

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

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

Docket No. DW 04-048

Post-Hearing Brief Of The Pennichuck Companies

November 16, 2007

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I. INTRODUCTION

This case presents the Commission with a proposal unlike any it has previously been asked to consider. The City of Nashua is seeking this Commission's authority to dismantle New Hampshire's largest investor owned water utility. Ironically, City officials do not dispute that the utility they are asking the Commission to authorize them to condemn has fulfilled its obligation to provide safe, reliable service to the public.

For decades, Pennichuck Water Works ("PWW"), first on its own and more recently with its sister companies, Pennichuck East Utility ("PEU") and Pittsfield Aqueduct Company ("PAC")¹, have worked successfully with the State to address problems at some of the most distressed water systems in New Hampshire. With the support and encouragement of this

¹ PWW, PEU and PAC are collectively referred to in this brief as the Pennichuck Utilities. Together with their parent company, Pennichuck Corporation, and their contract operations affiliate, Pennichuck Water Service Corporation, they are referred to as the Pennichuck Companies.

Commission, the three Pennichuck Utilities and their sister company, Pennichuck Water Service Corporation ("PWSC"), have developed into a true regional utility, serving large portions of Southern and Central New Hampshire and interconnecting with various municipal utilities who provide service in more limited areas. More recently, the Pennichuck Utilities have expanded into Northern New Hampshire as well, in an effort to help address problems with water systems in that portion of the state. Today, PWW owns and operates more than 22 different water systems in 11 different municipalities, and the three Pennichuck Utilities serve more than 57 different systems in 25 municipalities.²

Nashua's plan to takeover PWW is founded on its expressed desire for "local control," i.e., control by Nashua, and rests on the claim that Nashua politicians will act in a manner that will be more in line with the public interest than the can be achieved through the regulatory oversight of this Commission. Granting Nashua's petition in this case would constitute a complete about face from more than twenty-five years of Commission policy that encouraged and supported the development of the regional utility that PWW and its sister companies have become. The evidence in this case does not support a finding that such an outcome is consistent with the public good. In fact, the destruction of the regional utility formed by Pennichuck Corporation and its subsidiaries would do real harm both to customers and the broader interests of the State of New Hampshire.

II. STANDARD OF REVIEW

A. Nashua must demonstrate that the benefits of its proposed taking outweigh the substantial harm it will cause.

To succeed in this case, Nashua must demonstrate that the benefits of its proposed taking outweigh the substantial harm such a taking would cause. As the New Hampshire Supreme

² Exh. 3001 at 5-9; Exh. 3004A, DLW-2 at 2.

Court has made clear, a governmental authority proposing a taking must demonstrate that the taking is both for a public purpose and will result in a public benefit. The precise statutory terminology may vary among New Hampshire's condemnation statutes--from public interest (RSA 38:10) to necessity (RSA 205:1; 371:1) to occasion (RSA 231:8)--but each term reflects the same constitutional requirement, and the supreme court has applied uniform standards when confronted with differing legislative phrasing.³

In deciding whether a taking is in the public good, a tribunal is charged with determining whether the taking would result in a net benefit to the public by undertaking a balancing test. "In conducting the appropriate balancing test to determine public necessity, the taking authority must consider all public benefits of the proposed taking against all burdens and social costs suffered by every affected property owner." *Petition of Bianco*, 143 N.H. 83, 86 (1998); *Merrill v. City of Manchester*, 127 N.H. 234, 237 (1985). "[A] public necessity exists if the city demonstrates a public purpose for the taking and that, on balance, 'a probable net benefit to the public [will result] if [the] taking occurs for the intended purpose.'" *Appeal of City of Keene*, 141 N.H. 797, 802 (1997) (citations omitted.). Thus, the Commission is charged in this case with identifying all of the impacts of the City's proposal—not just those on Nashua, but also the impact on the customers of all three Pennichuck Utilities, on the State, on the shareholders of Pennichuck Corporation, on the customers of PWSC and on the public generally.

The supreme court has further clarified the extent of a taking authority's burden in eminent domain cases, observing that the extent of the necessity of a proposed taking will affect

³ See, *Rodgers Dev. Co. v. Tilton*, 147 N.H. 57, 59 (2001) ("we have used different terms to describe our consideration of the same basic question – referring variously to the “need,” “necessity,” “exigency,” “convenience,” and “interest” of the public”); *Merrill v. Manchester*, 127 N.H. 234, 238-39 (1985) (applied road condemnation “occasion” standard to blighted property condemnation “necessity” case). See also RSA 498-A:9-b (uniform process in BTLA cases for superior court referral on issue of necessity, net public benefit, public purpose (changed as of January 1, 2007 to public use)).

the weight that should be given to the burdens imposed by the taking. In *Rodgers*, the court explicitly cautioned that "public interest" exists on a spectrum, with the level of necessity ranging from mere convenience to exigency, and noted that a taking for mere convenience justifies only a slight imposition on private rights and that only an exigent need would justify a significant invasion of rights. *Rodgers*, 147 N.H at 60.

Nashua has never claimed that PWW provides inferior or unsafe water service to its customers, and in fact it has conceded that the opposite is true. See Section III, *infra*. The City's failure to demonstrate an exigent need for the taking it has proposed in this case, particularly when considered in light of the harm that the taking will cause, therefore requires the Commission to reject the City's proposal.

Contrary to the City's assertions, this case cannot be decided based on the no net harm standard. The no net harm standard applies in cases where a utility seeks this Commission's authority to transfer assets on a consensual basis, and is premised on the concept that investors should not be constrained in the use of their own capital if the use proposed does not harm the public.⁴ The no net harm standard considers the potential effect of an exercise of private rights on the public. See *New England Elec. Syst.*, 84 NH PUC 502, 510 (1999). In this case, the Commission is confronted with a proposed exercise of governmental power that would significantly infringe private rights.⁵

Our state supreme court observed twenty-five years ago that this Commission's role is to regulate "so that the constitutional right of free trade and private enterprise are disrupted as little as possible." *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1067 (1982). In this case,

⁴ See *Grafton County Electric Light & Power v. State*, 77 N.H. 539, 540 (1915); *Re: Eastern Utilities Assoc.* 75 NH PUC 188, 190 (1990); *Re: Eastern Utilities Assoc.*, 76 NH PUC 236, 252 (1991).

⁵ It is worth noting that when Pennichuck Corporation proposed to be acquired by Philadelphia Suburban Corporation in a consensual transaction, the City of Nashua asserted that a net benefits standard should be applied. *Tr. Day III* at 198-99.

Nashua is asking this Commission to do precisely the opposite. With respect to the taking of property through eminent domain, "New Hampshire is among the most protective of landowners in the nation." Mark Hodgdon, *Property Taking Through Eminent Domain*, Nat. Bus. Inst. Feb. 2006 at 13.⁶ This is not the case to depart from that well-earned reputation.

Investors do not lose their property rights when they invest in a business venture simply because the business provides a regulated service to the public. In fact, there are important policy reasons why the Commission should exercise heightened vigilance to protect the interests of utility shareholders. The public interest will not be served by sending a message to the investment community that a well run utility such as PWW, one that has fulfilled its obligations and worked constructively with this Commission and the New Hampshire Department of Environmental Services for years, can have all of its assets taken because one of the municipalities it serves hopes to control the utility's future.

The evidence in this proceeding demonstrated that Nashua's proposed taking will result in a significant invasion of private rights and is likely to do substantial harm to the public interest. The constitutional protections afforded PWW as a target of the City's proposed eminent domain taking are no less rigorous than those afforded other parties merely because PWW is a public utility. Because Nashua cannot satisfy its burden of proof, the taking of PWW's assets must be found to be not in the public interest, and therefore Nashua's petition should be denied.

B. The rebuttable presumption of RSA 38:3 has no bearing on this case.

The City has attempted to evade the heavy burden it must overcome by arguing that it benefits from a statutory presumption of public interest under RSA 38:3. The statutory presumption, however, has no meaningful application to a case such as this—one in which the

⁶ See e.g., N.H. CONST. art. 12-a (amended 11-7-06); Exh. 3002 at 25-26 (where Mr. Patch discussed recent efforts in New Hampshire to limit the exercise of eminent domain).

condemning authority is attempting to take utility assets that extend far beyond its own boundaries to ten other municipalities, none of which themselves have approved the taking under RSA Ch. 38 and two of which have actively opposed the taking through their intervention in this proceeding.⁷

As the Commission recognized in a prior ruling in this case, eminent domain statutes must be strictly construed,⁸ a principle that has particular significance here, given the vast area over which the systems that Nashua seeks to condemn are located. Surely the Legislature could not have intended when it enacted RSA 38:3 that a vote by a single municipality would create a presumption in favor of a taking of assets located in other municipalities that have never voted on the taking proposed and, in some cases, have actively and vociferously opposed the taking before this Commission. To give Nashua the benefit of a statutory presumption in such a case not only would be contrary to law, it would defy common sense.⁹

III. PWV HAS CREATED A SUCCESSFUL REGIONAL UTILITY. THE PUBLIC INTEREST WOULD NOT BE SERVED BY DISMANTLING IT.

From its inception in 1853 until 1983, Pennichuck Water Works was a small utility that provided service almost exclusively within the City of Nashua. With the Commission's

⁷ Even the Town of Bedford, which itself voted to municipalize at one point, has made clear that it does not support a taking that would result in its being served by Nashua. Tr. Day XI at 129-30. At the hearing, Mr. Scanlon confirmed his deposition testimony that he does "not believe Bedford is well served by being a customer of the City of Nashua." Tr. Day XI at 131-32; Exh. 3001A (which includes Attachment DLC-4 from Mr. Correll's January 12, 2006 testimony).

⁸ Order No. 24,425 (January 21, 2005) at 11-13 (citing to *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 181 (1940); *Fortin v. Manchester Housing Authority*, 133 N.H. 154 (1990); RSA 498-A; and 26 Am Jur2d, Eminent Domain §20). See also, 4 Tiffany, *The Law of Real Property*, § 1252 (3rd ed. 1975); *Orono-Veazie W. Dist. v. Penobscot Cty. Water Co.*, 348 A.2d 249, 253 (Me. 1975); *Ronci Mfg. Co., Inc. v. State*, 403 A.2d 1094, 1097 (R.I. 1979).

⁹ As the Pennichuck Companies have noted since the outset of this case, such a reading of RSA 38 would lead to the absurd result that a single municipality such as Nashua would have the ability to condemn the entirety of Public Service Company of New Hampshire's electric system merely because PSNH operates within the City. The same theory would allow the City of Concord to take all the assets of Unitil Energy Systems, including those in Hampton and across the Seacoast area, because Unitil operates in Concord.

approval, PWW restructured itself in 1983 by converting to a holding company structure¹⁰, and shortly thereafter, began expanding its operations well outside of Nashua.

The expansion of Pennichuck's service territory was carried out with the support and encouragement of this Commission, and over time the company acquired numerous water systems in dozens of municipalities across Southern and Central portions of the state.¹¹ In many cases, those acquisitions assisted the Commission and other state authorities in their efforts to address difficult water supply problems of long standing. No other utility inside or outside the state has shown the same willingness and capacity to play such a constructive role, and as a result, over time Pennichuck was transformed from a small local water company into a truly regional utility. Today, the three Pennichuck Utilities serve over two dozen municipalities throughout the State, operating approximately four dozen different water systems each with their own sources of supply as well as more than a dozen interconnections with municipal water providers.¹² In addition, PWSC serves another 16,000 customers in three different water systems that it operates on a contractual basis in addition to the customers it serves at over eighty privately owned water systems.¹³

Throughout this period of expansion, PWW has demonstrated its ability to provide safe, adequate, reliable water service to its customers at reasonable rates. The record is replete with testimonials of support from City officials, State regulatory officials, the City's proposed contractors and the municipalities where PWW operates regarding the professionalism and

¹⁰ See *Pennichuck Water Works*, 68 NH PUC 253 (1983).

¹¹ See, e.g., Exh. 5001 at 53 (where Mr. Naylor confirms that "Pennichuck has been continuously and consistently supported in its efforts to acquire and rehabilitate smaller systems by the Commission and by DES."); *Pennichuck Water Works*, 68 NHPUC 253 (1983).

