

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

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

Docket No. DW 04-048

MERRIMACK'S POST-TRIAL MEMORANDUM IN OPPOSITION TO THE CITY
OF NASHUA'S PETITION TO TAKE PENNICHUCK WATER WORKS

The Commission should deny Nashua's petition because Nashua cannot establish, as it must, that this taking is in the public interest. It cannot do so because the evidence shows that Nashua's valuation was predetermined, was unethically performed, and is totally unreliable. As a result, Nashua also presented the Commission with incomplete and speculative information as to its proposed operation of the water system which makes it impossible for the Commission to accurately predict that the taking is in the long-term public interest.

On March 19, 2004, nearly two years before submitting his appraisal, George Sansoucy, Nashua's appraiser and valuation expert, appeared before the Nashua Board of Alderman and told the City that his company "...will be proposing a value of \$81-\$82 million for this taking." Exhibit 3197 A, P. 17. "When I have done my job," Sansoucy said, "... if all goes well I come back to you with a price you can accept and a deal and a structure that you can live with to go forward." Id., P. 29. Consistent with these promises, Mr. Sansoucy issued his appraisal two years later, valuing the Pennichuck assets at \$85 million.

The evidence shows that the Commission cannot reasonably rely on Sansoucy's valuation. In the municipalization of a utility, valuation is the principal driver of rates, the determining factor in whether Nashua can fund operating expenses. A proper

valuation contains an accurate estimation of capital requirements. Valuation is the most critical component of the public interest analysis. Because Nashua's valuation is unreliable, the Commission cannot conclude this taking is in the public interest.

Summary of Argument

Nashua failed to meet its burden of demonstrating that the taking is in the public interest. The divergence between the evidence predicted in Nashua's pre-filed testimony and the evidence actually presented at the hearings demonstrates that Nashua's petition is unrealistic. In addition, Nashua's proposed taking threatens vital interests of the Town of Merrimack, the Merrimack Valley Region, and the state.

First, Nashua's appraiser and valuation expert, George Sansoucy, performed a fundamentally flawed appraisal in several respects. Mr. Sansoucy had a clear conflict of interest under the standards governing professional appraisal practices. Because of this conflict, his appraisal is unreliable and of no value in determining whether Nashua's costs to operate or finance the water systems will be such that rates are predictable - a key element of the public interest determination. Moreover, he did not apply the best valuation method and applied other methods incorrectly.

Second, the purported benefits of the taking are illusory. As an example, the purported savings due to Nashua's tax-exempt status are completely negated by Nashua's promise at trial to make payments in lieu of tax. Similarly, its employment of contractors who are not tax exempt renders its purported tax savings on income and profits illusory. In addition, the savings Nashua flaunted resulting from municipal control and management proved unrealistic in view of these third party contracts for operating and oversight functions.

Third, the sole party before the Commission with no interest in the outcome, the PUC Staff, concluded that the petition is contrary to the public interest. This conclusion should be given considerable weight in the Commission's determination.

Fourth, it is unclear whether the voluntary conditions which Nashua expressed willingness to assume are enforceable. Even if enforceable, the practicalities of enforcement would inevitably involve substantial cost and significant delay. Nashua predicted regulatory cost savings would, as a result of these "conditions", dissipate. Moreover, adopting these conditions without discovery and without granting to parties opposing the taking an opportunity to be meaningfully heard on those conditions violates the due process rights of parties opposed to the taking. For these reasons, and the others described in the post trial briefs of Pennichuck and other parties, the Commission should deny Nashua's petition.

Argument

I. THE COMMISSION SHOULD GIVE NO WEIGHT TO MR. SANSOUCY'S APPRAISAL.

A. Nashua's Appraiser¹ violated USPAP standards.

According to the Uniform Standards for Professional Appraisal Practices, "[I]n the performance of an assignment, a Member must develop and communicate each analysis and opinion without being misleading, without bias for the client's interest and without accommodation of his or her own interest." See Canon 3, Code of Professional Ethics (from P. 652, *The Appraisal of Real Estate*, 12th Ed. Appraisal Institute, 2001.). Prior to his appraisal, Mr. Sansoucy (1) advised the City on its tax assessment of

¹ Mr. Sansoucy is principal of the firm George E. Sansoucy, PE, L.L.C. ("GES"), of which Mr. Walker is an employee. See Day VI (Afternoon Session), 12:10-23. Mr. Walker participated in the preparation of the appraisal with Mr. Sansoucy.

