THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. _____

Pennichuck Water Works, Inc.
Pennichuck Corporation
Pennichuck East Utility, Inc.
Pennichuck Water Service Corporation
Pittsfield Aqueduct Company, Inc.

APPENDIX TO
APPEAL BY PETITION PURSUANT TO RSA 541:6

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APPENDIX TO APPEAL BY PETITION PURSUANT TO RSA 541:6

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 04-048

CITY OF NASHUA

RSA 38 Proceeding re Pennichuck Water Works

Order Approving Taking and Determining Value

ORDER NO. 24,878

July 25, 2008

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

I. INTRODUCTION

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

II. STATUTORY AUTHORITY

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

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

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

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

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

III. BACKGROUND AND PROCEDURAL HISTORY

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

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

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

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

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

B. April 2004 through April 2005: Preliminary Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. APPLICABLE LEGAL STANDARD

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

A. Pennichuck

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

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

B. Town of Milford

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

C. Staff

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

D. City of Nashua

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

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

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

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

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

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

E. Commission Analysis

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

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

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

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

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

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

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

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

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

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

V. PUBLIC INTEREST ISSUES

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

A. Pennichuck

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Town of Milford

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

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

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

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

C. Town of Merrimack

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

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

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

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

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

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

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

D. Anheuser-Busch, Inc.

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

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

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

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

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

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

E. Staff

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. City of Nashua

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G. Commission Analysis

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

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

1. PWW Customers Within Nashua

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. PWW Customers Outside Nashua

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

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

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

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

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

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

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

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

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

3. Wholesale Contracts

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

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

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

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

4. DigSafe

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

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

5. Franchise

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

6. PEU and PAC

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

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

7. Conclusion

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

VI. VALUATION

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

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

A. Summary of Values

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

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

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

B. Valuation Methods Employed

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

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

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

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

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

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

C. Nashua's Valuation Testimony

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

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

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

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

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

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

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

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

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

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

2. Nashua's Sales Comparison Approach

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

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

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

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

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

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

3. Nashua's Income Approach

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

D. PWW's Valuation Testimony

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

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

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

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

1. PWW's Asset Approach/Asset Accumulation Method

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Critiques of Valuation Testimony

1. Pennichuck

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

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

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

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

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

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

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

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

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

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

2. Nashua

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

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

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

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

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

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

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

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

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

F. Pennichuck Motion to Disqualify Messrs. Sansoucy and Walker

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

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

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

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

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

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

G. Commission Analysis

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

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

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

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

1. Sales Approach

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

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

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

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

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

2. Asset Approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Income Approach

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

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

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

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

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

Exh. 3007, at 21 and 22.

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

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

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

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

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

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

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

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

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

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

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

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

valuations. The procedural schedule called for updates to the valuation testimony and the parties filed updates on November 14, 2006 to bring the values forward to 2005. We now modify PWW's appraisal to bring the valuation date forward from 2005 to 2008. We take this step in anticipation of additional procedural steps that, to the extent Nashua prevails in any rehearing or appeal and elects to proceed, would likely result in a ratifying vote pursuant to RSA 38:13 in the last quarter of 2008 or the first quarter of 2009. Accordingly, we apply the same present value factor of 5 percent that PWW used to discount 2008 amounts to 2005 amounts. PWW used .8850 to discount 2008 to 2005. The reciprocal to bring 2005 amounts forward to 2008 is 1.1299, (i.e., 1/.8850 = 1.1299). The adjustment brings the values forward to 2008 from $169,974,131 to $192,053,771.

4. Reconciliation of Asset and Income Values

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

VII. MITIGATION FUND

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

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

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

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

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

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

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

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

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

VIII. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Based upon the foregoing, it is hereby

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

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

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

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

Thomas B. Getz Chairman	Graham J. Morrison Commissioner

Debra A. Howland
Executive Director and Secretary

Concurring and Dissenting Opinion of Commissioner Below

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Clifton C. Below
Commissioner

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

Docket No. DW 04-48

MOTION FOR RECONSIDERATION AND/OR REHEARING REGARDING ORDER NO. 24,878

Pennichuck Water Works, Inc. ("PWW"), Pennichuck Corporation, Pennichuck East Utility, Inc. ("PEU"), Pennichuck Water Service Corporation ("PWSC") and Pittsfield Aqueduct Company, Inc. ("PAC") (collectively, "Pennichuck") respectfully request that, pursuant to RSA 541:3, the Commission reconsider or conduct a rehearing of Order No. 24,878 (the "Taking Order") for the reasons set forth below. In support of this Motion, Pennichuck states as follows:

This Motion for Reconsideration and/or Rehearing arises out of the Commission's order on the merits authorizing the City of Nashua ("Nashua") to take the assets of PWW by eminent domain, subject to nine conditions, in exchange for payment to PWW of $203 million plus the establishment of a mitigation fund of $40 million for the benefit of the customers of PWW's affiliated utility companies, PEU and PAC.

Pennichuck seeks reconsideration or a rehearing of the Taking Order because the order, among other things, fails to meet the legal standard required by RSA 38 and the New Hampshire and United States Constitutions for the condemnation of utility property, fails to make the factual findings required to support such an order for a taking and for the valuation of PWW's assets, and fails to consider or misunderstands relevant evidence presented by Pennichuck.

In reviewing the Taking Order, PWW has identified the following errors that require rehearing:

a) the Commission erred by failing to apply the public interest standard applicable for eminent domain takings in New Hampshire and by failing to articulate any cognizable public interest standard at all;

b) the Commission erred by interpreting RSA 38 to give it the authority to allow Nashua to take water systems located entirely outside of Nashua even though those systems are not connected to the system that serves Nashua and are not necessary to supply water service within Nashua;

c) the Commission erred by conducting separate public interest analyses for the taking of PWW's core and satellite systems, where the only proposal before it called for the taking of all systems together;

d) the Commission erred in previously ruling that Nashua's petition did not exceed the scope of the January 14, 2003 confirming vote of its residents, and by not informing its residents that Nashua would use eminent domain to take PWW assets;

e) the Commission's decision failed to consider or weigh properly evidence of the public interest, including the interests of the broader public, the interests of the state, and the democratic interests of residents of towns outside of Nashua;

f) the Commission's decision failed to consider the harm to Pennichuck Corporation and its shareholders in its public interest analysis;

g) the Commission erred by failing to conduct its public interest analysis based upon Nashua's pre-filed proposal, which was the proposal on which PWW conducted discovery, and instead based its ruling upon Nashua's altered proposals submitted during the hearing;

h) the Commission erred by treating the statutory presumption of public interest as irrebuttable by imposing numerous significant substantive conditions in an attempt to overcome the substantial defects that the Commission found in Nashua's proposal;

i) the Commission erred by imposing numerous conditions to satisfy substantial defects in Nashua's proposal that are beyond the Commission's authority and thus are not enforceable and cannot support a public interest finding;

j) the Commission erred by imposing conditions subsequent to the taking of PWW's assets to satisfy substantial defects in Nashua's proposal and which Pennichuck will be unable to challenge should those conditions not be met because the Taking Order will have become final;

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

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

m) the Commission's finding that a $40 million mitigation fund would generate $3.4 million annually to benefit customers of PEU and PAC is not supported by the evidence because, among other things, it fails to consider tax consequences and the achievability of an annual rate of return of 8.5%, and it fails to consider whether Nashua can legally establish such a fund;

n) the Commission erred by relying upon information outside of the record, including a water supply contract between Nashua and the Town of Milford filed on February 22, 2008, and PWW's 2006 and 2007 annual reports;

o) it is difficult to determine how the Commission arrived at its valuation numbers and whether the Commission correctly performed the valuation analysis it purported to adopt because the Taking Order lacks detail as to a number of numerical components;

p) the Commission wrongfully excluded from its asset and income approach valuation analysis a 2% long term growth factor in the applicable capitalization rates;

q) in the asset approach to valuation, the Commission brought forward the value of PWW from December 31, 2005 to December 31, 2008, without showing the underlying data it used and by relying upon incomplete and extra-record financial information;

r) RSA 38 violates Pennichuck's equal protection rights, since it does not provide for a trial by jury on all valuation matters.

I. APPLICABLE STANDARD

Motions for rehearing and/or reconsideration of a Commission order are governed by RSA 541. RSA 541:3 provides that the Commission may grant a motion for rehearing if "good reason for the rehearing is stated in the motion." *See Connecticut Valley Electric Co. v. Public Service Co. of New Hampshire*, DE 03-030, Order No. 24,189 dated July 3, 2003 at 2. As stated in *Dumais v. State*, 118 N.H. 309 (1978), the purpose of a rehearing is to provide consideration of matters that were either overlooked or "mistakenly conceived" in the original decision. *See also, Investigation as to Whether Certain Calls are Local*, DT 00-223/00-054, Order No. 24,218 dated October 17, 2003 at 8 ("Motions for rehearing direct attention to matters 'overlooked or

mistakenly conceived' in the original decision and require an examination of the record already before the fact finder.").

In reviewing any motion for rehearing, the Commission thus analyzes each and every ground that is claimed to be unlawful or unreasonable to determine if there is a basis to grant the request, i.e., if there is "good reason" shown. *In re Wilton Telephone Company and Hollis Telephone Company*, DT 00-294/DT 00-295, Order No. 23,790 dated September 28, 2001; *see also, Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996*, DT 97-171, Order No. 23,847 dated November 21, 2001 at 11-12.

II. ARGUMENT

A. Lack of Any Public Interest Standard

The Taking Order explains its entire public interest analysis in terms of burdens of proof, with the statutory presumption of public interest in favor of Nashua appearing to be given an overwhelming and insurmountable weight because, as the Commission stated, "approximately 87 percent of PWW's customers are within the City of Nashua." (Taking Order, p. 51). Because of the extreme weight that the Commission gave to Nashua's municipal vote to confirm an aldermanic resolution to acquire PWW's water systems, the Commission failed to engage in the balancing approach required by New Hampshire law. Specifically, the Commission failed to apply the net benefit test by weighing the "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 New Hampshire Supreme Court has held that "public interest" is measured on a spectrum, and takings for convenience justify only slight impositions on private rights, *Rodgers Dev. Co. v. Tilton*, 147 N.H. 57, 59(2001). In this case,

the proposed taking imposes significant burdens on private rights. In addition to putting the State's largest investor-owned utility essentially out of business, the tax impact of the taking is likely to reduce the "just compensation" ordered by the Commission so that the ultimate owners of the property being taken—the shareholders of Pennichuck Corporation—will never be adequately compensated for the property being seized. Despite this devastating burden on private property rights, the Commission failed to require any substantial justification for Nashua's proposal, instead deferring at every turn to the insurmountable weight it gave the municipal vote. The Taking Order ignores the Constitutional and policy principles which require heightened vigilance to protect the property interests of business ventures providing regulated service to the public.[1]

Even if the Commission believes that it conducted the balancing required by *Bianco*, *Merrill* and *Rodgers*, it certainly failed to set forth its methodology in the Taking Order, contrary to general New Hampshire administrative law, *Appeal of Conservation Law Foundation*, 127 N.H. 606, 683 (1986)(agency obligated to set forth its reasoning and conclusions so that the court may effectively review its "methods, findings and order"); *Appeal of Newington*, 149 N.H. 347, 352 (2003)(administrative body must set forth its reasoning sufficient for appellate review) and the specific "reasoning" requirement of RSA 363:17-b for all Commission decisions.

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[1] The Commission may have erroneously relied upon the "no net harm" standard, which applies solely to the exercise of private rights with potential public consequences, such as from a consensual utility asset transfer. *See*, *New England Elec. Sys.*, 84 NH PUC 502, 510 (1999). Because the Commission did not articulate the standard it applied, it is impossible to tell.

B. Systems Entirely Outside of Nashua

The Commission earlier in this case ruled as follows: "Based on the overall statutory scheme, the construction of the statute as a whole, and the legislative history and intent, the related threads of the analysis of RSA Chapter 38 lead to the conclusion that the eminent domain authority delegated by the Legislature in RSA 38:2 should be narrowly construed...." Order No. 24,425, p. 16. The Commission went on to rule in that order that the statute did not permit Nashua to take the assets of PEU and PAC, and that its attempt to take PWW assets outside of Nashua would depend upon a factual inquiry. Specifically, the Commission stated: "Our reading of the legislative history of the re-enactment of RSA Chapter 38 persuades us that the Legislature intended that the extent of the taking power that could be exercised beyond municipal boundaries would be limited. This conclusion is driven in good part by [then-]Representative Below's stated concern that a municipality may have to take some property outside its boundaries in order to prevent the stranding of some customers. The fair inference to be drawn from his statement is that extra-territorial takings were presumed and intended to be limited." *Id.* pp. 14-15. *See also*, Order No. 24,448 (order on Nashua's Motion for Rehearing).

Despite that earlier ruling, the Commission gave short shrift to its narrow construction of RSA 38 and determined in the Taking Order that the public interest permitted the condemnation of PWW satellite systems (i.e. those not hydraulically connected to the Nashua core system) based solely upon a finding that those customers would be "better served by remaining part of the PWW system for purposes of rate and service continuity". (Taking Order, p. 59). In other words, the Commission reasoned that since it had already made a public interest finding for a taking of the Nashua assets and since, according to the Commission, "[d]ivorcing the satellite

systems from the core system involves substantial uncertainty" (Taking Order, p. 58), PWW must forfeit its satellite systems allegedly to assure rate and service continuity for its satellite system customers. That is a long way from the "stranding" of customers. As the Commission rightly stated, the Legislature intended that the taking authority of municipalities be narrowly construed. There is no indication that the Legislature intended that a single condemning municipality should be authorized to take forcibly an entire utility's operating assets without regard to whether those assets were necessary to provide service within the municipality or to any portion of the system serving the municipality. Moreover, the harm to the satellite systems identified by the Commission was the result of the very taking it claimed to be in the public interest.

The exercise of such broad and devastating powers by a municipality and this Commission require a more specific and unambiguous authorization from the Legislature, something that is wholly lacking here. The constitutional and policy reasons that the Commission previously articulated for a narrow construction of RSA 38 call for just the opposite result here: there may be no taking of PWW's satellite systems unless it is "*require*[d]". RSA 38:6. Where the excuses for taking the satellite systems are the avoidance of uncertainty and rate and service continuity, matters regarding which there was no meaningful evidence during the hearing, there are less drastic alternatives available than condemnation to protect the interests of satellite system customers. Those alternatives include finding that Nashua's proposal to take PWW's assets is not in the public interest. Pennichuck previously raised these issues in its April 5, 2004 Motion to Dismiss and its Motion for Rehearing that resulted in Orders No. 24,425 and 24,448, and Pennichuck hereby incorporates those arguments by reference. To the extent that

the Taking Order now also includes a finding of public interest as to the taking of the satellite systems, Pennichuck now includes that issue in its request for rehearing.

C. The Segmented Public Interest Analysis

Even though Nashua's entire case was premised on a single taking of all of the assets of PWW together, the Commission did not look at PWW's assets as a whole, but rather in parts. First, the Commission took pains to rely upon the presumption in favor of municipal ownership in RSA 38:3 as it analyzed the taking of PWW's system within Nashua. (Taking Order, pp. 50-57). Acting as if the taking of PWW's Nashua assets was a separate proposal, the Commission concluded that PWW had not met its burden of proof. Next, the Commission analyzed the proposed taking of the assets outside Nashua, treating the taking of the Nashua system assets as a given and concluding that a taking of the satellite system assets would also be in the public interest because of what it claimed was the uncertainty and potential negative rate impact that would be caused by splitting the ownership of those assets from the Nashua water system. The Commission did this despite having previously ruled that the rebuttable presumption does *not* apply to Nashua's proposal to take PWW assets outside of the city. (Taking Order, p. 25; Order No. 24,567, p. 5).

