
THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0274

Appeal of City of Nashua
Appeal of Pennichuck Water Works, Inc.,
Pennichuck Corporation, Pennichuck East Utility, Inc.,
Pennichuck Water Service Corporation, Pittsfield Aqueduct Company, Inc.

Appeal by Petition Pursuant to RSA 541:6
from Final Order of New Hampshire Public Utilities Commission

BRIEF OF CROSS-APPELLANTS

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QUESTIONS PRESENTED FOR REVIEW BY THE PARTIES

P5) Whether the PUC erred by requiring, as a condition for its finding of public interest for the condemnation of PWW assets, the continued exercise of jurisdiction over Nashua beyond the PUC's authority, contrary to RSA 362:4. (Preserved at Pennichuck Motion for Reconsideration and/or Rehearing ("Rehearing Motion"), pp. 17-18, Cert.Rec. p. 10429)

P5 & 6) Whether the PUC erred by imposing at least nine substantive conditions which painted a public interest gloss on Nashua's otherwise defective proposal, thus acting in a legislative capacity and depriving Pennichuck of a right to be heard before its assets had been taken, resulting in denial of Pennichuck's constitutional rights to due process and property. (Rehearing Motion, pp. 14-20, Cert.Rec. p. 10429)

P3) Whether the PUC erred by failing to apply to Nashua's petition the public interest balancing approach constitutionally required for eminent domain takings in New Hampshire, by failing to articulate its methodology for analyzing the public interest, and by failing to weigh all relevant aspects of the public interest, including the statewide interest in Pennichuck's capacity to operate a regional water system and to take over small troubled water systems, the interests of customers in towns outside of Nashua and the ownership interest of shareholders. Rehearing Motion, pp. 5-6, 10-14, Cert.Rec. p. 10429)

P8 & N3) Whether there was evidence to support the PUC's determination that the public interest required creation of a mitigation fund to protect the customers of PEU and PAC, where there was evidence that those companies would otherwise suffer increased annual operating costs of \$3.4 million should Nashua take PWW assets, and whether there was evidence to support the PUC's public interest determination that a \$40 million fund would be sufficient to fund that \$3.4 million annually, where there was no evidence that a fund in that amount could

actually generate that level of annual revenue. (Rehearing Motion, pp. 21-22, Cert.Rec. p. 10429 and Nashua appeal)

N1) Whether there was evidence to support the PUC's consideration of hypothetical not-for-profit buyers in its valuation of PWW's assets, where there was substantial expert testimony that the presence of not-for-profit buyers can influence the value of a water utility. (Nashua appeal)

N2) Whether the PUC erred in interpreting RSA 38 so as not to permit Nashua to take PEU and PAC assets, where neither company provides water service or owns any assets in Nashua. (Nashua appeal)

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Fifth and Fourteenth Amendments (App. p. 1)

N.H. Const. pt. 1, art. 2, 12, 14, 15; pt. 2, art. 83 (App. p. 1)

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STATEMENT OF THE CASE¹

This case concerns Nashua's attempt to take by eminent domain all of the operating assets of Pennichuck Water Works, Inc. ("PWW"), an investor-owned water utility that serves Nashua and ten other communities in southern New Hampshire. Nashua's board of aldermen

¹ A comprehensive procedural history of the case is set forth in PUC Order No. 24,878 ("Taking Order") at pp. 3-20, PUC Certified Record ("Cert.Rec.") p.10302, also appearing in the appendix filed with Nashua's brief ("N.App.") pp. 24, 27-44.

began the takeover attempt in November 2002, in response to a proposed merger the PUC was reviewing between PWW's parent, Pennichuck Corporation², and another water company, then known as Philadelphia Suburban Corporation. Nashua's voters confirmed the aldermanic resolution in January 2003. Three weeks later Nashua provided notice, under RSA 38:6, to PWW, Pennichuck East Utility, Inc. ("PEU") and Pittsfield Aqueduct Company, Inc. ("PAC") of the city's request to acquire all three utilities. The utilities responded in the negative on March 25, 2003. Meanwhile, given Nashua's condemnation threat, Philadelphia Suburban backed out of the merger. Taking Order, pp. 3-4, 8, N.App. pp. 27-28, 32.

Nashua finally filed a condemnation petition with the PUC on March 25, 2004, over a year after the initial public vote.³ Nashua's petition asked the PUC to approve its condemnation of PWW, PEU, and PAC, and to set the price Nashua must pay as just compensation for the taking. Almost a year later, on January 21, 2005, the PUC ruled in Order No. 24,425 that Nashua does not have the authority under RSA 38 to condemn PEU and PAC because those entities do not provide water service in Nashua. Taking Order, pp. 8-9; N.App., pp. 1, 32-33.

All parties submitted extensive pre-filed testimony on the separate questions of whether Nashua's condemnation is in the public interest; and the amount Nashua should pay to compensate PWW for the fair market value of its assets. The PUC Commissioners viewed portions of the PWW system in December 2006, and conducted the twelve-day merits hearing on various non-consecutive days in January and September 2007. PUC Staff and a number of intervenors participated in the merits hearing, which consisted primarily of witness cross and redirect examination. Taking Order, pp. 14, 16, 18; N.App., pp. 38, 40, 42.

² All of the Pennichuck entities are referred to collectively herein as "Pennichuck."

³ Prior to Nashua's PUC filing, there were some court proceedings among the parties, leading to an earlier decision by this Court. *Pennichuck Corp. v. Nashua*, 152 N.H. 729 (2005). Taking Order, pp. 4, 6, N.App. pp. 28, 30.

The PUC issued its ruling on July 25, 2008. Taking Order, N.App. p. 24. In its order, the PUC found that Pennichuck failed to overcome RSA 38:3's rebuttable presumption that municipal condemnations of utility property are in the public interest. However, the PUC did not articulate which public interest standard it applied, nor did it balance the parties' interests. The PUC also conditioned its public interest ruling on Nashua's compliance with at least nine substantive conditions, including: establishment of a \$40 million mitigation fund to offset future harm to customers of PEU and PAC; imposition of level retail and wholesale rates; and ongoing compliance with PUC customer service and DigSafe rules. The PUC also asserted continuing jurisdiction over Nashua to make sure that these conditions will be met over time, despite the statutory exemption for municipalities from utility regulation. Finally, the PUC awarded PWW damages of \$203 million as the fair market value of the PWW assets subject to condemnation.

Both Pennichuck and Nashua filed motions for rehearing, which the PUC denied on March 13, 2009. Cert.Rec., p. 10601, N.App., p. 145. Both parties filed appeals pursuant to RSA 541:6. In addition to opposing Nashua's three appeal questions in this brief, Pennichuck will brief only four of the eight questions presented in Pennichuck's appeal petition, arranged in a different order. Thus Pennichuck waives its other four questions. *See, Appeal of Omega Entertainment, LLC*, 156 N.H. 282, 299 (2007).

STATEMENT OF FACTS

I. PUBLIC INTEREST ISSUES.

PWW is the state's oldest business corporation. It has provided water service in New Hampshire for 157 years, initiating service in Nashua in 1852. Within the past 25 years, PWW has expanded to provide regulated utility service in 11 communities in southern New Hampshire. In 1998, PWW's parent, Pennichuck Corporation, formed PEU and PAC to acquire certain water systems of the former Consumers New Hampshire Water and Pittsfield Aqueduct Company,

respectively, serving 16 communities throughout the state. *Pennichuck East Utility, Inc. and Pennichuck Corporation*, 83 NHPUC 191 (1998); *Pennichuck Corporation and Pittsfield Aqueduct Company*, 83 NHPUC 44 (1998). In addition, PWW personnel operate water systems under contract for several municipal and small community water systems through its unregulated affiliate, Pennichuck Water Service Corporation (“PWSC”). Correll Test., Ex. 3001, pp. 5-9, 12, Cert.Rec. p. 14060, P.App. pp. 14-18, 21⁴.

Pennichuck expanded its expansion of its regulated utility service with the support and encouragement of the PUC in order to, among other things, address problems that had arisen in many small, poorly capitalized water systems in the state.⁵ Pennichuck introduced uncontroverted evidence from PUC staff, Nashua’s contractor and town officials that PWW is a well-run organization providing excellent service to customers. Naylor Test., Ex. 5001, p. 69, Cert.Rec. p. 17043; Noran Test., 9/5/07, p. 129, Cert Rec. p. 7804; White Test., Ex. 3022, p. 16, Cert.Rec. p. 15782; Daniels Test., Ex. 4001, p. 1, Cert.Rec. p. 16982.

Pennichuck reminded the PUC that it needed to weigh not just the interest of Nashua residents, but also the public interest of the entire state, the state’s policy in favor of regional water service, the interest of Pennichuck customers in towns outside of Nashua, the interest of customers served by PWSC, and the interest of Pennichuck shareholders. Pennichuck submitted

⁴ The parties prefiled witness direct testimony. Each witness’ testimony was entered at the hearing in separate exhibits and is referenced by the witness’ last name plus “Test.”, the designated exhibit number and page reference. If the direct testimony included any exhibits, the exhibits received the same exhibit number as that of the testifying witness, plus a letter suffix. Cross-examination of witnesses appears in the transcript of the hearing. That is referenced by the witness’ last name plus “Test.”, the hearing date and page reference. Certain testimony appears in an appendix to this brief, referenced as (“P.App. p. _”).

⁵ Although PWW, PEU, and PAC are separate water systems, as is common in the utility industry, PWW provides all of the employees for PEU and PAC, as well as PWSC, and costs are allocated among the Pennichuck affiliates in accordance with a cost allocation agreement on file with the PUC. *Pennichuck East Utility*, 83 NHPUC at 191; *Pittsfield Aqueduct Company*, 83 NHPUC at 44; Correll Test., Ex. 3001, pp. 10-11, P.App. pp. 19-20; Patch Test., Ex. 3002, pp. 5-8, P.App. pp. 41-44; Ex. 3001A Att. DLC-1, Cert.Rec. p. 14114.

testimony from a former PUC chairman and the current director of the PUC's gas and water division regarding the significant role Pennichuck played in working with the State and the PUC to support the growth of regional utilities and acquire smaller troubled systems. Testimony showed that the loss of PWW would mean that Pennichuck could no longer fulfill this important role in the state. Testimony also showed that Pennichuck shareholders would suffer double taxation from such a taking. Patch Test., Ex. 3002, pp. 4-8, 20-22, P.App. pp. 40-44, 56-58; Naylor Test., Ex. 5001, pp. 51-56, Cert.Rec. p. 17043; Correll Test., Ex. 3001, pp. 15-20, P.App. pp. 24-29; Ware Test., Ex. 3004, pp. 17-18, Cert.Rec. p. 14262. The PUC disregarded this testimony, stating "[a]lthough this evidence is credible, it is not the type of evidence that can form the basis for denying Nashua's petition." Taking Order pp. 51-52, N.App. pp. 75-76.

The Towns of Merrimack and Milford, and the PUC's own staff, all opposed the taking because of the harm it would cause the public interest, including loss of PUC oversight and rival municipality control of the towns' water supply. Daniels Test., Ex. 4001, Cert.Rec. p. 16982; Hinch Test., Ex. 4003, Cert.Rec. p. 16994; Naylor Test., Ex. 5001, Cert.Rec. p. 17043; Noonan Test., Ex. 5003, Cert.Rec. p. 17167. The PUC staff noted, among other matters, its concern about future rates, particularly for non-Nashua PWW customers and PEU and PAC customers who would be served by a gutted Pennichuck. Naylor Test., Ex. 5001, pp. 67-70, Cert.Rec. p. 17043. Nashua even admitted that it may decide to sell off "far flung" PWW systems in towns like Newmarket and Epping. Streeter Test., 1/10/07 pp. 142-44, Cert.Rec. p. 6784.

