

In The Matter Of:

Meeks, et al., v.

Virginia Department of Transportation, et al.

May 1, 2013

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V I R G I N I A:

CIRCUIT COURT OF THE CITY OF PORTSMOUTH

DANNY MEEKS, et al.,)	
)	
Plaintiffs,)	
)	
V.)	NO. 12-1705
)	
VIRGINIA DEPARTMENT OF)	
TRANSPORTATION, et al.,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS

- - -

BEFORE: THE HONORABLE JAMES A. CALES, JR.
 Portsmouth, Virginia
 Wednesday, May 1, 2013

1 **Appearances:**

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TRANSCRIPT OF PROCEEDINGS

- - -

(Court reporter sworn)

(10 a.m.)

THE COURT: Good morning, ladies and gentlemen.

MR. MCSWEENEY: Good morning.

MR. RAPHAEL: Good morning.

THE COURT: I feel like I should lead with a preliminary statement to confirm why we're here and the process that we're going through today.

As I understand, both sides have agreed to the facts and both sides have agreed to a summary judgment; is that correct?

MR. MCSWEENEY: That's correct.

MR. THOMAS: That's correct, Your Honor.

THE COURT: And so today we are going to have -- both sides have presented two briefs, excellent briefs, and long briefs, that the Court has had the pleasure to go over at least four times per brief, maybe more on some of them.

So today the Court's duty is to decide whether or not -- not whether it's a good contract, or not whether the contract is advisable or not advisable, but whether the contract is legal. That's the only

1 decision that I really have to make here today.

2 In a very short way of saying it, I don't
3 care about traffic, I don't care about congestion. I
4 care about it, but it doesn't enter into my ruling
5 today. The only thing that enters into my ruling is
6 whether that contract is legal. And on that issue, the
7 plaintiff in this case has the burden of proof. And
8 according to the language in the Marshall case, it's
9 pretty much beyond a reasonable doubt, as I read
10 Judge Goodwyn's opinion.

11 So having said that, I will say to all of
12 you -- we have a great number of people here -- some of
13 you have a very emotional interest in the outcome of
14 this case. I will tell you up front, I don't want any
15 emotions displayed in this courtroom.

16 Now we may proceed. Who goes first?

17 I have to get -- we have a -- with this
18 wonderful new courthouse, we have a major problem in
19 that the mike head is awful. So I need you all, if
20 possible, to be at the podium. We have mikes down
21 there, but the mike heads are so absolutely directional
22 that you need to be cognizant of the fact that you need
23 to stay right in front of it.

24 MR. THOMAS: Your Honor, hopefully you're
25 able to hear me at this point.

1 THE COURT: Oh, yeah.

2 MR. THOMAS: My name is Norman Thomas. I
3 am a member of the Virginia Attorney General's Office
4 and today in these proceedings, Your Honor, I, along
5 with a number of others from our office, represent the
6 Virginia Department of Transportation, which I will
7 refer to through the procedures as "VDOT."

8 With me today are other members of the
9 Attorney General's office and, briefly, I would like to
10 acknowledge their presence to the Court.

11 First is the Solicitor General of the
12 Commonwealth of Virginia, the Honorable E. Duncan
13 Getchell.

14 In addition is Deputy Attorney General J.
15 Kennerly Davis, who bears primary responsibility over
16 transportation matters from a divisional level.

17 The section chief of the transportation
18 section, Senior Assistant Attorney General Jeffrey
19 Allen is here with me today.

20 And, also, a member of the transportation
21 section, Assistant Attorney General Ellen Porter, all
22 of whom have participated throughout the litigation
23 that commenced, as you know, last July.

24 Your Honor has indicated an outline, if
25 you will, of how we will proceed today. We'll have our

1 arguments. You've indicated you've read the briefs.
2 Anything that we do not specifically argue today,
3 respectfully, Your Honor, we would reserve to the
4 briefs. So that if we don't cover it expressly, that
5 there be no question on the record, should the matter
6 be appealed, that there's a waiver of any --

7 THE COURT: That's certainly understood
8 for both sides. And all four briefs, they will be
9 incorporated into the record, if that's the appropriate
10 way to do it.

11 MR. THOMAS: Yes, sir.

12 THE COURT: We understand what you're
13 saying.

14 MR. THOMAS: Yes, sir. We --

15 THE COURT: Having been down there where
16 you are, years and years ago, I know you don't always
17 say what you plan on saying when you get here, for one
18 reason or another, so we'll proceed with that
19 understanding.

20 MR. THOMAS: Yes, sir. We've learned to
21 be careful to protect our record and that's only a good
22 thing, but we certainly are mindful of it.

23 Your Honor --

24 THE COURT: You're not suggesting that
25 somebody is going to appeal me, are you?

1 MR. THOMAS: We're confident you'll be
2 correct.

3 Your Honor, on behalf of VDOT, I do have
4 prepared remarks; however, much more important than
5 covering things and going through the outline of the
6 argument is the assurance that we answer the Court's
7 questions. So although I have prepared remarks, if you
8 would simply like to ask questions or ask questions
9 along the way, however it is best to explore the issues
10 --

11 THE COURT: Well, you may cover most of
12 my questions.

13 MR. THOMAS: All right. Then I will
14 proceed.

15 THE COURT: I don't have many.

16 MR. THOMAS: I will proceed with my
17 prepared remarks; however, please, at any given time,
18 Your Honor, feel free to ask a question and I will do
19 the best I can to answer it thoroughly.

20 THE COURT: Thank you.

21 MR. THOMAS: Despite the multifaceted
22 approach that the plaintiffs are taking in this case,
23 and all of the arguments, whether constitutional,
24 statutory, or based on the Comprehensive Agreement
25 itself that has been entered into by VDOT with the

1 co-defendant, Elizabeth River Crossings Company, the
2 case really seeks to do one thing.

3 The plaintiffs resist the introduction of
4 user fees on the various components of the project, the
5 integrated roadways that form the single project which
6 is the subject of the Comprehensive Agreement.

7 In doing that, our position is that they
8 seriously misconstrue Virginia constitutional law, that
9 they invalidly attack the Public-Private Transportation
10 Act of 1995 through a series of misconstructions and
11 ignoring, in many instances, its specific terms, and,
12 also, a series of mis -- misconstructions, if you will,
13 misrepresentations, however you wish to term it,
14 incorrect interpretations of the Comprehensive
15 Agreement itself.

16 In effect, they engage in such hyperbole
17 that they misconstrue the contract which is, as you
18 have said, the sole issue, is it a legal or illegal
19 contract. And by misconstruing it so extremely, they
20 undermine any foundation on which they might make
21 otherwise constitutional or statutory arguments.

22 My prepared remarks cover, basically,
23 three things: One is the misconception of the
24 constitution of the PPTA, which is the Public-Private
25 Transportation Act of 1995, and the misconception of

1 the Comprehensive Agreement itself.

2 In essence, in their resistance to the
3 introduction of user fees on these integrated roadways,
4 the plaintiffs single out two provisions of the
5 Comprehensive Agreement and, along with them, the
6 corresponding sections of the PPTA.

7 First, is that which imposes the user
8 fees on the roadway segments for those that wish to use
9 the roadway segments; that is, the tolls.

10 And, secondly, they attack the
11 compensation events that might arise under the terms of
12 the contract if certain contingent future events take
13 place, and they seek to attack those under statutory
14 construction and constitutional construction.

15 First, I'll open on the topic of the
16 plaintiffs' complaint of an unlawful delegation of the
17 taxing authority.

18 There has been no unlawful delegation of
19 the taxing authority, and I will go through three
20 points in discussing that particular matter.

21 First, the user fees are just that; they
22 are not taxes.

23 Tolls are not taxes.

24 Firstly, because the revenue that is
25 raised from the introduction of user fees and the

1 payment of the user fees is used entirely on this
2 project.

3 Secondly, the General Assembly has, both
4 historically and modernly and based on facts, seen
5 these roadway segments as an integrated project; that
6 is, a series or network of connections between the
7 cities of Portsmouth and Norfolk, traversing the same
8 river, the Elizabeth River.

9 And, third, that the user fees themselves
10 meet the statutory and constitutional definition of
11 tolls.

12 Turning to the first point, we begin with
13 definitions from the Virginia Supreme Court that are
14 binding as to what constitutes a tax and what
15 constitutes a toll.

16 The Virginia Supreme Court has been very
17 clear with us, and I will quote briefly the case of
18 Westbrook v. The Town of Falls Church, which is cited
19 in the briefs. It is one of the seminal cases in this
20 area. And the Supreme Court states, "A tax is an
21 enforced contribution imposed by the government for
22 governmental purposes or public needs. It is not
23 founded upon contract or agreement."

24 That case went on, in the very next
25 paragraph of the Court's opinion, to favorably cite the

1 section on taxation in Volume 51 of American
2 Jurisprudence as follows: "A tax is a forced charge or
3 contribution. It operates in invitum, and is in no way
4 dependent upon the will or contractual assent, express
5 or implied, of the person taxed."

6 The Court, after making those statements
7 and reciting that quotation, cited both its own
8 precedent as well as United States Supreme Court
9 precedent for that particular holding.

10 And I think it's worth it to pause
11 briefly to look at that phrase "in invitum." It is
12 Latin, of course. But what it means is it is an
13 imposition against an entirely unwilling person. It is
14 without regard to any notion of consent or assent to
15 the charge.

16 Even the plaintiff's favorite case, which
17 is Marshall v. Northern Virginia Transportation
18 Authority, although it is irrelevant for both purposes
19 of this litigation because there the parties stipulated
20 that what was being dealt with in the course of the
21 opinion were taxes. There was no specific inquiry
22 there whether they were user fees, that is, tolls, or
23 whether they were taxes. But, nevertheless, it does
24 stand for one important proposition and that is a tax
25 represents an imposition for the raising of general

1 revenue, not something that is tied to the payment for
2 a specific project and certainly, as in this case, a
3 project of component parts that forms a network of
4 roadways.

5 Turning to the definition of a toll --
6 and, again, we respectfully submit that these are
7 binding authorities, unreversed cases of the Supreme
8 Court.

9 In Hampton Roads Sanitation District v.
10 Smith, the Court stated, "A toll is nothing more than
11 an authorized charge for the use of a special
12 facility."

13 In that case, the Court looked at
14 sewerage charges and determined and used the
15 nomenclature that they were tolls. And just as here,
16 in that case, the user fee, that is the sewerage fee,
17 as here the toll, came about upon its payment for the
18 ability to use the sewerage system, and here it uses
19 the roadway components as part of this project.

20 In fact, these are, in essence, a classic
21 bona fide fee for service where the imposition of the
22 toll bears a reasonable correlation to the benefit
23 given to the driver of the vehicle that wishes to
24 utilize the facilities. They gain access to the
25 roadways.

1 In this case, the PPTA, at Virginia Code
2 Sections 56-565 and 566, and the Comprehensive
3 Agreement at Section 5-06, very early in the terms of
4 the Comprehensive Agreement, require and specify that
5 all the revenues that are generated from the
6 introduction of user fees on these roadways goes
7 exclusively to the project.

8 In fact, 5.06 specifies by its terms that
9 these revenues will be paid first by ERC -- that is,
10 Elizabeth River Crossings -- for any amounts that are
11 owed to VDOT. After that, they go to operation and
12 maintenance expenses.

13 We have to remember, this is not just a
14 design/build contract. This is a contract that
15 requires ERC, for a lengthy period of time, to operate
16 and maintain these heavily-traveled roadways such that
17 they must keep them up to all standards, governmental
18 and otherwise.

19 After the payment of operational expenses
20 and maintenance expenses, the contract requires that
21 they pay into taxes. And they must pay their taxes, a
22 point we'll come back to later, and any required
23 reserves.

24 The last entity -- the last category to
25 be paid is Elizabeth River Crossings. The money goes

1 to the project and it goes nowhere else.

2 In fact, the very next section, 5.07,
3 tells us that ERC bears the complete and total risk of
4 sufficient revenues in this contractual arrangement.
5 That section is aptly titled Revenue Risk Related to
6 Traffic Volume. And under it, there is no general
7 revenue for any purpose. ERC gets paid last if the
8 funds, through careful operation and maintenance and
9 the building of the roadway, are sufficient to pay them
10 anything. It stays with the project.

11 The General Assembly also, Your Honor,
12 has made it abundantly clear from their perspective
13 that these roadway segments, that is, the Downtown
14 Tunnel, Midtown Tunnel, and the MLK Freeway Extension,
15 what I will call the "MLK Extension," are part and
16 parcel of a single unit project.

17 They did so in 2007 at the Acts of
18 Assembly, Chapter 896, where, in looking at the
19 Downtown/Midtown Tunnel corridor, that is, the roadways
20 that connect them and the roadways themselves, the
21 General Assembly itself dubbed this a single
22 transportation facility. They made that finding in
23 granting powers to the former Hampton Roads
24 Transportation Authority.

25 Now, they came along in 2009 and

1 transferred all the powers from that Authority to the
2 Commonwealth Transportation Board and its contracting
3 agent, VDOT, and left intact the single transportation
4 facility finding, and, also, the legislative permission
5 that if there be any project commenced in this
6 corridor, in this project area, that the CTB and VDOT
7 had the authority to impose tolls to pay for the
8 project.

9 But the binding together of these roadway
10 segments is not new. If we go all the way back to 1956
11 in the Acts of Assembly 1956, at Chapter 285, the
12 General Assembly then was looking at the fact that the
13 Downtown Tunnel, which had been built some years
14 earlier, was congested. It was not able to
15 realistically and conveniently carry all of the volume
16 of traffic that wished to traverse the Elizabeth River
17 in between the cities of Portsmouth and Norfolk. And
18 what they did at that point in time was authorize a
19 system of crossings by the concept and the planning and
20 the initiation of the Midtown Tunnel itself.

21 The important point here is this: The
22 General Assembly looked at what would be two tunnels
23 and approaches and approach roads. And the very genius
24 of the idea, the only reason to do it, was that they
25 functioned together to carry the heavy volume of track

1 that existed even then between these two cities of
2 Tidewater, across and under and through the Elizabeth
3 River.

4 They did it again in 1971 as the General
5 Assembly began to recognize that the single tube
6 Downtown Tunnel and the single tube Midtown Tunnel were
7 not enough. Traffic was heavy, it was congested, and
8 they needed more capacity, and so they looked at the
9 tunnels and their approaches and approach roads and
10 dubbed them for the need of a third vehicular
11 connection between the two cities.

12 In other words, this was the commencement
13 of the second tube of the Downtown Tunnel.

14 They did the same thing again in the 1977
15 Acts of Assembly at Chapter 176, where, in the planning
16 and implementation that was necessary to go along with
17 the building of the second Downtown Tunnel tube, they
18 integrated it in as part of the interstate highway
19 system of I-264.

20 The plaintiffs wrongly state that these
21 project components are bound together only for some
22 matter of convenience for financing; what that does is
23 completely ignore the function of these roadway
24 components.

25 The tunnels to convey across the

1 Elizabeth River and the MLK Extension is the necessary
2 final leg, the final leg of the stool, if you will, to
3 bring about connectivity that takes the traffic off the
4 mid-town streets of Portsmouth and makes it so that
5 high volumes of traffic can move from one approach to
6 the other.

7 For example, if there's a wreck in one
8 tunnel or a breakdown in one tunnel, they can decide to
9 use the other.

10 But in order to do that and to move the
11 volumes, they have to have the connector approach
12 roads. So that coming in from the west on 264, one
13 might make a meaningful choice, if there's a bridge
14 lift on the Berkley Bridge, not to use the Downtown
15 Tunnel but to cross over the MLK Extension and use the
16 Midtown Tunnel.

17 Likewise, coming in from 17 north. If
18 you come on 164 in Portsmouth and you're approaching
19 the Midtown Tunnel and it's backed up to a
20 fare-thee-well, then you simply get on the MLK
21 Extension, hit 264, and come right down into the
22 Downtown Tunnel.

23 And it works the same coming from the
24 east. One can choose to exit into Norfolk, go down
25 Brambleton Avenue, and use the Midtown Tunnel if the

1 Downtown Tunnel, for one reason or another, is backed
2 up or has an accident in it.

3 Study after study after study in this
4 record supports the legislative facts that have been
5 determined to bind these roads together as a network.

6 The Federal Highway Administration, which
7 is both a study authority, because of the integration
8 of the Downtown Tunnel into the I-264 system, but also
9 a loaning authority through the TIFIA loan. They have
10 done studies. Studies have been done by VDOT, by
11 Elizabeth River Crossings, by and for the Virginia
12 Small Business Finance Authority, another loaning
13 authority here, all of them coming to the same
14 conclusion; that this is an interconnected series of
15 connections between the two cities traversing the
16 river.

17 They are enjoying, together, a symbiotic
18 relationship. They are working in tandem to do a
19 particular thing. That particular thing is to move
20 extraordinary high volumes of traffic on a daily basis
21 across the river for ingress and egress to Portsmouth
22 and the City of Norfolk as well.

23 Your Honor, we submit to you this: If
24 you ignore the legislative findings, which as we know
25 are entitled to great deference by the Court by law, if

1 you ignore all the studies that bring forth the facts
2 that completely dispel any notion that this is a tying
3 together for mere financial convenience, but, instead,
4 a functional system of roadways, put it out of your
5 mind and simply look at the aerial photographs and the
6 diagrams and the maps in the record. Just to look upon
7 them is to see that this is a network of roadways, not
8 some type of frittered individual parts. And the fact
9 that the plaintiffs say that that's not existent is an
10 intentional blindness in this case that simply ignores
11 the truth of the matter.

12 THE COURT: How did the Jordan Bridge
13 work into all this?

14 MR. THOMAS: Pardon?

15 THE COURT: The Jordan Bridge.

16 MR. THOMAS: Yes, sir.

17 THE COURT: Why isn't this part of the
18 network?

19 MR. THOMAS: Well, it's not part of the
20 network, it's a private road being operated by private
21 people. It is not a state facility and, in fact, it's
22 new. So -- so it's interesting that it's visible from
23 this courthouse and you can see the Jordan Bridge and
24 you can look over and see the Berkley Bridge. It is
25 close, but it is not part of this network of conveyance

1 across the river between these two cities.

2 THE COURT: How -- where does the network
3 start and stop? Why -- the High Rise Bridge, for lack
4 of a better term, why isn't that part of the network?

5 MR. THOMAS: Yes, sir, and I understand.

6 THE COURT: And if you have a network say
7 from the peninsula to Hampton Roads, would you start --
8 would you network all three of those crossings? Or
9 would you go up to Surry and network the ferry, too?
10 Or where does the network start and stop?

11 MR. THOMAS: The network for this case
12 starts and stops with the Downtown/Midtown Tunnels and
13 the MLK Extension. Those other matters are perhaps
14 considerations for the General Assembly and for the
15 responsible public entity, that being VDOT or the
16 Commonwealth Transportation Board, for another day.
17 That's not before us.

18 We understand that the plaintiffs want to
19 make a parade of horribles as to it could be expanded
20 to a whole statewide system. Well, if that effort is
21 someday tried, and it's rank speculation to think that
22 it ever would be, well, we have courts that can hear
23 those cases.

24 But here, and the reason that this
25 network, I say, is confined to these three component

1 segments of the network, is that that's the sum total
2 of the Comprehensive Agreement that we're dealing with,
3 that is the sum total of the legislative findings, the
4 sum total of the studies that are factual, that show
5 the rationality of the legislative findings and the
6 basis in genuine fact.

7 Everything else is all speculation. Is
8 it impossible that there will be further roadway
9 improvements that look to integrated segments of a
10 roadway, whether in Hampton Roads or Northern Virginia
11 or anywhere else? Yes. But they will be decided on
12 their own facts at the time they come about.

