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

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

**IN THE SUPERIOR COURT OF 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.¹ 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.”²

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.³ This “abbreviation” removed “telephone or telegraph plant and lines,” along with the long list and the emphatic language, “any similar or dissimilar utility.”⁴

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.

¹ Passed by the Senate on March 6, 1917 and approved by the Governor March 15, 1917.

² 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.")

³ 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.”)

⁴ 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*.”⁵ 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*.”⁶ Given Click!’s system is “useful” and “*required*” for continued service, Click! is not surplus. Privatization requires a vote of the people.⁷

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.⁸ Defendant asserts Click! was built for Tacoma Power’s (“Power’s”) abandoned pilot meter program. This is misleading and wrong.

⁵ 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).

⁶ RCW 35.94.040 limits surplus, with: “and is not required for providing continued public utility service.”

⁷ Legislative intent for surplus under the Laws of 1917 is found in the PUD laws of 1945.

⁸ 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.⁹ Click! was born,
17 built, bought and paid for as a utility system.¹⁰ Municipal competition was divisive when first
18 proposed.¹¹ It remains controversial across our nation today.¹² 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 ⁹ 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.

¹⁰ 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”).

¹¹ 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).

¹² 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* .¹³ 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: ¹⁴

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

14 Defendant knows the definition of utility, and that the laws protecting municipally-owned
15 utility assets from disposal require a public vote.¹⁵ This Court can do justice, by upholding the
16 law and reminding them of their solemn duty on this crucial public policy matter. *See Fondren* ¹⁶

17 II. COUNTERSTATEMENT OF FACTS

18 Shook incorporates herein by this reference all facts set forth in this Motion and Declaration
19 in Support, and in Plf.[’s] Motion for Partial Summary Judgment (“MPSJ”), and Mo. for TRO,
20 and all declarations filed in this matter. Following is a summary of facts relevant to Def[’s]
21 arguments in response to Defendant’s cross MPSJ.

22 Click! is a self-described “Telecommunications System,” providing competitive Telecom
23 services, as shown in this 2001Click! press release:¹⁷

24 **July 24, 2001**

25 Click! Network is an operating section of Tacoma Power and is the nation’s largest municipally
26 owned telecommunications system. Click! provides competitive telecommunications services in
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
or by calling 253-502-8900.

Contact: Diane Lachel, 253-502-8537; Cyndi Wikstrom, 253-502-8763

¹³ 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 Wash. 237 (1934).

¹⁴ Shook Decl. 12/12/19, Ex. 32. Pg. 1, Ln. 20. (Def.[’s] Resolution citing public right to vote.).

¹⁵ “we do not construe a statute that is unambiguous.” *Food Servs. of Am. v. Royal Heights, Inc.*, 123 Wn.2d 779, 784-85, (1994).

¹⁶ *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).

¹⁷ 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.¹⁸ Approximately \$200 million in historical costs are invested in
7 Click!’s System.¹⁹ *E.g.* Some of Click!’s core routers cost over \$1 million each.²⁰

8 Click!’s services are enjoyed by governmental, commercial and residential customers alike.²¹

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.²²

13 As the Telecommunication Study concluded, “*One could hope. . .*”²³

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 modern 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.²⁴

23 Click! provides “lit” wholesale telecommunication service.²⁵ It enables retail ISP partners to
24 provide BIAS.²⁶ Cable modems are owned by Click!’s ISP partners, or by the ISP’s customers,
25 the “end-users.”²⁷ ²⁸ On Click!’s DOCSIS, coaxial, portion of telecom platform, Click! installs

26 ¹⁸ Shook Decl. 12/30/19, Ex. 85 Tacoma Ord.#26141, 10/28/97, (additional \$67 million funding).

27 ¹⁹ Shook Decl. 12/30/19, Ex. 75, Pg. 1 Click! Asset Study, 3/18/13, by Rates, Planning & Analysis Dept.

28 ²⁰ Shook Decl. 12/30/19, ¶ 2. Ex. 73. (Board’s Cisco CRB-8 Resolution U-10884, router \$1,034,100).

29 ²¹ Shook Decl. 12/12/19 Ex. 64 (Click! provides data-transport and broadband to Tacoma’s Libraries).

30 ²² 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 ²³ Shook Decl. 10/30/19. Ex. 10, at Pg. 186 of 398, (Conclusions of Telecommunications Business Plan).

