

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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 FAIRFAX COUNTY WATER :
 AUTHORITY, :
 Plaintiff : Civil Action No.
 vs. : 2008-16114
 CITY OF FALLS CHURCH, :
 Defendant :
 - - - - - x

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

September 15, 2009

VOLUME 2

The parties met, pursuant to the notice of
 the Judge, at 10:05 a.m.

BEFORE: THE HONORABLE R. TERRENCE NEY

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 4 Authority
 5 John Tuohy, City of Falls Church
 6
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P R O C E E D I N G S

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THE COURT: Good morning. I apologize to each and every one of you. You just have no idea how much is going on outside the courtroom, that it seems we're in a crisis atmosphere every moment because we're so busy here at the Fairfax circuit courts.

Plus I know, as all of you can appreciate, especially the party representatives, how much everybody relies upon his or her staff, the people you work with, to help you out in getting things done. And when a person is missing, it makes a huge difference.

I rely so much, for example, on my deputy, Deputy Price, who is here, my court clerk, Jennifer Cubis, who is here. But you don't see our law clerk, who was sitting up here yesterday. She came in to work -- she comes in when I come in -- at 7:30 this morning. But while walking her dog, her dog was in an altercation with a skunk. And taking care of the dog, she of course became

1 wound up with the skunk, or the scent of the
2 skunk. And she did her very best to get herself
3 presentable and she showed up at 7:30. And it was
4 clear that her efforts had been unsuccessful. And
5 as Judge Robert Smith just said to me, it was
6 ugly.

7 And so Ms. Cubis, the court clerk, said
8 to Virginia Bell, the law clerk, you better go
9 home and try again.

10 So that has contributed to the chaos of
11 this morning. But I do apologize that we're late.
12 And when Ms. Bell arrives, I hope that none of you
13 will be holding your noses or indicating that you
14 know I told you the story.

15 All right. Mr. Raphael, are you ready
16 to proceed?

17 MR. RAPHAEL: Yes. Thank you, Your
18 Honor.

19 THE COURT: Yes, sir.

20 MR. RAPHAEL: Your Honor, I would move
21 Plaintiff's Exhibit 5, 10, and 11. These are the
22 1950 charter, the 1992 and '93 amendments.

1 There's no objection on the City's trial list
2 objections.

3 THE COURT: Hearing no objection, they
4 will be received.

5 (Plaintiff's Exhibits 5, 10 and 11 were
6 received into evidence.)

7 MR. RAPHAEL: Now, at this time, Your
8 Honor, I would like to play the video excerpts
9 from the City's corporate designation deposition.
10 We have -- we have the counterdesignations that
11 the City gave me this morning. And Mr. Sapp has
12 been able to incorporate them into the video.

13 And there are some objections as well.
14 I propose that we just take them up as we go
15 through it. And we can pause the video, deal with
16 the objection.

17 THE COURT: All right.

18 MR. RAPHAEL: If you sustain it, we'll
19 skip to the next piece.

20 THE COURT: Mr. Thomas is on his feet.
21 Yes, sir.

22 MR. THOMAS: I am, Judge. I have a copy

1 of the objections and our counterdesignations if
2 the Court would like.

3 THE COURT: All right.

4 MR. THOMAS: The objections are just in
5 grid form. And I think it might be helpful as we
6 go through these for the Court to have a copy of
7 this.

8 THE COURT: All right. That will be
9 very helpful. Thank you, sir.

10 MR. RAPHAEL: And it appears, Your
11 Honor, I misspoke. Mr. Sapp has not had time to
12 actually put the video clip in. So what we can do
13 is read -- we can read the piece. But he hasn't
14 had enough time to incorporate it in the half hour
15 we had to get ready for this.

16 THE COURT: So are we going to have a
17 little bit of video, a little bit of reading?

18 MR. RAPHAEL: Yes, Your Honor.

19 THE COURT: Is there any --

20 MR. THOMAS: Yeah, I -- I do object,
21 Judge, inasmuch as I think our counterdesignations
22 are entitled to the same dignity as their

1 designations. And so if we're going to play a
2 videotape of their designations, then I think it's
3 appropriate to play the videotape --

4 THE COURT: Do we not just have one disk
5 that has the whole thing?

6 MR. RAPHAEL: Well, it's what -- we had
7 it put into a presentation mode where the clips
8 were put together so it would very quickly go from
9 one to the next. And we need about a half hour to
10 integrate them into the presentation mode to make
11 it run smoothly. We just got the designations,
12 the counters this morning, and just haven't had a
13 chance to do that.

14 THE COURT: Do you stand on your
15 objection?

16 MR. THOMAS: There are some objections,
17 Judge -- as we've laid out in that grid, there are
18 some objections that we have thrown over the bow
19 and some that we have maintained. So we continue
20 to --

21 THE COURT: In other words, you want
22 Mr. Sapp to put the thing together so we have the

1 presentation of the testimony that you believe is
2 helpful to your case to be seen by the Court at
3 the same -- in the same context as that which has
4 been designated by Mr. Raphael?

5 MR. THOMAS: I think that's right. Yes,
6 sir.

7 THE COURT: Can you do that? Can that
8 be done?

9 MR. RAPHAEL: Your Honor, that would
10 take about 30 minutes. Can I make a suggestion?

11 THE COURT: Yes, sir.

12 MR. RAPHAEL: If we take -- if we give
13 Mr. Sapp 30 minutes to do that, in the meantime,
14 there's a general issue that will come up with
15 regard to the objections which I think we can
16 argue now.

17 THE COURT: Why don't we do that?

18 MR. RAPHAEL: All right. And I promise
19 I won't bother Mr. Sapp while he's doing that.

20 THE COURT: Okay. Thank you.

21 MR. RAPHAEL: Your Honor, you're going
22 to see in the objections that are coming, a number

1 of them where the objection at the deposition was
2 simply the word "objection." As an example, if
3 you have the designations from yesterday, if we go
4 to page 262, line 4, the question was: "And the
5 money that's provided as a return to the City is
6 not limited to being spent on anything relating to
7 the water system?"

8 THE COURT: Do I have the transcript?
9 Should I be reading off --

10 MR. RAPHAEL: I thought I handed up
11 yesterday a -- the excerpts that we had.

12 THE COURT: I've got it. Hang on. I
13 take it back. I've got it. Here it is.

14 MR. RAPHAEL: And if you go, please, to
15 page 262, line 4.

16 THE COURT: Yes, sir.

17 MR. RAPHAEL: So the question was, "And
18 the money that's provided as a return to the City
19 is not limited to being spent on anything related
20 to the water system?"

21 Mr. Thomas objected with the word, just
22 "objection." And then he said "go ahead." And

1 the witness answered it.

2 The -- I would like the Court -- I think
3 the Court should rule that any objections that
4 were made during a deposition -- and obviously
5 objections other than to form are preserved. But
6 objections that go just to form I think are waived
7 unless the lawyer says what the basis for the
8 objection is.

9 Rule 4:5(c) of the Rules of the Supreme
10 Court of Virginia says that examination and
11 cross-examination of witnesses at a deposition may
12 proceed as permitted at the trial.

13 And rule 4:7(d)(3)(b) provides that a
14 lawyer has to state an objection with reasonable
15 specificity at the time or it's waived.

16 An objection, simply "I object" doesn't
17 say what the basis for the objection is. There
18 might be multiple bases for it.

19 THE COURT: Do you wish to be heard on
20 that, Mr. Thomas? That's a bedrock rule.

21 MR. THOMAS: Well, I do, Judge,
22 inasmuch -- first of all, we have some objections

1 in here that are objections to relevancy. And I
2 don't think I have to make objections to relevancy
3 in the context of the deposition, identified as
4 objections to relevancy.

5 For example, Judge, in this -- in this
6 collection of deposition excerpts, there is
7 considerable testimony about what the Court took
8 up yesterday about historical rate information,
9 which --

10 THE COURT: But how do I know, for
11 example, if you simply say "objection," what the
12 basis for the objection is?

13 MR. THOMAS: Well, I don't -- as I say,
14 I don't believe that I need to state the basis for
15 an objection to, for example, relevancy. The
16 objection as it's stated here, in the example that
17 Mr. Raphael gave you, merely an objection to the
18 form. And we move on.

19 MR. RAPHAEL: Your Honor, the -- there
20 are lots of different objections to form. And on
21 occasion, they said what they thought it was.
22 Sometimes they would say "compound," sometimes

1 they would say something else. If the word is
 2 just "objection," you have to guess what the
 3 objection was. And it's -- I mean, I've got as an
 4 excerpt from the deposition handbook a guidance.
 5 I'm happy to hand that up to you. But the
 6 guidance makes clear that, make your objection
 7 specific enough to identify the impropriety you're
 8 objecting to. Examples of improper objections
 9 are: "I object to that question," or "objection.
 10 That's not admissible."

11 Examples of properly specific objections
 12 in a deposition are: "Assumes facts not in
 13 evidence," "misstates the witness' testimony," and
 14 so forth.

15 That's how I generally objected when I
 16 put my objections on the record.

17 If a lawyer can just say "objection," it
 18 gives him the flexibility and freedom to make any
 19 objection he wants that he later thinks of. It's
 20 totally counter to the way you practice in a
 21 trial. And depositions are supposed to proceed as
 22 at trial.

1 I'm not saying that an objection that
 2 goes to something other than form is waived.
 3 Because Mr. Thomas is right. If they want to
 4 object to relevance or admissibility on some other
 5 ground than to form, that's preserved. But
 6 objections as to form have to be made. And if a
 7 lawyer doesn't say what the objection is, he
 8 shouldn't be able to come up with another idea
 9 about what he might have asserted at the time.
 10 And that's just consistent with the rules of the
 11 Supreme Court of Virginia how a deposition is
 12 supposed to be conducted, like at trial.

13 THE COURT: Okay. I -- do we have any
 14 authority on this beyond the rules?

15 MR. RAPHAEL: I have -- I will -- let me
 16 hand up an excerpt from a deposition handbook.
 17 This is Nolo's Deposition Handbook from May of
 18 2007. And I've given you an excerpt from
 19 page 185. But I think the governing authority,
 20 Your Honor, is rule 4:5(c) of the Supreme Court of
 21 Virginia, which says that examination has to
 22 proceed -- "may proceed as permitted at the

1 trial," and rule :7(d)(3)(b), which says that
 2 "errors and irregularities occurring at the oral
 3 examination in the manner" -- let's see.

4 Rule 5:25, "error will not be sustained
 5 to any ruling at the trial court unless the
 6 objection was stated with reasonable certainty at
 7 the time of the ruling except for good cause
 8 shown."

9 So this is actually an important issue.
 10 You don't see decided cases on this. But it's an
 11 important issue. The question is should a court
 12 allow a lawyer simply to say "objection," and then
 13 he can --

14 THE COURT: Well, it's clear in the
 15 courtroom that's impermissible. It's clear,
 16 unless the grounds for the objection are stated at
 17 trial, they will not be considered on appeal, for
 18 example.

19 It doesn't seem to me that it should be
 20 any different for the deposition. It's true. I
 21 object because that's calling for hearsay, you may
 22 go ahead and answer the question because we're

1 only at the deposition stage. But that's the
 2 basis for my objection which I intend to insist
 3 upon at the time of trial.

4 The Court rules that any objections to
 5 which the grounds were not stated will not be
 6 considered.

7 MR. RAPHAEL: Okay. Thank you, Your
 8 Honor.

9 THE COURT: What else?

10 MR. RAPHAEL: Well, I'm trying to see if
 11 there's something else I can address before we get
 12 to the video deposition. Bear with me. I'm
 13 sorry, Your Honor.

14 THE COURT: That's not a problem.

15 MR. RAPHAEL: Your Honor, I would move
 16 Plaintiff's Exhibits 75 through 92, omitting
 17 Exhibit 86. These are the Falls Church
 18 Consolidated Annual Financial Reports for the
 19 years 1991 through the present -- through 1998.
 20 we're missing the one for FY '97. That's why I
 21 omitted exhibit -- there's actually no exhibit
 22 behind tab 86 because we don't have it. The rest

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1 of these I would move, and the City listed no
2 objection to these in their trial exhibit
3 objection list.
4 MR. HOLZHEIMER: Can you repeat, which
5 exhibits again?
6 MR. RAPHAEL: 75 through 92, omitting
7 86.
8 THE COURT: Hearing no objection, they
9 will be received.
10 (Plaintiff's Exhibits 75 through 85 and
11 87 through 92 were received into evidence.)
12 MR. RAPHAEL: Thank you, Your Honor. I
13 would also move Exhibits 96 and 97. These are the
14 Consolidated Annual Financial Reports for 1986 and
15 1987. Again, there was no City objection on their
16 exhibit list.
17 MR. HOLZHEIMER: No objection, Your
18 Honor.
19 THE COURT: Thank you. They'll be
20 received.
21 (Plaintiff's Exhibits 96 and 97 were
22 received into evidence.)

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1 MR. RAPHAEL: Thank you, Your Honor. I
2 would move Plaintiff's Exhibit 99. This is the
3 1992 ordinance establishing the rate that -- the
4 rate for water at \$1.59. There was no City
5 objection on its exhibit list.
6 MR. THOMAS: No objection.
7 THE COURT: Thank you. It will be
8 received.
9 (Plaintiff's Exhibit 99 was received
10 into evidence.)
11 MR. RAPHAEL: Plaintiff's Exhibit 105
12 was the 1999 ordinance changing the commodity rate
13 to \$1.64. Again, no objection on the City's list.
14 MR. HOLZHEIMER: No objection, Your
15 Honor.
16 THE COURT: Thank you. It will be
17 received.
18 (Plaintiff's Exhibit 105 was received
19 into evidence.)
20 MR. RAPHAEL: I would move Plaintiff's
21 Exhibit 30, which is the May 12, 2003, adoption of
22 the rate schedule that changed the rate from \$1.64

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1 to \$1.97 for the year 2003, and to \$2.36 for the
2 year 2004. The City did object to this on hearsay
3 grounds. And I think -- I think it's because the
4 ordinance is actually part of the minutes. And I
5 believe that they object to the minutes. Is that
6 correct?
7 MR. HOLZHEIMER: It is, Your Honor. And
8 the Court has already ruled on a motion in limine
9 that the Court is not allowing minutes or
10 statements of the City Council members in.
11 To the extent he wants the resolution
12 in, we've not objected to any of the resolutions.
13 THE COURT: All right.
14 MR. RAPHAEL: Your Honor, I don't
15 believe you've yet ruled on that issue. What I
16 propose to do here, to avoid having to address
17 that issue now without your seeing the document, I
18 have no problem limiting the exhibit to the
19 attached ordinance resolution setting the rate.
20 THE COURT: We'll leave it at that for
21 the time being. Just the resolution, no minutes.
22 MR. RAPHAEL: Thank you, Your Honor.

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1 THE COURT: Yes, sir.
2 MR. HOLZHEIMER: I'm sorry. Which
3 number was that?
4 MR. RAPHAEL: That was Plaintiff's
5 Exhibit 30.
6 (Plaintiff's Exhibit 30 was received
7 into evidence.)
8 MR. RAPHAEL: And then, Your Honor,
9 lastly, I would move Plaintiff's Exhibit 37, which
10 are the minutes from the June 13, 2005 meeting of
11 the City Council where they adopted what is now
12 the current rate schedule, establishing the rate
13 at \$3.03.
14 We had the same issue here. The
15 ordinance is part of the minutes. For purposes of
16 us offering at this time, I would offer just the
17 resolution that's attached to it and not the
18 accompanying minutes.
19 THE COURT: All right. The resolution
20 will be received. The minutes will not.
21 (Plaintiff's Exhibit 37 was received
22 into evidence.)

1 MR. RAPHAEL: And, Your Honor, with the
2 Court's indulgence, if we may take a short recess
3 to permit Mr. Sapp to finish his work.

4 THE COURT: That will be fine. Is there
5 anything else we need to address at this time,
6 Mr. Thomas?

7 MR. THOMAS: I don't think so, Your
8 Honor.

9 THE COURT: Okay. We'll just take a
10 brief recess.

11 MR. RAPHAEL: Thank you, Your Honor.

12 THE COURT: Thank you. Thank you all
13 very much.

14 (Whereupon, a recess was taken between
15 10:23 a.m. and 10:50 a.m.)

16 THE COURT: All right. Are we ready to
17 roll?

18 MR. RAPHAEL: Yes, Your Honor. Thank
19 you.

20 Mr. Sapp, would you begin the video
21 deposition, please.

22 Just to set the stage before he does

1 that, this is the -- you're going to be seeing the
2 corporate representative, John Tuohy, who is the
3 general manager of the finance department and the
4 chief financial officer, who was testifying on
5 behalf of the City.

6 THE COURT: All right. Hang on, one
7 second.

8 And you'll let me know when you have an
9 objection?

10 MR. THOMAS: Yes, sir.

11 THE COURT: Thank you, sir.

12 (Excerpts from the videotaped deposition
13 of JOHN TUOHY were presented as follows:)

14 (Whereupon, a video clip was played and
15 herein transcribed as follows:)

16 Q (By Mr. Raphael) Good afternoon,
17 Mr. Tuohy. Nice to see you again. For anyone
18 watching the tape or reading the transcript, I
19 want to make clear what just happened. We are in
20 the corporate designation deposition of the City
21 of Falls Church.

22 (Whereupon, a video clip concluded and

1 the hearing continued as follows:)

2 MR. THOMAS: Could I ask, it appears we
3 don't have a page number up on the screen. The
4 deposition I have and the objections that we have
5 to make are by page and line number. So is
6 there -- I guess I'm asking some indulgence here
7 from the technology folks. Is there a way to have
8 the page number?

9 (Whereupon, a video clip was played and
10 herein transcribed as follows:)

11 Q (By Mr. Raphael) Good afternoon, Mr.
12 Tuohy. Nice to see you again. For anyone
13 watching the tape or reading the transcript, I
14 want to make clear what has just happened. We are
15 in the corporate designation deposition of the
16 City of Falls Church. Mr. Shields has been
17 testifying with regard to a number of the topics
18 that are the subject of the deposition. Because
19 of scheduling issues, we agreed to have you come
20 in, cover the topics that you're going to cover on
21 behalf of the City. And then when we are finished
22 with your testimony for the City on your topic,

1 we'll go back to Mr. Shields for the conclusion of
2 the topics. Is that -- is that consistent with
3 your understanding of why you're here?

4 A Yes.

5 Q All right. We talked at the beginning
6 of your segment of this deposition that you're
7 here to represent the City in connection with
8 topic 5, and that topic, broadly speaking, is
9 about the history of the return on equity,
10 correct?

11 A Correct.

12 Q And do you feel that you are prepared to
13 testify on that subject today on behalf of the
14 City?

15 A Yes.

16 Q And do you -- do you understand that
17 when you are answering questions in this
18 deposition about that topic, that it's the same as
19 the City answering the question?

20 A That's correct.

21 Q And so, similarly, if you say I don't
22 know in an answer -- in response to the question,

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1 that's the same as the City saying it doesn't
2 know?
3 A Yes.
4 Q Has the City ever taken monies from the
5 water system and used them for purposes unrelated
6 to providing water utility services?
7 A It's a matter of interpretation. So I
8 would have to say one person could say yes, one
9 person could say no.
10 Q How would one person say yes in response
11 to that question?
12 A We take a return on equity into the
13 general fund, which is part of the totality of the
14 revenues for the City, and the City provides a
15 wide range of services, some of which are water
16 related and some of which are not. So the answer
17 could be yes. The other could say, since it's
18 undifferentiated, fungible, if you will, then the
19 answer is no.
20 Q Okay. Let's unpack that a little bit.
21 A Uh-huh.
22 Q The City -- the City's water system is

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1 administered by the City government, correct?
2 A That's correct.
3 Q And in addition to some direct expenses
4 in connection with operating the water system,
5 like paying the Aqueduct to buy the water, the
6 City incurs a certain management cost -- it incurs
7 certain management costs to operate the water
8 system, right?
9 A Correct.
10 Q And the City calculates the -- its
11 indirect costs associated with the water system
12 and makes a transfer from the water fund to the
13 general fund to pay those costs, right?
14 A Correct.
15 Q On top of that, the City takes a return
16 on equity, transfer to the general fund, right?
17 A Correct.
18 Q And that money is not to compensate the
19 City for actual costs or services provided, but to
20 provide a return to the City, right?
21 A Correct.
22 Q And the money that's provided as a

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1 return to the City is not limited to being spent
2 on anything relating to the water system?
3 (MR. THOMAS): Objection. Go ahead.
4 (THE WITNESS): Correct. Like I said,
5 it's fungible.
6 Q (By Mr. Raphael) Right. That could be
7 spent on schools, police, or anything else the
8 City spends money on?
9 A Correct.
10 Q Does the City have a policy against
11 diverting water utility funds to uses unrelated to
12 water utility services?
13 A No.
14 Q Topic 5 asks about the history of the
15 return on equity. When did the City of Falls
16 Church first take a return on equity from the
17 water fund to the general fund?
18 A I do not know. I went back through a
19 number of old documents that I have in my office
20 and was able to validate at least back to the 1981
21 transfer, which I was then able to cross-walk in
22 my discussion with Son Nguyen with the memo that

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1 he did. So independently I came up with the same
2 figures using either budget documents or audited
3 financial statements that are in my possession.
4 Q So the City is able to say that at least
5 as early as 1981 it was taking a return on equity
6 from the water fund to the general fund?
7 A That's correct.
8 Q Isn't it true, Mr. Tuohy, that the City
9 of Falls Church was taking a return on equity as
10 early as 1961?
11 (MR. THOMAS): Objection. Go ahead.
12 (THE WITNESS): This would indicate
13 that, yes.
14 Q (By Mr. Raphael) Okay. Have you had a
15 chance to --
16 (Whereupon, a video clip concluded and
17 the hearing continued as follows:)
18 MR. THOMAS: If I could make an
19 objection.
20 THE COURT: I'm sorry. Where was the
21 objection?
22 MR. THOMAS: The objection is at

1 page 271, which is where we're stopped here on the
2 screen. And the objection that I have, Judge,
3 goes for the next series of designations.

4 THE COURT: I'm sorry, Mr. Thomas.
5 You've lost me. What page?

6 MR. THOMAS: Page 271, beginning at
7 line 10.

8 THE COURT: Page 271, line 10. "Have
9 you had a chance to review the charter of the City
10 of Falls Church?"

11 MR. THOMAS: Correct.

12 THE COURT: And where is the objection?

13 MR. THOMAS: And my objection is a
14 relevancy objection here, which as I understand
15 from the Court's ruling a moment ago, was not an
16 objection I needed to make on the record at the
17 time.

18 THE COURT: Right.

19 MR. THOMAS: It's an evidentiary
20 objection.

21 THE COURT: Correct.

22 MR. THOMAS: And the objection I have

1 is, as I said, a relevancy objection going to
2 page 275, line 9. And the reason for the
3 objection, Judge, is that this is an examination
4 of this witness about past charters of the City,
5 which, as we went through in some detail
6 yesterday, the only charter that's at issue in
7 this case is the current charter of the City,
8 which authorizes the City to take a transfer from
9 its water fund to its general fund. And a
10 discussion about past charters and amendments to
11 those charters isn't relevant to the case.

12 MR. RAPHAEL: These documents are
13 already in evidence, Your Honor.

14 THE COURT: Sir?

15 MR. RAPHAEL: These documents are in
16 evidence. It's Plaintiff's 5, 10 and 11.

17 THE COURT: Don't they contain the same
18 language permitting the transfer, the prior
19 charters?

20 MR. THOMAS: They most certainly do
21 permit a transfer from the water fund to the
22 general fund. But testimony about whether there

1 was a two-thirds vote requirement under the old
2 charter and a majority vote under the new charter,
3 I just don't think that's relevant.

4 THE COURT: Well, it's really not going
5 to make any difference. It's not what the case is
6 actually about. But I view some of this in some
7 respects as a history lesson as to what was
8 actually going on. But I really thought I had
9 understood yesterday that the enabling language on
10 which the City relies has been consistent
11 throughout.

12 MR. THOMAS: On the fundamental point
13 that Your Honor made just a moment ago, that's
14 correct.

15 THE COURT: Okay. Okay. I'm going to
16 permit it. Objection overruled.

17 MR. THOMAS: Okay.

18 THE COURT: Where are we picking up,
19 Mr. Raphael?

20 MR. RAPHAEL: We're picking up, Your
21 Honor, at 271, line 10.

22 THE COURT: Okay.

1 (Whereupon, a video clip was played and
2 herein transcribed as follows:)

3 Q (By Mr. Raphael) Have you had a chance
4 to review the charter of the City of Falls Church
5 previously?

6 A Yes.

7 Q And of course this is the 1950 version.
8 Sir, if you need some time to look at this, please
9 take your time. But I want to ask you about
10 subsection (d) of section 13.06, governing the
11 issue of the -- treating each utility as a
12 separate enterprise. So take a moment and read
13 subsection (d).

14 (Whereupon, a video clip concluded and
15 the hearing continued as follows:)

16 MR. RAPHAEL: And, Your Honor, for the
17 record, this is referring to Plaintiff's -- what's
18 in evidence as Plaintiff's Exhibit 5. Same as
19 Deposition Exhibit 237.

20 THE COURT: All right. Thank you.

21 (Whereupon, a video clip was played and
22 herein transcribed as follows:)

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1 Q (By Mr. Raphael) Subsection (d)?
2 A Yes.
3 Q Have you also read section 13.07?
4 A Yes.
5 Q Okay. You see that the 1950 charter
6 from the City of Falls Church actually required
7 the City to go through a specific methodology in
8 accounting for what it did with the water system
9 funds, right?
10 A Uh-huh.
11 Q You need to say yes or no.
12 A Yes.
13 Q Okay. And it -- in subsection 10, it
14 required that the amount estimated for
15 depreciation actually be paid into -- be
16 identified separately, and then section 13.7
17 required that amount to be paid into the water
18 works renewal fund, right?
19 (MR. THOMAS): Objection. Go ahead.
20 (THE WITNESS): That's what it says,
21 yes.
22 Q (By Mr. Raphael) Yes, sir. And

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1 subsection (d)(12), the last thing that would be
2 left after you did all the calculations might be
3 an excess of receipts over expenses, right?
4 (MR. THOMAS): Objection. Go ahead.
5 Q (By Mr. Raphael) (D)(12)?
6 A Yes.
7 Q And subsection 13.07 addresses what you
8 could do with that excess, right? Directing your
9 attention specifically to about halfway through
10 that paragraph, reads, quote, a sum of money equal
11 to item 9 above shall be paid annually by the
12 director of finance into the general fund. That
13 was referring to the -- to PILOT, payments in lieu
14 of taxes, right?
15 A Correct.
16 Q Okay. And then it goes on, quote, the
17 whole or any part of any excess of receipts over
18 expenses shown in item 12 above may, when
19 authorized by the council by the affirmative votes
20 of at least two-thirds of the entire council, be
21 transferred to the general fund or to the renewal
22 fund of each utility respectively, unquote.

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1 Do you see that sentence?
2 A Yes.
3 Q All right. So at least as of 1950, the
4 code authorized the City to, by a two-thirds vote,
5 to transfer monies from the water fund to the
6 general fund that were surplus funds?
7 (MR. THOMAS): Objection. Go ahead.
8 (THE WITNESS): Correct.
9 Q (By Mr. Raphael) Okay. Now, the charter
10 was subsequently changed to alter those
11 requirements, was it not?
12 A Yes.
13 (Whereupon, a video clip concluded and
14 the hearing continued as follows:)
15 MR. RAPHAEL: The next document he's
16 going to be referring to is in evidence now as
17 Plaintiff's Exhibit 10. It was Deposition
18 Exhibit 238.
19 THE COURT: Thank you.
20 (Whereupon, a video clip was played and
21 herein transcribed as follows:)
22 Q (By Mr. Raphael) Let me hand you a

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1 document I've just marked as Deposition
2 Exhibit 238.
3 Exhibit 238, Mr. Tuohy, is chapter 513
4 of the Virginia Acts of Assembly from 1992. And
5 directing your attention specifically to page 658,
6 do you see the amendment there to section 13.06 of
7 the City charter?
8 A Yes.
9 Q Okay. And if you skip down to -- and
10 turn the page to page 659, and do you see that the
11 General Assembly deleted the specific list of
12 accounting procedures that had -- that the City
13 had to undertake in accounting for the funds of
14 the water system, and replaced that list with a
15 statement that -- that the accounts should be
16 kept, quote, in accordance with accepted
17 principles of public utility accounting?
18 A That's correct.
19 Q All right.
20 (Whereupon, a video clip concluded and
21 the hearing continued as follows:)
22 MR. RAPHAEL: Your Honor, the next

1 document he's going to be referring to is in
2 evidence now as Plaintiffs Exhibit 11, Deposition
3 Exhibit 239. It's the 1993 amendment to the
4 charter.