Through the testimony of John Guastella and others, Pennichuck showed how Nashua's taking would result in lost efficiencies of scale and substantially higher rates for remaining Pennichuck customers, and would deprive the state of a regional utility able to acquire troubled systems. The PUC agreed with Mr. Guastella's "detailed analysis," and found that the

condemnation would cause substantial harm to PEU and PAC customers, to the tune of \$3.4 million annually. Rather than deny Nashua's condemnation petition, the PUC required Nashua to establish a mitigation fund that would generate \$3.4 million annually to offset those losses. The PUC set the mitigation fund amount at \$40 million, without considering whether it could generate \$3.4 million in net annual income. The PUC ignored the effects of income taxation, and failed to consider the likelihood that the fund could earn 8.5 percent per year in Nashua's hands. Guastella Test., Ex. 3016, pp. 2-5, Cert.Rec. p. 15542; Ex. 3016A Att. JFG-2 and JFG-3, Cert.Rec. p. 15553; Correll Test., Ex. 3001, pp. 15-19, P.App. pp. 24-28; Ware Test., Ex. 3004, pp. 5-9, Cert.Rec. p. 14262; Taking Order, pp. 92, 96, N.App. pp. 116, 120.

II. VALUATION ISSUES.

Pennichuck relied upon the testimony of nationally renowned business valuation expert, Robert Reilly. Mr. Reilly analyzed the PWW assets under the three generally accepted appraisal approaches (cost, income, and sales), ultimately concluding a value, as of December 31, 2005, of \$273.4 million, based 60% on the cost approach and 40% on the income approach. Mr. Reilly rejected the sales approach due to a lack of transactions sufficiently comparable to the PWW system. Mr. Reilly performed an observed depreciation analysis. He worked with engineers to excavate, inspect, and sample pipes in the ground, determining their remaining useful life. He used a New Hampshire appraiser to value the real estate assets. Mr. Reilly assembled all of this work into a series of reports, and testified at length at the hearing. All of Mr. Reilly's work was conducted in full compliance with the Uniform Standards of Appraisal Practice. Reilly Test., Ex. 3007, 3007A, 3017, 3017A, 3021, 3021A, 3021B, Cert.Rec. pp. 14543, 14583, 15633, 15640, 15744, 15747, 15772; Reilly Test. 9/12/07, pp. 5-237, Cert.Rec. p. 8598, P.App. pp. 63-95.

Nashua relied upon George Sansoucy, whose valuation as of December 31, 2004 was \$85 million, based equally on the income and sales approaches. Sansoucy Test., Ex. 1007, 1007A, Cert.Rec. pp. 11036, 11051. He acknowledged that PWW had placed in service an additional \$54 million in new assets since that time, and those assets should be included in value to the extent they are included in rate base. Sansoucy Test., Ex. 1017, pp. 4-10, Cert.Rec., p. 12020. Mr. Sansoucy did not perform a full cost approach, nor a real estate appraisal, nor any observed depreciation analysis. There was considerable evidence submitted demonstrating that Mr. Sansoucy's appraisal did not comply with the Uniform Standards of Appraisal Practice. The PUC repeatedly found that Pennichuck's evidence on valuation was "more credible" than that supplied by Mr. Sansoucy. Taking Order, pp. 84-92, N.App. pp. 108-116.

The PUC largely adopted Mr. Reilly's methodology. Like him, the PUC considered the asset, income and comparable sales approaches to valuation, but relied solely upon the asset and income approaches, giving them a 60/40 weighting respectively. Taking Order, p. 93, N.App., p. 117. Still, the PUC did not accept all of Mr. Reilly's assertions, and made numerous adjustments to his calculations. Taking Order, pp. 91-92, N.App. pp. 115-116. The PUC determined the value of PWW assets to be \$203 million as of December 31, 2008, about one third less and three years later than Mr. Reilly's 2005 valuation. Taking Order, p. 93, N.App., p. 117.

In this appeal, only Nashua contests the PUC's valuation amount. Nashua focuses solely on one part of Mr. Reilly's methodology, which the PUC adopted as part of its income approach. Specifically, Nashua challenges the PUC's acceptance of Mr. Reilly's opinion that the presence of not-for-profit, or government buyers, in the hypothetical pool of purchasers for the PWW system would impact the price the PWW system would attract in the marketplace if it were placed for sale. Mr. Reilly opined that any hypothetical purchaser negotiating to acquire the

PWW system would increase its bid to account for the potentially higher bids of competing municipal purchasers, which both parties' agreed can afford to pay more to acquire utilities due to certain cost and regulatory advantages. Mr. Reilly's opinion was based on his considerable experience valuing water systems across the country, including specific sales data demonstrating that municipal buyers do in fact pay higher prices to acquire utilities. Reilly Test., 9/12/07, pp. 75-76, 186-89, 212, P.App. pp. 66-67, 74-77, 86.

Mr. Sansoucy agreed that the pool of hypothetical purchasers for the PWW system includes multiple municipal entities. Mr. Sansoucy agreed that municipal entities have numerous cost and regulatory advantages not available to privately owned companies. However, Mr. Sansoucy opined that the presence of these municipal entities in the hypothetical pool would have no impact whatsoever on the market price for the PWW system. Sansoucy Test., Ex. 1015. There was considerable hearing testimony on the hypothetical buyer issue, including questions from the Commissioners, and in the end the PUC agreed with Mr. Reilly. Taking Order, pp. 89-92, N.App. pp. 113-116. As to Nashua's hypothetical buyer arguments, in its order denying Nashua's rehearing request, the PUC stated, "Nashua's arguments in this regard were not overlooked; they were simply not found to be persuasive". Order No. 24,948, p. 25, N.App. p. 169, Cert.Rec. p. 10601.

SUMMARY OF ARGUMENT

The PUC determined that it needed to retain substantial regulatory jurisdiction over Nashua in order for Nashua's operation of PWW assets to meet the public interest standard for a taking. However, the PUC does not have the statutory authority to assert continuing jurisdiction over Nashua, pursuant to RSA 362:4.

Given Nashua's woefully inadequate proposal to operate PWW, the PUC imposed at least nine conditions upon Nashua as prerequisites to its public interest finding. The conditions violate PWW's constitutional rights, in that it turns the PUC into a quasi-legislature and not an adjudicator of the case before it, they deprive PWW of a hearing on the public interest case made against it, and in some cases require hearings after PWW has gone out of business and is unable to address matters at a hearing.

The PUC failed to apply the constitutionally required balancing approach, and certainly failed to articulate what standard it used, in considering whether the public interest permitted the taking of PWW assets. Had it done so, the evidence is clear that there is no public interest for any asset condemnation to take place here.

The PUC properly made factual findings based upon the evidence that customers of PEU and PAC require the establishment of a mitigation fund to offset \$3.4 million in increased annual operating costs they will suffer should Nashua take PWW assets, costs caused by the resulting loss of significant economies of scale. However, the PUC made factual findings not supported by the record concerning the size of the mitigation fund needed to earn that \$3.4 million per year.

Nashua contests the PUC's reliance on Mr. Reilly's opinion that the presence of multiple municipal buyers in the hypothetical pool of purchasers for the PWW system would have an impact on its market price. This factual determination is consistent with this Court's previous rulings on the issue, and is supported by substantial evidence in the record. Given that this Court gives "considerable deference" to the trier of fact in utility valuation cases, the PUC's conclusions in this area must be affirmed.

Nashua also contests the PUC's decision to exclude from the eminent domain proceeding the assets of PEU and PAC, two separately incorporated companies that do not provide any

service within Nashua. The PUC correctly interpreted RSA 38 not to permit a municipality to take assets of utilities not operating therein.

ARGUMENT

I. THE PUC’S ASSERTION OF CONTINUED REGULATORY JURISDICTION OVER NASHUA EXCEEDS ITS STATUTORY AUTHORITY

The PUC imposed at least nine conditions for Nashua’s taking of PWV’s assets which were “prerequisites to our decision that the taking is in the public interest.” Taking Order, pp. 98-99, N.App. pp. 122-23. In doing so, the PUC exceeded its statutory authority to impose conditions upon a municipality under RSA 38:11, because the enforcement of those conditions requires the PUC to extend its jurisdiction over Nashua, which is forbidden by RSA 362:4.

Conditions that require continued PUC oversight include the following:

- Creation of a \$40 million mitigation fund, paid for by Nashua, for the benefit of PEU and PAC customers. Taking Order, pp. 96, 99, N.App., pp. 120, 123. As the PUC noted in its rehearing order:

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. (Order No. 24,948, p. 26, N.App. p. 170).
- Service to customers outside of Nashua must be maintained indefinitely at the same rates as for Nashua customers, and all current wholesale water arrangements must be continued either through assumption of those contracts or new tariff filings. Taking Order, p. 98, N.App, p. 122.
- Nashua must amend its private contractor agreement so it will handle all customer service functions, subject to the PUC’s customer service rules, N.H. Code Admin. R. Puc 1200. Id.
- Nashua must provide ongoing technical advisory staffing for wholesale customers. Id.
- Nashua must establish a permanent technical advisory board, subject to the Right to Know Law, RSA 91-A, and with reports to the PUC and the Consumer Advocate. Id.

- Nashua must submit for approval to the PUC after the taking becomes final the agreements with the operations and oversight contractors. *Id.*, p. 99.
- Nashua must become an operator in the DigSafe program subject to ongoing oversight under RSA 374:48 and N.H. Admin. R. Puc 800. *Id.*

As a municipality, Nashua is statutorily exempt from PUC regulation as a utility under RSA 362:4, III-a, so long as it does not charge its out of town customers more than a fifteen percent premium over customers living in Nashua. Given that Nashua has confirmed to the PUC that it will charge out of town customers at the same rate as Nashua customers (Taking Order, pp. 49, 59, N.App., pp. 73, 83), it is exempt from regulation as a utility.⁶ Nashua even argued before the PUC that it was exempt from continuing PUC jurisdiction, except to the extent it consented. Taking Order pp. 59-60, N.App. pp. 83-84.

Since Nashua would be statutorily exempt from PUC jurisdiction, the PUC has no authority to exert continued oversight over Nashua as set forth in the PUC's substantive conditions to its public interest finding. Given that Nashua's appeal petition here complains about the \$40 million mitigation fund, it no doubt would serve as considerable future fodder for hearings at the PUC, hearings over which it has no jurisdiction. The PUC's review of out of town and wholesale rates likewise would exceed its authority, and would require approval of any Nashua financing that could affect rates. Imposition upon Nashua of the PUC's customer service and DigSafe regulations (N.H. Code Admin. R. 800 and 1200) would give PUC staff continuous oversight – with no statutory authority - over Nashua's day-to-day operations of the PWW system. For instance, Nashua will be required to submit monthly reports to the PUC on various

⁶ RSA 362:4, III-a does not exempt municipalities from PUC jurisdiction to grant geographic franchises for out-of-town service. RSA 374:22 and 26 retain PUC jurisdiction for that single purpose, and in this case the PUC has exercised that jurisdiction, explicitly permitting Nashua to obtain those franchises as a parallel finding to its public interest finding under RSA 38. Taking Order, pp. 26-27, 62, 97. Therefore the PUC's one-shot jurisdiction over Nashua to grant franchises has been or will have been fully exercised by the time of any taking of PWW assets.

customer billing and complaint matters, and on underground facility damage. N.H. Code Admin. R. 804.01; 1203.20. It will also be subject to detailed requirements concerning customer billing and complaints, and concerning the training and duties for locating underground facilities. *Id.*

The PUC was justifiably concerned about Nashua's woefully inadequate proposal, and believed that the public interest could only be met by its continued oversight. But the PUC has 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). *See, Gould v. N.H. Div. of Motor Vehicles*, 138 N.H. 343, 347 (1994); *Blair v. Manchester Water Works*, 103 N.H. 505, 507-508 (1961). The PUC cannot expand its jurisdiction by Nashua's agreement, since its jurisdiction is limited to that granted by statute. *Id.* *See, Plaquemines Port, Harbor and Terminal Dist. v. Fed. Maritime Comm'n*, 838 F.2d 536, 542, n. 2 (D.C. Cir. 1988) (consent of parties cannot add to administrative agency jurisdiction); *Amoco Prod. Co. v. Wyoming Bd. of Equalization*, 7 P.3d 900, 904 (Wyo. 2000) ("If an agency lacks subject matter jurisdiction, any proceeding conducted by it has a fundamental defect which cannot be cured by waiver or consent by the parties."); *Klaren v. Bd. Of Fire and Police Commissioners*, 240 N.E.2d 535, 538 (Ill. Ct. App. 1968) ("[I]t has long been the law that when a court has no jurisdiction of the subject matter, it cannot be conferred by consent By analogy, the same rationale would apply to . . . an administrative agency."). *See generally*, Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FCLJ 49, 65-66 (2000); 2 Am.Jur. 2d Administrative Law § 283 ("deviations from an agency's statutorily established sphere of action cannot be upheld based upon an agreement, contract, or consent of the parties").