Pennichuck; (2) represented the City in abatement proceedings involving Pennichuck; (3) participated in previous valuation exercises with the city; (4) provided testimony in this proceeding as to whether the taking is in the public interest; (5) worked with the City before the inception of this proceeding with regard to the Pennichuck/Philadelphia Suburban transaction; (6) performed a "preliminary analysis" of the proposed taking and presented it to the City in 2002; and (7) participated in and assisted with the drafting of the City's pre-filed testimony, data requests, and data responses for other witnesses in this very proceeding. Hearing Day II, 83:16-84:22. Sansoucy also participated in the drafting of the City's water ordinance. Hearing Day I, 125:18-20. In addition, he was involved in the City's negotiations with its operations, maintenance, and oversight contractors. Hearing Day I, 125:14-17; Day I, 208-209.

As explained by Mr. Reilly, a nationally recognized expert and leading authority² in the field of appraisal generally and business valuation particularly, Mr. Sansoucy's various roles are not consistent with USPAP standards.

Well, from what it says here and what you described where the individual is preparing testimony and answering questions and writing cross-examination questions, it -- that seems to me to be an advocacy function and not an appraisal function. In the USPAP world that's called valuation consulting, and an individual can perform valuation consulting and perform advocacy services, as a real estate broker, as an investment banker, as an advocate in a litigation matter, but you can't do that and be an appraiser for the same client. You either have to be one or the other, you just can't be both.

In my opinion, the problem that USPAP has, is when an individual such as Mr. Sansoucy for the same client is performing advocacy services on Monday, and then on Tuesday signs an appraisal. USPAP just doesn't allow that.

² Mr. Reilly's qualifications are summarized at pages 2 through 5 of his January 12, 2006 pre-filed testimony.

Hearing Day VIII, 23:4-17; 198:16-23. Mr. Reilly also testified about the reason USPAP prohibits an appraiser from simultaneously performing advocacy and appraisal functions.

The reason, Reilly testified:

is so users, readers of appraisal reports, parties who rely upon appraisal reports such as this commission or a buyer or seller or a financing institution, knows that the appraisal report is reliable because the appraiser prepared that report under ethical standards; there was no bias, there was no intention to deceive, there was no advocacy for a certain party or position.

Hearing Day VIII, 15:10-18. In the face of Mr. Sansoucy's unabashed advocacy for the taking, see Day III, 83:15-18, 116:20-117:4, his preconception of the result, see, e.g., Exhibit 3197 A and Day III, 103:17-22, and his continued participation as a consultant and assistant to the City's witnesses in connection with this proceeding, Day I, 126:3-5, the Commission should recognize Mr. Sansoucy's partiality and deem his appraisal unreliable. It is beyond dispute that Mr. Sansoucy has not performed an independent appraisal consistent with USPAP. If the appraisal is unreliable, then the analysis of system operation and rates are equally unreliable and Nashua has not met its burden of proof on the issue of public benefit. This is so regardless of the applicability of any presumptions in its favor.

If the Commission has any doubt about this, it need only turn to Mr. Sansoucy's own statement roughly two years prior to submitting his appraisal: "[We] will be proposing a value of 81-\$82 million for this taking. ... When I've done my job, and if all goes well, I'll come back to you with a price you can accept and a deal and a structure you can live with going forward." See Exhibit 3197 A, P. 17 and Hearing Day III,

111:18-23.³ The appraisal was designed, indeed “structured,” to support Nashua’s position that the taking was in the public interest. Id. It was not an independent, impartial appraisal of the fair market value of the assets of Pennichuck Water Works. Not only did Sansoucy and Walker have a preconceived notion of the result, they knew how they would arrive at that result by disregarding the most appropriate valuation method for utility properties before conducting the appraisal. See Pp. 7-8, *infra*.

B. Nashua’s Appraiser did not employ proper valuation methodology.

An appraiser’s role is to determine fair market value of the subject property. See *The Appraisal of Real Estate* (12th ed.), P. 13. The price a willing buyer would pay a willing seller determines fair market value. Thus, a crucial step in achieving an accurate valuation of any property is a proper determination of the market, i.e. – the population of willing buyers. *The Appraisal of Real Estate*, P. 269. Once the appraiser establishes the market, an appraiser employs one or more of several valuation methods to determine fair market value, e.g. – cost approach, income capitalization approach, comparable sales approach. See, generally, *The Appraisal of Real Estate*. Mr. Sansoucy failed to correctly determine the market and failed to properly employ the available valuation methods.

³ When asked on cross-examination about Mr. Sansoucy’s prediction of value, Mr. Reilly stated: “Well, the only problem is it’s strictly prohibited under USPAP. If you don’t mind violating USPAP, flagrantly and grossly violating USPAP, if that’s not a problem to your personal ethics standards, then I guess it’s not a problem. If you do have any personal ethical standards, then it is a problem.” Hearing Day VIII, 122:11-17.

