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

BUSINESS & INDUSTRY ASSOCIATION OF NEW HAMPSHIRE

Its Attorney:

Richard J. Maloney, No. 1604
BARBARA A. M. MALONEY, ESQ. PLLC
15 DARTMOUTH DRIVE, SUITE 203
AUBURN, NEW HAMPSHIRE 03032

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QUESTIONS PRESENTED FOR REVIEW THAT ARE ARGUED IN THIS BRIEF

I. NASHUA QUESTIONS

3. Whether the PUC erred in interpreting RSA 38 so as not to permit Nashua to take Pennichuck East Utility, Inc. ("PEU") and Pittsfield Aqueduct Company, Inc. ("PAC") assets, where neither company owned supply or distribution facilities or provided water service to Nashua.

II. PENNICHUCK QUESTIONS

3. 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. (Preserved at Pennichuck Motion for Reconsideration and/or Rehearing ("Rehearing Motion"), pp. 5-6, 10-14, Cert.Rec. p. 10429).

5. 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. (Rehearing Motion, pp. 17-18, Cert.Rec. p. 10429)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

N.H. Const. pt. 1, art. 2, 12, 14, 15; pt. 2, art. 83 (Addendum p. 19)

RSA 38:1-14 (Addendum p. 20)

RSA 362:4 (Addendum p. 24)

STATEMENT OF THE CASE AND OF FACTS[1]

Business & Industry Association of New Hampshire ("BIA") moved to intervene at the New Hampshire Public Utilities Commission ("PUC") in this matter on December 8, 2004. Cert.Rec. pp. 681-83. As its petition stated, the BIA "advocates policy that promotes and preserves the economic well being of the state. The BIA is composed of over 400 businesses in the state." Id. Its petition noted the concern of commercial and industrial water customers in the greater Nashua area, most of which are BIA member companies. It also noted that "[t]his case concerns a major policy issue that is of great interest to the BIA, namely the ability of a municipality to acquire a public utility through eminent domain." Id.

The BIA's petition to intervene reflects its Public Policy Principles, which include its opposition to public policy that: "has the effect of putting businesses out of business; [or] leads to involuntary socialization or takeover of business".

The PUC granted the BIA's intervention request on January 21, 2005. Order No. 24,425, Cert.Rec. pp. 767-91, N.App. p. 1.

Nashua's original petition sought to take the assets of Pennichuck's three public utility subsidiaries, PWW, PEU and PAC, even though neither PEU nor PAC supply or distribute water within Nashua. In the same order in which the PUC granted the BIA's petition to intervene, it also ruled that Nashua could not condemn the property of PEU and PAC because those companies did not provide water service in Nashua. Id.

After extensive discovery and a lengthy hearing, the PUC issued its Order Approving Taking and Determining Value on July 25, 2008. Taking Order, N.App. pp. 25-144. In its order,

[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. 27-44.

the PUC conditionally found that Pennichuck failed to overcome the rebuttal presumption of public interest for a municipal taking of utility property, as set forth in RSA 38:3. However, the PUC did not articulate which public interest standard it applied, nor did it balance the parties' interests, nor did it consider substantial evidence of Pennichuck's good work. The PUC awarded PWW damages of $203 million for the taking of all of its assets in Nashua and ten towns. Finally, it ordered the establishment of a $40 million mitigation fund for the benefit of the customers of PEU and PAC to offset the damages caused by Nashua's taking.

The BIA also adopts Pennichuck's Statement of the Case and Statement of Facts as set forth in its brief.

SUMMARY OF ARGUMENT

This Court must weigh heavily the constitutional and statutory rights of a well run New Hampshire business facing condemnation of its assets for political reasons, especially in light of the preference for free enterprise expressed in New Hampshire Constitution, pt. II, art. 83. The Court should not interpret RSA 38 in a manner which discourages investment in New Hampshire.

Specifically, this Court should uphold the PUC's decision not to permit Nashua to take the assets of two utilities, PEU and PAC, which do not provide water supply or distribution services in Nashua. This Court should reverse the PUC's decision that public interest exists to take the assets of PWW, since the PUC failed to weigh the interests of its shareholders and otherwise failed to weigh undisputed evidence of Pennichuck's long record of good service and its active role promoting the state's policy in favor of regional water systems.

Finally, this Court should reverse the PUC's decision on public interest because, as a prerequisite to that finding, it imposed at least nine conditions which required continued PUC

jurisdiction over Nashua. That continued jurisdiction exceeds PUC authority over a municipality, as set forth in RSA 362:4.

ARGUMENT

I. THE PUC MUST INTERPRET ITS EMINENT DOMAIN AUTHORITY NARROWLY, IN LIGHT OF CONSTITUTIONAL AND PUBLIC POLICY CONSTRAINTS

The crux of this case is whether a New Hampshire municipality has the power to de facto "nationalize" a publicly traded corporation. If this Court decides in the affirmative, the long term consequences of such power on the economy of New Hampshire, and the role of governments in that economy, will be dramatic.

