

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 16, 2009

VOLUME 3

The parties met, pursuant to the notice of
the Judge, at 9:33 a.m.

BEFORE: THE HONORABLE R. TERRENCE NEY

1 APPEARANCES:
 2 On Behalf of the Plaintiff:
 3 STUART A. RAPHAEL, ESQ.
 4 PATRICIA M. MOODY, ESQ.
 5 Hunton & Williams, LLP
 6 1751 Pinnacle Drive, Suite 1700
 7 McLean, Virginia 22102
 8 (703) 714-7463
 9 sraphael@hunton.com
 10
 11 On behalf of the Defendant:
 12 ALEXANDER "SANDY" THOMAS, ESQ.
 13 RICHARD D. HOLZHEIMER, JR., ESQ.
 14 BRENT R. GARY, ESQ.
 15 REED SMITH, LLP
 16 3110 Fairview Park Drive, Suite 1400
 17 Falls Church, Virginia 22042
 18 (703) 641-4276
 19 athomas@reedsmith.com
 20
 21
 22

1 EXHIBITS
 2 EXHIBIT NO. RECEIVED
 3 DEFENDANT'S
 4 21 Memorandum from John Doane to
 5 The Mayor and the City of Falls
 6 Church Council, 12/9/1991 656
 7 22 Memorandum from John Doane to
 8 Director of Utilities, 12/10/1991 658
 9 26 Memorandum from Hector Rivera to
 10 Son Nguyen, 1/14/1998 659
 11 36 E-mail from Wyatt Shields to
 12 Brenda Creel, Robert Etris, John
 13 Tuohy, 11/9/2005 662
 14 41 E-mail from Jamie Bain Hedges to
 15 Falls church Repository,
 16 2/11/2009 663
 17 71 Glenn Watkins' resume 699
 18 71-A Glenn Watkins' list of testimonies 701
 19
 20
 21
 22

1 APPEARANCES (Continued):
 2 ALSO PRESENT:
 3 Charles Murray, Fairfax County Water
 4 Authority
 5 John Tuohy, City of Falls Church
 6
 7
 8 CONTENTS
 9 WITNESS DIRECT CROSS REDIRECT
 10 CHRISTOPHER WOODCOCK 452 474
 11 492
 12 CHARLES M. MURRAY 494 506 524
 13 GLENN WATKINS 679 701 (voir dire)
 14 714 (continued)
 15
 16 EXHIBITS
 17 EXHIBIT NO. RECEIVED
 18 PLAINTIFF'S
 19 28 Letter from City Manager to
 20 County Executive, 5/7/2003 667
 21 REBUTTAL 22 Nonsuit orders dated
 22 June 16, 1959 534

1 PROCEEDINGS
 2 - - - - -
 3 THE COURT: Good morning. All right,
 4 Mr. Woodcock. You are still under oath, sir.
 5 MR. THOMAS: Judge, I had been
 6 admonished to make better use of the microphone.
 7 And I will do that today.
 8 THE COURT: Actually, I thought it was
 9 on. But, I mean, I could hear you all. But it's
 10 much better with the microphone. And you speak
 11 very softly, Mr. Thomas.
 12 MR. THOMAS: I understand. At some
 13 point today, it will become off, and I suspect
 14 that will be my doing, and I'll try to keep an eye
 15 out.
 16 THE COURT: And Deputy Price will keep
 17 her eye on it.
 18 All right, you may begin, Mr. Thomas.
 19 Whereupon,
 20 CHRISTOPHER P.N. WOODCOCK
 21 having been previously duly sworn, was examined
 22 and testified further as follows:

Page 452

1 **CROSS-EXAMINATION**
2 **BY MR. THOMAS:**
3 Q Good morning, Mr. Woodcock.
4 A Good morning, Mr. Thomas.
5 Q Mr. Woodcock, setting Falls Church
6 aside, it's a fact, isn't it, that in preparing
7 your opinion in this case, you didn't study the
8 finances of any Virginia municipality with a
9 utility, right?
10 A In preparing for this case, no, I did
11 not.
12 Q Okay. Now, you gave some testimony
13 yesterday, Mr. Woodcock, about the AWWA and its
14 various manuals. Do you recall that testimony?
15 A Yes.
16 Q Okay. Now, in particular, you gave some
17 testimony about the M5 manual which is identified
18 as Plaintiff's Exhibit 107.1. And that's the
19 manual entitled Water Utility Management, right?
20 A Yes, it is.
21 Q Okay. If you have a copy of the
22 exhibits there.

Page 453

1 A I do not. I'm sorry.
2 Q I think actually you do. Right to your
3 left.
4 A Oh, I do. I'm sorry.
5 Q Plaintiff's Exhibit 107.1.
6 A Let's see how these are organized. I'm
7 trying to -- 107? So I look under tab 107, is
8 that --
9 Q Yes. Under Plaintiff's Exhibit, you'll
10 see they're listed on the side there.
11 **MR. THOMAS:** Can we have this ELMO
12 turned on so it shows up on the screen, please.
13 Thank you.
14 **THE WITNESS:** Plaintiff's Exhibit 107.
15 **BY MR. THOMAS:**
16 Q That's correct. 107.1, which will be
17 right behind tab 107.
18 A I see. Okay. Got it, yes.
19 Q So we're looking at the same thing.
20 You're looking at the selections from the M5 Water
21 Utility Management manual, right?
22 A I have it. Yes.

Page 454

1 Q In particular you gave testimony
2 yesterday about numbered paragraph 2, which is on
3 page 2 of that exhibit, right?
4 A Yes. Page 33 of the manual, the second
5 page of the exhibit.
6 Q Correct.
7 A Yes.
8 Q Right. Thank you. And this is in the
9 chapter entitled Utility Financial Management,
10 right?
11 A Yes, it is.
12 Q And you gave testimony yesterday about
13 the section that says, in numbered paragraph 2,
14 "water utility funds should not be diverted to
15 uses unrelated to water utility services," right?
16 A Correct.
17 Q Okay. Now, it's a fact, isn't it,
18 Mr. Woodcock, that that selection from this
19 chapter is one of five principles that the AWWA
20 sets out here in the overview section, right?
21 A Yes. It's one of the five numbered
22 principles, yes.

Page 455

1 Q Okay. I want to ask you about a section
2 of this overview that you didn't testify about
3 yesterday. Look up above the numbered paragraphs
4 there on page 33, the second page of this exhibit.
5 Do you see where the AWWA writes, quote, AWWA
6 recognizes the following principles that water
7 utilities should establish. Right?
8 A I see that, yes.
9 Q Okay. So these are recommendations from
10 the AWWA, right?
11 A That's a fair characterization, yes.
12 Q Thank you. It's a fact that the AWWA
13 expressly provides these principles can be
14 balanced against other policy objectives, right?
15 A It does say that. There is a "however."
16 Q Understand. What it says, as a matter
17 of fact, is, quote -- and this is right after the
18 section you just looked at, quote, implementation
19 of these principles can be balanced against other
20 policy objectives. Right?
21 A Yes. And then semicolon, however, and
22 there's some caveats.

1 Q Right. And they discuss the long-term
2 financial integrity of water utilities and the
3 ability to provide service to customers, right?

4 A Correct.

5 Q And those are objectives that are
6 consistent with the paragraph right above the
7 paragraph we're looking at, where AWWA states what
8 it believes water service should be characterized
9 by, public water service should be characterized
10 by, right?

11 A Yes.

12 Q Okay. So the AWWA acknowledges here in
13 this guidance that it's not one size fits all for
14 government owned water utilities, right?

15 A Yes. My hesitancy is, when you say one
16 size fits all, the implication is the one size
17 doesn't matter. The one size does matter. But it
18 doesn't necessarily -- there can be circumstances
19 or other policy objectives, as stated under here,
20 that could or should be taken into account. But
21 with that caveat, yes.

22 Q That's fair. Thank you. And you know,

1 don't you, Mr. Woodcock, that some municipalities
2 with utilities follow these principles and some
3 don't?

4 A Correct.

5 Q And you know, don't you, that some
6 municipalities follow some of these principles
7 that other municipalities don't follow, right?

8 A That's correct also.

9 Q Okay. And you know, don't you,
10 Mr. Woodcock, that some states actually have
11 statutes that reflect the principles on this list
12 of principles from the AWWA, and some states
13 don't, right?

14 A I'm going to say yes, but I can't think
15 of a specific statutory provision in a state that
16 sort of tracks with this. But I -- I'm not at all
17 surprised that there are some.

18 Q All right. Now, these principles here
19 in this section of the M5 manual, they actually
20 contemplate that a utility might implement a
21 non-cost of service rate-setting practice, right?

22 A Perhaps you can point me to --

1 Q I will. Fair enough. If you could look
2 at -- this is a section that you didn't talk about
3 yesterday. But if you could look at paragraph 4,
4 which is on the page right behind the page we've
5 been talking about.

6 Do you see in paragraph 4, about
7 two-thirds of the way down, the AWWA writes: Any
8 non-cost of service rate-setting practice
9 implemented by a utility should be fully disclosed
10 to its customers, regulators, and the financial
11 community?

12 Do you see that?

13 A I see that wording.

14 Q Okay. And so if the AWWA thought that a
15 utility should not implement a non-cost of service
16 rate-setting practice, it would have said so in
17 these principles, right?

18 A I'm going to say yes, but I'm going to
19 also note that the policy that's outlined in this
20 exhibit has been superseded several months ago, I
21 believe it was. It was updated. And it's
22 essentially the same for many areas. The part you

1 just read, as I recall, was subject to quite a bit
2 of debate. And I believe it has been changed from
3 this.

4 The requirement -- or the suggestion or
5 the recommendation that -- for full disclosure, I
6 believe was changed because of the issues or the
7 problems that might cause. The Rates and Charges
8 Committee, when it was looking at that one piece,
9 was troubled with that requirement, that
10 recommendation; that it was perhaps a little too
11 onerous to suggest that everybody should always
12 disclose to customers, regulators, and financial
13 communities that it might cause issues.

14 And there were some other language
15 changes in those particular sentences. And I -- I
16 don't have those with me, what they were. But
17 there were a few changes to that.

18 Now, having said that, I don't think
19 that the gist of what you're asking, the
20 derivation from non-cost based, was necessarily
21 impacted. I believe that's still the case. But
22 it was changed a little bit.

1 Long answer to that. I'm sorry.
 2 Q And I appreciate that. But for our
 3 purposes here today, this is the M1 manual section
 4 that you testified about yesterday, right?
 5 A The M5 manual, yes.
 6 Q I'm sorry. The M5 manual.
 7 A Yes, it is.
 8 Q And at least this version of the M5
 9 manual includes as a principle how a utility
 10 should go about disclosing a non-cost of service
 11 rate-setting practice, right?
 12 A It does. But the portion that I was
 13 testifying to yesterday was not changed by the
 14 updated policy. What I'm telling you is that the
 15 section you were just asking me about was indeed
 16 changed.
 17 Q Okay.
 18 A As I recall, it was changed. The gist
 19 of it, as I said, was at least softened perhaps a
 20 little bit more.
 21 Q Okay. But the principle remains the
 22 same, correct?

1 A I believe the principle is still
 2 expressed that way, yes.
 3 Q All right. Now, you're familiar, are
 4 you not, Mr. Woodcock, with McQuillin's treatise
 5 on municipal corporations?
 6 A I'm not familiar with it, no.
 7 Q Well, then you weren't aware, were you,
 8 that McQuillin has a chapter in his treatise on
 9 municipal corporations entitled Municipal
 10 Ownership of Public Utilities?
 11 A I'm not sure who McQuillin is.
 12 Q Fair. So you don't know he had a
 13 chapter in his treatise on that topic, right?
 14 A That's true.
 15 Q Well, I want to show you a section from
 16 that chapter entitled Municipal Ownership of
 17 Public Utilities. It will come up on the screen
 18 here and I'll ask you about it.
 19 MR. RAPHAEL: Your Honor, I have to
 20 object. I don't -- I don't think that it's proper
 21 cross-examination for an expert with regard to --
 22 to show hearsay that had not been authenticated or

1 established, and to show that to a witness who
 2 says he hasn't used it or seen it or relied on it.
 3 THE COURT: You gave notice that you
 4 would be relying upon this, did you not?
 5 MR. THOMAS: No. And I don't believe
 6 that the code section that I believe that
 7 Mr. Raphael is referring to involves
 8 cross-examination. I believe that it's only as to
 9 direct examination. We have cited the McQuillin
 10 treatise on municipal corporations repeatedly in
 11 our papers to the Court and to the other side.
 12 THE COURT: Is there a requirement, if
 13 they're going to cross-examine with a learned
 14 treatise, Mr. Raphael, that they not be permitted
 15 to do so -- that they failed to comply with?
 16 MR. RAPHAEL: Well, I think -- Your
 17 Honor, bear with me one minute, please.
 18 I would -- yes, Your Honor. Bostic
 19 versus About Women OB/GYN. It's 275 Virginia 567,
 20 2008. The Supreme Court of Virginia held that it
 21 was in error -- it set aside a defense verdict in
 22 a medical malpractice case because the trial court

1 erred in permitting counsel to show the trier of
 2 fact, the jury in that case, a medical treatise
 3 that defendant's expert neither agreed with nor
 4 relied upon to form his opinion. So, yes, I think
 5 it is -- I think it is improper.
 6 Also, I would add this is a legal
 7 treatise. As we proffered, Mr. Woodcock has not
 8 testified on a legal conclusion.
 9 THE COURT: Well, I don't know what is
 10 going to be cited out of it. But I was not aware
 11 that, for cross-examination, an expert could not
 12 be asked about treatises, rules, regulations,
 13 codes, protocols, everything.
 14 MR. RAPHAEL: Well, your Honor, it's a
 15 vehicle for hearsay. That's the objection. It's
 16 a vehicle for hearsay.
 17 MR. THOMAS: Well, it's a treatise that,
 18 as I think the Court just indicated, is a learned
 19 treatise. It happens to be -- it happens to cover
 20 a subject directly relevant to what this witness
 21 has been offered to testify about. And I think on
 22 cross-examination I'm entitled to ask him.

1 8.01-401.1 which I believe is the only
2 code section that bumps up against this issue,
3 deals only with direct testimony and disclosure of
4 learned treatises that are going to be read into
5 the case in direct testimony.

6 I simply want to show him a section of
7 what I think is a treatise from an applicable area
8 of law that he's -- I'm sorry, an applicable area
9 that he's been asked to testify about and tell him
10 that that's different from the AWWA.

11 THE COURT: I think it's permissible.
12 I'm going to permit it.

13 MR. RAPHAEL: All right. May I proffer,
14 Your Honor, under 8.01-401.1 the condition of
15 being able to show an expert something on
16 cross-examination is that it be contained in a
17 published treatise, periodical or pamphlet on a
18 subject of history, medicine or other science or
19 art, established as a reliable authority by
20 testimony or by stipulation.

21 And that hasn't happened. So I think
22 he's not laid the predicate for this.

1 THE COURT: In other words, you're
2 challenging the reliability of McQuillin's
3 Municipal Corporations, a text which is well known
4 to generations of lawyers?

5 MR. RAPHAEL: It's known to lawyers,
6 Your Honor. But it's not -- it is not part of the
7 rate-making --

8 THE COURT: We haven't heard what the
9 question is yet.

10 MR. RAPHAEL: Well, I can tell you what
11 the question is going to be.

12 THE COURT: Well, but I don't know what
13 the question is. I'm going to permit it.

14 Exception noted.

15 MR. THOMAS: Thank you, Judge.

16 BY MR. THOMAS:

17 Q Okay. Mr. Woodcock, I've put up here on
18 the screen before you a section -- a part of
19 section 35.59 from McQuillin's treatise on
20 municipal corporations, and the chapter on
21 municipal ownership of public utilities.

22 You see where McQuillin writes: While

1 in theory, water from a municipally owned plant
2 should come to the consumer without profit to the
3 municipality, this does not exclude the idea of
4 profit in operation. A city is entitled to a
5 reasonable profit and it may even use that profit
6 for other valid municipal purposes.

7 Do you see that?

8 A I do see that, yes.

9 Q Okay. And that's different from the M5
10 guidance that you testified about yesterday,
11 right?

12 MR. RAPHAEL: Objection to the extent
13 he's calling for an interpretation of a legal
14 treatise that he says he didn't review or rely on.

15 MR. THOMAS: I'm not asking for a legal
16 opinion. I'm asking him to determine that that
17 is -- to acknowledge that that is different from
18 the AWWA advice that he talked about yesterday.

19 THE COURT: Well, the language is clear.
20 I think it's a fair question. I think it's a fair
21 question. Objection overruled.

22 THE WITNESS: I'm sorry. I'm just

1 reading the whole thing if that's okay,
2 Mr. Thomas.

3 BY MR. THOMAS:

4 Q Sure.

5 A I'm just trying to understand what the
6 context of this is.

7 I will grant you what you're showing me
8 and what I'm looking at does indeed seem to
9 contradict or be at odds with the policy of the
10 American Water Works Association.

11 Q Thank you. Now, you gave some testimony
12 yesterday, Mr. Woodcock, about the utility basis
13 and the cash basis methods, right?

14 A Yes.

15 Q Do you remember that testimony?

16 A Yep.

17 Q All right.

18 A I do.

19 Q Now, again, I would like you to set
20 Falls Church aside, okay? In preparing your
21 report and your opinions in this case, you didn't
22 look into what method Virginia municipal utilities

1 use to establish their rates, right?
 2 A I'm sorry. Could you ask that again.
 3 Q Sure.
 4 A I'm just trying to follow all of the
 5 pieces of that.
 6 Q There are moving parts. I understand.
 7 Let's set Falls Church aside, okay? In
 8 preparing your opinions in this case, you didn't
 9 look into what method Virginia municipal utilities
 10 use to establish their rates, right?
 11 A I saw documents, discovery documents
 12 that certainly got into that issue of other
 13 utilities and what practices were for those other
 14 utilities. And I saw those prior to the
 15 completion of my report.
 16 Q Okay. Fair enough. But after seeing
 17 those documents produced in discovery, you didn't
 18 make any investigation beyond that to determine
 19 which method Virginia utilities, other than Falls
 20 Church, use to establish their rates?
 21 A I did talk to people about what they had
 22 done, what their experiences were with Virginia

1 utilities. So I would disagree with that
 2 statement.
 3 Q All right.
 4 A Not all certainly, but some Virginia
 5 water utilities.
 6 Q All right.
 7 A And I'm talking water utilities only, as
 8 distinct from any other kind.
 9 Q Well, in preparing -- again, setting
 10 aside Falls Church, in preparing your report in
 11 this case, you didn't review the CAFRs of any
 12 other Virginia municipality owning a utility,
 13 right?
 14 A In preparing my report, I did not look
 15 at any other CAFRs. That's correct.
 16 Q Now --
 17 A I think that's -- that's correct. There
 18 were over 300 documents. There may have been one.
 19 I don't recall one. And if there were, it didn't
 20 enter into any major degree. I don't want to say
 21 absolutely not. There may have been one in there.
 22 And if you show me a deposition exhibit that was

1 one and I didn't recall it, I -- I will agree that
 2 there was one.
 3 Q All right. Okay. Now, you also gave
 4 some testimony yesterday about the M1 manual as
 5 opposed to the M5, the M1 manual, right?
 6 A Correct.
 7 Q Do you remember that testimony?
 8 A I do.
 9 Q Okay. And that's a document, if you
 10 could flip into the place where you just were, at
 11 107.3 among plaintiff's exhibits.
 12 A I have that.
 13 Q Okay. And in particular, Mr. Woodcock,
 14 you gave some testimony about -- or that related
 15 to the section within Plaintiff's Exhibit 107.3
 16 called Service Outside City Limits, right?
 17 A That's correct.
 18 Q Okay. And like the M5 manual we
 19 discussed, this is general guidance from the AWWA,
 20 right?
 21 A Correct.
 22 Q And some municipalities follow it and

1 some don't, right?
 2 A That's correct.
 3 Q Okay. In fact if you take a look,
 4 please, at the last paragraph in the section that
 5 you talked about yesterday, which is on the third
 6 page of -- I'm sorry, the last page of this
 7 exhibit. Do you see that?
 8 A The paragraph that starts "in some
 9 instances"?
 10 Q Right. The beginning of that paragraph,
 11 it says: In some instances as a matter of policy
 12 a government owned utility might choose to waive
 13 the distinction between owner and nonowner
 14 customers and consider the utility to be
 15 metropolitan in nature.
 16 Do you see that?
 17 A I do.
 18 Q Okay. And so the AWWA itself says that,
 19 as a matter of policy, a government owned utility
 20 might depart from this guidance in the M1 manual,
 21 right?
 22 A Yes, it does.

1 Q Okay. Now, also within -- I want to ask
2 you about some section -- a section of the M1
3 manual that you didn't give some testimony about
4 yesterday.

5 And, Judge, if I could, I would like to
6 pass up what we've marked for identification
7 purposes only as Defendant's Exhibit 90.

8 THE COURT: All right.

9 MR. THOMAS: May I approach the witness?

10 THE COURT: Yes, sir.

11 BY MR. THOMAS:

12 Q Now, Defendant's Exhibit 90,
13 Mr. Woodcock, the first page of this exhibit is
14 the cover of the -- the cover page of the AWWA
15 manual M1, right?

16 A Yes, it is.

17 Q Okay. And if you would just turn over
18 to the next page, the second page in this exhibit,
19 and that's entitled "Foreword," right?

20 A Yes, it is.

21 Q Look down, if you would, please, at the
22 bottom paragraph of the Foreword to the M1 manual.

1 Do you see it says there, "As with the other
2 manuals prepared by the Rates and Charges
3 Subcommittee, this manual will not prescribe a
4 solution."

5 Do you see that?

6 A I do.

7 Q And that's consistent with your
8 understanding of how the M1 manual is used, right?

9 A It is. I actually wrote that paragraph.

10 Q You did?

11 A I did.

12 Q All right. And you say -- you see here
13 also that it says, "Rather, it is intended to
14 provide guidance and advice," right?

15 A Correct.

16 Q All right. And that's consistent with
17 your understanding of how this manual is used,
18 right?

19 A Yes.

20 Q Okay. And then further, two lines down,
21 you see where it says, "The purpose of this manual
22 is to describe and present issues associated with

1 developing water rates and charges, to enumerate
2 the advantages and disadvantages of various
3 alternatives, and to provide information to help
4 users determine water rates and charges that are
5 most relevant to a particular situation"? Right?

6 A It does. Yes.

7 Q Okay. So the -- the intent, perhaps
8 your intent of the M1 manual was to provide
9 flexibility in the use of the principles that it
10 lays out in the manual, right?

11 A Overall intent was that, absolutely,
12 yes, that's a fair characterization.

13 MR. THOMAS: Judge, I don't have further
14 questions at this time.

15 THE COURT: Thank you. Redirect?

16 MR. RAPHAEL: Thank you, Your Honor.

17 Ken, could you bring up Plaintiff's
18 Exhibit 107.1 and page 2 of 9..

19 REDIRECT EXAMINATION

20 BY MR. RAPHAEL:

21 Q Good morning, Mr. Woodcock.

22 A Good morning.

1 Q Mr. Thomas asked you some questions
2 about the M5 manual?

3 A Yes, he did.

4 Q And you're seeing it here on your
5 display. And he asked you questions about the
6 nondiversion principle that's found in -- on
7 page 32 of the M5 manual, correct?

8 A I can't see -- is that page 36?

9 Q That's page 33.

10 A Page 33, yes.

11 Q Right. And he pointed out some language
12 talking about the possibility of balancing these
13 concerns against other concerns.

14 Ken, can you highlight the sentence at
15 the end of the paragraph that reads "to this end."
16 I'm showing -- highlight the sentence that reads
17 "basic financing and water rate principles
18 include." That's the end of the paragraph.

19 All right. You see the sentence that
20 reads: Basic rate -- financing and rate
21 principles include?

22 A I do.

1 Q Is the principle of not diverting funds
2 from a water fund to a governmental, a general
3 fund, a basic financing and rate principle?

4 A Very basic one.

5 Q Okay. And in your experience, do most
6 utilities in the United States that are
7 municipally owned follow that principle?

8 A They do.

9 Q And is that a principle that you've ever
10 recommended to any utility that it waive or not
11 follow?

12 A That they not follow? No. I've never
13 suggested that they not follow that.

14 Q Mr. Thomas also asked you some questions
15 about McQuillin's legal treatise on municipal
16 corporations. He didn't show you the citations to
17 the cases that were contained in that document,
18 did he?

19 A He did not.

20 Q Right. And I actually have McQuillin's
21 here, and I would like to ask you about some other
22 related citations if I may.

1 Can we get the ELMO set up?

2 Okay. I put the McQuillin treatise on
3 the ELMO here. I'm displaying from section 35:43.
4 Do you see the sentence at the top that reads:
5 Although a municipality's operation of a public
6 utility may be a proprietary activity, it is still
7 engaged in a public enterprise for a public
8 purpose. Do you see that sentence?

9 A I do see that.

10 Q Do you agree with that statement, that
11 it's engaged in a public purpose when it provides
12 water service to out-of-town customers?

13 MR. THOMAS: Objection. That's not what
14 this provision says.

15 THE COURT: Well, that's a fair
16 objection. Mr. Raphael, just ask him if he agrees
17 with the sentence beginning with "although" and
18 ending with "purposes."

19 BY MR. RAPHAEL:

20 Q Do you agree with that sentence?

21 A I do.

22 Q All right. Let me show you another one,

1 please. Okay. I'm showing you the section from
2 35:52. Do you see the paragraph that says: The
3 duty of a municipality owning a public utility to
4 furnish services and supplies without
5 discrimination and at reasonable rates extends to
6 users outside the City, including, it has been
7 ruled, applicants partly without and partly within
8 the City limits, where the City has undertaken to
9 serve the public outside the City, unquote?

10 Do you see that sentence?

11 A I do see that, yes.

12 Q Do you agree with that statement?

13 MR. THOMAS: Objection. Judge, I didn't
14 ask Mr. Woodcock whether he personally agreed with
15 any statement in McQuillin. I asked him if the
16 statements that he saw, that I put up there from
17 McQuillin, were consistent with the AWWA policy
18 that he testified about yesterday.

19 THE COURT: That's true. But you could
20 have asked him these others. It seems to me the
21 door was certainly opened on McQuillin's. I think
22 this is fair redirect. Objection overruled.

1 MR. RAPHAEL: Thank you, Your Honor.

2 BY MR. RAPHAEL:

3 Q Do you agree with that statement?

4 A I'm sorry. Could you just show me the
5 beginning part of that.

6 Q Here. I'm displaying the text. I won't
7 read it again. But I'm displaying the text of
8 35:52. You tell me when to turn the page.

9 A I agree with that, yes. I remember the
10 second page, yes.

11 Q Thank you. And now I would like to show
12 you section 35:65 from McQuillin's treatise, which
13 you haven't seen this before today, have you?

14 A I have not.

15 Q Right. Do you see the sentence that
16 says: However, a City may not overcharge a
17 customer based on the value of the services to the
18 customer?

19 A I do see that.

20 Q Do you agree with that?

21 A Yes.

22 Q And in the next sentence says: Rates to

Page 480

1 nonresident users are required to be reasonable,
2 not unreasonably high and discriminatory.
3 Do you see that sentence?
4 A I do.
5 Q Do you agree with that one, too?
6 A I do. I think both of those are
7 incorporated within the policy that I talked about
8 from the AWWA and general rate making. I totally
9 agree with those.
10 Q Those are consistent with the AWWA
11 policies, those statements?
12 A Consistent with AWWA policy and good
13 rate-making practice.
14 Q Okay. Ken, could you bring up, please,
15 Exhibit 107.3. All right. Can you go, please,
16 Ken, to page 4.
17 Okay. This is -- Ken, can you magnify
18 the paragraph that reads "in some instances."
19 All right. This is the paragraph that
20 Mr. Thomas showed you on cross-examination. Do
21 you recall that?
22 A Yes, I do.

Page 481

1 Q All right. And the sentence he read to
2 you was: In some instances, as a matter of
3 policy, a government-owned utility might choose to
4 waive the distinction between owner and nonowner
5 customers and consider the utility to be
6 metropolitan in nature.
7 Do you remember that sentence he read to
8 you?
9 A I do.
10 Q And then I'm not sure he read the second
11 sentence: In such a case, differences in costs
12 between owners and nonowners are not recognized in
13 cost allocation and rate making.
14 Do you see that?
15 A I do.
16 Q Is that consistent with what you've
17 testified about with regard to utility rate
18 making?
19 A Yes, it is.
20 Q All right. So the City of Falls Church,
21 for example, does the City of Falls Church
22 recognize a difference in the cost of service to

Page 482

1 its in-City and out-of-City customers?
2 MR. THOMAS: Judge, I'm sorry. Same
3 objection as of yesterday. I think this is just a
4 back-door way to try and have Mr. Woodcock say
5 whether -- whether Falls Church is doing something
6 correctly or incorrectly in his view.
7 THE COURT: He wasn't asked about the
8 correctness of it, simply the fact of it.
9 Objection overruled.
10 MR. RAPHAEL: Thank you, Your Honor.
11 THE WITNESS: I'm sorry. I forgot your
12 question.
13 BY MR. RAPHAEL:
14 Q Yeah, you testified at length yesterday
15 about your analysis of the Falls Church Water
16 system?
17 A Yes.
18 Q Does Falls Church currently recognize in
19 its rate making any distinction in the cost of
20 service between its in-City and out-of-City
21 customers?
22 A It does not. They're the same rates and

Page 483

1 charges inside and outside the City of Falls
2 Church.
3 Q So Falls Church has chosen to do what's
4 described in this paragraph here in terms of
5 treating inside and outside-City customers alike,
6 correct?
7 A They have made that choice, yes.
8 Q In theory, if Falls Church had wanted
9 to, could it have come up with a higher rate for
10 its outside-City customers than its inside-City
11 customers?
12 MR. THOMAS: Objection. Judge, I think
13 that calls for speculation.
14 MR. RAPHAEL: Your Honor, this is an
15 expert. And it goes directly to the principles of
16 rate making and what's discussed in this paragraph
17 that Mr. Thomas has opened the door to.
18 MR. THOMAS: If I could, Judge, the
19 issue -- the issue is whether our rates and
20 charges in our charter is unconstitutional.
21 THE COURT: Right.
22 MR. THOMAS: Not whether Falls Church

1 could have gone about setting its rates in some
2 way other than how he thinks they have.