5 THE COURT: Thank you.

6 (Whereupon, a video clip was played and
7 herein transcribed as follows:)

8 Q (By Mr. Raphael) Let me hand you what
9 I've just marked as Deposition Exhibit 239.
10 Exhibit 239 is chapter 969 of the 1993 Acts of
11 Virginia. And do you see the -- there were some
12 amendments made to section 13.07 of the City
13 charter, right?

14 A Yes.

15 Q And the amendments permitted the City to
16 transfer payments in lieu of taxes from the water
17 system to the general fund, right?

18 (MR. THOMAS): Objection. Go ahead.

19 (THE WITNESS): Yes.

20 Q (By Mr. Raphael) And then the amendments
21 went on to provide, quote, a return on equity that
22 is calculated using generally accepted accounting

1 principles for utility enterprises, when
2 authorized by the council by the affirmative votes
3 of a majority of the council, may be transferred
4 to the general fund or to the improvement fund of
5 each utility respectively, period, unquote.

6 Did I read that accurately?

7 A Yes.

8 Q All right. As of 1993, the charter no
9 longer required the City to maintain something
10 separately called the water works renewal fund,
11 right?

12 A That is correct.

13 Q And instead of -- instead of a
14 two-thirds vote to transfer surplus monies from
15 the water fund to the general fund, it only
16 required a majority vote?

17 A That is correct.

18 Q Do you know why the City asked for this
19 change to the charter?

20 (MR. THOMAS): Objection. Go ahead.

21 (THE WITNESS): No, I do not.

22 Q (By Mr. Raphael) And do you see the

1 reference to the phrase "generally accepted
2 accounting principles for utility enterprises"?

3 A Yes.

4 Q What are those?

5 A The City is governed by the statements
6 of the Governmental Accounting Standards Board,
7 which you'll often hear called GASB. There are a
8 number of generally accepted accounting principles
9 that are relevant to enterprise funds.
10 Essentially, enterprise funds are funds that are
11 run similar to the way a private industry would be
12 run as opposed to purely governmental, what's
13 known as fund based or modified accrual. So there
14 are differences between the two, and those
15 differences are laid out.

16 We're also allowed to use any Financial
17 Accounting Standards Board statements prior to
18 1987. So there is a bit of a mix, although,
19 obviously, the FASBs from '87 are getting a little
20 long in the tooth at this point.

21 Q Okay. Is there a separate GASB
22 statement for utility enterprises?

1 A No.

2 Q So the GASB statement you're referring
3 to is a statement for generally accepted
4 accounting principles?

5 A Right. Now, there are numerous
6 statements that deal with this.

7 Q Does any GASB statement address the
8 question of whether it's appropriate for a public
9 utility to transfer monies from the water fund to
10 the general fund?

11 A No.

12 Q Are you aware of any publication that
13 contains guidance on that question?

14 A No.

15 Q With regard to the change in 1993
16 allowing the City to make a transfer of money from
17 the water fund to the general fund as a return on
18 equity by a simple majority vote rather than a
19 two-thirds vote, is it fair to say that that --

20 (Whereupon, a video clip concluded and
21 the hearing continued as follows:)

22 MR. THOMAS: If he could finish with

1 this answer, it's the next one.
 2 (Whereupon, a video clip was played and
 3 herein transcribed as follows:)
 4 Q (By Mr. Raphael) -- change made it
 5 easier for the City Council to make such
 6 transfers?
 7 (MR. THOMAS): Objection. Go ahead.
 8 (THE WITNESS): Yes.
 9 (Whereupon, a video clip concluded and
 10 the hearing continued as follows:)
 11 MR. THOMAS: I have an objection if I
 12 could.
 13 THE COURT: Right.
 14 MR. THOMAS: This next question, Your
 15 Honor, relates to whether transfers by the City
 16 from its water fund to its general fund increased
 17 after 1993. That's squarely within the ambit of
 18 this historical rate and transfer information that
 19 we think doesn't have any relevance to the case
 20 and we --
 21 THE COURT: Right.
 22 MR. RAPHAEL: Your Honor, may I --

1 THE COURT: I understand. And I
 2 addressed that earlier. I'm going to permit it.
 3 Objection overruled.
 4 MR. THOMAS: Thank you, Your Honor.
 5 (Whereupon, a video clip was played and
 6 herein transcribed as follows:)
 7 Q (By Mr. Raphael) And is it also true
 8 that the amount of money that was transferred by
 9 the City of Falls Church from its water fund to
 10 its general fund increased after 1993?
 11 (MR. THOMAS): Objection. Go ahead.
 12 (THE WITNESS): Yes.
 13 Q (By Mr. Raphael) And I believe you
 14 indicated earlier that the City's financial
 15 statements are the best source of information
 16 about what the City's actual financial situation
 17 was in any given fiscal year?
 18 A That is correct.
 19 Q And those statements are audited each
 20 year by an independent accounting firm, right?
 21 A Yes.
 22 Q And as far as you know, the statements

1 are accurate?
 2 A Yes.
 3 Q Now, prior to fiscal year 2007 -- and
 4 just so the record is clear, the City's fiscal
 5 year runs from -- runs through June 30th of the
 6 year, right?
 7 A Yes.
 8 Q So July 1 through June 30?
 9 A Correct.
 10 Q Prior to fiscal year 2007, the City
 11 regularly transferred money from the water fund to
 12 the general fund, calling it a return on equity,
 13 correct?
 14 A That's correct.
 15 Q And in fiscal year 2007 and fiscal year
 16 2008, the City changed the name of the transfer,
 17 calling it now a management fee, right?
 18 A That's correct.
 19 Q Is it true that there's really no
 20 significant difference between the term "return on
 21 equity" and the term "management fee"?
 22 (MR. THOMAS): Objection. Go ahead.

1 (THE WITNESS): Sorry. Yes.
 2 Q (By Mr. Raphael) Basically the same
 3 thing?
 4 A Yes.
 5 Q Is the City aware of any water rate
 6 manual or guide that describes the management fee
 7 that's used by the City?
 8 A No.
 9 Q Is the City aware of any water rate
 10 manual or guide that describes the return on
 11 equity concept used by the City to transfer money
 12 from the water fund to the general fund?
 13 (MR. THOMAS): Objection. Go ahead.
 14 Q (By Mr. Raphael) From the water fund to
 15 the general fund?
 16 A Are you referring to the -- prior to the
 17 management fee or....
 18 Q Yes. Is there any -- is there any --
 19 I'm interested in an authoritative treatise,
 20 manual, guide, anything like that that the City
 21 can say this return on equity is described by that
 22 guide?

1 (MR. THOMAS): Objection. Go ahead.
 2 (THE WITNESS): No.
 3 Q (By Mr. Raphael) Mr. Tuohy, let me hand
 4 you a document I just marked as deposition --
 5 (Whereupon, a video clip concluded and
 6 the hearing continued as follows:)
 7 THE COURT: Yes, sir.
 8 MR. THOMAS: I don't want to wear out my
 9 welcome on this, Judge, but this next line of
 10 questions is -- again elicits information about
 11 the City's historic transfers from its water fund
 12 to its general fund. This is going back now to
 13 1981.
 14 THE COURT: Right.
 15 MR. THOMAS: I just want to make sure my
 16 objection is noted on the record.
 17 THE COURT: No, it's noted. You're not
 18 wearing out your welcome. It's just that it seems
 19 to me this is really more in the nature of
 20 historical information. The issue before the
 21 Court is whether or not the current rates and the
 22 most recently set rates are violative of the

1 constitutional issues that are asserted by the
 2 plaintiff.
 3 All right? So your objection is noted.
 4 (Whereupon, a video clip was played and
 5 herein transcribed as follows:)
 6 Q (By Mr. Raphael) This is Exhibit 240.
 7 240 is Fairfax Water's second request for
 8 admissions, correct?
 9 A Yes.
 10 Q And directing your attention to the
 11 second page, specifically request for admission
 12 15, this sets out a table of what Fairfax Water
 13 thought represented the amounts taken by the City
 14 of Falls Church as a return on equity or a
 15 management fee for the years 1981 to 2008. And
 16 the City was asked to admit that this was correct.
 17 (Whereupon, a video clip concluded and
 18 the hearing continued as follows:)
 19 MR. RAPHAEL: Your Honor, just for the
 20 record, the table that's shown on the screen here
 21 is in our request for admission at Plaintiff's
 22 Exhibit 68 at page 16. And it's the -- when the

1 City answered this request for admission, they
 2 didn't include the table. So that's what you're
 3 seeing on the screen now.
 4 THE COURT: All right. Thank you.
 5 (Whereupon, a video clip was played and
 6 herein transcribed as follows:)
 7 Q (By Mr. Raphael) Are you with me so far?
 8 A Yes.
 9 Q All right. And the City denied that
 10 this was correct?
 11 A That's correct.
 12 Q Right. And I believe you indicated in
 13 your denial that you were unable to verify the
 14 amounts for 1981 through 1986, right?
 15 A Was it 1991? I don't think so.
 16 Q 1981.
 17 A 1981?
 18 Q 1981 through 1986, and also 1988 through
 19 1991.
 20 A That sounds correct, yes.
 21 Q All right. You said in your personal
 22 deposition that the City had no way of tracking

1 the actual contributed capital over the years if
 2 it wanted to go back and do that?
 3 (MR. THOMAS): Objection. Go ahead.
 4 (THE WITNESS): That's correct.
 5 Q (By Mr. Raphael) Is that the City's
 6 position?
 7 A Yes.
 8 Q How was the return on equity computed
 9 for the year -- fiscal year 2001?
 10 A Between 2001 and 2006, it was based on a
 11 methodology that was contained in a memorandum
 12 from KPMG.
 13 Q That memorandum was from 2003, wasn't
 14 it?
 15 A No. I think it was earlier than that.
 16 Q Are you sure about that?
 17 A I'm not 100 percent sure because I don't
 18 have the document.
 19 Q This is -- we're talking about the KPMG
 20 analysis that was lost, that the City doesn't have
 21 anymore?
 22 A Right.

1 Q Okay. And you think that was the
2 analysis used to set the return on equity for
3 fiscal year 2001?
4 A Yes.
5 Q If it turns out that document was
6 actually in 2003, then that conclusion would not
7 be accurate, right?
8 (MR. THOMAS): Objection. Go ahead.
9 (THE WITNESS): That's correct.
10 Q (By Mr. Raphael) Okay. So you indicated
11 that for 2001 and 2006 the numbers were based on
12 the Malcolm Pirnie analysis. What about 2002?
13 A No, no, no. You got that wrong.
14 Q Sorry.
15 A The 2001 through 2006 is KPMG.
16 Q Yes, sir. I'm sorry. I didn't
17 understand the word "through."
18 A Okay.
19 Q So fiscal years 2001 through 2006, the
20 rate of return or return on equity that was used
21 by the City was based on the KPMG methodology?
22 A That's correct.

1 Q And in 2001 and 2002, the numbers
2 change. In 2001 they were \$4,576,191. In 2002 it
3 was 4.8 million, almost 4.9 million. Do you see
4 that?
5 A Yes.
6 Q And then in fiscal years 2003 through
7 2006, the number is the same, a little over
8 4.6 million?
9 A That's correct.
10 Q Why -- explain to me why the numbers
11 were the same from 2003 to 2006.
12 A Okay. The decision was made, my
13 understanding, was to keep that fixed rather than
14 change the amount.
15 Q Who made that decision?
16 A Well, I was told the finance director
17 made the decision. And I didn't ask Shirley that
18 question. I probably should have.
19 Q Do you know if that decision was
20 approved by the City Council?
21 A I do not know that.
22 Q Okay. In fiscal years 2007 and 2008,

1 was the return on equity based on the analysis
2 that Mr. Cumiskey had adopted?
3 A Yes.
4 Q Or recommended?
5 A Yes, that's correct.
6 Q That's the management fee approach,
7 right?
8 A That's correct.
9 Q And the management fee approach is that
10 the City should take 10 percent of operating
11 revenues plus 100 percent of investment income?
12 Right?
13 A Yes.
14 Q And the investment income is the -- are
15 the cash and investments held by the City of Falls
16 Church for the water system, right?
17 A That is correct.
18 Q And those earn interest and dividends
19 over the course of the year; that's the income --
20 the investment income, right?
21 A That's correct.
22 Q And the City takes 100 percent of that

1 income each year and transfers it to the general
2 fund under the management fee approach, right?
3 A That is correct.
4 Q Okay. And we covered in your personal
5 deposition previously that -- and earlier today,
6 that the management fee is on top of the indirect
7 costs that are already reimbursed to the City for
8 managing the system?
9 A That's correct.
10 Q The City reimburses itself under the
11 term "administration" for all of the indirect
12 costs associated with operating the water system,
13 right?
14 A Right.
15 Q And those include -- that includes a
16 portion of your time, a portion of Mr. Foster's
17 time, a portion of Mr. Shields' time, the time
18 they spend on the water system, right?
19 A That's correct.
20 Q When we see the term "administration" in
21 the financial statements, that number includes all
22 of their time spent on the water system?

1 A That's correct.

2 Q So when there is then a management fee
3 taken on top of that, there's no additional
4 management being paid for through that; it's
5 already been paid for in administration?

6 (MR. THOMAS): Objection. Go ahead.

7 (THE WITNESS): Correct.

8 Q (By Mr. Raphael) The PILOT is
9 transferred from the water fund to the general
10 fund?

11 A Correct.

12 Q Has the City of Falls Church from time
13 to time looked to the AWWA for guidance on issues
14 relating to rate of return for the water system?

15 A Not since I've been there, no.

16 Q Prior to that time, it has looked to the
17 AWWA, has it not?

18 A Yes.

19 Q Okay. Is it fair to say that the AWWA
20 is one of the recognized industry leaders with
21 regard to how water systems should be operated?

22 (MR. THOMAS): Objection. Go ahead.

1 (THE WITNESS): Yes.

2 Q (By Mr. Raphael) What limiting principle
3 is there, if any, as to how much money the City of
4 Falls Church can transfer from its water fund to
5 the general fund?

6 (MR. THOMAS): Objection. Go ahead.

7 (THE WITNESS): I'll tell you the
8 methodology I use is I take a look at the
9 sustainability of the fund. So you don't want to
10 take anything out that would be in excess of what
11 the fund could sustain.

12 Q (By Mr. Raphael) Right. Well,
13 sustainability is measured not only by what you
14 take out but by how much you raise the water rates
15 to replenish it, right?

16 (MR. THOMAS): Objection.

17 (THE WITNESS): I guess you could say
18 that. Sure.

19 Q (By Mr. Raphael) If you're going to take
20 out more as a return on equity, you're going to
21 have to raise rates to cover it, aren't you?

22 (MR. THOMAS): Objection. Go ahead.

1 (THE WITNESS): Possibly, yes.

2 Q (By Mr. Raphael) So what I'm after here
3 is does the City have any limiting principle as to
4 how much is too much to take out of the -- of the
5 water fund to transfer to the general fund?

6 (MR. THOMAS): Objection. Asked and
7 answered.

8 (THE WITNESS): I'm trying to think how
9 to answer that. I would have to say yes. I mean,
10 we look at sustainability, which I'll admit is a
11 subjective. But that's my job.

12 Q (By Mr. Raphael) And so is there --
13 what's the limiting -- you're saying the limiting
14 principle is sustainability?

15 A Yes.

16 Q But if you -- let's suppose the City
17 wants to -- the City is currently taking about
18 \$2.8 million from the water fund as a transfer to
19 the general fund, right?

20 A It will be less than that this year.

21 Q Between 2.5 and 2.8?

22 A Sure.

1 Q Okay. And previously it was taking as
2 much as \$4.8 million, right?

3 A Correct.

4 Q And one of the reasons the City lowered
5 the amount it was transferring from the water fund
6 to the general fund was so it wouldn't have to
7 raise the commodity charge, right?

8 A Correct.

9 Q Okay. But suppose the City didn't do
10 that. Suppose the City continued a transfer to
11 the level of \$4.6 million and raised the water
12 rates. It could have raised the rates
13 sufficiently to cover the transfer, could it not?

14 (MR. THOMAS): Objection. Go ahead.

15 (THE WITNESS): Yes.

16 Q (By Mr. Raphael) Okay. And really what
17 I'm trying to get at in my question is, is there
18 any limiting principle as to how much is too much
19 to take as a transfer from the water fund to the
20 general fund?

21 (MR. THOMAS): Objection.

22 (Whereupon, a video clip concluded and

1 the hearing continued as follows:)

2 MR. RAPHAEL: Your Honor, this may sound

3 a little repetitive. But this is the

4 counterdesignation. This wasn't in mine. So it's

5 going to go on from here to page 323, 19.

6 (Whereupon, a video clip was played and

7 herein transcribed as follows:)

8 (THE WITNESS): Well, when I use

9 "sustainability," we're getting into a public

10 policy question, which is -- there's some point

11 where you just can't have a commodity charge.

12 What you're essentially postulating is the sky is

13 the limit.

14 Q (By Mr. Raphael) Isn't it?

15 A No.

16 Q What's the limit?

17 A The limit is there's a certain public

18 policy question, which is how much is appropriate,

19 right, fair, just, I mean, all these things, and

20 what can sustain the water fund as an ongoing

21 entity.

22 Q Okay. And in some years, in some past

1 years, the return on equity was as much as

2 40 percent of the operating revenues of the water

3 system, right?

4 A Correct.

5 Q Okay. Is 40 percent -- 40 percent I

6 take it is not too much from your standpoint?

7 (MR. THOMAS): Objection.

8 Q (By Mr. Raphael) From the City's

9 standpoint?

10 A The City used an accepted methodology.

11 So at that point, the City's position is it was

12 correct.

13 Q What I'm trying to find out is whether

14 there is a limiting principle that the City can

15 articulate as to how much is too much. I take it

16 the City doesn't have a percentage that represents

17 the threshold? You know, as a percentage of the

18 operating revenues, this return on equity is too

19 much, correct?

20 (MR. THOMAS): Objection.

21 (THE WITNESS): Correct.

22 Q (By Mr. Raphael) Turn, please, to

1 Deposition Exhibit 140. Turn, please, to

2 page 3123.

3 (Whereupon, a video clip concluded and

4 the hearing continued as follows:)

5 MR. THOMAS: When you get through

6 playing this, can we get to 331?

7 MR. RAPHAEL: Your objection is at 331,

8 12?

9 MR. THOMAS: Yes.

10 MR. RAPHAEL: Okay.

11 MR. THOMAS: Great.

12 (Whereupon, a video clip was played and

13 herein transcribed as follows:)

14 Q (By Mr. Raphael) These are notes

15 prepared for the Utility Committee meeting by the

16 City of Falls Church for May 19th, 1999?

17 A Correct.

18 Q Did you ask Mr. Nguyen about this

19 document?

20 A No, I did not.

21 Q Did you read Mr. Nguyen's testimony

22 about this document at his deposition?

1 A No, I did not.

2 Q And then if you turn, please --

3 (Whereupon, a video clip concluded and

4 the hearing continued as follows:)

5 MR. THOMAS: If I could, Judge, I have

6 an objection to this next designation from Fairfax

7 Water. What the testimony that follows in this

8 designation intended to capture is one written

9 line in one large document created by somebody

10 other than the City's witness. And all the

11 question is is, "I'm going to read this line, did

12 I read it correctly?" And I have a relevancy

13 objection and a best evidence objection and in

14 fact a doctrine of completeness objection to this.

15 I don't think it's fair to take this one

16 line totally out of -- in isolation out of context

17 of an overall document.

18 THE COURT: Are you offering the entire

19 document?

20 MR. THOMAS: Have we -- it's not on our

21 exhibit list.

22 THE COURT: Is the plaintiff?

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1 MR. RAPHAEL: It's -- this is a two-page
2 document, Your Honor, that is part of Plaintiff's
3 Exhibit 19.
4 THE COURT: Has that been received?
5 MR. RAPHAEL: It has not been received.
6 Plaintiff's Exhibit 19 is a 140-page water booklet
7 prepared by Son Nguyen, who was at the time the
8 general manager of environmental services in
9 charge for running the water system.
10 THE COURT: Mr. Nguyen is an employee of
11 the City?
12 MR. RAPHAEL: That's correct. And he
13 headed the water department at the time. He
14 prepared the book for his use.
15 THE COURT: Objection overruled. If you
16 want to put in the entire document, Mr. Thomas, to
17 show that this statement is ad hominem in nature
18 or something along those lines, you may.
19 Otherwise it's proper examination. You may
20 continue.
21 (Whereupon, a video clip was played and
22 herein transcribed as follows:)

Page 239

1 Q (By Mr. Raphael) Bottom of the next
2 page, 3124. This is a summary of staff's
3 recommendations concerning whether to sell or
4 lease the water system. Do you see that?
5 A Yes.
6 Q And Mr. Nguyen indicated that, quote,
7 these options are not profitable to the City
8 because the revenue will not be significant, and
9 you will lose the money-making machine (the goose)
10 forever, end quote. Isn't that right?
11 A Yes.
12 Q Mr. Nguyen referred to the water fund as
13 a money-making machine, right?
14 A Uh-huh.
15 Q You need to say yes or no.
16 A Oh. Yes.
17 Q And he referred to the water system as
18 the goose that laid the golden egg?
19 (MR. THOMAS): Objection. Asked and
20 answered.
21 (THE WITNESS): Yes.
22 Q (By Mr. Raphael) Mr. Tuohy, let me show

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1 you a document that we've just marked as
2 Deposition Exhibit 241.
3 (Whereupon, a video clip concluded and
4 the hearing continued as follows:)
5 MR. RAPHAEL: Your Honor, for the
6 record, Exhibit 241, Deposition Exhibit 241 is
7 found at Plaintiff's Exhibit 107.1.
8 THE COURT: Which has been admitted?
9 MR. RAPHAEL: It has not been admitted.
10 It is a learned treatise that we disclosed more
11 than -- 30 days before trial.
12 THE COURT: All right. Thank you.
13 (Whereupon, a video clip was played and
14 herein transcribed as follows:)
15 Q (By Mr. Raphael) For the record, it's a
16 copy of the AWWA M5 manual entitled "Water Utility
17 Management," second edition, 2005.
18 Do you have page 33?
19 A Yes.
20 Q Directing your attention to the first
21 paragraph there. For the record, it reads, "Since
22 January 1965, the American Water Works

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1 Association's board of directors has had a policy
2 statement on utility financing and rates." And it
3 goes on to talk about the statement.
4 I want to next direct your attention to
5 the numbered paragraph 2 at the bottom of page 33,
6 in the second sentence, which for the record
7 reads, quote, water utility funds should not be
8 diverted to uses unrelated to water utility
9 services, period, unquote.
10 Do you see that?
11 A Yes.
12 Q Is this the -- is this the first time
13 you were aware that the AWWA actually has a policy
14 statement that water utility funds should not be
15 diverted to water utility -- to non-water utility
16 purposes?
17 (MR. THOMAS): Objection. Go ahead.
18 (THE WITNESS): Yes.
19 Q (By Mr. Raphael) Okay. And is it fair
20 then to conclude that in deciding whether to take
21 a return on equity from the water fund to the
22 general fund, the City was not aware of the AWWA

1 policy on this point?
 2 (MR. THOMAS): Objection. Go ahead.
 3 (THE WITNESS): That's correct.
 4 Q (By Mr. Raphael) All right. Is it fair
 5 to say that the City's practice in taking a return
 6 on equity from the water utility fund to the
 7 general fund is not consistent with that statement
 8 of policy that we just read?
 9 (MR. THOMAS): Objection.
 10 (THE WITNESS): Correct, yeah.
 11 Q (By Mr. Raphael) Okay. And are you
 12 aware that this AWWA policy statement has been in
 13 effect since 1965?
 14 (MR. THOMAS): Objection. Go ahead.
 15 (THE WITNESS): No, I'm not.
 16 Q (By Mr. Raphael) In the course of
 17 preparing to testify as the City's representative
 18 on the history of the return on equity, did you
 19 come across anything to show that the City was
 20 aware that its practice of transferring monies
 21 from the water fund to the general fund was
 22 inconsistent with the AWWA policies?

1 A No.
 2 Q Did the City ever transfer monies from
 3 its water fund to its general fund in order to
 4 provide relief to City taxpayers?
 5 A It's an interesting question. We
 6 transfer it in as part of the general revenue.
 7 But that's -- we've been through this before where
 8 we dump it all into one pile and then what happens
 9 happens.
 10 Q Right. And isn't it true --
 11 A But if you're asking was there an
 12 explicit policy statement to do that?
 13 Q Well, I'm not asking it quite that way.
 14 I'm asking generally if in the past the City has
 15 transferred monies from the water fund to the
 16 general fund in order to help reduce the property
 17 tax rate and charges to its own citizens?
 18 A I guess you could say that, yes. I
 19 guess you could say that, yes.
 20 Q Okay. When has the City done that?
 21 A I don't know.
 22 Q Okay. Has it done it on more than one

1 occasion?
 2 A I do not know.
 3 Q What is your basis for saying that the
 4 City has done that?
 5 A We have a couple reports that say that
 6 it could be done, so imputing that the City is
 7 aware of the possibility.
 8 Q Mr. Tuohy, let me hand you a document
 9 I've just marked as Deposition Exhibit 242.
 10 (Whereupon, a video clip concluded and
 11 the hearing continued as follows:)
 12 MR. RAPHAEL: Your Honor, Exhibit 242 is
 13 Plaintiff's Exhibit 23. The City registered no
 14 objection to it in its objection list. And I
 15 would move its admission at this time.
 16 MR. THOMAS: No objection.
 17 THE COURT: Thank you, Mr. Thomas. It
 18 will be received.
 19 (Plaintiff's Exhibit 23 was received
 20 into evidence.)
 21 (Whereupon, a video clip was played and
 22 herein transcribed as follows:)

1 Q (By Mr. Raphael) This is the City
 2 Manager's memo of October 10, 2002, to the Mayor
 3 and the Council of the City of Falls Church,
 4 correct?
 5 A That is correct.
 6 Q All right. And the City Manager at the
 7 time was Dan McKeever?
 8 A That's correct.
 9 Q Directing your attention, sir, to the
 10 first paragraph, I think it's the third sentence.
 11 For the record, it reads, quote, the water fund in
 12 particular needs a rate adjustment to cover our
 13 ever-increasing costs, especially the sizable ROI
 14 transfer to the general fund. Without adjusting
 15 the rates, the ROI will drain the water fund of
 16 its cash, period, unquote. Do you see that?
 17 A Yes.
 18 Q Okay.
 19 (Whereupon, a video clip concluded and
 20 the hearing continued as follows:)
 21 MR. THOMAS: Judge, if I could.
 22 THE COURT: Yes, sir.

