

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

DW 04-048

CITY OF NASHUA'S REPLY BRIEF

NOW COMES the City of Nashua (“Nashua”) and submits the following *Reply Brief*:

I RESPONSE TO PENNICHUCK

Pennichuck asks the Commission to reject provisions of RSA 38 enacted by the legislature, stating for example that “[t]he rebuttable presumption has no bearing in this case.”¹ Pennichuck asserts that the Commission should disregard the express provision under RSA 38:3 and instead weigh “all public benefits of the proposed taking against all burdens and social costs”.² Nashua is confident that, even under the standard proposed by Pennichuck, the evidence demonstrates that Nashua’s acquisition is in the public interest. However, Pennichuck’s suggestion that the Commission ignore RSA 38 and instead apply a net benefits test, is simply an attempt to avoid its own burden to produce credible evidence to rebut the presumption of public interest in the first instance.

RSA 38:3 requires that Pennichuck present credible evidence of harm in order to rebut the statutory presumption of public interest.³ Once credible evidence is submitted, Nashua has the burden to demonstrate, based on a preponderance of the evidence, that its petition “is in the public interest”.⁴ However, a great deal of the harm Pennichuck alleges is not based on credible

¹ *Post Hearing Brief of the Pennichuck Companies*, Page 5.

² *Post Hearing Brief of the Pennichuck Companies*, Page 3.

³ *Petition for Valuation of J Brodie Smith Hydro-Electric Station*, Order No. 24,086, Pages 27-28 (2007).

⁴ RSA 38:11.

evidence but rather on speculation or assertions such as “the usual inter-municipal jealousies”⁵ so lacking in evidentiary support that it fails to rebut the presumption of public interest. Because RSA 38 provides for a statutory standard to be applied, the cases that Pennichuck has selected from the vast body of law concerning eminent domain are largely inapplicable. The Commission’s role in this proceeding is to weigh the evidence concerning those issues for which Pennichuck submitted sufficient credible evidence to rebut the presumption of public interest, and, ultimately reach a conclusion based on that evidence.

A. PENNICHUCK IGNORED ITS ABILITY TO REORGANIZE IN ORDER TO EXAGGERATE HARM TO PEU AND PAC CUSTOMERS

Pennichuck makes a number of arguments as to the harm its non-PWW customers will suffer. Pennichuck’s arguments continue to ignore the fundamental flaws in its argument: that the harm it alleges these customers will suffer is largely self-inflicted by its efforts to remove PEU and PAC customers from this proceeding; and its failure to consider that Pennichuck could reorganize and even lower its cost-of-service below what it currently charges.⁶ Indeed, Pennichuck witnesses acknowledged that while harms to non-PWW customers could be mitigated,⁷ they performed no analysis of re-organization in their testimony or compared their results to the costs of other utilities.⁸ They ignore that, from the outset of this proceeding, Nashua sought to acquire all three regulated utilities and that ownership under a common municipal or regional owner would resolve these concerns and further promote the public interest. Had Pennichuck analyzed its ability to re-organize or merge with a large utility holding company, it is clear that it could claim little or no harm to PEU or PAC customers.

⁵ See e.g. Exhibit 3001, Pages 13-14; *but see*, Exhibit 1014, Pages 13-17 (Nashua’s commitments).

⁶ Pennichuck rates are currently higher than nearly all comparably sized utilities. See e.g., Exhibit 1014, Pages 19-20; Exhibit 1016 (SMS Exhibit 4), Page 63; Exhibit 1026, Pages 3-4.

⁷ Transcript, September 13, 2007, Pages 10-12,37-39; Transcript, September 26, 2007, Pages 132-135.

⁸ See e.g. Transcript, September 18, 2007, Pages 153-156, (Guastella); Transcript, September 18, 2007, Pages 195-196) (Patch); Transcript, September 11, 2007, Pages 62-64 (Ware); Transcript, September 13, 2007, Pages 12-13 Pages 37-38 (Correll).

