THE STATE OF NEW HAMPSHIRE
SUPREME COURT

#2009-0274

Appeal of City of Nashua
Appeal of Pennichuck Water Works, Inc.

Appendix to Brief of the City of Nashua

City of Nashua,

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APPENDIX
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CITY OF NASHUA

Petition for Valuation Pursuant To RSA 38:9

Order Addressing the Pennichuck Utilities' Motion to Dismiss

ORDER NO. 24,425

January 21, 2005

APPEARANCES: Upton & Hatfield, L.L.P. by Robert Upton, II, Esq., for City of Nashua; McLane, Graf, Raulerson & Middleton, P.A., by Steven V. Camerino for Pennichuck Water Works, Inc., Pennichuck East Utilities, Inc., and Pittsfield Aqueduct Company, Inc; Wadleigh, Starr & Peters, P.L.L.C., by Stephen J. Judge, Esq. for Merrimack Valley Regional Water District; Elizabeth Coughlin, Merrimack Valley Regional Watershed Council, Inc.; Stephen William for Nashua Regional Planning Commission; Fred S. Teeboom, a customer representing himself; Barbara Pressly, a customer representing herself; Drescher & Dokmo, P.A. by William R. Drescher, Esq., for the Towns of Amherst and Milford; Bossie, Kelly, Hodes, Buckley & Wilson, P.A., by Jay L. Hodes, Esq., for the Towns of Litchfield and Hudson; Mitchell & Bates, P.A., by Laura A. Spector, Esq., for the Town of Pittsfield; Eugene F. Sullivan, III for the Town of Bedford; Edmund J. Boutin, Esq., for the Town of Merrimack; Ransmeier & Spellman, P.A. by Dom S. D'Ambruoso, Esq. for Anheuser-Busch, Inc.; Michael S. Giaimo, Esq. for the Business & Industry Association of New Hampshire; New Hampshire State Representative Claire B. McHugh; Office of the Consumer Advocate by F. Anne Ross, Esq. for residential ratepayers; and Marcia A. B. Thunberg, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY AND BACKGROUND

This docket was initiated by a petition from the City of Nashua (Nashua) on March 25, 2004, seeking valuation of all plant and property of Pittsfield Aqueduct Company, Inc. (PAC), Pennichuck East Utilities, Inc. (PEU), and Pennichuck Water Works, Inc. (PWW) (together, the Pennichuck Utilities or Pennichuck) necessary to establish a municipal water works system. The subsequent procedural history has been detailed in Order No. 24,379 (October 1, 2004) and we will not reiterate it at length here. Briefly, the Commission granted interventions by interested parties and required Nashua to file supportive testimony in accordance with Puc 204.01(b). On

April 5, 2004, the Pennichuck Utilities filed a Motion to Dismiss in Full or in Part or, Alternately, to Stay Proceeding.[1]

On October 1, 2004, the Commission issued Order No. 24,379 requesting briefs on the following legal questions: 1) can Nashua take the assets of PEU and PAC; 2) can Nashua take assets of PWW that are not integral to the core system; 3) has Nashua properly followed the voting requirements of N.H. RSA Chapter 38; and 4) was the vote consistent with the requests made in Nashua's valuation petition? Nashua, the Pennichuck Utilities, Fred Teeboom, and Barbara Pressly filed briefs or position statements. Some members of the Merrimack Valley Regional Water District (District) filed letters expressing support of Nashua's Brief, though one District member wrote to clarify that the District's intervention is to provide members with information only and that, in its view, support of Nashua's brief was beyond the District's authority.

II. POSITIONS OF THE PARTIES

A. City of Nashua

Nashua argues that RSA Chapter 38 allows Nashua to take any plant and property of the Pennichuck Utilities lying outside the municipality that is required to promote the public interest, as determined by the Commission. In Nashua's view, the scope of authority to acquire extra-municipal plant and property is commensurate with the scope of the public interest that the Commission is authorized to consider. It contends that the statute makes clear that the

[1] In addition to proceedings at the Commission, Nashua and the Pennichuck Utilities have been in litigation on related matters in the New Hampshire Superior Court and United States Federal District Court. Among the issues has been whether the Commission or the Court should have jurisdiction over the valuation and taking. On September 1, 2004, the Hillsborough County Superior Court – Southern District ruled that Nashua could proceed with its valuation petition before the Commission, as the agency with primary jurisdiction to hear matters of this type.

Commission must determine how much plant and property situated outside the municipality the public interest requires the municipality to acquire. See, RSA 38:2; 38:6; 38:9; and 38:14.

RSA 38:12 clearly permits a municipality to expand plant beyond its boundaries pursuant to RSA 38:6-11, according to Nashua, and it avers that, in public utility matters, the scope of public interest and public good are broad. *See*, RSA 369:1 and 4; 374:26; 374:30; 375-B:7; 378:27; and 378:28. Determining the scope of public interest requires a balancing of the public goods and the public harms and Nashua contends that in some state eminent domain proceedings, including Montana, the public interest test involved a broad analysis of the impacts of a taking. Similarly, it points out that in Pennsylvania the public interest analysis is broad, involving review of the benefits and detriments to all affected parties.

Nashua urges the Commission to define the public interest broadly and review the interests of customers, ratepayers, the will of Nashua voters, PWW's shareholders, regional water supplies, and the effect on smaller systems that might be retained by the Pennichuck Utilities. The scope of taking, it contends, should be commensurate with the scope of public interest.

Unlike in past eminent domain proceedings before the Commission, while the Pennichuck Utilities are separate legal entities, each with its own assets, own service territories, and own corporate and legal history, Nashua contends that the utilities operate in an integrated manner. Taking of only assets situated in Nashua, it asserts, could cause the Pennichuck Utilities to lose economies of scale that would impact cost and quality of service.

Since 1913, Nashua points out, New Hampshire has allowed municipal purchase of plant and property outside municipal limits that is necessary and in the public interest. Based on that fact, it is apparent, according to Nashua, that the Legislature envisioned instances in which the

utility would want the municipality to acquire utility property outside the municipal limits such as when the utility would be left with small, uneconomic portions of its business. It cites for support the testimony of Representative Below on House Bill 528 before the Senate Committee on Executive Department and Administration on April 21, 1997, wherein Rep. Below testified as to the breadth of public interest the Commission would review.

According to Nashua, the Pennichuck Utilities' argument that RSA 38:6 prohibits a municipality from taking assets of a utility that does not provide service within the municipality is not supported by the broad public interest. Further, it ignores the reality of how PAC, PEU and PWW operate. In giving the Commission the authority to require a municipality to acquire property outside its municipal boundaries, Nashua contends the Legislature recognized that there might be situations where outlying property that is part of a utility system, if not acquired, would shift costs to the remaining ratepayers. PAC, PEU, and PWW are linked by economies of scale, it concludes, and, therefore, should be considered one system.

With respect to the confirming vote, Nashua avers that the Nashua Board of Aldermen intended to acquire the assets outside Nashua for the purpose of establishing a regional water district as evidenced by their passage of Resolution R-02-27. The Aldermen resolved to "establish a water works system and, in order to establish such water works system, to acquire *all or a portion of* the water works system serving the inhabitants of the City and others."[2]

According to Nashua, the voting procedure used by Nashua was the same as that used by the City of Berlin in a municipal taking of the J. Brodie Smith Hydro Station in Berlin, New

[2] Resolution: Endorsing and Encouraging the Creation of a Regional Water District, Providing for Municipal Acquisition of the Public Water Works System and Pursuing Possible City Membership in a Regional Water District on Mutually Beneficial Terms, dated December 2, 2002.

Hampshire[3] and in that case the Commission allowed Berlin to proceed under RSA Chapter 38. Similarly, in this case, Nashua states, the acquisition was discussed at ward meetings and in other forums around Nashua. Nashua also relied on newspaper articles in the Nashua Telegraph[4] as well as PAC, PEU, and PWW's vigorous public relations campaign to provide the balance of information to educate voters. On January 14, 2003, by a margin of 6505 to 1867, Nashua voters confirmed Resolution R-02-127. On January 28, 2003, pursuant to RSA 38:6, the Aldermen passed Resolution R-03-160 in which the Aldermen determined it necessary and in the public interest to acquire PWW, PEU, and PAC. Finally, on February 5, 2003, Nashua indicated that it notified PWW, PAC, and PEU of its interest to acquire all plant and property of the utilities.

B. Pennichuck East Utilities, Inc., Pittsfield Aqueduct Company, Inc., and Pennichuck Water Works, Inc.

The Pennichuck Utilities argue that the plain meaning of RSA Chapter 38 is contrary to Nashua's position and that RSA 38:6 is unambiguous in its requirement that a municipality may only take property of a utility that serves the municipality. The Pennichuck Utilities also make the following assertions: PAC and PEU are separate legal corporations and neither PAC nor PEU generates or distributes water for sale in Nashua .[5] While the pipes, mains, and water supply of each of the Pennichuck Utilities are distinct and owned by the respective utility, PWW employs the personnel necessary to operate the three utilities, and owns all of the trucks and office equipment used to serve the customers of PAC, PEU, and PWW. PWW charges PAC and PEU their proportionate shares of overall costs. Furthermore, Pennichuck argues that the Legislature used the singular form of the word "utility" in 38:7; 38:8; 38:9; 38:10; and 38:11 and

[3] The docket, DE 00-211, was closed before a final determination was made, when the City of Berlin withdrew its request to take the facility by eminent domain.
[4] Nashua attached newspaper articles dated 1/6/03, 1/7/03, 1/8/03, 1/10/03, 1/11/03; 1/12/03 and 1/14/03.
[5] PEU serves approximately 4,526 customers in the Towns of Atkinson, Bow, Derry, Hooksett, Litchfield, Londonderry, Pelham, Plaistow, Raymond, Sandown, and Windham, New Hampshire. PAC serves approximately 645 customers in the Town of Pittsfield. Pennichuck Utilities Brief at 3.

the Legislature did not use the term to refer to affiliate public utilities. It also states that utility affiliates have existed for years, preceding the Legislature's amendment of RSA Chapter 38 in 1997 and the Legislature did not expand the definition of utility to include affiliates. According to Pennichuck, eminent domain statutes are construed narrowly, which further supports the argument that RSA Chapter 38 should not be expanded beyond its plain meaning.

Pennichuck argues that Nashua's request essentially asks the Commission to pierce the corporate veil. PAC, PEU and PWW are three separate, legally distinct corporations and Pennichuck contends that the New Hampshire Supreme Court limits piercing of the corporate veil to instances when the corporate identity has been used to promote injustice or fraud.

Nashua's interpretation of RSA Chapter 38, Pennichuck argues, could turn the public interest presumption in RSA 38:6 on its head. Following Nashua's logic, the vote by twenty percent of Nashua's voters creates a presumption that taking the water systems in Bow, Newmarket, and Salem is in the public interest. This flawed logic, it asserts, would lead to patently absurd results.

Pennichuck also posits that the Legislature contemplated a municipality needing to take less than the complete plant and property of a utility as evidenced by RSA 38:9,III and the provisions allowing severance damages. Legislative testimony on RSA Chapter 38, it states, indicates the legislature envisioned municipalities establishing distribution systems within municipal bounds and only taking portions of the system outside the municipality to avoid stranding customers and the legislative history thus confirms the plain meaning of RSA Chapter 38.

The New Hampshire Supreme Court has affirmed the importance of municipal votes, according to Pennichuck. In the case involving Manchester Water Works and its decision to

fluoridate water, Pennichuck points out that the Court held that Manchester Water Works had violated RSA 485:14 by failing to obtain approval from the other towns it served.

With respect to the confirming vote, the Pennichuck Utilities aver that the action taken by the Board of Aldermen is not consistent with the referendum presented to voters. The referendum posed to voters was limited to whether acquiring "all or a portion of the water works system currently serving the inhabitants of the City and others be confirmed." It asserts that the satellite systems in Newmarket, Raymond, and Salem do not serve "the inhabitants of the City". The Pennichuck Utilities argue, therefore, that Nashua's attempt to lay claim to the assets of PAC, PEU and PWW exceeds the scope of authority granted by the voters.

Finally, the Pennichuck Utilities assert that Nashua is essentially acting in the District's stead. Because RSA 38:2-a, VI specifically prohibits regional water districts from having the power of eminent domain, it argues that the effort by Nashua to do what the District could not should be prohibited.

C. Mr. Fred S. Teeboom

Mr. Teeboom avers that the City of Nashua did not follow the voting requirements of RSA Chapter 38. He also contends that the votes taken are not consistent with the requests made in Nashua's Valuation Petition. In support of his argument, Mr. Teeboom states that Nashua failed to provide voters with sufficient information in support of and against the acquisition. The lack of information did not allow voters to understand the full ramifications of the vote. He contends that Nashua downplayed the actual costs of and revenue bond needs for the eminent domain proceeding. He also contends that relevant cost comparison and valuation information was not provided to voters prior to the vote and the information is still outstanding.

Mr. Teeboom argues that Resolution R-02-127 endorses Nashua's acquisition of PWW but fails to state why the acquisition is in the public interest. The proffered reason is only a general assertion that maintenance of an adequate supply of clean, affordable drinking water is essential to the viability of any community. He also states that Nashua offers no explanation as to why public ownership is better than private ownership. RSA 38:3 required voters be "duly warned" of the confirming vote and Mr. Teeboom asserts that voters were only supplied information through local newspaper articles and limited informational meetings. Mr. Teeboom concludes that this does not qualify as being duly warned and Nashua should have provided voters with negative aspects of the acquisition rather than solely disseminating positive information.

D. Ms. Barbara Pressly

Ms. Pressly supported the purchase and regionalization of the water company but objected to certain language contained in the District Charter. Ms. Pressly provided a detailed account of how the decision to create the Charter came about. Ms. Pressly explained her involvement in drafting the Charter and then how the Charter language changed subsequent to her involvement. Ms. Pressly averred that it would be "logical and in the public interest to maintain the status quo of the delivery service and transfer only ownership" of the water company. Position Statement filed October 25, 2004. Ms. Pressly recommended that Nashua be given more votes on the District's board because Nashua ratepayers constitute such a high percentage of customers served. She also advocated for more Commission oversight of the District.[6]

[6] Ms. Pressly's comments focus on the Regional Water District Charter and are not pertinent to the specific questions posed for consideration of the Motion to Dismiss. The actions she urges the Commission to take, moreover, are beyond the Commission's authority.

III. COMMISSION ANALYSIS

By Order No. 24,379 (October 1, 2004), we provided, among other things, that the parties submit briefs addressing four questions: 1) does RSA Chapter 38 grant Nashua the authority to take the property of PEU, PAC and PWW, three affiliated entities that are subsidiaries of Pennichuck Corporation; 2) can Nashua take assets of PWW that are not integral to the core system; 3) has Nashua properly followed the voting requirements of RSA Chapter 38; and 4) was the vote consistent with the requests made in Nashua's valuation petition?

A. Does RSA Chapter 38 Grant Nashua Authority to take PEU, PAC and PWW?

The first question is a legal issue that must be resolved as a threshold matter in order to promote the orderly conduct of the proceeding. In analyzing this issue, we first take official notice that each of the three affiliates is a separate corporate entity,[7] that each has been granted separate franchises for the areas they serve,[8] that each is separately assessed by the Commission pursuant to RSA Chapter 363-A,[9] and that only PWW is engaged in the sale of water in Nashua.[10] Nashua contends its eminent domain authority extends to all three affiliates; the Pennichuck Utilities contend that Nashua's authority does not extend to the property of PEU or PAC.

Inasmuch as a municipality may exercise only those powers the legislature specifically grants, and those powers that are implied or incidental to an express grant, *Lavallee v. Britt*, 118 N.H. 131, 131 (1978), the first step in our analysis is to examine the enabling language contained in RSA 38:2. That provision states: "Any municipality may...take...plants for the manufacture

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[7] Pennichuck Utilities' Memorandum of Law on Scope of RSA Chapter 38, October 25, 2004 at 2-3.
[8] See, e.g. *Pennichuck Water Works, Inc.* 68 NHPUC 253 (1983); *Pennichuck East Utilities, Inc.* 83 NHPUC 191 (1998); *Pittsfield Aqueduct Company, Inc.* 83 NHPUC 44 (1998).
[9] State of New Hampshire Public Utilities Commission Fiscal Year 2005 List of Utility Assessments at 27-28.
[10] *Pennichuck Water Works, Inc.* 68 NHPUC 253 (1983).

and distribution of...water for municipal use, for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized, or directed by the commission."

After setting forth the grant of authority, RSA Chapter 38 then details the process that a municipality must follow in order to exercise that authority. RSA 38:3 provides that a 2/3 majority vote of the governing body must approve the acquisition, which in turn must be confirmed by a majority vote at a general or special election of the municipality's voters. This confirming vote creates a rebuttable presumption that the taking is in the public interest. RSA 38:6 then requires that the governing body "notify in writing any utility engaged, at the time of the vote, in...distributing...water for sale in the municipality, of the vote." That section also provides that the municipality "may purchase all or such portion of the utility's plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, and shall purchase that portion, if any, lying without the municipality which the public interest may require...as determined by the commission."

RSA 38:7 concerns a reply by the utility. If the reply is in the negative, then the municipality may proceed to condemnation of the property as provided by RSA 38:10. In the event the municipality and the utility are not agreed as to price and to how much, if any, of the property to be taken, the Commission, after notice and hearing, must decide what will be condemned and the price to be paid. RSA 38:9. Unless the municipality and the utility agree on the sale of utility property, pursuant to RSA 38:11, the Commission must determine whether the taking is in the public interest and may set conditions in order to satisfy that the public interest will be met.

On first reading, RSA 38:2 appears to be a broad grant of authority to a municipality. It allows the taking of property for use not only by the municipality and its inhabitants but by

"others", which is undefined, and "for such other purposes," also undefined, as authorized by the Commission. Nashua argues, accordingly, that it may take the property of the three utilities, PWW, PEU and PAC. The Pennichuck Utilities disagree, arguing that RSA 38:6 limits Nashua's authority to take the property only of a utility engaged in the sale of water in Nashua, namely PWW.

While the Pennichuck Utilities contend that the plain and ordinary meaning of RSA Chapter 38 is unambiguous, we disagree. The parties have posed plausible conflicting interpretations of RSA Chapter 38 based on references to separate, specific statutory language. As a consequence, in order to resolve the conflict, we look to case law, legal treatises, and to recognized rules of statutory construction for guidance on how to interpret the breadth of the power of eminent domain. First, as an overarching principle, we recognize that a legislative grant of power to condemn for a public use may be exercised only within a clear definition of the grant, bounded by the express words or necessary implication of those words, *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 181 (1940). In addition, we note that "Statutes conferring the power of eminent domain are subject to strict construction against the one exercising the power and in favor of the landowner." 26 Am Jur2d, Eminent Domain §20. Furthermore, we must interpret the statute "not in isolation, but in the context of the overall statutory scheme" and we must "keep in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole." *Appeal of Ashland Electric Department,* 141 N.H. 336, 341 (1996). Finally, in light of the internal conflict posed by the seemingly broad grant of authority that Nashua argues is contained in RSA 38:2 and the limitation that the Pennichuck Utilities argue is contained in RSA 38:6, we turn to legislative

history to determine the Legislature's intent. *Petition of Public Service Co. of New Hampshire*, 130 N.H. 265, 282 (1988).

Within this analytical framework, the crux of the issue here is the proper interpretation of RSA 38:6. Nashua essentially ignores the portion of the statute that requires notice to a utility engaged in the sale of water in Nashua and focuses instead on the later reference in RSA 38:6 to acquiring such property as the public interest requires. Pennichuck, by contrast, centers its argument on the required notice to a utility engaged in the sale of water in Nashua, which would be limited to PWW. The relevant questions then become: Is RSA 38:6 a mere notice provision, *i.e.*, can the reference to a utility engaged in the sale of water in the municipality be read broadly or overlooked? Or does RSA 38:6 constitute a substantive limitation on the grant of authority in RSA 38:2, *i.e.*, must the reference to a utility engaged in the sale of water in the municipality be strictly construed? Furthermore, is RSA 38:6 instructive as to legislative intent, *i.e.*, can it be read in concert with legislative history and other principles of statutory construction to divine the proper interpretation?

To answer these questions, we begin first by considering RSA 38:6 through the lens of a strict construction which, based on the citations above, we conclude we are required to do. In the context of a strict construction, we must give meaning to the language requiring that the governing body notify the "utility engaged...in...distributing...water for sale in the municipality." RSA 38:6. Consequently, because PWW is the only utility selling water in Nashua, it follows that only PWW could be the recipient of a valid notice and, therefore, only the property of PWW could be taken.

As to Nashua's argument regarding the language later in RSA 38:6 that the municipality "shall purchase that portion, if any, [of the plant and property] lying without the municipality

which the public interest may require," that particular public interest determination must be read in the context of a narrowly construed grant of authority and not in a manner that would invalidate the notice requirement. *Appeal of Ashland*, 141 N.H. at 341 (one must read two statutes of similar subject matter so as not to contradict one another and to effectuate the overall legislative purpose). In addition, we must read the provision in the context of the statute overall and not isolate particular words or phrases. *Appeal of Ashland*, 141 N.H. at 341.

Moreover, Nashua's approach would conceivably make the taking power pursuant to RSA 38:2 virtually unlimited, which would be incompatible with the Court's ruling in *Maine-New Hampshire Interstate Bridge* that a power of eminent domain may be exercised only within a clear definition of the grant of authority. In *Maine-New Hampshire Interstate Bridge,* the Bridge Authority's taking of an easement for use by a utility was neither expressly authorized nor necessarily implied by its enabling statute. 91 N.H. at 181. In this case, Nashua seeks to make the reference in RSA 38:2 to "others" limited only by the Commission's determination of the scope of the public interest, which we conclude that, as is applied to PEU and PAC, would be an unwarranted expansion of the enabling language.

The strict constructionist approach is supported also by the Legislature's actions in adopting RSA Chapter 498-A, the Eminent Domain Procedure Act. While RSA Chapter 498-A was later amended to exempt municipal takings of utility property pursuant to RSA Chapter 38, see Laws 1981, 3:2; Laws 1990, 70:3, the Legislature's commitment to elements of due process cannot simply be overlooked in the context of a public utility condemnation. This conclusion is bolstered by the Court's observations in *Fortin v. Manchester Housing Authority*, 133 N.H. 154 (1990) that RSA Chapter 498-A "protects the proprietary rights of individuals by imposing numerous procedural burdens on the condemning authority." 133 N.H. at 157. It is reasonable

to conclude that the Court, in light of its decision in *Fortin*, would give comparable weight to procedural steps that serve to safeguard proprietary interests in this case as well.

In seeking to resolve the conflicting interpretations of RSA Chapter 38 posed by the parties, we look also to legislative intent as expressed through its legislative history. In his opening remarks before the Senate Committee on Executive Departments & Administration on April 21, 1997, concerning the re-enactment of RSA Chapter 38, Representative Bradley indicated that House Bill 528 clarifies, simplifies and "lays some new groundwork for what is an existing right now of municipalities, towns and cities across the state to, through a process, take over the existing utility network within their community or in some circumstances outside of their community."[11] In addition, Representative Below noted that "it is important to realize that the right of municipalities to municipalize a monopoly utility system has existed from early in this century and it exists in almost every state in the nation, and it has been exercised from time to time."[12] Representative Below acknowledged as well "that a municipality may have to acquire some property outside of its boundaries. If there [are] some customers that would otherwise be stranded with a small distribution line that crosses a municipal boundary the commission would have the power to order the utility that is selling its property or having its property acquired and also order the municipality to acquire that portion of a system that may be outside of their boundaries."[13]

Our reading of the legislative history of the re-enactment of RSA Chapter 38 persuades us that the Legislature intended that the extent of the taking power that could be exercised beyond municipal boundaries would be limited. This conclusion is driven in good part by

[11] New Hampshire Senate Committee on Executive Departments and Administrative, April 21, 1997 Committee Report, p. 1.
[12] Id. at 3.
[13] Id. at 7

Representative Below's stated concern that a municipality may have to take some property outside its boundaries in order to prevent the stranding of some customers. The fair inference to be drawn from his statement is that extra-territorial takings were presumed and intended to be limited. The legislative history also makes repeated references to the taking of the property of a utility, in the singular, and does not appear to contemplate the taking of the property of multiple utilities, as Nashua seeks to do. It is also instructive to note that, given that PWW, PEU and PAC are separately formed and franchised utilities, that the stranding concern espoused by Representative Below would seem to be logically obviated with respect to customers of PEU and PAC if Nashua were only permitted to pursue a taking of the property of PWW.

The legislative history and the legislative intent, therefore, are in conflict with Nashua's expansive interpretation of RSA Chapter 38. Moreover, Nashua's interpretation would lead to the incongruous result that a single municipality could effectively "municipalize" property in the 21 towns and cities that the Pennichuck Utilities serve. Finally, if Nashua's expansive interpretation of RSA Chapter 38 were to be given credence, it would mean that Nashua had the power to take property on a scale equivalent to a regional water district. We know, however, that the Legislature specifically held back the power of eminent domain for water districts that are formed pursuant to RSA 38:2-a. RSA 38:2-a, VI could not be clearer: "No regional water district shall have the authority to take property by eminent domain." Allowing Nashua to take the property of up to 21 towns and cities and either operate them as a district or transfer them to the District would appear to violate the intent of RSA 38:2-a,VI. As the Court noted in *Maine-New Hampshire Interstate Bridge,* the Legislature could have granted such power but chose not to; unless the power can be found by express words or clear implication of the statute, there can be no such grant of authority. 91 N.H. at 181.

Based on the overall statutory scheme, the construction of the statute as a whole, and the legislative history and intent, the related threads of the analysis of RSA Chapter 38 lead to the conclusion that the eminent domain authority delegated by the Legislature in RSA 38:2 should be narrowly construed and that the notice requirement in RSA 38:6 should be given full effect. Accordingly, we find that the property of PEU and PAC may not, as a matter of law, be taken by the City of Nashua.

B. Can Nashua Take Assets of PWW that are not Integral to the Core System?

We have determined that Nashua is not entitled to take the property of PAC and PEU but that Nashua is entitled to take the property of the utility that serves Nashua, namely PWW, if we determine the taking to be in the public interest. We now address the issue of how much of PWW's property Nashua has a right to pursue. Preliminarily, we note that the question as posed above implies a standard for taking, i.e., whether assets to be taken are integral to the core system. Such a standard is not found in statute and has not been established by the Commission. Consequently, the question is more accurately stated: What assets of PWW may Nashua pursue through condemnation?[14]

RSA Chapter 38 contains no language defining the extent of a municipality's taking, other than the requirement that it be some or all of the utility that provides water to the inhabitants of Nashua, as the Commission finds to be in the public interest. PWW's franchise includes the entire municipality of Nashua, as well as areas of three towns that are physically

[14] The parties are not disadvantaged by our recasting of the question, as the determination of the extent of PWW's assets that Nashua may be entitled to take will be a factual one, based on the record yet to be developed in this proceeding.

interconnected to PWW's Nashua facilities[15] and portions of eight other towns that are not physically interconnected.[16]

RSA Chapter 38 does not expressly restrict a municipality to taking only the minimum amount of plant and property needed to serve its inhabitants, or require that the customers of the newly formed municipal water system all reside within the municipality. Nor is there a requirement that the assets to be taken be physically located within, or even connected to, the municipality. To the contrary, within the context of our discussion in the previous section, which limits Nashua's authority to PWW, RSA 38:2 states that a municipality is entitled to take "plants for the manufacture and distribution of water for municipal use, for the use of its inhabitants *and others*..." (emphasis supplied). RSA 38:6 states further that the municipality "may purchase all or such portion of the utility's plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, *and shall purchase that portion, if any, lying without the municipality which the public interest may require...* " (emphasis supplied).

When feasible, we must construe the language of the statute in accordance with its plain meaning. *Appeal of Ashland Electric Department*, 141 N.H. at 341. As discussed above, RSA 38:2 expressly authorizes taking of plant and property "for the use of its inhabitants and others". Furthermore, RSA 38:6 expressly allows a municipality to take property outside its municipal boundaries "which the public interest may require". Finally, RSA 38:9 states that, when the municipality and the utility fail to agree upon how much property "within or without the municipality the public interest requires" be taken, the Commission will make the determination.

[15] Portions of Amherst, Hollis and Merrimack are served through facilities interconnected to the Nashua facilities. Pennichuck Utilities Memorandum of Law on Scope of RSA Chapter 38, October 25, 2004 at 2.
[16] Portions of Bedford, East Derry, Epping, Merrimack, Milford, Newmarket, Plaistow and Salem are served through facilities that are not interconnected to the Nashua facilities. Pennichuck Utilities Memorandum of Law on Scope of RSA Chapter 38, October 25, 2004 at 2.

We conclude, therefore, that Nashua is entitled to pursue all assets of PWW, regardless of which customers those assets serve and where the assets are located. Whether it is in the public interest to allow Nashua to take any or all of PWW's assets, however, remains a factual determination of the public interest for the Commission to make. *See* RSA 38:10.

C. Has Nashua Followed Voting Requirements of RSA 38:3?

In order for a municipality to take utility property, it must first obtain a 2/3 majority vote of the governing body to do so. RSA 38:3. The vote must then be confirmed by "a majority of the qualified voters at a regular election or at a special meeting duly warned in either case" within one year from the date of the initial vote of the governing body. If favorable, the majority vote will create a rebuttable presumption that the taking is in the public interest. RSA 38:3.

It is uncontested, from the submissions of Nashua and the Pennichuck Utilities, that the governing body, in this case the Nashua Board of Aldermen, passed by a 2/3 majority a resolution to "establish a water works system and acquire all or a portion of the water works system currently serving the inhabitants of the City and others." Board of Aldermen Resolution No. R-02-127, November 26, 2002. Nashua has thus satisfied the first prong of the required votes necessary to pursue a taking.

The second voting requirement is that a majority of the voters of the municipality confirm the decision to take the utility property, within one year of the resolution. Again, according to the uncontested submissions of Nashua and PWW, the voters of Nashua approved by nearly 78% the Aldermen's resolution to acquire "all or a portion of the water works system currently serving the inhabitants of the City and others." (8,395 votes were cast, 6,525 of which were in favor.) This vote has been represented, without challenge, to have occurred on January 14, 2003, which satisfies the one year requirement of the statute. The Pennichuck Utilities argue that,

although a majority voted in favor, the voter turnout was very low and the information provided in advance of the vote was not specific as to the assets to be taken. Mr. Teeboom shares the concern that the information prior to the vote did not fully inform voters.

RSA 38:3 is silent as to whether it requires a majority of votes cast in support or a majority of eligible voters in support. New Hampshire law, however, resolves this question in a similar case. In *Laconia Water Company v. Laconia,* 99 N.H. 409, 410 (1955), the City of Laconia sought to acquire by eminent domain the Laconia Water Company and, pursuant to the statutory requirements at the time, a majority of the "qualified voters" had to approve the acquisition. Laconia Water Company challenged the vote, in which a majority of those voting approved, but the majority in favor was far less than a majority of the qualified voters in the city. The court rejected the water company's argument stating that, absent a statutory provision to the contrary, the city needed to attain a majority of those qualified voters *at the meeting*, not a majority the qualified voters *of the city*. 99 N.H. at 412. The *Laconia* Court noted this is the general rule, long respected, so that "[s]ilence on the part of the members not voting cannot be counted against the express voice of another part voting." 99 N.H. at 411, quoting *Richardson v. Union Congregational Society*, 58 NH 187, 188 (1877).

Mr. Teeboom argues that the voters were not "duly warned" because Nashua did not pose the issue in a "pro" and "con" format as votes for some purposes require. This is an issue that has been addressed by the Hillsborough County Superior Court in Docket 02-E-0441, *Fred S. Teeboom v. City of Nashua*. The Superior Court, on January 6, 2003, ruled that Nashua was not required to present the vote in the form Mr. Teeboom suggests, and denied Mr. Teeboom's request for declaratory or injunctive relief. Similarly, we do not find the vote invalid for having been presented in the format that Nashua selected.

Further, Mr. Teeboom argues that Nashua did not present adequate forums on the proposal to voters prior to the vote and thus did not meet the requirement that voters be "duly warned" prior to the vote. We do not construe the statute to require that voters be fully briefed on all aspects of the issue, only that they be put on notice of the place, day and hour of the vote and the subject matter of the question to be posed. We will not invalidate the vote on the basis that Nashua did not present the matter to the public as often or in the format Mr. Teeboom might have preferred. Based on the information presented, Nashua has met the voting requirements of RSA 38:3.

D. Was the Vote Consistent with Requests in Nashua's Valuation Petition?

The final question we posed for briefing was whether the vote taken on January 14, 2003, was consistent with the petition filed with the Commission on March 25, 2004. Because we have found that Nashua is not entitled to pursue the assets of PAC or PEU, it is not necessary to determine if the vote sufficiently addressed the assets of those utilities. Further, having found that Nashua is entitled to pursue the assets of PWW both within and without Nashua's municipal boundaries, we only need to evaluate if the confirming vote was consistent with a taking of PWW.

The language of the vote, as presented by Mr. Teeboom[17] and uncontested by the Pennichuck Utilities and Nashua, mirrors the Board of Aldermen's resolution R-02-127. It asks if the voters will confirm the resolution to "establish a water works system and, in order to establish such a water works system, to acquire all or a portion of the water works system currently serving the inhabitants of the City and others..." It then states that "[a] YES vote means that the City may continue to pursue acquisition of the Pennichuck water system under the procedures outlined in RSA 38. A NO vote means that the City may not acquire the water system

[17] Teeboom Brief, Exhibit III.

now, and the issue may not be submitted to the voters again for at least two years." The resolution clearly puts voters on notice that the vote is whether to acquire some or all of the Pennichuck water system serving the inhabitants of Nashua and others which, in light of the rulings contained herein, pertains only to the property of PWW. The Pennichuck Utilities argue that the "system" Nashua voted to take must be limited to the "core system" of interconnected facilities serving Nashua. We disagree, finding no basis to conclude that the vote extended only to the physically integrated so-called "core system" of PWW. The vote is consistent with the extent of the City's authority and, therefore, Nashua has satisfied the threshold voting requirements of RSA 38:3 and is entitled to pursue the valuation petition.

E. Procedural Issues

Finally, we must address outstanding procedural issues. The Business and Industry Association of New Hampshire (BIA), which claims among its members some PWW customers, sought late intervention and stated it did not anticipate sponsoring testimony. We will grant the request but encourage the BIA and all parties, in the interests of efficiency, to join where possible, and avoid duplicative lines of testimony and examination.

A procedural schedule has not yet been adopted for the duration of this docket. We understand from a filing of the Pennichuck Utilities on December 16, 2004, that they intend to submit a Motion for Summary Judgment and have asked for 10 days from the issuance of this order to make their filing. We granted the request by secretarial letter December 21, 2004. The Motion for Summary Judgment, therefore, is due January 31, 2005. As recommended by the Parties and Staff, responses thereto must be filed within 30 days from the date the Motion is due, that is, March 2, 2005.

Another threshold issue discussed at the prehearing conference was whether the valuation inquiry and the public interest inquiry should proceed in tandem or one should precede the other. The Staff letter stated that the Parties and Staff recommended that four days after the submission of objections to the Motion for Summary Judgment, those interested may file "statements or memoranda on the question of whether the Public Interest and Valuation issues should be bifurcated in this proceeding." We accept this recommendation and await these submissions, which will be due March 8, 2005. The only other procedural date proposed as a result of the prehearing conference was a technical session. The recommendation had been to hold the session on March 8, 2005, which would have been 30 days from the date statements were filed on whether to separate the valuation and public interest inquiries. Though the timing seems somewhat lengthy, we will adopt the recommendation of the Parties and Staff and schedule a technical session 30 days from the date that memoranda on bifurcation are filed, that is, April 8, 2005.

The letters also refer to discussion, though no resolution, regarding a "data room" for all documents related to the case. This would be in addition to the files (both electronic and in hard copy) maintained at the Commission, all of which are open for inspection. We believe it is appropriate to have a full set of materials available for review in the Nashua area, but will not order creation of a data room at this time, as we understand the Parties and Staff will be discussing this at the April 8, 2005 technical session. To assist in those discussions, however, we will require the data room to meet the following conditions: it shall make materials available for review during regular business hours; it shall allow copying, at a reasonable fee, of any materials which parties or members of the public may request; and information which the Commission

determines to be confidential and exempt from public disclosure pursuant to RSA Chapter 91-A shall be available only in redacted form.

We will not rule on other procedural issues that have been discussed, such as the use of electronic filing, as we understand the Parties and Staff are still working on recommendations. We will, however, provide the following guidance: we expect the Parties and Staff to use electronic means where possible, and we will waive administrative rules as needed to facilitate electronic exchange of filings and discovery.

Based upon the foregoing, it is hereby

ORDERED, that the Pennichuck Utilities' Motion to Dismiss as to Pittsfield Aqueduct Company, Inc. and Pennichuck East Utilities, Inc. is hereby GRANTED; and it is

FURTHER ORDERED, that the Pennichuck Utilities' Motion to Dismiss as to Pennichuck Water Works is hereby DENIED; and it is

FURTHER ORDERED, that the City of Nashua may proceed in this docket as to the assets of Pennichuck Water Works, Inc. and not as to the assets of Pittsfield Aqueduct Company, Inc. and Pennichuck East Utilities, Inc.; and it is

FURTHER ORDERED, that the intervention request of the New Hampshire Business and Industry Association is GRANTED; and it is

FURTHER ORDERED, that PWW has until January 31, 2005 to file a Motion for Summary Judgment, responses to which shall be submitted by March 2, 2005; and it is

FURTHER ORDERED, that memoranda on the sequencing of the inquiries on public interest and valuation shall be filed on March 8, 2005; and it is

FURTHER ORDERED, that there shall be a technical session on April 8, 2005 at the offices of the Commission, at which time the data room and other procedural issues will be addressed.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of January, 2005.

Thomas B. Getz	Graham J. Morrison	Michael D. Harrington
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

REVISED
08/06/08

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 04-048

CITY OF NASHUA

RSA 38 Proceeding re Pennichuck Water Works

Order Approving Taking and Determining Value

ORDER NO. 24,878

July 25, 2008

APPEARANCES: Upton and Hatfield, L.L.P. by Robert Upton II, Esq. and Justin C. Richardson, Esq. for City of Nashua; McLane, Graf, Raulerson & Middleton, P.A. by Steven V. Camerino Esq., Sarah B. Knowlton Esq., and Thomas J. Donovan, Esq. and Baker, Donelson, Bearman, Caldwell & Berkowitz, P.A. by Joe A. Conner, Esq. for Pennichuck Water Works, Inc., Pennichuck East Utility, Inc., Pittsfield Aqueduct Co., Pennichuck Water Service Corp. and Pennichuck Corp.; Ransmeier & Spellman, P.C. by Dom S. D'Ambruoso, Esq., Daniel J. Mullen and John T. Alexander, Esq. for Anheuser-Busch, Inc.; Eugene F. Sullivan III, Esq. for Town of Bedford; Boutin Associates, P.L.L.C. by Edmund J. Boutin, Esq. for Town of Merrimack; Waidleigh, Starr, and Peters, P.L.L.C. by Stephen J. Judge, Esq. for Merrimack Valley Regional Water District; Brown, Olson & Gould, P.C. by Bryan K. Gould Esq. and E. Maria Reinemann, Esq. for Town of Milford; Barbara Pressly, pro se; Claire McHugh, pro se; Office of the Consumer Advocate by Meredith A. Hatfield, Esq. and Rorie Hollenberg, Esq. on behalf of residential ratepayers; and Marcia A.B. Thunberg, Esq. of the Staff of the New Hampshire Public Utilities Commission.

I. INTRODUCTION

RSA 38 authorizes a municipality, with the approval of the Commission and at a value set by the Commission, to take public utility property for the use of its citizens and others. The City of Nashua (Nashua) has invoked RSA 38 in an effort to municipalize its local water utility, Pennichuck Water Works, Inc. (PWW) and certain affiliates. In this order, based on an extensive evidentiary record developed over twelve days of hearings, we grant Nashua's petition, solely as to PWW, with conditions, and provide our valuation of the assets to be taken by the municipality.

II. STATUTORY AUTHORITY

Chapter 38 of the New Hampshire Revised Statutes sets forth a detailed statutory scheme that municipalities may invoke in order to establish, or to assume the ownership of, "suitable plants for the manufacture and distribution of electricity, gas, or water for municipal use, for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized or directed by the commission." RSA 38:2, I.

In the case of a city such as Nashua, RSA 38:3 authorizes the municipality to move forward with such a plan "after 2/3 of the members of the governing body shall have voted, subject to the veto power of the mayor as provided by law, that it is expedient to do so," and provided that within one year of such decision, it is "confirmed by a majority of the qualified voters at a regular election or at a special meeting duly warned in either case." *See also* RSA 38:3-a (describing similar procedure as to regional water districts), 38:4 (as to towns or village districts) and RSA 38:5 (as to unincorporated towns and unincorporated places).[1] All four sections providing for a confirming popular vote specify that the effect of such a vote, if affirmative, is to create "a rebuttable presumption that such action is in the public interest."

Within 30 days of the confirming vote, the municipality must provide written notice of the action to "any utility engaged, at the time of the vote, in generating or distributing electricity, gas or water for sale in the municipality." RSA 38:6. The notice must "include an inquiry as to whether the utility elects to sell . . . that portion of its plant and property located within or without the municipality which the municipality has identified as being necessary for the municipal water service." *Id.*

[1] The authority granted by these three sections of RSA 38 is described therein not as the authority to take private property but, rather, the authority to "initially establish . . . a plant." It is clear from the overall language of RSA 38 that, in appropriate circumstances, a municipality may exercise this establishment authority by instituting condemnation proceedings.

The utility or utilities must provide a response within 60 days. RSA 38:7. When, as here, the utilities indicate an unwillingness to negotiate a sale, "the municipality may proceed to acquire the plant as provided in RSA 38:10." *Id.* Section 10, in turn, allows the municipality to take the property by condemnation if, after notice and hearing, the Commission determines such taking to be in the public interest. RSA 38:10. Moreover, pursuant to RSA 38:11, the Commission "may set conditions and issue orders to satisfy the public interest." The Commission is also tasked with determining just compensation for the taking, pursuant to authority set forth in RSA 38:9. Section 9 vests in the Commission not only the responsibility to fix the price to be paid for the plant and property in dispute but also to determine "the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner." *Id.* The Commission must also assess the expenses of its investigation to "the parties involved."

III. BACKGROUND AND PROCEDURAL HISTORY

A. November 2002 to March 2004: Pre-Petition Events

On November 6, 2002, by a vote of 14-1, Nashua's Board of Alderman decided pursuant to RSA 38:3 to establish a municipal water works system and to acquire all or part of the privately owned water works system serving Nashua's inhabitants. The mayor approved the aldermanic resolution on December 2, 2002. Nashua conducted a special meeting of its voters on January 14, 2003, at which the voters confirmed the resolution by a vote of 6,525 to 1,867. Nashua provided RSA 38:6 notice on February 5, 2003 to three affiliated public utilities, all

subsidiaries of the Pennichuck Corporation (Pennichuck): PWW, Pennichuck East Utilities, Inc. (PEU), and Pittsfield Aqueduct Company (PAC).[2]

PWW serves customers in Nashua as well as in the towns of Amherst, Hollis, Merrimack and Milford. PWW also owns and operates community water systems in Bedford, East Derry, Epping, Milford, Newmarket, Plaistow and Salem. PEU serves customers in Atkinson, Derry, Hooksett, Londonderry, Pelham, Plaistow, Raymond, Sandown and Windham. At the time of Nashua's notice, PAC served customers in Pittsfield; it has since expanded and now also serves customers in Barnstead, Conway, and Middleton.

All three utilities responded in the negative to Nashua's inquiry on March 25, 2003. Negotiations ensued, without success, terminating in January 2004. Pennichuck thereafter instituted civil proceedings against Nashua in Superior Court, alleging, *inter alia*, that RSA 38 was unconstitutional because it did not provide utilities subject to condemnation under the statute with the right to a jury trial, and that Nashua had unreasonably delayed the institution of RSA 38 proceedings before the Commission.[3] Nashua responded by filing its RSA 38 petition with the Commission on March 25, 2004.

B. April 2004 through April 2005: Preliminary Proceedings

Although the next procedural step in such circumstances is ordinarily the issuance by the Commission of an order of notice, other developments intervened. Specifically, on April 5, 2004, PWW, PEU, and PAC jointly moved for dismissal of the petition or, in the alternative, for a stay. In the wake of the motion, the Town of Milford filed an intervention request, Nashua

[2] In most instances throughout the proceeding, both Pennichuck and its subsidiaries have appeared jointly. Therefore, except where specifically indicated by the context, we use the term "Pennichuck" as shorthand to describe all of the Pennichuck-affiliated entities that have appeared in the proceeding.

[3] Pennichuck instituted two parallel proceedings in Superior Court, one seeking a declaratory judgment and the other an action for damages. The former proceeded to the summary judgment stage; Nashua removed the latter to federal court on May 17, 2004.

filed a pleading in opposition to the utilities' joint motion, Nashua moved to disqualify the law firm representing the utilities on the ground that the firm was also representing a different municipality in an unrelated RSA 38 proceeding, and, on May 3, 2004, the Commission indicated by secretarial letter that it would stay the docket pending the Superior Court's resolution of a request by Pennichuck to enjoin Nashua from proceeding before the Commission on its petition.

PWW, PEU, and PAC submitted a pleading in opposition to the disqualification motion on May 10, 2004. The Town of Milford submitted a motion asking for a determination that its bulk water contract with PWW would remain in effect; PWW, PEU, and PAC asked the Commission to hold the motion in abeyance. The Superior Court denied the utilities' request for an injunction against Nashua on June 7, 2004. Accordingly, the Commission issued an order of notice on June 22, 2004, scheduling a pre-hearing conference for July 28, 2004 and establishing a deadline for intervention requests. The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential customers pursuant to RSA 363:28 and the Commission received intervention petitions from the Town of Bedford, PWW customer Barbara Pressly, the Town of Hollis, the Town of Raymond, the Town of Hudson, the Town of Pittsfield, the Town of Amherst, the Merrimack Valley Regional Water District, the Town of Londonderry, the Nashua Regional Planning Commission, PWW customer Fred S. Teeboom, the Town of Litchfield and the Merrimack River Watershed Council. PWW, PEU, and PAC objected to the regional water district's intervention request on the ground that its constituent towns had separately sought intervenor status.

The pre-hearing conference took place as scheduled on July 28, 2004. Thereafter, the Commission received late intervention requests from Rep. Claire B. McHugh of Nashua, PWW customer Anheuser-Busch, Inc., and the Town of Merrimack.

The Superior Court rendered its decision in the related declaratory judgment action on August 31, 2004. *See Pennichuck Corp. v. City of Nashua*, 2004 WL 1950458. The Court determined that: (1) Pennichuck had not been deprived of its right to due process by virtue of the absence in RSA 38 of an opportunity for a Superior Court hearing, as opposed to a hearing before the Commission, *Id.* at *4 to *5; (2) the question of whether Pennichuck is entitled on equal protection grounds to a jury trial on the issue of damages was not yet ripe for adjudication, *Id.* at *5; (3) a declaratory judgment was unnecessary on Pennichuck's as-applied claim raising the issue of inverse condemnation[4] because an adequate alternative remedy, in the form of damages, was available to Pennichuck in other proceedings, *Id.* at *6; (4) RSA 38 was not facially unconstitutional on inverse condemnation grounds, *Id.*;, (5) Pennichuck was not entitled to judgment in its favor based on the doctrine of laches,[5] *Id.* at *7; and (6) based on the doctrine of primary jurisdiction, the Commission, by virtue of its expertise, is the appropriate forum for determining, at least in the first instance, whether Nashua could municipalize Pennichuck subsidiaries other than PWW itself, *Id.* at 8. The trial court therefore entered summary judgment

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[4] Inverse condemnation, unconstitutional because it amounts to a taking without just compensation, occurs "when a governmental body takes property in fact but does not formally exercise the power of eminent domain." *Pennichuck Corp. v. City of Nashua*, 152 N.H. 729, 733 (2005) (also noting that inverse condemnation can occur "through either physical act or by regulation") (citations omitted). As distinct from Pennichuck's separate claim that RSA 38 is facially unconstitutional on this ground, the as-applied claim argued that inverse condemnation had occurred here based on the specific facts of the case.

[5] Laches is "derives from contract principles which require that performance must be within a reasonable time when no time for performance is specified by statute or agreement." *Pennichuck Corp.* 152 N.H. at 736 (citations omitted). In rejecting Pennichuck's laches claim, the Superior Court determined that the City had not waited too long to pursue RSA 38 in light of ongoing negotiations between the parties. *Cf. Greenwood v. New Hampshire Public Utils. Comm'n*, 527 F.3d 8, 15-16 (1st Cir., 2008) (concluding that laches barred federal preemption claim that lay unasserted for 17 years).

in favor of Nashua but dismissed without prejudice the as-applied inverse condemnation claim as well as the claim challenging the extent of Nashua's RSA 38 municipalization rights.

Soon after the Superior Court's decision in the declaratory judgment action, the U.S. District Court for the District of New Hampshire issued its ruling on the merits of the separate damages action. Specifically, on September 13, 2004, the federal court dismissed without prejudice Pennichuck's federal claims (raising issues of substantive due process and inverse condemnation), deeming them to be unripe. *Pennichuck Corp. v. City of Nashua*, No. 2004 DNH 134, slip op. at 7 (D.N.H. Sept. 13, 2004). Declining pursuant to 28 U.S.C. § 1367(c) to exercise supplemental jurisdiction over the non-federal claims (raising similar issues but invoking the New Hampshire Constitution, common-law intentional interference with contractual relations, and the state Consumer Protection Act, RSA 358-A), the U.S. District Court remanded the case back to the New Hampshire Superior Court where it was first instituted. *Id.* at 8.

The Commission issued its order following a pre-hearing conference on October 1, 2004. *See City of Nashua*, Order No. 24,379, 89 NH PUC 565 (2004). In Order No. 24,379, the Commission granted all pending intervention requests, suspended the motion to disqualify the utilities' counsel pending resolution of the unrelated RSA 38 proceeding, decided to hold the Town of Milford's motion in abeyance, directed the parties to submit briefs on the issues raised by the pending motion to dismiss, directed Nashua to file testimony by November 22, 2004 with regard to its technical, financial, and managerial capability as well as on public interest issues, and scheduled an additional pre-hearing conference. *Id.* at 571.

On November 30, 2004, the Superior Court dismissed without prejudice the remaining claims in the damages action that had been remanded from the federal court. The Superior Court characterized the damages action as follows:

> The upshot of all of Pennichuck's claims . . . is that the City has not invoked the RSA 38 procedures in good faith and for the legitimate purpose of actually acquiring some or all of Pennichuck's property. Pennichuck avers that the City has never had any real intention of acquiring Pennichuck's property but instead has used the specter of eminent domain proceedings to upset Pennichuck's attempt to merge with Philadelphia Suburban Corporation.

Pennichuck Corp. v. City of Nashua, No. 04-C-169, slip op. at 2-3 (N.H. Super. Ct., S. Hillsborough Div., Nov. 30, 2004). The Superior Court ruled that these claims are not ripe for adjudication until the proceedings before the Commission are concluded. *Id.* at 3-4. Pennichuck did not appeal this decision.

Nashua filed testimony with the Commission as directed, extensive briefing took place, the Business and Industry Association of New Hampshire submitted an intervention request and, on December 9, 2004, the second pre-hearing conference took place, followed by a technical session.

The Commission issued Order No. 24,425 on January 21, 2005. *See City of Nashua*, 90 NH PUC 15 (2005). In Order No. 24,425, the Commission concluded that "the eminent domain authority delegated by the Legislature in RSA 38:2 should be narrowly construed and that the notice requirement in RSA 38:6 should be given full effect." *Id.* at 23. Therefore, the Commission ruled that Nashua could not condemn the property of PEU and PAC, inasmuch as these utilities did not provide water service in Nashua. *Id.* However, the Commission also concluded that Nashua was entitled to "pursue" all assets of PWW, even those assets located in other municipalities and regardless of whether those assets are interconnected with the system serving Nashua. *Id.* at 24. In so ruling, the Commission stressed that "[w]hether it is in the

public interest to allow Nashua to take any or all of PWW's assets . . . remains a factual determination of the public interest for the Commission to make." *Id.*

The Commission also ruled in Order No. 24,425 that Nashua had followed the requirements of RSA 38:3 with regard to the confirmatory vote, rejecting arguments to the contrary advanced by intervenor Teeboom and by Pennichuck. *Id.* at 25-26. Finally, the Commission made certain procedural determinations: that the intervention request of the Business and Industry Association be granted, that the utilities should have until January 31, 2005 to file the motion for summary judgment they had indicated they would submit, that responses to the summary judgment motion would be due on March 2, 2005, and that the Commission would entertain pleadings on or before March 8, 2005 on the question of whether to bifurcate the proceeding into separate "public interest" and "valuation" phases. *Id.* at 26. The Commission scheduled a technical session and laid out certain ground rules for the centralized "data room" under discussion by the parties and Commission Staff (Staff) as a means of expediting discovery. *Id.*

PWW filed a motion for rehearing of Order No. 24,425 on February 18, 2005, joined thereafter by the Town of Merrimack. Nashua objected in writing on February 28, 2005, joined thereafter by the Merrimack Valley Regional Water District. Neither PWW nor any of its affiliates filed a summary judgment motion, but the Commission received extensive pleadings from the parties on the bifurcation question, which the Commission resolved on March 31, 2005 in Order No. 24,447. *See City of Nashua*, 90 NH PUC 126 (2005). The Commission declined to bifurcate the proceedings and directed the parties and Staff to develop a proposed procedural schedule to govern the remainder of the proceeding. *Id.* at 129-30. On April 4, 2005, the Commission denied PWW's motion for rehearing of the previous determination with regard to

the extent of the assets Nashua could potentially municipalize. *City of Nashua*, Order No. 24,448, 90 NH PUC 130 (2005).

On April 5, 2005, the Commission received a jointly-filed intervention request from PWW's parent company, Pennichuck Corporation, as well as PEU, PAC (both no longer directly subject to the municipalization petition, per Order No. 24,425) and a third affiliate, Pennichuck Water Service Corporation (PWSC). The pleading noted that PWSC is not a public utility but, rather, operates community and municipal water systems in New Hampshire and Massachusetts under contract. Staff submitted an agreed-upon procedural schedule on April 12, 2005, Nashua objected to the pending intervention requests on April 15, 2005, and intervenor Pressly submitted an unsigned pleading, captioned as testimony, on April 20, 2005. The Town of Bedford and intervenor McHugh submitted testimony on April 22, 2005.

By Order No. 24,457 (April 22, 2005) *see City of Nashua*, 90 NH PUC 157 (2005), the Commission approved the proposed procedural schedule, granted a rules waiver that had the effect of lengthening the applicable time for objecting to discovery requests from four to ten days, and granted the pending intervention requests of the four PWW affiliates. The schedule, as approved, called for several rounds of pre-filed direct testimony, punctuated by extensive discovery, culminating in hearings in September 2006. *Id.* at 158-59.

C. April 2005 to November 2006: Discovery and Motion Practice

Over the course of the ensuing 20 months, the parties conducted discovery, developed and submitted pre-filed written testimony, and presented the Commission with numerous discovery disputes, other procedural issues and a summary judgment motion. *See* secretarial letter of June 24, 2005 (amending certain discovery deadlines); Order No. 24,485, 90 NH PUC 289 (July 8, 2005) (denying Nashua's request to limit discovery requests of PWW); Order No.

24,487, 90 NH PUC 294 (July 8, 2005) (allowing PWW and affiliates to include claims about monetary damages and other financial contentions in their "public interest" testimony); Order No. 24,488, 90 NH PUC 297 (July 18, 2005) (granting PWW motion to compel discovery of Nashua); Order No. 24,489, 90 NH PUC 300 (July 18, 2005) (denying PWW motion to compel discovery of Town of Amherst and Merrimack Valley Water District); Order No. 24,494, 90 NH PUC 314 (July 29, 2005) (denying Nashua motion to compel discovery of PWW); Order No. 24,495, 90 NH PUC 316 (July 29, 2005) (protective order as to certain information produced by PWW and affiliates); secretarial letter of October 3, 2005 (revising procedural schedule); Order No. 24,555, 90 NH PUC 568 (December 2, 2005) (denying rehearing of Order Nos. 24,487 and 24,488, and clarifying Order Nos. 24,489 and 24,494); Order No. 24,567, 90 NH PUC 619 (December 22, 2005) (denying PWW motion for summary judgment and PWW motion to bar late-filed testimony, and revising procedural schedule); secretarial letter of January 11, 2006 (revising procedural schedule and postponing hearings to January 2007); Order No. 24,583 (January 27, 2006) (granting protective treatment of certain PWW information); Order No. 24,596 (March 3, 2006) (denying Nashua motion to consolidate DW 04-048 with Docket No. DW 05-179, concerning proposed waiver of certain provisions of Uniform System of Accounts for Water Utilities for PEU and PAC); Order No. 24,605 (March 24, 2006) (granting request for protective treatment of certain information to be produced by Nashua); secretarial letter of April 19, 2006 (designating Staff witness Mark A. Naylor, Director of the Gas & Water Division, as Staff advocate pursuant to RSA 363:32); Order No. 24,654 (August 7, 2006) (denying PWW motion to compel discovery of Nashua); secretarial letter of September 7, 2006 (establishing 20 business-day deadline for motions to compel discovery); secretarial letter of September 7, 2006 (suspending deadline for submission of "capstone" testimony); secretarial letter of September 14,

2006 (revising procedural schedule); Order No. 24,667 (Sept. 22, 2006) (denying, without prejudice, PWW motion to strike pre-filed testimony of Nashua witnesses Hersh, McCarthy, Henderson, Fuller, Anderson, and Raswyck); Order No. 24,671 (Sept. 22, 2006) (denying PWW motion for rehearing of Order No. 24,654); Order No. 24,681 (Oct. 23, 2006) (granting in part and denying in part PWW motion to compel discovery responses of Nashua); and Order No. 24,699 (Nov. 8, 2006) (granting PWW motion to compel discovery responses of Nashua and denying Nashua motion for protective treatment of related documents). To the extent any of these determinations bear upon the outcome of the proceeding, we discuss them *infra*.

Pennichuck also pursued an appeal of the Superior Court decision during this period. On November 16, 2005, the New Hampshire Supreme Court affirmed the trial court's decision. *See Pennichuck Corp.*, 152 N.H. at 741. *Inter alia*, the appellate tribunal held on the issue of inverse condemnation that Pennichuck had not to date been "deprived of the economically viable use of its property, nor will such a deprivation occur unless and until all necessary steps to the condemnation process have been completed." *Id.* at 734. The justices also rejected Pennichuck's argument that certain time limits, absent from RSA 38 but present in other eminent domain statutes, should apply. *Id.* at 735-36.

Thus, with Pennichuck having exhausted its appellate remedies in civil court, and with discovery here having been completed, by late November of 2006, more than four years after the aldermanic vote that began RSA 38 proceedings and some 30 months after Nashua filed its petition with the Commission, the case finally stood at the threshold of administrative hearing.

D. November 2006 to January 2007: Motions *in Limine* and Opening Hearings

On November 22, 2006, the Commission issued a secretarial letter that set forth how the agency intended to proceed with final hearing preparations and the hearings themselves. Specifically, the Commission: (1) scheduled a view of certain PWW facilities, pursuant to N.H. Code Admin. Rules Puc 203.28, for December 6, 2006; (2) adopted, with certain modifications, the hearing schedule agreed upon by the parties during a conference with the Commission's general counsel, providing for nine days of hearings between January 10 and February 1, 2007; (3) ruled that the Commission would not entertain opening statements at hearing but, instead, would receive pre-hearing briefs on or before December 15, 2006; (4) determined the order in which the parties would present their witnesses, (5) set forth the order of cross-examination of such witnesses; (6) required the parties to confer prior to hearing and pre-mark exhibits to the extent possible; (7) established, in light of pending issues that had the potential to consume hearing time if left unresolved, a deadline of December 12, 2006, with responses due ten days later, for motions *in limine;* (8) scheduled argument, if necessary, on any such motions for January 4, 2007; and (9) described how the Commission would handle any discussion of confidential materials at hearing.

On November 27, 2006, Nashua submitted a pleading captioned as a "compliance filing" and motion for confidential treatment pursuant to Order No. 24,699. In this pleading, Nashua asked the Commission to reconsider its determination that certain materials being produced in discovery by Nashua were not entitled to protective treatment, also requesting that the Commission determine that Nashua not be required to produce to PWW any additional materials relative to a federal grand jury investigation in Indiana relative to the operations contractor Nashua plans to employ upon assuming ownership of PWW's facilities. Also on November 27,

2006, PWW filed a motion in limine seeking to disqualify and strike the testimony of George E. Sansoucy and Glenn C. Walker, Nashua's expert witnesses on the issue of valuation.

PWW and the Pennichuck Corporation jointly filed an objection to Nashua's November 27, 2006 pleading on December 4, 2006. They requested that Nashua be directed to produce the disputed information within 24 hours.

On December 6, 2006 the Commission's view of certain PWW facilities was conducted as scheduled, with most parties present.

The Commission issued Order No. 24,706 on December 8, 2006, ruling that, rather than await responsive pleadings to PWW's motion to disqualify and strike the testimony of Nashua's valuation witnesses, the Commission would deny the motion summarily but without prejudice. The Commission described the issues raised in PWW's disqualification motion as "essentially, and obviously, unripe," stressing that it was expressing no view as to the substance of PWW's motion.

Nashua filed three motions *in limine* on December 8, 2006. The first sought to exclude the testimony of PWW witness R. Kelley Myers, which concerned the extent to which the municipalization proposal continued to enjoy public support in Nashua. The second sought to exclude evidence concerning severance damages, also requesting a determination that both PWW and the Pennichuck Corporation were precluded from seeking severance damages pursuant to RSA 38:9. The third motion sought to exclude certain supplemental testimony of two PWW witnesses, Donald Ware, President of Pennichuck Water Works, and John F. Guastella, Pennichuck's revenue expert.

On December 13, 2006, the Commission's general counsel filed a letter reporting on his efforts to resolve the dispute between PWW and Nashua over the discoverability of information

related to the grand jury investigation of Nashua's operations contractor in Indiana. Later the same day, the Commission issued a secretarial letter adopting the general counsel's recommendation, agreed to by PWW and Nashua, and which involved production of the documents to PWW at a specified location.

Anheuser-Busch, Inc., the Merrimack Valley Regional Water District, Nashua, Commission Staff, Pennichuck, and OCA filed opening statements on December 15, 2007. PWW filed objections to Nashua's three motions *in limine* on December 18, 2006.

On December 21, 2006, Nashua filed a motion asking the Commission to postpone the hearings for at least 180 days and to convene a settlement conference. Appended to the motion was a copy of Nashua's written settlement proposal to PWW, for which Nashua requested confidential treatment pursuant to N.H. Code Admin. Rules Puc 203.08. The general counsel submitted a letter on December 27, 2006, summarizing certain hearing-related technical arrangements as agreed to by Nashua and PWW.

PWW filed a pleading in opposition to Nashua's motion for postponement on December 28, 2006. Also on that date, Nashua submitted: (1) a letter stating that Nashua had a good-faith basis for requesting confidential treatment of the previously submitted settlement proposal, expressing an intention to file a formal motion for confidential treatment; and (2) a letter discussing certain of the logistical arrangements, related to exhibits, described in the general counsel's letter of the previous day. PWW responded by letter filed on January 3, 2007. Also on January 3, both Nashua and PWW filed an agreed-upon witness schedule.

PWW filed a motion seeking reconsideration of Order No. 24,706, relative to Nashua's valuation witnesses, on January 4, 2007. On January 5, 2007, the Commission issued: (1) a secretarial letter, denying Nashua's motion to postpone the hearings; and (2) Order No. 24,722,

granting Nashua's motion to exclude PWW witness Myers, also excluding the testimony of Brendan Cooney, the witness Nashua had proferred to rebut Mr. Myers. Order No. 24,722 otherwise denied the pending *in limine* motions and their requests to exclude certain evidence. Nashua filed an opposition to the pending reconsideration motion of PWW on January 10, 2007.

January 10, 2007 also marked the opening of the merits hearing in the proceeding. The Commission also heard testimony on January 11, 2007.

E. January 2007 through July 2007: Agreed-to Stay

On the morning of the third scheduled hearing day, January 16, 2007, Nashua and Pennichuck filed a joint motion to continue the hearing for 120 days. According to the motion, the signatories had agreed upon such a continuance for the purpose of facilitating settlement discussions. The movants also indicated that they may, upon expiration of the 120 days, seek a further continuance of at least 60 days. They further requested that, during the stay period, all parties be enjoined from submitting additional pleadings. The Commission granted the motion at hearing on January 16, 2007, indicating that it expected to receive only submissions related to the progress of the negotiations during the stay, and that any other submissions would be held in abeyance absent extraordinary circumstances.

On February 22, 2007, the Commission issued a secretarial letter scheduling a status conference for May 17, 2007, one day after the expiration of the 120-day stay. On April 23, 2007, the Commission rescheduled the status conference to May 16, 2007. Pennichuck, jointly with Nashua, filed a motion on May 15, 2007 for an extension of the stay until July 16, 2007. By letter of May 16, 2007, Nashua reported that intervenors Town of Milford, Town of Amherst, Merrimack Valley Water District, Barbara Pressly, and Claire McHugh concurred in the request

for a further stay. The Commission conducted the scheduled status conference on July 16, 2007, granting the requested stay on May 18, 2007.

By secretarial letter of June 7, 2007, the Commission advised the parties of how it intended to proceed in the event no agreement was reached by the expiration of the stay on July 16, 2007. The letter listed a series of hearing dates in August, September, October, and November it had reserved for possible use in this docket, scheduling a technical session for July 17, 2007. On July 16, 2007, by separate letters, Nashua and Pennichuck reported that they had been unable to reach agreement and that the Commission should proceed with plans to resume the hearings.

F. July 2007 through December 2007: Resumed Hearings and Briefing

The technical session took place as scheduled on July 17, 2007. The Commission's general counsel thereafter filed a report, setting forth the parties' agreed-upon recommendations for resuming the hearings and rescheduling witnesses. Deviating somewhat from these recommendations, for scheduling reasons exogenous to this docket, the Commission by secretarial letter on July 20, 2007 specified eleven days in September 2007 on which it would conduct the resumed merits hearing. The parties were given until August 10, 2007 to submit proposed witness schedules.

Pennichuck filed such a schedule, but it became clear that not all issues had been resolved. Specifically, Pennichuck objected to Nashua's plan to substitute two witnesses, Stephen Siegfried and Alyson Willans, both associated with Nashua's operations contractor, for witnesses who, according to Nashua, were no longer associated with the contractor (David Ford and Robert Burton). Nashua filed a motion to that effect on August 10, 2007, to which Pennichuck objected on August 13, 2007. In addition, Pennichuck moved on August 15, 2007

for leave to substitute Donald Ware as the witness sponsoring a portion of the testimony previously submitted by Donald Correll, who presented the testimony as president of PWW but had since left that post to become CEO of American Water. Nashua later acceded to Pennichuck's witness substitution request.

On August 21, 2007, the Commission issued a secretarial letter granting Nashua's request to add Mr. Siegfried and Ms. Willans to the list of those testifying, but also required Nashua to tender them for deposition, further indicating that the Commission still expected Mr. Ford and Mr. Burton to testify as well. The Commission explicitly declined to rule on an issue raised by Pennichuck, concerning the participation of the two new Nashua witnesses in due diligence efforts associated with the failed settlement negotiations, characterizing PWW's concerns about such participation as speculative. The Commission stressed that it would rule on any such issues as they arose at hearing.

By secretarial letter issued on August 24, 2007, the Commission added an additional half-day of hearing time to the schedule, on September 7, 2007. The purpose of the change was to accommodate a scheduling exigency related to one of Nashua's witnesses.

Hearings took place as scheduled on September 4, 5, 7, 10, 11, 12, 13, 18, 19, and 26, 2007. PWW renewed its objection to Nashua offering testimony from Mr. Siegfried and Ms. Willans, which the Commission overruled. On September 25, 2007, Nashua filed a written motion to strike Mr. Ware's testimony on behalf of PWW, arguing that Mr. Ware had given "material false testimony" concerning PWW's use of a so-called "computerized maintenance management system" (CMMS). According to Nashua, Mr. Ware contradicted himself when he stated that Nashua's contractor would make no efficiency gains by implementing a CMMS (because such a system was already in use at PWW) but later stated that he had little or no

knowledge of such a system. According to Nashua, this had the effect of depriving Nashua of the opportunity to cross-examine Mr. Ware fully on the question of PWW's ability to manage maintenance costs.

The parties thereafter made several filings in response to record requests posed during the hearings. On October 11, 2007, PWW filed a list of 33 exhibits that were still subject to disagreement among the parties as to admissibility. Chairman Getz, in his capacity as presiding officer, took up these remaining evidentiary issues at a hearing held on October 12, 2007. He issued his rulings by letter of October 17, 2007. In his ruling, the Chairman noted that 29 of the disputed exhibits consisted of responses made by Nashua to data requests interposed during discovery. PWW had objected to admitting these documents on the ground that Nashua was seeking to use them as an unfair means of supplementing the direct testimony of its witnesses. The Chairman agreed that admission of these exhibits would be unfair and, therefore, he excluded them. He also excluded three other disputed exhibits from the record, one, no. 1117A, that had been excluded at hearing and two others, nos. 1145 and 3258, concerning bidding by multiple government entities for the purchase of an investor-owned utility. He admitted the remainder of the disputed exhibits into evidence.

The Chairman's letter fixed November 16, 2007 as the deadline for submission of post-hearing briefs. This was based on a prior agreement of the parties to establish a due date that was 30 days from the Commission's ruling on disputed exhibits. By secretarial letter of October 29, 2007, the Commission established December 3, 2007 as the due date for reply briefs.

On February 22, 2008, the Town of Milford filed a water supply contract into which Milford had entered with the City of Nashua. In essence, Nashua agreed that if the RSA 38 taking proceeds, Nashua would honor Milford's current contract with PWW for backup water

supply in connection with Milford's own municipal water system. As recited in the motion, Milford and Nashua jointly requested that the Commission approve the contract as part of its consideration of the underlying municipalization request.

Staff filed a letter on February 22, 2008 commenting on Milford's submission. Staff took the position that the Commission lacks jurisdiction to consider the bulk water supply contract in light of RSA 362:4, III-a(a)(2) (providing that a municipality selling water under a bulk supply contract executed after July 23, 1989 is not thereby a public utility). Staff also raised concerns about the potential necessity of reopening the evidentiary record to consider the contract and possible due process issues. Pennichuck filed a pleading in opposition to the Milford motion on February 27, 2008.

On February 29, 2008, the Town of Milford responded to Staff's concerns. The Milford letter stated that: (1) Nashua and Milford have simply asked the Commission to approve the agreement pursuant to RSA 38:11 and :17 as a condition of approving the underlying municipalization request, as distinct from resolving the question of whether the Commission has jurisdiction to enforce the Milford-Nashua agreement; (2) neither Milford nor Nashua was seeking to reopen the record in light of the agreement; and (3) the agreement simply "resolves some of the issues in dispute between Nashua and Milford in this docket."

IV. APPLICABLE LEGAL STANDARD

There is disagreement among the parties and Staff concerning the manner in which RSA 38 is applicable to this case. Accordingly, we begin our analysis with a discussion of the legal framework.

A. Pennichuck

It is the position of Pennichuck that we cannot grant Nashua's RSA 38 petition unless Nashua has demonstrated that the benefits of the proposed taking outweigh what Pennichuck characterizes as "the substantial harm such a taking would cause." Pennichuck Brief at 2. According to Pennichuck, the authority for this proposition is found in the various New Hampshire statutes governing condemnation and reflects the constitutional requirement that property be taken by the government only for a public purpose.

Pennichuck further contends that the rebuttable presumption contained in RSA 38:3 has "no meaningful application" to this case. *Id.* at 5. In the view of Pennichuck, this is because Nashua is proposing to take utility property that extends into ten other municipalities, none of which have themselves approved municipalization under RSA 38 and two of which have actively opposed Nashua's efforts. Indeed, according to Pennichuck, to accord Nashua the RSA 38:3 rebuttable presumption in these circumstances would amount to an interpretation of the statute that would allow a single municipality such as Nashua to take all of Public Service Company of New Hampshire (PSNH), simply because Nashua is within the PSNH service territory.

B. Town of Milford

The Town of Milford, which opposes the transaction, contends that the RSA 38:3 rebuttable presumption is simply a presumption that the taking is in the interest of Nashua citizens as opposed to New Hampshire as a whole. According to Milford, for the Commission to allow Nashua to take advantage of the presumption in the circumstances of this case would be to deprive every other municipality affected by the transaction of its due process rights. According to Milford, Pennichuck has correctly asserted that in order for the transaction to receive approval Nashua must demonstrate that the taking would result in net benefits to the public in general.

C. Staff

Staff states that RSA 38:3 creates a rebuttable presumption that Nashua's taking is in the public interest. When faced with determining the public interest, Staff contends the Commission has historically conducted a balancing of benefits which is nearly identical to the common law balancing of benefits in eminent domain matters. With respect to Nashua's contention that Order No. 24,567 requires that it obtain franchise approval to serve customers outside of Nashua, Staff stated the public interest determination under RSA 374 is subsumed in the public interest analysis of RSA 38 and does not create undue complication. According to Staff, as long as the Commission balances all benefits against the "harm and social costs," both the public interest standard of RSA 38 and the public exigency requirement applicable to all eminent domain cases will have been appropriately addressed.

D. City of Nashua

Nashua has a much different view of the statutory and constitutional framework. According to Nashua, to prevail in this case Pennichuck bears the burden of affirmatively rebutting the RSA 38:3 presumption that the proposed taking is in the public interest. Nashua contends that this rebuttable presumption in its favor applies not simply to the PWW assets within Nashua's borders but also the assets of the utility located in other municipalities.

