

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

- - - - - x  
 FAIRFAX COUNTY WATER :  
 AUTHORITY, :  
     Plaintiff : Civil Action No.  
     vs. : 2008-16114  
 CITY OF FALLS CHURCH, :  
     Defendant :  
 - - - - - x

Fairfax County Circuit Court  
 4110 Chain Bridge Road  
 Fairfax, Virginia 22030

September 14, 2009

VOLUME 1

The parties met, pursuant to the notice of  
 the Judge, at 10:17 a.m.

BEFORE: THE HONORABLE R. TERRENCE NEY

1 APPEARANCES:  
 2 On Behalf of the Plaintiff:  
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 20  
 21 ALSO PRESENT: Charles Murray, Fairfax County Water  
 22 Authority; John Tuohy, City of Falls Church

1 PROCEEDINGS  
 2 - - - - -  
 3 THE COURT: Good morning. Fairfax  
 4 County Water Authority against City of Falls  
 5 Church. Are the parties ready?  
 6 MR. RAPHAEL: Good morning, Your Honor.  
 7 Yes, sir. Stuart Raphael for Fairfax Water.  
 8 THE COURT: We must have had some  
 9 confusion as to everything we were going to do. I  
 10 thought the only thing we were doing today is the  
 11 motion in limine filed on behalf of the City with  
 12 regard to excluding Fairfax Water's expert  
 13 witness, Christopher Woodcock.  
 14 I then understood that, from  
 15 Mr. Raphael's letter to my law clerk of September  
 16 the 3rd, that Mr. Thomas would like to be heard on  
 17 the City's motions in limine to exclude any  
 18 statements by the City Council and its staff,  
 19 excluding evidence of the City's past water rates  
 20 or water fund transfers to the general fund.  
 21 Mr. Raphael then wrote, "Accordingly, I  
 22 also enclose courtesy copies of Fairfax Water's

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PLAINTIFF'S	
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1 briefs in opposition to those two motions."  
 2 We did not receive and we do not have  
 3 those two briefs, nor did we have Mr. Thomas'  
 4 briefs with regard to those matters.  
 5 I'm happy to hear them this morning, but  
 6 I'll have to hear it cold, because I haven't had  
 7 the benefit of the briefs.  
 8 Yes, sir.  
 9 MR. RAPHAEL: Yeah. That's --  
 10 THE COURT: And I don't find any fault  
 11 with counsel. It's just there's a lot going on.  
 12 MR. RAPHAEL: I understand, Your Honor.  
 13 With the Court's permission, we would like to  
 14 proceed today with the motions and the trial. We  
 15 have a lot of witnesses here. And I think we can  
 16 finish this week if we can get started.  
 17 THE COURT: Well, we're going to have --  
 18 we're set for 2 weeks. And because of a variety  
 19 of scheduling problems, we're going to just be  
 20 doing the best we can. We just have lots of --  
 21 lots of time constraints.  
 22 I didn't think we were doing anything

1 except for the motions today. And as a result,  
2 I've got some things in the back that will have to  
3 be attended to.

4 Here's what we're going to do. We're  
5 going to go until 3:00 today. Tomorrow we're  
6 starting at 9:30. But counsel can be here as  
7 early as 9:00. We may be able to start that  
8 early, but I've got an appointment at 8:00.

9 Tomorrow we have to adjourn at 4:00 because I  
10 teach law at George Mason on Tuesdays.

11 On Wednesday we'll start at 9:00,  
12 perhaps at 8:30, so we can catch some of this time  
13 back. But on Thursday we're going to have to  
14 adjourn at 4:00, because I have to give a lecture  
15 to the Federal Bar Association in Alexandria at  
16 5:00, and it's going to take at least an hour to  
17 get down there at that time of day.

18 On Thursday we'll start at 8:30, or 9:00  
19 at the latest, seeing how we're doing. Then we  
20 have to be flexible with our time. Generally we  
21 don't sit past 1:00 on Thursdays because of Friday  
22 motions. Obviously we will not sit on Friday.

1 Next week, we'll start on Monday at  
2 9:00. We'll go to 4:00. Tuesday we'll start at  
3 9:00 and we'll go to 4:00. Wednesday, we'll start  
4 at 9:00 and we'll go till 5:00. Thursday, 9:00  
5 until 1:00.

6 I think that should give us enough time.  
7 I mean, this case is -- is really not all that  
8 complicated for everybody.

9 MR. RAPHAEL: That's right.

10 THE COURT: I mean, you all know more  
11 about it than I do. But from looking at the  
12 papers and having been involved in it, it doesn't  
13 seem to me it's all that complicated.

14 MR. RAPHAEL: And we're down -- it's  
15 just Count V.

16 THE COURT: Only on the constitutional  
17 issue. That's correct.

18 Yes, Mr. Thomas. Do you wish to be  
19 heard, sir?

20 MR. THOMAS: Not on the issues we're  
21 talking about right now, Judge.

22 THE COURT: All right, sir. Everybody

1 okay with that?

2 MR. RAPHAEL: Yes, sir.

3 THE COURT: All right. Now, how would  
4 you like to proceed? Do you want to proceed first  
5 on your motion in limine with Mr. Woodcock, and  
6 then -- again, I'll be glad to take the other two  
7 without the benefit of briefs, if you don't mind.  
8 I'll leave it to your discretion.

9 MR. RAPHAEL: That's --

10 MR. THOMAS: I think that's fine, Judge.

11 MR. RAPHAEL: That's fine with us, Your  
12 Honor. I will be asking for the rule on  
13 witnesses. I will defer to the Court's discretion  
14 as to when the best time is to --

15 THE COURT: Inasmuch as some of the  
16 issues that will be raised in the motions are  
17 going to be -- I mean, everything is wound up in  
18 the substance of this case, it seems to me that  
19 the witnesses should be excluded at this point.  
20 All right?

21 Those persons in the courtroom other  
22 than the party representatives at counsel table,

1 would you please rise -- who are going to testify.

2 Let's see. One, two, three, four -- all  
3 right. Ladies and gentlemen, you all are going to  
4 have to wait outside until called to testify in  
5 this matter. The reason for this rule is so that  
6 your testimony is based upon matters within your  
7 personal knowledge as opposed to anything you  
8 might hear in the courtroom.

9 Please don't discuss this case while  
10 you're waiting to testify. And even more  
11 importantly, don't discuss it after you've  
12 testified with anyone who may be waiting to  
13 testify. That could cause real problems and  
14 affect the sanctity of the trial we're having.

15 All right. We'll try to get to you as  
16 soon as we can. But you can tell, with the issues  
17 presented here, it's going to take some time. So  
18 you'll have to be patient.

19 All right. Thank you very much.

20 MR. RAPHAEL: Thank you, Your Honor.

21 THE COURT: Yes, sir.

22 All right. Mr. Thomas.

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1 MR. THOMAS: Thank you, Judge. Sandy  
2 Thomas representing the City of Falls Church.  
3 As the Court knows, we have brought a  
4 motion in limine.  
5 THE COURT: Right.  
6 MR. THOMAS: Our motion to strike the  
7 expert designation of plaintiff's expert.  
8 THE COURT: And I've read your pleadings  
9 and I've read the responsive pleadings. Let me  
10 ask you these questions. Obviously Mr. Woodcock  
11 cannot be permitted to state in his opinion what  
12 the City of Falls Church is doing is illegal or  
13 improper.  
14 I mean, I think even Mr. Raphael agrees  
15 with that. I shouldn't say even Mr. Raphael. I  
16 believe in his papers he makes clear he agrees  
17 with that. But what if Mr. Woodcock were to  
18 testify that this is the way it's done in every  
19 jurisdiction in the United States insofar as the  
20 charges and how they're used by the municipality,  
21 but the City of Falls Church does it differently?  
22 That doesn't make it illegal.

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1 I guess what I'm saying, since it's not  
2 a jury trial, what is the harm of hearing  
3 Mr. Woodcock's history lesson as to the way other  
4 jurisdictions do it? But the fact that Falls  
5 Church does it differently -- I'm not even  
6 suggesting Falls Church does do it differently,  
7 because the papers that you filed suggest that the  
8 way Falls Church, the City does it is very similar  
9 to many jurisdictions throughout the Commonwealth,  
10 not to mention other jurisdictions in the United  
11 States.  
12 But even if it weren't, unless it's  
13 running afoul of the law, specifically the  
14 Constitution, what -- wouldn't it be more  
15 efficient just to hear what he has to say?  
16 MR. THOMAS: No. It wouldn't. And  
17 here's what I think is the missing component in  
18 the way the Court has framed the issue. And that  
19 is the Virginia Supreme Court itself has said,  
20 without ambiguity, that a municipality can profit  
21 from its operations of its utilities.  
22 THE COURT: Right.

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1 MR. THOMAS: And what Mr. Woodcock wants  
2 to do is come in and offer a contrary opinion.  
3 They can call it a policy opinion. They can call  
4 it what they want. But it is a contrary opinion  
5 to that that's established by the Virginia Supreme  
6 Court.  
7 And so I think the harm, frankly, is  
8 that it would be highly prejudicial to the City to  
9 have Mr. Woodcock come in and sort of -- with a  
10 disguised legal opinion, which is this is what  
11 municipalities should not do, when the Virginia  
12 Supreme Court has very clear law that says  
13 municipalities can do that. Judge, I don't  
14 think --  
15 THE COURT: I'm able to make that  
16 distinction, though. I mean, really, have faith  
17 in me, Mr. Thomas. I can figure out when he's  
18 stepping over that particular line.  
19 And I thought that his distinction was  
20 sort of even a little more narrower, depending on  
21 whether or not you -- we talk about the return on  
22 equity principle, the utility method of rate

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1 making, enterprise fund, these kinds of  
2 distinctions that, again, they may be very  
3 interesting, but, ultimately, I just don't see  
4 how -- if I were to say everything Mr. Woodcock  
5 has testified to the Court will accept  
6 100 percent, that's the end of the case, because  
7 it's not the end of the case unless what Falls  
8 Church is doing -- and I can't imagine there's  
9 going to be a great deal of dispute about what  
10 Falls Church is actually doing -- runs afoul of  
11 the law.  
12 MR. THOMAS: I think that's fair except,  
13 again, Mr. Woodcock's opinion, on page 23, for  
14 example, of his report says -- and it's quite  
15 absolutist -- it says no community should charge  
16 more than the cost of service to provide water.  
17 THE COURT: That's his opinion, though.  
18 MR. THOMAS: It is his opinion. And the  
19 problem -- and of course I credit the Court's  
20 ability to distinguish between him coming in and  
21 offering a legal opinion versus something else.  
22 The problem is that the opinion that he is

1 offering is flatly contrary to Virginia law, and  
2 it shouldn't be offered in the first place. In  
3 other words, I think we need to back the analysis  
4 up to the very beginning.

5 He's already offered an opinion -- he's  
6 already authored, I should say, an opinion that is  
7 totally inconsistent with Virginia law.

8 Judge, it's no different than if a  
9 plaintiff wanted to come into this court in a  
10 personal injury case and say I want to put on an  
11 expert witness who is going to testify that even  
12 though the plaintiff contributed to her injuries  
13 in this case, she should still be able to recover  
14 from that defendant.

15 THE COURT: Right.

16 MR. THOMAS: She should still be able to  
17 recover. Because I can tell the Court -- I'm an  
18 expert and I can tell the Court, really the policy  
19 in terms of allocation of fault is better if  
20 plaintiffs in that situation can recover from  
21 defendants in that situation.

22 That would never come in. Now, I

1 appreciate the court versus jury distinction. But  
2 it never -- it would never come in because  
3 Virginia law is very clear; we're a contributory  
4 negligence state.

5 This is no different at all, Judge.  
6 It's no different at all. That's what  
7 Mr. Woodcock wants to come in and say as a matter  
8 of policy, which again, it's just a -- it's a  
9 stalking horse for a legal argument. But it's a  
10 legal argument that's been resolved in Virginia.

11 THE COURT: Well, Mr. Raphael probably  
12 disputes that. Or, put differently, he believes  
13 it's been resolved differently. We have the two  
14 competing lines of cases. But, you know, one  
15 does, if I read them correctly, address the  
16 treatment of residents versus the treatment of  
17 nonresidents.

18 MR. THOMAS: That's the McMahon line of  
19 cases.

20 THE COURT: Right.

21 MR. THOMAS: Which deals exclusively  
22 with whether charges levied on residents by a

1 locality are an exercise of police power or a tax.  
2 That's all that line of cases deals with.

3 THE COURT: Right.

4 MR. THOMAS: And I understand the Court  
5 understands that.

6 I think that this is an issue we can and  
7 we should resolve at this juncture. The only gate  
8 through which the plaintiff can, or at least says  
9 that it can offer Mr. Woodcock's opinion is  
10 through this holding out exception gate. And I --  
11 I appreciate that that's -- that there's some  
12 complexity to that issue. But, again, I think  
13 that's something that we should resolve now.  
14 Because, absent the application of that gate --  
15 that's the pivot point for the whole effort on the  
16 part of the plaintiff to offer Mr. Woodcock's  
17 testimony.

18 Well, what they say is, well, because  
19 this McMahon line applies, and, again, I agree  
20 with, I think, with the Court's representation, it  
21 doesn't apply. Not its representation. But it  
22 doesn't apply because it's only applied to in-town

1 or in-city residents.

2 THE COURT: Uh-huh.

3 MR. THOMAS: But their approach is,  
4 well, because this McMahon line of cases applies,  
5 well, then Mr. Woodcock should be able to offer  
6 his opinion that that -- those charges by Falls  
7 Church are a tax. And they're a tax because the  
8 City, quote, holds itself out as a utility  
9 provider.

10 That's, as I said, that's the pivot  
11 point that then they say we then can offer  
12 Mr. Woodcock's testimony because the City holds  
13 itself out.

14 THE COURT: But isn't the first question  
15 you're going to ask on cross-examination is that,  
16 with regard to the holding out, that there's a  
17 distinction between residents and nonresidents?

18 MR. THOMAS: I am now.

19 THE COURT: Well, no, but I mean --

20 MR. THOMAS: Of course.

21 THE COURT: -- that's the challenge to  
22 his testimony insofar -- of course I don't know

1 what he's going to testify factually. I haven't  
2 read his deposition.

3 MR. THOMAS: Right.

4 THE COURT: But insofar as legally, you  
5 could sit down and look out the windows and the  
6 door and say he can testify all he wants, it has  
7 nothing to do with what's going on here, because  
8 these are services being offered to nonresidents,  
9 and that falls within the rubric of the different  
10 line of cases and is plainly legal in the  
11 Commonwealth of Virginia.

12 MR. THOMAS: Well, I could make that  
13 argument. And we have made that argument to the  
14 Court.

15 But the problem is this. Whether the  
16 holding out exception applies -- and it doesn't.  
17 Whether the holding out exception applies or it  
18 doesn't isn't a question for Mr. Woodcock. It's  
19 not a question for a nonlegal expert witness.

20 Okay? That's the avenue that the  
21 plaintiff wants to use in order to get  
22 Mr. Woodcock's testimony in.

1 And, again, I think this is a threshold  
2 issue that the Court can determine now. And that  
3 is, this exception doesn't have anything to do  
4 with this case. And that's a legal analysis.  
5 That's not a question of fact. And it's not a  
6 question -- because obviously we do provide  
7 service outside of our City limits. And we have  
8 for decades.

9 But that's not a question for expert  
10 testimony. It's a legal determination that the  
11 Court can make now. If the Court resolves that  
12 legal determination the way I believe it should  
13 resolve that legal determination, Mr. Woodcock  
14 can't come in and testify, because what he wants  
15 to offer is an opinion that's contrary to a long  
16 line of Virginia cases, all of which I think we've  
17 cited to the Court.

18 THE COURT: Is Mr. Woodcock -- I mean,  
19 when he was examined at his deposition, is he  
20 going to make the distinction or say there is no  
21 distinction between residents versus nonresidents?

22 MR. THOMAS: That's what he said in his

1 deposition. His analysis applies regardless of  
2 whether this is extraterritorial charges and rates  
3 or in-territorial charges and rates.

4 THE COURT: Did you question him or  
5 attempt to question him as to the distinction  
6 drawn by the decisions in the Commonwealth of  
7 Virginia?

8 MR. THOMAS: I did. I did. And with  
9 respect to the decisions in the Commonwealth of  
10 Virginia, for example, the Attorney General  
11 opinion that we've cited to the Court and we've  
12 attached to our bench brief, he'd never seen it.

13 So, again, I think asking Mr. Woodcock  
14 about the interpretations -- his interpretations  
15 of Virginia law is one thing. Whether he can  
16 testify about an opinion, what they characterize  
17 as a policy opinion, which is contrary to those  
18 holdings of Virginia law, is another matter.

19 THE COURT: Uh-huh.

20 MR. THOMAS: And the only way that the  
21 plaintiff tries to bridge between those two is by  
22 attempting to apply this McMahan line of cases and

1 then turning on the holding out exception as  
2 saying, well, that holding out exception is going  
3 to equalize, right, the City of Falls Church with  
4 Fairfax County with respect to whether it's  
5 properly exercised its police power in the County.

6 That's the only way that they get into  
7 the place or get to a place where Mr. Woodcock is  
8 offering an opinion about whether this is a tax or  
9 not.

10 And, again, I appreciate the Court's  
11 ability to discern between whether he's offering a  
12 legal opinion or not, but that's really not my  
13 point. My point is the opinion, no matter how you  
14 characterize it, is contrary to Virginia law. And  
15 we can weave through all of the orange cones that  
16 the plaintiff has set up here in order to get to  
17 that place, but the one cone it can't get past is  
18 this holding out exception, which I know we've  
19 laid this out in our papers to the Court -- that  
20 is --

21 THE COURT: Explain to me again exactly  
22 how the holding out exception works.

1 MR. THOMAS: The holding out exception  
2 is a very simple and narrow thing. It provides an  
3 exception to the general rule that a locality  
4 providing service outside of its boundaries need  
5 not provide service to anyone who wants it.

6 So the holding out exception is --  
7 provides an exception to that rule, which says, if  
8 you provide -- if you hold yourself out as a  
9 utility providing service extraterritorially, if  
10 you hold yourself out that way, then you can't  
11 refuse, key word there, you cannot refuse to  
12 provide service but for a utility-based reason.  
13 That's it. That's as far as it goes. It's an  
14 exception to that rule.

15 The City of Falls Church, as it relates  
16 to this case, the City of Falls Church hasn't  
17 refused to provide service to anyone. It hasn't  
18 refused to provide service to anyone. What the  
19 plaintiff wants to do is take that exception and  
20 elevate it to something that it most definitely is  
21 not, which is some kind of rule that says that if  
22 you hold yourself out as providing utility service

1 extraterritorially, well, then you're a public  
2 utility for all purposes, and you've got to  
3 provide that service at cost, and moreover, you  
4 are then judged in a way equal with the locality  
5 where you're providing that service in terms of  
6 whether the rates and charges that you impose are  
7 levies, which would be a proper exercise of the  
8 police power of the locality, or whether they're  
9 taxes.

10 The problem is very simple. Falls  
11 Church doesn't have any police power in the County  
12 of Fairfax. It doesn't have any police power. So  
13 that whole McMahan line of cases, as I think the  
14 Court observed a moment ago, that whole McMahan  
15 line of cases very sensibly applies only to  
16 instances where the locality itself has imposed,  
17 either as a proper exercise of its police power,  
18 on its own citizens, a levy or a fee, or whether  
19 that levy or fee applied on its own citizens is  
20 actually a tax.