Nashua seeks to take all of the assets of PWW, which in turn comprises over 75% of the assets of Pennichuck Corporation, thus effectively killing off Pennichuck Corporation as we know it. Pennichuck Corporation is one of the few New Hampshire based companies publicly traded (it is traded on NASDAQ). This is not like Federal government involvement in situations such as AIG or General Motors, whose imminent insolvency would negatively impact the economy as a whole. When it did intervene, the Federal government did so with the stated purpose of exiting in the future. On the contrary, Nashua seeks to acquire a profitable and efficient enterprise because of the very fact that it is profitable and efficient. Moreover, it is an enterprise already regulated by the PUC as to rates and infrastructure investment.

The exercise of such power is a warning to businesses (especially publicly traded corporations) that provide services to municipalities. Moreover, economic questions about the impact of such a taking on local property taxes and on state business taxes have long term consequences.

Rather, this is a situation in which New Hampshire's oldest continuously operating business, profitably serving PWW customers in eleven New Hampshire communities and serving customers of its affiliates in at least sixteen other New Hampshire communities (Correll Test., Ex. 3001, pp. 6-9, 12, Cert.Rec. p. 14060)[2], faces condemnation for political not economic, reasons.

New Hampshire businesses deserve better treatment before the law.

Granted, the citizens of Nashua did take a vote on January 14, 2003, relating to PWW. While the ballot referenced RSA 38, it said nothing about a taking of PWW assets by eminent domain or condemnation. Rather, the voters were asked a simple question: whether "to acquire all or a portion of the water works system serving the inhabitants of the City and others". Order No. 24,425 pp. 4-5, N.App. pp. 4-5. RSA 38 does contain two paths, one of voluntary acquisition and one of condemnation. Compare, RSA 38:7, 8 and 9. As a publicly traded business, Pennichuck must always be willing to consider being acquired. But voluntary acquisition is very different from the forced taking of property. Moreover, the citizens of Amherst, Hollis, Milford, Merrimack, Derry, Epping, Newmarket, Plaistow and Salem, all served by PWW, never got any chance to vote on whether Nashua, instead of PWW, should own their water systems. Taking Order, pp. 21, 25, N.App. pp. 45, 49.

New Hampshire's approach to eminent domain takings has become more restrictive in recent years. In reaction to the United States Supreme Court's decision in *Kelo v.City of New London*, 545 U.S. 469 (2005), the legislature in 2006 added substantive provisions to the Eminent Domain Procedure Act, RSA 498-A, stating that "public use" and not just "public purpose", is required to

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[2] 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. Witness cross-examination appears in the hearing transcript, referenced by the witness' last name plus "Test.", the hearing date and page reference. Parallel page reference is also provided to the initial page of the document in the Certified Record.

take private property. RSA 498-A:1 and 2, VII. Peter Loughlin, Local Government Law (2008 Supp.), § 816. Public policy analysts have properly seized upon the present case as an example of the dangers inherent in the too easy use of eminent domain power against private business. Charles M. Arlinghaus, *The End of Free Enterprise in New Hampshire*, New Hampshire Union Leader (November 30, 2005), p. A8. Ex. 3002A, DLP-8, Cert.Rec. p. 14173

This state encourages free enterprise and avoids government intervention in or operation of traditional private functions unless it is absolutely necessary. Patch Test., Ex. 3002, pp. 24-25, Cert.Rec. p. 14147. This philosophy is reflected in the New Hampshire Constitution, pt. II, art. 83, which this Court has said "declares our fundamental preference for free enterprise." *Appeal of Omni Communications, Inc.* 122 N.H. 860, 862 (1982). The Court stated: "[t]he role and duty of [the PUC] is to oversee and regulate those few necessary monopolies so that the *constitutional rights of free trade and private enterprise* are disrupted as little as possible" (emphasis added). 122 N.H. at 862-63.[3]

The rubber hits the road of the constitutional "preference for free enterprise" in this case. The uncontroverted testimony of the former Chairman of the PUC is that:

> a [PUC]-ordered taking of PWW's assets by the City of Nashua would have a chilling effect on the investor-owned utility industry in New Hampshire. Such a decision would not be looked on favorably in the utility industry in New Hampshire or by the community outside of New Hampshire. For the [PUC] to approve the eminent domain taking of the premier water utility in the state, an otherwise successful, well-run, growth-oriented company, against its wishes would send an unfavorable message about investor-owned utilities and the regulatory community in New Hampshire. Other utilities might be seen as being at risk of similar takings by eminent domain. [PUC] approval of this taking would send the message that the [PUC] puts little weight on the interests of investors of a utility that provides excellent service to customers. Such an action could also send a negative message to the financial community and could

[3] This statement jibes with accepted economic theory that private enterprises have greater productive efficiency than comparable public enterprises. W. Viscusi, J. Vernon & J. Harrington, *Economics of Regulation and Antitrust*, (2d Ed. (1995), pp. 468-71.

> potentially drive up the cost of borrowing money to other New Hampshire utilities. One of the other consequences of such a decision might be that individual or institutional investors would be less willing to invest in NH utilities. Such a decision would not be good for the regulatory industry across the board. There could also be a ripple effect from such a decision: municipalities in the state might start to look seriously at taking over utility assets in their communities and outside of their communities, like what Nashua is proposing to do here.