1. Sansoucy failed to correctly determine the proper market for willing buyers and sellers.

The market of willing buyers of Pennichuck includes municipalities. However, Sansoucy did not include or even consider the price a willing not for-profit entity would pay for the utility. This was a crucial error. As explained by Pennichuck:

The composition of hypothetical buyers will determine the range of prices the subject property will bring on the market. The Sansoucy Appraisal contains no analysis of the likely population of willing buyers for the PWW operating assets, but assumes, without any support or explanation, that the likely population of hypothetical willing buyers of PWW includes only private investor-owned utility ("IOU") buyers with characteristics identical to those of PWW...

Contrary to the unsupported assumption in the Sansoucy Appraisal, the evidence will demonstrate that the likely population of hypothetical willing buyers of PWW includes not-for-profit public entities, like the City of Nashua. This fact is significant because in any acquisition of a going concern business, the population of buyers with the greatest expected synergies will set the range of market prices that all serious potential bidders will have to match.

PWW Opening Stmt. And Trial Memo., Pp.33-34. Consistent with this prediction, Mr. Reilly testified that municipalities are among the population of willing buyers and should be included in the market determination. Hearing Day VIII, 50:4-21. Moreover, Mr. Sansoucy himself testified that the majority of water systems are owned by the public sector. Hearing Day III, 69:13-70:3. Despite this, Sansoucy only considered private entities in determining the market of willing buyers. See Reply Testimony of Sansoucy and Walker, May 22, 2006, 2:20-3:2.

2. Sansoucy failed to use the cost approach, generally recognized as the correct method for utility valuation.

The cost approach is generally accepted as an important, if not the best, method of valuation of special purpose property. See The Appraisal of Real Estate, Pp. 25-26, 354 (special purpose property is "a limited market property with a unique physical design,

special construction materials, or a layout that restricts its utility to the use for which it was built.”). Mr. Sansoucy nonetheless declined to give any weight to the cost approach. In fact, Sansoucy and Walker refused to acknowledge that the Pennichuck property is special purpose property. Hearing Day III, 243:11-29; 247-248.

In fact, Sansoucy indicated to Nashua before his appraisal that the cost approach would be given no weight. Hearing Day III, 97:13-24. Mr. Walker testified at trial that GES rarely, if ever, gave any weight to the cost approach in appraising a utility because “the cost approach is going to result in the highest value.” Hearing Day III, 99:17-100:6. Walker also testified that it is appropriate to dismiss the cost approach before conducting an appraisal, based on his experience. *Id.* This is in direct conflict with USPAP standards. See USPAP Canon 3.

Not surprisingly, Mr. Sansoucy’s appraisal methodology has been criticized previously in two cases in New York State. See *Mirant New York, Inc. v. Town Of Stony Point Assessor*, 2006 WL 2559525, *5 (N.Y. Sup. 2006) and *Orange and Rockland Utilities, Inc. v. Assessor of Town of Haverstraw*, 2006 WL 2336306, *6 (N.Y. Sup. 2006). In contrast to Mr. Sansoucy’s refusal to consider the cost approach in this case, the parties in *Mirant* stipulated at trial that the cost approach is an appropriate valuation method for “specialty use” properties. *Mirant*, 2006 WL 2559525, *5 (N.Y. Sup., 2006).

3. Sansoucy improperly applied the comparable sales approach to a situation involving special purpose property.

The record at trial shows that no comparable sales existed to conduct an appraisal of Pennichuck. In fact, Sansoucy and Walker acknowledged that they had not included for comparison a single transaction involving a municipal buyer. Hearing Day III, 253:4-8. Mr. Walker acknowledged several inconsistencies with his approach and a proper

comparable sales method. See Hearing Day III, 131-169. Walker used only a revenue multiple based on the size of the utility and revenue, despite his awareness that location, motivation for the transaction, condition of the system, and expectation of cash flow determined comparability. Hearing Day III, 131:11-132:22. For instance, Walker's carelessness included: using data two years after the transaction, which he admitted "would be a problem," Hearing Day III, 168:20-169:2; valuing transactions without validating whether the sale was part of a larger transaction, Hearing Day III, 154:1-12; using a regulatory allocation figure instead of actual sales figures, Hearing Day III, 146:5-12; not adjusting the sales price for a transaction that occurred in two regulatory jurisdictions, Hearing Day III, 158:2-159:15; failing to make a personal review of assets or asset condition, Hearing Day III, 157:20-24; and failing to make a proper adjustment for the age and condition of the assets of an old system, Hearing Day III, 138:15-19.