¹² Exh. 3001 at 13-17; Exh. 5016; Tr. Day I at 187-93.

¹³ Exh. 3001 at 17.

excellence of the service provided by the Pennichuck Utilities.¹⁴ Veolia's expert on community water systems and operational and engineering issues, Mr. Noran, who has direct experience in New Hampshire with many of the water systems now owned by the Pennichuck Utilities, testified that "Pennichuck is a quality operation." Tr. Day IV at 129. In a case as adversarial as this one, such comments are particularly noteworthy coming from a senior representative of the company that would benefit most if Nashua's efforts to condemn PWW were successful.

PWW's record of success and that of its sister companies should not be taken for granted or considered lightly. The Commission is well familiar with the many troubled water systems it has had to oversee over the years.¹⁵ Contrary to Mr. Sansoucy's suggestion, these systems are not limited to existing small regulated systems. They include many other small community water systems that either are already facing water supply and operational problems that require acquisition by a larger, more financially sound company, as well as systems that are not yet in trouble but have insufficient access to capital and therefore are likely to become troubled.¹⁶ The seemingly intractable problems of those systems consume the time, attention and resources of the Commission on a scale that can be disproportionate to the number of customers affected. Daniels Lake Water Works, whose acquisition by PEU was approved by this Commission this past year, had only 32 customers and was in Commission receivership for 7 years.¹⁷ As the Commission well knows, drinking water issues often present some of the most significant and emotionally charged problems facing utility customers and the state regulators and political representatives responsible for helping to solve those problems.

¹⁴ Alderman McCarthy (Tr. Day VI (a.m.) at 76-78); DES (Tr. Day IV at 128-29); PUC (Exh. 5001 at 69); Exh. 3002 at 39, 40-42); R.W. Beck (Tr. Day V at 17); Veolia (Tr. Day IV at 129); Merrimack (Tr. Day X at 33, 49, 51); Bedford (Tr. Day X at 103-4, 127-28; Exh. 3022 at 14-189); Milford (Tr. Day XI at 51).

¹⁵ Exh. 5014 at 49-53.

¹⁶ Tr. Day IX at 142-43; Tr. Day XII at 79-80.

¹⁷ See Order No. 24,757 (Dkt. DW 06-172)

It is not an overstatement to suggest that, while PWW and its sister utilities may have opportunities for further improvement, they can be considered the paradigm of what regulators hope a utility will be. The Director of this Commission's Water and Gas Division perhaps said it best:

This is not a poorly run water company; even Nashua acknowledges that. This is a well-run, healthy business with various operations centered primarily on water service. Pennichuck has earned a reputation with regulators, both at the Commission and at NHDES, as well as among municipal and business leaders as a good company, with intelligent and pro-active leadership.

Exh. 5001 at 69. The Bedford Planning Director expressed a similar view only a few years ago, noting that Pennichuck "takes an active role in the planning processes of the communities it serves" and "makes a special and specific effort to act in the public interest of the communities it serves and to fulfill the needs of its municipalities, rather than simply using a 'by the book' business as usual approach." Exh. 3022 at 16. And Milford Selectman Daniels stated that PWW is "a reliable partner that has gone above and beyond its contractual requirements to support Milford." Exh. 4001 at 1. Few utilities can boast such support from their regulators, their customers and the communities they serve. That the company is able to earn a profit is nothing for it to be ashamed of. Those profits have made it possible for PWW and its sister utilities to reinvest in their existing systems and expand into new areas where their help is needed. It is the lack of profitability and the capital derived from profits that has plagued most small water utilities.

Nashua's jealousy that Pennichuck has not limited its investment horizon to the City's borders may reflect the City's natural parochial view, but it would be contrary to the public interest to allow such a narrow perspective to result in the destruction of the successful model that the Pennichuck Companies have created with the support and vision of this Commission.

This Commission should not condone the dismantling of such an enterprise where no good reason has been shown for doing so.

IV. A TAKING BY NASHUA WILL HAVE SIGNIFICANT AND IRREVERSIBLE ADVERSE IMPACTS

A. Condemning PWW would destroy the financial core of the ownership structure that enables the Pennichuck Companies to function as a successful regional utility.

If Nashua were allowed to condemn Pennichuck Water Works, the core of Pennichuck Corporation's financial and operational structure would be gutted, and the ability of its subsidiaries to play the role of regional utility in New Hampshire would come to an immediate end. The testimony of Messrs. Naylor, Patch, Correll, Guastella and Ware demonstrated that the ability of the Pennichuck companies to collectively serve as a regional utility is wholly dependent on the existence and continued health of PWW. PWW is the financial engine that generates the bulk of the Pennichuck Utilities' earnings and enables those companies to invest the necessary funds to maintain and upgrade the water systems currently owned by them and to acquire new systems. Without PWW's financial strength, Pennichuck Corporation would either be unable to access the debt markets or would have to do so on far less favorable terms than it does today. Its access to new equity funds would be significantly curtailed and potentially cut off entirely.¹⁸ In short, without PWW, Pennichuck Corporation and its other subsidiaries would be a small water utility like any other, with limited access to capital. Nashua did not present a shred of evidence to the contrary.

¹⁸ Exh. 3001 at 16-18.

B. Condemnation of PWW is likely to result in a significant loss of technical capability to PEU, PAC and PWSC and, possibly, to the City's contract operator as well.

In addition to the devastating impact that the loss of PWW would have on the finances of the remaining Pennichuck Companies, a taking by Nashua would undermine the remaining companies' staffing. All of the employees who operate PEU, PAC and PWSC and provide service to their customers are employed by PWW.¹⁹ While Nashua has proclaimed that it has no use for the management personnel employed by PWW, it has attempted to lay claim to PWW's field staff and other operational personnel. If the City were successful in moving those employees to Veolia, who would be left to operate PEU, PAC and PWSC? The employees that Nashua seeks to transfer to Veolia's employment are highly experienced personnel with considerable knowledge of the day-to-day operations of all four Pennichuck water companies. Veolia has acknowledged as much, which is precisely why it hopes to be able to hire those individuals away from Pennichuck.²⁰

If Nashua has its way, the remaining Pennichuck Companies will lose those employees and have to restaff with far less experienced personnel. If Nashua and Veolia are unsuccessful in hiring these individuals, then they will have to operate the utility without the very individuals who know the system best. There is a third possibility as well, which is the real potential that some of the most highly skilled and employable PWW personnel may seek employment elsewhere to ensure that they do not find at a later date that their positions are among those that Veolia and Nashua plan to eliminate in the transition to municipal ownership. Under any one of these three scenarios, utility operations and customer service would almost certainly be

¹⁹ Exh. 3004 at 5.

²⁰ As Mr. Ashcroft noted, "The people who are running it know what they are doing," Tr. Day IV at 129. "They will be a critical component of our success going forward." Tr. Day IV at 151.

substantially adversely affected, and the technical and managerial capacity of the remaining utilities would be greatly diminished.

C. Nashua will not replace PWW as a regional utility if allowed to condemn PWW's assets.

Nashua's repeated criticism of Pennichuck for reinvesting profits in systems outside of Nashua lays bare one of the fundamental failings of the City's proposal that it be allowed to takeover ownership of PWW—the City has no motivation, either financial or political, to invest beyond its borders and become a true regional utility.²¹ Mayor Streeter and Alderman McCarthy's weak assurances that the Nashua Board of Aldermen will act in the interests of anyone other than the people who elect them simply are not credible. Selectman McCray from Merrimack, an elected official who plays much the same role as Nashua's aldermen, put it most pointedly and frankly: "elected people, they're always going to cater to the people that elect them." Tr. Day XI at 66.

In some of their more candid moments, Nashua's representatives have made it abundantly clear that Nashua, not the rest of the State, is their priority. Mayor Streeter, of course, shot back in answer to a question during his deposition that "I'm not concerned with Epping and Newmarket,"²² and Ms. Hersh confirmed during her testimony that "the City of Nashua, that should be our first priority." Tr. Day VI (a.m.) at 108. These are not just accidental or casual statements by minor public officials. These are statements from two of the City's lead representatives in a case in which those officials *knew* that the City's sincerity about their

²¹ Exh. 3002 at 18 (where Mr. Patch noted that there is "little or no incentive for the municipal utility to take on problem systems outside its existing service territory."); Exh. 5001 at 52 (where Mr. Naylor observed that "[a] true regional utility with a profit motive is incited by effective regulation to get the product to the people who need it and want it under rates and conditions that are just and reasonable for all who are served.").

²² Exh. 3001A (which includes Attachment DLC-3 to Mr. Correll's January 12, 2006 testimony).

willingness to take over the role of regional utility was a central issue. Such statements make clear that Nashua is not prepared to function as a regional utility in any true sense.

At various times during this case, Nashua has suggested that it may be willing to acquire other water systems, that Veolia would be willing to do so or that some unidentified third party utility would be willing to do so. But the testimony has demonstrated that just the opposite is true—there is no party other than Pennichuck that is willing and capable of playing such a role. Mr. Naylor put it most bluntly under cross examination by the City, stating "I don't believe for a minute that Nashua will acquire unconnected systems in other communities." Tr. Day XII at 119. The limitations and qualifiers that Alderman McCarthy put on his willingness to consider such acquisitions made it clear to all that the City's claimed interest in purchasing additional water systems was at best a grudging acknowledgement that it had to say something positive about its intent.²³

While the City has at times suggested that its proposed contractor, Veolia, would be available to work with the Commission to solve the problems of small, troubled water systems in the state, Veolia itself has made plain that it has no interest in owning regulated utility systems.²⁴ That Veolia may have an interest in being asked to operate other water systems under contract should come as no surprise. But as Mr. Naylor pointed out more than once, water systems become troubled because they lack capital,²⁵ not because they lack someone who is willing to be paid to operate them.

²³ See, e.g., Tr. Day II at 116-18 (where Mr. McCarthy refers variously to systems in a "geographically logical location", those that "can be hydraulically connected" and those "in towns in which [Nashua] already had a presence."

²⁴ Tr. Day IV at 157 (where Mr. Ashcroft testified that the acquisition of regulated utilities is not part of Veolia's business plan); see also Tr. Day X at 142-43 (where Mr. Guastella testified that it was highly unlikely there would be another utility that could operate PEU and PAC as efficiently as PWW does).

²⁵ See, e.g., Tr. Day XII at 111.

Nashua has also speculated that some other utility besides one of the Pennichuck companies might be willing to come to New Hampshire to acquire troubled systems. Yet, none has done so to date, and Nashua failed to posit a financial model that would enable another utility to successfully operate small satellite systems in the state without the efficiencies created by the ownership of a major core water system, such as Pennichuck operates today. Mr. Ware gave perhaps the most vivid description of why this is so, noting that without PWW "[t]he hub that generated the work that maintained enough of the staff and efficiencies [would be] gone....In this taking, the hub is gone, the spokes are left. A wheel with no hub, the spokes fall off." Tr. Day VII at 62. Mr. Guastella, who has a long history of national experience in the water industry, testified that he could not think of a single company that could operate PEU and PAC more efficiently than PWW has.²⁶

Nashua has steadfastly refused to accept that there are significant benefits to the economies of scale that the Pennichuck companies have achieved through their association with one another. Yet the absence of those economies is precisely the reason that no other utility, whether based in New Hampshire or elsewhere, has been able to develop into a regional utility with the scope of the Pennichuck companies.²⁷

The only company that Nashua could offer up to potentially replace the role of the Pennichuck Companies, was Lakes Region Water Company, a company which itself has become troubled recently due at least in part to its own limited access to capital to make necessary capital improvements.²⁸ Surely this cannot be part of the justification for the condemnation of Pennichuck.

²⁶ See Tr. Day X at 142-43.

²⁷ See, e.g., Tr. Day X at 145-46.

²⁸ Tr. Day XII at 85, 124-25.

V. THE OPERATING AND MANAGEMENT STRUCTURE PROPOSED BY NASHUA IS UNPRECEDENTED AND WILL BE INEFFICIENT AND INEFFECTIVE.

In the face of Pennichuck's undisputed track record of success, Nashua has proposed a management and operational structure that is plagued with numerous weaknesses and multiple uncertainties that individually and collectively translate into the likelihood that PWW's customers would receive significantly diminished service at the same or higher rates than they do today. This is not just PWW's opinion, it is the unequivocal view of the Director of the Commission's own Division of Water and Gas.

