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REPORTER'S RECORD
VOLUME 1 OF 2 VOLUMES
TRIAL COURT CAUSE NO. 2022-CI-06061

TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILLS, INC.,)
Plaintiff)
vs.) 288TH JUDICIAL DISTRICT
CITY OF SAN ANTONIO, TEXAS)
Defendants) BEXAR COUNTY, TEXAS

MOTION FOR INJUNCTIVE RELIEF

On the 21st day of February, 2023, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Nadine M. Nieto, Judge Presiding, held in San Antonio, Bexar County, Texas.

Proceedings reported by computerized stenotype machine.

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1 THE COURT: Okay. I'm going to go ahead
2 and call the case formally. Cause Number 2022CI06061,
3 Texas Disposal System Landfill, Inc. versus the City of
4 San Antonio, Texas.

5 Will the attorneys please identify
6 yourselves and who you represent?

7 MS. KIRKLAND: Good morning, Your Honor.
8 Bonnie Kirkland and Melanie Fry here on behalf of
9 Movant, City of San Antonio.

10 THE COURT: All right.

11 MR. HEMPHILL: Good morning, Your Honor.
12 Jim Hemphill and Chris Cyrus on behalf of the Respondent
13 and Plaintiff, Texas Disposal Systems Landfill, Inc.

14 THE COURT: All right. Thank you very
15 much.

16 MR. HEMPHILL: Thank you.

17 THE COURT: All right. Time announcement
18 is four hours. Do you think -- do both parties think
19 that that's going to be sufficient time?

20 MS. KIRKLAND: Yes, Your Honor. We
21 conferred and we're going to do our best to keep it as
22 succinct as possible.

23 MR. HEMPHILL: Agreed, Your Honor.

24 THE COURT: All right. This is a setting
25 on a TRO; is that correct?

1 MS. KIRKLAND: I believe we're here on the
2 temporary injunction, Your Honor.

3 THE COURT: Okay. So then I'm -- what
4 party received the TRO?

5 MS. KIRKLAND: Neither party has received.
6 We have gone straight to the temporary injunction, Your
7 Honor.

8 THE COURT: Ah. I've got two slips. One
9 says TRO and the other one says injunctive relief. So
10 we're here on the injunctive relief.

11 MS. KIRKLAND: Yes, Your Honor. If I may,
12 we were set for the TI last week. We weren't able to
13 get to it and so we set the TRO as a precaution if we
14 weren't going to be able to obtain a court for four
15 hours today, so -- but we are here on the temporary
16 injunction if we can move forward on that.

17 THE COURT: All right. That sounds fine.
18 Will there be witnesses?

19 MS. KIRKLAND: Yes, Your Honor. The City
20 of San Antonio will have one.

21 THE COURT: Okay.

22 MR. HEMPHILL: And TDSL will have a
23 witness as well.

24 THE COURT: Okay. So then the Court will
25 on its own motion invoke the rule. Is that --

1 MS. KIRKLAND: That's no problem. I was
2 going to tell some people probably to leave then.

3 THE COURT: Yes. So I mean unless -- I do
4 that on all cases where there's going to be an
5 evidentiary hearing, but if the parties agree that they
6 don't want that, that's another matter.

7 MR. HEMPHILL: Yeah. Our witness will be
8 our corporate representative.

9 THE COURT: Oh, that's considered a party.

10 MR. HEMPHILL: Yeah.

11 THE COURT: So the corporate
12 representative can stay.

13 MR. HEMPHILL: Right.

14 THE COURT: Do I -- let me just ask you
15 then, does either party request that I invoke the rule?

16 MS. KIRKLAND: I do not think it's
17 necessary for our part.

18 MR. HEMPHILL: I agree, Your Honor.

19 THE COURT: Okay. So then I won't worry
20 about it then.

21 Okay. So then let's proceed and see how
22 far we can get along before we break for lunch.

23 Would you like to make an opening
24 statement?

25 MS. KIRKLAND: Yes, Your Honor, I would.

1 And we're ready to proceed.

2 THE COURT: All right.

3 MS. KIRKLAND: If I may, Your Honor, I
4 have a binder that just has the documents handy and
5 printed out if that's okay with you.

6 THE COURT: Sure.

7 MS. KIRKLAND: Opposing counsel has been
8 provided a copy as well.

9 THE BAILIFF: Turn your microphones on.

10 MS. KIRKLAND: Sure. I've never had
11 trouble projecting. Let me know.

12 Would it be better for you if I sit? Can
13 you hear me better if I'm closer to the mic?

14 THE STENOGRAPHER: Either way is fine.

15 MS. KIRKLAND: Your Honor, do you have a
16 preference if I address you sitting or standing?

17 THE COURT: No. If you're more
18 comfortable sitting, please, you may be seated.

19 MS. KIRKLAND: Just in case, be closer to
20 the mic.

21 May I proceed, Your Honor?

22 THE COURT: You may.

23 **OPENING STATEMENT**

24 MS. KIRKLAND: We're here today on a
25 temporary injunction because Texas Disposal Systems

1 Landfill is threatening to disrupt the City's solid
2 waste operations which will cause ripples -- ripple
3 effects throughout -- to the City and its customers and
4 the residents of San Antonio, impacting public health
5 and safety, as nothing more than an aggressive
6 renegotiation tactic for a contract which they no longer
7 want to be a part of or be obligated to.

8 So we're here for one reason today, as I
9 said, and that's to ask the Court to grant us temporary
10 injunction to prevent them from taking certain steps
11 which would harm the City.

12 Before I get into the requests, I'd like
13 to give the Court some background just because you
14 haven't heard this matter before and I think context
15 would be helpful.

16 You will hear today from David Newman who
17 is the director of the City's solid waste operations.
18 He will testify generally that the City collects from
19 368,000 residents. They collect over 600,000 tons of
20 trash per day -- I'm sorry, per year, and that comes
21 from curbside collections, from litter pickups downtown,
22 bulky waste and brush collection. Probably see their
23 trucks all the time.

24 Prior to 1993 when the City collected this
25 trash, they had a landfill that they would go to. After

1 they got -- they decided permits ran out and they were
2 going to contract out to third parties for disposal
3 sites and in 1993 they entered into agreements with
4 three different companies for disposals.

5 After they original -- we call that the
6 original agreement in '93. Basically via the original
7 agreement, one of which was with TDSL, the City would --
8 the disposal sites were obligated to take a certain
9 amount of trash, the City was obligated to provide a
10 certain amount of trash to these sites, and there was a
11 contract rate that was set for this.

12 After a few years, City Council decided
13 they wanted longer term contracts. And so after that,
14 TDSL and the City entered into what we call the first
15 amendment. And what the first amendment did was extend
16 that original agreement to 2025 and it reduced a little
17 bit of the tonnage requirements.

18 As part of both the first -- the original
19 agreement and the first amendment, the parties had put
20 in language that said, We'll discuss eventually possibly
21 leasing what's called the Starcrest Transfer Station to
22 TDSL.

23 At a high level, what a transfer station
24 is is multiple trucks loaded could come to one central
25 site, put their smaller loads in one big truck and that

1 big truck would then take it to the landfill. That way
2 those little trucks don't have to make, like, eight
3 trips to the landfill. The City owns and operates --
4 well, at the time, owned and operated the Starcrest
5 Transfer Station.

6 In 1998, the parties entered into an
7 agreement, which is called the second amendment, and in
8 that second amendment is where TDSL officially began to
9 operate the Starcrest Transfer Station. As part of
10 that, the duration on the second amendment was until
11 January 15th, 2023; however, TDSL had a unilateral right
12 to extend that contract for another two years so that it
13 would expire with the original agreement in 2025. So if
14 you picture the original agreement expiring in 2025, the
15 second amendment would expire in 2023 unless TDSL said,
16 No, I'd like them to all run together.

17 It was a big part of the second amendment
18 that they made it clear that these agreements were
19 severable. The City thought it was important to retain
20 its ability to dispose and so the first amendment -- the
21 original and first amendment dealt with taking disposal
22 waste to TDSL's site in Buda, Texas -- it's a landfill
23 over there -- whereas the transfer station is located in
24 town.

25 Via the second amendment, the City still

1 had requirements. They had a minimum requirement of
2 tonnage every year of waste that they had to provide to
3 TDSL. It's a hundred thousand tons. TDSL likewise had
4 an obligation on how much they had to take. And, again,
5 there was a contractual rate set for this.

6 Because the original agreement and second
7 amendment were all meant to work together, the City
8 could meet its contractual obligation by delivering all
9 of its waste to Starcrest and that would satisfy both
10 the first -- the original amendment -- sorry, the
11 original agreement and first amendment. So, again, that
12 was entered into in 1998.

13 Relevant to this particular hearing, the
14 second amendment set the specific disposal rate for what
15 the City would pay to dispose of trash at the Starcrest
16 Transfer Station. It also put in an escalator.
17 Essentially every year that rate would be analyzed and
18 it set a metric for how it would be increased.

19 The other thing it did was because it's a
20 City facility, the City wanted to ensure that it was
21 going to retain access and priority of service to that
22 facility, so all that was written into the second
23 agreement.

24 THE COURT: What date was the second
25 agreement?

1 MS. KIRKLAND: It was in 1998. Under Tab
2 B, Your Honor, we've put the original agreement, the
3 first amendment, and the second amendment. I've
4 separated the first amendment and the second amendment
5 by the blue tabs. And so if you look at the second
6 amendment, I believe it was -- it was executed in
7 January of '98.

8 THE COURT: All right.

9 MS. KIRKLAND: So thereafter, in 2000, the
10 parties signed a memorandum of agreement, and then about
11 a year later they signed a special addendum to the
12 agreement related to the transfer of a permit that's
13 required for the transfer station.

14 Those documents together sort of make up
15 what controls the relationship between the parties. For
16 decades, TDS and the -- TDSL and the City performed
17 their obligations under the contract.

18 In August -- on August 2nd, 2021, TDSL
19 sent a letter to the City essentially saying -- invoking
20 mediation, which is a prerequisite to litigation. And
21 as part of that, they were stating that -- they claimed
22 the annual increases on the disposal rate were
23 insufficient given a reduction in their revenue but an
24 increase in costs including what they alleged were costs
25 driven by the City allegedly dumping -- improperly

1 dumping bulky waste at Starcrest.

2 And for reference, Your Honor, bulky waste
3 would be -- well, the witnesses will describe it better
4 than me, but essentially large items, mattresses,
5 appliances, that sort of item. It was TDSL's position
6 that those couldn't be dumped at Starcrest. The City
7 had been dumping them there under the position that they
8 were allowed to be.

9 TDS -- on this notice letter, they
10 attached two invoices. One was for what they said was
11 lost revenue from the bulky waste that they didn't --
12 weren't able to collect.

13 I'll take a step back. I apologize.

14 The City had opened up what's called a
15 bulky waste collection center. You may have heard of
16 them. It's -- there's about four locations in town. If
17 you're a resident of San Antonio, you take an electric
18 bill, you can go and you can drop this bulky waste,
19 because the City used to pick it on the side of the
20 road, you know. This was how they could locate it
21 because of the trucks. The trucks changed.

22 One of those locations is down the road
23 from Starcrest and so the City would take bulky waste
24 from that location and take it to Starcrest. That
25 started in approximately 2013. From 2013 to 2021, TDSL

1 accepted that waste. It wasn't until 2021 that they
2 raised this issue and said, We're not accepting your
3 bulky waste anymore.

4 And one of those invoices was essentially
5 them saying, We should have been -- This is money we
6 would have earned from the public if you hadn't have
7 opened up that bulky waste center. We lost this revenue
8 because you had a center -- they would have come to us
9 if you hadn't have created that center.

10 The other thing that was on there was an
11 invoice for repair to the facility, which was disputed
12 by the parties. Their position is the City asked them
13 to do it. The City's position is it was a repair that
14 had to be done.

15 So these two invoices were on this letter.

16 The parties met in November of 2021 via an
17 informal meeting. It wasn't resolved. They weren't
18 able to come to any kind of resolution on it.

19 THE COURT: Not a mediation.

20 MS. KIRKLAND: It wasn't a mediation. No,
21 Your Honor. It was an informal meeting because, again,
22 the parties had had a good relationship up to this point
23 and so they were trying to work this out.

24 TDS requested the disposal rate be
25 increased, which the City did not agree to, beyond what

1 the contract provided. So obviously, like as I
2 mentioned, the contract has a set disposal rate. TDSL
3 was asking for that to be increased further beyond what
4 the contract allowed.

5 Days later, after the City refused this,
6 TDSL stopped accepting the City's dead animals which was
7 a requirement under the contracts. It's my least
8 favorite part to talk about, Your Honor. After some
9 discussion, they began to accept those and then they
10 stopped later again. They also reduced their operating
11 hours across the board.

12 In March, the parties did -- in March of
13 2022, the parties did go to a mediation. That was their
14 first mediation. Again, it was unsuccessful. The day
15 after that mediation, the City began to experience
16 delays in their service at Starcrest.

17 So as I mentioned, the contract is written
18 such that the City can get priority of service. It's
19 written in there and we'll go through that with our
20 witnesses. But essentially they're given priority in
21 the sense of for every four trucks of City, you can
22 treat another truck. You can service another truck. So
23 four to one. And they're not supposed to wait longer
24 than 30 minutes to get service.

25 Prior to the mediation, that had rarely

1 been an issue. The day after the mediation, the City
2 begins to see delays of hour, hour-and-a-half, two
3 hours. It begins to disrupt the City's operations.

4 So in March, after the mediation, TDSL
5 then files suit. They have a suit going in this for
6 breach of contract and quantum meruit.

7 In May, the City sent its first notice of
8 cure to TDSL under the contract and under that we
9 brought up the service issues I discussed, Your Honor,
10 and the refusal of the dead animals.

11 After the notice, there were some minor
12 improvements to the service, but the issues continued.
13 The parties at that time agreed that they would mediate
14 again, but due to, you know, just schedules they weren't
15 able to do that until later.

16 In September of 2022, the City sent a
17 second notice to cure, this time reiterating the prior
18 issues that hadn't been addressed as well as noting new
19 concerns in terms of they were violating the priority of
20 service, again in terms of servicing other haulers is
21 the best way to say that, before the City's haulers, and
22 there was also a notice regarding some equipment that
23 had broken.

24 On November 22nd, 2022, TDSL sent a long
25 response to the City's prior cure notices. And in that,

1 they disputed the City's default allegations, but it
2 also -- they included their own default allegations.

3 Per the notice, if the City did not
4 capitulate to TDS's demands, because it had a -- it
5 noted some cure issues saying if the City did, they
6 could cure by doing these items.

7 TDS said that it would deny the City
8 access to the Starcrest Transfer Station or
9 alternatively will allow the City access if the City
10 will pay the public rate. So not the contract rate, the
11 public rate. So if the City will not agree to pay the
12 public rate, the City will lose access to Starcrest, and
13 it will not pay the back-invoices. And I'll -- again,
14 Your Honor, you'll see the cure notice that lays these
15 out.

16 Further complicating the threat, the
17 public gate rate is actually measured in a different way
18 than the contract rate. It does volume as opposed to
19 weight, so it was going to create its own problem in
20 terms of the City being able to perform its obligations.
21 So as a result, the City filed its original counterclaim
22 which included request for some declaratory relief, and
23 as part of that we included an application for temporary
24 injunction.

25 The parties entered into a rule 11,

1 essentially maintaining the status quo or at least what
2 we agreed would maintain, as best we could, the status
3 quo until the Court could hear our temporary injunction.
4 That rule 11 expires tomorrow. So if the Court does not
5 grant the request for temporary injunction as of
6 Thursday, based on representations from TDSL, the City
7 will lose access to the Starcrest Transfer Station.

8 TDSL has already begun to send invoices to
9 the City attempting to charge them for the public rate,
10 so they are taking steps. They are -- they have said
11 they are going to do this. They have taken steps to
12 begin to do this.

13 I'll be -- the City will testify that they
14 have no intention of at this point paying those
15 back-invoices. They do not believe there's grounds for
16 it, that there's basis for it, so they dispute these
17 invoices which is why, as I mentioned, Your Honor, our
18 anticipation is that the City would be locked out.
19 Without hyperbole, the lack of access to Starcrest will
20 have a significant impact on the City's operations doing
21 solid waste.

22 The routes are designed. There are
23 three -- as I mentioned, three disposal sites within the
24 City. The City has spent a significant amount of time
25 and resources designing its routes. And, in fact, it

1 just went through a route redesign to make these routes
2 as efficient as possible and designed around these
3 disposal sites.

4 They are not close to each other. If they
5 had -- so it's not as easy as just going to a different
6 site. If the City had to suddenly lose access to
7 Starcrest, it had to access the other two, you'd be
8 adding an hour to two hours per load which will go into
9 per day. So whereas days used to last ten hours, you're
10 looking at now 13 to 14-hour days for the drivers,
11 additional mileage put on the equipment, but more
12 importantly what we'll go through is the interaction
13 that you'll now be seeing increased with the public.
14 And that is -- that will happen on day one. It will
15 only get worse from there.

16 The risks are not quantifiable. Director
17 Newman will testify to that. TDS's actions will put the
18 public's health and safety at risk if they're not
19 enjoined from denying access and the other relief
20 requested.

21 So the City is asking you to issue a
22 temporary injunction and to maintain the status quo
23 until this case can be set for a trial on its merits
24 and --

25 THE COURT: Couple of questions.

1 MS. KIRKLAND: Yes, Your Honor.

2 THE COURT: Is there a trial date?

3 MS. KIRKLAND: No, Your Honor.

4 THE COURT: Okay. Is there a DCO?

5 MS. KIRKLAND: No, Your Honor. This is --
6 it's pretty early on. Once this got going, we
7 immediately moved -- started moving into this realm and
8 we were also trying to mediate, so it's sort of been
9 here at this point.

10 THE COURT: Do the parties agree that this
11 Court has the -- that this Court can either issue a TRO
12 today that allows you 14 days or move forward with the
13 injunctive relief?

14 MS. KIRKLAND: Your Honor, I would take
15 the position you do have that jurisdiction. I would ask
16 for expediency and efficiency because we do have
17 everyone here to move forward on the temporary
18 injunction so that there could be stability and so that
19 the parties can plan because I think both sides will
20 agree, due to do the magnitude of these operations,
21 planning gets involved in this, and so I think for both
22 it would be good to have relief.

23 THE COURT: So both parties really want me
24 to issue injunctive relief one way or another, either to
25 agree or to deny injunctive relief.

1 MR. HEMPHILL: Right. To deny, Your
2 Honor. We're not asking for --

3 THE COURT: To deny. To deny. The
4 parties don't want --

5 (Laughter)

6 MS. KIRKLAND: I was like, Do you? We can
7 resolve this.

8 THE COURT: Understood. Understood. No,
9 that's not what I meant.

10 Obviously you want me to deny the
11 injunctive relief, but both agree that I should either
12 grant or deny and not do -- not the band-aid, if you
13 will, of the TRO.

14 MS. KIRKLAND: We would request that, Your
15 Honor, yes.

16 THE COURT: All right. And so now,
17 please, sir, I will hear from you.

18 **OPENING STATEMENT**

19 MR. HEMPHILL: Thank you, Your Honor.

20 This is a contract dispute. There's a
21 dispute over the amount that the City owes. This is
22 about money. This is not about any irreparable harm. I
23 think that's the overarching reason why we think that an
24 injunction is not appropriate.

25 The City says it's going to lose access.

1 The only reason it would lose access is if it refuses to
2 pay the bills that TDSL has sent.

3 Now the City claims we don't think these
4 bills are appropriate. That's what this litigation is
5 about.

6 If the City wishes to maintain access, pay
7 the bills. Access is maintained. And even under their
8 scenario, there's no irreparable harm. But even if they
9 lose access, we don't believe there's any irreparable
10 harm because the City has multiple options for how to
11 handle the disposal of trash.

12 One of the things that I don't think
13 you'll hear -- because it's not in the affidavits and
14 it's not in the pleadings, one thing I don't think the
15 Court will hear today is any allegation that any action
16 by TDSL in denying access to Starcrest would result in
17 the public garbage piling up, would result in any kind
18 of disease or any kind of public health threats that
19 garbage collection and disposal is designed to prevent.

20 I think what the City is saying is it's
21 going to take us more time. We might have to pay our
22 employees more money. They might have to drive further.
23 They might have to be in traffic more. None of those
24 are irreparable harm.

25 If they have to pay their employees more

1 to deal with the situation and if they believe that's
2 TDSL's fault and TDSL has acted in a manner that's
3 contrary to its contractual obligations, you've got a
4 counterclaim.

5 We believe the City has acted contrary to
6 its contractual obligations in multiple respects. This
7 whole thing started because the City has been delivering
8 to the Starcrest Transfer Station the type of waste
9 that's not eligible for the agreed contract rate.

10 When TDSL agreed to the second amendment,
11 what it says is that TDSL will accept at Starcrest the
12 types of waste that regularly collected municipal solid
13 waste as was processed through the Starcrest Transfer
14 Station from 1991 to 1996, so there's a defined type of
15 waste. That type of waste is the type of waste that
16 came back then from collections at homes. It's
17 collected in what we call route trucks that go to homes,
18 they compact the waste, and take it to the transfer
19 station.

20 I'm sure the Court understands the concept
21 of the transfer station. And if I may approach for a
22 moment, I've got some notes that -- a couple of things
23 that might help the Court.

24 THE COURT: Yes.

25 MR. HEMPHILL: This is just a little

1 PowerPoint, but I'm not going to go through the entire
2 thing, but there are a couple of things I think that
3 might be helpful.

4 THE COURT: Okay.

5 MR. HEMPHILL: First, on page three of the
6 PowerPoint is a map of San Antonio metro area, and the
7 Court will see the location of three different
8 facilities.

9 Just north of the airport, there's a red
10 dot and it says Starcrest. That's the transfer station
11 that we're talking about.

12 THE COURT: Where am I hearing the
13 feedback? Is it? Can I just -- if we turn.

14 MR. HEMPHILL: I'll just turn off the mic.

15 THE COURT: Thank you.

16 MR. HEMPHILL: I think I'm plenty loud.

17 THE COURT: Yes. Yes. I can hear you.
18 Yes.

19 MR. HEMPHILL: So there's the dot that
20 says Starcrest.

21 THE COURT: Yes.

22 MR. HEMPHILL: That's the transfer
23 station, and I'll talk more about how that operation
24 works in just a moment.

25 THE COURT: Okay.

1 MR. HEMPHILL: Down in the lower right, it
2 says Tessman Road. That is a landfill that's owned, I
3 believe, by Republic. Used to be BFI. That is a
4 landfill, not a transfer station. So the City has a
5 contract with Republic, and it takes waste directly to
6 that landfill.

7 Then in the lower left, in the southwest
8 quadrant, it says -- the dot says Covell Gardens. That's
9 a landfill that's owned by Waste Management. These are
10 competitors of TDSL. That's a landfill where they
11 directly haul waste. So they've got these two
12 landfills, and then Starcrest is a transfer station.

13 It is a place where route trucks go and
14 they go up on a platform and then they dump their waste
15 into a trailer on a compactor, depending. But
16 ultimately the waste that gets transferred to these big
17 trailers that are pulled by semi-trailer trucks, right,
18 go up I-35 to the TDSL landfill that's in southern
19 Travis County. So it is a -- it takes more time to
20 process trucks at Starcrest, and it takes more expense
21 to operate Starcrest and then truck the waste up to the
22 landfill in southern Travis County.

23 THE COURT: Hays or Travis? Buda?

24 MR. HEMPHILL: It's in Travis County.
25 It's near Buda. It's actually a small town called

1 Creedmoor, which is right by the border but it's
2 almost -- it's just barely Travis County.

3 THE COURT: Because when you said Buda,
4 that's why I was --

5 MR. HEMPHILL: It's just basely Travis
6 County.

7 THE COURT: All right.

8 MR. HEMPHILL: So it's just north of the
9 Hays/Travis County line.

10 THE COURT: Okay.

11 MR. HEMPHILL: And the contract also
12 allows the City to haul waste directly to the TDSL
13 landfill, bypassing Starcrest if the City so wishes.

