102604-8

No. 57246-0-II

IN THE COURT OF APPEALS, DIVISON II
STATE OF WASHINGTON

THOMAS McCARTHY

Petitioner,

and

CHRISTOPHER ANDERSON,

Appellant,

v.

CITY OF TACOMA,

Respondent

PETITION FOR REVIEW

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CONTENTS

Cases

Statutes

Tacoma Public Utilities Board Resolution

Tacoma City Ordinances and Resolutions

City of Tacoma Charter

Federal Statutes

Other Authorities

References

State Rules

1. IDENTITY OF MOVING PARTY.

Thomas McCarthy asks this Court to review the Court of Appeals decision terminating review.

2. DECISION FROM DIVISION II OF THE COURT OF APPEALS

On Oct. 3, 2023, Division II terminated review. McCarthy's Motion for Reconsideration was denied November 9, 2023. Order denying reconsideration—*See* Appendix.

3. INTRODUCTION.

In 1996 Tacoma decided to build our nation's first "open access" municipal telecommunications systems, to provide Tacoma Public Utilities' ("TPU's") ratepayers with "broadband" utility service—alongside water and power. CP 231-35, 532-542, 2622-26.

A detailed "Telecommunications Study" and "Business Plan" was prepared—to help policy makers decide if they should establish Click! Network (Click!) CP 309-462, 1475, 1772-73.

The Study asked, “Why should a Public Owned Electric Utility be Involved in Telecommunications?” CP 310. The study found broadband “*key to creating a foundation for economic growth*”—and “telecommunications” the “Railroad of the 21st Century.” CP 345.

> 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.

Also:

> [T]he new railroad towns are "Tele-Communities", with a strong communications infrastructure supported by both information technology and telecommunications systems.

The incumbent monopolists were not investing. The Study recommended TPU provide broadband as a “utility service” CP 453.

> One could hope that other companies would step forward and create a modern

> telecommunications system, but the prospects for that occurring appear dim. (emphasis added).

Click!'s establishment was unprecedented and controversial. "Municipal competition" sounded alarm bells across the highly monopolized telecommunications industry. CP 927, 963-964, 1299

Monopolist incumbents—a "*telecom cartel*"—mounted an "organized effort" to discredit Click! and protect their markets. CP 207-08. Rainier Connect ("Rainier") and Comcast (TCI at the time) fiercely opposed Click!'s creation. CP 970-72, 1492-1500, 2672-75, 1373-77.

City's resolve was unwavering—spending $200 million over 20-years—Click!'s state-of-the-art fiber-optic system, built upon City's easements and eminent domain, passed 120,000 homes—creating competition, spurring economic growth, and improving broadband service. With Click!, broadband prices were 20–25% lower. CP 928-29.

As a "public utility", Council set Click!'s rates and published them in "Title-12 Municipal Utilities"—like water and power. CP 280, 1787, 2671, 2675-80. Council also established "net neutrality" policies. CP 557-65, 807-09.

To spur economic development, the City promoted Click!'s benefits—advertising Tacoma as "*America's Most Wired City*". CP 1397.

Rainier's opposition to Click! continued—with large campaign contributions currying political support for "privatization"—a scheme ultimately carried out via "*surplus*"—skirting *statutory* mandates for a "*public-vote*". CP 969-79.

Without any bidding, RFPs, or procedures typically protecting City property from fraudulent disposal, Click!'s entire enterprise—with $25 million a year in revenue and 22,578 active broadband and data-transport customer accounts—was sold as ***"surplus***" under RCW 35.94.040. CP 1530.

Rainier acquired possession and control of the going concern—lock, stock, barrel and brand—under a contract

running 40-years—when Click! is to be returned to the people. CP 870, 1528. 1863, 1816-2025, 2190-91.

Obviously, a scheme granting 40-years of unfettered private possession and control of a utility's customers and assets—then *requiring their return*—was never Legislator's intent for "*surplus*".

Municipal broadband is an essential utility—like water, power, roads and bridges. Communities nationwide are building fiber-optic broadband "information highways". CP 574-78, 629-34, 592-627, 2261-62.

"Like electricity, broadband has grown from a luxury to an essential part of public life". *See* A Light in Digital Darkness: Public Broadband; The Yale Journal of Law & Technology Vol. 20 311 (2018). CP 628-34.

Broadband is a vital public policy issue affecting all Citizens. RCW 43.330.532 provides: "The legislature finds that: (1) Access to broadband is critical to full participation in society and the modern economy. Review Applies—RAP 13.4(b)(4).

4. ISSUES PRESENTED FOR REVIEW

4.1 Should this Court accept review where Division II failed to apply Washington law and allowed a municipal broadband utility system to be privatized as "surplus", when 23,000 ratepayers are actively using the utility system? (RAP 13.4(b)(1)(3)&(4))

4.2 Should this Court accept review where Division II failed to follow binding precedent in *Bremer* mandating a public vote is the "only procedure" by which Council can privatize a municipal broadband system? (RAP 13.4(b)(1)&(4))

4.3 Should this Court accept review where Division II ignored over 130 years of binding case law regarding the primary ultra vires doctrine? (RAP 13.4(b)(1)&(4))

5. STATEMENT OF THE CASE

McCarthy adopts the Opinion—except for these errors:

First, Division II erroneously states the Shook/Bowman case was heard in "February **2019**". Op. at 6. Shook/Bowman was a *subsequent* case—heard February 28, 2020—and settled out of court "*based on the parties' stipulation*." Op. at 7. With no final judgment, Shook/Bowman is irrelevant—"since the parties could settle for myriad reasons not related to the

resolution of the issues they are litigating" *Marquardt v. Federal Old* 33 Wash.App. 685, 689 (1983).

Second, Click! operates on "*additional capacity*"—required for implementing Click!'s broadband "business plan"—not on "*excess capacity*". Op. 4. CP 1380-84, CP 2291-93.