In taking that position, Nashua contends that the Commission should revisit the determination made on December 22, 2005 in Order No. 24,567 that Nashua is obliged to obtain a utility franchise under RSA 374:26 and RSA 362:4, III-a(a) with respect to areas outside of Nashua that it would serve as the successor to PWW. In Order No. 24,567, the Commission ruled that the RSA 38:3 rebuttable presumption applies only to the PWW assets and franchise within Nashua because "only voters of Nashua had a voice in the vote that gave rise to that

presumption." Order No. 24,567 at 5, 90 NH PUC at 621-22. According to Nashua, this ruling conflicts with the language in RSA 38:9 authorizing a municipality to petition the Commission to determine "how much, if any, of the plant and property lying within and without the municipality the public interest requires the municipality to purchase." Nashua also invokes RSA 38:14, which makes explicit reference to a municipality acquiring and operating utility property located in another municipality, and which provides that the acquiring municipality "may operate within such other municipality as a public utility with the same rights and franchises which the owners of such outlying plant, as purchased, would have had such purchase not been made."

In support of this argument, Nashua directs the Commission's attention to *Appeal of Ashland Electric Department*, 141 N.H. 336 (1996), in which the New Hampshire Supreme Court ruled that RSA 38 required a municipal utility to obtain Commission approval prior to expanding the utility's facilities into the service territory of a public utility within the municipality's borders. According to Nashua, the *Ashland Electric* case supports its position because, in its ruling, the Court made no reference to franchise approval but, instead, quoted approvingly a Commission order describing the RSA 38 process as "comprehensive."

According to Nashua, the rebuttable presumption that the transaction is in the public interest applies not simply to the acquisition of assets located within Nashua but to all assets of PWW. In support of this argument, Nashua contends that Sections 2, 6, 9, and 14 of RSA 38 give the Commission authority to determine how much property outside municipal boundaries it is in the public interest for the municipality to acquire. In the opinion of Nashua, the Legislature could have limited the effectiveness of the rebuttable presumption to areas within the municipality itself, but chose not to do so. Therefore, according to Nashua, citing *Hinsdale v.*

Chesterfield, 153 N.H. 70, 889 A.2d 32 (2005), it would be inappropriate for the Commission to infer the existence of such a requirement.

E. Commission Analysis

We conclude that, because the Nashua Board of Alderman (by the requisite two-thirds vote) and thereafter the voters of Nashua (by majority vote) have endorsed the proposed municipalization of PWW, the plain language of RSA 38:3 entitles Nashua to a rebuttable presumption that the proposed taking of the assets located within Nashua is in the public interest.[6] We therefore reject Pennichuck's contention that the presumption has no meaningful application to this case. Accordingly, it is the burden of Pennichuck, and the other parties who oppose the petition, to demonstrate that the taking is *not* in the public interest as to the assets lying within Nashua.

Unlike many eminent domain cases, this is not a proceeding in which the underlying purpose of the proposed taking is being challenged as insufficiently public (as distinct from private) in nature as to raise constitutional difficulties. *Cf. Kelo v. City of New London, Conn.*, 545 U.S. 569 (2005) (holding that furthering city's economic development plan was valid public use under U.S. Constitution); *Rockingham County Light & Power Co. v. Hobbs*, 72 N.H. 531 (1904) (establishing constitutionality in New Hampshire of takings by electric utilities). That the provision of public water supply is a public purpose of constitutional sufficiency requires no discussion here. Indeed, the Legislature has decided as much by enacting RSA 371 (authorizing public utilities to institute condemnation proceedings before Commission).

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[6] As noted by Nashua, RSA 38:3 actually authorizes a municipality to "initially establish" a utility "plant" as opposed to explicitly allowing the taking property of a functioning utility. No party has suggested that this phraseology, which recurs elsewhere in RSA 38, raises any issues. Indeed, the Commission has previously declined to interpret the phrase "initially establish . . . a plant" as limiting a municipality's authority to acquire existing utility facilities. *See City of Manchester*, Order No. 23,350 (Nov. 22, 1999), 84 NH PUC 624. We thus need not address Nashua's argument about the meaning of the phrase in question.

Similarly, by enacting RSA 38 the Legislature has explicitly endorsed the propriety of municipalities taking utility property, further making the policy choice that such a taking is presumed to be in the public interest in the circumstances of this case. Consequently, we are called upon to allocate the burden of proof here to the municipalization opponents as to the assets lying within Nashua.

To the extent necessary, we reaffirm Order No. 24,567 that the rebuttable presumption of public interest applies only to utility property within Nashua's municipal boundaries. Since it is the confirming vote that generates the presumption, it follows that the Legislature's intent was to require us to accord a measure of deference to decisions arising out of the democratic process at the municipal level. Obviously, it would run counter to that principle if the democratic process in one municipality could have a potentially dispositive effect on the municipalization of property in one or more other municipalities. Thus, as to assets located outside of Nashua, Nashua bears the burden of proving that the taking of those assets is in the public interest.

One additional issue requires discussion. There has been extensive argument, in various contexts, about our authority to subject Nashua to ongoing regulatory oversight and set conditions as part of an approval of the proposed transaction. In general, Nashua has proposed such ongoing oversight as a means of protecting municipalities that currently rely on PWW for wholesale water, Anheuser-Busch (which likewise purchases water from PWW on a wholesale basis) and PWW customers not located in Nashua and thus not constituents of the municipal officials who would have ultimate responsibility for the municipalized system. Opponents of municipalization contend that we lack the authority to set certain conditions because they would have the effect of expanding our regulatory jurisdiction without legislative authority.

It is well established that the Commission "is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute." *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1066 (1982) (citing *Petition of Boston & Maine Railroad*, 82 N.H. 116, 116, 129 A. 880, 880 (1925)). In this instance, RSA 38:11 expressly grants the Commission authority, in making a public interest determination, to "set conditions . . . to satisfy the public interest." While this authority is not limitless, it surely allows us to bind an acquiring municipality, especially to commitments it has made that have the effect of causing it to function in some respects as if it were a regulated public utility, as long as a reasonable nexus exists between those commitments and the public interest considerations at issue in the proceeding.[7] For this reason, we proceed with our analysis of the record with the assumption that it is lawful to set conditions which fall squarely within the realm of utility regulation, and that we will maintain continuing authority to enforce any conditions.

Lastly, as stated in Order No. 24,567, we conclude that Nashua must comply with RSA 374 relative to franchise approval for service it provides outside its corporate boundaries. RSA 362:4, III-a specifically states that although a municipal corporation furnishing water service to customers outside its municipal boundaries, shall not be considered a public utility in certain circumstances, "[n]othing in this paragraph shall exempt a municipal corporation from the franchise application requirements of RSA 374." Furthermore, we do not agree with Nashua that franchise approval for service outside of Nashua is impliedly granted by RSA 38:14, nor do we see a conflict between RSA 38:9 and the franchise application requirement of RSA 374. In fact,

[7] This reading of RSA 38:11 is consistent with RSA 38:2, which explicitly authorizes a municipality to take utility property not simply to provide water for its inhabitants and other but also for "such other purposes as may be permitted, authorized, or directed by the commission." RSA 38:2, I. Likewise, section 2 of RSA 38 authorizes municipalities to "[d]o all other things necessary for carrying into effect the purposes of this chapter." RSA 38:2, III. *See In re Watterworth*, 149 N.H. 442, 445 (2003) (noting that statutes should be interpreted "in the context of the overall statutory scheme and not in isolation").

any practical difference between the two is moot since review of Nashua's franchise for service outside Nashua has been accommodated in the instant proceeding. As such, we will consider in this order whether it is for the public good for Nashua to be granted a franchise to provide water service to customers located outside Nashua.

V. PUBLIC INTEREST ISSUES

We thus turn to the question of whether the proposed transaction is in the public interest as required by RSA 38:3 and RSA 38:9, including what conditions are necessary pursuant to RSA 38:11. At hearing, all parties were afforded an opportunity to present evidence and examine witnesses. Post-hearing, however, only Pennichuck, the Town of Milford, the Town of Merrimack, Anheuser-Busch, Inc., Staff, and Nashua submitted argument on the issue of public interest. Their positions appear below.

A. Pennichuck

According to Pennichuck, since PWW was restructured in 1983 to a holding company structure, Pennichuck has, with the encouragement of the Commission, grown into a regional utility willing to expand its operations and thereby solve endemic water supply problems. Pennichuck further contends that, throughout this period of expansion, Pennichuck has consistently demonstrated an ability to provide safe, adequate, reliable drinking water at reasonable rates. This record, according to Pennichuck, "should not be taken for granted or considered lightly." Pennichuck Brief at 8.

Pennichuck contends that, if Nashua were allowed to condemn PWW, the core of Pennichuck's financial and operational structure would be gutted and Pennichuck would no longer be able to play the role of regional utility. In support of this proposition, Pennichuck cites the testimony of Messrs. Naylor, Patch, Correll, Guastella, and Ware. According to Pennichuck,

PWW is the financial engine that generates most of Pennichuck's earnings, which enables the Pennichuck companies to invest in upgrades and new systems.

It is further the contention of Pennichuck that if the taking were to go forward the result would be a significant loss of technical capability, both to the remaining Pennichuck entities as well as, possibly, to Nashua's contract operator. Pennichuck points out that all of the employees who provide service to the non-PWW utilities are PWW employees and Nashua has indicated a desire to hire PWW field staff and other operational personnel (as distinct from PWW management). Thus, according to PWW, either Nashua and its contractors will be successful in attracting PWW employees, in which case the remaining Pennichuck utilities will be drained of vital experience, or Nashua and its contractors will be unsuccessful, in which case Nashua will lack key operational capability. Pennichuck also raises the specter of PWW employees seeking employment elsewhere to ensure that their positions are not among those that Veolia or Nashua eliminate following the transition to municipal ownership.

Pennichuck dismisses as "not credible" any assurances from elected officials in Nashua that as owners of the PWW system they will act in the best interests not only of Nashua's residents but also of residents of nearby and regional municipalities. *Id.* at 12. Pennichuck's point is that, once the system belongs to Nashua, there would be no more regional utility because Nashua has no motivation to invest beyond its borders. Pennichuck further asserts that Veolia has no interest in owning other systems (as opposed to operating them under contract). In that regard, Pennichuck draws the Commission's attention to Mr. Naylor's testimony to the effect that small water systems become troubled not because they lack qualified operators but because they lack capital. Pennichuck also dismisses as speculation the notion that some other, unidentified utility might come forward to provide the kind of regional assistance Pennichuck

has provided. The requisite economies of scale would simply be lacking, according to Pennichuck.

Pennichuck criticizes Nashua's plans for management and operations post-takeover, describing them as unprecedented, inefficient, and ineffective. According to Pennichuck, Nashua plans to turn over PWW's water systems to a pair of private contractors – Veolia and R.W. Beck, which in turn would engage numerous subcontractors – without Nashua itself employing anyone who knows anything about running a water utility. According to Pennichuck, although Nashua has characterized R.W. Beck's role as owner's representative, Veolia as the system operator plans to report directly to municipal officials. This, according to Pennichuck, means that ultimately any disagreements between the two contractors would have to be resolved by politicians. Pennichuck contends that such issues would be resolved "in a highly politicized forum where decisions are frequently made for reasons other than purely business considerations." *Id.* at 16. Pennichuck also hypothesizes that such a paradigm would make it difficult to operate the PWW system on a day-to-day basis.

Pennichuck criticizes Nashua for having a "single-minded focus on reducing the operating costs in its model" causing Nashua to "sacrifice prudent operational considerations." *Id.* at 16-17. Conceding that Veolia is a multinational conglomerate with considerable expertise, Pennichuck nonetheless points out that Veolia's direct experience in operating combined water supply and distribution systems at the scale of PWW is limited to Veolia's work in Indianapolis. Similarly, Pennichuck contends that Beck has never played the role of owner's representative in connection with a water distribution system, as opposed to a water supply facility or a construction project.

Relying on the testimony of Mr. Burton on behalf of Veolia, Pennichuck maintains that the customer service structure planned by Nashua conflicts directly with the advice Nashua received from Veolia. According to Pennichuck, Veolia advised Nashua to use only one entity to receive and address customer service inquiries, on the theory that requiring customers to call multiple contact numbers (e.g., depending on whether the call concerns billing or service) is confusing and frustrating. Pennichuck notes that Nashua's plan (at least up until the last day of hearings) called for billing and collection to be handled at City Hall with service issues directed to Veolia.

Pennichuck argues that the operational paradigm contemplated by Nashua would replace efficiency and accountability with the kind of complexity that is likely to cause problems to fall through the cracks. According to Pennichuck, Veolia has experienced this sort of dispute as demonstrated by litigation between Veolia and municipalities with which it had contracted. Exh. 3181. According to Pennichuck, Nashua has already had disputes with both Veolia and R.W. Beck about the scope, nature, and cost of each contractor's obligations to Nashua. Pennichuck foresees "a mind set under which each party to the contract does only what it thinks is required under their legal arrangement," as opposed to "looking at each situation from the eyes of the recipients of the water service." *Id.* at 22.

Additionally, Pennichuck warns that internal political disputes are a significant risk to the operation of the system under municipal ownership in Nashua. The utility directs the Commission's attention to witness Paul Doran's use of the word "feisty" to characterize Nashua's Board of Aldermen. *Id.* at 23. Pennichuck points out that differences and factions within Nashua's city government have led to harsh public allegations, litigation, and labor

disputes. In these circumstances, according to Pennichuck, there is great potential that the interests of customers in other communities will be compromised.

Pennichuck foresees an "immense" impact on rates if the municipalization goes forward, one that would eclipse any cost savings (e.g., income taxes, compliance costs) that would be achieved as the result of public ownership. *Id.* The source of this impact, according to Pennichuck, would be the constitutional requirement for Nashua to pay the fair market value for PWW assets, as opposed to the book value (i.e., depreciated original cost value) that is currently the basis for PWW's rates. Pennichuck contends that the testimony it proffered from witness John Guastella demonstrates that at nearly any plausible purchase price any rate benefit posited by Nashua is effectively eliminated. Pennichuck contends that Nashua has significantly underestimated operating costs, the addition of which would cause rates under Nashua ownership to be significantly in excess of those that currently apply under PWW ownership. Pennichuck also asserts that, because the proposed contract between Nashua and Veolia shifts so many costs into the "supplemental" category, it is simply impossible to ascertain the true cost to Nashua of operating the utility. *Id.* at 25.

Relying on the testimony of Philip Ashcroft, a Veolia official, Pennichuck notes that the contract presented at hearing will change significantly before it is finalized and Veolia has conducted its due diligence. According to Pennichuck, Mr. Ashcroft made clear that Veolia kept its base price down by shifting pricing risk to the municipality.

Pennichuck contends that even the cost projections of Nashua's own valuation witness, Mr. Sansoucy, demonstrate that the PWW system will be less efficient under municipal ownership than that of the utility. Pennichuck points to his testimony that operating expenses would total in excess of $10.4 million in 2008. According to Pennichuck, this figure would

increase by more than $146,000 by adding amounts that Nashua witness Paul Noran of Veolia indicated would need to be added to the base fee assumed by Mr. Sansoucy.

Pennichuck notes that one of its witnesses, John Guastella, offered an estimate of annual municipal operating expenses that were more than $1 million lower than Mr. Sansoucy's projection. According to Pennichuck, this is not evidence that Nashua will actually be able to achieve the same efficiencies as PWW. Rather, in the view of Pennichuck, even assuming that Nashua could operate the system as efficiently as Mr. Guastella estimated, using a rate base that reflects the fair market value of the PWW system (as opposed to Nashua's proposed valuation) would result in rates that are effectively no different under municipal ownership than the rates that PWW charges.

Pennichuck asserts that it is simply not possible to fairly and completely compare the rates under Nashua's proposed ownership with PWW rates. But, according to Pennichuck, if one were to undertake such a comparison it would be critical to adjust the estimate of municipal rates to reflect changes the municipality had itself proposed over the course of the case, known operating costs that Nashua omitted or understated, and "additional costs that the Veolia contract structure will impose but that are not reflected in the base fee." *Id.* at 28.

Pennichuck accuses Nashua of adopting a "cavalier" attitude about PWW customers located outside of Nashua. *Id.* at 29. In the view of Pennichuck, Nashua has adopted an ever-changing position about the effect of municipalization on those customers, originally contending that their rates should go up because they subsidize other customers and later agreeing to maintain rate parity. Noting the municipality's agreement during the course of hearings to subject itself voluntarily to regulation by the Commission with respect to the non-Nashua customers, Pennichuck still contends that Nashua has offered nothing credible to divert a fact

finder from the notion that non-Nashua customers will be victims of the vicissitudes of Nashua's often contentious political process. According to Pennichuck, the proposal for voluntary submission to Commission jurisdiction is contrary to applicable law. To that end, Pennichuck cited a series of federal cases to the effect that jurisdiction cannot be conferred on an administrative agency by consent of the parties.

According to Pennichuck, beyond the effects on the non-Nashua customers of PWW, municipalization of PWW will trigger substantial rate increases for customers of PEU and PAC, compared to the rates those PWW affiliates would be able to charge if PWW remains a subsidiary of Pennichuck. Pennichuck points to the analysis of Mr. Guastella for evidence of lost economies of scale. According to Pennichuck, Nashua's disagreement with Mr. Guastella's detailed analysis, as laid out in the testimony of Mr. Sansoucy, is unsubstantiated and speculative.

Pennichuck criticizes Nashua for offering up changes to its municipalization plan over the course of the proceeding. Noting that Nashua did not submit a plan when it filed its initial petition in 2004, Pennichuck contends that Nashua's plans have evolved continuously from the point at which they were first submitted in early 2006 to the hearings themselves, at which Nashua proposed various conditions in response to evidence that had been adduced. According to PWW, the evolving nature of Nashua's plans not only presents a public policy problem but also has the effect of depriving Pennichuck, as the owner of the property proposed for condemnation, of its right to due process.

Finally, Pennichuck rejects Nashua's assertion that it would be a better steward of the public water supply than Pennichuck has been. According to Pennichuck, Nashua approved all of the development plans (undertaken by a non-regulated affiliate of PWW after transfer of land

previously held for resource protection purposes) that Nashua has criticized in this proceeding. Moreover, according to Pennichuck, Nashua is seeking to rewrite history by suggesting that stewardship concerns were the driving force behind its legal battle over this development, which culminated in the New Hampshire Supreme Court decision reported as *Appeal of City of Nashua*, 121 N.H. 874 (1981). Pennichuck asserts that Nashua's concern had to do with money – specifically, the regulatory treatment that had the effect of allowing Pennichuck shareholders, as opposed to customers, to receive the financial benefits of the real estate's appreciation over the years of its utility ownership.

Pennichuck directs the Commission's attention to the testimony of its witness Eileen Pannetier to the effect that Pennichuck's stewardship program is one of the best in the region, the best conducted by an investor-owned company, and superior to that of any government-operated system of comparable size. Pointing out that control of development for watershed protection purposes rests not with the utility but with the municipalities in which the watershed lies, Pennichuck contends that Nashua has deliberately ignored the fact that the utility's decisions on which lands required continuing protection from development were based upon an extensive environmental study. According to Pennichuck, Nashua provided no expert testimony to undermine the reasonableness of Pennichuck relying on this report. The utility dismisses Nashua's testimony about watershed protection as non-credible because it came from people who lacked expertise and were merely expressing personal opinions that are hostile to development.

In its pleading of February 27, 2008, Pennichuck expresses opposition to the joint motion, discussed supra, to approve the post-hearing contract entered into between Nashua and the Town of Milford. According to Pennichuck, submitting the contract following the hearings

amounts to an improper attempt to supplement the record without affording other parties an opportunity for cross-examination. Pennichuck also contends that, notwithstanding the terms of the agreement, New Hampshire law provides that the Commission would have no jurisdiction to regulate the provision of wholesale water service by Nashua to Milford.

B. Town of Milford

The Town of Milford operates its own municipal water system and has a bulk water supply contract for backup purposes with Pennichuck. It asks the Commission to rule that the proposed municipalization of PWW would not be in the public interest. According to Milford, the municipalization would leave Milford without a backup water supply, inasmuch as the contract automatically would terminate in those circumstances. Milford notes that it currently relies on two wells for its primary water supply, and would not be able to assure its citizens reliable water supply if one of the two wells should go out of service, even for routine maintenance, after Nashua has taken over the PWW system. Noting the testimony of Alderman McCarthy of Nashua to the effect that Nashua would continue to honor the contract, Milford points out that the alderman had no authority to bind Nashua on this question.

The contract Milford filed on February 22, 2008, Milford's cover letter to that contract, and Milford's letter of February 29, 2008 make clear that the town's position on this issue has changed somewhat. Milford and Nashua agreed that, should the municipalization proceed, Nashua would essentially adopt the Milford-PWW contract for backup water supply. Milford asks the Commission to treat the contract as a condition of approving the underlying petition, suggesting that such a condition would have the effect of rendering its objections based on this issue moot.

Although the contract does not preclude Nashua from assigning its obligations under the agreement, Nashua cannot relieve itself of its obligations under the contract by delegating its obligations to another entity, particularly a water district. Concern about Nashua transferring the system to a water district was an issue raised by Milford during and after the hearings. The Nashua-Milford agreement also provides that Nashua will submit to, and will not challenge, the jurisdiction of the Commission with respect to provision of water service to Milford. The terms of the agreement are severable, i.e., if any provisions were declared invalid the overall agreement would not become void.

While the contract appears to address all of the issues raised by Milford, the agreement does not require Milford to support the underlying petition. The motion in support of the contract indicates that the purpose of the agreement was simply to avoid an interlocutory appeal of issues related to the Commission's regulatory jurisdiction should Nashua proceed with municipalization and, as noted *supra*, Milford's February 29, 2008 letter indicates that the contract resolves only some of the issues in dispute between the two municipalities.

C. Town of Merrimack

The Town of Merrimack opposes Nashua's plan to municipalize the PWW system. According to Merrimack, the Commission must reject Nashua's petition because Nashua's valuation of the utility property was "predetermined," "unethically performed," and "totally unreliable."[8] Merrimack Brief at 1.

Merrimack further contends that the asserted benefits of the transaction are largely illusory. Specifically, according to Merrimack, the record reveals that Nashua's claimed savings from lack of overhead, tax expenses and administrative costs will not, by Alderman McCarthy's

[8] Merrimack's concerns about the valuation, which are similar to those expressed by Pennichuck, are summarized and discussed in the section of the order discussing valuation issues.

own admission during his testimony, materialize. Merrimack questioned the legality of Nashua's plans to finance the acquisition by issuing municipal bonds, given that some of the assets to be acquired by Nashua are outside Nashua limits.

According to Merrimack, once Nashua assumed control of the PWW system it would no longer be subject to Commission regulation, even as to bulk water contracts with municipalities and others. Merrimack also objects to Nashua's assertion that PWW would be subject to local control under Nashua's ownership. In that regard, Merrimack notes that Veolia, as the outside contractor Nashua plans to use to operate the system, is the corporate successor of Vivendi, the entity that held a majority interest in Philadelphia Suburban, whose ultimately unsuccessful effort to purchase Pennichuck was opposed by Nashua and formed the backdrop to this proceeding.

Merrimack urges the Commission to give great weight to the Commission Staff's "independent, impartial, and unequivocal" opinion that the taking should not proceed. *Id.* at 18. In particular, Merrimack pointed to Staff testimony to the effect that Nashua ownership of the PWW system would cause harm to PWW customers outside Nashua, including customers in Merrimack.

Finally, Merrimack asks the Commission to reject the notion that conditions agreed to by Nashua over the course of the hearings mitigate any public interest concerns. According to Merrimack, there is no guarantee that Nashua will honor the conditions or that the Commission can enforce them.

D. Anheuser-Busch, Inc.

Anheuser-Busch, whose Merrimack brewery acquires water for use in its production process pursuant to a special contract with PWW that expires in 2015, expressed concerns about

the proposed municipalization and requests that the Commission, at a minimum, impose and enforce certain conditions on the transaction.

Noting that its facility is not located in Nashua, Anheuser-Busch raised the issue of whether ratemaking decisions by a municipal water utility in Nashua would be influenced by political pressures unfavorable to large industrial customers located beyond the municipal borders. Anheuser-Busch noted with approval Nashua's commitments at hearing to continue to serve Anheuser-Busch according to the terms of the special contract with PWW, and to submit future disputes to the Commission for resolution. Anheuser-Busch requested that the Commission condition approval on the fulfillment of these conditions.

Anheuser-Busch expressed concerns about Nashua's stated inability to continue to serve the brewery pursuant to a special contract, as distinct from a tariff that embraces the terms of the special contract. Anheuser-Busch notes that, unlike a tariff, contract terms are subject to negotiation and are judicially enforceable. According to Anheuser-Busch, to the extent Nashua is not a regulated utility there is no mechanism for preventing Nashua from modifying or revoking the applicable tariff unilaterally.

It is the contention of Anheuser-Busch that applicable New Hampshire law effectively creates a presumption that when a municipal utility serves customers beyond its borders, such service remains subject to utility regulation absent a specific statutory provision to the contrary. A specific statutory provision that concerns Anheuser-Busch is RSA 362:4, III-a(a)(1), with its rule exempting municipal utilities from rate regulation if the municipality offers "new customers" outside municipal borders the same service it offers within the municipality, at rates that are no more than 15 percent higher. According to Anheuser-Busch, this provision affords no protection to an outside, industrial customer with high usage.

According to Anheuser-Busch, it presumes that Nashua could provide reliable water service of appropriate quality while serving as an effective steward of the watershed and achieving some cost savings. However, Anheuser-Busch expressed concern that no neighboring municipality supported the municipalization plan unconditionally, a situation the intervenor views as possibly portending future conflicts that will not serve the interests of the region as a whole. Additionally, although Anheuser-Busch indicated it presumes Veolia could be a capable system operator with which it could work effectively as an industrial customer, there is no guarantee that some other, less reliable operator could eventually succeed Veolia. Anheuser-Busch also expressed concerns about what it characterized as a lack of experience on the part of Nashua's other contractor, R.W. Beck.

E. Staff

Staff opposes Nashua's bid to municipalize PWW. According to Staff, the evidence does not support a Commission determination that municipal ownership will lower rates. Staff agrees it is possible that Nashua could achieve some savings in the realms of capital costs, income taxes, compliance costs, and corporate overhead, but Staff points out that nothing would require Nashua to apply these savings to rate reductions.

According to Staff, relying on the testimony of Mr. Ware for Pennichuck, costs related to billing and collections, customer service, labor rates and the development of a geographic information system were either not accounted for or underestimated by Nashua. Staff further contends, based on the testimony of its own witness, that Nashua had underestimated the costs of unplanned maintenance, fuel, electricity, purchased water, and compliance with the DigSafe program. Further, Staff contends that certain per-unit costs are missing from Nashua's proposed operating agreement with Veolia. Staff raises the possibility that the base fee to be charged by

Veolia had been artificially reduced by inappropriately allocating foreseeable costs to variable fees as opposed to the fixed base fee. In the view of Staff, PWW customers will experience rate increases in the future regardless of which entity owns the system, but such increases will likely be less under municipal ownership because of municipal access to less costly debt financing. But Staff warns that uncertainties prevent making any reliable projections of future rates.

Staff is particularly concerned about possible rate effects with respect to the so-called "satellite" systems and their roughly 3,000 customers. This refers to water systems that are owned and operated by PWW, serve customers outside of Nashua and are not interconnected with the system that serves the Nashua customers. Staff sees conflicting responses from Nashua about how it will calculate rates for these customers, noting that Nashua has complained that its citizens are subsidizing water service to the satellite customers outside Nashua. Therefore, Staff dismisses Nashua's indication that it will continue to charge these customers the same rates all other customers will pay. According to Staff, the general notion of a municipal water system owning satellite systems outside its municipal boundaries is a poor model and not in the public interest.

It is Staff's view that municipalization will also adversely affect rates for PEU and PAC. Like Pennichuck, Staff contends that PEU and PAC will suffer from the loss of efficiencies and economies of scale when they are no longer affiliated with PWW. Although conceding that certain predictions of Pennichuck witness John Guastella – rate increases of 66 percent for PEU and 64 percent for PAC – are worst-case scenarios, Staff nevertheless foresees some harm to these customers as the result of rate increases.

Staff rejected any contentions by Nashua that its citizens are currently subsidizing the PEU and PAC customers. In fact, Staff contends that Pennichuck's ownership of PEU and PAC

actually benefits Nashua customers of PWW because of operating efficiencies and the sharing of common assets over a large customer base. Staff points out that such efficiencies are the reason Nashua originally sought to acquire not just PWW but PEU and PAC as well. Staff further rejects any suggestion that Nashua customers are subsidizing Milford or Anheuser-Busch and these entities' wholesale acquisition of water from PWW. In that regard, Staff points to Commission orders approving the contractual arrangements as consistent with the public interest. Staff also notes that the Commission regularly reviews PWW's cost allocations in connection with rate cases and the submission of affiliate agreements.

Noting that the regionalization of water service has consistently been the public policy of the state, particularly as a means of addressing problems arising out of small and undercapitalized water systems with aging facilities, Staff indicates that it places Nashua and PWW "on an equal footing" with regard to which owner of the system would be likely to promote and enter into regional solutions to water supply problems outside the PWW service territory. Staff notes that municipalities have historically been unwilling to assist water users outside their boundaries, but notes that the Legislature passed RSA 362:4, III-a in 2002, which allows municipalities to charge a rate premium to such users, as a means of encouraging municipalities to enter into regionalization plans.

In the view of Staff, Nashua's support of regionalization will be greatly constrained in practice. Staff points out that Nashua's initial filing contemplated the transfer of the PWW system to the newly formed Merrimack Valley Regional Water District, but Nashua has since deferred that plan to some unspecified point in the future. Further, according to Staff, Nashua expressed an interest only in working on regional approaches with adjoining municipalities, as opposed to systems that are remote from Nashua's or are investor-owned. Moreover, according

to Staff, even if the Nashua area delimits the appropriate scope of regionalization efforts for the PWW system under municipal ownership, the evidence suggests that Nashua is reluctant to play even this relatively limited role.

Staff contends that Nashua's assertions about its superiority to PWW as a potential steward of the watershed do not provide a basis for finding municipalization to be in the public interest. Staff points out that only part of the Pennichuck Brook watershed is actually within Nashua's borders and, thus, Nashua's ability to address watershed issues would be limited.

According to Staff, it is likely that Veolia and R.W. Beck, as the contractors Nashua plans to use to operate and oversee the PWW system, have the capability to discharge their functions effectively. However, Staff characterizes as "disconcerting" the "incompleteness of the contracts and Nashua's position that it can simply amend the documents later to ameliorate any deficiencies." *Id.* at 29. Staff expresses concern that Nashua plans no actual day-to-day contact with Veolia and instead plans to rely on R.W. Beck to oversee Veolia's work.

Staff also does not approve of Nashua's planned allocation of customer service functions between municipal employees and Veolia, which involves the former handling bill-related queries and the latter fielding service-related concerns. Staff noted that many customer calls raise both kinds of concerns. Thus, Staff foresees frustrated callers, bounced between Veolia and City Hall. Staff conceded that Nashua raised the possibility of having Veolia handle all customer calls, which would address Staff's concern, but Staff nevertheless suggests that the Commission ignore this possibility on the ground that it had not been subject to discovery and full inquiry at hearing. Staff also contends that the evidence is unclear at best about how many employees Nashua plans to devote to receiving and acting on customer inquiries.

Staff also expressed concern about whether Nashua would participate in the state's RSA 374 Underground Utility Damage Prevention System – also known as DigSafe – because municipalities, unlike utilities, are not required to do so. Conceding that Nashua agreed at hearing that either it or Veolia would voluntarily join DigSafe, Staff nevertheless notes that only Nashua would be eligible for membership. Staff also argues that the prohibition on unfunded state mandates in the New Hampshire Constitution is a significant obstacle to the Commission requiring Nashua to participate in DigSafe.

Staff characterized as "inappropriate" and "contrary to law" Nashua's proposal to add Commission-imposed conditions to the transaction in exchange for approval. *Id.* at 40. According to Staff, Nashua has not met its obligation "to make a clear and definitive proposal to the Commission." *Id.* at 42.

F. City of Nashua

In urging the Commission to approve its petition, Nashua draws the Commission's attention to the language of RSA 38:2, I and its reference to municipal authority to "establish" facilities for the distribution of water. According to Nashua, use of the word "establish" means the Legislature did not require the petitioning municipality to have in place, at the time of the petition, a fully realized plan with technical and managerial qualifications specified. In the view of Nashua, Pennichuck has consistently failed to recognize this statutory reality and, in effect, has argued that in order to prevail in a proceeding such as this a municipality would have to have a fully functioning water department in place prior to invoking the RSA 38 municipalization process before the Commission.

Nashua contends that, if the Legislature had intended to require a petitioning municipality to address all of the issues concerning qualifications, operating and managerial parameters and

other concerns prior to filing the petition, the Legislature could have done so. According to Nashua, the Legislature in essence decided to take the opposite approach, by creating in RSA 38:3 a rebuttable presumption in favor of the transaction when it receives a two-thirds majority by the governing body and has been subject to a confirming vote by municipal voters.

According to Nashua, it has been diligent since filing its petition about implementing concrete plans for municipalizing the PWW system, to the point of entering into detailed agreements with contractors for operation and oversight of the system. Nashua concedes that it is impossible to describe with absolute certainty what municipal operation would entail, but it blames Pennichuck itself for the uncertainties. Specifically, Nashua points to what it characterizes as Pennichuck's refusal to permit Nashua to conduct due diligence or to contact Pennichuck employees about the terms and conditions of their employment, as well as errors in the costs Pennichuck reported to the Commission for items such as energy, fuel, and chemicals.

Nashua contends that its selection of Veolia as system operator brings significant technical and managerial advantages over a small, investor-owned utility like PWW. Nashua notes that the Veolia subsidiary that will be directly involved is Veolia Water North America – Northeast LLC, a wholly owned subsidiary of Veolia Water North America. According to Nashua, Veolia Water North America is the largest water services partnership company in the U.S. and provides services in more than 600 communities, has annual revenue of $530 million, 1.4 million water customers, and 3,150 employees of which 1,200 are licensed operators and 400 are licensed water operators. Nashua further points out that the parent company of Veolia Water North America – Veolia Environment – is the largest water service provider in the world with 55,000 employees serving 110 million people. According to Nashua, it is in the public interest for PWW's customers to be served by an operator with such skills, experience, and

qualifications. Further, according to Nashua, what Nashua characterizes as its "public-private partnership" with Veolia will also reduce substantially the overhead that PWW customers currently pay for services that are not related to the actual operation of the water system. Nashua Pre-Hearing Brief at 18-19 and Post-Hearing Brief at 5-6.

According to Nashua, the much smaller PWW cannot bring the same level of insight and sophistication to the job, and as evidence Nashua cites PWW's ongoing water treatment plant upgrade project. According to Nashua, what was originally represented to the Commission in 2002 as a project of $6 million to $14 million had become a project in excess of $40 million by 2006, not including AFUDC (allowance for funds used in construction, a recoverable expense for ratemaking purposes), which Nashua contends will continue to accrue at 8 percent annually until the upgraded facilities are finally placed into service. Nashua complains that cost-of-service utility regulation actually rewards PWW for failing to control the cost of the project, as long as the utility convinces the Commission that the costs are reasonable. According to Nashua, the Commission and its Staff are not qualified to second guess a utility that lacks the technical resources to control the costs of such a project. According to Nashua, by way of contrast it is Veolia's practice to deliver projects of this sort for a specified contract price.

Nashua also directs the Commission's attention to the record evidence concerning PWW's use of CMMS (computerized maintenance management software), which Veolia also plans to use. Nashua points to the pre-filed direct testimony of Donald Ware, to the effect that PWW had used a CMMS software package for more than five years so that the advent of Veolia as system operator would not, in that respect, achieve any new efficiencies. However, according to Nashua, in February 2007 a Commission audit revealed that despite an expenditure of $600,000 PWW had not been making effective use of the software.

According to Nashua, its proposed operations, maintenance, and management (CM&M) agreement with Veolia will provide service that exceeds what is currently being provided to PWW customers. Nashua accuses Pennichuck of incorrectly claiming that the terms of this contract are not enforceable; according to Nashua, the agreement's draft status merely reflects the fact that its terms may need to be amended to accommodate any conditions added by the Commission in this order. Nashua contends that, if Veolia fails to live up to its service commitments, it can be replaced as contractor in a competitive marketplace, whereas utility customers are not similarly free to replace their utility. Thus, according to Nashua, Veolia will be a more accountable operator than PWW.

Citing evidence as to letters of deficiency issued by the Department of Environmental Services to PWW, Nashua contends that it will do a better job than PWW has in complying with federal and state drinking water standards. Nashua accuses PWW of being reluctant to make investments to comply with such regulations, suggesting that Veolia will be more proactive because, should it fail to identify necessary improvements, it will be required to indemnify Nashua for any resulting fines and penalties.

Nashua asserts that its record of customer service will be superior to that of PWW. According to Nashua, it's existing billings and collections department is highly efficient and capable of adding municipal water to its list of responsibilities, which currently include property taxes, wastewater, and vehicle registrations. Nashua notes that the department currently employs six full-time customer service agents and one part-time data entry person, all with experience in using PWW's water consumption data because it is employed to generate bills for use of Nashua's wastewater system. Nashua notes that it plans to add two additional customer service representatives to the department upon acquisition of the water system. Nashua also stresses that

Veolia plans to devote two customer service representatives of its own to fielding service-related (as opposed to billing-related) inquiries and that, in any event, Veolia will be contractually required to provide an appropriate level of service regardless of how many employees it has.

According to Nashua, beyond actual customer contacts, it and Veolia will be working "behind the scenes" to enhance customer service. Nashua Post-Hearing Brief at 25. Nashua notes that Veolia plans to maintain detailed call logs to keep track of operational inquiries, with a system of work orders and process charts used to ensure that all such inquiries are resolved.

Nashua complains that both Pennichuck and Staff have criticized Nashua's customer service plans based on fundamental errors and misunderstandings. According to Nashua, Pennichuck and Staff: (1) failed to consider that nearly half of Pennichuck's customers do not receive service from PWW and will thus not require customer service from Nashua post-acquisition; (2) conducted no analysis of Veolia's experience providing customer service in Indianapolis, under a similar arrangement with that municipality; (3) ignored the fact that Nashua's customer service will be subject to Commission jurisdiction because it will serve customers outside Nashua itself; and (4) indulged in unwarranted speculation by opining about a lack of coordination and delineation of responsibilities.

According to Nashua, for the years 2008 through 2017, PWW customers would save $360 million in rates under municipal ownership of the system, assuming Nashua's valuation estimate is appropriate and further assuming that Nashua issues a system repair and replacement bond of $18 million every three years. Nashua contends that its operations and maintenance expenses will be $1.7 million less than PWW's in the first year, increasing thereafter, in light of Nashua's ability to eliminate PWW's "bloated administrative and overhead expense and the unique benefits and synergies available to municipalities." *Id.* at 56. Nashua disputes any

Pennichuck contention that there are areas not covered by the Veolia contract that will amount to additional, unaccounted-for expenses. According to Nashua, what this overlooks is that the Veolia contract was designed to mirror PWW's current operations. Thus, in Nashua's view, if there truly are any overlooked expenses they amount to additional costs that both PWW and Nashua would incur.

Concerning the effects of municipalizing PWW on PEU, PAC, and PWSC, Nashua contends that any harm alleged by Pennichuck is both overstated and self-inflicted. Nashua begins this argument by noting that in its original petition it proposed to acquire PEU and PAC, and PWW – and that it stands prepared to move forward with its original proposal. Nashua then contends that Pennichuck's successful effort to dismiss PEU and PAC as parties is the cause of the harm Pennichuck now alleges to those affiliates. In the view of Nashua, as Pennichuck has acquired affiliates outside the PWW service territory it has allocated centralized costs of Pennichuck and PWW to those affiliates arbitrarily. According to Nashua, in these circumstances any determination by the Commission that harms to PEU and PAC preclude municipalization would, in effect, mean that PWW could never be subject to acquisition under RSA 38.

Nashua urges the Commission to reject the testimony of PWW witness John Guastella concerning likely rate effects on PEU and PAC. According to Nashua, Mr. Guastella's analysis is flawed because he simply allocated costs based on the model used by PWW without considering whether the model itself is appropriate and cost-effective in comparison to other ways of organizing utility operations. Indeed, according to Nashua, even assuming Mr. Guastella's analysis to be reasonable, this merely proves that PEU and PAC are providing an unreasonable subsidy to PWW under the current ownership and cost allocation regime.

The last issue raised by Nashua concerns Pennichuck's record as steward of the watershed and Nashua's likely record as successor to those stewardship responsibilities. According to Nashua, it has already taken significant steps toward watershed protection by adopting exemplary regulations and acquiring 483 acres of land. Nashua accuses Pennichuck of continuing to transfer land held for conservation purposes to its unregulated real estate development affiliate even as a draft watershed management plan was in circulation 11 years ago that recommended preservation of existing undeveloped land. According to Nashua, Pennichuck's own experts concluded in a 2003 report that the estimated yield of Pennichuck Brook had declined by more than 75 percent over the preceding century. All of this, in Nashua's view, illustrates a key difference between a publicly owned water system and an investor-owned water utility.

Nashua proposes a series of eight conditions that the municipality contends are appropriate and responsive to concerns raised in the course of this proceeding. They are: (1) a requirement that Nashua serve all PWW customers, inside or outside Nashua, at the same core rates; (2) service to customers outside Nashua remaining under the regulatory jurisdiction of the Commission for purposes of addressing quality-of-service issues; (3) service to all customers according to its Water Ordinance, including its Main Extension Policy, as amended and the Water Ordinance will be subject to the Commission's jurisdiction.; (4) mandatory Commission approval of any franchise transfers; (5) Nashua's adoption of the obligations arising out of existing wholesale contracts, subject to Commission jurisdiction; (6) Nashua's compliance with Commission regulations concerning customer service; (7) the availability of technical advisors on a 24-hour basis to industrial and wholesale customers, with technical information about the

water treatment process available electronically at least daily; and (8) the establishment of a technical advisory board, which would make periodic recommendations to Nashua.

Nashua also lays out what it characterizes as four "discretionary conditions" that the municipality contends are not necessary but that Nashua is willing to adopt to address the concerns of others. These conditions are: (1) full regulation of the system as a water utility through December 31 of the fifth year after municipalization; (2) amendment of the OM&M agreement with Veolia to provide that all customer service functions will be compliant with N.H. Code Admin. Rules Puc 1200, governing customer relations of regulated utilities; (3) acquisition by Nashua of PEU and PAC or, in the alternative, creation of a mitigation fund pursuant to a future Commission proceeding with the value of the fund capped at the value of the two utilities' plant-in-service; and (4) making Nashua's final contracts with Veolia and R.W. Beck subject to Commission approval, with the agreements being submitted by Nashua for review within 60 days of final resolution of this docket.

G. Commission Analysis

Upon a careful review of the record, it is our finding that neither Pennichuck nor any other party, including Staff, has rebutted the RSA 38:3 presumption that the proposed municipalization of Pennichuck Water Works is in the public interest as to the PWW plant and property within Nashua. In addition, we find that the taking of plant and property outside Nashua is in the public interest and, as a result of certain conditions which we make a part of our determination, we conclude that impacts with respect to customers outside Nashua's municipal boundaries have been satisfactorily addressed. Lastly, in order to provide some additional context for the discussion below, we note that of the approximately 25,000 PWW customers, 22,000 receive service from the core system and 3,000 receive service from satellite systems that

are not physically interconnected to the core system. Furthermore, of the 22,000 core customers, roughly 21,700 are within the city of Nashua and 300 are outside the city. Thus, approximately 87 percent of PWW's customers are within the City of Nashua.

1. PWW Customers Within Nashua

In an effort to overcome the public interest presumption in RSA 38:3, opponents to the taking argue that PWW has a strong record as a regional presence and that it is better able than Nashua to solve regional water supply problems. We are unable to agree with Pennichuck's general assertion that because PWW, in conjunction with its regulated affiliates PEU and PAC, is a successful regional utility the public interest would not be served by allowing a municipality to acquire it. As testified by Mr. Naylor and others, Pennichuck has provided safe and reliable water service to its customers for many decades, and it has also been willing to make investments in systems elsewhere in the region that were experiencing operational and financial difficulties. Staff acknowledges assertions by Nashua that it is willing to contribute to solving water supply challenges that arise regionally, but Staff views this willingness as too limited because, according to Staff, it covers only the immediate Nashua area, and too speculative because it would be done through a municipal water system that does not enjoy regional support and by a city that has been hostile to PWW's regional role. Staff Brief at 20-25.

In our judgment, the presumption that the proposed municipalization is in the public interest cannot be rebutted by assertions that the municipalized water system will be unwilling or unable to acquire service territories for which the system being taken is not currently responsible. It is laudable that Pennichuck and its subsidiaries have been willing to expand into new areas when that result was consistent with good public policy, but ultimately an investor-owned utility cannot be expected to do so unless such a decision is in the best interests of shareholders, who

expect to maximize return on their investment within certain risk parameters. In short, while the testimony at hearing would arguably suggest that Pennichuck is more willing than Nashua will be to acquire troubled water systems, we find, ultimately, that the testimony is speculative. In this sense, arguments concerning Nashua's future role in the region are not adequate to rebut the statutory presumption in favor of municipal ownership.

As noted above, Mr. Naylor testified about Pennichuck's positive record as a utility. Although this evidence is credible, it is not the type of evidence that can form the basis for denying Nashua's petition. In other words, the opponents of an RSA 38 petition cannot, in our view, rebut the presumption in favor of the taking by demonstrating that the utility has a good record.

Pennichuck also asks us to consider the workforce implications for PEU, PAC, and PWSC of municipalizing PWW. As the record before us demonstrates, all of the employees who operate PEU, PAC, and PWSC are employees of PWW. These employees provide services to PEU, PAC, and PWSC pursuant to affiliate agreements. Pennichuck notes that Nashua and Veolia will attempt to hire PWW's field staff in the event that municipalization moves forward and that, if successful, these efforts will drain PWW's current affiliates of badly needed expertise. Pennichuck notes a second possibility is that many PWW employees will opt not to change employers, and thus Nashua will operate the water system without the very individuals who know the system best. In reality, principles of supply and demand suggest that, post-municipalization, Nashua and the remaining Pennichuck companies will be able to compete successfully for the workforce each needs. If Nashua's contractors are unsuccessful in hiring PWW's employees, they have testified that they will bring in their own experienced employees. We do not view as likely the possibility that the water system will be operated by inexperienced

employees, as Pennichuck contends, and we conclude that Pennichuck has not overcome the presumption that the taking is in the public interest. The issue of potential harm, in terms of the added cost to PEU and PAC of replacing these employees, is an issue we will address below.

Pennichuck asks us to reject Nashua's municipalization plans because, in Pennichuck's view, Nashua's proposed relationship with the contractors Veolia and R.W. Beck is flawed. We find, however, that the proposed arrangements are reasonably calculated to lead to an effective operation of the PWW system. Pennichuck points out that Veolia's experience, though perhaps extensive as a general proposition, is actually quite limited when it comes to operating a water system (as distinct from a wastewater system) for a municipality. In fact, the only such system Veolia has operated is the one in Indianapolis. We do not find this to be a disqualifying level of experience that overcomes the presumption in RSA 38:3. Indianapolis is a city of significant size and many of the operational tasks Veolia must perform are not unique to municipal water systems. Staff itself opined that Veolia and Beck likely have the resources to fulfill their obligations under the proposed contracts with Nashua. Staff Brief at 29. As Pennichuck has noted, Veolia's performance would improve in the event it hires PWW employees. Additionally, we find that the prior experience of R.W. Beck as an owner's representative is adequate, even if it has been limited to design/build projects and water supply facilities as opposed to distribution systems.

Singled out for particular criticism by Pennichuck and Staff was Nashua's proposal that it perform billing and collection functions while Veolia performs the remaining customer service functions. Pennichuck was critical that separating customer service functions between Veolia and City employees was fraught with uncertainty and would cause customers to suffer. Pennichuck noted Veolia's initial response to Nashua's request for proposals was for Veolia to

perform all the customer service functions. Staff testified that many customer calls involve a combination of operational issues and billing and collection issues. Exh. 5003 at 5 lines 1-6. Thus, it contends that customer service functions should be integrated. At hearing, Nashua proposed to have Veolia perform all of the customer service functions and Staff opined in its brief that this proposal would likely address Staff's concerns. Both Pennichuck and Staff expressed reservation, however, that the parties had not had sufficient discovery opportunity on Nashua's proposal.

With respect to discovery, the record shows numerous instances where the parties examined whether Nashua should perform some of the customer service functions or whether it should be entirely performed by Veolia. See, e.g., Exh. 1005, Exh. 1006, Exh. 1013, Exh. 3013, Exh. 3043, Exh. 3045, and Exh. 3257. As such, we find that this issue has been adequately examined.

Nashua's commitment, as set forth in its brief, states:

> Nashua shall amend its OM&M Agreement with Veolia Water so that Veolia Water shall provide all customer service functions, including billing and collections, in full compliance with all applicable laws, rules, and regulations related to customer service, including but not limited to the Commission's Puc 1200 regulations.

We interpret Nashua's commitment to mean that Veolia will perform customer service functions as described in Exhs. 3043 and 3045. We find this approach to be reasonable and note that no party has shown it to be contrary to the public interest. Although we agree that Nashua may structure its customer service functions solely with Veolia, we nonetheless believe it useful to condition our approval on Nashua's commitment to not bifurcate the customer service functions.

Objections to Nashua's provision of customer service are also addressed by the facts that Nashua: commits to providing service according to its Water Ordinance; will have technical

advisors on call 24-hours per day for industrial and wholesale customers; and will establish a technical advisory board. The technical advisory board will include representatives of retail and wholesale customers, regulatory agencies, municipalities served by the system, developers and public interest organizations. Lastly, pursuant to RSA 362:4, III-a(b), Nashua will continue to be subject to the Commission's jurisdiction; although it will be exempt from accounting, reporting, and auditing functions pursuant to RSA 362:4, II. In light of the Commission's continued jurisdiction and commitments by Nashua, we find that there has been no showing that Nashua's customer service function will be performed in a manner contrary to the public interest.

Pennichuck has also been critical of elected officials being the ultimate decision makers once the PWW system is city-owned. According to Pennichuck, this is likely to "throw such issues into a highly politicized forum where decisions are made for reasons other than purely business considerations." Pennichuck Brief at 16. Pennichuck asserts that Veolia has "ample experience" with disagreements between it as an operations contractor and the municipality for which it works. *Id.* at 21 (noting that "[i]n some cases it sued its municipal partner first" and in others "the municipality sued first"). It would be inappropriate for us to adopt such a skeptical view of the ability of elected officials to make good decisions. In essence, Pennichuck's perspective amounts to a disagreement with the policy choice implicit in the RSA 38:3 rebuttable presumption favoring municipal ownership.

With respect to arguments that Nashua's contracts are incomplete, we do not share Staff's view that the contracts with Veolia and R.W. Beck are too incomplete or tentative to support a finding in favor of municipalization. As Nashua has noted, much of the uncertainty is the inevitable result of the indeterminacy of the scope of the relevant responsibilities pending resolution of disputed issues in this proceeding. Opponents of municipalization have complained

that Nashua and Veolia have sought to exploit the uncertainty by failing to include essential tasks in the proposed contract with Veolia, thus obscuring the true cost of the contractual relationship. The record does not support a finding that Nashua has done this to intentionally gain an advantage over its opponents. Moreover, given the delay from the time the contracts were drafted to the time the contracts will be implemented, it is reasonable for certain costs, such as labor rates, to not be fixed. As we stated in Order No. 24,567, "[i]t would strain credulity to expect, in the context of a statutory scheme that allows the petitioner to forestall a final determination on whether to proceed with a taking until after valuation is determined ...that Nashua should have had final contracts developed ." *City of Nashua,* Order No. 24,567, 90 NHPUC 619, 622 (2005).

We next turn to the issue of rates under Nashua ownership and note that, unlike most issues, the parties appear to be in general agreement that rates under municipal ownership would likely be lower than under private ownership at certain valuations. Nashua contends that under its ownership, cost advantages, operating efficiencies, and lower capital requirements available to it would allow it to operate the water system with a lower revenue requirement than PWW. Exh. 1015 and Hearing Transcript of January 10, 2007 (1/10/07 Tr.) at 29 lines 13-21. Pennichuck's witness, Mr. Guastella, testified that at a valuation of $248.4 million, Nashua's revenue requirement would be lower than PWW's. 9/18/07 Tr. at 101 lines 12-24. Mr. Guastella was careful to note that a lower revenue requirement would only result in lower rates if the savings were actually applied to the rates. 9/18/07 Tr. at 102 lines 1-10. In its brief, Nashua states that "at any value that is less than what PWW has proposed, there will be lower rates under Nashua's ownership and the differential will continue to grow over time." Nashua Brief at 13. From this, we conclude that Nashua intends to use its lower revenue requirement to lower

customer rates. And from our valuation analysis, we conclude that the value of PWW's assets as of December 31, 2008, is $203 million, which is lower than the $248.4 million threshold that Pennichuck and Nashua contend would produce a rate advantage for municipal ownership.

Finally, inasmuch as we find that the presumption that the taking by Nashua is in the public interest has not been rebutted, we need not resolve various factual allegations made by Nashua as to PWW's conduct of its affairs as a public utility. Nevertheless, we deem it appropriate it to address two specific allegations. First, Nashua charges that PWW has done a poor job as a steward of the watershed that is the ultimate source of its customers' water supply. We find that this allegation is not supported by the facts presented here. Second, Nashua charges that Mr. Ware testified falsely as to PWW's use of certain management software. Again, we find the allegation is not supported by the facts.

2. PWW Customers Outside Nashua

We now turn to questions relating to PWW customers not located in Nashua and how much property it is in the public interest for Nashua to take outside its municipal boundaries. There are two distinct categories of customers and property outside Nashua's boundaries: one group of customers is connected to the core system, and the second group of customers is served by satellite systems. Between the two, the clearer case concerns the property and customers physically interconnected to the core system, i.e., the non-Nashua core customers. Physical separation from the core system would likely have negative effects both on the integrated system and the customers cut off from it. Consequently, keeping the integrated system intact serves the public interest.

The public interest concern with respect to non-Nashua core customers goes to the fact that they are not citizens of Nashua and therefore lack a voice in Nashua's decisionmaking. The

Commission, however, can effectively protect such customers inasmuch as Nashua, to the extent it provides service outside its municipal boundaries, will be regulated by the Commission, pursuant to RSA 362:4,III-a(b), and Nashua, therefore, may not raise rates unless there is a cost basis for doing so and the Commission approves such an increase. As to ensuring these customers receive the same quality and quantity of water as customers located within Nashua, we note that being on the core system these customers take service from the same distribution system that supplies inside customers. Thus, core customers residing outside Nashua will receive the same quality and quantity of water as customers residing inside Nashua.

With respect to the satellite systems, the issue of the physical interconnectedness to the core system does not apply. The core system could be taken without any adverse hydrological impact upon the satellite systems. As a result, the public interest inquiry devolves essentially to a consideration of whether the customers of such systems would be better served by remaining associated with the core system or by being divorced from it. Divorcing the satellite systems from the core system involves substantial uncertainty as to whether those systems would constitute a new, independent utility within the Pennichuck holding company structure, or be attached to one of the existing utility companies. There are untested legal questions as well concerning the Commission's authority to require melding the satellites into one of the other Pennichuck subsidiaries and there are other effects to consider concerning the possible rate impacts on such customers.

In Order No. 24,425 (January 21, 2005) the Commission concluded that extra-territorial takings were intended by the Legislature to be limited but that ultimately the extent of such a taking required a factual determination as to what the public interest required. In this instance, the focus of what constitutes the public interest is not on the physical interconnectedness of the

water systems but on what best serves the approximately 3,000 customers of the satellite systems. As with the non-Nashua customers of the core system, we find that the customers of the satellite systems are better served by remaining part of the PWW system for purposes of rate and service continuity and because they will retain the protections of state regulation pursuant to RSA 362:4,III-a(b), which means that Nashua may not increase these customers' rates unless Nashua can prove that an increase is justified on the basis of reasonable and prudent costs.

Opponents to the taking argue that customers of PWW that are not constituents of Nashua's elected officials would have no recourse if those officials treated them less favorably than customers within Nashua. Such concerns appear to be based on a misunderstanding of the extent of the Commission's authority pursuant to RSA 362:4, III-a. Furthermore, Nashua addresses any such concerns by proposing that the Commission condition approval of the taking on the continued use of a consolidated rate design whereby "core" rates are applied to all retail customers, regardless of their location. Nashua agrees to apply its water ordinance, including the main extension policy in the ordinance, in a manner that does not discriminate between customers inside and outside of Nashua. We find the proposed conditions to be reasonable. Finally, RSA 38:11 grants the Commission broad content to set conditions.

Additionally, Nashua agrees that service quality issues should remain subject to the Commission's oversight pursuant to RSA 374 and that the Commission should have jurisdiction relative to any service quality complaints, and that it should not sell, lease or otherwise transfer its franchises without prior Commission approval. Nashua Post-Hearing Brief at A-1 and A-2. We acknowledge Nashua's commitments, but we do not agree with its underlying premise that the Commission lacks jurisdiction in these regards. To the contrary, RSA 362:4 clearly provides that all municipal corporations serving outside their corporate boundaries are not exempt from

the franchise requirements of RSA 374. Thus, any future transfer of Nashua's franchise would remain subject to Commission jurisdiction. Furthermore, any complaints brought under Chapter 365 pertaining to the safety and adequacy of water supplied to customers are also subject to the Commission's jurisdiction.

3. Wholesale Contracts

Some opponents to Nashua's petition argue the taking is not in the public interest because Nashua has no obligation to honor PWW's existing wholesale contracts and that municipal wholesale customers in particular will be left without the protections of Commission jurisdiction. They cite RSA 362:4,III-a(a)(2) which states that municipal corporations furnishing water service pursuant to wholesale contracts to another municipality shall not be considered public utilities for purposes of the Commission's enabling statutes. To overcome these concerns, Nashua has agreed to abide by the terms of existing wholesale contracts "or, if required for bonding purposes," to "create a wholesale tariff that incorporates the rates and provisions of the existing wholesale contracts." *Id.* This agreement pertains both to municipal purchasers, e.g., Milford and Merrimack, as well as to PWW's wholesale commercial customer, e.g., Anheuser-Busch.

We agree that in the ordinary course of Commission oversight of municipal water systems, a municipal corporation furnishing bulk water to another municipal entity "shall not be considered a public utility" for purposes of the Commission's enabling legislation. RSA 362:4, III-a(a)(2). This statutory provision has been in existence since before the Legislature most recently codified RSA 38 in 1997. We also note that the ability of the Commission to set conditions to satisfy the public interest, pursuant to RSA 38:11, has survived recent modifications to both RSA 38 and RSA 362:4 in 2002 and 2003. In light of the Legislature's

activity in these areas, we cannot conclude that the Legislature intended RSA 362:4 to limit, as opponents contend, the Commission's ability to ensure the public interest is satisfied under RSA 38:11. As already noted, *supra*, we conclude that we have broad authority to set conditions pursuant to RSA 38:11, which allows us to subject Nashua to the same oversight with respect to wholesale water supply contracts as that to which PWW is currently subject.

Subsequent to the hearings, Nashua strengthened this condition further by entering into a written agreement with the Town of Milford that has the effect of: (1) precluding Nashua from taking advantage of PWW's contractual right to terminate the water supply agreement, and (2) precluding Nashua from changing positions and challenging the Commission's authority to provide regulatory oversight of the wholesale relationship. In our judgment, the effect of this agreement is to resolve any doubt that Milford will continue to enjoy the legal protections it currently enjoys with respect to its bulk water purchases from the PWW system. Accordingly, we deem Milford's Motion to Consider and Maintain Effectiveness of Existing Contract to be moot. We therefore approve the agreement and incorporate its terms here as a part of our public interest determination.

4. DigSafe

We next turn to the issue of Nashua's compliance with the state's Underground Utility Damage Prevention System, the so-called DigSafe law, under RSA 374:48-56, which protects the public safety by requiring excavators and operators of public utilities to take certain precautions when digging near buried public utility facilities. As Staff testified, the statute does not require municipalities to join, although Concord, Dover, Hudson, Portsmouth are voluntary members. 9/26/07 Tr. at 26 lines 2-3. The City of Nashua is not currently a member, but it has agreed to become a member of DigSafe. 9/26/07 Tr. at 21 lines 21-24 and at 22 line 1.

We find that Nashua's municipal membership in the state's DigSafe program is necessary to our finding that its taking of PWW is in the public interest. We specify that Nashua itself, as opposed to its contractors, must become and remain a member of the DigSafe program. We also condition approval of Nashua's taking on Nashua hiring a PWW employee familiar with PWW's facilities, although we do not condition our approval on Nashua hiring any specific employee of PWW.

5. Franchise

We next address the issue of franchise authority for Nashua to serve customers outside its municipal boundaries. Based on the evidence presented in this docket, we find that Nashua has effectively demonstrated the financial, managerial, and technical capabilities required for a public water utility to receive permission to commence business pursuant to RSA 374:22, I. In the event Nashua proceeds to commence such business, it must also receive the requisite approvals from the Department of Environmental Services as required by RSA 374:22, III and receive final, formal approval from the Commission.

6. PEU and PAC

In making our public interest determination, we must also consider the effects of the transaction on PEU, PAC and their approximately 7,000 customers. In our judgment, the evidence demonstrates that, upon a taking by Nashua of PWW, there will be a loss of synergies and capabilities to these two smaller utilities that will impact them adversely, in the form of rate increases that customers would not otherwise sustain. However, as Nashua points out, to preclude the transaction on this basis would be to determine, in effect, that Pennichuck Water Works (or any other utility with such affiliate relationships) is simply not amenable to municipalization under RSA 38. We do not believe this is consistent with legislative intent.

Accordingly, it is our determination that the appropriate method for resolving the public interest issues that concern PEU and PAC is to treat the effects as remediable through a mitigation fund established as a condition pursuant to RSA 38:11. Payments from such a fund should be payable for the benefit of PEU and PAC customers pursuant to our ongoing authority over these utilities as discussed in Section VII.

7. Conclusion

In summary, the opponents of municipalization have not rebutted the presumption that Nashua's planned municipalization of Pennichuck Water Works as it applies to customers within the municipal boundaries of Nashua is in the public interest pursuant to RSA 38:3. Furthermore, in light of the conditions we will set pursuant to RSA 38:11, the taking as it applies to PWW customers outside the boundaries of Nashua and customers of PEU and PAC is in the public interest. Accordingly, we turn to the question of valuation.

VI. VALUATION

Pursuant to RSA 38:9, the Commission is charged with determining the price "of the plant and property lying within or without the municipality that the public interest requires the municipality to purchase." Constitutional principles require just compensation for the property taken. *Opinion of the Justices,* 131 N.H. 504, 510 (1989). Just compensation is defined as fair market value. *Id.* It is "the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining." *Edgecomb Steel Co. v. State,* 100 N.H. 480, 487 (1957). Furthermore, the condemnee is entitled to a valuation "for the most profitable purpose, or advantageous use, to which [the property] could be put on the day it was taken." *Opinion of the*

Justices. 131 N.H. at 510 (citing *Emmons v. Power Utilities Co.*, 83 N.H. 181, 184 (1927)). The fair market value of a public utility includes the "value of its property and franchises taken together as a going concern." *Washington Suburban Sanitary Comm. v. Utilities, Inc. of Maryland,* 775 A.2d 1178, 1193 (Md. 2001).

A. Summary of Values

Nashua employed the firm of George E. Sansoucy, P.E., LLC (GES) to provide valuation testimony. GES determined the value of PWW's real, personal, and intangible property as of December 31, 2004. Exh. 1007A at 7. Specifically, witness George Sansoucy of GES determined the value of PWW using a cost approach. Witness Glenn Walker of GES determined the value of PWW using a sales comparison and an income capitalization approach. Frederick H. Smith provided assistance in costing of improvements and Philip L. Munck assisted in sales research. See generally Exh. 1007A. GES determined the value of PWW's assets as of December 31, 2004 to be $85,000,000. Pursuant to the procedural schedule, the parties filed testimony updating their initial valuations so as to be more current than December 2004. In testimony filed November 14, 2006, GES updated this value to $139,000,000 as of December 31, 2007. GES arrived at this value by adding $54,000,000 in "new property, plant and equipment" at rate base value to its initial $85,000,000.

PWW employed various experts in its effort to value its assets. Richard Riethmiller, an independent consultant, with the assistance of Harold Walker III of Gannett Fleming, Inc. determined the replacement cost new (RCN) of PWW's tangible personal property and performed the depreciation analysis reflected in the replacement cost new less depreciation (RCNLD). Russell W. Thibeault of Applied Economic Research determined the fair market value of PWW's real estate assets. Robert F. Reilly, managing director of Willamette

Management Associates, determined the fair market value of PWW's net working capital and intangible property and determined the fair market value of PWW's assets in their entirety. *See generally* Exh. 3007A. Mr. Reilly determined the value of PWW's assets as of December 31, 2004 to be $248,400,000. In testimony filed on November 14, 2006, Mr. Reilly updated his value to $273,400,000 as of December 31, 2005. Exh. 3021 and 3021A. This figure excludes approximately $37.1 million in plant additions related to the water treatment plant.[9]

B. Valuation Methods Employed

The record reflects that, as a general matter, three types of valuation methods are traditionally used in determining fair market value: the asset or cost approach, the sales comparison approach, and the income approach. In the asset based or cost approach, a value is derived for the fee simple interest in a property by estimating the current cost to construct a reproduction of, or replacement for, the existing structure plus any profit or incentive; deducting depreciation from the total cost; and adding the estimated land value. Appraisal Institute, *The Appraisal of Real Estate* (12th ed., 2001) at 349. Other adjustments may be made to the indicated fee simple value of the property to reflect the value of the property interest being appraised. The cost approach supports two methods for estimating cost and three methods of estimating depreciation. *Id.* "The cost approach is based on the principle ... that a purchaser would likely not pay more for a property than the cost of replacing it." Exh. 1007A at 34.

In the sales comparison approach, an opinion of market value is developed by comparing properties similar to the subject property that have recently sold, are listed for sale, or are under contract. *The Appraisal of Real Estate* at 417. "[C]omparisons are made to demonstrate the

[9] Exh. 3009A at 16 ("future liability yet to be expended - $37,087,391").

price at which the subject property would most likely be sold if it had been offered for sale in the market place" Exh.1007A at 34.

The income approach to value consists of methods, techniques, and mathematical procedures that an appraiser uses to analyze a property's capacity to generate future monetary benefits of income and convert these benefits into an indication of present value. *The Appraisal of Real Estate* at 471. The analysis of cost and sales data is often an integral part of the income capitalization approach, and capitalization techniques are frequently employed in the cost and sales comparison approaches. *Id.*

The accepted valuation practice involves use of a combination of these methods to derive a fair market value, although each method may be given different weight in the overall determination of value. In this case, Nashua and PWW's appraisal experts considered all three approaches in their analyses but, as explained below, they differed in the weighting they attributed to each approach and how they performed the underlying calculations.

C. Nashua's Valuation Testimony

In determining its figure of $85 million, GES considered all three approaches to valuation. GES calculated an indicated valuation of $104 million under the asset based approach but assigned it zero percent weighting. GES gave no weight to this approach because it concluded that the value was over estimated as a result of the "existence of external obsolescence such as the limitations on earnings potential due to cost of service rate regulation and other factors." Exh. 1007 at 3. Using the sales comparison approach, GES determined an indicated valuation of $89 million. It determined a value of $80 million using the income approach. GES assigned an equal weighting to the sales and income valuations and determined the overall appraisal valuation of $85 million as of December 31, 2004.

As stated earlier, GES concluded that approximately $54 million in new property, plant, and equipment should be added to PWW's assets to reflect activity between December 31, 2004 and December 31, 2007. GES did not perform an amended appraisal but, instead, suggested that the property additions made since December 31, 2004 be added to fair market value "in the same amount as their contribution to rate base." Exh. 1017 at 4.

We next describe GES's analysis within each of the valuation methods employed.

1. Nashua's Asset Approach/Trended Original Cost Method

In the asset approach, GES used a trended original cost method. This method estimates the cost new of property by adjusting the historic cost with a multiplier factor derived from a construction cost index. In this case, GES used PWW's Generally Accepted Accounting Principles (GAAP) Taxable Asset Reports and Main Pipe Inventory and applied a multiplier factor obtained from the Handy-Whitman Index of Public Utility Construction. Exh. 1007A at 43. GES recognized the existence of limitations to using the asset reports and inventory, but considered them to be a reasonable estimate of the original cost of PWW that would produce a reasonable estimate of the PWW system. Exh. 1007A at 42.

From this adjusted calculation of original cost, GES deducted for curable physical deterioration, incurable physical deterioration, and functional obsolescence.[10] GES did not quantify or deduct for economic obsolescence for PWW's assets because, as stated earlier, when

[10] Curable physical deterioration concerns property that is in need of repair or replacement at the time of appraisal. Exh. 1007A at 45. Incurable physical deterioration is decay of items that cannot be reversed and must be replaced or be subject to major repair. *Id.* Functional obsolescence is a curable or incurable flaw in the property when compared with the highest and best use and most cost effective functional design requirements at the time of appraisal. Five types of functional obsolescence exist. *The Appraisal of Real Estate* at 403-404.

economic obsolescence is applied to the formula, it reduces the value and approximates the sales and income approach values.[11] *Id.* at 48. Exh. 1007 at 3. 9/10/07 Tr. at 44 lines 7-11.

To calculate curable physical deterioration, GES reviewed PWW's known capital budget items contained in the Fay, Spoffard, and Thorndike Capital Improvement Plan for deferred maintenance as of the valuation date. GES considered the deferred maintenance items to represent $10 million of curable physical deterioration. Exh. 1007A at 45. To establish incurable physical deterioration, GES developed a percent relationship of estimated age of the property to the useful lives of the property, or 36.2 percent. *Id.* at 46. For calculating functional obsolescence, which GES defined as deficiencies in the system caused by assets not complying with required water quality regulations, GES assembled cost estimates for the water treatment plant upgrades, security costs, and other items from information provided in PWW's 2004 rate case, Docket No. DW 04-056. *Id.* at 46. These three categories of depreciation result in a combined percentage of 53.4 percent of cost new.

GES then estimated the market value of PWW's land as of December 31, 2004 by reviewing the 2004 assessment values established by the individual towns and adjusting for the corresponding equalization ratio. GES considered the equalized assessment of each land parcel "a reasonable estimate of PWW's land value for the purposes of this report." *Id.* at 48.

2. Nashua's Sales Comparison Approach

In valuing PWW's assets using the sales comparison approach, GES reviewed the sale of 28 water systems around the country. Exh. 1007A at 52. These sales occurred between 1995 and 2006. According to GES, the "sales comparison approach is most applicable in an active market where the prices paid serve as accurate indicators of the most probable selling price of the

[11] Economic obsolescence is the reduction in the value of the asset caused by factors beyond the owners' control such as regulatory change or inflation. Exh. 1007A at 47.

subject property as of the valuation date." Exh. 1007A at 49. In comparing the sales, GES used numerous units of comparison.

One unit of comparison involved computing the ratio of the sale price to net plant, minus net contributions in aid of construction (CIAC). This reflects the relationship between the sale price of the utility and its plant-in-service rate base. GES determined the ratio to be 1.6. GES used only Class A-1 water utilities (as classified by the National Association of Water Companies) with gross annual revenues of $10 million or more. GES also used data relating to PWW's net plant minus net CIAC which it obtained from PWW's 2004 rate case proceeding. Exh. 1007A at 41. GES applied the ratio to the net plant minus net CIAC and determined the indicated valuation of $81.6 million, rounded. Exh. 1007A at 55.

GES also calculated another unit of comparison: a value estimate based on a ratio of sale price to earnings before interest, taxes, depreciation and amortization (EBITDA). As with the earlier ratio, GES based its analysis on Class A-1 water utilities with gross annual revenues of $10 million or more and on amounts relating to EBITDA found in PWW's 2004 rate case proceeding. GES calculated an indicated valuation of $96 million, rounded. Exh. 1007A at 56. GES did not compute any other unit of comparison.

GES then determined a composite valuation by assigning an equal weight to the ratio determined by comparing sale price to net plant minus CIAC and the ratio determined by comparing sale price to EBITDA. With this even weighting, GES arrived at a value estimate of $89 million. Exh. 1007A at 56. As with the asset based approach, GES did not specifically update this value in its November 14, 2006 update testimony.

3. Nashua's Income Approach

GES identified two methods generally used to capitalize future income: direct capitalization and yield capitalization. For purposes of valuing PWW, GES considered both methods but states it ultimately chose only to use the yield capitalization method. Exh. 1007A at 54. According to GES, this method converts future benefits into present value by discounting each future benefit at an appropriate yield rate or by developing an overall rate that explicitly reflects the investment's income pattern, value change and yield rate. Exh. 1007A at 58.[12] Within this method, GES reviewed PWW's *pro forma* cash flows presented in PWW's 2004 rate case proceeding and adjusted it by using an average annual IRS depreciation rate of 4.5 percent. GES also deducted income taxes (calculated before expensing interest on debt) to determine income to be capitalized, or $5,804,889. Exh. 1007A at 62 and 63. GES divided this income amount by a weighted average cost of capital of 7.20 percent which included an adjustment to the debt rate for the deductibility of interest expense. GES's analysis yielded a value estimate of $80,623,452. *Id.* at 64.

D. PWW's Valuation Testimony

In determining PWW's initial overall valuation, Mr. Reilly considered the asset based approach/asset accumulation method, income approach/discounted cash flow (DCF) method, and the sales comparison approach/guideline merged and acquired company method. Mr. Reilly determined an indicated valuation of $253.8 million as of December 31, 2004 under the asset based approach/asset accumulation method and assigned it a 60 percent weighting. Exh. 3007A at 4. Mr. Reilly explained that he gave the asset based approach value a 60 percent weighting

[12] Although GES purports to use the yield capitalization method, the supporting schedules appear to use the direct capitalization method. Exh. 1007A at 64.

because of PWW's assets being special purpose property.[13] In testimony filed on November 14, 2006, Mr. Reilly updated this value to $266.4 million as of December 31, 2005. Under the income approach/DCF method, Mr. Reilly initially determined an indicated fair market value of $240.2 million. He assigned it a 40 percent weighting because, in his opinion, a buyer would rely heavily on the income generating capacity of these assets in making a purchasing decision. Exh. 3007 at 35-36 and Exh. 3007A at 5. In testimony filed on November 14, 2006, Mr. Reilly updated this value to $283.9 million as of December 31, 2005. Using the 60/40 weightings, Mr. Reilly determined an overall fair market value of PWW, as of December 31, 2005, of $273.4 million. Exh. 3021A at 3.