3 THE COURT: You're correct on the first
4 part. With regard to the second part, however, is
5 there any dispute that Falls Church could have
6 done this however Falls Church chose to do so?
7 The issue is whether what it has chosen to do is,
8 in this particular case, constitutional or not.

9 MR. RAPHAEL: I would add also whether
10 it's consistent with its own charter. But we'll
11 be seeing that as well.

12 THE COURT: Well, I'm going to permit
13 it.

14 MR. RAPHAEL: Thank you.

15 THE COURT: I'm going to permit it.
16 Objection overruled. Restate the question,
17 please.

18 BY MR. RAPHAEL:

19 Q Yes. My question was, in theory, the
20 City of Falls Church, if it had wanted to, could
21 have followed the utility method of rate setting
22 and come up with a higher rate for its

1 outside-City customers than its inside-City
2 customers, right?

3 A It could have. And it was presented
4 with that option as one of the alternatives it was
5 given.

6 Q That was in 2003, the CDM study?

7 A Yes, it was.

8 Q And it declined to do that, right?

9 A It did.

10 Q And am I correct that, even under the
11 utility method of coming up with a higher rate for
12 outside-City customers and potentially a lower
13 rate for in-City customers, the net revenues
14 funded by those rates still equal the cash
15 requirements for -- of the system, correct?

16 A That's correct. The presentations by
17 Camp Dresser McKee in presenting that graphically
18 showed in two different presentations exactly what
19 you said. The total cash needs is what would be
20 required.

21 Q Okay. Thank you, Mr. Woodcock. No
22 further questions.

1 MR. RAPHAEL: Your Honor, Mr. Woodcock
2 lives in Massachusetts. He next week is going to
3 be installed as the president of the New England
4 Water Works Association. I would like him to be
5 able to be excused to go attend that. We may need
6 to recall him for rebuttal. But if we may have
7 the Court's permission for him to be excused to
8 attend to his duties, I would be grateful.

9 THE COURT: I certainly have no
10 objection to that.

11 But I want to ask Mr. Woodcock one
12 question. Do I understand, sir, that it's your
13 opinion that a public utility should base its
14 price only upon operating costs of services and a
15 return on equity? Those are the only two
16 permissible elements?

17 THE WITNESS: No. Not quite, Your
18 Honor. It's -- a municipal utility should base
19 its prices on what it costs to provide service.
20 Fees and charges should be set so that they
21 recover what the utility costs are.

22 And for a municipality, those costs are

1 their operating costs, their debt service, and any
2 cash capital outlays, minor capital outlays that
3 they might have, or projects that they would
4 choose to fund from cash or reserves and may not
5 debt finance.

6 For municipal utilities, the overall
7 requirements, the overall amount that they are
8 recovering from rates do not, should not include
9 any provision for a return on investment in terms
10 of the overall amount they recover, both inside
11 and outside.

12 THE COURT: No provision for return on
13 investment?

14 THE WITNESS: In terms of allocating
15 between inside and outside, that's considered.
16 But, again, that's this distinction I was talking
17 about yesterday.

18 In terms of the overall recovery of
19 costs, the amount that's needed or required to run
20 the -- any water utility --

21 THE COURT: If they wish to have a
22 return on investment, they may. But they might

1 allocate that differently between inside and
2 outside; is that correct?

3 THE WITNESS: They might allocate it
4 differently between inside and outside. But in
5 the end they would true up to what those true cash
6 expenses are, excluding any return on investment,
7 excluding any depreciation, which, again, is an
8 accounting expense, if you will, not a -- there's
9 no check written to depreciation.

10 THE COURT: And it's your opinion that
11 the utility should not be permitted to make a
12 profit?

13 THE WITNESS: To the extent that they
14 make a profit on sales to customers outside the
15 City, yes, they should be allowed to make a profit
16 on those. But that profit stays within the
17 utility, because the overall revenues are
18 determined on what their cash needs are, and that
19 those then are all spent. They have to pay the
20 debt. They have to pay the bills. They have to
21 pay for the vehicles, that type of thing.

22 It's reflected in lower rates for the

1 customers within the City, and hence the
2 difference between in-City and out-of-City rates.

3 THE COURT: All right. Thank you, sir.
4 You answered my questions. Any questions from
5 counsel?

6 MR. RAPHAEL: Yes. You asked an
7 important question. I would like to follow up
8 briefly on that to make sure we're on the same
9 wavelength.

10 BY MR. RAPHAEL:

11 Q To make it easy, suppose a city has 100
12 customers, and 50 are inside customers and 50 are
13 outside customers. Suppose the total cost of
14 operating the water works, including whatever
15 surplus you need to cover future expenses, suppose
16 that's a hundred dollars. And suppose further the
17 costs of operating the system are the same for the
18 in-city and out-of-city customers.

19 A Okay.

20 Q So it's 50, 50, \$100 to operate.

21 You're saying in theory the city could
22 say that the fees charged to the outside-city

1 customers could include a return on equity and a
2 profit component in terms of how you set the
3 rates, right? So you might set the rates -- I'm
4 sorry, you need to say yes or no.

5 A Yes. The profit -- the profit that's
6 earned by the utility, as distinct from city,
7 would be reflected in the amounts charged to
8 customers outside the city.

9 So in your 50/50 calculation, the
10 amounts charged to customers outside the city
11 could be 60 or \$70, depending upon what that
12 actual cost was.

13 Q All right. So let's suppose that the
14 profit component or the return on equity component
15 is \$10. So instead of charging \$50 to the
16 outside-city customers net, they would be charging
17 \$60.

18 A Correct.

19 Q Right? And then the in-city customers
20 only have to make up the difference, which would
21 be \$40?

22 A The inside-city customers make up the

1 residual cash needs, and would then pay \$100 cash
2 needs less the \$60 received from outside.

3 Q So their rates would be less?

4 A So their rates would be less.

5 Q That's even despite that the costs of
6 service are the same, right?

7 A No. The costs of service in this
8 example are different. The costs to serve those
9 outside the city are \$60.

10 Q Okay.

11 A The cost to serve those inside the city
12 is \$40. There's actually, on a cash basis, it's
13 50/50. However, there is a profit earned by the
14 city customers. They get that profit back in
15 terms of a lower rate.

16 Q Okay. So those two rates, the lower
17 rate for the in-city customers and the higher rate
18 for the outside-city customers together generate
19 \$100.

20 A Correct.

21 Q And all that money stays in the water
22 system?

1 A And all that money stays in the water
2 system.
3 Q Thank you very much.
4 THE COURT: All right. Mr. Thomas.
5 RE-CROSS-EXAMINATION
6 BY MR. THOMAS:
7 Q Mr. Woodcock, you know, don't you, that
8 there are numerous Virginia municipal utilities
9 providing service outside of their boundaries,
10 right?
11 A Yes.
12 Q And in preparing your opinions in this
13 case, you didn't investigate those other Virginia
14 municipal utilities to determine whether they were
15 allocating costs in the manner which you just
16 described, right?
17 A Correct.
18 Q Okay. Now --
19 MR. THOMAS: Okay. No further
20 questions, Judge.
21 THE COURT: All right. Thank you. Any
22 final redirect?

1 MR. RAPHAEL: No thank you, Your Honor.
2 THE COURT: Thank you very much,
3 Mr. Woodcock. You may go, sir.
4 THE WITNESS: Do these stay here?
5 THE COURT: And Mr. Raphael will let us
6 know if it will be necessary to ask you to come
7 back from the Commonwealth of Massachusetts to be
8 with us.
9 THE WITNESS: Thank you.
10 THE COURT: Thank you, sir.
11 THE WITNESS: Do I -- I'm sorry. Do I
12 take that, Your Honor, then that I am free to
13 attend next week?
14 THE COURT: Yes, sir.
15 THE WITNESS: Thank you very much.
16 THE COURT: Yes, sir. Thank you.
17 MR. RAPHAEL: And just so -- the rule on
18 witnesses would still apply to Mr. Woodcock to the
19 extent he's going to be recalled subject to what
20 we discussed yesterday, that --
21 THE COURT: Yes, sir.
22 MR. RAPHAEL: -- I can consult with him

1 for purposes of trial preparation.
2 THE COURT: Yes, sir.
3 MR. RAPHAEL: Thank you, Your Honor.
4 THE COURT: Yes, sir. Please call your
5 next witness.
6 MR. RAPHAEL: I call Chuck Murray.
7 Whereupon,
8 CHARLES M. MURRAY
9 was called as a witness, and, having first been
10 duly sworn, was examined and testified as follows:
11 DIRECT EXAMINATION
12 BY MR. RAPHAEL:
13 Q Good morning, Mr. Murray. Could you
14 state your name and address for the record,
15 please?
16 A Charles M. Murray, 124 Tollgate Way,
17 Falls Church, Virginia.
18 Q And what is your current position of
19 employment, Mr. Murray?
20 A I'm the general manager of Fairfax
21 Water.
22 Q How long have you been the general

1 manager of Fairfax Water?
2 A Since January of 2006.
3 Q Okay. And were you employed by Fairfax
4 Water before January of 2006?
5 A Yes, I was.
6 Q In what capacity?
7 A From October 2003 to January 2006, I was
8 the executive officer of Fairfax Water.
9 Q All right. So you've been there since
10 the end of 2003?
11 A Yes, sir.
12 Q All right. Is Fairfax Water a
13 governmental entity or a private for-profit
14 entity?
15 A Fairfax Water is an authority created
16 under the Water and Waste Authorities Act. And so
17 it is a body corporate and politic.
18 Q And where does Fairfax Water provide
19 water service?
20 A It provides retail service to citizens
21 of Fairfax County. And it provides wholesale
22 service to residents of Loudoun County, Prince

1 William County, City of Alexandria, Town of
2 Herndon, Dulles Airport, and Fort Belvoir.

3 Q All right.

4 A A total of about 1.5 million people.

5 Q Okay. What is the current commodity
6 charge Fairfax Water charges for water?

7 MR. THOMAS: Your Honor, I object based
8 on relevance. I'm not sure what Fairfax Water's
9 commodity charge has to do with the issues in the
10 case.

11 THE COURT: Well, we're getting a little
12 bit of history here. I think this is fine.
13 Objection overruled.

14 THE WITNESS: \$1.83 per thousand
15 gallons.

16 BY MR. RAPHAEL:

17 Q All right. I think you said at the
18 outset that you live in the City of Falls Church?

19 A Yes, sir.

20 Q There may be a bit of irony here that
21 you're the general manager of Fairfax Water. Do
22 you know what the commodity charge is as a

1 another irony. Does Fairfax Water own buildings
2 that are -- that receive water service from the
3 City of Falls Church?

4 A Yes, we do. Our headquarters building
5 is on the City of Falls Church system.

6 Q All right. And, Ken, if we could bring
7 up Plaintiff's Exhibit 2, please. This is in
8 evidence.

9 Does this map reflect the City of Falls
10 Church's area of water service outside the City
11 limits and in Fairfax County?

12 A Yes, sir.

13 Q And that's shown in the lighter green?

14 A Yes, sir.

15 Q Okay. And are the Fairfax Water
16 buildings that you mentioned shown in the
17 asterisks north of the horizontal blue line at the
18 bottom there?

19 A Yes.

20 Q And is that -- does that horizontal blue
21 line align with Route 50?

22 A Yes, it is.

1 resident of the City of Falls Church?

2 A Yes, I do.

3 Q What is it?

4 A \$3.03 per thousand gallons.

5 Q Okay. And in your capacity as general
6 manager of Fairfax County Water Authority, are you
7 familiar with what the average customer charge is
8 for a Falls Church customer in the City -- in
9 the -- the City of Falls Church or in Fairfax
10 County?

11 A Yeah. An average winter quarter for a
12 City resident is about \$85.19 per quarter.

13 Q And what is the average charge for a
14 Fairfax County customer?

15 A About --

16 Q Let me clarify. A Fairfax County
17 customer of Fairfax Water.

18 A \$50.97 per quarter.

19 Q So about a \$35 difference?

20 A Yes, sir.

21 Q All right. We mentioned one irony about
22 where you live and what you do. There may be

1 Q What is Route 50?

2 A Route 50 is a major east-west highway
3 through Fairfax County.

4 Q How wide is it?

5 A I think at our headquarters building it
6 goes from six lanes to four.

7 Q All right. And you mentioned the
8 headquarters building. Is there another building
9 near the headquarters building that is also served
10 with water from the City of Falls Church water
11 system?

12 A Yes, our original headquarters building,
13 which is now our planning and engineering
14 building. We have two buildings there.

15 Q All right. How long has the planning
16 and engineering building been occupied by Fairfax
17 Water?

18 A Since the late '70s.

19 Q And has Fairfax Water received water
20 from the City of Falls Church for that building
21 during that entire period?

22 A Yes.

1 Q With regard to the Morin building, the
2 headquarters building that you mentioned, how long
3 have you occupied that building?

4 A Since the late 1990s.

5 Q And since the time Fairfax Water has
6 occupied that building, has the building received
7 water service from the City of Falls Church?

8 A Yes.

9 Q Now, has Fairfax Water, under your
10 watch, looked into the possibility of building its
11 own connections -- let me back up and lay some
12 foundation for that. We mentioned Route 50, which
13 is to the south of the two buildings that are
14 occupied by Fairfax Water, correct?

15 A Yes.

16 Q And is the water line that Fairfax Water
17 has nearest to those buildings on the south side
18 of Route 50?

19 A Yes, it is.

20 Q So if you wanted to connect to those
21 lines, would you have to tunnel under Route 50?

22 A Yes, we would.

1 Q All right. Since the time that you've
2 been the general manager of Fairfax Water, have
3 you investigated the possibility of building your
4 own connection for those two buildings to the
5 Fairfax Water water line on the south side of
6 Route 50?

7 A Yes. In May of 2008.

8 Q And what did you discover with regard to
9 the obstacles to doing that?

10 A You mentioned one of them, the
11 requirement to tunnel under Route 50 and to
12 acquire a permit from the Virginia Department of
13 Transportation to do such.

14 The other obstacles were, number 1,
15 cost. The cost of providing service to those two
16 buildings would be somewhere between 311- and
17 \$457,000.

18 And, in addition, we would have to
19 obtain easements for our pipelines, which would
20 likely conflict with existing easements held by
21 the City of Falls Church for their pipelines.

22 Q All right. And as a result of those

1 issues, did you decide to pursue or not to pursue
2 the investigation further?

3 A I decided not to pursue it further.

4 Q All right. Now, with regard to the
5 easement issues, why was the easement issue in
6 terms of an existing Falls Church line of concern
7 to you?

8 MR. THOMAS: Objection, Judge. I think
9 we're getting into territory here that relates to
10 the case that's been put off into February of next
11 year. I don't think it's relevant to this case.

12 MR. RAPHAEL: I agree in part with
13 Mr. Thomas. We are in part getting into what's
14 been put off. But, the City has made the argument
15 in its papers in this case that Fairfax Water
16 should just connect to its own system if it wants
17 to. I'm trying to establish the barriers to doing
18 that. And I think this is fair game for that.
19 Unless the City wants to say it's not going to
20 make that argument, that we could just connect to
21 the Fairfax Water system.

22 THE COURT: Mr. Thomas.

1 MR. THOMAS: I'm not going to make that
2 argument.

3 THE COURT: There you have it.

4 MR. THOMAS: I'm sorry. I'm not
5 going -- I am going to argue what he said I am
6 going to argue.

7 THE COURT: Namely that Fairfax Water
8 could hook up to its own water?

9 MR. THOMAS: Correct.

10 THE COURT: Okay. Then I'll permit it.

11 MR. RAPHAEL: Thank you, Your Honor.
12 Could you read back the question,
13 please.

14 (The reporter read the record as
15 requested.)

16 THE WITNESS: We had become aware that
17 the City had refused to move their easements in
18 the case of a development in the Merrifield area,
19 a developer who had proffered to hook up to the
20 Fairfax Water system and would require some relief
21 from the easements that the City owned.

22 And we knew that the City had refused to

1 relocate those easements and felt that we needed
 2 some resolution of legal issues surrounding those
 3 easement issues before we would seriously
 4 consider --
 5 BY MR. RAPHAEL:
 6 Q Did you have a concern that, if the City
 7 would not allow easements to be relocated for any
 8 customer who wanted to switch service providers to
 9 Fairfax Water, that even if it were cost-effective
 10 to make the switch, you couldn't do so?
 11 A Yeah. I think that was part of our
 12 concern.
 13 Q And the developer you just mentioned, is
 14 that the Halstead development that's here shown on
 15 Plaintiff's Exhibit 2?
 16 A Yes.
 17 Q To the west of Gallows Road?
 18 A Yes, it is.
 19 Q Now you said you looked into the cost of
 20 making the connection in May of 2008. Why was it
 21 in May of 2008?
 22 A We had just gotten a decision in federal

1 court on the case the City brought against Fairfax
 2 Water claiming an exclusive service area. And
 3 based on the decision of the federal court, we
 4 felt we had the freedom to look at the possibility
 5 of hooking our buildings up to our own system.
 6 Q And the federal decisions are attached
 7 as Exhibits 2 and 3 to the amended complaint. Was
 8 that the case in which the City was seeking to
 9 preclude Fairfax Water from offering service
 10 anywhere in the area shown in light green on
 11 Plaintiff's Exhibit 2?
 12 A Yes, sir.
 13 Q So after you won the decision in that
 14 case, you looked into possibly connecting to your
 15 system?
 16 A Yes, we did.
 17 MR. THOMAS: I object on the basis these
 18 questions are leading. I appreciate the Court is
 19 going to grant some latitude inasmuch as it's a
 20 bench trial.
 21 THE COURT: All right. Try not to lead,
 22 Mr. Raphael.

1 MR. RAPHAEL: Thank you, Your Honor.
 2 BY MR. RAPHAEL:
 3 Q And so following the -- after the
 4 decision, was that when you did your analysis?
 5 A Yes.
 6 Q All right.
 7 MR. RAPHAEL: That's all I have for this
 8 witness, Your Honor.
 9 THE COURT: All right.
 10 Cross-examination.
 11 CROSS-EXAMINATION
 12 BY MR. THOMAS:
 13 Q Hi, Mr. Murray.
 14 A Good morning.
 15 Q Nice to see you.
 16 Mr. Murray, this dispute has been going
 17 on for a long time, hasn't it?
 18 A Yes, sir.
 19 Q And I believe you just testified that
 20 the P&E building for -- that's planning and
 21 engineering, right?
 22 A Yes.

1 Q Planning and engineering building for
 2 Fairfax Water has been a customer of Falls
 3 Church's since, I think you said the late 1970s?
 4 A Yes.
 5 Q And so it's your view, isn't it, that
 6 Fairfax Water has been paying unlawful rates since
 7 that time?
 8 A Yes.
 9 Q Is that correct?
 10 Okay. And with respect to the
 11 headquarters buildings -- I'm sorry, the
 12 headquarters building, I think you said that
 13 became a customer or became Fairfax Water's
 14 headquarters building in the late 1990s, right?
 15 A Yes.
 16 Q Am I right that it's your view that
 17 Fairfax Water has been paying unlawful rates to
 18 Falls Church since that time, right?
 19 MR. RAPHAEL: Objection. Asked and
 20 answered, Your Honor. He asked for the earlier
 21 date.
 22 THE COURT: I'm sorry.

1 MR. RAPHAEL: It's asked and answered.
2 He's now asking about a later date than the one he
3 was asking about.

4 THE COURT: This is a different
5 building.

6 MR. THOMAS: It's a different building.
7 And I acknowledge he said they were right around
8 the corner from each other.

9 THE COURT: Right. No, I understood.
10 BY MR. THOMAS:

11 Q Okay. And you waited until 2009 to
12 bring this claim, right?

13 A Yeah -- 2008.

14 Q Well, actually, the amended complaint
15 asserting the count that brings us here today was
16 in 2009, right?

17 A Okay.

18 Q You agree with me on that?

19 A Yes.

20 Q Now, the transmission main that Fairfax
21 Water has, I think you testified is across Route
22 50 from the headquarters building and the P&E

1 building, right?

2 A Yes.

3 Q Those are the two small dots right here
4 and next to where it says "Multiplex," right?

5 A Yes, sir.

6 Q All right. And even though Fairfax
7 Water has had its P&E building there since the
8 late 1970s, you waited until May of 2008 to look
9 into trying to switch over to your own service,
10 right?

11 A That's the first time I looked into the
12 issue, yes.

13 Q Now, you indicated one of the obstacles
14 that you encountered was a permit requirement from
15 the Virginia Department of Transportation, right?

16 A Yes.

17 Q Okay. And you never sought a permit
18 from the Virginia Department of Transportation to
19 run your lines under Route 50, right?

20 A We did not ask for a permit.

21 Q Okay. And you mentioned one of the
22 obstacles was an easement that you felt you might

1 need from the City of Falls Church, right?

2 A Possibly.

3 Q Okay. Possibly.

4 A Yes.

5 Q Possibly not, right?

6 A There would have been -- it would have
7 been very difficult to align the connection
8 without conflicting with existing lines that the
9 City had in place.

10 Q All right. You never asked the City if
11 they would agree to relocate their easements, did
12 you?

13 A We did not.

14 Q Okay. Now, Mr. Murray, Fairfax Water
15 has understood for a long time that the City of
16 Falls Church profits from its water system, right?

17 A Yes.

18 Q And it's understood that to be the case
19 for more than 50 years, right?

20 MR. RAPHAEL: Your Honor, this line of
21 questioning exceeds the scope of my direct. He's
22 trying to put on his defense here. He can call

1 Mr. Murray in his case if he wants to do that.
2 He's going to get into material that preceded this
3 witness' employment with Fairfax Water in 2003.

4 THE COURT: Well, it was established in
5 the direct testimony that Fairfax Water has been a
6 customer of the City for many years, and of course
7 the irony of having its headquarters within the
8 City. I think it's fair. I think it's fair. I
9 think it's within the scope of the direct
10 examination. Objection overruled.

11 MR. RAPHAEL: May I add one other
12 objection?

13 THE COURT: Yes, sir.

14 MR. RAPHAEL: As Ms. Moody just pointed
15 out to me, wisely, he's also asking what Fairfax
16 Water knew as opposed to what this witness knew.
17 This witness only got there in 2003.

18 It's one thing to take a corporate
19 designation deposition. It's another thing to ask
20 a fact witness about something that happened
21 before he was there.

22 THE COURT: Well, let's see if he can

1 lay a foundation.
 2 MR. RAPHAEL: Thank you.
 3 THE COURT: Go ahead.
 4 BY MR. THOMAS:
 5 Q Mr. Murray, you know from your
 6 involvement in this litigation that more than
 7 50 years ago, Fairfax Water understood that the
 8 City profited from its operations in the County,
 9 right?
 10 MR. RAPHAEL: I just object to the
 11 extent that the question calls for reliance on
 12 hearsay.
 13 THE COURT: Well, Mr. Murray is the
 14 general manager. He knows the answer to this
 15 question or he doesn't. Objection overruled.
 16 THE WITNESS: Based on documents which
 17 I've read, it's my understanding that the previous
 18 general managers knew there was a profit being
 19 taken.
 20 BY MR. THOMAS:
 21 Q I'm sorry. I couldn't hear the end of
 22 your answer.

1 A I have no personal experience, but based
 2 on the documents I've seen, the answer is yes.
 3 Q Okay. And the documents you're talking
 4 about are the documents from Fairfax Water's own
 5 files, right?
 6 A Yes.
 7 Q Okay. And you know, don't you, that
 8 50 years ago, when the City of Falls Church wanted
 9 to run a line down Gallows Road near the Fairfax
 10 County Hospital, not far from where your
 11 headquarters are, that Fairfax Water objected and
 12 said that's just because the City of Falls Church
 13 wants to make profits off of its water system,
 14 right?
 15 MR. RAPHAEL: Your Honor, again, this is
 16 getting far afield from anything I asked this
 17 witness about.
 18 THE COURT: How does this connect?
 19 MR. THOMAS: Well, Mr. Raphael asked
 20 this witness about the history of Fairfax Water's
 21 customer relationship --
 22 THE COURT: Right.

1 MR. THOMAS: -- with the City of Falls
 2 Church. I think I'm entitled to explore with this
 3 witness Fairfax Water's understanding about the
 4 City's operations, not just for the whole period
 5 of time that they were a customer, which is from
 6 the late '70s until today, but prior to that time.
 7 I mean, Your Honor, these -- if Fairfax
 8 Water has been paying these rates, as Mr. Murray
 9 just indicated, for now coming up on 30 years,
 10 they've been paying them knowing something about
 11 how the City operates its system.
 12 THE COURT: I know. What does that have
 13 to do with extending a line down Gallows Road?
 14 MR. THOMAS: Because, at the time that
 15 the City, as I think Mr. Murray just indicated, at
 16 the time the City decided to extend that line down
 17 Gallows Road 50 years ago, Fairfax Water said,
 18 hey, you guys shouldn't be able to do that. All
 19 you're doing is trying to continue to profit from
 20 your water operations.
 21 THE COURT: But why is that relevant to
 22 any of this?

1 MR. THOMAS: Well, I think it's -- it's
 2 very relevant to our defense of laches in this
 3 case, Your Honor, which is they've known for many,
 4 many years, not just because of being a customer,
 5 but because of what they've said about how the
 6 City operates its system, which, 50 years ago, if
 7 you compare 50 years ago with what they're saying
 8 today, is really no different.
 9 THE COURT: Well, Mr. Raphael.
 10 MR. RAPHAEL: Yes, Your Honor. First of
 11 all, it's clear he's trying to do his defense case
 12 here, when I spent just a few moments with this
 13 witness. And the only question I asked him of a
 14 historical nature is how long has the building
 15 been connected to the water system, dealing with
 16 the issue of are they a customer now, and why
 17 can't they switch. That's what he testified
 18 about.
 19 The most recent building that he talked
 20 about was in the late '70s. Mr. Thomas now wants
 21 to go back to 1957 or 1958, when I wasn't even
 22 alive and this witness was a young person.

1 THE COURT: What?
 2 THE WITNESS: Wow. Very young.
 3 THE COURT: Let's go easy, Mr. Raphael.
 4 MR. RAPHAEL: Did I say that out loud?
 5 Anyway, my point is he's going far
 6 afield. And I don't think this is within the
 7 scope of anything that I asked this witness about.
 8 If he wants to call him back in his case, he can
 9 do that.
 10 THE COURT: No, I understand. I
 11 understand all of that.
 12 MR. RAPHAEL: May I also just add I
 13 stand on my objection, I would like to stand on my
 14 objection that the latches and waiver and estoppel
 15 defense were not properly disclosed.
 16 THE COURT: No, I understand that as
 17 well. That's been preserved. I'll let Mr. Murray
 18 answer this one question. But I don't think we
 19 should get much further into this, Mr. Thomas.
 20 MR. THOMAS: Okay. I'll curtail it and
 21 move on.
 22 THE COURT: Okay.

1 BY MR. THOMAS:
 2 Q So you know, don't you, Mr. Murray,
 3 that, 50 years ago, when the City of Falls Church
 4 wanted to run its line down Gallows Road, Fairfax
 5 Water objected and said City of Falls Church is
 6 just trying to profit off of the customers it has
 7 in Fairfax County, right?
 8 MR. RAPHAEL: Same objections.
 9 THE COURT: Yes, sir.
 10 THE WITNESS: I think it was a little
 11 bit more than that. There was a lot going on in
 12 that case, having to do with a provision of law
 13 that said that you couldn't duplicate facilities.
 14 So whoever got their line in the ground first had
 15 squatter's rights.
 16 And I think there was a dispute between
 17 the Authority and the City as to, you know, who
 18 was going to serve what areas and who would -- who
 19 would put a line in the ground first.
 20 BY MR. THOMAS:
 21 Q Right. And that dispute, and I think
 22 you mentioned it, or you referred to it as a case

1 a moment ago, that case was actually a lawsuit
 2 that Fairfax Water filed against the City in this
 3 court in 1959, right?
 4 A I believe so, yes.
 5 Q I'm sorry?
 6 A Yes.
 7 Q And you've seen a copy of that
 8 complaint?
 9 A Yes.
 10 Q So you know that in that complaint, one
 11 of the things that Fairfax Water alleged was that
 12 the City was profiting from its water operations
 13 in Fairfax County, right?
 14 A Yeah. And I think their concern was
 15 they were trying to increase their service area.
 16 Q Right. Fairfax Water didn't like that?
 17 A Yes.
 18 Q Okay. And you know, also, don't you,
 19 that, in that case that you mentioned, Fairfax
 20 Water alleged that the profits that it claimed the
 21 City took from its operations in Fairfax County
 22 were paid by the City into the City's general fund

1 and used solely for the benefit of the persons
 2 residing within the City, right?
 3 MR. RAPHAEL: Your Honor, may I have a,
 4 just a standing objection to this line of
 5 questioning?
 6 THE COURT: You have it. I think
 7 Mr. Thomas is almost done on this line.
 8 MR. THOMAS: I am.
 9 THE WITNESS: Yes. But to be fair,
 10 those profits were 10 times less than they became.
 11 BY MR. THOMAS:
 12 Q So they were okay then, but they're not
 13 okay now?
 14 A I'm not saying they were okay then or
 15 now.
 16 Q They were just less?
 17 A They were a lot less.
 18 Q Okay. All right. Mr. Raphael asked you
 19 about Fairfax Water's rates and about the City of
 20 Falls Church's rates. Do you remember that
 21 testimony?
 22 A Yes.

1 Q Okay. I would like to put up here on
2 the screen, Mr. Murray, what has been marked for
3 identification purposes as Defendant's Exhibit 40.

4 Mr. Murray, do you see that document
5 there up on the screen identified as Defendant's
6 Exhibit 40?

7 A Yes.

8 Q Okay. And you're familiar with that
9 document, right?

10 A Yes.

11 Q That's something that Fairfax Water puts
12 on its Web site, right?

13 A Yes, sir.

14 Q In fact Fairfax Water prepares a
15 comparison of local water rates, and that's what's
16 listed here, right?

17 A Yes.

18 Q All right. And as I think perhaps you
19 testified earlier, the comparison is based on
20 24,000 gallons of residential water use by an
21 established customer over a three-month period,
22 right?