13 It's introducing what we contend,
14 respectfully, to be completely irrelevant
15 considerations to the decision before this Court to
16 shrilly sound the alarm that there may be some tying
17 together of a broader network of roadways in the
18 future. Let's address that matter if and when it ever
19 takes place.

20 And I know that Mr. Raphael is going to
21 speak quite a bit to the ripeness issue here, but
22 there's a good case that's cited in the briefs that
23 says a controversy is not made by taking a position and
24 challenging the government to refute it.

25 And that's what the plaintiffs are

1 attempting to do. They want you to stray off as a
2 Court into areas that are not necessary for
3 consideration.

4 Have I answered the Court's question on
5 that particular --

6 THE COURT: I guess I haven't really
7 expressed -- my concern is the nexus between the Martin
8 Luther King, the Downtown Tunnel, the Midtown Tunnel,
9 and why -- I guess it stops there. And I guess my
10 question is why does it stop there.

11 And let's forget the Jordan Bridge, which
12 is a private entity, but let's go to the other
13 crossings over on Military Highway and the interstate.
14 Why aren't -- it just seems to me that if you are going
15 to network, network everything that's connected.

16 I don't understand the General
17 Assembly's -- it appears that they picked this one out
18 and it appears that they may have picked it out only
19 because the only way they could get people to go
20 through the Midtown Tunnel, which they could clearly
21 toll with this new project, was to toll the Downtown
22 Tunnel. That's the way it appears, so that's what I'm
23 asking.

24 MR. THOMAS: Well, it has been done since
25 the very idea or concept of a Midtown Tunnel was

1 introduced and it goes back to the functionality
2 argument that I made a few minutes ago.

3 These two crossings being proximate to
4 each other and, essentially, downtown-to-downtown
5 connections, work together in the most immediate sense.

6 While there are other roadways that might
7 be taken to get from one city to the other, these are
8 the two that are in immediate proximity to each other,
9 almost within sight of each other looking down the
10 river, and they are what work immediately together.

11 And that was the recognition that the General Assembly
12 made in 1956 and '71 and '77 and all the way up through
13 2007 and 2009.

14 They are close in proximity. They are --
15 one is taking traffic for the other. One is the
16 natural other road to take, if you will, to get across
17 the Elizabeth River if you're moving from downtown
18 Norfolk to downtown Portsmouth or downtown Portsmouth
19 to downtown Norfolk. They are free to choose.

20 And as we know, the General Assembly has
21 plenary power. The Constitution of Virginia and the
22 Constitution of the United States are limiting on that
23 power, but the legislature in Virginia enjoys plenary
24 power. And if they wish to link them, and there's any
25 rational basis for doing so, then that is a legislative

1 fact that is entitled throughout the court system to
2 great deference.

3 And here, not only have they linked them
4 historically and modernly, but the facts back it up,
5 because these two tunnels and the approach roads to get
6 from one to the other or to one or the other all
7 function together to carry a daily traffic flow that is
8 very predictable and very heavy.

9 And I hope I've answered your question in
10 that regard.

11 THE COURT: I think so. Thank you.

12 MR. THOMAS: I want to turn -- point one
13 was that this is not a general revenue device. This is
14 all devoted to this project.

15 Number two, of course, is the tying,
16 legislative and factually, of the roadway components.
17 But let's turn to the definition of a user fee, that
18 authorized charge for the use of a special facility.

19 What's important here is that, once
20 again, there's controlling authority in Virginia on
21 point, and it dealt, once again, with sewerage service.
22 I will point the Court to this predicate and then the
23 case.

24 Here, if the motorist wishes to use the
25 roadway, then the motorist will pay the toll to use one

1 or the other or two of the three of the components of
2 this particular network system.

3 If the motorist chooses not to utilize
4 these roadways, the motorist pays nothing. In Bott v.
5 Hampton Roads Sanitation District Commission, the Court
6 looked again, as I said, at sewerage fees and made it
7 clear that, in that instance, you either connect to the
8 sewer or you don't, that that's your decision. And
9 there is no analysis whatsoever of whether or not you
10 have an alternative.

11 The issue is here, to bring it home, do
12 you use the roadway segments or do you not. If you do,
13 you pay a bona fide fee for service that is reasonably
14 correlated to the service and benefit that you are
15 receiving. If you don't use the roadway, you don't pay
16 a dime. You don't pay anything. And that is the
17 matter of contract that the Court noted in the Bott
18 case; it's up to you.

19 And this is an important point. There is
20 nothing in Virginia law or the law anywhere else that
21 we have found or that the plaintiffs have pointed out
22 to you that enters into the calculus of whether a user
23 fee is a toll or whether it is neither one of those,
24 but, instead, a tax. There is no calculus whatsoever
25 of alternatives.

1 And yet, Your Honor, if you were to
2 accept on behalf of this Court the plaintiffs'
3 invitation to be the first to look to alternatives and
4 the viability and to enter that into the calculus of
5 whether it is a toll or a tax, the record is full of
6 alternatives, and we have already talked about one of
7 them, but I'll list all of the ones that are in the
8 record for purposes of the Court's consideration.

9 Of course, the TIFIA loan, that is the
10 loan from the Federal Highway Administration, requires
11 that Elizabeth River Crossings do what is necessary to
12 enhance bus service through the tunnel system and
13 across the connecting road; that is, if you do not wish
14 to take your own vehicle and pay the toll, but you
15 still wish to convey across the river or to connect to
16 these tunnels, you may take the bus, and that is a
17 required component of Elizabeth River Crossings to
18 undertake.

19 The record mentions the utilization of
20 the ferry. It is daily, it is regular, and it is
21 downtown-commercial district to downtown-commercial
22 district.

23 There is the Jordan Bridge, and it is a
24 private bridge, and yet, as we know, it is in very
25 close proximity. You look at the diagrams, it's not

1 far away. And if an alternative be sought, an
2 alternative it is. And then, of course, there's the
3 two free alternatives; to go out to the Gilmerton
4 Bridge and either connect back across the Berkley
5 Bridge by coming through Berkeley or go across the
6 Campostella Bridge by going that way; and then the High
7 Rise Bridge over Interstate 64 by passing through the
8 Bowers Hill area to get there. They are all
9 alternatives.

10 And what is more, the fact that a given
11 motorist may subjectively believe that one or the other
12 of them is not reasonable for them or is not in some
13 way convenient, I would invite the Court to think of
14 this tangible example: If we wish to go to Cape
15 Charles, Virginia, on any given day from South Hampton
16 Roads, we pay a toll. We pay a whopping, strapping
17 toll to go across the Chesapeake Bay Bridge Tunnel, but
18 a toll it is, even though the next alternative, if you
19 will, runs through Annapolis, Maryland. It is not a
20 function of convenience, and I make that point to
21 illustrate that.

22 Your Honor, I want to turn to the PPTA
23 itself and make a few comments there.

24 There, the plaintiffs wrongly assert many
25 things about the PPTA and the Comprehensive Agreement

1 and it's worth taking a few minutes now. I don't want
2 to tax your time, if you'll pardon the expression.

3 The General Assembly properly enacted the
4 PPTA including its provisions for the public private
5 contracting to design, build, finance, operate, and
6 maintain transportation facilities, including the
7 transportation facility that is the project at hand in
8 this case.

9 Numerous cases tell us that legislative
10 findings and legislative enactments enjoy, in Virginia
11 constitutional law, a presumption of validity. The
12 cases express it. In particular, I believe, the
13 Montgomery County case, that it's the strongest
14 presumption known to the law, and it's operable here.
15 Contrary to some of the statements made by the
16 plaintiffs, it is, indeed, operable here.

17 And what is more, in exercising its
18 plenary power and leaving the issue that there's been
19 no delegation of taxing authority, the Constitution
20 allows the General Assembly to delegate certain matters
21 of its legislative authority to executive agencies and
22 that's been done for many, many years and it is a
23 recognition constitutionally that the General Assembly
24 itself cannot efficiently engage in the minutia of
25 government, that they have to utilize executive

1 agencies that have expertise in particular areas to get
2 certain things done.

3 There's a great case in Virginia,
4 Thompson v. Smith, that says without this power,
5 legislation would become either oppressive or
6 inefficient.

7 And, here, the PPTA does what you would
8 expect in the delegation, proper delegation, of
9 legislative authority.

10 At 56-558, the General Assembly makes a
11 number of very specific legislative findings, that is,
12 legislative facts. I won't take the time to run
13 through them specifically, but the overview of them is
14 like this: The General Assembly recognizes the
15 critical need on behalf of the general welfare and the
16 public need itself for transportation infrastructure in
17 Virginia.

18 It recognizes that the things that had
19 been done up and to the modern time had not
20 sufficiently provided that infrastructure. And, so,
21 the approach that the legislature determined to pursue
22 is the encouragement of private investment in the
23 transportation infrastructure of the Commonwealth. Not
24 only do they express what they want to do, but therein
25 they express why they want to do it.

1 And then the PPTA goes on, from 56-560,
2 all the way through near its end, at 56-573.1, to give
3 the detailed instruction to the executive agencies that
4 are the responsible public entities for transportation
5 infrastructure, what they're supposed to do and how
6 they're supposed to do it.

7 This is something that the plaintiffs do
8 not acknowledge. They gloss over it in all of their
9 briefs. And, frankly, it's time to call them on it.
10 These standards are very particular and very exacting.
11 And just to go through a few, the responsible public
12 entity, and here I'll just term that as VDOT because
13 they are meeting the definition of a responsible public
14 entity under the PPTA, must adopt guidelines and they
15 must follow those guidelines throughout any
16 consideration in any proposal for the design, build,
17 finance, operation, or maintenance of a transportation
18 facility; that is, this project.

19 They do have those guidelines. They've
20 been promulgated by the Secretary of Transportation as
21 they were required in the Acts of Assembly in 2006.
22 Those guidelines have to be consistent with competitive
23 procurement principles; they are. The record is
24 replete with references to the process that was
25 followed.

1 VDOT had to go to the affected local
2 jurisdictions, according to a specific section of the
3 PPTA. They had numerous meetings with the governmental
4 structures in both Portsmouth and Norfolk.

5 There is transparency throughout the
6 process. There is a requirement that VDOT post the
7 proposal when it was received; that was done. There is
8 a requirement that they have opportunity for public
9 comment; that was done. There were no less than five
10 public hearings on this project. They have to post the
11 Comprehensive Agreement, once it's entered, with only
12 minor carve-outs for proprietary information.

13 The compensation that is to be paid, and
14 that's where we get to the heartbeat of what the
15 plaintiffs are after here, the compensation that goes
16 to the private entity must be reasonable, factually
17 reasonable, including that any forecast of traffic
18 volumes, any forecast of tolling revenues, has to be
19 independently reviewed.

20 The statute in its modern form calls it
21 an independent audit. In earlier versions of the
22 statute, which were applicable during this time, it was
23 called an independent review panel, and that was done
24 in this case.

25 And, finally, just to make the point,

1 this is an executive agency and the PPTA specifically
2 requires that before any comprehensive agreement for a
3 transportation facility can be entered into by an
4 executive agency bearing responsibility for
5 transportation matters, it must be specifically
6 approved by the Secretary of Transportation; that was
7 done here.

8 Where is that in the plaintiffs
9 accusations hurled that this is unfettered executive
10 discretion? It's just not so. And it's not so
11 according to the record. In every step of the way,
12 every requirement, every oversight, every transparency,
13 and every approval-related provision under the PPTA,
14 which are nothing to sneeze at in their complexity and
15 in the expense of meeting them, including the specific
16 findings that VDOT itself had to make in order -- and
17 they are in the Comprehensive Agreement -- in order to
18 justify moving forward with the project. It's all
19 there.

20 The bottom line is this: The PPTA is
21 constitutional, it's rationally related to its purpose,
22 it's based on legislative facts that are subject to
23 great deference by the Court, and for which the factual
24 record backs them up.

25 In addition, there is no unlawful

1 delegation of legislative authority because the
2 exacting standards set forth in the PPTA, although
3 ignored by the plaintiff, were followed to the letter,
4 every "T" crossed, every "I" dotted by VDOT in this
5 case.

6 Turning to the Comprehensive Agreement
7 itself, I'm going to go through four specific points
8 very quickly where the plaintiffs have mischaracterized
9 completely the Comprehensive Agreement.

10 One is their assertion that there is a
11 maximum rate of return set for ERC in this case. There
12 is no such thing. In fact, we've already discussed
13 that Section 5.06 prescribes exactly how the revenues
14 generated from the tolls in this case, the user fees,
15 have to be paid out. There is no requirement that
16 Elizabeth River Crossings receive one penny. Not one
17 penny.

18 In fact, at Section 5.01A, Elizabeth
19 River Crossings acknowledges, if you will, that they
20 are entitled to nothing after the closing is paid, the
21 public funds amount that VDOT paid at the closing of
22 the financial -- financial closing of this project,
23 that ERC is entitled to nothing after that unless and
24 until it comes about that everything else is paid.

25 There is no requirement under 5.07 that

1 ERC receive anything. It is the section that says they
2 bear the risk respecting traffic volumes; that is, the
3 revenues that will be generated by the variable of
4 traffic flows through the project segments. So that's
5 number one.

6 We'll talk about compensation events now
7 that can come about through alternative facility
8 construction or the imposition of taxes by locality.

9 They contend that there's a guarantee of
10 millions of dollars to ERC if an alternative facility
11 is built. They say that ERC has a monopoly power, if
12 you will, if such an alternative facility is built.
13 And they further say that there's a tax refund or
14 rebate that brings about an unconstitutional special
15 law.

16 Let's look briefly at each one of them.

17 There is no guarantee of millions of
18 dollars if an alternative facility is built.

19 Mr. Raphael is going to talk to you about
20 the ripeness issue on that and it's worthy of
21 discussion because the issue is not ripe at all.

22 But from the public agency standpoint, it
23 is important to look at the what-if.

24 First of all, there is no guarantee at
25 all. The compensation events only give ERC a right

1 that is an entitlement to make a potential claim. They
2 must decide if they are going to make the claim and
3 they must give proper notice.

4 The State enjoys an absolute right under
5 several sections of the Comprehensive Agreement to
6 develop other transportation facilities for the public
7 need and the general welfare as it sees fit, and that
8 is guaranteed in the contract.

9 If an alternative facility is built, and
10 we can use an example of one that's named in the
11 Comprehensive Agreement, Patriot's Crossing, the
12 theorized third crossing across Hampton Roads.

13 Well, if it's built, it may not have any
14 negative impact on costs or impact on revenues
15 generated at this project. The motorists may choose to
16 stay right where they are and not use it as an
17 alternative, but for other purposes. It may be tolled
18 itself, and the Downtown and Midtown Tunnels and the
19 MLK Extension be a bargain by comparison. The fact is,
20 it may not have an impact on costs or revenues of ERC.

21 Secondly, even if it does, there's a
22 minimum threshold that must be met. If it doesn't meet
23 the minimum threshold, ERC is entitled to no monies
24 whatsoever under a compensation event.

25 They must prove the impact to generate

1 any entitlement to compensation and VDOT is entitled to
2 give contrary evidence.

3 The specific sections on comprehensive
4 or, excuse me, on compensation events also say that if
5 they are insured for the loss, then the insurance is to
6 cover it and that absolves VDOT from any potential
7 viability for compensation.

8 And, finally, even if they make a Notice
9 of Claim and establish an impact on costs and meet the
10 threshold and prove their case, they are all
11 compensation events, still subject to appropriation by
12 the General Assembly. It's the ultimate check and
13 balance.

14 ERC runs the risk that notwithstanding
15 proving up their claim, the General Assembly might say
16 we're not going to pay it. And they have no recourse
17 if the General Assembly takes that position.

18 Let's turn to the monopoly.

19 THE COURT: They have no recourse if the
20 General Assembly --

21 MR. THOMAS: It's subject to
22 appropriation; yes, sir. Absolutely. In the contract,
23 with respect to compensation events --

24 THE COURT: Where are you in the
25 contract?

1 MR. THOMAS: Any compensation event is
2 subject to appropriation.

3 It may be in the exhibits, if I may grab
4 the exhibit book.

5 THE COURT: Sure.

6 MR. THOMAS: It's Section 25.19 of the
7 Comprehensive Agreement, and I thank Mr. Raphael for
8 helping me put my fingers on it.

9 25.19 states that the Department's
10 payment of any concessionary damages, losses, or any
11 other amounts due and owing by the Department pursuant
12 to this agreement will be subject to the appropriation
13 by the General Assembly and allocation to the CTB. In
14 addition -- that's Subsection A.

15 Subsection B reads as follows: The
16 parties hereto agree and acknowledge that subject to
17 appropriation, such obligation of the Department to pay
18 concessionary damages and any other amounts was and is
19 a material inducement in consideration for the
20 execution and delivery of this agreement by the
21 concessionaire.

22 So it's there. But what it does, it
23 makes a mockery of the plaintiffs' assertion that there
24 is a guarantee of millions of dollars.

25 And I'm going to make this point now and

1 I'll make it again in a moment: Misconstruing this --
2 I'll stop soon, I promise.

3 Misconstruing the Comprehensive Agreement
4 accomplishes one thing for the plaintiffs; it's a
5 foundation of sand on this constitutional argument
6 house that they wish to build.

7 The Comprehensive Agreement does not back
8 up what they say, it doesn't say what they allege it to
9 say, and no matter how shrill be their constitutional
10 arguments, if the factual foundation is not there, they
11 lose this case, and that's the point that I make to the
12 Court.

13 As to monopoly power, I will just cover
14 it quickly. There's no basis in law or fact that if
15 any alternative facility is ever built anywhere that
16 might have an impact on this project's revenues or
17 costs, that ERC gets to build it. They would have to
18 go through the same competitive procurement procedures
19 as anybody else.

20 They are saying that there's a monopoly
21 power there? It's fancy. It's not in the
22 Comprehensive Agreement, it's not in the PPTA, it is
23 nowhere to be found.

24 THE COURT: Well, wouldn't they, because
25 of this, have a competitive advantage? I don't know

1 that it's really a monopoly, but it certainly appears
2 to be a competitive advantage that would be created.

3 MR. THOMAS: How would they translate it
4 into a competitive advantage? They may get compensated
5 for effects on the benefit of their bargain here, but
6 it has nothing to do with any right to construct or
7 competitive advantage to build an alternative facility,
8 and that's what they are saying to you.

9 It doesn't translate. It does not make
10 sense that they do, but they say that. And a monopoly,
11 as they call it, is an exclusive right. That's all a
12 monopoly is. And that's what they say is here. And is
13 it true or not. And if it's not, they lose.

14 And the same thing with these tax
15 impositions. They are all subject to the same
16 parameters of proof as any compensation agreement.
17 They don't apply to taxes that are imposed by
18 localities of general application, but, really, only to
19 punitive measures that are leveled against ERC as a
20 result of this project.

21 But there's -- Section 506 and 25-20,
22 Your Honor, require ERC to pay their taxes. There's
23 never a rebate of taxes. They have to pay them. If
24 there's contractual compensation, then they have to
25 prove it, and the General Assembly has to appropriate

1 for it.

2 The last thing I'll say, because I don't
3 want to take any more time, the case of Concerned
4 Residents of Gloucester County v. The Board of
5 Supervisors of Gloucester County decides this case on
6 the issue of whether changes in tax laws or changes in
7 the exclusivity, if you will, of ERC's rights here
8 under the contract.

9 In that case, the Virginia Supreme Court
10 said these types of contractual provisions that
11 guarantee the benefit of the bargain with any private
12 entity that contracts with a public agency are not
13 special laws and they are not delegations of the taxing
14 authority.

15 I invite you to read the case and
16 recognize its controlling status. The United States
17 Supreme Court has decided, essentially, the same thing
18 in the U.S. v. Winstar case, which we have cited in the
19 brief.

