

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY WATER AUTHORITY,)	
)	
Plaintiff,)	
)	
v.)	CL-2008-16114
)	
CITY OF FALLS CHURCH,)	
)	
Defendant.)	

**FAIRFAX WATER'S REPLY BRIEF
IN SUPPORT OF JUDGMENT ON COUNT V**

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CORRECTIONS TO CITY'S FACTUAL STATEMENTS

Several misstatements by the City warrant correction. First, the evidence did *not* show that the City “repeatedly confirmed that its water system’s rates, return on investment and its profit transfers were consistent with best utility practices in Virginia.” (Def. Br. at 4.) To the contrary, the City’s consultant reports were excluded as hearsay. (Tr. 1182:11-19 (DX 43); 1188:9-14 (DX 44); 1199:3-10 (DX 46); 1202:1-4 (DX 47); 1218:13-16 (DX 50); 1216:20-1217:2 (DX 52).) The Court said that it would *not* conclude that the reports blessed the City’s practices (Tr. 1396:11-1397:5), and even if they had, the reports would not prove those practices to be constitutional. (Tr. 1396:6-10.)

Second, Mr. Tuohy did *not* testify that transferring water moneys to the general fund is “consistent with generally accepted utility accounting principles.” (Def. Br. at 4.) He said that “disclosure” was consistent (Tr. 1410:22-1411:2) but made clear that generally accepted accounting principles *do not address* the appropriateness of such transfers. (Tr. 217:2-14, 1456:7-1457:3.)

Third, the “reasonableness” of the City’s rates was *not* conceded. (Def. Mem. 27.) Fairfax Water’s cross-examination of an irascible Mr. Watkins showed that his hypothetical “reasonable” rate was grossly inflated. As shown in Table 3 of Fairfax Water’s Opening Brief, a handful of corrections to his analysis changes the calculated rate to \$2.62, significantly less than the \$3.03 currently charged by the City. And again, the Court correctly noted that, even if the current rates were arguably reasonable, it still would not prove that the City may constitutionally use those rates to generate surpluses to be transferred to the general fund. (Tr. 1123:12-19.)

Finally, there was no evidence that any retail customer -- including Fairfax Water -- can “re-negotiate” the commodity rates paid to Falls Church. (Def. Br. 7.) To the contrary, the commodity rate is prescribed by City law (PX 37), and there was no evidence that any such published tariff charge can be negotiated. (Tr. 1346:14-1347:6.) Indeed, the City conspicuously ignores its own counsel’s concession that Fairfax Water is a “captive” customer to Falls Church (Tr. 887:9-13), along with the City’s other “captive” customers in Fairfax County (Tr. 888:11-19). The City also

ignores its efforts to exclude Fairfax Water from the market, both through its prior federal lawsuit and its continuing efforts to prevent developers from switching to Fairfax Water. (Pl. Br. 6-7 & n.2.)

REPLY ARGUMENT

The City cannot escape the *Robinson* and *McMahon* line of cases. A municipal fee must be reasonably related to the cost of service, regardless of whether the fee is charged to residents or non-residents. (Pl. Br. at 11-13.) The City incorrectly argues that each of these cases involved an involuntary “levy,” implying that if Falls Church does not utter the word “levy,” it can charge whatever it wants. That ignores the Supreme Court’s teaching that if the *purpose* of the enactment is to generate general revenue -- something Falls Church concedes here -- the measure is a tax “regardless of the name attached” to it. *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 431, 657 S.E.2d 71, 77 (2008); *City of Charlottesville v. Marks’ Shows, Inc.*, 179 Va. 321, 329, 18 S.E.2d 890, 894 (1942) (“denomination” irrelevant). The City also obscures plain English. A tax is simply a “monetary charge imposed by the government on persons, entities or property to yield public revenue.” Black’s Law Dictionary 1469 (7th ed. 1999). To “levy” is simply to “impose or assess [a tax] by legal authority.” *Id.* at 919. The City has done just that. It has imposed a fixed and non-negotiable charge for public water -- a necessity of life for which its captive customers have no practical alternative -- in order to generate surplus revenues to transfer to the general fund.

