Pg. 1:20.

11 20 WHEREAS the City Charter Section 4.6 requires a vote of the people  
12 21 before the City may sell, lease, or dispose of any utility system, or parts thereof

13 Defendant admits that “telegraph and telephone,” now known as “telecommunications” or  
14 “telecom,” was one of the protected utilities, on the *long-list* of municipal utilities requiring a  
15 vote of the people, in the original version of RCW 35.94, the “Laws of 1917.” <sup>3</sup>

16 As a result, City’s only remaining opposition boils down to one main argument, that the  
17 Laws of 1917 were “repealed” in 1965, eliminating the “long-list” and any vote of the people  
18 requirement for the public’s telecom assets.<sup>4</sup> As seen here, page 10, line 17 of Def.’s Response: <sup>5</sup>

19 17 of the statute as it existed in 1917. However, it is unnecessary for the Court to decide this question  
20 18 because Chapter 137 of the Laws of 1917, including the reference to telephone plant and lines,  
21 19 was repealed in its entirety in 1965.

22 Defendant erroneously asserts, “reference to telephone plant and lines, was repealed in its  
23 entirety in 1965.” That is not true. The Law of 1917 was “repealed and replaced,” in its *entirety*.  
24

25 <sup>1</sup> Shook Decl. 12/12/19, Ex. 32. Pg. 1, Ln. 20, ¶ 4. (Def.’s own Res. U-10828 citing public’s right to vote.).  
26 <sup>2</sup> As evidenced by over 2,100 pages of essential assets listed in the Click! IRU privatization agreement, without  
which Click!’s telecom services cannot continue in operation. Shook Decl. 11/1/19, Ex. 29, 30.  
<sup>3</sup> Def’s Resp., Pg. 14:10, (“cable modem and metro-ethernet services are a form of telecommunications”).  
<sup>4</sup> “Laws of 1917” refer to the RRS §§9512-9514, “Sale or Lease of Public Utilities Owned by Cities.”  
<sup>5</sup> Def.’s Response, Pg. 10:17, Defendant states: “the Laws of 1917, including the reference to telephone plant  
and lines, was repealed in its entirety in 1965.”

Plaintiff Shook’s Reply In Support Of  
Motion for Partial Summary Judgment  
Mitchell Shook, Plaintiff  
3624 6<sup>Th</sup> Ave Suite C, Tacoma, WA 98406

1 The Laws of 1917 did not change in 1965 and a search for a definition of “utility” is not  
2 required. The statute defines telecom as the utility. Since Click! is owned by a city, and it doesn’t  
3 matter which Department of the city owns it, the popular vote requirement survives.

4 **A. The People’s Right to Vote was Not Extinguished by the Laws of 1965.**

5 The City’s main argument, that the Laws of 1917 were “repealed” in 1965, is easily dispelled,  
6 by examining 1951’s inaugural Chapter 80.48, incorporated as Chapter 35.94 in 1965.<sup>6</sup>

7 The 1951 version is identical to the statute today. Nothing was changed in 1965.<sup>7</sup> Seen here is  
8 RCW 80.48.010 as it appeared in 1951; and, as it remains today: Shook Dec. 1/6/20, Ex. 92:

9 **Chapter 80.48**  
**SALE OR LEASE OF MUNICIPAL UTILITIES**

10 **Sections**

- 11 80.48.010 Authority to sell or let.  
80.48.020 Procedure.  
80.48.030 Execution of lease or conveyance.

12 **80.48.010 Authority to sell or let.** A city may lease for any term  
13 of years or sell and convey any public utility works, plant, or sys-  
tem owned by it or any part thereof, together with all or any equip-  
ment and appurtenances thereof. [1917 c 137 § 1; RRS § 9512.]

14 Today’s Title 35 version is identical to the Title 80 version from 1951. The 1965 enactment of  
15 Chapter 35 RCW did not “repeal” or change the previous Chapter 80.48 RCW. Since the statutes  
16 were identical, before and after the 1965 enactment of Title 35, the law falls under Chapter 35.98’s  
17 “Construction” statement, in RCW 35.98.010, which provides, “The provisions of this title . . . shall  
18 be construed as restatements and continuations, and not as new enactments.” Chapter 35.94’s  
19 enactment was, simply, “restatements and continuations” of the law, with no change in the law.  
20 Thus, it remains intact as originally enacted.

21 **Chapter 35.98**  
**CONSTRUCTION**

22 **35.98.010 Continuation of existing law.** The provisions of this  
23 title insofar as they are substantially the same as statutory provi-  
24 sions repealed by this chapter, and relating to the same subject  
25 matter, shall be construed as restatements and continuations, and  
26 not as new enactments.

<sup>6</sup> Shook Decl. 1/6/20, Ex. 95 (Laws of 1965 savings clause, and Laws of 1951 with the statute as it existed at the inception of the RCW, as Chapter 80.48 RCW, showing RCW 35.94 was never changed.

<sup>7</sup> “Laws of 1917” were RRS §§9512-9514, “Sale or Lease of Public Utilities Owned by Cities or Towns.”

1 As a “Continuation of existing law,” the language in RCW 35.94.020 necessarily still  
2 encompasses “telegraph and telephone plants and lines, **or any system embracing all or any one**  
3 **or more of such works or plant or any similar or dissimilar utility system.**”<sup>8</sup> (Emphasis added).

4 Click!’s telecommunication system is the modern equivalent of “telegraph and telephone plants  
5 and lines,” and it is also a “similar or dissimilar” system. Thus, the protective popular vote-of-the-  
6 people requirement remains in effect under current statutory language.

7 So the City has negotiated the terms of the IRU, Business Agreement and Ordinance to assign  
8 the Click! Franchise. The statute requires City do those things. But there is a final step, which the  
9 statute requires, with a *clear statement* that the “ordinance shall not take effect until it has been  
10 submitted to the voters of the city for their approval or rejection at the next general election.”<sup>9</sup>

### 11 **1. Continuation of the Laws of 1917 into the 1951 Inauguration of RCW**

12 It is worth remembering the Laws of 1917 were “abbreviated” prior to codification into RCW  
13 80.48 in 1951.<sup>10</sup> A savings clause was added at RCW 1.04.020.<sup>11</sup>

14 When the statute was “Rewritten for brevity,” the long-list of utilities, with “telegraph and  
15 telephone,” was shortened to a generality encompassing “any public utility works, plant, or system  
16 owned by it or any part thereof, together with all or any equipment and appurtenances thereof.”

17 In 1946, the Code Revision & Recompilation Committee provided a letter, which explained that  
18 all “major changes in the course of revision” would be documented in a “third column,” with a  
19 “catch-line” containing the “reviser’s explanation in parenthesis.” The original letter can be found  
20 in Shook Decl. 12/30/19, Ex. 81 pg. 15 (pg. 330 of 507). Seen here, is an excerpt from that letter:<sup>12</sup>

21 **The third column contains the catch-line of each section as set**  
22 **forth in the revision itself, together with the reviser’s explan-**  
23 **ation in parenthesis of the major changes made in the course of**

24 \_\_\_\_\_  
25 <sup>8</sup> Shook Decl. 1/6/20, Ex. 95. *Also see* Laws of 1965, Ch. 7, Page 444.

26 <sup>9</sup>A “contract contrary to the terms and policy of a legislative enactment is illegal and unenforceable. *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 *Hederman v. George*, 35 Wash.2d 357, 362, 212 P.2d 841 (1949); *State v. Nw. Magnesite Co.*, 28 Wash.2d 1, 26-27, 182 P.2d 643 (1947).

<sup>10</sup> Fully briefed on page 1 of Plaintiff Shook’s Motion, and in Plaintiff Bowman’s MPSJ on Pages 9-12.

<sup>11</sup> “nothing herein shall be construed as changing the meaning of any such laws.”

<sup>12</sup> Shook Decl. 12/30/19, Ex.81, Reviser’s Notes Volume 2, Revised Code of Washington, 1946, At 80-7, (stating RRS § 9512 was “rewritten for brevity.”)

1 Thus, the emphatic “similar and dissimilar” language was retired, not by legislative action, but  
2 by a code reviser’s revision for “brevity,” as shown in the “reviser’s explanation, seen here:<sup>13</sup>

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.

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6 **B. Telecommunications Service is Not a Cable TV Service.”**

7 In City’s other argument against the public vote, which I call the “Hail Mary,” for being sillier  
8 than surplus, Defendant admits Click! is a telecommunication system, providing telecom services;  
9 yet denies they ever “intended” Click! to be a telecommunication system.<sup>14</sup>

10 All “intentions” aside, the argument is flawed. First, it’s false. Second, the City is legally and  
11 equitably estopped from asserting that it is not a telecom system because it has previously taken  
12 the position that it is.

13 Click! is owned by the City’s public utility, it provides telecom services and this case is not  
14 about “intentions.” Defendant’s own pleadings and business plans, in the 1996 case confirming  
15 authority for utility funding of Click!, prove Defendant’s “intention” was to establish a commercial  
16 telecom system, as part of the public utility, to deliver municipal telecom services.<sup>15</sup> Furthermore,  
17 Defendant admits Click! is a “telecommunications network” and its services are “a form of  
18 telecommunications.”<sup>16</sup> As seen the Response, on Page 14:10.

19 | defendant does not dispute that Click! Network operates over a network that meets the definition  
20 | of telecommunications. The HFC Network was built as a telecommunications network, and cable  
21 | television, cable modem and metro-ethernet services are a form of telecommunications.

22 Defendant urges viewing Click! as a “one-way” TV system, as in *Issaquah*.<sup>17</sup> The  
23 distinctions between TV and Click! was briefed in Plaintiff’s Response on Pages 6-7.

24  
25 <sup>13</sup> Decl. 12/30/19, Ex. 81 pg.19, or page 334/507 in the PDF. (reviser’s note rewritten for brevity)

26 <sup>14</sup> City’s Resp., Pg. 20:13, (“City had no intention of allowing Click! to operate as a telecommunications utility”).

<sup>15</sup> Shook Decl., 12/30/19 Ex. 88, *City of Tacoma v. Taxpayers and Ratepayers of Tacoma*,

<sup>16</sup> 47 USC § 153(53) The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

<sup>17</sup> *Issaquah v. Teleprompter, Inc.*, 93 Wn.2d 567 (1980).

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**1. Telecommunications is Easily Distinguished From Cable TV**

Since Click! is a “communication system,” Defendant’s argument is moot under the Laws of 1917, which require a vote, and under federal, state and local statutes, and case law, which *all* fully distinguish cable TV from telecom.<sup>18</sup>

The legalities and complexities of advanced telecommunications technology and regulations can be perplexing, but some recent cases are helpful. *Community Telecable’s* ruling differentiates cable TV from Click!’s “two-way” telecommunications.<sup>19</sup> The Oregon State Supreme Court distinguishes cable TV and telecom systems, in explaining why Comcast’s cable modem services should be taxed as telecom and not cable TV.<sup>20</sup> As seen in *City of Eugene v. Comcast*, here:

Thus, considering the Telecommunications Act in context, we conclude that it created a regulatory scheme that focuses on the function of the service provided rather than on the communications facility used to provide it. Within that scheme, telecommunications services are generally treated as telecommunications services and cable services as cable services, regardless of who provides the service or how. *Id.* at 551

The FCC has recognized that, as it relates to distinguishing cable, telecommunications, and information services, none of those classifications “rests on the particular types of facilities used. Rather, each rests on the function that is made available.” *In re Inquiry Concerning High-Speed Access to the Internet*, 17 FCC Rcd 4798 at 4821; *see also* 47 USC § 522(6) (defining “cable services”); 47 USC § 153(53) (defining “telecommunications service”); 47 USC § 153(24) (defining “information service”). That is expressly the case for “telecommunications service,” which the Act defines as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used.*” 47 USC § 153(53) (emphasis original) *Id.* at 551.

**C. City Charter and Franchise Agreement do Not Prohibit Telecommunications Business.**

Defendant’s disingenuous and ill-conceived contention that City Charter Section 4.1 prohibits the City from providing telecom services is deeply insulting to the legacy of Tacoma’s own

<sup>18</sup> *E.g. Community Telecable V. City Of Seattle* 164 Wn.2d 35 (Wash. 2008) differentiates TV from Telecom. *See also*, 47 USC § 153(50) *compare with* 47 U.S.C. § 522(6), *E.g.* RCW 82.04.065 (27), Tacoma Municipal Code Title 16 B. (“Telecom service” does not include television and video programming service).

<sup>19</sup> *E.g. Community Telecable V. City Of Seattle* 164 Wn.2d 35 (Wash. 2008) differentiates TV from Telecom. *See also*, 47 USC § 153(50) *compare with* 47 U.S.C. § 522(6), *E.g.* RCW 82.04.065 (27), Tacoma Municipal Code Title 16 B. (“Telecommunications service” does not include television and video programming service).

<sup>20</sup> *City of Eugene v. Comcast of Oregon II, Inc.*, 359 Or. 528, 375 P.3d 446 (2016)

Plaintiff Shook’s Reply In Support Of  
Motion for Partial Summary Judgment

Mitchell Shook, Plaintiff  
3624 6<sup>th</sup> Ave Suite C, Tacoma, WA 98406

1 Honorable Judge Homer T. Bone, who authored that language. It places no such limitation on the  
2 types of utility services the City may “sell and deliver.” It affords “all the powers granted to cities  
3 by “state law,” and specifically provides “not by way of limitation.” As seen here,:

4 **Article IV**  
**PUBLIC UTILITIES<sup>13</sup>**

**General Powers Respecting Utilities**

5 **Section 4.1** – The City shall possess all the powers granted to cities by state law to construct, condemn  
6 and purchase, purchase, acquire, add to, maintain, and operate, either within or outside its corporate  
7 limits, including, but not by way of limitation, public utilities for supplying water, light, heat, power,  
8 transportation, and sewage and refuse collection, treatment, and disposal services or any of them, to the  
9 municipality and the inhabitants thereof; and also to sell and deliver any of the utility services above  
10 mentioned outside its corporate limits, to the extent permitted by state law.

11 The Charter’s history is fascinating, not only for the strong protection it affords citizens, with  
12 Section 4.6’s right to vote in protecting utility assets from wrongful privatization, but also for the  
13 fact it contains contributions by Hon. Judge Bone, the “Father of Public Power.”<sup>21</sup> Judge Bone was  
14 Chairman of the City’s Freeholder Charter Committee in 1926.<sup>22</sup> In Judge Bone’s personal letter,  
15 published in the 1944 Congressional Record, he describes his leadership role in creating Tacoma’s  
16 City Charter. *see* Shook Decl. 12-30-19, Ex. 80 pg. 5.

17 In 1926 a charter revision commission was elected by the people of Tacoma  
18 for the purpose of revising the city charter. I was elected to that commission,  
19 receiving many thousands more votes than anyone else who had been a  
20 candidate, and without objection was made chairman of the charter revision  
21 commission. Naturally, I made every effort to see that the revised (and  
22 present) city charter which was the outgrowth of the work of this commission,  
23 contained suitable provisions respecting franchises for private utilities. I  
24 wrote, and had incorporated into the new charter, a provision authorizing a  
25 referendum on any franchise which might be granted a private utility.

26 **D. Status as “System” or Departmental Organization is Unrelated to Right to Vote.**

Defendant describe the dispute as whether “Click! Network is a separate public utility from  
Tacoma Power.”<sup>23</sup> Also, that Click! was “intended” to be a municipal service. But “separate utility”

<sup>21</sup> Shook Decl. 1/6/20 Ex.96 Death Of Former Senator Homer T. Bone Congressional Record- Senate Mr.  
Magnuson. Mr. President, with a sense of great sorrow I announce to the Senate the passing yesterday of a  
former distinguished Member of this body, Homer T. Bone of the State of Washington. He was 87 years old.  
He served here for two terms with great distinction. . . . he was one of the most brilliant men ever to grace  
this body. He was a determined advocate of the development of power through the use of natural resources,  
particularly hydro-electric development. Out in the Pacific Northwest *we considered him to be the father of  
public power*, and also the Rural Electrification Administration.

See also, In 2016 Homer T. Bone Award went to Congressman Norm Dicks, last accessed 1/5/20, at  
<https://www.vnf.com/norm-dicks-recipient-of-homer-t-bone-award>, *also*, <https://perma.cc/Y5X2-SF5J> .

<sup>22</sup> Shook Decl. Part Two 12/12/19, Ex. 67 Pg. 3 (Judge Bone Chairman of 1926 Freeholders Charter  
Commission, and Member of the Utilities, Franchises; Public and Local Improvements Committee.)

<sup>23</sup> Quoting Def.’s Response Pg. 3:6.

1 is not the issue, or the standard for triggering the public vote.<sup>24</sup> Click!’s assets and appurtenances,  
2 by virtue of their public ownership, are “*any part thereof*” of a utility, triggering the vote.<sup>25</sup> In  
3 Shook’s Motion, under “Relief Requested” Shook asks, “Are telecom *assets* of a municipal utility”  
4 protected by the laws. Seen here, Page 3, of Shook’s MPSJ, here:

5 15 || 1. Are telecommunication assets of a municipal utility governed by Chapter 35.94 RCW or ||  
6 16 || Tacoma City Charter 4.6 ? ||

7 Defendant admits the assets and appurtenances were acquired for utility purpose.<sup>26</sup> Unless  
8 these assets are obsolete, worn out and no longer useful in performing the public purpose for which  
9 they were acquired, i.e. “surplus,” which they are not, they are protected by law. Defendant does  
10 not deny the assets are useful and valuable for the very same utility purposes for which they were  
11 acquired, nor can they deny it, given the assets are now earning \$25 million a year in revenue and  
12 will continue doing so under privatization.<sup>27</sup>

13 **1. Organizational Status Does Not Affect Click!’s Status as a Communication Utility.**<sup>28</sup>

14 Defendant’s theory that City created Click! to provide “municipal services,” not to create a  
15 “utility,” is irrelevant. As *Seen* here, from Defendant’s Response, pg. 19. In 9:<sup>29</sup>

16 Converting Click!’s ownership, from the Department of Utilities (“TPU”), to place it under  
17 general government’s control, does not magically convert the System into some other type of  
18 municipal service, such as a library, theater or ball park. Click! will never be anything other than a  
19 communications utility, regardless of administrative organization or “naming.”

20 <sup>24</sup> Plaintiff’s “Any Part Thereof” arguments are in the Plaintiff’s 10/30/19 Motion for TRO, hereby  
21 incorporated, *see* Pages 17-18 for the “Any Part Thereof” standard and threshold for triggering a public  
22 vote. *See also*, Page 12 where plaintiff cites the City of Duvall’s process for surplus property, as an  
23 example of best practices adhering to the surplus property requirements of RCW 35.94.040, *See also* Shook  
24 Decl. 10/30/19, Ex. 19. (Seattle Classified ad), *See also*, Shook’s “Email to Tacoma City Council” on  
25 Duvall process, Shook Decl. 12/30/19, Exhibit 82. Informs the Court and explains why Shook’s “any Part  
26 Thereof” resolves this case.

<sup>25</sup> See Shook moving brief, Pg. 27, Ln 3. If portions of Click! qualify as the “works, plant, *or system* owned  
by it or *any part thereof*,” then vesting via surplus is *ultra vires*.

<sup>26</sup> Def’s Response Pg. 22:10 (“The City does not dispute that the entire HFC Network was acquired for  
public utility purposes—nor, that operation of Click! Network was also for public utility purposes, i.e.”)

<sup>27</sup> For the full briefing on the history of RCW 35.94.040 and the legislative intent of “surplus,” see  
Shook’s Motion, on Pages 23-25. Surplus and “any part thereof,” are the issues before this Court.  
They determine the vote of the people over disposal of our assets.

<sup>28</sup> Click! is a “communication utility” by statutory definition RCW 35.96.020. Also RCW 80.04.010(28)  
Click! is a utility and “Telecommunication Company,”

<sup>29</sup> Defendant discusses authority under RCW 35A.11.020 and claims Click! was not “intended to be a utility.

1 Institutional naming and organizational convenience aside, it doesn't matter if the utility is an  
2 obligation of TPU or general government. Calling it a "municipal service," does not destroy the  
3 Laws of 1917 that have protected municipal telecom from privatization for over 100 years.<sup>30</sup>

4 TPU initiated the creation of Click!, not general government. TPU funded Click!, with approved  
5 of Council at the request of the TPU Board. TPU management saw a need to upgrade infrastructure  
6 and hired consultants to study the prospect of a telecom system. The consultants advised TPU of  
7 efficiencies and benefits that could be realized by increasing the original budget by an additional  
8 \$50 million, to include "*additional capacity*." Defendant has stated, "The original cost estimate for  
9 the network was \$15 million and the consultant's recommendation made to the city was to spend  
10 more and also bring telecommunications services to customers."<sup>31</sup> The additional capacity was  
11 costly; "The approved cost estimate for the network was **\$65 million**, but by the time Click! was  
12 launched to customers in July 1998 the cost grew to **\$89 million**."<sup>32</sup> (emphasis added.)

13 The community's need for an advanced telecom system with broadband capability was viewed  
14 as essential and projected to yield benefits in revenue diversification and economic growth, which,  
15 in turn, would increase sales of other utilities. Council approved TPU's plan, in Resolution No.  
16 33668 establishing the System:<sup>33</sup> Council determined, "the City Light Division's broadband  
17 telecommunications proposal is in the best interests of the City, will serve a public purpose and . . .  
18 that the proposed broadband telecommunications system shall be owned, operated and controlled  
19 by the City of Tacoma Department of Public Utilities Light Division." Click! is a utility asset.<sup>34</sup>

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20 <sup>30</sup> Click! is a municipal "communication utility." RCW 35.94 makes no distinction based on what  
21 "department" a city places its utilities in. The protective public vote emanates from the fact Click! is a  
22 telecom system and named utility, protected on the "long-list" of utilities, in the Laws of 1917; plus, that  
23 right to vote was confirmed in *Bremer* by our Supreme Court. *see Bremerton Municipal League v.*  
24 *Bremer*, 15 Wn.2d 231 (1942); *Bremer* guides the Court, under *Fondren v. Klickitat County*, 79 Wn. App.  
25 850, 856, 905 P.2d 928 (1995) (Supreme Court binding on state courts).

26 <sup>31</sup> Shook Decl. 1/6/20, Ex. 93, Pg. 5. (Click! Network Business Plan Revised 3-20-17 Tenzin Gyalzen.)  
<sup>32</sup> *Id.* at 5 ("The approved cost estimate for the network was **\$65 million**, but by the time the Click! was  
launched to customers in July 1998 the cost grew to **\$89 million**.").

<sup>33</sup> Shook Decl. 10/30/19, Ex. 10:4 Res. 33668, also, Ex. 11 Ordinance 25930 (creating System.) Ex. 50  
(Conclusions of Business Plan for establishing Click!) 12/30/19, Ex. 74 Klein deposition and statements. Ex.  
70 (Baarsma Singleton Paper on Creating Capacity.), Ex. 83, historical website statements, press releases  
and news articles about Click! creation. Ex. 85 incremental cost to construct System, Ex. 88 briefs from '96  
and '97 case approving Click!.

<sup>34</sup> Click! was built and paid for by TPU and is a municipal utility protected by the public vote  
under the Laws of 1917. A separate department or designation as a "system" is not required to  
trigger the public vote. Click!'s services compels the public vote.

1        Instead of disputing Plaintiff’s facts, which they cannot, City pretends they never “intended”  
2 Click! to be a telecom system, that it was just another “municipal service;” and that departmental  
3 naming magically extinguishes citizens’ “right to vote,” allowing Defendant to surplus Click!.  
4 Defendant cites Click!’s cable TV franchise, an agreement with themselves, as proof that Click! is  
5 just a “municipal service” and not really a part of TPU, a municipal utility. Defendant goes on to  
6 compare Click! with and old worn out service vehicle or work truck.<sup>35</sup>

7        Not so fast! Some long-lost progressive era policymakers, Judge Bone among them, still have a  
8 say about privatization here, via their City Charter and the Laws of 1917. Bless their souls, for they  
9 knew about such things, having endured their own impossible scandals, over 100 years ago. The  
10 protections they provided, in clear, emphatic, language, from wrongful privatization, in case  
11 anything “similar or dissimilar” should ever happen again, survive today.<sup>36</sup>

12        Defendant admits Click! is a telecom system providing telecom services; but claims citizens  
13 have no right to vote over its disposal, since it is not a “separate” utility system. There is no law that  
14 requires the City to organize Click! more separately than it already has. Click!’s organization, as a  
15 sub-fund of Tacoma Power, is not precluded by law. The City accounts for Click! revenue and  
16 expenses appropriately. Furthermore, the City’s chosen and convenient method for organizing  
17 Click! under TPU recently passed judicial scrutiny in *Coates v Tacoma*.<sup>37</sup>

18        **2. Assets Will Continue Performing Utility Purpose For Which They Were Acquired.**

19        The Court need not find Click! is a “separate system,” rather, only that its assets are “any part  
20 thereof, and whether those assets are “property, or equipment originally acquired for public utility  
21 purposes,” which they were.<sup>38</sup> Then, are the assets surplus, which they are not; since they continue  
22

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23 <sup>35</sup> Def’s Response, Page 20:21, (“For instance, if the City surplused a work vehicle, ostensibly it would still  
24 be continuing on in the same capacity as a vehicle.”)

25 <sup>36</sup> See Shook Decl. 12/30/19, Ex. 80 (Honorable Homer T. Bone’s Letter in the 1944 Congressional Record,  
26 published upon Judge Bone’s departure from the Senate, having been appointed a Judge to the Ninth Circuit.  
Also, “similar or dissimilar” is a play on that emphatic phrase, found in the Laws of 1917. It just shows how  
serious these legislators were about making their intentions clear.

<sup>37</sup> And why not? Click! supports Power’s purpose, of efficiently providing electrical power, and has a true  
nexus to such purpose, by offsetting costs, increasing revenue thru economic growth and diversifying  
revenues. Institutional naming, or organizational departmentalizing, do not turn Click! into a non-utility  
“municipal service,” such as a public gathering facility, service, a ball park, library or luxury TV service.

<sup>38</sup> Direct quote from RCW 35.94.040. (Lease or sale of property originally acquired for utility purposes.)

1 providing the same “utility purpose” for which they were acquired.<sup>39</sup> Thus, the assets are not  
2 surplus under the clear statement in RCW 35.94. The meaning of the term “surplus” is found in the  
3 legislative history that show the intent of RCW 35.94.040<sup>40</sup>

4 Furthermore, under the City Charter, there is no “surplus” clause at all. A vote is required  
5 regardless of surplus. The fact that the assets themselves are essential is obvious. Without them  
6 there is no municipal Click! telecommunication service available for the community.

7 Click!’s essential assets will continue serving the same customers with the same services, which  
8 Defendant does not deny, for it’s true. Click!’s assets are not surplus. Defendant maintains a  
9 reversionary interest in the assets and fiber optic network.

10 In Defendant’s example of a surplus work truck, Defendant argues the truck, once sold,  
11 continues performing the same function, that of a work truck. Perhaps, but not for TPU; nor in  
12 performing the very “utility purpose” for which the truck was acquired.<sup>41</sup>

13 Imagine a water truck, acquired by TPU to deliver customers’ water. The truck and water  
14 enterprise cannot be sold to a private party, to continue delivering water to the same customers,  
15 with the same truck, only with the private company then setting rates for customers’ water service.  
16 Selling a truck, or Click!, this way, violates the spirit of the surplus statute, which limits surplus  
17 to useless assets “not required for providing continued public utility service,”<sup>42</sup> and defines the  
18 items as “unserviceable, inadequate, obsolete, worn out or unfit to be used.”<sup>43</sup>

19 Also, when TPU sells a surplus truck, it retains no reversionary interest, requiring the truck be  
20 returned after 20 years. When something is surplus, the asset is “disposed of.” Cities do not retain  
21 reversionary interests when disposing of surplus assets under RCW 35.94.040.

22 <sup>39</sup> A detailed analysis of proper procedures for conveying public property, is available on MRSC : at  
23 <http://mrsc.org/Home/Explore-Topics/Legal/General-Government/Sale-of-Surplus-City-or-Town-Property.aspx> Also at- <https://perma.cc/XY4T-UQLS> None of which Defendant has, admittedly, followed;  
24 as Defendant cites authority for gifting of public funds via “ negotiated disposition of surplus TPU assets if  
25 approved” by the Board” See Def’s MJS, Pg. 22.

26 <sup>40</sup> See Shook’s moving brief, page 23. Defendant has not disputed that the assets are not actually  
surplus, nor do they deny the legislative history and intent of surplus, for they cannot. Click! assets  
are valuable and not “obsolete” or “useless.”

<sup>41</sup> Defendant’s work truck example is irrelevant. Service vehicles are not named in the “long-list” of utilities  
protected by the Laws of 1917, and do not bear the distinction of being the second “pubic utility” ever  
regulated in Washington State, as was “telephone and telegraph,” under the Railroad Commission.

<sup>42</sup> Quoting RCW 35.94.040.

<sup>43</sup> RCW 54.16.180 (showing clear legislative intent and definition of “surplus” for municipally-owned utility  
property.) See Shook’s moving brief., Pgs. 24, 25, (detailed history of surplus statute).

1 Defendant is conveying, unforgivably, the community’s broadband system, and the beloved  
2 Click! brand and trademark. Privatization is an offensive gift of public funds; a lending of the  
3 good name, and credit, of the government to a private party, a most basic gifting violations.<sup>44</sup>

4 **3 Cable TV Franchise is Irrelevant and Does Not Limit Authority for Telecom Services.**

5 Federal statutes distinguish TV from Telecom. The City’s self-issued cable TV franchise only  
6 requires Click! obtain a separate telecom license. It does not convert Click! into a cable TV system.  
7 All modern cable television franchise agreements are careful to distinguish telecom as a separate  
8 activity. This is done, not to prevent the provision of broadband services, but so TV revenues are  
9 not confused with such services or telecommunications, which are generally exempt from taxation  
10 under the ITFA. By specifying that the agreement does not cover telecommunications, cities avoid  
11 creating unnecessary difficulty in collecting their 5% cable TV franchise fee. The City’s references  
12 to cable TV regulations do not apply to telecommunications, under 47 USC § 541(b)(3)(A)(ii). *City*  
*of Eugene v. Comcast*, is again helpful:

13 “If a cable operator \* \* \* is engaged in the provision of telecommunications  
14 services, \* \* \* the provisions of *this subchapter* shall not apply to such cable  
15 operator or affiliate for the provision of telecommunications services.” 47 USC  
16 § 541(b)(3)(A)(ii) (emphasis added). That provision is best read as establishing  
17 that telecommunications services are not to be regulated as cable services, and  
not subject to cable franchising requirements, merely because those  
telecommunications services are provided over a cable system.

18 **E. Reply to Miscellaneous Citations in Defendant’s Response**

19 Defendant cites *Clark, Issaquah* and *King County*.<sup>45</sup> *King County* is cited simply to show  
20 “*Issaquah* is still good law,” the silly implication being Click!’s advanced telecom network is the  
21 equivalent to an old cable TV system, which *Issaquah* considered a “luxury,” or “something you can  
22 do with a rooftop antenna.”<sup>46</sup> Both *Clark* and *Issaquah* support plaintiff’s case. *Clark*’s definition of  
23 “utility” is broad enough to include the butcher, the baker and the broadband-maker.<sup>47</sup> More than

24 <sup>44</sup> *Port of Longview V. Taxpayers* 85 Wn.2d 216, at 222, 1974 (municipality borrowing money in its own  
name in form of municipal bond, and loaning that same money to a private corporation.)

25 <sup>45</sup> Def.[’s] MSJ, Pg. 14. *Issaquah v. Teleprompter, Inc.*, 93 Wn.2d 567 (1980), *King County v. King County*  
*Water Districts et. al.*, Wash. No. 96360-6, Slip Op. (Dec. 5, 2019). *Clark v. Olson*, 177 Wash. 237 (1934).

26 <sup>46</sup> *Issaquah*, at 574, “It’s something you can do with a rooftop antenna. In that sense, it’s not a utility.”

<sup>47</sup> *Clark* provides that a “dedication to a public use” constitutes a utility. *Clark* also explains “public  
use” or “public utility” are established by “implication” and accommodation. *Clark* provided many  
examples of how “public use was implied.”<sup>47</sup> Those examples can be translated to Click!, further  
establishing Click!’s status as a municipally owned “utility.” Under *Clark*, Click! is a utility because

1 implying Click! is a utility, Defendant admits taxing Click! as a utility, on page 22 of their response,  
2 at line 17, seen here:

3 17 || TPU. Thus, because Click! Network generates revenue accruing by reason of transaction of  
4 18 || business, it is taxed under the GET as a business unit of TPU. Therefore, Mr. Shook's argument

5 *Issaquah* defines Click! as a "communication utility," properly citing RCW 35.96.020, "a  
6 statute dealing with the conversion of electric and communication facilities to underground  
7 facilities in cities and towns," and recognizing that Cable TV did not fit that definition. Since Click!  
8 is admittedly a communication system, indubitably Click! fits the standard of RCW 35.96.020.<sup>48</sup>

### 9 **Right to Vote is Constitutionally Protected**

10 In a free and democratic society, the power to vote is a fundamental right afforded citizens.  
11 The Washington State Constitution, Article I, Section 19 provides, "No power, civil or military,  
12 shall at any time interfere to prevent the free exercise of the right of suffrage."<sup>49</sup>

13 Defendant's freewheeling disposal of Click! destroys citizens' fundamental Constitutional  
14 right to vote on the disposal of their valuable municipal utility assets. The right to vote, "in a free  
15 and unimpaired manner is preservative of other basic civil and political rights, any alleged  
16 infringement of the right of citizens to vote must be carefully and *meticulously scrutinized*."  
(emphasis added) *Reynolds v. Sims*, 377 U.S. 533, 561-62, (1964).

17 When citizens of Tacoma granted City officials the privilege of managing their utilities, they  
18 were not content to divest themselves of every managerial function normally associated with the  
19 operation of a business concern. By their charter they have retained express power over the  
20 divestiture of their functional public utility property, or "*any part . . . any equipment and*  
21 *appurtenances thereof*." The contract in question has the effect of violating the charter for the  
22 City of Tacoma and is therefore void unless approved by the voters as required by the charter.<sup>50</sup>

23 \_\_\_\_\_  
24 "public use was implied" by Click! holding itself out as a utility, by providing services to a certain class of  
25 the public, by Council setting rates, by funding and organizing Click! within the Dept. of Utilities, by the  
26 System being installed under the right of eminent domain, by Click! holding FCC licenses, by entering into  
telecom franchises agreements and contracts, by sharing lobby space within TPU headquarters for customer  
service purposes, and by City's treatment and taxation of Click! as a utility.

<sup>48</sup> *Issaquah*, at 574, cited the definition of "communication utility" in RCW 35.96.020, calling it "a statute  
dealing with the conversion of electric and communication facilities to underground facilities in cities and  
towns". Cable TV did not fit that definition, but Click! certainly does.

<sup>49</sup> *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007)

<sup>50</sup> Drawing inspiration from *Clark v. City of South Haven*, 8 Mich. App. 74 (1967), 153 N.W.2d 669.

Plaintiff Shook's Reply In Support Of  
Motion for Partial Summary Judgment

Mitchell Shook, Plaintiff  
3624 6<sup>th</sup> Ave Suite C, Tacoma, WA 98406

1 The facts set forth in plaintiff's motion have not been refuted, for they are true.<sup>51</sup> Finally,  
2 please note, as stated in *Tacoma v. Taxpayers of Tacoma*,

3 Tacoma's municipal utility authority has limits. In exercising its proprietary power,  
4 Tacoma may not act beyond the purposes of the statutory grant of power, *State ex*  
5 *rel. PUD 1 v. Wylie*, 28 Wash.2d 113, 182 P.2d 706 (1947), or contrary to express  
6 statutory or constitutional limitations. *Metropolitan Seattle v. Seattle*, 57 Wash.2d  
7 446, 459-60, 357 P.2d 863 (1960); 12 E. McQuillin, *supra* at § 35.35.<sup>52</sup>

#### 8 **F. Conclusion**

9 For the foregoing reasons, the Court should deny Defendant's Motion and grant Plaintiff's  
10 motion for partial summary judgement by declaring council's actions to dispose of Click! by  
11 surplus ultra vires and require the matter be put to a vote of the people, as required under City  
12 Charter 4.6 and RCW 35.94.020.

13 Respectfully submitted this 6<sup>th</sup> day of January 2020.

14 

15 \_\_\_\_\_  
16 Mitchell Shook, Plaintiff

17  
18  
19  
20 <sup>51</sup> These undisputed facts encompass the historical information of Click! showing, the "Telecommunication  
21 Business Plan," the "Study Team," the original goals behind Click!'s creation, the funding, construction,  
22 marketing, and promotion, that resulted in an enterprise with \$25 million in annual revenue, a separate  
23 organizational chart and structure, expenses accounted for separately, growing profits and revenues,  
24 delivering Gigabit speed Broadband Internet Access Service, Fiber To The Home ("FTTH"), VoIP  
25 prioritized DOCSIS 3.1 modem and "Metro Ethernet" services, over *state-of-the-art technology*, with  
26 expansive operations, serving 35,000 residential, institutional and governmental customer accounts,  
including Tacoma's Public Libraries, holding telecom licenses, franchises and agreements; paying City's  
public utility Gross Earning Tax on telecom revenue, as a telecom utility, owning essential routers, servers,  
hubs, nodes, and IP addresses, that are not surplus and will *continue* providing the same utility services, to  
the Utility's same customers; with wholesale rates set by Council, published in Title 12-Utilities in the  
Municipal Code; privatization eliminating Council control over rates; Click! held out as one of four utility  
services; water, power, rail and telecommunications, under four distinct brand names: Tacoma Water,  
Tacoma Power, Tacoma Rail and Click! Network, sharing common customer service facilities in the lobby  
space of TPU's headquarters, appearing together on TPU's website as "Our Services: Power, Water, Rail,  
Click!." Not insignificant facts; yet, all undisputed.

<sup>52</sup> *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 695, 743 P.2d 793 (1987)



City of Tacoma  
Office of the City Clerk

### CERTIFICATE OF CITY CLERK

I, Doris Sorum, City Clerk of the City of Tacoma, Washington, do hereby certify that the attached is a full, true and correct copy of Ordinance No. 25930 passed by the City Council on July 23, 1996.