1 A Yes.

2 Q Okay. And Fairfax Water puts this on
3 its Web site just to give customers an idea of how
4 much their water bill is compared to other
5 utilities in the area, right?

6 A Yeah. Several utilities do the same
7 thing.

8 Q Okay. Fair enough. For utilities in
9 the region.

10 A Correct.

11 Q And by the region, I mean Washington,
12 D.C. area, right?

13 A Yes, sir.

14 Q Okay. And in fact, here, this is the
15 one that was current as of July 1 of this year,
16 right?

17 A Yes.

18 Q That is Defendant's Exhibit 40?

19 A Yes, sir.

20 Q Okay. And this comparison that Fairfax
21 Water publishes shows, at the top end of this
22 scale, the Town of Leesburg --

1 MR. RAPHAEL: Your Honor, if I may lodge
2 an objection at this point. I have no objection
3 to this exhibit insofar as it compares Fairfax
4 Water and Falls Church. But I didn't ask him any
5 questions about what other utilities charge. I
6 don't think that's relevant. Because the
7 comparison here is --

8 THE COURT: I know, but you made the
9 point that it was much more expensive to buy water
10 from Falls Church than it was from Fairfax Water.
11 And Mr. Thomas wants to show why a broader
12 understanding of water rates generally would take
13 some of the strength out of that assertion.

14 I believe it's proper. Objection
15 overruled.

16 MR. RAPHAEL: Thank you.

17 MR. THOMAS: Thank you.

18 BY MR. THOMAS:

19 Q Okay. Mr. Murray, you see here at the
20 top end of the Fairfax Water comparison is the
21 Town of Leesburg outside-Town rate, right?

22 A Yes.

1 Q And that basic water service charge is
2 \$162.06, right?

3 A Yes.

4 Q All right. And then right under that is
5 Virginia American Water Company for Prince William
6 County, right?

7 A Yes.

8 Q Okay. And that may also, Mr. Murray,
9 that may also be on your screen right there to
10 your right.

11 A Yes, it is.

12 Q And Virginia American Water Company is
13 an investor owned utility providing water service
14 in Virginia, right?

15 A Yes.

16 Q Okay. And you know they make a profit
17 on selling water in Virginia, right?

18 A Yes.

19 Q Okay. Now, right here in the middle of
20 the list is another Virginia American Water
21 Company for the City of Alexandria. That's their
22 services there, right?

1 A Yes.

2 Q Okay. And then the City of Falls Church
3 is right in the middle of the pack below
4 Rockville, Maryland, right?

5 A Yes, sir.

6 Q All right. And then Fairfax Water is
7 all the way at the bottom, correct?

8 A Yes, sir.

9 Q Okay.

10 MR. THOMAS: Your Honor, I don't have
11 any further questions at this time. As
12 Mr. Raphael indicated, I do intend to call
13 Mr. Murray in our case.

14 THE COURT: All right. That's fine.
15 Thank you, Mr. Thomas.

16 MR. THOMAS: Thank you.

17 THE COURT: Redirect, Mr. Raphael.

18 MR. RAPHAEL: Thank you, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. RAPHAEL:

21 Q Mr. Murray, with regard to the issue of
22 when you looked into the possibility of connecting

1 the Fairfax Water buildings north of Gallows Road
2 by tunneling under Route 50 to a line on the south
3 side of Gallows Road, the issue came up just now
4 in your discussions with Mr. Thomas about needing
5 a VDOT permit for that.

6 A Yes.

7 Q Did you have any concerns about
8 obtaining a VDOT permit with -- in light of
9 actions that had previously been taken by Falls
10 Church?

11 A Yes.

12 Q What were those concerns?

13 A We had become aware --

14 MR. THOMAS: Objection. Judge, this is
15 beyond what I just asked the witness. All I asked
16 the witness is whether they had actually applied
17 for a permit. And he said no.

18 MR. RAPHAEL: And now he's going to
19 address that.

20 THE COURT: Sir.

21 MR. RAPHAEL: Now he's going to address
22 that.

1 THE COURT: I'm going to permit it.
2 Objection overruled.

3 THE WITNESS: We had been preparing to
4 install some additional water mains in the Gallows
5 Road/Lee Highway area a few years prior, and
6 became aware that the City had written the
7 Virginia Department of Transportation objecting to
8 the issuance of such a permit to install those
9 water mains.

10 BY MR. RAPHAEL:

11 Q Okay. Let me bring up Plaintiff's
12 Exhibit 2 so we can see where those are.
13 Can you -- what was the location of the
14 water lines that you were trying to expand?

15 A Gallows Road near Lee Highway.

16 Q Is that around right there where I'm
17 pointing?

18 A Yes.

19 Q Ken, can you bring that up a little
20 bigger? Can you make it a little bigger than
21 that? Just put the box around the Dunn Loring
22 area where it says -- Ken, see my pointer here.

1 Just bring that up, please.

2 Okay. Is that -- does this show the
3 area that you're talking about?

4 A I'm seeing Lee Highway.

5 Q Lee Highway and Gallows Road?

6 A Yeah. I don't see Gallows called out.

7 Q I think it's this blue line here that
8 we've taken -- well, scroll down, Ken, so we can
9 see Gallows Road to the north, please. I'm sorry.
10 Scroll up.

11 There you go. Do you see Gallows Road?

12 A Yes.

13 Q Okay. And, Ken, pull it back down so we
14 can see the Multiplex.

15 A So just to the right of the Multiplex
16 properties labeled there.

17 Q Okay. So the VDOT -- you were trying to
18 get a permit from VDOT in connection with
19 expanding your water lines in this area at the
20 intersection of Lee Highway and Route 29 near the
21 Multiplex?

22 A Yes.

1 Q And did you become aware of anything
 2 that Falls Church did in connection with that
 3 effort?
 4 A Yes. They wrote Virginia Department of
 5 Transportation objecting to the issuance of the
 6 permit for the installation of those lines,
 7 claiming an exclusive service area.
 8 Q Okay. Now, with regard to the two
 9 properties owned by Fairfax Water north of --
 10 north of Route 50, the properties are currently
 11 served by Falls Church lines. Would you have to
 12 physically disconnect the connections to the Falls
 13 Church lines in order to hook up your own lines?
 14 A Yes, we would.
 15 Q And did you have any concerns about the
 16 prospect of having to do that?
 17 A Yes, we did.
 18 Q Why?
 19 A We became aware that the City had
 20 threatened criminal sanctions against the Halstead
 21 developer --
 22 MR. THOMAS: Objection, Judge.

1 THE WITNESS: -- for tampering with
 2 their water lines.
 3 MR. THOMAS: Objection. It's highly
 4 prejudicial. The City did not threaten anything.
 5 And I think -- as I said, I think it's highly
 6 prejudicial for the witness to get into that
 7 issue.
 8 MR. RAPHAEL: Well, number 1, we believe
 9 they did. And, number 2, the issue is why Fairfax
 10 Water did not move forward with this. And this is
 11 a consideration why.
 12 THE COURT: Well, I just don't think
 13 it's relevant to the issue that's before us,
 14 namely the -- whether the rates that are being
 15 charged to nonresident users, when monies are
 16 going to benefit resident users, is an
 17 unconstitutional tax.
 18 Objection is sustained.
 19 MR. RAPHAEL: Just so we're clear, the
 20 reason we're pursuing this is because the City has
 21 argued that we should just switch over.
 22 THE COURT: Oh, I understand.

1 MR. RAPHAEL: Okay.
 2 THE COURT: I think I've got it.
 3 MR. RAPHAEL: All right.
 4 BY MR. RAPHAEL:
 5 Q And now, of the factors that you've
 6 talked about, the cost, which I think you said was
 7 between somewhere in the \$300,000 range north,
 8 maybe double that --
 9 A Yes.
 10 Q -- and the VDOT permit, needing to
 11 disconnect lines or move easements, which was the
 12 most significant consideration in your decision
 13 not to move forward with switching?
 14 A I would say the cost.
 15 Q Okay. And we have the -- we have in
 16 evidence the invoices for the past 3 years that
 17 Falls Church charged to Fairfax Water for water
 18 service. And they total about \$40,000. How does
 19 that compare to the cost of building your own
 20 connection to -- under Gallows Road?
 21 A That was a -- I think it totaled \$40,000
 22 for I think 3 years worth of service --

1 Q Right.
 2 A -- for those two buildings. And as I
 3 said, we were looking at the cost of hooking up,
 4 between 311- and \$457,000. So we were looking at
 5 a payback period of probably 20 years or more,
 6 possibly as long as 30-year payback period.
 7 Q All right. Now, Mr. Thomas also, over
 8 my objection, asked you some questions about the
 9 1959 case.
 10 May I have proper redirect on that
 11 without waiving my objection?
 12 THE COURT: You may.
 13 MR. RAPHAEL: Thank you.
 14 BY MR. RAPHAEL:
 15 Q That -- that case was prior to the time
 16 that the City of Falls Church and Fairfax Water
 17 reached a settlement agreement concerning their
 18 respective service areas, correct?
 19 A Let me make sure I understand the
 20 question. That case --
 21 Q Yeah. The case that Mr. Thomas asked
 22 you about where Fairfax Water sued the City of

1 Falls Church because of its efforts to extend a
2 line along Gallows Road --

3 A Yes.

4 Q -- that was the case he asked you about?

5 A Yes.

6 Q My question was that was before the
7 May 1959 settlement agreement between Fairfax
8 Water and Falls Church, correct?

9 MR. THOMAS: Judge, my only objection
10 is, again, leading. And, again, I appreciate that
11 the Court will allow some latitude. But these are
12 leading questions.

13 THE COURT: All right. Well, that
14 question was okay. All right. Go ahead. You may
15 answer, Mr. Murray.

16 THE WITNESS: Yes. I believe it was.
17 In fact, I believe the agreement settled that
18 case.

19 MR. RAPHAEL: Right. And, Your Honor, I
20 would offer at this point Plaintiff's Exhibit 22.
21 I'm sorry, I should say Plaintiff's Rebuttal
22 Exhibit 22. This is a copy of the nonsuit order

1 in the case that Mr. Thomas was speaking about,
2 Fairfax County Water Authority versus City of
3 Falls Church. The case was nonsuited on
4 June 26th, 1959.

5 I would offer that. There are two
6 orders here. Apparently the Town of Fairfax had
7 intervened in the case. So the first order was
8 the nonsuit dismissing without prejudice Fairfax
9 Water's lawsuit. And then at a later date, there
10 was a nonsuit of the Town of Fairfax's
11 intervention action. So the whole case was
12 dismissed without prejudice.

13 THE COURT: All right. Any objection,
14 Mr. Thomas?

15 MR. THOMAS: Can I have one moment,
16 Judge?

17 THE COURT: Mr. Thomas.

18 MR. THOMAS: Judge, the only objection I
19 would have would be to authenticity. I don't see
20 that this is certified by a clerk in this court or
21 in any other way. So subject to that objection,
22 no objection.

1 THE COURT: All right.

2 MR. RAPHAEL: I can represent that, as
3 an officer of the court, this is from the court's
4 file.

5 THE COURT: Well, we're going to receive
6 it. Objection overruled. Thank you.

7 (Plaintiff's Rebuttal Exhibit 22 was
8 received into evidence.)

9 BY MR. RAPHAEL:

10 Q And the 1959 agreement that you had with
11 the City of Falls Church established an exclusive
12 service area for 30 years, right?

13 A Yes, sir.

14 Q Okay. When did that agreement expire?

15 A 1989.

16 Q All right. Mr. Thomas also showed you a
17 rate comparison chart. Can you bring up
18 Defendant's Exhibit 40, Mr. Sapp.

19 And the first one -- this is a -- he
20 said, identified this as a chart of comparative
21 rates.

22 MR. RAPHAEL: And, again, here, Your

1 Honor, I would like permission to ask redirect
2 without waiving my objection that this is
3 irrelevant.

4 THE COURT: Yes, sir.

5 MR. RAPHAEL: Thank you.

6 BY MR. RAPHAEL:

7 Q The Town of Leesburg -- Ken, can you
8 show the top of that chart, please.

9 Okay. The Town of Leesburg is up here
10 at the top of this chart with \$162.06 for an
11 average quarterly charge for a customer.

12 Do you see that?

13 A Yes.

14 Q And are you aware of what has happened
15 with this rate in the past several months?

16 A Yes.

17 Q What?

18 MR. THOMAS: I object on the basis of
19 relevancy.

20 THE COURT: Well, you've asked about the
21 rates. Objection overruled.

22 BY MR. RAPHAEL:

1 Q What happened?
 2 A It's my understanding that the Circuit
 3 Court has decided that that rate is not legal and
 4 that the Town of Leesburg is in the process of
 5 developing a new rate structure.
 6 Q Yes, sir. Now, Mr. Thomas also pointed
 7 out that Fairfax Water's rate was the lowest in
 8 the region at the bottom of the chart. Can we go
 9 to the bottom of the chart, please. And your rate
 10 is shown there at the bottom.
 11 A Yes.
 12 Q Okay. And can we -- there we go.
 13 MR. RAPHAEL: Thank you, Your Honor. No
 14 further redirect.
 15 THE COURT: All right. Thank you very
 16 much, Mr. Murray. You may step down, sir.
 17 Do you want to take a few minutes?
 18 MR. RAPHAEL: I would be grateful, thank
 19 you.
 20 THE COURT: Okay. We'll take
 21 10 minutes. The Court will be in recess.
 22 (Whereupon, a recess was taken between

1 10:52 a.m. and 11:24 a.m.)
 2 THE COURT: Please call your next
 3 witness.
 4 MR. RAPHAEL: Your Honor, plaintiff will
 5 rest. And just for the record, we will tender a
 6 redacted version of two exhibits, Exhibit 30 and
 7 37. Those are the --
 8 THE COURT: I'm sorry. I can't hear
 9 you.
 10 MR. RAPHAEL: We will tender to the
 11 Court redacted versions of Plaintiff's Exhibit 30
 12 and 37. Those were the two --
 13 THE COURT: The minutes.
 14 MR. RAPHAEL: The minutes that had the
 15 rate ordinances attached to them. We'll show the
 16 first page, and then we'll redact the rest.
 17 THE COURT: All right.
 18 MR. RAPHAEL: We'll submit that. And
 19 with that, we rest.
 20 THE COURT: All right. Thank you very
 21 much.
 22 All right. Mr. Thomas.

1 MR. THOMAS: Judge, if I could, I would
 2 like to make a motion.
 3 THE COURT: Well, you may. I mean,
 4 obviously you have a right to.
 5 MR. THOMAS: I'm not very encouraged.
 6 THE COURT: Well, no. It's not because
 7 of the merits. It's -- I mean, this is a case
 8 that -- there's very little dispute over the
 9 facts. I think the only factual dispute in some
 10 respects may be with regard to the issue of
 11 latches. But it's really -- it's really a
 12 question of law and, you know, how the City is
 13 acting, and whether that's running afoul of the
 14 law.
 15 I just think I'm unlikely to grant a
 16 motion to strike without hearing the City's
 17 evidence. In other words, I would take it under
 18 advisement and subsume it into a final decision of
 19 the case.
 20 But I'm very happy -- maybe you'll tell
 21 me something that will cause me to change my mind.
 22 But it seems to me that Fairfax Water probably has

1 made a prima facie case with regard to the fact
 2 that these rates are, first -- well, it's clear
 3 that the City of Falls Church may sell services to
 4 residents and nonresidents. It's clear that it
 5 may set the price for doing so.
 6 How it sets the price with regard to the
 7 issue of beyond costs and return on equity, we've
 8 had testimony from Mr. Woodcock as to what is done
 9 by other jurisdictions.
 10 But, you know, I've read most of the
 11 authorities cited by both sides. And it's plain
 12 that many localities in Virginia, it seems, at
 13 least initially, are not doing it that way with no
 14 judicial problem.
 15 And then we get to the specifics here,
 16 whether a nonresident purchaser may complain about
 17 the fact that the rates must be for matters that
 18 benefit the citizens in as much as the funds that
 19 are -- that are gained, perhaps entirely properly
 20 because the City may seek a profit that
 21 Mr. Woodcock so testified on nonresident users,
 22 leaving aside the equalization of rates subissue.

1 If that means that the nonresident users
2 are subsidizing the resident users for services
3 for which they do not obtain a benefit -- and the
4 answer may be they can perfectly well do that
5 because that's the cost of water if you're
6 purchasing it from the City and you don't live in
7 the City. I don't know the answer to that
8 question yet.

9 But it just seems to me that it would
10 be -- it would be improper for the Court to throw
11 the matter out at this point without deciding the
12 essential issue here, which I think is
13 encapsulized in that very last -- that very last
14 question.

15 MR. THOMAS: Okay. If I --

16 THE COURT: Absolutely.

17 MR. THOMAS: I'm going to make -- I'm
18 making my motion to strike. And I appreciate
19 where the Court's thinking is on it. And I
20 understand it. I think there are just two things
21 that I would like to add to the Court's
22 characterizations of where we are.

1 And the first is that, as we discussed
2 at the outset of this case, this is a challenge to
3 the constitutionality of the City's charter, an
4 act of the General Assembly of Virginia.

5 THE COURT: And I didn't even address
6 that in passing. But I'm quite well aware of
7 that. They're operating under legislative
8 authority, which is entitled to a high degree of
9 respect and presumption of correctness.

10 MR. THOMAS: Right.

11 THE COURT: But there are still laws
12 that may be unconstitutional.

13 MR. THOMAS: I understand. And what
14 I -- what I would like to do, if for no other
15 reason than just the record --

16 THE COURT: That's fine.

17 MR. THOMAS: -- on this motion is to
18 give the Court to understand why I think there's a
19 special -- a special analysis that, at this stage,
20 and again at the close of our case --

21 THE COURT: Yes, sir.

22 MR. THOMAS: -- the Court should throw

1 the case out.

2 The first is, as I mentioned, in as much
3 as this is a challenge to the charter, an act of
4 Assembly, the Court must find that the charter is
5 unconstitutional, not to find that the City's
6 practices based on that charter are
7 unconstitutional, I think that much goes without
8 saying.

9 The standard for doing so in Virginia is
10 rather -- not rather. It's very high. A statute
11 is not to be declared unconstitutional unless the
12 Court is driven to that conclusion. That is from
13 the Roanoke against Michael's Bakery case,
14 180 Va. 132.

15 Every reasonable doubt -- under Virginia
16 law, every reasonable doubt should be resolved in
17 favor of the constitutionality of an act of a
18 legislature.

19 I think there's an important interplay
20 here on the standard of the motion to strike and
21 standard that is applied to a claim of
22 unconstitutionality, because, in the latter, any

1 reasonable doubt whether a statute is
2 constitutional shall be resolved in favor of its
3 validity.

4 And so that's the place where we find
5 ourselves. And without going into excruciating
6 detail about the evidence that the Court has
7 before it, I think where the Court is left at this
8 stage is with testimony from Mr. Woodcock who has
9 identified certain financial summaries from --
10 frankly, from the City's publicly available
11 Comprehensive Annual Financial Reports. So that's
12 one thing he has done.

13 And the second thing he has done is
14 identified the fact of industry guidance and
15 admitted freely that that industry guidance are
16 recommended principles and are observed by some
17 municipalities and not by others.

18 And I don't think that puts any weight
19 on the scale that the plaintiffs have to tip under
20 this high burden of unconstitutionality which I
21 mentioned just moments ago. So that's thing one.

22 And thing two in response to the Court's

1 observations a moment ago is I want to make sure
2 that we are not going down the road of the much
3 discussed McMahon line of cases. Because, as I
4 said at the outset of this case and I'll say again
5 today, I really think that's a threshold question
6 about whether what the City -- the practices that
7 are giving them the benefit of all doubt at this
8 stage, I really think that's a threshold question.

9 That's sort of a fork in the road that
10 the Court needs to resolve and can resolve in the
11 absence of further factual inquiry and resolve in
12 favor of the City and grant the City's motion to
13 strike.

14 And so I want to make -- I'm sort of in
15 self-preservation mode in one sense in that I want
16 to make sure I don't understand the Court to say
17 that's the analysis --

18 THE COURT: I haven't gone down this
19 road. You needn't hear that. I know there's a
20 fork in the road. Let's say they've got both, one
21 one way and the other one the other way. There
22 are two sets of cases. And the Fairfax Water

1 relies on one line and the City relies on one
2 line. But I haven't studied them sufficiently to
3 make a conclusion.

4 But my initial questions on Monday, we
5 were talking about the holding out and all of
6 that. I just haven't made a decision.

7 MR. THOMAS: Okay.

8 THE COURT: I think the parties are
9 entitled to as full a consideration by the Court
10 on a matter that's of great interest to both
11 parties.

12 MR. THOMAS: Of course. One last point;
13 and that is that, even under the standard of a
14 motion to strike, given that this is a claim of
15 unconstitutionality, if we are in equipoise with
16 respect to these competing, though, I think,
17 reconcilable lines of cases, then I think that
18 needs to be resolved in favor of the City. And
19 for that reason the City's motion should be --

20 THE COURT: That's true. But at this
21 point, it's whether or not the Fairfax Water has
22 met its burden of going forward not whether it's

1 met its burden of prevailing on the case on a
2 motion to strike. And I think they have
3 sufficiently met that burden.

4 So that the Court would like to, at
5 least at this point, reserve on the motion to
6 strike until we've had the benefit of the
7 defendant's evidence and then consider the renewed
8 motion with all of the evidence in the case.

9 MR. THOMAS: Okay. I have a very short
10 bench memo.

11 THE COURT: All right. I would be very
12 happy to have it.

13 MR. THOMAS: Okay. I'll pass it up to
14 the Court.

15 THE COURT: Yes, sir.

16 MR. THOMAS: And to counsel.

17 MR. RAPHAEL: At the risk of standing up
18 and asking to respond to the motion to strike,
19 even though Your Honor is preferring to defer, I
20 would like to address the legal issues that have
21 been raised because Mr. Thomas went on at length
22 in the motions in limine about the law in this,

1 and there have been a number of colloquies about
2 it. I would like to respond to those colloquies.
3 I think it's in the back of Your Honor's mind. I
4 would like a chance to address it.

5 THE COURT: Do you want to do that now?

6 MR. RAPHAEL: Yes, Your Honor.

7 THE COURT: I don't have any objection
8 to doing that. We can -- and Mr. Thomas can
9 respond further if he chooses.

10 MR. THOMAS: Thank you, Judge.

11 THE COURT: Thank you, Mr. Thomas.
12 Thank you.

13 MR. RAPHAEL: And since we have all this
14 equipment, I couldn't pass up the chance to just
15 do a PowerPoint presentation.

16 THE COURT: Right.

17 MR. RAPHAEL: I want to talk about what
18 I think are the relevant lines of cases and
19 authorities that Your Honor is going to have to
20 consider.

21 And you've been focused on the
22 constitutional argument. But there is also a

1 nonconstitutional argument here as well that what
2 the City is doing is inconsistent with its own
3 charter. And I alluded to this in the opening
4 statement. And I just want the Court to be aware
5 of it, that there is a nonconstitutional argument
6 here as well.

7 THE COURT: Well, enlighten me on that.

8 MR. RAPHAEL: All right. I would like
9 to, if I can, address that argument first. And
10 then I'm going to address the constitutional
11 argument and what I think are the lines of cases
12 that are relevant to that.

13 THE COURT: Okay.

14 MR. RAPHAEL: Those are the Marshall --
15 the recent case in Marshall versus NVT. The line
16 of cases -- it's not just McMahon, but it starts
17 with Robinson and Marks' Shows. And the Mount
18 Jackson and Town of Rocky Mount cases which are
19 the principal ones the City relies. And, finally,
20 take the non-Virginia authorities like McQuillin.

21 Let's talk about the nonconstitutional
22 argument here. The question arises, if we're

1 right, does the Court have to invalidate the
2 charter of Falls Church? While I think -- our
3 argument is the City shouldn't be transferring any
4 return on equity to the general fund.

5 But there actually is a middle ground
6 here which I have, I think, a responsibility to
7 identify for the Court. And that addresses
8 Section 13.09 of the City charter which you saw in
9 opening statement. This is from 1995 Virginia
10 Acts Chapter 655.

11 And you remember this is the provision
12 that said that every -- if the rates charged by
13 the City are insufficient to cover their expenses,
14 then it's the duty of the City to come up with new
15 rates.

16 And the key language is in the last
17 sentence of that where it says that they have to
18 come up with a schedule of rates which, in its
19 judgment, will produce receipts equal to expense.
20 Receipts equal to expense.

21 In this case, it's clear that they have
22 not been doing that. This provision arguably is

1 totally consistent with what Mr. Woodcock said is
2 proper utility rate making.

3 You remember he said: "Question: With
4 regard to what the revenue requirements are for
5 the municipal utility, is it proper to include a
6 transfer to the general fund as an element of the
7 revenue requirements for the utility?"

8 "Answer: It's not proper to include
9 that."

10 That's consistent with what this charter
11 provision says, that you set the rates so that
12 receipts equal expense.

13 Now, has the City set its rates equal to
14 its expense? The evidence on that is undisputed.
15 It clearly has not. And we showed that to you in
16 Plaintiff's Exhibit 36 where the City Manager
17 recommended this rate increase. This was the
18 original rate setting. And he was recommending
19 raising it to that. And the original one was more
20 than sufficient to cover the costs. And they just
21 wanted to raise it further.

22 So under the City's own charter, they

1 didn't raise the rates to set receipts equal to
2 expense. They set them to --

3 THE COURT: Well, what is expense
4 referring to? If you go back to the charter --

5 MR. RAPHAEL: That's the expense of
6 operating --

7 THE COURT: Yeah. Will produce receipts
8 equal to expense.

9 MR. RAPHAEL: The expense of operating
10 the system.

11 THE COURT: But is it the expense of the
12 utility --

13 MR. RAPHAEL: Yes.

14 THE COURT: -- or is it the expense that
15 the City is looking at with regard to all of its
16 matters? Because from the evidence that has been
17 presented by Fairfax Water, they're looking at all
18 of these expenses which include the ones that you
19 think have nothing to do with the -- with the
20 water.

21 And they say, well, we need to meet
22 these expenses, and this is a way that we have

1 chosen to do it. Maybe that's, "whoa, it's going
2 to horrify Mr. Woodcock," but it may not
3 necessarily be illegal. It may not even be
4 necessarily in violation of this chapter if, in
5 the City's judgment, expense is not limited simply
6 to the expense of the utility. I'm just asking
7 the question.

8 MR. RAPHAEL: I know. It's a good
9 question. Remember, here we're talking about a
10 utility fund, an enterprise fund. It's the rates
11 to be charged with respect to services and water
12 and sanitary sewer facility shall be fixed from
13 time to time.

14 THE COURT: Right.

15 MR. RAPHAEL: It's talking about how you
16 set the rates of that fund. It doesn't say
17 anything about including monies that the City's
18 general fund needs.

19 Now, how do you square this with the
20 provision that says the City can transfer money
21 from the return on equity to the general fund? We
22 think that provision is not proper.

1 But there is a way to square it
2 theoretically. The way to do it would be, every
3 3 years, if you're running losses, you need to
4 redo the rates so the rates generate enough money
5 to equal expenses. That's what 13.09 provision
6 says.

7 If you have a year where you have a
8 surplus, an argument can be made that, in that
9 year, the General Assembly authorized the City to
10 transfer the money.

11 But what it hasn't authorized is
12 something that the City has been doing for several
13 years, which is setting the rates way above what
14 they need to cover their expenses in order to
15 generate that transfer.

16 Now, this -- what I'm talking about here
17 is also consistent, I think, with what the -- and
18 the other -- the other factual point,
19 incidentally, to show that they have been doing
20 what I said they're doing, are the CAFRs from 2001
21 to 2008 that had that same note about the transfer
22 to the general fund of excess operating funds.

1 The M1 manual is fully consistent with
2 this alternative explanation I'm offering for the
3 City's charter. And you saw this during
4 Mr. Woodcock's examination.

5 Actually, Ken, can we go to the slide
6 that you prepared.

7 And this came out quite well. I'm glad
8 Your Honor asked the question on follow-up with
9 him because I hope he explained it even more
10 clearly this time than yesterday.

11 And what we were getting at is, let's
12 assume you have a City with a population of 50
13 people inside and 50 people outside. The total
14 cash needs of running the water system are \$100.
15 You can allocate those costs between outside-City
16 customers and inside-City customers. You can --
17 in doing that, you can base your outside-City
18 rates on a return on equity. And that's common in
19 the utility rate-making process.

20 THE COURT: Right.

21 MR. RAPHAEL: So the outside-City
22 customers might pay \$60; whereas, the inside-City

1 customers still pay \$40. You're still raising a
2 total of \$100 just like you are in a cash-needs
3 approach. The money stays in the enterprise fund.

4 That's the source of confusion we talked
5 about. I think it led to a little confusion, and
6 it didn't come out as cleanly as it should have.

7 The point is people confuse this concept
8 with the idea you can then take that profit out of
9 the water system altogether. That's not what
10 general rate making says.

11 As I said, I think this concept is fully
12 consistent with my suggested alternative --
13 suggested interpretation of the City charter and
14 the rate-setting provision as to how they set
15 rates. I think the evidence is clear that they
16 have not been doing what that charter provision
17 says.

18 So there is a -- I understand the
19 constitutional principle that, if you don't have
20 to decide a constitutional issue, you avoid it.

