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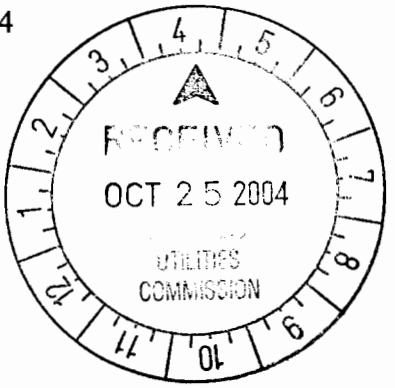
October 25, 2004



By Hand Delivery

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

Re: DW 04-048 – City of Nashua Taking Of: Pennichuck East Utility, Inc., Pittsfield Aqueduct Company, Inc., Pennichuck Water Works, Inc.

Dear Ms. Howland:

Enclosed for filing with the Commission are an original and eight copies of Pennichuck East Utility, Inc., Pittsfield Aqueduct Company, Inc. and Pennichuck Water Works, Inc.'s Memorandum of Law on Scope of RSA Chapter 38 together with a computer diskette in Word format with the enclosed Memorandum on it.

Sincerely,

Steven V. Camerino

SVC:cb

Enclosure

NHPUC OCT25'04 PM 4:12

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Docket #: 04-048-1 Printed: October 25, 2004

FILING INSTRUCTIONS:

WITH THE EXCEPTION OF DISCOVERY (SEE NEXT PAGE) FILE 1 ORIGINAL & COVER LETTER, PLUS 8 COPIES (INCLUDING COVER LETTER) TO:

DEBRA A HOWLAND
EXEC DIRECTOR & SECRETARY
NHPUC
8 OLD SUNCOOK RD
CONCORD NH 03301-7319

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

City of Nashua Taking Of:

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

Docket No. DW 04-048

PENNICHUCK EAST UTILITY, INC., PITTSFIELD AQUEDUCT COMPANY, INC. AND PENNICHUCK WATER WORKS, INC.'S MEMORANDUM OF LAW ON SCOPE OF RSA CHAPTER 38

In accordance with Commission Order No. 24,379[1], Pennichuck East Utility, Inc. ("PEU"), Pittsfield Aqueduct Company, Inc. ("PAC"), and Pennichuck Water Works, Inc. ("PWW") submit the following memorandum of law.

I. INTRODUCTION

This case arises out of the City of Nashua's (the "City" or "Nashua") efforts to take the assets of three separate corporations—PEU, PAC and PWW—each of which is a regulated public utility. In its petition, Nashua lays claim to all of the assets of all three of these entities, despite the fact that neither PEU nor PAC provides service in Nashua or owns any assets there and despite the fact that a significant portion of the assets of PWW are located many miles from Nashua, are not connected to the water system that serves Nashua, and are entirely unnecessary to provide water service in Nashua.

As is set forth below in more detail, there is no legal basis for Nashua's attempt to seek Commission approval under RSA Ch. 38 to take such assets, and in fact the City's attempt to do

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[1] The Commission's October 1, 2004 Order did not expressly deny the Pennichuck Utilities' Motion to Dismiss Nashua's Petition filed on April 5, 2004. However, to the extent that the Order could be construed as having denied the Pennichuck Utilities' Motion, this Memorandum of Law also should be considered as the Pennichuck Utilities' Motion for Reconsideration of such Order pursuant to RSA 541:3.

so is contrary to the plain meaning of that statute. Because Nashua's petition in this case greatly exceeds the scope of any taking permitted by law, the Commission should determine that it lacks the authority to consider the relief requested by Nashua and dismiss the City's petition as filed.

II. FACTS

A. History of the Pennichuck Utilities

PWW is a New Hampshire corporation that was initially formed to provide water service to Nashua and subsequently received approval from the Commission to serve other communities. All of its issued and outstanding shares are owned by Pennichuck Corporation (the "Parent Company"), a publicly traded holding company. PWW was granted public utility status by this Commission in its Order No. 16,373 in Docket No. DF 83-105 as part of a proceeding that arose from a corporate restructuring of PWW's predecessor entity. In subsequent years, the Commission has expanded the scope of PWW's operating authority to include all or a portion of the communities of Amherst, Bedford, East Derry, Epping, Hollis, Merrimack, Milford, Nashua, Newmarket, Plaistow and Salem. The distribution systems serving the City of Nashua and a small portion of the Towns of Merrimack, Amherst, and Hollis are operated as a single unit and have come to be known as the "Core System" because they form a contiguous, interconnected water distribution system relying on the same water source and network of mains. Today, PWW serves approximately 21,415 customers in the City of Nashua and 967 customers in the Towns of Merrimack, Amherst and Hollis. PWW also has 2,224 customers in the 21 non-contiguous water systems owned by it in the Towns of Bedford, East Derry, Epping, Merrimack, Milford, Newmarket, Plaistow and Salem. Each of these systems exists on a "stand alone" basis, with its own pipes, mains and water supply.

In 1998, the Parent Company formed PEU to acquire most of the water systems then owned by Consumers New Hampshire Water Company, Inc. ("Consumers Water"). None of

these systems were or are connected to the Core System. PEU was granted public utility status by this Commission in Order No. 22,880 in Docket DE 96-227. In order to raise the capital necessary to acquire the Consumers Water systems, PEU issued 100 shares to the Parent Company (in exchange for equity from the Parent Company) and PEU issued its own debt instruments. The rates for water service for customers of the PEU systems were, and continue to be, set separately from those of PWW with reference to the separate rate base, operating expenses and cost of capital of PEU. Rate cases for PEU and PWW have been conducted entirely separately, and the costs attributable to each company are accounted for separately. PEU currently serves approximately 4,526 customers in the Towns of Atkinson, Bow, Derry, Hooksett, Litchfield, Londonderry, Pelham, Plaistow, Raymond, Sandown and Windham, New Hampshire.

In 1998, the Parent Company formed a third subsidiary, PAC, to acquire the assets of an investor owned utility that was then serving a portion of the Town of Pittsfield, New Hampshire which was experiencing significant operational problems. Although the transaction was accomplished through a sale of assets, the separate status of the utility serving Pittsfield was maintained by acquiring the former owner's assets through PAC. Because PAC was a separate, newly formed corporation, it was required to and did obtain its own separate approval from this Commission to operate as a public utility. See Order 22,843. As with PEU, the utility assets of PAC were and have been maintained separate and apart from those of PWW, and PAC's rates have been set based on PAC's own rate base, operating expenses and cost of capital. As with PEU, the stock of PAC is owned by the Parent Company and it issues its own debt instruments that are separate and apart from those of PWW and PEU. PAC currently serves approximately 645 customers in the Town of Pittsfield.

While the pipes, mains and water supply of each of the Pennichuck Utilities are distinct and owned by the individual utility, PWW employs the individuals necessary to operate the three utilities, and owns all of the trucks and office equipment used to serve the customers of PWW, PEU and PAC. In turn, PWW charges PAC and PEU their proportionate share of the costs incurred for such equipment and personnel.

B. Nashua's Attempt to Take the Assets of PEU, PAC and PWW

On November 26, 2002, in response to the Parent Company's announced intention to merge with Philadelphia Suburban Corporation, the Nashua Board of Aldermen adopted a resolution calling for a referendum asking Nashua voters whether they would authorize the City "to acquire all or a portion of the water works system currently serving the inhabitants of [Nashua] and others."[2] Nashua did not offer any further explanation as to which particular assets it would attempt to take and in fact resisted legal attempts to require that it provide information to the citizenry regarding the scope of the referendum.[3] Instead, Nashua conducted a rushed special election only seven weeks later, on January 14, 2003, in which approximately twenty percent of the voters participated, one of the lowest voter turnouts in recent years. Not surprisingly, the referendum passed by a vote of 6,525 to 1,870.

On February 5, 2003, purporting to act pursuant to RSA 38, Nashua sent written notification of its desire to acquire all of the utility assets of PEU, PAC and PWW. In recognition of the distinct legal status of the three regulated subsidiaries of the Parent Company, Nashua sent separate demand letters to each of PWW, PAC and PEU. See Exhibits B, C and D

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[2] Interestingly, the 2003 referendum was only the latest in Nashua's periodic abortive efforts to municipalize the water company providing service in the City. In 1911, Nashua first explored municipalizing PWW when PWW was considering extending service to Hudson. Then, in the late 1950's, when Nashua was unhappy with a PWW rate increase, it pursued the possible municipalization of PWW. In both instances, Nashua gave up on its efforts.

[3] See January 6, 2003 Order in Teeboom v. City of Nashua, Docket 02-E-441 (Hillsborough County Superior Court, Southern District).

to Nashua's Petition. Each letter stated that "the Nashua Board of Aldermen have determined that all of the plant and property of [the recipient utility] is necessary for municipal water service and in the public interest for the City to acquire" and further inquired whether the recipient utility was willing "to sell the property identified above to the City of Nashua." The identical language was included in all three letters, even though the plant and property of PEU and PAC were not in fact "necessary for municipal water service" in Nashua and despite the fact that neither company owned any assets in Nashua or provided any service to there. Id.

On March 25, 2003, PEU, PAC and PWW each responded to Nashua's letters, informing Nashua that they were not willing to sell their assets to the City. See Exhibits E, F, and G to Nashua's Petition. The very next day, Nashua replied that "The City will *now proceed* under RSA 38:10 to petition the Public Utilities Commission in order to complete the acquisition of the plant and property specified in Nashua's letters sent earlier under RSA 38:6." (Emphasis added.) Nearly a year later, the City finally filed a petition with this Commission, seeking to take all of the utility assets of all three companies, without regard to who owned the assets or whether they were needed to provide water service in Nashua or to the Core System that serves Nashua.

III. ARGUMENT

A. The Scope of the Assets That Are Properly the Subject of Nashua's Petition Is A Threshold Issue That Must Be Decided at the Outset of This Case, Not at the End.

Nashua has repeatedly argued in numerous forums that the issue of which assets it should be allowed to seize is a question of what the "public interest" is and that the issue can only be decided by this Commission after it has considered all of the facts that Nashua has claimed it will present on this and other issues. The City completely ignores the fact that the identity of the proper condemnee is a threshold legal question of statutory interpretation, not an issue of fact. Similarly, it is also a threshold issue of law for this Commission to determine whether Nashua

has the authority to take assets that are not necessary for the City to provide municipal utility service. While Nashua may remain free to try to establish during the course of this proceeding why particular shared assets are or are not necessary for that purpose, the parties to this proceeding need to know at the outset what the legal standard will be for determining whether or not a particular asset is subject to taking at all. That standard relates not to any factual determination to be made by the Commission later in the case, but rather to the burden of proof that Nashua must meet in presenting its case and the standard of review that will be applied by this Commission in ultimately determining whether particular assets should even be considered under the statutory public interest test. These are seminal matters that must be resolved at the outset of this proceeding. To the extent that assets are manifestly unnecessary to serve Nashua or the Core System—such as wells and pipes located in far away systems—the Commission should rule at the outset that these assets are beyond the reach of Nashua under RSA Ch. 38, thereby limiting the scope of this proceeding.

B. RSA Ch. 38 Does Not Give Nashua the Authority to Take Utility Assets That Are Owned by Companies That Neither Provide Service in Nashua Nor Own Any Assets There.

1. The Plain Meaning of RSA Ch. 38 Is Contrary to Nashua's Position.

As this Commission has repeatedly observed, "[i]n matters of statutory interpretation, we must initially look at the plain meaning of the words used." Investigation of the Congestion on the Telephone Network Caused by Internet Traffic, Order No. 24,294, slip op. at 9 (Dkt. DT 99-020 Mar. 12, 2004) (*citing* Matarese v. N.H. Mun. Assoc. Prop.-Liability Ins. Trust, 147 N.H. 396, 401 (2002)). Thus, the task of the Commission in interpreting statutory language is to first:

> examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used…When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we refuse to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute. …Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation.

Balke v. City of Manchester, 150 N.H. 69 (2003) (finding that municipality exceeded its statutory authority by failing to obtain approval of voters in outlying towns to fluoridate water) (citations omitted). An administrative agency should not "read words into [the statute] which the legislature did not see fit to insert." See Appeal of CNA Insurance Companies, 143 N.H. 270, 272 (1998) (quoting from Gregory v. State, 117 N.H. 62, 63 (1977)).

In the present case, the plain and ordinary meaning of the relevant words of RSA Ch. 38 is unambiguous. RSA 38:6 provides that, after taking the appropriate vote, a city "shall notify in writing *any utility engaged*, at the time of the vote, *in generating or distributing* electricity, gas, or *water for sale in the municipality* of the vote." (Emphasis added.) Neither PEU nor PAC is a utility engaged in generating or distributing water for sale in Nashua. To the contrary, as discussed above, they are separate corporations, each with separate legal status as public utilities authorized to operate in different geographic portions of New Hampshire.