20 The last point, except to answer your
21 questions, are this: Where did the State Corporation
22 Commission come from in this case? We have no idea.
23 It wasn't plead.

24 But, also, if you look at Virginia Code
25 Section 56-574, it opts the PPTA out of any statutory

1 scheme where the General Assembly previously had
2 inserted the State Corporation Commission. And even
3 that, in the old state Highway Corporation Act of 1988,
4 it dealt with private roads, not public roads. And
5 here, ERC only enjoys a permit to these roadway
6 segments within this project. And, lastly, they do not
7 meet the definition of a public utility under 56-1.

8 So, once again, we don't know where it
9 came from, but what we do know is this, and we submit
10 to the Court --

11 THE COURT: It was innovative, wasn't it?

12 MR. THOMAS: Pardon?

13 THE COURT: It was innovative.

14 MR. THOMAS: It was innovative, but, you
15 know, innovation in a case with respect to a \$2 billion
16 contractual agreement with necessary transportation
17 infrastructure, it may be innovative, but it's not
18 humorous.

19 Do you have further questions, Your
20 Honor? I'll be happy to answer them.

21 THE COURT: (Shaking head)

22 MR. THOMAS: Thank you, sir.

23 MR. RAPHAEL: Your Honor, if I speak
24 loudly, can I dispense with the mike?

25 THE PUBLIC: No. We can't hear you.

1 THE COURT: No.

2 MR. RAPHAEL: Your Honor, Stuart Raphael
3 for the defendant Elizabeth River Crossings and with me
4 is Bob Tata, and I have prepared some PowerPoint slides
5 to try to get through this in an efficient manner.

6 THE COURT: Sure.

7 MR. RAPHAEL: I have a copy we will give
8 you when we're done and a copy for opposing counsel.

9 Let me give you just a quick road map of
10 where I'm going.

11 THE COURT: And if I'm not looking at you
12 it's because I'm watching the PowerPoint here, where
13 the screen is set up.

14 MR. RAPHAEL: That's probably for the
15 better.

16 I'm going to show you a couple of
17 demonstrative exhibits that I think will be helpful as
18 the argument goes on. I'm going to then cover the
19 tolls or user-fees-not-taxes point, the unlawful
20 delegation issue, which will include the lack of
21 ripeness argument as to the alternative facility and
22 change in control claims -- or change in tax law
23 claims, the surrender of sovereignty issue, the no
24 special law violation issue. And then very briefly at
25 the end I'm going to cover four arguments: The SCC

1 argument, the due process claim, and I'm going to end
2 with what I think are some fundamental flaws in the
3 plaintiffs' theory and, really, the absence of any
4 limiting principles.

5 You have seen this map. It's a project
6 overview. Looking at the facilities from a broader
7 perspective, you have the Midtown Tunnel here, the
8 Downtown Tunnel there, and then the MLK Extension
9 connecting the freeway. The South Norfolk Jordan
10 Bridge is there. There's the Gilmerton Bridge,
11 Route 13, and then the High Rise Bridge connecting
12 Interstate 64.

13 The project adds an additional Midtown
14 Tunnel tube to eliminate the dangers of the unit -- the
15 bidirectional flow that you have now, and connects
16 through the MLK Extension to the freeway to the south
17 to allow access to the Downtown Tunnel.

18 Just roughly, the Downtown Tunnel is
19 about 2 miles from the Midtown Tunnel and the MLK
20 Extension is about three-quarters of a mile to connect
21 those highways.

22 So this brings us to the argument -- the
23 primary argument in the case which is that the tolls
24 here are user fees, not taxes.

25 There are two independent grounds for

1 that, Your Honor. The first is the integrated project
2 argument, that the revenues are not used for unrelated
3 purposes. The second is the contractual relationship
4 argument that the tolls are paid in exchange for a
5 government service. They are not a surcharge on a
6 private transaction like, for example, a sales tax.

7 As we point out in our papers, you can
8 enter judgment on either or both of these points; they
9 are independent.

10 Starting with the first point, that the
11 revenues are not used for unrelated purposes. The
12 General Assembly, as Mr. Thomas pointed out, has
13 consistently treated these tunnels and facilities as
14 interrelated. It's undisputed in the record that the
15 history of the Midtown Tunnel was that it was created
16 as a response to the steadily increasing traffic
17 experienced at the Downtown Tunnel, and that excerpt is
18 from Defendant's Exhibit 3 at page 3, which is the
19 Senate document from 1973.

20 The 1956 law that authorized the Midtown
21 Tunnel identified it and authorized the Elizabeth River
22 Transportation District to create a, quote, additional
23 vehicle connection between Norfolk and Portsmouth.
24 Where the tunnel was going to be located was up to the
25 district to decide. And that statute also authorized

1 it to construct any necessary approaches and approach
2 roads and, most importantly, allowed the use of tolls
3 for either tunnel to finance the bonds to construct the
4 new Midtown Tunnel.

5 And you see there, Your Honor, the
6 definition of project, that it shall include the
7 existing project and such additional vehicular
8 connection.

9 In 2006, the General Assembly created the
10 Hampton Roads Transportation Authority and it
11 specifically authorized the construction of this
12 particular project. And it did so -- you see that in
13 that first excerpt, identified first and second phased
14 projects, and it said that the Downtown Tunnel, Midtown
15 Tunnel, and MLK Extension should be constructed as a
16 first-phase project before the HRTA could get on to any
17 second-phase projects.

18 The statute also said that it was the
19 intent of the General Assembly that the Public-Private
20 Transportation Act should be used to do the
21 construction. So the General Assembly fully expected
22 the PPTA to be used for this exact project.

23 Finally, the law made it clear that the
24 Midtown and Downtown Tunnels were part of a single
25 transportation facility, and you see that language

1 highlighted at the bottom of the slide there. So the
2 General Assembly said both facilities may be tolled if
3 improvements are made to either tunnel.

4 And that's, again, a recognition that
5 these are functionally inter-dependent in order to
6 provide traffic flow between Norfolk and Portsmouth.

7 As Mr. Thomas pointed out, the HRTA was
8 abolished in 2009, but its powers to toll were
9 transferred to CTB, and, of course, the CTB in this
10 case has approved the tolling arrangements and the
11 Comprehensive Agreement that's at defendants'
12 Exhibit 28.

13 I think the single most important issue
14 in this case is the notion of legislative deference
15 to -- deference to the legislative facts that the
16 General Assembly has found.

17 There's a distinction here, Your Honor,
18 between legislative findings that the General Assembly
19 makes and evidentiary findings that you would make or a
20 jury would make in a civil trial.

21 Legislative findings, as the case law
22 makes clear, cannot be set aside unless they are
23 clearly erroneous or wholly unwarranted. And like the
24 Court said in Harrison v. Day, unless there's a clear
25 abuse of discretion by the General Assembly in coming

1 up with its finding. The determination -- the Court
2 said it's, quote, not a matter of judicial cognizance,
3 unquote.

4 Now, the plaintiffs in their reply brief,
5 and they mischaracterized the standard of review here.
6 They cite Montgomery County for the proposition that
7 your review of the legislative determination is
8 de novo, and that's just not what the case says. That
9 was a case decided that was like this case, on cross
10 motions for summary judgment. It went up to the
11 Supreme Court and, as Your Honor is well aware, the
12 Supreme Court reviews a summary judgment ruling
13 de novo. You do have de novo review there. But you
14 don't have de novo review of the legislature's factual
15 finding, and that's just clear from the case law and I
16 think they confused those two points.

17 The Court in Montgomery County
18 importantly upheld the General Assembly's legislative
19 finding that an intermodal facility in Montgomery
20 County would help reduce truck traffic on Interstate 81
21 and that was really critical to the outcome of the
22 case.

23 The internal improves clause prohibits
24 the State from investing in projects of internal
25 improvements, but there's an exception. Public roads

1 is an exception.

2 So in Montgomery County, the State gave
3 millions of dollars to Norfolk Southern Corporation to
4 help it build an intermodal facility in Montgomery
5 County. And the plaintiffs said that's a project of
6 internal improvement; it's basically a facility to put
7 containers on rail. It's not a road. And the Supreme
8 Court said, Well, the General Assembly found that by
9 doing that project you would take a lot of truck
10 traffic off of Interstate 81, and that was a reasonable
11 connection to roads.

12 I think it's a good case to show the
13 deference that the Court gives to legislative findings
14 and facts like that and like the one you have in this
15 case.

16 As the Court said in Montgomery County,
17 the General Assembly's determination was within the
18 prerogative of the legislature and is not one that we
19 may disturb as we do not find it repugnant to the
20 internal improvements clause under our narrow standard
21 of review.

22 You asked a very good question of
23 Mr. Thomas about how far the network here extends, and
24 I want to address that.

25 There's the map again. And the -- as you

1 can see, the three facilities at issue here really form
2 the center of the wheel, the center of the hub of this
3 transportation network.

4 I took your question as being along these
5 lines: Could the General Assembly have found that the
6 Gilmerton Bridge and the High Rise Bridge were part of
7 the same network?

8 They probably could have found that.
9 Absolutely.

10 But that's not what's at issue in this
11 case.

12 The issue is, is their and finding that
13 the Midtown Tunnel, Downtown Tunnel, and MLK Extension
14 are connected, is that supported -- was that a clear
15 abuse of discretion. And on that question the answer
16 is really clear. And I think this also answers the
17 slippery-slope problem. The plaintiffs come in and say
18 under -- what if General Assembly found the whole state
19 was a project?

20 Obviously if that were -- if that
21 situation ever arose, the State is -- might have a much
22 harder time winning even under the abuse of discretion
23 standard. And that's kind of like the Terry v. Messer
24 case, which is the plaintiffs -- one of their favorite
25 cases, where even though the General Assembly said that

1 the financial commitment that was being made there did
2 not require appropriation of funds in the future
3 secured by tax obligations, the Supreme Court looked
4 past that and said, well, in fact, it did.

5 That's the only case where they've found
6 that the General Assembly's legislative finding was
7 just not right because on the face of it it was wrong.
8 But this case is at the other end of the spectrum and
9 it's pretty easy to decide given all of the
10 interconnectedness between --

11 I know it's easy for me to say.

12 (Laughter)

13 MR. RAPHAEL: I saw where you were going
14 with that.

15 But, no, it is easy to decide in the
16 sense that you have clear legislative findings that
17 cannot be said to be clearly erroneous. So that's the
18 issue; have the plaintiffs met their burden to show
19 that the General Assembly abused its discretion. And
20 the answer to that is no.

21 There are numerous relatedness findings
22 by both Virginia state agencies and federal agencies.
23 We collected them at pages 8 to 12 of our opening
24 brief.

25 For example, the 1973 Senate report,

1 which made clear that the very genesis of the Midtown
2 Tunnel was to help with congestion in the Downtown
3 Tunnel.

4 Another example was defense Exhibit 30 at
5 page 19. This was the offering statement by the
6 Virginia Small Business Finance Authority, and the
7 Finance Authority pointed out that this project is a --
8 will provide and improve the transportation network
9 between Portsmouth and Norfolk connected with these two
10 major tunnels.

11 Another example was defendant's
12 Exhibit 8, which was the interchange justification
13 report that was prepared for VDOT and the Federal
14 Highway Administration, and the agencies concluded that
15 a widened Midtown Tunnel would provide additional
16 roadway capacity into downtown Norfolk and could
17 relieve congestion on the Downtown Tunnel as the Martin
18 Luther King Freeway Extension would provide a
19 convenient alternative for -- route.

20 Finally, another example, the Federal
21 Highway Administration's revised Record of Decision
22 concerning the Midtown Tunnel, where the agency
23 concluded that the Midtown Tunnel would not only add
24 additional capacity there -- in fact, it will double
25 it -- but the last bullet point, the last point, Number

1 4, it will alleviate traffic on the other river
2 crossings, particularly the Downtown Tunnel.

3 So lots of evidence in the record
4 undisputed about connectedness.

5 The plaintiffs own exhibits, as we point
6 out in our papers, also show the relatedness of these
7 facilities.

8 For example, they put in the MLK Freeway
9 Extension Environmental Impact Report, which points out
10 that, right now, if you don't have any improvements,
11 commuters between Norfolk and Portsmouth are going to
12 continue to face long delays if either of the tunnels
13 is down because they are connected; and one goes down,
14 you have a lot more traffic at the other.

15 Another example, they put in the
16 Governor's press release when this project was
17 consummated where the Governor talks about the value of
18 the project improving the transportation network.

19 There's only one piece of contrary
20 evidence that they put into the record, and that's --
21 they found on the Department of Transportation's
22 website a calendar notice for the Office of Small and
23 Disadvantaged Business advertising a meeting -- excuse
24 me.

25 I hope your screen is clearer than mine

1 because I'm having trouble seeing this television
2 monitor.

3 THE COURT: What part can't you read?

4 MR. RAPHAEL: I can't read the small
5 print, is what I can't read.

6 This is the only document that they've
7 got, which mentions the notion that these are somehow
8 separate facilities. It says -- it identifies the
9 three facilities and says --

10 THE COURT: It calls them three separate
11 projects being procured as one project.

12 MR. RAPHAEL: That's it, yes, and that's
13 all they've got. That's all they've got. That's it.

14 And I think really the key point here is
15 that this single document is not enough to show that
16 the Virginia General Assembly had no basis to conclude
17 that these three facilities were interrelated. That's
18 the test. It's: You're not finding this fact in the
19 first instance; you're looking to see if the evidence
20 and the record supports the General Assembly's finding,
21 and, more precisely, whether you could rule that the
22 General Assembly abused its discretion in concluding
23 that these three facilities were interrelated.

24 So the bottom line here, that single
25 transportation facility finding cannot be said to be

1 arbitrary, clearly erroneous, or a clear abuse of
2 discretion. And now that he we've been through that,
3 that's really the core factual part of the cases.

4 Now, what are the legal consequence of
5 that finding? Well, the legal consequence is that
6 there's not a tax here because the fees that are
7 charged are user fees, not taxes.

8 The plaintiffs haven't cited a single
9 case from anywhere in the country holding that tolls
10 are taxes. If the Court were to review that here, it
11 would be the first time, and the first time in
12 Virginia.

13 We put into our opening brief an
14 annotation that looks at the question of when tolls are
15 held to be taxes. And the author said, Whenever the
16 question has arisen, the Courts have said that it's not
17 within the constitutional provision respecting taxes.

18 The two closest cases in Virginia held
19 that the tolls -- the Dulles toll road charges were
20 user fees, not taxes. And those cases are Gray v.
21 Virginia Secretary of Transportation, decided by Judge
22 Spencer in Richmond, and then the Corr v. --

23 THE COURT: And I love the way she did
24 it, because -- but it wasn't very helpful, as
25 Mr. McSweeney pointed out in his last brief, because

1 she referred to the briefs.

2 MR. RAPHAEL: Yes. It certainly would
3 have been more helpful here if she had written an
4 opinion or wrote it out in longer form.

5 THE COURT: I may have been inspired by
6 that.

7 MR. RAPHAEL: Well, and we want to
8 encourage you in that effort.

9 We were -- Mr. McSweeney was counsel for
10 Gray in that case. I was counsel for VDOT, for the
11 Secretary of Transportation in that case. And we
12 certainly were at least happy that she said that she
13 decided the case for the reasons we stated in our
14 briefs. And we put those briefs into the record here,
15 and you're reading the same thing again. We made the
16 same arguments there, right, that we're making here.

17 Judge Trenga had the same arguments in
18 front of him in the Corr case. Mr. McSweeney and I
19 were both counsel in that case as well. And both of
20 those cases involved the extension of Metrorail to
21 Dulles Airport, and the financing mechanism there is to
22 use tolls from the Dulles toll road, the surpluses, to
23 fund the Metrorail construction.

24 The plaintiffs -- or the General Assembly
25 actually defined that transportation corridor. You

1 have got the toll road, the access road, and then in
2 the median strip that's where the rail line is going.
3 The General Assembly defined that corridor as a single
4 project that was eligible for revenue bond financing.
5 That's actually in the revenue State Bond Act. We've
6 got a slide that identifies -- shows the access road,
7 the toll road, and mass transit. They are all
8 considered part of the same project.

9 Now, the plaintiffs -- Mr. McSweeney
10 argued for the plaintiffs in those cases that using
11 toll road surpluses was an illegal tax. The same
12 argument he's making here. And his main argument was
13 Marshall, which is the main case they rely on here.

14 We argued that the tolls were not a tax
15 because the facilities were interrelated, the toll road
16 users had Metrorail as an alternative; right? If they
17 didn't want to drive on the toll road, they could take
18 the Metrorail.

19 We also pointed out that these drivers on
20 the toll road would face less traffic in the future as
21 the users shifted to Metro. So there actually was a
22 benefit, direct benefit, to people driving on the toll
23 road.

24 We relied in both cases on the utility
25 fee cases and the revenue bond cases that we have

1 discussed here.

2 And the Court in Gray held that the tolls
3 were taxes for the reasons we stated. And the Court in
4 Corr held that the tolls were not taxes because the
5 revenues were not used for unrelated purpose.

6 Judge Trenga also -- he liked Judge
7 Spencer's opinion order at least enough to cite it and
8 say that that was additional authority for his
9 decision.

10 The closest non-Virginia case also
11 supports us, and that's the Murphy v. Massachusetts
12 Turnpike Authority case from last year. I did, just
13 for demonstrative purposes, I got a map of Boston,
14 Boston Harbor, and you can see all those connections
15 from the northeast and the north and the northwest.

16 What happened there was the Mass -- the
17 MTA operated all of those crossings. Some of them were
18 tolled and some of them were not. And the plaintiffs
19 said, hey, 58 percent of those toll revenues are going
20 for other facilities that are not tolled; that's a tax.
21 The same argument that's being made here.

22 The Supreme Court in Massachusetts said
23 no, no, no, the MTA is operating an integrated
24 transportation network. And because of that, there's
25 nothing wrong with using revenues from one of those

1 tunnels to fund a bridge or a different tunnel for the
2 same integrated network.

3 To take it to the extreme in the other --
4 in this case, going in the other direction, there's
5 going to be a new tube added to the Midtown Tunnel to
6 eliminate the safety problem, you know, the current
7 bidirectional flow.

8 Suppose you had a commuter who said: I
9 only go from Norfolk to Portsmouth, I never take the
10 other tube, so I shouldn't have to pay for that tube, I
11 should only have to pay for the one I use.

12 Under their theory, they have no way to
13 explain why that wouldn't be a consequence of their
14 theory.

15 The two lines of Virginia cases confirm
16 that conclusion, the utility fees cases and the revenue
17 bond cases.

18 Under the utility fee cases,
19 Mr. McSweeney's papers continually discuss the idea
20 there's a quid pro quo test. That phrase is not found
21 in the McMahon line of cases. It's not there. I think
22 they've misstated what the test is. The test is not on
23 an individual basis, the test is on a systemwide basis.
24 So the question is whether the fee generating revenue
25 unreasonably exceeds the cost of providing the service

1 systemwide.

2 And then we cite, explain, we have
3 excerpts from those three cases at page -- at footnote
4 10, pages 12 and 13 of our reply brief.

5 But, for example, Eagle Harbor, in that
6 case, the county of Isle of Wight did a number of sewer
7 and -- water and sewer improvements throughout the
8 county. And in one district, the northern service
9 district, there were no sewer improvements at all. The
10 county charged a \$4,000 sewer tap fee to connect to a
11 sewer line. The developer said, Wait a minute; why
12 should I have to pay \$4,000 bucks per tap when the
13 money that this is supposedly paying for didn't pay for
14 anything in the area where I'm connecting.

15 And the Supreme Court didn't have any
16 problem with that. They didn't raise a tax argument,
17 but they did argue that the fees were unreasonable in
18 that the Supreme Court held that the fees were
19 reasonable because they applied to all new customers
20 countywide, were less than the actual system costs, and
21 were solely dedicated to retiring the utility bond
22 issue. So I think that case is analogous here.