Based on Staff's experience with water utilities, Staff sees the absence of effective internal oversight by Nashua, and more particularly the delegation of both operations and oversight to contractors, as not creating an effective ownership and management approach for a major business. Even with the most experienced contractors, there is considerable risk that their lack of ownership or other long term interest in the assets may cause inefficient and uneconomic operation.

Exh. 5001 at 62.

A. The City's proposed operation and management structure is unprecedented.

The risks posed by the City's proposal are further compounded by the fact that the operating and management structure that Nashua seeks to put in place has never been tried before. Under the City's proposal, it would turn over the management and operations of PWW's twenty-two water systems to two private contractors without itself employing a single individual who would be knowledgeable about running a water utility.²⁹ Each of the City's principal contractors, in turn, would subcontract out portions of their responsibilities to one or more other contractors.

Neither Nashua nor Veolia nor Beck was able to point to any relevant precedent for the complex operating structure and contractual arrangement proposed. Beck would be Nashua's

²⁹ Tr. Day V at 19.

eyes and ears in overseeing the operations contractor, Veolia. And Beck would engage a separate subcontractor for matters on which Beck itself lacks the necessary capabilities.³⁰ The day-to-day operations of the utility would be turned over to Veolia, and Veolia would hire one or more subcontractors to handle various functions.³¹ Charges from both Veolia's and Beck's subcontractors, in time, will be passed through to the City with a markup for the prime contractor's profit in addition to the profit of the subcontractor that is already included in the bill.³²

Although Nashua described Beck as the “owner’s representative,” Veolia intends to deal directly with the City rather than go through Beck because “[w]e report to our client.”³³ At the same time, Beck will also deal directly with the City.³⁴ Both claim that they will report to the Mayor and/or Board of Aldermen. Because the City will have no one on staff who will be a water utility expert, it appears that disputes between Veolia and Beck and significant decisions about the utility will be brought directly to politicians - the Mayor and/or aldermen - for decision. Aside from the likelihood that this process will throw such issues into a highly politicized forum where decisions are frequently made for reasons other than purely business considerations, no City employee will be in a position to provide the Mayor and aldermen with impartial advice when Beck and Veolia are in disagreement. This also will make it difficult to operate the utility on a day-to-day basis, where real time decisions must be made.

The City’s failure to provide for any permanent employees who are knowledgeable about the water utility is an example of how Nashua's single-minded focus on reducing the operating

³⁰ Tr. Day V at 10, 26-28, 55, 67, and 71.

³¹ Tr. Day IV at 108-13.

³² Tr. Day V at 27-28; Tr. Day IV at 222-23.

³³ Tr. Day IV at 116-17.

³⁴ Tr. Day V at 57.

costs in its model has led it to sacrifice prudent operational considerations.³⁵ It is simply not realistic to have contractors reporting to politicians (all of whom but the mayor have full time jobs outside their elected positions) who will then be required to make highly technical decisions regarding the investment of significant capital or complex operational matters. It is inevitable that the City will have to hire one or more staff to fill this significant gap. Of course, Nashua (or at least Mr. Sansoucy) appears to be counting on that occurring after it has already acquired the utility, so that the additional operating expenses associated with such a change will not be reflected in the revenue requirement analysis being reviewed by this Commission.

The structure proposed by the City was plainly created to address its political and litigation concerns, rather than a desire to put in place the most effective and beneficial way to run a utility. The effects of such a structure will, of course, be borne by the customers in the end, either in the form of delays and reduced quality of service or in the form of higher costs when Nashua realizes that it needs to add additional staff. Not surprisingly, Nashua failed to point to a single example of another municipality that had engaged a contractor to operate a water supply and distribution system where the municipality lacked any internal personnel capable of overseeing the contractor.

While Veolia is certainly a large international conglomerate with significant expertise in many areas, its direct experience in operating combined water supply and distribution systems the size of PWW is limited to its recent experience in Indianapolis. The majority of the “water” systems it operates are actually waste water systems. Moreover, there are few drinking water

³⁵ Mr. Ashcroft testified at his deposition and during the hearing that "Nashua has no expertise in water treatment or managing assets of this type." Tr. Day IV at 50. Mr. Doran testified that he was "not aware of anybody's background has particular experience to water and what the experience of anybody that has any water—direct water experience." Tr. Day V at 90. Alderman McCarthy also confirmed that no one in the Department of Public Works will play any role with regard to the operation of the utility. Exh. 3078.

systems where it operates both the water supply component and the distribution component.³⁶

None of the systems it operates involve the complexities and challenges of the two dozen satellite systems spread over a large area as does PWW. New Hampshire's experience with Consumers NH Water Company's efforts to operate under a similar model in the past should be ample demonstration that the results that PWW has been able to achieve are not a forgone conclusion.³⁷

While Beck asserted that it has acted as an oversight contractor before, a closer examination shows that it has never played the role proposed in this case.³⁸ Where Beck has acted as the "owner's representative" in the past, it was for a design/build project or was related only to a water supply facility, not a distribution system.³⁹ Of equal significance, here Beck would be overseeing not just the operation of a single water treatment plant, it would be overseeing the operation of literally dozens of community wells in almost two dozen small community water systems scattered over a large geographic area plus the associated distribution systems and the related customer service functions. Notably, Beck has not overseen operations for a municipality that itself lacked any employees with significant knowledge of the water system. The one example that Beck, Veolia and Nashua have repeatedly relied on is Beck's experience with the Tampa Bay Water Authority, where Beck was engaged to oversee a major water treatment facility. But as Mr. Gates acknowledged, the governmental entity that owns that

³⁶ Tr. Day IV at 52-72.

³⁷ See, e.g., Order No. 19,543 ("In December of 1988, Southern interconnected the Stonegate system with the Williamsburg system [because] the Stonegate system was suffering from inappropriate levels of radon and radium in its water supply. Southern attempted to alleviate these problems but was unsuccessful in its efforts."); Order No. 20,196 ("The OCA further argued that mismanagement by Southern and its parent company, Consumers Water Company ("Consumers"), as well as poor water quality required an overall reduction in rates"); Order No. 22,883 ("Consumers New Hampshire's service and water quality and utility management were not on a par with that of Pennichuck").

³⁸ Mr. Doran conceded that he was not familiar with any Beck oversight of a water distribution utility. Tr. Day V at 40. And Mr. Doran and Mr. Gates have never themselves overseen the operation of water system. *Id.* at 101.

³⁹ Tr. Day V at 41.

facility has considerable staff of its own with significant internal expertise.⁴⁰ Nashua appears to hope that the Commission will give no weight to these “firsts” that it is attempting to test out on the customers of PWW. These unprecedented features of the City’s proposal are critical to any review of Nashua's proposal because they add a significant component of operational risk and inefficiency that is likely to negatively affect both customer service and the costs assumed by Mr. Sansoucy in his projections. At a time when many in New Hampshire would like the state to remain first in the nation, surely this is not what they have in mind.

B. It is the customers who will suffer.

Under the City’s proposed model, it is clear that it is the customers who will suffer. Aside from the fact that Veolia has never operated a system as diverse as the twenty-two water systems operated by PWW, under Nashua's proposal customers would be subjected to a customer service structure that directly conflicts with the advice that Veolia itself offered to the City. As Mr. Burton confirmed in his deposition and confirmed again during the hearing, based on his experience the best way to operate is to have all customer service functions in one party because using one entity to resolve customer concerns is less complicated and time consuming.⁴¹ Veolia's own proposal to the City observed that "requiring the customer to call multiple contact numbers for resolution of water related issues tends to be confusing and frustrating to customers [because] many consumers don't clearly understand the difference between a billing or field service issue." Tr. Day IV at 47. In the face of this direct advice, the City, with Mr. Sansoucy at the helm, chose instead to split the billing and collection function from the rest of customer service.

⁴⁰ Tr. Day V at 40-42.

⁴¹ Tr. Day IV at 46.

As Ms. Noonan commented, Nashua's decision to divide customer service into two separate parts—one for billing and collection and the other for operational issues—is likely to leave many customers lost in a no man's land. Tr. Day XII at 39. When customers are unhappy with Beck and Veolia, who will they call? The Mayor or the aldermen? Nashua may argue that it withdrew its bifurcated customer service model on the last day of hearings when its attorney suggested that it would be willing to consolidate customer service under Veolia. But this eleventh hour change to the City's proposal leaves the Commission, the Commission's staff, PWW and the other parties no opportunity to understand how this new proposal will work and what the additional costs associated with such a change will be. One could wonder why Nashua attempted to divide customer service into separate parts in the first place, given Veolia's pointed and numerous warnings against doing so, but the answer appears obvious—the City thought that if it handled utility billing and collection issues the same as it does its tax collection and sewer billing it could save money—a decision that reflects Nashua's fundamental misunderstanding of the substance of those functions and the coordination that those functions require if water utility customers are to receive the kind of service to which they are entitled. The City's approach also reflects its view that developing a model that minimized operating expenses was job one in this case, regardless of the impact on customers.

VI. THE POTENTIAL FOR DISPUTES WITH NASHUA'S CONTRACTORS AND THE CITY'S OWN INTERNAL POLITICAL BATTLES ARE LIKELY TO ADVERSELY AFFECT THE CITY'S ABILITY TO OPERATE THE UTILITY EFFECTIVELY AND EFFICIENTLY.

The investor owned utility structure of PWW has served New Hampshire well for so many years because it better aligns the company's management, operating structure and motivation with the interests of the utility's customers and those of the state at large. Under

PWW ownership, there is ample government oversight through this Commission and, with regard to water supply issues, the Department of Environmental Services.

With a single owner/operator such as PWW, there is no question who bears responsibility for meeting all aspects of the obligation to provide safe, adequate and reliable water service at a reasonable price. When a problem arises, there is no finger pointing and no doubt who must take action to address the issue. Under PWW ownership, political concerns and contractual obligations are not an issue. PWW's obligations are coextensive with the law, and therefore it cannot look to another party when a problem requires previously unanticipated action or expense.

By contrast, the structure that Nashua has proposed to implement creates a balkanization of interests, dividing among multiple factions the obligation to spend money and take action on various matters. Under that model, each party's obligations—even Nashua's—are defined by complex and potentially ambiguous contracts in which each party has attempted to carefully circumscribe its responsibilities or shift costs and obligations to the other. As a result, the potential for issues to fall between the cracks of such an agreement or raise unanticipated questions is likely to lead to disputes. Such disputes do not necessarily reflect bad faith on any party's part. They are simply the normal result of the stresses and strains of parties operating under a complex, multi-million dollar arrangement.

The evidence in this case showed that Veolia has ample experience with such disputes. In some cases it sued its municipal partner first. In others the municipality sued first. In each case, however, the claims were similar in nature—that one party or another failed to fulfill its

obligations or make payments for amounts claimed to be due. In the end, such disputes led to a breakdown in the relationship.⁴²

There is already ample indication that Nashua's relationships with Veolia and Beck are likely to lead to differences regarding how much and for what services the contractors are entitled to be compensated. Even before contracts have been signed and operations have begun, both Veolia and Beck have had disputes regarding amounts that should be paid to them.⁴³ In the case of Beck, there was even disagreement regarding whether the company had been authorized to proceed with work at all.⁴⁴ Both Beck and Veolia had to release potential legal claims against Nashua in order to move forward.⁴⁵ The risks, costs and delays brought on by such disputes is something that is simply not present in the regulated utility structure under which PWW operates.

Contract disputes between a municipality and its contract operator are not just a concern because of the cost and disruption that can be caused by litigation. Of greater concern is that they reflect a mind set under which each party to the contract does only what it thinks is required under their legal arrangement, rather than focusing on what customers require or what is the right thing to do. Rather than looking at each situation through the eyes of the recipients of the water service, it has a tendency to cause the owner and operator to think first about who bears the cost of a particular decision and whether that cost can be pushed over to the other party to the contract. Such positioning is likely to lead to delay and inefficiencies that ultimately harm the customer. In sum, Nashua's proposal for a multi-party structure with interconnecting obligations

⁴² Exhs. 3181 and 3222 provide some examples of litigation that reflects just these kinds of problems; *see also* Tr. Day IV at 276-85.