For example, Pennichuck argues that “[w]ithout PWW’s financial strength, Pennichuck Corporation would either be unable to access the debt markets or would have to do so on far less favorable terms than it does today. Its access to new equity funds would be significantly curtailed and potentially cut off entirely.”⁹ This argument, however, asks the Commission to ignore common sense and its own experience regulating New Hampshire utilities. Both Pennichuck and its counsel are aware that Aquarion serves only 8,400 customers in New Hampshire,¹⁰ only slightly more than the number of customers currently served by PEU and PAC,¹¹ and is part of Macquarie Utilities, Inc. (Kelda), a “diversified international provider of investment banking and financial services with approximately 8,600 employees in 23 countries”¹² that provides water services to 1.9 million households.¹³ Both the Commission and its staff, likely at the urging of Pennichuck’s counsel, recognized the benefits of membership in a larger utility holding company.¹⁴ Pennichuck’s witnesses acknowledge that they would consider such an approach, yet they conveniently declined to conduct any analysis in their own testimony.

Nashua does not ask the Commission to ignore any harm to PEU, PAC or PWSC customers if such harm can be proven on the merits. For this reason, Nashua sought initially to acquire all three Pennichuck utilities, pursued acquisition of the entire Pennichuck Corporation,¹⁵ and has proposed to the Commission a condition that it require that Nashua be required to compensate PAC and PEU for any harm that those entities can establish on the merits. Such a

⁹ Post Hearing Brief of the Pennichuck Companies, Page 11.

¹⁰ *Aquarion Water Company of New Hampshire*, Order No. 24,691, Page 1.

¹¹ Exhibit 3001, Pages 7-9.

¹² *Aquarion*, Order No. 24,691, Page 1.

¹³ *Aquarion*, Order No. 24,691, Page 2.

¹⁴ *Aquarion*, Order No. 24,691, Page 9 (“When asked to comment on whether the proposed transaction would provide benefits, Staff witness Mark A. Naylor, director of the Commission’s gas and water division, testified that there were potential financial benefits in terms of access to capital. Mr. Naylor testified further: “I think it’s clear, from the Joint Petition and the testimony...that there’s a clear incentive on the part of the acquiring company to keep this company and the other Aquarion companies operating efficiently” to protect their investment. 9/20/06 Tr. at 76, lines 3-13.”).

¹⁵ *Cf. Joint Motion for Continuance*, (January 16, 2007) (“A settlement could involve Nashua’s acquisition of some or all of the assets of Pennichuck or one or more of its subsidiaries”).

condition will allow the Commission to promote the public interest by providing customers of the PWW system improved operations at lower costs through Nashua's partnership with Veolia Water, while eliminating any potential harm by "set[ting] conditions and issu[ing] orders to satisfy the public interest."¹⁶

B. THE REAL HARM TO PENNICHUCK IS THE LOSS OF UNREASONABLE SHAREHOLDER PROFIT AT THE EXPENSE OF ITS UTILITY CUSTOMERS

Pennichuck's brief argues that "there are significant benefits to the economies of scale that the Pennichuck companies have achieved through their association with one another."¹⁷ While Pennichuck tries to frame the issue in terms of harm to its customers, the only real harm will be borne by Pennichuck shareholders because they will lose the opportunity to capture unreasonable profits for their unregulated businesses at the expense of customers of all of the Pennichuck Utilities.

The evidence includes the following: In 2005 PWW served approximately 24,500 customers, and PEU and PAC served approximately 4,900 and 1,685 customers respectively.¹⁸ Its unregulated service company, PWSC, however, served a total of 15,834 customers as well as "developer and other privately owned water systems in New Hampshire and Massachusetts under contracts with over 80 owners of those systems."¹⁹ As a result, over one-third of its total of 46,919 customers (regulated and un-regulated), and nearly two-thirds the number served by PWW directly, are served by an entity that is wholly unregulated by the Commission.²⁰

It would be reasonable to assume that PWSC's cost bear some rational relationship to the number of customers. The evidence tells a shocking story to the contrary: In 2005, PWW paid

¹⁶ RSA 38:11.

¹⁷ Post Hearing Brief of the Pennichuck Companies, Page 14.

¹⁸ Exhibit 3001, Pages 7-9.

¹⁹ Exhibit 3001, Page 9.

²⁰ These numbers do not take into consideration unregulated services provided by PWSC to regulated customers of PWW, PEU and PAC. See, e.g., Exhibit 3003B, Pages 1-3.