Nowhere do the words of RSA Chapter 38 give a municipality the authority to seize the assets of a utility that does *not* provide service within the municipality attempting the taking. Yet, Nashua would have this Commission believe that, in enacting RSA Chapter 38, the Legislature intended to authorize the City to take all of the assets of not just PWW, but both of its regulated affiliates as well, merely because PWW itself provides water service within the City. Even if such a legislative intention made sense from a policy standpoint, which it plainly does not, the words of RSA Chapter 38 do not support such a reading.

That the Legislature intended to grant a municipality the authority to take utility assets only from the entity that provides service within the municipality's boundaries is further evidenced by the repeated use of the word "utility," in the singular, throughout RSA Chapter 38. RSA Ch. 38 refers to "the utility" three times in Section 7, again in Section 8, two more times in Section 38:9,I and again in both Sections 10 and 11.

If the Legislature had intended to expand the scope of the statute to include utility affiliates, it certainly could have done so. As the Commission is well aware, the Legislature has amply demonstrated its awareness of issues involving affiliates in the public utility context through the enactment of provisions such as those of RSA Ch. 366 (regarding transactions between public utilities and their affiliates).

The existence of multiple utility affiliates owned by a single holding company is nothing new in New Hampshire. For example, Concord Electric Company and Exeter and Hampton Electric Company both existed for many years as separate subsidiaries of Unitil Corporation. And Manchester Gas Company and Gas Service, Inc., and subsequently Concord Natural Gas Corporation, existed under common ownership but as separate utility entities for a period of years. Nowhere does RSA Ch. 38 include any indication of an intention to grant a municipality the authority to take assets of more than one utility or of companies that may happen to be affiliated with the local utility.

When RSA Ch. 38 was extensively amended in 1997, the affiliation of PWW and PEU already existed, as did the affiliate relationship of the Unitil companies. Plainly, the legislature could have addressed such situations if it had wished to, and if it had believed that such a statutory structure was both constitutional and good policy. It did not, and this Commission should not accept Nashua's invitation to do now what the Legislature chose not to do then.

2. Expanding the Applicable Statute Beyond its Plain Meaning Is Particularly Inappropriate in This Case Because RSA Ch. 38 Is An Eminent Domain Statute and Must Therefore Be Construed Narrowly.

Nashua's efforts to expand the scope of RSA Ch. 38 beyond its plain meaning are also contrary to the well-established rule that eminent domain statutes should be narrowly construed. See 4 Tiffany, The Law of Real Property, § 1252 (3rd ed. 1975); see also Orono-Veazie W. Dist.

v. Penobscot Cty. Water Co., 348 A.2d 249 (Me. 1975); Ronci Mfg. Co., Inc. v. State, 403 A.2d 903 (R.I. 1979).

> Statutes conferring the power of eminent domain are subject to strict construction against the one exercising the power and in favor of the landowner, because the power of eminent domain is one of the most harsh proceedings known to the law. Such statutes are not to be extended or broadened by inference or implication or by judicial construction. A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication; and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.

26 Am Jur2d, Eminent Domain § 20.

This principle of narrow interpretation has even greater application in situations, such as the present one, where a municipality is seeking to exercise authority to condemn property outside of its corporate limits. See Village of Arlington Heights v. Gatzke, 428 NE2d 947 (Ill.App. 1981)(prohibiting a municipality from using drainage condemnation authority to create a reservoir outside of city limits); McQuillan, Mun. Corp. § 32.66 (3rd ed. 1991). Yet rather than seeking to exercise its condemnation powers narrowly, as would be appropriate, Nashua has urged this Commission to authorize it to exercise those powers in the broadest manner imaginable, in a way that goes well beyond any reasonable reading of the statute. Nashua has failed to provide this Commission with any appropriate basis to stray from this important rule of statutory construction, and it should refuse to do so.

3. Nashua Has Failed to Provide Any Basis for its Requests that the Commission Effectively Pierce the Corporate Veil by Ignoring the Separate Legal Existence of PEU and PAC.

In arguing that the Commission should authorize it to condemn the assets of PAC and PEU, Nashua would have the Commission effectively pierce the corporate veil between PWW, PEU and PAC by ignoring the legal distinction that separates them and treating the three corporations as if they were one. Yet in urging the Commission to take such an extreme step, Nashua has not provided any accepted legal basis for doing so. It is a fundamental principle of

corporate law that a corporation is a legal entity entirely separate and distinct from the individuals who compose it. Moreover, just because two corporations have identical shareholders does not justify treating them as a single legal entity. See Fletcher's Cyc. Corp., § 28, p. 496. The New Hampshire Supreme Court has repeatedly held that the corporate veil may only be pierced where the corporate identity has been used to promote an injustice or fraud, where a defendant has suppressed the fact of incorporation, and where an individual expressly agrees to personal liability for a corporation's debts. See Lamontagne Bldr. v. Bowman Brook, 150 N.H. 270, 275 (2003); see also Gautschi v. Auto Body Discount Center, 139 N.H. 457, (1995). Piercing the corporate veil is plainly not justified in the present case, and Nashua's naked attempt to do so cannot provide a basis for the City's attempt to expand the scope of the authority granted under RSA Ch. 38.

C. RSA Ch. 38 Does Not Give Nashua the Power to Take Assets of PWW That Are Not Needed to Provide Service to the Water System in the City.

In addition to lacking the legal authority to take the assets of PEU and PAC, Nashua also lacks any authority to take assets of PWW that are not necessary to provide water service within the City's bounds. Contrary to Nashua's position, RSA 38:6 by its terms limits the assets that the City may take to those that are "necessary for the municipal utility service."

While RSA Ch. 38 does provide municipalities with limited power to take assets outside their bounds if the Commission finds that it is in the public interest to do so, see RSA 38:6, the statutory structure makes clear that those assets must be limited to those necessary to enable the municipality to provide service within its own bounds.[4] The reason for such a limitation is simple. If this were not the case, one municipality might be able to "municipalize" water service

[4] Even in the case of an existing municipal utility, the statute only authorizes the taking of "such plant owned by a utility which is necessary for expanded *municipal* utility service." RSA 38:12. (emphasis added).

in another community by taking over the system in the other town, even though the second town had not voted to take over the local utility and may have even opposed the municipalization of service. Thus, if RSA Ch. 38 were read as allowing Nashua to take the water system in Bow, Bow would be forced into choosing between having Nashua provide water service and set rates for citizens there or taking the water system itself under RSA Ch. 38:14 even though it did not want to municipalize water service in the first place.

If Nashua's interpretation of the scope of RSA Ch. 38 were correct, then what would be the point of the public interest presumption associated with the municipal vote provided for in RSA 38:3, 4 and 5? Nashua cannot credibly assert that a vote by twenty percent of its electorate creates a presumption that Nashua's desire to take the water systems in Bow, Newmarket and Salem is in the public interest. The only reasonable reading of the statute is that a vote to municipalize utility service relates to the taking of the local water system only, i.e. the system that provides service to the community taking the vote. Anything more would stretch the words of RSA Ch. 38 to the breaking point.

In a similar circumstance involving fluoridation of a municipal water supply, the New Hampshire Supreme Court recently held that Manchester Water Works, a municipal utility that serves residents of Manchester and surrounding towns, had violated RSA 485:14 by fluoridating its water supply without the approval of the voters of *all* of the towns where it provided service. (It had obtained approval only from voters in the City of Manchester.) The Court reasoned that "if only the municipality owning the water system were required to approve fluoridation, one small municipality owning a water system could hold a referendum on fluoridation among its voters, and then provide fluoridated water to numerous large municipalities without the residents of the large municipalities having a vote." Balke, 150 N.H. at 73. Similar to the Court's ruling in Balke, and contrary to Nashua's position in this case, the voters of Nashua do not have the

authority to decide the fate of water users in 21 other towns across the Southern and Central portions of New Hampshire simply because some residents of Nashua may wish to municipalize their water service.

Plainly, the legislature contemplated that, in taking the assets necessary to provide municipal utility service, a city might need to take less than all of the assets of the subject utility. This is reflected by the provision for severance damages. Thus, RSA 38:9,III requires the Commission, when assessing damages to determine the amount, "if any, caused by the severance of the plant and property of the owner." While Nashua's reason for expanding its taking to the maximum scope conceivable and beyond may be to reduce the severance damages that the City would otherwise have to pay[5], such a justification is a wholly inappropriate basis for attempting to expand the scope of RSA Ch. 38.

Although Nashua asserts its desire to reduce severance damages is an issue of "public interest" and hopes the Commission will view the question of which PWW assets may be taken as one to be considered during the public interest phase of this proceeding[6], in fact the question before the Commission at this stage is simply whether assets that are not needed to operate a municipal utility in Nashua are properly the subject of this proceeding at all. In other words, the Commission must first decide the scope of Nashua's eminent domain authority (e.g. whether Nashua has eminent domain power over PAC, PEU and/or any PWW assets not necessary to provide service to Nashua). The Commission then must decide whether the taking of any assets that are properly subject to an RSA Ch. 38 claim by Nashua is in the public interest. Nashua incorrectly blurs these two questions into one. Whether the severance damages should be paid is

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[5] See July 28, 2004 transcript in DW 04-048, pp. 28, 58.

[6] Id.

simply not relevant to an initial determination of whether RSA Ch. 38 provides a legal basis for taking certain assets at all.

D. The Legislative History of RSA Ch. 38 Does Not Support Nashua's Reading of the Statute.

The New Hampshire Supreme Court has repeatedly held that the legislative history of a statute is not to be considered in interpreting statutory language unless the statute itself is ambiguous. In re Naswa Motor Inn, Inc., 144 N.H. 89, 90 (1999). As discussed above, the meaning of RSA Ch. 38 is unambiguous in this case, and therefore resort to the statute's legislative history is inappropriate. Nevertheless, because the Commission's Order No. 24,379 requested that the parties review any relevant history of RSA Ch. 38, that analysis is provided below.

In 1997, the legislature re-enacted RSA Chapter 38, and hearings were held to consider proposed changes to the statute. During this 1997 re-enactment (which took the form of HB 528), the New Hampshire Senate Committee on Executive Departments and Administration held a hearing at which the following testimony was given:

- Representative Below: "...it [the Bill] strengthens and reinforces an existing right of municipalities to municipalize *their distribution system...*"

  "...the public interest determination by the commission is a change from the existing statute to the extent that they determine if it is in the public interest...but it says they may set condition and issue orders to satisfy the public interest. This clarified their ability to positively assert conditions or even issue orders that say the public interest requires, for instance, that a municipality may have to acquire some property outside of its boundaries. *If there is some customers that would otherwise be stranded with a small distribution line that crosses a municipal boundary the 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.*

April 21, 1997 Committee Report, pp. 3, 7, attached as Exhibit A (emphasis added).

Representative Below's testimony underscores the two points discussed above. First, that the legislature was contemplating only the taking of the utility providing service in the municipality asserting Chapter 38 rights, not utilities providing service elsewhere. Second, that the public interest would dictate the taking of extra-territorial utility property based only on oddities of the configuration of the utility distribution system, e.g., where disconnection of the assets at a certain juncture would result in the stranding of customers or other like circumstances. Comments from Representative Bradley, Chair of the House Science, Technology and Energy Committee, confirm this view: "It [HB 528] clarifies, it simplifies, and it lays some new groundwork for what is an existing right now of municipalities…to, through a process, take over the existing utility network *within their community* or in some circumstances outside of their community." Id., p. 1 (emphasis added). Both Representative Below and Bradley, recognized leaders with regard to utility legislation, regarded the Chapter 38 power as limited in just the way described above. Thus, recourse to the legislative history of RSA Ch. 38 only confirms the plain meaning of the statute's express wording.

E. Nashua's Attempted Taking is Also Inconsistent With the Vote Taken to Authorize the Taking.

On November 26, 2002, the Nashua Board of Aldermen adopted a resolution authorizing, in part, the City 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 currently serving the inhabitants of the City and others." See Exhibit A to Nashua's Petition. This resolution was predicated on a number of recitals, including the following, which were plainly intended to state the purpose of the referendum:

- WHEREAS *the Board of Aldermen of the City of Nashua* finds that these purposes can best be served by public ownership of all or a portion of the water works system serving the inhabitants of the City and others; and

- WHEREAS *the Board of Aldermen of the City of Nashua* finds that the acquisition and maintenance of such system can and should be accomplished via the issuance of revenue bonds based on anticipated revenues, and not upon general obligation bonds of a community; and

- WHEREAS the Mayor has recommended public ownership of the water works system.

See id. The resolution directed that the City hold a special meeting of the voters "for the purpose of confirming the adoption of this resolution...." Id. Shortly after the resolution was adopted, the following referendum was presented to the voters:

> Shall the resolution of the Board of Alderman adopted on November 26, 2002 determining that it is expedient for the City 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 currently serving the inhabitants of the City and others be confirmed?

Id. Thus, the purpose of the vote was to confirm the action taken by the Board of Aldermen in November, which was to authorize the taking of "all or a portion of the water works system currently serving the inhabitants of the City and others."