The fallacy with the Commission's piecemeal analysis is its failure to consider Nashua's proposal for taking PWW as a whole. That was Nashua's sole proposal before the Commission. If the Commission considered PWW as a whole, it would have needed to confront – without the benefit of any rebuttable presumption – whether the satellite systems would be better off with PWW remaining as owner of all the assets. Given that the satellite system communities had no vote, and many feared Nashua's control, the result would have been very different. Moreover, the fallacy of the piecemeal analysis is proven by considering what the result might have been

had the Commission conducted its piecemeal analysis in reverse order, by first considering whether Nashua could meet its public interest burden of proof for it to take approximately two dozen unconnected water systems in nearly a half dozen municipalities outside Nashua and then deciding whether the harm caused by severing the core from those satellites was in the public interest.

D. Nashua Lacked a Valid Municipal Vote for the Taking

Pennichuck argued, in its April 5, 2004 Motion to Dismiss and its related Motion for Rehearing, that the January 14, 2003 confirming vote in Nashua pursuant to RSA 38:3 is inconsistent with and more narrowly defined than Nashua's petition in this docket. Specifically, Pennichuck argued that the voters at most considered acquiring assets of PWW comprised of the core system centered in Nashua. The Commission previously denied Pennichuck relief on this issue in its Orders No. 24,425 and 24,448. Because this issue was previously ruled upon by the Commission and has been preserved for appeal, Pennichuck will not repeat its argument here and hereby incorporates the arguments from its Motion to Dismiss and Motion for Rehearing by reference. The vote also wrongfully failed to inform the public that Nashua planned to use its eminent domain authority to take PWW assets.

E. The Commission Did Not Consider All of the Relevant Evidence

The Taking Order explicitly states, with no legal or factual support, that evidence submitted by PWW and Commission staff concerning "Pennichuck's positive record as a utility" and its "willing[ness] to expand into new areas" is not adequate evidence or is speculative and cannot rebut Nashua's public interest presumption. The Commission's refusal to accord any weight to the credible evidence from Commission staff, Veolia staff, and Bedford and Milford town officials (Ex. 5001, p. 69; Noran, Tr. Day 4, p. 129; Ex. 3022, p. 16; Ex. 4001, p. 1) that

Pennichuck is a well run utility points out the superficiality of the Commission's consideration of the evidence. (Taking Order, pp. 51-52).

In addition, the Taking Order fails to weigh the damage to the public interest of the state as a whole from losing access to the state's largest investor-owned water company, with the capital and operational capability necessary to assist and take over troubled water systems statewide. *See*, Naylor Test., Ex. 5014, pp. 49-53; Ware, Tr. Day 7, p. 62. Indeed, there is nothing "speculative" about Pennichuck's role, given the Commission's track record of approving Pennichuck's water system acquisitions.[2] Beyond the statewide harm to PEU and PAC, the undisputed evidence was that New Hampshire would also lose PWSC, which operates 86 water systems serving 19,230 customers in private and municipal water systems. It would have little choice but to go out of business, because of the loss of economies of scale. Correll Test., Ex. 3001, pp. 9, 13, 15-16; Ware Test., Ex. 3004, pp. 17-18.

Rather, it is Nashua whose interest in acquiring other water systems is at best speculative. *See, e.g.*, Naylor, Tr. Day 12, p. 119. *See*, *Blair v. Manchester Water Works*, 103 N.H. 505, 507 (1961)(Commission cannot force municipal water service extensions). The Commission's statement that PWW would not acquire troubled water systems unless it believed it to be in its shareholders' interest is unremarkable and misses the point entirely. As former Commissioner Patch testified, it is the very fact that such acquisitions are in the interests of an investor owned utility's shareholders and are unlikely to be in the interest of a municipal utility that should lead

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[2] In fact, Pennichuck is prepared to demonstrate that since the hearing it has been approached to acquire Lakes Region Water Co., a New Hampshire water utility facing challenges familiar to the Commission. With the threatened loss of PWW, and the lost economies of scale, the remaining Pennichuck entities cannot address this business opportunity, to the detriment of Lakes Region customers and the state.

the Commission to conclude that the taking proposed here by Nashua is not in the public interest. *See* Ex. 3002, pp. 16-20.

The Taking Order also ignores the interest of Pennichuck shareholders, an interest that the Commission is required to address under both applicable statutory and common law. First and foremost, the order gives no weight or even any consideration to the massive harm that is likely to be inflicted on Pennichuck Corporation's shareholders because of the multi-million dollar corporate level income tax liability that will reduce the "just compensation" ordered by the Commission. As Mr. Correll testified, those shareholders are unlikely to ever receive the $203 million calculated by the Commission, but rather a figure that, in addition to any capital gains tax paid by each individual shareholder, would first be reduced by "the imposition of state and federal income taxes [at the corporate level] totaling approximately 40% on the difference between the purchase price and the original cost less depreciation of the assets." Ex. 3001, p. 20. The Commission properly considered the negative impact on customers of PEU and PAC in conducting its public interest analysis, but inexplicably ignored the interests of shareholders. This omission is particularly ironic in light of the fact that in the middle of the hearing on the merits, the Commission stayed the proceeding to allow the parties an opportunity to explore a settlement and, as part of that process, to seek special legislation that was intended to allow a stock acquisition by Nashua as a means of addressing the tax impact of a taking of PWW's assets. See, 2007 Laws, Ch. 347:5. That legislation permitted a solution to Pennichuck's massive tax liability which the Taking Order ignores, and demonstrates the public interest harm from an asset taking.

The Taking Order also accords great deference to the "ability of [Nashua] elected officials to make good decisions", despite significant evidence to the contrary with respect to its

plans to take PWW. (Taking Order, p. 55). While the Commission noted the opposition of the Towns of Milford and Merrimack to the taking (Taking Order, pp. 35-37), the Commission in its public interest analysis gives no similar deference to the ability of Merrimack or Milford elected officials also to make good decisions. In fact, the Commission ignores their opposition in its public interest analysis, and with it the astute observation of Merrimack Selectman Daniel McCray: "...elected people, they're always going to cater to the people that elect them, and no one in Merrimack has a vote in there." (McCray, Tr. Day 11, p. 66).

F. The Commission Ignored the Revenue and Taxation Harm to Pennichuck Shareholders

While the Commission did consider the harm to customers of PEU and PAC in its analysis of Nashua's proposal, it ignored the real harm that Pennichuck Corporation shareholders will suffer from the Taking Order. For instance, the inevitable loss of PWSC's business from the shrinking of Pennichuck's operations will result in the loss of a substantial non-regulated source of profits, which directly harms its shareholder owners. (Correll Test., Ex. 3001, pp. 15-16). Furthermore, as set forth above, the taking of PWW assets is likely to trigger a substantial income tax liability at the corporate level, in addition to an eventual capital gain tax at the shareholder level, neither of which is contemplated in the valuation analysis, but which will significantly diminish any distribution the shareholders would ultimately receive for their shares as a result of the taking ordered by the Commission. (*Id.*, pp. 17-20).

As the Commission is aware, it is "the arbiter between the interests of the customer and the interests of the regulated utilities." RSA 363:17-a. As such it is required to consider the interests of shareholders in determining whether Nashua's proposal is in the public interest. *Appeal of Pinetree Power*, 152 N.H. 92, 100 (2005)(balancing of customer and utility interests

not only legally permitted but required).. The Commission has a long history of balancing the interests of customers and utility shareholders, and has held that "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 PSNH*, 90 NH PUC 542, 559 (2005).

Even Nashua acknowledged earlier in this case that the Commission must weigh the interests of Pennichuck's shareholders in determining whether the taking is in the public interest. ("Nashua urges the Commission to define the public interest broadly and review the interests of customers, ratepayers, the will of Nashua voters, PWW's shareholders, regional water supplies, and the effect on smaller systems that might be retained by the Pennichuck Utilities." Order No.24,425, p. 3.) Yet in the Taking Order, the Commission failed to even consider the interests of Pennichuck's shareholders. Its failure to do so was plain error.

G. Nashua's Changing Proposal

Pennichuck defended this case the only way it could, by responding to Nashua's original petition and its prefiled testimony. During the course of discovery, Pennichuck uncovered numerous public interest defects in Nashua's proposal. It retained expert witnesses, incurred significant expense and submitted extensive prefiled testimony countering Nashua's position. When confronted with the weight of Pennichuck's evidence leading up to and at the hearing, Nashua changed its proposal in significant ways, including extensive proposals to submit voluntarily to Commission jurisdiction, to serve satellite system customers at core rates, to alter its operating contract, to consolidate all customer service functions with Veolia and to create a mitigation fund for PAC and PEU. The Commission's conduct sanctioned Nashua's approach of

creating an ever-moving target. Each time Pennichuck shot a hole through the middle of Nashua's last proposal, the Commission allowed Nashua to reconfigure its taking proposal.

This occurred even at the last day of the hearing, when Nashua proposed numerous new conditions for the first time. The Commission summarized twelve new conditions proposed by Nashua in the Taking Order, pp. 49-50. The Commission then adopted most of those conditions in its order, stating that they "are explicitly determined to be prerequisites to our decision that the taking is in the public interest". (Taking Order, p. 98). None of those conditions was part of Nashua's proposal prior to the hearing, and Pennichuck therefore could not conduct discovery on or respond meaningfully to Nashua's post-hearing proposal, which the Commission ultimately chose to adopt in the Taking Order.

Permitting Nashua to alter its taking proposal after the fact and up through the last day of trial and including those changes in the Taking Order deprives PWW of its due process rights under Pt. 1, Art. 2 and 14 and Pt. 3, Art. 83 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution. "A fundamental requirement of the constitutional right to be heard is notice of the impending action that affords the party an opportunity to protect the [legally protected] interest through the presentation of objections and evidence." *Appeal of Concord Steam*, 130 N.H. 422, 427-28 (1988). See, K. Davis, Administrative Law Treatise § 14:11, at 50 (2d ed. 1980). It also runs directly contrary to longstanding civil procedure principles for the orderly disposition of disputes. See, *Keshishian v. CMC Radiologists*, 142 N.H. 168, 176 (1997) (late filed addition of claims should be denied).

H. The Commission's Conditions Made the Presumption Irrebuttable

The Commission imposed nine conditions in the Taking Order. (Taking Order, pp. 98-99). Those conditions include Nashua's creation of a $40 million mitigation fund for the benefit

of PEU and PAC customers, a requirement that service to customers outside of Nashua be maintained at the same rates as for Nashua customers, a requirement that Veolia handle all customer service functions, the creation of a technical advisory board, and a requirement for Commission approval of the final Veolia and R.W. Beck contracts. As the Commission stated, these conditions are "prerequisites to our decision that the taking is in the public interest." (Taking Order, p. 98). In other words, without these conditions, the Commission determined that Nashua's taking of PWW would *not* be in the public interest.

In effect, the Commission substantially altered Nashua's woefully inadequate proposal, transformed it into a very different structure, imposed costly new obligations upon Nashua, and then proclaimed that costly, changed structure would meet the public interest. Pennichuck in effect became a mere ombudsman, relegated to pointing out deficiencies in the proposed taking for Nashua and the Commission to remedy, rather than the property owner proving its case that Nashua's proposal clearly was contrary to the public interest. This transformed the Commission's RSA 38:11 authority to set conditions for a municipal taking into a mechanism that made it impossible for PWW ever to overcome the presumption of RSA 38:3. In so doing, the Commission badly overstepped its RSA 38:11 authority to impose conditions, using it to convert the statutory rebuttable presumption into one that was effectively irrebuttable. The Commission exceeded its quasi-judicial obligation to serve as a neutral arbiter of the public interest under RSA 38 and adjudicate the proposal before it. Instead, it performed as a super-legislature to enact (under the guise of imposing "conditions") a complicated ownership and operational scheme that then served as a basis for the Commission to determine that Nashua met its public interest requirements to take PWW assets. Surely the Legislature by adding the "condition" language to RSA 38:11 never conceived that the Commission would some day

become a dealmaker, cobbling together the terms for an acceptable municipalization proposal because the City proposing the taking had failed to do so itself.

I. Conditions Beyond the Commission's Authority

As discussed above, the Taking Order includes nine conditions that are "prerequisites" to its public interest finding. (Taking Order, pp. 98-99). Many of those conditions require the Commission to exercise ongoing regulatory authority over the new municipal utility that Nashua proposes to create. Specifically, the Commission, among other things, asserts that it will assure that customers of PWW outside of Nashua continue to receive the same rates, terms and conditions as Nashua customers. (Taking Order, pp. 59, 98); that it will continue to oversee service quality issues, *id.*, that it will continue to have oversight of PWW's wholesale contracts (Taking Order, pp. 60-61; 98); and that it will require Nashua's membership in DigSafe. (Taking Order, pp. 61-62, 99).

The Taking Order recognizes that RSA 362:4 exempts municipalities from utility regulation and that the Commission 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). Over the years, RSA 362:4 has been amended to lessen Commission oversight over municipal water operations, but even before that, the supreme court has made clear that the Commission's authority over municipal utilities is limited and thus, for example, it cannot force a municipality to increase its service territory. *Blair*, supra.

The Commission employs three rationalizations for its seizure of authority not granted to it by the Legislature. It somehow finds solace in the residual requirement that municipalities must obtain an upfront franchise to serve geographic territory outside of their boundaries (RSA

374:22); in its generic right to impose conditions on municipal taking of utilities (RSA 38:11); and in Nashua's stated willingness to accept voluntarily the assertion of expanded Commission jurisdiction.

The franchise territory requirements of RSA 374:22 and 26 are barebones, and in the case of privately owned utilities, are supplemented by ongoing Commission oversight. In the case of a municipal utility, once the franchise is granted, there is no ongoing Commission oversight of the municipality. The Commission's authority to regulate is gone once the franchise is granted, other than to the extent specified by statute, and is only restored when and if the franchise is transferred or revoked. Issuance of a franchise for a territory outside of Nashua certainly cannot trump the explicit municipal exemption in RSA 362:4 from ongoing regulation. Similarly, the Commission's authority under RSA 38:11 to impose conditions on a taking serves a limited purpose, and cannot be read to trump the explicit municipal exemption of RSA 362:4.

Finally, the Commission cannot expand its jurisdiction by Nashua's agreement, since its jurisdiction is limited to that granted by statute. *See, Appeal of Public Service Co., supra*; *Plaquemines Port, Harbor and Terminal Dist. v. Fed. Maritime Comm'n*, 838 F.2d 536, 542, n. 2 (D.C. Cir. 1988)(consent of parties cannot add to administrative agency jurisdiction); 2 Am Jur 2d Administrative Law § 283 (...deviations from an agency's statutorily established sphere of action cannot be upheld based upon an agreement, contract, or consent of the parties).

J. Conditions That Are Triggered After the Taking

Several of the "prerequisite" public interest conditions that the Commission has imposed upon Nashua will come into play only when the Taking Order becomes final, or thereafter. For instance, condition 8 requires Nashua to submit for approval its agreements with Veolia and R.W. Beck within sixty days after the Taking Order becomes final, condition 3 requires Nashua

to include in its Veolia agreement that Veolia will provide all customer service functions, condition 7 requires Nashua to create a $40 million mitigation fund to benefit PEU and PAC customers, and condition 9 requires Nashua to hire a PWW employee familiar with its facilities. (Taking Order, pp. 98-99).