Mr. Reilly assigned no weight to the sales comparison approach. His search of recent acquisitions yielded 12 companies that had been acquired within four years prior to the valuation date. Five of the 12 sales were purchases by investor-owned entities and Mr. Reilly found them either too small, too large, or involving both water and sewer operations. The remaining seven sales involved purchases by public entities and Mr. Reilly found them either too small, involving a forced sale, or involving other utilities in the sale such as gas, electric, or sewer. Exh. 3007A at 41-46. In his opinion, because of these differences as well as the uncertainty regarding the condition of the guideline assets, the comparative sales were not sufficiently comparable to provide meaningful valuation guidance as to the PWW assets. For these reasons, Mr. Reilly assigned a zero weighting to the sales comparison approach.

1. PWW's Asset Approach/Asset Accumulation Method

According to Mr. Reilly, the asset based approach/asset accumulation method is relied upon by most appraisers valuing special purpose property. It is a multi-step process and involves

[13] Special purpose property is a "limited-market property with a unique physical design, special construction materials, or a layout that restricts its utility to the use for which it was built." *Appraisal of Real Estate* at 25.

the addition of values for tangible personal property, operating real estate and real property interests, and intangible personal property to estimate the fair market value of a subject's total operating assets. Exh. 3007 at 22.

For tangible assets, Mr. Riethmiller, with the assistance of Mr. Walker, conducted a Replacement Cost New Less Depreciation (RCNLD) analysis. Mr. Riethmiller defined RCN (i.e., replacement cost new) as the estimated cost of replacing, under current conditions, the water treatment, storage, and distribution assets of the PWW system with new property that has the nearest equivalent material or utility compared to the property being valued. Exh. 3008 at 6. This appraisal method assumes construction of the entire system in one continuous effort. *Id.* In some instances, the replacement material may be functionally superior to the property being valued and thus adjustments may be necessary to account for the functional obsolescence in the observed depreciation portion of the analysis. Mr. Riethmiller testified that observed depreciation is a manner of quantifying the existing condition of the property in terms of its physical deterioration and functional obsolescence and is generally expressed as a percentage of RCN. Exh. 3008 at 8.

To start the RCNLD analysis, Mr. Walker prepared a detailed inventory of PWW's tangible assets: the treatment plant, wells, pump stations, tanks, and transmission and distribution mains and services. PWW's mains include asbestos, cement, cast iron lined, cast iron unlined, ductile iron, concrete, copper, PVC, and galvanized steel. PWW has a limited amount of 6" and 72" Swiss steel pipe, which is a spiral wound, riveted mild steel pipe with a bitumastic coating on the exterior and interior. Exh. 3008 at 16. The 72" Swiss steel main was installed in 1898 and was unlined until the early 1970's when it was cleaned and lined. Mr. Walker determined, at current prices, what it would cost to replace those assets. This calculation comprises the RCN

portion of the calculation. Mr. Riethmiller then took Mr. Walker's detailed inventory and RCN and quantified the observed depreciation of the current condition of the assets.

Mr. Riethmiller conducted 18 sampling digs to confirm the observed depreciation of PWW's mains. According to Mr. Riethmiller, the samples confirmed that the mains were in remarkably good condition. Exh. 3008 at 18. Mr. Riethmiller calculated the observed depreciation percentage for each asset category and determined an overall observed depreciation percentage of 25 percent. By applying the observed depreciation to the RCN, Mr. Riethmiller completed the RCNLD analysis. Exh. 3007 at 23; and Exh. 3009A at 16-87.

For real estate and real property interests, Mr. Thibeault appraised the fee interest of 60 real estate parcels and 67 cross country easements owned by PWW. Exh. 3011 at 3-4. He determined a value of $12,038,800 for real estate PWW owned in fee and $863,700 for easements. Combined, Mr. Thibeault determined PWW's real estate and real property interests had a fair market value of $12,902,500.

For intangible assets, Mr. Reilly determined the value of PWW's distribution maps, water pumping rights, databases, company records, and a trained and assembled workforce using the RCNLD method. Since he deemed PWW's water pumping rights to be of a special nature, he determined that value by using an income approach/direct capitalization method. In total, Mr. Reilly determined a fair market value of PWW's intangible assets of $41.8 million. Exh. 3007 at 28.

Mr. Reilly then determined the amount of economic obsolescence and subtracted it from the values for the tangible assets, real estate and real property interests, and intangible assets. He determined economic obsolescence by capitalizing, at 7 percent, the difference between the required return on the RCNLD valuation amount and the projected earnings. Exh. 3007A at 36.

Based on the accumulation of all of the above, Mr. Reilly determined an indicated value of PWW's assets using the asset based approach to be $253.8 million. Exh. 3007A at 37. In testimony filed in November 2006, Mr. Reilly updated this value to be $266.4 million as of December 31, 2005. Exh. 3021A at 5.

2. PWW's Income Approach/Discounted Cash Flow Method

As already noted, the income based approach assumes that the value of a business is the present worth of its future income. To value that income, Mr. Reilly used the DCF method, which uses a company's financial projections to estimate the present value of the future cash flow. He determined the net cash flow portion of the method by taking the EBIT and adding depreciation and amortization expense, subtracting capital expenditures, and subtracting required increases in working capital. Exh. 3007A at 38. He determined the appropriate present value discount rate to apply in the DCF by determining the WACC.

In Mr. Reilly's opinion, the WACC should reflect the cost of capital of the likely population of willing buyers, and those buyers include not-for-profit public entities. Exh. 3007A at 38. The not-for-profit entities enjoy advantages such as no income tax, low cost financing, no regulation, and reduced property taxes and these advantages allow these entities to set the range for the purchase price. According to Mr. Reilly, the market price for a business valued as a going concern will be set by the purchasers with the greatest expected synergies. Exh. 3007 at 17.

As to the net cash flow, Mr. Reilly adjusted PWW's financial projections for December 31, 2005 through December 31, 2009 for the expected financial performance of the hypothetical purchasers; specifically he used a not-for-profit purchaser. Exh. 3010A at 2-5. The 2005 to 2009 projections were followed by a normalized year. *Id.* Mr. Reilly defended this adjustment

as being necessary because the buyer with the most synergies will set the range of market prices for the group.

As to WACC, Mr. Reilly used a build-up model and incorporated the capital structure of a hypothetical buyer. He calculated an 18.7 percent cost of equity and a cost of debt of 4.6 percent. He weighted the cost of equity at 5 percent and cost of debt at 95 percent which yielded a 5 percent WACC. Exh. 3007A at 68. Mr. Reilly then took the present value discount rate of 5 percent and subtracted an expected long-term growth rate of 2 percent to produce a 3 percent direct capitalization rate. *Id.* at 69. These factors produced an indicated value of $240.2 million using the DCF method. In November 2006, Mr. Reilly updated this figure to $283.9 million.

E. Critiques of Valuation Testimony

1. Pennichuck

Within the sales approach, Pennichuck criticized Nashua for choosing comparable sales based on one comparability factor alone. Four of the nine transactions were stale; one was not a transaction; three were part of multi-state transactions; and the remaining transaction was a multi-state water/sewer transaction. Pennichuck stated that Mr. Walker admitted he made certain errors in identifying some of the sales transactions as comparable. 9/4/07 Tr. at 159-160, 166-169, and 270. Nashua's reliance on the sales data was erroneous because its experts never made any personal review of the assets. In addition, Nashua applied a stock and debt method, which is used to value stock, not assets. Pennichuck was critical of Nashua characterizing the market approach as "active and transparent" and affording it a 50 percent weighting.

Within the income approach, Nashua relied on a WACC of private regulated water utilities. It did not analyze the pool of hypothetical buyers and instead assumed a buyer would be like PWW. In essence, Nashua assumed that the pool of hypothetical purchasers consisted

only of regulated private companies, which understates fair market value. Pennichuck asserts that this assumption was unlike past appraisals in which Nashua's experts acknowledged a municipal buyer in the hypothetical pool. In this instance, Pennichuck contends that Nashua's experts knew that using a regulatory rate of return and capitalization rate would result in a value that would approximate rate base. Exh. 3061 at 16 n.3.

According to Pennichuck, Nashua's cost approach contained numerous errors: arbitrarily assigning lives to assets; arbitrarily making a $10 million deduction for "curable physical depreciation"; and valuing the existing water treatment plant at $5,500,000. Pennichuck also asserts that there were failures to: value intangible assets or real property; perform an appraisal of operating real estate and real property; and assign any weight to the asset valuation approach, relying instead on inaccurate and incomplete tangible personal property original cost data.

Nashua did not update the appraisal with the most current financial and asset information so the valuation is based on December 31, 2004 data. Nashua' experts recognized that the trended original cost method will not result in an accurate and reliable estimate of the current cost of the system if the original cost data is not accurate. 9/4/07 Tr. at 203-204. They admitted that more accurate records "will get a higher trend." 9/4/07 Tr. at 230. Exh. 3102. Pennichuck argues that at least two documents were used by Nashua's expert that he knew were unreliable in preparing his cost approach: (1) PWW's CPRs, and (2) PWW's engineering inventory. 9/4/07 Tr. at 205-208 and Pennichuck post hearing brief at p. 48 (11/16/07).

Pennichuck was critical of Nashua's age-life depreciation method and stated that it essentially produced a theoretical depreciation. Exh. 3018 and Exh. 1007A at 45-46. Pennichuck's expert, Mr. Reithmiller explained that unless an asset is new, the estimate of observed depreciation is rarely simple and requires: (1) the analysis of multiple factors,

(including historical system information), and (2) the application of engineering experience and professional judgment. Nashua's experts, instead, used an age-life method to determine what he calls the "incurable physical deterioration" of the property, which he defined as the "decay of items over the course of time that cannot be reversed or eliminated without replacement or major repairs to the property." This age-life method relied on: (1) the expected useful physical life, or economic life expectancy, as compared against, (2) the actual age of the asset as reflected in the PWW records. Thus, Mr. Reithmiller concluded Nashua's depreciation calculation is only as credible as: (1) the data used for the expected life of the PWW assets, and (2) the data used to conclude the actual age of the PWW assets.

As to the reliability of the expected life data, Nashua assumed a straight line basis over the course of its economic life, although Mr. Reithmiller notes that age-life is not appropriate since a water system does not physically deteriorate on a straight line basis and transmission and distribution piping has a long life. As to the actual age of the assets, Nashua states that three factors were considered in calculating the useful physical life for the assets of PWW: (1) the materials and design used to construct the assets, (2) the regulatory service lives, and (3) the age of the property. Pennichuck asserts that some information can be garnered on how an asset will perform over time from the type of material that was used to construct it, but significant additional information is needed to accurately determine its current condition. It concludes that regulatory service lives do not equal actual service lives for sale price valuation purposes.

Lastly, Pennichuck noted that Nashua did not dispute the inventory underlying Mr. Reilly's cost approach; the pricing of the direct and indirect construction costs of the water system; the observed depreciation applied to the assets; or the valuation of any of the intangible assets developed by Mr. Reilly; the appraisal of real estate by Russell Thibeault; or the

discounted cash flow formula Mr. Reilly employed in performing the income approach. Exh. 1015 at 15; 9/4/07 Tr. at 39-41. Further, Nashua did not challenge Mr. Reilly's detailed descriptions of the comparable transactions that he considered and ultimately rejected. Exh. 1015 at 15-16. Finally, Nashua acknowledged that for special purpose property the cost approach is an appropriate approach to consider and rely upon, yet it assigned zero weight to that approach. 9/4/07 Tr. at 248 and Exh. 3206 at 4.

2. Nashua

Nashua criticized Pennichuck's fair market value analysis as containing: an erroneously calculated economic obsolescence, use of an erroneous discount rate, wrong assumptions that included assumption of a "brownfield" construction approach which artificially inflated the cost new of the PWW system, and failure to recognize bona fide offers to purchase the PWW assets shortly before the valuation date and other transactions in the marketplace. Exh. 1015 at 4 and 5.

Nashua contended that PWW's fair market value is not influenced by "not-for-profit" entities since those entities enjoy synergies and savings not available to the typical buyer. Exh. 1015 at 2 and 4. According to Nashua, by assuming the synergies of a "not-for-profit public" entity and by considering these synergies in developing the capitalization rate, Mr. Reilly developed an "investment value" that artificially inflates PWW's fair market value by $160 million. Exh. 1015 at 5 and 6.

Nashua contends that a market for PWW's special purpose property existed in 2004 but that Mr. Reilly ignored this market evidence. Nashua's expert, Mr. Walker, used twenty-eight sales comparisons and concluded the most important characteristic was size, and sales were grouped according to the National Assoc. of Water Companies classification for revenue. He developed market-based ratios he believed were the best indicators of the value of PWW and

ultimately selected sale price to net plant less CIAC and sale price to EBITDA. He concluded the larger systems command a premium over smaller systems and thus he used those sales of systems with gross annual revenues of $10 million or more. Nashua points out that Mr. Reilly failed to complete or weight the sales method.

Nashua observes that buyers of income producing property view cash flow as a critical element affecting value and that under the income capitalization method a value is estimated by capitalizing the cash flow available to satisfy debt and equity with a market based rate of return. Because Mr. Walker's capitalization rate assumed no further earning growth, it is considered a yield capitalization method. Nashua states that Mr. Walker used a typical buyer and Mr. Reilly used a not-for-profit or special buyer, which has certain benefits or synergies available to it that a typical buyer would not. Nashua argues that these benefits should not be considered and it contends that Mr. Walker's scatter graph for sale price to EBITDA ratio was the only empirical evidence that municipalities pay more than IOUs. Exh. 1007A, at 54.

Nashua criticized Mr. Reilly's inclusion of a growth rate in his income approach and stated that assuming an earnings growth rate will be the same as the growth in customers is inconsistent with both historic levels and future estimates. It further opines that earnings growth without capital expenditures will result in over earning. Pennichuck's witness, Mr. Guastella, does not support the 2 percent growth rate since his schedule reflects a declining rate base 2009-2015. Exh. 3010A at 3. Absent the 2 percent growth rate, Nashua argues PWW's fair market value would be $89 million.

Mr. Reilly assumed a 5 percent rate of return (ROR) to establish the capitalized income shortfall from which he calculated economic obsolescence attributable to his cost method. Citing the *Appraisal of Real Estate*, 12th Ed., Pages 487-493, Nashua states the cost of capital and rate

of return of a typical buyer or investor should have been used and it argues that PWW's 8.68 percent ROR is a good proxy. If Mr. Reilly used 8.68 percent, the economic obsolescence would have been 68 percent, not 47 percent and would have yielded a cost method value of $160,000,000.

Nashua asserts that Mr. Reilly's valuation exceeds that of Pennichuck Corporation alone as follows: On December 31, 2005, Pennichuck Corporation's stock sold for $20.45 per share. When multiplied by 4,200,000 outstanding shares and adding outstanding debt of $41,456,000, an enterprise value of Pennichuck Corporation of $127,346,000 results. Nashua contends that this enterprise value is consistent with the SG Barr Devlin 2002 auction and Philadelphia Suburban's bid. Nashua further contends that whenever Mr. Reilly made a choice, it was always to increase the value by: using a hypothetical buyer that would result in the greatest value, adding a long term growth rate, using municipal capitalization, and not weighting the sales approach.

F. Pennichuck Motion to Disqualify Messrs. Sansoucy and Walker

On November 27, 2006, the Pennichuck Companies filed a motion to disqualify Messrs. Sansoucy and Walker as valuation expert witnesses. Pennichuck argued that: (1) Sansoucy and Walker were biased in favor of Nashua in a manner that is inconsistent with the Uniform Standards of Professional Appraisal Practice (USPAP) because they stood to profit personally from an outcome favorable to Nashua and specifically sought their engagement by promising to recommend a predetermined outcome; and (2) that the two witnesses failed to follow the USPAP standards when they conducted their actual valuation by employing a "no net harm" approach that bears no relationship to accepted valuation methodologies as well as misapplying the accepted methodologies. In support of the motion, Pennichuck cited the leading U.S. Supreme

Court case on the admissibility of expert testimony, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the state-law codification of the *Daubert* principles found at RSA 516:29-a. Pennichuck argued that the Commission "should not lower the bar to allow Sansoucy and Walker to testify as to their opinion of value if such an expert opinion would not be permitted in court." Pennichuck also relied upon RSA 310-B:18-a, which concerns disciplinary proceedings for licensed or certified real estate appraisers and adopts the USPAP ethical and professional conduct standards in effect at the time of the appraisal assignment as the relevant standard for adjudicating such proceedings. This standard became effective August 18, 2006.

On December 8, 2006, in Order No. 24,706, we denied the motion without prejudice, noting that *Daubert* did not apply to the Commission's proceedings and concluding that the credibility of these witnesses would be best determined at hearing.

At hearing, the Pennichuck Companies presented evidence that Mr. Sancoucy's firm, GES, was hired by Nashua to advocate that acquiring PWW's assets was in the public interest. Exh. 3036. GES's compensation was estimated to be $538,000. *Id.* at 8. As part of the same contract, GES would assist Nashua in preparing contracts for the operation, maintenance, and management of the water system assets. *Id.* at 6. GES would assist with closing activities and would participate "in the preparation of materials to facilitate the optimum debt structure and cost for the acquisition, and the placement of tax exempt debt." *Id.* On July 20, 2006, Nashua submitted the joint testimony of Mr. Sansoucy, Mayor Bernard Streeter, and Alderman Brian S. McCarthy, positing that Nashua's taking of PWW's assets was in the public interest. Exh. 1016. On January 12, 2006, Nashua filed a self-contained appraisal report performed by GES and on November 14, 2006, Nashua filed testimony of GES intended to update the appraisal. Exh. 1007A and Exh. 1017. The appraisal report contained a certification signed by Messrs. Walker

and Sansoucy that "[w]e have no present or prospective interest in the property that is the subject of this report, and no personal interest or bias with respect to the parties involved." Exh. 1007A at 66.

We understand the concerns raised by Pennichuck, however, it is the responsibility of the Real Estate Appraiser Board under RSA 310-B, and not the Public Utilities Commission, to determine whether violations of the professional standards applicable to appraisers have occurred. Accordingly, we do not express any opinion as to whether Messrs. Walker and Sansoucy have failed to comply with the USPAP standards. Moreover, while the multiple roles played by Mr. Sansoucy in this transaction could arguably be construed to be in conflict, in our view the Commission's rules, Puc 202.03, do not require the exclusion of the testimony of Messrs. Walker and Sansoucy from the record. Accordingly, we will assess their testimony solely on its merits.

G. Commission Analysis

Nashua and PWW are in agreement that a fair market valuation price must be fixed for Pennichuck Water Works and, pursuant to New Hampshire law, such a value would be "the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably be given weight in such bargaining." *Edgecomb Steel* at 487. Nashua and PWW are also in agreement that there are three general approaches to calculating fair market value, namely, the cost or asset based approach, the comparable sales approach, and the income based approach.

However, there is little agreement between Nashua and PWW as to the application of these general concepts. Among other things, Nashua relies on a 50-50 weighting of the sales and

income approaches and assigns zero value to the cost approach, while PWW relies on a 60-40 weighting of the cost and income approaches and assigns zero value to the sales approach. Also of consequential dispute between the parties is Nashua's discounting of the effect of public entities as willing buyers and PWW's conclusion that the "likely population of hypothetical buyers for the PWW system will include the market influences of not-for-profit entities" and that such entities "will set the market price" under the income approach. Exh. 3007 at 22 and 39.

Among the critiques of the various approaches are the arguments that the sales approach does not accurately value public utility property and that a drawback to the asset or cost approach is that it does not value intangibles, which must be added separately. In this case, PWW's expert used an income approach to value water pumping rights and other intangible assets, which he then added to the asset approach. Exh. 1007B1 at 30. As to the asset approach, there is a distinction between fair market value and rate base, and some items are not included in rate base but should be included in fair market value. This is true for items of value such as CIAC, still functioning but fully depreciated machinery, and appreciated assets. Thus, "whatever approach, premised on a regulatory rate base that excludes significant utility assets, almost without exception results in less than full or just compensation for all property taken." *Washington* at 1194 (citing 4A J.L. Sackman, *Nichols* (3d ed. rev.2000) § 14A.06[1][6], at 14A-17). Because each approach must be adjusted to overcome items of value not inherently included in it, we will not treat one approach as conclusive. Rather, we will evaluate each approach and then weight them accordingly.

1. Sales Approach

Experts for both Nashua and PWW testified that PWW's assets are special purpose property. 9/4/07 Tr. at 241 lines 17-20; Exh. 3007 at 10. The value of special purpose property

is not as accurately determined using the sales approach as compared to the asset and income approaches. According to *The Appraisal of Real Estate*:

> When the market is weak and few market transactions are available, the applicability of the sales comparison approach may be limited, for example, the sales comparison approach is usually not applied to special purpose properties because few similar properties may be sold in a given market even when it is geographically broad. For valuing special purpose properties, the cost approach may be more appropriate and reliable.

The Appraisal of Real Estate at 419. Further, according to Nichols' *The Law of Eminent Domain* §12C.01[3][a], special purpose property cannot typically be valued using the sales approach.

We find that PWW's operating assets are special purpose in nature. We also note that the record documented few comparable sales. For instance, of the 28 potential sales that Nashua's experts identified, they only found nine comparable sales based on size. Exh. 1007A at 30-33. Of those nine sales, four were more than five years old, three were part of multi-state transactions, one was a stock transaction, and the remaining sale was not sufficiently comparable. Exh. 3017A at 32-38. As a result, we agree with PWW that the lack of sales that are comparable on more than one factor to PWW's assets makes the sales approach less useful than the asset and income approaches. Given the paucity of comparable sales, we find that the sales comparison approach is not useful in determining the market value of PWW's assets. Accordingly, we will afford this approach no weight in our valuation.

2. Asset Approach

The elements ordinarily considered in the fair market value of a public utility are the current value of the tangible property, present and future earnings, the "going value" of the plant, and the amount of money required to put the plant in good condition. *Washington (*citing 4A J.L.

Sackman, *Nichols* (3d ed. rev. 2000). Various methods are traditionally relied on to determine the value of these elements and each has its own drawbacks but, of them, greater weight seems to be placed on the asset approach. *Id.* at 1193 citing Nichols §15.06[2], at 15-47.

PWW's use of the asset approach is more credible than Nashua's for a number of reasons. First, with respect to land, PWW valued its real estate and easements through a certified land appraisal and included in its analysis 2005 tax assessment data, before any current use deduction. Exh. 3011A. Nashua, however, extrapolated PWW's land value by taking the 2004 assessment values and adjusted for the corresponding equalization ratio set by the Department of Revenue Administration. Nashua did not adjust for current use impact.

PWW's experts valued PWW's land at $12.9 million while Nashua's experts valued PWW's land at $4.5 million. Exh. 3011A at 13-18 and Exh. 1007A. At the level of individual parcels, the differences can be seen as follows: a 16-acre parcel on Narrows Road was listed by Nashua as having a 2004 assessed value of $74,800 while PWW's expert listed the same property as having a 2005 assessed value, before current use, of $353,500; two 2-acre parcels on Ferry Road were valued by Nashua using 2004 assessed values of $1,200 and $1,400 while PWW's expert used 2005 assessed values, before current use, of $2,400 each. Additionally, PWW's land appraisal was developed with a greater attention to detail and specifically identified the highest and best use characteristics of 60 parcels and 67 easements, located in Amherst, Bedford, Derry, Hollis, Merrimack, and Nashua. Exh. 3011A. Nashua made no such highest and best use notations. Nashua's approach is lacking as a reasonable basis for determining just compensation for condemnation purposes when more accurate data and methods existed. Consequently, we are persuaded that PWW's method is superior to Nashua's method and we adopt PWW's appraisal valuation amount of $12.9 million for land.

Furthermore, there was a significant difference between Nashua's and PWW's appraisal valuation for intangible property. Nashua's appraisal valuation for intangible property is $176,833. Exh. 1007B1 at 30. By comparison, PWW's appraisal valuation for intangible property is $41,800,000. Exh. 3007A at 62. Intangible property was an integral part of PWW's operating assets and each component of intangible property should be identified and incorporated in the overall valuation of the operating assets. PWW's valuation was estimated based on an appraisal of each of the individual discrete intangible assets, *i.e.*, distribution maps, engineering drawings, water pumping rights, water system records and reports, Synergen work order database, laboratory reports, SCADA computer software system, and a trained and assembled workforce. By comparison, Nashua's estimate did not identify individual components. Thus, it is impossible to determine its credibility. For these reasons, we adopt PWW's asset approach and related appraisal valuation, subject to certain modifications as discussed below.

With respect to water pumping rights, PWW assigns a value of $24.5 million to water pumping rights associated with its permit to draw water from the Merrimack River. PWW used the cost approach whenever possible to appraise intangibles. Exh. 3007A at 55, 57, 58, 59, 60, and 61. However, Mr. Reilly used the income approach for water rights. He specifically used what looks like a direct capitalization method to determine that PWW's water rights were worth $24.5 million, except that instead of capitalizing the value of a stream of revenue or cash flow, an assumed avoided expense is capitalized. Exh. 3007A at 56. He used this method because, in his opinion, water rights were of a special nature, although he did not elaborate on the basis for that opinion. Exh. 3007 at 25. To assign a value, Mr. Reilly calculates valuation based on a proxy expense derived from the average volumetric charge of $1.11 per cubic foot that PWW pays to Manchester Water Works and Merrimack Village District for water it purchases for its

Bedford and Merrimack franchise areas. He then divides the expense (earnings) by a capitalization rate of 3 percent to calculate the valuation amount of $24.5 million.

The value assigned to water rights is substantially higher than the values given to other intangibles. Mr. Reilly used a proxy charge of $1.11 but provides no justification for this multiplier other than it appears to be the going rate PWW pays for water in the geographic vicinity of its pumping rights. Further, PWW fails to provide any persuasive evidence regarding: (1) whether such permits are difficult or easy to acquire, or (2) the costs of acquiring such a permit. Although we agree that water rights in theory have value, based on the record we find no reasonable basis for assigning the value of $24.5 million to the water pumping rights as proposed by PWW.

With respect to depreciation, PWW's experts determined observed depreciation to be $139.3 million, or 25.0 percent of RCN-tangible personal property. Exh. 3021A at 20. Nashua's experts determined depreciation to be approximately 53.4 percent of RCN-tangible personal property tangible. Exh. 1007A at 43. We note further that PWW's experts corroborated depreciation through 18 sampling digs on PWW's mains; thus the depreciation factor is based more on fact than on assumed probabilities. The observation method is recognized as the preferred method of determining depreciation. *See State v. Hoquiam,* 155 Wash. 678, 687 (1930). Here, we find PWW's depreciation analysis to be more credible; however, we will modify PWW's observed depreciation percent from 25 percent to 25.7 percent to comport with the observed depreciation approved in PWW's most recent rate case, Docket No. DW 06-073, in which Nashua participated. In that proceeding, depreciation was 25.7 percent of original cost and incorporated the impact of physical and functional deterioration and was thoroughly reviewed by Staff and the parties. We find that the rationale for depreciation reserves in PWW's

recent rate case is compatible with the rationale for observed depreciation as used in appraisal valuation. Since PWW's rate case and appraisal occurred near in time to one another, it cannot be said that the passage of time accounts for PWW's use of 25 percent rather than 25.7 percent.

With respect to economic obsolescence, we first note that it addresses the question of whether the operating assets are generating enough income to support a required rate of return. Exh. 3007 at 27. This factor can have a significant impact on the asset-based approach. PWW's appraisal experts determined economic obsolescence to be $205.2 million as of December 31, 2005. Exh. 3021A at 18. Nashua's appraisal experts did not determine economic obsolescence and explained only that adding economic obsolescence would have brought the asset valuation more in line with the sales and income valuations. Exh. 1007A at 48. We find the absence of economic obsolescence in Nashua's approach inconsistent with established law recognizing it as relevant to determining fair market value. *See Southern New Hampshire Water Co. v. Town of Hudson*, 139 N.H. 139, 142 (1994).

As noted above, according to PWW, as of December 31, 2005, economic obsolescence is a deduction of $205.2 million to the indicated valuation under the asset based approach. Exh. 3021A at 19. This deduction measures the difference between the required return on the appraised valuation of the assets and the net present value of the projected earnings. PWW divides the income shortfall of $14.366 million by the capitalization rate of 7 percent, which is the 5 percent WACC plus the 2 percent growth rate, to determine the capitalized value of the income shortfall of $205,233,000. Exh. 3021 at 18. Although we agree with this method, we do not find it reasonable to use a 7 percent capitalization rate as an input. We employ instead the 5 percent capitalization rate determined reasonable in the income approach. Recalculating the required return and the projected earnings yields an income shortfall of $14,084,662. We divide

this income shortfall by the capitalization rate of 5 percent to calculate the capitalized value of the income shortfall of $281,693,242.

In addition, we must modify PWW's appraisal to bring the valuation date forward from December 31, 2005. Accordingly, we incorporate an adjustment for additions and retirements and accumulated depreciation reserves for the years 2006, 2007, and 2008 as identified in PWW's annual reports, filed with the Commission, for 2006 and 2007. Bringing the valuation date forward to December 31, 2008, we determine the value of PWW's assets using the asset approach to be $210,349,285 as of December 31, 2008.

3. Income Approach

We begin our analysis of the valuation testimony employing the income approach by noting that estimates for earnings and capitalization rates are key components in the determination of valuation amounts in this approach. The income approach using the direct capitalization method involves dividing earnings by the capitalization rate. Thus, a change in the capitalization rate has a substantial effect on valuation.

Consistent with its position that not-for-profit entities in the pool of hypothetical buyers will set the range of the purchase price, PWW used a not-for-profit cash flow as the measure of earnings in its DCF analysis. PWW began with PWW's projected financial statements and made adjustments to account for certain not-for-profit cost advantages. In contrast, Nashua discounts the effect of not-for-profit buyers.

Mr. Reilly's testimony on behalf of Pennichuck is persuasive in contending that the cost of capital will reflect the likely population of willing buyers and it comports as well with fair market valuation theory and New Hampshire law concerning the propriety of focusing on a

population of hypothetical buyers as opposed to any particular likely buyer or buyers. Mr. Reilly testifies to these points as follows.

> A fair market value appraisal must look to the likely composition of the population of hypothetical buyers in order to determine the range of market prices. As the definition of "fair market value" looks to the hypothetical buyer, a fair market value appraisal may not assume any specific or identified buyers. The characteristics of the population of potential buyers is considered in a two-step process:
>
> > (1) The appraiser determines what types of buyers comprise the population of hypothetical buyers; and
> >
> > (2) The appraiser determines which type of buyer within that population will set the range of market prices.
>
> In the case of a going concern business, the buyers with the greatest expected synergies will set the range of market prices for the acquisition.
>
> The most likely population of hypothetical willing buyers of PWW would include not-for-profit public entities. This conclusion is based on several facts, including: (1) that the vast majority (around 80%) of the water systems in the United States are owned by public entities; (2) that Pennichuck Corporation is the principal investor owned utility in the geographic territory where PWW is located; and (3) there are a number of public entities in New Hampshire that could acquire the PWW system. These not-for-profit public entities would include a city, town, or district (including yet-to-be-formed districts). Thus, the likely population of hypothetical buyers for the PWW system will include the market influences of not-for-profit entities.
>
> What any particular public entity has or has not indicated about its interest in the PWW system is not relevant to a fair market valuation... Appraisal literature and appraisal courses never insert the subjectivity of asking what any particular person's interest is in property subject to a fair market valuation.

Exh. 3007, at 21 and 22.

We find Mr. Reilly's testimony to be persuasive and we conclude that so long as it is legally permissible for not-for-profit buyers, that is, more than one such buyer, to buy PWW, which is

the case here, their influence on valuation as part of the population of willing buyers must be given full effect.[14]

With respect to the capitalization rates proposed by PWW and Nashua, PWW recommends a rate of 5 percent, from which it deducts a 2 percent growth rate to apply a 3 percent capitalization rate in calculating its income valuation, while Nashua recommends a rate of 7.2 percent with a 0 percent deduction for growth. Consistent with the discussion above, it is appropriate to rely on the PWW approach inasmuch as it better reflects the influence of not-for-profit entities in the hypothetical population of willing buyers, but there is an issue of fact concerning the amount of the deduction for growth that should be credited. PWW's growth rate appears inflated for purposes of the calculation here, insofar as it applies to the normalized year 2010, a year for which there is some question about the 2 percent growth rate. In fact, the record indicates the 2 percent growth rate is the growth rate included in the PWW appraisal that goes through 2009, not 2010. 9/12/07 Tr. at 103 lines 6-8. Further, the record indicates that the 2 percent growth rate represents inflation only. *Id.* at 99 lines 6-7. Yet, there is no support for the

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[14] The dissent misconstrues our view in one important respect. We do not conclude that the presence of one not-for-profit buyer will be entirely determinative of value. Rather, we conclude that, so long as it is legally permissible for more than one not-for-profit entity to purchase, fair market value must be determined based on the hypothetical presence of such willing buyers.

In contrast, the dissent does not give full effect to the influence of not-for-profit buyers but, rather, posits a negotiation between a single willing buyer (the condemnor) and a seller (who we know to be unwilling) that effectively averages PWW's and Nashua's respective valuations. Such an approach is not supported by the record and produces a value that is not fair market value.

Furthermore, the dissent's analysis of the value that would result from the negotiation between a single willing buyer and a single willing seller, inappropriately excludes the effect a second willing not-for-profit buyer would have on such a negotiation.

Ultimately, the dissent calculates a value akin to a forced sale by limiting the hypothetical population of willing buyers to the City of Nashua. The dissent's reliance on the so-called typical case therefore errs by equating "typical" with "likely", as that term is used in a fair market value appraisal, and by effectively considering the City of Nashua as the particular buyer in this case.

Finally, the dissent's line of reasoning renders the fair market value valuation exercise meaningless because, taken to its logical conclusion, there is no fair market value that can be derived in the case of one willing not-for-profit buyer and one unwilling seller.

conclusion that earnings will grow by 2 percent. Consequently, we find that Nashua's use of a 0 percent deduction for growth is the better input to the formula. Accordingly, we use a 5 percent capitalization rate.

We now turn to the hypothetical buyers' influence on earnings. We note that both PWW and Nashua indicated that a not-for-profit entity buyer will have certain cost advantages over a for-profit counterpart. According to PWW, these cost advantages include: (1) income tax savings, (2) access to low-cost municipal financing, (3) property tax savings and, (4) relief from regulatory expense. Exh. 3007 at 17 and 18. PWW increased earnings to reflect these cost advantages and used the present value of the earnings of the not-for-profit entity in its income approach.

As with our discussion of the capitalization rate, we find that PWW's approach to earnings is reasonable because it properly accounts for the influence of not-for-profit entities in the population of willing buyers and we find as well that PWW's estimate of the cost advantages to such entities is reasonable and appropriate. Dividing earnings of $8,540,012 by a capitalization rate of 5 percent yields an income valuation of $170,800,230. We deduct $826,099 from this net present valuation to account for the present value discrete period negative net cash flows for the years 2006-2009 and determine that the indicated value for PWW's assets under the income approach is $169,974,131 million, as of December 31, 2005.

Further, we note that in eminent domain proceedings, the relevant date for valuation purposes is "the day of the taking." *Dow v. State*, 107 N.H. 512, 514-15 (1967) (quoting *Edgcomb Steel of New England, Inc. v. State*, 100 N.H. 480, 486 (1957)). Of course, a specific date for the taking, or closing, has not been established. Any date after December 31, 2004, which was the date the parties set for initially valuing PWW's assets, requires an update to the

valuations. The procedural schedule called for updates to the valuation testimony and the parties filed updates on November 14, 2006 to bring the values forward to 2005. We now modify PWW's appraisal to bring the valuation date forward from 2005 to 2008. We take this step in anticipation of additional procedural steps that, to the extent Nashua prevails in any rehearing or appeal and elects to proceed, would likely result in a ratifying vote pursuant to RSA 38:13 in the last quarter of 2008 or the first quarter of 2009. Accordingly, we apply the same present value factor of 5 percent that PWW used to discount 2008 amounts to 2005 amounts. PWW used .8850 to discount 2008 to 2005. The reciprocal to bring 2005 amounts forward to 2008 is 1.1299, (i.e., 1/.8850 = 1.1299). The adjustment brings the values forward to 2008 from $169.974.131 to $192.053,771.

4. Reconciliation of Asset and Income Values

We now turn to the issue of what weight to attribute to each valuation approach. We agree with PWW that the 60 percent weighting of the asset approach is appropriate. The asset approach discretely identifies and fairly values the relevant tangible and intangible property. The income approach is based on the premise that the value of the operating assets of a going concern business is the present value of the economic income expected to be derived from the assets. The income approach, however, is less data intensive and only indirectly values the total of a company's tangible and intangible assets. Thus, we afford the income approach a 40 percent weighting. Accordingly, we find the overall fair market value of PWW's assets as demonstrated at hearing to be $203,031,079 as of December 31, 2008. This amount is exclusive of the mitigation fund discussed below.

VII. MITIGATION FUND

RSA 38:9, III requires the Commission, when valuing a utility for municipalization purposes, to "determine the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner." This codifies an aspect of the constitutional protection from taking without just compensation. *See City of Manchester v. Airpark Business Center Condominium Unit Owners' Assn*, 148 N.H. 471, 473 (2002) In addition, RSA 38:11 provides that the Commission may set conditions to satisfy the public interest.

Pennichuck proposes the creation of a mitigation fund to protect customers of PEU and PAC from lost economies or synergies resulting from the taking. Nashua proposes that the amount of this fund not be decided here but that it be determined, assuming Pennichuck does not opt to sell the other two utilities to Nashua, in a separate proceeding. Nashua further proposes to cap the mitigation fund at the value of the two utilities' plant in service. While the lost economies are arguably in the nature of damages caused by severance, we treat the effects here as related to our general public interest inquiry and, to the extent the effects negatively affect PEU and PAC customers, an issue to be considered within our authority to set conditions pursuant to RSA 38:11.

We do not agree with Nashua that it is beyond the scope of this proceeding to address the effects of the municipalization on PEU and PAC customers. RSA 38:11 plainly permits us to undertake that analysis here. See Order No. 24,487 (July 8, 2005) and Order No. 24,555 (December 2, 2005). Both Nashua and PWW had an opportunity to provide testimony and other evidence on the effects of the taking on PWW's affiliates. PWW in fact provided detailed analysis of the harms to PAC and PEU customers. Nashua did not provide much detailed

analysis but, regardless of its litigation strategy, we find that there is sufficient evidence in the record quantifying the harm to customers of PAC and PEU such that we deem a separate proceeding unnecessary. Furthermore, whether it is more properly characterized as severance or a condition required as a matter of the public interest pursuant to RSA 38:11, the net effect is essentially the same.

The record demonstrates that PWW, PAC, and PEU are highly interdependent companies sharing resources through Commission-approved affiliate agreements. PWW supplies the majority of the shared resources that PAC and PEU rely on to provide water service to customers. PAC and PEU will lose the efficiencies inherent in sharing resources, and replacing those resources will cause PAC and PEU to incur greater expense. This greater expense would be passed along to customers in the form of rate increases.

As to Nashua's suggestion that the mitigation funds be capped at the limits of PAC and PEU's respective plant in service, we do not find any logical reason for such a limitation. Nashua has acknowledged that PWW, PAC, and PEU enjoy efficiencies in the shared use of resources. The purpose of the mitigation fund is to compensate customers for the loss of those efficiencies. Thus, limiting the mitigation fund to a value not to exceed the regulatory concept of plant in service of each company is arbitrary and bears no connection to the ability of the fund to fairly compensate customers for those lost efficiencies.

Pennichuck offered evidence of harm through its expert, John Guastella, who testified that $3.4 million in additional annual revenue requirements would be needed by PEU and PAC if Nashua takes PWW. Exh. 3016 at 4. He determined this figure after reviewing operations and maintenance expense projections for water supply and distribution, engineering, customer service, and administrative and general. He also reviewed the companies' 2005 operations

summaries. For each category, Mr. Guastella adjusted for items such as changes in vendor charges due to reduced volume, changes in the number of employees, and changes in salaries. He also included a return and depreciation expense on assets PEU and PAC would need to acquire to replace the common assets lost with the taking of PWW. Mr. Guastella concluded that PAC would need a revenue increase of $409,873.09. Exh. 3016A at 9. This translates into an approximately 66 percent rate increase for Pittsfield customers in order for PAC to earn a reasonable rate of return. The increase is also in addition to rate increases PAC would normally obtain in a rate case. He concluded PEU would need a revenue increase of $2,992,059.64. Exh. 3016A at 8. For PEU customers, this translates into an approximately 64 percent rate increase. Id. at 3. The combined shortfall in annual revenue requirement for both PAC and PEU is $3.4 million. We accept these figures as representing the harm to PEU and PAC customers from losing the synergies associated with PWW's assets and we find that the public interest requires as a condition of our approval that Nashua establish an appropriate mitigation fund.

As to the issue of what specific mechanism would produce $3.4 million annually, we note that Mr. Guastella testified that assuming a capitalization rate in the range of 6.5 percent to 8.5 percent, an initial fund investment of approximately $40 to $50 million would be required to generate annual earnings of $3.4 million. Commission Staff contended that the customer impact is on the low end asserted by PWW and we agree with Staff that a mitigation fund of $40 million is reasonably calculated to insulate PEU and PAC customers from the effects of the taking. We will address the specific method for implementing this result as a compliance matter in this proceeding after the City makes a ratifying vote and all rehearings and appeals are exhausted.

VIII. CONCLUSION

This proceeding has been complex, contentious and long. It involves a proposed taking by eminent domain by the second largest city in the state of the state's largest privately-owned public water utility. From the outset, there have been serious legal questions of first impression concerning the application of the governing statute, RSA 38, and every step in the proceeding has been hotly contested. For the reasons set forth above, and based on our careful consideration of the extensive record, we find that it is in the public interest for the City of Nashua to take the assets of Pennichuck Water Works provided that the City complies with certain conditions.

In making our decision, we have sought to keep faith with our obligation under RSA 38:3 to presume the taking to be in the public interest, considering whether opponents of the taking have rebutted the presumption. They have not, although it is clear that the issues raised by the opponents and Nashua's efforts to address those issues through conditions have had the effect of enhancing the extent to which municipalization of PWW serves the public good.

The RSA 38:3 presumption, however, extends only to the borders of the petitioning municipality, whereas PWW's operations extend beyond Nashua both through physically interconnected services to some areas as well as satellite systems that are not interconnected. As to the territories outside its borders, Nashua was required to demonstrate that the taking is in the public interest and that the City meets the requirements for franchise authority pursuant to RSA 374. We have determined that such authority is consistent with the public good provided that Nashua continues to operate the entire PWW system according to a unified rate structure, providing all customers with the same quantity and quality of water.

Once we have determined that the proposed taking is for the public good, RSA 38:9 requires us to fix the price to be paid by Nashua to acquire the utility facilities being condemned.

For the reasons set forth above, we have determined the fair market value of the assets in question to be $203,031,079 as of December 31, 2008, which we round to $203 million. However, the public interest requires Nashua to pay an additional sum to account for costs ultimately incurred by customers of Pennichuck's other utility subsidiaries arising out of the loss of the affiliation with PWW.

The conditions to our approval are as follows, and are explicitly determined to be prerequisites to our decision that the taking is in the public interest:

1. Nashua shall provide service to all customers within the current PWW service territory, regardless of location, with the same service at the same rates, terms, and conditions. Such service shall be in accordance with Nashua's Water Ordinance and Main Extension Policy.

2. Nashua shall provide service to all PWW's wholesale users in accordance with the rates, terms, and conditions of all existing wholesale contracts either by adopting those contracts outright or, if required for bonding purposes, by filing with the Commission a wholesale tariff that incorporates the rates and provisions of the existing wholesale contracts.

3. Nashua shall not bifurcate its customer service functions. It shall amend its contract with Veolia to provide that Veolia, as system operator, handles all customer inquiries whether related to billing, service, or both. The provision of customer service by Veolia on behalf of Nashua shall be in compliance with the Commission's rules governing customer service, including N.H. Code Admin. Rules Puc 1200.

4. Nashua shall have technical advisors on call 24-hour per day available to industrial and wholesale customers of the system.

5. Nashua shall make technical water treatment process information available electronically on a daily or more frequent basis, upon request from any industrial or wholesale customer.

6. Nashua shall establish a technical advisory board to provide recommendations concerning technical operations and policies related to the water system, including but
not limited to customer service, technical operations, watershed, water quality, and
source water protection. Membership in the technical advisory board shall include representatives of retail and wholesale customers, regulatory agencies,

municipalities served by the system, developers, and public interest organizations. Nashua shall provide updates to the technical advisory board concerning its operations, maintenance, and management of the system. The technical advisory board shall meet on a monthly basis and be subject to the open meeting and public document availability provisions of the Right-to-Know Law, RSA 91-A. The technical advisory board shall annually make written recommendations to the City of Nashua concerning its operations, providing a copy to the Commission and the Office of Consumer Advocate.

7. Nashua shall mitigate the harm to customers of PEU and PAC occasioned by the City's acquisition of the assets of PWW by creating a mitigation fund as described above.

8. Within 60 days of the order on the merits of this case becoming final and no longer subject to appeal, Nashua shall submit for approval by the Commission duly authorized and executed agreements with Veolia Water and R.W. Beck, incorporating all conditions imposed by the Commission.

9. Nashua shall be obligated to participate as an operator in the Underground Utility Damage Prevention System (Digsafe) described in RSA 374:48 et seq. and N.H. Code Admin. Rules Puc 800. Nashua shall hire a PWW employee familiar with PWW's facilities.

Finally, although it is neither a condition nor otherwise a direct component of our decision on the merits of this case, we note that RSA 38:9, IV provides:

> The expense to the commission for the investigation of the matters covered by the petition, including the amounts expended for experts, accountants, or other assistance, and salaries and expenses of all employees of the commission for the time actually devoted to the investigation, but not including any part of the salaries of the commissioners, shall be paid by the parties involved in the manner fixed by the commission. [15]

In our judgment, it is not appropriate to determine the manner in which the Commission's costs will be allocated among the parties until the merits of the case are finally concluded and it has been determined whether the taking will actually proceed. At the appropriate time, we will give the parties an opportunity to be heard on this issue.

[15] The expenses of the investigation attributable to Commission Staff's participation in the proceeding, as of June 30, 2008, total approximately $120,000.00.

Few proceedings conducted before the Commission over its many decades of existence have been as challenging to the participants as this one has been. The need to conduct wide-ranging discovery, the desirability of allowing the major parties to explore settlement as carefully as possible, the importance of holding extensive hearings for the purpose of developing a complete record, and the appropriateness of allowing the parties a full opportunity to make their respective cases in writing after the close of hearings all contributed to the length of this proceeding. In our view, the parties and the public can thereby derive confidence that the important matters in this case have been fully and fairly considered.

We are aware that the decision we make today does not end the matter nor necessarily resolve all issues in controversy. Ultimately, the decision of whether to take the utility property at issue in this case is subject to municipal ratification pursuant to RSA 38:13. Accordingly, we conclude this order with an expression of confidence in the City of Nashua's ability to own and operate the PWW system responsibly, as well as our confidence in the current ownership's ability to do so as well.

Based upon the foregoing, it is hereby

ORDERED, that the taking of the plant and property of Pennichuck Water Works, Inc. lying within or without the municipality of Nashua, New Hampshire, in particular, plant and property as described in Exhibit 3021 and Exhibit 3021A, by the City of Nashua is in the public interest, subject to the conditions set forth herein; and it is

FURTHER ORDERED, that the price to be paid for such plant and property is $203 million; and it is

FURTHER ORDERED, that the City of Nashua shall establish a mitigation fund for the benefit of the customers of Pennichuck East Utilities, Inc. and Pittsfield Aqueduct Company as described herein.

By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of July, 2008.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Debra A. Howland
Executive Director and Secretary

Concurring and Dissenting Opinion of Commissioner Below

I concur with the analysis and decision of the Commission with regard to public interest issues (Section IV) and the conditions of approval, including the establishment of a mitigation fund for the benefit of PEU and PAC customers. However, I respectfully dissent with regard to valuation because I reach a different conclusion based on the record in this case and how I understand the law to apply.

Without question, the most difficult part of this case has been the determination of a fair market value of the assets to be taken, prospective to the date of the taking, which is not known at present. As the New Hampshire Supreme Court has noted, "[i]t has been said that '(t)he search for 'fair market value' is a snipe hunt carried on at midnight on a moonless landscape.'" *Fusegni v. Portsmouth Housing Authority*, 114 N.H. 207, 211 (1974), (citation omitted). This analogy seems particularly true with investor-owned public water utilities for which there is a limited market with very few and infrequent asset sale transactions of the type and scale being valued here (compared with stock acquisitions or mergers, that are also relatively few in number), and a substantial effect and constraint of value due to government regulation, with regard to not only rates, but also the financing and sale of assets, including limitations on the discontinuance of service and termination of the franchise and obligation to serve. *See* RSA 369:1, 7, and 8 and RSA 374:28, 30, and 33. The New Hampshire Supreme Court has also observed that "[t]he unlikelihood of sale is, after all, the reason why valuation of public utilities is so extraordinarily difficult." *Southern New Hampshire Water Co. v. Town of Hudson*, 139 N.H. 139, 142, (1994). Certainly this is an area where reasonable people can disagree, even given the same set of the facts.

My dissent concerns four issues. First is the exclusive reliance on the hypothetical possibility of one or more not-for-profit municipal buyers in the determination of earnings and capitalization rates under the income-based approach to valuation. This also affects the determination of value under the asset based approach due to the calculation of economic obsolescence. Second is the choice to exclude most property taxes from the assumed expenses in determining the amount of earnings to be capitalized. This also affects the calculation of economic obsolescence. Third is the exclusion of payroll taxes from the assumed expenses in determining the amount of expenses to be capitalized. The fourth issue concerns the method used in the income-based approach and some minor adjustments to the asset-based approach.

With regard to the first issue, the majority adopts Pennichuck's position that the potential of one or more hypothetical not-for-profit or municipal buyers in a fair market-based negotiation will be entirely determinative of the value under the income-based approach, both with regard to the assumptions about the expenses and earnings or net cash flow available for capitalization and with regard to the capitalization rate. While I conclude that the potential of a municipal buyer in such a transaction will more likely than not be a factor and influence the value, I cannot agree that it will be entirely determinative.

Strong evidence in support of my conclusion comes from the testimony of Pennichuck's own valuation expert, Mr. Reilly, who was the lead proponent in this case for using the municipal, rather than for-profit capitalization rates, expenses, and earnings in the income based approach. In response to a question as to whether there would be a different price effect "if the universe of potential willing buyers only included one possible nonprofit entity" instead of multiple non-profit bidders, 9/12/07 Tr. at 205, Mr. Reilly answered:

> It may. That hypothetical is the hardest question to answer. ... If you assume one, there's uncertainty, and it really becomes a bidding contest – it becomes more of

> an issue of psychology than economics, will the for profits assume the not for profits are going to put all the chips on the table at one time and they'll have to bid up against the not for profit.
>
> We've seen cases where that happens, where just having one not for profit can increase the bidding, but we've also seen cases where that didn't happen, where the not for profit was perhaps astute enough or well advised enough to say everyone around here other than me is a for profit corporation, they will have a higher cost of financing, they will pay income taxes, they're going to bid down here, I just need to be one dollar above them.

Id. at 206. Then, when asked how many situations he had seen involving multiple not-for-profit or governmental bidders, Mr. Reilly responded: "It has occurred. I would say that's the minority of cases. When there's a municipality involved, typically there's one municipality, and typically it's a friendly negotiation." *Id.* at 211.

This testimony illustrates for me what is the crux of the matter: whether the market for this type of investor-owned water utility typically or likely consists of multiple municipal buyers that are more likely than not to drive the price up to the maximum that they would be willing to pay for a given rate and earnings level based on their lower expenses and cost of capital, or whether typically there is only one or no serious municipal buyers in the market such that their influence on price is more limited or even non-existent. In such a case, the market-price is more likely to be primarily determined by the projected operating expenses, earnings, and cost of capital of a for-profit entity or investor and their markets economics. PWW and the Commission adopt the view that fair market value will be set by one or more hypothetical municipal buyers, apparently regardless of whether such hypothetical buyers are typical of potential or likely buyers. In my judgment, this essentially makes the fair-market value the same as the full "investment value" to a municipal buyer, which is not necessarily typical of the market. Carried to its logical extreme, use of a hypothetical municipal or not-for-profit buyer to determine value under the income approach whenever such entity might be a legally permissible buyer, even if

not plausible, likely or typical, could result in substantially increased (roughly doubled) valuations for large numbers and types of income producing properties.

The Appraisal of Real Estate defines investment value as "[t]he specific value of a property to a particular investor or class of investors based on individual investment requirements; distinguished from market value, which is impersonal and detached." *The Appraisal of Real Estate* at 26. The treatise goes on to note that fair market value can, at times, be the same as investment value "[i]f the investor's requirements are typical of the market." *Id.* (emphasis added). In chapter 20, "The Income Capitalization Approach," the treatise elaborates: "To develop an opinion of market value with the income capitalization approach, the appraiser must be certain that all [of] the data and forecasts used are market-oriented and reflect the motivations of a typical investor who would be willing to purchase the property at the time of the appraisal. A particular investor may be willing to pay a price different from market value, if necessary, to acquire a property that satisfies other investment objectives unique to that investor." *Id.* at 476 (emphasis added). However, as Mr. Reilly's own testimony indicates, the market for PWW's type of property does not typically consist of multiple municipal buyers and even when there is one potential municipal buyer, such hypothetical buyer need only offer one dollar more than what a for-profit investor would economically be willing to pay in order to set the market price.

Potential municipal buyers are not conventional investors and the majority's income approach sets the value to PWW based on a calculation of what a municipal entity can theoretically afford to pay, even though such a price would likely mean that such a municipality would forgo any potential savings in water rates from what they would otherwise be. I do not agree that this is the market value of PWW, nor that it is the transferable or transmissible value

that a municipality could realize should it, in turn, opt to sell the system back into the market place where potential buyers would likely be for profit investors.

Other jurisdictions have grappled with this same concern. In *Onondaga County Water Auth. v. New York Water Service. Corp.*, 139 N.Y.S.2d 755 (N.Y. App. Div. 1955), the Appellate Division of the New York Supreme Court noted that "the capitalization of earnings method is a proper consideration in arriving at the value of a regulated public utility" but held that an appraisal commissioners' award was based on an erroneous theory of valuation according to the price condemnor could afford to pay the property, rather than the value to the condemnee. *Id.* at 767-78. By basing earnings on a tax exempt bond issue the Court held that "this approach in effect capitalizes and confers upon the company the enormous advantage of tax-free operation." *Id.* at 764. Citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) and a series of other cases, the New York Court noted that, "[r]egardless of the principle of valuation adopted, all of the cases agree that 'the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken'." In *Monongahela,* the U.S. Supreme Court also found the "[t]he value of property, generally speaking, is determined by its productiveness, -the profits which its use brings to the owner." *Id.* at 328.

In *Gray Line Bus Co. v. Greater Bridgeport Transit Dist.*, 449 A.2d 1036, 1982 (Ct. 1982), the Supreme Court of Connecticut, while recognizing that a condemning authority "must compensate a public utility company for the 'going concern value' of the enterprise," further observed that "a public body in an eminent domain proceeding ought not to be required to pay more for property than would be raised in an ordinary sale between private parties." *Id.* at 423

(citing *Searl v. School District No. 2*, 133 U.S. 553, 562, 10 S.Ct. 374, 377, 33 L.Ed.2d 740 (1890); 4 Nichols, Eminent Domain (1981) § 12.1.).

The New Hampshire Supreme Court has observed the price to be paid in a taking "is customarily taken to mean fair market value ... determined after considering the 'highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future ..., not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.'" *Opinion of the Justices*, 131 N.H. 504, 509 (1989) (citations omitted and emphasis added). Use by a hypothetical municipal buyer is, by definition, not for profit and not profitable.

My conclusion that the universe of likely potential buyers is unlikely to include more than one municipal entity is further supported by New Hampshire law, particularly as it has been interpreted and applied by this Commission during an earlier phase of this case in *City of Nashua*, Order 24,425 (Jan. 21, 2005) , 90 NH PUC 15. RSA 38 is the grant of authority for municipalities to acquire water systems, whether by purchase or taking. In Order No. 24,425, the Commission concluded that "the eminent domain authority delegated by the Legislature in RSA 38:2 should be narrowly construed and that the notice requirement in RSA 38:6 should be given full effect." *Id.* at 23. That notice requirement states that a municipality "may purchase all or such portion of the utility's plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, and shall purchase that portion, if any, lying without the municipality which the public interest may require, pursuant to RSA 38:11 as determined by the commission." Thus this Commission concluded that Nashua did not have the authority to try to take any portion of PWW affiliates PAC or PEU as those utilities did not provide any municipal utility service within Nashua. The same

authorizing language in RSA 38 regarding takings also applies to voluntary purchases and acquisitions. While PWW provides some utility service in towns outside of Nashua, the core of the system and some 87 percent of the customers are within Nashua. Thus it seems unlikely, even in a voluntary sale, that the Commission would find that the public interest *requires* a prospective municipal purchaser of such peripheral or detached satellite systems to also purchase a much larger (by roughly a factor of ten or more in this instance) core of the system in another municipality.

Pennichuck argued that a regional water district, a form of non-profit municipal entity under New Hampshire law, is another permissible buyer that might compete in a market-based sale and tend to drive the price up to the maximum that a non-profit could afford to pay. I find that this is unlikely as RSA 38:2-a, which establishes the authority for regional water districts to purchase or acquire (but not take by eminent domain) as well as maintain and operate water utilities, specifies that such acquisition be for the purpose of manufacturing and distributing "water for the use of municipalities that are members of the regional water district and for such other purposes as may be permitted, authorized, or directed by the commission." It seems unlikely in a typical voluntary sale that a regional water district would actively compete in a sale against a member municipality.

In the one case where such a voluntary sale has occurred in New Hampshire in recent years, the Tilton and Northfield Water District was created by the two towns as a village district serving residents in both towns pursuant to RSA 52 in order to acquire the investor owned Tilton and Northfield Aqueduct Company, Inc. in a voluntary sale that was approved by this Commission in Order No. 24,562 (December 9, 2005). In that case, the acquisition was clearly

for the use of the members of two municipalities, i.e., Tilton and Northfield, and not a case where multiple municipal bidders were competing and driving up the sale price.

Other evidence that the population of potential buyers may not include any not-for-profit buyers lies in the fact that Pennichuck's financial advisor, SG Barr Devlin, did not identify any municipal or other non-profit entities as potential strategic partners that could acquire or merge with Pennichuck before a proposed merger with Philadelphia Suburban Corporation was announced in 2002. Exh. 1094 at 33, 9/12/07 Tr. at 71.

Nashua argued for the opposite approach to that advocated by Pennichuck: to only utilize the earnings and capitalization rate for a regulated for-profit entity in the income based approach to valuation. In following this approach, Nashua would have us completely ignore the influence of a potential not-for-profit municipal buyer. Not accounting for this influence would be contrary to the conclusion of the New Hampshire Supreme Court that it would be an error to not consider a potential unregulated municipal buyer in determining valuation of a water utility. *See Southern New Hampshire Water Co. v. Town of Hudson*, 139 N.H. 142, 143, (1994). Under Nashua's income approach, the value would essentially be that of rate base or net book value. Exh. 3061 at 16, n.3. While some troubled water systems and small community water systems may sell at or below net book value, it is not unusual for well-operated public utilities, such as PWW, to sell at a premium above rate base, even though this Commission has had a long standing policy disfavoring the recovery of acquisition premiums from ratepayers. *See, e.g., Iberdrola, S.A.*, Order No. 24,812 (Dec. 28, 2007) (concerning indirect acquisition of New Hampshire Gas. Co. through parent company transaction); *National Grid plc*, Order No. 24,777 (July 12, 2007) (concerning indirect acquisition of KeySpan); *EnergyNorth Natural Gas, Inc.*, 85 NH PUC 360, 367-368 (2000); *Aquarion Water Co. of New Hampshire*, Order No. 24,691 (Oct.

31, 2006), 91 NH PUC 509 (concerning indirect transfer of Aquarion to Macquarie Utilities, Inc.); and *Hampton Water Works, Inc.*, Order No. 23,924 (March 1, 2002), 87 NH PUC 104, 109, (2002).

Instead of the choosing between the position adopted by the majority (and advocated by Pennichuck) and that of Nashua, I would give equal weight to the expenses and cost of capital that would be typical for both municipal buyers and regulated for-profit investors. In free market negotiations bargains are usually struck somewhere in the broad middle between the value perceived by the seller and that perceived by the buyer when there is a substantial difference between the two. In such a hypothetical bargain freely negotiated between an investor owned water utility and a single municipal buyer, taking into account all considerations that might fairly be brought forward and given substantial weight in such bargaining, it seems reasonable to conclude that such bargaining might likely result in a price being agreed upon around the mid-point of investment value that each might be able to realize given the expenses, resulting earnings, and the cost of capital likely to be incurred by each going forward. The mechanics of affording municipal and for-profit entities equal weight in the income approach would require calculating PWW's value using the municipal earnings, expenses, and capitalization rate and then calculating the same using the for-profit earnings, expenses, and capitalization rate. Then each determined value would be weighted 50 percent. An approach that averages municipal and for-profit capitalization rates has been identified as an acceptable consideration in at least one other jurisdiction. *See, Washington Suburban Sanitary Commission v. Utilities, Inc. of Maryland,* 775 A.2d 1178, 1201-1202 (2000).

Given the voting requirements under RSA 38 and RSA 33:8 (for approval of the issuance of bonds), which apply even in the case of a voluntary municipal purchase, it seems unlikely that

a super majority of those who vote to approve such a purchase would be willing to forego all potential savings and synergies from municipalization and approve the maximum theoretical price they might be able to justify for the same water rates, especially considering the risk and uncertainty that comes with such a change in ownership and operation. For the investors or stockholders in a for-profit utility, other similar utility investment opportunities exist, and a value that represents a substantial premium or capital gain over the ongoing return on regulated rate base would seem difficult to refuse, even if it falls short of the maximum amount that a municipal buyer might hypothetically be able to pay. Thus, between a willing buyer and a willing seller, a bargain seems more likely than not to be struck towards the mid-point in values.

Likewise, if the potential buyers were only for-profit entities, it seems unlikely that the existing owner would be willing to undertake the substantial transaction costs and risks of a sale without some significant acquisition premium above and beyond the book value and ongoing investment value to the present owner of the assets. As noted above, acquisition premiums for a well-run and sizable utility such as PWW are not that unusual, notwithstanding their exclusion from rate base. Therefore I find that an even weight to the likely earnings and capitalization rates of both for-profit and non-profit potential buyers is a more likely indicator of fair-market value than giving either possibility exclusive weight and the other no weight in the income approach to valuation.

The second point that I dissent from the majority on is their exclusion of property taxes from the assumed expenses of the hypothetical non-profit municipal buyer. Pennichuck argues, and the Commission agrees, that RSA 72:11 only requires municipal water systems to make payments in lieu of taxes on water utility land owned in other towns, so most property taxes (such as those on buildings and improvements) can be excluded from the assumed operating

expenses of the municipal buyer, thus increasing the projected earnings to be capitalized. Nashua testified that they placed no value on the legal possibility of a municipal system being able to avoid paying most property taxes and that they intend to make payments in lieu of taxes for the water system. 1/11/07 Tr. at 89. An observation of the New Hampshire Supreme Court in *Southern New Hampshire Water Co.* quoting from the trial court's opinion, sheds some light on this issue:

> [S]ince taxes are a legitimate operating expense, the utilities are allowed to include them in rate base, and thus simply pass along any tax increases to ratepayers in the form of higher utility bills. On the other hand, in those instances where the utility is fortunate enough to win a battle and reduce its tax payments, the town's other taxpayers must make up the difference. When one considers that ... ratepayers and taxpayers are likely to be one and the same persons, it becomes obvious that the only real winners in this game are the lawyers and expert witnesses, who collect their fees regardless of the outcome. To avoid this needless waste of time and money, I join with the [Board of Tax and Land Appeals] in urging the legislature to consider the adoption of a uniform method of utility valuation for ad valorem tax purposes.
>
> Although we understand that ratepayers and taxpayers are not inevitably "one and the same," we find the trial court's point well taken.

Southern New Hampshire Water Co., 139 N.H. at 144-45 (citations omitted).

Although the context of this observation is the valuation of water utility property for *ad valorem* property tax purposes, there is a similarity with the question at hand: whether the legislative body and elected leaders of a municipality would place and pay for a value on the ability of a municipally owned water utility to avoid payment of property taxes. Unlike most other taxes, municipal, school district, and county property tax rates are set annually based on the revenue needs and the grand list of taxable property of the taxing district. Thus a reduction in the amount of taxable property on the tax roll, all other things being equal, directly results in a proportional increase in the property tax rate and consequentially a dollar-for-dollar increase in property taxes paid from the remaining property taxpayers. While the population of property

taxpayers in towns where PWW pays property taxes is not exactly the same as the universe of ratepayers on the system nor the same as those who might vote to approve a purchase and issuance of revenue bonds, there is likely a strong connection between the three, with most, if not all, such voters being taxpayers and/or ratepayers as well (and/or elected by such).

It is difficult to imagine that a super majority of such voters would be so naïve as to place a value on paying property taxes out of the left pocket rather than the right one, even if there is some difficult to discern difference in how much change remains in some people's pockets compared to others, knowing that the overall sum shifting from right pockets to left pockets within the overall district is about the same. This is not a value that is in anyway transmissible with the property to an investor-owned buyer, nor is this a small number.[16] Thus, taking into account all considerations that might fairly be brought forward and given substantial weight in a voluntary negotiation of sale price, and the likely motivations of such a buyer, I find that it is extremely unlikely that the elected leaders and a super majority of those persons who would be required to vote to ratify a purchase and issue revenue bonds to pay for it would place any significant value on the ability to reduce property taxes paid through their water bills only to have to make up for that savings through an approximately equal increase in overall property taxes on the community. This being the case, I do not agree that it is appropriate for Mr. Reilly and the majority to remove property taxes from expenses in their hypothetical. Federal and state income taxes are different, as the tax rate is fixed and it is truly an expense that a municipal

[16] The difference in assumed property tax expense in Mr. Guastella's projection of operating expenses under PWW ownership versus municipal ownership for 2009 is just over $2 million per year. Exh. 3016X, at 3 and 4. Dividing this assumed increased net income or cash flow by the assumed municipal capitalization rate of 5 percent yields an increase in market value of $40 million.

buyer can avoid without discernable consequence, so I do deduct those from the projected expenses under municipal ownership.[17]

The third issue on which I dissent is the exclusion of payroll taxes from the Commission's projection of expenses that a municipal buyer would incur. The Commission mimics Mr. Reilly's calculation in this matter, which is clearly erroneous in my judgment. In his calculation of earnings to be capitalized, Mr. Reilly added back in PWW's projected "Non-Income Taxes," which consists of property taxes and payroll taxes, but excluded from that add back "taxes assessed on land," elsewhere termed payments in lieu of taxes, or PILOT. Exh. 3021X, at 19, n. (a). I suspect that this is a simple error that the Commission decision adopts by default. Nowhere in the record does Mr. Reilly, Pennichuck, or anyone else suggest that a hypothetical municipal owner will not incur payroll tax expense, whether directly through employees to operate the system or indirectly through contracted services. On the contrary, Pennichuck's revenue and expense expert, Mr. Guastella, provided testimony that a municipal owner would properly be projected to incur payroll taxes. Exh. 3016X, at 3 and 4. Mr. Guastella projected payroll tax expense under municipal ownership for 2008 and 2009 and subsequent years. *Id* at 4. In my judgment excluding this expense from the projected expenses of a hypothetical municipal buyer improperly inflates the valuation for such a buyer by an amount on the order of $9 million.[18]

The fourth issue on which I dissent is the method for the income approach to valuation, and consequently to an aspect of the calculation of economic obsolescence or depreciation in the

[17] It is interesting to note, however, that to the extent that a hypothetical municipality were to choose to have a private for-profit entity operate and maintain the system under contract, as Nashua has proposed to do in this case, some amount of income taxes on the vendor's profit margin for goods and services provided could reasonably be expected to be passed through in the contract price and rates.

[18] Using an assumed ongoing excluded present value expense or increase in earnings to be capitalized of roughly $450,000 per year divided by the municipal capitalization rate of 5% equals $9 million in value.

asset-based approach. I concur with the majority finding that the record on the sales comparison approach simply does not indicate sufficient reliable, comparable, and timely sales data to make a meaningful valuation determination based on other sales. I also concur with the finding of the majority that Mr. Reilly's expense and earnings calculation, based on financial statements projected by Pennichuck for Moody's, Exh. 3021X at 18, is, overall, the more reliable of the two income-based valuation analyses, with the three exceptions on which I dissent noted above and with the exceptions noted by the majority, in particular with regard to their rejection of reduction of the capitalization rate by the 2 percent "growth rate" asserted by Mr. Reilly.

The valuations in this case were originally made as of December 31, 2004, with some subsequent limited updates. Pennichuck used a discounted cash flow (DCF) method while Nashua used a yield capitalization method. Both methods attempted, to some degree, to adjust lumpy projected future cash flows into a present value. For the period from 2005 through 2009 PWW was projected to have, and has in fact experienced, rather uneven or lumpy growth in revenue, expenses, rate base, earnings, and cash flow. This is due in large part to major investments in its water treatment plant and certain other facilities resulting in a near doubling of net plant in service (or rate base) over this period and a number of actual and projected rate increases, including step increases and related regulatory lags. These irregular investments were projected to be substantially complete by the end of this year. Exh. 3016A at 5. A close examination of the PWW "Projected Capital Budget, Calendar Years 2005-2009 with 2004 Actuals" reveals that the capital expenditures projected for 2009 represent a normalized capital expenditure program. Exh. 1075X. at 2. Also, a series of rate increases to recover the lumpy additional investments through 2008 were projected to by complete and in place at the start of February, 2009. Exh. 3016 at 3 and Exh. 3010 at 9.

With a minor adjustment, including the income tax effect, to bring the projected rate increase back to the start of January, the projected revenue for all of 2009, as well as ongoing expenses and capital expenditures, can be considered to be a normalized or good approximation of the net present value of projected steady state earnings and cash flow going forward, a solid basis for a direct capitalization of income. The nature of a regulated water utility, as well a self-regulated municipal system, particularly considering the constraints of RSA 38:28-29, is that significant increases or decreases in expenses and capital expenditures usually flow through as a proportional adjustment in rates that maintain approximately the same overall net earnings or cash flow relative to the amount of invested capital. Thus a single normalized prospective year from the date of valuation is a reasonable basis for direct capitalized valuation, even if actual results, due to changes in expenses or capital expenditures, prove to be significantly different.

Pennichuck in their DCF income valuation started with earnings before interest and taxes (EBIT) (the taxes being income taxes) and added back depreciation and amortization, but deducted capital expenditures and required increases in working capital to figure net cash flow to be capitalized. This was done for projected calendar fiscal years 2006-2009 plus a normalized or terminal 2010 year (representing the assumed future cash flow for future years), which was the average of 2006-2009. The 2006-2009 discrete projections were then discounted to present values as of the end of 2005 and added to the capitalized value of the 2010 normalized net cash flow. The majority follows this approach, with their own adjustments including the capitalization rate, to determine a value as of December 31, 2005 and then brings that value forward to December 31, 2008, using an inverse of the discount rate.

Instead, I would simply do a direct capitalization of a normalized calendar year 2009 net cash flow as representative of the expected normalized net cash flow going forward, which also

fully accounts for the projected additional capital investments through the end of this year. This approach is supported by Reilly's text on "Business Valuation Approaches and Methods," entered as Exhibit 1081, where he describes on page 210; "some generalizations about the relative attractiveness of the two basic income approach valuation methods:"

1. *Stable or evenly growing economic income flow.* If the economic income flow is either stable or growing (or declining) at a fairly even rate, the [direct] capitalized economic income method should conclude as accurate a value indication as the discounted economic income method.
2. *Predictable but uneven changes.* If there are reasons to believe that changes will be significant but predictable, even though uneven, the discounted economic income model should produce a more accurate valuation.

The evidence in this case indicates that the latter was projected to be the case from 2005 through 2008, while the former is expected to be the case going forward from the end of this year. Guastella's Revenue Requirement Analysis, Exh. 3016X at Sch. B, clearly confirms this.

Thus to determine the present value of net cash flow to be capitalized, I would simply use the normalized net cash flow for calendar year 2009, the 12 months immediately following the date of valuation,[19] which is December 31, 2008, with a minor tax-adjusted assumed increase in revenue for the rate increase projected for February 1, 2009 to bring the projected rate increase back to January 1, 2009, eliminating an assumed one-time regulatory lag. For both the municipal and for-profit buyer I assume full property tax payments, but deduct state and federal income taxes from a municipal buyer's expenses, yielding net cash flow of about $7.7 million for the for-profit buyer and $10.3 million for the municipal buyer. For the capitalization rate I use the same weighted average cost of capital (WACC) for the municipal buyer as Pennichuck and the majority, namely 5.0 percent, which, though Nashua questioned it, is also supported by Nashua's

[19] This is the time period indicated in *The Appraisal of Real Estate* at 493: "Direct capitalization, on the other hand, requires a one-year cash flow estimate (date of valuation plus next 12 months) to use for application of an overall [capitalization] rate to estimate value."

own expert witness and financial advisor to the City, Steven A. Adams of First Southwest Company, who stated in his pre-filed testimony that in modeling municipal bonds for the proposed acquisition, his company used a 5.0 percent interest rate for the cost capital. Exh. 1004 at 9. For the for-profit capitalization rate I would use the WACC last approved by this Commission for PWW, namely 7.9 percent, per Order No. 24,751 (May 25, 2007). This results in an indicated value under the income approach of $97.6 million to a for-profit buyer and $206 million to a municipal buyer. Using the confluence or mid-point of these two values as the best approximation of the price that would be arrived at by fair negotiations between a willing owner and typical willing potential buyers, which more likely than not will include no more than one potential municipal buyer, results in an overall indicated market value of about $151.8 million for the income-based component.