21 Okay. So the holding out exception, it  
22 only asks whether a municipal utility offering

1 service outside of its boundaries can refuse to  
2 provide service. And if it can refuse to provide  
3 service, has it done so on some utility-based  
4 reason.

5 Again, that is not our case. We are not  
6 in that place.

7 THE COURT: You mean the City cannot  
8 refuse to provide services? If someone says we  
9 would like to hook up to your water, you say,  
10 well, it's all the way out in Herndon. It's too  
11 far for us.

12 MR. THOMAS: If the holding out  
13 exception had been adopted by the Virginia Supreme  
14 Court, which it has not, its application would  
15 come up in a context where the City of Falls  
16 Church provides service outside of its boundaries,  
17 in some particular area outside of its boundaries,  
18 and it has hooked up with one customer, and  
19 another customer -- and the perfect example of  
20 this is the Town of Rocky Mount case that we cited  
21 to the Court. The City of Falls Church provides  
22 service outside the -- it has hooked up service to

1 one customer here, and another customer says, hey,  
2 you've got to hook up to me too. You've got to  
3 hook up to me too.

4 The general rule in that setting, as I  
5 mentioned a moment ago, the general rule in that  
6 setting is that a municipality providing utility  
7 service outside of its boundaries has no  
8 obligation to hook up to anybody except, except if  
9 it holds itself out in that area as providing  
10 service.

11 And if it holds itself out in that area  
12 as providing service, then it can't refuse to hook  
13 up this guy over here. It can't refuse to hook up  
14 this guy over here in the absence of a  
15 utility-based reason for not doing it.

16 Okay? So that's -- that's the way this  
17 holding out exception comes up. It is most  
18 definitely not a doctrine. It's an exception. So  
19 it has to be an exception to something. It is  
20 definitely not a doctrine that does what the  
21 plaintiff says that it does, which is, once you --  
22 once you hold yourself -- this is their theory,

1 not the law. But once you hold yourself out as  
2 providing service as a utility outside of your  
3 boundaries, well, then you're a public utility for  
4 all purposes, and you've got to provide your  
5 services at cost. That's what Mr. Woodcock wants  
6 to say. We sort of get into the Woodcock world  
7 where no municipality should provide service,  
8 water service in any way except at cost.

9 But what they say this holding out  
10 exception means is that if you come in there and  
11 you provide service and hold yourself out as  
12 providing service extraterritorially, then you've  
13 got to provide that service at cost.

14 And this regime about -- within the  
15 McMahon line of cases, about whether what you're  
16 actually doing is a proper exercise of police  
17 power or is it a tax, well, then that applies to  
18 you too. Okay? That's not what the holding out  
19 exception says, Judge.

20 And I realize that we sort of have to  
21 go, you know, in this circuitous route to come  
22 back to -- to come -- I'm sorry -- but to come

1 back to the question of whether Mr. Woodcock  
2 should be permitted to testify. But I think we  
3 sort of have to go down -- we have to go through  
4 that odyssey in order to arrive back at the place  
5 where the only way that Mr. Woodcock --

6 THE COURT: Doesn't Mr. Woodcock then  
7 have to testify that the City, in offering service  
8 beyond the City limits, is unable to refuse  
9 service if anybody wants it?

10 MR. THOMAS: He --

11 THE COURT: Doesn't he have to say that?

12 MR. THOMAS: He could testify --

13 THE COURT: I mean, from your point of  
14 view. Not necessarily from Mr. Raphael's. To fit  
15 within the holding out exception.

16 MR. THOMAS: Well, let me -- I'll answer  
17 the question. Let me take it one step back. I  
18 don't think he can testify anything at all about  
19 the holding out exception. That's a legal  
20 doctrine. If he comes in and testifies --

21 THE COURT: Well, we'll see how the City  
22 of Falls Church works. Is he going to testify

1 that because the City of Falls Church offers to  
2 sell water outside the City boundaries, it cannot  
3 refuse if anybody says we want your water? Can he  
4 testify to that?

5 MR. THOMAS: I think he would be  
6 arriving at a legal conclusion if he were to  
7 testify to that. I can't -- I myself can't reason  
8 away that that's anything but a legal conclusion.  
9 All right?

10 Even if it is something other than a  
11 legal conclusion, Judge, it's totally irrelevant.  
12 This is not a case about the City of Falls Church  
13 refusing service to anyone.

14 THE COURT: What your position is, it's  
15 a case about the City of Falls Church having  
16 surplus water which it is offering for sale, and  
17 if people want to buy it, then they can sell it at  
18 profit and use it for their general fund, et  
19 cetera, et cetera, et cetera, falling within that  
20 other line of cases, the Mount Jackson line of  
21 cases.

22 MR. THOMAS: That's correct. That's

1 correct. But I don't -- I don't think we -- I  
2 don't think we can, and as a matter of law, should  
3 be in a place where the question is does the  
4 holding out exception apply because the City can't  
5 refuse service to anyone. That doesn't take us  
6 anywhere. That doesn't lead us to any place in  
7 this case that is relevant to the outcome on the  
8 question of whether our rates and charges are  
9 constitutional.

10 It doesn't, for the simple reason that  
11 the case isn't about what the holding out  
12 exception applies to. It's not about that. It's  
13 not about whether the City is --

14 THE COURT: Well, if the -- if the Court  
15 were to find that the City of Falls Church is not  
16 holding itself out to other areas of Fairfax  
17 County as the provider of water, isn't that the  
18 end of the inquiry as far as you're concerned? If  
19 they're not holding out, then they fall within the  
20 non-holding out line of cases, and what they're  
21 doing with their money is entirely proper?

22 MR. THOMAS: I think that's true. My --

1 my only -- my only problem with that approach is  
2 that we -- we have no reason to be having a  
3 discussion about the holding out exception in the  
4 first instance. Because this is not a case about,  
5 like Rocky Mount was, it's not a case about  
6 whether the City of Falls Church has refused to  
7 provide service to anyone. That's the only time  
8 the holding out exception actually comes into  
9 play.

10 So again, I think what we have, we're  
11 at -- I think it's a threshold issue, really, for  
12 the Court. And I think it has, you know, a lot to  
13 do with what kind of evidence comes in and what  
14 doesn't come in. And, you know, I -- I do agree  
15 with the Court that it can -- it can separate out  
16 between, you know, improper legal opinion offered  
17 by Mr. Woodcock and other sort of policy-based  
18 opinion.

19 But, again, my -- my complaint, really,  
20 is that we need to take a step back from that,  
21 because Mr. Woodcock has in his -- page 3 and  
22 page 23 and throughout his report, his opinions,

1 all of them, where he's actually offering  
2 opinions, are based on this idea, without any  
3 ambiguity, that a city cannot profit from its  
4 water utility. That's the heart of his opinion.  
5 And my fundamental problem is that Virginia law  
6 says something totally different from that.

7 THE COURT: Right.

8 MR. THOMAS: And so having Mr. Woodcock  
9 come in and offer testimony about something that  
10 is -- that is resolved in the law --

11 THE COURT: Your view of the law would  
12 be that Fairfax Water operating as a public  
13 utility cannot profit. But if it chose to offer  
14 water to the citizens of Fauquier County, perhaps  
15 it could.

16 MR. THOMAS: I'm not sure I agree with  
17 that, and here's why. I think if we went and  
18 looked at the Virginia Water and Sewer Authorities  
19 Act, we would see that Fairfax Water, like other  
20 water and sewer authorities around Virginia, are  
21 statutorily prohibited from doing that. In other  
22 words, I don't think we'd even get to that place.

1 And I also think that Fairfax Water has  
2 a charter enabled by the Water and Sewer  
3 Authorities Act where it wouldn't be in a place to  
4 go offer service, for example, in Fauquier.

5 THE COURT: But Falls Church is able to  
6 offer services.

7 MR. THOMAS: It is. It is, under  
8 15.2-2109 of the Virginia Code.

9 THE COURT: So it's not operating under  
10 the same constrictions as Fairfax Water.

11 MR. THOMAS: It is most definitely not.  
12 It is most definitely not. That is a key  
13 distinction. It is most definitely not. And  
14 that's why it lands, Your Honor, in these cases  
15 that we've cited to the Court that say, look, a  
16 Virginia municipality that is providing service  
17 outside of its boundaries can profit from that  
18 service. Can profit from that service.

19 That authority does not say, and this  
20 much I suspect is obvious, but that authority does  
21 not say a Virginia municipality providing service  
22 outside of its boundaries can profit from its

1 water service sold to nonresidents except where it  
2 holds itself out as the utility provider. That is  
3 not the State of Virginia law.

4 So I think the opinion, again, the  
5 opinion that Fairfax Water wants to bring in, as a  
6 threshold matter, Mr. Woodcock's view of the  
7 world, that municipal utilities shouldn't profit  
8 from their service, shouldn't profit from water,  
9 because water is essential to life, that opinion  
10 runs headlong into the applicable authority here.  
11 We can debate all day long whether the McMahon  
12 line applies. I don't think there is a debate  
13 about whether the holding out exception applies.

14 But for Mr. Woodcock to be able to come  
15 in and offer an opinion that runs right into Mount  
16 Jackson and its progeny I think is improper.  
17 Again, I analogize it to somebody coming in and  
18 saying, gee, that plaintiff ought to be able to  
19 recover.

20 THE COURT: Thank you. Let me hear from  
21 Mr. Raphael. Thank you, Mr. Thomas.

22 Yes, sir.

1 MR. RAPHAEL: Good morning, Your Honor.  
2 I think there are two things going on with this  
3 particular argument. One is whether Woodcock  
4 should be allowed to express a particular opinion  
5 or statement at trial. The other issue is the  
6 overarching issue in the case, what is the law  
7 that applies to this.

8 THE COURT: And I raised that. That  
9 came from me as opposed to Mr. Thomas.

10 MR. RAPHAEL: Right. I would like to  
11 respond to both.

12 THE COURT: Absolutely.

13 MR. RAPHAEL: With regard to the issue  
14 of whether Mr. Woodcock should testify, your  
15 original instinct was dead on. What Mr. Thomas is  
16 talking about is a very small segment of what  
17 you're going to hear from Mr. Woodcock. And we  
18 tried to lay out at page 2 of our brief all of the  
19 things he's going to talk about. This is a very  
20 small part of it.

21 So from the standpoint of judicial  
22 efficiency, you can't -- he can't be excluded from

1 saying anything. He's got a lot of stuff that  
2 we're not even discussing here that he's going to  
3 talk about.

4 For example, he has studied the  
5 financial system of the City of Falls Church, and  
6 I'm using him to summarize what the financial  
7 transfers have been and that sort of thing. It's  
8 clearly permissible for him as an expert to do.  
9 That wouldn't be excluded if they won this motion.

10 So I think from the standpoint of  
11 judicial efficiency, it makes little sense to try  
12 to reach some kind of categorical ruling before  
13 you've even heard what he has to say. So I think  
14 that the motion should be --

15 THE COURT: I looked at, on page 2 of  
16 your memorandum, all of the things that he was  
17 going to. And it seemed to me -- that's why I put  
18 it to Mr. Thomas that way -- as more of a history  
19 lesson in general as to what other people do, and  
20 specifics with regard to what Falls Church does,  
21 which probably is not going to be a great deal of  
22 dispute. It's the legal effect of what the City

1 is doing that's at issue.

2 MR. RAPHAEL: That's right. And so --  
3 so I think the motion in limine should be denied  
4 for that reason. That he can testify on numerous  
5 things that are relevant. And he shouldn't be  
6 categorically excluded. And if we get to -- if I  
7 ask him a question that would be impermissible --  
8 Mr. Woodcock, isn't it true that Virginia law says  
9 X -- there would be an objection. It would be  
10 sustained.

11 I'm not going to ask him that. And he's  
12 not going to testify about what Virginia law is.  
13 So the motion in limine with regard to that issue  
14 should be denied.

15 I do want to respond to the lengthy  
16 argument that you've heard from Mr. Thomas on the  
17 underlying law here. These are the same  
18 arguments, Your Honor, that were raised at the  
19 demurrer stage in March. And Judge Thatcher heard  
20 Mr. Thomas's arguments then, and he wrote a very  
21 significant opinion denying the City's demurrer  
22 and saying that if the facts are as we allege,

1 that the Court couldn't say, as a matter of a law,  
2 that what the City is doing is not  
3 unconstitutional.

4 We've spent the last 6 months preparing  
5 the case for trial. We're ready to go. And I  
6 think -- I suspect that however the Court decides  
7 this case, it's going to go up to the Supreme  
8 Court. We're ruling on what is a very important  
9 issue in Virginia. And I think it's important  
10 that the record be complete in order to facilitate  
11 not only this Court's determination of what the  
12 law is, but the Supreme Court's as well.

13 Now, with regard to the issue of what  
14 law does apply here, it's true that we have cited  
15 the McMahan line of cases, and we think it does  
16 apply here. The McMahan line of cases doesn't  
17 draw the clear distinction that the City claims it  
18 does. There is nothing in there that says, by the  
19 way, this rule doesn't apply if the City provides  
20 service outside of its jurisdiction. The cases  
21 don't address that issue.

22 What they say -- and this is consistent

1 with all of the opinions from -- almost all of the  
2 opinions I should say from the Attorney General  
3 and Circuit Courts about what a municipality has  
4 to do when it sets a fee. The fee has to be based  
5 on the cost of service.

6 If it results in an improper -- in a  
7 revenue generating device, then it's no longer a  
8 fee for service; it's a tax, and it's invalid  
9 under the Virginia constitution.

10 Mr. Thomas wouldn't dispute, I don't  
11 think, that if our -- if the plaintiff here were a  
12 Falls Church citizen, that the citizen could bring  
13 this claim. He's only arguing -- he's arguing  
14 essentially that as a resident -- or a business in  
15 Fairfax County, they don't have standing to make  
16 the same claim. But one of the interesting things  
17 about this case that you're going to hear is that  
18 the rates that are charged by Falls Church are the  
19 same to in-city people and out-of-city people.  
20 And on the face of it, it looks like that -- it  
21 suggests that everything might be hunky-dory. But  
22 the reason it's a problem is because it's a high

1 rate which has built into it an amount that  
2 results in a huge subsidy to the general fund. Of  
3 course that only benefits City taxpayers.

4 But getting back to my original point, a  
5 Falls Church citizen could come in here and sue  
6 the City under the McMahon line of cases, and if  
7 the facts are as we think we're going to prove,  
8 the fees would be struck down.

9 So why should Fairfax Water be  
10 disenfranchised from making the same argument?  
11 This is our extraterritorial tax point. It's  
12 actually much worse if a County resident can't  
13 challenge what the City is doing because a County  
14 resident has no political representation in the  
15 City of Falls Church. That's the Robinson case we  
16 cited, that said that the reason -- sorry,  
17 extraterritorial taxes are particularly --

18 THE COURT: Why can't a County resident  
19 get its water from Fairfax Water?

20 MR. RAPHAEL: Because -- you're going to  
21 hear why. Almost all of them are way too far from  
22 a line to feasibly connect. You're going to hear

1 testimony on that. It's not for -- most of the  
2 people in Fairfax County who are served by the  
3 City, it's not a feasible alternative.

4 I do want to address the two cases that  
5 the City hangs its hat on, the Rocky Mount case  
6 and the Mount Jackson case.

7 These cases are not on point. Here is  
8 why. Let's start with Mount Jackson. That was  
9 the earlier case. In that case the Town had  
10 entered into a contract with one -- a single user  
11 for water service outside the Town. And the Town  
12 then reneged and said, you know what, we think  
13 this contract was ultra vires. The Supreme Court  
14 said no, no, no, a town does have the power under  
15 Virginia law to enter into a contract like this to  
16 provide service to a single user.

17 And because the Town doesn't have any  
18 obligation to provide service, it can negotiate  
19 the price that it wants.

20 In the course of that opinion there was  
21 dictum saying that a town can take into  
22 consideration matters of pecuniary benefit and

1 profit. It's that dictum that the City hangs its  
2 hat on.

3 The next case was Mount Jackson. What  
4 happened there was you had a Wal-Mart locating in  
5 the County, outside of the Town of Rocky Mount.  
6 And the Town of Rocky Mount entered into an  
7 arm's-length contract with the Wal-Mart to provide  
8 sewer service. Then along came a fast food  
9 restaurant and wanted to set up shop next-door to  
10 the Wal-Mart. The Town said we're going to charge  
11 you this high connection fee to do that. The fast  
12 food restaurant said whoa, whoa, whoa, you have an  
13 obligation to provide service at the same price.  
14 You can't do that.

15 The Supreme Court said no, no. This is  
16 where the holding out doctrine came into play.  
17 The Town hadn't established a service area where  
18 the Wal-Mart was located, it had no obligation to  
19 provide service to the people next-door to the  
20 Wal-Mart, and it could negotiate at arm's length  
21 the contract with a particular user.

22 That's entirely different from what this

1 case involves. This case involves a city  
2 providing service in a very large area in Fairfax  
3 County. It's something like 20 -- 30 square  
4 miles. It's provided service for decades. It --  
5 the City can't pick and choose who its customers  
6 are.

7 Mr. Thomas explained to you what the  
8 holding out doctrine was, and I agree with what he  
9 said, except I disagree that it only applies to  
10 the issue of whether you can deny service. It  
11 actually goes on to say you have to treat those  
12 customers just like your own customers. That's  
13 what the holding out doctrine is. Any cost  
14 differential has to be based on a cost of service  
15 differential.

16 We'll talk about the utility method of  
17 accounting and how the rate of return can be  
18 considered a part of how you set rates for  
19 outside-city customers. That's going to be part  
20 of the testimony that you're going to hear.

21 This doctrine was applied in Giordano,  
22 the decision by Judge Horne earlier this year,

1 where the Circuit Court of Loudoun County said --  
2 that was the case, Your Honor, where the Town of  
3 Leesburg was charging about a hundred percent  
4 surplus on water and sewer service to customers  
5 who lived in Loudoun County. About 25 percent of  
6 their customers were in Loudoun County, compared  
7 to Falls Church, where 92 percent of their  
8 customers are in Fairfax County.

9 So the out-of-town residents in Giordano  
10 sued the Town, saying you don't have a legitimate  
11 basis to impose this 100 percent surcharge on us.

12 Now, Judge Horne, in his opinion, which  
13 we've submitted to the Court, ruled that the case  
14 didn't involve an extraterritorial tax because the  
15 total revenues that were raised from both the  
16 in-town and out-of-town customers were what was  
17 needed to run the system. There was no surplus  
18 profit transferred to the general fund.

19 He says this, it's page 3, I believe, of  
20 the opinion. It says this is not a case where  
21 there's an excess charge masquerading as a tax.  
22 So to that extent, Giordano is very different from

1 this case.

2 But then Judge Horne went on to say the  
3 cost of service principle still applies, because  
4 the Town was providing service generally to these  
5 folks in Loudoun County. And because the Town  
6 couldn't justify a cost differential for the  
7 hundred percent surcharge, he struck down the  
8 charge, and ordered the Town to redo it. They're  
9 in the process of redoing it now.

10 We also cited --

11 THE COURT: Whereby they will equalize  
12 the charges between the Town residents and the  
13 Loudoun County residents?

14 MR. RAPHAEL: I believe they've done a  
15 cost of service study. I believe they're going to  
16 come up with a cost differential to charge a  
17 higher rate to Loudoun County customers than to  
18 Town customers.