In its argument that Nashua's proposed taking was not in the public interest, Pennichuck highlighted the inadequacy and changeability of the contractor agreements, the inadequacy of Nashua's planned bifurcated customer service structure, and the harm to PEU and PAC customers. The Commission agreed, and required changes to the agreements, review of their final content and creation of a $40 million mitigation fund, but Nashua's satisfaction of these conditions will not be reviewed and adjudicated until **after all PWW appeals have been exhausted**. (Taking Order, pp. 96, 99). This post-appellate review process, however, raises the issue of what protection Pennichuck and the public have if the Commission is faced with the reality of significant, but necessary, cost changes to those agreements in the latter proceeding such that it has an impact on rates and renders the taking no longer in the public interest? What if the $40 million mitigation fund is not adequate to yield the desired $3.4 million in annual revenue or is determined to be unworkable either because Nashua is legally unable to finance or establish such a fund? By the time the Commission finishes its review, Pennichuck's appeals will have ended and PWW's assets may well have been taken or, at a minimum, its appeal rights will have expired. Mr. Naylor testified on this very issue at the hearing, point outing that "if the Commission were to set conditions on approval, I don't now how the ... shareholders of the Company are put back into their original position, if the City subsequently was not meeting the conditions." (Naylor, Tr. Day 12, p.77). Yet the Commission failed to even consider this issue.

It is not overstating matters to say that this is a corporate death penalty case. But here, the Commission proposes continuing its review of public interest "prerequisites" after the sentence has been carried out. In other words, the Commission has turned several of its conditions precedent, i.e. "prerequisite" matters needed to find public interest, into conditions subsequent, evaluated after the taking has occurred. This placement of the cart before the horse – or more appropriately the placement of the gallows before the conviction -- is the very essence of the denial of due process to which PWW has a right under Pt. 1, Art. 2 and 14 and Pt. 3, Art. 83 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution. See, *Bianco, Merrill, Concord Steam*, supra.

K. The Commission Did Not Consider Nashua's Ability to Finance the Acquisition.

The Commission was required to find that Nashua has the financial, managerial and technical capability to acquire and operate the utility it proposes to take from PWW, yet the Commission completely bypassed the financial analysis at the $243 million acquisition cost it determined. The City presented no evidence whatsoever that it is capable of issuing bonds to finance such a purchase price. Rather, its case regarding its ability to issue bonds was based on the City's proposal and valuation. It presented no witnesses nor any documentary evidence that funding for the acquisition and any necessary additional costs was feasible at the acquisition cost ultimately determined by the Commission. As the Commission is well aware, the difficulty of financing such an acquisition has increased significantly since the hearing on the merits concluded eleven months ago. See, e.g., *Public Service Corp. of N.H.*, Order No. 24,845 (Dkt. DE 07-070 4/14/08). To that point, Nashua's financial advisor, Steven A. Adams, testified that the bond market is the most important factor in municipal financing. (Ex. 1004, p. 9). The lack of any Commission finding on this point constitutes clear error.

L. The Commission Understated Nashua Rates

The Commission considered the change in rates for PWW customers under Nashua ownership and found that the rates would be lower under Nashua ownership, a critical basis for its finding of public interest. In so doing, it relied upon Mr. Guastella's testimony that a $248.4 million price tag for PWW assets would likely generate a Nashua revenue requirement about the same as that for PWW.[3] The Commission then compared that amount with its valuation of PWW assets at $203 million and concluded that municipal ownership "would produce a rate advantage".

Leaving aside Pennichuck's criticisms, set forth in sections N-Q, *infra*, of the $203 million valuation amount, there are three problems with the Commission's rate comparison analysis. First, the correct comparison is not $203 million with $248.4 million. Rather it is $243 million because the cost to Nashua of the $40 million mitigation fund must be included That leaves a relatively small 2% difference. Second, Mr. Guastella's analysis did not include Nashua operating costs from certain conditions imposed by the Commission, such as $311,000 annually for Veolia to perform all customer service functions (Noran, Tr. Day 4, pp. 99-103), $100,000 annually for participation in DigSafe (Noran, Tr. Day 4, pp. 181-85), at least $200,000 more annually in Veolia's base fee because of the passage of time since the contracts were first proposed (*id.*), and significant unanticipated amounts for Commission regulatory requirements

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[3] In fact, the Commission stated that Mr. Guastella testified that "Nashua's revenue requirement would be lower than PWW's" (Taking Order at 56), when in fact Mr. Guastella testified that even under Nashua's assumed operating costs at $248 million acquisition cost would result in rates that "would be *insignificantly* lower than Pennichuck's" Tr., 9/18/07 at 81 (emphasis added) and that "there would be *essentially no significant difference* in terms of revenue under continued ownership by PWW or acquisition by the City of Nashua." Exh. 3010 at 10 (emphasis added).

(such as rate cases, financing approvals, and accounting). (*Id.*) Finally, Mr. Guastella's analysis did not reflect all of the additional costs that Veolia will pass on to Nashua as supplemental charges outside of its fixed annual fee. Ex. 1005B (Draft Veolia Agreement, Appendices E, G, H, and Q). Veolia admitted that its contract seeks to shift pricing risks onto Nashua. Ashcroft, Tr. Day 4, pp. 35-37. Mr. Sansoucy even assumed that operating expenses for Nashua would be $10,410,000 in 2008 (Ex. 1002, Exhibit GES-4), a million dollars more than Mr. Guastella's earlier projection. (Ex. 3016X, Sch. C).

When all of these cost increases are factored in, ratepayers in all of PWW's service territories face **higher rates** under Nashua ownership. On an objective basis, this public interest factor must weigh in favor of continued PWW ownership.

M. The Mitigation Fund

In its order, at Nashua's urging, the Commission latched onto the concept of a mitigation fund, finding that "the public interest requires as a condition of our approval that Nashua establish an appropriate mitigation fund." (Taking Order, p. 96). The stated purpose of the fund was to mitigate the "$3.4 million in additional annual revenue requirements [that] would be needed by PEU and PAC if Nashua takes PWW." (Taking Order p. 95). The Commission established the fund at the low end of the range of damage to PEU and PAC discussed by Mr. Guastella, based on an assumed capitalization rate of 8.5%, (Taking Order, p. 96), but deferred "the specific method for implementing this result as a compliance matter in this proceeding after the City makes a ratifying vote and all rehearings and appeals are exhausted." *Id.* Pennichuck agrees with the Commission that PEU and PAC customers would suffer harm that requires compensation in the event of a taking, and that theoretically a fixed principal fund not held by Nashua, maintained in perpetuity, and totaling at least $40 million, is critically important and

would serve as a remedy. But the Commission erred in assuming that it created a valid and enforceable remedy for those customers and, in stating that, such a hypothetical remedy fixed yet another defect in Nashua's proposal.

In ordering that the mitigation fund be created, the Commission incorrectly stated that "Pennichuck proposes the creation of a mitigation fund to protect customers of PEU and PAC from lost economies or synergies resulting from the taking." (Taking Order, p. 94). PWW never proposed such a fund and, in fact, Mr. Guastella testified that he had not considered what problems might be encountered if the Commission attempted to require such a fund. (Guastella, Tr. Day 10, pp. 149-52). Mr. Guastella's testimony merely attempted to quantify in present value terms the magnitude of the harm that would be imposed on PEU and PAC customers if PWW's assets were taken by eminent domain. At no time did he testify that a mitigation fund would be possible to create, nor was such a fund otherwise proposed by Pennichuck. This erroneous understanding of the testimony is significant because the Commission failed to consider numerous critical issues regarding establishment of a mitigation fund and whether its purpose could be accomplished, particularly at the $40 million level.

The Commission simply assumed, without considering any evidence on the issue, that the annual revenue stream of $3.4 million it intended to create can in fact be generated by a fixed principal fund of $40 million, yet there was no testimony that this would reasonably be possible. Instead, the only testimony on the necessary size of such a fund was from Mr. Guastella, who testified only that *if* $40 million were contributed to a fund and *if* the fund earned 8.5% annually (i.e. on a *net* basis), it would yield an annual income stream of $3.4 million. The Commission then wrongly took this hypothetical proposition and effectively converted it into a finding that such a result was possible. In doing so, the Commission failed to take evidence on any of these

issues, and thus did not consider any of the following significant impediments, among others, that would undermine the result the Commission sought to achieve:

- taxation of the initial contribution of $40 million to the mitigation fund would reduce the net contribution to approximately $24 million after taxes[4], in which case the annual earnings on the fund would be only approximately $2 million annually (at 8.5% pretax), rather than $3.4 million;

- to the extent that the annual income stream from the fund is taxable, then the fund would have to generate substantially greater gross revenue to net 8.5%;

- a post-taxation 8.5% rate of return is highly unlikely to be achieved by any fund of investments appropriate for the Commission's stated purpose;

- Nashua may lack the legal authority to issue bonds for the purpose of creating a fund that earns a yield materially higher than the interest rate that the bonds themselves bear (sometimes referred to as arbitrage) or that will benefit customers of privately owned water systems that are located outside Nashua and that it does not serve.

N. The Commission Relied Upon Significant Information Outside of the Record

In the public interest and valuation portion of its order, the Commission used a number of documents outside of the record of this proceeding. It found that a water supply contract between Nashua and the Town of Milford filed with the Commission on February 22, 2008 "strengthened" Nashua's public interest case. (Taking Order, p. 61). In its asset approach analysis, it used adjustments for additions and retirements of assets and accumulated depreciation reserves for 2006, 2007 and 2008 based upon PWW's annual reports for 2006 and 2007. (Taking Order, p. 89).

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[4] As noted in Mr. Correll's prefiled testimony, Pennichuck's effective income tax rate is approximately 39%. (Ex. 3001 at 20).

While Pennichuck agrees that a valuation update is appropriate, the Commission's self help approach created more problems than it solved. Relying upon materials outside of the record of this proceeding creates easily avoidable error (such as the Commission's apparent failure to include certain readily ascertainable new assets in the update). It also is a due process violation of the most basic nature (see, *Appeal of Public Service Co. of N.H.* 122 N.H. at 1072-73,) and flies in the face of the Commission's own rules, which govern the use of materials from other proceedings. N.H. Code of Admin. Rules Puc 203.27(b) requires the Commission to give notice of its intent to use such materials, and Puc 203.27(c) affords parties the opportunity to contest their use. In fact, Nashua and Pennichuck considered submitting for administrative notice different materials from other proceedings, but the Commission refused to admit them into the record. (Secretarial Letter Order, September 17, 2007). It appears that the Commission ignored that order, reviewed material outside of the record, and used them to craft the Taking Order. That constitutes clear error.

O. The Commission Failed to Explain the Numbers in Its Valuation Order

While the Commission discussed its valuation methodology, it did not provide a roadmap to enable the parties to review how it applied its methodology to reach its conclusion. Absent a showing of the Commission's calculations whereby it reached its result, neither the parties nor a reviewing court can properly analyze the valuation portion of the Taking Order to determine if the Commission properly implemented the valuation methodology it purported to adopt. *Appeal of Newington, supra*; RSA 363:17-b.

P. The Commission Failed to Include a 2 Percent Growth Rate in Its Capitalization Rates

Both in its asset approach and income approach analysis of valuation, the Commission refused to apply a modest 2% long term growth factor to the applicable capitalization rate.

(Taking Order, pp. 88-89, 91-92). Mr. Reilly stated in his report and at the hearing that a growth factor is a regular component of the income approach capitalization rate (or its negative in the calculation of economic obsolescence under the asset approach). (Ex. 3007A, p. 35, 39; Reilly, Tr. Day 8, pp. 98-110). In fact, Mr. Reilly conservatively assumed no growth in customers or volume of water sold. He only assumed that, over time, PWW revenues and costs would each increase at a modest rate per annum such that the difference between them – income – would grow by a modest 2%. Nashua argued that there would be no growth in PWW's customers or sales over time, and Mr. Reilly did not dispute that in his testimony. But Nashua did not grasp the mathematical fact that, when revenues grow at a rate at least equal to the growth rate in expenses, income, by definition, also grows. As a regulated utility, PWW has a right to recover reasonable expense increases and, additionally, provided its average per annum capital spending exceeds its per annum depreciation expense, its rate base and the resulting net income generated from this increasing rate base will also increase over time. Especially in light of the fact that expense increases are recoverable dollar-for-dollar through rate case filings, an assumption that capital spending will exceed depreciation by an amount that will cause "income" to grow at an average rate of 2% is very reasonable and conservative. The Commission itself seemed to acknowledge the need to account for growth when it applied a 5% growth factor to update its income approach valuation from 2005 to 2008. (Taking Order, p. 93).

The consequence of not including the 2% long term growth factor in both the asset and income valuation calculations is significant. Pennichuck estimates the adverse effect on PWW's valuation as of December 31, 2005 to have been approximately $92.7 million. This amount should be added back to PWW's valuation as of that date.

Q. The Update of PWW's Value Is Based Upon Incomplete Information and Is Difficult to Evaluate

Apart from using information outside of the record in this proceeding, the information the Commission used to bring forward PWW's valuation from December 31, 2005 (the amended agreed date in the procedural schedule) to December 31, 2008 is incomplete and impossible to evaluate. (Taking Order, pp. 89, 92-93).

For instance, Pennichuck cannot determine whether the Commission provided an accurate mechanism to compensate PWW properly for capital additions made up until the date of taking. To compound matters, the Commission did not show what data it used to calculate its update, which makes it impossible for review by parties to this proceeding, let alone an appellate court. *See, Appeal of Newington, supra.* The Commission could have avoided these errors had it called for supplemental filings for the Commission to consider in its update of the initial order to the date of the taking. In summary, Pennichuck questions the methodologies employed and reserves its right to appeal the update amount and the methods by which they were determined.

R. Pennichuck is Entitled to a Jury Trial on Damages

As the Commission noted at Taking Order, p. 6, the superior court (Hillsborough South No. 04-E-0062) on August 31, 2004 ruled that it was not then ripe to determine whether Pennichuck is entitled to a jury trial on damages. That question would become ripe only after the Commission found public interest and made its award of damages.

Now that the superior court's ripeness criteria have been met, Pennichuck has been denied its equal protection constitutional right to a jury trial on damages. *See, e.g.*, N.H. CONST., pt. 1, arts. 2,12,14; *Gazzola v. Clements*, 120 N.H. 25, 29 (1980); *White Mountain Power Co. v. Maine Central RR*, 106 N.H. 443, 445 (1965). The owners of other public utility

assets facing eminent domain taking (RSA 371:10) and the owners of all other property subject to condemnation processes in New Hampshire (RSA 498-A:9) enjoy this right. The absence of this right makes the valuation process set forth in RSA 38 unconstitutional on equal protection grounds.

III. CONCLUSION

For the reasons set forth above, Pennichuck respectfully requests that the Commission rehear, including an oral argument, and reconsider the Taking Order as set forth above.

Respectfully submitted,

Pennichuck Water Works, Inc.
Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Service Corporation
Pennichuck Corporation

By Their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: August 22, 2008

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2008, a copy of the foregoing Motion For Reconsideration And/Or Rehearing Regarding Order No. 24,878 has been forwarded by electronic mail to the parties listed on the Commission's service list in this docket.

_____
Steven V. Camerino

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

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

DW 04-048

OBJECTION TO PENNICHUCK'S MOTION FOR RECONSIDERATION

NOW COMES the City of Nashua ("Nashua") and objects to Pennichuck Water Works, Inc.'s *Motion for Reconsideration and/or Rehearing Regarding Order No. 24,878*, and in support thereof states as follows:

I. INTRODUCTION

Pennichuck Water Works and its affiliates allege eighteen (18) reasons for which it argues reconsideration and/or rehearing is necessary. Nashua asserts that none of the alleged grounds were the result of Commission error. Each of the eighteen "errors" is addressed in turn.