Turning to the asset based approach to value, I don't dissent from the analysis of the majority in method or in most other aspects, except that for purposes of calculating economic obsolescence, I would use the average of a municipal and for-profit buyer's WACC (for both the capitalization rate and the required rate of return) and their net operating income (which is EBIT in the case of a municipal buyer and EBIT less income taxes in the case of a for-profit buyer) instead of just EBIT. I would also observe that a close examination of Mr. Reilly's Exhibit 3007A, at 14, in which he calculates economic obsolescence or depreciation, also called capitalized economic shortfall or capitalized excess earnings, for his asset based approach to valuation, reveals that this approach can be considered to be just another income approach to valuation using a slightly different measure of earnings or cash flow to be capitalized.

To be clear, though much ado was made in this case over the importance and weight to be given to an asset-based approach to value, in the end, using Reilly's method for calculating

economic obsolescence, it doesn't really matter what particular value, if any, is given to water pumping rights, or land,[20] or any other particular asset item. This is because whatever the asset values are, they are multiplied by the assumed required rate of return (which is the same in this case as the WACC) to calculate the required economic income which is then totaled and compared with the present value of projected EBIT (as a measure of economic income). The difference in this case is termed income shortfall, that is then capitalized by dividing it by the capitalization rate resulting in the capitalized income shortfall (which, though a large negative number in this case, is also called "intangible value in the nature of goodwill") that is in turn subtracted from the nominal sum of assets values as economic obsolescence or economic depreciation to determine valuation under this asset approach.

Following this same approach to asset valuation as Pennichuck and the majority, but with the modified measures of earnings, required rate of return and capitalization rate described above, I calculate an indicated value of $150.4 million. Using either a 60 percent weight to the asset based approach and 40 percent weight to the income based approach, or equal weight to each, the result is an overall indicated fair market value of $151 million (rounded) for the assets of PWW to be taken. With the addition of $40 million for a mitigation fund, as discussed by the majority, for impacts to PEU and PAC customers (which is like a negative acquisition premium for removal of synergies, economies of scale and severance of service agreements) that the public interest requires as a condition of our approval of this taking, the total amount that I would

[20] In reviewing Pennichuck's valuation of land prepared by Mr. Thibeault, I had some concern that in valuing PWW land and easements, all presently used in support of providing water service, that he did not take into account the effect of government regulation as the *Opinion of the Justices*, 131 N.H. 504 (1989), suggests would be appropriate. For instance, he valued a parcel on which is located a water storage tank, presumably necessary for the water system, as having a highest and best use as a residential parcel, thought is seems very unlikely that it could be permissibly be put to that use on the day it was taken or in the reasonably near future. However, for practical purposes in this case that doesn't really matter since the asset based valuation is the same in the end, due to the way in which economic obsolescence is calculated, regardless of the particular value placed on land under the methodology advocated by Pennichuck and adopted by the majority and myself for purposes of the asset based component of valuation.

require Nashua to pay for the taking of PWW is $191 million as of the end of 2008 or early 2009.

Clifton C. Below
Commissioner

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 04-048

CITY OF NASHUA

RSA 38 Proceeding re Pennichuck Water Works

Order Denying Motions for Rehearing

ORDER NO. 24,948

March 13, 2009

I. INTRODUCTION

On July 25, 2008, the Commission issued Order No. 24,878 approving the City of Nashua's (Nashua) taking by eminent domain of Pennichuck Water Works, Inc. (PWW) and setting a value for PWW's assets (Order). On August 22, 2008, PWW, Pennichuck Corporation, Pennichuck East Utility, Inc. (PEU), Pittsfield Aqueduct, Company, Inc. (PAC), and Pennichuck Water Service Corporation (PWSC) (collectively Pennichuck), filed a motion for rehearing. On August 25, 2008. Nashua filed its motion for rehearing.

On August 27, 2008, Nashua filed an objection to Pennichuck's motion for rehearing and, on August 29, 2008, Pennichuck filed a motion to strike Nashua's motion for rehearing as untimely together with an objection to Nashua's motion for rehearing. On September 4, 2008, Nashua filed an objection to Pennichuck's motion to strike. On September 8, 2008, Nashua filed a motion to strike Pennichuck's objection to Nashua's motion for rehearing. On September 18, 2008, Pennichuck filed a motion for leave to reply as well as a reply to Nashua's objection to Pennichuck's motion to strike. Also on September 18, 2008, Pennichuck filed an objection to Nashua's motion to strike Pennichuck's objection to Nashua's motion for rehearing. On September 24, 2008, Nashua filed a response to Pennichuck's motion for leave to reply.

II. POSITIONS OF THE PARTIES

A. PENNICHUCK

Motion for Rehearing

Pennichuck alleges that the Order fails to meet the legal standard required by RSA 38 and the New Hampshire and United States Constitutions for the condemnation of utility property; fails to make the factual findings required to support such an order for a taking and for the valuation of PWW's assets; and fails to consider, or misunderstands, relevant evidence.

1. Public Interest Standard

Pennichuck claims that the Order fails to apply an appropriate public interest standard and fails to articulate any cognizable public interest standard. In making these allegations, Pennichuck relies on case law involving takings pursuant to: RSA 231:8 and :23 (laying out public highways); RSA 205:2-b (taking of blighted land for redevelopment); and RSA 423:3 (taking of land for municipal airports). Pennichuck further claims that the Order may have erroneously applied a no net harm standard. According to Pennichuck, the Order fails to set forth the Commission's reasoning and methodology in determining the public interest.

2. Water Systems Entirely Outside of Nashua

Pennichuck claims that the Order erroneously interprets RSA 38 to give the Commission authority to allow Nashua to take water systems (satellite systems) located entirely outside of Nashua, even though those systems are not connected to the system that serves Nashua and are not necessary to supply water service within Nashua. Pennichuck points to the Commission's finding in Order No. 24,425 that the authority conferred under RSA 38:2 should be narrowly construed as it relates to facilities beyond municipal boundaries. Pennichuck then claims that the Commission failed to narrowly construe the takings authority when it used uncertainty, and rate

and service continuity as bases for allowing Nashua to take the satellite systems. Pennichuck further asserts that there was no meaningful evidence to support the Commission's finding that Nashua should acquire the satellite systems. Pennichuck incorporates its arguments in its earlier motions to dismiss and for rehearing of Order No. 24,425 into this motion for rehearing.

3. Segmented Public Interest Analysis

Pennichuck claims the Commission erred when it conducted separate public interest analyses for the taking of PWW's core and satellite systems, where the only proposal before the Commission called for the taking of all systems together. Pennichuck argued that no vote occurred in the municipalities containing satellite systems outside of Nashua and that no rebuttal presumption supports the taking of satellite systems. According to Pennichuck, if the Commission had considered the PWW systems as a whole, including the satellite systems, it would have had to consider the public interest of taking all systems, without the benefit of the rebuttable presumption of RSA 38:3.

4. Municipal Vote for the Taking

Pennichuck repeated arguments made in its earlier motions to dismiss and for rehearing that Nashua's petition exceeded the scope of the January 14, 2003 confirming vote of its residents which, according to Pennichuck, only authorized taking the core system. Pennichuck claimed that voters were not properly informed that Nashua would use eminent domain to take PWW assets.

5. Failure to Consider Relevant Evidence

Pennichuck claims that the Order fails to consider, or weigh properly, evidence of the public interest, including the interests of the broader public, the interests of the state, and the democratic interests of residents of towns outside of Nashua. Specifically, Pennichuck claims

that the Commission failed to accord any weight to testimony by Commission staff, Veolia staff, and Bedford and Milford town officials, that Pennichuck is a well-run utility.

Further, Pennichuck claims that the Commission failed to weigh the damage to the public interest of losing access to the capital and operational capability of the State's largest investor-owned water utility. Pennichuck points out that the public benefits of PWSC, which operates 86 water systems serving 19,230 customers in New Hampshire, would also be lost due to the taking of PWW and the ensuing loss of economies of scale.

Pennichuck argues that the acquisition of troubled water systems was in the interest of an investor-owned utility and will not be in the interest of a municipal utility such as Nashua. As a result, according to Pennichuck, Nashua's acquisition of PWW is not in the public interest.

Pennichuck also claims that the Commission failed to consider the harm to PWW shareholders in the form of a multi-million dollar corporate tax liability that will result from the taking. Pennichuck argues that the legislation allowing Nashua to acquire PWW assets through a stock acquisition was an effort to address this massive tax impact.[1]

Finally, Pennichuck claims that, by giving deference to the ability of Nashua's elected officials to make good decisions regarding utility operations, the Commission ignored the opposition to the taking by the elected officials of the Towns of Merrimack and Milford.

6. Tax and Revenue Harm to Pennichuck Shareholders

Pennichuck asserts that the Order fails to consider the harm to Pennichuck Corporation and its shareholders in its public interest analysis. While the Commission considered the harm to customers of PEU and PAC, Pennichuck claims the Order does not discuss the loss of substantial non-regulated revenues to PWSC, nor the substantial corporate tax and capital gains tax at the

[1] *See*, 2007 Laws, Ch. 347:5 (SB 206).

shareholder level that will result from Nashua's taking of PWW assets. Pennichuck argues that the Order fails to balance customer and shareholder interests as required by RSA 363:17-a. Pennichuck takes the position that the Order's failure to consider the interests of Pennichuck shareholders is plain error.

7. Modifications to Nashua's Proposal

Pennichuck claims that the Order fails to conduct the public interest analysis based on Nashua's pre-filed proposal, upon which PWW conducted discovery, and instead based the ruling upon Nashua's altered proposals presented during hearing. Pennichuck points out that Nashua changed its initial takings proposal by voluntarily submitting to Commission jurisdiction, by agreeing to serve satellite system customers at core rates, by altering its operating contract to consolidate all customer service functions with Veolia, and by offering a mitigation fund for PAC and PEU.

Pennichuck argues that it expended time and expense in countering Nashua's pre-filed proposal and then had to litigate new proposals even as late as the last day of hearing, when Nashua proposed new conditions for the first time. Pennichuck claims that it was deprived of its due process rights because it had no opportunity to conduct discovery on, or respond to, the new conditions. Pennichuck claims that the Commission's consideration of the new conditions without further discovery and hearing violates Pennichuck's due process rights under Pt. 1, Art. 2 and 14 and Pt. 2, Art. 83 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution.

8. Conditions in Order Make the Presumption Irrebuttable

Pennichuck claims that the Order treats the statutory presumption of public interest as irrebuttable by imposing numerous significant substantive conditions in an attempt to overcome

the substantial defects that the Commission found in Nashua's proposal. Because the Order at p. 98 finds the conditions "are explicitly determined to be prerequisites to our decision that the taking is in the public interest," Pennichuck argues that without those conditions the Commission determined that the taking would not be in the public interest. Pennichuck then asserts that the conditions overstepped the Commission's authority to set conditions under RSA 38:11 and converted the statutory rebuttable presumption into one that was essentially irrebuttable. Pennichuck takes the position that the Commission's use of conditions in this way turned the Commission into a "super-legislature" enacting a complicated ownership and operational scheme which served as a basis for a public interest finding. Pennichuck Motion for Rehearing at p.16.

9. Conditions Exceed Commission Authority

Pennichuck claims that the Order imposes numerous conditions to satisfy substantial defects in Nashua's proposal that are beyond the Commission's authority, are not enforceable, and cannot support a public interest finding. Pennichuck refers to conditions that it claims require the Commission to exercise ongoing regulatory authority over the new municipal utility including: (1) customers of PWW outside of Nashua receiving the same rates, terms and conditions as those in Nashua; (2) continuing to oversee service quality issues; (3) continuing to oversee wholesale contracts; and (4) requiring Nashua's membership in DigSafe.

Pennichuck states that RSA 362:4 exempts municipalities from utility regulation. Pennichuck argues that RSA 374:22 (dealing with franchise authority), which does apply to municipalities, does not create ongoing Commission authority over municipalities. Pennichuck also asserts that RSA 38:11 cannot include conditions that would have the effect of extending the Commission's regulatory authority to a municipal water system. Pennichuck concludes that

Nashua's agreement to conditions cannot have the effect of extending the Commission's jurisdiction beyond that granted by statute.

10. Conditions Occurring After the Taking

Pennichuck claims it will not be able to challenge conditions subsequent to the taking, should those conditions not be met, because the Order will have become final. Such conditions include: (1) Commission review and approval of Veolia and R.W. Beck agreements 60 days after the Order becomes final; (2) inclusion of customer service functions in the Veolia agreement; (3) creation of a mitigation fund to benefit PEU and PAC customers; and (4) requirement that Nashua hire a PWW employee familiar with its facilities.

Pennichuck points out that should the conditions not be met post-taking it will not be possible to put the shareholders of Pennichuck back into their original condition. Pennichuck claims that the Order turns several of the prerequisite conditions into conditions subsequent, to be evaluated after the taking has occurred. Pennichuck argues that this is a corporate death penalty case where the gallows have been placed before the conviction. According to Pennichuck, this amounts to a denial of its due process rights under Pt. 1, Arts. 2 and 14 and Pt. 2, Art. 83 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution.

11. Nashua's Ability to Finance the Acquisition

Pennichuck claims that the Order's finding that Nashua is financially capable of acquiring and operating the assets of PWW is flawed because the Commission did not consider whether Nashua could finance the acquisition under the conditions prevailing in the financial markets and on the terms set forth in the Order.

12. Nashua's Future Rates

Pennichuck asserts that the rate comparability analysis in the Order between PWW and hypothetical Nashua rates, even assuming the Commission's taking price of $203 million, fails to account for the $40 million mitigation fund and fails to consider evidence of additional costs that were not included in Nashua's revenue requirement model.

Pennichuck notes that the Order relied upon rate analysis by Pennichuck's witness, Mr. Guastella, for its rate comparison and that Mr. Guastella did not include certain additional costs to Nashua in his analysis. According to Pennichuck, those additional costs include; additional payments to Veolia to perform all customer service functions ($311,000 annually), costs of participation in DigSafe ($100,000) annually, additional base fee to Veolia due to passage of time ($200,000 annually), significant unanticipated amounts for regulatory requirements, and additional costs from Veolia as supplemental charges. Pennichuck noted that Nashua's witness, Mr. Sansoucy, estimated operating expenses for Nashua in 2008 at $10,410,000 which Pennichuck claims is a million dollars more than Mr. Guastella's earlier projection.

13. Mitigation Fund

Pennichuck claims that the finding in the Order that a $40 million mitigation fund would generate $3.4 million annually to benefit customers of PEU and PAC is not supported by the evidence because it fails to consider tax consequences and the achievability of an annual rate of return of 8.5%. In addition, according to Pennichuck, the Order fails to consider whether Nashua can legally establish such fund. As a result, Pennichuck argues that the Commission erred in assuming that it had created a valid and enforceable remedy for PEU and PAC customers.

14. Information Outside the Record

Pennichuck asserts that the Order relies upon information outside the record. Specifically Pennichuck claims that the Commission should not have considered a water supply contract between Nashua and the Town of Milford filed on February 22, 2008, and PWW's 2006 and 2007 annual reports. Pennichuck claims that the Order failed to include new assets in the updated valuation and violated Pennichuck's due process rights by failing to give notice of the Commission's intent to use such materials and an opportunity to contest their use. *See, Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1072-73 (1982).

15. Explanation of Valuation Numbers

Pennichuck claims that the Order lacks detail as to a number of numerical components, making it difficult to determine whether the Commission correctly performed the valuation analysis it purported to adopt. Pennichuck asserts that without reviewing the Commission's actual calculations it is not possible to determine whether the Commission applied its valuation methodology properly. *See, Appeal of Newington*, 149 N.H. 347, 352 (2003) and RSA 363:17-b.

16. Lack of Two Percent Growth Rate in Capitalization Rates

Pennichuck claims that the Order wrongfully excluded from its asset and income approach valuation analysis a 2% long-term growth factor in the applicable capitalization rates. Pennichuck claims that the Commission erred in not applying a 2% growth factor and thereby understated PWW's value as of December 31, 2005, by approximately $92.7 million.

17. Update of PWW Value

Pennichuck claims that in the asset approach to valuation the Commission brought forward the value of PWW, from December 31, 2005 to December 31, 2008, without showing the underlying data it used. Pennichuck asserts that the Commission erred when it relied upon

incomplete and extra-record financial information (2006 and 2007 PWW annual reports) to update the asset value of PWW.

18. Pennichuck's Right to Jury Trial

Pennichuck argues that RSA Chapter 38 violates Pennichuck's equal protection rights because it does not provide for a trail by jury on all valuation matters. According to Pennichuck, it has been denied its equal protection constitutional right to a jury trial on damages. See, e.g. N.H. CONST., pt. 1, arts. 2, 12, and 14; *Gazzola v. Clements*, 120 N.H. 25, 29 (1980); *White Mountain Power Co. v. Maine Central RR*, 106 N.H. 443, 445 (1965). Pennichuck asserts that the owner of property facing an eminent domain taking by a public utility (RSA 371:10) and the owners of all other property subject to condemnation processes in New Hampshire (RSA 498-A:9) enjoy the right to a jury trial. Pennichuck concludes that the absence of a right to a jury trial as part of the valuation process set out in RSA 38 is unconstitutional on equal protection grounds.

Motion to Strike Nashua's Motion for Rehearing

Pennichuck's motion to strike concerns RSA 541:3, which requires that motions for rehearing of state agency decisions be filed with the agency within thirty days after the date of the agency decision.[2] Pennichuck states Nashua filed its motion for rehearing on August 25, 2008, thirty-one days after the date of the decision. In support of its argument that the motion is untimely, Pennichuck relies on *Appeal of Carreau*, 157 N.H. 122, 945 A.2d 687 (2008) and

[2] 541:3 Motion for Rehearing –"Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion."

LaCroix v. Mountain, 116 N.H. 545 (1976) in which the Court held that it lacked jurisdiction over the appeals since the respective petitioners filed the appeals beyond the thirty-day time period prescribed by RSA 541:6.[3] In *Carreau*, the Court held that "[w]e have repeatedly held that New Hampshire follows the majority rule regarding compliance with statutory time requirements, and, thus, '[o]ne day's delay may be fatal to a party's appeal.'" *Carreau*, supra at 688 citing *Dermody v. Town of Gilford*, 137 N.H. 294, 296 (1993). Specifically, the Court found that compliance with a statutory appeal period "is a *necessary prerequisite* to establishing jurisdiction in the appellate body." *Id.*

Pennichuck also relies on *Phetteplace v. Town of Lyme*, 144 N.H. 621, 624-625 (2000), a tax appeal under RSA 76, in which the Court held that when the legislature unambiguously establishes a date certain for filing an appeal, it is immaterial that the final day for filing falls upon a weekend or holiday. The Court explained that the legislature contemplated September 1 falling on a weekend or a holiday when it used language "on or before September 1."

Pennichuck argues that the Commission's administrative rule, N.H. Code Admin. Rules Puc 202.03, is immaterial because the period of time applicable to a motion for rehearing is not established by Commission rule, but rather by RSA 541:3. Procedural rules are not available to cure a party's failure to timely move for a rehearing pursuant to RSA 541:3. *See, In re McHale*, 120 N.H. 450 (1980). Finally, Pennichuck points out that "[e]ven a long-standing administrative interpretation of a statute is irrelevant if that interpretation clearly conflicts with express statutory language." *Appeal of Rainville*, 143 N.H. 624, 627 (1999).

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[3] 541:6 Appeal – "Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court."

B. NASHUA

Motion for Rehearing and Clarification

1. Municipal Buyer Theory Is Not Supported by Evidence

Nashua argues that the Commission erred in using the price a hypothetical not-for-profit municipal buyer would pay as a foundation for its determination of valuation. More specifically, Nashua claims that the Commission erred in concluding that a competitive market of non-profit purchasers exists, or influences the market for PWW. Nashua asserts that there is no evidence that such a market exists and it argues that even PWW's valuation expert could not give a single example where two not-for-profits bid on the same water utility. Nashua argues that actual sales of water companies as well as a recently published report on sale prices for water companies support a much lower value for PWW in the range of $85 million. Nashua notes that the only municipal acquisitions of water systems in New Hampshire have been incremental expansions of existing infrastructure and that municipalities have not been active bidders in the market for water companies. As a result, Nashua claims there is no evidence in the record to support a valuation based upon competition among hypothetical not-for-profit bidders.

2. Municipal Buyer Theory Is Not Consistent with New Hampshire Law

Nashua points out that only the municipality where the utility serves may acquire, either by consensual sale or by eminent domain. *See*, RSA Ch. 31 and 38. Nashua argues that New Hampshire law does not permit a municipality to bid competitively on a water company's assets located principally in areas outside the municipality. Nashua asserts that Pennichuck was not able to cite any New Hampshire law that would permit such bidding activity by municipals or other similar not-for-profits. As a result, Nashua claims that the Commission may not use a hypothetical not-for-profit buyer in valuing PWW assets.

3. Nashua Is the Only Municipality Capable of Acquiring PWW

Nashua argues that none of the municipalities which PWW serves, except Nashua, can either legally or practically bid to acquire PWW. According to Nashua, Pennichuck's valuation witness, Mr. Reilly, admitted at hearing that Nashua is the only municipality capable of acquiring the PWW system.

The record demonstrated that there are no reasonably probable competitive municipal or not-for-profit buyers for PWW. Nashua argues that, with 87% of the PWW customers, Nashua is the only municipality with sufficient customers to acquire PWW. Behind Nashua, Amherst has the highest number of PWW customers, but Amherst customers comprise only 3.8% of the PWW customer base. Merrimack, Hollis, Milford, Bedford, Derry, Epping and Newmarket all have smaller percentages of the PWW customer base than Amherst. Plaistow and Salem are served by satellite systems that are not hydraulically connected to the core PWW system. As a result, Nashua claims that none of these municipalities are either legally or practically capable of taking the assets of PWW.

4. Municipal Buyers Lack Authority to Purchase Stock of Water Companies

Nashua claims that even PWW's valuation expert, Mr. Reilly, opined that because municipal buyers cannot buy the stock of a for-profit water company they were not identified as potential buyers by SG Bar Devlin in 2002. Nashua goes on to argue that most water company sales are stock sales as opposed to asset sales in order to avoid a corporate tax on appreciated water company assets. According to Nashua, in negotiated sales between willing buyers and sellers, sellers are not willing to sell assets and incur an additional 39% tax liability without compensation.

Nashua notes that New Hampshire municipalities do not have authority to acquire and hold the stock of utilities such as PWW under Part 2, article 5 of the New Hampshire Constitution, absent a special grant of legislative authority and a public purpose. As a result, Nashua claims that municipal buyers do not and cannot influence the market for PWW.

5. The Reilly Theory Does Not Establish the Fair Market Value of PWW Assets

Nashua argues that by relying on Mr. Reilly's hypothetical municipal purchaser the Commission did not determine the fair market value of PWW. Instead, according to Nashua, the Commission developed the price Nashua was able to pay or, in other words, the investment value of PWW to Nashua. Nashua asserts that the value a buyer can afford to pay is not the fair market value. Nashua posits that the best evidence of the market for PWW is the auction of its parent, SG Barr Devlin in 2002. Nashua claims that SG Barr Devlin did not invite the participation of municipal buyers in the auction and further claims that municipal buyers do not have the motivations of a typical investor. Nashua argues that the evidence suggests that municipal buyers do not pay more than for profit investors. According to Nashua, Mr. Reilly admitted that in a typical market with only one municipal bidder the price could be only $1.00 more than what for-profit buyers would pay. Nashua concludes that the Commission should reject Mr. Reilly's hypothesis regarding municipal buyers and support Commissioner Below's dissenting opinion on that point.

6. Nashua Should be Allowed to Acquire PAC and PEU

Nashua argues that the Commission failed to give proper effect to the broad grant of authority in RSA 38:2 and :11 when it read RSA 38:6 as limiting the more general takings authority. Nashua claims the Commission's decision to allow Nashua to take only PWW is contrary to the plain language of RSA 38:2 and :11.

Nashua observes that PWW, PAC and PEU are highly interdependent companies which all use the computer systems, equipment and employees of PWW to operate. According to Nashua, PAC and PEU have no employees, equipment or inventory, all of which are supplied by PWW and located in Nashua. PAC and PEU are operated out of Nashua, using PWW's communications system, IT system and its administration, accounting, billing and customer service. Nashua claims that separation of PAC, PEU and PWW is a financial and regulatory exercise, but from an operational perspective they are all operated and controlled from PWW facilities in Nashua.

7. Mitigation Fund, Double the Combined Values and Revenues of PAC and PEU, Should be Reduced

Nashua claims that the only evidence of harm to PAC and PEU customers was based upon a continuation of the current corporate model. According to Nashua, establishing a mitigation fund based upon that evidence ignores opportunities for PAC and PEU to mitigate the harm by merging their operations into a larger utility. Nashua asserts that PWWs' calculation of harm simply carried PWW's existing overhead over to a much smaller utility without considering opportunities to reduce or even eliminate harm to customers of PAC and PEU. Nashua argues that the Commission should either require Nashua to acquire the assets of PAC and PEU to satisfy the public interest, or establish procedures to reduce the mitigation fund in light of Pennichuck's ability to mitigate the harm to the PAC and PEU customers.

8. Rebuttable Presumption Applied Only to Assets in Nashua

Nashua argues that RSA 38:3 creates a rebuttable presumption that the action voted on is in the public interest. Nashua insists that the presumption applies to all utility assets, regardless of where they are located. Nashua asserts that the Commission's concern that the will of one

community's voters should not apply to another is precisely the type of political question best left for the Legislature. Nashua points out that RSA 38:14 already addresses this concern by allowing each municipality to conduct its own vote which is binding on Nashua. According to Nashua, the Town of Bedford did just that and voted to support Nashua's petition.

Nashua claims that the Commission's finding that the rebuttable presumption applies only to property within the municipality is harmless error in this case because the Commission found that acquiring assets of PWW outside of Nashua is in the public interest. Nonetheless, Nashua raises the issue for resolution in a possible appeal of this decision.

9. Request for Clarification Regarding the Mitigation Fund

Nashua argues that the Commission failed to specify what happens to the mitigation fund in the event that harm to PAC and PEU customers either ceases or is greatly reduced by acquisition by another investor owned utility, or by acquisition by the municipalities where the utilities are located. As a result, Nashua asks the Commission to clarify whether the mitigation fund is permanent, regardless of whether or not the harm to PAC and PEU customers exists, or whether the fund is an interim requirement which continues only so long as the Commission deems necessary.

Nashua states that the permanent versus temporary status of the mitigation fund determines the type of funding and tax treatment available for the fund. Nashua urges the Commission to clarify that Nashua will be entitled to a return of the mitigation fund upon a final determination by the Commission that the fund is no longer required. Nashua claims that failure to clarify the nature of the mitigation fund substantially erodes the financial benefits of municipal ownership and acts as a barrier to removal of the inefficiencies the fund is intended to mitigate.

Nashua also requests that the Commission clarify the date upon which the fund is to be established. Nashua asks the Commission to specify whether the mitigation fund is to be established upon ratification under RSA 38:13 and RSA 33-B, or at the time the mechanics of the mitigation fund are determined by the Commission. Nashua states that depending upon the timing of establishing the fund it might consider treating the fund as an operating expense rather than as an initial capital expenditure in order to reduce costs to customers.

Nashua notes that the Order states that the mitigation fund should be payable for the benefit of PEU and PAC customers as a condition imposed under RSA 38:11. Order at p. 63. Nashua requests that the Commission clarify that the mitigation fund is a condition required as a matter of public interest and not as severance damages which are payable to the condemnee. in this case PWW, and not to PEU and PAC.

Objection to Pennichuck's Motion to Strike Nashua's Motion for Rehearing

Nashua argues that it has long been a settled principle in New Hampshire that "when the terminal day of a time limit falls upon Sunday that day is to be excluded from the computation." *HIK Corporation v. Manchester*, 103 N.H. 378, 381 (1961), *quoting* 86 C.J.S. Time § 14(2). Nashua explains that the Order was issued on July 25, 2008, causing the 30-day rehearing period to end on August 24, 2008, a Sunday. As a result, Nashua takes the position that its filing on the following Monday, August 25, 2008, was timely.

Nashua also relies on *Hunter v. State*, 107 N.H. 365 (1966) in which the Court noted the State's admission that because the tenth day fell on a Sunday, "the time could be extended to the next day March 1." *Id.* at 366. Nashua argues that the Court in *Ireland v. Town of Candia*, 151 N.H. 69 (2004) made clear the settled principle that if the final day of a time period appeal falls on a Sunday, a motion for rehearing filed on the following Monday is timely. Nashua

distinguishes the cases cited by Pennichuck claiming that in all those cases the facts were not similar to the facts in this docket.

Lastly, Nashua contends that the legislature recently recognized this principle in its adoption of Chapter 11 of the Laws of 2007 (HB 1152) which states: documents are deemed timely when "filed...on the next business day where a statute specifies a deadline that falls on a weekend or legal holiday." This law is effective on January 1, 2009.

Motion to Strike Pennichuck's Objection to Nashua's Motion for Rehearing

Nashua argues that Pennichuck's Objection attaches and attempts to place into the record Exhibit 3258, which the Commission previously ruled was inadmissible. Nashua requests that if Exhibit 3258 is not stricken, Exhibit 1145 should be entered because it contains information concerning the sales listed in Exhibit 3258. Nashua maintains that the information contained in Exhibit 3258 is unreliable and misleading.

Nashua also moves to strike sections B and C of Pennichuck's objection, in which Pennichuck argues that Nashua did not timely seek rehearing of the Commission's earlier decisions: (1) to exclude PAC and PEU assets from Nashua's eminent domain petition; and (2) to apply the RSA 38:3 rebuttable presumption only to assets located within Nashua. The basis for Nashua's motion to strike is a letter from Pennichuck's counsel to Nashua's counsel, dated October 6, 2005, in which Pennichuck's counsel takes the position that motions for rehearing on interlocutory matters are not needed to preserve an appeal and that motions for rehearing can be delayed until a final order is issued.

III. COMMISSION ANALYSIS

A. Motions to Strike

Regarding Pennichuck's motion to strike Nashua's motion for rehearing, we find that the cases cited by Pennichuck are not controlling with regard to the treatment of the 30-day rehearing deadline under RSA 541:3. In this case, the 30-day deadline fell on Sunday, August 24, 2008. We read *HIK Corporation v. Manchester*, 103 N.H. 378, 381 (1961) to provide for filing on the following Monday when the statutory deadline falls on a Sunday and we find no basis for concluding that this precedent has been overturned. The cases cited by Pennichuck in support of its motion to strike involve different facts and, while they may arguably suggest a direction in which the Court might be headed, it is not for us to arrive there ahead of the Court. Consistent with *HIK Corporation*, we find that Nashua's motion for rehearing and clarification was timely filed. Accordingly, we deny Pennichuck's motion to strike.

Regarding Nashua's motion to strike Pennichuck's objection to Nashua's motion for rehearing and clarification, we agree that Exhibit 3258 was excluded from the record by a Secretarial Letter dated October 17, 2007. In that same letter, we also excluded Exhibit 1145. As a result, we will strike both Exhibits 3258 and 1145, and any argument concerning them contained in Pennichuck's objection and in Nashua's motion to strike. With regard to Nashua's request that we strike Pennichuck's arguments regarding the timeliness of Nashua's motions for rehearing on issues decided by earlier orders in this docket, we find no reason to strike those arguments.

B. Motions for Rehearing

The standard for granting a motion for rehearing pursuant to RSA 541:3 and RSA 541:4 requires the movant to demonstrate that the order is unlawful or unreasonable. Good cause for

rehearing may be shown by new evidence that was unavailable at the time or that evidence was overlooked or misconstrued. *Dumais v. State*, 118 N.H. 309, 312 (1978). Further, in order to preserve a question for review a litigant must not raise an issue for the first time in a motion for rehearing. *Appeal of Campaign for Ratepayers Rights*, 133 N.H. 480, 484 (1990). Instead, the matter raised in a motion for rehearing must have been "determined in the action, or proceeding, or covered or included in the order..." RSA 541:3.

1. Pennichuck

Pennichuck's first three arguments concern the public interest standard described in the Order. Pennichuck claims the standard was not clearly articulated and should not have been segmented to deal with separate customer groups based on location within or without Nashua and upon interconnectivity to the core system. Pennichuck does not raise any new facts or arguments, but nonetheless claims that the Order is deficient and illegal. We find both our articulation and application of the public interest standard sufficiently described and supported by the record in this proceeding. Order at pp. 50-63.

Pennichuck's fourth argument repeats arguments made earlier in its motion to dismiss that Nashua's January 14, 2003 confirming vote pursuant to RSA 38:3 was inconsistent with and more narrowly construed than Nashua's petition in this proceeding. We rejected these arguments by Pennichuck in our earlier Order No. 24,425 and incorporate our analysis in that order by reference in this order.

Pennichuck's fifth and sixth arguments claim that the Commission failed to consider relevant evidence on a number of issues. First, Pennichuck alleges that the Commission did not consider either Pennichuck's good record or the benefit to troubled water systems of having Pennichuck continue to own PWW. Clearly, we considered that evidence as described in the

Order at pp. 51-52, however, we did not give the evidence the weight Pennichuck claims it deserves. Concerning the loss of PWSC, tax impacts to Pennichuck Corporation and its shareholders, and opposition to the taking by Merrimack and Milford, we did not accord the weight to that evidence that Pennichuck claims it deserves. As trier of fact, the Commission must consider and weigh all of the evidence presented in order to make factual determinations. We made those determinations in the Order and Pennichuck has not presented any new evidence or argument that we have not already considered.

Pennichuck's seventh argument asserts that due process required that it should have had further opportunity to conduct discovery on various modifications made to Nashua's proposal, or to conditions proposed by Nashua during the course of the hearing. With regard to the proposed modification to the Veolia contract to include both service and billing functions, we determined that sufficient discovery had been conducted on that issue. Order at p. 54. With regard to establishing a mitigation fund, there was significant evidence presented on the harm to PAC and PEU customers and the size of the investment fund needed to mitigate those harms. Order at pp. 94-96. As a result, we do not find any lack of evidence or due process on that issue. Regarding Commission regulation of Nashua's retail and wholesale water rates, Nashua's membership in the DigSafe program, and guarantees of equal water rates to all PWW customers, those conditions all involve regulatory policy and could have been proposed by the Commission absent any suggestion by Nashua. All parties were allowed briefs and reply briefs following hearing and had ample opportunity to argue against such regulatory proposals. As a result, we conclude that all parties have been afforded due process on both factual and policy issues.

Pennichuck's eighth, ninth and tenth arguments involve the nine conditions the Commission placed on Nashua. Order at pp. 98-99. Pennichuck claims the conditions make the

presumption of public interest irrebuttable, exceed the Commission's authority, and in some cases involve events following the taking. Pennichuck has not presented new evidence or arguments on these points that we have not already considered. We have determined that the Commission has authority to impose these conditions. Order at pp. 25-26. We do not find it unfair or illegal that some conditions, such as the amended contract with Veolia, must follow the taking. Such compliance issues are part of the Commission's legitimate regulatory oversight.

Pennichuck's eleventh argument claims that the Commission failed to consider whether Nashua was financially capable of funding the acquisition of PWW for $203 million plus the $40 mitigation fund. As required, we considered whether Nashua has the financial, managerial and technical capabilities required for a public water utility and granted it a water franchise. Order at p. 62. We do not agree that we were required to find that Nashua is capable of financing the specific amount of $243 million. As Nashua points out, conditions in the financial markets change. Had such a finding been made, it would likely need to be updated at the time the taking actually occurs. Further, if Nashua is unable or disinclined to finance $243 million, presumably it will not vote to acquire the PWW assets, and it will not vote to issue bonds and notes, and the taking will not occur.

Pennichuck's twelfth argument is that the Commission understates Nashua's future rates in order to make its public interest finding. Pennichuck claims that the analysis of rates should have included the cost of the mitigation fund, making the actual cost to be recovered in rates $243 million. Pennichuck has not raised any new facts or arguments not already considered and we find no reason to adjust our analysis on this issue. Order at pp. 56-57

Pennichuck's thirteenth argument challenges the $40 million mitigation fund on the basis that it would not generate $3.4 million annually and that the Commission did not consider

whether Nashua may legally establish such a fund. With regard to the findings required to establish the amount of investment in the mitigation fund, Pennichuck has not presented any evidence or argument we have not already considered. We see no reason to alter our findings or conclusion that a $40 million mitigation fund is both adequate and appropriate. Order at pp. 94-96. As for the details of establishing such a mitigation fund, we indicated that the specific methods for implementing the condition will be addressed as a compliance matter. Order at p. 96.

Pennichuck's fourteenth argument concerns the Commission's use of PWW's 2006 and 2007 annual reports filed with the Commission, Order at p. 89, as well as the Commission's reference to a wholesale water agreement between Nashua and the Town of Milford filed with the Commission after hearing on February 22, 2008, Order at p. 61. Regarding the Commission's use of PWW annual reports, Pennichuck should not be surprised by the Commission's reliance on PWW's annual regulatory filings, the filing and veracity of which is required by RSA 374:15, and Puc 607.06 and Puc 609.04, consistent with the Commission's duty to keep informed as to the capitalization of public utilities and other matters pursuant to RSA 374:4. Such reliance is common in the ratemaking context. *See, New England Tel. & Tel. Co. v. State*, 113 N.H. 92, 101-102 (1973); and *Granite State Alarm Inc. & a. v. New England Tel. & Tel. Co.*, 111 N.H. 235, 238 (1971). Further, Pennichuck could have asked to reopen the record if it needed to respond to the Nashua-Milford wholesale water agreement. The agreement was filed in this docket and is the result of further discussion and negotiation between those parties. We find that our reliance on this agreement is not a violation of Pennichuck's right to due process.

Pennichuck's fifteenth argument claims that the Order fails to give sufficient detail concerning its valuation methodology. Absent showing the actual calculations, Pennichuck claims that it is not possible to determine whether the Commission correctly applied its methodology. The methodology, including the components of the calculation, is described in the Order at pages 84-93 in sufficient detail for the purposes of the Commission's findings.

Pennichuck's sixteenth argument challenges the Commission's rejection of the 2% growth factor recommended by Pennichuck's valuation expert. Order at pp. 91-92. We considered and rejected the recommended growth factor for the reasons set out in the Order. Pennichuck has not presented any new evidence or argument not already considered and we find no reason to reconsider this issue.

Pennichuck's seventeenth argument asserts that the Order does not explain the methodology or the detailed information used for updating the valuation in sufficient detail to allow a party to check the calculations. Our description of the methodology and the detail provided in the Order at pages 89 and 93 is sufficient for the purposes of the Commission's findings.

Pennichuck's final argument asserts that, because RSA Chapter 38 does not provide the right to a jury trial in the valuation of the PWW assets, the statute is unconstitutional. We generally assume the constitutionality of the statutes under which we operate. Accordingly, we will not grant rehearing on this argument.

2. Nashua

Nashua's first five arguments deal with assumptions in our valuation analysis concerning hypothetical municipal bidders and their influence on the fair market value of PWW's assets as well as claims that Mr. Reilly's theory reaches an investment value rather than a fair market value. Nashua presents no new arguments or evidence not previously considered. Rather, Nashua re-marshals its previous arguments as to why fair market value should not be based on the hypothetical presence of more than one not-for-profit buyer. Nashua's arguments in this regard were not overlooked; they were simply not found to be persuasive. As discussed in the Order at pages 89-93, we found instead that Pennichuck's witness was persuasive regarding the influence of not-for-profit buyers. Our analysis and conclusions remain as previously stated.

Nashua's sixth argument challenges our decision to prevent Nashua from acquiring PAC and PEU by eminent domain pursuant to RSA Chapter 38. Pennichuck claims that Nashua waived this argument by failing to move for rehearing of Order No. 24,425, which was issued on January 21, 2005, in which we excluded these two entities. We find Nashua's motion for rehearing on this issue timely. The scope of the taking was raised early in the proceeding and determined in Order No. 24,425. Nashua has not raised any new arguments or evidence on this issue in its motion for rehearing and we incorporate by reference the analysis contained in Order No. 24,425.

Nashua's seventh argument alleges that the harm to PEU and PAC has been overstated by Pennichuck's witnesses and that the mitigation fund provides an excessive amount of compensation to those entities. Nashua presents no new evidence or argument on these issues. We find our analysis of the evidence as well as the resulting mitigation fund discussed in the Order at pp. 94-96 to be supported by the record.

Nashua's eighth argument challenges the decision in Order No. 24,567 and also discussed in the Order at pp. 24-25 that the rebuttable presumption contained in RSA 38:3 applies only to assets located in Nashua. The issue was raised earlier in the proceeding and was decided in Order No. 24,567. Nashua has not raised any new arguments on this legal issue not already considered in Order No. 24,567 as well as the Order.

With regard to Nashua's request for clarification concerning the mitigation fund, when we established the mitigation fund, Order at pp. 94-96, we did not conclude that a mitigation fund would be maintained in perpetuity. Rather, details such as the length and start date of the fund will be determined as compliance matters. PEU and PAC are both regulated public utilities and the Commission will continue to oversee their rates and operations. We required the establishment of a mitigation fund as a public interest condition to ensure that the ratepayers of PEU and PAC are not harmed as a result of the taking. As circumstances change for PEU and PAC there may be no further need for the mitigation fund to continue to exist, however, it is not possible to forecast such future events. We anticipate that interested parties will participate in the Commission's ongoing oversight of the mitigation fund.

Based upon the foregoing, it is hereby

ORDERED, that Pennichuck's motion to strike Nashua's motion for rehearing is DENIED; and it is

FURTHER ORDERED, that Nashua's motion to strike Pennichuck's objection to Nashua's motion for rehearing is GRANTED in part and DENIED in part as discussed herein; and it is

FURTHER ORDERED, that Pennichuck's motion for rehearing is DENIED; and it is

FURTHER ORDERED, that Nashua's motion for rehearing is DENIED.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of March 2009.

Thomas B. Getz
Chairman

Graham J. Morrison (KNS)
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

Concurring and Dissenting Opinion of Commissioner Below

I concur with the majority in all respects except with regard to its analysis and conclusion concerning Nashua's first five arguments that deal with assumptions in the majority's original valuation analysis concerning hypothetical municipal bidders and their influence on the fair market value of PWW's assets. Consistent with the reasoning set forth in my previous dissent on the issue of valuation, I would grant rehearing on this issue to consider, among other things, the testimony of Donald Ware and John Joyner cited on page 4 of Nashua's motion for rehearing and the auction of Pennichuck's parent by SG Barr Devlin in 2002, discussed at page 18.

Clifton C. Below
Commissioner

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

City of Nashua: Petition for Valuation Pursuant to RSA 38:9

Docket No.: DW 04-048

MOTION FOR REHEARING AND CLARIFICATION

NOW COMES the City of Nashua and moves for rehearing on issues related to valuation and clarification with respect to certain findings made concerning the public interest under RSA 541, and in support hereof states as follows:

I. MOTION FOR REHEARING

A. THE COMMISSION ERRED BY ACCEPTING PENNICHUCK'S THEORY THAT MUNICIPAL BUYERS INFLUENCE VALUE WHICH WAS OVERWHELMINGLY CONTRADICTED BY THE EVIDENCE

1. There can be little doubt that the Commission's Order of July 25, 2008; Order No. 24,878 is among the most comprehensive and thorough in the Commission's history. The City of Nashua, its citizens, and those of surrounding communities commend the Commission for both the scope and thoroughness of its analysis. The City therefore does not undertake lightly its decision to seek rehearing because it recognizes, as it must, the tremendous effort the Commission has undertaken in evaluating the issues and evidence presented to it.

2. However, the primary issue for which Nashua seeks rehearing or reconsideration, i.e. valuation, is one for which the Commission is itself divided. Therefore, rather than ask the Commission to simply weigh the evidence in its favor and accept the testimony of one expert in favor of another, Nashua asks this Commission to re-examine the errors identified by Commissioner Below's dissenting opinion and that lie

at the foundation of the majority's determination of the price to be paid by Nashua: that hypothetical not-for-profit municipal buyers fundamentally alter the market for Pennichuck Water Works' property that is the subject of this proceeding.

3. This motion therefore builds upon the four corners of the Commissioner Below's opinion, and draws the majority of Commission's attention to additional critical evidence that it overlooked that demonstrates that Pennichuck's municipal buyer theory is a not supported by the evidence or the realities of the market for water utilities. Specifically:

i. The Commission erred by concluding that a competitive market of municipal or non-profit buyers exists or influences the market for Pennichuck Water Works, which was unsupported by the evidence.

ii. The Commission erred by accepting a municipal buyer theory that is not legally permissible under New Hampshire Law.

iii. The Commission erred because the municipal buyer theory is impracticable.

iv. The Commission failed to consider that municipal buyers are not active participants in the marketplace because they have no authority to purchase stock of for-profit water companies.

v. The Commission erred by concluding that the Reilly theory established the fair market value of the assets.

These points are addressed below.

i. The Commission Erred By Concluding That A Competitive Market Of Non-Profit Purchasers Exists, Or Influences The Market for Pennichuck Water Works.

4. The Commission accepted Pennichuck's theory of value put forth by its expert Robert Reilly, that multiple not-for-profit entities (municipalities) would compete in the pool of buyers and set the range of the purchase price because they could afford to

pay more than investor owned utilities.[1] There is, however, no evidence demonstrating that such a competitive market of municipal or not-for-profit buyers exists. The Commission's own decision, which spans 120 pages, fails to identify a single municipal or not for profit purchaser that would compete against Nashua.

5. Even Mr. Reilly acknowledged when asked in "how many situations have you seen where there have been multiple non -- not for profit or governmental bidders?"[2] that it only happens in "the minority of the cases".[3] He further indicated his belief that the situations in which more than one municipal buyer actually competed to "bid up" the value represented "very few cases – where it may be back to back, literally next door municipalities, why should we -- you know, and the concern is often, I'll just be honest with you, if we're -- if I'm city A and I'm right next to city B and the water company is in the middle, [...]when city A and city B are both bidding, then the prices can get bid up."[4]

6. When asked if he could "recall the names of any of these situations" or examples where municipal buyers had "bid up" the market price for a water utility, however, *he was unable to recall even a single example to support his theory.* Mr. Reilly stated that "Oh, I can look--I can't think on the top of my head, but I can research that and get you that information".[5]

7. It may be that Mr. Reilly's failure to recall even a single example of when municipal or other not for profit purchasers competitively "bid up" the value of an investor owned utility is merely circumstantial evidence. However, "some circumstantial

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[1] Order No. 24,878 at p. 89.
[2] Transcript, September 12, 2007, Pages 210-211.
[3] Transcript, September 12, 2007, Page 211.
[4] Transcript, September 12, 2007, Pages 211-212.
[5] Transcript, September 12, 2007, Page 212.

evidence is very strong, as when you find a trout in the milk."[6] Mr. Reilly's comment that he thought that they existed, but simply could not recall an example, is particularly troubling because the difference between his value of $248 million, and that of Mr. Walker of $85 million is entirely dependent the existence of such a market for Pennichuck Water Works. There is no evidence that such a market exists, and his testimony that he thought one existed but could not recall any specific example is suspect. One would expect the milkman, confronted with the trout, to say no less.[7]

8. There was undisputed affirmative evidence, however, that such a competitive market of municipal buyers does not exist. Donald Ware, P.E., Chief Engineer and President of Pennichuck Water Works testified that, based on his 25 years of industry experience, municipalities as a general matter, have "no interest" in acquiring water systems and are "not regularly in the business" of doing so.[8] There is no rational basis for the Commission to accept Mr. Reilly's vague but unconfirmed sense that municipal buyers might participate competitively in the market with Mr. Ware's 25 years of *actual experience* indicating that they do not.

9. The Commission also heard from John Joyner, President of Infrastructure Management Group, Inc. ("IMG") who testified on cross examination concerning his firm's financial advisory practice made up of former investment bankers specializing in the privatizing and management of utilities, including water systems.[9] He prepared a report entitled *Tapping Public Assets,* with other members with considerable experience

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[6] *McIntosh v. Personnel Commission*, 117 N.H. 334, 339 (1977) *quoting* Henry David Thoreau, Journal, November 11, 1850.

[7] Nineteenth century American dairymen delivered their milk in cans and dispensed the amount each house required. If they forded a stream on the way to the market, there was always the temptation to top up the cans with water from the brook. This led Henry David Thoreau in his journal to observe that "some circumstantial evidence is strong, as when you find a trout in the milk."

[8] Transcript, September 11, 2007, p. 63, 64.

[9] Transcript, September 18, 2007, Page 48.

in selling infrastructure assets and raising capital for new facilities.[10] That report advised that "[r]egulated utilities *usually sell for at or close to their "rate base"*; i.e., roughly, the original cost of the utility, less depreciation" and that "[s]ale prices for water utilities *usually range from $1500 to $3500 per customer connection*, with a $2000 per connection median, but they can go higher if the opportunity for growth or operating cost savings is exceptional."[11]

10. On cross examination, he applied his range of values for water utility assets to Pennichuck's 25,000 customers, which resulted in a value range from $37,500,000 to $87,500,000. Thus, his own upper range of values, again based on his firm's *actual experience*, bears a striking resemblance to the value of $85,000,000 concluded by Nashua's valuation expert Glenn Walker from his analysis of actual sales in actual markets.[12] The Commission's Order and analysis overlooks this testimony which begs for an explanation.

11. Mr. Joyner's testimony and report is also telling in what it does not say. At no point does Mr. Joyner or his team of municipal utility management experts suggest that there is any reason that other municipal buyers might step in and pay a substantial premium above what investor-owned utilities pay. Rather, his report confirms what Donald Ware candidly admitted on cross-examination: that there is no active market of municipal buyers that has any appreciable influence on the market.

12. This omission is particularly damaging to Pennichuck's municipal buyer theory because, as discussed below,[13] a tax-exempt municipal seller would not be subject

[10] Ibid at Page 49.
[11] Exhibit 1099, Page 6 (emphasis added).
[12] Exhibit 1007A, Page 65.
[13] See Section I (A)(iv).

to the capital gains tax that a for profit seller such as Pennichuck would face if it sold its assets to a municipality, due to the municipal purchasers inability to purchase stock without special legislative authorization.[14] As a result, a not-for-profit municipal buyer would have an even greater capacity to buy from another municipality because a municipal seller would not face the "substantial" capital gain tax liabilities amounting to "many tens of millions of dollars" just to make a financially equivalent offer to a for profit stock purchaser.[15] However, Mr. Joyner's testimony and his report confirms what Pennichuck Water Works candidly admitted: that there simply are not municipal buyers actively competing in the marketplace.

13. It is also surprising to Nashua that the Commission would accept Reilly's municipal buyer hypothesis because if in fact municipalities were active competitors influencing the market for Pennichuck Water Works, they would also be active in seeking approval from this Commission for the franchises they acquired. The Commission's own jurisprudence, confirms that municipal acquisitions are in the nature of incremental expansions of existing infrastructure, not competitive acquisitions of the nature hypothesized by Mr. Reilly. The Commission's decisions in *Tilton and Northfield Aqueduct Company Inc.*,[16] the *Manchester Water Works,*[17] *Portsmouth,*[18] and other cases confirm this.[19] Municipal buyers played little or no role in bidding or establishing the market price in the recent acquisitions of investor-owned utilities, including

[14] *Cf.*, Laws of 2007 Chapter 347; SB 206 (2007) (Nashua's limited right to purchase stock).
[15] Exhibit 3001, Page 20.
[16] Order No. 24,562.
[17] *See, e.g., Manchester Water Works*, Order No. 18,628, Order No. 24,326 & Order No. 24,775.
[18] *City of Portsmouth*, Order No. 24,865 (sewer service).
[19] *E.g. City of Laconia*, Order No. 24,433; Order No. 24,841; *City of Dover*, Order No. 24,506; *North Conway Water Precinct*, Order No. 24,360.

Philadelphia's proposed acquisition of Pennichuck Water Works,[20] Aquarion,[21] Hampstead Water Company,[22] or PAC, Consolidated and Central Water Company, Inc., when they were acquired by Pennichuck.[23] Indeed, it was the testimony of the Commission's own Director of the Water Division, Mark A. Naylor,[24] and former PUC Commissioner, Douglas L. Patch,[25] that municipal water systems are not engaged in the *business* of acquiring other water systems.

14. Thus, the Commission erred by accepting Pennichuck's municipal buyer hypothesis, which was not only unsupported by the evidence, but contrary to the evidence before the Commission. However, Nashua does not suggest that the Commission need, as a matter of law, accept the appraisal of its own experts. Nashua requests that the majority reconsider its determination of value based on the lack of evidentiary support for the existence of a municipal buyers' market for Pennichuck Water Works and join Commissioner Below's opinion which tempered the municipal buyer theory in light of the paucity of evidence to support it. To do otherwise would force the citizens of Nashua and customers in surrounding communities to bear an unreasonable and unnecessary $50 million in additional debt as a result of an unsupported theory of value that has made "the only real winners in this game ... the lawyers and expert witnesses, who collect their fees regardless of the outcome."[26]

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[20] *See* Order No. 24,020.
[21] *Aquarion Water Company of New Hampshire*, Order Nos. 24,651 & 24,691.
[22] *Hampstead Area Water Company*, Order No. 24,803.
[23] *Pennichuck Corporation*, Order No. 22,843; *Pittsfield Aqueduct Company, Inc.*, Order No. 24,606.
[24] Exhibit 5001, Page 52, 53, 56.
[25] Exhibit 5002, Page 18.
[26] *Southern New Hampshire Water Company v. Hudson*, 139 N.H. 139, 145 (1995).

ii. The Commission Erred by Accepting a Municipal Buyer Theory That Is Not Legally Permissible Under New Hampshire Law.

15. Municipalities in New Hampshire are subdivisions of the State and have only the powers granted to them by the Legislature.[27] In order for a city or town or district to acquire the assets of a utility, therefore, there must be a specific grant of authority from the legislature. Nashua has advocated that RSA 38 is the sole grant of that authority, not only for a taking but also a consensual sale. See RSA 38:2. As the Commission has already ruled in Order No. 24,425, herein, the only New Hampshire city or town or district which could lawfully acquire the assets of Pennichuck under RSA 38 is one in which the Company is engaged in distributing water for sale.

16. Even if Nashua and a municipality could legally acquire by agreement what it cannot accomplish under RSA 38, there must be some other grant of authority, which there is not. Under RSA 31:3, a municipality may only "purchase and hold real and personal estate for the public uses of [its] inhabitants". Thus, a municipality cannot simply vote to raise and borrow funds to compete to acquire water utility property that serves customers in other municipalities under RSA 31:3 unless the acquisition was for "the public uses of [its] inhabitants."

18. The similarity of RSA 31:3 to RSA 38:6 is noteworthy. In both RSA 31:3 and RSA 38:6, in order for a municipality to acquire water utility assets there must be a connection between those assets and the inhabitants of the municipality. Either their purchase serves the public use of the municipality's inhabitants (RSA 31:3) or the assets must belong to a utility which serves its inhabitants (RSA 38:6). There is no grant of

[27] *City of Manchester School Dist. v. City of Manchester*, 150 NH 664, 666 (2004); Order No. 24,425, Page 9.

authority in New Hampshire law for any municipality to acquire the assets of a water utility on a competitive basis regardless of where it is located.

19. Yet this is precisely the approach to value used by Pennichuck's expert and adopted by the Commission. He advocated in his report that the population of likely buyers included "*any* incorporated New Hampshire city or town."[28] In his testimony before the Commission contrary to New Hampshire law, he argued that the "potential buyers did not actually have to either touch the city of Nashua *or touch Pennichuck Water Works.* [...] a buyer could be a municipality or a water district or a regional district *anyplace in New Hampshire; it doesn't have to be actually physically located within the Pennichuck service area.*"[29]

20. Mr. Reilly repeatedly referred to an alleged memorandum he had received from Pennichuk's attorneys which provided the legal authority for his hypothesis.[30] Yet, when asked to produce such a memorandum he was unable to do so.[31] Upon request by Nashua, the Commission required the memorandum to be produced by Pennichuk's attorneys. It became apparent that no memorandum existed and at best there had been a conversation with Mr. Reilly.[32] The substance of that conversation as set forth in the transcript provides no legal support for the Reilly hypothesis that the population of likely buyers could include any New Hampshire city or town. In fact, Mr. Reilly was told:

> [T]hat the potential governmental buyers would be, obviously, Nashua. Any other town where Pennichuck Water Works provides service, any village district, similarly where Pennichuck Water Works provides service, all of those could, by consensually or exercise eminent domain under RSA 38.

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[28] Exhibit 3007A, Page 2.
[29] Transcript, September 12, 2007, Pages 47-48.
[30] Transcript, Sept. 12, 2007, page 58.
[31] Ibid at Pages 58-61.
[32] Ibid at Page 144.

> In addition, the current regional water district, any new water district that was formed or any other intermunicipal special district formed pursuant to RSA 52A all can buy on a consensual basis.
>
> The state of New Hampshire could acquire the utility, the United States Government could acquire the utility, or nay out of state or bi-state government body.[33]

It is clear that Reilly's hypothesis is in direct conflict with New Hampshire law. The alleged memorandum confirms that the pool of municipal buyers is limited to those cities and towns served by Pennichuck Water Works. The attempt to include water districts formed under RSA 52A goes nowhere. There is no RSA 52A! Assuming the reference should have been RSA 52, the boundaries of such a district are set by the selectmen in the towns in which they are located.[34] Nashua doubts that the law of New Hampshire is that a town not served by Pennichuck, such as Lancaster,[35] could establish a water district pursuant to RSA 52 that would be able to purchase the very assets the town could not purchase.[36] Likewise, if the reference was to RSA 53A, the same result is reached. Two towns not served by Pennichuck could not create a water district by intermunicipal agreement that could acquire what the towns were not permitted to buy. If Order No. 24,425 is good law, the Reilly hypothesis is vastly limited.

21. The Reilly theory is both factually and legally absurd, and not permitted under New Hampshire law. Relying on it, he was able to assign a value that would result from circumstances that do not and cannot exist as a matter of law. It is not fair market value, but a theoretical value in a hypothetical scenario that may have interest in

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[33] Ibid at p. 145.
[34] RSA 52:1.
[35] See discussion regarding Lancaster at Transcript Sept. 12, 2007, Page 51.
[36] See, e.g., RSA 52:8.

academic circles but does not exist in any market, and certainly not the market for Pennichuck Water Works.

iii. In The Few Municipalities That Have The Legal Authority To Acquire Pennichuck Water Works, The Evidence Is Overwhelming That It Is Neither Practical Nor Reasonably Probable They Would Compete To Purchase Pennichuck Water Works.

22. Even Mr. Reilly admits that if Nashua is the only practical legal not-for-profit buyer then "[t]hat hypothetical is the hardest question to answer [because] we've also seen cases where [bidding up] didn't happen".[37] Such is the case with the market for Pennichuck Water Works, as there are no likely municipal buyers, other than Nashua, that could legally or practically acquire the system under RSA 38, or even RSA 31:3. As a result his hypothesis does not reflect generally accepted standards for valuing the fair market value of property at its legally permissible and reasonably probable highest and best use.[38]

23. There are no reasonably probable competitive municipal or not-for-profit buyers for Pennichuck Water Works. The record is undisputed that 87 percent of Pennichuck Water Works customers, or approximately 21,600 of 25,000, are located in Nashua.[39] The remaining customers are scattered in 10 other municipalities in southern New Hampshire. None of these municipalities have more than a fraction of the customers (RSA 38) or inhabitants (RSA 31) in Nashua.

24. Amherst, the largest in terms of the number of customers, has only 760 customers (3.8%) that use wells as their primary supply and are connected to the core system *as a backup*, and 181 customers in two community well systems not connected to

[37] Transcript, September 12, 2007, Page 206.
[38] Exhibit 1097 / 3100; *The Appraisal of Real Estate*, Twelfth Edition, Chapter 12 (Highest and Best Use).
[39] Order No. 24,878 at p. 108; Exhibit 3001, Page 7.

the core.[40] The Nashua core system serves only a "small portion of the Towns of Merrimack and Hollis" with 222 (0.8%) and 67 (0.3%) customers, respectively.[41] Pennichuck Water Works' customers in Bedford (812 in 5 systems for 3.2%), Derry (648 in 5 systems for 2.6%), Epping (78 for 0.3%), Newmarket (87 for 0.3%), Plaistow (194 in 3 systems for 0.8%) and Salem (72 for 0.3%) are served by satellite systems that are not hydraulically connected to the Nashua core.[42] Milford has 119 customers in three systems (0.5%), in addition to its wholesale supply contract for its own water department.

26. Under RSA 38, these are the only communities authorized to acquire Pennichuck Water Works. There are no other lawful purchasers. In contrast to Nashua with over 20,000 customers, each of these communities has only a tiny fraction of the customer base, though some, like Merrimack and Milford, have significant wholesale contracts or customers. It is plainly absurd to think that hypothetically, Amherst with 3.8% of the total number of customers would competitively bid against Nashua to acquire Pennichuck Water Works. Yet this is the foundation of the municipal buyer hypothesis adopted by the Commission.

27. The same result is true even if the Commission were to assume, for the purposes of argument, that municipalities have the power to acquire water utilities by agreement, outside the provisions of RSA 38. Under RSA 31:3, only Nashua of all of these municipalities can claim that the acquisition of the entire Pennichuck Water Works bears a rational relationship to the "public uses of [its] inhabitants". To suggest that Amherst, would competitively bid in the market to establish or purchase its own water

[40] Exhibit 3001, Page 7.
[41] Exhibit 3001, Page 6.
[42] Exhibit 3001, Page 7.

department by acquiring over 24,000 foreign customers in order to serve its own 941 customers is fundamentally unsupported by the evidence, setting aside common sense.

28. Even if these communities elected to competitively bid against Nashua, and managed to obtain financing and the votes and other necessary approvals for such an endeavor, the municipal buyer hypothesis still faces a fundamental practical problem. RSA 38:14 provides Nashua or any other municipality the ability to "opt out" of an acquisition by another municipality by conducting its own vote under RSA 38, *which is binding on the acquiring municipality.*

29. Thus, even assuming that one community, such as Bedford (3.2%),[43] bid competitively to acquire Pennichuck Water Works, under RSA 38:14, Nashua could simply not bid at all and conduct its own "vote to establish a municipal plant" and "all the provisions of this chapter shall be binding as to such determination." Nashua would not need to compete and any other municipal buyer, because under RSA 38:14 any municipal buyer that did not cooperate with Nashua as Nashua has done with the Regional Water District, would potentially face the loss of 87% of its customers.

30. The simple reality is that only Nashua is in a position to overcome the financial, political, and legal obstacles that would face any municipality that sought to acquire Pennichuck Water Works. These obstacles make it a legal and practical impossibility for any other municipal or not-for-profit buyer to compete in the market place to acquire an investor owned utility like Pennichuck Water Works. If it were otherwise, it would be reflected in the record. However, the record in this proceeding reflects the fact such a market of competitive municipal buyers simply does not exist. Mr. Reilly's theory is therefore not based on a hypothetical version of New Hampshire in

[43] Bedford, of course, supports Nashua's petition. *See* Exhibit 2003, Pages 4-5.

which municipalities free from legal, financial, political and tax[44] constraints compete in the open market to acquire the State's largest investor owned utility. His valuation does not reflect the reasonably probable highest and best use of property.

31. It is far more likely that, rather than compete in the market to acquire Pennichuck, municipal buyers would cooperate to ensure that they acquired the system at the lowest possible price. The Commission's own experience and the record in this case confirms this. For example:

- In this proceeding, Nashua is a founding member of the Merrimack Valley Regional Water District, which has consistently supported Nashua's petition. Nashua has committed to the principle of transferring ownership to the District,[45] and there is no evidence that even that process would be a competitive bid. Despite Nashua's pre-dominance in terms of the number of customers, Nashua has agreed to a charter for the District that allows in many, but not all, of the votes taken by the District Nashua only "gets one vote, just like any other community."[46]
- The Towns of Amherst and Bedford, the two largest communities by the number of customers outside of Nashua, supported Nashua's petition.[47]
- In the case of the Tilton-Northfield Water District's acquisition of the Tilton and Northfield Aqueduct Company, both municipalities involved cooperated to form a village district under RSA 52, which requires approval by both governing

[44] See Section I (A)(iv), below.
[45] *See e.g.*, Transcript, January 10, 2007, Page 21; Exhibit 1014, generally, and at Pages 2, 15 & MBS Exhibit 3 (Response to Staff 4-93); Exhibit 1016, Pages 3-4.
[46] Transcript, January 11, 2007, Pages 43-44.
[47] Order No. 24,379, Page 8; Exhibit 2003, Pages 4, 5.

bodies.[48] They could have competed against each other up to their ability to pay but there is not evidence to suggest this occurred.[49] Nor did any other surrounding municipal or not-for-profit entity seek to acquire the system. The only municipalities in which the system was located collaborated to minimize their costs, as should be expected of not-for-profit governmental buyers.

- In the case of the proposed sale of Pennichuck to Philadelphia Suburban, as Commissioner Below recognized, Pennichuck's own investment banker SG Barr Devlin did not identify any municipal buyers as likely purchasers of the system.[50]

32. The evidence is clear that of all the potential municipal buyers with the legal authority to purchase Pennichuck Water Works, whether under RSA 38 or otherwise, only Nashua has the practical ability to do so. The record further demonstrates that the same limitations on municipal buyers in the market for Pennichuck Water Works exist throughout the entire water utility market. Were it otherwise, there would be evidence of sales of investor owned utilities similar to Pennichuck to municipalities. The record in this proceeding confirms that there are none that show any appreciable impact of the municipal buyer phenomenon as advocated by Mr. Reilly.

iv. The Commission Failed To Consider That Municipal Buyers Are Not Active Participants In The Marketplace Because They Have No Authority To Purchase Stock Of For-Profit Water Companies And Are Therefore Unable To Compete In The Marketplace.

33. During his cross-examination, when explaining why he believed SG Bar Devlin had not identified any municipal buyers in 2002, Reilly opined that municipalities cannot buy the stock of a for-profit water company. In doing so he demonstrated yet

[48] *See, e.g.*, RSA 52:1 ("the selectmen of the town or towns shall fix, by suitable boundaries, a district including such parts of the town or towns as may seem convenient").
[49] Order No. 24,562, *Tilton Northfield Aqueduct Company*, 90 NHPUC 599 (2005).
[50] Order No. 24,878, Page 109; Exhibit 1094, Page 33; Transcript, September 12, 2007, Page 71.

another reason why his theory that municipal buyers would set the purchase price for Pennichuck Water Works is fundamentally flawed.

34. Few, if any, asset sales occur in the market place for water utilities such as Pennichuck Water Works. Virtually all of the sales identified by both Reilly and Walker were stock sales. The reason for this is simple: asset sales cause a for-profit seller to recognize gain for federal and state income tax purposes equal to the excess of the aggregate value it receives for each asset less its adjusted tax basis in those assets.[51] The effective rate of such a tax is 39%.[52] By comparison, when the stock of the utility is sold to effectuate transfer, the only gain recognized is the gain in share price by the stock holder. As a result, stock sales avoid an effective 39% capital gain tax liability that sellers to municipalities would incur.[53]

35. New Hampshire municipalities do not have the authority to acquire and hold stock of for profit water utilities like Pennichuck under Part 2, Article 5 of the New Hampshire Constitution, absent a special grant of legislative authority and a public purpose.[54] Without authority to acquire and hold stock, municipalities are unable to compete with for-profit investor owned utilities in the market for water utilities. In a negotiated sale between a willing buyer and a willing seller, the sellers are not willing to incur an additional 39% tax liability without compensation.

36. In fact, Pennichuck's own testimony explains that it would never consider selling to a municipal purchaser. As Donald Correll explained "[b]ecause a large portion of PWW's assets are of a fairly old vintage, this differential would be substantial and *the*

[51] Internal Revenue Code, Sec. 1211(a) ; Exhibit 3001, Page 20.
[52] Ibid.
[53] Exhibit 3001, Page 20.
[54] *Cf. Laws of 2007 Ch 347*; SB 206 (2007) (authorizing Nashua to purchase stock only by agreement).

income tax burden would certainly run into the many tens of millions of dollars."[55] Conveniently, Reilly's municipal buyer theory ignores the "many tens of millions of dollars" costs that a municipal buyer of Pennichuck Water Works would need to overcome just to compete on an equal basis with a stock purchaser, if it were even allowed a seat at the negotiating table, as the SG Barr Devlin report shows it was not.[56]

37. By overlooking "the many tens of millions of dollars" in capital gains tax liability that a municipal buyer would need to overcome, the Commission failed to account for critical evidence demonstrating why municipal buyers do not and cannot appreciably influence the market for Pennichuck Water Works. This error allowed the majority of the Commission to assume a population of municipal buyers operating under financial circumstances that do not exist and arrive at a value far in excess of market value. The Commission should therefore reconsider its determination of price in light of this evidence and adopt the price as determined by Commissioner Below, whose valuation mitigated for the lack of data to support Pennichuck's municipal buyer theory, which was not supported by the evidence.

v. The Commission Erred By Concluding That The Reilly Theory Established The Fair Market Value Of The Assets.

38. What the Commission has done by accepting Reilly's hypothesis, as noted at length by Commissioner Below,[57] is not to establish the fair market value as required by RSA 38, but rather the price that Nashua, because of its many synergies,[58] is able to pay or, in other words, investment value to Nashua. It is not surprising then Reilly created his hypothesis concerning more than one municipal buyer. It allowed him to

[55] Exhibit 3001, Page 20.
[56] *See* Order No. 24,878, Page 109 and the citations contained therein.
[57] Order No. 24,878, p. 104-108.
[58] Ibid at p. 92.

assume a lower cost of capital and rate of return and in so doing double the values he would have derived if he had used the cost of capital and rate of return of a typical buyer.[59]

39. However, what a buyer can afford to pay is not the same as fair market value. Investment value is specific to a particular investor or class of investors that has specific investment requirements,[60] while fair market value focuses on the *typical* investor with investment requirements *typical* of the market.[61] But, as Commissioner Below has noted, Reilly, himself, has admitted that the *typical* market for water utility assets consists of only one municipal buyer and that under such conditions the one municipal buyer will bid only $1.00 more than what a *typical* for profit buyer would pay for the assets.[62] Because Reilly's market, by his own admission, is not *typical* and focuses on a particular class of investors rather than a typical investor, his hypothesis must fail.

40. Ultimately the best evidence of the market for PWW is the auction of its parent by SG Barr Devlin in 2002. SG Barr Devlin did not identify any potential municipal buyer and none submitted bids.[63] If municipal buyers could pay almost double what a for profit buyer could pay, notwithstanding any capital gains tax, it is likely SG. Barr Devlin would have invited their participation. Municipal buyers were not then, and are not now, the most likely population of hypothetical willing buyers. They do not have the motivations of a typical investor and they have different objectives. And, as Mr. Reilly admitted, the market does not typically consist of more than one.

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[59] Ibid at p. 104, 105; Exhibit 1015, GES Exhibits 16, 17.
[60] The Appraisal of Real Estate, 12th Ed., p. 26.
[61] Ibid.
[62] Order No. 24,878, p. 104, 105.
[63] Exhibit 1094, p. 33.

41. The only empirical evidence about the impact of municipal participation in the market suggests that they do not pay more than for-profit investors[64] confirming Commissioner Below's observation that it is unlikely a municipality would be willing to forego all its potential savings and synergies[65] and Reilly's admission that in a typical market with only one municipality, the price could be only $1.00 more than what a for-profit buyer would pay.

vi. Conclusion.

42. The Commission should reconsider its reliance upon the Reilly hypothesis for the reasons set forth herein, in Nashua's November 16, 2007 Memorandum and in the dissenting opinion of Commissioner Below, which made reasonable adjustments in light of the lack of evidence in the record in this case to support his theory that municipal buyers would compete in the market to acquire Pennichuck Water Works. As noted herein, this theory does not reflect market value and is based on fundamental errors and assumptions.

B. THE COMMISSION ERRED BY DENYING NASHUA'S PETITION TO ACQUIRE PAC & PEU AND REQUIRING THAT NASHUA MITIGATE HARM TO THEIR CUSTOMERS IN AMOUNT MORE THAN DOUBLE THEIR VALUE AND REVENUES

i. The Commission Improperly Denied Nashua The Opportunity To Acquire PEU and PAC.

43. Nashua requests that the Commission reconsider its decision Order No. 24,425, strictly construing the notice provision in RSA 38:6 and prohibiting Nashua from acquiring Pennichuck East Utilities (PEU) and the Pittsfield Aqueduct Corporation

[64] Exhibit 1007 (E); See also Transcript Sept. 10, 2007 (Afternoon) Page 85, 89.
[65] Order 24,878, Page 111.

(PAC). In so doing, the Commission defeated the plain meaning of the clear grant of authority to acquire those utilities consistent with the public interest.

44. In its March 22, 2004 *Petition for Valuation* and its October 21, 2004, *Memorandum of Law*, Nashua asserted that RSA 38:2, 6, 9 and 14 allow Nashua to seek to acquire all three of Pennichuck's regulated utilities, including PEU and PAC, and that it is the Commission's role to determine how much plant and property, including PEU and PAC, the public interest requires Nashua to purchase. Moreover, RSA 38:11grants power to the Commission to set conditions and issue orders to satisfy the public interest, including the authority to require purchase of plant and property outside municipal boundaries it determines such acquisition is in the public interest.

45. At Pennichuck's urging, however, the Commission disregarded the "broad grant of authority" under the plain meaning of RSA 38:2 in favor "considering RSA 38:6 through the lens of strict construction".[66] In so doing, the Commission departed from express grant of authority established by the legislature and disregarded the New Hampshire Supreme Court's decision in the *Appeal of Ashland Electric*, 141 N.H. 336, 341 (1996) which clearly indicates that RSA 38 is to be construed according to "its plain and ordinary meaning," and that the Commission "must keep in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole, and not simply by examining isolated words and phrases found therein."

46. By strictly construing RSA 38:6, a procedural provision of the statute entitled *Notice to Utility*, as limiting the substantive grant of authority in RSA 38:2, entitled *Establishment, Acquisition and Expansion of Plants*, Pennichuck and the Commission made a "fortress out of the dictionary" and defeated the "purpose or object

[66] Order No. 24,425, Pages 10 & 12.

to accomplish" under RSA 38 of allowing the Commission to require that a municipality acquire such plant and property as necessary to protect the public interest.