Patch Test., Ex. 3002, pp. 23-24, Cert.Rec. p. 14147.

Given that Nashua is following its alternative statutory path of condemnation, and given New Hampshire's constitutional preference for free enterprise, this Court must interpret RSA 38's eminent domain provisions with appropriate caution. This Court has recognized that other eminent domain statutes must be read narrowly. *See*, *Fortin v. Manchester Housing Authority*, 133 N.H. 154, 158 (1990) ("condemnation proceedings are intended to protect the proprietary rights of the individual who may be involuntarily deprived of property through the coercive power of the State"); *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 181 (1940)("[i]t is fundamental that a legislative grant of power to condemn for a public use, being derogatory of common right, may be exercised only within the clear definition of the grant"). In *Interstate Bridge*, this Court did not permit the Authority's eminent domain taking of a utility easement, since the enabling statute called for the Authority "to use such property [condemned]", which the Court read narrowly to mean that the planned reconveyance to a utility is not permitted. *See also*, *Orono-Veazie W. Dist. v. Penobscot Cty. Water Co.*, 348 A.2d 249, 253 (Me. 1975); *Ronci Mfg. Co., Inc. v. State*, 403 A.2d 1094, 1097 (R.I. 1979); 4 Tiffany, The Law of Real Property, § 1252 (3rd ed. 1975); Am Jur2d, Eminent Domain §20.

Narrow interpretation is even more important here, since a substantial amount of PWW property lies outside of Nashua, in towns that never took a vote to authorize a taking. *See*, *Village of Arlington Heights v. Gatzke*, 428 NE2d 947 (Ill.App. 1981)(prohibiting a municipality

from using drainage condemnation authority to create a reservoir outside of city limits); McQuillan, Municipal Corporations § 32.66 (3rd ed. 1991).

In its brief, Nashua claims that *Interstate Bridge* is no longer good law. Nashua Brief, pp. 26-27. But the cases it cited dealt with a subsequent broadening of the condemnation statute involved (*Public Service Co. v. Shannon*, 105 N.H. 67, 68 (1963)) or confirm the narrow reading of eminent domain statutes (*Leary v. Manchester*, 91 N.H. 442, 443-44 (1941)("Since the grant of power to condemn includes only its express terms and necessary implications ... the plaintiff's title cannot be acquired under the act above cited").

II. THE PUC CORRECTLY RULED THAT NASHUA HAS NO RIGHT TO TAKE THE ASSETS OF PEU AND PAC, WHICH DO NOT PROVIDE WATER SERVICE IN NASHUA

Pennichuck is organized, as are many New Hampshire businesses, into different business units. Three of them, PWW, PEU and PAC, provide water service in different parts of the state. But neither PEU nor PAC provides any water service to Nashua, and PEU and PAC own their own pipes, water resources and other related assets. Correll Test., Ex. 3001, pp. 8-10, Cert.Rec. p. 14060. Other New Hampshire utilities, such as Unitil Corporation and the predecessor to National Grid, have operated separate utility companies in different geographic areas. *See,* Pennichuck Memorandum on Scope of RSA 38, October 25, 2004, p. 8, Cert.Rec. p. 495. Nashua sought to take the assets of PEU and PAC at the same time it sought to take the assets of its local water utility, PWW. The PUC rejected that attempt in its Order No. 24,425, N.App. p. 1. If it had ruled otherwise, logically Concord also would have enjoyed the right to take all of the assets of the former Exeter and Hampton Electric Company while it remained a separate subsidiary under Unitil ownership, and Manchester would have enjoyed the right to take the

assets of the former Gas Service, Inc. serving Nashua while it remained a separate entity from Manchester Gas Company, but under common ownership.

The language in RSA 38:6 limits the right to take assets only to "any utility engaged ... in generating or distributing ... water for sale in the municipality". Only Nashua meets that criterion. Correll Test., Ex. 3001, pp. 8-10, Cert.Rec. p. 14060. This Court must interpret RSA 38's condemnation power narrowly, and contrary to the reading propounded by Nashua in its brief, so as to limit its authority to seek only the assets of PWW. *See, Interstate Bridge,* 91 N.H. at 181; *Omni Communications*, 122 N.H. at 862; N.H. Const., pt. 2, art. 83.

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

A. THE PUC IGNORED THE INTERESTS OF PENNICHUCK SHAREHOLDERS

Corporations are persons, entitled to constitutional rights just as are individuals. *Trustees of Dartmouth College v. Woodward*, 1 N.H. 111, 120 (1817), *reversed on other grounds*, 17 U.S. 518 (1819). Corporations are owned by their shareholders. Therefore, part of the constitutional protection afforded corporations in a condemnation action (N.H.Const. pt. 1, art. 2, 12, 14, 15; pt. 2, art. 83) must be consideration for the interests of its shareholders. By statute, the PUC likewise must consider the interests of utility shareholders in its rulings. *See, Appeal of Pinetree Power*, 152 N.H. 92, 100 (2005). In another context, the PUC has recognized its obligation: "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).