Dated this 15<sup>th</sup> day of January 2020.

  
\_\_\_\_\_  
Doris Sorum, City Clerk  
City of Tacoma, Washington





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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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WHEREAS, the Light Division may wish to connect such telecommunications system to individual residences and businesses in its service area or to other providers of telecommunications services; and

WHEREAS, the City has determined that it should create a telecommunications system as part of the Electric System in order to construct these telecommunications improvements; and

WHEREAS, the City by Ordinance No. 23514 passed November 20, 1985 (as amended and supplemented, the "Ordinance"), authorized Electric System Revenue Bonds (the "Bonds") of the City to be issued in series, made covenants and agreements in connection with the issuance of such Bonds and authorized the sale and issuance of the first series of such Bonds in the aggregate principal amount of \$125,505,000 (the "1985 Bonds") for the purpose of refunding all of the City's then outstanding light and power revenue bonds; and

WHEREAS, the 1985 Bonds were issued under date of December 1, 1985 and are now outstanding; and

WHEREAS, the City has heretofore issued ten additional series of Bonds on a parity with the 1985 Bonds, which bonds were issued and are now outstanding:

Authorizing Ordinance	Bonds Dated	Principal Amount Issued
23663	July 1, 1986	\$ 30,000,000
24073	May 1, 1988	60,400,000
24296	May 1, 1989	48,500,000
25004	December 1, 1991	13,800,000
25004	December 5, 1991	42,400,000
25004	December 5, 1991	42,400,000
25089	May 1, 1992	31,295,000
25165	September 1, 1992	131,675,000
25333	August 1, 1993	3,318,500
25489	May 10, 1994	135,665,000

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WHEREAS, after due consideration, it appears to the City Council and the Public Utility Board (the "Board") that it is in the best interest of the City to create and construct a telecommunications system and to issue Electric System Revenue Bonds to finance a portion of the costs of such construction and that the exact amount of Bonds and terms of the Bonds shall be determined by resolution of the Council; and

WHEREAS, Section 10.1 of the Ordinance provides that the City may, without the consent of the owners of any Bonds, adopt an ordinance supplemental to or amendatory of the Ordinance to provide for the issuance of Future Parity Bonds and to prescribe the terms and conditions pursuant to which such Bonds may be issued, paid or redeemed; and

WHEREAS, the City desires to provide that the issuance and sale of the Bonds will be issued and secured under the Ordinance as amended and supplemented by Ordinance No. 23663, Ordinance No. 24073, Ordinance No. 24296, Ordinance No. 25004, Ordinance No. 25089, Ordinance No. 25165, Ordinance No. 25333, Ordinance No. 25489 and this Ordinance;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF TACOMA:

ARTICLE I

DEFINITIONS AND AUTHORITY

Section 1.1. Supplemental Ordinance. This Ordinance No. 25930 is supplemental to and is adopted in accordance with Section 5.1 and Article X of the Ordinance and shall be known as the Eighth Supplemental Electric System Revenue Bond Ordinance (the "Eighth Supplemental Ordinance").

Section 1.2. Definitions.

A. All terms that are defined in Section 1.1 of the Ordinance shall have the same meanings, respectively, in this Eighth Supplemental Ordinance as such terms are given in

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Section 1.1 of the Ordinance, as amended and supplemented by the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Supplemental Ordinances.

B. In this Eighth Supplemental Ordinance:

"Arbitrage and Tax Certification" means the certificate executed by the Director of Finance of the City pertaining to the calculation and payment of any Rebate Amount with respect to the Bonds.

"Bond Sale Resolution" means the resolution to be adopted by the City Council setting forth the final terms of the Bonds.

"Bonds" means the Electric System Revenue Bonds, 199\_\_, of the City issued pursuant to the Ordinance and this Eighth Supplemental Ordinance.

"Code" means the Internal Revenue Code of 1986, as amended, together with corresponding and applicable final, temporary or proposed regulations and revenue rulings issued or amended with respect thereto by the United States Treasury or the Internal Revenue Service, to the extent applicable to the Bonds.

"Eighth Supplemental Ordinance" means this Ordinance No. 25930.

"Rebate Amount" means the amount, if any, determined to be payable with respect to the Bonds by the City to the United States of America in accordance with Section 148(f) of the Code.

Section 1.3. Authority for this Eighth Supplemental Ordinance. This Eighth Supplemental Ordinance is adopted pursuant to the provisions of the laws of the State of Washington, the Tacoma City Charter and the Ordinance.

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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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The applicable limitations contained in Section 5.2 of the Ordinance having been complied with in the issuance of the Bonds, the Bonds will have a lien upon the Net Revenues of the Electric System for the payment of principal thereof and interest thereon equal in priority to the lien upon the Net Revenues of the Electric System for the payment of the principal of and interest on the 1985 Bonds, the 1986 Bonds, the 1988 Bonds, the 1989 Bonds, the 1991 Bonds, the 1992 Bonds, the 1992B Bonds, the 1993 Bonds and the 1994 Bonds.

Section 2.4. Due Regard. The Council and Board hereby find and determine that due regard has been given to the cost of the operation and maintenance of the Electric System and that it has not obligated the City to set aside into the Bond Fund for the account of the Bonds a greater amount of the revenues and proceeds of the Electric System than in its judgment will be available over and above such cost of maintenance and operation.

Section 2.5. Findings. The Council and Board hereby find it to be necessary and in the best interests of the City to issue the Bonds in order to provide part of the funds necessary to finance the Telecommunications Project.

ARTICLE III

AUTHORIZATION OF BONDS

Section 3.1. Principal Amount, Designation and Series. Pursuant to the provisions of the Ordinance, a series of Bonds of the City entitled to the benefit, protection and security of such provisions is hereby authorized in the aggregate principal amount of not to exceed \$1,000,000. Such Bonds shall be designated as, and shall be distinguished from the Bonds of all other series by the title, "City of Tacoma, Washington Electric System Revenue Bonds, 199\_."

Section 3.2. Purpose. The purpose of the Bonds is to provide part of the funds necessary to finance the Telecommunications Project, make any necessary deposit to the Reserve Account and to pay the costs of issuance and sale of the Bonds.

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Section 3.3. Date, Maturities and Interest. The Bonds shall be issued in the aggregate principal amount of not to exceed \$1,000,000 and shall be dated as of the date provided in the Bond Sale Resolution and shall bear interest from their dated date to their stated dates of maturity or prior redemption. The exact principal amount of the Bonds shall be established by the Bond Sale Resolution. The Bonds shall mature on the dates of the years and in the principal amounts and shall bear interest payable semiannually on the dates and at the rates per annum set forth in the Bond Sale Resolution.

Section 3.4. Denomination and Numbers. The Bonds shall be issued in fully registered form in the denominations of \$5,000 or any integral multiple of \$5,000 within a maturity. The Bonds shall be numbered separately in such manner and with any additional designation as the Registrar deems necessary for purposes of identification. The Bond Sale Resolution may provide for the Bonds to be held in book-entry only form.

Section 3.5. Redemption Terms. By the Bond Sale Resolution, the City Council may determine that all or a portion of the Bonds shall be subject to redemption prior to maturity at the option of the City, in whole or in part, on any date and at the respective redemption prices specified in the resolution. The City Council may designate certain Bonds as Term Bonds that will be subject to redemption by operation of the Bond Retirement Account through Sinking Fund Requirements in the years and amounts set forth in the resolution.

Section 3.6. Reservation of Right to Purchase. The City reserves the right to use money in the Revenue Fund or any other legally available funds at any time to purchase any of the Bonds in the open market provided there is no deficiency in the accounts within the Bond Fund. Any purchases of Bonds may be made with or without tenders of Bonds and at either public or private sale.

Section 3.7. Tax Exemption. The City shall comply with the provisions of this section unless, in the written opinion of nationally-recognized Bond Counsel to the City, such

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compliance is not required in order to maintain the exemption of the interest on the Bonds from federal income taxation.

The City hereby covenants that it will not make any use of the proceeds from the sale of the Bonds or any other funds of the City which may be deemed to be proceeds of such Bonds pursuant to Section 148 of the Code and the applicable regulations thereunder which will cause the Bonds to be "arbitrage bonds" within the meaning of said Section and said regulations. The City will comply with the applicable requirements of Section 148 of the Code (or any successor provision thereof applicable to the Bonds) and the applicable regulations thereunder throughout the term of the Bonds.

The City further covenants that it will not take any action or permit any action to be taken that would cause the Bonds to constitute "private activity bonds" under Section 141 of the Code.

Section 3.8. Arbitrage Rebate. The City will pay the Rebate Amount, if any, to the United States of America at the times and in the amounts necessary to meet the requirements of the Code to maintain the federal income tax exemption for interest payments on the Bonds, in accordance with the Arbitrage and Tax Certification.

ARTICLE IV

REGISTRATION, FORM AND GENERAL TERMS

Section 4.1. Registrar and Paying Agent. The initial Registrar and Paying Agent shall be the fiscal agencies for the state of Washington in Seattle, Washington, and New York, New York.

Section 4.2. Transfer and Exchange. So long as the Bonds are not in book-entry form, any Bond may be transferred pursuant to its provisions at the Registrar's principal office for such purpose by surrender of such Bond for cancellation, accompanied by a written instrument of transfer, in form satisfactory to the Registrar, duly executed by the registered owner in

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1 person or by the registered owner's duly authorized attorney. Upon payment of any applicable  
2 tax or governmental charge, the City will execute and the Registrar will authenticate and  
3 deliver at the principal office of the Registrar (or send by registered mail to the owner thereof  
4 at the owner's expense), in the name of the transferee or transferees, a new Bond or Bonds in  
5 authorized denominations of the same interest rate, aggregate principal amount and maturity,  
6 dated as of the last interest payment date to which interest has been paid so that there shall  
7 result no gain or loss of interest as a result of such transfer. To the extent of authorized  
8 denominations, one Bond may be exchanged for several bonds of the same interest rate and  
9 maturity, and for a like aggregate principal amount, and several Bonds of the same interest rate  
10 and maturity may be exchanged for one or several Bonds, respectively, of the same interest  
11 rate and maturity and for a like aggregate principal amount.

12 In every case of a transfer or exchange of any Bonds, the surrendered Bonds shall be  
13 canceled by the Registrar and a certificate evidencing such cancellation shall be promptly  
14 transmitted by the Registrar to the City. As a condition of any such transfer or exchange, the  
15 City at its option may require the payment of a sum sufficient to reimburse it for any tax or  
16 other governmental charge that may be imposed thereon. All Bonds executed, authenticated  
17 and delivered in exchange for or upon transfer of Bonds so surrendered shall be valid  
18 obligations of the City evidencing the same debt as the Bonds surrendered, and shall be entitled  
19 to all the benefits and protection of the Ordinance to the same extent as the surrendered  
20 Bonds.

21 Section 4.3. Limitation on Transfer or Exchange of Bonds. The City shall not be  
22 required to (a) issue, transfer, or exchange Bonds after the 15th day of the month prior to any  
23 interest payment date therefor, or (b) to register, discharge from registration, transfer or  
24 exchange any Bonds which have been designated for redemption within a period of 30 days  
25 next preceding the date fixed for redemption.  
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Section 4.4. Effect of Payment. All payments of or on account of interest to any registered owner of any Bond, and all payments of or on account of principal to any registered owner of any Bond (or to his or her assigns), shall be valid and effectual and shall be a discharge of the City, the Paying Agent and the Registrar in respect of the liability upon the Bonds or claims for interest, as the case may be, to the extent of the sum or sums paid.

All Bonds upon the payment or redemption thereof shall be canceled and destroyed by the Paying Agent, and a certificate evidencing such payment, cancellation and destruction shall be promptly transferred by the Paying Agent to the City.

Section 4.5. Mutilated, Lost, Stolen or Destroyed Bonds. In case any Bond shall at any time become mutilated or be lost, stolen or destroyed, the City in the case of such mutilated Bond shall, and in the case of such lost, stolen or destroyed Bond in its discretion may, execute and direct the Registrar to authenticate and deliver a new Bond of the same interest rate and maturity and of like tenor and effect in exchange or substitution for and upon surrender and cancellation of such mutilated Bond, or in lieu of or in substitution for such destroyed, stolen or lost Bond. If such stolen, destroyed or lost Bond shall have matured or have been called for redemption, instead of issuing a substitute therefor, the City may without the surrender of such Bond at its option pay the same (in which case the City shall promptly file a certificate to that effect with the Paying Agent and Registrar) or cause the same to be paid by the Paying Agent by a certificate of the City directing such payment filed with the Paying Agent. Except in the case where a mutilated Bond is surrendered, the applicant for the issuance of a substitute Bond shall furnish to the City and the Registrar evidence satisfactory to them of the theft, destruction or loss of the original Bond, and also such security and indemnity as may be required by the City or the Registrar, and no such substitute Bond shall be issued unless the applicant for the issuance thereof shall reimburse the City and the Registrar for the expenses incurred in connection with the preparation, execution, authentication, issuance and

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delivery of the substitute Bond. Any such substitute Bond shall be equally and proportionately entitled to the security of the Ordinance with all other Bonds issued hereunder, whether or not the Bond alleged to have been lost, stolen or destroyed shall be found at any time. The Registrar shall cancel all mutilated Bonds surrendered to it.

Section 4.6. Execution and Authentication of Bonds. The Bonds shall be executed on behalf of the City with the manual or facsimile signature of the Mayor and attested with the manual or facsimile signature of the City Clerk and the seal of the City shall be imprinted or impressed on each of the Bonds. The Bonds shall bear thereon a certificate of authentication, in the form set forth in Section 4.7 of this Eighth Supplemental Ordinance, executed manually by the Registrar. Only such Bonds as shall bear thereon such certificate of authentication shall be entitled to any right or benefit under the Ordinance and no Bond shall be valid or obligatory for any purpose until such certificate of authentication shall have been duly executed by the Registrar. Such certificate of the Registrar upon any Bond executed on behalf of the City shall be conclusive evidence that the Bond so authenticated has been duly authenticated and delivered under the Ordinance and that the owner thereof is entitled to the benefits of the Ordinance.

In case any of the officers who shall have signed or attested any of the Bonds shall cease to be such officers before the Bonds so signed or attested shall have been actually delivered, such Bonds shall be valid nevertheless and may be issued by the City with the same effect as though the persons who had signed or attested such Bonds had not ceased to be such officers.

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Section 4.7. Form of Bonds.

(a) The Bonds shall be in substantially the following form:

UNITED STATES OF AMERICA  
STATE OF WASHINGTON  
CITY OF TACOMA  
ELECTRIC SYSTEM REVENUE BOND, 199\_

No. \_\_\_\_\_ \$ \_\_\_\_\_  
Interest Rate: \_\_\_\_\_ Maturity Date: \_\_\_\_\_ CUSIP No: \_\_\_\_\_  
\_\_\_\_\_% \_\_\_\_\_  
Registered Owner: \_\_\_\_\_  
Principal Amount: \_\_\_\_\_ DOLLARS

The City of Tacoma, a municipal corporation of the State of Washington (hereinafter called the "City"), for value received, hereby promises to pay to the Registered Owner identified above, or registered assigns, on the Maturity Date identified above, the Principal Amount indicated above and to pay interest on such principal amount from the date hereof or the most recent date to which interest has been paid or duly provided for, at the Interest Rate set forth above per annum, payable \_\_\_\_\_, 199\_, and semiannually thereafter on the first day of each \_\_\_\_\_ and \_\_\_\_\_ until payment shall have been made or provided for.

Principal of and interest on this bond are payable solely out of the special fund of the City known as the "Electric System Revenue Bond Fund" created and established by Ordinance No. 23514 of the City (the "Bond Fund"). Both principal of and interest on this bond are payable in lawful money of the United States of America. Interest shall be paid by mailing a check or draft or by wire transfer as provided in the Bond Ordinance (as hereinafter defined) to the registered owner or assigns at the address shown on the bond register as of the 15th day of the month prior to the interest payment date. Principal shall be paid to the registered owner or assigns upon presentation and surrender of this bond at the principal office of the Paying Agent or Agents which initially are the fiscal agencies of the State of Washington in Seattle, Washington, and New York, New York. (Such fiscal agencies also act, and are hereinafter referred to collectively, as the "Bond Registrar").

This bond shall not be valid or become obligatory for any purpose or be entitled to any security or benefit under the Bond Ordinance until the Certificate of Authentication hereon shall have been manually signed by the Bond Registrar.

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This bond is one of a duly authorized series of bonds aggregating \$ \_\_\_\_\_ in principal amount and designated as "Electric System Revenue Bonds, 199\_." This bond and the bonds of this series (the "Bonds") are issued under and pursuant to Ordinance No. 23514 as amended and supplemented by Ordinance No. 23663, Ordinance No. 24073, Ordinance No. 24296, Ordinance No. 25004, Ordinance No. 25089, Ordinance No. 25165, Ordinance No. 25489 and Ordinance No. 25930 of the City (together the "Bond Ordinance"), and under the authority of and in full compliance with the Constitution and laws of the State of Washington.

The Bonds are issued for the purpose of providing part of the funds necessary for financing capital improvements to the Electric System. The Bond Ordinance permits the issuance of Future Parity Bonds payable from the Bond Fund ranking on a parity with the 1985 Bonds, the 1986 Bonds, the 1988 Bonds, the 1989 Bonds, the 1991 Bonds, the 1992 Bonds, the 1992B Bonds, the 1993 Bonds, the 1994 Bonds and the Bonds and secured by an equal charge and lien on the Net Revenues and permits the costs associated with certain Contract Resource Obligations to be included in the Electric System's Operating Expenses (as such terms are defined in the Bond Ordinance). The 1985 Bonds, the 1986 Bonds, the 1988 Bonds, the 1989 Bonds, the 1991 Bonds, the 1992 Bonds, the 1992B Bonds, the 1993 Bonds, the 1994 Bonds, the Bonds and any Future Parity Bonds are hereinafter collectively referred to as the "Parity Bonds."

Copies of the Bond Ordinance are on file at the office of the City Clerk and at the principal office of each Paying Agent for this bond. Reference is hereby made to the Bond Ordinance and to any and all modifications and amendments thereof for a more complete description of the Revenues available for the payment of the principal of and interest on the Bonds and the rights and remedies of the owners of the Bonds with respect thereto, the terms and conditions upon which the Bonds have been issued, and the terms and conditions upon which this bond shall no longer be secured by the Bond Ordinance or deemed to be outstanding thereunder if money or certain specified securities sufficient for the payment of this bond shall have been set aside in a special account and held in trust for the payment thereof. Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Bond Ordinance.

Under the Bond Ordinance, the City is obligated to set aside and pay into the Bond Fund out of the Revenues of said Electric System certain fixed amounts sufficient to pay the principal of and interest and premium, if any, on all Parity Bonds at any time outstanding as the same become due and payable, all as is more fully provided in the Bond Ordinance. The Bonds and the interest thereon constitute the only charge against the Bond Fund and the amount of the Net Revenues pledged to said Bond Fund, as provided in the Bond Ordinance.

In and by the Bond Ordinance, the City covenants to establish, maintain and collect rates and charges for electric energy sold through the ownership or operation of the Electric

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System and all other services, facilities and commodities sold, furnished or supplied by the City in connection with the ownership or operation of the Electric System which shall be fair and adequate to provide Revenues sufficient for the payment of the Parity Bonds and all payments which the City is obligated to set aside in the Bond Fund and for the proper operation and maintenance of the Electric System, including payment of certain Contract Resource Obligations, all necessary repairs, replacements and renewals thereof and other costs thereof, as provided in the Bond Ordinance.

The Bonds maturing on and after \_\_\_\_\_ 1, \_\_\_\_\_ are subject to redemption prior to maturity at the option of the City on any date on and after \_\_\_\_\_ 1, 20\_\_\_\_, in whole or in part, upon written notice as provided hereinafter, at the redemption prices with respect to each Bond (expressed as a percentage of the principal amount of the Bonds to be redeemed) set forth below, together with the interest, if any, accrued thereon to the date fixed for redemption:

Redemption Period	Redemption Price
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If less than all of the Bonds subject to optional redemption are to be called for redemption, the City shall choose the maturities to be redeemed. In the event that less than all of the Bonds of any maturity are called for redemption, the particular Bonds of such maturity to be redeemed shall be selected by lot by the Bond Registrar, or, so long as the Bonds are held in book-entry form, by the Securities Depository.

The Bonds maturing on \_\_\_\_\_ 1, \_\_\_\_\_ (hereinafter referred to as the "Term Bonds") shall be redeemed prior to maturity by lot, not later than \_\_\_\_\_ 1 in the years \_\_\_\_\_ through \_\_\_\_\_, inclusive, from amounts credited to the Bond Retirement Account in the Bond Fund as sinking fund installments therefor (to the extent such amounts have not been used to redeem or purchase such Bonds as provided below) and in the principal amounts as set forth below, upon written notice as provided hereinafter by payment of the principal amount thereof, together with the interest, if any, accrued thereon to the date fixed for redemption.

Year	Amount
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The City may purchase or redeem the Term Bonds through the application of part or all of the respective sinking fund installments therefor at any time prior to any \_\_\_\_\_ 1 due date.



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Any money not so used to redeem or to purchase such Term Bonds shall be substantially exhausted by application to the redemption of such bonds on such succeeding \_\_\_\_\_ 1. If, as of any \_\_\_\_\_ 1, the principal amount of Term Bonds retired by purchase or redemption from any source exceeds the cumulative requirement for sinking fund installments through such date, such excess may be credited against the sinking fund installment for the next fiscal year.

Written notice of redemption shall be given by first class mail, postage prepaid, not less than 30 days nor more than 60 days before the redemption date to the registered owners of the Bonds to be redeemed in whole or in part at their last addresses, if any, appearing on the Bond Register, but any defect with respect to the redemption of any bond shall not invalidate the redemption of any other bond. Notice of redemption having been given by mailing, as aforesaid, the Bonds so called for redemption shall on the date specified in such notice become due and payable at the applicable redemption price herein provided, and from and after the date so fixed for redemption (except as to any bond, or portion of any bond, not so redeemed in accordance with such call for redemption) interest on said Bonds so called for redemption shall cease to accrue.

A portion of the principal sum of this bond in the amount of \$5,000, or any integral multiple thereof, may be redeemed, and if less than all of the principal sum hereof is to be redeemed, in such case upon the surrender of this bond at the principal office of the Bond Registrar, there shall be issued to the registered owner, without charge therefor, for the then unredeemed balance of the principal sum hereof, fully registered bonds of like series, maturity and interest rate in any of the denominations authorized by the Bond Ordinance.

This bond shall be transferable by the registered owner at the principal offices of the Bond Registrar upon surrender and cancellation of this bond, and thereupon a new registered bond or bonds of the same principal amount and interest rate and maturity will be issued to the transferee as provided in the Bond Ordinance. The City, the Bond Registrar, the Paying Agents and any other person may treat the person in whose name this bond is registered as the absolute owner hereof for the purpose of receiving payment hereof and for all purposes and shall not be affected by any notice to the contrary, whether this bond be overdue or not.

It is hereby certified, recited and declared that all acts, conditions and things required by the Constitution and statutes of the State of Washington to exist, to have happened and to have been performed precedent to and in the issuance of this bond do exist, have happened and

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have been performed in due time, form and manner as prescribed by law, and that the amount of this bond, together with all other obligations or indebtedness of the City, does not exceed any constitutional or statutory limitations of indebtedness.

IN WITNESS WHEREOF, the City of Tacoma, by its City Council, has caused this bond to be executed in its name with the facsimile or manual signature of its Mayor, and attested by the facsimile or manual signature of its Clerk, and the seal of said City to be imprinted or impressed hereon, all as of the \_\_\_\_ day of \_\_\_\_\_, 199\_.

CITY OF TACOMA, WASHINGTON

By \_\_\_\_\_  
Mayor

(SEAL)

Attest:

\_\_\_\_\_  
City Clerk

Authentication Date: \_\_\_\_\_

CERTIFICATE OF AUTHENTICATION

This bond is one of the bonds described in the within-mentioned Bond Ordinance and is one of the Electric System Revenue Bonds, 199\_ of the City of Tacoma, Washington, dated \_\_\_\_\_, 199\_.

WASHINGTON STATE FISCAL  
AGENCY, Bond Registrar

By \_\_\_\_\_  
Authorized Officer

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ASSIGNMENT

FOR VALUE RECEIVED, the undersigned hereby sells, assigns and transfers unto

PLEASE INSERT SOCIAL SECURITY OR TAXPAYER  
IDENTIFICATION NUMBER OF TRANSFEREE

[Empty box for Social Security or Taxpayer Identification Number]

(Please print or typewrite name and address, including zip code, of Transferee)

\_\_\_\_\_ the  
within bond and does hereby irrevocably constitute and appoint \_\_\_\_\_ the  
attorney-in-fact to transfer said bond on the books kept for registration thereof with full power  
of substitution in the premises.

DATED: \_\_\_\_\_.

SIGNATURE GUARANTEED:  
\_\_\_\_\_

NOTE: The signature on this Assignment must correspond with the name of the registered owner as it appears upon the face of the within bond in every particular, without alteration or enlargement or any change whatever.

ARTICLE V

APPLICATION OF PROVISIONS OF ORDINANCE TO BONDS

Section 5.1. Issuance of Future Parity Bonds. The provisions of Article V of the Ordinance relating to the issuance of Future Parity Bonds shall apply to the Bonds.

Section 5.2. Contract Resource Obligations. The provisions of Article VI of the Ordinance relating to Contract Resource Obligations shall apply to the Bonds.

Section 5.3. Application of Sections 7.1 through 7.3 of Ordinance Relating to Special Funds and Accounts. Except as otherwise provided below in Section 5.10, the provisions of

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1 Sections 7.1 through 7.3 of the Ordinance relating to the Revenue Fund and the accounts  
2 therein, the Bond Fund and the accounts therein, the Cumulative Reserve Fund, and the  
3 investment of money held for the credit of such Funds shall apply to the Bonds.

4 Section 5.4. Covenants to Secure Bonds. The provisions of Article IX of the  
5 Ordinance setting forth the covenants to secure Bonds, as amended by Article VII of the First  
6 Supplemental Ordinance, shall apply to the Bonds.

7 Section 5.5. Supplemental and Amendatory Ordinances. The provisions of Article X  
8 of the Ordinance relating to supplemental and amendatory ordinances shall apply to the Bonds.

9 Section 5.6. Defaults and Remedies. The provisions of Article XI of the Ordinance  
10 relating to defaults and remedies shall apply to the Bonds.

11 Section 5.7. Amendments and Bondowners' Meetings. The provisions of Article XII  
12 of the Ordinance relating to amendments and bondowners' meetings shall apply to the Bonds.

13 Section 5.8. Miscellaneous. The provisions of Article XIII of the Ordinance relating  
14 to the City's contract with the owners of Bonds, money held by the Paying Agent one year  
15 after the due date, the benefits of the Ordinance and severability shall apply to the Bonds.

16 Section 5.9. Rights of AMBAC. The provisions of Article X of the Second  
17 Supplemental Ordinance and Article VII of the Fifth Supplemental Ordinance and Article VIII  
18 of the Sixth Supplemental Ordinance relating to the rights of AMBAC Indemnity Corporation  
19 are incorporated herein by reference and shall be in force and effect so long as any 1988 Bond,  
20 1992 Bond or 1992B Bond, respectively, is Outstanding and insured by the municipal bond  
21 guaranty insurance policy therein authorized.

22 Section 5.10. Reserve Subaccount. There is hereby established within the Reserve  
23 Account a special subaccount entitled the "199\_\_ Reserve Subaccount." Funds in such  
24 Reserve Subaccount shall be treated in all respects as other funds in the Reserve Account. The  
25 City shall make transfers into the Reserve Subaccount from money and investments in the  
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Reserve Account, from proceeds of the Bonds, or from other available money in amounts sufficient to satisfy the Reserve Account Requirement with respect to the Bonds.

The City is authorized to satisfy the requirements of Section 7.2 of the Ordinance with respect to the Reserve Account as to the Bonds through the use of Qualified Insurance, or a Qualified Letter of Credit, which may be purchased on the date of closing of the Bonds or after the issuance of the Bonds and substituted for amounts in the Reserve Subaccount pursuant to the provisions of Section 7.2 of the Ordinance.

ARTICLE VI

DISPOSITION OF BOND PROCEEDS

Section 6.1. Construction Account. A special fund of the City has heretofore been created and designated the "City of Tacoma Electric System Construction Fund" (the "Construction Fund"). There is hereby created within the Construction Fund a special account to be known as the "199\_\_ Bonds Construction Account" into which shall be deposited from the proceeds of sale of the Bonds. Money in the Construction Account shall be used for paying part of the costs of the acquisition, construction and installation of the additions and improvements described in Exhibit A, and for paying all expenses incidental thereto (including but not limited to costs of issuance of the Bonds, engineering, financing, legal or any other incidental costs) and for repaying any advances heretofore or hereafter made on account of such costs, and such money or so much thereof as may be necessary be and hereby is appropriated for such purpose.

All proceeds of the Bonds so deposited in the Construction Account shall be continuously and fully invested to the extent practicable in Permitted Investments. Interest earned and income or profits derived by virtue of such investments shall remain in the account and be used for the purposes for which the Bonds are issued or other lawful purposes. Money in the Construction Account may be transferred to the Bond Fund in such amounts as shall be

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1 necessary to pay principal of and interest on Bonds, and may be used to pay any Rebate  
2 Amount.

3 Section 6.2. Disposition of Proceeds. The proceeds of the Bonds are hereby  
4 appropriated for the following purposes and shall be deposited as follows:

5 1. The amount equal to the interest accruing on the Bonds from their dated  
6 date to the date of their delivery shall be deposited in the Interest Account in the Bond Fund  
7 and invested in Permitted Investments.

8 2. To the extent permitted by the Code, the amount that when added to  
9 other money in the Reserve Account will ensure that the total amount in the Reserve Account  
10 equals the Reserve Account Requirement shall be deposited in the Reserve Account in the  
11 Bond Fund.

12 3. The balance of the Bond proceeds shall be deposited in the Construction  
13 Account and used for the purposes specified in Sections 6.1, including payment of costs of  
14 issuance of the Bonds.

15 ARTICLE VII

16 SALE OF BONDS

17 Section 7.1. Sale of Bonds. The Bonds may be sold by competitive or negotiated sale,  
18 which sale shall be approved by the Bond Sale Resolution.

19 Section 7.2. Official Statement; Insurance. The Director and/or Deputy Director of  
20 Utilities are authorized to prepare a preliminary official statement for the marketing of the  
21 Bonds and to solicit bids for bond insurance. The Bond Sale Resolution shall approve the  
22 preliminary and final official statements and any bond insurance.

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ARTICLE VIII  
MISCELLANEOUS

Section 8.1. Defeasance. In the event that the City, in order to effect the payment, retirement or redemption of any Bond, sets aside in the Bond Fund or in another special account, advance refunding bond proceeds or other money lawfully available or direct obligations of the Department of the Treasury of the United States of America ("Government Obligations"), or any combination of such proceeds, money and/or Government Obligations, in amounts which, together with known earned income from the investment thereof are sufficient to redeem, retire or pay such Bond in accordance with its terms and to pay when due the interest and redemption premium, if any, thereon, and such proceeds, money and/or Government Obligations are irrevocably set aside and pledged for such purpose, then no further payments need be made into the Bond Fund for the payment of the principal of and interest on such Bond, and the owner of such Bond shall cease to be entitled to any lien, benefit or security of the Ordinance except the right to receive payment of principal, premium, if any, and interest from such special account, and such Bond shall be deemed not to be outstanding hereunder.

Section 8.2. Undertaking to Provide Ongoing Disclosure. In the Bond Sale Resolution the City shall undertake to provide certain ongoing disclosure for the benefit of the owners of the Bonds as required by Section (b)(5) of the Securities and Exchange Commission's Rule 15c2-12 under the Securities and Exchange Act of 1934.

Section 8.3. Severability. If any one or more of the provisions of this Eighth Supplemental Ordinance is or are held by any court of competent jurisdiction to be contrary to law, then such provision or provisions shall be null and void and shall be deemed separable from the remaining provisions and shall in no way affect the validity of the other provisions of this Eighth Supplemental Ordinance or the Bonds.

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Section 8.4. Effective Date. This Eighth Supplemental Ordinance shall take effect and be in force thirty days after its passage, approval and publication as required by law. Any actions taken pursuant to this Eighth Supplemental Ordinance before its effective date and after its passage are hereby ratified, approved and confirmed.

INTRODUCED AND READ FOR THE FIRST TIME at a regular meeting of the City Council held the 16th day of July, 1996.

PASSED by the City Council of the City of Tacoma, Washington, and authenticated by its Mayor at a regular meeting of the Council held this 23rd day of July, 1996.

CITY OF TACOMA, WASHINGTON  
By *Paul Egan*  
Mayor

Attest:  
*Rick Rosenblatt*  
City Clerk

APPROVED AS TO FORM:  
*[Signature]*  
City Attorney, ch. 15.57.

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CLERK'S CERTIFICATE

I, the undersigned, the duly chosen, qualified and ~~acting~~ City Clerk of the City of Tacoma, Washington, and keeper of the records of the City Council (herein called the "Council"), DO HEREBY CERTIFY:

1. That the attached Ordinance No. 25930 (herein called the "Ordinance") is a true and correct copy of an Ordinance of the Council, as finally passed at a regular meeting of the Council held on the 23<sup>rd</sup> day of July, 1996 and duly recorded in my office.

2. That said meeting was duly convened and held in all respects in accordance with law, and to the extent required by law, due and proper notice of such meeting was given; that a legal quorum was present throughout the meeting and a legally sufficient number of members of the Council voted in the proper manner for the passage of said Ordinance; that all other requirements and proceedings incident to the proper adoption of said Ordinance have been duly fulfilled, carried out and otherwise observed, and that I am authorized to execute this certificate.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City as of this 24<sup>th</sup> day of July, 1996.

Rick Rosenblatt  
City Clerk  
City of Tacoma, Washington



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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

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City of Tacoma  
Office of the City Clerk

## CERTIFICATE OF CITY CLERK

I, Doris Sorum, City Clerk of the City of Tacoma, Washington, do hereby certify that the attached is a full, true and correct copy of Substitute Resolution No. 33668 adopted by the City Council on April 8, 1997.

Dated this 15<sup>th</sup> day of January 2020.

  
Doris Sorum, City Clerk  
City of Tacoma, Washington





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



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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 APR 08 1997

*Rick Eisenberg*  
Mayor

*Rick Rosenblatt*  
Attest: City Clerk

Approved as to form & legality:

*B. S. Karavites*  
Assistant City Attorney

Requested by Public Utility Board Resolution No. U-9258

599c



# REQUEST FOR ORDINANCE OR RESOLUTION

CITY CLERK USE

Request #:	6366
Ordinance #:	
Resolution #:	33668

1. Date: **March 20, 1997**

Requesting Department/Division/Program	Sponsored By	Phone/Extension
2. <b>Tacoma Public Utilities/Light Division</b>		
Contact Person (for questions):		Phone/Extension
3. <b>Steven J. Klein</b>		502-8203

4. Preparation of Resolution is requested for the City Council meeting of Tuesday April 8, 1997

5. Summary Title/Recommendation: (A concise sentence, as it will appear on the Council Agenda)

Authorize the development of a broad band telecommunications network to improve electric utility service and improve the telecommunications infrastructure available to the community. This would include the business plan for a broad band telecommunications system and the implementation of the telecommunications system.

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?)

The Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment and research on similar activities in other municipalities. It is projected that the cost for the construction and installation of this system will be approximately \$55 million to construct, plus more than \$10 million for startup operations. However, the Light Division believes that the overall benefits to the City, the Light Division and its customers will exceed the projected costs.

In addition to the benefits to the Light Division that the system would deliver through improved communication abilities, the system will also have the ability to transport data, provide high speed Internet access and deliver full cable television service.

7. Financial Impact: (Future impact on the budget.)

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 March 20, 1997	Attached

RECEIVED  
 97 MAR 27 AM 11:37  
 CITY CLERK'S  
 OFFICE

9. Funding Source: (Enter amount of funding from each source)

Fund Number & Name:	State \$	City \$	Other \$	Total Amount

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
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CERTIFICATE

I, Charleen Jacobs, do hereby certify that I am the Clerk of the Public Utility Board of the City of Tacoma, and that record and maintain custody of the official records and minutes of the Public Utility Board.

I further certify that the attached is a full, true, and correct copy of Amended Substitute Resolution U-9258 dated April 9, 1997.

In witness whereof, I have set my hand this 16 day of January 2020.

Charleen Jacobs  
Clerk, Public Utility Board  
Tacoma Public Utilities  
City of Tacoma, Washington

Attachment

State of Washington  
County of Pierce

Subscribed and sworn to before me this 16 day of January 2020.



Deborah D. McLellan  
Notary Public in and for the  
State of Washington, County of Pierce  
My commission expires 10-8-21



AMENDED  
SUBSTITUTE  
U-9258

**RESOLUTION NO.**

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3 WHEREAS the City of Tacoma, Department of Public Utilities,  
4 Light Division desires to: (1) develop a state-of-the-art fiber optic system  
5 to support enhanced electric system control, reliability and efficiency;  
6 (2) develop capability to meet the expanding telecommunications  
7 requirements in an evolving competitive electric market, the most critical of  
8 which is real-time, two-way interactive communications with individual  
9 energy consumers, (3) create greater revenue diversification through new  
10 business lines (i.e. internet transport, cable TV, etc.), (4) enhance  
11 traditional products and service, and (5) maximize return on Light Division  
12 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  
Light Division customers are projected to exceed and justify the initial cost,  
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 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: Daryl Hedman  
Chairman

G. S. Karavitis Bil Moss  
Assistant City Attorney Secretary

Lydia Stevenson Adopted April 9, 1997  
Clerk

589d(a)



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



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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 April 8, 1997

Mayor

Attest: City Clerk

Approved as to form & legality:

B. A. Karavites  
Assistant City Attorney

Requested by Public Utility Board Resolution No. U-9258

599c



# RESOLUTION NO.

SUBSTITUTE  
U-9258

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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 technology 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 service, 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 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 systems 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



1 WHEREAS the City Council and Public Utility Board will continue  
 2 to be involved in the future decision-making on this proposal including  
 3 construction contracts, and debt financing approvals, quarterly reviews on  
 4 the project direction during the startup period, approval of agreements for  
 5 use of City rights-of-way for telecommunications purposes which  
 6 agreements will (to the extent required by law) treat the Light Division  
 7 substantially similar to other franchises that the City grants for similar  
 8 businesses, and

9 WHEREAS the Public Utility Board hereby finds and determines  
 10 that the Light Division's proposal for a broad band telecommunications  
 11 system is in the best interests of the City, will serve as a public purpose,  
 12 and should be approved and implemented; Now, therefore,

BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

13 That the Board hereby approves the Light Division's proposal  
 14 including the Business Plan for a broad band telecommunications system,  
 15 and the Board recommends that the City Council approve a resolution to  
 16 authorize the Light Division to proceed to implement said proposal for a  
 17 broad band telecommunications system, and the Board recommends that  
 18 the City Council continue to be involved in the major policy decisions  
 19 including construction contracts, debt financings, the public rights-of-way  
 20 use agreements for telecommunications and quarterly reviews.

