

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant To RSA 38:9

Order Addressing the Pennichuck Utilities' Motion to Dismiss

**ORDER NO. 24,425**

January 21, 2005

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

**I. PROCEDURAL HISTORY AND BACKGROUND**

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

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April 5, 2004, the Pennichuck Utilities filed a Motion to Dismiss in Full or in Part or, Alternately, to Stay Proceeding.<sup>1</sup>

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

## II. POSITIONS OF THE PARTIES

### A. City of Nashua

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>3</sup> The docket, DE 00-211, was closed before a final determination was made, when the City of Berlin withdrew its request to take the facility by eminent domain.

<sup>4</sup> Nashua attached newspaper articles dated 1/6/03, 1/7/03, 1/8/03, 1/10/03, 1/11/03; 1/12/03 and 1/14/03.

<sup>5</sup> PEU serves approximately 4,526 customers in the Towns of Atkinson, Bow, Derry, Hooksett, Litchfield, Londonderry, Pelham, Plaistow, Raymond, Sandown, and Windham, New Hampshire. PAC serves approximately 645 customers in the Town of Pittsfield. Pennichuck Utilities Brief at 3.

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

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

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

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

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

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

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

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

C. Mr. Fred S. Teeboom

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



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

D. Ms. Barbara Pressly

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

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

### III. COMMISSION ANALYSIS

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

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

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

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

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<sup>7</sup> Pennichuck Utilities' Memorandum of Law on Scope of RSA Chapter 38, October 25, 2004 at 2-3.

<sup>8</sup> See, e.g. *Pennichuck Water Works, Inc.* 68 NHPUC 253 (1983); *Pennichuck East Utilities, Inc.* 83 NHPUC 191 (1998); *Pittsfield Aqueduct Company, Inc.* 83 NHPUC 44 (1998).

<sup>9</sup> State of New Hampshire Public Utilities Commission Fiscal Year 2005 List of Utility Assessments at 27-28.

<sup>10</sup> *Pennichuck Water Works, Inc.* 68 NHPUC 253 (1983).

and distribution of...water for municipal use, for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized, or directed by the commission.”

After setting forth the grant of authority, RSA Chapter 38 then details the process that a municipality must follow in order to exercise that authority. RSA 38:3 provides that a 2/3 majority vote of the governing body must approve the acquisition, which in turn must be confirmed by a majority vote at a general or special election of the municipality’s voters. This confirming vote creates a rebuttable presumption that the taking is in the public interest. RSA 38:6 then requires that the governing body “notify in writing any utility engaged, at the time of the vote, in...distributing...water for sale in the municipality, of the vote.” That section also provides that the municipality “may purchase all or such portion of the utility’s plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, and shall purchase that portion, if any, lying without the municipality which the public interest may require...as determined by the commission.”

RSA 38:7 concerns a reply by the utility. If the reply is in the negative, then the municipality may proceed to condemnation of the property as provided by RSA 38:10. In the event the municipality and the utility are not agreed as to price and to how much, if any, of the property to be taken, the Commission, after notice and hearing, must decide what will be condemned and the price to be paid. RSA 38:9. Unless the municipality and the utility agree on the sale of utility property, pursuant to RSA 38:11, the Commission must determine whether the taking is in the public interest and may set conditions in order to satisfy that the public interest will be met.

On first reading, RSA 38:2 appears to be a broad grant of authority to a municipality. It allows the taking of property for use not only by the municipality and its inhabitants but by

“others”, which is undefined, and “for such other purposes,” also undefined, as authorized by the Commission. Nashua argues, accordingly, that it may take the property of the three utilities, PWW, PEU and PAC. The Pennichuck Utilities disagree, arguing that RSA 38:6 limits Nashua’s authority to take the property only of a utility engaged in the sale of water in Nashua, namely PWW.