14 If the City refuses to pay the bills,
15 TDSL, yes, is saying, We're not going to allow the City
16 to access Starcrest because we believe that would be a
17 breach of their obligations under the contract which
18 relieves TDSL of their obligation. But TDSL is willing
19 to continue accepting the waste if the bills are paid
20 from January 15th of this year going forward.

21 If the City says, No, we don't want to do
22 that, we're not going to pay the bills because we don't
23 think we owe them, the City can not only haul to Covell
24 Gardens and Tessman Road, they can also haul up to the
25 landfill in Creedmoor near Buda. There's no dispute

1 over the disposal rate there.

2 We have a contractual disposal rate for
3 city waste that come to the TDSL landfill. That's not
4 in dispute. We're not asking for any higher rates for
5 that. Just Starcrest.

6 THE COURT: Just Starcrest.

7 MR. HEMPHILL: Just Starcrest.

8 So an overarching question, of course,
9 when a party petitions a Court for temporary injunctive
10 relief is is there an adequate remedy at law or not.
11 There is. It's damages.

12 Either the City chooses to pay the bills,
13 continue access to Starcrest, and try to recover that,
14 what they claim is an overpayment from TDSL as part of
15 this lawsuit because that issue is joined, or the City
16 decides that it doesn't need Starcrest so badly that it
17 wants to pay its bills and goes to the other landfills
18 and goes up to TDSL if it chooses.

19 One of the things that the City says is,
20 Well, these other landfills, one closes at 5:00 and one
21 closes at 6:00. The TDSL landfill is 24 hours a day
22 every weekday, so they've got that option to go up I-35
23 and dump the truck there.

24 So if you look at page -- if the Court
25 looks at page two of this PowerPoint, the previous page,

1 this is kind of a summary of the grounds why we think
2 denial -- and says it TRO, but temporary injunction as
3 well.

4 First of all, no irreparable harm. I've
5 spoken of that.

6 The Court will hear evidence and our
7 argument that the City is in prior material breach of
8 the contract which relieves the obligation of TDSL to
9 accept waste at the contract rate.

10 Then we get to the misinterpretation point
11 about reasonable care. And this is the priority
12 provision that Counsel was discussing, because we
13 believe the City badly misreads the priority provision
14 in the parties' contract. They're asking this Court to
15 order TDSL to process every City truck that comes to
16 Starcrest within 30 minutes unless 15 trucks show up at
17 the same time. That is not what the contract says.

18 The contract says that TDSL will use
19 reasonable care to service City trucks within 30
20 minutes. And then it says TDSL will be deemed to have
21 used reasonable care if 15 trucks show up -- 15 or more
22 trucks show up at the same time.

23 So the City wants to rewrite the contract
24 to say TDSL must service City trucks within 30 minutes
25 unless 15 or more show up. That's a not what the

1 contract says. It says use reasonable care, and
2 reasonable care is a fact issue and it depends upon on
3 the circumstances because the Court will hear evidence
4 that in some circumstances it is physically impossible
5 to service every -- to guarantee service to City trucks
6 in 30 minutes even if fewer than 15 show up.

7 So we don't think that injunctive relief
8 is appropriate under the City's interpretation of the
9 priority provision because we think they're
10 misinterpreting it. And it also wouldn't be
11 appropriate -- injunctive relief wouldn't be appropriate
12 to order TDSL to use reasonable care because reasonable
13 care depends on the circumstances and we get in the
14 situation where we'd be coming to court every week where
15 the City says, You haven't used reasonable care, and
16 TDSL says, Yes, we have and here's why, because we have
17 this truck and this truck and this truck and this truck
18 and all these loads.

19 THE COURT: But is the City requiring the
20 30-minute rule or is the City just requiring access to
21 Starcrest?

22 MR. HEMPHILL: The City is requiring --
23 the City has asked for injunctive relief that -- I
24 can -- I'll read exactly what the City is asking for.
25 They are asking for a 15-minute rule.

1 THE COURT: 30-minute.

2 MR. HEMPHILL: Excuse me, a 30-minute rule
3 and if there are 15 or fewer trucks.

4 MS. KIRKLAND: For ease, Your Honor, I
5 can -- if you look to page 22 of the City's application,
6 it lists out specifically what we're requesting in terms
7 of injunctive relief. I also have a draft order if that
8 would be more helpful as to specificity.

9 THE COURT: okay. And this is in the
10 application for injunctive relief?

11 MS. KIRKLAND: Yes, Your Honor, in the
12 binder.

13 THE COURT: What tab is that?

14 MS. KIRKLAND: It's the very first one,
15 the one without the tab, page 22.

16 MR. HEMPHILL: And the City says [as read]
17 TDS be required to provide priority of service in
18 accordance with the agreement.

19 Well, it's the 'in accordance with the
20 agreement' where the conflict is because in their
21 application they say -- their interpretation is that we
22 must service for City trucks within 30 minutes. And
23 that's not what it says. It's a reasonable care
24 provision.

25 TDSL is losing \$200,000 a month operating

1 Starcrest. TDSL has -- part of its affirmative claim is
2 circumstances have changed so materially and in a way
3 unanticipated by the parties back in the '90s that
4 performance of the contract under the contract's rates
5 is excused. That's a whole separate argument from what
6 TDSL has said -- claims is the City's breach.

7 So there's really two reasons that TDSL
8 says, We're not required to continue taking
9 regularly-collected waste at the contract -- originally
10 contracted rate.

11 Number one is the prior breach by the
12 City.

13 Number two is the changed circumstances
14 that make performance impracticable. And we've cited
15 some law on impracticability in our motion and it's
16 also -- you know, there are summaries of these cases in
17 the PowerPoint handout that I gave the Court on pages 13
18 and 14 where Texas case law citing restatement of
19 contracts says if there's been an occurrence of an event
20 that was unanticipated and the non-occurrence of that
21 event was a fundamental assumption of the contract, then
22 performance is impracticable and performance is excused.

23 And the Court will hear evidence about the
24 amount that -- of -- of charge that TDSL has been
25 allowed to increase its charges over the life of the

1 contract versus how much the City has raised its
2 charges. As a matter of fact, I'm looking for the
3 summary. We have a summary of this and we will have
4 exhibits to this effect as well in testimony.

5 Page 12 of the handout. Under the
6 Consumer Price Index escalator in the contract, TDSL has
7 been capped over the years at a 74 percent increase in
8 its rates. The City charges its customers, its
9 residents, to pick up their trash -- in that same amount
10 of time, when TDSL was limited to 74 percent, the City
11 has increased its fees 215 percent. Because the City
12 and TDSL are experiencing the same type of increase
13 costs, the City has been able to pass it on. The City
14 has refused any requests by TDSL to adjust.

15 Diesel fuel prices in this period have
16 increased 806 percent; transfer truck prices have
17 increased 200 percent; trailer prices increased
18 158 percent. But TDSL is capped at 74 percent.
19 \$200,000 every month TDSL is losing, almost
20 two-and-a-half million dollars a year.

21 So that, in addition to what we think --
22 what we contend are the City's prior breaches of
23 contract, excuse TDSL's performance.

24 We'll go through those. We'll go through
25 those. One of them is the bulky waste issue. The City

1 began delivering a different waste stream to TDSL at
2 some point after this contract began.

3 THE COURT: It's been 25 years since --

4 MR. HEMPHILL: That's correct. They
5 began, I don't know, 12 years ago, the City, delivering
6 a different waste stream. And TDSL did invoice for
7 that, but did not realize that it was an inappropriate
8 waste stream. And when it did, it said, You owe us the
9 difference between the contract rate and what the rate
10 would -- the appropriate rate for that waste stream, and
11 the City has refused to pay it.

12 The City also has what's called a
13 put-or-pay requirement. The City has to deliver a
14 hundred thousand tons of waste to TDSL every year at
15 Starcrest or at the landfill in southern Travis County
16 or combination thereof. And if the City doesn't deliver
17 a hundred thousand tons a year, the City has to pay for
18 the shortfall as if it did. It's kind of like a take or
19 pay contract in oil and gas that I learned about a long
20 time ago when I took the bar.

21 But, for example, if the City delivers
22 80,000 tons in a fiscal year -- and their fiscal year
23 runs through the end of September. If they deliver
24 80,000 tons in a fiscal year, they have to pay as if
25 they had delivered that extra 20,000 tons even though

1 they didn't deliver. Part of that is because when TDSL
2 agreed to do this, it had to be guaranteed a particular
3 waste stream.

4 In the fiscal year ended 2022, the City
5 did not meet its put-or-pay obligation. That's
6 undisputed. They didn't deliver a hundred thousand
7 tons.

8 The City says, We didn't have to because,
9 TDSL, you weren't giving us priority.

10 The contract sets forth a procedure by
11 which the City can seek deduction of diverted waste.
12 What do I mean by diverted waste? Contract says that if
13 a truck arrives at Starcrest and has to wait more than
14 30 minutes, and the City has a designated on-site
15 program manager, that program manager can say, Go to
16 another landfill, and that tonnage can be deducted from
17 the put-or-pay requirement.

18 It's in the contract. No dispute about
19 that. That's all -- what the City did, the -- and the
20 City had to give daily reports of diversion to TDSL.
21 The City didn't do any of that in the fiscal year ending
22 2022.

23 As a matter of fact, it appears that the
24 City decided to have trucks not even ever go to
25 Starcrest. They said, Well, looks like they're going to

1 have to wait more than 30 minutes so we're going to send
2 them to another landfill, and claimed a deduction for
3 that. That's not what the contract says.

4 It's important that these trucks actually
5 go to Starcrest, number one, to ensure that they wait 30
6 minutes; number two, so they can weigh in so TDSL knows
7 the amount of weight that can be deducted from put or
8 pay if they have to wait more than 30 minutes; and
9 number three, so that TDSL can check and say, Yes, this
10 truck weighed in, this is the weight it had, the tonnage
11 weight, it had to wait, it was delayed more than 30
12 minutes, and on-site program manager then diverted the
13 truck. That's -- that's okay, but it's not what they
14 did.

15 So TDSL invoiced the City for that
16 put-or-pay shortfall for the fiscal year ended
17 September 30th, 2022. It's about 1.1 million,
18 1.15 million. City says, Nope, we're not going to pay
19 that.

20 So that brings us here. And as we read
21 the City's request -- I'm sure that I'll be corrected if
22 I'm incorrect. But as we read the City's request, they
23 want this Court to say, number one, TDSL, you must
24 accept any waste the City brings you. You can't shut
25 down Starcrest. You can't deny access. That's number

1 one.

2 When an -- as a matter of fact, in the
3 contract there's only certain types of waste that TDSL
4 needs to accept.

5 Number two, they want the Court to order
6 TDSL to bill them no more than the agreement rate for
7 any waste that is brought even if it's not the same kind
8 of waste that's contemplated in the contract. They can
9 bring bulky waste; they can bring special waste. I
10 don't think they bring hazardous waste, but what they're
11 asking the Court to do wouldn't prevent them from doing
12 that.

13 So they say, You've got to allow access,
14 and you can't bill more than this contract rate which
15 is -- whether that's the appropriate rate is in dispute
16 in this lawsuit, so they want the Court to adjudicate
17 the merits of the lawsuit.

18 They don't say that they have to pay the
19 rate. So under what they're asking the Court to do,
20 TDSL has to keep taking the City's waste even if the
21 City decides not to pay during the pendency of
22 litigation.

23 And, again, they want the Court to make
24 some order on the priority here. And as I read their
25 pleadings, their interpretation of the priority

1 provision is, Got to service trucks within 30 minutes
2 unless 15 arrive at the same time.

3 You'll hear testimony that that is -- TDSL
4 could have 200 people on staff and there are times when
5 that's impossible. That's why the contract says shall
6 use reasonable care instead of setting a hard and fast
7 30-minute deadline.

8 So for all of those reasons, many of which
9 will have evidence and testimony on today, we would ask
10 the Court to deny the request for injunctive relief.

11 The City can choose whether they want to
12 pay the bills, have access to Starcrest. And if they
13 think they're overpaying, they have a counterclaim to
14 recover that, or the City can determine, We don't want
15 to pay.

16 Per year the increased amount that TDSL is
17 charging amounts to about just under 2 percent of the
18 City's entire solid waste budget. Not a large amount.
19 As a matter of fact, it's pretty close to two-and-a-half
20 million dollars a year that TDSL is losing right now in
21 the operations of Starcrest.

22 So the City can choose to pay it and
23 retain access, or say, We're not going to -- to pay,
24 we're going to -- we're going to use the other
25 landfills, but that will not cause -- I don't think

1 you'll hear any evidence that goes to cause any
2 danger -- actual danger to public health or safety.

3 I think the most that they say is there's
4 going to be more cars, more trucks on the road at more
5 times with more traffic and they're going to have to pay
6 their drivers more. That's not irreparable harm.

7 If this were a case where trash wasn't
8 going to get picked up, I think it would be a different
9 situation. I don't think that's what's the City is
10 saying and I don't think there will be evidence to
11 support that type of irreparable harm.

12 THE COURT: Okay.

13 MR. HEMPHILL: Thank you.

14 THE COURT: All right. So we'll see what
15 the evidence shows us. I know the City is asking for
16 the status quo until trial.

17 MS. KIRKLAND: Yes, Your Honor.

18 THE COURT: I didn't ask if the City has a
19 current counterclaim.

20 MS. KIRKLAND: Yes, Your Honor. We filed
21 a declaratory judgment action asking for certain
22 declarations of -- interpretations of provisions of the
23 contract that are in dispute with TDSL.

24 THE COURT: Okay. And is there a setting
25 for the dec action hearing?

1 MS. KIRKLAND: No, Your Honor. I assume
2 it would be taken up with the trial on the merits, with
3 the counterclaim -- I mean with their -- with TDSL's
4 counterclaim.

5 THE COURT: All right. Because sometimes
6 you can have a hearing on a dec action and so I didn't
7 know if you had that set.

8 MS. KIRKLAND: Sure. Yes, Your Honor.

9 THE COURT: All right. Okay. Well then,
10 you know what, this is perfect for us to go to lunch.
11 This is a good time for that. So when we come back, at
12 1:30 -- I will be here ready at 1:30 -- we will proceed
13 with witness testimony.

14 MS. KIRKLAND: Yes, Your Honor.

15 (Luncheon recess)

16 THE COURT: All right. Ms. Kirkland, you
17 may proceed.

18 MS. KIRKLAND: Thank you.

19 We'd like to call David Newman to the
20 stand, Your Honor.

21 THE COURT: All right. Mr. Newman.

22 MS. KIRKLAND: Your Honor, if I may, I've
23 created a binder for the witness as well so they can
24 reference the exhibits, if I can provide that to them.

25 THE COURT: Yes.

1 MS. KIRKLAND: Additionally, I have a
2 demonstrative which has some slides, which I'll have a
3 copy for Counsel, too. He can have that as well. That
4 may be easy to reference.

5 (Witness takes the stand)

6 THE COURT: Thank you.

7 All right, sir. If you'll raise your
8 right hand.

9 **DAVID NEWMAN,**

10 having been first duly sworn, testified as follows:

11 MS. KIRKLAND: Your Honor, if I may
12 provide you with a copy as well.

13 THE COURT: Yes, please.

14 MS. KIRKLAND: And, again, this is more of
15 a demonstrative.

16 **DIRECT EXAMINATION**

17 BY MS. KIRKLAND

18 Q Good afternoon, David. Would you please state
19 your name for the record.

20 A David Newman.

21 Q Who do you work for?

22 A The City of San Antonio.

23 Q And how long have you worked for the City?

24 A Approximately 26 years.

25 Q What do you do for the City of San Antonio?

1 A I'm currently the director of the Solid Waste
2 Management Department.

3 Q So at a very high level, what does that mean
4 you do?

5 A It means that me and my staff collect garbage
6 from the citizens of San Antonio.

7 Q So in terms of the Solid Waste Management
8 Department, if you were going to high level describe
9 this, the type of services that the City provides, could
10 you tell us what that is?

11 A Certainly. So we collect curbside -- we
12 provide curbside collection services to approximately
13 370,000 customers, and those curbside services include
14 garbage collection, recycle collection, as well as
15 organics collection.

16 We also provide from the curb brush and
17 bulky collection. We also provide a number of other
18 services, the bulky waste collection sites. We have
19 brush grinding facility as well as collecting from
20 downtown litter baskets.

21 My department also does the fleet
22 maintenance of our trucks as well as public works and
23 many other departments for the heavy fleet, and we
24 collect illegal dumping, and there's probably a few
25 others I'm missing.

1 Q My least favorite, do you collect the dead
2 animals on the streets as well?

3 A We do. We collect dead animals as well.

4 Q And you -- how much trash are you picking up
5 annually, doing all of these services?

6 A If you include recycling and organics into that
7 mix, it's approximately 600 -- excuse me, 600,000 tons.

8 Q And how many people does the City of San
9 Antonio employ to provide these services?

10 A The Solid Waste Department employs 805
11 employees.

12 Q And with all this trash, this 600,000 tons per
13 year, where does it go?

14 A So the recycling that we collect through the
15 recycle cart goes to a contracted vendor that processes
16 it, and that's sold off as recycling.

17 The organics is the same way. We collect
18 that and our drivers through our trucks will deliver
19 that to another vendor, and they process that and turn
20 it into compost.

21 The garbage that is collected -- and it's
22 about 330,000 tons of the 600,000-ton figure I
23 mentioned -- that garbage is taken to three facilities.
24 We contract with three different companies. One is
25 Waste Management on the west side. Another is Republic

1 on the east side. And of course, TDS which operates the
2 City's transfer station on the north side, and they
3 truck that up to Buda.

4 So the City does not own an active
5 landfill, but we rely on these contracts to take this
6 waste.

7 Q Why have three individual sites?

8 A Well, there's several reasons for that. One is
9 certainly to have some diversification, but also we
10 design our routes so that -- this is a large city.
11 We're the seventh largest city in the nation, I think,
12 still, and we collect from, you know, a lot of
13 customers. So we -- the routes that are in the location
14 of the disposal site, those are the ones that go to that
15 facility. So for logistics purposes, so that we don't
16 drive all over town trying to get to a particular
17 facility, that's one reason why we would have these
18 three.

19 Q And I think you mentioned it, but who -- who
20 operates these three sites?

21 A So there are contractors, and one is Waste
22 Management, another is Republic Services, and the third
23 is Texas Disposal System.

24 Q And so has it always been this way?

25 Let's that a little step back.

1 Sir, you mentioned the City doesn't have a
2 landfill. Was that ever true?

3 A The City did have a landfill, and it closed in
4 1993. So in 1993, that was when the City began
5 contracting waste -- excuse me, contracting for the
6 disposal of the waste.

7 So a period of time in the '90s, that was
8 originally I think with -- with BFI that became
9 Republic, as well as TDS, and then a third vendor, Waste
10 Management, was included into this.

11 And so essentially the solicitation that
12 the City did way back then grouped all of these
13 together. It was the same RFP. And so however many
14 years ago back in 1993 is when this change occurred.

15 Q And so I'm going to ask you to turn in that
16 binder to Tab B. And with Tab B -- you can take a look
17 through if you need to.

18 A I apologize. I have to figure this out.

19 Q No, you're okay.

20 A Okay.

21 Q Do you recognize that document?

22 A Yes.

23 Q What do you recognize that document to be?

24 A This is the original contract.

25 Q And does it appear to be a true and correct

1 copy of that contract?

2 A Yes.

3 Q And if you go to the first blue tab, does that
4 appear to be the first amendment to the contract?

5 A Yes.

6 Q And if we go to the second blue tab, does that
7 appear to be the second amendment to the contract?

8 A Yes.

9 Q And, again, do these appear to be true and
10 correct copies of those documents?

11 A Yes, they do.

12 MS. KIRKLAND: Your Honor, I would move to
13 admit these as Plaintiff's -- sorry, City's Exhibit A.

14 THE COURT: Any objections?

15 MS. KIRKLAND: Or B. Sorry.

16 MR. HEMPHILL: Your Honor, my only
17 objection is that there are some ordinances included in
18 here that aren't -- aren't necessarily part of the
19 contract, and there's also a document that also --
20 there's a subsequent amendment or a subsequent addendum
21 to the contract that's not included here. But as long
22 as the record is clear on those things, then I don't
23 object to its admission.

24 MS. KIRKLAND: I intend to introduce those
25 in just a -- just a minute. I was keeping -- I had

1 already submitted these as one document, so I wanted to
2 admit them together, but I will address those in just a
3 second.

4 MR. HEMPHILL: Fair enough.

5 THE COURT: All right. With that
6 understanding, Exhibit -- did you say A?

7 MS. KIRKLAND: It will be B, Your Honor.
8 I'm sorry.

9 Exhibit A is his affidavit, so I didn't --
10 I wanted to keep it consistent with the application.

11 THE COURT: Okay. Applicant's Exhibit B
12 shall be admitted into evidence.

13 (Applicant's Exhibit B admitted)

14 Q (MS. KIRKLAND) And then I'm going to ask you
15 to turn to Exhibit I, if you don't mind.

16 Do you recognize this document?

17 A Yes.

18 Q And what is this document?

19 A The special addendum to -- which is part of the
20 contract.

21 Q And this was executed approximately when?

22 A I believe 2001.

23 Q And then if you can please turn to Exhibit --
24 I'm sorry.

25 MS. KIRKLAND: Your Honor, I move to admit

1 Exhibit I.

2 MR. HEMPHILL: No objection.

3 THE COURT: All right. Applicant's
4 Exhibit I shall be admitted into evidence.

5 (Applicant's Exhibit I admitted)

6 Q (MS. KIRKLAND) If you'll please turn to
7 Exhibit M.

8 Do you recognize this document?

9 A Yes.

10 Q And what does this document appear to be?

11 A This is a memorandum of agreement between the
12 City and Texas Disposal Systems.

13 Q Does this appear to be a true and correct copy
14 of the memorandum of agreement?

15 MS. KIRKLAND: Your Honor, I would move to
16 admit Exhibit M.

17 MR. HEMPHILL: No objection, noting that
18 there's some extraneous handwriting on the first page
19 that's not actually part of the agreement. But with
20 that understanding, the record clear, no objection.

21 MS. KIRKLAND: Agreed, Your Honor. This
22 is copy we have.

23 THE COURT: Okay. Maybe we would redact
24 that handwriting.

25 MS. KIRKLAND: I could white it out.

1 It's -- the copy that the City has has handwritten notes
2 on it, so -- but I'm happy to white it out and maybe
3 submit a new version of it if the Court would prefer.

4 THE COURT: All right. We'll keep that as
5 for the record with the court reporter.

6 And, Mr. Hemphill, do you have any
7 objection to the whiteout of those notes?

8 MR. HEMPHILL: No objection, Your Honor.

9 THE COURT: All right. Applicant's
10 Exhibit M shall be admitted into evidence.

11 (Applicant's Exhibit M admitted)

12 Q (MS. KIRKLAND) David, in these documents that
13 we just looked at together -- the original agreement,
14 the first amendment, the second amendment, the special
15 addendum, and the memorandum of understanding -- is it
16 your understanding that these documents generally form
17 the contract between the parties or the documents that
18 govern the relationship?

19 A Yes.

20 Q Okay. At a high level, what was the purpose of
21 the original agreement?

22 A The purpose was for the City to take 100,000
23 tons of garbage to the TDS landfill in Buda for a term
24 of five years.

25 Q And that agreement as we looked at was

1 eventually amended, correct, a couple of years later?