21 THE COURT: Right.

22 MR. RAPHAEL: I think that would provide

Page 556

1 one way of avoiding it while still concluding that
2 the City is overcharging its outside City
3 customers.
4 Can we go, Ken, back please. And this
5 is the M1 manual.
6 THE COURT: Right.
7 MR. RAPHAEL: I think I made that point.
8 THE COURT: Yes, sir.
9 MR. RAPHAEL: Now, let me move over to
10 the constitutional argument. There are a lot of
11 cases here. And I appreciate that Your Honor is
12 going to study them. But I would like, if I
13 could, to tell you what I think are the relevant
14 lines.
15 I want to start at the end, the most
16 recent one, and then I want to go back to the
17 beginning. I'm going to start with the Marshall
18 case, and I'm going to talk about the Robinson to
19 Marks' Shows to McMahon and to Mountain View, and
20 go to the case the City relies on, and talk about
21 the Virginia authorities.
22 As Your Honor is aware, the question in

Page 557

1 Marshall versus the Northern Virginia
2 Transportation Authority, which was a political
3 subdivision of Virginia and authorized by the
4 General Assembly, was: Were those fees
5 unconstitutional taxes?
6 The fees were for things, among other
7 things, vehicle license, inspection and
8 registration. And the monies that were used from
9 these fees were used to repay general revenue
10 bonds for transportation purposes. The fees were
11 specifically set as to what they could be by the
12 General Assembly.
13 The Court held that the General Assembly
14 acted unconstitutional in empowering the NVTA to
15 impose these fees. The Court said that, despite
16 the strong presumption of validity of the
17 provision, the General Assembly provided the very
18 strict provisions in the constitution concerning
19 taxation.
20 And the Court said -- and this is at
21 page 431 of the Virginia Reports: When the
22 primary purpose of an enactment is to raise

Page 558

1 revenue, the enactment will be considered a tax,
2 regardless of the name attached to it.
3 That's consistent in what's been seen in
4 other cases where the Court says, it doesn't
5 matter what name you call it, if you call it a fee
6 or license or charge, whatever, it still could
7 well be a tax.
8 In this case, the purpose of these
9 charges was not to pay for the specific items
10 associated with them, vehicle inspection or
11 licensing or registration. The purpose was a
12 general purpose to raise monies for transportation
13 generally. And for that reason, it was a tax.
14 And here is where I think we get to the
15 extraterritorial issue. Because the NVTA was not
16 elected, despite the fact that the General
17 Assembly said what the rates would be if they were
18 imposed, the Court said the unelected NVTA
19 couldn't decide to impose the fee.
20 Why is that? Because the taxing power
21 is very different from other powers in the
22 constitution. And this is really significant.

Page 559

1 It's different because the constitution
2 has explicit language. And this is a quote from
3 Marshall. "Because the constitution's explicit
4 language demonstrates the special status that the
5 legislative taxing power occupies in the
6 constitution, and reflects the greater
7 restrictions that the constitution places on the
8 General Assembly's exercise of the taxes power."
9 What provisions are we talking about in
10 the constitution? There are a number of them. We
11 pleaded them in our complaint. And here I think
12 are the most significant ones.
13 Article 1, Section 6. The people cannot
14 be taxed without their own consent or that of
15 their representatives duly elected. No taxation
16 without representation.
17 This dates back to the original charter
18 written by George Mason in the Virginia
19 Declaration of Rights. And it's -- and this was
20 the primary basis on which the Supreme Court in
21 Marshall said that the General Assembly violated
22 the constitution when it authorized the NVTA to

1 impose these taxes, these fees.
 2 Article 1 Section 11, the Virginia due
 3 process clause.
 4 THE COURT: And your position here is
 5 that the elected officials of the City of Falls
 6 Church were not elected by the non-city residents
 7 who are paying this fee.
 8 MR. RAPHAEL: Exactly right. Article I,
 9 section 11, the Virginia due process clause, no
 10 person shall be deprived of its property without
 11 due process of law.
 12 Article IV, section 14 (5), the General
 13 Assembly shall not enact any local law, like a
 14 charter, for the assessment and collection of
 15 taxes.
 16 Article X, section 1, all taxes shall be
 17 levied and collected under general laws and shall
 18 be uniform upon the same class of subjects within
 19 the territorial limits of the authority levying
 20 the tax.
 21 The Supreme Court cited all these
 22 provisions and said the taxing power is very

1 different from other powers in the Constitution,
 2 and that's why a strong standard applies.
 3 So that's, I think, a key issue for us
 4 here.
 5 Now, what Marshall applied to this case
 6 was the primary purpose of the current water rate
 7 structure designed to raise general revenues for
 8 the City or to pay for the operating maintenance
 9 and capital costs of the system.
 10 The answer to that is clear. It was
 11 purely a general revenue measure. And that's
 12 shown by the City Manager's memo of May 13th,
 13 2005, at Plaintiff's Exhibit 36.
 14 And this gets back to these charts that
 15 I showed you earlier. See.
 16 I'm flipping back and forth between the
 17 two, and they -- all they're doing is raising more
 18 money. They've already covered all their costs
 19 and expenses.
 20 You also had Mr. Woodcock's testimony
 21 about this exhibit where he said the existing
 22 rates were more than sufficient to cover all

1 costs. And that the increase was needed to
 2 facilitate the large transfers of profit from the
 3 water fund to the general fund.
 4 So do the City's actions violate the
 5 principle of no taxation without representation?
 6 Absolutely. And you pointed it out. 92 percent
 7 of the City's customers are in Fairfax County, and
 8 they have no political representation in the City.
 9 Now, let me switch over to the Robinson
 10 through McMahan to Eagle Harbor, that line of
 11 cases. It begins -- and the reason you need to
 12 begin at the beginning is because the beginning
 13 starts with extraterritorial taxation issues.
 14 Robinson versus City of New York, 1908,
 15 the issue -- the Court in this case held that it
 16 was unconstitutional for the City of Norfolk to
 17 impose a license fee for a circus performance
 18 occurring just outside its city limits where it
 19 had no regulatory powers.
 20 And the Supreme Court said -- and here
 21 is a quote -- there's lots of good language from
 22 Robinson about why extraterritorial taxation is so

1 bad. Here is a good sample.
 2 To any extent that one man is compelled
 3 to pay in order to relieve others of a public
 4 burden properly resting upon them, his property is
 5 taken for private purposes, as plainly and
 6 palpably as it would be if appropriated to the
 7 payment of the debts or the discharge of
 8 obligations which the person thus relieved by his
 9 payments might owe to private parties.
 10 Very strong language about the evils of
 11 extraterritorial taxation.
 12 Next came City of Charlottesville versus
 13 Marks' Shows in 1942. And the Supreme Court in
 14 this case held that it was unconstitutional for
 15 Charlottesville to impose a license fee on a
 16 circus operator -- the early cases were circuses
 17 and carnivals. It tells you something about the
 18 times. But it was unconstitutional for the City
 19 of Charlottesville to impose a license fee on a
 20 circus operator just outside the City limits but
 21 well within the City's statutory police power.
 22 Remember, in those days, the General

1 Assembly authorized the Cities to exercise their
2 police powers a mile beyond their boundaries in
3 many instances. Charlottesville was such a case.

4 And the Court said this fee was
5 unconstitutional because it grossly exceeded the
6 cost of service of the -- it -- the City claimed,
7 Well, we need -- we need to pay for the police to
8 supervise the circus, and they're taking in two to
9 three times on that. And they weren't spending it
10 on police monies; they were sticking it in their
11 general fund.

12 Now, the difference between this case
13 and Robinson was that here, the City had statutory
14 regulatory authority 1 mile into Albermarle
15 County. Remember in Robinson, the City of Norfolk
16 did -- and so the argument was made here, Well,
17 because the City has regulatory authority, it can
18 impose the tax or impose the charge.

19 Did that make a difference? No. The
20 Supreme Court said we need not -- sorry. I have a
21 typo in this. We need not decide that here, the
22 Court said, because the charge was a mere revenue

1 tax such as was condemned in Robinson.

2 And it went on to say that the exacted
3 charge must bear some reasonable relation to the
4 additional burdens imposed, and it didn't.

5 So the first two cases in this line of
6 authorities are extraterritorial taxation cases.

7 What happens after Marks' Shows? You
8 get to McMahan in 1980 where the Court upheld a
9 City ordinance -- this was the City of Virginia
10 Beach -- which required homeowners to pay a fee
11 for the cost of extending water lines to their
12 property even if they chose not to connect.

13 And the Court said that it -- it upheld
14 the fee because, in this case, the charges imposed
15 by the ordinance would not exceed the actual cost
16 to the City of installing the water lines. A
17 reasonable correlation arose between the benefits
18 conferred and the costs exacted.

19 And so in cases where the fee doesn't
20 pay for all the costs, it's an easy case. It's
21 not a tax because it's not even covering the cost.
22 It's when it exceeds the cost, like in Marks'

1 Shows and Robinson, that you have a potential
2 constitutional violation.

3 Now, this language here I believe is the
4 beginning of the reasonable correlation test that
5 you then read about in later cases.

6 Now, and it's true, McMahan didn't
7 involve outside -- it didn't mention whether there
8 were outside-city customers who were -- on whom
9 this obligation was imposed.

10 And I think the City's argument on the
11 McMahan is, Well, it only applies to inside-city
12 people. Well, that may or may not have been true.
13 But it may not have been true, and the issue just
14 wasn't discussed.

15 The next case was Tidewater Association
16 of Homebuilders versus City of Virginia Beach.
17 This is also from the same jurisdiction. And the
18 Court there upheld the fee charged for new water
19 connections in order to help finance construction
20 of water pipelines -- from a water pipeline from
21 Lake Gaston.

22 And, again, the Court said this fee was

1 not a tax because the anticipated revenue was only
2 one-third of the total cost of the project.
3 Obviously, fee revenues will not exceed the City's
4 cost in providing the service.

5 So very consistent line here that you've
6 got to look to cost of service.

7 Then came Mountain View --

8 THE COURT: I'm sorry. Could you go
9 back to Tidewater.

10 MR. RAPHAEL: Yes, Your Honor.

11 THE COURT: I'm just...

12 Okay. I got it. Thank you.

13 MR. RAPHAEL: Then came Mountain View.

14 And Mountain View, I think, is a really important
15 case. Here, the Court held -- this was in 1998 --
16 that the City properly charged a refuse collection
17 fee and that it wasn't an impermissible tax,
18 despite the fact that the fee generated a surplus.

19 And the whole case, the litigation in
20 the trial court turned on whether the surplus was
21 going to be spent on the trash collection services
22 or whether it was just a general revenue device.

1 And the Court held that a municipal
 2 ordinance setting a fee for refuse collection is
 3 not an invalid revenue generating device solely
 4 because the fee set by the ordinance generates a
 5 surplus.
 6 The relevant inquiry as set forth in
 7 McMahan and reaffirmed in Tidewater is whether
 8 there's a reasonable correlation between the
 9 benefit conferred and the cost exacted by the
 10 ordinance.
 11 Now, in this case, the Court concluded
 12 that the -- even though the fees were generating a
 13 surplus, that the Court accepted the City's
 14 testimony that the surplus was intended to fund
 15 future landfill replacement costs. So this wasn't
 16 a matter of, you know, funding some other general
 17 City budget item that wasn't in the trash
 18 collection system.
 19 Now, the three cases we've just been
 20 through -- McMahan, Tidewater Builders, and
 21 Mountain View -- the Court doesn't say whether
 22 they are outside-city customers or not, okay. I

1 think that's important.
 2 The next -- the last case in this line
 3 was Eagle Harbor versus Isle of Wight County.
 4 This was in 2006. And in this case, the Supreme
 5 Court upheld the water and sewer fees that were
 6 charged by the Isle of Wight County because they
 7 generated revenues that, quote, were less than the
 8 actual system costs and were solely dedicated to
 9 retiring utility bond costs.
 10 So, here, again, it's a cost-of-service
 11 analysis. And all these cases we've talked about
 12 so far, the City wins because the fees are
 13 insufficient to cover their costs.
 14 And the Court summarizes the McMahan
 15 line of cases as saying that the McMahan and its
 16 progeny establish that the judicial inquiry as to
 17 a reasonable correlation relating to a municipal
 18 fee is directed to whether that fee is a bona fide
 19 fee for service or an invalid revenue-generating
 20 device, unquote.
 21 Now, I hope you will indulge me for
 22 having gone through this. But I think it's

1 important to see how these cases originate with
 2 Robinson and Marks' Shows. And they're not
 3 limited. They're extended by McMahan and
 4 Tidewater Builders and Mountain View.
 5 As I said earlier, both Robinson and
 6 Marks' Shows found unconstitutional taxes imposed
 7 on persons located beyond the City limits. Marks'
 8 Shows based that finding on excessive charges
 9 relative to the cost of service, not on whether
 10 the City has the power to regulate.
 11 Mr. Thomas said in opening statement or
 12 on the motion in limine, Well, the City doesn't
 13 have any police power authority in Fairfax County.
 14 That's irrelevant. That doesn't determine whether
 15 it's a tax or not. Just like it didn't in Marks'
 16 Shows or Robinson. It's irrelevant.
 17 Tidewater Builders specifically follows
 18 Marks' Shows which in turn follows Robinson. And
 19 there's no mention in this line of cases whether
 20 there were any outside-city users at all.
 21 What do I conclude from this? You can't
 22 disregard the McMahan line of cases at all. To

1 the contrary, they don't exclude the
 2 cost-of-service principle as applied to
 3 outside-town users. There's nothing in Virginia
 4 law, I think, that makes that conclusion except
 5 for the Mount Jackson and Town of Rocky Mount
 6 cases, which I'm going to get to a second and show
 7 you why they're distinguishable.
 8 Other Virginia authorities support
 9 applying the cost of service principle to
 10 out-of-town users. What are they? Well, just
 11 recently -- I pointed this out already -- Judge
 12 Horne in Giordano versus the Town of Leesburg
 13 issued a very lengthy written opinion, which we've
 14 tendered to the Court, in which he applied the
 15 cost-of-service principle to the outside-city
 16 customers, and he struck down the rates because
 17 the City hadn't justified them. The rates were
 18 improper because there was no -- they were not
 19 based on the cost of service.
 20 That case didn't reach the
 21 constitutional question. Why? Because it was
 22 undisputed that the total revenues raised were

1 just enough to pay for the cost of operating the
2 system.

3 So he specifically said this was not an
4 issue of extraterritorial taxation or a fee
5 masquerading -- he uses the word "masquerading."
6 It's not a case of a fee masquerading as a tax.
7 That's what we have in this case.

8 Another Virginia authority that supports
9 our position here is the 1997 opinion of the
10 Virginia Attorney General at page 77,
11 December 8th, 1997, where the Attorney General
12 opined that the charges for utility services to
13 out-of-town customers must be cost based, or they
14 would be an improper revenue-generating device.

15 Now, let me get to -- these are the two
16 cases the City has got to hang its hat on. And
17 when this case goes up to the Supreme Court,
18 whoever wins here, this is going to be the issue
19 in the Supreme Court: Where does this case fall
20 in the McMahon line of cases versus these two,
21 Mount Jackson and Town of Rocky Mount.

22 I'd like to discuss them with a slide or

1 two for each one. The overview here is that these
2 cases are distinguishable because the language in
3 them about municipal profit was dictum, number 1.
4 And, number 2, because the cases involved a fact
5 situation entirely different from what we have
6 here.

7 These involved a single out-of-town
8 user, a single contract, to extend service, not
9 tariff rates by a municipal utility that, like the
10 City of Falls Church, holds itself out as the --
11 sometimes the only provider, but certainly as a
12 provider that doesn't discriminate among different
13 customers whom it serves. And the facts of these
14 cases are not remotely similar to our case.

15 Let's start with the Corporation of
16 Mount Jackson versus Nelson in 1928. In this
17 case, the Town entered into a contract to extend
18 water service to a gas station. The gas station
19 was located 1,000 feet north of the town.

20 The Town then said, all right, we
21 don't -- and they had a new politicians come into
22 office. And the Town didn't want to pursue this

1 contract anymore and tried to renege on it and
2 argued that its own contract was ultra vires.

3 The Court held it was not. And it was
4 not because, and here's-- the Court said it was
5 not because it had the power to extend the line
6 that -- its powers weren't limited to within the
7 Town.

8 Here's the dicta that the City relies
9 on, quote: Common sense requires us to hold that
10 a City in the possession of surplus water,
11 lawfully acquired, should not permit it to run to
12 waste when it can be sold at a profit.

13 They like that word "profit" there.

14 And they like this dicta also: This is
15 a source of profit to them, contributes to the
16 sanitation of the outlying districts and
17 indirectly to that of the towns themselves.

18 But, as you can see, we're talking about
19 a very different situation where the Town didn't
20 have to serve that gas station. It could have
21 said no. And it -- it negotiated an arm's length
22 contract for what it was going to charge. It had

1 the power to do that.

2 But that is not this case, where you've
3 got the City serving 110,000 people in a service
4 area it's served for 40 years.

5 So let's go on to the second case the
6 will City relies on, the Town of Rocky Mount
7 decision from 1998. Here, this is very similar to
8 Mount Jackson. Here, the Town extended, in an
9 arm's length contract, agreed to extend its sewer
10 line to a Wal-Mart located a quarter mile outside
11 of Town.

12 Wal-Mart had to pay \$250,000 for that to
13 buy into the system. And it was the only -- it
14 was the only user on this sewer line, this
15 brand-new sewer line that the Town built to
16 provide service to it.

17 Then, an adjacent fast-food store
18 operated by Wenco of Danville wanted to locate
19 right next-door to the Wal-Mart, and, naturally,
20 it wanted to hook up to the sewer system. And it
21 said, "Town, can we hook up?" The Town said,
22 "Sure, but it's going to cost you \$125,000."

1 And the Town said, "What? Are you
2 kidding me? You provide water -- you provide
3 sewer service not only to people inside the town,
4 but to people outside the town." The fast-food
5 restaurant said, "Are you kidding? You provide
6 sewer service to people inside the Town and
7 outside the Town at uniform rates." That's
8 footnote 2.

9 They actually had some other out-of-town
10 customers. But those were customers on different
11 sewer lines. And Wenco said, "We should get the
12 same rate."

13 And the trial court agreed with that.
14 And it said, yeah, you've got to charge the same
15 rate to Wenco as you charge to anybody else who is
16 on your system.

17 And the Supreme Court -- the trial court
18 also applied the holding out doctrine. And we've
19 talked a lot about that. The Court said that the
20 Town had held itself out as a general service
21 provider and therefore had to charge a uniform
22 connection rate.

1 The Supreme Court reversed. It said:
2 Under the facts presented here, we need not
3 consider whether the holding out exception should
4 be adopted in Virginia. The present record
5 contains no evidence that the Town entered into an
6 agreement to provide sewer service to a general
7 service area that included the property.

8 So, as I said earlier, the only entity
9 on this line was the Wal-Mart. And so it was not
10 a holding out situation.

11 And Mr. Thomas suggested earlier that
12 the Supreme Court, you know, poo-poo'd the holding
13 out doctrine. I don't think that that's a correct
14 reading at all. They just didn't need to reach
15 it.

16 And the dictum in this case that the
17 City likes is this one. It says: In the
18 performance of a purely proprietary function, a
19 municipality may consider factors of corporate
20 benefit and pecuniary profit.

21 But, again, here, the Court didn't reach
22 the key question that I think we have in our case

1 which is, if the Town had held itself out as
2 providing service to the general area, like Falls
3 Church does, did it have to charge the same
4 uniform rates it charged to other in-town and
5 out-of-town customers.

6 And I think the answer to that is yes.
7 And if Fairfax Water were the only County user and
8 we had to negotiate at arm's length to buy water
9 from the City, that's a totally different
10 situation.

11 But ours is a case where we're one of
12 110,000 County users. And there's no -- you heard
13 from the testimony, there's really not a practical
14 alternative.

15 THE COURT: But there is a uniform rate.
16 It's the same rate for inside or outside of Falls
17 Church.

18 MR. RAPHAEL: That's exactly right, and
19 they can't discriminate. That's a the point of
20 the holding out doctrine. If they wanted to
21 charge Fairfax Water a higher rate, they couldn't
22 do that. Nor do I think they --

1 THE COURT: What I'm saying, though, is
2 everyone being charged the same rate. And so
3 you're not saying they're charging more to the
4 people in Fairfax County than they are to the
5 people within the City. But you're saying the
6 rate is too high because it's set for an improper
7 purpose.

8 Isn't that really the heart of the
9 matter?

10 MR. RAPHAEL: Well, I agree with most of
11 what you said. The rate's the same for City and
12 outside-city customers.

13 THE COURT: Right.

14 MR. RAPHAEL: I think Your Honor
15 suggested in an earlier colloquy, "Well, nobody
16 from the City is complaining about this, right?"
17 And --

18 THE COURT: Yes, I did.

19 MR. RAPHAEL: Yeah. And I don't think
20 anyone -- I haven't seen any lawsuit yet. I think
21 people from the City may complain from time to
22 time. That's really not the point.

1 The point is why are we not surprised
 2 that people from the City don't complain about
 3 this.
 4 THE COURT: And your answer is because
 5 they have a low tax rate.
 6 MR. RAPHAEL: That's exactly right.
 7 They're getting a huge benefit that is facilitated
 8 by this very unique situation where 92 percent of
 9 the customers live outside the City.
 10 THE COURT: No, I understand.
 11 MR. RAPHAEL: So it's like taking money
 12 out of the one pocket --
 13 THE COURT: The only reason I asked the
 14 question --
 15 MR. RAPHAEL: -- and putting it in the
 16 other.
 17 THE COURT: The only reason I
 18 interrupted you, Mr. Raphael, is when you talk
 19 about the inequality, you say, Well, here we
 20 actually do have equality of rates. It's just you
 21 say they're too high --
 22 MR. RAPHAEL: That's right.

1 THE COURT: -- because they're funding
 2 an improper --
 3 MR. RAPHAEL: That's exactly right. And
 4 I want to come back to that because I think -- I
 5 want to address the point that even City
 6 taxpayers, ratepayers could raise the claim and we
 7 shouldn't be disenfranchised from raising it
 8 because we don't happen to live in the City. But
 9 I'm going to get to that in a second.
 10 The holding out principle is, based
 11 on -- he's right, Mr. Thomas is right. It's an
 12 exception to the general rule that a municipality
 13 that operates a water utility has no duty to serve
 14 customers outside of its jurisdiction.
 15 Under the holding out exception as set
 16 forth in Rocky Mount, a municipal corporation that
 17 holds itself out as providing utility services to
 18 a given area will be treated as a public utility
 19 for purposes of serving that area.
 20 THE COURT: Right.
 21 MR. RAPHAEL: And that not only means
 22 you can't deny service; it means you've got to act

1 like a public utility and charge the same rates to
 2 the same classes of customers.
 3 And the Court said in Rocky Mount: This
 4 exception applies only upon proof of either an
 5 agreement by the municipal corporation to provide
 6 actual utility service to a general service area
 7 or the actual provision of service to a number of
 8 properties in a given area manifesting the
 9 municipality's consent to provide service to that
 10 area as a public utility.
 11 We have both in this case. Because the
 12 City of Falls Church agreed in 1959 to provide
 13 service to this area. And then it actually has
 14 done so and in fact tried to exclude Fairfax
 15 Water, the testimony was in 2007, from even
 16 entering the market. And we're still fighting
 17 over that issue.
 18 Now, the McQuillin, which is one of the
 19 sources in this principle, describes the holding
 20 out principle this way: The duty of a
 21 municipality owning a public utility to furnish
 22 services and supplies without discrimination and

1 at reasonable rates extends to users outside the
 2 City, where the City has undertaken to serve the
 3 public outside the City, unquote.
 4 I read this with -- on redirect with
 5 Mr. Woodcock. But this is the holding out
 6 principle. It's not as limited -- it's not so
 7 limited as Mr. Thomas suggested that it just means
 8 you can't deny service. It means you've got to
 9 treat like -- you know, similar classes of
 10 customers the same way.
 11 And another -- another proposition from
 12 McQuillin is this -- I mean, in fairness,
 13 McQuillin says things that both sides would like
 14 to cite. It's like many legal encyclopedias: You
 15 can find something to support either side.
 16 Ultimately, this is a question of what
 17 Virginia law is. And that's not answered by
 18 McQuillin. But McQuillin also says this -- the
 19 City likes this proprietary governmental
 20 distinction. But McQuillin says, although a
 21 municipality's operation of a public utility may
 22 be a proprietary activity, it is still engaged in

1 a public enterprise for public purpose.
2 So I've got a list of all these things
3 from McQuillin I think are good for us. And I'm
4 sure they have their own list.

5 Stone Lee, which Your Honor mentioned
6 earlier in the trial, from the Loudoun -- got a
7 typo in that, I apologize -- Loudoun County
8 Circuit Court in 1999, Judge Chamblin said that
9 Rocky Mount does not preclude the holding out
10 doctrine. The Supreme Court just didn't need to
11 reach it.

12 And then he went on to say: The holding
13 out exception is very reasonable and just plain
14 makes sense. If a municipality undertakes to
15 provide utility services in a given area outside
16 its corporate limits, then it should be held to
17 the same standard as it would be in providing such
18 services within its own corporate limits.

19 It's hard to argue with that reason.

20 And then lastly, I point out the holding
21 out doctrine has been embraced by the Virginia
22 Attorney General. In its 1989 opinion, the

1 Attorney General said a utility provider that
2 holds itself out as a service provider in a given
3 area has a general obligation under the holding
4 out doctrine to provide service within available
5 capacity to those persons who desire such service.

6 Conclusions from this, Your Honor.

7 Number 1, the doctrine is very viable in
8 Virginia. Although, as the Supreme Court said in
9 Town of Rocky Mount, it hasn't yet formally
10 embraced it. But this -- if ever there is a case
11 for it, I think this is it.

12 Number 2, because Falls Church holds
13 itself out as serving eastern Fairfax County, the
14 doctrine fully applies here. And they have a
15 duty, Falls Church has a duty to supply water
16 service to its Fairfax County customers at fair
17 and reasonable nondiscriminatory rates.

18 Do we lose if the Court finds for
19 whatever reason that the holding out doctrine does
20 not apply? I don't think so. Because the City's
21 rates, which are the same for all customers, would
22 be a tax under the McMahon standard if a City

1 resident filed this case.

2 And, obviously, a City resident has a
3 big financial incentive not to overturn the apple
4 cart because they're getting a big savings on
5 their tax rate. But they clearly would have
6 standing to bring the claim.

7 It's no less a tax when a Fairfax County
8 customer is involved. If anything, it's a lot
9 worse. Because Fairfax residents have zero
10 representation in the City of Falls Church.

11 So even if we didn't have the holding
12 out doctrine, I think we still win under the
13 McMahon line of cases.

14 The last -- couple last -- couple
15 things. The City hangs its hat also on the 2003
16 Attorney General opinion where the Attorney
17 General said, there's -- the parens there says
18 2005. In the wee hours of the morning, I got this
19 wrong. It's 2003.

20 The Attorney General said that the Town
21 of Warrenton could spend surplus utility revenues
22 to offset the cost of building a recreational

1 center. But the opinion doesn't talk about taxes
2 or the constitutional issue. It just doesn't
3 address it.

4 And there are prior Attorney General
5 opinions that do address the tax issue which
6 support our position. In 1997, the Attorney
7 General -- I cited this earlier -- opined that
8 charges for utility services to out-of-town
9 customers had to be cost based.

10 And then there are a number of other
11 opinions that say that all, you know, municipal
12 fees have to be based on the cost of service
13 rather than a revenue-generating measure.

14 Under the City's approach, they have no
15 limiting principle at all to how much the City
16 could charge or gouge or overcharge Fairfax County
17 customers. And I know courts are frequently
18 considered with limiting principles. We have one;
19 they don't.

20 Their principle, as you heard from
21 Mr. Tuohy, is one of sustainability: Is the
22 general fund transfer amount covered by the rates?

1 That is not a principle at all; that's just a fact
2 of what goes in has to match what comes out.
3 That's not a limiting principle.

4 And the rates as a result have nearly
5 doubled from 2000 to 2005 going from \$1.64 to
6 \$3.03 to maintain very high transfers of
7 \$4.6 million a year for a long period of time.

8 The City's current rates are affected by
9 the past excesses. They took \$58 million in cash
10 from the water fund which necessitated higher
11 rates. And they can overcharge customers with
12 impunity. Because of this unique situation where
13 92 percent of the customers are in Fairfax. And
14 you recall Mr. Tuohy saying, you know, the general
15 manager Nguyen described the water system as a
16 money-making machine, the goose that laid the
17 golden egg, and worth more because of the transfer
18 than if it were sold.

19 And that was even before the return on
20 equity went from 18 percent of revenues to
21 43 percent of revenues.

22 So if the rates are the same, why don't

1 Falls Church citizens sue? We've addressed this.
2 As a practical matter, of course, the Court's
3 aware of a huge litigation cost for a natural
4 person to bring a case like this. There's no way
5 a natural person's going to bring this case.

6 So as a practical matter, they can get
7 away with what they want to charge.

8 Why don't you just not buy our water?
9 That's an argument that you've heard. Local law
10 requires a connection to a public system. For
11 most customers in Fairfax County, there is no
12 alternative. There are huge barriers to switching
13 even if you're near a Fairfax Water line. You
14 heard about the distance Fairfax Water's own line
15 across Route 50, the huge expense associated with
16 that.

17 The fact that Falls Church has used its
18 power over existing easements to block people from
19 switching. And this, I'd say, is not an answer in
20 any other tax case you can find.

21 In Marshall, somebody might have said,
22 Why don't you just avoid licensing your car in

1 Northern Virginia? You don't have to pay the tax.
2 Or in Mountain View, Why don't you just
3 hire your own private trash collector? You don't
4 have to pay the tax.

5 Or Marks' Shows, Why don't you just take
6 your carnival elsewhere?

7 It's not an answer in the tax case.

8 So and then the last two cases that they
9 cite in their trial bench memo were ones involving
10 an unpublished federal district court opinion from
11 the City of Newport News. And I -- those cases, I
12 think, are distinguishable.

13 They don't -- they involve a -- much
14 like Town of Rocky Mount and Mount Jackson, they
15 involve a specific contract that was entered into
16 between the City of Newport News and the federal
17 government.

18 The transfers were not anywhere near
19 what we're talking about here. There was no
20 testimony in the case that the practices were not
21 generally accepted or -- and I think we do have
22 that evidence in this case.

1 So -- and it's also a federal case,
2 obviously not binding on the Court.

3 The other Virginia case involving
4 Newport News that they cite doesn't address this
5 question as all.

6 So this is an important case. You know
7 that. We are here. We've got a very clear line
8 of authority, starting with Robinson and leading
9 through Eagle Harbor, which we think strongly
10 supports our legal opinion. And that line of
11 authority began with cases saying extraterritorial
12 taxes are bad. You can't read the McMahon line of
13 cases as abandoning that; it extended it.

14 And Town of Rocky Mount and Mount
15 Jackson, those are the classic one-on-one arm's
16 length, you know, handshake, "this is what we'll
17 charge for service if you want to buy it." Those
18 cases don't control what the situation we have
19 here where you're dealing with a City that's held
20 itself out as the service provider for decades.
21 And they can't discriminate. And that fees have
22 to be reasonably based on the cost of service.