⁴³ *See, e.g.*, Tr. Day V at 31-39; Exh. 3254; Tr. Day IV at 165-66; Exh. 3054.

⁴⁴ Tr. Day V at 31-39.

⁴⁵ *See* Exhs. 3054, 3254.

and overlapping responsibilities will create confusion and a significant potential for disputes, higher costs and ineffective operations.

Internal political disputes within Nashua add another significant risk to operation of the water system that does not exist under PWW ownership. Even Mr. Doran, who was testifying in support of the City's proposal, felt compelled to volunteer that "[t]he Aldermen in Nashua is a very feisty group." Tr. Day V at 60. Nashua has had numerous major internal legal differences in recent years, with one faction within city government suing another or leveling harsh accusations of wrong doing at one another as well as ongoing labor disputes with a dozen or so different city employee unions. *See* Tr. Day VI (a.m.) at 79-93; Exh. 3242. Alderman McCarthy suggested that the vitriol of Nashua politics is common among municipal governments. Even if Alderman McCarthy is correct, the same tenor and contentiousness is nearly certain to invade decisions regarding the water utility when aldermen are called upon to decide difficult issues with multi-million dollar consequences, especially when the expenditures need to be made outside the borders of Nashua. The potential for injustice to occur when such issues require a balancing of the concerns of Nashua citizens with those in Bedford, Epping or even Merrimack is particularly great. Can one reasonably expect elected officials to take action that reflects anything less than that their first priority is Nashua?

There is no doubt that water is a highly politicized issue. It is the politics of water that gave rise to this case in the first place. Where a utility serves so many communities, all but one of which will have no say in electing the politicians who have ultimate authority over the utility, customers are more likely to obtain equal treatment and better protection from this Commission than from local officials.

VII. NASHUA'S PROPOSAL WILL NOT RESULT IN SAVINGS FOR PWW CUSTOMERS.

- A. The substitution of fair market value for the depreciated original cost of PWW's assets will have a significant adverse impact on rates. When adjusted for Nashua's true operating expenses, the City's revenue requirement will exceed PWW's.**

Nashua has repeatedly sought to focus the Commission's attention on certain limited costs, such as income taxes and public company compliance costs, that would be eliminated under municipal ownership. What Nashua has failed to address is the immense impact on rates that would result from paying fair market value for PWW's assets, i.e., the value to which Pennichuck would be constitutionally entitled if a taking were to proceed (*see* Section XI *infra*). Replacing the depreciated original cost of PWW's assets with their fair market value, when added to the operating costs that are likely to result from the contractual arrangements and inefficient operational and managerial structure that the City has proposed, will eliminate hypothetical savings that would otherwise arise from municipal ownership. As Mr. Guastella demonstrated in Attachments JFG-1⁴⁶, JFG-5 and JFG-6⁴⁷ at almost any plausible purchase price assumption, the rate benefits posited by Nashua are effectively eliminated.⁴⁸

Using Mr. Sansoucy's own projected operating costs and adjusting only for known errors identified in Mr. Ware's prefiled testimony, Mr. Guastella demonstrated that under various purchase price scenarios that are more reasonable than the \$85 million assumed by Mr. Sansoucy, Nashua's revenue requirement would vary only minimally from the rates forecast for PWW. Notably, Mr. Guastella's analysis did not include any of the increases to Mr. Sansoucy's

⁴⁶ Exh. 3016X (where Mr. Guastella assumed that Nashua would operate as efficiently as PWW but would avoid certain expenses such as income taxes, public company expenses and the like).

⁴⁷ Both JFG-5 and JFG-6 are included in Exh. 3016B.

⁴⁸ It is also worth noting that, as Mr. Guastella observed, the constraints of municipal finance result in the City's imposing the full cost of PWW's current asset base on today's customers, rather than spreading that cost out over the full useful life of the assets. This generational inequity may be something that the City of Nashua wishes to impose on its own citizens, but it is not fair to make customers in PWW's other systems pay the cost of providing service to customers thirty or forty years from now. Tr. Day X at 123-25.

projections that Nashua's own witnesses identified during the hearing, such as a \$46,000 increase in the Veolia base fee, plus another \$100,000 that was not included originally for Dig Safe, plus unknown amounts for the many other commitments that Nashua has made or for items that it did not reflect such as the full cost of participation in regulatory proceedings such as rate cases and financing approvals, fixed asset accounting costs, and the cost of staff necessary to maintain books for regulatory purposes and to comply with GASB.⁴⁹ It is not surprising that Mr. Sansoucy's figures failed to reflect these costs since he created his own operating expense data, rather than obtaining it from the contractors who would be operating the system.⁵⁰ The addition of these missing and understated amounts would push Nashua rates well above PWW's, but because the proposed contract between Nashua and Veolia shifts so many costs into the supplemental category, it is impossible to know the true cost of operating the utility under the City's proposed structure.⁵¹

What is known, as Mr. Ashcroft testified, is that the contract presented to the Commission will change significantly before it is finalized because Veolia has yet to conduct its due diligence.⁵² In fact, it is known that the price will have to be adjusted to reflect updated information even for those items that were subject to due diligence; for example, Mr. Ashcroft observed that Veolia's bid was based on data from PWW's 2004 annual report, and therefore the price would have to change.⁵³ Mr. Ashcroft made clear that Veolia was able to keep the base price of the contract down by shifting the pricing risk to the City.⁵⁴ Notably, in explaining why

⁴⁹ See, *i.e.*, Tr. Day IV at 181-88; Tr. Day V at 84-87.

⁵⁰ Tr. Day IV at 39-40.

⁵¹ The functions for which the costs are additional under the Veolia contract are set forth in Appendix E, G and H to the draft contract; See Exh. 4007.

⁵² Tr. Day IV at 36-37.

⁵³ Tr. Day IV at 260-62.

⁵⁴ Tr. Day IV at 35.

the draft contract imposed so much pricing risk on the City and remained subject to further change, Mr. Ashcroft sounded appropriate words of caution:

This is, in my experience, a unique situation where we're involved in supporting a client through an eminent domain taking. We have no sort of road map of how this will all take place. It's very unusual. Normally we would make the bid, there would be a proposal, there would be contract negotiations. During those negotiations what we'd end up with would probably be significantly different to the original proposal, then we would sign the contract. We made that proposal over two years ago. We concluded the draft agreement a year and a half ago, and still we have no contract because the process continues. It's, from my experience, a very unusual process.

Tr. Day IV at 37.

Mr. Ashcroft's testimony sounded eerily like the problems described by Mr. Joyner in response to questions from Attorney Richardson regarding United Water's experience in Atlanta:

Similar to this case, the due diligence process was hampered by certain information not being available to the private bidders, with respect to what the true operating expenses were and with respect to what the true condition of the assets, especially the underground assets, what 's the condition of those assets...The operating expenses were much higher than United Water had anticipated. And, like most contracts like this, the lawyers—the lawyers couldn't save the day when the operating expenses were higher and the revenues were inadequate. So this private-public partnership was doomed from the very beginning.

Tr. Day IX at 73-74. As both Mr. Joyner and Mr. Ashcroft testified, Veolia has attempted to avoid putting itself in a situation where its expenses exceed the revenues it receives from Nashua by being "careful to assign the risk to the municipality". Tr. Day IX at 85. That risk transfer is evidenced most starkly by the pages and pages of services set forth in Appendices E, G, H, and Q, to the Veolia draft contract that provide for supplemental charges to the City. (Appendix E contains Supplemental Services, G contains Capital Improvement Services, H contains Unplanned and Emergency Maintenance, and Q contains Transition Services such as those services not covered by the separate transition fee.).⁵⁵ The problem for the Commission in this

⁵⁵ Tr. Day IV at 199-245, which describes the scope of services in detail.

case is that the City has provided no reliable basis on which to estimate the true cost of all those additional services or their impact on rates.

B. Mr. Sansoucy's own cost projections demonstrate that the City's proposal will result in less efficient operations than under PWW and result in higher rates.

Even a cursory examination of the operating cost projections provided by Nashua, without any adjustments, reveals that the City's plan will be less efficient than PWW's current operations. Exhibit GES-4 to Mr. Sansoucy's testimony (Exh. 1002) sets forth the City's projected operating expenses, unadjusted for any of the errors or for any of the cost increases conceded by Nashua during the hearing. According to Mr. Sansoucy, Nashua's operating expenses would total \$10,410,000 in 2008, a figure that would increase by over \$146,000 simply by adding the amounts that Mr. Noran testified should be added to the base fee. Attachment JFG-1, Schedule C to Mr. Guastella's testimony (Exh. 3016X), by comparison, shows the operating expenses that a municipal utility would incur if it simply adopted PWW's current operating structure and stripped out those expenses that a municipal utility could avoid because of its non-profit status—items such as income taxes and shareholder related expenses. For 2008, Mr. Guastella's model shows operating expenses that are over *a million a year less than Mr. Sansoucy's projection*.⁵⁶ Despite the fact that Mr. Guastella's model showed lower operating costs than Mr. Sansoucy's, Mr. Sansoucy saw fit to criticize Mr. Guastella for failing to reflect the "efficiencies" that he claimed the City's proposal would bring. Mr. Sansoucy's assertion on this point was just one more example of the double speak that appears to characterize his testimony. The reality is that the City's claim that its proposed operating and management structure will bring efficiencies to the operation of the water utility is completely illusory.

⁵⁶ Exh. 3016X.

As Mr. Guastella testified, his analysis was not intended to suggest that Nashua will actually be able to achieve the same efficiencies as PWW. Rather, the analysis shows that, even assuming such efficiencies are achieved by Nashua, when one assumes a rate base that reflects the fair market value of PWW's assets rather than their original cost, there is effectively no difference in rates between municipal ownership versus PWW ownership. Obviously, to the extent that Nashua fails to operate the utility as efficiently as Pennichuck, rates would increase commensurately. Similarly, one need only adjust Mr. Guastella's model for those expenses that Mr. Sansoucy either omitted or understated or for the additional commitments that Nashua has made during the course of this case, and Nashua's rates quickly exceed those of PWW. If it were possible to quantify the additional costs that could result from the inefficiencies that are likely to arise from the multi-tiered operation and management structure that the City has proposed, the rates under City ownership would be higher still. Thus, the adverse rate impact of a City takeover of PWW will not be limited to the collateral damage that will be experienced by customers of PEU and PAC. It will affect customers of PWW directly as well.

This demonstrates why, if the Commission is to be able to fairly and completely compare the rates under Nashua's proposed ownership with those of PWW (which Pennichuck believes cannot be done), it is critical to fully reflect the costs arising from (1) the multiple changes that the City has made to its proposal throughout the case, (2) known operating costs of PWW that were omitted or understated in the City's projections but that the City has no means to avoid or mitigate, and (3) the additional costs that the Veolia contract structure will impose but that are not reflected in the base fee. All of these items will significantly increase the City's operating costs, but the exact dollar impact is unknown or unknowable because of the timing of the changes to the City's proposal or because the pricing structure of the Veolia contract effectively

hides them. Either way, the result is the same. The City has failed to demonstrate any rate benefits to customers, and it is likely that customers will pay higher rates under Nashua's proposed operating structure than under PWW. Surely the Commission cannot justify a taking of this magnitude based on such an uncertain analysis.

VIII. NASHUA HAS FAILED TO PROVIDE CREDIBLE ASSURANCES THAT THE INTERESTS OF CUSTOMERS OUTSIDE THE CITY WILL BE ADEQUATELY PROTECTED.