2 A Correct.

3 Q And what was the -- what were the big changes
4 in that amendment?

5 A It reduced the volume down to 50,000 tons, but
6 it extended the term to 2025, so it extended the term
7 significantly.

8 Q And for both the original agreement and the
9 first amendment, those were to take waste to the -- what
10 we're calling the Buda facility as it's described in the
11 contract.

12 A That is correct, for the City of San Antonio to
13 take the waste to TDS's landfill in Buda.

14 Q As part of that agreement, was there language
15 that the parties would have a discussion about the lease
16 of the Starcrest Transfer Station?

17 A Yes.

18 Q Can you please explain to the judge what the
19 Starcrest Transfer Station is?

20 A It is a -- it's a facility that's owned by the
21 City of San Antonio where we take collection trucks that
22 are out in the neighborhood collecting those carts that
23 I mentioned. And they can only hold ten to maybe
24 12 tons of garbage, but they take it to this facility.
25 It's permitted through the State to be a transfer

1 facility where we take the smaller truck, put it into a
2 larger truck that's a tractor-trailer that can be hauled
3 up to the landfill.

4 So these are fairly common in -- in areas,
5 including San Antonio, but it's to reduce how many
6 loads, and also to make sure that what you're taking it
7 in is a tractor-trailer versus a route truck.

8 Q And in terms of why that distinction matters,
9 why did you note that it's a tractor-trailer that would
10 be making this commute, not a hauler, a trash hauler?

11 A There's several reasons. Number one, these
12 trucks -- these automated side-load trucks that we
13 collect with, just one truck is collecting from about
14 1200 homes in one day, and -- and so that's -- that's
15 quite a bit. We need to keep them on the road
16 collecting from those homes.

17 But also, they are very maintenance
18 intensive, because basically an automated truck is one
19 driver, one truck, and an automated arm collects the
20 cart that the City provides and dumps it into the truck,
21 and it -- and it can collect more. But they are
22 maintenance intensive, and so you want it on the route,
23 you want it collecting from the customers and not
24 driving on the highway, which is better suited for a
25 tractor-trailer that has far less maintenance than an

1 automated side-load truck. So that's -- that's one
2 reason. And also I mentioned the ability to put more
3 into a tractor-trailer.

4 Q So prior to TDSL operating -- taking over
5 operations in '98, did the City operate the Starcrest
6 Transfer Station?

7 A Yes.

8 Q And how was the City utilizing it? Were they
9 using it to take the garbage up to Buda for the -- under
10 the original agreement?

11 A Under the original agreement, yes.

12 Q So the second amendment -- the purpose of the
13 second amendment was for the lease of the Starcrest
14 Transfer Station; is that correct?

15 A Yes.

16 Q And when we pull up the contract --

17 MS. KIRKLAND: And so I would direct
18 everybody to slide two in the little handout that I
19 have. It's also, again, under Exhibit B.

20 Q (MS. KIRKLAND) What were -- did the City have
21 a minimum tonnage requirement that it has to meet?

22 A Yes. Under the second amendment, it's
23 100,000 tons if it's delivered through the transfer
24 station.

25 Q And does that satisfy the tonnage requirements

1 under both the original agreement and the second
2 amendment?

3 A Yes. Those two agreements are -- they're --
4 yes, that's correct. It would satisfy for both
5 agreements, yeah.

6 Q And under the agreement, did TDSL have a
7 minimum that they had -- I'm sorry.

8 The contract provided that they had to
9 accept at least 500,000 tons from the City; is that
10 correct?

11 A That's correct.

12 MR. HEMPHILL: I'm going to object as
13 leading because -- and also as mischaracterizing what
14 the document says.

15 MS. KIRKLAND: I'll rephrase.

16 THE COURT: All right.

17 Q (MS. KIRKLAND) David, when we -- would you
18 please read the first sentence of the contract of the
19 second amendment for Section F?

20 A Exhibit -- I'm sorry, which?

21 Q Sure. If you would go to -- so if you're in
22 Exhibit B, at that second blue tab, and you can go to
23 what's marked as page three.

24 A Into Section F?

25 Q Yes. Just the first sentence of Section F,

1 please.

2 A [As read] TDSL agrees to accept up to
3 500,000 tons per year of City solid waste hauled by any
4 City vehicle or designated hauler, which includes a City
5 contractor, during the term of this agreement at the
6 rates and adjusted in a manner set forth in this
7 agreement.

8 Q Did the contract set the rate the City must pay
9 for disposing of waste at Starcrest?

10 A Yes.

11 Q And so the contract set out the original
12 disposal rate; is that correct?

13 A Yes.

14 Q And if you turn to page 11 of the contract,
15 Section T, is that where it was set out?

16 A Yes, I believe so.

17 Q Now does the rate go up or -- I'm sorry. I
18 should say can the rate change every year?

19 A The rate can change annually.

20 Q Can it go down?

21 A Yes.

22 Q And it can also go up, I assume.

23 A Yes.

24 Q Is there a method under the contract on how any
25 change will be developed?

1 A Yes.

2 Q And what method is that, does the contract
3 provide?

4 A The contract provides for us to use the
5 Consumer Price Index.

6 Q And that's set out in Section T as well; is
7 that right?

8 A Yes.

9 Q Now, do the parties -- historically, do the
10 parties -- have they communicated about this rate change
11 every year?

12 A Yes.

13 Q Is there generally a recognition by the City
14 and TDS on what the appropriate contract rate will be
15 for the following year?

16 A Yes.

17 Q Has there ever been any disagreement about what
18 the contractual rate is for a given year?

19 A No, not that I know of.

20 Q In terms of Starcrest and the operation of
21 Starcrest, obviously the City is allowed to bring waste
22 to Starcrest; correct?

23 A Correct.

24 Q And the City has to pay a contract rate for
25 that, the waste disposal; is that right?

1 A Yes.

2 Q Is there other revenue streams at Starcrest
3 that TDSL will enjoy by leasing the property?

4 A Yes. The contract states that they can accept
5 commercial waste through there, as well as operate a
6 business there.

7 Q So TDSL's only revenue from operating Starcrest
8 doesn't just come from accepting City waste.

9 A I don't believe so, no.

10 Q You mentioned that they are able to accept
11 waste from both their own haulers and third parties; is
12 that correct?

13 A Yes.

14 Q So does the City have to compete for service
15 with these third parties?

16 A Under the contract, we should not be competing
17 for the service. We should have priority service.

18 Q And so -- and that's specifically written into
19 the contract, you said?

20 A Yes.

21 Q Okay. And when was -- when is the second
22 agreement -- second amendment set to expire? Or when
23 was it set to expire?

24 A The second amendment was set to expire January
25 of this year, 2023.

1 Q And I think you testified before, the original
2 agreement and first amendment and the second amendment
3 were written in a way to be severable; is that correct?

4 A I was attempting to say that, yes.

5 Q And so can you kind of explain what the purpose
6 of that was, to your understanding?

7 A The -- so the contract that started all of this
8 was for the City to deliver waste to Buda using City
9 vehicles. And the second amendment provided that TDS
10 would operate the transfer station so we didn't have to
11 take it to Buda with City trucks, but they would take
12 it, and that would -- that would satisfy the agreement
13 of 50,000 tons that the City would take to Buda.

14 If we -- if we terminated one side of the
15 contract, it should not affect the other. So that was
16 what I was attempting to say earlier.

17 Q And so in terms of the working relationship,
18 how would you historically describe the working
19 relationship between TDSL and the City of San Antonio?

20 A It's been very good.

21 Q Has that changed?

22 A Yes.

23 Q When did that change?

24 A August of 2021.

25 Q And I'm going to ask you to turn to Exhibit C.

1 Tell me if you recognize that.

2 A Yes, I do.

3 Q What is this document?

4 A This is the letter that Bob Gregory sent to the
5 City of San Antonio that described -- it included an
6 invoice for approximately \$12 million, and it invoked
7 the mediation and alleged a lawsuit after that.

8 Q Does this appear to be a true and correct copy
9 of that letter?

10 A Yes.

11 MS. KIRKLAND: Your Honor, I'd move to
12 admit that as the City's Exhibit C.

13 MR. HEMPHILL: No objection, Your Honor.

14 THE COURT: All right. City's Exhibit C
15 shall be admitted into evidence.

16 (Applicant's Exhibit C admitted)

17 Q (MS. KIRKLAND) What were the complaints raised
18 in the letter again? I think you briefly touched on
19 those. Just high level.

20 A It -- that the City took waste from the bulky
21 sites that allegedly were not allowed under the
22 contract.

23 Q So one issue was the bulky waste, and we've
24 obviously -- the judge has heard this term, at least a
25 little bit, in the opening statements from the parties.

1 What is -- what is bulky waste?

2 A In our definition at the City of San Antonio,
3 it would be things that a San Antonio resident from
4 their house, which is the only customer that we have,
5 that they would -- would throw away but it doesn't fit
6 into their cart, so it's bulky. But it includes things
7 like a barbecue pit, a sofa, a table. It could be a
8 mattress, et cetera.

9 Q Did the City of San Antonio ever take bulky
10 waste to the Starcrest Transfer Station for disposal?

11 A Yes.

12 Q How long have they been doing that?

13 A I think for many, many years. I think prior to
14 the City of San Antonio changing to an automated
15 collection system, I believe it was collected regularly.
16 When rear-load crews would pull up to a house where
17 someone had set something like that out, they would pick
18 it up and put it in the -- in the truck. But also I
19 think that there were city-wide clean-up events where we
20 would bring material like that in as well.

21 Q So bulky waste -- is it fair to say bulky waste
22 has been going through the Starcrest Transfer Station
23 for as long as you can recall?

24 A Yes.

25 Q In terms of since TDSL has been operating the

1 transfer station, has the City taken bulky waste to the
2 transfer station for disposal?

3 A I'm sorry. Could you repeat the question?

4 Q Sure.

5 Since TDSL has been operating Starcrest,
6 has the City taken bulky waste to Starcrest?

7 A Yes.

8 Q And did TDSL accept that waste?

9 A Yes.

10 Q And have they been accepting it since 2013, as
11 best you can recall?

12 A Yes, up until this letter.

13 Q Okay. So you don't recall any time since they
14 started taking over operations of Starcrest to this
15 letter in 2021 of them complaining about bulky waste?

16 A No, not at all.

17 Q Was there anything in the contract that
18 prevented the City from taking bulky waste to the
19 Starcrest Transfer Station?

20 A No.

21 Q And if we look at --

22 MS. KIRKLAND: I'm going to point everyone
23 to slide six in my handout. And this is a snapshot of
24 the second amendment.

25 Q (MS. KIRKLAND) How does the contract define

1 waste?

2 So I'll ask you to read starting at, All
3 such materials brought.

4 A Okay. I think I'm starting right.

5 [As read] Such materials shall include the
6 same type of waste, including small amounts of brush,
7 white goods, and materials from citizen clean-up events,
8 as has been customary for the City, as has been
9 processed by the City, through the transfer station from
10 1991 through 1996, and other solid waste appropriate for
11 the transfer station.

12 Q And so under -- under that, the City understood
13 bulky waste to be appropriate through the transfer
14 station?

15 A Yes. I -- I think for several reasons here.
16 One, this used a very old term of 'white goods,' which
17 when I mentioned -- or I may have mentioned an
18 appliance, that would typically be a white good, but
19 also, citizen collection as well as the fact that, yes,
20 we had brought material in through trucks.

21 Q And is it your understanding that TDSL
22 separately accepts bulky waste from third parties at
23 Starcrest?

24 A Yes.

25 Q Okay. So it is the type of waste being

1 processed through the transfer station?

2 A To my knowledge, yes.

3 Q I'm going to ask you to turn to Exhibit L.

4 Do you recognize Exhibit L?

5 A Yes.

6 Q What is Exhibit L?

7 A It's the specifications for the contract.

8 Q And does this appear to be a true and correct
9 copy of the request for proposal that was issued in
10 1995?

11 A Yes.

12 MS. KIRKLAND: Your Honor, I'd ask that
13 Exhibit L be admitted.

14 THE COURT: Mr. Hemphill?

15 MR. HEMPHILL: Your Honor, I believe I
16 have no objection. It's quite voluminous. I haven't
17 had a chance to review the entire thing. But if it is
18 what it purports to be, then I have no objection.

19 MS. KIRKLAND: That would be my
20 representation is that it is what it purports to be.

21 THE COURT: And this is Exhibit?

22 MS. KIRKLAND: L, Your Honor.

23 I apologize. I'm going a little out of
24 order.

25 THE COURT: That's all right.

1 City's Exhibit L shall be admitted into
2 evidence.

3 (Applicant's Exhibit L admitted)

4 Q (MS. KIRKLAND) The request for proposal is
5 referenced in the second amendment; is that fair?

6 A Yes.

7 Q And so there are some terms that may be defined
8 in the RFP that are also brought into the second
9 amendment; is that correct?

10 A Yes.

11 Q Does the -- the RFP defines municipal solid
12 waste as well; is that right?

13 A Yes.

14 Q And when we read that definition, can you
15 please read out the definition of municipal solid waste
16 under the RFP?

17 A What page is it on?

18 Q Oh, I'm sorry. It is on page 24.

19 A [As read] 1.09: Municipal solid waste shall
20 mean solid waste resulting from or incidental to
21 municipal, community, commercial, institutional, and
22 recreational activities, including garbage, rubbish,
23 ashes, street cleaning, dead animals, sludge, brush,
24 yard waste, tires, silt, large appliances, and
25 furniture, construction material, earth, and all other

1 solid waste other than industrial solid waste.

2 Q And so would you define some of those items --
3 would you also call them bulky waste?

4 A Yes.

5 Q And so the contract considered those part of
6 the municipal solid waste; is that right?

7 A Yes.

8 Q So the contract specifically provides that
9 bulky waste can go to Starcrest; is that fair?

10 A Yes.

11 Q Now is the term 'bulky waste' used anywhere in
12 the contracts -- in the contract language?

13 A I don't know that it is.

14 Q Does the contract mention anything about
15 compacted or uncompacted as TDSL raised in their cure
16 notice?

17 A No.

18 Q That aside, did they ever approach you when you
19 did provide bulky waste? Were you ever billed
20 separately for it, the City?

21 A We were billed separately, yes.

22 Q Did the City pay those bills when they received
23 them?

24 A Yes.

25 Q Do you recall what the rate was?

1 A It was the contract rate. There is only one
2 rate, and that was what the -- the rate was.

3 Q Prior to the notice in August of 2021, in the
4 20 years of the contract had the City ever been told by
5 TDSL not to bring bulky waste to the facility?

6 A Not that I know of.

7 Q Once they raised the issue, did the City take
8 any action?

9 A We did.

10 Q What did you do?

11 A We stopped within the day of taking the bulky
12 waste from the Bitters location to Starcrest.

13 Q Did you do that because you agreed that bulky
14 waste shouldn't go there?

15 A No.

16 Q Then why did you stop taking it?

17 A We had a good working relationship. I wanted
18 to continue that, and wanted to just try to help the
19 situation if that would.

20 Q And so is it the City's position that bulky
21 waste is appropriate at Starcrest?

22 A It is the City's position that it's
23 appropriate, yes.

24 Q And that the City did not breach the contract
25 by taking bulky waste to Starcrest.

1 A Correct.

2 Q Now despite that, when we look back at the
3 letter, you mentioned the letter included an invoice for
4 \$12 million.

5 A Yes.

6 Q And what was that for?

7 A It was for bulky waste that was taken to the
8 facility between 2013 to 2021.

9 Q Did the City pay that invoice?

10 A Not the 12 million invoice, no. We had
11 previously paid those invoices.

12 Q Does the City dispute that it owes the
13 \$12 million?

14 A The City disputes that we owe that money.

15 Q Did the letter also demand an increase in the
16 contractual disposal rate?

17 A I believe it did.

18 Q And before, we talked about the contract
19 provides for how -- that it will change based on the
20 CPI; is that correct?

21 A That is correct.

22 Q And so if we look at slide eight in the
23 handout, which is the language from Section T, the
24 second amendment, that's where it discusses how the rate
25 will be changed; is that right?

1 A Yes.

2 Q And it goes up and down based on the Consumer
3 Price Index --

4 A That's correct.

5 Q -- you said?

6 And then -- I apologize. Give me just one
7 minute.

8 If we go back to slide four, it defines
9 how that CPI will be -- what CPI index is used; is that
10 right?

11 A Yes.

12 Q And that's taken from the first amendment which
13 is referenced in the second amendment.

14 A Yes.

15 Q Okay. And so, other than this provision, are
16 you aware of anything in the contract that provides for
17 an increase in the disposal rate?

18 A No.

19 Q Was the City surprised to receive this letter
20 in August 2021?

21 A Absolutely.

22 Q I should say, were you surprised to receive
23 that?

24 A I was -- I was flabbergasted, yes.

25 Q Had there been any agreement between the City

1 and TDSL to raise the rates?

2 A No.

3 Q Has there been any such agreement since they
4 brought up this proposal?

5 A No.

6 Q Prior to this letter, was the City paying the
7 contractually obligated disposal rate?

8 A Yes.

9 Q And had the City -- so before August 2021, you
10 said the City was paying the contractual disposal rate;
11 is that right?

12 A Yes.

13 Q TDSL was accepting the City's waste at
14 Starcrest.

15 A Yes.

16 Q And TDSL was providing priority of service to
17 the City --

18 A Yes.

19 Q -- at Starcrest?

20 After receiving this letter in August of
21 2021, what happened next?

22 A Well, I did reach out to Mr. Gregory and wanted
23 to try to get some clarification because I was -- was
24 surprised by it. And ultimately we ended up having an
25 informal meeting followed by two mediations, and then

1 we're here today.

2 Q When you had the meeting, did they raise the
3 same issues that were in the letter?

4 A Yes.

5 Q I take it because we're here today the meeting
6 didn't resolve anything; is that fair?

7 A That's fair.

8 Q And you said that they mediated the dispute --
9 or you did mediate the dispute.

10 Do you recall when the first mediation
11 was?

12 A I -- I think it may have been -- I think
13 November of -- no, I don't actually.

14 Q If I said March 2022, does that sound about
15 right?

16 A Oh, it absolutely does.

17 Q Okay. Again, there wasn't a resolution reached
18 in the mediation; is that right?

19 A No, there was not.

20 Q After the mediation happened, did anything
21 change in terms of the operation of Starcrest?

22 A Yes, it did.

23 Q What happened?

24 A I received a phone call from Alfonso Castillo,
25 who is our manager -- a program manager for the site,

1 who said that the wait times were excruciatingly long,
2 an hour, two hours, and it was preventing us from doing
3 our jobs, basically.

4 Q Prior to the mediation -- so, you know,
5 March 1st of 2022 -- was the City experiencing any of
6 these delays?

7 A Not at all.

8 Q What was the average service time at the
9 facility?

10 A Oh, it was much less than 30 minutes. I think
11 probably in the neighborhood of 15.

12 Q And then you're saying the day after the
13 mediation, complete change?

14 A The day after the mediation, a complete change.

15 Q And did the City change how it operated?

16 A No.

17 Q Any other -- did you -- was the City aware of
18 any operational changes made by TDSL after the
19 mediation?

20 A We were told an operational change, yes.

21 Q What was explained to you about the changes?

22 A It was explained to us that they reduced their
23 personnel from six to two.

24 Q You mentioned that there were long delays.

25 What kind of impact did this have on the

1 City's operations?

2 A It -- it greatly impacts the City. And for
3 those individuals, it -- it turns into a very long day,
4 number one; but number two, it -- it starts to become an
5 issue of being able to pick up the garbage.

6 We did have to divert loads because we
7 couldn't just sit there and wait and wait and wait, and
8 so we had to divert some loads. And under the contract,
9 it allows our manager to do that and make that decision.
10 He did, so we went to an alternate site that is farther
11 away. But I -- I think we stayed out until 8:30 or 9:00
12 that evening with several -- several of our drivers.

13 Q And did the City consider that to be a breach
14 of the contract, TDSL's delays in service?

15 A Yes.

16 Q And what does the contract require in terms of
17 service to the City?

18 A For priority service, it's two things. One is
19 that the wait time would be no more than 30 minutes;
20 and, number two, that the City would be granted
21 priority, four of the City's trucks to every one of
22 either TDSL's trucks or a third party.

23 MS. KIRKLAND: And I will point the
24 witness and the Court to slide nine of the handout.
25 This is Section C of the second amendment.

1 Q (MS. KIRKLAND) Is that where you'll find the
2 discussion or language related to priority of service?

3 A Yes.

4 Q And so as you mentioned -- could you please
5 read that first -- the sentence in quotes? I'm sorry.

6 Read the first sentence.

7 A [As read] Priority to City service pursuant to
8 Ordinance Number 85263, passed December 5th, 1996, which
9 provides in part that this second amendment is intended
10 to ensure to the City, quote, first priority for the
11 City's use and access to the transfer station
12 facilities, thereby affording the City a right -- excuse
13 me -- a first right of service and limiting work or
14 services available to third parties at any time the City
15 may so choose or need the station's capacity.

16 Q And that next section says you have this right
17 at any time; correct?

18 A Yes.

19 Q There's no limitation?

20 You also mentioned -- if we turn to the
21 second -- the next page, page ten of the handout, this
22 is Section Two. What is Section two about of the
23 contract?

24 A It describes the process for that priority
25 service, that there would be two separate lines. The

1 City would line up in one, and TDS and third parties
2 would be in another so that you could take the four City
3 trucks to every one of TDS or other vehicles.

4 Q And that is -- again, that is the contract
5 language related to how the City defined -- what their
6 right to priority of service was at the facility.

7 A Yes.

8 Q And you talked about diversion, the ability to
9 divert.

10 If we go to slide 11, which is Section
11 Three of paragraph C, is that where they talk about
12 diversions?

13 A Yes.

14 Q What is the City -- what can the City do? When
15 can you divert?

16 A It speaks -- the contract speaks in a couple of
17 places about diverting loads, but for various reasons --
18 and they're -- and it's spelled out here, too, the
19 program manager can divert the loads due to the fact
20 that TDS is not processing these vehicles in a timely
21 manner.

22 Q And did the City have to start doing that with
23 the service issues?

24 A We did.

25 Q And did you send a cure notice to TDSL to try

1 to remedy the situation?

2 A Yes. We did that twice.

3 Q I'm going to ask you to turn to Exhibit D, or
4 what's in the tab as Exhibit D.

5 Do you recognize this document?

6 A Yes.

7 Q What is this document?

8 A I believe this is the first cure letter that we
9 sent to TDS.

10 Q Does that appear to be a true and correct copy
11 of that cure letter?

12 A Yes.

13 MS. KIRKLAND: Your Honor, I would ask
14 that Exhibit D be admitted.

15 MR. HEMPHILL: No objection.

16 THE COURT: City's Exhibit D shall be
17 admitted into evidence.

18 (Applicant's Exhibit D admitted)

19 Q (MS. KIRKLAND) And again, at a high level,
20 what were the deficiencies noted in this letter?

21 A That TDS was not abiding by the contract by not
22 processing the City trucks in less than 30 minutes.

23 We also speak in this to dead animals and
24 the prior -- you know, throughout most of the contract,
25 the City was taking dead animals here with -- with no

1 issue at all, but we were being told that we could no
2 longer bring them first on the weekends, and then it
3 kind of changed a little bit because we had a few verbal
4 conversations. But ultimately, we were no longer able
5 to take dead animals.

6 Q And if we look at slide 12, which references
7 Section G of the agreement, is that the provision that
8 allows the City to take dead animals to Starcrest?

9 A Yes.

10 Q And how -- I mean what -- had the City's
11 practice been to take dead animals to Starcrest?

12 A Yes.

13 Q Had that practice changed in all the time that
14 TDSL had been operating Starcrest?

15 A No, not that I know of.

16 Q And your understanding was they had a concern
17 that you -- that the City was taking commercially
18 collected dead animals?