In order to understand the scope of the vote, one must necessarily refer back to the words of the Aldermanic resolution. The resolution plainly refers to the acquisition of only one water works system ("the water works system"), which is then modified by the words "currently serving the inhabitants of the City and others." There is only one water works system that meets this definition, and that is the Core System of Pennichuck Water Works, which provides water service to Nashua and others in outlying communities. Without question, the Pennichuck Water Works satellite systems in Newmarket, Raymond, and Salem do not meet this criterion as they provide no service whatsoever in Nashua, nor do the systems owned by Pennichuck East Utility and Pittsfield Aqueduct Company. The fact that these unconnected, and in some cases, separately owned systems are not part of the water works system serving Nashua is perhaps best

illustrated by the fact that all of them are designed to operate independently and most of them were once owned by wholly unrelated companies.

Despite the clearly limiting language encompassed by the public vote, Nashua seeks to lay claim to the assets of all three Pennichuck Utilities, regardless of whether they constitute "the water system currently serving the inhabitants of the City and others." This claim of power greatly exceeds the scope of authority that was or could have been granted by the voters of Nashua. Without a vote that properly authorizes its actions, Nashua cannot proceed with the taking in this docket. See Balke.

F. Nashua's Position Would Lead to Patently Absurd Results.

As Nashua would have it, any municipality in New Hampshire could take all of the assets of any utility serving it, regardless of whether the utility provided service only within the municipality attempting the taking or in other municipalities across the state. (Of course, Nashua takes even this argument one step further by claiming that such a broad power further include the power to take the assets of all affiliated companies providing utility service in other parts of the state.) The absurdity of Nashua's position is plainly evident when one applies this theory to other New Hampshire utilities. Following Nashua's logic, all of the following would be legally authorized under RSA Chapter 38:

- The City of Lebanon decides to municipalize electric service, so it takes Granite State Electric Company's assets in Salem, New Hampshire as well as those in Lebanon;
- The City of Concord decides to municipalize electric service, so it takes Unitil Energy System's assets in Exeter and Hampton, New Hampshire as well as those within Concord;
- The City of Nashua decides to municipalize gas service, so it takes KeySpan Energy Delivery's assets in Manchester, Concord, Tilton and even Berlin.
- The Town of Durham decides to municipalize electric service, so it takes all of the assets of Public Service of New Hampshire, from Portsmouth to Claremont, and Colebrook to Nashua.

One could complete this mental exercise for every single public utility in New Hampshire, and in not one instance would Nashua's theory make sense. As applied, Nashua's claim to unbridled power of eminent domain would effectively strip other municipalities and their citizenry of their rights under RSA 38, while the voters of Nashua would become omnipotent. It is difficult, if not impossible, to imagine that the Legislature intended to grant one municipality extraterritorial power while crippling other municipalities and disenfranchising voters across the state. See id. (city's claim to sole authority to approve fluoridation of water system serving multiple communities flawed logic because it would mean that "one small municipality owning a water system could hold a referendum on fluoridation among its voters, and then provide fluoridated water to numerous large municipalities without the residents of the large municipalities having a vote.").

Even counsel for Nashua recognized that a single municipality did not have the legal authority to take utility assets used to serve other municipalities, and that if multiple municipalities were to be served, each municipality would need to come forward to take the assets used to serve its territory. During the 1997 legislative hearing, Attorney Upton testified that if multiple communities were served by a utility and they wished to municipalize it, "...what you're going to see is you're going to see inter-municipality agreements to enter into some kind of municipalization where one or more, two or more communities will municipalize what exists in them and the operate it as a single entity. I think that will be the wave of municpalization in the future." See Exhibit A, p. 25. Here, Nashua has failed to do that. Instead, it is attempting to take the water systems in almost two dozen municipalities across Southern and Central New Hampshire based on a vote of less than twenty percent of the electorate in the City of Nashua.

G. The Regional Water District is a Red Herring.

In apparent recognition that it lacks the legal authority to take assets outside the City to serve far flung communities such as Bow, Epping, Newmarket, Plaistow and Pittsfield, Nashua has represented to the PUC that it may choose to transfer all of the Pennichuck Utilities' assets to a regional water district, attempting to legitimize its taking efforts by claiming that it is promoting the "regionalization" of water services. Nashua has even suggested that this would somehow further the Legislature's intent in enacting RSA 38:2-a.

Nashua's argument could not be further off the mark. In 2003, well after Nashua had sent its demand letters to PEU, PAC and PWW and what is now known as the "Merrimack Valley Regional Water District" had begun its informal organization, the Legislature considered whether to adopt legislation authorizing the creation of regional water districts (in essence, enabling the Merrimack Valley Regional Water District to come into existence). During that legislative debate, the Legislature was faced with the decision of whether to grant regional water districts the power of eminent domain over existing public utilities. The Legislature explicitly rejected the concept, providing instead that "No regional district shall have the authority to take property by eminent domain." RSA 38:2-a, VI.

Had the New Hampshire Legislature intended to promote water regionalization through eminent domain takings from investor owned utilities, it surely knew how to do so. Instead, it did just the opposite in clear and unambiguous language. Thus, there is no basis for Nashua's claim that its efforts to take PEU, PAC and PWW promote the Legislature's intent, or that the existence of a shell regional entity that itself could not take the assets Nashua is seeking is somehow relevant to any consideration of the issues before the Commission in this case.

H. Nashua's Efforts to Link the Three Pennichuck Utilities Because they Share the Use of PWW Employees or Trucks Is Erroneous.

Although PEU and PAC do rely on individuals employed by PWW for their operations, Nashua wrongly assumes that this sharing arrangement is somehow relevant to the Commission's takings analysis. Contrary to what Nashua may believe, these individuals are not property that is owned by PWW or any of its affiliates. They are people who are free to come and go and seek alternative employment at their own free will. While PWW values these employees greatly, they are not subject to Nashua's eminent domain efforts. The fact that PEU and PAC are served by employees of PWW, therefore, is entirely irrelevant for purposes of determining the proper scope of Nashua's eminent domain petition since those employees cannot be seized by Nashua.

Even to the extent that PWW owns assets that are used to provide service to PEU and PAC, this ownership in and of itself does not justify an expansion of Nashua's eminent domain authority to include these wholly distinct utilities. For example, if Nashua determined that the trucks owned by PWW were necessary for municipal utility service, these assets, which are fungible, could be replaced easily by PEU or PAC upon PWW's receipt of adequate compensation. However, that would not be the case for pipes, mains, and water supplies used by PEU or PAC to serve their customers because the taking of those assets would put the three utilities in the impossible position of building a parallel system to the one just taken and trying to serve the very same customers being served by Nashua.

IV. CONCLUSION

For the reasons stated above, the Pennichuck Utilities request that the Commission dismiss Nashua's Petition based on its failure (and legal inability) to state a claim for assets of PEU and PAC, and any assets of PWW not necessary to provide water utility service within the City.

Respectfully submitted,

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

By Their Attorneys

MCLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

October 25, 2004

By: _____

Thomas J. Donovan
Steven V. Camerino
Sarah B. Knowlton
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Certificate of Service

I hereby certify that a copy of this Memorandum of Law has been forwarded to the parties listed on the Commission's service list in this docket.

Dated: October 25, 2004

_____
Steven V. Camerino

EXHIBIT A

DW 04-048
39 Pages

Date: April 21, 1997
Time: 11:00 a.m.
Room: 104 LOB

The Senate Committee on Executive Departments & Administration held a hearing on the following:

HB 0528 relative to municipal water, gas and electric utilities.

Members of Committee present:

Senator J. King
Senator Rubens
Senator Whipple
Senator Roberge
Senator Podles
Senator Patenaude

The Chair, Senator John A. King, opened the hearing.

Representative Jeb Bradley, Carr 8: For the record, Jeb Bradley, Carroll County District 8. I come back before you again this morning with probably one of the most important pieces of the year. This bill, HB 528, is similar to a bill that passed the Senate last year. It clarifies, it simplifies, and it 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.

We believe that this is a very important piece of legislation for several reasons. As I said, it clarifies and it simplifies an existing right and opportunity, but perhaps more importantly should the process of electric utility deregulation falter or get slowed down in the courts, this provides some balance and some needed opportunities for municipalities to proceed on their own if the benefits of competition don't arrive as quickly as we had hoped.

I'll just touch upon some of the main changes in the statute that are in this bill, and then Cliff, I think, would be happy to take you through some of the details. This re-enacts RSA 38, repeals and re-enacts, so there are many

changes, but the specific ones are that those areas that are different for electric and water are spelled out with different provisions. The water sections that are separate are later in the bill.

The public interest determination is changed, and that is throughout the bill, starting on page 1 of the bill, or page 2 actually, line 29, 38:3, cities, towns, or village districts, 38:4 and 38:5, unincorporated places. What the language "rebuttable presumption" says is that once there has been a vote by the community, there is a presumption by the community that the public utilities commission should listen to that there is a presumption that the public interest is satisfied by that vote.

It is further illuminated on page 3 of the bill in section 38:11 where the public interest determination by the commission is spelled out, and it does give the commission the opportunity to set conditions and issue orders to satisfy the public interest. So clearly the commission is an integral player here.

Language in the bill added "unincorporated places" which, while most of us who live south of the White Mountains don't have to worry about that, it was a major interest for Representative Larry Guay, who represents several unincorporated places, that they be given ample opportunity.

The ratification section on page 4, language was added to make it explicitly clear that municipalities were authorized to hold special meetings if necessary. That was a possible shortcoming in the prior statute. The limitation in RSA 33-B on bonding was removed so that communities could exceed, I believe, it was a 10% cap and go forward without that limitation.

Senator Eleanor Podles, D. 16: Where is that bonding? On page 4? That you're talking about.

Representative Jeb Bradley, Carr 8: It is ...yes, in section 38:13.

Senator Eleanor Podles, D. 16: So, we're still on ratification in other words?

Representative Jeb Bradley, Carr 8: It is in that section. Yes, Senator. And, I think one of the last other major changes that is in this bill are on page 9, the consequential damages section that allows the commission to determine, in essence, consequential damages which is what we're calling stranded costs, if the Federal Energy Regulatory Commission decides it does not have jurisdiction, which is highly unlikely.

The following section, 38:34, says that any newly municipalized electric company shall unbundle rates, and it also allows those five communities that now have municipal electric departments, which include my town of Wolfeboro, Woodsville, Littleton, Ashland, and New Hampton, that they may voluntarily unbundle.

Another key provision is the financial responsibility section, which in essence says that if you're not part of the service territory of a municipal utility or you choose not to take generation services from that municipalized entity that you cannot be held responsible for any problems through taxes or other charges.

I think that highlights most of the bill. Once again, I think this is a really important piece of legislation in that it hopefully will provide an opportunity for communities to go forward based on statutory rights that they've had in the past and will offer another option should there be protracted litigation with regard to the restructuring of our electric utility industry.

Representative Clifton Below, Grafton 13: I am Representative Clifton Below, representing Grafton District 13, the City of Lebanon and Town of Enfield.

I would just like to elaborate on Representative Bradley's comments and say that I think this bill in part was part of a sort of carrot and stick approach to help us move towards competition restructuring and lower electric rates. Obviously it is in a sense the stick part in that it provides municipalities, it strengthens and reinforces an existing right of municipalities to municipalize their distribution system and makes that opportunity more meaningful and one that can really be exercised should this effort to restructure result in protracted litigation, or whatever.

I think 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. In fact, there are over 2,000 municipal electric systems in this country, some of which were created by municipalization. Most of which were formed in the early days of electrification, and they serve somewhere in the order of 20% of the nation's customers.

Our laws have not been updated in this regard for many years. This bill, I think was SB 610 last year, went through this committee, was approved, went through our committee. We provided some amendments and when we got to conference committee there was a feeling that we really hadn't done as much work as needed to be done, and the bill was allowed to die in conference committee by sort of mutual consent of all the parties.

It was reintroduced and we put a lot of work into this. There was a number of different bills that essentially became this one bill. We had ones that attempted to update the water system section. There was another bill, HB 411, which looked at the bonding issue, and went to update RSA 33-B, and they were all merged into this one bill. After we had taken them apart and worked on each separate part we put them all back together.

If you'd like, I don't know how much detail you want to go into this, but I would be happy to walk through some of the more detail in terms of what is new and what has changed. We'll try to go through this slowly. Starting on page 1, chapter 38. I believe that is the same title of the chapter as currently exists, and we're simply repealing and re-enacting the whole chapter.

On line 10, Roman three (III), the term "municipality" is defined to include unincorporated towns and unorganized places. On line 16, there were some words added such as "establish, expand ...". We already had "take, purchase, lease." We just wanted to make clear the terminology included expansion of an existing system.

For the five systems that exist, I think a couple of them serve their whole towns, but at least three of them only serve part of their existing towns, Ashland, New Hampton, and Haverhill or Woodsville, only serve part of their towns. Wolfeboro I think serves basically almost the whole town.

Representative Jeb Bradley, Carr 8: 98%.

Representative Clifton Below, Grafton 13: Line 20 on the first page again there were some words that were added for these purposes. "Take" was added in. It wasn't there. "Or otherwise lease," "or otherwise acquire and maintain" I think were some additions.