While the Pennichuck Utilities contend that the plain and ordinary meaning of RSA Chapter 38 is unambiguous, we disagree. The parties have posed plausible conflicting interpretations of RSA Chapter 38 based on references to separate, specific statutory language. As a consequence, in order to resolve the conflict, we look to case law, legal treatises, and to recognized rules of statutory construction for guidance on how to interpret the breadth of the power of eminent domain. First, as an overarching principle, we recognize that a legislative grant of power to condemn for a public use may be exercised only within a clear definition of the grant, bounded by the express words or necessary implication of those words, *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 181 (1940). In addition, we note that “Statutes conferring the power of eminent domain are subject to strict construction against the one exercising the power and in favor of the landowner.” 26 Am Jur2d, Eminent Domain §20. Furthermore, we must interpret the statute “not in isolation, but in the context of the overall statutory scheme” and we must “keep in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole.” *Appeal of Ashland Electric Department*, 141 N.H. 336, 341 (1996). Finally, in light of the internal conflict posed by the seemingly broad grant of authority that Nashua argues is contained in RSA 38:2 and the limitation that the Pennichuck Utilities argue is contained in RSA 38:6, we turn to legislative

history to determine the Legislature's intent. *Petition of Public Service Co. of New Hampshire*, 130 N.H. 265, 282 (1988).

Within this analytical framework, the crux of the issue here is the proper interpretation of RSA 38:6. Nashua essentially ignores the portion of the statute that requires notice to a utility engaged in the sale of water in Nashua and focuses instead on the later reference in RSA 38:6 to acquiring such property as the public interest requires. Pennichuck, by contrast, centers its argument on the required notice to a utility engaged in the sale of water in Nashua, which would be limited to PWW. The relevant questions then become: Is RSA 38:6 a mere notice provision, *i.e.*, can the reference to a utility engaged in the sale of water in the municipality be read broadly or overlooked? Or does RSA 38:6 constitute a substantive limitation on the grant of authority in RSA 38:2, *i.e.*, must the reference to a utility engaged in the sale of water in the municipality be strictly construed? Furthermore, is RSA 38:6 instructive as to legislative intent, *i.e.*, can it be read in concert with legislative history and other principles of statutory construction to divine the proper interpretation?

To answer these questions, we begin first by considering RSA 38:6 through the lens of a strict construction which, based on the citations above, we conclude we are required to do. In the context of a strict construction, we must give meaning to the language requiring that the governing body notify the "utility engaged...in...distributing...water for sale in the municipality." RSA 38:6. Consequently, because PWW is the only utility selling water in Nashua, it follows that only PWW could be the recipient of a valid notice and, therefore, only the property of PWW could be taken.

As to Nashua's argument regarding the language later in RSA 38:6 that the municipality "shall purchase that portion, if any, [of the plant and property] lying without the municipality

which the public interest may require,” that particular public interest determination must be read in the context of a narrowly construed grant of authority and not in a manner that would invalidate the notice requirement. *Appeal of Ashland*, 141 N.H. at 341 (one must read two statutes of similar subject matter so as not to contradict one another and to effectuate the overall legislative purpose). In addition, we must read the provision in the context of the statute overall and not isolate particular words or phrases. *Appeal of Ashland*, 141 N.H. at 341.

Moreover, Nashua’s approach would conceivably make the taking power pursuant to RSA 38:2 virtually unlimited, which would be incompatible with the Court’s ruling in *Maine-New Hampshire Interstate Bridge* that a power of eminent domain may be exercised only within a clear definition of the grant of authority. In *Maine-New Hampshire Interstate Bridge*, the Bridge Authority’s taking of an easement for use by a utility was neither expressly authorized nor necessarily implied by its enabling statute. 91 N.H. at 181. In this case, Nashua seeks to make the reference in RSA 38:2 to “others” limited only by the Commission’s determination of the scope of the public interest, which we conclude that, as is applied to PEU and PAC, would be an unwarranted expansion of the enabling language.

The strict constructionist approach is supported also by the Legislature’s actions in adopting RSA Chapter 498-A, the Eminent Domain Procedure Act. While RSA Chapter 498-A was later amended to exempt municipal takings of utility property pursuant to RSA Chapter 38, see Laws 1981, 3:2; Laws 1990, 70:3, the Legislature’s commitment to elements of due process cannot simply be overlooked in the context of a public utility condemnation. This conclusion is bolstered by the Court’s observations in *Fortin v. Manchester Housing Authority*, 133 N.H. 154 (1990) that RSA Chapter 498-A “protects the proprietary rights of individuals by imposing numerous procedural burdens on the condemning authority.” 133 N.H. at 157. It is reasonable

to conclude that the Court, in light of its decision in *Fortin*, would give comparable weight to procedural steps that serve to safeguard proprietary interests in this case as well.