A. Customers of PWW who live or work outside Nashua's borders will have no voice in a municipal utility owned by Nashua.

Ownership of the utility by Nashua poses particularly significant risks for customers outside the City's boundaries. The City's cavalier attitude toward these customers is evident from its ever-changing position on the issue. First, the City argued that Nashua citizens are subsidizing customers outside Nashua, which appeared to indicate an intention to raise rates for customers in systems outside the City if Nashua were allowed to takeover PWW.⁵⁷ Later, the City tried to assure the Commission that it was committed to leaving rates outside the City at the same level as those inside the City.⁵⁸ When it was pointed out that customers outside Nashua would lose the protection afforded by Commission jurisdiction if rates inside and outside the City were the same, the City then proposed to be subject to Commission jurisdiction on a voluntary basis.⁵⁹

Through all of the twists and turns in Nashua's positions on this issue, it has failed to provide any meaningful assurance that the interests of customers outside of Nashua will carry the same weight with City aldermen—the ultimate authority over any municipal utility owned by Nashua—as will the interests of the voters of Nashua who elect those aldermen. Mayor Streeter

⁵⁷ See, e.g., Exh. 1007 at 13; Exh. 5001 at 82-84.

⁵⁸ See, e.g., Tr. Day II at 142.

⁵⁹ See, e.g., Tr. Day VI (a.m.) at 62, 111.

and Alderman McCarthy have claimed that altruism will prevail among the aldermen, and that they will give equal weight to the concerns of non-Nashua residents and businesses as they will to those within their electoral territories. But that response simply is not credible. First, it is fundamentally inconsistent with the electoral structure in Nashua, where most aldermen are elected to represent a ward rather than the City's residents on an at-large basis. In other words, the aldermanic structure itself is intended to create a political body where the aldermen's focus is not even as broad as the entirety of the City. Second, given that the Mayor and aldermen are elected by Nashua's citizens, not those of the other ten towns served by PWW, it would be naïve to believe that on difficult decisions of significant political concern, the interests of a few thousand customers outside the City who have no vote in Nashua will prevail over those of the tens of thousands of voters who can decide whether the Mayor and aldermen remain in office.

Perhaps Mr. McCray, a Merrimack selectman put it best when he said:

What it indicates to me is that on a day in time when Mr. Streeter is the mayor he had a commitment, but this is an elected force of government, which means it's always going to be rotating people. And, unfortunately, elected people, they're always going to cater to the people that elect them, and no one in Merrimack has a vote in there. So I am not questioning and impugning the intentions, but time changes, and in the end elected officials are going to do what makes Nashua residents happy and re-elect them.

Tr. Day XI at 66. Mr. McCray expressed similar concerns regarding the potential for Nashua to focus on its own self interest if it was faced with a decision such as whether to extend the water system to enable a major employer to locate in an adjacent community such as Merrimack.⁶⁰

There is nothing in Nashua's proposal that even suggests that customers in the many communities outside Nashua that are served by PWW will be better protected by Nashua officials than by this Commission. Despite the fact that the interests of these customers could easily have been anticipated to be a central issue in this case, the City's proposal failed to include

⁶⁰ Tr. Day XI at 45-46.

any workable or enforceable mechanism to ensure that those interests would be adequately protected. Even Mr. Scanlon stated that he was not aware of any forum in which Bedford would be able to raise its concerns if Nashua owned the utility. Tr. Day XI at 105. It is ironic, if not surprising, that the inequities and many of the most significant risks of the City's proposal would be imposed primarily on those who had no vote in the first place regarding whether the proposed condemnation should proceed at all.

The City's fallback position is that it will agree to subject its out of town operations to PUC jurisdiction as a means of ensuring that the aldermen do not act contrary to the interests of customers in outside the Nashua core. Such a proposal is contrary to law, because the Commission cannot expand its subject matter jurisdiction, with or without Nashua's agreement.⁶¹ Even if the City's proposal were legally sustainable, it would almost certainly put the Commission in the politically untenable position of having to force the City to take action in circumstances where the Board of Aldermen had already decided not to act. One can easily imagine the aldermen, faced with a politically unpalatable choice, deciding they would prefer that the Commission order them to do something, rather than taking politically unpopular actions on their own. Of course, the legal infirmity of what Nashua has proposed would come back to haunt customers when it mattered most – that is when the Commission imposed an obligation that the City did not like and therefore sought to oppose.

⁶¹ See, e.g., *Plaquemines Port, Harbor, and Terminal Dist. v. Fed. Maritime Comm'n*, 838 F.2d 536, 542 n.3 (D.C. Cir. 1988) (administrative agency jurisdiction cannot be achieved or conferred by consent of the parties); *Greenwood v. N.H. Pub. Util. Comm'n*, 2007 D.N.H. 88 (July 19, 2007) at 24 (finding that a party could not vest the NHPUC with authority specifically withheld from it by Congress); *Tenaska Wash. Partners, L.P. v. U.S.*, 34 Fed. Cl. 434, 440 (1990) (citing *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990)) (an administrative agency is only empowered to act within the statutory guidelines establishing its power; any action exceeding its statutory authority is void); *Concord Natural Gas Corp.*, 121 N.H. 685, 689 (1981) ("An administrative agency must act within its delegated powers."); see also 2 Am. Jur. 2d Admin. Law § 283 ("deviations from an agency's statutorily established sphere of action cannot be upheld because based upon agreement, contract, or consent of the parties").

B. Customers of PEU and PAC will suffer direct financial harm because the loss of PWW will result in significant rate increases for them.

As the evidence demonstrates, perhaps the most certain and immediate adverse impact of a taking by Nashua would fall on the customers of PEU and PAC. There is substantial record evidence that spreading the costs associated with operating PWW over the additional customer base of PEU, PAC and PWSC has helped reduce the cost per customer for PWW, while allowing PEU, PAC and PWSC to operate at less cost than they could on a stand-alone basis. This relationship has historically benefited all of the Pennichuck Companies, which is one of the reasons that they have been encouraged to continue to acquire new systems over time.⁶²

Mr. Guastella's detailed analysis, set forth in Attachments JFG-2 and JFG-3 to his May 22, 2006 testimony (Exh. 3016A), showed that PEU and PAC will suffer significant rate increases if they lose the economies of scale from which they currently benefit through their relationship with PWW. PWSC would also experience a significant increase in its operating expenses, resulting in a need to greatly increase its customer fees, but because it is an unregulated entity and can't renegotiate existing arrangements, it would almost certainly be forced out of business. The further adverse rate impact from the additional lost economies of scale that would be experienced by PEU and PAC if PWSC went out of business was not reflected in Mr. Guastella's model.

The rate impact from the loss of PWW is not mere speculation. Mr. Guastella carefully analyzed the costs of operating these companies on a stand-alone basis from the ground up. Although Mr. Sansoucy attempted to dismiss Mr. Guastella's analysis as a simple allocation of existing PWW costs, Mr. Guastella in fact undertook a far more complex and in-depth effort to

⁶² See, e.g., Exh. 5001 at 45, 47-48; See *Consumers Water Co.*, 80 NH PUC 394, 397 (1995)(involving a tariff change by PWW in which the Commission held that "The addition of new customers spreads the cost of system improvements among a larger customer base...").

ensure that his model captured the true cost of operating PEU, PAC and PWSC after a taking of PWW.

We actually performed a very detailed analysis and study, which included interviews with various Company people, including the heads of each of their departments, and officers of the Company. We analyzed every department to determine what staffing levels would be needed if Pennichuck Water Works itself were acquired by Nashua, and all that would be left would be PEU, PAC, and PWSC, the service company. And, we eliminated a large number of employees... We also reviewed each of the employees during the course of this analysis as to how much time was spent for regular time, overtime, what the various pay rates would be for the employees remaining. We also reallocated duties of the employees to make sure that there would be (1) no duplication or, when we made adjustments for employees, and we were left with, for example, three and a half employees, whether we could use one employee and change the duties, so that the employees would share duties... I undertook an effort to direct the Company to contact all of the 17 vendors of major supplies to determine whether the purchasing of material, supplies, chemicals, would change if their purchasers were of a lower volume. So, they obtained specific estimates from their vendors.... We had them call the insurance companies that provide insurance to determine what the insurance levels would be.... And we determined what additional equipment would have to be purchased by PEU, PAC, and PWSC, in order to continue its operations, which equipment is now with PWW.... And, we eliminated a number of assets.

Tr. Day X at 85-86; *see also* Tr. Day X at 144. A detailed description of the analysis performed by Mr. Guastella and the basis for the asset and operating costs used in that analysis is set forth in his Attachment JFG-2. Where a smaller building could be utilized for office space, he used that lower cost. Of course, any new vehicles, computer systems and other assets that would need to be purchased would have to be acquired at present day values, and therefore would no longer be reflected at the depreciated original cost they were previously on the books for under PWW ownership. Thus, the increased asset cost resulting from an eminent domain taking falls on the customers of PEU and PAC, and not solely those of PWW.⁶³

Mr. Sansoucy also sought to attack Mr. Guastella's analysis by positing a much lower operating cost based on some loosely described and unsupported industry standard he referred to

⁶³ Even Mr. Scanlon recognized without doing the detailed analysis performed by Mr. Guastella that the lost economies of scale that would result from being severed from the Nashua core would have a devastating impact on water rates in Bedford. Tr. Day XI at 149-50.

for the first time during his live testimony. Not only did Mr. Sansoucy fail to provide any substantiation for the figures he used, he also failed to consider that the cost of operating thirty-five different water systems with a total of 6,000 customers in sixteen communities spread over a significant geographic area cannot be compared on a per customer basis with the cost of operating a single core water system with the same total number of customers. As with other data offered up in this case by Mr. Sansoucy, his average per customer operating costs have no relevance to this case and are highly suspect.

Mr. Sansoucy further speculated that either Veolia or another contract operations company or regulated utility might be interested in operating PEU and PAC and perhaps could do so at a lesser cost than PEU and PAC on a stand-alone basis. Yet there was no credible, evidence to support this speculation. Mr. Ware explained that without the economies of scale created by the operation of a large core system in the state, any other such company that sought to operate PEU and PAC would have significantly higher costs than Pennichuck does today.⁶⁴ Mr. Sansoucy also attempted to suggest that the failings of the Nashua/Veolia condemnation proposal could be remedied if only the Commission would require Pennichuck to turn all three of its utilities over to the City and Veolia. Having failed to find a direct means to takeover all three utilities, Mr. Sansoucy's suggestion is simply a transparent effort to accomplish the same result indirectly. It is also worth asking what the likelihood is that PEU and PAC would have any meaningful negotiating leverage with Veolia in such a situation, which would present near and long term potential for significantly unequal bargaining power between Veolia and the two small remaining Pennichuck Utilities.

⁶⁴ See, e.g., Tr. Day VII at 62; see also Tr. Day X at 153 (where Mr. Guastella observed "I can't imagine any other investor-owned buyer even looking at because of what would happen," referring to the lost economies of scale and the need for significant rate relief.).

IX. NASHUA SHOULD NOT BE ALLOWED TO REMAKE ITS PROPOSAL BY ATTEMPTING TO REMEDY ITS FLAWS THROUGH THE IMPOSITION OF MULTIPLE SIGNIFICANT CONDITIONS.

The risks created by the known aspects of Nashua's proposal are greatly compounded by the unknowns created by the series of changes the City made to it during the course of this case. Initially, Nashua failed to submit any proposal at all. When Pennichuck sought to have Nashua's initial petition dismissed, the Commission ordered the City to file its public interest case by November 2004. In January 2006, the City expanded its filing by providing information regarding its proposed contractor operator and oversight contractor, and modified other aspects of its case. Since then, the City's proposal has continued to evolve, and that evolution continued through the final day of testimony, with the City proposing numerous conditions that it suggested could be imposed by the Commission with the City's consent. Even as the last witnesses in the case (Mr. Naylor and Mr. Noonan) were testifying, Nashua was still proposing significant changes, suggesting through questions on cross examination that the City would be willing to change its agreement with Veolia to provide for a consolidation of all customer service functions. Ironically, the conditions proffered by Nashua are almost all designed with the same end in mind—to mimic protections that customers already have under the current structure of PWW ownership with Commission regulation.