The PUC recognizes that its assertion of continued jurisdiction over Nashua may rest on thin ice, but makes the “assumption” that it can do so based upon a broad interpretation of its authority to “set conditions... to satisfy the public interest” in RSA 38:11. Taking Order, p. 26, N.App., p. 50. But that general power to establish conditions does not create any specific power to impose conditions that conflict with the limitations in RSA 362:4 concerning PUC regulation of municipalities. Two canons of statutory construction contradict the PUC’s “assumption”. First, a specific statute governs a general statute. *See, e.g., Sanborn Reg’l Sch. Dist. v. Budget Comm.*, 150 N.H. 241, 242 (2003) (“[I]n the case of conflicting statutory provisions, the specific statute controls over the more general statute.”). Here, the express jurisdictional limitations in RSA 362:4 are more specific with respect to the PUC’s authority to exercise ongoing jurisdiction over a municipality. Second, statutes should be read in harmony, where possible. *See, e.g., In re Aldrich*, 156 N.H. 33, 35 (2007) (“We do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme.”). RSA 362:4 can be harmonized with RSA 38:11 by reading the latter as permitting the PUC to impose conditions only when such conditions would not result in the exercise of jurisdiction over municipalities. This interpretation gives effect to both statutes, whereas the PUC’s interpretation would require the Court to read one statute impliedly to repeal the other, which is a disfavored interpretation. *See, e.g., FTC v. A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946) (“Repeals by implication are not favored.”).

Since the substantive conditions requiring PUC oversight are “prerequisites” to its finding of public interest, and since that oversight exceeds the PUC’s statutory authority, Nashua’s proposed taking without those unauthorized conditions can no longer be in the public interest. This Court has no alternative but to reverse the PUC’s determination of public interest and dismiss Nashua’s case.

II. THE PUC IMPOSED CONDITIONS UPON NASHUA'S EMINENT DOMAIN TAKING IN VIOLATION OF PENNICHUCK'S CONSTITUTIONAL RIGHTS

The PUC imposed all those significant conditions upon Nashua, before it could take PWW's assets, because there were so many fatal flaws in Nashua's proposal. In effect, Nashua's proposal went through an Eliza Doolittle transformation, with the PUC Commissioners acting as Henry Higgins. But in doing so, the PUC transformed the PUC's limited RSA 38:11 authority to set conditions into a mechanism that made it impossible for PWW either to overcome the presumption of RSA 38:3 or to prove that a Nashua taking was not in the public interest. The PUC addressed each harm to the public interest that Pennichuck and its allies proved simply by imposing another condition. Taking Order, pp. 98-99, N.App., pp. 122-123.

For instance, Pennichuck proved the substantial harm to customers of PEU and PAC resulting from a taking of PWW assets. Taking Order, pp. 62-63, 94-96, N.App. pp. 86-87, 118-120. That resulted in the creation of the \$40 million mitigation fund condition. PUC staff objected to Nashua's contractor's proposal to oversee street excavations without membership in DigSafe, and that resulted in the requirement that Nashua submit to New Hampshire's DigSafe regulations, N.H. Admin. R. Puc 800. Taking Order, pp. 61-62, N.App. pp. 85-86. Pennichuck and PUC staff pointed out the many problems with Nashua's proposal to bifurcate customer service between itself and its contractor, and that resulted in a requirement for integrated customer service subject to the PUC's consumer standards, N.H. Admin. R. Puc 1200. Taking Order, pp. 53-55, N.App. pp. 77-79.

None of these conditions was part of Nashua's flawed proposal, the proposal that the parties litigated – at great expense -- over several years. Nashua Petition for Valuation dated March 24, 2004, Cert Rec. p. 1. These conditions came to light only at the merits hearing, or later, in Nashua's post-hearing brief. McCarthy Test., 1/10/07, pp. 150-53, Cert.Rec. p. 6784;

1/11/07, p. 143, Cert.Rec. p. 7051; Gates Test., 9/7/07, pp. 15-16, Cert.Rec. p. 8160; Sansoucy Test., 9/10/07 PM, pp. 96-97, Cert.Rec. p. 8458; Daniels Test., 9/19/07, pp. 19-20, Cert.Rec. p. 9491; McCray Test., 9/19/07, pp. 61-63, Cert.Rec. p. 9491; Mills Test., 9/19/07, pp. 80-82, Cert.Rec. p. 9491; Scanlon Test., 9/19/07, pp. 111-113, Cert.Rec. p. 9491; Knepper Test., 9/26/07, pp. 22-23, Cert.Rec. p. 9694; Noonan Test., 9/26/07, pp. 51-54, Cert.Rec. p. 9694; Naylor Test., 9/26/07, pp. 71-74, 165-68, Cert.Rec. p. 9694; Nashua Post-Hearing Brief, App. A, Cert.Rec. p. 9952.

The imposition of so many conditions raises three constitutional problems. First, the PUC exceeded its quasi-judicial obligation to serve as a neutral arbiter of the public interest under RSA 38:9 and to adjudicate the proposal before it. *See*, 363:17-a. Instead, it performed as a super-legislature to enact (under the guise of imposing “conditions”) a complicated ownership and operational scheme that then served as a basis for the PUC to determine that Nashua met its public interest requirements to take PWW assets. By doing so, the PUC deprived Pennichuck of its constitutional due process rights in taking its property. *See*, N.H.Const., pt. 1, art. 2, 12, 14 and 15 and pt. 2, art. 83 and U.S.Const., Fifth and Fourteenth Amendments.

Second, the PUC permitted Nashua to change radically its proposal at the hearing and thereafter so as to counteract the overwhelming evidence showing lack of public interest. This deprived Pennichuck of its due process right to address proposals that varied significantly from the one Nashua made in its petition and in its prefiled testimony. *See*, e.g., Taking Order p. 54, N.App. p. 78. Pennichuck simply did not receive its due process right for notice and a hearing at the PUC concerning a taking of its property. *Appeal of Public Service*, 122 N.H. at 1073 (“notice must give ... [parties] the opportunity to have a hearing on the government’s action” quoting *Petition of Clark*, 122 N.H. 888, 891 (1982) and citing *NLRB v. Temple-Eastex, Inc.*, 579

F.2d 932, 936 (5th Cir. 1978); 3 K. Davis, *Administrative Law Treatise* § 14:11, at 50 (2d ed. 1980)). *See also, Appeal of Concord Steam Corp.*, 130 N.H. 422, 427-28 (1988).

Finally, several of the PUC's public interest conditions require follow-up PUC review only after the taking becomes final, or thereafter. For instance, the PUC plans to schedule a subsequent proceeding "after all rehearings and appeals are exhausted" to determine the administration of the \$40 million mitigation fund to benefit PEU and PAC customers. *Taking Order*, p. 96, N.App., p. 120. Also, Nashua must submit to the PUC for approval its agreements with Nashua's contractors within sixty days *after* the taking becomes final, including the addition of new terms for the contractor to provide all customer service functions. *Taking Order*, pp. 98-99, N.App. pp. 122-23. Nashua concedes that the current unsigned agreements with contractors contain many blanks and need many changes. *Sansoucy Test.*, 1/10/07, pp. 229-30, Cert.Rec. p. 6784; *Ashcroft Test.*, 9/5/07, pp. 37-39, 342-43, Cert.Rec. p. 7804; *Doran Test.*, 9/7/07, pp. 15-16, Cert.Rec. p. 8160.

This post-appellate PUC review process leaves Pennichuck and the public with no recourse if the PUC is faced with the reality of significant, but necessary, cost changes to contractor agreements in the latter proceeding such that it has an impact on rates and renders the taking no longer in the public interest. *Naylor Test.*, 9/26/07, pp. 136-38, Cert.Rec. p. 9694. Similarly, if the PUC later determines that the \$40 million fund has structural defects or will not yield sufficient annual revenues, PWW and the customers of its remaining affiliates will have no meaningful recourse.

It is not an overstatement that this is a corporate death penalty case. But here, the PUC proposes continuing its review of public interest "prerequisites" *after* the death sentence has been carried out. In other words, the PUC has turned several of its conditions precedent, i.e.

“prerequisite” matters needed to find public interest, into conditions subsequent, evaluated after the taking has occurred. This placement of the cart before the horse – or more appropriately the placement of the gallows before the conviction -- is the very essence of the denial of due process to which PWW has a right under pt. 1, art. 2, 12, 14 and 15 and pt. 2, art. 83 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. See, *Bianco, Merrill, supra; Appeal of Concord Steam*, 130 N.H. at 427-28 (“the due process clause of the New Hampshire Constitution, N. H. Const. pt. 1, art. 15, guarantees to the holder of the interest the right to be heard *at a meaningful time* and in a meaningful manner...”) (emphasis added).

III. THE PUC FAILED TO APPLY THE CONSTITUTIONALLY REQUIRED BALANCING APPROACH FOR ANALYZING PUBLIC INTEREST

A. The PUC Did Not Weigh the Benefits and Burdens of a Taking, as Required by the Constitution

The New Hampshire Constitution and numerous decisions of this Court require tribunals to adopt a specific methodology in considering whether the state’s exercise of its property condemnation power meets the required public interest in the circumstances before it. Here, the PUC failed to meet its constitutional mandate. Specifically, it failed to apply the net benefit test, which weighs the “public benefits... against all burdens and social costs suffered by every affected property owner.” *In re Bianco*, 143 N.H. 83, 86 (1998). See, *Merrill v. Manchester*, 127 N.H. 234, 237 (1985). This Court has held that “public interest” is measured on a spectrum, and takings for convenience justify only slight impositions on private rights. *Rodgers Dev. Co. v. Town of Tilton*, 147 N.H. 57, 59 (2001). In this case, the proposed taking imposes significant burdens on private rights, but the PUC never weighed those burdens, except to calculate compensation for property taken.

The PUC framed its entire public interest analysis around burdens of proof, and did not engage in a constitutional analysis of benefits and burdens. Specifically, the PUC stated that:

“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.”

Taking Order, p. 25, N.App., p. 49.

The PUC thus jumped from a given - that a municipal taking of utility property is a public *purpose* - all the way to the allocation of burden of proof to examine public interest. But the PUC skipped over the crucial, Constitution-required, step: the consideration whether the taking is a net public *benefit*, that is whether the benefits of the taking outweigh the burdens. The PUC confused that weighing process with the evidentiary rebuttable presumption of public interest (or benefit) in favor of Nashua. The burden shifting provisions of RSA 38:3 do not eliminate that weighing process and do not constitute a legislative declaration of public interest, such as that found in one railroad right of way eminent domain statute, RSA 228:60-a. *See, Malnati v. State*, 148 N.H. 94, 100 (2002).

In confronting evidence showing the absence of public interest for a taking by Nashua, the PUC either ignored the testimony or found it “speculative”. It said: “[a]lthough this evidence is credible, it is not the type of evidence that can form the basis for denying Nashua’s petition.” Taking Order pp. 51-52, N.App., pp. 75-76. And to the extent the PUC weighed anything, it focused on customer numbers: “approximately 87 percent of PWW’s customers are within the City of Nashua.” Taking Order, p. 51, N.App., p. 75. Because of the extreme weight that the PUC gave to one factor -- Nashua’s municipal vote confirming an aldermanic resolution to acquire PWW’s water systems -- the PUC failed to engage in the public interest balancing

approach required by case law interpreting the New Hampshire Constitution. Examples of four significant matters that the PUC failed to weigh are the following:

First, it never weighed evidence submitted by PWW and PUC staff concerning “Pennichuck’s positive record as a utility” and its “willing[ness] to expand into new areas.” Instead, the PUC stated simply that such evidence cannot rebut Nashua’s public interest presumption. Taking Order, p. 51-52, N.App., pp. 75-76. The PUC’s reliance upon an evidentiary presumption means it refused to accord any weight to the credible evidence from PUC staff, Veolia staff, and Bedford and Milford town officials (Naylor Test., Ex. 5001, p. 69, Cert.Rec. p. 17043; Noran Test., 9/5/07, p. 129, Cert.Rec. p. 7804; White Test., Ex. 3022, p. 16, Cert.Rec. p. 15782; Daniels Test., Ex. 4001, p. 1, Cert.Rec. p. 16982) that Pennichuck is well run. See, Taking Order, pp. 51-52, N.App., pp. 75-76. If this is “not the type of evidence that can form the basis for denying Nashua’s petition” (Taking Order, p. 52, N.App., p. 76) then what type of evidence could?