Significantly, the City cannot dispute that one of its *own* citizens could successfully challenge its water charges as a “tax” under the *McMahon* line of cases. City residents, of course, have little reason to complain since their water bills are more than recouped from the tax benefits flowing from the general fund transfer. (See Pl. Br. 4-6.) But that does not change the fact that the purpose of the City’s water rates is to generate surplus profits and reduce local taxes. A non-city customer is not debarred from challenging this tax simply because he lives in Fairfax County. Indeed, *extraterritorial* taxes are worse because the nonresident receives no tax benefit from the general fund transfer; he has “no voice in voting it, in selecting the purposes, or in expending it.”

Robinson v. City of Norfolk, 108 Va. 14, 17, 60 S.E. 762, 763 (1908) (citation omitted).¹

The City incorrectly argues that there is no difference between: (1) charging water rates designed to generate profits to transfer to the general fund; and (2) charging higher water rates to outside-city customers (based on a return on equity) and lower rates to in-city customers, while keeping all revenues within the water fund to meet the cash needs of the system. But there is a huge difference under *Robinson* and its progeny. In the first scenario, the rates are intended to create surplus general revenues and, therefore, constitute an unlawful tax. In the second, the rates bear a reasonable relationship to the total cost of service. (Indeed, contrary to its brief, the City's witnesses all agreed that these two scenarios were entirely different. (Tr. 1007:8-1008:10; Tr. 1584:9-22).)

Similarly, there is a world of difference between: (1) an arms-length, negotiated agreement with a customer *outside* of the City's service area; and (2) the published tariff rates charged by a municipal utility *within* its declared service area. A municipal utility is under no legal obligation to sell water either on a wholesale basis to another governmental entity, or to a retail customer located outside its service area. The parties in that situation are free to contract at arms-length. That is why

¹ Falls Church mistakenly relies on cases dealing with inter-locality taxation under § 183 of the now-repealed 1902 Constitution. Section 183 of the old Constitution permitted a county to tax a city's waterworks property located within its boundaries if: (i) the city's entire system was not used "wholly and exclusively" for city purposes, *Warwick County v. City of Newport News*, 153 Va. 789, 810, 151 S.E. 417, 424 (1930) (*Warwick I*); or (ii) the property was a source of "revenue or profit" to the city, *City of Newport News v. Warwick County*, 159 Va. 571, 593, 166 S.E. 570, 577 (1932) (*Warwick II*). Contrary to Falls Church's claim, these cases did not approve the practice of overcharging non-city residents to transfer money to the general fund. The Newport News charter actually mandated (in § 5) that revenues raised from outside-city customers "*be applied solely*" to the water system. *Warwick I*, 153 Va. at 794 n.*, 798, 811, 151 S.E. at 418 n.*, 420-21, 424; *Warwick II*, 159 Va. at 578, 166 S.E. at 572. But because the net revenues of the Newport News system -- including sales within the city itself -- reflected a profit for the tax years in question, the Court concluded that the city's property was taxable under § 183. *Warwick I*, 153 Va. at 811-12, 151 S.E. at 424; *Warwick II*, 159 Va. at 594, 607-08, 166 S.E. at 578, 583. The Court further indicated that the question of inter-locality taxation under § 183 was separate from whether the city's charter restricted the use of moneys raised from non-residents. *E.g.*, *Warwick I*, 153 Va. at 813, 151 S.E. at 425 (the charter "has no relation to the question of taxation, and does not refer thereto. That question is determined by Constitution, section 183"); *Warwick II*, 159 Va. at 598, 166 S.E. at 579 ("the question of [inter-locality] taxation is determined by the [1902] Constitution and not by the