Third, there's been no finding that Click!'s business model is "outdated". Op. at 4. During *Coates*, in 2019, the City argued Click! was profitable—see *Coates v. City of Tacoma,* 457 P.3d 1160, at 1175.

> [T]he City of Tacoma contended that Click! is not operated at a financial loss. Wash. Ct. of Appeals oral argument, *Coates v. City of Tacoma*, No. 51695-1-II (Sept. 9, 2019), at 30 min, 50 sec. through 32 min., 5 sec. (on file with court).

Click!'s profitability is an unsettled issue. The record undisputedly documents a decades-long campaign by opponents to disparage Click! by fraudulently fabricating "losses." CP 206-08, 1040-43.

Finally, Division II states *Coates* established "that Click! was not a separate utility system". Op. at 10. This is irrelevant—since "*a separate utility system*" is not the threshold for triggering the public vote.

City Charter § 4.6 requires a vote for "*any utility system, or parts thereof*"; and RCW 35.94.040 requires the vote for "*any personal property or equipment*" . . . required for providing *continued* utility service. CP 2616-20.

6. GROUNDS FOR REVIEW AND ARGUMENT

Division II's opinion—that Click! is *not* a "public utility" and does *not* provide "public utility service"—is an obvious error affecting citizens statewide.

The trial court made the same mistake, stating Click! ***"is not a public utility***". *See* the Verbatim Report of Proceedings, 8/26/2022, page 55.

> THE COURT: [T]hat's my ruling. I'm going to find that ***Click! system is not a public utility*** within the definition of 35.94.020 or within section 4.6 of the City Charter, and so therefore, the agreement with Rainier

> Connect, was not subject to a vote of the public over it.
>
> Now, if they tried to do something with respect to the sources of water supply, waterworks, hydrants, sanitary sewers, and storm drains, we might have a problem. ***Or at least we'd have a vote. But not for the internet.***

Division II agreed, approvingly, that "*no customers*" relied on Click! for "any" utility services*. See* Op. 10.

> [T]here were no Tacoma Power customers who were relying on any part of Click! for **any** of their **utility services.**

6.1 Review Is Warranted Because Division II's Holding Conflicts with Express Statutory Limitations on Surplus Disposal of Municipal Utility Systems.

Only by ignoring the fact that Click! is a "public utility"—for purposes of triggering the public vote mandate—could Division II reach its erroneous conclusion, that City Council has authority to privatize Click! Network, as surplus, in avoidance of statutes reserving all disposal authority unto the electorate.

Division II ignored that Click!'s system and services are defined as "public utilities" by statutes, case law and the City's own Charter, Ordinances, Resolutions and admissions.

Division II's finding, that Council's "surplus" disposal of Click! was lawful is obviously erroneous—as seen by considering that Council's privatization contract requires Click!'s assets and brand be returned after expiration of the 40-year term. Surplus assets are not "*returned*". CP 1854-2025, 2190-91.

RCW 35.94.040 precludes applying "surplus", to avoid the public-vote mandate in RCW 35.94.02, when a utility assets are **"***required for providing continued public utility service***"**.

Click!'s assets are obviously "*required for providing continued public utility service*"—since Click! ***is*** currently providing broadband services, to the same ratepayers, as always—only now under private ownership and control.

The City has unlawfully granted a private company a lease conveying—for decades to come—unfettered ownership and control over an essential municipal utility enterprise. A lease that

includes Click!'s valuable brand, and over 22,000 active ratepayer customer accounts. CP 1980-2006.

6.1.1 Opinion Conflicts with State Statutes Defining Broadband as a Public Utility.

Click!'s system and services meet every statutory definition of a "public utility" that is providing a "public utility service".

Washington state regulates Broadband as a "public utility", by applying *net neutrality* principles under RCW 19.385.020 (2) requiring: "A person engaged in the provision of broadband internet access service in Washington state, may not: (a) Block lawful content, (b) Impair or degrade lawful internet traffic, (c) Engage in paid prioritization. The act require: **"**The *utilities and transportation* commission must provide notice of the effective date of this act to affected parties.**"**

Title 80 Public Utilities, with RCW 80.04.010, establishes Click! is a "Telecommunications Company": (28) 986

> 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".

Also, RCW 80.04.010 (23) provides Telecommunications Companies are "public utilities"; i.e. "every gas company, electrical company, telecommunications company. . ."

RCW 43.330.530 (1) (a) defines broadband as "Advanced Telecommunications Capability".

RCW 43.330.530 (6) defines Broadband as "telecommunications". Specifically, "networks of deployed *telecommunications equipment* and technologies necessary to provide high-speed internet access and other advanced *telecommunications services* to end users."

The AG finds municipal "*Telecommunications businesses are public utilities*." Wash. AGO 2003 No. 11.

Division II's opinion allows any freewheeling municipal government power to avoid statutory public-vote requirements by labeling any broadband system as "surplus".

Warranting review, RAP 13.4(b)(4)

6.1.2 Opinion Conflicts with Court's Broad Definition of "Public Utility".

Case law broadly defines "Public utilities"—with language that encompasses Click!'s broadband system.

In *Inland Empire* the Court broadly defined "public utility". *Inland Empire Rural Electrification, Inc. v. Department of Pub. Serv.,* 199 Wash. 527, 537, 92 P.2d 258 (1939).

> A corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds 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;

Citing *Clark v. Olson*, 177.Wn. 237, 31 P.2d 534, 93 A.L.R. 240; See also, *West Valley Land Company v. Nob Hill Water Ass'*, 107 Wn.2d 359, 729 P.2d 42, (1986).

In *Winkenwerder* "public utility" is broadly defined: *Winkenwerder v. City of Yakima* 52 Wn.2d 617, 628 (1958).