Second, it never weighed the damage to the public interest of the state as a whole from losing access to the state’s largest investor-owned regional water company, with the capital and operational capability necessary to assist and take over troubled water systems statewide. See, Patch Test., Ex. 3002, pp. 20-23, P.App. pp. 56-59; Naylor Test., Ex. 5014, pp. 49-53, Cert.Rec. p. 17363; Ware Test., 9/11/07, p. 62, Cert.Rec. p. 8841. Indeed, there is nothing “speculative” (Taking Order, p. 52, N.App., p. 76) about Pennichuck’s role, given the PUC’s track record of approving Pennichuck’s water system acquisitions. Patch Test., Ex. 3002, pp. 20-22, P.App. pp. 56-58. Beyond the statewide harm to PEU and PAC, the undisputed evidence was that New Hampshire would also lose PWSC, which operates 86 water systems serving 19,230 customers in private and municipal water systems. It would have little choice but to go out of business,

because of the loss of economies of scale. Correll Test., Ex. 3001, pp. 9, 13, 15-16, P.App. pp. 18, 22, 24-25; Ware Test., Ex. 3004, pp. 17-18, Cert.Rec. p. 14262.

Third, while the PUC noted the opposition of the Towns of Milford and Merrimack to the taking (Taking Order, pp. 35-37, N.App., pp. 59-61), it never weighed the damage to the public interest of those towns, which opposed Nashua's taking or were not represented in the hearing room. In fact, the PUC ignores their opposition in its public interest analysis, and with it the astute observation of Merrimack Selectman Daniel McCray: "...elected people, they're always going to cater to the people that elect them, and no one in Merrimack has a vote in there [Nashua]." McCray Test., 9/19/07, p. 66, Cert.Rec. p. 9491. Nashua Mayor Bernard Streeter and Alderman McCarthy testified that "far-flung" communities like Epping or Newmarket served by PWW might be better off other than under Nashua ownership. McCarthy and Streeter Test., 1/10/07, pp. 142-44, Cert.Rec. p. 6784.

Fourth, the PUC failed to consider evidence of harm to the shareholders of New Hampshire's oldest business. Correll Test., Ex. 3001, pp. 15-21, P.App. pp. 24-30. The New Hampshire Constitution calls for commerce and trades to be promoted as an "essential right of the people". The PUC is supposed to balance shareholder interests in its deliberations. *See, Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 100 (2005). As the PUC has stated in relation to another statute: "RSA 363:17-a states an important public policy principle and we take seriously our obligation to serve as an arbiter as opposed to a defender or advocate of either utility shareholders or utility customers." *Re Public Service Co. N. H.*, 90 NH PUC 542, 560 (2005). One tangible shareholder loss that the PUC ignored is the double taxation burden (39% at the corporate level plus more at the shareholder level) of the taking upon the ultimate owners of the property being taken – the shareholders of Pennichuck Corporation – which will reduce the "just

compensation” ordered by the PUC. Correll Test., Ex. 3001, pp. 17-20, P.App. pp. 26-29. The PUC also ignored the loss of Pennichuck’s major non-regulated source of profits from PWSC, which directly harms its shareholders. Correll Test., Ex. 3001, pp. 15-16, P.App. pp. 24-25.

Despite this devastating burden on private property rights, the PUC failed to require any substantial justification for Nashua’s proposal, and instead deferred at every turn to the insurmountable weight it gave the municipal vote and the rebuttable presumption of RSA 38:3. The Taking Order ignores the constitutional and policy principles which require heightened vigilance to protect the property interests of businesses providing regulated service to the public.

B. Even if the PUC did weigh the public interest, it failed to set forth its reasoning or methodology in doing so.

Even if the PUC thought that it conducted the balancing required by *Bianco, Merrill* and *Rodgers*, it certainly failed to set forth its methodology in the Taking Order, contrary to general New Hampshire administrative law (*Appeal of Conservation Law Found.*, 127 N.H. 606, 652 (1986)(agency obligated to set forth its reasoning and conclusions so that the court may effectively review its “methods, findings and order”); *Appeal of Town of Newington*, 149 N.H. 347, 352 (2003)(administrative body must set forth its reasoning sufficient for appellate review)) and the specific “reasoning” requirement of RSA 363:17-b for all PUC decisions. Here, the PUC did not cite a single case about the factors to consider in determining the public interest, or how to conduct the net benefits test.

The articulation of the PUC’s reasoning is particularly important here, since it may have erroneously relied upon the “no net harm” standard, which applies solely to the exercise of private rights with potential public consequences, such as from a consensual asset transfer

between private utilities.⁷ *See, New England Elec. Sys.*, 84 NHPUC 502, 510 (1999). Because the PUC did not articulate the standard it applied, it is impossible to tell which, if any, standard it did apply.

IV. THE RECORD SUPPORTS THE ESTABLISHMENT OF A MITIGATION FUND TO GENERATE \$3.4 MILLION PER YEAR IN REVENUE TO PROTECT CUSTOMERS OF PEU AND PAC, BUT THE RECORD DOES NOT SUPPORT A \$40 MILLION FUND AS SUFFICIENT TO GENERATE THAT REVENUE.

A. There Was Evidence from which the PUC Could Find that Customers of PEU and PAC Would Be Harmed from \$3.4 Million in Increased Annual Expenses after Nashua's Taking of PWW Assets, and that the Public Interest Required a Mitigation Fund to Offset Those Expenses

The PUC concluded that the public interest required creation of a mitigation fund to protect the customers of PAC and PEU from the loss of significant economies of scale should Nashua take the assets of PWW. Taking Order, pp. 94-96, N.App., pp. 118-120. Pennichuck agrees with the PUC finding, based upon evidence in the record, that the combined shortfall in the annual revenue requirements of PAC and PEU (i.e. increased operating expenses) from such a taking is \$3.4 million, which “requires... establish[ment of] an appropriate mitigation fund”. *Id.*, p. 96. This Court must uphold the PUC’s finding so long as there is some evidence in the record. *Appeal of Basani*, 149 N.H. 259, 262 (2003).

Now Nashua appeals the establishment of a fund of that size. Not so many months ago, as it admitted in its own brief, “Nashua proposed a mitigation fund because there was no alternative once the PUC foreclosed the statutory mechanism for acquiring the plant and property of [PEU and PAC].” Nashua Brief, p. 32. Nashua’s problem is that the PUC had before it only one “detailed analysis” of the harms to PEU and PAC customers from a taking, and that “detailed analysis” came from Pennichuck. Nashua instructed its experts “not to perform any

⁷ Mr. Sansoucy advocated for a “no net harm” standard. Ex. 3197, p. 7 (Nashua March 16, 2004 aldermanic meeting minutes, p. 15); Walker Test. 9/10/07 PM, pp. 38-41, Cert.Rec. p. 8458.

analysis” on this topic. Walker Test., 9/4/07, p. 104, Cert.Rec. p. 7518. *See also*, Naylor Test., 9/26/07, p. 181, Cert.Rec. p. 9694. The PUC’s consideration of that “detailed analysis” led to its conclusion that PEU and PAC customers would be harmed, and that would require the establishment of a mitigation fund should Nashua take PWW’s assets. Taking Order, p. 94, N.App., p. 118. *See*, Sansoucy Test., 1/10/07, pp. 169-70, Cert.Rec. p. 6784; Naylor Test., 9/26/07, pp. 181-82, Cert.Rec. p. 9694.

The PUC adopted Mr. Guastella’s “detailed analysis”, and determined that the combined shortfall in PEU’s and PAC’s revenue requirement due to increased annual operating expenses following Nashua’s taking would be \$3.4 million per year. Taking Order, p. 96, N.App. p. 120. Now, Nashua is unhappy that the PUC made a factual determination from the evidence as to the harm suffered by PEU and PAC customers; harm that requires establishment of a mitigation fund. But as with other factual determinations of the PUC, this Court must uphold them so long as there is some supporting evidence. *Basani*, 149 N.H. at 262. The decision to require a mitigation fund requires a “balance [of] competing economic interests”, as to which this Court defers to the PUC. *Appeal of Pinetree Power, Inc.*, 152 N.H. at 95.

Mr. Guastella’s detailed analysis, set forth at Ex. 3016A at Att. JFG-2 and JFG-3, Cert.Rec. p. 15553, (see also Guastella Test., 9/18/07, pp. 84-86, 94, 144, Cert.Rec. p. 9268; Naylor Test., 9/26/07, pp. 131-32, 139, Cert.Rec. p. 9694), showed that PEU and PAC will require significant rate increases if they lose the economies of scale from their relationship with PWW.⁸ He carefully analyzed the costs of operating these companies on a stand-alone basis from the ground up. Mr. Guastella testified under cross examination about his efforts:

⁸ Mr. Guastella’s “detailed analysis” was backed up by the testimony of Pennichuck and PUC staffers concerning the devastating effect that the loss of PWW would inflict upon PEU and PAC. Correll Test., Ex. 3001, pp. 15-16, P.App. pp. 24-25; Ex. 3001A Att.DLC-1(Cost Allocation and Services Agreement),

We actually performed a very detailed analysis and study, which included interviews with various Company people, including the heads of each of their departments, and officers of the Company. We analyzed every department to determine what staffing levels would be needed if Pennichuck Water Works itself were acquired by Nashua, and all that would be left would be PEU, PAC, and PWSC, the service company. And, we eliminated a large number of employees... We also reviewed each of the employees during the course of this analysis as to how much time was spent for regular time, overtime, what the various pay rates would be for the employees remaining. We also reallocated duties of the employees to make sure that there would be (1) no duplication or, when we made adjustments for employees, and we were left with, for example, three and a half employees, whether we could use one employee and change the duties, so that the employees would share duties... I undertook an effort to direct the Company to contact all of the 17 vendors of major supplies to determine whether the purchasing of material, supplies, chemicals, would change if their purchasers were of a lower volume. So, they obtained specific estimates from their vendors.... We had them call the insurance companies that provide insurance to determine what the insurance levels would be.... And we determined what additional equipment would have to be purchased by PEU, PAC, and PWSC, in order to continue its operations, which equipment is now with PWW.... And, we eliminated a number of assets.

Guastella Test., 9/18/07, pp. 85-86, Cert.Rec. p. 9268. *See also*, Guastella Test., 9/18/07, p. 144, Cert.Rec. p. 9268; Ex. 3016A, Att. JFG-2 and JFG-3, Cert.Rec. p. 15553. Mr. Guastella used a lower cost estimate where a smaller building could be utilized for office space. Of course, any new vehicles, computer systems and other assets needed to be purchased would have to be acquired at present day values. They would not be subject to the depreciated original cost of assets previously on the books under PWW ownership. Thus, the increased asset cost resulting from an eminent domain taking would fall on the customers of PEU and PAC, and not solely those of PWW. Ex. 3016A, Att. JFG-2 and JFG-3, Cert.Rec. p. 15553.

The real reason for Nashua's appeal on this point is its desire not to have to pay for the mitigation fund it proposed as a condition for a PUC finding of public interest. It suggests that Pennichuck should find its own solution to the real harm Nashua would cause to PEU and PAC.

Cert.Rec. p. 14114; Patch Test., Ex. 3002, pp. 11-13, P.App. pp. 47-49; Ware Test., Ex. 3004, pp. 5-9, Cert.Rec. p. 14262; Ware Test. 9/11/07, pp. 149-53, Cert.Rec. p. 8841; Naylor Test., 9/26/07, p. 131, Cert.Rec. p. 9694.