19 A My understanding in talking to Mr. Gregory is
20 that we collect 25,000 dead animals every year, which is
21 a lot, but the assumption was that we were collecting
22 them from veterinary offices and not as specifically
23 stated in the contract, that they're from city streets
24 or alleys, and that we must be collecting them from
25 veterinary offices, and I told them that that's not the

1 case. So we kind of went back and forth, but ultimately
2 they said no more dead animals.

3 Q So despite assurances, to this day have they
4 accepted dead animals at Starcrest?

5 A No.

6 Q Does the City continue to try to deliver dead
7 animals to the facility?

8 A Yes, we do.

9 Q What about the service issues noted in the
10 letter? Were those remedied after the first notice?

11 A No. We experienced delays that were heavy on
12 some days, not so much on others, so it was somewhat
13 chaotic as to the nature of the delays. But -- but on
14 any given week, I would say that the -- the delays
15 continued.

16 Q As the issues continued, did the City send
17 another cure notice?

18 A Yes.

19 Q I'm going to ask you to turn to what's behind
20 Tab E.

21 Do you recognize this document?

22 A Yes.

23 Q What is this?

24 A This is the second cure letter.

25 Q Does this appear to be a true and correct copy

1 of that letter?

2 A Yes.

3 MS. KIRKLAND: Your Honor, I would ask
4 that Exhibit E be admitted.

5 MR. HEMPHILL: No objection.

6 THE COURT: Applicant's Exhibit E shall be
7 admitted into evidence.

8 (Applicant's Exhibit E admitted)

9 Q (MS. KIRKLAND) What were the concerns being
10 raised by the City in this particular letter?

11 A Two things.

12 One is the priority service. Again, it's
13 the same issue of not being able to get our trucks in
14 and out of the facility in a timely manner.

15 And then the second one is that we pointed
16 out that they had not maintained equipment because we
17 thought that maybe that was contributing to the delays
18 and that their process had changed to make it longer for
19 us.

20 Q And did the letter note that the issues raised
21 in the first notice remained outstanding as well?

22 A That's correct.

23 Q Did TDS -- TDSL ever eventually respond to the
24 City's notices?

25 A Yes.

1 Q I'm going to ask you to look at Tab F and ask
2 if you recognize this document.

3 A Yes.

4 Q What is this document?

5 A This is TDS's response to the cure letter.

6 Q Does this appear to be a true and correct copy
7 of that letter?

8 A Yes.

9 MS. KIRKLAND: Your Honor, I would ask
10 that Exhibit F be admitted.

11 MR. HEMPHILL: No objection.

12 THE COURT: Applicant's Exhibit F shall be
13 admitted into evidence.

14 (Applicant's Exhibit F admitted)

15 Q (MS. KIRKLAND) Is it fair to say that TDSL
16 disagreed with the City's allegations in their cure
17 notices?

18 A Yes.

19 Q Did TDSL have their own complaints in that
20 letter?

21 A Yes.

22 Q Now if we look at the beginning of it, and as
23 spoken to during their opening, did TDSL raise concerns
24 about revenue loss or just loss at the facility?

25 A Yes.

1 Q How much were they saying they were losing?

2 A \$200,000 per month.

3 Q At the end of this letter, what did TDSL do?

4 A They extended the contract an additional
5 two-and-a-half years, more or less.

6 Q That was -- did the City have a right to extend
7 the contract?

8 A No. It was -- under the contract, it was only
9 TDS's ability to extend the contract.

10 Q And they exercised that right?

11 A And they exercised that right.

12 Q Now in the letter, they referenced
13 approximately five defaults by the City; is that fair?

14 A Yes.

15 Q Does the City dispute the grounds for each of
16 those defaults?

17 A Yes.

18 Q And I'll direct you to page 14 of the handout.

19 Does the letter identify what would be
20 acceptable cures by the City?

21 A Yes.

22 Q And what are those?

23 A Are you asking me to read what's underlined?

24 Q Sure, you can.

25 A Okay.

1 [As read] One, payment of past due
2 invoices as detailed above; and, two, good faith
3 negotiation agreement regarding Texas Disposal's request
4 for an equitable rate adjustment that covers Texas
5 Disposal's costs and a reasonable return to provide
6 solid waste acceptance, processing, transportation, and
7 disposal services with the increased rate effective
8 January 15, 2023; an appropriate rate escalation
9 mechanism that adequately accounts for regular and
10 inflationary cost increases also effective January 15th,
11 2023.

12 Q What would happen if the City failed to meet
13 those requirements?

14 A That the City would lose access to the
15 Starcrest Transfer Station.

16 Q So just to be clear, the City had the option of
17 paying all of those invoices; correct?

18 A Yes.

19 Q How much did those total?

20 A 12 million.

21 Q And they had to negotiate a contractual rate
22 increase; is that right?

23 A That's correct.

24 Q As well as a new method for calculating rate
25 increases?

1 A That's correct.

2 Q And if the City failed to do so, the City would
3 lose access to Starcrest?

4 A Yes.

5 Q What was the deadline to meet the first letter?

6 A I believe this was January 16th or --

7 Q January 15th sound right?

8 A January 15th.

9 Q I'll cheat for you.

10 A Okay.

11 Q Prior to this, did the parties mediate again?

12 A We had two mediations. We received this
13 letter, I think, right before the mediation.

14 Q And that mediation was unsuccessful; correct?

15 A That's correct.

16 Q Has the City paid the invoices?

17 A We have not paid these invoices.

18 Q Does the City dispute that it owes for the
19 invoices?

20 A We dispute these.

21 Q So we are obviously past January 15th.

22 A Yes.

23 Q What happened after the deadline passed?

24 A We -- we -- so we are continuing to experience
25 delays to some extent. Some days are better than

1 others.

2 But they did begin charging us -- or
3 sending us weekly invoices with the expectation to pay
4 within seven days, which this is different from the
5 contract, and charging us their gate rate of \$40 per
6 cubic yard, which is an assumed amount.

7 And what we have done is to attempt to
8 follow the contract and pay these based on tonnage per
9 the contract rate.

10 Q Okay. So let's take a step back.

11 So as of, you know, January 15th when the
12 City didn't meet the demands -- January 16th may have
13 been a holiday. I can't remember.

14 A It was Martin Luther King Day.

15 Q So you would have attempted to take waste again
16 on January 7th; is that right? January 17th.

17 A Yes.

18 Q When that happened, you're saying they began to
19 charge you -- or you received an invoice seven days
20 later based on cubic yardage? Is that what you're
21 saying?

22 A That's correct.

23 Q Okay. So it's volume; right? That's not --
24 it's not weight.

25 A That's correct.

1 Q Were they weighing you as well?

2 A They were.

3 Q Okay. So when you received the invoice,
4 though, are they seeking for you to pay the -- based on
5 weight or based on volume?

6 A It's based on volume.

7 Q And that is the public gate rate; correct?

8 A As I understand it, yes.

9 Q So when the amount that they're charging you on
10 the invoice -- and I'll direct you to Exhibit K.

11 Do you recognize Exhibit K?

12 A Yes.

13 Q What is Exhibit K?

14 A This is one of the invoices, probably the first
15 one because it split up part of that with tonnage and
16 then yardage for the rest of the week.

17 Q Does this appear to be a true and correct copy
18 of that invoice?

19 A Yes, it does.

20 MS. KIRKLAND: Your Honor, I move to admit
21 Exhibit K.

22 MR. HEMPHILL: No objection.

23 THE COURT: City's Exhibit K shall be
24 admitted into evidence.

25

1 (Applicant's Exhibit K admitted)

2 Q (MS. KIRKLAND) So as you stated, this the
3 invoice reflects the change that occurred on
4 January 15th?

5 A Yes, it does.

6 Q So first line is -- the City is being charged
7 per ton per the contract rate; is that right?

8 A Yes.

9 Q And the second line demonstrates TDSL modifying
10 how they're charging the City.

11 A Yes.

12 Q Has the City received more than one of these
13 invoices?

14 A Yes. I believe we received four today.

15 Q And how has the City been paying them?

16 A We have amended the invoice, and we have
17 paid -- for the loads that have gone through, we have
18 paid it based on tonnage at the rate of 36.23 per ton.

19 Q How are you able to pay what you think is
20 appropriate?

21 A They are continuing to weigh the vehicles, so
22 we know how much comes in based on the weight.

23 Q And, again, the contract speaks in terms of
24 weight; correct? Your disposal rate is per ton.

25 A That's correct.

1 Q And the City's obligations for -- the
2 put-or-pay requirement that's come up before, that's per
3 ton; is that correct?

4 A That's correct.

5 Q And so weight is the defining characteristic in
6 the contract.

7 A Absolutely, yes.

8 Q Does the contract speak in terms of cubic
9 yards?

10 A No, it does not.

11 Q If TDSL ever stopped weighing the trucks, would
12 the City have an ability to track how much waste it's
13 taking to the facility?

14 A No. It'd be difficult.

15 Q Would it have an ability to pay invoices in
16 accordance with the contract rate?

17 A No.

18 Q You're not currently locked out of Starcrest;
19 is that right?

20 A Correct.

21 Q Did the City have a -- did the parties enter
22 into an agreement pending this hearing?

23 A We did.

24 Q And I'll direct you to Exhibit N.

25 MS. KIRKLAND: Your Honor, I think I'll

1 just ask if you'll take judicial notice of it with --
2 Counsel and I signed the rule 11 agreement.

3 THE COURT: Okay. This is a signed rule
4 11 agreement that's been filed with the Court?

5 MS. KIRKLAND: No, it has not been filed.

6 THE COURT: But there is no disagreement?

7 MR. HEMPHILL: There's no disagreement,
8 Your Honor.

9 THE COURT: All right. Exhibit N shall be
10 admitted into evidence.

11 (Applicant's Exhibit N admitted)

12 Q (MS. KIRKLAND) And so Exhibit N is what has
13 been in effect between -- until we could have this --
14 sorry.

15 A Yes.

16 Q Yes.

17 Now, in addition to the invoices, has the
18 City received any other communication from TDSL pending
19 this hearing?

20 A I don't recall any.

21 Q I'll ask you to turn to Tab J.

22 A Okay. Okay.

23 Q Do you recognize this letter?

24 A I do.

25 Q What is this?

1 A I had forgotten about this earlier, but it was
2 a letter that we had received from Mr. Gregory
3 describing that -- I had sent a letter stating how we
4 were paying the invoices per the contract rate. And he
5 obviously received the letter, so he sent this response
6 back to that.

7 Q And so based on the letter, is it your
8 understanding that upon expiration of the rule 11, that
9 TDSL does intend to block access to Starcrest by the
10 City?

11 A Yes, lose access to Starcrest.

12 Q Now in response to TDSL's actions, did the City
13 file a counterclaim?

14 A Yes.

15 MS. KIRKLAND: And, again, I would ask the
16 Court to take judicial notice of the pleading that's on
17 file.

18 THE COURT: Court shall take judicial
19 notice.

20 MS. KIRKLAND: The -- oh, Your Honor, if I
21 didn't move to admit Exhibit J, I'd like to do so now.

22 THE COURT: Yes.

23 MR. HEMPHILL: No objection.

24 MS. KIRKLAND: Thank you.

25 THE COURT: The City's Exhibit J shall be

1 admitted into evidence.

2 (Applicant's Exhibit J admitted)

3 Q (MS. KIRKLAND) Now the first declaration that
4 the TD- -- that the City is seeking from the Court is
5 that TDSL has no right to prevent the City from
6 accessing Starcrest under the contract; is that correct?

7 A Yes.

8 Q Is it -- in the contract, is access to
9 Starcrest an important issue for the City?

10 A Absolutely.

11 Q Is it noted several times?

12 A Yes.

13 Q I'd like to go through those. And it may be
14 easier with the handout, too, as it goes directly to
15 those.

16 So we've looked at, obviously, Section C.
17 And that was the priority of service section; is that
18 right?

19 A Yes.

20 Q And in that section, as you read before, it
21 talks about priority of service and access to the
22 facility; is that right?

23 A Yes.

24 Q Is that reiterated in Section D?

25 A I'm sorry. Where is Section D?

1 Q Sorry. You can either turn to page -- page 17
2 on the handout or you can go to page seven of the second
3 amendment.

4 A Yes.

5 Q Can you please read that first sentence of
6 Section D?

7 A [As read] The City and its designated haulers
8 shall have first right of access to any and all capacity
9 at the transfer station for full process and disposal
10 services at the contract price. TDS will have second
11 priority.

12 Q And, again, if you turn to page ten of the --
13 of the amendment, can you read the last sentence of that
14 paragraph?

15 A [As read] Neither TDSL nor the City shall close
16 or relocate the transfer station without the prior
17 written consent of the other.

18 Q Can you read the last sentence?

19 A [As read] The City shall not reduce the
20 capacity of the transfer station to receive or process
21 solid waste materials during the term of this second
22 amendment.

23 Q Are you looking at a different --

24 A I might be.

25 Q Are you looking at Section N? On page ten,

1 Section N?

2 A Okay. The last sentence of that paragraph
3 reads [as read] TDSL shall also have the right to accept
4 solid waste from other haulers to the extent that the
5 acceptance of such volume does not interfere with the
6 City's priority and the orderly acceptance of City
7 collection vehicles.

8 Q And, again, did the City give itself an
9 extraordinary contractual remedy to ensure daily access?

10 And for that, I will direct you to page 18
11 of the second amendment and -- and/or page 19 of the
12 handout.

13 A Page 18.

14 Q For Section C1, does the language specifically
15 state recognizing that the City needs daily access to
16 the facility?

17 A Yes.

18 Q Are you aware of any basis, again, of the
19 contract for TDSL to be able to deny access for the --
20 to the City --

21 A No.

22 Q -- for the grounds that TDSL is alleging?

23 A No.

24 Q The second declaration that the City is seeking
25 is for the disposal rate.

1 The declaration that the disposal rate the
2 City is obligated to pay for waste disposed of at
3 Starcrest is \$36.23; is that your -- is that your
4 understanding of what the contract disposal rate should
5 be based on the contract?

6 A This year it is \$36.23, yes.

7 Q Did TDSL disagree that that's the contractual
8 rate?

9 A No. Through the process that we have, TDSL
10 submits the contract rate increase based on CPI, and the
11 City approves that. And so there is a letter that
12 states that 36.23 is the contracted price.

13 Q And I'll ask you to turn to Tab H.

14 A Okay.

15 Q Is this the letter you were speaking of?

16 A Yes.

17 Q Does this appear to be a true and correct copy
18 of that letter?

19 A Yes.

20 MS. KIRKLAND: Your Honor, I would ask
21 that Exhibit H be admitted.

22 MR. HEMPHILL: No objection.

23 THE COURT: All right. City's Exhibit H
24 shall be admitted into evidence.

25

1 (Applicant's Exhibit H admitted)

2 Q (MS. KIRKLAND) In this letter, you said they
3 acknowledged what the contractual rate is.

4 A Yes.

5 Q They just want a higher one; is that fair?

6 A Correct.

7 Q So despite acknowledging what the contractual
8 rate should be and the invoices that you've seen to
9 date, is TDSL attempting to charge the City a higher
10 rate than that?

11 A Yes. Almost double.

12 Q So is the City asking the Court to declare the
13 disposal rate to be -- to be paid by the City that
14 established by the contract?

15 A Yes.

16 Q And are they further asking that the Court make
17 a declaration that TDSL cannot deny access to Starcrest
18 for failure to pay whatever rate they come up with for
19 the disposal rate?

20 A Yes.

21 Q Now there are -- based on TDSL's extension of
22 the contract, how much longer did you say the contract
23 will last?

24 A Until September 2025.

25 Q So is the City also seeking declarations on the

1 method for establishing what the rate in 2024 and 2025
2 will be?

3 A Yes, that's correct.

4 Q And if you ever need to, slide 21 has some --
5 has references. I'm sorry. That's not the right
6 number. I'm sorry. Slide 15, if you need reference for
7 the declarations.

8 And, again, the City's declaration, is
9 that based on contract language that we looked at before
10 in terms of how the increase will be calculated?

11 A (No audible response)

12 Q Is that a yes?

13 A Yes.

14 Q Sorry. She can't write a head nod.

15 Is this -- is the City seeking this
16 declaration so that TDSL can't try to force a rate
17 increase outside of the contract again?

18 A Yes.

19 Q The City is also requesting a declaration that
20 TDSL can't refuse to accept dead animals at Starcrest;
21 is that right?

22 A Yes.

23 Q And we looked -- we talked about that before
24 today. They're not accepting them.

25 A Correct.

1 Q Prior to 2021, had they ever refused them?

2 A No.

3 Q Finally, the City is also requesting a
4 declaration that the City can get service in 30 minutes
5 or less, absent heavy demand; is that right?

6 A That's correct.

7 Q And that is, again, based on the language of
8 the contract.

9 A Yes.

10 Q And you mentioned before, prior to the
11 mediation in 2022, there were no historic issues with
12 service.

13 A For 20-plus years, we had no service problems.

14 Q Now, given the imminent threat of the denial of
15 access to the property, the City has also filed an
16 application for temporary injunction, which is what
17 we're on here today.

18 You submitted an affidavit on behalf of
19 that; is that correct?

20 A Yes.

21 Q In terms of what the City's requests are for
22 injunction, is it your understanding that the City is
23 asking the Court to prevent -- or to enjoin TDS from
24 preventing the City from accessing Starcrest and dumping
25 solid waste at Starcrest until the conclusion of this

1 litigation?

2 A Yes.

3 Q And they're asking that TDS be enjoined from
4 charging the City a disposal rate beyond the 36.23 per
5 ton for solid municipal waste dumped by the City at
6 Starcrest in 2023?

7 A Yes.

8 Q I'm trying to do my part of reading slower for
9 her so that she can get it.

10 Are you also -- is the City also
11 requesting that TDS be enjoined from -- I'm sorry, that
12 they be required to provide priority of service -- or I
13 should say, be enjoined from failing to provide the City
14 priority of service at Starcrest?

15 A Yes.

16 Q And then finally, is the City asking that TDS
17 be enjoined from refusing to weigh the City haulers at
18 Starcrest and charge the City per ton based on the
19 contractual rate?

20 A Yes.

21 Q And are the City's requests based on its
22 understanding of the agreement?

23 A Yes.

24 Q And are you asking the Court to prevent TDS
25 from taking steps outside of the contract before trial?

1 A Yes.

2 Q Let's talk about harm. That's what we're here
3 for. We're here on a temporary injunction.

4 We obviously -- we went through the
5 declarations that the City is seeking and in terms of
6 what we think those are based on. You're also asking
7 that you not be -- in terms of injunction, you're asking
8 that you not be denied access to Starcrest, so I want to
9 talk to you about that.

10 In opening, there was discussions as to
11 whether or not this is something that is irreparable or
12 not, so let's talk through it.

13 You're options, based on TDSL's language,
14 is to pay the back-invoices, which are over 12 million;
15 is that right?

16 A Yes.

17 Q Or you can pay the higher gate rate; is that
18 right?

19 A That's my understanding.

20 Q What is the harm to the City if TDS is allowed
21 to charge a higher rate in the contract? Why can't the
22 City just pay the higher rate?

23 A Well, first of all, we don't have those
24 dollars. The Solid Waste Department is considered an
25 enterprise fund, which means that the services we

1 provide are paid for by the revenue that the department
2 generates, which is mostly from the user fees, the
3 garbage fee. So our customers pay a garbage fee, and
4 that's what funds us. We do not have those dollars,
5 number one.

6 It was mentioned that maybe -- well,
7 regardless, we -- if we were to attempt to -- to pay
8 this -- I think first and foremost let me just say that
9 it's my duty as the director of the department to follow
10 the contract, and the contract states that we pay a
11 rate, and that's what we are doing. And so to just
12 simply say okay and -- and pay that is problematic, not
13 just for this contract but all the City contracts. And
14 this one in particular is somewhat joined together with
15 two other disposal company contracts.

16 I would assume that if we were to raise
17 the rate here, we would be raising the rate on the other
18 two as well, and that is certainly concerning.

19 But it's a terrible precedent to be made
20 that a contract has a defined rate, yet at the end of
21 the term we just raise it, we double it. So that's --
22 that's, I think, the most important thing there.

23 With respect to trying to generate
24 additional dollars to pay for this, for \$12 million or
25 the additional gate rate, we would have to ask City

1 Council for approval, and then that would be charged to
2 our residents in terms of generating those additional
3 funds. So.

4 I think for those reasons, that's --
5 it's -- it's not something that we take lightly.

6 Q So to -- to summarize, you don't have the funds
7 readily available.

8 A Correct.

9 Q And to get the funds, you would have to go
10 through a process that ultimately would result at some
11 point of getting those from the residents of San
12 Antonio.

13 A That's correct.

14 Q We talked about this briefly in terms of also
15 the rate that they're charging in terms of how they're
16 charging, the cubic versus the not cubic. Is that -- is
17 the concerns that get raised by this different rate
18 another reason the City is asking for the injunction?

19 A The rate of per cubic yard is making an
20 assumption that this truck is fully -- is full. We
21 bring trucks in, and yes, their capacity is 28 cubic
22 yards, but sometimes we bring in a ton. Maybe it's
23 ten tons; maybe it's 12 tons. You can't see how much is
24 in there. So to begin charging a volume base when you
25 can't even see what's inside the truck is -- is -- it

1 can't be done.

2 Q So to reiterate this idea that, you know, the
3 option the City has is just to pay -- pay the gate rate
4 and move on, that's not really an option for the City.

5 A No, it's not an option.

6 Q So based on our understanding of what will
7 happen next then, if the City cannot pay the gate rate
8 or -- then the City will lose access to Starcrest.

9 A That is my understanding, yes.

10 Q So you're currently diverting some trucks; is
11 that right?

12 A Yes.

13 Q How many trucks do you think you're diverting
14 on average?

15 A About 10 percent. And so let me try to put
16 that in perspective just a little bit because we talked
17 a lot about tons and cubic yards.

18 And each truck that we have is collecting
19 from about 1,200 homes, more or less, so 1200 homes in
20 one day. We would send 20 trucks in one day to TDS.
21 They would make two loads each. So that -- those --
22 those 20 trucks times 1200 is 20,000, more or less.
23 That's the -- the easy math for me.

24 In a week, that's 100,000 customers.
25 100,000. Basically a third of our customers in the City

1 of San Antonio. It's an enormous amount that goes
2 through this -- this transfer station.

3 And -- and so you asked what's happening
4 today. I think on average, about 10 percent per day is
5 diverted and that's due to the -- the wait time
6 exceeding the 30 minutes.

7 Q And how is that -- what are you seeing in terms
8 of the impact that's happened? Just the 10 percent?

9 A So the impact on 10 percent is not just on that
10 one driver, but we have to send other drivers to help.
11 So when they get diverted -- and keep in mind, they may
12 be in the facility. Maybe they get into the facility at
13 4:15 or 4:30, but if they're not able to tip out their
14 load by 5:00, then they're diverted. That's extremely
15 problematic.

16 But they drive a longer distance to the
17 next closest landfill and, round trip, that's an
18 additional hour. Two loads, two hours. When that
19 occurs, you start getting into traffic issues. It's
20 taking longer.

21 We designed these routes so that we're out
22 while most people are at work or kids are in school, and
23 so we want to finish during that time frame that we have
24 and not be out in traffic, not be around kids or people
25 when we're collecting.

1 When we're late, we have customers that
2 call in and ask where we're at. That's generating more
3 work orders for us to do. If we have a tired driver at
4 the end of ten hours, but if they're now extending that
5 another two hours, another three hours, we have safety
6 concerns. And ultimately, I think our drivers, which
7 have multiple choices on where they can drive a truck,
8 may decide that they don't want to work for us any
9 longer and that they want to go somewhere else, and that
10 causes even more problems.

11 But generally speaking, to a degree -- and
12 this is just with 10 percent, we're going to have issues
13 with our driver, with the drivers that go and help.
14 We're going to have issues with our truck being on the
15 road, and that's a multi-pronged problem.