4. Sansoucy improperly applied the income capitalization approach.

Two significant errors make Nashua's use of the income approach unreliable. First, the direct capitalization method should only be used when there are comparable sales in the market. Appraisal Institute, p. 629. One accepted measure of direct capitalization is to calculate capitalization using a measure of net cash flow. Mr. Reilly testified that the figure utilized in the calculation is net income (revenues minus cost), plus depreciation, minus capital expenditure. Hearing Day VIII, 39:3-20; see also Appraisal Institute 484-85. Failing to account for each of these components results in an unreliable appraisal that is impossible to rectify. Hearing Day VIII, 39:22-30:19. Mr. Walker stated he did not include capital expenditures in his calculation. Hearing Day III, 259:2-5. As Mr. Walker later admitted on cross-examination, all expenses, including

annual capital expenditures, must be taken into account to conduct a reliable appraisal. Hearing Day III. 259:6-260:4. For these reasons, the income method appraisal value submitted by Nashua must be given no weight.⁴

The following exchange is illustrative of the difference between Nashua's approach and Mr. Reilly's approach to income capitalization.

Q. (Mr. Upton on cross) Okay. Well, let's – shall we try to make an equation? You've got revenues and you've got costs and expenses. And if you subtract costs and expenses from revenue and it's less than revenues, that's net cash flow, isn't it?

A. (By Mr. Reilly) Only by Mr. Sancoucy's definition. The rest of the world would add depreciation expense and subtract capital expenditures –

Q. I'm trying to simplify this.

A. (By Mr. Reilly) Well, do you want an incorrect answer or do you want a correct answer?

Q. No, I want to get to my question.

Q. I'm really not trying to quibble with you, I'm trying to make it – I'm trying to do the easy version. If you subtract costs and expenses from revenues and there's a balance, that's net cash flow, isn't it?

A. (By Mr. Reilly) Well, no, that's simply wrong.

Q. Okay, what is it?

A. (By Mr. Reilly) It's wrong.

Q. But what is – what's left over? What do you call what's left over?

A. (By Mr. Reilly) Well, I don't know, but it's not net cash flow. If you want to finish to get to net cash flow, you add depreciation expense and subtract capital expenditures.

Hearing Day VIII, 108:18-110:4.

⁴ The New York opinions also criticized Sancoucy's sales and income methodologies because the appraisals included "unreliable price forecast and overstated expenses." *Id.*

As noted above, the valuation is central to the public interest analysis. Merrimack's foremost concern is that, because Nashua's valuation is so unrealistic, the taking will result in a capital requirement that inevitably leads to substantially higher rates or deferred or forgone capital improvements. The rates Nashua will charge its customers, both inside and outside of the City, is primarily driven by the valuation of the assets of Pennichuck. Nashua admits that the rates cannot be determined until a final valuation has been set. Hearing Day II, 128:15-21. However, Nashua's assumed valuation is unreliable.

Mr. Reilly, a nationally recognized expert in the field, concluded that the Sansoucy/Walker Appraisal is "one of the most fundamentally flawed appraisals" he has reviewed. Reilly Reply Testimony, May 22, 2006, 3:1-2. Reilly continued: "It would be impossible to correct the Sansoucy Appraisal, as the number and extent of the errors renders the conclusion unreliable." Id. at 3:2-3. Mr. Reilly's conclusion is not surprising, given that Mr. Sansoucy is not a member of any accredited appraisal organization, is not a certified public accountant, and has never worked under a supervisory appraiser. See Hearing Day 3, 28-31. Mr. Sansoucy is an engineer by trade and an advocate by choice.⁵

⁵ Although Mr. Walker does have appraisal credentials, the weight of the evidence clearly suggests that he was Sansoucy's employee and that his opinion was driven by Mr. Sansoucy's value opinion delivered to Nashua two years before the appraisal was.

II. THE EVIDENCE SHOWS THAT NASHUA HAS NOT MET ITS BURDEN THAT THE TAKING IS IN THE PUBLIC INTEREST.

A. **The statutory presumption that the taking is in the public interest has only a limited application to this case.**

The Commission is charged with determining whether the taking of Pennichuck Water Works by the City of Nashua is in the public interest. The taking can proceed if, and only if, the commission “has determined that it is in the public interest.” RSA 38:10.

The “rebuttable presumption” that the acquisition of a water utility is in the “public interest,” when the taking municipality votes in favor of instituting condemnation proceedings, see RSA 38:3, is only a presumption that the acquisition is in the interest of that municipality, because the voters of a given municipality cannot speak by vote or otherwise to the interests of residents of other municipalities. This fact was recognized by the Commission in an earlier stage of this proceeding. See Order no. 24,567 (stating in the context of the franchise request that “the rebuttable presumption extends only to the public interest analysis for Nashua itself, as only voters of Nashua had a voice in the vote that gave rise to that presumption.”). For the commission to apply the presumption in this case would violate the due process rights of every effected municipality outside of Nashua. The commission should focus its public interest inquiry broadly, recognizing that the proposed taking has significant and potentially severe effects on many areas outside of Nashua, including the Town of Merrimack.