> The crucial and final test is, does the

> utility—*subserve a public purpose*—does it furnish a natural need of the city or its citizens—does it contribute to his comfort, prosperity or happiness? If it does, it is public; otherwise, not.

Thereby warrantying review—RAP 13.4(b)(1)

6.1.3 Opinion Conflicts with City's Own Definition of Broadband as a Public Utility.

City classifies Click! as a "public utility". In Ordinance #25930, "Establishment of Telecommunication System" City created a "public utility"—dedicating the system "to the public purpose of providing "broadband" service—as a one of TPU's public utility services. CP 468-72.

> The City hereby creates a separate system of the City's Light Division to be known as 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.

Council approved TPU's "*broad band telecommunications proposal*", finding Click!'s Business Plan "*sufficient and*

adequate". Council dedicated $40,000,000 to this broadband utility to serve *"a* public purpose".

Council's 1997 Resolution #33668 authorized TPU to "*implement said proposal for a broad band telecommunications system*". CP 289. (emphasis added).

> WHEREAS, 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, Council hereby approves the Light Division's proposal including the Business Plan and the Department of Public Utilities, Light Division is authorized to proceed to **implement said proposal** for a broad band telecommunications

Given Click!'s revolutionary status—as the first municipal broadband utility in Washington—City immediately sought judicial authority, under the Uniform Declaratory Judgement Act ("UDJA"), Chapter 7.24 RCW, for funding the highly controversial "business plan" to provide broadband public utility service. *City of Tacoma v Taxpayers and Ratepayers of the City*

Pierce County Superior Court No. 96-2-09938-0 (1996). CP 1681-86, 501-518, 675-91, 1691-1699, 1761-68.

The City *argued* Click! was a "public utility", and the City had every right to offer broadband service as a "public utility service"—citing RCW 39.92.050's authority for establishing Click! as a "*public utility or addition, betterment, or extension thereto*". CP 1473-77, 2652-53, 2675-77.

Defendants, the "*Taxpayers and Ratepayers", argued* Click! was ***not a public utility***—that Click!'s broadband business plan was a "general government" function—requiring voter approval for funding and operating the new enterprise. CP 1749-59.

The City cited Charter § 4.2, as providing the "Power to Acquire and Finance Public Utilities". CP 468, 1787, 1685, 1691-1703, 1723-39, 1767-76.

> 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.

City argued that a broadband public utility service would serve the public interest and welfare, improve ratepayers lives—and the business plan was sound. CP 528, 1734-38.

> The Light Division, with the assistance of numerous experts, has prepared a comprehensive Telecommunications Study. The Telecommunications Study incorporates a comprehensive business plan outlining the proposed services, operations, organizational structure and finances of the Telecommunications System. See Exhibit D to Second Athow Decl. (Telecommunications Study notebook). The chief concern raised by defendants' opposition on the previous summary judgment motion was the absence of such a plan. That objection has now been fully met.

The City cited the Telecommunications Act of 1996, as federal authority preempting legal impediments to establishment of Click!'s municipal broadband system and services. CP 513

> The City is further authorized to provide telecommunications services by the Telecommunications Act of 1996, through the Act's preemption of any legal requirement that has the effect of preventing any entity from

> providing any interstate or intrastate telecommunications services.

The City prevailed. The court confirmed TPU's legal authority to implement the broadband business plan and provide "broadband public utility service". CP 1776. 1720.

For 23 years, City relied on that determination—promoting, owning and operating Click! as a "public utility system".

Council set reasonable rates and obeyed "net-neutrality" regulations—as required by RCW 19.385.020 and FCC Title 47 CFR § 8.1(a)-Transparency. CP 557-65.

Click! was held out to ratepayers as one of "our services", and shared lobby space in TPU headquarters—alongside water and power. All the hallmarks of a "public utility". CP 557-65 (policies), CP 231-33, 891 ("our service"), 889 (lobby photo), 1521 (sponsoring events), 2438-39.

The City's definition of Click! as a "public utility" was reconfirmed in 2017, when Ratepayers filed a lawsuit for

declaratory relief against TPU, alleging TPU was unlawfully subsidizing Click!. See *Coates v. Tacoma, supra.*

Plaintiffs claimed Click! was "*not a utility*", but a "general government" obligation; and, that TPU was illegally subsidizing Click!—in violation of the accountancy act. *Coates*, *supra*.

City argued Click! was a "public utility", the issue having been settled by the binding 1997 UDJA action—since declaratory judgments have "*the force and effect of a final judgment or decree*" under RCW 7.24.010.

City maintained collateral estopple precluded Ratepayers from disputing the long "*settled issue*" of Click!'s public-utility status.

The *Coates* decision confirmed Click! was "public utility" property. This was City's leading argument!. *Coates* at 1176, FN 4, *supra*.

> [4] The parties spend a **considerable amount of time** arguing whether the Ratepayers' current claims are barred by **res judicata** arising from the 1990s declaratory judgment action or whether **collateral**

estoppel bars the relitigation of any

Division II's opinion ignores *Coates* binding determination, since public-vote requirements apply to "*part of*" a utility—warranting review under RAP 13.4(b)(2).

Division II's opinion creates unlimited municipal authority for skirting public-vote requirements—exposing other consumer owned utilities to similar fraudulent "surplus privatization schemes" and damaging innocent citizens.

6.1.4 "Surplus" Cannot Apply to Assets Required for Continuing Service.

When utility assets are required to continue providing utility service, the public-vote mandates in Charter § 4.6 and RCW 35.94.020 ***cannot*** be avoided by "surplus". RCW 35.94.040 precludes surplus avoidance of public-vote requirements—to assets *necessary* in performing their intended undertaking.

Therefore, Click! cannot be "surplus" under RCW 35.94.04—since Click!'s assets continue providing the same public utility service they were originally dedicated to. CP 2191.