The continuous evolution of Nashua's proposal presents serious legal and practical problems for a condemnation proceeding such as this. Most obviously, the ever-changing nature of the City's proposal makes it impossible for PWW, as the condemnee, or for the Commission staff, which is charged with conducting an investigation of the proposed taking, to fully understand the extent and implications of the City's proposal. The fact is that it has never been entirely clear precisely what the City's proposal is because its approach has effectively, if not literally, been to say to the Commission, "you tell us what would be acceptable to you, and we

will adjust our proposal accordingly." While such a process, although immensely inefficient, might arguably be appropriate in a case where a petitioner is seeking approval of a proposed use of its own property, it is completely inappropriate when the case being adjudicated involves a taking of private property from a condemnee. The due process failings of a proceeding conducted in this manner are obvious—lack of full and fair discovery, inability to meaningfully prepare for and conduct cross-examination, and an inability to confront witnesses⁶⁵ – all fundamental rights of a condemnee.

Nashua's approach turns the Commission's investigative and judicial role completely on its head. It is the City's obligation to tell this tribunal as well as PWW—the target of the taking—what its proposal is. If the proposal is flawed, it must be rejected. It is not the Commission's role to recraft the City's proposal through the imposition of significant conditions that would convert it into something that Nashua may have signaled it would find acceptable but that differs from what it initially proposed.

Nashua's failure to define the extent of its proposed taking and the structure overlaying that taking is far more than a legal failing, however. The absence of a complete and definitive plan affects the very substance of what the City has proposed and the impact of that proposal on customers. Under the City's proposal, will customers outside of Nashua have the protection offered by PUC jurisdiction? The answer is unclear because first Nashua said no, but later it said yes.⁶⁶, ⁶⁷ Under the City's proposal, will special contracts be subject to Commission jurisdiction?

⁶⁵ A particularly egregious example of this last concern was Nashua's suggestion during cross examination of Ms. Noonan and Mr. Naylor on the very last day of hearings that the City would be willing to accept a condition that it consolidate all customer service and billing and collection functions under Veolia, rather than dividing them between Veolia and the City. Tr. Day XII at 66-67, 77, 166.

⁶⁶ See, e.g., Exh. 3084; Tr. Day VI (a.m.) at 20.

⁶⁷ Equally problematic is the fact that the City failed to address at all the question of whether the Commission may, by agreement or otherwise, extend its subject matter jurisdiction beyond the scope granted to it by the Legislature.

First Nashua said no, but later it said yes.⁶⁸ What about Nashua's participation in Dig Safe? First the City said nothing about the subject, and later it said it would participate but it turned out that Veolia's contract proposal didn't contemplate that participation and the significant cost associated with it.⁶⁹ And how can the Commission assess the cost of the customer service aspects of the City's proposal, given that on the last day of hearings the City's attorney indicated a willingness to consolidate that function under Veolia, an option that Mr. Noran testified earlier had been estimated by Veolia to cost an extra \$311,000.⁷⁰

There are numerous examples throughout the case of such fundamental changes in Nashua's position on legal and other issues, not to mention changes it has made in its underlying proposal. The common thread among all of them is that each time Nashua has shifted its position only after a particular weakness in its case was pointed out by Pennichuck or the Commission staff. Not only does this flip-flopping in position raise series questions about Nashua's credibility, the constantly evolving nature of the City's position has also made it impossible to conduct discovery or cross examination on a meaningful basis or to fully consider the legal, operational and cost ramifications of the changes. The Commission staff has itself expressed just this concern.⁷¹ A matter as significant as the condemnation of the state's largest regulated water company deserves to be treated more seriously – and the law requires it.

The numerous and substantial conditions that Nashua has proposed would have the effect of creating an entirely new and untested legal structure that raises serious questions. If Nashua were to voluntarily subject itself to Commission jurisdiction, would the Commission's authority be limited to ratemaking or would it extend to matters such as service quality issues, main

⁶⁸ See, e.g., Exh. 3084, Exh. 3158; Tr. Day II at 142-43.

⁶⁹ See, e.g., Exh. 5002 at 5; Tr. Day IV at 184; Day XII at 30-31.

⁷⁰ Tr. Day IV at 99-103; Exh. 3045 at 35.

⁷¹ See, e.g., Tr. Day XII at 77.

extension policies, the Commission's utility assessment, the books and records maintained by the City, tariff language changes not involving rates and charges, customer complaints, collection and service termination issues and other matters? Each of these requires its own statutory analysis.⁷² What would the Commission's enforcement powers be, and how could the Commission exercise effective oversight or enforcement if its access to and authority over municipal records is limited? If the Commission believes that the public interest requires Nashua to serve customers in need beyond any service territory acquired from PWW, would the Commission have the authority to do so?⁷³ Such issues are not merely hypothetical. As the evidence in this case demonstrated, for example, Bedford has on more than one occasion sought the extension of utility service into portions of that town, but the nearest municipal utility has been unwilling to provide service. Certainly, the same could occur in other communities as well.

Similarly, Nashua has expressed its intent to include CWIP (construction work in process) in rates inside Nashua,⁷⁴ but how should the Commission deal with the statutory prohibition on the inclusion of CWIP in rates outside Nashua if the City has agreed to subject those rates to Commission jurisdiction? And as the testimony showed, Nashua must necessarily recover from its in-town customers any imprudently incurred costs, given that there are no shareholders to absorb these costs.⁷⁵ But does the Commission have the authority and should it, as a matter of policy, allow imprudently incurred costs to be recovered from customers outside Nashua?

⁷² For example, RSA 362:4,II expressly states that a "municipal corporation furnishing water or sewage disposal services outside its municipal boundaries shall not be considered a public utility under this title for the purpose of accounting, reporting, or auditing functions with respect to said service." There are no exceptions noted.

⁷³ In *Blair v. Manchester Water Works*, 103 N.H. 505 (1961), the Court unambiguously held that the Commission lack such power.

⁷⁴ Tr. Day I at 117.

⁷⁵ Tr. Day XII at 104.

The City would have the Commission believe that such "details" can be tended to later, if only the Commission would award it PWW's assets first. Perhaps Nashua could not have anticipated every detail of its proposed operating plan in advance of filing its case, but matters as basic as whether and to what extent the municipal utility would be subject to Commission oversight, the structure of the customer service process and participation in Dig Safe are not mere details. They are public utility fundamentals. The casual approach that the City has taken to such significant issues not only fails to inspire confidence, it also demonstrates a lack of managerial competence and seriousness as to the nature of the enterprise that the City is seeking authority to undertake, a failure to appreciate the seriousness of the impact that such matters will have on the thirty thousand or so customers of the three affected utilities, and a lack of concern for the Commission's need for a complete record in order to fulfill its obligation to determine whether the taking proposed by the City is in the public interest. The Commission should not accept the City's invitation to rewrite its condemnation proposal.

X. PENNICHUCK HAS BEEN A GOOD STEWARD OF THE WATERSHED

Since the inception of this case, the City has sought to abdicate any responsibility for watershed protection. It has claimed that it would be a better steward of the public water supply, yet the evidence indicates just the contrary. PWW has fulfilled its responsibility to provide a safe and reliable supply of drinking water to a rapidly growing region, and it has done so at reasonable rates even as government regulation of the drinking water supply has become significantly more stringent.

Nashua claims that PWW acted irresponsibly by transferring certain land holdings to an affiliate and developing portions of that land. Yet the evidence demonstrated that all of the development undertaken by PWW's affiliate in Nashua was *approved by the City* itself, and of

course the City has benefited greatly over the years from the significant increase to its tax base that was brought about by that development.

The City hopes through this case to rewrite history. At the time that PWW transferred land out of rate base, the City's concern did not relate to the watershed. They related to money. The City contested the transfer at the time because of the way the chart of accounts for water utilities treated the value of the land (essentially allocating to shareholders the value of any appreciation). There is no indication in the order of this Commission approving the transfer of the land⁷⁶ or the related New Hampshire Supreme Court decision⁷⁷ that Nashua had any concern that the land would be developed. It wanted what it thought was its fair share of the money.

The City now argues that Pennichuck abdicated its responsibility to protect the watershed serving its customers and, therefore, the utility should be condemned. Not only has Nashua failed to present any credible evidence in support of such a claim, the evidence demonstrates that the opposite is true. If there is blame to be cast for negative effects from development in Nashua, the responsibility lies primarily with the City itself.

Ms. Pannetier's testimony provides important context for assessing Nashua's allegations about Pennichuck's stewardship of the watershed. According to Ms. Pannetier, an environmental expert relied on not only by Pennichuck, but also by both *the City of Nashua*,⁷⁸ as well as the State of New Hampshire's Department of Environmental Services⁷⁹:

Pennichuck's [watershed] program is one of the best, if not the best, watershed program in the region today. PWW is the best for-profit company in terms of watershed protection that I have encountered, and it is better than any government-operated system of its size.

⁷⁶*Pennichuck Water Works*, 65 NH PUC 363, 366-68 (1980).

⁷⁷ *Appeal of City of Nashua*, 121 N.H. 874, 876 (1981) (affirming the Commission's decision to allow the removal of 1,490 acres of land from Pennichuck Water Works' rate base at historical cost).

⁷⁸ See Tr. Day X at 68-69.

⁷⁹ Tr. Day X at 66.

Ex. 3005 at 9.

At trial, Ms. Pannetier explained that the decrease in the yield of the watershed in recent years is attributable to many factors, such as imperviousness, which has reached up to 100% in portions of Nashua such as the Route 101A commercial corridor, other forms of development, and the discharge of phosphorous.⁸⁰ Ms. Pannetier explained that control over the watershed (and thus its protection against this type of development) rests largely with local communities in which the watershed is located, such as Nashua, Merrimack, and Hollis⁸¹, not with Pennichuck.⁸² Pennichuck does not, and cannot, control the actions of the planning boards in each community that approve development.

Notably, only 17% of the Pennichuck Brook watershed is in Nashua at all.⁸³ Significant portions of the watershed lie in Merrimack, which opposes the taking proposed by Nashua. Merrimack expressed significant concern about the potential for Nashua to use the power of eminent domain available outside borders, particularly given that Nashua might use such power to slow development in neighboring towns.⁸⁴ At the hearing, Selectman McCray testified:

We have recently acquired some companies that were in Nashua that moved to Merrimack, and the idea that they would take some of our last viable land to be commercially developed by eminent domain would be a huge concern to us, and something that all council members have expressed major concerns with.

Tr. Day VI (a.m.) at 42.

Nashua's claim that PWW should have engaged in the wholesale purchase of land or that Pennichuck Corporation should have refrained from allowing development of any of the

⁸⁰ Tr. Day X at 19-20.

⁸¹ Ms. Pannetier explained that "in this watershed, probably the most important factor is the controls that the Town of Hollis has on land development." Tr. Day X at 33.

⁸² *Id.* at 32.

⁸³ Tr. Day VI (a.m.) at 95.

⁸⁴ The use of eminent domain to acquire land outside of Nashua if the City is able to gain control of the utility is a tool that Ms. Hersh conceded she would advocate using. Tr. Day VI (a.m.) at 95-96.

Southwood property as a means of protecting the watershed is also not supported by the evidence. Aside from the fact that the City's witnesses entirely ignored the fact that an extensive environmental study (known as the Sasaki report) provided the basis for determining which lands were appropriate for development and which should remain undeveloped or protected to safeguard the watershed, the City provided no expert testimony at all on the historical development of land in the watershed area. Ms. Pannetier was the only expert who provided testimony on this issue. Nashua, instead, chose to present several witnesses who held strong personal opinions about historical development of the watershed, but none had professional training or certifications in the matters at issue.⁸⁵ Those unprofessional opinions were extreme and wide-ranging, with one—Alan Fuller—advocating the closure of significant portions of the Everett Turnpike.⁸⁶ It is clear that Ms. Hersh and Alderman McCarthy have a single-minded focus on acquiring land and stopping development in the Nashua area regardless of whether that is the most cost-effective means of protecting the water supply.⁸⁷

Ms. Pannetier, on the other hand, testified that land acquisition usually is *not* the most cost-effective method of watershed protection, and that there are other means of protecting the watershed that will deliver equal or better results at less cost to utility customers, including street sweepers (to reduce phosphorous entry into the watershed⁸⁸), the retrofit of stormwater detention basins "particularly in Nashua and some in Merrimack," and community-based watershed management regulations⁸⁹. *Id.* at 66. Thus, Nashua's criticisms of Pennichuck on watershed

⁸⁵ Mr. McCarthy is not an expert, Tr. Day VI at 63, nor is Ms. Hersh, Exh. 1012 at Exh. 1, nor is Mr. Fuller. Tr. Day VI at 13.