Despite this constitutional and statutory framework, the PUC completely ignored Pennichuck shareholders in its public interest analysis. It did not consider the tangible

shareholder loss from the double taxation burden (39% at the corporate level plus more at the shareholder level) of the taking of depreciated assets. Correll Test., Ex. 3001, pp. 17-20, Cert.Rec. p. 14060. While tax consequences might not affect the valuation of a company in an eminent domain case, it certainly does affect the public interest rights of shareholder who will receive much less than the "just compensation" ordered by the PUC. The PUC also ignored the public interest harm to shareholders and to Pennichuck Corporation itself from the fact that its non-regulated subsidiary, Pennichuck Water Service Corporation, will be forced to go out of business post-taking. The bulk of its operations will be gone and the remaining operations may not justify the existence of a publicly traded corporation. This is a loss to shareholders who invested for the long term, in good faith, and will now receive proceeds after the payment of corporate taxes and be forced to pay taxes on the proceeds. Correll Test., Ex. 3001, pp. 9, 13, 15-16, Cert.Rec. p. 14060; Ware Test., Ex. 3004, pp. 17-18, Cert.Rec. p. 14262.

Finally, there are the broader implications to the New Hampshire economy because of the forced taking of a corporation's operating assets, despite the good faith investment of the corporation. At a time where capital investment is critical to New Hampshire's economy, a narrow and short sighted interpretation of public interest will deter future investment.

B. THE PUC DID NOT WEIGH SUBSTANTIAL EVIDENCE OF PENNICHUCK'S PUBLIC INTEREST BENEFITS

As Pennichuck has noted in its brief, the PUC failed to conduct the constitutionally required net benefit analysis, weighing "public benefits… against all burdens and social costs suffered by every affected property owner." *Petition of Bianco*, 143 N.H. 83, 86 (1998). *See*, *Merrill v. Manchester*, 127 N.H. 234, 237 (1985). The PUC used the rebuttable presumption of public interest set forth in RSA 38:3 as a short-hand way to eliminate the difficult weighing process needed to determine whether public interest exists.

For instance, the PUC staff that regulates PWW testified that it is a well run company providing good service to its customers. Naylor Test., Ex. 5001, p. 69, Cert.Rec. p. 17043. Even Nashua and its contractors had to admit that Pennichuck operates well and provides an adequate supply of clean drinking water to its many customers throughout New Hampshire. McCarthy Test. 1/10/07. p. 242, Cert.Rec. p. 6784; Noran Test. 9/5/07, p. 129, Cert.Rec. p. 7804.

The PUC staff and others testified as to Pennichuck's important work as a truly regional water supplier in New Hampshire, consistent with the state's policy to increase regional water supply initiatives. That state policy notes that, by contrast, "[m]any municipal water suppliers have a parochial view of their current water supplies..." Patch Test., Ex. 3002, pp. 15-16, Cert.Rec. p. 14147, quoting from New Hampshire Department of Environmental Services and PUC, *Regulatory Barriers to Water Supply Regional Cooperation and Conservation in New Hampshire* (2001), Ex. 3002A, Att. DLP-A, Cert.Rec. p.14173. A private water company must also submit to regulation which typically seeks long term solutions that are in the public interest and insures prudent investments and expenditures. *See* Order No. 22,462, *Re Least-cost Planning for Water Utilities*, 81 NH PUC 1037 (1996). Patch Test., Ex. 3002, p. 10, Cert.Rec. p. 14147. These witnesses testified about Pennichuck's ability and willingness to take over troubled water systems statewide, often with the encouragement or at the request of the PUC. They also testified that the remaining Pennichuck entities would lose this capacity should PWW's assets be taken. Patch Test., Ex. 3002, pp. 5-7, 15-16, 20-23, Cert.Rec. p. 14147; Naylor Test., Ex. 5014, pp. 49-53, Cert.Rec. p. 17363; Ware Test., 9/11/07, p. 62, Cert.Rec. p. 8841.

Not every town supported Nashua's taking either. While the PUC noted the opposition of the Towns of Milford and Merrimack to the taking (Taking Order, pp. 35-37, N.App., p. 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. 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.

The uncontroverted evidence showed that Pennichuck is a well run company, that it uniquely fulfills the state's public interest for regional water suppliers, that it willingly acquires small troubled water systems, and that at least some towns which it serves want no part of Nashua ownership. Any business would consider that to be an enviable record of public service and private management. But the PUC has swept aside Pennichuck's positive record and stated that it cannot overcome the statutory presumption of public interest in favor a taking. That cramped reading of RSA 38 is not only bad public policy; it goes against the constitutional requirement that "declares our fundamental preference for free enterprise." *Omni Communications,* 122 N.H. at 862. Courts reviewing public interest in eminent domain cases must remember that the fundamental purpose of government is "to protect the health, safety and general welfare of the public". *Leary v. Manchester*, 91 N.H. at 445, quoting *New York City Housing Authority v. Muller*, 1 N.E. 2d 153, 155 (1936). Here, there is no "menace to the public health, safety or general welfare", but just the opposite. Any New Hampshire business, but especially Pennichuck, deserves better treatment than this from its government.

