

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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FAIRFAX COUNTY WATER :
 AUTHORITY, :

Plaintiff : Civil Action No.
 vs. : 2008-16114

CITY OF FALLS CHURCH, :
 Defendant :

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Fairfax County Circuit Court
 4110 Chain Bridge Road
 Fairfax, Virginia 22030

September 17, 2009

VOLUME 4

The parties met, pursuant to the notice of
 the Judge, at 9:28 a.m.

BEFORE: THE HONORABLE R. TERRENCE NEY

1 APPEARANCES:

2 On Behalf of the Plaintiff:
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21 ALSO PRESENT: Charles Murray, Fairfax County Water
22 Authority; John Tuohy, City of Falls Church

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3 THE COURT: Things went later last night
4 than I anticipated, both in terms of my remarks
5 and then staying, you know, afterwards to speak to
6 some of the people there. And I didn't get home
7 until 8:30. So I did not review the CAFRs from
8 those other jurisdictions. So if we could -- I
9 promise I'll do it between now and Monday morning.
10 Okay.

11 MR. RAPHAEL: Thank you, Your Honor. If
12 I may be heard briefly.

13 THE COURT: Yes, sir.

14 MR. RAPHAEL: Two points. Number 1, the
15 CAFRs that you just mentioned, I neglected to
16 mention yesterday -- sorry. I neglected to
17 mention -- I neglected to mention yesterday that
18 we also had another objection we had interposed
19 that they had not been produced to us in
20 discovery. They showed up for the first time on
21 the City's trial exhibit list.

22 THE COURT: Were they requested in

1 discovery?
2 MR. RAPHAEL: Well, I think we requested
3 all -- I'll double-check. I believe we requested
4 any documents they planned to offer into evidence.
5 But I'll confirm that.

6 THE COURT: Okay.

7 MR. RAPHAEL: But that was the first
8 time that we had seen that exhibit.

9 I also would like to tender to the Court
10 a copy of the slides I used yesterday on the
11 motion to strike.

12 THE COURT: Oh, thank you. Thank you
13 very much.

14 MR. THOMAS: Judge, if I --

15 THE COURT: Yes, sir.

16 MR. THOMAS: If I could, on the issue of
17 the CAFRs. First, those are not City documents.
18 I don't believe the request came from plaintiffs
19 that we produce documents that might make their
20 way onto our exhibit list. And these are --
21 actually all of them are 2008 CAFRs that were not
22 done at the time of their discovery request.

1 So, these are items we put on our
2 exhibit list. They are other public records of
3 governmental entities within Virginia. I don't
4 think we need to produce them in discovery.

5 THE COURT: Well, just take a look at
6 the thing. But being a matter of public record,
7 it's not something that would have been under the
8 exclusive control of the one party or the other.
9 But nonetheless, we'll take a look at it.

10 But I do want to review them because I
11 promised I would do so, and then see whether or
12 not they can come in.

13 There was something else I was going to
14 review as well, and that was the --

15 MR. THOMAS: That was an exhibit, a 1999
16 report that is among plaintiff's exhibits. It is
17 a report from the City of Falls Church. I believe
18 it's Plaintiff's Exhibit 29 -- no. 19. I'm
19 sorry.

20 THE COURT: That's right. And I would
21 review that without reading the substance. Just
22 kind of getting a view. I'll do that as well.

1 MR. RAPHAEL: And, Your Honor, just to
2 close the loop for the record. We had requested
3 in request for production number 26 all documents
4 that the City plans to offer as an exhibit in this
5 case. The City did not object to it. They
6 answered, "the City will provide documents
7 responsive to this request in accordance with its
8 obligations under the applicable rules of the
9 Supreme Court and orders of the court."

10 And I would just represent to the Court,
11 if we had known that these exhibits were going to
12 be offered, we would have done discovery into what
13 these other systems do. I think it's unfair for
14 the City to identify systems that they're going to
15 argue that they compare to for the first time in
16 their trial exhibit list.

17 MR. THOMAS: Judge, if I could. This --
18 this expert was examined extensively by
19 Mr. Raphael in his deposition about what other
20 cities in Virginia engage in the practices that
21 are at issue in this case. Nothing that -- no --
22 no lack of production on our part has had any

1 prejudice at all in their -- on their part in
2 looking at CAFRs, publicly available CAFRs that
3 are on anybody's Web site from any locality within
4 Virginia and determining whether those localities
5 do make transfers or not make transfers.

6 So, again under 8.01-390, they are to be
7 received, in other words, we offer and they are to
8 be received.

9 THE COURT: Right. This is the
10 discovery aspect, however.

11 MR. THOMAS: Right.

12 MR. RAPHAEL: Sorry.

13 MR. THOMAS: And if I could, I think the
14 only objection you heard yesterday was as to their
15 relevance. I think I can establish and will
16 establish this morning, and further to the Court's
17 point about looking at them before Monday -- my
18 expectation was to ask this witness about them and
19 then move them into evidence today. So....

20 MR. RAPHAEL: Your Honor, I just need to
21 respond briefly. Number 1, this witness did not
22 discuss any of these matters in his report. He

1 indicated in his deposition -- this will come
2 up -- that he just started looking at this stuff
3 the day before his deposition. Under John Crane,
4 it is not admissible through this expert.

5 So this is just an example of the late
6 production of this information. We got it for the
7 first time --

8 THE COURT: Well, John Crane goes to the
9 witness's designation, what he or she said they're
10 going to testify about, and not as to a failure to
11 comply with discovery.

12 MR. RAPHAEL: Yes. I think you're
13 right. There are two issues here. One is John
14 Crane and whether he can get into this material
15 that wasn't in his report. The other is whether
16 these exhibits can come in when they show up for
17 the first time on the trial exhibit list.

18 MR. THOMAS: Judge, if I could. It
19 is -- it is an incorrect characterization of this
20 witness' report to say that this issue was not
21 disclosed in his report. It most certainly was.
22 As I indicated yesterday, at page 7 of our -- this

1 witness' report, he said flat out, in response to
2 Mr. Woodcock's testimony, as was offered the other
3 day, "an opportunity to earn a fair and reasonable
4 profit based on the risks confronted is a
5 universally accepted cost of providing service in
6 rate making."

7 MR. RAPHAEL: That's not the point.

8 MR. THOMAS: If I could.

9 THE COURT: Yeah. One at a time.

10 MR. THOMAS: If I could.

11 So the issue was raised. It was
12 disclosed in his expert designation. He was
13 examined about it in his deposition. So it's --
14 it is not a fair characterization to say that,
15 well, we shouldn't be able to examine this witness
16 on examples of the issues that are raised in
17 his -- disclosed specifically in his designation.

18 I think the Court observed this the
19 other day. In your designation, it's not -- if
20 you don't identify, you know, this example, this
21 example, and this example of the proposition that
22 you set forth in your designation, that doesn't

1 mean you're precluded from testifying about it.

2 MR. RAPHAEL: Your Honor, if I may.

3 THE COURT: Yes, sir.

4 MR. RAPHAEL: Nothing on page 7 of
5 Mr. Watkins' report mentions any of these systems.
6 When I asked him this question in his deposition:

7 Question: Do I understand that you
8 recently started to look into what other systems
9 do, what the City does?

10 Answer: Yes.

11 When did you begin to do that?

12 Answer: In earnest yesterday.

13 It would be totally improper for this
14 witness to get into these exhibits that were not
15 in his report and I couldn't fairly inquire about.

16 THE COURT: When was this deposition
17 taken?

18 MR. RAPHAEL: About 2-1/2 weeks ago.

19 MR. THOMAS: His deposition was taken
20 August 14th, Your Honor. I have a full excerpt
21 from the deposition where Mr. Raphael made
22 examination on these specific issues of this

1 particular witness. I would be glad to provide
2 those to the Court.

3 THE COURT: Well, I would like to see
4 it. I would like to see it.

5 MR. RAPHAEL: And as you're reading
6 this, Your Honor, the portion that I read that is
7 not highlighted on here is from page 264, 17,
8 through 264, 22.

9 THE COURT: All right. What -- which
10 jurisdictions did these CAFRs refer to,
11 Mr. Thomas?

12 MR. THOMAS: These CAFRs, meaning the
13 ones that are in our exhibits?

14 THE COURT: Yes, sir.

15 MR. THOMAS: Norfolk, Danville, Newport
16 News, Richmond, Harrisonburg.

17 THE COURT: Martinsville?

18 MR. THOMAS: That's not among our
19 exhibits.

20 THE COURT: Salem?

21 MR. THOMAS: That's not among our
22 exhibits.

1 THE COURT: Charlottesville?

2 MR. THOMAS: Not among our exhibits.

3 THE COURT: I don't know, Mr. Raphael.

4 MR. RAPHAEL: Your Honor, can I be
5 heard?

6 THE COURT: It looks to me as though, in
7 fact, the magic word "CAFR" was used by you, the
8 acronym, rather.

9 MR. RAPHAEL: Your Honor, if I may be
10 heard.

11 THE COURT: Yes, sir.

12 MR. RAPHAEL: Excuse me, Mr. Thomas.

13 Your Honor, Mr. Watkins' report was
14 identified 30 days before the discovery cutoff.
15 And we took his deposition, I believe, after the
16 discovery cutoff -- maybe just the week of the
17 discovery cutoff to take -- to take the
18 deposition.

19 THE COURT: Right.

20 MR. RAPHAEL: The report does not
21 mention any specific system by name.

22 At the deposition, as you have just

1 read, he indicated that he was aware of some
2 systems. He had just started looking at them in
3 earnest the day before his deposition.

4 THE COURT: Right.

5 MR. RAPHAEL: And he had had some CAFRs
6 for some depositions. And when I asked some
7 questions about, do you know whether they transfer
8 money or not? For some, he said yes. For some,
9 he said no.

10 The Supreme Court in 2007, in the John
11 Crane case, ruled, at 274 Va. 581 at page 591,
12 quote, A party is not relieved from its disclosure
13 obligation under the rule simply because the other
14 party has some familiarity with the expert witness
15 or the opportunity to depose the expert.

16 THE COURT: I'm familiar with all of
17 that.

18 MR. RAPHAEL: Right. If this had been
19 in Mr. Watkins' report, I would have had a chance
20 to have a rebuttal expert on these specific
21 systems.

22 This, frankly, is sandbagging because it

1 comes in for the first time on the trial exhibit
2 list. And he mentions it in his deposition. And
3 then I say are you going to be testifying about
4 it? He says he doesn't know.

5 John Crane -- in John Crane, the party
6 who took the expert's deposition, and the opinion
7 came out in the expert's deposition, but it wasn't
8 in the report. And the Supreme Court said that's
9 not good enough. It's got to be in the
10 disclosure --

11 THE COURT: Right.

12 MR. RAPHAEL: -- or you defeat the
13 purpose of the rule.

14 This would be hugely prejudicial to us
15 if we have to defend other systems that we're
16 hearing about for the first time in detail now and
17 denied the ability to have a rebuttal expert on
18 those systems.

19 THE COURT: But you did not know until
20 yesterday afternoon that the position of the City
21 of Falls Church is that other municipalities in
22 Virginia are doing the identical thing as the City

1 of Falls Church? You know the answer to that
2 question is of course you knew that. Of course
3 you knew that the opinion of Mr. Woodcock would be
4 assailed by the City on the basis that he didn't
5 look at anything in Virginia.

6 And you knew that Mr. Watkins was being
7 designated to talk about his familiarity with
8 jurisdictions in Virginia.

9 MR. RAPHAEL: Not the -- let me respond
10 to those several points. Number 1, we knew the
11 City was going to be arguing that other Virginia
12 jurisdictions --

13 THE COURT: Right.

14 MR. RAPHAEL: -- do what Falls Church
15 has done. That's in several of the documents that
16 we think are hearsay that they're trying to get
17 in.

18 Number 2, I didn't know that Mr. Watkins
19 was going to be an expert on these points, because
20 it wasn't in his report. And at his deposition
21 when I found out he had just started looking at
22 it, I frankly relied on my confidence that the

1 Court, under John Crane, wouldn't let in an
2 opinion that came in the deposition that was not
3 in the report.

4 THE COURT: Well, I haven't seen the
5 report.

6 MR. RAPHAEL: Well --

7 THE COURT: I haven't seen the report
8 and I haven't seen the expert designation. I
9 haven't seen those things. Why would I have?

10 MR. RAPHAEL: You would not have.
11 That's right.

12 THE COURT: But let me take a look at
13 them.

14 MR. RAPHAEL: Okay. We can bring up
15 page 7 of Mr. Watkins' report that Mr. Thomas
16 referred to.

17 THE COURT: Sir.

18 MR. THOMAS: Could I be heard on some of
19 the issues?

20 THE COURT: Sure. Absolutely.

21 MR. THOMAS: Your Honor, the expert
22 witness designation is a summary of the opinions

1 to be offered by the expert.
 2 Mr. Watkins has given a summary of
 3 opinions that he offered, that he is going to
 4 offer. And he gave that in his designation. That
 5 put these folks fairly on notice of what his
 6 opinions are.

7 THE COURT: Can I see it?

8 MR. THOMAS: Sure.

9 THE COURT: Do you want to put it up,
 10 Mr. Raphael?

11 MR. RAPHAEL: Yes, Your Honor.
 12 Defendant's Exhibit 70. And Mr. Sapp can just go
 13 to page 7 that Mr. Thomas referred to.

14 MR. THOMAS: Your Honor, page 7.

15 THE COURT: All right.

16 MR. THOMAS: Your Honor, right in the
 17 middle of the page, the paragraph that begins
 18 "Mr. Woodcock is incorrect that the City's water
 19 administrative costs exceed 24 percent." If we go
 20 down to the next sentence.

21 "Mr. Woodcock is incorrect in his
 22 statement on page 16 of his report that a return

1 on investment, or profit, that is transferred to
 2 the City's general fund, is not an appropriate or
 3 proper cost for a municipal water enterprise fund.
 4 An opportunity to earn a fair and reasonable
 5 profit based on the risks confronted is a
 6 universally accepted cost of providing service in
 7 rate-making financial theory and US court
 8 findings."

9 That is a summary of the opinion that
 10 Mr. Watkins disclosed in this case, Your Honor.
 11 He is -- I am going to ask him about examples to
 12 support that precise opinion. Mr. Raphael had an
 13 opportunity in the deposition to make examination
 14 of Mr. Watkins on that issue. And the examples
 15 that Mr. Watkins could come up with at his
 16 deposition, in addition to saying there are a
 17 multitude of examples, this happens all the time,
 18 I'll give you some examples I can think of right
 19 off the top of my head.

20 He gave that testimony specifically
 21 about the Richmond CAFR. He gave that testimony
 22 specifically about the Norfolk CAFR, and then a

1 variety of other cities in Virginia.

2 Under 8-point -- if I could, Your Honor.
 3 Under 8.01-401.1, which is opinion testimony
 4 offered by experts, that provision says: In any
 5 civil action any expert witness may give testimony
 6 or render an opinion or draw inferences from
 7 facts, circumstances or data made known or
 8 perceived by such witness at or before the hearing
 9 or trial during which he is called to testify.

10 He's given an opinion that encompasses
 11 this very issue in response to an opinion offered
 12 by the witness, the expert witness proffered by
 13 Fairfax Water.

14 And I'm entitled to ask him about
 15 examples that support his opinion. I can ask him
 16 at or before the hearing or trial during which he
 17 is called upon to testify under 8.01-401.

18 MR. RAPHAEL: And, Your Honor --

19 MR. THOMAS: And I think it's -- it
 20 is -- I have to say I take some great umbrage at
 21 the notion that this is sandbagging. This is not
 22 in any way sandbagging. This expert designation

1 was made in -- on a timely basis. His deposition
 2 was taken. He was given a full opportunity to
 3 examine Mr. Watkins about, what do you think about
 4 this issue that Mr. Woodcock has said, that cities
 5 don't, localities don't make transfers.

6 And I'm entitled to ask this witness
 7 about examples of just that very point.

8 MR. RAPHAEL: Your Honor, yesterday,
 9 Mr. Thomas indicated that he had no witness for
 10 these CAFRs when he was describing them. He said
 11 he had no witness.

12 MR. THOMAS: That's not --

13 MR. RAPHAEL: More importantly --

14 THE COURT: He didn't mean it in that
 15 context. He meant he wasn't going to call people
 16 from these various jurisdictions to go through
 17 what these documents were about and explain how
 18 they did it, because the documents had been
 19 properly authenticated and he believes they're
 20 going to make plain from the documents themselves
 21 how these transfers occur.

22 MR. RAPHAEL: Moreover --

1 MR. THOMAS: I think that's exactly
2 right, Judge. That's the point of --
3 THE COURT: Mr. Raphael has it right
4 now. Yes, sir.
5 MR. THOMAS: Yes, Your Honor.
6 MR. RAPHAEL: Rule 4:1, Your Honor, for
7 expert disclosures, not only requires a statement
8 of what the expert opinion is, but a statement of
9 the substance of the facts that support it. And
10 these facts were not in the report.
11 What Mr. Thomas read to you, what you
12 see on the screen, doesn't say anything about
13 these systems.
14 THE COURT: Right. I understand.
15 MR. RAPHAEL: This would be hugely
16 prejudicial. I have not had a chance to prepare
17 for these specific systems because I didn't think
18 there was any way this would come into evidence
19 with this expert.
20 MR. THOMAS: Judge.
21 THE COURT: Mr. Thomas.
22 MR. THOMAS: If I could, these CAFRs --

1 we produced these CAFRs with our exhibits. I'm
2 going to ask Mr. Watkins about items on the pages
3 in the CAFRs. This is a question about
4 cross-examination. Mr. Raphael can examine
5 Mr. Watkins about whether his understanding of the
6 CAFR that's in front of him is correct or whether
7 it's not correct. He can ask him. Doesn't it say
8 this or doesn't it say that.
9 THE COURT: Well --
10 MR. THOMAS: Does it not -- does it not
11 comport with your understanding of whether all
12 municipalities or substantial municipalities in
13 Virginia make these transfers from the water fund
14 to the general fund.
15 THE COURT: All right. Mr. Raphael, you
16 have the last word.
17 MR. RAPHAEL: Thank you. One more
18 point, Your Honor. And that is under 8.01-401.1
19 Mr. Thomas just referenced, if you're going to try
20 to get in documents through an expert, you've got
21 to have them 30 days before trial. I got them
22 15 days before trial on the exhibit list.