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1 MR. THOMAS: An objection to the line of
 2 questioning that will follow here from 343 to 347.
 3 This is questioning that deals with the question
 4 of whether the City Manager advised the Mayor and
 5 the City Council that the water system is actually
 6 worth more based on the ROI it would generate than
 7 if you'd sold it. I don't see how that has any
 8 relevance to the case.
 9 MR. RAPHAEL: He's examining him on this
 10 document, which is in evidence. It's been
 11 admitted. And the relevance is that it's going to
 12 go to show that the rate increases are always
 13 related to the need to maintain a high level of
 14 ROI transfer, which is the pattern and practice
 15 that we're attacking. And, in addition, that the
 16 increases -- the amount of ROI has --
 17 THE COURT: I think it's proper.
 18 It's -- it's in some respects, if not the heart of
 19 the matter, close to it, of the plaintiff's
 20 contention. Objection overruled. Exception
 21 noted.
 22 (Whereupon, a video clip was played and

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1 herein transcribed as follows:)
 2 Q (By Mr. Raphael) So you recognize that
 3 because of the amount of the ROI, return on
 4 investment being taken in 2002, there was a need
 5 to increase water rates to cover it?
 6 A Correct.
 7 Q Okay. And if you would -- directing
 8 your attention to the fourth bullet from the
 9 bottom of the page, the second sentence reads,
 10 quote, conclusion: The value of the system is far
 11 less than needed to invest the proceeds to receive
 12 the current level of ROI transfer, period,
 13 unquote.
 14 A Oh, okay.
 15 Q Do you see that sentence?
 16 A Yes.
 17 Q Okay. So am I correct that the City
 18 Manager was advising the Mayor and the City
 19 Council that the water system was actually worth
 20 more based on the return on investment it was
 21 generating than if you'd get if you sold the
 22 system?

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1 (MR. THOMAS): Objection. Go ahead.
 2 (THE WITNESS): Yes.
 3 Q (By Mr. Raphael) Okay. And then
 4 directing your attention to the second page,
 5 Mr. McKeever has the paragraph with the rhetorical
 6 question, has the water fund been operating with a
 7 deficit?
 8 And the answer is no. And at the bottom
 9 of the paragraph, it states that the water fund
 10 has operated in the black through June 2002. Do
 11 you see that?
 12 A That's correct.
 13 Q Is that accurate?
 14 A Yes.
 15 Q And then on the last page of this memo,
 16 Exhibit 242, there's a concluding paragraph. And
 17 let me take the sentences shown one or two at a
 18 time. He's referring here to the CDM report that
 19 we saw earlier, correct?
 20 A Yes.
 21 Q And the third sentence of the paragraph
 22 reads, quote, the single greatest contributing

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1 factor is the amount transferred to the general
 2 fund as a return on investment, unquote.
 3 And he's referring here to the single
 4 greatest factor of what is causing a drain of the
 5 funds in the water fund, correct?
 6 A That is correct.
 7 Q And Mr. McKeever then says, quote, while
 8 lawfully permitted, the ROI, return on investment,
 9 must be calculated into the base rates so that it
 10 is replenished on a regular basis, period,
 11 unquote?
 12 A Correct.
 13 Q And the City tried to do that when it
 14 could, right?
 15 A Yes.
 16 Q Okay. And then a couple sentences down,
 17 Mr. McKeever said, therefore, it is -- quote,
 18 therefore, it is extremely important that the
 19 Council determine a level of rates that cover our
 20 costs and provide for a reasonable ROI, period,
 21 unquote.
 22 Same thing here, the City tried to do

1 that where it could, right?

2 A Correct.

3 Q Do you remember specifically what
4 actions were taken by the City after this memo of
5 October 10, 2002, in order to ensure that the
6 water rates covered the return on investment?

7 A Well, two things happened. I don't have
8 the exact dates off the top of my head. One is
9 there was an adjustment to the commodity charge,
10 and, two, we dropped the ROI.

11 Q All right. But you didn't drop the ROI
12 until 2006, right?

13 A Right.

14 Q Okay. We're still back in 2002 here?

15 A Right.

16 (Whereupon, a video clip concluded and
17 the hearing continued as follows:)

18 MR. RAPHAEL: The next exhibit he's
19 going to be referring to, Your Honor, is
20 Deposition Exhibit 119, which is the same as
21 Plaintiff's Exhibit 26. I would move its
22 admission at this time. The City lodged no

1 objection to it in its objection list.

2 MR. THOMAS: No objection.

3 THE COURT: Thank you. It will be
4 received.

5 (Plaintiff's Exhibit 26 was received
6 into evidence.)

7 (Whereupon, a video clip was played and
8 herein transcribed as follows:)

9 Q (By Mr. Raphael) Could you turn, please,
10 to Deposition Exhibit 119. This has been
11 previously marked. It's an E-mail from Dan
12 McKeever, the City Manager, to Dan Gardner and
13 other members of the City Council, dated
14 April 13th, 2003, correct?

15 A That is correct.

16 Q Do you see where Mr. McKeever says
17 "setting the rates at the \$1.97 level will provide
18 sufficient cash flow for the entire five-year
19 period to full all operations," I think it's "fund
20 all operations, ROI and CIP"?

21 Do you see that sentence?

22 A Yes.

1 Q And so the City in fact did set the
2 rates at \$1.97 following this E-mail, correct?

3 A Correct.

4 Q And that rate was set, at least in part,
5 to ensure that it would fund the anticipated
6 return on investment?

7 A Correct.

8 (Whereupon, a video clip concluded and
9 the hearing continued as follows:)

10 MR. RAPHAEL: Your Honor, the next
11 exhibit that you're going to hear discussed is
12 Plaintiff's Exhibit 34. It's the minutes of the
13 April 25th, 2005 meeting of the City Council.

14 MR. THOMAS: If I could, Judge, lodge an
15 objection to that and to the testimony designated
16 to follow it from page 354 to 356. That is
17 testimony based on the hearsay statements of the
18 minutes. And for the reasons that we discussed
19 yesterday in connection with our motion in limine,
20 we would ask that this testimony not come in.

21 MR. RAPHAEL: Your Honor, these minutes
22 will reflect a statement by the City Manager that

1 a rate increase was needed in order to cover the
2 return on equity. He is the chief executive
3 officer of the City. And that is an admission by
4 the City's primary agent, the City Manager.

5 MR. THOMAS: Judge --

6 MR. RAPHAEL: He also says that a
7 7 percent increase is what is needed to cover the
8 return on investment. That's a statement of fact
9 by the City's agent in the City's business
10 records. They're regularly approved minutes. And
11 it's been admitted that the minutes are true and
12 accurate reflections of the meeting.

13 MR. THOMAS: If I could --

14 THE COURT: But the minutes contain
15 statements of other members of Council and the
16 Mayor?

17 MR. RAPHAEL: I'm only offering it for
18 the purpose of what -- the statement you're about
19 to hear by the City Manager. That's the only
20 reason I'm offering it.

21 THE COURT: You're offering the entire
22 document or just --

1 MR. RAPHAEL: Well, what I would like to
2 do -- I haven't moved it at this time. What I
3 would like to do is have Mr. Tuohy acknowledge, as
4 the City's deposition -- corporate representative,
5 that this in fact was communicated to the City
6 Council by the City Manager. So I don't need to
7 move it at this time.

8 MR. THOMAS: Judge --

9 MR. RAPHAEL: I think, in other words,
10 Your Honor, I think the objection is premature.

11 MR. THOMAS: Well, no. I think -- I
12 don't agree that the objection is premature,
13 Judge. First of all, this is precisely the point
14 that we discussed yesterday about the propriety of
15 looking into the process of making legislation.
16 These rates to which this testimony relates are
17 voted on by Council and become enacted by
18 ordinance of resolution.

19 THE COURT: What if we just limit it to
20 the question from line 15 to 18 on page 355 and
21 the answer at line 19?

22 MR. RAPHAEL: That's all I'm offering it

1 for. I haven't moved --

2 THE COURT: I'm asking Mr. Thomas.

3 MR. RAPHAEL: I'm sorry.

4 THE COURT: Just -- and have no further
5 reference to the minutes, and not require their
6 introduction. Is there any dispute that the City
7 Manager --

8 MR. THOMAS: There is none, and that's
9 fine.

10 THE COURT: Okay. Let's do that.

11 MR. RAPHAEL: Thank you, Your Honor.

12 Mr. Sapp, can you play it from line --
13 page 355, line 15 through line 19.

14 THE COURT: 19.

15 MR. RAPHAEL: Yes. And then the tape --
16 before he does that, after line -- page 355,
17 line 19, the tape is going to continue with a
18 reference to Deposition Exhibit 62. And for the
19 record, that is Plaintiff's Trial Exhibit 35.

20 It's an E-mail from the City Manager dated May 5,
21 2005.

22 THE COURT: Was there any objection to

1 that exhibit?

2 MR. THOMAS: We did object to that on
3 the basis of hearsay, Your Honor.

4 THE COURT: The E-mail?

5 MR. THOMAS: Yes.

6 MR. RAPHAEL: As you'll hear, the E-mail
7 says that it's a statement by the City Manager, a
8 factual statement that a 7 percent increase is the
9 only one that would be sufficient to cover the ROI
10 transfer. It's a statement of fact by the City's
11 agent.

12 MR. THOMAS: Again, Judge, this is --
13 these are statements that relate to and go into
14 the process of making legislation which ultimately
15 resulted in a vote by the City Council on a rate
16 increase. And so I think what we've --

17 THE COURT: I think there's a
18 difference, however, Mr. Thomas, between the
19 statement of a manager and an employee, the -- the
20 executive as opposed to City Council members or
21 the Mayor. It seems to me that those are the ones
22 that are insulated. And this is simply the City

1 Manager's opinion as expressed in this E-mail.

2 Is the City Manager not going to testify
3 in this case? He's not being called?

4 MR. RAPHAEL: This was Dan McKeever, who
5 has passed away. The current City Manager is
6 Wyatt Shields.

7 THE COURT: But Mr. McKeever is no
8 longer alive?

9 MR. RAPHAEL: That's correct.

10 THE COURT: I'm going to permit it. I'm
11 going to permit it. It really still is -- if it's
12 a 7 percent increase, a 70 percent increase, or
13 one-half of 1 percent increase, it doesn't change
14 Fairfax Water's position that any increase to
15 provide additional funds that would go to the
16 general fund is unconstitutional. That's what the
17 case is really about.

18 MR. THOMAS: Thank you, Your Honor.

19 THE COURT: I'm going to permit it.
20 Exception noted.

21 MR. SAPP: I have to back it up.

22 MR. RAPHAEL: So Mr. Sapp is going to

1 back up the tape or get to the portion of the tape
2 at page 355, line 15, and then play it from there.

3 (Whereupon, a video clip was played and
4 herein transcribed as follows:)

5 Q (By Mr. Raphael) The City Manager was
6 informing the City Council, was he not, that a
7 rate increase was needed at least in part to cover
8 the return on equity?

9 A That's correct.

10 (Whereupon, a video clip concluded and
11 the hearing continued as follows:)

12 MR. RAPHAEL: Ken, you can keep playing
13 it.

14 (Whereupon, a video clip was played and
15 herein transcribed as follows:)

16 Q (By Mr. Raphael) Can you turn, please,
17 to Deposition Exhibit 62. Deposition Exhibit 62
18 is an E-mail of May 5, 2005, from the City
19 Manager, Dan McKeever, to the City Council, right?

20 A Yes.

21 Q And if you -- do you see the E-mail from
22 Mr. McKeever where he says, quote, one thing that

1 is critical to remember regarding the three levels
2 of increases, the 7 percent increase is the only
3 increase that fully stabilizes the fund, provides
4 the ROI (return on investment) transfer, and
5 establishes a fund balance in accordance with our
6 general fund policy regarding fund balance,
7 period, unquote.

8 Do you see that?

9 A Yes.

10 Q Was the City Manager reporting that a 7
11 percent rate increase was needed at least in part
12 to cover the projected amount of the return on
13 equity?

14 A Yes.

15 Q And in fact the City adopted a 7 percent
16 increase in rates, true?

17 A I believe that's correct, yes.

18 (Whereupon, a video clip concluded and
19 the hearing continued as follows:)

20 MR. RAPHAEL: Your Honor, at this point
21 I would move the E-mail that was just being
22 discussed and which you've just ruled on. It's

1 Plaintiff's Exhibit 35.

2 MR. THOMAS: And subject to our
3 objection, Judge. We object for reasons we
4 discussed a moment ago.

5 THE COURT: What is included in the
6 E-mail besides that which has been referenced?
7 Isn't that all we need? Wouldn't this testimony
8 be sufficient?

9 MR. RAPHAEL: Well, the document has --
10 Ken, can you -- is it possible to bring up the
11 exhibit to see it? Plaintiff's Exhibit 35. And,
12 Ken, if you could illuminate the top half portion
13 of it, please. The top half of the document. The
14 one on top, I'm sorry.

15 MR. SAPP: Right there?

16 MR. RAPHAEL: Yeah. Right there. Go to
17 the graph.

18 The quote that came out in the
19 deposition just now was the last sentence of that
20 paragraph. But as you'll see, what the City
21 Manager was saying is that there are three
22 possible -- he's considering three possible

1 percentage adjustments to the rate. And of the
2 three, the only one that covers the rate -- the
3 ROI increase is the 7 percent one.

4 So I think these other statements are
5 statements of fact about the financial position of
6 the system. And for the same reasons that the
7 last sentence is admissible, the previous ones are
8 as well.

9 MR. THOMAS: If I could, Judge.

10 THE COURT: Well, it's not really a
11 statement of fact. It's a statement of his
12 opinion. Is the objection based on hearsay that
13 he cannot be cross-examined?

14 MR. THOMAS: It is.

15 MR. RAPHAEL: Well --

16 THE COURT: You know, Mr. Raphael, I
17 don't think you need more than that sentence
18 anyway. I mean, we've got it. Objection is
19 sustained.

20 MR. RAPHAEL: All right. Your Honor,
21 the next document that you're going to be hearing
22 about on the tape I believe is Deposition

1 Exhibit 249, which is the same as Plaintiff's
 2 Exhibit 13.
 3 THE COURT: And there's no objection to
 4 that?
 5 MR. RAPHAEL: I haven't moved it yet,
 6 Your Honor.
 7 MR. THOMAS: We have the same objection,
 8 Your Honor. Hearsay. I would like to pull the
 9 document up if I could.
 10 THE COURT: What is the document?
 11 MR. RAPHAEL: I'm offering -- these are
 12 the minutes of the November 1995 council meeting.
 13 I can show you the callout of what we're offering
 14 it for. The City Manager at the time makes the
 15 statement: "Mr. Lasso reported that because of
 16 the City's good management of its water system,
 17 each year it receives a substantial amount of
 18 money which is used to defray costs that the City
 19 might otherwise have to pay for through general
 20 taxes."
 21 THE COURT: Do I have this in front of
 22 me in the transcript?

1 MR. RAPHAEL: I believe you do.
 2 THE COURT: Which page?
 3 MR. RAPHAEL: Actually, Your Honor, this
 4 is a little premature. This does not come up
 5 until page 388 of the transcript. So there are a
 6 number of entries before we get there.
 7 THE COURT: Okay. Why don't we just
 8 keep rolling until we get there.
 9 MR. RAPHAEL: All right. My apologies.
 10 THE COURT: No problem.
 11 (Whereupon, a video clip was played and
 12 herein transcribed as follows:)
 13 Q (By Mr. Raphael) There have been
 14 statistics that have been used in this litigation
 15 for the percentage of people inside the City and
 16 outside the City who receive Falls Church Water.
 17 Is it accurate that 8 percent of the City's water
 18 customers are Falls Church residents and
 19 92 percent are Fairfax County -- are in Fairfax
 20 County?
 21 (MR. THOMAS): Objection. Go ahead.
 22 (THE WITNESS): That's correct.

1 Q (By Mr. Raphael) Okay. But it has not
 2 been an unusual thing for --
 3 (Whereupon, a video clip concluded and
 4 the hearing continued as follows:)
 5 MR. THOMAS: Objection here.
 6 THE COURT: Yes, sir.
 7 MR. THOMAS: Thank you. The objection
 8 here, again, Judge, is this is a -- this is
 9 Mr. Raphael's attempt to elicit testimony about
 10 what City Council members have said, be they from
 11 the dais or otherwise, and for reasons we
 12 discussed previously, that is hearsay and should
 13 not be --
 14 THE COURT: I'm sorry. That's with
 15 regard to what we just heard?
 16 MR. THOMAS: No, Your Honor. I was
 17 trying to get ahead.
 18 THE COURT: Which page?
 19 MR. THOMAS: 374. It's a question, if I
 20 could, about how City Council members have
 21 described the transfer from the water fund to the
 22 general fund, what terms they've used. Again,

1 that's hearsay, individual local politicians in
 2 Falls Church. They do not bind the City, and this
 3 testimony should not come in.
 4 MR. RAPHAEL: Your Honor, we're offering
 5 this to show that it was common knowledge in the
 6 City that the fund transfers reflect a reduction
 7 in the tax rate. It's not offered for the
 8 statement of any one particular Council member.
 9 THE COURT: Didn't Mr. Tuohy testify as
 10 to that earlier at his deposition?
 11 MR. RAPHAEL: He did.
 12 THE COURT: We've already heard that.
 13 He said earlier, because you asked him the
 14 specific question, couldn't this result in a lower
 15 tax rate? And he said, well, yes, it could.
 16 MR. RAPHAEL: This is slightly
 17 different. This is offered to show that it is
 18 common knowledge among the leaders of the City
 19 that this is happening. It's different from
 20 saying it could happen or it might have happened
 21 one time.
 22 MR. THOMAS: Well, then, Judge, I would

1 add to my objection the objection of relevance.
2 Whether it's common knowledge among --
3 THE COURT: I think the City Manager's
4 testimony has settled this issue. And getting
5 into the City Council members' thoughts,
6 deliberations, even common knowledge, I just don't
7 think is proper. Objection is sustained.

8 MR. RAPHAEL: All right.

9 MR. THOMAS: If I could, I believe this
10 is the same case with the next designation, which
11 is at page 377, where, in the designated section,
12 the witness is asked about what an individual
13 councilman, who was -- who was years and years ago
14 on the Council, Mr. Sam Mabry, had to say about
15 the general fund transfers.

16 MR. RAPHAEL: Mr. Thomas, are you at
17 page 377?

18 MR. THOMAS: I am.

19 MR. RAPHAEL: Your Honor, I think there
20 may be a misunderstanding here, because we're only
21 offering on page 377, lines 14 through 19, the
22 question about what the amount of the transfer

1 represents this year on the tax rate, and the
2 chief financial officer says for the City
3 6 percent.

4 MR. THOMAS: Okay.

5 THE COURT: And that question is being
6 put to Mr. Tuohy?

7 MR. THOMAS: Fair enough.

8 MR. RAPHAEL: That's right.

9 MR. THOMAS: My mistake.

10 THE COURT: All right.

11 MR. RAPHAEL: Mr. Sapp, I think we're at
12 page 377, line 14.

13 (Whereupon, a video clip was played and
14 herein transcribed as follows:)

15 Q (By Mr. Raphael) This year, the amount
16 of the transfer from the water fund to the general
17 fund represents about 6 cents on the tax rate,
18 doesn't it?

19 (MR. THOMAS): Objection. Go ahead.

20 (THE WITNESS): Correct.

21 Q (By Mr. Raphael) My question is, isn't
22 it true that the City has taken money in the past

1 from that water fund --

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

4 MR. THOMAS: If I could, Judge, on this
5 question, this is an objection based on relevance.
6 What the City has done, for reasons we discussed
7 yesterday in the motion to strike Mr. Woodcock,
8 what the City has done with its transfers from the
9 water fund to the general fund are I think not in
10 dispute and not relevant.

11 MR. RAPHAEL: Your Honor, this is the
12 City's representative and its chief financial
13 officer acknowledging that the City in the past
14 has used its water fund monies to help balance the
15 City's general budget.

16 THE COURT: Right. I frankly think it's
17 redundant. But at least for that reason I'm going
18 to permit it. Objection overruled.

19 MR. RAPHAEL: Ken, 386, line 9, please.

20 (Whereupon, a video clip was played and
21 herein transcribed as follows:)

22 Q (By Mr. Raphael) Isn't it true that the

1 City --

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

4 MR. RAPHAEL: I'm sorry. Actually can
5 you stop. I think we're --

6 THE COURT: At 387, line 9.

7 MR. RAPHAEL: Did we have 377, line 14
8 already? Has that been played?

9 MR. SAPP: I thought that was skipped.

10 MR. RAPHAEL: That stays.

11 THE COURT: Yes, sir.

12 MR. RAPHAEL: I think we're back to 377,
13 line 14.

14 THE COURT: We had that.

15 MR. RAPHAEL: We already played that?
16 I'm sorry. Then we are up to page 387.

17 THE COURT: Now we're at page 387,
18 line --

19 MR. RAPHAEL: Thank you.

20 (Whereupon, a video clip was played and
21 herein transcribed as follows:)

22 Q (By Mr. Raphael) My question is isn't it

1 true that the City has taken money in the past
 2 from that water fund and used it to help balance
 3 the City's general budget?
 4 (MR. THOMAS): Objection.
 5 (THE WITNESS): Correct.
 6 Q (By Mr. Raphael) Okay. Let me hand you,
 7 sir, a document I've just marked as Deposition
 8 Exhibit 249.
 9 (Whereupon, a video clip concluded and
 10 the hearing continued as follows:)
 11 MR. THOMAS: Your Honor, we have a
 12 familiar objection on this, the line of questions
 13 that relates to City Council minutes. Our
 14 objection is the same objection we've lodged with
 15 respect to prior minutes.
 16 MR. RAPHAEL: Your Honor, I'm offering
 17 this only for the statement of the City's manager
 18 at the time, David Lasso, that -- and I, for the
 19 record, it reads: Mr. Lasso reported that because
 20 of the City's good management of its water system,
 21 each year it receives a substantial amount of
 22 money which is used to defray costs that the City

1 might otherwise have to pay for through general
 2 taxes.
 3 That's what the examination is about.
 4 THE COURT: Well, it's the same
 5 objection that we had earlier. We'll handle it on
 6 the same basis, by permitting the reference to
 7 what Mr. Lasso, a City employee, said to the
 8 members of the Council and the Mayor, but not to
 9 permit the introduction of the minutes themselves.
 10 MR. RAPHAEL: Just for the record, Your
 11 Honor --
 12 THE COURT: I think that would just be
 13 388, lines 15 through 389, line 10. Take a look,
 14 Mr. Raphael. I think that would...
 15 MR. RAPHAEL: That's correct, Your
 16 Honor. And just so the record is clear, this is
 17 referring to Plaintiff's Exhibit -- Trial
 18 Exhibit 13, which was Deposition Exhibit 249.
 19 THE COURT: Yes, sir.
 20 MR. RAPHAEL: So, Ken, if you could play
 21 it from page 388, line 15, please.
 22 And if I may, Your Honor, I think,

1 before he starts that up, so the record is clear,
 2 this is from the November 27th, 1995 City Council
 3 meeting.
 4 THE COURT: All right. That's fine.
 5 (Whereupon, a video clip was played and
 6 herein transcribed as follows:)
 7 Q (By Mr. Raphael) And for the record, it
 8 reads, quote, Mr. Lasso reported that because of
 9 the City's good management of its water system,
 10 each year it receives a substantial amount of
 11 money which is used to defray costs that the City
 12 might otherwise have to pay through general taxes,
 13 period, unquote.
 14 Do you see that?
 15 A Correct.
 16 Q And is that another example of a
 17 representative of the City saying that the
 18 transfer of monies from the water fund to the
 19 general fund has been helpful to help reduce
 20 general taxes?
 21 (MR. THOMAS): Same objection as the
 22 objection made to the clips played a moment ago.

1 But go ahead.
 2 (THE WITNESS): Yes.
 3 Q (By Mr. Raphael) Okay.
 4 (Whereupon, a video clip concluded and
 5 the hearing continued as follows:)
 6 MR. RAPHAEL: The -- you can play it.
 7 We're up to page 397.
 8 (Whereupon, a video clip was played and
 9 herein transcribed as follows:)
 10 Q (By Mr. Raphael) Has the City done
 11 anything to quantify the amount of financial risk
 12 that its residents take in the operation and
 13 maintenance of the water system?
 14 A No.
 15 Q Has the City done anything to calibrate
 16 the return on equity to the amount of any such
 17 risk?
 18 (MR. THOMAS): Objection. Go ahead.
 19 (THE WITNESS): No.
 20 Q (By Mr. Raphael) When I deposed you in
 21 your individual capacity a couple weeks ago, I
 22 asked you about a general bond obligation, a bond

1 issue by the City that was taken a couple years
2 ago. Do you remember that?

3 A Yes.

4 (Whereupon, a video clip concluded and
5 the hearing continued as follows:)

6 MR. RAPHAEL: Your Honor, the City has
7 an objection coming up to lines 399, 4 through 14.
8 This issue relates, Your Honor, to whether a
9 general government bond -- an issue of a general
10 obligation bond by the City of Falls Church was in
11 fact booked as going to be repaid from the City's
12 water revenues as opposed to the City's taxpayer
13 dollars. This goes to the issue of whose risk is
14 it.

15 And the discussion is about the fact
16 that even though it's a general obligation bond,
17 it's been recorded in the records of the City as
18 going to be repaid from the water revenues as
19 opposed to general taxpayer dollars.

20 Mr. Thomas has an objection to page 399,
21 line 4 through 14. And I think it would be
22 appropriate to address that now before we read the

1 portion that gets into his objection.

2 MR. THOMAS: I think that's fair, and I
3 appreciate that.

4 The testimony that plaintiff wants to
5 play here is to the effect that the City Council,
6 quote, made it clear in issuing these general
7 obligation bonds, the general obligation bonds
8 would somehow be paid through water revenue bonds.
9 That's -- those are statements, again, statements
10 of City Council members outside of the resolution
11 that is the document that embodied the general
12 obligation bond, the fact of the general
13 obligation bond being taken on by the City. So
14 statements outside of what the resolution had to
15 say are improper and should be excluded.

16 MR. RAPHAEL: Your Honor, to be clear,
17 the reference in the accompanying minutes, which
18 are at Plaintiff's Exhibit 58, is a statement by
19 the City's chief financial officer. And the
20 statement was, quote, because the repayment is
21 budgeted in the water fund, there is no effect
22 upon the City's general fund debt limit as set by

1 the Council's adopted debt policy.

2 So it's true that the reference to the
3 deposition transcript is to the City Council. But
4 the underlying record is a statement of the chief
5 financial officer of the City.

6 MR. THOMAS: Well, again, Judge, here
7 are minutes offered to animate what is a
8 legislative act on the part of the City, which is
9 to pass a resolution taking on a general
10 obligation bond. I think it's improper to go
11 through -- whether the line of questioning here on
12 page 399 is correct inasmuch as it refers to --

13 THE COURT: Well, if the bond was to --
14 was for improvements to the water system, why
15 can't we simply agree that a bond was issued for
16 improvements to the water system that was to be
17 repaid from revenues of the water system, rather
18 than taxpayer monies, and leave it at that?

19 MR. RAPHAEL: I'm happy with that.

20 THE COURT: Can you live with that or
21 not?

22 MR. THOMAS: The only problem that I

1 have with that is that the bond that was issued
2 was in fact a general obligation bond backed by
3 the full faith and credit of the taxpayers of the
4 City of Falls Church. How they paid for that --
5 how they hoped to and planned to pay for that is
6 really pretty immaterial. The point is that it's
7 a general obligation bond taken on by the City.
8 And the risk of default is on the City and its
9 citizens. So I --

10 MR. RAPHAEL: Yes -- sorry.

11 MR. THOMAS: That's okay. So no, I'm
12 not sure that I do think that --

13 THE COURT: What you're saying,
14 Mr. Thomas, is that the bond speaks for itself.

15 MR. THOMAS: Correct. And the
16 legislation that passed it speaks for itself.

17 THE COURT: I think he's got the better
18 of it, Mr. Raphael. Because they could have said,
19 well, this bond looks like a water bond but it's
20 really going to be for the Fourth of July
21 fireworks. That's our deal.