IV. THE PUC LACKS AUTHORITY TO RETAIN JURISDICTION OVER NASHUA TO PROTECT THE INTEREST OF PWW CUSTOMERS

In addressing the many concerns raised by many parties, the PUC responded by placing at least nine conditions for Nashua to take PWW's assets. Taking Order, pp. 98-99, N.App., pp. 122-123. Many of those conditions require the PUC to continue to assert jurisdiction over Nashua. But, as explained in greater detail by Pennichuck, the PUC thereby 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.

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. Nashua even argued before the PUC that it was exempt from continuing PUC jurisdiction, except to the extent it consented. Taking Order, p. 59, N.App., p. 83. 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. This means that the PUC's review of retail and contract (including Anheuser-Busch) rates also would exceed its authority. Likewise, imposition upon Nashua of the PUC's customer service and DigSafe regulations (N.H. Code Admin. R. 800 and 1200) exceeds the PUC's authority.

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. However, the PUC cannot protect business or residential customers, because 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.

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. As PWW explained in its brief, 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. *See, e.g., Sanborn Reg'l Sch. Dist. v. Budget Comm. of Sanborn Reg'l Sch. Dist.*, 150 N.H. 241, 242 (2003) ("[I]n the case of conflicting statutory provisions, the specific statute controls over the more general statute."). Also, 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."). Section 362:4 can be harmonized with section 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.

Since the substantive conditions requiring PUC oversight to protect customers 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.

CONCLUSION

This Court should hold that Nashua failed to submit a proposal for its taking of the assets of Nashua that would meet the public interest, and so reverse the order of the PUC, because the prerequisite conditions that the PUC imposed exceed the PUC's statutory authority. Alternatively, the Court should remand the case because the PUC failed to apply the required constitutional public interest balancing approach, in light of all the evidence submitted. If the

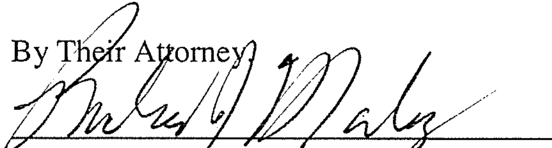
Court upholds the taking decision, it should affirm the PUC's determination dismissing it as to PEU and PAC.

Respectfully submitted,

Business & Industry Association of New Hampshire

By Their Attorney,

Date: September 29, 2009



Richard J. Maloney, No. 1604
BARBARA A. M. MALONEY, ESQ. PLLC
15 DARTMOUTH DRIVE, SUITE 203
AUBURN, NEW HAMPSHIRE 03032

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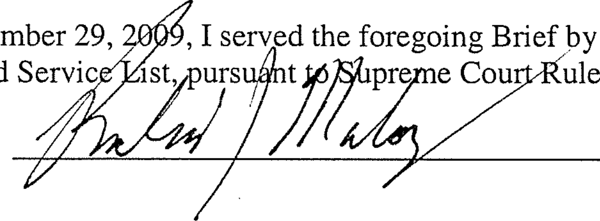

Service List

Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

Michael Delaney, Attorney General
Office of Attorney General
33 Capitol Street
Concord, NH 03301-6397

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301

Robert Upton, II, Esquire
Upton & Hatfield
23 Seavey Street, P.O. Box 2242
North Conway, NH 03860

Meredith A. Hatfield, Esquire
Office of Consumer Advocate
21 S. Fruit Street, Suite 18
Concord, NH 03301

Marcia A. B. Thunberg, Esquire
NH Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301-2429

Bryan K. Gould, Esquire
Brown, Olson & Gould
2 Delta Drive, Suite 301
Concord, NH 03301

Edmund J. Boutin, Esquire
Boutin & Altieri, PLLC
1 Buttrick Road, P.O. Box 1107
Londonderry, NH 03053-1107

Eugene F. Sullivan, III, Esquire
11 South Street
Concord, NH 03301

William R. Drescher, Esquire
Drescher & Dokmo
21 Emerson Road, P.O. Box 7483
Milford, NH 03055-7483

Laura A. Spector, Esquire
Mitchell & Bates, PA
25 Beacon St., East
Laconia, NH 03246

Jay L. Hodes, Esquire
Hage & Hodes P.A.
440 Hanover Street
Manchester, NH 03104

Town of Hollis
Mark Johnson
7 Monument Square
Hollis, NH 03049-6121

Town of Londonderry
David Caron
268B Mammoth Road
Londonderry, NH 03053

Nashua Reg. Planning Commission
Steven Williams
115 Main St., P.O. Box 847
Nashua, NH 03061

Stephen J. Judge, Esquire
Wadleigh, Starr & Peters, PLLC
95 Market Street
Manchester, NH 03101

Merrimack River Watershed Council, Inc.
Christine Tabak, Executive Director
600 Suffolk Street, 5th Floor
Lowell, MA 01854

Thomas J. Donovan, Esquire
McLane, Graf, Raulerson & Middleton P.A.
11 South Main St., Suite 500
Concord, NH 03301

Claire McHugh
61 Dublin Avenue
Nashua, NH 03063-2045

Daniel J. Mullen, Esquire
Ransmeier & Spellman, PA
One Capitol St., P.O. Box 600
Concord, NH 03302-0600

Barbara Pressly
11 Orchard Avenue
Nashua, NH 03060

ADDENDUM TO BRIEF OF BUSINESS & INDUSTRY ASSOCIATION OF NEW HAMPSHIRE

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NEW HAMPSHIRE CONSTITUTION

Part 1

[Art.] 2. [Natural Rights.] All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

[Art.] 12. [Protection and Taxation Reciprocal.] Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

[Art.] 14. [Legal Remedies to be Free, Complete, and Prompt.] Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Art.] 15. [Right of Accused.] No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

Part 2

[Art.] 83. [Encouragement of Literature, etc.; Control of Corporations, Monopolies, etc.] Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people: Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination. Free and fair competition in the trades and industries is an inherent and essential right of t he people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof. Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts, and officials doing business within the state; to prevent fictitious capitalization; and to authorize civil and criminal proceedings in respect to all the wrongs herein declared against.