1 THE COURT: Well, remember, he's not
2 trying to get the documents in through the expert.
3 He's trying to get the documents in through
4 8.01-390. But he wants the expert to be able to
5 refer to them, perhaps. Perhaps not.
6 MR. THOMAS: That's correct, Your Honor.
7 And my intention -- the objection yesterday was
8 that -- we're past the hearsay problem. That --
9 8.01-390 deals with that.
10 THE COURT: Right.
11 MR. THOMAS: We're past the hearsay
12 problem. The objection I heard yesterday was
13 relevance. This expert witness can establish that
14 these are relevant documents. I'm going to move
15 them in pursuant to 8.01-390, they having been
16 established as relevant documents. They're highly
17 relevant.
18 I think it would be hugely prejudicial
19 for my case and for our defense in this case were
20 they not to be deemed to be relevant in the case.
21 THE COURT: All right. All right.
22 First, I don't think that this is a John

1 Crane situation, for a number of reasons. First,
2 the whole -- the essence of the testimony from the
3 expert witness on behalf of Fairfax Water and the
4 expert witness on behalf of the City is that,
5 first, on behalf of Fairfax Water, transfers from
6 a utility fund to a general fund are impermissible
7 for all the reasons stated by Mr. Woodcock. And
8 he pointed to a number of jurisdictions throughout
9 the United States that follow that type of
10 procedure.
11 Mr. Watkins, on the other hand, will be
12 testifying to the contrary, pointing to
13 municipalities in Virginia. That's not a mystery
14 to anybody. That's all ultimately what this case
15 is about.
16 There are many other aspects, of course.
17 But the linchpin is the transfer of funds from a
18 utility fund to a general fund, thereby benefiting
19 the taxpayers within the jurisdiction and
20 prejudicing the taxpayers without the jurisdiction
21 who don't have the right to vote on their elected
22 representatives. That's the heart of this matter.

1 That's not a mystery to anyone. Not to
2 the plaintiff, not to the defendant. And the
3 opinions, the heart of the opinions is challenging
4 these two conflicting views as to whether or not
5 municipalities may do so.

6 I find that Mr. Watkins, the designation
7 of Mr. Watkins is broad enough to include that
8 because he spot on refutes Mr. Woodcock's opinion
9 that such transfers are impermissible.

10 When the deposition was taken, the
11 deposition is not changing anything or discovering
12 anything new about Mr. Watkins' opinions in this
13 regard but, rather, seeing on what he bases them.

14 He points to a number of localities in
15 his deposition testimony. And he is specifically
16 asked about CAFRs by Mr. Raphael.

17 In short, I don't think -- I don't think
18 that this is -- there's been a failure on the part
19 of the City to properly designate. And I'm going
20 to overrule the objection and note Fairfax Water's
21 exception to the Court's ruling.

22 MR. THOMAS: Thank you, Judge.

1 CAFRs at issue here until their trial exhibit
2 list, 15 days before trial. That's the first time
3 we had seen them.

4 Number 3, if we had seen them either in
5 discovery or in this expert's report on July 16th,
6 2009, we would have conducted discovery as to
7 those other systems and we would have engaged an
8 expert to rebut the opinions. I didn't know what
9 he's going to say these other systems do beyond
10 what's in his deposition.

11 Lastly, when I took this gentleman's
12 deposition on August 14th, 2009, which I believe
13 was the week of the discovery cutoff, he
14 identified -- he explained that he was aware of a
15 couple systems that he thought were similar. He
16 had just started in earnest to do research on that
17 the day before his deposition, and identified
18 through that earnest research done the day before
19 his deposition a number of systems, some of which
20 we're now seeing for the first time here.

21 So I believe it's a clear violation of
22 John Crane.

1 MR. RAPHAEL: Your Honor, may I proffer
2 my objection for the record and also ask for a
3 clarification as to whether the witness will be
4 limited to what he said in his deposition and not
5 go further than that.

6 First I would like to --

7 THE COURT: You certainly can go ahead
8 and proffer.

9 MR. RAPHAEL: Thank you, Your Honor.
10 With regard to this expert's report, which was
11 given to us July 16th, 2009, the report does not
12 identify any specific Virginia system to which
13 this expert is going to refer for the proposition
14 that other Virginia systems are doing what the
15 City of Falls Church is doing in this case.

16 Number 2, we asked for any documents the
17 City intended to introduce in discovery and
18 introduce at trial as an exhibit in this case, to
19 be produced in discovery. That was our request
20 for production number 26, to which the City did
21 not object.

22 Number 3, the City did not produce the

1 I would ask in light -- unless the
2 Court -- I ask the Court to limit the witness to
3 anything he said in his deposition and prevent him
4 from going further than that, because it would be
5 unfair prejudice to us to have to deal with it for
6 the first time now.

7 MR. THOMAS: I think the Court's ruled.

8 THE COURT: Mr. Thomas.

9 MR. THOMAS: I object to the
10 characterization by the plaintiff of the
11 deposition testimony that the Court just read. So
12 I think that deposition testimony speaks for
13 itself. And I don't see -- these CAFRs are simply
14 examples to support the opinion that Mr. Watkins
15 has provided to Fairfax Water in his disclosure.
16 And so there's no reason to limit -- to limit this
17 witness to those particular places. He said there
18 are a multitude of cities that do just that, in
19 Virginia. And he identified some in particular.
20 And I'm going to ask him about those.

21 MR. RAPHAEL: Mr. Thomas, could you
22 please point to the page where he did that in his

1 report, because I didn't see it, the page where he
2 did that.

3 THE COURT: No, he meant in the
4 deposition.

5 MR. THOMAS: I do. Thank you.

6 THE COURT: In the deposition. Well,
7 I'm going to permit it.

8 MR. THOMAS: Thank you.

9 THE COURT: I'm going to permit it. And
10 you've made your proffer, and there's no reason
11 for the Court to comment on it.

12 MR. THOMAS: Thank you, Judge.

13 THE COURT: Thank you. You may proceed.
14 Whereupon,

15 GLENN WATKINS
16 having been previously duly sworn, was examined
17 and testified further as follows:

18 DIRECT EXAMINATION (Continued)

19 BY MR. THOMAS:

20 Q Good morning, Mr. Watkins.

21 A Good morning, counsel.

22 THE COURT: You're still under oath,

1 Mr. Watkins.

2 THE WITNESS: Yes, sir.

3 BY MR. THOMAS:

4 Q Mr. Watkins, we were discussing
5 yesterday examples from your experience of
6 municipal water utilities that use the utility
7 method for establishing their overall revenue
8 requirement. Do you remember that testimony?

9 A Yes, sir, I do.

10 Q I believe earlier in your testimony
11 yesterday you identified municipal water utilities
12 in Wisconsin, right?

13 A That is correct.

14 Q All right. Would you describe for the
15 Court your understanding of the use of -- by
16 municipal water utilities in Wisconsin --

17 MR. RAPHAEL: Objection. This issue of
18 Wisconsin did not come up in this witness'
19 deposition. It's not in his report. And this --
20 he's trying to get into what Wisconsin's practice
21 is with regard to transfers. It's not in his
22 report, and it wasn't discussed in the deposition.

1 This is a John Crane violation clearly.

2 MR. THOMAS: Judge, this witness just
3 yesterday, I asked this witness to describe the
4 utility method for setting rates, and asked in his
5 experience do you -- in your experience, do you
6 know that other states use the utility method for
7 establishing the rates for their municipal water
8 utilities. He said yes. And he identified New
9 Berlin, Wisconsin as an experience where he
10 personally had had the opportunity to work on a
11 rate matter for that Wisconsin utility. And
12 the -- and the utility used the utility method for
13 establishing its rates.

14 I simply am asking this witness to
15 describe that for the Court.

16 THE COURT: I really think you're
17 reading John Crane too tightly, Mr. Raphael. It's
18 intended to ensure that, I believe, the parameters
19 of the designation are sufficiently broad as to
20 put counsel on fair notice as to what subjects the
21 expert witness will be testifying, and reasons, et
22 cetera, as provided for by the rule. But not to

1 require every single detail. The details can be
2 properly discovered by going through the
3 identified categories at a discovery deposition,
4 which is what happened here.

5 MR. RAPHAEL: Your Honor --

6 THE COURT: If he was not asked about
7 other jurisdictions, well, he wasn't. But that
8 doesn't mean he is precluded about testifying as
9 to them, in my opinion.

10 MR. RAPHAEL: Your Honor --

11 THE COURT: And I so rule.

12 MR. THOMAS: Thank you, Judge.

13 THE COURT: Let's move on.

14 BY MR. THOMAS:

15 Q Do you remember the question?

16 A Perhaps you ought to reask it, counsel.

17 Q Okay. We were talking about the
18 municipal water utilities using the utility method
19 for setting its overall revenue requirement.

20 A Right.

21 Q And yesterday I believe you gave some
22 testimony about Wisconsin municipal utilities

1 using the utility method to establish their
2 overall revenue requirement. Do you remember that
3 testimony?

4 A Yes, sir.

5 Q Would you describe for the Court an
6 example that you have had of a Wisconsin municipal
7 water utility using the utility method to
8 establish its overall revenue requirements.

9 A Yes. I was engaged in a rate study
10 involving the City of New Berlin, Wisconsin, which
11 is a suburb of Milwaukee, in which their total
12 revenue requirement, as we call it, the term of
13 art, is established using the utility method, as
14 are every municipal utility in the state of
15 Wisconsin. That's a rule of practice.

16 So when I go in and do a rate case, one
17 of the things I need to make sure of is that I'm
18 following the local rules of practice. In the
19 state of Wisconsin, every utility is regulated and
20 uses the utility approach, or at least a variant
21 thereof.

22 Q Okay. And the utility approach includes

1 as a component of cost a fair return, correct?

2 A Correct. Correct.

3 Q And I asked you yesterday about other
4 examples and you identified Richmond, I believe,
5 right?

6 A Yes.

7 Q How do you know that?

8 A I know that from reviewing the CAFR.
9 But I also know it from my experience. I live in
10 Richmond. I work in Richmond. I have close
11 business contacts in Richmond. I am the rate
12 consultant for something called the Virginia
13 Energy Governmental Purchasing Association. It's
14 an association of governmental agencies for
15 purchasing energy throughout the state.

16 One of the members -- again, I'm the
17 rate consultant, their economist for that
18 organization.

19 One of the members of the board of
20 directors is the comptroller for the City of
21 Richmond. He and I have had discussions about
22 doing further work regarding the development of

1 the revenue requirements for the City of Richmond.

2 And he explained to me --

3 MR. RAPHAEL: Objection. Hearsay.

4 THE WITNESS: The basic framework that
5 they use.

6 THE COURT: Objection sustained.

7 BY MR. THOMAS:

8 Q You mentioned the Richmond City CAFR.
9 Is that a place that you would look to determine
10 how a locality handles its finances with respect
11 to its utilities?

12 A Yes.

13 Q You have a book with exhibits there from
14 the defendants. If you would pull the one that
15 includes Exhibit 66. I believe the defendant's
16 exhibits are going to be all the way over on your
17 left.

18 A 66. I believe I have it.

19 Q Okay. Do you have that in front of you
20 there, Mr. Watkins?

21 A Yes, sir, I do.

22 Q And would you tell the Court what this

1 is.

2 A This is the 2008 comprehensive annual
3 financial report for the City of Richmond. I
4 think we're all referring to them as CAFRs.

5 Q CAFR. Okay. Look, if you would, at
6 page Roman XI of this CAFR.

7 A Yes, sir. I'm there.

8 Q Okay. Do you see up at the top of the
9 page where it says: DPU reviews revenue
10 requirements for each utility and recommends --

11 THE COURT: I'm sorry. Which page are
12 you on?

13 MR. THOMAS: Roman XI on Exhibit 66.
14 It's at the beginning of the CAFR.

15 MR. RAPHAEL: And, Your Honor, I'm sorry
16 to try the Court's patience, but I feel I have to
17 rise.

18 THE COURT: You're not trying my
19 patience, Mr. Raphael.

20 MR. RAPHAEL: Thank you, Your Honor. I
21 have to rise and object, Your Honor, because I
22 asked this witness in his deposition, at page 268,

1 line 13, whether he knew if these municipal
2 entities transferred money from a water fund to
3 the general fund. And he said: Like I said for
4 Richmond, I'm not sure. So now he's coming in
5 with a document he's looked at after the fact,
6 after his deposition, and he's going to testify
7 about it. It's unfair.

8 MR. THOMAS: Judge --

9 THE COURT: I understand the objection.

10 Mr. Thomas.

11 MR. THOMAS: I think the Court has
12 ruled.

13 THE COURT: Objection overruled.

14 MR. THOMAS: Thank you.

15 BY MR. THOMAS:

16 Q Mr. Watkins, I'm asking you about the
17 use of the utility requirement -- utility method,
18 okay?

19 A The utility method, not whether they
20 make transfers or not, but the method?

21 Q At this moment in time, that's right.

22 A Okay.

1 Q Thank you. And look if you would at the
2 top paragraph there of Roman XI. Do you see where
3 it says: DPU reviews revenue requirements for
4 each utility and recommends rate changes annually
5 if needed during the annual budget process. Rates
6 are set on a basis similar to that used for
7 investor owned utilities regulated by public
8 utility commissions. All operating costs,
9 including operation and maintenance expenses,
10 depreciation expenses, payments in lieu of taxes,
11 and a reasonable return on rate base are included
12 in the calculation of total revenue requirements
13 for each utility. The Council is the sole
14 rate-setting authority.

15 Do you see that?

16 A Yes, I do.

17 Q All right. Is that consistent with your
18 understanding that Richmond is a municipality -- a
19 municipal -- a municipality that uses the utility
20 requirement -- the utility basis for setting its
21 overall revenue requirement?

22 MR. RAPHAEL: Objection. Leading.

1 THE COURT: Try not to lead.

2 MR. THOMAS: Thank you.

3 THE COURT: You may answer that
4 question.

5 THE WITNESS: Yes. It's -- they use
6 return on rate base. That -- I believe I
7 discussed that earlier yesterday. That is the
8 basic premise of the utility method.

9 BY MR. THOMAS:

10 Q Okay. And if you look here at the
11 middle sentence in that paragraph, do you see
12 where it references payments in lieu of taxes and
13 a reasonable return on rate base? Do you see
14 that?

15 A Yes, I do.

16 Q And what do you understand -- can you
17 tell the Court what you understand the distinction
18 between the two to be.

19 A The payment in lieu of taxes
20 represent -- well, just as the word indicates,
21 payment in lieu of property taxes or real estate
22 taxes. Typically, not always, but typically those

1 are recorded as an expense as opposed to return on
2 rate base, which is, under the utility method, or
3 any profitability method, that would reflect your
4 return or a profit on your investment.

5 Q All right. What if any service do
6 Richmond public utilities provide outside of the
7 Richmond City lines?

8 A The City of Richmond also serves
9 portions of the County of Henrico as well as
10 portions of the County of Chesterfield.

11 MR. THOMAS: Your Honor, I'd move the
12 admission of Defendant's Exhibit 66.

13 MR. RAPHAEL: Your Honor, I object for
14 the reasons I stated. This document was not
15 produced to us in discovery despite that it was
16 asked for. It has been now discussed by a witness
17 who didn't identify it in his report. It was not
18 discussed by this witness at his deposition. When
19 I asked him about this issue at his deposition, he
20 said he didn't know. This is really unfair to us,
21 Your Honor.

22 THE COURT: I understand the objection.

1 But I'm going to permit the introduction of the
2 exhibit. It seems to me it's a public document,
3 in this case from the City of Richmond, Virginia.
4 And it's being offered pursuant to 8.01-390. It's
5 been fully and properly authenticated. Objection
6 overruled. Exception noted.

7 (Defendant's Exhibit 66 was received
8 into evidence.)

9 MR. THOMAS: Thank you, Judge.

10 BY MR. THOMAS:

11 Q Mr. Watkins, do you understand there to
12 be a -- do you understand the terms "fair rate of
13 return" and "profit" to be similar?

14 A I consider them to be somewhat
15 different. But for context of this case, I think
16 that we can use that as a -- you know, to be
17 similar.

18 Q Okay.

19 A In my context, fair rate of return would
20 include a fair rate of return on both debt and
21 equity, and you take the weighted average. And I
22 think, when you're saying profit, I equate that to

1 the return on equity.

2 Q All right. Okay. Now, based on your
3 experience, do municipalities profit from their
4 utilities?

5 A Oh, absolutely.

6 Q Do all?

7 A No. It's a local decision. Some do.
8 Some don't.

9 Q How do you know that?

10 A From my experience. 29 years. Working
11 a lot in Virginia. Doing several cases in
12 Virginia. And also as a result of reviewing some
13 of these CAFRs. But primarily from my experience.

14 Q All right. Based on your experience, is
15 a city's CAFR a place you would look to determine
16 whether the municipality profits from its
17 utilities?

18 A Yes. That would be one way.

19 Q All right. Take a look if you would at
20 Exhibit 65, which may or may not be in the same
21 book you have there.

22 A I believe it is in here. Yes, sir. I

1 have it.

2 Q Would you tell the Court what this is?

3 A This is the CAFR for the City Norfolk,
4 Virginia, for fiscal year ending June of 2008.

5 Q I'm sorry?

6 A This is the CAFR for the City of
7 Norfolk, Virginia, for fiscal year ending June 30,
8 2008.

9 Q All right. Look, if you would, please,
10 at page 72 of the Norfolk 2008 CAFR, which is
11 Exhibit 65.

12 A Yes.

13 MR. RAPHAEL: I'm sorry, Sandy, what
14 page?

15 MR. THOMAS: Yeah. 72.

16 BY MR. THOMAS:

17 Q Okay. Are you familiar with how --
18 you're familiar with how CAFRs are organized,
19 aren't you?

20 A Yes, I am.

21 Q All right. Would you explain to the
22 Court what the interfund transfer section lays

1 out?

2 A The interfund transfer sections are
3 typically or universally --

4 THE COURT: Hang on. Yes, sir.

5 MR. RAPHAEL: Your Honor, this is the
6 same objection. May I have a standing objection
7 to the introduction and inquiry about these CAFRs
8 based on the previous objection?

9 THE COURT: Yes, sir. Absolutely.

10 MR. RAPHAEL: Thank you.

11 THE COURT: The record will so reflect.

12 BY MR. THOMAS:

13 Q Mr. Watkins, I had asked you if you
14 would just give the Court some context for this
15 interfund transfer section of the Norfolk 2008
16 CAFR.

17 A Right. The interfund transfer section
18 relates to the financial statements that provide
19 details on certain aspects of the financial
20 statement. They're contained in every CAFR,
21 basically.

22 But it provides information as to how

1 funds are transferred in and out of the various
2 municipal funds, to the general fund, away from
3 the general fund, et cetera, et cetera.

4 Q All right. And would you explain to the
5 Court what this particular section on interfund
6 transfers from the Norfolk 2008 CAFR indicates
7 with respect to this municipality profiting from
8 its utilities?