22 MR. RAPHAEL: Your Honor, if I may --

1 THE COURT: I don't think they can do
2 it.
3 MR. RAPHAEL: Your Honor, if I can put
4 this to one side for a second and show you
5 Plaintiff's Exhibit 58 at page 3 of 5. These are
6 the minutes from the September 25th, 2006 City
7 Council meeting where the bond was approved.
8 Ken, if you could bring up page 3 of 5,
9 please. Can you show that callout?
10 This is a report by the chief financial
11 officer. I'm really offering it for this sentence
12 here: Because the repayment is budgeted in the
13 water fund, there is no effect upon the City's
14 general fund debt limits as set by the Council's
15 adopted debt policy.
16 It's a statement by the chief financial
17 officer about how the bond is booked on the City's
18 books.
19 THE COURT: Well, that was somewhat
20 along the nature of my suggested resolution.
21 MR. RAPHAEL: Yes, sir.
22 THE COURT: Mr. Thomas.

1 MR. THOMAS: Right. And my objection
2 is, as I stated a moment ago, the bond speaks for
3 itself. The opinion of the -- of the financial
4 manager of the City about --
5 THE COURT: How it's going to be
6 reflected. I agree. The objection is sustained.
7 MR. RAPHAEL: All right. Just to make a
8 proffer, the bond doesn't say where the repayment
9 money comes from. That's my point, is that it's
10 booked on the records of the City as to be repaid
11 from the water fund. That's not in the bond.
12 THE COURT: I understand.
13 MR. RAPHAEL: Thank you. Mr. Sapp, I
14 think that takes us to page 3 -- we have the
15 City's designation now, which begins at page 400,
16 line 16.
17 And, Your Honor, you're going to be
18 hearing Mr. Thomas' redirect of Mr. Tuohy.
19 THE COURT: Right.
20 MR. RAPHAEL: And then you'll hear my
21 concluding examination.
22 THE COURT: Yes, sir.

1 MR. RAPHAEL: We're almost done.
2 It should be on page 400, line 16. It
3 goes to 401, 21. And then my question picks up at
4 401, 22.
5 (Whereupon, a video clip was played and
6 herein transcribed as follows:)
7 Q (By Mr. Thomas) Mr. Raphael asked you
8 some questions about any connection between the
9 water fund for the City of Falls Church and the
10 City of Falls Church tax rate? Do you remember
11 those questions?
12 A Yes.
13 Q What direct relationship, if any, has
14 there been between the water fund and the City of
15 Falls Church's tax rate?
16 A There is not a direct relationship.
17 Q Can you explain.
18 A When we figure out the City's budget, we
19 figure the return on equity at the beginning of
20 the process. The tax rate is computed at the end
21 of the process. So whatever all the different
22 revenue sources are compiled together results in

1 the tax rate.
2 Q Okay. He also asked you about any
3 connection between the water fund for the City of
4 Falls Church and the City's efforts with respect
5 to its budget. Do you remember that --
6 A Yes.
7 Q -- question? And any impact on the
8 City's budgeting process by transfers from the
9 water fund. Do you remember that?
10 A Yes.
11 Q Okay. Is there any direct relationship
12 between the water fund and the City's budget in
13 the context of the City's budgeting process?
14 A When we budget for the water fund; is
15 that your question?
16 Q No. For the City's budget?
17 A For the general fund budget?
18 Q Yes.
19 A Yes, there's a relationship.
20 Q And would you explain what that is.
21 A We do the budget for the water fund,
22 P&L, do the budget for the general fund. There's

1 a transfer that's part of that process. And then
2 at the end, when we see all the different revenues
3 coming in, that gives us, if you will, the delta
4 between revenues and expense of the general fund.
5 And we use that obviously to adjust, either
6 expenditures downward or revenues upward.

7 Q (By Mr. Raphael) Mr. Tuohy, you said
8 there was not a direct relationship between the
9 return on equity and the tax rate. And you
10 explained that the way the budget process works is
11 the return on equity is computed for the water
12 fund, and that money goes into the general fund,
13 and then you set the tax rate based on the money
14 you need to pay the City's operations, correct?

15 A Correct.

16 Q All right. So the more money that goes
17 into the general fund from the return on equity,
18 the less money you need in tax dollars, right?

19 A Correct.

20 (Whereupon, a video clip concluded and
21 the hearing continued as follows:)

22 MR. RAPHAEL: Okay. Your Honor, that

1 concludes the video excerpts from the City's
2 deposition.

3 THE COURT: All right. Thank you.

4 MR. RAPHAEL: Your Honor, the first live
5 witness is Chris Woodcock.

6 THE COURT: All right. Why don't we
7 take a few minutes and we'll come back and hear
8 from Mr. Woodcock.

9 MR. RAPHAEL: Thank you.

10 (Whereupon, a recess was taken between
11 12:01 p.m. and 12:19 p.m.)

12 THE COURT: All right. Mr. Raphael.

13 MR. RAPHAEL: Thank you, Your Honor. We
14 call Christopher P.N. Woodcock to the stand.

15 THE COURT: All right.

16 Whereupon,

17 CHRISTOPHER P.N. WOODCOCK
18 was called as a witness, and, having first been
19 duly sworn, was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. RAPHAEL:

22 Q Good afternoon, Mr. Woodcock. Could you

1 please state your full name for the record.

2 A Christopher Philip Neville Woodcock.

3 Q And where do you live, Mr. Woodcock?

4 A Northborough, Massachusetts.

5 Q How are you currently employed?

6 A I am the president of Woodcock &
7 Associates, Incorporated.

8 Q What is Woodcock & Associates,
9 Incorporated?

10 A It's a consulting firm that provides
11 rate and financial cutting services to water
12 utilities and waste water utilities.

13 Q And how long -- are you the principal of
14 that firm?

15 A I'm the president, yes.

16 Q How long have you been providing advice
17 to water and waste authorities or utilities
18 concerning rate-making practices?

19 A Over 30 years. Since 1976.

20 Q All right. Could you briefly describe
21 for the Court, please, your educational
22 background.

1 A I have a Bachelor of Arts degree in
2 economics and a Bachelor of Science degree in
3 civil engineering.

4 Q And what types of professional services
5 do you perform for your clients?

6 A They're generally involved with the
7 development of and calculation of water and sewer
8 rates, cost of services studies, some expert
9 witness work in relation to that. Financial
10 studies in terms of looking and developing capital
11 improvement programs for water, waste water
12 utilities, financing plans, financial feasibility
13 studies in support of bond issues.

14 And not so much recently, but in the
15 past, some general management studies of water and
16 waste water utilities.

17 Q All right. Can you take a look,
18 please -- let's take a look, please, at
19 Plaintiff's Exhibit 3.3.

20 Ken, can you bring that up.

21 Do you recognize Plaintiff's Exhibit 3.3
22 as your curriculum vitae?

1 A I do.
 2 Q Okay. Are the contents of the
 3 curriculum vitae accurate?
 4 A Yes, they are.
 5 MR. RAPHAEL: Your Honor, I'm not sure
 6 what your preference is. I would move the CV at
 7 this time of Mr. Woodcock. And I would have no
 8 objection when we get to the City's experts.
 9 THE COURT: I am happy to receive them.
 10 Do you have a problem? I'll receive your expert's
 11 as well.
 12 MR. THOMAS: That's fine.
 13 MR. RAPHAEL: I have no objection to
 14 that either.
 15 THE COURT: Okay.
 16 MR. RAPHAEL: I'm sorry, 3.3 is
 17 received?
 18 THE COURT: Yes, sir.
 19 MR. RAPHAEL: Thank you, Your Honor.
 20 (Plaintiff's Exhibit 3.3 was received
 21 into evidence.)
 22 BY MR. RAPHAEL:

1 study that's done in the derivation of water
 2 rates. It's been used in sewer rates as well.
 3 But it's a study that involves the
 4 analysis and determination of what the expenses or
 5 revenue requirements are for the utility, the
 6 functionalizing of those expenses as to what they
 7 are, allocating them to different classes or
 8 customer classes or groups of class, types of
 9 service. And then ultimately, the development of
 10 rates that would cover what those costs of
 11 providing services are.
 12 Q All right. And then referring to
 13 your -- page 1 of your CV here at Exhibit 3.3,
 14 Plaintiff's 3.3, you have some cities listed here
 15 for whom you've done work.
 16 What are some of the larger cities for
 17 which you've done water studies?
 18 A Portland, Maine; Boston; New York City;
 19 Washington; Baltimore; Metropolitan Water
 20 District, which is pretty much Southern
 21 California; San Diego County Water Authority;
 22 Denver; Detroit; Fort Worth.

1 Q Now, directing your attention to the
 2 first paragraph, Mr. Woodcock, it indicates that
 3 you've done over 300 municipal and private water
 4 and waste water financial and management studies.
 5 Do you see that?
 6 A I do.
 7 Q Are those the types of studies you just
 8 mentioned, the different types of studies?
 9 A Yes, they are.
 10 Q Okay. And what -- about what percentage
 11 of your water utility clients have been municipal
 12 government clients as opposed to investor-owned or
 13 private water providers?
 14 A I would say about 95 percent are
 15 municipal entities, either cities, towns,
 16 districts, states, some countries. The other
 17 5 percent, private water utilities or private
 18 clients.
 19 Q All right. You mentioned the phrase
 20 "cost of service study." What is a cost of
 21 service study?
 22 A Cost of service study is generally a

1 Q All right. And are those water
 2 providers generally larger than the City of Falls
 3 Church?
 4 A Yes.
 5 Q Have you also done work for water --
 6 municipal water bodies that are smaller than the
 7 City of Falls Church?
 8 A Yes, some much smaller.
 9 Q Okay. Have you done work for any water
 10 or waste utilities in Virginia?
 11 A Yes.
 12 Q Which ones?
 13 A I have done studies of waste water rates
 14 and charges for Arlington County, Fairfax County,
 15 the Frederick-Winchester Sewage Authority, I
 16 believe is what it's called. And I also did a
 17 joint study that involved an element of waste
 18 water rates that was jointly paid for by Arlington
 19 and Fairfax County.
 20 Q Are the principles similar between water
 21 rates and waste water rates?
 22 A The principles are --

1 MR. THOMAS: If I could. I think that's
2 a matter that calls for some opinion testimony,
3 and he's not been offered as an expert at this
4 stage.

5 MR. RAPHAEL: I'm establishing --

6 THE COURT: I think his experience is
7 broad enough that he can answer that question.
8 Objection overruled.

9 THE WITNESS: The principles are
10 similar, yes.

11 BY MR. RAPHAEL:

12 Q Okay. And when was the work that you
13 did for Arlington County and Fairfax County?

14 A I don't remember the exact date. I
15 believe Fairfax County was -- might have been late
16 1970s, but I think it was the early 1980s. The
17 same with Arlington County.

18 Q All right. And for the Frederick
19 water --

20 A Frederick-Winchester --

21 Q Uh-huh. Waste water.

22 A -- was sometime later. Perhaps 1985.

1 Q All right. Have you published books or
2 journal articles on water or waste water
3 rate-making practices?

4 A Yes, I have.

5 Q And are these -- let's go, please, Ken,
6 to page 2 of the CV at Plaintiff's Exhibit 3.3.

7 Do you -- you have some listed here in
8 the third paragraph, correct? Some M1 -- or AWWA
9 manual listings?

10 A Yes. That lists a number of the
11 American Water Works Association manuals that I've
12 had involvement in.

13 Q All right. And then we're going to come
14 back to this.

15 Let's go please to page 3 of your CV.
16 On page 3 of your CV, you begin to list
17 publications and presentations.

18 Do you see this?

19 A I do.

20 Q And it goes on for the next page or so,
21 right?

22 A Several pages, yes.

1 Q Now, were any of these articles that you
2 prepared peer reviewed?

3 A Yes.

4 Q Which ones were peer reviewed?

5 A Generally anything that was associated
6 with the journals, the American Water Works
7 Association Journal, I believe the New England
8 Water Works Journal. And I would have to look
9 through all of them. I think there was one other
10 magazine where there may have been one that was
11 peer reviewed, too. I would have to look through
12 the whole list to give you that one.

13 Q Have numerous of your articles on water
14 rate making practices been peer reviewed?

15 A Yes.

16 Q Now, let's go back, please, to page 2 of
17 your CV. And let's look at that third paragraph
18 there. This indicates that you were the former
19 chairman and a member of the AWWA Rates and
20 Charges Committee.

21 Do you see that?

22 A I do.

1 Q Let's start with the AWWA. What is the
2 AWWA?

3 A The AWWA it's an acronym for the
4 American Water Works Association. It's an
5 association of water supply professionals that
6 involves water utilities, consultants, suppliers
7 that are involved in the water works industry.

8 It has, I'm not sure of the number of
9 members, Your Honor. I think there's over 10,000
10 at the annual convention. But it encompasses --
11 it's really North American when it says
12 "American." So Canada, Mexico and the United
13 States.

14 Though it's certainly recognized
15 internationally, the publications are purchased
16 and sought by international organizations. And
17 the conventions are quite well-attended by members
18 from all over the world. It's not just for North
19 America.

20 Q All right. And it also indicates you
21 were the former chairman of the Rates and Charges
22 Committee.

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1 Do you see that?
2 A Yes.
3 Q What is the Rates and Charges Committee
4 of the AWWA?
5 A The AWWA has a number of different
6 technical committees that are involved in
7 different elements of water works practice, if you
8 will.
9 One of them is the Rates and Charges
10 Committee that is responsible for developing
11 guidance, reviewing documents that are submitted
12 to the association, including papers and books.
13 Anything that has to do with water rates, fees,
14 charges are looked at and developed and reviewed
15 by that committee.
16 Q Okay. And then, on page 2 of your CV
17 here that we have displayed in Plaintiff's
18 Exhibit 3.3, you list some of the manuals that
19 have been published by the AWWA.
20 And for the record, we see the M1
21 manual, Principles of Water Rates, Fees and
22 Charges; the M4, Alternative Rates Manual; the

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1 M26, Water Rates and Related Charges; the M35, the
2 Revenue Requirements Manual; and the M54,
3 Developing Rates for Small Water Systems manual.
4 Can you describe briefly for the Court
5 what those manuals are and what they deal with.
6 A They were a series of manuals. They
7 started with the M1, which was just called "Water
8 Rates" initially when it was first published, that
9 had -- that dealt with the recommendations and
10 guidelines for the proper development of water
11 rates and charges. It expanded over the years to
12 include what's called alternative rates and
13 charges, M50 or -- or 34.
14 There was also a manual on different
15 related charges, hydrant charges, availability
16 fees, that type of thing. There was also M20 --
17 M35 on revenue requirements.
18 During my chairmanship, I had moved to
19 consolidate all of those. And while all four of
20 those are still publications and available through
21 the association, they're all really right now
22 incorporated within the M1 manual, which is a

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1 fairly thick and expensive document that
2 incorporates all of those.
3 And then we also decided that because it
4 was quite thick and expensive document to develop,
5 another manual, the M54 manual, for smaller
6 systems; smaller systems being 10,000 customers or
7 less, somewhere in that order. It wasn't quite as
8 comprehensive. It wasn't literally as weighty and
9 figuratively as well.
10 Q All right. And then you were the former
11 chairman of the Rates and Charges Committee. Are
12 you still on the AWWA Rates and Charges Committee?
13 A I am. I am the longest serving member
14 on that committee.
15 Q All right. What responsibilities did
16 you have as the chairman of the Rates and Charges
17 Committee with regard to writing the manuals?
18 A With regards to writing the manuals, it
19 was generally putting together the committees that
20 were doing it, coordinating it, deciding who would
21 be responsible for different sections or chapters,
22 who would be primary author, secondary authors,

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1 reviewers, that type of thing.
2 I was also involved in the editorial
3 committee as chairman of the -- of the whole
4 committee, when different manuals were -- came out
5 and published.
6 Q Did you actually contribute to the text
7 of the manuals?
8 A I contributed quite a bit to the text of
9 every one of those manuals.
10 Q All right. Now --
11 A Varying amounts to different ones. But
12 in some way to all of them.
13 Q You said that -- excuse me. You said
14 that the M1 manual incorporated some of the
15 earlier manuals that had been published, and it
16 was a pretty weighty document.
17 I have a copy of the M1 manual here in
18 my hand. And I wanted to show you some excerpts
19 which we've produced to the City more than 30 days
20 ago.
21 And directing your attention to -- let's
22 go to Plaintiff's Exhibit 107.3, Ken. Okay. So

1 this is the cover page of the M1 manual.
 2 And then, Ken, can you please go to page
 3 XVII.
 4 Is this the acknowledgment page from the
 5 M1 manual?
 6 A Yes, it is.
 7 Q Okay. And then you're listed here as
 8 the chairman of the rates and charges
 9 subcommittee; is that right?
 10 A That's correct.
 11 Q Okay. What does the asterisk represent
 12 next to your name?
 13 A The asterisk next to my name and a few
 14 others are members of the editorial committee for
 15 that manual.
 16 Q All right. Now, this manual was
 17 published in -- it's the fifth edition from the
 18 year 2000, right?
 19 A Correct.
 20 Q Okay. Is there a new manual that's in
 21 the works as well?
 22 A There's a new manual that's in the

1 works, yes.
 2 Q And are you working on that, too?
 3 A I am.
 4 Q Do you have any personal familiarity
 5 with how public and private water utilities use
 6 the AWWA manuals in determining what rates to
 7 charge for water service?
 8 A I do.
 9 Q And how are you deriving that
 10 experience?
 11 MR. THOMAS: I'm sorry.
 12 MR. RAPHAEL: How...
 13 MR. THOMAS: I'm sorry. My objection is
 14 I think he was asked whether he has personal
 15 experience with how it's used by other utilities.
 16 And I have a feeling we're going to get into some
 17 hearsay territory where he's going to testify
 18 about how he knows that other municipalities have
 19 used the guidance. And I don't think he's
 20 qualified as an expert at this point to do that.
 21 MR. RAPHAEL: Your Honor, I'm --
 22 THE COURT: I didn't understand the

1 question that way, frankly.
 2 Do you want to restate the question?
 3 MR. RAPHAEL: Yes, Your Honor.
 4 My question was: Do you have personal
 5 familiarity -- emphasis on "personal" --
 6 THE COURT: Right.
 7 MR. RAPHAEL: -- with how public and
 8 private and public water utilities use the AWWA
 9 manuals?
 10 THE COURT: And I assume that the answer
 11 to that is based upon his experience and being an
 12 adviser and consultant to these municipalities.
 13 MR. RAPHAEL: Precisely. Correct.
 14 THE COURT: Objection overruled.
 15 THE WITNESS: Yes, I do.
 16 BY MR. RAPHAEL:
 17 Q And how have you derived that
 18 experience?
 19
 20 A In working with the hundreds of
 21 utilities that I've worked with over the years.
 22 I've seen them with copies of it looking at it,

1 using it, asking me questions about it, making
 2 suggestions regarding it.
 3 Q Mr. Woodcock, you -- have you testified,
 4 also, before any state public utility commissions?
 5 In Virginia, we call it the State Corporation
 6 Commission.
 7 But I want to ask you broadly, have you
 8 testified before any state public utility
 9 commissions that regulate water utility rates?
 10 A I have.
 11 Q Which ones?
 12 A Maine, New Hampshire, Connecticut, Rhode
 13 Island, New York, Texas, province of Alberta. I'm
 14 not sure if there's something I skipped there.
 15 Q Okay. And what kind of expert testimony
 16 have you given in those proceedings?
 17 A It's generally been about -- in the
 18 public utility commissions, it's all been water
 19 rate related as to what proper charges would be,
 20 different elements of charges, consumption service
 21 charges, hydrant charges, revenue requirements,
 22 borrowing costs, debt costs, capital expense,

1 capital costs, that type of thing.
2 Q All right. And are you aware that, in
3 Virginia, the Virginia State Corporation
4 Commission does not regulate the rates charged by
5 municipal water utilities like Falls Church?

6 A I am aware of that, yes.

7 Q Do you have experience with the rate
8 commissions before whom you've testified with
9 regard to private utilities, investor-owned
10 utilities?

11 A Some of them, yes.

12 Q Okay. Some of the -- some of the PUCs,
13 the public utility commissions, right?

14 A I have worked for -- in cases involving
15 dockets before those commissions that involve
16 private as opposed to municipally owned utilities
17 or districts, yes.

18 Q All right. Do some of those -- and
19 Virginia doesn't regulate private -- or publicly
20 owned municipal utilities.

21 Do some of the commissions before whom
22 you've testified regulate publicly owned municipal

1 utilities that provide water service?

2 A I think you said Virginia doesn't
3 regulate privately owned or investor. I believe
4 they do.

5 Q I miss -- I'm sorry. I may have
6 misspoke. I'm trying to distinguish between the
7 fact that Virginia doesn't regulate municipal
8 water utilities.

9 My question is: Do some of the other
10 public service commissions in other states before
11 whom you've testified regulate municipal water
12 utilities?

13 A Yes. Many of those that I mentioned do.
14 There are very few states that do. A dozen maybe
15 that have some form of regulation with municipal
16 utilities. It's unusual. And there's maybe a
17 dozen out of the 50 that have some rate regulation
18 for municipal utilities.

19 Of the ones that I listed, I think all
20 but New York state regulate municipal --
21 Connecticut doesn't regulate them as to rates.
22 They do it as to reporting. And New York doesn't

1 as to rates.

2 Q All right. Have you also served as an
3 arbitrator with regard to water rate issues or
4 waste water rate issues involving in-town and
5 out-of-town customers?

6 A I have.

7 Q Can you describe that experience
8 briefly, please.

9 A There have been several occasions when I
10 was selected as an arbitrator. The two that are
11 coming to mind involved cases where there were two
12 communities who had a dispute as to how much was
13 being charged, whether it was appropriate or
14 proper amount, and I was selected as an arbiter.
15 One in Michigan and one in Arkansas.

16 Q All right. And you have not been
17 involved in rate-making proceedings before the
18 Virginia State Corporation Commission; is that
19 correct?

20 A That's correct.

21 Q All right. And approximately how many
22 times have you been found by a state public

1 utility commission to be qualified as an expert in
2 utility rate making or cost of service analysis?

3 A I'm going to say 50. It may be 40.
4 More likely 60.

5 Q Okay. 40 to 60 times?

6 A 40 to 60. Yes.

7 Q All right. And have you ever failed --

8 A It may be more than that. I don't think
9 it's less than 40, though.

10 Q Have you ever failed to qualify as an
11 expert in any water rate proceeding before any
12 state public utility commission?

13 A I have not.

14 Q And am I correct you've been doing this
15 since 1976?

16 A I have been working as a consultant
17 since 1974. The first year and a half, I was
18 doing engineering design of water and sewer
19 systems. Since January of 1976, I have been doing
20 exclusively water, sewer rates, storm water rates,
21 and management and finance issues.

22 Q All right. And is the term "enterprise

1 fund" something that is used in connection with
2 describing municipal utilities?

3 A Yes, it is.

4 Q And what is an enterprise fund?

5 A An enterprise fund is a fund that's
6 generally set up by a municipal government to --
7 to segregate the accounting, if you will, of
8 expenses and revenue.

9 The intent, I think, is really to
10 provide some degree of transparency to the public
11 to show exactly what the cost of running the
12 utility is, or the enterprise that's been set up.
13 What the -- all of the costs are and how it's
14 funded and paid for.

15 Q All right. Does your training and
16 experience enable you to analyze a public
17 utility's records to determine the bases on which
18 it transfers funds from an enterprise fund to a
19 general fund?

20 A Yes.

21 Q Have you had an occasion to do that here
22 with regard to the City of Falls Church?

1 A I have.

2 Q Does your training and experience enable
3 you to testify about what is generally accepted
4 practice in the United States with regard to
5 municipal and private rate making?

6 A Yes, it does.

7 Q And are those generally accepted
8 rate-making practices described in the AWWA
9 manuals that you have contributed to?

10 A They are.

11 Q And I think you indicated you have
12 evaluated the rate-making practices of the City of
13 Falls Church. What materials did you consider for
14 that?

15 A I looked at quite a bit of information.

16 But in terms of looking at the issue
17 that you just asked about, it was primarily the
18 comprehensive annual financial reports, or CAFRs,
19 as they're called often, for a number of years
20 from the City of Falls Church. So it was
21 primarily those financial statements.

22 In addition, I have looked at a number

1 of exhibits that have come out of the depositions
2 in this case, including staff reports, memorandum,
3 E-mails, compendiums of information, bond
4 documents, reports.

5 Q All right. And did you prepare a
6 detailed report on your analysis in this case?

7 A I did.

8 Q Is that Plaintiff's Exhibit 3?
9 Ken, can you bring that up.

10 A Yes, it is.

11 MR. RAPHAEL: Your Honor, that's
12 Plaintiff's Exhibit 3.

13 BY MR. RAPHAEL:

14 Q Did you perform a full-blown cost of
15 service study for the Falls Church system?

16 A I did not perform a full-blown cost of
17 service study for Falls Church.

18 Q And why not?

19 A One wasn't needed for the purpose of
20 what it was that I was asked to look at in this
21 case.

22 Q And what was that?

1 A It was basically to look at -- what I
2 was asked to do is basically to look at whether
3 Falls Church had transferred money from its water
4 utility enterprise fund to the general fund of the
5 City of Falls Church. When that had been done,
6 how much that had been done, what was involved in
7 those expenses, the magnitude of those expenses,
8 and provide an opinion as to whether that was
9 proper or not.

10 Q All right. And does your training and
11 experience enable you to provide testimony to this
12 Court to help it understand the financial aspects
13 of how the City of Falls Church has operated its
14 water system in the past and how it's operating it
15 now?

16 A Yes, sir, I believe it does.

17 MR. RAPHAEL: Your Honor, I would offer
18 Mr. Woodcock as an expert in the following areas:
19 The financial aspects of how the City has operated
20 its water system in the past and how it is
21 operating it now, and generally accepted water
22 utility rate-making practices in the United

1 States.
 2 THE COURT: Do you wish to voir dire?
 3 MR. THOMAS: Very briefly, please.
 4 THE COURT: You may.
 5 VOIR DIRE EXAMINATION
 6 BY MR. THOMAS:
 7 Q Good afternoon, Mr. Woodcock.
 8 A Good afternoon, Mr. Thomas.
 9 Q How are you?
 10 A I am excellent. Thank you.
 11 Q Thanks. Mr. Woodcock, I think you
 12 indicated to Mr. Raphael that you have never
 13 qualified as an expert on utility-related matters
 14 before the Virginia State Corporation Commission,
 15 right?
 16 A That's correct.
 17 Q All right. And you've never qualified
 18 as an expert on utility-related matters in a
 19 Virginia court, correct?
 20 A Correct.
 21 Q All right. And you've not conducted a
 22 rate study in this case, right?

1 A I have not conducted a full-blown cost
 2 of service study in this case.
 3 Q Okay. And you, in your experience, have
 4 never surveyed the practices of Virginia
 5 municipalities with respect to transfers from
 6 utility funds to general funds, right?
 7 A Prior to or -- I'm not sure in what time
 8 period you're asking that, Mr. Thomas.
 9 Q In your experience, doing what you do,
 10 you've never conducted any such survey of Virginia
 11 municipalities that operate utilities, right?
 12 A Prior to this case, I have not.
 13 Within this case, I have looked at and
 14 seen information regarding that.
 15 Q Okay. And in preparing your report and
 16 doing the work that you did in this case, you
 17 looked at the City of Falls Church's CAFRs,
 18 correct?
 19 A Correct.
 20 Q You didn't look at the CAFRs of any
 21 other city in Virginia, correct?
 22 A I have quickly looked over several that

1 were defendant exhibits. I've looked over those
 2 CAFRs.
 3 Q That wasn't my question.
 4 A I'm sorry. I misunderstood.
 5 Q My question was with respect to your --
 6 preparation of your report in this case.
 7 A Preparation of my report, I had not.
 8 Correct.
 9 Q Okay.
 10 MR. THOMAS: Your Honor, in addition to
 11 the objections that we raised through our motion
 12 to strike and motion in limine with respect to
 13 Mr. Woodcock, I would object to his being offered
 14 as an expert in the two categories identified by
 15 Mr. Raphael. And would add to that, to those
 16 objections raised in the motion in limine the fact
 17 that he has not qualified as an expert previously
 18 in Virginia and has not looked at any other
 19 municipalities operating utilities in Virginia and
 20 arriving at the conclusions in this case.
 21 THE COURT: But he's not being offered
 22 as to any other Virginia municipalities, only as

1 to Falls Church and only as to other jurisdictions
 2 throughout the United States.
 3 MR. THOMAS: I understand. But he has
 4 been asked to give an opinion about the practices
 5 of a Virginia utility and whether they are
 6 consistent with generally accepted principles and
 7 has not looked at any other Virginia municipal
 8 utility.
 9 THE COURT: But I think that's a fertile
 10 area for cross-examination.
 11 MR. THOMAS: That's fine.
 12 THE COURT: All right. Mr. Woodcock,
 13 Mr. Christopher Woodcock will be accepted by the
 14 Court as an expert witness with regard to -- what
 15 is the overall category? Generally accepted
 16 practices for utility rate making?
 17 MR. RAPHAEL: Yes, Your Honor. The two
 18 identified were generally accepted water utility
 19 rate-making practices in the United States. And
 20 the other was the financial aspects of how the
 21 City has operated its water system in the past and
 22 how it is operating it now.