21 Approved as to form & legality:

22  
 23 Mark Bubenik  
 24 Chief Assistant City Attorney

25  
 26 Lydia Stevenson  
 27 Clerk

Ross Singleton  
 Acting Chairman

W. J. Barker  
 Acting Secretary

Adopted 3/26/97

29

Request for Board meeting

CITY OF TACOMA  
DEPARTMENT OF PUBLIC UTILITIES

U-9258

of March 26, 1997

REQUEST FOR RESOLUTION

Date: March 19, 1997

INSTRUCTIONS: File request in the Office of the Director of Utilities as soon as possible but not later than nine working days prior to Board meeting at which it is to be introduced. Completion instructions are contained in Administrative Policy POL-104.

1. Summary title for Utility Board agenda: (not to exceed twenty-five words)  
Authorize the development of a broad band telecommunications network to improve electric utility service and improve the telecommunications infrastructure available to the community.

2. A resolution is requested to: (brief description of action to be taken, by whom, where, cost, etc.)  
Approve the Light Division's proposal including the business plan for a broad band telecommunications system and authorize the Light Division to proceed to implement the telecommunications system.

The Light Division projects that the cost for the construction and installation of this telecommunications system will be approximately \$55 million dollars to construct, plus more than \$10 million dollars for startup operations. However, the Light Division believes that the overall benefits to the City, the Light Division, and its customers will exceed the projected costs.

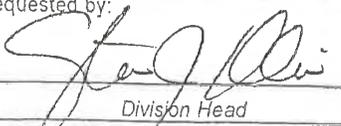
3. Summarized reason for resolution:  
The Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment, and research on similar activities in other municipalities. Presentations have been made to neighborhood councils, chambers of commerce, local economic development groups, and the Tacoma Public School Board. A public hearing on the proposed telecommunications system was held by the Public Utility Board on March 12, 1997, and another public hearing was held by the City Council on March 18, 1997. Information summarizing the Telecommunications study and our recommendations was made available at the presentations and public hearings.

In addition to the benefits to the Light Division that the system would deliver through improved communications abilities, the system will also have the ability to transport data, provide high speed Internet access, and deliver full cable television service.

4. Attachments:  
a. Letter to the Public Utility Board and City Council from Mark Crisson

5.  Funds available

6. Deviations requiring special waivers:  None

Initiated by:  _____ Section Head	Requested by:  _____ Division Head	Approved:  _____ Director of Utilities
---	---	--

REQRES.DOC



Mark Crisson  
Director

3628 South 35th Street  
P.O. Box 11007  
Tacoma, WA 98411-0007

Divisions  
Light  
Water  
Belt Line

March 20, 1997

To the Chairman and Members of the Public Utility Board and  
To the Mayor and Members of the City Council

### RESOLUTION NO. U-

#### RECOMMENDATION

The Light Division requests approval by the Public Utility Board and the City Council to develop a broad band telecommunications network as described in the Light Division Telecommunication Study. This action authorizes project implementation and the initiation of design and contract specifications. The Light Division will bring subsequent requests for construction contract and debt issuance approval to the Public Utility Board and City Council as the project progresses. Both policy bodies will also be periodically advised of project status during the development process.

#### BACKGROUND

In preparation for this request, the Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment, and research on similar activities in other municipalities. Staff has made presentations to neighborhood councils, chambers of commerce, local economic development groups, the Tacoma Port Commission, and the Tacoma Public School Board. Two joint Public Utility Board/City Council study sessions were held. A public hearing on the proposed telecommunications system was held by the Public Utility Board on March 12, 1997, and another public hearing was held by the City Council on March 18, 1997. Information summarizing the Telecommunications study and our recommendations was made available at the presentations and public hearings.

The Light Division estimates the cost of this telecommunications system will be approximately \$55 million dollars for construction and installation, plus more than \$10 million dollars for startup operations. The business plan indicates excellent financial potential even under conservative revenue and market penetration assumptions. We recognize the plan's projections are no guarantee of success, but we think the project risks are manageable and justified given the project benefits. These benefits include:

- Improves electric service by enabling distribution system automation, market access, and real-time, interactive communication with customers
- Provides better telecommunications and cable television service sooner and cheaper than other providers will deliver
- Significantly enhances regional economic development and quality of life by creating state-of-the-art telecommunications infrastructure and providing it to all businesses and residences throughout the community
- Creates opportunities for public private partnerships in the wholesale leasing of system capacity to retail telecommunications service providers
- Provides additional revenue to the Light Division and General Government through expansion of the market for telecommunications services

**SUMMARY**

The proposed telecommunications system will strengthen the Light Division's competitive position in the electric power industry through the provision of enhanced electric and telecommunication services to *all* Light Division customers. This system will serve a public purpose and is in the best interests of the City.

Very truly yours,



Mark Crisson  
Director of Utilities



# REQUEST FOR ORDINANCE OR RESOLUTION

CITY CLERK USE

Request #:  
Ordinance #:  
Resolution #:


1. Date: *March 20, 1997*

Requesting Department/Division/Program	Sponsored By	Phone/Extension
2. <i>Tacoma Public Utilities/Light Division</i>		
Contact Person (for questions):		Phone/Extension
3. <i>Steven J. Klein</i>		<i>502-8203</i>

4. Preparation of Resolution is requested for the City Council meeting of Tuesday April 8, 1997

5. Summary Title/Recommendation: (A concise sentence, as it will appear on the Council Agenda)

Authorize the development of a broad band telecommunications network to improve electric utility service and improve the telecommunications infrastructure available to the community. This would include the business plan for a broad band telecommunications system and the implementation of the telecommunications system.

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?)

The Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment and research on similar activities in other municipalities. It is projected that the cost for the construction and installation of this system will be approximately \$55 million to construct, plus more than \$10 million for startup operations. However, the Light Division believes that the overall benefits to the City, the Light Division and its customers will exceed the projected costs.

In addition to the benefits to the Light Division that the system would deliver through improved communication abilities, the system will also have the ability to transport data, provide high speed Internet access and deliver full cable television service.

7. Financial Impact: (Future impact on the budget.)

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 March 20, 1997      Attached

9. Funding Source: (Enter amount of funding from each source)

Fund Number & Name:	State \$	City \$	Other \$	Total Amount
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If an expenditure, is it budgeted?     Yes     No    Where?    Org #    Acct #

10. <i>Steven J. Klein</i> Department Director/Utility Division Approval	Approved as to Availability of Funds Director of Finance	City Manager/Director Utilities Approval
---	---	--



Mark Crisson  
Director

3628 South 35th Street  
P.O. Box 11007  
Tacoma, WA 98411-0007

Divisions  
Light  
Water  
Belt Line

March 20, 1997

To the Chairman and Members of the Public Utility Board and  
To the Mayor and Members of the City Council

### RESOLUTION NO. U- 9258

#### RECOMMENDATION

The Light Division requests approval by the Public Utility Board and the City Council to develop a broad band telecommunications network as described in the Light Division Telecommunication Study. This action authorizes project implementation and the initiation of design and contract specifications. The Light Division will bring subsequent requests for construction contract and debt issuance approval to the Public Utility Board and City Council as the project progresses. Both policy bodies will also be periodically advised of project status during the development process.

#### BACKGROUND

In preparation for this request, the Light Division has undertaken an extensive telecommunications study that includes market research, telecommunications industry analysis, an examination of the regulatory environment, and research on similar activities in other municipalities. Staff has made presentations to neighborhood councils, chambers of commerce, local economic development groups, the Tacoma Port Commission, and the Tacoma Public School Board. Two joint Public Utility Board/City Council study sessions were held. A public hearing on the proposed telecommunications system was held by the Public Utility Board on March 12, 1997, and another public hearing was held by the City Council on March 18, 1997. Information summarizing the Telecommunications study and our recommendations was made available at the presentations and public hearings.

The Light Division estimates the cost of this telecommunications system will be approximately \$55 million dollars for construction and installation, plus more than \$10 million dollars for startup operations. The business plan indicates excellent financial potential even under conservative revenue and market penetration assumptions. We recognize the plan's projections are no guarantee of success, but we think the project risks are manageable and justified given the project benefits. These benefits include:

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- Improves electric service by enabling distribution system automation, market access, and real-time, interactive communication with customers
- Provides better telecommunications and cable television service sooner and cheaper than other providers will deliver
- Significantly enhances regional economic development and quality of life by creating state-of-the-art telecommunications infrastructure and providing it to all businesses and residences throughout the community
- Creates opportunities for public private partnerships in the wholesale leasing of system capacity to retail telecommunications service providers
- Provides additional revenue to the Light Division and General Government through expansion of the market for telecommunications services

**SUMMARY**

The proposed telecommunications system will strengthen the Light Division's competitive position in the electric power industry through the provision of enhanced electric and telecommunication services to *all* Light Division customers. This system will serve a public purpose and is in the best interests of the City.

Very truly yours,



Mark Crisson  
Director of Utilities

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## **RESOLUTION NO.**

SUBSTITUTE  
U-9258

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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 technology 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 service, 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 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 systems 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



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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:

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Chief Assistant City Attorney

\_\_\_\_\_  
Secretary

\_\_\_\_\_  
Clerk

Adopted \_\_\_\_\_

# EXHIBIT 10 (b)

# Telecommunications Study

by Tacoma City Light

Tacoma City Council  
Public Utility Board  
Joint Study Session  
February 18, 1997

## Why should a Publicly Owned Electric Utility be involved in Telecommunications?

- Board initiated RFP process in 1995
- Enhanced Telecommunication capability vital to the Utility in order to continue to improve service and provide choice to customers in rapidly changing environment.
- Investment in the community that provides a pathway to choice and competition.
- Over 100 years ago, Tacoma took steps to improve vital infrastructure to better serve our citizens.

## Key Operational Advantages to Tacoma City Light

- Electric system control and outage reporting
  - Savings to Tacoma City Light
  - Savings to customers
- Electric system performance monitoring and preventive maintenance
- Providing interactive communication link to customers

## Telecommunications Study Team

- Bruce Campbell, Metro Utility Communications Group
- F. Paul Carlson, Ph.D., Metropolitan Communications Consultants
- Linda Dethman, Dethman & Associates
- Stuart Hauser, Metro Utility Communications Group
- Peggy sue Heath, A.B.D., APEX Business Solutions
- Sandy Hunt, Ph.D., APEX Business Solutions
- Richard C. T. Li, P.E., Metropolitan Communications Consultants
- Bruce Mann, Ph.D., University of Puget Sound
- Catherine Rudolph, APEX Business Solutions
- Susan V. Marr, Metro Utility Communications Group
- Gene Starr and the research team at Market Data Research
- Staff team: Chandra Enos, Lisa Steadmon, and Steve Roberts, P.E.

# Telecommunications Study

## Brief Review of Part One

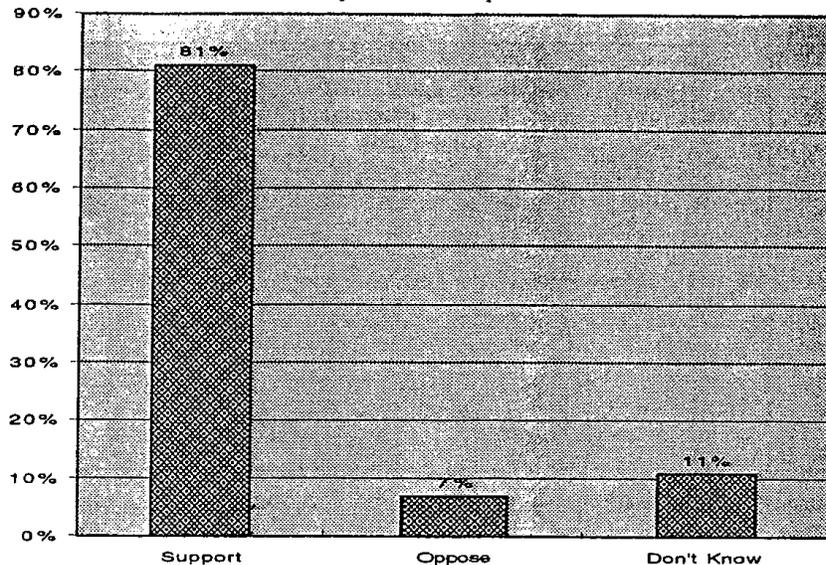
- Telecommunications technology
- Telecommunication companies
- Regulation: Federal, State, and Local
- Other cities and communities
- Local telecommunications history
- Existing telecommunications options in our local communities

## Business Market Research

- Survey of 200 businesses:
  - representing \$5 billion in revenue & 25,000 jobs
  - average of three locations in greater Tacoma area
- Importance of telecommunications links
  - 74% say links are extremely important to their success
  - 62% reported that a link being out one day would cause serious harm to their business; 20% said that it would shut them down
- 61% of businesses use Internet (but with limited access)
- 14% of employees telecommute (increasing to 18% in 2yr)
- Limited Experience with High Speed Lines
  - Two-thirds were not familiar with ISDN lines or T-1 lines

## Support for Tacoma City Light Telecommunications System

To what degree do you support Tacoma City Light building this new communications system to improve service to customers?



## Economic Development Impacts

- Market trends
  - Change in economic base
  - Downtown development activities
- Business Environment
- Telecommunications needs
  - Development activities at military bases
  - The expanding health services industry
  - Professional & financial services
  - Port of Tacoma

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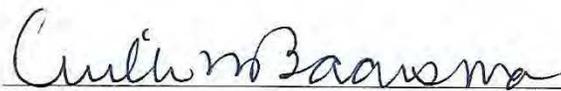
CERTIFICATION OF AUTHENTICITY

I make the following statements under penalty of perjury under the laws of the State of Washington. I am over 18 years of age and competent to testify. I am one of the authors of the paper entitled Creating Capacity And Competition In Broadband. I understand that a party seeks to introduce the following document into evidence in a case pending in Pierce County Superior Court.

1. Creating Capacity And Competition In Broadband, published in April 2000, which is Exhibit 70 in Shook's 12/30/19 Declaration.

I have reviewed the document described above and attest that such is a true and correct copy of what the document purport to be.

Signed on this 10 day of January 2020 in TACOMA, Washington.



William H. Baarsma

Certification of True and Correct Copy

# CREATING CAPACITY AND COMPETITION IN BROADBAND TELECOMMUNICATIONS: THE CITY OF TACOMA'S INITIATIVE

*William H. Baarsma*  
*University of Puget Sound*  
*School of Business & Public Administration*  
*1500 North Warner*  
*Tacoma, WA 98416*  
*Phone: 253-879-3393*  
*Fax: 253-879-3156*  
*Email: wbaarsma@ups.edu*

*Ross Singleton*  
*University of Puget Sound*  
*Department of Economics*  
*1500 North Warner*  
*Tacoma, WA 98416*  
*Phone: 253-879-3591*  
*Fax: 253-879-3500*  
*Email: singleton@ups.edu*

## 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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- [4] Grove, Andy, Chairman of Intel Corp., Live Internet E\*Trade Interview, Nov. 14, 1998.
- [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.
- [9] Tacoma City Power. Preliminary Official Statement Relating to \$37,065,000 Electric System Revenue and Refunding Bonds, 1999, p. 16.
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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 THE RATEPAYERS  
OF THE CITY OF TACOMA,  
Defendants.

No. 96 2 09938 0

CITY OF TACOMA'S MOTION FOR  
SUMMARY JUDGMENT

Plaintiff City of Tacoma ("City") requests that this Court enter a 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.

CITY OF TACOMA'S MOTION FOR SUMMARY JUDGMENT - 1

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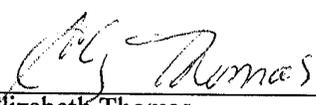
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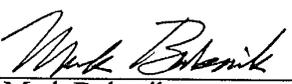
Grounds for this motion are set forth in the record in this matter, the accompanying memorandum in support of motion for summary judgment, and the declaration of Jon Athow.

DATED this 5<sup>th</sup> day of November, 1996.

PRESTON GATES & ELLIS

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CITY OF TACOMA

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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 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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MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
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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**

- 7
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.
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**IV. EVIDENCE RELIED UPON**

17 The City believes that the following facts are undisputed in every material respect. These  
18 facts are contained in the Declaration of Jon Athow in Support of the City's Motion for Summary  
19 Judgment ("Athow Decl.").

20 Plaintiff, the City of Tacoma, is a municipal corporation and a city of the first class of the  
21 State of Washington. The Defendants herein are taxpayers of the City of Tacoma and ratepayers of  
22 its electrical utility, which is known as the Light Division of the Department of Public Utilities (the  
23 "Light Division"). Harold E. Nielsen, Jr., the taxpayer and ratepayer representative, is a resident and  
24 taxpayer of the City and a customer of the Light Division. The City currently owns and operates,  
25 through its Light Division, an electric utility (the "Electric System") for the purpose of providing  
26 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.

MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 4

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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,  
343 (1983).

24 In light of these constitutional and statutory provisions, the Washington Supreme Court has  
25 held that "the only limitation on the power of cities of the first class is that their action cannot  
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MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 6

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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

MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
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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.

26

MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 9

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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.

25  
26  
MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 10

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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,

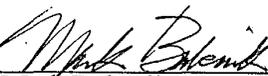
PRESTON GATES & ELLIS

By 

Elizabeth Thomas, WSBA # 11544

Laura A. Rosenwald, WSBA # 25722

CITY OF TACOMA

By 

Mark Bubenik, WSBA # 3083

Chief Assistant City Attorney

Attorneys for Plaintiff City of Tacoma

MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 11

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**Switch & Save! Internet as low as \$15/month!!**  
**For a limited time, new customers can switch to Rainier Connect and take advantage of our lowest prices ever!**

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 PERMIT # 4

- 10 Mbps for only **\$15/mo.**
- 25 Mbps for only **\$20/mo.**
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- 75 Mbps for only **\$35/mo.**
- 100 Mbps for only **\$45/mo.**



**RAINIER**  
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 Your *Local* Choice for  
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Call or click today to  
 find out more!  
**253.683.2200**  
**RainierConnect.com**

- You'll get:**
- 24/7 Support
  - Savings up to \$59.95/mo.
  - Free Install • Free Modem
  - No waiting for the "Cable Guy!"\*\*

\*Terms & Conditions: Offer valid through 3/31/20 to new residential customers on the Click! Network and only in areas serviceable by Rainier Connect. Must not have been a Rainier Connect customer in the last 60 days. Prices do not include taxes, surcharges and additional fees. Rates will remain as long as customer remains in good standing and does not make changes to services. Services and pricing subject to change. Services are subject to Rainier Connect terms and conditions. High Speed Internet service is limited to a single outlet. Speeds may vary based on customer equipment. Customer equipment must meet minimum requirements. Must have a DOCSIS 3.0 certified modem. Routers may affect performance depending on model and type. All Internet Services are subject to our Internet Service Acceptable-Use Policy.

|||||  
 \*\*\*\*\*  
 AUTO\*\*\*SCH 5-DIGIT 98464 20  
 Dear Neighbor  
 8429 S 18th St  
 Tacoma WA 98465-1016



TACOMA PUBLIC UTILITIES  
3628 South 35th Street  
Tacoma, Washington 98409-3192

**IMPORTANT ACCOUNT  
INFORMATION ENCLOSED**

ADVANCED STREAM CUSTOMER



PSRRTED STD  
U.S. POSTAGE PAID  
TACOMA, WA  
PERMIT NO. 2



March 13, 2020

**SECOND NOTICE OF POTENTIAL CHANGE IN SERVICE EFFECTIVE MARCH 31**

Dear Advanced Stream Customer:

On March 31, 2020, Click! Network, an operating entity of Tacoma Public Utilities, will transfer operational control of Click! Network to Rainier Connect, an existing ISP on Click! Network. As such, beginning April 1, 2020, Rainier Connect will become the operator of what is currently Click! Network and begin providing cable television services, Internet access services, and other related telecommunications services. Additional information on this event is available at <https://www.mytpu.org/community-environment/projects/click-network-update/>.

Advanced Stream provides your Internet access service through an agreement with Click! Network. In December of 2019, Click! Network gave notice to Advanced Stream that its ISP Advantage agreement with Click! Network will expire on March 30, 2020. This is our second notice to inform you that after March 30, there is a possibility that Advanced Stream will not continue to be an Internet service provider (ISP) on Click! Network. However, it is our understanding that Advanced Stream and Rainier Connect are in discussions regarding a new agreement that would allow Advanced Stream to continue providing internet access service after March 30.

If Advanced Stream and Rainier Connect are unable to reach an agreement, then Advanced Stream will no longer be your internet access service provider after March 30. If that happens Click! Network and Rainier Connect have agreed to continue providing internet access services to former Advanced Stream customers for a limited time after March 30. This grace period will give you time to transfer your internet access services.

If you have questions about your current service, please contact Advanced Stream. Alternatively, you are free to contact Rainier Connect, the other ISP on the Click! Network for information about their Internet access service offerings. Rainier Connect can be reached at [www.rainierconnect.com](http://www.rainierconnect.com) or by call at 253-683-2200.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jackie Flowers', is written in a cursive style.

Jackie Flowers, Director  
Tacoma Public Utilities

(c) **Operator Maintenance.** The Parties agree that Operator shall have responsibility for Maintenance of the Tacoma Power Commercial System, as described in **Exhibit D** hereto.

**11. ADDITIONAL CONDITIONS RELATED TO USE OF THE TACOMA POWER COMMERCIAL SYSTEM**

(a) **Tacoma Power Commercial System Upgrades.** Operator agrees to make Tacoma Power Commercial System upgrades in accordance with the terms of **Exhibit E** hereto.

(b) **Capital Expenditures Commitment.** Operator agrees to make Capital Expenditures to the physical assets of the Tacoma Power Commercial System as specified in **Exhibit F** hereto.

(c) **Equitable Access.** Operator agrees to the equitable access commitments in **Exhibit G** hereto.

(d) **Affordable Access.** Operator agrees to the affordable access commitments in **Exhibit H** hereto.

(e) **Customer Service Commitments.** Operator agrees to the customer service commitments in **Exhibit I** hereto.

(f) **Customer Privacy.** Operator agrees to the customer privacy commitments in **Exhibit J** hereto.

(g) **Net Neutrality.** Operator agrees to the net neutrality commitments in **Exhibit K** hereto.

(h) **Open Access to Telecommunications Assets.** Operator agrees to the open access commitments in **Exhibit L** hereto.

(i) **Economic Development and Educational Opportunities.** Operator agrees to the economic development and educational opportunities commitments in **Exhibit M** hereto.

(j) **Preserve Competition Among Providers.** Operator agrees to certain restrictions on Transfers as more fully detailed in **Exhibit N** hereto.

(k) **Continuity of Services.** The obligations and rights of the Parties with respect to the transition of the Tacoma Power Commercial System upon the termination of this IRU Agreement are contained in **Exhibit O** hereto and Section 21(f) (Survival of Certain Provisions) of this IRU Agreement.

(l) **Labor Relations.** Operator agrees that, pursuant to Section 7 of the National Labor Relations Act (29 U.S.C. § 157), all employees used in the operation of the Tacoma Power Commercial System shall have the right to self-organization, to form,

**EXHIBIT L**  
**OPEN ACCESS TO TELECOMMUNICATIONS ASSETS**

**1. OPEN ACCESS PROGRAM**

(a) Operator shall provide wholesale services over the Tacoma Power Commercial System to other telecommunications providers (but not to Operator's Affiliates except with the prior written approval of Tacoma Power) consistent with its practices and policies in other geographic areas in which it provides wholesale services, to the extent appropriate ("**Open Access Program**"). All terms and conditions of the Open Access Program shall be determined by the Operator.

(b) In furtherance of the requirements in Section 1(a), Operator agrees to conspicuously post and continuously maintain on its website a copy of its Open Access Program.

**2. ANNUAL REPORT**

(a) Operator shall provide Tacoma Power with a copy of its Open Access Program on an annual basis on the Annual Reporting Date.

**3. REMEDIES FOR NON-COMPLIANCE**

(a) Failure of Operator to maintain its Open Access Program posted on its website is a Default. Liquidated damages in the amount of Two Hundred and Fifty Dollars (\$250) per day shall accrue from the date of receipt of Notice of Default until the Default is cured.

AFFIDAVIT OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on March 23, 2020, I served true and correct copies of:

1). PETITIONER SHOOK'S RESPONSE IN SUPPORT OF PETITIONER BOWMAN'S MOTION FOR ACCELERATED REVIEW

This document was delivered via the Washington State Appellate Courts' Secure Portal Electronic Filing system to all Council appearing in this case, and additionally thru Email to the Attorneys for the Respondent: Zachary B Parker, at zach@christielawgroup.com, Robert L. Christie, at bob@christielawgroup.com, 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., and Appellant Bowman's attorney, Kent Roland Van Alstyne at kvanalstyne@phillipsburgesslaw.com

Dated March 23, 2020



Mitchell Shook,  
Appellant, Pro Se

August 15 2022 11:36 AM

THE HONORABLE BRYAN CHUSHCOFF  
COUNTY CLERK  
NO. 19-2-07135-0  
Date: 8/15/22

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

MITCHELL SHOOK,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

No. 19-2-07135-0

DEFENDANT CITY OF  
TACOMA'S COMBINED  
RESPONSE TO ANDERSON'S  
PARTIAL SUMMARY  
JUDGMENT MOTION AND  
MCCARTHY'S MOTION FOR  
SUMMARY JUDGMENT

THOMAS MCCARTHY and CHRISTOPHER  
T. ANDERSON,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

**Noted for Consideration:**  
**August 26, 2022**  
***Oral Argument Requested***

Defendant City of Tacoma respectfully requests this Court grant its Motion for Summary Judgment and deny Plaintiff Anderson's Motion for Partial Summary Judgment. The City further request that the Court disregard entirely McCarthy's "Motion for Summary Judgment", which was

DEFENDANT CITY OF TACOMA'S  
COMBINED RESPONSE TO PLAINTIFFS'  
MOTIONS FOR SUMMARY JUDGMENT - 1  
(19-2-07135-0)

**CHRISTIE LAW GROUP, PLLC**  
2100 WESTLAKE AVENUE N., SUITE 206  
SEATTLE, WA 98109  
206-957-9669

1 filed without a Note for Motion, something PCLR 7.a.3.A requires. The City has separately moved  
2 to strike the bulk of what both plaintiffs have filed in conjunction with their motions on several  
3 grounds that will not be repeated here.

4 Plaintiffs filed their motions as if this Court and other courts have never addressed the central  
5 issues. The identical legal issue over whether the Click! Network is a separate “utility” from Tacoma  
6 Power has been decided. It is not a separate utility. Neither plaintiff discusses Judge Spier’s ruling  
7 on that identical issue or her ruling that the City’s surplus declaration was not arbitrary or capricious.  
8 Res judicata bars plaintiffs from relitigating those issues here. Further, neither plaintiff even mentions  
9 the Court of Appeals decision in *Coates v. City of Tacoma*, 11 Wn.App.2d 688, 697, 457 P.3d 1160  
10 (2019)<sup>1</sup>, holding specifically that “Click! and Tacoma Power are not separate “utilities.” And neither  
11 even mention this Court’s determination on July 24, 2020 that, subject to receiving more information  
12 on two metering projects, the “rest of the sale is fine, and there’s no problem.” (Transcript p. 12, lines  
13 14-16; Ex. D to Declaration of Christie dated July 20, 2022).

14 In addition to ignoring this Court’s analysis set forth in the July 24, 2020 hearing on the City’s  
15 motion, both plaintiffs act as if this Court never entered its July 19, 2019 Order Denying Motion for  
16 Writ of Prohibition and for Preliminary Injunction. In that Order and at the July 2020 summary  
17 judgment hearing, the Court articulated its reliance on *City of Issaquah v. Teleprompter Corp.*, 93  
18 Wn.2d 567, 574-75 (1980) to conclude that “Click! is not a utility for purposes of RCW 35.94.” (Order  
19 p. 8). Anderson unpersuasively re-hashes the *Teleprompter* decision in his motion, but never even  
20 references *Coates*, a binding decision issued 20 years later and specific to Click! The City’s re-filed  
21

22 \_\_\_\_\_  
<sup>1</sup> This decision was ordered published on February 11, 2020.

1 Motion for Summary Judgment, noted for hearing contemporaneously with these motions, addresses  
2 these issues in full and that analysis will not be repeated her.

3 At the time of the July 2019 hearing on the motion for a preliminary injunction the Court  
4 noted in its Order that “. . . the Gateway Meter Project does still use a portion of Click! that apparently  
5 is the subject of the negotiations between defendant and Rainier Connect. Certainly, to the extent it  
6 is used by Tacoma Power, it constitutes a part of the utility system. Defendant claims that it will  
7 retain this capacity as a result of any agreement with Rainier Connect until it is no longer needed by  
8 the utility. This could mean that the Gateway Meter capability will not be part of the agreement and  
9 would be disposed of (possibly) only after it is no longer needed.” (Emphasis original). Indeed, what  
10 caused this Court concern at the last summary judgment hearing two years ago were unanswered  
11 questions concerning the status of the Gateway metering project and another commercial metering  
12 project called Stark. As fully addressed in the City’s renewed motion, prior to the transfer of  
13 operational control of the Tacoma Power Commercial System (aka Click!) to Rainier Connect on  
14 April 1, 2020, Tacoma Power “ended its use of the [Click! network] for transmission of data collected  
15 from Gateway and Stark meters. This included, shutting down the Gateway meter service and reading  
16 Gateway meters manually, using a wireless network to transmit data from Stark meters, and reading  
17 Stark Meters manually when a wireless connection could not be made to a Stark meter.” Supplemental  
18 Declaration of Tenzin Gyalsten, Par. 7, p. 2, line 19-p. 3, line 2. Put simply, those two metering  
19 programs are dead.

20 With this additional information in hand, and there being no genuine issue of material fact,  
21 this Court should grant the City’s motion for summary judgment and dismiss plaintiffs’ Complaint  
22 with prejudice. Anderson’s motion for partial summary judgment should be denied. Should the Court

DEFENDANT CITY OF TACOMA’S  
COMBINED RESPONSE TO PLAINTIFFS’  
MOTIONS FOR SUMMARY JUDGMENT - 3  
(19-2-07135-0)

**CHRISTIE LAW GROUP, PLLC**  
2100 WESTLAKE AVENUE N., SUITE 206  
SEATTLE, WA 98109  
206-957-9669

1 choose to consider McCarthy's unnoted motion, it too should be denied.

2 Respectfully submitted this 15<sup>th</sup> day of August, 2022.

3  
4 CHRISTIE LAW GROUP, PLLC

5 By: /s/Robert L. Christie  
6 ROBERT L. CHRISTIE, WSBA #10895  
7 Attorneys for Defendant City of Tacoma  
8 2100 Westlake Avenue N., Suite 206  
9 Seattle, WA 98109  
10 Phone: 206-957-9669  
11 Email: [bob@christielawgroup.com](mailto:bob@christielawgroup.com)

12 WILLIAM C. FOSBRE, City Attorney

13 By: /s/Christopher D. Bacha  
14 CHRISTOPHER D. BACHA, WSBA #16714  
15 Attorneys for Defendant City of Tacoma  
16 Office of the City Attorney  
17 Department of Public Utilities  
18 3628 South 35th Street, P.O. Box 11007  
19 Phone: 253-502-8348  
20 Email: [cbacha@ci.tacoma.wa.us](mailto:cbacha@ci.tacoma.wa.us)

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 22, 2022, I electronically filed the foregoing with the Clerk  
3 of the Court using the LINX system. I also hereby certify that I have mailed by US Postal Service  
4 the document to the following non-LINX participants:

5 Thomas McCarthy  
6 801 S. Cushman Avenue  
7 Tacoma, WA 98405  
8 Email: Tmccarthy253@gmail.com;  
9 *Plaintiff Pro Se*

10 James P. Grifo, WSBA #45192  
11 The Law Office of James P. Grifo, LLC,  
12 164 Dougherty Lane, Friday Harbor, WA 98250,  
13 Email: jpg@grifolaw.com;  
14 *Attorney for Plaintiff Christopher T. Anderson*

15 CHRISTIE LAW GROUP, PLLC

16 By: /s/Robert L. Christie  
17 ROBERT L. CHRISTIE, WSBA #10895  
18 STUART A. CASSEL, WSBA #49808  
19 Attorneys for Defendant City of Tacoma  
20 2100 Westlake Avenue N., Suite 206  
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22 Telephone: (206) 957-9669  
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[stu@christielawgroup.com](mailto:stu@christielawgroup.com)

August 15 2022 12:03 PM

CONSTANCE R. WHITE  
COUNTY CLERK  
NO: 19-2-07135-0

1 The Honorable Judge Bryan Chushcoff  
Department 4  
2 Hearing Date: August 26, 2022, at 9:00 a.m.

3  
4  
5  
6  
7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
**IN AND FOR THE COUNTY OF PIERCE**

8  
9 MITCHELL SHOOK,  
10 Plaintiff,

11 v.

12 CITY OF TACOMA,  
Defendant.

NO. 19-2-07135-0

**PLAINTIFF ANDERSON'S  
RESPONSE TO CITY OF TACOMA'S  
MOTION FOR SUMMARY  
JUDGMENT**

13  
14 THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,

15 Plaintiffs,

16 v.

17 CITY OF TACOMA,  
18 Defendant.

19 **I. INTRODUCTION**

20 In this latest attempt to disenfranchise its own citizens, the City of Tacoma ("the City") again asks  
21 this Court to "dismiss" Plaintiff Anderson's Complaint, claiming that Plaintiff Anderson's claims are  
22 barred by the doctrine of *res judicata*. However, this Court has already denied the City's request to dismiss  
23 this case based on the doctrine of *res judicata*, since there is no evidence that factual issues concerning  
24 meters were ever raised in Cause No. 19-2-11506-3, or otherwise considered by, Judge Speir.

PLAINTIFF ANDERSON'S RESPONSE TO  
CITY OF TACOMA'S MOTION FOR SUMMARY JUDGMENT

- 1 -

THE LAW OFFICE OF JAMES P. GRIFO, LLC  
164 Dougherty Lane  
Friday Harbor, WA 98250  
(P): 360-370-5186

1 Furthermore, even if the doctrine of *res judicata* could be applied in this case, then it should not, because  
2 this consolidated lawsuit was not an action “subsequent to” the matter in which Judge Speir ruled on the  
3 parties’ cross motions for summary judgment: Cause No. 19-2-11506-3 was commenced on October 16,  
4 2019, and the above-captioned matter was commenced on May 15, 2019. Moreover, Plaintiffs Anderson  
5 and McCarthy did not bring this case in the same legal capacity or with the same interests as that of  
6 Mitchell Shook and Darrel Bowman in the case decided before Judge Speir. While it is true that Mr.  
7 Shook and Mr. Bowman attempted to litigate many of the pending issues, Mr. Shook was largely self-  
8 represented, and most importantly, he had a vested and distinct interest in the subject matter. Mr. Shook  
9 was litigating as the proprietor and owner of a private business that operated on Click! Network, which  
10 was shuttered as a result of the unlawful transfer of Click! Network to Rainier Connect – Mr. Shook’s  
11 competitor. Mr. Shook was litigating his claims to protect his livelihood and the decades of work that he  
12 put into creating Advanced Stream; not as a voter in the City of Tacoma. The fact that Mr. Shook settled  
13 all of his lawsuits with the City, which included abandoning the appeal in Division II prior to the appellate  
14 court’s consideration of the issues, in exchange for the City forgiving his company debt in the amount of  
15 several hundreds of thousands of dollars highlights the capacity in which Mr. Shook was litigating his  
16 claims. Unlike Mr. Shook, Plaintiffs Anderson and McCarthy are litigating as persons who have been  
17 deprived of their fundamental right to vote on the disposition of Click! Network to a private company.  
18 This lawsuit represents the last chance that the citizens of Tacoma have to challenge the propriety of the  
19 City’s disposition of a public asset without a vote of the people. Furthermore, the doctrine of *res judicata*  
20 is an equitable doctrine based on public policy, and its purpose is to relieve the court from the burden of  
21 twice trying the same issue between the same parties. If the doctrine of *res judicata* were applied at this  
22 late date in this case, then it would only serve to deprive Plaintiffs Anderson and McCarthy of their day  
23 in court and their right to seek appellate review of the significant issues of widespread consequence raised  
24 in this case. Certainly, the law – an equitable doctrine nonetheless – cannot be construed to work such  
an injustice.

Moreover, issues presented in this case, including whether Tacoma Public Utilities (“TPU”)

1 continued to use any of the Click! Network infrastructure for metering of utility services was not ever  
2 considered by Judge Speir when she ruled on the City’s Motion for Summary Judgment.