Legislators never intended granting unlimited "surplus" disposal power over functional utility assets—to avoid public-vote protections. CP 2267-72.

RCW 35.94.040 shows no legislative intent to permit "surplus disposal" of entire, functional, utility systems. *See State v. Evans*, 177 Wn.2d 186, 199, 298 P.3d 724 (2013) (any ambiguity in statutes meaning may be resolved by resorting to legislative history to determine legislative intent).

The City of Tacoma sponsored RCW 35.94.040. Mr. Paul Nolan, City Attorney for Tacoma Public Utilities was the legislation's "Principal Proponent" CP 791-92, CP 739-802.

Senator Rasmussen, Tacoma's 29th District, and Representative Kelley, Tacoma's 28th District, introduced Senate Bill No. 2835 and House Bill 939 "Authorizing an additional method for the disposition of certain property owned by municipal utilities" CP 781-84, 791, 792-98.

TPU Director Benedetti wrote Legislators, assuring them the City only sought surplus authority "*consistent with that long*

enjoyed by the Public Utility Districts under RCW 54.16.180." Appended as Exhibit 3. Also CP 769-70.

TPU attorney, Mr. Nolan testified, March 22, 1973, before the House Local Government Committee—assuring Legislators the surplus authority TPU sought was "the same privileges" Public Utility Districts enjoyed. CP 797-98.

That "same" PUD surplus authority is in RCW 54.16.180 only permits surplus of assets that are:

> [O]bsolete, 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.

Click!'s not "worn out" or "obsolete"—or "unfit to be used in the operations of the system."

Division II disregards the principle that "Courts must give effect to the "plain meaning" legislature intended. *State v. J.M.*, 144 Wn.2d 472,(2001).

"The court's fundamental objective is to ascertain and carry out the Legislature's intent". If statutes are clear, the court must

give effect to that plain meaning as an “expression of legislative intent." *Dept. of Ecology v. Campbell,* 146 Wash.2d at 9-14, 43 P.3d 4 (2002)

Division II also ignores the overall context of the statutory scheme—which demonstrates Legislators provided the public-vote to preventing despoilment of municipal utility property.

"Language within a statute must be read in context with the entire statute and construed in a manner consistent with the general purposes of the statute." *Nationwide Papers, Inc. v. Northwest Egg Sales, Inc*., 69 Wn.2d 72, 76, 416 P.2d 687 (1966). Quoted with favor by *Chemical Bank*, *surpa*, at 782.

Division II’s opinion eviscerates the very “*purpose*” behind Chapter 35 RCW. Meriting review. RAP 13.4(b)(1)(4)

Further discussion of “intent” for surplus is at CP 2267-71.

6.1.5 Opinion Conflicts with City Charter § 4.6—which Provides No Surplus Authority.

Charter § 4.6 contains no “surplus” authority—mandating only “The City ***shall never*** sell, lease, or dispose of any utility

system, or parts thereof essential to continued effective utility service" absent voter approval.

While Tacoma's home-rule authority is "as broad as the state"; Tacoma may ***not*** exercise powers that violate the ***City's own Charter.*** *See Chemical Bank v. WPPSS*, 99 Wn.2d 772, 798, 666 P.2d 329 (1983);

Council's proprietary power is limited by express statutory or constitutional limitations. *Metropolitan Seattle v. Seattle,* 57 Wash.2d 446, 459-60, 357 P.2d 863 (1960); 12 E. McQuillin, supra at § 35.35.

In this case, Council expressly confessed, in City's own Resolution U-10828, that Charter § 4.6's vote requirement applies to Click! CP 588.

6.2 Review Is Warranted Because Division II's Holding Conflicts with Supreme Court Opinion in *Bremer*.

This Court fully interpreted RCW 35.94.020 in *Bremer*—finding a "public utility" was "*any kind of utility in whose operations the public has an interes*t". *Bremerton Municipal*

League v. Bremer, 15 Wn.2d 231, 237; 130 P.2d 367 (Wash. 1942). ("*Bremer*").

Bremer's holding controls. The public-vote is mandatory: CP 736-38, 219-23.

> [T]hese sections of our statutes provide *the only procedure* by which the city can lawfully sell or lease municipal wharves.

The 1917 version of RCW 35.94.010—originally RRS § 9512—included a "*long list*" of utilities. Telecommunications, as *"telephone lines and plants"*—was specifically listed. *Bremer* at 237. CP 1619-21

> 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***.

Bremer found the statutes sweeping language defining "utilities", with phrase, "and any other municipally-owned public utility, or public utility system *similar or dissimilar in*

character", as powerful legislative intent for protecting municipally-owned utility assets.

Bremer applied the statute to protect "wharves and docks" from privatization without a vote—a "utility" not listed in the statute. *Bremer* at 237

> [T]he 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"

The Telecommunications Act of 1985 substituted "Telecommunications" for the words "Telephone" and "Telegraph" throughout the utility code—Title 80 RCW. *See* Laws of 1985. Ch. 450, Sec. 13, Pgs. 1978 -1995. Appended—Exhibit 5, CP 1108-1112, 2677-80.

If "wharves and docks" qualify for *voter-protection*, as "similar" under *Bremer's* holding, certainly a specifically named utility—"Telecommunications"—qualifies.

"Broadband" is telecommunications. RCW 43.330.530 (1)(a) defines it as "Advanced Telecommunications Capability".

Therefore, review is merited—RAP 13.4(b)(1),(4).

6.2.1 Opinion Conflicts with Unabbreviated Statutory Language Defining Click! as a Municipal Utility.

All confusion over the definition of "public utility" in this case stems from a Code Revisor's 1946 abbreviation to RRS § 9512 (now RCW 35.94.010)— replacing the "long list" of utilities with the current language, of **"**any public utility works, plant or system owned by it or any part thereof**"**. Revisor's Notes—Appended as Exhibit 4.

