

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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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 23, 2009

VOLUME 7

The parties met, pursuant to the notice of
the Judge, at 9:25 a.m.

BEFORE: THE HONORABLE R. TERRENCE NEY

1 APPEARANCES:
 2 On Behalf of the Plaintiff:
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 7 Falls Church 1582
 8 (presented through videotape excerpts)
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1 APPEARANCES (Continued):
 2 ALSO PRESENT:
 3 Charles Murray, Fairfax County Water
 4 Authority
 5 John Tuohy, City of Falls Church
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PROCEEDINGS

THE COURT: Good morning.

MR. RAPHAEL: Good morning.

MR. THOMAS: Good morning.

THE COURT: All right. You're still under oath, Mr. Tuohy. Mr. Thomas, you may continue, sir.

MR. THOMAS: Thank you, Judge. Whereupon,

JOHN TUOHY

having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. THOMAS:

Q Good morning, Mr. Tuohy.

A Good morning.

Q Mr. Tuohy, were you in the courtroom the other day when Mr. Watkins was asked about the Town of Vienna and its water system?

A Yes, I was.

Q All right. And what familiarity, if

any, do you have with the Town of Vienna's water system and its finances related to it?

A I've had an opportunity to do a fair amount of analysis of their finances.

Q Would you explain to the Court why that is?

A Certainly. Your Honor, I think it's well known, at least in this courtroom, but not necessarily by you, that the City is in serious discussions with the Town of Vienna for acquiring their water and sewer system. As part of the due diligence, I've had the opportunity to take a look at their finances in some detail.

Q And, where, if anywhere, does the Town of Vienna provide water and sewer services?

A It provides about 9,000 customers with water and sewer services, or with water services anyway. About 6,000 are inside the corporate limits of the Town. About 3,000 are in the unincorporated area of Fairfax County.

Q And what if any transfers does the Town of Vienna make from its utility fund to its

general fund as a return?

MR. RAPHAEL: Your Honor, let me just rise and object to this line of questioning as it's not relevant. What another locality may or may not do is not relevant to the legality of what the City of Falls Church is doing.

And, in addition, to the extent that this gentleman is testifying in his capacity as a reputed financial expert, he was not identified as an expert in discovery, nor was any expert opinion report produced.

THE COURT: Well, two things. First, Fairfax Water offered testimony through Mr. Woodcock that many jurisdictions throughout the United States do not handle their use of funds received from utilities in the same manner that the City of Falls Church does. So it seems to me it's appropriate that the City be permitted to point out but there are some that do or may.

Secondly, with regard to Mr. Tuohy's testimony, I find that it's not being offered as an expert but as a fact witness, because he knows

this because of his position with the City of Falls Church and the work that he does with regard to the Town of Vienna. Objection overruled. Exception of Fairfax Water is noted.

MR. RAPHAEL: Thank you, Your Honor.

THE COURT: Yes, sir.

BY MR. THOMAS:

Q Mr. Tuohy, do you remember the question?

A If you could repeat it, I'd appreciate it.

Q Okay. What, if any, transfers does the Town of Vienna make from its utility fund to the general fund of the Town as a return or a profit from its utility operations?

A If you take a look at their fiscal 2008 CAFR, which is what I've been working off of, they transferred somewhere in excess of \$900,000 from the utility fund to the general fund as a support -- they call it support for governmental activities or operations. Profit.

Q Now, Mr. Tuohy, would you take a look at the first exhibit book from the defendants, and

1 particularly Defendant's Exhibit 40.
 2 A Okay. Got it.
 3 Q Okay. What do you understand that to
 4 be, Mr. Tuohy?
 5 A What I understand this to be is a
 6 printout from Fairfax Water's Web site, which is a
 7 comparison of local water rates.
 8 THE COURT: I'm sorry. Which exhibit
 9 are we looking at?
 10 MR. THOMAS: It's Exhibit 40 from the
 11 defendant's, Exhibit 40.
 12 THE COURT: Falls Church Exhibit 40.
 13 MR. THOMAS: Yes, sir.
 14 THE COURT: Thank you.
 15 THE WITNESS: This is the same one as I
 16 recall that was put up on the screen last week.
 17 BY MR. THOMAS:
 18 Q All right. Thank you. Which, if any,
 19 of the entries here for localities are for water
 20 services that are supplied by the Washington
 21 Aqueduct?
 22 A Directly, that would be the City of

1 Washington, D.C. WASA, Arlington, Falls Church,
 2 and indirectly, Vienna is a wholesale water
 3 customer of ours, they purchase 100 percent of
 4 their water from the City.
 5 Q And which if any of these water service
 6 providers listed on Exhibit 40 are what you
 7 understand to be for profit water service
 8 providers?
 9 A Virginia American Water is for profit.
 10 That appears twice because they have two services
 11 within the Washington Metro area.
 12 MR. THOMAS: Thank you, Judge.
 13 MR. RAPHAEL: Your Honor, I want to
 14 renew my objection that what other localities or
 15 entities do and what they charge is not probative
 16 of whether the City's rate contains an
 17 unconstitutional rate or contains an improper
 18 subsidy or is unreasonable.
 19 THE COURT: I understand the objection.
 20 MR. THOMAS: Your Honor, I would offer
 21 Defendant's Exhibit 40.
 22 MR. RAPHAEL: Same objection.

1 THE COURT: All right. It will be
 2 received.
 3 (Defendant's Exhibit 40 was received
 4 into evidence.)
 5 MR. THOMAS: Thank you.
 6 BY MR. THOMAS:
 7 Q Mr. Tuohy, were you in here in the
 8 courtroom when Mr. Watkins was asked about whether
 9 the City's return on its water fund constitutes a
 10 violation of any arbitration rules?
 11 A Yes, I was.
 12 Q All right. And what if any
 13 understanding do you have regarding the arbitration
 14 rules for local governments?
 15 MR. RAPHAEL: Your Honor, I think that
 16 we're about to get into an area of testimony
 17 concerning legal issues. And he's not a lawyer.
 18 He's not qualified to offer an opinion about
 19 whether something is or is not arbitration.
 20 THE COURT: Mr. Thomas.
 21 MR. THOMAS: Your Honor, Mr. Watkins was
 22 asked about this very issue over my objection that

1 it was calling for a legal conclusion or calling
 2 for a legal judgment.
 3 THE COURT: His testimony with regard to
 4 it was that it -- it was not included in -- I
 5 can't remember the specific. It was not included
 6 in something.
 7 MR. RAPHAEL: He said he didn't know if
 8 it was arbitration.
 9 THE COURT: That's right. That was his
 10 response.
 11 MR. THOMAS: Right.
 12 THE COURT: And he was not opining
 13 whatsoever on the provision, I know that.
 14 MR. THOMAS: I think -- I think if
 15 permitted I think I can lay a foundation to
 16 suggest that he's not -- it will suggest he's not
 17 going to offer a legal conclusion.
 18 THE COURT: Let's see.
 19 MR. THOMAS: Okay.
 20 BY MR. THOMAS:
 21 Q What understanding if any do you have
 22 concerning arbitration rules with respect to local

1 governments?

2 A Okay. That's a fair question. I'm not
3 going to answer this as a lawyer. I'm answering
4 it as a chief financial officer, so I want to be
5 clear about that. I'm going to have to give you
6 another minute dissertation if you'll allow me to
7 do that.

8 THE COURT: Please speak closer to the
9 microphone. It's a very large courtroom.

10 THE WITNESS: Sorry, Your Honor.

11 MR. RAPHAEL: I'm sorry, Your Honor.
12 He's testifying as a financial expert now. That's
13 expert opinion. He's not permitted to offer
14 expert opinion.

15 THE COURT: No, he's not testifying as a
16 financial expert; as a financial officer in the
17 work that he does in that particular position.
18 That's the way I understand his testimony.

19 MR. RAPHAEL: I don't think he can -- I
20 don't think he can offer an understanding of what
21 the law is on arbitrage.

22 THE COURT: He said he was specifically

1 not going to do that. Let's hear him out.

2 THE WITNESS: Right. And we have to go
3 back to 1986. I hate to do this to you.
4 Arbitrage as you know is benefiting from
5 differences between two markets. And prior to
6 1986, local governments used to be able to borrow
7 money, tax exempt, and invest in any sort of
8 investment allowed under the code of Virginia,
9 which normally would be taxable if you or I bought
10 it. So there was a delta; they would earn more
11 money than they were being charged for the
12 interest rate on the bond.

13 A 1986 tax reform act created something
14 called the arbitrage rebate provision. And it
15 directed the Department of Treasury to put
16 together a whole series of regulations governing
17 what happens if you earn more money on your
18 investments than you're paying the bondholder.

19 This is something that's been going on,
20 well, since 1987, because it was in effect
21 January 1. Yeah. Anyway.

22 So what happens is, if we borrow

1 money -- and just to make this simple, let's say
2 we borrowed money for a pool, and it takes a
3 couple years to build the pool, so we invest the
4 money in the meantime. Anything over and above
5 the bond yield has to be turned over to the
6 federal government. It's rebated. I won't get
7 into the whole accounting rules for how you do
8 that, but it's fairly complicated.

9 What the arbitrage rules provide for is
10 what happened to the invested --

11 MR. RAPHAEL: I'm sorry, Your Honor.
12 Objection. He's now saying what the rule
13 provides. It's classic legal testimony. It's not
14 proper.

15 THE COURT: Isn't he stating it, though?
16 What if he stated what the First Amendment says
17 and is telling me this is what it says, not what
18 it means, not how it's been interpreted. I mean,
19 I just don't think he's doing that. Let's see.
20 Let's test it a little bit longer.

21 MR. RAPHAEL: I think the rule, the
22 plain language of the rule would be the proper

1 thing to look at, not for him to say from memory
2 what he thinks the rule says.

3 THE COURT: Well, you can challenge him
4 with it on cross-examination.

5 Go ahead, Mr. Tuohy.

6 THE WITNESS: I may be a little
7 inartful. But as I said from the beginning, I'm
8 not a lawyer.

9 THE COURT: I understand. I understand.

10 THE WITNESS: In any case, what happens
11 is we would have to turn that over to the federal
12 government. Once the money is entirely spent, we
13 now have a pool. If we rent that out, you have
14 swim meets and things like that, if we make more
15 money on the pool than the cost, that's okay.
16 That's not governed by the arbitrage. It only is
17 applicable to unexpended bond proceeds.

18 THE COURT: All right.

19 BY MR. THOMAS:

20 Q Thank you. Now, Mr. Tuohy, I believe
21 you were here in the courtroom when Mr. Watkins
22 was asked a question about the City's leak rate

1 with respect to its water system.
 2 A Yes, I recall that.
 3 Q Do you understand what a leak rate is?
 4 A Yes. The term "leak rate," what you
 5 often hear, it's also called lost water. And what
 6 that is -- I think I talked about that a little
 7 bit, but I'll expand on it a bit.
 8 You purchase more water than you sell.
 9 And the reason for that is you might have leaks in
 10 your pipes. You might have a water main break.
 11 Obviously nobody would charge for that. And you
 12 have fire service. You know, the fire department
 13 hooks up and they put out the fire. Well,
 14 obviously we don't meter that as well.
 15 So there's some delta between how much
 16 you purchase and how much you sell. That's the
 17 leak rate.
 18 The leak rate for the City of Falls
 19 Church is about 15 percent.
 20 Q And why do you know that?
 21 A I need to know that in order to prepare
 22 the budget every year. I talk to our engineer,

1 because obviously I have to do both the
 2 expenditure side, which is the purchase of the
 3 water, and the revenue side, which is the sale.
 4 So I need to know what that difference is. And
 5 that's an engineer's estimate we use in doing the
 6 estimates for the budget for the water system.
 7 Q All right. Now, Mr. Tuohy, I believe
 8 you were also here yesterday when Mr. Watkins was
 9 asked to assume a 10 percent increase in a given
 10 year in the sale of water by the City of Falls
 11 Church. Do you remember that?
 12 A Yes, I remember that.
 13 Q All right. In your experience, has the
 14 City ever seen an increase year over year of that
 15 magnitude?
 16 A That would be an enormous increase in
 17 water sales. In a high growth time, we look at
 18 maybe 1 to 2 percent.
 19 MR. THOMAS: All right. Did the Court
 20 have any questions for Mr. Tuohy?
 21 THE COURT: No, sir.
 22 MR. THOMAS: All right. I don't have

1 any further at this time.
 2 THE COURT: All right.
 3 Cross-examination.
 4 MR. RAPHAEL: Your Honor, may I have
 5 about 30 seconds, please?
 6 THE COURT: Yes, sir.
 7 MR. RAPHAEL: Thank you.
 8 THE COURT: I do have one question. The
 9 enormous increase for water sales were for what
 10 years, Mr. Tuohy?
 11 THE WITNESS: No. It was a
 12 hypothetical. Mr. Watkins asked to take a look at
 13 what would happen if our water sales went up
 14 10 percent.
 15 THE COURT: Oh.
 16 THE WITNESS: And I can't imagine a
 17 circumstance where that would occur.
 18 THE COURT: I'm with you. Thank you.
 19 MR. THOMAS: So if I could -- so I think
 20 I'm clear.
 21 BY MR. THOMAS:
 22 Q You didn't understand there to be a year

1 when there was any 10 percent increase in water
 2 sales?
 3 A No. Absolutely not.
 4 MR. THOMAS: All right. Thank you.
 5 THE COURT: All right.
 6 All right, Mr. Raphael.
 7 MR. RAPHAEL: Thank you, Your Honor.
 8 THE COURT: Yes, sir.
 9 CROSS-EXAMINATION
 10 BY MR. RAPHAEL:
 11 Q Good morning, Mr. Tuohy.
 12 A Good morning.
 13 Q You came to work as the general manager
 14 of financial services and the Chief Financial
 15 Officer for the City of Falls Church about 5 years
 16 ago?
 17 A That's correct.
 18 Q And before that, am I correct, sir, that
 19 you had not worked for any public body that
 20 provided water service?
 21 A No.
 22 Q So is it fair to say that the first time

1 that you dealt with utility accounting issues
2 involving a water provider was when you arrived at
3 the City of Falls Church in September of 2004?

4 A You didn't hear my answer. I said no.
5 I worked for Arlington County, which has a water
6 system.

7 Q Do you remember when I asked you this
8 question in your deposition: Question, is it fair
9 to say that the first time you dealt with utility
10 accounting issues involving a water provider is
11 when you arrived at the City of Falls Church in
12 September of 2004?

13 Answer: That's correct?

14 A Right. You asked two different
15 questions. Have I ever worked for any place that
16 has a utility system, which is what you just asked
17 me now. And then you asked if I ever worked on
18 utility accounting then. It's two different
19 questions.

20 Q What I'm getting at is the first time
21 you had any experience with utility accounting
22 issues involving a water provider was when you

1 came to work for the City of Falls Church?

2 A That's correct.

3 Q As of the time I took your deposition in
4 this case several weeks ago, you had not taken any
5 courses in utility accounting, correct?

6 A That's correct.

7 Q And as of the time I took your
8 deposition in April, you had not read any AWWA
9 manual relating to setting water rates, correct?

10 A No. The AWWA is not something that
11 governs what we do.

12 Q That wasn't my question.

13 A Okay.

14 Q My question was, as of the time I took
15 your deposition, you had not read any AWWA manual
16 relating to setting water rates, correct?

17 A That's correct.

18 Q All right. Mr. Thomas asked you some
19 questions about GASB 34; is that right?

20 A No, he did not. He didn't ask any
21 questions about GASB 34.

22 Q I think you mentioned how you account

1 for a proprietary system under GASB. Do you
2 remember that line of questioning?

3 A Well, he asked the question how we
4 accounted for it. I used GASB 34 terminology,
5 which talks about businesslike activities. But he
6 didn't ask me about GASB 34.

7 Q Well, I have GASB 34 here. Now, you
8 mentioned that the GASB rules, the accounting
9 rules apply to various types of activities,
10 including things like landfills operated by a
11 locality?

12 A That's correct.

13 Q So if the City operates a refuse
14 collection system, that would be covered by GASB,
15 correct?

16 A Yes.

17 Q And the City also follows GASB 34 with
18 regard to the proprietary fund accounting that it
19 does for its sewer system, right?

20 A That's correct.

21 Q And the sewer system only serves Falls
22 Church customers, right?

1 A Yes.

2 Q It doesn't have -- there's no Fairfax
3 County customer who's on the City's sewer system,
4 right?

5 A We actually have about 400 Fairfax
6 customers. It's de minimis.

7 Q When I asked you that question in your
8 deposition, you told me it just served inside-City
9 customers.

10 A And, at the time, I thought that was
11 true. But I inquired later on, and my customer
12 service rep told me I was wrong.

13 Q Okay. Now, whether it provides service
14 inside or outside, you're still going to apply
15 GASB 34 to the way you account for the proprietary
16 fund, correct?