33 ²⁴ 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 ²⁵ “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.

²⁶ “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)

²⁷ There are only two remaining ISPs operating on Click!, Advanced Stream and Rainier Connect.

²⁸ 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.²⁹ With FTTP, Click! installs, operates and
7 maintains all customer premise equipment required to make the FTTP services operational.³⁰

8 Click! also provides Tacoma Public Libraries, and 100 other institutional customers, with
9 Metro Ethernet service.³¹ This provides a transparent data path, and involves no "change in the
10 form or content of the information as sent and received."³² 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."³³ 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.³⁴ Telecom is NOT cable television.³⁵

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.³⁶

19 Cable TV ("cable system") is a closed-off, "one way" system, with "closed transmission
20 paths."³⁷ One-way capability is not telecom.³⁸ Compare 47 U.S.C. § 522(7), with 47 USC §
21 153(50). Click!'s physical infrastructure, "the pipes," is a wire "communication system."³⁹

22 ²⁹ Fiber to the Premises, is fiber optic telecommunications directly to customers' premises.

23 ³⁰ Shook Decl. 12/12/19, Ex. 57, Pg. 326/423. (Click! Network Role and Responsibilities).

24 ³¹ 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 ³² 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 ³³ 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 ³⁴ See Def.[']s] SJM, Pgs. 13, 14, 15, 17, 18, and 21.

34 ³⁵ *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 ³⁶ 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!.⁴⁰ 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 2019.⁴¹

18 The primary objective in creating Click! was to fulfill the community’s need for an alternative
19 to the incumbent monopoly provider.⁴² 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.⁴³ 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 ³⁷ 47 U.S.C. § 522(7). (Cable System: a facility, consisting of closed transmission paths).

³⁸ 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.

³⁹ 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.”

⁴⁰ Shook Decl. 12/30/19, ¶ 4, Ex. 76. (Data usage and revenues over the System are increasing).

⁴¹ Shook Decl. 12/30/19, ¶ 4., Ex. 76 (Operational Summaries for Oct 2018 and Oct 2019).

⁴² 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”).

⁴³ 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." ⁴⁴ 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.

⁴⁴ 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.⁴⁵ Telecom has been a regulated public utility since 1909 in Washington.⁴⁶ Even longer than electric power.⁴⁷

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.”⁴⁸

Defendant has conceded the public’s statutory right to vote, in Council’s own resolution.⁴⁹ *Lenci v City of Seattle*, 36 Wn. 664, 668 (1964). *Cf.* RCW 35.94.020.⁵⁰ (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.⁵¹

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.”⁵²

But the definition of “public utility” is provided by name, in the statute itself, in the long list of protected utilities.⁵³ 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.”⁵⁴ In *Arnott v. Spokane*, 6 Wash. 442, (1893):

⁴⁵ In 47 U.S. Code Title 47, state at Chapter 80.36 RCW, local in Tacoma Municipal Code Title 16 B.

⁴⁶ 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.”).

⁴⁷ Electricity regulated by Laws of 1911, Ch. 117, Pg. 538, *See also* Shook Decl. 12/12/19 Ex. 36, Pg. 2.

⁴⁸ 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.

⁴⁹ Shook Decl. 12/12/19, Ex. 32. Pg. 1, Ln. 20. (Def.[’s] own Resolution citing public right to vote.)

⁵⁰ 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).

⁵¹ 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)

⁵² Def.[’s] MSJ., 12/12/19, Pg. 16, Ln.10.

⁵³ “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).

⁵⁴ 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.⁵⁵

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.”⁵⁶ 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.⁵⁷

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.⁵⁸

24 Click! was established for more than TPU’s needs.⁵⁹ By sharing common infrastructure,
25 easements and rights of way, Click! and Tacoma Power maximize the value of their assets,
26 generating operational synergies.⁶⁰ This was the original purpose of the System.⁶¹

24 ⁵⁵ *Arnott v. City of Spokane*, 6 Wash. 442, (1893) citing 1 Dill. Mun. Corp. (4th Ed.) 449, (373;).

25 ⁵⁶ APPA website (Multiservice utilities: A one-stop shop for communities). <https://perma.cc/BF37-FN29>

25 ⁵⁷ See Shook MPSJ, Pg. 26, discussion of fibers and “tubes.” *Also see*, Shook Decl. 12/12/19 Ex. 31, Pg. 4)

26 ⁵⁸ 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.