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1 THE COURT: All right. So he will
 2 observe, from his experience, other municipalities
 3 in the United States and in so -- and how they do
 4 it and what is -- well, he'll offer that
 5 testimony.
 6 With regard to Falls Church, he's not
 7 offering an opinion as to the correctness or
 8 incorrectness but simply describing what he
 9 discovered from his analysis, correct?
 10 MR. RAPHAEL: I'm not sure I followed
 11 your question entirely, Your Honor.
 12 THE COURT: I think you probably do.
 13 MR. RAPHAEL: He is going -- I mean, he
 14 will be -- he will be testifying that what Falls
 15 Church is doing is not consistent with generally
 16 accepted rate-making practices. That's towards
 17 the end.
 18 THE COURT: Well, but as Mr. Thomas
 19 points out, in the Commonwealth of Virginia, he's
 20 not in a position to say that with regard to other
 21 jurisdictions. I suspect that he will say that.
 22 But those are other jurisdictions.

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1 I'm happy to admit him as an expert with
 2 those -- within those parameters.
 3 MR. RAPHAEL: Thank you, Your Honor.
 4 DIRECT EXAMINATION (Continued)
 5 BY MR. RAPHAEL:
 6 Q Now, Mr. Woodcock, I believe you said
 7 that some of the key documents you relied on were
 8 the City's CAFRs, the consolidated annual
 9 financial reports, correct?
 10 A Correct.
 11 Q And does the City maintain the funds of
 12 the water system in what it describes as an
 13 enterprise fund?
 14 A It does.
 15 Q Do the CAFRs report the financial
 16 condition of the water system?
 17 A Yes, they do.
 18 Q Can we bring up Plaintiff's Exhibit 77,
 19 please. This is in evidence, Your Honor. This is
 20 the 2006 CAFR.
 21 Do you recognize Plaintiff's Exhibit 77
 22 as the 2006 -- the CAFR for fiscal year 2006 for

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1 the City of Falls Church?
 2 A Yes, the cover of it, at least.
 3 Q Yes. And let's go to page 46 of 119,
 4 Mr. Sapp. All right.
 5 This is Exhibit 9 from the 2006 CAFR,
 6 correct?
 7 A That's correct.
 8 Q Right. And I want to ask you about some
 9 of the expenses.
 10 You derive data from these various CAFRs
 11 for purposes of doing your summaries of how the
 12 Falls Church system is operated, correct?
 13 A That's correct.
 14 Q Ken, will you bring up the top part of
 15 that exhibit, please.
 16 Okay. And there's a reference here for
 17 operating revenues, charges for service,
 18 \$18.1 million.
 19 Do you see that?
 20 A I do.
 21 Q What's reflected in the charges for
 22 service category?

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1 A It's the revenues from -- on the
 2 18 million for the water utility, the revenues
 3 that are derived from what I believe are called
 4 customer charges. They're minimum or service
 5 charges. Metered revenues for metered sales of
 6 water. And the wholesale charges from the City of
 7 Falls Church.
 8 Q The -- now, just --
 9 MR. RAPHAEL: Your Honor, just to
 10 clarify the record, there are times when I'm going
 11 to be asking Mr. Sapp to go to a particular page
 12 of the exhibit. It may be different from the
 13 actual page number on the exhibit. And I'll try
 14 to make that clear when that happens.
 15 For example, in this instance, the page
 16 of the CAFR, I believe, is page 43, even though it
 17 was page 46 of the exhibit. If that's --
 18 THE COURT: All right.
 19 MR. RAPHAEL: -- if that makes sense.
 20 THE COURT: That's fine.
 21 BY MR. RAPHAEL:
 22 Q And now let's go to the next entry on

1 this Exhibit 9, page 43 of the CAFR.
 2 Do you see the entry for administration,
 3 almost \$5.4 million?
 4 A I do.
 5 Q What does the administration category
 6 reflect for the water system for the City of Falls
 7 Church?
 8 A It reflects the administrative expenses
 9 for the water division which includes the costs of
 10 customer service I believe is how it's
 11 categorized, as well as administrative costs from
 12 the environmental services department. I may have
 13 that name wrong.
 14 So the overall administration of the
 15 water utility. As well as a number of indirect
 16 expenses that are charged by the City of Falls
 17 Church general fund to the water utility
 18 enterprise fund.
 19 Q For example, is a portion of the time
 20 of, say -- the City attorney who is with us today,
 21 is a portion of his time allocated to the water
 22 system in the administration category?

1 A Yes, it is.
 2 Q And is that true for the other executive
 3 officers for the City of Falls Church?
 4 A I'm not sure about every executive
 5 officer. But a number of them. Finance in
 6 particular is included in there, administration
 7 personnel, that type of thing.
 8 Q Does it include all of the direct and
 9 indirect costs for operating the water system?
 10 A Yes.
 11 Q Okay. Now --
 12 A Indirect and direct administrative
 13 costs.
 14 Q That's correct.
 15 A Yes.
 16 Q All of the costs of managing the water
 17 system, are those included in that?
 18 A Well, I -- yes.
 19 Q Okay. Now, there is also -- Ken, can we
 20 scroll down a little bit. Under nonoperating
 21 revenues, please. All right.
 22 Do you see the entry for availability

1 fees? In this year, it was \$815,870.
 2 A I do.
 3 Q What's -- can you describe for the Court
 4 what an availability fee is.
 5 A Availability fees are charges that are
 6 assessed by water or sewer utilities or other
 7 entities within the City. They can be for
 8 schools, parks, for roads.
 9 In this case, these are fees that are
 10 assessed to new connections to the water system to
 11 pay for the -- the cost or the value of providing
 12 service to those new connections.
 13 You might want to look at it as just
 14 sort of a buy-in charge to a new connection in
 15 order to pay what the costs are of providing
 16 capacity or available capacity in the water
 17 system.
 18 Q Okay. Now, in this particular exhibit,
 19 for the CAFR for 2006, the availability fees are
 20 listed under the nonoperating revenues category.
 21 Do you see that?
 22 A Correct.

1 Q Now, was that true in earlier years?
 2 A Some of the earlier years, they were
 3 combined in the operating revenues, I believe.
 4 I'm not sure exactly what year it switched. But
 5 in the very -- earlier years in this, they were
 6 combined in their operating revenues.
 7 Q And for purposes of your analysis, did
 8 you treat the availability fees as part of the
 9 operating revenues or not?
 10 A In terms of purposes of the listing of
 11 operating revenues that I had in my exhibits, it
 12 was not a part of that.
 13 Q Okay. The next entry here is for
 14 investment earnings. And for the CAFR for 2006
 15 shows the investment earnings at \$429,000.
 16 Do you see that?
 17 A I do.
 18 Q And what are the investment earnings for
 19 the water system?
 20 A Those are generally the interest
 21 earnings on funds that are held within the
 22 enterprise funds, the interest or dividends that

1 are earned on the cash or investments that the --
2 held by the enterprise or for the enterprise by
3 the City of Falls Church.

4 Q Okay. Can we scroll down, please, to
5 the bottom part. There we go.

6 Now, under transfers to the general
7 fund, there's an entry here for payment in lieu of
8 taxes, \$110,000.

9 Do you see that?

10 A Yes, sir.

11 Q What is a payment in lieu of taxes?

12 A It's an expense that's sometimes charged
13 by a municipal government to enterprises within
14 that government to reflect the amount of taxes,
15 property taxes that would have been paid if this
16 were a separate privately owned entity.

17 In other words, if this was the Falls
18 Church Water Company, not a department of the
19 City, but the Falls Church Water Company, they
20 would be paying property taxes to the City of
21 Falls Church.

22 And the payment in lieu of taxes is a

1 number that's intended to represent an amount that
2 would be what would be paid if it were a private
3 entity, or a taxable entity is probably more
4 precise.

5 Q Okay. And then the -- we're looking --
6 the highlighted number here reflects the figure
7 for the water system. The one to the right of it
8 is for the sewer system, right?

9 A Correct. Yeah, the 40,000 there is the
10 payment in lieu of taxes for the sewer. I think
11 that's the number at the top of that column.

12 Q Yes, sir.

13 A Sewer enterprise.

14 Q Okay. And the next entry is for the
15 return on equity. And for the fiscal year 2006,
16 it was \$4.6 million, correct?

17 A Correct.

18 Q There was no return on equity for the
19 sewer system?

20 A That's correct.

21 Q Did you encounter any fiscal year in
22 which the City had taken a return on equity for

1 its -- for operating its sewer system?

2 A No. I looked back at the CAFRs for
3 the -- for a number of years, and I don't recall
4 there being one single entry for a return on
5 equity or what's now called management fee going
6 to the sewer enterprise. It only shows up for the
7 water enterprise.

8 Q Okay. I want to talk about the types of
9 transfers from the water fund to the general fund.
10 And I think there are three of them.

11 Let's start, first, with the payment for
12 direct and indirect costs. You identified that as
13 administration charges, right?

14 A It's part of that 5 million of
15 administrative charges we were looking at earlier,
16 yes, sir.

17 Q Okay. And a second transfer is the
18 PILOT, the payment in lieu of taxes; is that
19 right?

20 A Yes, sir. The 110,000 that's on the
21 screen there now.

22 Q Okay. The last, the third category is

1 for the return on equity, right?

2 A Correct.

3 Q Has the City since fiscal year '07
4 called that a management fee?

5 A Since fiscal year '07, it's been termed
6 a management fee, yes, sir.

7 Q All right. Let's go back then to the
8 first category of transfer, the administrative
9 charges.

10 Have you been involved in utility rate
11 cases where the amount of the administrative
12 charge was questioned as being too high?

13 A Yes, I have. Quite a few. And more
14 recently than in the past.

15 Q All right. And why is it a concern to
16 rate makers like yourself or to the public utility
17 commissions before whom you've testified as to why
18 an administration charge would be too high?

19 MR. THOMAS: Judge, if I could. I don't
20 think there's any issue -- objection. I don't
21 think this is relevant. I don't think there's
22 been any issue made in this case about whether the

1 City's administrative costs are too high or too
 2 low. And so I don't think this is relevant to the
 3 question for the Court.
 4 MR. RAPHAEL: Your Honor, the testimony
 5 will be and his report was that administrative
 6 charges are at the high end. But even though
 7 they're at the high end, we're going to give the
 8 City the benefit of the doubt and not criticize
 9 them for being at the high end.
 10 But I think it's relevant to show that
 11 they are at the high end because that's another
 12 buffer where there is a transfer from the water
 13 fund to the general fund.
 14 THE COURT: Okay. I thought that the
 15 administrative -- the administration costs or
 16 amounts shown in that column from prior
 17 representations included the transfer of funds
 18 into it. Is that not correct?
 19 MR. RAPHAEL: No, that's -- it's not
 20 correct. That's separate. That 5.3 million that
 21 you see here on the CAFR for 2006 is the
 22 administrative charge. That's separate from the

1 management fee.
 2 The return on equity -- Ken, if you'd
 3 scroll down to the bottom of that -- is right
 4 there. See, that's --
 5 THE COURT: That's the management fee.
 6 MR. RAPHAEL: That's -- well, no. No,
 7 the return -- well, yes. I'm sorry.
 8 The return on equity is what the City
 9 now calls the management fee.
 10 THE COURT: Right. I got it.
 11 MR. RAPHAEL: But it doesn't cover
 12 administration. It doesn't have any management in
 13 it. That was Mr. Tuohy's testimony.
 14 THE COURT: So I was incorrect on that.
 15 So the administrative -- administration expenses
 16 having nothing to do with the transfer of funds
 17 from receipts for the sale of water to the general
 18 fund. Why would it be relevant?
 19 MR. RAPHAEL: Because it is one area
 20 where a City can put hidden profit. And the
 21 City's administrative charges here are at the high
 22 end. But we're going to say, you know, even

1 though they're at the high end, we're going to
 2 give them the benefit of the doubt on that. I
 3 think --
 4 THE COURT: So why hear any testimony
 5 about it?
 6 MR. RAPHAEL: Because --
 7 THE COURT: That's your objection?
 8 MR. THOMAS: That's my objection.
 9 MR. RAPHAEL: Well, as long as the facts
 10 that I just reflected are not disputed, I think
 11 that that's appropriate.
 12 THE COURT: I don't think they are.
 13 MR. THOMAS: Well, the CAFRs say what
 14 they say.
 15 THE COURT: Right.
 16 MR. RAPHAEL: What they don't say, Your
 17 Honor, is that the administrative charges that are
 18 imposed by the City, that are taken by the City,
 19 are at the high end as utilities go.
 20 THE COURT: But you-all aren't
 21 complaining about it, right?
 22 MR. RAPHAEL: That's true.

1 THE COURT: Objection sustained.
 2 BY MR. RAPHAEL:
 3 Q Now, with regard to the PILOT,
 4 Mr. Woodcock, you -- are you aware that the PILOT
 5 is authorized by the city charter?
 6 A I am.
 7 Q All right. And is the PILOT, payment in
 8 lieu of taxes, taken by other public municipal
 9 utilities with which you're familiar?
 10 A It is in some cases. In this case, the
 11 PILOT authorized by the charter is -- I'm going to
 12 have the wording incorrect. But it's something to
 13 the effect of the amount of taxes that would be
 14 paid if this were a private utility. The charter
 15 says something to that effect.
 16 Q Yes. Were you able to determine how the
 17 City computed the PILOT?
 18 A I was not.
 19 Q All right. And are you expressing any
 20 opinion in this case about whether the PILOT is
 21 too high?
 22 A I didn't express an opinion in my report

1 that the PILOT seemed high. But in the scheme of
2 what we're looking at, it was not an issue that we
3 were raising.

4 Q All right. Now, let's then focus on the
5 third category of transfer from the water fund,
6 the general fund, the return on equity, or the
7 management fee.

8 I have a quick -- let's go....

9 MR. RAPHAEL: I'm going to be bringing
10 up Plaintiff's Exhibit 82. It's the CAFR for
11 2001.

12 THE COURT: What was the number of the
13 exhibit we were just looking at? Is that 8?

14 MR. RAPHAEL: It was Plaintiff's
15 Exhibit 75.

16 THE COURT: 75. I'm sorry.

17 MR. RAPHAEL: Yes.

18 THE COURT: Thank you.

19 MR. RAPHAEL: I'm sorry.

20 MR. THOMAS: I think it was 77.

21 MR. RAPHAEL: Okay. 77. That's right.

22 THE COURT: 75?

1 of the return on equity?

2 A I was struck by the language, "excess
3 operating funds." That seemed to be somewhat
4 severe.

5 Q All right. What do you mean by that?

6 MR. THOMAS: Judge, if I could. And it
7 may be that the Court will grant me a running
8 objection on this.

9 These are CAFRs that relate to a period
10 of time before the current rates of the City were
11 in place. I don't believe, as I mentioned before,
12 that any kind of pattern and practice evidence, if
13 you will, is relevant to this case. And so I
14 would object to --

15 THE COURT: All right. Well, we'll let
16 that be a standing objection --

17 MR. THOMAS: Thank you.

18 THE COURT: -- as to all inquiries along
19 this line.

20 It's 1 o'clock now. Shall we take a
21 break?

22 MR. RAPHAEL: Sure.

1 MR. RAPHAEL: 77. It was --

2 THE COURT: 77. Thank you.

3 MR. RAPHAEL: It was the...

4 THE COURT: And what year was that CAFR
5 for, 77?

6 MR. RAPHAEL: The one you were seeing
7 was for 2006.

8 THE COURT: Thank you.

9 MR. RAPHAEL: All right. Ken, let's go
10 to the next page.

11 Okay. Show the callout, please.

12 BY MR. RAPHAEL:

13 Q This is the CAFR for 2001, Plaintiff's
14 Exhibit 82, which is in evidence.

15 Do the CAFRs contain notes that describe
16 the return on equity transfer to the general fund?

17 A Yes, they do.

18 Q And this is the CAFR for 2001. Is this
19 the note that describes that transfer?

20 A Yes, it is.

21 Q And did you find anything significant
22 about the way that the CAFR described the transfer

1 THE COURT: Is that okay?

2 MR. RAPHAEL: That's fine. Thank you.

3 THE COURT: Okay. We'll take our
4 luncheon recess until 2 o'clock.

5 (Whereupon, at 1:00 p.m., the hearing
6 was recessed, to be reconvened at 2:00 p.m. this
7 same day.)

1 AFTERNOON SESSION (2:10 p.m.)
 2 THE COURT: All right. Mr. Woodcock,
 3 you may resume the stand, sir. You are still
 4 under oath.
 5 THE WITNESS: Yes, sir, Your Honor.
 6 THE COURT: All right. Mr. Raphael.
 7 MR. RAPHAEL: Thank you, Your Honor.
 8 THE COURT: Yes, sir.
 9 Whereupon,
 10 CHRISTOPHER P.N. WOODCOCK
 11 was called as a witness, and, having previously
 12 been duly sworn, was examined and testified
 13 further as follows:
 14 DIRECT EXAMINATION (Continued)
 15 BY MR. RAPHAEL:
 16 Q We broke for lunch and we were looking
 17 at the time at Plaintiff's Exhibit 82, which is
 18 the 2001 CAFR. And here is the callout for
 19 page 36 for the CAFR and the note on the return on
 20 equity transfer, right. That's where we -- we
 21 left off there.
 22 A Yes, sir.

1 Q And you were describing the phrase
 2 "excess operating funds" which we see here on the
 3 slide.
 4 What were -- how were those excess
 5 operating funds -- what happened to those excess
 6 operating funds?
 7 A Those, in this year 2001, they were
 8 transferred from the water enterprise fund to the
 9 general fund.
 10 Q Is this same note repeated in subsequent
 11 CAFRs for the City of Falls Church?
 12 A It's repeated almost identically. In
 13 2007, the calculation of it from 6 percent of the
 14 total fund equity was changed to the new formula
 15 of all of the investment income, 10 percent of the
 16 operating income. And it's referred to as the
 17 management fee in lieu of...
 18 Q The return --
 19 A Transfer -- return on equity, yes.
 20 Q All right. And let's -- just for the
 21 record, let's click through this repetitive note.
 22 Let's go to the CAFR for 2002. This is

1 Plaintiff's Exhibit 81 at page 35.
 2 Is that the note?
 3 A That's the note, yes, sir.
 4 Q All right. And the CAFR for 2003, this
 5 is Plaintiff's Exhibit 80 at page 69.
 6 Is that the note?
 7 A That's the note, yes.
 8 Q And each time it uses the phrase "excess
 9 operating funds"?
 10 A Each year, it uses the phrase -- I'm
 11 trying to remember if 2007 and '08, there was a
 12 slight change in that. But essentially the same
 13 words, "excess operating funds."
 14 Q All right. Here's the CAFR for fiscal
 15 year 2004. It's Plaintiff's Exhibit 79 at
 16 page 69.
 17 The same note and the same reference to
 18 the excess operating funds, correct?
 19 A To the excess operating funds, yes.
 20 Q And here's the CAFR for fiscal year
 21 2005. It's Plaintiff's Exhibit 78 at page 69.
 22 A Yes. And, again, "excess operating

1 funds."
 2 Q All right. And here's the CAFR for
 3 fiscal year 2006, Plaintiff's Exhibit 77 at
 4 page 70.
 5 Is that the same note?
 6 A Yes, it is.
 7 Q And the same reference to excess
 8 operating funds?
 9 A Same reference to excess operating
 10 funds.
 11 Q And then here you mention the CAFR for
 12 2007, there was a change. Here's the CAFR for
 13 2007. It's Plaintiff's Exhibit 76 at page 72.
 14 And how is the note changed in fiscal
 15 year 2007?
 16 A It does still say "excess operating
 17 funds." The calculation of it changed from
 18 6 percent, 7-1/2 percent in the earlier ones we
 19 just looked at to 10 percent of the operating
 20 income plus 100 percent of the investment earnings
 21 are what make up this new management fee.
 22 Q Okay. Does it retain the excess

1 operating funds language?

2 A It retains the excess operating funds
3 language, yes, it does.

4 Q All right. And then the amount of the
5 transfer for fiscal year 2007 has gone down to
6 \$2.9 million; is that right?

7 A It went down from 4 million, 4.2 million
8 roughly as the year before, as I recall, down to
9 2.9 million, yes, sir.

10 Q And the CAFR for 2008 is Plaintiff's
11 Exhibit 75 at page 66.

12 Is that the same note formula that's
13 used in the CAFR for 2007?

14 A Same formula. Same wording, "excess
15 operating funds." The dollar amount is slightly
16 different.

17 Q Okay. The dollar amount for this fiscal
18 year was \$2.93 million.

19 A Correct.

20 Q Okay. Thank you.

21 Now, you mentioned some financial
22 summaries that you had worked on in connection

1 with your engagement in this case, right?

2 A Yes.

3 Q Ken, could you please bring up
4 Plaintiff's Exhibit 3.1.

5 Mr. Woodcock, did you compile this
6 chart?

7 A I did, yes, sir.

8 Q What does it show?

9 A What this shows is --

10 MR. THOMAS: Judge, if I could just to
11 renew the objection that this shows historic data
12 going back over time, well beyond the rates that
13 were set in 2005.

14 THE COURT: Yes, sir. That objection is
15 preserved.

16 THE WITNESS: What this shows is really
17 a summary of information developed -- that was
18 developed primarily from the CAFRs of the City of
19 Falls Church for each fiscal year: What the
20 operating revenues were that we talked about
21 earlier this morning, the amount of the return on
22 investor management fee each year.

1 The next column is a number that I
2 actually calculated. It wasn't in the CAFRs. But
3 what it shows is the percentage that the return on
4 investment was of total operating revenues.

5 The next column, interest income, was
6 from the financial reports. The next number --
7 because generally in the financial reports, it's a
8 number I actually calculated independently from
9 information in the financial reports and generally
10 matches those, and then the water --

11 BY MR. RAPHAEL:

12 Q Hang on for a second. Before you get on
13 to the next column, for the record, the column
14 you're referring to is the end-of-year cash plus
15 investment column?

16 A Yes.

17 Q All right. And the last column?

18 A The last column is what the water rates
19 in Falls Church were. Those didn't come from the
20 CAFRs. Those came from various documents that I
21 had seen, City Council minutes or reports from
22 staff or outside entities.

1 Q Okay. And you weren't here when this
2 happened, but the rate schedules for the City are
3 in evidence at this point.

4 A Okay.

5 Q Now, with regard to the fiscal year for
6 the City of Falls Church, does that run from
7 July 1 of one year to June 30th of the next?

8 A Yes. So, for example, the first year
9 there, fiscal year 1995, would encompass July 1,
10 1994, to June 30th, 1995.

11 So the fiscal year is sort of the ending
12 of that July-to-June period.

13 Q Yes, sir. So if we say fiscal year
14 2008, for example, that's June -- July 1 of 2007
15 through June 30th of 2008.

16 A That's correct.

17 Q All right. And you mentioned this
18 middle column here that you calculated transfers
19 as a percentage of operating revenues.

20 A Yes.

21 Q Is that a percentage comparison of the
22 return on equity or management fee amount divided

1 by the operating revenues for the water system for
2 the year?

3 A Yes, it is.

4 Q All right. Now, with regard to the
5 column for the end-of-year cash plus investment,
6 did you need to make any adjusting entries for the
7 years 2002 and 2003 when you did your analysis?

8 A Yes, I did. As I said, I -- these
9 numbers essentially show up in the Consolidated
10 Annual Financial Reports. I had actually gone
11 through and calculated each one of these numbers.
12 I'm not sure why I needed to verify what was in
13 there, but as to how they would determine those.

14 I went through and calculated these
15 numbers. And for -- the right year -- 2002 and
16 2003, those numbers are not the numbers that show
17 up in the CAFRs.

18 Q Why is that?

19 A In 2002, there was a loan from the water
20 enterprise fund. The water utility loaned some
21 8.8 million. I don't have the exact number. I
22 can find it for you.

1 But some 8.8 million was loaned from the
2 water utility enterprise fund to the City of Falls
3 Church general fund. And the ending cash balance
4 was actually 8.8 million less than the
5 40.2 million that I've shown here. The CAFR
6 showed 8.8 million less.

7 For purposes of what I showed here, I
8 was looking at it as -- you know, it was a loan
9 investment. And I included it in there.

10 Q Is that because it was money of the
11 water system?

12 A I assumed that it was, yes.

13 Q All right. Now, when you were reviewing
14 this exhibit in preparing to testify today, did
15 you discover a small error?

16 A I did. For -- let's see, 1999, the
17 37,905 number was off by \$3,000, I believe.

18 Q Is it the year 2000 or 1999?

19 A The year 2000, I'm sorry, yes.

20 Q And what was the error?

21 A There was -- when I was putting the
22 numbers together that I used to derive each one of

1 these, I had put in a number, an 8 instead of a 5
2 in the thousands column. And I had overstated it
3 by 3,000.

4 Q Okay. So instead of \$41,977,285 for the
5 end-of-year cash plus investment, it should have
6 been \$41,980,285?

7 A Yes.

8 Q All right.

9 A I understated it. I'm sorry, I
10 understated it by 3,000.

11 Q All right. Did that, correcting for
12 that error have any impact on your analysis in the
13 case?

14 A It was \$3,000 difference out of
15 42 million roughly. It's fairly negligible.

16 Q Yes.

17 MR. RAPHAEL: Your Honor, I have a
18 substitute exhibit that makes that correction
19 which I've he marked as Plaintiff's Exhibit 3.1-A,
20 and I would like to substitute the exhibit --

21 THE COURT: Absent the objection. I
22 mean, other than the standing objection.

1 MR. THOMAS: Right. Other than the
2 standing objection.

3 THE COURT: Yes, sir. It will be
4 received.

5 (Plaintiff's Exhibit 3.1-A was received
6 into evidence.)

7 MR. RAPHAEL: Thank you. May I approach
8 the witness, Your Honor?

9 THE COURT: Yes, sir.

10 BY MR. RAPHAEL:

11 Q And here we're showing Exhibit 3.1-A on
12 the screen. Now, do rate-making professionals in
13 your line of work compile data summaries like this
14 when analyzing the financial aspects of the
15 utilities water system?

16 A Yes, they do.

17 Q And with the correction that we just
18 went over, are the entries in this exhibit
19 accurate?

20 A Yes, they are.

21 MR. RAPHAEL: Your Honor, I move the
22 admission of Exhibit 3.1-A.

1 THE COURT: It will be received, subject
2 to the City's objection.

3 MR. RAPHAEL: Thank you.

4 BY MR. RAPHAEL:

5 Q Can we go, please, to Plaintiff's
6 Exhibit 3.6.

7 Did you prepare this document,
8 Mr. Woodcock?

9 A Yes, I did.

10 Q What does this chart show?

11 A It's graphically showing that transfers
12 as a percent of operating revenues from
13 Plaintiff's Exhibit 3.1. It was actually from
14 3.1. It doesn't have the corrected number 3.1-A,
15 that \$3,000.