16 First off, there's more wear and tear
17 directly.

18 Second, if I can't get the truck in to
19 repair it, then I'm going to have much bigger problems,
20 and repairing trucks these days is very difficult
21 because of the everything shortage, so we need them in
22 so we can repair them because they're -- they're vital,
23 and I can't just go down to the store and buy another
24 one. They take two years to get a truck these days.

25 And third is the customer. The customer

1 is seeing an impact because we're not there to pick them
2 up. We may be missing them. Or we're not missing them;
3 we're just coming late; we're coming after it's dark.
4 And that's -- that's generating even more issues for us
5 in terms of customer service and being able to get
6 everybody collected. And that's just with 10 percent.

7 Q So that's -- so just with 10 percent, you're
8 already experiencing these additional problems in terms
9 of --

10 A Yes.

11 Q -- your drivers working longer hours, more
12 mileage on your trucks, more interactions with
13 customers; is that correct?

14 A That is correct.

15 Q If the City is completely denied access to
16 Starcrest, so a hundred percent of trucks have to be
17 diverted, what do you anticipate the impact being with
18 that?

19 A It's unfathomable, actually. It -- it took us
20 a year to rebalance our routes because the City has
21 grown and it doesn't grow equally, so we had to kind of
22 balance everything back in and make sure that each
23 driver is collecting two loads, and there's a lot of
24 science involved in doing it. So it took us at least a
25 year just to redesign our routes.

1 But you're talking garbage from 20,000
2 customers a day that, I think, ultimately were -- were
3 having more and more issues that are -- ultimately, we
4 may be leaving garbage uncollected is the greatest
5 concern here because we can't get people very quickly.

6 And let me mention that real quick. These
7 are not easy trucks. First of all, you're driving on
8 the opposite side that you normally would. You're
9 against the curb. You're operating a joystick to grab
10 the cart. You're trying to read a map.

11 It takes us some time to find an employee,
12 and then to get them trained it could take a year. I
13 would expect that if we were fully -- if we were fully
14 denied access, we would need people. We would need
15 trucks. We can't get them quick enough. We can't get
16 people quick enough. We can't get trucks quick enough.

17 So I think at the end of the day, we would
18 attempt as best we can, but I think we would leave
19 garbage down. And that's not -- that's not farfetched
20 because just down the road in Houston, they have issues
21 with leaving garbage uncollected because they -- they
22 have issues related to trucks and personnel, and we
23 would have the same issues here.

24 Q So let's take a step back, because that was a
25 lot.

1 A Yeah.

2 Q The other two facilities, how far away are they
3 from Starcrest in terms of travel time for your trucks?

4 A I -- I don't know off the top of my head. I
5 think that it -- it may be an additional hour one way,
6 two hours round trip, but that's assuming no traffic.

7 Q And so immediately your employees are now
8 schedule to work 10-hour days?

9 A They're currently scheduled to work a 10-hour
10 day, so they clock in at 6:30 and they should be
11 clocking out at 4:30.

12 Q With the additional time that would be added
13 because of these diversions, how long are you -- do you
14 think your employees will have to work regularly?

15 A I think probably an additional three hours, and
16 I think that three to four well into the night, and
17 that's -- that's a very long day, and I think it's for
18 most of the employees.

19 Q So you anticipate that their days, like, where
20 they used to clock out at 3:30 are now clocking out
21 6:30, 7:30, possibly later?

22 A I think that where they would normally clock
23 out at 4:30, 7:30, 8:00 would not be abnormal. And it's
24 not just those 20 trucks, but I think that it's the
25 additional personnel that we have to try to send in to

1 help.

2 And by the way, those -- those drivers
3 don't know the routes, so it takes them even longer to
4 try to collect it. It's -- I think it's a very -- very
5 real problem, and we don't want that.

6 Q So you're going to have an impact because your
7 personnel are going to be working longer days?

8 A Yes.

9 Q How long do you think they'll work 14, 15-hour
10 days?

11 A I think many of them won't do that longer than
12 two weeks.

13 Q Other than the personnel issue, your equipment
14 now, which is built on a shorter route, is now going to
15 be driving additional hours and mileage on the road. Is
16 that going to have an impact on the equipment?

17 A It's going to have a huge impact.

18 Q You've mentioned these are sophisticated
19 machines.

20 A They are, and they're very maintenance
21 intensive.

22 Q And so is part of what you do every day to do
23 maintenance on these trucks?

24 A Yes. So when the driver comes in, gets their
25 assignment, they do a pre check of the equipment to make

1 sure it's in good working order, and they do the same
2 post-trip inspection at the end. And then they would
3 communicate with the fleet if there's something that
4 needed to be done.

5 Q And so when you mentioned should something
6 happen with these trucks as you're putting more mileage
7 on them, there's a very limited amount of parts
8 available to fix them.

9 A That is true.

10 Q So that's parts and employee -- or that's
11 equipment and employees, and that's important. Those
12 are obviously going to have an impact.

13 Could you just throw money at the problem?
14 Can you get more drivers? Can you get more trucks?

15 A I can't get more drivers. I can't get more
16 trucks.

17 Q So what about -- is there another element to
18 this? How are the -- now that your people are going to
19 be in traffic and they're going to be in neighborhoods
20 when children are coming home from school, people are
21 coming home from work, do you anticipate any issues
22 coming up with those increased interactions?

23 A Absolutely. I drive a truck every now and
24 then, and I can tell you that if there's kids or anyone
25 standing around a cart, it is a extremely difficult

1 thing, and we don't want that. We want to avoid that.

2 Q Are you concerned that there will be more
3 accidents?

4 A Yes, I am.

5 Q As there are more just instances of trucks and
6 people coming together?

7 A There will be more accidents, and I believe
8 there will also be issues where vehicles or other
9 objects are blocking the cart itself.

10 Q Meaning, because your guys are picking up
11 later, because you now have to pick up at 5:30, 6:00,
12 you're coinciding with people parking on the street
13 coming home?

14 A That's correct.

15 Q And so that trash won't be able to be picked
16 up?

17 A That's correct.

18 Q And this assumes -- so, assuming nothing else
19 goes wrong, on the day that you lose access to
20 Starcrest, if you lose that access on Thursday, is the
21 City going to immediately see longer hours for the
22 workers?

23 A Yes.

24 Q And additional mileage on the trucks?

25 A Yes.

1 Q And interactions with the public?

2 A Yes.

3 Q And that's assuming nothing goes wrong, as in
4 no additional equipment malfunctions?

5 A Yes.

6 Q And you don't lose access to either one of the
7 other sites, your two disposal sites.

8 A Correct.

9 Q If any of those other things happen, is it even
10 more catastrophic?

11 A It would be even more catastrophic, yes.

12 Q Can you even imagine what that would be like?

13 A No, I cannot.

14 Q Even without that, though, because I just want
15 to focus on what you know is going to happen on day one,
16 is the type of harm that's going to occur from losing
17 access, is that -- can you quantify that?

18 A No, I can't.

19 Q Is there -- can you be made whole for that
20 later on with damages?

21 A No.

22 Q So are you concerned that if the City loses
23 access that there's going to be an impact to the
24 citizens of San Antonio because your trucks are going to
25 be working after dark?

1 A Absolutely.

2 Q During rush hour?

3 A Yes.

4 Q Interacting with people coming home.

5 A Yes.

6 Q Increased risk of property damage, personal
7 injury accidents.

8 A Yes.

9 Q What happens if you can't dump the trucks at
10 the end of the day?

11 A If a facility is closed or it's not accepting
12 the waste, we would have to take the truck back to our
13 facility, which is not something that we ever want to
14 do. But we would keep it separate because there's a
15 fire risk to this truck. And these trucks, by the way,
16 cost about \$400,000 each.

17 Additionally, with garbage inside the
18 truck, it's corrosive; it's caustic; it's not something
19 that's -- it's -- you don't want that sitting in the
20 truck because it causes harm to the truck. So there's
21 even more issues concerning the truck integrity, keeping
22 trash in it. So fire risk as well as maintenance
23 issues.

24 And -- and then the next day, the driver,
25 instead of going out on their route, is now going to a

1 landfill to dispose of the waste.

2 Q Now, opposing at one point mentioned, Well, you
3 can still go to Buda.

4 Is that an option?

5 A No, it's not.

6 Q Why not?

7 A Buda is approximately 50 or 60 miles away. Our
8 trucks, as I said earlier, are designed to collect in a
9 neighborhood and collect from those 1200 homes every
10 day, not to be driving on a highway and -- and for that
11 matter, they're also only -- they can't carry as much as
12 a tractor-trailer could. So we -- we don't have the
13 ability to drive them up and back and finish the route.

14 Q Do you believe that if the City was denied
15 access to Starcrest that this would impact the health
16 and safety of the citizens of San Antonio?

17 A I do.

18 Q And is that noted in the contract, and is there
19 language in the contract to that point?

20 A Yes, it is.

21 Q Are you asking the Court -- is the City asking
22 the Court to maintain the status quo until trial?

23 A Yes.

24 Q And that includes those requests that were set
25 out in the application?

1 A Yes.

2 Q Is the City willing to post a bond to secure
3 the temporary injunction?

4 A Yes.

5 Q In terms of housekeeping, did you sign a
6 verification in support of the City's application? Did
7 you sign an affidavit?

8 A Yes.

9 Q Okay. And I believe that's attached as Exhibit
10 A.

11 MS. KIRKLAND: Your Honor, I'd ask that --
12 well, he's testifying obviously, but...

13 Q (MS. KIRKLAND) Is this matter important to the
14 City?

15 A Absolutely.

16 Q Do you have people here who are engaged and
17 want to be involved? Did you bring some people?

18 A I do. I have Alfonso Castillo, who is our
19 program manager and also operates the Northeast Service
20 Center collections, as well as Nick Galus. He's our
21 assistant director over operations, as well as one of
22 our City attorneys.

23 Q So this is important to the City?

24 A Yes, it is.

25 Q And the City -- does the City believe that it

1 will be irreparably harmed if TDS is not enjoined today?

2 A Yes.

3 MS. KIRKLAND: Pass the witness.

4 THE COURT: All right. This is a good
5 time to take a short break.

6 And after we return, it will be your
7 witness, Mr. Hemphill.

8 (Recess)

9 THE COURT: All right. Mr. Hemphill, it
10 is your witness.

11 MR. HEMPHILL: Thank you, Your Honor.

12 **CROSS-EXAMINATION**

13 BY MR. HEMPHILL

14 Q Mr. Newman, you understand there is a dispute
15 between TDSL and the City regarding the appropriate
16 rates the City should be paying TDSL at Starcrest;
17 correct?

18 A Correct.

19 Q And you've testified as to what you believe
20 what the City's position is regarding the appropriate
21 rates; correct?

22 A Correct.

23 Q And you understand that TDSL disagrees with
24 that; correct?

25 A Yes.

1 Q And you understand that TDSL -- at -- that TDSL
2 attempted to work out some kind of arrangement or some
3 compromise or agreement before this lawsuit was filed by
4 having a -- several meetings; correct?

5 A That's not the way I remember it.

6 Q You don't remember having more than one meeting
7 before the August 2nd, 2021 letter?

8 A I do recall having meetings.

9 Q Okay. And do you recall one of the topics at
10 those meetings being TDSL's contention that the contract
11 rate was inadequate to cover even its own costs because
12 of the dramatic raise -- rise in expenses associated
13 with operating Starcrest and trucking the waste to the
14 TDSL landfill?

15 A Yes.

16 Q Okay. And ultimately you're aware that TDSL
17 filed this lawsuit to adjudicate those disputes;
18 correct?

19 A Yes.

20 Q Okay. And you understand that the City is here
21 today in court seeking an injunction to force TDSL to
22 give the City access to Starcrest even if the City
23 refuses to pay the bills TDSL has sent; correct?

24 A Well, we have a dispute on those bills. We're
25 seeking to continue the access, yes.

1 Q Right. Even if the City doesn't pay the bills,
2 the City wants to retain access to Starcrest.

3 A The City is not paying the disputed bills. We
4 want to continue the access.

5 Q So let me make this clear. The City is asking
6 the Court to order TDSL to take the City's waste even if
7 the City doesn't pay the bills that TDSL has sent to the
8 City?

9 A We want TDS to follow the contract and continue
10 through the contract.

11 MR. HEMPHILL: Okay. I got to say this, I
12 object to that as nonresponsive.

13 Q (MR. HEMPHILL) My question simply is you're
14 asking the Court to order TDSL to accept the City's
15 waste even if the City doesn't pay the invoices that
16 TDSL has sent; is that correct?

17 A You're referring to the -- the invoices that
18 the City disputes.

19 Q I am.

20 A And we are asking to the Court to maintain the
21 status quo of the contract.

22 Q In other words, to allow the City to continue
23 to access Starcrest even if it doesn't pay those
24 invoices.

25 A Yes.

1 Q Okay. And you talked a lot about the contract.
2 Really, what you -- what the City is here doing today is
3 asking the Court to order TDSL to perform the contract;
4 right?

5 A That is what we're asking.

6 Q That's you specifically asking for performance
7 of the contract ordered by the Court; correct?

8 A Correct.

9 Q And you understand that TDSL does not intend to
10 cut off access to the City at Starcrest if the City pays
11 the invoices that have been being sent since
12 January 15th; correct?

13 A Yes. We received that ultimatum, yes.

14 Q Okay. So we're not talking about the
15 12 million; correct?

16 A I think we are talking about the 12 million.

17 Q So is it your understanding that TDSL will
18 not -- will cut off access -- the City's access to
19 Starcrest if the City doesn't pay TDSL 12 million?

20 A I believe it's that or raise the rate or -- and
21 that's -- that's both.

22 Q So are you aware that TDSL has said to the City
23 that it will not cut off access if the City pays the
24 invoices that have been sent since January 15th, 2023,
25 and will let the Court decide on the 12 million?

1 A Yes.

2 Q Okay. So -- and you're -- are you also aware
3 that the City -- that TDSL has offered the City an
4 alternative rate to the \$40 per yard?

5 A Yes.

6 Q Of 64.89 a ton?

7 A Yes.

8 Q Okay. Which typically would be a better rate
9 than \$40 a yard; right?

10 A Yes.

11 Q And isn't it standard practice when charging by
12 the yard to charge by the volume of the truck rather
13 than the volume of the waste that's in the truck?

14 A That -- no. I don't believe so.

15 Q Okay. So I want to make sure I understand
16 this. The City has already chosen -- if the Court
17 doesn't issue an injunction requiring TDSL to
18 specifically perform the contract, which is what the
19 City wants, the City has already determined that it
20 would rather lose access to Starcrest than to pay the
21 rate that TDSL is asking to pay?

22 A No, that's not what we want. We want to
23 continue to utilize the transfer station. We need the
24 transfer station.

25 Q Yeah. But let me -- let me make sure my

1 question is clear.

2 The City has determined that if the Court
3 doesn't enjoin TDSL, if the Court doesn't force TDSL to
4 take the City's waste at what the City claims is the
5 correct rate, the City has already determined that it
6 would rather lose access to TDSL's Starcrest -- to
7 Starcrest than to pay TDSL either the gate rate or the
8 offered discounted rate?

9 A That's not what the City wants. We don't want
10 to lose access.

11 Q But the City -- but I thought I heard you say
12 that you're not going to pay those invoices, period.
13 End of story.

14 A That's correct.

15 Q Okay. And so if the Court doesn't issue an
16 injunction and the City doesn't pay the invoices, then
17 you understand TDSL has said that it's going to
18 terminate access until the invoices are paid; correct?

19 A That is what's written, yes.

20 Q And so I just want to ask this one more time.
21 Does the City intend to lose access to Starcrest if the
22 injunction is not granted rather than pay the TDSL
23 invoices?

24 A We -- look, I'm -- I'm just the director of the
25 Solid Waste Department, but I assume that we would seek

1 all legal remedy that we could if that were the case.

2 THE COURT: Mr. Hemphill, I'm sorry to
3 interrupt your examination. I need -- the Court needs
4 clarification.

5 If you're not requesting the \$12 million
6 be paid, what is the amount that TDSL is requesting?

7 MR. HEMPHILL: Your Honor, what TDSL is
8 asking is that TDSL would accept a rate of 64.89 per ton
9 just going back to January 16th of this year and going
10 forward.

11 THE COURT: And do we know what that
12 amount is in invoices?

13 MR. HEMPHILL: For what's invoiced up to
14 this point?

15 THE COURT: Yes.

16 MR. HEMPHILL: I think it's around
17 \$300,000.

18 THE COURT: All right. Thank you.
19 You may proceed.

20 MR. HEMPHILL: Thank you.

21 Q (MR. HEMPHILL) So you understand that the City
22 could decide to pay those invoice and retain access to
23 Starcrest even if the Court doesn't enter an injunction;
24 correct?

25 A Yes.

1 Q Okay. Now you might not have seen this because
2 it was just filed, but TDSL filed a response to the
3 City's TRO application, and in it is an affidavit from
4 Mr. Gregory, so you probably haven't had a chance to
5 read that yet; is that right?

6 A I have not read it in detail, but I did look
7 through it just a little bit.

8 Q So in that affidavit, Mr. Gregory reiterates
9 under oath what TDSL has said many times in this
10 lawsuit, which is TDSL, regardless of what happens, as
11 long as the City has access to Starcrest, they're not
12 going to stop weighing the trucks.

13 You understand that now; right?

14 A That -- the first time I read that and
15 understood that was today.

16 Q So regardless of what happens, the City will
17 always have the -- as long as TDSL weighs the trucks and
18 provides the City with those weights, which it has
19 committed under oath to do, the City would be able to
20 calculate what it believes it owes on a per ton basis;
21 is that fair to say?

22 A Yes.

23 Q So that aspect of the City's request for an
24 injunction has already been dealt with because TDSL says
25 we're going to keep weighing them; correct?

1 A Yes.

2 Q And if the City doesn't get the injunction and
3 chooses to pay TDSL what TDSL is asking for the January
4 '23 time frame forward -- set aside the 12 million --
5 the January '23 time frame forward, the City would be
6 able to track the difference between TDSL's charges and
7 what the City thinks is appropriate; correct?

8 A If that were the case, yes.

9 Q As it has been doing; correct?

10 A Correct.

11 Q So far in 2023; correct?

12 A Yes.

13 Q Okay. And so the amount of what the City
14 claims would be overpayments could easily be calculated
15 by the City; correct?

16 A Yes.

17 Q Now in your testimony, I think you refer to --
18 I'm sorry if I get the name wrong -- Mr. Castillo as the
19 program -- I'm sorry. What did you call him?

20 A I may have called him the program manager. His
21 actual title is solid waste manager.

22 Q Solid waste manager over the entire city?

23 A No. He's over our northeast service center,
24 but he's also the manager for this contract.

25 Q Okay. Has Mr. Castillo ever been designated to

1 TDSL as the on-site representative as that term is used
2 in the second amendment to the contract?

3 A I believe so.

4 Q When -- when was that?

5 A I think approximately two years ago. Maybe
6 three or four.

7 Q Was it before or after the lawsuit was filed?

8 A I can't remember.

9 Q Okay. Was that done in writing?

10 A I don't believe so. I think it was verbal.

11 Q Now I think we've heard some discussion over
12 what's called a put-or-pay provision; correct?

13 A Yes.

14 Q And while the City can deliver under the second
15 amendment up to 500,000 tons per year of municipal solid
16 waste to Starcrest, it's only committed under put or pay
17 to deliver up to 100,000; is that correct?

18 A That's correct.

19 Q And 500,000 tons is more than the City collects
20 in a year; correct?

21 A That's correct.

22 Q If you take out recycling and compost.

23 A Yes.

24 Q And the second amendment specifically says that
25 that waste could be received at Starcrest, at the

1 landfill in southern Travis County, or any combination
2 thereof; correct?

3 A Yes.

4 Q So there is some anticipation in the second
5 amendment that if the City wished to do so, it could
6 deliver waste to the landfill in Travis County; fair?

7 A Yes.

8 Q And then under the put or pay, the City has to
9 pay TDSL for any tonnage short of a hundred thousand
10 unless there's an allowable setoff; is that --

11 A That's fair.

12 Q -- fair?

13 Okay. Now you -- you understand that --
14 well, the City's fiscal year ends September 30th every
15 year; is that correct?

16 A That's correct.

17 Q And you understand that for the fiscal year
18 ended September 30th, 2022, the City delivered less than
19 100,000 tons of regularly collected Municipal solid
20 waste to Starcrest; correct?

21 A Correct.

22 MR. HEMPHILL: Your Honor, if I may
23 approach?

24 THE COURT: You may.

25 MR. HEMPHILL: I don't think this has been

1 entered as an exhibit yet. So we have a binder, too.
2 And I'm going to try to avoid duplication, but there
3 might be some. We have a copy for the witness, the
4 court reporter, and opposing counsel as well.

5 THE COURT: Thank you.

6 Q (MR. HEMPHILL) Now if you could turn to
7 Exhibit -- in the notebook I just handed you, it's
8 what's on Tab 8. It's marked as PX 8, Plaintiff's
9 Exhibit 8.

10 Tell me when you see that.

11 A I've got it.

12 Q This is an invoice that TDSL sent to the City
13 for a put-or-pay shortfall for the fiscal year ended
14 September 30th, 2022; correct?

15 A Yes.

16 MR. HEMPHILL: Your Honor, we move to
17 admit PX 8.

18 MS. KIRKLAND: No objection.

19 THE COURT: All right. It will be --
20 TDSL's Exhibit 8 shall be admitted into evidence.

21 (Plaintiff's Exhibit 8 admitted)

22 MR. HEMPHILL: Thank you, Your Honor.

23 Q (MR. HEMPHILL) Now this invoice says that the
24 actual tonnage shipped by the City to Starcrest in that
25 fiscal year was 65,495.07 tons.

1 Do you see that?

2 A Yes.

3 Q Do you believe that's correct?

4 A Yes.

5 Q Now, the City has not paid that invoice; is
6 that correct?

7 A That's correct.

8 Q Okay. And it's about -- it's 1.15 million and
9 change; correct?

10 A Yes.

11 Q Now as -- is it true that the City is claiming
12 entitlement to a setoff on the put-or-pay requirement
13 for that fiscal year because the City claims it was
14 required to divert waste to other landfills due to
15 alleged violation by TDSL of the agreements of priority
16 provision?

17 A Yes.

18 Q Now, if you would look at exhibit -- or Tab 3
19 to that notebook. And do you recognize this as a copy
20 of the second amendment?

21 A Yes.

22 MR. HEMPHILL: Your Honor, I know that
23 this is kind of already in evidence, but I'm going to
24 move to admit this, just the second amendment, as TDS --
25 Plaintiff's Exhibit 3.

1 THE COURT: TDSL's Exhibit 3 shall be
2 admitted into evidence.

3 (Plaintiff's Exhibit 3 admitted)

4 MR. HEMPHILL: Thank you, Your Honor.

5 Q (MR. HEMPHILL) If you can turn to page six of
6 that exhibit. In the -- in the subparagraph two,
7 there's some -- some highlighting; do you see that?

8 A Yes.

9 Q And it says [as read] TDSL shall use reasonable
10 care to ensure that no vehicle of the City or its
11 designated haulers will be required to wait more than 30
12 minutes.

13 Did I read that correctly?

14 A Yes.

15 Q Then it goes on to say that [as read] TDSL will
16 be deemed to have used reasonable care, even if trucks
17 wait more than 30 minutes, if waits due to large
18 numbers, 15 or more vehicles, of City trucks arriving at
19 the transfer station within approximately the same time
20 period.

21 Is that a fair summary of what that says?

22 A Yes.

23 Q All right. Is it the City's position that any
24 time a City truck has to wait at Starcrest more than 30
25 minutes if there are less than 15 trucks arriving at the

1 same time, it is a violation of the priority provision?