17 A That's correct.

18 THE COURT: I'm sorry, Mr. Raphael. I
19 have forgotten. What is the -- the acronym GASB
20 is for?

21 MR. RAPHAEL: It's a government
22 accounting standards series.

1 THE COURT: Okay.
 2 THE WITNESS: Governmental accounting
 3 standards board, which is a standard-setting body
 4 for governments in the United States.
 5 THE COURT: I know it was mentioned last
 6 week at some point but for some reason it escaped
 7 my mind. Thank you.
 8 THE WITNESS: And the 34, there's a
 9 whole series of pronouncements. We're up to 59
 10 right now.
 11 THE COURT: All right.
 12 BY MR. RAPHAEL:
 13 Q This GASB 34 tells you basically in your
 14 CAFRs how to report the various financial
 15 transactions?
 16 A That's correct.
 17 Q Okay. Now, with regard to the City's
 18 sewer service, which you said is also governed by
 19 GASB 34 in terms of how it's accounted for, am I
 20 correct that the City does not take a return on
 21 equity from the sewer service?
 22 A That's correct.

1 Q Am I correct, sir, that in your view the
 2 City could charge a return on equity even if it
 3 provided service to only its own citizens?
 4 A Well, I'm not really clear on that.
 5 Q Do you remember when I asked you that
 6 question in your deposition?
 7 A Yeah.
 8 Q Question, page 214, line 1, question:
 9 If I understand you correctly, you don't have a
 10 view -- you don't view a return on equity as
 11 depending on whether the City's providing services
 12 outside the City. The City could charge a return
 13 on equity even if it only provided water to its
 14 own citizens.
 15 Answer: That's correct.
 16 A Yeah, you asked if I didn't have a view.
 17 Q I said the City could charge a return on
 18 equity even if it only provided water to its own
 19 citizens.
 20 A What was the preliminary part of that?
 21 Didn't you say --
 22 Q That you don't have a view -- you don't

1 view a return on equity as depending on whether
 2 the City's providing service outside the City.
 3 That was the first question.
 4 A Okay. That's fair, yeah.
 5 Q And the next question was, the City, in
 6 your view, the City could charge a return on
 7 equity even if it only provided water to its own
 8 citizens. And you said that's correct.
 9 A Oh, yeah. If we provide water to our
 10 own citizens.
 11 Q And that's your belief, right?
 12 A Yeah.
 13 Q Now, am I correct, sir, that GASB 34
 14 doesn't tell you -- doesn't provide a methodology
 15 for how you compute a return on investment,
 16 correct?
 17 A Oh, you're absolutely correct.
 18 Q Right.
 19 A One thing we need to bear in mind, and
 20 let me -- this may save us a little bit of time.
 21 Accounting standards do not tell you how
 22 to do business. They do not. You can do business

1 any way you want. What's important is, whatever
 2 you do has to be properly accounted for and has to
 3 be properly displayed.
 4 Q Right.
 5 A But they don't tell you how to do
 6 business.
 7 Q Right. So GASB doesn't tell you whether
 8 it's appropriate for a municipal utility like the
 9 City of Falls Church to transfer money from a
 10 proprietary fund to a general fund as a return on
 11 equity?
 12 A Absolutely not.
 13 Q Right.
 14 A GASB doesn't tell you how to do
 15 business.
 16 Q Right.
 17 A It would be inappropriate for it to say
 18 that.
 19 Q And as of the time I took your
 20 deposition in this case, am I correct that you
 21 were unaware of any publication that contained any
 22 guidance on whether it was appropriate for a

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1 municipal utility to transfer money as a profit
2 from the water fund to the general fund?
3 A That's correct.
4 Q Mr. Thomas asked you questions about
5 various reports that the City had -- that had been
6 provided to the City over many years in the past.
7 Do you remember that line of questioning?
8 A Yes, I do.
9 Q And you identified about eight different
10 reports, right?
11 A That's correct.
12 Q And you said, in your view, it was the
13 best practice to talk to different rate
14 consultants about what a system is doing. Do you
15 remember that?
16 A That's correct.
17 Q All right. Now, of the reports you
18 listed, only two of them -- only one of them
19 really was done during your tenure at the City,
20 right, the PJ Sun report?
21 A That's correct.
22 Q Okay. And as of the time I took your

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1 deposition in this case, you hadn't read any of
2 the earlier reports except for the KPMG report?
3 A That's correct.
4 Q And subsequently, the KPMG report has
5 been lost by the City and you can't find it,
6 right?
7 A Yes.
8 Q Even though that's the basis on which
9 the City has set the -- the basis on which the
10 City set the return on equity for the years 2003
11 through 2006?
12 A Yes.
13 Q Okay. And am I correct, sir, that you
14 then later, after your personal deposition, you
15 testified in a corporate representative capacity
16 on behalf of the City of Falls Church?
17 A Yes.
18 Q And in order to do that, you had to do a
19 lot of reading to get ready for your deposition,
20 right?
21 A Yes.
22 Q So you read all of the prior reports at

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1 that point?
2 A That's correct.
3 Q Am I correct that, even after reading
4 those reports, you were still unaware of the fact
5 that the AWWA has had a policy since the 1960s
6 against diverting money from a water fund to the
7 general fund?
8 A That's correct.
9 Q And so when I showed you the AWWA policy
10 in the City's deposition, and we saw that during
11 our case in chief, that was the first time you'd
12 ever heard of that policy, right?
13 A Right.
14 Q And you testified on behalf of the City
15 that the City's policy is not consistent with the
16 AWWA policy, right?
17 A That's correct.
18 Q Now, you also testified on direct
19 examination about the management fee concept. And
20 the City adopted that in 2006 for fiscal year
21 2007, right?
22 A That's correct.

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1 Q And am I correct, sir, that at the time
2 I took your deposition, you were not aware of any
3 water rate manual or treatise where the management
4 fee concept was described, right?
5 A Right.
6 Q And the -- that's the concept where you
7 take -- the profit is based on 10 percent of the
8 operating revenues plus 100 percent of the
9 investment income?
10 A Uh-huh.
11 Q You need to say yes or no.
12 A Yes.
13 Q Thank you. And at the time the City
14 adopted the management fee, am I correct that you
15 were unaware of the fact that PJ Sun and
16 Mr. Cumiskey had come up with that idea based on
17 Mr. Cumiskey's experience with what private
18 companies were charging to the governments of
19 Armenia and the Republic of Georgia to run their
20 water systems?
21 A What Mr. Cumiskey gave us in his report
22 was a variety of practice throughout the United

1 States.

2 Q That's not my question, Mr. Tuohy. My
3 question was, isn't it true that, at the time you
4 adopted the management fee, you were unaware that
5 it originated based on Mr. Cumiskey's experience
6 in the government -- with the government of
7 Armenia and the Republic of Georgia with regard to
8 what they pay private entities to operate their
9 water systems?

10 A At the time I was unaware of that,
11 that's correct.

12 Q Right. And you subsequently learned
13 that that was its etymology, correct?

14 A Its what?

15 Q You learned that that's where it came
16 from, that that's how he came up with the idea?

17 A No.

18 Q Do you remember when I asked you that
19 question in your deposition?

20 A Actually, I don't.

21 Q All right. Question: Did you read
22 that -- referring to Mr. Cumiskey's deposition,

1 did you read that in his deposition yesterday?

2 Answer: Yes.

3 A Oh, okay.

4 Q And when you learned that the origin of
5 this management fee concept was that, you were
6 surprised, weren't you?

7 A Yes.

8 Q Okay. And at the time Mr. Cumiskey and
9 PJ Sun did their work on this concept, they never
10 told you or mentioned that AWWA actually had a
11 policy about not diverting water system monies for
12 purposes unrelated to the water system, correct?

13 A I was unaware of that, that's correct.

14 Q And am I correct, sir, that the
15 management fee doesn't pay for any management,
16 because all of the management costs are already
17 covered by the administration charge paid to the
18 general fund?

19 A I kind of went through that yesterday in
20 one of my one-minute theses. Essentially what I
21 did is I likened it to somebody who manages a
22 house for you. And so, yes, you can call it a

1 management fee.

2 You know, we could quibble about the
3 terminology. I can call it whatever you want.
4 The fact of the matter is it's a recognition of
5 the value of the risk that we take as the owner of
6 the water system.

7 Q Right. I heard what you said yesterday
8 and what you just said now. But isn't that
9 totally inconsistent with what you told me in your
10 deposition? Do you remember when I asked you this
11 question in your deposition -- and this was the
12 City's deposition.

13 A Right.

14 Q Question: So, when there's then a
15 management fee taken on top of that, referring to
16 the administration charge, there's no additional
17 management being paid for through that. It's
18 already been paid for in administration?

19 Answer: Correct.

20 That was your testimony, wasn't it,
21 Mr. Tuohy?

22 A And I'm trying to clarify where we're

1 coming from.

2 Q That was your testimony, was it not?

3 A All right, let me --

4 Q Yes or no, please, Mr. Tuohy?

5 MR. THOMAS: Object. I think the
6 witness is trying to answer the question.

7 THE COURT: Well, he'll have that
8 opportunity. But Mr. Raphael is entitled to a
9 direct answer to his direct question.

10 THE WITNESS: All right. That's what I
11 said in my deposition.

12 BY MR. RAPHAEL:

13 Q Yes, sir. And that was not -- you said
14 that in your deposition.

15 A Yeah.

16 Q And you also said it in the City's
17 deposition on behalf of the City, right?

18 A Right.

19 Q And when I asked you the question of
20 whether the administration costs were intended to
21 cover all direct and indirect costs, you said
22 that's right?

1 A Correct.

2 Q Okay. Historically, Mr. Tuohy, isn't it
3 true that the City's water system has been funded
4 primarily on a pay-as-you-go basis?

5 A That's correct.

6 Q In 2006 the City issued a \$5.5 million
7 bond to finance some of the capital improvements
8 for the water system, right?

9 A Yes.

10 Q And you presented a report at the time
11 that that was adopted, you presented a report to
12 the City Council about that, right?

13 A Yes.

14 Q And you told the City Council, did you
15 not, "because the repayment is budgeted in the
16 water fund, there is no effect upon the City's
17 general fund debt limits as set by the Council's
18 adopted debt policy"?

19 A And that's absolutely correct.

20 Q And that means, does it not, despite the
21 fact that it's a general obligation bond rather
22 than a revenue bond, it will not affect the City's

1 ability to issue future debt because the repayment
2 will come from water revenues, right?

3 A Right.

4 Q Has the City reported to its auditors
5 any concern about its ability to repay any
6 outstanding bond?

7 A No.

8 Q You indicated on direct examination that
9 you thought a profit was needed to compensate the
10 City for operating its water system. Do you
11 remember that?

12 A Yes.

13 Q How is it possible, sir, that Fairfax
14 Water has operated its water system in Fairfax
15 County and provided service to Loudoun, Alexandria
16 and Prince William for decades without taking any
17 profit?

18 MR. THOMAS: Objection, Judge. I think
19 there's no foundation for that with respect to
20 this witness and his understanding of Fairfax
21 Water's operation. And it calls for him to
22 speculate.

1 THE COURT: Ask him the foundational
2 question first.

3 MR. RAPHAEL: All right.

4 BY MR. RAPHAEL:

5 Q You -- you're familiar -- you've
6 testified about other water systems, right?

7 A Right.

8 Q And you are familiar with the Fairfax
9 County Water system because you look -- you
10 explored it as part of your reporting to the City
11 Council; isn't that true?

12 A What do you mean?

13 Q Didn't you conduct a financial review of
14 the Fairfax Water system in 2006 in connection
15 with talking to the City Council about the water
16 disputes between the City and Fairfax Water?

17 A I took a look at their 2005 CAFR; that's
18 correct.

19 Q Right. And you're aware that Fairfax
20 Water does not earn a profit on the water service
21 that it provides to its customers, correct?

22 A It depends on how you define it. They

1 always come out to the plus every year.

2 Q Right. But they don't transfer money to
3 the Fairfax County government, do they?

4 A Right. But that's a different question.

5 Q But you're aware that they're a
6 not-for-profit operation?

7 A Correct.

8 Q How is it possible, Mr. Tuohy, that
9 Fairfax Water has operated as a nonprofit
10 operation since 1959, without taking out any
11 profit?

12 MR. THOMAS: Same objection, Judge.
13 Calls for speculation. Really asks this witness
14 for a legal conclusion inasmuch as the Fairfax
15 Water Authority is set up under a statutory
16 regime, totally different than what this case
17 relates to.

18 THE COURT: Well, the testimony of
19 Mr. Tuohy, as I understood it, was with regard to
20 the City's operation; that it could not operate
21 without a profit.

22 And the cross-examination is, well,

1 Fairfax Water does so. You know that to be the
2 case. How can that be so. I think it's a proper
3 question. Objection overruled.

4 THE WITNESS: Okay. Perhaps I'm kind of
5 uncomfortable doing this. I haven't done what I
6 would consider to be the proper analysis to find
7 out how they do it.

8 Fairfax Water has an entirely different
9 business model than ours, entirely different.
10 Almost half of their water is wholesale. So
11 essentially what they're doing is they're able to
12 lay off a lot of their cost to the wholesale
13 customers. And not improperly so, but they're
14 able to do so.

15 So if you're talking about that versus
16 approximately 6 percent of ours is wholesale, it's
17 an entirely different business model.

18 BY MR. RAPHAEL:

19 Q All right.

20 A So there's no commonality between the
21 two. They always come out to the plus, which is
22 good. That's what they're supposed to do.

1 Q You have no basis to say, do you, that
2 Fairfax Water makes a profit on what it sells to
3 its wholesale customers? What's your basis for
4 that?

5 A No. I didn't say they make a profit. I
6 said they're able to put a number of their costs
7 off. You know, for example, there's a capital
8 contribution that they use the availability. So
9 they have to purchase into that.

10 Q Right.

11 A I don't know the cost structure of how
12 they do it to the wholesale customers.

13 Q Right.

14 A Nor do I know the cost structure of how
15 they put it off onto their general customers. Nor
16 do I even know the structure of their investment.
17 They're sitting on a couple hundred million
18 dollars in cash, which obviously they can use as
19 an offset to their rates.

20 Q Right.

21 A What you're asking me to do is to do,
22 essentially, 2 weeks worth of work sitting up here

1 without the CAFR in front of me.

2 Q Right.

3 A I don't know how they do it.

4 Q You don't know how they do it?

5 A No.

6 Q You're aware that Fairfax Water sets its
7 rates based on a cost of service study, correct?

8 A No.

9 Q You don't even know that?

10 A I have never seen any study, so I have
11 no idea.

12 Q All right. At the time I took your
13 deposition in this case, Mr. Tuohy, when you were
14 speaking on behalf of the City, am I correct that
15 the City had not done anything to quantify the
16 amount of risk that its residents have taken to
17 operate the water system?

18 A If you're asking if we've done a study
19 to quantify the risk, the answer is no.

20 Q My question was had you done anything to
21 quantify the risk?

22 A No.

1 Q And as of the time I took your
2 deposition, the City had not done anything to
3 calibrate the return on equity it has taken from
4 the water system over the years to the amount of
5 any risk it had incurred, correct?

6 A That's correct.

7 Q Mr. Thomas asked you questions about
8 your participation in discussions with Fairfax
9 Water in the past couple years concerning the
10 possibility that Fairfax Water might purchase the
11 City's water system, right?

12 A Yes.

13 Q And you testified that, at some point,
14 those discussions came to an end, right?

15 A That's correct.

16 Q And you were here yesterday when
17 Mr. Murray testified that he received -- Fairfax
18 Water received a letter from Mayor Robin Gardner
19 in January of 2007 indicating that the City was
20 not interested in selling the water system?

21 A Correct.

22 Q Right?

1 And is that -- does that timing sound
2 right to you?

3 A That sounds about right.

4 Q Okay. And a month after that, the City
5 filed a lawsuit against Fairfax Water, didn't it?

6 A Yes.

7 Q And the City was claiming that it had an
8 exclusive service area in Fairfax County and no
9 one else, including Fairfax Water, could provide
10 service there, right?

11 A I wasn't a participant in the lawsuit,
12 so I'm going to have to say yes, with the caveat
13 that I didn't really do anything.

14 Q Okay. Can you identify any instance,
15 Mr. Tuohy, in which anyone from Fairfax Water said
16 that it would forever give up its right to
17 challenge the City's future water rates?

18 A I have never heard that, no.

19 Q Let's switch gears. I want to ask you
20 about the 2010 budget. The City approved its
21 budget for fiscal year 2010 on April 27th of this
22 year, correct?

1 A That's correct.

2 Q Mr. Sapp, could you please bring up
3 Plaintiff's Rebuttal Exhibit 12.

4 MR. THOMAS: Judge, if I could, I think
5 this is beyond the scope of direct.

6 THE COURT: Objection overruled.

7 MR. RAPHAEL: And I think it's going to
8 be easier to navigate through the screen, but I
9 have paper copies of the 2010 budget as well.

