

THE STATE OF NEW HAMPSHIRE  
before the  
PUBLIC UTILITIES COMMISSION

City of Nashua, Petition for Valuation Pursuant to RSA 38:9  
Docket No. DW-04-048

**BRIEF OF THE TOWN OF MILFORD**

Pursuant to the briefing schedule approved by the Public Utilities Commission on October 29, 2007, the Town of Milford submits the following brief.

**I. Introduction**

Milford operates its own municipal water system and regularly acquires water from Pennichuck Water Works as a backup to its municipal water supply sources under a bulk water supply contract dated March 21, 2002 (the "Contract"). Loss of this firm backup water supply would seriously compromise Milford's ability to provide clean drinking water to its citizens.

Milford opposes the taking for six main reasons: (1) if the City of Nashua acquires Pennichuck's assets, then the Contract would terminate leaving Milford without a backup water supply; (2) Nashua will inevitably place its interests above those of the other municipalities now served by the Pennichuck system whereas Pennichuck's incentive is to treat all of its customers' interests equally; (3) out-of-state management of the water system will be less responsive to local needs and undermines the original rationale for the proposed taking; (4) Nashua's exercise of authority beyond its own borders infringes upon the territorial interests of Milford; (5) the charter of the proposed Merrimack Valley Regional Water District provides Nashua with vastly greater control as compared to Milford even should Milford vote to join; and (6) Nashua expects Water District members to reimburse it for legal costs incurred in acquiring Pennichuck's assets even though those members had no control over those costs.

Should Nashua nonetheless be allowed to acquire Pennichuck's assets through eminent domain, the Commission must protect Milford's interest by holding Nashua to its representation that it would honor the Contract on all the current terms irrespective of whether Nashua maintains control over the water system or those assets are transferred to the Water District.

## **II. Facts**

Milford has its own water system, but since 1987 it has relied on Pennichuck to provide a backup supply of water. Exhibit 4002 at 1. The Contract with Pennichuck is literally essential to Milford because the town has only two useable wells of its own – the Curtis Wells located across the town line in the Town of Amherst – to supply clean water to approximately 3,200 water customers. *Id.* Milford actually owns three other wells, but two are contaminated and the third one produces water with too much iron and manganese, requiring treatment that is cost-prohibitive. *Id.*

Because of its own limited water supply, Milford relies heavily upon Pennichuck in cases of emergency, such as when a pump breaks down. *Id.* at 2. When only one well is useable, Milford uses Pennichuck as its primary water supply with its remaining well serving as backup. *Id.* This is done as a precaution to minimize the risk of pump failure in the remaining well (each of the two useable wells has only one pump). *Id.* Over the past five years, Milford has had to rely upon Pennichuck up to three times per year as a result of emergencies, each emergency shutdown lasting up to five days. *Id.*

Milford also relies on Pennichuck once or twice a year when it has to close a well for routine maintenance and five to ten times per year when it must supplement its own water supply in periods of high demand. *Id.* The town also draws on Pennichuck water on a more frequent basis so that it can run its own wells at less than full capacity, thereby extending the life of the

pumps. *Id.* In 2005, Milford relied on water from Pennichuck during every month of the year, using a total of approximately 47 million gallons of Pennichuck's water. *Id.*

On March 25, 2004, Nashua filed a Petition for Valuation Pursuant to RSA 38:9. The petition was in furtherance of Nashua's efforts to take, by eminent domain, Pennichuck East Utility, Inc., Pittsfield Aqueduct Company Inc., and Pennichuck Water Works. On April 14, 2004, Milford filed a request for intervenor status with the Commission so it could oppose the taking, thereby preserving the Contract (Exhibit 2004, Attachment A) and the town's beneficial relationship with Pennichuck. On May 26, 2004, Milford filed a motion requesting that the Commission maintain the effectiveness of the existing Contract between Pennichuck and Milford; the Commission ordered this motion held in abeyance until it could determine the proper scope of the case. Order No. 24,379 (October 1, 2004).

Under paragraph 5 of the Contract, all of Pennichuck's contractual obligations terminate if Pennichuck's plant or property is acquired by any municipality other than Milford and "such acquisition directly and adversely affects the ability of [Pennichuck] to provide water service to Milford." Exhibit 4002, Attachment A at 3-4. A private acquisition has no such effect because paragraph 9 of the Contract specifies that, "[i]n the event of a sale of all or part of [Pennichuck's] assets it is understood and agreed . . . that such sale shall in no way compromise, diminish or alter this contract or conditions thereof." *Id.* at 4-5.

During Milford's cross-examination of Nashua's witness panel on January 11, 2007, Alderman McCarthy repeatedly represented that Nashua would honor the Contract with Pennichuck under the current terms should Nashua be permitted to acquire Pennichuck's assets. Hearing Transcript, Day II (January 11, 2007) at 60-61, 63-64. He further represented that Nashua would strike paragraph 5 of the Contract if the taking were approved. *Id.* at 64.

Alderman McCarthy acknowledged, however, that he not only lacked authority to make these representations on behalf of Nashua but that the Board of Aldermen has taken no steps whatsoever to commit the City to the assumption of the Contract. *Id.* at 59-61.