16 But it shows the percentage of revenues
17 as from the return on investment as compared to
18 the total operating revenues for the Falls Church
19 water enterprise.

20 Q Okay. Well, 3.1-A didn't make any
21 changes to the operating revenues for --

22 A I'm sorry. You're right. It did not

1 make any -- yes. So it's the same numbers that
2 are in 3.1 and 3.1-A for those.

3 Q Okay. And can you tell me why you put
4 this exhibit together.

5 A I put it together after I had put
6 together the comparison in Exhibit 3.1. I think
7 it sometimes helps to graphically see what these
8 numbers look like and mean.

9 And as I was putting together the table
10 in 3.1, the -- those numbers, the transfers as a
11 percentage of operating revenues sort of jumped
12 out at me as being rather large in comparison to
13 anything I've ever seen before.

14 And I --

15 MR. THOMAS: Objection, Your Honor. I
16 think what the Court ruled earlier was that
17 Mr. Woodcock is not going to opine on the
18 correctness or the incorrectness of what the City
19 of Falls Church has done. Moreover, the
20 plaintiff's own theory is that it doesn't matter
21 whether it's a dollar or \$5 million of transfer
22 from water fund to general fund.

1 So this time I think is objectionable.

2 MR. RAPHAEL: I don't agree with the
3 characterization. I think he's explaining why he
4 put this together. And he shows showing -- I
5 mean, he's explaining that, the answer to that.
6 These are very large transfers that he's never
7 seen before in his 36 years of experience. That's
8 significant. It goes right to the heart of the
9 case.

10 THE COURT: Why does it? If it's only
11 \$1.

12 MR. RAPHAEL: Well, that's my point,
13 Your Honor. That's not -- we take issue with the
14 characterization. We think it is -- we wouldn't
15 be here if it were just \$1. It's not just \$1.
16 It's millions of dollars every year.

17 THE COURT: But you're not seeking the
18 recovery of any of those funds. You're here for a
19 far different reason.

20 MR. RAPHAEL: True.

21 THE COURT: That's why you don't care
22 about getting any of those funds.

1 MR. RAPHAEL: We're here to stop the
2 practice of making huge transfers from the water
3 fund to the general fund. And this is the
4 pattern.

5 THE COURT: You're here to stop any
6 transfer.

7 MR. RAPHAEL: Any transfer of a return
8 on equity or a profit. That's correct.

9 THE COURT: Right.

10 MR. RAPHAEL: But the evidence of the
11 pattern and practice is directly relevant to that.

12 Moreover, if I can just briefly address
13 this point, Your Honor.

14 THE COURT: It's relevant with regard to
15 \$1. It doesn't make any difference -- if he
16 doesn't like what the City of Falls Church is
17 doing in certain respects, that's not really what
18 the case is about.

19 MR. RAPHAEL: I mean, I'd --

20 THE COURT: We need to keep the focus
21 exactly on the transfers.

22 MR. RAPHAEL: May I make an additional

1 point, Your Honor.

2 THE COURT: Yes, sir.

3 MR. RAPHAEL: I believe the City has
4 also opened the door on the issue of what change
5 has occurred between 1995 when the charter
6 amendment went through and what's happened to
7 date.

8 The City's claim is, Oh, you've known
9 about this -- Fairfax Water has known about this a
10 long time. You've heard from Mr. Thomas at length
11 about that.

12 And I think that in light of that
13 position, we're entitled to show that something
14 has fundamentally changed since 1995, after the
15 charter amendment went through; that the amounts
16 of transfer went up dramatically at that point.
17 That has not been the case prior to 1995. For
18 example --

19 THE COURT: Why don't just have
20 Mr. Woodcock say the amount of transfers changed
21 according to the -- to what you see in these
22 tables as opposed to it looked fishy to him.

1 MR. RAPHAEL: All right. Well, I mean,
2 I'm trying to get this into evidence at this
3 point.

4 THE COURT: Well, I'm going to probably
5 let it into evidence. It was not offered before.

6 But I think the objection is well taken
7 with regard to the characterization. That's
8 really not the issue.

9 MR. RAPHAEL: All right.

10 THE COURT: Objection sustained.

11 BY MR. RAPHAEL:

12 Q Mr. Woodcock, does this Exhibit 3.6
13 accurately summarize the financial information
14 reflected in the CAFRs?

15 A Yes, it does.

16 MR. RAPHAEL: I would move Exhibit 3.6.

17 MR. THOMAS: Same objection as
18 previously noted, Your Honor. Plus I think it's
19 cumulative to the exhibit that the Court just
20 admitted a moment ago.

21 THE COURT: All right. I'm going to
22 receive it. Exception noted.

1 (Plaintiff's Exhibit 3.6 was received
2 into evidence.)

3 MR. RAPHAEL: Thank you, Your Honor.

4 THE COURT: Yes, sir.

5 BY MR. RAPHAEL:

6 Q Can we go -- turn, please, to
7 Exhibit 3.5, Plaintiff's Exhibit 3.5.

8 Did you prepare this chart,
9 Mr. Woodcock?

10 A I did.

11 Q What does this chart show?

12 A This chart shows a summary of several of
13 the columns in Exhibit 3.1. It shows the -- in
14 the blue line what the ending cash balances were
15 in the water enterprise fund and how those changed
16 over this period from 1995 through 2008.

17 It shows the green line that's going up
18 from the bottom left to the upper right, what the
19 cumulative amount of the transfer for the return
20 on equity or management fee have been since 19 --
21 since the beginning of 1981, what those cumulative
22 amounts have been.

1 Q I'm sorry. Did you say 1981?

2 A I did.

3 Since '95. I'm sorry. Since 1995
4 through 2008.

5 And then the red line shows what the
6 rates charged by Falls Church, the base rate
7 charged by Falls Church have been from 1995
8 through 2008.

9 Q Does this chart accurately summarize the
10 data from multiple sources in the CAFRs?

11 A Yes, it does.

12 MR. RAPHAEL: I would move Exhibit 3.5
13 at this point, Your Honor.

14 MR. THOMAS: Same objections, Judge.

15 THE COURT: All right. Same ruling.
16 Exception noted.

17 Exhibit 3.5 will be received.

18 (Plaintiff's Exhibit 3.5 was received
19 into evidence.)

20 MR. RAPHAEL: Thank you, Your Honor.

21 BY MR. RAPHAEL:

22 Q Now, in analyzing the financial

1 operation of the Falls Church water system during
2 this period, did you find a relationship between
3 the rates charged, the cash balance in the water
4 fund, and the general fund transfers that you have
5 graphed here?

6 A Yes. There is a relationship.

7 Q And what is the relationship?

8 A Well, as the transfers started to go up,
9 particularly when they went up in the 4 million
10 range from the 2.9 million range, the amount of
11 money that was in cash and investments within the
12 enterprise fund had a corresponding drop.

13 Q Is that shown here?

14 A That's shown there, yes.

15 Q And I'm -- just for the record, I'm
16 pointing to where the blue line slopes down
17 beginning in fiscal year 2001. Is that right?

18 A Yes.

19 Q Okay. I'm sorry to interrupt you. You
20 were talking about the relationship between these
21 lines.

22 A And it's showing basically the

1 relationship that the increase, as you had that
2 increase in the transfers from -- let's see. It
3 was about \$3 million in 2000, up to 4-and-a-half
4 million dollars in 2001, how the amount of money
5 in the cash and investments started to drop with
6 that, and then how the City had to react with an
7 increase in rates in order to make up for that
8 loss and cash and investments.

9 Q All right. And are the rate increases
10 shown in the red line?

11 A Yes, they are.

12 Q All right. Can we turn, please, to
13 Plaintiff's Exhibit 3.4.

14 Did you prepare this summary chart,
15 Mr. Woodcock?

16 A Yes, I did.

17 Q And what does this chart summarize?

18 A This is a chart that summarizes the
19 return on investment, or the management fee, the
20 amount that was transferred from the water
21 enterprise fund to the City's general fund going
22 back to 1981 and through the fiscal year 2008.

1 Q All right. And --

2 A And it also shows the sum of the total
3 of all those years as well.

4 Q 58.878 million?

5 A Correct.

6 Q All right. There's a footnote here that
7 you called out.

8 This is from your report, right?

9 A Yes, it is.

10 Q There's a footnote 1 here that is called
11 out that reads for the year 1991 that the City
12 claims that the amount for 1991 was higher,
13 2,070,468. And you've referred to the City's
14 deposition at page 287.

15 By contrast, you reflect the sum
16 \$1,391,560.

17 Why did you use a smaller number than
18 what the City asserts was the number?

19 A I used that smaller number because,
20 despite the assertion in the City's deposition
21 that the number was 2 million plus, the other
22 information that I had available to me -- and

1 there wasn't any CAFR for that year that broke
2 this out like this, but the other information in
3 terms of summaries from staff reports reflected
4 the \$1,391,560 number.

5 And I believe just looking at the prior
6 years, 1989, 1990 of 1.2, 1.29 million, and then
7 the subsequent years, 1.5, 1.2 million, I think
8 the 2 million number that the City claimed in its
9 deposition was likely incorrect and that it was
10 more likely the 1.39 million number that I've
11 shown on this exhibit.

12 Q Okay. And with that note, is the data
13 in this chart, Exhibit 3.4, accurate to the best
14 of your professional judgment?

15 A Yes, it is.

16 MR. RAPHAEL: I would move Exhibit 3.4.

17 MR. THOMAS: Same objections, Judge.

18 THE COURT: Yes, sir. It will be
19 received.

20 MR. RAPHAEL: Thank you.

21 THE COURT: Objection of the City's
22 noted.

1 (Plaintiff's Exhibit 3.4 was received
2 into evidence.)

3 MR. RAPHAEL: Thank you, Your Honor.

4 THE COURT: Yes, sir.

5 BY MR. RAPHAEL:

6 Q In the course of doing your
7 investigation of how the City operated its water
8 system, did you come across materials indicating
9 that the rate increases were based on the need to
10 maintain transfers of the return on equity to the
11 general fund?

12 A Yes, I did.

13 Q Okay. Let me show you -- let's go to
14 Plaintiff's Exhibit 23.

15 A I'm sorry, Your Honor, to have my back
16 to you. To see this, I need to turn a bit.

17 Q Plaintiff's Exhibit 23 is in evidence
18 already.

19 Do you recognize this as the City
20 Manager's memorandum of October 10, 2002, to the
21 City Council?

22 A I do.

1 Q Okay. And let's go, please, to the
2 callout on page 1.

3 Is this the memorandum that preceded the
4 rate increase in the following June 2003?

5 A Yes, it is.

6 Q All right. Can you show, Ken, the
7 callout, "the water fund in particular" callout.

8 MR. THOMAS: Judge, if I could object to
9 this line of questioning. Again, this is the
10 opinion of the deceased City Manager leading up to
11 an ordinance that established rates in 2003. As
12 we've argued previously, I don't think that's
13 relevant.

14 THE COURT: Well, I think I permitted
15 this aspect of it.

16 MR. RAPHAEL: You did, Your Honor.

17 THE COURT: The last two sentences of
18 the first paragraph.

19 Did we admit the entire exhibit?

20 MR. RAPHAEL: You did, and there was no
21 objection in the City's list of objections to
22 exhibits.

1 THE COURT: Well, then that's the reason
2 that happened. All right.

3 Objection noted.

4 MR. RAPHAEL: Ken, if you could show
5 that callout on page 1, please.

6 MR. SAPP: On 1?

7 MR. RAPHAEL: Yes. The water fund in
8 particular.

9 BY MR. RAPHAEL:

10 Q Now, you and I have had an occasion to
11 discuss which of these records you thought were
12 important prior to today, correct?

13 A Yes, we have.

14 Q And is this a document that you thought
15 was significant?

16 A This is one where I thought it was
17 significant in that it showed that direct link
18 between the adjustments and the rates and the need
19 to maintain -- in order to maintain the transfers
20 for the return on investment.

21 Q And have -- have we highlighted the
22 language that you thought was significant?

1 A The last sentence wasn't particularly
2 relevant. The second-to-last sentence and the one
3 that started "the water fund in particular," those
4 two sentences are the ones that were the most
5 relevant, yes.

6 MR. RAPHAEL: May I read them for the
7 record, Your Honor.

8 THE COURT: You may.

9 BY MR. RAPHAEL:

10 Q "The water fund in particular needs a
11 rate adjustment to cover our ever-increasing
12 costs, especially the sizable ROI transfer to the
13 general fund. Without adjusting the rates, the
14 ROI will drain the water fund of its cash."

15 Those are the two sentences that you
16 found significant.

17 A That's the two sentences, correct.

18 Q Can we go, please, Ken, to the fourth
19 page of this document.

20 And we had a callout that begins
21 there -- not that one. The language that starts
22 "therefore, it is."

1 A Yes.

2 Q As Mr. Sapp is highlighting it, would

3 you just read the language that you thought was

4 significant from this document.

5 A I think even the one before that he did

6 not highlight. "Unfortunately, our current rates

7 do not consider these costs, and our reserves are

8 not being replenished."

9 The reserves not being replenished, I

10 thought was an example of that.

11 Then it goes on to say: "Therefore, it

12 is extremely important that the Council determine

13 a level of rates that cover our costs and provide

14 for a reasonable ROI."

15 Q All right. Thank you.

16 Can we go, please, to Plaintiff's

17 Exhibit 26.

18 MR. RAPHAEL: And, Your Honor,

19 Plaintiff's Exhibit 26 is in evidence. It's an

20 E-mail from the City Manager to the City Council

21 dated April 13, 2003.

22 BY MR. RAPHAEL:

1 Q Was this another one of the documents

2 that you found significant in showing the

3 connection between the increase in rates and the

4 are return on equity?

5 A Yes, it is.

6 Q All right. Ken, if you can highlight,

7 please, the third paragraph and show the first

8 sentence.

9 Have I found the right one that you

10 pointed out to me --

11 A Yes.

12 Q -- as to why this -- can you read that

13 for the record, please.

14 A "Setting the rates at the \$1.97 level

15 will provide sufficient cash flow for the entire

16 5-year period to" -- it should be, I think, "to

17 fund" --

18 Q Yes.

19 A -- "all operations, ROI and CIP."

20 And, again, what struck me here was the

21 setting of the rate that will fund all the

22 operations, capital improvement programs and the

1 ROI, return on investment.

2 Q All right. And was a rate of \$1.97

3 subsequently adopted by the City Council?

4 A It was.

5 THE WITNESS: And, Your Honor, I should

6 point out, in various places it talks about ROE,

7 return on equity, or ROI, return on investment.

8 They're used interchangeably. And I'm using them

9 interchangeably as well.

10 THE COURT: Thank you.

11 BY MR. RAPHAEL:

12 Q Thank you, Mr. Woodcock.

13 Did -- now, if we can go, please,

14 Mr. Sapp, to Plaintiff's Exhibit 30.

15 Your Honor, Plaintiff's Exhibit 30 is in

16 evidence. It's the resolution.

17 Let's go to the page that has the

18 resolution on it. It's page 6. This is the one

19 where the -- this document was admitted for the

20 attached resolution rather than the content of the

21 minutes preceding it.

22 All right. So if we could show, Ken,

1 the callout for the rate that was set by the City

2 of Falls Church.

3 Now, this reflects the rate that was

4 charged at \$1.97 for the year 2003 that you just

5 talked about. Did the rate for \$2.36 go into

6 effect subsequently for the year 2004?

7 A Yes, it did.

8 Q Okay. And then -- now, this document

9 was from 2003. It projects -- do you see where

10 it's projecting future rates for future years?

11 A Yes, I do. For 2005, '06, '07, and '08.

12 Q So for 2005, for instance, it projected

13 a rate of 2.83. And a rate of \$3.06 for 2006.

14 A Correct.

15 Q Do you see that?

16 A I see those.

17 Q Did those specific rates go into effect

18 subsequently?

19 A The rates that are not highlighted -- in

20 other words, the rates for 2005, 2006, 2007, and

21 2008 -- did not go into effect subsequently.

22 Q Okay. Was it there a different rate

1 ordinance subsequently adopted?
 2 A Yes, there was. Well, there was a
 3 different rate ordinance adopted for 2005.
 4 Q Let's take a look at that, please.
 5 Let's go to Plaintiff's Exhibit 36.
 6 Or, actually, before we do that, let's
 7 look at a memo that precedes that. This is a memo
 8 from May 13, 2005, from the City Manager to the
 9 City Council.
 10 Okay.
 11 MR. RAPHAEL: I don't think that I've
 12 moved 36 into evidence, Your Honor. But there's
 13 no objection to it on the City's objection list.
 14 And I would move Exhibit 36 at this
 15 time.
 16 MR. THOMAS: Only as to relevance, Your
 17 Honor.
 18 THE COURT: All right. It will be
 19 received.
 20 (Plaintiff's Exhibit 36 was received
 21 into evidence.)
 22 MR. RAPHAEL: Thank you, Your Honor.

1 BY MR. RAPHAEL:
 2 Q All right. So this is a memo from the
 3 City Manager, Dan McKeever at the time, to the
 4 City Council dated May 13th, 2005. Let's go to
 5 the second page of it.
 6 There's a discussion of water rates
 7 beginning at the top here, correct?
 8 A Yes.
 9 Q All right. And let's highlight that
 10 first paragraph.
 11 And it refers to two attachments. Do
 12 you see that?
 13 A Yes. There are two tables and two
 14 graphs attached to this memorandum.
 15 Q All right. And this is a document that
 16 you pointed out to me previously as something that
 17 you thought was significant?
 18 A Yes. Again, showing that direct
 19 relationship between the rate setting and the
 20 achieving of the return on investment, return on
 21 equity.
 22 Q Okay. And let's show -- you mentioned

1 that there were graphs. Let's go to the first
 2 graph which was at page 5 of 7 of this exhibit.
 3 And what did this graph reflect?
 4 A This graph reflects the -- there's three
 5 lines on here. One of them -- the blue line shows
 6 what the projection of operating and capital costs
 7 are for Falls Church -- for the Falls Church water
 8 utility.
 9 The green line shows what the projection
 10 of revenues are with no change. Now, referring
 11 back to the exhibit that we just looked at
 12 previously, that I said, no, those rates were not
 13 adopted for 2005, '06, '07, '08, I believe these
 14 are the revenues, then, that would be based on
 15 those rates that were projected earlier.
 16 And the orange or red line at the top is
 17 what the City's operating costs and capital costs
 18 are for their water utility plus an additional
 19 almost \$5 million for return on equity.
 20 And what it's showing is that, if Falls
 21 Church followed through with those initial
 22 projections of the rates for 2005, '06, '07, '08,

1 there would be insufficient revenues to be able to
 2 pay the full return on investment, return on
 3 equity.
 4 Q Would the revenues under the projected
 5 rates be sufficient to pay all of the operating
 6 and capital costs?
 7 A The revenues on the green line were more
 8 than sufficient to pay all of the costs of the
 9 water enterprise, the costs being the operating
 10 and all their capital costs, everything having to
 11 do with the water utilities. The rates were more
 12 than sufficient to pay for all of those.
 13 Q All right. Let me ask you the
 14 difference between the red line and the blue line.
 15 Do I understand correctly that the red
 16 line is the same as the blue line, but it adds in
 17 the return on equity?
 18 A It adds in the return on equity, yes,
 19 you're correct, of about 4.6, 4.8 million. I
 20 forget the exact number.
 21 Q All right. And then the memo referred
 22 to a second attachment, a second graph. Let's

1 look at that one now.
 2 A Yes.
 3 Q Is this the second graph?
 4 A Yes. Now, the memo talked about and had
 5 a table as well that showed what the rates would
 6 be if those initial projections that we looked at
 7 in the prior exhibit were increased 7 percent. So
 8 those rates for 2005, '06, '07, '08 were increased
 9 an additional 7 percent, what would the effect be
 10 on the revenues.

11 And what this graph shows is that they
 12 would still recover all of their expenses, all of
 13 the blue line. But, in addition, it would enable
 14 them to pretty much or come closer to covering all
 15 of the expenses plus the 4-plus million of return
 16 on investment or equity.

17 And then by 2009, they were basically
 18 recovering all of their costs plus this return as
 19 well with the higher 7 percent increase.

20 Q All right. Ken, can we show the two
 21 graphs side by side.

22 All right. So what are we seeing here?

1 A What we're seeing here is, on the left
 2 is the rates that were -- I'm sorry, I've
 3 forgotten the exhibit number, 36, I think that we
 4 had looked at earlier?

5 Q 36, correct.

6 A 36?

7 Q Or the one that had the previous rates?

8 A Yes. That were not put into effect.

9 Q Plaintiff's Exhibit 30.

10 A 30. If those rates had not gone into
 11 effect, the green line on the left would result --
 12 all their costs would be covered, but there
 13 wouldn't be quite enough to be paying all the
 14 costs plus the return on investment.

15 The graph on the right says, if we add
 16 7 percent to those amounts for 2005, '06, '07, and
 17 '08, we can still cover all our costs, but we can
 18 pay much more of that return on equity or return
 19 on investment, the orange line.

20 Q Okay. And did the City Manager make a
 21 specific rate recommendation on the memorandum of
 22 page 3?

1 A He did.

2 Q Okay. Can you show that, Ken.
 3 So he recommended the rates in
 4 attachment B?

5 A That's correct. Altern- --

6 Q Okay.

7 A -- or attachment B.

8 Q Can we see that?

9 A The graph on the right.

10 Q It's page 6 of 7.

11 A So that's the graph on the right there.
 12 The green line has that additional 7 percent.
 13 That's what the manager had recommended.

14 Q Okay. And I'm trying to find the actual
 15 rates that he was recommending. Is that -- that's
 16 on attachment B?

17 A It is. That's on the table that the
 18 graphs come from.

19 Q Okay. And so which -- what are the
 20 rates that were referenced?

21 A The -- the first two are the ones that
 22 went into effect, the \$1.97 and the 2.36 that we

1 looked at in Exhibit 30. However, column D, as in
 2 "dog" there, 3.03, 3.27, 3.54, those were
 3 7 percent higher than the ones we looked at in
 4 Exhibit 30.

5 I think if Mr. Sapp has attachment A,
 6 you'll see that those numbers that are highlighted
 7 in yellow are all 7 percent higher than what's
 8 shown on the table in attachment A, which match
 9 exactly those that were in Exhibit 30.

10 Q All right. And let's go to -- can we --
 11 Ken, can you bring up a comparison, please,
 12 between the 2005 and 2003 rate schedules,
 13 comparing Plaintiff's Exhibit 30 at page 6 with
 14 Plaintiff's Exhibit 37 at page 7.

15 So, just for the record, we have on the
 16 left-hand side of the screen Plaintiff's
 17 Exhibit 30 at page 6, which was the 2003 rates.
 18 And Plaintiff's Exhibit 37 on the right, at
 19 page 7, with the rate schedule adopted in 2005.

20 Okay. And this is showing the earlier
 21 projected rates against the subsequent rate
 22 actually adopted for fiscal year 2006.

1 A That's correct. And I don't have a
2 calculator with me. But I had checked these. I
3 think if you add 7 percent to the \$2.83 rate,
4 you'll get 3.03. 7 percent of the 3.06 rate,
5 you'll get the 3.27 that's shown on there.

6 And the number in the upper right of
7 what we're looking at right now are the numbers
8 with the 7 percent adjustment, alternative, or
9 attachment B in the memo we were looking at.

10 Q Okay. Now, the rate here that's shown
11 on the right-hand side of \$3.03 for fiscal year
12 '06, is that the rate that's still in effect?

13 A Yes. Actually, that rate was voted on
14 subsequent to this recommendation, I think about a
15 month later, and is still in effect as of today.

16 Q All right. Now, we've been talking
17 about materials linking the rate increase to the
18 need to maintain the return on investment.

19 Did you also come across materials
20 linking the transfers from the water fund to the
21 general fund on the one hand to reductions in the
22 City's real property tax rate on the other?

1 A Yes, I did.

2 Q And you've had an occasion to point
3 these materials out to me in the past, correct?

4 A I have, yes.

5 Q All right. Let's begin with -- can we
6 go to Plaintiff's Exhibit 40, Mr. Sapp.

7 MR. THOMAS: Judge, if I could object to
8 this line of questioning in as much as it relates
9 to transfers from water fund to general fund. For
10 reasons we talked about yesterday, I don't think
11 that's a relevant issue in the case. And we're
12 about to get into public utility committee meeting
13 minutes that we objected to as hearsay.

14 And so I can object now or I can object
15 later.

16 But the -- but the relevance of
17 transfers from water fund to general fund, given
18 the case law that we talked about yesterday and
19 the motion in limine with Mr. Woodcock, I don't
20 think are relevant.

21 MR. RAPHAEL: Your Honor, I've got --
22 I'm sorry. There are two issues.

1 THE COURT: Well, the relevance is
2 plainly -- it's plainly relevant because there are
3 two different views taken as to whether or not
4 such transfers are permitted. That's for me to
5 decide.

6 But insofar as the facts as to whether
7 or not the transfers are taking place, the --
8 Fairfax Water has to, you know, prove that this is
9 in fact occurring. I'm not sure we've had a
10 single factual item of proof so far that's been
11 disputed.

12 MR. THOMAS: I think the way this issue
13 was teed up was one that related to the motives of
14 the City in making transfers from water fund to
15 general fund, and that's not for Mr. Woodcock to
16 testify to.

17 THE COURT: I didn't think it was
18 motive. I thought it was the fact that the
19 property tax rate -- it can be demonstrated that
20 the rate is not rising significantly, if at all at
21 the same time that the rate for the sale of the
22 water is, in fact, rising.

1 That's a factual observation that you
2 wish to establish, is it not?

3 MR. RAPHAEL: That is correct, Your
4 Honor.

5 THE COURT: And didn't we have something
6 touching upon that?

7 Well, sure, we did. Mr. Tuohy's
8 testimony.

9 MR. RAPHAEL: That's correct.

10 THE COURT: Right.

11 And I'm going to permit it. But not in
12 the context of motive. From the context of, you
13 know, what occurred here. There really are very
14 few disputed facts in the case.

15 MR. RAPHAEL: I think that's correct so
16 far.

17 THE COURT: All right.

18 BY MR. RAPHAEL:

19 Q All right. You recognize this,
20 Mr. Woodcock, is the approved minutes of the
21 Utility Committee meeting from the Council on
22 July 7, 2005?

1 A Yes.
2 Q All right. And there's a section in the
3 middle referring to specific findings, issues,
4 comments, as a result of this presentation. I
5 just want to point out two of them.

6 The first one highlighted in the middle
7 of the page there says that: "The purchases of
8 water from the Washington Aqueduct and the ROI
9 transfer to the general fund are the two single
10 largest expenses for 2004."

11 And why did you think that this was
12 significant?

13 A I thought it was significant in that
14 the, the transfer, the ROI transfer was, A, such a
15 large components of the total expenses, and, B,
16 was clearly an element in the setting of rates.

17 Q All right. And the purchases of water
18 from the Washington Aqueduct, what does that refer
19 to?

20 MR. THOMAS: Judge, if I could, with
21 apologies. This document itself is hearsay. It
22 is the public utility committee meeting minutes.

1 I don't think that this expert can
2 testify to the details of the hearsay contained in
3 this document. That's hearsay itself upon
4 hearsay. So I think this line of questioning is
5 objectionable.

6 And then I don't -- I don't think I need
7 to wait until this document is offered into
8 evidence. He can't -- I don't think he can
9 testify to the details of the hearsay even before
10 the hearsay itself is offered.

11 THE COURT: Is this a document to which
12 you object because it's minutes of a meeting
13 involving members of the Town Council?

14 MR. THOMAS: Well, it's a minutes --
15 yes. And to be precise, it's minutes of the Falls
16 Church City Council Utilities Committee from July
17 2005.