10 THE COURT: All right. I would like
11 that, please. Thank you. I'm very low tech,
12 Mr. Raphael.

13 MR. RAPHAEL: Not in our eyes, Your
14 Honor.

15 THE COURT: Thank you.

16 THE WITNESS: I have to admire that.
17 I'm a Luddite myself.

18 BY MR. RAPHAEL:

19 Q Now, you recognize this as the adopted
20 budget for the City of Falls Church for fiscal
21 year 2010, correct?

22 A That is correct.

1 Q And the budget contains a memo from the
2 City Manager that summarizes what's in it, right?

3 A That's correct.

4 Q And that's at page 1 after the table of
5 contents, right?

6 A Yes.

7 Q Okay. That's signed by the City
8 Manager, Wyatt Shields, right?

9 A Yes.

10 Q You review this before it's finalized,
11 correct?

12 A I actually wrote it.

13 Q All right. Thank you. Now, if you turn
14 to page 7 of this document, there's a report here
15 in Mr. Shields' cover report that you wrote about
16 the water and sewer funds, right?

17 A Yes.

18 Q And look at these two sentences I've
19 highlighted in the top two paragraphs. And for
20 the record, it reads: This budget continues the
21 sound policy decisions of prior Councils, and
22 places the enterprise funds operated by the City

1 on a sustainable and financially secure footing.
2 The water and sewer funds are supported by a
3 stable rate structure that will remain unchanged
4 for the third straight year.

5 Do you see that?

6 A Yes.

7 Q And you wrote those statements, right?

8 A Yes.

9 Q In fact the City this year -- this
10 fiscal year did not need to include a rate
11 increase in its water rates for fiscal year 2010,
12 correct?

13 A That's correct.

14 Q And the reason for that was that the
15 revenue from existing rates was sufficient, right?

16 A Well, the revenue was sufficient, but,
17 also, we did cost containment as well.

18 Q Okay. And the rates for 2010 are the
19 same rates that were set originally by the City
20 Council in 2005 --

21 A Correct.

22 Q -- right?

1 And I think there may be a mistake in
2 here. I think you indicate that the -- it says
3 that the rates for the third straight year will
4 not have to be increased. Wasn't this actually
5 the fifth straight year that they didn't have to
6 be increased?

7 A I think you're right. Yeah.

8 Q Okay. And this budget also included --
9 includes a transfer of a return on equity from the
10 water fund to the general fund in the amount of
11 \$2.2 million, right?

12 A That is correct.

13 Q And this budget, as we said, this was
14 approved in April of 2009, right?

15 A Yes.

16 Q And this lawsuit was filed in December
17 of 2008, correct?

18 A Correct.

19 Q And Count 9 that brings us here today
20 was added in January of 2009?

21 A Correct.

22 Q All right. So you were aware of this

1 litigation at the time you were considering what
2 to put in your 2010 budget?

3 A That's correct.

4 Q And, in fact, you were aware that Judge
5 Thacher overruled the City's demurrer to Count 5
6 on March 13th, 2009. That was more than a month
7 before the City adopted the budget, correct?

8 A Can you tell me what a demurrer is?

9 Q You're aware that the City filed a
10 demurrer, a motion to dismiss Count 5 on the
11 ground that it failed to state a claim?

12 A I don't know what it was. I just know
13 that this went forward.

14 Q Right. You were aware that there was an
15 opinion from Judge Thacher concerning the -- that
16 the case would go forward on this count?

17 A Right.

18 Q Right. And that was in March of 2009?

19 A Correct.

20 Q And a month after that, knowing that the
21 case was going forward, the City had adopted its
22 budget, right?

1 A Correct.

2 Q And the budget memo is actually
3 addressed to, not only to the City Council, but to
4 the taxpayers and citizens of the City of Falls
5 Church, right?

6 A That's correct.

7 Q Okay. And you wanted to be honest with
8 them in this document, didn't you?

9 A Yes.

10 Q That's sort of the -- that's the most
11 important thing one can do as a City official is
12 to be honest with the citizens?

13 A Absolutely.

14 Q Now, can you point to me in this
15 document anything that expresses any concern about
16 the impact of Count 5 on the City's ability to
17 finance its water system?

18 A Well, absolutely not, because, as I'm
19 sure you're well aware, first of all, state code
20 specifically allows us to do this. And I'm not
21 going to override what I believe to be in the
22 opinion of the General Assembly is okay.

1 The second thing, and I'm sure, Your
2 Honor, this will come as no surprise, the City's
3 position is that the suit has no merit.

4 Q Right.

5 A And certainly the citizenry are well
6 aware of what's going on here. It's been actively
7 reported to the press. They're in blogs talking
8 about it. It's, you know, something -- I have no
9 particular concern about this.

10 Q Okay. So let's just unpack that a
11 little bit. My question was, there's nothing in
12 this document that provides any -- that expresses
13 any concern by the City about what might happen to
14 the City's finances if Count 5 were successful?

15 A That's correct.

16 Q Okay. In fact, you've got a section of
17 the cover memo that you wrote that talks about
18 other possible concerns. Let's go, Mr. Sapp,
19 please, to page 7 of the document.

20 THE COURT: Can I interrupt you,
21 Mr. Raphael?

22 MR. RAPHAEL: Yes, Your Honor.

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1 THE COURT: You asked Mr. Tuohy where in
2 here it's shown that there will be a transfer from
3 the water fund to the general fund.
4 MR. RAPHAEL: And you would like to know
5 where that is?
6 THE COURT: I believe he answered
7 affirmatively, but I just don't see it.
8 MR. RAPHAEL: Well, he didn't refer to a
9 page. He said it was 2.2 million.
10 THE COURT: Right.
11 MR. RAPHAEL: If you want to find that,
12 Your Honor, it's on page 37 of the document.
13 THE COURT: Okay. That's fine. Thank
14 you so much.
15 BY MR. RAPHAEL:
16 Q All right. The -- now, page -- okay.
17 Here we are on page 7 of Plaintiff's Rebuttal 12,
18 which is the FY 2010 fiscal year budget.
19 Do you see at the bottom of the page
20 there's a paragraph that says "looking ahead"?
21 A Right.
22 Q And this next section goes on to talk

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1 about financial uncertainties for the City, right?
2 A Right.
3 Q And it talks about uncertainty in the
4 real estate markets, right?
5 A Oh, absolutely. The whole series of
6 uncertainties that are out there. None of this
7 should be news to anybody that reads the
8 newspaper.
9 Q It talks about uncertainties in federal
10 funding, right?
11 A Correct.
12 Q It talks about declines in the value of
13 investments, right?
14 A Right.
15 Q And it talks about a variety of possible
16 future problems?
17 A Absolutely.
18 Q It doesn't mention anything about water,
19 does it?
20 A Of course not.
21 Q Okay. And you said that the citizens
22 are fully aware of what's going on in this case

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1 because they can read blogs about the case?
2 A Blogs, newspapers. I mean, it's been
3 heavily reported, as I'm sure you're well aware.
4 Q And you're comfortable relying on the
5 blogs and the newspapers to discharge the City's
6 obligation to inform the citizenry of what's going
7 on?
8 A And public hearings and Town meetings.
9 I mean, there's been a variety of ways of getting
10 this out.
11 Q When did you last have a public hearing
12 about the substance of Count 5?
13 A We don't have a public hearing on the
14 substance of Count 5. The public hearing is on
15 the budget as a whole.
16 Q Right.
17 A Any and all topics in the budget are
18 subject to public hearing.
19 Q And was there any discussion at the
20 public hearing on the impact of this lawsuit on
21 the budget?
22 A I don't recall anybody being

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1 particularly concerned about it.
2 Q Okay. Now, before this budget was
3 adopted in April of 2007, you and Mr. Shields
4 discussed what you might have to do in the new
5 fiscal year in the event that the Court in this
6 case ruled that the general fund transfers were
7 illegal, right?
8 A Did I testify to that?
9 Q You did.
10 A Okay. I don't remember that discussion.
11 Q Would you like me to refresh you on it?
12 A Sure.
13 Q Question -- page 106, question: Tell me
14 what discussions you had with Mr. Shields about
15 what effect it would have on the City's financial
16 operations if the Court were to order that the
17 City could no longer transfer monies from the
18 water fund to the general fund, whether as a
19 return on equity or management fee?
20 Answer: Well, the discussion is in the
21 context of developing the 2010 budget. So it is
22 an element of the 2010 budget. So we would have

1 to make some sort of adjustment if this is no
2 longer there.

3 A Right. That's a fair statement,
4 obviously.

5 Q And notwithstanding this lawsuit, you
6 and the City obviously chose to include a
7 \$2.2 million management fee/return on equity
8 transfer in the 2010 budget, right?

9 A Absolutely.

10 Q Okay.

11 A I think it's very clear that we -- the
12 City's position is that this has no merit.

13 Q Right. It didn't affect what you did on
14 the 2010 budget?

15 A No.

16 Q What's the real estate tax for FY 2010?

17 A \$1.07 per hundred.

18 Q Right. And how much money is
19 represented by a 1 cent change in the real estate
20 tax?

21 A \$350,000.

22 Q So the budgeted transfer from the

1 management fee is worth about 6 cents on the real
2 estate tax rate?

3 A If you want to do that, yeah.

4 Q Well, isn't that common? Isn't that
5 common in the City of Falls Church to express
6 conversions like that?

7 MR. THOMAS: Objection to the form of
8 the question, Your Honor. Common for the City of
9 Falls Church?

10 MR. RAPHAEL: That's fair. Let me
11 restate that.

12 BY MR. RAPHAEL:

13 Q Isn't it common for you and the
14 financial staff to speak about what effect a
15 monetary amount has in terms of its value in cents
16 on the tax rate?

17 A Well, it's certainly common for
18 politicians to do that, yes.

19 Q And you've done that, too, haven't you?

20 A Sure.

21 Q Okay. And you're not a politician?

22 A Thank God.

1 Q All right. Now, if the Court were to
2 order the City to stop transferring a return on
3 equity from the water fund to the general fund,
4 the City would either have to cut its general fund
5 expenses or increase taxes to offset the revenue
6 loss, correct?

7 MR. THOMAS: Objection, Judge. I think
8 that asks this witness to speculate.

9 THE COURT: How would he know that?

10 MR. RAPHAEL: He's the Chief Financial
11 Officer. He was allowed to ask all kinds of
12 questions, what would you have done if. And this
13 is proper rebuttal.

14 THE COURT: Well, that's true. That's
15 true. I permitted that. I'm going to let him
16 answer that. Objection is overruled. You're
17 correct.

18 THE WITNESS: Well, if I could recast
19 that, we'd have to increase revenues, but not
20 necessarily increase taxes. Because as I
21 mentioned, again, yesterday when I gave my
22 one-minute brief on how the budget is prepared,

1 it's an equation. You have all these different
2 revenues. You have all these different expenses.

3 What Mr. Raphael is trying to do is draw
4 a direct linear relationship between the transfer
5 and the tax rate. That absolutely cannot do. If
6 you were to go through my deposition, he
7 repeatedly tried to get me to say that and I
8 repeatedly told him that that's not true.

9 BY MR. RAPHAEL:

10 Q Right. But if you listen to my
11 question, that's not what I asked you.

12 My question was, isn't it true that if
13 you had to make up for the revenue loss if the
14 Court said you can't transfer this money anymore,
15 there are a variety of things you can do. You
16 could cut expenses, right?

17 A Correct.

18 Q You could find other sources of revenue,
19 right?

20 A Correct.

21 Q Or you could increase taxes?

22 A That's a source of revenue.

1 Q Yes, sir. Right. And that was my
2 question.
3 A Your question was would I have to
4 increase taxes.
5 Q No. It was you would either have to cut
6 your general fund expenses or increase taxes. And
7 you're right. I didn't say or find other sources
8 of revenue.
9 A Right.
10 Q But there are a variety of things you
11 would have to look at, right?
12 A Exactly right.
13 Q Okay. And while that would not be
14 financially optimal from the City's perspective,
15 it would also not be a huge problem for the City,
16 would it?
17 A It would be unpleasant but it wouldn't
18 be a huge problem. We could do it.
19 Q Right. And I asked you that question in
20 your deposition?
21 A Yeah.
22 Q And you told me it would not be a huge

1 problem. And you didn't seem to be that concerned
2 about it. Isn't that a fair statement?
3 MR. THOMAS: Objection, Judge. That's
4 an unfair question. He's characterizing the
5 demeanor of a witness in a deposition.
6 THE COURT: I think Mr. Tuohy can
7 respond to it. He's -- he knows what's going on.
8 He can answer the question.
9 Go ahead, Mr. Tuohy.
10 THE WITNESS: Yeah. It was very fair to
11 say that I would make it work.
12 BY MR. RAPHAEL:
13 Q Right.
14 A Absolutely.
15 Q I would like to play that, Your Honor.
16 Ken, would you play that clip, please.
17 (Whereupon, a video clip was played and
18 herein transcribed as follows:)
19 Q (By Mr. Raphael) How much of a
20 financial hardship would that be for the City?
21 (MR. THOMAS): Objection. Go ahead.
22 (THE WITNESS): We could do that.

1 Q (By Mr. Raphael) You could do it. How
2 painful would it be?
3 (MR. THOMAS): Objection.
4 (THE WITNESS): Well, it would be
5 painful in this context. Everybody is having
6 financial difficulties.
7 Q (By Mr. Raphael) But it wouldn't be --
8 it wouldn't cause you to go into bankruptcy?
9 A Oh, no. Certainly not.
10 Q I'm taking from your answer that it
11 wouldn't be optimal, but it also wouldn't be a
12 huge problem?
13 A Correct.
14 (Whereupon, a video clip concluded and
15 the hearing continued as follows:)
16 THE WITNESS: Yeah. And that's exactly
17 what I just said.
18 BY MR. RAPHAEL:
19 Q Right. You didn't seem very concerned
20 about it. Is that a fair statement?
21 A Not being concerned is probably too much
22 reading into it. But something that -- you do

1 what you've got to do.
2 Q Right. Okay.
3 A We clearly made it clear that it
4 wouldn't be optimal. I used the word "painful"
5 here in the courtroom. "Optimal" there. But it
6 doesn't change the answer, which is certainly it
7 would not be something I would seek out.
8 Q You could live with it?
9 A I would have to live with it.
10 Q Yes, sir. And you could?
11 A Yeah. You have to live with what you
12 have to live with.
13 Q Right. Now, Mr. -- Mr. Thomas asked you
14 some questions about the Town of Vienna's system;
15 is that right?
16 A That's correct.
17 Q The City -- you said the City is
18 considering whether to buy the system. The City,
19 isn't it true, has also been in negotiations for a
20 potential long-term wholesale customer contract
21 through Vienna?
22 A That's correct.

1 Q And there's been a term sheet that's
2 been prepared between the City and Vienna relating
3 to that potential wholesale customer contract,
4 right?

5 A That's correct.

6 Q And under that contract, if it's
7 approved, Vienna would be paying for the cost of
8 service plus a 10 percent management fee, right?

9 A That's correct.

10 Q And that management fee would be agreed
11 to by the government of the Town of Vienna, right?

12 A Correct.

13 Q Now, I asked you some questions about
14 Vienna in your personal deposition. Do you
15 remember that?

16 A Yes.

17 Q And I asked you if you knew -- what you
18 knew about the Town of Vienna's approach with
19 regard to a return on equity. And, at that time,
20 you didn't know how they computed it, did you?

21 A No.

22 Q Okay. And you also were asked some

1 questions about Defendant's Exhibit 40.
2 Ken, can we bring that up, please.
3 DX-40.

4 This is the comparative rate sheet
5 showing the different rates charged by the
6 different public water providers.

7 Okay. And Ken, if you could magnify the
8 top of the screen showing down to "The Town of
9 Vienna, inside Town limits."

10 Okay. Do you see that, Mr. Tuohy?

11 A Yes.

12 Q All right. So the Town of Vienna is at
13 the high end of what water utilities charge, isn't
14 it --

15 A Yes, it is.

16 Q -- for water?

17 A Yes.

18 Q And the highest one is the Town of
19 Leesburg for its outside-City customers, right?

20 A If you don't count Virginia America.

21 Q Well, Town of Leesburg is at the top,
22 correct?

1 A Correct.

2 Q And that's for its outside-City
3 customers, right?

4 A Correct.

5 Q And those are the -- that's the charge
6 that's been struck down by the Circuit Court of
7 Loudoun County, right?

8 A I understand that's the case, yeah.

9 Q And they're having to redo their outside
10 customer rate, correct?

11 A Yes.

12 Q And then we go two notches down, and we
13 have the Town of Vienna, outside town limits,
14 \$112.88. And for the inside customers, it's
15 \$103.76, right?

16 A That's correct.

17 Q And you haven't studied how they compute
18 that rate differential, right?

19 A No. I haven't studied how they do that.

20 Q And so the Town of Vienna is at the high
21 end of the range, is it not?

22 A Yes.

1 Q You were also asked some questions about
2 the Falls Church leak rate. And you said it
3 was -- the lost water rate. You said it was
4 15 percent?