9 A Yes. There were \$8.5 million
10 transferred out of the water utility fund.
11 Roughly \$1.6 million transferred out of the
12 wastewater utility fund. Actually, it's
13 \$1,632,612.

14 Q All right. And if you look up at the
15 top part of this grid, do you see where it says
16 "general fund"?

17 A Yes.

18 Q All right. And then looking over to
19 your right, do you see a column that indicates
20 "in"?

21 A Correct.

22 Q And a number of \$10 million?

1 A Correct.

2 Q And what do you understand that to show?

3 A Well, that is what I referred to earlier
4 as can be referred to as the credits.

5 Now, the debits, that is transferred out
6 of the utility fund and transferred into the
7 general fund.

8 Q All right. And are the notes beneath
9 the chart here useful in your understanding of why
10 these funds were transferred from the utility
11 funds to the general fund?

12 A Yes, sir.

13 Q All right. And what do they indicate?

14 A Well, they indicate that the -- that the
15 general fund was transferred in \$10 million, and
16 as a reflection to represent a return on the
17 investment from the utility fund back to the
18 general fund.

19 Q Okay. And in fact, in this -- the first
20 full paragraph there beneath the grid, do you see
21 where it says general fund transfers in of
22 \$10 million include a million 5 from the

1 wastewater fund and 8.5 million from the water
2 utility fund, and represent a return on investment
3 back to the general fund?

4 A So it does. Yes.

5 Q Do you see that?

6 A Yes.

7 Q All right. So is that consistent with
8 your understanding that this municipality profits
9 from its utility?

10 A Oh, absolutely.

11 Q All right. Now, do you understand that
12 that transfer from the City of -- I'm sorry, from
13 the water fund of the City of Norfolk to the
14 general fund of the City of Norfolk to be over and
15 above PILOT?

16 MR. RAPHAEL: Objection. Leading again.

17 THE COURT: Yeah. Try not to lead,
18 Mr. Thomas.

19 BY MR. THOMAS:

20 Q Okay. What if any component of payment
21 in lieu of taxes does the transfer of 8.5 million,
22 as evidenced on page 72 of this exhibit, indicate?

1 A I believe it is. I'm just reading the
2 rest of the note here.

3 Q I might be able to speed it along here,
4 Mr. Watkins.

5 A I'm not the quickest reader.

6 Q That's all right.

7 Are you aware that the City of Norfolk
8 issued water revenue bonds in 2008?

9 A Yes, yes.

10 Q Okay. I think if you would look at
11 Defendant's Exhibit 74, which is going to be, I
12 believe, in the last book of defendant's binders,
13 the last binder.

14 A Yes. Yes, sir.

15 MR. THOMAS: And, Your Honor, if I could
16 move Defendant's Exhibit 65 into evidence. That's
17 the Norfolk CAFR I was just asking Mr. Watkins
18 about.

19 MR. RAPHAEL: Same objections as before.

20 THE COURT: Right. It will be received.
21 The plaintiff's exception is noted.

22 (Defendant's Exhibit 65 was received

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1 into evidence.)
2 BY MR. THOMAS:
3 Q Mr. Watkins, do you have Defendant's
4 Exhibit 74 in front of you?
5 A I do indeed.
6 Q Okay. What is it?
7 A This is entitled "The City of Norfolk,
8 Virginia, 58,415,000, Water Revenue Bonds, Series
9 2008." It is a discussion of that bond issue. I
10 don't know if "prospectus" is the correct word.
11 But it provides quite a bit of information
12 regarding that bond issue.
13 Q All right. Look, if you would, at the
14 bottom of page 19 of Defendant's Exhibit 74.
15 A Page 19?
16 Q Yes, sir. Okay. Down at the bottom, do
17 you see the section entitled "Financial
18 Management"?
19 A I do indeed.
20 Q All right. Does this case to you when
21 the Norfolk City Council established its water
22 utility fund?

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1 A Yes. July of 1979.
2 Q All right. Do you see where it says it
3 established that fund as a distinct enterprise
4 fund of the City to account for all of the
5 financial activity related to providing water
6 services to its customers? Do you see that?
7 A Yes.
8 Q Do you see where it says: The fund is
9 operated on a self-supporting basis?
10 A Yes.
11 Q All right. Can you explain to the Court
12 what you understand a distinct enterprise fund to
13 be?
14 A A distinct enterprise fund in municipal
15 government is one in which business activities,
16 the records of the business activities are
17 accounted for and maintained separately from other
18 aspects of the general government. We can call
19 that the general fund.
20 They -- the accounting is a little bit
21 different because they're a business activity.
22 And that the funds are -- or the accounting for

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1 the funds are kept totally separate for that
2 business activity or enterprise fund.
3 Q All right. Now, looking at the next
4 paragraph, do you see where this bond prospectus
5 indicates: Since its inception, regular transfers
6 have been made from the fund to the City's general
7 fund for payments in lieu of taxes and as a return
8 on the City's investment in the system?
9 Do you see that?
10 A Yes, sir.
11 Q All right. Is that consistent with your
12 understanding of page 72 of the Norfolk 2008 CAFR
13 which we just introduced as Exhibit 65?
14 A Yes.
15 Q All right.
16 A Perfectly.
17 Q Turn, if you would, in Defendant's
18 Exhibit 74, Mr. Watkins, to page 25 of this bond
19 offering.
20 A Okay.
21 Q Now, looking at table 17, entitled
22 "Water utility fund projected operating results,"

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1 do you see that?
2 A Yes, sir, I do.
3 Q Okay. Do you see the line there for
4 "Payment to general fund (ROI)"?
5 A Yes, I do.
6 Q All right. And what does that show
7 beginning at 2008 and going out to 2012?
8 A The budgeted amounts are \$8.5 million
9 each year 2008 through 2012, for payments to the
10 general fund to reflect return on investment.
11 Q Look, if you would, at the line right
12 above the line that says "payment to general fund
13 (ROI)." Do you see that?
14 A The line above it that says "payment in
15 lieu of taxes"?
16 Q Right.
17 A Yes, sir, I'm there.
18 Q Is that separated out as a distinct item
19 on this?
20 A Right. That would be in addition to or
21 separate from the payment to the general fund for
22 the ROI. That would be the budgeted amounts for

1 payment in lieu of taxes each year. It varies.
2 It starts with \$3.1 million and grows to
3 \$3.8 million by 2012 on a budgeted basis.

4 Q Do you understand the City of Norfolk --
5 what understanding, if any, do you have about the
6 City of Norfolk's service outside of its
7 boundaries for water?

8 A I know it well. The City of Norfolk
9 serves the United States Navy, both the Oceana
10 Naval Station and the large Navy base.

11 It also provides service to the City of
12 Virginia Beach. It may serve some other
13 localities, like Portsmouth, but I'm not sure of
14 that. But I know they do serve some water to
15 Virginia Beach and the United States Navy.

16 Q All right.

17 MR. THOMAS: Your Honor, I move
18 Defendant's Exhibit 74 into evidence.

19 THE COURT: All right.

20 MR. RAPHAEL: Same objections.

21 THE COURT: It will be received.

22 MR. RAPHAEL: Same objections as before.

1 THE COURT: Yes, sir.

2 MR. RAPHAEL: And the ones listed in our
3 objection list.

4 THE COURT: Yes, sir. It will be
5 received. Exception of the plaintiff noted.

6 (Defendant's Exhibit 74 was received
7 into evidence.)

8 BY MR. THOMAS:

9 Q Look if you would, Mr. Watkins, at
10 Defendant's Exhibit 64.

11 A Exhibit 64, sir?

12 Q Yes, sir.

13 A Yes, sir, I have it.

14 Q And would you tell the Court what this
15 is?

16 A This is the City of Newport News,
17 Virginia, CAFR for fiscal year ending June of
18 2008.

19 Q 2008. Right. Turn, if you would, to
20 page 21 of the City of Newport News 2008 CAFR at
21 Defendant's Exhibit 64.

22 A Did you say 21, counsel?

1 Q I did.

2 MR. RAPHAEL: Your Honor, may I -- I
3 would like to object to this on the ground this
4 was not mentioned by Mr. Watkins in his -- either
5 his report or his deposition. So this is the
6 first time he's talking about this exhibit, when I
7 had asked him in his deposition tell me all the
8 ones that you looked at.

9 THE COURT: Well, but he was still
10 looking.

11 MR. RAPHAEL: I thought discovery had to
12 end at some point. We're supposed to get it in
13 before.

14 THE COURT: Well, it probably should
15 have ended more than 2-1/2 weeks prior to the
16 onset of this trial. But this is the way the
17 thing has happened.

18 I don't find it improper. Particularly
19 documents of this nature. Objection overruled.
20 Exception noted.

21 MR. RAPHAEL: Thank you.

22 MR. THOMAS: Thank you, Judge.

1 THE COURT: Which page, Mr. Thomas?

2 MR. THOMAS: 21.

3 BY MR. THOMAS:

4 Q Now, Mr. Watkins, looking at page 21,
5 what, if anything, does this statement of
6 revenues, expenses, and charges -- I'm sorry,
7 changes in net assets for the proprietary funds of
8 the City of Newport News indicate to you
9 concerning any profit taken by this municipality
10 from its utilities?

11 MR. RAPHAEL: Objection. Calls for
12 speculation.

13 THE WITNESS: As clearly indicated --

14 THE COURT: Objection overruled.

15 THE WITNESS: Excuse me. I'm sorry.

16 THE COURT: Objection overruled.

17 THE WITNESS: As clearly indicated in
18 the document, the exact sum of \$10 million was
19 transferred out of the utility fund net of --
20 after all expenses.

21 BY MR. THOMAS:

22 Q All right. And if you could just give

1 the Court some context about page 21, you're
2 looking, are you not, at the column up at the top
3 here called "Major Fund - Public Utility," right?

4 A That's correct.

5 Q And then the transfer item that you
6 referred to is here down, most of the way down the
7 page at "transfers out," right?

8 A That is correct. This is what we refer
9 to in the business world as an income statement.
10 And this is down towards the bottom. So this is
11 transferred out -- transfers out after -- well,
12 it's -- the presentation is the same for virtually
13 every CAFR.

14 Q All right. Thank you. Look, if you
15 would, please, at page 46 of Defendant's
16 Exhibit 64.

17 A Was that 46?

18 Q 46. Yes, sir.

19 A Yes, sir. I'm there.

20 Q All right. This is -- up at the top, do
21 you see where it says "interfund receivables,
22 payables and transfers"?

1 A Yes, I do.

2 Q Is this a similar page to the interfund
3 transfers page you testified about with respect to
4 the Norfolk CAFR?

5 A Yes, sir. The notes to the financial
6 statements tend to be very, very similar for
7 municipal CAFRs.

8 Q All right. And what does the chart at
9 the bottom of page 46 show you about transfers
10 from the City of Newport News's public utility
11 fund to its general fund, if anything?

12 A It indicates that \$10 million was
13 transferred to the general fund from the utility
14 fund.

15 Q Right. And on this particular chart
16 over in the left-hand side, it says "general
17 fund," right?

18 A Correct.

19 Q And over on the right-hand side, it
20 indicates transfers to other funds and then from
21 other funds, right?

22 A Right. I apologize. Perhaps -- perhaps

1 other -- the Court is not as familiar with these
2 as I am. And I'm sorry, yes, it clearly shows
3 that -- it shows both a debit and the credit. It
4 shows the transfers out of the utility fund and
5 then the transfers of that amount back into the
6 general fund.

7 Q All right. Look, if you would, down at
8 the note beneath the chart here on the bottom of
9 page 46. Do you see the last sentence of that
10 paragraph?

11 A Yes.

12 Q All right. Do you see where it says:
13 Transfer from the public utility fund to the
14 general fund is used to finance general government
15 expenditures?

16 A Yes.

17 Q Do you see that? Is that consistent
18 with your understanding that this particular
19 municipality profits from its utilities?

20 A Oh, yes. Yes.

21 Q And then turn, finally, Mr. Watkins,
22 please, to page 72 of Defendant's Exhibit 64.

1 A Page 72. Yes, sir. I'm there.

2 Q Now, this is the -- what is this chart
3 here?

4 A This -- this shows a variance report
5 between budgeted and actual amounts for costs and
6 expenses, things of that nature, for the City of
7 Newport News.

8 Q All right. And looking about a third of
9 the way down the page, do you see where, under the
10 heading "miscellaneous revenue," it indicates
11 payment in lieu of taxes, or payments in lieu of
12 taxes?

13 A Yes, I do.

14 Q All right. And that's separately
15 itemized, correct?

16 A That's correct.

17 Q And then down at the bottom of the page,
18 do you see where it says "transfers from other
19 funds"?

20 THE COURT: I'm sorry, which page is
21 this?

22 MR. THOMAS: Yes, sir. It's page 72.

1 THE COURT: Thank you.
 2 BY MR. THOMAS:
 3 Q Do you remember the question,
 4 Mr. Watkins?
 5 A As I --
 6 Q Yeah.
 7 A Ask it again if you would.
 8 Q I was asking about the line underneath
 9 the miscellaneous revenue. Do you see where it
 10 says "payment in lieu of taxes"?
 11 A Correct.
 12 Q You understand that to be separately
 13 itemized?
 14 A That's correct. It's booked as an
 15 expense.
 16 Q Do you see the line at the bottom, it
 17 says "transfers from other funds"?
 18 A Yes.
 19 Q All right. What if any relationship
 20 does that line item have with the utility fund
 21 transfers that you testified about a moment ago?
 22 A They're mutually exclusive. What I mean

1 is one is not included in the other. They're
 2 separate from each other.
 3 Q You mean the payment in lieu of taxes
 4 and the transfers are separate from each other?
 5 A Correct.
 6 Q Okay. But the transfers from other
 7 funds, the \$10 million indicated down here at the
 8 bottom --
 9 A Right.
 10 Q -- do you see that? You understand that
 11 to correlate to the transfers from the utility
 12 fund of the City of Newport News?
 13 A Oh, absolutely, yes.
 14 MR. RAPHAEL: Objection. Cumulative and
 15 leading.
 16 THE COURT: That is a leading question.
 17 Objection sustained.
 18 MR. THOMAS: Your Honor, I would move
 19 admission of Defendant's Exhibit 64.
 20 THE COURT: It will be received subject
 21 to the plaintiff's objection.
 22 MR. RAPHAEL: Thank you, Your Honor.

1 THE COURT: Thank you, sir.
 2 (Defendant's Exhibit 64 was received
 3 into evidence.)
 4 MR. RAPHAEL: May I just confirm for the
 5 record this is the standing objection based on all
 6 the objections?
 7 THE COURT: Absolutely. Absolutely.
 8 MR. RAPHAEL: Thank you.
 9 BY MR. THOMAS:
 10 Q Look if you would, please, Mr. Watkins,
 11 at Defendant's Exhibit 68.
 12 A 68.
 13 Q Do you have that exhibit?
 14 A I do indeed.
 15 Q What do you understand this to be?
 16 A This is the CAFR for the City of
 17 Danville, Virginia for fiscal year ending
 18 June 2008.
 19 Q Look, if you would, please, Mr. Watkins,
 20 at page 83.
 21 A The pages are sticking here. Okay. I'm
 22 there.

1 Q All right. Up at the top half of the
 2 page, what if anything does this chart indicate to
 3 you concerning any transfers from utility funds to
 4 general fund for the City of Danville?
 5 A Yes. Again, this is a note to a
 6 financial statement indicating that there were
 7 13 million -- \$13.6 million transferred into the
 8 general fund in total, which is comprised of
 9 \$677,000 rounded transferred out of the wastewater
 10 fund, \$933,000 transferred out of the water fund,
 11 approximately \$2.6 million transferred out of the
 12 gas fund, and approximately \$9 million transferred
 13 out of the electric fund.
 14 Q Okay. Do you see the note here at the
 15 bottom that indicates: Transfers from the
 16 enterprise funds represent contributions from
 17 these funds to support the City's operations?
 18 A Yes.
 19 THE COURT: Which page are you on?
 20 MR. THOMAS: I'm on page 83, Your Honor.
 21 THE COURT: 83. Thanks, Mr. Thomas.
 22 THE WITNESS: Yes, I do.

1 BY MR. THOMAS:

2 Q All right. And what if anything does
3 this indicate to you concerning any profit by the
4 City of Danville from its municipal operations --
5 I'm sorry, from its utility operations?

6 A Well, sure. The utility operations are
7 the enterprise funds, first of all. And these
8 transfers reflect the profits from those
9 operations back to the general fund or general
10 operations of the City.

11 MR. THOMAS: Your Honor, I would move
12 Defendant's Exhibit 68.

13 MR. RAPHAEL: Same objection.

14 THE COURT: It will be received subject
15 to the objection of Fairfax Water as stated.

16 (Defendant's Exhibit 68 was received
17 into evidence.)

18 BY MR. THOMAS:

19 Q Look, if you would, please, Mr. Watkins,
20 at Defendant's Exhibit 69.

21 A Yes, sir, I'm there.

22 Q And what is that?

1 A This is the CAFR for the Town of Vienna,
2 Virginia for fiscal year ending June 2008.

3 Q All right. Turn if you would, please,
4 Mr. Watkins, to page 41. Do you see Note 6 there?

5 A I do.

6 Q All right. What does that indicate to
7 you, if anything, concerning any transfers from a
8 utility fund to the general fund?

9 A As indicated in the note to the
10 financial statement, \$962,000 were transferred to
11 the general fund from the water and sewer fund to
12 supplement general fund operations, or to help run
13 the government of the Town of Leesburg.

14 Q I'm sorry, I think you misspoke. You
15 said Leesburg.

16 A Did I say Leesburg? I apologize. The
17 Town of Vienna.

18 Q All right. That's what you understand
19 this particular note to say?

20 A Yes.

21 MR. RAPHAEL: Objection. Calls for
22 speculation.

1 THE COURT: Objection overruled.

2 MR. THOMAS: And I would move, Your
3 Honor, Defendant's Exhibit 69.

4 MR. RAPHAEL: Same standing objections,
5 Your Honor.

6 THE COURT: Yes, sir. It will be
7 received subject to those.

8 (Defendant's Exhibit 69 was received
9 into evidence.)

10 BY MR. THOMAS:

11 Q Now, Mr. Watkins, can you think of any
12 localities outside of Virginia that take transfers
13 from utility funds to general funds over and above
14 indirect costs and payment in lieu of taxes?

15 A Sure. There's a multitude. It's common
16 practice in North Carolina.

17 MR. RAPHAEL: Same objection, Your
18 Honor. Not disclosed in the report. And this
19 wasn't disclosed in the deposition either.