18 MR. RAPHAEL: Your Honor, it's -- these
19 are -- this is not offered to show interpreting
20 legislation. This is offered to show statements
21 of fact by authorized agents of the City.

22 And there are only two facts that I'm

1 trying to show here.

2 Number 1, that the ROI transfer, as a
3 fact, was one of the two largest expenses. That's
4 a fact. It's not a statement of legislative
5 opinion.

6 And the second is going to be what that
7 reflects on the tax rate. That's a fact as well.

8 So this is -- it just can't be that just
9 because something that shows up in the minutes
10 it's automatically inadmissible. It's got to
11 be -- it's admissible for the purpose of
12 demonstrating the fact that it was admitted by
13 City agents.

14 THE COURT: Mr. Thomas.

15 MR. THOMAS: No. I don't agree with
16 that at all. It can be that it shows up in the
17 minutes and it still be hearsay. And it can be,
18 and I think it is, the law here in Virginia that
19 this expert can't offer the details of that
20 hearsay in his expert testimony.

21 THE COURT: Isn't he simply identifying
22 two statements that he observed? I mean, and

1 these were statements made -- now that I can see a
2 little bit more of the memorandum -- from the
3 City's staff as opposed to, you know, Council
4 members or the Mayor opining on this and that?

5 MR. THOMAS: No. This -- these are
6 Utility Committee meeting minutes --

7 THE COURT: Right.

8 MR. THOMAS: -- from, you know, from --

9 THE COURT: But don't they start out
10 staff --

11 MR. RAPHAEL: Right there, Your Honor.
12 Finance Director Tuohy.

13 THE COURT: Right.

14 MR. THOMAS: They do, calling on, I
15 think, the Court to determinate at what level the
16 staff had the ability to speak for the City and
17 have it not be hearsay.

18 MR. RAPHAEL: Well, Your Honor, it's --
19 Virginia is a little different from the federal
20 rules. Under the federal rules, admissions by the
21 opposing party are actually not hearsay.

22 THE COURT: Right.

1 MR. RAPHAEL: In Virginia rules, I think
2 they are hearsay. But there is an exception,
3 because they're admissions by a party agent.
4 THE COURT: And they're admissible.
5 MR. RAPHAEL: Exactly. So for that
6 reason, it's not hearsay.
7 And I would like to add, the City has
8 admitted that this document is a true and accurate
9 copy of the approved minutes from this meeting.
10 And that's Dan McKeever's signature on the bottom
11 left-hand corner, the City Manager.
12 MR. THOMAS: I don't think that's any --
13 that's true. That's true. We have admitted that
14 they are authentic copies of the minutes.
15 But what's reported, for example, what's
16 highlighted here are statements from the City
17 Council as reported up -- as reported over to the
18 staff person of the City.
19 So, again, they start out as hearsay.
20 And they continue as hearsay.
21 And I -- I appreciate the point that the
22 witness is saying, I looked -- I observed this,

1 but he's also reading into the record what this
2 document says.
3 THE COURT: I think the statements
4 reflected in this document of staff, in this case,
5 Mr. Tuohy, who was the -- he had a different title
6 at that point which I can no longer see, given the
7 display of the exhibit, are plainly admissible.
8 And they can be challenged by the City
9 when she presents her evidence. But I suspect
10 that will not be the case.
11 Objection overruled.
12 MR. RAPHAEL: Thank you, Your Honor.
13 I would move Exhibit 40 at this time.
14 THE COURT: Why don't we just admit
15 those two statements and leave it at that.
16 Because I don't want to tinker with the Court's
17 ruling that we're not going to have minutes of
18 meetings at which Council members are respect
19 present or the Mayor be admissible. I don't think
20 they are properly admissible.
21 MR. RAPHAEL: All right. Well, let
22 me --

1 THE COURT: But those two statements I
2 think are.
3 MR. RAPHAEL: All right. So -- thank
4 you, Your Honor.
5 So the record is clear, the first
6 statement -- there are two statements from this
7 that I am offering.
8 The first one is shown here. And it
9 reads: "The purchases of water from the
10 Washington Aqueduct and the ROI transfer to the
11 general fund are the two single largest expenses
12 for 2004."
13 There's a second statement highlighted
14 here that states that the transfer to the general
15 fund -- that the ROI -- I'm sorry.
16 I'm offering this to show that the
17 current ROI transfer represents approximately
18 17 cents on the tax rate.
19 THE COURT: All right.
20 MR. RAPHAEL: Those two statements of
21 fact.
22 THE COURT: All right. And those were

1 statements offered by Finance Director Tuohy.
2 MR. RAPHAEL: That's correct.
3 THE COURT: All right.
4 MR. THOMAS: Subject to my objection.
5 THE COURT: Yes, sir.
6 MR. RAPHAEL: Excuse me, Your Honor.
7 Your Honor, to preserve the record on
8 the issue of these minutes, I would like to hand
9 up a bench memo that addresses -- we think that
10 the rule -- there is a rule that Your Honor has
11 discussed previously concerning the use of minutes
12 to show legislative history with regard to what a
13 City Council intended with regard to legislation
14 that's enacted.
15 THE COURT: Yes, sir.
16 MR. RAPHAEL: We submitted a brief in
17 connection to the motion in limine.
18 THE COURT: You know, and I was
19 incorrect, because I didn't -- I thought you were
20 missing two briefs, that being one of them. And I
21 did not have any briefs from the City and those
22 particular points. But we heard them cold, more

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1 or less.

2 And I did find your brief. It was

3 attached as an exhibit -- or as an attachment to

4 the major motion in limine which we discussed

5 initially yesterday.

6 And I pulled it out because I was going

7 to read it. And I will certainly read your bench

8 memo and reconsider my ruling if in fact persuaded

9 otherwise.

10 MR. RAPHAEL: Okay. And just so it's

11 clear what I'm asking the Court to do. That brief

12 that you now have argued that the rule that the

13 City is advocating is inapplicable on its face --

14 THE COURT: Right.

15 MR. RAPHAEL: -- because, Number 1, to

16 the extent they're acting in a proprietary

17 capacity, the rule doesn't apply.

18 And, Number 2, that other statements of

19 facts in minutes are admissible if -- they would

20 have to show that the minutes are inadmissible for

21 any purpose.

22 THE COURT: Right.

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1 MR. RAPHAEL: There -- to the extent

2 that you've overruled us on that point, and we

3 acknowledge that there is case law from the

4 Supreme Court that says that minutes are not

5 admissible to show legislative intent.

6 THE COURT: Right.

7 MR. RAPHAEL: Okay. We actually would

8 submit, and to preserve for appeal, the argument

9 that that rule is wrong because it's inconsistent

10 with the proposition that courts look to

11 legislative history to see how an ordinance or act

12 of Congress or an act of the General Assembly was

13 adopted.

14 You're not free to change that ruling of

15 the Supreme Court.

16 THE COURT: I'm not.

17 MR. RAPHAEL: But for us to raise it

18 there, I've got to raise it here.

19 THE COURT: Sure.

20 MR. RAPHAEL: So I have a bench memo

21 that does that --

22 THE COURT: All right.

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1 MR. RAPHAEL: -- which argues why that

2 is incorrect and should be overruled by the

3 Supreme Court.

4 THE COURT: Well, I'll be happy to look

5 at it.

6 MR. RAPHAEL: And it's entitled Fairfax

7 Water's Brief in Support of Objecting to Rule that

8 Courts cannot Inquire into Legislative History.

9 THE COURT: Right. And this is to

10 preserve the point for an appeal if necessary?

11 MR. RAPHAEL: That's correct.

12 THE COURT: Thank you, sir.

13 MR. RAPHAEL: And, Your Honor, I handed

14 you the original. That's the signed original

15 brief.

16 THE COURT: I'm sorry?

17 MR. RAPHAEL: What I handed you is the

18 signed original. I assume that -- that's the

19 version that will make it into the file.

20 THE COURT: Yes, sir.

21 MR. RAPHAEL: All right. Thank you,

22 Your Honor.

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1 BY MR. RAPHAEL:

2 Q Mr. Woodcock, going back now to the two

3 statements from the July 7th, 2005, meeting of the

4 Utility Committee, we were talking first about the

5 one dealing with the purchases of water from the

6 Washington Aqueduct.

7 And I think the last question I asked

8 you leading into the legal discussion we just had

9 was what -- what is the purchase of water from the

10 Washington Aqueduct? What does that refer to?

11 A Falls Church primarily obtains its

12 treated water supply from the Corps of Engineers

13 Washington Aqueduct. And it's charged for that

14 water, the treated water, the service of the

15 provision of that treated water by the Corps of

16 Engineers.

17 And that item is the largest item -- or

18 one of the two largest items in the expenses of

19 the water utility of Falls Church.

20 Q Does Falls Church have any water

21 treatment plants of its own?

22 A Falls Church has no water treatment

1 plants, no other source of supply other than
2 buying it from outside the City of Fairfax County
3 Water Authority, for example.

4 Q Is its major source of supply the
5 aqueduct?

6 A Its major source of supply is the
7 Washington Aqueduct, yes, sir.

8 Q Is that why it's the largest expense?

9 A That's why the largest expense, yes,
10 sir.

11 Q And second largest expense next to that
12 was what?

13 A The return on investment.

14 Q Okay. Now, the second statement that
15 came out of these minutes referred to the current
16 ROI transfer representing approximately 17 cents
17 on the tax rate. Why did you find that statement
18 to be significant?

19 A I found that statement relevant or
20 important to me at least in terms of the money
21 coming from the water charges and what happened to
22 it and what the impact of transferring it to the

1 general fund was or is.

2 Q All right. Can we go, please, to
3 Plaintiff's Exhibit 53. These are the minutes of
4 the City Council meeting of April 24, 2006.

5 And let's go to -- Ken, let's go,
6 please, to page 3 of 7. Can you call out that
7 statement, please.

8 MR. RAPHAEL: Now, Your Honor,
9 consistent with your previous rulings, I would
10 like to have a standing objection to the refusal
11 to admit the minutes that I have on my exhibit
12 list.

13 THE COURT: Yes, sir. And who is
14 Mr. Mabry?

15 MR. RAPHAEL: Mr. Mabry is a City
16 Council member.

17 What I would like to offer from this is
18 the statement of fact that the return on equity of
19 about \$3 million equaled about 8 to 10 cents on
20 the tax rate or about \$600 in benefit for each
21 homeowner as a statement of fact.

22 THE COURT: Mr. Thomas.

1 MR. THOMAS: Judge, if I could.

2 Mr. Mabry was a City Council member in
3 the City of Falls Church. I don't know, but I
4 believe he served one term. He is a local
5 politician.

6 Statements by local politicians which
7 find their way into the minutes are classically
8 hearsay.

9 The City Council binds the City, not the
10 individual politicians who make up the City
11 Council who have come and gone. So I think,
12 again --

13 THE COURT: No, I think the objection is
14 still well taken. I really do. And this is not
15 one that can be cured by reading simply this
16 statement because it does come from a councilman
17 who may be correct. He may be incorrect. But
18 what he's thinking, musing, observing, whether
19 correctly or incorrectly, doesn't result in the
20 City's actions through passed laws.

21 And until the Supreme Court of Virginia
22 or the General Assembly change the effect of well

1 over half a century of settled law, the Court is
2 bound by it.

3 Objection sustained.

4 MR. RAPHAEL: Thank you, Your Honor.
5 May I proffer the statement for the
6 record.

7 THE COURT: Yes, sir.

8 MR. RAPHAEL: The statement is:
9 Mr. Mabry noted that it was a significant --
10 referring to the water system -- a significant
11 asset and produced approximately \$3 million in
12 return on equity as well as indirect support for
13 staff functions. He said the return equaled about
14 8 to 10 cents on the tax rate or about \$600 in
15 benefit for each homeowner.

16 THE COURT: That is for the record only
17 and will not be considered by the Court.

18 MR. RAPHAEL: Thank you, Your Honor.

19 THE COURT: Yes, sir.

20 MR. RAPHAEL: Now, with regard -- Ken,
21 can you pull up, please, Plaintiff's Exhibit 13.

22 And go please to page 2 of this document, and can

1 you show the callout on the bottom of page 2.
2 And, Your Honor, we've tread on this
3 ground a little bit already. You've not allowed
4 me to offer the minutes here at Plaintiff's
5 Exhibit 13. I believe you did allow me to read in
6 the statement by the City Manager on behalf of
7 the -- the statement of the City Manager that the
8 City transfers money to -- from the water fund to
9 the general fund that allows it to save taxes.

10 You let me read that in before. I just
11 want to be able to examine this witness about
12 whether he found this document significant.

13 THE COURT: Mr. Thomas.

14 MR. THOMAS: The same objection with
15 respect to, Judge, these are 1995 minutes relating
16 to water fund transfers 10 years before the
17 current rates were set.

18 THE COURT: Who is Mr. Lasso?

19 MR. RAPHAEL: He's the City Manager.

20 THE COURT: He is or was?

21 MR. THOMAS: He was.

22 MR. RAPHAEL: He was. I'm sorry. He

1 was the City Manager. And your Honor had ruled
2 previously that this statement could come in.
3 That was in the --

4 THE COURT: No, of course, I remember
5 that.

6 I'm going to permit it because it's an
7 admission of an employee of the City.

8 MR. RAPHAEL: Thank you, Your Honor.

9 BY MR. RAPHAEL:

10 Q Was this a statement that you found
11 significant, Mr. Woodcock?

12 A It was.

13 Again, this went in two different cases.

14 One, certainly the second part that the return on
15 investment defrayed costs that the City might
16 otherwise have to pay through general taxes.

17 The second one which I found a little
18 curious was because of the City's good management.
19 I'm not sure profits are generated because of good
20 management. There is to some degree --

21 MR. THOMAS: Objection.

22 THE COURT: Objection sustained.

1 MR. THOMAS: Thank you.

2 THE COURT: Objection sustained.

3 MR. RAPHAEL: Your Honor, I would like
4 to offer Plaintiff's Exhibit 18 which are the
5 minutes of the May 10, 1999, meeting. It's
6 actually a video clip of statements by Mayor
7 Schnider.

8 I'm going to proffer to you, Your Honor,
9 that this 1-and-a-half-minute clip would show the
10 Mayor of the City of Falls Church stating,
11 Number 1, that the City was able to use water fund
12 transfers to lower the property tax rate for Falls
13 Church citizens.

14 And, Number 2, that the City could be
15 taking a lot more than it had been from the water
16 fund, as much as 4.8 million, but it would have to
17 raise the water rates by 33 percent to do that.

18 It's relevant to show that that's
19 exactly what the City later did. These are
20 statements of fact that the transfers to the
21 general fund resulted in decreased City property
22 taxes. And, Number 2, that in order to increase

1 the amount of the return on equity, the City had
2 to raise the rates charged to customers.

3 THE COURT: And all of those may be
4 true, but I don't think this is the proper vehicle
5 for the admission of those asserted facts.

6 Objection, Mr. Thomas?

7 MR. THOMAS: Yes.

8 THE COURT: Sustained. Exception noted.

9 MR. RAPHAEL: Thank you, Your Honor.

10 THE COURT: Yes, sir. Thank you.

11 MR. RAPHAEL: And I, like Mr. Thomas,
12 hope that I don't wear out my welcome with you.
13 But I do need to proffer another one.

14 THE COURT: That's all right. I
15 understand. If you don't proffer it, it's gone
16 forever.

17 MR. RAPHAEL: Yes. Yes, Your Honor.

18 I'd like to offer, Your Honor,
19 Plaintiff's Exhibit 32. It's a video clip that's
20 admitted as to its authenticity by Councilman
21 Mabry at the City Council meeting of April 26,
22 2004. It's 33 seconds long.

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1 If permitted to show this, Your Honor,
 2 it would show that councilman -- it will show
 3 Councilman Mabry's exchange with the executive
 4 staff, the City Manager and Chief Financial
 5 Officer in which they jointly stated that the
 6 transfer from the water fund to the general fund
 7 accounts for the 20 cent savings on the City
 8 property tax rate. It's a statement by more than
 9 Mr. Mabry. It's by a City, you know, staff --
 10 THE COURT: This is Mr. Mabry, who was a
 11 one-term councilman who's described by Mr. Thomas
 12 as a local politician?
 13 MR. RAPHAEL: Yes. I think he's not
 14 doing justice to him, because he's also the chair
 15 of the Utilities Committee for the City of Falls
 16 Church.
 17 THE COURT: Well, I'm sure that
 18 Mr. Thomas would have the record reflect that that
 19 was not meant as a pejorative.
 20 MR. THOMAS: I mean no offense to
 21 Mr. Mabry at all.
 22 THE COURT: Of course not.

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1 MR. RAPHAEL: I'm sure he doesn't. But
 2 I think what --
 3 THE COURT: If you're all going to have
 4 a complete record, I think that should be included
 5 as well.
 6 MR. RAPHAEL: I think what distinguishes
 7 this from the previous ones that you've disallowed
 8 is that it's showing him with an exchange with the
 9 Chief Financial Officer in which they say jointly
 10 that the transfer is saving 20 cents on the
 11 property tax rates.
 12 It's in a hybrid category. It's Mabry,
 13 but Mabry plus the City Chief Financial Officer.
 14 It's 33 seconds.
 15 THE COURT: Well --
 16 MR. THOMAS: Same objection, Judge.
 17 THE COURT: And the same ruling. And
 18 the exception of Fairfax Water is noted.
 19 MR. RAPHAEL: I would also move
 20 Plaintiff's Exhibit 31 which are the minutes of
 21 the same meeting, knowing full well what you're
 22 about to say.

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1 THE COURT: And your exception is noted.
 2 MR. RAPHAEL: Thank you, Your Honor.
 3 So that's refused?
 4 THE COURT: Yes, sir.
 5 MR. RAPHAEL: Thank you. Thank you.
 6 THE COURT: Yes, sir.
 7 MR. RAPHAEL: I'm not sure if "thank
 8 you" is the right word.
 9 THE COURT: That's absolutely correct.
 10 MR. RAPHAEL: I am also not going to say
 11 may I please have another.
 12 BY MR. RAPHAEL:
 13 Q Now, Mr. Woodcock, let's move on to the
 14 management fee that was used by the City beginning
 15 in fiscal year 2007. It was actually adopted
 16 sometime in 2006, correct?
 17 A That's correct.
 18 Q And it was based on transferring an
 19 amount from the water fund to the general fund
 20 that we've seen of 10 percent of operating
 21 revenues and 100 percent of investment income,
 22 correct?

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1 A That's correct.
 2 Q Now, have you ever seen a basis for a
 3 management fee like that described in any of the
 4 authoritative texts or journals that you've seen
 5 or written as a proper basis for municipal water
 6 utility to transfer money to the general fund?
 7 MR. THOMAS: Judge, I think we're coming
 8 right up against the ruling the Court made
 9 previously about whether -- what the City -- the
 10 correctness or the incorrectness of what the City
 11 has done with this question. So I object to it on
 12 that basis.
 13 MR. RAPHAEL: Your Honor, this is --
 14 just shows that the management fee is not a
 15 generally accepted rate-making principle.
 16 THE COURT: I think that Mr. Woodcock
 17 can testify that in his work, experiences, and
 18 observations of other municipalities that he has
 19 not seen management fees of such a large category.
 20 I mean, I think he can obviously say that.
 21 But to opine further that -- to suggest
 22 that because he found this to be in the case of

1 Falls Church, then I think that's what crosses the
2 line.

3 But I think he can say what he's
4 observed. Absolutely.

5 MR. RAPHAEL: All right.

6 THE COURT: Yes, sir.

7 MR. THOMAS: If I could get one bit of
8 clarification on that ruling, which is the last
9 part of what the Court said about management fees
10 of such a large amount.

11 Again, the management fee, whether it --
12 we've not been sued for taking too much in
13 management fees.

14 THE COURT: Well --

15 MR. THOMAS: We've been sued for taking
16 it improperly.

17 THE COURT: It doesn't look like the
18 other ones that he's observed. Let's put it that
19 way. But that doesn't -- maybe that means it's
20 completely wrong. But maybe it's not completely
21 wrong. Just it's simply different. And I'm going
22 to permit him to say that it's different, okay.

1 MR. THOMAS: Okay.

2 MR. RAPHAEL: Thank you, Your Honor.

3 BY MR. RAPHAEL:

4 Q Mr. Woodcock, have you ever seen the
5 management fee formula that's used by the City of
6 Falls Church in any of the prior work you've done?

7 A I have not.

8 Q Have you seen it described in any water
9 utility rate manual or guideline?

10 A I have not.

11 Q Is the water fund receiving any
12 management for the -- for what it's paying as a
13 management fee to the City's general fund?

14 A It is not receiving any management for
15 the management fee.

16 Q And why is that?

17 A It receives the payment for management,
18 if you will, as part of the administrative costs
19 we were talking about this morning. I think it
20 was in the 2006 CAFR where you showed me an amount
21 of approximately 5 million for administration.
22 That includes the indirect costs from the City

1 which include the management from the manager and
2 various offices within the City.

3 So those are already accounted for
4 within the administrative expenses. There are no
5 additional management costs, fees, services,
6 anything, related to management over and above
7 those.

8 Q Okay. Thank you.

9 Now, are you familiar with the cash
10 basis and the utility basis for the municipal
11 water utility to set its water rates?

12 A I am.

13 Q Okay. Can you describe for the Court or
14 explain for the Court what the cash basis is.

15 A The cash basis is pretty much like what
16 one would look at at their normal budget. It
17 includes your operating expenses of your house.
18 It would be your cleaning and utility bills and
19 painting, maintenance, things like that.

20 It includes your capital expenses,
21 payment of mortgage, things like that. And it
22 includes any pay-as-you-go capital financing. A

1 small repair to your home, for example, in the
2 case of the water utility. Generally a small
3 purchase or repair or minor capital improvement
4 would be the elements of the cash basis.

5 Q All right. And then the other one is
6 the utility basis.

7 Can you explain what the utility basis
8 is, both for a private utility and for a public
9 utility.

10 A The utility basis is another method of
11 determining expenses, if you will. It includes
12 those same operating costs. The electricity and
13 power and labor, that type of thing.

14 But, instead of debt service and
15 pay-as-you-go capital, it includes depreciation,
16 going back to my analogy, how much value your home
17 might lose as opposed to any mortgage that you
18 pay. And it also includes a return on investment,
19 an amount that's paid, a profit, if you will, on
20 how much money has been invested into it.

21 Q Okay. Now, we've seen the materials
22 showing that the City transfers the -- a return on

1 investment, a return on equity from the water fund
2 to the general fund.

3 Is what you're talking about with regard
4 to the calculation of a rate for customers
5 something different from that?

6 A I'm sorry. I --

7 Q Yes. We've seen how -- we've seen
8 materials showing that the City has transferred
9 monies from the water fund to the general fund and
10 it calls that a return on an equity or a return on
11 investment.

12 A Yes.

13 Q You're discussing the use of the concept
14 of a return on equity as part of the utility
15 method of setting rates. And I'm trying to
16 understand, is there a difference between the two
17 concepts?

18 A There's a difference. The return on
19 equity, return on investment under the utility
20 basis is an element of the revenue required to
21 operate or run the utility. It's not -- it's an
22 expense of the utility.

1 I'm not sure if that answers your
2 question.

3 Q Well, let me ask you this: Where a City
4 has outside City customers --

5 A Yes.

6 Q -- is it common to use, or at least not
7 uncommon to use the utility method for determining
8 the rates to be charged to outside and inside City
9 customers?

10 A That's correct. There's two -- there's
11 almost two different method or two different
12 meanings to the word "utility basis." One is in
13 the allocation of expenses using the utility basis
14 to split costs between inside the City and
15 outside. The other is to determine what the total
16 revenue needs are.

17 Q Okay. And in determining, using the
18 utility basis, what the rates should be for
19 outside City customers, is it appropriate to use a
20 return on equity in calculating those rates?

21 A For a municipal utility, is it.

22 Q Okay. And with regard to what the

1 revenue requirements are for the municipal
2 utility, does -- is it proper to include a
3 transfer to the general fund as an element of the
4 revenue requirements for the utility?

5 A It is not proper to include that.

6 Q Okay. And do people sometimes confuse
7 the two concepts?

8 MR. THOMAS: Objection, Judge. I'm not
9 sure what the witness -- there's no foundation.

10 MR. RAPHAEL: Well, let me refer -- I'll
11 withdraw it.

12 THE COURT: Okay.

13 BY MR. RAPHAEL:

14 Q Do -- do some of your water clients or
15 others in the -- who may be new to the industry
16 sometimes confuse the concept of including a rate
17 of return on equity as part of calculating what
18 the rates should be charged to outside City
19 customers on the one hand with the idea of
20 transferring money from the water fund to the
21 general fund on the other?

22 A Yes. It's quite common to make that

1 confusion. And that confusion is actually called
2 out in the M1 manual that you showed me from the
3 American Water Works Association.

4 Q Okay. This is an M1 manual -- this is
5 the one that you helped write?

6 A Yes.

7 THE COURT: I'm sorry. I don't
8 understand what the confusion is about.

9 MR. RAPHAEL: Well, let me see if I can
10 clear that up.

11 THE COURT: If a return on investment
12 may be used --

13 MR. RAPHAEL: Yes.

14 THE COURT: -- to -- as an item for
15 paying the costs of the utility, an item which you
16 would not have in your regular cash running
17 expenses.

18 But where is the confusion? And this is
19 something that can't be charged to nonresident
20 customers of the utility.

21 MR. RAPHAEL: Yeah.

22 THE COURT: So where does the confusion

1 come?
 2 BY MR. RAPHAEL:
 3 Q Here's the confusion: In setting the
 4 revenue requirements for the utility under the
 5 utility approach, determining how much money it
 6 needs, do you include profit in that revenue
 7 requirement determination.
 8 A You do not -- you do not include that.
 9 Yeah, one of the -- perhaps one of the best
 10 exhibits that shows this is actually Defendant's
 11 Exhibit --
 12 Q Is this the M1 manual you're talking
 13 about?
 14 A No. It was actually Defendant's
 15 Exhibit 70, I believe, that I thought showed this
 16 pretty clearly. I don't have the list in front of
 17 me.
 18 BY MR. RAPHAEL:
 19 Q Okay.
 20 A It was a presentation by one of the
 21 City's consultants. But it was --
 22 Q Is the issue of -- I'm sorry.

1 A What it shows is that there's really two
 2 steps.
 3 The first step is in allocating costs
 4 between inside and out. You would use the utility
 5 basis and say, okay, I'm going to imagine for a
 6 moment that I'm a private investor-owned utility.
 7 And in terms of allocating the costs to those
 8 customers outside my corporate limits, I will act
 9 like a private utility and determine what
 10 revenues, what share of the revenues they ought to
 11 pay me.
 12 However, the total costs, the total
 13 revenues that I need to recover, do not include
 14 return on investment. I need to pay the mortgage,
 15 pay for the new roof, and pay for electricity. I
 16 need to cover my cash expenses. And the total
 17 amount of revenues that I recover are the cash
 18 basis.
 19 It's often called the residual cash
 20 needs. I look at the utility needs, get that from
 21 outside. And that might be \$50. And if my total
 22 cash needs are \$70, that \$20 residual comes from

1 inside.
 2 So they're mixed in the case of
 3 municipal utilities. If I was a private utility,
 4 the Chris Woodcock Water Company, the allocation
 5 end would be the same to everybody. It didn't
 6 matter what the corporate limits are. I'm going
 7 to charge you-all on a utility basis.
 8 That's sort of where the confusion is.
 9 And I'm not sure, Your Honor, if I just added to
 10 it or helped resolve it.
 11 THE COURT: Well, it's no worse.
 12 THE WITNESS: Okay.
 13 BY MR. RAPHAEL:
 14 Q Let's see if we can make it even
 15 clearer.
 16 Does the M1 manual discuss this concept
 17 and explain why some people are confused about it?
 18 A It does.
 19 Q All right. Can we -- I have a copy of
 20 the M1 manual here. Can we go, please, to -- this
 21 is Plaintiff's Exhibit 107.3 at page 65 and 66.
 22 Okay. This is the -- this is the

1 section dealing with municipal utilities providing
 2 service outside City limits, correct?
 3 A Yes, it is.
 4 Q And, Ken, if you show, please, the whole
 5 portion of that bottom page, from the word
 6 "sometimes." Okay.
 7 And if you could direct the Court,
 8 Mr. Woodcock, to the portion of the text that you
 9 relied on or contributed to that expresses -- that
 10 explains why some people get confused about this
 11 concept and tries to answer the confusion.
 12 A Well, the highlighted part of it I think
 13 does that. Again, I am reading from it:
 14 Sometimes, those who design or review water rates
 15 do not fully understand how the cash-needs
 16 approach to measuring total revenue requirements
 17 relates to the utility basis of allocating.
 18 And let me just stop there and explain
 19 that again. The misunderstanding is the
 20 cash-needs approach to determine total revenues
 21 versus the utility basis of allocating expenses.
 22 And then it goes on, with regard to

1 government-owned water systems.
2 Q Before you -- let me stop you right
3 there.