5 A Right. Correct.

6 Q Has the leak problem gotten better or
7 worse over the years?

8 A I have no way of knowing that.

9 Q All right. Well, let's -- Mr. Sapp,
10 would you bring up Plaintiff's Exhibit 13, please.
11 These are the minutes of a November 27, 1995 City
12 Council meeting. Let's go to page 2. You see at
13 the time, the City Manager was David Lasso?

14 A Yes.

15 Q Okay. Let's go to page 2, please.

16 MR. THOMAS: Your Honor, if I could --
17 excuse me. If I could, I think we're about to go
18 to parts of minutes that are in the nature of --
19 parts of minutes that we objected to for reasons
20 we've stated earlier.

21 So I think this is hearsay. He's asking
22 the witness about that.

1 MR. RAPHAEL: I haven't gotten to it
2 yet.
3 THE COURT: Well, we made a distinction
4 between a report of a City employee or officer
5 versus the minutes which reflect the comments,
6 observations, et cetera, by members of the Council
7 and Mayor.
8 Doesn't this fall into the prior
9 category?
10 MR. THOMAS: Well, I think we're going
11 to the former category. And if it does, I object
12 to it. If it falls in the latter category, then I
13 don't.
14 THE COURT: I think it's the other way
15 around.
16 This is the report of an employee as
17 opposed to anything involving a City Council
18 member or the Mayor.
19 MR. THOMAS: Okay. My suspicion,
20 perhaps not well grounded, is that we were going
21 to the City Council and Mayor.
22 THE COURT: That's off limits. I know

1 Mr. Raphael knows that.
2 MR. THOMAS: All right.
3 BY MR. RAPHAEL:
4 Q Okay. And we have a highlight here from
5 prior testimony. This sentence by Mr. Lasso has
6 been admitted into evidence.
7 I actually wanted to focus on the next
8 sentence that Mr. Lasso said.
9 Ken, if you could deselect the first one
10 and select the second one, please.
11 Okay. And for the record it reads,
12 "he," referring to Mr. Lasso, the City Manager,
13 "said the amount of water lost in the system,
14 usually due to leakage, has been reduced
15 significantly over the last 5 years, from
16 10 percent in FY '91 to 5 percent in 1995. He
17 said this is a significant decrease and noted that
18 the City pays for the water that is lost."
19 Do you see that?
20 A Yes.
21 Q All right. You have no reason to
22 dispute the accuracy of that, right?

1 A I have absolutely no basis one way or
2 the other.
3 Q So why has the leak problem gotten three
4 times worse since 1995?
5 A I have no -- this is the first time I've
6 seen this. I depend on the reports of our
7 engineers. So by the best professional reports
8 that I'm getting from professional engineers,
9 that's what the lost water rate is.
10 Q When was that report produced to us in
11 discovery?
12 A It wasn't a report. I asked the
13 engineer that.
14 Q When did you do that?
15 A I do it every year during the budget
16 process. Probably, you know, maybe January or
17 something.
18 Q When did you last ask?
19 A We had a discussion about this maybe a
20 month ago.
21 Q Okay. The City is including in what it
22 bills to the cost of the water fund its legal fees

1 in defending this case, correct?
2 A That's correct.
3 Q Now, you mentioned that it's -- in the
4 past that City staff and you yourself have
5 discussed the value of a monetary amount in the
6 budget in terms of what it represents in cents on
7 the property tax rate, right?
8 A Correct.
9 Q And if we wanted -- if we want to figure
10 out how much a penny on the tax rate is worth, we
11 can do that from the data in the consolidated --
12 consolidated -- in the CAFRs?
13 A Comprehensive. Yes.
14 Q Yeah. It's -- you look to the schedule
15 in the CAFR that shows assessed property value,
16 right?
17 A Right.
18 Q For commercial and residential property,
19 right?
20 A Real property.
21 Q And you can divide that by 100 and then
22 by 100 and come up with what 1 cent represents?

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1 A Right. That's where I came up with my
2 rough rule of thumb, \$350,000.
3 Q Okay. Mr. Tuohy, thank you very much.
4 THE COURT: Redirect, Mr. Thomas?
5 MR. THOMAS: Very briefly, Judge.
6 THE COURT: Yes, sir.
7 REDIRECT EXAMINATION
8 BY MR. THOMAS:
9 Q Mr. Tuohy, Mr. Raphael asked you some
10 questions about the AWWA. Do you remember those
11 questions?
12 A Yes, I do.
13 Q And I think you gave some testimony
14 earlier about your understanding of the charter of
15 the City of Falls Church?
16 A Yes.
17 Q All right. Do you understand the City's
18 charter to require the City to apply AWWA
19 guidance?
20 A It does not.
21 Q Have you ever had that understanding?
22 A No.

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1 Q Now, Mr. Raphael also asked you about,
2 and you gave some testimony about public hearings
3 in the buildup of the City's budget?
4 A Yes.
5 Q All right. And over the course of your
6 tenure as the City's CFO, have you participated in
7 public hearings about the City's budget as it
8 developed it?
9 A Oh, absolutely, yes.
10 Q All right. Approximately how many?
11 A Let's see. We normally do about three a
12 year. This past year we had a couple Town Hall
13 meetings, and then some meetings that I did not
14 participate in which were one-on-one meetings
15 where anybody could come in and talk to the City
16 Council. This is on Saturdays.
17 So I would say, over the course of my
18 career, probably -- I mean, just in Falls Church,
19 20 some-odd meetings.
20 Q Right. Is it your experience that those
21 public meetings of whatever variety they are are
22 publicly advertised?

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1 A Oh, absolutely.
2 Q All right. And in those 20 some-odd
3 meetings, when, if at all, has Fairfax Water ever
4 appeared at a meeting in the City's budgeting
5 process to object to any rate or charge imposed by
6 Falls Church?
7 A I've never seen them.
8 Q Mr. Raphael asked you about the 2010
9 budget. Do you still have that in front of you?
10 A Yes, I do.
11 Q Okay. If you look at page 7 there of
12 that budget. Right underneath the box there in
13 the middle of page 7, do you see where it says:
14 The water fund -- and I believe you said you wrote
15 this -- the water fund includes funding for
16 capital improvements to maintain the high level of
17 service and reliability that our customers expect.
18 Do you see that?
19 A Yes.
20 Q The capital improvements that you
21 reference there, for how long have those capital
22 improvements been planned?

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1 A The capital improvement process for
2 water systems has a very, very long lead time.
3 Minimum of 10 years. We adopt what's called a
4 10-year comprehensive plan. Then there's actually
5 a formally adopted document which is a five-year
6 capital improvement program, and that's included
7 in here. So we have both the 10-year and a
8 5-year. But it's not uncommon to have even
9 20-year time horizons for major infrastructure
10 projects.
11 MR. THOMAS: Thank you, Judge. Unless
12 the Court has questions, I have no further
13 questions of this witness.
14 THE COURT: I have no questions. Thank
15 you, Mr. Thomas. Thank you, Mr. Tuohy. You may
16 step down, sir.
17 Please call your next witness.
18 MR. THOMAS: Your Honor, if I could have
19 a moment, I would like to prepare some
20 housekeeping matters.
21 THE COURT: All right.
22 MR. THOMAS: And take care of getting

1 some things introduced.
 2 THE COURT: All right. We'll take a few
 3 minutes. The court will be in recess.
 4 (Whereupon, a recess was taken between
 5 10:19 a.m. and 10:45 a.m.)
 6 THE COURT: Yes, Mr. Thomas.
 7 MR. THOMAS: Thank you, Judge.
 8 THE COURT: Yes, sir.
 9 MR. THOMAS: Just a couple of
 10 housekeeping things, Judge.
 11 I'd like just very briefly to proffer a
 12 quick proffer with respect to some of the exhibits
 13 that were refused by the Court, if that is
 14 permissible.
 15 THE COURT: All right.
 16 MR. THOMAS: This relates to Exhibits
 17 29, 43-A, 44, 45, 46, 47 and 52.
 18 And I would simply proffer that those
 19 exhibits would show that the City -- would show
 20 the City's consistent reliance on expert
 21 methodologies to establish its rates, charges and
 22 its transfer policy and its conduct consistent

1 with that reliance.
 2 THE COURT: These were the consultants'
 3 reports?
 4 MR. THOMAS: Correct. Correct.
 5 And I also have a set of exhibits here,
 6 Judge, that were modified as we went. And I have
 7 some that we can hand up here.
 8 THE COURT: I should say for the record
 9 the reason that those exhibits were refused by the
 10 Court is because, first, the City offered
 11 testimony that it had consulted with experts over
 12 the years. And as a result of those
 13 consultations, it put into practice its present
 14 system with regard to transferring funds from the
 15 water utility to the City. So that testimony was
 16 received in that respect.
 17 But, further, that -- and, secondly,
 18 that the City offered an expert witness, a
 19 Mr. Woodcock, who testified, based upon his
 20 professional expertise, et cetera, that what the
 21 City was doing was in his opinion proper, not in
 22 the legal sense, but in the sense of the

1 applicable authorities, the American Water Works
 2 Association, et cetera.
 3 And, third, that because the reports
 4 themselves, if they came in, would plainly be
 5 hearsay and Fairfax Water would not be able to
 6 cross-examine them.
 7 MR. THOMAS: I think that's a fair
 8 account. Thank you, Judge.
 9 MR. RAPHAEL: I'm sorry. I think Your
 10 Honor may have misspoken on the point 2 as to who
 11 offered Woodcock.
 12 I think you said the City offered
 13 Woodcock, and that was Fairfax Water.
 14 THE COURT: Oh, excuse me. Correct.
 15 The City offered Mr. Watkins.
 16 MR. THOMAS: Watkins, right.
 17 THE COURT: Thank you.
 18 MR. THOMAS: Now, Judge, I have a number
 19 of exhibits which I mentioned were modified as we
 20 went. Those include Defendant's Exhibit 41-A, 41,
 21 21, 71-A, and 70-A. And I have originals of those
 22 exhibits which I'd like to pass up to the clerk

1 and copies for the Court. And we provided copies
 2 to Fairfax Water as well.
 3 THE COURT: We're glad to receive those.
 4 MR. RAPHAEL: Subject to my -- any
 5 previously overruled objections, Your Honor.
 6 THE COURT: Absolutely. Yes, sir.
 7 (Defendant's Exhibits 21, 41, 41-A, 70-A
 8 and 71-A were received into evidence.)
 9 MR. THOMAS: And with that, Judge, we
 10 rest.
 11 THE COURT: All right. Let me make one
 12 comment.
 13 The City offered Plaintiff's Exhibit 19,
 14 the October 1999. And I just couldn't get to it
 15 last night. I -- because I teach. By the time I
 16 get home, it's quarter after 9:00. And there are
 17 other things that need to be attended to.
 18 But I'll read it later today, and I'll
 19 advise you all this afternoon whether or not it
 20 will be admitted.
 21 And if so -- if not, of course not. But
 22 what I suspect that many portions of it will be

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1 admitted but perhaps not all of it. But I don't
2 even know if that's the case because I haven't
3 looked at it yet.
4 And I promise, Mr. Raphael, I will not
5 read that which is plainly hearsay. I'm simply
6 going to review it, okay?
7 MR. RAPHAEL: Thank you, Your Honor.
8 Could I just note, I've had a chance to
9 look at this document more carefully.
10 THE COURT: Yes, sir.
11 MR. RAPHAEL: And this document contains
12 numerous of the exhibits that you've already
13 excluded as hearsay.
14 THE COURT: Well, that may make my job
15 all that much easier.
16 MR. RAPHAEL: Yes, sir. And I can
17 identify the page numbers, if that would
18 facilitate your review.
19 THE COURT: Do you want to do that
20 now --
21 MR. RAPHAEL: Sure.
22 THE COURT: -- or do you want to just

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1 give me a note to that effect?
2 MR. RAPHAEL: It will be very quick.
3 THE COURT: Okay. Hang on. Let me
4 get --let me change....
5 Okay. Yes, sir.
6 MR. RAPHAEL: The Defendant's Exhibit 47
7 is found at page CITY-FOIA2 3138.
8 THE COURT: I'm sorry. The number is?
9 You don't need the FOIA. What is the page?
10 MR. RAPHAEL: 3138.
11 THE COURT: 3138.
12 MR. RAPHAEL: Yes. That's Defendant's
13 47 that was refused.
14 At page 3157, that's Defendant's 18,
15 which was refused.
16 At page 3180, that was Defendant's 19.
17 At page 3181, that was Defendant's 43.
18 And at page 3200, that was Defendant's
19 21, which was withdrawn. That's the one that
20 originally was suggested as a report of the City.
21 And we said we thought that was a report of
22 Newport News, and that was withdrawn.

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1 THE COURT: Right.
2 MR. RAPHAEL: Those are just the
3 exhibits that are contained in here that have been
4 rejected as hearsay.
5 There's lots of other hearsay in here to
6 which we would object.
7 THE COURT: Okay.
8 MR. RAPHAEL: And I don't think the
9 City's proffer as to what's in here that they
10 think is relevant.
11 THE COURT: Well, that was three days
12 ago when that was addressed. But it seemed to me
13 it was to show that what the City is doing is --
14 they're properly doing.
15 But let me take a look at it, okay?
16 MR. THOMAS: Thank you, Judge.
17 Judge, I'd like to renew our motion to
18 strike and would like to be heard on that. I'm
19 not sure if the Court would like to do that after,
20 if there is any, rebuttal evidence.
21 THE COURT: Well, I'm really going to
22 decide the case on the merits. I mean, I'm going

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1 to take the motions to strike and subsume them
2 into a decision on the merits.
3 I have all of the evidence. I know what
4 the issues are, I believe. And -- but the motion
5 to strike is reviewed -- is renewed by the City of
6 Falls Church. And the Court is taking it under
7 advisement. All right.
8 MR. THOMAS: Such that the Court's not
9 going to hear argument from either party on our
10 motion?
11 THE COURT: No, sir.
12 MR. THOMAS: All right.
13 THE COURT: Do you all have rebuttal
14 evidence.
15 MR. RAPHAEL: We have a brief rebuttal
16 evidence. But I would like -- I have a motion to
17 strike on the defenses, which I would like to be
18 heard on and it won't take long.
19 THE COURT: I really want to decide the
20 case on the merits.
21 MR. RAPHAEL: I understand, Your Honor.
22 I think I need to get on my record my motion to

1 strike. And I will be quick.

2 THE COURT: Well, then, Mr. Thomas
3 should be able to do the same as well.

4 Why don't we take the rebuttal evidence
5 first. Do you want to do that? Well, I know it's
6 out of sequence.

7 MR. RAPHAEL: I think the difference,
8 Your Honor, is you've heard lots of legal argument
9 on the motion to strike as to their case. What
10 I'm addressing are the affirmative defenses which
11 you've heard no legal argument yet.

12 MR. THOMAS: Well --

13 THE COURT: The affirmative defenses?

14 MR. RAPHAEL: Waiver of estoppel and
15 laches. I think they fail as a matter of law, and
16 I'd like to --

17 THE COURT: Well, I've had a note that I
18 took on Sunday -- made to myself on Sunday evening
19 to put the question to Mr. Thomas. But I didn't
20 want to do that while everything was going on. As
21 whether any of those doctrines apply to a
22 constitutional violation.

1 I mean, just because a person has slept
2 on their rights, I mean, doesn't -- I mean, just
3 assuming they do, if it's a constitutional
4 violation, it's so.

5 Do you want to address that now?

6 MR. THOMAS: I'd be glad to. And I'd be
7 glad to address it with a bench brief that gets to
8 that specific issue, Your Honor.

9 And if the Court would like to hear
10 argument now, I can do that. Or I can pass it
11 up --

12 THE COURT: Is that what you wish to
13 argue now as well, Mr. Raphael?

14 MR. RAPHAEL: I wanted to -- I had some
15 different bases for my motion to strike. But
16 that's certainly one of them.

17 THE COURT: Well, why don't we have -- I
18 mean, I'll it up to you all. Enough argument for
19 you to get in the record. But I'm really not
20 going to decide this case until I've read
21 everything and I've considered everything.

22 MR. RAPHAEL: I understand.

1 THE COURT: And I'm going to invite
2 posttrial briefing. I've only had the benefit of
3 an excellent bench brief filed on behalf of the
4 City.

5 The Fairfax Water should certainly have
6 the opportunity to, you know, have a summing up
7 posttrial brief.

8 MR. THOMAS: Right. I think there -- if
9 I could suggest. There are sort of two different
10 things we're talking about. On the one hand,
11 motions to strike.

12 I mean, I would like to, if the Court
13 would like to indulge argument, whether it is on
14 our own affirmative motion to strike or their
15 motion to strike affirmative defenses, I'd like to
16 be heard if they're going to be heard. And I
17 suspect the same is true.