23 That systemwide approach was also taken
24 in McMahon. That was the case where Virginia Beach
25 required every landowner to pay for the extension of

1 public water to their property line even if they didn't
2 actually connect. And the plaintiffs said, We have
3 wells, we spent a lot of money on our wells, we
4 shouldn't have to pay this fee because we don't connect
5 to the system anyway.

6 So under the quid pro quo theory, that
7 case should have come out in favor of the plaintiffs;
8 right? But it didn't. The Supreme Court said that the
9 fee was not an improper revenue generating device. It
10 didn't matter that the plaintiffs didn't get any direct
11 individual benefit by not connecting. And the test the
12 Court applied was looking at the total revenues raised
13 against the total costs. The total revenues were about
14 \$4.7 million, but the program cost 20 million.

15 So the Supreme Court said that's
16 obviously not an improper revenue generating device
17 because they are not paying for all of the cost of it.

18 The same approach was taken in Tidewater
19 Builders Associates and the same approach applies here
20 because the project tolls here, it's undisputed, are
21 not sufficient to pay for the cost of this project.

22 Virginia, for example, had to put in
23 \$422 million to make this thing work. So the tolls are
24 not enough to pay for it.

25 Let me turn to the revenue bond cases

1 briefly. I'm just going to talk about, really, one of
2 them, and that's Button II. That's the case where the
3 Supreme Court upheld a state college financing
4 authority act which allowed colleges to charge fees, to
5 increase fees on existing college facilities in order
6 to pay bonds to fund the construction of new college
7 facilities.

8 Under the plaintiffs' theory, that was an
9 illegal tax, but the Supreme Court held that repayment
10 did not depend on the State's taxing power, so there
11 was no referendum constitutionally required to approve
12 the debt.

13 Now, it's true, and you'll hear this from
14 the plaintiffs, that case involved the predecessor to
15 Article VII, Section 10. It didn't involve Article I,
16 Section 6, which is at issue in this case, but the
17 principle is the same. You don't have tax involved
18 when the same project repays the bonds.

19 If the plaintiffs were right, if their
20 taxation without representation theory were right, the
21 bonds -- the bond statutes upheld in cases like Button
22 were actually unconstitutional. And I think the
23 plaintiffs concede this, and I think you'll find that
24 at page 11 of their reply brief.

25 What they say in response is, Well, for

1 any bonds that are in issue, there's a pretty short
2 statute of limitations to challenge them, and that's
3 all they've got. They ignore that such bond mechanisms
4 couldn't be used in the future at all, including the
5 state revenue bond act for projects like Dulles toll
6 road or the York bridges or a number of the others that
7 we point out in our papers.

8 That would be a sea-change in the way
9 that you have transportation capital financing in this
10 state. It bears mention that in our Constitution, the
11 current one, was adopted in 1971; that was six years
12 after Button II. And the special fund doctrine had
13 been adopted in 1949 when Almond v. Gilmer upheld the
14 original state Revenue Bond Act.

15 It's just inconceivable to me that when
16 the General Assembly adopted the 1971 Constitution they
17 thought that they were abandoning the use of bond
18 revenue mechanisms like the ones we're talking about in
19 this case.

20 And this is also interesting. Gilmer, in
21 1947, held that the General Assembly had been using
22 revenue bond financing mechanisms since 1933. And this
23 is what -- this is kind of unusual. You think of
24 courts deciding -- Your Honor and the Supreme Court
25 decide what the Constitution means. The General

1 Assembly ordinarily wouldn't think to say this is what
2 the Constitution means.

3 What the Court did in Gilmer was to say
4 the General Assembly has been using these mechanisms
5 for so long that that construction is actually entitled
6 to great weight in interpreting the constitutional
7 provision.

8 I think the same reasoning applies
9 equally here. You could not -- you should not adopt a
10 rule advocated by the plaintiffs that would overturn
11 revenue bond mechanisms that have been in use since
12 1933.

13 Now, let me cover what is the plaintiffs'
14 main case, Marshall v. Northern Virginia Tax Authority.
15 We think the case is easily distinguished. There was
16 no dispute in Marshall that the fees in question were
17 actually taxes. I have listed them. There are seven
18 different fees and taxes listed in that case.

19 The issue wasn't whether they were taxes.
20 The issue was did you get around the problem of the
21 taxes being imposed by an unelected body because the
22 taxes were set by the General Assembly, not by the
23 NVTA. And the Supreme Court said, no, the General
24 Assembly has to both decide what the tax will be and
25 decide whether to impose it. That's what Marshall was

1 about.

2 But the fees in that case didn't relate
3 to any particular project. Right? They went into a
4 general fund that was used to repay transportation
5 bonds generally for the nine localities in Northern
6 Virginia that were part of the NVTA. So there was no
7 nexus between the monies paid on any particular
8 project.

9 There was no -- no connection between,
10 you know, what the guy was paying and any kind of thing
11 he's getting in return.

12 The General Assembly didn't try to
13 establish a nexus in that case like it has done clearly
14 for the Midtown Tunnel and the Downtown Tunnel.

15 And like the Metrorail project at issue
16 in Gray and Corr, in this case people using, for
17 example, the Downtown Tunnel are going to have an
18 additional tunnel to use the new tube on the Midtown
19 Tunnel. They'll experience less traffic at the
20 Downtown Tunnel because, number one, the capacity is
21 going to be doubled at the Midtown Tunnel; number two,
22 there's going to be congestion pricing to keep the
23 traffic moving, and they'll see traffic conditions
24 displayed that will allow them to take a different
25 route if one of the routes is blocked.

1 So the project integration here is clear,
2 and I think that easily distinguishes Marshall. Again,
3 Judges Spencer and Trenga had no problem at all finding
4 Marshall to be inapposite.

5 So that's the biggest part of my
6 presentation. It covers the integration project
7 argument.

8 I do want to also urge the Court to
9 decide the case on the other independent ground that
10 there's a contractual relationship here between a toll
11 route road user and stating it's not like a tax imposed
12 as a surcharge on a third-party transaction.

13 And Mr. Thomas was right. It all comes
14 back to Westbrook. The developer in that case said
15 that he was challenging the cost of a sewer service
16 extension. He claimed that it violated Section 170 of
17 the 1901 Constitution, which I have given you the text
18 of on the slide. That basically said that a local
19 extension of utility service could not charge more than
20 in excess of the peculiar benefits resulting therefrom.
21 So it's kind of like the argument the plaintiffs are
22 making here.

23 The Supreme Court held that the sewer
24 line was not a tax, the extension was not a tax, and it
25 quoted the language Mr. Thomas read to you. A tax is

1 an enforced contribution by the government, it's not
2 founded upon contract or agreement. And because the
3 contractor there admitted that he contracted for the
4 sewer line extension, that was it, it was -- it was not
5 a tax.

6 The tolls in this case to use a faster
7 road are legally indistinguishable from the sewer
8 service at issue in Westbrook.

9 We don't have a surcharge on private
10 transaction as in Marshall, they had no choice, they
11 had to pay the tax. But here the government doesn't
12 force anybody to use the Midtown Tunnel, the Downtown
13 Tunnel, or the MLK Extension.

14 Other instances where the government acts
15 like a contractor, one of them is the Virginia State
16 Lottery. We all know that the lottery raises a lot
17 money that's used for educational purposes. Under the
18 plaintiffs' theory, you couldn't do that. You could
19 only charge the cost of operating the lottery.

20 Another example is municipal golf
21 courses. No one forces you to play golf, although some
22 may dispute that, but it's very typical for municipal
23 golf courses to raise surpluses there that go to other
24 parts of the municipality, but it's a contractual
25 relationship.

1 Now, does a factual dispute exist about
2 the feasibility of using alternative routes, does that
3 preclude summary judgment?

4 As Your Honor indicated at the outset,
5 the parties we thought were in agreement, and they are
6 in agreement the case is proper for summary judgment.
7 We don't think that there's a problem here because it's
8 undisputed that alternative routes exist.

9 The issue is not whether alternative
10 routes exist; the issue is one of their convenience.

11 In going back to the map, you have the
12 Jordan Bridge, which is privately owned. That's a toll
13 bridge. It's operated privately. It's about 1.7 miles
14 from the Downtown Tunnel as the crow flies. Obviously
15 it's longer if you're driving.

16 There's the Gilmerton Bridge about
17 3.9 miles away. There's the High Rise Bridge about
18 five miles away as the crow flies.

19 Is it less convenient to take those
20 routes going if you're trying to just go from downtown
21 Norfolk to downtown Portsmouth? You bet it's less
22 convenient, but you can go that way.

23 And the record on that is in dispute --
24 is not in dispute. We have in the record Defendant's
25 Exhibit 30, which is the Virginia state bond -- the

1 Small Business Finance Authority document, which makes
2 clear that the -- there are alternatives in paragraphs
3 2.44 and 2.45.

4 It points out that the other bridge
5 crossings are alternative routes, although they -- the
6 journey times in peak traffic are highly unreliable.
7 We all know that. They are highly unreliable, but they
8 are clearly alternatives.

9 So if you -- the only conclusory
10 statement to the contrary is in plaintiffs' Exhibit 18,
11 which is a February 2009 letter from the Secretary of
12 Transportation to the Independent Review Panel asking
13 them to review the Elizabeth River Crossings conceptual
14 proposal.

15 If you take a look at that document, what
16 the Secretary of Transportation says is that he's
17 asking the independent review panel to analyze the data
18 and make recommendations to the Commissioner on the
19 following issues, and he points out that funding for
20 project is going to require the retroactive tolling of
21 three existing corridors, and he goes on to say that
22 the project as defined in the solicitation does not
23 provide for any free alternatives.

24 Now, it's not clear if this means there
25 are no alternatives. If the solicitation defined

1 project described no alternatives, of course that's
2 true.

3 THE COURT: There's always an
4 alternative.

5 MR. RAPHAEL: Absolutely.

6 THE COURT: The question -- I mean, I
7 could get on 460, go to Richmond, come back down and
8 cross the James River Bridge; that's an alternative.
9 Well, not the James River Bridge but the Hampton Roads
10 Bridge Tunnel; that's an alternative. But the question
11 is -- isn't the question are there reasonable
12 alternatives? I think that was the point.

13 That's where you all -- you're hitting on
14 the first question I had asked today --

15 MR. RAPHAEL: Yes.

16 THE COURT: -- so that's why I let you
17 all go.

18 MR. RAPHAEL: Sure.

19 THE COURT: The -- I presume that there's
20 no real issue whether there are alternatives from
21 reading Mr. McSweeney's brief, but whether these
22 alternatives are viable or reasonable.

23 And I believe in your second brief you
24 asked me to take judicial notice that there were
25 alternatives. I'm not sure how you do that in a

1 summary judgment hearing, but I'm willing to take
2 judicial notice of about anything if we can get it
3 done.

4 MR. RAPHAEL: Well, let me try to--

5 THE COURT: They are not really
6 reasonable alternatives. You know that, I know that,
7 Mr. McSweeney knows that, and everybody knows that.

8 MR. RAPHAEL: Well, I don't think that
9 that's in the record. I don't think the record shows
10 that there are no reasonable alternatives.

11 I think the record is -- the slides I
12 just showed you establish exactly the opposite, that
13 there are alternatives.

14 THE COURT: There are alternatives, but
15 they're alternatives -- when you figure the price of
16 gas --

17 MR. RAPHAEL: Well, obviously a driver is
18 going to make the mental calculation is it worth it
19 for me to sit in traffic here and take the longer route
20 or should I pay the toll? Everybody's going to have to
21 make that calculation, absolutely.

22 But this is not -- I just drove my
23 daughter up north a couple weeks ago and I have to go
24 the Susquehanna Bridge, Interstate 95. There's no
25 alternative to that, unless you want to go to a local

1 road that's ten miles away. These alternative routes
2 are a lot more feasible than that.

3 But I also want to address the question,
4 is -- if you think that that's a fact that's in doubt
5 or in question, does that prevent you from reaching
6 summary judgment?

7 THE COURT: I'm not sure it's really in
8 question. Well, I didn't think it was until you said
9 that.

10 The problem I have is that -- I guess the
11 fact it's in question is are these alternatives
12 reasonable.

13 MR. RAPHAEL: Right.

14 And let me get to my slide about, does
15 that -- would discovery on that point make a
16 difference? I mean, I think the record establishes
17 that there are reasonable alternatives at least for
18 many, many people.

19 THE COURT: If you live in Craddock and
20 you are going to Greenbrier, it may be. But if you
21 live where I live and I'm going to Ghent, and I live in
22 Glenshellah, if you know anything about the City of
23 Portsmouth, and I'm right near the Midtown Tunnel. If
24 you live where I live and you're going to Ghent, it's
25 certainly not --

1 MR. RAPHAEL: Well, but that's only
2 because you're prepared to sit in the traffic to get
3 there more directly than to take the alternative route;
4 right? That's really what it's coming down to. But it
5 comes down to this --

6 THE COURT: It depends on how would you
7 define "reasonable."

8 MR. RAPHAEL: Well, the legal question,
9 Your Honor, is does it make a legal difference here in
10 this case.

11 THE COURT: Yes, and that's why I'm
12 asking.

13 MR. RAPHAEL: And I don't think it does.
14 The reason -- suppose we took discovery, we took
15 discovery of all these fine people in the room and
16 said, What way do you go in? Do you feel like you've
17 got a reasonable alternative? And a lot of people
18 would probably say, No, we don't think we do. But it's
19 going to come down to --

20 THE COURT: I'll tell you what, I would
21 bet you what the answer would be if you ask it.

22 MR. RAPHAEL: Right. Right. But it
23 comes back to Westbrook. Really, Westbrook is the
24 guiding case here; right? That's the one the
25 developer needs the sewer line.

1 THE COURT: Yes.

2 MR. RAPHAEL: There is an alternative
3 usually often for sewer service where you can build a
4 septic tank. Although you may not be able to get as
5 many houses on septic as you can if you get public
6 sewer. But suppose you didn't have the ability to put
7 many septic fields on the property; would that have
8 made a difference in Westbrook? And the answer is no.
9 There's no discussion in Westbrook about the notion of
10 having a reasonable alternative, so I think Mr. Thomas
11 is exactly right on that.

12 So legally it doesn't matter on this
13 point. It just doesn't matter.

14 And going through the discovery exercise
15 wouldn't put you in any better position to decide it
16 then than it does now.

17 THE COURT: I agree. You all brought it
18 up. I was questioning whether it was even necessary to
19 think about.

20 MR. RAPHAEL: Ultimately it is -- well, I
21 think about a lot of things that are really not
22 necessary for me to think about.

23 THE COURT: Well, I do too.

24 MR. RAPHAEL: Legally, it doesn't matter.
25 If you want to cut to the chase, it doesn't matter. It

1 still comes down to it's a contractual exchange just
2 like it was in Westbrook, no matter how much that
3 developer really needed that public service line.

4 Of course, there are -- there are two
5 independent arguments. We have now concluded the
6 second independent argument. You are free to decide it
7 on either one or both. We'd like you to do it on both,
8 but you're free to decide it on one.

9 Getting back to my road map now, I want
10 to cover the unlawful delegation point. I have been
11 through the bulk of my presentation, if you're
12 concerned about the time.

13 But the basic principle --

14 THE COURT: With Mr. Thomas, I gave up.

15 MR. RAPHAEL: He is a recidivist driver.

16 With regard to the unlawful delegation
17 issue, the basic principle is did the General Assembly
18 set the policy and legal principles to be followed.
19 And the key case on that is Thompson v. Smith. This is
20 the language we quoted in the brief, The legislature
21 must declare the policy of the law and fix the legal
22 principles which are to control in given cases, but an
23 administrative body may be invested with the power to
24 ascertain the facts and conditions to which the
25 policies and principles apply.

1 The legislative standard -- and this is
2 really the teaching of Thompson. The legislative
3 standards can be really broad and really abstract, and
4 Thompson gives some examples of that, one of them was
5 whether sanitary and drainage arrangements were, quote,
6 sufficient to protect the public health, unquote.
7 That's pretty darn broad. But that was enough
8 legislative guidance to pass muster in -- the Thompson
9 court said.

10 Another example comes from the Bell v.
11 Dorey case we cited where the Supreme Court said this
12 language was enough to be a proper statement of the
13 policy, that the agency was supposed to promulgate
14 regulations that were feasible based on the best
15 available evidence and limited to conditions which
16 would materially impair the health or functional
17 capabilities -- capacities of the employee. Very, very
18 broad guidelines.

19 By comparison to those broad guidelines
20 that passed muster, the PPTA guidelines are really
21 specific by comparison and they are set out in Section
22 56-560, the things that the agency has to find before
23 it can approve a PPTA project; that there's a public
24 need, that the facilities are reasonable and will
25 address the needs by improving safety, reducing

1 congestion, increasing capacity, et cetera, and that
2 the estimated cost is reasonable and that the private
3 entity plans will result in the timely development or
4 more efficient operation.

5 So those are much clearer guidelines than
6 in the cases that --

7 THE COURT: Where are you in the tabs, do
8 you remember? I thought I had it marked, but I had the
9 wrong thing marked.

10 MR. RAPHAEL: Do you mean in terms of
11 what argument?

12 THE COURT: No, the PPTA guidance. Which
13 tab is that under in your --

14 MR. RAPHAEL: Oh. We did not include
15 the -- this slide is from the statute itself. This is
16 56-560, which I didn't include a copy of the statute in
17 the tabs.

18 But what we did include in the tabs, if
19 you look at defendant's Exhibit 25 at page 27 --

20 THE COURT: Okay.

21 It took me two days to figure out the
22 numbering and the pages. Okay.

23 MR. RAPHAEL: Okay. And what I've done
24 on the slide is I've just -- the findings by VDOT are
25 on two pages. I combined them together on a single

1 page on the slide, but these are all the findings that
2 VDOT made that were -- that it was required to analyze
3 and make and issue in order to approve this project,
4 and you see the list is quite lengthy. But it matched
5 the statutory requirements that it had to meet in order
6 to approve the project.

7 So the bottom line, Your Honor, is that
8 there's clearly no unlawful delegation here either with
9 regard to the PPTA itself or with regard to the
10 Comprehensive Agreement.

11 Now, I do want to touch -- I think the
12 plaintiffs have abandoned at least some of these
13 arguments, but they raised an assortment of delegation
14 arguments in their Complaint, things like lacking
15 authority over compensation numbers, lacking authority
16 to provide for congestion pricing and E-ZPass. They
17 claimed that ERCO had the power unilaterally to set
18 tolls, which is not correct. Then they attacked the
19 compensation provisions for alternative facility
20 impacts and future tax law changes.

21 Let me -- I think Mr. Thomas covered the
22 fact that there's no profit guarantee here, so I'm
23 going to skip that slide. He made it clear that
24 Elizabeth River Crossings really assumes the risks of
25 being able to make any money at all on this project,

1 which is a huge protection for the State and the --
2 bears a huge amount of risk.

3 I do want to touch on this notion that is
4 raised by the plaintiff that it is somehow illegal for
5 tolls to fund any kind of money that the contractor
6 might ultimately make on this project. If you couldn't
7 pay a contractor a return to undertake a project, the
8 government couldn't undertake any government
9 contracting, and the -- it bears mention that one of
10 those findings that the Department made, that VDOT
11 made, was that you could not satisfy the project need
12 here by ordinary procurement methods. That's why you
13 needed to use the PPTA. And, nonetheless, they've said
14 the estimated cost is reasonable. That's a finding
15 that there's just no basis to set that aside. And VDOT
16 also found that the project would be delivered in a
17 more efficient, more timely, and less costly fashion.