The Supreme Court has provided significant guidance as to the meaning of the term “public interest.” As explained by Pennichuck in its opening statement, the public interest standard is essentially one of whether or not the taking will result in “net benefits” to the public:

To determine whether there is a net benefit from the taking proposed in this case, the Commission must engage in a balancing test. "In conducting the appropriate balancing test to determine public necessity, the taking authority must consider all public benefits of the proposed taking against all burdens and social costs suffered by every affected property owner. " 147 N.H. at 87; Merrill 127 N.H. at 237. Thus, the Commission is charged with identifying all of the impacts of the City's proposal-not just those on Nashua, but also the impact on the customers of all three Pennichuck Utilities, on the state, on the shareholders of PNNW, on the customers of PWSC and on the public generally.

Opening Statement and Trial Memo. of the Pennichuck Companies, P 6. The evidence in this case demonstrates that Nashua did not meet its burden. See N.H. Admin. Code PUC 203.25 ("Unless otherwise specified by law, the party seeking relief through a petition, application, motion or complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence.") (emphasis added).

B. Nashua's Petition is based on unrealistic expectations.

The benefits of municipal ownership asserted by Nashua are largely illusory. As the evidence at trial demonstrated, many of the savings claimed by Nashua would either not be realized or would be negligible due to other required costs or considerations. In its pre-filed testimony and at trial, Nashua claimed that, as a municipality, it would not have the overhead and administrative costs, nor be subject to the same tax obligations as Pennichuck. See, e.g, Hearing Day 1, 26:21-27:8. However, in a lengthy but important exchange at trial, Nashua acknowledged that these purported savings were not real.

Q You complained about the high overhead and administrative costs in Pennichuck. And -- as I understand it, that's right?

A (McCarthy) I don't believe I complained, we have commented on it.

Q And, you're going to now substitute Veolia, Beck, and subcontractors

--

A (McCarthy) Yes.

Q -- for what Pennichuck does with their overhead and administrative?

A (McCarthy) Yes.

Q And, these corporations are private, publicly held corporations, are they not?

A (McCarthy) They are.

Q And, don't they have the same concerns that Pennichuck does about making a profit, delivering a return to their shareholders?

A (McCarthy) They have those concerns, yes.

Q And, don't they have a concern about paying their executives?

A (McCarthy) Yes, they do.

Q And, wouldn't you think that the top executive sitting over there in France probably makes a hell of a lot more money than the executive for Pennichuck?

A (McCarthy) I doubt that he makes one percent of Veolia's revenues.

Q Okay. Let's go to tax. Nashua is not going to pay any taxes. But isn't it true that Nashua has told everyone concerned that it will make payments in lieu of taxes out of the water system?

A (McCarthy) Yes.

Q Does that include real estate taxes to the City of Nashua?

A (McCarthy) Yes.

Q So that the ratepayers will still bear the burden of paying Nashua real estate taxes, only with a different name, isn't that right?

A (McCarthy) And, the taxes in the other communities that Pennichuck currently serves.

Q So, there's no net savings there?

A (McCarthy) There is not.

Hearing Day II, 87:17-88:18 and 89:17-90:7. Nashua also acknowledged having to hire two additional individuals in its building department and stated it was uncertain whether it would have to hire one or more additional employees to act as a liaison to the regulatory authority. See Hearing Day I, 218:2-12. Nashua also instructed Sansoucy to exclude severance damages as part of his valuation appraisal. Hearing Day III, 104:18-24. The severance damage issue pertains to the public benefit balance in terms of the effect a partial taking will have on what is left of the PWW, PEU, and PAC system, its customers, and its ability to provide cost effective service.

Further, concerns exist regarding Nashua's financing proposal. Nashua proposed to finance the taking through the use of municipal revenue bonds. See Hearing Day II, 283:11 – 284:24. However, it is unclear whether state law allows a municipality to use revenue bonds to purchase assets outside of the municipality. *Id.*; RSA 33:1. Also, Nashua used the capital expenditure figures Pennichuck projected without determining if these figures included expenses previously deducted by Pennichuck in a net income calculation. Hearing Day III, Pp. 196:5-197:2. If Pennichuck calculated expenses incurred that Nashua would have to include as a capital expenditure, additional borrowing would be required. *Id.* Without more certainty regarding the financing plan, rate levels cannot be certain. Therefore, the Commission cannot reasonably conclude that this taking is in the public interest.

Another of the several uncertainties particularly daunting to Merrimack is whether so-called "special water contracts" would continue under the present terms with other parties. When asked on cross examination about these special water contracts, Mr. McCarthy of the City's Board of Aldermen admitted that there was no guarantee that

Nashua would honor the contracts, and could only offer his understanding that such would be the case.