18 If we're not going to have argument on
19 motions to strike, no matter what strike they may
20 be, well, then, that's fine. We can fold those,
21 what I'm sure will be ample arguments on the law
22 from both sides into posttrial briefing and then

1 argument.

2 But, I mean, just for purposes of
3 planning for today, I think it's probably one or
4 the other.

5 We've had a discussion, and we -- I may
6 be getting a little ahead of ourselves. But we've
7 had discussions, Mr. Raphael and I have, about
8 what kind of posttrial briefing and argument we
9 would suggest to the Court. Obviously subject to
10 whatever the Court wants to do on it.

11 THE COURT: Okay. Do you want to share
12 that with me now?

13 MR. THOMAS: I'd be glad to. Subject
14 to, you know, being able to argue on the motion to
15 strike, if the Court is inclined to entertain
16 their argument on their motion to strike.

17 It strikes me it's either -- either both
18 or none.

19 THE COURT: I would really rather
20 consider it on the papers.

21 MR. THOMAS: That's fine.

22 THE COURT: But you feel you have to get

1 it in the record? I'm just reluctant to make any
2 decision.

3 MR. RAPHAEL: I understand that. And
4 that, no doubt, is prudent. But I think
5 procedurally I feel more comfortable if I had the
6 motion to strike on the record so, in a worst case
7 scenario -- hopefully I'm never there, but in a
8 worst case scenario, I can say the motion to
9 strike should have been granted.

10 THE COURT: Right.

11 MR. RAPHAEL: I just need it for the
12 record.

13 THE COURT: Well, then, why don't you do
14 that. Why don't you each just have a brief
15 summary of what you want to say.

16 And I know how important it is. I'm not
17 disregarding it. But I'm not going to decide the
18 case right this -- obviously, I've given this a
19 lot of thought and I have a very good idea which
20 way I'm thinking about this matter.

21 But nonetheless, it is entitled to the
22 type of effort on the part of the Court that has

1 been put into it by counsel and the parties. And
2 so I just want to be very careful. It's a big
3 case.

4 So go ahead.

5 MR. THOMAS: Well, then, I think that
6 leaves me with a couple of things.

7 First, I mentioned a bench brief on the
8 issue, the very issue the Court just raised with
9 respect to the applicability of the affirmative
10 defense in this case of laches --

11 THE COURT: Yes, sir.

12 MR. THOMAS: -- to a constitutional
13 claim. And I'll give that to you.

14 THE COURT: Yes, sir.

15 MR. THOMAS: As the Court inquired a
16 moment ago about our discussion about possible
17 posttrial procedure. Mr. -- if you can keep me in
18 lines on this, we discussed two possibilities.

19 I'm not sure if the Court wants to take this up
20 now, but we discussed two broad possibilities.

21 One being an opening brief by Fairfax
22 Water, a response brief by the City, and then a

1 reply brief by Fairfax Water followed by argument.
2 And as I think it was Fairfax Water's
3 suggestion.

4 MR. RAPHAEL: We want to -- we --
5 what -- I think we're in agreement that we want to
6 do what the Court thinks is most helpful. And
7 there are two models that we talked about. And I
8 think we disagree about which one would be most
9 helpful. But you should tell us what you prefer.

10 THE COURT: The other model being a
11 simultaneous presentation?

12 MR. RAPHAEL: Yeah.

13 MR. THOMAS: Correct.

14 MR. RAPHAEL: The model I proposed is
15 we'll file an opening brief. We'll say what we
16 think the facts show. Argument. They'll file an
17 opposition. We'll file a reply.

18 I think the other model is they
19 submitting a proposed findings of fact and
20 conclusions of law. They don't want us to have a
21 reply and then argue it.

22 Frankly, my experience, and I don't know

1 if this has been your experience, my experience
2 has been when you have simultaneous filings, you
3 don't have good contact with argument.

4 THE COURT: Right.

5 MR. RAPHAEL: It's much better to have
6 opening brief, a reply brief, an opposition brief
7 and a reply brief. It forces the parties to
8 confront each other's arguments.

9 And I think the Court gets to the point
10 faster that way.

11 THE COURT: Right. No, I agree.

12 That's -- what I would like is this. I
13 would like an opening brief, a response, a reply
14 brief. These don't have to be long. I mean, you
15 all can agree upon something. But we don't need
16 50 pages.

17 And then perhaps have oral argument
18 primarily for the purpose of seeing what questions
19 that I may have for either of you. But perhaps
20 not. We may not need it.

21 MR. THOMAS: All right.

22 THE COURT: Is that agreeable?

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1 MR. RAPHAEL: Yes, Your Honor.
2 THE COURT: That's what we're going to
3 do.
4 MR. THOMAS: All right.
5 THE COURT: Okay.
6 MR. THOMAS: Okay. Could we discuss the
7 page limits at this point, just because I think
8 we'll --
9 THE COURT: What about 15/15/5? Are you
10 all good with that? A brief brief.
11 MR. RAPHAEL: I have a modest proposal.
12 THE COURT: Yes, sir.
13 MR. RAPHAEL: Could we have 30 pages
14 total, however we allocate it?
15 THE COURT: Could you live with 25?
16 That's all you get on a petition for appeal, I
17 think.
18 MR. RAPHAEL: I -- I don't mean to
19 haggle.
20 May I have -- may I have -- may I have
21 20 for the opening and 10 for the reply?
22 THE COURT: 20/10. Can you live with

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1 that?
2 MR. THOMAS: Well, if that's -- if they
3 have 30 pages, then I'd like to have 30 pages.
4 THE COURT: Then you get 30. Okay. All
5 right.
6 MR. THOMAS: All right. And timing?
7 THE COURT: That's up to you all.
8 MR. THOMAS: Okay.
9 THE COURT: Whatever suits you.
10 Obviously the sooner the better. But I don't want
11 to -- the sooner the better, because I have
12 60 matters we're hearing on Friday morning, plus I
13 have a long case tomorrow.
14 MR. RAPHAEL: All right.
15 THE COURT: So obviously. But I don't
16 tend to forget things.
17 MR. RAPHAEL: Why don't we say no longer
18 than 2 weeks and then 1 week between the next two
19 briefs.
20 THE COURT: That's fine. That's
21 perfectly fine.
22 MR. RAPHAEL: Sandy, did you hear this?

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1 MR. THOMAS: Sorry.
2 MR. RAPHAEL: We'll file our opening
3 brief no longer than 2 weeks from now. Then
4 you'll have a week to respond, and we'll have a
5 week to reply.
6 THE COURT: Perfect.
7 MR. THOMAS: We can do that.
8 THE COURT: Perfect. Okay.
9 Now, Mr. Thomas, you may put on the
10 record your argument with regard to your
11 affirmative defense.
12 MR. THOMAS: Well, actually, Your Honor,
13 I was going to make -- at least summarize my
14 argument on a motion to strike.
15 THE COURT: All right.
16 MR. THOMAS: And then I can get into
17 that.
18 THE COURT: Yes, sir. That's fine.
19 MR. THOMAS: Judge, I do think that
20 after 6 or 7 days of evidence that we do -- we
21 should ground this case at least a little bit in
22 where what it really is, and that is, under

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1 Count 5, all there is is a claim of
2 unconstitutionality of the City's rates and
3 charges as applied to Fairfax Water.
4 And I think the Court has heard evidence
5 that there is, from the City, a reliance on the
6 City's charter. And so by definition and by
7 necessity, the Court has to address the
8 constitutionality of the City's charter.
9 The legal standard obviously on a motion
10 to strike at this stage is familiar to the Court,
11 but I think the Court does need to layer into that
12 legal standard the reality of what this is all
13 about is a constitutional challenge to a statute,
14 and, as a consequence, that activity is held to a
15 higher standard.
16 That's legislation, which is what it is,
17 a statute is presumed to be constitutional. And
18 the party of attacking it has the burden of
19 proving that it's unconstitutional, and any
20 reasonable doubt has to resolve in the City's
21 favor.
22 Again, just by way of grounding what

1 we're talking about here, I think there's been --
 2 I think there's been some substantial effort on
 3 the part of the plaintiff to make this case into
 4 something it is not, which is to say make this
 5 claim into a claim of unconstitutionality brought
 6 by the residents of eastern Fairfax County. That
 7 is most definitely not what this case is.

8 The plaintiff does not have that
 9 standing. They've not sought it. They've not
 10 satisfied the standards from the Supreme Court in
 11 the Philip Morris/Chesapeake Bay Foundation case
 12 for any kind of representation standing.

13 The question is whether the statute is
 14 unconstitutional and the City's activities based
 15 on it are unconstitutional as applied to Fairfax
 16 Water.

17 What I think they run into -- and we've
 18 been into this to some degree obviously in our
 19 papers with the Court. But what I think the
 20 plaintiff runs into is a very long line of cases
 21 from the Virginia Supreme Court that provide a
 22 statutory authorization for just exactly what the

1 City is doing and the evidence would suggest that
 2 it is doing with respect to profiting from its
 3 utilities.

4 Again, we have to start with the
 5 charter, Your Honor. And the charter of the City,
 6 I know the language is familiar to the Court, but
 7 the charter passed by the legislature of Virginia
 8 provides that a return on equity may be
 9 transferred to the general fund.

10 As I mentioned at the outset, Your
 11 Honor, of the case, this charter language is not
 12 some sort of outlier. It's not some sort of fluke
 13 in Virginia statutory history.

14 The charter provisions for the City of
 15 Richmond talk about transfer of retained earnings
 16 to the utility -- from the utility fund to the
 17 general fund of that City. And the charter of the
 18 City of Radford talks about the use of profits
 19 from the City's utility operations for industrial
 20 development within the City.

21 And so I think what the Court can take
 22 from that evidence, even looking at the evidence

1 from this case in the light most favorable to the
 2 plaintiff about the uses of the water funds as
 3 transferred to the general fund, I think what the
 4 Court can take from that, the fact of the 1993
 5 charter for the City and these other charters, is
 6 that the Virginia legislature knows full well what
 7 it's doing.

8 And the Virginia legislature is familiar
 9 with the notion of using utility funds for the
 10 purpose -- for purposes unrelated to the utility
 11 and transferring it to the benefit of the
 12 citizens --

13 THE COURT: Even assuming that's
 14 correct, Mr. Thomas, did the General Assembly
 15 realize that the customers from whom fees were
 16 being received for the sale of water by the City
 17 included nonresidents? Did the General Assembly
 18 know that?

19 MR. THOMAS: Your Honor, the General
 20 Assembly is comprised of legislators and senators
 21 from all over the Commonwealth including
 22 representatives of Fairfax, Virginia.

1 THE COURT: But what I'm saying is, by
 2 making reference to other charters that permit
 3 transfers of this nature, are those situations in
 4 which nonresidents are being charged the same as
 5 residents and these -- and these fees or funds
 6 received, some of them are going to the general
 7 fund, which benefits only the residents?

8 I mean, that's the heart of the Fairfax
 9 Water's case.

10 MR. THOMAS: Right. And I think the
 11 Court has heard testimony in this case, and I
 12 don't think it's contradicted, that the City of
 13 Richmond provides service outside of its
 14 boundaries, for example.

15 So as I -- and back to my original point
 16 which I think really does respond to the Court's
 17 concern. Had there been some -- some evidence --

18 THE COURT: I'm not aware of which
 19 jurisdiction provided service outside of its
 20 boundaries that was not as a result of an arm's
 21 length negotiation if there was one in which
 22 citizens, just regular users, were -- were not

1 those cases in which there was a differential
2 rate?

3 MR. THOMAS: I missed the last part.
4 Were not those cases where there was a
5 differential rate? I don't think there's evidence
6 one way or the other on that.

7 THE COURT: Well, I agree with you. I
8 don't -- I don't think that there's -- there's
9 another jurisdiction which is exactly matched
10 based upon the evidence that we've received what
11 Falls Church is doing.

12 MR. THOMAS: Nor do I think that the
13 fact -- the presence or the absence of a
14 differential rate is dispositive of the question.
15 The point --

16 THE COURT: At least it addresses how a
17 return on equity can be treated. There is one way
18 that nonresidents may have to pay more. And both
19 experts have agreed that that might be done for
20 the return on equity or return on investment.

21 But that -- that's, in my view, at
22 least, at this point, question begging the

1 ultimate question.

2 MR. THOMAS: Okay. Well, there is --
3 there are two components here. The complaint
4 is -- I mean, the allegation of the wrongdoing is
5 profit per se, whether it's a dollar or \$5 million
6 as I said, profit per se, and then transfer of
7 profit from utility fund to water fund. That --
8 neither of those --

9 THE COURT: I don't think Fairfax
10 Water's case rests upon that. I think they say
11 the better practice would be not to take a profit.
12 But I don't think they're asserting that's an
13 unconstitutional action. They say that's just not
14 the way you should run a utility.

15 I think the heart of the constitutional
16 argument is that nonresidents are paying for
17 services for residents, and they don't have a
18 chance to say I don't like -- I don't want to buy
19 the swimming pool that Mr. Tuohy referred to.

20 MR. THOMAS: Fair enough.

21 Well, the Court mentioned evidence of an
22 arms' length transaction. And that is the only

1 evidence that we have in this case with respect to
2 this plaintiff. Again, we're not talking about
3 eastern Fairfax County ratepayers. We're talking
4 about a single ratepayer in this case, and it
5 happens to be a water company.

6 And I think the Court can glean from the
7 evidence viewed most -- you know, in most -- the
8 light most favorable to the plaintiff that they
9 are a sophisticated outfit and are perfectly
10 capable of negotiating an arm's length deal.

11 The evidence that the Court has in this
12 case is that, take 1997, and 1995, for example,
13 when they built their -- when they built their
14 headquarters over right off of Route 50 where they
15 have a pipe running down one side of the highway.

16 That they got into an arm's length
17 transaction with the City of Falls Church for an
18 easement agreement. The City of Falls Church
19 said, well, here's how much your hook-up fees are
20 going to be if you want to connect to the City of
21 Falls Church. And they said fine. And they
22 issued a purchase order to that particular vendor.

1 With the backdrop of this being a
2 constitutional claim, there's no principled reason
3 why the Court should and can, I think, distinguish
4 between that and the -- the United States against
5 Newport News case, the McKenzie case we provided
6 the Court a copy of from 1977.

7 These folks signed up for that service.
8 Now, set aside whether they, you know, whether
9 they believed that they've been paying
10 unconstitutional rates for 30 years or 20 years or
11 10 years. But with, you know, a very
12 sophisticated entity in the business that is at
13 issue in this case, with a pipe across the street,
14 signed up to this business in an arm's length
15 transaction.

16 And speculation, and that's all we have
17 on the plaintiff on this is speculation one way or
18 another as to whether there was some sort of
19 negotiated discussion about whether they would pay
20 rates that were tariff rates or rates that were
21 contracts rates.

22 We have an offer and an acceptance from

1 them, from a water company, to take their water
2 from the City of Falls Church. There's no reason
3 why that should take us out of the analysis that
4 Judge McKenzie conducted in the 1977 case.

5 Particularly in light of, Your Honor, in
6 light of the Warwick cases from the Tidewater,
7 that originated down in the Tidewater area and
8 were decided by the Supreme Court in 1930 and
9 1932.

10 I mean, those are very instructive
11 cases. They -- they're postured in a little bit
12 different way because the question was really in
13 those cases whether the City of Newport News could
14 be taxed, should be taxed on the profits that it
15 was taking from the water system. They were
16 resisting that naturally. And so the cases were
17 postured that way.

18 But the important point is that -- is
19 that there was statutory authorization in 1926
20 from the General Assembly that kicked off that
21 first Warwick case, the 1930 Warwick case. There
22 was statutory authorization there that did a

1 couple of things that were really important for
2 purposes of this analysis here.

3 One of them was that it imposed a duty
4 on the City to serve those residents. It imposed
5 a duty on the City of Newport News to serve these
6 residents. Then we had Warwick County, so it
7 imposed a duty on Warwick County and one other
8 County to serve those residents.

9 It authorized the City to charge
10 reasonable rates. And then it told the City what
11 to do with those rates. So they had to be used --
12 the proceeds were -- how to be applied. They were
13 applied solely for the operation, maintenance and
14 necessary extension of the water works and the
15 plant and system and payment of the bonds.

16 The -- the problem with that, and what's
17 important about that Warwick 1 case is that the
18 City had actually realized profits from the
19 operation of its out-of-boundary service. Service
20 authorized by statute. Just like the City of
21 Falls Church.

22 And the question then came up and said,

1 well, the -- the Warwick Court in 1930 said,
2 having a right to charge reasonable rates, the
3 City's water works should be a source of revenue
4 and profit to the City of Newport News. That says
5 to the City of Newport News, Your Honor. That
6 doesn't say to the City of Newport News to be
7 retained in their water fund and used solely for
8 the purposes of reducing the rates of in-town or
9 in-city customers. These are profits to be -- to
10 be retained or used by the City of Newport News.