18 The plaintiffs at one point -- I'm not
19 sure they still argue it -- but at one point they said
20 there was no authority for E-ZPass and congestion
21 pricing. The PPTA language clearly authorizes
22 authority to have user fees to preserve capacity and
23 prevent congestion. I think it's well within the PPTA.

24 I also wanted to point out, I noticed
25 this in preparing for today, the 2007 statute, which

1 established the HRTA's powers that were later
2 transferred to the CTB. That statute actually
3 specifically called for something like E-ZPass. It
4 said that the amount of any such toll may be varied --

5 THE COURT: I read it.

6 MR. RAPHAEL: Okay.

7 -- based on congestion levels. It also
8 talks about the need for an electronic tolling system.
9 So there's no question the General Assembly authorized
10 E-ZPass and congestion pricing.

11 The concessionaire does not set the
12 tolls. I think this is clear. The Comprehensive
13 Agreement -- I'm sorry; the PPTA makes clear that the
14 tolls, that the user fees shall be established by
15 agreement of the parties, meaning by VDOT and Elizabeth
16 River Crossings. And it also says that the execution
17 of the agreement is conclusive evidence, conclusive
18 evidence, that the user fees comply with the PPTA.

19 And the Comprehensive Agreement itself
20 makes clear that the tolls are not set unilaterally by
21 Elizabeth River Crossings.

22 The arguments about alternative
23 facilities and change in future tax laws, these are --
24 fundamentally, it comes down to the question did VDOT
25 have the contractual power to agree to those

1 arrangements? I think the answer is they clearly did.

2 We start with the PPTA, Section 56-566,
3 authorizes the agreement to include appropriate
4 provisions for compensation, and they can even include
5 a maximum run on profit. The agreement can contain
6 such other terms and conditions that the responsible
7 public agency finds are necessary to serve the purposes
8 of the chapter.

9 And then another key provision is
10 56-566 -- I'm sorry; 56-558, that an action serves the
11 public purpose of the PPTA if it provides the
12 facilities for timely development and/or operation. So
13 that's another check on how you decide whether the
14 provision is appropriate.

15 If there's any question about it, you
16 have to err on the side of the government on this
17 because 558-C says public and private entities may have
18 the greatest possible flexibility in contracting with
19 each other for the provision of public services.

20 And, lastly, the chapter is to be
21 liberally construed. So the contractual authority is
22 very, very broad.

23 Now, with that background, there are two
24 compensation event provisions that they don't like.
25 This is an excerpt from the Comprehensive Agreement

1 that's defendant's Exhibit 25 at page 34.

2 There are lots of potential compensation
3 events. And remember, you need -- from our standpoint,
4 we need those. Because the only way that the Elizabeth
5 River makes money on this is if it manages the
6 property -- the project correctly and if its traffic
7 projections and forecasts are accurate. If you make
8 changes in those assumptions, it could result in a huge
9 loss.

10 So one of the provisions on which
11 Elizabeth River Crossings relied was the alternative
12 facility provision. Another was that there's not going
13 to be -- we're not going to have the rug pulled out
14 from under us with regard to the existing tax law
15 exemptions that apply to PPTA projects.

16 The contract specifically says, at page
17 30 of Exhibit 25, that these concessionary damage
18 provisions were a material inducement in consideration
19 for the execution of the agreement. So without these
20 provisions, the State could not have gotten this deal.

21 The alternative facility provision is
22 excerpted here on this slide. It's from page 33.2 of
23 defendant's Exhibit 25. And when you look at the
24 provisions that -- the alternative facilities that
25 might trigger a compensation event, it's the things

1 we've been talking about; the possibility of a third
2 river crossing, broadening, widening both the lanes on
3 the High Rise Bridge that could result in reduced
4 traffic flow for the project facilities. It might lead
5 to a compensation claim.

6 You'll note here, Your Honor, that this
7 does not include the Jordan Bridge, because that's
8 privately owned, and it also does not include
9 facilities that are constructed or operated by the City
10 of Norfolk or the City of Portsmouth; right?

11 So, basically, what this is saying is
12 that Virginia -- VDOT and the contractor entered into
13 this agreement that was based on certain financial
14 assumptions, and one of them was that the State wasn't
15 going to pull the rug out from the concessionaire by
16 building additional crossings, that were totally within
17 its power to do, without making sure that the
18 concessionaire would receive compensation if that
19 happened if it could prove a loss as a result. That's
20 what's going on here.

21 The change in tax law provisions is a
22 similar kind of assumption. This was the part of the
23 case that I had the hardest time getting my head
24 around. Once you sort of get that there are existing
25 PPTA tax exemptions, it's all pretty clear.

1 What we did in our brief, at page 21, was
2 to list for you all of the existing tax exemptions that
3 apply to PPTA projects, and it includes things like
4 recordation taxes, sales taxes, license fees, et
5 cetera. Those are existing tax exemptions.

6 THE COURT: Which brief are you speaking
7 of, number one or number two?

8 MR. RAPHAEL: Number one. Defendant's
9 opening brief at page 21.

10 As I said, I'll make sure to give you a
11 copy of these slides so you have it to refer back to.

12 But you'll see there at the top of page
13 21, those are the existing tax exemptions that apply to
14 all PPTA projects now. Okay?

15 Then what we did, we said, okay, we'll
16 look at the Comprehensive Agreement, it's page 37 of
17 defendant's Exhibit 25, and you see what is defined as
18 a tax imposition event. And then you can match -- you
19 can match the tax -- the existing tax exemptions to
20 what would be a tax imposition event if the tax
21 exemption were changed someday, eliminated, and
22 somebody were to impose a tax. Right?

23 So there's a symmetry here between those
24 tax imposition events and the existing tax law
25 exceptions. But as Mr. Thomas pointed out, nothing in

1 this agreement exempts the concessionaire from having
2 to pay income taxes or other generally applicable
3 taxes. So it's simply to deal with that possible
4 future contingency that those existing tax exemptions,
5 on which everybody relies, might be changed.

6 And that brings us to the ripeness issue.
7 There are lots of uncertainties whether anything is
8 ever going to come of this. And, frankly, this is the
9 easiest way to decide this part of the case if you were
10 so inclined.

11 This slide shows all of the, you know,
12 what-ifs that have to happen in order to get to any
13 kind of compensation claim.

14 With regard to an alternative facility
15 event, the legislature or VDOT would first have to
16 provide for an alternative facility of the kind listed.
17 For a tax change event, you'd have to -- the
18 legislature would have to repeal the exemptions.

19 The next thing that would have to happen
20 would be the alternative facility would have to be
21 built or the taxes would have to be imposed. Then,
22 Elizabeth River would have to claim and demonstrate
23 that that, in fact, led to an impact on costs or
24 revenues.

25 If that couldn't be resolved and legal

1 action resulted, we'd have to prove in court that we
2 were damaged. And suppose we did that and suppose
3 there were a compensation judgment awarded. It's
4 subject to appropriation by the legislature and it's an
5 allocation by the CTB, and that's the provision that
6 Mr. Thomas showed you. So there are lots of what-ifs
7 here before anything ever comes of these provisions.
8 And for those reasons, the claims are just not ripe.

9 THE COURT: Let me interrupt.

10 You go to court first -- and this may not
11 be relevant to the whole thing, but I'm just curious
12 now.

13 You have go to court first to get the
14 damages, then the legislature can decide whether to pay
15 them? Is that what you told me?

16 MR. RAPHAEL: Well, no. The first thing
17 we'd have to do is make the claim.

18 THE COURT: Right. I understand that.

19 MR. RAPHAEL: If we couldn't work it
20 out --

21 THE COURT: I dropped the first couple
22 things --

23 MR. RAPHAEL: Sure.

24 THE COURT: -- but I got down to the
25 bottom two.

1 MR. RAPHAEL: Skipping down your list, we
2 get a judgment, but we can't get it paid until -- it's
3 subject to appropriation by the General Assembly. So
4 that's the last -- they've got to decide if they're
5 going to appropriate for it.

6 THE COURT: Could the Court make the
7 General Assembly do that under this?

8 MR. RAPHAEL: That's exactly why this
9 case isn't ripe. There are lots of what-if's. That's
10 the whole point. It's who knows.

11 THE COURT: I mean, if you take -- you
12 all cited Winstar, but Winstar could flip on you, too,
13 it seems to me. Didn't they say that was a contractual
14 obligation, that the --

15 MR. RAPHAEL: Oh. Well, what Winstar
16 says is that the contractual obligation is enforceable
17 against the government if the government makes it clear
18 that that's what's supposed to happen, and it did in
19 Winstar, and that's not a surrender of sovereignty.
20 That's what Winstar says.

21 THE COURT: So what choice would the
22 legislature have but to pay it?

23 MR. RAPHAEL: Well, I -- I don't know
24 what they would do, and that's another part of the --
25 another part of what's speculative about it. But the

1 contract says it's subject to appropriation.

2 THE COURT: What I am really asking is
3 what does that mean? What does "subject to
4 appropriation" mean?

5 MR. RAPHAEL: Well, and I think the
6 plaintiffs would probably like you to write an opinion
7 on that right now.

8 THE COURT: Well --

9 MR. RAPHAEL: Right? But that's the
10 point. It's who knows. It's not ripe. That's why we
11 have a ripeness doctrine. And we have cited a bunch of
12 cases for this. I thought -- it's not -- really, the
13 best language, sadly, is not from our own Supreme
14 Court. It's from the U.S. Supreme Court where they say
15 claims that rest upon contingent future events that may
16 not occur as anticipated or indeed may not occur at all
17 are not ripe. That's this case.

18 The Supreme Court of Virginia said it in
19 Franklin -- City of Fairfax v. Shanklin, the
20 controversy must be one that's justiciable, where
21 specific adverse claims are based upon present rather
22 than future or speculative facts are ripe for
23 adjustment, and courts are not constituted, and the
24 declarative judgment statute was not intended to vest
25 them with authority to render advisory opinions or to

1 answer inquires which are merely speculative.

2 So this last colloquy is a perfect
3 example. What would the legislative do? What would a
4 Court do? Who knows. That's why we have a ripeness
5 doctrine and why we don't decide these things.

6 THE COURT: That's a great answer, by the
7 way.

8 MR. RAPHAEL: Thank you.

9 Now, the plaintiffs have an interesting
10 way to try to get around this. They say, oh, really,
11 the thing -- what makes this ripe now is that these
12 provisions are going to chill the General Assembly from
13 eliminating existing tax law exemptions and may chill
14 the General Assembly from providing for additional
15 river crossings. But that's a claim based on an injury
16 of somebody else. It's an injury to the General
17 Assembly.

18 They have not alleged or shown how they
19 are possibly hurt by any such reluctance. They are not
20 asserting their own rights and that, of course, is an
21 independent reason why the claims are not ripe.

22 There's no link between any inaction by
23 the General Assembly now -- and, of course, the General
24 Assembly is out of session now. But they have not
25 established any link between that and anything that

1 hurts them. Like how does that lead to higher tolls?
2 They haven't -- they can't answer that. They haven't
3 answered that.

4 We also pointed out in our papers that
5 where your claim for ripeness depends on how something
6 affects the government and its behavior, that's
7 inherently speculative. As we all know, who knows what
8 the government is going to do when the folks get
9 together. It's inherently speculative.

10 And I think the last point on the
11 ripeness issue that's worth pointing out is that if
12 these claims are unenforceable, if the General Assembly
13 thinks that or VDOT thinks that, they're perfectly --
14 they have lots of legal talent to be able to bring
15 those claims at the appropriate time. They don't need
16 the plaintiffs counsel to represent them in that, and
17 that's another reason why the claims are not ripe now.

18 Let me turn to the surrender of
19 sovereignty issue. We covered it already with Winstar.
20 Winstar is really a great case. It covers the history
21 -- it's a really long case and it's kind of a pain to
22 read because it's so long. Justice Souter's opinion
23 was, you know, a plurality opinion, but they agree on
24 one thing: That the government is legally able to
25 contract to pay damages to a private party if the

1 government changes the rules of the game or changes the
2 law. And that's what Winstar is all about and that's
3 what their claims here are all about.

4 So there's no reason to think that
5 Virginia's law on surrender of sovereignty issues is
6 any different from that. One place where you see that
7 is when you look at the report of the commission on
8 constitutional revision for Virginia's Constitution of
9 1969 when they talk about this notion, you know, the
10 unmistakability doctrine and surrender of sovereignty.
11 They cite the Stone v. Mississippi case from 1879,
12 which is the same case Justice Souter was talking about
13 before he wrote that language up there. So there's
14 just no reason to think that Virginia's law here is any
15 different from the Supreme Court's.

16 Of course, all government contracts can
17 constrain the government in some way compared to not
18 being contractually obligated, and the plaintiffs offer
19 you no limiting principle as to how the government
20 could ever be bound under their theory.

21 Mr. Thomas pointed out the Concerned
22 Residents of Gloucester County case. This case is
23 relevant for a couple of reasons. One of them is that
24 it involves both the exclusive service arrangement
25 provision, with the waste contractor there, as well as

1 a change in tax law provision, and both of those
2 provisions were upheld. If the plaintiffs were right
3 about their surrender of sovereignty argument, that
4 case could've come out that way.

5 There's no surrender of sovereignty here.
6 As for the tax provision, the concerned residents
7 Supreme Court case said that the contract does not
8 waive taxes; it simply provides that the contractor
9 gets a credit if taxes are imposed in the future. That
10 case couldn't have come out that way if the plaintiffs
11 were correct.

12 Let me -- before I get to the special law
13 claim -- let me just quickly cover the special law
14 claim.

15 Concerned residents also dispatched that
16 claim because the Court said, in analyzing the special
17 laws challenge, the question is whether the
18 classification is reasonable. And it pointed out that
19 if any stated facts can be conceived to sustain it,
20 then you've got to sustain it. And the provision there
21 was not unreasonable or arbitrary because it was fair
22 consideration for the services rendered.

23 And it's the same issue we talked about.
24 This waste contractor enters into a long-term agreement
25 with the State, with the locality. At the time, there

1 were no local property taxes imposed. If they were
2 going to be imposed, that would be a fundamental change
3 in the bargain.

4 The Supreme Court said you could have a
5 credit provision in that situation, and so it held that
6 the provision did not violate the prohibition against
7 special laws.

8 Let me just, I just want to comment -- I
9 don't have a slide on this, but I want to comment on
10 this -- it came up in the plaintiffs' arguments about
11 certain statutes in Virginia that provide antitrust
12 immunity if a municipality enters into an agreement or
13 does something that is anti-competitive. And I think
14 they are mixing up apples and oranges here.

15 There are two issues on that. The first
16 issue is, does state law allow the state agency to
17 enter into the contract? Do they have authority to
18 enter into the contract?

19 There's a second issue that comes up in
20 the antitrust context involving Parker immunity. The
21 Supreme Court held in Parker v. Brown antitrust laws
22 don't apply to state actors or to the state. They
23 didn't want to constrain state legislatures.

24 The question there was, in a later case,
25 so what about a municipality? If a municipality does

1 something anti-competitive, is it subject to Sherman
2 Act liability under the antitrust laws? And the
3 Supreme Court developed a line of cases that said,
4 we're not going to necessarily treat the municipality
5 as the State. What we need to see is state law that
6 authorizes the municipality to act in a way intended to
7 be or clearly likely to be anti-competitive; right? So
8 that's what they're mixing up.

9 The initial question is do you have the
10 contractual authority to do the deal? And we clearly
11 do.

12 The other question is would you have
13 Parker immunity if you were sued under the antitrust
14 laws? And for that, it's helpful to have a statute
15 that says we intend this to be anti-competitive -- to
16 be valid even if it's anti-competitive. So I think
17 they run off the rails in mixing up those two points.

18 I'm nearly done.

19 The three last points I want to quickly
20 tick through. The State Corporation Commission
21 argument, I think you've covered that. It wasn't
22 pleaded. The SCC has no inherent power just because
23 it's created by the Constitution and there's no
24 statutory or constitutional basis to think the SCC has
25 any control over this project. In fact, the PPTA says

1 it does not.

2 The due process claim, that's Count 6, is
3 totally duplicative of everything else. I think the
4 easiest way to show that is with this screenshot where
5 I've taken the claim from paragraph 73 of the Complaint
6 and I've highlighted for you all the things that go
7 into why they say there's a due process violation.
8 It's simply a rehash of everything we've talked about.

9 I want to end with the absence of
10 limiting principles here on the -- in the plaintiffs'
11 arguments. They would invalidate a dozen PPTA projects
12 that are underway or completed. They would invalidate
13 all revenue bond financing that -- involving multiple
14 facilities that are part of the same project. They
15 would overturn cases like Button and Gilmer. They'd
16 reverse the outcomes in cases like Gray and Corr. Corr
17 is on appeal in the Fourth Circuit, but Gray has
18 concluded. They would invalid the Metrorail to Dulles
19 project. They would require that utility fees reflect
20 a quid pro quo on an individual basis for the value
21 received by each user, which would overturn cases like
22 McMahon and Eagle Harbor, and they deprive the
23 government the opportunity to contract with a private
24 company that would not be able to have an assurance
25 that -- if long-term contracts are going to operate as

1 it expects, without the government pulling the rug out
2 from under it.

3 So the claims that they make are
4 unsupported, they cannot cite a single case supporting
5 the outcome they urge here, and we ask for summary
6 judgment on all counts.

7 I do have for the Court a proposed order
8 and I'd like to just briefly pass it up.

9 MR. MCSWEENEY: We have not seen it. I
10 would prefer that we be able to look at it before it's
11 handed up, Your Honor.

12 MR. RAPHAEL: Sure.

13 MR. MCSWEENEY: We can do that after the
14 argument.

15 THE COURT: Does that complete your
16 argument?

17 MR. RAPHAEL: What I wanted -- I'm nearly
18 at the end, yes, and what I wanted to do was hand it up
19 and just show you how simple it is.

20 THE COURT: Well, let me do this: Is
21 that -- I'm trying to find out if there's anything
22 other than the order that you have to -- that you want
23 to deal with in your argument?

24 MR. RAPHAEL: The only other thing was to
25 ask if you had any remaining questions.

1 THE COURT: I have some, but I'm going to
2 wait to ask them after Mr. McSweeney gets his chance.

3 MR. RAPHAEL: All right.

4 THE COURT: While Mr. McSweeney looks at
5 your proposed order, I'm going to take a ten-minute
6 recess and let you wrap up extremely quickly, if you
7 need to, after that.

8 MR. RAPHAEL: Well, in that event, I'm
9 concluded and I really appreciate your patience. Thank
10 you very much.

11 THE COURT: Then I will let Mr. McSweeney
12 make his argument after the ten-minute recess, and then
13 we'll decide whether I should look at that order now or
14 later.

15 MR. RAPHAEL: May I hand you the slides?

16 THE COURT: Sure. Sure. Certainly.

17 MR. RAPHAEL: Thank you, Your Honor.

18 THE COURT: The Court will be in recess.

19 (Recess)

20 THE COURT: Any objection to me getting
21 this now? I know you don't want me to enter it now.

22 MR. McSWEENEY: I haven't read -- my
23 co-counsel has, and I -- okay.

24 We may interject our objections later,
25 Your Honor, but for purposes of --

1 THE COURT: Just for having it, glancing
2 over it as parts of his argument.

3 MR. RAPHAEL: The main point was to just
4 track the arguments to the counts.

5 THE COURT: Sure. Thank you.

6 MR. RAPHAEL: Thank you.

7 THE COURT: Mr. McSweeney.

8 MR. MCSWEENEY: Your Honor, I blanched,
9 as you know, in your chambers when I was told we were
10 going to have 45 minutes apiece. It's been more than
11 two hours. I don't intend to spend two hours
12 responding. And I really don't want to get into the
13 weeds in responding point-by-point to Mr. Thomas and
14 Mr. Raphael.