the federal government lost its challenge in *United States v. City of Newport News*, No. 75-110, Slip Op. at 6 (E.D. Va. June 8, 1977), and why the City’s examples of *other* wholesale customer agreements are inapposite (*see* Pl. Br. at 15-16).² Indeed, the situation is similar to what happened in *Rocky Mount*, where the town was under no legal obligation to extend sewer service to a new customer when the town had not yet held itself out as the area’s public utility. *Town of Rocky Mount v. Wenco of Danville, Inc.*, 256 Va. 316, 321, 506 S.E.2d 17, 20 (1998).³ By contrast, when a locality like Falls Church holds itself out as the area’s water utility, the holding out doctrine requires not only that it provide service, but that it do so “without discrimination and at reasonable rates.” 12 Eugene McQuillin, *The Law of Municipal Corporations* § 35.52 at p. 795-96 (3d ed. 2006).

Finally, it is no defense to say that Fairfax Water must forever pay unlawful charges because it “chose” to buy office buildings in eastern Fairfax County. A customer’s choice where to live does not give the City carte blanche to use its water rates to raise general revenues. Indeed, it would have been no defense in *Marshall* to say “you don’t have to garage your car in Northern Virginia,” or in *Mountain View* to say “you don’t have to get your trash collection from the city,” *Mountain View LP v. City of Clifton Forge*, 256 Va. 304, 504 S.E.2d 371 (1998), or in *Robinson* or *Mark’s Shows* to say “you don’t have to bring your carnival here.” Virginia does not make its people move away when they no longer wish to pay an unconstitutional tax that is “masquerading as a fee for service.” *Giordano v. Town of Leesburg*, No. 42736 at 3 (Loudoun County Mar. 6, 2009).

[charter]”). These cases do not remotely suggest, as Falls Church claims, that the Court silently declared the *Robinson* line of cases “inapplicable on these facts.” (Def. Mem. 16 n.9.)

² *Accord Westbrook, Inc. v. Town of Falls Church*, 185 Va. 577, 39 S.E.2d 277 (1946) (holding that developer voluntarily contracted with town to extend sewer service to property not already served). As noted in prior briefing, Falls Church in *Westbrook* emphasized the distinction between extending service to a new area (as in that case) and charging existing users for service, conceding the latter to be a form of taxation. (*See* FCWA Br. Opp. Demurrer at 19 & Ex. 1 (filed Feb. 24, 2009).)

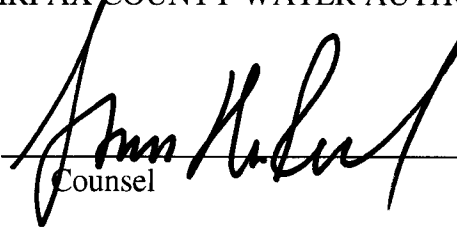
³ The City incorrectly implies that *Rocky Mount* was a “holding out” case because 56 other non-city properties obtained sewer service from the town. (Def. Br. at 18-19.) But the Court made clear that “[n]one of these properties, except the Wal-Mart store site, is served by” the sewer line in question. *Id.* at 319 n.2, 506 S.E.2d at 19 n.2.

CONCLUSION

The Court should render judgment for Fairfax Water and enter the Decree attached to its opening brief.

Respectfully submitted,

FAIRFAX COUNTY WATER AUTHORITY

By: 
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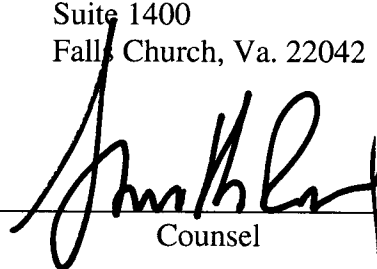
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CERTIFICATE OF SERVICE

I certify that on October 28, 2009, a copy of the foregoing Brief was sent by both electronic and U.S. first-class mail to the offices of the following counsel for the City of Falls Church:

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