Q I also want to ask you about honoring these special contracts, as probably no surprise to you that I would ask you about that. I assume that that includes the special contract with the Town of Milford, Mr. McCarthy?

A (McCarthy) Yes.

Q And, has the Board of Aldermen voted to honor the special contracts?

A (McCarthy) The Board of Aldermen has not been put in a position where it needs to vote on that issue at this point.

Q So, when you say that "the City of Nashua has agreed to honor those contracts", what step has been taken to formalize that commitment?

A (McCarthy) I think there has been, in the Board's discussions to date of this proceeding, there has been a discussion and the Board understands that it must honor those agreements.

Q That's not reflected in any resolution of the Board?

A (McCarthy) I don't know that it's called out by name, because I don't know that it's ever been brought up as an issue that the Board needed to take acquisition on. But it is understood that we need to maintain those agreements.

Hearing Day II, 59. Similarly, the City admitted that it may be necessary to increase the rates charged to satellite system customers in the future. Hearing Day I, Day I:100:10-100:24. It further admitted that the Commission would have no role in regulating bulk water contracts. Hearing Day I, Pp. 149-150.

Merrimack's concern is that Nashua, if the Commission approves the taking, is not subject to the jurisdiction of the Commission. RSA 362:4.⁶ As stated by Merrimack's representative at trial, David McCray, in response to a question regarding

⁶ Nashua could subject itself to PUC regulation only if it charges non-Nashua customers at a rate greater than 14.99% of the Nashua rate and certain other statutory prerequisites, which vary depending on whether the customer is a new or existing customer. See RSA 362:4, III-a, (a)-(e).

the future of Pennichuck's contract with Anheuser-Busch, Mr. McCray said, "[under] the current situation, we always have the PUC to come back to again. So ... unless the contract went on forever I would still have the same concerns, because our thinking is long range, not just the next ten years." Hearing Day XI, 32:15-19. When asked about systems in Merrimack not currently served by Pennichuck, Mr. McCray expressed his concern because the Merrimack Village District system "serves a large part" of Merrimack. When Merrimack had a problem in 1993, McCray testified, "[i]f Pennichuck had not stepped forward, the results would have been very grave." Hearing Day XI, 47:6-11. Lastly, when Mr. McCray was asked whether the vote in Nashua "was representative of what the people of the town of Merrimack think is in their public interest," he replied:

No. In fact, I actually believe it to be the opposite. I base that on the fact that, again, I served on the board and the council for six years, and this has -- has hit -- has taken a large part in the press for the past three years. And when I speak to people, they voice major concerns.

And the fact is, their concerns aren't as much with the 300 residents; Anheuser-Busch is a huge concern to Merrimack. It's a huge concern every day. I don't -- I'm not going to compare us to the Berlin mills, but I am going to tell you if anything ever happened to Fidelity or Merrimack, the tax rate and other issues in this town would be felt for years to come. So every day we say prayers for Anheuser-Busch and Fidelity. It's important to us.

Hearing Day XI, 47:23-48:16.

C. Nashua's claim that the taking will amount to local control is wrong.

Despite Nashua's claim that a taking would amount to "local control" of the system, Nashua proposes to contract out several key operation functions. Alderman McCarthy admits that his concern with the offer from Philadelphia Suburban was that Vivendi, a foreign corporation, was a majority shareholder of Philadelphia Suburban.

Vivendi is now Veolia, the very same company Nashua proposes operates the system. Hearing Day 1, 210:1-212:16. Further, the contract between Nashua and Veolia explicitly states that Nashua can delegate payment arrangements to Veolia. See Hearing Day 2, P. 273. Not only does Nashua propose that private contractors run the operations and oversight functions for the proposed “public” utility, it has allowed for the possibility of delegating another key function of running the water system, that of billing and collection, the most customer centered aspect of the water utility. In no way does this equate to local control.

III. THE PUC SHOULD GIVE CONSIDERABLE WEIGHT TO THE STAFF’S INDEPENDENT, IMPARTIAL, AND UNEQUIVOCAL CONCLUSION THAT THE TAKING IS NOT IN THE PUBLIC INTEREST.

Unlike any other party in this proceeding, the PUC staff has no interest in the outcome. *In Re Generic Investigation Into Intralata Toll Competition Access Rates*, 1992 WL 511280, *2 (N.H.P.U.C.) (stating, in the context of a ratemaking proceeding: “[g]enerally, the Staff has no vested interest in any proceeding before the Commission, other than to serve the public good. Staff’s sole function is to advise the Commission on questions of policy, theory, or methodology...”). Staff’s only interest is the fair determination as to whether this proposed taking is in the public interest. In pre-filed testimony⁷, Mr. Mark Naylor of the PUC staff, in summarizing Staff’s view, stated:

Staff has very carefully considered all of the issues in this case, and has extensively reviewed all of the evidence presented with these public interest issues in mind. Staff’s conclusion is that Nashua’s request, while perhaps fulfilling the wishes of the voters in the January 2003 municipal vote authorizing the City to explore a taking, does not meet the “net benefits” test and is therefore not in the public interest.