When we turn to page 2 on line 4 or line 3 is where this phrase comes that says, "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." This provides this process where it takes a two-thirds vote of the governing body. I should mention that is also a new term. In many places there were specific references to the city council, the town selectmen, mayors, so on and so forth. We changed the reference so it generally talks about the governing body of a particular entity, which is a defined term elsewhere in the statutes.

But, this creates the notion that if there is a two-thirds vote to establish a municipal utility system that that creates a rebuttable presumption. That it is in the public interest. When we talk about this, there were attempts I

think in 610, as well as the way this bill was introduced, to define what public interest was meant. We ended up deciding not to do that because there is a long history of defining the term "public interest" in the law, in the case law, and the law before the PUC.

Both the utilities that were involved in testifying on this as well as the other groups, municipalities all felt it was better to not try to create a new definition for public interest, but rather to allow the one that exists in case law that has evolved over time to stand. But, it does create that presumption that can be rebutted and challenged when it goes to the commission. That's repeated on line 9, and it is a vote of the town or village district which is obviously at an annual meeting or a special meeting duly warned.

The whole section starting on line 12, 38:5, By Unincorporated Towns and Unorganized Places, this is a whole new section because they were not addressed previously. Senator Fred King and Representative Guay were concerned, and Coos County has taken something of a position on this. They had representation in this matter wanting to be sure that in Coos County where there are so many unincorporated towns that there would be a mechanism to provide for municipalization, which is through two-thirds of the members of the county convention.

Again, on line 22, there is a reference to within 30 days after the confirming vote the governing body shall notify in writing any utility engaged of the vote. Previously this mentioned there was a lot of different sections that talked about the mayor of a city or the selectmen. We just said the governing body shall provide the notice.

Down on line 33 where the utility is then to reply within 60 days of the receipt as to whether they are, in effect, willing to sell or not. That is given back to the governing body. Then it does provide if the utility says no, then 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 as provided in 38:10.

I believe that that exists in the current statute. We looked at taking that in and out, but ended up deciding that that should stay. It simply says if they say no then it is up to the process that is set forth as to what property is to be acquired. Whereas if the utility applies in the affirmative as provided in line 37, then they set forth the price in terms it is willing to accept and specify what plant and give a schedule of plant that is to be sold to the municipality.

Then 38:8 on page 3, line 6 provides that the governing body may negotiate and agree with the utility if there is a negotiated agreement on the sale. 38:9, Valuation, of course that was part of the existing statute, although

there are some changes to it. For instance, on line 18 it specifies that "...the commission shall determine the amount of damages if any caused by the severance of 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."

That is an important section because traditionally it was up to the commission to determine all damages of all nature. This has separated the damages into sort of the severance damages versus the consequential damages and stranded cost.

If you turn to 38:33, which is at the bottom of page 9, line 36, provides that consequential damages are going to be determined by the Federal Energy Regulatory Commission. Although it says to the extent they don't have jurisdiction actually, it says the commission shall determine just and reasonable consequential damages. The reason it says it in that way is because basically the FERC, Federal Energy Regulatory Commission, last spring in a major order addressing the whole issue of stranded costs in the electric utility industry said that they will ...they asserted jurisdictions that they will determine damages of this nature stranded cost related to generation and supply arrangements as a result of municipalization.

So, the point is that FERC has asserted jurisdiction over this issue in what is called FERC Order 888, and the feeling was that since FERC has said they have jurisdiction over determination of these kinds of stranded costs and what is going to be paid for them in the case of municipalization because it is transforming part of a retail system into a wholesale customer, and basically FERC says it has jurisdiction over wholesale transactions and arrangements. That is where it is assumed that it is going to be determined.

However, it does say that if FERC does not assert jurisdiction and is legally challenged, there are some entities challenging FERC's assertion of jurisdiction, then the commission shall have the ability to determine that on a just and reasonable basis. And then of course it says the commission need not make a determination when there is an agreement between the utility and the municipality. It says need not because it is conceivable that there would be a third party which felt that there needed to be issues addressed so the commission could step in and make a determination if they felt that was the public interest required.

So, if you turn back to page 3, and I think the section IV on line 23 and 38:10 are essentially similar to what currently exists. 38:11 at the bottom of the page the public interest determination by the commission is a change from the existing statute to the extent that they determine if it is in the public interest, although we've created a rebuttable presumption that it is by a two-thirds vote of the municipality, but it says they may set condition and issue orders to satisfy the public interest. This clarified their ability to positively assert conditions or even issue orders that say the public interest requires, for instance, that a municipality may have to acquire some property outside of its boundaries. If there is some customers that would otherwise be stranded with a small distribution line that crosses a municipal boundary the 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.

For instance, which was a gap that we found in the current statute that wasn't addressed if that's what the public interest would require. Again, it goes on to say the commission need not make a determination if there is an agreement for sale. But again, if there is a third party, such as a neighboring municipality or some customers who felt that they would be aggrieved by the proposed sale, the commission could be on their own initiative or petitioned by another party go ahead and make a public interest determination even if there is mutual agreement. And again, they could set conditions or issue orders to insure that public interest is satisfied.

When we get into this actually I think this expansion of existing municipals is a new section. Again that wasn't clearly addressed in the existing statute, and we added a provision that parallels the process for expansion. Ratification -- this is where the issue of bonds came up -- under the existing statute does not really reference out of its own language. It talks about municipality issuing bonds to pay for the acquisition cost, and it says such indebtedness shall not exceed at any one time 10% of the tax valuation of the community. However, the existing statute doesn't make clear whether these bonds are general obligation bonds, revenue bonds, or what. So, various bond counsel who looked at the current statute said it is really ambiguous and would be very difficult to utilize.

Typically, any acquisition that is being contemplated is less than 10% of the valuation of the municipality. However, usually that condition is only related to general obligation bonds and not tied in to revenue bonds. So, it was felt the appropriate thing to do was tie this into RSA 33-B which is the existing statute on municipal revenue bonds that disconnects them from sort of the general obligation of the community. It makes them specific to anticipated revenues from specific facilities. So, what we have done is tied

this off to the fact that the municipality may issue bonds and notes pursuant to RSA 33-B.

I'm going to ask you to turn to page 10. Near the bottom of the page, line 32, there is an amendment to RSA 33-B on revenue producing facilities, the term that provides the definition the existing statute covers water works, sewage treatment plants, solid waste facilities, but it doesn't cover electricity and gas systems. So, we have specified and included into the definition of revenue producing facilities "facilities for the production, generation, transmission, or distribution of electricity or gas," so then it all flows right out of that 33-B which has been updated in recent years and is considered to be a pretty clear good statute about how to do revenue bonds.

As Jeb mentioned, it goes on because there is a time limit at the start of – I'm back on page 4 on line 8 – it provides that the municipality within 90 days of a final determination of price has to decide whether or not to proceed with the acquisition, it does provide in line 13 that the municipality is authorized to hold a special meeting to take such a vote, and it clarifies that the special meeting doesn't have to be an emergency situation, but they can take it to satisfy the timing requirement, and of course the purpose of the timing requirement is so that once evaluation is made it proceeds without dragging it out so the evaluation would change over time by a delay in the vote to decide whether to go ahead and do it.

We did consider changing this, but we left it in on line 19. There is a specification that if the ratifying vote provided for in this section is in the negative, no other action under this chapter shall be had during the ensuing two year period. So, if a town chooses not to proceed, essentially under the voting provisions of 33-B which I believe requires a two-thirds majority vote to issue revenue bonds, if that two-thirds vote fails then the whole, there can be no other action for at least a 2 year period of time, so that this provides sort of a time out period where it is not, the incumbent utility has a chance to go ahead and perform and not be bothered by this for a couple of years.

Going on down to section 38:14, Operation of Plant, line 25-26, there is a new phrase that provides that "The operation by a municipality outside its own limits shall be subject to the jurisdiction of the commission except as provided in RSA 362." In RSA 362 which has to do with the general jurisdiction of the commission, it does provide that if a municipality provides utility service outside of its boundaries on the same rates and terms as it provides to its own residents within its boundaries it is not subject to the commission jurisdiction.

So, for instance, and I don't know if this is the case, but the Manchester Water Works, the Manchester Water Department which serves communities

outside of its boundaries, is or isn't subject to jurisdiction depending on whether it charges the same rates or different rates as it does to its own customers. Does that make sense? So, we just tied that off and tied it back into RSA 362. I think there was an attempt to spell that out in the existing statute, but it was felt to just tie it back into the other.

I think there is a little clarification on page 4, line 30 that a municipality may take by eminent domain land, any interest in land or water right within its limits. It doesn't allow a town to go outside of its limits for the expansion of plant, so that could only be done pursuant to a commission order to satisfy the public interest or by mutual agreement.

I think on page 5 and 6, most of that is pretty much as it exists in the current statute. There is something, I think the supply contract section had a little bit of language that was changed on line 4 where it starts off "Any such municipality may contract with individuals, corporations, and other municipalities and the citizens of such other municipalities for supplying them ...." There was just clarification language. You say citizens thereof. There are quite a few places, I'm not hitting every point, but there are quite a few places where we tried to clean up language that was ambiguous or not very clear or archaic. I'm not hitting all those points.

Page 7 is where the next major set of changes is. On page 7, line 8 is the additional provisions for water systems. It used to be that some of these sections were blended right in to the rest of the chapter. We decided to take out the ones that are specific to water systems and electric systems and put them at the end of the chapter, so it is just a little more clear. Most of this exists in the current statute. An example of the kind of minor changes we made on line 33, there is the section called Water Rates. It used to be Water Rentals, and used the term "rentals" throughout. We just changed it to the word "rates" because that is the term used these days.

Turning on to page 9, the additional provisions for electric systems, as Representative Bradley mentioned, at the bottom of the page, there is the section on consequential damages, and as I previously mentioned, it explains how that would be dealt with. On page 10, line 5 the Unbundling Rates and Open Access, that's new as well as the 38:35 is all new.

Maybe I'll just take a minute to explain the significance of that. It does provide that if a municipality establishes a municipal system then in effect it can't require customers to pay through taxes or otherwise costs associated with the utility except for power or services consumed either directly by the municipality or by the customer. That's on lines 13, 14, 15. So, it provides that if you are going to municipalize you can't use the taxpayers' ability to

pay taxes as a way of subsidizing that municipalization effort. It really has to stand on its own as a revenue producing activity.

Obviously, the intent there is as we're moving generation to the competitive side, we recognize that distribution will remain a regulated monopoly, but it was felt that the taxing ability of communities should not be used to subsidize and affect municipalization efforts. It should stand on its own.

The next section Roman two (II) at line 16 goes into address the specific issue of generation services. I should just say that we considered not allowing municipal systems to own generation. Since generation is subject to competition. We had a lot of debate about that. We ended up coming down on the side of saying that we aren't going to presume to know better than the municipality whether they should actually own generation or not. We're going to leave that as a local decision, but we want to make it clear that if they acquire generation either through ownership or through contract, for instance, there again they cannot make their customers or the taxpayers of the community responsible for the cost of those generation services except to the extent that they take power from that generation facility.

So, what it says here in this line 16 through 24 is that if a municipality is going to own generation it has to support itself on its own revenues and they can't go back to the taxpayers or the customers to subsidize or support that. In a sense it has to compete on its own merits.

So, that would certainly be something that bond council for a municipal system would look at as they were authorizing the issuance of revenue bonds to make sure that the credit really is that they are secured only by the facility itself, such as a mortgage would do.

The other new thing in here is the Roman three (III) at line 25, which provides that if a municipal electric utility acquires a generation plant and equipment, the municipal electric utility shall make payments in lieu of taxes in the amount that the plant and equipment would have paid taxes if it had been owned by a private owner. So there again, it is stating that you are not going to subsidize a municipal owned generation plant to compete against private owned generation by exempting it from the payment of property taxes. That it should make payments comparable to what it would pay if it was privately owned.

The last sentence essentially ties that back in and says it is not part of the cost of generation services that people that aren't taking those services can be held liable for it.

Going on down on line 32 again is the amendment to RSA 33-B, which I discussed before. On page 11, line 5 there is a heading "Redundant Electric Lines." This is a new section, which I think we put in the House version of the Senate bill last year, which we retained, which specifies that "No public utility or municipal utility shall construct redundant parallel electric utility lines. Such duplication of lines shall be deemed contrary to sound economic policy and contrary to the public interest," and does not apply until retail electric competition is certified to exist.

That is just to make clear that if a municipal system wants to expand, the way they should expand is by taking or acquiring existing distribution lines and not constructing parallel lines, because obviously parallel lines, two sets of poles down the same street could present a situation where it is not really in the public interest, because you're duplicating the cost of the distribution system. We did make that apply prospectively only because there has been a case where the Town of Ashland has attempted to expand. The PUC found 2 to 1 against the municipal system, and said that they could not expand by running parallel lines to the co-op lines. They appealed that. I don't know exactly where that stands, but this is intended to not really address their issue but to set a policy going forward from a time some time next year when the competition is established. So we're saying really competition can exist in generation services, but not in distribution services at this time.