2 A Yes.

3 Q So the City doesn't -- thinks the phrase
4 'reasonable care' doesn't matter?

5 A We -- we believe that it's specific to having
6 15 or more trucks showing up at one time.

7 Q So the City's interpretation of the contract is
8 TDSL shall service City trucks in 30 minutes or less
9 unless 15 or more arrive at approximately the same time?

10 A Yes, as they have for 20-plus years.

11 Q So that's what -- that's how the City reads the
12 contract?

13 A Yes?.

14 Q Okay. And then there is -- well, let me ask
15 this.

16 Is it the City's position that it can
17 divert trucks that never even come to Starcrest?

18 A We have to. Other than -- otherwise, they're
19 going to be waiting in line.

20 Q Okay. I'm still on Exhibit 3 on page six under
21 subparagraph three.

22 And it says [as read] In the event that a
23 City vehicle is required to wait longer than 30 minutes
24 as a result of, one, TDSL not providing the City first
25 right to service at the transfer station, or two, TDS

1 being unable to provide normal services to the transfer
2 station using reasonable care, the City's on-site
3 program manager will determine at his or her sole
4 discretion whether the City vehicles are to be diverted
5 to another landfill.

6 Did I read that correctly?

7 A Yes.

8 Q All right. And then the next sentence says [as
9 read] If City vehicles are diverted due to the failure
10 of TDSL to use reasonable care, TDSL will do a number of
11 things, including -- on page seven, subparagraph C --
12 credit towards the City's requirement to deliver
13 100,000 tons annually, all tons diverted from the
14 transfer station to another disposal facility.

15 Did I read that correctly?

16 A Yes.

17 Q Is that the provision the City is relying upon
18 to claim a deduction from the put-or-pay requirement for
19 fiscal year ended September 30th, 2022?

20 A Yes.

21 Q So it's the City's position that if the City
22 determines in its sole discretion that a truck that
23 never even went to Starcrest is going to have to wait
24 more than 30 minutes, the City can divert that truck and
25 deduct from put or pay? Is that fair -- a fair summary

1 of the City's position?

2 A No. I don't think that it actually --
3 accurately describes it because we have trucks that are
4 en route, and they have to make a decision on where
5 they're going to dispose. If the line is already an
6 hour long, then the supervisor is not -- is going to
7 tell them to divert and go somewhere else based on their
8 conversations with Alfonso Castillo.

9 Q And the City doesn't make any kind of
10 determination about whether TDSL is using reasonable
11 care. It just says that if we think the truck has to
12 wait more than 30 minutes, we're going to divert it;
13 correct?

14 A I think that's fair, yes.

15 Q So can you tell me who made the determinations
16 to make those diversions during fiscal year ended
17 September 30th, 2022?

18 A Mr. Castillo, who I referenced previously.

19 Q Did Mr. Castillo make those determinations
20 while on site at Starcrest?

21 A He may have, but most of the time he is not on
22 site. He's just right down the road.

23 Q And is it fair to say that for trucks that the
24 City decides to divert that never go to Starcrest, TDSL
25 has no way to determine what the wait of those trucks

1 were, other than taking the City's word for it; is that
2 correct?

3 A No, that's not correct.

4 Q How is TDSL to determine what the weight of
5 those trucks are?

6 A Because when we go to another facility, it's
7 weighed, and so we have a record of what that weight is.

8 Q And during the fiscal year ended
9 September 30th, 2022, did the City provide daily
10 diversion reports to TDSL?

11 A No. We tracked it, but we have not provided it
12 to TDSL.

13 Q And same thing is going on now, right, that the
14 City or a City representative is often making a
15 determination to divert trucks away from Starcrest
16 before they even get to Starcrest; is that fair to say?

17 A While they are en route and preparing to leave
18 the disposal facility, that decision is made.

19 Q Before they get to Starcrest; correct?

20 A Yes. Or while they're en route to Starcrest.

21 Q But 'en route' is not the same as 'at'
22 Starcrest?

23 A Please know that these routes are designed to
24 go to Starcrest.

25 Q Correct. But the trucks are being diverted

1 without having to wait 30 minutes; correct?

2 A That's correct. If they went there, they would
3 wait longer than 30 minutes.

4 Q According to someone who may or may not be on
5 site; correct?

6 A We have someone on site.

7 Q So you said that currently the City is
8 diverting about 10 percent.

9 And I'm sorry, I'm going to have to ask
10 you a couple of questions about that because I honestly
11 didn't follow everything you said.

12 10 percent of what? 10 percent of the
13 trucks that are set to go to Starcrest?

14 A I think that's a fair statement. 10 percent of
15 the routes that are designed to go to Starcrest, yes.

16 Q And you said that's 20 trucks?

17 A So 20 trucks would do two loads, so that would
18 be 40 loads per day.

19 Q So on a typical day, 200 route trucks are set
20 to go to Starcrest?

21 A No. 20 trucks would go to Starcrest two times
22 a day, so that's 40 loads.

23 Q I'm just trying to work on this 10 percent --

24 A Okay.

25 Q -- figure.

1 I thought you said 20 trucks was
2 10 percent of the ones -- of the trucks that are --

3 A No.

4 Q I might have misunderstood, so I'm just trying
5 to clear this up.

6 A Sure.

7 Q So it's 10 percent of what?

8 A So I would say it's 10 percent of the 40 loads
9 per day.

10 Q 10 percent of the 40 loads?

11 A Correct.

12 Q So four loads?

13 A Correct.

14 Q About four loads are being diverted per day?

15 A It -- it has been as much as 50 percent of the
16 loads, but -- and some days it's none. But on average,
17 I think we're looking at about 10 percent today.

18 Q About four trucks?

19 A Correct.

20 Q And it's fair to say that, isn't it, that the
21 City hasn't looked into the circumstances on any
22 particular day that are causing any alleged delays. The
23 City's attitude as you've testified is -- or the City's
24 position as you've testified is if the truck has to wait
25 more than 30 minutes, that's a violation of priority

1 unless 15 or more arrive at the same time.

2 Fair to say?

3 A I'm sorry. You -- I think you said two things
4 there. Could you repeat the question?

5 Q I tried not to, but maybe I did so I'll try to
6 make it clear.

7 The City's position is that it doesn't
8 matter what the circumstances at Starcrest are. If the
9 City truck has to wait more than 30 minutes, that's a
10 violation of priority provision unless 15 City trucks
11 arrive at the same time; fair?

12 A I think that's fair.

13 Q Now would you agree that the City's delivery of
14 waste to Starcrest varies widely? And by that I mean
15 some hours of the day there are -- there isn't much
16 waste delivered and other hours there's a whole bunch?

17 A That's correct.

18 Q And you'll agree that when City trucks arrive
19 at Starcrest is within the City's control and not TDSL's
20 control; correct?

21 A There's a lot of factors, but we are the ones
22 making the delivery.

23 Q And so it's the City -- the City determines
24 when the trucks are going to Starcrest; fair to say?

25 A Well, to some degree, yes.

1 Q I mean, TDSL doesn't call up and say, Send some
2 more trucks; right?

3 A Correct.

4 Q Has the City ever attempted to level out the
5 delivery of waste at Starcrest so it's more predictable
6 and more even per hour rather than showing peaks and
7 valleys?

8 A We have on a daily basis -- on a weekly basis,
9 I should say, in that when I mentioned the rebalancing
10 last year, that is one of the things that we did to
11 spread the delivery between five days instead of four
12 days, so that normalizes it somewhat.

13 But we are collecting today as we have for
14 a very long time, making two loads. And so with two
15 loads, your drivers are going to finish at roughly the
16 same time because there is no garbage to be picked -- to
17 be delivered at 7:00 a.m.

18 Q So the City sends its route drivers all out at
19 basically the same time.

20 A That's correct.

21 Q Could the City stagger those start times if it
22 so chose?

23 A No.

24 Q Why not?

25 A Because it's in the City code.

1 I don't think that's fair to our
2 customers, either, to send out trucks at different
3 times. I think that would be chaotic.

4 Q What's in the City code?

5 A Well, one thing that's in there is not to put
6 the cart out until a certain time, but it also states
7 that when our collection vehicles are to begin. And for
8 that matter, it goes into commercial waste and hours of
9 operations for that, too, because these are loud trucks
10 and you don't want to drive down the neighborhood and
11 wake everybody up.

12 Q So it's fair to say that the City code says
13 garbage collection isn't going to start before a certain
14 time.

15 A That's correct.

16 Q But it doesn't say that that time can't be the
17 beginning of a staggered collection schedule.

18 A Correct.

19 Q Is that fair?

20 A Yes.

21 Q You would agree that TDSL is not obligated to
22 offer the City a level of service beyond whatever's
23 required by the contract; correct?

24 A Correct.

25 Q Now, I think we saw in some of the exhibits

1 that you looked at earlier that the City has claimed
2 that TDSL is in default of the priority provision;
3 correct?

4 A Yes.

5 Q And that's for not servicing City trucks within
6 30 minutes; correct?

7 A Yes.

8 Q And you're aware that there's a contractual
9 remedy for alleged violation of that priority provision,
10 correct, which is deduction from put or pay?

11 A Yes.

12 Q Okay. Aside from the priority provision, does
13 the City claim that TDSL has been in default in any
14 other way?

15 A Yes.

16 Q What?

17 A Not accepting dead animals, for one.

18 Q Okay. Any others?

19 A Well, with respect to the dead animals, the
20 time of delivery was -- is specified in there that they
21 should accept them on Saturdays and be available to us
22 at other times. Since the failed mediation, TDS closes
23 rightly at five o'clock, so there is no -- no
24 after-hours delivery of waste there.

25 Q Okay. I want to make sure I understand. So

1 the City is claiming it is a default not to accept dead
2 animals after hours?

3 A Correct.

4 Q Okay. Any other alleged defaults that the City
5 is claiming for TDSL that we haven't discussed yet?

6 A I'm sure there are, but off the top of my head,
7 I can't think of anything more at the moment.

8 Q Well, the only other thing that I've seen at
9 any notice of default is something about a scale.

10 A Oh, uh-huh.

11 Q Is the City still claiming there's a default?

12 A No, not a default. I think the situation with
13 the scale was that TDS changed their process, which made
14 the -- made it a longer process for the City to dispose
15 of the waste.

16 Q And do you realize now that TDSL was using a
17 different scale to measure its -- to weigh its transfer
18 trailer but stopped doing that? It's no longer doing
19 that?

20 A I'm sorry. Can you repeat that?

21 Q Let me make it simple.

22 A Okay.

23 Q Do you still believe there's any problem with
24 an inoperable scale at Starcrest that constitutes a
25 default by TDS?

1 A It slows up the process tremendously, but it's
2 not something that we're alleging as a default.

3 Q Can you explain how this slows up the process?

4 A Yeah. My understanding of how that works is
5 when the waste is deposited into the trailer, there's a
6 scale under it that's weighing it out so that you know
7 the -- when you get the maximum amount in there. And
8 without that, they are pulling the trailer up to where
9 the scale is, and if it's too heavy or it's too light,
10 it's got to go back down and you have to pull material
11 out or put material in, so that slows up the process.

12 Q And are you aware whether or not TDSL has
13 discontinued that process during periods of City's peak
14 demand?

15 A I am not aware.

16 Q So if evidence showed that they have
17 discontinued that practice, then that wouldn't be
18 slowing down on those -- at those times; is that fair to
19 say?

20 A Correct, yes.

21 Q Anything else you can think of that the City
22 claims is a default by TDSL?

23 A Not off the top of my head.

24 Q Okay. Now, the second amendment says that [as
25 read] TDSL will accept at Starcrest the City's regularly

1 collected municipal solid waste and as has been
2 processed by the City through the transfer station from
3 1991 through 1996.

4 Do you recall that?

5 A Yes.

6 Q Okay. And that -- and if you want to refer to
7 the second amendment, I'm on -- this is TDSL Exhibit 3
8 and I'm on page three, below the paragraph that says F,
9 if you'd like to refer to this. I'm not trying to test
10 your memory.

11 A Thank you.

12 Q So down toward the bottom, the agreement
13 actually -- actually reads [as read] TDSL agrees to
14 accept the City's regularly collected municipal solid
15 waste, which includes waste from all City departments,
16 City contractors, and designated City haulers at the
17 City contracted price.

18 Did I read that correctly?

19 A I'm sorry. I'm still trying to find -- you're
20 on page three toward the bottom?

21 Q Toward the bottom. It's highlighted. Page
22 three of Exhibit 3.

23 A Yes.

24 Q So, again, it refers to TDS accepting at the
25 contract price the City's regularly collected municipal

1 solid waste?

2 A Correct.

3 Q Fair?

4 A Yes.

5 Q And then down at -- the sentence starts at the
6 bottom that's highlighted says [as read] Such material
7 shall include the same types -- type of waste including
8 small amounts of brush, white goods, and materials from
9 citizen clean-up events as been customary for the City
10 as has been processed by the City through the transfer
11 station from 1991 through 1996, and other solid waste
12 appropriate for the transfer station.

13 Did I read that correctly?

14 A Yes.

15 Q And then it says [as read] In consultation with
16 the City, TDSL shall set standards as to what are
17 acceptable materials.

18 Correct?

19 A Yes.

20 Q Now, again, I don't want to mischaracterize
21 your testimony. I want to make sure I understood it.

22 I think you testified that the City's
23 practices with regard to the collection and disposal of
24 bulky waste had not changed since 1996. Was that your
25 testimony or not?

1 A They have changed somewhat the collection of
2 bulky waste, yes.

3 Q Yes. And the second amendment we saw refers to
4 citizen clean-up events; correct?

5 A Correct.

6 Q And the City used to have citizen clean-up
7 events where citizens could put bulky waste at the
8 curbside and get it picked up for free a couple of times
9 a year; is that correct?

10 A I think the City clean-up events refers to the
11 citizens bringing material to places like Starcrest and
12 about 20 or some-odd other locations across the City.

13 Q So that was a different thing than the
14 twice-yearly bulky waste pick-up at residences?

15 A The citizen's clean-up, but -- and we continue
16 those today, but yes, they're -- that's different than
17 the bulky waste collection.

18 Q So is it fair to say that in 1996 the City's
19 bulky waste practices for residents was to have
20 particular times of the year where citizens could set
21 out bulky waste and have it picked up by the City?

22 A Yes. And we do that today as well.

23 Q All right. But then after 1996, the City
24 established bulky waste drop-off points for the City; is
25 that fair to say?

1 A It is. The -- the only change in the brush
2 collection at curbside is that we went from commingling
3 brush and bulky to separating brush and bulky out. We
4 still collect at curbside.

5 But to answer your question, we did add
6 bulky waste collection sites.

7 Q And those sites are free for citizens to drop
8 off.

9 A That's correct.

10 Q And then the City, up until 2021, hauled that
11 waste in roll-off containers uncompacted to Starcrest;
12 correct?

13 A That's correct.

14 Q Okay. And that was different than how the City
15 handled it before 1996; correct?

16 A Different in what way?

17 Q Didn't have the drop-off sites.

18 A That's true. Correct.

19 Q And I -- I also think -- correct me if I'm
20 wrong -- I'm sure you will -- you testified that the
21 City has not changed its practices with regard to
22 collection of dead animals.

23 A That's correct. To my knowledge, that's
24 correct.

25 Q Okay. Is it the case that the City now has a

1 service where if a resident has a dead animal they can
2 call the City and have that dead animal specifically
3 picked up?

4 A Yes.

5 Q Especially picked up?

6 A Uh-huh.

7 Q Was that service in place in 1996?

8 A Yes.

9 Q Okay.

10 A Different phone number, but yes.

11 Q Okay. Are those dead animals picked up in
12 specialized trucks?

13 A Yes.

14 Q What other sources of dead animals are there --
15 are picked in those trucks?

16 A So besides from a citizen calling and saying I
17 have a dead dog, can you pick it up, it would also be
18 deer that might be hit in the road or a bird, or in some
19 cases what used to be prominent was collecting from
20 veterinary offices.

21 Q Talk about that in a minute.

22 Is what you're talking about that goes in
23 with those -- those residents' pick-ups basically
24 roadkill?

25 A Some is. Some are; some aren't.

1 Q Okay. Well, there was -- there are animals
2 that are -- the second amendment refers to -- or one of
3 the agreements refers to dead animals collected on City
4 streets and alleys; correct?

5 A Yes.

6 Q And so that would include dead animals that
7 are, for lack of a better word, roadkill.

8 A Yes, it would include that.

9 Q And the City believes that includes the
10 specialty pick-ups when specially requested by a
11 resident.

12 A Yes, which is what we have done for decades.

13 Q And the City has recently started to offer a
14 \$10 per animal pick-up for veterinary establishments and
15 commercial establishments; is that correct?

16 A No, not recent. That's been going on for a
17 long time, too.

18 Q Okay. How are those animals collected?

19 A In the same manner. It's -- someone would call
20 and arrange for the collection, and the City would pick
21 it up.

22 Q And are those loads mixed with the other types
23 of dead animal pick-up?

24 A They have been. We looked back at how many of
25 those that we did in the past three years and -- or five

1 years, and we collected zero, one, maybe at the most two
2 in one year. So it's gotten to the point where that's
3 something that just doesn't occur any longer.

4 Q Okay. So at one point, the commercially
5 collected dead animals were mixed in with the animals
6 that were collected on City streets and alleys?

7 A That's correct.

8 Q Now, you're aware that in 2017 the City
9 requested that TDSL do some modifications or repairs to
10 the floor at Starcrest; correct?

11 A I am aware of that.

12 Q That was a request made by the City; correct?

13 A And probably others as well. But, yes, we did
14 make that request.

15 Q And TDSL performed the work and paid for it;
16 correct?

17 A That's correct.

18 Q And TDSL has sent an invoice for that to the
19 City; correct?

20 A That is correct.

21 Q The City has refused to pay that; correct?

22 A That is correct.

23 Q And the City has refused to pay that because?

24 A Because we feel that that -- that work that was
25 done, which was essentially a pothole in the tipping

1 floor, needed to be repaired, that that was maintenance,
2 and it was basically preventing our trucks from
3 unloading properly.

4 Q And if you could look at Tab 4 in the notebook.

5 Do you recognize this is a special
6 addendum to the contract?

7 A I do.

8 Q Does it appear to be a true and correct copy of
9 that?

10 A Yes.

11 MR. HEMPHILL: Plaintiff offers TDSL
12 Plaintiff's Exhibit 4.

13 MS. KIRKLAND: It's in, but no objection.

14 THE COURT: It's for the record, I'm sure.

15 MS. KIRKLAND: Absolutely.

16 THE COURT: TDSL's Exhibit -- did you
17 say -- where were we at? 4?

18 MR. HEMPHILL: 4.

19 THE COURT: Shall be admitted into
20 evidence.

21 (Plaintiff's Exhibit 4 admitted)

22 Q (MR. HEMPHILL) Mr. Newman, if you could look
23 at page two of Exhibit 4, there's an item C that is
24 highlighted. Do you see that?

25 A I do.

1 Q And it says, [as read] TDSL shall not bear the
2 cost for any modifications to the permit or facility
3 requested of TDSL by the City, which requests may be
4 made subsequent to the permit conveyance to TDSL and
5 which request may exceed requirements of the parties'
6 privatization agreement.

7 Do you see that?

8 A Yes.

9 Q And it's the City's position that those repairs
10 do not fall under that provision; is that correct?

11 A Correct. We did not see it as a modification;
12 we saw it as a repair.

13 Q And it refers to a permit there. Just for the
14 record, a transfer station has to have -- to run -- to
15 operate in Texas has to have a permit from the TCEQ, the
16 Texas Commission on Environmental Quality; correct?

17 A Yes.

18 Q And there is a permit at Starcrest -- for
19 Starcrest to operate; correct?

20 A Yes.

21 Q And that permit is held by TDSL; correct?

22 A Yes. It was transferred from the City to TDSL
23 through this amendment.

24 Q And so the City owns the facility; TDSL holds
25 the permit; and the City leases the facility to TDSL.

1 Is that fair?

2 A Yes.

3 Q Okay. Now we talked -- you talked some in your
4 testimony about the Consumer Price Index escalator for
5 the per ton rate that's in the agreement; correct?

6 A Yes.

7 Q And I think -- maybe I'm wrong again -- you
8 said you started working for the City in about '96 or
9 '97?

10 A '97.

11 Q '97.

12 So you were not working for the City when
13 the contract -- the original 1993 contract was entered;
14 correct?

15 A I was not.

16 Q Okay. So you can't speak to the City's
17 expectation at the time the contract was made of whether
18 that CPI escalator would be adequate in the years to
19 come; is that fair to say?

20 A Well, I can read the contract and I can
21 interpret the contract. I -- I can't speak to intent or
22 whatever happened during any negotiations.

23 Q Right. You can see what the contract says.

24 A Right.

25 Q But you can't speak to what the City expected

1 at the time the contract was entered because you didn't
2 work for the City; fair?

3 A I would expect that the -- I would assume that
4 the expectations of the City are in the contract itself.

5 Q But that's an assumption. Like you just said,
6 you would assume.

7 A I -- I expect TDSL to follow the contract as
8 well as the City of San Antonio.

9 Q That's, to be fair, not my question.

10 My question is you can't speak to the
11 City's expectation at the time the contract was entered
12 in 1993 because you didn't work for the City then; fair?

13 A I think that the expectation is -- is in the
14 pages of the contract, that TDS will do these things and
15 the City of San Antonio will pay them the contracted
16 rate. That's the expectation. So I can speak to that,
17 but I can't speak to things that happened in 1993 before
18 I worked at the City.

19 Q All right. So you can't speak to anything that
20 happened in 1993 with the City; fair enough?

21 A I can speak to things that I may have read
22 or -- and certainly contracts that are in place today,
23 but I can't speak to a verbal conversation or someone's
24 intent.

25 Q Fair enough.

1 The City doesn't take issue with TDSL's
2 assertion that the CPI has not, in fact, kept pace with
3 the cost of running the Starcrest operation; does it?

4 A I -- I think I do disagree with that. We
5 raised the contract by 9 percent this year and 6 or
6 7 percent last year. So, yes, I think that it is
7 adequate.

8 Q So you've done an analysis of the costs of
9 running the transfer station and shipping the waste to
10 the Travis County landfill --

11 A No.

12 Q -- or the landfill in Travis County?

13 A No. I've not done a cost --

14 Q You've not done that?

15 A No.

16 Q And to be fair, it's the City's position that
17 it doesn't matter how much the costs have increased;
18 TDSL is limited by that CPI escalator. That's fair,
19 right?

20 A Yes.

21 Q And you know that the amount that the City
22 charges to its residence to pick up trash has increased
23 far more than this -- than TDSL's rates have increased;
24 fair?

25 A No, I don't believe that's fair. I think that

1 had we applied the CPI to the City's rate back then, we
2 may be higher today than what our current rate is.

3 Q Have you -- you believe? Have you done an
4 analysis of that?

5 A Briefly. We have briefly looked at that, yes,
6 sir.

7 Q So you think that the City's rates it charges
8 customers have increased less as a percentage than
9 TDSL's rates have increased to the City?

10 A No. I think what I'm saying here -- and it
11 depends on what year you start at. But if we apply the
12 same CPI that we applied to the contract, that the rate
13 that the City of San Antonio charges the rate payer
14 would actually be higher today if we applied the CPI.

15 Q I mean, that's -- I mean, that's something
16 that's -- have you done that analysis anywhere?

17 A Just a back-of-the-napkin kind of thing, so...

18 Q Okay.

19 A Just a curiosity on our part.

20 Q But you have not done any analysis -- to be
21 fair, you haven't done any analysis of how much TDSL's
22 actual costs to operate Starcrest at the transfer rates
23 have increased?

24 A No.

25 Q And TDSL has made multiple requests to the City

1 for rate increases; correct?