15 If you will indulge me to put the focus
16 in focus from our perspective, because we are the
17 plaintiff, it was our complaint, it's been
18 mischaracterized, so I want to go through it.

19 THE COURT: Take as much time as you
20 need.

21 MR. MCSWEENEY: Well, don't do that, Your
22 Honor.

23 What we're --

24 THE COURT: I will tell you, you know, my
25 father was a preacher; so I learned to sit in the back

1 row with my friend John in Bowling Green. And after
2 about 15 minutes, I could faze him right now and look
3 around in church.

4 MR. MCSWEENEY: That's precisely what I'm
5 worried about.

6 THE COURT: I'm just telling you this.

7 In fact, my friend John, when they closed
8 that particular part of the church -- we built a new
9 sanctuary -- bought the pew that we used to sit in and
10 he has it up in Gloucester County. Maybe he's sitting
11 it in right now for all I know.

12 Go ahead.

13 MR. MCSWEENEY: What we're challenging is
14 that the PPTA, the statute itself, authorizes the
15 commissioner of VDOT, an unelected individual, to
16 execute a contract with a private company that puts the
17 people's elected representatives on the sidelines and
18 out of the games, out of this game, on matters covered
19 by this Comprehensive Agreement for 58 years, during
20 which the private company admittedly can earn, no
21 guarantee, but he can earn a substantial profit, but he
22 earns that profit through the imposition of tolls.

23 I want to address one point very quickly,
24 Your Honor; Mr. Raphael's argument that every contract
25 as a result of out-sourcing involves a private company

1 trying to make a profit.

2 He knows the difference. This is a
3 public service corporation by definition. It earns its
4 profit only because it is authorized by the government
5 to impose a toll on the public. And clearly this
6 case -- much of what was said about the Comprehensive
7 Agreement and the compensation that the concessionaire
8 may earn here is totally irrelevant.

9 The fact is, it cannot receive any
10 compensation through the imposition of a toll; it
11 cannot impose the toll unless someone with legislative
12 power authorizes it.

13 We did plead it in Section -- in
14 paragraph 60. We said that VDOT does not have the
15 power and the General Assembly cannot delegate that
16 power.

17 Let me turn to a case that they heavily
18 rely on. Eagle Harbor, decided recently by the Supreme
19 Court, said that this Court has held, quoting from
20 Eagle Harbor, This Court has held that setting fees
21 and -- rates and fees for sewer and water services is a
22 nondelegable legislative function. Nondelegable
23 legislative function.

24 One of the distinctions in Eagle Harbor,
25 Tidewater, McMahon, Mountain View, the four cases they

1 rely on, is that the user fees in each case were
2 imposed by an elected body.

3 Put the tax versus toll issue aside.
4 There's one feature that distinguishes this case from
5 Corr, from Gray, and from any other case, including the
6 Massachusetts Transportation Authority case, the Murphy
7 case; that is, that a private company is authorized to
8 impose the toll and receive a profit from operation of
9 this toll road.

10 Now, they argue that this is not a public
11 service corporation because it is not within the
12 definition in the statute.

13 I'd point the Court to Gruber v.
14 Commonwealth. It's a 1934 case, I believe. Gruber
15 addressed the same issue.

16 The argument was made that the definition
17 in the Constitution -- in the Constitution -- did not
18 cover the motor carrier in that case. And the Court
19 said, by definition it is a public service corporation.
20 And what the Constitution contemplated was that, as
21 circumstances change, other public service corporations
22 than those that existed in 1902 would emerge. And it
23 has been repeatedly said by the Supreme Court every
24 public service corporation was intended to be governed
25 and regulated by the State Corporation Commission.

1 Now, we didn't mention the State
2 Corporation Commission in our pleading. We didn't have
3 to.

4 The issue is not whether the State
5 Corporation Commission has the power here. The issue
6 is whether VDOT has the power. Under Eagle Harbor, for
7 one, and we cited Appalachian Power, and there are
8 dozens of Supreme Court cases that say setting rates,
9 which is -- they've said is really the objective of
10 that process, is to authorize a return on investment of
11 a private company. That is a purely legislative
12 function that cannot be delegated.

13 Now, one proposition Marshall
14 established, and I cited a number of other cases in our
15 opening brief, instances in which the Supreme Court,
16 the Virginia Supreme Court, said this particular
17 function is legislative, purely legislative, and it
18 cannot be delegated; the definition of crime, for
19 example.

20 The other one that has repeatedly been
21 held, perhaps more than any other, is that rate setting
22 is a purely legislative function. It doesn't matter
23 whether you call it a tax or a fee or whatever. You
24 cannot authorize a private company to impose a user fee
25 on the consuming public unless it's authorized by a

1 legislative body.

2 Now, what they ignore, and I expected
3 them to know the historical background, in 1902,
4 Virginia did something that no other state had done
5 then and, to my knowledge, has done since; it created
6 two legislatures, the General Assembly and the State
7 Corporation Commission.

8 And the Court has repeatedly said that
9 when it acts within the jurisdiction given by the
10 Constitution, it is the General Assembly, for all
11 purposes.

12 Now, the reason I say that is the people
13 in this Commonwealth have understood that certain
14 things have to be done by somebody other than
15 legislators because it consumes too much time and it
16 requires expertise. That is precisely why the
17 Corporation Commission was created. But, again, that
18 is not the issue, whether the Corporation Commission
19 has jurisdiction.

20 Now, every statutory grant, in addition
21 to what the Constitution provides, is vested in the
22 State Corporation Commission. It allows the
23 Corporation Commission to exercise the very same
24 legislative power it exercises when it uses the
25 function that is given to it under the Constitution

1 explicitly.

2 That's the only way rates can be
3 established. In fact, I think Professor Howard himself
4 said even the General Assembly, given the history of
5 the Constitutional revision and the adoption in 1970,
6 even the General Assembly cannot set the rates, only
7 the State Corporation Commission can -- or local
8 elected officials can establish rates, as they did in
9 Eagle Harbor.

10 Now, Mr. Raphael went into great length
11 about -- in his toll versus taxes argument, saying that
12 water rates and sewer rates are not taxes. Mr. Raphael
13 represented the prevailing party in a case we cited,
14 Fairfax County Water Authority v. City of Falls Church.
15 I'm going to quote what his argument was in his reply
16 argument.

17 Significantly, the City cannot dispute
18 that one of its own citizens can successfully challenge
19 its water charge as a tax on the McMahon line of cases.
20 Clearly, what is involved here that is not involved in
21 the other cases that I cited earlier, including Corr --
22 Corr -- Massachusetts Transportation Authority, the
23 Murphy case, is that there is a private profit
24 involved.

25 The mere fact that there is an element

1 that was not involved in the previous cases, the
2 revenue bond cases, the special fund cases, the utility
3 fees cases, are very straightforward cases. You look
4 at the cost of the project and you do simple math and
5 you come up with the toll.

6 When you add the additional factors in
7 this case, including the rate of return, the return on
8 investment of E-R-C-O, "ERCO," it is, by definition, a
9 legislative function in approving it. It is not like
10 the revenue bond cases or utility fee cases. They are
11 simply not governing here. They are not applicable
12 here because of that feature.

13 In Count 1, we have asserted four
14 different bases. One is just because there is the
15 setting -- there is a grant of authority to return --
16 to obtain a return on investment, which is a purely
17 legislative function when that's authorized, the PPTA
18 and the Comprehensive Agreement are unconstitutional.
19 VDOT simply doesn't have the power to do that and the
20 General Assembly cannot grant it.

21 The second is that it is a tax, and I'll
22 go into that. In fact, we've spent most of our time in
23 briefs and argument today on the tax issue.

24 The third is we argued that under the
25 PPTA, VDOT has the prerogative to -- pardon me, Your

1 Honor -- to establish by contract an abridgement of the
2 common law sovereignty.

3 We've repeatedly cited the Town of
4 Victoria case. Later on, Your Honor, in -- the Supreme
5 Court said, Victoria stands for the proposition -- and
6 I'm quoting -- that if the state grants a
7 municipality -- and you can substitute VDOT here -- the
8 power to enter into an inviolable agreement, fixing
9 utility rates for the consuming public, an
10 unconstitutional abridgement of the police power would
11 result.

12 So that's twice the Supreme Court has
13 made clear that there's an abridgement of the
14 sovereignty of the Commonwealth when the General
15 Assembly gives to -- this was an elected body, a
16 municipality; in our case, it's an unelected body, so
17 all the more reason it is an unconstitutional
18 delegation of power because it allows VDOT to abridge
19 the sovereign of police power of the Commonwealth.

20 Finally, we said in those areas where
21 there could be a delegation because it was not a purely
22 legislative function, there were no adequate standards
23 to govern the exercise of that discretion.

24 There has been no discussion about the
25 relevant function in this case. There was talk about

1 how you approve the project; there was a discussion of
2 the statutory policy language. None of that related to
3 the setting of user fees, and that's where we have said
4 that the language is so general that it is not an
5 adequate standard.

6 The more recent case, more recent than
7 Thompson v. Smith, is the case we cited Chapel v.
8 Commonwealth. It's a 1955 case, and it said that the
9 language there was so general it could not provide any
10 guidance to the agency in its exercise if the
11 discretion was delegated.

12 I would ask you to compare the language
13 in the statute which simply says, in one instance, that
14 user fees can be set as the parties decide by contract,
15 without any kind of limitation or standard or any kind
16 of guidelines, other than by contract.

17 Now, it does say when it sets the rates
18 for congestion fees it is to preserve capacity and
19 prevent congestion. However, the record demonstrates
20 that the principle reason for that is to raise revenue,
21 not to preserve capacity or to prevent congestion.

22 The user fees themselves and the
23 classifications are reached without any guidance at all
24 other than the language by a contract, by agreement.
25 That is hardly, by any standard, an adequate guideline

1 to be used by an agency that is exercising that
2 important power.

3 Now, I mentioned in the brief that it was
4 odd that counsel would rely on the Concerned Residents
5 of Gloucester County case, because that case
6 demonstrates the point we make in Count 2; that VDOT
7 had no power to provide for the alternative facility
8 language, because it does have anti-competitive
9 effects, it does give ERCO, or one of its partners, a
10 competitive advantage of millions of dollars in -- if
11 and when there is an alternative facility to be
12 constructed. It puts it ahead of its competitors by
13 millions of dollars.

14 There are two aspects, Your Honor, that
15 we talked about constricting the sovereignty of the
16 Commonwealth. One was in regard to the broad
17 delegation, which for 58 years sets a rate which is
18 binding upon the Commonwealth, unlike the rates set by
19 the Corporation Commission, which are subject to change
20 at any time under change of circumstances even at the
21 instance of the State Corporation Commission.

22 All the problems that counsel talked
23 about, all the reasons it needed this language would
24 have been dealt with if they'd gone the route that the
25 General Assembly had provided properly in the Highway

1 Corporation Act, which is to give them authority and
2 that responsibility to the State Corporation
3 Commission.

4 One thing is clear when you look at
5 Counts 3, 4 and 5, and I'm going back to some of the
6 arguments made on the previous two counts made by
7 counsel, but I want to frame this first for the Court.

8 Clearly, the General Assembly cannot
9 enact a special law that gives any individual company
10 or any individual the right to any kind of payment from
11 the state treasury. That's explicit in the
12 Constitution. I don't think there's any argument about
13 that either. It's Article IV, Section 14.

14 And I cited Davis v. Marr in our brief,
15 which simply said, in passing, that if the General
16 Assembly had given general power, even under general
17 law, to an agency to do what it could not do, the
18 General Assembly could not do, that would raise the
19 issue of a violation of that same section. It was
20 under the old Constitution, but the same provisions,
21 Article IV, Section 14, and that's precisely what's
22 happened here.

23 There's no question about the ripeness as
24 to 3, 4, and 5 if that provision is in the Constitution
25 and it authorizes that payment from the General

1 Assembly, because it does have a present effect on the
2 general -- on legislators.

3 It may affect very clearly the decision
4 to build another facility or how it may be built
5 because it's a close financial call in any one of these
6 projects, as the record before you in this case
7 demonstrates.

8 Count 6 clearly does rely on our
9 establishing the propositions in Counts 1, 2 -- 1 and 2
10 in particular. I have no argument with counsel on
11 that, but we still are entitled to the declaration that
12 it's a violation of due process. We don't win on that,
13 of course, unless we win on Count 1 or Count 2.

14 Let me go back to the four propositions
15 in Count 1, because I think that's where most of the
16 argument -- most of the discussion has been about.

17 If you begin with the unequivocal
18 statement in Eagle Harbor that setting rates for water
19 and service -- water service and sewer service is a
20 nondelegable legislative function, that puts all of the
21 argument of counsel into question and all of the
22 argument about toll versus tax is irrelevant. It is a
23 nondelegable legislative function to set the rates, and
24 this is without consideration of a return on investment
25 of a private company.

1 The issue in those four cases dealt with
2 a particular tax or a special assessment versus a user
3 fee. But even in those cases, and Eagle Harbor made it
4 plain, only the elected body, the elected local
5 governing body, could impose or decide on the rates. I
6 don't know how it could be more clear when the Court
7 said it is a nondelegable legislative function.

8 Now, clearly in this case it's odd and
9 ironic that counsel, in closing, would argue that we
10 offer no limiting principle.

11 One of the arguments we've made is there
12 is no limiting principle if you adopt their network, in
13 related network theory. There's no way to draw the
14 line on that because it could encompass anything that
15 has a relationship to each other.

16 For one reason or another, Counsel has
17 deliberately ignored what we have repeatedly pointed
18 out. We did not rely simply on some footnote in the
19 Federal Highway Administration document or something
20 online from the Federal Highway Administration.

21 Instead, we relied most heavily on a
22 statement by both VDOT and the Federal Highway
23 Administration in its NIPA document, the final
24 environmental assessment for this project, in which
25 they said the three components of the present Downtown

1 Tunnel, Midtown Tunnel, and Martin Luther King Freeway
2 Extension have independent utility -- this is their
3 words, independent utility -- and were individually
4 reviewed previously under the National Environmental
5 Policy Act.

6 The three components are now being
7 bundled as a single project for construction purposes.
8 It doesn't mean they are a single facility. In fact,
9 the language of the statute that Counsel relies on,
10 particularly the 2007 legislation, recognizes
11 explicitly that there are multiple facilities.

12 This is the governing principle we urge
13 the Court to adopt. And once you depart from it, it is
14 a slippery slope and there is no principle governing
15 standard or rule, no manageable -- judicially
16 manageable test, and, indeed, could be any concept that
17 the General Assembly came up with, including
18 multi-modal arrangements that could be treated as a
19 single facility.

20 When the General Assembly's conclusion is
21 unwarranted, as the case they cite themselves
22 establishes, and the Court can see it by simply looking
23 at the very diagram or the very map that Counsel put up
24 and we've attached to each of our briefs, these are
25 physically separated projects, physically separated

1 facilities.

2 The governing principle should be this:
3 When a facility has independent utility and is separate
4 from another, you cannot tax someone who is driving on
5 that facility to pay for improvements on another
6 facility or to build a new facility even if there are
7 indirect benefits.

8 In fact, PPTA, by its own language -- and
9 we pointed this out in our brief -- in Section 560, the
10 PPTA contemplated that all of its projects would have
11 an indirect effect on existing facilities, on existing
12 roads. All of them -- in fact, they cannot proceed
13 unless the Commissioner makes a determination that
14 there is congestion reduction and public safety
15 improvement; so this is an indirect effect of any PPTA
16 project.

17 Now, what they have done here is exactly
18 what VDOT conceded in its statement, in its EPA --
19 rather, it's NIPA document. They bundled these three
20 independent, separate, physically separate facilities
21 into one for construction and financing purposes. And
22 you need look no further than the two toll assessment
23 or toll feasibility studies that are in our submissions
24 to demonstrate how this came about. It came about for
25 two reasons.

1 The projects were bundled because there
2 was no way to finance -- as VDOT saw it, there was no
3 way to finance the additional Midtown tube unless the
4 Downtown Tunnel was added.

5 Tidewater Skanska itself, which is one of
6 the partners in the ERCO, said, You need to add this,
7 as did the other submitters; you need to add the
8 Downtown Tunnel for financial reasons. That makes it a
9 feasible project financially. All of the other
10 justifications are after the fact.

11 Clearly there are some benefits, but even
12 a tax creates a benefit, indirect benefits as well as
13 direct benefits. If that were the test, there is no
14 governing principle, no judicially manageable standard
15 for this Court or any other Court.

16 That is not the only time that Counsel
17 has ignored what we have repeatedly cited to the Court.
18 To the extent alternatives are even a factor, clearly
19 they were a factor in the Fairfax Water Authority case,
20 by counsel's own argument. Alternatives are not an
21 issue, voluntariness is not an issue; otherwise, sales
22 tax, excise tax, gas tax would not be taxes at all.

23 They concede that there was no argument
24 at all in Marshall about the fees. Counsel for the
25 Commonwealth or for VDOT argued that the motorists were

1 compelled to pay those fees.

2 They were no more compelled to pay those
3 fees than anybody using any toll road.

4 The fee for repairs of automobiles could
5 be avoided by going to the next jurisdiction or not
6 getting the repair at all, and that was true for all of
7 the fees. They were all voluntarily undertaken. There
8 were alternatives available.

9 There's another feature in Marshall that
10 they ignore. The fees and taxes, all eight of them,
11 went into one fund for interrelated projects in
12 Northern Virginia. Not for general government
13 purposes, but for a transportation package in Northern
14 Virginia, were interrelated to solve the congestion
15 problems in Northern Virginia.

16 There's really no distinction between the
17 two given the principle they've adopted. If you look
18 at interrelated, they all dealt with congestion
19 reduction, they were all alternatives to each other,
20 they all were serving the same purpose.

21 I have cited to you, or read, actually,
22 the statement from the Town of Victoria and the Supreme
23 Court decision. Actually, it was Commonwealth v.
24 VEPCO, which is in 214/457, where the Court said -- and
25 I'll repeat it again, if I may, Your Honor, because

1 it's that important -- if the State grants a
2 municipality the power to enter into an inviolable
3 agreement, fixing utility rates for the consuming
4 public, an unconstitutional abridgement of the police
5 power would result.

6 Why is that not the case here? That is
7 precisely the case and it abridges the Commonwealth's
8 policy -- rather, police power for 58 years. For 58
9 years.

10 It troubled me somewhat when I heard you
11 remark that this was an innovative argument. There's
12 nothing innovative about a proposition that's
13 allowing -- authorizing a rate of return, and that's
14 admittedly what happened here; they argue risk, but
15 that's not a factor, because there's risk in every one
16 of the actions established by the Corporation
17 Commission in granting the rate of return.

18 If the stockholders of APCO take over
19 Dominion, they take some risk. It may be a different
20 risk. But what they don't argue is that ERCO is
21 allowed to make a profit by imposing a toll on a state
22 facility to be imposed on the general public, and that
23 is a public service corporation by definition.

24 I don't know whether I gave you the --
25 the Gruber -- the Gruber case dealt with precisely that

1 same argument, that the definition in the Constitution
2 didn't cover the public service corporation in that
3 case, and the Court said it doesn't matter, it is by
4 its nature a public service corporation and all public
5 service corporations are subject to the jurisdiction
6 and regulation of the State Corporation Commission.

7 Again, the four utility fee cases -- the
8 special fund cases really have no bearing on this case
9 for other reasons, reasons apart from the distinction I
10 made that there is a return on investment here, which
11 is a factor none of those other cases involved. But
12 those special fund cases do not deal with the toll
13 versus tax issue at all. They deal only with whether
14 the Commonwealth is obligated to appropriate money from
15 the general fund.

16 The utility fee cases do involve a number
17 of cases in which there is a discussion of toll versus
18 user fee -- or tax versus user fee. But, again, let me
19 point to the -- to the most important distinction,
20 which is that in every one of those cases an elected
21 body was establishing the rates.