3 Finally, the Court of Appeals decision in *Coates v. City of Tacoma*, 11 Wn. App.2d 688, 457 P.3d  
4 1160 (2019) concerned a legal issue distinct from those now before the Court; but, if the *Coates* decision  
5 were to be considered in the context of this proceeding, then the Court will quickly see that *Coates* actually  
6 supports the positions advanced by Plaintiffs Anderson and McCarthy; not the City. As is extensively  
7 briefed in Plaintiff Anderson’s Motion for Summary Judgment, which – along with the supporting  
8 declarations – is hereby incorporated in full, the Tacoma City Charter requires a vote of the people before  
9 the City may sell, lease, or dispose of any utility system, or parts thereof. Similarly, under Chapter 35.94  
10 RCW, a city may lease, sell, or convey any public utility works, plant, or system that it owns or “any part  
11 thereof,” following a vote of the people. As the City highlights, the *Coates* Court concluded, for the  
12 purposes of RCW 43.09.210(3), that Click! Network constitutes “a part of” Tacoma Public Utilities.  
13 Thus, if Click! Network is a part of Tacoma Public Utilities, then by the plain language of the Tacoma  
14 City Charter and Chapter 35.94 RCW, a vote of the people was required before the City could lawfully  
15 lease Click! Network to Rainier Connect.

16 Respectfully, for all of the reasons set forth in Plaintiff’s Anderson’s Motion for Summary  
17 Judgment and supporting declarations, and for the reasons set forth herein, this Court should grant  
18 summary judgment to Plaintiff Anderson and order the relief requested in Plaintiff Anderson’s moving  
19 papers, and deny the City’s latest Motion for Summary Judgment.

18 **II. COUNTERSTATEMENT OF MATERIAL FACTS**

19 Plaintiff Anderson incorporates his Motion for Partial Summary Judgment, and all documents  
20 filed in support thereof, and all records and pleadings on file, as though fully set forth herein. Mr. Shook  
21 filed suit against the City of Tacoma on April 17, 2019, under Cause No. 19-2-07135-0. On May 15,  
22 2019, Plaintiffs Anderson and McCarthy filed suit against the City of Tacoma, under Cause No. 19-2-  
23 07873-7. On June 10, 2019, these two lawsuits were consolidated under Cause No. 19-2-07135-0. Darrel  
24 Bowman then filed suit against the City on October 16, 2019, under Cause No. 19-2-11506-3. This case

1 was then consolidated with another suit brought by Mr. Shook on October 28, 2019, which was assigned  
2 Cause No. 19-2-11760-1, on December 2, 2019. After Plaintiff Anderson's case was consolidated with  
3 one of Mitchell Shook's lawsuits against the City of Tacoma, Mitchell Shook amended his Complaint to  
4 assert claims under federal law, and the City sought removal of this consolidated case to federal court. It  
5 is unclear why the City did not seek to consolidate all the pending lawsuits concerning the substantive  
6 issues raised in this action, but Plaintiff Anderson never had any opportunity to participate in the lawsuit  
7 against the City pending before Judge Speir. Plaintiff Anderson also did not have any right or opportunity  
8 to appeal Judge Speir's ruling. Mr. Shook sought direct review by the Washington State Supreme Court  
9 of Judge Speir's ruling, which petition for review was denied, and the matter was transferred to Division  
10 II of the Court of Appeals for consideration. *See, McCarthy Declaration of August 1, 2022, Ex. C.*  
11 Without any briefing or argument before the Court of Appeals, Mr. Shook then entered into a Settlement  
12 Agreement with the City, releasing all claims in all of his lawsuits pending against the City, and which  
13 included Mr. Shook agreeing to abandon the right to appeal any decision in any of those lawsuits. Grifo  
14 Decl. ISO Response, Ex. A. In exchange for dismissing his lawsuits, the City agreed to forgive Mr. Shook  
15 and his company more than \$200,000.00, which his Company, Advanced Stream, purportedly owed to  
16 TPU. *Id.* As a result of this settlement, the appeal of Judge Speir's ruling was abandoned, and the case  
17 was dismissed. Then, on June 1, 2020, in this consolidated case, the City filed a Motion for Summary  
18 Judgment. The City argued that Plaintiffs' claims are barred by the doctrine of *res judicata*, but this Court  
19 properly denied the City's Motion for Summary Judgment and the City's argument that Plaintiffs' claims  
20 should be barred by *res judicata*. Plaintiff Anderson then filed a Motion for Partial Summary Judgment  
21 and set the matter to be heard without oral argument on July 1, 2022. The City informally requested an  
22 extension so that the Court could entertain the parties' cross-motions for summary judgment, and  
23 Plaintiff Anderson re-noted his Motion for Partial Summary Judgment to be heard on August 26, 2022,  
24 which is the same day as the City's instant Motion.

### III. ISSUES PRESENTED

A. Whether the equitable defense of *res judicata* applies in this case, when Plaintiffs Anderson

1 and McCarthy are litigating in a different capacity than Mr. Shook and Mr. Bowman, when it would be  
2 inequitable and only operate to deprive the last two citizens of the City of Tacoma who have raised the  
3 pending issues from having their day in Court, when the application of the doctrine would arguably violate  
4 Plaintiffs' due process rights, and when this case was filed and pending prior to the case in which Judge  
5 Speir's decision was rendered?

6 B. Whether the Court of Appeal's decision in *Coates* controls even though *Coates* construed  
7 and interpreted an entirely different statute to resolve distinctly different issues than those presented in  
8 this case?

9 C. Whether the City's phasing out its metering projects affects the ultimate questions of  
10 whether the City had the authority to dispose of Click! Network without a vote of the people required  
11 under the Tacoma City Charter and Chapter 35.94 RCW?

#### 12 IV. EVIDENCE RELIED UPON

13 This response to the City's latest Motion for Summary Judgment is based on all of the pleadings  
14 and files on record in this consolidated case, and the documents filed concurrently herewith.

#### 15 V. ARGUMENT AND AUTHORITY

16 A. ***Res Judicata* is an Equitable Doctrine, Which the City Should be Precluded from  
17 Invoking Since the City Failed to Consolidate the Actions When it Had the Opportunity to do  
18 so, and Since it Would Significantly Prejudice the Plaintiffs and the People of Tacoma if it were  
19 Applied in this Case.**

20 At its core, *res judicata* is an equitable doctrine. There would be nothing equitable about denying  
21 Plaintiffs Anderson and McCarthy their day in court by invoking the doctrine in this proceeding and at  
22 this juncture. "[W]hen considering whether *res judicata* precludes a party from litigating a claim, we are  
23 careful to not 'deny the litigant his or her day in court.'" *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d  
24 853, 865, 93 P.3d 108 (2004) (quoting *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1  
(1986)). The doctrine of *res judicata* is also based on public policy. *Luisi Truck Lines, Inc. v. Washington  
Utilities and Transportation Commission*, 72 Wn.2d 887, 435 P.2d 654 (1967). "Its purpose is to relive the

1 court from the burden of twice trying the same issue between the same parties. There is nothing,  
2 however, in the doctrine or its historic application which encourages the court to so apply it as to ignore  
3 principles of right and justice and the court should be hesitant to so apply the doctrine as to deprive any  
4 person of property rights without having his day in court.” *Id.*, at 896.

5 Not only would the application of *res judicata* deprive Plaintiffs Anderson and McCarthy of their  
6 day in court, but it would also result in depriving the electorate of the City of Tacoma of their right to  
7 vote on the City’s lease of a public utility codified in RCW 35.94.020 and the Tacoma City Charter. The  
8 statute at the heart of this case has not been interpreted and construed by Washington Courts since the  
9 Supreme Court’s decision in *Bremerton Municipal League v. Bremer*, 15 Wn.2d 231, 130 P.2d 367 (1942), and  
10 everyone in the State of Washington would benefit from the appellate courts’ consideration of the issues  
11 presented in this case.

12 Moreover, the City of Tacoma should be estopped from invoking the doctrine of *res judicata*, since  
13 the City is responsible for the piecemeal consolidation of cases that now allows the City to argue Plaintiffs’  
14 claims should be barred by the equitable doctrine of *res judicata*. In the vein of the doctrine of unclean  
15 hands, the City had the full and complete ability to consolidate this matter with Mr. Shook’s Pierce County  
16 Superior Court Cause No. 19-2-11506-3, and the City could have coordinated a meaningful opportunity  
17 for Plaintiffs in this case to participate in the case pending before Judge Speir. Instead, the City removed  
18 this action to federal court, where Plaintiffs Anderson and McCarthy were stuck waiting for Mr. Shook  
19 to adjudicate his federal claims, and all the while the City continued litigating its other case against Mr.  
20 Shook in Pierce County Superior Court before Judge Speir. Plaintiffs Anderson and McCarthy had no  
21 meaningful opportunity to participate in the matter before Judge Speir and had no opportunity to appeal  
22 her decision to the Court of Appeals. The City should not be allowed to sideline the Plaintiffs in this  
23 action so that it can pick the parties against whom it litigates only to then turn around and tell other parties  
24

1 in a separate proceeding that they have been deprived of their day in court because a different party lost  
2 in another Superior Court matter and then abandoned the appeal in exchange for hundreds of thousands  
3 of dollars in debt relief. Regardless of how this Court rules on the merits in this case, an appeal of that  
4 decision is certain. These important, complex, and novel legal issues have never had the opportunity to  
5 be considered by the appellate courts, and for that reason alone this Court should deny the City's request  
6 to dismiss Plaintiffs' claims based on the doctrine of *res judicata* and decide this case on the merits.

7 **B. Even if *Res Judicata* Could be Applied to this Case, There is No Concurrence of**  
8 **Identity with Respect to the Persons and Parties or the Quality of the Persons for or Against**  
9 **Whom the Claim is Made.**

10 For *res judicata* to apply, a prior judgment must have a concurrence of identity with a subsequent  
11 action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons  
12 for or against whom the claim is made. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983). Elements  
13 numbered three and four are not satisfied in this case.

14 There can be no dispute that Plaintiffs Anderson and McCarthy were not parties to Pierce County  
15 Superior Court Cause No. 19-2-11506-3. Thus, there can be no concurrence of identity with regard to  
16 persons and parties. Plaintiffs Anderson and McCarthy are also not in privity with Mr. Shook and Mr.  
17 Bowman. Washington Courts have not adopted an all-inclusive definition to determine whether parties  
18 are in privity for the purposes of *res judicata*. Trautman, Philip A., CLAIM AND ISSUE PRECLUSION IN  
19 CIVIL LITIGATION IN WASHINGTON, Wa. Law Rev., Vol. 60, No. 4, P. 819 (1985). Mr. Shook and Mr.  
20 Bowman were litigating to protect Advanced Stream, which was an Internet Service Provider on Click!  
21 Network. With the primary focus of protecting business interests, Mr. Shook was forced to settle all his  
22 lawsuits with the City of Tacoma in order to be relieved from his business debts. See Grifo Decl. ISO  
23 Response, Ex. A. On the contrary, Mr. Anderson is litigating this case as a ratepayer and as a citizen of  
24 Tacoma who was deprived of his right to vote on this valuable public asset. Anderson Decl. ISO

1 Response.

2 The different capacities in which Mr. Shook and Mr. Bowman were prosecuting their claims from  
3 the Plaintiffs in this case also means that the quality of the persons for whom the claim is made is different.  
4 In *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 429 P.2d 207 (1967), the court determined there was a lack  
5 of quality between the persons and parties to the proceedings, as prescribed by the fourth element of res  
6 judicata, since the first proceeding involved a “nonadversary,” while the second proceeding involved an  
7 “avowed adversary.” *Id.*, at 397-98. Quite simply, the Plaintiffs in this case are advancing their claims  
8 solely as ratepayers and citizens of Tacoma who by statute and under the City Charter should have had  
9 the right to vote on the City’s disposition of Click! Network. There are no ulterior motives or other  
10 interests driving this litigation, and Plaintiffs are committed to having these legal questions of broad public  
11 import resolved by the appellate courts, if necessary.

12 **C. Applying *Res Judicata* in this Case Would Violate Plaintiffs’ Due Process Rights.**

13 Finally, the application of *res judicata* in this case implicates due process requirements. The United  
14 States Supreme Court has made it clear that there is a due process component to *res judicata*. *Richards et al*  
15 *v. Jefferson County, Alabama, et al*, 517 U.S. 793, 116 S. Ct. 1761 (1996). The limits on the power of state  
16 courts to develop estoppel rules reflect the general consensus that one is not bound by a judgment in a  
17 litigation in which he is not designated as a party or to which he has not been made a party by service of  
18 process. *Id.*, at 798 (citing *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115 (1940)). There is an exception  
19 to the general rule where it can be said that there is privity between a party to the second case and a party  
20 who is bound by an earlier judgment, but adequate representation of a party in a second case will not be  
21 found when he has not been informed that the matter is pending and did not have the opportunity to  
22 choose for himself whether to appear or default, acquiesce or contest. *Id.*, at 799 (citing *Mullane v. Central*  
23 *Hanover Bank Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950)). It has further been held that mere notice may  
24

1 not suffice to preserve one’s right to be heard in a case. The general rule is that the law does not impose  
2 upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which  
3 he is stranger. *Chase National Bank v. Norwalk*, 291 U.S. 431, 441, 54 S. Ct. 475 (1934). Here, the City  
4 availed itself of procedural mechanisms to sideline the Plaintiffs in this case – Plaintiffs who filed their  
5 claims against the City prior to the parties who participated in the proceeding before Judge Speir – only  
6 to then turn around and argue that Plaintiffs in this case should be barred from having their day in court.  
7 The City could have invited the Plaintiffs in this case to participate in the proceeding before Judge Speir;  
8 but it did not. The City could have consolidated all of the lawsuits concerning the City’s unlawful  
9 disposition of Click! Network in violation of RCW 35.94.020 and the Tacoma City Charter; but it did not.  
10 The application of *res judicata* in this case would violate Plaintiffs’ due process rights, and this Court should  
11 deny the City’s request for dismissal based on this equitable doctrine.

12 **D. This Case Cannot be Barred by *Res Judicata*, Since it is Not a Subsequent Action.**

13 It is black letter law that “the threshold requirement of *res judicata* is a valid and final judgment on  
14 the merits **in a prior suit.**” *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004)  
15 (emphasis supplied). Here, Plaintiffs Anderson and McCarthy commenced this action by filing a  
16 Complaint on May 15, 2019. Pierce County Superior Court Cause No. 19-2-11506-3, the consolidated  
17 matter in which Judge Speir ruled on the parties’ cross-motions for summary judgment, was commenced  
18 **after** Plaintiffs Anderson and McCarthy first sought redress for their claims. Since the matter resulting  
19 in Judge Speir’s ruling was not an action “subsequent to” the above-captioned matter, *res judicata* cannot  
20 apply. *Reeves v. Mason County*, 509 P.3d 859, 868 (2022) (“Under Washington law, for the doctrine of *res*  
21 *judicata* to apply, a prior judgment must have a concurrence of identity **with a subsequent action** in (1)  
22 subject matter, (2) . . .”) (emphasis supplied).

1           **E.     The *Coates* Decision Concerned a Different Legal Question Under a Different**  
2 **Statutory Framework and Offers This Court Limited Guidance on the Issues Presented in this**  
3 **Case.**

4           In *Coates*, the Court of Appeals only considered whether TPU was unlawfully subsidizing Click!  
5 Network in violation of the local government accounting statute, RCW 43.09.210, and the Tacoma  
6 City Charter art. IV, Sec. 4.5. *Coates v. City of Tacoma*, 11 Wn. App.2d 688, 457 P.3d 1160 (2019). The  
7 *Coates* matter compelled the Court of Appeals “to decide what constitutes an ‘undertaking’ and a  
8 ‘public service industry’ **for the purposes of the [local government accounting] statute**” *id.*,  
9 (Fearing, J., dissenting) (emphasis supplied); not a “utility” under Chapter 35.94 RCW or Section 4.6  
10 of the Tacoma City Charter. While the City is quick to highlight that TPU’s electric utility and Click!  
11 Network are one “undertaking” for the purposes of RCW 43.09.210(3), the City misses the mark. If  
12 *Coates* stands for anything in this case, it is the proposition that Click! Network was established under  
13 the Tacoma Public Utilities umbrella, and it constituted just one more utility service provided by the  
14 City, through TPU, to the citizens of Tacoma. *See, Grifo Decl., Part One* (Substitute Resolution No.  
15 33668: “That the Council hereby finds and determines that the City Light Division’s broad band  
16 telecommunications proposal is in the best interests of the City, will serve a public purpose . . . That  
17 the proposed broad band telecommunications system shall be owned, operated, and controlled by the  
18 City of Tacoma Department of Public Utilities Light Division with the Public Utility Board providing  
19 oversight and approval of business and third party agreements, as appropriate, . . . and the City Council  
20 shall continue to be involved in the major policy decisions including construction contracts, rate  
21 setting policies, debt financings, the public rights-of-way for telecommunications agreements and  
22 quarterly reviews.”). The *Coates* decision was careful not to opine on whether Click! Network is a  
23 public utility for the purposes of Chapter 35.94 RCW or Section 4.6 of the Tacoma City Charter. If  
24 this Court were to agree with Plaintiffs and conclude that a vote of the people was required before the

1 City leased Click! Network to a private party, then such a ruling would not conflict with *Coates* in any  
2 way; neither would the remedies sought by Plaintiff Anderson in this case. This case is not concerned  
3 at all with the “financial structure” between Click! Network and TPU; but, the fact that TPU installed,  
4 maintained, used, and operated the telecommunications system at issue in this case for the benefit of  
5 the citizens of the City certainly militates in favor of the arguments advanced by the Plaintiffs.

6 This case turns on the question of whether Click! Network constitutes: “any public utility  
7 works, plant, or system owned by it or any part thereof, together with all or any equipment and  
8 appurtenances thereof,” RCW 35.94.010 (the modern incarnation of RRS § 9512), or whether Click!  
9 Network constitutes: a “utility system, or parts thereof essential to continued effective utility service,  
10 . . . .” under Section 4.6 of the Tacoma City Charter. In this case, unlike in *Coates*, the question of  
11 whether the City’s telecommunications system constitutes a “public utility” or “utility system” is  
12 answered by the plain language of RCW 35.94.010-.020, the legislative history of this provision,  
13 Section 4.6 of the Tacoma City Charter, and the Supreme Court’s decision in *Bremerton Municipal League*  
14 *v. Bremer*, 15 Wn.2d 231, 130 P.2d 367 (1942). The *Bremer* Court even held that a wharf used at times  
15 by the public constituted a public utility, finding that it was “a similar or dissimilar utility or system”  
16 under the statute. *Id.*, at 237. The *Bremer* Court went on to define the term “utility,” for the purposes  
17 of the statute now codified as RCW 35.94.020 – and at issue in this case – “includes any kind of utility  
18 in whose operations the public has an interest, that is to say, any public utility.” *Id.* For these reasons,  
19 the Court of Appeals’ decision in *Coates*, and the fact that the City may have discontinued operation  
20 of its smart meters prior to the transfer of operational control of Click! Network to Rainier Connect,  
21 are both unavailing. Plaintiffs strenuously contend that Click! Network – TPU’s two-way broadband  
22 telecommunications system – is a utility in which the public had an interest, and is therefore subject  
23  
24

1 to the requirements of RCW 35.94.020 and Section 4.6 of the Tacoma City Charter. As such, the City  
2 had to hold a vote of the people before it decided to dispose of this important public asset.

3 **F. Conclusion.**

4 For all of the foregoing reasons, Plaintiff Anderson respectfully requests the Court deny the  
5 City's Motion for Summary Judgment and grant Plaintiff Anderson's Motion for Partial Summary  
6 Judgment in its entirety.

7 DATED this 15<sup>th</sup> day of August 2022.

8 The Law Office of James P. Grifo, LLC

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12 James P. Grifo, WSBA No. 45192  
13 Attorney for Plaintiff Anderson  
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August 15 2022 12:03 PM

CONSTANCE R. WHITE  
COUNTY CLERK  
NO: 19-2-07135-0

1 The Honorable Judge Bryan Chushcoff  
Department 4  
2 Hearing Date: August 26, 2022, at 9:00 a.m.

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

8 MITCHELL SHOOK,

9 Plaintiff,

10 v.

11 CITY OF TACOMA,

12 Defendant.

**NO. 19-2-07135-0**

**DECLARATION OF CHRISTOPHER  
T. ANDERSON IN SUPPORT OF  
PLAINTIFF ANDERSON'S  
RESPONSE TO THE CITY OF  
TACOMA'S MOTION FOR SUMMARY  
JUDGMENT**

13 THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,

14 Plaintiffs,

15 v.

16 CITY OF TACOMA,

17 Defendant.

18 I, Christopher T. Anderson, hereby declare as follows:

- 19 1. I am one of the Plaintiffs named in the above-captioned matter.
- 20 2. I am over the age of 18, and competent to testify to the following based upon my personal  
21 knowledge.
- 22 3. I petitioned this Court for relief as a citizen of the City of Tacoma, and as a voter entitled to cast  
23 a vote on the City's disposition of Click! Network under RCW 34.94.020 and Section 4.6 of the Tacoma  
24

25 DECLARATION OF CHRISTOPHER T. ANDERSON  
26 ISO ANDERSON'S RESPONSE - 1 -

THE LAW OFFICE OF JAMES P. GRIFO, LLC  
164 Dougherty Lane  
Friday Harbor, WA 98250  
(P): 360-370-5186

1 City Charter. I did not pursue this action to support Mitchell Shook or his company, Advanced Stream.

2 4. Mr. Shook paid for the lawyer that previously represented me and Mr. McCarthy in this lawsuit  
3 while it was pending in federal court, and when Mr. Shook decided to settle his claims with the City, Mr.  
4 McCarthy and I lost our legal representation.

5 5. At no time during the pendency of this action did I ever understand or believe that I had any  
6 right or opportunity to participate in the consolidated Pierce County Superior Court Cause No. 19-2-  
7 11506-3 before Judge Speir. Neither the City nor the Court ever invited me to participate in that  
8 proceeding. I also had no right or opportunity to appeal Judge Spier's decision to the Court of Appeals  
9 or the Washington State Supreme Court. As such, I have never had my day in Court, and I respectfully  
10 request that the Court rule on the merits of the issues presented in this case.

11 6. Regardless of how the Court rules in this case, it is certain that an appeal will follow. With all due  
12 respect to the Superior Court, sometimes trial courts reach the wrong decision; sometimes the courts of  
13 appeal reach the wrong decision. Our judicial branch contains several layers of appellate review to ensure  
14 that the laws of the State of Washington are properly construed and applied, and all I am asking for is a  
15 chance to have the issues presented in this case decided in a transparent, full, and fair proceeding for all  
16 parties – including the City of Tacoma – and to have the issues raised in this case considered by the  
17 Superior Court and all Courts of Appeal that this case may come before.

18 I certify and declare under penalty of perjury under the laws of the State of Washington that the  
19 foregoing is true and correct.

20 Signed this 12<sup>th</sup> day of August 2022, in Tacoma, Washington.

21 

22 \_\_\_\_\_  
23 Christopher T. Anderson

August 15 2022 12:03 PM

CONSTANCE R. WHITE  
COUNTY CLERK  
NO: 19-2-07135-0

1 The Honorable Judge Bryan Chushcoff  
2 Department 4  
3 Hearing Date: August 26, 2022, at 9:00 a.m.

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

9 MITCHELL SHOOK,  
10 Plaintiff,  
11 v.  
12 CITY OF TACOMA,  
13 Defendant.

**NO. 19-2-07135-0**

**DECLARATION OF JAMES P. GRIFO  
IN SUPPORT OF PLAINTIFF  
ANDERSON'S RESPONSE TO THE  
CITY OF TACOMA'S MOTION FOR  
SUMMARY JUDGMENT**

14 THOMAS McCARTHY and CHRISTOPHER  
15 T. ANDERSON,  
16 Plaintiffs,  
17 v.  
18 CITY OF TACOMA,  
19 Defendant.

20 I, James P. Grifo, hereby declare as follows:

- 21 1. I am the attorney of record for Plaintiff Christopher Anderson in the above-captioned matter.  
22 2. I am over the age of 18, and competent to testify to the following based upon my personal  
23 knowledge.  
24 3. Attached hereto as **Exhibit A** is a true and correct copy of the Settlement Agreement between  
25 Mitchell Shook and the City of Tacoma, which I obtained from a hyperlink contained in an article  
26

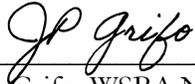
DECLARATION OF JAMES P. GRIFO  
ISO ANDERSON'S RESPONSE - 1 -

THE LAW OFFICE OF JAMES P. GRIFO, LLC  
164 Dougherty Lane  
Friday Harbor, WA 98250  
(P): 360-370-5186

1 published on April 19, 2020 in the News Tribune, which I accessed on August 12, 2022 at the following  
2 address: <https://www.thenewstribune.com/news/business/article242044416.html>.

3 I certify and declare under penalty of perjury under the laws of the State of Washington that the  
4 foregoing is true and correct.

5 Signed this 12<sup>th</sup> day of August 2022, in Friday Harbor, Washington.

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10 James P. Grifo, WSBA No. 45192

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**EXHIBIT A**





1 Hereafter the parties are collectively referred to as “Parties” and individually as Party.

2 **III. PURPOSE**

3 The purpose of this Settlement Agreement (Agreement) is to resolve forever any and  
4 all outstanding Claims and Litigation, as defined below, upon the terms and conditions of this  
5 Agreement, to support the transfer of operational control of the Tacoma Power Commercial  
6 Network, and to ensure that there are minimal impacts to service for all customers.  
7

8 **IV. DEFINED TERMS**

9 The terms defined below where capitalized shall have the meaning as given herein.

10 “Advanced Stream” shall mean and refer to Advanced Stream, Inc. together with any  
11 subsidiaries and affiliates.

12 “City” shall mean and refer to the City of Tacoma, a municipal corporation, inclusive of the  
13 Tacoma Public Utilities Department and its business units.

14 “Claim(s)” shall mean and refer to any and all claims, demands, causes, actions and lawsuits  
15 seeking recovery of damages, costs (including attorney’s fees), penalties, equitable or contract  
16 remedies, or other relief, of Advanced Stream and Mitchel Shook and his marital community,  
17 and their assigns, and against the City, its officers (elected and appointed), employees,  
18 attorneys, agents, contractors, consultants, or volunteers, and Rainier Connect North, LLC or  
19 its parent, affiliates or subsidiaries, and their officers, employees, attorneys, agents,  
20 contractors, consultants, or volunteers, arising out of or related in any way to the Click!  
21

22 Business Transaction Agreement (CBTA) executed by and between Rainier Connect North,  
23 LLC, Mashell Inc., and the City on or about November 8, 2019, or the circumstances leading  
24

1 to and including, the negotiation and execution of the CBTA, the transfer of operational  
2 control of the Tacoma Power Commercial Network to Rainier Connect North, LLC, the  
3 surplus declarations related to the CBTA, and facts and circumstances leading to and included  
4 the divestment of approximately 34.6 miles of Mountain Division rail line to WRL, LLC in  
5 2016 and the divestment of approximately 4.4 miles of Mountain Division rail line in 2019.

6 “Customer” shall mean and refer to all residential, retail or commercial customers of  
7 Advanced Stream receiving internet, e-mail, voice and other services over the Click! Network  
8 both prior to and after the transfer of control to Rainier Connect North, LLC pursuant to the  
9 CBTA.  
10

11 “Litigation” shall mean and refer to the following: Mitchell Shook v. City of Tacoma,  
12 Mountain Rail Division (U.S. Dist. Ct, Wa. W. Dist., Case No. 3:19cv05794BHS; Wa.  
13 Thurston County Sup. Ct., Case No. 19-2-03950-34); Mitchell Shook v. City of Tacoma (U.S.  
14 Dist. Ct, Wa. W. Dist., Case No. 3:19cv05829BHS Wa. Sup. Ct., Case No 19-2-07135-0)  
15 consolidated with Thomas McCarthy and Christopher T. Anderson v. City of Tacoma;  
16 Mitchell Shook v City of Tacoma (Wa. Sup. Ct., Case No. 19-2-11760-1) consolidated with  
17 Bowman v City of Tacoma, and associated petition for review/appeal (Washington Supreme  
18 Court No. 98229-5); Advanced Stream, LLC v City of Tacoma (Wa. Sup. Ct., Case No. 19-2-  
19 11949-2).  
20  
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22 “Modem” shall mean and refer to retail, commercial and residential modems, and related  
23 equipment, such as EMTA (Embedded Multimedia Terminal Adapter), MTA (Multimedia  
24

1 Terminal Adapter) and similar equipment, used to support or provide voice, video or data  
2 services.

3 **V. AGREEMENTS BY THE PARTIES**

4 A. Advanced Stream and Mitchell Shook agree, that as a precondition of City's  
5 obligations set forth herein, they shall undertake and complete the following obligations.  
6

- 7 1. Advanced Stream agrees to approve entry of an agreed order of dismissal of all  
8 Litigation in which it is a party, and each and every claim therein stated or implied,  
9 with prejudice, with all parties to bear their own costs, and agrees that it will not  
10 support directly or indirectly any prosecution of such claims or related litigation or  
11 appeals.
- 12 2. Mitchell Shook agrees to approve entry of an agreed order of dismissal without  
13 qualification of all Litigation in which he is a party, and each and every claim therein  
14 stated or implied, with prejudice, with all parties to bear their own costs, and agrees  
15 that he will not support directly or indirectly prosecution of any such claims or related  
16 litigation or appeals. In the matters consolidated with Bowman and  
17 McCarthy/Anderson referenced in the definition of Litigation in Article IV, the  
18 foregoing obligation of dismissal applies only to the Claims brought by Mitchell  
19 Shook.
- 20 3. Advanced Stream releases, holds harmless, and forever discharges the City, its officers  
21 (elected and appointed) employees, attorneys, agents, contractors, consultants, and  
22 volunteers, and Rainier Connect North, LLC, and its parent Mashell Inc., affiliates and  
23 subsidiaries, and their officers, employees, attorneys, agents, contractors, consultants,  
24 and volunteers, from and against any and all Claims and agrees to indemnify and  
25 defend the same from and against any claims, demands, causes, actions and lawsuits  
26 seeking recovery of damages, costs (including attorney's fees), penalties, equitable or  
contract remedies, or other relief, made or brought by third parties, to the extent  
caused by the acts or omissions of Advanced Stream.
4. Mitchell Shook releases, holds harmless, and forever discharges the City, its officers  
(elected and appointed) employees, attorneys, agents, contractors, consultants, and  
volunteers, and Rainier Connect North, LLC, and its parent Mashell Inc., affiliates and  
subsidiaries, and their officers, employees, attorneys, agents, contractors, consultants,  
and volunteers, from and against any and all Claims, and agrees to indemnify and  
defend the same from and against any claims, demands, causes, actions and lawsuits  
seeking recovery of damages, costs (including attorney's fees), penalties, equitable or

1 contract remedies, or other relief, made or brought by third parties, to the extent  
2 caused by the acts or omissions of Mitchell Shook occurring either prior to the  
3 effective date of this Agreement or within six (6) years following the effective date of  
4 this Agreement.

- 5 5. The Parties acknowledge and agree that upon the expiration of the Advanced Stream  
6 ISP Advantage agreement on March 30, 2020, Advanced Stream will no longer be an  
7 internet service provider on the Click! Network and will no longer provide retail  
8 internet services to Customers. Advanced Stream further acknowledges and agrees  
9 that it will have no use for the Customer Modems and that the cost of regaining  
10 possession of the Modems from Customer premises will far exceed the salvage value  
11 of the Customer Modems. Further, Advanced Stream recognizes that under the  
12 current health crisis and declared state of emergency, maintaining internet services to  
13 Customer is important to protect public health, safety and welfare. Advanced Stream  
14 therefore releases and assigns any and all right, title and interest it may have in and to  
15 the Modems that are installed on Customer premises, to the Customer identified on the  
16 Customer account for the Modem(s), free and clear of any and all encumbrances, and  
17 further, agrees to promptly take all steps necessary to remove any and all  
18 encumbrances upon such modems, and related equipment, at Advanced Stream's  
19 expense. Advanced Stream agrees to execute all documents that are requested by a  
20 Customer or the City that is reasonable and necessary to effectuate or document this  
21 release.
- 22 6. Advanced Stream and Mitchell Shook agree to engage in good faith efforts to  
23 cooperate with the City and Rainier Connect North, LLC in the transfer of Customers  
24 to the Click! Network and the subsequent transfer of any Customers who request a  
25 transfer of service to Rainier Connect North, LLC, and in furtherance thereof will  
26 assign Advanced Stream staff during regular business hours (Monday – Friday) until  
close of business on April 14, 2020 to support these efforts and to remove or minimize  
any impediments or barriers that could lead to a disruption in service to a Customer or  
to the transfer. Advanced Stream further agrees to continue to maintain e-mail and  
voice services for Customers transferred to Click! Network until either May 31, 2020  
or until the Customer has initiated e-mail and voice services with another provider,  
whichever time-period is shorter.
7. Mitchell Shook in his personal capacity, and in his capacity as president and CEO of  
Advanced Stream, shall not, following the effective date of this Agreement and for a  
period of five (5) years thereafter, disparage this Agreement, the Click! Network, the  
CBTA, the parties to the CBTA, the transfer of operational control of the Tacoma  
Power Commercial Network to Rainier Connect North, LLC, and the facts and  
circumstances underlying the transfer of operational control of the Tacoma Power  
Commercial Network to Rainier Connect. For purposes of this section, disparage shall

1 mean, whether written or oral, any negative, false, or inflammatory statement, and a  
2 statement to bring discredit or reproach upon. The Parties agree and acknowledge that  
3 this non disparagement provision is a material term of this Agreement, the absence of  
4 which would have resulted in the City refusing to enter into this Agreement.”

- 5 8. Mitchell Shook withdraws all public records requests submitted to the City of Tacoma  
6 since January 1, 2018.

7 B. City agrees that it will, as a condition of the obligations of Advanced Stream and  
8 Mitchell Shook as set forth herein, complete the following obligations:

- 9 1. The City agrees that in consideration for the obligations set forth in this Agreement,  
10 Click! Network shall apply a credit of **\$284,187.22** (the “Credit”) against the  
11 Advanced Stream’s outstanding account balance due and owing to the Click! Network  
12 for the billing period of January 20, 2020 through February 19, 2020.

- 13 2. The City shall apply the Credit to Advanced Stream’s account balance in installments  
14 as follows:

15 (a) The first installment shall be comprised of a credit of **\$142,093.61** and shall be  
16 applied upon the Court’s approval of the last agreed order of dismissal to be filed  
17 pursuant to Article V, Sections A.1 and A.2;

18 (b) The second installment shall be comprised of a credit of **\$142,093.61** and shall be  
19 applied on June 30, 2020, provided that the obligations of Advanced Stream and  
20 Mitch Shook hereunder have been satisfactorily completed. All late penalties, fees  
21 and interest on the Credit shall be suspended from the effective date of this Agreement  
22 through June 30, 2020.

## 23 VI. EFFECT OF SETTLEMENT AGREEMENT

24 This Agreement, when satisfactorily fulfilled as described above, constitutes the full  
25 and final resolution of the Parties. It is intended that Rainier Connect North, LLC, its parent,  
26 affiliates and subsidiaries are intended third party beneficiaries of the release given under  
Article V, Sections A.3 and A.4 of this Agreement, and that the Customers are intended third

1 party beneficiaries of the release and assignment given under Article V, Section A.5 of this  
2 Agreement.

3 **VII. PARTIES BOUND AND AUTHORITY**

4 This Agreement applies to and is binding upon the signatories and their successors and  
5 assigns. The parties each represent and warrant that they have full power and actual authority  
6 to enter into this Agreement and carry out all actions required of them by this Agreement.  
7

8 Advanced Stream and Mitchell Shook represent and warrant that no Claims have been  
9 assigned, delegated or attorned by them to a third party. The Parties agree and acknowledge  
10 that these representations and warranties are materials terms of this Agreement, the absence of  
11 which would have resulted in the City refusing to enter into this Agreement.

12 **VIII. COMPLIANCE WITH OTHER LAWS**

13 Nothing in this Agreement shall be construed as excusing the Parties from compliance  
14 with any applicable federal, state or local statutes, ordinances or regulations applicable to the  
15 activities governed by this Agreement.  
16

17 **IX. MODIFICATION**

18 This Agreement may be modified only upon written agreement and amendment by the  
19 parties.  
20

21 **X. FULL UNDERSTANDING AND INDEPENDENT LEGAL COUNSEL**

22 The parties each acknowledge, represent and agree that they have read this Agreement and  
23 that they have been fully advised by their own legal counsel regarding their legal rights with  
24 respect thereto.

**XI. EFFECTIVE DATE OF SETTLEMENT AGREEMENT**

This Agreement shall take effect upon the signatures of both parties.

**TACOMA PUBLIC UTILITIES**

**ADVANCED STREAM, INC.**



Jackie Flowers, Director

By: MITCHELL SHOOK

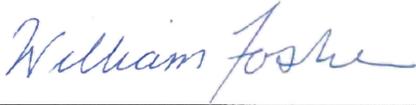
Its:

Date: \_\_\_\_\_

Date: 4/6/20

Approved as to Form:

**MITCHELL SHOOK**



City Attorney

Date: 4/6/20

**SPOUSE**



Name: WISADUTA KHADMA

Date: 4-6-20



Nicholas Powers,  
Attorney for Advanced Stream  
Attorney for Mitchell Shook

Date: 4.6.2020

August 15 2022 4:03 PM

CONSTANCE R. WHITE  
COUNTY CLERK  
NO: 19-2-07135-0

The Honorable Judge Brian Chushcoff  
Hearing Date: August 26, 2022

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

MITCHELL SHOOK,

Plaintiff Pro Se,

**NO. 19-2-07135-0**

v.

CITY OF TACOMA,

Defendant.

**PLAINTIFF MCCARTHY'S  
RESPONSE TO DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGEMENT**

THOMAS MCCARTHY; and  
CHRISTOPHER T. ANDERSON,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

**I. RELIEF REQUESTED**

Plaintiff Tom McCarthy ("McCarthy") respectfully request the Court deny Defendant City of Tacoma's ("the City") Motion for Summary Judgment with prejudice. Moreover, McCarthy requests that this Court grant Plaintiffs Anderson and McCarthy's Motion for Summary Judgement.

1 **II. INTRODUCTION**

2 This is a very simple case, for two reasons: **First**, the recent Covid-19 pandemic has made  
3 it obvious that a municipal telecommunication system is an even more essential public utility  
4 than anyone ever expected.