1 So I -- I realize this is a preview of
2 the closing argument. But this is the first
3 chance I've had to really give you a full-blown
4 legal analysis.

5 THE COURT: Well, I appreciate it. Is
6 this all written down for us? I've been taking
7 notes. You know, you speak very rapidly.

8 MR. RAPHAEL: I would like to submit a
9 trial brief. But I think it would be -- it makes
10 sense to do it at the time it would do most good
11 for the Court. And so I would take your guidance
12 on what that would be.

13 I have a version now. I think it'll get
14 better with time, much like a good wine. But --

15 THE COURT: Well, I mean, I've taken a
16 lot of notes. But, you know, it's very helpful to
17 have something to read. Mr. Thomas submitted one,
18 which obviously I read because you heard that from
19 my initial questions.

20 MR. RAPHAEL: Yes, sir.

21 THE COURT: So just -- you can mull on
22 that with your colleague.

1 MR. RAPHAEL: Thank you.

2 THE COURT: Thank you. Thank you.

3 MR. THOMAS: If I could.

4 THE COURT: Would you like to respond?

5 MR. THOMAS: Briefly.

6 THE COURT: Yes, sir.

7 MR. RAPHAEL: Your Honor, I do have the
8 legal authorities if you would like a copy.

9 THE COURT: We don't have that yet? We
10 would love to have it.

11 MR. RAPHAEL: We don't yet have a copy
12 for opposing counsel. So I could give it to you
13 now or we could wait. Whichever.

14 THE COURT: I'm not going to be reading
15 it, probably, between now and --

16 MR. RAPHAEL: We'll just make sure we
17 have a copy of this.

18 THE COURT: All right. Thank you.

19 Yes, sir.

20 MR. THOMAS: A couple of points, Judge.
21 I think I need to take up at the outset -- take up
22 at the outset this new, and I mean brand-new claim

1 that there is a claim in this case beyond the
2 constitutional claim as it relates to Count V.
3 There is not; that this is the first mention of
4 any such --

5 THE COURT: You mean the violative of
6 the charter claim?

7 MR. THOMAS: Exactly right. And I have
8 a copy of the amended complaint, which if the
9 Court doesn't have one handy, I would be happy to
10 pass up to the Court. And we can take a look at
11 how Count V in this case is pled.

12 There is no mention whatsoever of the
13 City not abiding by its own charter. Count V is
14 pled uniformly and only -- it is titled as -- the
15 relief it seeks is only as to the
16 constitutionality or unconstitutionality of what
17 the City is doing based on what its charter says.

18 And so I think it's highly prejudicial
19 to the City to now be defending against a claim
20 that is not in the amended complaint. I think
21 that's contrary to Virginia law, in particular
22 Board of Supervisors against Robertson case, which

1 is 266 Virginia 525, where if I could quote very
2 briefly from the Court, it says: It is firmly
3 established that no court can base its judgment or
4 decree upon facts not alleged or upon a right
5 which has not been pleaded and claimed.

6 And as I said, I don't -- I don't -- I'm
7 not sure it's a great use of the Court's time to
8 walk through the allegations within the amended
9 complaint of Count V, but I would be glad to
10 provide a couple of highlights.

11 First is Count V itself is styled:
12 (unconstitutionality of the City's rates, fees and
13 charges for public water).

14 The allegation goes on, and again, I'm
15 picking several of the key and I think most
16 salient allegations. Paragraph 96 of the amended
17 complaint, quote, the systems of rates, fees and
18 charges used by the City for the provision of
19 public water service constitutes an invalid
20 revenue-generating device.

21 It's alleged in paragraph 98 that these
22 charges are a hidden and extraterritorial tax.

1 Paragraph 99 identifies various Virginia
2 constitution articles and provisions which we are
3 said to be violating. Paragraph 100 alleges that
4 the charter violates the constitution of Virginia.

5 MR. RAPHAEL: Excuse me. Mr. Thomas,
6 please read the whole sentence.

7 MR. THOMAS: I would be glad to. "To
8 the extent the City contends that the charter of
9 the City of Falls Church permits it to use surplus
10 water revenues to subsidize the City's general
11 operations unrelated to the water system, the
12 charter violates the constitution of Virginia."

13 That's exactly what we contend. That's
14 exactly what we contend. And that's exactly what
15 the legislature passed in the charter in
16 section 13.09, or 07 I actually think it is.

17 The claim, Judge, is in -- the whole
18 premise of jurisdiction for this court is alleged
19 at paragraph 104 of the amended complaint, where
20 it says "an actual case and controversy exists
21 with respect to whether the City's rates, fees and
22 charges for water service are unconstitutional."

1 So I -- again, Judge, I don't want to
2 beat the horse dead, but this is a new allegation.
3 It's a new claim. And I think it's unfair to the
4 City that it should have to defend it at this
5 point; that it is somehow alleged to be not
6 abiding by a provision of its own charter, which
7 is not called out in any way in the amended
8 complaint.

9 THE COURT: All right.

10 MR. THOMAS: Judge, section 15.2-2109 of
11 the Virginia code I think has to -- it bears some
12 mention at this point, and I know I mentioned it
13 earlier in the case. That is the provision of the
14 Virginia code identified as powers of localities
15 as to public utilities and computer services;
16 prevention of pollution of certain water.

17 The very first section of 15.2-2109
18 provides -- and I'm going to use some ellipses
19 here because there are utility services that
20 aren't relevant to what we're talking about
21 here -- "any locality may obtain control of,
22 establish, maintain, operate, extend, enlarge

1 water works within or outside of the limits of the
2 locality and may acquire within or outside the
3 limits of the locality in accordance with" the
4 condemnation provisions of the code, facilities in
5 which to do that.

6 So the activities of the City of Falls
7 Church are specifically authorized under that code
8 section, which is to say they're entitled under
9 2109 of 15.2 to operate and extend and enlarge
10 within and outside of its boundaries a system of
11 water works, which is exactly what it did
12 beginning more than 70 years ago.

13 That code section I think has to be read
14 in conjunction with the Rocky Mount and Mount
15 Jackson line of cases. And it -- it -- it does
16 not lead one to the conclusion -- it can't lead
17 one to the conclusion where Fairfax Water wants
18 the Court to go, which is that the City therefore
19 must operate its water system at cost.

20 In other words, the authority that they
21 have cited is quite distinct from the authority
22 which we have cited, which are specific instances

1 where a municipal utility has extended its lines,
2 as it's permitted to do, as Falls Church is
3 permitted to do under 15.2-2109, outside of its
4 boundaries. That scenario has been specifically
5 addressed by the Virginia Supreme Court. And it
6 has said, it has held, not mentioned in dicta, it
7 has held that a municipality operating a utility
8 outside of its boundaries may consider factors of
9 pecuniary profit or gain. That's what it has
10 held.

11 I think it was telling that in the clip
12 that just appeared up on the screen from the Mount
13 Jackson case, which the plaintiff has dismissed as
14 dicta, begins with the words "we hold," and goes
15 on to say that a city can profit from the sales of
16 water outside of its boundaries. We hold that.

17 Where under Fairfax Water's theory does
18 this take us? Inevitably it takes us back to the
19 holding out exception, which I -- I very much
20 agree with Mr. Raphael must be read to determine
21 what Virginia law says about the holding out
22 exception.

1 And what Virginia law says about the
2 holding out exception is that it comes into play
3 only in circumstances where there is an exception
4 to the general rule that a locality operating a
5 municipality outside of its boundaries may not
6 refuse -- may not -- may refuse service to a
7 customer outside of its boundaries. May refuse.
8 That's the general rule.

9 Holding -- the holding out doctrine, of
10 course, is an exception to that rule which says,
11 well, actually holding yourself out, you can't
12 refuse unless you've got a utility related or
13 utility based reason in order to refuse.

14 Those are the four corners. That's the
15 square of the holding out doctrine as it's been
16 discussed in Virginia. That's the totality of the
17 cases in Virginia that deal with the holding out
18 exception. It is in that context.

19 I appreciate that the Virginia Supreme
20 Court -- I don't think that the Virginia Supreme
21 Court has shown any disrespect to the holding out
22 exception. It's just never decided to apply it.

1 And so the question is whether this is a
2 perfect case to apply the holding out exception.
3 This is -- this is a highly imperfect case to
4 apply the holding out exception, for the simple
5 reason that there's no question in this case about
6 whether the City of Falls Church has refused,
7 properly or improperly, to provide service to
8 anyone.

9 Taking the holding out exception and
10 sort of inflating it, like the plaintiff is doing,
11 takes the holding out exception into a totally
12 different realm. It wouldn't be an exception. It
13 would be something else. It is only identified as
14 an exception.

15 What they say it is -- and again, I'm
16 having a little bit of a deja vu here because I
17 know I made this argument to the Court at the
18 outset of this case. But the way they can hook or
19 try to hook into this notion that our rates and
20 charges and fees are a tax is only through the
21 gate of a holding out exception. But that gate
22 can't open for them, as I said, because we have

1 not refused service to anyone, and therefore would
2 be subject to the exception.

3 Where that leads us, then, I think, is
4 whether McMahan can apply in the first instance.
5 As I mentioned at the outset, the McMahan calculus
6 is something -- a very particular calculus. It's
7 a very particular question. And that is whether a
8 fee or a charge that is levied by a locality is
9 actually a fee or a charge or whether it's a tax.
10 Whether it's a fee posed on its own inhabitants,
11 which is what the case is in the line of cases
12 that they rely on; is it a proper exercise of its
13 police power, or is it a tax, in fact a tax.

14 There is no evidence in this case --
15 and, again, as I said in my initial motion to
16 strike argument, there is no evidence in this case
17 that this is a tax, that our rates and fees are a
18 tax in the first instance.

19 It is only through this vehicle of the
20 McMahan line of cases that one can make that
21 conclusion. If you get -- you can't get there but
22 for going through the McMahan line of cases.

1 Okay?

2 We've not -- we've been -- we've been
3 foisted upon this McMahan line of cases by, they
4 say, the County's own actions in requiring that
5 residents of the County hook up to water service
6 if it is available. That's not our -- that's not
7 our ordinance. That's not our law. We didn't
8 create that. We provide service in parts of
9 Fairfax County. The County has deemed it
10 appropriate to require that residents there,
11 throughout the County, if they can, hook up to
12 water service. That's not us exercising any
13 police power whatsoever.

14 And the holding out exception, the
15 holding out exception does not stand for the
16 proposition that just because we're there, we have
17 to operate at cost. And that's what they're
18 saying it means. And that's -- that's the holding
19 out exception plus a lot. The holding out
20 exception doesn't -- it doesn't -- as it's even
21 been discussed, much less adopted, as it's even
22 been discussed in Virginia, it doesn't get them

1 there from here.

2 THE COURT: But Fairfax Water is -- I

3 mean, the City of Falls Church rather is serving a

4 lot of customers in Fairfax County who have no

5 place to go other than -- other than the City of

6 Falls Church, I mean, because of the historical

7 basis that it was there, because these lines are

8 there, because of all of that. And if you say,

9 well, who do you buy your water from? We get it

10 from Falls Church, we love it, no complaint, great

11 water. But that's their only choice. That's the

12 only choice they have.

13 The essence of the complaint I

14 understand is that, you know, I didn't realize,

15 but the reason we're paying these rates as opposed

16 to if we had the opportunity to hook up with

17 Fairfax Water, for example, is because we're

18 subsidizing these other services, and I don't want

19 to pay for that. But there's nothing I can do

20 about it.

21 MR. THOMAS: Well, I think the starting

22 point is --

1 THE COURT: It seems to me that the

2 holding out -- I mean, it's sort of a -- well,

3 it's such a little bitty few words taken from a

4 few cases, and what does it mean? But it seems to

5 me it's a backwards doctrine in that it shows up

6 from the cases where there is no holding out.

7 Because you've got one customer or two customers

8 that are trying to do something like that. They

9 said, well, they can do what they want to because

10 it's an arm's-length transaction.

11 But where on the other hand they're

12 providing a utility service to a lot of people who

13 have nowhere else to go, that -- that the fees

14 must be for those services. That's a question.

15 That's not an assertion.

16 MR. THOMAS: I understand that. That's

17 precisely why the holding out exception doesn't

18 apply.

19 THE COURT: But nobody can negotiate

20 with -- no one can negotiate with the City of

21 Falls Church about their rates.

22 MR. THOMAS: But that is --

1 THE COURT: There's no arm's length.

2 MR. THOMAS: That is a consequence of

3 two things; of Fairfax Water having made its own

4 judgment at this point that it's not going to

5 extend its lines to various parts of Fairfax

6 County, despite claiming repeatedly, Judge, that

7 they have every right to do so.

8 THE COURT: I thought that if the

9 facilities -- I mean, should the facilities be

10 duplicated? Should we have two sets of water

11 lines in Pimmit Hills and all that area of Fairfax

12 County?

13 MR. THOMAS: Judge, that's what -- part

14 of what we're going to have a trial about in

15 February. The other part of this case, Judge, is

16 that they're going about duplicating service in

17 parts of the historic service area of the City of

18 Falls Church. And they think that's just fine.

19 And they're doing it on their own time and the way

20 they want to do it.

21 And that's really my point, Judge.

22 There's a very fundamental inequity here for the

1 City of Falls Church. Having gone about, for

2 years, and I won't go down my laches road at this

3 point, but having gone about for years --

4 THE COURT: No. I understand all of

5 that.

6 MR. THOMAS: I know.

7 THE COURT: My question is not

8 badmouthing the City. It's just trying to respond

9 to the -- to the aspect that the City is enjoying

10 funds for the City residents from the fees that

11 are unrelated to the cost of the water being

12 furnished either to residents or nonresidents.

13 MR. THOMAS: Right.

14 THE COURT: And that's true. You agree

15 with me. That is actually true.

16 MR. THOMAS: Yes. But what the Mount

17 Jackson and Rocky Mount line of cases say is not

18 that the municipal utility is entitled to profit

19 from out of boundary service. That is not what

20 they say.

21 What they say is that the municipality

22 is entitled to profit and to take into

1 consideration pecuniary gain in providing service
2 outside of its boundaries. I mean, it's a very
3 important distinction and one that we've heard a
4 lot about over the course of this case.

5 THE COURT: Let me ask this question.
6 Assuming that's true, I frankly don't -- assuming
7 that's true, then can the municipality take that
8 profit and apply it to nonutility matters?

9 MR. THOMAS: And in fact --

10 THE COURT: What case says that? What
11 happens to the reasonable correlation test?

12 MR. THOMAS: The reasonable correlation
13 does not come into play. The -- there is not a
14 reasonable correlation component in the Mount
15 Jackson, Rocky Mount line of cases.

16 THE COURT: I know, but --

17 MR. THOMAS: It doesn't say that. I
18 mean --

19 THE COURT: But we -- we know that
20 there's a general proposition that utilities are
21 supposed to pay for themselves, but not be making
22 a lot of extra money, but maybe they want to make

1 some extra money to improve the utility, to build
2 more lines, to make better water, but not
3 necessarily to buy new, you know, police cars.

4 MR. THOMAS: But if I could. The -- the
5 Mount Jackson and Rocky Mount line of cases, they
6 go beyond the distinction I just identified for
7 the Court, which is, indeed, they say that a
8 municipality, as opposed to a municipal utility,
9 can profit from that sale of water outside of its
10 boundaries.

11 But they go further than that and they
12 say that, in fact, a municipality has a duty to do
13 so. That's what -- that's what -- you've got a
14 municipal utility which is owned by the citizens
15 of this utility, and the Town owes a duty to its
16 citizens to make the best use -- I can't remember
17 exactly what the precise language of it is, Judge,
18 but I know it's in our brief. The municipality
19 owes a duty to its citizens to make the best use
20 of and the most use of this asset for the benefit
21 of its citizens.

22 It doesn't say for the -- it doesn't

1 graft on what they would like to graft on to those
2 holdings, which is -- this is what they would like
3 to graft on to those holdings: For the benefit of
4 the citizens of that locality in the form of lower
5 water rates, or in the form of utility rates that
6 are, you know, are somehow subsidized by
7 out-of-town customers.

8 That's not what they say. That's not
9 what they say. They say this is an asset. The
10 locality has an obligation to go out and make the
11 most of that asset. And they can take pecuniary
12 gain and profit into consideration in doing that.

13 I want to come back to sort of the
14 penultimate question the Court just asked, which
15 again comes back to the holding out exception.
16 And that is really what the plaintiff is trying to
17 do here, through the holding out exception, is
18 impose on the City an obligation to operate their
19 finances just like they do. In other words, on an
20 enterprise basis.

21 But when -- I think one of the first
22 questions the Court asked at the outset of this

1 case was, well, couldn't Fairfax Water go about
2 and build in a profit component into its rates and
3 do this, too. I think the fact is that they
4 couldn't. Okay.

5 So we do have two different types of
6 utility providers here in Virginia. We have
7 municipal utilities -- at least two. We have
8 three. Municipal utilities under 50.2-2109
9 providing service outside of its boundaries and
10 entitled to enjoy pecuniary profit in doing it.
11 We have investor owned utilities, which I think
12 you just heard Mr. Murray admit, in places like
13 Prince William County, sell water at a profit.
14 Okay. And you have water and sewer authorities
15 created under the Water and Sewer Authority Act,
16 which is also in 15.2. They operate as an
17 enterprise fund.

18 Through this skinny point in the
19 hourglass called the holding out doctrine, really,
20 practically speaking, what's happening here is
21 that Fairfax Water is trying to, through that
22 misapplied doctrine, hold us to a point where --

1 to a place where we must operate this 90/10
2 structure at cost. And I think the -- sort of the
3 common sense question to the Court has to be, you
4 know, what kind of incentive would that have
5 created for Falls Church to operate this system
6 and extend the system in the first instance? If
7 this were one big cost exercise, what kind of
8 incentive would that have given Falls Church to
9 extend its lines into Fairfax County to begin
10 with?

11 I think the answer to that is it
12 wouldn't. It wouldn't. And as these folks have
13 known for 50 years, it didn't. Because they, for
14 years and years, as alleged by them, enjoyed a
15 profit from the operation of their system.

16 One or two quick points, Your Honor.
17 The plaintiff has, I think, made much of the
18 Loudoun Circuit Court decision in the Giordano
19 case. One of the parts of that case that they've
20 not mentioned is the court's observation there
21 that plaintiffs challenged the fairness and the
22 reasonableness of the rates charged to the

1 out-of-town customers, but not the right of the
2 Town to make a reasonable profit. That's the
3 observation from the Loudoun Circuit Court.

4 I think one thing we can take from that
5 is that the Loudoun Circuit Court's view appears
6 to be that even if we are within the McMahon line
7 of cases, and if we are going down that road, then
8 a perfectly acceptable component of a locality's
9 revenue requirements, in other words, what it goes
10 through in setting its rates, is a fair return, is
11 a fair return on its equity.

12 All right. And so I -- it's -- you
13 know, it's not -- as we've indicated in our trial
14 brief, it's not the end of the analysis if we get
15 to the McMahon line of cases, because then the
16 question really becomes, well, is it fair to
17 include a fair return for the locality operating
18 and having its rates analyzed under the McMahon
19 line. Is a fair return component of that
20 acceptable. And I think the Loudoun Circuit Court
21 suggested that it was.

22 The memorandum opinion from Judge

1 MacKenzie from the Newport News case that we
2 attached a copy of to the Court, a 1977 decision,
3 very important for a variety of reasons, but I'll
4 keep this very short. Very important because
5 squarely presented to the court in that case was
6 the question of whether transfers from a water
7 fund in that case, the utility fund of Newport
8 News, to the general fund of the City of Newport
9 News, constituted an unlawful tax on the United
10 States government, which said, you know, we're not
11 subject to taxation. And the answer was no. It's
12 not an unlawful tax.

13 I think, Judge, only other -- except to
14 return to where I started here, which is the
15 inequity of this new claim that we're violating
16 our own charter, I -- we would like the
17 opportunity obviously to respond to whatever trial
18 brief we see from the plaintiff here. But we'll
19 want to do so in a way that the Court thinks is
20 most economical.

21 THE COURT: Well, that's fine. I
22 appreciate that very much. Thank you. Thank you,

1 Mr. Thomas.

2 Mr. Raphael.

3 MR. RAPHAEL: I don't want to wear out
4 my welcome.

5 THE COURT: No. I'm glad to hear from
6 you all. You've been living with this case for a
7 long time. We've only had it since Monday.

8 MR. RAPHAEL: With regard to the claim
9 of unfair surprise, our primary argument on
10 Count V is a constitutional one. I admit that.
11 I -- I don't think that the argument is
12 inconsistent in any way with what we've pleaded in
13 Count V. I think it's fully consistent with it.

14 I raise it because I know about the
15 doctrine of constitutional avoidance, and that if
16 the Court is looking for -- I don't want you to do
17 this, but if the Court is looking for a way to
18 avoid deciding the constitutional issue, I think
19 there is a way to do that. I wouldn't be happy
20 with it. The ruling would be that the City -- and
21 I'm not advocating this, but the ruling would be
22 that the City has to set rates based on expenses.

1 It doesn't preclude the City from
 2 including a return on equity in setting the
 3 outside-City rates.

4 And then, you know, in a particular
 5 year, if the City had a surplus, the charter
 6 provisions seem to say that it can transfer it. I
 7 still think that that's a tax. But if you
 8 disagreed with me on that, there would be a middle
 9 position where you could come out and give us most
 10 of the relief we need under the doctrine of
 11 constitutional avoidance.

12 I think the Court could have raised this
 13 on its own, based on the doctrine of
 14 constitutional avoidance. That is why I raise it.
 15 But I do think what the City is doing is not
 16 consistent with its own charter. And I think the
 17 provisions that we've pleaded in Count V are fully
 18 consistent with that, where we talk about how the
 19 City's charges to customers grossly exceed the
 20 cost of service. That's clearly true under both
 21 the constitutional issue as well as the lesser
 22 included, are they following the charter issue.

1 And that's why I pleaded in the complaint, to the
 2 extent the City claims that its charter authorizes
 3 this, it's unconstitutional.

4 So I think it's fully within the scope
 5 of what's here. And Your Honor applied a very
 6 liberal standard to allow the City to raise a
 7 laches defense that wasn't based on anything that
 8 they put in their interrogatory answer. I think
 9 that we fare much better by comparison to that.

10 But I think it's fair game. The City
 11 asks, well, why would the City have gotten into
 12 the water business if they couldn't have reaped
 13 all these profits. But what the evidence was is
 14 that the City was taking a very small amount until
 15 about -- until the charter was changed, and then
 16 they hit the gas on it and it went way up.

17 And the -- the other answer to
 18 Mr. Thomas' rhetorical question is, why would a
 19 City do that? Well, ordinarily, you don't
 20 ordinarily see cases like this, where a City --
 21 the vast majority of a City's customers are
 22 outside-City customers. This is an anomaly.

1 Normally -- and this was true in the Town of
 2 Leesburg case. In the Town of Leesburg case
 3 25 percent of the Town's customers lived outside
 4 the City. The City was already building -- the
 5 Town. The Town had to build a water system for
 6 its folks, and if it had surplus water, Virginia
 7 said, yeah, you can dispose of it rather than pump
 8 it to waste. That would be silly. Make some
 9 money from it. That's fine.

10 That doesn't address the holding out
 11 doctrine. But the answer to the question why
 12 would the City bother to extend service. Because
 13 the City would benefit by, if it wants to,
 14 charging a lower rate to its customers. That's
 15 where the benefit comes from. That's where the
 16 return on equity can be used in setting the
 17 outside-City rate.

18 That of course is fully consistent with
 19 everything you've heard from Mr. Woodcock about
 20 how rates were set. I dare say it's fully
 21 consistent with the concepts in McQuillin and Town
 22 of Rocky Mount and Mount Jackson about the idea of

1 making a profit.

2 They don't go into the detail in those
 3 instances. Where is that profit? See, in this
 4 case the profit goes to reducing the in-Town
 5 rates. It doesn't go as a transfer out of the
 6 water fund --

7 THE COURT: In-Town rates for the water?

8 MR. RAPHAEL: That's correct. That's
 9 correct. That's where the benefit comes from.

10 So I think -- I think I've probably said
 11 enough. I'm happy to answer any questions you
 12 have.

13 THE COURT: No, no, no. I appreciate
 14 the remarks from both of you. And I'll be happy
 15 of course to have this in writing, because it's
 16 been a lot down to write down very quickly.

17 MR. RAPHAEL: Yes, Your Honor. We'll do
 18 that.

19 THE COURT: Thank you.

20 MR. THOMAS: I wonder, Judge, if I can
 21 respond to just one point.

22 THE COURT: Yes, sir.

1 MR. THOMAS: Which is that I don't
2 believe at this point that we -- that we have any
3 evidence from the plaintiff that our rates are
4 unreasonable.

5 Now, I appreciate their claim that,
6 inasmuch as there are -- there is evidence of
7 transfers from water fund to general fund, those
8 are -- are facts that they have attempted to get
9 into evidence. But there is no evidence or
10 opinion from the plaintiff that our rates are
11 unreasonable or excessive. And so I'm -- and so
12 for that -- I just want to add that to the motion
13 to strike, so it's clear from the record that
14 that's a basis.

15 THE COURT: Well, they're challenging
16 the rates because they're high rates in order to
17 pay for services that are unconnected with water.

18 This is a constitutional claim.

19 MR. THOMAS: Well --

20 THE COURT: That's what the case is --
21 there are two major aspects, it seems to me. One,
22 whether or not the City is charging more for

1 water, whether inside or outside, than it should
2 be charging. Whether it should be really making a
3 profit beyond that, having the people outside have
4 to reimburse at a higher rate to pay for the cost
5 of the improvements. And, two, whether the monies
6 that are generated by the rates as to out-of-City
7 customers can be used for City services when those
8 out-of-City customers don't get the benefit of
9 them.

10 MR. THOMAS: Well, I think --

11 THE COURT: I think that's the heart of
12 Fairfax Water's case.

13 MR. THOMAS: Well, I feel like I need to
14 put some gloss on it, because I think it's the
15 case that their claim isn't that we're making too
16 much profit. Their claim is not that we are
17 taking too much out of the water system. We've
18 heard plenty of sort of editorial comment
19 throughout the case that -- and particularly from
20 Mr. Murray, who I think you heard say that, in the
21 early years of paying our rates, they knew that
22 the City was taking a profit from them, but it

1 really wasn't that much.

2 All right. Not -- not their case. Not
3 their case. If they had sued us saying you're
4 taking too much profit, that would be a different
5 case. I know I've made this point before. Their
6 claim, Your Honor, is, if we take one dollar over
7 and above the costs of the system --

8 THE COURT: That's what I just said.
9 That's point number 1.

10 MR. THOMAS: Right. I understand. So
11 we don't have -- they don't have evidence of and
12 haven't put on evidence that our rates are
13 unreasonable. They have a theory that we're not
14 entitled to make a transfer of a dollar, whether
15 it's a dollar or 5 million, from the water fund to
16 the general fund. They have a theory of that.
17 But they don't have evidence that our rates are
18 unreasonable.

19 THE COURT: Well, I think we've
20 addressed that.

21 MR. THOMAS: Okay. Thank you.

22 THE COURT: All right. Well, why don't

1 we break for lunch now. The Court will be in
2 recess.

3 (Whereupon, at 12:42 p.m., the hearing
4 was recessed, to be reconvened at 2:00 p.m. this
5 same day.)
6
7
8
9

1 AFTERNOON SESSION (2:10 p.m.)
 2 THE COURT: All right. Mr. Thomas.
 3 MR. THOMAS: Thank you, Judge.
 4 THE COURT: Yes, sir.
 5 MR. THOMAS: Could I start with some
 6 housekeeping matters?
 7 THE COURT: Yes, sir.
 8 MR. THOMAS: I would like to move into
 9 evidence a number of documents that are the
 10 subject of certifications that the City has
 11 provided to the clerk and to Fairfax Water under
 12 8.01-390. I can give a list of those. They are
 13 exhibits -- Defendant's Exhibits 64, 65, 66, 67,
 14 68, 69 and 74. Again, Judge, we provided
 15 certifications under that 8.01-390 with respect to
 16 those documents.
 17 As well as Defendant's Exhibits 1, 18,
 18 19, 20, 21, 22, 25, 26, 27, the last three pages
 19 of Defendant's Exhibit 41, Defendant's Exhibit 62,
 20 63, 73, and Plaintiff's 19 and 28.
 21 THE COURT: Any objection?
 22 MR. RAPHAEL: Yes, Your Honor. First of

1 all, I was not able to keep up with Mr. Thomas
 2 when he was reading those off. I don't -- for
 3 documents that have -- for documents that have a
 4 certification as to authenticity, I may not have
 5 an authenticity objection, but I do have other
 6 objections based on foundation and relevance. So
 7 I'm not agreeable to them coming in at this time.
 8 If we want to take them one by one, we can address
 9 that.
 10 MR. THOMAS: Can I respond?
 11 THE COURT: Yes, sir.
 12 MR. THOMAS: The certifications that we
 13 provided for each one of the documents that I just
 14 listed are made pursuant to 8.01-390, which
 15 provides that copies of records of this
 16 Commonwealth, and I'm going to skip some of the
 17 language, or any political subdivision or agency
 18 of the same, other than those located in the
 19 clerk's office of a court, shall be received as
 20 prima facie evidence, provided that such copies
 21 are authenticated to be true copies, either by the
 22 custodian thereof or by the person to whom the

1 custodian reports, if they are different.
 2 That's the certification we provided for
 3 each one of them. I believe the code --
 4 THE COURT: What is the nature of these
 5 documents?
 6 MR. THOMAS: There are a couple of
 7 different categories. I can take them broadly.
 8 THE COURT: Broadly.
 9 MR. THOMAS: The first, let's start at
 10 the end, Defendant's Exhibits 64, 65, 66, 67, 68
 11 and 69. Let's take those as a block. Those are
 12 comprehensive audited financial reports from other
 13 jurisdictions, 2008 CAFRs from other jurisdictions
 14 in Virginia. And they are, as I said, are
 15 certified with original signature by the custodian
 16 of those records.
 17 THE COURT: Do you object to those?
 18 MR. RAPHAEL: Yes, I object on relevance
 19 grounds, Your Honor. What's the point?
 20 THE COURT: I think he's going to try to
 21 show, I assume, they're doing the same thing that
 22 Falls Church is doing, so therefore....