⁵⁹ Shook Decl. 12/30/19 Ex. 70, -(City of Tacoma’s Initiative, April 2000. Mayor Baarsma).

⁶⁰ 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).

⁶¹ 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.⁶²

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.*"⁶³ 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

⁶² 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).

⁶³ 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. ⁶⁴ So much more than meters. ⁶⁵

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. ⁶⁶ Excerpts from their paper show Click! was not about meters: ⁶⁷

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:

⁶⁴ Shook Decl. Ex. 74, Pgs. 18, 20. Mr. Klein (political attacks on Click! formation -Hendery & Crowley).

⁶⁵ 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).

⁶⁶ 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.

⁶⁷ 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
6 provider's national president and an additional due diligence review by three
7 outside consultants, the city policy makers moved forward with the \$100 million
8 overbuild. (emphasis added).

9 The Professors' Paper shows the System's primary objective was a "broader strategy," the
10 community's need for advanced telecommunication services. The prospect of \$100 million in
11 Additional Capacity creating municipal competition was alarming to the incumbent, TCI, who
12 warned Tacoma of "the *pitfalls and risks* associated with municipal ownership."⁶⁸ (*supra*)

13 In preparing the Business Plan, a detailed "Marketing Survey" was conducted, to study "The
14 Current Business Market."⁶⁹ This Survey excerpt shows Click! was more than meters:

15 To help assess current business market support for advanced telecommunications
16 services in the greater Tacoma area, Tacoma City Light pursued two avenues of
17 consumer research: A telephone survey of 200 businesses, with 25 or more
18 employees. . . This group represents a pool of "Potential Customers."

19 Based upon the results of 200 telephone interviews with medium to large Tacoma
20 area businesses, the Potential Customer business market is on the brink of being
21 ready for advanced telecommunications technologies. The money is there,. . .key
22 findings show these customers account for more than \$5 billion dollars in annual
23 revenues and 25,000 jobs. What's more, they currently spend over \$10 million
24 dollars annually on telecommunications services. They perceive telecommunications
25 links are extremely important to the success of their businesses, and many believe
26 their telecommunications needs will increase rapidly, particularly for Internet access
and local data networks.

As the Business Plan and Marketing Survey indicate, Click!'s creation was seen as vital for
Tacoma to remain economically competitive and prosper.⁷⁰ 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!.

⁶⁸ Shook Decl. 12/30/19, Ex. 74, Pgs. 25, 28 (TCI, later AT&T, President Leo Hindery opposed Click!'s
creation, publicly scolded Superintendent Klein and sponsored studies to discredit Click!)

⁶⁹ 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.).

⁷⁰ 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:⁷¹

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.⁷²

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.⁷³ 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

⁷¹ Shook Decl. 12/30/19, Ex. 71, Pgs. 16, 17. (Click! Network Financial Performance Review).

⁷² 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.)

⁷³ 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.”⁷⁴ Click! has its
11 own unique brand, loyal customers, annual sales of \$25 million a year, and assets covered by a
12 private entity. The City has every right to organize its utility departments as a “multiservice
13 utility.”⁷⁵ 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.⁷⁶ *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.⁷⁷

19 The enabling Ordinance 25930 provides: “The City **hereby creates** a separate system of . .
20 City Light.”⁷⁸ 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.⁷⁹ Click! was established to fulfill the community’s need for an advanced telecom

⁷⁴Finance Dept, does not track performance of other Power divisions. Shook Decl. 12/30/19, ¶ 2.

⁷⁵ Tacoma has broad authority in organizing its utilities; but, cannot sell them without public vote.

⁷⁶ “Shouts” is more accurate, since the “Excess” phrase appears capitalized 35 times in Defendant’s brief.

⁷⁷ Shook Decl. 12/12/19, Ex. 42, Pg. 2.

⁷⁸ Shook Decl. Ex. 11, Pg. 8 (Article II creates a separate system, adopts Click! business plan.”

⁷⁹ 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.⁸⁰ It is a municipal alternative to the incumbent monopoly provider, who, at the time,
2 “could care less” about Tacoma.⁸¹

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:⁸²

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.⁸³ 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.⁸⁴ This is why the FCC, FTC and DOJ closely regulate mergers of the
15 powerful telecommunication conglomerates.⁸⁵

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.⁸⁶ required to create Click!’s essential services.⁸⁷ 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 ⁸⁰ 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).