The remaining references throughout the rest of this are simply existing statutes that tie back to this section to this RSA and 38 because we've re-enacted it. The numbering has changed, so it makes the proper references to the numbers. If that helps you.

Senator Jim Rubens, D. 5: My compliments to the House committee. This is some quality draftsmanship. I have some questions.

On page 9, line 37 where you would use the terminology of the standard "just and reasonable" as opposed to the "fair, balanced, equitable" language in 1392. So, we have 2 standards by which stranded costs can be determined. Why did the committee choose to not recognize the standard.

Representative Jeb Bradley, Carr 8: FERC would use the "just and reasonable" standard under Order 888, and that's why we chose to do that.

Senator Jim Rubens, D. 5: But here we are coming back to the state. The state determination where we've set a policy for all other which would probably be the vast majority of stranded costs determination fee would be using the fair, balanced and equitable. Why the difference here is probably a small category of that asset.

Representative Jeb Bradley, Carr 8: Primarily because that would be a FERC standard that they would use it. We just felt that that was appropriate because of the reliance on the FERC standard.

Representative Clifton Below, Grafton 13: To be honest, that was drafted last year, and there was no really question of it this year, so we didn't really revisit that particular question. Although, it was drafted after HB 1392 had passed. But, just to let you know we didn't actually discuss that in the House this year.

Senator Jim Rubens, D. 5: You didn't discuss changing it then?

Representative Clifton Below, Grafton 13: Correct.

Senator Jim Rubens, D. 5: You have required, I just want to be clear what you are meaning here at the top of page 10. When competition exists anywhere in the state, automatically by statute any municipalized authority muscle out choice by consumers who live in that municipality zone, municipalized zone must allow choice?

Representative Jeb Bradley, Carr 8: Anyone going forward. Those five existing may voluntarily.

Senator Jim Rubens, D. 5: Do you define anywhere, do you define direct versus consequential damages anywhere in here so we have a clear demarcation?

Representative Jeb Bradley, Carr 8: No.

Representative Clifton Below, Grafton 13: Well, I think there is ...it is not a defined term, that's correct. There is an elaboration of it which was on page 3, lines 16-22. It says "...caused by the severance" in the first instance, and then it clarifies so that severance really happens with regard to any kind of utility. So, a water system, if there is severance, it is the broad term. In case of electric utilities, it is limited to the value of plant and property and the cost of direct remedial requirements. So that's how there is an attempt to define it.

And then it says "...consequential damages such as ..." so people seem to feel that sufficiently ...

Senator Jim Rubens, D. 5: You discussed that in committee and those definitions were considered sufficient?

Representative Clifton Below, Grafton 13: Yes.

Senator Jim Rubens, D. 5: For costs that are direct damages, is there reference to net depreciated book value or book value of those assets besides remedial costs as you debated, decided?

Representative Clifton Below, Grafton 13: It was debated. There was some question about the whole valuation process. There was consideration to whether it should be thrown to the board of tax and land appeals in terms of the appeal procedure to the commission determination. It was felt that the commission in many ways really was more expert in terms of utility property and in terms of how it was going to balance the public interests between shifting costs to say an existing rate base versus a municipalized effort, i.e. if you set the price too low in an acquisition, you would actually potentially shift cost onto existing ratepayers that are left behind with the incumbent utility.

So, this is an indirect answer, but we felt that it should stay with the commission. There was discussion about whether we should spell out whether it is net depreciated book value, but it was felt that was not ...it was decided not to do that.

Senator Jim Rubens, D. 5: So now it is ambiguous. The PUC decides.

Representative Clifton Below, Grafton 13: Yes.

Senator Jim Rubens, D. 5: How could there be, if the definition net book were used aside from the remedial costs, how could it be argued that would be anything other than fair to all parties on both sides?

Representative Clifton Below, Grafton 13: It might be. You may hear some other arguments on that point.

Senator Jim Rubens, D. 5: On page 5, line 3, the definition of supply contracts. The list isn't exhausted there. For example, LLC's, persons, which under the law is deemed to include all other types of entities. Could that language be somewhat expanded to make sure we don't lose anyone or any entity?

Representative Clifton Below, Grafton 13: I don't see a problem.

Senator Allen Whipple, D. 8: What page was that, Jim?

Senator Jim Rubens, D. 5: Page 5, line 3. "...municipality may contract with individuals, corporations, and other municipalities and the citizens ..." but you may have other entities like LLC's or a person.

Representative Clifton Below, Grafton 13: Sure, partnerships. That sounds like a good idea to me.

Senator Jim Rubens, D. 5: On page 10, line 18, let's say a municipality makes a bad decision with respect to some kind of generation supply, some kind of open ended generation contract with cost escalation provisions, would that be possible? And the customer is then, by virtue of the municipal price going up would decide to elect to go to another supplier, then there will become fewer and fewer customers for the municipal generation choice and we get into a death spiral situation, and you prohibit the municipality from loading that back on the taxes. What do you foresee here?

Representative Clifton Below, Grafton 13: Well, potentially what is foreseen here because there is this unbundling rates and open access that the party at the other end of the contract, say it is a contracted provision for services, would have their contractual rights limited in essence by the statute which would exist prior to that contract, which says that if the municipal system say defaults on that contract, that they couldn't force that municipal system to have recourse back on their customers, because of what will then be an existing statutory provision saying that they are limited. I think the ...

Senator Jim Rubens, D. 5: The municipal system would, in essence, have limited assets and a limited ability to collect from any party. The party entering into a generation contract would be forewarned of that?

Representative Clifton Below, Grafton 13: Should be forewarned of it in light of this provision in the statute. Likewise, if the municipal owned a generation plant, decided to build one, it proved to be uneconomic, they couldn't get any customers for it, they would probably default on it, and whoever loaned the money would foreclose on the facility itself as their recourse, and that would be the only recourse considering that this provision was on the books prior to the indenture, the debt obligation.

Senator Jim Rubens, D. 5: So this provision then would, in essence, foreclose any municipal entity from having an open ended liability?

Representative Clifton Below, Grafton 13: Yes. Yes that's the intent of it.

Senator Jim Rubens, D. 5: Is that right? No doubt about that?

Representative Clifton Below, Grafton 13: Well ...

Senator Jim Rubens, D. 5: This could be a huge problem unless there is no doubt. Municipalities could make mistakes.

Representative Clifton Below, Grafton 13: There is no doubt that this is the intent, and the effect of this would be to very much discourage a new municipal system from getting involved in generation at all. You know, I can never totally anticipate how something like this might be litigated, but clearly the people who looked at it felt like that would be the effect, that it would very much limit what could be done.

It was thought that the nature of the things that a municipal might do, because many municipalities have a large electric load of their own, is that they might go out and arrange for a contract to provide generation services for their own plant, and they might say to their customers in town, their customers of the distribution system, "We've got a good deal for supply of generation. If you'd like to join in our contract, there is a three year commitment here at this price. You're welcomed to do so, but you have to sign a contract."

So, the municipality might sort of aggregate some amount of load in part to satisfy their own load, but it would be anticipated in light of this provision they would only do so to the extent, they would only make a commitment to the extent they had customers signed up and committed to it. But, there again, the interpretation we have heard that this provision in the statute prior to the enactment of the contract would sort of rule over the contract. The contract would be subject to these statutory conditions so that the party at the other end supplying generation would have limited recourse if there is a default on that.

Senator Jim Rubens, D. 5: Right now in Dover, the Dover situation, Dover may wish to municipalize and then ensues a lengthy prospect of litigation over valuation. Does this bill streamline that valuation contest, valuation disagreement contest so that that doesn't become an inhibitory barrier? How would we delegate it to the PUC?

Representative Clifton Below, Grafton 13: That was certainly part of the intent of updating this legislation, and I think it does in a couple ways. It clarifies the vote process by the community, and the turnaround times. It clarifies the bonding authority, and it takes to the extent that it narrows what the commission has to decide the damages are, the valuation is, it narrows that so that can go ahead and happen.

If there is litigation with FERC as to the consequential damages, that can take years, but that could, and that is typically what has delayed

municipalization efforts, but in this case it could proceed under state law while those issues are litigated before FERC, and they will land however they play out.

Senator Jim Rubens, D. 5: So, perhaps by virtue of FERC 888 there could still be massive inhibitions against municipalization due to the prospect of extended litigation in Washington before FERC?

Representative Clifton Below, Grafton 13: There is certainly that risk factor, and we couldn't see any way to get around that.

Senator Eleanor Podles, D. 16: On page 8, on 38:30, line 28, it allows the municipality the power of eminent domain, section 30, the water supply. Is that new or is that in statute?

Representative Jeb Bradley, Carr 8: I believe that is existing statute. I'll check.

Representative Clifton Below, Grafton 13: We're pretty certain that is in the existing statute.

Senator Eleanor Podles, D. 16: Could you find out for me?

Representative Jeb Bradley, Carr 8: We'll find out.

Senator Eleanor Podles, D. 16: Going back to page 4 now, on 38:12, line 3, the expansion of plants by the municipalities. Could you expand on that? Is that something that is new?

Representative Clifton Below, Grafton 13: Yes. The current law didn't really have any clear provision for how an existing municipal utility would expand, and I think there have been cases about existing water plants and electric ones in the case of Ashland where they have sought to expand and it just hasn't been clear how they do that.

So, in the case of Ashland they said we are offering the co-op so much money to buy a distribution line on a road in the Town of Ashland that they serve part of and they wanted to serve the rest of it. The co-op said no thank you and so the Town of Ashland proposed to build their own set of (tape change) the process of determining value and damages to the PUC.

Senator Eleanor Podles, D. 16: So, does this apply to all municipalities?

Representative Jeb Bradley, Carr 8: No, just the 5 existing municipalities: Wolfeboro, Ashland, New Hampton, Woodsville ...

Senator Eleanor Podles, D. 16: Oh, I see.

Representative Clifton Below, Grafton 13: Well, those are the 5 electric. There are many municipalities that have water systems that may want to expand. Typically, there is not a private and a public water system in the same town, but that is not always the case. Obviously they could do it by mutual agreement, but it may be that the voters in a particular town felt strongly that they wanted their existing municipal water system to serve the whole town or more of it. This provides a clear route for doing that.

Senator Eleanor Podles, D. 16: Would that apply to Manchester, Manchester Water Works?

Representative Clifton Below, Grafton 13: They would not have the authority to expand outside their boundaries using eminent domain or the power of taking. They could only do that outside their boundaries by mutual agreement. So, it would only apply to the City of Manchester within its own boundaries if there is some part that it doesn't serve already.

William Bartlett, Jr.: For the record, I am William Bartlett, Jr., and I represent Consumers New Hampshire Water Company. Consumers supports HB 528 provided it is not intended to effect any matter before the Public Utilities Commission at this time.

There was discussion in the House, and I believe it was the intent that HB 528 was not to effect the issue between Consumers and the Town of Hudson. Representative Below mentioned today that this was to go forward. I would hope that that forward means that anything that would come before the commission in the future.

We did not find any exception or any grandfathering, so-called, and it is our request that the committee consider adding "However, it shall not be applicable to any proceeding then pending under the former Chapter 38 as this legislation is to be effective July 1, 1997." So, we feel it would be unfair to legislate the matter that is before the Public Utilities Commission at this time.

Senator Jim Rubens, D. 5: Do you know no other cases relative to any type of utility that would be effected by this grandfathering?

William Bartlett, Jr.: It is to the best of my knowledge that this is the only one that is appearing before the Public Utilities Commission. There is a representative from the Public Utilities Commission here today that could

probably expand on that better than I. This is the only one that we are doing any work on.

Senator Allen Whipple, D. 8: What page ...?

William Bartlett, Jr.: This just adds to after the effective date.

Robert Upton: My name is Robert Upton. I represent the Towns of Bow and Deerfield, and speak in favor of HB 528.

An attempt to answer Senator Rubens' question about net book and the use of net book as the direct value, direct damage value, there was discussion about that before Representative Bradley's committee, and the towns, I think, would say that as a matter of inherent fairness that to use net book cost when we tax them at fair market value would have been unfair. So, when that issue came up before the committee, the towns, who of course would benefit dramatically by use of net book cost as the valuation method didn't rush in and say, "yeah, we agree."

We tax them at fair market value like we tax everybody else's property, and the feeling that to use a lower value for purposes of acquisition probably wouldn't be fair. That may not be an answer, but it is a rationale at least for the position that the towns and cities took in the hearings.

I'm not going to say an awful lot. I think that the testimonies of Representatives Bradley and Below is an indication of how long and hard the process was in the legislature, in the House. It is also, I think, a really good example of how that legislative process works at its best. Everybody, all the participants to this debate were given an enormous opportunity to present whatever information they had. There was tons of debate. Representative MacGillivray held everybody's feet to the fire. Nobody got anything by him, I can tell you that for sure.