11 And then it went on to say, and this is
12 in the 1930 case, a very substantial part of such
13 profit being derived from the consumers of water
14 outside of the City of Newport News to whom the
15 City owes no duty other than that which was
16 imposed by the 1926 statute.

17 The Warwick beat went on. And, again,
18 it went on in a way that's really relevant to the
19 case, to the intersection right where the Court
20 finds it.

21 The statute -- the constitutional
22 provisions were changed and the came I say came up

1 again 2 years later in the Virginia Supreme Court.
2 And it's decided in a manner that is flatly
3 contrary to the position that we have here from
4 the City -- I'm sorry, from Fairfax Water.

5 There the Court found that Newport News
6 did, indeed, derive a net profit from the sale of
7 the water sufficient to subject it to tax
8 liability. It said, well, you're making money
9 here, and you need to be taxed on it.

10 And Newport News' reaction was, well,
11 wait a minute, under the statute, under this
12 enabling act that I just described a moment ago
13 for the Court, we're not allowed to take a profit.
14 We're not allowed to take a profit.

15 And the Court said that's not -- that's
16 not the case. That's not the case. You are. It
17 took that statutory authorization, which said,
18 well, here, there are very specific things that
19 you can do here and very specific ways for you to
20 apply those proceeds that you get from providing
21 water service outside of your boundary.

22 And it went on -- and the Court held,

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1 after applying all the gross earnings received
2 from outside consumers to the purposes specified
3 by the Act and then applying such part of the
4 gross revenues received from its own consumers as
5 may be necessary to the payment of allowable
6 expenditures, the City will then have the right to
7 cover all of the net earnings or profits derived
8 from the operation of its entire water works
9 system into the treasury of the City to be used
10 for any legitimate purpose it deems fit.

11 That was a bad result for the City of
12 Newport News. They did not like that. But that's
13 precisely what the statute authorized them to do.
14

15 And it -- I can't emphasize enough, the
16 statute at issue there, the Act of Assembly, the
17 1926 Act of Assembly said you have to charge
18 reasonable rates and here is how you apply them.

19 What the Supreme Court said is we're
20 going to understand that statutory authorization
21 to mean that, within your reasonable rates, you
22 can earn a profit. And moreover, we're going to

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1 understand that statutory authorization to mean
2 that you can take that profit and you can use it
3 for any legitimate purpose you want as a City.

4 There's no reason for us to get -- as
5 we're challenging the constitutionality of the
6 City's charter, there's no reason to depart from
7 that line of reasoning.

8 Now, the common law authorization --
9 that's -- the Warwick case is 1 and 2 of the
10 Supreme Court's understanding of a statutory
11 authorization for a City to profit from its water
12 system.

13 The common law authorization, Judge, and
14 I mentioned Judge McKenzie's decision from 1977 in
15 the Eastern District of Virginia which follows
16 right along in the wake of the Warwick decisions
17 and indeed cites it. And, again, there's no
18 reason for us to get outside of that.

19 But the common law authorization picks
20 up and I think dovetails just perfectly nicely,
21 with the Warwick 1 and Warwick 2 line of cases.

22 Now, the Court is I know familiar with

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1 the Mount Jackson and the Town of Rocky Mount
2 cases because we've briefed them to the Court and
3 we had some discussion about this at the outset.
4 But I think it bears repeating.

5 In the Mount Jackson case, the Court
6 indicated that localities providing utility
7 service beyond their borders should be governed
8 largely by the same rules applied to private
9 corporations and that they are specifically
10 authorized to make a profit for the benefit of
11 their own citizens.

12 The Town of Rocky Mount reaches the same
13 conclusion. It's in 1998. When a municipal
14 corporation provides utility services outside its
15 territorial limits, it is performing a
16 proprietary, not a governmental, function, and,
17 therefore, may consider factors of corporate
18 benefit and pecuniary profit.

19 Perfectly consistent with the Warwick
20 line of cases where, in the Newport News instance,
21 service was provided to areas outside of the
22 County, not on an incidental basis.

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1 So the Falls Church -- the City of Falls
2 Church I think enjoys this clear authority to
3 generate a profit on the sale of water to Fairfax
4 Water.

5 Again, Judge, we're not talking about
6 generating a profit on the sale of water broadly
7 within eastern Fairfax County, but the question is
8 whether it can generate a profit of the sale of
9 water to Fairfax Water. And the practice has been
10 upheld and subject to judicial scrutiny. Just
11 like I mentioned in the 1926 act and Judge
12 McKenzie's decision.

13 Now, again, this is an area where I know
14 the Court has had some -- has had some
15 considerable briefing and argument. But, in the
16 face of that statutory and common law
17 authorization for the City to profit from its
18 out-of-boundary, out-of-territory water service,
19 Fairfax Water has tried to inject a test that
20 doesn't apply. And that's this reasonable
21 correlation test.

22 There are two basic problems with it,

1 Judge. The first is that Fairfax Water either
2 misses or ignores the fact that every case that
3 applies the reasonable correlation test involved a
4 levied charge.

5 THE COURT: Didn't we already have all
6 this argument?

7 MR. THOMAS: I'm sorry?

8 THE COURT: Didn't you give me this
9 argument at the outset of the case?

10 MR. THOMAS: Some flavor of it, I
11 suspect, yes.

12 THE COURT: Right. I mean, it's a great
13 argument. I mean, I love it. But I have heard
14 it. And I thought this was going to be sort of
15 we're going to focus more on preserving for the
16 record the argument with regard to latches.

17 MR. THOMAS: Right.

18 THE COURT: Okay.

19 MR. THOMAS: All right. But believe it
20 or not, I was summarizing.

21 THE COURT: Okay. Well, it's a summary.
22 This is -- it's a great summary, but I really do

1 have it.

2 MR. THOMAS: Okay. All right.

3 Well, I'll continue with a real summary.

4 THE COURT: Summary pages.

5 MR. THOMAS: Okay.

6 THE COURT: Okay.

7 MR. THOMAS: Fundamentally, Judge, what
8 I think -- what I think is going on here is that
9 Fairfax Water is trying to take, and you've seen
10 this through the evidence, they're trying to take
11 this notion that there is a preponderance of --
12 it's not a notion, it's a fact, that there's a
13 preponderance of the City of Falls Church's
14 customers outside of the City, right. And then
15 turn that into a situation that fits within the
16 reasonable correlation test.

17 The problem with that is that those
18 residents outside, and again, there's no reason to
19 be talking about them since the only plaintiff
20 here is Fairfax Water. Those residents outside of
21 the City of Falls Church, they are not subject to
22 any charge levied by ordinance by the City of

1 Falls Church.

2 That's the only territory in which the
3 reasonable correlation test comes up. Whether
4 it's a circus, or whether it's a water -- whether
5 it's water service or sewer service. All right.

6 And so there's no reason to -- what
7 they're trying to do is take this image of
8 90 percent/10 percent out-of-city
9 customers/in-city customers, and then fit that
10 into a reasonable -- the reasonable correlation
11 test. It doesn't fit. It's a square peg in a
12 round hole.

13 They're trying to make this reasonable
14 correlation test something the Supreme Court has
15 never made it. And the way they're trying to do
16 it is through this holding out exception.

17 And, your Honor, I know the Court is
18 familiar with our argument on the holding out
19 exception --

20 THE COURT: Right.

21 MR. THOMAS: -- and it's
22 inapplicability. And I won't go into it further

1 at this time.

2 Finally, Judge, the Court doesn't have
3 to necessarily reject the reasonable correlation
4 test. And based on the evidence here, it could
5 accept the reasonable correlation test, and the
6 City would have no liability, or Count 5 would
7 still fail.

8 And that's for the simple reason, if we
9 return back to the Warwick cases, 1 and 2, you had
10 a statutory authorization that required reasonable
11 rates and told the City what it could do and how
12 it had to apply those rates. And still, and yet,
13 there was a profit component recognized by the
14 Supreme Court within that reasonable rate
15 requirement.

16 And the Court has heard substantial
17 evidence about that. And I think the evidence
18 from Mr. Watkins is un rebutted, which is to say a
19 municipality may set its rates that way. It may
20 arrive at its rates that way, which is to say
21 building in a fair return on its rates.

22 And that would be perfectly consistent.

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1 It would be perfectly consistent with the Warwick
 2 line of cases. And it would, if necessary, fit us
 3 into this reasonable correlation test.
 4 THE COURT: All right.
 5 MR. THOMAS: All right. Judge, just to
 6 focus briefly on the defense of latches, I don't
 7 think there is any question about the facts in the
 8 case that Fairfax Water has been paying the City
 9 of Falls Church's rates since the late 1970s.
 10 Mr. Murray --
 11 MR. RAPHAEL: Excuse me, Mr. Thomas. I
 12 apologize for interrupting.
 13 I thought usually the party moving to
 14 strike the defenses goes first and then the
 15 defendant responds. If he wants to do it, that's
 16 fine.
 17 THE COURT: As long as he's here.
 18 Really, I'm not going to rule on the affirmative
 19 defense today. And this is just to make sure it's
 20 a part of the record. And, of course, the
 21 argument is always very helpful.
 22 But I want to read the briefs. So as

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1 long as Mr. Thomas has the podium, he may complete
 2 his argument.
 3 MR. RAPHAEL: Thank you.
 4 MR. THOMAS: Okay. Thank you, Judge.
 5 You know, again, I think the facts are
 6 without dispute that Fairfax Water, the same
 7 plaintiff here, has understood what the City's
 8 practices are with respect to the finances of the
 9 water system going back to 1959. The Court has
 10 seen that from its lawsuit.
 11 Mr. Murray testified, I think
 12 unambiguously, that the City has paid, it
 13 thinks -- I'm sorry, that Fairfax Water has paid,
 14 it believes, unlawful rates since the late 1970s.
 15 It's an old saw, I think. But it has
 16 plenty of case law that need not be mentioned that
 17 equity aids -- it aids the vigilant.
 18 And the Court has heard from the
 19 testimony of the City that there are long-term
 20 projects, long-term capital projects, for example,
 21 that have been planned over periods of years by
 22 the City, and financed in particular ways that

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1 would have been very different had this issue been
 2 raised in any kind of timely fashion.
 3 With respect to the question of the
 4 applicability of the defense of latches as a bar
 5 to claims challenging legislation as
 6 unconstitutional, we provided the Court with a --
 7 with a brief to that effect. There are a number
 8 of Virginia cases where a bar of latches was
 9 applied to a claim of unconstitutionality.
 10 For example, a redistricting plan that
 11 the Eastern District and then the Fourth Circuit
 12 took up in the White against Daniel case. That's
 13 at page 3, Your Honor, cited at page 3 of our
 14 brief. 909 F.2d 99.
 15 And there were -- in that case, there
 16 was a delay of -- it was years, Judge. And I'm
 17 not sure -- 7 years. A delay of 7 years in
 18 between the redistricting at issue and the
 19 constitutional challenge to that redistricting.
 20 And the defense of latches was found to lie there.
 21 So I understand the Court's -- I asked
 22 the same question whether, you know, a defense of

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1 latches can lie against a claim of
 2 unconstitutionality. And I think the answer to
 3 that question is yes, it can. And we've set forth
 4 in our papers why that is.
 5 THE COURT: Right. No, I've just been
 6 reviewing some of these cases, and I just was
 7 tossing and turning about it because, if it's
 8 unconstitutional, I mean, look at Plessy against
 9 Ferguson. A lot of separate schools were built,
 10 but it was just as wrong in 1896 as it was in
 11 1954. And there we have it.
 12 All right.
 13 MR. THOMAS: So thank you, Judge.
 14 THE COURT: Thank you.
 15 MR. THOMAS: If there are any further
 16 questions. And I appreciate the opportunity to
 17 brief these issues further.
 18 THE COURT: Thank you. Your arguments
 19 are very helpful, Mr. Thomas.
 20 Mr. Raphael.
 21 MR. RAPHAEL: I'm debating which way to
 22 start. I did have a motion to strike on the

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1 affirmative defenses which I would like to get on
2 the record.
3 THE COURT: Right. You can use the
4 podium.
5 MR. RAPHAEL: Thank you. If I might,
6 I'd like to -- let me do the motion to strike on
7 the affirmative defenses here. And I'll be quick
8 about it.
9 THE COURT: That's all right.
10 MR. RAPHAEL: I understand Your Honor's
11 ruling. I have a couple slides I'd like to refer
12 to in response to the City's motion to strike.
13 THE COURT: All right.
14 MR. RAPHAEL: So if I may go back to my
15 table at that time, I would appreciate your
16 indulgence.
17 THE COURT: That would be fine, yes.
18 MR. RAPHAEL: With regard to the
19 affirmative defenses, Your Honor, let me take up
20 waiver and estoppel together. And I do have for
21 the Court some cases I would like to hand up.
22 THE COURT: Thank you.

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1 MR. RAPHAEL: As Your Honor is well
2 aware, the defenses of waiver and estoppel both
3 require prove by clear and convincing evidence.
4 With regard to the waiver claim, the
5 City essentially I guess is arguing that Fairfax
6 Water has forever waived its right to challenge
7 the rates that are charged by Falls Church either
8 now or ever in the future.
9 And there's just been -- there's been
10 zero evidence of that in this case that there was
11 any knowing and intentional relinquishment of a
12 right to challenge something in the future.
13 And the first case I handed to you was
14 Stuarts Draft Shopping Center where the Court
15 makes this point quite plainly.
16 And I flagged the page for you with the
17 flag where the Court says that: Waiver has to
18 be -- you have to have knowledge of the facts
19 basic to the exercise of the right and the intent
20 to relinquish that right.
21 And there's been no evidence presented
22 by Falls Church that Fairfax Water had any intent

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1 to relinquish the right.
2 And then the Court goes on to say that
3 the -- at the bottom of page 6 and on to page 7,
4 that the delay in asserting a right is not a basis
5 to find a waiver.
6 At the top of page -- first full
7 paragraph on page 7: Perceiving no essential
8 difference between the principles of waiver
9 applicable to a partial performance of the
10 contract and those applicable to its breach, we
11 hold that the buyer's mere delay in asserting its
12 right did not advance an intent to relinquish that
13 right. Accordingly, we concluded that the Court
14 erred in submitting the issue of waiver to the
15 jury.
16 The next case is on -- is really the
17 same -- makes the same point, Dominick versus
18 Vassar from 1988. And the flag I gave you on that
19 one says that, and it's quoting the Maxi decision
20 from 1976. But the Court here says silence or
21 inaction in a absence of a duty to speak does not
22 create waiver of estoppel.

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1 Obviously there is no duty upon Fairfax
2 Water to tell the City that it would never ever
3 ever challenge its water rates in the future. So
4 in the absence of such a duty, there can be no
5 waiver or estoppel. And for those reasons, Your
6 Honor, their defenses of waiver and estoppel fail
7 as a matter of law.
8 I would, Your Honor, like to renew my
9 objection that none of the -- none of the evidence
10 offered by the City in support of a waiver defense
11 was disclosed in the interrogatory.
12 And the waiver interrogatory, the
13 answer, for example, read -- and this is -- it's
14 only a few sentences. The City said:
15 The facts supporting this claim are
16 these: Instead of raising its claims of
17 monopolization and attempted monopolization during
18 the past 20 years, Fairfax Water intentionally
19 referred developers of property within the City's
20 traditional service area to the City up until
21 roughly 2005.
22 Fairfax Water specifically and

1 repeatedly told developers that it could not
 2 provide water service in these areas and that the
 3 City was the provider in such areas.
 4 Fairfax Water knowingly relinquished any
 5 right it had to assert that the City is an
 6 unlawful monopolist or is dangerously close to
 7 becoming one because of the City's reluctance to
 8 relinquish its property and easement rights in an
 9 area the City serviced for decades without Fairfax
 10 Water's objection and with its consent and knowing
 11 encouragement.
 12 So, I mean, nothing in that
 13 interrogatory answer remotely touching on what you
 14 heard from Mr. Tuohy and Mr. Nguyen as any kind of
 15 basis for a waiver claim.
 16 I do think that's unfair. It came as a
 17 surprise here. And I think we -- we dealt with
 18 it.
 19 THE COURT: Right.
 20 MR. RAPHAEL: But it was a surprise and
 21 it was unfair.
 22 Now, so for these reasons, the waiver

1 and estoppel document clearly doesn't apply. And
 2 this isn't even a close case of where they have to
 3 prove it by clear and convincing evidence. There
 4 has been no evidence offered to show a knowing and
 5 intentional relinquishment of the right to
 6 challenge the fees in perpetuity.
 7 THE COURT: Well, there may not be any
 8 evidence of that. But the stronger suit on their
 9 behalf seems to me -- on behalf of the City is
 10 that Fairfax Water has been a customer for eons,
 11 and Fairfax Water is a very sophisticated entity.
 12 And it knows -- has known exactly what has been
 13 going on. And, of course, they tried to negotiate
 14 and work things out which has not come to
 15 fruition.
 16 And with that knowledge, they have
 17 watched Falls Church expand their facilities and
 18 continue under the same practice with the same
 19 transfers. And none of it's secret. It's all
 20 made public.
 21 And now they -- I mean, this is -- this
 22 is a constitutional question put to the Court.