⁷ The PUC Staff, “[w]hen participating in an adjudicative proceeding, ... shall be subject to the rules in this part in the same manner and to the same extent as a party.” PUC ADC 201.3.

Pre-filed Testimony of Staff Member Naylor (April 13, 2006), 66:11-15. Mr. Naylor and the Staff went further, in fact. "It is staff's view that not only are there not net benefits outside Nashua, there are real harms that will result from the taking of the assets of PWV." Naylor Pre-Filed, 66:21-23 (emphasis added).

The PUC staff also made conclusions particularly pertinent to the concerns of the Town of Merrimack. In response to a question regarding the "potential impact" a taking would have on service quality for customers who do not reside in Nashua, Ms. Noonan of the PUC staff stated:

... As a customer of PWV, both Nashua and non-Nashua residents can turn to the Commission for billing problems, water quality issues, etc. For Nashua residents, the Mayor and Board of Alderman would, in theory, serve in that role. As elected officials, they would have a duty to their constituents to ensure all such matters are resolved fairly and equitably. However, non-Nashua residents would have no such recourse. Additionally, as Mr. Naylor has pointed out in his testimony, there is also the possibility that non-Nashua residents who are not physically interconnected with the core system serving Nashua could see degraded levels of service as Nashua invests more money in the water system infrastructure serving Nashua and less in the infrastructure which services other municipalities.

Pre-filed Testimony of Staff Member Noonan 5:9-22. At the conclusion of the twelve days of testimony, Mr. Naylor of the PUC staff re-confirmed the accuracy of Staff's pre-filed testimony and indicated that subsequently filed testimony did not change his opinion.

Q. In your direct testimony this morning, you described and adopted your previously filed testimony and adopted data responses. But something you said gave me pause. You indicated that you had not had an opportunity to submit a [sic] additional testimony based on the reply testimonies that were filed and other things that were filed subsequently to your direct testimony. And, I don't think that I heard the follow-up question. Based upon the things you saw in that subsequently filed material, does that change in any way your filed testimony in this case?

A. No. It doesn't change my opinion of the filing.

Hearing Day XII, 75:19-76:7. The Commission should give considerable weight to the impartial view of its staff. The staff's findings, as laid out in pre-filed testimony and presented at the hearing by Mr. Naylor and others, demonstrate that the proposed taking involves too many uncertainties and potential detriments to be considered in the public good.

Having conducted an independent review of the pre-filed testimony, the PUC Staff concluded that "not only are there not net benefits outside Nashua, there are real harms that will result from the taking of the assets of PWW." Naylor Pre-filed, 66:21-23. Consistent with this conclusion, the pre-filed testimony and testimony at the hearing demonstrates far too many uncertainties and potential harms for the commission to conclude that the proposed taking is in the public interest. These self same flaws pervade the cross examination testimony of Nashua's witnesses and necessitated Nashua's proposed "conditions" as stop-gaps to overcome the speculative basis for Nashua's proposed taking.

IV. NASHUA'S NUMEROUS PROMISES DURING THE COURSE OF THE SEVERAL HEARINGS ARE NOT NECESSARILY ENFORCEABLE AND WILL SUBSTANTIALLY INCREASE THE COST OF ITS OPERATION.

Throughout the hearing, representatives of the City of Nashua and counsel for the City, in an effort to allay the concerns expressed by the parties and the PUC staff, stated Nashua's willingness to accept certain conditions on the taking. These "conditions" ranged from service procedures, to the assumption of contractual obligations, to

submission to PUC regulation in some instances.⁸ However, there is absolutely no guarantee that these “conditions” would in fact be adopted by or enforced against Nashua. The principal concern in this regard is whether, and how, any interested party could enforce such a condition or promise. The following colloquy between counsel for Merrimack and PUC staff member Naylor is representative of the problem posed by Nashua’s promises of voluntarily imposed conditions:

A. Well, I have a problem with the concept of "conditions". I don't think this is a normal PUC proceeding, where conditions can or should be imposed, for a couple of important reasons. Number one would be that, you know, there's no opportunity for discovery on those issues, for the Commission or the benefit of the Commission or the parties. And, you know, if the Commission were to set conditions on an approval, I don't know how the -- how the shareholders of the Company⁹ are put back into their original position, if the City subsequently was not meeting the conditions. So, that's a concern that I have.

Q. Well, is -- for instance, you heard a representation this morning that Veolia, in the City's current offer to change its proposal, would "conduct all of the customer service". And, is it your view that that would increase the amount that Veolia would be charging Nashua for its service?