2 A I wouldn't characterize it as that.

3 Q TDSL has never asked -- asked -- requested that
4 the City agree to a rate higher than what the contract
5 is?

6 A The first time that I actually saw a proposed
7 rate was in our -- the meeting that we had after the
8 August 2nd, 2021 letter. That was the first time that I
9 had seen a rate. We had had discussions about cost
10 increases, yes, but the first time I saw a proposed rate
11 was in 2021.

12 Q The City -- well, let me ask it this way.

13 Is it fair to say that it's immaterial to
14 the City whether TDSL is losing a large amount of money
15 running Starcrest?

16 A I don't know if they are losing a large amount
17 of money, but I think that the point is that we do not
18 have language in the contract that specifies how much
19 overhead or profit that the company makes.

20 Q Let me try that again because I'm not sure that
21 answered my question.

22 It's fair to say that it's immaterial to
23 the City if TDSL is losing money operating Starcrest?
24 Makes no difference to the City; correct?

25 A Well, I'll agree with you.

1 Q Okay. And to be fair, it's the City's position
2 that the City has the absolute right to refuse to
3 consider any request by TDSL for a rate adjustment
4 beyond the contract rate. Fair?

5 A We have considered it. We just don't agree
6 with it.

7 Q So the City thinks it has -- the City's
8 position is it has the absolute right to refuse any rate
9 request -- rate increase request --

10 A Yes.

11 Q -- beyond the CPI escalator?

12 A That's correct.

13 Q Now, one of the things that you said, I
14 believe, in your testimony was that if the City agrees
15 to pay TDSL the increased per ton or per yard rate that
16 TDSL is requesting, you would assume that rates to other
17 landfills would have to be raised as well? Is that
18 fair? Did you -- is that something you testified to?

19 A I did say that it opens up that possibility.
20 And not just those contracts, but probably the hundreds
21 if not thousands of other contracts that the City has.

22 Q Are you aware of whether the City has ever in
23 any context granted a request for a rate increase that
24 went beyond a contractual rate?

25 A Yes.

1 Q The City has done that; correct?

2 A The City has done that.

3 Q Right. And the City didn't have to renegotiate
4 hundreds of other contracts because of that; correct?

5 A No.

6 Q Okay. But you would agree, would you not, that
7 there are additional costs in running a transfer station
8 and transferring that waste to a landfill over and above
9 just accepting waste at a landfill?

10 A Yes, and I think that's represented in the rate
11 as well which is higher than the other two rates.

12 Q Exactly.

13 And you realize that TDSL has a rate for
14 taking waste to its landfill; correct?

15 A Correct.

16 Q And you understand that TDSL is not claiming
17 any adjustment -- or requesting any adjustment to that
18 rate; correct?

19 A I -- can you repeat that.

20 Q Sure. TDSL isn't saying, City, if you bring
21 waste to our landfill, you have to pay us more.

22 A Oh. Correct.

23 Q Right.

24 And so if TDSL is not requesting any
25 increase in its landfill rate, isn't it fair to say that

1 the other landfills wouldn't have any basis for
2 increasing their rates? Isn't that the apples-to-apples
3 comparison?

4 A I don't -- I don't think that would prevent
5 them from coming to the City and making that request.

6 Q Now I think we started with this, and I'm sorry
7 to go back to it but I still want to make sure I
8 understand.

9 If the Court denies the City's request for
10 an injunction, does the City have a plan as to what it's
11 going to do?

12 A I -- I'm going to say no. I -- I can't -- no.

13 Q So you spent a lot of time in your direct
14 testimony talking about the things that you contend
15 would happen if the City loses access to Starcrest;
16 correct?

17 A Yes.

18 Q But since the City hasn't decided what to do if
19 no injunction is granted, those things might not happen;
20 isn't that correct? Because the City might choose not
21 to lose access to Starcrest.

22 A No, I totally disagree. I think those things
23 will happen.

24 Q But those things will only happen if the City
25 loses access to Starcrest; correct?

1 A Yes.

2 Q Okay. So, let me ask it again.

3 Has the City decided that if it does not
4 get an injunction, it is going to not pay TDSL and lose
5 access to Starcrest?

6 A We're going to pursue all legal remedies that
7 we have.

8 Q Going to try one more time because I don't
9 think that's responsive.

10 You spent a lot of time talking about
11 losing access to Starcrest, and my point is isn't it up
12 to the City -- if the injunction is denied, isn't it up
13 to the City whether they lose access to Starcrest or
14 not?

15 A Absolutely not. There's two people in this --
16 or there's two companies in this contract, and TDS plays
17 a role as well. And so it's up to TDS here.

18 Q And TDS has said if the City agrees to pay,
19 without prejudice to trying to recover that money if the
20 City's interpretation is correct, we will allow -- TDSL
21 will allow access to Starcrest; right?

22 A And the City is saying follow the contract.

23 Q So the -- it will be up to the City to choose
24 what to do if the injunction is denied.

25 A We will certainly make a decision as to what to

1 do.

2 MR. HEMPHILL: Pass the witness, Your
3 Honor.

4 MS. KIRKLAND: Brief redirect, Your Honor?

5 THE COURT: Yes. And I do want to know,
6 are there more witnesses?

7 MS. KIRKLAND: Not from -- on our side, on
8 Movant's side. I do anticipate he has one.

9 MR. HEMPHILL: We do have a witness, Your
10 Honor.

11 THE COURT: All right. Because we are at
12 the 4-hour mark, as you know. And do you think that
13 with your other witness that we will be here until 5:00?
14 I don't have anything else to do. I just need to know
15 what timing is like.

16 MR. HEMPHILL: I believe so, Your Honor.

17 THE COURT: And do you think we'll be able
18 to conclude by 5:00?

19 MR. HEMPHILL: I would hope so, Your
20 Honor, yes. I will do my best to keep it as short as I
21 can.

22 THE COURT: All right. Let's see how it
23 goes, because the other option would be that I would
24 carry you over until tomorrow. And I just need to know
25 if I need to do that because I need to notify presiding.

1 MR. HEMPHILL: Understood.

2 Is that -- that something that the Court
3 would want to figure out now or later or just see how
4 the next witness goes?

5 THE COURT: It's something that the Court
6 will want to figure out by 4:30.

7 MR. HEMPHILL: Thank you, Your Honor.

8 THE COURT: Because others, besides me,
9 need to know.

10 MR. HEMPHILL: Thank you, Your Honor.

11 THE COURT: Okay. All right.

12 MS. KIRKLAND: I'll keep it brief, Your
13 Honor.

14 THE COURT: Yes, please.

15 **REDIRECT EXAMINATION**

16 BY MS. KIRKLAND

17 Q Again, I just want to follow up on the
18 conversation we just had in terms of choice and whose
19 actions have choices.

20 They are saying that it is in the City's
21 hands to keep access to Starcrest; specifically, the
22 City can pay back-invoices.

23 Has it been the City's understanding that
24 the only back-invoices they need to pay are those four
25 invoices they received to date at the higher rate?

1 A No. That is not our understanding at all.

2 Q And, in fact, is that inconsistent with the
3 notice letters that are attached as Exhibit F and
4 Exhibit J to your application?

5 A Correct.

6 Q Importantly, let's assume you would -- if we
7 were just discussing the invoices through this year, I
8 believe his estimate was approximately 300,000?

9 A I think it's closer to 3 million.

10 Q Well, so let's talk about it. If the judge or
11 the Court -- I'll phrase it differently.

12 If the City was going to entertain the
13 idea of paying these invoices that are coming in, the
14 back-invoice to date is approximately -- you said
15 about -- how much do you think you've been invoiced to
16 date?

17 A Oh, I -- with the four invoices, I don't recall
18 off the top of my head.

19 Q This last bill, it was approximately a
20 hundred -- if we look at Exhibit K, approximately a
21 \$150,000 for -- it's hard to say, maybe three weeks?

22 So if you push that forward, do you have
23 any idea how much the City could even anticipate paying
24 at this higher disposal rate?

25 A And this is just for two weeks. I -- I think

1 through the -- through a fiscal year, you're looking at
2 close to \$3 million.

3 Q Is that money that the City has?

4 A It is not money that the City has.

5 Q Is it the City's position that they were
6 prevented from meeting the put-or-pay requirement in
7 2022?

8 A Yes, it is.

9 Q Is the City asking -- is what the City is
10 asking for from the Court today, not in regard to the
11 declaration what we ultimately are seeking at the trial,
12 but just for the Court to maintain the status quo until
13 trial?

14 A That is correct, yes.

15 MS. KIRKLAND: Pass the witness, Your
16 Honor.

17 MR. HEMPHILL: No more questions.

18 THE COURT: All right.

19 Thank you, Mr. Newman.

20 (Witness steps down)

21 (Brief discussion off the record)

22 THE COURT: All right. Does the City
23 rest?

24 MS. KIRKLAND: Yes, Your Honor. We would
25 like a close -- a brief close at the end.

1 THE COURT: Yeah, I'm going to allow it.

2 But you don't have any other witnesses?

3 MS. KIRKLAND: No, Your Honor, subject to
4 if anything in rebuttal comes up, but I don't
5 anticipate.

6 THE COURT: Okay. Subject to rebuttal,
7 the City will rest.

8 Mr. Hemphill, would you like to call a
9 witness?

10 MR. HEMPHILL: We would.

11 First, we would just like to move for
12 denial of the temporary injunction for the City's
13 failure to meet its burden in its case-in-chief,
14 particularly not showing irreparable harm and not
15 showing that it is not in breach, particularly with
16 regard to the 2022 put-or-pay shortfall that the City
17 has refused to pay.

18 I think the witness testified and
19 confirmed that the City did not follow the process in
20 the contract to receive a setoff, so I want to make that
21 clear for the record.

22 THE COURT: Okay. Would you like to
23 respond?

24 MS. KIRKLAND: Your Honor, yes.

25 If I may, I do think the City has

1 established its burden. We've shown a probable -- or a
2 cause of action, probable right to relief, and as well
3 as a probable injury.

4 I do think in terms of whether or not he
5 spoke -- you heard his testimony on whether or not we
6 thought we were in breach of last year's contract in the
7 put-or-pay. He testified that he thought the City was
8 prevented from performing.

9 But more importantly, that's not the
10 standard for purposes of the temporary injunction. It's
11 whether or not we're entitled to the relief we're
12 seeking under the declarations, and I do think we've met
13 that burden in addition to disproving whether or not
14 there was a breach of contract.

15 But I think we've shown that we have a
16 probable right to relief on the declarations that we're
17 seeking, specifically access to the property and the
18 rate being charged at the contractual rate.

19 And we have demonstrated, as Mr. Newman
20 testified multiple times, there is an immediate and
21 irreparable harm that will be caused by (sic) the City
22 if they are denied this particular relief. So I think
23 we've met our burden.

24 THE COURT: All right. Your request for a
25 directed verdict at this time is denied.

1 MR. HEMPHILL: Plaintiff-Respondent calls
2 Bob Gregory.

3 (Witness takes the stand)

4 **BOB GREGORY,**

5 having been first duly sworn, testified as follows:

6 THE COURT: You may proceed, Mr. Hemphill.

7 **DIRECT EXAMINATION**

8 BY MR. HEMPHILL

9 Q Could you state your name for the record,
10 please.

11 A Bobby Edward Gregory.

12 Q Mr. Gregory, what's your position with TDSL?

13 A I am the president, principal owner, CEO of
14 TDSL.

15 Q Let's try to do a little history, quickly. Go
16 back to 1993. Was your position with TDSL the same
17 then?

18 A Yes.

19 Q Were you involved in the discussions and
20 negotiations with the City of San Antonio that resulted
21 in what became the agreement between the parties?

22 A Yes.

23 Q Are you the person who approved the agreement
24 for TDSL?

25 A Yes.

1 Q Are you the person who ultimately approved the
2 amendments and the special addendum to the agreement?

3 A Yes.

4 Q And what I -- if I talk about the agreement
5 generally today, I'm talking about all of the
6 agreements; fair enough?

7 A Yes.

8 Q Unless I specify otherwise?

9 A Yes.

10 Q Now, do you recall that in the original
11 contract -- and actually, I think it was in the RFP,
12 there was a mechanism for increasing the price or
13 adjusting -- yearly adjustments of the price that TDSL
14 could charge to the City?

15 A Yes.

16 Q And you recall -- well, if you could look at,
17 first of all, Exhibit 1 in the notebook in front of you.

18 A Tab 1?

19 Q Tab 1.

20 A Yes.

21 Q Do you recognize that as the original
22 agreement?

23 A Yes, I do.

24 MR. HEMPHILL: Your Honor, again, I
25 believe it's in the record, but for purposes of this,

1 I'd like to offer TDSL Plaintiff's Exhibit 1, the
2 original contract.

3 MS. KIRKLAND: No objection.

4 THE COURT: Plaintiff's Exhibit 1 shall be
5 admitted into evidence.

6 (Plaintiff's Exhibit 1 admitted)

7 Q (MR. HEMPHILL) Now if you could look,
8 Mr. Gregory, at Exhibit 1. It says page 20 of 38 at the
9 bottom.

10 A Page 20?

11 Q Twenty of 38 in blue at the bottom.

12 A I got it.

13 Q Is that the Consumer Price Index escalator that
14 we've been talking about today?

15 A Yes, it is.

16 Q Okay. At the time TDSL entered into this
17 agreement that's Exhibit 1, did TDSL have any
18 expectation regarding whether the CPI escalator would be
19 sufficient to keep up with TDSL's increased costs over
20 time?

21 A Yes, sir.

22 Q What was that expectation?

23 A We thought it would cover all of the cost
24 increases due to operation of the transfer station and
25 the transfer of waste to the landfill.

1 Q Was that indeed its effect?

2 A That was not its effect at all.

3 Q As you sit here today, has that -- has this CPI
4 escalator been sufficient to keep up with TDSL's
5 increased costs in operating Starcrest?

6 A It has not. It's been woefully inadequate.

7 Q Is TDSL making money, losing money, breaking
8 even on its Starcrest operations with the City?

9 A TDSL loses over a hundred -- \$200,000 a month.
10 That's over two-and-a-half million dollars a year.

11 Q Have you asked members of your staff under your
12 direction to research how certain costs have increased
13 and represent them in graphic form?

14 A Yes.

15 Q Could you turn to Tab 11 in the notebook,
16 please?

17 A I have it.

18 Q Is this a fair and accurate representation of
19 the data that has been compiled by your staff at your
20 request?

21 A Some of it, yes.

22 Q Okay.

23 MR. HEMPHILL: Plaintiff offers
24 Exhibit 11.

25 MS. KIRKLAND: No objection, Your Honor.

1 THE COURT: Plaintiff's Exhibit 11 shall
2 be admitted into evidence.

3 (Plaintiff's Exhibit 11 admitted)

4 Q (MR. HEMPHILL) Now, Mr. Gregory, what does --
5 what does this chart show as the percentage increase of
6 TDSL's rate to the City from 1995 through
7 September 2022?

8 A It shows it to be a 74 percent increase.

9 Q And just to the left of that, what does it show
10 as the City of San Antonio rate to citizen percentage
11 increase, 1995 estimated rate through September 2022 as
12 obtained from the website and historical data according
13 to this exhibit?

14 A 215 percent.

15 Q And what does the chart show as in regard to
16 the cost of diesel fuel?

17 A 806 percent.

18 Q 806 percent increase?

19 A Yes.

20 Q Is diesel fuel a major component of TDSL's
21 expense in operating Starcrest?

22 A Yes.

23 Q And is it a major factor as to why the CPI
24 escalator has not been adequate?

25 A Yes. Clerical workers -- CPI does not cover --

1 or adequately cover the increased price of fuel, trucks,
2 trailers, most things related to our contract.

3 Q And those things are shown on this Exhibit 11?

4 A They are, with the exception of two rates by
5 the City of San Antonio. And those were not restricted
6 under the CPI. They were without restriction.

7 Q Is it your understanding that the City of San
8 Antonio has no limitation on the amount of increase that
9 it can pass on to its customers?

10 A Well, I think that's controlled by the City
11 Council. I think they would say they have some -- some
12 limitation, but it's not restricted, to my knowledge, by
13 any CPI.

14 Q This -- this situation with increased costs,
15 not keeping up with the CPI escalator, has that been
16 brought -- has TDSL brought that to the City's attention
17 before August 2nd, 2021?

18 A Yes, for approximately a decade before that.

19 Q Okay. And has some of that been communicated
20 with Mr. Newman?

21 A Yes.

22 Q And the letter that we saw that TDSL sent to
23 the City of San Antonio on August 2nd, 2021, was that
24 new information?

25 A No. I don't think any of it was new except,

1 perhaps, the amount of the billing of bulky waste. We
2 had -- we had complained and talked numerous times about
3 the problem with the added costs to manage the bulky
4 waste and it not being covered. That was just new
5 that -- that we were submitting an invoice for that
6 amount.

7 Q Fair enough.

8 So the issues with the CPI escalator being
9 inadequate were not new at that point?

10 A Not at all.

11 Q Has -- in response to these communications that
12 TDSL has had with the City, has the City ever offered to
13 make an adjustment to TDSL's rate at Starcrest other
14 than with the CPI escalator?

15 A Ask the question again. Has TDS offered?

16 Q No, no, no.

17 Has the City offered to ever make any
18 adjustments to TDSL's rate other than under the CPI
19 escalator?

20 A They have not.

21 Q Has TDSL made proposals to the City for rate
22 adjustments?

23 A Numerous proposals on different occasions.

24 Q Has the City accepted any of those proposals?

25 A No.

1 Q Now we talked some earlier about the concept of
2 regularly collected municipal solid waste; do you
3 remember that?

4 A Yes.

5 Q And we talked -- and that's in the second
6 amendment, which is Plaintiff's Exhibit 3. At the
7 bottom of page three, if you'd like to -- and going on
8 to the top of page four, if you'd like to refer to it
9 while I ask these questions.

10 A I have it.

11 Q Were the provisions with regard to TDSL agrees
12 to accept regularly collected solid waste as processed
13 through Starcrest from 1991 to 1995, were those
14 provisions important to TDSL in agreeing to accept a
15 hundred thousand tons of waste per year at Starcrest at
16 the contract rate?

17 A Absolutely.

18 Q Can you please give a brief explanation as to
19 why those provisions were important?

20 A Well, there's broad definitions of what solid
21 waste is and what the City could deliver that is
22 generated by residences and small businesses. So the
23 type of waste, its compactability, how heavy it is, and
24 how it fills the trailers, and what the payload would be
25 are very, very important in the operation of a transfer

1 station and the transfer of waste. It involves the
2 cost.

3 Q Could the City bring to Starcrest waste
4 different than regularly collected municipal solid waste
5 of the type that was processed from 1991 to 1996?

6 A Yes.

7 Q Could they do that at the contract rate?

8 A No.

9 Q What would be the rate for different types of
10 waste?

11 A The contract provided that the rate would
12 either be a rate negotiated and agreed to by the
13 parties, or it would be the rate that TDS charges the
14 other customers, the gate rate so to speak, or it would
15 be a special waste charge, things like dead animals,
16 tires, things that are outside the norm of what is
17 collected regularly during that period of time, and
18 particularly from 1991 to 1996.

19 Q After the second amendment was entered, did the
20 City change the types of waste it was bringing to
21 Starcrest other than those that were regularly collected
22 and processed from '91 through '96?

23 A Yes, it did.

24 Q Was the City's handling of bulky waste one of
25 those changes?

1 A Yes.

2 Q If you would look at Tab 5 to your notebook.

3 This is an excerpt from the City San
4 Antonio Code of Ordinances, chapter 14, article one,
5 definition, solid waste. And there's a definition of
6 bulky waste there. Do you see that?

7 A I do.

8 Q Have you had a chance to review that
9 definition?

10 A I have.

11 Q Do you believe that definition is consistent
12 with your understanding of bulky waste?

13 A Yes.

14 MR. HEMPHILL: To the extent necessary,
15 Your Honor, we move to admit exhibit -- Plaintiff's
16 Exhibit 5.

17 MS. KIRKLAND: No objection.

18 THE COURT: Plaintiff's Exhibit 5 shall be
19 admitted into evidence.

20 (Plaintiff's Exhibit 5 admitted)

21 Q (MR. HEMPHILL) So from 1991 through 1996, how
22 did the City handle residential bulky waste as it
23 relates to Starcrest?

24 A The City collected residential waste. It
25 collected bulky waste along with that to the extent that

1 it would fit into a truck or it was regular household
2 waste. Large, bulky waste was picked up twice a year,
3 and they had community clean-ups where they could
4 deliver it to Starcrest and other locations as well.

5 But bulky waste is a broad term, and it
6 includes things that are very small, very large. This
7 mainly is dealing with larger items, the definition that
8 you're referring to.

9 Q And from 1991 to 1995 when the City brought
10 bulky waste to Starcrest, was it compacted, uncompact?
11 What was the nature of the waste?

12 A It was to 1996 by the way, but it was
13 compacted.

14 Q What if citizens had bulky waste they wanted to
15 dispose of at times other than the times that the City
16 did the curbside bulky waste collection? Where could
17 they take that waste? Could they take it to Starcrest?

18 A Well, as long as TDSL has operated Starcrest,
19 yes. They could bring it to Starcrest. They could take
20 it to other landfills as well.

21 Q And what rate would TDSL charge for such bulky
22 waste at Starcrest?

23 A The rate today is \$40 a cubic yard. That has
24 been raised through the years, so I'm not sure what it
25 would have been when we very first started, but it's

1 relative to that.

2 Q Would it be -- would it have been the City's
3 contracted rate?

4 A It would not have ever been the City's
5 contracted rate.

6 Q Okay. Is uncompacted bulky waste more costly
7 to process?

8 A Yes.

9 Q Why?

10 A First of all, at Starcrest there is a direct
11 dump where you pull up and directly into the trailer.
12 The other location is a compactor, and you have to doze
13 it through. It takes a lot longer to doze it through
14 and a lot more labor and time.

15 So bulky waste is a -- is a waste stream
16 that is more expensive to manage. It fills the trucks
17 quicker, and you -- the payload going to the landfill is
18 less. So it's a very, very different waste stream,
19 hence two different compactor chutes the way you --
20 where it's handled.

21 Q And so the City, when it started bringing bulky
22 waste to Starcrest from citizen drop-off centers and
23 roll-offs, was that uncompacted?

24 A It was uncompacted, yes.

25 Q More costly to deal with?

1 A Yes.

2 Q Was it eligible for the contract rate?

3 A No, it was not.

4 Q Did TDS accept it for a time at the contract
5 rate?

6 A It came to -- it came to Starcrest for a while
7 and I was -- I was not aware of it, nor people in the --
8 in the Austin operation were aware that it was coming as
9 a bulky waste from a citizens' drop-off location.

10 Q Did the City notify TDSL of this change in
11 practice?

12 A All we know is that there was a communication
13 between our billing department that they were going to
14 start hauling waste and that, to my knowledge and to our
15 staff's knowledge, there was no indication that it was a
16 bulky waste material.

17 Q So does the -- did that bulky waste qualify for
18 the contract rate?

19 A No.

20 Q What rate would have been applicable? Not
21 number, but how would you have calculated what was
22 applicable?

23 A The gate rate for the -- that other customers
24 are charged.

25 Q Since discovering this, has TDSL sent an

1 invoice to the City for the difference between what it
2 paid and what the cost should have been?

3 A Initially, we didn't. We tried to negotiate
4 things to make up a difference, but when we realized
5 that it was a failed attempt we did charge the City for
6 the bulky rate.