\$957,000 Pennichuck Corporation expenses, yet PWSC paid only \$56,000.²¹ Similarly, in 2005 PWW customers paid \$4.5 million in PWW costs, while PWSC customers paid only \$237,000.²² Thus, PWW customers pay in rates over seventeen times cost allocation paid by PWSC. Pennichuck Corporation has manipulated its corporate structure and that of its affiliates so that PWSC, having essentially no assets and no employees, escapes paying any reasonable share of Pennichuck Corporation's expenses while taking in over two million dollars in annual revenue to the benefit of its shareholders.²³ These phenomenal discrepancies explain in large part why the numbers of PWW customer service and administrative employees and management expenses are excessive. Costs for PWSC are buried in allocations to Pennichuck utility customers to allow PWSC to return a significant unregulated return to its shareholders.

The problem is not limited to PWSC. Nashua submitted testimony that despite the fact that, as of December 31, 2004, its real estate development affiliate, Southwood, had developed some 1,019 acres and generated gross proceeds of over \$26 million.²⁴ Yet the evidence shows that Southwood paid only \$2,000 in Pennichuck Corporate costs²⁵ and only \$60,000 in Pennichuck Water Works costs in 2005. Thus, the corporate sponsor of very developments that have contributed to increased phosphorous levels and decreases in the safe yield of the Pennichuck pond system, are provided financial reporting, accounting and administrative services at little or no cost.²⁶

These numbers are not typographical errors. They are the reality that PWW customers face every time they pay their bills for water service. Pennichuck as a regulated monopoly has

²¹ Exhibit 1132, Page 4.

²² Exhibit 1132, Page 6, Tables 3 (PWW costs) & 3A (PWSC costs).

²³ Exhibit 1132, Page 5, Table 2.

²⁴ Exhibit 1007A, Page 10 (5); Exhibit 1012, Page 36 (30).

²⁵ Exhibit 1132, Page 4, Table 1.

²⁶ Exhibit 1132, Page 5, Table 1.

highest rates in the state for a comparably sized utility,²⁷ oversight by PUC staff notwithstanding, its customers are forced to pay the costs for Pennichuck's unregulated service corporation and its real estate development affiliate to further erode the recharge of its water supply which has already declined by 75%, and has caused many of the ponds to experience algae blooms and various stages of eutrophication.²⁸ This deterioration of both water supply and water quality has led to the need to supplement Pennichuck's supply using water from the Merrimack River, which has resulted in algal blooms, water quality problems, and the need to upgrade its water treatment plant, to the benefit of Pennichuck's shareholders and the detriment of its customers.²⁹

C. PENNICHUCK'S CRITICISMS OF NASHUA'S OPERATING MODEL ARE SPECULATIVE AND NOT SUPPORTED BY THE EVIDENCE

In Section V (a) of its brief Pennichuck argues that Nashua's proposal is unprecedented and would result in confusion. These criticisms are unwarranted. As a general matter, the roles to be played by the City and Nashua's oversight and operations contractors are clearly set forth in the testimony of Nashua Mayor Bernard Streeter et al.,³⁰ and in responses to data requests.³¹ While Pennichuck speculates that confusion and problems will result, there is no confusion; and the agreements with Veolia and Beck even provided specific examples, such as the roles to be played by each party in evaluating and implementing a five year capital improvements plan.³² Pennichuck argued at length at trial that there were conflicting definitions of maintenance,

²⁷ Exhibit 1016, Pages 3 & 63 ("The survey shows that privately held Pennichuck Water Works has the highest rates of any system serving more than 25,000 people.").

²⁸ See e.g., Exhibit 1105, Page 12 (2-2); Exhibit 1108, Pages 3-4.

²⁹ See e.g., Exhibit 1011, Pages 14-20 (13-19) (Allan Fuller, Ph.D), Exhibit 1112, Page 8 (Rebecca McEnroe, Pennichuck engineer and consultants reporting "Eutrophic conditions (lots of nutrients) Merrimack river high in nitrogen."), Exhibit 3199 (George E. Sansoucy, P.E. "[A]ll of your marginal water now comes from the Merrimack River. It takes electricity; it takes chemicals to clean it; it's dirtier than the stuff in Pennichuck Brook. That's why you have a new treatment plant.").

³⁰ Exhibit 1014, Pages 4-5 (3-4).