19 THE COURT: Because it costs more to  
20 provide the service further from the Town's  
21 facility?

22 MR. RAPHAEL: And I can't speak to the

1 facts of that case. I don't have personal  
2 knowledge of it. But in theory, certainly, if  
3 there's a cost differential, you can charge a  
4 higher price to out-of-town customers.

5 That's where this idea of the in-town  
6 customers benefiting from having built the system,  
7 that's where it comes into play; that the in-town  
8 customers can get the benefit of a lower --  
9 hypothetically they can get the benefit of a lower  
10 rate that they pay for water service.

11 But the idea of an enterprise fund is  
12 the money stays in the fund. You don't take a big  
13 chunk of it and take it out of the water system  
14 and put it into the general fund.

15 This is why, I think we said in our  
16 brief concerning the Woodcock motion in limine,  
17 what -- what you're going to hear at trial today  
18 and this week is going to be very consistent with  
19 the idea of a town earning a benefit from the fact  
20 that it has built a water system. And we're not  
21 denying that here. If Falls Church wanted to  
22 benefit, it could theoretically have a lower rate

1 for its in-city customers than its out-of-city  
2 customers. It's chosen not to do that. It's  
3 chosen to apply the same rate. You're going to  
4 hear testimony as to what that means. It means  
5 that they've built in a huge hidden surplus that  
6 they annually transfer from the water fund to the  
7 general fund. And it has a huge effect on their  
8 general budget. It drops their property tax this  
9 year 6 cents on the mill rate of \$1.07. In past  
10 years it's been over 30 cents on the tax rate.  
11 It's huge.

12 This brings me back to where I started  
13 with regard to the overarching legal issue here,  
14 and that is, we won this issue on demurrer. That  
15 doesn't mean we're going to win at the end of the  
16 trial. But we're -- Judge Thacher said put on  
17 your case. And we're ready to do that.

18 THE COURT: I understand that.

19 MR. RAPHAEL: And you need a full  
20 record. You need to hear the evidence. But  
21 getting back to how we started this inquiry.  
22 Woodcock has got a lot he's going to talk about

1 that is totally unrelated to this motion. So the  
2 motion in limine should be denied, and we should  
3 just -- let's get to it, let's get to the  
4 evidence.

5 THE COURT: Okay. Thank you.

6 MR. THOMAS: Can I respond?

7 THE COURT: Yes, sir.

8 MR. THOMAS: Just briefly, Your Honor.

9 A couple of points, Judge. The --  
10 Fairfax Water has, over the years, complained  
11 bitterly about the prospect of a rate  
12 differential, which is the solution that I believe  
13 Fairfax Water just suggested to the Court for  
14 resolving this question about, well, can the City  
15 actually profit.

16 And as I've said, they have complained  
17 bitterly about this notion of a rate differential  
18 for years, going back to 2003 when it first came  
19 up. And I believe if the Court looks in their  
20 amended complaint, it will see that it complains  
21 about the City having even floated the idea of  
22 charging a rate differential as between in-city

1 and out-of-city customers.

2 I think it is an unfair characterization  
3 of Mr. Woodcock's report to say that he has lots  
4 and lots of other things to talk about as -- by  
5 way of expert opinion that don't have anything to  
6 do with what I'm complaining about. Because that  
7 is not the case.

8 I think if the Court looks at page 3 of  
9 his report, he lists six -- I believe it's six.  
10 It is. Six areas of summary for the opinions that  
11 he intends to offer. The first such area isn't  
12 expert opinion. It's just a compilation of  
13 gathering facts. As he said in his deposition, my  
14 skills that I brought to bear for number 1 were  
15 that I could read.

16 The rest of those categories that he  
17 intends to offer expert opinion on, that is to say  
18 items 2 through 6 in his own summary, they all  
19 hinge on this question about, you know, can a  
20 municipality profit from the sale of water. That  
21 is right at the heart of all of them.

22 And so I -- I -- I don't think it's a

1 fair characterization to say that he's got -- this  
2 is sort of a footnote to Mr. Woodcock's expert  
3 testimony. It is not. It is fundamental to it.  
4 It is essential to it.

5 THE COURT: The citizens of Falls Church  
6 are not complaining that the City is charging them  
7 too much for water for the reasons Mr. Raphael  
8 explained? We shouldn't have to pay that much  
9 money? I mean, they're not the plaintiff in this  
10 case.

11 MR. THOMAS: They are not the plaintiff  
12 in this case. And so -- so I'm -- whether they  
13 are or whether they aren't, I'm not aware of a  
14 lawsuit brought by any citizens of Falls Church.

15 THE COURT: I'm not either.

16 MR. THOMAS: And I think the Court  
17 raises a good point. Mr. Raphael argues, well --

18 THE COURT: I mean, if it's the same  
19 rates charged to the citizens as charged to the  
20 noncitizens, and it's a rate which is not  
21 justified because the monies are being raised for  
22 purposes other than running the utility, one would

1 think that a citizen would have as much standing  
 2 to challenge it as -- a resident as a nonresident.  
 3 MR. THOMAS: One would think so. And  
 4 were one in that situation, then I think the  
 5 McMahan line of cases might have some application.  
 6 And I think it's -- I think it's an  
 7 improper reading of that line of cases to say,  
 8 well, we should have every -- we should be able to  
 9 hook into that line of cases, just like a Falls  
 10 Church resident should be able to hook into that  
 11 line of cases, too.  
 12 That's not what those cases stand for.  
 13 It's not what those cases stand for. And the  
 14 simple reason that it's not what those cases stand  
 15 for is because the question that's asked in those  
 16 cases is, on the one hand, is this a proper  
 17 exercise of the police power of this locality,  
 18 right, in letting this fee or this charge. Is it  
 19 a proper exercise of that locality's police power.  
 20 Or is it a tax. Or is it just a fee or a  
 21 charge -- a tax disguised as a fee or a charge.  
 22 And in asking that question, the

1 analysis comes down to is there a reasonable  
 2 correlation between the fee and the service  
 3 provided. That makes sense. That makes sense  
 4 when you're asking that question in the context,  
 5 in the only context that these things come up,  
 6 which is police power proper exercise, or tax.  
 7 The City of Falls Church has no police  
 8 power in Fairfax County. It hasn't tried to  
 9 exercise any. It would, I suspect, have a problem  
 10 if it had. So we are outside of that line of  
 11 cases.  
 12 I think it's fair to say that if a  
 13 resident of the City of Falls Church did have a  
 14 problem with the City's rates, equal rates between  
 15 County and City, and wanted to make a claim about  
 16 whether those rates and charges are really an  
 17 improper exercise of the police power, a levy or  
 18 charge improperly imposed by the City pursuant to  
 19 its police power, or a tax, I suppose that it  
 20 would do that, it could do that through this line  
 21 of cases that the plaintiff wants to avail itself  
 22 of.

1 But it -- those -- those cases don't  
 2 say -- and they would have to, in order for the  
 3 plaintiff to proceed -- they don't say, well, you  
 4 know, if you've got somebody outside of any kind  
 5 of ambit in which you can apply your police power,  
 6 outside of any kind of range where you could apply  
 7 your police power, well, then, you can hook into  
 8 this McMahan line of cases and you can hoist onto  
 9 the City this reasonable correlation requirement.  
 10 There's no authority that stands for  
 11 that proposition.  
 12 Now, what they try and say is the  
 13 mechanism that hoists this reasonable correlation  
 14 onto the City of Falls Church -- in derogation of  
 15 all of the Mount Jackson and Rocky Mount line of  
 16 cases -- what they say that sort of hooks the City  
 17 into this is this holding out notion. Which,  
 18 again, Your Honor, it does not apply in  
 19 circumstances -- it's never been considered by the  
 20 Supreme Court of Virginia in circumstances other  
 21 than is there a basis for a refusal to provide  
 22 service. Is there a basis for a locality that is

1 engaged in providing service, making a profit, is  
 2 there a basis for saying I'm going to serve you  
 3 but not you.  
 4 So, Judge, I think this is -- it's a  
 5 totally fundamental issue. I don't think this  
 6 issue was resolved as the plaintiff thinks it was  
 7 resolved on demurrer.  
 8 I think that we are right at the  
 9 intersection where the Court can say, you know,  
 10 can this McMahan line of cases apply? Should it  
 11 apply? And if that's the case -- if it's not the  
 12 case that that line of cases applies, well, then  
 13 Mr. Woodcock, with this totally fundamental and  
 14 absolutist view that municipalities should provide  
 15 water at cost, it doesn't come in.  
 16 So we ask the Court to strike the  
 17 designation and exclude his testimony.  
 18 THE COURT: Well, there is a divergence  
 19 in the two line of cases. And Fairfax Water  
 20 asserts that one line of cases makes it clear that  
 21 the rates must be based for the cost of services  
 22 and not be based on matters which amount to a tax.

1 because they're providing for services other than  
2 the water services, and that would be an improper  
3 taxation upon a nonresident of the City.

4 The City on the other hand states that  
5 it is selling this water, it's applying the same  
6 rates, and it's proper to do so. And there's no  
7 Virginia law to the contrary. Indeed, Virginia  
8 law permits the City to make a reasonable return,  
9 particularly given the fact that it has -- it is  
10 the one who's built the water system and is  
11 providing the water to these various customers.

12 It seems -- Judge Thacher's ruling in  
13 this case with regard to this particular issue is  
14 simply that there is a case or controversy  
15 presented, but he has not ruled which line of  
16 cases govern the result of this case. And I -- I  
17 just don't believe that the Court is in a position  
18 at this point to state it's one way or the other,  
19 without hearing more of the facts of the case.

20 Insofar as Mr. Woodcock is concerned, of  
21 course especially since this is a bench trial, the  
22 Court would rather err in having evidence

1 presented than in excluding it altogether and  
2 having this case have to come back for a second  
3 trial.

4 And looking at the testimony that's  
5 being offered, a lot of it seems to me is  
6 undisputed factually. A lot of it is somewhat of  
7 a history lesson perhaps. A lot of it might be  
8 what other people do, which probably is not all  
9 that relevant.

10 Insofar as his opinions, however, if  
11 they get from facts to in his opinion, this is the  
12 way it should be done, then I look at that as --  
13 as treading into areas of legal opinion, which  
14 would be plainly impermissible. And I'm counting  
15 on Mr. Thomas to raise the red flag should that  
16 happen.

17 So I'm going to permit Mr. Woodcock's  
18 testimony subject to those advisories. The City's  
19 exception to the Court's ruling is noted. Really,  
20 what I'm saying, Mr. Thomas, I just think it's  
21 premature for me to carte blanche kick him out at  
22 this point.

1 MR. THOMAS: I understand.

2 THE COURT: Okay?

3 MR. THOMAS: Yes.

4 THE COURT: All right. Now, sir.

5 MR. THOMAS: Now, we did have, for our  
6 part, two additional motions in limine. And I  
7 appreciate that the Court is hearing those cold.

8 THE COURT: I'm ready to go.

9 MR. THOMAS: Okay. The first, Your  
10 Honor, is a motion in limine that we have brought  
11 to preclude the plaintiff from introducing various  
12 statements of City Council members and  
13 statements -- hearsay statements in minutes of the  
14 City Council.

15 THE COURT: Didn't we have a tangential  
16 issue involving Fairfax County on this very point?

17 MR. THOMAS: We certainly did.

18 THE COURT: And cities and governments  
19 speak through their resolutions and laws.

20 MR. THOMAS: Yes, we did. And that's, I  
21 think, a fair account.

22 THE COURT: Did I not rule that way?

1 MR. THOMAS: You did. You did. So --

2 THE COURT: I'll hear from Mr. Raphael,  
3 but I can't imagine why I would rule differently  
4 on this particular point.

5 Yes, sir.

6 Isn't this just inviting mischief, to  
7 say, well, I did vote yes, but frankly, between  
8 you and me, et cetera, et cetera, et cetera?

9 MR. RAPHAEL: That's not what we're  
10 going to be offering, Your Honor. I think this  
11 one is premature too, because the City hasn't  
12 identified any of the evidence they're trying to  
13 exclude. They want some kind of categorical  
14 ruling in the abstract.

15 Let me talk about the kinds of things --

16 THE COURT: They don't want the  
17 testimony of the City Council persons, and they  
18 don't want, I guess, handwritten minutes or notes  
19 of the meetings?

20 MR. RAPHAEL: I don't have handwritten  
21 notes of meetings. If I can address, Your  
22 Honor --

1 THE COURT: Hang on a second. Am I  
2 correct in that?

3 MR. THOMAS: It's two categories.  
4 Videotapes of City Council members which the  
5 plaintiff would like to play.

6 THE COURT: Right.

7 MR. THOMAS: City Council members  
8 sitting up at the dais, which is to say Falls  
9 Church local politicians sitting up at the dais  
10 talking about whatever individually they think.

11 THE COURT: Right.

12 MR. THOMAS: And then minutes of the  
13 City Council meetings which capture the same thing  
14 but on paper, just to say, local politicians just  
15 talking about what they think.

16 THE COURT: Okay. I'd forgotten about  
17 the videotape. I remember reference to that.

18 MR. RAPHAEL: I think you need to  
19 consider the evidence as it comes in. We can  
20 certainly have this debate for particular pieces  
21 of evidence. But it's very unfair to us to defend  
22 everything in the abstract. In order to exclude a

1 piece of evidence -- let's suppose we have some  
2 minutes of a City Council meeting. Suppose  
3 there's a factual statement in there. We're  
4 certainly entitled to offer a factual statement by  
5 a City's agent, not to show what legislation  
6 means -- and this rule only applies if you're  
7 interpreting legislation. It doesn't mean a  
8 statement of fact is inadmissible just because it  
9 happens to be in the minutes.

10 Moreover, the City's main argument in  
11 this case is it's acting in a proprietary  
12 capacity, not a legislative capacity, when it  
13 provides service outside of the City.

14 THE COURT: But why are the musings or  
15 statements of the members of the council, how do  
16 they shed any light on this dispute?

17 MR. RAPHAEL: Frankly, Your Honor, the  
18 only statements I think we're going to get to, and  
19 we're only going to offer a fraction of what's on  
20 our exhibit list, but the ones that will come up  
21 will be statements of fact, for example, that a  
22 particular transfer one year was a certain amount

1 or resulted in -- was the equivalent of, say, 20  
2 cents on the tax rate.

3 These are statements of fact. These are  
4 not -- I am not offering any statements -- I will  
5 not offer any statements in my case in chief to  
6 show what an ordinance means or what the  
7 legislature intended when it passed something.  
8 That's not what we're offering.

9 So I think, again, it's premature to  
10 rule in the abstract. You need to see the  
11 evidence and consider it as it comes in. You  
12 can't rule any statement, no matter what it is, is  
13 inadmissible for any purpose.

14 THE COURT: Well, why can't I rule that  
15 statements of members of City Council and minutes  
16 taken during meetings -- we could -- there would  
17 never be an end of fighting about a law if we had  
18 to look behind it.

19 MR. RAPHAEL: But, see, you're assuming  
20 that I'm offering to show what a law means.  
21 That's not what I'm offering it for.

22 THE COURT: Is that a distinction

1 without a difference?

2 MR. RAPHAEL: No, it's not.

3 THE COURT: You're offering it to  
4 influence the finder of fact.

5 MR. RAPHAEL: If there's a statement of  
6 fact made by the City Manager or the City chief  
7 financial officer or the Mayor, it's a statement  
8 of fact. It's not offered to show what  
9 legislation means. It's admissible. It's not  
10 precluded by the rule. The rule prohibits the  
11 statement of an individual legislator about what  
12 the legislature meant when it enacted something.  
13 That's not what I'm offering it for.

14 THE COURT: Can't these facts be shown  
15 by other methods?

16 MR. RAPHAEL: Maybe they can. That's  
17 another reason you should wait and not rule in the  
18 abstract. They're really seeking an advisory  
19 opinion. They haven't identified any exhibit that  
20 they're trying to exclude. They want some general  
21 sweeping ruling.

22 THE COURT: Let's do this. Let's wait

1 until we get to it, until it's offered. But let's  
2 also state that I'm going to be very disinclined  
3 to permit any evidence of statements and/or  
4 minutes made by members of the City Council,  
5 including the Mayor.

6 MR. RAPHAEL: I understand.

7 THE COURT: And maybe you want to  
8 rethink that, given that. Maybe there's another  
9 way of doing it. If you get to that point and you  
10 want to offer that, then obviously I'll listen to  
11 you, or rather like to hear a proffer. But I  
12 think Mr. Thomas has a better argument.

13 MR. RAPHAEL: All I'm asking for is  
14 let's take it one by one. I understand the  
15 Court's guidance. Thank you.

16 THE COURT: Okay. Thank you, sir. Yes,  
17 sir.

18 MR. THOMAS: Against my better  
19 instincts, Judge, if I can make one observation  
20 about this issue.

21 THE COURT: I'm basically ruling in your  
22 favor.

1 MR. THOMAS: Okay. All right. Well,  
2 then I won't. All right.

3 We have a second -- I guess it's a third  
4 motion in limine. And it's of a similar stripe,  
5 Judge. And that is a motion in limine with  
6 respect to what the plaintiff plans to offer in  
7 the nature of decades of evidence of the historic  
8 rates and charges and transfers by the City of  
9 Falls Church from its water fund to its general  
10 fund.

11 THE COURT: And what is your objection  
12 to that? I mean, if that's a matter of historical  
13 fact. I mean, your bottom line defense in this  
14 case is, so what, we're permitted to do it under a  
15 long line of Virginia cases.

16 MR. THOMAS: Correct. And their bottom  
17 line case is our current rates are  
18 unconstitutional.

19 THE COURT: Correct.

20 MR. THOMAS: The only relief that they  
21 seek -- as the Court observed a couple of weeks  
22 ago, they are not here seeking disgorgement of a

1 nickel or any kind of refund. They would have had  
2 to have done very different things if they were  
3 doing those things.

4 The only relief they're seeking is a  
5 declaration that the City's current rates are  
6 unconstitutional, and I think much more  
7 foundationally, the City's charter is  
8 unconstitutional.

9 And they seek an injunction going  
10 forward that the City must comply with what they  
11 say are the constitutional requirements for rates.

12 So going back --

13 THE COURT: What is that going -- what  
14 is that actually -- maybe I have to put that to  
15 Mr. Raphael. Because last night I was making  
16 notes as I was going over some of these papers.  
17 And my question for Mr. Raphael -- you don't have  
18 to answer this minute but you might want to answer  
19 in a minute -- if the Court were to completely  
20 agree with Fairfax Water, what is the City  
21 permitted to charge? I think that's a fair  
22 question.

1 MR. THOMAS: Right. I would like to try  
2 and answer -- anticipate the answer and then tell  
3 the Court why I think it's wrong. But I'll wait.

4 THE COURT: All right. No, no. But  
5 I've been thinking about that, because -- and  
6 Mr. Thomas just reminded me of the prior colloquy.  
7 What does the City really want? I mean, wouldn't  
8 this be the ultimate advisory opinion, to say it's  
9 unconstitutional, everybody go home. There must  
10 be some specific relief sought, or an injunction  
11 against, don't continue doing it this way, but  
12 what? There may be some lean result where you go  
13 out and recompute it or something.

14 MR. THOMAS: Right.

15 THE COURT: Nobody has to answer that  
16 question now, but it does seem to me to be very  
17 pertinent. Yes, sir.

18 MR. THOMAS: If I can make one  
19 observation on that very question. Right now, as  
20 we stand here today, and has been the case since  
21 1993, the City has a statutory -- has statutory  
22 permission from the Virginia legislature to take

1 profits from its utility fund and transfer it to  
2 its general fund. That's an act of the general  
3 assembly of Virginia. It's part of section 13 of  
4 the charter of the City of Falls Church.