Nashua also confirmed its intent to assign the Contract to the Water District along with the Pennichuck assets. Hearing Transcript, Day II at 64-65. Under the Water District Charter, Nashua has vastly greater control over Water District affairs than would smaller communities such as Milford. Exhibit 2006. For example, Charter Article 6(b) provides for two methods of voting, by director and by customer. *Id.*, Attachment A at 5-6. With respect to issues to be determined by a “vote by customer,” each director is assigned a number of votes equal to the number of customers residing in the municipality represented by the director. *Id.* By virtue of its population, Nashua is expected to have more than two-thirds of the votes when voting by customer. Certain key business and financial issues are determined by a “vote by customer” such as (1) issuance or refunding of bonds or other indebtedness by the Water District; (2) establishment of rates and charges for water supply to customers; and (3) adoption of the Water District capital improvement plan. *Id.* at 8-9. Thus, issues of water supply expansion and rates would be controlled by Nashua.

Charter Article 23 governs amendments to the charter and requires that any amendment be approved by “a two-thirds vote by director and a two-thirds vote by customer” effectively ensuring that no amendments to the Charter can occur without the affirmative vote of Nashua. *Id.* at 25-26.

At no time during the hearing did Nashua’s witnesses propose to relinquish its dominance of Water District governance or offer some other mechanism to guaranty that municipalities like Milford would continue to receive the non-discriminatory service that Pennichuck has

consistently provided. As a result, there remains no meaningful counterweight to Nashua's self-interest in Water District affairs, and other municipalities would be at Nashua's mercy.

### **III. Argument**

A. The Commission Should Prevent Nashua From Taking the Assets of Pennichuck Because Such a Taking Would be Contrary to the Public Interest of Milford's Citizens, in Violation of RSA 38:11.

Under RSA Chapter 38, the Commission must determine whether a municipal taking of utility property is in the public interest. RSA 38:11; City of Nashua: Petition for Valuation Pursuant to RSA 38:9, 2005 N.H. PUC LEXIS 69, at \*3 (July 8, 2005). The supreme court has held that such an evaluation of the public interest cannot be limited to the utility owner's own restricted territory but must include the region as a whole and all of the utility's consumers. *See Parker Young Co. v. State*, 83 N.H. 551, 563 (1929).

Milford has a duty to protect and preserve the health and property of its citizens. *Marbucco Corp. v. City of Manchester*, 137 N.H. 629, 632-33 (1993); *Mayor of Manchester v. Smyth*, 64 N.H. 380, 382 (1887). It has entered into the Contract with Pennichuck in furtherance of that duty. The proposed taking threatens Milford's ability to discharge that duty, and Milford opposes the taking as a consequence. There are several factors underlying Milford's opposition:

1. Milford currently obtains its backup supply of water from Pennichuck pursuant to the Contract. Under the terms of that agreement, "[i]f plant or property of [Pennichuck] is so acquired by [Nashua], and such acquisition directly and adversely affects the ability of [Pennichuck] to provide water service to Milford, the obligations of the parties under the terms of [the Contract] shall cease and terminate." Exhibit 2004, Attachment A at 3-4. As a result, if Nashua acquires Pennichuck's assets, Milford will be left without a backup supply of water. Because Milford relies on only two wells for its entire water supply, should one or both of these

wells fail for any reason or need routine maintenance, Milford would be unable to provide its citizens with a reliable supply of clean drinking water. This failure would constitute a breach of Milford's duty to protect and preserve the health and property of its citizens.

While Alderman McCarthy sought to assuage Milford's concern on this subject by testifying that Nashua would honor the Contract, this testimony is not binding on Nashua because Alderman McCarthy did not have the authority of the board to bind Nashua to assume the Contract's obligations. Hearing Transcript, Day II at 60-61; RSA 47:1. Even if one were to conclude that it was mere indifference that led the board of aldermen to send representatives to the hearing without authority to bind the City with respect to Milford's rights under the contract – an issue of which Nashua had long been aware (Hearing Transcript, Day XI (Sept. 19, 2007) at 10, 16; Hearing Transcript, Day II at 63-64) – it is at least indicative of the lack of importance the City assigns to the interests of Milford that the board did not bother to vote on the issue before the hearing.<sup>1</sup>

2. Pennichuck is a public utility subject to the jurisdiction of the Commission. RSA 362:2, :4. Because Nashua is a municipal corporation, it maintains that its operation of the water system is exempt from Commission oversight. Exhibit 3158; *see* RSA 362:2, :4, II and III-a. The lack of Commission oversight would only exacerbate the disproportionate authority Nashua would wield over the water supply of Milford and other municipalities if it were permitted to take Pennichuck's assets.

It is one thing for a municipality to take a water system that is confined to that municipality's boundaries. In such a case, the utility is managed for the benefit of the municipality's citizens, and those who manage it are politically accountable to those citizens.

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<sup>1</sup> To Milford's knowledge, the board has still yet to vote to affirm Alderman McCarthy's representations regarding the City's assumption of the Contract.