It proposes, with no analysis, that Pennichuck sell off these entities, perhaps even to Nashua. Mr. Guastella, backed up by Mr. Ware, testified that loss of efficiencies from the taking of PWW would survive any sale of PEU or PAC, and the same higher operating expense problem would continue to exist. Sansoucy Test., 1/11/07, pp. 149-52, Cert.Rec., p. 7051; Guastella Test., 9/18/07, pp. 149-150, 153, Cert.Rec. p. 9268; Ware Test., 9/11/07, pp. 61-62, Cert.Rec. p. 8841. Nashua complains that the mitigation fund would exceed the depreciated rate bases of PEU and PAC. Nashua Brief, p. 32. But rate base is not the same as the operating expenses of a utility. Nashua presented all of these arguments, in lieu of a detailed analysis, to the PUC, but the PUC found them lacking, and crafted its own remedy to address the harms to PEU and PAC customers. Taking Order, pp. 95-96, N.App., pp. 119-120⁹

B. There was no Evidence from which the PUC could Determine that a \$40 Million Fund would be Sufficient to Generate \$3.4 Million in Annual Revenue

The problem with the PUC's decision to create a mitigation fund arose in the second step of its analysis, when it took that annual revenue requirement of \$3.4 million and capitalized it to come up with \$40 million, which it determined should be the size of the mitigation fund. Taking Order, p. 96, N.App. p. 120. Mathematically, the PUC took \$3.4 million and divided it by an assumed 8.5% capitalization rate to arrive at \$40 million. *See, Id.* The PUC used the highest rate (i.e. most aggressive) in a 6.5% to 8.5% range, resulting in the lowest possible mitigation fund amount. *Id.*; Guastella Test., Ex. 3016, pp. 2-3, Cert.Rec. p. 15542. The PUC then

⁹ Incredibly, Nashua now realizes that it should have submitted its own "detailed analysis", and complains that it "never had the opportunity to submit responsive testimony" after Mr. Guastella's May 22, 2006 prefiled testimony. Nashua Brief, pp. 32-33. Nashua played the role of plaintiff in this case. The hearing itself did not begin until January 10, 2007. By the September 11, 2006 Joint Motion to Eliminate Filing of Capstone Testimony, Cert.Rec. p. 5725, and granted by the PUC, Nashua affirmatively waived filing another round of testimony which would have been due on September 15 and November 14, 2006.

accepted, without further explanation, that \$40 million should be enough “to insulate PEU and PAC customers from the effects of a taking.” Taking Order, p. 96, N.App., p. 120.

The PUC simply assumed, without considering any evidence on the issue, that a fixed principal fund of \$40 million can in fact generate an annual revenue stream of \$3.4 million. There was no testimony that this would reasonably be possible. The only testimony on the necessary size of such a fund came from Mr. Guastella, who testified only hypothetically that *if* \$40 million were contributed to a fund and *if* the fund earned 8.5% annually (i.e. on a *net* basis), it would yield an annual income stream of \$3.4 million. Guastella Test., Ex. 3016, pp. 2-3, Cert.Rec. p. 15542; 9/18/07, pp. 151-52, Cert.Rec. p. 9268. *See*, Sansoucy Test., 1/10/07, pp. 171-72, Cert.Rec. p. 6784.

The PUC wrongly took this simple mathematical calculation and converted it into a finding that such a result would be possible to achieve. It did not resolve crucial matters such as:

- whether a fund of this nature could reasonably be expected to earn an annual return of 8.5% on a sustained basis;
- the mechanics of how such a fund would work. For example, if the funds were to be held by Pennichuck for the benefit of PAC and PEU customers, the initial \$40 million might be subject to income tax at a 39% rate, thereby substantially reducing the funds on which a return could be earned. *See*, Correll Test., Ex. 3001, pp. 17-20, P.App. pp. 26-29;
- the fact that income derived from the fund would be taxable to PAC or PEU at 39%, which would require achievement of a return of more than 8.5% in order to yield the necessary \$3.4 million annually.

Perhaps because the record lacked this critical evidence, the PUC deferred “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.” Taking Order, p. 96, N.App., p. 120. As discussed in Sections I and II, the establishment of the mitigation fund is an

example of a condition required to establish the public interest for a taking, with its implementation reviewed following the taking of PWW assets. Nashua welcomed establishment of a mitigation fund, but, unlike Pennichuck, “did not provide much detailed analysis.” Taking Order, pp. 94-95, N.App., pp. 118-119. While Pennichuck contends that collectively the conditions placed upon Nashua’s taking require reversal of the entire public interest case, should this Court uphold the placement of those conditions, then this Court should affirm establishment of a mitigation fund generating \$3.4 million annually. However, the PUC’s failure to calculate properly an amount which will net \$3.4 million per year to benefit PEU and PAC customers requires that this portion of that public interest finding be reversed, or at least remanded for consideration of what higher fund amount is required to net that amount per year.

V. EVIDENCE IN THE RECORD SUPPORTS THE PUC’S VALUATION OF PWW’S ASSETS, AND THIS COURT THEREFORE MUST UPHOLD IT.

Nashua has appealed the PUC’s determination that the PWW system has a fair market value of \$203 million as of December 31, 2008. Taking Order, p. 93, N.App. p. 117. The PUC’s fair market value ruling is a finding of fact that must be upheld if the record contains any evidence supporting the PUC’s determination. *See, Society Hill at Merrimack Condominium Ass’n v. Town of Merrimack*, 139 N.H. 253, 255 (1994) (determination of fair market value is an issue of fact); *Appeal of Basani*, 149 N.H. 259, 262 (2003) (agency findings of fact may be reversed only upon a showing there was no evidence from which the agency could conclude as it did); RSA 541:13 (agency findings of fact are prima facie lawful and reasonable). The record in this case contains ample evidence supporting the PUC’s valuation decision, and this Court must affirm it.

A. The Testimony of PWW Expert Robert Reilly is Sufficient, Standing Alone, to Meet the Standard of Review Applicable to the PUC's Valuation Decision.

Nashua's appeal focuses on a single underlying component -- the hypothetical buyer -- within the income approach, which was just one of the three valuation approaches the PUC considered in valuing the PWW system. The value the PUC computed under the income approach was ultimately 40% of the PUC's overall valuation; the remaining 60% was based on the cost approach.¹⁰

The hypothetical buyer determination is one component of the income approach to business valuation. The income approach assumes that value may be determined by calculating the present value of the future net income a business or asset will produce over time. In the case of public utility assets, the income-generating potential differs depending on whether the assets are owned by a regulated private entity or by a municipal or government entity. Walker Test., 9/4/07, pp. 252-53, Cert.Rec. p. 7518. All of the experts in this case agreed that a public utility system has greater income-generating potential under municipal as opposed to private ownership, due in large part to certain advantages municipalities have over private entities, including the lack of rate regulation and lower operating costs due to such factors as lower taxes, lower cost financing and absence of dividend payments. Sansoucy Test., Ex. 1007, pp. 11-15, Cert.Rec. p. 11036; Reilly Test., Ex. 3007, pp. 14-15, 28-32, Cert.Rec. p. 14543; Reilly Report, Ex. 3007A, pp. 2-3, 17, 36-39, Cert.Rec. p. 14583. These advantages or synergies are "widely known in the water service industry" and explain "why 80 percent of all water utilities in the United States are owned by municipalities." Reilly Test., 9/12/07, p. 76, P.App. p. 67. If, as

¹⁰ The PUC rejected the comparable sales approach in its entirety, agreeing with PWW's expert that none of the identified sales was sufficiently comparable to the PWW system to provide an indication of fair market value. Taking Order pp. 83-84, N.App. pp. 107-108.

PWW expert Robert Reilly opined, these municipal buyer synergies are considered in the valuation, the public utility has a higher income potential, and ultimately, a higher value under the income approach. If the valuation ignores the presence and impact of municipal buyers in the marketplace, as Nashua's experts did, the result is a lower value under the income approach. Taking Order, pp. 89-92, N.App. pp. 113-116; Reilly Test. 9/12/07, pp. 187-188, P.App. pp. 75-76.¹¹

Nashua concedes that the PUC's hypothetical buyer determination was based on and supported by the testimony of PWW's lead appraiser Robert Reilly: "The Commission relied upon the valuation of PWW's assets by Pennichuck's expert, Robert F. Reilly." Nashua Brief, p. 4. The PUC essentially adopted Mr. Reilly's hypothetical buyer determination for use in the PUC's income approach analysis.¹² Mr. Reilly is a pre-eminent expert in the field of business valuation. He holds numerous professional appraisal designations and certifications and has written or co-authored six authoritative books on valuation principles. Reilly Test., Ex. 3007, pp. 2-5, Cert.Rec. p. 14543. Mr. Reilly's expert qualifications went unchallenged, and his

¹¹ If the appraiser confines his analysis to regulated buyers, the income approach valuation will be roughly equivalent to the public utility's rate base, as Nashua's valuation was in this case. This Court has held, and Nashua's experts acknowledged, that a public utility's rate base is not representative of the utility's fair market value. *Southern N.H. Water*, 139 N.H. at 142; Taking Order, pp. 109-110, N.App. pp. 133-34. See also, *Dade County v. Gen. Waterworks Corp.*, 267 So.2d 633, 641 (Fla. 1972) (holding that capitalizing a public utility's regulated earnings will reach a number close to rate base, which is not fair market value); *Onondaga County Water Authority*, 139 N.Y.S.2d 755, 768 (N.Y. App. Div. 1955) (holding that if the income approach is completed using a regulated rate of return, then the valuation conclusion will always approximate the utility's rate base, which is so completely dissimilar to fair market value that the distinction "needs no comment.").

¹² The PUC did not adopt Mr. Reilly's income approach entirely. For example, the PUC rejected the use of a growth rate (Mr. Reilly used 2%) and substituted a 5% capitalization rate for Mr. Reilly's 7% rate, resulting in an income approach value that was approximately one-third lower than Mr. Reilly's. Taking Order pp. 88-89, N.App. pp. 112-113. Ironically, Mr. Reilly testified that if he were to value the PWW system *without* considering the impact of municipal buyers, his income approach conclusion would be lower by approximately one-third. Reilly Test. 9/12/07, pp. 187-88, P.App. pp. 75-76. The PUC's 2008 valuation of \$203 million is roughly two-thirds of Mr. Reilly's 2005 valuation of \$273 million.

testimony was admitted into evidence without objection.¹³ Reilly Test., 9/12/07, pp. 6-7, P.App. pp. 64-65. PUC findings on questions of fact are presumed lawful and reasonable, and this presumption may be overcome only by a showing that there was *no evidence* in the record to support the PUC's decision. RSA 541:13; *Basani*, 149 N.H. at 262. Therefore, the PUC's hypothetical buyer determination must be upheld if there is any evidence in the record to support the PUC's decision. *Basani, supra*.¹⁴

A factual determination must be upheld as supported by the evidence where the trier of fact based its decision on expert testimony properly admitted into the record, even if the record also contains conflicting expert testimony. *Crown Paper Co. v. City of Berlin*, 142 N.H. 563, 570 (1997) (argument that lower court's valuation was unsupported was "readily dismissed" because the decision was based on one party's expert testimony); *Southern N.H. Water Co. v. Town of Hudson*, 139 N.H. 139, 141 (1994) (lower court's utility valuation was supported by the evidence and should be upheld where the court's valuation "was based on the town's expert's testimony and report, both of which were admitted into evidence."); *Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 98 (1994) (PUC decision must be upheld where appellant conceded that the decision relied upon record evidence in the form of an expert report); *In re Guardianship of Dorson*, 156 N.H. 382, 388 (2007) (probate court decision upheld, since based on expert testimony). Thus Mr. Reilly's expert testimony is sufficient, standing alone, to meet the "any

¹³ In contrast to Mr. Reilly, Nashua's experts were challenged as to their qualifications, partiality, and credibility, based on numerous grounds, including the fact that none hold any designations or certifications from any major appraisal organizations, and the fact that in their role as consultants to the city for the takeover, they stood to benefit financially from Nashua's condemnation of the PWW system. Taking Order, pp. 80-82, N.App. pp. 104-106.

¹⁴ See also *Georgia PSC v. ALLTEL Georgia Communications Corp.*, 536 S.E.2d 542, 547 (Ga. Ct. App. 2000) (testimony by experts is sufficient to satisfy the any evidence standard of review for PSC factual determinations).

evidence” standard of review applicable to the PUC’s valuation decision, and the PUC’s decision must be upheld.¹⁵

The record contains sufficient evidence, in the form of the expert testimony of Mr. Reilly, to satisfy the requirement that the PUC’s factual determinations be supported by some evidence in the record. As Nashua concedes, the PUC’s factual determination of the likely population of hypothetical buyers for the PWW system is based on the testimony of Mr. Reilly. Thus the record contains some evidence to support the PUC’s decision, and the decision must be upheld.