II. ARGUMENT

A. PENNICHUCK'S ARGUMENT THAT THE COMMISSION FAILED TO APPLY THE PUBLIC INTEREST STANDARD IGNORES THE COMMISSION'S COMPREHENSIVE ANALYSIS

Pennichuck essentially asserts that the Commission should disregard the express provisions of RSA 38:3 establishing a rebuttable presumption in this proceeding and instead weigh all public benefits of the proposed taking against all burdens and social costs. This argument is not new and was featured in its Post Hearing Brief.[1]

In making this argument, Pennichuck asks the Commission to re-write RSA 38 for its own benefit, so that it may escape its own failure to meet its burden under RSA 38:3 to rebut with credible evidence the presumption of public interest in the first

[1] Post Hearing Brief of the Pennichuck Companies, Pages 2-6.

instance. The Commission's decision makes clear that Pennichuck failed to do this. Section V (A) of the Commission's order shows that it understood and considered all of Pennichuck's arguments,[2] and it specifically reviewed and rejected many in Section V (G) that merited specific mention, including Pennichuck's arguments concerning its record as utility,[3] work force implications,[4] Nashua's model for oversight and operations contractors,[5] customer service and billings and collections practices,[6] the nature of elected municipal officials,[7] the status of Nashua's operations and oversight contracts,[8] rates,[9] and many other issues discussed throughout its decision such as the mitigation fund requirement.

The Commission found none of these arguments or other arguments presented to be sufficiently persuasive to rebut the presumption of public interest.[10] For example, with regard to Nashua's plan to contract operations to Veolia Water, the Commission found that, contrary to Pennichuck's arguments, "the proposed arrangements are reasonably calculated to lead to an effective operation of the PWW system."[11]

The Commission also heard evidence concerning problems with Pennichuck's operations and ways in which Nashua would improve service consistent with the public interest. For example, Nashua presented evidence concerning the considerable experience and expertise its contractors would bring to the operation of its water

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[2] Order No. 24,878, Pages 27-35.
[3] Page 51.
[4] Page 52.
[5] Page 53.
[6] Page 53.
[7] Page 55.
[8] Pages 55-56.
[9] Pages 56-57.
[10] Page 63.
[11] Page 53.

system,[12] relative to that of a smaller investor owned utility like Pennichuck,[13] the impact of Pennichuck's tremendous overhead on operating costs,[14] its cost over-runs,[15] its failure to implement CMMS as a cost management system,[16] its violation of drinking water standards,[17] and its rates.[18] The Commission received substantial evidence concerning the advantages that Nashua's public-private partnership would bring in the areas of operations, local control, rate savings and other areas.[19]

The Commission declined to rule on this evidence presented by Nashua because it found that the presumption of the public interest had not been rebutted.[20] Thus, it seems clear that even if the Commission were to apply a different standard, and specifically weigh each argument against another, the outcome would be any different.

Under RSA 38:3, Nashua was entitled to a rebuttable presumption that the acquisition was in the public interest. Unfortunately for Pennichuck and devastating to its argument, the Commission found that following a review of the record neither Pennichuck nor any other party had rebutted the RSA 38:3 presumption that the acquisition was in the public interest.[21] Once such a finding was made the balancing test advanced by Pennichuck was unnecessary and would likely produce the same result under a different name. However, because the Commission's decision is both comprehensive and consistent with the requirements of RSA 38, reconsideration or rehearing is unnecessary.

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[12] Page 44.
[13] Page 44.
[14] Page 45.
[15] Page 45.
[16] Page 45.
[17] Page 46.
[18] Page 47.
[19] Ibid at Pages 50-63.
[20] Page 57.
[21] Order No. 24,878, Page 50.

B. THE COMMISSION CORRECTLY DETERMINED THAT THE PUBLIC INTEREST REQUIRED NASHUA TO ACQUIRE ALL OF PENNICHUCK WATER WORKS UNDER RSA 38:9

Pennichuck argues that Nashua cannot lawfully acquire satellite systems that are not connected to the Nashua core. However, the scope of RSA 38 as it applies to Pennichuck Water Works is not subject to serious debate or doubt. RSA 38:2, I, by its express terms authorizes Nashua to "take ... one or more suitable plants for the manufacture and distribution of ... water for municipal use, for the use of its inhabitants *and others*, and for such other purposes as may be permitted, authorized, or directed by the commission." (emphasis added). RSA 38:9, I, again by its express terms, requires that the Commission determine "how much, if any, of the plant and property lying within or without the municipality the public interest requires the municipality to purchase".

Order No. 24,425 made clear that this was to be a central issue in this case. Nashua sought all of Pennichuck Water Works assets because it believed that the public interest was best served for all existing customers to be served by one system under a unified rate structure. The Commission agreed.[22]

Pennichuck appears to have chosen an "all or nothing" strategy in this proceeding and did not present any evidence that the public interest would be better served by having the existing satellite customers removed from Pennichuck Water Works utility. It has not presented any evidence to the contrary, and neither the record in this proceeding nor the law supports its argument.

However, the Commission should pause to consider Pennichuck's argument that Nashua cannot lawfully acquire satellite systems because it stands in contrast to the arguments it made concerning the Reilly municipal buyer hypothesis. In effect,

[22] Order No. 24,878, Pages 57-60.

Pennichuck now argues that not even Nashua has the legal authority to acquire water systems outside its borders, let alone any other New Hampshire municipality.

This argument is unfounded, but it does highlight the extent to which Pennichuck overstated its municipal buyer hypothesis to this Commission. As set forth in Nashua's August 25, 2008, *Motion for Rehearing*, New Hampshire law requires that there be a public purpose reasonably related to serving its inhabitants of a municipality (RSA 31:3) or others (RSA 38). In Nashua's case, the public purpose is achieved by allowing Nashua to serve its inhabitants and others as part of a unified rate structure that will treat customers both inside and outside the City equally. *cf.* RSA 362:4, III-a.

To argue that Nashua cannot lawfully acquire the existing satellites is to admit that the municipal buyer hypothesis has no foundation in New Hampshire law, which as set forth in Nashua's *Motion for Rehearing*, does not distinguish between acquisition by taking or by consensual purchase.

C. PENNICHUCK ITSELF ADVOCATED FOR THE SEPARATE PUBLIC INTEREST ANALYSES IT NOW CLAIMS TO BE IN ERR

Pennichuck now seeks to assign error to the Commission's separate analysis of the public interest standard as it applies outside of Nashua, thevery result it advocated to the Commission in this proceeding. Pennichuck first made such an argument as early as its September 6, 2005 *Motion for Summary Judgment*, in which Pennichuck argued that Nashua was not entitled to presumption of public interest for assets located outside of Nashua. In its own words, Pennichuck urged the Commission:

> "Nashua may also claim that the rebuttable presumption in RSA 38:3 provides it with some shelter from the requirement of proving its capability to operate a water utility. But that is not the case. *RSA 38:3 provides a rebuttable presumption that the taking of the system in Nashua is in the public interest, not a rebuttable presumption that a franchise*

should be granted to the municipality to provide utility service to Merrimack, Amherst, and other surrounding towns."[23]

Pennichuck urged the Commission to conduct the same two part analysis in Section III (A)(3) of its December 15, 2006, *Opening Statement and Trial Memorandum*. It cannot now argue that it was legal error to adopt the very result it advocated to the Commission.

Pennichuck's legal flip flop may be permissible advocacy. However, that advocacy comes with certain risks. Pennichuck cannot claim legal error for the very result it advocated, over Nashua's objection. The Commission should rebuke Pennichuck's invitation to find error in an approach it advocated to the Commission.

Moreover, the error for which Pennichuck complains, if Pennichuck's argument that there is no rebuttable presumption for franchises outside of Nashua, is one that is more appropriately directed to the legislature, not to the Commission. The Commission has largely done what RSA 38 requires. Any complaint that it should have evaluated the public interest differently should be made to the New Hampshire

D. PENNICHUCK'S ARGUMENT THAT NASHUA HAS NOT FOLLOWED THE VOTING REQUIREMENTS OF RSA 38:3 IGNORES THE PLAIN LANGUAGE OF THE STATUTE.

Pennichuck's argument regarding the votes taken by Nashua have already been considered and acted upon by the Commisison.[24] It is enough to say that they ignore the plain language of RSA 38:2, followed by Nashua and its attorneys, that a municipality may establish a plant for the distribution of water "for the use of its inhabitants and others". Not only did Nashua clearly contemplate the purchase of PWW assets outside Nashua, but also the assets of PEU and PAC. As is apparent from the attachments to

[23] Pennichuck Water Works' September 6, 2005 Motion for Summary Judgment, Page 8, Paragraph 14.
[24] Order No. 24,425; Order No. 24,448.

Nashua's memorandum of Law dated October 21, 2004, the public was clearly warned of Nashua's intent prior to its confirming vote on January 14, 2003.

The suggestion that the Commission erred by not previously ruling that Nashua's votes did not inform residents that it would use eminent domain is unfounded. There is no requirement in RSA 38 to give such a notice. Nashua fully warned its residents that it was acting under RSA 38. In addition, as in the taking of property outside Nashua, the attachments to Nashua's October 21, 2004 memorandum clearly demonstrate that if Pennichuck did not willingly sell the assets the City could petition the PUC to take them.

Pennichuck's argument also ignores the fact that the vote taken by Nashua was a direct result of the company's proposed sale to Philadelphia Suburban. As set forth in Exhibit 1001, Pages 2-3, that proposed sale received substantial attention and it was widely understood that Nashua sought to acquire Pennichuck in order to preserve local control by acquiring the company. Whether the words "eminent domain" or others should have been employed is ultimately a political question to be answered by the legislature or in the ballot box. As the Commission has already determined, Nashua met the necessary requirements under RSA 38 and there is no evidence to suggest the contrary.

E. PENNICHUCK'S ARGUMENT THAT THE COMMISSION FAILED TO CONSIDER THE BROADER PUBLIC IS NOT SUPPORTED BY THE RECORD

Pennichuck argues that the Commission overlooked evidence that it is a well run utility. However, Pennichuck overstates its case. Nashua concedes that there is some testimony that the employees performing work in the field do their job reasonably well. The same can hardly be said of its management, however, which represent an enormous

overhead expense with 4 or 5 of its officers making the same combined salary as its 44 to 45 employees performing actual maintenance work[25] and which failed to deliver projects such as its water treatment plant and CMMS system on-time and on-budget.[26] *See also* Section II (A), herein.

It is true that it is in the very nature of an investor owned utility to seek to expand its revenues wherever possible. However, it is also true that such incentives come at a cost as it is not always possible by regulation to curb a regulated utilities thirst for a "feeding frenzy at the public trough" as the Nashua Telegraph so aptly described Pennichuck's management practices that ultimately led to its chief executive officer being removed for securities fraud.[27] As discussed in Nashua's brief, there was also evidence of violation of drinking water standards.

The Commission also considered evidence that Nashua's partnership with Veolia Water "will also reduce substantially the overhead that PWW customers currently pay for services that are not related to the actual operation of the water system"[28] and that "if Veolia fails to live up to its service commitments, it can be replaced as contractor in a competitive marketplace, whereas utility customers are not similarly free to replace their utility."[29]

This and other evidence considered by the Commission was extensive. It was not the Commission's role, however, to rule on each and every assertion made, whether by Nashua or Pennichuck, but rather a far more nuanced question, as the Commission recognized, created by the express provisions of RSA 38, as to whether circumstances

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[25] Transcript, September 13, 2007, Page 126.
[26] Order No. 24,878, Page 45.
[27] Exhibit 1121.
[28] Order No. 24,878, Page 45.
[29] Order No. 24,878, Page 46.

exist such that the legislative presumption that municipal ownership of water utilities itself promotes the public good must itself be rebutted.

Nashua notes that any party in this proceeding could have requested the opportunity to present findings of fact and rulings of law to the Commission. Pennichuck failed to request such rulings and it cannot now argue that it was the Commission's legal responsibility to rule on each and every piece of evidence presented. So the question is not whether each and every fact presented by Pennichuck was thoroughly and individually analyzed against all of the benefits presented by Nashua, which were many, but whether Pennichuck presented evidence that showed on the whole, viewed through the Commission's own expertise as a regulator of both municipal and investor owned utilities, that the presumption in favor of the public interest had been rebutted.

Finally, Pennichuck argues that the Commission failed to consider broader political interests of other municipalities. In Nashua's own *Motion for Rehearing*, Nashua notes that both Bedford and Amherst, the two largest communities in terms of number of customers, support Nashua's petition, as do many other communities. However, the argument that the Commission should tally the votes of other communities is really an argument to be made to the legislature, and not within the confines of the public interest standard.

F. PENNICHUCK'S ARGUMENT THAT THE COMMISSION FAILED TO CONSIDER HARM TO ITS SHAREHOLDERS IS NOT SUPPORTED BY THE RECORD AND IGNORES THE IMPACT OF THE COMMISSION'S DETERMINATION OF VALUE.

Pennichuck argues that harm to its shareholders should have been considered in the balancing test it performed.[30] However, the sole evidence Pennichuck cites in support

[30] Pennichuck Motion For Reconsideration, Pages 13-14.

of its argument is the testimony of Donald Correll[31] which was not sufficient to rebut the presumption. Mr. Correll alleges that the harm would be substantial, and as much as "many tens of millions of dollars" but does not provide any precise evidence or calculations. Under the circumstances, the Commission correctly concluded that this evidence was not sufficient to rebut the presumption of public interest.

The Commission noted in other contexts, "[t]he source of this impact, according to Pennichuck, would be the constitutional requirement for Nashua to pay the fair market value for PWW assets, as opposed to the book value (i.e., depreciated original cost value) that is currently the basis for PWW's rates."[32] Thus, the harm of taxation of which Pennichuck complains is the result of it receiving fair market value for its assets at a premium that greatly exceeds the value of their regulatory earning potential for the shareholders. Indeed even the value arrived at by Commissioner Below in his dissent includes such a premium over the value of the earnings to the company's shareholders or stock to overcome any potential harm to shareholders.

Pennichuck's argument is in effect an argument that it should be entitled to more than just compensation or fair market value of Pennichuck Water Works. The legislature could have chosen to impose such a requirement in RSA 38 but it did not elect to do so. Even if it had, it seems unlikely that Pennichuck's vague allegations of substantial harm or "many tens of millions" without any supporting calculations or testimony are hardly sufficient to support its claim of error. The Commission should decline Pennichuck's invitation to create such a standard in this proceeding that the legislature chose not to enact, and that is not adequately supported in the record.

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[31] Exhibit 3001, Pages 17, 18, 20, 21.
[32] Order No. 24,878, Page 31.

G. THE COMMISSION DID NOT ERR BY REFUSING TO PREVENT NASHUA FROM REFINING ITS PROPOSAL AND THE COMMISSIONS DECISION IS CONSISTENT WITH RSA 38 AND DUE PROCESS.

Pennichuck argues that the Commission erred by not requiring Nashua to freeze its proposal in time the moment it was filed. Such an approach would have greatly benefitted Pennichuck because it could have spent the last four or more years building a case against Nashua while it could only wait. However, there is no basis for Pennichuck's argument.

This argument was conclusively put to rest in Nashua's December 15, 2006 pre-hearing *Memorandum in Support of Petition for Valuation*, in which Nashua explained in detail that RSA 38:2 allows Nashua to *establish* a water system by filing a petition to the Commission. Pennichuck's argument that the Commission should preclude Nashua from moving forward with its proposal during the years in which this proceeding has continued would have had the practical effect of denying Nashua the opportunity to do what the statute expressly allows. Pennichuck's complaint that Nashua proposed conditions is also one that runs contrary to RSA 38:11 which expressly provides the Commission with that authority.