47. Pennichuck's use of the dictionary has been well played. In effect, strictly construing a procedural notice requirement of RSA 38:6, it has created the very harm that the statute seeks to prevent. As noted in Order No. 24,425, the legislative history of RSA 38 indicates that:

> "a municipality may have to acquire some property outside of its boundaries. If there [are] some customers that would otherwise be stranded with a small distribution line that crosses a municipal boundary *the commission would have the power to order the utility that is selling its property or having its property acquired and also order the municipality to acquire that portion of a system that may be outside of their boundaries.*"[67]

48. Thus, Pennichuck has caused the Commission to impose a Mitigation Fund condition that will require Nashua to pay twice the value and revenues of the two utilities simply to maintain the status quo.[68] Pennichuck has essentially used this lens to prevent the very result that the plain meaning of RSA 38:2 & 11 are intended to prevent.

49. The evidence before the Commission supports acquisition of all three utilities by Nashua. The Commission found that "PWW, PAC and PEU are highly interdependent companies."[69] In fact, PEU and PAC are simply shells created for rate purposes: they have no employees, no equipment or inventory, all of which are provided by PWW *using property located in Nashua.* Likewise PEU and PAC are operated out of PWW's operations center in Nashua, using its communications and IT system, and its administration, accounting, billing and customer service. Their separation from PWW is

[67] Order No. 24,425, Page 14 (emphasis added).
[68] Exhibit 3016, Pages 2-3.
[69] Order No. 24,878, Page 95.

a financial and regulatory exercise,[70] but from an operational perspective, the sale and distribution of water by PEU and PAC is controlled from and originates in Nashua using equipment and other property owned by PWW.

ii. The Commission Erred By Requiring A Mitigation Fund Double The Combined Values And Revenues Of PAC And PEU.

50. The Commission's decision suggests that Nashua employed a "litigation strategy" to avoid addressing the mitigation of harm to PEU and PAC customers. This is simply untrue.[71] Pennichuck first submitted testimony of John Guastella describing the harm in Reply Testimony on May 22, 2006, relying on company specific data responses that had not previously been produced.[72] As a result, Nashua never had the opportunity to submit responsive testimony. Even Staff acknowledges it had an inadequate opportunity to complete discovery on the company's testimony.[73]

51. The Commission has chosen to protect PEU and PAC customers from the harm that Pennichuck created by requiring that Nashua establish a $40 million mitigation fund. The only evidence presented on the harm to PEU and PAC was based upon a continuation of the current corporate model. Such an approach, however, fails to consider several different opportunities to mitigate the harm by merging the operations into a larger utility.

52. For example, Donald Correll, former President of PWW and now the CEO of American Water, testified that his company would look at the purchase of PEU and PAC. Donald Ware, the current President of PWW said the sale of PEU and PAC to

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[70] See generally, Exhibit 1132.
[71] Order No. 24,878, Pages 94-95.
[72] *See e.g.*, Exhibit 3010, Page 10; Exhibit 3016, Page 2 (explaining his prior failure to calculate subsidies to PEU and PAC.)
[73] Transcript, September 26, 2007, Pages 129-130.

Nashua should be considered. For its part, Nashua urges the Commission to require that Nashua acquire all three regulated utilities, thereby eliminating the very harm that Pennichuck seeks to create in order to defeat the purposes of RSA 38. In any of these scenarios, PAC and PEU would continue to benefit from being part of a larger water system.

53. As Staff noted, Pennichuck's calculation of harm simply carried Pennichuck's existing overhead over to a much smaller utility without considering opportunities such as these to reduce or even completely eliminate any harm to customers of PEU and PAC.[74] There is every reason to believe that the harm to PEU and PAC has been overstated. The Commission should therefore reconsider its Order No. 24,425 and 24,878 and require that either Nashua acquire the assets of PEU and PAC to satisfy the public interest under RSA 38:11, or establish procedures whereby the mitigation fund may be reduced to a reasonable level in light of Pennichuck's ability to mitigate harm it created for its own customers.

C. THE COMMISSION ERRED IN DETERMINING THE REBUTTABLE PRESUMPTION APPLIES ONLY TO ASSETS LOCATED IN NASHUA

54. The Commission made a significant error by determining that the rebuttable presumption applies only to assets within a municipality's boundaries, which has no support under RSA 38. The error is harmless in this case because the Commission ultimately determined that it was in the public interest for Nashua to acquire all of the assets of Pennichuck Water Works. However, Nashua requests reconsideration of this determination in order to ask the New Hampshire Supreme Court to clarify the law in the event of an appeal by Pennichuck.

[74] *See, e.g.*, Transcript, September 26, 2007, Page 135.

55. The Commission stated that:

> [T]he rebuttable presumption of public interest applies only to utility property within Nashua's municipal boundaries. Since it is the confirming vote that generates the presumption, *it follows that the Legislature's intent* was to require us to accord a measure of deference to decisions arising out of the democratic process at the municipal level. Obviously, *it would run counter to that principle if the democratic process in one municipality could have a potentially dispositive effect on the municipalization of property in one or more other municipalities.*[75]

56. Nashua has already explained in detail its position that the rebuttable presumption applies to all of the assets of Pennichuck Water Works and incorporates by reference its October 6, 2005 *Objection to Pennichuck Water Works, Inc.'s Motion for Summary Judgment,*[76] and its December 15, 2006 *Memorandum in Support of Petition for Valuation Pursuant to RSA 38:9.*[77]

57. It is apparent that the Commission erred by second guessing what the legislature might have enacted rather than applying the plain meaning of the terms it actually chose to enact. RSA 38 is clear that a favorable vote by Nashua's citizens creates a rebuttable presumption that acquisition of all of the utility's assets is in the public interest. There is no language in RSA 38 that suggests that the rebuttable presumption applies is limited to the voting municipality.

58. The Commission's concern that the will of one community's voters should apply to another is precisely the type of political question that is best left to the legislature, not for this Commission to resolve by re-writing the provisions of RSA 38. In fact, the legislature has already addressed this very concern: RSA 38:14 allows each municipality to conduct its own vote, which is binding on Nashua. The Town of

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[75] Order No. 24,878, Page 25 (emphasis added).
[76] See, e.g., Pages 8-10.
[77] See, e.g., Pages 11-15.

Bedford, a supporter of Nashua's petition and a member of the regional water district, has taken this precise step.

59. The Commission's error is harmless in this case because it determined under RSA 38:9 that acquisition of all of Pennichuck Water Works by Nashua is required by the public interest. Nashua merely requests reconsideration in order to preserve this issue in the event of an appeal by Pennichuck concerning the standard to be applied in this proceeding.

II. REQUESTS FOR CLARIFICATION CONCERNING THE MITIGATION FUND REQUIREMENT

60. The Commission states that it has determined that "a mitigation fund of $40 million is reasonably calculated to insulate PEU and PAC customers from the effects of the taking" and that it "will address the specific method for implementing this result as a compliance matter in this proceeding after the City makes a ratifying vote and all rehearings and appeals are exhausted."[78]

61. However, the amount of the mitigation fund, $40,000,000 is substantial, and increases Nashua's cost to acquire Pennichuck Water Works by nearly 20%. According to Pennichuck's own experts, the amount of the fund is over twice the book value and revenues of utilities whose customers it is intended to benefit.[79] Nashua therefore requests the following clarifications so that its elected officials may evaluate its impact in their decision to ratify the Commission's decision pursuant to RSA 38:13.

[78] Order No. 24,878
[79] Transcript, September 18, 2007, Pages 151-152.

A. CLARIFICATION AS TO WHETHER NASHUA IS ENTITLED TO RECOVER THE MITIGATION FUND TO THE EXTENT THAT HARM TO PEU AND PAC CUSTOMERS IS ELIMINATED OR IS SHOWN TO BE LESS THAN ESTIMATED.

62. The Commission's Order No. 24,878 states that the mitigation fund to be established "should be payable for the benefit of PEU and PAC customers pursuant to our ongoing authority over these utilities".[80] The Commission further ordered that it "will address the specific method for implementing this result as a compliance matter in this proceeding after the City makes a ratifying vote and all rehearings and appeals are exhausted."[81]

63. However, the Commission did not specify what happens to the mitigation fund in the event that the harm to customers to be mitigated ceases or is greatly reduced, for example, in the event that those utilities were: (a) acquired by the City of Nashua; (b) acquired by the municipalities in which they are located, as has already been proposed in Pittsfield; (c) acquired by another investor-owned utility such as Aquarion (Macquarrie); or (d) were found to be over-stated.

64. As a result, it is unclear to Nashua whether when ratifying the Commission's decision pursuant to RSA 38:13, it should consider the mitigation fund requirement as: (1) an additional $40 million capital expenditure never to be returned to Nashua, even if the harm alleged ceases to exist; or (2) as an interim requirement that continues only so long as the Commission deems necessary.

65. This question is important because if the $40 million mitigation fund is intended to be permanent, regardless of whether it is necessary, the combined cost to Nashua approaches the price at which the revenue requirement for a municipally owned

[80] Order No. 24,878, Page 63.
[81] Order No. 24,878, Page 96.

water utility would be approach those of a for-profit, investor-owned utility. Thus, a permanent mitigation fund would reduce the financial benefits of Nashua's ownership.

66. The question is also important for the purposes of financing the acquisition. Nashua understands that under the provisions of the Internal Revenue Code, to the extent that Nashua retains any interest in the fund, including, any right to repayment of amounts in the fund, the bonds required to establish the fund will be taxable. However, without clarification, Order No. 24,878 leaves open a worst case scenario in which Nashua uses taxable bonds to establish the mitigation fund, only to discover at a later date that it is not entitled to receive the proceeds.

67. Nashua urges the Commission to clarify that Nashua will be in fact entitled to return of the mitigation fund upon a final determination by the Commission that it is no longer required. To do otherwise could: (1) substantially erode the financial benefits of municipal ownership; (2) act as a barrier to removal of inefficiencies that the fund is intended to mitigate by removing incentives for Pennichuck Corporation to sell to either the City of Nashua or a larger investor-owned utility in the region such as Aquarion or others or to reduce operating or other costs.

B. CLARIFICATION CONCERNING THE DATE WHEN THE MITIGATION FUND IS TO BE ESTABLISHED.

68. Order No. 24,878 is unclear whether the mitigation fund is to be established upon ratification under RSA 38:13 and RSA 33-B or at the time that the mechanics of the mitigation fund are determined by the Commission. Under the latter approach, for example, Nashua might consider treating the mitigation fund as an operating expense rather than as an initial capital expenditure, if it lowered cost to

customers. Nashua therefore requests that the Commission clarify its intent concerning the timing of the mitigation fund requirement.

C. CLARIFICATION CONCERNING WHETHER THE MITIGATION FUND IS TO BE TREATED AS A CONDITION OF THE PUBLIC INTEREST OR AS SEVERANCE

69. Order No. 24,878 states that the mitigation fund "should be payable for the benefit of PEU and PAC customers pursuant to our ongoing authority over these utilities"[82] as a condition imposed under RSA 38:11. However, the Commission also states that whether the mitigation fund "is more properly characterized as severance or a condition required as a matter of the public interest pursuant to RSA 38:11, the net effect is essentially the same."[83]

70. There is one key distinction, however, insofar as an award of severance damages is payable to the condemnee. Nashua requests that the Commission clarify that the mitigation fund is not to be treated as severance damages payable to any of the Pennichuck entities.

Respectfully submitted,

CITY OF NASHUA
By Its Attorneys
UPTON & HATFIELD, LLP

Date: August 25, 2008

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[82] Order No. 24,878, Page 63.
[83] Order No. 24,878, Page 95.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent this day by e-mail and first class mail to all persons on the Commission's official service list in this proceeding.

Date: August 25, 2008

Justin C. Richardson, Esq.

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

City of Nashua: Taking of Pennichuck Water Works, Inc.

Docket No. DW 04-48

PENNICHUCK'S OBJECTION TO NASHUA'S MOTION FOR REHEARING AND CLARIFICATION REGARDING ORDER NO. 24,878

Pennichuck Water Works, Inc. ("PWW"), Pennichuck Corporation, Pennichuck East Utility, Inc. ("PEU"), Pennichuck Water Service Corporation ("PWSC") and Pittsfield Aqueduct Company, Inc. ("PAC") (collectively, "Pennichuck") object to the late-filed Motion for Rehearing and Clarification filed by the City of Nashua ("Nashua") with respect to the Commission's Order No. 24,878 (the "Taking Order"). The Commission has already considered and rejected the issues that Nashua raises, and Nashua has presented no good reason that the Commission should now alter its prior determination on those matters. Pennichuck addresses the lateness of Nashua's Motion in a separate Motion to Strike. By way of further explanation for this Objection, Pennichuck states as follows:

A. IN VALUING PWW'S ASSETS, THE COMMISSION PROPERLY CONSIDERED THE COST OF CAPITAL AND CASH FLOWS FOR NOT-FOR-PROFIT PURCHASERS OF PWW ASSETS

The Commission properly considered the operating cost and cost of capital advantages enjoyed by not-for-profit entities, including municipalities, in its calculation of the income approach component in valuing PWW's assets. (Taking Order, pp. 89-91). That cost of capital percentage is also used in calculating economic obsolescence in determining the value of PWW's assets under the asset approach. (Taking Order, p. 88).

The Commission had no choice but to consider not-for-profit buyers in determining cost of capital for the asset and income approach, and cash flows for the income approach, since the supreme court has determined that it would be error not to do so. *Southern N.H. Water Co. v. Hudson*, 139 N.H. 139, 142 (1994). Despite the clear direction of *Southern N.H. Water*, Nashua took the incredible position that the Commission should limit itself only to considering the cost of capital and cash flows of for-profit entities. In fact, with no authority, Mr. Walker's and Mr. Sansoucy's income approach assumed that the hypothetical purchaser would simply inherit PWW's same income, expenses and cost of capital. (Ex.1007A, pp. 62-64).[1]

Nashua apparently has learned well from Mr. Sansoucy, and has reversed itself with respect to the propriety of considering not-for-profit buyers in the calculation of PWW's asset value. Nashua will now settle for half a loaf--latching on to Commissioner Below's dissent, with its 50-50 weighting of for-profit and not-for-profit buyers. (Taking Order Dissent, pp. 103-110). The problem with Nashua's fawning praise of the dissent's analysis, and with the dissent itself, is its obsession with the likelihood of specific purchase deals, instead of the simple requirement that certain types of deals are hypothetically possible. See, Taking Order, p. 91, n. 14. Contrary to Nashua's argument, the Commission's job is not to confine itself to the one municipal purchaser – Nashua – that is attempting to take PWW assets by eminent domain, but rather to consider all potential purchasers that could buy the assets if offered for sale on a consensual basis. That is precisely what the majority did.

The Commission found Pennichuck's valuation expert, Mr. Reilly, to present a "persuasive" analysis using a *hypothetical* buyer's cost of capital and cash flows, not that of a particular *likely* buyer. (Taking Order, pp. 89-90). And not all of those buyers need be not-for-

[1] Not surprisingly, Mr. Sansoucy took the opposite approach in prior valuations of PWW ("the income analysis presented from the view of the hypothetical municipal utility presents a sound indicator of value", Ex. 3212, p. 9)(see also, Ex. 3200, pp. 4-7).

profit buyers, with their attendant synergies. As Mr. Reilly stated in his report, a single not-for-profit potential buyer among for-profit buyers "impacts the fair market value of the system". (Ex. 3007, pp. 14-19). See, Tr. Day 8, pp. 75-76, 186. As Mr. Reilly said: "we don't need a hundred municipal buyers, we don't even need ten, but we need *one* or two" to have it influence the hypothetical bidding. Tr. Day 8, pp. 186. The mechanics of this hypothetical mixed not-for-profit and for-profit bidding environment are simple:

> each buyer looks around and says if I want to win, I've got to outbid everyone at this table. And if one or two or three people at the table are municipal buyers, then I've got to bid at least what they're going to bid. Now the ultimate winner may well be an investor owned utility. All I'm saying is that investor owned utility is going to have to pay what he thinks the municipal buyer is going to pay, otherwise he'll never be the winner in the bidding process.

Tr. Day 8, pp. 188-89.

The problem with Nashua's motion, and with the dissent, is its transformation of the appraisal concept of *typical* buyers into a subjective review of the motivation of specific not-for-profit entities. For Nashua to identify and then psychoanalyze a subset of specific potential buyers within the pool of typical buyers inserts a level of detail and subjective analysis simply not relevant to an appraiser's determination of typical hypothetical buyers. This added subjectivity is improper because it is impossible to know who *actually* would participate in a consensual bidding process for the assets if they were actually offered up for sale. All that can be known is who *may* participate. As the Commission quoted from Mr. Reilly's testimony:

> What any particular public entity has or has not indicated about its interest in the PWW system is not relevant to a fair market valuation... Appraisal literature and appraisal courses never insert the subjectivity of asking what any particular person's interest is in property subject to a fair market valuation.

Taking Order, p. 90, quoting Ex. 3007, p. 22 [sic, should be 14].

Mr. Reilly's full testimony on this point is as follows:

> What any particular public entity has or has not indicated about its interest in the PWW System is not relevant to a fair market valuation. If I inserted what a particular town was saying about its current interest in the PWW System, it would be the same as inserting what my brother-in-law's motivations and thoughts were about the woodsy cottage in my example above—it has no place in the analysis. Appraisal literature and appraisal courses never insert the subjectivity of asking what any particular person's interest is in property subject to a fair market valuation. If an appraiser had to identify every specific purchaser of a particular piece of property before concluding a fair market valuation, he would never finish his assignment. Moreover, as to the current population of not-for profit public entities, things change and what a particular municipal buyer may or may not do is driven by the current political environment. That environment could change tomorrow. Finally, an appraiser must include in the population of hypothetical buyers entities that may be formed in the future (yet-to-be-formed public entities) that would have the authority to acquire the PWW System. It would not be feasible to ask these yet to-be-formed entities what their subjective current interest is in the PWW System—because they do not exist. In short, the subjective interest of any particular buyer is never a question in a fair market evaluation.

Ex. 3007, pp. 14-15.

The appraisal literature that Mr. Reilly referred to includes, of course, The Appraisal Institute, *The Appraisal of Real Estate*, (12th ed. 2001), which the Commission cited extensively. The Commission rightly found PWW's assets to be special purpose property (Taking Order, p. 84), limiting the market of buyers and requiring an appraiser to use considerable "personal judgment". *The Appraisal of Real Estate*, pp. 25-26. Still, an appraiser must consider whatever market exists, and must be "objective, impersonal and detached" from any one buyer. Id., p. 476. Considering the needs of a "particular investor" means the appraisal is no longer of "market value" but instead of "investment value", using "subjective, personal parameters". Id[2]. Mr. Reilly thus was careful to identify the (albeit small) class of not-for-profits as typical buyers, without getting sucked into a subjective analysis of the specific situation of Nashua or another specific municipality.

[2] The dissent (Taking Order, p. 105) misapplies the concept of investment value, assuming that the class of not-for-profit buyers that Mr. Reilly identified in his determination of market value is the same as a "particular investor" for whom an appraiser would determine investment value.

The Commission is right to find Mr. Reilly's report and testimony, backed up by appraisal literature, to be persuasive. He is a pre-eminent valuation scholar, with six professional designations and certifications, and authorship of six authoritative books in the field. (Ex. 3007, pp. 2-5; Ex 3007A, pp. 96-98). Nashua's only "experts" lacked any meaningful credentials and totally ignored municipal buyers. Ex. 1007, pp. 62-64.

Nashua in its motion points to scattered evidence for the obvious proposition that there is not a large market for water companies the size of PWW. Motion, ¶ ¶ 4-7. That is inconsistent with Nashua's earlier valuation claim, which relied heavily upon the presence of 28 alleged comparable sales, and argued for a fifty percent weighting for that approach. (Taking Order, p. 66). Of course the Commission did not give any weight to the sales approach, finding a "paucity of comparable sales" (Taking Order, p. 84). But the lack of sales that are *comparable* is not indicative of the size of the market and, more important, simply is irrelevant to the income approach and its reliance upon *hypothetical* buyers.

Nashua also misunderstands Mr. Reilly's testimony. There need not be two specific municipal buyers hypothetically competing to acquire PWW assets. See, Motion, ¶ ¶ 13, 22-32. There could be one municipal buyer and one for-profit buyer, and the for-profit buyer may well offer as much as the capitalized cash flow of the municipal buyer.[3] (Tr. Day 8, pp. 188-89). Thus Nashua's discussion as to what two or three not-for-profit buyers would or would not do is subjective and hence irrelevant to an appraiser's work.

[3] Not-for-profit buyers and for-profit buyers may analyze matters differently, but the for-profit buyer must address the synergies that not-for-profits enjoy in cost of capital and expenses, which carries over into the 2% inflation factor that Mr. Reilly applied and which is, in part, the subject of Pennichuck's Motion for Rehearing, sec. P. If the successful buyer is a not-for-profit, its ratemaking need not be based upon rate base, and its revenue would likely rise by no less than inflation over time. If the successful buyer is a regulated for-profit utility, long term income still will go up at least 2% annually, assuming typical rises in recoverable expenses, and ongoing capital expenditures somewhat exceeding depreciation.

While more than one hypothetical not-for-profit buyer is not required, Nashua's motion by itself admits that other hypothetical not-for-profit buyers exist. Nashua admits that Amherst, Merrimack, Bedford, Milford and other communities could acquire PWW assets pursuant to RSA 38. Motion, ¶ 26. The choices those towns made in the current case — such as the choices of Merrimack and Milford not to pursue an acquisition -- are plainly irrelevant to an analysis of fair market value. Of course, Nashua conveniently ignored the evidence that one town, Bedford, actually voted to condemn PWW assets, and would be interested in a consensual purchase as well, either through the Regional Water District or directly. Scanlon Test., Tr. Day 10, pp. 142-150.

Nashua's motion seems to admit, as it must, that the Merrimack Valley Regional Water District, or some other water district, could acquire PWW assets pursuant to RSA 38:2-a. Motion, ¶ ¶ 21,31. The State of New Hampshire and Manchester Water Works, with a franchise in Bedford, could do so as well. See, Tr. Day 10, pp. 145-47. Nashua's own motion (¶ ¶ 43-49), includes mention of Nashua's desire to acquire PEU and PAC assets. Pittsfield has also expressed an interest in buying PAC assets.

As Mr. Reilly testified and the Commission found, there is more than one legally permissible potential not-for-profit buyer for PWW assets. (Taking Order, p. 90). It does not matter that some of the potential municipal buyers identified might face practical or political challenges in pursuing an authorized purchase (just as Nashua has encountered in its efforts to purchase PWW), because that would introduce a level of subjectivity into the appraiser's work. Ex. 3007, p. 14. Whether designing a proposal that is determined to meet the public interest or public use requirements of RSA 38 and 31:3 (Motion, ¶ 18) or the need to form a water district under RSA 52-A and 38:2-a (Motion, ¶ 20), such logistical considerations are irrelevant, if they

exist at all. Nashua claims that its size gives it veto power over any other entity wishing to acquire PWW assets (Motion, ¶ 29, 30). While such threatening statements confirm the fears of surrounding towns about Nashua's intentions, the City's characterization of how negotiations take place in the real world are not true, in addition to being impermissibly subjective. Nashua assumes that a hypothetical negotiation occurs only after non-profit buyers have taken the formal votes needed to close on a consensual transaction with Pennichuck. The more likely scenario is an informal negotiation, including for-profit buyers, at which an agreed upon price is arrived at well before the negotiated price is presented for formal votes.

Nashua then makes the argument that there is no market for municipal buyers of privately owned water companies in New Hampshire because municipalities and other not-for-profits allegedly can only conduct asset purchase transactions, which water companies avoid for tax reasons. Motion, ¶ ¶ 33-37. That is not true: municipalities and other not-for-profits can purchase stock.[4] In fact, the Commission approved a private water company stock sale in *Tilton Northfield Aqueduct Company*, 90 NHPUC 599 (2005). And Nashua itself obtained clarifying legislation to confirm that it can both buy *and hold* Pennichuck shares. Laws 2007, Ch. 347:5.

Contrary to Nashua's specific statements (Motion ¶ 4-7) about the lack of a municipal buyers ' market, Pennichuck offered additional evidence involving competing not-for-profit buyers. The Commission at the hearing specifically requested Pennichuck to locate other completed transactions in which more than one potential municipal buyer expressed interest.

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[4] A recent consensual Connecticut water district purchase of the stock of a water company illustrates this fact and further supports the valuation found in this case. If the Commission were to order a rehearing, Pennichuck would introduce evidence showing that South Central Connecticut Regional Water Authority, even though it was the only bidder for the entire business enterprise of BIW Limited, purchased all of the shares of BIW for $23.75 per share, or 3.55 times book value. See, SEC 8-K filing dated January 14, 2008, found at http://www.sec.gov/Archives/edgar/data/1169237/000107261308000101/0001072613-08-000101-index.htm. If this same multiple were applied to Pennichuck's stock, it would value Pennichuck at approximately $40 per share as of June 30, 2008.

Pennichuck complied, and supplied a list of four such transactions, Ex. 3258. After a post-hearing conference with the Commission chairman, at which Nashua objected to the admission of that exhibit, the Commission by letter order dated October 17, 2007, refused to admit it. A copy of Ex. 3258 is attached to this objection, and the discussion on the record at that hearing provides additional facts about those four transactions (Tr. 10/12/07, pp. 22-28). In light of Nashua's false characterization of Mr. Reilly's testimony on this issue, if the Commission were to grant a rehearing, Pennichuck would again seek admission of Ex. 3258 into evidence, including any necessary supporting material to demonstrate that these transactions respond directly to the questions asked by Commissioner Below during the hearing on the merits.

Nashua also claims that the 39% federal income tax consequence from an asset transaction means that Pennichuck would never agree to an asset sale. Motion, ¶ 34. First of all, whether a purely voluntary transaction takes the form of a stock or asset sale does not define or limit that hypothetical market. Beyond that, of course Pennichuck has steadfastly objected to a forced taking of its assets because, among other things, of the substantial corporate level tax burden it would place on its shareholders. The Commission should have considered this and other shareholder interests in its public interest analysis. See, Pennichuck's Motion for Rehearing, section F. In its motion (¶ 34), Nashua finally seems to concede this harm to Pennichuck's shareholders. If anything, a for-profit company's resistance to sell because of income tax consequences would drive the necessary purchase price *higher* in a true consensual transaction. Yet Nashua just as quickly forgets that Pennichuck shareholders exist, complaining that the Taking Order "would force the citizens of Nashua... to bear ... $50 million in additional debt... that has made 'the only real winners in this game ... the lawyers and expert witnesses...' (citation omitted)." Motion, ¶ 14. Nashua is not being forced to do anything. Instead, it seeks to

use raw governmental power to force Pennichuck and its shareholders to hand over private property. This is the nub of Pennichuck's public interest case.

Finally, like the dissent, Nashua incorrectly seizes upon the 2002 work of SG Barr Devlin for Pennichuck. But since SG Barr Devlin's assignment was the sale of the entirety of the publicly traded holding company, not just the regulated utility assets, it is not surprising that municipalities were not considered among the likely purchasers. Mr. Reilly distinguished SG Barr Devlin's work, and the Commission rightly was not concerned with it in its Taking Order. (Ex. 3017A, pp. 17-18)(Tr. Day 8, pp. 227-232).

B. THE COMMISSION CANNOT NOW REVISIT ITS 2005 REMOVAL OF PAC AND PEU ASSETS FROM THIS CASE

Nashua asks the Commission to revisit its Order No. 24,425, dated January 21, 2005, which, among other matters, ruled that Nashua's petition could not include PEU or PAC assets. PWW timely sought rehearing from another portion of that order, dealing with the municipal vote and PWW satellite system assets. Nashua objected to PWW's motion, but never moved for rehearing on the ruling removing PEU and PAC assets from the case. That is, until now.

Nashua's attempt to seek a rehearing on Order No. 24,425 fails because it was not filed within thirty days of the order, as required by RSA 541:3. That requirement is particularly applicable in this case, since the case has proceeded over the past three and one half years, through extensive discovery, valuation testimony and a merits hearing, without the inclusion of the PEU and PAC assets. Mr. Reilly did not value those assets. The Taking Order did not make any public interest analysis or valuation with respect to those assets. In fact, the parties presented no evidence whatsoever regarding the taking of those assets, other than the harm to the customers of PEU and PAC if the assets of PWW are taken. For the Commission to grant a rehearing on this point would lead to revisiting public interest and valuation issues for all of the

Pennichuck entities, requiring additional discovery, expert testimony and a new merits hearing. It is simply too late.

Moreover, the Commission properly stated the law in Order No. 24,425 that eminent domain statutes must be read strictly, that RSA 38 does not afford an interpretation to permit Nashua to take assets of entities with no connection to the City. Order No. 24,425, pp. 9-16. See, *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 181 (1940); RSA 38:6 ("utility [must be] engaged...in...distributing...water for sale in the municipality").

Nashua' s new-found problem with Order No. 24,425 is the fact that the Taking Order requires Nashua, as a condition of taking PWW assets, to establish a $40 million mitigation fund to offset rate increases that PEU and PAC customers will suffer as a result of the taking of PWW assets. Taking Order, pp. 94-96. That requirement reflects the harm to the interests of those customers, as documented by Mr. Guastella's testimony. Nashua now complains that it did not have the chance to counter that evidence, first quantified in Mr. Guastella's May 22, 2006 testimony. Motion, ¶ 50. Yet, in addition to cross-examination of Mr. Guastella at a deposition and at trial, Nashua had more than enough opportunity to conduct discovery on and address this argument. It chose not to. Nashua even agreed to forego a round of capstone testimony as late as September, 2006. Commission Letter Order, September 14, 2006. Nashua has not articulated a reason for a new hearing on the harm suffered by PEU and PAC, other than an attempt to retry the issue.

C. NASHUA WAIVED ANY CLAIM THAT THE REBUTTABLE PRESUMPTION DOES NOT APPLY TO ASSETS OUTSIDE OF NASHUA

The Commission ruled in Order No. 24,567 (December 22, 2005) that the rebuttable presumption contained in RSA 38:2 only applies to PWW assets located within Nashua. It reaffirmed that ruling in the Taking Order, p. 25. Nashua never filed a timely motion for

rehearing of Order No. 24,567, as required by RSA 541:3, and so has waived raising this issue at this point.

The Commission properly interpreted the rebuttable presumption provision of RSA 38:2 not to apply to assets of PWW located in communities outside of Nashua, many of which opposed the taking. To do otherwise would extend beyond the town line the effect of Nashua's already deficient municipal vote. See, Pennichuck Motion for Rehearing, sec. D. Nashua voters cannot presume to speak for Merrimack residents, and vice versa. The Commission made the only logical interpretation possible of the statute.

D. MITIGATION FUND CLARIFICATION

In seeking clarification of the Commission's order, Nashua seeks to gut the $40 million mitigation fund that is required to be established as a condition of Nashua's approval in order to offset the harm to customers of PEU and PAC. Nashua's attempt to eviscerate the mitigation fund before it is even established proves Pennichuck's concern that, after PWW's assets are taken, Nashua will invoke every avenue to reduce or remove the many conditions that underpin the Commission's finding of public interest for this taking. See, Pennichuck Motion for Rehearing, sec. J.

For instance, Nashua seems to hope that it can get a refund of the fund, or that it need continue only so long as the Commission will order it. (Motion, ¶ 64). Nashua seems to hope that it can avoid actually fronting any money for the fund (Motion, ¶ 68), making it an annual operating expense, and thereby placing PEU and PAC at the mercy of Nashua for payment each and every year. Nashua also wants to retain financial control over the fund (Motion ¶ 66), which would harm the customers of PEU and PAC and would defeat the purpose of its establishment in the first place.

The real reason for Nashua's request for clarification concerning the mitigation fund is its desire not to have to pay for it. It admits that: "the combined cost to Nashua approaches the price at which the revenue requirement for a municipally owned water utility would be approach [sic] those of a for-profit, investor owned utility. Thus, a permanent mitigation fund would reduce the financial benefits of Nashua's ownership." Motion, ¶ 65. That proves the point of Pennichuck's Motion for Rehearing, sec. L, that there is no public interest benefit coming from Nashua's ownership of PWW assets, because, among other things, there are no savings to PWW customers under municipal ownership.

E. CONCLUSION

For the reasons set forth herein, Pennichuck requests that the Commission deny Nashua's Motion for Rehearing and Clarification.

Respectfully submitted,

Pennichuck Water Works, Inc.
Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Service Corporation
Pennichuck Corporation

By Their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: August 29, 2008

By: _____

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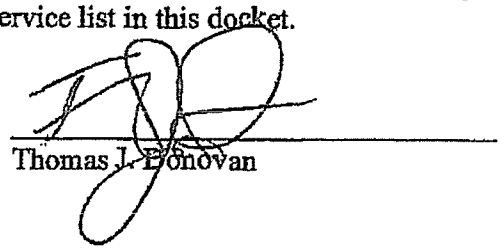
CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2008, a copy of the foregoing Objection to Motion for Rehearing and Clarification has been forwarded by electronic mail to the parties listed on the Commission's service list in this docket.



Thomas J. Donovan

LAWS

of the

STATE OF NEW HAMPSHIRE

2007 REGULAR SESSION

CONCORD, N.H.

(b) A percentage of each amount collected under this section shall be retained in the debt recovery fund for the purpose of funding the costs of all debt collection. The percentage shall be set annually by the attorney general in consultation with the commissioner of the department of administrative services at 150 percent of the total costs and expenses of the debt collection during the prior fiscal year divided by the total debt collected. Any amount remaining in the fund at the end of a fiscal year in excess of 200 percent of the costs and expenses of debt collection during the fiscal year shall be paid in a proportional amount to the accounts for which they were collected.

(c) The treasurer shall deposit in the debt recovery fund all amounts collected by the department of justice under this section. The attorney general is authorized to accept, budget, and expend moneys in the debt recovery fund received from any party without the approval of the governor and council for the purposes of:

(1) After deducting the amounts authorized in subparagraph IV(b), transferring on a quarterly basis a proportional amount recovered to the accounts for which they were collected; and

(2) Recruitment, training, administration, overhead, and supervision of such assistant attorneys general and support staff as necessary for the purposes of this section.

(d) All moneys in the debt recovery fund shall be continually appropriated to the department of justice and shall not lapse.

(e) The state treasurer, upon approval of the attorney general, shall pay the expenses of recruitment, training, administration, and supervision of assistant attorneys general and support staff as necessary for the purposes of this section, and transfer a proportional amount of unretained funds recovered to the accounts for which they were collected.

V. For purposes of this section, the term "debt" shall include fines and other debts or amounts owed to the state.

VI. Notwithstanding any other provision of this section, and subject to the supervision of the attorney general as to matters of law, state agencies and departments may seek collection of debts in small claims court without referring the debt to the attorney general. The authorization granted to seek collection of debts in small claims court under this paragraph shall not be construed to constitute a waiver of the sovereign immunity of the state, or any other defense, right, immunity, or other protection under law, including any statutory provision.

346:2 Attorney General; Duties. Amend RSA 7:6 to read as follows:

7:6 Powers and Duties as State's Attorney. The attorney general shall act as attorney for the state in all criminal and civil cases in the supreme court in which the state is interested, and in the prosecution of persons accused of crimes punishable with death or imprisonment for life. The attorney general shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state, and with the aid of the county attorneys, the attorney general shall enforce the criminal laws of the state. The attorney general shall have the power to collect uncollected debts owed to the state as set forth in RSA 7:15-a.

346:3 New Subparagraph; Debt Recovery Fund. Amend RSA 6:12, I(b) by inserting after subparagraph (252) the following new subparagraph:

(253) Moneys deposited in the debt recovery fund by the treasurer under RSA 7:15-a, IV.

346:4 New Section; Position Established. Amend RSA 7 by inserting after section 15-a the following new section:

7:15-b Debt Collection Attorney. The department of justice shall have the authority to hire a full-time support attorney and such staff as may be necessary, who shall be responsible solely for all duties associated with the collection of debt owed to the state. The position shall be funded through the debt recovery fund established in RSA 7:15-a, IV.

346:5 Appropriation. The amount of $100,000 for the fiscal year ending June 30, 2008 is hereby appropriated to the debt recovery fund established by RSA 7:15-a, IV for the purpose of start-up costs, provided that 25 percent of the recoveries collected each quarter shall be paid into the general fund until $100,000 has been paid into the fund. The appropriation in this section shall be in addition to any other sums appropriated to the department for such purpose. The governor is authorized to draw a warrant for said sum out of any money in the treasury not otherwise appropriated.

346:6 Effective Date. This act shall take effect July 1, 2007.

(Approved: July 16, 2007)
(Effective Date: July 1, 2007)

CHAPTER 347 (SB 206)

AN ACT RELATIVE TO THE INVESTMENT AUTHORITY OF LOCAL GOVERNMENT ENTITIES AND AUTHORIZING THE CITY OF NASHUA TO PURCHASE PENNICHUCK CORPORATION STOCK.

Be it Enacted by the Senate and House of Representatives in General Court convened:

347:1 County Treasurers. Amend RSA 29:3 to read as follows:

29:3 Excess Funds. Whenever the county treasurer has in custody an excess of funds which are not immediately needed for the purpose of expenditure the county treasurer may, with the approval of the county commissioners and county executive committee and upon such terms as shall be approved by the county commissioners, invest the same in participation units in the public deposit investment pool established pursuant to RSA 383:22 or in obligations fully guaranteed as to principal and interest by the United States government. The obligations may be held directly or in the form of securities of or other interests in any open-end or closed-end management-type investment company or investment trust registered under 15 U.S.C. section 80a-1 et seq., if the portfolio of the investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations. Any person who directly or indirectly receives any such funds or moneys for deposit or for investment in securities of any kind shall, prior to acceptance of such funds, make available at the time of such deposit or investment,

an option to have such funds secured by collateral having a value at least equal to the amount of such funds. Such collateral shall be segregated for the exclusive benefit of the county. Only securities defined by the bank commissioner in rules adopted pursuant to RSA 386:57 shall be eligible to be pledged as collateral. At least yearly, the county treasurer, with the approval of the county commissioners, shall review and adopt an investment policy for the investment of public funds in conformance with the provisions of applicable statutes.

347:2 **Investment by Single Trustee.** Amend RSA 31:26 to read as follows:

31:26 **Investments by Single Trustee.** In towns which have chosen a single trustee of trust funds such funds shall be invested only by deposit in any federally or state-chartered bank or association authorized to engage in a banking business in this state, or in state, county, town, city, school district, water and sewer district bonds and the notes of towns or cities in this state and when so invested the trustee shall not be liable for the loss thereof; and in any common trust fund established by the New Hampshire Charitable Foundation in accordance with RSA 292:23; or in obligations fully guaranteed as to principal and interest by the United States government. The obligations may be held directly or in the form of securities of or other interests in any open-end or closed-end management-type investment company or investment trust registered under 15 U.S.C. section 80a–1 et seq., if the portfolio of the investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations. Deposits in a federally or state-chartered bank or association shall be made in the name of the town which holds the same as a trust, and it shall appear upon the books thereof as a trust fund. Any person who directly or indirectly receives any such trust funds for deposit or for investment in securities of any kind shall, prior to acceptance of such funds, make available at the time of such deposit or investment an option to have such funds secured by collateral having value at least equal to the amount of such funds. Such collateral shall be segregated for the exclusive benefit of the town depositing or investing such funds. Only securities defined by the bank commissioner as provided by rules adopted pursuant to RSA 386:57 shall be eligible to be pledged as collateral. The trustee may retain investments as received from donors until the maturity thereof.

347:3 **Refunding Bonds.** Amend RSA 33:3–d, II to read as follows:

II. Refunding bonds shall be payable in installments, the first of which shall be not later than the earliest stated principal maturity date of the bonds being refunded and the last of which shall be not later than the last date on which the bonds being refunded could have been made payable under that law applicable to the bonds being refunded. The installment payments of refunding bonds shall be arranged in accordance with RSA 33:2 except that any installment that is payable earlier than the date on which the first installment is required to be made payable may be in any amount. The proceeds of refunding bonds, exclusive of any premium and accrued interest and any proceeds used to pay issuing or marketing costs, shall, upon their receipt, be paid immediately to the paying agent for the bonds which are to be called and prepaid; and such paying agent shall hold such proceeds in trust until the bonds are redeemed. While such proceeds are held in trust, they may be invested for the benefit of the municipality or county as may be provided in any

other applicable law of the state of New Hampshire relating to the investment or deposit of municipal or county funds; and the income derived from investment may be expended to pay the principal of and redemption premium, if any, on the refunded bonds and interest thereon until they are redeemed. Refunding bonds issued in accordance with this section shall be subject to the same statutory limit of indebtedness, if any, as the bonds refunded; provided, however, that upon the issuance of the refunding bonds, the bonds refunded shall no longer be counted in determining any limit of indebtedness of the municipality or county.

347:4 **Treasurer's Duties.** Amend RSA 197:23–a to read as follows:

197:23–a **Treasurer's Duties.** The treasurer shall have custody of all moneys belonging to the district and shall pay out the same only upon orders of the school board or upon orders of the 2 or more members of the school board empowered by the school board as a whole to authorize payments. The treasurer shall deposit the moneys in participation units in the public deposit investment pool established pursuant to RSA 383:22, or in solvent banks in the state, except that funds may be deposited in banks outside the state if such banks pledge and deliver to a third party custodial bank or the regional federal reserve bank collateral security for such deposits United States government obligations, United States government agency obligations, or obligations of the state of New Hampshire in value at least equal to the amount of the deposit in each case. The amount of collected funds on deposit in any one bank shall not at any time exceed the sum of its paid-up capital and surplus. The treasurer shall keep in suitable books provided for the purpose a fair and correct account of all sums received into and paid from the district treasury, and of all notes given by the district, with the particulars thereof. At the close of each fiscal year, the treasurer shall make a report to the district, giving a particular account of all of the treasurer's financial transactions during the year. The treasurer shall furnish to the school board statements from the books, and submit the books and vouchers to them and to the auditors for examination, whenever so requested. Whenever the treasurer has in custody an excess of funds which are not immediately needed for the purpose of expenditure, the treasurer shall, with the approval of the school board, invest the same in participation units in the public deposit investment pool established pursuant to RSA 383:22, in savings bank deposits of banks incorporated under the laws of the state of New Hampshire, or in certificates of deposits and repurchase agreements of banks incorporated under the laws of the state of New Hampshire or in banks recognized by the state treasurer, and obligations fully guaranteed as to principal and interest by the United States government. The obligations may be held directly or in the form of securities of or other interests in any open-end or closed-end management-type investment company or investment trust registered under 15 U.S.C. section 80a–1 et seq., if the portfolio of the investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations. Any person who directly or indirectly receives any such funds for deposit or for investment in securities of any kind shall, prior to acceptance of such funds, make available at the time of such deposit or investment an option to have such funds secured by collateral having a value at least equal to the amount of such funds. Such collateral shall be segregated for the exclusive benefit of the district. Only securities defined by the bank commissioner as provided by rules adopted pursuant to RSA

386:57 shall be eligible to be pledged as collateral. At least yearly, the school board shall review and adopt an investment policy for the investment of public funds in conformance with the provisions of applicable statutes.

347:5 Purchase of Pennichuck Corporation Stock by the City of Nashua.

I. Notwithstanding the provisions of any law to the contrary, the city of Nashua is authorized to purchase the stock of Pennichuck Corporation or one or more of its subsidiaries upon agreement with such corporation. The public utilities commission shall make a public interest determination prior to any such purchase. For the purpose of obtaining control of the plant and property of Pennichuck Corporation or its subsidiaries, the city may acquire and hold such stock, or establish one or more business corporations under RSA 293–A. Except as otherwise provided in this section, the provisions of RSA 38 shall apply to the acquisition of stock by the city.

II. The acquisition of such stock shall be deemed to be within the policy and purposes of RSA 38 if, prior to the acquisition of stock as provided in this section, the board of aldermen of the city find that:

(a) The acquisition of stock, rather than the direct acquisition of plant and property, will provide a more orderly method for the city to establish, own, and operate a municipal water utility consistent with the purposes of RSA 38.

(b) The acquisition of stock, rather than the direct acquisition of plant and property, will be financially beneficial to the city and its customers and will, therefore, be in the best interests of the city and provide a public benefit.

III. The acquisition by the city of the stock of Pennichuck Corporation or its subsidiaries as provided by this act is a purpose for which the city may issue bonds and notes pursuant to RSA 33–B.

347:6 Effective Date.

I. Sections 1–4 of this act shall take effect 60 days after its passage.

II. The remainder of this act shall take effect upon its passage.

(Approved: July 16, 2007)

(Effective Date: I. Sections 1–4 of this act shall take effect September 14, 2007.
II. The remainder of this act shall take effect July 16, 2007.)

CHAPTER 348 (SB 217)

AN ACT ESTABLISHING THE NEW HAMPSHIRE HOUSING AND CONSERVATION PLANNING PROGRAM.

Be it Enacted by the Senate and House of Representatives in General Court convened:

348:1 New Subdivision; Office of Energy and Planning; Housing and Conservation Planning Program. Amend RSA 4–C by inserting after section 23 the following new subdivision:

Housing and Conservation Planning Program

4–C:24 Definitions. In this subdivision:

I. "Eligible applicant" means a single municipality or 2 or more municipalities applying together.

II. "Growth and development strategy" means a plan by a single municipality or 2 or more municipalities to guide community growth in a way that creates a balanced housing supply, including higher density and workforce housing opportunities, while preserving valuable natural resources and the community's quality of life through efficient and compact development.

III. "Program" means the housing and conservation planning program.

IV. "Stage" means one of the 4 specific stages of developing and implementing a growth and development strategy to be funded through the housing and conservation planning program.

4–C:25 Housing and Conservation Planning Program Established. There is hereby established the housing and conservation planning program, which shall be administered by the office of energy and planning. The program shall provide technical assistance matching grants to municipalities to plan for growth and development in a manner that permits a balanced housing stock, including higher density and workforce housing opportunities, and promotes, whenever possible the reuse of existing buildings, including historic properties, while protecting communities' natural resources through more efficient and compact development. Participation in the program is voluntary.

4–C:26 Program Administration; Eligible Applicants; Use of Program Funds.

I. Eligible applicants shall include:

(a) Municipalities; or

(b) A group of municipalities applying together to plan on a regional basis.

II. Awards of program funds may be used to purchase technical assistance from third-party technical assistance providers, including but not limited to regional planning commissions, to achieve the purposes of the program.

4–C:27 Program Administration; Eligible Technical Assistance.

I. The program shall award matching grants to fund technical assistance activities in the development and implementation of a growth and development strategy. The 4 specific stages of activities are as follows:

(a) Stage 1: Natural and Historic Resource and Housing Data Gathering and Analysis. This stage includes:

(1) Understanding and mapping housing, income, and demographic data, including housing market costs, housing units needed to meet future expected growth in a municipality and the region, and the affordability of a municipality's housing for all income ranges.

(2) Mapping land use values, including conservation, soils, wetlands, working forests, farmlands, and other natural resources.

(3) Developing a build-out analysis of growth and development impacts on housing availability and natural resources.

(4) Mapping historic structures and buildings within communities.

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properties. Examples of such properties include houses of worship, museums, schools, public buildings, and clubhouses.

Limited-market properties may be appraised based on their current use or the most likely alternative use. Due to the relatively small markets and lengthy market exposure needed to sell such properties, there may be little evidence to support an opinion of market value based on their current use. The distinction between market properties and limited-market properties is subject to the availability of relevant market data. If a market exists for a limited-market property, the appraiser must search diligently for whatever evidence of market value is available.

If a property's current use is so specialized that there is no demonstrable market for it but the use is viable and likely to continue, the appraiser may render an opinion of use value if the assignment reasonably permits a type of value other than market value. Such an estimate should not be confused with an opinion of market value. If no market can be demonstrated or if data is not available, the appraiser cannot develop an opinion of market value and should state so in the appraisal report. It is sometimes necessary to render an opinion of market value in these situations for legal purposes, however. In these cases, the appraiser must comply with the legal requirement, relying on personal judgment and whatever direct market evidence is available. Note that the type of value developed is not dictated by the property type, the size or viability of the market, or the ease with which that value can be developed; rather, the intended use of the appraisal determines the type of value to be developed. If the client needs a market value opinion, the appraiser must develop an opinion of market value, not use value.

Investment Value

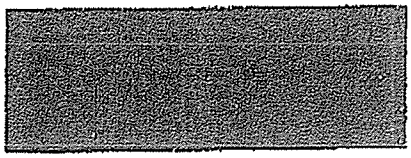
While use value focuses on the specific use of a property, investment value represents the value of a specific property to a particular investor. As used in appraisal assignments, investment value is the value of a property to a particular investor based on that person's (or entity's) investment requirements. In contrast to market value, investment value is value to an individual, not necessarily value in the marketplace.

Investment value reflects the subjective relationship between a particular investor and a given investment. It differs in concept from market value, although investment value and market value indications sometimes may be similar. If the investor's requirements are typical of the market, investment value will be the same as market value.

Investment value: The specific value of a property to a particular investor or class of investors based on individual investment requirements; distinguished from market value, which is impersonal and detached.

When measured in dollars, investment value is the price an investor would pay for an investment in light of its

perceived capacity to satisfy that individual's desires, needs, or investment goals. To render an opinion of investment value, specific investment criteria must be known. Criteria to evaluate a real estate investment are not necessarily set down by the individual investor; they may be established by an expert on real estate and investment value, i.e., an appraiser.



Going-Concern Value

A going concern is an established and operating business with an indefinite future life. For certain types of properties (e.g., hotels and motels, restaurants, bowling alleys, manufacturing enterprises, athletic clubs, landfills), the physical real estate assets are integral parts of an ongoing business. The market value of a such a property (including all the tangible and intangible assets of the going concern, as if sold in aggregate) is commonly called its *going-concern value*. (See Figure 2.1.) Appraisers may be called upon to develop an opinion of the investment value, use value, or some other type of value of a going concern, but most appraisals of going-concern value relate to market value.

Traditionally, going-concern value has been defined as the value of a proven property operation. The emerging definition of the term highlights the assumption that the business enterprise is expected to continue operating well into the future (usually indefinitely); in contrast, liquidation value assumes that the enterprise will cease operations. Going-concern value includes the incremental value associated with the business concern, which is distinct from the value of the real property. The value of the going concern includes an intangible enhancement of the value of the operating business enterprise, which is produced by the assemblage of the land, buildings, labor, equipment, and the marketing operation. This assemblage creates an economically viable business that is expected to continue. The value of the going concern refers to the total value of the property, including both the real property and the intangible personal property attributed to business enterprise value (see Figure 2.2).

It may be difficult to separate the market value of the land and the building from the total value of the business, but such a division of realty and non-realty components of value is often required by federal regulations. When an appraiser cannot effectively separate the market value of the real estate from its business enterprise value, it is appropriate to state that the reported opinion of value includes both market value and business enterprise value and that the appraiser has not been able to distinguish between them. Only qualified practitioners should undertake these kinds of assignments, which must be performed in compliance with appropriate USPAP standards. (Business enterprise value is discussed in Chapter 27.)

value are worked into the test of financial feasibility for redevelopment of the land.

highest and best use of land as though vacant: Among all reasonable, alternative uses, the use that yields the highest present land value after payments are made for labor, capital, and entrepreneurial coordination.

highest and best use of property as improved: The use of a property, as improved, that will maximize its value.

The timing of a specified use is an important consideration in highest and best use analysis. In many instances, a property's highest and best use may change in the foreseeable future. For example, the highest and best use of a farm in the path of urban growth could be for interim use as a farm, with a future highest and best use as a residential subdivision. (The concept of interim use, which is a special situation in highest and best use analysis, is discussed in more detail later in this chapter.) If the land is ripe for development at the time of the appraisal, there is no interim use. If the land has no subdivision potential, its highest and best use would be for continued agricultural use. In such situations, the immediate development of the land or conversion of the improved property to its future highest and best use is usually not financially feasible.

The intensity of a use is another important consideration. The present use of a site may not be its highest and best use. The land may be suitable for a much higher, or more intense, use. For instance, the highest and best use of a parcel of land as though vacant may be for a 10-story office building, while the office building that currently occupies the site has only three floors.

Testing Criteria in Highest and Best Use Analysis

In addition to being reasonably probable, the highest and best use of both the land as though vacant and the property as improved must meet four implicit criteria. That is, the highest and best use must be

1. Physically possible
2. Legally permissible
3. Financially feasible
4. Maximally productive

These criteria are often considered sequentially.[1] The tests of physical possibility and legal permissibility must be applied before the remaining tests of financial feasibility and maximum productivity. A use may be financially feasible, but this is irrelevant if it is legally prohibited or physically impossible.

1. Although the criteria are considered sequentially, it does not matter whether legal permissibility or physical possibility is addressed first, provided both are considered prior to the test of financial feasibility. Many appraisers view the analysis of highest and best use as a process of elimination, starting from the widest range of possible uses. The test of legal permissibility is sometimes applied first because it eliminates some alternative uses and does not require a costly engineering study. It should be noted that the four criteria are interactive and may be considered in concert.

CHAPTER 12

Highest and Best Use Analysis

Market forces create market value, so the analysis of market forces that have a bearing on the determination of highest and best use is crucial to the valuation process. When the purpose of an appraisal is to develop an opinion of market value, highest and best use analysis identifies the most profitable, competitive use to which the property can be put.

The highest and best use of a specific parcel of land is not determined through subjective analysis by the property owner, the developer, or the appraiser; rather, highest and best use is shaped by the competitive forces within the market where the property is located. Therefore, the analysis and interpretation of highest and best use is an economic study and a financial analysis focused on the subject property.

In all valuation assignments, opinions of value are based on use. The highest and best use of a property to be appraised provides the foundation for a thorough investigation of the competitive position of the property in the minds of market participants. Consequently, highest and best use can be described as the foundation on which market value rests.

Fundamentals of Highest and Best Use

Highest and best use may be defined as follows:

> The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value

Fundamentally, the concept of highest and best use applies to land alone because the value of the improvements is considered to be the value they contribute to the land. Land is said to *have* value, while improvements *contribute to* the value of the property as a whole. The theoretical emphasis of highest and best use analysis is on the potential uses of the land as though vacant. In practice, though, the contribution of value of the existing improvements and any possible alteration of those improvements must be recognized, so the highest and best use of the property as improved is equally important in developing an opinion of market value of the property. In many appraisal assignments

Highest and best use is the reasonably probable and legal use of vacant land or an improved property that is physically possible, legally permissible, appropriately supported, financially feasible, and that results in the highest value.

A distinction is made between the highest and best use of the land or site as though vacant and the highest and best use of the property as improved.

of improved properties, there may be little if any question of possible change in the property's use at the date of valuation because the market is significantly built-up and properties are being sold on the basis of their continued use.

In the development of an appraisal, the appraiser must distinguish between highest and best use of the land as though vacant and highest and best use of the property as improved. The appraisal report should clearly identify, explain, and justify the purpose and conclusion for each type of use and, if a separate conclusion of highest and best use of land as though vacant was not made, explain and justify why it was omitted.

To clarify the distinction between the highest and best use of 1) the land or a site as though vacant and 2) property as improved, consider a single-family residential property located in an area zoned for commercial use. If there is market demand for a commercial use, the maximum productivity of the land as though vacant will most likely be based on a commercial use. In this case, the single-family improvements may contribute little if any to the value of the property as a whole. If, however, the market value for residential use is greater than the market value for the permitted commercial use less demolition costs, then the highest and best use of the property as improved will be for continued residential use.

In the analysis of highest and best use of land as though vacant, the appraiser seeks the answers to several questions. First:

Should the land be developed or left vacant?

If the answer to this question is that the land should be developed, a second question is:

What kind of improvement should be built?

The third question the appraiser asks relates to the highest and best use of the property as improved, which is a distinct concept developed by valuation theorists and practitioners to answer an important question that the original concept does not address. This question is:

Should the existing improvements on the property be maintained in their current state or should they be altered in some manner to make them more valuable?

Appraisal theory holds that as long as the value of a property as improved is greater than the value of the land as though vacant, the highest and best use is the use of the property as improved. In practice, however, a property owner who is redeveloping a parcel of land may remove an improvement even when the value of the property as improved exceeds the value of the vacant land. Investors are not likely to pay large sums for the underlying land simply to hold onto the property until the value of the remaining improvement has decreased to zero. The costs of demolition and any remaining improvement

value are worked into the test of financial feasibility for redevelopment of the land.

The timing of a specified use is an important consideration in highest and best use analysis. In many instances, a property's highest and best use may change in the foreseeable future. For example, the highest and best use of a farm in the path of urban growth could be for interim use as a farm, with a future highest and best use as a residential subdivision. (The concept of interim use, which is a special situation in highest and best use analysis, is discussed in more detail later in this chapter.) If the land is ripe for development at the time of the appraisal, there is no interim use. If the land has no subdivision potential, its highest and best use would be for continued agricultural use. In such situations, the immediate development of the land or conversion of the improved property to its future highest and best use is usually not financially feasible.

highest and best use of land as though vacant: Among all reasonable, alternative uses, the use that yields the highest present land value after payments are made for labor, capital, and entrepreneurial coordination.

highest and best use of property as improved: The use of a property, as improved, that will maximize its value.

The intensity of a use is another important consideration. The present use of a site may not be its highest and best use. The land may be suitable for a much higher, or more intense, use. For instance, the highest and best use of a parcel of land as though vacant may be for a 10-story office building, while the office building that currently occupies the site has only three floors.

Testing Criteria in Highest and Best Use Analysis

In addition to being reasonably probable, the highest and best use of both the land as though vacant and the property as improved must meet four implicit criteria. That is, the highest and best use must be

1. Physically possible
2. Legally permissible
3. Financially feasible
4. Maximally productive

These criteria are often considered sequentially.[1] The tests of physical possibility and legal permissibility must be applied before the remaining tests of financial feasibility and maximum productivity. A use may be financially feasible, but this is irrelevant if it is legally prohibited or physically impossible.

1. Although the criteria are considered sequentially, it does not matter whether legal permissibility or physical possibility is addressed first, provided both are considered prior to the test of financial feasibility. Many appraisers view the analysis of highest and best use as a process of elimination, starting from the widest range of possible uses. The test of legal permissibility is sometimes applied first because it eliminates some alternative uses and does not require a costly engineering study. It should be noted that the four criteria are interactive and may be considered in concert.

The highest and best use of a property is concluded after the four criteria have been applied and various alternative uses have been eliminated. The remaining use that fulfills all four criteria is the highest and best use.

The initial analysis of the market and land use regulations usually limits the number of property uses to a few logical choices. For example, market analysis may suggest that there is demand for a large office building in a community. If the subject site is surrounded by modern, single-family residential developments, however, a large, multistory office building would probably not be a logical use, even if it were legally permitted. Similarly, a housing development for the elderly might be a permissible use for a site, but, if most residents of the area are under 40 years old, this use may be illogical and might not meet the criterion of financial feasibility. Consideration of whether a use is reasonably probable should continue throughout the analysis of highest and best use as more is learned about the potential use of the property. Reasonable probability is both a tentative starting point and a conclusion for the use or uses that are ultimately deemed probable.

Appraisers must exercise caution in performing the market analysis that results in the determination of highest and best use. Although a given site may be particularly well-suited for a specific use, there may be a number of other sites that are equally or more appropriate. Therefore, the appraiser must test the highest and best use conclusion to ensure that existing and potential competition from other sites has been fully recognized.

An appraiser must also consider the competition among various uses for a specific site. For example, competition for available sites along a commercial strip development may be intense. Developers of community retail uses, garden office uses, and fast food franchises may bid against one another for these sites. The highest and best use and the value of the sites will reflect this competition. In turn, the competing commercial uses will price their goods and services to accommodate the competitive prices dictated by the market.

The same observation may be applied to central business districts (CBDs). The market may define the highest and best use of land in the CBD simply as high-rise development, which often includes a mix of uses such as office, retail, hotel, and residential apartment or condominium use. At times the highest and best use conclusion for a CBD site does not indicate a specific highest and best use but rather a class of uses that is supported by market area trends and reflects a consistent density of development. Although the appraiser considers specific uses in determining highest and best use, the appraiser's analysis of these uses is often general, based on commonly accepted operating expense ratios and other data inputs. Often the appraiser stops short of detailed feasibility analysis, which may involve extensive consultation with planners, architects, engineers, and cost estimators.

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Highest and Best Use of Land as though Vacant

The value of land is generally determined as though vacant.[2] When land is already vacant, the reasoning is obvious—an appraiser values the land as it exists. When land is not vacant, however, its contribution to the value of the property as improved depends on how it can be put to use. Therefore, the highest and best use of land as though vacant must be considered in relation to its existing use and all potential uses. In general, the conclusion of highest and best use of land as though vacant is required except in circumstances where improved properties have structures with significant remaining economic lives and little or no indication of market demand for a change in use.

The possibility of removing existing improvements underlies the concept of highest and best use of land as though vacant, even when improvements are present. Any building can be demolished; the fact that most buildings in a given area are not does not negate the possibility. Land values are not penalized so long as the existing buildings have economic value. If the buildings no longer have value, demolition is appropriate. For example, consider a valuable commercial site in an excellent location that is currently improved with a service station that is free of any negative environmental features.[3] A purchaser who wants to build a high-rise office building on the site may pay a price for the property that includes no value, or even negative value, for the existing improvements. The potential use, not the existing use, usually governs the price that will be paid for land if that use is economically feasible.

Highest and best use of the land or site as though vacant may be the existing use, a projected development, a subdivision, or an assemblage; alternatively, it may involve holding the land as an investment.

2. Standards Rule 1-3(b) directs an appraiser to "develop an opinion of the highest and best use of the real estate." The comment to this rule explains, "An appraiser must analyze the relevant legal, physical, and economic factors to the extent necessary to support the appraiser's highest and best use conclusion(s). The appraiser must recognize that land is appraised as though vacant and available for development to its highest and best use, and that the appraisal of improvements is based on their actual contribution to the site."

   For an improved property, the valuation of the land as though vacant is a necessary procedure within the appraisal process, but it is one that is performed under a hypothetical condition, i.e., that the subject site is vacant. In essence, the fundamental concept of highest and best use applies to land alone. By considering land alone, the appraiser can then determine the contributory value, if any, of any improvements. Seen in this light, the highest and best use of property as improved is a special case that requires market evidence to support the assumption that the property can be appraised with land and improvements combined.

3. When the highest and best use of the land as though vacant is different from that of the property as currently improved, demolition may be considered as one alternative. At this time the costs of demolition are addressed as well as the costs of curing any environmental problems—e.g., the removal of underground storage tanks, the abatement of asbestos, the replacement of transformers containing PCBs.

Historic district zoning controls and historic easements (deed restrictions) have made demolition permits difficult, if not impossible, to obtain in some areas. Furthermore, special tax incentives for older buildings can substantially enhance their value and alter the highest and best use of the property in certain cases.

In some cases an appraiser may conclude that the highest and best use of a parcel is to hold the land for investment purposes—i.e., to remain vacant or to be employed in some interim use until development is justified by market demand. This frequently occurs when there is external obsolescence present in the market—e.g., when real estate markets are temporarily oversupplied, extremely high financing costs impair development, a major plant in the area closes or a major environmental disaster occurs during early phases of redevelopment projects, or other, similar situations. For many parcels of land, achieving the highest and best use requires some change in zoning or an improvement in roads or other infrastructure needed to accommodate the new use. The highest and best use of land as though vacant may call for its subdivision into smaller parcels of land or its assemblage with other land.

The Ideal Improvement

If a building improvement is determined to be the highest and best use of the vacant land, the appraiser must determine and describe the type and characteristics of the ideal improvement to be constructed. The appraiser compares any existing improvements on the site with the ideal improvement and the differences are analyzed to determine the depreciation suffered by the existing improvements. The ideal improvement should meet the following criteria:

- Takes maximum advantage of the site's potential given market demand
- Conforms to current market standards and the character of the market area
- Contains the most suitably priced components

If a new improvement is considered to be the highest and best use of the land as though vacant, it presumably will have no physical deterioration or functional obsolescence—i.e., it would be neither an underimprovement nor an overimprovement. Thus, any difference in value between the existing improvement and the ideal improvement would be attributable to these forms of depreciation. The appraiser must still consider external obsolescence, which may affect both the existing improvement and the ideal improvement.

The conclusion of highest and best use for a parcel of land should be as specific as the marketplace suggests. General categories such as "an office building," "a commercial building," or "a single-family residence" may be adequate in some situations, but in others the particular use demanded by market participants must be specified, such as "a suburban office building with 10 or more floors" or "a three-bedroom single-family residence with at least 2,500-sq.-ft."

The conclusion of the highest and best use analysis of a site as though vacant should be as specific as the market suggests.

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Test of Legal Permissibility of Land as though Vacant

In all instances the appraiser must determine which uses are legally permissible. Private restrictions, zoning, building codes, historic district controls, and environmental regulations must be investigated because they may preclude many potential uses. Frequently the appraiser must consider whether there is a reasonable probability that the zoning could be changed in order for the highest and best use of the property to be realized.

The test of legal permissibility helps the appraiser determine which uses are permitted by current zoning, which uses could be permitted if a zoning change were granted, and which uses are restricted by private restrictions on the site. Private restrictions, deed restrictions, and long-term leases relate to the covenants under which some properties are acquired. These restrictions may prohibit certain uses or specify building setbacks, heights, and types of

Probability of a Zoning Change

In investigating the reasonable probability of a zoning change, the appraiser must consider trends in the market area and the history of zoning requests in the area as well as documents such as a community's comprehensive or master plan. Uses that are not compatible with the existing land uses in the area (such as a gas station in the middle of an exclusive single-family residential subdivision) and uses for which zoning changes have been requested but denied in the past (such as an industrial use where several industrial zoning changes have been turned down in the past two years) can usually be eliminated from consideration as potential highest and best uses. On the other hand, a zoning change from residential to commercial may be reasonable if other properties in the market area have received a similar zoning change recently or if a community's comprehensive plan designates the property for a use other than its current use. For example, consider a site zoned single-family residential in a transitional neighborhood where the zoning on several similar sites has been changed recently to commercial. Also, the city's comprehensive plan designates the property as a future commercial corridor. Both of these factors may support an appraiser's conclusion that there is a reasonable probability of rezoning the subject site for commercial use.

Additional evidence of the possibility of new zoning includes land assemblage, removal of structures, and new construction in an area. This evidence may be supported by zoning change applications, zoning hearings, actions by municipalities, and interviews with planning and zoning officials. Even if there is no current market evidence of a zoning change, documented interviews with officials and discussion of zoning practices and histories can be helpful in evaluating the possibility of a zoning change.

In preparing a land development forecast for an area, the appraiser must fully disclose all pertinent factors relating to a possible zoning change, including the time and expense involved and the risk that the change will not be granted. The appraiser should consider the time and expense of obtaining a zoning change in estimating the land value of the property. Consider a site that would be worth $125,000 if the zoning were changed to commercial. The appraiser realizes that the cost of obtaining a zoning change will be $10,000 and that it would take about six months to achieve the zoning change. Thus the appraiser should make a $10,000 downward adjustment to account for the cost of obtaining the zoning change and consider whether any discounting is necessary to reflect the six months it will take to achieve the zoning change.

The probability of a zoning change may not be 100% certain, and the challenge is to determine whether market participants will pay a premium in anticipation of a potential zoning change and to document the conclusion. Many sales never close because they are subject to rezoning that could not be obtained.

materials. If deed restrictions conflict with zoning laws or building codes, the more restrictive guidelines usually prevail. A long-term lease may affect the highest and best use because lease provisions may limit use over the remaining term of the lease. For example, if a property is subject to a land lease that has 12 years to run, it may not be economically feasible for the tenant to construct and move to a new building with a longer remaining economic life. In such a case, the appraisal report should state that the determination of highest and best use as leased is influenced by the lease's impact on future utility over the remaining lease term.

Successful application of the legal permissibility test to a site as though vacant relies on analysis of zoning laws. If there are no private restrictions, the uses allowed by the zoning laws prevail. However, if the zoning is not appropriate for the subject site, or if a more appropriate highest and best use could be obtained with a zoning change, then the possibility of a change in zoning should be considered.

In addition to analyzing zoning and private restrictions, testing the legal permissibility of a land use also requires the appraisers to investigate, other applicable codes and ordinances, including building codes, historical district ordinances, and environmental regulations. All of these codes and ordinances can have an impact on the way a site is developed and can limit how a site can be developed.

Building codes can prevent land from being developed to what would otherwise be its highest and best use by imposing burdensome restrictions that increase the cost of construction. For example, the additional cost of a water retention pond with excess capacity that is required by local ordinance could impact the size of a proposed community shopping center. Less restrictive codes typically result in lower development costs, which attract developers; more restrictive codes tend to discourage development. In some areas, more restrictive building codes are used to slow new construction and limit growth. Historical ordinances, such as historic facade easements, and overlay districts may be so restrictive that they preclude development.

Concerns over the long-range effects of certain land uses sometimes result in increased environmental regulation and stricter development controls. Appraisers must be familiar with environmental regulations pertaining to clean air, clean water, and wetlands, and they should be sensitive to the public's reaction to proposed development projects. When resistance from local residents and the general public (known as NIMBY, i.e., "not in my back yard") occurs, it can pressure city officials to stop or limit certain real estate developments or change the density or character of a specific plan.

As with zoning ordinances, if there are any limitations inherent in other applicable codes, ordinances, and regulations, the appraiser should investigate whether there is a reasonable probability of a change relative to the subject property.

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Possibility of Assemblage

Certain parcels can achieve their highest and best use only as a part of an assemblage. In such a case, the appraiser must either determine the feasibility and probability of assembly or make the highest and best use determination and other appraisal decisions on the assumption that such an assembly would be made. For example, a large petrochemical plant may be constructed on a site that has been created by assembling several smaller tracts. The individual tracts may not have had the potential for such a large-scale industrial use separately and, therefore, may have had much lower unit values for alternative uses.

If the appraiser concludes that the highest and best use can be achieved through an assemblage, the costs and timing of achieving the assemblage must be taken into consideration. In the example of the petrochemical plant, assembling the site might take more than two years. Although the assemblage would allow the smaller parcels to accommodate the plant, the time delay may be too long for the developer of the petrochemical plant. The appraiser must also recognize that frequently a higher-than-market price might have to be paid to assemble a tract of land, particularly for properties acquired near the end of the assemblage period. These costs must be reflected in the resulting land value estimate and in the appraiser's conclusions as to the reasonable probability of assemblage.

Test of Physical Possibility of Land as though Vacant

The test of physical possibility addresses the physical characteristics associated with the site that might affect its highest and best use. The size, shape, terrain, and accessibility of land and the risk of natural disasters such as floods or earthquakes affect the uses to which land can be put. The utility of a parcel may also depend on its frontage and depth. Irregularly shaped parcels can cost more to develop and, after development, may have less utility than regularly shaped parcels of the same size.

Ease of access enhances the utility of a site. The capacity and availability of public utilities are also important considerations. If a sewer main located in front of a property cannot be tapped because of a lack of capacity at the sewage disposal plant, the property's use might be limited. When topography or subsoil conditions make development difficult or costly, the land's utility may be adversely affected. If the cost of grading or constructing a foundation on the subject site is higher than is typical for sites in the area competing for the same use, the subject site may be economically infeasible for the highest and best use that would otherwise be indicated.

Test of Financial Feasibility of Land as though Vacant

In determining which uses are legally permissible and physically possible, an appraiser eliminates some uses from consideration. Only those uses that meet the first two criteria are analyzed further. As long as a potential use has value commensurate with its cost and conforms to the first two tests, the use is financially feasible.

If the physically possible and legally permissible uses are income-producing, the analysis of financial feasibility will often focus on which potential uses are likely to produce an income (or return) equal to or greater than the amount needed to satisfy operating expenses, financial obligations,

To test financial feasibility and maximum productivity, the respective values under alternative uses are developed by analyzing data such as land value, the rate of return and risk associated with the use, and capitalized overall property value.

and capital amortization of the investment. To determine the financial feasibility, the appraiser estimates the future gross income that can be expected from each use. Vacancy and collection losses and operating expenses are then subtracted from each gross income to obtain the likely net operating income (*NOI*) from each use. A rate of return on the invested capital can then be calculated for each use. If the net revenue capable of being generated from a use is sufficient to satisfy the required market rate of return on the investment, the use is said to be financially feasible.

If the uses are not income-producing, the analysis will determine which are likely to create a value or result in a profit equal to or greater than the amount needed to develop and market the property under those uses. Analyses of supply and demand and of location are needed to identify those uses that are financially feasible and, ultimately, the use that is maximally productive. To determine the financial feasibility of a use that will not generate income, the appraiser compares the value benefits that accrue from the use against the expenses involved. If the value benefits exceed the costs, the use is considered feasible. If the value benefits fall below the costs or exceed costs by only a marginal amount, the use may not be financially feasible.

Successful application of the financial feasibility test to land as though vacant relies on interpretation of relevant and credible market evidence collected and analyzed in the market area and in the subject property's competitive market. Risk is an important consideration and must be weighed along with other feasibility factors. Any external obsolescence related to a specific use should be incorporated into the test of financial feasibility.

Test of Maximum Productivity of Land as though Vacant

The test of maximum productivity is applied to the uses that have passed the first three tests. Additional analysis of the market forces of supply and demand may aid in the process of elimination. The test addresses not only the value created under the maximally productive use but also the costs to achieve the value, if any, such as demolition and removal of structures, environmental remediations costs, and zoning changes. Of the financially feasible uses, the highest and best use is the use that produces the highest residual land value consistent with the market's acceptance of risk and with the rate of return warranted by the market for that use. To determine the highest and best use of land as though vacant, rates of return that reflect the associated risks are often used to capitalize income from different uses into their respective values. The use that produces the highest residual land value is the highest and best use.

The residual land value (R_L) found by estimating the value of proposed use (land and improver and subtracting the cost of the la capital, and entrepreneurial coor expended to create the improven Alternatively, the land value can estimated by capitalizing the resi income to the land. The land inc residual income remaining after able to the improvements have b property.[4] In testing alternate us differences in the residual incom the process of capitalization, so t considering the assumptions of l persuasive indication of land val useful in highest and best use an of alternate uses can be compare value. (The land residual technic discussed further in Chapter 22.

The potential highest and b use that is expected to remain or ments. Normal life expectancy d tion, and other factors. The strea produced by the buildings reflec specific, land use program.