In seeking to resolve the conflicting interpretations of RSA Chapter 38 posed by the parties, we look also to legislative intent as expressed through its legislative history. In his opening remarks before the Senate Committee on Executive Departments & Administration on April 21, 1997, concerning the re-enactment of RSA Chapter 38, Representative Bradley indicated that House Bill 528 clarifies, simplifies and “lays some new groundwork for what is an existing right now of municipalities, towns and cities across the state to, through a process, take over the existing utility network within their community or in some circumstances outside of their community.”<sup>11</sup> In addition, Representative Below noted that “it is important to realize that the right of municipalities to municipalize a monopoly utility system has existed from early in this century and it exists in almost every state in the nation, and it has been exercised from time to time.”<sup>12</sup> Representative Below acknowledged as well “that a municipality may have to acquire some property outside of its boundaries. If there [are] some customers that would otherwise be stranded with a small distribution line that crosses a municipal boundary the commission would have the power to order the utility that is selling its property or having its property acquired and also order the municipality to acquire that portion of a system that may be outside of their boundaries.”<sup>13</sup>

Our reading of the legislative history of the re-enactment of RSA Chapter 38 persuades us that the Legislature intended that the extent of the taking power that could be exercised beyond municipal boundaries would be limited. This conclusion is driven in good part by

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<sup>11</sup> New Hampshire Senate Committee on Executive Departments and Administrative, April 21, 1997 Committee Report, p. 1.

<sup>12</sup> Id. at 3.

<sup>13</sup> Id. at 7

Representative Below's stated concern that a municipality may have to take some property outside its boundaries in order to prevent the stranding of some customers. The fair inference to be drawn from his statement is that extra-territorial takings were presumed and intended to be limited. The legislative history also makes repeated references to the taking of the property of a utility, in the singular, and does not appear to contemplate the taking of the property of multiple utilities, as Nashua seeks to do. It is also instructive to note that, given that PWW, PEU and PAC are separately formed and franchised utilities, that the stranding concern espoused by Representative Below would seem to be logically obviated with respect to customers of PEU and PAC if Nashua were only permitted to pursue a taking of the property of PWW.

The legislative history and the legislative intent, therefore, are in conflict with Nashua's expansive interpretation of RSA Chapter 38. Moreover, Nashua's interpretation would lead to the incongruous result that a single municipality could effectively "municipalize" property in the 21 towns and cities that the Pennichuck Utilities serve. Finally, if Nashua's expansive interpretation of RSA Chapter 38 were to be given credence, it would mean that Nashua had the power to take property on a scale equivalent to a regional water district. We know, however, that the Legislature specifically held back the power of eminent domain for water districts that are formed pursuant to RSA 38:2-a. RSA 38:2-a, VI could not be clearer: "No regional water district shall have the authority to take property by eminent domain." Allowing Nashua to take the property of up to 21 towns and cities and either operate them as a district or transfer them to the District would appear to violate the intent of RSA 38:2-a, VI. As the Court noted in *Maine-New Hampshire Interstate Bridge*, the Legislature could have granted such power but chose not to; unless the power can be found by express words or clear implication of the statute, there can be no such grant of authority. 91 N.H. at 181.



Based on the overall statutory scheme, the construction of the statute as a whole, and the legislative history and intent, the related threads of the analysis of RSA Chapter 38 lead to the conclusion that the eminent domain authority delegated by the Legislature in RSA 38:2 should be narrowly construed and that the notice requirement in RSA 38:6 should be given full effect. Accordingly, we find that the property of PEU and PAC may not, as a matter of law, be taken by the City of Nashua.

B. Can Nashua Take Assets of PWW that are not Integral to the Core System?

We have determined that Nashua is not entitled to take the property of PAC and PEU but that Nashua is entitled to take the property of the utility that serves Nashua, namely PWW, if we determine the taking to be in the public interest. We now address the issue of how much of PWW's property Nashua has a right to pursue. Preliminarily, we note that the question as posed above implies a standard for taking, i.e., whether assets to be taken are integral to the core system. Such a standard is not found in statute and has not been established by the Commission. Consequently, the question is more accurately stated: What assets of PWW may Nashua pursue through condemnation?<sup>14</sup>

RSA Chapter 38 contains no language defining the extent of a municipality's taking, other than the requirement that it be some or all of the utility that provides water to the inhabitants of Nashua, as the Commission finds to be in the public interest. PWW's franchise includes the entire municipality of Nashua, as well as areas of three towns that are physically