⁸⁶ *See, e.g.*, Exh. 1011 at 30.

⁸⁷ *See, e.g.*, Tr. Day VI (a.m.) at 101-2, 59-61, 66-67.

⁸⁸ Nashua and Merrimack each contribute approximately 30% of the total phosphorous load on the Pennichuck watershed. *Id.* at 71.

⁸⁹ Pennichuck supported the Nashua watershed ordinance. Exh. 3228.

issues are long on hyperbole but short on substance, and as a result should be given no weight in this proceeding.

XI. THE FAIR MARKET VALUE OF THE PWW ASSETS IS \$273,400,000.

In the event that the Commission determines that Nashua's proposed condemnation of PWW is in the public interest—and only in that event—the Commission is tasked with determining how much Nashua must pay to take the water company assets. RSA 38:9. In this case, all parties agree that the Commission should apply the “fair market value” standard: the “price which the property will bring in a fair market, after reasonable efforts have been made to find the purchaser who will give the price for it.” *Public Serv. Co. of New Hampshire v. New Hampton*, 101 N.H. 142, 146 (1957) (internal quotations omitted).⁹⁰

At the outset of this discussion it is critical to note that fair market value cannot be determined by simply equating fair market value to the utility's rate base. Exh. 3007 at p. 10-11. Both appraisers in this case agree that rate base is separate and distinct from fair market value, and that the fair market value of water systems is in fact far greater than rate base. Tr. Day III at 251; Tr. Day VI at 83; Tr. Day VIII at 176. There can be no doubt about this fundamental premise,⁹¹ with Courts holding that PUC rate regulation has “nothing to do” with determining the

⁹⁰ See Exh. 3007 at 10; Tr. Day VIII at 209 (Reilly) (“Fair market value’ has a common definition. It is typically defined as the price at which an asset would change hands between a willing buyer and a willing seller, when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, and both parties have reasonable knowledge of the relevant facts.”); and Exh.1007A at 2 (Walker) (“The definition of market value, as used in this report, is defined as follows: The most probable price which the property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.”).

⁹¹ This Commission is well-familiar with the *regulatory concept of rate base* representing a statement of the historical cost of some, but not all, specified utility plant in service assets less accounting, (or “book”) depreciation. See, e.g., *New Hampton*, 101 N.H. at 151. Exh. 1007A at 24. Conversely, fair market value is an *appraisal concept* of the current value in exchange between a willing buyer and a willing seller. An individual plant such as the one at New Hampton might have more intrinsic or market value than another in the system but this is not necessarily reflected in its rate base value because of the date of acquisition or the circumstances under which it was acquired. See also *Nichols on Eminent Domain* § 20.01 (2000).

fair market value of a utility. *Southern New Hampshire Water Co., Inc. v. Town of Hudson*, 139 N.H. 139, 142 (1994).

The parties also agree that the Commission should determine fair market value in this case consistent with the appraisal standards contained in the two recognized publications in the field: the *Uniform Standards of Professional Appraisal Practice* (“USPAP”) and *The Appraisal of Real Estate* (12th ed. 2001) published by The Appraisal Institute (“*The Appraisal of Real Estate*”).⁹²

Robert F. Reilly, the chief appraiser for PWW, considered all of the major approaches to value, and arrived at the following fair market value synthesis for the PWW assets:

APPROACH	METHOD	VALUE INDICATOR (ROUNDED)	WEIGHT
Asset-Based Approach	RCNLD “Bricks and Sticks”	\$266,400,000	[60%]
Income Approach	Discounted Cash Flow	\$283,900,000	[40%]
Total for PWW System (a/o December 31, 2005)		\$273,400,000	

Exh. 3021 at 18.⁹³

⁹² The record is replete with citations to both appraisers’ testimony showing the applicability of USPAP: Tr. Day III at 44 (testifying that the Sansoucy appraisal is “in compliance with” USPAP); Tr. Day VII (p.m.) at 71 (“Q. So in the inner ring when you perform your appraisal, you have to conform with USPAP? A. (By Mr. Walker) Correct.”); Exh. 1007A at 62; Tr. Day III at 47-48 (“Our analysis, opinions and conclusions were developed, and this report has been prepared in conformity with the requirements of the Uniform Standards of [sic] Appraisal Practice”). The Panel was provided with a copy of the current USPAP standards as Exh. 3259. Tr. Day VIII at 219-220.) For real estate appraisals, USPAP sets the “ethical and professional conduct standards” in New Hampshire. RSA 310-B:18-a. The same is true as to the appraisers’ reliance on *The Appraisal of Real Estate*: Exh. 1007A at 36-44 (notes 15-24) and 53-54 (notes 31-32); Tr. Day VIII at 13-14; Tr. Day VI (p.m.) at 73 (agreeing that *The Appraisal of Real Estate* is published by “a nationally recognized affiliation dealing with appraisal issues and appraisal problems” and is “[s]ometimes called the bible of appraisal practice”); *The Appraisal of Real Estate*.

⁹³ Reilly’s original appraisal valued the PWW assets at \$248,400,00 as of December 31, 2004. On November 4, 2006, Reilly submitted Update Testimony that was intended to “update the appraisal report closer to the date of the hearing based on the most current financial and asset information available as of that time.” Exh. 3021 at 3. Sansoucy and Walker chose not to update their appraisal with the most current financial and asset information so their valuation is still based on stale December 31, 2004 data.

Reilly's appraisal employed recognized appraisal methodologies and is fully compliant with all recognized appraisal standards, including those set forth in USPAP and *The Appraisal of Real Estate*. Reilly's credentials as a preeminent expert in the field of business valuation were acknowledged by Nashua. Exh. 1007 at 2-5 (setting forth Reilly's six professional designations and certifications, authorship of six authoritative books, and the scope of his valuation experience); Exh. 1007A at Appendix F. Reilly's experience, qualifications and recognized status as a pre-eminent valuation expert prompted counsel for Nashua to say that Reilly was "probably one of the most qualified people [Mr. Upton] ever had the privilege of deposing." See Exh. 6 to Pennichuck's November 27, 2006 Motion in Limine to Disqualify George E. Sansoucy and Glenn C. Walker as Valuation Witnesses.

The vast majority of Reilly's appraisal was unchallenged by Nashua. Nashua does not dispute the inventory underlying Reilly's cost approach; the pricing of the direct and indirect construction costs of the water system; the observed depreciation applied to the assets; or the valuation of any of the intangible assets developed by Reilly; the appraisal of the real estate by Russell Thibeault; or the discounted cash flow formula Reilly employed in performing the income approach. Exh. 1015 at 15; Tr. Day III at 39-41. Moreover, Nashua made no challenge to Reilly's detailed descriptions of the comparable transactions that he considered and ultimately rejected as part of the Sales Approach. Exh. 1015 at 15-16.

Nashua retained George Sansoucy and Glenn Walker as "consultant[s] to the City of Nashua" to *both* [1] testify that the taking is in the public interest and [2] appraise the assets, among other things. Tr. Day I at 18. Sansoucy and Walker created an appraisal that valued the PWW assets at \$85 million. Unlike Reilly, the qualifications, partiality and credibility of Walker and Sansoucy are challenged in this case. As to experience, and in stark contrast to Reilly,

neither Walker nor Sansoucy has any designation or certification from any of the major professional appraisal organizations. Tr. Day III at 30-31. Moreover, Sansoucy and Walker have had numerous courts and other tribunals hear, and ultimately reject, their opinions as, variously, unsupported, wrong, and based on unreliable data and reasoning. As discussed more thoroughly below, Sansoucy's and Walker's appraisal, which is replete with errors and omissions, does not employ recognized appraisal methodology and does not comply with recognized appraisal standards. Each of Walker's and Sansoucy's valuation approaches—the cost approach, the income approach, and the market approach—are imbued with such fundamental and far-reaching problems as to be wholly unreliable in determining the fair market value of the PWW assets.⁹⁴

It is not surprising that Sansoucy and Walker reached a conclusion that is not representative of the fair market value of the PWW system. The Sansoucy Appraisal conclusion of \$85 million is within \$3 million of what Sansoucy promised Nashua it would be before he was even hired. Sansoucy, a lifelong proponent of municipal ownership of utilities who acknowledges he will benefit financially in the form of additional compensation if the condemnation of PWW is successful, promised Nashua that if engaged, he would produce a

⁹⁴ Sansoucy has been extensively criticized by numerous tribunals for using unreliable data and for his flawed analyses. Some of these cases were referenced in the cross-examination of Sansoucy and Walker, and the Commission indicated it would allow the opportunity to read the referenced orders. See e.g. *Mirant New York, Inc. v. Town of Stony Point Assessor*, 824 N.Y.S.2d 756 (2006) (where the court criticizes Sansoucy for using unreliable data previously rejected by the court in his income and sales approaches, utilizing a trended original cost method despite the fact that he had previously opined that various deficiencies precluded the sole use of that method and failing to investigate and verify the accuracy of the cost records); *Orange and Rockland County Utilities, Inc. v. Assessor of the Town of Haverstraw*, 824 N.Y.S.2d 769 (2006) (court expressed similar criticisms as in *Mirant*); *EnergyNorth Natural Gas, Inc. v. City of Nashua*, N.H. Super. Ct. Docket No. 93-E-348 (Feb. 14, 1995) (court criticized Sansoucy's age life conclusions as "disingenuous"); *Matter of Niagra Mohawk Power Corp. v. City of Cohoes Bd. of Assessors*, 280 A.D.2d 724 (3rd Dept. 2001) (court found Sansoucy lacked expertise to testify as an appraiser); see also *County of Wayne, infra*, *Intermountain Power Agency, infra*, and *Sprague Energy Corp., infra* (court rejected Sansoucy's valuation finding it bore no relationship "to any reasonable assessment of fair market value.").

valuation in the range of \$81 and \$82 million, which he assured the city would allow it to finance the purchase without having to raise rates. Tr. Day III at 103-04. Sansoucy even told Nashua how he would accomplish this goal, in part, by promising that he would give the cost approach no weight. Tr. Day III at 95-102. The Commission need only review the minutes of Sansoucy's 2004-2006 presentations to the Nashua Board of Alderman to appreciate the fact that the Sansoucy Appraisal conclusion was predetermined and that Sansoucy was the City's champion representative, consistently advocating for the condemnation of the PWW system, both at the PUC and publicly. Exhs. 3197A, 3198A, 3199, 3218 and 3055. Sansoucy and Walker did not conduct an independent, impartial and objective appraisal of the fair market value of the PWW assets, because that is not what they set out to do.

There has been substantial valuation testimony filed in this case. This analysis will highlight the fundamental errors in the valuation performed by Nashua's appraisers, Sansoucy and Walker, and support Reilly's valuation as the only credible evidence before this Commission of the fair market value of the PWW assets.

A. Walker and Sansoucy did not properly conduct any of the three generally accepted appraisal approaches.

The appraisers in this case determined the fair market value of the PWW assets using three recognized appraisal approaches: [1] the asset-based or cost approach; [2] the income approach; and [3] the sales comparison or market approach. Tr. Day VII (p.m.) at 67-69; Tr. Day III at 126; Exh. 3007A at 19-20. There is substantial disagreement, however, on the validity, credibility and reliability of the respective appraisals in this case.⁹⁵ Reilly relied

⁹⁵ For instance, Reilly stated in his May 22, 2006 rebuttal testimony that "[t]he Sansoucy Appraisal is one of the most fundamentally flawed appraisals I have reviewed. It would be impossible to correct the Sansoucy Appraisal, as the number and extent of the errors renders the conclusion totally unreliable. If I were asked by a client, my advice would be that the Sansoucy Appraisal is useless for the purposes of determining the fair market value of the PWW operating assets, and should therefore be discarded in its entirety." Exh. 3017 at 2-3.

primarily on the cost approach (giving it 60% weight in the valuation reconciliation) and secondarily on the income approach (40% weight). Exh. 3007A at 47; Exh. 3021A at 3. Conversely, Walker and Sansoucy relied equally on the sales comparison approach and the income capitalization approach, and gave the cost approach “no weight in the final value estimate.” Exh. 1007A at 65. The following sections will further discuss the differences between the appraisers, and the deficiencies that render the Sansoucy Appraisal wholly unreliable.