5 During the pandemic’s “lock downs”, when people were confined to their homes, Tacoma  
6 Public Utilities’ telecommunication system, Click! Network (the System), allowed people to  
7 “telecommute.” Students attended school online, Courts and public meeting moved to online  
8 formats, people worked remotely, utilized telemedicine applications to visit doctors, attended  
9 virtual meetings, obtained essential news and information, ordered food, medicine and other  
10 essentials —all online, over Click! Network.

11 Click! demonstrated its role as a vital, integrated, part of our City’s 129-year-old municipal  
12 utility. Tacoma Public Utilities’ (TPU’s) telecommunications system continues to serve a  
13 public role, as an essential “connection” to the world, as the community’s municipal  
14 “information highway.” The Covid-19 pandemic made clear how very essential this vital  
15 public telecommunication utility service is.

16 What foresight the City Council, TPU Board, Staff and Community leaders had in 1998,  
17 when creating, funding, constructing and launching the Click! System, to recognize what an  
18 essential public utility “Telecommunication Services” would become.<sup>1</sup>

19 The Covid-19 pandemic makes it simple for this Court to understand why the System’s is  
20 obviously not “surplus.” Click! remains a valuable state-of-the-art fiber optic network, which  
21 continues providing telecommunication services exactly as it was built to do, (with the only  
22 exception being that a private company is now setting rates and casing the ratepayers’ checks).

23 The **Second** reason this case is simple is that the City’s 1996 & 1997 Resolutions and  
24 Ordinances, which authorized the funding, construction and operation of the System, all cite  
25 “*public benefits*”, and “*public interest, welfare, convenience and necessity*” as reasons for

26 <sup>1</sup> 47 USC § 153(53) The term “telecommunications service” means the offering of telecommunications  
for a fee directly to the public, or to such classes of users as to be effectively available directly to the  
public, regardless of the facilities used.

1 creation of the System.<sup>2</sup> These terms are the basic and most essential elements of any public  
2 utility.

3 For example, on June 26, 1996, The TPU Board passed RESOLUTION NO. U-9198, stating:

4 WHEREAS by the installation of additional  
5 telecommunications capacity, this system would have the  
6 capability of providing additional public benefits for the  
City, and Light Division ratepayers,

7 *see* Grifo Decl. Part One, 5/18/22, Ex. 11, Pg. 326 to 331, Emphasis added

8 Also, on July 23, 1996, the City passed Ordinance No. 25930, “An Ordinance of the City of  
9 Tacoma Establishing a Telecommunications System”

10 ARTICLE II  
11 FINDINGS; ESTABLISHMENT OF THE TELECOMMUNICATIONS PROJECT  
AS A SEPARATE SYSTEM; AND ADOPTION OF PLAN AND SYSTEM

12 Section 2.1. Establishment of Telecommunication System. The City  
13 hereby creates a separate system of the City's Light Division to be  
14 known as the telecommunications system (the "Telecommunications  
15 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  
16 Exhibit A.

17 *see* Grifo Decl. Part 1, 5/18/22, Ex. 11, pg. 299/932 -emphasis added.

18 On April 8, 1997, City Council’s Resolution No. 33668 approved the “Telecommunication  
19 System” Business Plan:

20 WHEREAS the City Council hereby finds and determines  
21 that the Light Division’s proposal for a broadband  
22 telecommunications system is in the best interests of the City,  
will serve a public purpose and that said Business Plan is  
sufficient and adequate, therefor

23 *see* Grifo Decl. Part 1, 5/18/22, Ex. 10(a), pg. 130/932:

24 On April 9, 1997, TPU Board’s Amended Substitute Resolution U-9258 passed, stating:  
25  
26

---

<sup>2</sup> The terms “Public Benefit” & “Public Purpose”, the defining elements of a public utility, are repeated in all the Ordinances and Resolutions creating the Telecommunications System. .

1 WHEREAS the Public Utility Board hereby finds and  
2 determines that the Light Division’s proposal for a  
3 broadband telecommunications system is in the best interests  
4 of the City, will serve a public purpose, and should be  
5 implemented, Now, therefor . . .

6 *see* Grifo Decl. Part 1, 5/18/22, Ex. 10(a), pg. 128/932):

7 With Click! thus established, as an integrated asset of TPU, constructed with public utility  
8 funds, City and State laws relating to disposal of utilities clearly compel an approving public  
9 vote on the disposal of our community’s vital municipal telecommunication utility assets.

10 **III. STATEMENT OF MATERIAL FACTS**

11 This Response to Defendant’s Motion for Summary Judgment is based upon the facts in  
12 McCarthy’s Motion for Summary Judgment, as well as the declaration filed in conjunction with  
13 that motion and all the other pleadings and filings of record in the above-captioned matter.–

14 **IV. STATEMENT OF THE ISSUES**

- 15 1. Whether this complaint should be dismissed due to the *Coates v. City of Tacoma*<sup>3</sup>  
16 decision in the Court of Appeals — a decision which simply found Click! was properly  
17 established as a “betterment,” or “part” of TPU, and if *Coates* has any bearing on the  
18 question of declaring a state-of-the-art telecommunication system as “surplus.”? (No,  
19 *Coates* has no bearing.)
- 20 2. Whether TPU’s discontinuation of a failed smart meter program authorizes the City to  
21 avoid the public vote requirements found in City and State law and dispose of a vital state  
22 of the art public telecommunications System to a private party, who will completely  
23 control the system, setting rates and cashing customer’s monthly checks, even as the  
24 System continues to operate and provide TPU ratepayers with the very broadband  
25 telecommunications services for which it was created? (No, meters are not the issue.)  
26

---

<sup>3</sup> *Coates v. City of Tacoma*, 11 Wn. App.2d 688, 457 P.3d 1160 (2019)

1 3. Is res judicata an equitable doctrine that insists and affords Plaintiff McCarthy his “day in  
2 court”, allowing for a full, fair and final determination of his legal right to vote upon the  
3 disposal his municipal utilities’ vital telecommunication system? (Yes, it is.)

4 **V. EVIDENCE RELIED UPON**

5 This motion is based on the declarations, pleadings and papers filed under this cause.

6 **VI. LEGAL AUTHORITY AND ARGUMENT**

7  
8 **A. Summary Judgment Standard.**

9 Summary judgment is appropriate if there are no genuine issues of material fact, and the  
10 moving party is entitled to judgment as a matter of law. *Zonnebloem, LLC v. Blue Bay Holdings,*  
11 *LLC*, 200 Wn. App. 178, 182, 401 P.3d 468 (2017); CR 56(c). A genuine issue of material fact  
12 exists if reasonable minds could disagree on a factual issue. *Id.* at 182-83. Courts view all facts  
13 and reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 182

14 **B. *Coates* only Proves Click! is part of a Utility, which Supports the Plaintiff’s Claim  
15 for the Right to Vote.**

16 The City points out that the *Coates* case demonstrates Click! is “part of” a utility system not  
17 a “separate” utility system unto itself. *See Coates v. City of Tacoma*, 11 Wn. App.2d 688, 457  
18 P.3d 1160 (2019). However, this argument does not help the City, for the City Charter and State  
19 law protect even “parts” of a utility system —especially parts that are actually in service by the  
public utility, continuing to provide the very public services they were constructed to provide.

20 Defendant asserts *Coates v. Tacoma* prevents this Court from finding Click! is anything  
21 other than “part of” a public utility. Defendant fails to realize that even “part of ” a utility  
22 system is sufficient to win McCarthy his right to vote.

23 The findings in *Coates* do not cut in the defendants’ favor, for it is the actual disposal of a  
24 functional public utility asset that triggers McCarthy’s right to vote. It matters not if Click! is a  
25 “System” or simply a functional “part of” TPU.

26 Yet, Click! is most certainly a “Telecommunication System.” For over 20 years, Click! was  
an integrated “Department” of Tacoma Power, with its own brand identity and organizational

1 structure tasked with building and operating the “System” while maintaining its own accounting  
2 records, separately tracking income and expenses, and producing monthly reports.<sup>4</sup>

3 *Coates* found that:

4 ¶5 The City of Tacoma owns Tacoma Public Utilities  
5 (TPU). TPU is governed by the Public Utility Board and  
6 consists of Tacoma Power, Tacoma Water, and Tacoma  
7 Rail. **Click! is one of six sub-units** that comprise Tacoma  
8 Power. The other five sub-units consist of more traditional  
9 electric-distribution functions like generation, power  
10 management, and technology services. Tacoma Power's  
11 expenses and revenues are accounted for in the City's Power  
12 Fund. **Financially, Click! is intended to operate**  
13 **independently, and as a result, Click! maintains a sub-fund**  
14 **within the Power Fund.**

15 *Coates v. City of Tacoma*, 11 Wn. App.2d, at 690. (emphasis added)

16 The Plaintiff (Ratepayers) in *Coates* claimed Click! was not a utility, but rather a money  
17 losing “undertaking” for which the City’s general government (not the TPU Ratepayers) should  
18 be responsible for under the local government accounting statute, RCW 43.09.210(3).<sup>5</sup>

19 The City defended, arguing Click! was a “utility”, had been established as a utility and was  
20 certainly “part of” Tacoma Power —not a general government “enterprise.” The *Coates* court  
21 found, “we conclude that Click! and Tacoma Power's electric utility are one undertaking for  
22 purposes of RCW 43.09.210(3).” *Coates*, at 697, ¶31.

23 The *Coates* ruling confirm Click! is a utility system, and is “part of” Tacoma’s public  
24 utility, not a general government enterprise, undertaking or obligation, and that its operation as  
25 a part of the utility did not violate the Accountancy Act.<sup>6</sup>

26 As “one undertaking,” *Coates* establishes Click! is, at least, “any part thereof,” of a utility  
—triggering the mandatory vote requirement in McCarthy’s favor under both RCW 35.94 and  
City Charter § 4.6.

<sup>4</sup> Grifo Decl Part One, 5/18/22, Ex. 42(a), Pg. 723/932 -showing Click! service counter, separate from  
TPU counters in the lobby of TPU. Also, Ex. 26. Pg. 15/932, showing Click! Organization Chart,

<sup>5</sup> Losses were disputed a disputed issue and no finding on losses was ever made or required.

<sup>6</sup> E.g. City of Tacoma’s 4/20/19 MPSJ in *Coates v City of Tacoma*, Pierce County Superior Court 17-2-  
08907-4. Page-3.on The Nature or Mandamus Relief,

1 Given City Charter § 4.6 has no surplus clause, *Coates* supports McCarthy’s right to vote  
2 on disposal of the System regardless of surplus.<sup>7</sup> Any other reading leads to absurd results.

3 Most notably, the father of public power, the City of Tacoma own Honorable Judge Homer  
4 T. Bone was Chairman of the City of Tacoma’s 1926 Charter Committee.<sup>8</sup> The Committee could  
5 not have made City Charter’s Section §4.6 any clearer! “The City shall never sell, lease, or  
6 dispose of any utility system, or parts thereof essential to continued effective utility service.”  
7 Under the City Charter, if the disposal of Click! is a (1) *sale, lease, or disposal* of a (2) *utility*  
8 *system or essential part thereof*, Plaintiff must prevail on the merits of his claim.

### 9 Disposal of Utility Properties

10 Section 4.6 – The City shall never sell, lease, or dispose of any  
11 utility system, or parts thereof essential to continued effective  
12 utility service, unless and until such disposal is approved by a  
13 majority vote of the electors voting thereon at a municipal  
14 election in the manner provided in this charter and in the laws of  
15 this state.

16 City of Tacoma Charter § 4.6 (emphasis added).

17 Click! Network’s state of the art telecommunication service is not only a “utility service;”  
18 it is a vital and essential utility service. Clearly the System is “*essential to continued effective*  
19 *utility service*.” —a fact that so markedly demonstrated, to the world, by the harsh events of the  
20 recent Covid-19 pandemic.

21 Since *Coates* confirms that TPU’s Power Department and Click!’s telecommunications  
22 network are “one undertaking,” *Coates* establishes Click! is part of a “municipal utility”, which  
23 triggers the mandatory vote clause in RCW 35.94.040 in itself.

24 Click! simply needs to have been “*originally acquired for public utility purposes*” and  
25 required for “*providing continued public utility service*” —which Click! continues doing today!<sup>9</sup>

26 <sup>7</sup> See Grifo Decl Part Three, 5/18/22, Ex. 89, pg. 190/428 (Tacoma City Charter Article 4 -Utilities.)

<sup>8</sup> Grifo Decl. Part Two 5/18/22, Ex. 67, Pg. 78/499, Judge Bone unanimously elected Chair of Charter Committee.

<sup>9</sup> RCW 35.94.040 only authorizes surplusing of property, or equipment originally acquired for public utility purposes that “is not required for providing continued public utility service.”

1 Yes, Click!’s assets are actually “*providing continued public utility service*” today, under  
2 illegal privatization, nonetheless Click! is obviously “useful” and “*required*” for continued  
3 service.

4 McCarthy’s right to vote is thus protected under both City Charter Section 4.6 and  
5 Chapter 35.94 RCW. Click! cannot lawfully be “surplused.” Privatization that alienates a fully  
6 functioning public utility System requires an approving vote of the electorate.<sup>10</sup>

7 Thus, it is the municipal utilities’ acquisition, construction, operation and ownership of the  
8 Click! assets, along with the fact that the assets are serving a useful public utility purpose, that  
9 compels a public vote requirement.

10 The transfer of the Click! Network is an ultra vires act, and *void ab initio*. The Asset  
11 Purchase Agreement (APA) is void, and the City must hold a municipal election, and obtain the  
12 approval of the electorate, prior to vesting the System to any buyer. Here are similar cases:

13 where the mode of contracting is expressly provided by law, no other  
14 mode can be adopted which will bind the corporation. This principle  
15 results from the fact that municipal corporations derive all their powers  
16 from their charters.

17 *Arnott v. City of Spokane*, 6 Wash. 442, 33 P. 1063, (1893) (emphasis added)

18 As boards of county commissioners themselves are but creatures of the  
19 statute, they must pursue and exercise the powers conferred on them in  
20 strict compliance with the statutes. By so doing is the only way they  
21 can bind their principal. Contracts entered into in defiance of the  
22 manner pointed out by statutes, or which have no support in the  
23 statutes, bind no one.

24 *Green v. Okanogan County*, 60 Wash. 309, 111 P. 226, (1910) (emphasis added)

25 we are constrained to hold that the lease here in question was void ab  
26 initio, and that the warrants issued in payment therefor are invalid,  
because both the making of the lease and the issuance of the warrants,  
without the assent of the voters, were ultra vires of the town council.

*State v. Town of Newport*, 70 Wash. 286, 126 P. 637, (1912) (emphasis added)

It is well established that the power to ratify is coextensive only with  
the power to contract, and that an act which was illegal for want of  
authority on the part of the contracting powers cannot be ratified.

Also,

---

<sup>10</sup> Legislative intent for surplus under the Laws of 1917 may also be found and “harmonized” in the PUD laws of 1945, from which both the City and PUD surplus laws originated. See Anderson’s 5-16-22 MSJ, Pg.19, in this present case, showing the PUD laws under Chapter 54.16 RCW are analogous.

1 In the case at bar there was no power on the part of the municipality to  
2 enter into this contract. The power was conferred upon the voters. The  
3 city had authority only to put the machinery in motion which would  
4 elicit and determine the will of the voters. The discretion and authority  
5 were conferred upon the voters, and not upon the officers of the city.

6 *State v. City of Pullman*, 23 Wash. 583, 63 P. 265 (1900) (emphasis added)

7 This court, in the case of *State v. Pullman*, 23 Wn. 583, 63 P.  
8 265, 83 Am. St. 836, held ultra vires a contract by the city to purchase  
9 water pipe which had been laid by the state outside of the city limits,  
10 the city having no authority to contract for the erection, etc., of public  
11 works in an amount exceeding \$100, or to contract for the extension of  
12 its water system whereby an indebtedness should be created, without  
13 authority of the voters of the city. The state of Washington had agreed  
14 to sell to the city water piping which had been laid outside the city  
15 limits, the state bringing suit to enforce the contract, the same was held  
16 ultra vires and void,

17 *Jones v. Centralia*, 157 Wn. 194, 214 (Wash. 1930) (emphasis added)

18 In the case at bar, while the city commissioners had no power in  
19 law to act under the void election, the authority of the city  
20 commissioners must not be confused with the authority of the voters  
21 of the city, who did have, under the law, complete power and  
22 authority to direct the city officials to proceed to erect the power plant  
23 which is the subject-matter of the litigation now before us.

24 Appellant next cites the case of *State ex rel. Craig v. Newport*,  
25 70 Wn. 286, 126 P. 637, in which it was held that the town authorities  
26 having no authority to provide for a municipal water system without  
submission of the plan or system to the electors, the action of the  
town officers in leasing property to be used for that purpose, without  
submitting the matter to a vote, was ultra vires, and that the  
acceptance by the town of the benefits of the contract did not  
constitute such a ratification thereof as would estop the city from  
disputing the indebtedness illegally attempted to be incurred by the  
lease. This again is another instance of acts by the officials of a town  
which were wholly ultra vires and beyond their power. The court held  
the lease void ab initio, no election having ever been called at which  
the electors were afforded an opportunity of authorizing the execution  
thereof by the city officers.

*Jones v. Centralia*, 157 Wn. 194, 216 (Wash. 1930) (emphasis added)

1 **C. .Smart Meters are Not the Issue. A Fully Functional Public Utility System has Been**  
2 **Wrongfully Taken Without an Approving Vote of the City’s Electorate.**

3 1. Smart Meters are a Red Herring.

4 Defendant asserts Click! was built for Tacoma Power’s (“Power’s”) abandoned pilot meter  
5 program and that by removing these smart meters somehow McCarthy’s right to vote over  
6 disposal of his municipal telecom utility is extinguished. This is misleading and wrong. Try as  
7 the Defendant may to recast the facts, Defendant’s attempt to convert a cancelled pilot meter  
8 program into a surplus declaration over Click!’s entire telecommunication enterprise runs  
9 headlong into the undisputed material fact that Click! was expressly created, designed and built  
10 to fulfill the community’s pressing need for an advanced “Telecommunication System.”

11 Tacoma Power’s failed pilot program is totally unrelated to the community’s vital need for  
12 this essential utility System. Click!’s assets are not rendered “surplus,” or “excess capacity” by  
13 Power’s abandoned meter program, since the primary objective in creating Click! was to fulfill  
14 the community’s need for a modern telecommunication system and to provide an alternative to  
15 the incumbent monopoly provider. Consider Tacoma Mayor Baarsma and Professor  
Singleton’s Paper on Click!, entitled “Creating Capacity”

16 “The City built a broadband telecommunications system with the  
17 express purpose of providing competitive telecommunications  
18 services to businesses and residents within the City”).

19 See Grifo Decl Part Two 5/18/22, Ex. 70, Pg. 281/499

20 The pilot meter program was an afterthought, only developed in “the mid-2000s,” nearly 10  
21 years after policymakers first envisioned the community’s need for Click!. Tenzin Gyaltzen,  
Click! General Manager, confirms this, by saying:<sup>11</sup>

22 “*During the mid-2000s*, Tacoma Power developed Gateway  
23 Meters (Tacoma Power’s name for its smart meters) that could  
24 relay information from its electric customers to Tacoma Power  
headquarters via the HFC Network. At its peak, Tacoma Power  
had over 18,000 gateway meters deployed.”

25 Emphasis added

26 \_\_\_\_\_  
<sup>11</sup> Pierce County Superior Court Civil Case 19-2-11506-3, Declaration of Tenzin Gyaltzen, Dec. 12<sup>th</sup>,  
2019 Pg. 3, ¶ 7

1 The careful planning and construction of Click! included costly investments to secure  
2 “Additional Capacity,” which Click! utilizes and relies on today. TPU paid for these  
3 improvements. See Grifo Decl Part Three, 5/18/22, Ex. 85, Pg. 63/428 Tacoma Ord.#26141,  
4 10/28/97, providing additional \$67 million funding for additional capacity.

5 Click!’s System and facilities are not surplus. They are functional, useful “additional  
6 capacity.” The System is a valuable and vital municipal asset. The disposal of such  
7 sophisticated equipment, software, switches, fiber-optics, franchises, intellectual property,  
8 trademarks, IP addresses, customer accounts, contracts and “data pipes” —all of which are not  
9 “excess capacity” or “surplus” —must be a question for the voters of Tacoma, not their elected  
10 officials. See Grifo Decl Part Two, 5/18/22, Ex. 70, Pg. 283/499 (“Additional Capacity”  
11 created). Also, Grifo Decl Part Two, 5/18/22 Ex. 74 at Pg. 377/499, at Pg. 3, ¶¶ 7, 8, and 9, the  
12 May 5, 1997, the Declaration of Steve Klein regarding the Business Plan..

13 2. Facts behind the Creation of Click! Network –It Was the Community’s Need for a  
14 Modern Telecommunication System – Click! was Not Built for Smart Meters!.

15 Click! was established as a municipal communication utility, with a clear mandate to  
16 provide commercial communication services. The extensive Telecommunication Study and  
17 Business Plan prepared in creating Click!, and other historical evidence, demonstrate Click!  
18 was created for much more than supporting Tacoma Power’s aborted pilot meter program.<sup>12</sup>

19 The circumstances surrounding the creation of Click! reveal Tacoma’s desperate need for  
20 a municipal telecommunication utility system and explain why Click! was established.

21 The significance of the utility system’s creation is revealed in a 1998 letter, from TPU  
22 Director Crisson to City Council, along with his attached MSNBC article describing the City’s  
23 communications project. Director Crisson said, “I know the City Council, as well as the Board,  
24 will be proud of this national coverage.” The MSNBC article was titled, “*Tacoma Power to  
25 give TCI a jolt. Municipal utility prepares to jump into cable.*”<sup>13</sup> Some excerpts:

26 <sup>12</sup> Grifo Decl. 5/16/22 Part One, Ex. 10, (Excerpts from Business Plan and Telecommunication Study).

<sup>13</sup> Grifo Decl. 5/16/22 Part One, Ex. 14. Pg. 366/942 (Mr. Crisson’s Letter to City Manager Corpuz,  
MSNBC Article).

1 While AT&T officials congratulate themselves on their \$48 billion purchase of  
2 Tele-Communications Inc., they might want to keep an eye on the Northwest  
3 corner of TCI's sprawling cable empire. Tacoma Power, the city-owned utility  
4 of Tacoma, Wash. will soon turn on ***a \$100 million broadband  
communications network*** that will enable it to sell cable TV and Internet access  
5 as well as water and electricity - making it a direct competitor to TCI.

6 IF THE PROJECT is successful, it is sure to encourage more municipal  
7 utilities to take on TCI and other cable monopolies across the country. The  
8 effort is already getting attention from local governments weary of residents'  
9 complaints about ***high prices and poor service from their incumbent cable  
provider***. Tired of waiting for new competitors to shake things up, many cities  
10 and towns are thinking about either constructing their own cable network, or  
11 encouraging their local utility to do it for them. Tacoma Power's Click!  
Network is the largest such effort to date.

12 ***Concerned cable industry officials*** are launching a public relations counter-  
13 offensive, citing studies that question the viability of such projects and  
14 complaining that access to public funds give government-backed systems an  
15 unfair competitive edge.

16 The news article's very premise, "it is sure to ***encourage more municipal utilities*** to take on  
17 TCI and other cable monopolies across the country," shows Click! was revolutionary at the  
18 time. That "***Concerned cable industry officials*** are launching a public relations counter-  
19 offensive," demonstrates Click! was controversial for, famously, pioneering the public  
20 broadband movement now sweeping our nation and the world.<sup>14</sup> So much more than meters.

21 In April 2000, Mayor Baarsma and Dr. Singleton, of University of Puget Sound, authored a  
22 paper on Click!, Creating Capacity And Competition In Broadband Telecommunications: The  
23 City Of Tacoma's Initiative.<sup>15</sup> The paper asked: **Why not invest more dollars to expand the  
fiber optic pipe?**

24 Excerpts from their paper show Click! was not about meters:<sup>16</sup>

25 ABSTRACT: This paper describes the process by which the City of Tacoma,  
26 Washington came to build an open access, broadband telecommunications

27 <sup>14</sup> Grifo Decl. 5/16/22 Part Two, Ex. 74, Pgs. 394/499. Mr. Klein revealing political attacks on Click!'s  
initial formation -discussed Leo Hendery & Mike Crowley).

28 <sup>15</sup> Mayor Baarsma was a professor at the University of Puget Sound and on City Council at the time,  
even voting on the creation of Click! in 1996. Grifo Decl. 5/16/22 Part One, Ex. 11. Pg. 299/932.

29 <sup>16</sup> Grifo Decl. 5/16/22 Part Two, Ex. 70, pg. 282/499, "*Creating Capacity and Competition in Broadband  
Telecommunications: The City of Tacoma's Initiative*," April 2000. The title of this learned paper  
indicates Click! was more than a simple betterment, it was intentionally "created capacity."

1 system designed to promote effective competition in the provision of Internet  
2 and other telecommunications services.

3 The City of Tacoma has designed and built a broadband telecommunications  
4 system with the *express purpose of providing* competitive  
5 telecommunications services to businesses and residents within the City.

6 But before making the multi-million-dollar investment, the utility's director  
7 requested that Tacoma Power's citizen oversight body, the Utility Board,  
8 authorize an outside review by a consultant group--the Stanford Research  
9 Institute (SRI).

10 The Board approved and soon SRI's consultants came back with an  
11 interesting idea: *Why not invest more dollars to expand the fiber optic pipe?*  
12 Then Tacoma Power could offer its customers an array of services--cable  
13 television, competitive Internet access, telephony and data transport. The  
14 Telecommunications Act signed into law by President Bill Clinton in 1996  
15 had, in fact, given Tacoma Power this option by eliminating barriers to entry  
16 into the telecommunications market. This led Tacoma Power's superintendent  
17 to proclaim: "The new law afforded us the opportunity to embark on a  
18 broader strategy. . ."

19 The next step was to conduct a marketing survey. The findings forecast over  
20 33,000 cable customers in three years of operation. Within ten years time, the  
21 entire investment of \$100 million would be paid off. . . . But before  
22 embarking on this major undertaking, Tacoma Power borrowed once again  
23 from the private sector. The utility pulled together a panel of fourteen experts  
24 from an array of disciplines to review and pass on a final business plan. That  
25 plan, which was given the stamp of approval by the panel, called for retail  
26 and wholesale applications.

27 The political dynamics revolving around Tacoma Power's plans to build a  
28 fiber optic system soon changed once the management team broadened their  
29 strategy to include an array of telecommunications services. The manager of  
30 the incumbent cable provider (TCI) sent a scathing critique of the utilities'  
31 business plan to the Tacoma City Manager. The twenty-one page letter ended  
32 with the warning: "(Tacoma's policy makers should)...pause and let the  
33 euphoria of the benefits you may now expect be replaced by a realistic  
34 appreciation of the *pitfalls and risks associated with municipal ownership*  
35 of what is traditionally an entertainment service provided by private enterprise."  
36 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. (emphasis added).

37 The Professors' Paper shows the System's primary objective was a "broader strategy," the  
38 community's need for advanced telecommunication services. The prospect of \$100 million in

1 **Additional Capacity** creating municipal competition was alarming to the incumbent, TCI, who  
2 warned Tacoma of “the *pitfalls and risks* associated with municipal ownership.”<sup>17</sup> (*supra*)

3 In preparing the Business Plan, a detailed “Marketing Survey” was conducted, to study  
4 “The Current Business Market.”<sup>18</sup> This Survey excerpt shows Click! was more than meters:

5 To help assess current business market support for advanced  
6 telecommunications services in the greater Tacoma area, Tacoma City  
7 Light pursued two avenues of consumer research: A telephone survey  
8 of 200 businesses, with 25 or more employees. . . This group represents  
9 a pool of "Potential Customers."

10 Based upon the results of 200 telephone interviews with medium to  
11 large Tacoma area businesses, the Potential Customer business market  
12 is on the brink of being ready for advanced telecommunications  
13 technologies. The money is there,. . .key findings show these customers  
14 account for more than \$5 billion dollars in annual revenues and 25,000  
15 jobs. What's more, they currently spend over \$10 million dollars  
16 annually on telecommunications services. They perceive  
17 telecommunications links are extremely important to the success of  
18 their businesses, and many believe their telecommunications needs will  
19 increase rapidly, particularly for Internet access and local data  
20 networks.

21 As the Business Plan and Marketing Survey indicate, Click!’s creation was seen as vital for  
22 Tacoma to remain economically competitive and prosper.<sup>19</sup> Like the arrival of the Northern  
23 Pacific railroad in Tacoma in the 1870’s, such infrastructure was considered essential for  
24 success in the digital era. A monopoly existed in Tacoma and policymakers wanted a better  
25 system and service. This was the primary reason for establishing Click!.

26 \_\_\_\_\_  
<sup>17</sup> Grifo Decl. 5/16/22 Part Two, Ex. 74, Pgs. 398/499, Pgs. 25, 28 ( TCI, later AT&T, President Leo Hindery opposed Click!’s creation, publicly scolded Superintended Klein and sponsored studies to discredit Click!)

<sup>18</sup> Grifo Decl Part One, 5/18/22, Ex. 10, Pg. 179/932, ( Market Demand Summary -Potential Market They are more concerned about reliability than price for their local phone service, and very concerned about getting quick response from any telecommunications vendor.).

<sup>19</sup> Grifo Decl Part One, 5/18/22 Ex. 10, Pg. 243/932 ( “One of the most significant ways a community and its economic base are intertwined is through an area's infrastructure. As a result, the evolution of a community's economy often depends upon the investments it makes in its transportation system, power system, and-given the shift to the information age-its telecommunication system.” (emphasis added).).

1 Defendant's MacGuffin, a failed pilot meter project, is a red herring attempting to conceal  
2 the true purpose for the creation of the System. Consider that, in April 2000, five years before  
3 the pilot meter program, in Price Waterhouse's "Performance Review" for Click!, it said:<sup>20</sup>

4 Click! continues to be at the forefront among public and private  
5 utility telecommunications efforts. This position has brought  
6 considerable national recognition to Tacoma, and also significant  
7 tangible benefits. From a review of local press clippings, at least  
8 400 new jobs, five building renovation projects, enhanced  
9 University of Washington and UPS academic programs, and several  
10 development projects are all linked to the development and  
11 presence of Click!. Establishing Click! prompted AT&T (TCI and  
12 Excite @home) to upgrade services to Tacoma residents much  
13 earlier than otherwise would have happened.

14 The success of Click! and its continuing value to the community  
15 depends on a team effort among business, civic and education  
16 leaders to create a unique region with considerable growth  
17 potential. The fiber/coax network is literally and figuratively the  
18 thread that ties them together and enables this potential. Working  
19 together, this team can leverage the Click! asset to attract major  
20 new businesses, create jobs, attract students to programs that  
21 provide the skills for those jobs and generally enhance the whole  
22 community.

23 This Review cites "significant tangible benefits" from leveraging Click! "to attract major  
24 new businesses, create jobs, attract students to programs that provide the skills for those jobs  
25 and generally enhance the whole community." All of which leads to more power and water  
26 sales, which have a clear nexus to TPUs other utilities.

27 *Even telecommuting was cited in the original plan.*<sup>21</sup> However, there is no mention of  
28 Power's pilot meter program. In the revolutionary excitement of creating "America's Most  
29 Wired City," smart meters were not even cited in the Performance Review, Business Plan,  
30 Marketing Study or other documentation relating to the creation of Click!.

31 Click! was revolutionary in 1996. All media reports, scholarly papers and professional

32 <sup>20</sup> Grifo Decl Part Two 5/18/22, Ex. 71, Pgs. Pg. 297/499. ( Click! Financial Performance Review ).

33 <sup>21</sup> *E.g.*, Today Tacoma maintains a robust Commute Trip Reduction Program. Tacoma Municipal Code  
34 Section 13.15.020 (Z). "Teleworking/telecommuting" means the use of . . . technology to permit an  
35 employee to work from home. *See also* RCW 70.94.521 (automotive traffic is the major source of  
36 emissions of air contaminants), (reduce single-occupant vehicle commuting.) RCW 28B.130.005 (Intent.  
Telecommuting -mitigate the adverse . . . effects of auto dependency and traffic congestion.)

1 evaluations, show that creating an advanced telecommunication utility system for the  
2 community was Click!’s primary purpose.<sup>22</sup> Click!’s creation was not about smart meters.

3 Defendant claims Click! is not a utility since the only utility is Tacoma Power and the need  
4 for the smart meters is the only purpose for Click!. *But* Power’s needs are not the issue. Click!  
5 was never intended to be “*essential*” for Power’s purposes. Click!’s assets were created as  
6 “additional capacity,” purchased and installed to enable the vital telecommunication services  
7 that the community needed. These assets remain essential for providing these same  
8 telecommunication services today.

9 For over 20 years, in TPU’s lobby, Click! maintained a separate customer service counter,  
10 operated Click! as a separate “department” and “system.” Click! has a life and brand of its own  
11 the Click! “System” is certainly an essential utility —especially to the Click! users. *See* Grifo  
12 Decl Part One, 5/18/22, Ex. 42 (a)(b), Pg. 724/932 (pictures of Click! Counter in TPU Lobby).

13 Click!’s enabling Ordinance #25930 provides: “The City **hereby creates** a separate system  
14 of . . . City Light.”<sup>23</sup> Click! was born as a “Separate System.” Click! is “Telecommunication  
15 System.” Click!’s “System” is essential to Click!’s users, who depend on the infrastructure in  
16 everyday life.<sup>24</sup> Click! was established to fulfill the community’s need for an advanced  
17 telecom system.<sup>25</sup> It is a municipal alternative to the incumbent monopoly provider, who, at the  
18 time, “could care less” about Tacoma.

19 In 1996, when TPU staff first proposed Click! to City Council, the incumbent monopoly,  
20 TCI (now Comcast), had no interest in upgrading their system. After repeated requests by the

21 \_\_\_\_\_  
22 <sup>22</sup> Grifo Decl Part Two 5/18/22, Ex. 70, Pg. 281/499 (Mayor’s paper and  
23 newspaper article.) *also* Ex. 71, (Auditors Review).

24 <sup>23</sup> Grifo Decl Part One, 5/18/22, Ex. 11, Pg. 299/932, Pg. 8 (Article II creates a separate system, adopts  
25 Click! business plan.”

26 <sup>24</sup> RCW 43.330.532 [B]roadband is critical to full participation in society and the modern economy . . .  
by enabling access to health care, education, and essential services, providing economic opportunities,  
and enhancing public health and safety.

*Also* Grifo Decl Part One, 5/18/22, Ex. 21, Pg. 425/932, & Grifo Decl Part One, 5/18/22, Ex. 37, Pg.  
659/932 Pierce County Broadband Connectivity and Access Evaluation

<sup>25</sup> *See generally*, Grifo Decl Part One, 5/18/22, Ex. 23, Pg. 473/932 (“[B]roadband is taking its place  
alongside water, sewer and electricity as essential infrastructure for communities”. Quoting USDA  
Report).

1 City, TCI's attitude was, "*go jump in the lake.*" Power Superintendent Steve Klein recalled  
2 TCI's attitude:<sup>26</sup>

3 [C]ity council, they're having a heck of a problem with the incumbent  
4 cable provider who still has the crummy system, refuses to upgrade it.  
5 And they don't come to the table to negotiate the franchise agreement.  
6 They can just tell the city government to jump in the lake. And if you  
7 don't like it, we'll just shut it -- we'll shut it down.

8 Monopoly incumbents can afford such cavalier arrogance.<sup>27</sup> Most consumers have no  
9 alternative for access. Monopoly and oligopoly control of broadband in America is the norm.  
10 FCC data shows nearly 85 percent of Americans have either one choice or no choice for speeds  
11 in excess of 100 Mbps.<sup>28</sup> This is why the FCC, FTC and DOJ closely regulate mergers of the  
12 powerful telecommunication conglomerates.<sup>29</sup>

13 Click!'s costly construction was never "excess capacity." Council prudently and  
14 specifically resolved to provide "Additional Capacity," with additional, incremental  
15 investment, funding equipment, abundant optical fiber, including dark fiber, and the skilled  
16 staff to cobble it all together.<sup>30</sup> required to create Click!'s essential services.<sup>31</sup> Click! was built  
17 to accommodate the community's anticipated, ever-increasing, need for the data flow and for  
18 the explosive growth projected in the future.

19 Power Superintendent Steve Klein, the "Father of Click! Network," explained the project's  
20 origins and cited the "further review" that led to the additional investment in additional capacity  
21 for "expanding the network." *see* Grifo Decl Part Two 5/18/22, Ex. 74, Pg. 384/499.

22 Tacoma Power originally planned to build a fiber-optic network to  
23 control its substations. Further review indicated that expanding the  
24 network and offering a wide range of telecommunications services  
25 would benefit our customers and our community.<sup>32</sup>

26 <sup>26</sup> Grifo Decl Part Two 5/18/22, Ex. 74, Pg. 394/499, Pg. 12. (Power Superintendent's Steve Klein deposition).

27 <sup>27</sup> Grifo Decl Part Two 5/18/22, Ex. 78, Pg. 450/499 (monopoly power monitored by DOJ and FTC.)

28 <sup>28</sup> FCC, Annual Internet Access Services Report (2018), *see also*, FCC Fact Sheet Communications Marketplace Report GN Docket No. 18-231 Report: GN Docket No. 18-231 Ex. D-3.

29 <sup>29</sup> *See* AT&T-DIRECTV Order, 30 FCC Rcd at 9141, para. 20, 21; Comcast-NBCU Order, 26 FCC Rcd at 4248, para. 24, (The FCC and DOJ, consider market power of incumbent and barriers to entry).

30 <sup>30</sup> Grifo Decl Part Three, 5/18/22, Ex. 85 Pg. 63/428 (City's 1997 Res. for \$69 Million for telecom).

31 <sup>31</sup> Grifo Decl Part One, 5/18/22, Ex. 11, Pg.301/932 Ex. 11, Pg. 4, Ord.# 25930 ("City has determined that it is prudent and economical to provide **additional capacity** on such telecommunications system").

32 <sup>32</sup> Grifo Decl Part Three, 5/18/22, Ex. 83 Pg. 50/428, ("About us" description of Click! and historical screen shots of Click!'s website form the Wayback Machine, digital archive of the World Wide Web.).