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<sup>14</sup> The parties are not disadvantaged by our recasting of the question, as the determination of the extent of PWW's assets that Nashua may be entitled to take will be a factual one, based on the record yet to be developed in this proceeding.

interconnected to PWW's Nashua facilities<sup>15</sup> and portions of eight other towns that are not physically interconnected.<sup>16</sup>

RSA Chapter 38 does not expressly restrict a municipality to taking only the minimum amount of plant and property needed to serve its inhabitants, or require that the customers of the newly formed municipal water system all reside within the municipality. Nor is there a requirement that the assets to be taken be physically located within, or even connected to, the municipality. To the contrary, within the context of our discussion in the previous section, which limits Nashua's authority to PWW, RSA 38:2 states that a municipality is entitled to take "plants for the manufacture and distribution of water for municipal use, for the use of its inhabitants *and others...*" (emphasis supplied). RSA 38:6 states further that the municipality "may purchase all or such portion of the utility's plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, *and shall purchase that portion, if any, lying without the municipality which the public interest may require...*" (emphasis supplied).

When feasible, we must construe the language of the statute in accordance with its plain meaning. *Appeal of Ashland Electric Department*, 141 N.H. at 341. As discussed above, RSA 38:2 expressly authorizes taking of plant and property "for the use of its inhabitants and others". Furthermore, RSA 38:6 expressly allows a municipality to take property outside its municipal boundaries "which the public interest may require". Finally, RSA 38:9 states that, when the municipality and the utility fail to agree upon how much property "within or without the municipality the public interest requires" be taken, the Commission will make the determination.

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<sup>15</sup> Portions of Amherst, Hollis and Merrimack are served through facilities interconnected to the Nashua facilities. Pennichuck Utilities Memorandum of Law on Scope of RSA Chapter 38, October 25, 2004 at 2.

<sup>16</sup> Portions of Bedford, East Derry, Epping, Merrimack, Milford, Newmarket, Plaistow and Salem are served through facilities that are not interconnected to the Nashua facilities. Pennichuck Utilities Memorandum of Law on Scope of RSA Chapter 38, October 25, 2004 at 2.

We conclude, therefore, that Nashua is entitled to pursue all assets of PWW, regardless of which customers those assets serve and where the assets are located. Whether it is in the public interest to allow Nashua to take any or all of PWW's assets, however, remains a factual determination of the public interest for the Commission to make. *See* RSA 38:10.

C. Has Nashua Followed Voting Requirements of RSA 38:3?

In order for a municipality to take utility property, it must first obtain a 2/3 majority vote of the governing body to do so. RSA 38:3. The vote must then be confirmed by "a majority of the qualified voters at a regular election or at a special meeting duly warned in either case" within one year from the date of the initial vote of the governing body. If favorable, the majority vote will create a rebuttable presumption that the taking is in the public interest. RSA 38:3.

It is uncontested, from the submissions of Nashua and the Pennichuck Utilities, that the governing body, in this case the Nashua Board of Aldermen, passed by a 2/3 majority a resolution to "establish a water works system and acquire all or a portion of the water works system currently serving the inhabitants of the City and others." Board of Aldermen Resolution No. R-02-127, November 26, 2002. Nashua has thus satisfied the first prong of the required votes necessary to pursue a taking.

The second voting requirement is that a majority of the voters of the municipality confirm the decision to take the utility property, within one year of the resolution. Again, according to the uncontested submissions of Nashua and PWW, the voters of Nashua approved by nearly 78% the Aldermen's resolution to acquire "all or a portion of the water works system currently serving the inhabitants of the City and others." (8,395 votes were cast, 6,525 of which were in favor.) This vote has been represented, without challenge, to have occurred on January 14, 2003, which satisfies the one year requirement of the statute. The Pennichuck Utilities argue that,

although a majority voted in favor, the voter turnout was very low and the information provided in advance of the vote was not specific as to the assets to be taken. Mr. Teeboom shares the concern that the information prior to the vote did not fully inform voters.