³¹ See, e.g., Exhibit 1026, Page 12 & Exhibit 5007, Page 31 (Nashua Response to Data Request 5-15 regarding roles played by Veolia Water and R.W. Beck and their respective duties to report); see also Exhibit 1012, Pages 42-43 (R.W. Beck roles in source water protection and water conservation).

³² See e.g., Exhibit 5006, Page 14 (discussing implementation of the CIP).

RRRM, and capital projects that would result in Veolia Water claiming the exclusive right to perform RRRM services. However, *it ignores the first sentence in definition of RRRM*, that “where such maintenance activities have been defined by this Agreement as OM&M under Appendix D, or as Capital Improvement Projects under Appendix G[,]”³³ they are either maintenance provided as part of the Annual Fee, or competitively bid as capital projects. Veolia Water witnesses testified as much, noting that Nashua and its oversight contractor, are “in the driver's seat as far as RRRM projects and capital projects that are approved for Veolia to execute” and have broad discretion to designate those projects as maintenance,³⁴ RRRM or capital projects³⁵ in the best interests of customers.

Ironically, Pennichuck argues that “[t]he investor owned utility structure of PWW has served New Hampshire well for so many years because it better aligns the company's management [...] with the interests of the utility's customers and those of the state at large.”³⁶ There is little evidence to support Pennichuck’s argument and much evidence to the contrary including revisions to watershed protection reports,³⁷ fraudulent financial transactions by Pennichuck’s former CEO³⁸ and other matters. Indeed, one of the main functions of regulation by the Commission is to protect customers from the unfettered interests of shareholders.³⁹ Were Pennichuck’s argument true, there would be little need for any regulation or oversight by the Commission.

³³ Exhibit 1005B, Appendix H, Para. 1 (a), Page 80.

³⁴ Transcript, September 5, 2007, Pages 205-206.

³⁵ Transcript, September 6, 2007, Pages 210-211.

³⁶ *Pennichuck Brief*, Page 20.

³⁷ Exhibit 1012, Pages 7-10; *see also* Nashua’s post-trial *Memorandum*, Pages 69-71.

³⁸ *See, generally*, Exhibit 1121.

³⁹ *See, e.g., Appeal of PSNH*, 130 N.H. 748, 750 (1988)(“ In setting rates, a regulatory commission follows a process of identifying consumer and producer interests competing for recognition, with an ultimate goal of striking a fair balance or accommodation between them, to be reflected in charges to customers that may be described as just and reasonable both to the customer and to the utility.”); *Pennichuck Water Works*, 65 NHPUC 363, 369 (“The commission's tariff rule is specifically couched in language so as to allow the commission *the necessary flexibility to fulfill its statutory obligation to balance the interests of the utility and consumers.*)(emphasis added).

D. PENNICHUCK'S ARGUMENT THAT THERE WILL BE NO RATE BENEFITS UNDER NASHUA'S OWNERSHIP IGNORES THE TESTIMONY AND UNFAIRLY MANIPULATES THE EXHIBITS.

PWW's argument and the Guastella analysis, on which it is based, that there will be no rate savings under Nashua's ownership are dependent upon the adoption of its Reilly value.

While the Sansoucy analysis, likewise, is dependent upon the adoption of the Walker value, what the two analyses establish is that the range of rate savings, depending on whose value is adopted, is from zero to \$360 million. The PWW argument ignores, however, that Guastella has already conceded that for every dollar less than the Reilly value that the Commission sets the fair value of the assets, there will be rate savings to Nashua that will grow over time.⁴⁰ Unless the Commission adopts the Reilly valuation, therefore, there will be rate savings and the closer the value is set to the Walker valuation the greater they will be.

The attempt by PWW to compare the operating expenses in the Guastella analysis⁴¹ to those in the Sansoucy analysis⁴² to argue that Guastella assumed lower operating costs for Nashua than Sansoucy is meaningless and misleading. Sansoucy's cost takes into account the Veolia and Beck contracts while Guastella had not even looked at them. Moreover, the purpose for preparing the two analyses was different. Sansoucy sought to demonstrate that Nashua's revenue requirements would be less than PWW's. Guastella, on the other hand, wanted to show that at Reilly's value, Nashua would not need to raise rates.⁴³ Only if Guastella had actually projected the cost for Nashua, as opposed to his simplistic assumption that no one could operate more efficiently than PWW, would any comparison be meaningful.