⁸¹ 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.

⁸² Shook Decl. 12/30/19, Ex. 74, Pg. 12. (Power Superintendent’s Steve Klein deposition).

⁸³ Shook Decl. 12/30/19 Ex. 78, (monopoly power closely monitored. DOJ and FTC guidelines.)

⁸⁴ 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.

⁸⁵ 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).

⁸⁶ Shook Decl. 12/30/19, Ex. 85 (City’s 1997 Emergency Res. for \$69 Million, includes telecom team).

⁸⁷ 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.⁸⁸

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.⁸⁹

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.⁹⁰

21 Telecommunications has been a regulated public utility since the Pacific Telegraph Act of
22 1860.⁹¹ AT&T monopolized the industry for most of the 20th century.⁹²

23 The Communications Act of 1934 created the FCC. AT&T’s monopoly was broken up by
24 1983.⁹³ Congress recognizes telecom is an essential public utility.⁹⁴ In Section 706(a) of the

25 ⁸⁸ 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.).

⁸⁹ Shook Decl. 12/30/19 Ex. 70, Creating Capacity and Competition in Broadband Telecommunications.

⁹⁰ Click Business Transaction Agreement, Infeasible Right of Use, or “Privatization Agreements.”

⁹¹ 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.

⁹² Shook Decl. 12/12/19, Ex. 49 Pg. 3. (Kingsbury Commitment did not hinder AT&T).

⁹³ Judge Greene’s opinion, *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1983).

⁹⁴ 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.⁹⁵

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.⁹⁶

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.⁹⁷

⁹⁵ Shook Decl. 12/12/19, Ex. 59, Declaration of Terry Dillon.

⁹⁶ Shook Decl. 12/30/19, Ex. 24, Pg. 23 (US West and TCI had used up all available pole space.)

⁹⁷ 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. 80.⁹⁸

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.⁹⁹ Click!’s
5 wires are *data pipelines*, “and no doubt” a public utility. In *State v. Kuykendall* it was found:¹⁰⁰

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.”¹⁰¹ Shook Decl. 12/30/19, Ex.
25 80. Pg. 22 (“Power fight”).

26 Nothing in the statute requires a monopoly, although one nearly exists.¹⁰² 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.¹⁰³ Comcast’s 2015 bid for Time Warner Cable would have

⁹⁸ 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”.)

⁹⁹ *State v. Kuykendall*, 137 Wash. 602, 611 243 P. 834, (1926), “taxicab company was a public utility.”

¹⁰⁰ *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.

¹⁰¹ 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).

¹⁰² Tacoma suffers oligopoly, with two alternatives for BIAS, generally. Because of Click!’s existence.

1 consolidated 30 million subscribers.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ 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^{108 109}

25 ¹⁰³ Shook Decl. 12/30/19 Ex. 69, Pgs. 38, 39, (DOJ 4/24/15 DOJ Press release “significant concerns that
26 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.¹¹⁰ It preserved federal and state policy goals furthering
8 municipal broadband.¹¹¹ Shook Decl. 10/30/19, Ex. 21 (White House Report).

9 Charter § 4.6 has no surplus clause.¹¹² 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.¹¹³

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.¹¹⁴

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.¹¹⁵

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.¹¹⁶ 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.¹¹⁷

23 ¹⁰⁸ *E.g.* City of Tacoma’s 4/20/19 MPSJ. on The Nature or Mandamus Relief, *Coates v City of Tacoma*,
24 Pierce County Superior Court 17-2-08907-4., Page-3.

¹⁰⁹ Losses were disputed issue and no finding on losses was ever made.

¹¹⁰ Shook Decl. 12/12/19, Ex. 55 (Council Resolution for an Audit of controversial Click! accounting.)

¹¹¹ RCW 43.330.532, (Access to broadband critical to full participation in society and modern economy).

¹¹² Shook Decl. 12/30/19, Ex. 89 (Tacoma City Charter Article 4 -Utilities.)

¹¹³ Shook Decl. Part Two 12/12/19, Ex. 67 Pg. 3 (Judge Bone elected Chair of Charter Committee).