RSA 38:3 is silent as to whether it requires a majority of votes cast in support or a majority of eligible voters in support. New Hampshire law, however, resolves this question in a similar case. In *Laconia Water Company v. Laconia*, 99 N.H. 409, 410 (1955), the City of Laconia sought to acquire by eminent domain the Laconia Water Company and, pursuant to the statutory requirements at the time, a majority of the “qualified voters” had to approve the acquisition. Laconia Water Company challenged the vote, in which a majority of those voting approved, but the majority in favor was far less than a majority of the qualified voters in the city. The court rejected the water company’s argument stating that, absent a statutory provision to the contrary, the city needed to attain a majority of those qualified voters *at the meeting*, not a majority the qualified voters *of the city*. 99 N.H. at 412. The *Laconia* Court noted this is the general rule, long respected, so that “[s]ilence on the part of the members not voting cannot be counted against the express voice of another part voting.” 99 N.H. at 411, quoting *Richardson v. Union Congregational Society*, 58 NH 187, 188 (1877).

Mr. Teeboom argues that the voters were not “duly warned” because Nashua did not pose the issue in a “pro” and “con” format as votes for some purposes require. This is an issue that has been addressed by the Hillsborough County Superior Court in Docket 02-E-0441, *Fred S. Teeboom v. City of Nashua*. The Superior Court, on January 6, 2003, ruled that Nashua was not required to present the vote in the form Mr. Teeboom suggests, and denied Mr. Teeboom’s request for declaratory or injunctive relief. Similarly, we do not find the vote invalid for having been presented in the format that Nashua selected.

Further, Mr. Teeboom argues that Nashua did not present adequate forums on the proposal to voters prior to the vote and thus did not meet the requirement that voters be “duly warned” prior to the vote. We do not construe the statute to require that voters be fully briefed on all aspects of the issue, only that they be put on notice of the place, day and hour of the vote and the subject matter of the question to be posed. We will not invalidate the vote on the basis that Nashua did not present the matter to the public as often or in the format Mr. Teeboom might have preferred. Based on the information presented, Nashua has met the voting requirements of RSA 38:3.

D. Was the Vote Consistent with Requests in Nashua’s Valuation Petition?

The final question we posed for briefing was whether the vote taken on January 14, 2003, was consistent with the petition filed with the Commission on March 25, 2004. Because we have found that Nashua is not entitled to pursue the assets of PAC or PEU, it is not necessary to determine if the vote sufficiently addressed the assets of those utilities. Further, having found that Nashua is entitled to pursue the assets of PWW both within and without Nashua’s municipal boundaries, we only need to evaluate if the confirming vote was consistent with a taking of PWW.

The language of the vote, as presented by Mr. Teeboom<sup>17</sup> and uncontested by the Pennichuck Utilities and Nashua, mirrors the Board of Aldermen’s resolution R-02-127. It asks if the voters will confirm the resolution to “establish a water works system and, in order to establish such a water works system, to acquire all or a portion of the water works system currently serving the inhabitants of the City and others...” It then states that “[a] YES vote means that the City may continue to pursue acquisition of the Pennichuck water system under the procedures outlined in RSA 38. A NO vote means that the City may not acquire the water system

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<sup>17</sup> Teeboom Brief, Exhibit III.

now, and the issue may not be submitted to the voters again for at least two years.” The resolution clearly puts voters on notice that the vote is whether to acquire some or all of the Pennichuck water system serving the inhabitants of Nashua and others which, in light of the rulings contained herein, pertains only to the property of PWW. The Pennichuck Utilities argue that the “system” Nashua voted to take must be limited to the “core system” of interconnected facilities serving Nashua. We disagree, finding no basis to conclude that the vote extended only to the physically integrated so-called “core system” of PWW. The vote is consistent with the extent of the City’s authority and, therefore, Nashua has satisfied the threshold voting requirements of RSA 38:3 and is entitled to pursue the valuation petition.

E. Procedural Issues

Finally, we must address outstanding procedural issues. The Business and Industry Association of New Hampshire (BIA), which claims among its members some PWW customers, sought late intervention and stated it did not anticipate sponsoring testimony. We will grant the request but encourage the BIA and all parties, in the interests of efficiency, to join where possible, and avoid duplicative lines of testimony and examination.

A procedural schedule has not yet been adopted for the duration of this docket. We understand from a filing of the Pennichuck Utilities on December 16, 2004, that they intend to submit a Motion for Summary Judgment and have asked for 10 days from the issuance of this order to make their filing. We granted the request by secretarial letter December 21, 2004. The Motion for Summary Judgment, therefore, is due January 31, 2005. As recommended by the Parties and Staff, responses thereto must be filed within 30 days from the date the Motion is due, that is, March 2, 2005.