20 THE COURT: Objection overruled.

21 THE WITNESS: It's common practice in
22 North Carolina. The City of High Point,

1 Albemarle, North Carolina, are two examples in
2 North Carolina. There's a multitude.

3 Florida, it's -- it's common practice.

4 I believe -- it's not Leesburg. Lakeland,
5 Florida. Delaware. Smyrna, Delaware and Dover,
6 Delaware clearly have an established practice of
7 transferring money from the utility fund to the
8 general fund, to support the general operations of
9 the state government -- or the local government.

10 BY MR. THOMAS:

11 Q And when you say that, do you mean over
12 and above indirect costs and PILOT?

13 A Yes, yes.

14 Q Okay. Thank you.

15 MR. THOMAS: If I could have --

16 THE WITNESS: It's common practice.

17 Some do, some don't. It happens throughout the
18 country. But those are examples.

19 MR. THOMAS: Okay. Judge, if I could
20 have just one minute.

21 THE COURT: Yes, sir.

22 MR. THOMAS: Okay. Thank you.

1 Judge, I don't have further questions at
2 this time.

3 THE COURT: All right. Let's take
4 5 minutes before cross, okay? The Court will be
5 in recess.

6 (Whereupon, a recess was taken between
7 10:28 a.m. and 10:44 a.m.)

8 THE COURT: All right. Mr. Raphael,
9 cross-examination.

10 MR. RAPHAEL: Thank you, Your Honor.

11 THE COURT: Yes, sir.

12 CROSS-EXAMINATION

13 BY MR. RAPHAEL:

14 Q Good morning, Mr. Watkins.

15 A Good morning, Mr. Raphael.

16 Q You and I spent a fair amount of time
17 together one day talking about your analysis in
18 this case, correct?

19 A The better part of an afternoon,
20 correct.

21 Q Yes, sir. And most of that discussion
22 was connected with the primary subject of your

1 report, which had to do with what rate the City
2 might charge, which is not any question that
3 Mr. Thomas asked you about, right?

4 MR. THOMAS: I think he can answer that
5 question.

6 THE WITNESS: We covered a multitude of
7 topics. It was my deposition. I answered the
8 questions that you asked.

9 BY MR. RAPHAEL:

10 Q Right. But you had lots and lots of
11 mathematical Excel sheets and schedules attached
12 to your report, didn't you?

13 MR. THOMAS: Judge, if I could,
14 Mr. Raphael is asking the witness questions beyond
15 the scope of direct. He's asking about other
16 things that were in the witness' --

17 THE COURT: Well, this is an expert
18 witness. He's entitled to do so. I mean, he's
19 trying to make a point. I understand what it is.
20 I don't think that's improper. Objection
21 overruled.

22 BY MR. RAPHAEL:

1 Q You had lots of schedules and Excel
2 sheets. You sent me a bunch of Excel sheets. Do
3 you remember that?

4 A Yes. There were several schedules that
5 were attached to my report. You're absolutely
6 correct.

7 Q And you weren't asked about any of those
8 on direct examination, were you?

9 A I didn't hear any questions about it,
10 no.

11 Q No, sir. Now, we've heard a couple
12 times about your work in the Leesburg case. And
13 the schedules that you did for this case that
14 Mr. Thomas didn't ask you about are very similar
15 to the schedules that you did in the Leesburg
16 case, right?

17 A That's a reasonable characterization,
18 yeah.

19 Q Right. And prior to the Leesburg case,
20 you had never before done a rate study for a City
21 or Town that supplies its own water service to the
22 public, right?

1 A As my client? I -- I have done several.
2 That --

3 Q That's true.

4 A During my deposition and in your
5 question, you frame it as those are my clients. I
6 have --

7 Q Yes.

8 A -- done several. But not as my clients.

9 Q Right. I understand.

10 A However, in the Halifax case, as I
11 indicated in my deposition, my client per se was
12 the Virginia International Raceway. But I worked
13 in conjunction with the County of Fairfax because
14 they could not afford to hire a consultant
15 independently.

16 Q Right. And that case didn't have to do
17 with anything regarding a transfer of money from a
18 water fund to a general fund, did it?

19 A No. It had to do with the determination
20 of fair and reasonable rates.

21 Q It didn't have anything to do with the
22 transfer of money from a water fund to a general

1 fund, correct?
 2 MR. THOMAS: Objection. Asked and
 3 answered.
 4 THE WITNESS: That's what I just said.
 5 You were correct.
 6 BY MR. RAPHAEL:
 7 Q Okay. Now, you have actively -- you
 8 testified about a number of other systems, water
 9 utility systems on direct examination. And you've
 10 been actively looking for examples of systems that
 11 transfer money similar to the way Falls Church
 12 does it, right?
 13 A I've been actively looking for systems
 14 that do and don't transfer. Some do, some don't.
 15 Q Okay. And did you continue to do that
 16 investigation after I took your deposition about a
 17 month ago?
 18 A Yes. I have looked at others since
 19 then.
 20 Q And some of the things that you
 21 testified about today are based on what you
 22 learned after I took your deposition, correct?

1 A On the specifics. But as I indicated in
 2 my deposition, it's well known. I didn't know the
 3 exact -- the specific municipalities, municipality
 4 A, municipality B. As I indicated in my
 5 deposition, I was very clear, it's common
 6 knowledge in my practice that that is a common
 7 practice.
 8 Q But the names were not all known to you
 9 at the time, were they?
 10 A Not all of them.
 11 Q Right.
 12 A Some of them were, as I indicated, the
 13 City of Richmond and Norfolk in particular.
 14 Q Right. And so you continued to do the
 15 research to find examples of things to support
 16 what you were saying, right?
 17 A Not to support, but to find the specific
 18 utilities or, excuse me, municipalities that do
 19 either operate at a profit or build a profit
 20 component in their rates, or that transfer money
 21 to the general fund.
 22 Q And I believe you indicated just now

1 that you didn't -- you identified a number of
 2 systems that don't engage in this practice of
 3 transferring money as profit from the water fund
 4 to the general fund, correct?
 5 A Oh, absolutely.
 6 Q Which ones did you identify that don't
 7 follow that practice that Falls Church follows?
 8 A Let's see. Leesburg. We've talked
 9 about that. They do not engage in transfers. The
 10 County of Hanover, my home county, does not
 11 transfer money. Colonial Heights does not.
 12 Petersburg does not. I don't know. There are
 13 many that do and many that don't.
 14 Q Which other ones did you identify that
 15 don't transfer money?
 16 A I may have a list. I may not. Let me
 17 look at my...
 18 I don't know. There's a host of them,
 19 counselor, a host that do not in Virginia.
 20 Q All right. Did you make a list of ones
 21 that do not transfer money?
 22 A At one time I did have a list of all of

1 the ones I looked at. And I checked the ones that
 2 did transfer money and put an X by the ones that
 3 did not. I don't have them here.
 4 Q You didn't bring that list with you?
 5 A No.
 6 Q And that list wasn't produced to us, was
 7 it?
 8 A I have no idea, sir.
 9 Q Did you give it to your counsel?
 10 A No.
 11 Q All right. Where is that list now?
 12 A It's on my computer.
 13 Q Where is your computer?
 14 A Counselor, I don't mean to argue with
 15 you, but let me answer your question.
 16 THE COURT: No, no. You just answer
 17 questions, Mr. Watkins.
 18 THE WITNESS: Yes, sir.
 19 BY MR. RAPHAEL:
 20 Q Where is your computer, Mr. Watkins?
 21 A Sitting in the waiting room right there.
 22 MR. RAPHAEL: Can the witness be

1 permitted to obtain his computer so he can look at
2 the notes he just testified about?

3 MR. THOMAS: Judge, I think these are
4 just the witness's notes that he already indicated
5 that he looked at as he made a list that some do
6 and some don't. Mr. Raphael's asked him which
7 ones don't. He said to his recollection which
8 ones don't.

9 THE COURT: Are you able to access that
10 list, Mr. Watkins?

11 THE WITNESS: I believe so.

12 THE COURT: I don't see any harm in
13 doing that. I think that's -- I think that would
14 be perfectly fair. I think it would actually be
15 fairer to the witness so he has it in front of
16 him. Let's take a few minutes and let him get it.
17 Okay.

18 MR. RAPHAEL: Thank you, Your Honor.

19 THE COURT: The court will be in recess.
20 (Whereupon, a recess was taken between
21 10:50 a.m. and 11:02 a.m.)

22 MR. THOMAS: Your Honor, if I could be

1 heard on an objection briefly on this.

2 THE COURT: Sure. Absolutely. Yes,
3 sir.

4 MR. THOMAS: Judge, a couple of points.
5 First of all, I think that this request to take a
6 look at something this witness has prepared really
7 gets right into work product.

8 THE COURT: He was asked specifically
9 whether or not he furnished it to counsel.

10 MR. THOMAS: I understand that. But
11 that does not -- the question is if he furnished
12 it to counsel or not, if it's requested by counsel
13 for -- to an agent of counsel, the --

14 THE COURT: That's true. But
15 Mr. Watkins, he's the one that raised the
16 substantive list. He volunteered. And I
17 specifically asked him. And I didn't sense that
18 he had any objection to taking a look at it.

19 MR. THOMAS: That's fine. If I could
20 then just for preservation purposes. The
21 suggestion that this was somehow not produced in
22 discovery I think is --

1 THE COURT: Well, I didn't hear that
2 suggestion.

3 MR. THOMAS: Well, then, that's fine.

4 THE COURT: Did you make such a
5 suggestion?

6 MR. RAPHAEL: I don't think the list
7 that he's talking about, which I haven't seen
8 before, has been produced in discovery. But I
9 haven't seen it yet, so I don't --

10 THE COURT: Oh, okay. Well, no, I think
11 Mr. Watkins said he didn't give it to counsel.

12 MR. RAPHAEL: Right.

13 MR. THOMAS: I wanted to get ahead of
14 any suggestion that it should have been produced.

15 THE COURT: I didn't hear that from
16 Mr. Raphael.

17 MR. THOMAS: Okay.

18 THE COURT: Do you have the list now?

19 MR. RAPHAEL: No. I have not had a
20 chance to see it.

21 THE COURT: Okay.

22 MR. RAPHAEL: May I approach the witness

1 and see the list?

2 THE COURT: Yes, sir.

3 MR. RAPHAEL: In the meantime, while I'm
4 looking at that, Your Honor.

5 THE COURT: Yes, sir.

6 MR. RAPHAEL: I would like to make sure
7 it gets into the record two documents that I've
8 marked as PX Watkins 1 and PX Watkins 2. PX
9 Watkins 1 is a copy of Defendant's Exhibit 70 and
10 Deposition Exhibit 312. PX Watkins 1 was this
11 gentleman's expert report.

12 I'm not offering it into evidence. But
13 I think it needs to be in the record to preserve
14 my objection that everything that we've just heard
15 is not in his report.

16 THE COURT: Sure. That's fine.

17 MR. RAPHAEL: And PX Watkins 2, Your
18 Honor, is the deposition excerpts where he talks
19 about how he just did this in earnest yesterday.

20 THE COURT: Right.

21 MR. RAPHAEL: I also ask the Court's
22 indulgence to read the report, because I believe,

1 I really do believe what we've just heard is a
2 sandbag and I object to it.
3 MR. THOMAS: Judge, I'm -- I object to
4 both of these. I think the Court just said that
5 the PX-70, the report itself, Mr. Watkins'
6 report -- I'm sorry, DX-70 would not be admitted
7 into evidence but merely included in the record.
8 Is that --

9 THE COURT: Well, that's part of your
10 proffer is what I'm understanding.

11 MR. RAPHAEL: It's his expert report.
12 So I don't really want it in evidence. But I need
13 it in the record so I can show if I -- if Your
14 Honor does not change his opinion, I can show
15 there was error in admitting this information
16 which was not disclosed in the report.

17 MR. THOMAS: Well, Judge, I --

18 MR. RAPHAEL: The report is not filed
19 with the Court, so it's not going to be in the
20 record.

21 THE COURT: And it's not offered as
22 evidence either. The expert is generally bound by

1 the designation which has been furnished, which
2 I've already ruled is broad enough to cover these
3 matters.

4 And of course they were well explored or
5 certainly explored in the deposition. And this is
6 the only real issue, the only real issue in this
7 entire case. Real. I mean, there are little
8 issues floating around. But the real issue is the
9 transfer of funds, I believe.

10 Yes, Mr. Thomas.

11 MR. THOMAS: Well, I was -- I didn't
12 mean to interrupt the Court, if the Court was
13 going to rule on his request.

14 THE COURT: I'm going to think about it
15 for a few minutes. But it's being offered not for
16 me to read, I don't believe, but to be part of
17 Mr. Raphael's proffer so that he's preserved his
18 objection.

19 MR. THOMAS: Right.

20 MR. RAPHAEL: Yes.

21 MR. THOMAS: And if I could, parts of
22 that report have already been read in the record.

1 That proffer has been made. I see no reason at
2 all to include the whole report.

3 Just for fairness sake, Mr. Woodcock,
4 the plaintiff's expert, delivered a report of some
5 24 pages, some huge percentage of which never came
6 through in testimony the other day before the
7 Court.

8 THE COURT: Well, that often happens.
9 That's another reason we don't receive the
10 reports, other than the cumulative effect, et
11 cetera.

12 MR. THOMAS: And hearsay as well. And I
13 think the same treatment should be accorded to
14 this. I think the Court has already heard a
15 proffer as to what the scope of the designation
16 was and ruled that it's proper for the witness to
17 testify on it.

18 THE COURT: Wouldn't that be more
19 efficient, Mr. Raphael?

20 MR. RAPHAEL: Your Honor, as I said, I'm
21 proffering it so I can preserve my objection for
22 appeal.

1 THE COURT: Well, I know. But
2 Mr. Thomas makes a good point. It's going to look
3 like, look, there's this huge report, and the
4 point he simply made is they had a huge report as
5 well. If this case goes further than here, a
6 reviewing court is never going to be able to make
7 that distinction.

8 MR. RAPHAEL: I'm sorry. I don't quite
9 understand the objection, Your Honor.

10 THE COURT: If you appeal and you say
11 look at this report, look how big it is, he didn't
12 testify about any of it, oh, my goodness, how
13 could this have happened. What error was
14 committed by that trial judge. What was he
15 thinking.

16 And Mr. Thomas can say, well, wait a
17 minute, their expert witness had a big report and
18 he didn't talk about any of it whatsoever.

19 MR. RAPHAEL: That's --

20 THE COURT: So where do we get --

21 MR. RAPHAEL: First of all, that --
22 sorry.

1 THE COURT: Why don't you simply proffer
2 those portions of his report that you think are
3 pertinent to his failure to disclose?

4 MR. RAPHAEL: My point is what he's
5 testified about is not disclosed anywhere in that
6 report. Excuse me, Mr. Thomas. The answer to
7 Mr. Thomas' concern, if he does have that concern,
8 is let's proffer Mr. Woodcock's report, not for
9 evidence, but to address that concern.

10 My point is, in order for me to make my
11 John Crane argument, I need to be able to show
12 Your Honor that everything this gentleman just
13 testified about was not disclosed in the expert
14 report. I need it for my record.

15 I also ask -- I am going to ask the
16 Court -- you ruled on the admissibility of all of
17 that --

18 THE COURT: Right.

19 MR. RAPHAEL: -- without reading the
20 report. I ask the Court to read the report and
21 reconsider the ruling. I think when you read the
22 report -- that's why you're hearing such

1 resistance here. When you read the report you
2 will see it was fundamentally addressed to an
3 issue you didn't hear a thing about. All of this
4 stuff is new.

5 MR. THOMAS: Your Honor, that is not
6 true. And, Your Honor --

7 THE COURT: Well, it's at variance with
8 the deposition exhibit -- with the questions that
9 were put to him with regard to how other
10 localities do what they -- the City of Falls
11 Church does; namely, transfer funds from the
12 utility to the general fund.

13 MR. RAPHAEL: Right. But John Crane
14 turns on what's in the disclosure in the expert
15 report, not on what's in the deposition.
16 Remember, John Crane was -- the expert opinion
17 came out of the deposition. And the Supreme Court
18 said it doesn't matter. It's got to be in the
19 disclosure.

20 THE COURT: I know that. But the
21 designation they were talking about is the one
22 that needs to be provided pursuant to the rule.

1 MR. RAPHAEL: That's what it was.
2 There's a disclosure which attached that report.

3 MR. THOMAS: That's correct.

4 MR. RAPHAEL: That's the disclosure.

5 MR. THOMAS: Parts of which have been
6 proffered to the Court. And the Court has ruled
7 that it is sufficient to enable this witness to
8 testify to what he's testified to.

9 THE COURT: Right.

10 MR. THOMAS: Right. And the Court has
11 seen the deposition exchanges --

12 THE COURT: But Mr. Raphael is talking
13 about the report, not the designation. He is
14 talking about both, of course, but I've already
15 ruled on the designation.

16 But now he's saying that the report
17 differs from the testimony being offered and that
18 John Crane reaches far enough to go there.

19 MR. RAPHAEL: Absolutely. This -- I
20 will tell you candidly, Judge, this came as a
21 surprise to me that they were going to get into
22 this. It wasn't in the report.

1 At the deposition he said --

2 THE COURT: Don't you think this is
3 devastating cross-examination? Here you've
4 prepared all this stuff and abandoned it
5 altogether. Isn't this strange? Isn't that
6 rather compelling? I mean, they're still within
7 their designation. I don't believe John Crane
8 talked about the report.

9 MR. RAPHAEL: No, it did. It did.

10 THE COURT: No, but -- well, go ahead.

11 MR. RAPHAEL: It was referring to the
12 disclosures under Rule 4:1(b)(4)(A)(1), and their
13 disclosure was to attach the report.

14 And the disclosure said, without
15 limiting -- it had a quick summary.

16 THE COURT: Right.

17 MR. RAPHAEL: It said everything that
18 you need is in the report. So the report is
19 attached.

20 John Crane says, quote, a party is not
21 relieved from its disclosure obligation under the
22 rule, that's the report.