Highest and Best Use o

Highest and best use of a proper should be made of an improved ments and the ideal improvemer of highest and best use as thoug property as improved may be co the appraiser need not analyze e tures or rates of return for altern except to test or support the con highest and best use. However, t highest and best use of a proper improved may involve renovatio rehabilitation, expansion, adapta conversion to another use, partia

4. According to traditional economic production (labor, capital, and ent income—i.e., the *residual*—is attril

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The residual land value (R_L) can be found by estimating the value of the proposed use (land and improvements) and subtracting the cost of the labor, capital, and entrepreneurial coordination expended to create the improvements. Alternatively, the land value can be estimated by capitalizing the residual income to the land. The land income that is capitalized into value is the residual income remaining after operating expenses and the return attributable to the improvements have been deducted from the income to the total property.[4] In testing alternate uses with the land residual technique, any differences in the residual income attributable to the land are magnified by the process of capitalization, so the appraiser should take special care in considering the assumptions of highest and best use. While not usually a persuasive indication of land value on its own, the land residual technique is useful in highest and best use analysis because the relative residual land values of alternate uses can be compared to determine the use that yields the highest value. (The land residual technique and other types of residual techniques are discussed further in Chapter 22.)

residual: The quantity left over; in appraising, a term used to describe the result of an appraisal procedure in which known components of value are accounted for, thus solving for the quantity that is left over, such as land residual or building residual.

The potential highest and best use of the land is usually a long-term land use that is expected to remain on the site for the normal life of the improvements. Normal life expectancy depends on building type, quality of construction, and other factors. The stream of benefits (income and amenities) produced by the buildings reflects a carefully considered, and usually very specific, land use program.

Highest and Best Use of Property as Improved

Highest and best use of a property as improved pertains to the use that should be made of an improved property in light of the existing improvements and the ideal improvement described at the conclusion of the analysis of highest and best use as though vacant. The highest and best use of a property as improved may be continuation of the existing use. In such a case, the appraiser need not analyze expenditures or rates of return for alternative uses except to test or support the conclusion of highest and best use. However, the highest and best use of a property as improved may involve renovation or rehabilitation, expansion, adaptation or conversion to another use, partial or total

The highest and best use of a property as improved may be continuation of the existing use, renovation or rehabilitation, expansion, adaptation or conversion to another use, partial or total demolition, or some combination of these alternatives.

4. According to traditional economic theory, income attributable to the three other agents of production (labor, capital, and entrepreneurial coordination) is paid, and then the remaining income—i.e., the *residual*—is attributable to the land.

demolition, or some combination of these alternatives. If no capital expenditures are required to effect the necessary changes to the existing improvements, estimated returns can be compared directly. If capital expenditures are required, however, rates of return for each potential use must be calculated, considering the total investment in the property and all capital expenditures. These rates of return can then be compared with rates of return for other similar types of investments to determine whether the potential uses are financially feasible. Alternatively, the appraiser may compare all costs of acquisition and capital improvements with other competing properties in the same market.

In analyzing the highest and best use of owner-occupied properties, appraisers must consider any rehabilitation or modernization that is consistent with market preferences. For example, the highest and best use of a luxury residence should reflect all rehabilitation that would be required for maximum enjoyment of the property. The rehabilitation program should ensure the maximum profit upon future sale of the property in order to be deemed economically feasible. For a leased property, rehabilitation should focus on maximizing profit (rental income) or value to the owner-landlord.

Test of Legal Permissibility of Property as Improved

In the analysis of the highest and best use of the property as improved, the test of legal permissibility addresses whether the subject property conforms with existing legal requirements and how that compliance or noncompliance affects the property's value. The appraiser reviews many of the same public and private restrictions that were examined in testing the legal permissibility of the land as though vacant. However, for the highest and best use of the property as improved, the analysis shifts from a survey of potential uses to an evaluation of the existing improvements.

Often, although not always, the results of this test are implicit—i.e., the existing use is legally permissible because it conforms with all of the codes, ordinances, and restrictions reviewed by the appraiser. In this situation, the appraiser may conclude that the existing use is legally permissible and that no alternative uses are legally permissible, and then proceed with the test of physical possibility. In other instances, an appraiser may determine that the existing improvements are nonconforming—i.e., do not conform to some aspect of the codes, ordinances, and private restrictions that affect that property. For nonconforming properties or properties with improvements that differ significantly from the ideal improvement, the appraiser must determine whether the codes, ordinances, or private restrictions allow modification of the improvements that would bring them into conformity. This may involve the same type of analysis of a reasonable probability of change as is conducted in the application of this test to the highest and best use of the land as though vacant. Again, the appraiser should report any evidence supporting a reasonable probability that a change could be made to bring the improvements into

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Test of Physical Possibility

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conformity with a particular code, ordinance, or restriction. Such evidence could include trends in the market area, historical changes to codes or ordinances in the area, and a community's master plan. The appraiser should incorporate the costs of obtaining the changes and the time necessary to achieve the changes into the value estimate of the subject property as improved.

The appraiser also should investigate how rigorously the city or private organization (such as a homeowner's association) enforces its codes, ordinances, and restrictions and the impact of enforcement on value. For example, an existing single-family residence on land zoned for commercial use obviously does not conform to zoning restrictions. However, if the community is not enforcing its codes and ordinances with respect to such a residential use and the property is not a recognized legally nonconforming use, the appraiser might conclude that the nonconforming use has no negative impact on the value of the property. (Legally nonconforming uses, which are a special situation in highest and best use analysis, are discussed later in this chapter.)

Test of Physical Possibility of Property as Improved

Testing the physical possibility of highest and best use as improved addresses the physical and functional problems associated with physical characteristics such as size, location, design, and condition and how these factors affect the highest and best use of the improved property. The test usually reveals the major items of physical and functional depreciation and whether or not they are curable.

An existing improvement that is substantially larger than the ideal improvement might represent an overimprovement in a particular market, while an existing improvement that is substantially smaller than the ideal improvement might represent an underimprovement. Depreciation may be present in both situations, but, depending on the specific facts associated with the property and its market, one may be curable whereas the other is incurable.

The location of an improvement can have a substantial impact on the highest and best use of the property as improved. For example, consider a building that requires substantial rehabilitation to achieve its highest and best use. If the property shares party walls on both sides, its location could effectively prohibit rehabilitation. Likewise, the interior and exterior design of a building may or may not be adaptable to change, making any related depreciation either curable or incurable. Also, the physical condition of the existing improvements will have a significant effect on the value of the property as well as its highest and best use. The appraiser should be able to separate physical deterioration into the deferred maintenance, incurable short-lived, and incurable long-lived categories.

Almost all the factors analyzed in testing the physical possibility of the property as improved have some form of cost associated with them, particu-

larly if some form of physical change is necessary to achieve the highest and best use. The costs (including a provision for profit) of curing physical deterioration or functional obsolescence, redesigning a building, or converting the existing improvements into an alternative use must be analyzed in light of the value created in the market; the effect of the changes on value is more important than simply how much the costs will be. If the changes will not be profitable, the expenditures would not be made—a point that the appraiser would be wise to incorporate into the highest and best use analysis.

As in the application of the test of legal permissibility, the results of the test of physical possibility are often implicit—i.e., the existing use is obviously physically possible, and no significant physical modifications need to be considered because of the condition, functional utility, and maintenance associated with the improvement. In these situations, the appraiser would conclude that continuation of the existing use meets the physical possibility test and proceed on to the test of financial feasibility.

Test of Financial Feasibility of Property as Improved

The test of financial feasibility of the property as improved addresses the market demand for the subject property in its current state. If the existing use creates a positive return on the investment, that use is financially feasible.

The test of financial feasibility relies on the conclusions of the three approaches to value as well as the land value estimate. If the value of the propery as improved exceeds the value of the land as though vacant, the appraiser could reasonably conclude that continuation of the existing use is financially feasible. However, certain actions such as curing deferred maintenance or rewriting a below-market lease may still increase the value of the property and should be considered. These factors are usually addressed in the test of maximum productivity.

Test of Maximum Productivity of Property as Improved

Often the appraiser concludes that continuation of the existing use is legally permissible, physically possible, and financially feasible. However, in any of the first three tests, the appraiser may have determined that some actions should be taken, and corresponding costs should be incurred, to make the subject property more valuable. These factors are considered in the test of maximum productivity.

In one of the first three tests of the highest and best use of the property as improved, the appraiser may have concluded that the property owner should fix deferred maintenance or a curable functional problem. In this case, as part of the test of maximum productivity the appraiser compares the costs of curing the deferred maintenance or the functional problem to the resulting value. If the changes to the property result in a higher value or if they preserve the existing value, then those expenditures would contribute to the maximally productive use and that should be stated in the highest and best

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Special Situations in Hig

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- Single uses
- Legally nonconforming uses
- Interim uses (including land h
- Uses that are not the highest
- Multiple uses
- Special-purpose uses

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use conclusion. Other factors that may have to be analyzed in a similar manner include conversion costs, rehabilitation or remodeling costs, and, in the extreme, demolition and removal costs.

Successful completion of the test of maximum productivity should allow the appraiser to specify exactly what expenditures, if any, would allow the subject property to achieve its highest and best use. These expenditures should be reflected in the conclusion of the highest and best use of the property as improved as well as in the application of each approach to value.

Reporting Highest and Best Use Conclusions

All appraisal reports should contain statements that describe the appraiser's analyses and conclusions pertaining to the highest and best use of the land as though vacant or of the property as improved. Both must be addressed in market value assignments that include a separate site valuation. As a general rule, the highest and best use statement should summarize the discussion that precedes it and follow the sequence of the four tests. A logically structured review of the four tests forms the foundation for the opinion of value. Certain conditions of an appraisal assignment may alter the information that should appear in the appraisal report regarding highest and best use, as illustrated in Table 12.1.

Highest and best use analysis often incorporates techniques and data from the application of all three approaches to value. Table 12.2 illustrates where in the appraisal report supporting documentation is found for the reported conclusions of each test of highest and best use. In many appraisal assignments, the final tests of financial feasibility and maximum productivity require information that is obtained from the application and development of the approaches. Therefore, even though the discussion of highest and best use traditionally precedes the approaches to value in narrative appraisal reports, the conclusion of highest and best use often can be finalized only after a preliminary analysis of alternative land uses has been performed. The conclusions reported in the highest and best use section of a report should be consistent with conclusions in the other parts of the report.

Special Situations in Highest and Best Use Analysis

In identifying and testing highest and best use, special considerations are required to address the following situations:

- Single uses
- Legally nonconforming uses
- Interim uses (including land held for investment purposes)
- Uses that are not the highest and best uses
- Multiple uses
- Special-purpose uses

Table 12.1 Highest and Best Use Statements in Appraisal Reports

If...
The goal of the analysis is to identify the highest and best use among two or more potential uses ***or*** the highest and best use conclusion is the primary objective of a consulting assignment.
Then the report should include...
The results of "testing" alternatives (e.g., income and rent calculations for income-producing properties and/or the different value opinions derived for each alternative use) and the reasoning employed.

If...
The highest and best use of an improved property is different from its existing use.
Then the report should include...
Justification for this conclusion in a market value appraisal report.

If...
A separate estimate of land value ***is*** presented in the appraisal.
Then the report should include...
Discussion of the highest and best use of the land as though vacant as well as the highest and best use of the property as improved.*

If...
A separate estimate of land value ***is not*** presented, ***and*** continued use of the property as improved is an appropriate limiting condition of the appraisal.
Then the report should include...
Discussion of only the highest and best use of the property as improved, although discussion of the highest and best use of the land as though vacant is usually included anyway, even when it is not required. In such cases—which are generally use value situations—the existing improvements may not represent the highest and best use of the land, but they are expected to continue in use and thus add value to the land. If an opinion of market value is needed, such a limiting condition is probably not appropriate. The rationale for applying such a limiting condition needs to be thought through carefully.

If...
The highest and best use of the land as though vacant and highest and best use of the property as improved are different.
Then the report should include...
Identification of each highest and best use separately with the statement that the highest and best use of the land as though vacant was determined under the theoretical presumption that the land is vacant and available for development and the statement that the highest and best use of the property as improved was determined based on the continued economic viability of the property in its current state.

If...
The land is already improved to the highest and best use.
Then the report should include...
Separate statements on highest and best use and a statement that the determination is the same for both the land as though vacant and the property as improved or a statement that the land is improved to its highest and best use. The identification of the highest and best use of the land as though vacant and of the property as improved can be combined, but better appraisal reporting entails distinct statements of each. There are different reasons for analyzing both and separate thought processes for each analysis.

* Standards Rules 1-3(b) and 1-4(b)(i) of USPAP, which are specific guidelines rather than binding requirements, advise appraisers in developing a real property appraisal to "recognize that land is appraised as though vacant and available for development to its highest and best use, and that the appraisal of improvements is based on their actual contribution to the site;" and to "develop an opinion of site value by an appropriate appraisal method or technique."

Table 12.2 Location of Su

Test	Sit
Legal permissibility	•
Physical possibility	•
	•
Financial feasibility	•
(Demand and supply)	•
(Value and profit/return)	•
	•
Maximum productivity	•

Single Uses

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Table 12.2 Location of Supporting Documentation

Test	Section of Appraisal Report: Site as Though Vacant	Section of Appraisal Report: Property as Improved
Legal permissibility	• Zoning and other restrictions	• Zoning and other restrictions
Physical possibility	• Market area data • Site data	• Improvement data
Financial feasibility (Demand and supply) (Value and profit/return)	• Region • City • Neighborhood • Subject's market area	• Region • City • Neighborhood • Subject's market area
Maximum productivity	• Land valuation	• Cost approach • Sales comparison approach • Income capitalization approach

Single Uses

Single uses, interim uses, legally nonconforming uses, uses that are not the highest and best use, multiple uses, and special-purpose uses all require special consideration.

The highest and best uses of land as though vacant and property as improved are often consistent with surrounding uses. For example, a single-family residential use is usually not appropriate in an industrial district. However, a property's highest and best use may be unusual or even unique. For example, market demand may be adequate to support one large, multistory office building in a community, but it may not support more than one. A special-purpose property such as a museum may be unique and highly beneficial to its site, but it might not be supported by surrounding land uses or comparable properties. Land value should be based on the highest and best use of the property, regardless of its most likely use as suggested by surrounding land uses and comparable properties. However, regardless of what improvement is on a site, the highest and best use of the land as though vacant should be the one that meets all four tests. Therefore, the ideal improvement might be significantly different than the existing improvements, and the highest and best use of the land as though vacant of a single-use property might be to develop it differently than it is currently developed.

If an existing single-use property is being appraised, some level of market analysis should be performed to determine whether the single use should be continued or discontinued. If the analysis reveals that the single use should be discontinued, the appraiser should then ask what, if anything, should be done with the improvement? If the improvement does not contribute to value and the assignment involves an opinion of market value, then the highest and best use would probably be something other than maintaining the existing use. (An entirely different conclusion relative to highest and best use as improved

would result if use value were being determined rather than market value.) For a proposed single-use property, the market should be carefully analyzed to determine whether another single use of the same type already exists.

Legally Nonconforming Uses

A legally nonconforming use is a use that was lawfully established and maintained but no longer conforms to the land use regulations of the zone in which it is located. Some legal nonconformities can be created by governmental action such as a partial taking in an eminent domain proceeding. Consider a gas station property with 20,000 square feet of land, which is the minimum amount of land area required by zoning for gas station use. If the city acquired 1,000 square feet of the land for an intersection improvement, the site would then contain 19,000 square feet and would no longer conform to the zoning requirements for site size. Other legally nonconforming use situations can be created when codes and ordinances are changed. For example, a single-family residence on a 7,500-sq.-ft. site in the core residential district of a community zoned R-1 requires at least 7,500 square feet of land area. If the city adopts a new zoning ordinance in which the minimum site size for a lot zoned R-1 is increased to 10,000 square feet, the existing property will no longer conform. In both instances the nonconforming use situations are considered *legal* nonconformances because they were caused by an action of a governmental body. Most zoning ordinances have special sections that deal with nonconforming use situation; appraisers must be familiar with these sections when appraising legally nonconforming uses.

legally nonconforming use: A use that was lawfully established and maintained, but no longer conforms to the use regulations of the current zoning in the zone where it is located; also known as a *grandfathered use.*

Zoning changes may create underimproved or overimproved properties. A single-family residence located in an area that is subsequently zoned for commercial use may be an underimproved property. In this case, the residence will most likely be removed so that the site can be improved to its highest and best use, or the house will be considered an interim use until conversion to commercial use is financially feasible. A legally nonconforming property can become overimproved when zoning changes reduce the permitted intensity of property use. For example, the site of an older apartment building with eight units in a fully built-up neighborhood might be downzoned to a less intense use. That is if the vacant site were developed now, the new zoning restrictions would only allow six units to be built. Nonconforming uses may also result from changes in the permitted density of development and changes in development standards that affect features such as landscaping, parking, setbacks, and access.

Zoning ordinances vary with the jurisdiction. They usually permit a preexisting, or grandfathered, use to continue but prohibit expansion or major alterations

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Interim Uses

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They usually permit a preexist-
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that support the nonconforming use. Some jurisdictions specify a time period for phasing out legally nonconforming uses. When a nonconforming use is discontinued, it usually cannot be reestablished. In most jurisdictions, a nonconforming use must be eliminated if the property suffers major damage or if the property is abandoned for a statutory period of time. In some instances, a nonconforming use can be rebuilt to the same intensity of use that it had prior to its destruction, provided it has no more impact on the market area than it did before.

downzoning: A public action in which the local government reduces the allowable density for subsequent development, e.g., fewer housing units, fewer stores, or changes the allowable use from a more intensive use to a less intensive use, e.g., multifamily to single-family.

When valuing land with a legally nonconforming use, an appraiser must recognize that the current use may be producing more income, and thus have more value, than the property could produce with a conforming use.[5] The legally nonconforming use may also produce more income and have a higher value than comparable properties that conform to the zoning. Therefore, when the value of the legally nonconforming use of the property is developed by comparing similar, competitive properties to the subject in the sales comparison approach, the appraiser should consider the higher intensity of use allowed for the subject property and also consider the risks and limitations associated with the nonconformity. In the case of the eight-unit apartment building in an area downzoned to six-unit developments, for example, the appraiser will have to determine whether sales of properties with six units are appropriate comparables, in applying the sales comparison approach.

Legally nonconforming uses that correspond to the highest and best use of the property as improved are often easy to recognize. Sometimes, however, it is not clear whether an existing nonconforming use is the site's highest and best use. The question can only be answered by careful analysis of the income and/or selling price produced by the nonconforming use and the incomes and/or selling prices that would be produced by alternative uses if the property were brought into conformity with existing regulations.

Interim Uses

The use to which a site or improved property is put until it is ready for its future highest and best use is called an *interim use.* Thus, interim use is a

5. In most nonconforming use situations, the opinion of market value reflects the nonconforming use. Land value, however, is based on the legally permissible use, assuming that the land is vacant. Some practitioners believe the difference between the final opinion of market value of a nonconforming use and the land value reflects the contribution of the existing improvements and possibly a bonus for the nonconformance. In this scenario, the appraiser separates the value of the nonconforming improvements and the bonus created by the nonconforming use. Alternatively, some practitioners believe that the value added in a downzoning should not be attributed solely to the improvement but should be allocated between the improvement and the land. This is commonly accomplished by applying a ratio to the overall property value that reflects typical ratios of the contributions of land and improvements to value in similar market properties not affected by downzoning.

Interim use: The temporary use to which a site or improved property is put until it is ready to be put to its future highest and best use.

current highest and best use that is likely to change in a relatively short time—say, five to seven years. Farms, parking lots, golf courses, old buildings, and temporary buildings may be interim uses. Mining and quarry operations may be considered special cases of interim uses that usually continue until depletion of the resource. Mobile home parks were once considered an ideal interim highest and best use; more recently, mobile home park owners have found it difficult and expensive to accomplish a change in use.

The appraiser must identify the interim uses of the property being appraised and all comparable properties. Differences in the interim uses of comparable properties must be taken into account even though their future highest and best uses are identical. Differences in the prices paid may be due to different return requirements and different anticipated demolition costs.

An interim use may or may not contribute to the value of the land or the improved property. If an old building or other use cannot produce gross revenues that exceed reasonable operating expenses, it does not contribute to property value. If the net return of the improvements is less than the amount that could be earned by the vacant land, the buildings do not have contributory value (although in some markets, property owners may prefer to retain a single-family dwelling on commercial land in transition rather than leave the land vacant). Indeed, the value of an improved property may be less than the value of the land as though vacant when demolition costs are considered. The value of the land is based entirely on its potential highest and best use.

The principle of consistent use, which holds that land cannot be valued based on one use while improvements are valued based on another, must be considered when properties are devoted to temporary, interim uses. The use value of a site under an interim use may differ substantially from the market value of the same site as though vacant and available for development under its long-term highest and best use. Many outmoded improvements clearly do not resemble the ideal improvement, but they do create increments of value over the value of the vacant land. These improvements may appear to violate the principle of consistent use, but in fact the market simply acknowledges that, during the transition to a new use, the value contributed by old improvements to an improved property make the land and the existing improvements worth more than the vacant land.

Land that is held primarily for future sale, with or without an interim use, may be regarded as a speculative investment.[6] The purchaser or owner may believe that the value of the land will increase, but there is a risk that the

6. In general usage, the term *speculative investment* can carry pejorative implications of high risk or uncertainty. In the language of real estate appraisal, *speculation* is defined as the purchase or sale of property motivated by the expectation of realizing a profit from a rise or fall in its price.

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and best use, so the appraiser sh
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Multiple Uses

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expected appreciation will not occur while the investor holds the land. Nevertheless, the current value of the land is a function of its future highest and best use, so the appraiser should discuss its potential highest and best use. The appraiser may not be able to predict the exact future highest and best use, but the general type of future use (e.g., as a shopping center or industrial park) is often known or anticipated by the zoning, surrounding land-use patterns, or a comprehensive city plan. Because there may be several types of potential highest and best use (e.g., single-family or multifamily residential developments), appraisers usually cannot identify a specific future highest and best use; they can, however, discuss logical alternative uses and anticipated income and expense levels.

Use That Is Not the Highest and Best Use

According to the concept of consistent use, an improvement must be valued based on a use that is consistent with the property's highest and best use. However, many existing buildings and other improvements are inconsistent with the ideal improvement for their sites and are developed differently than they would be if the land were vacant. Nevertheless, the highest and best use may be in the same category as the existing use. For example, the highest and best use of a site improved with a 10-year-old apartment building may be for a new, more functional apartment building. Similarly, the highest and best use of a residential site improved with a 20-year-old house may be for a new, more modern single-family residence.

For certain sites the general category of highest and best use may have changed—e.g., from apartment to industrial use or from single-family residential to commercial use. If the improvements on these sites existed prior to the change in the market area, they suffer from external obsolescence and are likely to have less value than similar improvements on more appropriate sites. It would be incorrect to value such an improvement as if it were located on an appropriate site.

Multiple Uses

multiple use: A combination of compatible land uses in an area or in a single building.

Highest and best use often includes more than one use for a parcel of land or an improved property. A large tract of land might be suitable for a planned unit development with a shopping center in front, condominium units around a golf course, and single-family residential sites on the remainder of the land. Business parks often have sites for retail stores in front and warehouse or light manufacturing structures in the rear.

One parcel of land may serve many functions. Timberland or pastureland may also be used for hunting, recreation, and mineral exploration. Land that serves as a right of way for power lines can double as open space or a park. Public streets with railroad siding are also considered multiple-use land.

A single building can have multiple uses as well. A hotel may include a restaurant, a bar, and retail shops in addition to its guest rooms. A multistory building may contain offices, apartments, and retail stores. A "single-family," owner-occupied home may have an apartment upstairs.

If the highest and best use of a property is for more than one use on the same parcel or in the same building, the appraiser must estimate the contributory value of each use. If, for example, the market value of a timber tract that can be leased for hunting is compared on a unit basis with the value of another timber tract that cannot, the difference should be the value of the hunting rights; in the opinion of market value, the appraiser would have to account for both the value of the hunting rights and the value of the timber operation on the site. In oil-producing areas, appraisers are often asked to segregate the value of mineral rights from the value of other land uses; properties with mineral rights value can be compared with properties that do not have such rights. In multiple-use assignments, the sum of the values of the separate uses may be less than, equal to, or greater than the value of the total property.

Special-Purpose Uses

Because special-purpose properties are appropriate for only one use or for a very limited number of uses, appraisers may encounter practical problems in specifying highest and best use. The highest and best use of a special-purpose property as improved is probably the continuation of its current use if that use remains viable. For example, the highest and best use of a plant currently used for heavy manufacturing is probably continued use for heavy manufacturing, and the highest and best use of a grain elevator is probably continued use as a grain elevator. If the current use of a special-purpose property is physically, functionally, or economically obsolete and no alternative uses are feasible, the highest and best use of the land may be realized by demolishing the structure and selling the remains for their scrap or salvage value.

Sometimes a special-purpose property must be analyzed and appraised on the basis of two highest and best uses—i.e., continuation of the existing, special-purpose use and conversion to an alternative use. In such a situation, the highest and best use conclusion depends largely on how the market is defined. For example, a house of worship may first be analyzed based on its highest and best use as a place of worship. In this analysis, the contributory value of the improvements would be supported by cost, sales, or income data. If market demand exists, the members of a congregation may be willing to purchase the subject property at a value that reflects its present use as a house of worship. If the market demand for such buildings is low or nonexistent, however, the appraiser may also project a highest and best use as conversion to commercial office space or some other appropriate alternative use. The estimated value of the improvements for conversion to the alternative use would probably be derived from a detailed cost study or from sales data on

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houses of worship converted to commercial uses. The market value (and the potential users) of the property converted to a commercial use would probably differ from its market value (and potential users) as a house of worship. Thus, the highest and best use of a special-purpose property, such as a house of worship, depends on the amount of market demand for such space.

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tained and fully understand the behavioral characteristics of the buyers and sellers involved in property transactions. Caution should be exercised when sales data is provided by someone who is not a party to the transaction. Incorrect conclusions may result if the appraiser relies on such data without considering the motivation of the parties to the transactions. Sometimes brokers will be able to provide more reliable information than the buyer or seller. Similarly, errors can result if anticipated income and expense schedules are inaccurate or if potential changes in use are not considered.

It is imperative that the appraiser identify and analyze the strengths and weaknesses of the quantity and quality of the data compiled and the extent of the comparative analyses undertaken in the sales comparison approach. All relevant facts and opinions must be considered in the analysis and reported in the amount of detail required by the type of appraisal report. The reliability of the data, the analyses performed, and the final conclusion of value should be presented in both the sales comparison approach and, where appropriate, the final opinion of value.

The sales comparison approach is a significant and essential part of the valuation process, even when its reliability is limited. Although appraisers cannot always properly identify and quantify how the factors affecting property value are different, they can still use the sales comparison approach to determine a probable range of value in support of a value indication derived using one of the other approaches. Furthermore, the comparison process often provides data needed to apply the other approaches—e.g., overall capitalization rates for the income capitalization approach or depreciation estimates for the cost approach.

Income multipliers, capitalization rates, and yield rates are applied in the income capitalization approach to value, but it is appropriate to extract such rates and factors from comparable properties in sales comparison analysis. Comparable prices are not adjusted on the basis of differences in net operating income per unit because rents and sale prices tend to move in relative tandem. However, the appraiser should consider why the income from units varies among the sale properties. Sensitivity and trend analyses may be performed to gain an understanding of this variance.

For example, an appraiser may analyze sales of income-producing properties to derive potential and effective gross income multipliers, overall and equity capitalization rates, and even total property yield rates. These factors are not adjusted quantitatively. Instead, the appraiser considers their ranges and the similarities and differences between the subject and comparable sale properties that cause the multipliers and rates to vary. The appraiser then selects the rate from within the bracket that is most appropriate to the property being appraised for use in the income capitalization approach.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 31
POWERS AND DUTIES OF TOWNS

Powers

Section 31:3

31:3 In General. – Towns may purchase and hold real and personal estate for the public uses of the inhabitants, and may sell and convey the same; may recognize unions of employees and make and enter into collective bargaining contracts with such unions; and may make any contracts which may be necessary and convenient for the transaction of the public business of the town.

Source. RS 31:3. CS 32:3. GS 34:3. GL 37:3. PS 40:3. PL 42:3. RL 51:3. RSA 31:3. 1955, 255:1, eff. July 14, 1955.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 38
MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS

Section 38:1

38:1 Definitions. – In this chapter:

I. ""Commission" means the public utilities commission, unless the context otherwise indicates.

II. ""Utility" means any public utility engaged in the manufacture, generation, distribution, or sale of electricity, gas, or water in the state.

III. ""Municipality" means any city, town, unincorporated town, unorganized place, or village district within the state.

IV. ""Municipal water company" means any water distribution system or water supply utility, owned or operated by a municipality, whether as a municipal department, separate company, or otherwise.

V. ""Regional water district" means any regional water district formed pursuant to RSA 53-A, for the purpose of providing and assuring the provision of an adequate and sustainable supply of clean water.

Source. 1997, 206:1, eff. July 1, 1997. 2003, 281:8, eff. July 18, 2003.

Section 38:2

38:2 Establishment, Acquisition, and Expansion of Plants. – Any municipality may:

I. Establish, expand, take, purchase, lease, or otherwise acquire and maintain and operate in accordance with the provisions of this chapter, one or more suitable plants for the manufacture and distribution of electricity, gas, or water for municipal use, for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized, or directed by the commission.

II. For these purposes, take, purchase, and hold in fee simple or otherwise lease or otherwise acquire and maintain any real or personal estate and any rights therein, including water rights.

III. Do all other things necessary for carrying into effect the purposes of this chapter.

IV. Excavate and dig conduits and ditches in any highway or other land or place, and erect poles, place wires, and lay pipes for the transmission and distribution of electricity, gas, and water in such places as may be deemed necessary and proper.

V. Change, enlarge, and extend the same from time to time when the municipality shall deem necessary, and maintain the same, having due regard for the safety and welfare of its citizens and security of the public travel.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:2-a

38:2-a Establishment, Acquisition, and Expansion of Plants; Regional Water Districts. – Any regional water district may:

I. Establish, expand, purchase, lease, or otherwise acquire and maintain and operate in accordance

with the provisions of this chapter, one or more suitable plants for the manufacture and distribution of water for the use of municipalities that are members of the regional water district and for such other purposes as may be permitted, authorized, or directed by the commission.

II. For these purposes, purchase and hold in fee simple or otherwise lease or otherwise acquire and maintain any real or personal estate and any rights therein, including water rights.

III. Do all other things necessary for carrying into effect the purposes of this chapter.

IV. Excavate and dig conduits and ditches in any highway or other land or place, and erect poles, place wires, and lay pipes for the distribution of water in such places as may be deemed necessary and proper.

V. Change, enlarge, and extend the same from time to time when the regional water district shall deem necessary, and maintain the same, having due regard for the safety and welfare of the citizens of the member municipalities and security of the public travel.

VI. No regional water district shall have the authority to take property by eminent domain.

Source. 2003, 281:9, eff. July 18, 2003.

Section 38:3

38:3 By Cities. – Any city may initially establish such a plant after 2/3 of the members of the governing body shall have voted, subject to the veto power of the mayor as provided by law, that it is expedient to do so, and after such action by the city council shall have been confirmed by a majority of the qualified voters at a regular election or at a special meeting duly warned in either case. Such confirming vote shall be had within one year from the date of the vote to establish such a plant, and if favorable, shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:3-a

38:3-a By Regional Water Districts. – Any regional water district may initially establish such a plant after 2/3 of the members of the governing body of the district shall have voted affirmatively, and a majority of the constituent municipalities of the district by a majority vote of their legislative bodies have confirmed that vote. Such confirming vote shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the constituent municipalities within 2 years thereafter.

Source. 2003, 281:10, eff. July 18, 2003.

Section 38:4

38:4 By Towns or Village Districts. – Any town or village district may initially establish such a plant after 2/3 of all the voters present and voting at an annual or special meeting, duly warned in either case, have voted by ballot with the use of the checklist that it is expedient to do so. A favorable vote to establish such a plant shall create a rebuttable presumption that such action is in the public interest. If such vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:5

38:5 By Unincorporated Towns and Unorganized Places. – Any unincorporated town or unorganized place may initially establish such a plant after 2/3 of the members of the county convention shall have voted that it is expedient to do so, and, if there are any registered voters in that unincorporated town or unorganized place, after such action by the county convention shall have been confirmed by a majority of the qualified votes in that unincorporated town or unorganized place at a regular election or at a special meeting duly warned in either case. Such confirming vote shall be had within one year from the date of the vote to establish such a plant, and if favorable, shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:6

38:6 Notice to Utility. – Within 30 days after the confirming vote provided for in RSA 38:3, 38:4, or 38:5 the governing body shall notify in writing any utility engaged, at the time of the vote, in generating or distributing electricity, gas, or water for sale in the municipality, of the vote. The municipality notifying any utility in such manner may purchase all or such portion of the utility's plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, and shall purchase that portion, if any, lying without the municipality which the public interest may require, pursuant to RSA 38:11 as determined by the commission. The notice to such utility shall include an inquiry as to whether the utility elects to sell, in the manner hereinafter provided, that portion of its plant and property located within or without the municipality which the municipality has identified as being necessary for the municipal utility service.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:7

38:7 Reply by Utility. – The utility shall reply to the inquiry provided for in RSA 38:6 by delivering its answer in writing to the governing body within 60 days of the receipt of the inquiry. If the reply is in the negative, or if the reply is not made within the 60 days, the utility thereby forfeits any right it may have had to require the purchase of its plant and property by the municipality, and the municipality may proceed to acquire the plant as provided in RSA 38:10. If the reply is in the affirmative, the utility shall submit the price and terms it is willing to accept for all of its plant and property identified by the municipality in its inquiry, together with a detailed schedule of such plant and property with proper evidence of title. All of the plant and property identified by the municipality shall at all reasonable times thereafter be open to the examination of the officers and agents of the municipality and others charged with the duty of determining the fair value of the property.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:8

38:8 By Agreement. – The governing body of a municipality may negotiate and agree with the utility upon the price to be paid for such plant and property; provided, however, that such agreement shall not be binding upon the municipality until ratified pursuant to RSA 38:13.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:9

38:9 Valuation. –

I. If the municipality and the utility fail to agree upon a price, or if it cannot be agreed as to how much, if any, of the plant and property lying within or without the municipality the public interest requires the municipality to purchase, or if the schedules of property submitted in accordance with RSA 38:7 are not satisfactory, either the municipality or the utility may petition the commission for a determination of these questions.

II. The commission, after proper notice and hearing, shall decide the matters in dispute.

III. When required to fix the price to be paid for such plant and property, the commission shall determine the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner. In the case of electric utilities, such amount shall be limited to the value of such plant and property and the cost of direct remedial requirements, such as new through-connections in transmission lines, and shall exclude consequential damages such as stranded investment in generation, storage, or supply arrangements which shall be determined as provided in RSA 38:33.

IV. The expense to the commission for the investigation of the matters covered by the petition, including the amounts expended for experts, accountants, or other assistants, and salaries and expenses of all employees of the commission for the time actually devoted to the investigation, but not including any part of the salaries of the commissioners, shall be paid by the parties involved, in the manner fixed by the commission.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:10

38:10 Construction or Condemnation. – If the utility shall have replied to the inquiry provided for in RSA 38:7 in the negative or if it shall have failed to reply within the time prescribed in RSA 38:7, the municipality, in the event that it shall have passed the vote or votes required in RSA 38:3, 38:4, and 38:5 and after the commission upon proper notice and hearing has determined that it is in the public interest to do so, may construct a municipal plant or may take all or any portion of such private plant and property by condemnation, paying therefor just compensation determined in the manner provided in RSA 38:9.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:11

38:11 Public Interest Determination by Commission. – When making a determination as to whether the purchase or taking of utility plant or property is in the public interest under this chapter, the commission may set conditions and issue orders to satisfy the public interest. The commission need not make any public interest determinations when the municipality and utility agree upon the sale of utility plant and property.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:12

38:12 Expansion of Existing Municipals. – A municipality that has an existing municipal plant may expand such plant or may purchase or take, in the manner prescribed in RSA 38:6-11 and RSA 38:33, all or a portion of such plant owned by a utility which is necessary for expanded municipal utility service. Such action shall not require any further vote under RSA 38:3, 38:4, or 38:5.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:13

38:13 Ratification. – Within 90 days of the final determination of the price to be paid for the plant and property to be acquired under the provisions of RSA 38:8, 38:9 or 38:10 and any consequential damages under RSA 38:33, the municipality shall decide whether or not to acquire the plant and property at such price by a vote to issue bonds and notes pursuant to RSA 33-B as may be necessary and expedient for the purpose of defraying the cost of purchasing or taking the plant, property, or facilities of the utility which the municipality may thus acquire. The municipality is authorized to hold a special meeting, if necessary, to take such vote without having to petition the superior court for permission to do so. An affirmative vote under RSA 33-B shall constitute ratification on the part of the municipality of the final determination of the price to be paid for the plant and property under the provisions of RSA 38:8, 38:9, or 38:10 and any consequential damages under RSA 38:33. If the money is so raised it shall immediately be paid to the utility, which shall thereupon execute a proper conveyance and surrender the plant and property to the municipality. If the ratifying vote provided for in this section shall be in the negative, no other action under this chapter shall be had during the ensuing period of 2 years.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:13-a

38:13-a Aggregate Municipal Revenue Bonds. – If the commission orders divestiture of generation facilities in the implementation of electric utility restructuring under RSA 374-F, any municipality which has voted to acquire a hydro-electric facility as provided in RSA 38 may jointly issue with any other municipality which has also voted to acquire a hydro-electric facility as provided in RSA 38 municipal revenue bonds and notes pursuant to RSA 33-B as may be necessary and expedient for the purpose of defraying the cost of purchasing or taking such hydro-electric generation facilities. Such municipal revenue bonds or notes may be in the aggregate of the total cost of purchasing or taking such generation facilities as set forth in RSA 33-B:3 and may be issued in the joint names of any such municipalities in accordance with their respective interests therein. In all other respects, the provisions of RSA 33-B shall apply to the issuance of such municipal revenue bonds and notes.

Source. 2000, 164:2, eff. May 23, 2000.

Section 38:14

38:14 Operation of Plant. – A municipality, which has so acquired the plant, property, or facilities of a public utility in any other municipality, may operate within such other municipality as a public utility with the same rights and franchises which the owners of such outlying plant, as purchased, would have had such purchase not been made. The operation by a municipality outside its own limits shall be subject to the jurisdiction of the commission except as provided in RSA 362. If the outlying municipality shall itself vote to establish a municipal plant all the provisions of this chapter shall be binding as to such determination.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:15

38:15 Taking Property. – Any such municipality may enter upon and take by eminent domain any land or any interest in land or water right within its limits, or in the case of a village district within the limits of the town or towns within which it is situated, which may be necessary for the construction, extension, or maintenance of its plant, and shall pay all damages sustained thereby, or by any other thing done under the authority of this chapter.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:16

38:16 Damages. – If the municipality shall not agree with the owner of the property referenced in RSA 38:15 as to damages, either party may apply to the superior court in the county where the town or district is located, or if the municipality is a village district then to the board of selectmen of the town or towns within which the village district is situated, to have the same laid out and the damages determined and proceedings thereon shall be as upon a petition for the laying out of a highway.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:17

38:17 Supply Contracts. – Any such municipality may contract to supply electricity, gas, or water to individuals, corporations, other municipalities, or any person for any of the purposes named or contemplated in this chapter, and make such contracts, and establish such regulations and such reasonable rates for the use thereof, as may from time to time be authorized by the commission.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:18

38:18 Commissioners. – For the more convenient management of any such electric, gas, or water works system, any such municipality may vest the construction, management, control, and direction of the same in a board of commissioners to consist of 3 or more citizens of such municipality, the commissioners to have such powers and duties as the municipality may prescribe. Their term of office shall be for 3 years and until their successors are elected and qualified. The first board of commissioners may be chosen for terms of one, 2, and 3 years, respectively, by the legal voters of the municipality at any legal meeting or election at which the provisions of this chapter are accepted, or at any special meeting or election thereafter called for that purpose, and their successors shall be elected at each annual meeting or election thereafter in the manner or form as the municipality may determine.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:19

38:19 Appointment. – The commissioners may be appointed by the mayor and board of aldermen or city council, by the selectmen of the town, or by the commissioners of the district if the municipality

fails to elect or votes to allow appointments.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:20

38:20 Compensation and Organization. – The compensation of the commissioners shall be fixed by the municipality. They shall be sworn to the faithful discharge of their duties. They shall annually organize by choosing one of their number as chairperson of their board. They shall appoint a clerk and a superintendent of the works and such other officers as they may deem necessary, and shall thereupon furnish a certificate of such organization to the clerk of the municipality, who shall record the same in the clerk's records. The commissioners shall fix the compensation of all officers and agents appointed by them, and all officers and agents shall be sworn to the faithful discharge of their duties.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:21

38:21 Reports. – The commissioners shall annually, at the time other city, town, or district officers report, make a report to the municipality of the condition of the plant financially and otherwise, showing the funds of the department, the expenses and income of the department, and all other material facts. This report shall be published in the annual report of the municipality.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:22

38:22 Liens and Collection of Charges. –

I. All charges for services furnished to patrons by a municipally owned electric, gas, or water works shall create a lien upon the real estate where such services are furnished.

II. A municipality may use any of the following collection procedures for charges and the use of one collection procedure for one service shall not preclude the use of a different collection procedure for another service:

(a) A municipality may commit bills for charges to the tax collector with a warrant signed by the appropriate municipal officials requiring the tax collector to collect them. The tax collector shall have the same rights and remedies, including a lien on the real estate, and be subject to the same liabilities in relation thereto as in the collection of taxes as provided in RSA 80; provided, however, that the real estate lien shall continue for 18 months from the date of the last unpaid bill.

(b) The official or board responsible for administering the municipal utility may collect charges for services by direct billing on any periodic basis it may choose. All charges which are delinquent may be committed to the tax collector with a warrant signed by the appropriate municipal officials requiring the tax collector to collect them. The tax collector shall have the same rights and remedies, including a lien on the real estate, and be subject to the same liabilities in relation thereto as in the collection of taxes as provided in RSA 80; provided, however, that the real estate lien shall continue for 18 months from the date of the last unpaid bill.

(c) If the official or board responsible for administering the municipal utility has not committed the charges to the collector of taxes, the municipality shall have a lien upon the real estate where the services were furnished and the lien shall continue for 18 months from the date of the last unpaid bill, unless the municipality records in the registry of deeds for the county in which the land is situated a notice of lien, in which case the lien shall continue for 6 years from the date of the last unpaid bill. The

lien may be enforced in a suit by the municipality against the owner of the real estate. In such a suit, the municipality shall have the right to a judgment for per year charges, interest at the rate of 12 percent from the date of the last unpaid bill to the date of judgment, and costs. The records in the municipal department which furnished the services shall be sufficient notice to maintain suit upon the lien against subsequent purchasers or attaching creditors of the real estate.

(d) When the services were furnished to some person or legal entity other than the owner of the real estate, the liens provided for in this paragraph shall be effective against the owner of the real estate only for charges of which the owner of the real estate was notified by the municipality within 120 days of the date the charges became delinquent; provided, however, that a municipality may meet these notice requirements by mailing to the owner of the real estate copies of the bills for services at the same time bills are furnished to the person or legal entity which received the services.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:23

38:23 Security Deposits From Tenants. – Notwithstanding any other provision of law, any public utility, including any municipal corporation, providing electricity or gas services other than for resale to a customer who is not the owner of the premises serviced by the utility and who has a separate electric or gas meter, for the premises serviced, may obtain a security deposit from the customer only, and shall not obtain a security deposit from the owner of the premises. The owner of the premises shall not be liable for the failure of a tenant to pay the utility bill when such tenant's premises has a separate meter, and the utility shall not have any lien on the property of the landlord under RSA 38:22 for the tenant's failure to pay the utility bill.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:24

38:24 Effect on City Charters. – Nothing contained in this chapter shall affect, alter or change the provisions of any city charter with respect to the management, control, and direction of electric, gas, or water works.

Source. 1997, 206:1, eff. July 1, 1997.

Additional Provisions for Water Systems

Section 38:25

38:25 Water Control. – Any municipality which shall have received an order from the department of environmental services under the provisions of RSA 147, 485 or 485-A shall proceed forthwith, after a majority vote in favor of such action, by the governing body, to acquire whatever easements and lands as are necessary to comply with the order and may enter upon, for the purpose of survey leading to land description, any land within the municipality. In so proceeding, the selectmen of the town, commissioners of the district, county commissioners, or mayor and aldermen of a city shall institute any necessary land taking in accordance with the provisions of RSA 38:15 and RSA 38:16, and anything contained in RSA 231 or in the statutes generally notwithstanding, the decision of the officials authorized by this section to institute proceedings shall not be vacated and any subsequent appeal or other action by the owner or owners shall be based solely on the amount of damages assessed, and the

duly authorized agents of the municipality shall have full right of immediate entry for the purposes of detailed surveys, borings, or the conduct of any and all other actions necessary or desirable to aid the municipality in the implementation of the order of the department.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:25-a

38:25-a Village District Hearings. – Prior to authorizing the expansion of a franchise area of a water company owned or operated by a water village district, the public utilities commission shall, after notice, hold a public hearing in each town or city in which the village district is located, at which it shall hear testimony and receive evidence from any interested party.

Source. 2002, 174:1, eff. May 15, 2002.

Section 38:26

38:26 Bylaws and Ordinances. –

I. In municipalities with public water systems the governing body, or the board of water commissioners, if any, may adopt such ordinances and bylaws relating to the system or structures as required for proper maintenance and operation.

II. Any person who violates any ordinance or bylaw adopted pursuant to paragraph I of this section shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:27

38:27 Assessment for Water Supply. – The governing body, or board of water commissioners if any, may assess upon the persons who are served by the water system, or whose lands receive special benefit from the water system, their just share of the expense of constructing, acquiring, and operating the system or paying any capital debt or interest incurred for the system.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:28

38:28 Water Rates. – For the defraying of the cost of acquisition, construction, payment of the interest on any debt incurred, management, maintenance, operation, and repair of water systems, or construction, enlargement, or improvement of such systems, the governing body, or the board of water commissioners, if any, may establish a scale of rates to be called water rates, may prescribe the manner in which and the time at which such rates are to be paid and may change such scale from time to time as may be deemed advisable. The amount of such rates may be based upon the consumption of water on the premises connected to the water system, or the number of persons served on the premises, or upon some other equitable basis.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:29

38:29 Water Funds. –

I. The funds received from the collection of water rates shall be kept as a separate and distinct fund to be known as the water fund. Such fund shall be allowed to accumulate from year to year, shall not be commingled with town or city tax revenues, and shall not be deemed part of the municipality's general fund accumulated surplus. Such fund may be expended only for the purposes specified in RSA 38:28, or for the previous expansion or replacement of water lines or water systems.

II. Except when a capital reserve fund is established pursuant to paragraph III, all water funds shall be held in the custody of the municipal treasurer. Estimates of anticipated water rate revenues and anticipated expenditures from the water fund shall be prepared and submitted to the governing body as set forth in RSA 32:3, if applicable, and shall be included as part of the municipal budget submitted to the local legislative body for approval. If the municipality has a properly established board of water commissioners, then notwithstanding RSA 41:29 or RSA 48:16, the treasurer shall pay out amounts from the water fund only upon order of the board of water commissioners. Expenditures shall be within amounts appropriated by the local legislative body.

III. At the option of the local governing body, or of the board of water commissioners, if any, all or part of any surplus in the water fund may be placed in one or more capital reserve funds held in the custody of the trustees of trust funds pursuant to RSA 35:7. If such a reserve fund is created, then the governing body, or board of water commissioners, if any, may expend such funds pursuant to RSA 35:15 without prior approval or appropriation by the local legislative body, but all such expenditures shall be reported to the municipality pursuant to RSA 38:21. This paragraph shall not be construed to prohibit the establishment of other capital reserve funds for any lawful purpose relating to municipal water systems.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:30

38:30 Protection of Water Supply. – Any municipality or municipal water company supplying water to the public for domestic use shall have the power to take by the exercise of the right of eminent domain any property needed to protect the purity of the water so supplied, upon petition to the superior court or in the case of a village district to the board of selectmen of the town or towns within which the district is situated and proceedings thereon as in case of a petition for the laying out of a highway.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:31

38:31 Discontinuance of Service. –

I. Notwithstanding any other provision of law to the contrary, except as provided in paragraph V of this section, no municipal water company shall disconnect service to a customer if any part of the service provided accrues to the benefit of one or more parties known by company to be residential tenants, unless the company gives written notice to the tenants. Such notice shall set forth:

(a) The date on or after which the company proposes to disconnect service.

(b) A statement that the reason for disconnection is a dispute between the company and the landlord.

(c) A statement that the tenant should contact the landlord for more information.

(d) An address and telephone at which the tenant may contact the utility in order to make arrangements to maintain service.

II. A municipal water company shall refrain from terminating service to the affected premises if so requested by the tenant, provided that the tenant agrees to be responsible for service provided as of the

date of the tenant's request. However, the water company may continue to list the landlord's past due balance on the tenant's bill, and the lien created pursuant to RSA 38:22 shall include any past due charges which accrue after the company begins billing the tenant. The utility shall provide direct service to the person requesting it on terms and conditions applicable to all residential customers. Such service may include other charges, such as sewer and fire protection service, if customarily included with water service billing.

III. Immediately upon learning that a tenant has been disconnected without the notice required in paragraph I, the water company shall reconnect service and may charge a reasonable reconnection fee which may be added to the existing arrearage.

IV. The notice required by paragraph I shall be provided to the tenant no less than 7 days in advance of the proposed disconnection, by posting a conspicuously lettered notice on the main entrance door to each building in which service is being terminated. In addition, the company shall post the notice on a back door or side door to which the company has reasonable access, or in a common area of each building. The company, at its option, may notify the tenants in the affected property by mail rather than by posting.

V. The notice to tenants required by paragraph I of this section shall not be required when necessary to avoid danger to life or property, and upon the order of a duly constituted public authority such as police, firefighters, public health officer, and building inspectors.

Source. 1997, 206:1, eff. July 1, 1997.

Additional Provisions for Electric Systems

Section 38:32

38:32 Exemption for Municipal Small Scale Power Facility. – Except in municipalities which have acquired, expanded, or established a plant under this chapter, the development by a municipality of any small scale power facility, as defined in RSA 374-D:1, IV shall not be subject to the provisions of this chapter. Nothing in this section shall be construed as exempting municipalities from the provisions of this chapter with respect to the acquisition of a utility plant and equipment if there exists a dispute between the municipality and the utility.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:33

38:33 Consequential Damages. – In matters over which the Federal Energy Regulatory Commission does not have jurisdiction, or has jurisdiction but chooses to grant jurisdiction to the state, the commission shall determine, to a just and reasonable extent, the consequential damages such as stranded investment in generation, storage, or supply arrangements resulting from the purchase of plant and property from a utility and shall establish an appropriate recovery mechanism for such damages. The commission need not make such a determination when the municipality and utility agree upon the sale of utility plant and property.

Source. 1997, 206:1, eff. July 1, 1997. 2000, 164:3, eff. May 23, 2000.

Section 38:34

38:34 Unbundling Rates and Open Access. – Municipal electric utilities established after July 1,

1997, shall unbundle their rates and allow for open access to competitive retail electric supply markets as soon as retail electric competition is certified to exist anywhere in the state pursuant to RSA 38:36. Municipal electric utilities established prior to July 1, 1997, may voluntarily unbundle their rates and allow open access to competitive retail electric supply markets.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:35

38:35 Financial Responsibility. –

I. Any retail electric customer located within a municipality that has established a municipal electric utility after July 1, 1997, but who is not within the service area of such utility, shall not be responsible for, and no entity may require the customer to pay, through taxes or otherwise, any costs associated with such utility except for electric power and services consumed directly by the municipality, and any electric power and services sold by the utility to the customer.

II. Any retail electric customer located within the service area of a municipal electric utility established after July 1, 1997, who does not purchase generation services by or acquired through such municipal electric utility, as allowed by RSA 38:34, shall not be responsible for, and no entity may require the customer to pay, through taxes or otherwise, any costs of generation services from such municipal electric utility, except for electric power consumed directly by the municipality. Nothing in this paragraph shall prevent any property owners or retail electric customers from signing contracts of any duration with such municipal electric utility after retail electric competition is certified to exist pursuant to RSA 38:36, and being bound by their terms, including damages for termination.

III. If any municipal electric utility acquires existing plant and equipment used for the generation of electric power, the municipal electric utility shall make payments in lieu of property taxes in the amount that the plant and equipment would have paid taxes if they had been owned by a private owner. Such payments in lieu of taxes shall be included in ""costs of generation services" as provided in paragraph II.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:36

38:36 Certification. – The chairman of the public utilities commission shall certify to the secretary of state the date that retail electric competition exists in each portion of the state.

Source. 1997, 206:1, eff. July 1, 1997.

Section 38:37

38:37 Limitation on Purchase, Construction, or Operation of Certain Fossil Fuel Facilities. –

I. Except as provided in paragraph II, no municipal electric utility or municipality may, after July 1, 2000, purchase, construct, or operate any fossil fuel plants for the manufacture of electricity and sale to customers beyond the bounds of the municipality.

II. Following consultation with the department of environmental services to adequately address present and future environmental impacts, a municipality or a municipal electric utility may petition the department for specific permission for such acquisition, operation, or construction.

Source. 2000, 293:4, eff. June 21, 2000.

Broadband Access

Section 38:38

38:38 Broadband Access. –

I. In this subdivision:

(a) ""Access tariff" means the fee charged on a monthly or annual basis to broadband carriers for access to the broadband infrastructure.

(b) ""Areas not served" means any part of a municipality without a wireless or facilities based broadband service or a wireless or facilities based broadband service provider. Wireless shall not include subscription satellite service.

(c) ""Broadband" means the transmission of information, between or among points specified by the user, with or without change in the form or content of the information as sent and received, at rates of transmission defined by the Federal Communications Commission as ""broadband."

(d) ""Broadband carrier" means any provider of broadband services, except aggregators of broadband services, as defined in section 226 of the 1996 Telecommunications Act.

(e) ""Broadband infrastructure" means all equipment and facilities, including all changes, modifications, and expansions to existing facilities, as well as the customer premises equipment used to provide broadband, and any software integral to or related to the operations, support, facilitation, or interconnection of such equipment, including upgrades, and any installation, operations and support, maintenance, and other functions required to support the delivery of broadband.

(f) ""Broadband service" means the offering of broadband for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(g) ""Open network" means any broadband infrastructure which is open to any third party users in a nondiscriminatory manner on a fair and equitable basis using publicly available access tariffs for services.

(h) ""Open network interfaces" means the technical and operational means, manners, and methods for any third party access to the broadband infrastructure, which shall be provided on the basis of generally acceptable industry standards available at the time of access.

II. A municipality may use its broadband infrastructure for the purpose of providing an open network and assuring that third party access is available in accordance with current state and federal regulations.

Source. 2006, 225:6, eff. July 31, 2006.

Section 38:39

38:39 Broadband Access Tariffs. – For defraying the cost of acquisition, construction, payment of the interest on any debt incurred, management, maintenance, operation, and repair of broadband infrastructure, or the construction, enlargement, or improvement of such systems, the governing body may establish a scale of rates called access tariffs, may prescribe the manner and the time for the payment of such tariffs, and may change such tariffs when it deems advisable.

Source. 2006, 225:6, eff. July 31, 2006.

Section 38:40

38:40 Broadband Fund. –

I. The funds received from the collection of access tariffs shall be kept as a separate fund to be known as the broadband fund. Such fund shall be allowed to accumulate from year to year, shall not be

commingled with town or city tax revenues, and shall not be deemed part of the municipality's general fund accumulated surplus. Such fund may be expended only for the purposes specified in RSA 38:38, or for the previous expansion or replacement of broadband infrastructure.

II. Except when a capital reserve fund is established pursuant to paragraph III, all broadband funds shall be held in the custody of the municipal treasurer. Estimates of anticipated revenues and anticipated expenditures from the broadband fund shall be prepared and submitted to the governing body as a special warrant article as set forth in RSA 32, if applicable, and shall be included as part of the municipal budget submitted to the local legislative body for approval. Expenditures shall be within amounts appropriated by the local legislative body.

III. At the option of the local governing body, all or part of any surplus in the broadband fund may be placed in one or more capital reserve funds held in the custody of the trustees of trust funds pursuant to RSA 35:10. If such a reserve fund is created, then the governing body, may expend such funds pursuant to RSA 35:15 without prior approval or appropriation by the local legislative body, but all such expenditures shall be reported to the municipality pursuant to RSA 38:41. This paragraph shall not be construed to prohibit the establishment of other capital reserve funds for any lawful purpose relating to broadband access.

Source. 2006, 225:6, eff. July 31, 2006.

Section 38:41

38:41 Broadband Fund Report. – The governing body shall annually make a report of the broadband fund to the municipality showing the expenses and income of the fund, and all other material facts. This report shall be published in the annual report of the municipality.

Source. 2006, 225:6, eff. July 31, 2006.

Section 516:29-a

516:29-a Testimony of Expert Witnesses. –

I. A witness shall not be allowed to offer expert testimony unless the court finds:

(a) Such testimony is based upon sufficient facts or data;

(b) Such testimony is the product of reliable principles and methods; and

(c) The witness has applied the principles and methods reliably to the facts of the case.

II. (a) In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:

(1) Have been or can be tested;

(2) Have been subjected to peer review and publication;

(3) Have a known or potential rate of error; and

(4) Are generally accepted in the appropriate scientific literature.

(b) In making its findings, the court may consider other factors specific to the proffered testimony.

Source. 2004, 118:1, eff. July 16, 2004.

one of the bound volumes to each board of county commissioners, and deposit the others in the state library.

1875, 29:1, 2. 1878, 44:1. G. L. 28:1. 1887, 7:2. P. S. 30:1.

3. Contents; Form. The reports of the several officers named in section 1 shall contain a summarized account of all their transactions which concern the county, for the current year ending as aforesaid, and shall be prepared, in a uniform manner alike in each county, so that accurate statistics can be compiled from them, to wit: Total cost of maintaining a county farm; total amount of outdoor relief given; number and list of paupers maintained at the farm; the number and list of feeble-minded, and the number and list of prisoners, together with the cost *per capita* a week at the county farms, computed by the same method in each county; number and list of people helped outside the farm and the towns in which they reside; and said county commissioners shall return such statistics to the state board of charities on or before July first in each year, on blanks furnished by the board.

1878, 44:2. G. L. 28:2. P. S. 30:2. 1901, 26:1.

4. Convention Proceedings. The county commissioners of each county shall publish attested copies of the proceedings of the county convention, with the printed reports of the county officers for the year in which such proceedings occurred.

1885, 21:1. P. S. 30:3.

TITLE VIII

TOWNS, CITIES AND VILLAGE DISTRICTS

CHAPTER 42

POWERS AND DUTIES OF TOWNS

1. Public Corporations. Every town is a body corporate and politic, and by its corporate name may sue and be sued, prosecute and defend, in any court or elsewhere.

R. S. 31:1. C. S. 32:1. G. S. 34:1. G. L. 37:1. P. S. 40:1. iii, 524. iv, 92. v, 13, 280. xii, 409. xvi, 450. xxiii, 83. xxxiv, 351. xxxv, 530. xxxvi, 234, 424. xxxviii, 21. xxxix, 213. xli, 111. xliii, 542. xliv, 414. lxviii, 341.

2. Parishes. All places incorporated by the name of parishes with town privileges are towns, and are entitled to the privileges, vested with all the powers, and subject to all the liabilities, of towns.

R. S. 31:2. C. S. 32:2. G. S. 34:2. G. L. 37:2. P. S. 40:2.

Powers

3. In General. Towns may purchase and hold real and personal estate for the public uses of the inhabitants, and may sell and convey the same; and may make any contracts which may be necessary and convenient for the transaction of the public business of the town.

R. S. 31:3. C. S. 32:3. G. S. 34:3. G. L. 37:3. P. S. 40:3. ii, 20, 508. iii, 524. v, 458. vii, 571. xlii, 125. lxx, 323, 397. lxxiii, 202. lxxx, 522.

4. Appropriations. Towns may at any legal meeting grant and vote such sums of money as they shall judge necessary for the following purposes:

I. SCHOOLS. For the support of schools and to build and repair school houses.

II. PAUPERS. To maintain the poor.

III. HIGHWAYS. To lay out, build and repair highways, sidewalks and bridges.

IV. LIGHTS. To light streets.

V. MEETING-HOUSES. To repair meeting-houses owned by the town, so far as to render them useful for town purposes.

P. L. Ch. 42, s. 4
P. VI
1931 Ch. 90, s. 2

VI. HOSPITALS. To aid hospitals.

VII. ———, FREE BEDS. To obtain a free hospital bed for the use of such inhabitants of the town as have been entitled to receive assistance from the town by reason of their indigent circumstances for not less than a year, not exceeding three hundred dollars; or for the permanent endowment of a hospital bed for the use of such inhabitants, not exceeding five thousand dollars.

VIII. NURSING. To aid dispensaries established therein for tubercular patients, not exceeding one tenth of one per cent of their valuation, and to aid visiting or district nursing associations or the American Red Cross.

IX. ENLISTMENTS. To encourage voluntary enlistments in case of war or rebellion.

X. MEMORIALS. To procure and establish a monument, memorial building or testimonial to the services of soldiers and sailors of such town; to celebrate the return of its soldiers, and to provide a hall or other suitable meeting place for a post of the Grand Army of the Republic, located in the town.

XI. MEMORIAL DAY. To defray the expense of decorating the graves of soldiers and sailors who have served in the army or navy of the United States in time of war, not exceeding three hundred dollars yearly, to be given to and expended by committees appointed by the Grand Army of the Republic, the Spanish War Veterans or the American Legion, so long as they shall continue the services of Memorial Day as originally established and now observed, and thereafter to such persons or organizations as shall continue such services in the several towns.

P. L. Ch. 42, P. XI
1929 Ch. 17

XII. ARMORIES. To provide and maintain armories for military organizations stationed therein which form part of the New Hampshire National Guard or reserve militia, not exceeding five hundred dollars yearly for each organization.

XIII. FIRES. To provide means for the extinguishment of fires.

XIV. LIBRARIES. To establish and maintain public libraries and reading rooms, or to assist in the maintenance of any library or reading room that is kept open for the free use of all the inhabitants of the town.

XV. PARKS; CEMETERIES. To establish and maintain parks and commons, cemeteries and receiving tombs, and for erecting markers or headstones in any cemetery owned by the town.

XVI. SHADE TREES. To acquire, set out and maintain shade and ornamental trees in highways, cemeteries, commons and other public places.

XVII. PLAY GROUNDS. To establish and maintain suitable coasting and skating places, not exceeding five hundred dollars yearly, and to establish, equip and maintain suitable places for public play grounds.

XVIII. BAND CONCERTS. To aid free public band concerts, not exceeding eight hundred dollars yearly.

XIX. ADVERTISING. To issue and distribute circulars and other written or printed matter calling attention to the resources and natural advantages of the town.

XX. HISTORIES. To prepare and publish the history of the town.

XXI. OLD HOME WEEK. To defray the expenses of observing old home week, and for the celebration of anniversaries.

XXII. WEATHER RECORDS. To maintain and record weather observations.

P. L. Ch. 42, s. 4 P. XXIII 1931 Ch. 90, s. 1

XXIII. PHYSICIANS. To support a resident physician, in towns which otherwise would be without the services of such physician, the appropriation to be expended in quarterly payments.

XXIV. DETECTION OF CRIME. To procure the detection and apprehension of any person committing a felony therein.

XXV. MOTHS. To limit the ravages of and if possible to exterminate the brown tail moth and other insect pests.

XXVI. COUNSEL. In the case of towns which may be affected directly or indirectly by any attempted or actual abandonment of railroad facilities by any railroad in this state, to employ counsel and defray other expenses necessary to duly protect its interests against and, if possible, to prevent such attempted or actual abandonment of railroad transportation facilities.

XXVII. TOWN CHARGES. To defray all necessary charges arising within the town.

1849, 861:1. R. S. 31:4. C. S. 32:4. 1862, 2580:3. G. S. 34:4. 1868, 1:6; 26:1. 1872, 40:1. 1875, 39:1. 1876, 2:1. G. L. 37:4, 9; 49:10; 50:1. 1883, 69:3. 1889, 7:1; 82:1. P. S. 40:4. 1891, 1:1. 1895, 29:1. 1897, 23:1. 1899, 13:1, 2; 34:1. 1901, 8:1; 17:1; 54:1. 1905, 18:1. 1909, 73:1. 1911, 81:1; 146:1. 1913, 58:1. 1915, 58:1; 64:1. 1917, 225:1. 1919, 17:3; 41:1. 1923, 27:1, 2. 1925, 11:1. xxi, 81. xxvii, 104. xxxv, 189. xli, 539. xlv, 9, 126, 526. lxvii, 480, 508. lxviii, 341. lxx, 323. lxxi, 374, 471, 577. lxxii, 483, 543. lxxvii, 374. lxxviii, 387. lxxx, 36.

5. ——, **At Special Meetings.** No money shall be raised or appropriated at any special town meeting except by vote by ballot, nor unless the ballots cast at such meeting shall be equal in number to at least one half of the number of legal voters borne on the check-list of the town at the annual or biennial election next preceding such special meeting; and such check-list shall be used at any meeting upon the request of ten legal voters of the town. This section shall not apply to money to be raised for the public defense or any military purpose in time of war.

P. L. Ch. 42, s. 5 as amended by 1927 Ch. 56 1931 Ch. 129

P. L. Ch. 42, s. 5 1927 Ch. 56, s. 1 & 3

1876, 2:1. 1881, 69:3. P. S. 40:4. 1917, 167:1.

6. ——, **For Holidays.** City councils may, at any legal meeting, grant and vote money, not exceeding five hundred dollars, for providing municipal Christmas trees or for public patriotic exercises for Memorial Day, Independence Day or other holidays.

1909, 77:1. 1921, 42:1.

7. **Contract with Hospital.** The treasurer of any town or city which provides a free hospital bed shall make a contract with the hospital concerning the admission of patients, and the rates, rules and regulations governing such admission shall be approved by the selectmen of towns or the city council of cities before the payment of any money to the hospital.

1899, 13:3.

8. **Assessors' Association.** For the encouragement of equitable taxation and the education of public officials in tax problems, each town and city shall annually pay to the New Hampshire Assessors' Association the sum of two dollars, which shall provide annual membership in said association for the selectmen, assessors, town or city clerks, treasurers and collectors.

1921, 51:1.

9. **Legislative Counsel.** Towns may at any legal meeting authorize the employment by the selectmen of counsel in legislative matters in which the town is directly or indirectly interested, or may ratify the previous employment by the selectmen of such counsel and may grant and vote money therefor.

1901, 62:1.

Emergency Borrowing

10. **When Allowed.** Towns may incur indebtedness and issue notes for temporary loans, other than loans in anticipation of taxes, in any case where moneys belonging to them are lost or rendered unavailable through any default, suspension of payment or other casualty. They may proceed in like manner where moneys received for the use of a school or village district, but not yet paid over thereto, are so lost or rendered unavailable.

1925, 1:1.

11. **Method.** The power may be exercised in cities by a two-thirds vote of the city councils. It may be exercised by the selectmen of towns and the governing boards of districts without vote of the inhabitants in town or district meeting. Provided, that no sum in excess of one hundred thousand dollars shall be so borrowed without vote of the city, town or district.

1925, 1:1.

12. **Amount; Debt Limit.** Loans so effected shall not exceed the amount of the funds so lost or unavailable; and the proceeds thereof shall be held in lieu of such funds and applied to the same uses. The loans shall not be included in determining the authorized borrowing capacity of the municipality.

1925, 1:1.

13. **Due Date; Refunding.** The notes originally issued for such loans shall be payable not later than the tenth day of December following the next annual tax assessment after their issue; but by vote of the city councils, or at a legal town or district meeting, such notes may be renewed from time to time in whole or in part pending determination of the amount recoverable on account of the funds, or may be refunded in whole or in part by the issue of bonds of the municipality subject in all other respects to the provisions of chapter 59.

1925, 1:1.

14. **Recovered Funds.** Whenever such municipality recovers any portion of the funds, the net sum so recovered shall be applied to the payment of any balance remaining unpaid on such notes or bonds.

1925, 1:1.

Forestry

15. **Purchase.** Towns may at any legal meeting grant and vote such

sums of money as they shall judge necessary to purchase, manage and improve lands for the purpose of growing wood and timber.
1913, 27:1.

16. **Management.** Any lands so purchased shall be managed under the direction of the state forester.
1913, 27:2.

17. **Proceeds.** After deducting necessary expenses, the net proceeds from the sale of wood and timber from such lands shall be paid into the town treasury.
1913, 27:3.

Trust Funds

18. **In General.** Towns may take and hold in trust gifts, legacies and devises made to them for the establishment, maintenance and care of libraries, reading-rooms, parks, cemeteries and burial lots, the planting and care of shade and ornamental trees upon their highways and other public places, and for any other public purpose that is not foreign to their institution or incompatible with the objects of their organization.
G. L. 49:7; 50:3. P. S. 40:5. 1901, 83:1. 1907, 70:1. liv, 18. lxvii, 180. lxix, 381. lxxvii, 110.

19. **For Cemeteries.** Towns shall take and hold in trust gifts, legacies and devises made to them for the care of cemeteries and burial lots when the terms of the gift, legacy or devise do not impose any liability upon the town beyond the amount of the gift, legacy or devise and the income thereof.
G. L. 49:7; 50:3. P. S. 40:5. 1901, 83:1. 1907, 70:1. liv, 18. lxix, 381. lxxvii, 60. lxxx, 36.

20. ——, **Optional.** Towns may receive from cemetery associations or individuals funds for the care of cemeteries or any lot therein, and the income thereof shall be expended by the town in accordance with the terms of the trust or contract under which the funds were received.
G. L. 49:7; 50:3. P. S. 40:5. 1901, 83:1. 1907, 70:1. liv, 18. lxxvii, 60.

21. **Trustees.** All such trusts shall be administered by a board of three trustees. One trustee shall be elected by ballot at each annual town meeting for a term of three years. The election shall be under a proper article in the warrant and upon a separate ballot. Vacancies shall be filled by the selectmen for the remainder of the term. In cities said trustees shall be chosen and hold their office for such term as shall be provided for by city ordinance.
1915, 162:2.

22. **Custody; Investments.** The trustees shall have the custody of all trust funds held by their town. The funds shall be invested only by deposit in some savings bank in this state, or in bonds, notes or other obligations of the United States government, or in state, county, town, city and school district bonds and the notes of towns or cities in this state; and when so invested the trustees shall not be liable for the loss thereof. The trustees may retain investments as received from donors, until the maturity thereof. P. L. Ch. 42, s. 22
1915, 162:3. 1917, 75:1; 171:1. 1929 Ch. 100

P. L. C. 42, s. 22 as amended by 1929 C. 100 1933 C. 46

23. **Expenditures.** Such funds, or the income thereof, to be expended, shall be paid to trustees or agents of the town established to carry out the objects designated by such trusts, and, if there be no such trustees or agents, then such expenditures shall be made by the full board of town trustees.
1915, 162:3. 1919, 96:1.

24. **Audit.** The accounts of the trustees shall be audited annually by the auditor of the town, the securities shall be exhibited to the auditor, and he shall certify the facts found by his audit and the list of all securities held. The trustees shall submit to the auditor a detailed statement of the securities held by them and the particular trust to which they belong, and exhibit to him a statement of all receipts and expenditures with proper vouchers. The reports of the trustees and of the auditor shall be printed in the annual report of the town.
1915, 162:3.

25. **Records.** The trustees shall keep a record of all trusts in a record book, which shall be open to the inspection of all persons in their town.
1915, 162:3.

26. **Compensation.** The trustees shall serve without pay, but their actual expenses shall be paid by the town.
1915, 162:4.

27. **Bond.** The trustees shall give a bond in such sum as the town shall direct, the expense thereof to be paid by the town. The expenses of said trustees and the expense of their bond shall be charged as incidental town charges.
1915, 162:5.

28. **Deposits.** Deposits in savings banks shall be made in the name of the town which holds the same in trust, and it shall appear upon the book thereof that the same is a trust fund.
1915, 162:7.

29. **Payment by Towns.** Each town shall pay over to the trustees the full amount of its trust funds.
1915, 162:6.

Power to Make By-Laws

30. **Purposes; Penalties.** Towns may make by-laws for the care, protection, preservation and use of the public cemeteries, parks, commons, libraries and other public institutions of the town; for the prevention of the going at large of horses and other domestic animals in any public place in the town; for the observance of Memorial Day, whereby interference with and disturbance of the exercises held under the auspices of the Grand Army of the Republic for such observance, by processions, sports, games or other holiday exercises, may be prohibited; to regulate the use of mufflers upon boats and vessels propelled by gasoline or naptha and operating upon the waters within the town limits; respecting the kindling, guarding and safe-keeping of fires, and for removing all combustible materials from any building or place, as the safety of property in the town may require; to regulate the operation of vehicles, except by railways as common carriers, upon their streets; to regulate the conduct of public dances; and for making and ordering

their prudential affairs. They may appoint all such officers as may be necessary to carry the by-laws into effect, and may enforce their observance by suitable penalties not exceeding ten dollars for each offense, to enure to such uses as they may direct.

R. S. 31:6 7. 1845, 242:1. C. S. 32:6, 7, 8. G. S. 34:5, 6, 7; 45:5. G. L. 37:5, 6, 7; 49:6. P. S. 40:7, 8. 1901, 5:1. 1909, 94:1. 1919, 86:3. 1925, 140:1. lxix, 30, 171.

31. **When in Force.** By-laws adopted by any town without limitation shall continue in force until altered or annulled by vote of the town or by-law.

R. S. 31:8. C. S. 32:9. G. S. 34:8. G. L. 37:8. P. S. 40:12.

Public Play Grounds

32. **Establishment; Management.** Any town may take land within the municipal limits in fee by gift, purchase or right of eminent domain, or may lease the same; and may prepare, equip and maintain it, or any other land belonging to the municipality and suitable for the purpose, as a public play ground; may conduct and promote thereon play and recreation activities; may equip and operate neighborhood center buildings; may operate public baths and swimming pools; and may employ such play leaders, play ground instructors, supervisors, recreation secretary, or superintendent and other officials as it deems best.

1917, 86:1 | P. L. Ch. 42, s. 32 | 1927 Ch. 98 |

33. **Tax.** Any town may raise annually a specific number of cents on each one hundred dollars of assessed valuation to be used for the purposes described in section 32.

1917, 86:2.