This is probably not from anybody's standpoint a perfect bill, but I think it is one that is a good legislative compromise, and I think it probably will work based upon what I have been able to see. From the standpoint of the cities and towns it is important for several reasons. In deregulation, the cities and towns need the ability to compete.

I can tell you that the towns and cities are not getting ready, at least the ones I represent. I represent most of the large generation towns. We're not getting ready to run out and take these plants. Obviously given the amounts of money that are involved, it would take a considerable decision by a town to take a plant like the Merrimack Station or the Newington Station.

What we feel that we have to have is a club or a tool in the event that the utilities are not performing the way they should be in deregulation, if they are not, for example, providing the rates, if they are not providing service, if they are not providing reliability, if they are not providing safety. In deregulation, we don't know who the owners of these facilities are going to be. We already know that on the Connecticut River that New England Power is divesting itself of all of those generation plants, and the PUC has ordered divestiture of PSNH's plants among others.

So, we don't know who is going to own them. We don't know if they are going to be as good operators as PSNH and New England Power have been historically. If they are, there is probably not going to be a great rush to run out and take these plants, but if there are problems with service, if there are problems with reliability, if there are problems with rates, we want to have the ability to be able to go to them and say, "Hey, you better start performing, or we're going to get into the business, and we may take you."

By giving cities and towns these powers, we think it will influence deregulation in a positive way. If it bogs down in the courts, for example, if deregulation really is going to get bundled up in the court and stay there for a long time, it will give towns and cities an opportunity to move forward and affect rates in a positive way, because ultimately a municipality can do it cheaper. We have lower borrowing rates than a utility has, and even though this bill requires us to make an equivalent tax payment, we're still paying ourselves.

We don't have to pay dividends. We don't have to worry about shareholders. We can do it cheaper than a utility can. Hopefully, that threat that we can get in there and do it will impact rates in a positive way. In some areas of the state where rates are not going to have downward pressure like Coos County, that is extremely important, and it is entirely conceivable that irrespective of what happens in the courts with deregulation that you will see some municipalization in that area.

This bill, we think, very carefully recognizes that non-municipal customers should not have to pay for the system. There was a lot of discussion about that and we think that is very important in keeping a level playing field in deregulation. It would give us a huge advantage if we could lay all of this off on taxpayers who are not members or customers of the municipal system. We think that is an important thing that Representative Bradley's committee recognized and dealt with.

This bill gives cities and towns, and it is one thing they focused on, and it was very important to us, the ability to pay for these facilities if we decide we're going to do it with revenue bonds as opposed to general obligation

bonds. So, the difference in large part being instead of with a general obligation bond you put the full faith and credit of the municipality behind the payment. With a revenue bond what you're doing is you're saying that the facility itself will fund the payment. The value of the facility will be the security for the payment of that obligation as opposed to the full faith and credit of the town.

That was a real hindrance under the prior law to the towns being able to do it. Your bonding capacity was limited to 10% of your taxable value, and in some instances the value of these facilities exceed that. So it was a real hindrance to doing it. The fact that we don't have to be worried about debt limits and the like now and that citizens don't have to worry about paying for something they don't use, we think is a real positive improvement in this bill, and it is a good deal for everybody.

The final provision of the bill that we think is important is the presumption of public interest, having been obtained by virtue of a two-thirds vote of the community. In order to do this, you all probably live in towns and cities where there are requirements for two-thirds votes for various bond issues. A two-thirds vote is a very difficult vote to get. If the municipality is able to get a two-thirds vote authorizing it to go forward with municipalization, it makes the process that much more streamlined and may prevent a hearing before the PUC unless the utility wants to challenge that presumption.

I guess I would just say, in short, 528 is a considerable improvement to RSA 38, and we think it reflects the realities of a deregulated environment, and we urge its passage. I'd be happy to answer any questions.

Senator Jim Rubens, D. 5: Would it then be a correct statement if any ratepayer of a municipalized system feels that they want to, if there is competition anywhere in the state, feels that they want to get out if the price is too high, they can do so without any burdens?

Robert Upton: Absolutely, unless they've entered into a service contract that Representative Below was talking about. It may be for start-up purposes important for municipal systems to go out and enter into service contracts with some of its larger customers to insure that they don't just walk the system, but I think the normal homeowner or somebody like that, they're not going to do service contracts. At least I'd be surprised if they would, and those people will have the ability to shop around and if they think they can get better rates, get them.

That's the whole purpose of deregulation, and they should have that ability. We are counting on the fact that we can do it cheaper and do it better.

Senator Jim Rubens, D. 5: How is the residential ratepayer guarded against a municipality overpaying for the distribution part of any assets?

Robert Upton: Well, it's again funded, it's required to be funded by revenue bonds, so it is not going to enter into the general obligation of the community so that as a taxpayer you're not going to pay for it.

Senator Jim Rubens, D. 5: How is the ratepayer guarded against the municipal overpayment for distribution?

Robert Upton: He's not going to buy the system from us because our rate system won't be competitive if we overpay for it.

Senator Jim Rubens, D. 5: My final question on the net book question, we have prohibited redundant lines. Would it be conceivable that a particular set of lines through a municipality might be valued at chokehold valuation levels, and be demonstratively valued that way?

Robert Upton: Sure, I can tell you there was not unanimity about whether or not redundant lines ought to be prohibited.

Senator Jim Rubens, D. 5: Therefore the market value and that would be a chokehold valuation would be the market value?

Robert Upton: Right.

Senator Jim Rubens, D. 5: Could that not be driven to absurd levels compared to the intangible physical valuation?

Robert Upton: I have to say, as I started to say; and excuse me for interrupting, but I thought the cities and towns were not unanimous that we should not be able to put in a redundant line if that circumstance existed, but the committee was very strong about it didn't want that, and that was one of those areas of compromise that we felt that we had to, in order to get some of the provisions that were beneficial to us, that we shouldn't resist that.

As an ideal matter, I don't think that there ought to be a prohibition against redundant lines, because I can see precisely what you're talking about occurring and where it would be beneficial for a community or a municipality getting into the system to run a redundant line at far reduced cost.

Senator Jim Rubens, D. 5: Couldn't then in almost every case or even every case municipalization be blocked by a claim for or an actuality of some kind of chokehold valuation for part of the generation assets?

Robert Upton: We have to, I think the way we ultimately thought about it was that we had to count on the PUC and the PUC's expertise in valuing these, and that the PUC would not permit a chokehold by virtue of a redundant line.

But whether that happens or not, I mean, it can only ...I guess that's why I said we think this is not a perfect bill, but that it will work, and that if it doesn't work we can come back to you with problems like that and can give you precise examples of where that occurred and how that ought to be discontinued.

Senator Jim Rubens, D. 5: Any other major areas where municipalities had concerns about the bill here as presented?

Robert Upton: Well, I guess I can't speak for all of them. I know I had some concerns about the equivalent tax payment, but I thought clearly that there ought to be some payment of everything above expenses ought to be paid back in to the general fund. Any money that is raised by a municipal system above its expenses ought to go back into it, but I think the feeling in the committee was that they wanted a level playing field, and municipalities had a better than level playing field if we got into the system if we didn't have to make an equivalent tax payment.

I don't think any of the communities object to that. They're simply paying themselves out of the system, so that it is ultimately not a hardship. To me it doesn't make tremendous sense to do it that way, but it clearly is a requirement and not something I think anybody is going to go to the mat on.

Senator Jim Rubens, D. 5: Wouldn't you have an argument for the bill here, would you have a cost shift if you allowed some tax payment lower than present tax payments on members of the municipality where taxpayers were not users of that municipal utility service?

Robert Upton: Arguably, and I think that's what Representative MacGillivray would tell you that he was very cautious of when he included that in there. He wanted to make sure that that couldn't possibly happen. I think everybody looked at it and said that will work fine, and as a compromise.

Senator Allen Whipple, D. 8: When a community decides to municipalize, and has to set the value on what it is going to be paying for the distribution system with the current provider, and you say that this distribution system can now be taxed at fair market value. Would you say, in your opinion, is that a fair price the community is going to pay the fair market value would pay what the assessed value was?

Robert Upton: Sure, but there are other elements that are going to go into it. I think at least the utilities will argue that if that portion of their franchise is being stripped from them that there is a severance that influences the overall value of the total franchise and that that should be reflected in the value of that. But, in essence, sure that ought to be the starting place, whatever the fair market value of it is, and fair market value for taxation purposes may be different than fair market for acquisition purposes, although it is a little hard to conceptualize that, but I think that that could be the case in some instances.

Senator Allen Whipple, D. 8: Could something follow like a distribution system is taxed at say $10 million, and the community offered the $10 million, and the utility who owned it said they think it is worth more. They think it is probably worth $40 million. Could a community make an argument for assessing it at $40 million?

Robert Upton: Well, we sure will try. I'm sure. These battles are fought out on so many different levels once you get into these abatement processes. There are 5 methods of valuation that the court can look at. It can look at net book cost, replacement cost, comparable sales, the income that the plant generates, and its replacement value. Would you, an alternate system, would you replace it with something more functional currently and would that be less or more expensive to do?

It is a very very complicated process that the court looks at and trying to pin value on a utility plant on any particular day is just about impossible, especially when you start taking into consideration the effects of deregulation. Nobody knows what deregulation means to value. We just don't. We think it means on the short term that especially for generation facilities that the value goes down.

Both Bow and Newington, I can tell you, have taken enormous hits in their value. The value in Bow by agreement declined from $320 million down into the $250 range. In Newington it went from approximately $320 down to $150, so and that is just the impact of deregulation. What is deregulation going to mean for these plants?

There was discussion about the possibility of Newington being mothballed. Just put away for awhile in all of this process. Nobody knows. I wish we could guess a little better, but we can't, and it is going to take us into a lot of very strange places. Deregulation is going to be very very fascinating in a lot of different ways, and it is going to have a lot of impacts that people aren't considering.

Senator Jim Rubens, D. 5: How solid is the argument that because the Supreme Court has ruled there is no exclusive franchise that there could be no argument as to an impact on franchise valuation as a result of severing out some of those assets that a municipality might attempt to take?

Robert Upton: I'm sure I don't want to limit my ability to argue just that, but I think what you would hear from the utilities is that when you own any property and it is of a certain size and you cut off a piece of it, that you're limiting the value of what remains. Whether you have an exclusive franchise or not, you have a bundle of property that is being reduced in size and that could effect the value of the remaining property. I don't know whether it is a good argument or not.

Senator Jim Rubens, D. 5: But, I can see at least for simplicity's sake two valuation methods or two impact valuation methods, one being the physical effects on the remaining let's say distribution assets of the utility which would be things like power balancing, and then secondly, the diminution of value of the franchise. I'm wondering to what extent this is an argument that diminution value of the franchise must equal zero, because there is no (unclear) franchise to begin with. Would you argue that?

Robert Upton: I certainly would. I think the value to the franchise falls to the wayside. I think the loss in value to the remaining property is an argument that probably will be made and be made effectively if I know the utility's lawyers, and I do.

Senator Jim Rubens, D. 5: You would argue for the municipality would argue ...

Robert Upton: Clearly argue that there is no more franchise value.

Senator Allen Whipple, D. 8: If a community is buying a distribution system, if it bought the whole system, part of it say goes into an adjoining community with the permission of the adjoining community or the partnership of the adjoining community, if you bought the whole system so then there wouldn't be any question of splitting the system up. The value of what is left, would you say that that would be at fair market value would be what it would be taxed at, take the whole system?

Robert Upton: The whole system still is a part of a greater system. Say, for example, in Claremont, I can't remember what are the towns around Claremont, but say Claremont, the entire Claremont distribution system included some in Unity or something like that, if that is one of the towns around you, that entire system is still a part of the statewide system of the utility, so even though you have taken the entire system in Claremont,

including what may exist in any of the surrounding towns, you still have the question of severance of that entire internal system from the entire larger system.

Senator Allen Whipple, D. 8: Are you talking about, let's say the entire larger system is a company. What if you took everything a company had?

Robert Upton: Then I think that's a better argument. That's right, you have the Vermont, I don't remember the name, and the rest of their facility, as I recall, is all in Vermont, so if you took the entire what exists in New Hampshire it is a little bit harder to argue about severance. (tape change)

Senator Jim Rubens, D. 5: Could municipalities band together in becoming an acquiring entity?

Robert Upton: Absolutely. And that is what I think you will see in places like Coos County, because in Coos County it is going to be very difficult for them to achieve the rates that we're talking about in the southern part of the state and the lower rates. There just isn't enough demand up there for power producers to give them good rates, unless there is either aggregation or a banding together to municipalize so that they can bring a considerable amount of demand to the table and then justify getting some lower rates.

Senator Jim Rubens, D. 5: So, the municipalities as a part of CVEC could band together to take all those assets and that would streamline the entire process down to some kind of FERC proceeding ...

Robert Upton: Sure. I would think so. I would think it would. As I said, I think that is really what you're going to see is you're going to see inter-municipality agreements to enter into some kind of municipalization where one or more, two or more communities will municipalize what exists in them and then operate it as a single entity. I think that will be the wave of municipalization in the future.