Even assuming that Nashua's proposal changed over time, the record does not support Pennichuck's claim that those changes in any way violated Pennichuck's right to due process or substantive rights. Each round of testimony in this proceeding was subject to extensive discovery. As noted in Nashua's July 31, 2006 *Objection to Motion to Compel*, parties submitted over 651 data requests to the City concerning its proposal. There were multiple rounds of testimony from both the City and the Company, depositions of multiple City witnesses, staff, and experts, and opportunities for updates,

rebuttals, continuances. The Commission itself described discovery in this proceeding as "encyclopedic" and it is hard to imagine another proceeding in which procedural due process was given greater weight.

It is ironic that Pennichuck's counsel in this proceeding would make such an argument, as during the same period in which this case was proceeding, counsel for Pennichuck Water Works represented the petitioner in Docket No. DT07-11, *Verizon New England Inc.*, and proposed substantial changes to its proposal in a proceeding operating on a procedural schedule of far greater compression, in a case of no less importance.[33] As the Commission's noted in reviewing those changes, made after the Commission's hearings on the merits, "fundamental aspects of the transaction as presented in New Hampshire have changed" and that "[t]hese changes are positive and ultimately outcome-determinative."[34] Such changes are an inevitable result of the requirement that the Commission evaluate petitions before it and impose conditions to satisfy the public interest. RSA 38:11 expressly allows for this and Pennichuck cannot claim surprise or that its procedural or substantive rights were violated in any way.

H. THE COMMISSION PROPERLY EXERCISED ITS AUTHORITY TO IMPOSE CONDITIONS ON NASHUA'S PROPOSAL

Since long before this proceeding commenced, RSA 38:11 has allowed the Commission to "set conditions and issue orders to satisfy the public interest." The conditions proposed by Nashua were the subject of much discovery and have been known to Pennichuck since at least 2005 when they were first proposed in responses to data requests and later incorporated into testimony and exhibits.[35] As discussed in the May

[33] Order No. 24,823.
[34] Order No. 24,823, Pages 87; see also Pages 20-37 (seventeen pages describing changes to the proposal).
[35] See e.g., Exhibit 1014.

22, 2006 pre-filed *Testimony of Mayor Streeter et al.*, these included conditions to protect customers in other municipalities,[36] retail and wholesale customers,[37] transfer of franchises to the Regional Water District,[38] terms and conditions of service under its water ordinance,[39] customers in satellite systems.[40] There are numerous other examples, both in exhibits offered to the Commission,[41] and in responses to data requests that were not admitted as exhibits in this proceeding but were provided to Pennichuck and other parties under Rule Puc 203.09.

Thus, Pennichuck has been keenly aware of both the fact that the statute authorizes conditions and the nature and substance of the Commissions that Nashua had proposed. It has had the opportunity to conduct discovery under the procedural schedule, cross-examination,[42] and file detailed briefs and arguments in that regard. Thus, Pennichuck cannot complain that it had no opportunity to evaluate the conditions proposed to the Commission. It can only complain that the Commission used conditions effectively to achieve their intended result, furtherance of the public interest as contemplated by RSA 38:11.

Pennichuck's attempts to mischaracterize Nashua's proposal as inadequate, are simply not reflected by the evidence in this proceeding, and do not merit further response.

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[36] See e.g., Exhibit 1014, Pages 15 (16) to 16 (17).
[37] See e.g., Exhibit 1014, Page 23.
[38] See Exhibit MBS Exhibit 4 attached to Exhibit 1014.
[39] See Exhibit 1016, Pages 19-20.
[40] See Exhibit 1016, Page 20.
[41] See e.g., Exhibit 1026, Pages 1, 2, 19.
[42] See e.g., Transcript, January 10, 2007, Pages 145 & 151; January 11, 2007, Pages 60-61 & 64-65.

I. CONDITIONS IMPOSED BY THE COMMISSION ARE ENFORCEABLE AS A MATTER OF LAW AND WERE USED TO PROMOTE THE PUBLIC INTEREST UNDER RSA 38.

Pennichuck's argument concerning an alleged lack of authority to enforce its conditions has been fairly and adequately addressed by the Commission in its Order. Nashua further incorporates by reference its December 15, 2006,[43] and November 16, 2007,[44] *Memorandum in Support of Petition for Valuation*, which further explains the legal basis for the Commission to impose such conditions.

Pennichuck appears unable to grasp that RSA 38:11 is a specific grant of legislative authority that is not constrained by whether or not Nashua is a public utility. Even assuming for the sake of argument, that Commission lacks authority over municipal utilities as public utilities, the Commission has a specific grant of authority and indeed, jurisdiction, over municipalities under RSA 38:11. In addition, many of the conditions fall well within the Commission's inherent authority to regulate the terms and conditions of service within franchises outside Nashua's borders under RSA 374 and as provided by RSA 362:4, III-a.

As noted above, Pennichuck's attempts to mischaracterize Nashua's proposal as inadequate, are simply not reflected by the evidence in this proceeding, and do not merit further response.

J. IT IS IMMATERIAL WHETHER PENNICHUCK WILL BE UNABLE TO CHALLENGE CONDITIONS IMPOSED UNDER RSA 38:11 AT A LATER DATE.

Pennichuck challenges the Commission's decision because it argues that it will have no authority to adjudicate compliance after the Commission's decision becomes

[43] See, e.g., Pages 9-10.
[44] See, e.g. Pages 2-7.

final. However, the Commission has its own statutory and inherent powers to enforce its orders and the conditions imposed in this proceeding. As set forth above, the Commission has imposed its conditions in a manner that is lawful and reasonable under RSA 38:11. It retains the authority to enforce them on its own initiative, or upon complaint under RSA 365. Nothing further is required.

K. THE ARGUMENT THAT THE COMMISSION DID NOT CONSIDER WHETHER NASHUA COULD FINANCE THE ACQUISITION UNDER CURRENT CONDITIONS IN THE FINANCIAL MARKETS AND ON THE TERMS IN ORDER NO. 24,878 IS A RED HERRING

Although Nashua presented prefiled testimony from Brian McCarthy, then President of the Board of Aldermen and Steven Adams, Senior Vice President of First Southwest Company, the City's financial advisor that Nashua had the financial capability to own and operate a water utility[45] and that there were many financing options under which Nashua could successfully market its acquisition bonds[46] and made available for cross-examination Carol Anderson, its financial officer, Pennichuck made no effort to inquire of these knowledgeable witnesses concerning Nashua's ability to acquire the assets at a higher price and different market conditions. It did not even require Steven Adams to be presented for cross examination.

Nashua's financial capability to own the assets has been established and not challenged. The ultimate financial determination will be made by Nashua when the Board of Aldermen decide whether or not to acquire the Pennichuck property at a price of $203 million by a vote to issue bonds. Until then, Nashua is entitled to the well supported finding that it has the requisite financial capability.

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[45] Exhibit 1001, Page 11, 12.
[46] Exhibit 1004, Pages 3-10.

L. PENNICHUCK'S ARGUMENT THAT THE COMMISSION FAILED TO ACCOUNT FOR THE $40 MILLION MITIGATION FUND IN ITS RATE ANALYSIS SIMPLY PROVES NASHUA CASE

It is ironic that Pennichuck argues that Nashua's rates would be higher, when substantial evidence points to the fact that Pennichuck has some of the highest rates in the State of New Hampshire for a similarly sized utility. The Commission, however, has considerable experience in the area of utility rates and accepted both the rate comparison's produced by Nashua at Exhibit 1015, and the acknowledgement by Pennichuck's own experts that Nashua's rates would be lower.

Even assuming for the sake of argument that the difference between Nashua's ownership at a combined costs of $243 million versus the $248 million price at which there would still be savings is "relatively small" as Pennichuck argues, its own argument still shows that savings would result. This can hardly be said to rebut the presumption of public interest.

In addition, Pennichuck's witnesses such as Donald Ware and Donald Correll both testified that Pennichuck would likely reorganize or sell its remaining utility assets to a larger investor owned utility. As discussed in Nashua's August 25, 2008 *Motion for Rehearing*, this could potentially eliminate the need for the mitigation fund entirely. Nashua has requested clarification that the mitigation fund may in fact be reduced in the event that it is shown to be no longer necessary. Such clarification, as seems likely to be granted, would demonstrate that savings would likely be substantial.

Rate savings are but one of many benefits of municipal ownership which is itself entitled to a rebuttable presumption of the public interest. Pennichuck's argument that rate savings may be as little as 2% does nothing to rebut that presumption. There are

other tangible benefits that the Commission noted. For example, Nashua submitted evidence of Veolia Water's experience delivering capital projects on-time and on-budget, compared to Pennichuck's experience, for example, constructing a water treatment plant "originally represented to the Commission in 2002 as a project of $6 million to $14 million [that] had become a project in excess of $40 million by 2006, not including AFUDC (allowance for funds used in construction, a recoverable expense for ratemaking purposes)".[47]

In a case of this magnitude, it can always be argued that some issue has not received the attention it deserved, or that an issue presented at hearings may not have been fully discussed in detail. However, agencies are permitted under RSA 541-A to rely on their own expertise. To require agencies to reproduce detailed calculations of savings would ultimately make their decisions unreasonably difficult. In this case, Pennichuck was charged with the role of rebutting a presumption of public interest. Its argument that savings to customers under municipal ownership would only be 2% does little to help its case.

M. PENNICHUCK'S ARGUMENTS CONCERNING THE MITIGATION FUND DO NOT ADVANCE ITS CASE

Pennichuck argues that the Commission did not consider tax consequences of establishing a mitigation fund and whether Nashua had legal authority to establish such a fund. These questions are not relevant to the Commission's decision and do not rise to the level of legal error. Under RSA 38:13, Nashua is required to ratify the Commission's decision which, subject to pending requests for clarification, appears to require that a mitigation fund be established either as part of ratification, or at a later compliance date.

[47] Order No. 24,878, Page 45.

The Commission does not need to adjudicate in this proceeding whether Nashua in fact has the legal authority to establish such a fund. Those questions can be resolved appropriately in evaluating whether to ratify the decision, as may be clarified by the Commission. Moreover, there is no evidence or legal basis to support Pennichuck's remaining arguments concerning the mitigation fund.

N. THE COMMISSION DID NOT ERR BY CONSIDERING THE WATER SUPPLY AGREEMENT BETWEEN NASHUA AND MILFORD OR PWW'S 2006 AND 2007 ANNUAL REPORTS TO THE COMMISSION

Pennichuck assigns error to consideration of a Water Supply Agreement between Nashua and Milford filed with the Commission on February 22, 2008 under a joint motion for approval to which both Pennichuck and Staff objected at length. In its discussion of Wholesale Contracts and their impact on the public interest, the Commission approved the agreement and incorporated its terms as part of its condition under RSA 38:11 subjecting Nashua to the same oversight as Pennichuck with respect to wholesale contracts.[48]

Because the agreement was submitted in a motion seeking approval, Pennichuck was able to fully contest its use by the Commission in the same manner afforded by Puc. 203.27. By approving the agreement the Commission effectively overruled their objections to its use in the same manner it would have under Puc 203.27.

The Commission used the 2006 and 2007 Annual Reports filed with it by PWW to update its valuation analysis from 2005 to year-end 2008. There can be little doubt that if the commission had given notice of its intent to use the PWW annual reports that

[48] Order 24,878, Pages 60, 61.

Pennichuck would not have contested their use. All the relevant PWW Annual Reports available at the time of trial were made exhibits[49] without objection.

It is fundamental to the scheme of RSA 38 that the Commission determine if an acquisition is in the public interest and set the price and it is "uniquely qualified to make such a determination because of its experience and specialized knowledge."[50] Pennichuck would have the Commission exercise its specialized knowledge and expertise but not permit it to use the tools available to it. In Pennichuck's world substance would always be subordinated to form.

O. THE COMMISSION ADEQUATELY EXPLAINED THE CALCULATIONS IT EMPLOYED TO VALUE PENNICHUCK'S ASSETS AS OF DECEMBER 31, 2008

Pennichuck complains that the Commission failed to explain the numbers in Order No. 24,878. Although Nashua takes exception to the theory that produced the numbers, the methodology and calculations performed by the Commission were apparent.[51] In fact the explanations used by the Commission were clearer than those employed by Reilly to explain his income method.[52]

The Commission told the parties its method, the source of its figures, the date of its valuation and the results of its calculation.

Pennichuck's reliance on Appeal of Newington, 149 NH 347 (2003) is misplaced. In Newington DES arbitrarily reduced a pollution exemption for a stack from 100% to 50% when there was no evidence in the record to support the reduction. The reduction of

[49] See Exhibits 1069A, 1069B and 1070.
[50] Pennichuck Corporation et al v. Nashua, NH Superior Court No. 04_E-0062, Order dated June 8, 2004 at Page 3.
[51] See eg. Order No. 24,878, Pages 88, 89, 91, 92.
[52] Exhibit 3007A, page 38, 39; Exhibit 21.

Pennichuck's capitalization rate by the 2% growth rate was fully supported in the record[53] and fully explained in the Order.

In addition, as noted previously, Pennichuck could have requested the opportunity to present requests for finding of fact and rulings of law but elected not to do so. The Commission adequately explains the basis for its determination of value and it was not error to omit a detailed schedule or other calculation where none was requested.

P. A 2% LONG TERM GROWTH RATE IS NOT SUPPORTED IN THE RECORD AND WAS PROPERLY REPEALED BY THE COMMISSION.

For purposes of calculating economic obsolescence in his cost method and value in his income approach, Reilly utilized a 2% long-term growth rate which he characterized as "inflation only, and no real growth".[54] He further assumed, for purposes of his discounted cash flow analysis,[55] which he used to establish value in his income method, that capital expenditures would equal depreciation[56] and rate base would remain constant.[57] The fact that the rate base remained constant was what he meant by "no real growth".[58]

Notwithstanding his assumption that there would be no growth in rate base and that expenses would increase at the same level as revenues Reilly continued to insist there would be a 2% growth in earnings.[59] His analysis, however, was completely contrary to that of John Guastella and defies sound economics. Mr. Guastella, for purposes of his rate analysis, projected PWW operations including revenues, expenses

[53] Transcript Sept. 18, 2007, Pages 132, 133; Transcript Sept. 12, 2007, Pages 99-104.
[54] Transcript Sept. 12, 2007, Pages 99, 100.
[55] Exhibit 3007X, RFR-1 (Exhibit 21).
[56] Transcript, Sept. 12, 2007, Page 148.
[57] Ibid at Pages 154, 155.
[58] Ibid.
[59] Ibid at Page 154.

and rate base[60] over a similar period as Reilly and likewise concluded that rate base would either remain constant or decline slightly after 2009.[61] Unlike Reilly, however, during the period of flat or declining rate base, Guastella projected a decline in earnings or net operating income.[62] When asked about this in his deposition, Guastella admitted that a declining rate base would result in declining earnings.[63] And he was right! A regulated utility such as PWW experiences growth in earnings through capital expenditures and rate increases allowed by the Commission to pay for the capital additions. If the earnings of PWW increased at Reilly's long term growth rate of 2% without capital expenditures as he projected, and as he must to achieve the level of value he has, the company would soon be over-earning on its allowed rate of return and an adjustment to rates would be necessary.[64]

In light of such testimony, it was proper for the Commission, if not required, to reject a 2% growth rate.

Pennichuck's reference to the growth rate as "modest" is an understatement of considerable proportion. The 2% growth rate represents 40% of Reilly's terminal value or $113,866,800.[65]

Q. PENNICHUCK'S ARGUMENT THAT THE UPDATE OF VALUE PERFORMED BY THE COMMISSION IS INCOMPLETE AND DIFFICULT TO EVALUATE IGNORES THE COMMISSION'S CLEAR ANALYSIS AND RELIANCE UPON ITS EXPERTISE.