A. I have no idea.

Q. Is this one of the issues that trouble you, in terms of lack of discovery?

A. Certainly. Yes.

Q. And, if there were a price increase because of that, would it affect rates, in your view?

A. It could, depending on the magnitude of the cost.

⁸ See, e.g., Day I, 134:11 (PUC regulation of operation outside Nashua); Day I, 151:6, 159:6 (PUC review of special contracts); Day I, 218:7 (additional staff to deal with PUC regulation); Day II, 47:4, 48:11, 142:20 (PUC regulation over special contracts); Day II, 64:10 (voluntary continuation of Milford/PWW contract); Day II, 142:15 (application of core rates to satellite systems); Day II, 191:10, 197:10, 265:20 (promises regarding service procedures).

⁹ Merrimack believes that Mr. Naylor may have misspoken when he said “shareholders.” The sentence makes more sense if it is taken as, or something akin to, “stakeholders” of the transaction.

Q. Now, and I'm not asking you to give me a legal opinion, but is it your view that, even if the so-called "conditions" that Nashua is now offering as concessions were part of the order, could the PUC have anything to do with their enforcement?

A. Well, that's a good question. I don't know. I'm not convinced that the City's operation of this utility, after this proceeding, would be subject to Commission regulation. I'm not convinced that regulation is something that the City can opt into or out of.

Q. Now, is it your view that the PUC can obtain jurisdiction by agreement, as opposed to by statute?

A. I have not heard of that.

Hearing Day XI, 77:3-78:16.

The Public Utilities Commission is a creature of the legislature, endowed with only so much jurisdiction as the legislature has conferred upon it. Appeal of Concord Natural Gas Corp., 121 N.H. 685, 689 (1981); see also Kimball v. New Hampshire Bd. of Accountancy, 118 N.H. 567, 568 (1978); and see 2 Am Jur 2d Administrative Law § 281. The extent to which a municipal utility is considered a public utility and thus subject to the jurisdiction of the PUC is set out RSA 362:4. Agency jurisdiction cannot be conferred by any action of the parties before it. Am Jur 2d Administrative Law at § 283. “[T]hus, deviations from an agency’s statutorily established sphere of action cannot be upheld based upon an agreement, contract, or consent of the parties. Nor can they be made effective by waiver or estoppel.” Id.

Even if the PUC were to condition its approval of the taking (as it is empowered to do under RSA 38:11), the administrative process of enforcing such a condition in the event of a breach or dispute is highly troubling to Merrimack, especially given Nashua’s admissions that it is far more concerned with Nashua’s customers than those of other

municipalities.¹⁰ Attempts at enforcing these conditions would inevitably require substantial legal cost, consume valuable administrative resources at the municipal level, and involve uncertain results. Merrimack experiences none of these things under its current relationship with Pennichuck.

Moreover, these voluntarily imposed conditions raise serious due process problems. As noted by Mr. Naylor above, there was no discovery on these issues. None of the parties was given the opportunity to investigate meaningfully the details, practicalities, and implications of these conditions. In addition to the absence of any guarantee as to whether, how, and by whom these conditions are enforceable, there is no clarity as to whether and how Nashua can adopt them. The parties have not had the opportunity to issue data requests or to obtain other discovery as to whether Nashua can, in fact, adopt them. For the PUC to approve these conditions in the absence of discovery and an opportunity to examine Nashua would be a blind acceptance of Nashua's word – much to the prejudice of all the parties in the case.

¹⁰ Nashua's operation of the system requires a water ordinance to provide minimum levels of customer protection. Nashua has never adopted a water ordinance. Day II, 78:2-16. Nor is the drafting of the water ordinance complete. *Id.* Nor has Nashua determined its ultimate cost under Veolia's operating contract. Day III, 186-88.

Conclusion

For the foregoing reasons, the Town of Merrimack respectfully requests that the Commission deny Nashua's petition to condemn certain assets of the Pennichuck Corporation.

THE TOWN OF MERRIMACK
BY ITS ATTORNEYS,
BOUTIN & ALTIERI, PLLC

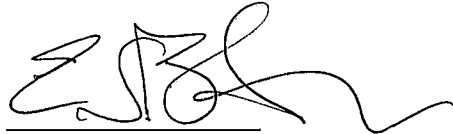
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Post Trial Memorandum in Opposition to the City of Nashua's Petition to Take Pennichuck Water Works" was served this 16th day of November, 2007, by U.S. mail on Claire McHugh, 61 Dublin Ave, Nashua, N.H. 03063, and on all other parties by electronic means.

A handwritten signature in black ink, appearing to read "E. Boutin", written over a horizontal line.

Edmund J. Boutin