5 THE COURT: So I have to find that  
6 unconstitutional.

7 MR. THOMAS: Correct. I don't think  
8 that there is a way that the Court could determine  
9 that what the City is alleged to be doing now is  
10 unconstitutional without declaring the charter of  
11 the City of Falls Church to be unconstitutional.  
12 I don't think one can get there from here.

13 So very fundamentally, I think, in  
14 response to the Court's question, I mean, I -- I  
15 mean, I think if Fairfax Water gets everything it  
16 wants in this Count V, well, then we're back to  
17 the legislature to get our charter right, not just  
18 our charter, but charters for other cities across  
19 Virginia.

20 THE COURT: Right. Back to the past  
21 rates.

22 MR. THOMAS: On the historical rates

1 question, Fairfax Water's view, and confirmed by  
2 their expert, I think repeatedly, is that one  
3 dollar of transfer from the water fund of the City  
4 of Falls Church to the general fund constitutes an  
5 unconstitutional tax.

6 Mr. Woodcock would say, well, nobody  
7 will ever notice or it's really not that big of  
8 deal. But the theory, for it to have -- just so  
9 its characteristics are clear to the Court, the  
10 theory from the plaintiff is, if you take one  
11 dollar over and above indirect costs and payment  
12 in lieu of taxes and transfer it from the water  
13 fund to the general fund, that's a tax. All  
14 right?

15 So it doesn't matter whether it's one  
16 dollar or whether it's \$5 million. And it doesn't  
17 matter whether it was done for one year or a  
18 hundred years. It doesn't matter from their --  
19 from their own theory.

20 THE COURT: But why does it matter to  
21 the City? I don't disagree with you. Why do you  
22 care about the historical past rates? What

1 difference does it make?

2 MR. THOMAS: I think it makes a  
3 difference inasmuch as --

4 THE COURT: Would it make a difference  
5 if they had been all done in a manner that would  
6 be acceptable to Fairfax Water and now you've  
7 changed? But if it's always been the same, what  
8 difference does it make?

9 MR. THOMAS: I think it makes a  
10 difference because the City last set its rates in  
11 2005. And as the Court will hear, it did so based  
12 on a very careful analysis about whether what it  
13 was doing was proper.

14 THE COURT: And you don't have any  
15 quarrel with the introduction of those rates?

16 MR. THOMAS: Absolutely not. They were  
17 established by ordinance and were -- and the  
18 transfer of water funds to general fund is  
19 established by budget resolution, and embodied in  
20 the City's comprehensive annual financial report.

21 So no, we wouldn't have any quarrel with  
22 that at all. So I think the problem I have is why

1 go through the exercise of 1991 until 2005? Why  
2 go through that exercise when the only allegations  
3 on the street are that our current rates are  
4 unconstitutional and that our charter is  
5 unconstitutional? Why go through the exercise?

6 I don't think we need to go through the  
7 exercise, and particularly in light of the fact  
8 that the relief that they're asking for is purely  
9 prospective.

10 Now, I think the argument that we --  
11 that comes back is, well, there should be -- we  
12 should be able to establish a pattern and  
13 practice. Well, Judge, we've got our current  
14 rates set in 2005. Pattern of practice, when  
15 their theory is that one dollar of transfer is a  
16 tax and it's unlawful, pattern and practice  
17 doesn't have any bearing on this case. It doesn't  
18 have any relevance.

19 So that's the problem. And so we would  
20 ask the Court to preclude evidence and testimony  
21 from the plaintiff about the City's historic  
22 rates.

1 THE COURT: All right. Thank you, sir.  
 2 Mr. Raphael. Why do you all need that?  
 3 MR. RAPHAEL: I think Mr. Thomas is  
 4 overstating how much evidence you're going to see  
 5 on this. But if I --  
 6 THE COURT: Then why don't we just take  
 7 2005 forward?  
 8 MR. RAPHAEL: May I bring up one of the  
 9 slides to show why?  
 10 THE COURT: Yes, sir.  
 11 MR. RAPHAEL: Can you bring up  
 12 plaintiff's 3.5, please.  
 13 We had attached this to the brief that  
 14 you hadn't seen.  
 15 You can't look at a particular year as  
 16 one snapshot. What this graph shows, Your Honor,  
 17 the red line shows the rates since 1995, and a  
 18 significant thing that happened in 2002 and 2003.  
 19 The blue line shows the water balance --  
 20 the cash balance in the water fund. What you're  
 21 going to hear testimony about is the cash balance  
 22 in the water fund and the rates that are charged

1 by the City and the amount of the transfer to the  
 2 general fund is an integrated whole. You can't  
 3 just look at one without looking at the other.  
 4 THE COURT: But why not look at all  
 5 three from 2005 onward?  
 6 MR. RAPHAEL: Because we need to show  
 7 you -- first of all, the last rates were set in  
 8 2005. The evidence is going to show that the City  
 9 has consistently raised rates based on  
 10 incorporating the return on equity transfer as  
 11 part of the rate structure. We're entitled to get  
 12 that evidence in to show their custom and pattern.  
 13 Because we're not just saying that the current  
 14 rate is wrong. We're asking the Court to say the  
 15 City cannot do this in the future. To answer your  
 16 question --  
 17 THE COURT: Why do you need the past  
 18 rates to do that? Why can't you just say what  
 19 they've been doing since 2005, they cannot do in  
 20 the future?  
 21 MR. RAPHAEL: Because I need to show you  
 22 what led up to 2005. The real focus period here

1 is going to be 2000 forward. And we're not  
 2 talking about reams of evidence. My case is going  
 3 to take probably no more than a day. It's going  
 4 to be very efficient. But I --  
 5 THE COURT: It still should be proper  
 6 evidence. If this has been the case all of these  
 7 years, has Fairfax Water been a customer all these  
 8 years?  
 9 MR. RAPHAEL: Yes, it has.  
 10 THE COURT: Why has it waited so long to  
 11 file a lawsuit?  
 12 MR. RAPHAEL: You're going to hear  
 13 evidence about why. Number 1, there were  
 14 discussions for years between the parties to try  
 15 to work out their differences. They didn't go  
 16 anywhere. The City sued Fairfax Water in 2007.  
 17 That case was --  
 18 THE COURT: So there's a lot of  
 19 disputes. But my question is has Fairfax Water  
 20 not sat on its rights? Are you sure you want all  
 21 this evidence in here?  
 22 MR. RAPHAEL: I'm happy to take that

1 risk, Your Honor. The laches -- there's been no  
 2 disclosure in discovery that they intend to make a  
 3 laches defense.  
 4 MR. THOMAS: That is untrue, Your Honor.  
 5 MR. RAPHAEL: I have a motion on that  
 6 when we're done with this one. With regard to --  
 7 we're not seeking to get back money. We're  
 8 saying, going forward, the City should not be able  
 9 to include in the rates and charges a subsidy to  
 10 the general fund and should not be allowed to  
 11 transfer surplus profits from the water fund to  
 12 general fund.  
 13 Your Honor asked, if the Court agrees  
 14 with our position, what is the City allowed to do.  
 15 And the answer is quite simple. Number 1, they  
 16 can set the rates going forward on a cost of  
 17 service basis, like the Town of Leesburg is doing  
 18 right now, after having its outside rates struck  
 19 down.  
 20 And more importantly, if Your Honor  
 21 agrees with us on the fundamental principle we're  
 22 advocating, which is this is an enterprise fund

1 and hidden profits shouldn't be built in and  
2 transferred, because that doesn't represent the  
3 cost of service, if Your Honor agrees with that  
4 relief, the rates fix themselves. So we're not,  
5 unlike the plaintiffs in the Giordano case, we're  
6 not asking you to set a rate. We're not asking  
7 you to refund all of the excess monies we paid all  
8 these years.

9 THE COURT: Then what do you want the  
10 Court to do?

11 MR. RAPHAEL: We want a declaration that  
12 what the City is doing is wrong, and an injunction  
13 to stop them from doing it going forward.

14 THE COURT: Then how are they going to  
15 charge their customers for their water?

16 MR. RAPHAEL: They set the rates every  
17 year, Your Honor. They can do a cost of service  
18 study and come up with new rates. That's all  
19 we're asking for. We're not asking for  
20 retrospective relief.

21 But the custom and practice, which we do  
22 allege in the complaint is directly relevant to

1 this, and I think without your hearing the  
2 evidence it would be -- it would do great  
3 injustice to us to say we can't explain to you why  
4 the City raised the rates in 2002, in 2003, in  
5 2004 and 2005.

6 THE COURT: You said the presentation of  
7 the evidence that is displayed on this particular  
8 slide will only take a few moments?

9 MR. RAPHAEL: A few moments. It is  
10 going to take a couple hours to put on this  
11 evidence. But I think it will be done quite  
12 efficiently.

13 I do want to say, apart from this slide,  
14 we're going to offer a summary of the total amount  
15 of return on equity that's been transferred since  
16 1981. It's a one-page summary of that. And the  
17 total amount that the City has taken as a return  
18 on equity since 1981 is \$58 million.

19 Now, the reason -- we're offering that  
20 for two reasons. Number 1 --

21 THE COURT: To show the difference  
22 between that sum and what they've actually taken

1 in which they've used for other purposes.

2 MR. RAPHAEL: That's what it is.  
3 That's -- that defines what it is. But we're  
4 offering it because the City's -- the City's main  
5 explanation for why it charges a return on equity  
6 is that it's compensating itself for the alleged  
7 risk it took in building the system. The evidence  
8 is going to be that's just not true. The City has  
9 built the system on a pay as you go basis. Since  
10 92 percent of its customers are Fairfax County  
11 customers, the Fairfax ratepayers actually paid  
12 for the system.

13 Moreover, because the City has pocketed  
14 \$58 million since 1981, they have way  
15 overcompensated themselves for any arguable risk.  
16 So I need that piece of evidence to rebut their  
17 claim that they've had risk. That part of the  
18 case is very short.

19 So, I ask Your Honor, again, please  
20 don't rule in the abstract until you've heard the  
21 evidence here.

22 THE COURT: All right.

1 MR. RAPHAEL: It would simply do  
2 injustice to us.

3 THE COURT: Yes, sir. Mr. Thomas, yes,  
4 sir.

5 MR. THOMAS: Just a couple of points,  
6 Judge.

7 There is no -- as I think the Court has  
8 observed, there is no claim of disgorgement here.  
9 The claim is that the current rates are  
10 unconstitutional. Pattern and practice has no  
11 bearing on it at all. I'm not sure the Court just  
12 heard at all what bearing it could have on it.

13 The Court is correct, Fairfax Water has  
14 paid these rates since at least the late 1970s,  
15 and we have had as an affirmative defense in this  
16 case a defense of laches since our response to the  
17 amended complaint. The Court will hear a  
18 substantial amount of testimony from the City of  
19 Falls Church on that issue.

20 I interrupted the Court. I'm sorry.

21 THE COURT: Then you would not want this  
22 evidence in just to say, sure, there it is, it

1 looks pretty bad, doesn't it. But they knew this.  
 2 They've been paying it all these years.  
 3 MR. THOMAS: That's not this evidence,  
 4 Your Honor.  
 5 THE COURT: That's a piece of it.  
 6 MR. THOMAS: I understand. That's not  
 7 this evidence. That's evidence of laches, of  
 8 sleeping on their rights to the detriment of the  
 9 City.  
 10 THE COURT: I understand.  
 11 MR. THOMAS: That's established in a  
 12 very different way when compared to the relief  
 13 that they waited until 2009 to seek, which is, we  
 14 want a declaration going forward that these rates  
 15 are unconstitutional.  
 16 There is no reason -- you've got 4 years  
 17 going back to when our rates were last set.  
 18 There's no reason to turn this case into an  
 19 examination of the City's rates and charges and  
 20 transfers going back to 1991. There's no reason  
 21 to do that.  
 22 Mr. Raphael suggests, I think in

1 response to the Court's earlier question, well,  
 2 the City would have to go do a rate study and  
 3 figure out what its cost of service is. Well, the  
 4 Court is going to hear in this case that the City  
 5 actually has done a rate study, and the City will  
 6 have the only evidence on the street in this case  
 7 that establishes that its rates, its current  
 8 rates, those that are under attack, are reasonable  
 9 and cost based.  
 10 Our expert in that case happened to have  
 11 been the expert in the Leesburg case, Mr. Glenn  
 12 Watkins, and the Court will hear from him as well.  
 13 THE COURT: I'm sorry. What was the  
 14 name of the expert?  
 15 MR. THOMAS: Glenn Watkins.  
 16 THE COURT: All right.  
 17 MR. THOMAS: And, finally, Judge, just a  
 18 word on what I think I heard was some sort of  
 19 correlation between the claim of risk and the  
 20 notion or the -- the claim of risk on the part of  
 21 the City and the idea that these historic rates  
 22 are necessary for them to put on some kind of

1 defense to our claim of risk.  
 2 I think, fundamentally, what that --  
 3 what that misapprehends is the notion of the risk.  
 4 I mean, the City -- and there's plenty of  
 5 authority to support this, including the case from  
 6 the Eastern District of Virginia and the Newport  
 7 News decision from 1977 that we supplied the Court  
 8 with -- there's good authority there and good  
 9 factual evidence here, that the City's risk is  
 10 that the water system is going to -- will crater.  
 11 The City's risk is that the water system will go  
 12 away. And it's all on the backs of the City to  
 13 provide water service pursuant to the system that  
 14 it's spent a lot of time and effort to build out.  
 15 THE COURT: But the heart of your  
 16 evidence with regard to 2005 going forward is  
 17 going to be the rates were set based upon what was  
 18 necessary to run this system?  
 19 MR. THOMAS: Correct. That -- that's  
 20 correct. And the transfers that were made from --  
 21 and --  
 22 THE COURT: Which would include a return

1 on equity.  
 2 MR. THOMAS: Absolutely right. As is  
 3 permitted -- contrary to what Mr. Woodcock wants  
 4 to say, as is permitted by Virginia law, which is  
 5 to say a profit.  
 6 So, again, I'm delighted to hear that  
 7 the plaintiff's case is, you know, likely to take  
 8 a day or so. But I -- there's just no reason why  
 9 we need to go through the exercise of looking past  
 10 what is alleged to be wrong. And that is the  
 11 City's current rates.  
 12 THE COURT: I don't know, Mr. Raphael.  
 13 I think he's got the better of it. I don't see  
 14 how that sheds any light on this. You know, they  
 15 were beating their children all these years and  
 16 now they're just tying them up. That's what the  
 17 case is about.  
 18 MR. RAPHAEL: Your Honor, I've got to  
 19 have my pattern and practice evidence in there.  
 20 If you limit me, we end up risking coming back for  
 21 a second trial. It's just --  
 22 THE COURT: You can proffer it to the

1 court reporter. It will be part of the record.  
2 MR. RAPHAEL: Your Honor, please don't  
3 do this. This would be a huge error in -- that  
4 would prevent us from showing the pattern and  
5 practice has been to include the return on equity  
6 in the way they set the rates.

7 Can we bring up -- can I just bring up  
8 that slide again, please.

9 THE COURT: Yes.

10 MR. RAPHAEL: 3.5.

11 THE COURT: But if it's the current  
12 rates that are being challenged, what difference  
13 does it make if everything in the past were done  
14 properly or improperly?

15 MR. RAPHAEL: Because it's not just the  
16 rates. It's also the cash balance in the fund,  
17 92 percent of which was financed by Fairfax  
18 County --

19 THE COURT: But you've got the cash  
20 balance in the fund since 2005, don't you?

21 MR. RAPHAEL: Right. And I need this  
22 evidence to show you the relationship between the

1 cash balance in the fund, the transfers to the  
2 general fund, and the increase in the rate  
3 designed to cover those transfers.

4 It goes to the heart of the pattern and  
5 practice claim. I need to show that what the City  
6 of Falls Church is doing is a consistent pattern  
7 and practice of charging rates that include a  
8 hidden profit that they transfer from the water  
9 fund to the general fund.

10 THE COURT: If that's true of the  
11 current rate which is being challenged, why does  
12 it make any difference as to the past rates?

13 MR. RAPHAEL: My evidence of what they  
14 did -- no one disputes that the rate now was set  
15 in 2005. I need to show you what led up to that.  
16 And a key part of that story is what happened in  
17 2002, 2003, and 2004.

18 THE COURT: And what is the key part?

19 MR. RAPHAEL: Well, in 2002, the rate  
20 was set -- the rate was increased, and the  
21 evidence will show it was increased in order to  
22 cover a huge increase in the amount that was being

1 transferred from the water fund to the general  
2 fund.

3 In 2003, same thing. They were finding  
4 that they were -- you see the blue line coming  
5 down. The rate wasn't enough to cover -- they  
6 were making huge transfers from the water fund to  
7 the general fund. And so they had to raise the  
8 rate again. And the evidence will show that the  
9 reason they raised the rate was to cover the  
10 transfer from the water fund to the general fund.  
11 You see the increasing slope in the green line.  
12 They did the same thing in 2004, and the same  
13 thing in 2005. And that is -- goes directly to  
14 our allegation that there's a pattern and practice  
15 here.

16 The other issue is this. The City  
17 charter was amended in 1992, '93, and '95. And  
18 the evidence will show that, as a result of those  
19 changes, which brought in the current charter that  
20 we're saying is unconstitutional, the City's  
21 practices changed. They were able to massively  
22 increase the amount of monies that were being

1 transferred from the water fund to the general  
2 fund. You need to hear that evidence to show why  
3 the charter led to what it -- what we're now  
4 saying is unconstitutional.

5 So I just -- I ask the Court, please  
6 don't rule in a vacuum until you hear the  
7 evidence. If it sounds like it's irrelevant at  
8 the time, you can rule at the time. But please  
9 don't make a categorical ruling before you hear  
10 the evidence.

11 THE COURT: I'll defer on it until it's  
12 offered. But my thinking is that Mr. Thomas has  
13 the better argument.

14 MR. RAPHAEL: Thank you.

15 THE COURT: All right. Do we have any  
16 other preliminary matters?

17 MR. RAPHAEL: Yes, Your Honor. I have  
18 three very brief -- three very brief motions in  
19 limine.

20 Your Honor, there was a reference  
21 earlier to the defense of laches. We asked an  
22 interrogatory asking the City to disclose all the

1 facts that support your claim of laches. And  
2 there was no mention of laches in connection with  
3 Count V. I would like to show you the  
4 interrogatory answer if I may.

5 THE COURT: Do I have to rule on that  
6 now?

7 MR. RAPHAEL: Well, it --

8 THE COURT: I was the one who raised it.

9 MR. RAPHAEL: You were, but I think it  
10 was your suggestion, quite frankly, that led them  
11 to put a lot of stuff on their exhibit list that  
12 suggests that they're going to make a laches  
13 argument. And we're about to go to opening  
14 statement. I'm just saying I don't think it would  
15 be proper for them to make a laches defense when  
16 we asked them for the facts supporting it in  
17 discovery, and there was no answer on Count V.

18 They had an answer for laches with  
19 regard to the monopolization claims in Counts I  
20 and II. But the interrogatory makes it very clear  
21 that's all they were answering about, and they  
22 didn't add or address Count V.

1 It's a discovery violation, Your Honor.  
2 They cannot raise a defense when we asked them for  
3 the factual support for it, and they never  
4 bothered to answer it or update it. So I am  
5 asking you to rule in limine that the laches  
6 defense cannot stand.