When one municipality takes a system that serves many other municipalities, however, the other municipalities and their citizens become disenfranchised.

It is only reasonable to expect that Nashua's city government will always act in the interests of its citizens and, if necessary or even expedient, to the detriment of the interests of the citizens of other towns. Under ordinary circumstances, however, Nashua's city government has little ability to promote its own interests at the expense of the citizens of other communities. That is because it is a fundamental precept of representative government that governmental authority may be exercised only over those who elect the governors. *See, generally*, N.H. Const. part 1, art. II; *Chasan v. Village District of Eastman*, 128 N.H. 807, 821-22 (1986).

Here, Nashua proposes to transfer Pennichuck's assets to a water district over which it has complete control for all practical purposes. *See ante* at 4-5. Milford is not a member of the district, but even if it were it could not prevent Nashua from favoring its own residents to the detriment of Milford's.<sup>2</sup> If Nashua's residents decide that they want their water supply to be under the control of their political leaders instead of a private-sector company, that is their prerogative. Nashua's voters control and are therefore responsible for the competency of their political leadership and the policies their leaders pursue. It is contrary to the public interest, however, to make the water supply of the residents of Milford subject to the control of Nashua's political leaders when Milford's residents have no say in the selection of Nashua's leaders.

Milford has a twenty-year history with Pennichuck, and it has found Pennichuck a reliable partner that has gone above and beyond its contractual requirements to support Milford. By way of example, in December 2003, Milford had a very serious water main break. Exhibit 4001 at 1. Pennichuck went beyond its obligations under the backup water supply agreement by

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<sup>2</sup> Milford has so far elected not to become a member precisely because to do so would be, in effect, to risk ceding control over its water supply to Nashua.

directing its own personnel to assist with the repair work at no cost to Milford. *Id.* Milford knows from experience that Pennichuck's management is responsive to customer needs and that Milford can depend on Pennichuck to provide quality water service at a reasonable rate. In other words, Pennichuck has a demonstrated ability to run the water utility, and it has no incentive – as does Nashua – to favor one group of customers over another.

In short, while Nashua's takeover of Pennichuck may be in the City's interests, it is decidedly not in the interests of Milford. Nashua chose to try to take a utility that serves many municipalities and other customers outside the City's boundaries, yet it has not bound itself to any mechanism that would protect Milford from discriminatory treatment in the provision of water to its residents. Milford now has a long-term contract with a reliable supplier of backup water, and the supplier is subject to Commission oversight. Nashua's takeover proposal would replace the certainty of Milford's current arrangements with unproven management, lack of Commission oversight, and Nashua's political dominance over a service that is essential to Milford's residents. Milford opposes the taking as a result.

3. Nashua originally sought to acquire Pennichuck's assets against the backdrop of a possible merger between Pennichuck and another company that would have placed the local water system under the control of a foreign corporation. *Id.* at 1-2. The purpose of the incorporation of the Regional Water District was purportedly to insure local control. *Id.* Nashua was to be the vehicle to transfer the control from Pennichuck to the Water District. *Id.* Nashua now plans to have an out-of-state company manage the water system after the acquisition, contrary to the original intent of the acquisition. *Id.* Milford opposes the loss of local control over the water system because out-of-state management will be less responsive to local needs, especially those of customers located outside of Nashua's municipal limits. *Id.*

For all of the foregoing reasons, the Town of Milford respectfully requests that the Commission deny Nashua's petition.

B. If the Commission Approves the Taking, it Should Condition its Approval Upon Nashua's Assuming the Contract with the Exception of Paragraph 5.

Again, paragraph 5 of the Contract between Milford and Pennichuck voids Pennichuck's obligations if Nashua succeeds in taking Pennichuck's assets: "If plant or property of [Pennichuck] is so acquired by [Nashua], and such acquisition directly and adversely affects the ability of [Pennichuck] to provide water service to Milford, the obligations of the parties under the terms of [the Contract] shall cease and terminate." Exhibit 2004, Attachment A at 3-4.

It is essential to the continued health, safety, and welfare of the citizens of Milford that the provision of water pursuant to the Contract is not interrupted.

Thus, consistent with its obligations under RSA 38:11, the Commission must ensure that – if the taking is approved – Nashua assume all of Pennichuck's obligations under the Contract with the exception of the language from paragraph 5 quoted above.

These representations, however, are not binding on the City or the Water District. Nashua's panel repeatedly represented to the Commission that it would assume the Contract's obligations should it be permitted to acquire Pennichuck's assets and ensure that the Water District assume those obligations as well. Hearing Transcript, Day II at 60-61, 63-64. At a minimum, then, the Commission should condition any acquisition by Nashua and any subsequent transfer to the Water District upon the assumption of the Contract's obligations by Nashua and the Water District.

**IV. Conclusion**

Based upon the foregoing, Milford respectfully requests that the Commission deny Nashua's petition as contrary to the public interest, or in the alternative, that the Commission

ensure that any and all of Pennichuck's obligations under the Contract are assumed by Nashua and the Water District should Nashua be allowed to acquire Pennichuck's assets.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties listed on the attached service pursuant to the requirements of Rule Puc 203.02.

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