In, The Code Revision Committee's 1946 letter explained RRS 9512 was "***Rewritten for brevity***", CP 1624, 1629

RCW 1.04.020's "savings clause" preserved RRS § 9512 protective public-vote requirement for telecommunications:

> [N]othing herein shall be construed as changing the meaning of any such laws.

6.2.2 Opinion Conflicts with Established Doctrine of *Stare Decisis* by Disregarding *Bremer*.

Stare decisis requires Division II to follow *Bremer's* definition of "utility" and apply RCW 35.94.020 for Click!'s "disposal"—for this is "*the only procedure by which the city can lawfully sell or lease*" Click!

"The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *State v. Devin*, 158 Wash.2d 157, 168, 142 P.3d 599 (2006);

Bremer established RCW 35.94.020 provides *the only procedure* by which Click! can lawfully be sold or leased.

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 P.3d 871 (2010);

Review is warranted. RAP 13.4(b)(1),(4).

6.3 Review Is Warranted Because Opinion Conflicts with 130 Years of this Court's Teachings Regarding the *Ultra Vires* Doctrine.

Division II's finding—that Council's surplus resolution was "*not arbitrary and capricious*"—is completely **irrelevant**. Op at 3, 6, 8-10.

Council's *reasonableness* is not at issue here. Council acted *beyond its authority*—contravening City Charter and State law—which renders Council's disposal of Click! ultra vires.

Council has no disposal authority, *because*, "the discretion and authority were conferred upon the voters, and not upon the officers of the city." *State v. Town Of Newport*, 70 Wash. 286, 291, 126 P. 637 (Wash. 1912).

Time and again, this Court has reaffirmed an act is absolutely ultra vires when the government entity has no authority to act. *Wendel v. Spokane County*, 27 Wash. 121, 124, 67 P. 576 (1902).

A contract in conflict with statutory requirements is illegal and unenforceable as a matter of law. *Hederman v. George*, 35

Wn.2d 357, 362, 212 P.2d 841 (1949); and, "only *the voters*, not the city itself, had *power* to contract." *State v. City of Pullman*, 23 Wash. 583 (1900).

Since Council cannot contract beyond its powers, Click!'s privatization contract is void. *Chemical Bank v. WPPSS*, 99 Wn.2d 772, 797-98, 666 P. 2d 329 (1983)

For over 130 years this Court has consistently applied the ultra vires doctrine to render contracts *void ab initio* when government has "no authority to act on the subject-matter", or the action "is wholly beyond the scope of its powers"—*Wendel*, 27 Wash. at 124; or, manifestly violative of public policy. See *Edward v. Renton*, 67 Wn.2d 598, 604-05, 409 P.2d 153 (1965).

In 1893 this Court stated:

> Where the mode of contracting is expressly provided by law, no other mode can be adopted which will bind the corporation. This principle results from the fact that municipal corporations derive all their powers from their charters.

Arnott v. Spokane, 6 Wash. 442, (1893),

Ultra vires acts are void, for “where the procedure followed has not been in accordance with law, proceedings had thereunder must be held void,” *Jones v. City of Centralia*, 157 Wash. 194 at 212, 289 P. 3, 11 (1930)

In 1902, this Court succinctly explained an act is “absolutely ultra vires” when a governmental entity has “no authority to act on the subject-matter—it being wholly beyond the scope of its powers[.]" *Wendel v. Spokane County*, 27 Wash. 121, 124, 67 P. 576 (1902).

Winkenwerder at 622, on City’s limited powers:

> It is clear from . . . many other decisions of this court that the only limitation on the power of cities of the first class is that their action cannot contravene any constitutional provision or any legislative enactment.

"Ultra vires acts are those done wholly without legal authorization or in direct violation of existing statutes." *Metro. Park v. State*, 85 Wash.2d 821, 825, 539 P.2d 854 (1975).

When a state agency enters into a contract that is completely outside of its authority, i.e., ultra vires, or enters into

a contract that violates public policy or a statutory scheme, the contract is void and unenforceable. See *Finch v. Matthews*, 74 Wash.2d 161, 172, 443 P.2d 833 (1968):

When legislature has not authorized the action, it is ***invalid*** no matter how necessary it might be. *See Hillis Homes, Inc. v. Snohomish Cy*., 97 Wn.2d 804, 808 (1982).

The ultra vires doctrine "protects the citizens and taxpayers from unjust, ill-considered, or extortionate contracts, or those showing favoritism" see *10 E. McQuillin*, Municipal Corporations § 29.02, at 200 (3d ed. 1981).

Washington's Constitution, Article I, Section 19 provides, "No power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." See *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007); also, Article I, Section I provides: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed." *Freedom Foundation v. Gregoire*, 178 Wash.2d 686, 310 P. 3d 1252, 1269 (2013)

The right to vote **"**in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.**"** *Reynolds v. Sims*, 377 U.S. 533, 561-62, (1964). The vote ensures government officials remain accountable, as "trustees" of the people's assets.

By City Charter and state statute, citizens are vested with disposal authority—to determine ***ownership*** and control of their municipal utilities. This right to determine "ownership" of Click! is a "real interest"—essentially a "property right." Council's illegal confiscation of this right violates Citizens' right to due process.

The City's authority in exercising its proprietary power is limited. Tacoma may not act beyond the purposes of the statutory grant of power, *State ex rel. PUD 1 v. Wylie*, 28 Wash.2d 113, 182 P.2d 706 (1947), or contrary to express statutory or constitutional limitations. *Metropolitan Seattle v. Seattle*, 57 Wash.2d 446, 459-60, 357 P.2d 863 (1960).

"[T]he lease here in question was *void ab initio*, 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." *See State v. Town of Newport*, 70 Wash. 286, 126 P. 637, (1912). The statutes in this case are unambiguous. Review is warranted RAP 13.4(b)(1),(4).