7 And the same is true of their waiver and  
8 estoppel defenses, which also their interrogatory  
9 answers did not address.

10 I have two more after that one. But  
11 that's the first one, Your Honor.

12 THE COURT: All right. Yes, sir.

13 MR. THOMAS: Your Honor, there is no  
14 basis to preclude us from offering a defense of  
15 laches in this case. We asserted laches as an  
16 affirmative defense from the very outset in our  
17 answer to the amended complaint.

18 THE COURT: What about the  
19 interrogatory?

20 MR. THOMAS: Our interrogatory puts them  
21 more than fairly on notice. I'm looking at it  
22 right here. It puts them more than fairly on

1 notice that the City went about, because of  
2 Fairfax Water's acquiescence in Falls Church's  
3 operation throughout its Fairfax County service  
4 area, because they acquiesced in that, the City  
5 went about making substantial investments in its  
6 system.

7 I can read to the Court from that  
8 interrogatory answer. "Based on these  
9 representations and Fairfax Water's consistent  
10 acquiescence since the expiration of the 1959  
11 agreement, the City made significant investments  
12 in its water system for the purpose of serving  
13 customers in Fairfax County."

14 Your Honor, that is more than sufficient  
15 to put the plaintiff on notice as to our defense  
16 of laches. That is a key defense in this case.

17 They -- you know, they ---they themselves --

18 THE COURT: And that applied to all  
19 counts?

20 MR. THOMAS: This is an interrogatory  
21 response asking that we set forth our affirmative  
22 defenses and what we -- what we rely on in

1 asserting our affirmative defenses.

2 THE COURT: Okay.

3 MR. THOMAS: So there is no -- and it is  
4 a key defense in this case. And we've asserted it  
5 since the very outset. There's no reason to move  
6 in limine on the defense of laches.

7 MR. RAPHAEL: I would like to show you  
8 the answer, because I don't believe Mr. Thomas  
9 read all of it.

10 Could you please bring up Plaintiff's  
11 Exhibit 69, at page 15 and 16.

12 Okay. You'll see at the bottom of  
13 page 15 is where the answer for laches begins.  
14 Now can you go again, please, to page 16. And  
15 then show the whole -- that's fine. Show a little  
16 bit more than that, please.

17 It's clear they're talking about  
18 monopolization. They're not talking about  
19 anything about having paid monies over the years  
20 for water fees to Falls Church. That's not  
21 mentioned in this answer. They're only talking  
22 about monopolization.

1 THE COURT: Well, the highlighted  
 2 matters would certainly support that contention.  
 3 But the earlier language seems to me to be broad  
 4 enough that it would fit within the --  
 5 MR. RAPHAEL: The broader -- the earlier  
 6 language is talking about investments the City  
 7 made in its system. It has nothing to do with  
 8 paying monies that are overcharges. That's a  
 9 different argument they're about to make.  
 10 THE COURT: But one leads to the other,  
 11 does it not? Because they made the investments  
 12 and then they want to reflect them in their  
 13 charges to all of their customers. And Mr. Thomas  
 14 is arguing Fairfax Water's been paying these  
 15 charges all of these years until this lawsuit was  
 16 brought.  
 17 MR. RAPHAEL: But what you just said is  
 18 not in that answer. And frankly, Your Honor,  
 19 until you mentioned this issue at the last hearing  
 20 we had a couple weeks ago, it's the first time I  
 21 thought they were going to be making a laches  
 22 argument. It was not in their answer. And they

1 didn't update it.  
 2 I think -- if they were going to make  
 3 the argument -- and you're going to see on their  
 4 exhibit list, they've got stuff going back many,  
 5 many years to show that Fairfax Water supposedly  
 6 knew everything that the City was doing with  
 7 regard to how it set its rates and should have  
 8 brought this claim before. That's not disclosed  
 9 in here. This is talking about why the City  
 10 should be allowed to continue to offer water  
 11 service in Fairfax County, because they've made an  
 12 investment in doing so. It does not address the  
 13 issue in Count V.  
 14 THE COURT: Mr. Thomas.  
 15 MR. THOMAS: If I could, Judge.  
 16 THE COURT: Yes, sir.  
 17 MR. THOMAS: The allegation that Fairfax  
 18 Water, or the facts about Fairfax Water being a  
 19 customer of the City of Falls Church are made in  
 20 the amended complaint, Your Honor. They're made  
 21 in the amended complaint. That's what they say.  
 22 They say they're a customer of the City of Falls

1 Church.  
 2 We say here, based on their conduct, we  
 3 went about making substantial investments in our  
 4 system in Fairfax County and in the City, as a  
 5 result of them having acquiesced to the City's  
 6 operation and as a result of them having continued  
 7 just keep on keeping on, which is what the  
 8 testimony from them in deposition was. That runs  
 9 squarely into the defense of laches.  
 10 They've been on notice of this for --  
 11 THE COURT: I think so, too. The motion  
 12 in limine with regard to laches is denied. The  
 13 exception of the plaintiff to the Court's ruling  
 14 is preserved.  
 15 MR. RAPHAEL: All right. Thank you,  
 16 Your Honor. The second one --  
 17 THE COURT: Does that include waiver and  
 18 estoppel, or is that separate?  
 19 MR. RAPHAEL: Well, I would like to show  
 20 you the answers on waiver and estoppel, to make  
 21 the record, if I can. Can you please bring up  
 22 pages 13 and 14. Plaintiff's Exhibit 69. Let's

1 do the waiver one first.  
 2 You can see they're only talking about  
 3 the monopolization claim here. I think it's -- it  
 4 would be really unjust to extend this to Count V.  
 5 THE COURT: The thing that troubles me,  
 6 Mr. Raphael, is that this is really more lawyer  
 7 language, I think, than -- and I say that  
 8 respectfully -- than pinning down every single  
 9 area of the complaint. It just seems to me that,  
 10 whether it's based upon monopoly or whether it's  
 11 based upon a constitutional violation or based  
 12 upon an antitrust aspect, akin, of course, to  
 13 monopolization, that it probably was unlikely that  
 14 people were using those words back and forth for  
 15 the past 20 or 30 years, notwithstanding the fact  
 16 that there certainly was a dispute between Fairfax  
 17 Water and the City of Falls Church, or maybe a  
 18 dispute, a concern, disagreement, insofar as the  
 19 rates being charged.  
 20 But for whatever reason that dispute did  
 21 not come to a head until recently, or at least  
 22 come to litigation. And I'm not suggesting that

1 the City is -- is going to prevail on its defense  
2 of laches, waiver and estoppel. Those are very  
3 difficult defenses to prove and they must be  
4 affirmatively proved.

5 But it just seems to me, under the  
6 circumstances of this case, the relationship of  
7 these parties, the knowledge of the rates being  
8 charged, the concern about what was being done --  
9 I mean, neither party is a babe in the woods --  
10 that they're within their rights to offer evidence  
11 that Fairfax Water slept on its rights. I'm going  
12 to permit them to do that.

13 MR. RAPHAEL: And my last motion, Your  
14 Honor, is we'd filed a motion in limine some time  
15 ago in connection with the antitrust issues,  
16 relating to a May 2007 draft memorandum by Fairfax  
17 County -- to Fairfax County employees that was  
18 never signed, it was never finalized. There was  
19 extensive testimony taken by Mr. Thomas. And it's  
20 undisputed that the memo was never finalized,  
21 never approved by anyone.

22 We thought the City was going to offer

1 it only in connection with the antitrust issues.  
2 They've included it on their exhibit list here.  
3 It has nothing to do with the tax claim. And we  
4 think that it should be excluded.

5 If you look at, for example, the  
6 City's --

7 THE COURT: Couldn't we wait until they  
8 offer it, though, for this particular, since it's  
9 a discrete document?

10 MR. RAPHAEL: You could wait. The City  
11 said in its brief in opposition, the memo is  
12 directly relevant to Fairfax Water's claims of  
13 monopolization, Count I, and attempted  
14 monopolization, Count II, and is directly relevant  
15 to the City's defenses to those claims. They  
16 didn't even say in their motion in limine  
17 opposition that it had anything to do with Count  
18 V.

19 THE COURT: I just think I'll be in a  
20 better position to rule on it when we get to it.

21 MR. RAPHAEL: Thank you, Your Honor.

22 THE COURT: So I'm not denying it. I'm

1 just deferring.

2 MR. RAPHAEL: Thank you.

3 THE COURT: Are you ready for your first  
4 witness?

5 MR. RAPHAEL: Yes, Your Honor.

6 THE COURT: Do you all want to take  
7 5 minutes?

8 MR. RAPHAEL: That would be great.

9 THE COURT: The Court will be in recess  
10 for 5 minutes.

11 (Whereupon, a recess was taken between  
12 11:41 a.m. and 12:10 p.m.)

13 THE COURT: I neglected to ask you all,  
14 do you wish to make opening statements?

15 MR. RAPHAEL: We would, Your Honor.  
16 Thank you.

17 THE COURT: Okay. All right. I'm happy  
18 to hear from you.

19 MR. RAPHAEL: Thank you, Your Honor. If  
20 I might be so bold as to introduce the folks who  
21 are with me.

22 THE COURT: Sure.

1 MR. RAPHAEL: I think that might be  
2 helpful. With me at counsel table is my  
3 associate, Patty Moody, Chuck Murray, who is the  
4 general manager of Fairfax Water.

5 THE COURT: Yes, sir. Glad to have you  
6 here.

7 MR. RAPHAEL: And I'm going to be using  
8 the word "Ken" a lot. That's Ken Sapp, who is my  
9 technician.

10 THE COURT: Hi, Ken. Glad to have you  
11 here.

12 MR. RAPHAEL: And Paula Jackson, my  
13 assistant.

14 THE COURT: Nice to have you here.

15 MR. RAPHAEL: This is a map I know Your  
16 Honor has seen before. It's Exhibit 1 to our  
17 amended complaint and it's a map of the service  
18 areas, the service area where the City of Falls  
19 Church provides water service both in the City and  
20 outside in the eastern portion of Fairfax County.

21 You see the dark green area. The large  
22 display doesn't have the best color. But on

1 your -- on your display, the dark green area is  
2 where -- is the City of Falls Church proper. And  
3 in the lighter green area is in Fairfax County  
4 where Falls Church provides water service. The  
5 blue lines that you see running through the City's  
6 area of service represents a Fairfax Water  
7 transmission line. Fairfax Water also supplies  
8 water to that Pimmit Hills subdivision.

9 You have seen in the pleadings a  
10 discussion about the 1959 agreement between  
11 Fairfax Water and Falls Church which established  
12 this exclusive service area. It lasted for  
13 30 years. And the other events that you postponed  
14 for trial until February relate to issues about  
15 competition between them.

16 This case relates to the issue of  
17 Fairfax Water as a customer of the City with  
18 regard to two of the buildings that it owns that  
19 are in the City's area of service. And those are  
20 shown in the asterisks under the word "Multiplex"  
21 north of Gallows Road -- or north of Route 50  
22 towards the bottom of the screen. That's the two

1 buildings that Fairfax Water owns.

2 The evidence will be, I think,  
3 uncontroverted on this, that Fairfax Water pays  
4 fairly substantial sums to the City of Falls  
5 Church for water service. We will have in  
6 evidence the bills for just the past 3 years to  
7 show in order of magnitude what that is.

8 THE COURT: Which was the first water  
9 system? Was it Falls Church?

10 MR. RAPHAEL: Falls Church was the first  
11 water system. Falls Church, as you know, was a  
12 Town in Fairfax County until about 1947. It  
13 became a City then. And it began to supply water  
14 service both in the Town and outside the Town.  
15 But very early on, even as early as 1950, most of  
16 the City's water customers lived outside of the  
17 City of Falls Church, and provided water service  
18 in Fairfax County.

19 And Fairfax Water wasn't created until  
20 1957. And at that point, there were some 26, 27  
21 different water service providers in this area.  
22 And the Fairfax County Board of Supervisors

1 created Fairfax Water under the newly created  
2 Water and Waste Authorities Act, with a view to  
3 having it provide an integrated water service  
4 supply, at least for the areas that didn't have  
5 water service at the time.

6 And one of the problems that actually  
7 came up that was discovered back then was, once  
8 you had a water system in place, it was very  
9 difficult to get a competing water system in  
10 there. In fact, the original Water and Waste  
11 Authorities Act had a provision that said a water  
12 authority couldn't duplicate the service of  
13 another water purveyor. So Falls Church actually  
14 had the ability, if it wanted to, to get its lines  
15 in place first and basically preempt Fairfax  
16 Water's ability to establish a water system.

17 And that actually led to early  
18 controversies. That's what led to the 1959  
19 agreement where both sides carved out a service  
20 area and have provided, the evidence will be  
21 they've provided water service, Falls Church has  
22 continued to provide water service in those same

1 areas.

2 Fairfax Water has attempted to offer  
3 service to a number of properties. Those are the  
4 ones that are shown in red on the map.

5 So far the only developer that has  
6 indicated a desire to switch over to Fairfax Water  
7 is the Halstead developer, and that's the subject  
8 of a case that's put off until February. None of  
9 these other developers, although they were  
10 approached, has chosen to connect to Fairfax  
11 Water's system.

12 So that's the map.

13 And then, as a result of the extensive  
14 area of service by the City in Fairfax County,  
15 92 percent of the City's water customers are  
16 Fairfax County residents. That's about 110,000  
17 people. Whereas, only 11,000 people take water  
18 from the City in the City of Falls Church. So  
19 it's a 92 percent --

20 THE COURT: Is this a historical  
21 customer base? Or has the City been out seeking  
22 new customers since -- since the creation of the

1 Fairfax County Water Authority?  
2 MR. RAPHAEL: I don't believe they are.  
3 I think if that question comes up, they would say  
4 that they've tried to maintain the same area of  
5 service that they had in the 1959 agreement. That  
6 was really why the City filed the lawsuit, why it  
7 said it filed the lawsuit against Fairfax Water in  
8 February of 2007.

9 We've attached to our complaint the  
10 opinion of the federal district court in that case  
11 and the opinion of the Fourth Circuit.

12 But the City claimed in the federal  
13 lawsuit that, because -- because it bought its  
14 water from the Aqueduct, the Army Corps of  
15 Engineers runs the Aqueduct, that federal law  
16 somehow preempted Fairfax Water's ability to offer  
17 competing water service in this same area.

18 So this arose when, in early 2007,  
19 according to the Federal District case and the  
20 pleadings in the case, Fairfax Water offered water  
21 service to a developer, and Falls Church perceived  
22 that as a threat and filed the lawsuit to try to

1 block Fairfax Water from competing at all, arguing  
2 that it had an exclusive federal franchise.

3 And the District Court ruled in May of  
4 2007 that Virginia law allowed Fairfax Water to  
5 provide water service where it could anywhere in  
6 Fairfax County. The City appealed that. And the  
7 Fourth Circuit affirmed the trial court's ruling.

8 The other part of the case that's been  
9 postponed has to do with our claim that the City  
10 has continued to try to block Fairfax Water from  
11 entering the market since losing the federal case.  
12 But that's for another day. That's the case  
13 that's put off.

14 So the --

15 THE COURT: Are the problems between  
16 these two entities being seen primarily on what  
17 I'll call the fringes of the area served by the  
18 City and the fringes of the area served by Fairfax  
19 Water? I mean, is Fairfax Water seeking to  
20 provide water to someone, let's say, southeast of  
21 the City?

22 MR. RAPHAEL: Well, what Fairfax Water

1 has said in the complaint, and this is the subject  
2 for trial in February, is in these areas where it  
3 has distribution -- transmission mains running  
4 through the City's area of service, it can provide  
5 water service to adjoining, certainly to adjoining  
6 customers. There are issues about how much it  
7 cost --

8 THE COURT: Would these not be new  
9 customers? It wouldn't displace existing  
10 customers, not go door to door and say change  
11 over --

12 MR. RAPHAEL: That's correct. It's not  
13 done that. And I don't know how much of this is  
14 going to come out in this case as opposed to the  
15 February case. And I don't mean to try to spill  
16 over into that, and that wasn't my intention. But  
17 since you asked, there are sizable tap fees.

18 There are three different types of tap  
19 fees that a new customer pays. There's an  
20 availability fee, which is really the capital  
21 buy-in to make the water system available. It's  
22 like paying your fair share of the system.

1 There's a connection charge to build the  
2 connection and put the meter on the line. The  
3 larger the meter, the larger the charge. And then  
4 there's a local facilities charge, which is  
5 designed to capture the cost of having the  
6 distribution lines and fire hydrants and all those  
7 kinds of things.

8 So a new customer has to pay all of the  
9 tap fees, and they are significant. So where the  
10 practical area of competition has been is near an  
11 existing line where you have a new development so  
12 the developer can connect to either system. And  
13 it's really been -- all of the red properties  
14 shown on the map, for example, are new development  
15 properties where you had a developer building a  
16 very large new development. Halstead, for  
17 example, was a four-building development that had  
18 a thousand units, you know, four different  
19 buildings, including a hotel. And Halstead had  
20 proffered in October of 2007 to connect to Fairfax  
21 Water's system. That's the subject of the  
22 February case. And I don't want to get into that

1 too much.

2 But I hope I've answered your question  
3 about where the area of competition is. It's near  
4 an existing line.

5 Now, there are some physical barriers to  
6 connecting to something even if it's near your  
7 line. For example, Gallows Road here, I mean,  
8 Route 50 is a physical barrier that would make it  
9 very difficult for Fairfax Water to connect to its  
10 own line. Even though you see here its properties  
11 are set close to Route 50, it would have to extend  
12 the lines underneath Route 50.

13 Similarly, the Beltway runs along here.  
14 If you need to get across the Beltway, that's a  
15 very challenging, very difficult thing to do.

16 Now, obviously most of the people in  
17 Fairfax County are nowhere near an existing  
18 Fairfax Water line, and they clearly have no other  
19 alternative but to buy water from the City of  
20 Falls Church.

21 This service area, as I said, was  
22 established in 1959 and the evidence will show

1 it's remained the same ever since.

2 And the imbalance between outside-city  
3 customers and city customers is really at the  
4 heart of the case. And that's why Falls Church  
5 has been able to charge the same rate to Fairfax  
6 County customers as it charges to City customers.  
7 Because it is a high rate, Your Honor. And it's  
8 true that City customers pay that. But they get a  
9 huge benefit from that in the form of  
10 significantly reduced taxes. Hundreds and  
11 hundreds of dollars a year in tax savings. That's  
12 really the essence of what's going on here.

13 Now, it's -- we are, as you know,  
14 seeking to argue that the City's charter, to the  
15 extent it permits the City's practice, is  
16 unconstitutional. So I think it's important for  
17 the Court to see what the charter is and the  
18 provisions that we're talking about and how  
19 they've changed from the original charter.

20 This is the original charter from 1950.  
21 It's Plaintiff's Exhibit 5. Section 13.06(d).  
22 And you'll see that the general assembly set out

1 the manner in which the director of finance for  
2 the City was to account for the operations of the  
3 water system. It has a line-by-line detailed  
4 method for how you do that.

5 Then in section 13.07, the charter  
6 provided what you could do with a utility surplus.  
7 The first thing I wanted to point out is  
8 section 13.06(d)(10) from the original charter.  
9 That established that the City would track  
10 depreciation for its system, capital that  
11 depreciated over time, and treat that as an  
12 expense.