Senator Jim Rubens, D. 5: The FERC proceeding would be some kind of deliberation over the extent to which the existing power purchase contracts become exhausted, termination of the contract and valuation of that remaining duration? Something like that?

Robert Upton: I guess so. I have to say I'm not the greatest expert on what happens at FERC, but it would seem to me that something along those lines would have to happen, and then you'd go from there.

This offers, I mean and I think one of the reasons the towns and cities feel that this is such an important bill is that this gives us a chance to get the

effects of deregulation, especially if it bogs down. That we can go ahead and do some thoughtful and new things and try to get some of the benefits of deregulation for our citizens. And like I said earlier, it gives us a tool to say to the utilities, "Look, either do it or we're going to do it. Stand up and get us some of these benefits, or we're going to carefully think about this and maybe do it." And it is a good bill for that reason.

Senator Allen Whipple, D. 8: What you're saying, I think what it says in this bill, is that if you have a utility that continues to fight this deregulation procedure, this bill allows the community to just move in and municipalize?

Robert Upton: Yes.

Senator Allen Whipple, D. 8: Get done with what the legislature intended to do.

Robert Upton: Yes. And I want to compliment again Representative Bradley's committee and Representative Below's subcommittee. They were excellent committees to do this. They worked incredibly long and hard on this, and they really ought to be commended for all that they've done on this bill. This was not an easy bill.

Richard Samuels: I am Dick Samuels from the McLane Law Firm in Manchester, representing the Town of Ashland. Three things to say. First, Ashland is one of those 5 municipalities that currently has an electric department, and Ashland supports this bill although it is not ideal from its perspective. I'm not sure it is ideal from anyone's.

Second, Representative Below made a statement about what Ashland's controversy was before the Public Utilities Commission and then the Supreme Court, and I just want to clarify that what Ashland did was propose to expand its system by duplicating the lines in a portion of its town that is served by New Hampshire Electric Co-op, and we asked the Public Utilities Commission whether we needed their approval to do that.

The Public Utilities Commission, by a 2-1 decision, said yes, you have to get our approval, which we hadn't applied for. We appealed that to the Supreme Court, and the Supreme Court agreed with the Public Utilities Commission. We did have to get their approval to expand into that area. But, there has been no denial of any requests to expand. There has been no denial of an attempt to put in duplicate lines, although we were sure that was coming.

Third, and finally, on Section 30, Senator Podles, which is the Water Supply Protection Condemnation section which is something that has been in the act for a long time. It is not new.

Susan Chamberlin: I am Susan Chamberlin. I am here for the Town of Hudson. We are the first town to be using the municipalization statute, and I was fortunate to work with the House committee on making some changes to the statute in order to improve the process, and I'm speaking in support of these changes. I think the committee looked long and hard at how they all interrelated into each other and considered not only water but the electric, and came up with some good solid amendments to improve the process. Particularly the change or the creation of a presumption that once the vote goes through that that creates a presumption that it is in the public interest. I think that is important to recognize that municipals make these sort of decisions all the time as to what is best for their community, how they can best use their money, how they can best make economic development decisions, and this is one option for municipals to look at.

There was a question about whether or not ratepayers were protected from overpaying for these assets. The purchase price has to be confirmed by another vote, so once they go in, they say we want to do this, they go through the whole valuation process, either there is an agreement or the PUC comes up with a number. That number has to go back to the constituents to be voted on, so they do have an opportunity to say, "This is too much. It is not worth it to us."

So, as a group, they are protected. If one individual thinks it is too much they would have the option, if it is electric, to go somewhere else, or if it is water to dig a well, but that would be an option.

I'd be happy to answer any questions about the process. I have a copy of the amendment that Mr. Bartlett wants to put on. I don't see that it is necessary. This is not a retroactive piece of legislation. It doesn't apply to something that has already gone forward. I just don't see that it is necessary.

The comments on net book value -- I will talk briefly about what we have proposed regarding that and the issue for Hudson is more the allocation than the actual total number, and the way we propose to allocate it is that the net book would go to the shareholders. We think they're entitled to that. The difference between whatever the commission determines is just compensation and the net book would go back to the remaining ratepayers. So, in essence, it goes to the company, but it doesn't go to the shareholders. It goes to offset any potential rate impact for the remaining customers.

So, the Town of Hudson still has to pay this money, but we are proposing an allocation that will go to the benefit of the remaining ratepayers and not let the shareholders just take the money and run with it. That way they are getting full compensation for the amount of capital that they've put up.

They've received a return over the years, and the remaining ratepayers are protected. And we think this is a fair way to go. So whether or not that would be the way it would be in every single case I don't know. I think with Hudson, Hudson has been subsidizing the outlying communities for some time, so that is a large chunk of money that is needed to offset any rate impact for those other customers. But we didn't feel that the public interest would be met unless we made that offer, and so that is how we decided to go forward.

Senator Jim Rubens, D. 5: That arrangement has been agreed to by both parties in Hudson?

Susan Chamberlin: No. That's what we're litigating.

Senator Jim Rubens, D. 5: Isn't that like a sham transaction, inflating or having a higher price and then paying the differential back to the acquirer?

Susan Chamberlin: Well, it doesn't go to the acquirer. No, it goes to the remaining ratepayers. It doesn't go back to the town. It goes back to the remaining systems. It pays down the debt on the remaining system, so that they don't have a rate increase in order to compensate for us leaving the system. So Hudson doesn't get it. It is Litchfield, Pelham, or whoever else is left on the system would get it.

Senator Jim Rubens, D. 5: What is the standard of proof in rebuttable presumption? To rebut for something not a public interest?

Susan Chamberlin: I don't recall.

Robert Upton: It would have to be a preponderance of the evidence. I don't see how it could be otherwise unless it is by statute established that it is a higher burden of a preponderance of the evidence.

Senator Jim Rubens, D. 5: Is that an excessively high or a low burden?

Susan Chamberlin: It is not excessive. It is similar to what the commission does when it looks at public interest, all the circumstances.

Amy Ignatius: For the record, I am Amy Ignatius, general counsel at the Public Utilities Commission. We are here in support of the bill, and again congratulate the members who worked very hard on it.

There were a couple of questions that came up. I just wanted to address for your information, there was a question on whether there are any other utilities who have cases now pending before the commission in a similar

situation to Consumers Water, and I can't think of any that are. I'll go check, and if there is anything different I'll submit a letter to you to let you know that, but I can't think of any so that the amendment that Consumers proposed to make clear that it is not applicable to any proceeding then pending, I think, would only apply to the Consumers' case.

As to whether it is necessary, good, or bad, we don't oppose that provision. I think it is possible to interpret whether the new statute should apply to this case or not in different ways, so it may be necessary to put it in to be absolutely clear if people want to exclude that. Sometimes the commission will interpret new statutes as applying at the time they make a decision. Other times they will decide whether to apply the new statute at the time that the thing was filed with the commission. It varies at times, so it sounds like everyone agrees that this is their intent that none of these provisions apply to the case that is pending. It has been filed for probably a year and has another year to go in its proceedings. This would certainly make it absolutely clear.

The only other thing I wanted to mention is the whole question of how to do valuation, and should you specify in the bill net book value or fair market value or any other of the valuation methods. I think it is safest not to. We generally use net book value in all of our valuations but they don't usually involve this kind of a situation. They are usually for other purposes.

So, whether we would in an acquisition case use net book value, I don't know. Whether we'd use fair market value, I really don't know, so I wouldn't be comfortable with specifying either way. I think it would be best that when the commission is dealing with that he has got all the parties with all of the opportunity to brief it and argue it and really think through and maybe even craft some hybrid form or different valuations for different categories of property, who knows.

I don't know if there is any need to say it here, and you might limit things that otherwise could be more creatively worked out at the commission. So, I would recommend you keep that as is in the bill, not specify either way.

That's it. If there are any questions, I'm happy to answer them. Otherwise, I know this has been going on for awhile. I'm happy to conclude.

Senator Jim Rubens, D. 5: So the PUC would, in a case where a particular distribution asset might have some kind of very very high chokehold valuation, the PUC would possibly likely diminish that valuation or that plant evaluation?

Amy Ignatius: We generally call them bottleneck services, and where you sort of have this critical need to have people have access to it, we haven't been dealing with it in valuation quite so much as in costing out people's access to it in other industries, and the push on the commission's front has been to make sure that that access is ...people can get to it at a reasonable price, really looking at the actual cost of the service rather than its value to the operation of the system overall.

If that is illustrative of what might happen in an acquisition case, keep that in mind, but I think until it gets to that point I can't predict any better than anyone else would how the commission would interpret it. But generally there has not been a value analysis. There has been a cost of the service analysis in setting prices or rates for people to be able to tap into it, and presumably the commission would start from a cost basis in looking at valuation, and unless it can be convinced that it should look at a market value basis, I think its general approach is to start with cost and begin and end on a cost basis unless someone tells them otherwise.

And there may be good arguments that valuation should come in to some extent, but its general approach is not to begin that way, but to begin with a cost basis.

Senator Jim Rubens, D. 5: But here the proposed law would say to begin with a market valuation, at least with respect to real estate taxation. Wouldn't that be used as evidence before the PUC the legislature intends market value rather than a cost basis to be used?

Amy Ignatius: I guess I don't know that the bill says that it starts on a valuation basis looking at a real estate level.

Senator Jim Rubens, D. 5: It intends that municipalities be compensated for lost real estate taxes at a market valuation.

Amy Ignatius: It requires a payment in lieu of taxes that is based on the kind of taxes it has been receiving, but ...

Senator Jim Rubens, D. 5: I was just wondering whether that would be deemed as legislative intent, that market valuation would be used in that portion of (unclear)

Amy Ignatius: I guess I would see them as different analyses, and they might have a different approach in how to set the valuation and not take that as a direction from the legislature to use fair market value. If it is being read to mean a presumption that we are looking at a fair market value approach,

then maybe we do need to say something to not weight it in favor of any particular valuation method.

I had never interpreted it that way, so that is helpful to know if you've interpreted it that way.

Senator Jim Rubens, D. 5: Isn't it dangerous to statutorily restrict redundant distribution assets constructed in order to mitigate the potential for this – the word used, not the chokehold ...

Amy Ignatius: Bottleneck services?

Senator Jim Rubens, D. 5: ... bottleneck valuation?

Amy Ignatius: We did not propose that provision or at least this session we didn't, and I don't know if last session the commission may have been in favor. I honestly don't know, because I wasn't here for that. I think I was told by someone that the commission did weigh in on that last year, so I don't mean to be contradicting my agency.

Senator Jim Rubens, D. 5: You don't recollect what the PUC's position last year was?

Amy Ignatius: I'm told that we were in favor of prohibiting redundant facilities a year ago, and there has never been a ruling on that in the Ashland case. They didn't get to that point, because they haven't yet filed back to come through the commission for approval and whether it is in the public interest.

I think it is really a public interest analysis. There will have to be some duplication of some facilities for someone to operate a competitive system within. Let's say they're both tapping off of a transmission line with different distribution systems. There is going to be some duplication of some facilities in order to make that happen, but that doesn't mean that it is actually running up and down the street, two lines, block after block after block, but there will be some level of duplication.

If you've got someone who is really locking up a corridor and they just can't possibly get anyone else into the system without it, it is hard for me to understand how that becomes a duplicate distribution. Well, I should stop. I'm going to get myself in a knot here.

Senator Jim Rubens, D. 5: The language is very restrictive here. "No public utility or municipality shall construct redundant parallel electric utility lines." There is not an allowance for de minimus redundancy. So, I

would wonder whether the PUC would prefer to let this question be resolved by public interest determination.

Amy Ignatius: I can certainly take that back to the commission and try and give a response to you before you are scheduled to vote on the bill.

Senator Jim Rubens, D. 5: So, we can await an official PUC ...

Amy Ignatius: Some sort of a letter with some sort of statement. I don't know quite what I'll be able to obtain, but I will try.

If there is nothing further, thank you.

Representative Jeffrey MacGillivray, Hills 21: For the record, I am Representative Jeff MacGillivray, Hillsborough District 21, and I am a co-sponsor of this legislation.

I would like to simply address a couple of the loose ends that were left. A question was asked earlier by Senator Podles whether does the provision on expansion of existing municipals, 38:12, apply to all, and I believe someone may have given you the impression that that would apply only to the 5 existing electrics and the existing water. It would also apply to new municipals created in the future when a few years after that they went and expanded their facilities further.

It was meant to be all inclusive to provide a short cut from part of the procedure but not all of the procedure when an existing municipality whether it was existing before this legislation or newly formed subsequent to it went through the process. It leaves out the steps under RSA 38:3, :4, or :5, but then prescribes the method of 38:6 through :11.

Second, in response to some questions from Senator Rubens regarding ratepayers wanting out, they can do so, and he was talking in terms of distribution systems. If a distribution system is taken over by a municipality in a part of town, there is no intent, and indeed there is no practical way, for an individual ratepayer to get out, and some statements might have been ambiguous. The comments made do apply to generation customers who are intended to be able to be let out, so we indeed have retail competition in all newly formed municipals, and hopefully in the existing ones in the not too distant future as well, although that is not required by statute.