REVISED STATUTES ANNOTATED

38:1 Definitions. – In this chapter:

I. ""Commission" means the public utilities commission, unless the context otherwise indicates.

II. ""Utility" means any public utility engaged in the manufacture, generation, distribution, or sale of electricity, gas, or water in the state.

III. ""Municipality" means any city, town, unincorporated town, unorganized place, or village district within the state.

IV. ""Municipal water company" means any water distribution system or water supply utility, owned or operated by a municipality, whether as a municipal department, separate company, or otherwise.

V. ""Regional water district" means any regional water district formed pursuant to RSA 53-A, for the purpose of providing and assuring the provision of an adequate and sustainable supply of clean water.

38:2 Establishment, Acquisition, and Expansion of Plants. – Any municipality may:

I. Establish, expand, take, purchase, lease, or otherwise acquire and maintain and operate in accordance with the provisions of this chapter, one or more suitable plants for the manufacture and distribution of electricity, gas, or water for municipal use, for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized, or directed by the commission.

II. For these purposes, take, purchase, and hold in fee simple or otherwise lease or otherwise acquire and maintain any real or personal estate and any rights therein, including water rights.

III. Do all other things necessary for carrying into effect the purposes of this chapter.

IV. Excavate and dig conduits and ditches in any highway or other land or place, and erect poles, place wires, and lay pipes for the transmission and distribution of electricity, gas, and water in such places as may be deemed necessary and proper.

V. Change, enlarge, and extend the same from time to time when the municipality shall deem necessary, and maintain the same, having due regard for the safety and welfare of its citizens and security of the public travel.

38:2-a Establishment, Acquisition, and Expansion of Plants; Regional Water Districts. – Any regional water district may:

I. Establish, expand, purchase, lease, or otherwise acquire and maintain and operate in accordance with the provisions of this chapter, one or more suitable plants for the manufacture and distribution of water for the use of municipalities that are members of the regional water district and for such other purposes as may be permitted, authorized, or directed by the commission.

II. For these purposes, purchase and hold in fee simple or otherwise lease or otherwise acquire and maintain any real or personal estate and any rights therein, including water rights.

III. Do all other things necessary for carrying into effect the purposes of this chapter.

IV. Excavate and dig conduits and ditches in any highway or other land or place, and erect poles, place wires, and lay pipes for the distribution of water in such places as may be deemed necessary and proper.

V. Change, enlarge, and extend the same from time to time when the regional water district

shall deem necessary, and maintain the same, having due regard for the safety and welfare of the citizens of the member municipalities and security of the public travel.

VI. No regional water district shall have the authority to take property by eminent domain.

38:3 By Cities. – Any city may initially establish such a plant after 2/3 of the members of the governing body shall have voted, subject to the veto power of the mayor as provided by law, that it is expedient to do so, and after such action by the city council shall have been confirmed by a majority of the qualified voters at a regular election or at a special meeting duly warned in either case. Such confirming vote shall be had within one year from the date of the vote to establish such a plant, and if favorable, shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

38:3-a By Regional Water Districts. – Any regional water district may initially establish such a plant after 2/3 of the members of the governing body of the district shall have voted affirmatively, and a majority of the constituent municipalities of the district by a majority vote of their legislative bodies have confirmed that vote. Such confirming vote shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the constituent municipalities within 2 years thereafter.

38:4 By Towns or Village Districts. – Any town or village district may initially establish such a plant after 2/3 of all the voters present and voting at an annual or special meeting, duly warned in either case, have voted by ballot with the use of the checklist that it is expedient to do so. A favorable vote to establish such a plant shall create a rebuttable presumption that such action is in the public interest. If such vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

38:5 By Unincorporated Towns and Unorganized Places. – Any unincorporated town or unorganized place may initially establish such a plant after 2/3 of the members of the county convention shall have voted that it is expedient to do so, and, if there are any registered voters in that unincorporated town or unorganized place, after such action by the county convention shall have been confirmed by a majority of the qualified votes in that unincorporated town or unorganized place at a regular election or at a special meeting duly warned in either case. Such confirming vote shall be had within one year from the date of the vote to establish such a plant, and if favorable, shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

38:6 Notice to Utility. – Within 30 days after the confirming vote provided for in RSA 38:3, 38:4, or 38:5 the governing body shall notify in writing any utility engaged, at the time of the vote, in generating or distributing electricity, gas, or water for sale in the municipality, of the vote. The municipality notifying any utility in such manner may purchase all or such portion of the utility's plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, and shall purchase that portion, if any, lying without the municipality which the public interest may require, pursuant to RSA 38:11 as determined by the commission. The notice to such utility shall include an inquiry as to

whether the utility elects to sell, in the manner hereinafter provided, that portion of its plant and property located within or without the municipality which the municipality has identified as being necessary for the municipal utility service.