13 And then section 13.07 said you take  
14 that amount from item (10) for depreciation, and  
15 you pay it into the water works renewal fund or  
16 sanitary sewer works renewal fund respectively,  
17 from which appropriations would be made to rebuild  
18 and extend the system.

19 So the idea is you keep -- track the  
20 cost of your depreciating capitals, and you put  
21 that into the segregated fund to protect the  
22 system for future expansion and maintenance.

1 The next sentence in 13.07 deals with  
2 what you're going to hear about referred to as the  
3 PILOT. It stands for Payments In Lieu Of Taxes.  
4 Going back to 13.06(d)(9), one of the accounting  
5 items that you'll see here that the City was  
6 supposed to track was taxes not actually accruing  
7 but which would have accrued during such year had  
8 the utility not been municipally owned.

9 The City is a public body. So it  
10 doesn't pay property taxes on the property that it  
11 owns. The concept here is a public body utility  
12 could pay a transfer from the water fund to the  
13 general fund that would represent the taxes it  
14 would pay if it were a privately owned entity. We  
15 call that -- that's called PILOT.

16 And the original charter allowed the  
17 City to do that. The current charter still does.  
18 We're not challenging that in this case. But  
19 that's what the PILOT is.

20 And the next sentence, and the last  
21 sentence in the original charter, provision --  
22 section 13.07, dealt with the disposition of a

1 utility surplus. Here again, going back to  
2 section 13.06(d)(12), you see the last item in the  
3 accounting was, you had an excess of receipts over  
4 expenses. The difference between items (4), total  
5 receipts, and items (11), total expenses, that was  
6 categorized here in subsection (12).

7 And then section 13.07, the last  
8 sentence said that the whole or any part of any  
9 excess of receipts over expenses shown in  
10 item (12) above may, when authorized by the  
11 council by the affirmative vote of at least  
12 two-thirds of the entire council, be transferred  
13 to the general fund or to the renewal fund of each  
14 utility respectively.

15 That's the origin of the return on  
16 equity that we're talking about now.

17 Now, the charter also had a provision  
18 dealing with how you would --

19 THE COURT: And this is a state statute.

20 MR. RAPHAEL: That's correct. The  
21 charter is Plaintiff's Exhibit 5. It's also just  
22 a copy of the 1950 Acts of Virginia. So it

1 doesn't need to be an exhibit. The Court could  
2 take judicial notice of it obviously.

3 The original charter also had a  
4 provision which remains in the current one,  
5 section 13.09, dealing with how rates can be  
6 changed. And I've highlighted the sentence there  
7 that I want to direct you to.

8 It says: If for any three consecutive  
9 fiscal years, the average annual receipts of any  
10 utility, as shown in item (4) of subsection (d),  
11 shall be less than its average annual expenses as  
12 shown in item (11) of subsection (d) of 13.06, it  
13 shall be the duty of the director of public  
14 utilities and the City Manager to recommend, and  
15 the Council to adopt, for that utility, a schedule  
16 of rates which in its judgment will produce  
17 receipts equal to expense.

18 So I think the original concept here was  
19 quite different from what the City is doing now.  
20 The original concept is rates would be set based  
21 on, so receipts would equal expense. If you  
22 exceeded that, you'd have to increase the rates,

1 if you've exceeded it for 3 years, you have to  
2 increase the rates so receipts equal expense.

3 You see the amount that it's comparing  
4 is the amount in 13.06(d)(4) and 13.06(d)(11).  
5 But in a given year, according to the charter, if  
6 there were a surplus, item (12) under 13.07, that  
7 surplus could be transferred, on a two-thirds vote  
8 of the Council, either to the renewal funds of the  
9 utility or to the general fund.

10 So the phrase "return on equity" didn't  
11 appear in the 1950 charter.

12 Now, these provisions were changed in a  
13 series of amendments between 1992 and 1995.  
14 Here's the 1992 amendment. It's Plaintiff's  
15 Exhibit 10. And what this amendment did was to  
16 delete the list from 13.06(d), all -- so no longer  
17 was the City required to go through this specific  
18 list.

19 And what it then read was that the water  
20 and sewer utility shall be conducted as separate  
21 enterprises. And subsection B said the director  
22 of finance shall keep separate accounts in

1 accordance with accepted principles of public  
2 utility accounting for each utility.

3 So instead of having a list of how they  
4 were supposed to do it, the change said just do it  
5 based on generally accepted principles of public  
6 utility accounting.

7 The General Assembly, and maybe the  
8 City, I don't know which, missed the  
9 cross-references to the 13.06(d) in the other  
10 provisions. And so, in 2003 -- in 1993 and 1995,  
11 they came back to fix those.

12 In 1993, they came back and fixed the  
13 provision dealing with the disposition of utility  
14 surplus. Here is the amendment from 1993. It's  
15 Plaintiff's Exhibit 11. And you can see this is  
16 the first time the return on equity concept shows  
17 up.

18 So the general assembly deleted the  
19 references to the subsections of 13.06(d) -- you  
20 see here I'm highlighting item (10), for  
21 example -- and replaced it with this language.  
22 This is in the current charter.

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1 It reads: A sum of money equal to taxes  
2 not actually accruing but which would have accrued  
3 during such year had the utility not been  
4 municipally owned, shall be paid annually by the  
5 utility into the general fund.  
6 That's the PILOT provision.  
7 And then the return on equity provision  
8 is in the last sentence. It reads: A return on  
9 equity that is calculated using generally accepted  
10 accounting principles for utility enterprises,  
11 when authorized by the Council by the affirmative  
12 votes of a majority of Council, may be transferred  
13 to the general fund or to the improvement fund of  
14 each utility respectively.  
15 So a couple summary points here. The  
16 water works renewal fund was eliminated. The  
17 PILOT was retained. And the return on equity was  
18 substituted for the previous reference to surplus.  
19 And instead of being transferred -- requiring a  
20 two-thirds vote to transfer, now only a majority  
21 vote was required.  
22 And that's -- we talked about before why

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1 the history was relevant, because after these  
2 changes, the amount of return on equity shot way  
3 up after a couple years.  
4 In 1995, the General Assembly came back  
5 and fixed another error that wasn't corrected in  
6 the earlier amendments. We don't have this as a  
7 plaintiff's exhibit, but it's 1995 Virginia Acts,  
8 chapter 655.  
9 And this one amended, technically, just  
10 made some technical amendments to section 13.09,  
11 which addressed how you change rates. So it  
12 deleted the references to the old 13.06(d)(4) and  
13 (d)(11). And I've given you just on the screen  
14 the reference to what that said.  
15 But the basic concept was retained.  
16 That the City of Falls Church, if it went for  
17 3 years with expenses exceeding receipts, would  
18 then adjust the rates to produce receipts equal to  
19 expense. And of course this one doesn't say  
20 anything about return on equity.  
21 Now, we will put in -- into evidence a  
22 summary of what the return on equity was between

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1 1981 and the present. It was \$58.8 million,  
2 almost \$58.9 million. These figures generally  
3 come from the City's consolidated annual financial  
4 reports or CAFRs. You'll hear the word CAFR used  
5 a lot, and that's what that stands for.  
6 This chart shows you what the return on  
7 equity has been as a percentage of operating  
8 revenues of the water system.  
9 So after the amendments of 1995, the  
10 return on equity was here, around 15 percent.  
11 Then you see beginning in 1999, it starts to inch  
12 up. In 2000, it goes up considerably. And by  
13 2001 and 2002, the return on equity was over  
14 40 percent of the operating revenues of the water  
15 system. And -- I mean, that is quite  
16 extraordinary. It did -- it has come down in a  
17 percentage term since then. The current return on  
18 equity or return on investment as a percentage of  
19 the City's water system's operating revenues is  
20 still about 15 percent, however. It was almost  
21 \$3 million a year in 2007 and 2008. So 15 percent  
22 of the revenue is being moved from the water fund

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1 to the general fund.  
2 This chart we showed you earlier. And  
3 it puts in graphic terms the consequence of the  
4 change to the charter in 1992 through 1995. It  
5 shows you the decision by the City of Falls Church  
6 to increase significantly the amount it was  
7 transferring from the water fund to the general  
8 fund.  
9 At the same time the City had a very  
10 huge cash balance, cash and investments for the  
11 water system. Here, back in '95, for example,  
12 with operating revenues of about \$12 million, they  
13 had almost \$30 million in cash in the system,  
14 which is really an extraordinary amount of cash.  
15 And it kept going up with the rates that  
16 had previously been set and hadn't been changed  
17 through the late '90s. But beginning here, on the  
18 slope, you'll see 1999 to 2000, the decision was  
19 made to drastically increase the amount of return  
20 to the general fund. Much of that money came from  
21 the cash balance in the water fund. So the cash  
22 balance started to drop. It was up here at about

1 43 million. It starts to drop after 2002.  
 2 And the City responds by increasing the  
 3 rates, here in 2002, 2003, 2004 and 2005, to  
 4 get -- to stabilize the cash balance in the water  
 5 system, while raising the money it needs to  
 6 operate the system.  
 7 And there are of course two sources of  
 8 money for the return on equity. There's the  
 9 operating revenues coming in every year. And then  
 10 there's this huge cash balance in the water fund.  
 11 It's like having a checking account and a savings  
 12 account. And sometimes they wouldn't spend the  
 13 money out of the checking account. They would  
 14 take a big transfer from the savings account.  
 15 But either way, that's money, 92 percent  
 16 of which came from Fairfax County ratepayers.  
 17 I want to show you sort of the key  
 18 events as to why these rate increases are central  
 19 to the City's pattern and practice here. We're  
 20 going to start with October 10, 2002, the City  
 21 Manager warned the City Council that the water  
 22 fund needed a rate adjustment to cover our

1 ever-increasing costs, especially the sizable ROI  
 2 transfer to the general fund. Without adjusting  
 3 the rates, the ROI will drain the water --  
 4 MR. THOMAS: I'm loath to object in  
 5 opening. I apologize.  
 6 THE COURT: I'm aware of your position.  
 7 And the Court's indicated very likely what its  
 8 ruling is going to be. Inasmuch as it's opening  
 9 argument, I'll permit it.  
 10 MR. RAPHAEL: So as a result of the need  
 11 to protect the increasing ROI, the City Council  
 12 raised the commodity rate from \$1.64 to \$1.97. It  
 13 raised it again on January 1, 2004 to 2.36. And  
 14 then in May -- on May 13th of 2005, the City  
 15 Manager again warned that the rates were  
 16 insufficient to cover the return on investment and  
 17 he recommended raising the rates another  
 18 7 percent, to \$3.03.  
 19 And I would like to show you -- Ken, can  
 20 we go to the May 15th, 2005 memo.  
 21 This is the City Manager's memo to the  
 22 City Council. The City has not objected to it on

1 its exhibit list. Let me go to page 2 of this,  
 2 where he explains what's happening with the water  
 3 fund.  
 4 And the City Manager, Dan McKeever at  
 5 the time, said that he's got two attachments. The  
 6 first one shows a cash flow projection in a graph  
 7 that reflects the water rate increases as adopted  
 8 in 2003. The second one, attachment B, is a cash  
 9 flow projection in a graph that reflects the 2003  
 10 water rates with another 7 percent added to the  
 11 already established rates.  
 12 And this is the first graph that he  
 13 refers to. And you can see here, the blue line  
 14 in -- reflects the cost of operating and capital.  
 15 That's the cost of operating the water system.  
 16 The green line shows the revenues being obtained  
 17 from the commodity charge to customers.  
 18 Here the memo indicates that if the  
 19 rates continue as have been established, they  
 20 are -- they are well enough to cover the operating  
 21 and capital. But they're not enough to cover the  
 22 additional \$4.6 million that the City was taking

1 every year as the return on equity.  
 2 And what he explains is, if you don't  
 3 increase the rates, you're not going to be able to  
 4 get that return on equity amount that you want to  
 5 get.  
 6 And here's what he shows would happen if  
 7 you had a 7 percent rate adjustment. The green  
 8 line bumps up and it nearly gets to the projected  
 9 amount that the City wanted for a return on equity  
 10 by the year 2009.  
 11 And here are the two charts side by  
 12 side. So you can see on the left, without a rate  
 13 adjustment, it's plenty to cover operating costs  
 14 and capital, but not enough to get that huge  
 15 \$4.6 million transfer.  
 16 On the right, if you bump up the rate  
 17 7 percent, you can get pretty close to that amount  
 18 that the City wanted to take.  
 19 As a result, he recommended that the  
 20 rates be increased. And the City Council adopted  
 21 the rate increase.  
 22 This is Plaintiff's Exhibit 37, which

1 shows the rate increase going up to \$3.03 for the  
2 year -- fiscal year 2005 and 2006.

3 Now, the City's fiscal year, Your Honor,  
4 runs from July 1 of every year until June 30th of  
5 the following year. So that was the rate that was  
6 in effect during that fiscal year.

7 Now, I want to quickly go through a  
8 repetitive note that you're going to see in the  
9 CAFRs, the consolidated annual financial reports.  
10 This is -- and I'm just going to tick through them  
11 from 2001 to 2008. It's basically the same note.

12 Here it is. The first time you see this  
13 note is in the 2001 CAFR. It's Plaintiff's  
14 Exhibit 82. It says -- it reports about the  
15 return on equity transfer. It says: During the  
16 fiscal year ended June 30, 2001, the water fund  
17 transferred 4.5, almost \$4.6 million to the  
18 general fund based on a calculation of 6 percent  
19 of total fund equity in the water fund.

20 The next sentence reads: This is a  
21 transfer of excess operating funds, which, per  
22 City Council, can then be reappropriated for

1 general fund expenditures.

2 This note is repeated every year since  
3 2001. Here it is for 2002. This is Plaintiff's  
4 Exhibit 81. The reference to excess operating  
5 funds being transferred here. It was 4.8, almost  
6 \$4.9 million, which the City characterizes as  
7 excess operating funds being reappropriated to  
8 general fund expenditures.

9 Here it is for 2003, Plaintiff's  
10 Exhibit 80, the same note, \$4.6 million in excess  
11 operating funds. 2004, Plaintiff's Exhibit 79,  
12 the same note, \$4.6 million in excess operating  
13 funds. Plaintiff's Exhibit 78, the CAFR for 2005,  
14 same note. Same note for 2006.

15 And then we get to 2007. Here is where  
16 you're going to hear that the City changed the  
17 method for determining the return on equity.  
18 Instead of calling it a return on equity, as it's  
19 used in the charter, the City now calls this a  
20 management fee. The management fee concept was  
21 adopted in 2006 but it became effective for fiscal  
22 year 2007. So it became effective for the year

1 running July 1, 2006 through June 30, 2007.

2 The management fee is reported here in  
3 the note in Plaintiff's Exhibit 76 for the 2007  
4 CAFR. It's -- it reads like the previous notes.  
5 But it says that the fee is calculated based on  
6 10 percent of operating income and 100 percent of  
7 investment earnings. This is a transfer of excess  
8 operating funds, which, per City Council, can then  
9 be reappropriated to general fund expenditures.

10 So the same language about excess  
11 operating funds is retained. The same language  
12 about transfers for general fund expenditures.

13 And here is how the City calculates it  
14 now. It takes 10 percent of its operating revenue  
15 and just shoots that over to the general fund. On  
16 top of that, it takes 100 percent of investment  
17 income.

18 This is quite significant because the  
19 investment income comes, Your Honor, from that  
20 very large cash balance, the savings account that  
21 I mentioned, 92 percent of which was funded by  
22 Fairfax County customers. So the City is earning

1 very, very significant dividends and interest on  
2 those investments and taking 100 percent of it,  
3 moving it into the general fund. And it's done  
4 that every year since fiscal year 2007.

5 Here's the CAFR for 2008. You see the  
6 same note here, about transferring \$2.93 million  
7 in excess operating funds to be reappropriated for  
8 general fund expenditures.

9 Now, I think it's going to be undisputed  
10 that these transfers have had a very significant  
11 effect on the tax rate in -- the property tax rate  
12 for the City of Falls Church. You're going to  
13 hear the City's corporate designee explaining that  
14 the way it works is you -- the budget process  
15 works by determining the money that's going to go  
16 into the general fund from the water fund. And  
17 then you set the tax rate based on how much money  
18 you need to pay for the City's operations.

19 So the more money that goes into the  
20 general fund from the return on equity, the less  
21 money you need in tax dollars. I think that's  
22 going to be undisputed.

1 Now, if you take the 2008 CAFR and you  
2 look at the amount of the general fund transfer,  
3 and the assessed value of retail -- of real  
4 property that's reported in the CAFR for the  
5 previous 10 years, you can actually calculate what  
6 the value is in tax dollars of that transfer.

7 And so just showing here from fiscal  
8 year 2000 to the present, you can see that the  
9 amount of the transfer was worth a huge corollary  
10 amount in the property tax rate.

11 The peak was in 2001. It was 34 cents  
12 on the tax dollar in 2001. In fiscal year 2008,  
13 it was 9 cents on the dollar.

14 MR. THOMAS: Judge, if I could, I don't  
15 think we're hearing what the evidence is going to  
16 show in this case. And this is not a chart that  
17 I've seen before. Nor is it consistent with how  
18 the City deals with its management fee and the  
19 relationship between management fee and taxes.

20 So I think we're getting far afield in  
21 terms of an opening statement about what the  
22 evidence is going to show.

1 THE COURT: Well, perhaps. But it is  
2 opening statement, so I'm going to allow  
3 Mr. Raphael this leeway.

4 MR. RAPHAEL: Thank you, Your Honor.  
5 And just for the record, all the data here comes  
6 from the City's 2008 CAFR. And the parties have  
7 stipulated that that's admissible.

8 THE COURT: Well, none of this is  
9 disputed.

10 MR. RAPHAEL: And here is just a chart  
11 to show graphically the effect on the tax rate.  
12 This doesn't necessarily mean that if they didn't  
13 have the transfer, the tax rate would have been,  
14 for example, let's take 2005. This isn't to say,  
15 if they didn't have the transfer in 2005, the tax  
16 rate would have been \$1.21 instead of \$1.03. They  
17 might have cut expenses and not had to have that  
18 much money. The idea is if you want to measure  
19 the amount of the transfer and what it means on  
20 the tax rate, this is what that shows.

21 So it's a very significant transfer.  
22 The CAFR for 2009 isn't done yet. I believe it

1 comes out in November. So the last CAFR that we  
2 have is for fiscal year 2008.

3 It was 9 cents for fiscal year 2008.

4 And the testimony will be that for this current  
5 fiscal year, '09, it's going to be 6 cents on the  
6 tax rate.

7 The management fee, as I said, was based  
8 on 10 percent of operating revenue and 100 percent  
9 of investment income. But the evidence will come  
10 in, Your Honor, that the management fee, although  
11 it sounds like it pays for management, doesn't  
12 really pay for any management at all. The reason  
13 for that is the City has a separate charge for all  
14 direct and indirect costs associated with  
15 operating the water system. And that shows up on  
16 the City's financial statements as a charge for  
17 "administration." And the testimony is undisputed  
18 that that charge reflects all indirect costs of  
19 managing the water system. So the management fee  
20 is on top of that. It's not for any management at  
21 all.

22 Mr. Woodcock will testify, and you'll

1 hear from the City's witnesses, I think, that they  
2 can't find the management fee concept expressed in  
3 any water rate manual. There's no pedigree for  
4 it.

5 The City's financial consultant,  
6 Mr. Cumiskey, came up with the idea apparently  
7 based on his experience with private companies  
8 overseas. It's not consistent with generally  
9 accepted rate-making principles.