1 But this is a business case. That's what this
 2 case is all about.
 3 MR. RAPHAEL: The --
 4 THE COURT: So they're saying it's --
 5 well, you know what they're saying.
 6 MR. RAPHAEL: No, I understand. I
 7 understand.
 8 But I don't think it goes to the point I
 9 made, which is there has to be -- there has to
 10 be -- there has to be a relinquishment of a known
 11 right. And one -- and can't be based on mere
 12 silence. And that what they're trying to base it
 13 on.
 14 THE COURT: Well --
 15 MR. RAPHAEL: That's what the two cases
 16 have said.
 17 THE COURT: I know. I'm familiar with
 18 both cases.
 19 MR. RAPHAEL: So -- and in --
 20 THE COURT: I just think that the facts
 21 in those two cases are a lot narrower than a third
 22 of the century of particular conduct.

1 MR. RAPHAEL: Well, I just -- just to be
 2 clear on that, I mean, there is evidence in the
 3 record that the -- at various points in time,
 4 Fairfax Water was aware of the fact that the City
 5 was transferring money and that it was treating it
 6 as a profit. That's different from knowledge that
 7 that practice is illegal.
 8 And as you know, namely the Marshall
 9 decision from -- it was from 2008, I think it
 10 really reminded people that the no taxation
 11 without representation clause in the Constitution
 12 really means something.
 13 So --
 14 THE COURT: That was the reason for my
 15 initial question to Mr. Thomas.
 16 MR. RAPHAEL: Yes, Your Honor.
 17 THE COURT: It doesn't lose its -- it
 18 unconstitutionality by the passage of time.
 19 MR. RAPHAEL: That's exactly right. And
 20 under the City's theory, Fairfax Water never ever
 21 could challenge the rates in the future no matter,
 22 you know, how outrageous they were to become.

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1 That just can't be what waiver and
2 estoppel means. That just can't be right. And if
3 Fairfax Water has delayed in bringing this case,
4 it's lost the money it might have had to pay had
5 it brought the case sooner.
6 But it hasn't lost the right to say, in
7 the future, please don't overcharge us and include
8 this transfer. And that's really where I think
9 the defenses go to.
10 Now, with regard to laches, the third
11 case I handed up was E.W. Face & Son versus
12 Cherry. And this case stands for the proposition
13 that laches does not bar continuing conduct in
14 the future. And I tabbed for Your Honor the page
15 of the case.
16 This case involved a nuisance suit where
17 the plaintiff lived next to a brick manufacturing
18 plant for 18 years without complaining about it.
19 And then filed a nuisance case and sought an
20 injunction to stop the brick manufacturer from
21 polluting.
22 And the Court said the evidence makes

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1 that a case of continuing nuisance to which the
2 doctrine of laches does not apply.
3 I think that's pretty close to what we
4 have here. I mean, yes, the City's been doing
5 this for many years. And I think we've shown the
6 pattern and practice of that. But laches doesn't
7 prevent us from saying, in the future, please stop
8 doing that.
9 And that's really all we're asking for
10 in this case.
11 THE COURT: All right.
12 MR. RAPHAEL: Now, so that's my motion
13 to strike with regard to waiver, estoppel and
14 laches.
15 And now, if I may, Your Honor, address
16 the -- respond to the City's motion to strike.
17 THE COURT: Yes, sir.
18 MR. RAPHAEL: Mr. Thomas -- Mr. Thomas
19 said that the McMahon line of cases doesn't apply.
20 And I'm not going to -- I'm not going to belabor
21 this because I did cover it at length in our
22 opposition to their original motion to strike.

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1 THE COURT: Right.
2 MR. RAPHAEL: But just to remind the
3 Court that the McMahon line of cases might more
4 appropriately be called the Robinson line of
5 cases. And I think as we showed on the first
6 motion to strike, Robinson and the Charlottesville
7 case, Marks' Shows, preceded the McMahon line of
8 cases. And those were both extraterritorial tax
9 cases. And there's nothing in the McMahon line of
10 cases to say whether there were outside-city users
11 or not.
12 Now, the City wants to say, well, but
13 our charter allows us to do this. Really there
14 are two points on that.
15 Number 1, assuming what they're saying
16 is right, the charter is subordinate to the
17 Constitution just like the General Assembly's law
18 in the Marshall case was struck down by the
19 Supreme Court in 2008 as violative of the rule,
20 that you can't have taxation without
21 representation.
22 THE COURT: Is that -- am I not correct

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1 that that's the heart of your case?
2 MR. RAPHAEL: That is the heart of our
3 case.
4 THE COURT: What if -- if the City went
5 home tonight and said, well, we thought this thing
6 over, and we're not going to make these transfers
7 from the utility fund to the general fund
8 henceforth.
9 MR. RAPHAEL: We'd be delighted if they
10 did that.
11 THE COURT: No. But would that be the
12 end of your constitutional argument?
13 MR. RAPHAEL: Well, I don't think -- I
14 think what Your Honor -- what that question gets
15 to, if I may, is mootness.
16 THE COURT: Yes, sir.
17 MR. RAPHAEL: And the primary, the
18 leading authority on that is the Laidlaw case from
19 the Supreme Court which says that a defendant's
20 voluntary cessation of conduct does not moot the
21 case, especially if you're seeking injunctive
22 relief.

1 And I think, in light of what's happened
2 here, I mean, they were on notice about this claim
3 since --

4 THE COURT: I know. But I'm just
5 saying, what if they say, we promise we'll never
6 do it again? Would this case not be over?

7 MR. RAPHAEL: I think it would be over.
8 But I'd like that in the order that says that they
9 wouldn't do it. That's what I was getting at.

10 THE COURT: This is just a
11 hypothetical -- I mean, just a question.

12 MR. RAPHAEL: Yes, it would be -- this
13 Count 5 would be over if they tried to agree to
14 that.

15 THE COURT: I'm trying to absolutely
16 confirm that what I believe is the heart of the
17 matter is in fact the heart of the matter.

18 MR. RAPHAEL: That is the heart of the
19 matter.

20 THE COURT: You don't quarrel with --
21 you may not like it, but you don't quarrel with
22 their making a profit on the sale of water.

1 You don't assert that's
2 unconstitutional, do you?

3 MR. RAPHAEL: We don't assert -- and
4 there's been a lot of testimony on how the utility
5 rate-making method works.

6 THE COURT: Right.

7 MR. RAPHAEL: And we don't dispute, that
8 if the City wanted to include a rate of return as
9 part of its rate making for the outside-city
10 customers, it can do that.

11 THE COURT: They can do it.

12 MR. RAPHAEL: What it can't do is take
13 the money out of the water fund, the benefit to
14 the ratepayers in the City is potentially lower
15 rates.

16 THE COURT: Right.

17 MR. RAPHAEL: The City could have done
18 that. They actually looked into doing that --

19 THE COURT: Right.

20 MR. RAPHAEL: -- in 2003. They chose
21 not to. That was their choice. If they wanted to
22 go the other way, they're free to explore that.

1 THE COURT: Right.

2 MR. RAPHAEL: But what they can't do is
3 take the money out and then effectively make the
4 outside-city customers, really all the customers,
5 but particularly the 92 percent who live outside
6 of the City --

7 THE COURT: Right.

8 MR. RAPHAEL: -- pay for all these
9 municipal benefits.

10 THE COURT: All right.

11 MR. RAPHAEL: Now, I do think it's
12 important, however, to respond to the claim that
13 the City is just doing what it's charter
14 authorizes.

15 Because I think the evidence shows
16 that's just not true. And that's why it's
17 relevant to look at the charter.

18 And I've got it up here on the screen,
19 Your Honor. And this is the original 1950
20 charter.

21 And you remember how the
22 section 13.06(d) which you can see here, this is

1 Exhibit 5, Plaintiff's Exhibit 5, it set out the
2 list of how the City was supposed to account for
3 what goes into --

4 THE COURT: Could I go back to the prior
5 question?

6 MR. RAPHAEL: Yes. Yes.

7 THE COURT: If Fairfax Water concedes
8 that the City could make a profit from its
9 nonresident customers, use that money for any
10 purpose it chose when it comes to the City, what
11 is the distinction between doing that and doing
12 what they're doing here?

13 MR. RAPHAEL: It's the first -- you made
14 a slight misstatement in the first part of it.

15 They can't use it for any purpose. It's
16 got to stay in the water system.

17 THE COURT: Okay.

18 MR. RAPHAEL: The benefit to the City
19 ratepayers is lower rates, if they want to do it
20 that way. That's the benefit.

21 THE COURT: So making a profit is fine,
22 but it needs to remain in the water fund.

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1 MR. RAPHAEL: Well, including a
2 return -- I don't mean to quibble, but I think --
3 THE COURT: That's all right.
4 MR. RAPHAEL: -- I think there's an
5 important distinction. The issue is using a rate
6 of return in calculating the outside-city rates.
7 I mean, it's our view that Cities are
8 not in the business to make profits.
9 THE COURT: Right.
10 MR. RAPHAEL: They're nonprofit. That's
11 why they don't pay taxes.
12 That being said, is it proper for a City
13 to get something back for its risk in investment
14 in providing a service outside the City? Yes.
15 You do it in a rate making. You charge a higher
16 rate --
17 THE COURT: Right.
18 MR. RAPHAEL: -- to your outside-city
19 customers. And the benefit is to the inside-city
20 customers who pay less.
21 But it's an enterprise fund. The money
22 stays in the fund. It doesn't get whisked out

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1 every year to fund schools and police and
2 libraries. And that's the problem we have in this
3 case.
4 Now, the charter is important here,
5 because that's -- we're saying the charter is --
6 if it is as the City interprets it, we think it's
7 unconstitutional. There is, under the principle
8 of constitutional avoidance, an argument here by
9 which you don't have to say it's unconstitutional.
10 And I alluded to this --
11 THE COURT: Right.
12 MR. RAPHAEL: -- I mentioned this on the
13 motion to strike.
14 THE COURT: Right.
15 MR. RAPHAEL: But I think the evidence
16 has really demonstrated -- this is the 1950
17 charter. And you see on the left side the section
18 13.06(d) which set out how the director of finance
19 was supposed to account for what was in the water
20 system.
21 And items (1), (2) and (3) add up to
22 line (4), total receipts. That's a the money

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1 coming in. And items (5) through (10) add up to
2 total expenses. That's line (11). Do you see
3 that?
4 And then line (12) was the excess.
5 Line (12) was "excess of receipts over expense or
6 expense over receipts (the difference between
7 items (4) and (11))."
8 Now, the rate-making procedure provision
9 was in section 13.09. And look at what that said.
10 It said, if for any 3 years there was a shortfall
11 comparing line item (4) to line item (11), then it
12 would be the duty of the director of public
13 utilities and the City Manager to recommend, and
14 the council to adopt, a schedule of rates which,
15 in its judgment, will produce receipts equal to
16 expense.
17 And the receipts are from line
18 item (11), and the expense is from line item --
19 I'm sorry, the receipts are line item (4), and the
20 expense is line item (11).
21 So as it was originally structured,
22 there was no surplus built into the rate making.

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1 Do you see that?
2 The surplus was, in a given year, you
3 might have a surplus, but the rates weren't based
4 on that. The rates were based on setting receipts
5 equal to expense. That's how it was originally
6 designed.
7 And then section 13.07 of the original
8 charter addressed what you could do in a year if
9 you might have a surplus.
10 And you'll see it there in the last
11 sentence of 13.07. It says: The whole or any
12 part any excess of receipts over expenses shown in
13 item (12) may, when authorized by the Council by
14 the affirmative votes of at least two-thirds of
15 the entire council, be transferred to the general
16 fund or to the renewal fund of each utility
17 respectively.
18 So, you see, Your Honor, the rates were
19 supposed to be set just like we say they should be
20 set. The receipts equal expense without including
21 a profit transfer in your rate making.
22 And then in a given year maybe if you

1 had a surplus, because it was a really dry year
2 and you sold a lot of water, well, maybe under
3 this, the General Assembly would authorize a
4 transfer to -- of the surplus to the renewal fund
5 or the general fund upon a two-thirds vote.

6 That's not what they're doing now. And
7 why is that? Well, the charter, the charter was
8 changed. But I don't think it was changed in a
9 material way that affects this point. And I just
10 want to quickly demonstrate that.

11 Section 13.06(d), the laundry list, was
12 deleted in 1992. That's Plaintiff's Exhibit 10.
13 But there was no -- they didn't address the other
14 sections in the cross-references to the
15 subsections.

16 So in 1993, they came back in
17 Plaintiff's Exhibit 11, 1993, Va. Acts
18 Chapter 969. And they changed this -- this is the
19 surplus provision.

20 And you see they changed it to eliminate
21 the references to item (12), which was the surplus
22 from 13.06(d). And they just replaced it with the

1 sentence that's at issue here: A return on equity
2 that is calculated using generally accepted
3 accounting principles for utility enterprises,
4 when authorized by the Council by the affirmative
5 votes of a majority of Council may be transferred
6 to the general fund or to the improvement fund of
7 each utility respectively.

8 So by all appearance, this was a change
9 to bring 13.07 in line with the changes made to
10 13.06. It does introduce the concept of return on
11 equity or at least the phrase. But it's still
12 referring to the amount that was the surplus in a
13 given year when receipts exceeded expense.

14 But, again, here again, the General
15 Assembly didn't affect the provision on how you
16 set rates. That still was in 13.09.

17 And so they came back 2 years later in
18 1995, and they eliminated the cross-references to
19 the now deleted portions of 13.06(d). Do you see
20 that? They eliminated item (4) and item (11).

21 But they still said you set rates so
22 that receipts equal expense. That's not what the

1 evidence -- the evidence has been absolutely
2 uncontested that that's not how the City does it.

3 The City sets receipts so that they
4 exceed expense. And they take that surplus every
5 year and they transfer it to the general fund.

6 So, frankly, I think that the City is
7 not following the charter. And it's not doing
8 what the General Assembly thought it might be
9 doing.

10 So there is a nonconstitutional way of
11 getting to the same place.

12 Now, we think that the -- we think the
13 better ruling would be that what the City is doing
14 is unconstitutional and that you should so rule
15 and prevent the City from setting rates such that
16 they include a surplus. I think that violates
17 both the City charter and it violates the McMahan
18 line of cases.

19 Now, the City makes the argument, well,
20 we're just doing what a lot of other people do.
21 But I think that evidence didn't come in the way
22 they think it did. I mean, the evidence on the

1 cross-examination of Mr. Watkins was that all of
2 the examples that he came up with he didn't -- he
3 either didn't know important details about them or
4 there were cases involving wholesale customers
5 contracts where you had an arm's length agreement
6 to negotiate the rate. And that's a
7 fundamentally --

8 THE COURT: So I was not incorrect in my
9 question to Mr. Thomas.

10 MR. RAPHAEL: You were not. Absolutely
11 not.

12 And, I mean, this is even apart from the
13 fact that, you know, because others do it, it must
14 be okay. Well, obviously that's never a legal
15 defense. It's either legal or it's not.

16 When Judge Horne recently struck down
17 the Town of Leesburg's rates to the outside-city
18 customers because they weren't cost based, is that
19 going to affect what some other Virginia
20 localities do? I'm sure it will.

21 I mean, the Town of Vienna is a good
22 example. That evidence came out in Mr. Tuohy's

1 cross that they charge a higher rate to their
 2 outside-city customers. Is it cost based? I
 3 don't know. I haven't looked at that. Might the
 4 decision affect how they do things? Sure.
 5 But that's what a Court does. It
 6 decides what the law ought to be, and everybody
 7 comes in line to that.
 8 I mean, Your Honor's aware that the
 9 Superior Court in Los Angeles just struck down the
 10 actions by the City of Los Angeles in transferring
 11 \$30 million from the water fund to the general
 12 fund because the constitution of California
 13 doesn't permit fees to be set in a way that
 14 generates a surplus.
 15 Does that affect LA in a significant
 16 way? I'm sure it does.
 17 Of course, in our case, we're not asking
 18 for any money to be paid for. We're saying in the
 19 future, please don't do it this way. Please don't
 20 continue to tax us and include a surplus in your
 21 rate-making process. So what we're asking for is
 22 really quite modest.