7. CONCLUSION

Review should be granted, by RAP 13.4(b)(1),(2),(3) & (4), to reverse trial court's error, free TPU ratepayers from the clutches of a monopolistic cartel, restore Citizens' rightful control and oversight of Click! and support Washington State's policy that clearly recognizes broadband is an essential "public utility". *See* RCW 43.330.532.

Respectfully submitted 12/8/2023:

Tom McCarthy, Appellant

CERTIFICATION

I certify this document contains 4,988 words, excluding parts of the document exempted from word count by RAP 18.17

CERTIFICATE OF SERVICE

I, Thomas McCarthy, certify under penalty of perjury under the laws of the State of Washington, that on the 8th day of December 2023, I caused a true and correct copy of the foregoing document to be served on the following parties: [x] By E-Filing

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THOMAS MCCARTHY - FILING PRO SE

December 08, 2023 - 2:42 PM

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Division Two

October 3, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MITCHELL SHOOK, Plaintiff, v. CITY OF TACOMA, Respondent,	No. 57246-0-II UNPUBLISHED OPINION
THOMAS MCCARTHY and CHRISTOPHER T. ANDERSON, Appellants, v. CITY OF TACOMA, Respondent.	

MAXA, J. – Thomas McCarthy and Christopher Anderson appeal the trial court's grant of summary judgment in favor of the City of Tacoma and denial of their summary judgment motions regarding whether the City lawfully could lease its Click! Network to Rainier Connect without approval by the City's voters.

In 1996, the City authorized Tacoma Power's Light Division, a part of Tacoma Public Utilities (TPU), to build a new telecommunications system as part of its electric utility infrastructure to assist in the generation, distribution, and transmission of electricity. The system also had sufficient capacity to provide cable television, broadband transport, and high-speed

internet to Tacoma Power customers, which resulted in the formation of Click!. Click! operated for over 20 years as a sub-unit of Tacoma Power.

In 2019, the City determined that it no longer wanted to operate Click!. The City Council adopted a resolution that declared Click!'s assets and the telecommunications system's excess capacity to be surplus and not required for or essential to continued utility service. The City then entered into an agreement with Rainier Connect under which Tacoma Power would retain control and ownership of the telecommunications system and, in exchange for a fee, Rainier Connect would use the excess capacity to provide cable, video, and internet access. Rainier Connect subsequently assumed operational control of Click!.

RCW 35.94.010 states that a city may lease or sell any "public utility" works, plant, or system, but under RCW 35.94.020 such a lease or sale cannot take effect until approved in an election by the city's voters. However, RCW 35.94.040(2) provides that voter approval is not required if the property "is surplus to the city's needs and is not required for providing continued public utility service." In addition, § 4.6 of the Tacoma City Charter (TCC) states that the City cannot sell or lease parts of any "utility system" without a vote of the people if the system is "essential to continued effective utility service."

McCarthy and Anderson argue that the trial court erred in granting summary judgment in favor of the City because Click! was a public utility and the City's decision to declare Click! to be surplus was arbitrary and capricious. Therefore, a vote of the people was required. The City argues that (1) res judicata bars McCarthy's and Anderson's claims based on the trial court's summary judgment ruling in the Shook/Bowman lawsuit, (2) Click! was not a public utility, and (3) the City Council's decision to declare Click! to be surplus was not arbitrary and capricious.

We hold that the City Council's decision to declare Click! to be surplus and not required for or essential to continued utility service was not arbitrary and capricious, and therefore we do not address the other two issues. Accordingly, we affirm the trial court's grant of summary judgment in favor of the City and denial of McCarthy's and Anderson's summary judgment motions.

FACTS

Background

In 1996, the Tacoma City Council adopted ordinance 25930, which authorized the construction of a telecommunications system as a separate system of Tacoma Power's Light Division and the issuance of bonds to fund the construction. The telecommunications system was designed to perform a number of traditional electric utility functions, including substation communications functions, automated meter reading, automated billing and bill payment, distribution automation, and government communications functions. The system also was designed to provide cable television, internet access, and transport of signals for service providers offering telecommunications services.

The City then initiated a declaratory judgment against the City's taxpayers and ratepayers to confirm that the enactment of the ordinance and the City's ability to issue revenue bonds was lawful.[1] The trial court granted summary judgment in favor of the City, ruling that the City had authority to provide cable television services and to lease telecommunications facilities and capacity to telecommunications providers.

In 1997, the City Council adopted substitute resolution 33668, which approved Tacoma Power's plan to develop a fiber optic, broad band telecommunications system to provide

[1] *City of Tacoma v. Taxpayers and Ratepayers*, Superior Court No. 96-2-09938-0 (1996).

enhanced electric utility functions as well as cable television service, high speed internet access, and data transport. Tacoma Power constructed approximately 1,500 miles of fiber and coaxial cable. Using the excess capacity of this system, Tacoma Power in 1998 created a sub-unit to provide commercial telecommunication services to its customers under the brand name Click!. Click! operated for the next 20 years.

Over the years, Click!'s operational costs increased significantly, consumer demand for cable television reduced, and Click!'s business model became outdated. In January 2018, an outside consultant suggested a business model in which the City would retain ownership of the telecommunications system including Click!, and a third party would provide cable television and/or internet access while covering Click!'s capital and operating costs.

In August 2018, the consultant recommended that the City Council negotiate term sheets with Rainier Connect and another provider to take over operation of Click!. In March 2019, the City directed the TPU director to enter into good faith negotiation of agreements with Rainier Connect in which the City would retain ownership of the existing telecommunications system and Rainier Connect would use the system's excess capacity to provide cable, video, and internet access. Negotiations resulted in the drafting of the Click! Business Transaction Agreement between the City and Rainier Connect under which Rainier Connect would assume control of Click!.