10 And the City will also concede that it's  
11 really just another name for the return on equity;  
12 although it suggests that you're getting  
13 management for it when you're really not.

14 The City diverts, as I mentioned,  
15 100 percent of the water interest income from the  
16 huge cash balance in the water fund to the general  
17 fund.

18 And since fiscal year 2007, it's true  
19 that the return on equity amounts have come down.  
20 They came down from 4.6 million to a little under  
21 3 million. It's a smaller transfer. But it's  
22 allowed -- the fact that it's a smaller transfer

1 has allowed the City to put off having to do  
2 another rate increase. That's why the City has  
3 been able to hold the rates flat at \$3.03 since  
4 2005. It had to reduce the transfer significantly  
5 in order to keep those rates flat. But it's still  
6 2 to \$3 million a year.

7 This year, the management fee is  
8 budgeted at 2.2 million. But in previous years,  
9 the amounts transferred had been higher than the  
10 amounts budgeted. That amounts to about 6 cents  
11 on the tax rate. And the City adopted the current  
12 budget in April of 2009, while this litigation was  
13 pending.

14 Chris Woodcock, we've had some  
15 discussion about him already, we will hear from  
16 him. He's a leading expert on municipal utility  
17 rate-making practices in the United States. He's  
18 the former chairman of the AWWA Rates and Charges  
19 Committee that actually writes the book on the  
20 rates and charges and explains how a municipal  
21 utility is properly supposed to run its  
22 rate-making practices.

1 He's advised cities across the country  
2 on their rate making, including some of the  
3 largest constituents in the country.

4 He's studied at length the financial  
5 aspects of the City's water system. And he's  
6 going to provide the financial studies, some of  
7 which I've shown you, concerning that water  
8 system.

9 He's also going to explain how a lot of  
10 people confuse this concept of return on equity,  
11 which is used in the utility basis for rate  
12 making, confusing that idea with transferring  
13 money to the general fund.

14 This is an excerpt from the M-1 manual.  
15 We've identified it to opposing counsel. It will  
16 be shown during Mr. Woodcock's examination. And  
17 the book explains how people confuse these two  
18 concepts.

19 A municipal utility, according to  
20 generally accepted rate-making practices,  
21 determines its cash revenue requirements based on  
22 cash needs. It does not include a profit

1 component.

2 But that doesn't mean it can't charge a  
3 higher rate to its outside-city customers. What  
4 it can do if it wants to is use a return on equity  
5 to determine what the higher rate could be --  
6 could be for the outside-city customers. And, for  
7 example, if you had \$100 -- if you need -- to run  
8 your system, you need \$100 to run your system, and  
9 let's say you have 50 customers in city, and 50  
10 customers outside the city, you might end up  
11 charging the outside-city customers more and  
12 paying for 60 percent of your cash needs. The  
13 remaining 40 percent will be paid by the other  
14 half. So they get a lower rate.

15 And that's the benefit -- when we talk  
16 about the return on equity, according to generally  
17 accepted utility rate-making practices, that's  
18 what it's talking about. It's not talking about  
19 taking that money out of the enterprise fund and  
20 putting it in the water system.

21 And Mr. Woodcock is going to explain  
22 that. He's going to explain how a lot of people

1 confuse that concept.

2 He also will explain that it's been the  
3 AWWA's -- the American Water Works Association's  
4 standard since the 1960s that water utility funds  
5 should not be diverted to uses unrelated to water  
6 utility services. That you can recover taxes,  
7 payments in lieu of taxes, or payments for  
8 services, but there's no mention of taking a  
9 profit for a municipal utility.

10 And you're going to -- you're going to  
11 hear that the City was unaware of this policy  
12 until the City's deposition in this case. And has  
13 not followed it. The City does not follow the  
14 policy.

15 Now, Chris Woodcock will testify also  
16 that the management fee that I described earlier  
17 is not a generally accepted utility rate-making  
18 practice. He'll testify that including a profit  
19 in the revenue requirement is not a generally  
20 accepted utility rate-making practice.

21 Now, you're going to hear also from the  
22 City's expert, Glenn Watkins. His experience is

1 almost entirely with privately owned -- privately  
2 owned regulated water utilities, not municipal  
3 utilities. He has very little, very little  
4 experience with municipal utilities.

5 And he makes precisely the mistake that  
6 Mr. Woodcock describes. He concludes that the  
7 return on equity, as part of the rate making, can  
8 be transferred to the general fund. And that's  
9 just not right.

10 He also thinks that a city can  
11 overcharge its citizens for water in order to  
12 reduce the tax rate. And you're going to hear why  
13 he thinks that's just common sense. And I don't  
14 want to get into legal argument, but what he's  
15 going to talk about is totally inconsistent with  
16 the McMahan line of cases. He thinks a city can  
17 charge as much as it wants to its own citizens for  
18 water.

19 He also didn't look at how the City has  
20 actually set its water rates in this case or how  
21 it's determined the amount of transfers. He will  
22 not opine on the management fee at all.

1 What does he do? Well, he looks at the  
2 City's water rates for the past year, and the  
3 City's water cost and expenses. And he says -- he  
4 does what he calls a cost of service study for  
5 that. He says, looking at all those costs and  
6 expenses for the past year, and projecting what  
7 they might be, I can come up with a rate of \$3.33.  
8 That's his testimony.

9 So he says, since the current rate is  
10 only \$3.03, which is lower than what it could be,  
11 the current rate must be reasonable.

12 Now, what you're going to hear is that,  
13 when he did that analysis, he included a  
14 \$2.6 million transfer of profit in his revenue  
15 requirement. And if you take that profit transfer  
16 out, the rate would actually be 2.81, which is  
17 less than what the City charges now.

18 The City's explanation for why it  
19 charges a return on equity is that it's  
20 compensating itself for the risk of running the  
21 water system and making the system available to  
22 Fairfax County residents.

1 But the truth is that the City built the  
2 system almost entirely on a pay as you go basis,  
3 meaning that the payments for it come out of the  
4 ratepayers, the vast majority of whom, since the  
5 '50s, have been Fairfax County residents. So it's  
6 just wrong to say that the City and the taxpayers  
7 built the system. It's just not true. The  
8 outside-city customers by and large did it.

9 Another example would be the bonds that  
10 the City has issued on occasion for the water  
11 system have been repaid mostly from Fairfax County  
12 customers. In fact, I don't think there's any  
13 evidence that bonds were repaid with taxpayer  
14 dollars.

15 Since 1981, the amount transferred from  
16 the water fund to the general fund totals \$58  
17 million. And you're going to hear -- and this is  
18 the reason why this is important. The City has  
19 not tracked the total compensation for "risk" that  
20 it's supposedly taken. And it's never tried to  
21 calibrate the return on equity to the amount of  
22 that risk.

1 So we think that it's very significant  
2 that the City has way overcompensated itself in  
3 the past. Mr. Watkins doesn't want to look at any  
4 of that. He says you can only look forward, you  
5 can never look backward. As a result, he's not  
6 examined any of the past practices beyond earlier  
7 than 2007.

8 What we're seeking in this case is a  
9 declaration that transferring excess water funds  
10 to the general fund constitutes an  
11 unconstitutional tax. We're seeking an injunction  
12 barring the City from transferring excess water  
13 funds in the future.

14 What we're not seeking in the case,  
15 we're not seeking a refund of past payments. If  
16 we've waited a long time to bring this case, it's  
17 money out of our pocket. But there's no  
18 prohibition on asserting the constitutional right  
19 we have to protest an illegal rate going forward.  
20 And that's the relief that we're seeking.

21 We're also not seeking to require a  
22 particular commodity rate to be charged. Why is

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1 that? Because once the City is required to keep  
2 the water monies in the water fund, in accordance  
3 with generally accepted utility rate-making  
4 practices, the rates will fix themselves.  
5 They will do a cost of service study.  
6 They'll charge rates. If they want to look into  
7 differential rates, that's certainly their right  
8 to do so. You'll not hear any evidence of protest  
9 from Fairfax Water about this issue in the past.  
10 So that's -- it's really an elegant  
11 solution. It's very different from what's  
12 happened in the Town of Leesburg case, for  
13 example, where the Court ordered a specific rate  
14 to be imposed.  
15 We're simply saying, if you keep all the  
16 money in the enterprise fund, like it's supposed  
17 to be, an enterprise fund, the rates will fix  
18 themselves.  
19 Thank you, Your Honor.  
20 THE COURT: Thank you, Mr. Raphael.  
21 I suspect you're going to take more than  
22 10 minutes with your opening.

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1 MR. THOMAS: I do.  
2 THE COURT: Why don't we take our lunch  
3 break now and let's come back at say quarter to 2.  
4 MR. THOMAS: That's fine.  
5 (Whereupon, at 12:50 p.m., the hearing  
6 was recessed, to be reconvened at 1:45 p.m. this  
7 same day.)  
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1 AFTERNOON SESSION (1:53 p.m.)  
2 THE COURT: All right, Mr. Thomas.  
3 MR. THOMAS: Thank you, Judge.  
4 If it please the Court, I, too, would  
5 like to make some introductions if I could.  
6 THE COURT: Yes, sir.  
7 MR. THOMAS: Here at counsel table with  
8 me is Rick Holzheimer, who is my colleague at the  
9 law firm.  
10 THE COURT: Mr. Holzheimer, good to see  
11 you.  
12 MR. THOMAS: Next to him is Mr. John  
13 Tuohy, who is our corporate representative.  
14 THE COURT: Mr. Tuohy.  
15 MR. THOMAS: Mr. Tuohy is the CFO of the  
16 City of Falls Church.  
17 THE COURT: Yes, sir. I'm glad to have  
18 Mr. Tuohy here.  
19 MR. THOMAS: And I think the Court knows  
20 John Foster, who is the City attorney.  
21 THE COURT: Very well. Nice to see you,  
22 sir.

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1 MR. FOSTER: Good afternoon, Your Honor.  
2 MR. THOMAS: And then right behind them  
3 is my colleague Brent Gary.  
4 THE COURT: Good to see you, Mr. Gary.  
5 MR. THOMAS: And Catherine Kleifges.  
6 THE COURT: Nice to have you here.  
7 Thank you.  
8 MR. THOMAS: Thank you, Judge.  
9 Judge, this is a political dispute.  
10 It's not a legal problem. And least of all, it's  
11 not a constitutional problem.  
12 What I think the Court will see from the  
13 evidence in this case is that the conduct that  
14 Fairfax Water here claims is unconstitutional is  
15 conduct that the Virginia legislature has for  
16 decades expressly approved as part of the City's  
17 charter.  
18 And I think that the history lesson  
19 about the evolution of the City's charter, while  
20 interesting, is perhaps most interesting inasmuch  
21 as one thing has been constant. And that is that  
22 the Virginia legislature has authorized the City

1 of Falls Church to transfer funds from its utility  
2 fund to its general fund.

3 Of course the charter -- the only  
4 charter that matters and the only charter that is  
5 at issue in this case is the charter that is  
6 currently operative, which as the Court observed,  
7 is a statute passed by the General Assembly of  
8 Virginia.

9 That charter provides something very  
10 specific with respect to utility funds. And I  
11 think reference to it specifically is worthwhile.

12 13.02 of the Falls Church charter, and  
13 I'm looking at it as Defendant 1 in defendant's  
14 exhibits, but 13.02 of the City's charter says  
15 very specifically "a return on equity that is  
16 calculated using generally accepted accounting  
17 principles for utility enterprises, when  
18 authorized by the council by the affirmative votes  
19 of a majority of council, may be transferred to  
20 the general fund or to the improvement fund of  
21 each utility respectively."

22 One of the things that I think the Court

1 will see in this case is that this is an effort on  
2 the part of Fairfax Water to graft language onto  
3 the charter as passed in 1993 so that it  
4 references not generally accepted accounting  
5 principles, which is what it says, but so that it  
6 references generally accepted rate-making  
7 principles.

8 The legislature surely understood the  
9 difference between those two things and provided  
10 for something other than what Fairfax Water wants  
11 the Court to think the charter provides.

12 I think the Court will see that Fairfax  
13 Water's complaint here really is not with the City  
14 but with the fact that the Virginia legislature  
15 for cities across Virginia, from Falls Church to  
16 Radford to Richmond, has authorized transfers of  
17 utility funds for general operating purposes of a  
18 locality.

19 And I think the Court will also see from  
20 the evidence that the City of Falls Church  
21 operates its water utility and has operated its  
22 water utility in a manner perfectly consistent

1 with that statutory blessing and that historic  
2 statutory blessing from the Virginia legislature.

3 And I also think the Court will see that  
4 this utility, this municipal utility operated by  
5 the City of Falls Church, is operated in a manner  
6 perfectly consistent with that of other Virginia  
7 municipalities operating utilities. And there are  
8 many of them.

9 And I think the Court will see that this  
10 utility is operated in a manner perfectly  
11 consistent with Norfolk, Newport News, Danville,  
12 Harrisonburg, Vienna, just to name a few.

13 And so I think the Court will see from  
14 the evidence that the constitutional challenge  
15 here is really nothing but the latest effort on  
16 the part of Fairfax Water to force the City of  
17 Falls Church out of the water business in Fairfax  
18 County and to fulfill what the Court will see from  
19 the evidence is Fairfax Water's stated mission of  
20 acquiring all water systems in territory that  
21 Fairfax Water thinks that it can serve.

22 We've had some discussion about this

1 already this morning, Your Honor. But the  
2 evidence will show you that, clear back to the  
3 1930s, when Falls Church was still a town and  
4 before Fairfax Water was even an idea, and before  
5 the Virginia Water and Sewer Authorities Act,  
6 which we discussed earlier, was even on the books,  
7 Falls Church was enterprising enough to establish  
8 a water system that provided water to City  
9 residents and Fairfax County residents who,  
10 because of Falls Church's initiative, because of  
11 the City's initiative, had access to reliable and  
12 safe drinking water; to parts of Fairfax County  
13 that, because of Falls Church's initiative, grew  
14 and developed economically into what we see today  
15 in parts of eastern Fairfax County.

16 But I think you -- the Court will also  
17 see from the evidence that the one thing that has,  
18 over time, sought to obstruct Falls Church's  
19 operation of its water system in Fairfax County  
20 has been the Fairfax Water Authority. And dating  
21 back at least 50 years, Judge, Fairfax Water has  
22 understood and complained that the City takes a

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1 profit from its water system and operated its  
2 water system in a manner sufficient to generate a  
3 profit.  
4 You'll see from the evidence, Your  
5 Honor, that this suit comes 50 years after another  
6 suit by Fairfax Water in this court against this  
7 City.  
8 I'll show the Court the first page of  
9 the complaint, which it will find at Exhibit 72  
10 among defendant's exhibits.  
11 That's the first page of a complaint  
12 filed in this Court, Your Honor, as you can see.  
13 Fairfax County Water Authority versus the City of  
14 Falls Church. It was a signed complaint. The  
15 signature page several pages later in Exhibit 72  
16 here, brought by the Fairfax Water Authority.  
17 Again, same -- same parties, same court.  
18 And I think the Court will see that in 1959  
19 Fairfax Water made allegations in that suit in  
20 this court that look an awful lot like those  
21 allegations and the complaints that it makes in  
22 this case.

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1 In 1959 Fairfax Water alleged in its  
2 lawsuit in this court that the City of Falls  
3 Church operates its water system in a large area  
4 of Fairfax County outside the City's corporate  
5 limits.  
6 It alleged in 1959, in this court, that  
7 the City operated its system not in a governmental  
8 capacity but in a proprietary capacity. These are  
9 items that the Court will find in that complaint.  
10 And it also alleged, Your Honor, in  
11 1959, that the City realized, quote, substantial  
12 profits from its water system in Fairfax County.  
13 And then, also, Your Honor, in that 1959  
14 suit against the City in this court, it alleged  
15 very specifically that, on information and belief,  
16 Fairfax Water alleges that the City of Falls  
17 Church does not operate the water system in a  
18 governmental capacity, but in a proprietary  
19 function. As I said, it alleged that it realized  
20 substantial profits on the operation of the water  
21 system by the City in Fairfax County.  
22 And then, Your Honor, at paragraph 10,

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1 within Defendant's Exhibit 72, Fairfax Water went  
2 on to allege in 1959 that those profits are,  
3 quote, paid in to the general fund of the City of  
4 Falls Church and used solely for the benefit of  
5 the persons residing within said corporate limits.  
6 I think, Your Honor, that the Court will  
7 be able to compare those allegations by Fairfax  
8 Water 50 years ago with Fairfax Water's claims in  
9 this suit, and conclude that this action comes too  
10 late. And the Court will be able to conclude at a  
11 minimum, and at best, that Fairfax Water has slept  
12 on its rights.  
13 THE COURT: Well, what happened to that  
14 lawsuit?  
15 MR. THOMAS: Judge, the record in the  
16 clerk's office is incomplete at best. I believe  
17 what happened, and I'm just telling the Court what  
18 I believe happened, is it was resolved by the 1959  
19 agreement. All right?  
20 The Court will also hear that Fairfax  
21 Water has been a customer of the City of Falls  
22 Church since the late 1970s. And to be clear,

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1 Your Honor, what that means, and I know that it's  
2 clear -- or I suspect it's clear from the  
3 allegations of the amended complaint. What that  
4 means is that Fairfax Water, the Water Authority  
5 in Fairfax County, at its headquarters, for  
6 decades, has purchased its water from the City of  
7 Falls Church. It has been in the service area of  
8 the City of Falls Church for decades.  
9 What that further means, Judge, is that  
10 the City has charged, if Fairfax Water is to be  
11 credited in this case, allegedly unconstitutional  
12 rates for decades. And Fairfax Water has paid  
13 them without ever alleging until 2009 that the  
14 City's rates were in any way unreasonable or  
15 unlawful.  
16 And I think the Court will also see from  
17 the evidence, that for decades, Fairfax Water has  
18 tried to purchase the City of Falls Church's water  
19 system. That's very significant in the context of  
20 this case for a variety of reasons.  
21 When it tried to purchase the City's  
22 water system in 1985, the Court will see that

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1 right at the heart of that offer, right at the  
2 heart of the offer made by Fairfax Water to the  
3 City was Fairfax Water's own recognition that the  
4 return or the profit made by the City of its water  
5 operations should be replaced, and that the City  
6 should have the benefit of that profit on an  
7 ongoing basis with annual payments.  
8 You'll hear that Fairfax Water's offer  
9 to the City was essentially, Your Honor, we'll  
10 make you whole. You turn the system over to us,  
11 and we will replace your profit that you make from  
12 the water system with annual payments to you.  
13 And I think the Court will be able to  
14 see from the evidence that, when Fairfax Water  
15 wanted to buy the City's system, it had no problem  
16 at all with the City's profits, at least none that  
17 it bothered to mention. Of course it made no  
18 mention of the -- of any unreasonableness of the  
19 City's rates or any unreasonableness of its  
20 charges or any lack of legality. Same parties,  
21 same water system, and the same constitution.  
22 As I -- as I mentioned in our motion in

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1 limine exchanges this morning, the plaintiff's  
2 theory in this case is that the amount doesn't  
3 matter. The amount of transfer doesn't matter.  
4 Whether it's a dollar, \$5 million, it doesn't  
5 matter.  
6 And what the evidence is going to show  
7 the Court is that Fairfax Water knew fully, fully  
8 well back in 1984, 1985, 1986 that the City was in  
9 the practice of taking a profit from its water  
10 system and transferring those monies from the  
11 water system -- I'm sorry, from the water fund to  
12 the general fund.  
13 I think the Court will also hear that  
14 those negotiations in the mid-1980s would have  
15 been substantially different had Fairfax Water not  
16 slept on its rights and waited until 2009 to bring  
17 this claim.  
18 Now, the evidence I think is also going  
19 to show that those -- those -- that those  
20 negotiations did not produce a transaction. But  
21 it did produce in the City a renewed focus on its  
22 water system. And there were two things critical

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1 to this case that evidenced that new attention by  
2 the City to its water system when those  
3 transaction discussions fell through.  
4 First, the City was determined to  
5 analyze its water system's rates, its return on  
6 investment, and its transfers made from the water  
7 fund to the general fund, and make sure that it  
8 was complying with best utility practices in  
9 Virginia.  
10 And the Court will see from the evidence  
11 that the City studied these issues extensively as  
12 far back as 1984, with an analysis from the  
13 consulting firm of Malcolm Pirnie, a firm that has  
14 for decades advised Virginia municipal --  
15 municipalities on the operation of their  
16 utilities.  
17 And the Court will see that, in 1984,  
18 Malcolm Pirnie confirmed that the practice of  
19 taking a return on investment from a municipal  
20 water system was consistent with practices  
21 throughout Virginia and recommended the  
22 methodology for the City to do just that,

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1 recommended the methodology for the City to take  
2 transfers from its water fund to its general fund  
3 out of a return on equity from the water system.  
4 But, as the Court will see, the City, in  
5 its diligence, wanted to make sure that its  
6 practices were proper, and that its rates were  
7 reasonable, and that its transfers of return on  
8 equity were appropriate.  
9 And the Court will hear evidence that in  
10 1991, 1992, 1998, 1999, 2001, 2005, the City, over  
11 and over again, studied the very issue that is  
12 right at dead center on this case, and that is the  
13 validity of its rates and its transfers from the  
14 water fund to the general fund, and studied it in  
15 order to get it right.  
16 The evidence is going to show the Court  
17 that the City did get it right, and it has gotten  
18 it right. It has a system that allows a fair  
19 return on its equity and, importantly, is easy to  
20 administer and it is transparent to the public.  
21 The Court will see that what plaintiff  
22 would like to establish as some sort of sneaky

1 effort to reduce the City's tax burden, or sneaky  
2 effort to transfer a profit from its utility fund  
3 to its general fund has been the subject of fully  
4 disclosed CAFRs going back decades. And there  
5 is -- there's been absolutely nothing sneaky  
6 whatsoever in this, nor has the City  
7 reverse-engineered its return on equity in order  
8 to -- in order to fill its budget gaps, if you  
9 will.