1 THE COURT: Right.
 2 MR. RAPHAEL: Simply because the other
 3 party has some familiarity with the expert
 4 witness.
 5 THE COURT: Got all that.
 6 MR. RAPHAEL: Right. Or the opportunity
 7 to depose.
 8 THE COURT: Uh-huh.
 9 MR. RAPHAEL: And when I did depose him
 10 he said he just started in earnest looking at it
 11 the day before.
 12 THE COURT: No, I've got all that.
 13 We've already hashed through that. We've already
 14 made the ruling.
 15 But what you're complaining about is he
 16 furnished this report which has all this stuff in
 17 it and he's chosen not to testify about that.
 18 MR. RAPHAEL: Yes.
 19 THE COURT: What he has chosen to
 20 testify about is what is covered within the
 21 parameters of the expert designation, about which
 22 you examined him, as well as other matters when

1 you took his deposition.
 2 MR. THOMAS: That's exactly right.
 3 MR. RAPHAEL: I don't believe --
 4 THE COURT: I believe that satisfies
 5 John Crane. I really do.
 6 MR. RAPHAEL: I understand, Your Honor.
 7 I would -- I need to proffer the full text for
 8 my -- for purposes of the review in court.
 9 MR. THOMAS: That is not --
 10 THE COURT: I want to think about that.
 11 I want to think about that because I think if I
 12 accept it, even as part of the proffer, that I may
 13 be committing error, because I don't think John
 14 Crane goes that far.
 15 What this is is the expert says I'm
 16 going to talk about this and this and this and
 17 here is my report. And it contains -- and the
 18 report is furnished. It contains all these kinds
 19 of things, and then chooses to not talk about all
 20 those things. Has changed his or her mind for
 21 whatever reason and talked about things that were
 22 within the parameters of the designation.

1 If she gets outside of that, over. Even
 2 though you could depose. Over. No question about
 3 it.
 4 But I don't think the linchpin is the
 5 report.
 6 MR. RAPHAEL: I understand your point.
 7 But the proffer I think is -- I've never -- I'm
 8 not familiar with the Court saying you -- I'm not
 9 going to let you proffer what you think you need
 10 to preserve your point for appeal.
 11 THE COURT: Let me just think about
 12 it --
 13 MR. RAPHAEL: Okay.
 14 THE COURT: -- just a little bit.
 15 MR. RAPHAEL: Thank you.
 16 THE COURT: You might be right about it.
 17 Let me just think about it.
 18 Yes, sir.
 19 MR. RAPHAEL: Now --
 20 THE COURT: Okay. Do you want to
 21 continue with your --
 22 Oh, wait a minute. Do you still have an

1 objection?
 2 MR. THOMAS: No.
 3 THE COURT: All right.
 4 MR. THOMAS: That's quite all right. I
 5 think I've made the objections with respect to
 6 this.
 7 THE COURT: Right. All right. Now, you
 8 want to approach the witness --
 9 MR. RAPHAEL: Thank you, Your Honor.
 10 MR. THOMAS: Can I come, too?
 11 THE COURT: -- to take a look at those?
 12 You both may come, of course.
 13 THE WITNESS: May I stand, Your Honor?
 14 It might be easier for them.
 15 THE COURT: That would be fine. Yes,
 16 sir.
 17 THE WITNESS: Thank you.
 18 MR. RAPHAEL: Can I suggest that we do
 19 this off the record?
 20 THE COURT: You mean just to take a look
 21 because you haven't seen it?
 22 (Attorneys reviewing document on

1 computer.)
 2 MR. RAPHAEL: Okay.
 3 THE WITNESS: Should I leave this on?
 4 BY MR. RAPHAEL:
 5 Q Yes, please. Now, when we broke,
 6 Mr. Watkins, you were going to fire up your
 7 computer and look at a list that you had kept of
 8 when you did your research into other systems.
 9 And you just showed us at the witness stand an
 10 Excel sheet that you prepared.

11 When did you actually prepare that Excel
 12 sheet?

13 A I can tell you real quick from the last
 14 revision. Let's see the best way to do that.
 15 Bear with me just a minute, please.

16 MR. THOMAS: Judge, while he is looking,
 17 can I just make sure that I have made clear my
 18 objection from earlier about access to this
 19 particular spreadsheet, which is under the rules,
 20 under rule 4:1(a), the limit of discovery on an
 21 expert is very clear. And that is you've got the
 22 designation and you have a deposition. And this

1 water fund or the utility fund on the one hand, to
 2 the general fund on the other.

3 A Right.

4 Q And having looked at the list, are you
 5 refreshed to be able to answer that question?

6 A Yes.

7 Q Okay. Which other systems do not
 8 transfer money from their water fund to their
 9 general fund?

10 A We have -- all of -- most utilities
 11 transfer some kind of funds. You know, whether it
 12 be PILOT or whatever. So in answering this,
 13 the -- the answer is directed to transferring for
 14 profits.

15 Q Yes, sir.

16 A They may include some other expenses.

17 I have Manassas that I cannot be sure
 18 whether it's profit or not profits.
 19 Charlottesville it appears that my note says
 20 transfers may be PILOT. Not certain. In other
 21 words, I'm not sure if it's entirely just for
 22 expenses or not.

1 goes beyond that. I want to make sure that
 2 objection is on the record.

3 THE COURT: Well, I've given the reasons
 4 I've made the particular ruling.

5 MR. THOMAS: I understand.

6 THE COURT: Just the unique
 7 circumstances.

8 MR. THOMAS: I understand.

9 THE WITNESS: I'm ready, sir.

10 BY MR. RAPHAEL:

11 Q Yes, sir. What date did you last edit
 12 that?

13 A It was last edited August 30th, 2009 at
 14 3:01 p.m.

15 Q Okay. And that was after your
 16 deposition; is that right?

17 A I believe so, yes.

18 Q Okay. About 2 weeks ago?

19 A That would sound about right.

20 Q All right. Now, you said that if you
 21 looked at the list it might help refresh you as to
 22 other systems that do not transfer money from the

1 Fredericksburg, transfers to general
 2 fund for various programs. I can't be certain
 3 what that is from the information provided.

4 Blacksburg, the transfer -- they do have
 5 transfers but they appear to be limited to
 6 transfers from the utility fund to the capital
 7 budgeting fund for various governmental equipment.

8 And let's see. Purcellville says note
 9 to transfers net of debt service, income statement
 10 page 25. I can't be certain if the transfers are
 11 for profit or what. So I didn't want to certainly
 12 indicate that they were.

13 Some municipalities have a separate fund
 14 for their debt service, and their financial
 15 statements will show it as a transfer out. But
 16 really all it is is a transfer from the utility
 17 fund to a specific debt service fund. They just
 18 account for it that way.

19 That was Purcellville. And the
 20 remaining -- the remaining items on the list are
 21 reflected as municipalities that I found transfer
 22 money to the general fund that are --

1 Q Okay.

2 A -- as a result of profits, if you will.

3 Q Okay. Now, when you identified one like
4 the City of Richmond where you thought that it was
5 in a category of a utility that transferred money
6 from a water fund to the general fund, did you do
7 any follow-up to confirm --

8 THE COURT: Hang on. There's an
9 objection. What's the objection?

10 MR. THOMAS: My objection is that the
11 witness has not identified Richmond as a
12 municipality that transfers funds from a water
13 fund to a general fund.

14 THE COURT: Let Mr. Raphael explore
15 that. He talked about Richmond.

16 MR. THOMAS: But he talked about
17 Richmond in the context, Your Honor, of Richmond
18 setting its rates based on the utility method and
19 building in a fair rate of return. He did not, in
20 direct -- and so now we're beyond the scope of
21 direct. He did not testify about Richmond.

22 THE COURT: I think this is proper

1 cross-examination. Objection overruled.

2 BY MR. RAPHAEL:

3 Q Are you including Richmond as an example
4 of a utility that transfers money from its water
5 fund to its general fund as profit?

6 A No, sir. I'm not. In fact, the City of
7 Richmond uses the utility method to develop its
8 rates, i.e., there's a profit component in there.
9 But I did review the Richmond financial statements
10 very carefully. I don't believe Richmond does
11 transfer money out of the utility fund.

12 Q In -- I think you said that you were
13 very familiar with the Richmond utility system,
14 correct?

15 A Fairly familiar, yes.

16 Q Okay. And who is the controller of
17 public utilities for the City of Richmond?

18 A Lasserty or Lafferty. Duane Lassiter or
19 Duane Lafferty. Something like that.

20 Q Can you spell it?

21 A I can't even remember if it's Lassiter
22 or Lafferty. It's -- Lasserty? Lassiter or

1 Lafferty.

2 THE COURT: You don't know which one it
3 is.

4 MR. RAPHAEL: That's fair enough.

5 THE WITNESS: I can't remember exactly.

6 BY MR. RAPHAEL:

7 Q And would it surprise you -- the name,
8 if I represent to you the name is Wayne Lassiter,
9 is that --

10 A That sounds exactly right, sir.

11 Q Would it surprise you if I told you that
12 Wayne Lassiter has never heard of you?

13 A I have met him at the VEPCO meeting, so,
14 yes, it would surprise me.

15 Q Okay. Who is the consulting engineer
16 for the City of Richmond water system?

17 A I don't know.

18 Q Now, when you identified a water system
19 that you indicated you believe does transfer money
20 from the water fund to the general fund as profit,
21 let's take Norfolk, for example.

22 A Okay.

1 Q Did you do additional things to follow
2 up to confirm your suspicion?

3 A No. I -- I take the audited financial
4 statements, you know, as -- as they are. And in
5 some cases it's not clear. Some cases it is
6 clear.

7 Q Okay. In which cases was it not clear?

8 A As I indicated, Charlottesville was not
9 clear. It's a very good example.

10 Q Let me ask it this way. In any of the
11 cases that you identified on direct examination as
12 examples of systems that you thought transferred
13 money from the water fund to the general fund, was
14 it unclear to you at first?

15 A Some were, yes.

16 Q Which ones were unclear to you at first?

17 A Manassas, Manassas Park. So I haven't
18 rendered an opinion that they do it for profit.
19 Maybe I'm misunderstanding your question.

20 Q Let me ask it again. For the systems
21 that you testified about on direct examination
22 that you said you thought did take a transfer of

1 profit from the water fund to the general fund --

2 A Yes, sir.

3 Q -- they included Norfolk, Newport News,
4 some systems in North Carolina, Danville. Do you
5 remember that?

6 A Yes. Yes.

7 Q All right. My question was: With
8 regard to any of those systems, was it unclear to
9 you at first looking at the CAFR whether, in fact,
10 they transferred money as profit from the water
11 fund to the general fund such that you then needed
12 to follow up?

13 A Oh, I see. I apologize. No, for those
14 that we discussed in my direct it was clear from
15 the financial statements, could tell from the
16 notes of the financial statements. So there was
17 no confusion.

18 Q So you didn't feel that you needed to
19 follow up because you had everything you needed
20 from the CAFR, right?

21 A That's correct.

22 Q So am I correct you didn't actually call

1 instances that you had personal familiarity with
2 concerning the systems you testified about on
3 direct was one that transferred money from the
4 water fund to the general fund as profit?

5 A Specifically, no. Again, with my
6 experience in Virginia, the topic has come up from
7 time to time. But we didn't go -- I didn't
8 remember specifically which exact municipalities
9 did and did not transfer money as a result of
10 profits.

11 Q Right. And so you didn't -- you didn't
12 pursue any specific follow-up with regard to your
13 inquiry concerning the City of Newport News --
14 strike that. Concerning -- you didn't do any
15 specific follow-up concerning your inquiry about
16 Danville or Vienna, true?

17 A That is correct.

18 Q Okay.

19 A On Newport News I did.

20 Q All right. Is -- which is the best
21 example, you think, of the ones that you went
22 through on direct?

1 anyone from any of those systems to ask about the
2 systems?

3 A You are correct.

4 Q And didn't do any historical research to
5 determine what the background was as to how the
6 transfer came about?

7 A Well, I know about the City of Norfolk
8 because of the litigation that went on years and
9 years between Norfolk and Newport News when they
10 wanted to build a pipeline to Lake Gaston. I was
11 somewhat involved in that.

12 Q Okay. Did that dispute have anything to
13 do with transferring money from a water fund to a
14 general fund?

15 A Not specifically. But it had to do with
16 the operations of -- of the Norfolk funds and the
17 profits or non-profits that they were making, et
18 cetera, et cetera, and the cash flows of the
19 various municipalities.

20 Q Okay. So you were familiar with Norfolk
21 from that prior experience, although it didn't
22 involve the specific issue here. Were there other

1 A I think they're all good examples, sir.

2 Q Which one do you think is the best --

3 A I'm not going to give a superlative. I
4 don't have a best example.

5 Q So they're all equal in your mind?

6 A I don't know if they're all equal. I
7 think they're examples of municipalities that
8 transfer profits. The point is some do; some
9 don't.

10 Q Okay. Did you find any ambiguity in any
11 of the CAFRs that you looked at with regard to the
12 systems that we just talked about?

13 A In what context?

14 Q Where the reference to what the transfer
15 was for was unclear?

16 A Oh, absolutely. Absolutely. That's
17 what we discussed earlier. Some of the financial
18 statements are not clear. For example, Manassas
19 is not clear. So I didn't want to -- to represent
20 to the Court or to anybody for that matter that,
21 indeed, it does represent profit. I wasn't
22 certain.

1 Q Okay. Actually my question was about
2 the ones that you identified as positive
3 identifications of systems that transferred money
4 from the water system to the general fund.

5 A Yes. In my professional opinion, I'm
6 reasonably certain that that's what those
7 represent.

8 Q And my question was: When you looked at
9 the CAFRs for those, did you see any ambiguities
10 that made you at least uncertain at first?

11 A Not that I recall. These CAFRs are
12 several hundred pages. It takes a while to go
13 through them. It takes a little while to
14 understand them. However, as I indicated during
15 my direct examination, the notes to the financial
16 statements tend to be fairly consistent, at least
17 in format. So in that regard, I could -- you can
18 make a determination sometimes. And then other
19 times, you say, well, the note is so ambiguous, I
20 can't tell. And those are the ones that I told
21 you about that I didn't want to represent to you
22 or to the Court that they do represent profits.

1 They may, they may not. I just don't know.

2 Q Some CAFRs are better than others as far
3 as how clear they are in their disclosures?

4 A Without a doubt.

5 Q All right. Now, how many water systems
6 are there in Virginia that are operated by
7 municipalities?

8 A There's a lot. There's a firm called
9 Draper Aden that puts a report out. I'm going to
10 be off a little bit. But somewhere -- 80, 60, 80
11 in that ballpark. And I may be off by 15 or 20.

12 Q Okay. And did you try to do a
13 full-blown survey of all of those?

14 A No, I did not.

15 Q You're not able to say then with any
16 precision what percentage of those do what you say
17 the City of Falls Church does, right?

18 A No, I'm not.

19 Q Okay. Now, you didn't actually analyze
20 how the City of Falls Church has set its own water
21 rates, correct?

22 A That's correct.

1 Q And you're not providing any opinion in
2 this case concerning the way that Falls Church
3 City set its management fee was appropriate,
4 correct?

5 A You are correct.

6 Q And you're not providing any opinion
7 about why the City of Falls Church raised its
8 water rates in 2005, correct?

9 A You are correct.

10 Q And you're not providing any opinion
11 about whether the amount of money that the City of
12 Falls Church has transferred from its water fund
13 to its general fund is unreasonable, correct?

14 A Either way, you are correct.

15 Q And the primary subject of your report
16 that you prepared and that we spent the time
17 asking you about in your deposition concerned
18 something that you didn't testify about on direct
19 examination?

20 THE COURT: He already answered that,
21 Mr. Raphael.

22 BY MR. RAPHAEL:

1 Q Okay. Now, let's talk about the City of
2 Norfolk.

3 A Okay.

4 Q Who are Norfolk's wholesale customers?

5 A The City of Virginia Beach is one. They
6 may serve a portion -- they may serve Chesapeake,
7 but I can't be certain sitting here, and the
8 United States Navy.

9 Q And when did the City of Norfolk enter
10 into a wholesale contract with Virginia Beach?

11 A That information in fact is in one of
12 the exhibits that we looked at. Perhaps somebody
13 can help me with it.

14 Q Sure.

15 A It was the Norfolk bond document.
16 Mr. Raphael, if you --

17 MR. THOMAS: Defendant's 74.

18 BY MR. RAPHAEL:

19 Q Defendant's 74.

20 A 74.

21 Q Why don't you turn -- Ken, maybe you can
22 bring this up, E-1, which I believe is page 173 of

1 the exhibit.
 2 This is a pretty long document,
 3 Defendant's 74. Did you read the whole thing?
 4 A Yes, I did. I spent quite some time
 5 reading this.
 6 Q So you read it cover to cover?
 7 A I did not read all of the legal
 8 covenants. But the report from the engineering
 9 and consulting firm I did read.
 10 Q Okay. Let me take you to appendix E of
 11 the Defendant's Exhibit 74, which is the bond
 12 issue by the City of Norfolk. Do you see this is
 13 a copy of the wholesale customer contract between
 14 the City of Norfolk and the City of Virginia
 15 Beach?
 16 A That's what it appears to be, yes.
 17 Q Right. And you read this contract,
 18 right?
 19 A Let me go back and see.
 20 Q And, Your Honor, it's E-1.
 21 THE COURT: Is that the page number?
 22 MR. RAPHAEL: It does at the bottom.

1 It's E-1.
 2 THE WITNESS: Yeah. I finally found E.
 3 It's a little difficult to find.
 4 MR. RAPHAEL: It's about 10 pages from
 5 the back.
 6 THE WITNESS: Yes, I see it now. Thank
 7 you.
 8 BY MR. RAPHAEL:
 9 Q Did you read this contract from cover to
 10 cover?
 11 A I believe I did. My recollection is I
 12 do recall reading the covenants with respect to
 13 rates and charges, delivered points of
 14 measurement. Some of the curtailment and force
 15 majeure I did not read.
 16 Q A lot of people don't read those
 17 clauses.
 18 A I think you're right.
 19 THE COURT: I'm sorry?
 20 MR. RAPHAEL: A lot of people don't read
 21 those clauses.
 22 BY MR. RAPHAEL:

1 Q Directing your attention then to page
 2 E-1. This is the wholesale customer contract
 3 between the City of Norfolk and the City of
 4 Virginia Beach, correct?
 5 A Yes.
 6 Q And this contract was entered into in
 7 1993, right? Second line of the --
 8 A Yes. I'm sorry. July 14th, thank you.
 9 Q Okay. This contract specifies what
 10 rates and charges the City of Virginia Beach will
 11 pay to the City of Norfolk for water service, does
 12 it not?
 13 A Yes. I believe it does.
 14 Q All right. And let's -- and it provides
 15 how -- what the City of Norfolk is going to do
 16 with the money it gets from Virginia Beach that is
 17 paid for its wholesale customers, right?
 18 A I don't know. Maybe you can help direct
 19 me to that section.
 20 Q All right. Let's go to page E-2,
 21 Mr. Sapp.
 22 A Okay.