22 In Eagle Harbor, the Court said, again,
23 that that's a nondelegable legislative function,
24 regardless of whether it's a tax or a user fee.

25 The Court has no choice, in looking at

1 the delegation in the PPTA, other than to conclude that
2 it has delegated legislative functions
3 unconstitutionally.

4 Now, if you do turn to the toll versus
5 tax issue, to use Counsel's argument, you need to find
6 a governing principle, one that's judicially
7 manageable. They offer none.

8 In fact, it's instructive to see how many
9 ways they have tried to describe this project. They've
10 called it an integrated transportation network, a
11 functionally interrelated project, part of the same
12 transportation project, interconnectedness is the test,
13 integrated segments of a single transportation system.

14 Those words are not sufficient to provide
15 the Court with a judicially manageable test. What is a
16 judicially manageable test -- there are two. One is
17 when you impose rates; that is a legislative function
18 that cannot be delegated to VDOT. We have plead that,
19 we've established that.

20 Secondly, they clearly under Marshall
21 cannot impose a tax. And if you are taking money from
22 the users of the road that I'm driving on and forcing
23 me to pay to build another, even if I enjoy an indirect
24 benefit, that is a tax because it involves legislative
25 discretion. It goes beyond the simple math and the

1 simple proposition that we look at one facility,
2 determine its cost, and arithmetically come up with a
3 toll. When you have the complexity of the factors in
4 this case, that alone makes it a tax, the lead being
5 the return on investment.

6 The Court has repeatedly said that is a
7 legislative function, to authorize a return on
8 investment. We have it here. It's admitted we have it
9 here. Whether there is a risk or not is not the issue.
10 This contract at this statute authorizes VDOT to
11 authorize a toll to be imposed by a private company for
12 the operation of a state facility used by the consuming
13 public.

14 Your Honor, we haven't waived any
15 arguments. I don't want to spend an hour. In fact,
16 I'll answer any questions you have, but we clearly have
17 not waived any -- we rely on our brief, on our two
18 briefs. We think we've adequately responded to each in
19 our briefs and we would point to the responses
20 particularly in our reply brief.

21 The central proposition we have argued
22 repeatedly is that the General Assembly cannot give the
23 rate making power or the taxing power to an unelected
24 body or an unelected individual, which is exactly what
25 it did here. Much of the argument, particularly the

1 argument about whether they complied with the PPTA, is
2 totally irrelevant.

3 The issue is whether the PPTA is itself
4 constitutional. The clear language of 56-566, granting
5 the power of a responsible public entity, including
6 VDOT, to impose a user fee, particularly when it
7 establishes no clear standards, there's no standard for
8 the user fees other than everybody be treated alike
9 under the same circumstances.

10 There is no governing standard in 56-566,
11 but that is a subsidiary argument. The principal and
12 central issue is whether VDOT could have and exercise
13 the power to set rates and authorize a return on
14 investment in this case.

15 That issue has never been addressed, to
16 my knowledge, in a situation like this. There are no
17 cases on -- either way on that. You're going to be the
18 first to rule on that.

19 Murphy, Corr and Carr, and Gray have
20 nothing to do with that proposition. But I remind the
21 Court, too, of what the Court said in Commonwealth v.
22 VEPCO, repeating what the Court said in the Town of
23 Victoria, that where the General Assembly gives even an
24 elected body like a municipality the power to set
25 rates, it is abridging the police power of the

1 Commonwealth.

2 I'll be happy to answer any questions
3 you have, Your Honor.

4 THE COURT: Do I -- in order to rule on
5 Counts 1 and 2, do I have to find that the toll is a
6 tax?

7 MR. MCSWEENEY: No. No. We would like
8 for you to find that, but that's not necessary under
9 their own argument, under their own authority, which is
10 why I mentioned Eagle Harbor.

11 APCO, the Appalachian Power case, which
12 was decided at 216 Virginia, and we cited repeatedly in
13 our case, said rate making, it's a legislative --
14 nondelegable legislative function. It's a purely
15 legislative function. The Court has said it repeatedly
16 and we've cited those cases.

17 When a return on investment is involved,
18 it makes it entirely different from the cases they rely
19 on. But even Eagle Harbor says setting rates when you
20 don't have a return on investment is a nondelegable
21 legislative function.

22 So you don't even have to reach the toll
23 versus tax issue in this case. We wish you would. But
24 it's sufficient on our first basis, which is this is a
25 return on investment that cannot be authorized by an

1 elected body or a body that has legislative power under
2 the Constitution, State Corporation Commission, which
3 is why we mentioned it. But VDOT doesn't have that
4 power, cannot be given that power.

5 THE COURT: Who sets the tolls on the
6 bridge -- the Chesapeake Bay Bridge Tunnel?

7 MR. McSWEENEY: I think that's set by a
8 Commission. That would also be challengeable.

9 THE COURT: So if they had set a
10 Commission to do this, it would be consistent with what
11 they've done in the past?

12 MR. McSWEENEY: It's what's been done --

13 THE COURT: It's subject to challenge
14 anyway.

15 MR. McSWEENEY: Yes. Except in the
16 highway corporation -- Dulles Greenway, for example, is
17 a toll road, privately owned, established under a
18 different statute. And the General Assembly gave the
19 authority and responsibility of the State Corporation
20 Commission there, recognizing that rates have to be set
21 by a body that has legislative power.

22 These other bodies don't have legislative
23 power. And if Eagle Harbor is right and if counsel is
24 right in the Fairfax Water Authority Case, it is a
25 nondelegable legislative function. Whether it's a tax

1 or not is a subsidiary issue. You don't have to reach
2 that issue.

3 Now, it's something that -- I understand
4 that the General Assembly has done a lot of things. It
5 did a lot of things before the Terry v. Messer case.
6 And the General Assembly tried to expand the special
7 fund doctrine and the Court simply slapped it down and
8 said in passing -- it also talked about abridgement of
9 sovereignty power.

10 But the point of the Terry case for our
11 purposes right now is, it said the fact that the
12 General Assembly has done this in the past and gotten
13 away with it does not provide a basis for concluding
14 that it's lawful here. You have to look at the
15 Constitution and look what this statute does and
16 determine, on the basis of the Constitution, the cases
17 decided by the Supreme Court, and what the General
18 Assembly has done, whether it's constitutional.

19 The fact that they have done it in other
20 ways and done it in the past is not -- it can't be used
21 as a bootstrap argument.

22 THE COURT: Don't I have to give
23 deference, to use your term, of the General Assembly's
24 bundling of these? Because they clearly stated in the
25 language, several times, that these projects were as

1 one.

2 MR. MCSWEENEY: Well, even their own
3 case -- the case they cite on deference says that when
4 the determination made by the General Assembly is
5 unwarranted on the facts, the Court's not bound by it.
6 It's only a presumption. It may be a strong
7 presumption, but it's only a presumption. And in the
8 language, which they rely on from the 2007 legislation,
9 they recognize it's multiple facilities.

10 They can call it whatever they want, but
11 it doesn't make it a rose. It doesn't mean they can
12 use that definition to circumvent the constitutional
13 requirement when they delegate to an unelected body.

14 They can bundle any way they want. The
15 General Assembly can do anything it wants if it does it
16 directly, but it can't do it -- create a taxing
17 situation and then delegate the power to impose that
18 tax to an unelected body.

19 In many ways this case is much stronger
20 than Marshall. In Marshall, right up until the end,
21 NVTA and the Commonwealth argued that it was not a
22 delegation because every bit of discretion was tied up
23 in the General Assembly's language. They didn't set
24 the rates, they didn't decide who would be taxed, they
25 didn't decide what the -- what the character of the tax

1 was. All they had to decide was whether it would be
2 imposed or not. And the Court said still, the taxing
3 power, even if the last decision about when and
4 where -- when and whether to impose that tax is left to
5 an unelected body, it's unconstitutional.

6 In this case there's far more discretion
7 involved. It's not just the imposition. They decided
8 to impose, but they also decide all the determinants,
9 all the factors that go into it, which is a much easier
10 case, I submit, than the Marshall case.

11 And whenever we have this argument, they
12 tried out this -- some language that it has to be for
13 general government purposes. Well, I pointed out that
14 the Marshall case involved taxes and fees that went
15 into a fund for the construction of a limited number of
16 projects that were related in Northern Virginia, part
17 of their plan, which was an interrelated comprehensive
18 plan.

19 If you adopt their argument, any regional
20 plan could be funded this way. You could fund -- you
21 could impose a tax on somebody who uses this road, even
22 if it's an existing road already paid for, to pay for
23 the construction of another road they don't use. And
24 if there's anything that carves out what legislative
25 discretion is, it's deciding when you can impose a tax

1 on one person to pay for the benefit of another one.
2 We cited the case for that proposition. That is
3 legislative discretion and that's what's involved here.

4 Even if the General Assembly defines the
5 project, if it involves taking money from one person
6 using one facility, one highway, to pay for another,
7 that's a tax.

8 It may be allowable if the General
9 Assembly does it itself, but it can't delegate that
10 power to an unelected body or an unelected person.
11 That's the lesson of Marshall.

12 THE COURT: Would it be -- this is a
13 hypothetical.

14 Would it be allowable if they delegated
15 it to the State Corporation Commission? Is that --

16 MR. McSWEENEY: Yes, and that's the whole
17 concept of the Corporation Commission. It was
18 originally directed at the all powerful railroads. As
19 time went on, in 1914 they extended it to electric
20 utilities, and then in '23 they extended it to motor
21 carriers, and they extended as public service
22 corporations emerged because of changing economics.
23 But the whole idea was to give it to a body that had
24 the expertise and the time to delve into it and set
25 rates in detail, but in recognition that you don't give

1 that to unelected persons.

2 The Constitution, as I've said, did
3 something that no other state has done. It gave the
4 Corporation Commission true judicial and true
5 legislative power. Many people -- lawyers from other
6 states don't understand our structure. The Corporation
7 Commission is a peculiar duck. It has true legislative
8 power, which is why in 1968 the -- I was a staff
9 attorney at the commission on constitutional revision.
10 One of the arguments was we need to have something --

11 THE COURT: That was about the time you
12 got out of law school.

13 MR. McSWEENEY: It was the year I got
14 out.

15 I wish you hadn't dated me.

16 THE COURT: Well, when I date you, I date
17 me.

18 MR. McSWEENEY: That's right. I didn't
19 want to say that either.

20 The whole idea was to give the General
21 Assembly some control over the Corporation Commission
22 so it was not a totally independent legislative body.
23 So they allowed -- the new Constitution allows the
24 General Assembly to establish criteria and standards
25 that the Corporation Commission has to follow when it

1 exercises its legislative function. But otherwise it
2 is just as much a legislative body as the Court has
3 said explicitly as the General Assembly in the area
4 where the Congress -- rather, the Constitution is given
5 jurisdiction.

6 THE COURT: Well, the tax breaks that you
7 have argued in the brief --

8 MR. McSWEENEY: Yes.

9 THE COURT: -- how do they differ from
10 the State giving tax breaks to -- for new businesses
11 that come into --

12 MR. McSWEENEY: It can do that by general
13 law. It can do that always. It may not be good
14 policy, but it can do it. What it can't do is say,
15 ERCO, we're going to give you a private law that gives
16 you a tax break. That's explicitly prohibited by
17 Article IV, Section 14. And they can't tell you that
18 we're going to give you money back -- I don't care what
19 game they play with words, it's still a refund; it's
20 money back from the state treasury to one company. And
21 they don't do it directly; they do it through a general
22 law, the PPTA, that allows VDOT to do exactly what the
23 General Assembly couldn't do directly.

24 Now, this is subject to appropriation.
25 It invokes all kinds of inner-position and other

1 arguments that are abstract constitutional arguments.

2 Any time the General Assembly gets a bill
3 or gets a court order, whether it's from a Federal
4 Court or as it did in a state bar case, it pays it.
5 But everything that comes out of the state treasury has
6 to be paid by appropriation. All of it is subject to
7 appropriation. That argument is meaningless; it simply
8 states what the law is, that everything is subject to
9 appropriation.

10 In the Constitution explicitly they say
11 any money taken out of the treasury cannot be done
12 by -- except pursuant to appropriation.

13 THE COURT: Anything else?

14 MR. McSWEENEY: No. I hope you have
15 nothing else. I'm at an hour, but that was only
16 because of the questions. I tried to keep it at least
17 half the length of theirs.

18 THE COURT: Okay.

19 MR. McSWEENEY: Thank you, Your Honor.

20 MR. RAPHAEL: Your Honor, I think I can
21 do this in about three or four minutes --

22 THE COURT: Let's go.

23 MR. RAPHAEL: -- assuming the screen
24 comes on.

25 THE COURT: I think I'll revise what I

1 said earlier. We're going to try to finish the
2 argument before we break, so -- three or four minutes
3 sounds good.

4 MR. RAPHAEL: I got a chance to put just
5 a couple slides together as Mr. McSweeney was speaking.

6 The first point I want to address is this
7 notion that setting the tolls is a legislative function
8 that can't be delegated to VDOT.

9 Now, let's be clear. The concessionaire
10 does not set the tolls unilaterally. I don't think
11 there's any dispute about that. They are set by VDOT
12 together with the concessionaire and they're set and
13 fixed by the Comprehensive Agreement.

14 I think Mr. McSweeney is confusing cases
15 involving municipalities, cases involving the State
16 Corporation Commission, and cases involving state
17 agencies.

18 Eagle Harbor was a municipality
19 fee-setting case. That's where he said the power to
20 set rates can't be delegated. And that would be true
21 for a municipality. You couldn't, say, delegate to
22 some private person the power to set what the fees
23 would be. But nothing prohibits state agencies from
24 setting tolls if they are authorized to do that by the
25 General Assembly.

1 And that authority is expressly found in
2 Code Section 33.1-269(5). That's the power in the
3 state Revenue Bond Act that authorizes the Commonwealth
4 Transportation Board, an unelected body, to set tolls
5 on all the projects that are defined in the state
6 Revenue Bond Act.

7 He confuses the State Corporation
8 Commission, which has specific authority under the
9 Constitution only over railroad, telephone, gas and
10 electric companies; right? It doesn't cover public
11 service companies and it doesn't cover common carriers,
12 it doesn't cover transportation companies, unlike the
13 1902 Constitution.

14 The legislature granted the State
15 Corporation Commission authority to regulate the rates
16 of public service companies, but there's -- it's clear
17 as a matter of law that Elizabeth River Crossings is
18 not a public service company.

19 How do we know that? Because the term is
20 defined in Code Section 12.1-12 as a gas, pipeline,
21 electric, light, heat, power, or water supply company.
22 I think common carrier was listed there; not
23 transportation companies. So it's clear as a matter of
24 law that ERC is not a public service corporation.

25 Mr. McSweeney takes the Appalachian Power

1 case that he cites out of context. That's 216 Virginia
2 617. He says it stands for the proposition that the
3 General Assembly can't delegate legislative authority
4 to anybody, but what the court actually said was
5 this -- and this was an SCC case.

6 The Court said, It must be remembered
7 that in performing the duty of affixing reasonable and
8 just rates for a public service corporation, providing
9 heat, light, and power service, the State Corporation
10 Commission exercised a legislative function delegated
11 to it by the General Assembly by code -- then Code
12 Section 56-235.

13 So I think he's very much overstating the
14 issue of what the General Assembly can and can't
15 delegate as the -- as the state Revenue Bond Act makes
16 clear; the CTB can set tolls and it's not elected and
17 that is a delegated power.

18 I also wanted to add that the General
19 Assembly knows how to reserve power to control tolling
20 when it wants to. 56-565(A) of the PPTA says that the
21 General Assembly retains tolling authority over
22 Interstate 81. It could have done that with other
23 projects; it didn't.

24 There was a bill this year, Senate Bill
25 865 that was introduced, that would have required

1 General Assembly approval for all new tolling by the
2 Commonwealth Transportation Board except HOT lanes, but
3 it failed in the House transportation committee. So
4 the General Assembly knows how to do this when it wants
5 to and it hasn't done it here.

6 Let me briefly answer the criticism about
7 the City of Falls Church. That's the map from the City
8 of Falls Church case, and I did represent Fairfax Water
9 in this case.

10 If I can show you here on this screen, so
11 I can use the pointer, the City of Falls Church is
12 shown in that dark green right there. It has about 2.2
13 square miles. It served about 38 square miles of
14 Fairfax County. And what the City was doing was
15 padding its water rates to include a hidden profit,
16 which then transferred to this general fund in order to
17 reduce the property tax. And it was a whopping
18 reduction; it was like 30 cents on the dollar on the
19 mill rate to lower the tax rate for citizens of the
20 city. And we argued that was an unconstitutional tax,
21 the Circuit Court agreed with us, and the Supreme Court
22 denied the writ, finding no reversible error.

23 This is nothing like that case. There is
24 no surplus built into these rates to fund unrelated
25 projects. It's undisputed that all of the money goes

1 solely to the project.

2 With regard to the -- Mr. McSweeney
3 raised plaintiffs' Exhibit 19. He quoted from the NIPA
4 report that the three projects have independent
5 utility, but that doesn't show that they are not
6 interrelated. And if you look at the end of that
7 exhibit, plaintiffs' Exhibit 19, it concludes by saying
8 that everybody's going to benefit by reduced traffic.

9 He misses the distinction between
10 legislative determinations and factual determinations
11 and I think Your Honor is on to that.

12 Our limiting principle here is simple.
13 The question is, does the General Assembly have a
14 reasonable basis to conclude that these three project
15 facilities should be treated as a single project. And
16 here they clearly do, and the burden of proof is on
17 plaintiffs to show that there is no connection and they
18 can't. They haven't done that. They can't show an
19 abuse of discretion.

20 Thank you, Your Honor.

21 THE COURT: I have some questions.

22 MR. RAPHAEL: Yes, Your Honor.

23 THE COURT: Are there any other projects
24 where VDOT has the power to set the tolls?

25 MR. RAPHAEL: There are a number of

1 projects where the Commonwealth Transportation Board
2 sets the tolls under the state Revenue Bond Act.

3 My co-counsel is probably in a better
4 position to answer that as to what VDOT does, but the
5 code section I showed you in the state Revenue Bond Act
6 authorizes the CTB to set the tolls in order to repay
7 the bonds.

8 THE COURT: What is the limit on the
9 tolls that could be imposed on these facilities? Is
10 there any limit?

11 MR. RAPHAEL: Is there any limit --

12 Well, there is a -- one limit would be
13 that you couldn't raise more money than you need to
14 fund the project; that operates as a limit. That's a
15 limit here, too.

16 THE COURT: That's not much of a limit,
17 is it?

18 MR. RAPHAEL: Well, I think that the
19 point is that the State has great power with regard to
20 how it finances these things as long as the funds are
21 used for the project.

22 And in some instances the state
23 contributes a significant amount of money, as it's done
24 here. And with regard to the Metrorail project, the
25 State has contributed millions of dollars to keep the

1 tolls down on that project as well. So I think that
2 operates as a self-sustaining limit.

3 THE COURT: You said something earlier
4 that hit on one of my concerns, and I should have asked
5 you this before you left the first time, and, that is,
6 you argued that the language in the PPTA was specific
7 enough to allow VDOT to enter into these contracts,
8 that it seemed like pretty broad language to me when I
9 read it, that -- I don't know what the Commissioner or
10 the head of VDOT was prohibited from doing.

11 MR. RAPHAEL: Well, I think the slide I
12 showed you, and you have a copy of that, that
13 identified the PPTA findings that have to be made, that
14 goes to the policy direction by the General Assembly.

15 And once the responsible public agency
16 concludes that the project meets those requirements,
17 that satisfies any concern about whether the
18 legislature has provided adequate direction.