The argument that the Commissioner's update of value is incomplete and difficult to evaluate is virtually identical to its argument that the Commission failed to explain the

[60] Exhibit 3010, page 7.
[61] Exhibit 3010X, Schedule B; Transcript, Sept. 12, 2007, Page 155; Transcript, Sept. 18, 2007, Page 132.
[62] Ibid.
[63] Transcript, Sept. 12, 2007, Page 155.
[64] Exhibit 1015X, page 12(11).
[65] Transcript, Sept. 12, 2007, Page 158.

numbers in Order No. 24,478. Nashua therefore, relies on its objection set forth in Paragraph II (O) supra.

Nashua further objects because the argument ignores the agency expertise exercised by the Commission. The update was fully explained and the methodology and calculations were apparent. Moreover, performing an update is precisely what the legislature intended under RSA 38:9 when it provided that the Commission would fix the price.

Finally, the argument ignores the admonition of the NH Supreme Court in the valuation of utility property that "[j]udgment is the touchstone".[66] In New Hampshire there is no judicial or administrative body better equipped to exercise the judgment then the Commission.

R. PENNICHUCK IS NOT ENTITLED TO A JURY TRIAL ON DAMAGES

Pennichuck's argument that it has been denied its equal protection constitutional right to a jury trial on damages is fundamentally flawed. Utility condemnees are not similarly situated with other condemnees[67] and, even if condemnees under RSA 38 and RSA 498-A were deemed similarly situated, the classifications are justified because of the unique requirements of RSA 38.[68] Moreover, both statutes protect the basic interests of condemnees in securing an independent tribunal's determination of public interest/necessity and just compensation. Finally there is no constitutional right to trial by jury on the issue of just compensation.[69]

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[66] *New England Power v. Littleton*, 114NH 594, 599 (1974).
[67] Malnali v. State, 148, NH 94, 98 (2002).
[68] Manchester Housing Authority v. Fish, 102 NH 280, 283 (1959).
[69] Whelton v. State, 106 NH 362, 363 (1965).

III CONCLUSION

For the reasons set forth herein Nashua respectfully urges the Commission to deny Pennichuck's Motion for Reconsideration of Order No. 24,878.

Respectfully submitted,

CITY OF NASHUA
By Its Attorneys
UPTON & HATFIELD, LLP

Date: August 27, 2008

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CERTIFICATE OF SERVICE

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

Date: August 27, 2008

_____
Justin C. Richardson, Esq.

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 04-048

CITY OF NASHUA

RSA 38 Proceeding re Pennichuck Water Works

Order Denying Motions for Rehearing

ORDER NO. 24,948

March 13, 2009

I. INTRODUCTION

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

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

II. POSITIONS OF THE PARTIES

A. PENNICHUCK

Motion for Rehearing

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

1. Public Interest Standard

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

2. Water Systems Entirely Outside of Nashua

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

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

3. Segmented Public Interest Analysis

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

4. Municipal Vote for the Taking

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

5. Failure to Consider Relevant Evidence

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

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

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

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

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

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

6. Tax and Revenue Harm to Pennichuck Shareholders

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

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

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

7. Modifications to Nashua's Proposal

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

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

8. Conditions in Order Make the Presumption Irrebuttable

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

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

9. Conditions Exceed Commission Authority

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

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

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

10. Conditions Occurring After the Taking

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

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

11. Nashua's Ability to Finance the Acquisition

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

12. Nashua's Future Rates

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

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

13. Mitigation Fund

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

14. Information Outside the Record

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

15. Explanation of Valuation Numbers

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

16. Lack of Two Percent Growth Rate in Capitalization Rates

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

17. Update of PWW Value

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

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

18. Pennichuck's Right to Jury Trial

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

Motion to Strike Nashua's Motion for Rehearing

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

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

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

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

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

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

B. NASHUA

Motion for Rehearing and Clarification

1. Municipal Buyer Theory Is Not Supported by Evidence

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

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

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

3. Nashua Is the Only Municipality Capable of Acquiring PWW

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

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

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

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

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

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

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

6. Nashua Should be Allowed to Acquire PAC and PEU

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

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

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

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

8. Rebuttable Presumption Applied Only to Assets in Nashua

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

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

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

9. Request for Clarification Regarding the Mitigation Fund

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

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

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

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

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

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

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

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

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

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

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

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

III. COMMISSION ANALYSIS

A. Motions to Strike

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

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

B. Motions for Rehearing

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

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

1. Pennichuck

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Nashua

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

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

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

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

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

Based upon the foregoing, it is hereby

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

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

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

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

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

Thomas B. Getz
Chairman

Graham J. Morrison (KNS)
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

Concurring and Dissenting Opinion of Commissioner Below

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

Clifton C. Below
Commissioner

REVISED:
02-08-05

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant To RSA 38:9

Order Addressing the Pennichuck Utilities' Motion to Dismiss

ORDER NO. 24,425

January 21, 2005

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

I. PROCEDURAL HISTORY AND BACKGROUND

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

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

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

II. POSITIONS OF THE PARTIES

A. City of Nashua

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Mr. Fred S. Teeboom

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

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

D. Ms. Barbara Pressly

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

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

III. COMMISSION ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[17] Teeboom Brief, Exhibit III.

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

E. Procedural Issues

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

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

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

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

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

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

Based upon the foregoing, it is hereby

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

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

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

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

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

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

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

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

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

Attested by:

Debra A. Howland
Executive Director & Secretary

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant To RSA 38:9

Order Denying Motion for Rehearing

ORDER NO. 24,448

April 4, 2005

I. PROCEDURAL HISTORY AND BACKGROUND

This docket was initiated by a petition from the City of Nashua (Nashua) on March 25, 2004, seeking valuation of all plant and property of Pittsfield Aqueduct Company, Inc. (PAC), Pennichuck East Utilities, Inc. (PEU), and Pennichuck Water Works, Inc. (PWW) necessary to establish a municipal water works system. The Commission, on January 21, 2005, issued Order No. 24,425 which found, as a matter of law, that Nashua was entitled to seek the property of PWW but not the property of PAC or PEU.

On February 18, 2005, PWW filed a Motion for Reconsideration and/or Rehearing of Order No. 24,425 (Motion) pursuant to RSA 541:3. Fred Teeboom, a PWW customer who formally intervened, noted his support of the Motion but did not make a filing of his own. The Town of Merrimack argued in support of the Motion in a February 23, 2005 filing. Nashua filed an Objection to Motion for Rehearing (Objection) on February 24, 2005; the Merrimack Valley Regional Water District (District) stated its concurrence with Nashua's Objection on February 28, 2005. PWW noted, pursuant to N.H. Admin. Rules, Puc 203.04(f) that the Town of Litchfield was also opposed to the Motion. PWW submitted a Reply to Nashua's Objection on March 2, 2005.

II. POSITIONS OF THE PARTIES

A. Pennichuck Water Works, Inc.

PWW asks for reconsideration and/or rehearing of Commission findings that 1) Nashua was entitled to pursue all assets of PWW and 2) the vote by Nashua residents validly authorized Nashua to pursue those assets. In support, PWW referenced the arguments posed in its October 25, 2004 memorandum of law and further argued as follows: Under the Commission's reasoning, RSA Chapter 38 "would potentially allow a single municipality to take assets throughout the state merely because the people within that one town or city had voted to municipalize utility service." PWW argues that the powers of eminent domain should be narrowly construed and that the Legislature never intended as broad a reach of powers as the Commission found. Specifically, PWW argues, the Commission ignored the legislative history that demonstrated it allowed takings beyond municipal bounds in order to protect against "stranding of customers who would otherwise be disconnected from the utility's system." PWW argued that RSA Chapter 38 should be read to limit a taking to "just those assets necessary to provide municipal utility service and any additional assets necessary to ensure that remaining customers would not be cut off from service." Motion at pp. 2-3.

As to the vote, PWW argued that the Commission should have limited the taking to the assets that are necessary to serve customers within Nashua, absent a vote of every other municipality that PWW serves, as was required by *Balke v. City of Manchester*, 150 N.H. 69 (2003) and RSA 485:14.

In reply to Nashua's Objection to the Motion, PWW argues that the towns of Hollis and Milford have not stated a position regarding the taking and should not be identified as in support of Nashua's position.

B. Town of Merrimack

The Town of Merrimack joined PWW in its Motion, stating that though it has not stated a position on Nashua's petition to take the property of PWW by eminent domain, it has "expressed skepticism as to some of the claims in support thereof." Merrimack also notes that "a substantial part" of the franchise and utility property being sought is located in Merrimack and serves its main industrial area. Among the customers located in Merrimack is Anheuser-Busch, described as PWW's largest customer. According to Merrimack, its residents have not had an opportunity to vote on the taking; they should not be "disenfranchised by Nashua's arbitrary action" taking property beyond Nashua's bounds.

C. City of Nashua

Nashua's Objection urges the Commission to reject the Motion, as it states no new arguments and ignores the plain language of RSA 38:6 that allows taking of property outside a municipality's bounds when required by the public interest. Nashua also takes issue with PWW's suggestion that 'public interest' is not sufficiently defined, noting previous Commission dockets addressing the public interest in the context of eminent domain. Nashua identifies the towns of Amherst, Bedford, Hollis and Milford that have either joined the District or have voted to enter joint agreements to establish the District. Finally, Nashua takes issue with PWW's argument that because the New Hampshire Supreme Court found that fluoridation requires a vote of each municipality,

so too should each municipality vote on eminent domain, as the statute in question explicitly requires each municipality to put the fluoridation question to a vote.

III. COMMISSION ANALYSIS

To grant a motion for rehearing pursuant to RSA 541:3 and 541:4, the movant must demonstrate that the order is unlawful or unreasonable. Good cause for rehearing may be shown by new evidence that was unavailable at the time or that evidence was overlooked or misconstrued. *Dumais v. State*, 118 N.H. 309, 312 (1978). PWW has not submitted new evidence; rather, it argues that the Commission erred on the law, interpreting RSA Chapter 38 in such a way that violated the legislature's intent and resulted in an overly broad reach of eminent domain powers.

PWW is correct in noting that eminent domain powers are to be strictly construed. Strict construction, however, does not mean an agency may disregard the language of a statute, which is what PWW would have us do. Our reading of RSA Chapter 38 and in particular RSA 38:6, led us to the conclusion that Nashua was entitled to pursue the assets of PWW, though not affiliated utilities PEU or PAC. Whether such taking is in fact in the public interest is yet to be determined in this docket.

PWW presumes a statutory limitation, i.e., "just those assets necessary to provide municipal utility service and any additional assets necessary to ensure that remaining customers would not be cut off from service." Motion, p. 3. While such a test may merit consideration in determining the public interest in a case such as this, it is only one formulation of the public interest to be considered during hearing.

We do not disagree that our analysis leads to the theoretical possibility that one municipality could vote to pursue assets located throughout the state if served by that

utility. Such a hypothetical result, however, would be constrained by the limits of the public interest as informed by legislative history.

PWW's assertion that we ignored the legislative history regarding stranding of customers is plainly wrong. Legislative intent was an express part of the analysis of the scope of RSA Chapter 38. We acknowledged that stranding of customers was a reason cited to allow taking beyond municipal boundaries, and that "the Legislature intended that the extent of the taking power that could be exercised beyond municipal boundaries would be limited." Order at 14. The degree to which customers may be stranded and the costs imposed on them as a result are part of the public interest inquiry to be undertaken in this proceeding. The actual extent of the assets of PWW that Nashua may pursue outside its municipal bounds, however, cannot be resolved in advance by analysis of the statute and legislative history alone.

We agree with Nashua that the Supreme Court's requirement that each municipality vote before fluoridation of the water supplies that serve them is not relevant. The statute at issue in that case, RSA 485:14, explicitly required such votes. *Balke v. City of Manchester*, 150 N.H. at 73. There is no such requirement in RSA Chapter 38; to impose one would be beyond our powers.

PWW readily acknowledges that it has restated its arguments from prior pleadings and oral argument, and in fact incorporated those arguments by reference. Having presented no new evidence or persuasive argument, the Motion for Rehearing and/or Reconsideration will be denied.

Based upon the foregoing, it is hereby

ORDERED, that Pennichuck Water Works, Inc.'s Motion for Rehearing and/or Reconsideration of Order No. 24,425 is hereby DENIED.

By order of the Public Utilities Commission of New Hampshire this fourth day of April, 2005.

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

Attested by:

Debra A. Howland
Executive Director & Secretary

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

Order Denying Motion for Summary Judgment and Motion to Bar Testimony and Granting in Part Motion for Extension of Procedural Schedule

ORDER NO. 24,567

December 22, 2005

I. INTRODUCTION

The New Hampshire Public Utilities Commission (Commission) opened this docket upon the March 25, 2004 filing by the City of Nashua, New Hampshire (Nashua) to take the utility assets of Pennichuck Water Works, Inc. (PWW), Pennichuck East Utility and Pittsfield Aqueduct Company, pursuant to N.H. RSA 38:9. The three Pennichuck entities opposed the petition and challenged Nashua's interpretation of the reach of RSA Chapter 38:9. In Order No. 24,425 (January 21, 2005), the Commission determined that RSA Chapter 38 authorized Nashua to pursue the taking of PWW but not Pennichuck East Utility or Pittsfield Aqueduct Company.

The case is now in the discovery stage and is scheduled for hearing in January 2007. The procedural schedule set dates for testimony and ensuing discovery on the public interest portion of Nashua's case separate from the valuation inquiry. PWW is due to file testimony on its valuation and its assessment of Nashua's technical, financial, and managerial capability and public interest on January 12, 2006. Also due that date is Nashua's testimony on "valuation and public interest issues dependent upon valuation." Capstone testimony joining the public interest and valuation issues is due from all parties by September 15, 2006; rebuttal on the capstone testimony is due from all parties by November 14, 2006. *See* Letter of Executive Director Debra A. Howland to the Parties and Staff (October 3, 2005).

On September 6, 2005, PWW filed a Motion for Summary Judgment (Motion), asking the Commission to find that Nashua has failed to submit testimony demonstrating its managerial or technical capabilities to operate the water system.

The Commission, by secretarial letter dated September 14, 2005, granted all interested parties until October 6, 2005, to respond to PWW's Motion. On October 6, 2005, Nashua filed an Objection to PWW's Motion for Summary Judgment (Objection).

On October 18, 2005, PWW filed a Motion for Leave to Respond to City of Nashua's Objection to Motion for Summary Judgment and PWW's Reply to the Objection, to which Nashua responded on October 27, 2005, with an Objection to PWW Inc.'s Motion for Leave to Respond.

II. POSITIONS OF THE PARTIES

A. PWW

PWW states that Nashua must obtain a franchise for service beyond Nashua's borders, pursuant to RSA 374:26, and that Nashua bears the burden of proof that it possesses the capability to operate the water system to obtain such a franchise as well as to satisfy one aspect of the public interest requirement of RSA 38:10. The procedural schedule agreed to by the Parties and Staff set deadlines for submission of testimony regarding Nashua's technical and managerial competence, as part of the public interest portion of the case. Under that schedule, testimony on those issues was to have been prefiled by November 22, 2004. Nashua has stated an intention to operate the water system by means of two contracts with third party vendors but, according to PWW, has provided no information as to those "unknown third parties." PWW concludes, therefore, that it is impossible for Nashua to meet its burden of proof and the

Commission should grant summary judgment dismissing the taking petition.