⁴⁰ Transcript, September 18, 2007, pages 102, 103.

⁴¹ Exhibit 3016X (JFG-1 Revised, Schedule C)

⁴² Exhibit 1017 (Exhibit GES-4)

⁴³ Transcript, September 18, 2007, Page 101.

E. PENNICHUCK’S ARGUMENT THAT CUSTOMERS OUTSIDE THE CITY WILL BE UNPROTECTED IS UNSUPPORTED AND CONTRADICTED BY THE EVIDENCE AND THE LAW

Pennichuck argues that “[c]ustomers of PWW who live or work outside Nashua's borders will have no voice in a municipal utility owned by Nashua.”⁴⁴ Pennichuck conveniently neglects that, under Pennichuck ownership, customers have neither “voice” nor vote on Pennichuck’s Board of Directors, whether located in Nashua or across the street from its corporate office in Merrimack. Its meetings are not held in public, nor are they subject to the right-to-know law. The only “voice” customers have is to direct their concerns to the Commission staff, or by filing a complaint under RSA 365. However, under RSA 362:4, II, Nashua will remain a utility for the purposes of the quality of service provided to customers located outside the City under RSA 374:1 and as provided by law. Nashua has proposed binding commitments to this Commission under RSA 38:11 to ensure that, *inter alia*, all wholesale and retail customers will continue to have recourse to the Commission. Nashua has repeatedly committed to the establishment of a regional water district in order to provide the very voice Pennichuck claims customers will lack. The provisions of RSA 38:11, RSA 362 and 374, provide the Commission with the statutory authority to continue to protect customers in the event that Nashua’s service outside its borders is unjust or unreasonable. The Commission’s own legal precedents confirm this.⁴⁵

II. RESPONSE TO THE TOWN OF MERRIMACK

Merrimack’s participation in this proceeding has been curious. Nashua clearly understood from its testimony⁴⁶ that Merrimack had concerns regarding Anheuser-Busch (“AB”), the Merrimack Valley Water District and its citizens and businesses that would be served by Nashua. And yet, with the exception of the testimony David McCray, the entire focus

⁴⁴ Pennichuck Brief, Page 30.

⁴⁵ *See, e.g.*, Exhibits 1074 & 1085.

⁴⁶ Exhibit 4003.

of Merrimack during trial, was to personally discredit Mr. Sansoucy and his limited role in valuation. This disproportionate attention on Mr. Sansoucy continued in Merrimack's post-hearing Memorandum. Given Nashua's commitments to charge core-rates to customers outside Nashua, including Merrimack, and to honor the rates and other terms and conditions of the special contracts, including the contract of AB, the only credible explanation for Merrimack's attack on Mr. Sansoucy is the personal animus of its counsel. Indeed, Mr. Sansoucy and Mr. Boutin were not new to each other. Previously Sansoucy had valued for tax purposes the assets of Mr. Boutin's client, Southern New Hampshire Water Company. In that proceeding, notwithstanding Mr. Boutin's attack on his credibility, the trial court and the Supreme Court accepted Sansoucy's valuation.⁴⁷ Mr. Boutin has a long memory.

In its post-hearing Memorandum, Merrimack asserts that Nashua "acknowledged" that its projected savings "were not real" and, in support, quotes at length from the Transcript.⁴⁸ In the quoted testimony regarding overhead, the impression that Merrimack sought to leave with the Commission was that because Veolia's executives make more than PWW's executives there would be no savings in administrative costs. The quoted testimony, however, is cut short and the full explanation by Alderman McCarthy is eliminated or ignored.⁴⁹ When the full transcript is examined, it is clear that Alderman McCarthy testified that Veolia's price is substantially less than PWW's cost of operation, includes all overhead, administration and profit and will result in real savings.⁵⁰ In the same vein, Merrimack suggests that Nashua "acknowledged" it would need "two additional individuals in its building department" which would cut into its expected

⁴⁷ *Southern New Hampshire Water Co., v. Hudson*, 139 NH 139 (1994).

⁴⁸ Post-hearing Memorandum of Merrimack, Pages 13-14.

⁴⁹ *Ibid* p. 14.