In October, the City held a public hearing to discuss the proposed surplus of Click!'s assets and excess capacity of the telecommunications system. In November, the City Council adopted Resolution No. 40467, which found Click!'s assets and excess capacity were surplus to the needs of Tacoma Power and TPU. The resolution stated:

> [C]onsistent with RCW 35.94.040 and Section 4.6 of the City Charter, the City Council does hereby find and determine that the Click! Assets and Excess Capacity in the HFC Network, as described in the recitals above, are not required for, and are not essential

> to, continued public utility service or continued 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.

Clerk's Papers (CP) at 854-55. The City then adopted Resolution No. 40468, which authorized the execution of the Click! Business Transaction Agreement between Tacoma Power and Rainier Connect.

In April 2020, Tacoma Power transferred full operational control of Click! to Rainier Connect.

Lawsuits Against the City

In April 2019, Mitchell Shook, representing himself, filed a lawsuit against the City under cause number 19-2-07135-0 seeking an order prohibiting the City from leasing Click! to Rainier Connect without approval from the City's voters. Shook alleged that he was "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." CP at 3.

McCarthy and Anderson also filed suit against the City regarding the potential lease of Click! to Rainier Connect. Paragraphs 1.1 and 1.2 of the complaint described McCarthy and Anderson as follows:

> [McCarthy] is a resident of the city of Tacoma, county of Pierce, state of Washington. Mr. McCarthy is a residential customer and ratepayer of Tacoma Power. Mr. McCarthy also subscribes to residential Internet access over Click! Network.
>
> [Anderson] is a resident of the city of Tacoma, county of Pierce, state of Washington. Mr. Anderson is a residential customer and ratepayer of Tacoma Power. Mr. Anderson also subscribes to residential Internet access over Click! Network.

CP at 3290-91.

The trial court consolidated the Shook lawsuit and the McCarthy/Anderson lawsuit under the Shook cause number. Shook subsequently filed an amended complaint that asserted federal

claims. The City then removed the case to federal court in September 2019. The case eventually was remanded back to state court in April 2020.

In October 2019, Shook and Darrel Bowman filed separate lawsuits against the City regarding the potential lease of Click! to Rainier Connect. The lawsuits were consolidated under cause number 19-2-11506-3.

Summary Judgment in Shook/Bowman Case

In the Shook/Bowman case, the City, Shook, and Bowman all filed summary judgment motions. Bowman was represented by counsel and Shook represented himself. The trial court heard oral argument in February 2019.

The trial court first addressed whether Click! was a "public utility" under RCW 35.94.040 and TCC § 4.6. The court noted that Click! "is a telecommunications system that operates on the excess capacity of TPU's electric [utility's] existing infrastructure." CP at 2119. The court found that there was "no dispute that the CLICK! Network was never formally dedicated as a public utility," and that "the CLICK! Network is not a stand-alone utility." CP at 2119-20. However, the court concluded that Click! was "originally acquired for public utility purposes under RCW 35.94.040 and a part of a utility system under Tacoma City Charter Section 4.6." CP at 2120.

The trial court then addressed whether the City's determination that Click! was surplus and not essential to continued effective utility service under RCW 35.94.040 and TCC § 4.6 was lawful. The court reviewed this determination using the arbitrary and capricious standard – whether the City Council's decision was "willful and unreasoning or without consideration of and in disregard of facts or circumstances." CP at 2021. The court found that all of the City's reasons for declaring Click! surplus were reasonable and ruled in favor of the City:

> The plaintiffs have failed to raise genuine issues of material facts on this issue of whether the City's decisions were arbitrary and capricious. The Court has no basis to invalidate the City's decisions, and as such, the City's resolutions must stand. Because the City is determined that Click!'s assets and the excess capacity are surplus and not essential, the public vote requirements in RCW 35.94.040 and Tacoma City Charter Section 4.6 are not triggered.

CP at 2123.

The trial court entered an order granting summary judgment in favor of the City and dismissing Shook's and Bowman's claims against the City with prejudice on February 28, 2020.

Shook and Bowman appealed the trial court's summary judgment order. However, in April 2020 Shook entered into a settlement agreement with the City in which he agreed to dismiss all pending litigation against the City. In July 2020, this court dismissed the appeal in the Shook/Bowman lawsuit based on the parties' stipulation.

Summary Judgment in McCarthy/Anderson Case

In the McCarthy/Anderson case, both the City and McCarthy and Anderson filed summary judgment motions in July 2022. The trial court granted summary judgment in favor of the City. The court concluded that Click! was not a public utility within the meaning of RCW 35.94.020 or TCC § 4.6. Therefore, the agreement with Rainier Connect was not subject to a public vote. The court did not grant summary judgment based on res judicata relating to the Shook/Bowman lawsuit.

McCarthy and Anderson appeal the trial court's grant of summary judgment in favor of the City and the denial of their summary judgment motions.

ANALYSIS

A. SUMMARY JUDGMENT STANDARD

We review summary judgment orders de novo. *Mihaila v. Troth*, 21 Wn. App. 2d 227, 231, 505 P.3d 163 (2022). We view all evidence in the light most favorable to the nonmoving

party, including reasonable inferences from the evidence. *Id.* Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.* A genuine issue of material fact exists if reasonable minds can come to different conclusions on a factual issue. *Id.* But summary judgment can be determined as a matter of law if the material facts are not in dispute. *Antio, LLC v. Dep't of Revenue*, 26 Wn. App. 2d 129, 134, 527 P.3d 164 (2023).

We can affirm a trial court's grant of summary judgment on any ground supported by the record. *Johnson v. Liquor & Cannabis Bd.*, 197 Wn.2d 605, 611, 486 P.3d 125 (2021).

B. DETERMINATION THAT CLICK! WAS SURPLUS

McCarthy and Anderson argue that the City's decision to declare Click! to be surplus was contrary to law and arbitrary and capricious. We disagree.