B. The Court May Not Reweigh the Conflicting Expert Testimony in this Case.

Nashua’s valuation arguments focus not on the PUC’s decision, but rather on the testimony of Mr. Reilly. Nashua’s appellate brief is simply a rehash of the various arguments Nashua previously made in briefs before the PUC. These arguments dispute Mr. Reilly’s methodologies, attack the credibility of his opinions, and highlight allegedly contrary testimony offered by other witnesses, while making no mention of testimony and proof offered in support

¹⁵ Even in jurisdictions that require Commission decisions be supported by “substantial evidence,” a higher standard than the “any evidence” standard used in New Hampshire, if the Commission bases its decision on the record testimony of a qualified expert with a rational basis for his views, a reviewing court must uphold the Commission’s decision, even if other experts disagreed. *See Public Service Co. of Oklahoma v. Oklahoma Corporation Commission*, 115 P.3d 861, 870 (Okla. Sup. Ct. 2005) (“[i]n cases before the Commission involving the testimony of expert witnesses, a factual finding is supported by substantial evidence when the evidence is offered by a qualified expert who has a rational basis for his views, even if other experts disagree.”); *Consumers Power Co. v. PSC*, 472 N.W.2d 77, 92 (Mich. Ct. App. 1991) (“a PSC decision is supported by substantial evidence if it is supported by expert opinion testimony, offered by a qualified expert who has a rational basis for his views, whether or not other experts disagree.”) (internal citations omitted); *Montana-Dakota Utilities Co. v. Montana Dept. of Pub. Serv.*, 725 P.2d 548, 552 (Mont. Sup. Ct. 1986) (because the Commission adopted the conclusions of an expert’s report, the decision was supported by substantial evidence).

of Mr. Reilly's opinions.¹⁶ Nashua's recycled arguments present issues that are well beyond the permitted scope of this Court's limited review.

The PUC, and not the Court, is the sole entity that may assess the credibility of the expert testimony presented and resolve conflicts between dueling experts: "[o]nce testimony is admitted, it is the PUC's duty to resolve issues of fact and conflicts of opinion." *Appeal of McKenney*, 120 N.H. 77, 81 (1980) (noting that the PUC is not compelled to accept the opinion evidence of any one witness). To make its hypothetical buyer determination, the PUC had to resolve the significant conflicts between the testimony of Mr. Reilly and the testimony of Nashua's experts. The PUC resolved these conflicts by assessing the credibility of the expert's opinions and weighing the evidence presented. After a careful and thorough analysis, including detailed direct questioning from the Commissioners on this issue, the PUC found Mr. Reilly's analysis more credible. As the PUC stated in its Order denying Nashua's rehearing request, "Nashua's arguments in this regard [concerning the presence of hypothetical not-for-profit buyers] were not overlooked; they were simply not found to be persuasive." Order No. 24,948, p. 25, N.App. p. 169. This Court may not reweigh the evidence or substitute its own judgment for that of the PUC as to the credibility of the expert testimony. *Delucca v. Delucca*, 152 N.H.

¹⁶ Nashua recycles arguments from its PUC briefs citing phrases taken out of context in the testimony of non-valuation witnesses. For example, Nashua misreads the testimony of PWW President Donald Ware as stating that municipal buyers are not present in the marketplace at large. Mr. Ware testified that it would be difficult to find any buyer, municipal or private, if PWW were left with only the PEU and PAC utilities. Ware Test. 9/11/07, p. 64, Cert.Rec. p. 8841. Similarly, Nashua's brief misreads the testimony of John Joyner, who specifically stated that "I am not a valuation expert," and acknowledged he holds no professional training in appraisal techniques. Joyner Test, 9/13/07, pp. 52, 81-82, Cert.Rec. p. 9095. On the issue of municipal buyer presence in the marketplace, Nashua's brief fails to mention that its own expert, Mr. Sansoucy, noted 8 municipal purchases of private systems in his report. Ex. 1007A, p. 52, Cert.Rec. p. 11051. Finally, Nashua incorrectly seizes upon the 2002 work of SG Barr Devlin, which advised Pennichuck concerning the failed stock sale of Pennichuck Corporation, not an asset sale of PWW. Nashua fails to mention that Mr. Reilly easily distinguished stock deals and Barr Devlin's work, and the PUC properly did not rely upon it. Reilly Report, Ex. 3017A, p. 17, Cert.Rec. p. 15640; Reilly Test., 9/12/07, pp. 227-32, P.App. pp. 87-92.

100, 102 (2004)(trier of fact resolves conflicts in valuation testimony); *Tennessee Gas Pipeline Co. v. Town of Hudson*, 145 N.H. 598, 602 (2002)(same).

Nashua's brief makes the specious claim that various issues related to the PUC's hypothetical buyer determination were undisputed. Nashua's characterization is incorrect. The hypothetical buyer issue was one of the most vigorously contested valuation matters in the PUC proceeding, and was the subject of extensive conflicting expert testimony. Taking Order, p. 83, N.App. p. 107 (noting that the hypothetical buyer conflict was an issue of "consequential dispute" between the parties). Nashua's brief also makes the illogical argument that there were no **facts** in the record to support certain underlying **hypothetical** assumptions the experts made. Again, Nashua's characterization of the evidence is simply incorrect.

This Court has previously held that public utility valuations must consider the impact of potential municipal buyers. *Southern N.H. Water*, 139 N.H. at 142.¹⁷ Both sides in this case acknowledged that the pool of potential buyers for the PWW system includes municipalities, but the experts submitted conflicting testimony and opinions on the impact resulting from those potential buyers. Sansoucy Test., 9/4/07, p. 252, Cert.Rec., p. 7518; Reilly Test., Ex. 3007, pp. 14-15, Cert.Rec. p. 14543. The PUC found that only Mr. Reilly's analysis properly accounted for the potential impact of municipal buyers.

¹⁷ See also, *Opinion of the Justices*, 131 N.H. 504, 509-510 (1989) (striking down as unconstitutional legislation which valued public utilities under conclusive presumption that utility would continue in the hands of a regulated buyer – thus ignoring the possibility of municipal buyers). Other jurisdictions have reached similar conclusions; *Washington Suburban Sanitary Comm'n v. Utilities, Inc. of Maryland*, 775 A.2d 1178 (Md. 2001) (upholding valuation that considered impact of municipal buyers, noting that the experts had testified that hypothetical government purchasers were included in the relevant market); *Massachusetts-American Water Co. v. Grafton Water District*, 631 N.E.2d 59, 61 (Mass. App. Ct. 1994) (stating that it was not error to consider the existence of unregulated buyers in valuing a utility); *Dade County v. Gen. Waterworks Corp.*, 267 So.2d 633, 641 (Fla. 1972) (confining valuation to consideration of regulated buyers only did not result in fair market value); *Onondaga County Water Authority*, 139 N.Y.S.2d 755 (N.Y. App. Div. 1955) (income approach that focuses solely on regulated earnings will conclude rate base, which is not fair market value).

Mr. Reilly's report and testimony made a simple point, which the PUC accepted: given the fact that municipal entities can and do pay higher prices to acquire public utilities, the presence of one or more municipal entities in the pool of hypothetical buyers results in a higher overall value for the public utility. His reasoning is also simple: because any acquirer, public or private, knows it has to outbid what the municipal buyers would be willing to pay. Reilly Test., Ex. 3007, pp. 14-19, Cert.Rec. p. 14543; Reilly Test., 9/12/07, pp. 75-76, 186, P.App. pp. 66-67, 74. Mr. Reilly's conclusions were based on his considerable expertise, experience, and professional judgment.

The hypothetical buyer analysis by definition does not deal with an identified person or negotiation. Instead, the appraiser makes a hypothetical assumption based on professional judgment. The appraiser must assume that the assets were placed for sale on the marketplace, and then determine what types of entities would likely be present in the pool of hypothetical buyers for those assets. To determine the pool of hypothetical buyers, the appraiser does not identify and then psychoanalyze a subset of specific potential buyers to determine which buyers are the most likely to purchase the assets, because that inserts a level of detail and subjective analysis simply not appropriate to the hypothetical buyer analysis. It is impossible to know who *actually* would participate in a hypothetical consensual bidding process for the assets if they were actually offered up for sale. Reilly Test., Ex. 3007, pp. 15-16, Cert.Rec. p. 14543; Reilly Test., 9/12/07, pp. 208-210, P.App. pp. 82-83. Therefore, all the appraiser can and should do is identify who *may* participate. The PUC understood this distinction between determining a pool of potential hypothetical buyers versus predicting the likelihood of a purchase by any one specific buyer. As the PUC 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, N.App. p. 114, quoting Reilly Test., Ex. 3007, p. 14, Cert.Rec. p. 14543.

See also, Appraisal Institute, *The Appraisal of Real Estate* (12th ed. 2001), p. 476 (appraiser must remain "objective, impersonal, and detached" from any one buyer.) P.App. pp. 100.¹⁸

Adding to the complexity of the hypothetical buyer analysis is the fact that PWW's assets are those of a public utility. As the PUC correctly recognized, public utility assets constitute special purpose property (Taking Order, p. 84, N.App. p. 108), with a limited market of buyers. Therefore valuing public utility assets requires the appraiser to use considerable "personal judgment."¹⁹ *The Appraisal of Real Estate*, pp. 25-26, P.App. pp. 97-98. *Accord, Southern N.H. Water*, 139 N.H. at 142 ("The unlikelihood of sale is, after all, the reason why valuation of public utilities is so extraordinarily difficult").

Nashua claims, incorrectly, that Mr. Reilly lacked empirical data to support his professional judgment that the value of the PWW system would be influenced by the presence of municipal buyers in the pool of hypothetical purchasers. First of all, as an expert, Mr. Reilly need not present specific data supporting the general valuation concepts that underlie his testimony, and he need not cite to specific factual examples in support of his professional

¹⁸ Considering the needs of a "particular investor" means the appraisal is no longer indicative of "market value" but is instead an assessment of the "investment value," or value of the system to a particular investor. *The Appraisal of Real Estate*, pp. 26-27, P.App. pp. 98-99. Nashua turns this standard on its head. Nashua claims Mr. Reilly's income approach was an investment value analysis, when it is Nashua that improperly conducted an investment value analysis. Mr. Reilly used municipal-based numbers in his income approach, not because those numbers reflected Nashua's characteristics, but instead because he concluded, as the PUC found, that those numbers were reflective of the range of prices the PWW system would bring on the market. Nashua's income approach capitalized PWW's regulated earnings, thus calculating the investment value of the system to PWW. Nashua reaches its income approach conclusion by separately analyzing the subjective needs and motives of each particular municipal purchaser in order to eliminate them from consideration, which is the exact definition of an investment value analysis. *See, Id.*

¹⁹ Mr. Sansoucy considered the PWW assets to be special purpose property when he appraised them for Nashua in 1995 for property tax purposes. Sansoucy Test., 9/4/07, pp. 241-42, 245-46, Cert.Rec. p. 7518; Ex. 3061, p. 8. Mr. Sansoucy's assistant admitted PWW was special purpose property under cross-examination. Walker Test. 9/4/07, pp. 241-42, Cert.Rec. p. 7518; 9/5/07, p. 74, Cert.Rec. p. 7804.

judgment as to hypothetical assumptions. *Carignan v. N.H. International Speedway*, 151 N.H. 409 (2004) (expert may base opinion on inadmissible facts, including hearsay). *See generally*, N.H. R. Evid. 703.