1 Q If you could highlight the bottom
 2 paragraphs there. Give him the page number, too.
 3 A Return on rate base?
 4 Q Right. Did you read these paragraphs?
 5 A Yes, I did.
 6 Q For the record -- may I read these into
 7 the record, Your Honor?
 8 THE COURT: Yes, sir.
 9 BY MR. RAPHAEL:
 10 Q The first paragraph is return on rate
 11 base. "Virginia Beach must pay to Norfolk an
 12 annual return on the Virginia Beach rate base.
 13 The annual rate of return to be applied to the
 14 Virginia Beach rate base is computed by
 15 multiplying the embedded effective average annual
 16 interest cost of the Norfolk utilities department
 17 water system debt for the applicable rate year by
 18 1.25."
 19 Next paragraph: "Rate base. The rate
 20 base for the purposes of the water services
 21 contract is the original cost of the Norfolk water
 22 system less accrued depreciation (as shown on

1 Norfolk's books and records). The rate base
2 includes construction work in progress,
3 expenditures which have been paid by Norfolk at
4 the time of rate determination, and general
5 facilities related to the Norfolk water system."

6 Do you see that?

7 A Yes, I do.

8 Q So the City of Virginia Beach has agreed
9 to the basis on which the return and rate base and
10 percentage calculations are computed, right?

11 A Yes. They've agreed to use a utility
12 approach.

13 Q And they've agreed -- and they've
14 agreed -- the City has agreed how that approach
15 will be applied to payments by the City to Norfolk
16 for water service, right?

17 A Well, in the development of rates,
18 right.

19 Q Yes.

20 A In the methodology, correct.

21 Q The City agreed to it, didn't it?

22 A It certainly appears to be, yes.

1 Q Yes. When did Fairfax County agree to
2 the method by which Falls Church charges Fairfax
3 County customers for rates for water service?

4 MR. THOMAS: Objection, Your Honor.

5 THE WITNESS: I don't know. That would
6 seem to require a legal conclusion. They pay for
7 their rates. I don't know.

8 MR. THOMAS: My objection is lack of
9 foundation.

10 THE COURT: Your objection is on what?

11 MR. THOMAS: There is no foundation for
12 the question.

13 THE COURT: Well, he can simply ask him
14 if he knows.

15 THE WITNESS: I don't know either way,
16 sir.

17 BY MR. RAPHAEL:

18 Q Would it surprise you to learn that
19 there is no such agreement between Fairfax County
20 and the City of Falls Church?

21 A With respect to --

22 Q With respect to the ability of Falls

1 Church to impose charges on Fairfax County
2 customers that have return on equity profit
3 embedded in the rates?

4 A There typically isn't with any of those
5 services in which an out-of-town or
6 out-of-municipal-area is served. At least I'm not
7 aware of any, have ever seen such any.

8 Q Except for the City of Norfolk and
9 Virginia Beach?

10 A Yes. This is a negotiated wholesale
11 contract. You're correct.

12 Q That's right.

13 A There is a similar one for the Navy, as
14 well.

15 Q And a similar one for the City of
16 Chesapeake?

17 A There may be. I can't recall right now.

18 Q And, again, we're talking about the
19 agreements -- the one you mentioned for the City
20 and for the Navy, you're talking about an

21 agreement between the Navy and the City of Norfolk
22 for the provision of water service to the Navy

1 installations, right?

2 A That's correct.

3 Q And that contract similarly specifies
4 how the return on equity is going to be
5 determined, right?

6 A My recollection is is that the rate to
7 the United States Navy is the retail rate plus
8 10 percent.

9 Q Right. And do you know -- my question
10 is: Do you know if that's specified in the
11 contract?

12 A I believe it is.

13 Q Similar question for the City of
14 Chesapeake, which you thought was also a wholesale
15 customer of Norfolk. Do you know -- well, let me
16 ask you this. Do you know if the City of Norfolk
17 takes a transfer to its general fund from the
18 water fund corresponding to a return on equity for
19 the water supplied to the City of Chesapeake?

20 A You're going to have to run that
21 question by me again.

22 Q Sorry.

1 A You lost me on that one.
 2 Q My question is: Do you know whether the
 3 City of Norfolk takes a return on equity as profit
 4 from monies transferred from its water fund to its
 5 general fund with regard to water that Norfolk
 6 supplies to the City of Chesapeake?
 7 A I'm pretty good at understanding the
 8 English language. You have so many things in that
 9 question. Is the question simply do I know if the
 10 contract specifies that, between the City of
 11 Chesapeake and Norfolk, is there a profit
 12 provision?
 13 Q I'm getting there, but that wasn't my
 14 question. Let me -- I'll try to break it up for
 15 you to make it easier to understand.
 16 A Thank you very much.
 17 Q With regard to -- let's start at the
 18 beginning.
 19 A Right.
 20 Q Does Norfolk supply water to the City of
 21 Chesapeake?
 22 A I believe it does.

1 Q Does it do so on a wholesale customer
 2 basis?
 3 A I believe that's correct.
 4 Q And is there a contract between the City
 5 of Chesapeake and the City of Norfolk?
 6 A I believe there is.
 7 Q And do you -- have you seen a contract?
 8 A Yeah. That's why -- there's several.
 9 I -- I recall seeing one, I think. But I may
 10 be -- I may be incorrect. If there is I'll agree
 11 subject to check, if you make that representation.
 12 Q Okay. Do you know one way -- is it --
 13 strike that.
 14 Is it typical in this wholesale customer
 15 contract situation where a city is supplying water
 16 on a wholesale basis to another adjacent locality
 17 to reach agreement as to how the charges will be
 18 applied?
 19 A Oh, absolutely.
 20 Q And such a contract, as we've just seen
 21 between Norfolk and Virginia Beach, could specify
 22 how Norfolk would receive a return on equity for

1 sales of that water?
 2 A Yes.
 3 Q All right. And did you -- have you done
 4 any investigation or study into the history of how
 5 that customer contract agreement came about?
 6 A Which one is that?
 7 Q For the City of Norfolk and the City of
 8 Virginia Beach.
 9 A No.
 10 Q Can we go, please, Ken, to Defendant's
 11 Exhibit 64. All right. Defendant's Exhibit 64
 12 you were asked about on direct examination. This
 13 is the CAFR for the City of Newport News, right?
 14 A Bear with me. I'm getting it.
 15 Q You can see it on the screen here,
 16 Mr. Watkins. You're free to look it up on paper,
 17 too.
 18 A Thank you. It's pretty blurry on the
 19 screen. Yes, this -- 64 is the Newport News CAFR.
 20 Q Right. And Mr. Thomas asked you about
 21 page 21 of this document. Can we go, please,
 22 Mr. Sapp, to page 21.

1 A I'm there, sir.
 2 Q Okay. Okay. We have page 21 on the
 3 display. And this is the schedule Mr. Thomas
 4 asked you about, right?
 5 A There's so many. I'm getting them
 6 confused.
 7 Q Sure.
 8 A What this is, this is the income
 9 statement for the water fund.
 10 Q Okay. And if you -- Mr. Sapp, could you
 11 please highlight the -- towards the -- almost
 12 four-fifths of the way towards the bottom.
 13 Transfers out, \$10 million.
 14 Okay. Mr. Thomas asked you what this
 15 represented. And you said this represented a
 16 transfer of return on equity, correct?
 17 A Yes. I believe that's correct.
 18 Q Right. And it doesn't say that on the
 19 page, does it?
 20 A No. What you need to do is go to the
 21 notes to the financial statements.
 22 Q Okay. We're going to get there. We're

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1 going to get there. My question is it doesn't say
2 it on this page, does it?
3 A Oh, no, from this information alone you
4 couldn't make that determination necessarily.
5 Q Okay. And does the City of Newport News
6 take a PILOT?
7 A I believe they do. I believe they do.
8 Q And where does the City of Newport News
9 provide water service outside of the City?
10 A I'm not sure. I'm not sure if they --
11 if they serve portions of York County or not, or
12 Matthews County. I don't know.
13 Q Do they provide any water service
14 outside the City?
15 A I don't know.
16 Q You didn't investigate that?
17 A No, sir.
18 Q So you don't know whether they have any
19 customers or what -- if they have any customers,
20 what percentage they represent of their rate
21 customer population?
22 A No. I don't know if they serve just

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1 in-City or out-of-City or a multitude of areas. I
2 don't know either way.
3 Q And because you don't know if they have
4 any customers outside the City, do you know if
5 they have any wholesale customers outside the
6 City?
7 A Yes. I know they have the United States
8 Army that -- which would be Fort Eustis, has been
9 a customer of theirs for years and years.
10 Q All right. And how far -- strike that.
11 Does the City of Newport News have a
12 wholesale customer contract between itself and the
13 US Army for the base at Fort Eustis?
14 A Yes.
15 Q And does the --
16 A At least they did at one time. Whether
17 it's currently in effect, I can't -- I can't
18 testify for certain. But I would imagine they
19 still do.
20 Q When did you last see the contract?
21 A As a result of -- well, a discussion of
22 the contract as a result of the opinion in the

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1 United States in federal court, the federal court
2 decision involving a lawsuit between the City of
3 Newport News and the Department of Defense.
4 Q Is that the Warwick case?
5 A I believe that's right. It was in the
6 mid-'70s, late '70s, somewhere in there.
7 Q You last saw the contract in the
8 mid-'70s?
9 A I don't -- reference to the contract as
10 far as there being an agreement from the
11 Department of Army and the United States
12 government to purchase water from Newport News.
13 Q Okay. My question is when you last saw
14 the actual contract.
15 A Oh, I don't know if I've ever seen the
16 actual contract per se. I don't think I have in
17 fact.
18 Q But you know that there was a contract
19 between the two?
20 A I presume there was because of the
21 language in the order.
22 Q Right. And did the contract specify the

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1 rates at which the City of Newport News would
2 provide water to Fort Eustis?
3 MR. THOMAS: Objection, Judge. If he
4 says he hasn't seen the contract --
5 THE COURT: He still could know.
6 Objection overruled.
7 THE WITNESS: I read the order from the
8 Warwick case. And I can't remember if the rates
9 per se were mentioned or not.
10 BY MR. RAPHAEL:
11 Q All right. And do you know if the
12 contract specified the return on equity that the
13 City of Newport News would take?
14 A In terms of dollars or percent?
15 Q Either.
16 A No, I don't.
17 Q You mentioned a number of jurisdictions
18 in North Carolina that you said you believed had a
19 return on equity as profit from the water system
20 to the general fund.
21 A Yes.
22 Q One of them -- I think the first one was

1 High Point.
 2 A Yes.
 3 Q Is High Point a city or county?
 4 A It's a city in North Carolina.
 5 Q And in Virginia, cities are independent
 6 of counties. In North Carolina, is it the same
 7 way?
 8 A No. I think -- they're a little
 9 different. Yeah, cities are within a county in
 10 North Carolina. They do have independent cities.
 11 And the legal distinction quite frankly I don't
 12 know.
 13 Q You don't know one way or the other
 14 whether it's like Virginia or not?
 15 A No, I know -- I know -- I know that the
 16 composition in Virginia is unlike most other
 17 states. And North Carolina is different in the
 18 sense that, in Virginia, an independent city is
 19 not within a county. In North Carolina a city I
 20 believe is still within the county.
 21 Q Okay.
 22 A But there are independent cities. And

1 the legal distinction, I don't know.
 2 Q Okay. What is High Point?
 3 A I believe it's a city.
 4 Q Is it an independent city or part of a
 5 surrounding county?
 6 A I'm not positive, sir.
 7 Q What is the surrounding county?
 8 A It's -- High Point is right there in the
 9 Goldsboro area. I -- I don't know.
 10 Q You don't know the county?
 11 A No. Not sitting here, no.
 12 Q And does the City of High Point supply
 13 any water to people outside of the limits of the
 14 City?
 15 A That I don't know either.
 16 Q And did you do anything to investigate
 17 that?
 18 A No. That was not the purpose of the
 19 investigation.
 20 Q All right. Did you mention any other
 21 cities in North Carolina?
 22 A Yes. Albemarle.

1 Q Albemarle, North Carolina?
 2 A Yes.
 3 Q Is that spelled like it is for the
 4 Virginia Albemarle?
 5 A Yes. It's on the eastern area there,
 6 near Edenton area, if you will.
 7 Q Okay. Is the City of Albemarle, North
 8 Carolina, an independent city?
 9 A I don't think so. But I'm not positive.
 10 I believe it's the Town of Albemarle. Or it may
 11 even be Albemarle County. I frankly don't
 12 remember. I don't know.
 13 Q What's the surrounding county for the
 14 town of Albemarle in North Carolina?
 15 A It would be in the Albemarle area.
 16 Perquimans County, that area. If you're going
 17 down 17 in North Carolina, the Tidewater area,
 18 around Edenton, Elizabeth City, south of Elizabeth
 19 City, North Carolina, that area.
 20 Q Okay. Do you know if the Town of High
 21 Point supplies any water to customers outside the
 22 Town limits?

1 A No, I don't know either way.
 2 Q Do you know if it has any wholesale
 3 customer contracts?
 4 THE COURT: I don't think that was the
 5 question you meant to ask. You said "High Point."
 6 You meant Albemarle.
 7 MR. RAPHAEL: You're right, Your Honor.
 8 I'm sorry. Thank you.
 9 BY MR. RAPHAEL:
 10 Q I meant to ask this: Do you know if the
 11 Town of Albemarle supplies any water to customers
 12 outside the Town limits?
 13 A No, I don't know.
 14 Q Now, with regard to -- were there any
 15 other North Carolina jurisdictions you mentioned
 16 on direct examination?
 17 A I believe those were the two that I
 18 mentioned.
 19 Q You mentioned one in Florida. I don't
 20 think I wrote it down fast enough. Lake?
 21 A Lakeland, Florida.
 22 Q Lakeland?

1 A Right. L-A-K-E-L-A-N-D.
 2 Q And is Lakeland a city, county or town?
 3 A It's a city.
 4 Q Do you know in Florida whether the
 5 cities are part of the surrounding counties?
 6 A I know for a fact they are part of the
 7 county. My mother lives in Florida so I learned
 8 their laws a little bit helping her with her real
 9 estate deals.
 10 Q And so -- okay. Does the City of
 11 Lakeland, Florida supply any water to people who
 12 live outside the City limits?
 13 A I don't know.
 14 Q And you didn't try to investigate that?
 15 A No, sir. It was not the issue.
 16 Q Okay. Were there any other cities in
 17 Florida that you looked at with regard to the
 18 question of transferring money as profit from the
 19 water fund to the general fund?
 20 A Yes. Ocala, I believe. Ocala, Florida.
 21 Q Is Ocala a county, city or town?
 22 A I think it's all three. I think there's

1 a County of Ocala and Town of Ocala, but I stand
 2 to be corrected. It's in the central portion of
 3 the state.
 4 Q And does Ocala, Florida -- strike that.
 5 Are you aware of whether Ocala, Florida
 6 has any customers outside the corporate limits of
 7 the jurisdiction to whom it supplies water?
 8 A No, sir. I don't know either way.
 9 Q All right. Were there any other
 10 entities in Florida that you looked at or
 11 mentioned?
 12 A No. I believe that's all.
 13 Q And I think you mentioned one in
 14 Delaware. Smyrna, is it?
 15 A There's two I mentioned. Smyrna,
 16 Delaware and Dover, Delaware. They're
 17 incorporated cities.
 18 Q With regard to Smyrna, Delaware, in
 19 Delaware, is -- strike that.
 20 Is Smyrna a county, city or town?
 21 A It's a city, incorporated city.
 22 Q And is Delaware like Florida? Do the --

1 are the cities part of the surrounding counties?
 2 A It's more like New Jersey and the New
 3 England states. It has the Township, City,
 4 County. Delaware is comprised of only two
 5 counties or three counties, Sussex County and
 6 Nash. So it's structured more like the New
 7 England aspect of local government, where you have
 8 Cities, Towns, Townships. And the Counties, you
 9 know, remains to be seen whether they have any
 10 political influence or powers.
 11 But that being said, I don't understand
 12 the details of Delaware political organization.
 13 Q Does Smyrna supply water to any people
 14 who live outside the corporate limits of Smyrna?
 15 A I don't know for sure. I don't know
 16 either way.
 17 Q Does it have any wholesale customers
 18 outside the Town limits or the City limits?
 19 A I don't know.
 20 Q Dover, Delaware. Does Dover, Delaware
 21 supply water to anyone who lives outside the
 22 limits of Dover, Delaware?

1 A Yes. It serves Dover Air Force Base.
 2 Q Is that owned by the United States Air
 3 Force?
 4 A Indeed it is.
 5 Q How long has it served the Dover Air
 6 Force Base?
 7 A I have no idea.
 8 Q Have you ever seen the customer
 9 wholesale contract between Dover and the Dover Air
 10 Force Base?
 11 A I have not.
 12 Q So you would be speculating as to what
 13 the contract says, right?
 14 A I have no idea what this contract says,
 15 let alone speculating to what it may say.
 16 Q Do you know whether Dover, Delaware
 17 transfers money from its water utility fund to its
 18 general fund?
 19 A I'm sorry. Could you repeat the
 20 question.
 21 Q Yes. Do you know if Dover, Delaware
 22 transfers money as profit from its water utility

1 fund to its general fund?
 2 A Yes, I do.
 3 Q All right. And do you know if the
 4 amount of that is specified in the contract
 5 between Dover Air Force Base and Dover, Delaware?
 6 A No. You are -- as I understood your
 7 question, and I'm very sorry if I've misunderstood
 8 it. If I understood your question, your question
 9 was does Dover transfer money from its utilities
 10 fund to its general fund.
 11 Q Yes.
 12 A The answer is yes.
 13 Q All right.
 14 A Now your next question had to do with
 15 the Air Force?
 16 Q Yes.
 17 A It has nothing to do with the Air Force.
 18 Q My question is, do you know whether the
 19 contract between Dover, Delaware, and the United
 20 States Air Force for the Dover Air Force Base has
 21 any provisions specifying the amount that Dover,
 22 Delaware can take as a return on equity?

1 A Oh, no. I don't know either way. I
 2 have not seen that contract.
 3 Q Okay. Now, what were the other cities
 4 you mentioned in Virginia that you thought took
 5 money from the water fund to the general fund?
 6 THE COURT: Danville and Vienna.
 7 THE WITNESS: Thank you, Your Honor.
 8 THE COURT: Yes, sir.
 9 MR. RAPHAEL: Thank you, Your Honor.
 10 THE COURT: Yes, sir.
 11 BY MR. RAPHAEL:
 12 Q Is Danville a county, city or town,
 13 Mr. Watkins?
 14 A It's an incorporated city.
 15 Q And what is the surrounding county?
 16 A Well, on one side is Halifax. And I
 17 believe Pittsylvania is the other. But I stand to
 18 be corrected. But it's down there in south side
 19 Virginia.
 20 Q Does Danville supply water on a
 21 wholesale basis to any customers outside the City?
 22 A Yes.