1 MR. RAPHAEL: I don't think they're
 2 relevant. I think he needs to lay a foundation
 3 that they say what he wants to offer them for.
 4 I -- I don't think you just accept them without
 5 seeing each one.
 6 THE COURT: Well, I mean, they have
 7 nothing to do with this case perhaps. But what
 8 are these documents showing?
 9 MR. THOMAS: They show the practices of
 10 other municipal utilities in Virginia.
 11 THE COURT: Which are similar to the
 12 practice of the City of Falls Church?
 13 MR. THOMAS: Correct.
 14 THE COURT: So you contend. Well, I
 15 think --
 16 MR. RAPHAEL: Your Honor, I don't think
 17 that's correct. I think you can't just -- we need
 18 to see the document that he's offering.
 19 THE COURT: They were not furnished to
 20 you?
 21 MR. THOMAS: Oh, they were.
 22 MR. RAPHAEL: No, they were. But for

1 example, a document may show that there was a
2 transfer between a fund. But it doesn't say what
3 it was for or why. And I -- I can't -- if it
4 doesn't go into the issue here, it's not relevant.
5 So I'm not going to agree the stuff can just come
6 in without a showing as to why it's relevant.

7 For some of these documents, you may
8 well need foundation to explain what it is that's
9 going on. I don't think that comes out from the
10 document itself. So we're going to end up having
11 a side show on what other jurisdictions do which
12 doesn't go to the question of whether what Falls
13 Church is doing is legal or not.

14 MR. THOMAS: Well, Judge, the plaintiffs
15 have just put on evidence of and testimony from
16 their expert about what the practices are in other
17 jurisdictions. It seems to me like it's perfectly
18 relevant -- more than perfectly relevant, it is
19 relevant for us to establish what the practices
20 are in Virginia.

21 And I think the -- the quarrel that
22 Mr. Raphael may have is a subject for

1 cross-examination. But he's had these documents
2 for some time. And they're authenticated --

3 THE COURT: Are you going to offer these
4 through a witness or just offer them as they are?

5 MR. THOMAS: I'm going to offer them as
6 they are through this code section, because
7 they're certified by the custodian of those
8 records. The code section says they can be
9 received as prima facie evidence.

10 MR. RAPHAEL: If they're relevant. And
11 there has to be a foundation to show that they're
12 relevant. And there's not going to be for many of
13 these documents, Your Honor.

14 THE COURT: I can't decide that without
15 looking at them.

16 MR. RAPHAEL: That's exactly right.

17 THE COURT: I'll have to look at those.
18 I mean, I'll look at them.

19 MR. THOMAS: As we go?

20 THE COURT: As we go.

21 MR. THOMAS: Item number 74 is a tiger
22 of a little bit of a different stripe. And that

1 is a bond, a water revenue bond offering from the
2 City of Norfolk from just last year. It is
3 similarly authenticated, and subject to a, you
4 know, the same kind of certification that I
5 described a moment ago. I think it's subject to
6 the same ruling the Court just made.

7 THE COURT: All right.

8 MR. THOMAS: All right. And let me grab
9 the exhibit book, please.

10 As for the other categories, Your Honor,
11 Defendant's Exhibit 1 is a copy of the charter of
12 the City of Falls Church, which I think the Court
13 can take judicial notice of. But it is certified
14 as the charter of the City of Falls Church.

15 THE COURT: Any objection to that?

16 MR. RAPHAEL: Well, Your Honor, I
17 don't -- I don't mean to sound quarrelsome, but I
18 do have a problem with this charter. The language
19 in the key provision doesn't match what's in the
20 Virginia code section. And I understand that this
21 charter is administered by the Municode, which
22 Your Honor may be familiar with. It's a Web

1 service that has -- posts copies of various
2 municipal charters and ordinances on the Internet.

3 I believe that this -- Municode is in
4 the process of revisiting, revising this chart. I
5 don't think it's up to date. And for that reason
6 I was not able to stipulate to its authenticity.

7 The key -- the key provision dealing
8 with transfers of monies from the water fund to
9 the general fund, you saw the version from the
10 Virginia acts, it has the word "may" in there,
11 "may be transferred." The word "may" does not
12 appear in this version of the document. So on its
13 face it's not accurate. So that's why I couldn't
14 agree.

15 MR. THOMAS: Fair enough. I think, as
16 the Court observed some days ago, I think it can
17 take judicial notice of the charter of the City of
18 Falls Church inasmuch as it is a statute.

19 THE COURT: But what Mr. Raphael is
20 saying, it may not be a correct version.

21 MR. THOMAS: And I'm saying that's fair.
22 Since the Court can take judicial notice of it, we

1 will provide a copy that is complete.
 2 THE COURT: I will be happy to receive
 3 what is in fact the charter.
 4 MR. THOMAS: That's fine. 18,
 5 Plaintiff's Exhibit 18 is a letter from the then
 6 City Manager of the City of Falls Church to the
 7 director of the Fairfax County Water Authority
 8 from March 9 of 1988, again certified pursuant to
 9 8.01-390. And we move that one -- move that into
 10 evidence as well.
 11 MR. RAPHAEL: Excuse me, Mr. Thomas.
 12 Which exhibit are you referring to?
 13 MR. THOMAS: Defendant's 18.
 14 MR. RAPHAEL: Your Honor, we object to
 15 this based on foundation, relevance and hearsay.
 16 MR. THOMAS: If I could, Your Honor.
 17 THE COURT: Yes, sir.
 18 MR. THOMAS: This is a document that
 19 relates to purchase negotiations from the mid-'80s
 20 between Fairfax Water and the City of Falls
 21 Church, and it's a response from the City of Falls
 22 Church to Fairfax Water indicating that

1 discussions about the purchase of the City's
 2 system between the two are officially over.
 3 So I think it's -- it's highly relevant
 4 to the --
 5 THE COURT: Why isn't it hearsay?
 6 MR. THOMAS: Because it's --
 7 THE COURT: How can it be
 8 cross-examined?
 9 MR. THOMAS: Well, first of all, it's
 10 been certified pursuant to this code section,
 11 which I -- again, I keep going back to the code
 12 section. The code section indicates that they
 13 shall be received -- documents that are certified
 14 pursuant to this code section shall be received as
 15 prima facie evidence.
 16 THE COURT: I understand that. But any
 17 correspondence coming from any person once
 18 certified is to be received by the Court?
 19 MR. THOMAS: That's what this code
 20 section says. It is to be received.
 21 THE COURT: What code section is that?
 22 MR. THOMAS: It's 8.01-390.

1 THE COURT: And is this a record? Is
 2 this letter a record?
 3 MR. THOMAS: I think what it has to be
 4 is a record or a report prepared by a -- it is a
 5 record, yes -- prepared by a public official
 6 pursuant to a duty imposed by statute or required
 7 by the nature of their office. Those things,
 8 under the Taylor v. Marine Overseas Corp. case,
 9 are admissible as proof of the facts stated
 10 therein.
 11 MR. RAPHAEL: Your Honor, may I be
 12 heard?
 13 THE COURT: Yes, sir.
 14 MR. RAPHAEL: I think Your Honor's
 15 instinct is exactly right. The fact that it's in
 16 their records doesn't mean that everything that's
 17 in their records that they can authenticate as
 18 being in their records comes into evidence.
 19 I'm looking at the annotations in
 20 8.01-390. There's the citation here to Taylor
 21 versus Maritime Overseas Corp., that although a
 22 record or report may qualify as a public document,

1 the hearsay objection is overcome only if the
 2 document relates facts or events within the
 3 personal knowledge or observation of the recording
 4 official, to which he can testify should he be
 5 called as a witness.
 6 And in addition to the issue of whether
 7 it's proper under 390, you have the issue of is it
 8 relevant? And I don't think that that's been
 9 established. There's been no foundation for why
 10 this is relevant to anything.
 11 MR. THOMAS: Well --
 12 THE COURT: And what is this? What does
 13 this letter say?
 14 MR. THOMAS: This is a letter from the
 15 then City Manager of the City of Falls Church,
 16 Tony Griffin, in which he indicates that the City
 17 Council of Falls Church has formally indicated
 18 that discussions regarding the sale of the water
 19 system have been terminated.
 20 THE COURT: Addressed to Fairfax Water?
 21 MR. THOMAS: Addressed to the director
 22 of Fairfax Water. This comes from Fairfax Water's

1 files.
 2 MR. RAPHAEL: And that, Your Honor, has
 3 no bearing on anything in the case.
 4 MR. THOMAS: Judge --
 5 MR. RAPHAEL: The fact they were
 6 negotiating for a possible sale of the system, so
 7 what? It's not relevant to whether the rates
 8 they're charging now are constitutional or not.
 9 MR. THOMAS: It goes --
 10 THE COURT: Well, but, you know, that
 11 may -- that may be true in some respect. But
 12 isn't this -- doesn't this fall within the history
 13 exception of this case? You know, let's --
 14 because, as I've stated earlier, you all know
 15 everything that's been going on. But it's
 16 relatively new for me. And it's -- this back and
 17 forth may not have a bearing on the ultimate
 18 decision as to the ultimate issue in the case, but
 19 it seems to me I should err on the side of
 20 receiving this.
 21 And the annotations to section 8.01-390
 22 states that this section creates the, quote,

1 official written statements exception to the
 2 hearsay rule. It seems to me this letter would
 3 fall within it.
 4 MR. THOMAS: If I could.
 5 THE COURT: It will be admitted.
 6 MR. THOMAS: Thank you. If I could just
 7 pick up on that last point. I think it's clear
 8 from the annotations, and I think it's also clear
 9 from Friend, on law of evidence in Virginia, that
 10 this -- that 8.01-390 creates an exception to the
 11 hearsay rule.
 12 THE COURT: I just -- I learned that.
 13 But you'd think I would see this section all the
 14 time. But I don't recall ever having seen it.
 15 MR. THOMAS: Okay. Well, in that case,
 16 I would like to revisit the issue of the CAFRs
 17 inasmuch as I think it's plain -- it's plain that
 18 those CAFRs are relevant to the case. We have an
 19 opinion on the street that the AWWA says, you
 20 know, this is how you do things. And these are
 21 CAFRs which can suggest contrary to that.
 22 THE COURT: Well, the reason I said that

1 I would like to -- I think I need to read them is
 2 because Mr. Raphael's objection as to those is
 3 that it's not clear from them that it's showing
 4 the kind of transfer from a utility fund to a
 5 general fund of a municipality; that he can't tell
 6 that from reading them.
 7 MR. THOMAS: I understand. And my point
 8 on that, Your Honor, is that that's a subject of
 9 cross-examination. That's the weight to which the
 10 Court --
 11 THE COURT: But he can't cross-examine
 12 the record.
 13 MR. THOMAS: I'm sorry?
 14 THE COURT: He can't cross-examine the
 15 document. Are you going to have a witness discuss
 16 those documents?
 17 MR. THOMAS: I can move them in through
 18 a -- through a witness, sure. Yes, I can do that.
 19 But -- if they're admitted in evidence, then he
 20 can say, well, Your Honor, look, here's what this
 21 says that is contrary, you know, to the claim by
 22 the defendant that this is a common practice in

1 Virginia.
 2 In other words, he can say, well,
 3 Newport News actually doesn't do this. Look at
 4 page so and so of the CAFR. The CAFR is going --
 5 THE COURT: Let me at least take a look
 6 at them before I rule on them.
 7 MR. THOMAS: Would the Court like to do
 8 that now?
 9 THE COURT: No. Whenever it is time.
 10 MR. THOMAS: Okay.
 11 THE COURT: No thank you, rather.
 12 MR. THOMAS: All right. Exhibit 19,
 13 which is a memorandum from the acting City Manager
 14 of Falls Church, March 30, 1990, to the director
 15 of public utilities, in which the rate of return
 16 of other Virginia utilities is discussed. That,
 17 again, I believe falls -- it's clearly relevant to
 18 the case. As the Court observed a moment ago,
 19 the -- the plaintiff has been entitled to or has
 20 put on considerable evidence about the history of
 21 the City's rates.
 22 THE COURT: Right. I'll receive it.

1 MR. RAPHAEL: May I be heard on that,
2 please?

3 THE COURT: Yes, sir.

4 MR. RAPHAEL: This seems fundamentally
5 unfair, that they can pick and choose whatever
6 documents that are in their files and say oh, this
7 is an official record now, and I'm offering -- it
8 comes in --

9 THE COURT: But it is an official
10 record, is it not? Haven't you been through their
11 files? Haven't you subpoenaed their records?
12 Haven't you gone through all the discovery? You
13 can put in the documents that you think -- you
14 already did. The -- the money maker document, for
15 example. And the other ones as well that you
16 think are helpful. They're just trying to do the
17 same thing.

18 MR. RAPHAEL: Your Honor, to make a
19 record, the Virginia doctrine, I'm reading out of
20 Imwinkelried and Professor Sinclair,
21 I-M-W-I-N-K-E-L-R-E-I -- I'm sorry, R-I-E-D, and
22 Professor Sinclair on Evidentiary Foundations.

1 It's section 9.5, page 309. "The
2 exception for government records is a useful and
3 important aspect of Virginia evidence law. But
4 the Virginia doctrine is considerably more
5 circumscribe than that in federal practice where,
6 under Rule 803(8), a range of evaluated other
7 material may be received and where personal
8 knowledge requirements are less stringent."

9 As I mentioned earlier, I believe that
10 there's a requirement here that the records be
11 prepared pursuant to a duty imposed by statute,
12 required by the nature of the office, and
13 admissible as proof of facts stated therein.
14 Although a record or report can qualify as a
15 public document, the hearsay objection is overcome
16 only if the document, quote, relates facts or
17 events within the personal knowledge and
18 observation of the recording official to which he
19 can testify should he be called as a witness,
20 unquote.

21 And, for example, the document that is
22 at issue here, Plaintiff's 19, is reporting what

1 other people reported to the director of public
2 utilities, which he's then reporting to the acting
3 City Manager. I have no way to cross-examine
4 that. And it's fundamentally unfair. It's not --
5 it is -- even if this document were authentic,
6 it's purported hearsay and I have no way to
7 cross-examine the hearsay.

8 MR. THOMAS: Judge.

9 THE COURT: I think that -- I think that
10 the purpose of 8.01-390 was to create an exception
11 as to that. Virtually every public document is
12 going to be involving hearsay if it's a memorandum
13 or a letter from a public official. And this is
14 simply obviating a need to call everybody from a
15 particular locality or jurisdiction to say this is
16 one of our records. This was made --

17 MR. RAPHAEL: If I may. Plaintiff's
18 Exhibit 19 is a perfect example, which is the
19 subject here. It says: In response to your
20 March 21 memorandum I have polled two of the
21 utilities referenced by Mr. Dolecki. And then he
22 reports what they told him.

1 So it would be a business record,
2 potentially, or a public record if it records
3 something within the personal knowledge of this
4 declarant. But this is reporting hearsay from
5 other sources.

6 THE COURT: I understand.

7 MR. RAPHAEL: I have no way to
8 cross-examine. I believe it's clearly outside the
9 scope of the Taylor case, which says that the
10 recording official has to have personal knowledge
11 of it. He doesn't. He's reporting hearsay he got
12 from elsewhere.

13 MR. THOMAS: I think, as the Court just
14 observed, every report or record of a municipality
15 or a subdivision of the Commonwealth is going to
16 contain some form of hearsay. That's why this is
17 a hearsay exception.

18 So this is no different. This is a
19 report created by the acting City Manager.

20 THE COURT: Well, why would that not go
21 to the weight of that evidence? I mean, it seems
22 to me it's a -- it can be stringently argued that

1 it's a very flimsy reed, because you just have
2 this person saying this. And if that's so good,
3 why don't they bring these people from these
4 jurisdictions.

5 MR. RAPHAEL: Well, the -- that's true.
6 But it's not just weight. It's admissibility.
7 Hearsay is not admissible. And the fact --

8 THE COURT: Unless there's an exception.

9 MR. RAPHAEL: Unless there's an
10 exception. But the exception gets the record in
11 only if the material reported is within the
12 personal knowledge of the declarant. That's the
13 Taylor case. And where the declarant here, the
14 director of public utilities, is asking people
15 what they do and then recording it and reporting
16 it to someone else, that is embedded hearsay. It
17 is not covered by Taylor. It's frankly, I think,
18 it's clearly outside the scope of the public
19 records exception to the hearsay rule, which, as
20 Imwinkelried points out, is more narrow than the
21 federal rule.

22 MR. THOMAS: Well, Judge, it is more

1 narrow because it requires the certification that
2 the statute indicates is required.

3 MR. RAPHAEL: That's not correct. It
4 says -- I'm sorry, Mr. Thomas. I didn't mean to
5 interrupt you.

6 MR. THOMAS: That's okay. This
7 interpretation of 8.01-390, Your Honor, would
8 totally swallow the rule. I mean, that -- this is
9 why we have the rule, is because if you've got a
10 report that's prepared by somebody in their
11 ordinary job description within their -- within
12 the subdivision of the Commonwealth, if it's
13 certified by a custodian of the records, then it
14 is -- it is admissible as -- to be received as
15 prima facie evidence and the facts therein are
16 established.

17 So like I said, I think that that -- the
18 interpretation here being urged on the Court just
19 swallows the rule.

20 MR. RAPHAEL: I think it's the other way
21 around. Number 1, it's not correct that the --
22 that anything comes in if it's certified. As the

1 court in Taylor makes clear, the hearsay objection
2 is overcome only if the document, quote, relates
3 facts or events within the personal knowledge and
4 observation of the recording official to which he
5 can testify should he be called as a witness,
6 unquote.

7 So if Mr. Livinski, who wrote this, said
8 this is what I did on this day, yeah, that would
9 come in as a public record.

10 THE COURT: Right.

11 MR. RAPHAEL: But when he's saying I
12 called the following 10 people and they told me X,
13 Y and Z and they told me their brother said X, Y
14 and Z, that's classic hearsay, I have no way to
15 cross-examine it, it's clearly not within the
16 scope of Taylor.

17 And Mr. Thomas' proposal would swallow
18 the rule, because you can slap an authentication
19 sticker on anything, everything comes in. That
20 can't be the bar.

21 MR. THOMAS: No. No. Judge, the -- the
22 rule itself is that the document is admitted as

1 prima facie evidence if it is a report prepared by
2 someone acting in his or her capacity. The rule
3 would cease to exist if you then had to call that
4 person and say did you prepare this acting in your
5 capacity.

6 THE COURT: Mr. Raphael agrees with you
7 so far. It's just that, when the person called --
8 it's then stated did you state that you talked to
9 these people in that memorandum? Yes. Did you
10 state this is what they told you? Whoops. That's
11 when he's going to object. That's plainly
12 hearsay, I can't cross-examine them even if you're
13 here in person, Mr. Livinski. To that extent,
14 that aspect of the document would be inadmissible.

15 What the statute is doing is permitting
16 Mr. Livinski not to appear and testify as to
17 matters which he has recorded within his own
18 personal knowledge.

19 If you were to offer to say that
20 Mr. Livinski documents that he had these
21 conversations but did not offer it for the truth,
22 that what was told him was true, perhaps

1 Mr. Raphael would reconsider his objection. But
2 if it's offered for the truth that what these
3 people told him, which is now reflected in a
4 document, is so, I think the objection is well
5 taken.

6 MR. THOMAS: Okay. It's -- fair enough.
7 It is no more offered for the truth of what's
8 asserted in it than the information in the five or
9 six different CAFRs that I just mentioned a moment
10 ago is offered for the truth of what's in it.
11 It's merely offered to show that there is some
12 practice out there that is different -- I'm
13 talking about the CAFRs now -- some practice out
14 there that is different from the practice that was
15 just received in evidence, evidence of that
16 practice that the Court just heard from
17 Mr. Woodcock.

18 So no, I don't offer it for the truth of
19 the matter establishing that Norfolk, Newport
20 News, Falls Church, et cetera do these things. I
21 offer it simply to show that the City, through its
22 director of public utilities, whose job is clearly

1 encompassed in what is covered in this memo, went
2 about gathering information, whether that
3 information was right or wrong.

4 MR. RAPHAEL: May I -- I think that's
5 clearly incorrect. If Mr. Livinski were here on
6 the stand and he said I called Newport News and
7 Norfolk and these others, and this is what they
8 said, I'd stand up and I'd object as hearsay. And
9 you would sustain that. You can't get around that
10 simply because he put it down in writing and now
11 they're getting it in writing without the witness
12 on the stand.

13 THE COURT: No, I agree with that.

14 MR. RAPHAEL: And it is offered for the
15 truth.

16 THE COURT: No, it is offered for the
17 truth, Mr. Thomas. That's the whole point. It's
18 the whole point, that these people are doing these
19 things differently.

20 MR. THOMAS: I -- I don't agree, Your
21 Honor. It is not offered for the truth of the
22 matter asserted in here. It is not offered to

1 establish that Norfolk in 1984 reported 4 percent
2 and had a current rate of return in 1991 from
3 their water utility of 18 percent. I'm not
4 offering it to establish that's right or wrong.
5 I'm offering it to establish that the City went
6 about trying to figure out what other utilities
7 were doing in Virginia.

8 THE COURT: Well, why don't you just
9 leave it at that. Have Mr. Tuohy testify that he
10 knows that they went about the job of trying to
11 find out what other municipalities were doing.
12 Period. He can testify as to that. What did they
13 tell you? Mr. Raphael is going to stand up.

14 MR. THOMAS: The problem of that, Judge,
15 is the Court has just received a very substantial
16 amount of evidence from the plaintiff about
17 what -- the history of the City's finances with
18 its water system going back to, you know, 1991,
19 and in one case 1981, having to do with how the --
20 how the City ran its operations and what it did.

21 And, you know, and in order to -- and
22 then to keep out evidence which I think is

1 properly certified under this code section about
2 what the City did that was sort of behind those
3 efforts --

4 THE COURT: But Mr. Tuohy or someone
5 else could testify as to what the City did.
6 Mr. Raphael is not objecting to what the City did.
7 He's objecting to the hearsay aspect of it. Did
8 you go out and talk to lots of municipalities.
9 Yes. What did they tell you? Objection.
10 Hearsay.

11 And that's -- that's an objection I
12 would have to sustain. And it's the same as in
13 the memo here. He's not quarreling with the
14 certification of Mr. Livinski or the things that
15 he wrote or the things that he did. But he's
16 quarreling with what he said people told him, that
17 cannot be cross-examined.

18 And I think that -- and I think that
19 even reading the annotation in Taylor against
20 Maritime, that he's correct in that. I think
21 that's the correct reading of it.

22 Now, as to the financial matters, I

1 don't -- I haven't read those, but I don't think
2 that's going to be the same situation. Those are
3 going to be official reports of a municipality
4 that may shed some light on this. I don't think
5 that falls within the hearsay situation.

6 I mean, it falls within the protection,
7 within the exception. But what this gentleman
8 said in his letter is plainly hearsay. And it's
9 plainly offered for the truth.

10 So objection is sustained to that part
11 of that document.

12 MR. THOMAS: Okay. I think in order to
13 make a record on this I would like to go ahead and
14 offer these other ones.

15 THE COURT: Absolutely.

16 MR. THOMAS: And then we can take them
17 as we go. The next is Defendant's Exhibit 20,
18 which is a quote-unquote report on the public
19 utilities fund payments to the City, prepared by
20 the City Manager's office of May 29, 1991. Quite
21 I think evident on the face of the document
22 itself, it is a report prepared by the City

1 Manager's office of the City of Falls Church on
2 the subject topic. And I would move its admission
3 pursuant to this code section 8.01-390.

4 THE COURT: Mr. Raphael.

5 MR. RAPHAEL: Your Honor, to the best of
6 my knowledge, this is not a report of the City of
7 Falls Church. I believe it's a report from
8 Newport News. There is nothing in the document to
9 indicate that it's Falls Church City's report. In
10 fact, it's got a 757 area code on the front. And
11 when it refers -- it talks about the prior case
12 involving Newport News. And then when it refers
13 to what the City's prior financial records were,
14 the numbers are totally different from the City of
15 Falls Church's records.

16 So I'm reasonably confident this is not
17 a City of Falls Church record, even though they
18 had it. I think it's from a different city
19 entirely. So, yes, I do object to it. I also --
20 there's been no proffer as to why it's relevant.
21 I object to it on relevance grounds. I also
22 believe it contains hearsay. Unless there's a

1 proffer as to why it's being offered, I don't
2 think it should come in.

3 MR. THOMAS: Fair enough. I'll withdraw
4 that.

5 THE COURT: Okay.

6 MR. THOMAS: He's correct.

7 THE COURT: All right.

8 MR. THOMAS: The next is Defendant's
9 Exhibit 21, which is a memorandum to the Mayor and
10 the City Council from the City Manager, where the
11 subject is utility fund transfer work session,
12 dated December 9, 1991, in which -- and providing
13 information for use at that work session, copied
14 to City Attorney, director of utilities and the
15 director of finance.

16 The document references the City
17 Council's request that Dr. Charles Phillips
18 provide a summary to the City of return on equity
19 rationale. And the memo discusses that. So I
20 would move that pursuant to 8.01-390 as well.

21 MR. RAPHAEL: Your Honor, I have a
22 number of problems with this one. Number 1, it

1 attaches a -- what appears to be something that
2 resembles what you would think -- that you would
3 find in a learned treatise. So to that extent
4 it's hearsay. And 8.01-401.1 would have required
5 this to be identified, to be used 30 days before
6 trial. And even then it says that the treatise
7 can't come into evidence. You can read from it.
8 But it cannot come into evidence.

9 So it's clearly hearsay. There's been
10 no foundation as to establish relevance.

11 I would like to briefly point -- comment
12 on the issue of why -- why do we care what the
13 City was told about its practices. If the City
14 was told what it was doing in 1991 was okay, that
15 doesn't prove that what they're doing today is
16 proper. Whether -- and there is no good faith
17 defense here. It's either constitutionally legal
18 or it's not.

19 THE COURT: I think they're entitled to
20 show they were exercising their best judgment and
21 they were being responsible to their citizens in
22 compliance with the law, with their charter, with

1 the enabling legislation.
 2 I mean, I think that's -- if it's wrong,
 3 it's not going to make it right. But nonetheless,
 4 I think they're entitled to show they're actually
 5 proper.
 6 MR. RAPHAEL: Putting that aside, it's
 7 still hearsay.
 8 THE COURT: You'll go back to the
 9 treatise.
 10 MR. RAPHAEL: It's still a treatise.
 11 THE COURT: Do you need the treatise?
 12 MR. THOMAS: I don't. Just the memo.
 13 THE COURT: Okay. The cover memo will
 14 be admitted.
 15 (Defendant's Exhibit 21 was received
 16 into evidence.)
 17 MR. THOMAS: Thank you.
 18 The same is true with Defendant's
 19 Exhibit 22, Your Honor. It covers generally the
 20 same subject. It's from the next day.
 21 THE COURT: Okay.
 22 MR. THOMAS: And there are no

1 attachments. It is a one-page document.
 2 THE COURT: I think that would be
 3 properly admissible.
 4 MR. THOMAS: Thank you, Your Honor.
 5 MR. RAPHAEL: I'm sorry. Which one is
 6 that?
 7 MR. THOMAS: 22.
 8 THE COURT: 22.
 9 MR. RAPHAEL: We actually did have the
 10 same -- we had objections based on foundation,
 11 relevance and hearsay to this.
 12 Can we have a proffer as to what it's
 13 offered for?
 14 MR. THOMAS: Sure. It is offered for
 15 the similar reasons I just described a moment ago,
 16 and which the Court I think just indicated was
 17 relevant, which is the -- the City's efforts to
 18 understand and get right its utility fund
 19 transfers over the period of time that Fairfax
 20 Water has put on evidence that the City was, in
 21 their view, getting it wrong.
 22 MR. RAPHAEL: Well, Your Honor, a couple

1 things on this. Number 1, the City has
 2 vociferously objected to materials from the past.
 3 They're now offering something from 1991. And all
 4 it says is here's some information for you to
 5 consider.
 6 THE COURT: But I overruled their
 7 objections.
 8 MR. THOMAS: They've come in.
 9 THE COURT: I brought in everything from
 10 the past.
 11 MR. RAPHAEL: All right.
 12 THE COURT: I decided all those in your
 13 favor.
 14 MR. RAPHAEL: Well --
 15 THE COURT: I think this falls within
 16 the same category. It shows they're taking a look
 17 at it and this is what they decided to do. 22
 18 will be admitted.
 19 (Defendant's Exhibit 22 was received
 20 into evidence.)
 21 MR. THOMAS: I'm going to withdraw my
 22 request for Exhibit 25, Your Honor.