19 Then the question is did they have
20 authority for these particular contractual terms, and
21 they did. They're covered -- some of them are covered
22 expressly and others are well within the power to
23 provide for compensation mechanisms, and that's -- and
24 the PPTA says, As long as you're serving those project
25 purposes, the government and the private entity have

1 the greatest flexibility possible.

2 You recall that provision? The greatest
3 flexibility possible and any doubt is resolved in favor
4 of the government because the statute is liberally
5 construed.

6 So I think there are two concepts: Does
7 the statute provide adequate guidance -- and given the
8 examples from Thompson of things which were much --
9 really vague, but found to be adequate guidance, the
10 PPTA by contract is much more specific. So you easily
11 resolve the issue of whether the PPTA is valid.

12 Then the question is, does the PPTA give
13 contracting authority to the -- to VDOT? And that's
14 easy to answer, too, because it's got express authority
15 and every other implied power to do it as long as
16 you're meeting the goal of delivering an efficient
17 project meeting all of those requirements. The agency
18 has to find that the cost is reasonable and that it was
19 delivered in a more efficient manner than normal
20 methods, and all of that has been satisfied here.

21 THE COURT: I think when I read it, what
22 it sounded like to me -- not George Allen the Governor,
23 but his father, general manager of the Red Skins, Jack
24 Kent Cooke, always used to say, I gave him an unlimited
25 budget and he overspent it.

1 It just sounds to me like they gave the
2 Commissioner absolute cart blanche. And even though
3 you say those -- he has to make certain findings, he
4 can boot -- it seems like the ability to bootstrap his
5 own opinion is just built into the thing. There's no
6 real limitations.

7 MR. RAPHAEL: Well, but -- yeah, I don't
8 think that's right because there's a very elaborate
9 process that Mr. Thomas talked about.

10 For example, there's an Independent
11 Review Panel that reviews the conceptual proposal and
12 makes a recommendation to the State whether to proceed.
13 Then there's an interim Comprehensive Agreement where
14 the concessionaire undertakes to respond and provide
15 studies to make sure that the project can be built as
16 planned. And if, at that point, the State wants to
17 proceed with it, it can enter into a comprehensive
18 agreement. There's also an independent audit required
19 of the revenue data and the traffic data that's being
20 used to -- as the model for the project.

21 So this is not something that the
22 director of -- the Highway Commissioner can just do on
23 his own without any supervision. There's lots of
24 procedural checks and balances. The State has to find
25 that it satisfies all of these requirements.

1 So there's also the notion that you --
2 there's a presumption in favor of the regularity of the
3 way the government has acted. And you've been offered
4 no evidence in this case, in this record, that there's
5 any reason to question that it was done other than
6 absolutely properly here.

7 THE COURT: Okay. Thank you.

8 Mr. Thomas, have you got anything else
9 you want to say?

10 MR. THOMAS: Yes, sir, if I may.

11 THE COURT: Sure.

12 MR. THOMAS: Mr. Raphael has covered much
13 of your last question, but I did want to echo something
14 and perhaps add as well.

15 The legislative findings that went into
16 the PPTA at 56-558 talk about the public welfare and
17 the public need and the delivery of these
18 transportation facilities not only encouraging private
19 investment to do them, but to bring them home to the
20 citizenry at a reasonable price.

21 It's all about that. It's not about
22 giving cart blanche authority. The public interest is
23 throughout everything that is done.

24 In addition, under the PPTA, before any
25 Comprehensive Agreement can be approved by the

1 Secretary of Transportation on his review, VDOT itself,
2 or the responsible public entity in general, must make
3 a number of findings that -- including those in this
4 Comprehensive Agreement -- that it is an effective
5 pricing, that it is a delivery of the public need, that
6 it is reasonable in all of its costs.

7 So it is not an instance where there's
8 unregulated discretion. We have to remember, too, of
9 course, in the PPTA process that the whole thing is
10 transparent. There's public hearings. There are
11 required consultations with the affected jurisdictions.

12 So there's a lot more that goes into it,
13 including the Independent Review Panel, that looks over
14 all the traffic volume projections and the tolling
15 projections for it.

16 So there's a whole lot of oversight in
17 the process itself. And we should not -- I'd simply
18 ask that the Court not lose sight of that when we hear
19 from the plaintiffs about how these are just state
20 officials run amuck that can do whatever they want.
21 It's not borne out.

22 THE COURT: I don't think that's what he
23 said. I think what he said was they've not necessarily
24 run amuck, but the power they were given exceeds the --
25 it can't be delegated. It's not constitutional.

1 MR. THOMAS: Well, I'm going to make two
2 points there.

3 One is on this concept of the State
4 Corporation Commission's jurisdiction. Of course, in
5 the State Corporation Commission law, the terms of
6 rates and rate makings, they are terms of art in that
7 highly-regulated statutory scheme. And Mr. McSweeney
8 has made the assertion that, by definition, Elizabeth
9 River Crossings is a public service corporation.

10 I happen to have with me the statutory
11 definition of a public service corporation. And I
12 submit to you that upon hearing me recite it, you will
13 not find reference to anything resembling Elizabeth
14 River Crossings.

15 It is at 56-1 where it defines public
16 service corporation or public service company. It
17 includes gas, pipeline, electric, light, heat, power,
18 and water supply companies, sewer companies, telephone
19 companies, and all persons authorized to transport
20 passengers or property as a common carrier. That's it.
21 It's not road builders. It doesn't cover them.

22 The State Corporation Commission's
23 looking at the public utility law is under the
24 "takings" clause of the Constitution, having nothing do
25 with the jurisprudence of other contracting agencies.

1 They are not a public service corporation; end of
2 inquiry.

3 Mr. McSweeney can't make it so by making
4 their own definition. And it goes to the broader
5 point. When it comes to remedies under the rule of
6 law, some remedies are available through the judicial
7 system, but some are not.

8 Under the rule of law as in this case,
9 when the Constitution and the statutes are against you,
10 your remedy is to go to the legislature and get it
11 changed. They don't like this, they don't want to pay
12 the user fees, but that doesn't mean that we can create
13 law as we go to help them get their way.

14 I want to add this, too: The Virginia
15 Department of Transportation, through the Community
16 Services -- or, excuse me, Commonwealth Transportation
17 Board, is empowered at 33-112 to set tolls on state
18 highways, to answer a direct question that you asked.

19 VDOT is to let all of the contracts and,
20 under title -- excuse me, 33.1-12, Subsection E-15,
21 establish highway user fees for the systems of state
22 highways.

23 In its plenary power, the General
24 Assembly has assigned to the Commonwealth
25 Transportation Board this responsibility. It has made,

1 by that same statutory section, under 2A, VDOT the
2 contracting agent of the Commonwealth Transportation
3 Board.

4 In addition, under 33.1-223.2:12, it
5 talks about how tolling may vary according to time of
6 day, type of vehicle, that it can be a variable, and
7 that that is --

8 THE COURT: That doesn't help me at all.

9 MR. THOMAS: No. But the only point I'm
10 making is it specifically notes under the PPTA, when
11 VDOT is working or when responsible public entities are
12 working with private entities, this authority is given
13 to them.

14 So you add that to the fact that this
15 record contains the CTB's resolution, fully ratifying
16 everything done in this particular contractual
17 arrangement, and the authority has been completely
18 followed, constitutionally and statutorily, as well as
19 the checks and balances that apply to this very
20 Comprehensive Agreement.

21 A couple of other things, based on
22 comments made by Mr. McSweeney.

23 In talking about alternative facilities,
24 he rightfully said if and when they are built, and that
25 brings us to this ripeness issue on this whole thing

1 that we're discussing with respect to compensation
2 events and tax impositions that may or may not bring
3 them about.

4 They are not ripe.

5 The case of Fairfax v. Shanklin, which is
6 cited by us at 205 Virginia 227, the Court noted that
7 an actual antagonistic assertion or denial of right
8 must take place. And in that particular case, it was
9 whether a local board was possibly going to act in a
10 certain way under a zoning ordinance.

11 And what the case stands for is that one
12 cannot anticipate what legislative action will be for
13 the purposes of establishing a justiciable issue. It
14 is, by its own nature, speculative as to what any
15 legislative body will do. And you certainly can't say,
16 well, then if and when something happens, we want our
17 rights adjudicated now. That's not what ripeness is
18 about.

19 Ripeness is about the fact that whatever
20 legislation you might want to complain about has been
21 enacted and you have been harmed, and that's not the
22 case with respect to compensation events under any
23 rationale of this Comprehensive Agreement.

24 The plaintiffs also want to liken these
25 tolls to sales taxes. But a sales tax, as Mr. Raphael

1 said, is a surcharge on a private transaction. And by
2 that, it means that the sales tax is a tax imposed
3 against an unwilling party by virtue of the fact that
4 there is a commodity being purchased.

5 If you buy a loaf of bread and there's
6 tax on it, the tax does not go to the cost between you
7 and the seller of the loaf of bread. It doesn't help
8 pay for that loaf of bread. It's something the
9 government takes in addition.

10 A user fee is different. A user fee,
11 such as the tolls, in this case, is a transaction
12 between the citizen and the access to the roadway.
13 Meaning that that toll helps to pay for that roadway,
14 as well as granting you access to that roadway. It is
15 not something external to the transaction. It is -- it
16 is the bona fide fee for service to access the various
17 roadway components.

18 There's more points I could make, Your
19 Honor; what's more important is answering your
20 questions. Are there any additional questions from the
21 Court?

22 THE COURT: No additional questions.

23 MR. THOMAS: Thank you so much for your
24 time.

25 On behalf of VDOT, I respectfully ask

1 Your Honor, as we did at the beginning, that you grant
2 summary judgments -- summary judgment to the
3 defendants' summary judgment motion and that you deny
4 the summary judgment motion of the plaintiffs.

5 MR. MCSWEENEY: Let me be quick so we can
6 get out of here, Your Honor.

7 Mr. Raphael makes the point that I've
8 tried to make to you; that when the element of profit
9 is involved -- and that was what was involved in the
10 Fairfax Water Authority case -- it's a totally
11 different situation. That becomes a taxing situation.
12 That's what he argued in that case.

13 The fact that the profit is recognized to
14 a private company instead of a municipality makes no
15 difference. That's the initial factor that makes it a
16 tax.

17 He also makes the point for me in the
18 APCO case. The General Assembly can add to -- it's
19 anticipated that the General Assembly will add to the
20 constitutional jurisdiction of the Corporation
21 Commission. And when it does, the Corporation
22 Commission exercises the same legislative power it
23 does, and this has been said in Lewis Trucking,
24 207 Va. 23, and a host of others, that it acts just as
25 if it were the General Assembly. Whether it's

1 delegated by the General Assembly to it as an add-on to
2 the jurisdictional Constitution makes no difference.
3 It has the same legislative power.

4 Let me just cite again the Gruber case.
5 Gruber v. Commonwealth, 140 Va. 312. At page 322, the
6 Virginia Supreme Court said the definition of public
7 service corporation in the Constitution and in the
8 statute in that case, in both, was not controlling. It
9 was the nature of the corporation that controlled.

10 And I would, once again, point out to the
11 Court what we said in our brief, in both the opening
12 and in our reply, that the General Assembly, in the
13 Highway Corporation Act, declared the toll road to be a
14 public service corporation. So it knows what it is; it
15 is a public service corporation.

16 Any private entity that has the authority
17 to impose a toll or a user charge, any kind of charge,
18 on the general public for the use of a -- not just a
19 public facility, but a private facility, but in this
20 case a public facility, is a public service
21 corporation. It's been repeatedly said. We've cited
22 the cases. Munn v. Illinois was embraced by the
23 Virginia Supreme Court and is a case we've cited in our
24 brief.

25 It's very interesting to hear the

1 discussion about all the policy and finding
2 requirements in the PPTA.

3 None of what Mr. Thomas or Mr. Raphael
4 described to the Court had anything to do with setting
5 user fees, and that's what we point to. It's not
6 authorizing the overall project. There are plenty of
7 policy statements to guide, there are findings there,
8 but there is nothing -- responding to your question,
9 what limits -- there are no limits to the amount that
10 VDOT can charge under 56-566 when it comes to
11 establishing the charges for the use of those roads.

12 And Mr. Thomas' argument could be that
13 any existing road could be tolled at any level, and the
14 justification is you get the right to use it. That, by
15 definition, is a tax. And the reason that the -- that
16 the sections he cites, 33.1-12 and the state Revenue
17 Bond Act, have no bearing here is that they don't deal
18 with the situation we have here where rates include a
19 profit. Rates include a profit.

20 It is not a situation where you have an
21 out-sourcing and the company hopes to make a profit.
22 We're talking about a situation where the State
23 authorizes a private company to operate a state
24 facility and charge the general public a rate. And in
25 this case, there is no standard to govern how much it

1 might be. It has to be the same for everybody, but
2 there's nothing in the statute that limits how much it
3 can be.

4 And finally, Your Honor, the legislative
5 finding is simply unwarranted here. Even the
6 definition, even the language of the statute they rely
7 on shows on its face that what they are doing is
8 bundling multiple facilities. They use the word
9 "facilities" twice. It is a multiple-facility project.

10 If they can do that here by simply waving
11 a wand and making a finding, they can do it to any kind
12 of project that is interrelated. We've never argued
13 that it's not interrelated, but we argued if that's the
14 test, you're on a slippery slope. There's no
15 judicially manageable standard.

16 THE COURT: Let me ask -- may I ask a
17 question?

18 MR. McSWEENEY: Yes, indeed, Your Honor.

19 THE COURT: If I rule that pairing,
20 bundling, combining, whatever word you want to use,
21 these projects, that the General Assembly has that
22 authority, is that a death nil for your position --

23 MR. McSWEENEY: Oh, no.

24 THE COURT: -- as far as -- even if I
25 ruled that, yes, they have the authority to bundle, is

1 the term you used throughout your briefs, that doesn't
2 necessarily mean that they concede the taxing power or
3 the tolling power.

4 MR. McSWEENEY: Precisely. That's it.
5 That's what Marshall said.

6 The General Assembly can do a whole lot
7 of things. It can enact any different taxes and fees,
8 but it can't give it to somebody else to impose. And
9 in this case it could bundle, it could do --

10 THE COURT: So what, really, difference
11 does the bundle make?

12 MR. McSWEENEY: Well, the bundling makes
13 this difference: When you take money --

14 THE COURT: It makes a big difference to
15 everybody here, but --

16 MR. McSWEENEY: Yes.

17 When you take money from one person to
18 benefit another and to construct another facility, it
19 may be a good idea, it may benefit, indirectly, the
20 person who is being tolled, but that's a tax and that's
21 a legislative decision.

22 We've cited a case that recited that.
23 When you take from one person to give to another,
24 that's a tax, by definition. Simply saying, oh, it's a
25 single facility, does not obviate the need for this

1 Court to look at what happened. It is clearly a
2 bundling of multiple facilities. It's not a question
3 whether it's a good idea. They cannot give that power
4 to impose that and choose the user fees to VDOT, which
5 is unrelated. They can't do it, and that's clearly
6 established by Marshall.

7 We're not challenging the General
8 Assembly's -- if they decided tomorrow to do this, they
9 could do it. They could bundle it and impose it
10 themselves. They could ship it to the Corporation
11 Commission, or they could do it, but they can't do it
12 the way they did it.

13 THE COURT: Anybody have anything else
14 they want to say one more time?

15 Okay, here's what we'll do: We will --
16 it's 1:30. I want two hours. I may or may not need
17 two hours. I may come back and say, I need two months,
18 two years. But right now, I need two hours. So we'll
19 come back at 3:30.

20 Everybody have a nice lunch except me and
21 Mr. Ellis. Mr. Ellis will be with me having whatever
22 we have, and we'll see you then. Hopefully I'll have a
23 decision.

24 (Lunch recess 1:30 p.m.)

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AFTERNOON SESSION

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(3:30 p.m.)

THE COURT: I want to begin by saying to all the attorneys what an excellent job everyone has done throughout this matter, in briefs, even more the arguments today have been excellent on both sides. And, now, I don't even -- I'm not even going to try, as I told you this morning, with a written opinion to match those briefs that I've gotten.

So this is going to be a very short ruling here and you all can do what you want with it.

I don't want any displays in the courtroom.

In so far as Count 6, and the final count of the plaintiffs' Complaint is concerned, the Court does not believe that the plaintiffs have carried the burden adequately so as to decide the due process issue at this point in time; therefore, we dismiss the count in favor of the defendants.

As to Counts 3, 4, and 5, while the plaintiffs have made compelling arguments as to the merits, the Court is of the opinion that these counts are not ripe for litigation at this time.

The Court recognizes the power of the

1 General Assembly to join, bundle, and put cases in the
2 same project.

3 In this particular case, without reaching
4 an opinion on the validity of it, the Court is of the
5 opinion that the bundling of the Downtown Tunnel with
6 the Midtown Tunnel and the Martin Luther King Freeway
7 Extension was a bundling solely to produce revenue.

8 The General Assembly has exceeded its
9 power by ceding the setting of toll rates and taxes in
10 violation of Article IV, Section 14, of the
11 Constitution of Virginia.

12 I believe this is a distinguishable
13 example set forth by the defendant because in this
14 latest -- in this particular legislative action, the
15 General Assembly has given unfettered power to the
16 Department of Transportation to set toll rates without
17 any real or meaningful parameters.

18 Mr. McSweeney, I suppose you prevailed on
19 the main count. Will you draw the order and circulate
20 it?

21 MR. MCSWEENEY: I will circulate it
22 tomorrow, Your Honor.

23 THE COURT: And I'm sure you want to note
24 your appeals, so note your appeals.

25 MR. THOMAS: Your Honor, at the time the

1 order is entered, we would also move to stay the
2 Court's order pending the appeals being actually filed
3 --

4 THE COURT: Sure, I guess you can do
5 that.

6 MR. THOMAS: -- as such. All right.

7 THE COURT: Yeah.

8 Anything else?

9 MR. McSWEENEY: Yes, Your Honor.
10 Count 2.

11 THE COURT: Count 2 and Count 1 I merged.
12 I'm sorry.

13 MR. McSWEENEY: Okay, very good.

14 THE COURT: I did the same thing you all
15 did in argument; I merged 3, 4, and 5 and 1 and 2 for
16 the sake of this decision.

17 MR. McSWEENEY: Appreciate your patience.

18 THE COURT: Any more questions?

19 Excellent job. Have a good day.

20 (Whereupon, the hearing concluded at
21 3:33 PM)

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CERTIFICATE OF COURT REPORTER

I, Kerry E. Zahn, RMR-CRR, do hereby certify that I reported verbatim the proceedings in the Circuit Court of the City of Portsmouth, in the matter of Danny Meeks, et al., v. Virginia Department of Transportation, et al., heard by The Honorable James A. Cales, Jr., Judge of said court.

I further certify that the foregoing is a true, accurate and complete transcript of said proceedings.

Given under my hand this 3rd day of May, 2013, at Norfolk, Virginia.

Kerry E. Zahn RMR-CRR
Notary Registration No. 209810

	4:8;31:2;32:11; 142:5	100:15;119:15	86:17;92:6;141:9; 144:3	allowing (1) 115:13
§	accurate (1) 81:7	adds (1) 43:13	agencies (9) 28:21;29:1;30:3; 50:22,22;51:14; 129:17,23;140:25	allows (5) 28:20;102:22; 105:18;126:23; 127:22
\$2 (1) 41:15	accusations (1) 32:9	adequate (6) 105:22;106:5,25; 135:18;136:7,9	agency (14) 32:1,4;34:22;40:12; 51:22;75:13,22;80:7; 92:16;106:10;107:1; 108:17;135:15; 136:17	Almond (1) 62:13
\$4,000 (2) 59:10,12	acknowledge (3) 5:10;30:8;37:16	adequately (2) 118:18;151:18	adjudicated (1) 143:17	almost (1) 23:9
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