1 Q Which ones?
 2 A Halifax County, the Virginia
 3 International Raceway -- I stand corrected. I
 4 apologize. That's for -- that's with respect to
 5 wastewater.
 6 I did know that at one time because all
 7 of this was a critical issue in the work I did
 8 with the City of Halifax -- County of Halifax.
 9 I'm sorry. Sitting here, I don't recall if it
 10 serves portions of Pittsylvania County or not. I
 11 just don't remember.
 12 Q Do you know if the City of Danville
 13 supplies water to anyone who lives outside the
 14 City limits?
 15 A I believe it does. I'm pretty sure it
 16 does. But I can't say with 100 percent certainty.
 17 I did know that at one time. I do know that
 18 Danville has a large water treatment plant,
 19 wastewater treatment plant, excuse me, and it
 20 provides wastewater treatment facilities for
 21 several of the surrounding communities,
 22 localities.

1 Q So we're clear, are you saying you don't
 2 know for sure whether Danville supplies water to
 3 people outside the limits of Danville?
 4 A That's correct. And I apologize. I did
 5 at one time. I don't want to say for certainty.
 6 I just don't recall right now. I believe they do
 7 but I'm not certain.
 8 Q And you've not investigated the Danville
 9 water system further than looking at the CAFR for
 10 it, correct?
 11 A No. At one time I knew it backwards and
 12 forwards because of my work in conjunction with
 13 Halifax County and their water system.
 14 Q In connection with your work in this
 15 case, all you've done for Danville is look at the
 16 CAFR?
 17 A That's right. That's right.
 18 Q All right. And then the last one I
 19 think you mentioned was Vienna. Is Vienna a
 20 county, city or town?
 21 A It's my understanding it's a town.
 22 Q And I think the CAFR that you were asked

1 about on -- the CAFR that you were asked about on
2 direct examination is Defendant's Exhibit 69.

3 Mr. Sapp, could you bring that up, please.

4 And while he's doing that, Mr. Watkins,
5 let me ask you, does the Town of Vienna supply any
6 water to customers outside of the Town of Vienna?

7 A I don't believe it does. But I'm not
8 certain.

9 Q Okay. Does the Town of Vienna have a
10 wholesale customer contract with anyone outside of
11 the Town of Vienna for water service?

12 A Yes. City of Falls Church.

13 Q The Town of Vienna supplies water to
14 the --

15 A No. The other way around. The other
16 way around. The City of Falls Church supplies
17 water to Vienna.

18 Q All right. Does the Town of Vienna sell
19 water to any wholesale customer outside of Vienna?

20 A I don't know.

21 Q Turn, please, to page 7 of Defendant's
22 Exhibit 69.

1 A Yes, sir. I'm there.

2 Q All right. And Mr. Sapp, if you could
3 illuminate the bottom paragraph, please, of
4 page 7. I said "illuminate." It was not a good
5 choice of words. I've replaced it with "magnify."

6 Mr. Sapp, if you could highlight in that
7 callout, about halfway down, the two sentences
8 that begin with "the transfers consist of."

9 Did you read this CAFR from cover to
10 cover?

11 A No. I don't know that I read it from
12 cover to cover. But I did read the financial
13 aspects relating to transfers.

14 Q Did you read this page?

15 A I believe I did.

16 Q All right. Now, for the record, these
17 sentences are describing the transfers, correct?

18 A In part. In part.

19 Q All right. And the callout I've
20 highlighted reads: The transfers consist of those
21 from the water and sewer fund to the debt service
22 fund for the former fund's share of debt

1 retirement and those from the water and sewer fund
2 to the general fund to recover the latter fund's
3 costs related to the support of its operations.

4 These transfers are netted against those from the
5 capital projects fund to the water and sewer fund.

6 Mr. Watkins, how much of the transfer
7 from the water fund to the general fund was for
8 repayment of debt?

9 A We would have to turn -- and we may not
10 be able to make a determination. But let's go to
11 the notes to the financial statement, which
12 provide more detail. And perhaps that would shed
13 some light on it. I don't know sitting here.

14 What I'm doing is looking for the notes
15 to the financial statement, which are part of any
16 audited financial statement. Here we go.

17 And they tend to be in the back for the
18 transfers.

19 I'm looking for the note -- the required
20 note for interfund receivables and transfers.

21 They're on every one. They're not always the same
22 number. They tend to be in the back.

1 Here we go. Note 6. Interfund --

2 Q What page are you on?

3 A I'm on page 41, sir, interfund balances.

4 Q Okay. Ken, can you go to 41, please.
5 The bottom of page 41.

6 A Right.

7 Q And call out -- magnify and call out the
8 bottom note, please, Note 6. There you go.

9 A Yes. Yes.

10 Q This is what you're referring to, right?

11 A Yes. That's right. Note 6.

12 Q Okay. And this indicates that, of the
13 transfer to the general fund, \$327,422 was for
14 repayment of debt, right?

15 A Correct. And \$962,000 even was for
16 profit.

17 Q That transfer -- you're referring to the
18 portion that says transfers to the general fund
19 from the water fund to supplement general fund
20 operations?

21 A Yes, sir.

22 Q Okay. That's that 962 you're talking

1 about right there?
 2 A Yes, sir.
 3 Q Okay. Now let's go back to page 7.
 4 A Okay. All right. I've got my hand in
 5 both places.
 6 Q Now, do you see at the end of that first
 7 illuminated sentence, it reads -- describing what
 8 the transfers are for, it says part of it is to,
 9 quote, to recover the latter fund's costs -- let
 10 me start that over.

11 It says to recover the latter fund's
 12 costs related to the support of its operations.
 13 Do you see that sentence?

14 A Yes.

15 Q So part of the transfer is to cover the
 16 costs of running the water system, isn't it?

17 A "The transfers consist of those from the
 18 water and sewer fund to the debt service fund from
 19 the former fund's share of debt retirement to
 20 those of the water and sewer fund to the general
 21 fund to recover the latter fund's costs related to
 22 the support of its operations."

1 Q Right. How much is that? The amount
 2 transferred from the water fund to the general
 3 fund to pay for direct and indirect costs of
 4 operating the water system?

5 A It's not clear. You can't tell that
 6 from there.

7 Q That's right. That's right. In fact,
 8 sir, why don't you go to page 24 of the CAFR --

9 A Page 24.

10 Q -- for the Town of Vienna. At
 11 Exhibit 69.

12 A Okay.

13 Q And we've got page 24 of the CAFR
 14 illuminated on the screen. Do you have that?

15 A Yes, I do.

16 Q There's no listing here for
 17 administration, is there?

18 A Administrative expenses?

19 Q Administration is a standard entry in
 20 CAFRs, is it not?

21 A No. Not necessarily.

22 Q It's an entry one sees frequently?

1 A Very frequently, you do. But there's no
 2 standard classification in municipal accounting as
 3 far as that. But, commonly, you will see an
 4 administrative breakout. Sometimes you don't.

5 Q Right. All of the City of Falls Church
 6 CAFRs that you've seen, I guess the two for '07
 7 and '08, those break out administration
 8 separately, right?

9 A That's correct. The way their system of
 10 accounts are, they classify things as
 11 administrative, source of supply, distribution.
 12 That's the way the Town has elected to classify
 13 their expenses.

14 Q Right. And there's no listing here on
 15 Exhibit 8 of the Town of Vienna CAFR on page 24
 16 for administration, is there?

17 A No. Obviously they don't have that
 18 classification. It's more than likely in
 19 personnel services. But I don't know. You would
 20 have to look into the nuts and bolts.

21 Q It might help to talk to somebody at the
 22 Town of Vienna to see how they do it, right?

1 A If you were interested in their
 2 administrative expenses, of course.

3 Q And interested in finding out what
 4 portion of the transfer was for administration
 5 cost, you would want to talk to them about that,
 6 wouldn't you?

7 A If that's what you were interested in,
 8 yeah.

9 Q Yes, sir. All right. Now, you did look
 10 a little bit -- you didn't talk much about the
 11 City of Falls Church on direct examination, but
 12 you did look extensively into the Falls Church
 13 system as per your report, didn't you?

14 A As far as their financial system --

15 Q Yes.

16 A -- yes. That is correct.

17 Q And Falls Church, in addition to the
 18 return on equity that it transfers from its water
 19 fund to the general fund, it takes a PILOT,
 20 doesn't it?

21 A It does. \$110,000.

22 Q \$110,000?

1 A Yes.

2 Q And the amount of the PILOT is
3 arbitrary, is it not?

4 A It is.

5 Q And you concluded that based on your
6 investigation?

7 A No. I was told based on my
8 investigation that it was arbitrary. I found it
9 to be reasonable. But it was -- it was not based
10 on any mathematical --

11 Q Okay.

12 A -- formula or mathematical study.

13 Q Who told you -- somebody from the City
14 told you that the PILOT was arbitrary?

15 A I don't know if the word -- I think
16 "arbitrary" is your word. It may be -- but you
17 may be correct. Discussions I had with Mr. Tuohy
18 and Ms. Ryman, they were not aware of any study,
19 mathematical study in which the \$110,000 in PILOT
20 was determined.

21 Q Okay. You said it was my word. Do you
22 remember when I asked you this question at your

1 deposition:

2 Question: Did you look at how Falls
3 Church calculates the PILOT?

4 Answer: Yes. It's arbitrary?

5 A Okay.

6 Q You told me that, didn't you?

7 A I don't remember if I used the word
8 "arbitrary" or not. I didn't mean to insinuate
9 either way.

10 Q Okay.

11 A The point is it's not based on a
12 mathematical formula.

13 Q Right. Okay. Now, in Virginia,
14 municipal water systems are not regulated by the
15 State Corporation Commission, right?

16 A That's correct.

17 Q And you think as a result of that it's
18 important that the rates that a city charges to
19 its out-of-town customers be fair and reasonable,
20 don't you?

21 A I think that that is important
22 regardless of the form of regulation or lack

1 thereof.

2 Q Whether it's regulated or not, its fees
3 and charges to outside customers should be fair
4 and reasonable, right?

5 MR. THOMAS: Judge, if I could, this is
6 outside the scope of the direct of this witness.
7 And to make that objection a little bit more,
8 we're going right back to where we were
9 previously, which is some component of
10 Mr. Watkins' disclosure related to a rate study of
11 the City of Falls Church. I didn't ask him about
12 that in direct. So this is beyond the scope of
13 the direct. I mean, it's no different than if I
14 had -- it's no different than if I had gotten up
15 and asked Mr. Woodcock about a variety of opinions
16 that he gave in his report but didn't testify
17 about.

18 THE COURT: Well, I still think we have
19 a little more latitude in dealing with an expert
20 witness, because she or he has identified the
21 general areas on which testimony will be based.
22 And this -- these questions certainly fall within

1 those general areas. I'm going to permit it.
2 Objection overruled.

3 MR. RAPHAEL: Could you read back the
4 question that's pending, please.

5 (The reporter read the record as
6 requested.)

7 THE WITNESS: Yes.

8 BY MR. RAPHAEL:

9 Q And in addition, a public -- a municipal
10 utility's fees and charges to outside customers
11 should be nondiscriminatory, based on customers
12 within the same customer class?

13 A In general. There may be reasons for
14 discrimination. You have to understand
15 discrimination has two different meanings. You
16 can have price discrimination and political
17 discrimination. But certainly they can
18 discriminate in prices due to cost reasons.

19 Q Sure. A city could have a higher charge
20 to its outside-city customers than its in-city
21 customers, right?

22 A It could. Sure.

1 Q And --
 2 A And there may be legitimate or there may
 3 not be legitimate reasons for that.
 4 Q Right. And we talked about this in your
 5 deposition. You recognize a distinction, do you
 6 not, between the return on equity that's used to
 7 compute what an out-of-town rate should be on the
 8 one hand, and whether money should be transferred
 9 from the water fund to the general fund as a
 10 profit on the other? Those are two separate
 11 things, right?
 12 A In my view -- yeah, the determination of
 13 what a proper return on equity is or proper return
 14 on profit is and whether one transfers money is --
 15 are two different issues, yes.
 16 Q Separate questions?
 17 A Yes.
 18 Q Okay. Now, getting back to the issue of
 19 a fair and reasonable charge to outside-City
 20 customers. You testified on this subject in the
 21 Leesburg case, right?
 22 A Indeed I did.

1 Q And in the Leesburg case, you testified
 2 that the Town had a monopoly on water service in
 3 the portion in Loudoun where it provided service,
 4 right?
 5 A That's correct.
 6 Q And because the Town had a monopoly, you
 7 testified that it was important to ensure that the
 8 rates that it was charging to outside-Town
 9 customers were fair and equitable, right?
 10 A Right. Because they're captive
 11 customers. Sometimes to a lawyer monopoly means a
 12 very specific thing. So captive customer would be
 13 more of an economic perspective, but either one.
 14 Q Captive. You like the phrase "captive
 15 customer"?
 16 A Yes. They're captive to that.
 17 Q And isn't it true, Mr. Watkins, that it
 18 would not be right for Falls Church to charge
 19 excessive rates to its Fairfax County customers?
 20 MR. THOMAS: Objection, Judge.
 21 THE COURT: That's a hypothetical
 22 question. I don't think that's a proper question.

1 Objection sustained.
 2 BY MR. RAPHAEL:
 3 Q All right. Well, getting back to the
 4 source of your belief, or your principle that it's
 5 not proper to overcharge outside-city customers,
 6 what is the source of that principle?
 7 A The foundation of economics, the theory
 8 of public utility regulation, the theory of proper
 9 pricing, as well as my -- well, my 30 years
 10 experience, that's the way that we do rate making.
 11 And pretty much that's the way -- not pretty much.
 12 That's the proper way to set rates.
 13 Q Right. Well, isn't another
 14 consideration that it's important to have fair and
 15 equitable rates because outside-city customers can
 16 be captive customers?
 17 A I'm sorry.
 18 Q Isn't part of your basis for saying that
 19 the rates need to be fair and reasonable is that
 20 outside-city customers are captive customers?
 21 A Yes.
 22 Q You testified to that in your --

1 A Yes.
 2 Q In the Leesburg case, right?
 3 A Right.
 4 Q Right. And the City of Falls Church
 5 likewise has captive customers in the portion of
 6 Fairfax County where it provides water service,
 7 doesn't it?
 8 A That's been an assumption. I don't
 9 know. I mean, I've assumed that they're captive,
 10 but I can't say for certain.
 11 Q Well, do you remember when I asked you
 12 this question in your deposition:
 13 Question: And the City of Falls Church
 14 does have captive customers in the eastern portion
 15 of Fairfax County, doesn't it?
 16 Answer: Yes. I think that's fair to
 17 say.
 18 MR. THOMAS: If I could, Judge, and this
 19 is going to be the subject of my earlier
 20 objection, in addition to the fact it was
 21 hypothetical.
 22 The plaintiff is Fairfax Water

1 Authority. They are not here in any kind of
2 representation or standing about all eastern
3 Fairfax County customers. They claim that these
4 rates are unconstitutional. As I said, they're
5 not here representing all Fairfax County customers
6 of the City of Falls Church. And so I don't think
7 this is a relevant line of inquiry. I think it
8 goes beyond.

9 THE COURT: But the Fairfax Water is a
10 customer.

11 MR. THOMAS: I understand that.

12 THE COURT: And it's a captive customer.

13 MR. THOMAS: I understand that. But
14 these questions relate to all customers in eastern
15 Fairfax County.

16 THE COURT: Well --

17 MR. THOMAS: They're not plaintiffs in
18 the case.

19 THE COURT: If you want Mr. Raphael to
20 limit the questions to a customer, he's still
21 going to get the same response.

22 MR. THOMAS: Well, that's -- I

1 appreciate that. The customer is the plaintiff.
2 And it's not, you know, some number of eastern
3 Fairfax County customers appearing through this
4 plaintiff.

5 THE COURT: I understand that. I
6 understand that.

7 Restate the question one more time,
8 Mr. Raphael.

9 MR. RAPHAEL: Yes, Your Honor.

10 BY MR. RAPHAEL:

11 Q Mr. Watkins, my question was, isn't it
12 true that Fairfax County -- strike that.

13 Isn't it true that the City of Falls
14 Church, like the Town of Leesburg, has captive
15 customers in the portion of Fairfax County where
16 it provides water service?

17 A Yeah. I believe that's fair.

18 Q All right.

19 A A fair assessment.

20 Q Now, let me switch over to talk about
21 the City's customers in the City. Am I correct
22 that you think it would be okay for the City to

1 charge nothing to Falls Church City customers and
2 simply give the water away?

3 A That would be a possibility. And I
4 think that would be fine. I think it's a matter
5 of local policy.

6 Q Okay. The City of Falls Church can do
7 whatever it wants with regard to the City
8 customers, right?

9 A Within its own city, that's right.

10 Q So, conversely, the City could charge,
11 instead of giving it away, the City could charge a
12 very high price to its own citizens, much more
13 than needed to cover the costs, and then use the
14 surplus to reduce the taxpayers' property taxes,
15 right?

16 MR. THOMAS: Objection, Judge. Calls
17 for a hypothetical again.

18 MR. RAPHAEL: This gentleman is an
19 expert. He's allowed to answer hypotheticals.

20 THE COURT: That's true. Repeat the
21 question, would you, please.

22 BY MR. RAPHAEL:

1 Q The City could charge a much higher
2 water rate to its own citizens than is needed to
3 cover the cost and then use the surplus to reduce
4 the City's property tax rates?

5 MR. THOMAS: Same objection, Judge.
6 It's a hypothetical. It doesn't have anything to
7 do with the question of whether the rates and
8 charges imposed are unconstitutional.

9 THE COURT: This is an expert witness.
10 I think it's a fair question. I think it's a fair
11 hypothetical. Mr. Watkins can answer if he
12 wishes.

13 THE WITNESS: Sure. Hypothetically,
14 that could certainly be possible.

15 BY MR. RAPHAEL:

16 Q Okay. But you're not aware of any legal
17 rules that apply to whether the City can charge a
18 higher rate to its own citizens and use the
19 surplus to reduce taxes, right?

20 MR. THOMAS: Objection. I think he's
21 asking about something that's beyond the scope of
22 what this expert has been designated to testify

1 to.

2 THE COURT: But he just asked him if
3 he's aware of it, not to opine on the legality.
4 Maybe he is. Maybe he isn't. I think it's a fair
5 question.

6 THE WITNESS: I'm sorry. Could you ask
7 it one more time.

8 BY MR. RAPHAEL:

9 Q Yes. You're not aware of any legal
10 rules that address in Virginia whether it's proper
11 for a city to charge a higher water rate to its
12 own citizens and then use the surplus to reduce
13 taxes?

14 A I'm not aware either way.

15 Q And similarly, in addition to providing
16 high charges for water service, a City might have
17 high rates for fire protection service and use
18 those surpluses to fund other City expenses,
19 right?