⁵⁰ Transcript, January 11, 2007, Page 88 (line 19-24), Page 89 (line 1-11).

savings.⁵¹ In fact, as is crystal clear from the Transcript, the two additional employees were in “customer service” and their cost was already included in Nashua’s projections.⁵² To suggest, using these examples, that Nashua “acknowledged” that its projected savings were “not real” was such a distortion of the testimony and facts that it effects the credibility of Merrimack’s entire Memorandum and should cause the Commission, as it did the Supreme Court in *Southern New Hampshire Water*, when faced with misstatements by Mr. Boutin, to scrutinize Merrimack’s arguments “more carefully.”⁵³

III. RESPONSE TO ANHEUSER BUSCH

Anheuser-Busch notes its concern that Mr. Sansoucy “initially stated that the City’s residents subsidize AB’s special contract rate” but later acknowledged that he might “revise his opinion about the existence of a subsidy”.⁵⁴ The statements do not appear in Nashua’s pre-filed testimony, but the issue is undeniably an important one. However, it is to large extent moot because Nashua has proposed and agreed to conditions to honor and renew the terms and conditions of all existing wholesale contracts, and to make any complaints relative to wholesale service, including rates, subject to Commission oversight pursuant to RSA 38:11.

Nashua looks forward to working with Anheuser Busch, the Towns of Milford, Merrimack, and other wholesale customers as opportunities arise. Nashua expects that the Commission will impose a condition similar to that proposed by Nashua, and, in the final analysis, it will be the opinion of the Commission, not Mr. Sansoucy, that will ultimately matter in the event that any subsidy is alleged to exist. Moreover, while Mr. Sansoucy has played an important role in this proceeding, Nashua fully expects to rely on the opinion of its financial and

⁵¹ Post-hearing Memorandum of Merrimack, Page 15.

⁵² Transcript, January , 2007, Pages 217, 218.

⁵³ 139 NH at 144.

⁵⁴ Brief of Anheuser-Busch, Page 4 (emphasis added).

oversight advisors in the unlikely event that Nashua is unable to resolve any issue related to any any of the special contracts that currently exist, or may exist in the future.

IV. RESPONSE TO THE OFFICE OF CONSUMER ADVOCATE

The Office of Consumer Advocate (OCA) made four recommendations. The first asked the Commission to ensure that all customers be provided service at comparable rates and quality, and that a customer advisory board be established to help protect the interests of customers located outside of the City. Nashua concurs with this recommendation, and believes that its proposed conditions 1 – 3 and 6 – 8 are reasonably calculated to implement this recommendation.⁵⁵ Nashua has no objection to the OCA’s second recommendation, that the Commission “protect the remaining Pennichuck customers from increased costs due to any lost efficiencies.”⁵⁶ As noted herein, Nashua believes that harm to PEU and PAC customers, if any, will be limited due to its ability to re-organize as part of a larger utility group and proposed condition eleven to mitigate any harm that cannot be avoided.

Nashua does not believe that ruling on OCA’s recommendations three and four is appropriate at this time because the Commission’s ruling is unknown and there have been no procedural or substantive rulings on costs. Furthermore, while RSA 38 provides for the recovery of the Commission’s costs in this proceeding, it does not provide or suggest that Pennichuck’s exorbitant legal costs may be assessed against the City, nor would it be appropriate to adopt such a policy without clear direction from the legislature.

V. RESPONSE TO STAFF

Staff argues that lower rates under Nashua’s ownership are uncertain because the valuation is unknown and because it is not known if the Commission will order severance

⁵⁵ Nashua’s post-trial *Memorandum*, Appendix A.

⁵⁶ *Statement of the Office of Consumer Advocate*, Page 1 (November 16, 2007).

damages. Of course, until it is set by the Commission, valuation is uncertain. But what is certain is that at any value that is less than what PWW has proposed, there will be lower rates under Nashua's ownership and the differential will continue to grow over time.⁵⁷ It is also certain that the City, as a municipality, has certain cost advantages or synergies available to it, which all things being equal, will cause it to have a lower cost of operation. These cost advantages were recognized by both of PWW's expert witnesses, Mr. Guastella and Mr. Reilly.⁵⁸