1 Fiber must be activated, or “lit,” to provide communication services. At great expense,  
2 TPU invested tremendous “additional” public resources in providing the optical equipment,  
3 modulating electronics, hub buildings and other equipment and staff necessary to light this  
4 fiber and make it capable of carrying telecommunications services. There is nothing “excess”  
5 or surplus in Click!’s enterprise or the fiber it owns.

6 Power’s incremental investment to establish Click!, created a functional telecom system,  
7 addressing the community’s need for Broadband services. The “lit” fiber, and the currently  
8 unused dark fiber, are not “excess” capacity. These assets were intentionally included, as  
9 “*additional capacity*” in the original Ordinance and Business Plan. It is worth remembering  
10 Mayor Baarsma and Professor Singleton’s Paper, which described that incremental  
11 investment.<sup>33</sup>

12 *Why not invest more dollars to expand the fiber optic pipe?* Then  
13 Tacoma Power could offer its customers an array of services--cable  
14 television, competitive Internet access, telephony and data transport.

15 Click!’s assets are performing their intended purpose and function. They are useful and  
16 required for Click’s current and future needs in delivering essential services to the community.

17 The fact Click!’s fiber, both lit and dark, which are included in the privatization scheme, in  
18 exchange for \$2.5 million a year, shows these are these fibers are not obsolete or surplus, rather  
19 they are clearly valuable assets protected from plunder by the necessary public vote  
20 requirement that must precede any separation or alienating privatization of public utilities.<sup>34</sup>

21 **D. Res Judicata Does Not Apply**

22 The Court has ultimate discretion in this matter. *See J.M. Weatherwax Lumber Co. v.*  
23 *Ray*, 38 Wash. 545, 80 P. 775 (1905); *see also* Phillip A. Trautman, Claim and Issue Preclusion  
24 in Civil Litigation in Washington, 60 WASH. L. REV. 805, 806, 842 (1985).

25 1. Res Judicata Is An Equitable, Court-Created Doctrine Established At Common Law.

26 <sup>33</sup> Grifo Decl Part Two 5/18/22, Ex. 70, Pg. 298/499, Creating Capacity and Competition in Broadband Telecommunications.

<sup>34</sup> Click Business Transaction Agreement, Indefeasible Right of Use, or “Privatization Agreements.”

1 The City is attempting to perpetrate the ultimate inequity, by extinguished McCarthy’s right  
2 to vote upon the disposal of his public utility’s vital municipal telecommunications assets. The  
3 City seeks claim preclusion, while pointing to Mr. Shook’s stipulated settlement in a separate  
4 Pierce County Superior Court case. To allow res judicata in this instance would be a  
5 misapplication of the res judicata doctrine, because two of the four elements required for res  
6 judicata are missing in this instance. Res judicata requires a concurrence of identity in four  
7 respects: (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the  
8 quality of the persons for or against whom the claim is made. *Northern Pac. Ry. v. Snohomish*  
9 *County*, 101 Wash. 686, 688, 172 P. 878 (1918).

10 In this case, both the identity of the persons and the “quality” of the parties are different. The  
11 doctrine of res judicata cannot be applied where the identity of the parties, or the quality of the  
12 parties, is different. *Seattle-First Nat’l Bank v. Kawachi*, 91 Wn.2d 223, 588 P.2d 725 (1978).

13 Mr. McCarthy shares no “identity” with Mr. Shook or Mr. Bowman. Their interests are not  
14 similar or aligned with McCarthy. They do not share the same “quality” as McCarthy. Mr. Shook  
15 operated as an Internet Service Provider over the Click! Network. Mr. Shook’s motivation in  
16 bringing his case was that of a business person trying to avoid the financial ruin of losing his  
17 company’s access to Click! Network and all of his customers. Mr. Shook sought the assistance of  
18 his business associate, Mr. Bowman, to join him in saving his company. See Decl. of McCarthy,  
19 8-15-22, Exhibit C.

20 Mr. Shook ultimately succeeded in receiving a large financial payout from the City in  
21 exchange for abandoning his case and entering into a stipulated dismissal with the City prior to a  
22 full and fair determination of McCarthy’s “right to vote” on the merits by the Court of Appeals.  
23 Mr. Bowman participated in the case at Mr. Shook’s request. When Mr. Shook negotiated his  
24 settlement, Mr. Bowman dropped his claim also, and no full, fair and final determination, on the  
25 merits of the matter, was ever reached. See Decl. of McCarthy, 8-15-22, Exhibit E.

1       McCarthy’s sole and true desire is to have his right to vote determined, in a full and fair  
2 hearing, with a final judgment based on the merits of the case —not based on the amount the  
3 City’s willing to pay off in a back-room settlement.

4       Mr. Shook’s motivation was to avoid financial ruin, which he succeeded in doing, as  
5 evidenced by the fact that Mr. Shook abandoned his claims upon entering into a negotiated  
6 dismissal. That is not a full and fair hearing or final judgement on the merits.

7       The doctrine of *res judicata* is meant to provide an equitable opportunity for a fair outcome.  
8 There is no equity in denying McCarthy his day in court, nor in denying the citizens of Tacoma  
9 their lawful right to vote. This issue represents a matter of great public policy importance, and  
10 the issue of McCarthy’s right to vote should ultimately be settled by the laws and the peoples last  
11 safeguard, the Courts —not by some back-room payoff.

12       2. Clarification on The Issue of ‘Two-Way Communications’ and the True Definition of  
13 ‘Telecommunications’

14       The Defendant argues that this Court is only interested in finding out about the current  
15 deployment of “smart meters” —that the matter of smart meters and their removal from the  
16 System is the only issue remaining. However, certainly the Court would also be interest in an  
17 *equitable outcome*? Indeed, the Court commented that “It isn’t clear to me that the cable  
18 television is purely a one-way communication item.” See Decl. of Robert Christie, Pg. 118/133.  
19 For this reason it is important to help the Court understand that cable television is certainly not  
20 telecommunications or “two-way communications.”

21       As noted in the following verbatim transcript, this Court also recognized that the issue of  
22 “telecommunications vs Cable TV” (one-way vs two-way communication) has not been settled  
23 by *Issaquah*. Judge Chushcoff stated:

24               When there was a motion to reconsider my July order, the  
25 issue of two-way communications versus one-way  
26 communication was raised for the first time. I discussed that in  
my ruling in a couple of ways. It seemed to me what I said -- if  
memory serves, it was something like, first of all, I have no reason  
to believe that a cable television system is a purely one-way

1 communication. It is different from telephone. It is different from  
2 the internet, but I can order a movie on my cable television  
3 system. In order to do that, the communication has to go the other  
4 direction. It isn't clear to me that the cable television is purely a  
5 one-way communication item.

6 No. 2, the Issaquah case -- the Supreme Court did not analyze  
7 that problem in an idea of a one-way versus two-way  
8 communication sort of way. Of course, the third problem was, at  
9 least for purposes of the motion to reconsider was, that that had  
10 never been raised in any of the prior pleadings or argument or  
11 anything else until the motion to reconsider. It was entirely new  
12 and not supported by any particular evidence. As I say, given that  
13 I think that I can order a television movie through my cable  
14 television system, it seems to me, that, of itself, suggests that it's  
15 more than a one-way communication system.

16 See Decl. of Robert Christie, 7-29-22 Pg. 118/133, Transcript of Judge  
17 Chushcoff's Hearing on the City's Motion for Summary.

18 As a legal matter, Click! is, by definition a "*Telecommunications System*" which must not be  
19 confused with a *Cable TV System*. Comparison of Click! to cable TV under *Issaquah*, are  
20 irrelevant, unhelpful and erroneous.

21 Every Ordinance, Resolution, Franchise Agreement, Court Case, Contract, Federal, State  
22 and Municipal filing relating distinctly identifies Click! as a "Telecom System."<sup>35</sup>

23 Tacoma Municipal Code Title 16 B., states "Telecommunications service" does not  
24 include television and video programming service.

25 RCW 80.36.630 shows State law mirrors federal code. "Telecommunications has the same  
26 meaning as defined in 47 U.S.C. Sec. 153."

Under 47 U.S.C. Sec 153 (53) "telecommunications services are treated as  
telecommunications services regardless of the facility used to provide them."

Also consider, 47 U.S.C. § 522(6). Cable Service is one-way transmission to subscribers of  
video programming, and subscriber interaction for the selection or use of such video

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<sup>35</sup> Grifo Decl. Part One, 5/18/22, Ex. 6, Pg. 102/932, , (TPU Annual Report, describes "telecommunications system"), also Ex. 11, (Ordinance creating Click!), Ex. 12, 13, (1996 and 1997 Orders affirming System and utility funding), Ex. 17, (Installation Contract). Ex. 62 403/932, (Century Link Contract) Ex. 64 (Library Contract) Ex. 65. (County Franchise) *E.g.,*).

1 programming or programming service. *Compare with*, 47 USC § 153(50) telecommunications”  
2 means the transmission, between or among points specified by the user, of information of the  
3 user’s choosing.

4 Telecom is not cable television under state law. RCW 82.04.065 (27) provides  
5 “Telecommunications service does not include television and video programming service.”  
6 Also, see Television is also expressly distinguished.

7 *See* RCW 35.99.010 (1) "Cable television service" means the one-way transmission to  
8 subscribers of video programming and other programming service and subscriber interaction, if  
9 any, that is required for the selection or use of the video programming. (emphasis provided)

10 Click! is a telecom system, with *two-way communications*, capable of sending and  
11 receiving data, of the user’s choosing, to and from all “end points” of the World Wide Web.<sup>36</sup>

12 Cable TV (“cable system”) is a closed-off, “one way” system, with “closed transmission  
13 paths.”<sup>37</sup> One-way capability is not telecommunications under the law . *Compare* 47 U.S.C. §  
14 522(7), with 47 USC § 153(50). Click!’s physical infrastructure, “the pipes,” is a wire  
15 “communication system.”<sup>38</sup>

16 As a telecom system, with vast underground facilities, as seen in the APA, Click! is a  
17 “communication utility” by the definition in RCW 35.96.020.

18 While the statutes, legalities and complexities of advanced telecommunications technology  
19 and regulations can be perplexing, some recent cases are helpful. For example, *Community*  
20 *Telecable’s ruling* differentiates cable TV from Click!’s “two-way” telecommunications.<sup>39</sup> see  
21 *Community Telecable V. City Of Seattle* 164 Wn.2d 35 (Wash. 2008).

22  
23  
24 <sup>36</sup> Grifo Decl. Part One, 5/18/22, Ex. 59 , Pg. 927/932, (Telecommunications definition by Mr. Dillon,  
retired Click! Manager).

25 <sup>37</sup> 47 U.S.C. § 522(7). ( Cable System: a facility, consisting of closed transmission paths).

26 <sup>38</sup> 47 USC § 153(59) “wire communication” or “communication by wire” means the transmission of  
... pictures, and sounds of all kinds by aid of wire, cable, or like connection.”

<sup>39</sup> *E.g. Community Telecable V. City Of Seattle* 164 Wn.2d 35 (Wash. 2008) differentiates TV from  
Telecom. *See also*, 47 USC § 153(50) *compare with* 47 U.S.C. § 522(6), *E.g.* RCW 82.04.065 (27),

1 Finally, allow the Oregon State Supreme Court to help us distinguish cable TV and telecom  
2 systems, in explaining why Comcast’s cable modem services should be taxed as telecom and  
3 not cable TV. As seen in *City of Eugene v. Comcast*, here:

4 Thus, considering the Telecommunications Act in context, we  
5 conclude that it created a regulatory scheme that focuses on the  
6 function of the service provided rather than on the communications  
7 facility used to provide it. Within that scheme, telecommunications  
8 services are generally treated as telecommunications services and  
9 cable services as cable services, regardless of who provides the  
10 service or how. *Id.* at 551

11 The FCC has recognized that, as it relates to distinguishing cable,  
12 telecommunications, and information services, none of those  
13 classifications “rests on the particular types of facilities used. Rather,  
14 each rests on the function that is made available.” *In re Inquiry*  
15 *Concerning High-Speed Access to the Internet*, 17 FCC Rcd 4798 at  
16 4821; *see also* 47 USC § 522(6) (defining “cable services”); 47 USC  
17 § 153(53) (defining “telecommunications service”); 47 USC §  
18 153(24) (defining “information service”). That is expressly the case  
19 for “telecommunications service,” which the Act defines as “the  
20 offering of telecommunications for a fee directly to the public, or to  
21 such classes of users as to be effectively available directly to the  
22 public, *regardless of the facilities used.*” 47 USC § 153(53)  
23 (emphasis original) *Id.* at 551.

24 *City of Eugene v. Comcast of Oregon II, Inc.*, 359 Or. 528, 375 P.3d 446 (2016).

25 Many municipalities are now building their own public utility telecommunications systems.  
26 Even the City of Anacortes has established a telecommunications utility.<sup>40</sup>

This case is a matter of great public concern and importance.<sup>41</sup>

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24 <sup>40</sup> See Grifo Decl. Part One, 5/18/22, Ex. 58 (a)(b)(c), Pg. 912 of 932, Anacortes Resolution  
25 <sup>41</sup> Grifo Decl. 5/16/22 Part One, Ex. 18, Pg. 408/932 A Sampling of Municipal Broadband Utilities in the  
26 USA. *See also* Grifo Decl. 5/16/22 Part One, Ex. 21, Pg. 425/942, Appendix 1: (U.S. Municipalities with  
Broadband Networks, Report from The Executive Office of the President. Benefits Of Competition And  
Choice For Community Development And Highspeed Internet Access. (January 2015)). *Compare with*,  
Grifo Decl. 5/16/22 Part Two, Ex. 60, pg. 3/499 (Australia’s NBN, open access project passes 11 million  
homes).

1 **VII. Conclusion**

2 In closing, please consider that the Citizens of Tacoma have reserved, exclusively unto  
3 themselves, the right to vote upon the disposal of their municipal utility assets, see *Clark v. City*  
4 *of South Haven*, 8 Mich. App. 74 (1967), 153 N.W.2d 669  
5

6 [W]hen the voters of South Haven granted the privilege to  
7 generate power, they were not content to divest themselves of  
8 every managerial function normally associated with the  
9 operation of a business concern. By their city charter they have  
10 retained express power over the discontinuance of their public  
11 utility. The contract in question has the effect of violating  
12 section 13.5 of the charter for the city of South Haven

13 Respectfully submitted, this 15<sup>th</sup> day of August 2022

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18 Tom McCarthy, Plaintiff  
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AFFIDAVIT OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on August 15, 22, I served true and correct copies of:

- 1). PLAINTIFF's RESPONSE TO DEFENDANT's Motion For Summary Judgement.
- 2). The 8-15-22 Declaration of Tom McCarthy.

These documents were delivered via the Court's e-serve system and additionally thru Email to the Attorneys for the Defendant's Council, Robert Christie and the other parties in this case.

Respectfully submitted,

This 15 day of August 2022



Tom McCarthy, Plaintiff

August 15 2022 4:03 PM

CONSTANCE R. WHITE  
COUNTY CLERK  
NO: 19-2-07135-0

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

8 MITCHELL SHOOK,

9 Plaintiff,

10 v.

11 CITY OF TACOMA,

12 Defendant.

NO. 19-2- 07135-0

DECLARATION OF  
THOMAS MCCARTHY

13  
14  
15 I, Tom McCarthy, hereby declare as follows:

16  
17 1. I am over the age of 18, and competent to testify to the following based upon my personal  
18 knowledge.

19 1. Attached hereto as **Exhibit D** and incorporated herein by this reference is a true and correct  
20 copy a declaration from Mitchell Shook.

21 2. Attached hereto as **Exhibit E** and incorporated herein by this reference is a true and correct  
22 copy a declaration from Darrel Bowman.

23  
24 I declare under the penalty of perjury under the laws of the State of Washington that the  
25 foregoing is true and correct.  
26

1 DATED this 15<sup>th</sup> Day of August 2022, at Tacoma, Washington.

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6 Thomas McCarthy

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CONSTANCE R. WHITE  
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NO: 19-2-07135-0

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

8 MITCHELL SHOOK,

9 Plaintiff,

10 v.

11 CITY OF TACOMA,

12 Defendant.

NO. 19-2- 07135-0

CORRECTED 8-15-22 DECLARATION  
OF THOMAS MCCARTHY

13  
14 I, Tom McCarthy, hereby declare as follows:

15  
16 1. I am over the age of 18, and competent to testify to the following based upon my personal  
17 knowledge.

18 1. Yesterday, 8-15-22, when filing my DECLARATION OF THOMAS MCCARTHY, I forgot  
19 to include the **Exhibit D and Exhibit E**; therefore, I am refileing this CORRECTED

20 DECLARATION, to add these Exhibits to the record,

21  
22 2. Attached hereto as **Exhibit D** and incorporated herein by this reference is a true and correct  
23 copy a declaration from Mitchell Shook.

24 3. Attached hereto as **Exhibit E** and incorporated herein by this reference is a true and correct  
25 copy a declaration from Darrel Bowman.

26 I declare under the penalty of perjury under the laws of the State of Washington that the

1 foregoing in true and correct.  
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3  
4 DATED this 16<sup>th</sup> Day of August 2022, at Tacoma, Washington.

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# EXHIBIT D

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

MITCHELL SHOOK,  
Plaintiff,

v.

CITY OF TACOMA,  
Defendant.

**NO. 19-2-07135-0**

**DECLARATION OF MITCHELL  
SHOOK**

THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,  
Plaintiffs,

v.

CITY OF TACOMA,  
Defendant.

I, Mitchell Shook, hereby declare as follows:

1. I offer this declaration not in support of, or in opposition to, any of the arguments or claims now before the Court, but simply to clarify a fact that has become an issue in this case.
2. I am over the age of 18, and competent to testify to the following based upon my personal knowledge.
3. I filed several lawsuits against the City of Tacoma to challenge the lease of Click! Network

1 to Rainier Connect, which was a competitor of my business, Advanced Stream. I litigated all of my  
2 cases against the City of Tacoma to save my business, which was my life's work and my livelihood.

3 I certify and declare under penalty of perjury under the laws of the State of Washington that  
4 the foregoing is true and correct.

5 Signed this 15<sup>th</sup> day of August 2022, in Tacoma, Washington.

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 Mitchell Shook

# EXHIBIT E

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

MITCHELL SHOOK,  
Plaintiff,

v.

CITY OF TACOMA,  
Defendant.

**NO. 19-2-07135-0**

**DECLARATION OF DARREL  
BOWMAN**

THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,

Plaintiffs,

v.

CITY OF TACOMA,  
Defendant.

I, Darrel Bowman, hereby declare as follows:

1. I am over the age of 18, and competent to testify to the following based upon my personal knowledge.

2. I have been a personal friend and business advisor to Mitchell Shook for many, many years.

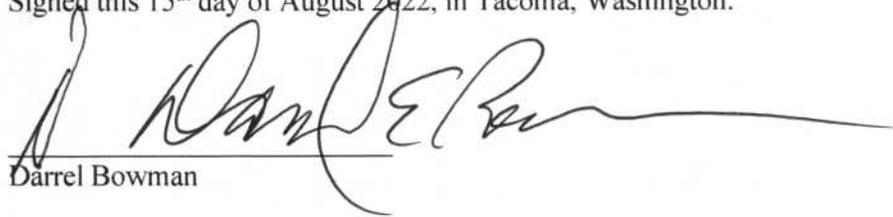
I was also a customer of Advanced Stream until the City gave control of Click! Network to Rainier Connect.

Darrel Bowman Declaration

1 3. I filed a lawsuit against the City at the request of Mitchell Shook, to support him, and to help  
2 protect his business and the company that provided me with broadband internet service. When  
3 Mitchell Shook agreed to dismiss all of his lawsuits against the City, I too agreed to dismiss my case  
4 against the City. I then changed my mind and asked the Court of Appeals to disregard the stipulated  
5 dismissal of my case, but it was too late, and I never had an opportunity to have Judge Speir's ruling  
6 considered by the Court of Appeals.

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

9 Signed this 15<sup>th</sup> day of August 2022, in Tacoma, Washington.

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12 Darrel Bowman

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Darrel Bowman Declaration

August 22 2022 1:47 PM

CONSTANCE R. WHITE  
COUNTY CLERK  
NO: 19-2-07135-0

1 Honorable Judge Bryan Chuschcoff  
2 Hearing Date: August 26, 2022, at 9:00 a.m.

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

9 MITCHELL SHOOK,  
10 Plaintiff,

11 v.

12 CITY OF TACOMA,  
13 Defendant.

**NO. 19-2-07135-0**

**PLAINTIFF ANDERSON'S REPLY IN  
SUPPORT OF ANDERSON'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

14 THOMAS McCARTHY and CHRISTOPHER  
15 T. ANDERSON,  
16 Plaintiffs,

17 v.

18 CITY OF TACOMA,  
19 Defendant.

20 **I. INTRODUCTION**

21 The City of Tacoma's ("the City's") Consolidated Response to Anderson ("Anderson") and  
22 McCarthy's ("McCarthy's") Motions for Summary Judgment ("Response") fails to respond to the  
23 substantive arguments raised in Plaintiffs' moving papers. Instead, the City has elected to rest its  
24 opposition on its assertion that Plaintiffs' claims are barred by the equitable doctrine of *res judicata*. Since  
25 the City has offered no meaningful arguments in opposition to the issues raised in the Plaintiffs' moving  
26 papers, then if this case is not barred by *res judicata* the Plaintiffs should prevail. This case should not be  
barred by the equitable doctrine of *res judicata*, and Plaintiff Anderson incorporates Anderson's Response

PLAINTIFF ANDERSON'S REPLY IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY JUDGMENT

- 1 -

THE LAW OFFICE OF JAMES P. GRIFO, LLC  
164 Dougherty Lane  
Friday Harbor, WA 98250  
(P): 360-370-5186

1 to the City of Tacoma’s Motion for Summary Judgment by this reference.

2 The primary legal questions before the Court are: (1) whether the City’s hybrid fiber coaxial  
3 telecommunications network and broadband internet service (“Click!”) is a public utility subject to vote  
4 requirements set forth in RCW 35.94.020 and Section 4.6 of the Tacoma City Charter; and, (2) whether  
5 the City had the authority to unilaterally declare this fully and still functioning public utility to be “surplus”  
6 in order to evade having to submit the proposed lease of Click! to the voters. This Court does not need  
7 to look any further than the plain language of RCW 35.94.010, RCW 35.94.020, the Washington Supreme  
8 Court’s decision in *Bremerton Municipal League v. Bremer*, 15 Wn.2d 231, 130 P.2d 367 (1942), and Section  
9 4.6 of the Tacoma City Charter to see that the law required the City put the question of leasing Click! to  
10 a vote prior to its unilateral disposition of this important public utility. This case is not as complicated as  
11 the City would have the Court believe, and the Court should not be distracted by the City’s red-herring  
12 arguments. For all of the reasons set forth in the pleadings and filings of record in the above-captioned  
13 matter, which are incorporated herein, and as follows, this Court should deny the City’s Motion for  
14 Summary Judgment, and grant Anderson’s Motion for Partial Summary Judgment in its entirety.

15 **II. EVIDENCE RELIED UPON**

16 This motion is based on all of the pleadings and papers filed in this action, which are incorporated  
17 herein by this reference.

18 **III. LEGAL AUTHORITY AND ARGUMENT**

19 **A. The City Has Failed to Ever Meaningfully Respond to Plaintiffs’ Argument that Click! is**  
20 **a Public Utility Subject to RCW 35.94.010 and 35.94.020.**

21 The City has never offered any legal authority interpreting RCW 35.94.010 and RCW 35.94.020,  
22 which are the main statutory provisions at issue in this case. RCW 35.94.010 plainly states a city “may  
23 lease for any term of years or sell and convey **any public utility works, plant, or system owned by it**  
24 **or any part thereof, . . .**” RCW 35.94.010 (emphasis supplied). As explained in Anderson’s moving  
25 papers, the construction of this statute requires consideration of this statute’s original text in RRS § 9512.  
26 Since RRS § 9512 finds its present iteration in RCW 35.94.010, the primary question in this case is whether

1 the City’s hybrid fiber coaxial telecommunications system is “similar or dissimilar” to a “telephone or  
2 telegraph plant and lines.” RRS § 9512. The City has never disputed that Click! meets this statutory test;  
3 because it cannot. Therefore, the Court need go no further than applying this statutory test to Click!  
4 because if “plain language [of a statute] is subject to only one interpretation, [a court’s] inquiry is at an  
5 end.” *G-P Gypsum Corp. v. State Dept. of Revenue*, 169 Wn.2d 304, 317, 237 P.3d 256 (2010) (Sanders, J.  
6 dissenting).

7 An extensive analysis of the legislative history of RCW 35.94.010 is in Anderson’s Motion for  
8 Partial Summary Judgment, which is incorporated here in its entirety. Briefly, RRS § 9512,<sup>1</sup> which  
9 contained an illustrative list of utilities, was editorially rewritten by the State Revision and Recompilation  
10 Committee (“Code Committee”) for brevity and then codified into RCW 80.48.010 in 1951 when the  
11 Legislature first enacted the Revised Code of Washington. The RCWs were enacted with an express rule  
12 of construction that “in case of any omissions or any inconsistency between any of the provisions of the  
13 revised code as so supplemented or modified and the laws existing immediately preceding this enactment,  
14 the previously existing laws shall control.” RCW 1.04.020 (emphasis supplied). Thus, RCW 80.48.010,  
15 as it existed from 1951 to 1965, provided that “A city may lease for any term of years or sell and convey  
16 any public utility works, plant, or system owned by it or any part thereof, together with all or any  
17 equipment and appurtenances thereof,” but its meaning was still controlled by RRS § 9512. The existing  
18 statutory language of RCW 80.48.010 in 1965, immediately preceding the enactment of 1965 Senate Bill  
19 No. 3, was therefore identical to the language in RCW 35.94.010 as it appeared after the enactment of the  
20 1965 bill.

21 In 1965, the Legislature passed Senate Bill No. 3, which repealed every single existing law in  
22 Washington governing cities and towns and then “reenact[ed]” the same into Title 35 “without changing  
23 the substance of the law.” *See* 1965 Wash. Sess. Laws 454 (cities and towns explanatory note); *see also*

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24  
25 <sup>1</sup> The full text of RRS § 9512 is as follows: “It is and shall be lawful for any city or town in this state now or hereafter  
26 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.” *Id.* (emphasis supplied).

1 Wash. AGO 1965–1966 No. 26 (Wash. A.G.) (Senate Bill No. 3...merely re-enacts Title 35 of the Revised  
2 Code of Washington...[and] makes no substantive change in the statutory law governing cities and  
3 towns). As a result, the 1965 Bill contained an express provision regarding the “continuation of existing  
4 law.” *Id.*, at 444; *see also* RCW 35.98.010. Specifically, that section provided:

5           The provisions of this title insofar as they are substantially the same as  
6           statutory provisions repealed by this chapter, and relating to the same  
7           subject matter, shall be construed as restatements and continuations, and  
8           not as new enactments.

9 1965 Wash. Sess. Laws 444 (emphasis supplied); RCW 35.98.010. RRS § 9512, in its rewritten and  
10 codified form at RCW 80.48.010, was therefore restated and continued in RCW 35.94.010, because the  
11 language in the repealed RCW 80.48.010 was identical to the language in RCW 35.94.010. *See* 1965 Wash.  
12 Sess. Laws 442; RCW 80.48.010 (stating that RCW 80.48.010 was “Repealed by 1965 c 7 § 35.98.040.  
Now codified as chapter 35.94 RCW.”); RCW 35.94.010.

13           If there were any remaining doubt as to the effect of the 1965 Bill, which there is not, the Attorney  
14 General restated the scope of the 1965 Bill later that same year—noting that the “legislation merely re-  
15 enacts Title 35 of the Revised Code of Washington relating to cities and towns.” Wash. AGO 1965–  
16 1966 No. 26 (Wash. A.G.) (“1965 AGO”). The 1965 AGO then cited section 35.98.010 as “spell[ing]  
17 out the legislature’s intent as to construction.” *Id.* Based on that provision, the 1965 AGO concluded  
18 that “nothing contained in Senate Bill No. 3 (chapter 7, Laws of 1965) should be regarded as altering  
19 existing status...[s]ince this legislation makes no substantive change in the statutory law governing cities  
20 and towns.” *Id.* Therefore, RRS § 9512 still controls the meaning of RCW 35.94.010 today.

21           **B. The Washington State Supreme Court’s Decision in *Bremerton Municipal League v.***  
22           ***Bremer* is the Only Binding Authority Relevant to the Issues in this Case and It Clearly**  
23           **Holds that a Vote was Required Before the City Could Lease Click!, Which is Supported**  
24           **Entirely by Arguments the City Made to Prevail in *City of Tacoma v. The Taxpayers and***  
25           ***the Ratepayers of the City of Tacoma.***

26           The City has never been able to distinguish or otherwise explain how the Supreme Court’s  
decision in *Bremer* does not control the outcome of this case. The parties have spilt much ink fighting  
about the definition of “public utility” as it is used in Chapter 35.94 RCW and the Tacoma City Charter.

1 However, the Supreme Court in *Bremer* provides this Court with the definitional test:

2 “This, we think includes any kind of utility in whose operations the public has an interest,  
3 that is to say, any public utility.”

4 *Bremerton Municipal League v. Bremer*, 15 Wn.2d 231, 237, 130 P.2d 367 (1942). In *Bremer*, after the City of  
5 Bremerton had constructed a wharf, the City later leased the wharf and the buildings located on it, along  
6 with surrounding harbor areas, to the Bremerton Terminal Company, without a vote of the people. *Id.*,  
7 at 232. The validity of the lease was challenged based on the arguments that the City was not the owner  
8 of the harbor areas and therefore did not have the authority to lease that area, that wharves are public  
9 utilities that cannot be leased without a vote of approval, and that the city was without power to make  
10 certain agreements. *Id.*, at 235. The trial court held the lease invalid since the City was not the owner of  
11 the harbor area occupied by the wharves. *Id.*, at 235-6. The Supreme Court heard the appeal and agreed  
12 with the result reached, but concluded that RRS §§ 9512-9514 controlled the outcome. *Id.*, at 237. “We  
13 are of the opinion that these sections of our statutes provide the only procedure by which the city can  
14 lawfully sell or lease municipal wharves.” *Id.* The Court went on to explain that despite the fact that the  
15 statute specifically enumerates a long list of utilities – which did not include wharves or docks – is  
16 irrelevant, since the statutes clearly included any kind of utility in whose operation the public has an  
17 interest. *Id.*

18  
19 Here, there can be no dispute that the citizens of Tacoma (read: the public) have an interest in  
20 Click!<sup>2</sup> In fact, this Court should take judicial notice of the City’s arguments in *City of Tacoma v. The*  
21

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23 \_\_\_\_\_  
24 <sup>2</sup> The Court should also take judicial notice of the City of Tacoma’s Complaint filed in *City of Tacoma v. Comcast Cable*  
25 *Communications, LLC et al*, Pierce County Superior Court Cause No. 19-2-06715-8, in which the City plead: “Now, and for  
26 all relevant times herein stated, Click! Network is a division of Tacoma Power, a division of Tacoma Public Utilities, a  
department of the City of Tacoma, that provides internet service to the public and cable facilities to other divisions of  
Tacoma Power.” The City claimed *inter alia* that Defendants’ insertion of their own cable in Click! Network’s conduit  
constituted a gift of public funds and the conversion of public property to private use. The City further averred that the  
“Click Network Conduit at issue now, and for all relevant times herein stated, has always had “TPU Telecom,” permanently  
marked on it,” and expressly admitted that “the Conduit had been installed for a public benefit.”

1 *Taxpayers and the Ratepayers of the City of Tacoma*, Pierce County Superior Court Cause No. 96-2-09938-0, in  
2 which the City itself successfully argued that the City lawfully issued bonds under Ordinance No. 25930  
3 to construct Click! – **because it was a public utility!** Grifo Decl. Part One, Ex. 11, 12, 13.

4 Ordinance No. 25930 provided in relevant part:

5 Establishment of Telecommunication System. The City hereby creates a separate system  
6 of the City’s Light Division to be known as the telecommunications system (“the  
7 Telecommunications System”). **The public interest, welfare, convenience and  
8 necessity require the creation of the Telecommunications System.**

9 Grifo Decl. Part One, Ex. 11 (emphasis supplied). In that same Ordinance, the City authorized the  
10 issuance and sale of the City’s Electric System Revenue Bonds to provide part of the funds “. . . necessary  
11 for the acquisition, construction and installation of additions and improvements to the  
12 telecommunications system.” *Id.* In *Taxpayers*, the defendants claimed that a vote of the people was  
13 required for the City to incur general indebtedness for Click!, but the City rightly argued that under the  
14 Charter, “no vote of the people is required **for utility system** acquisitions unless ‘general indebtedness  
15 in incurred by the city.’” *Id.*, Ex. 13 (emphasis supplied). The City highlighted that the bonds would not  
16 be obligations of the general fund since they were issued under RCW 39.46.150. *Id.* RCW 39.46.150(3)  
17 states in relevant part:

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

24 The City of Tacoma successfully argued in 1997 that it had the authority to build a  
25 Telecommunications System and to issue bonds for its construction without a vote of the people,  
26 since the bonds were revenue bonds to be paid by revenues from the public utility; but, the City is  
here now arguing (nearly thirty years later) that Click! is not a public utility. The City cannot have it

1 both ways: either (1) the bonds issued under Ordinance 25930 were lawful and properly funded “the  
2 public utility or system” – as the City successfully argued; or, (2) Click! is not a public utility and the  
3 voters should have had the opportunity to vote on the issuance of the bonds to construct the  
4 Telecommunications System. While the City struggles to find consistency in its legal arguments, the  
5 City unfailingly appears to do whatever may be necessary to avoid letting its citizens vote. Based on  
6 the City’s own arguments in *Taxpayers*, the City should be estopped from arguing that Click! is not a  
7 public utility for the purposes of Chapter 35.94 RCW and/or Section 4.6 of the Charter.  
8

9 **C. *Coates v. City of Tacoma* Offers this Court Little Guidance on Whether Click! is a Public**  
10 **Utility Subject to the Vote Requirements Set Forth in RCW 35.94.020 and Section 4.6 of**  
11 **the Tacoma City Charter.**

12 The City suggests that the *Coates* decision somehow informs the issues presented to the Court in  
13 this case. Response, at 2. According to the City, the *Coates* decision dictates whether Click! is a public  
14 utility system under RCW 35.94.010 and the City Charter. While *Coates* briefly discussed whether Click!  
15 was separate from Tacoma Power—as opposed to a betterment—in the context of determining whether  
16 the financial structure of Click! violated the City Charter, no party to the *Coates* case took the position that  
17 Click! was itself a public utility system either for the purposes of Section 4.6 of the City Charter or RCW  
18 35.94. And no party to the *Coates* case raised any of the arguments raised in Plaintiffs’ Motions for  
19 Summary Judgment with respect to whether Click! is a public utility system under City Charter § 4.6 or  
20 RCW 35.94. As a result, the *Coates* decision does not help the Court (unlike *Bremer*, see argument above).

21 The portion of the *Coates* decision, which discussed whether Click! was separate “utility” or a  
22 separate “undertaking” from Tacoma Power was ancillary to the main issue in the case: whether the  
23 funding of Click! was a violation of the Washington Accountancy Act. The portion of the *Coates* decision  
24 that discusses whether Click! is separate “utility” or a separate “undertaking” from Tacoma Power is  
25 barely over a single page of the eleven-page majority opinion, and the twenty-two-page dissent never  
26 discussed the issue. *See Coates*, 11 Wn. App.2d 688, 698, 457 P.3d 1160 (2019) (only portion discussing  
separate utility or undertaking). This Court on the other hand is tasked with deciding whether Click! is a

1 public utility for the purposes of Chapter 35.94 RCW and Section 4.6 of the Charter. None of the major  
2 arguments Plaintiffs rely upon for the proposition that Click! is a public utility under the City Charter and  
3 RCW 35.94 were ever briefed or mentioned in *Coates*. See *Coates*, 11 Wn. App.2d 688, 457 P.3d 1160  
4 (2019). Neither party—nor the *Coates* court—discussed the meaning of “public utility,” performed  
5 statutory interpretation on the relevant statutory provisions, or cited any of the applicable case law. See  
6 *Id.* Chapter 35.94 RCW and Section 4.6 of the Charter were never mentioned, cited, nor analyzed at any  
7 point in *Coates*, which focused exclusively on funding provisions of the City Charter outside the public  
8 vote requirement in City Charter § 4.6. *Id.* Simply put, the *Coates* court did not consider any authority in  
9 any way relevant to the question of whether Click! is a public utility system under Section 4.6 of the City  
10 Charter and RCW 35.94. As a result, the opinion simply has no value to the Court in this case.

11 As explained above, this Court is not bound by *Coates*, and *Coates* has no meaningful value in this  
12 case. However, should this Court choose to follow any portion of *Coates*’ reasoning, it is important to  
13 recognize that *Coates* does not by its terms apply to Chapter 35.94 RCW. *Coates* only analyzed portions  
14 of the City Charter in the decision, and did not cite, discuss, nor analyze Section 4.6 of the Tacoma City  
15 Charter or Chapter 35.94 RCW in any way. See generally *id.* (no citation to RCW 35.94 or Tacoma City  
16 Charter § 4.6).

17 **D. *Issaquah v. Teleprompter* Does Not Help Answer the Questions Now Before the Court**  
18 **and Must be Considered in Light of Binding Precedent Set Forth in *Bremer*.**

19 This Court has suggested that *Issaquah v. Teleprompter*, 93 Wn.2d 567, 611 P.2d 741 (1980), helps  
20 to answer the question of whether the telecommunications aspect of Click! is a public utility. Christie  
21 Decl., Ex. D. Respectfully, *Issaquah* is not helpful or instructive in this case, and if the Court is going to  
22 construe *Issaquah* in this case, then it must harmonize that interpretation with binding precedent from the  
23 Supreme Court in *Bremerton Municipal League v. Bremer*. As an initial matter, *Issaquah* did not interpret or  
24 construe the actual statute at issue in this case. *Issaquah* interpreted Chapters 35A.90 and 35.92 RCW<sup>3</sup>.