34. **Officials.** The powers conferred by section 32 may be exercised by a recreation commission, by the school board, or by the park board, or may be divided between such recreation commission, school board and park board, or any of them, according as the town may decide.

1917, 86:3.

35. **Commission.** If any town shall decide that the above powers shall be exercised by a recreation commission it shall consist of five citizens of such municipality, who shall serve without pay. The two persons first appointed shall serve for three years; the two persons next appointed for two years; the fifth person appointed for one year. Their successors shall be appointed for three years. Vacancies as they occur shall be filled for the unexpired term only.

1917, 86:5.

36. ——, **Organization.** The commission shall from their own number elect a chairman, secretary and other necessary officers to serve for one year, or until their successors are elected. The commission shall have power to adopt rules of procedure and prescribe regulations for the conduct of all business within its jurisdiction.

1917, 86:5.

37. **Use of Public Property.** School houses and lands in charge of school boards, parks, commons and other similar grounds in charge of any board may be used for play ground and recreation activities, upon the payment of the expenses incident thereto, when such use will not

interfere with the use of school property for educational purposes, or of public grounds for park purposes.

1917, 86:7, 9.

38. ——, **Refusal.** School boards and those in charge of parks and other public grounds may refuse the use of the premises under their charge for play ground and recreation activities, if such interference would otherwise result.

1917, 86:7, 9.

Powers as to Shade and Ornamental Trees

39. **Regulations.** Towns may make regulations from time to time for the planting, protection and preservation of the shade and ornamental trees situated upon any lands within the limits of the town appropriated to public uses.

1861, 2502:1. G. S. 34:9. 1868, 1:6. G. L. 37:9. 1889, 82:1. P. S. 40:9. xxxv, 257. lxxii, 483.

40. **Rights of Owners.** Nothing in this subdivision shall be construed to deprive the owner of real estate of the right to plant, rear and protect any tree between the carriage path and sidewalk in any public street or highway on which his estate is situate, if it does not interfere with the public travel.

1861, 2502:3. G. S. 34:11. G. L. 37:11. P. S. 40:11. xxxv, 257. lxxii, 483.

Liability for Riots, etc.

41. **Town's Liability.** If persons, unlawfully, riotously and tumultuously assembled, shall injure or destroy any property, real or personal, the town within the limits of which such property is situate shall be liable to the owner thereof for the damages suffered by him, in an action on the case.

1854, 1519:1. G. S. 34:12. G. L. 37:12. P. S. 40:13. xv, 169. xlv, 83, 214. xlviii, 196, 211. lviii, 485.

42. ——, **Limitation.** No person shall be entitled to the benefits of the foregoing provision if it shall appear that the destruction of his property was caused by his illegal or improper conduct, nor unless it be made to appear that he, upon knowledge had of the intention or attempt to destroy his property, or to collect a mob for such purpose, sufficient time intervening, gave notice thereof to the mayor, one of the selectmen, or a justice of the peace of the town in which the property was situate.

1854, 1519:2. G. S. 34:13. G. L. 37:13. P. S. 40:14. xlv, 214. xlviii, 196, 211. P. L. Ch. 42, 1929 Ch. 1

43. **Recovery Over.** Any town which shall pay any sum of money, under the provisions of section 41, may recover the same, in an action on the case, against any one, or against two or more jointly, who shall have injured or destroyed the property.

1854, 1519:4. G. S. 34:15. G. L. 37:15. P. S. 40:15.

44. **Use of Militia.** The mayor of any city and the selectmen of any town are authorized, at the expense of the city or town, to call out sufficient military force to suppress or prevent a mob or riot within its limits.

1854, 1519:3. G. S. 34:14. G. L. 37:14. P. S. 40:16.

Pensions

45. Limitations. Towns may grant pensions to an amount not less than one hundred dollars nor more than five hundred dollars a year to any fireman, police officer or constable, who, by reason of permanent disability directly incurred in the performance of his official duty, is no longer able to perform active service in such capacity, or who has served faithfully for not less than twenty-five years; provided, that no pension shall be granted for more than one year at a time. P. L. Ch. 42, s. 45 1927 Ch. 17
1907, 85:1, 2. 1911, 107:1.

46. Adoption of Provisions. The provisions of the foregoing section may be adopted by any town by a major vote of the legal voters thereof at any regular election duly warned and holden therein in the warrant for which due notice is given of the intention to act upon the matter. At such election the following question shall be submitted to the voters: "Are you in favor of adopting the law to provide a pension for firemen, police officers and constables?" Said provisions may be adopted by any city by major vote of the city councils.
1907, 85:3. 1909, 115:1.

47. Administration. When such provisions have been adopted the city councils of the city or the selectmen of the town shall thereafter, under such regulations and restrictions and subject to such provisions as they may by vote or ordinance prescribe, grant pensions as herein authorized.
1907, 85:4.

Zoning Regulations

48. Grant of Power. For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of any city or town is empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes.
1925, 92:1.

49. Districts. For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes hereof; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.
1925, 92:2.

50. Purposes in View. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things,

to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. A regulation made under this subdivision shall not apply to existing structures nor to the existing use of any building, but it shall apply to any alteration of a building for use for a purpose or in a manner substantially different from the use to which it was put before alteration. A building used or to be used by a public service corporation may be exempted from the operation of any regulation made under this subdivision, if upon petition of the corporation the public service commission shall after a public hearing decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.
1925, 92:3.

51. Method of Enactment. The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended. No such regulation, restriction or boundary shall become effective or be altered until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in a paper of general circulation, in such municipality.
1925, 92:4.

52. ——, Changes. Such regulations, restrictions and boundaries may from time to time be amended or repealed. In case of a protest against such change, signed by the owners of twenty per cent either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending one hundred feet therefrom, or of those directly opposite thereto extending one hundred feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three fourths of all the members of the legislative body of such municipality.
1925, 92:5.

53. Zoning Commission. Such legislative body shall appoint a zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission.
1925, 92:6.

54. Board of Adjustment. Such local legislative body shall provide for the appointment of a board of adjustment, and in regulations and restrictions adopted pursuant to the authority hereof shall provide that the said board may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.
1925, 92:7.

55. ——, **Members; Removal; Vacancies.** The board of adjustment shall consist of five members, each to be appointed for a term of three years and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filed for the unexpired term.

P. L. C. 42, s. 55
1933 C. 36, s. 1

1925, 92:7.

56. ——, **Procedure.** The board shall adopt rules in accordance with the provisions of the ordinances. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.
1925, 92:7.

57. ——, **Appeals to Board.** Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.
1925, 92:7.

58. ——, **Effect of Appeal.** An appeal stays all proceedings under the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by the superior court on notice to the officer from whom the appeal is taken and cause shown.
1925, 92:7.

59. ——, **Notice of Hearing.** The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or attorney.
1925, 92:7.

60. ——, **Powers of Board.** The board of adjustment shall have the following powers:

I. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement hereof or of any ordinance adopted pursuant thereto.

II. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

III. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

IV. In exercising the above-mentioned powers such board may, in conformity with the provisions hereof, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, or decision, as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

V. The concurring vote of four members of the board shall be necessary to reverse any action of such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance.
1925, 92:7.

61. **Appeals to Court.** Any person aggrieved by any decision of the board of adjustment, or any decision of the legislative body of such municipality in regard to its plan of zoning, or any taxpayer, or any officer, department, board or bureau of the municipality, may apply to the superior court, within thirty days after the action complained of has been recorded, by a sworn petition, setting forth that such decision is illegal or unreasonable, in whole or in part, specifying the grounds upon which the same is claimed to be illegal or unreasonable.
1925, 92:7.

62. ——, **Procedure.** The court shall direct the record in the matter appealed from to be laid before it, hear the evidence and make such order approving, modifying or setting aside the decision appealed from as justice may require, and may make a new order as a substitute for the order of the board. The filing of the petition shall not stay proceedings upon the decision appealed from, but the court may, on application, notice to the board and on cause shown, grant a restraining order.
1925, 92:7.

63. ——, **Certifying Record.** An order of court to send up the record may be complied with by filing either the original papers or duly certified copies thereof, or of such portions thereof as the order may specify, together with a certified statement of such other facts as show the grounds of the action appealed from.
1925, 92:7.

64. ——, **Hearing, etc.** The court may take evidence or appoint a referee to take such evidence as it may direct and report the same with his findings of fact and conclusions of law.
1925, 92:7.

65. ——, **Costs.** Costs shall not be allowed against the board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from.
1925, 92:7.

add a. 65m
1933 C. 36, s. 2

66. ——, **Speedy Hearing.** All proceedings under this subdivision shall be entitled to a speedy hearing.
1925, 92:7.

67. **Remedies for Violations.** In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation hereof or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful action to restrain, correct, or abate such violation, to prevent the occupancy of the building, structure or land, or any illegal act or use in or about such premises.
1925, 92:8.

68. **Conflicting Provisions.** Whenever the regulations made under the authority hereof differ from those prescribed by any statute, ordinance, or other regulation, that provision which imposes the greater restriction or the higher standard shall govern.
1925, 92:9.

P. L. Ch. 42, s. 68 add 68a to 68e, inc. 1929 Ch. 90

Miscellaneous

69. **Stock Voting.** The selectmen of any town holding stock in any railroad as trustee or otherwise are authorized to vote thereon at all meetings of such corporation, and may appoint, in writing, an agent for that purpose.
1864, 2890:5. G. S. 34:20. G. L. 37:17. P. S. 40:18. Const. Art. 5. lvi, 514.

70. **Soliciting Funds.** The right to grant permits for soliciting funds for charitable purposes and for the sale of tags, flowers or other objects for charitable purposes is vested in that official of a city or town who administers its public charity funds.
1923, 121:1.

71. **Taking of Land.** Whenever any town cannot obtain by contract, for a reasonable price, any land required for public use, such land may be taken, the damages assessed, and the same remedies and proceedings had as in case of laying out highways by selectmen.
1872, 38:1. P. S. 40:6. lxvii, 480, 482. lxxv, 221. lxxviii, 388.

72. **Town Seal.** Every town shall provide for the use of its town clerk an official seal, bearing the name of the town and the date of its incorporation, and of such general design as may be approved by the selectmen thereof. Papers issued from the office of the town clerk may be attested therewith.
1917, 149:1.

73. **Fiscal Year.** The fiscal year of towns, village precincts and departments thereof, excepting school districts, shall end on January thirty-first.
1869, 26:4. G. L. 40:10. P. S. 43:49. 1893, 24:1. 1915, 102:1. 1917, 129:9. 10.

74. **Budget.** Immediately upon the close of the fiscal year the budget committee in towns where such committees exist, otherwise the selectmen, shall prepare a budget on blanks prescribed by the tax commission. Such budget shall be posted with the town warrant and shall be printed in the town report at least one week before the date of the town meeting.
1917, 129:8.

75. **Anticipation of Taxes.** Cities may, by a two-thirds vote of their city councils, and towns, by a major vote of their legal voters in a legally warned town meeting, incur debts for temporary loans in anticipation of the taxes of the municipal year in which such debts are incurred and expressly made payable therefrom by such vote. Such loans shall be payable within one year after the date of incurrence, and shall not be reckoned in determining the authorized limit of indebtedness.
1907, 21:1.

76. **Standard Time.** The standard time within the state shall be based on the mean astronomical time of the seventy-fifth degree of longitude west from Greenwich, known and designated by the federal statute as "United States Standard Eastern Time." It shall be unlawful for any town or other municipality to vote for, or otherwise establish, any other system of time. Any violation of this section shall be punishable by a fine of not more than five hundred dollars.
1921, 15:1. 1923, 105:1, 2.

CHAPTER 43

MUNICIPAL WATER-WORKS

1. **Municipal Power.** Any town or legally organized village district within the state, whenever by majority vote of the legal voters of said town or district, at a regular meeting, or by a two-thirds vote at a duly notified special meeting, they shall vote to do so, may construct, manage, maintain and own suitable water-works for the purpose of introducing into and distributing through any portions of said town or district an adequate supply of water for extinguishing fires and for the use of its citizens and others, and for such other public, private and mechanical purposes as said town or district may from time to time authorize and direct; and for that purpose may take, purchase and hold, in fee simple or otherwise, any real or personal estate and any rights therein, and water-rights, and do all other things necessary for carrying into effect the purposes of this chapter; and may excavate and dig canals and ditches in any street, place, square, passageway, highway, common or other land or place, over or through which it may be deemed necessary and proper for building, constructing and extending said water-works, and may relay, change, enlarge and extend the same from

66. ——, **Speedy Hearing.** All proceedings under this subdivision shall be entitled to a speedy hearing.
1925, 92:7.

67. **Remedies for Violations.** In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation hereof or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful action to restrain, correct, or abate such violation, to prevent the occupancy of the building, structure or land, or any illegal act or use in or about such premises.
1925, 92:8.

68. **Conflicting Provisions.** Whenever the regulations made under the authority hereof differ from those prescribed by any statute, ordinance, or other regulation, that provision which imposes the greater restriction or the higher standard shall govern.
1925, 92:9.

P. L. Ch. 42, s. 68 add 68a to 68c, inc. 1929 Ch. 90

Miscellaneous

69. **Stock Voting.** The selectmen of any town holding stock in any railroad as trustee or otherwise are authorized to vote thereon at all meetings of such corporation, and may appoint, in writing, an agent for that purpose.
1864, 2890:5. G. S. 34:20. G. L. 37:17. P. S. 40:18. Const. Art. 5. lvi, 514.

70. **Soliciting Funds.** The right to grant permits for soliciting funds for charitable purposes and for the sale of tags, flowers or other objects for charitable purposes is vested in that official of a city or town who administers its public charity funds.
1923, 121:1.

71. **Taking of Land.** Whenever any town cannot obtain by contract, for a reasonable price, any land required for public use, such land may be taken, the damages assessed, and the same remedies and proceedings had as in case of laying out highways by selectmen.
1872, 38:1. P. S. 40:6. lxvii, 490, 482. lxxv, 221. lxxviii, 388.

72. **Town Seal.** Every town shall provide for the use of its town clerk an official seal, bearing the name of the town and the date of its incorporation, and of such general design as may be approved by the selectmen thereof. Papers issued from the office of the town clerk may be attested therewith.
1917, 149:1.

73. **Fiscal Year.** The fiscal year of towns, village precincts and departments thereof, excepting school districts, shall end on January thirty-first.
1869, 26:4. G. L. 40:10. P. S. 43:49. 1893, 24:1. 1915, 102:1. 1917, 120:9, 10.

74. **Budget.** Immediately upon the close of the fiscal year the budget committee in towns where such committees exist, otherwise the selectmen, shall prepare a budget on blanks prescribed by the tax commission. Such budget shall be posted with the town warrant and shall be printed in the town report at least one week before the date of the town meeting.
1917, 129:8.

75. **Anticipation of Taxes.** Cities may, by a two-thirds vote of their city councils, and towns, by a major vote of their legal voters in a legally warned town meeting, incur debts for temporary loans in anticipation of the taxes of the municipal year in which such debts are incurred and expressly made payable therefrom by such vote. Such loans shall be payable within one year after the date of incurrence, and shall not be reckoned in determining the authorized limit of indebtedness.
1907, 31:1.

76. **Standard Time.** The standard time within the state shall be based on the mean astronomical time of the seventy-fifth degree of longitude west from Greenwich, known and designated by the federal statute as "United States Standard Eastern Time." It shall be unlawful for any town or other municipality to vote for, or otherwise establish, any other system of time. Any violation of this section shall be punishable by a fine of not more than five hundred dollars.
1921, 15:1. 1923, 105:1, 2.

CHAPTER 43

MUNICIPAL WATER-WORKS

1. **Municipal Power.** Any town or legally organized village district within the state, whenever by majority vote of the legal voters of said town or district, at a regular meeting, or by a two-thirds vote at a duly notified special meeting, they shall vote to do so, may construct, manage, maintain and own suitable water-works for the purpose of introducing into and distributing through any portions of said town or district an adequate supply of water for extinguishing fires and for the use of its citizens and others, and for such other public, private and mechanical purposes as said town or district may from time to time authorize and direct; and for that purpose may take, purchase and hold, in fee simple or otherwise, any real or personal estate and any rights therein, and water-rights, and do all other things necessary for carrying into effect the purposes of this chapter; and may excavate and dig canals and ditches in any street, place, square, passageway, highway, common or other land or place, over or through which it may be deemed necessary and proper for building, constructing and extending said water-works, and may relay, change, enlarge and extend the same from

time to time, whenever it shall deem necessary, and repair the same at pleasure, having due regard for the safety and welfare of its citizens and security of the public travel.
1907, 126:1. lxxiv, 534.

2. **Taking Property.** They may enter upon and take water from, and take and appropriate, any streams, springs, ponds or subterranean sources of water within the boundaries of the town so voting, or of the town in which the district so voting is located, not belonging to any aqueduct company, and secure the same by fence or otherwise, and may dig canals, ditches, make excavations or reservoirs, through, over, in or upon such land or inclosure through which it may be necessary for said water-works to be or to exist, for the purpose of obtaining, holding, conserving or conducting water for said purposes and placing such pipes or other materials or works as may be necessary for building and operating such water-works or for repairing the same.
1907, 126:2.

3. **Assessment of Damages.** If it shall be necessary to enter upon and appropriate any stream, spring, pond or subterranean source, or any land for the purposes aforesaid, or to raise or lower the level of the same by dams or otherwise, and if said town or district shall not agree with the owner thereof for the damage that may be done by the town or district, or such owner shall be unknown, the town or district, or the owner or party injured, may apply to the superior court for the county within which the property is situated to have the same laid out and the damages determined, and the court shall proceed as upon a petition thereto for laying out a highway.
1907, 126:2.

4. **Supply Contracts.** Said towns and districts may contract with individuals and corporations, whether citizens of the town or district or not, and with other municipalities and with individuals and corporations located in other municipalities, for supplying them with water for any of the purposes herein named or contemplated, and may make such contracts, and establish such regulations and tolls for the use of water for any of such purposes, as may from time to time be deemed proper and necessary to enjoy the provisions hereof.
1907, 126:3. 1915, 123:1.

Water Commissioners

5. **Powers; Election.** For the more convenient management of said water-works a town or district may vest the construction, management, control and direction of the same in a board of water commissioners, to consist of three or more citizens of such town or district, said commissioners to have such powers and duties relating to the construction, control and management thereof as the town or district may prescribe. Their term of office shall be for three years and until their successors are elected and qualified. The first board of commissioners may be chosen for terms of one, two and three years respectively by the legal voters of the town or district, at the same meeting in which the provisions of this chapter are accepted, or at any special meeting thereafter called for that purpose, and their successors shall be elected at each annual meeting thereafter, in manner or form as the town or district may determine; provided, that the term of service of the commissioners first elected shall be designated at the time of their election.
1907, 126:4.

6. **Appointment.** The commissioners may be appointed by the selectmen of the town, or by the commissioners of the district if the town or district fail, to elect, or shall vote to authorize the selectmen or commissioners to appoint.
1907, 126:4.

7. **Compensation; Organization.** The compensation of the commissioners shall be fixed by the town or district. They shall be sworn to the faithful discharge of their duties. They shall annually organize by choosing one of their number as chairman of their board. They shall appoint a clerk and a superintendent of the works and such other officers as they may deem necessary, and shall thereupon furnish a certificate of such organization to the town or district clerk who shall record the same in his records. The commissioners shall fix the compensation of all officers and agents appointed by them, and all officers and agents shall be sworn to the faithful discharge of their duties.
1907, 126:5.

8. **Vacancy.** Whenever a vacancy shall occur in said board from any cause the remaining members shall fill such vacancy temporarily by appointing a citizen of said town or district in writing, which appointment shall be filed with the town or district clerk and recorded by him in his records. The person so appointed shall hold office until the next annual town or district meeting, when the town or district shall elect a commissioner for the unexpired term.
1907, 126:5.

9. **Reports.** The commissioners shall annually make a report to the town or district, at the time other town or district officers report, of the condition of the water-works financially and otherwise, showing the funds belonging to their department and the expenses and income thereof, with such other facts and information as the inhabitants should have, which report shall be published in the annual report of the town or district.
1907, 126:5.

Miscellaneous

10. **Taxation; Borrowing.** Towns and districts may at any annual, special or biennial meeting, by a major vote of those present and voting, raise by taxation and appropriate, or borrow on the credit of the town or district, such sums of money as may from time to time be deemed necessary and expedient, for the purpose of this chapter, such indebtedness not to exceed at any one time ten per cent of the valuation of the town or district, and issue notes or bonds of the town or district therefor in accordance with the provisions of chapter 59 which are not inconsistent herewith.
1907, 126:6.

11. **Application of Chapter.** The foregoing provisions of this chapter shall not apply to any town or district wherein there is established a private water system chartered by the state and approved by the state

P. L. Ch. 87, 1921 Ch. 87

board of health, unless said private water system is purchased by said town or district, or otherwise legally acquired.
1907, 126:8.

12. **Taking Property.** Any municipality or water company supplying water to the public for domestic use shall have the power to take by the exercise of the right of eminent domain any property needed to protect the purity of the water so supplied, upon petition to the superior court, and proceedings thereon as in case of a petition for laying out a highway.

P. L. Ch. 43, add s. 13
1927 Ch. 71

CHAPTER 44

MUNICIPAL LIGHTING SYSTEMS

1. **Municipal Power.** Any town or village district may acquire or establish, and maintain and operate, a suitable municipal plant for the purpose of supplying through the whole or any portions of such municipality electricity or gas, or both, for the use of its citizens and others, and for such other purposes as the municipality may from time to time authorize and direct; and for that purpose may purchase and hold in fee simple or otherwise any real or personal estate and any rights therein, including water rights, and may do all other things necessary for carrying into effect the purposes of this chapter; and may excavate and dig conduits and ditches in any highway or other land or place, and erect poles and place wires for the transmission of electricity, and lay pipes for the distribution of gas, in such places as may be deemed necessary and proper; and may change, enlarge and extend the same from time to time when the municipality shall deem necessary, and maintain the same, having due regard for the safety and welfare of its citizens and security of the public travel.
1913, 218:1.

2. ——, **Adoption by Cities.** Any city may acquire or establish such a municipal plant after the city councils shall have twice voted, subject to the veto power of the mayor as provided by law, the second of such votes being passed not less than ninety days after the passage of the first vote, that it is expedient so to do, and after such final action by the city councils shall have been ratified by majority vote at a general election, or by a two thirds vote at a special meeting, of the qualified voters, duly warned in either case, and held not less than ninety days after the passage of the second vote of the city councils.
1913, 218:2.

3. **Powers of Council.** If such ratifying vote shall be in the affirmative the city councils may thereafter vote to accept the proposal of a public utility for the sale of its plant and property, if any shall have been made as provided in section 6, or may vote to take the plant and property of such public utility by condemnation proceedings as herein provided, or, subject to the provisions of this chapter, may vote to construct a municipal plant. In either case the city councils may appropriate or vote to borrow money for the purpose of paying for such plant and property, as provided in section 19.
1913, 218:2.

4. **Procedure in Towns.** Any town or village district may acquire or establish such a municipal plant after it shall have voted that it is expedient so to do, by majority vote at a regular town or district meeting, and, after the expiration of not less than ninety days, shall have ratified such action by like vote at an adjournment of such regular meeting. If such second vote shall be in the affirmative, said adjourned meeting may proceed as city councils may under section 3, including the raising of funds.
1913, 218:2.

Acquiring Public Utility

5. **Demand.** Within thirty days after the passage of the first vote by the city councils, or by a meeting in a town or district, the mayor of such city, the selectmen of such town or the commissioners of such district shall demand of any public utility of the same kind as that proposed to be acquired or established, and operating within the limits of the municipality, whether it desires to sell its plant and property to the municipality in case the latter completes the action necessary to the acquisition or establishment of a municipal plant.
1913, 218:2.

6. **Reply.** Such utility shall transmit its answer in writing to such inquiry within sixty days after its receipt. In case its answer shall be the negative, or in case it fails to transmit such answer within the sixty days aforesaid, it shall forfeit any right which it otherwise might have had to require the purchase of its plant and property, or any part thereof, by the municipality. In case it answers in the affirmative it shall state the terms and conditions upon which it is willing to sell its plant and property to the municipality, and shall offer to furnish a schedule thereof, upon demand after reasonable notice, and to permit an examination and appraisal of its plant and property by experts or other representatives of the municipality.
1913, 218:2.

7. **Examination; Report.** Thereupon the municipality shall, through its mayor, selectmen or commissioners make, or cause to be made, such examination or appraisal of the plant and property offered for sale to the municipality as it may deem advisable, and receive any further proposal by the utility for the sale to the municipality of its plant and property, or such portion thereof as may be specified in such proposal; and the results of such examination or appraisal, together with such further proposal, if any, and any recommendations thereon, shall be filed with the clerk of such municipality at least ten days prior to the

board of health, unless said private water system is purchased by said town or district, or otherwise legally acquired.
1907, 126:8.

12. **Taking Property.** Any municipality or water company supplying water to the public for domestic use shall have the power to take by the exercise of the right of eminent domain any property needed to protect the purity of the water so supplied, upon petition to the superior court, and proceedings thereon as in case of a petition for laying out a highway.

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1913, 218:2.

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1913, 218:2.

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1913, 218:2.

6. **Reply.** Such utility shall transmit its answer in writing to such inquiry within sixty days after its receipt. In case its answer shall be the negative, or in case it fails to transmit such answer within the sixty days aforesaid, it shall forfeit any right which it otherwise might have had to require the purchase of its plant and property, or any part thereof, by the municipality. In case it answers in the affirmative it shall state the terms and conditions upon which it is willing to sell its plant and property to the municipality, and shall offer to furnish a schedule thereof, upon demand after reasonable notice, and to permit an examination and appraisal of its plant and property by experts or other representatives of the municipality.
1913, 218:2.

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date set for the taking of the second vote in a town or district, or the ratifying vote in a city, upon the expediency of acquiring or establishing a municipal plant as above provided.
1913, 218 :2.

8. **Construction; Condemnation.** If such existing public utility shall have failed to answer as aforesaid, or shall have answered in the negative, the municipality, in case it shall have passed the votes and taken the action hereinbefore required, may construct a municipal plant, or it may take such private plant and property by condemnation, paying therefor just compensation as herein provided.
1913, 218 :2.

9. **Valuation.** If such existing public utility shall have answered in the affirmative, and in the manner aforesaid, and such municipality shall finally vote in favor of acquiring a municipal plant, and the municipality and the utility shall fail to come to an agreement as to the value of such public utility, such value shall be determined in the first instance by the public service commission after notice and hearing, and, on appeal of either party, taken within thirty days after the announcement of the decision of the commission, to the superior court of the county where the principal part in value of the plant and property of the utility is situated, by jury, in the manner provided for assessing damages upon appeal in proceedings for laying out highways. The price to be paid therefor shall be the fair value thereof; but no portion of such plant shall be estimated at less than its fair value for any other purpose. The price to be paid therefor shall also include the damages, if any, caused by the severance of any portion of such plant, property or facility lying outside the limits of the municipality.
1913, 218 :2.

10. **Adjustment.** The city councils in cities, the selectmen in towns and the commissioners in village districts shall have power to authorize the settlement and adjustment of any such condemnation proceedings upon such terms as they shall consider proper.
1913, 218 :2.

11. **Transfer.** As soon as practicable, but not exceeding one hundred and twenty days after the final vote of the municipality to take the plant and property of such public utility, such utility shall surrender; and the municipality shall take possession of, such plant, property and facilities, and thereafter shall operate the same. At the time of such change of possession, or as soon as practicable thereafter, the utility shall make and deliver, and the municipality shall receive and accept, such appropriate deeds, bills of sale or other evidences of title as the public service commission may approve or require, and the proceedings for ascertaining and assessing the amount to be paid and received therefor shall thereafter proceed to a conclusion. In case of disagreement the public service commission shall determine what property of the utility is and what is not subject to such conveyance under the terms of this chapter, and what shall and what shall not be included in such conveyance.
1913, 218 :2.

12. **Property Included.** Any municipality purchasing the plant, property or facilities of a public utility as aforesaid shall purchase the whole of such plant, property or facilities used in the production of the same kind of service as that proposed to be established by the municipality which is within its limits, as far as it is reasonably suitable for, or is used in connection with, such public utility business.
1913, 218 :2.

13. **Outlying Property.** Where the major part of the plant, property or facilities of such utility lies within the limits of the municipality purchasing the same, but other parts of such plant, property or facilities lie without its limits, the municipality may purchase the whole or such parts of such plant, property or facilities outside of its limits as the public service commission, taking into consideration the rights of the public utility and of the other municipalities in which it operates, may, after notice to all parties interested and a public hearing, determine is for the public interest and necessary for the proper carrying on of its business.
1913, 218 :2.

14. **Operation.** A municipality, which has so acquired the plant, property or facilities of a public utility in any other municipality, may thereafter operate therein as a public utility with the same rights and franchises which the owners of such outlying plant, as purchased, would have had had such purchase not been made. If the outlying municipality shall itself vote to establish a municipal plant all the provisions of this chapter shall be binding as to such purchase.
1913, 218 :2.

Miscellaneous

15. **Taking Property.** Any such municipality may enter upon and take by eminent domain any land or any interest in land or water right within its limits which may be necessary for the construction, extension or maintenance of its plant, and shall pay all damages sustained thereby, or by any other thing done under the authority of this chapter.
1913, 218 :3.

16. ——, **Damages.** If the municipality shall not agree with the owner thereof for the damage that may be done thereby either party may apply to the superior court in the county where said town or district is located to have the same laid out and the damages determined, and the court shall proceed as upon a petition thereto for laying out a highway.
1913, 218 :3.

17. **Supply Contracts.** Any such municipality may contract with individuals, corporations and other municipalities and the citizens thereof for supplying them with electricity or gas for any of the purposes herein named or contemplated, and make such contracts, and establish such regulations and such reasonable tolls for the use thereof, as may from time to time be deemed proper and necessary.
1913, 218 :4.

18. **Commissioners.** For the more convenient management of any such lighting system, any such municipality may vest the construction, management, control and direction of the same in a board of commissioners in the manner provided for water commissioners by sections 5 to 9 of the preceding chapter.
1913, 218 :5.

19. **Taxation; Borrowing.** Any such municipality may raise by taxation, and appropriate, or, as provided by chapter 59, may borrow and hire such sums of money on the credit of the municipality as may from time to time be deemed necessary and expedient for the purpose of defraying the cost of purchasing or taking the plant, property or facilities of any public utility aforesaid, which the municipality may acquire, or for constructing or enlarging any plant, works or system, said indebtedness not to exceed at any one time five per cent of the tax valuation of the municipality.

1913, 218:7.

20. **Maintenance.** Said municipalities may raise by taxation and appropriate such sums, if any, as may be necessary, over and above the earnings from said plant, to pay the charges of operating and maintaining the same, and to pay the principal and interest on their notes and bonds.

1913, 218:8.

CHAPTER 45

WARNING TOWN-MEETINGS

1. **Meetings, When Held.** A meeting of every town shall be holden annually on the second Tuesday of March for the choice of town officers and the transaction of all other town business. A town-meeting may be warned by the selectmen, when, in their opinion, there shall be occasion therefor.

R. S. 32:1. C. S. 34:1. G. S. 35:1. 1878, 60:1. G. L. 38:1. P. S. 41:1.

2. **Warrant.** The warrant for any town-meeting shall be under the hands of the selectmen, and shall prescribe the place, day and hour of the meeting. The subject-matter of all business to be there acted upon shall be distinctly stated in the warrant, and nothing done at any meeting, except the election of any town officer required by law to be made at such meeting, shall be valid unless the subject thereof is so stated.

R. S. 32:2. C. S. 34:2. G. S. 35:2. G. L. 38:2. 1885, 45:1. P. S. 41:2. vii, 113. xxiv, 208. xlvi, 411. liv, 71. lxii, 135.

3. ——, **Articles.** The selectmen, upon the written application of ten or more voters, or one sixth of the voters in town, shall insert in their warrant for the biennial, annual or any other meeting any subject specified in such application, or shall warn a meeting therefor if requested in such application.

R. S. 32:3. C. S. 34:3. G. S. 35:3. G. L. 38:3. P. S. 41:3. lxviii, 19.

4. ——, **Posting.** The selectmen may address their warrant to the inhabitants of the town qualified to vote in town affairs, in which case they shall post an attested copy of such warrant at the place of meeting, and a like copy at one other public place in the town, fourteen days before the day of meeting.

R. S. 32:4. C. S. 34:4. G. S. 35:4. G. L. 38:4. P. S. 41:4. iii, 178. vii, 206, 284. xxviii, 419. xl, 175. lii, 512.

5. ——, **By Constable.** Warrants for town-meetings may be directed to a constable of the town, requiring him to notify the inhabitants; and such constable shall post an attested copy of such warrant, as provided in the preceding section.

R. S. 32:5. C. S. 34:5. G. S. 35:5. G. L. 38:5. P. S. 41:5. vii, 206, 284.

6. ——, **Return.** The selectmen or the constable serving any warrant shall return the same, at the time and place of meeting, with a certificate of the service thereof, to the town clerk, or, in his absence, to one of the supervisors.

R. S. 32:7. C. S. 34:7. G. S. 35:7. G. L. 38:7. P. S. 41:7. vi, 182, 194. xix, 290. lii, 513.

7. **Selectmen's Power.** In case of the death or removal of any of the selectmen of a town the major part of those who remain in office shall have power to warn meetings.

R. S. 32:8. C. S. 34:8. G. S. 35:8. G. L. 38:8. P. S. 41:8.

8. **Warning by Justice, upon Neglect.** If the selectmen unreasonably neglect or refuse to warn a meeting, or to insert any article in their warrant, a justice of the peace, upon application in writing of ten or more voters, or of one sixth part of the voters of such town, may issue a warrant for such meeting.

R. S. 32:9. C. S. 34:9. G. S. 35:9. G. L. 38:9. P. S. 41:9.

9. ——, **Other Cases.** If the biennial or annual meeting in any town shall not have been held, or if there has never been any legal meeting of the town; or if, by reason of death, removal from the town, disability or resignation of the board of selectmen, no member of the board remains in office, a justice of the peace, on application of ten voters, or of one sixth part of the voters of the town, may issue a warrant for such meeting.

R. S. 32:10. C. S. 34:10. G. S. 35:10. 1875, 2:1. G. L. 38:10. P. S. 41:10.

10. ——, **Warrant.** The warrant of a justice of the peace for a town-meeting shall be under his hand, directed to a constable of the town, if any there be, otherwise to one of the voters applying; it shall specify the time, place and object of such meeting, and shall be served and returned in the same manner as warrants issued by selectmen.

R. S. 32:11. C. S. 34:11. G. S. 35:11. G. L. 38:11. P. S. 41:11.

11. **Other Warning.** Any town may, by vote, prescribe a different method of warning meetings; and the meetings warned in pursuance of such vote shall be legal and valid.

R. S. 32:6. C. S. 34:6. G. S. 35:6. G. L. 38:6. P. S. 41:6.

12. **Penalty.** If selectmen neglect to issue a warrant for the holding of any meeting for the choice of state, county or town officers, electors of president and vice-president of the United States and representatives in congress, or neglect to cause copies of such warrant, if not directed to a constable, to be duly posted, or notice of such meeting to be given, agreeably to any vote of the town, they shall for each offense be fined fifty dollars, for the use of the town.

R. S. 32:12. C. S. 34:12. G. S. 35:12. G. L. 38:12. P. S. 41:12.

7. Approval of Vouchers. The town manager may approve vouchers for obligations incurred by any department of which he has supervision, and, except during his absence or disability, the selectmen shall not draw orders for the payment of any such obligations without such approval. The selectmen may themselves approve such vouchers, or authorize their approval by some other person, in the event of the absence or disability of the town manager.
1929, 69:7.

8. Vacancy. Any vacancy in the office of town manager shall be filled as soon as practicable by the selectmen; and pending the appointment of a permanent manager, the selectmen may appoint a person to perform temporarily the duties of that office.
1929, 69:8.

R. L. C. 55 s. 9
1947 C. 238 s. 1

9. Incompatibility of Offices. The town manager, during the time that he holds such appointment, may be manager of a district or precinct located wholly or mainly within the same town as hereinafter provided, and may be elected or appointed to any municipal office in such town or included district or precinct that would be subject to his supervision if occupied by another incumbent; but he shall hold no other public office except justice of the peace or notary public.
1929, 69:9.

10. Compensation. The town manager shall receive such compensation as may be fixed by the selectmen, unless otherwise specifically voted by the town.
1929, 69:10.

11. Adoption of Provisions. The provisions of this chapter shall not become operative in any town unless and until the same are adopted by a majority of the legal voters of the town present and voting at an annual meeting duly warned as hereinafter provided.
1929, 69:11.

12. Warning. The selectmen, upon the written application of ten or more voters, or one sixth of the voters in the town, shall insert a proper article in their warning for such meeting, which article shall refer to this chapter.
1929, 69:12.

13. Revocation. A town that has adopted the provisions hereof may rescind such adoption by majority vote of the legal voters present and voting at a subsequent annual meeting, provided a proper article therefor is inserted in the warrant for such meeting; but no acts done or obligations incurred by the town manager prior to such rescission shall be affected thereby.
1929, 69:13.

14. Village Districts. A village district or precinct organized under, or established by special act for any of the purposes set forth in section 1 of chapter 70, may avail itself of the provisions hereof, so far as applicable, if a majority of the voters thereof present and voting at a district or precinct meeting so vote under a proper article in the warrant therefor as above provided. The commissioners of a village district or precinct adopting the provisions of this chapter shall have the same powers in respect to the employment, direction, supervision, and discharge of town managers and the fixing of their bonds and salaries as are herein conferred upon selectmen;

R. L. C. 55 s. 15 as inserted by 1947 C. 19 add s. 16 1947 C. 238 s. 3

RL C 55 s 15 as inserted by 1947 C 20 1951 C 135

provided, however, that no village district or precinct shall avail itself of the provisions hereof unless the town in which such district or precinct, or the major part thereof as shown by its valuation for taxation purposes, is located shall have voted to adopt such provisions; and provided, further, that whenever a village district or precinct shall adopt the provisions of this chapter, it shall appoint as its manager the manager of such town.
1929, 69:14.

RL C 55 s 16 as inserted by 1947 C 238 s 3 1951 C 29

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R. L. C. 56 1947 C. 238

R. L. C. 56 1947 C. 353

CHAPTER 56

MUNICIPAL LIGHTING AND WATER SYSTEMS

(Chapter 43 of the Public Laws repealed. 1937, 158:1)

R.L. C 56 s 1 1943 C 160 s 1

1. Reports, Accounts, Records, etc. Any municipality owning, operating, or managing any plant or equipment, or any part of the same, for the manufacture or furnishing of light, heat, power, or water for the public, or engaged in the generation, transmission, or sale of electricity or gas ultimately sold to the public, shall be subject to the provisions of sections 7 to 18, inclusive, of chapter 289.
1935, 153:1.

RL C 56 s 2 1951 C 293 s 3

2. Definitions. Unless the context otherwise requires, the following words, as used herein, shall have the following meanings:

"Commission," the public service commission.

"Utility," any public utility engaged in the manufacture, distribution, or sale of gas, electricity, or water in the state.

"Municipality," any city, town, or village district within the state.
1935, 153:2. 1937, 158:2.

3. Acquisition of Plants. Any municipality may take, purchase, lease, or otherwise acquire and maintain and operate in accordance with the provisions of this chapter, one or more suitable plants for the manufacture and distribution of gas, electricity, or water for municipal use and for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized, or directed by the commission; and for these purposes may purchase and hold in fee simple or otherwise any real or personal estate and any rights therein, including water rights; and may do all other things necessary for carrying into effect the purposes of this chapter; and may excavate and dig conduits and ditches in any highway or other land or place, and erect poles, place wires, and lay pipes for the transmission and distribution of electricity, water, and gas, in such places as may be deemed necessary and proper; and may change, enlarge, and extend the same from time to time when the municipality shall deem necessary, and maintain the same, having due regard for the safety and welfare of its citizens and security of the public travel.
1913, 218:2. P. L. 44:2. 1935, 153:2. 1937, 158:3.

4. Acquisition by Cities. Any city may acquire or establish such a plant after two-thirds of the members of the city council shall have voted, subject to the veto power of the mayor as provided by law, that it is expedient so to do, and after such action by the city council shall have been confirmed by a majority of the qualified voters at a regular election or at a special meeting

duly warned in either case. Such confirming vote shall be had within one year from the date of the vote to acquire. If the vote is unfavorable, the question shall not be again submitted to the voters within two years thereafter.
1913, 218:2. P. L. 44:2. 1935, 153:2.

5. Acquisition by Towns. Any town or village district may acquire or establish such a plant after two thirds of all the voters present and voting at an annual or special meeting, duly warned in either case, have voted by ballot with the use of the check-list that it is expedient so to do. If such vote is unfavorable, the question shall not be again submitted to the voters within two years thereafter.
1913, 218:2. P. L. 44:4. 1935, 153:2.

6. Notice to Utility. Within thirty days after the confirming vote provided for in section 4 or the vote provided for in section 5, the mayor of the city, the selectmen of the town, or the commissioners of the district shall notify in writing any utility engaged, at the time of said vote, in generating or distributing gas, water, or electricity for sale in said municipality, of said vote, and ask said utility whether it elects to sell, in the manner hereinafter provided, that portion of its plant and property located within said municipality which is suitable for and used in connection with the business of said utility, and that portion, if any, lying without said municipality which the public interest may require the said municipality to purchase.
1913, 218:2. P. L. 44:5. 1935, 153:2. 1937, 158:4.

7. Reply. The utility shall reply to such inquiry by delivering its answer in writing to the mayor of the city, the selectmen of the town, or the commissioners of the district within sixty days of the receipt of said inquiry. If the reply is in the negative, or if the reply is not made within the sixty days, the utility thereby forfeits any right it may have had to require the purchase of its plant and property by the municipality. If the reply is in the affirmative, it shall submit the price and terms it is willing to accept for all of said plant and property, together with a detailed schedule of all the plant and property it proposes to sell to said municipality, with proper evidence of title. If any of said plant and property lies without the said municipality, a separate schedule of said plant and property, with its proportionate share of the purchase price, shall likewise be filed. All of the said plant and property named in said schedules and used in connection therewith, shall at all reasonable times thereafter be open to the examination of the officers and agents of the municipality and others charged with the duty of determining the fair value of said property.
1913, 218:2. P. L. 44:6. 1935, 153:2.

RL C 56 s 8
1951 C 203 s 4

8. Agreement. The mayor and council of a city, the selectmen of a town, or the commissioners of a village district, may negotiate and agree with the utility upon the price to be paid for such plant and property; provided, however, that such agreement shall not be binding upon any city until ratified by a vote of the city council or upon any town or village district until ratified by the voters of said town or village district in the manner provided in section 5. Such vote shall be had within ninety days of the date of the filing of the reply provided in section 7.
1935, 153:2.

RL C 56 s 9
1951 C 203 s 1

9. Valuation. If the municipality fails to ratify the agreement to purchase in the manner provided in section 8 or if the price cannot be agreed upon, or if it cannot be agreed as to how much, if any, of said plant and property lying without said municipality the public interest requires said municipality to purchase, or if the schedules of property proposed to be sold, submitted in accordance with section 7, are not satisfactory, either the municipality or the utility may petition the commission for a determination of these questions; and the commission, after proper notice and hearing, shall decide the matters in dispute; and shall also, when required to fix the price to be paid for said plant and property, determine the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner; and from all of said determinations there shall be the right of appeal to the superior court, and upon such appeal the price determined by the public service commission may be considered as evidence on the question of the value of said plant and property. The expense to the commission for the investigation of the matters covered by said petition, including the amounts expended for experts, accountants, or other assistants, and salaries and expenses of all employees of the commission for the time actually devoted to said investigation, but not including any part of the salaries of the commissioners, shall be paid by the parties involved, in the manner fixed by the commission.
1913, 218:2. P. L. 44:9. 1935, 153:2. 86-S18.

10. Construction and Condemnation. If the utility shall have replied in the negative or if it shall have failed to reply within the time prescribed in section 7, the municipality, in the event that it shall have passed the vote or votes required in sections 4 and 5 and after the commission upon proper notice and hearing has determined that it is for the public interest so to do, may construct a municipal plant or may take such private plant and property by condemnation, paying therefor just compensation determined in the manner provided in section 9 hereof.
1935, 153:2.

11. Ratification. Within ninety days of the final determination of the price to be paid for said plant and property, as well as the amount of said plant and property to be taken or acquired under the provisions of section 9 or 10, said municipality shall decide whether or not to take said plant and property at said price by a vote similar to the ratifying vote provided in section 8. In the event that said vote or the vote in section 8 is in the affirmative, the municipality may then vote, within ninety days thereof, to raise by taxation, and appropriate, or, as provided by chapter 72, to borrow such sums of money on the credit of the municipality as may from time to time be deemed necessary and expedient for the purpose of defraying the cost of purchasing or taking the plant, property, or facilities of the utility which the municipality may thus acquire, or for constructing or enlarging any plant, works, or system, and said indebtedness shall not exceed at any one time ten per cent of the tax valuation of the municipality, or, in the event of a taking, such price and damages as are finally determined under the provisions hereof; and if said money is so raised it shall immediately be paid to the utility, which shall thereupon execute a proper conveyance and surrender the plant and property to the municipality, which shall thereafter operate it as a

public utility. If said ratifying vote provided for in this section shall be in the negative, no other action under this chapter shall be had during the ensuing period of two years. RL c 55 s 11 1853 c 349
1935, 153:2.

12. Operation. A municipality, which has so acquired the plant, property, or facilities of a public utility in any other municipality, may thereafter operate therein as a public utility with the same rights and franchises which the owners of such outlying plant, as purchased, would have had had such purchase not been made; and operation by a municipality outside its own limits, shall be subject to the jurisdiction of the public service commission as in the case of any other public utility. If the outlying municipality shall itself vote to establish a municipal plant all the provisions of this chapter shall be binding as to such purchase.
1913, 218:2. P. L. 44:14. 1935, 153:2.

13. Taking Property. Any such municipality may enter upon and take by eminent domain any land or any interest in land or water right within its limits which may be necessary for the construction, extension, or maintenance of its plant, and shall pay all damages sustained thereby, or by any other thing done under the authority of this chapter.
1913, 218:3. P. L. 44:15. 1935, 153:2.

14. Damages. If the municipality shall not agree with the owner thereof as to damages, either party may apply to the superior court in the county where said town or district is located to have the same laid out and the damages determined and the court shall proceed as upon a petition thereto for laying out a highway.
1913, 218:3. P. L. 44:16. 1935, 153:2.

15. Supply Contracts. Any such municipality may contract with individuals, corporations, and other municipalities and the citizens thereof for supplying them with electricity, water, or gas for any of the purposes herein named or contemplated, and make such contracts, and establish such regulations and such reasonable tolls for the use thereof, as may from time to time be authorized by the commission.
1913, 218:4. P. L. 44:17. 1935, 153:2. 1937, 158:5.

16. Commissioners. For the more convenient management of any such gas, electric, or water-works system, any such municipality may vest the construction, management, control and direction of the same in a board of commissioners to consist of three or more citizens of such municipality, said commissioners to have such powers and duties as the municipality may prescribe. Their term of office shall be for three years and until their successors are elected and qualified. The first board of commissioners may be chosen for terms of one, two, and three years, respectively, by the legal voters of the municipality at any legal meeting or election at which the provisions of this chapter are accepted, or at any special meeting or election thereafter called for that purpose, and their successors shall be elected at each annual meeting or election thereafter in manner or form as the municipality may determine.
1913, 218:5. P. L. 44:18. 1935, 153:2. 1937, 158:6.

17. Appointment. The commissioners may be appointed by the mayor and board of aldermen or city council, by the selectmen of the town, or by the commissioners of the district if the municipality fails to elect or shall so vote.
1937, 158:6.

18. Compensation and Organization. The compensation of the commissioners shall be fixed by the municipality. They shall be sworn to the faithful discharge of their duties. They shall annually organize by choosing one of their number as chairman of their board. They shall appoint a clerk and a superintendent of the works and such other officers as they may deem necessary, and shall thereupon furnish a certificate of such organization to the clerk of the municipality, who shall record the same in his records. The commissioners shall fix the compensation of all officers and agents appointed by them, and all officers and agents shall be sworn to the faithful discharge of their duties.
1937, 158:6.

19. Vacancy. Whenever a vacancy shall occur in said board from any cause, the remaining members shall fill such vacancy temporarily by the written appointment of a citizen of said municipality. This appointment shall be filed with the clerk of the municipality for record, and the person so appointed shall hold office until the next city election or annual town or district meeting; when a commissioner for the unexpired term shall be elected.
1937, 158:6.

20. Reports. The commissioners shall annually, at the time other city, town, or district officers report, make a report to the municipality of the condition of the plant financially and otherwise, showing the funds of the department, the expenses and income thereof, and all other material facts. This report shall be published in the annual report of the municipality.
1937, 158:6.

21. Protection of Water Supply. Any municipality or water company supplying water to the public for domestic use shall have the power to take by the exercise of the right of eminent domain any property needed to protect the purity of the water so supplied, upon petition to the superior court, and proceedings thereon as in case of a petition for the laying out of a highway.
1937, 158:6.

22. Liens for Rates. All charges as gas, water, or electric rates for gas, water, or electricity furnished to patrons in any municipality operating municipally-owned gas, water, or electric works, shall become a lien upon any real estate where such gas, water, or electricity is furnished, and said lien shall continue for one year from the last item charged in said gas, water, or electric rates; and said lien may be enforced by a suit in behalf of said municipality, ordered by the commissioners or other board in charge of the plant against the owner or owners of such real estate. The record in the office of the gas, water, or electric department of the gas, water, or electric rates, and the charges for gas, water, or electricity furnished as aforesaid, shall be sufficient notice to maintain suit upon such lien against subsequent purchasers or attaching creditors of said real estate.
1927, 71:1. 1937, 158:6. 90-144.

23. Effect on City Charters. Nothing contained in this chapter shall affect, alter or change the provisions of any city charter with respect to the management, control, and direction of gas, water, or electric works.
1937, 158:6.

24. **Constitutionality.** If any provision of this chapter or the application thereof to any person or circumstances is held invalid the remainder of the chapter and the application of such provisions to other persons or circumstances shall not be affected thereby.
1935, 158:3. 1937, 158:7.

CHAPTER 57

WARNING TOWN-MEETINGS

1. **Meetings, When Held.** A meeting of every town shall be holden annually on the second Tuesday of March for the choice of town officers and the transaction of all other town business. A town-meeting may be warned by the selectmen, when, in their opinion, there shall be occasion therefor.
R. S. 32:1. C. S. 34:1. G. S. 35:1. 1878, 60:1. G. L. 38:1. P. S. 41:1. P. L. 45:1.

2. **Warrant.** The warrant for any town meeting shall be under the hands of the selectmen, and shall prescribe the place, day and hour of the meeting, and, if there is an election at said meeting, in which an official printed ballot containing more than one name is used, the warrant therefor shall prescribe the time the polls are to open and also an hour before which the polls may not close. A town meeting may vote to keep the polls open to a later hour but may not vote to close the polls at an earlier hour than that prescribed by the selectman hereunder. The subject matter of all business to be acted upon at the town meeting shall be distinctly stated in the warrant, and nothing done at any meeting, except the election of any town officer required by law to be made at such meeting, shall be valid unless the subject thereof is so stated.
R. S. 32:2. C. S. 34:2. G. S. 35:2. G. L. 38:2. 1885, 45:1. P. S. 41:2. P. L. 45:2. 1941, 130:1. 7–113. 24–203. 46–411. 54–71. 62–185.

R. L. C. 57 s. 3 Add 2a 1945 C. 29 s. 1

R. L. C. 57 s. 3 1941 C. 21 R. L. C. 59 s. 15 1917 C. 89

3. **Articles.** Upon the written application of ten or more voters or one sixth of the voters in town, presented to the selectmen or one of them at least sixteen days before the day prescribed for an annual or biennial meeting, the selectmen shall insert in their warrant for such meeting any subject specified in such application. Upon the written application of fifty or more voters or one fourth of the voters in town, so presented not less than sixty days before the next annual meeting, the selectmen shall warn a special meeting to act upon any question specified in such application. The word "voters" in this section shall mean persons listed as such in the last previous revision of the check-list.
R. S. 32:3. C. S. 34:3. G. S. 35:3. G. L. 38:3. P. S. 41:3. P. L. 45:3. 1937, 40:1. 68–10.

4. **Posting Warrant.** The selectmen may address their warrant to the inhabitants of the town qualified to vote in town affairs, in which case they shall post an attested copy of such warrant at the place of meeting, and a like copy at one other public place in the town, fourteen days before the day of meeting.
R. S. 32:4. C. S. 34:4. G. S. 35:4. G. L. 38:4. P. S. 41:4. P. L. 45:4. 3–173. 7–206, 284. 28–419. 40–173. 52–512.

5. **Warrant to Constable.** Warrants for town-meetings may be directed to a constable of the town, requiring him to notify the inhabitants; and

such constable shall post an attested copy of such warrant, as p the preceding section.
R. S. 32:5. C. S. 34:5. G. S. 35:5. G. L. 38:5. P. S. 41:5. P. L. 45:5. 7

6. **Return of Warrant.** The selectmen or the constable servin rant shall return the same, at the time and place of meeting, with a of the service thereof, to the town clerk, or, in his absence, to one of visors.
R. S. 32:7. C. S. 34:7. G. S. 35:7. G. L. 38:7. P. S. 41:7. P. L. 45:6. 10-290. 52–512.

7. **Selectmen's Power.** In case of the death or removal of selectmen of a town the major part of those who remain in office power to warn meetings.
R. S. 32:8. C. S. 34:8. G. S. 35:8. G. L. 38:8. P. S. 41:8. P. L. 45:7.

8. **Warning, upon Neglect.** If the selectmen unreasonably refuse to warn a meeting, or to insert any article in their warrant, the superior court, upon application in writing of twenty-five or m or of one sixth part of the voters of such town, may issue a warra meeting, or order the insertion of an article in the warrant.
R. S. 32:9. C. S. 34:9. G. S. 35:9. G. L. 38:9. P. S. 41:9. P. L. 45:8. 1

9. **Warning by Justice: Other Cases.** If the biennial or annu in any town shall not have been held, or if there has never been meeting of the town; or if, by reason of death, removal from the ability or resignation of the board of selectmen, no member of remains in office, a justice of the superior court, on application of t voters, or of one sixth part of the voters of the town, may issue for such meeting.
R. S. 32:10. C. S. 34:10. G. S. 35:10. 1875, 2:1. G. L. 38:10. P. S. 41:10. 1939, 21:1.

10. **Warrant of Justice.** The warrant of a justice of the sup for a town meeting shall be under his hand, directed to or a deputy sheriff of the county in which the town is situate; it sh the time, place and object of such meeting and shall be served an in the same manner as warrants issued by selectmen.
R. S. 32:11. C. S. 34:11. G. S. 35:11. G. L. 38:11. P. S. 41:11. P. L. 4 21:1.

11. **Other Warning.** Any town may, by vote, prescribe method of warning meetings; and the meetings warned in pursua vote shall be legal and valid.
R. S. 32:6. C. S. 34:6. G. S. 35:6. G. L. 38:6. P. S. 41:6. P. L. 45:11.

12. **Penalty.** If selectmen neglect to issue a warrant for th of any meeting for the choice of state, county, or town officer of president and vice-president of the United States, and represe congress, or neglect to cause copies of such warrant, if not directe stable, to be duly posted, or notice of such meeting to be given, ag any vote of the town, they shall for each offense be fined fifty dolls use of the town.
R. S. 32:12. C. S. 34:12. G. S. 35:12. G. L. 38:12. P. S. 41:12. P. L. 45

13. **Adjournment to Sunday.** Whenever any adjournment of meeting shall fall upon a Sunday, it shall be held on the next s

of any state institution shall be denied the free exercise of the religion of his parents nor the liberty of worshipping God according to the religion of his parents whether living or dead.

Existing criminal law not affected.

SECT. 18. Nothing in this act shall be construed to repeal any portion of the criminal law of this state nor to in any manner abridge the powers of the superior court nor the right of appeal granted under law from orders and decrees of police and justice courts.

Act to be liberally construed.

SECT. 19. This act shall be liberally construed to the end that its purpose may be carried out to wit: that the care, custody, and disposition of a child shall approximate as nearly as may be that which should be given by its parents, and in cases where it can properly be done, the child to be placed in an approved family home and become a member of the family by legal adoption or otherwise.

Penalty for officer's neglect.

SECT. 20. Any officer who neglects to perform any of the duties required of him shall forfeit two hundred dollars for each offense.

Takes effect July 1, 1907.

SECT. 21. This act shall take effect upon the first day of July 1907.

[Approved April 4, 1907.]

CHAPTER 126.

AN ACT AUTHORIZING AND ENABLING TOWNS AND PRECINCTS TO CONSTRUCT, MANAGE, MAINTAIN AND OWN WATER-WORKS.

SECTION

Be it enacted by the Senate and House of Representatives in General Court convened:

Towns may vote to construct and maintain water-works.

SECTION 1. That any town or legally organized precinct within the state, whenever by majority vote of the legal voters of said town, or precinct, at a regular meeting or by a two-thirds vote at a duly notified special meeting of said voters, they shall vote to do so, are hereby authorized and empowered to construct, manage, maintain and own suitable water-works, for the purpose of introducing into, and distributing through any portions of said towns or precincts an adequate supply of water, in subterranean pipes,

for extinguishing fires and for the use of its citizens and others, and for such other public, private, and mechanical purposes as said town or precinct may from time to time authorize and direct; and for that purpose may take, purchase and hold, in fee simple or otherwise, any real or personal estate, and any rights therein, and water-rights, and do all other things necessary for carrying into effect the purposes of this act, and to excavate and dig canals and ditches in any street, place, square, passageway, highway, common, or other land or place, over or through which it may be deemed necessary and proper for building, constructing, and extending said water-works, and may re-lay, change, enlarge, and extend the same from time to time, whenever said towns or precincts shall deem necessary, and repair the same at pleasure, having due regard for the safety and welfare of its citizens and security of the public travel.

Right of eminent domain; damages, how assessed.

SECT. 2. Said towns or precincts are authorized and empowered to enter upon and take water from, and to take and appropriate any streams, springs, ponds, or subterranean sources of water within the boundaries of the town so voting, or of the town in which the precinct so voting is located, not belonging to any aqueduct company, and to secure by fence or otherwise such streams, springs, ponds, or subterranean waters, and dig canals, ditches, make excavations, or reservoirs, through, over, in, or upon such land or inclosure through which it may be necessary for said water-works to be, or to exist, for the purpose of obtaining, holding, preserving, or conducting water for said purposes, and placing such pipes or other materials, or works, as may be necessary for building and operating such water-works, or for repairing the same; *provided*, if it shall be necessary to enter upon and appropriate any stream, spring, pond, or subterranean source, or any land for the purposes aforesaid, or to raise or lower the level of the same by dams, or otherwise, and if said town or precinct shall not agree with the owner or owners thereof for the damage that may be done by said town or precinct, or such owner or owners shall be unknown, said town or precinct, or said owner or owners or party injured, may apply to the trial term of the superior court for the county within which such stream, spring, pond, or subterranean source is situate to have the same laid out and the damages determined, and that said court shall refer the same to the county commissioners for said county, who shall appoint a time and place of hearing, and give notice thereof in the same manner as is now provided by law for laying out highways, and said commissioners shall make report to said court, and said court may issue execution accordingly; if either party shall desire, they shall be entitled to a trial by jury, in such manner and under such regulations as the court may prescribe, in the same manner as appeals from the award of damages in the case of laying out of highways.

Contracts for water service authorized.

SECT. 3. Said towns and precincts are authorized and empowered to contract with individuals and corporations, whether citizens of said towns or precincts or not, for supplying them with water for any of the purposes herein named or contemplated, and to make such contracts, and establish such regulations and tolls for the use of water for any of said purposes, as may from time to time be deemed proper and necessary to enjoy the provisions of this act.

Boards of water commissioners authorized.

SECT. 4. For the more convenient management of said water-works, the said towns or precincts may place the construction, management, control, and direction of said water-works in a board of water commissioners, to consist of three or more citizens of such towns or precincts, said commissioners to be vested with such powers and duties relating to the construction, control and management of the same as may from time to time be prescribed by said towns and precincts. Their term of office shall be for three years, and until their successors are elected and qualified. The first board of commissioners may be chosen by the legal voters of the town or precinct at the same meeting in which the provisions of this act are accepted, or at any special meeting thereafter called for that purpose, and their successors shall be elected at each annual meeting thereafter, in manner and form, and for terms of office as the town or precinct may elect; *provided also* that the term of service of the commissioners first elected shall be designated at the time of their election, or said commissioners may be appointed by the selectmen of said town or the fire wardens of said precinct, if said town or precinct fail to elect, or if the town or precinct at any meeting vote to authorize and instruct the selectmen or fire wardens to appoint said water commissioners.

Compensation and duties; vacancies, how filled.

SECT. 5. The compensation of said commissioners shall be fixed by the town or precincts electing them. They shall be sworn to the faithful discharge of their duties. They shall annually organize by choosing one of their number as chairman of their board, and said board shall appoint a clerk and a superintendent of the works, and such other officers as they may deem necessary, and shall thereupon furnish the town or precinct clerk a certificate of such organization, and said clerk shall record the same in the records of the town or precinct. The commissioners shall fix the compensation of all officers and agents appointed by them, and all officers and agents shall be sworn to the faithful discharge of their duties. Whenever a vacancy shall occur in said board from any cause, the remaining members of the board shall fill such vacancy temporarily by appointing a citizen of said town or precinct in writing, which shall be filed with the town or precinct clerk and recorded by him in the records of said town or precinct; and the person so appointed shall hold office until the next annual town or precinct meeting after his appointment, when the town or precinct shall elect a commissioner to fill out the unexpired time, if any, of the person whose office became vacant and was so temporarily filled by appointment. Said commissioners shall annually make a report to the town or precinct which they may serve at the same time other town or precinct officers report, of the condition of the water-works financially and otherwise, showing the funds belonging to their department and the expenses and income thereof, with such other facts and information as the town or precinct should have, which report shall be published in the annual report of the town or precinct each year.

Appropriations and loans authorized.

SECT. 6. Said towns and precincts are also authorized and empowered, at any annual, special or biennial meeting, by a major vote of those present and voting, to raise by taxation and appropriate, or to borrow and hire, such sums of money on the credit of the town or precinct as may from time to time be deemed necessary and expedient, for the purpose of defraying the expenses of purchasing real estate, rights in real estate, water rights, streams, springs, ponds, lands underlaid with subterranean water, and other rights and property as aforesaid, and for constructing, maintaining, repairing, extending, enlarging and operating said water-works, said indebtedness not to exceed at any one time ten per cent. of the valuation of the town or precinct, and to issue notes or bonds of the town or precinct therefor in such amounts and payable at such time or times, and at such rates of interest as may be thought proper, and may exempt such notes or bonds from taxation when held by inhabitants of the town or precinct, said notes and bonds to be signed by the selectmen of the towns or the fire wardens or commissioners of the precincts, and countersigned by the treasurer of either.

Taxation for payment of loans.

SECT. 7. Said towns or precincts are hereby authorized and empowered to raise by taxation, and pay each year the interest of the notes and bonds so issued, and such part of the principal as the town may determine at any annual meeting.

Act not applicable when private system in operation.

SECT. 8. This act shall not apply to any town or precinct wherein there is now established a private water system chartered by the state and approved by the state board of health, unless said private water system is purchased by said town or precinct, or otherwise legally acquired. Persons or corporations who in good faith have procured charters previous to this from the state for water systems shall also be paid the actual outlay for such charters by towns or precincts where they may be located, before such towns or precincts can take advantage of the provisions of this act.

Takes effect on passage.

SECT. 9. This act shall take effect upon its passage.

[Approved April 4, 1907.]

CHAPTER 41.

AN ACT IN AMENDMENT AND CORRECTION OF SECTION 2, CHAPTER 40 OF THE PAMPHLET LAWS OF 1889.

Be it enacted by the Senate and House of Representatives in General Court convened:

Salary increased.

SECTION 1. The annual salary of the judge of probate for the county of Cheshire shall be six hundred dollars instead of four hundred dollars as is in said section 2, chapter 40 of the Laws of 1889, provided.

Repealing clause; takes effect.

SECT. 2. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, and this act shall take effect from the first day of January, 1891.

[Approved April 7, 1891.]

CHAPTER 42.

AN ACT LEGALIZING THE ACTION OF TOWNS IN APPROPRIATING MONEY FOR LIGHTING STREETS.

Be it enacted by the Senate and House of Representatives in General Court convened:

Action of certain towns legalized.

SECTION 1. The action of all such towns as have at any meeting held in the years 1890 and 1891 voted to raise and appropriate money for the purpose of lighting the streets within said towns is hereby legalized and made valid.

Takes effect.

SECT. 2. This act shall take effect upon its passage.

[Approved April 7, 1891.]

CHAPTER 43.

AN ACT TO ESTABLISH A BOARD OF REGISTRATION IN DENTISTRY.

Be it enacted by the Senate and House of Representatives in General Court convened:

Board of registration; eligibility; term; vacancy filled.

SECTION 1. The governor, with the advice and consent of the council, shall appoint three skilled dentists of good repute, residing and doing business in the state, who shall constitute a board of registration in dentistry; but no person shall be eligible to serve on said board unless he shall have been regularly graduated from some reputable medical or dental college duly authorized to grant degrees in dentistry, or shall have been engaged in the practice of dentistry for a period of not less than ten years previous to his appointment. The term for which the members of said board shall hold their office shall be three years, except that one of the members of the board first to be appointed shall hold his office for the term of one year, one for the term of two years, and one for the term of three years, respectively, and until their successors shall be duly appointed and qualified. Any vacancy occurring in said board shall be filled by the governor in conformity with this section; and any member of the board may be removed from office for cause by the governor, with the advice and consent of the council.

Organization; meetings.

SECT. 2. The board shall choose from its number a president and secretary, and it shall meet at least once in each year. Two of said board shall constitute a quorum.

Registration.

SECT. 3. Within six months from the time this act takes effect, it shall be the duty of every person who is at that time engaged in the practice of dentistry in this state, or who has received a dental degree from some college, university, or medical school authorized to confer the same, or shall have obtained a license from the New Hampshire Dental Society, to cause his name, residence, and place of business to be registered with said board, who shall keep a book for that purpose. The statements of every such person shall be verified under oath in such manner as may be prescribed by the board. Every person who shall so register with said board as a practitioner of dentistry, shall receive a certificate to that effect, and may continue to practice without incurring any of the liabilities or penalties provided in this act.

Examinations and certificates.

SECT. 4. All persons not provided for in section 3 may appear before said board at any of its regular meetings, and be examined with reference to their knowledge and skill in dentistry and

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American Jurisprudence, Second Edition

Laura Dietz, J.D., Glenda K. Harnad, J.D., of the National Legal Research Group, Inc., Alan J. Jacobs, J.D., Jack Levin, J.D., Jeffrey J. Shampo, J.D., Eric Surette, J.D., Lisa J. Zakolski, J.D.

Eminent Domain
I. Nature and Extent of Power
B. Authority to Exercise Power
1. United States

26 Am Jur 2d Eminent Domain § 20

§ 20 Navigable waters; riparian interests

The federal government, under the authority of the Constitution's Commerce Clause, n1 has a dominant servitude over navigable waters to which riparian ownership is necessarily subject, so that a proper exercise of that power does not "take" any property interest which riparian owners had to begin with. n2 The federal government may assert the federal navigational servitude as a defense against a regulatory takings claim. n3 In order to assert a defense under the navigational servitude in a regulatory taking case, the government must show that the regulatory imposition was for a purpose related to navigation. n4

Caution: This navigational servitude, however, does not create a blanket exception to the Just Compensation Clause of the Fifth Amendment whenever Congress exercises its authority to promote navigation. n5

The federal government's construction of dams and other structures on rivers, which so raises the water levels upstream from those structures as to cause major surface flooding or underground saturation of riparian lands and serious damage to the value of those lands, effects a taking subject to just compensation under the Fifth Amendment. n6 However, not all federal construction of irrigation, navigational-improvement, or flood-control projects which have the effect of causing or threatening to cause the flooding of riparian property upstream or downstream from those projects rises to the level of a compensable taking. n7 Government orders which prohibit property owners from constructing certain structures in navigable waters, or which require the owners of existing structures to make modifications to such structures, do not constitute compensable takings. n8

FOOTNOTES:

n1 U.S. Const. Art. I, § 8, cl. 3.

n2 *U.S. v. Cherokee Nation of Oklahoma, 480 U.S. 700, 107 S. Ct. 1487, 94 L. Ed. 2d 704 (1987).*

n3 *Palm Beach Isles Associates v. U.S., 208 F.3d 1374 (Fed. Cir. 2000)*, aff'd on reh'g, *231 F.3d 1354 (Fed. Cir. 2000).*

n4 *Palm Beach Isles Associates v. U.S., 208 F.3d 1374 (Fed. Cir. 2000)*, aff'd on reh'g, *231 F.3d 1354 (Fed. Cir. 2000)*.

n5 *Kaiser Aetna v. U. S., 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)*.

n6 *U.S. v. Kansas City Life Ins. Co., 339 U.S. 799, 70 S. Ct. 885, 94 L. Ed. 1277 (1950); Jacobs v. U.S., 290 U.S. 13, 54 S. Ct. 26, 78 L. Ed. 142, 96* A.L.R. 1 (1933).

n7 *U.S. v. Sponenbarger, 308 U.S. 256, 60 S. Ct. 225, 84 L. Ed. 230 (1939); Sanguinetti v. U.S., 264 U.S. 146, 44 S. Ct. 264, 68 L. Ed. 608 (1924)*.

n8 *Willink v. U.S., 240 U.S. 572, 36 S. Ct. 422, 60 L. Ed. 808 (1916)*.

SUPPLEMENT:

Cases

When state's eminent domain authority is delegated to another, courts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner. U.S.C.A. Const.Amend. 5; Const. Art. 1, § 19. *Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006)*.

REFERENCE: West's Key Number Digest, Eminent Domain [westkey] 4 to 11
U.S. Const. Art. I, § 8, cl. 3.
28 U.S.C.A. §§ *1346*(a)(2), 1491
40 U.S.C.A. §§ *3113*, 3114, 3117
Fed. R. Civ. P. 71A
A.L.R. Index: Eminent Domain
A.L.R. Digest: Eminent Domain §§ 2 to 17
Am. Jur. Pleading and Practice Forms, Eminent Domain §§ 53 to 63
Fed. Proc., L. Ed., Condemnation of Property § 14:3
West's Key Number Digest, Eminent Domain [westkey] 5

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Eminent Domain
I. Nature and Extent of Power
B. Authority to Exercise Power
3. Delegation of Power by Legislature

26 Am Jur 2d Eminent Domain § 24

§ 24 Statutory construction

A grant of the power of eminent domain is to be strictly construed against the condemning party and in favor of the property owner, n1 and the prescribed method of taking must be strictly pursued. n2 Statutes that vest the power of eminent domain in an agency must be strictly construed, because, by their operative nature, they subjugate the rights of private property owners to the greater public need. n3 Such statutes are not to be extended or broadened by inference or implication n4 or by judicial construction. n5 A statute which confers the right to exercise the power of eminent domain is to be strictly construed in the light of the objectives and the purposes sought to be attained by its enactment. n6

Authority to condemn must be expressly given or necessarily implied n7 and will not be construed from doubtful inferences. n8 The power of eminent domain should be construed favorably to the landowner when there is doubt as to the condemnor's right to exercise the power. n9 The authority for the taking of private property for public use should be clearly expressed, n10 and power to take land for a particular public use will not authorize a condemnation for a temporary use or for a limited period of time. n11

The common-law rule that statutory powers to condemn should be given a restrictive interpretation is inapplicable where the statute expressly provides that it shall be liberally construed to carry out the purposes of the legislature. n12 Moreover, the doctrine of strict construction does not exclude a reasonable and sound construction of the particular statute, n13 should not be carried to the extent of defeating the legislative intent, n14 and does not require such a strained or narrow interpretation of the language of the statute as to defeat its object. n15

Observation: The statute need not refer to the specific parcel of land at issue in condemnation, but the project must come within the class of expenditures that Congress intended to authorize. n16

FOOTNOTES:

n1 *Municipality of Anchorage v. Suzuki, 41 P.3d 147 (Alaska 2002); Kelo v. City of New London, 268 Conn. 1, 843 A.2d 500 (2004).*

n2 *Aposporos v. Urban Redevelopment Com'n of City of Stamford, 259 Conn. 563, 790 A.2d 1167 (2002).*

When the legislature delegates the power of eminent domain, the parameters of that power are strictly construed. *Blanchard v. Department of Transp., 2002 ME 96, 798 A.2d 1119 (Me. 2002).*

n3 *Cannon v. State, 807 A.2d 556 (Del. 2002).*

N4 *Schulman v. People, 10 N.Y.2d 249, 219 N.Y.S.2d 241, 176 N.E.2d 817 (1961).*

n5 *Browneller v. Natural Gas Pipeline Co. of America, 233 Iowa 686, 8 N.W.2d 474 (1943).*

n6 *National Compressed Steel Corp. v. Unified Government of Wyandotte County/Kansas City, 272 Kan. 1239, 38 P.3d 723 (2002).*

In a taking by a public authority, the legislature only grants such rights as are reasonably necessary to accomplish a public purpose. *General Hosp. Corp. v. Massachusetts Bay Transp. Authority, 423 Mass. 759, 672 N.E.2d 521 (1996).*

n7 *Coon v. City and County of Honolulu, 98 Haw. 233, 47 P.3d 348 (2002); Manufactured Housing Communities of Washington v. State, 142 Wash. 2d 347, 13 P.3d 183 (2000).*

n8 *Coon v. City and County of Honolulu, 98 Haw. 233, 47 P.3d 348 (2002).*

n9 *St. Andrew's Episcopal Day School v. Mississippi Transp. Com'n, 806 So. 2d 1105 (Miss. 2002).*

n10 *Pfeifer v. City of Little Rock, 346 Ark. 449, 57 S.W.3d 714 (2001).*

n11 *City of Waterbury v. Platt, 75 Conn. 387, 53 A. 958 (1903); Hibernia Underground R. Co. v. De Camp, 47 N.J.L. 518, 4 A. 318* (N.J. Ct. Err. & App. 1885).

n12 *U. S. ex rel. Tenn. Valley Authority v. Welch, 327 U.S. 546, 66 S. Ct. 715, 90 L. Ed. 843 (1946).*

n13 *State ex rel. Missouri Water Co. v. Bostian, 365 Mo. 228, 280 S.W.2d 663 (1955).*

n14 *Smith v. City Bd. of Ed. of Birmingham, 272 Ala. 227, 130 So. 2d 29 (1961); City of Tacoma v. Welcker, 65 Wash. 2d 677, 399 P.2d 330 (1965).*

n15 *Southwestern Bell Tel. Co. v. Newingham, 386 S.W.2d 663 (Mo. Ct. App. 1965).*

n16 *U.S. v. Certain Land Situated in City of Detroit, Wayne County, State of Mich., 873 F. Supp. 1050 (E.D. Mich. 1994),* aff'd, *76 F.3d 380 (6th Cir. 1996).*

SUPPLEMENT:

Cases

When the state takes an individual's private property for transfer to another individual or to a private entity, rather than for use by the state itself, the judicial review of the taking is paramount. U.S.C.A. Const.Amend. 5; Const. Art.