PWW notes in particular the customers of PWW who live outside Nashua's municipal bounds, arguing that Nashua has a "cavalier attitude" towards them. PWW further argues that the rebuttable presumption of RSA 38:3 that a taking is in the public interest extends only to the inhabitants of Nashua and cannot be read to extend to the 27,000 PWW customers residing in other nearby towns. PWW also argues that Nashua should not be allowed to file testimony on these issues as part of the capstone or the rebuttal testimony, in that it has had more than a year to develop its case and should not be allowed to use those responsive filing dates to make out its case in chief. PWW asserts, therefore, that there is no genuine issue of material fact requiring a hearing and requests summary judgment dismissing Nashua's petition in its entirety.

PWW did not seek concurrence of the parties to the Motion, given the relief requested. Finally, PWW requests oral argument on the Motion.

B. Nashua

Nashua's Objection argues first that PWW's Motion is not timely, in that the Commission had set a date of January 31, 2005, for PWW to file a motion for summary judgment, which it failed to do. Second, Nashua asserts that it has filed "extensive information" regarding its technical and managerial qualifications to operate the system and that PWW's Motion is an attempt to prevent the Commission from receiving evidence about the qualifications of the third party contractors Nashua is now soliciting. Finally, Nashua argues that PWW is not entitled to summary judgment as there is a rebuttable presumption that the taking petition is in the public interest, there is no requirement of a franchise and there is ample time to file testimony on the qualifications of its contractors under the current schedule.

III. COMMISSION ANALYSIS

We begin with four procedural matters. First, PWW did not seek concurrence in its Motion, as required by N. H. Admin. Rules, Puc 203.04(e). The purpose of the rule is to make clear to the Commission whether there is opposition to a requested finding, in which case the Commission will refrain from action to allow other parties to respond. Because, as PWW notes, the Motion is dispositive, attempts to obtain concurrence from Nashua would not have been a meaningful exercise, as it was clear that Nashua and possibly others would respond in opposition. Under the circumstances, we waive the requirement of Puc 203.04(e) in this instance.

Second, other than objections to motions, our rules do not authorize responsive pleadings such as were filed by PWW and Nashua. We find no basis to authorize such pleadings in this matter and deny the requests for such filings. Consequently, we have not considered the October 18 and October 27, 2005 submissions of PWW and Nashua in our deliberations.

Third, we reject Nashua's assertion that PWW's Motion was not timely filed. While it is true that a January 31, 2005 deadline had been set for PWW to file a motion for summary judgment, that deadline was in the context of a summary judgment motion PWW had stated it would file regarding the unconnected satellite systems within PWW. PWW did not make such a filing. Nashua seeks to transform the deadline for that particular motion for summary judgment into a deadline for any motion for summary judgment, a conclusion we do not accept. Our rules do not limit when a motion for summary judgment can be filed and PWW's decision not to file for summary judgment on the issue of the interconnectedness of the system does not constitute a waiver of the right to seek summary judgment on the grounds laid

out in the instant Motion.

Finally, we will not grant PWW's request for oral argument. We find the Motion and Objection to be an adequate basis on which to rule.

Inasmuch as the issue underpins much of the argument before us, we next address whether a franchise is required for Nashua in the event a taking of PWW is found to be in the public interest. We agree with PWW that a franchise is required for service beyond Nashua's municipal borders, pursuant to RSA 374:26 and 362:4,III-a (a). We do not agree with Nashua's assertion that such a franchise requirement is inconsistent with the rebuttable presumption of RSA 38:3. 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 service beyond Nashua's municipal bounds, Nashua must obtain a franchise.

We move now to the heart of the Motion and Objection thereto. Nashua has stated in testimony, pleadings and discovery that it intends to enter into a contract for the management of the water system and a second contract for oversight of that management. That being the case, the issue underlying the Motion for Summary Judgment is whether Nashua should have had those contractors identified and under contract by November of 2004, more than two years before a determination whether the taking will be authorized.

We find it unreasonable to conclude that Nashua should have had a fully-developed plan, including executed contracts for third-party operation of the water system, by November 22, 2004. Hence, we will not dismiss the taking petition on the basis that third party contractors have not yet been identified or their qualifications laid out in prefiled testimony. Among other things, this result is reasonable inasmuch as there was no distinction drawn at the

time Order No. 24,379 was issued between Nashua operating the system itself and operating the system through contracts with third parties, which is an important distinction. It would strain credulity to expect, in the context of a statutory scheme that allows the petitioner to forestall a final determination on whether to proceed with a taking until after valuation is determined, and a procedural schedule of the type employed here, that Nashua should have had final contracts developed so early in the process. Furthermore, we find the testimony filed on November 22, 2004, to have been sufficient to move forward in this proceeding.

If Nashua were intending to operate the system itself, there might be an argument for considering summary judgment, but that circumstance does not apply. We disagree with PWW's assertion, however, that, as a matter of law, there exists no issue of material fact as to the qualifications of Nashua to operate the system. The record is not completely devoid of evidence on that issue, though admittedly it is far from fully-developed.

Arguably, we could accept testimony on the qualifications of the third party contractors at the time of the capstone testimony, which would still allow the opportunity for discovery and rebuttal on these issues. However, Nashua has indicated that it is prepared to file testimony on these issues by January 12, 2006. We find that such filing will promote the orderly and efficient conduct of this proceeding and that there will be adequate opportunity for PWW to conduct discovery on these issues. Moreover, we will revise the procedural schedule such that testimony from PWW on these issues shall be due February 27, 2006.

We conclude that there is no prejudice to any party in proceeding in this manner. Furthermore, we find it logically consistent to segregate the broader issue of whether the taking is in the public interest from the more narrow issue of whether Nashua, through contractual

arrangements with third parties, can demonstrate the technical, financial and managerial ability to operate a public utility.

Finally, we note that on December 12, 2005, PWW filed a Motion to Bar Late Filed Testimony by Nashua and for Extension of Procedural Schedule and Nashua objected on December 16, 2005; Claire McHugh also objected. Our decision today renders moot the Motion to Bar and it is therefore, denied. As for the request to extend the procedural schedule, we grant the request in part as described below.

PWW argues for an extension inasmuch as it has not had the opportunity to conduct depositions regarding Nashua's ability to perform billing and collection services or conduct discovery regarding Nashua's intent to complete the eminent domain process. We disagree that these issues are "critical to PWW's ability to respond to Nashua's public interest filing." However, we consider the billing and collections issue related to the issues of technical, financial, and managerial capability, regarding which Nashua, as determined above, will be filing testimony on January 12, 2006. Consequently, PWW may pursue depositions in order to file relevant testimony on February 27, 2006. As for the issue of Nashua's intent to carry through with a taking, PWW may pursue discovery for its testimony on that issue to be filed on May 22, 2006. We will separately issue by Secretarial Letter a revised procedural schedule consistent with the various findings above,

Based upon the foregoing, it is hereby

ORDERED, that the request by Pennichuck Water Works, Inc. for waiver of N.H. Admin. Rules, Puc 203.04(e) requiring that it seek concurrence to its Motion for Summary Judgment is GRANTED; and it is

FURTHER ORDERED, that the requests of Pennichuck Water Works, Inc. and the City of Nashua for responsive pleadings are DENIED; and it is

FURTHER ORDERED, that the request of Pennichuck Water Works, Inc. for oral argument is DENIED; and it is

FURTHER ORDERED, that Pennichuck Water Works, Inc.'s Motion for Summary Judgment is DENIED; and it is

FURTHER ORDERED, that the Motion to Bar Late Filed Testimony is DENIED; and it is

FURTHER ORDERED, that the Motion for Extension of Procedural Schedule is GRANTED IN PART.

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

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

Attested by:

Debra A. Howland
Executive Director & Secretary

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

NO. 04-E-0062

PENNICHUCK CORPORATION, PENNICHUCK WATER WORKS, INC., PENNICHUCK EAST UTILITY, INC., AND PITTSFIELD AQUEDUCT COMPANY, INC.

V.

CITY OF NASHUA

OPINION AND ORDER

LYNN, C.J.

The defendant City of Nashua (City) has begun proceedings before the New Hampshire Public Utilities Commission (PUC) seeking to acquire by eminent domain certain plants and property owned by the plaintiffs, Pennichuck Corporation and its wholly owned subsidiaries[1] (Pennichuck), in order to establish a publicly owned or controlled water utility, as authorized by RSA chapter 38 (1997). Pennichuck instituted this declaratory judgment action in an effort to terminate or limit the City's attempt to condemn its property. The matter comes before the court at this time on the parties' cross motions for summary judgment.[2] With the exception of one claim which is not yet ripe for adjudication and another as to which dismissal without prejudice is appropriate, I conclude

[1] Pennichuck Water Works, Inc., Pennichuck East Utility, Inc., and Pittsfield Aqueduct Company, Inc. are each wholly owned subsidiaries of Pennichuck Corporation. The foregoing subsidiaries are all public utilities regulated by the PUC. Pennichuck Corporation also has two other subsidiaries, Pennichuck Services Corporation and Southwood Development Corporation, which are not regulated utilities. The latter two corporations are not named plaintiffs in this action.

[2] Prior to moving for summary judgment, the City also had filed a motion to dismiss. Inasmuch as the City's summary judgment motion incorporates the arguments asserted in the motion to dismiss, there is no need for me to separately address the motion to dismiss.

that the City's motion for summary judgment must be granted and Pennichuck's cross motion must be denied.

I.

For a moving party to prevail on a motion for summary judgment, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits filed, [must] show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (1997). In ruling on the motion, the court must construe all materials submitted in the light most favorable to the nonmovant. Metropolitan Prop. & Liab. Ins. Co. v. Walker, 136 N.H. 594, 596 (1993). However, the party opposing the motion "may not rest upon [the] mere allegations or denials of his pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV; Gamble v. University of New Hampshire, 136 N.H. 9, 16-17 (1992); ERA Pat Demarais Assoc's. v. Alex. Eastman Foundation, 129 N.H. 89, 92 (1986). A dispute of fact is "genuine" if "the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party," and "material" if it "might affect the outcome of the suit." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)(construing analogous language of Fed.R.Civ.P. 56); accord. Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648, 653 (1990).

Where the nonmoving party bears the burden of persuasion at trial, it must "make a showing sufficient to establish the existence of [the] element[s] essential to [its] case" in order to avoid summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the moving party bears the burden of persuasion at trial, it

must support its position with evidence "sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." Lopez v. Corporacion Azucarera de Puerto Rico, 938 F.2d 1510, 1516 (1st Cir. 1991).

II.

The record establishes the following pertinent facts. Pennichuck and its subsidiaries operate public utilities which provide water supply services to approximately 35,000 customers in New Hampshire. Although most of these customers are located in Nashua and surrounding communities, Pennichuck's operations extend to communities as far away as Pittsfield, New Hampshire. All of the Pennichuck companies have their headquarters in Nashua.

On April 29, 2002, Pennichuck entered into an Agreement and Plan of Merger with Philadelphia Suburban Corporation ("PSC"). Under this agreement, Pennichuck was to become a direct and wholly owned subsidiary of PSC. On June 14, 2002, Pennichuck filed a petition with the PUC seeking approval of the merger. The City moved to intervene in the PUC proceedings and objected to the merger.

On November 26, 2002, the City's board of alderman adopted, by a vote of 14 to 1, a resolution to acquire the plant and property of Pennichuck's water works system. A confirming vote by the Nashua electorate was held on January 14, 2003. The referendum question asked if the voters would authorize the City to acquire all or a portion of the water works system then serving the inhabitants of Nashua. The referendum was approved by the voters by a wide margin.

Soon after the referendum, PSC terminated its plans to merge with Pennichuck. Thereafter, on February 5, 2003, the City sent written notification to each of the Pennichuck utilities, detailing the assets which it sought to acquire, and inquiring whether the utilities were willing to sell such assets to the City. On March 25, 2003, Pennichuck responded in writing, indicating that it did not wish to sell any of its assets to the City. The following day the City notified Pennichuck that it intended to petition the PUC to condemn the Pennichuck assets identified in its inquiry letters.

Between March and November 2003, the City and Pennichuck engaged in negotiations concerning the possible sale of some or all of Pennichuck's assets to the City. On November 30, 2003, Nashua extended a formal offer to purchase Pennichuck for $121 million. Pennichuck rejected this offer on December 15, 2003, terminated negotiations with the City on January 27, 2004, and commenced the present lawsuit on February 4, 2004.

On March 24, 2004, the City filed a petition with the PUC, asking the agency to find that the City's condemnation of Pennichuck's assets is in the public interest and to determine the damages which the City must pay Pennichuck as a result of the taking.

III.

Pennichuck's petition asserts the following four claims: (1) that RSA 38 violates Pennichuck's constitutional right to the equal protection of the laws because it creates different condemnation procedures for the municipal acquisition of utility property than for the condemnation of other property; (2) that

the RSA 38 condemnation procedure is both per se unconstitutional and unconstitutional as applied in this case because it results in an inverse condemnation of Pennichuck's property; (3) that the City is prohibited from proceeding with the condemnation proceedings by the doctrine of laches; and (4) that the City's notices pursuant to RSA 38:6 are overbroad and invalid insofar as they seek to acquire property of Pennichuck not specifically needed to provide water service to consumers located within the City of Nashua. Before addressing these claims, it will be helpful to review the statutory scheme established by the legislature for the "municipalization" of public utilities.

RSA chapter 38 empowers municipalities to take by eminent domain privately-owned electric, gas and water utilities in order to maintain and operate the same as publicly-owned facilities. RSA 38:2. In order to initiate the process of acquiring a utility, there must first be an affirmative vote by two-thirds of the members of the municipal governing body and this vote must then be confirmed by a majority vote of the qualified voters at a regular election or special meeting called for this purpose. RSA 38:3. A favorable confirming vote creates a rebuttable presumption that the acquisition is in the public interest. Id. Within thirty (30) days of the confirming vote, the municipality must notify the utility and inquire if it is willing to sell the identified plant and property located within the municipality, as well as "that portion, if any, lying without the municipality, which the public interest may require, pursuant to RSA 38:11 as determined by the [PUC]." RSA 38:6. The utility is given sixty (60) days to respond. RSA 38:7.

The parties may then negotiate and reach a tentative agreement on the assets to be sold and the sale price, subject to ratification by a vote of the municipality to issue the necessary revenue bonds for the acquisition price. RSA 38:8 and 13. If no agreement is reached, either party may petition the PUC to determine whether it is in the public interest for the municipality to purchase some or all of the utility's property located inside or outside of the municipality. RSA 38:9. The PUC also determines the amount of "just compensation" or damages that the municipality must pay for the assets in question. RSA 38:9 and 10. After the PUC sets the acquisition price, the municipality must decide whether or not to purchase the assets for that price by a vote to issue revenue bonds pursuant to RSA 33-B. RSA 38:13. If the vote is in the affirmative, it constitutes a ratification by the municipality to acquire the assets at the price set by the PUC. If the vote is in the negative, no further proceedings under RSA 38 can be commenced for a period of two (2) years. RSA 38:13.

A.

Count I of Pennichuck's petition asserts that the condemnation procedure established under RSA chapter 38 violates the company's equal protection rights in two ways. First, unlike other condemnation statutes, which provide for a de novo appeal to superior court on the issue of the necessity for the taking, see RSA 231:8, :34 (1993); V.S.H. Realty, Inc. v. City of Manchester, 123 N.H. 505, 508 (1983); RSA 205:1; Merrill v. City of Manchester, 124 N.H. 8, 15 (1983), RSA 38 grants the PUC authority to make the necessity determination with only a limited right of appeal to the supreme court pursuant to RSA 541:6 and :13

(1997). See Appeal of Ashland Elec. Dept., 141 N.H. 336 (1996). Second, again unlike other condemnation statutes, i.e., RSA 498-A (1997) and RSA 371 (1995), which permit a jury to make the ultimate determination of the amount of damages to be assessed, RSA 38 grants the PUC authority to assess damages and contains no provision allowing an appeal to superior court for a jury trial on the damages issue.