25 \_\_\_\_\_  
26 <sup>3</sup> RCW 35.92’s express grant of power to exercise specific utilities does not shed any light on the meaning of public utility  
in RCW 35.94.

1 *Bremer*, on the other hand, actually interpreted RRS § 9512—the historical statute that controls the  
2 meaning of modern-day Chapter 35.94 RCW. *Bremer*, therefore, is the controlling authority on the  
3 interpretation of RCW 35.94, not *Issaquah*. And *Bremer* establishes definitively that monopoly  
4 characteristics are not required for something to be a public utility under RCW 35.94.

5 In *Bremer*, the court found that a municipal wharf was a “public utility” for purposes of RRS §  
6 9512. *Bremer*, 15 Wn.2d at 237. The municipal wharf was located directly next to a private wharf operated  
7 by the plaintiff, *Bremer*. *Id.* at 232–33. Notwithstanding that fact, the court determined that the municipal  
8 wharf was a “public utility” under RRS § 9512. *Id.* at 237. Put simply, if being a monopoly were an  
9 essential requirement to being a public utility under RCW 35.94, then the *Bremer* court could not have  
10 determined that the municipal wharf was a public utility because it had direct, next-door, private  
11 competition. Based on *Bremer* alone, it is clear that a public utility does not have to be a monopoly. As  
12 explained above, the *Bremer* Court tells us that the statute simply applies to “any kind of utility in whose  
13 operations the public has an interest.” *Bremer*, 15 Wn.2d 231, 237 (1942). Similarly, *Issaquah* does not  
14 stand for the proposition that a public utility must be a monopoly either. The *Issaquah* court never  
15 mentioned nor discussed the word monopoly.

16 **E. The Court Should Consider both the Physical Infrastructure and the Services Provided**  
17 **Therewith When Deciding Whether Click! is a Public Utility Under Chapter 35.94 RCW**  
18 **and Section 4.6 of the Tacoma City Charter.**

19 Click! is a hybrid fiber coaxial telecommunications system comprised of physical components,  
20 which as of 2014 included 1,426 miles of coaxial lines and 369 miles of fiber. Grifo Decl. Part One, Ex.  
21 56; Ex. 7. This physical infrastructure has allowed the City to make essential telecommunications services  
22 available directly to the public<sup>4</sup> to provide the people of Tacoma with essential public services. The  
23 Covid-19 pandemic highlighted the essential need for broadband telecommunication services, and even  
24 resulted in the creation of the Governor of Washington’s Statewide Broadband Office. RCW 43.330.532.

25  
26 <sup>4</sup> Consistent with 47 USC § 153(53) (defining telecommunications services).

1 This office was created to “encourage, foster, develop, and improve affordable, quality broadband within  
2 the state in order to: (a) drive job creation, promote innovation, improve economic vitality, and expand  
3 markets for Washington business; (b) serve the ongoing and growing needs of Washington’s education  
4 systems, health care systems, public safety systems, transportation systems, industries and businesses,  
5 governmental operations, and citizens; and (c) improve broadband accessibility for unserved communities  
6 and populations.” RCW 43.330.532. The Washington State legislature specifically found:  
7

8 **Findings—2019 c 365:** "The legislature finds that:

- 9 (1) Access to broadband is critical to full participation in society and the modern  
10 economy;  
11 (2) Increasing broadband access to unserved areas of the state serves a fundamental  
12 governmental purpose and function and provides a public benefit to the citizens of  
13 Washington by enabling access to health care, education, and essential services,  
14 providing economic opportunities, and enhancing public health and safety;  
15 (3) Achieving affordable and quality broadband access for all Washingtonians will  
16 require additional and sustained investment, research, local and community  
17 participation, and partnerships between private, public, and nonprofit entities;  
18 (4) The federal communications commission has adopted a national broadband plan  
19 that includes recommendations directed to federal, state, and local governments,  
20 including recommendations to:  
21 (a) Design policies to ensure robust competition and maximize consumer welfare,  
22 innovation, and investment;  
23 (b) Ensure efficient allocation and management of assets that the government controls  
24 or influences to encourage network upgrades and competitive entry;  
25 (c) Reform current universal service mechanisms to support deployment in high-cost  
26 areas, ensuring that low-income Americans can afford broadband, and supporting  
efforts to boost adoption and utilization; and  
(d) Reform laws, policies, standards, and incentives to maximize the benefits of  
broadband in sectors that government influences significantly, such as public  
education, health care, and government operations;  
(5) Extensive investments have been made by the telecommunications industry and  
the public sector, as well as policies and programs adopted to provide affordable  
broadband services throughout the state, that will provide a foundation to build a  
comprehensive statewide framework for additional actions needed to advance the  
state's broadband goals; and  
(6) Providing additional funding mechanisms to increase broadband access in  
unserved areas is in the best interest of the state. To that end, this act establishes a  
grant and loan program that will support the extension of broadband infrastructure to  
unserved areas. To ensure this program primarily serves the public interest, the  
legislature intends that any grant or loan provided to a private entity under this

1 program must be conditioned on a guarantee that the asset or infrastructure to be  
2 developed will be maintained for public use for a period of at least fifteen years.

3 2019 Ch. 365 § 1. Furthermore, the goals of the Broadband Office are as follows:

4 It is a goal of the state of Washington that:

5 (1) By 2024, all Washington businesses and residences have access to high-  
6 speed broadband that provides minimum download speeds of at least twenty-five  
7 megabits per second and minimum upload speeds of at least three megabits per  
8 second;

9 (2) By 2026, all Washington communities have access to at least one gigabit  
10 per second symmetrical broadband service at anchor institutions like schools,  
11 hospitals, libraries, and government buildings; and

12 (3) By 2028, all Washington businesses and residences have access to at least  
13 one provider of broadband with download speeds of at least one hundred fifty  
14 megabits per second and upload speeds of at least one hundred fifty megabits per  
15 second.

16 RCW 43.330.536. The City of Tacoma was well on its way to providing its citizens with this important  
17 public utility. That the City of Tacoma had the foresight decades ago to construct its own  
18 Telecommunications System, which was designed to accomplish the same goals now espoused by the  
19 state legislature is incredible. The City invested tremendous resources to create a state-of-the-art  
20 municipal telecommunications system, which system is still providing the exact same services today  
21 that it was when it was under the operation and control of the City. Not only is the physical plant of  
22 Click! a public utility for the purposes of Chapter 35.94 RCW and Section 4.6 of the Charter, but so  
23 are the services that were (and still are) provided on the physical infrastructure. *See*, 43.330.532.

24 **F. The City Has Admitted at Least One of the Issues Raised in this Case was Never  
25 Considered by Judge Speir, and Therefore This Case Cannot be Barred by the Doctrine  
26 of *Res Judicata*.**

There is limited case law defining when the subject matter of related cases differs. *Weaver v. City  
of Everett*, 194 Wn.2d 464, 450 P.3d 177, 185 (2019). The Supreme Court has “repeatedly held that ‘the  
same subject matter is not necessarily implicated in cases involving the same facts.’” *Id.* In this case the  
Court and the City have both acknowledged the consideration of new issues in this case:



*JP Grifo*

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

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1 The Honorable Judge Bryan Chushcoff  
2 Department 4  
3 Hearing Date: August 26, 2022 at 9:00 a.m.  
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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
8 **IN AND FOR THE COUNTY OF PIERCE**

9 MITCHELL SHOOK,  
10 Plaintiff,

11 v.

12 CITY OF TACOMA,  
13 Defendant.

**NO. 19-2-07135-0**

**DECLARATION OF SERVICE**

14 THOMAS McCARTHY and CHRISTOPHER  
15 T. ANDERSON,  
16 Plaintiffs,

17 v.

18 CITY OF TACOMA,  
19 Defendant.

20 I, James P. Grifo, hereby declare as follows:

- 21 1. I am the attorney of record for Plaintiff Christopher T. Anderson in the above-captioned matter.  
22 2. On August 22, 2022, I caused a true and correct copy of Plaintiff Anderson's Reply in Support  
23 of Anderson's Motion for Partial Summary Judgment to be served via electronic mail to Robert Christie,  
24 Esq., Defendant's counsel of record, at bob@christielawgroup.com, and to Thomas McCarthy,  
25 representing himself pro se, at tmccarthy253@gmail.com.

26 I certify and declare under penalty of perjury under the laws of the State of Washington that the

DECLARATION OF SERVICE

- 1 -

THE LAW OFFICE OF JAMES P. GRIFO, LLC  
164 Dougherty Lane  
Friday Harbor, WA 98250  
(P): 360-370-5186

1 foregoing is true and correct.

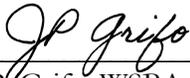
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Signed this 22<sup>nd</sup> day of August 2022.

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James P. Grifo, WSBA No. 45192

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THE HONORABLE BRYAN CHUSHCOFF  
COUNTY CLERK  
NO. 19-2-07135-0  
Date: 8/24/22

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

MITCHELL SHOOK,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

No. 19-2-07135-0

DEFENDANT CITY OF  
TACOMA'S REPLY IN SUPPORT  
OF MOTION FOR SUMMARY  
JUDGMENT

THOMAS MCCARTHY and CHRISTOPHER  
T. ANDERSON,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

**Noted for Consideration:  
August 26, 2022  
Oral Argument Requested**

Defendant City of Tacoma respectfully requests this Court grant the City's motion for summary judgment. Plaintiffs Anderson and McCarthy make several factually and legally incorrect arguments as to why the City's motion should be denied: (1) applying res judicata would be to deny

DEFENDANT CITY OF TACOMA'S REPLY  
IN SUPPORT OF MOTION FOR SUMMARY  
JUDGMENT - 1 (19-2-07135-0)

**CHRISTIE LAW GROUP, PLLC**  
2100 WESTLAKE AVENUE N., SUITE 206  
SEATTLE, WA 98109  
206-957-9669

1 Plaintiffs their day in court and their due process rights, (2) the Shook/Bowman suit involved different  
2 parties than the current case because Mr. Shook and Mr. Bowman did not bring their lawsuit as  
3 general taxpayers, and (3) *Coates v. City of Tacoma*, 11 Wn. App.2d 688, 457 P.3d 1160 (2019) does  
4 not apply to this case. The record and the law do not support any of these arguments. Further, and as  
5 explained in the City’s motion to strike, Plaintiffs have failed to file admissible evidence to support  
6 their responses. This Complaint should be dismissed with prejudice.

7 **I. Application of Res Judicata Will Not Work an Injustice on the Plaintiffs nor Deny Them**  
8 **Their Day in Court or Due Process Rights.**

9 Plaintiffs assert that the application of res judicata is inequitable and will deny them their day  
10 in Court. Plaintiffs ignore how this case has been ongoing since 2019, and they have had ample time  
11 to move their case forward in the three years since. Indeed, Plaintiff Anderson only filed his motion  
12 for partial summary judgment after this Court issued a notice for dismissal for want of prosecution on  
13 April 11, 2022 because no action had been taken by Plaintiffs in twelve months. Further, Plaintiffs’  
14 assertions that litigating in federal court was somehow unfair is belied by the fact both Anderson and  
15 McCarthy filed a motion for a temporary restraining order in federal court raising the same arguments  
16 asserted in their motions before the Court. Not only did both Plaintiffs litigate in federal court, but  
17 McCarthy and Anderson easily could have filed motions to intervene in cause number 19-2-11506-3  
18 before Judge Spier. *See CR 24; see also Columbia Gorge Audubon Society v. Klickitat County*, 98  
19 Wn. App. 618, 623, 989 P.2d 1260 (1999) (the requirements of CR 24 are “liberally construed to  
20 favor intervention.”) Any suggestion these Plaintiffs have been “sidelined” during the course of  
21 litigation is not supported by the record or the law.

22 As laid out in the City’s motion for summary judgment, Judge Spier already decided all of

1 these issues in this lawsuit when she granted the City’s Motion for Summary Judgment in cause  
2 number 19-2-11506-3. The purpose of res judicata is to avoid inconsistent judgments and repetitive  
3 litigation, protect the integrity and resources of the judicial system, and permit successful and  
4 interested parties to rely on final judgement. *Reeves v. Mason County*, 22 Wn. App.2d 99, 116,  
5 509 P.3d 859 (2022). Allowing Plaintiffs’ lawsuit to proceed when Judge Spier has already issued  
6 a final decision on the issues Plaintiffs raise would undermine all of the goals of res judicata. *See*  
7 *also Emeson v. Dep’t of Corrections*, 194 Wn. App. 617, 626, 376 P.3d 430 (2016) (for the  
8 purposes of res judicata, “[a] grant of summary judgment at a prior proceeding is considered a  
9 final judgment on the merits.”) The only reason this Court did not grant the City’s prior motion  
10 for summary judgment arguing res judicata was because of the Court’s concerns about the smart  
11 meter programs. But as discussed in the City’s motion, those concerns have now been addressed.  
12 Accordingly, the City’s motion for summary judgment should be granted and this case should be  
13 dismissed with prejudice.

14 **II. All of the Elements of Res Judicata Have Been Established.**

15 Plaintiff Anderson also asserts the third and fourth elements of res judicata, “persons and  
16 parties,” and “the quality of the persons for or against whom the claim is made.” *Eugster v.*  
17 *Washington State Bar Ass’n*, 198 Wn. App. 758, 786, 397 P.3d 131 (2017). This argument rests on  
18 the notion Mr. McCarthy and Mr. Anderson brought their claims as citizen taxpayers, while Mr.  
19 Shook and Mr. Bowman brought their claims for personal business interests. However, this  
20 argument is contradicted by Plaintiff’s own allegations. Paragraph 1.1 of of Mr. Bowman’s  
21 complaint in Pierce County cause number 19-2-11506-3 states:

22 [Bowman] is a resident of the city of Tacoma, county of Pierce, state of Washington.

1 Mr. Bowman is a residential customer and ratepayer of Tacoma Power. Mr. Bowman  
2 also subscribes to residential Internet access over Click! Network.

3 Similarly, paragraphs 1.1 and 1.2 of the Complaint in this case describes Mr. McCarthy and

4 Mr. Anderson as:

5 [McCarthy] is a resident of the city of Tacoma, county of Pierce, state of Washington.  
6 Mr. McCarthy is a residential customer and ratepayer of Tacoma Power. Mr.  
7 McCarthy also subscribes to residential Internet access over Click! Network.

8 [Anderson] is a resident of the city of Tacoma, county of Pierce, state of Washington.  
9 Mr. Anderson is a residential customer and ratepayer of Tacoma Power. Mr. Anderson  
10 also subscribes to residential Internet access over Click! Network.

11 Mr. McCarthy's and Mr. Anderson's own allegations show how elements three and four of  
12 res judicata are satisfied here. McCarthy, Anderson, and Bowman all asserted the same legal interests  
13 as citizens of the State. *Snyder v. Munro*, 106 Wn.2d 380, 383–84, 721 P.2d 962 (1986); *In Re*  
14 *Coday*, 156 Wn.2d 485, 501 130 P.3d 809 (2006); *see also City of Tacoma v. Taxpayers of*  
15 *Tacoma*, 357 U.S. 320, 340–41, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958). Further, Plaintiff  
16 Anderson's argument that res judicata can only be applied to subsequent actions based on date of  
17 filing ignores how a res judicata analysis looks to **prior judgments**, not filing dates. *E.g. Reeves*,  
18 22 Wn. App.2d at 116; *Eugster v. Washington State Bar Ass'n*, 198 Wn. App. 758, 786, 397 P.3d  
19 131 (2017); *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983); *Berschauer Phillips*  
20 *Construction Co. v. Mutual of Enumclaw Insurance Co.*, 175 Wn. App. 222, 227-28, 308 P.3d 681  
21 (2013). Robotic adherence to chronology of filing dates would elevate form over substance and  
22 undermine the purposes of res judicata. As discussed above and in the City's motion, all four  
elements of res judicata have been established, and the Court should dismiss this case with  
prejudice.



1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 22, 2022, I electronically filed the foregoing with the Clerk  
3 of the Court using the LINX system. I also hereby certify that I have mailed by US Postal Service  
4 the document to the following non-LINX participants:

4 Thomas McCarthy  
5 801 S. Cushman Avenue  
6 Tacoma, WA 98405  
7 Email: Tmccarthy253@gmail.com;  
8 *Plaintiff Pro Se*

7 James P. Grifo, WSBA #45192  
8 The Law Office of James P. Grifo, LLC,  
9 164 Dougherty Lane, Friday Harbor, WA 98250,  
10 Email: jpg@grifolaw.com;  
11 *Attorney for Plaintiff Christopher T. Anderson*

12 CHRISTIE LAW GROUP, PLLC

13 By: /s/Robert L. Christie  
14 ROBERT L. CHRISTIE, WSBA #10895  
15 STUART A. CASSEL, WSBA #49808  
16 Attorneys for Defendant City of Tacoma  
17 2100 Westlake Avenue N., Suite 206  
18 Seattle, WA 98109  
19 Telephone: (206) 957-9669  
20 Facsimile: (206) 352-7875  
21 Email: bob@christielawgroup.com  
22 stu@christielawgroup.com

August 22 2022 4:11 PM

CONSTANCE R. WHITE  
COUNTY CLERK  
NO: 19-2-07135-0

THE HONORABLE JUDGE BRIAN CHUSHCOFF  
Hearing Date: August 26, 2022

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

MITCHELL SHOOK,  
Plaintiff Pro Se, NO. 19-2-07135-0

v.

CITY OF TACOMA,  
Defendant.

**PLAINTIFF MCCARTHY'S REPLY TO  
DEFENDANT CITY OF TACOMA'S  
RESPONSE TO MCCARTHY'S MOTION  
FOR SUMMARY JUDGEMENT.**

THOMAS MCCARTHY; and  
CHRISTOPHER T. ANDERSON,  
Plaintiffs,

v.

CITY OF TACOMA,  
Defendant.

**I. RELIEF REQUESTED**

Plaintiff McCarthy ("McCarthy") requests that this Court deny Defendant City of Tacoma's Motion for Summary Judgment and grant Plaintiffs' Motions for Summary Judgment.

**II. EVIDENCE RELIED UPON**

Plaintiff McCarthy's Reply To Defendant's Response

Thomas McCarthy  
801 S Cushman Ave,  
Tacoma, WA, 98405

1 This motion is based on the pleadings and papers already on record in this case, the filings  
2 pertaining to the motions for summary judgment in the *City of Tacoma v. Taxpayers and Ratepayers of*  
3 *Tacoma*, under cause number 96-2-09938-0, and the filings pertaining to the motions for summary  
4 judgment the *Bowman v. City of Tacoma* case under cause number 19-2-11506-3.

### 5 **III. RESTATEMENT OF ISSUES PRESENTED**

6 The following issues are presented for resolution by the Court:

7 **1.** When a municipal Public Utility Ordinance establishes a Telecommunication System for  
8 the “*public interest, welfare, convenience and necessity*” to provide a “*public service*” and  
9 “*public benefit,*” to make telecommunications services available directly to the public, must that  
10 System be considered a “utility system” or “part thereof” and subject to the public vote  
11 requirements of City Charter § 4.6 and RCW 35.92 ? (Yes).

12 **2.** Does a plain reading of Ordinance 25930 support the conclusion that Tacoma City  
13 Council created a “utility system”, or parts thereof, to provide “effective public utility service”  
14 as the term “*utility service*” is intended in City Charter § 4.6 and/or RCW 35.92? (Yes).

15 **3.** Does regulation of “telecommunications” under Title 80 RCW “PUBLIC UTILITIES”  
16 demonstrate legislative intent for telecommunications services to be considered a “public utility  
17 service” under the RCW in Washington State ? (Yes).

18 **4.** Does RCW 80.04.010(23)’s definition of a "Public Service Company" as including  
19 “every gas company, electrical company, telecommunications company, wastewater company,  
20 and water company” demonstrate legislative intent for TPU’s telecommunication system to be  
21 considered a “public utility” under Washington state laws? (Yes).

22 **5.** Does RCW 80.04.010(28)’s definition of "Telecommunications Company" as including  
23 “every corporation, company, association, joint stock association, partnership and person, . . .  
24 and every **city or town** owning, operating or managing any facilities used to provide  
25 telecommunications for hire, sale, or resale to the general public within this state” demonstrate  
26

1 clear legislative intent compelling a designation of City’s telecommunications service as a  
2 “public utility service” under Washington State’s RCW ? (Yes).

3 **6.** Does **Federal Code** Title 47 U.S.C. Sec 153 (53) distinguish “*Telecommunications*  
4 *Services,*” from “*Cable TV Services*” as defined under Title 47 U.S. Code § 522 (6)? (Yes).

5 **7.** Does **State Code** RCW 35.99.010(7) distinguish “*Telecommunications Services,*” from  
6 “*Cable Television Services*” as defined under RCW 35.99.010(1) ? (Yes).

7 **8.** Does **Tacoma City Code** TMC 16B.01.030 (U)(V)(W) distinguish “*Telecommunications*  
8 *Services,*” from “*Cable Services*” as defined under TMC 16B.01.030 (C) ? (Yes).

9 **9.** Is a modern telecommunications system distinguishable from a cable tv system and does  
10 *Issaquah v. Teleprompter* have any bearing on the City’s right to create, declare surplus, or  
11 dispose of a municipal utility’s fiber optic Telecommunications System without a vote of the  
12 citizens under City Charter § 4.6 and/or RCW 35.92? (No).

13 **10.** Is “television” but one of many services or types of “information” that can be delivered  
14 over a modern telecommunications system? (Yes).

15 **11.** Was TPU’s telecommunications system originally established as a “public service,” for a  
16 public utility purpose, “necessary,” to provide a “public benefit” of making modern  
17 telecommunications services available for hire, sale, or resale to the general public? (Yes)

18 **12.** Does a municipal telecommunications system established to provide a “public service”  
19 and “public benefit,” by making telecommunications services available directly to the public,  
20 provide “utility service” as intended by City Charter § 4.6 and RCW 35.92 ? (Yes).

21 **13.** Did Ordinance #25930, authorizing TPU’s funding with utility “Revenue Bonds” for:

22 “Establishment of a Telecommunication System. *The City hereby*  
23 *creates a separate system of the City's Light Division to be known as*  
24 *the telecommunications system (the "Telecommunications System").*  
25 *The public interest, welfare, convenience and necessity require the*  
26 *creation of the Telecommunications System, contemplated by the plan*  
*adopted by Section 2.2 hereof, for the purposes set forth in Exhibit A”*

create a “utility system,” or parts thereof, providing “utility services” as the term “utility” is  
intended in Charter § 4.6 and RCW 35.92? (Yes).

1 **14.** Did TPU’s Telecommunications System deliver broadband internet and data transport  
2 services to ratepayers for over 20 years, under the direct operational control of the TPU Board  
3 and Tacoma Power management, with rates set by Tacoma City Council under authority of the  
4 Tacoma Municipal Code [TMC] Title 12 – Utilities ? (Yes).

5 **15.** Has TPU’s publicly owned Telecommunications System been privatized and separated  
6 from TPU’s operational control, and is that control, including setting rates, now solely vested in  
7 the private company, Rainier Connect (“Rainier”), under the “separation agreements”, i.e. the  
8 Asset Purchase Agreement (APA) and Indefeasible Right of Use (IRU) agreement? (Yes).

9 **16.** Since transfer of operational control to Rainier, does the System still provide *continued*  
10 *effective* public broadband internet and data transport services to TPU ratepayers? (Yes).

11 **17.** Is Rainier using the System to continue providing these same telecommunications  
12 services to the same customers, TPU’s ratepayers, post privatization and separation? (Yes).

13 **18.** Is TPU’s Telecommunication System still “useful,” and continuing to provide the very  
14 same public service benefits, to the very same ratepayers, for which it was created? (Yes).

15 **19.** Does the IRU provide TPU with a reversionary interest in the Telecommunications  
16 System requiring Rainier to return the System’s underlying physical fiber plant and all rights in  
17 the System’s IP addresses, Click! brand name, physical plant facilities, coax cables, conduit,  
18 easements, public right of way, communication and signal lines, usage of hub facilities,  
19 equipment cabinets, equipment poles, wires, lines, cables, equipment, braces, guys, anchors,  
20 vaults, and all attachments, appurtenances, and appliances necessary or incidental to the  
21 distribution and use of telecommunications services? (Yes).

22 **20.** Do the reversionary requirements in the IRU demonstrate such telecommunication  
23 system assets, originally acquired for public utility purposes, are still useful in providing  
24 continued public utility service *and are in fact* continuing to serve an effective *public purpose*,  
25 and are therefore not surplus under City Charter § 4.6 and/or RCW 35.92? (Yes).

1 21. Can valuable assets be considered “surplus” under Charter § 4.6 and RCW 35.92 when  
2 the agreement separating the public’s interest in those assets [the IRU] also requires the return  
3 of those same valuable assets upon termination of the agreement? (No).

4 22. Is City Council’s surplus declaration of TPU’s telecommunications system *ultra vires*  
5 and contrary to law under RCW 35.94.040 or City Charter § 4.6 ? (Yes).

6 23. Prior to approving the APA and IRU and transferring operation control over the System  
7 to Rainier, did City seek approval from voters of the city by submitting the matter of the  
8 System’s disposal to a vote as required under City Charter § 4.6 or RCW 35.92,? (No).

9 24. Where the mode of contracting for the separation of useful, in service, public utility  
10 assets, requires an approving public vote under City Charter or State statue, can any other mode  
11 be substituted to bind the City to a contract for the conveyance of such utility assets? (No)

12 25. Without an approving vote of the people on the disposal of their useful utility assets, as  
13 required under City Charter § 4.6 or RCW 35.92, did City Council have *legal authority* to  
14 execute the APA and IRU divesting TPU’s municipal telecommunication system (No).

15 26. Did City Council *exceed its legal authority* by conveying operational control over TPU’s  
16 telecom system to Rainier prior to obtaining an approving public vote as required under RCW  
17 35.94.040 or City Charter § 4.6 ? (Yes).

18 27. Is City Council’s separation of useful public utility assets, by conveying them to Rainier  
19 for a period of 20 years, without a public vote Charter § 4.6, necessarily *ultra vires*? (Yes)

20 28. Is an *ultra vires* contract *void ab initio*? (Yes).

21 29. Is *Res judicata* an equitable doctrine that must not be applied so rigidly as to work an  
22 injustice, or defeat important public policy goals of protecting public utility assets from  
23 collusion, fraud, favoritism, corruption, extravagance, and improvidence by public officials,  
24 officers and servants of the city ? (Yes).

25 **IV. BACKGROUND**

26 Click! Network, A Municipal Telecommunication System Born In Controversy.

1 In 1996 the City established the nation's first municipal broadband telecommunications  
2 system, Click! Network. It was both revolutionary and divisive.<sup>1</sup> Click! created competition in an  
3 industry dominated by monopolistic incumbents. Offering lower rates, faster internet speeds and a  
4 choice of providers over a competitive open access system, the City touted the Systems' virtues by  
5 promoting Tacoma as "America's #1 Wired City."<sup>2</sup> Incumbent monopolists, in large and small  
6 localities (Rainier among them), were publicly hostile, organizing efforts and conspiring to kill off  
7 the upstart municipal competitor. Tacoma Power Superintendent at the time, Mr. Steve Klein,  
8 described the opposition in those early days of Click! Network, in his 2017, deposition taken by  
9 Plaintiff's attorney, David Jurca, in *Coates v Tacoma 11 Wn. App. 2d 688; 2019*:

10 (Klein) A. My sense -- and this is my sense when I was there, and it's  
11 fairly accurate -- is the people in Click were wonderful. The service was  
12 wonderful. It was a local utility trying to do and doing good. How do  
13 you attack something like that? And so basically the opposition came up  
14 with, well, how do you attack it? You make people feel like they're being  
15 ripped off. And so every so many years, this theme would build up again,  
16 and here -- here it was again.

17 (Jurca) Q. When you refer to the local politicians, are you referring to  
18 people on the city council?

19 (Klein) A. Yes.

20 (Jurca) Q. Okay. Anyone in particular or . . .

21 (Klein) A. I would say, for the most part, the ones that were the most  
22 negative were Kevin Phelps and Michael Crowley. But they were very  
23 influential, and so they were able to oftentimes get others to -- to join  
24 them, but they were the two main individuals. And they also were -- kept  
25 in touch with Leo Hendery and AT&T then and that sort of thing.<sup>3</sup>

26 *see 5/18/22 Grifo Decl Part 2, Ex. 74, Pg. 398/499.*

Mr. Brian "Skip" Haynes, operator of incumbent telecom company Rainier Connect, who  
ironically now has full operational control over Click!, was another vocal opponent of Click! at the

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<sup>1</sup> 5/16/22, Grifo Decl. 1, Ex. 47, Pg. 804/932 Editorial on Rainier's opposition to creation of Click!.

<sup>2</sup> *See 5/18/22 Decl. of Grifo Part 2, Ex. 71, Pg. 313/499 Price Waterhouse Cooper's Summary on Click! Performance "you have provided the substance to the reality of Tacoma, America's #1 Wired City."*

<sup>3</sup> Michael Crowley's opposition continued thru 2019, as he was a co-plaintiff in *Coates v Tacoma 11 Wn. App. 2d 688; 457 P.3d 1160; 2019*, a case that attempted to derail Click! by accusing Click! of violating the accountancy act. Interestingly, Leo Hendery [the owner of TCI . . . which became Comcast in Tacoma] and Mike Crowley attended high school together at Bellarmine Prep, see Mr. Klein's deposition, in the 5/18/22 Decl. of Grifo Part Two at Pg 395/499. The cozy and insular nature of the Tacoma political establishment is well known and it is public knowledge that Judge Speir's sister Tiffany Speir is a long-time associate of Mr. Crowley's, having worked closely with Mr. Crowley at Master Builders Association in Tacoma for many years. See 8/22/22 Decl. of McCarthy, Ex. F

1 time. Mr. Haynes even authored an Op-Ed piece for The News Tribune arguing government had  
2 no business competing with private telecom companies. *see* Grifo Decl. Part One, 5/18/22, Ex. 47,  
3 Pg. 804/932, a 2008 News Tribune article, “*From Critic of Click! to Business Partner*”

4 To curry favor for privatization, Rainier’s principals provided large campaign contributions  
5 supporting Tacoma’s Mayor Woodards, who subsequently guided the Council and personally  
6 voted for surplusing Click!, and approving the APA and IRU transferring Click! operational  
7 control to Rainier Connect. *see* 5/18/22Grifo Decl. Part One, Ex. 47(a)(b), Pg. 804/932.

8 The tireless political and legal maneuvering by monopolist telecom operators and their  
9 lobbyist lackeys, to prevent municipal telecommunication competition is nothing new. It’s  
10 common knowledge that incumbent telecommunications providers protect their market share by  
11 seeking to prevent creation of such municipal networks.

12 Municipal utilities threaten incumbent’s monopoly profits, and municipal operation of  
13 telecommunication systems remains controversial across our nation today. <sup>4</sup> <sup>5</sup> Consider the  
14 Institute for Local Self Reliance’s paper, “Comcast Spends Big on Local Elections: Would  
15 Lose Millions in Revenue from Real Broadband Competition” *see* Grifo Ex. 69:

16 Comcast has a lot to lose from a competitive market in broadband Internet  
17 access. The cable firm is often the only option for broadband Internet access as  
18 defined by the Federal Communications Commission today. Comcast faces no  
19 competition in four out of ten census blocks where it offers broadband service  
20 and in 73 percent of the blocks that have competition, there is only one other  
21 option. The cable giant joined incumbent telephone company CenturyLink in  
22 Seattle with a \$50,000 donation to their preferred candidate, who just happens to  
23 oppose a municipal fiber network

24 A few tens of thousands of dollars is a small price to pay to secure tens of  
25 millions in monopoly profits per year. Massive firms monopolizing single  
26 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

---

24 <sup>4</sup> 5/18/22 Decl. Grifo, Ex. 69(a), Broad-Banned: The FCC’s Preemption of State Limits on Municipal  
25 Broadband, Vol. 68 Emory L.J. 407 (2018). Municipal utilities threaten incumbent monopoly’s  
26 (“Broadband Trust”). profits. This Trust lobbies fiercely to preserve entrenched cartel market power.

<sup>5</sup> Nineteen states have laws restricting municipalities from establishing telecommunication utilities. The  
Supreme Court confirmed state authority to preempt municipal competition in *Nixon v. Mo. Mun.  
League*, 541 U.S. 125, 140–41 (2004). The FCC attempted to preempt such state laws, but was overruled  
in *Tennessee v. FCC*, 832 F.3d 597, 610 (6th Cir. 2016).

1 expenditures are only one of many tools firms like Comcast use to protect their  
2 business from competition. Comcast also has regular access to decisionmakers  
via direct meetings, trade associations, and via their “philanthropic” pursuits.

3 *see* ILSR’s paper, 5/18/22 Decl. of Grifo Part Two, Ex. 69, Pg. 187/499 )

4 The Click! controversy is another chapter in the never-ending saga of monopoly interests  
5 seeking to eliminate competition and preserve anticompetitive cartel control thru political influence.

6 The vast influence and endless political payola of monopolist incumbents, has succeeded  
7 in sidelining Click! as an open access municipal competitor and silenced all attempts by the  
8 public to secure their rightful vote in protecting their municipal telecom system from illegal  
9 privatization. No full, fair and final determination of the right to vote has been made. Mr.  
10 Shook’s settlement, for financial necessity, cut short any appeal that might have determined the  
11 issue, and his negotiated settlement did not fully and fairly determine Mr. McCarthy’s (or the  
12 Tacoma electorates’) right to vote on disposal of their public utility.

14 Public policy issues in this case are of far-reaching importance. The prevention of collusion,  
15 fraud, favoritism, corruption, extravagance, and improvidence on the part of public officials,  
16 officers and servants of the city, along with the public’s right to vote on such issue must be fully  
17 and fairly litigated to a final decision on the merits, inclusive of McCarthy’s right to the appellate  
18 review process. If a fully functional state-of-the-art public utility System, such as Click!, can be  
19 disposed of by an illegal designation of “surplus,” then no utility is safe from privatization! A  
20 water or power system could be wrongfully “surplused” and privatized next. Sound public policy  
21 and judicial integrity require protecting such public utility assets from plunder.

## 23 **V. LEGAL AUTHORITY AND ARGUMENT**

### 24 **A. Click! Network Was Created as a Public Utility**

25  
26

1 Click! was created as a public utility, by a public utility, for the purpose of providing public  
2 utility services to TPU’s ratepayers. The City’s Business Plan for Click! and Ordinance #25930  
3 authorizing Utility Bonds to fund the System are more clear evidence: <sup>6 7</sup>

4 ORDINANCE NO. 25930

5 AN ORDINANCE of the City of Tacoma, Washington establishing a  
6 **telecommunications system** as part of the Light Division, supplementing  
7 Ordinance No. 23514 and providing for the issuance and sale of the  
8 ***City's Electric System Revenue Bonds*** in the aggregate principal  
9 amount of not to exceed \$1,000,000 to provide part of the funds  
10 necessary for the acquisition, construction and installation of additions  
11 and improvements to the telecommunications system.

12 Establishment of a Telecommunication System. The City hereby creates  
13 a separate system of the City's Light Division to be known as the  
14 telecommunications system (the "**Telecommunications System**"). The  
15 public interest, welfare, convenience and necessity require the creation  
16 of the Telecommunications System, contemplated by the plan adopted  
17 by Section 2.2 hereof, for the purposes set forth in Exhibit A”

18 *Emphasis added*

19 Using public utility funds, the City created a “*utility system*” to provide “*utility services*” as  
20 the term “utility” is intended to be construed in Charter § 4.6 and RCW 35.92. No general  
21 government funding was used.<sup>8</sup>

22 RCW Chapter 35.92 -MUNICIPAL UTILITIES, provides at RCW 35.92.070 a procedure for  
23 Cities to hold an election for funding utilities, *unless* the City has an ordinance allowing for  
24 *acquiring, opening, or operating **public utilities***. (emphasis added)

25 When the governing body of a city or town deems it advisable that  
26 the city or town purchase, acquire, or construct any such public utility,  
or make any additions and betterments thereto or extensions thereof, it  
shall ..... be submitted for ratification or rejection by majority vote of  
the voters of the city or town at a general or special election.

(1) No submission shall be necessary:

(b) When in the charter of a city a provision has been adopted  
authorizing the corporate authorities thereof to provide by ordinance for  
acquiring, opening, or operating any **of such public utilities**;

<sup>6</sup> 5/16/22 Decl. of Grifo, Ex 10(a), Pg. 126/932, Ex. 10(b) Pg. 143/932 -Business Plan.

<sup>7</sup> 5/16/22 Grifo Decl. Ex. 11, Pgs. 299 to 325 of/932, Ordinance #25930

<sup>8</sup> RCW 39.46.150 (b) “the public utility or system, or an addition or extension to the public utility or  
system, where the improvements, projects, or facilities financed by the revenue bonds are a portion of the  
public utility or system;”

1 The City obtained a declaratory judgement, in 1997's *City of Tacoma v. The Taxpayers and*  
2 *the Ratepayers of Tacoma*, Superior Court No. 96-2-09938-0, confirming authority to construct  
3 Click! as a "public utility" with "utility bonds," thereby avoiding the public vote requirement of  
4 RCW 35.92.070. Also, *see* RCW 39.46.150(3) Revenue Bonds the "Alternative method of  
5 issuance," which allows City funding of a "utility" without a public vote on issuing bonds, when  
6 the "facilities financed by the revenue bonds are a portion of the public utility or system. Further  
7 clear evidence a "public utility" system was created, and that the City intended to created Click!  
8 as a "*public utility system*" to provide effective "*public utility services*."

9 The enabling City Ordinance #25930<sup>9</sup>, and related TPU Resolutions U-33668<sup>10</sup> and  
10 Resolution U-9258<sup>11</sup> all cite "*public purpose*," "*public benefits*," and "*public interest, welfare,*  
11 *convenience and necessity*." This is fully briefed in McCarthy's Response to Defendant's Motion  
12 of Summary Judgement, beginning on page 2.

13 **B. Click! Operated as an Integrated Public Utility Department.**

14 For over 20 years TPU operated Click! Network as one of four integrated utility services, all  
15 operated under four distinct brands, Tacoma Water, Tacoma Power, Tacoma Rail and Click!  
16 Network. These operational units shared lobby space in TPU's headquarters. *See* 5/16/22 Decl.  
17 Grifo Part 1, Ex. 42(a), Pg. 723/932, photo of the lobby at TPU headquarters in 2019.