As noted above, RCW 35.94.040(2) states that the public vote requirement in RCW 35.94.020 does not apply if a city determines that property originally acquired for public utility purposes "is surplus to the city's needs and is not required for providing continued public utility service." And the public vote requirement in TCC § 4.6 applies only to parts of a utility system that are "essential to continued effective utility service."

The City's Resolution 40467 expressly stated,

> [C]onsistent with RCW 35.94.040 and Section 4.6 of the City Charter, the City Council does hereby find and determine that the Click! Assets and Excess Capacity in the HFC Network, as described in the recitals above, are *not required for, and are not essential to, continued public utility service or continued 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.

CP at 854-55. The issue here is whether this determination was lawful.

The City Council's adoption of Resolution 40467 was a legislative decision. We review legislative decisions under an arbitrary and capricious standard. *Teter v. Clark County*, 104 Wn.2d 227, 234, 704 P.2d 1171 (1985). Under this standard,

> [a] legislative determination will be sustained if the court can reasonably conceive of any state of facts to justify that determination. To be void for unreasonableness, an ordinance or resolution must be "clearly and plainly" unreasonable. Thus, appellants have a heavy burden of proof that the respondents' actions were willful and unreasoning, without regard for facts and circumstances.

Id. at 234-35 (citations omitted).

Here, the City determined that it no longer made sense to operate Click! as part of its electric utility. The City Council made the following findings in Resolution 40467:

> WHEREAS, since [1998], technology and consumer demands have changed with consumers shifting from predominantly consuming cable programming services to predominantly consuming internet access services, and
>
> WHEREAS operational costs for the Click! Network have significantly increased since 1998 while the Click! Network business model has become outdated and unable to respond quickly or efficiently to changes in the market place or provide the capacity to make capital investments necessary to upgrade the network and compete with the private sector.

CP at 849. In other words, the City concluded that operating Click! as part of Tacoma Power no longer was cost effective or beneficial.

This decision was made after careful consideration. Resolution 40467 found that the Public Utilities Board (PUB) had engaged in "many years of study" regarding alternative Click! business models and in conjunction with the City Council had hired an outside consultant to assist in the analysis. CP at 850. The consultant recommended that the City no longer operate Click! and engage in negotiations with third party providers. In addition, both the PUB and the City Council held public hearings regarding the proposed surplus of Click! assets.

Finally, the facts supported the City's determination that operation of Click! was not required for or essential to continued utility service. The City provided a declaration from Tenzin Gyaltsen, the general manager of Click!, who testified that there were no Tacoma Power customers who were relying on any part of Click! for any of their utility services.

McCarthy and Anderson make two arguments in support of invalidating Resolution 40467. First, Anderson argues that Resolution 40467 was contrary to law and void because RCW 35.94.040 does not authorize a city to declare an entire utility system surplus. However, *Coates v. City of Tacoma* established that Click! was not a separate utility system. 11 Wn. App. 2d 688, 698, 457 P.3d 1160 (2019). Instead, this court concluded that Click! was merely a betterment of the City's electric utility. *Id.* Therefore, the City did not declare an "entire utility system" surplus.

Second, McCarthy and Anderson emphasize that Click! continues to provide the exact same services to Tacoma Power customers as when the City operated Click!. They claim that this fact means that Click! continues to be essential for continued utility service. However, the question is whether the operation of Click! is essential for *the City* to provide continued utility service, not whether some other entity is providing the service. There is no evidence suggesting that it was essential for the City to provide cable television and internet access to its electric utility customers.

We conclude that the City did not act arbitrarily or capriciously in adopting Resolution 40467. And although the trial court did not rule on this basis, we can affirm a summary judgment order on any ground supported by the record. *Johnson*, 197 Wn.2d at 611. Therefore, we hold that the trial court did not err in granting summary judgment in favor of the City.

C. ATTORNEY FEES ON APPEAL

The City argues that McCarthy's and Anderson's appeal is frivolous, and therefore we should award attorney fees to the City under RAP 18.9(a). In fact, the prevailing theme of the City's entire brief is that every argument McCarthy and Anderson made was frivolous. We disagree.

An appeal is frivolous if, considering the entire record, we determine that the appeal presents no debatable issues and is completely without merit. *Lutz Tile Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007).

The City argues that this appeal is frivolous because res judicata bars McCarthy's and Anderson's claims. But McCarthy and Anderson argue that res judicata should not apply to bar their claims because they were not parties to the Shook/Bowman lawsuit. This argument raises debatable issues and is not completely without merit.

The City argues that McCarthy's and Anderson's argument regarding whether the public vote requirements of RCW 35.94.020 and TCC § 4.6 apply to the lease of Click! are frivolous, primarily based on *Coates*, 11 Wn. App. 2d 688. But although *Coates* held that Click! was not a stand-alone public utility, *id.* at 698, both RCW 35.94.020 and TCC § 4.6 require a public vote for the lease of a *part* of a utility system. *Coates* did not necessarily resolve whether Click! is a "part of" Tacoma Power. In addition, the trial court in the Shook/Bowman lawsuit ruled against the City on this issue, and arguably collateral estoppel precludes the City from even raising this issue.

Finally, the City argues that McCarthy's and Anderson's challenge to the determination that Click! was surplus and not required for or essential public utility service is frivolous. But this issue involves unique facts – declaring "surplus" a system that is still viable and will

continue to function as before under a different operator. McCarthy's and Anderson's argument on this question raises debatable issues and is not completely without merit.

We reject the City's baseless claim that this appeal is frivolous and decline to award attorney fees to the City on appeal.

CONCLUSION

We affirm the trial court's grant of summary judgment in favor of the City and denial of McCarthy's and Anderson's summary judgment motions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, J.
MAXA, J.

We concur:

Glasgow, CJ
GLASGOW, C.J.

Price, J.
PRICE, J.