1 The next is Exhibit 26, which is another
 2 memorandum from this -- from Hector Rivera, who
 3 was the City Manager, to Son Nguyen, who is the
 4 public utilities director and someone that --
 5 whose deposition Fairfax Water has taken in this
 6 case, dated January 14, 1998, regarding an update
 7 on the percentage of ROE for the water utility.
 8 Copied to the financial director. And we move
 9 this in pursuant to the same code section.
 10 MR. RAPHAEL: My only concern on this,
 11 Your Honor -- we have objected to this based on
 12 relevance, foundation and hearsay. We don't
 13 object to its authenticity. But what is the
 14 point? There's --
 15 THE COURT: I know. I understand your
 16 argument. You'll have a chance to say look at all
 17 this stuff they brought to you. It proves
 18 nothing. But I think they're entitled to all of
 19 this.
 20 MR. THOMAS: Thank you, Judge.
 21 THE COURT: 26 will be received.
 22 (Defendant's Exhibit 26 was received

1 into evidence.)
 2 MR. THOMAS: I'm going to skip item
 3 number 27, Your Honor.
 4 Item number 36, Judge, is a -- is a
 5 printout of an E-mail from the City Manager to the
 6 director of public utilities, to Mr. Tuohy as
 7 well, relating to a conversation with Mr. Chuck
 8 Murray, who testified a moment ago. This is
 9 conversation he captured from November of 2006.
 10 And it addresses -- it's relevant in the
 11 sense it addresses many of the issues that are
 12 presented in this case and that we've talked about
 13 before with respect to the City negotiating with
 14 Fairfax Water for the possible transaction
 15 involving the City's system.
 16 So I would move its admission.
 17 MR. RAPHAEL: Again, Your Honor, it's
 18 not relevant to any issue in the case. There's no
 19 relevance proffered here for this document. To
 20 the extent -- I don't know if this is being
 21 offered for any of the affirmative defenses, on
 22 laches, waiver and estoppel. Is that part of the

1 proffer, Mr. Thomas?
 2 MR. THOMAS: It is.
 3 MR. RAPHAEL: I'm not sure how it shows
 4 that. I also repeat the earlier objection we had
 5 to materials that go to those defenses because
 6 they weren't disclosed. None of the information
 7 that's in this memo was in the City's
 8 interrogatory answer about what the factual basis
 9 was for their defenses.
 10 MR. THOMAS: Judge, this document was
 11 produced to Fairfax Water months and months and
 12 months ago. I do think this is fairly captured in
 13 the interrogatory responses that we provided to
 14 them. And I would ask that it be admitted. I
 15 think it is -- it is highly relevant to our
 16 defenses, and it's highly relevant to the nature
 17 of the relationship between these two parties.
 18 THE COURT: I don't see any harm in
 19 admitting this. It's referring to statements made
 20 by the chief operating officer of Fairfax Water.
 21 MR. THOMAS: Thank you, Judge.
 22 THE COURT: Which would cure any hearsay

1 problems.
 2 (Defendant's Exhibit 36 was received
 3 into evidence.)
 4 MR. THOMAS: The next document, Your
 5 Honor, is the last three pages of Exhibit 41. So
 6 if the Court would turn to those. This is a
 7 letter from Son Nguyen, the director of public
 8 utilities, from May 30, 1997, and it encloses an
 9 invoice to the Fairfax County Water Authority for
 10 service at their building at 8570 Executive Park
 11 Avenue, as Mr. Murray testified, a place that a
 12 customer of the City of Falls Church has been
 13 located since 1997, I think that's what he said,
 14 or the late '90s.
 15 Behind it is a purchase order from
 16 Fairfax County Water, or attached to it is an
 17 invoice from Fairfax Water Authority and a
 18 receipt.
 19 MR. RAPHAEL: Just so the record is
 20 clear, you're offering F -- the pages that are
 21 Bates numbered FW-WIT 2345 through 2347?
 22 MR. THOMAS: That's correct.

1 MR. RAPHAEL: And I have my -- maybe I
 2 could have a standing objection with regard to the
 3 fact that none of this was disclosed in the
 4 interrogatory answer, and we don't think they
 5 properly asserted the defenses of laches, waiver
 6 or estoppel.
 7 THE COURT: All right. Thank you, sir.
 8 So noted.
 9 41, the last three pages, Bates stamped
 10 2345, 2346 and 2347 will be received.
 11 (Defendant's Exhibit 41 was received
 12 into evidence.)
 13 MR. THOMAS: Your Honor, I may be
 14 duplicating exhibits here, and if I am, I
 15 apologize. The next one is Defendant's
 16 Exhibit 62, which is the Falls Church
 17 comprehensive annual financial report from 2007.
 18 And then 63 is the Falls Church CAFR
 19 from 2008.
 20 MR. RAPHAEL: Your Honor, those -- I
 21 don't have any objection to these, but they're
 22 already in evidence at Plaintiff's 75 and 76.

Page 664

1 MR. THOMAS: All right. Okay. That's
2 fine. Then we need not offer them again here.
3 THE COURT: All right.
4 MR. THOMAS: Your Honor, the next one is
5 Defendant's Exhibit 73, which is going to be I
6 think in the last book of defendant's that you
7 have.
8 MR. RAPHAEL: I believe that's in
9 evidence already. I've admitted it in my case.
10 MR. THOMAS: Defendant's Exhibit 73.
11 Great. Well, then we can move on.
12 THE COURT: All right.
13 MR. THOMAS: The next one, Your Honor,
14 is Plaintiff's Exhibit 28, which is a 2003 letter
15 to Tony Griffin from -- who is the -- who became
16 the County Executive for the Fairfax County
17 government. This is 2003 letter from the City
18 Manager, Dan McKeever, to Mr. Griffin in which
19 Mr. McKeever, who was the City Manager, responds
20 to a variety of questions from the County
21 Executive of Fairfax County concerning the City's
22 water system.

Page 665

1 And that is similarly certified. And I
2 would move that into evidence.
3 THE COURT: I'm sorry. This is
4 Plaintiff's Exhibit which one?
5 MR. THOMAS: Yes, sir. 28.
6 THE COURT: Mr. Raphael.
7 MR. RAPHAEL: Your Honor, this is a
8 letter from Falls Church City to the County of
9 Fairfax. It's not copied to Fairfax Water. And I
10 don't know how it would come into evidence. Maybe
11 perhaps Mr. Thomas could proffer what the
12 relevance is. But what's the relevance of this?
13 MR. THOMAS: Well, first of all, Your
14 Honor, how it could come into evidence is because
15 it's certified under 8.01-390. That -- that's how
16 it comes into evidence. And it is a record of the
17 City of Falls Church, as I indicated before, by
18 the City Manager writing a letter to the County
19 Executive of the Fairfax County government.
20 The relevance is that this is an
21 exchange that has to do with the City's rates and
22 historic ROI transfers. And it discusses and

Page 666

1 deals with a setting where there was discussion
2 about the City of Falls Church imposing a rate
3 differential on its out-of-City --
4 THE COURT: No. I think it comes in
5 under 8.01-390, Mr. Raphael.
6 MR. RAPHAEL: Your Honor, I think it's
7 being offered to show that somehow Fairfax Water
8 knew about the practice. That this is not a
9 letter to Fairfax Water.
10 THE COURT: I don't think it's offered
11 for that purpose at all.
12 MR. RAPHAEL: If that's true, then I
13 don't object to it. If that's the limitation.
14 THE COURT: Because Fairfax Water is not
15 even copied on it.
16 MR. RAPHAEL: That's correct.
17 THE COURT: Right. It's to show what
18 Falls Church was thinking with regard to setting
19 water rates for City -- for customers within and
20 without the City.
21 MR. THOMAS: Correct.
22 THE COURT: All right. Well, then it

Page 667

1 will be received without objection.
2 (Plaintiff's Exhibit 28 was received
3 into evidence.)
4 MR. THOMAS: Thank you, Judge.
5 And then the last one, Your Honor, is
6 Plaintiff's Exhibit 19, which is a report by the
7 City of Falls Church Department of Environmental
8 Services entitled Water --
9 THE COURT: This is City's --
10 MR. THOMAS: Plaintiff's Exhibit 19.
11 THE COURT: 9-0?
12 MR. THOMAS: 19. 1-9.
13 THE COURT: 1-9?
14 MR. THOMAS: Yes.
15 MR. RAPHAEL: I do object to this, Your
16 Honor.
17 THE COURT: Hang on. Let me just get it
18 in front of me. Okay. All right.
19 MR. RAPHAEL: Your Honor, this is a
20 150-page document. It is rife with hearsay and
21 exactly the kind we've already talked about. It
22 includes things like surveys, phone calls to

1 people about what other systems charge. And you
2 can't -- you just can't admit the phone book here
3 that has all of this embedded hearsay in it. The
4 records exception doesn't apply to this. I marked
5 this as an exhibit because I planned to use it
6 with witnesses, and I did.

7 MR. THOMAS: And he has.

8 MR. RAPHAEL: But that doesn't mean the
9 whole thing comes in. I didn't offer it. It's
10 got lots of self-serving hearsay in it and it
11 shouldn't come in.

12 MR. THOMAS: Two points if I could,
13 Judge.

14 THE COURT: Hang on a second.

15 MR. THOMAS: Okay.

16 THE COURT: You know, I want to read
17 this -- I want to read this one before I rule on
18 it.

19 MR. THOMAS: Okay.

20 THE COURT: Because it's plainly in the
21 nature of a document put together by a subdivision
22 of the City with regard to the very subject that

1 brings us all together, and showing, I suspect,
2 what is being done and why it should be done.

3 And all of that is fine so far, but it
4 contains analyses, reports, recommendations from
5 entities other than those -- other than
6 individuals employed by the City, which would fall
7 plainly within the exception.

8 And -- and they may not survive the
9 hearsay objection. I just want to take a look at
10 it.

11 MR. THOMAS: I can come back. I can
12 renew my offer of that.

13 THE COURT: Okay. I'll try to read it
14 tonight. I've got to give this lecture. We're
15 going to have to leave in one hour actually. I'll
16 try to read it tonight, though.

17 MR. RAPHAEL: Just, for example, the
18 document that you refused was marked, I believe it
19 was Defendant's 21, that's embedded in this
20 document?

21 And I don't know if it will save the
22 Court the trouble to read through the whole thing

1 if there can be a proffer as to what is in here
2 that the City is interested in.

3 THE COURT: I don't mind reading through
4 it.

5 MR. THOMAS: Your Honor, as the Court
6 reads through it, it is not offered for the truth
7 of what is asserted in it. It is simply offered
8 to show the City examining its practices in a
9 highly relevant time period about which the Court
10 has already received --

11 THE COURT: But you can cure that by
12 having Mr. Tuohy say we really looked into this,
13 we really consulted people and we really reached
14 what we thought was the correct decision as a
15 result of everything that we did along those
16 lines.

17 But if I read this document, then I have
18 a memo from a Mr. Harrison or somebody which seems
19 to be, you know, really very detailed, well laid
20 out. Is it Mr. Harrison? It's the executive --
21 Mr. -- Mr. Creefield from Government Finance
22 Group, Incorporated. An analysis of capital cost

1 transfers, water prices, system values and so on.

2 And I don't know what it says because I
3 haven't read it. But it may say that we've really
4 taken a good look at this and a lot of people are
5 doing it this way. You can do it this way.
6 Mr. Raphael is going to say I can't cross-examine
7 Mr. Creefield.

8 MR. THOMAS: And what I say is that this
9 is not offered for the truth of whatever he had to
10 say. It is simply offered to demonstrate that the
11 City examined this issue and examined it
12 thoroughly.

13 THE COURT: Well --

14 MR. THOMAS: And I -- I will put on --

15 THE COURT: Consult with your colleagues
16 and see whether or not you want to simply do it
17 the other way, which would be plainly admissible.
18 Mr. Raphael is not going to object to this. But
19 he doesn't want the finder of fact in this case,
20 namely myself, reading what Mr. Creefield had to
21 say and accepting that as, you know, it just has
22 to leach in as the truth.

1 MR. THOMAS: Well, and my --
 2 THE COURT: Because part of your
 3 argument is other people are doing it this way.
 4 And I think that's a fine argument to make. But
 5 we're talking about the proof, what proof can
 6 survive the evidentiary restrictions by which
 7 we're all bound.
 8 MR. THOMAS: Right. And -- and I'll
 9 quit. But my only point is that it would be one
 10 thing were I offering it to say the City went out
 11 and it got advice from the Government Finance
 12 Group, Mr. Creefield, and that advice was correct.
 13 And that is -- that is the truth, what he said is
 14 the truth. The City can take these transfers,
 15 it's common practice for it to do that, no problem
 16 at all. That's the truth.
 17 It would be one thing if I were offering
 18 it for that. I'm not offering it for that
 19 purpose. I'm offering it for the purpose for
 20 showing -- it's highly relevant. These folks have
 21 made a big issue out of the motives of the City.
 22 THE COURT: I know. But what I'm saying

1 is that you can accomplish that same result in a
 2 way that will not run afoul of the evidentiary
 3 restrictions simply by asking Mr. Tuohy what did
 4 you do. Here is what we did. Woo, woo, woo.
 5 What did they tell you?
 6 Mr. Raphael, no, no, no, I object, that
 7 calls for hearsay.
 8 As a result of these investigations did
 9 you conclude that what you're doing is proper?
 10 I object.
 11 No. Objection overruled.
 12 MR. THOMAS: I understand.
 13 THE COURT: Okay.
 14 MR. THOMAS: And I appreciate that. And
 15 I -- and I expect to do just that. If the
 16 Court --
 17 THE COURT: Mr. Raphael probably wants
 18 to be heard further.
 19 MR. THOMAS: And we may hear something
 20 about that. But if the Court would take a look at
 21 the document and make a judgment about it.
 22 THE COURT: I think --

1 MR. THOMAS: I'll renew it. I'll renew
 2 my request at some point.
 3 THE COURT: Okay. Well, I'll take this
 4 home with me tonight.
 5 MR. RAPHAEL: Your Honor, again, I hate
 6 to sound quarrelsome. There's nothing in there I
 7 am afraid for you to see. But I do think it's
 8 improper for you to review a document that long
 9 that has so much hearsay in it when you're the
 10 trier of fact.
 11 THE COURT: I'm not going to read it.
 12 I'm just going to see what it contains.
 13 MR. RAPHAEL: Okay.
 14 THE COURT: I'm going to see what
 15 Mr. Creefield has submitted. And I -- I think
 16 that runs afoul of the rule. I'm seeing it your
 17 way. But I'm not going to go through it and let
 18 all of that be in my thinking.
 19 MR. RAPHAEL: Okay. Thank you, Your
 20 Honor.
 21 THE COURT: I think Mr. Thomas knows how
 22 to get this problem solved.

1 What else? Do we have any more?
 2 MR. THOMAS: I think that's it right now
 3 on the housekeeping.
 4 THE COURT: Then in that case, what I
 5 would like to have are the exhibits from the other
 6 municipalities. Which numbers are those?
 7 MR. THOMAS: I would be glad to. They
 8 are -- these are the CAFRs and that one bond
 9 offering?
 10 THE COURT: Right.
 11 MR. THOMAS: All right. I'll go slowly.
 12 They are 64, 65, 66, 67, 68, 69 and 74.
 13 THE COURT: 64 through 69 and 74.
 14 MR. THOMAS: I think that's right. And,
 15 Your Honor, if I could be heard on one small point
 16 before the Court begins looking at them, the Court
 17 has received into evidence the City's CAFRs from
 18 2007 --
 19 THE COURT: Right.
 20 MR. THOMAS: -- and 2008. I think the
 21 Court can conclude without further argument that a
 22 City's CAFR certified pursuant to 8.01-390 is

1 classically an item that comes in under that code
2 section. And so if the Court would take a moment
3 to look at those, I would be grateful.

4 THE COURT: The essence of the objection
5 to these is not hearsay. It's that it's not clear
6 from these reports that we have apples and apples
7 being compared to -- we have apples being compared
8 to apples here. And that's why I need to take a
9 look. I'm not sure I can get through all these
10 tonight, however. But I'll get through them.
11 Okay.

12 I'm correct in that, am I not?

13 MR. RAPHAEL: That's exactly right.
14 There are all kinds of bases for transfers. We
15 might say that's not what we say it is and we're
16 going to end up fighting about that.

17 THE COURT: Right. But if each one of
18 these says somewhere we're taking money from X
19 utility and putting it to the general fund, okay,
20 they're doing it.

21 MR. RAPHAEL: No. Remember there are
22 three kinds. Administrative cost transfers, we

1 don't object to that. PILOT, we don't object to
2 that. There may be loans that are not at issue.

3 We're talking about a very specific kind
4 of transfer here. So I think you're going to
5 find --

6 THE COURT: A surplus from the sale of
7 the utility's product.

8 MR. RAPHAEL: Yes. When you're dealing
9 with out-of-town customers.

10 THE COURT: Right. I think I've got it.

11 MR. THOMAS: Okay. And my only point,
12 Your Honor, is they can be admitted under
13 8.01-390. And I will argue that they say one
14 thing; they will argue that they say another
15 thing. But they are admissible prima facia under
16 the code section.

17 THE COURT: No, I understand that. I
18 just want to take a look at them. I just -- I
19 mean, for what -- if this case has to be appealed
20 to the Supreme Court of Virginia, I just don't
21 want it to be all tangled up with an abuse of
22 discretion by the trial court and admitting

1 evidence improperly.

2 It should go up on other grounds than
3 that, don't you think?

4 MR. THOMAS: Yeah. When and if it goes
5 up, I mean, that seems like to me to be the
6 caboose on the issues.

7 THE COURT: I understand.

8 MR. THOMAS: Okay. Well, I -- I again
9 ask that those exhibits that we have just
10 identified, the ones I just read off, and if the
11 Court would take a look at it --

12 THE COURT: Right, 64 through 69 and 74.

13 MR. RAPHAEL: -- that they be admitted
14 into evidence.

15 THE COURT: Right. I just want to take
16 a look at them. I'm just going to reserve on that
17 until I take a look at that. Okay?

18 MR. THOMAS: Okay. If I could just have
19 a second to clear the deck here.

20 THE COURT: Yes, sir.

21 MR. THOMAS: Judge, I'm ready when the
22 Court is.

1 THE COURT: I'm ready to go.

2 MR. THOMAS: Okay. The City calls Glenn
3 Watkins.

4 Whereupon,

5 GLENN WATKINS

6 was called as a witness, and, having first been
7 duly sworn, was examined and testified as follows:

8 MR. THOMAS: If I may, Your Honor.

9 THE COURT: Yes, sir.

10 DIRECT EXAMINATION

11 BY MR. THOMAS:

12 Q Mr. Watkins, would you state your name,
13 please.

14 A Yes. My name is Glenn A. Watkins.

15 Q Okay. And would you provide an address,
16 please, for the record. Business address is fine.

17 A Yes. My business address is
18 1051 East Cary Street, Suite 601, Richmond,
19 Virginia.

20 Q How are you employed, Mr. Watkins?

21 A I'm a principal and senior economist
22 with Technical Associates, Incorporated, which is

1 an economics consulting firm.
 2 Q Okay. How long have you been employed
 3 with Technical Associates?
 4 A 29 years.
 5 Q And over that period of time, have you
 6 had different titles?
 7 A Yes. I, if you will, rose up through
 8 the ranks. We're not structured as a partnership.
 9 I'm a partner now, but a principal. But I started
 10 as an undergraduate, as a research assistant, and
 11 moved up through the ranks and made partner, if
 12 you will, principal, in 1990.
 13 Q All right. And would you describe for
 14 the Court the business of Technical Associates,
 15 Inc.
 16 A Yes, we're a business and economics
 17 consulting firm that has been in business since
 18 1968. It was formed by various professors at
 19 Virginia Tech with a specialization in public
 20 utility regulation and, to a lesser extent,
 21 insurance regulation and some business damage
 22 work.

1 Q Okay. Would you briefly describe the
 2 subject matter of your specialty.
 3 A My specialty is devoted to public
 4 utility regulation, particularly with respect to
 5 electric, gas, water, waste water utilities. I
 6 rarely get involved in telecommunications. And to
 7 a lesser extent, insurance regulation, for those
 8 insurance lines that are regulated.
 9 Q All right. Mr. Watkins, what academic
 10 degrees do you hold? And from where?
 11 A I have an MBA from Virginia Commonwealth
 12 university and a Bachelor of Science and economics
 13 from the same.
 14 Q I'm sorry. From?
 15 A From the same university. Virginia
 16 Commonwealth.
 17 Q All right. And in what -- in what year
 18 did you receive your MBA?
 19 A It's been awhile. I better check.
 20 1988.
 21 Q All right. Mr. Watkins, do you have any
 22 certifications in the field of public utility

1 regulations?
 2 A Yes, I do.
 3 Q And what certifications do you have?
 4 A I'm a certified rate of return analyst
 5 from -- issued by the Society of Utility and
 6 Regulatory Financial Analysts.
 7 Q All right. I'm going to call that a
 8 CRRA certification, okay?
 9 A That's what we call it.
 10 Q All right. What are the requirements
 11 for a CRRA certification?
 12 A There are educational requirements,
 13 minimum educational requirements, minimum
 14 in-service requirements, and an examination
 15 requirement.
 16 Q And for how long have you been CRRA
 17 certified?
 18 A Since 1992.
 19 Q Is there specific expertise that is
 20 designated with the CRRA certification?
 21 A Yes. Certified Rate of Return Analyst,
 22 the certification means that you're certified in

1 determining the cost of capital, both debt and
 2 equity, and using the appropriate models with the
 3 appropriate expertise in determining the fair
 4 rates of return or fair costs of capital.
 5 Q All right. And is it fair to say you've
 6 been engaged in the business of public utility
 7 regulation consulting since about 1982?
 8 A Since 1980.
 9 Q 1980. Now, are you a member of any
 10 professional societies, associations, or
 11 organizations?
 12 A Yes, sir, I am.
 13 Q Would you describe for the Court what
 14 those are.
 15 A Yes. I'm a full member of the
 16 association of energy engineers, full member being
 17 I've -- I have met the minimum educational and
 18 experience requirements to be a full member.
 19 I'm a member of the American Water Works
 20 Association.
 21 I'm a member of National Association of
 22 Business Economists, as well as the Richmond

1 Association of Business Economists.
 2 And I'm also a member of Omicron Delta
 3 Epsilon, which is the national economics honor
 4 society.
 5 Q Okay. Have you ever conducted a rate
 6 study?
 7 A Several hundred.
 8 Q That was my next question. How many
 9 rate studies have you conducted?
 10 A I've been doing this for 29 years. I do
 11 about 20 a year. So somewhere in the neighborhood
 12 of 600, five to 600.
 13 Q All right. And for what types of
 14 utilities have you conducted rate studies?
 15 A As indicated earlier, my practice is
 16 devoted to water, waste water, electric, and
 17 natural gas utilities.
 18 Q And of that total number of rate studies
 19 that you have conducted, on how many of them would
 20 you say that you were the principal investigator
 21 or the lead?
 22 A I made partner or principal in 1990.

1 So, again, say 20 -- approximately 400. Three to
 2 400. Three to 500, somewhere in there.
 3 Q Have you given testimony in Court as an
 4 expert witness on public utility regulation
 5 issues?
 6 A Yes, I have.
 7 Q All right. Approximately how many
 8 times?
 9 A In -- including administrative hearings
 10 or in formal court? Sometimes I get confused with
 11 the lawyers what they're asking.
 12 Q You can break those out.
 13 A Okay. I've testified as an expert
 14 witness in excess of 100 times. Many of which
 15 have been before state or federal regulatory
 16 boards, as well as in state courts and federal
 17 courts.
 18 Q Okay. Will you just briefly describe
 19 for the Court who your clients are.
 20 A Yes. Typically my clients, almost
 21 exclusively my clients are state attorneys general
 22 and state public utility commissions.

1 Q Have you handled any utility engagements
 2 for the Virginia Attorney General?
 3 A Yes. The Attorney General is one of my
 4 biggest clients, if not my biggest client. I'm
 5 currently engaged with several projects with the
 6 Attorney General's office right now.
 7 Q And those are for matters pending before
 8 the State Corporation Commission?
 9 A Yes.
 10 Q Have you handled utility engagements for
 11 any other state attorneys general?
 12 A Yes. Routinely. Currently I'm engaged
 13 in the -- in a case for the North Carolina
 14 Attorney General, which is a big case, big power
 15 case. The Kentucky Attorney General on three
 16 different matters. The Washington state Attorney
 17 General on three or four different matters
 18 currently. Routinely represent several others.
 19 I've represented -- worked for several
 20 Attorney Generals in other cases that I'm not
 21 working on right now, of course.
 22 Q Mr. Watkins, have you served as an

1 adviser to any judicial bodies?
 2 A Yes. My firm, including myself, we
 3 are -- we are the technical advisors to the
 4 Washington, D.C. public utility commissioners.
 5 Not the commission staff, but we provide technical
 6 and public policy advice to the commissioners
 7 themselves and have for the last 18 or 20 years.
 8 Q All right. Is Fairfax County one of the
 9 members of that commission?
 10 A No.
 11 Were you referring to public utility
 12 commissions?
 13 Q Yes.
 14 A No. This -- I was referring to the
 15 Washington, D.C. public utility commission.
 16 Q Okay. Now, Mr. Watkins, is the economic
 17 theory of public utility rate regulation the same
 18 for all public utilities?
 19 MR. RAPHAEL: I object, Your Honor. I
 20 think that calls for an opinion. And this
 21 gentleman has not yet been qualified as such.
 22 THE COURT: Why is it an opinion? And

1 why would it not be based upon his knowledge and
2 his experience in the industry?

3 MR. RAPHAEL: Because there's been no
4 testimony he has any experience with governmental
5 rate -- cost-of-service studies for governmental
6 bodies providing water service.

7 THE COURT: Why don't you ask that
8 question.

9 BY MR. THOMAS:

10 Q Mr. Watkins, would you describe for the
11 Court your experience with regulatory -- public
12 utility regulatory matters involving governmental
13 entities.

14 A Yes. I have been engaged in numerous
15 projects involving governmental entities both
16 inside and outside of Virginia. As examples of
17 projects, they would include Colonial Heights and
18 Petersburg. That was a joint project. Halifax
19 County, which was a water case, Martinsville. I
20 was recently provided expert testimony before
21 Loudoun County Court in the Leesburg case which
22 was -- involved a water dispute.

1 I've provided expert testimony for
2 the -- before the Pennsylvania Public Utility
3 Commission on municipal water rates. In
4 Pennsylvania, the PUC regulates municipal water
5 rates for out-of-town customers.

6 And I have been engaged in Wisconsin on
7 a particular -- on a water matter.

8 Q Involving a municipal utility.

9 A Yes. It was the City of New Berlin.

10 Q And that was a municipal water utility?

11 A Yes. Their water rates.

12 Q Okay. Mr. Watkins, is the economic
13 theory of public utility rate regulation the same
14 for all public utilities?

15 MR. RAPHAEL: Your Honor, I would like
16 to voir dire him before he gets to an opinion like
17 this. I don't think that -- I think you're -- I
18 think I've got a pretty good argument here that
19 this gentleman is not qualified to render that
20 opinion.

21 THE COURT: I just don't see that he's
22 offering an opinion. I think he's offering an

1 observation based upon the work that he's done for
2 these various entities.

3 MR. THOMAS: I think that's right.

4 MR. RAPHAEL: Again, I'd like to voir
5 dire him before you reach that conclusion, because
6 I don't think he's --

7 THE COURT: All right. I'll let him do
8 that. Just on this question.

9 MR. RAPHAEL: Well, I need to go through
10 the list of what he has and hasn't done in order
11 to get to this point. So perhaps if we can set
12 this aside to the end, and then we can do the voir
13 dire and we can get back to it.

14 THE COURT: Well, this is probably the
15 first of many questions, however. Correct?

16 MR. THOMAS: I'm working my way through.
17 But that is correct.

18 I haven't asked him for an opinion.
19 I've asked him about whether the economic theory
20 is the same for the different types of utilities
21 that he has --

22 THE COURT: I just don't see why that's

1 an opinion.

2 MR. RAPHAEL: Okay.

3 THE COURT: I just don't see why that's
4 an opinion.

5 MR. RAPHAEL: I'm sorry, Mr. Thomas. Is
6 your question whether the theory of regulation is
7 the same for a water utility, private water
8 utility, as a private electric utility? Is that
9 the question?

10 MR. THOMAS: No. My question is --

11 THE COURT: No.

12 MR. THOMAS: No.

13 THE COURT: It's whether different
14 municipalities do it in different ways. Is that
15 correct?

16 MR. THOMAS: Well, that was --

17 THE COURT: You said it a little more
18 fulsome. But isn't that --

19 MR. THOMAS: Right. But I'm getting to
20 that question. But the first question was whether
21 the economic theory -- and I'm not asking him to
22 tell us what the economic theory is. What the

1 economic theory of public utility rate regulation
2 is the same for all public utilities, whether
3 we're talking about water or electric or gas.

4 THE COURT: Oh, I see. I got you.

5 MR. THOMAS: Yeah. And he's just -- if
6 I could, Judge, he's just testified that he has
7 been involved in engagements for all different
8 kinds of public utilities.

9 THE COURT: No, I know that. Water,
10 waste water, electricity.

11 MR. RAPHAEL: The distinction here, Your
12 Honor, is the public utility in this context that
13 you're talking about is an investor-owned utility
14 not a municipal utility.

15 And I think the question is going to is
16 the theory the same for municipal utilities as
17 investor-owned utilities.

18 That's a significant issue. As you
19 know, he has not been qualified to answer that
20 question. And I'd like to be able to voir dire
21 him before he says, yeah, it's the same. Because
22 it's not.

1 MR. THOMAS: Well, I think he has been
2 qualified on that. I just asked him whether he
3 has been involved in matters involving municipal
4 utilities. And he just gave the Court a long list
5 of examples where he was.

6 MR. RAPHAEL: Well, I'm going to voir
7 dire him on those examples because I don't think
8 they're applicable.

9 THE COURT: I think that's proper for
10 cross-examination. I really do.

11 MR. THOMAS: Thank you, Judge.

12 THE COURT: Objection overruled.

13 MR. THOMAS: Okay.

14 Do you remember the question,
15 Mr. Watkins?

16 MR. RAPHAEL: Excuse me, Your Honor.

17 Will I have an opportunity to voir dire him --

18 THE COURT: Absolutely. Absolutely.

19 BY MR. THOMAS:

20 Q Do you remember the question?

21 A Could you repeat it, please.

22 Q Yeah. Is the economic theory of public

1 utility rate regulation the same for the different
2 types of public utilities?

3 A Thank you.

4 Yes, it is. The economic theory is the
5 same regardless of the utility in question or the
6 type in question.

7 Q All right. And that would include
8 water, electric, and gas?

9 A Yes, sir.

10 Q All right. And does the theory of
11 economic -- I'm sorry, economic theory of public
12 utility rate regulation apply to the different
13 types of public utility ownership, which is to say
14 public and private?

15 MR. RAPHAEL: Your Honor, here again,
16 this is an important issue in the case. I'd like
17 to voir dire him before he offers the opinion.

18 THE COURT: Well, why don't you do that
19 when he's offered as an expert. He will be
20 offered very shortly.

21 MR. RAPHAEL: All right. Thank you.

22 THE WITNESS: Yes.

1 BY MR. THOMAS:

2 Q You mentioned some engagements in
3 Virginia. Could you describe for the Court the
4 substance, just briefly the substance of those
5 engagements.

6 A Concerning the municipal water utilities
7 I --

8 Q Yes.

9 A -- take it?

10 Q Yes.

11 A Most recently -- well, I was just
12 engaged by the Town -- for the Town of Louisa. I
13 don't know if I mentioned that or not. That was a
14 case that just came in a couple of weeks ago. In
15 which hopefully working with the Town of Louisa,
16 even though my client as a developer in resolving
17 water matters with respect to the Town of Louisa,
18 particularly in -- as it relates to the rates.