18 Besides sharing the lobby space, TPU's four effective utility brands shared a presence on  
19 TPU's website, where TPU self-describes its services, saying: "Tacoma Public Utilities Provides  
20 Services that are "Vital to Our Quality Of Life." TPU lists the "vital" services as: "Our Services:  
21 Power, Water, Rail and Click! Network. *See* 5/16/22 Decl. Grifo Part 1, Ex. 1(a) 65/932.

22 Click!'s wholesale telecommunication rates were set by City Council under the rules of  
23 Tacoma Municipal Code "Title 12 UTILITIES." *See* TMC Chapter 12.13 CLICK! Network.<sup>12</sup>

24 All of these facts demonstrate Click! is a "public utility," operating a "public utility system"  
25 and providing a "public utility service."

26 **C. By Definition Telecommunication is "Public Utility" and "Utility Service"**

<sup>9</sup> 5/16/22 Grifo Decl. Ex. 11, Pgs. 299 to 325 of/932,

<sup>10</sup> 5/16/22 Grifo Decl. Ex. 10, Pgs. 121 to 296 of/932 (includes business plan).

<sup>11</sup> 5/16/22 Grifo Decl. Ex. 11, at of 133/932.

<sup>12</sup> 5/16/22 Grifo Decl. Ex. 8, Pg. 112/932. TMC Title 12 UTILITIES.

1 **Federal Code** defines Click! as a “utility.” See 47 USC § 224(a)(1), where “Utility” means:

2 The term “utility” means any person who is a local exchange carrier or an  
3 electric, gas, water, steam, or other public utility, and who owns, or  
4 controls poles, ducts, conduits, or rights-of-way used, in whole or in part,  
5 for any wire communications.<sup>13</sup> (*Emphasis added*).

6 Federal Code Title 47 U.S.C. Sec 153 (53) defines “telecommunications service” as the  
7 offering of telecommunications for a fee directly to the public, *or to such classes of users as to*  
8 *be effectively available directly to the public, regardless of the facilities used.*

9 RCW Title 80 defines “PUBLIC UTILITIES.” see RCW 80.04.010(23), a “Public Service  
10 Company” includes “every gas company, electrical company, telecommunications company,  
11 wastewater company, and water company.”

12 RCW 80.04.010(28), a “Telecommunications Company,” includes “every corporation,  
13 company . . . and every city or town owning, operating or managing any facilities used to  
14 provide telecommunications for hire, sale, or resale to the general public within this state”.<sup>14</sup>

15 Our Supreme Court defines “public utility” as a service that will “subserve a *public use*.”  
16 *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 328 P.2d 873, (1958). Ask, The crucial and  
17 final test is, does the use “does the use — utility — subserve a public purpose — does it furnish  
18 a natural need of the city or its citizens — does it contribute to his comfort, prosperity, or  
19 happiness?” *Id.* at 328. Compare with *Bremerton Municipal League v. Bremer*, 15 Wn.2d 231,  
20 130 P.2d 367 (1942), the court found a “public utility” was “any kind of utility in whose  
21 operations the public has an interest.” *Bremer*, at 237.

22 The definition of a “utility system” is found in the plain meaning of the terms “utility” and  
23 “system.” Courts may also “look to standard English language dictionaries.” *North Pacific Ins.*  
24 *Co. v. Christensen*, 143 Wn.2d 43, 48, 17 P.3d 596 (2001). Black’s Law Dictionary’s defines  
25 “public utility” as, “a company that provides necessary services to the public, such as telephone  
26 lines and service, electricity and water.”<sup>15</sup> Merriam Webster provides “system” is “a regularly

24 <sup>13</sup> The 1996 Federal Telecommunications Act.

25 <sup>14</sup> Moreover, consider that Click! telecommunication system allows services that are the modern  
26 equivalent of the “telephone.” Transmitting and receiving ordinary-language messages is widely  
accomplished with VoIP service, a technology replacing traditional switched telephone technologies.  
Click! offers a “Voice Package”, or VoIP with QoS (“quality or service” features). that prioritize VOIP  
“data packets.” 5/16/19 Grifo Decl. Ex. 44, Pg. 752/932

<sup>15</sup> *Black’s Law Dictionary* Eleventh Edition 2019 P. 1859.

1 interacting or interdependent group of items forming a unified whole.” Click! is represented by  
2 2156 pages in the Click Business Transaction Agreement (CBTA)<sup>16</sup> plus the IRU. These assets  
3 constitute a “system.” Click! is a “Public Utility System” by the plain meaning of the term.

4 **D. Issaquah V. Teleprompter Provides No Definition Of “Utility” and Has No Bearing On The**  
5 **City’s Right to Declare the City’s Municipal Fiber Telecommunications System Surplus.**

6 *Issaquah* has no bearing on the City’s right to declare the City’s fiber System surplus, or on  
7 the right of the City to dispose of the System without a vote of the citizens under Charter § 4.6  
8 and RCW 35.92, because Click! is not a Cable TV System, *but rather* Click! is a  
9 “Telecommunications System.” *compare* RCW 35.99.010(1) with RCW 35.99.010(7). Also,  
10 *compare* Tacoma City Code TMC 16B.01.030 (U)(V)(W), defining “Telecommunications  
11 Services,” with TMC 16B.01.030 (C) and “Cable Services.” Finally, Title 47 U.S. Code §522  
12 (6), defines the term “cable service”: as:

13 (A) the one-way transmission to subscribers of (i) video programming,  
14 or (ii) other programming service, and; (B) **subscriber interaction**, if  
15 any, which is **required for the selection or use of such video**  
16 **programming or other programming service.** (emphasis added)

17 Telecommunications system *are* “public utility systems” that provide “public utility service.”

18 **E. Click!’s Ongoing Operation and Reversionary Interest Demonstrate System is Not Surplus.**

19 Since transfer of operational control to Rainier, the System continues to provide the same  
20 telecommunications services for which it was created, to the same TPU ratepayers. Moreover,  
21 under the terms of the IRU, TPU maintains a reversionary interest in the underlying assets of the  
22 Telecommunications System, requiring Rainier to return usage of the System’s physical fiber  
23 plant to TPU upon completion of the agreement. The IRU also compels Rainier to return all of  
24 the City rights to the System’s IP addresses, Click! brand<sup>17</sup>, physical telecommunications plant,  
25 coax cables, conduit, easements, rights of way, communication lines, hub facilities, equipment

26 <sup>16</sup> See 5/16/22 Decl. of Grifo, Ex. 2(b), Pg 88/932, also, Ex29, Pg. 508/932, citing the complete CBTA, a total 2156 pages, and referencing the 11/1/2019 Decl. of Shook, Ex. 29, in *Bowman v City of Tacoma, Pierce County Superior Court* NO. 19-2-11506-3.....

<sup>17</sup> See 5/18/22 Decl. Grifo Part 3 Pg. 384/428, 4.1 Licensee acknowledges that the Marks are valid, are the exclusive property of Licensor, and Pg. 391/248 See 5.3 Upon termination of this Agreement, Licensee shall permanently discontinue all use of the Marks and refrain from using any other service mark, trademark, trade name, corporate name,.

1 cabinets, poles, wires, cables, braces, guys, anchors, vaults, and all attachments, appurtenances,  
2 and appliances necessary or incidental to the distribution and use of telecommunications  
3 services.<sup>18</sup> The IRU’s reversionary interest demonstrates the System, and its assets are not  
4 “surplus,” but still provide continued public utility service. As such, City Council’s surplus  
5 declaration of TPU’s municipal telecommunications system is *ultra vires* and contrary to law.

6 Council has exceeded its legal authority, by authorizing execution of the APA and IRU to  
7 separate Click! and convey operational control to Rainier Connect prior to a public vote.

8 Where the mode of contracting for such a lease, sale or conveyance of public utility assets, is  
9 provided under the law, no other mode can be substituted to bind the City to a contract.

10 **VI. CONCLUSION**

11 Click Network’s fiber optic system continues to provide effective public utility service and  
12 Tacoma City Council’s surplus declaration of the System under RCW 35.94.040 is *ultra vires*.  
13 City Council is without any legal authority to bind the City to the terms of the IRU and APA  
14 absent a public vote under Tacoma City Charter § 4.6 and RCW 35.94.020. Execution of the  
15 APA and IRU is *void ab initio* and conveyance of Click!, a useful public utility asset, to Rainier  
16 for a period of 20 years is null and void. Click! assets and customers shall be returned to TPU  
17 until the protective public vote provides for disposal of the municipal public utility system.<sup>19</sup>

18 Respectfully Submitted this 22 day of August 2022

19 

20  
21  
22  
23 Thomas McCarthy

24  
25 <sup>18</sup> 5/19/22 Decl. of Grifo Part 3, Exhibit B, Pg. 265/428 The IRU requires: “The IP addresses assigned to  
26 Operator by Tacoma Power will continue to be proprietary to Tacoma Power. Upon termination of the  
IRU Agreement, Operator must return Tacoma Power-assigned IP addresses.”

<sup>19</sup> See *Bremer*, 237 “We are of the opinion that these sections of our statutes provide the only procedure  
by which the city can lawfully sell or lease municipal wharves.”

August 22 2022 4:11 PM

CONSTANCE R. WHITE  
COUNTY CLERK  
NO: 19-2-07135-0

1  
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5 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
6 **IN AND FOR THE COUNTY OF PIERCE**

7 MITCHELL SHOOK,

8 Plaintiff,

9 v.

10 CITY OF TACOMA,

11 Defendant.

**NO. 19-2- 07135-0**

8-22-22 DECLARATION AND  
AFFIDAVIT OF THOMAS  
MCCARTHY

12  
13  
14  
15 I, Tom McCarthy, hereby declare as follows:

16 1. I am over the age of 18, and competent to testify to the following based upon my personal  
17 knowledge.

18 1. Attached hereto as **Exhibit F** and incorporated herein by this reference is a true and correct  
19 copy an article "What became of Tacoma Click?"—which I downloaded today.

20  
21  
22 2. It is my understanding that Click! is still a relevant issue in our community and citizens often  
23 tell me they wish Click! had not been privatized.

24 3. Attached hereto as **Exhibit G** and incorporated herein by this reference is a true and correct  
25 copy an page from the internet, which I downloaded today from:

26 <http://mbapierce.blogspot.com/2011/09/master-builders-association-executive.html>.

8-22-22 DECLARATION OF TOM MCCARTHY- 1 -

Thomas McCarthy  
801 S Cushman Ave,  
Tacoma, WA, 98405

1 I declare under the penalty of perjury under the laws of the State of Washington that the  
2 foregoing in true and correct.

3  
4 DATED this 22<sup>nd</sup> Day of August 2022, at Tacoma, Washington.

5 

6  
7 Thomas McCarthy

8 AFFIDAVIT OF SERVICE

9 I declare under penalty of perjury of the laws of the State of Washington that on  
10 August 22, 2022 I served true and correct copies of:

- 11 1). Plaintiff McCarthy's Reply To Defendant's Response in the Motion For Summary  
12 Judgement.  
13 2). Plaintiff McCarthy's 8-22-22 Declaration

14 These documents were delivered via the Court's e-serve system and additionally thru  
15 Email to the Attorneys for the Defendant's Council, Robert Christie and all other attorney of  
16 record in the case.

17  
18 Dated this 22 day of August 2022

19 

20  
21  
22 Tom McCarthy, Plaintiff

# EXHIBIT F

## FEATURED

### What became of Tacoma Click?

*If there is anything we learned since 2020, it is that web access is an essential utility*

*By Morf Morford mmorford@soundpublishing.com • August 19, 2022 1:30 am*

Tags: [Featured](#)



In the early 2020s we all found ourselves spending more time in front of screens. (Photo by Morf Morford)

*By Morf Morford, Tacoma Daily Index*

From about mid-2020, many of us, from elementary school students to those of who could work from home, became more dependent on the internet than any of us could have imagined just a few months before.

From Zoom meetings to online schooling or shopping, or binge video streaming, staring at a screen became something almost all of us did almost constantly.

For many of us, our online existence was economic or even mental health salvation, for others it was yet another set of endless learning curves.

Our online presence provided income, distraction and something approximating social interaction, and most of the time, most of us were glad to have it.

And we were willing to pay for it.

Oddly enough, before the pandemic, Tacoma had its own city-wide, hard-wired, internet system.

Our public relations term for our city owned (Tacoma Public Utilities, TPU) system and how it defined us was “The most wired city”.

Click Network – formally known as Click! Cable TV – was the city of Tacoma’s municipally-owned cable and broadband internet network.

It began in the 1990s and grew out of a fiber optic network built by Tacoma Power to improve maintenance and efficiency of the power grid.

With excess capacity built in, TPU could give Tacoma-area cable customers an alternative to TCI, which had a monopoly in the area and was renowned for its erratic service – and unreasonable prices.

Click internet was sold indirectly to customers through two internet service providers – Advanced Stream and Rainier Connect – who leased space on the Click network.

Advanced Stream and Rainier Connect were/are local businesses with immediate access for customers.

Click’s lower-than-average rates back then also benefited Comcast customers in the Tacoma area – Comcast’s rates back then tended to be lower here than in other cities.

Click management estimated that their costs were 15 to 30 percent lower than what Comcast charged.

Since Click was a public utility, any rate increases had to be approved by Tacoma’s City Council.

Toward the end of 2016, the Tacoma City Council ordered an independent audit of Click’s finances.

Depending on how you interpret their findings, Click either made or lost money for the city.

To put it mildly, it is was crazy complicated.

In the end, Click was parted-out and sold to the highest/lowest bidder.

As is usual with Tacoma politics and processes, questions abound.

Based on precedent, if not law, any disbursement of a public utility (or part of a utility) should have gone to a public vote.

As we know now, web access became even more essential, if not universal since 2020.

Even if Click had not been profitable before 2020, it certainly would have been after that year.

There is something remarkable about public utilities – they provide a range of essential services, not for profit, but for the benefit of members/owners.

In a way, it’s kind of a crazy idea, but one that keeps prices low and allows for longer range investment in infrastructure for the provision of services far into the future.

Investment in the “wired” future of Tacoma was visionary.

I’m not convinced that getting rid of Click was a such a good idea.

\*\*\*\*

In the spirit of full-disclosure, I was a subscriber to Click via Advanced Stream for many years.

Their service was exceptional and reliable – and affordable.

Their office (on 6th Avenue) was always open with immediate assistance.

We have since then been with Rainier Connect and, to put it diplomatically, their service (and speed) is not even close to Advanced Stream.

But, from what I hear from friends, it is better than Comcast.

As in many other cases, local is almost always better than some distant corporate office.

Tags: [Featured](#)

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[< Previous](#)

[Luke Combs Meet And Greet & VIP Tickets](#)

[Next >](#)

[ProEco Fuel Saver Reviews - Does Pro Eco Chip Device Work as Advertised or Scam?](#)

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**[No. 22-2-08205-0-SUMMONS](#)**

**[Metro Parks Tacoma-Meeting notice](#)**

**[Bid #J2022-28-REQUEST FOR BID](#)**

**[NO. 22-4-01753-1-NOTICE TO CREDITORS](#)**

**[No. 20-5-00182-8-Notice of Petition](#)**

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# EXHIBIT G

More

# MBA of Pierce County

## Master Builders of Pierce County

Master Builders Association of Pierce County Website

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Posts



Comments

## About Me



### Master Builders Association of Pierce County

The Master Builders Association of Pierce County (MBA) is a non-profit trade association comprised of more than 1,000 builder and associate member companies employing over 10,000 people in Pierce County. One of over

Wednesday, September 14, 2011

## Master Builders Association Executive Officer Retires- New EO Named

Mike Crowley, Executive Officer for the Master Builders Association of Pierce County since 2001, has announced his retirement effective October 1, 2011. Former Tacoma Mayor and Council Member, and former downtown Tacoma retail businessman, Crowley is a longtime contributor to Tacoma's political and economic arenas.

"The MBA has benefitted from Mike's talents and standing in our community during his time at MBA," stated MBA President Rick Hjelm. "He brought the association to a new level and cultivated a strong staff that will keep MBA in good stead into the future. Mike will be missed by our members as well as those who worked with him as elected leaders and industry allies."

"I have enjoyed my time with MBA immensely," stated Crowley. "I have made some great friends

and had the opportunity to work for and represent a group of people essential to the local economy and community – homebuilders. My next steps? I plan to remain active in the community while spending more time with my wife and four grandchildren."

MBA's Board of Directors named Tiffany Speir as the new Executive Officer beginning October 1. "Tiffany has been with MBA since 1998 and has served as Government Affairs Director and



800 such local associations throughout the United States (15 in the state of Washington), the MBA's purpose is to promote through membership involvement, legislative action, networking and education, the opportunity for affordable housing to all while striving to maintain the highest ethical standards. The Master Builders Association believes that home ownership is the cornerstone of family security, stability, and prosperity. It strengthens the nation's communities, encourages civic responsibility and provides a solid foundation from which to work. The Master Builders Association is concerned with and has a stake in the quality of life here in Pierce County. It stresses community involvement as a means to an end--homes for all.

[View my complete profile](#)

### Blog Archive

- ▼ 2011 (8)
  - ▼ September (1)
    - Master Builders Association Executive Officer Reti...
  - ▲ July (1)
  - ▲ May (2)
  - ▲ April (1)

Assistant EO, and MBA is fortunate to have her in line to lead us into MBA's next phase," stated incoming MBA President Jim Yurina. "Our association is in good hands."

Master Builders Association of Pierce County (MBA) is a non-profit trade association comprised of more than 700 builder and associate member companies employing thousands of people in Pierce County. The MBA's mission is to promote, through membership involvement; legislative action, networking and education, the opportunity for affordable housing to all, while striving to maintain the highest ethical standards.

###

### MEDIA CONTACT:

Tiffany Speir, MBA of Pierce County Assistant EO/Government Affairs Director  
 253.272.2112 ext. 105  
 tspeir@mbapierce.com

Posted by Master Builders Association of Pierce County at 3:29 PM

### 2 comments:



**suvankar maity** September 14, 2011 at 8:29 PM

MBA - Get information about Online mba, mba programs, mba courses, mba education, mba preparation, mba online, Online MBA Course, Online MBA Benefits, Online MBA Degree.

[Reply](#)



August 26 2022 10:11 AM

CONSTANCE R. WHITE  
COUNTY CLERK

## IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

MITCHELL SHOOK  
Plaintiff(s)

vs

CITY OF TACOMA  
Defendant(s)

Cause Number: 19-2-07135-0  
**Memorandum of Journal Entry**

Judge/Commissioner: BRYAN CHUSHCOFF  
Court Reporter: Jessica Sanford  
Judicial Assistant: SUSAN WINNIE

---

SHOOK, MITCHELL		
CITY OF TACOMA	Stuart Cassel	Attorney for Defendant
CITY OF TACOMA	M. Joseph Sloan JR	Attorney for Defendant
CITY OF TACOMA	THOMAS C. MORRILL	Attorney for Defendant
CITY OF TACOMA	Robert L. Christie	Attorney for Defendant
CITY OF TACOMA	Christopher D. Bacha	Attorney for Defendant

---

Proceeding Set: Motion - Motion  
Proceeding Outcome: Held - Motion  
Resolution:

**Proceeding Date: Aug 26, 2022 10:11 AM**

**Clerk's Code: MTHRG**  
Proceeding Outcome code: **MTHRG**  
Resolution Outcome code:  
Amended Resolutcon code:

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

MITCHELL SHOOK  
vs  
CITY OF TACOMA

Cause Number: 19-2-07135-0  
**Memorandum of Journal Entry**

Judge/Commissioner: BRYAN CHUSHCOFF

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MINUTES OF PROCEEDING

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**Start Date/Time: Aug 26, 2022 9:05 AM**

Judicial Assistant: SUSAN WINNIE  
Court Reporter: Jessica Sanford

**August 26, 2022 09:05 AM** - This matter having come before the Court re: motion to strike. Present in Court: Robert Christie, atty. for City of Tacoma and Thomas McCarthy, Pro Se Plaintiff. Appearing via CourtCall: James Grifo, atty. for Plaintiff Christopher Anderson. Argument by atty. Christie. Court comments. Court denies motion to strike.

**End Date/Time: Aug 26, 2022 10:12 AM**

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August 26 2022 10:37 AM

CONSTANCE R. WHITE  
COUNTY CLERK

## IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

MITCHELL SHOOK  
Plaintiff(s)

vs

CITY OF TACOMA  
Defendant(s)

Cause Number: 19-2-07135-0  
**Memorandum of Journal Entry**

Judge/Commissioner: BRYAN CHUSHCOFF  
Court Reporter: Jessica Sanford  
Judicial Assistant: SUSAN WINNIE

---

SHOOK, MITCHELL		
CITY OF TACOMA	Stuart Cassel	Attorney for Defendant
CITY OF TACOMA	M. Joseph Sloan JR	Attorney for Defendant
CITY OF TACOMA	THOMAS C. MORRILL	Attorney for Defendant
CITY OF TACOMA	Robert L. Christie	Attorney for Defendant
CITY OF TACOMA	Christopher D. Bacha	Attorney for Defendant

---

Proceeding Set: Motion - Part Summary Judgment

**Proceeding Date: Aug 26, 2022 10:36 AM**

Proceeding Outcome: Held - Motion

Resolution: Summary Judgment

**Clerk's Code: MTHRG**

Proceeding Outcome code: **MTHRG**

Resolution Outcome code: **SMJG**

Amended Resolucton code:

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

MITCHELL SHOOK  
vs  
CITY OF TACOMA

Cause Number: 19-2-07135-0  
**Memorandum of Journal Entry**

Judge/Commissioner: BRYAN CHUSHCOFF

MINUTES OF PROCEEDING

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**Start Date/Time: Aug 26, 2022 9:08 AM**

Judicial Assistant: SUSAN WINNIE

Court Reporter: Jessica Sanford

**August 26, 2022 09:08 AM** - This matter having come before the Court re: motion for summary judgment. Present in Court: Robert Christie, atty. for City of Tacoma and Thomas McCarthy, Pro Se Plaintiff. Appearing via CourtCall: James Grifo, atty. for Plaintiff Christopher Anderson. Argument by atty. Grifo. **09:24 AM** - Argument by Mr. McCarthy. **09:51 AM** - Argument by atty. Christie. **09:59 AM** - Rebuttal argument by atty. Grifo. **10:03 AM** - Additional argument by atty. Christie. **10:04 AM** - Rebuttal argument by Mr. McCarthy. **10:10 AM** - Court comments. Court presents ruling and signs Orders presented by counsel. **10:27 AM** - Clarification by atty. Grifo. Court/counsel: colloquy re: form of orders. Case resolved.

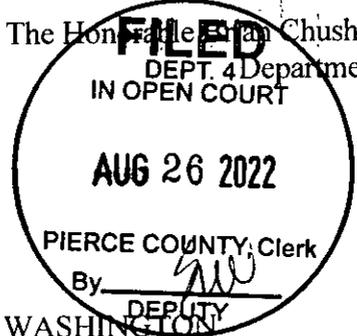
**End Date/Time: Aug 26, 2022 10:37 AM**

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9/27/2022



The Honorable Brian Chushcoff  
**FILED**  
DEPT. 4 Department 4  
IN OPEN COURT



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

MITCHELL SHOOK,  
  
Plaintiffs,  
  
v.  
  
CITY OF TACOMA,  
  
Defendant

No. 19-2-07135-0

ORDER DENYING PLAINTIFF'S  
MOTIONS FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT CITY OF  
TACOMA'S MOTION FOR  
SUMMARY JUDGMENT

**Noted for Consideration:**  
**August 26, 2022**  
*Oral Argument Requested*

THOMAS MCCARTHY and CHRISTOPHER  
T. ANDERSON,  
  
Plaintiffs,  
  
v.  
  
CITY OF TACOMA,  
  
Defendant

THIS MATTER, having come on regularly before this Court, on Plaintiff Anderson's Motion for Summary Judgment and Plaintiff McCarthy's Motion for Summary Judgment, the plaintiffs appearing pro se or by and through counsel, and the Court having reviewed the pleadings

[PROPOSED] ORDER DENYING PLAINTIFF'S  
MOTIONS FOR SUMMARY JUDGMENT AND  
GRANTING DEFENDANT CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 1  
(Case No. 19-2-07135-0)

**CHRISTIE LAW GROUP, PLLC**  
2100 WESTLAKE AVENUE N., SUITE 206  
SEATTLE, WA 98109  
206-957-9669

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9/27/2022

1 and files in this matter, specifically including the following:

- 2 1. Defendant City of Tacoma's Motion for Summary Judgment;
- 3 2. Declaration of Robert L. Christie, with exhibits;
- 4 3. Declaration of Tenzin Gyaltzen, with exhibits;
- 5 4. Supplemental Declaration of Tenzin Gyaltzen;
- 6 5. Plaintiff McCarthy's Motion for Summary Judgment;
- 7 6. Declaration of Thomas McCarthy;
- 8 7. Plaintiff Anderson's Response to Motion for Summary Judgment;
- 9 8. Declaration of Christopher J. Anderson in Support of Response;
- 10 9. Declaration of James P. Grifo in Support of Response;
- 11 10. Plaintiff McCarthy's Response to Defendants Motion for Summary Judgment;
- 12 11. Declaration of Thomas McCarthy;

- 13 12. \_\_\_\_\_; and
- 14 13. \_\_\_\_\_.

15 Having heard the argument of the parties and being otherwise fully advised in this matter;

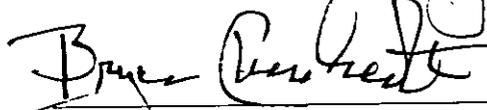
16 IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiff Thomas  
17 McCarthy's Motion for Summary Judgment is DENIED, Plaintiff Christopher Anderson's Motion  
18 for Summary Judgment is DENIED, and Defendant's Motion for Summary Judgment is  
19 GRANTED. This matter is hereby DISMISSED WITH PREJUDICE.

20 ///  
21 ///

[PROPOSED] ORDER DENYING PLAINTIFF'S  
MOTIONS FOR SUMMARY JUDGMENT AND  
GRANTING DEFENDANT CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 2  
(Case No. 19-2-07135-0)

**CHRISTIE LAW GROUP, PLLC**  
2100 WESTLAKE AVENUE N., SUITE 206  
SEATTLE, WA 98109  
206-957-9669

1 DONE IN OPEN COURT/CHAMBERTS this 26 day of August, 2022.

2   
3 HONORABLE BRYAN CHUSHCOFF

4 Presented by:

5 CHRISTIE LAW GROUP, PLLC

6 By /s/ Robert L. Christie  
7 ROBERT L. CHRISTIE, WSBA #10895  
8 STUART A. CASSEL, WSBA #49808  
9 Attorneys for Defendant City of Tacoma  
10 2100 Westlake Ave. N., Ste. 206  
11 Seattle, WA 98109  
12 Tel: 206-957-9669  
13 Fax: 206-352-785  
14 Email: bob@christielawgroup.com  
15 stu@christielawgroup.com



12 WILLIAM C. FOSBRE, City Attorney

13 By: /s/Christopher D. Bacha  
14 CHRISTOPHER D. BACHA, WSBA #16714  
15 Attorney for Defendant City of Tacoma  
16 Office of the City Attorney  
17 Department of Public Utilities  
18 3628 South 35th Street, P.O. Box 11007  
19 Phone: 253-502-8348  
20 Email: cbacha@ci.tacoma.wa.us  
21

[PROPOSED] ORDER DENYING PLAINTIFF'S  
MOTIONS FOR SUMMARY JUDGMENT AND  
GRANTING DEFENDANT CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 3  
(Case No. 19-2-07135-0)

**CHRISTIE LAW GROUP, PLLC**  
2100 WESTLAKE AVENUE N., SUITE 206  
SEATTLE, WA 98109  
206-957-9669

August 31 2022 8:30 AM

CONSTANCE R. WHITE  
COUNTY CLERK  
**NO: 19-2-07135-0**

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

MITCHELL SHOOK,  
Plaintiff,

v.

CITY OF TACOMA,  
Defendant.

THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,  
Plaintiffs,

v.

CITY OF TACOMA,  
Defendant.

**NO. 19-2-07135-0**

**NOTICE OF APPEAL TO DIVISION II  
OF THE WASHINGTON STATE  
COURT OF APPEALS**

**[CLERK'S ACTION REQUIRED]**

PLEASE TAKE NOTICE Plaintiff, Christopher T. Anderson, seeks review by Division II of the Washington State Court of Appeals of the trial court's Order Denying Plaintiff's *sic* Motions for Summary Judgment and Granting Defendant City of Tacoma's Motion for Summary Judgment entered August 26, 2022. A copy of this decision is attached to this Notice of Appeal.

1 DATED this 31<sup>st</sup> day of August 2022.

2 The Law Office of James P. Grifo, LLC

3 

4 \_\_\_\_\_  
5 James P. Grifo, WSBA No. 45192  
6 Attorney for Plaintiff Anderson

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**Declaration of Service**

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I caused to be served a true and correct copy of this Notice of Appeal to:

Robert L. Christie, WSBA No. 10895  
CHRISTIE LAW GROUP, PLLC  
2100 Westlake Ave. N., Ste. 206  
Seattle, WA 98109  
Attorney for Defendant City of Tacoma

Thomas McCarthy, Pro Se  
801 S. Cushman Ave.  
Tacoma, WA 98405

Christopher D. Bacha, WSBA No. 16714  
OFFICE OF THE CITY ATTORNEY  
3628 South 35<sup>th</sup> Street  
Tacoma, WA 98409

DATED this 31<sup>st</sup> day of August 2022.

  
\_\_\_\_\_  
James P. Grifo, WSBA No. 45192  
Attorney for Plaintiff Anderson



1 and files in this matter, specifically including the following:

- 2 1. Defendant City of Tacoma’s Motion for Summary Judgment;
- 3 2. Declaration of Robert L. Christie, with exhibits;
- 4 3. Declaration of Tenzin Gyaltzen, with exhibits;
- 5 4. Supplemental Declaration of Tenzin Gyaltzen;
- 6 5. Plaintiff McCarthy’s Motion for Summary Judgment;
- 7 6. Declaration of Thomas McCarthy;
- 8 7. Plaintiff Anderson’s Response to Motion for Summary Judgment;
- 9 8. Declaration of Christopher J. Anderson in Support of Response;
- 10 9. Declaration of James P. Grifo in Support of Response;
- 11 10. Plaintiff McCarthy’s Response to Defendants Motion for Summary Judgment;
- 12 11. Declaration of Thomas McCarthy;
- 13 12. \_\_\_\_\_; and
- 14 13. \_\_\_\_\_.

15 Having heard the argument of the parties and being otherwise fully advised in this matter;

16 IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiff Thomas  
17 McCarthy’s Motion for Summary Judgment is DENIED, Plaintiff Christopher Anderson’s Motion  
18 for Summary Judgment is DENIED, and Defendant’s Motion for Summary Judgment is  
19 GRANTED. This matter is hereby DISMISSED WITH PREJUDICE.

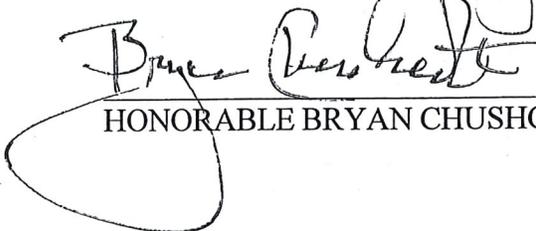
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[PROPOSED] ORDER DENYING PLAINTIFF’S  
MOTIONS FOR SUMMARY JUDGMENT AND  
GRANTING DEFENDANT CITY OF TACOMA’S  
MOTION FOR SUMMARY JUDGMENT - 2  
(Case No. 19-2-07135-0)

**CHRISTIE LAW GROUP, PLLC**  
2100 WESTLAKE AVENUE N., SUITE 206  
SEATTLE, WA 98109  
206-957-9669

1 DONE IN OPEN COURT/CHAMBERTS this 26 day of August, 2022.

2  
3   
HONORABLE BRYAN CHUSHCOFF

4 Presented by:

5 CHRISTIE LAW GROUP, PLLC

6 By /s/ Robert L. Christie 

ROBERT L. CHRISTIE, WSBA #10895

7 STUART A. CASSEL, WSBA #49808

Attorneys for Defendant City of Tacoma

8 2100 Westlake Ave. N., Ste. 206

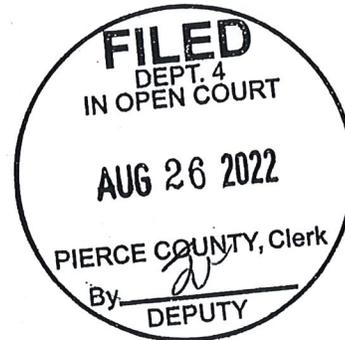
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9 Tel: 206-957-9669

Fax: 206-352-785

10 Email: bob@christielawgroup.com

stu@christielawgroup.com



11  
12 WILLIAM C. FOSBRE, City Attorney

13 By: /s/Christopher D. Bacha

14 CHRISTOPHER D. BACHA, WSBA #16714

Attorney for Defendant City of Tacoma

15 Office of the City Attorney

Department of Public Utilities

16 3628 South 35th Street, P.O. Box 11007

Phone: 253-502-8348

17 Email: cbacha@ci.tacoma.wa.us

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21 [PROPOSED] ORDER DENYING PLAINTIFF'S  
MOTIONS FOR SUMMARY JUDGMENT AND  
GRANTING DEFENDANT CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 3  
(Case No. 19-2-07135-0)

CHRISTIE LAW GROUP, PLLC  
2100 WESTLAKE AVENUE N., SUITE 206  
SEATTLE, WA 98109  
206-957-9669

September 13 2022 8:30 AM

CONSTANCE R. WHITE  
COUNTY CLERK  
**NO: 19-2-07135-0**

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

MITCHELL SHOOK,  
Plaintiff,

v.

CITY OF TACOMA,  
Defendant.

**NO. 19-2-07135-0  
APPEAL NO. 57246-0 [DIV. II]**

**DESIGNATION OF CLERK'S PAPERS**

**[CLERK'S ACTION REQUIRED]**

THOMAS McCARTHY and CHRISTOPHER  
T. ANDERSON,  
Plaintiffs,

v.

CITY OF TACOMA,  
Defendant.

COMES NOW, Appellant, Christopher T. Anderson, by and through his counsel of record, and pursuant to RAP 9.6 submits the following Designation of Clerk's Papers. The Appellant respectfully requests the Clerk of the Court transmit the following Clerk's Papers<sup>1</sup> to Division II of the Washington State Court of Appeals:

<sup>1</sup> Appellant acknowledges that a "Sub No." or other numerical indexing system is typically included; however, Pierce County Superior Court does not make any such information available on its Linx platform and therefore the same is not included in this table.

DOCUMENT	FILING DATE
Complaint	04/17/2019
Answer to Complaint	05/06/2019
Order Consolidating Cases	06/10/2019
Order Granting Leave to Amend	08/16/2019
Amended Complaint	08/26/2019
Answer	09/03/2019
Notice of Filing Petition for Removal to Federal District Court	09/04/2019
Order of Remand from Federal District Court	05/14/2020
Anderson's Motion for Partial Summary Judgment	05/16/2022
Declaration of James P. Grifo – Part One	05/16/2022
Declaration of James P. Grifo – Part Two (Corrected)	05/18/2022
Declaration of James P. Grifo – Part Three (Corrected)	05/18/2022
Declaration Regarding Re-Noting of Motion	06/07/2022
Defendant's Motion for Summary Judgment	07/29/2022
Declaration of Robert L. Christie	07/29/2022
Declaration of Tenzin Gyalsten	07/29/2022
Supplemental Declaration of Tenzin Gyalsten	07/29/2022
McCarthy's Motion for Summary Judgment	07/29/2022
Declaration of Thomas McCarthy	07/29/2022
Declaration of Thomas McCarthy	08/01/2022
Defendant City of Tacoma's Combined Response	08/15/2022

1	Anderson's Response to Motion for Summary Judgment	08/15/2022
2	Declaration of Christopher Anderson in Support of Response	08/15/2022
3	Declaration of James P. Grifo in Support of Response	08/15/2022
4	McCarthy's Response to Motion for Summary Judgment	08/15/2022
5	Declaration of Thomas McCarthy	08/15/2022
6	Corrected 8-15-22 Declaration of Thomas McCarthy	08/16/2022
7	Anderson's Reply in Support of Summary Judgment	08/22/2022
8	McCarthy's Reply in Support of Summary Judgment	08/22/2022
9	Defendant's Reply	08/22/2022
10	Declaration of Thomas McCarthy	08/22/2022
11	Clerk's Minute Entry	08/26/2022
12	Clerk's Minute Entry	08/26/2022
13	Order re: Motion for Summary Judgment	08/26/2022
14	Notice of Appeal w/ Fee	08/31/2022
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18 DATED this 13th day of September 2022.

19 The Law Office of James P. Grifo, LLC

20  
21   
22 \_\_\_\_\_  
23 James P. Grifo, WSBA No. 45192  
24 Attorney for Appellant Anderson

1 **Declaration of Service**

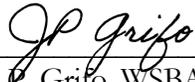
2 The undersigned declares under penalty of perjury under the laws of the State of Washington,  
3 that on the date stated below, I caused to be served a true and correct copy of this Designation of Clerk's  
4 Papers to:

5 Robert L. Christie, WSBA No. 10895  
6 Stuart Cassel, WSBA No. 49808  
7 CHRISTIE LAW GROUP, PLLC  
8 2100 Westlake Ave. N., Ste. 206  
9 Seattle, WA 98109  
10 Attorney for Defendant City of Tacoma

11 Thomas McCarthy, Pro Se  
12 801 S. Cushman Ave.  
13 Tacoma, WA 98405

14 Christopher D. Bacha, WSBA No. 16714  
15 OFFICE OF THE CITY ATTORNEY  
16 3628 South 35<sup>th</sup> Street  
17 Tacoma, WA 98409

18 DATED this 13<sup>th</sup> day of September 2022.

19   
20 \_\_\_\_\_  
21 James P. Grifo, WSBA No. 45192  
22 Attorney for Appellant Anderson  
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