1 The City argued on the motion to strike
 2 that, well, this is just an arm's length agreement
 3 between Fairfax Water and the City.
 4 That wasn't the evidence at all. And
 5 this came out in Mr. Murray's cross-examination
 6 where he said, at the time that Fairfax Water
 7 moved into these buildings -- I mean, I guess
 8 that's what you can fault them for. You shouldn't
 9 have moved to an area served by Falls Church.
 10 But when at the time they moved in
 11 there, Falls Church was the only service provider
 12 in the area. It charged tariff rates. That was
 13 the testimony. It doesn't negotiate the rates
 14 with Fairfax County ratepayers. They don't have a
 15 choice of saying, well, instead of paying you
 16 \$3.03, we'd only like to pay you \$1.85.
 17 You can't do that. And this goes back
 18 to the holding out doctrine. They are a utility
 19 provider in the area, and you can't negotiate the
 20 rates.
 21 And, of course, the testimony from
 22 Mr. Murray was, as a practical matter, it would be

1 too expensive to try to connect to the Fairfax
 2 Water system on the other side of Route 50.
 3 There's been no counterevidence on that.
 4 Not to mention the fact that the City
 5 has continuously tried to block Fairfax Water from
 6 trying to penetrate the City's market. And there
 7 was no counterevidence on that. Such as, for
 8 example, refusing to relocate easements if the
 9 customer is going to switch service providers.
 10 So, this idea that there was some kind
 11 of choice to use their water is like saying -- and
 12 I made this point on the motion to strike -- you
 13 know, you don't have to license your car in
 14 Northern Virginia.
 15 That's not a defense to, in Marshall,
 16 that the license fee is a tax. Or in the City of
 17 Charlottesville case, you don't have to have your
 18 carnival outside of City limits of
 19 Charlottesville. Well, that's never a defense to
 20 an illegal tax claim.
 21 So you look to the reality of the
 22 situation. And the reality of the situation is,

1 not just Fairfax Water, but all these 110,000
 2 people in Fairfax County who are using Falls
 3 Church Water as a practical matter, for the most
 4 part, do not have a realistic alternative.
 5 And for those that have, the developers,
 6 the new development that Fairfax Water has been
 7 trying to serve, the City has blocked that. And
 8 that's, of course, the subject of the antitrust
 9 case which is postponed until February.
 10 I do want to respond to the City's
 11 comments about the Newport News case. That's --
 12 THE COURT: No citizens wish to join
 13 with Fairfax Water? Not even a single citizen
 14 wanted to be a part of this, to piggyback?
 15 MR. RAPHAEL: It's outside the record
 16 that's been established.
 17 THE COURT: I'm asking you a question.
 18 This is argument.
 19 MR. RAPHAEL: There are tons of people
 20 who would want to -- I don't want to exaggerate.
 21 There are numerous people who would want
 22 to who -- have complained about --

1 THE COURT: And it's only a matter of
2 curiosity.

3 MR. RAPHAEL: There are numerous Fairfax
4 County customers who have complained about what
5 the City is doing. The Authority, Fairfax Water,
6 gets -- and this is not in the record, but since
7 you asked -- the Authority gets E-mails --

8 THE COURT: There was some reference to
9 that.

10 MR. RAPHAEL: -- saying, you know,
11 please don't let Falls Church continue to do to us
12 what they've been doing to us.

13 Did we see the need to join them as
14 plaintiffs in this case? No, because, for one
15 thing, this case -- this is a very expensive case.
16 If Fairfax Water can't bring this case, no one
17 else is really going to be able to bring this
18 case.

19 THE COURT: No. I understand.

20 MR. RAPHAEL: The City is going to
21 continue with these practices unless they're told
22 to stop. I mean, they continued with the practice

1 for their 2010 budget even after Judge Thacher
2 sustained the demurrer.

3 But this notion that there's an arm's
4 length deal here, the facts didn't support that in
5 the slightest.

6 Now, the case that the City seems to
7 hang its hat on the most, apart from Mount Jackson
8 and Rocky Mount, which are the two -- those are
9 the one-off cases where there was an arm's length
10 deal with a single user. And, as we pointed out,
11 that's different.

12 The other case they really hang their
13 hat on is this Newport News case which is the
14 centerpiece of their trial brief.

15 And I want to -- let's me just show you
16 a clip from that case. There are a number of
17 reasons why we think it's distinguishable.

18 Okay. Ken.

19 But in the City of Newport News case,
20 this is from -- this is paragraph 6 and 7 from the
21 case, the Court says: The City of Newport News
22 and the federal government have had an arm's

1 length contract for years and years and years,
2 decades. So the United States agreed to the rates
3 that it was being charged. And it couldn't be
4 heard to complain that the rates were an
5 unconstitutional tax.

6 This is just like the wholesale customer
7 cases. And you remember -- I'll let Your Honor
8 read that.

9 Do you remember, when Mr. Watkins was
10 talking about, well, yeah, Newport News has these
11 wholesale contracts with a lot of the towns it
12 represents. And I asked him, well, when did
13 Fairfax County agree that Falls Church could do
14 these practices with regard to Fairfax County
15 ratepayers? And he didn't know. Obviously there
16 has been no such agreement.

17 So those cases are really fundamentally
18 different. And I think Your Honor sees that.

19 The Warwick case that Mr. Thomas also
20 mentioned is inapposite. The issue in that case
21 was the taxation of the City's property in Warwick
22 County when it was operating a water system and

1 the other County wanted to impose a tax on it.

2 There was no issue about the
3 constitutionality of enabling legislation that
4 addressed whether Warwick County could transfer
5 money or not. So this case does not go to the
6 issue presented here, which is does the Virginia
7 constitution, which prevents taxation without
8 representation, apply in the Falls Church case.

9 Obviously, you know, Warwick County was
10 trying to avoid having to -- I'm sorry. This is
11 the City of Newport News was trying to avoid
12 having to pay taxes in other counties where it had
13 its water operations, property, property taxes.
14 And the counties wanted to be able to impose
15 taxes. I believe the Court said that they could
16 because the City was operating in a proprietary
17 capacity.

18 The constitution has since been changed.
19 But the City had no reason to suggest in that case
20 that they didn't have -- that it was
21 unconstitutional for them to transfer money from
22 the water fund to the general fund.

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1 This issue wasn't raised. It's not --
2 it's inapposite. And we'll address this in the
3 papers, but I just wanted to point that out.
4 Those are the highlights, Your Honor.
5 THE COURT: All right. Thank you.
6 Thank you very much, Mr. Raphael.
7 Yes, sir.
8 MR. THOMAS: Could I respond, or
9 would --
10 THE COURT: You don't really need to.
11 MR. THOMAS: All right.
12 THE COURT: I mean, you really don't.
13 You'll have an opportunity to do so in the papers.
14 And I understand the -- I understand the
15 arguments. And the plaintiff has the last word
16 traditionally. And so I think we have it.
17 Now, did you say you have some very
18 brief rebuttal evidence?
19 MR. RAPHAEL: Yes. And I believe we can
20 easily finish it before the lunch break.
21 THE COURT: All right. That means an
22 hour and 10 minutes is brief?

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1 MR. RAPHAEL: Well, let's see how we do.
2 To begin with, Your Honor, I had a very
3 brief designation from the City's corporate
4 deposition. I provided a copy to Mr. Thomas. And
5 I don't believe he has any counterdesignations.
6 It's from pages 327, 14 through 328, 12.
7 And I would like for Mr. Sapp to play that brief
8 clip for Your Honor now, if that's okay.
9 THE COURT: Yes, sir.
10 MR. THOMAS: I do have a relevancy
11 objection right in the middle of this very brief
12 clip, which I can raise then or I can raise now.
13 THE COURT: Well, why don't you raise it
14 when we get to it.
15 MR. THOMAS: Okay.
16 THE COURT: How does that sound?
17 (Excerpts from the videotaped RULE
18 4:5(b)(6) DEPOSITION OF THE CITY OF FALLS CHURCH
19 were presented as follows:)
20 (Whereupon, a video clip was played and
21 herein transcribed as follows:)
22 Q (By Mr. Raphael) Would you agree with me

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1 it there's a difference between taking return into
2 account and setting what the commodity rate ought
3 to be on the one hand and deciding whether to
4 transfer monies from the water fund to the general
5 fund on the other?
6 A Yes. There is a distinction between
7 those two, yes.
8 Q So in theory --
9 (Whereupon, a video clip concluded and
10 the hearing continued as follows:)
11 MR. THOMAS: There's my objection if I
12 could, Judge.
13 My objection to the question is about to
14 be asked is that it asks broadly of this witness,
15 Mr. Tuohy, a theoretical question about a
16 theoretical City engaged in some sort of
17 differential rate exercise. And I don't think
18 that's relevant to the case.
19 THE COURT: Well, I'm going to permit
20 it. Mr. Tuohy is obviously very well-versed in
21 these matters, very intelligent.
22 And he was very helpful in his testimony

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1 in giving me, for example, hypotheticals, the
2 building of the swimming pool, how you would
3 balance costs versus expenses. And so I think his
4 opinion to a hypothetical would be actually very
5 helpful.
6 Objection overruled.
7 (Whereupon, a video clip was played and
8 herein transcribed as follows:)
9 Q (By Mr. Raphael) A City could charge a
10 different rate to its outside-city customers than
11 its inside-city customers and use a return on
12 investment as part of the methodology for setting
13 the rates for its outside- and inside-city
14 customers?
15 A Right.
16 (MR. THOMAS): Objection. Go ahead.
17 (THE WITNESS): Yes.
18 Q (By Mr. Raphael) And that's a different
19 question from whether the City is going to take
20 money from the water fund and transfer it to the
21 general fund?
22 A That is correct.

1 (Whereupon, a video clip concluded and
2 the hearing continued as follows:)

3 MR. RAPHAEL: All right. That's my
4 brief clip.

5 Your Honor, a few administrative
6 details. I had a Judge yell at me one time when I
7 said I had housekeeping details. I try to avoid
8 that term.

9 THE COURT: Really? A Judge actually
10 yelled?

11 MR. RAPHAEL: Well, I overstated. I had
12 a judge very unhappy with that.

13 THE COURT: I mean that very seriously.
14 I've never had that experience. And I once
15 commented to somebody that someone said that, oh,
16 that's just a particularly nice judge because he
17 never yells anybody.

18 And I said, isn't that funny? What a
19 nice joke.

20 MR. RAPHAEL: This was not a --

21 THE COURT: There's nothing funny about
22 that. Lots of judges yell.

1 So that really actually happened, then?

2 MR. RAPHAEL: This was not in a Virginia
3 court.

4 THE COURT: Oh, well, that explains it.

5 MR. RAPHAEL: Federal court in New York.

6 THE COURT: Yes, sir.

7 MR. RAPHAEL: I would like to move in
8 Plaintiff's Rebuttal 12, which was the City's 2010
9 budget that I examined Mr. Tuohy on.

10 THE COURT: Right. I'm going to receive
11 it. If the City objects the objection --

12 MR. THOMAS: No objection.

13 THE COURT: No objection. Thank you.

14 (Plaintiff's Rebuttal Exhibit 12 was
15 received into evidence.)

16 MR. RAPHAEL: I would like, Your Honor,
17 to, I think it was on day 3, I proffered
18 P Watkins 1 and P Watkins 2, which were
19 respectively Mr. Watkins' expert report and then
20 the deposition excerpt handed in by the City to
21 show what questioning occurred in Mr. Watkins'
22 deposition.

1 And I had offered -- I wanted that in
2 the record so I could demonstrate that what he
3 testified about the first day was not disclosed.

4 THE COURT: I remember receiving those.

5 MR. RAPHAEL: Okay. I wasn't sure --
6 you -- I think you indicated you wanted to think
7 about whether there could be a limit on my
8 proffer. I'm not sure we got to the end point on
9 that.

10 THE COURT: I'm willing to accept those
11 materials as a proffer. But I sustained the
12 objection as to limiting his testimony.

13 MR. RAPHAEL: Understood.

14 And then I would like --

15 MR. THOMAS: That's correct. That's
16 what I recall.

17 THE COURT: Right.

18 MR. RAPHAEL: Okay. And then I would
19 like to proffer, which I'll -- a document that
20 I've marked as P Watkins 3.

21 And P Watkins 3 -- Your Honor had asked
22 about the interrogatory as opposed to the report.

1 And so P Watkins 3 is the interrogatory disclosure
2 which likewise said nothing about what he
3 testified about the first day.

4 THE COURT: All right. That will be
5 accepted as well.

6 MR. THOMAS: Subject to my --

7 THE COURT: As a proffer.

8 MR. THOMAS: Subject to my objection as
9 proffer.

10 THE COURT: As a proffer. Only as a
11 proffer.

12 MR. THOMAS: And my objection to
13 Mr. Raphael's characterization of it.

14 THE COURT: Yes, sir.

15 MR. RAPHAEL: I'm not obviously offering
16 this in evidence. It's a proffer to show what he
17 said.

18 THE COURT: I understand.

19 MR. RAPHAEL: Fairfax Water rests.

20 THE COURT: All right.

21 There's nothing further, Mr. Thomas?

22 MR. THOMAS: Well, Judge, I had -- with

1 respect to those reports that I proffered very
2 briefly at the close of our case, if the Court's
3 inclined, I would like to proffer those exhibits
4 themselves as well in the same manner that these
5 documents have been proffered.

6 THE COURT: I thought we did that. The
7 consultants' reports?

8 MR. THOMAS: Well, if we did that, then
9 that's fine. And we can include them in the
10 record just merely as proffered much like those
11 documents the Court just accepted.

12 THE COURT: I thought we already have
13 done so. And if we have not done so, then the
14 consultants' reports may be proffered. They were
15 refused by the Court for the reasons stated.

16 Actually, I thought we did that at the
17 outset of this dialogue.

18 MR. THOMAS: We may have, and I may have
19 missed it. We'll make sure that we have a set of
20 those to the clerk for that reason.

21 THE COURT: Okay. Mr. Raphael, are
22 you --

1 MR. RAPHAEL: Well, I understand what's
2 good for the goose is good for the gander. I
3 think it's a different situation, though.

4 I'd like to ask the Court's view. When
5 Your Honor refuses an exhibit and a proffer is
6 made about what it would say, has it been your
7 practice to include the exhibit in the record as
8 rejected or simply to have a proffer in the
9 transcript of what the exhibit would have said?

10 THE COURT: I've never been asked that
11 question before.

12 It's simply made a part of the record.

13 MR. RAPHAEL: Okay.

14 THE COURT: And it goes in the boxes
15 that go to Richmond, if someone wants to challenge
16 the trial judge's refusal to admit the exhibit.

17 But I do not consider the merits of the
18 exhibit in reaching a decision in the case because
19 the evidence was in fact refused.

20 Does that answer your question?

21 MR. RAPHAEL: It does. Thank you.
22 Thank you very much.

1 MR. THOMAS: And that's my understanding
2 of it. So we'll make sure that we have copies of
3 those.

4 THE COURT: Okay.

5 MR. RAPHAEL: And then lastly, Your
6 Honor, I do have a notebook of just the -- just
7 the exhibits that we offered that were received.
8 And they're abbreviated and highlighted to show
9 you what we highlighted during our case and during
10 our presentation.

11 It may -- it may make it easier for the
12 Court to find --

13 THE COURT: I'm very happy to receive
14 anything.

15 And if Mr. Thomas wishes to offer a
16 similar exhibit, if he doesn't have it -- or
17 demonstrative exhibit is what it is, and doesn't
18 have it at this time, I'll be still be glad to
19 have it. Very helpful.

20 MR. THOMAS: Thank you, Judge.

21 MR. RAPHAEL: Thank you very much, Your
22 Honor.

1 THE COURT: Very, very helpful.

2 MR. RAPHAEL: Do I take it Your Honor
3 would prefer to have -- not have closing now but
4 to do that after the briefing is done?

5 THE COURT: Yes, sir.

6 MR. RAPHAEL: Okay. That's fine.

7 THE COURT: Yes, sir.

8 Okay. Anything further?

9 I know that I'll have the opportunity to
10 say this again, but I want to speak specifically
11 to Mr. Murray, Mr. Tuohy, and Mr. Foster.

12 First, Mr. Murray, Mr. Raphael and
13 Ms. Moody and of course the assistants who have
14 been helping them in this matter have represented
15 to Fairfax Water exceedingly well. I'm sure you
16 know that.

17 Regardless of the outcome of the case,
18 they cannot be faulted for not having done
19 everything, not only in a very professional matter
20 but a very -- in a manner that's very helpful to
21 making the wishes of Fairfax Water known to the
22 Court. And they're to be commended for their fine

1 work.
 2 Similarly, Mr. Tuohy and Mr. Foster, I
 3 know you know this as well, but the efforts of
 4 Mr. Thomas and Mr. Holzheimer and Mr. Gary and
 5 their assistant as well have been also the very
 6 highest and most professional behavior by counsel.
 7 And it's such a pleasure to be in a case
 8 where the lawyers have worked so hard and managed
 9 to get along and not call each other names and
 10 have just done everything on behalf of, in this
 11 case, the City, as with Fairfax Water.
 12 And regardless of the outcome of the
 13 case, each party has been represented
 14 professionally, excellently in all regards.
 15 I want you all to know that. Okay?
 16 MR. RAPHAEL: Thank you very much.
 17 MR. THOMAS: Thank you very much.
 18 THE COURT: Thank you.
 19 The Court stands adjourned.
 20 (Whereupon, at 11:59 p.m., the hearing
 21 was adjourned.)
 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