Another threshold issue discussed at the prehearing conference was whether the valuation inquiry and the public interest inquiry should proceed in tandem or one should precede the other. The Staff letter stated that the Parties and Staff recommended that four days after the submission of objections to the Motion for Summary Judgment, those interested may file “statements or memoranda on the question of whether the Public Interest and Valuation issues should be bifurcated in this proceeding.” We accept this recommendation and await these submissions, which will be due March 8, 2005. The only other procedural date proposed as a result of the prehearing conference was a technical session. The recommendation had been to hold the session on March 8, 2005, which would have been 30 days from the date statements were filed on whether to separate the valuation and public interest inquiries. Though the timing seems somewhat lengthy, we will adopt the recommendation of the Parties and Staff and schedule a technical session 30 days from the date that memoranda on bifurcation are filed, that is, April 8, 2005.

The letters also refer to discussion, though no resolution, regarding a “data room” for all documents related to the case. This would be in addition to the files (both electronic and in hard copy) maintained at the Commission, all of which are open for inspection. We believe it is appropriate to have a full set of materials available for review in the Nashua area, but will not order creation of a data room at this time, as we understand the Parties and Staff will be discussing this at the April 8, 2005 technical session. To assist in those discussions, however, we will require the data room to meet the following conditions: it shall make materials available for review during regular business hours; it shall allow copying, at a reasonable fee, of any materials which parties or members of the public may request; and information which the Commission

determines to be confidential and exempt from public disclosure pursuant to RSA Chapter 91-A shall be available only in redacted form.

We will not rule on other procedural issues that have been discussed, such as the use of electronic filing, as we understand the Parties and Staff are still working on recommendations. We will, however, provide the following guidance: we expect the Parties and Staff to use electronic means where possible, and we will waive administrative rules as needed to facilitate electronic exchange of filings and discovery.

Based upon the foregoing, it is hereby

**ORDERED**, that the Pennichuck Utilities' Motion to Dismiss as to Pittsfield Aqueduct Company, Inc. and Pennichuck East Utilities, Inc. is hereby **GRANTED**; and it is

**FURTHER ORDERED**, that the Pennichuck Utilities' Motion to Dismiss as to Pennichuck Water Works is hereby **DENIED**; and it is

**FURTHER ORDERED**, that the City of Nashua may proceed in this docket as to the assets of Pennichuck Water Works, Inc. and not as to the assets of Pittsfield Aqueduct Company, Inc. and Pennichuck East Utilities, Inc.; and it is

**FURTHER ORDERED**, that the intervention request of the New Hampshire Business and Industry Association is **GRANTED**; and it is

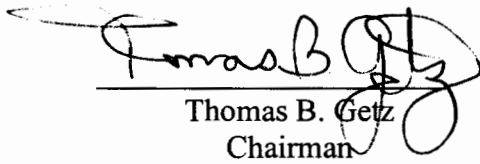
**FURTHER ORDERED**, that PWW has until January 31, 2005 to file a Motion for Summary Judgment, responses to which shall be submitted by March 2, 2005; and it is

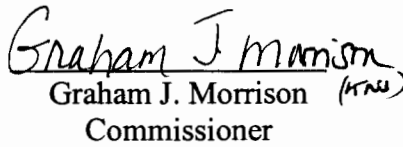
**FURTHER ORDERED**, that memoranda on the sequencing of the inquiries on public interest and valuation shall be filed on March 8, 2005; and it is

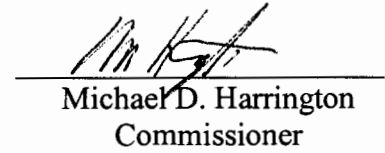


**FURTHER ORDERED**, that there shall be a technical session on April 8, 2005 at the offices of the Commission, at which time the data room and other procedural issues will be addressed.


By order of the Public Utilities Commission of New Hampshire this twenty-first day of January, 2005.

  
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Chairman

  
Graham J. Morrison (HNS)  
Commissioner

  
Michael D. Harrington  
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01/21/05 Order No. 24,425 issued and forwarded to  
all parties. Copies given to PUC Staff.

Docket #: 04-048-1 Printed: January 24, 2005

**FILING INSTRUCTIONS:**

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

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