7 Q Has the City paid the invoice?

8 A No.

9 Q If you could look at Exhibit 6 in your
10 notebook.

11 Does that appear to be a true and correct
12 copy of the invoices we just discussed?

13 A Yes.

14 MR. HEMPHILL: Plaintiff offers
15 Plaintiff's Exhibit 6.

16 MS. KIRKLAND: No objection, Your Honor.

17 THE COURT: Plaintiff's Exhibit 6 shall be
18 admitted into evidence.

19 (Plaintiff's Exhibit 6 admitted)

20 Q (MR. HEMPHILL) What's the total amount owed by
21 the City under this bulky waste invoice?

22 A Total amount due, \$11,823,128.48.

23 Q Has TDSL declared the City in default for
24 nonpayment of this invoice?

25 A Yes.

1 Q Is the City -- is TDSL requiring payment of
2 this invoice for the City to maintain access to
3 Starcrest?

4 A No. That will be dealt with in the litigation.
5 It's not part of whether they'll lose access to
6 Starcrest.

7 Q Also been in disagreement with the City over
8 dead animals; correct?

9 A Yes.

10 Q Okay. From your perspective, has the City's
11 practices in collecting dead animals and taking them to
12 Starcrest changed since 1996?

13 A Yes.

14 Q How have you observed them to change?

15 A Today's the first day I've heard that there was
16 ever a veterinarian charge of \$10 an animal, or
17 whatever, back in those days. I was not aware of any.

18 When TDS took over the operation of the
19 transfer station, there were dead animals that regularly
20 came in commingled with residential waste. And there
21 was a collection vehicle that collected some roadkill
22 that -- that I assumed, a fraction of the volume that
23 is -- that later -- more recently that has come in since
24 I believe they implemented the concierge service where a
25 resident would call and make an appointment and then

1 they would go pick up the dead animal one-on-one or
2 certainly to -- their charge from veterinarians to
3 service commercial dead animal collection.

4 Q Has -- have the amount of dead animals
5 increased or decreased or stayed the same since -- since
6 the second amendment was entered coming to Starcrest?

7 A The dead animals that came in separated loads
8 of just dead animals have increased dramatically. It's
9 hard -- we don't know what is commingled in with
10 garbage, just like someone may throw away a basketball
11 for that matter. You know, you don't -- you don't
12 count -- you don't know, you're unaware of how many are
13 commingled with the -- with the waste.

14 Q Has this presented any particular problems at
15 Starcrest for TDSL?

16 A It was -- it has always been a problem,
17 particularly at night hauls where dead animals came in
18 on Saturday because the City wouldn't -- wouldn't
19 regularly not cover them with lyme, so that they would
20 be -- they would -- wouldn't be a vector problem.

21 But it certainly became a problem when
22 five different routes of dead animals started coming in,
23 and that's when we started asking questions and later
24 realized that -- from a survey of veterinarians that
25 they were -- that there were veterinarians paying \$10 an

1 animal to -- to haul in. And then the large numbers
2 coming in made a -- made a big difference, particularly
3 on the night hours and off hours, let's say, and on
4 Saturday.

5 Q From TDSL's perspective, does this -- these
6 large amounts of dead animals delivered in bulk qualify
7 for the contract rate?

8 A No.

9 Q What rate do they qualify for?

10 A They qualify for a special waste rate. And we
11 think the City's choice of \$10 per animal for their
12 commercial collection, which we know does happen, is
13 appropriate.

14 Q Is TDSL willing to accept these bulk loads of
15 dead animals -- well, first of all, let me ask it this
16 way.

17 Is fair to say that TDSL considers these
18 large loads of bulk dead animals different than
19 regularly collected municipal solid waste processed at
20 Starcrest between '91 and '96?

21 A Yes.

22 Q Is TDSL willing to accept the dead animals at
23 Starcrest for the special waste rate?

24 A Yes, we are, assuming that they're not in such
25 large numbers that they become a problem with the

1 permit. We certainly can't have a vector problem or an
2 odor problem if thousands of animals were delivered on
3 any -- any single day. It's not -- it's not a landfill.

4 Q Now I want to briefly talk about put or pay.
5 We've done quite a bit on this, but just want to
6 confirm.

7 Does the bulky waste that we've been
8 talking about, the uncompacted bulky waste, would that
9 count toward satisfying the City's hundred thousand ton
10 put-or-pay requirement?

11 A If it's not a regularly collected waste, and
12 from the period of time '91 to '96, it does not qualify
13 as an acceptable waste, and it is does not qualify for
14 the credit against the put or pay -- or towards the put
15 or pay.

16 Q And as part of the invoice that's Exhibit 6 to
17 the City for a put-or-pay shortfall when tonnage from
18 the uncompacted bulky waste is deducted?

19 A Part of this invoice does include an adjustment
20 to the -- to the -- ask the question again. Maybe I
21 misunderstood it.

22 Q Sure, yeah.

23 A Sorry.

24 Q Does this invoice include charges for failure
25 to meet put or pay when the bulky waste is deducted?

1 A Yes.

2 Q And TDSL has also invoiced the City for a
3 put-or-pay shortfall for the fiscal year ended July --
4 excuse me, September of 2022; correct?

5 A Yes.

6 Q And is that invoice Plaintiff's Exhibit 8 in
7 your book?

8 A Yes.

9 Q I believe that's already in evidence.

10 Has the City paid for that put-or-pay
11 shortfall?

12 A No.

13 Q Has TDSL declared the City in default for
14 failure to pay that put-or-pay shortfall?

15 A Yes.

16 Q Does TDSL maintain that the City properly is
17 entitled to any setoff for alleged violation of the
18 priority provisions for this invoice that's Plaintiff's
19 Exhibit 8?

20 A No. We -- this -- today is the first we've
21 heard about their practice of having setoffs without
22 notifying us.

23 Q Did TDSL agree to a contract that says TDSL
24 shall service City trucks within 30 minutes at Starcrest
25 unless 15 or more show up at the same time?

1 A No.

2 Q Would TDSL have agreed to such a provision?

3 A No.

4 Q Why not?

5 A It would be impossible. It would be impossible
6 because the City would be sending more waste than the
7 transfer station could possibly manage in a 30-minute
8 time period.

9 Q Are there physical limitations as to how much
10 waste Starcrest can handle in a certain period of time?

11 A Yes.

12 Q And does it -- what factors go into that?

13 A Well, part of it is the -- the weight of the
14 load that's coming in and the compactability of the
15 garbage or the waste that's coming in, the speed at
16 which the drivers take to process their load.

17 We don't control when -- how many trucks
18 come in at one time. We don't control how full they are
19 or what their -- what type of waste they are. We accept
20 the City's waste, and we don't control how fast the
21 drivers move through the site. They can take time to
22 tend to their own personal business or whatever before
23 they leave the site.

24 Q Does the City waste come in in a predictable,
25 uniformed manner?

1 A It comes in a very unpredictable and very
2 un-uniformed manner from very, very high peaks to very,
3 very low valleys to nothing in one-hour periods of time
4 slots.

5 Q Has your staff under your direction compiled
6 some information about tonnage and loads coming in over
7 certain time periods to Starcrest to --

8 A Yes.

9 Q Could you look at Exhibit 12, please?

10 A I have it.

11 Q Are those four pages examples of data collected
12 by your staff under your direction with regard to timing
13 and amount of loads coming into Starcrest from the City
14 at particular different time frames?

15 A Yes.

16 Q So, for example, let's look at the second page.

17 MR. HEMPHILL: Oh. Plaintiff offers
18 Exhibit 12.

19 MS. KIRKLAND: No objections, Your Honor.

20 THE COURT: Plaintiff's Exhibit 12 shall
21 be admitted into evidence.

22 (Plaintiff's Exhibit 12 admitted)

23 Q (MR. HEMPHILL) If you look at the second page
24 of Exhibit 12, can you tell us what this shows?

25 A This is a graph that depicts one day in the

1 life of the transfer station. It is February 10th,
2 2022. You can see the graph starts at 8:00. There's an
3 hour slot between 8:00 to 9:00 and goes all the way over
4 to -- it says 18:00 to 19:00, but that's -- that's
5 military time, so to speak.

6 So the high peak is from 11:00 to
7 12:00 a.m. in the morning, and there are 16 trucks that
8 came in delivering 151 tons during that one-hour time
9 slot. You can see the time before, the hour slot
10 before, it was six trucks delivering 66 tons. The hour
11 before it was 8.7 tons coming in in one truck.

12 So the blue graph shows the tonnage, and
13 the -- the gold line, so to speak, is the tickets or the
14 loads, the different number of loads.

15 So the axis on the right-hand side shows
16 the number of trucks. So you have one-hour time slots
17 where there's six -- 16 that show up. The next hour is
18 three. Then it goes to five, then six, then nine, then
19 five, all the way out to the end of the day.

20 Q Let's just break for a minute.

21 A If I may, the peak deliveries in that time
22 slot, the one at -- between 11:00 to 12:00, if
23 annualized over a year would be -- and carried ten hours
24 a day would be an annual tonnage of 396,000 tons per
25 year.

1 So we, TDSL, can't just -- based on the
2 City's demand, they are -- they are demanding that we be
3 prepared and ready to take this volume of trucks and
4 tonnage every hour of the day, every day of the year.

5 Q And do you -- I'm sorry.

6 A And it just depicts how difficult it is to
7 staff the transfer station to carry 396,000 tons a year
8 in this one-day case when the other days they would have
9 little to nothing to do.

10 Q Do you believe that's required by the contract?

11 A I do not believe it's required by the contract
12 nor that it's reasonable.

13 MR. HEMPHILL: Your Honor, I just want to
14 be respectful of time. I know you said 4:30, and I've
15 gone a little past that, and I still have more. I think
16 I can finish direct by 5:00, but I don't -- I mean,
17 obviously there might be cross-examination and closing.
18 So I don't know what the Court's preference is, but I
19 just wanted to orient the Court as to where we are right
20 now if the Court needs to make any kind of arrangements.

21 THE COURT: Okay. So I am going to step
22 off anyway. It's probably time for a break for my court
23 reporter as well because I give her a break about every
24 hour-and-a-half.

25 So I'm going to step off. I'm going to

1 make a necessary call to presiding. I'm going to need
2 to hold you over.

3 And then tomorrow morning, I am actually
4 supervising incoming jurors for panels, so I will be
5 finished probably tomorrow around 10:00 to 10:30, so
6 that would mean that you would be here around that time
7 tomorrow. So it's not going to be bright and early in
8 the morning because I have to supervise the jurors.

9 MS. KIRKLAND: Whatever works for Your
10 Honor works for me as well.

11 THE COURT: Okay. So they keep us busy
12 here.

13 MS. KIRKLAND: I'm sure.

14 THE COURT: So let me make the call, and
15 then I'll come out and tell you what time to be here
16 tomorrow, and I'm thinking that what we do is adjourn
17 for the day, Mr. Hemphill. And then, I mean -- by the
18 time I come back, it's going to be around 5:00.

19 MR. HEMPHILL: Yeah, I could -- yes.
20 That's -- that's fine, Your Honor. I could -- I could
21 wrap it up probably in 15 minutes, but I think the Court
22 has a better idea.

23 THE COURT: Well, you know, my bailiff
24 also has to be here, so I'll check and see because I
25 can't be left without security.

1 MR. HEMPHILL: Of course.

2 THE COURT: So let me see.

3 (Recess)

4 THE COURT: My bailiff has kindly said
5 that he will stay with me.

6 And, Gina, that's fine with you. Gina, I
7 know. No pressure, Gina. But since we have to have a
8 record, Gina.

9 And so we're going to go ahead and stay
10 and allow Mr. Hemphill to finish his direct of this
11 witness, and then we will come back tomorrow at 10:30.

12 You will continue with cross,
13 Ms. Kirkland, and then I'm sure there probably will be
14 some redirect.

15 And then I just want to see, do you have
16 another witness or is this it?

17 MR. HEMPHILL: We do not have another
18 witness, Your Honor.

19 THE COURT: Okay.

20 MS. KIRKLAND: And at this point, I don't
21 anticipate any rebuttal.

22 THE COURT: Okay. So then after that,
23 then we can go ahead and hear closing and we can be
24 done.

25 Okay. Sounds good. That's the plan.

1 Please proceed, Mr. Hemphill.

2 MR. HEMPHILL: Thank you, Your Honor.

3 Q (MR. HEMPHILL) Mr. Gregory, we were looking at
4 Exhibit 12, and you explained the second page.

5 In sum, are the other pages similar data
6 from other time frames?

7 A The first page depicts an entire -- excuse me,
8 depicts an entire year from October 1st, 2020, to
9 November -- to September 30th, 2021. And, again, it
10 shows all hours of the day. This is all the days in
11 the -- the axis on the left shows up to 24,000 -- 21,000
12 loads that came in during that time slot from 10:00 to
13 11:00, whereas the hour before it was 6700 loads.

14 Q Is that loads or tons?

15 A Well, both are -- both are depicted. You can
16 see tons are in blue, and the -- and the numbers below
17 those blue lines not only depict the time slot of 9:00
18 to 10:00 or 8:00 to 9:00 or 7:00 to 8:00, but the number
19 of tons received during that time slot for the whole
20 year and the number of loads.

21 So when 2232 trucks come in -- loads come
22 in, at 10:00 -- 10:00 to 11:00, but 958 loads come in
23 the hour before, we don't get people to work part-time
24 or come in during busy times. They're on a -- they're
25 on a full-day shift.

1 So this is -- this first page of Exhibits
2 12 shows an entire year.

3 The next page that we previously discussed
4 shows one day on February 10th.

5 The third one shows a period of time from
6 January 1st, '22, to March 3, '22, and it shows, again,
7 those peak hour time slots, how the very erratic and
8 irregular flow of waste comes in.

9 We've asked the City to please regulate
10 those and bring them in at a 40-ton-per-hour rate
11 because 40-ton-an-hour rate will allow them to meet
12 their hundred thousand tons a year. But you can see on
13 the -- on page two of the exhibit, it's not 40 tons an
14 hour; it's 151 tons per hour. So the staffing to handle
15 151 tons versus 40 tons an hour is dramatically
16 different. It's dramatically more expensive for us to
17 operate.

18 We had no way of knowing this in 1993 or
19 1995 or 1998 when these contracts were being done.

20 Q You've mentioned a rate of 40 tons per hour.
21 If that were the constant rate, that would satisfy
22 throughout a year the City's put-or-pay requirement of a
23 hundred thousand tons; correct?

24 A Correct.

25 Q Is the current staffing at Starcrest by TDSL

1 sufficient to handle a constant load of 40 tons an hour?

2 A Yes. There's current staffing now.

3 Q Yes.

4 A Yes, it certainly is.

5 Q And does TDSL consider that taking reasonable
6 care?

7 A We do.

8 Q Show you one other. And these are quite large
9 because they're illegible if they're not, so I apologize
10 for their size.

11 Has your staff at TDSL also compiled data
12 about loads and ton -- or tonnage per hour over a
13 25-month period?

14 A Yes.

15 Q And is that depicted on the exhibit I just
16 handed you?

17 A Yes.

18 MR. HEMPHILL: Plaintiffs would offer this
19 exhibit as Plaintiff's Exhibit 13.

20 MS. KIRKLAND: No objection, Your Honor.

21 THE COURT: Plaintiff's Exhibit 13 shall
22 be admitted into evidence.

23 (Plaintiff's Exhibit 13 admitted)

24 Q (MR. HEMPHILL) Okay. Now very briefly,
25 there's some things -- well, first of all, what does

1 this -- this shows tons coming into Starcrest from the
2 City every hour, every day for a 25-month period; is
3 that accurate?

4 A That's correct.

5 Q And some are highlighted in yellow, some hour
6 periods. What are those? What do those represent?

7 A At the top of the page, you can see the heading
8 is 2021 to 2023, the period of time you just stated, by
9 the hours of day and the tons.

10 Tons of City waste received at Starcrest
11 by the vehicle arrival time within each one-hour time
12 slot over 40 tons per hour are highlighted in yellow.
13 You see the ones highlighted in yellow? Those are
14 amounts of tons over 40 tons per hour, which, again, 40
15 tons per hour allows the City to meet a hundred thousand
16 tons a year if it stayed consistent throughout the day.

17 The one-hour time slots receiving over 80
18 tons per hour of waste are bracketed or blocked.
19 They've got a line drawn around them. And then the peak
20 tonnage of each one-hour time slot is highlighted in
21 pink.

22 So you can go through the pages here and
23 know it's 25 months, every hour of every day, but you
24 can see the peak time slot for that whole 25-month
25 period.

1 On page one, you'll see the hours between
2 9:00 and 10:00 is 119 tons came in at -- between
3 9:00 a.m. and 10:00 p.m. Now the hour before it, only
4 21 tons came in.

5 You can go across the page and find that
6 some of them, particularly in the earlier stages, the
7 City was going -- was arriving later than we were
8 normally open, and we accommodated that, and they were
9 arriving earlier. You'll also see days on here that
10 were weekends where waste was received on the weekend.

11 We were doing way -- well over and above
12 the call of duty, so to speak, in taking waste and
13 accommodating the City's needs.

14 Interestingly enough, the high point of
15 the entire 25-month period and all hours of the day
16 occurred on the day that we sent the letter, August 2nd,
17 2021. And you'll see at 11:00 to 12:00 p.m., there was
18 192.11 tons delivered in that one-hour time period. Now
19 the hour before it only had 31 tons received. The hour
20 after it only had 19 tons received.

21 So I think you can get a grasp of the
22 challenge we had in staffing this, not knowing the
23 demand that the City would -- would bring upon us.

24 And if you just look at the pink shades,
25 you'll see that there's -- the pink occurs -- only one

1 pink is on each time slot. You'll see how they're
2 scattered out through the day. So we have to have a
3 full staff to handle these large volumes and large
4 peaks, and when you -- when you look at the City's
5 requirement that there are on the loads per day, and you
6 go back to the previous exhibit, you can -- you can see
7 that we -- depending on the 13-ton, 12-ton per truck
8 that comes in, it's just impossible for us to take the
9 type of waste that they expect us to do if the standard
10 of care is 30 -- at 30 minutes for trucks to wait.

11 Q Is it sometimes impossible with an unlimited
12 amount of staff for TDSL to process City trucks in 30
13 minutes or less?

14 A Yes.

15 Q Even if less -- even if fewer than 15 arrive at
16 the same time?

17 A Yes. Because you have days on here that you
18 have more than 15 arrive and you have a tonnage.

19 The morning shift is typically full, as
20 David testified. They finish their first route and fill
21 the route. In the afternoon shift, there will be more
22 trucks making up less tonnage. But nevertheless, that's
23 a limitation. Just the truck moving through the site
24 takes time because it just takes time.

25 And whenever a truck -- a trailer is

1 filled in the direct dump chute, then that trailer has
2 to be swapped.

3 The one that's the compactor takes much
4 more time to compact, and City's loads really don't work
5 well in the compactor because it jams them up. They
6 weren't designed for the heavy compaction of modern day
7 trucks that really didn't -- the City wasn't using back
8 in the '90s.

9 Q Does TDSL control when and how much waste comes
10 in from the City to Starcrest?

11 A No. No.

12 Q Does the City control that?

13 A Yes.

14 If I may speak to the -- again, this same
15 exhibit that you've handed out, if you go back to the
16 top of the first page, you'll see the 40 tons per hour
17 on 259 workdays is a hundred three thousand tons per
18 year, annualized figure. That day on August the 2nd,
19 2021 was 192.11 tons.

20 Just for example, if you take a 200-ton
21 per hour pace and apply it ten hours a day over all the
22 workdays, that's 518,000 tons per year that the City is
23 basically asking us to staff for and meet, and that is
24 not reasonable. The cost was so great.

25 That's the reason after basically a decade

1 of negotiating and asking the City for relief, after the
2 first mediation we said, We have to cut our costs.

3 We cut from going well above what the
4 current -- what the contract required to something that
5 was easy for the City to meet, we felt, the hundred
6 thousand tons per year.

7 That's mainly the source of their -- their
8 argument, that we should be meeting the maximum amount
9 they ever brought, even the 30 minutes for 15 loads
10 knowing they are 12 to 13 tons per load. It's a
11 tremendous, tremendous workload on the -- on the company
12 and impossible to meet.

13 Q If the Court granted an injunction consistent
14 with Mr. Newman's testimony that requires TDSL to
15 service every City truck within 30 minutes, unless 15
16 arrived at the same time, would it be possible for TDSL
17 to comply with that injunction?

18 A No. Even still the cost -- the loss per month
19 would be much greater than the \$200,000 a month that
20 we're losing now.

21 Q But there still would be occasions when it
22 would be impossible to comply.?

23 A That is correct.

24 Q Very quickly, on the modifications and repairs
25 to the floor that I discussed with Mr. Newman, does

1 TDSL -- has TDSL invoiced the City for those
2 modifications?

3 A Yes.

4 Q Does TDSL believe that the City is required to
5 pay for those modifications under the special addendum?

6 A Yes.

7 Q Has the City paid for it?

8 A No.

9 Q Has TDSL declared that an instance of default
10 by the City?

11 A Yes.

12 Q Has the City cured that default?

13 A They have not. That is one of the items that's
14 still in litigation and not one of the items that must
15 be paid or -- you know, or to be cut off.

16 Q To that point, if the City is claiming that an
17 injunction is necessary to prevent the City from being
18 cut off to access to Starcrest, is that accurate?

19 A No.

20 Q Why not? What does the City need to do to
21 ensure continued access to Starcrest from TDSL's point
22 of view?

23 A All the City needs to do is to pay the invoices
24 from January 15th of 2023 forward at either \$40 a cubic
25 yard or \$64.89 per ton, which is a lesser -- less costly

1 amount to the City. That's -- that's an option we've
2 provided the City. That's all they have to do.

3 The previous invoices are not part of that
4 requirement, and we've made that clear in our
5 communications.

6 Q So the 11 million doesn't have to be paid to
7 maintain access?

8 A That's part of the litigation. The lawsuit was
9 filed in March -- late March 2022, and that litigation
10 will carry on. And we're only -- once the City was in
11 default and didn't pay those -- those previous invoices,
12 we've -- we felt like we were relieved from the
13 responsibility of continuing to be subject to the
14 contract rate.

15 However, those invoices that they are in
16 default of that relieves us of that responsibility are
17 not a requirement that they pay it now. That's part of
18 the litigation. Only payment from January 15th of this
19 year, 2023 forward, at either \$40 a cubic yard or \$64.89
20 per ton.

21 Q Does TDSL want to be in litigation with the
22 City?

23 A No.

24 Q What kind of -- how does TDSL wish its
25 relationship with the City could work?

1 A I've had a contract with the City for about
2 almost 30 years. I would like for it to continue. I'd
3 like for the relationship to continue. We're just in a
4 position now at \$200,000 a month, it is just -- it's
5 absurd. It's something that's not done and we have --
6 we have a relief on the cost -- to cover the cost.

7 Q And your reference to \$200,000 a month, what's
8 that a reference do?

9 A A loss that TDSL has each month it operates
10 under the current contract rate.

11 MR. HEMPHILL: Thank you, Mr. Gregory.

12 Pass the witness.

13 THE COURT: All right.

14 Thank you, sir. You may step off.

15 (Witness steps down)

16 THE COURT: All right. So then we will be
17 back. We will reconvene at 10:30 tomorrow morning.

18 MS. KIRKLAND: And, Your Honor, I provided
19 a copy of my proposed order to opposing, so hopefully
20 that will streamline discussions we have tomorrow.

21 THE COURT: Okay.

22 MR. HEMPHILL: We'll take a look at it.

23 (Court adjourned)

24

25

1 STATE OF TEXAS
2 COUNTY OF BEXAR

3
4 I, Gina K. May, Official Court Reporter in and for
5 the 285th Judicial District Court of Bexar County, State
6 of Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record in the above-styled
11 and numbered cause, all of which occurred in open court
12 or in chambers and were reported by me.

13 I further certify that this Reporter's Record of the
14 proceedings truly and correctly reflects the exhibits,
15 if any, offered by the respective parties.

16 This the 27th day of February, 2023.

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23
24
25

/s/ Gina K. May

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