38:7 Reply by Utility. – The utility shall reply to the inquiry provided for in RSA 38:6 by delivering its answer in writing to the governing body within 60 days of the receipt of the inquiry. If the reply is in the negative, or if the reply is not made within the 60 days, the utility thereby forfeits any right it may have had to require the purchase of its plant and property by the municipality, and the municipality may proceed to acquire the plant as provided in RSA 38:10. If the reply is in the affirmative, the utility shall submit the price and terms it is willing to accept for all of its plant and property identified by the municipality in its inquiry, together with a detailed schedule of such plant and property with proper evidence of title. All of the plant and property identified by the municipality shall at all reasonable times thereafter be open to the examination of the officers and agents of the municipality and others charged with the duty of determining the fair value of the property.

38:8 By Agreement. – The governing body of a municipality may negotiate and agree with the utility upon the price to be paid for such plant and property; provided, however, that such agreement shall not be binding upon the municipality until ratified pursuant to RSA 38:13.

38:9 Valuation. –

I. If the municipality and the utility fail to agree upon a price, or if it cannot be agreed as to how much, if any, of the plant and property lying within or without the municipality the public interest requires the municipality to purchase, or if the schedules of property submitted in accordance with RSA 38:7 are not satisfactory, either the municipality or the utility may petition the commission for a determination of these questions.

II. The commission, after proper notice and hearing, shall decide the matters in dispute.

III. When required to fix the price to be paid for such plant and property, the commission shall determine the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner. In the case of electric utilities, such amount shall be limited to the value of such plant and property and the cost of direct remedial requirements, such as new through-connections in transmission lines, and shall exclude consequential damages such as stranded investment in generation, storage, or supply arrangements which shall be determined as provided in RSA 38:33.

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

38:10 Construction or Condemnation. – If the utility shall have replied to the inquiry provided for in RSA 38:7 in the negative or if it shall have failed to reply within the time prescribed in RSA 38:7, the municipality, in the event that it shall have passed the vote or votes required in RSA 38:3, 38:4, and 38:5 and after the commission upon proper notice and hearing has determined that it is in the public interest to do so, may construct a municipal plant or may take

all or any portion of such private plant and property by condemnation, paying therefor just compensation determined in the manner provided in RSA 38:9.

38:11 Public Interest Determination by Commission. – When making a determination as to whether the purchase or taking of utility plant or property is in the public interest under this chapter, the commission may set conditions and issue orders to satisfy the public interest. The commission need not make any public interest determinations when the municipality and utility agree upon the sale of utility plant and property.

38:12 Expansion of Existing Municipals. – A municipality that has an existing municipal plant may expand such plant or may purchase or take, in the manner prescribed in RSA 38:6-11 and RSA 38:33, all or a portion of such plant owned by a utility which is necessary for expanded municipal utility service. Such action shall not require any further vote under RSA 38:3, 38:4, or 38:5.

38:13 Ratification. – Within 90 days of the final determination of the price to be paid for the plant and property to be acquired under the provisions of RSA 38:8, 38:9 or 38:10 and any consequential damages under RSA 38:33, the municipality shall decide whether or not to acquire the plant and property at such price by a vote to issue bonds and notes pursuant to RSA 33-B as may be necessary and expedient for the purpose of defraying the cost of purchasing or taking the plant, property, or facilities of the utility which the municipality may thus acquire. The municipality is authorized to hold a special meeting, if necessary, to take such vote without having to petition the superior court for permission to do so. An affirmative vote under RSA 33-B shall constitute ratification on the part of the municipality of the final determination of the price to be paid for the plant and property under the provisions of RSA 38:8, 38:9, or 38:10 and any consequential damages under RSA 38:33. If the money is so raised it shall immediately be paid to the utility, which shall thereupon execute a proper conveyance and surrender the plant and property to the municipality. If the ratifying vote provided for in this section shall be in the negative, no other action under this chapter shall be had during the ensuing period of 2 years.

38:13-a Aggregate Municipal Revenue Bonds. – If the commission orders divestiture of generation facilities in the implementation of electric utility restructuring under RSA 374-F, any municipality which has voted to acquire a hydro-electric facility as provided in RSA 38 may jointly issue with any other municipality which has also voted to acquire a hydro-electric facility as provided in RSA 38 municipal revenue bonds and notes pursuant to RSA 33-B as may be necessary and expedient for the purpose of defraying the cost of purchasing or taking such hydro-electric generation facilities. Such municipal revenue bonds or notes may be in the aggregate of the total cost of purchasing or taking such generation facilities as set forth in RSA 33-B:3 and may be issued in the joint names of any such municipalities in accordance with their respective interests therein. In all other respects, the provisions of RSA 33-B shall apply to the issuance of such municipal revenue bonds and notes.