Staff further criticizes Nashua's operational plan under the contract with Veolia Water as having uncertain costs, largely relying on Mr. Ware's testimony that Nashua has understated a number of costs. The Ware analysis was, in large part, simply wrong,⁵⁹ but more importantly, RSA 38 does not require mathematical certainty.⁶⁰ There is also considerable irony in this criticism. PWW's operational plan likewise lacks any mathematical certainty. It has no fixed operations and maintenance cost, energy cost, unplanned maintenance cost or capital maintenance cost. It is certain that, under Pennichuck ownership, customers will be liable for the costs of capital projects even if they are significantly over-budget or fail to meet performance expectations.⁶¹ Unlike PWW, however, Nashua will provide customers with an oversight contractor with the ability to enforce contractual commitments to control costs and meet water quality standards. While PWW has no incentive to predict and prevent such costs, Nashua has created a plan which incentivizes its operator to seek opportunities to operate at the lowest possible cost.⁶² In addition, Veolia Water is the largest user of Synergen in the world.⁶³

⁵⁷ Transcript, September 18, 2007, Page 102.

⁵⁸ Ibid, Pages 112-115; Transcript September 12, 2007, Pages 76, 77, Exhibit 3007, Page 17.

⁵⁹ *City of Nashua's Memorandum*, November 16, 2007, Page 61.

⁶⁰ RSA 38:2 permits a municipality to "establish" a utility where one did not previously exist. Such a utility would be unable to determine its costs with the certainty Staff seeks.

⁶¹ See, e.g., Transcript, September 11, 2007, Pages 20-25 (customers liable for \$14 million in cost increases, not including AFUDC).

⁶² Transcript, September 5, 2007, Pages 105-107; Exhibit 1005, Pages 4,5.

⁶³ *Motion to Strike Ware Testimony*, Affidavit of Stephen Siegfried, filed September 25, 2007.

Synergen permits its users to better predict its various costs and to prevent expensive unplanned maintenance. The 2004 and 2007 Audits of Staff, make it clear that PWW is incapable of effectively using Synergen⁶⁴ and, incredibly, Mr. Ware testified that he did not know what Synergen was used for,⁶⁵ notwithstanding his prior responses to data requests that Synergen was PWW's "Vendor of CMMS software package" and that Reilly's valuation of the data base in excess of \$8 million, despite Staff's description of the database as essentially useless.

Staff and Pennichuck argue that Nashua's OM&M Agreement is a draft that makes a public interest determination impossible. Staff overlooks, however, testimony and exhibits demonstrating that the City and Veolia Water entered into an agreement that obligates the parties to enter into a final definitive agreement based on its proposed OM&M Agreement, including conditions imposed by the Commission, within 12 weeks of a final order of the Commission.⁶⁶ Also ignored by Staff is testimony by Veolia Water and Beck that they consider themselves to be bound by the agreements included in their testimony, and ultimately, the Commission's authority to require, as Nashua has proposed, a condition requiring that Nashua enter into final definitive agreements based on those proposed to the Commission.

Many of Staff's concerns arise from its belief that the Commission does not have the authority to impose conditions on Nashua's operations. Staff clearly ignores the express language in RSA 38:11, which not only allows the Commission to impose such conditions, but to use conditions in order to "satisfy the public interest."⁶⁷ Staff's objection to the Commission setting conditions to satisfy the public interest demonstrates an apparent bias against municipal ownership. Rather than providing the Commission with the benefit of its expertise and

⁶⁴ Transcript, September 12, 2007, Pages 87-94.

⁶⁵ Transcript, September 11, 2007, Page 55.

⁶⁶ Exhibit 3054.

⁶⁷ RSA 38:11.

suggesting conditions which would make the acquisition satisfy the public interest, Staff has instead argued that no conditions should be considered or imposed because it would not be fair to *shareholders*.⁶⁸ According to Staff the policy considerations in RSA 38 and the likely benefits of municipalization should be ignored. It the legislature did not intend that the Commission have the authority to set and explore conditions, the language of RSA 38:11 giving it the power would not have been necessary.

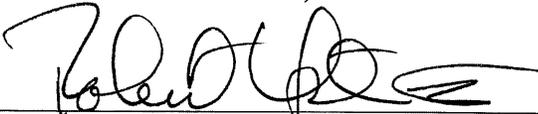
Respectfully submitted,

CITY OF NASHUA

By Its Attorneys,

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Date: December 3, 2007

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CERTIFICATE OF SERVICE

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

Date: December 3, 2007


Justin C. Richardson, Esq.

⁶⁸ Transcript, September 26, 2007, Page 77.