

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

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

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

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<sup>12</sup> Page 44.

<sup>13</sup> Page 44.

<sup>14</sup> Page 45.

<sup>15</sup> Page 45.

<sup>16</sup> Page 45.

<sup>17</sup> Page 46.

<sup>18</sup> Page 47.

<sup>19</sup> Ibid at Pages 50-63.

<sup>20</sup> Page 57.

<sup>21</sup> Order No. 24,878, Page 50.

*should be granted to the municipality to provide utility service to Merrimack, Amherst, and other surrounding towns.”<sup>23</sup>*

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

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

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

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

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

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<sup>23</sup> Pennichuck Water Works’ September 6, 2005 Motion for Summary Judgment, Page 8, Paragraph 14.

<sup>24</sup> Order No. 24,425; Order No. 24,448.