20 A Hypothetically, that would be possible.
21 Although, fire service rates are not that popular
22 in Virginia. There may be some.

1 Q All right.

2 A But hypothetically, that would certainly
3 be a possibility, yes.

4 Q And the authority -- the authority that
5 you rely on for this line of reasoning that a City
6 could charge a much higher rate and use the
7 surplus to reduce taxes, the authority that you
8 rely on for that is your common sense, right?

9 A And my training as well as the economic
10 theory espoused by various people. But common
11 sense, common knowledge, that's correct.

12 Q All right.

13 A It's really a matter of simple
14 arithmetic.

15 Q Do you remember when I asked you this
16 question in your deposition: Do you have any
17 texts on which you rely for that statement?

18 Your answer was: No, that's just common
19 sense?

20 A I remember making that statement. But
21 that is correct. It's a matter of simple
22 arithmetic.

1 Q All right. As of the time I took your
2 deposition, Mr. Watkins, you were not aware of any
3 other water resource manuals or texts that support
4 your statement that it's proper to transfer the
5 profit from the water fund to the general fund,
6 correct?

7 A That it is proper to transfer --

8 Q To transfer the profit from the water
9 fund to the general fund.

10 A No. I'm not aware of any text either
11 way. It's common practice.

12 Q And you talked a little bit about the
13 AWWA. Am I correct that you cited the AWWA's M1
14 manual in your report at page 4, footnote 4 as an
15 authoritative source?

16 A Page 4, footnote 4.

17 Q Ken, will you bring up Defendant's
18 Exhibit 70 at page 4.

19 A I've got it. Well, the words
20 "authoritative source" are yours. I do reference
21 the M1 and M35 manual in footnote 4 to page 4 of
22 that report.

1 Q Magnify footnote 4. Can you read
2 footnote 4, please?

3 A Absolutely. "This opinion is supported
4 in various texts as well as in practice in many
5 jurisdictions. See for example, American Water
6 Works Association rate manuals M1 and M35."

7 Q Right. Now, when I asked you about this
8 at your deposition you could not identify any
9 water rate manual that endorsed your view that
10 it's acceptable to transfer profits from the water
11 fund to the general fund, right?

12 MR. THOMAS: Objection. Asked and
13 answered.

14 THE WITNESS: No. It's typically not
15 addressed in a rate manual.

16 BY MR. RAPHAEL:

17 Q All right.

18 A As I discussed in my deposition.

19 Q And you're not claiming that the M1
20 manual condones transferring profits from the
21 water fund to the general fund, are you?

22 A No. Neither way. Whether it -- whether

1 you should or shouldn't. It doesn't say.
2 Q Okay. Now you're aware that the AWWA
3 has a policy statement concerning not diverting
4 water funds from the water system for purposes
5 unrelated to operating the water system, right?

6 A I'm aware of a policy. But it doesn't
7 say that you shall not. We went through that in
8 my deposition, as I'm sure you recall.

9 Q Okay. But you -- you're aware that the
10 policy doesn't endorse transferring -- diverting
11 monies from the water fund to the general fund for
12 purposes unrelated to operating the water system?

13 A Why don't we look at the policy,
14 counsel.

15 Q Sure. Ken, bring up Plaintiff's Exhibit
16 107.1 at page 2. And can you magnify paragraph 2,
17 please, Ken. And can you highlight the second
18 sentence rather than the third sentence, please.

19 Can you see it on the screen here,
20 Mr. Watkins?

21 A Yes. But we need the whole policy
22 statement.

1 Q Okay. I think we have it here. But
2 you're welcome to look at it in the hard copy of
3 the exhibit.

4 A Okay.

5 Q Now, the second sentence here in
6 paragraph 2 says "water utility funds should not
7 be diverted to uses unrelated to water utility
8 services." Right?

9 A The -- did I just do that or did you? I
10 think I did.

11 I am trying to read the statement, the
12 policy statement.

13 Q It's called out at the top of the
14 screen, if that makes it easier for you. If you
15 want to magnify a different part, we can do that,
16 too. You tell me what you would like.

17 A Thank you very much. Thank you. I am
18 reading the -- which is a -- from the entire
19 policy. There's actually a separate policy
20 statement. This is out of a manual.

21 "To this end, AWWA recognizes the
22 following principles that water utilities should

1 establish. Implementation of these principles can
2 be balanced against other policy objectives;
3 however, no policy should be adopted that
4 compromises the long-term financial integrity of
5 water utilities or their ability to provide
6 service to customers. Basic financing and rate
7 principles include:

8 "1, water utilities' revenues from water
9 service charges, user rates, and capital charges
10 (e.g., impact fees and system development charges)
11 should be sufficient to enable utilities to
12 provide for:

13 "Annual operation and maintenance
14 expenses; capital costs (e.g. debt service and
15 other capital outlays); and adequate working
16 capital and required reserves.

17 "Number 2: Water utilities should
18 account for and maintain their funds in separate
19 accounts from other government funds or owning
20 entity operations. Water utility funds should not
21 be diverted to uses unrelated to water utility
22 services. Reasonable taxes, payments in lieu of

1 taxes, and other payments for services rendered to
2 the water utility by a local government or other
3 divisions of the owning entity may be included in
4 the water utility's revenue requirements after
5 taking into account the contribution for fire
6 protection or other services furnished by the
7 utility to the local government or to other
8 divisions of the owning entity."

9 Q Right. This paragraph doesn't say
10 anything about transferring profits from the water
11 fund to the general fund, does it?

12 A No, it does not.

13 Q Okay.

14 A As indicated in the beginning of this,
15 of this policy statement, you should look at the
16 individual policies and circumstances.

17 Q Right. And it mentioned --

18 A But as a general matter, I would agree
19 with you. I'm not going to disagree with what's
20 on the paper.

21 Q Sure. It mentions transferring monies
22 for administrative costs, right?

1 A Yes. As a general matter.
 2 Q It mentions transferring monies for
 3 PILOT, right?
 4 A That's correct.
 5 Q It doesn't mention anything about
 6 profit?
 7 A No. It does not.
 8 Q Okay.
 9 A It doesn't mention anything about the
 10 salaries that should be paid secretaries, for
 11 example.
 12 Q But it does. Go back, please, Ken, to
 13 page 1.
 14 Do you see at the bottom, "reasonable
 15 taxes, payments in lieu of taxes and/or payments
 16 for services rendered to the water utility by a
 17 local government."
 18 A Correct.
 19 Q It does mention --
 20 A That has nothing to do with the salaries
 21 paid to the secretaries or the director. There's
 22 a lot of things this does not encompass. And I

1 don't mean to mince words. I think what is
 2 important, though, is to understand that, at the
 3 very beginning it says that, "towards this end,
 4 AWWA recognizes the following principles that
 5 water utilities should establish. Implementation
 6 of these principles can be balanced against other
 7 policy objectives."
 8 And I think that it is unfair to
 9 characterize something that you should not do
 10 something when the policy statement clearly says
 11 you should balance against what your local
 12 policies are. That's my whole point.
 13 Q Mr. Watkins --
 14 A It says what it says.
 15 Q It does. And you said it doesn't
 16 include the salaries of secretaries that work on
 17 the water system.
 18 A Right. There's a lot of things it
 19 doesn't --
 20 Q And I think you're mistaken. Can you
 21 please bring up, Ken -- we're putting the two
 22 pages up side by side so you can see them.

1 A Yes.
 2 Q And the sentence carries over. It says:
 3 "Reasonable taxes, payments in lieu of taxes,
 4 and/or payments for services rendered to the water
 5 utility by a local government or other divisions
 6 of the owning utility may be included in the water
 7 utility's revenues."
 8 So it does include secretaries'
 9 salaries, doesn't it?
 10 A Mr. Raphael, I'm sorry that you can't
 11 read. That would only be true if they were not
 12 part of the water division. If they were part of
 13 the water division, they're included in there.
 14 The director of public utilities or the chief
 15 engineers. It doesn't discuss what the
 16 engineering salaries should be.
 17 So sometimes secretaries' salaries may
 18 be allocated because the Mayor's secretary -- I
 19 wasn't referring to that. I apologize. I was
 20 referring to a secretary, if you will, within the
 21 water department.
 22 Q Okay. Well --

1 A Those would not be transferred in.
 2 Q The City of Falls Church has people who
 3 are not in the water department who provide
 4 indirect support for the water department?
 5 A Indeed they do.
 6 Q In fact a portion of Mr. Tuohy's time is
 7 paid for by the water system, right?
 8 A That's right.
 9 Q And a portion of the City Manager's time
 10 is paid for by the water system, right?
 11 A That's correct.
 12 Q And a portion of the City Council's time
 13 is paid for by the water system, right?
 14 A Absolutely.
 15 Q And the City Manager?
 16 A That's correct.
 17 Q And the Clerk?
 18 A Which clerk?
 19 Q The City Clerk.
 20 A I believe that's right.
 21 Q Right. And you're saying that's not
 22 consistent with this sentence?

1 A No. Not at all. I mean --
 2 Q You're not saying that?
 3 A -- with respect -- no. You're trying to
 4 twist things around, Counselor. All I'm saying is
 5 this statement does not tell you exactly what
 6 costs should and should not be included.
 7 Now, a secretary that is within the
 8 water utility department, that's not allocated or
 9 transferred in. Let's use the director of
 10 engineering if we may. It doesn't say what that
 11 salary should be.
 12 And I don't mean to mince words with you
 13 and take anything out of context, and I'm asking
 14 that you not do the same.
 15 The policy is clear that it depends on
 16 the individual policies.
 17 Q All right.
 18 A And the individual circumstances should
 19 dictate.
 20 Q And, Ken, if you would show the last
 21 sentence before paragraph 1 on page -- on the
 22 first page.

1 "Basic financing and rate principles
 2 include:" And it lists them, doesn't it?
 3 A Yes.
 4 Q Now, Mr. Watkins, can a city pay --
 5 strike that.
 6 You're aware that the City has a sizable
 7 cash balance in its water fund, right?
 8 A Yes. I believe it does.
 9 Q At the end of fiscal year '08 it was
 10 about \$20 million, right?
 11 MR. THOMAS: And Judge, if I could, this
 12 is totally beyond the scope of the direct. And
 13 I -- I don't want to keep bouncing up to say that,
 14 but I didn't get into any of this with this
 15 witness.
 16 THE COURT: Well, I recognize that, but
 17 he still is an expert witness. And his
 18 designation is very broad. I think this is proper
 19 cross-examination. Objection overruled.
 20 BY MR. RAPHAEL:
 21 Q And as far as you're concerned, as a
 22 rate-making consultant, the City could keep that

1 money in the water fund or simply pay it out to
 2 itself as a dividend, right?
 3 A Wait a minute. I thought we have a
 4 question outstanding as to what the balance is. I
 5 never answered that.
 6 Q Yeah. The previous question was you're
 7 aware that the City has a sizable cash balance in
 8 its water fund, right, about \$20 million, as of FY
 9 08?
 10 A It was \$17,118,000 as of the end of '08.
 11 Q Does that include investments?
 12 A No. The investments at fair value are
 13 \$3,525,000. So it's about \$20.6 million.
 14 Q Right. And as far as you're concerned
 15 as a rate-making consultant, the City could either
 16 keep that money in the water fund or simply pay it
 17 out to itself as a dividend, right?
 18 A What, the \$20 million?
 19 Q Yes.
 20 A It's their money. They -- they can do
 21 what they want with it. Whether they need to use
 22 it for future financing of capital improvements,

1 pay bonds, pay down unused bond funds, pay it as a
 2 dividend. That's correct. It's their money.
 3 They're entitled to do what they want with it.
 4 Q It was the last thing you said that I
 5 was interested in. Pay it as a dividend over to
 6 the City general fund.
 7 A Yes.
 8 Q And the amount that's in the cash
 9 balance of the water system comes from the
 10 customers of the water system, right?
 11 A Comes from a multitude of sources. It
 12 could come from unused bond financing. I don't
 13 know what it comes from.
 14 Q Right.
 15 A It could come from retained earnings.
 16 It could come from current operations. Not could.
 17 It does come from current operations.
 18 Q Sure.
 19 A It comes from retained earnings. It
 20 comes from unused bond proceeds. It comes from
 21 revenues collected from availability fees. It
 22 comes from a multitude of sources.

1 Q Right. And the largest source is from
2 the commodity charge imposed on customers, right?

3 A I haven't done an analysis of what's
4 comprised of that \$20 million cash. I don't know.

5 Q But don't you know that the largest
6 source of income for the City of Falls Church is
7 from fees charged for water to its customers?

8 A Right. When you're talking about cash,
9 you're talking about a stock. When you're talking
10 about income, you're talking about a flow.
11 They're two different concepts.

12 Q 92 percent of the City's water customers
13 live in Fairfax County, right?

14 A Yes. About that, that's correct.

15 Q So the cash coming in from sales of
16 water, the vast majority comes from Fairfax County
17 customers, true?

18 A With respect to user fees, that's
19 correct.

20 Q Okay.

21 A But that has nothing to do with the cash
22 in hand.

1 Q And the amount of the cash that the City
2 has in its water fund was not something that you
3 took into account in the analysis that you did in
4 this case, right?

5 A That's correct. And it's -- you never
6 do in rate making. The amount of cash on hand,
7 you make a cash working capital allowance --

8 Q Yeah.

9 A -- in the rate-making process. But the
10 amount of cash in hand is immaterial.

11 Q And you didn't look at any of the prior
12 rates that were charged by the City of Falls
13 Church, correct?

14 A That is correct.

15 Q And so you can't testify whether the
16 City in the past has gouged or overcharged its
17 Fairfax County customers, right?

18 MR. THOMAS: Objection, Judge.

19 THE WITNESS: I've already answered
20 that. You asked me that question earlier.

21 MR. RAPHAEL: No further questions.
22 Thank you very much, Mr. Watkins.

1 THE COURT: Thank you, Mr. Raphael.

2 THE WITNESS: Thank you, Mr. Raphael.

3 THE COURT: Redirect?

4 MR. THOMAS: If I can take a couple
5 minutes, Judge, I think I can finish up with this
6 witness before 1:00.

7 THE COURT: Do you want to take a little
8 break?

9 MR. THOMAS: Yes.

10 THE COURT: All right. If it's going to
11 take longer than that, then we'll have to do the
12 redirect on Monday morning.

13 MR. THOMAS: Okay.

14 THE COURT: Okay. The Court will be in
15 recess.

16 (Whereupon, a recess was taken between
17 12:25 p.m. and 12:42 p.m.)

18 THE COURT: Yes, sir.

19 MR. THOMAS: Your Honor, I would suggest
20 that we pick back up with this witness on Monday
21 morning. I think I've got more --

22 THE COURT: You've got more than

1 20 minutes worth?

2 MR. THOMAS: I do.

3 THE COURT: That's fine.

4 MR. THOMAS: Thank you.

5 THE COURT: Do you want to have an
6 objection?

7 MR. RAPHAEL: Your Honor --

8 THE COURT: Didn't we get the same
9 situation with another witness?

10 MR. THOMAS: We did.

11 MR. RAPHAEL: We did. I'm not going to
12 object to the request to continue with the witness
13 on Monday. I ask that the Court admonish the
14 witness not to do any further research.

15 THE COURT: Oh, I'll do exactly what I
16 did with -- it was with Mr. Woodcock, was it not?

17 MR. RAPHAEL: I don't recall.

18 MR. THOMAS: It was.

19 THE COURT: It was. All right.

20 Mr. Watkins, I'm sure you're already familiar with
21 that from your prior appearance as an expert
22 witness in other cases. We're going to come back

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1 to your cross-examination at 10:00 on Monday
2 morning. But between now and then, it's as though
3 you're still on the stand.
4 THE WITNESS: Yes, sir.
5 THE COURT: You can't do any research.
6 You can't look at anything. You can't talk to the
7 lawyers about what you said, what you're going to
8 be saying in the future, because it's just as
9 though -- they can never take a break and say, oh,
10 by the way, we want to go over a few things.
11 I know you understand that, but I wanted
12 to tell you how important it is because if it does
13 happen, we have a big mess in the trial. So don't
14 even think about this case. Have a real nice
15 Friday, Saturday and Sunday, and see you 10:00 on
16 Monday morning.
17 THE WITNESS: Thank you very much.
18 THE COURT: Thank you, sir. You all --
19 we're getting booted out of our courtroom tomorrow
20 because -- well, some technological reason. But
21 you can leave all of your things here. You can
22 take them with you if you want to. But if you

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1 don't want to take them, you can leave them here,
2 and they'll be safe. There will not be a problem.
3 The courtroom will be secure. The only
4 people entering it other than myself, Deputy
5 Price, Ms. Cubis and Ms. Bell, will be these tech
6 people who are going to put some wirings into
7 something, or another cabinet or something.
8 So I'll leave that up to you.
9 MR. THOMAS: Okay.
10 MR. RAPHAEL: Thank you, Your Honor.
11 And lastly, we now have a notebook of authorities
12 for you.
13 THE COURT: Yes, sir. Thank you so
14 much.
15 MR. RAPHAEL: And these have both the
16 authorities that we cited in our -- in the motion
17 in limine that addressed this issue as well as in
18 my PowerPoint slides.
19 THE COURT: Right.
20 MR. RAPHAEL: Together with the
21 authority that the City cited.
22 THE COURT: Great. That's terrific. I

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1 really appreciate that.
2 In terms of schedule, on Monday we'll
3 sit from 10:00 until 4:00. Tuesday, 9:00 until
4 4:00. Wednesday, 9:00 until 5:00. Thursday, 9:00
5 until 1:00. That should be enough time. But who
6 knows?
7 All right, ladies and gentlemen, thank
8 you all very, very much. I hope you all have a
9 nice weekend. I look forward to seeing all of you
10 on Monday morning.
11 MR. RAPHAEL: Thank you, Judge.
12 THE COURT: The Court stands adjourned.
13 (Whereupon, at 12:44 p.m., the hearing
14 recessed, to reconvene at 10:00 a.m. on Monday,
15 September 21, 2009.)
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1 CERTIFICATE OF NOTARY PUBLIC
2 I, Vicky Reiner, RMR, CRR, the officer before
3 whom the foregoing hearing was taken, do hereby
4 certify that said transcript is a true record of
5 the proceedings; that I am neither counsel for,
6 related to, nor employed by any of the parties to
7 the action; and further that I am not a relative
8 or employee of any attorney or counsel employed by
9 the parties thereto, nor financially or otherwise
10 interested in the outcome of the action.
11
12
13
14 _____
15 Notary Public
16 in and for the
17 Commonwealth of Virginia
18 My Commission expires:
19 December 31, 2011
20 Registration No. 7117657
21
22