1, § 19. *Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).*

Rule of strict construction should be applied to the condemnor's power and to the exercise of this power because the exercise of the power of eminent domain is an extraordinary power, and the rule of strict construction is intended to benefit the owner whose property is taken against his or her will; conversely, statutory provisions in favor of the owner, such as those which regulate the compensation to be paid to him or her, are to be afforded liberal construction. W.S.A. 32.09. *Spiegelberg v. State, 2006 WI 75, 717 N.W.2d 641 (Wis. 2006).*

REFERENCE: West's Key Number Digest, Eminent Domain [westkey]4 to 11
U.S. Const. Art. I, § 8, cl. 3.
28 U.S.C.A. §§ *1346*(a)(2), 1491
40 U.S.C.A. §§ *3113*, 3114, 3117
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Fed. Proc., L. Ed., Condemnation of Property § 14:3
West's Key Number Digest, Eminent Domain [westkey]8

NEW HAMPSHIRE CONSTITUTION

Part 2, Article 5

[Art.] 5. [Power to Make Laws, Elect Officers, Define Their Powers and Duties, Impose Fines and Assess Taxes; Prohibited from Authorizing Towns to Aid Certain Corporations.] And farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defense of the government thereof, and to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this state, and the forms of such oaths or affirmations as shall be respectively administered unto them, for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and also to impose fines, mulcts, imprisonments, and other punishments, and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same; to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of the government of this state, and the protection and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same; provided that the general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stocks or bonds. For the purpose of encouraging conservation of the forest resources of the state, the general court may provide for special assessments, rates and taxes on growing wood and timber.

U.S. Code collection

§ 1001. Determination of amount of and recognition of gain or loss

(a) Computation of gain or loss

The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount realized

The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized—

(1) there shall not be taken into account any amount received as reimbursement for real property taxes which are treated under section 164 (d) as imposed on the purchaser, and

(2) there shall be taken into account amounts representing real property taxes which are treated under section 164 (d) as imposed on the taxpayer if such taxes are to be paid by the purchaser.

(c) Recognition of gain or loss

Except as otherwise provided in this subtitle, the entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized.

(d) Installment sales

Nothing in this section shall be construed to prevent (in the case of property sold under contract providing for payment in installments) the taxation of that portion of any installment payment representing gain or profit in the year in which such payment is received.

(e) Certain term interests

(1) In general

In determining gain or loss from the sale or other disposition of a term interest in property, that portion of the adjusted basis of such interest which is determined pursuant to section 1014, 1015, or 1041 (to the extent that such adjusted basis is a portion of the entire adjusted basis of the property) shall be

disregarded.

(2) Term interest in property defined

For purposes of paragraph (1), the term "term interest in property" means—

(A) a life interest in property,

(B) an interest in property for a term of years, or

(C) an income interest in a trust.

(3) Exception

Paragraph (1) shall not apply to a sale or other disposition which is a part of a transaction in which the entire interest in property is transferred to any person or persons.

EXHIBIT A

Date: April 21, 1997
Time: 11:00 a.m.
Room: 104 LOB

The Senate Committee on Executive Departments & Administration held a hearing on the following:

HB 0528 relative to municipal water, gas and electric utilities.

Members of Committee present:

Senator J. King
Senator Rubens
Senator Whipple
Senator Roberge
Senator Podles
Senator Patenaude

The Chair, Senator John A. King, opened the hearing.

Representative Jeb Bradley, Carr 8: For the record, Jeb Bradley, Carroll County District 8. I come back before you again this morning with probably one of the most important pieces of the year. This bill, HB 528, is similar to a bill that passed the Senate last year. It clarifies, it simplifies, and it lays some new groundwork for what is an existing right now of municipalities, towns, and cities across the state to, through a process, take over the existing utility network within their community or in some circumstances outside of their community.

We believe that this is a very important piece of legislation for several reasons. As I said, it clarifies and it simplifies an existing right and opportunity, but perhaps more importantly should the process of electric utility deregulation falter or get slowed down in the courts, this provides some balance and some needed opportunities for municipalities to proceed on their own if the benefits of competition don't arrive as quickly as we had hoped.

I'll just touch upon some of the main changes in the statute that are in this bill, and then Cliff, I think, would be happy to take you through some of the details. This re-enacts RSA 38, repeals and re-enacts, so there are many

changes, but the specific ones are that those areas that are different for electric and water are spelled out with different provisions. The water sections that are separate are later in the bill.

The public interest determination is changed, and that is throughout the bill, starting on page 1 of the bill, or page 2 actually, line 29, 38:3, cities, towns, or village districts, 38:4 and 38:5, unincorporated places. What the language "rebuttable presumption" says is that once there has been a vote by the community, there is a presumption by the community that the public utilities commission should listen to that there is a presumption that the public interest is satisfied by that vote..

It is further illuminated on page 3 of the bill in section 38:11 where the public interest determination by the commission is spelled out, and it does give the commission the opportunity to set conditions and issue orders to satisfy the public interest. So clearly the commission is an integral player here.

Language in the bill added "unincorporated places" which, while most of us who live south of the White Mountains don't have to worry about that, it was a major interest for Representative Larry Guay, who represents several unincorporated places, that they be given ample opportunity.

The ratification section on page 4, language was added to make it explicitly clear that municipalities were authorized to hold special meetings if necessary. That was a possible shortcoming in the prior statute. The limitation in RSA 33-B on bonding was removed so that communities could exceed, I believe, it was a 10% cap and go forward without that limitation.

Senator Eleanor Podles, D. 16: Where is that bonding? On page 4? That you're talking about.

Representative Jeb Bradley, Carr 8: It is ...yes, in section 38:13.

Senator Eleanor Podles, D. 16: So, we're still on ratification in other words?

Representative Jeb Bradley, Carr 8: It is in that section. Yes, Senator. And, I think one of the last other major changes that is in this bill are on page 9, the consequential damages section that allows the commission to determine, in essence, consequential damages which is what we're calling stranded costs, if the Federal Energy Regulatory Commission decides it does not have jurisdiction, which is highly unlikely.

The following section, 38:34, says that any newly municipalized electric company shall unbundle rates, and it also allows those five communities that now have municipal electric departments, which include my town of Wolfeboro, Woodsville, Littleton, Ashland, and New Hampton, that they may voluntarily unbundle.

Another key provision is the financial responsibility section, which in essence says that if you're not part of the service territory of a municipal utility or you choose not to take generation services from that municipalized entity that you cannot be held responsible for any problems through taxes or other charges.

I think that highlights most of the bill. Once again, I think this is a really important piece of legislation in that it hopefully will provide an opportunity for communities to go forward based on statutory rights that they've had in the past and will offer another option should there be protracted litigation with regard to the restructuring of our electric utility industry.

Representative Clifton Below, Grafton 13: I am Representative Clifton Below, representing Grafton District 13, the City of Lebanon and Town of Enfield.

I would just like to elaborate on Representative Bradley's comments and say that I think this bill in part was part of a sort of carrot and stick approach to help us move towards competition restructuring and lower electric rates. Obviously it is in a sense the stick part in that it provides municipalities, it strengthens and reinforces an existing right of municipalities to municipalize their distribution system and makes that opportunity more meaningful and one that can really be exercised should this effort to restructure result in protracted litigation, or whatever.

I think it is important to realize that the right of municipalities to municipalize a monopoly utility system has existed from early in this century and it exists in almost every state in the nation, and it has been exercised from time to time. In fact, there are over 2,000 municipal electric systems in this country, some of which were created by municipalization. Most of which were formed in the early days of electrification, and they serve somewhere in the order of 20% of the nation's customers.

Our laws have not been updated in this regard for many years. This bill, I think was SB 610 last year, went through this committee, was approved, went through our committee. We provided some amendments and when we got to conference committee there was a feeling that we really hadn't done as much work as needed to be done, and the bill was allowed to die in conference committee by sort of mutual consent of all the parties.

It was reintroduced and we put a lot of work into this. There was a number of different bills that essentially became this one bill. We had ones that attempted to update the water system section. There was another bill, HB 411, which looked at the bonding issue, and went to update RSA 33-B, and they were all merged into this one bill. After we had taken them apart and worked on each separate part we put them all back together.

If you'd like, I don't know how much detail you want to go into this, but I would be happy to walk through some of the more detail in terms of what is new and what has changed. We'll try to go through this slowly. Starting on page 1, chapter 38. I believe that is the same title of the chapter as currently exists, and we're simply repealing and re-enacting the whole chapter.

On line 10, Roman three (III), the term "municipality" is defined to include unincorporated towns and unorganized places. On line 16, there were some words added such as "establish, expand ...". We already had "take, purchase, lease." We just wanted to make clear the terminology included expansion of an existing system.

For the five systems that exist, I think a couple of them serve their whole towns, but at least three of them only serve part of their existing towns, Ashland, New Hampton, and Haverhill or Woodsville, only serve part of their towns. Wolfeboro I think serves basically almost the whole town.

Representative Jeb Bradley, Carr 8: 98%.

Representative Clifton Below, Grafton 13: Line 20 on the first page again there were some words that were added for these purposes. "Take" was added in. It wasn't there. "Or otherwise lease," "or otherwise acquire and maintain" I think were some additions.

When we turn to page 2 on line 4 or line 3 is where this phrase comes that says, "Such confirming vote shall be had within one year from the date of the vote to establish such a plant, and if favorable, shall create a rebuttable presumption that such action is in the public interest." This provides this process where it takes a two-thirds vote of the governing body. I should mention that is also a new term. In many places there were specific references to the city council, the town selectmen, mayors, so on and so forth. We changed the reference so it generally talks about the governing body of a particular entity, which is a defined term elsewhere in the statutes.

But, this creates the notion that if there is a two-thirds vote to establish a municipal utility system that that creates a rebuttable presumption. That it is in the public interest. When we talk about this, there were attempts I

think in 610, as well as the way this bill was introduced, to define what public interest was meant. We ended up deciding not to do that because there is a long history of defining the term "public interest" in the law, in the case law, and the law before the PUC.

Both the utilities that were involved in testifying on this as well as the other groups, municipalities all felt it was better to not try to create a new definition for public interest, but rather to allow the one that exists in case law that has evolved over time to stand. But, it does create that presumption that can be rebutted and challenged when it goes to the commission. That's repeated on line 9, and it is a vote of the town or village district which is obviously at an annual meeting or a special meeting duly warned.

The whole section starting on line 12, 38:5, By Unincorporated Towns and Unorganized Places, this is a whole new section because they were not addressed previously. Senator Fred King and Representative Guay were concerned, and Coos County has taken something of a position on this. They had representation in this matter wanting to be sure that in Coos County where there are so many unincorporated towns that there would be a mechanism to provide for municipalization, which is through two-thirds of the members of the county convention.

Again, on line 22, there is a reference to within 30 days after the confirming vote the governing body shall notify in writing any utility engaged of the vote. Previously this mentioned there was a lot of different sections that talked about the mayor of a city or the selectmen. We just said the governing body shall provide the notice.

Down on line 33 where the utility is then to reply within 60 days of the receipt as to whether they are, in effect, willing to sell or not. That is given back to the governing body. Then it does provide if the utility says no, then the utility thereby forfeits any right it may have had to require the purchase of its plant and property by the municipality, and the municipality may proceed to acquire as provided in 38:10.

I believe that that exists in the current statute. We looked at taking that in and out, but ended up deciding that that should stay. It simply says if they say no then it is up to the process that is set forth as to what property is to be acquired. Whereas if the utility applies in the affirmative as provided in line 37, then they set forth the price in terms it is willing to accept and specify what plant and give a schedule of plant that is to be sold to the municipality.

Then 38:8 on page 3, line 6 provides that the governing body may negotiate and agree with the utility if there is a negotiated agreement on the sale. 38:9, Valuation, of course that was part of the existing statute, although

there are some changes to it. For instance, on line 18 it specifies that "...the commission shall determine the amount of damages if any caused by the severance of plant and property proposed to be purchased from the other plant and property of the owner. In the case of electric utilities such amount shall be limited to the value of such plant and property and the cost of direct remedial requirements, such as new through-connections in transmission lines, and shall exclude consequential damages such as stranded investment in generation, storage, or supply arrangements which shall be determined as provided in RSA 38:33."

That is an important section because traditionally it was up to the commission to determine all damages of all nature. This has separated the damages into sort of the severance damages versus the consequential damages and stranded cost.

If you turn to 38:33, which is at the bottom of page 9, line 36, provides that consequential damages are going to be determined by the Federal Energy Regulatory Commission. Although it says to the extent they don't have jurisdiction actually, it says the commission shall determine just and reasonable consequential damages. The reason it says it in that way is because basically the FERC, Federal Energy Regulatory Commission, last spring in a major order addressing the whole issue of stranded costs in the electric utility industry said that they will ...they asserted jurisdictions that they will determine damages of this nature stranded cost related to generation and supply arrangements as a result of municipalization.

So, the point is that FERC has asserted jurisdiction over this issue in what is called FERC Order 888, and the feeling was that since FERC has said they have jurisdiction over determination of these kinds of stranded costs and what is going to be paid for them in the case of municipalization because it is transforming part of a retail system into a wholesale customer, and basically FERC says it has jurisdiction over wholesale transactions and arrangements. That is where it is assumed that it is going to be determined.

However, it does say that if FERC does not assert jurisdiction and is legally challenged, there are some entities challenging FERC's assertion of jurisdiction, then the commission shall have the ability to determine that on a just and reasonable basis. And then of course it says the commission need not make a determination when there is an agreement between the utility and the municipality. It says need not because it is conceivable that there would be a third party which felt that there needed to be issues addressed so the commission could step in and make a determination if they felt that was the public interest required.

So, if you turn back to page 3, and I think the section IV on line 23 and 38:10 are essentially similar to what currently exists. 38:11 at the bottom of the page the public interest determination by the commission is a change from the existing statute to the extent that they determine if it is in the public interest, although we've created a rebuttable presumption that it is by a two-thirds vote of the municipality, but it says they may set condition and issue orders to satisfy the public interest. This clarified their ability to positively assert conditions or even issue orders that say the public interest requires, for instance, that a municipality may have to acquire some property outside of its boundaries. If there is some customers that would otherwise be stranded with a small distribution line that crosses a municipal boundary the commission would have the power to order the utility that is selling its property or having its property acquired and also order the municipality to acquire that portion of a system that may be outside of their boundaries.

For instance, which was a gap that we found in the current statute that wasn't addressed if that's what the public interest would require. Again, it goes on to say the commission need not make a determination if there is an agreement for sale. But again, if there is a third party, such as a neighboring municipality or some customers who felt that they would be aggrieved by the proposed sale, the commission could be on their own initiative or petitioned by another party go ahead and make a public interest determination even if there is mutual agreement. And again, they could set conditions or issue orders to insure that public interest is satisfied.

When we get into this actually I think this expansion of existing municipals is a new section. Again that wasn't clearly addressed in the existing statute, and we added a provision that parallels the process for expansion. Ratification -- this is where the issue of bonds came up -- under the existing statute does not really reference out of its own language. It talks about municipality issuing bonds to pay for the acquisition cost, and it says such indebtedness shall not exceed at any one time 10% of the tax valuation of the community. However, the existing statute doesn't make clear whether these bonds are general obligation bonds, revenue bonds, or what. So, various bond counsel who looked at the current statute said it is really ambiguous and would be very difficult to utilize.

Typically, any acquisition that is being contemplated is less than 10% of the valuation of the municipality. However, usually that condition is only related to general obligation bonds and not tied in to revenue bonds. So, it was felt the appropriate thing to do was tie this into RSA 33-B which is the existing statute on municipal revenue bonds that disconnects them from sort of the general obligation of the community. It makes them specific to anticipated revenues from specific facilities. So, what we have done is tied

this off to the fact that the municipality may issue bonds and notes pursuant to RSA 33-B.

I'm going to ask you to turn to page 10. Near the bottom of the page, line 32, there is an amendment to RSA 33-B on revenue producing facilities, the term that provides the definition the existing statute covers water works, sewage treatment plants, solid waste facilities, but it doesn't cover electricity and gas systems. So, we have specified and included into the definition of revenue producing facilities "facilities for the production, generation, transmission, or distribution of electricity or gas," so then it all flows right out of that 33-B which has been updated in recent years and is considered to be a pretty clear good statute about how to do revenue bonds.

As Jeb mentioned, it goes on because there is a time limit at the start of – I'm back on page 4 on line 8 – it provides that the municipality within 90 days of a final determination of price has to decide whether or not to proceed with the acquisition, it does provide in line 13 that the municipality is authorized to hold a special meeting to take such a vote, and it clarifies that the special meeting doesn't have to be an emergency situation, but they can take it to satisfy the timing requirement, and of course the purpose of the timing requirement is so that once evaluation is made it proceeds without dragging it out so the evaluation would change over time by a delay in the vote to decide whether to go ahead and do it.

We did consider changing this, but we left it in on line 19. There is a specification that if the ratifying vote provided for in this section is in the negative, no other action under this chapter shall be had during the ensuing two year period. So, if a town chooses not to proceed, essentially under the voting provisions of 33-B which I believe requires a two-thirds majority vote to issue revenue bonds, if that two-thirds vote fails then the whole, there can be no other action for at least a 2 year period of time, so that this provides sort of a time out period where it is not, the incumbent utility has a chance to go ahead and perform and not be bothered by this for a couple of years.

Going on down to section 38:14, Operation of Plant, line 25-26, there is a new phrase that provides that "The operation by a municipality outside its own limits shall be subject to the jurisdiction of the commission except as provided in RSA 362." In RSA 362 which has to do with the general jurisdiction of the commission, it does provide that if a municipality provides utility service outside of its boundaries on the same rates and terms as it provides to its own residents within its boundaries it is not subject to the commission jurisdiction.

So, for instance, and I don't know if this is the case, but the Manchester Water Works, the Manchester Water Department which serves communities

outside of its boundaries, is or isn't subject to jurisdiction depending on whether it charges the same rates or different rates as it does to its own customers. Does that make sense? So, we just tied that off and tied it back into RSA 362. I think there was an attempt to spell that out in the existing statute, but it was felt to just tie it back into the other.

I think there is a little clarification on page 4, line 30 that a municipality may take by eminent domain land, any interest in land or water right within its limits. It doesn't allow a town to go outside of its limits for the expansion of plant, so that could only be done pursuant to a commission order to satisfy the public interest or by mutual agreement.

I think on page 5 and 6, most of that is pretty much as it exists in the current statute. There is something, I think the supply contract section had a little bit of language that was changed on line 4 where it starts off "Any such municipality may contract with individuals, corporations, and other municipalities and the citizens of such other municipalities for supplying them ...." There was just clarification language. You say citizens thereof. There are quite a few places, I'm not hitting every point, but there are quite a few places where we tried to clean up language that was ambiguous or not very clear or archaic. I'm not hitting all those points.

Page 7 is where the next major set of changes is. On page 7, line 8 is the additional provisions for water systems. It used to be that some of these sections were blended right in to the rest of the chapter. We decided to take out the ones that are specific to water systems and electric systems and put them at the end of the chapter, so it is just a little more clear. Most of this exists in the current statute. An example of the kind of minor changes we made on line 33, there is the section called Water Rates. It used to be Water Rentals, and used the term "rentals" throughout. We just changed it to the word "rates" because that is the term used these days.

Turning on to page 9, the additional provisions for electric systems, as Representative Bradley mentioned, at the bottom of the page, there is the section on consequential damages, and as I previously mentioned, it explains how that would be dealt with. On page 10, line 5 the Unbundling Rates and Open Access, that's new as well as the 38:35 is all new.

Maybe I'll just take a minute to explain the significance of that. It does provide that if a municipality establishes a municipal system then in effect it can't require customers to pay through taxes or otherwise costs associated with the utility except for power or services consumed either directly by the municipality or by the customer. That's on lines 13, 14, 15. So, it provides that if you are going to municipalize you can't use the taxpayers' ability to

pay taxes as a way of subsidizing that municipalization effort. It really has to stand on its own as a revenue producing activity.

Obviously, the intent there is as we're moving generation to the competitive side, we recognize that distribution will remain a regulated monopoly, but it was felt that the taxing ability of communities should not be used to subsidize and affect municipalization efforts. It should stand on its own.

The next section Roman two (II) at line 16 goes into address the specific issue of generation services. I should just say that we considered not allowing municipal systems to own generation. Since generation is subject to competition. We had a lot of debate about that. We ended up coming down on the side of saying that we aren't going to presume to know better than the municipality whether they should actually own generation or not. We're going to leave that as a local decision, but we want to make it clear that if they acquire generation either through ownership or through contract, for instance, there again they cannot make their customers or the taxpayers of the community responsible for the cost of those generation services except to the extent that they take power from that generation facility.

So, what it says here in this line 16 through 24 is that if a municipality is going to own generation it has to support itself on its own revenues and they can't go back to the taxpayers or the customers to subsidize or support that. In a sense it has to compete on its own merits.

So, that would certainly be something that bond council for a municipal system would look at as they were authorizing the issuance of revenue bonds to make sure that the credit really is that they are secured only by the facility itself, such as a mortgage would do.

The other new thing in here is the Roman three (III) at line 25, which provides that if a municipal electric utility acquires a generation plant and equipment, the municipal electric utility shall make payments in lieu of taxes in the amount that the plant and equipment would have paid taxes if it had been owned by a private owner. So there again, it is stating that you are not going to subsidize a municipal owned generation plant to compete against private owned generation by exempting it from the payment of property taxes. That it should make payments comparable to what it would pay if it was privately owned.

The last sentence essentially ties that back in and says it is not part of the cost of generation services that people that aren't taking those services can be held liable for it.

Going on down on line 32 again is the amendment to RSA 33-B, which I discussed before. On page 11, line 5 there is a heading "Redundant Electric Lines." This is a new section, which I think we put in the House version of the Senate bill last year, which we retained, which specifies that "No public utility or municipal utility shall construct redundant parallel electric utility lines. Such duplication of lines shall be deemed contrary to sound economic policy and contrary to the public interest," and does not apply until retail electric competition is certified to exist.

That is just to make clear that if a municipal system wants to expand, the way they should expand is by taking or acquiring existing distribution lines and not constructing parallel lines, because obviously parallel lines, two sets of poles down the same street could present a situation where it is not really in the public interest, because you're duplicating the cost of the distribution system. We did make that apply prospectively only because there has been a case where the Town of Ashland has attempted to expand. The PUC found 2 to 1 against the municipal system, and said that they could not expand by running parallel lines to the co-op lines. They appealed that. I don't know exactly where that stands, but this is intended to not really address their issue but to set a policy going forward from a time some time next year when the competition is established. So we're saying really competition can exist in generation services, but not in distribution services at this time.

The remaining references throughout the rest of this are simply existing statutes that tie back to this section to this RSA and 38 because we've re-enacted it. The numbering has changed, so it makes the proper references to the numbers. If that helps you.

Senator Jim Rubens, D. 5: My compliments to the House committee. This is some quality draftsmanship. I have some questions.

On page 9, line 37 where you would use the terminology of the standard "just and reasonable" as opposed to the "fair, balanced, equitable" language in 1392. So, we have 2 standards by which stranded costs can be determined. Why did the committee choose to not recognize the standard.

Representative Jeb Bradley, Carr 8: FERC would use the "just and reasonable" standard under Order 888, and that's why we chose to do that.

Senator Jim Rubens, D. 5: But here we are coming back to the state. The state determination where we've set a policy for all other which would probably be the vast majority of stranded costs determination fee would be using the fair, balanced and equitable. Why the difference here is probably a small category of that asset.

Representative Jeb Bradley, Carr 8: Primarily because that would be a FERC standard that they would use it. We just felt that that was appropriate because of the reliance on the FERC standard.

Representative Clifton Below, Grafton 13: To be honest, that was drafted last year, and there was no really question of it this year, so we didn't really revisit that particular question. Although, it was drafted after HB 1392 had passed. But, just to let you know we didn't actually discuss that in the House this year.

Senator Jim Rubens, D. 5: You didn't discuss changing it then?

Representative Clifton Below, Grafton 13: Correct.

Senator Jim Rubens, D. 5: You have required, I just want to be clear what you are meaning here at the top of page 10. When competition exists anywhere in the state, automatically by statute any municipalized authority muscle out choice by consumers who live in that municipality zone, municipalized zone must allow choice?

Representative Jeb Bradley, Carr 8: Anyone going forward. Those five existing may voluntarily.

Senator Jim Rubens, D. 5: Do you define anywhere, do you define direct versus consequential damages anywhere in here so we have a clear demarcation?

Representative Jeb Bradley, Carr 8: No.

Representative Clifton Below, Grafton 13: Well, I think there is ...it is not a defined term, that's correct. There is an elaboration of it which was on page 3, lines 16-22. It says "...caused by the severance" in the first instance, and then it clarifies so that severance really happens with regard to any kind of utility. So, a water system, if there is severance, it is the broad term. In case of electric utilities, it is limited to the value of plant and property and the cost of direct remedial requirements. So that's how there is an attempt to define it.

And then it says "...consequential damages such as ..." so people seem to feel that sufficiently ...

Senator Jim Rubens, D. 5: You discussed that in committee and those definitions were considered sufficient?

Representative Clifton Below, Grafton 13: Yes.

Senator Jim Rubens, D. 5: For costs that are direct damages, is there reference to net depreciated book value or book value of those assets besides remedial costs as you debated, decided?

Representative Clifton Below, Grafton 13: It was debated. There was some question about the whole valuation process. There was consideration to whether it should be thrown to the board of tax and land appeals in terms of the appeal procedure to the commission determination. It was felt that the commission in many ways really was more expert in terms of utility property and in terms of how it was going to balance the public interests between shifting costs to say an existing rate base versus a municipalized effort, i.e. if you set the price too low in an acquisition, you would actually potentially shift cost onto existing ratepayers that are left behind with the incumbent utility.

So, this is an indirect answer, but we felt that it should stay with the commission. There was discussion about whether we should spell out whether it is net depreciated book value, but it was felt that was not ...it was decided not to do that.

Senator Jim Rubens, D. 5: So now it is ambiguous. The PUC decides.

Representative Clifton Below, Grafton 13: Yes.

Senator Jim Rubens, D. 5: How could there be, if the definition net book were used aside from the remedial costs, how could it be argued that would be anything other than fair to all parties on both sides?

Representative Clifton Below, Grafton 13: It might be. You may hear some other arguments on that point.

Senator Jim Rubens, D. 5: On page 5, line 3, the definition of supply contracts. The list isn't exhausted there. For example, LLC's, persons, which under the law is deemed to include all other types of entities. Could that language be somewhat expanded to make sure we don't lose anyone or any entity?

Representative Clifton Below, Grafton 13: I don't see a problem.

Senator Allen Whipple, D. 8: What page was that, Jim?

Senator Jim Rubens, D. 5: Page 5, line 3. "...municipality may contract with individuals, corporations, and other municipalities and the citizens ..." but you may have other entities like LLC's or a person.

Representative Clifton Below, Grafton 13: Sure, partnerships. That sounds like a good idea to me.

Senator Jim Rubens, D. 5: On page 10, line 18, let's say a municipality makes a bad decision with respect to some kind of generation supply, some kind of open ended generation contract with cost escalation provisions, would that be possible? And the customer is then, by virtue of the municipal price going up would decide to elect to go to another supplier, then there will become fewer and fewer customers for the municipal generation choice and we get into a death spiral situation, and you prohibit the municipality from loading that back on the taxes. What do you foresee here?

Representative Clifton Below, Grafton 13: Well, potentially what is foreseen here because there is this unbundling rates and open access that the party at the other end of the contract, say it is a contracted provision for services, would have their contractual rights limited in essence by the statute which would exist prior to that contract, which says that if the municipal system say defaults on that contract, that they couldn't force that municipal system to have recourse back on their customers, because of what will then be an existing statutory provision saying that they are limited. I think the ...

Senator Jim Rubens, D. 5: The municipal system would, in essence, have limited assets and a limited ability to collect from any party. The party entering into a generation contract would be forewarned of that?

Representative Clifton Below, Grafton 13: Should be forewarned of it in light of this provision in the statute. Likewise, if the municipal owned a generation plant, decided to build one, it proved to be uneconomic, they couldn't get any customers for it, they would probably default on it, and whoever loaned the money would foreclose on the facility itself as their recourse, and that would be the only recourse considering that this provision was on the books prior to the indenture, the debt obligation.

Senator Jim Rubens, D. 5: So this provision then would, in essence, foreclose any municipal entity from having an open ended liability?

Representative Clifton Below, Grafton 13: Yes. Yes that's the intent of it.

Senator Jim Rubens, D. 5: Is that right? No doubt about that?

Representative Clifton Below, Grafton 13: Well ...

Senator Jim Rubens, D. 5: This could be a huge problem unless there is no doubt. Municipalities could make mistakes.

Representative Clifton Below, Grafton 13: There is no doubt that this is the intent, and the effect of this would be to very much discourage a new municipal system from getting involved in generation at all. You know, I can never totally anticipate how something like this might be litigated, but clearly the people who looked at it felt like that would be the effect, that it would very much limit what could be done.

It was thought that the nature of the things that a municipal might do, because many municipalities have a large electric load of their own, is that they might go out and arrange for a contract to provide generation services for their own plant, and they might say to their customers in town, their customers of the distribution system, "We've got a good deal for supply of generation. If you'd like to join in our contract, there is a three year commitment here at this price. You're welcomed to do so, but you have to sign a contract."

So, the municipality might sort of aggregate some amount of load in part to satisfy their own load, but it would be anticipated in light of this provision they would only do so to the extent, they would only make a commitment to the extent they had customers signed up and committed to it. But, there again, the interpretation we have heard that this provision in the statute prior to the enactment of the contract would sort of rule over the contract. The contract would be subject to these statutory conditions so that the party at the other end supplying generation would have limited recourse if there is a default on that.

Senator Jim Rubens, D. 5: Right now in Dover, the Dover situation, Dover may wish to municipalize and then ensues a lengthy prospect of litigation over valuation. Does this bill streamline that valuation contest, valuation disagreement contest so that that doesn't become an inhibitory barrier? How would we delegate it to the PUC?

Representative Clifton Below, Grafton 13: That was certainly part of the intent of updating this legislation, and I think it does in a couple ways. It clarifies the vote process by the community, and the turnaround times. It clarifies the bonding authority, and it takes to the extent that it narrows what the commission has to decide the damages are, the valuation is, it narrows that so that can go ahead and happen.

If there is litigation with FERC as to the consequential damages, that can take years, but that could, and that is typically what has delayed

municipalization efforts, but in this case it could proceed under state law while those issues are litigated before FERC, and they will land however they play out.

Senator Jim Rubens, D. 5: So, perhaps by virtue of FERC 888 there could still be massive inhibitions against municipalization due to the prospect of extended litigation in Washington before FERC?

Representative Clifton Below, Grafton 13: There is certainly that risk factor, and we couldn't see any way to get around that.

Senator Eleanor Podles, D. 16: On page 8, on 38:30, line 28, it allows the municipality the power of eminent domain, section 30, the water supply. Is that new or is that in statute?

Representative Jeb Bradley, Carr 8: I believe that is existing statute. I'll check.

Representative Clifton Below, Grafton 13: We're pretty certain that is in the existing statute.

Senator Eleanor Podles, D. 16: Could you find out for me?

Representative Jeb Bradley, Carr 8: We'll find out.

Senator Eleanor Podles, D. 16: Going back to page 4 now, on 38:12, line 3, the expansion of plants by the municipalities. Could you expand on that? Is that something that is new?

Representative Clifton Below, Grafton 13: Yes. The current law didn't really have any clear provision for how an existing municipal utility would expand, and I think there have been cases about existing water plants and electric ones in the case of Ashland where they have sought to expand and it just hasn't been clear how they do that.

So, in the case of Ashland they said we are offering the co-op so much money to buy a distribution line on a road in the Town of Ashland that they serve part of and they wanted to serve the rest of it. The co-op said no thank you and so the Town of Ashland proposed to build their own set of (tape change) the process of determining value and damages to the PUC.

Senator Eleanor Podles, D. 16: So, does this apply to all municipalities?

Representative Jeb Bradley, Carr 8: No, just the 5 existing municipalities: Wolfeboro, Ashland, New Hampton, Woodsville ...

Senator Eleanor Podles, D. 16: Oh, I see.

Representative Clifton Below, Grafton 13: Well, those are the 5 electric. There are many municipalities that have water systems that may want to expand. Typically, there is not a private and a public water system in the same town, but that is not always the case. Obviously they could do it by mutual agreement, but it may be that the voters in a particular town felt strongly that they wanted their existing municipal water system to serve the whole town or more of it. This provides a clear route for doing that.

Senator Eleanor Podles, D. 16: Would that apply to Manchester, Manchester Water Works?

Representative Clifton Below, Grafton 13: They would not have the authority to expand outside their boundaries using eminent domain or the power of taking. They could only do that outside their boundaries by mutual agreement. So, it would only apply to the City of Manchester within its own boundaries if there is some part that it doesn't serve already.

William Bartlett, Jr.: For the record, I am William Bartlett, Jr., and I represent Consumers New Hampshire Water Company. Consumers supports HB 528 provided it is not intended to effect any matter before the Public Utilities Commission at this time.

There was discussion in the House, and I believe it was the intent that HB 528 was not to effect the issue between Consumers and the Town of Hudson. Representative Below mentioned today that this was to go forward. I would hope that that forward means that anything that would come before the commission in the future.

We did not find any exception or any grandfathering, so-called, and it is our request that the committee consider adding "However, it shall not be applicable to any proceeding then pending under the former Chapter 38 as this legislation is to be effective July 1, 1997." So, we feel it would be unfair to legislate the matter that is before the Public Utilities Commission at this time.

Senator Jim Rubens, D. 5: Do you know no other cases relative to any type of utility that would be effected by this grandfathering?

William Bartlett, Jr.: It is to the best of my knowledge that this is the only one that is appearing before the Public Utilities Commission. There is a representative from the Public Utilities Commission here today that could

probably expand on that better than I. This is the only one that we are doing any work on.

Senator Allen Whipple, D: 8: What page ...?

William Bartlett, Jr.: This just adds to after the effective date.

Robert Upton: My name is Robert Upton. I represent the Towns of Bow and Deerfield, and speak in favor of HB 528.

An attempt to answer Senator Rubens' question about net book and the use of net book as the direct value, direct damage value, there was discussion about that before Representative Bradley's committee, and the towns, I think, would say that as a matter of inherent fairness that to use net book cost when we tax them at fair market value would have been unfair. So, when that issue came up before the committee, the towns, who of course would benefit dramatically by use of net book cost as the valuation method didn't rush in and say, "yeah, we agree."

We tax them at fair market value like we tax everybody else's property, and the feeling that to use a lower value for purposes of acquisition probably wouldn't be fair. That may not be an answer, but it is a rationale at least for the position that the towns and cities took in the hearings.

I'm not going to say an awful lot. I think that the testimonies of Representatives Bradley and Below is an indication of how long and hard the process was in the legislature, in the House. It is also, I think, a really good example of how that legislative process works at its best. Everybody, all the participants to this debate were given an enormous opportunity to present whatever information they had. There was tons of debate. Representative MacGillivray held everybody's feet to the fire. Nobody got anything by him, I can tell you that for sure.

This is probably not from anybody's standpoint a perfect bill, but I think it is one that is a good legislative compromise, and I think it probably will work based upon what I have been able to see. From the standpoint of the cities and towns it is important for several reasons. In deregulation, the cities and towns need the ability to compete.

I can tell you that the towns and cities are not getting ready, at least the ones I represent. I represent most of the large generation towns. We're not getting ready to run out and take these plants. Obviously given the amounts of money that are involved, it would take a considerable decision by a town to take a plant like the Merrimack Station or the Newington Station.

What we feel that we have to have is a club or a tool in the event that the utilities are not performing the way they should be in deregulation, if they are not, for example, providing the rates, if they are not providing service, if they are not providing reliability, if they are not providing safety. In deregulation, we don't know who the owners of these facilities are going to be. We already know that on the Connecticut River that New England Power is divesting itself of all of those generation plants, and the PUC has ordered divestiture of PSNH's plants among others.

So, we don't know who is going to own them. We don't know if they are going to be as good operators as PSNH and New England Power have been historically. If they are, there is probably not going to be a great rush to run out and take these plants, but if there are problems with service, if there are problems with reliability, if there are problems with rates, we want to have the ability to be able to go to them and say, "Hey, you better start performing, or we're going to get into the business, and we may take you."

By giving cities and towns these powers, we think it will influence deregulation in a positive way. If it bogs down in the courts, for example, if deregulation really is going to get bundled up in the court and stay there for a long time, it will give towns and cities an opportunity to move forward and affect rates in a positive way, because ultimately a municipality can do it cheaper. We have lower borrowing rates than a utility has, and even though this bill requires us to make an equivalent tax payment, we're still paying ourselves.

We don't have to pay dividends. We don't have to worry about shareholders. We can do it cheaper than a utility can. Hopefully, that threat that we can get in there and do it will impact rates in a positive way. In some areas of the state where rates are not going to have downward pressure like Coos County, that is extremely important, and it is entirely conceivable that irrespective of what happens in the courts with deregulation that you will see some municipalization in that area.

This bill, we think, very carefully recognizes that non-municipal customers should not have to pay for the system. There was a lot of discussion about that and we think that is very important in keeping a level playing field in deregulation. It would give us a huge advantage if we could lay all of this off on taxpayers who are not members or customers of the municipal system. We think that is an important thing that Representative Bradley's committee recognized and dealt with.

This bill gives cities and towns, and it is one thing they focused on, and it was very important to us, the ability to pay for these facilities if we decide we're going to do it with revenue bonds as opposed to general obligation

bonds. So, the difference in large part being instead of with a general obligation bond you put the full faith and credit of the municipality behind the payment. With a revenue bond what you're doing is you're saying that the facility itself will fund the payment. The value of the facility will be the security for the payment of that obligation as opposed to the full faith and credit of the town.

That was a real hindrance under the prior law to the towns being able to do it. Your bonding capacity was limited to 10% of your taxable value, and in some instances the value of these facilities exceed that. So it was a real hindrance to doing it. The fact that we don't have to be worried about debt limits and the like now and that citizens don't have to worry about paying for something they don't use, we think is a real positive improvement in this bill, and it is a good deal for everybody.

The final provision of the bill that we think is important is the presumption of public interest, having been obtained by virtue of a two-thirds vote of the community. In order to do this, you all probably live in towns and cities where there are requirements for two-thirds votes for various bond issues. A two-thirds vote is a very difficult vote to get. If the municipality is able to get a two-thirds vote authorizing it to go forward with municipalization, it makes the process that much more streamlined and may prevent a hearing before the PUC unless the utility wants to challenge that presumption.

I guess I would just say, in short, 528 is a considerable improvement to RSA 38, and we think it reflects the realities of a deregulated environment, and we urge its passage. I'd be happy to answer any questions.

Senator Jim Rubens, D. 5: Would it then be a correct statement if any ratepayer of a municipalized system feels that they want to, if there is competition anywhere in the state, feels that they want to get out if the price is too high, they can do so without any burdens?

Robert Upton: Absolutely, unless they've entered into a service contract that Representative Below was talking about. It may be for start-up purposes important for municipal systems to go out and enter into service contracts with some of its larger customers to insure that they don't just walk the system, but I think the normal homeowner or somebody like that, they're not going to do service contracts. At least I'd be surprised if they would, and those people will have the ability to shop around and if they think they can get better rates, get them.

That's the whole purpose of deregulation, and they should have that ability. We are counting on the fact that we can do it cheaper and do it better.

Senator Jim Rubens, D. 5: How is the residential ratepayer guarded against a municipality overpaying for the distribution part of any assets?

Robert Upton: Well, it's again funded, it's required to be funded by revenue bonds, so it is not going to enter into the general obligation of the community so that as a taxpayer you're not going to pay for it.

Senator Jim Rubens, D. 5: How is the ratepayer guarded against the municipal overpayment for distribution?

Robert Upton: He's not going to buy the system from us because our rate system won't be competitive if we overpay for it.

Senator Jim Rubens, D. 5: My final question on the net book question, we have prohibited redundant lines. Would it be conceivable that a particular set of lines through a municipality might be valued at chokehold valuation levels, and be demonstratively valued that way?

Robert Upton: Sure, I can tell you there was not unanimity about whether or not redundant lines ought to be prohibited.

Senator Jim Rubens, D. 5: Therefore the market value and that would be a chokehold valuation would be the market value?

Robert Upton: Right.

Senator Jim Rubens, D. 5: Could that not be driven to absurd levels compared to the intangible physical valuation?

Robert Upton: I have to say, as I started to say, and excuse me for interrupting, but I thought the cities and towns were not unanimous that we should not be able to put in a redundant line if that circumstance existed, but the committee was very strong about it didn't want that, and that was one of those areas of compromise that we felt that we had to, in order to get some of the provisions that were beneficial to us, that we shouldn't resist that.

As an ideal matter, I don't think that there ought to be a prohibition against redundant lines, because I can see precisely what you're talking about occurring and where it would be beneficial for a community or a municipality getting into the system to run a redundant line at far reduced cost.

Senator Jim Rubens, D. 5: Couldn't then in almost every case or even every case municipalization be blocked by a claim for or an actuality of some kind of chokehold valuation for part of the generation assets?

Robert Upton: We have to, I think the way we ultimately thought about it was that we had to count on the PUC and the PUC's expertise in valuing these, and that the PUC would not permit a chokehold by virtue of a redundant line.

But whether that happens or not, I mean, it can only ...I guess that's why I said we think this is not a perfect bill, but that it will work, and that if it doesn't work we can come back to you with problems like that and can give you precise examples of where that occurred and how that ought to be discontinued.

Senator Jim Rubens, D. 5: Any other major areas where municipalities had concerns about the bill here as presented?

Robert Upton: Well, I guess I can't speak for all of them. I know I had some concerns about the equivalent tax payment, but I thought clearly that there ought to be some payment of everything above expenses ought to be paid back in to the general fund. Any money that is raised by a municipal system above its expenses ought to go back into it, but I think the feeling in the committee was that they wanted a level playing field, and municipalities had a better than level playing field if we got into the system if we didn't have to make an equivalent tax payment.

I don't think any of the communities object to that. They're simply paying themselves out of the system, so that it is ultimately not a hardship. To me it doesn't make tremendous sense to do it that way, but it clearly is a requirement and not something I think anybody is going to go to the mat on.

Senator Jim Rubens, D. 5: Wouldn't you have an argument for the bill here, would you have a cost shift if you allowed some tax payment lower than present tax payments on members of the municipality where taxpayers were not users of that municipal utility service?

Robert Upton: Arguably, and I think that's what Representative MacGillivray would tell you that he was very cautious of when he included that in there. He wanted to make sure that that couldn't possibly happen. I think everybody looked at it and said that will work fine, and as a compromise.

Senator Allen Whipple, D. 8: When a community decides to municipalize, and has to set the value on what it is going to be paying for the distribution system with the current provider, and you say that this distribution system can now be taxed at fair market value. Would you say, in your opinion, is that a fair price the community is going to pay the fair market value would pay what the assessed value was?

Robert Upton: Sure, but there are other elements that are going to go into it. I think at least the utilities will argue that if that portion of their franchise is being stripped from them that there is a severance that influences the overall value of the total franchise and that that should be reflected in the value of that. But, in essence, sure that ought to be the starting place, whatever the fair market value of it is, and fair market value for taxation purposes may be different than fair market for acquisition purposes, although it is a little hard to conceptualize that, but I think that that could be the case in some instances.

Senator Allen Whipple, D. 8: Could something follow like a distribution system is taxed at say $10 million, and the community offered the $10 million, and the utility who owned it said they think it is worth more. They think it is probably worth $40 million. Could a community make an argument for assessing it at $40 million?

Robert Upton: Well, we sure will try. I'm sure. These battles are fought out on so many different levels once you get into these abatement processes. There are 5 methods of valuation that the court can look at. It can look at net book cost, replacement cost, comparable sales, the income that the plant generates, and its replacement value. Would you, an alternate system, would you replace it with something more functional currently and would that be less or more expensive to do?

It is a very very complicated process that the court looks at and trying to pin value on a utility plant on any particular day is just about impossible, especially when you start taking into consideration the effects of deregulation. Nobody knows what deregulation means to value. We just don't. We think it means on the short term that especially for generation facilities that the value goes down.

Both Bow and Newington, I can tell you, have taken enormous hits in their value. The value in Bow by agreement declined from $320 million down into the $250 range. In Newington it went from approximately $320 down to $150, so and that is just the impact of deregulation. What is deregulation going to mean for these plants?

There was discussion about the possibility of Newington being mothballed. Just put away for awhile in all of this process. Nobody knows. I wish we could guess a little better, but we can't, and it is going to take us into a lot of very strange places. Deregulation is going to be very very fascinating in a lot of different ways, and it is going to have a lot of impacts that people aren't considering.

Senator Jim Rubens, D. 5: How solid is the argument that because the Supreme Court has ruled there is no exclusive franchise that there could be no argument as to an impact on franchise valuation as a result of severing out some of those assets that a municipality might attempt to take?

Robert Upton: I'm sure I don't want to limit my ability to argue just that, but I think what you would hear from the utilities is that when you own any property and it is of a certain size and you cut off a piece of it, that you're limiting the value of what remains. Whether you have an exclusive franchise or not, you have a bundle of property that is being reduced in size and that could effect the value of the remaining property. I don't know whether it is a good argument or not.

Senator Jim Rubens, D. 5: But, I can see at least for simplicity's sake two valuation methods or two impact valuation methods, one being the physical effects on the remaining let's say distribution assets of the utility which would be things like power balancing, and then secondly, the diminution of value of the franchise. I'm wondering to what extent this is an argument that diminution value of the franchise must equal zero, because there is no (unclear) franchise to begin with. Would you argue that?

Robert Upton: I certainly would. I think the value to the franchise falls to the wayside. I think the loss in value to the remaining property is an argument that probably will be made and be made effectively if I know the utility's lawyers, and I do.

Senator Jim Rubens, D. 5: You would argue for the municipality would argue ...

Robert Upton: Clearly argue that there is no more franchise value.

Senator Allen Whipple, D. 8: If a community is buying a distribution system, if it bought the whole system, part of it say goes into an adjoining community with the permission of the adjoining community or the partnership of the adjoining community, if you bought the whole system so then there wouldn't be any question of splitting the system up. The value of what is left, would you say that that would be at fair market value would be what it would be taxed at, take the whole system?

Robert Upton: The whole system still is a part of a greater system. Say, for example, in Claremont, I can't remember what are the towns around Claremont, but say Claremont, the entire Claremont distribution system included some in Unity or something like that, if that is one of the towns around you, that entire system is still a part of the statewide system of the utility, so even though you have taken the entire system in Claremont,

including what may exist in any of the surrounding towns, you still have the question of severance of that entire internal system from the entire larger system.

Senator Allen Whipple, D. 8: Are you talking about, let's say the entire larger system is a company. What if you took everything a company had?

Robert Upton: Then I think that's a better argument. That's right, you have the Vermont, I don't remember the name, and the rest of their facility, as I recall, is all in Vermont, so if you took the entire what exists in New Hampshire it is a little bit harder to argue about severance. (tape change)

Senator Jim Rubens, D. 5: Could municipalities band together in becoming an acquiring entity?

Robert Upton: Absolutely. And that is what I think you will see in places like Coos County, because in Coos County it is going to be very difficult for them to achieve the rates that we're talking about in the southern part of the state and the lower rates. There just isn't enough demand up there for power producers to give them good rates, unless there is either aggregation or a banding together to municipalize so that they can bring a considerable amount of demand to the table and then justify getting some lower rates.

Senator Jim Rubens, D. 5: So, the municipalities as a part of CVEC could band together to take all those assets and that would streamline the entire process down to some kind of FERC proceeding ...

Robert Upton: Sure. I would think so. I would think it would. As I said, I think that is really what you're going to see is you're going to see inter-municipality agreements to enter into some kind of municipalization where one or more, two or more communities will municipalize what exists in them and then operate it as a single entity. I think that will be the wave of municipalization in the future.

Senator Jim Rubens, D. 5: The FERC proceeding would be some kind of deliberation over the extent to which the existing power purchase contracts become exhausted, termination of the contract and valuation of that remaining duration? Something like that?

Robert Upton: I guess so. I have to say I'm not the greatest expert on what happens at FERC, but it would seem to me that something along those lines would have to happen, and then you'd go from there.

This offers, I mean and I think one of the reasons the towns and cities feel that this is such an important bill is that this gives us a chance to get the

effects of deregulation, especially if it bogs down. That we can go ahead and do some thoughtful and new things and try to get some of the benefits of deregulation for our citizens. And like I said earlier, it gives us a tool to say to the utilities, "Look, either do it or we're going to do it. Stand up and get us some of these benefits, or we're going to carefully think about this and maybe do it." And it is a good bill for that reason.

Senator Allen Whipple, D. 8: What you're saying, I think what it says in this bill, is that if you have a utility that continues to fight this deregulation procedure, this bill allows the community to just move in and municipalize?

Robert Upton: Yes.

Senator Allen Whipple, D. 8: Get done with what the legislature intended to do.

Robert Upton: Yes. And I want to compliment again Representative Bradley's committee and Representative Below's subcommittee. They were excellent committees to do this. They worked incredibly long and hard on this, and they really ought to be commended for all that they've done on this bill. This was not an easy bill.

Richard Samuels: I am Dick Samuels from the McLane Law Firm in Manchester, representing the Town of Ashland. Three things to say. First, Ashland is one of those 5 municipalities that currently has an electric department, and Ashland supports this bill although it is not ideal from its perspective. I'm not sure it is ideal from anyone's.

Second, Representative Below made a statement about what Ashland's controversy was before the Public Utilities Commission and then the Supreme Court, and I just want to clarify that what Ashland did was propose to expand its system by duplicating the lines in a portion of its town that is served by New Hampshire Electric Co-op, and we asked the Public Utilities Commission whether we needed their approval to do that.

The Public Utilities Commission, by a 2-1 decision, said yes, you have to get our approval, which we hadn't applied for. We appealed that to the Supreme Court, and the Supreme Court agreed with the Public Utilities Commission. We did have to get their approval to expand into that area. But, there has been no denial of any requests to expand. There has been no denial of an attempt to put in duplicate lines, although we were sure that was coming.

Third, and finally, on Section 30, Senator Podles, which is the Water Supply Protection Condemnation section which is something that has been in the act for a long time. It is not new.

Susan Chamberlin: I am Susan Chamberlin. I am here for the Town of Hudson. We are the first town to be using the municipalization statute, and I was fortunate to work with the House committee on making some changes to the statute in order to improve the process, and I'm speaking in support of these changes. I think the committee looked long and hard at how they all interrelated into each other and considered not only water but the electric, and came up with some good solid amendments to improve the process. Particularly the change or the creation of a presumption that once the vote goes through that that creates a presumption that it is in the public interest. I think that is important to recognize that municipals make these sort of decisions all the time as to what is best for their community, how they can best use their money, how they can best make economic development decisions, and this is one option for municipals to look at.

There was a question about whether or not ratepayers were protected from overpaying for these assets. The purchase price has to be confirmed by another vote, so once they go in, they say we want to do this, they go through the whole valuation process, either there is an agreement or the PUC comes up with a number. That number has to go back to the constituents to be voted on, so they do have an opportunity to say, "This is too much. It is not worth it to us."

So, as a group, they are protected. If one individual thinks it is too much they would have the option, if it is electric, to go somewhere else, or if it is water to dig a well, but that would be an option.

I'd be happy to answer any questions about the process. I have a copy of the amendment that Mr. Bartlett wants to put on. I don't see that it is necessary. This is not a retroactive piece of legislation. It doesn't apply to something that has already gone forward. I just don't see that it is necessary.

The comments on net book value -- I will talk briefly about what we have proposed regarding that and the issue for Hudson is more the allocation than the actual total number, and the way we propose to allocate it is that the net book would go to the shareholders. We think they're entitled to that. The difference between whatever the commission determines is just compensation and the net book would go back to the remaining ratepayers. So, in essence, it goes to the company, but it doesn't go to the shareholders. It goes to offset any potential rate impact for the remaining customers.

So, the Town of Hudson still has to pay this money, but we are proposing an allocation that will go to the benefit of the remaining ratepayers and not let the shareholders just take the money and run with it. That way they are getting full compensation for the amount of capital that they've put up.

They've received a return over the years, and the remaining ratepayers are protected. And we think this is a fair way to go. So whether or not that would be the way it would be in every single case I don't know. I think with Hudson, Hudson has been subsidizing the outlying communities for some time, so that is a large chunk of money that is needed to offset any rate impact for those other customers. But we didn't feel that the public interest would be met unless we made that offer, and so that is how we decided to go forward.

Senator Jim Rubens, D. 5: That arrangement has been agreed to by both parties in Hudson?

Susan Chamberlin: No. That's what we're litigating.

Senator Jim Rubens, D. 5: Isn't that like a sham transaction, inflating or having a higher price and then paying the differential back to the acquirer?

Susan Chamberlin: Well, it doesn't go to the acquirer. No, it goes to the remaining ratepayers. It doesn't go back to the town. It goes back to the remaining systems. It pays down the debt on the remaining system, so that they don't have a rate increase in order to compensate for us leaving the system. So Hudson doesn't get it. It is Litchfield, Pelham, or whoever else is left on the system would get it.

Senator Jim Rubens, D. 5: What is the standard of proof in rebuttable presumption? To rebut for something not a public interest?

Susan Chamberlin: I don't recall.

Robert Upton: It would have to be a preponderance of the evidence. I don't see how it could be otherwise unless it is by statute established that it is a higher burden of a preponderance of the evidence.

Senator Jim Rubens, D. 5: Is that an excessively high or a low burden?

Susan Chamberlin: It is not excessive. It is similar to what the commission does when it looks at public interest, all the circumstances.

Amy Ignatius: For the record, I am Amy Ignatius, general counsel at the Public Utilities Commission. We are here in support of the bill, and again congratulate the members who worked very hard on it.

There were a couple of questions that came up. I just wanted to address for your information, there was a question on whether there are any other utilities who have cases now pending before the commission in a similar

situation to Consumers Water, and I can't think of any that are. I'll go check, and if there is anything different I'll submit a letter to you to let you know that, but I can't think of any so that the amendment that Consumers proposed to make clear that it is not applicable to any proceeding then pending, I think, would only apply to the Consumers' case.

As to whether it is necessary, good, or bad, we don't oppose that provision. I think it is possible to interpret whether the new statute should apply to this case or not in different ways, so it may be necessary to put it in to be absolutely clear if people want to exclude that. Sometimes the commission will interpret new statutes as applying at the time they make a decision. Other times they will decide whether to apply the new statute at the time that the thing was filed with the commission. It varies at times, so it sounds like everyone agrees that this is their intent that none of these provisions apply to the case that is pending. It has been filed for probably a year and has another year to go in its proceedings. This would certainly make it absolutely clear.

The only other thing I wanted to mention is the whole question of how to do valuation, and should you specify in the bill net book value or fair market value or any other of the valuation methods. I think it is safest not to. We generally use net book value in all of our valuations but they don't usually involve this kind of a situation. They are usually for other purposes.

So, whether we would in an acquisition case use net book value, I don't know. Whether we'd use fair market value, I really don't know, so I wouldn't be comfortable with specifying either way. I think it would be best that when the commission is dealing with that he has got all the parties with all of the opportunity to brief it and argue it and really think through and maybe even craft some hybrid form or different valuations for different categories of property, who knows.

I don't know if there is any need to say it here, and you might limit things that otherwise could be more creatively worked out at the commission. So, I would recommend you keep that as is in the bill, not specify either way.

That's it. If there are any questions, I'm happy to answer them. Otherwise, I know this has been going on for awhile. I'm happy to conclude.

Senator Jim Rubens, D. 5: So the PUC would, in a case where a particular distribution asset might have some kind of very very high chokehold valuation, the PUC would possibly likely diminish that valuation or that plant evaluation?

Amy Ignatius: We generally call them bottleneck services, and where you sort of have this critical need to have people have access to it, we haven't been dealing with it in valuation quite so much as in costing out people's access to it in other industries, and the push on the commission's front has been to make sure that that access is ...people can get to it at a reasonable price, really looking at the actual cost of the service rather than its value to the operation of the system overall.

If that is illustrative of what might happen in an acquisition case, keep that in mind, but I think until it gets to that point I can't predict any better than anyone else would how the commission would interpret it. But generally there has not been a value analysis. There has been a cost of the service analysis in setting prices or rates for people to be able to tap into it, and presumably the commission would start from a cost basis in looking at valuation, and unless it can be convinced that it should look at a market value basis, I think its general approach is to start with cost and begin and end on a cost basis unless someone tells them otherwise.

And there may be good arguments that valuation should come in to some extent, but its general approach is not to begin that way, but to begin with a cost basis.

Senator Jim Rubens, D. 5: But here the proposed law would say to begin with a market valuation, at least with respect to real estate taxation. Wouldn't that be used as evidence before the PUC the legislature intends market value rather than a cost basis to be used?

Amy Ignatius: I guess I don't know that the bill says that it starts on a valuation basis looking at a real estate level.

Senator Jim Rubens, D. 5: It intends that municipalities be compensated for lost real estate taxes at a market valuation.

Amy Ignatius: It requires a payment in lieu of taxes that is based on the kind of taxes it has been receiving, but ...

Senator Jim Rubens, D. 5: I was just wondering whether that would be deemed as legislative intent, that market valuation would be used in that portion of (unclear)

Amy Ignatius: I guess I would see them as different analyses, and they might have a different approach in how to set the valuation and not take that as a direction from the legislature to use fair market value. If it is being read to mean a presumption that we are looking at a fair market value approach,

then maybe we do need to say something to not weight it in favor of any particular valuation method.

I had never interpreted it that way, so that is helpful to know if you've interpreted it that way.

Senator Jim Rubens, D. 5: Isn't it dangerous to statutorily restrict redundant distribution assets constructed in order to mitigate the potential for this – the word used, not the chokehold ...

Amy Ignatius: Bottleneck services?

Senator Jim Rubens, D. 5: ... bottleneck valuation?

Amy Ignatius: We did not propose that provision or at least this session we didn't, and I don't know if last session the commission may have been in favor. I honestly don't know, because I wasn't here for that. I think I was told by someone that the commission did weigh in on that last year, so I don't mean to be contradicting my agency.

Senator Jim Rubens, D. 5: You don't recollect what the PUC's position last year was?

Amy Ignatius: I'm told that we were in favor of prohibiting redundant facilities a year ago, and there has never been a ruling on that in the Ashland case. They didn't get to that point, because they haven't yet filed back to come through the commission for approval and whether it is in the public interest.

I think it is really a public interest analysis. There will have to be some duplication of some facilities for someone to operate a competitive system within. Let's say they're both tapping off of a transmission line with different distribution systems. There is going to be some duplication of some facilities in order to make that happen, but that doesn't mean that it is actually running up and down the street, two lines, block after block after block, but there will be some level of duplication.

If you've got someone who is really locking up a corridor and they just can't possibly get anyone else into the system without it, it is hard for me to understand how that becomes a duplicate distribution. Well, I should stop. I'm going to get myself in a knot here.

Senator Jim Rubens, D. 5: The language is very restrictive here. "No public utility or municipality shall construct redundant parallel electric utility lines." There is not an allowance for de minimus redundancy. So, I

would wonder whether the PUC would prefer to let this question be resolved by public interest determination.

Amy Ignatius: I can certainly take that back to the commission and try and give a response to you before you are scheduled to vote on the bill.

Senator Jim Rubens, D. 5: So, we can await an official PUC ...

Amy Ignatius: Some sort of a letter with some sort of statement. I don't know quite what I'll be able to obtain, but I will try.

If there is nothing further, thank you.

Representative Jeffrey MacGillivray, Hills 21: For the record, I am Representative Jeff MacGillivray, Hillsborough District 21, and I am a co-sponsor of this legislation.

I would like to simply address a couple of the loose ends that were left. A question was asked earlier by Senator Podles whether does the provision on expansion of existing municipals, 38:12, apply to all, and I believe someone may have given you the impression that that would apply only to the 5 existing electrics and the existing water. It would also apply to new municipals created in the future when a few years after that they went and expanded their facilities further.

It was meant to be all inclusive to provide a short cut from part of the procedure but not all of the procedure when an existing municipality whether it was existing before this legislation or newly formed subsequent to it went through the process. It leaves out the steps under RSA 38:3, :4, or :5, but then prescribes the method of 38:6 through :11.

Second, in response to some questions from Senator Rubens regarding ratepayers wanting out, they can do so, and he was talking in terms of distribution systems. If a distribution system is taken over by a municipality in a part of town, there is no intent, and indeed there is no practical way, for an individual ratepayer to get out, and some statements might have been ambiguous. The comments made do apply to generation customers who are intended to be able to be let out, so we indeed have retail competition in all newly formed municipals, and hopefully in the existing ones in the not too distant future as well, although that is not required by statute.

Senator Jim Rubens, D. 5: So a reduced valuation or an over valuation that is approved by the voters leaves someone using that distribution asset no way out? We're paying for that over valuation.

Representative Jeffrey MacGillivray, Hills 21: That is correct.

Senator Jim Rubens, D. 5: The distribution part?

Representative Jeffrey MacGillivray, Hills 21: The distribution part, that is correct. There wouldn't be any way around that. Wait on questions regarding distribution value and over valuation, because I have a couple later points on them as well, but yes. In that case, the people within that service area are intended to be customers of that, because they have no one else they can buy from. It has to come through that set of wires and poles. There is no direct protection from paying too much, but indeed the fact that a two-thirds vote is required should slow down most over valuations.

I'll skip ahead to one you just made regarding isn't it dangerous to block redundant lines. Look carefully at the wording there, and it says that the prohibition on redundant lines, page 11, lines 6-9, "This section shall not apply until retail electric competition is certified to exist ...." At that point you at least have access to competitive generation, so all of the points involved in municipalizing to try to hurry that process along are no longer relevant.

This section doesn't come into place until that log jam to competition is out of the way. So, to the extent that you were worried about the prohibition on redundant lines slowing down the opportunities for retail competition, that is not a reasonable concern. To the extent that you want it as a way of getting around a town that has paid too much for its distribution assets, that's a whole other problem.

Senator Jim Rubens, D. 5: That's not where my concern is aimed. It is aimed at post-competition. The present owner, pre-municipalization owner, of distribution assets simply assigning a chokehold or bottleneck valuation, very very high, extraordinarily high bottleneck valuation to those distribution assets thereby blocking reasonable acquisition price for that municipality. (tape change)

Representative Jeffrey MacGillivray, Hills 21: I think the procedures of the PUC are probably adequate to force them to allocate reasonable costs to reasonable parts of the system and not to do too much in that regard, but your concern is not unfounded.

There was a statement by one previous witness regarding that he didn't think it made tremendous sense to have this requirement of paying taxes after a community had taken over a generation asset. As I think you partially raised in your subsequent question, it is clear to me that if you want the other consumers in the town who are not interested in purchasing from

the municipality to have, in fact, a level playing field, then the municipality must continue to pay into the public coffers at a level consistent with the valuation procedure and the valuation process that previously existed. Otherwise, taxes are going up in the rest of the town to subsidize people that are purchasing from the newly municipally acquired utility. And that is why we put all of that in.

Senator Jim Rubens, D. 5: Representative MacGillivray, do you think there is any risk of a utility arguing that that market valuation is evidence that the acquisition price of some distribution asset might be at market as opposed to cost? The PUC has testified it is their usual basis for evaluation.

Representative Jeffrey MacGillivray, Hills 21: Let me ask you to hold that question for about one more minute.

Finally, on the entire question of fair market value versus depreciated book value, the problem here is that if you have a plant out there that is going to be bought and sold among private entities, fair market value is a reasonable way of figuring out approximately what it is worth. In the case of how much should utility customers pay to purchase a plant that they've already been making payments of, it is not an appropriate circumstance, and we discussed this for awhile and decided there was no way we could incorporate it into this legislation in any reasonable way. Maybe if we discuss it for several more years we will understand it well enough to be able to do something. Maybe you can help us.

What is going on here is that in a fair market value situation the company has something that is valued at fair market value, and they sell the products made from it, the electricity made from it, and they keep in mind the fact that they can sell it for something later. In the case of a regulated utility, the process is more analogous to making payments on a mortgage and paying off the entire capital of the plant within a 30 or 40 year time horizon.

What happens is the company is allowed to collect at a rate that will recover all of its investment in that asset over a 30 or 40 year lifetime of the asset, and by the time a few years have gone by, often the rate of return on capital has been set at a level that includes inflation or something of the sort, and what this means is that in effect you are paying down your mortgage faster in terms of the dollars that are there.

After 15 or 20 years have gone by the utility customer has made enormous payments toward paying off this plant, and indeed if no further investment is needed to be made in terms of major improvements, we would eventually reach the point after 30 or 40 years where the company had completely depreciated the asset on their books. They were no longer earning a return

on those assets, because they are now valued on the books at zero, and the customer, in effect, is paying nothing for those assets, because he has already previously paid more than he might pay in a free market situation. This is not anything that is right or wrong. It is simply a reasonable way of getting through a non-free market situation with some sort of a rule that works, and generally since investments have to be made in the upkeep of these lines, and poles have to be replaced and wires have to be replaced, it doesn't wind up too far removed from free market except in times when there is massive depreciation of the dollar.

Since such massive depreciation of the dollar did in fact take place in the '60s and '70s and early '80s many of these assets were first put on the books years ago and are currently hanging at fairly low starting values, and have, for the most part, been paid off. Although, in some cases the rates of return got fairly high during the late '70s and early '80s.

As a result, fair market value and net depreciated book value are sizably different, and it is very reasonable for the customers to continue to pay on the basis of net depreciated book value, and indeed, if somebody else took over that franchise, it would probably not be reasonable to mark up those assets so that the customers could pay for them again. Thus, there is very good reason based on what the assets are worth versus what the consumers have already paid for.

The difference between these two justifies a difference between what might be paid to a utility for this versus what somebody is reasonably entitled to tax the utility on, and the distinction is important when you consider that the amount being taxed on is something that has to be equitable across the state against other providers of competitive services in those situations where electric energy can be substituted against other possible suppliers of energy if you are not taxing this asset properly, whatever properly means. You are either creating an unbalanced playing field for them or against them.

That is a fairly long winded answer, but it is reasonable to have in the back of your mind a concept whereby these two should not be the same, the value that customers should have to pay to finish paying it off versus the value that is placed on it for taxation purposes.

Senator Jim Rubens, D. 5: Would it be wise to add a sentence to the effect that the real estate taxation basis, valuation basis for real estate taxation, would not be necessarily used as evidence for the PUC in their condemnation evaluation?

Representative Jeffrey MacGillivray, Hills 21: I'll be honest with you, I don't think I fully understand this issue. I don't think our committee has had

enough time to discuss it, so that the committee would feel it understands it, and until we have had a chance to discuss it among ourselves and reach a little more consensus than would be possible given that level of ignorance, I think it would be premature.

I don't think it will cause a problem given that we are by these statements making it clear that there is no legislative intent to make those two numbers equal and that there are reasonable grounds for believing that they, under certain circumstances, shouldn't be equal, and I think if we just leave it open for now, I think the PUC will do a reasonable job, and I think we can continue to study this matter, and maybe as we look at one of the re-referred municipalization bills that has been held over, we will have a chance to discuss this at length and maybe have some legislation next year. I think it would be premature at this time to write any words into this since they could very easily have unintended consequences, and given the amount of time we labored over a lot of difficult words in this, I think it is probably not a good idea to rush in with words that might have drastic unintended consequences.

Senator Jim Rubens, D. 5: You are arguing clearly that there should be no statutory basis for evaluation. It should be open ended. That's what you just stated.

Representative Jeffrey MacGillivray, Hills 21: I don't think that is necessarily what I'm saying. I'm saying that the two under many circumstances should not be the same.

Senator Jim Rubens, D. 5: Sometimes yes, sometimes no?

Representative Jeffrey MacGillivray, Hills 21: I am saying that in certain circumstances they should be different. I don't know whether there are some situations where they should be the same, but I think there are some situations where they should be different, and I think ...

Senator Jim Rubens, D. 5: So, what I'm asking is whether there should be language simply stating that the legislature is making no determination as to valuation methods thereby delegating it in an open end basis to the PUC?

Representative Jeffrey MacGillivray, Hills 21: I think that is the way the current practice is. I don't think it is necessary to add words at this time. I think the legislative intent that there is no intent in the law to make one drive the other is clear, and I think that we should continue and look at this for awhile and make sure we have it right, and maybe we will want to say something regarding what valuation should be used so that we don't have the current difficult situation where the department of revenue administration thinks it is supposed to continue using a method which towns have

challenged in the courts and through settlements without reaching the courts such that half the people in this state are having the utility poles in their municipalities taxed at a different rate than the ones that are just using the numbers from the DRA. I think we probably should address this at some point in the near future, but in this case I think near future means next year.

Senator Jim Rubens, D. 5: On the prohibition of redundant distribution assets, it is a flat prohibition. The PUC has testified on this that there is allowance for small amounts of redundancy or that flexibility would be required. Should the language reflect that somehow? Should the PUC be given latitude under the public interest determination as opposed to a flat prohibition on discretion of redundant assets?

Representative Jeffrey MacGillivray, Hills 21: Given that we are talking about assets that are going to remain under traditional utility regulation or something similar to it, any time you construct additional lines you are going to add to the total electric bills of the State of New Hampshire. It may be that you provide a savings for somebody at the expense of somebody else by doing something like this, but I think the prohibition is correct and that if there is a problem that looks like it might need redundant lines to solve it, it probably means there is a problem in the cost allocation formulas and it should be addressed directly so that the problem can be addressed without the additional expenditure of money rather than by spending more money and driving people's costs up further in order to subsidize a few local people at the expense of distributing some costs among the system as a whole.

I don't think the situation will ever arise where it is economically efficient to do anything of the sort. I think the PUC should clear up its cost allocation methods if in fact they cause a problem of this sort.

Senator Jim Rubens, D. 5: I'm contemplating obtuse arguments about consequential damages valuations due to the construction of redundant lines that may or may not be defensible and by allowance of redundancy distribution of such valuation arguments getting out there.

Representative Jeffrey MacGillivray, Hills 21: Given that we're discussing distribution lines which will continue to be under a regulated cost structure, I think that your arguments probably don't work. I think they are probably not appropriate in that environment. As long as you have the generation business tied to the distribution business, as we do at present, anything is possible, but please note that we made this section only apply after retail competition exists. I think the current language is sound and should be left alone.

Senator Allen Whipple, D. 8: As I understood when you were talking about valuing distribution systems, and in order to, and I know you're talking about protecting the ratepayers, would it be fair to say what you were saying was that the ratepayers have already paid for the system less the net book value which is left, and that if you paid more than that book value you would be having the ratepayers pay twice for the distribution system which they really have already paid when the rate was set?

Representative Jeffrey MacGillivray, Hills 21: I thank you for summarizing in one-tenth of the words I took what I said. That is exactly what I was trying to say. Thank you.

Senator Jim Rubens, D. 5: Here on the bottom of page 9, line 37, "just and reasonable extent." Would it be workable to say instead the commission shall determine, and are consistent with HB 1392, however that is defined today, consequential damages? So, that we have consistency in terms of state regulations of these consequential damages.

Representative Jeffrey MacGillivray, Hills 21: I agree with the answer given earlier by Representative Bradley, who I think summarized my views and those of most of the rest of the committee, if not all the rest of the committee. I will add that the 2 situations are not identical, because in one case you are taking existing businesses and having them go onwards, and we are simply converting existing distribution and generation systems into distribution systems with generation attached. In the other case, we are talking about acquiring something from the utility and permanently taking away from them assets that would have still been theirs under HB 1392.

And furthermore, I think that the issue really is moot for the reasons stated by Representative Bradley, that I doubt that FERC has any intentions of letting go of jurisdiction. Indeed to the extent that we have read in here words that match, words that they have intended to use, they might be more likely to allow our state commission to take over the adjudication rather than do all the work themselves if our words mirror theirs.

To the extent that our words don't mirror theirs, they are more likely to simply say we will take all the proceedings here in front of FERC and take our usual 2 or 3 years to do it. So, you have that factor to consider as well. To the extent that our language does not mirror FERC 888 language, we may be making it more difficult to have some of the factual determinations handled in-state as opposed to out-of-state. In any case, I think given FERC Order 888 that these words are reasonable.

Senator Jim Rubens, D. 5: But in HB 1392, we've instructed the valuation of the distribution assets to be at book value. We've not allowed stranded

costs to mark up D&D assets. Here we are leaving that question open. These could be very large sums of money we're talking about here. Not inconsequential sums of money. Again, when we set policy last year we said D&D assets are not to be marked up.

Representative Jeffrey MacGillivray, Hills 21: I believe the exact phrase is that it is not a preferred method, and we were sending a clear signal that they better have a very, very, very good reason for doing anything different. I agree with you.

Senator Jim Rubens, D. 5: I don't have the language in front of me. I think it was stricter than that.

Representative Jeffrey MacGillivray, Hills 21: You may be correct. My recollection is otherwise, but in any case the intent was clear. We don't like the idea.

With regard to the main point of your question ...

Senator Jim Rubens, D. 5: Then it ties in with Senator Whipple's concerns about valuation and above net book. We explored that.

Senator Allen Whipple, D. 8: Any other questions? Any one else wish to testify? If not, I'll close the hearing.

Hearing closed at 1:00 p.m.