The threshold determination that must be made in conducting an equal protection analysis is whether the state action in question treats similarly situated persons differently. Malnati v. State, 148 N.H. 94, 98 (2002). Pennichuck argues that it is similarly situated to all other condemnees who face the prospect of having their property taken by governmental authority. The City, on the other hand, asserts that the type of property that is subject to condemnation under RSA 38 – plants and property owned by public utilities – is fundamentally different from other kinds of property that may become subject to condemnation. Among other things, the City points to the facts that public utilities often exercise monopoly powers and are subject to comprehensive regulation by the PUC. The City asserts that these factors make necessity and damages determinations regarding public utility property particularly complex, and thus justify the legislature's decision to place such determinations in the hands of the agency (the PUC) with the requisite expertise.

Dealing first with the necessity issue, I need not decide whether the owners of public utility property are similarly situated to the owners of other property because, even assuming they are similarly situated, the procedures

established under RSA 38, whereby the PUC makes the determination of whether the condemnation is in the public interest, does not deny Pennichuck equal protection of the laws. Although the supreme court's decisions in Gazzola v. Clements, 120 N.H. 25 (1980) and Merrill contain some rather broad language, the narrow holdings of those cases was simply that, where the legislature had granted the right to a pre-taking necessity hearing for property condemned for some purposes, it was a violation of equal protection to deny the right to any pre-taking hearing for property condemned for other purposes. In neither of these cases did the court hold that the procedures to be followed in making necessity determinations must be identical in all condemnation proceedings. Indeed, in Merrill, after finding that the absence of a pre-taking hearing for property condemned for redevelopment purposes violated the equal protection rights of the plaintiff in that case because such a hearing was allowed where property is taken for highway purposes, the court went on to hold that, because there had been a full evidentiary hearing at the superior court level, there was no need for proceedings to begin anew before the board of mayor and alderman. 124 N.H. at 16. Instead, the court held that it was a sufficient remedy to remand the case to the superior court so that the master could make a proper, de novo, determination of necessity. Id. In other words, the court seemed to be saying that it was a sufficient vindication of the plaintiff's equal protection rights if he was afforded one full and fair hearing on the issue of necessity, even though under the highway condemnation statute a condemnee would have the right to two such hearings – the first before the municipal governing body and the second, de

novo one, before the superior court. Surely the court would not have fashioned this type of relief if it believed that the procedures for takings for redevelopment purposes had to be exactly the same as the procedures for takings for highway purposes. Pennichuck has failed to make any showing that the hearing on necessity (public interest) which it will receive before the PUC under RSA 38:9 is in some way inferior to a necessity hearing that would be conducted before the superior court under any of the other statutory schemes discussed above. See American Party of Texas v. White, 415 U.S. 767, 781 (1974) (party claiming an equal protection violation bears burden of demonstrating discrimination "of some substance"); cf. Jackson Water Works v. Public Utilities Com'n., 793 F.2d 1090, 1096 (9th Cir. 1986) (quoting American Motorists Ins. Co. v. Starnes, 425 U.S. 637, 644-45 (1976) ("it is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights.") (other citations and internal quotations omitted)).

Furthermore, in Malnati the court made it clear that the legislature has the power to dispense with necessity determinations altogether where it decides, "as a matter of legislative policy," that a certain class of property should be taken for public purposes. See 148 N.H. at 100. The Malnati court found no denial of equal protection in the legislature's disallowance of individual necessity determinations in connection with the State's condemnation of the reversionary interests in railroad rights-of-way, notwithstanding the fact that individual determinations are permitted for other types of takings. Under the rationale of

Malnati, the legislature presumably could, without violating equal protection, allow the governing bodies of municipalities to make similar policy determinations concerning whether utilities operating within their boundaries should be "municipalized" without affording any necessity hearing at all.

Based on the above analysis, I conclude that RSA 38:9, which grants Pennichuck the right to a single full and fair hearing before the PUC on the issue of whether the City's proposed condemnation is in the public interest, does not violate Pennichuck's equal protection rights.

More troubling is the question of whether RSA 38 deprives Pennichuck of equal protection by failing to provide for a jury trial on the issue damages. Although there is no absolute constitutional right to a jury trial in eminent domain proceedings, Whelton v. State, 106 N.H. 362, 363 (1965), the legislature has conferred this right by statute in all condemnation proceedings except those carried out pursuant to RSA 38. The extraordinary difficulty of valuing utility property arguably provides a sufficiently compelling state interest to justify the legislature's choice to assign this highly specialized task to the experts at the PUC. See, e.g., Southern N.H. Water Co. v. Town of Hudson, 139 N.H. 139, 142 (1994). But as Pennichuck correctly points out, when utility property is proposed for condemnation by another utility rather than by a municipality the complexity of determining value does not preclude the condemnee from insisting upon a jury trial to assess just compensation. See RSA 371:10. I conclude that it is unnecessary for me to decide at this juncture whether the denial of a jury trial on damages deprives Pennichuck of equal protection because the issue is not yet

ripe for adjudication. Even if Pennichuck's position on this point is meritorious, the appropriate remedy would not be to invalidate the entire statutory scheme. Rather, as was done in Gazzola and Merrill, the remedy would be for this court to incorporate into RSA 38 the appeal and jury trial features of RSA 371:10. There is no need to make a ruling on this matter now. The PUC has not even made a decision on necessity at this point, let alone held a hearing on damages. If and when the PUC reaches the issue of damages and renders a decision adverse to Pennichuck, the company may then press its claim that it is entitled to have damages reassessed by a jury in the superior court. See Appeal of Wintle, 146 N.H. 664, 666 (2001) (court should decide constitutional issues only when it is necessary to do so).

B.

Count II of Pennichuck's petition alleges that RSA 38 is unconstitutional both per se and as applied to the facts of this case because the statute's procedures result in the inverse condemnation of Pennichuck's property. With respect to the as-applied challenge, Pennichuck now concedes that it has an adequate alternative remedy for this claim in the parallel damages action which it originally filed in this court, docket number 04-C-169, and which has since been removed to federal court. Pennichuck therefore requests that its as-applied claim be dismissed without prejudice. Although the City asserts that this claim should be dismissed with prejudice, I treat Pennichuck's request as the equivalent of a motion for voluntary nonsuit and, in the absence of any showing by the City of

unfair prejudice, grant the dismissal without prejudice. See Cadle Co. v. Proulx, 143 N.H. 413, 416 (1999).

As for the remainder of count II, Pennichuck's facial attack on RSA 38 is based on the theory that an inverse condemnation of its property necessarily results from the following features of the statutory scheme: (1) the absence of a provision setting a time limit within which a municipality must initiate condemnation proceedings; and (2) the so-called "second look" provision of RSA 13, under which, even after the PUC has made a finding that the condemnation is in the public interest and has fixed the amount of damages to be paid, a municipality may decline to acquire the property if the voters fail to approve the issuance of revenue bonds pursuant to RSA 33-B to finance the acquisition. I find Pennichuck's arguments unavailing.

"Inverse condemnation" occurs when governmental actions or regulation, short of a physical invasion or taking, so substantially interferes with property that the owner is deprived of all or nearly all economically viable use thereof. See Sanderson v. Town of Candia, 146 N.H. 598, 600 (2001); Burrows v. City of Keene, 121 N.H. 590, 598 (1981). However, "[m]ere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership . . . and cannot be considered as a `taking' in the constitutional sense." Smith v. Wolfboro, 136 N.H. 337, 346 (1992) (quoting Agins v. Tiburon, 447 U.S. 255, 263 n.9 (1980)).

In this case, Pennichuck has not shown that any delays allegedly attributable to the challenged aspects of RSA 38 rise to the level of a de facto

taking of its property. While Pennichuck's business operations may have been affected by uncertainty and the value of its stock may have fluctuated over the period since the City first announced its intent to institute condemnation proceedings, and while Pennichuck may have incurred legal and other fees in fighting the City's attempted taking, these are simply the inherent risks of ownership in a system, such as ours, where all property is held subject to the sovereign's exercise of the power of eminent domain. See Cayon v. City of Chicopee, 277 N.E.2d 116, 119 (Mass. 1971). At no point has Pennichuck been deprived of the economically viable use of its property, nor will such a deprivation occur unless and until all necessary steps to the condemnation process, including the RSA 38:13 ratification vote, have been completed. Because no taking occurs until after the ratification vote, even assuming that the electorate ultimately fail to approve the acquisition at the price set by the PUC, the effect would be merely a discontinuance of the condemnation – an eventuality which does not give rise to a constitutional right to be compensated for losses and expenses in the absence of bad faith or unreasonable delay. 6 Nichols on Eminent Domain § 26D.01[6] (1999).

C.

In Count III of its petition, Pennichuck alleges that the City is barred from proceeding with its condemnation efforts by the doctrine of laches. Specifically, Pennichuck asserts that the one year delay between March 2003, when Pennichuck rejected the City's offer to purchase, and March 2004, when the City filed its petition with the PUC, was unreasonable and prejudicial to Pennichuck.

The City maintains that this one year interval is not unreasonable and is explained by the City's efforts during this period to reach an agreement with Pennichuck through negotiations.

The general rule is that where a condemnation statute does not contain a specific time limitation, condemnation proceedings must be instituted within a reasonable time. 6 Nichols § 24.07[1] (1995). Laches is an equitable doctrine that will bar litigation due to the inequity of permitting the claim to be enforced. See Town of Seabrook v. Vachon Mgmt., Inc., 144 N.H. 660, 668 (2000). "The party asserting laches bears the burden of proving both that the delay was unreasonable and that prejudice resulted from the delay." Appeal of Plantier, 126 N.H. 500, 505 (1985).

Here, Nashua has produced proof by way of the affidavits of Mayor Streeter and Alderman McCarthy detailing the efforts the City undertook between March 2003 and January 2004 to reach a negotiated acquisition of Pennichuck's assets. Pennichuck has offered no counter affidavits or other competent evidence to refute the sworn averments of Messrs. Streeter and McCarthy. See RSA 491:8-a, IV (1997). In the absence of such evidence, I hold as a matter of law that the City did not act unreasonably in determining not to file its petition with the PUC while it was engaged in active negotiations with Pennichuck aimed at resolving the acquisition matter . Petition of Bianco, 143 N.H. 83, 85 (1998) ("public policy encourages voluntary acquisitions from landowners before conducting involuntary condemnation proceedings"); see New Hampshire Donuts, Inc. v. Skipitaris, 129 N.H. 774, 785 (1987).

Other considerations also militate against application of laches in this case. Pennichuck obviously cannot seriously claim to have been surprised by the City's PUC filing, as it has been aware at all times that City was pursuing acquisition of Pennichuck's property. See Lineham v. S. New England Prod. Credit Assoc'n, 122 N.H. 179, 183 (1982). Moreover, laches has been allowed against governmental entities, such as a municipality, only in "extraordinary and compelling circumstance." Vachon Mgmt., 144 N.H. at 668. On the record before me, no such circumstances have been shown to exist.

D.

Pennichuck contends in count IV of its petition that RSA 38 limits the City to condemning only that portion of Pennichuck's property which is either (1) located within the geographical limits of Nashua or (2) if located outside Nashua, is necessary to provide water services within the City. Pennichuck therefore seeks to obtain a ruling from me at this time that the City may not condemn the property of its subsidiaries, such as Pennichuck East Utility or Pittsfield Aqueduct Company, whose operations have no connection with Nashua. The City responds that the PUC has primary jurisdiction to determine the extent of a municipal taking that is in the public interest, and that the court therefore should decline to rule on this claim. I agree with the City.

In order to encourage the exercise of agency expertise, preserve agency autonomy, and promote judicial efficiency, New Hampshire has long recognized the doctrine of primary jurisdiction. The doctrine mandates that a court refrain from exercising its jurisdiction to decide a question until it has first been decided

by a specialized agency that also has jurisdiction to do so. New Hampshire Div. of Human Servs. v. Allard, 138 N.H. 604, 607 (1994). See also Konefal v. Hollis/Brookline Coop. Sch. Dist., 143 N.H. 256, 258 (1998) ("primary jurisdiction in an agency requires judicial abstention until the final administrative disposition of an issue, at which point the agency action may be subject to judicial review") (citation and internal quotations omitted).

Under RSA 38, the legislature has charged the PUC with the responsibility of determining the extent, if any, of the acquisition of Pennichuck's property outside Nashua which is in the public interest. RSA 38:6, :9, :11. Given the myriad of economic factors and other considerations which are likely to be entailed in making this decision, there is no question that the expertise possess by the PUC makes it the logical forum to grapple with these issues in the first instance.

IV.

For the reasons stated above, the City's motion for summary judgment is hereby granted as to counts III and IV of the petition and with respect to that portion of count II of the petition which asserts a claim for per se taking of Pennichuck's property by inverse condemnation. That portion of count II alleging an as-applied inverse condemnation is dismissed without prejudice. The City's motion for summary judgment also is granted with respect to count I of the petition but this ruling is made without prejudice to Pennichuck's ability to reassert its claimed right to a jury trial on the issue of just compensation if it is dissatisfied with the PUC's assessment of damages. Pennichuck's motion for

summary judgment is denied in all respects. The City's request for an award of attorney's fees is also denied.

BY THE COURT:

August 31, 2004

ROBERT J. LYNN
Chief Justice

UNITED STATES CONSTITUTION

Amendment V
Criminal actions — Provisions concerning — Due process of law and just compensation.

No person shall be held to answer for a capital or otherwise infamouscrime, unless on a presentment or indictment of a grand jury, except incases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV
§ 1. Citizenship — Due process of law — Equal protection.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

NEW HAMPSHIRE CONSTITUTION

Part 1

Article 2d. [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.

Article 12th. [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.

Article 14th. [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.

Part 2

Article 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 or institutions of any religious sect or denomination. Free and fair competition in the trades and industries is an inherent and essential right of the 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.

RSA 38:1-13

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 allof 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.

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.

363:17-a Commission as Arbiter.

The commission shall be the arbiter between the interests of the customer and the interests of the regulated utilities as provided by this title and all powers and duties provided to the commission by RSA 363 or any other provisions of this title shall be exercised in a manner consistent with the provisions of this section.

363:17-b Final Orders.

The commission shall issue a final order on all matters presented to it. The transcript or minutes of oral deliberations shall not constitute a final order. A final order shall include, but not be limited to:

I. The identity of all parties;

II. The positions of each party on each issue;

III. A decision on each issue including the reasoning behind the decision; and

IV. The concurrence or dissent of each commissioner participating in the decision.

374:22 Other Public Utilities.

I. No person or business entity shall commence business as a public utility within this state, or shall engage in such business, or begin the construction of a plant, line, main or other apparatus or appliance to be used therein, in any town in which it shall not already be engaged in such business, or shall exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the commission.

II. No permission or approval under this section shall be required to be obtained by a foreign electric utility as defined in RSA 374-A:1 in connection with its participation in an electric power facility as defined in said section where the electric utility having the largest financial interest therein and the utility or utilities having primary responsibility for the construction or operation of the facility are domestic electric utilities as defined in said section or have obtained such permission.

III. No water company shall obtain the permission or approval of the commission to operate as a public utility without first satisfying any requirements of the department of environmental services concerning the suitability and availability of water for the applicant's proposed water utility.

374:26 Permission.

The commission shall grant such permission whenever it shall, after due hearing, find that such engaging in business, construction or exercise of right, privilege or franchise would be for the public good, and not otherwise; and may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest. Such permission may be granted without hearing when all interested parties are in agreement.