38:14 Operation of Plant. – A municipality, which has so acquired the plant, property, or facilities of a public utility in any other municipality, may operate within such other municipality as a public utility with the same rights and franchises which the owners of such outlying plant, as purchased, would have had such purchase not been made. The operation by a municipality

outside its own limits shall be subject to the jurisdiction of the commission except as provided in RSA 362. If the outlying municipality shall itself vote to establish a municipal plant all the provisions of this chapter shall be binding as to such determination.

362:4 Water Companies, When Public Utilities. –

I. Every corporation, company, association, joint stock association, partnership, or person shall be deemed to be a public utility by reason of the ownership or operation of any water or sewage disposal system or part thereof. If the whole of such water or sewage disposal system shall supply a less number of consumers than 75, each family, tenement, store, or other establishment being considered a single consumer, the commission may exempt any such water or sewer company from any and all provisions of this title whenever the commission may find such exemption consistent with the public good.

II. A municipal corporation furnishing water or sewage disposal services outside its municipal boundaries shall not be considered a public utility under this title for the purpose of accounting, reporting, or auditing functions with respect to said service.

III. A municipal corporation furnishing sewage disposal services shall not be considered a public utility under this title:

(a) If it serves customers outside its municipal boundaries, charging such customers a rate no higher than that charged to its customers within the municipality, and serves those customers a level of sewage disposal service equal to that served to customers within the municipality. Nothing in this section shall exempt a municipal corporation from the franchise application requirements of RSA 374.

(b) If it supplies bulk sewage disposal services pursuant to a wholesale rate or contract to another municipality, village district, or water precinct.

III-a. (a) A municipal corporation furnishing water services shall not be considered a public utility under this title:

(1) If it serves new customers outside its municipal boundaries, charging such customers a rate no higher than 15 percent above that charged to its municipal customers, including current per-household debt service costs for water system improvements, within the municipality, and serves those customers a quantity and quality of water or a level of water service equal to that served to customers within the municipality. Nothing in this paragraph shall exempt a municipal corporation from the franchise application requirements of RSA 374.

(2) If it supplies bulk water pursuant to a wholesale rate or contract to another municipality, village district, or water precinct. This subparagraph shall not apply to bulk water contracts which were in effect before July 23, 1989, or to the renewal of said bulk water contracts.

(b) The commission may exempt a municipal corporation from any and all provisions of this title except the franchise application requirements of RSA 374, and may authorize a municipal corporation to charge new customers outside its municipal boundaries a rate higher than 15 percent above that charged to its municipal customers, if after notice and hearing, the commission finds such exemption and authorization to be consistent with the public good. The commission may not authorize a municipal corporation to charge existing customers outside its municipal boundaries a rate higher than 15 percent above that charged to its municipal customers until any rate agreements in effect for those customers on May 13, 2002 shall have expired.

(c) A municipal corporation's authority to charge higher rates for new customers outside of its municipal boundaries shall be applied prospectively to new customers taking water service

provided by means of a main extension or an expansion of the municipal corporation's system after the effective date of this paragraph.

(d) A municipal corporation's authority to charge higher rates for existing customers outside of its municipal boundaries shall not become effective until any rate agreements in effect on May 13, 2002 have expired.

(e) A municipal corporation serving customers outside of its municipal boundaries and charging a rate no higher than 15 percent above that charged to its municipal customers prior to July 1, 2002, may also be exempted from regulation as a public utility, except for the franchise application requirements of RSA 374, if after notice and hearing, the commission finds such exemption and authorization to be consistent with the public good.

IV. (a) Any customer of a water utility shall have the right to terminate water service and secure water from an alternate source, if the customer can demonstrate the ability to comply with the requirements of RSA 485-A:29 and RSA 485-A:30-b, and the administrative rules adopted to implement these sections.

(b) Any covenant in a deed or contract that restricts the right to terminate water service from a water utility or in any way limits that right, shall be void as against public policy.

V. No property owner shall be required to connect to a municipal corporation furnishing water, provided such property owner can demonstrate the ability to comply with the requirements of RSA 485-A:29 and RSA 485-A:30-b.

VI. (a) For purposes of this chapter, a municipal corporation shall include a regional water district.

(b) During the initial 4 years of its operation, if a regional water district seeks to alter rates other than in a manner that uniformly impacts all customers within the district, any municipality that is a member of the regional water district may seek commission review of the proposed rate change. In order for the proposed rate change to take effect, the commission must determine that the proposed rates are cost-based and that they are not unduly discriminatory.

(c) A regional water district shall adopt and enforce quality of water service standards consistent with the commission's administrative rules.

(d) With respect to regional water districts, the 15 percent benchmark employed in this section shall be calculated in relation to an average of the regional water district's relevant rates as determined by the public utilities commission.

VII. (a) A homeowners association, including but not limited to a condominium unit owners association, shall not be considered a public utility under this title by virtue of providing water service if:

(1) The service is furnished only to members of the association or the occupants of their residential units; and

(2) The association is organized on a not-for-profit basis and is democratically controlled by the owners of the residential units and not the developer or subdivider thereof.

(b) Such a homeowners association is one consumer for purposes of paragraph I, and its individual members or their lessees shall not be treated as individual consumers.