Senator Jim Rubens, D. 5: So a reduced valuation or an over valuation that is approved by the voters leaves someone using that distribution asset no way out? We're paying for that over valuation.

Representative Jeffrey MacGillivray, Hills 21: That is correct.

Senator Jim Rubens, D. 5: The distribution part?

Representative Jeffrey MacGillivray, Hills 21: The distribution part, that is correct. There wouldn't be any way around that. Wait on questions regarding distribution value and over valuation, because I have a couple later points on them as well, but yes. In that case, the people within that service area are intended to be customers of that, because they have no one else they can buy from. It has to come through that set of wires and poles. There is no direct protection from paying too much, but indeed the fact that a two-thirds vote is required should slow down most over valuations.

I'll skip ahead to one you just made regarding isn't it dangerous to block redundant lines. Look carefully at the wording there, and it says that the prohibition on redundant lines, page 11, lines 6-9, "This section shall not apply until retail electric competition is certified to exist ...." At that point you at least have access to competitive generation, so all of the points involved in municipalizing to try to hurry that process along are no longer relevant.

This section doesn't come into place until that log jam to competition is out of the way. So, to the extent that you were worried about the prohibition on redundant lines slowing down the opportunities for retail competition, that is not a reasonable concern. To the extent that you want it as a way of getting around a town that has paid too much for its distribution assets, that's a whole other problem.

Senator Jim Rubens, D. 5: That's not where my concern is aimed. It is aimed at post-competition. The present owner, pre-municipalization owner, of distribution assets simply assigning a chokehold or bottleneck valuation, very very high, extraordinarily high bottleneck valuation to those distribution assets thereby blocking reasonable acquisition price for that municipality. (tape change)

Representative Jeffrey MacGillivray, Hills 21: I think the procedures of the PUC are probably adequate to force them to allocate reasonable costs to reasonable parts of the system and not to do too much in that regard, but your concern is not unfounded.

There was a statement by one previous witness regarding that he didn't think it made tremendous sense to have this requirement of paying taxes after a community had taken over a generation asset. As I think you partially raised in your subsequent question, it is clear to me that if you want the other consumers in the town who are not interested in purchasing from

the municipality to have, in fact, a level playing field, then the municipality must continue to pay into the public coffers at a level consistent with the valuation procedure and the valuation process that previously existed. Otherwise, taxes are going up in the rest of the town to subsidize people that are purchasing from the newly municipally acquired utility. And that is why we put all of that in.

Senator Jim Rubens, D. 5: Representative MacGillivray, do you think there is any risk of a utility arguing that that market valuation is evidence that the acquisition price of some distribution asset might be at market as opposed to cost? The PUC has testified it is their usual basis for evaluation.

Representative Jeffrey MacGillivray, Hills 21: Let me ask you to hold that question for about one more minute.

Finally, on the entire question of fair market value versus depreciated book value, the problem here is that if you have a plant out there that is going to be bought and sold among private entities, fair market value is a reasonable way of figuring out approximately what it is worth. In the case of how much should utility customers pay to purchase a plant that they've already been making payments of, it is not an appropriate circumstance, and we discussed this for awhile and decided there was no way we could incorporate it into this legislation in any reasonable way. Maybe if we discuss it for several more years we will understand it well enough to be able to do something. Maybe you can help us.

What is going on here is that in a fair market value situation the company has something that is valued at fair market value, and they sell the products made from it, the electricity made from it, and they keep in mind the fact that they can sell it for something later. In the case of a regulated utility, the process is more analogous to making payments on a mortgage and paying off the entire capital of the plant within a 30 or 40 year time horizon.

What happens is the company is allowed to collect at a rate that will recover all of its investment in that asset over a 30 or 40 year lifetime of the asset, and by the time a few years have gone by, often the rate of return on capital has been set at a level that includes inflation or something of the sort, and what this means is that in effect you are paying down your mortgage faster in terms of the dollars that are there.

After 15 or 20 years have gone by the utility customer has made enormous payments toward paying off this plant, and indeed if no further investment is needed to be made in terms of major improvements, we would eventually reach the point after 30 or 40 years where the company had completely depreciated the asset on their books. They were no longer earning a return

on those assets, because they are now valued on the books at zero, and the customer, in effect, is paying nothing for those assets, because he has already previously paid more than he might pay in a free market situation. This is not anything that is right or wrong. It is simply a reasonable way of getting through a non-free market situation with some sort of a rule that works, and generally since investments have to be made in the upkeep of these lines, and poles have to be replaced and wires have to be replaced, it doesn't wind up too far removed from free market except in times when there is massive depreciation of the dollar.

Since such massive depreciation of the dollar did in fact take place in the '60s and '70s and early '80s many of these assets were first put on the books years ago and are currently hanging at fairly low starting values, and have, for the most part, been paid off. Although, in some cases the rates of return got fairly high during the late '70s and early '80s.

As a result, fair market value and net depreciated book value are sizably different, and it is very reasonable for the customers to continue to pay on the basis of net depreciated book value, and indeed, if somebody else took over that franchise, it would probably not be reasonable to mark up those assets so that the customers could pay for them again. Thus, there is very good reason based on what the assets are worth versus what the consumers have already paid for.

The difference between these two justifies a difference between what might be paid to a utility for this versus what somebody is reasonably entitled to tax the utility on, and the distinction is important when you consider that the amount being taxed on is something that has to be equitable across the state against other providers of competitive services in those situations where electric energy can be substituted against other possible suppliers of energy if you are not taxing this asset properly, whatever properly means. You are either creating an unbalanced playing field for them or against them.

That is a fairly long winded answer, but it is reasonable to have in the back of your mind a concept whereby these two should not be the same, the value that customers should have to pay to finish paying it off versus the value that is placed on it for taxation purposes.

Senator Jim Rubens, D. 5: Would it be wise to add a sentence to the effect that the real estate taxation basis, valuation basis for real estate taxation, would not be necessarily used as evidence for the PUC in their condemnation evaluation?

Representative Jeffrey MacGillivray, Hills 21: I'll be honest with you, I don't think I fully understand this issue. I don't think our committee has had

enough time to discuss it, so that the committee would feel it understands it, and until we have had a chance to discuss it among ourselves and reach a little more consensus than would be possible given that level of ignorance, I think it would be premature.

I don't think it will cause a problem given that we are by these statements making it clear that there is no legislative intent to make those two numbers equal and that there are reasonable grounds for believing that they, under certain circumstances, shouldn't be equal, and I think if we just leave it open for now, I think the PUC will do a reasonable job, and I think we can continue to study this matter, and maybe as we look at one of the re-referred municipalization bills that has been held over, we will have a chance to discuss this at length and maybe have some legislation next year. I think it would be premature at this time to write any words into this since they could very easily have unintended consequences, and given the amount of time we labored over a lot of difficult words in this, I think it is probably not a good idea to rush in with words that might have drastic unintended consequences.

Senator Jim Rubens, D. 5: You are arguing clearly that there should be no statutory basis for evaluation. It should be open ended. That's what you just stated.

Representative Jeffrey MacGillivray, Hills 21: I don't think that is necessarily what I'm saying. I'm saying that the two under many circumstances should not be the same.

Senator Jim Rubens, D. 5: Sometimes yes, sometimes no?

Representative Jeffrey MacGillivray, Hills 21: I am saying that in certain circumstances they should be different. I don't know whether there are some situations where they should be the same, but I think there are some situations where they should be different, and I think ...

Senator Jim Rubens, D. 5: So, what I'm asking is whether there should be language simply stating that the legislature is making no determination as to valuation methods thereby delegating it in an open end basis to the PUC?

Representative Jeffrey MacGillivray, Hills 21: I think that is the way the current practice is. I don't think it is necessary to add words at this time. I think the legislative intent that there is no intent in the law to make one drive the other is clear, and I think that we should continue and look at this for awhile and make sure we have it right, and maybe we will want to say something regarding what valuation should be used so that we don't have the current difficult situation where the department of revenue administration thinks it is supposed to continue using a method which towns have

challenged in the courts and through settlements without reaching the courts such that half the people in this state are having the utility poles in their municipalities taxed at a different rate than the ones that are just using the numbers from the DRA. I think we probably should address this at some point in the near future, but in this case I think near future means next year.

Senator Jim Rubens, D. 5: On the prohibition of redundant distribution assets, it is a flat prohibition. The PUC has testified on this that there is allowance for small amounts of redundancy or that flexibility would be required. Should the language reflect that somehow? Should the PUC be given latitude under the public interest determination as opposed to a flat prohibition on discretion of redundant assets?

Representative Jeffrey MacGillivray, Hills 21: Given that we are talking about assets that are going to remain under traditional utility regulation or something similar to it, any time you construct additional lines you are going to add to the total electric bills of the State of New Hampshire. It may be that you provide a savings for somebody at the expense of somebody else by doing something like this, but I think the prohibition is correct and that if there is a problem that looks like it might need redundant lines to solve it, it probably means there is a problem in the cost allocation formulas and it should be addressed directly so that the problem can be addressed without the additional expenditure of money rather than by spending more money and driving people's costs up further in order to subsidize a few local people at the expense of distributing some costs among the system as a whole.

I don't think the situation will ever arise where it is economically efficient to do anything of the sort. I think the PUC should clear up its cost allocation methods if in fact they cause a problem of this sort.

Senator Jim Rubens, D. 5: I'm contemplating obtuse arguments about consequential damages valuations due to the construction of redundant lines that may or may not be defensible and by allowance of redundancy distribution of such valuation arguments getting out there.

Representative Jeffrey MacGillivray, Hills 21: Given that we're discussing distribution lines which will continue to be under a regulated cost structure, I think that your arguments probably don't work. I think they are probably not appropriate in that environment. As long as you have the generation business tied to the distribution business, as we do at present, anything is possible, but please note that we made this section only apply after retail competition exists. I think the current language is sound and should be left alone.

Senator Allen Whipple, D. 8: As I understood when you were talking about valuing distribution systems, and in order to, and I know you're talking about protecting the ratepayers, would it be fair to say what you were saying was that the ratepayers have already paid for the system less the net book value which is left, and that if you paid more than that book value you would be having the ratepayers pay twice for the distribution system which they really have already paid when the rate was set?

Representative Jeffrey MacGillivray, Hills 21: I thank you for summarizing in one-tenth of the words I took what I said. That is exactly what I was trying to say. Thank you.

Senator Jim Rubens, D. 5: Here on the bottom of page 9, line 37, "just and reasonable extent." Would it be workable to say instead the commission shall determine, and are consistent with HB 1392, however that is defined today, consequential damages? So, that we have consistency in terms of state regulations of these consequential damages.

Representative Jeffrey MacGillivray, Hills 21: I agree with the answer given earlier by Representative Bradley, who I think summarized my views and those of most of the rest of the committee, if not all the rest of the committee. I will add that the 2 situations are not identical, because in one case you are taking existing businesses and having them go onwards, and we are simply converting existing distribution and generation systems into distribution systems with generation attached. In the other case, we are talking about acquiring something from the utility and permanently taking away from them assets that would have still been theirs under HB 1392.

And furthermore, I think that the issue really is moot for the reasons stated by Representative Bradley, that I doubt that FERC has any intentions of letting go of jurisdiction. Indeed to the extent that we have read in here words that match, words that they have intended to use, they might be more likely to allow our state commission to take over the adjudication rather than do all the work themselves if our words mirror theirs.

To the extent that our words don't mirror theirs, they are more likely to simply say we will take all the proceedings here in front of FERC and take our usual 2 or 3 years to do it. So, you have that factor to consider as well. To the extent that our language does not mirror FERC 888 language, we may be making it more difficult to have some of the factual determinations handled in-state as opposed to out-of-state. In any case, I think given FERC Order 888 that these words are reasonable.

Senator Jim Rubens, D. 5: But in HB 1392, we've instructed the valuation of the distribution assets to be at book value. We've not allowed stranded

costs to mark up D&D assets. Here we are leaving that question open. These could be very large sums of money we're talking about here. Not inconsequential sums of money. Again, when we set policy last year we said D&D assets are not to be marked up.

Representative Jeffrey MacGillivray, Hills 21: I believe the exact phrase is that it is not a preferred method, and we were sending a clear signal that they better have a very, very, very good reason for doing anything different. I agree with you.

Senator Jim Rubens, D. 5: I don't have the language in front of me. I think it was stricter than that.

Representative Jeffrey MacGillivray, Hills 21: You may be correct. My recollection is otherwise, but in any case the intent was clear. We don't like the idea.

With regard to the main point of your question ...

Senator Jim Rubens, D. 5: Then it ties in with Senator Whipple's concerns about valuation and above net book. We explored that.

Senator Allen Whipple, D. 8: Any other questions? Any one else wish to testify? If not, I'll close the hearing.

Hearing closed at 1:00 p.m.