19 I'm also currently involved in a dispute
20 for the Town of Hamilton in Loudoun County.

21 I was the expert witness on behalf of
22 the plaintiffs in the Leesburg case in Loudoun

1 Circuit Court last February, I believe is where
2 the trial was.

3 Q And that's where the Town of Leesburg is
4 the municipal water provider?

5 A That is correct.

6 Q And you were qualified as an expert
7 before Judge Horne; is that right?

8 A Yes. That is correct. That is correct.

9 In addition, I have conducted rate
10 studies for -- involving Halifax water and waste
11 water as well as the Town of Martinsville, City of
12 Martinsville, excuse me, as it relates to an
13 industrial rate, or at least an industrial --
14 major industrial customer was my client.

15 Q And that was for the water utility
16 there?

17 A Actually, that was waste water for
18 Martinsville. Halifax was water and waste water.

19 And then the other example I gave, I
20 believe, was City of Petersburg and Colonial
21 Heights. That involved -- my client was the City
22 of Colonial Heights. And that involved the

1 determination -- the determination of rates -- of
2 remaining a customer, the City of Colonial Heights
3 remaining a customer from the City of Petersburg
4 or buying into a portion of the waste water
5 treatment facility. So it was a financial
6 analysis as well as a rate analysis, if you will.

7 Q All right. And you mentioned utility
8 rate regulation work you have done in Pennsylvania
9 involving municipal utilities.

10 Would you give the Court a brief
11 description of that experience.

12 A Yes. I have done two cases in
13 Pennsylvania.

14 In Pennsylvania, the state public
15 utility commission, which is very similar to our
16 State Corporation Commission, regulates
17 out-of-town water rates.

18 And the City of Bethlehem, I did a
19 complete analysis on of -- on behalf of what's
20 called the Office of Consumer Advocate which
21 represents consumer interests.

22 I also did another engagement for -- it

1 was for the Amish or -- Lancaster, excuse me.
2 Pardon me. Lancaster. So that was in
3 Pennsylvania.

4 And in Wisconsin, a similar engagement
5 involving a City of New Berlin, which is a suburb
6 of Milwaukee. In Wisconsin, the State Public
7 Service Commission has jurisdiction over all
8 public utility rates: Municipal, privately owned,
9 in town, out of town.

10 So -- so the State Public Service
11 Commission regulates, again, all municipal rates.
12 Whether they're in town, out of town, whatever.

13 Q Okay. And your work in Wisconsin
14 involved a municipal water authority?

15 A Yes. It was -- it was -- it's called
16 New Berlin water department.

17 Q Water department.

18 A Right.

19 Q Okay. Could you identify to the Court
20 the number of states where you have provided
21 public consulting services on a public utility
22 rate regulation.

1 A 39 or 40.

2 Q All right.

3 A 39 or 40, right in that area. The
4 majority.

5 MR. THOMAS: Your Honor, Mr. Watkins' CV
6 is Defendant's Exhibit 71, and I would ask that
7 that be admitted into evidence.

8 THE COURT: It will be received.

9 MR. THOMAS: Thank you.

10 MR. RAPHAEL: Is that a separate
11 document from the report?

12 MR. THOMAS: It is. It is.

13 MR. RAPHAEL: No objection, then.

14 THE COURT: Thank you.

15 (Defendant's Exhibit 71 was received
16 into evidence.)

17 MR. THOMAS: And we also have a separate
18 document. Well, it's not a separate document now,
19 but I can make it one, which is a page from
20 Mr. Watkins' report which lists his expert
21 testimony.

22 And I would ask that that be admitted

Page 700

1 into evidence.
2 THE COURT: Any objection?
3 MR. RAPHAEL: I'd like to have the pages
4 identified.
5 MR. THOMAS: It is in Exhibit 70. And
6 it is right behind -- in Exhibit 70, it's right
7 behind his CV.
8 THE WITNESS: I believe it's four pages,
9 the list of testimonies.
10 MR. THOMAS: Okay. Right.
11 MR. RAPHAEL: This is Exhibit 2 to his
12 report?
13 MR. THOMAS: Correct. Exhibit 2 to his
14 report.
15 MR. RAPHAEL: I don't have an objection
16 to that, although I would ask that it be
17 identified and received as a separate exhibit.
18 MR. THOMAS: I can do that.
19 THE COURT: All right. Thank you.
20 MR. THOMAS: Your Honor, why don't we do
21 that as Defendant's Exhibit 71-A.
22 THE COURT: All right.

Page 701

1 (Defendant's Exhibit 71-A was received
2 into evidence.)
3 MR. THOMAS: Your Honor, I'm tendering
4 Mr. Watkins as a qualified expert in the field of
5 public utility, regulation, and rate setting.
6 THE COURT: All right. Voir dire,
7 Mr. Raphael.
8 MR. RAPHAEL: Yes, please.
9 VOIR DIRE EXAMINATION
10 BY MR. RAPHAEL:
11 Q Good afternoon, Mr. Watkins.
12 A Good afternoon, Mr. Raphael.
13 Q Now, you indicated that you were an
14 expert for the plaintiffs in the Giordano versus
15 the Town of Leesburg case, correct?
16 A That is correct?
17 Q And, in fact, Reed Smith contacted you
18 as a result of your work in that case, right?
19 A I believe that's correct, yes.
20 Q In that case, you were opposed to the
21 Town of Leesburg. You represented the out-of-town
22 customers, right?

Page 702

1 A That is correct.
2 Q Okay. And the Town in that instance
3 charged a higher rate to its outside-town
4 customers than to the in-town customers, correct?
5 A That is correct.
6 MR. THOMAS: I'm not sure why this is
7 voir dire. This sounds like cross-examination to
8 me.
9 THE COURT: Well, it I'll give him a
10 little bit more leeway.
11 BY MR. RAPHAEL:
12 Q And about 20 to 25 percent of the Town's
13 customers were County residents who lived outside
14 the Town?
15 A That's about right.
16 Q And the issue that you worked on was
17 whether the amount that the Town was charging to
18 its out-of-town customers was justified, right?
19 A That is correct.
20 Q And you concluded in that instance that
21 the differential was not justified?
22 A No. That is not true. It's not the

Page 703

1 differential that I concluded was not justified.
2 It was the rate being charged out-of-town
3 customers --
4 Q Okay.
5 A -- was not justified.
6 Q Did you say it was too high?
7 A Yes, I did.
8 Q Now, out of all the work that you've
9 done in the past that you've just been examined
10 about by Mr. Thomas, am I correct that the
11 Leesburg engagement was the one that was most
12 similar to what you've done here?
13 A I would say so, yes.
14 Q And the Town of Leesburg does not
15 transfer money from its water fund to its general
16 fund as a profit, correct?
17 A I don't believe it does.
18 Q And you didn't provide any opinion in
19 the Town of Leesburg case with regard to whether
20 the Town should have been transferring money as a
21 profit from the water fund to the general fund,
22 correct?

1 A No. The issue of transfers did not come
2 up at all in that trial.

3 Q And this is your first engagement by the
4 City of Falls Church, right?

5 A It is.

6 Q And am I correct that you have not been
7 engaged by the City of Falls Church to give it any
8 advice about the actual rates that it should be
9 charging beyond your work here as a litigation
10 expert to prepare the report and to testify in
11 this case?

12 A Time will tell. As far as I know, no.

13 Q Up till now, not yet.

14 A That's correct.

15 Q All right. And at the time -- I took
16 your deposition about two-and-a-half weeks ago.

17 Do you remember that?

18 A Yeah. About three, two and a half,
19 something like that.

20 Q Yes, sir. And at the time I took your
21 deposition, am I correct that you were not doing
22 any work for other municipal water utilities?

1 A That's correct.

2 Q Okay. So the engagement that you
3 identified as just coming in, that was the Louisa
4 engagement?

5 A Yes.

6 And just so you understand, if I
7 misspoke or you misunderstood. The town of Louisa
8 is not my client. The client in that case is a
9 large developer.

10 Q Okay. I appreciate that.

11 You said that you worked on between five
12 and 600 rate studies for public utilities, right?

13 A Roughly, yes.

14 Q And you're including in public utilities
15 investor-owned utilities, right?

16 A Yes. In total.

17 Q And those are typically utilities that
18 are regulated by a state public utility
19 commission, right?

20 A In large part, yes.

21 Q Or in Virginia, it's the State
22 Corporation Commission, right?

1 A That's correct.

2 Q Am I correct that you -- that prior to
3 this case, you have not been engaged as an expert
4 to opine on whether it's appropriate for a
5 municipal government to transfer profits from its
6 water system to its general fund?

7 A That is correct. It's not -- it's never
8 been an issue before.

9 Q All right. That has never been an issue
10 for you.

11 A Correct.

12 Q Right. Now, cities and towns in
13 Virginia that provide their own water service to
14 customers are not regulated by the State
15 Corporation Commission, right?

16 A That is correct.

17 Q In fact, you have never, prior to this
18 case, you had never previously performed a rate
19 study for a city or a town that supplies its own
20 water to the public, right?

21 A No. I thought I indicated that, in
22 Pennsylvania, I filed testimony in that very

1 regard, as well as in Wisconsin.

2 Q Well, my question -- that wasn't my
3 question.

4 My question was, you have not been
5 previously performed a rate study for a city or
6 town that supplies its own water service to the
7 public.

8 A Oh, with them as my client?

9 Q Right.

10 A Is that your question?

11 Q Yes.

12 A I don't believe so.

13 Q Okay. You mentioned the Colonial
14 Heights work that you did. And that was in
15 Halifax County, correct?

16 A No. Colonial Heights is below Richmond.
17 It's the tri-cities: Richmond, Petersburg,
18 Hopewell.

19 Q Was your client in that instance the
20 Virginia International Raceway?

21 A No. That was the Halifax.

22 Q Yes.

1 A The Colonial Heights engagement, my
2 client was the City of Colonial Heights.

3 Q Okay. And let's start with the Halifax
4 County matter you mentioned.

5 A Okay.

6 Q Your client was Virginia International
7 Raceway; is that right?

8 A That's exactly right.

9 Q And that was you were working on an
10 agreement between Virginia International Raceway
11 and Halifax County?

12 A An agreement -- trying to reach an
13 agreement as to what the appropriate rate should
14 be, not just for them, but a rate study for the
15 rates in general for Halifax County, particularly
16 as it relates to one aspect or one service area of
17 the county.

18 Q Okay. And when I took your deposition,
19 I think you indicated that you didn't know at that
20 time whether Halifax County takes a transfer from
21 its water fund to its general fund as a return on
22 equity, right?

1 A That's correct. I don't know.

2 Q You also mentioned the Monticello
3 water -- I think you mentioned -- did you
4 mention -- I think you mentioned Monticello.

5 A Yes. But that is a privately owned
6 company.

7 Q That's a not a public -- that's not a
8 municipal utility.

9 A Correct. It's small privately owned.

10 Q And you identified a couple other
11 localities -- what I thought were localities, but
12 that I don't -- Caroline Water.

13 Is that a -- that's not a publicly owned
14 utility, right?

15 A Correct. That's also a small privately
16 owned neighborhood utility, if you will.

17 Q All right. And Princess Ann Water,
18 that's a private utility, not a municipality,
19 right?

20 A It's no longer in existence. I
21 believe -- at the time, when I did the engagement
22 it was privately owned. That's correct.

1 Q Then you mentioned the City of
2 Bethlehem, Pennsylvania.

3 And at the time I took your deposition,
4 you didn't know whether the City of Bethlehem
5 transferred any money as a profit from its water
6 fund to its general fund, correct?

7 A That is correct.

8 Q Okay. And then you mentioned this
9 Louisa engagement. Your client is a developer?

10 A That's right.

11 Q And the Town of Hamilton, who's your
12 client in that instance?

13 A The attorney is Rachel Downs. Counsel
14 is Rachel Downs. The actual client is a large
15 developer here in Northern Virginia.

16 Q All right.

17 MR. RAPHAEL: Thank you, Your Honor.
18 I'm prepared to offer argument on
19 whether he should be qualified.

20 THE COURT: All right.

21 MR. RAPHAEL: May I proceed?

22 THE COURT: Yes, sir.

1 MR. RAPHAEL: With all due respect to
2 Mr. Watkins, who spent probably more time with me
3 than he'd care to admit, I don't believe that he
4 is properly qualified to offer opinions in this
5 case as to two -- I think he might be qualified as
6 an investor-owned utility rate expert but not as a
7 municipal rate expert.

8 He is not qualified to offer any opinion
9 about whether it's proper for a municipal utility
10 to transfer money from the water fund to the
11 general fund. There's been no identification of
12 any expertise on that subject.

13 He's also not qualified to testify about
14 whether it's proper to include in the revenue
15 requirement of a municipal water system an amount
16 corresponding to profit. That was the basis for
17 his computing the supposed reasonable rate in this
18 case.

19 He's never testified or served as an
20 expert on these questions. This is different from
21 what happens with a private investor-owned
22 utility. Which it's called a public utility, but

1 it's not a municipal utility.

2 The closest case he had to this one he
3 admitted was the Town of Leesburg case. But in
4 that case, it didn't involve the core issues
5 presented here.

6 I think I've submitted to the Court
7 previously Judge Horne's opinion in that case.
8 And he makes it plain the case doesn't involve the
9 issue presented here with regard to whether it's
10 appropriate to transfer monies from the water fund
11 to the general fund. And that the tax issue is
12 not at issue for that reason.

13 And the City has not shown that, by
14 virtue of this gentleman's experience and training
15 in other areas relating to public utilities that
16 are not municipally owned that he's qualified to
17 opine on what I think are the central issues in
18 this case.

19 And so for those reasons, Your Honor, I
20 think he's not qualified to get into that issue.

21 THE COURT: Well, I think those are fair
22 matters for cross-examination. But I think that

1 Mr. Watkins' qualifications is as described. It's
2 often very rare, with the possible exception of
3 medical malpractice cases, to have an expert
4 witness who has done exactly the particular matter
5 which is the subject of dispute. Because if
6 somebody had done so, often you would not have the
7 dispute. Other than medical malpractice cases.

8 And I think that Mr. Watkins'
9 background, he's certified as a certified rate of
10 return analyst. He's been an expert witness
11 hundreds of times. He's an expert of the areas of
12 water, electric, waste water, and gas. His
13 clients have included a wide variety of entities:
14 Attorneys General from Virginia, North Carolina,
15 Washington state.

16 And maybe he's never had a case exactly
17 like this case. But there probably are very few
18 cases exactly like this case.

19 And I think the points that you make
20 with regard to the opinions that he may wish to
21 offer are a proper field for cross-examination.

22 But I think he's qualified to testify as

1 an expert witness. And the Court will accept him
2 as one in the area of public utility regulation
3 and rate setting.

4 Mr. Thomas.

5 MR. THOMAS: Thank you, Judge.

6 DIRECT EXAMINATION (Continued)

7 BY MR. THOMAS:

8 Q Mr. Watkins, I meant to ask you a moment
9 ago, in connection with your CV, you indicate that
10 you are a member of the AWWA?

11 A Yes, I am.

12 Q Okay. For how long have you been a
13 member of the AWWA?

14 A Oh, approximately 15 or 20 years,
15 somewhere in there. I don't remember the exact
16 date.

17 Q Okay.

18 A It's been a long time.

19 Q All right. And would you tell the Court
20 why you're a member of the AWWA.

21 A Sure. The AWWA is a very respectable
22 trade organization. It provides a lot of

1 functions, one of which is it provides guidance to
2 less experienced and rate-making principles. It
3 has a number of manuals. And we call them
4 cookbooks. But -- but very good.

5 But they do provide guidance. They
6 provide a lot of engineering assistance to
7 regulators, as well as engineers, as well as fire
8 protection standards, things of that nature.

9 So the point being they're very
10 respectable organization. And they've done a lot
11 for the industry. So in that regard, they're --
12 they're a good trade organization. And I support
13 them.

14 Q Okay. Would you tell the Court what
15 policy guidance of the AWWA do you consider to be
16 binding, if any, on public utilities.

17 A None.

18 And I mean that with the most respect
19 for AWWA. The AWWA is there to provide guidance,
20 reference. It's certainly not there as a policy
21 matter.

22 Q Okay.

1 MR. RAPHAEL: Your Honor --
 2 THE WITNESS: Either theoretically or in
 3 public policy.
 4 MR. RAPHAEL: Excuse me.
 5 THE COURT: Yes, sir.
 6 MR. RAPHAEL: Your Honor, I hate to rise
 7 so early, but this has not been disclosed in this
 8 gentleman's expert report. He relied on -- he
 9 relied on the M1 and the M35 for the core of his
 10 report.
 11 There's no testimony -- and there's no
 12 disclosure in his expert report about his opinions
 13 that he's now offering about the AWWA, which I
 14 think it's clear what the purpose of it is.
 15 MR. THOMAS: I'll move on, Judge.
 16 THE COURT: I'll have to take a look at
 17 the designation.
 18 MR. THOMAS: I'll move on, Judge.
 19 THE COURT: All right.
 20 MR. RAPHAEL: Well, I would ask that the
 21 last statement not be received in evidence as a
 22 result of its not being disclosed in the expert

1 report.
 2 THE COURT: The statement that the...
 3 MR. RAPHAEL: He said it's a cookbook.
 4 That it's not binding. It's suggesting that, you
 5 know, it doesn't really carry much weight, when he
 6 relies on it in his report at page 4, note 4.
 7 THE COURT: Well, he didn't -- he said
 8 he is very respectful of the AWWA, and it has all
 9 of these things, which he used the term "cookbook"
 10 initially.
 11 But he said it's a book for guidance,
 12 for reference, but that it's not binding on public
 13 utilities.
 14 MR. RAPHAEL: And that statement is not
 15 in his report, and he shouldn't be allowed --
 16 THE COURT: But that's the one you're
 17 complaining about, though, that it's not binding
 18 on public utilities.
 19 MR. RAPHAEL: That and I think that
 20 there, despite how respectfully it was expressed,
 21 that there is an edge to that expression. And I
 22 don't think that that's --

1 THE COURT: You mean the cookbook one?
 2 MR. RAPHAEL: Yes.
 3 THE COURT: All right. Mr. Thomas, can
 4 you live with Mr. Watkins' testimony striking the
 5 word "cookbook" --
 6 MR. THOMAS: Yes.
 7 THE COURT: -- and not binding on public
 8 utilities?
 9 MR. THOMAS: Well --
 10 THE COURT: Those are the only two that
 11 he wants stricken.
 12 MR. THOMAS: Sure. That's fine.
 13 THE COURT: All right.
 14 MR. RAPHAEL: Thank you.
 15 THE COURT: Thank you.
 16 BY MR. THOMAS:
 17 Q Mr. Watkins, based on your experience,
 18 would you explain to the Court the theoretical
 19 basis for establishing prices for public
 20 utilities.
 21 A Right. The economic theoretical basis
 22 for setting prices for public utilities are, first

1 of all, from a most global perspective, prices
 2 should be forward-looking, and prices should
 3 reflect forward-looking costs.
 4 Without getting into the long theory of
 5 public utility, the economics of public utility
 6 regulation, basically the -- the theory is that
 7 prices should be forward-looking, reflecting
 8 forward-looking costs. And those costs should
 9 reflect those costs that are prudently incurred to
 10 compensate the utility for its cost of doing
 11 business.
 12 Q Okay. In your experience, is that true
 13 for investor-owned utilities and municipal
 14 utilities?
 15 A Yes. The theory is the same either way.
 16 Q Okay. Would you explain to the Court
 17 why the theory is the same.
 18 A The theory of the firm, which is of
 19 course in economics or microeconomic theory is
 20 that whether you're talking about a regulated
 21 utility or a business practice, you know, a
 22 consulting firm, a law firm, you need to recover

1 your -- your cost of serving your customers.
 2 Those costs in the public utility are
 3 your operating and maintenance expenses as well as
 4 what we call your capital costs.

5 Your capital costs because the water
 6 industry is so capital intensive, it's so
 7 intensive in the infrastructure required, there
 8 are costs associated with that capital. And
 9 that -- those -- the basic types of capital costs
 10 are debt costs and equity costs.

11 Debt costs are often referred to or
 12 usually referred to as interest expenses. And
 13 equity costs would be your -- your fair profit on
 14 your equity return.

15 And then as well part of your capital
 16 costs, of course, are depreciation as well. That
 17 would allow you a return of your investment.

18 Q Okay. All right.

19 As opposed to a return from your
 20 investment.

21 A Right. You have a return on your
 22 investment and a return of your investment. And I

1 may have just misspoke.

2 Depreciation reflects a return of your
 3 investment, how you get your money back as a
 4 bondholder or as an equity owner. And interest or
 5 equity return, of course, is -- represents, you
 6 know, a return for the opportunity and the risk
 7 that you take on on undertaking, investing in such
 8 capital.

9 Q Okay. And in your experience, are both
 10 appropriate types of costs for requiring a public
 11 utility to serve customers?

12 A Yes. They are both appropriate either
 13 way.

14 Q Okay. Is that --

15 A For publicly owned, municipal. The
 16 theory is the same; the concepts are the same.

17 Q All right. Would you explain to the
 18 Court the basic steps in establishing a fair and
 19 reasonable rate for public utilities.

20 A Right. In the most simple terms, there
 21 are three components in setting rates in a utility
 22 rate case.

1 The first is the determination of the
 2 revenue requirement.

3 And then the second is the allocation of
 4 costs between customer classes. Typically, the
 5 different customer classes would be residential,
 6 commercial, industrial, et cetera.

7 And then once you determine the class
 8 revenue responsibilities, we call that, the final
 9 step is what's called rate design. That is, you
 10 take the costs that are allocated or the revenue
 11 requirement for a particular class of customers,
 12 divide that through particular billing units, and
 13 you actually come up with a price. And that's
 14 what we call the rate. But it's the price that
 15 will ultimately be charged the customer.

16 Q Okay. Are there different types of
 17 arriving at an overall revenue requirement?

18 A Yes.

19 Q Methods, I should say.

20 A Yes.

21 Q And would you explain to the Court what
 22 those methods are.

1 A Right. Well, in the most general sense,
 2 there are two methods used, particularly in the
 3 water industry.

4 One is known as the rate-based rate of
 5 return method, which in AWWA calls it a utility
 6 method. The other commonly used method by
 7 municipalities, and to a much lesser extent
 8 investor-owned, is known as the cash-needs
 9 approach.

10 Those are the two generic approaches.
 11 Now there's a lot of variance within those. Two
 12 basic approaches.

13 Q If we could take those in turn,
 14 whichever one you want to take first, and explain
 15 to the Court what those methods involve.

16 A Certainly. I'm indifferent. Let's just
 17 do the cash-needs approach first.

18 Q Fine.

19 A The cash-needs approach is -- can be
 20 viewed similar to a household budgeting type
 21 approach in that it tends to be simpler in
 22 concept, in that the -- the rate maker looks at

1 what are the cash that I need for a given
2 particular point in time.

3 And the cash requirements in the most
4 general perspective or components are operating
5 and maintenance expenses and what's known as debt
6 service requirements.

7 Debt service requirements would include
8 interest expense and the retirement of debt or --
9 you know, it would be similar to your car payment.
10 Your total house payment or your total car
11 payment.

12 So those are the basic categories of
13 costs, if you will, under the cash-needs approach.

14 Now, under the utility approach or the
15 rate-based rate of return approach, as it's more
16 commonly used in other industries, that approach
17 is similar to that of a nonregulated business in
18 that it is comprised of -- the revenue is
19 comprised of operating and maintenance expenses.

20 And those are generally the same as
21 under the cash needs. But it also includes debt
22 service -- not -- instead of debt service

1 in and the cash out are about the same.

2 Q Okay. In your experience, Mr. Watkins,
3 do some municipal utilities use the cash?

4 A Yes. Some do.

5 Q And that's in arriving at an overall
6 revenue requirement, right?

7 A Correct. Correct. Some do.

8 Q Now, in your experience, do some
9 municipal utilities use the utility method in
10 establishing an overall revenue requirement?

11 A Yes. Some use the cash needs; some use
12 the utility method. And then there's -- there's
13 a -- some that use a combination of the two.
14 It's -- it's not like black and white. They are
15 not cast in stone between a utility method and a
16 utility -- and a cash-needs method.

17 I explained the major differences. But
18 there's subtle variances that are also used.

19 So to answer your question, some -- some
20 use, you know, precisely the cash needs. Some
21 municipalities use precisely the utility method.
22 And then some use a variant.

1 payments, it includes depreciation expense.

2 And I think most people are familiar
3 with what depreciation expense is. But it's a
4 return of your capital that you have invested.

5 And then there's a return on rate base.
6 And I'll explain rate base. But basically what
7 rate base means is it's a return on your
8 investment.

9 Now, there's two components of your
10 investment typically, almost universally for
11 public utilities: There's a debt component and
12 there's an equity component. And you take the
13 weighted average of those two times the rate. And
14 that -- that is the capital return that is allowed
15 or the fair rate of return on rate base, as we
16 call it.

17 So the difference -- the difference is,
18 whereas the utility approach is -- is correct from
19 a theoretical standpoint as well as consistent
20 with American business practice, the cash-needs
21 approach is more of a, if you will, a simple
22 budgeting-type methodology to ensure that the cash

1 Q Could you provide the Court with an
2 example from your experience with a municipal
3 water utility that uses the utility method for
4 establishing its overall revenue requirements.

5 I'm not talking about allocating costs.
6 I'm talking about the overall revenue requirement.

7 A The overall revenue requirement.

8 Q Yes.

9 A The City of Richmond, Virginia, is one
10 example.

11 MR. RAPHAEL: Objection, Your Honor.
12 This is new material. I'm hearing this for the
13 first time. It was not disclosed in the expert
14 report or the deposition.

15 MR. THOMAS: That is not the case. He
16 discussed the City of Richmond in his deposition
17 testimony and in his expert report.

18 MR. RAPHAEL: Would you direct me --

19 MR. THOMAS: He identifies on page 7
20 that an opportunity to earn a fair and reasonable
21 profit based on the risk confronted is a
22 universally-accepted cost of providing service.

1 MR. RAPHAEL: I'm sorry. Where does it
2 say he was going to talk about Richmond in
3 connection with that?

4 MR. THOMAS: I've simply asked him for
5 an example based on his experience. And it's the
6 same question that was asked in the deposition.

7 MR. RAPHAEL: First of all, I don't
8 recall the question in the deposition. But the
9 issue of which cities are doing what has obviously
10 become an issue. And this gentleman has not
11 disclosed this topic in his expert report. And
12 John Crane is very clear on this. So I don't
13 think it can come in.

14 THE COURT: That he cannot use Richmond
15 as an example of the testimony that he's giving
16 that was described in his expert designation?

17 MR. RAPHAEL: Quite frankly, I wouldn't
18 be too concerned if this were the beginning and
19 the end of it and if this were just one example.

20 But I think there's going to be a lot
21 more. And I don't want to open the door to that
22 because it wasn't disclosed in the expert report.

1 MR. THOMAS: That's not -- that is not
2 true. And this is the -- it's the same approach
3 that I think the plaintiff took in trying not to
4 have Mr. Watkins qualified.

5 He has given a report and given a
6 deposition. And in his report, he identified
7 certain areas that he's going to testify to. And
8 this is one of those areas, which is to say how
9 you go about setting rates.

10 THE COURT: Right.

11 MR. THOMAS: Do municipal utilities use
12 the utility method?

13 THE COURT: Right.

14 MR. THOMAS: In fact, the first four
15 pages of his report are about how a utility,
16 investor-owned or municipal, goes about setting
17 its rates --

18 THE COURT: Right.

19 MR. THOMAS: -- and using the utility
20 method.

21 THE COURT: Right.

22 MR. THOMAS: And I just asked him for an

1 example.

2 THE COURT: Right.

3 MR. RAPHAEL: And I have no quarrel with
4 that. I just don't want to be starting down a
5 road about what Richmond does and whether it's
6 like what Falls Church does, because that's not in
7 the expert report.

8 THE COURT: But I wouldn't expect it to
9 be in the report. I mean, that is an example.

10 But I would expect that he's talked
11 about, you know, the cash-needs approach, some
12 utilities do. The utility method, some utilities
13 do. And some utilities use a combination of both.

14 MR. RAPHAEL: Yes.

15 THE COURT: So then Mr. Thomas asked,
16 Well, can you give us an example. And then
17 Mr. Watkins said, Well, the City of Richmond, for
18 example. That prompted the objection.

19 Maybe the objection at some point will
20 be well-taken. But I don't think it is.

21 MR. RAPHAEL: I think it's premature. I
22 agree. I'm sorry.

1 THE COURT: All right. Thank you.

2 You know, we're going to have to adjourn
3 now, unfortunately. I'm sorry. But I scheduled
4 this some time ago. And in fairness, it's a
5 lecture that I have to give in honor of one of my
6 former partners to the Federal Bar Association.
7 And the judiciary is going to be there. I'm
8 trying to decide whether or not I'm going to tell
9 them that Mr. Raphael has been bad-mouthing the
10 Federal Rules.

11 But --

12 MR. THOMAS: We can probably clip it,
13 find the citation here.

14 THE COURT: But it's set for the
15 ridiculous hour of 5 o'clock in Alexandria.

16 MR. THOMAS: That's fine.

17 THE COURT: And I have to be down there
18 to go through those kinds of things.

19 But we will start at 9 o'clock. We
20 don't have a criminal matter tomorrow morning. So
21 we'll start right at 9 o'clock. So maybe if you
22 all want to show up at 8:30 and make sure

1 everything is set up.
2 I'm generally here at 7:30, but set up
3 at 8:45. Maybe we can get started right then.
4 Okay?
5 MR. RAPHAEL: Glad to do it.
6 THE COURT: Thank you all very much.
7 The court will be in recess.
8 (Whereupon, at 3:46 p.m., the hearing
9 recessed, to reconvene at 9:00 a.m. on Thursday,
10 September 17, 2009.)
11
12
13
14
15
16
17
18
19
20
21
22

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 _____
15 Notary Public
16 in and for the
17 Commonwealth of Virginia
18 My Commission expires:
19 December 31, 2011
20 Registration No. 7117657
21
22