4 Is -- even under the utility approach to
5 calculating the rates, are the revenue
6 requirements determined on a cash basis?

7 A For a municipal utility, the revenue
8 requirements are always determined on a cash
9 basis.

10 Q Okay. Thank you.

11 Can you continue with the portions from
12 this M1 manual that you've relied on.

13 A The end of the sentence that says why
14 both elements are used. And they're used in
15 different ways here.

16 In this case, it says: "A
17 government-owned utility, in most cases, were not
18 regulated by a state public utility commission" --
19 as is the case in Virginia -- "determines the
20 total revenue requirements or costs of service on
21 a cash basis."

22 And, again, government-owned utilities

1 determine total revenue requirements, the total
2 amount from all rates and charges inside and out
3 on a cash basis.

4 Q All right. Do you want to go to the
5 next page of this?

6 A Yes. I think the top of the next page
7 perhaps explains that a little bit, too.

8 Q Okay. Identify the text that you think
9 explains that.

10 A Really start the second word in. The
11 "cash needs" again. What those cash needs must be
12 met as a utility as a whole.

13 And, again, I'll go back to my analogy
14 of owning a home. I need enough to pay the
15 electricity and gas and telephone bill and enough
16 to pay my mortgage. Those are what my cash needs
17 are as a utility.

18 "However," and it goes on here, "when
19 the utility serves outside, non-owner customers,
20 it's most appropriate to measure the costs on a
21 utility basis; that is, to assign the costs to
22 outside customers for the operating expenses,

1 depreciation, and appropriate return.

2 "The inside customers" -- and this is
3 sort of the critical part -- "the inside customers
4 are then responsible for all the remaining cash
5 requirements not derived from outside City
6 customers."

7 Again, and I'll go back, because, again,
8 I think this is somewhat confusing, Your Honor.
9 I'll go back to the home ownership. If I own a
10 duplex, I might charge you as my renter, for
11 example, on a utility basis independent of what I
12 pay for mortgage because I got a really good rate.

13 I happened to finance it through my
14 wealthy father-in-law, let's say, and I have a
15 very low mortgage rate. But I might charge you as
16 if I'm a private owner, and you're renting, and
17 whatever that market rate would be. And that
18 would be the utility basis.

19 However, I, as the owner of this duplex
20 property, need to have enough money in combination
21 from what I get from you and what I put into the
22 kitty in order to pay the heat, the lighting, the

1 electricity, and my mortgage. And that's what the
2 cash needs are.

3 I'm hoping it's becoming less confusing,
4 and I'm not making it worse, Your Honor.

5 Q Let me ask you a hypothetical. Suppose
6 you had a City that had 50 inside City customers
7 and 50 outside City customers.

8 A Yes.

9 Q Would the cash needs of the utility be
10 determined based on the cash needs approach for
11 that City?

12 A The cash needs would be what the cash
13 needs are, yes.

14 Q Right. And in allocating -- and the
15 City might charge a higher price to its outside
16 City customers than its inside City customers?

17 A I might charge \$60 to the outside
18 customers and \$40 to the inside customers.

19 Q So by having a differential rate, a city
20 might have its 50 percent of its customers who
21 live outside the City pay 60 percent of the costs,
22 right?

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1 A Correct.

2 Q And would the remaining 40 percent be
3 divided up among the 50 inside City customers?

4 A Yes. So I meet my hundred dollars cash
5 needs.

6 Q Okay.

7 A On a utility basis, my costs would be
8 \$60 to those customers outside. On a cash basis,
9 I need 100 total.

10 Q And then the last -- the next
11 highlighted sentence here, "thus," could you read
12 that for the record please?

13 A "Thus, the inside-City customers benefit
14 from having invested in and owning paid-up equity
15 in the system."

16 Q So is the benefit to the inside City
17 customers under this approach that they actually
18 get lower rates than they would otherwise?

19 A The benefit comes back in terms of lower
20 rates to the inside City customers. It doesn't
21 leave the system.

22 Q Okay. All right.

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1 When you say "it doesn't leave the
2 system," are you saying the money stays in the
3 water system enterprise fund?

4 A The water all stays within the
5 enterprise fund.

6 Q You said "the water all stays."
7 A I'm sorry. The revenues all stay within
8 the enterprise fund.

9 Q Hopefully the water does, too.

10 A Yes.

11 Q Now, has the AWWA had a policy since the
12 1960s with regard to diverting monies from a water
13 system for use for purposes unrelated to the water
14 system?

15 A Yes. I believe 1965 was the first of I
16 believe it's now four policies on that.

17 Q And are you familiar with the M5 manual
18 published by the AWWA?

19 A I am familiar with that.

20 Q Okay. And is the policy found in that
21 manual?

22 A That's probably the easiest place to

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1 find it.

2 Q Is this the M5 manual? Can you see?

3 A Yes.

4 Q All right. And --

5 MR. THOMAS: If I could. Just before we
6 get into what the M5 manual has to say, I would
7 like to lodge a relevance objection. Because I
8 think what the industry policy has to say really
9 doesn't bear on the constitutionality of the
10 City's water rates and the system --

11 THE COURT: And I think I made that
12 plain in our arguments yesterday morning. But
13 nonetheless I'm going to permit it because he's
14 entitled to testify that that's what the manual
15 says and he's seen it used that way many cases.

16 But that doesn't mean that what the City
17 is doing is unconstitutional.

18 MR. RAPHAEL: I appreciate your ruling,
19 Your Honor.

20 Just to clarify, this is the same policy
21 that was discussed in the City's corporate
22 designation deposition.

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1 THE COURT: Right.

2 MR. RAPHAEL: The --

3 THE COURT: Mr. Tuohy discussed it.

4 MR. RAPHAEL: That's correct.

5 THE COURT: And said they were not aware
6 of it.

7 MR. RAPHAEL: He was not aware -- the
8 City was not aware of it.

9 THE COURT: Right.

10 MR. RAPHAEL: But he also said the City
11 has followed the AWWA guidelines in the past in
12 setting its rates.

13 THE COURT: Yes, sir. No, I remember
14 that.

15 MR. RAPHAEL: All right.

16 BY MR. RAPHAEL:

17 Q Now, mr. Sapp, could you bring up,
18 please, Exhibit 107.1 and show the policy of the
19 AWWA at pages 2 to 3.

20 Is this the policy? And just for the
21 record, this is on page 33 of the M5 manual that's
22 been referenced. It also was Deposition

1 Exhibit 241. And here it's Plaintiff's
2 Exhibit 107.1.

3 What is the AWWA policy that you were
4 referring to on nondiversion? Could you point it
5 out.

6 A Well, this is the second section of that
7 policy designated by the number 2 on there.

8 It's a policy related to the financial
9 management of water utilities. And the second
10 numbered item in here, there's bulleted items as
11 well, subbulleted items.

12 The second sentence in here, the second
13 sentence I think is the operative one, that says:
14 "Water utility funds should not be diverted to
15 uses unrelated to water utility services."

16 Q All right. Now, in addition to the
17 AWWA, are there other authoritative sources or
18 treatises in the industry that speak to the
19 question of whether it's appropriate to transfer
20 monies from a water fund to a general fund for
21 uses unrelated to the water system?

22 A I believe the United States

1 don't think qualifies as a learned treatise, and
2 so I would object to it being read into the record
3 pursuant to 8.01-401.1.

4 MR. RAPHAEL: Your Honor, 8.01-401.1
5 refers to published treatises, periodicals, or
6 pamphlets on the subject of history, medicine, or
7 other science or art establishes a reliable
8 authority by testimony or by stipulation.

9 And I think that this clearly falls
10 within that language.

11 MR. THOMAS: Well, if I could add one
12 thing.

13 THE COURT: Yes, sir.

14 MR. THOMAS: On its face, without myself
15 reading it into the record, this training module
16 for the EPA from 2002, it says the modules are
17 being developed for new employees in particular.
18 It's an employee training module. I don't
19 think -- I think on its face it doesn't qualify
20 under 8.01-401.1.

21 MR. RAPHAEL: It's for employees of
22 water systems.

1 Environmental Protection Agency, an agency of the
2 US government, has incorporated this exact
3 sentiment in their trading documents.

4 Q All right. And let me -- you've
5 disclosed to the other side, to the City more than
6 30 days ago the EPA training module that you just
7 referenced which you cited in your report.

8 You cited the EPA module in your report,
9 correct?

10 A Yes.

11 Q And --

12 MR. THOMAS: If I could.

13 MR. RAPHAEL: Go ahead.

14 MR. THOMAS: Before we get there. I
15 believe the rule is that learned treatises can and
16 should be disclosed 30 days before in cases where
17 they will be read into evidence.

18 I believe the rule is that learned
19 treatises can be disclosed in these cases 30 days
20 before the entry of the statement.

21 THE COURT: Right.

22 MR. THOMAS: An EPA training module I

1 THE COURT: Well, whether it does or it
2 doesn't, it just doesn't seem to me to make much
3 difference. You know, what the EPA is
4 recommending doesn't make it unconstitutional to
5 do something any differently any more than what
6 AWWA recommends, thinks it's a good idea.

7 But that doesn't mean it's illegal if
8 somebody chooses not to follow it. It's their
9 proposed standards.

10 And I think that the witness can refer
11 to it. And I think it can be received in
12 evidence.

13 MR. RAPHAEL: I don't actually plan --
14 actually, I don't think it can be received in
15 evidence.

16 MR. THOMAS: Read into evidence.

17 MR. RAPHAEL: But it can be read.

18 THE COURT: The expert may give his
19 opinion based upon his review of the document.

20 MR. RAPHAEL: Thank you.

21 THE COURT: Yes, sir. Exception
22 preserved.

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1 MR. THOMAS: Thank you.
2 BY MR. RAPHAEL:
3 Q All right. Mr. Sapp, if you could bring
4 up Exhibit 107.3. I'm sorry. Exhibit 107.4.
5 Is this the EPA training module that you
6 described, Mr. Woodcock?
7 A Yes, it is.
8 Q And is this found on the EPA's Web site?
9 A Yes, it is.
10 Q And just for the record, EPA is the
11 Environmental Protection Agency of the United
12 States, correct?
13 A That's correct.
14 Q And which -- let's -- were there two
15 pages of this that you found significant?
16 A There were two pages of this, yes.
17 Q All right. Let's go to the first one.
18 Page 2 of 3 of this exhibit, which is actually
19 page 50 -- how long is this training module?
20 A Gee, 80, 90 pages. May even be 100. I
21 forget exactly how many. This is about halfway
22 through, as I recall.

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1 Q Here we are at page 50. That just calls
2 out the AWWA policy, correct?
3 A That calls out the AWWA that we're just
4 looking at, yes.
5 Q All right. And then there's the next
6 page that had you pointed out to me. Let's go to
7 that, please.
8 Ken, can you just bring up page 3 of 3
9 of the exhibit.
10 All right. Is this the slide on
11 overpricing?
12 A Yes.
13 Q What did you find significant about this
14 slide?
15 A What this -- this slide does is it's
16 giving the guidance from the EPA in terms of
17 pricing of water. There was an underpricing
18 slide, and this is an overpricing slide.
19 And basically what I found significant
20 here is that if a system overprices, it's clearly
21 charging more than it can justify.
22 And there's sometimes pricing is used to

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1 subsidize other services or functions, which I
2 found relevant here because that's what I believe
3 is going on.
4 Q All right. Thank you.
5 Mr. Woodcock, is this -- did you find
6 the EPA guidance here to be a reliable authority
7 on the practice of rate setting?
8 A In these elements, yes.
9 Q All right.
10 MR. RAPHAEL: And, Your Honor, pursuant
11 to Rule 8.01-401.1, I'd like to read in the
12 portions here which I'm allowed to do under the
13 rule. I'm going to read in the portions on the
14 right that are highlighted.
15 I think the 8.01-401.1 says that the
16 document can't physically come into evidence.
17 THE COURT: Right.
18 MR. RAPHAEL: But it says, quote, the
19 statements may be read into evidence.
20 So I'd like to do that now.
21 THE COURT: Well, yes, sir. You know
22 you can do it. But he can do it the hard way and

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1 say, "Well, before I ask you the question,
2 Mr. Woodcock, is it not true that the language
3 contained in the document about which you're going
4 to be asked the question says the following?"
5 He can do it, can't he?
6 MR. THOMAS: I suppose he can.
7 THE COURT: So we are.
8 MR. THOMAS: But I'd like to note my
9 objection to the extent that I don't believe that
10 this document itself qualifies for what can be
11 read in under the rule.
12 THE COURT: Fair enough. Fair enough.
13 Objection overruled, and the exception
14 noted.
15 MR. RAPHAEL: I'm going to try to read
16 this slowly for you. But I'm a recidivist and
17 sometimes don't succeed.
18 All right. This EPA training module at
19 page 53 reads: "A system that overprices collects
20 more revenues than requirements justify. Revenues
21 from overpricing are sometimes used to subsidize
22 other services or functions. Subsidies from

1 ratepayers are inconsistent with cost-based rate
2 making and generally unfair, particularly if
3 customers have not explicitly approved the
4 subsidy. The higher price induces customers to
5 underconsume; that is, to use less water than is
6 economically efficient."

7 That's the end of the exhibit.

8 BY MR. RAPHAEL:

9 Q Now, Mr. Woodcock, when the City's --
10 when monies are transferred by the City of Falls
11 Church from the water fund to the general fund as
12 a return on equity or management fee, are they
13 used for operating the water system?

14 MR. THOMAS: Objection.

15 THE COURT: That's been asked and
16 answered. He already answered that question
17 earlier.

18 Objection sustained.

19 MR. RAPHAEL: All right.

20 BY MR. RAPHAEL:

21 Q Are any monies in the general fund used
22 to operate the water system?

1 MR. THOMAS: Objection.

2 THE COURT: Actually, he answered that
3 as well.

4 MR. RAPHAEL: I'm sorry. I didn't -- I
5 don't recall that.

6 THE COURT: Well, maybe he didn't answer
7 that particular question. But it's so
8 self-evident.

9 You can go ahead and answer it.
10 Objection overruled.

11 THE WITNESS: Are any monies of the
12 general fund used to operate the water system?
13 No, other than the administrative costs that are
14 accounted for.

15 BY MR. RAPHAEL:

16 Q That's paid for by the water system.

17 A That's paid for by the water system,
18 yes.

19 Q Okay. Now, do the CAFRs report the
20 assessed value of real estate in the City of Falls
21 Church?

22 A Yes, they do.

1 Q And we've talked about the conversion
2 between the amount of money for the return on
3 equity transfer to the general fund and what that
4 represents on the tax rate.

5 A Yes.

6 Q Is it possible to use the reported
7 assessed value from the City's audited CAFRs to
8 calculate what that conversion figure is for the
9 various fiscal years?

10 MR. THOMAS: Objection on the basis of
11 relevance, Judge.

12 THE COURT: I'm sorry. I'm not sure I
13 understand the question.

14 MR. RAPHAEL: What I'm getting at, Your
15 Honor, is what is the value of the transfer in tax
16 dollars.

17 So we've had testimony, for example, in
18 Mr. Tuohy's deposition that the value this year is
19 6 cents. What I'm trying to show is that you can
20 establish what the number is each year based on
21 the data that's already in evidence and how we go
22 about doing that.

1 THE COURT: All right. Yes, sir.

2 MR. THOMAS: I don't think that he's
3 been qualified as an expert to give that
4 testimony. And I don't think that it's relevant.
5 Those are my objections.

6 THE COURT: Is that a mathematical
7 function? I mean --

8 MR. RAPHAEL: Yes, it is. It's just a
9 pure -- it's a pure math function.

10 THE COURT: I mean, why would this be
11 Mr. Woodcock's field of expertise? Simply because
12 he's so familiar -- familiar with rate setting
13 that you can make that kind of analysis, sir?
14 Mr. Woodcock?

15 THE WITNESS: Well, I can determine what
16 the dollar amounts are in order to make the
17 calculation, Your Honor. What the dollar amounts
18 of those transfers are.

19 THE COURT: Aren't there lots of
20 variables, though, with regard to setting the
21 City's tax rate that may not be reflected in these
22 hard numbers with regard to revenues from water

1 and other services?
 2 THE WITNESS: There certainly are, Your
 3 Honor. I think what my understanding of what
 4 Mr. Raphael was asking is if you take what those
 5 dollar amounts of the transfers are, can you
 6 calculate what the dollar impact on the tax rate
 7 is in terms of cents per hundred.

8 And to do that, one would have to know
 9 what the dollar amount is, which is what I've
 10 testified to, and I guess find where the assessed
 11 value is that tax rates are based on within the
 12 financial reports. And then it's purely
 13 mathematical after that.

14 MR. RAPHAEL: Yeah, I'm not offering him
 15 to show what the tax rate, you know, should have
 16 been or would have been or whatever. It's just to
 17 show what the equivalent value is in the amount of
 18 transfer in -- in cents on the tax rate.

19 THE COURT: Mr. Thomas.

20 MR. THOMAS: Again, I don't think he's
 21 been qualified as an expert to give that
 22 testimony.

1 And the prior testimony that the Court
 2 received, for example, from Mr. Tuohy is that
 3 these funds that come into the general fund are
 4 fungible. And then the City goes through a
 5 process of arriving at a tax rate.

6 And so I -- and so I don't think this --
 7 what this testimony would suggest that there is
 8 this direct connection between funds coming into
 9 the --

10 THE COURT: Well, I think that
 11 Mr. Woodcock's commendable candor suggests that he
 12 can do it by -- with the numbers he's gotten. But
 13 there still are intangibles with regard to setting
 14 tax rates.

15 It seems to me, you have this evidence
 16 anyway from Mr. Tuohy in which he essentially
 17 concedes your point.

18 MR. RAPHAEL: That's true. That's a
 19 fair point.

20 THE COURT: Objection sustained.

21 MR. RAPHAEL: I will be offering the
 22 chart later based on the evidence.

1 THE COURT: Yes, sir.

2 MR. RAPHAEL: All right.

3 BY MR. RAPHAEL:

4 Q Mr. Woodcock, do you have an opinion to
 5 a reasonable degree of professional certainty with
 6 regard to whether the management fee is a
 7 generally accepted utility rate-making practice?

8 MR. THOMAS: Objection.

9 THE COURT: Wait, wait. Whether the
 10 management fee what?

11 MR. RAPHAEL: Is a generally accepted
 12 utility rate-making practice.

13 THE COURT: Is a generally accepted --

14 MR. RAPHAEL: Is it a generally accepted
 15 utility rate-making practice.

16 THE COURT: Okay.

17 MR. THOMAS: Judge, again, I think this
 18 comes right up against the Court's earlier ruling.
 19 That is another way of saying is what the City
 20 currently doing correct or incorrect based on your
 21 view.

22 THE COURT: I think he's correct. I

1 mean, the documents that you've submitted about
 2 which Mr. Woodcock has testified choose a
 3 different course. But it seems to me for him to
 4 conclude that is what the Court has to conclude.

5 Objection sustained.

6 MR. RAPHAEL: All right. May I briefly
 7 address that, Your Honor?

8 THE COURT: Yes, sir.

9 MR. RAPHAEL: Your Honor, Virginia Code
 10 Section 8.01-401.3 which governs opinion
 11 testimony. And actually this is kind of -- this
 12 is relatively new. It's from 1993.

13 But subsection B of that says: "No
 14 expert or lay witness while testifying in a civil
 15 proceeding shall be prohibited from expressing an
 16 otherwise admissible opinion or conclusion as to
 17 any matter" -- thank you.

18 (The deputy turned on the power for the
 19 podium microphone.)

20 THE COURT: Where has that been for
 21 2 days?

22 MR. RAPHAEL: I guess it's been turned

1 off. I don't want to blow you away now.

2 And should I -- did you hear the first
3 half, of that or should I start over?

4 THE COURT: I reverse myself.

5 MR. RAPHAEL: Maybe you want me to turn
6 it off.

7 THE COURT: No, sir. That's fine. Go
8 ahead.

9 MR. RAPHAEL: Section 8.01-401.3 says,
10 in subsection B: "No expert or lay witness while
11 testifying in a civil proceeding shall be
12 prohibited from expressing an otherwise admissible
13 opinion or conclusion as to any matter of fact
14 solely because the fact is the ultimate issue or
15 critical to the resolution of the case. However,
16 in no event shall such witness be permitted to
17 express any opinion which constitutes a conclusion
18 of law."

19 So I am offering -- I'm not offering him
20 to say what Virginia law is. I am offering him --
21 this opinion --

22 THE COURT: But it smacks right up

1 against it. If he says it's not a permissible way
2 of doing it, then that means what Falls Church is
3 doing, the City of Falls Church is doing is
4 unlawful.

5 I mean, that's -- that's it. I agree
6 that that -- I'm familiar with this section and
7 how far an expert or opinion witness can go. But
8 I think it's going too far.

9 MR. RAPHAEL: Well, I'm not offering to
10 show -- he's not saying it's impermissible. He
11 saying it's not generally accepted in terms of how
12 it compares to what's generally done in the
13 industry. And that's a statement that he's fully
14 qualified to make.

15 THE COURT: I understood your question
16 to be phrased differently.

17 MR. RAPHAEL: Well, I think my question
18 was have you -- have you -- the question was
19 whether, to a reasonable degree of professional
20 certainty, the management fee is a generally
21 accepted utility rate-making practice, which is
22 something that's fully within his scope of

1 expertise as an expert in the rate-making
2 business. And I think that's fully consistent
3 with 8.01-401.3(b).

4 THE COURT: Mr. Thomas.

5 MR. THOMAS: Judge, first of all, the
6 Court ruled at the outset at Mr. Woodcock's
7 testimony that Mr. Woodcock would not be permitted
8 to come in and say what Falls Church is doing it
9 is doing incorrectly or correctly. That was the
10 Court's ruling.

11 THE COURT: Right. And Mr. Raphael is
12 saying he's not being asked that question. He's
13 being asked whether it's a generally accepted
14 practice, you know, based upon his experience.
15 And based upon his judgment.

16 MR. THOMAS: Right. And I don't believe
17 that 8.01-401.3 comes to Mr. Raphael's aid at all.

18 That talks about whether a witness
19 should be or could be prohibited from expressing
20 an otherwise admissible opinion or conclusion as
21 to any matter of fact solely because the fact is
22 the ultimate issue here.

1 The ultimate issue here is the
2 constitutionality of the City's rates.

3 THE COURT: Right.

4 MR. THOMAS: And they're saying these
5 rates are unconstitutional because they're
6 contrary to generally accepted rate-making
7 principles.

8 I think those dots connect quite
9 clearly, and this witness shouldn't be able to say
10 it.

11 THE COURT: I think so too. I'm going
12 to stand on my earlier ruling.

13 The objection is sustained.

14 MR. RAPHAEL: Just for the record,
15 Mr. Thomas misstated what I had offered it for,
16 not to say it's impermissible, but it's just not
17 generally accepted.

18 And I --

19 THE COURT: Well --

20 MR. RAPHAEL: It's a nuance. I
21 understand it's a nuance there, but I think it is
22 a significant difference.

1 THE COURT: Well, and my ruling was
2 initially based -- or my thinking on the first
3 question, the first question, impermissible as
4 opposed to not generally accepted.

5 But it's a fairly close call. I mean,
6 there really are no mysteries in this particular
7 case anyway. But there seems to me that --

8 MR. RAPHAEL: May I suggest --

9 THE COURT: It seems to me the Court
10 would be wiser to err on the side of not
11 permitting this response.

12 MR. RAPHAEL: With --

13 THE COURT: This opinion.

14 MR. RAPHAEL: With due respect, Your
15 Honor, if you don't permit it, then we'd have to
16 come back and try it again if it doesn't --

17 THE COURT: The case is not going to
18 turn on whether Mr. Woodcock thinks it's
19 permissible, but whether I do.

20 MR. RAPHAEL: I understand. May I
21 proffer what the statement would be?

22 THE COURT: Absolutely.

1 THE WITNESS: If permitted to testify to
2 this point, Mr. Woodcock would say that, to a
3 reasonable degree of professional certainty, the
4 management fee that's currently used by the City
5 of Falls Church is not a generally accepted
6 utility rate-making practice.

7 And similarly, he would testify that, to
8 a reasonable degree of professional certainty, the
9 City's practice -- well, may I ask this question?

10 BY MR. RAPHAEL:

11 Q Mr. Woodcock, do you have an opinion to
12 a reasonable degree of professional certainty
13 whether the City's practice of building a profit
14 into its revenue requirements is consistent with
15 generally accepted utility rate-making practices?

16 THE COURT: And I'll sustain --

17 MR. THOMAS: Objection.

18 THE COURT: -- that objection.

19 I think that's an easier question,
20 frankly. The first one I think is very, very
21 close, Mr. Raphael.

22 MR. RAPHAEL: I appreciate your candor

1 on that.

2 And I -- may I proffer that, if
3 permitted to testify, he would say, in fact, that,
4 to a reasonable degree of professional certainty,
5 the City's practice of building a profit into its
6 revenue requirements is not consistent with
7 generally accepted utility rate-making practices.

8 THE COURT: Yes, sir.

9 MR. RAPHAEL: Thank you.

10 That's all I have, Your Honor.

11 THE COURT: All right. It's almost
12 quarter of. And we have to adjourn at 4:00. So I
13 know that -- I'm certain that Mr. Thomas has more
14 than 15 minutes worth, correct?

15 MR. THOMAS: Yep.

16 THE COURT: All right. We're going to
17 adjourn.

18 Mr. Woodcock, you are, between now and
19 tomorrow morning, still in effect on the stand.

20 So you can't talk to your lawyers or really
21 anybody about your testimony, that which has been
22 given and that which will be given, because any

1 more than Mr. Raphael can consult with you right
2 now.

3 MR. RAPHAEL: Just to alert the Court to
4 an agreement that counsel reached yesterday. And
5 I respect whatever direction you give us on this.
6 We agreed yesterday, Mr. Thomas and I, that the
7 rule on witnesses as can applied to experts would
8 not prohibit us with consulting with our own
9 expert for purposes of helping us to prepare for
10 either the future examination, and I certainly
11 won't do that with respect to Mr. Woodcock, but
12 for preparing for the cross-examination of the
13 other side's expert. And that that would be work
14 product.

15 But we didn't want the --

16 THE COURT: Oh, sure, that's fine.

17 MR. RAPHAEL: Yeah, we didn't want the
18 rule to prohibit that and --

19 THE COURT: Oh, no, sir.

20 MR. RAPHAEL: All right. So I just
21 wanted to --

22 THE COURT: Just for the rest of his

1 testimony, cross-examination, redirect, you just
2 have to pretend you're still on the stand.
3 THE WITNESS: I understand, Your Honor.
4 MR. RAPHAEL: Thank you, Your Honor.
5 THE COURT: Thank you all so much. And
6 we're going to start, I promise, at 9 o'clock
7 sharp.
8 (Whereupon, at 3:50 p.m., the hearing
9 recessed, to reconvene at 9:00 a.m. on Wednesday,
10 September 16, 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