Second, Mr. Reilly did testify at great length about the basis for his judgment concerning the pool of hypothetical buyers. Reilly Test., 9/12/07, p. 212, P.App. p. 86. For example, Mr. Reilly referred to his considerable experience appraising water companies around the United States, where he has noted that municipal buyers have a particular influence on the prices paid for utility systems, such as PWW, that are largely surrounded by municipal systems and thus less attractive acquisition targets for private entities. Reilly Test., 9/12/07, pp. 180-81, P.App. pp. 68-69. He cited to his valuation work for an investor owned water company in Peoria, Illinois, in which he specifically examined investor versus municipal purchases of water utilities, and found that municipal buyers always paid higher multiples than private buyers. Reilly Test., 9/12/07, pp. 191-92, P.App. pp. 79-80. Mr. Reilly also testified that his firm conducts hundreds of hospital and other health care institution valuations each year, and those valuations are similarly influenced by the presence of not-for-profit and for-profit buyers. Reilly Test., 9/12/07, p. 207, P.App. p. 81.²⁰

The PUC found Mr. Reilly's analysis more credible than Mr. Sansoucy's, who opined that the presence of hypothetical municipal buyers would have no impact whatsoever on the potential market price for PWW's system. The PUC's determination of the relative weight and

²⁰ When Commissioner Below asked Mr. Reilly to compile a list of situations in which multiple not-for-profit entities expressed interest in a water system, (Reilly Test. 9/12/07, pp. 212, P.App. p. 86), Pennichuck complied, and supplied a list of four such transactions, proposed Ex. 3258. Nashua proposed a competing document on the subject, proposed Ex. 1145. At a post-hearing conference with the PUC chairman, there was colloquy about two of those multiple not-for-profit sales transactions, New Haven and Anderson. 10/12/07 Hearing, pp. 23-27, Cert.Rec. p. 9885. The PUC's Taking Order shows it was satisfied with the state of the record on municipal buyers without the need for additional paper, hence by letter order dated October 17, 2007, the PUC refused to admit either exhibit. Cert.Rec. p. 9917.

credibility of the expert testimony on the hypothetical buyer issue was no doubt influenced by the fact that Nashua's expert, Mr. Sansoucy, in industry presentations and in other cases (including a previous valuation of the PWW system for Nashua), routinely calculated fair market value by assuming the utility would bring a price in the marketplace equal to the higher price that a municipal buyer would pay. Ex. 3212, p. 9, Cert.Rec. p. 16739 ("the income analysis presented from the view of the hypothetical municipal utility presents a sound indicator of value."). See also, *Southern N.H. Water*, 139 N.H. at 142 (Sansoucy served as town's expert in assessing water utility and considered municipal buyers in valuation); Valuation of PWW, Ex. 3061, p. 18, Cert.Rec. p. 16158; Valuation of Hanover Water Works, Ex. 3200, pp. 4-7, Cert.Rec. p. 16715. In this case, Mr. Sansoucy simply reversed his previous position.²¹ Although Nashua's experts admitted the existence of municipal buyers in the hypothetical pool of purchasers for the PWW system, they committed the same fatal error identified by this Court in *Southern N.H. Water* by ignoring the impact those municipal buyers have on the valuation.

Even if this Court somehow disagreed with the PUC's determination that Mr. Reilly's analysis is more credible, this Court may not disturb the PUC's findings. This Court may not sit as trier of fact in appeals from the PUC, and thus must uphold the PUC's factual determinations if they are supported by expert testimony, even where the Court is persuaded it might have reached a contrary result. *Legislative Utility Consumers' Council v. Public Service Co.*, 119 N.H. 332, 340 (1979) (internal citations omitted). Assessing the credibility of testimony,

²¹ Mr. Sansoucy's change of mind is perhaps related to the different role he played in the various cases. In previous appraisals, he valued utility property for tax purposes on behalf of a municipality, thus a higher value benefited his client. In this case, Mr. Sansoucy promised Nashua that if he were hired, he would produce a valuation in the range of \$82 million, which he assured the city would allow it to finance the purchase without having to raise rates. Ex. 3197A, p. 17, Cert.Rec. p. 16618; Sansoucy Test., 9/4/07, pp. 103-04, 111, Cert.Rec. p. 7518. Sansoucy even told Nashua how he would accomplish this goal, in part, by promising to give no weight to the cost approach. Sansoucy Test., 9/4/07, pp. 95-102, Cert.Rec. p. 7518. Mr. Sansoucy kept his promise. He gave the cost approach no weight, and opined a value for the PWW system of \$85 million. Sansoucy Report, Ex. 1007A, Cert.Rec. p. 11051.

determining the weight that should be given to expert testimony, and resolving conflicts between expert opinions is the exclusive province of the PUC, not the Court. *Legislative Utility Consumers' Council*, 119 N.H. at 340; *New England Tel. Co. v. State*, 104 N.H. 229, 243 (1962) (whether the PUC should rely upon one expert opinion in preference to others is a matter for its judgment based on the evidence presented).

On more than one occasion, courts have cautioned that strict adherence to the rule prohibiting courts from reweighing evidence is particularly important in complex valuation matters where “judgment is the touchstone.” *Tennessee Gas Pipeline*, 145 N.H. at 602; *Southern N.H. Water*, 139 N.H. at 141; *New England Power Co. v. Town of Littleton*, 114 N.H. 594, 599 (1974). Public utility valuation is one of the most complex and “extraordinarily difficult” areas that mandate that “considerable deference” be given to the trier of fact. *Southern N.H. Water*, 139 N.H. at 142. So long as the tribunal met the legal standard to at least consider in some manner five methods of valuation (i.e. variations of the asset, sales and income approaches), this Court will uphold any valuation so long as there is “evidential support.” *Tennessee Gas Pipeline Co.*, 145 N.H. at 602; *Southern N.H. Water*, *supra*.

Therefore, this Court may not reweigh the evidence on appeal, but must instead confine its review to determining whether the PUC’s findings are supported by any competent evidence in the record. *Legislative Utility Consumers' Council*, 119 N.H. at 340; *Appeal of Dell*, 140 N.H. 484, 498 (1995) (the Court’s task in reviewing agency factual determinations is not to determine whether the Court would have found differently, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record). The PUC’s factual determination regarding the likely pool of hypothetical buyers for the PWW system is supported by the expert testimony of Mr. Reilly, and therefore must be upheld.

C. The PUC's Hypothetical Buyer Determination Is Consistent With RSA 38 and Other New Hampshire Law.

Nashua also argues, somewhat disingenuously, that the PUC's hypothetical buyer determination is contrary to law because it was based on an incorrect interpretation of RSA 38 and other New Hampshire law. Specifically, Nashua argues that in determining the pool of hypothetical buyers for the PWW system, the PUC relied upon an interpretation of RSA 38 that would permit any New Hampshire municipality to acquire the PWW system, regardless of whether the municipality was located within PWW's service area. Nashua's characterization of the PUC's ruling is incorrect. The PUC did not hold that RSA 38 gives any New Hampshire municipality the ability to acquire the PWW system. It simply held, based on the record, that there is more than one legally permissible potential municipal buyer for PWW assets. Taking Order, p. 90, N.App. p. 114. Both parties agreed that any of the 13 or so municipal entities within PWW's service area would have the authority under RSA 38 to purchase the PWW system. Nashua Brief, pp. 17-18. Because the 13 municipal entities within PWW's service area satisfied the PUC's requirement that there be "more than one" legally permissible municipal buyer, the PUC did not need to address whether additional municipalities beyond PWW's service area would also have the legal authority to acquire.

In its order denying Nashua's request to condemn PEU and PAC assets, the PUC interpreted the scope of condemnation authority granted by RSA 38. However, the PUC did not at any point during the proceedings address the scope of voluntary acquisition authority by public entities, whether under RSA 38 or otherwise. The PUC did not address Nashua's RSA 38 argument because Nashua's argument was completely irrelevant and unnecessary to the PUC's analysis.

Still, even under Nashua's interpretation of RSA 38, the potential municipal acquirers of PWW include all cities, towns, village districts, and existing or yet-to-be formed regional water districts within PWW's service area. Nashua Brief, pp. 17-18. That includes the towns served by PWW: Nashua, Amherst, Bedford, Derry, Epping, Hollis, Merrimack, Milford, Newmarket, Plaistow and Salem, as well as Manchester Water Works (which serves Bedford and Derry) and the Merrimack Valley Regional Water District (intended buyer of PWW assets from Nashua). Correll Test., Ex. 3001, p. 7, P.App. p. 16; McCarthy Test., 1/10/07, pp. 21, 130, Cert.Rec. p. 6784; Scanlon Test., 9/19/07, pp. 145-47, Cert.Rec. p. 9491. Nashua does not dispute that these entities are potential buyers, but instead premises its challenge to the PUC's ruling on the same argument it raised in the proceeding below – that, practically speaking, Nashua is the only **likely** municipal buyer.²² Its argument is particularly two-faced, since Nashua plans to sell the PWW assets post-taking to the Water District (McCarthy Test., 1/10/07 p. 21, 130, Cert.Rec. p. 6784), and the Water District plans to buy those assets. Water District Brief, p. 2. Of course, as this Court has previously held, the fact that a sale is unlikely is irrelevant to the determination of fair market value of a public utility. *Southern N.H. Water*, 139 N.H. at 142. The PUC accepted the opinion of PWW's expert Mr. Reilly, and the PUC's determination of the credibility of the expert testimony before it must be upheld.

²² Nashua's likelihood arguments on appeal are the same as those raised before the PUC, and are based on various predictions and assumptions as to the decision-making criteria certain potential buyers may have or actions they could take, all of which introduces improper subjectivity inconsistent with the concept of a hypothetical buyer. Taking Order, p. 90, N.App. p. 114; Reilly Test., Ex. 3007, pp. 14-16, Cert.Rec. p. 14543; Reilly Test., 9/12/07, pp. 208-210, P.App. pp. 82-84. For instance, Nashua's alleged veto power under RSA 38:14 over another entity's planned purchase misses the point, since it injects an eminent domain tool into what is supposed to be, hypothetically, a fully consensual negotiation. Stock and asset transactions and their income tax consequences interject considerations that are also completely irrelevant to determining fair market value. Reilly Test., 9/12/07 p. 235, P.App. p. 95. For what it is worth, municipalities may buy the stock of private water utilities. *In re Tilton-Northfield Aqueduct Company*, 90 NHPUC 599 (2005) (PUC approval of municipal acquisition of utility stock). The special legislation that Nashua obtained in this case allows it to buy and hold the stock of PWW's non-utility parent, and not just that of PWW. Laws 2007, Ch. 347:5, N.App. p. 214.

VI. THE PUC CORRECTLY CONCLUDED THAT RSA 38 DOES NOT PERMIT NASHUA TO TAKE ASSETS OF ENTITIES NOT DISTRIBUTING OR SELLING WATER IN THE CITY.

A. Nashua did not properly preserve the issue whether its petition could include PEU or PAC assets

Nashua failed to preserve this issue on appeal. It did not request a timely rehearing within thirty days pursuant to RSA 541:3 on Order No. 24,425, dated January 21, 2005, which among other matters, ruled that Nashua's petition could not include a request to take PEU or PAC assets. N.App. pp. 1-24.

RSA 541:4 is extremely specific about the requirements for preserving issues for appeal. It provides: "No appeal from any order or decision of the PUC shall be taken unless the appellant shall have made application for rehearing as herein provided..." Since Nashua did not move for a rehearing in 2005 within thirty days on the PUC's ruling precluding any taking of PEU or PAC assets, its challenge of that determination before this Court must fail. *See, Appeal of Office of the Consumer Advocate*, 148 N.H. 134, 136 (2002) ("RSA 541:4 precludes any appeal under RSA chapter 541 to this court by a party who has not applied for a rehearing before the agency").

In addition, Nashua has not set forth any good cause for allowing it to raise this issue now on appeal. The appellate procedures for seeking review of a PUC Order set forth in RSA 541:3 and RSA 541:4 are particularly pertinent in this case. After the PUC issued Order No. 24,425 in January, 2005, the parties proceeded through almost three years of extensive discovery, public interest testimony, valuation testimony and a merits hearing. None of it addressed the public interest for taking or the valuation of PEU or PAC assets. Allowing Nashua to revisit this issue now on appeal would lead to revisiting public interest and valuation issues for all of the Pennichuck entities, requiring additional discovery, expert testimony on public interest and

valuation and a new merits hearing, all of which would be contrary to the purpose of the requirements of RSA 541:3 and RSA 541:4. This Court should decline to address this issue.