10 The Court will see that time and again  
11 the City was advised that its rates and its  
12 transfers were reasonable and were consistent with  
13 the practices of other Virginia municipalities  
14 operating utilities. The Court will hear that  
15 again in this case from the City's expert,  
16 Mr. Glenn Watkins.

17 The Court will hear also from  
18 Mr. Watkins that he has analyzed the City's rates,  
19 its current rates, which again, as we discussed  
20 this morning, are those that are under attack.  
21 Mr. Watkins has analyzed those rates and he has  
22 found them to be reasonable and cost based.

1 Just to be very clear about this, Judge,  
2 what that means is Mr. Watkins has conducted a  
3 rate study to determine whether the rates in this  
4 case are reasonable.

5 That testimony will stand alone, because  
6 the plaintiff's expert in this case, Mr. Woodcock,  
7 has conducted no rate study, and no witness from  
8 the plaintiff has conducted any rate study such  
9 that no witness from the plaintiff can take the  
10 stand and say that they, based on any rate study,  
11 have concluded that the City's rates are  
12 unreasonable or are not cost based.

13 The Court will also hear from the City's  
14 CFO, Mr. John Tuohy, who the Court met a moment  
15 ago, who will explain to the Court how the City  
16 goes about setting its rates, and the City's  
17 methodology for calculating its return on the  
18 water system.

19 The Court will see from the evidence  
20 that the City's methodology is rational, it is  
21 supported, and the City does not, as I said, back  
22 into this number in order to fill some sort of

1 budget gap.

2 The Court will see from the evidence,  
3 Your Honor, that it just simply makes no sense to  
4 insist, as Fairfax Water insists in this case,  
5 that the City operate its water system at cost.  
6 And at the end of the day, that's what Fairfax  
7 Water is asking the Court to conclude, that the  
8 City must operate its system at cost.

9 Against that backdrop, Judge, of decades  
10 of expert advice validating the City's rates and  
11 its transfers, of decades of Fairfax Water's own  
12 acceptance of those practices by the City, and its  
13 acquiescence in the City's rates, having never  
14 alleged that they were unreasonable or unlawful,  
15 against the backdrop of the evidence that we will  
16 provide the Court that the City's rates are  
17 reasonable and cost based, and its methodology for  
18 calculating its transfers is appropriate, against  
19 that backdrop, the Court will see plaintiff's  
20 expert, Mr. Woodcock, who, in preparing his  
21 report, in this case, did not review the practices  
22 or the finances of another Virginia municipality

1 operating a utility, and did not review the  
2 charter of any other Virginia city or municipality  
3 with a utility, and who did not prepare a rate  
4 study of the City's water rates and wasn't even  
5 asked to.

6 But he, nonetheless, will try to tell  
7 the Court that the City has gotten it all wrong in  
8 calculating its rates and in making its transfers  
9 from the water fund to the general fund as an ROE.

10 Now, the Court will also hear that the  
11 second way that the City renewed its focus on its  
12 water system following these failed purchase and  
13 sale transactions in the mid-'80s was a series of  
14 huge investments by the City to improve its water  
15 system for the benefit of all of its customers,  
16 in-city and out-of-city, including Fairfax Water.

17 The Court will hear evidence that, in  
18 the late 1990s and past the year 2000, the City  
19 invested millions in its water facilities.  
20 Beginning in 1999, the Court will hear that the  
21 City invested millions in its Tysons tank over at  
22 Route 123 and 7 in Tysons Corner, at a price that

1 Fairfax Water itself estimated to be north of  
2 \$6 million. It spent millions to increase its  
3 capacity at Scotts Run pumping station.

4 And the Court will hear that the City  
5 presently backs with its own full faith and credit  
6 \$17 million in general obligation bonds for water  
7 system improvements.

8 Now, Fairfax Water was intimately aware  
9 of, they were very involved in the improvements  
10 that the City made to its water system that I  
11 described and the Court will hear evidence about.  
12 As a customer they stood to benefit. They knew  
13 exactly what was going on.

14 I think, based on the evidence, the  
15 Court will rightly ask itself, why in the face of  
16 these massive investments made by the City in its  
17 water system throughout the County, or the eastern  
18 part of the County, why did they wait until 2009  
19 to bring a claim that the City's rates and that  
20 its very charter since -- which has been on the  
21 book since 1993, was unconstitutional?

22 And the Court will hear evidence that

1 the City would have made very different investment  
2 decisions had Fairfax Water not slept on its  
3 rights.

4 So in sum, Your Honor, the evidence will  
5 show that the Virginia legislature has authorized  
6 the very practices that Fairfax Water now attacks.  
7 In order to prevail on this case, they must  
8 establish that the Virginia legislation  
9 establishing the City's charter is, indeed,  
10 unconstitutional.

11 And the Court will hear that the City's  
12 charter is no rogue actor. Virginia legislature  
13 has enacted charters from other cities that permit  
14 the use of utility funds for general governmental  
15 purposes. I think the Court can conclude from  
16 that that the Virginia legislature has made a  
17 decision about this and has sanctioned just the  
18 very practices that are now under attack.

19 I think the Court will hear that the  
20 City's return on investment and its transfers from  
21 its water fund are the product of decades of  
22 analysis and advice and are perfectly consistent

1 with the practices of other Virginia  
2 municipalities.

3 And the Court will hear, again, from  
4 Mr. Watkins, that the City's rates and its charges  
5 are reasonable and cost based.

6 And finally, the Court will conclude  
7 that Fairfax Water has understood the City's  
8 practices and transfers for at least 50 years, and  
9 been a customer for approximately 30 years. And  
10 the Court will conclude that this action comes too  
11 late.

12 So at the close, Your Honor, we will  
13 respectfully ask the Court to dismiss Fairfax  
14 Water's suit and enter judgment in the City's  
15 favor.

16 THE COURT: Thank you, Mr. Thomas.  
17 Have you got a 45-minute witness?

18 MR. RAPHAEL: Your Honor, what I would  
19 like to do is move some documents into evidence.  
20 I would like to show a brief excerpt from the  
21 City's corporate designation deposition. I would  
22 like to have Mr. Woodcock on the stand while I'm

1 doing that because he bases his testimony on this  
2 material. So if we could put him on the stand,  
3 I'll then proceed.

4 THE COURT: But we will not complete his  
5 testimony?

6 MR. RAPHAEL: We will not complete his  
7 testimony.

8 THE COURT: All right. Is that agreed,  
9 sir?

10 MR. THOMAS: That's fine with me. Would  
11 it be possible for our expert to be part -- to be  
12 in the courtroom for that testimony? I understand  
13 the rule on witnesses can go --

14 THE COURT: It's up to Mr. Raphael.

15 MR. RAPHAEL: We would not be in favor  
16 of that, Your Honor.

17 THE COURT: My hands are tied. All  
18 right.

19 MR. RAPHAEL: Would you call  
20 Mr. Woodcock.

21 THE COURT: Yes, sir.

22 MR. THOMAS: Can I just -- do I

1 understand that Mr. Woodcock is taking the stand  
2 now; is that right? In other words, if you're  
3 going to introduce evidence that is not relating  
4 to his testimony, then I think the rule on  
5 witnesses means he's not here.

6 MR. RAPHAEL: This is evidence that he's  
7 relied on for his report. He's already seen it.  
8 It's not like he hadn't seen it before.

9 THE COURT: Well, do we need him here  
10 then?

11 MR. RAPHAEL: It's not essential.

12 THE COURT: Maybe it would be better  
13 just to do it without the witness.

14 MR. RAPHAEL: All right.

15 THE COURT: I think that would be fine.

16 MR. RAPHAEL: Go back.

17 THE COURT: They're both out there.

18 MR. RAPHAEL: I would like to start,  
19 Your Honor, with some documents that are not  
20 contested.

21 First of all, I showed you earlier in  
22 opening the map of the area of service. That's

1 Plaintiff's Exhibit 2. I don't believe the City  
2 has an objection. I would move that at this time.

3 MR. THOMAS: No objection.

4 THE COURT: All right.  
5 (Plaintiff's Exhibit 2 was received into  
6 evidence.)

7 THE COURT: Mr. Raphael has described  
8 the documents he's about to refer to as being  
9 uncontested. Why don't we agree that, unless I  
10 hear an objection I won't have to ask you every  
11 time? Would that be agreeable?

12 MR. THOMAS: That's fine.

13 MR. RAPHAEL: That's perfect.

14 Next, Your Honor, the pleadings  
15 establish that Fairfax County Water Authority is a  
16 customer of Falls Church with regard to two  
17 buildings in Merrifield. That's paragraphs 93 and  
18 94 of the amended complaint and the answer by the  
19 City which admits those facts.

20 The pleadings also establish that the  
21 City has served the same geographic area of  
22 service in Fairfax County from 1959 until the

1 present.

2 Ken, would you bring up paragraphs 10 of  
3 the amended complaint and the answer.

4 (Discussion off the record.)

5 MR. RAPHAEL: Okay. Paragraph 10 of the  
6 complaint.

7 And then paragraph 10 of the complaint  
8 alleged that despite the expiration of the 1959  
9 agreement in 1989, the City has continued to serve  
10 the same geographic market for public water  
11 service that it served under the expired  
12 agreement. The City currently holds 100 percent  
13 of that market. And the City has admitted the  
14 allegations of paragraph 10.

15 The pleadings also establish, Your  
16 Honor, that 92 percent of the City's customers  
17 live in Fairfax County. This is paragraph 13 of  
18 the amended complaint.

19 About 110,000 people live in Fairfax  
20 County who are served by the City of Falls Church,  
21 whereas 1,100 -- 11,000 live in Falls Church. So  
22 it's 92 percent Fairfax County customers of Falls

1 Church, and 8 percent Falls Church customers of  
2 the City.

3 Your Honor, I would move into evidence  
4 Defendant's Exhibit 73, which is the Fairfax  
5 County Water Authority invoice history maintained  
6 by the City of Falls Church. Defendant's  
7 Exhibit 73.

8 I would also move Plaintiff's  
9 Exhibit 64, which are the billings by -- the  
10 actual statements by the City of Falls Church to  
11 Fairfax Water. And then there's a tabulation  
12 summarizing the amounts of the attached bills.

13 And, Ken, if you could flip through the  
14 pages of the exhibit on the screen, that would be  
15 helpful.

16 Will those be received, Your Honor?

17 THE COURT: Sir?

18 MR. RAPHAEL: Is that received? I'm  
19 sorry.

20 THE COURT: Yes, sir.

21 MR. RAPHAEL: Thank you.

22 THE COURT: Hearing no objection,

1 they're all received.  
 2 (Defendant's Exhibit 73 and Plaintiff's  
 3 Exhibit 64 were received into evidence.)  
 4 MR. RAPHAEL: Thank you, Your Honor.  
 5 MR. HOLZHEIMER: Your Honor, and for the  
 6 record, I'm trying to track here, that's 73,  
 7 Defendant's 73, Plaintiff's 64?  
 8 MR. RAPHAEL: That's correct.  
 9 MR. HOLZHEIMER: Was there anything  
 10 else?  
 11 MR. RAPHAEL: Not yet.  
 12 MR. HOLZHEIMER: Okay.  
 13 MR. RAPHAEL: At this time, Your Honor,  
 14 I would like to offer some excerpts from the  
 15 City's corporate designation deposition. The  
 16 entire segment is about 35 minutes. I'm going to  
 17 be stopping from time to time to admit documents  
 18 that are part of that.  
 19 And I handed counsel a paper copy of the  
 20 excerpts, and I would like to hand up a copy to  
 21 the Court as well if I might.  
 22 MR. THOMAS: If I could, I don't believe

1 these were exchanged prior to trial, as the trial  
 2 order indicates.  
 3 MR. RAPHAEL: Well, I offered to  
 4 exchange them. There was no reciprocation. The  
 5 rule actually applies to nonparties, not to  
 6 parties. This is a party deposition.  
 7 THE COURT: This is a deposition  
 8 transcript of the defendant's --  
 9 MR. RAPHAEL: Corporate representative.  
 10 THE COURT: -- corporate representative?  
 11 MR. RAPHAEL: That's right. And they  
 12 took the corporate representative deposition of  
 13 our clients. I have not received any designation  
 14 from them. I offered to designate. And  
 15 Mr. Thomas indicated that he didn't know if he  
 16 could get to it. It just didn't happen. But the  
 17 rule entitles me to offer the City's deposition  
 18 excerpts as substantive evidence. And there are a  
 19 handful of objections in here that can be ruled on  
 20 as we go through them.  
 21 THE COURT: All right. Yes, sir.  
 22 MR. HOLZHEIMER: Your Honor, if I may

1 address, because it was something I was looking at  
 2 earlier. We're not objecting to its admission,  
 3 Your Honor. But under the scheduling order, we  
 4 have the right to look at it to see what  
 5 objections we're going to stand on, what  
 6 objections we're going to pass.  
 7 Also, Your Honor, under the doctrine of  
 8 completeness, it may take things out of context,  
 9 not that they would do it on purpose, but we may  
 10 want to designate things above and below for  
 11 completeness.  
 12 THE COURT: Right. Well, why don't we  
 13 do this. We'll receive it, but take a look at it  
 14 tonight and let me know first thing in the morning  
 15 what additions you would like to have.  
 16 MR. RAPHAEL: And that will work  
 17 perfectly.  
 18 THE COURT: Okay.  
 19 MR. HOLZHEIMER: Thank you.  
 20 MR. RAPHAEL: I also have a copy for the  
 21 court reporter to follow along.  
 22 If we could just play the clips on that,

1 please.  
 2 MR. THOMAS: Does that mean, Judge,  
 3 we're going to resolve the objections in here as  
 4 we go?  
 5 THE COURT: I hope not. I think what  
 6 you need to do is determine upon your review  
 7 whether you're going to stand on the objections.  
 8 MR. HOLZHEIMER: Yes, Your Honor.  
 9 THE COURT: If not, then I'll resolve  
 10 them.  
 11 MR. THOMAS: So we're not playing the  
 12 tape now?  
 13 THE COURT: We're not playing it now.  
 14 MR. RAPHAEL: Well, I need to play the  
 15 tape to get the exhibits in that go with it.  
 16 THE COURT: Well, we'll do that in the  
 17 morning. Because -- so they have a chance to  
 18 designate. It will be okay. We'll do it first  
 19 thing.  
 20 MR. RAPHAEL: All right. Does --  
 21 THE COURT: Just put this at the last.  
 22 MR. RAPHAEL: Does the City intend to

1 offer designations from our corporate designation  
2 deposition? We would ask for a copy.

3 THE COURT: You have to ask them. I  
4 can't answer that question.

5 MR. RAPHAEL: I understand that. But  
6 what's fair for the goose is fair for the gander.

7 MR. HOLZHEIMER: And, your Honor, before  
8 we offer it to the Court, we'll provide it to them  
9 a day ahead of time to allow them the same  
10 opportunity to note their -- whether they stand on  
11 the objection. We'll make that available to them.

12 THE COURT: So when will you give  
13 Mr. Raphael your designation?

14 MR. HOLZHEIMER: We can do that  
15 tomorrow, Your Honor.

16 THE COURT: Okay. First thing tomorrow.  
17 Thank you.

18 MR. RAPHAEL: Your Honor, this -- for  
19 purposes of telling the story, while this kind of  
20 upsets the apple cart, there is a lot of material  
21 I need from the corporate designation deposition  
22 that precedes what Mr. Woodcock says. He

1 CERTIFICATE OF NOTARY PUBLIC

2 I, Vicky Reiner, RMR, CRR, the officer before  
3 whom the foregoing hearing was taken, do hereby  
4 certify that said transcript is a true record of  
5 the proceedings; that I am neither counsel for,  
6 related to, nor employed by any of the parties to  
7 the action; and further that I am not a relative  
8 or employee of any attorney or counsel employed by  
9 the parties thereto, nor financially or otherwise  
10 interested in the outcome of the action.

11  
12  
13 \_\_\_\_\_  
14 Notary Public  
15 in and for the  
16 Commonwealth of Virginia

17  
18 My Commission expires:  
19 December 31, 2011  
20 Registration No. 7117657  
21  
22

1 testifies based on what's in evidence. And it  
2 reverses the order of that. I think it would make  
3 sense to have that in first. You said we would  
4 break at 3 today. I don't mean to break early.  
5 But --

6 THE COURT: Is this the point when you  
7 would offer the deposition testimony?

8 MR. RAPHAEL: Yes, it is.

9 THE COURT: Then why don't we -- why  
10 don't you all use this time to do that work, and  
11 we'll start at 9:30 sharp tomorrow morning.

12 MR. RAPHAEL: Thank you very much.

13 THE COURT: All right. Is that  
14 agreeable?

15 MR. THOMAS: That's agreeable.

16 THE COURT: All right. The Court will  
17 be in recess until 9:30 tomorrow morning.

18 (Whereupon, at 2:25 p.m., the hearing  
19 recessed, to reconvene at 9:30 a.m. on Tuesday,  
20 September 15, 2009.)  
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