¹¹⁴ *E.g.* Shook’s MPSJ., Pg. 15, Fn. 74. (utility purpose, nexus to power, and *Okeson* line of cases).

¹¹⁵ “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).

¹¹⁶ 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.¹¹⁸ Washington State’s own net
3 neutrality laws support broadband’s vital role as an essential utility.¹¹⁹

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.¹²⁰ 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.¹²¹

9 The Communication Act of 1934 expressly grants states authority to promote and regulate
10 “telecommunications services, and safeguard the rights of consumers.”¹²²

11 All “information services” are accessed via telecommunications.” Click! is a physical
12 telecommunications system.¹²³

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.
18

19 ¹¹⁷ 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).

22 ¹¹⁸ *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.

¹¹⁹ *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.

¹²⁰ 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.

¹²¹ Chapter 19.385 RCW (may not: Block content, Impair internet traffic or Engage in paid prioritization).

¹²² 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).

¹²³ 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.¹²⁴ The City even cited the Telecom Act, in seeking this Court’s authority to
3 establish Click! in 1996.¹²⁵

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)¹²⁶

Also, in this same 1996 Brief, at Pg. 12, ¶ B (3.), City cited its authority to provide “utilities,”

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 Tacoma may conveniently render telecommunications services because the Light
10 Division has an existing citywide electric system of connections to customers’
11 homes, because it has existing billing relationships with customers, and because
12 it can provide services economically. Second, there is no express statutory
13 prohibition against city provision of municipal telecommunications services.
14 *Winkenwerder*, supra. To the contrary, the Legislature has acknowledged that
15 cities provide communications services through enacting a statute providing for
16 the burying of city-owned communications facilities. RCW 35.96.030. Finally,
17 the Legislature has determined that competitive markets for telecommunications
18 services serve the public interest. RCW 80.36.300; *In re Electric Lightwave, Inc.*,
19 123 Wn.2d 530, 538-39 (1994) (noting that “it is the state’s policy to promote
20 diversity in the supply of telecommunications services and products in
21 telecommunications markets throughout the state”). The City’s provision of
22 telecommunications services will make the market more competitive, thus
23 furthering the public interest recognized by the Legislature.

24 Defendant argues cable modem service is not telecommunications, citing *Brand X*.¹²⁷ But,
25 FCC designations aside, information service still requires telecommunications. Under USC 47
26 153(23) “information service” is the acquiring of “information via telecommunications.” It’s
these physical facilities the people have a right to vote over. “[T]elecommunications is part and

¹²⁴ 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.

¹²⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, § 253, 110 Stat. 70 (1996).

¹²⁶ 1996 Memorandum In Support Of City’s Summary Judgement. See Shook Decl. 10/30/19 Ex. 12.

¹²⁷ *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.¹²⁸ 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.¹²⁹ Procedurally, there was no
18 “RFP” issued for the sale of Click!, as Defendant alleges. Only an “RFI/Q”, for “information.”¹³⁰
19 Council never audited Click!’s financial performance.¹³¹ They voted to go “All-In,” to expand
20 Click!. The *Coates* lawsuit dashed those hopes, forcing Council to change direction.¹³²

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.¹³³ Fortunately, “the public vote is curative of all ills.”

24 ¹²⁸ 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).

25 ¹²⁹ Substantive ultra vires briefed in Pl. Shook’s MSJ., Pgs. 26, 27 and 28.

26 ¹³⁰ 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!”

¹³¹ 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.

¹³² *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.

¹³³ 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.¹³⁴ The CPA claim involves many facts. Discovery and a trial
5 could be required.¹³⁵ 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."¹³⁶

7 Finally, telecommunications is not a luxury. You can't add a "rooftop antenna" and get it.¹³⁷
8 The flow of such "information" requires a "pipeline," a fiber optic backbone, for transferring
9 customer's data.¹³⁸ 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 30th day of December 2019.

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27 Mitchell Shook
28 Plaintiff

24 ¹³⁴ *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

¹³⁵ 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.

¹³⁶ Quoting Hon. Homer T. Bone, handwritten letter, University of Puget Sound Crocker Library Archive.

¹³⁷ *Issaquah*, at 574, "It's something you can do with a rooftop antenna. In that sense, it's not a utility."

¹³⁸ 5G networks of the future, for example, require an underlying fiber network, like Click! to function.