B. The PUC ruled properly that RSA 38 does not permit Nashua to take PEU and PAC assets

In seeking to set aside the PUC's orders, Nashua has the burden of demonstrating that they are contrary to law or, by a clear preponderance of the evidence, are unjust or unreasonable. *Appeal of Pinetree Power*, 152 N.H. 92, 95 (2005); *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001). Here, the PUC correctly ruled that Nashua cannot acquire PEU and PAC, and Nashua has not, and cannot, meet its burden of proof on appeal.

Here, the evidence is not disputed that PEU is a corporation separate from PWW that generates, distributes and sells water in 12 communities in New Hampshire, including Londonderry, Windham and Raymond, none of which is hydraulically connected to the system serving Nashua. Similarly, PAC is a corporation separate from PWW that provides water service to towns not hydraulically connected to the Nashua system, including Pittsfield, Barnstead and Conway. Correll Test., Ex. 3001, pp. 8-9, P.App. pp. 17-18. PAC and PEU own the pipes, water resources and other assets located within their service territories. Correll Test., Ex. 3001, p. 10, P.App. p. 19. In 1998 as part of a settlement overseen by the PUC, Pennichuck acquired 24 community water systems that form the hub of PEU. Also in 1998, Pennichuck acquired the Pittsfield system that forms the hub of PAC. Ware Test., Ex. 3004, p. 16, Cert.Rec. p. 14262. Because PEU and PAC arrived with different rate base structures than PWW, Pennichuck and the PUC have always deemed it prudent to keep them separate entities. *See*, Pennichuck Memorandum on Scope of RSA 38, 10/25/04, p. 3, Cert.Rec. p. 495.

1. The Plain Language of RSA 38 Establishes That Nashua Does Not Have the Authority to Acquire PEU and PAC.

Nashua reads the provisions of RSA 38 in isolation in order to piece together an argument that it is somehow authorized to take the assets of PEU and PAC. It does so despite the fact that neither PEU nor PAC provides service in Nashua or owns any assets in the city, and each is incorporated separately from PWW. The PUC correctly rejected this broad and strained reading of RSA 38.

In matters of statutory interpretation, this Court is “the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole.” *In the Matter of Baker and Winkler*, 154 N.H. 186, 187 (2006). When interpreting a statute, the court first examines the language of the statute and, where possible, ascribes the plain and ordinary meaning of the words used. *Oullette v. Town of Kingston*, 157 N.H. 604, 609 (2008). When construing a statute, the Court does “not consider the words or phrases in isolation, but rather within the context of the statute as a whole.” *Chesley v. Harvey Ind. Inc.*, 157 N.H. 211, 213 (2008); *Balke v. City of Manchester*, 150 N.H. 69, 71 (2003) (finding that municipality exceeded its statutory authority by failing to obtain approval of voters in outlying towns to fluoridate water) (citations omitted). “The legislature is not presumed to waste words or enact redundant provisions, and every word of a statute should be given effect whenever possible.” *Town of Amherst v. Gilroy*, 157 N.H. 275, 279 (2008). The PUC’s decision correctly gives effect to each of the relevant statutory provisions in RSA 38.

RSA 38:2 sets forth the general grant of authority for a municipality to take the assets of a water utility for municipal use. RSA 38 then sets forth the specific process that a municipality must follow in order to exercise its eminent domain authority under the statute. As the PUC

noted, paramount here is the clear and unambiguous language of RSA 38:6. Indeed, the plain language of RSA 38:6 is dispositive.

RSA 38:6 provides that, after taking the appropriate vote, a city “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.” (Emphasis added). PWW is the only utility engaged in generating or distributing water for sale in Nashua. Neither PEU nor PAC, wholly distinct corporations from PWW with separate public utility franchises operating in different geographic areas of the state, generates, distributes or sells water in Nashua. As is common in the utility industry, PWW employs individuals and owns trucks and office equipment that support PEU and PAC. Still, both utilities’ core assets and its customers are maintained separate and apart from PWW. The pipes, mains and water supply of PEU and PAC are distinct and owned by each individual utility. Correll Test., Ex. 3001, pp. 8-10, P.App. pp. 17-19. Thus, because PWW is the only utility “engaged . . . in generating or distributing . . . water for sale” in Nashua, only PWW can be given valid notice and, therefore, only its assets may be taken within the framework of RSA 38.²³

Moreover, the statutory language that a municipality’s authority to take utility assets be restricted only to the entity that provides service within the municipality’s boundaries is bolstered by the repeated use of the word “utility,” in the singular, throughout RSA 38. RSA 38 refers to “the utility” three times in Section 7, again in Section 8, two more times in Section 38:9,I and again in both Sections 10 and 11. The PUC also noted the importance of the use of the term “utility” in the singular. Order No. 24,425, p. 15, N.App. p. 15. Nowhere does RSA 38

²³ Nashua misreads the PUC’s interpretation of RSA 38:6 and makes an inept analogy to electricity generation. Nashua Brief, p. 29. PEU and PAC have separate water supplies (i.e. “generation”) not hydraulically connected to PWW’s water systems. Ex. 3004A, Att. DLW-2 (system maps), Cert.Rec. p. 14285. By contrast, once generated, electricity can be wheeled through a vast interconnected grid.

include any indication of an intention to grant a municipality the authority to take assets of more than one utility or of companies that may happen to be affiliated with the local utility.

Given the clear statutory language, the PUC would have pierced PWW's corporate veil if it were to adjudicate whether Nashua could take PEU or PAC assets. This Court has repeatedly held that such veil piercing may only occur where the corporate identity has been used to promote an injustice or fraud, where a defendant has suppressed the fact of incorporation, or where an individual expressly agrees to personal liability for a corporation's debts. *See, Lamontagne Builders, Inc. v. Bowman Brook Purchase Group*, 150 N.H. 270, 275 (2003). *See also, Gautschi v. Auto Body Discount Center*, 139 N.H. 457, (1995). There was no basis for the PUC to do that here, especially since it had treated PWW, PEU and PAC as separate regulated entities for years.

The PUC correctly applied principles of statutory construction to find that the taking power granted under RSA 38 is limited by the express language of the statute to utility assets that provide service in Nashua. In rejecting Nashua's efforts to expand the scope of RSA 38 beyond its plain meaning, the PUC properly recognized that a legislative grant of power to condemn for public use may be exercised only within a clear definition of the grant, bounded by the express words or necessary implication of those words. *See, Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 181 (1940).²⁴

Contrary to Nashua's assertion, the PUC did not accomplish this by examining RSA 38 through a "distorted lens of strict construction," but instead interpreted the statute "not in

²⁴ It is a well-established rule that eminent domain statutes should be narrowly construed. *See*, 4 Tiffany, *The Law of Real Property*, § 1252 (3rd ed. 1975). *See also, Orono-Veazie Water Dist. v. Penobscot Cty. Water Co.*, 348 A.2d 249 (Me. 1975); *Ronci Mfg. Co., Inc. v. State*, 403 A.2d 1094 (R.I. 1979); 26 Am. Jur.2d, *Eminent Domain* § 20. "[T]he grant of power to condemn includes only its express terms and necessary implication." *Leary v. City of Manchester*, 91 N.H. 442, 443-44 (1941). The PUC correctly limited Nashua's eminent domain authority as bound by the express language of RSA 38.

isolation, but in the context of the overall statutory scheme.” Order No. 24,425, p. 11, N.App. p. 11 (citing *Appeal of Ashland Electric Department*, 141 N.H. 336, 341 (1996). Nashua misunderstands the concept of strict construction in its brief. Strict construction is not in lieu of or in conflict with the plain and ordinary meaning of the statute. In fact, “a strict construction is one which limits the application of the statute by the words used.” Singer, *Sutherland Statutory Construction*, 6th ed. 2000, § 58.2, p. 108. Thus, the PUC properly rejected Nashua’s invitation to extend or broaden the express language of RSA 38 by ignoring RSA 38:6 and reading the statute in isolation. The PUC reached its conclusion by properly limiting Nashua’s eminent domain power by excluding the assets of PEU and PAC, which do not fall within the scope of the plain language of the statute.

2. The Legislative History Supports the Finding of the PUC That Nashua Does Not Have the Authority to Seize the Assets of Utilities That Do Not Provide Service to Nashua.

“If a statute is ambiguous, the Supreme Court considers the legislative history to aid its analysis.” *State v. Whittey*, 149 N.H. 463, 467 (2003). As stated above, PWW does not believe that the relevant provisions of RSA 38 are ambiguous, read in their entirety and given their ordinary meaning. However, to the extent the Court does believe there is an ambiguity, the legislative history demonstrates that the PUC’s interpretation of the statute is correct.

The legislature held extensive hearings regarding the re-enactment RSA Chapter 38 in 1997 (HB 528). The testimony during those legislative hearings makes clear that the legislature intended that a municipality’s power to take assets beyond municipal boundaries would be limited.²⁵ Nowhere did the legislature contemplate that a city could take the assets of far flung

²⁵ Nashua argues in its brief that, in revising RSA 38 and its predecessors to allow taking outside municipal boundaries, the legislature recognized that there would be occasions when the acquisition of assets outside the municipality’s borders would be necessary and therefore the taking of PAC and PEU is authorized.

water systems not hydraulically connected to the local system, as is the case with PEU and PAC.

Specifically, the testimony of Representatives Below and Bradley, recognized leaders with regard to utility legislation, supports the conclusion that the legislature intended only the taking of the utility providing service in the municipality. Representative Below testified as follows:

[The Bill] strengthens and reinforces an existing right of municipalities to municipalize *their distribution system...*"

"...the public interest determination by the [PUC] is a change from the existing statute to the extent that they determine if it is in the public interest...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 [PUC] 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.*

April 21, 1997 Committee Report, pp. 3, 7, N.App. pp. 293, 297 (emphasis added). Representative Bradley stated: "It [HB 528] clarifies, it simplifies, and it lays some new groundwork for what is an existing right now of municipalities...to, through a process, take over the existing utility network *within their community* or in some circumstances outside of their community."

Committee Report, p. 1, N.App. p. 291 (emphasis added).

In addition, as the PUC pointed out in its Order, the legislative history repeatedly references the taking of the property in the singular, in direct conflict to Nashua's assertion that it has the authority to take the property of multiple utilities, even when the assets of those utilities have no connection to the City. *See*, Order No. 24,425, p. 15, N.App. p. 15. Therefore, to the

However, as the PUC correctly found, the legislative history is clear that the legislature contemplated only the taking of a utility providing service within the municipality and that the taking of assets outside the municipality would be limited to circumstances where the oddities of the utility system rendered it necessary to prevent the stranding of customers. That is not the case here. Nashua is attempting to take the assets of two wholly separate utilities serving entirely different parts of New Hampshire and providing no service to Nashua.

extent the Court finds any ambiguity in the statute, the legislative history further supports the PUC's finding that Nashua may not take the assets of PEU and PAC.

CONCLUSION

This Court should hold that Nashua's taking of PWW's assets does not meet the public interest, because the prerequisite conditions placed upon Nashua to meet the public interest require continuing PUC jurisdiction that exceeds its authority and that violates PWW's constitutional rights, and so this Court should reverse the order of the PUC. Alternatively, the Court should remand the case to the PUC to determine whether the proposed taking meets the public interest requirements, in light of all the evidence submitted, and to determine what size mitigation fund would generate \$3.4 million annually for the benefit of customers of PEU and PAC. Should this Court uphold the PUC's findings and rulings related to public interest, then it should also affirm the PUC's valuation determination, as well as the requirement for a mitigation fund that would generate \$3.4 million annually. Finally, and it should affirm the PUC's determination dismissing the taking petition as to PEU and PAC.

REQUEST FOR ORAL ARGUMENT

Pennichuck requests oral argument of not less than fifteen minutes. Thomas J. Donovan will argue for appellants.

Respectfully submitted,

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Pittsfield Aqueduct Company, Inc.
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Pennichuck Corporation

By Their Attorneys,

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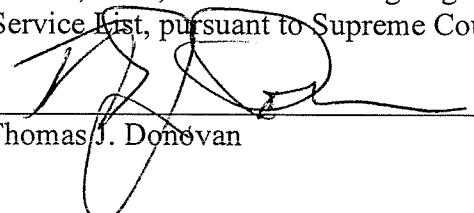
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Certificate of Service

I hereby certify that on September 29, 2009, I served the foregoing Brief by first class mail, postage prepaid, to the attached Service List, pursuant to Supreme Court Rule 26(2).


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