1. **Sansoucy and Walker Did Not Perform a Valid Cost Approach.**

In March 2004, before he had even been hired, Sansoucy promised Nashua that the cost approach would not be given any weight:

there are three approaches to value – cost, sales, and income. . . . The cost approach is the cost new of all the pipes and the treatment plant, the dams, the ponds, the water supply system less appreciation . . . What happens in a valuation is you test the cost approach against your other indicators of value and if the cost approach is higher then you ascribe additional economic depreciation to the cost approach. . . . The cost approach is used and we will do one. It will be part of the package. The PUC will want to consider it and look at it . . . *It will not be weighted for value in our analysis.* . . .

Exh. 3197A at 16 (emphasis added). The Sansoucy Appraisal⁹⁶, true to Sansoucy’s promise, completely abandons the cost approach as an indicator of value. Walker and Sansoucy made that decision despite that appraisal authority gives priority to the cost approach, particularly when valuing special purpose property such as utilities. Moreover, within the application of the cost approach itself, Walker and Sansoucy made numerous mistakes that range from the use of known unreliable data, to inexplicable deductions, to an age-life analysis that is unsupported by any empirical evidence. These careless mistakes and paper thin analysis likely are the result of

⁹⁶ Within the appraisal report itself, Sansoucy was responsible for the cost approach, with Walker being responsible for the depreciation analysis: “To the extent that the cost approach encompasses income and market depreciation, I was responsible for developing the cost approach through physical depreciation, and then assisted Walker in anything that he required for functional and economic depreciation.” Tr. Day III at 35-36.

the obvious. There was no need for reliability for an approach that was never going to be used as an indicator of value in their appraisal.

(a) The Sansoucy Appraisal's Failure to Properly Perform and Consider the Cost Approach is a Fundamental and Egregious Flaw.

The Sansoucy Appraisal's failure to consider the cost approach is an egregious appraisal flaw. Even Walker agrees that the PWW assets are special purpose property. Tr. Day III at 241. Special purpose property, as defined by *The Appraisal of Real Estate*, is "A limited market property with unique physical design, special construction materials, or a layout that restricts its utility to the use for which it was built."⁹⁷ *The Appraisal of Real Estate* at 25; Tr. Day III at 242. According to *The Appraisal of Real Estate*, the cost approach is an important, if not the best, appraisal approach to valuing special interest property, such as that of a public utility. *The Appraisal of Real Estate* at 25-26, 354 ("The cost approach is used to develop an opinion of market value . . . of proposed construction, special-purpose or specialty properties, and other properties that are not frequently exchanged in the market"); Tr. Day VIII at 30-33. Reilly testified from his vast appraisal experience that the greatest weight should be given to the cost approach in valuing special purpose properties. Tr. Day VIII at 30-33. Sansoucy acknowledged at his deposition that if the property qualifies as special purpose property, the cost approach to valuation is "an appropriate approach to consider and rely upon." Tr. Day III at 248; *see e.g.*, Exh. 3206 at 4 (Sansoucy Rochester Valuation: "as special purpose property the best starting point to determining value is the cost approach."). While he attempted to back away from that testimony at trial, Tr. Day III at 248, the fact remains that the authoritative appraisal texts clearly state that the cost approach should be given priority in valuing special purpose property such as

⁹⁷ In the present case, PWW's assets were plainly built for the unique purpose of supplying potable water and fire protection to the residents of Nashua and the ten other communities served by the company. Moreover, the PWW system is property of a type that is not frequently exchanged in the market.

the PWW assets. Sansoucy's pre-determined decision to disregard the cost approach entirely is a fundamental flaw that renders his entire appraisal unreliable.

(b) The Sansoucy/Walker Cost Approach is Unreliable Because it Relies on Records that Sansoucy Knew Were Incorrect.

While both Reilly and Sansoucy did a cost approach, within that approach the appraisers utilized different methods. Reilly did a replacement cost new (“RCN”) or “sticks and bricks” valuation. Ex. 3007 at 22-30. Reilly did an RCN after he determined that the original cost data from Pennichuck was not sufficiently reliable to perform a trended original cost analysis. Tr. Day VIII at 35. Even Sansoucy recognizes that the trended original cost method will not result in an accurate and reliable estimate of the current cost of the system if the original cost data is not accurate. Exh. 3102. In spite of this fact, Sansoucy, conversely, did a trended original cost approach; he pushed on with this analysis even after he knew that the PWW original cost data was not reliable.⁹⁸

There can be no doubt that Sansoucy relied on records that he knew were unreliable in preparing his cost approach. Sansoucy had at least two documents available to him in examining the physical assets of PWW: [1] the Company’s Continuing Property Records (“CPRs”); and [2] the Company’s engineering inventory. Tr. Day III at 207-208. Sansoucy chose, between the two, to rely on the CPRs for the appraisal, “regardless of their accuracy,” Tr. Day III at 210;

⁹⁸ Ironically, in one of the few cases that Sansoucy’s testimony was considered reliable by a Court, the Court did so because Sansoucy’s appraisal “was based upon *an actual inventory* and, where possible, *examination of the physical assets at issue*,” while the opposing expert’s opinion, among other things, used a trended approach. *Southern New Hampshire Water Company, Inc. v. Town of Hudson*, Docket 92-E-545, 547 at 14-15 (October 5, 1993) (Lynn, J., Opinion and Order). In this case, the sticks and bricks analysis was done by Reilly.

alternatively, he relied on the engineering inventory for the Capital Replacement Program.⁹⁹ Tr. Day III at 208, 210.

Despite that there were numerous and glaring inconsistencies within the documentation that showed that the records were not reliable—such as large gaps in installation of pipe, years where huge quantities of pipe were installed, large amounts of pavement being installed in a year where no pipe is listed—Sansoucy charged forward with his trended analysis anyway.¹⁰⁰ Tr. Day III at 218-24. These inconsistencies and problems were noted in a letter from PWW’s counsel dated November 15, 2005, prior to the filing of the Sansoucy Appraisal on January 12, 2006. Exh. 3017A at 40. Reilly noticed these same deficiencies and concluded that the trended original cost method could not work. Exh. 3017A at 11. However, Sansoucy pushed forward. Despite having the engineering records, Sansoucy clearly made no effort to “reconcile [the CPRs] to the engineering reports,” Tr. Day III at 220, or look at any work orders to check the accuracy of the records. Tr. Day III at 222. If he had, he would have easily been able to pick up the inaccuracies in the CPRs just as Reilly had. Tr. Day III at 224-28.

“If the original cost documentation is not accurate, there will be inaccuracies in the trended reproduction.” Tr. Day III at 203-4. Sansoucy himself in numerous prior appraisals and presentations acknowledged that a trended original cost method is fundamentally flawed if it is based on inaccurate data, and that the “bricks and sticks” RCNLD method Reilly employed is the

⁹⁹ While Sansoucy’s reasons for not using the engineering records remains vague despite the proliferation of spoken words, it seems to boil down to the fact that the engineering records did not have the original cost of the pipe. Tr. Day III at 226. However, Sansoucy admitted that he could—and has in the past—“done an individual unit cost.” *Id.*

¹⁰⁰ In testimony, Walker indicated, as if this made it any better, that the appraisal reports obliquely notes (on page 37) that “there were some issues with these continuing property records.” Tr. Day VI (p.m.) at 29. The report then concludes that they were “a reasonable estimate of the original cost of PWW and result in a reasonable estimate of the PWW system.” Exh. 1007A at 37. This oblique reference, however, is completely insufficient under USPAP. An appraiser cannot overcome a known data deficiency by noting, by an extraordinary assumption or otherwise, that the appraisal is limited because of a known data deficiency. Tr. Day VIII at 16-17.

most accurate method under the cost approach to determine value. *See e.g.*, Exh.3212 at 2-3; Exh. 3061 at 10-11; Exh. 3062 at 5-6. Sansoucy had a reason for using the inaccurate records anyway: he already knew the cost approach would be given no weight. Once the cost approach value got one dollar above the reconciled value indicator of the other two approaches (Sales and Market), Sansoucy could just stop:

Those are the original costs the Company booked, and we used that to trend. These are the same costs that have been used to make rates and make depreciation. *They came up with a cost greater than the reconciled cost. And, we found any further analysis to be de minimis.*

Tr. Day III at 228-29 (emphasis added); *see also* 208-9; Tr. Day III at 230 (admitting that more accurate records “will get a higher trend.”).

In short, Walker and Sansoucy’s reliance on data that they knew was incorrect makes the entirety of their cost approach unreliable.

(c) Sansoucy’s Other and Unexplainable Mistakes Make the Cost Approach Useless.

Despite being based on inaccurate data, the Sansoucy trended original cost makes numerous methodological errors that make the valuation hardly even a good faith effort, which provides further evidence of their pre-determined decision not to give any weight to the cost approach. These errors include the following:

(1) arbitrarily assigning a 75-year life to all assets, without any age-life study, which is an inexplicable change from their 1995 appraisal of Pennichuck which used a 90-year life. Tr. Day III at 230-31.

(2) arbitrarily making a \$10 million deduction for “curable physical deterioration” which they characterized as “estimated” short-term items, despite not being able to actually identify any items specifically identified to that category. Tr. Day III at 233-39.

(3) arbitrarily making a \$30 million deduction for “long-term items,” that are primarily the water treatment plant

improvements, while only valuing the existing water treatment plant at \$5,500,000. (Day III at p. 239-41.) In other words, the water treatment plant netted out in a *negative value of \$24 million* even though “[i]t was still treating water and providing service to the citizens of Nashua as of the valuation date.” Tr. Day III at 240-41 (emphasis added).

2. Walker Did Not Perform a Valid Income Approach.

In conducting his income approach, Walker made several errors that demonstrate that his analysis should be given no weight. First, Walker made no attempt to analyze the pool of hypothetical buyers, which is a foundational error in the analysis that impacts the entire appraisal. Walker disregards the presence of potential municipal buyers, and simply assumes that any purchaser will have the exact same revenue as PWW; the exact same operating and maintenance costs as PWW; and PWW’s, capitalization rate. As a result, when Walker’s income model is properly applied it results in a valuation of rate base, which all appraisers agree is not equivalent to fair market value. To avoid that result, Walker violated a low-level accounting rule by simply omitting any cash expenditures for capital improvements from his direct capitalization formula.

(a) The Sansoucy Appraisal Fails to Consider the Appropriate Hypothetical Buyer of the PWW Assets.

After deciding the valuation standard, the next fundamental determination an appraiser must make starts by analyzing the likely composition of the population of hypothetical buyers for the subject property. Exh. 3007 at 14-17. The New Hampshire Supreme Court, in *Southern New Hampshire Water Company v. Town of Hudson*, 139 N.H.139, 142 (1994), a case in which Sansoucy testified, has confirmed that the pool of hypothetical buyers for water companies in the state consists of *both* municipalities and private companies regulated by the PUC. The court also recognized in that case that that the failure of an appraiser to account for *both* types of

hypothetical purchasers, as Sansoucy has effectively done in this case, will result in a conclusion that is not representative of fair market value.

Sansoucy has acknowledged in previous appraisals he has performed of the PWW system that the population of hypothetical buyers for the PWW system includes both investor-owned buyers and municipal buyers. Exh. 3212 at 9 ("the income analysis presented from the view of the hypothetical municipal utility presents a sound indicator of value."). He has also assumed municipalities were in the pool in other valuations.¹⁰¹ See, e.g., Exh. 3200 at 4-7. At the hearing, Walker acknowledged that municipal buyers were part of the pool of hypothetical buyers. Tr. Day III at 252.

In addition to agreeing that non-for-profit buyers are in the mix, Sansoucy and Walker also agree that when competing with potential investor owned utility buyers, not-for-profit buyers have certain advantages: (1) exemption from Federal income tax; (2) reduced/saved regulatory costs; (3) access to low-cost municipal financing; and (4) reduced/eliminated property tax. Tr. Day I at 25-26; Tr. Day I at 134; Exh. 3007 at 14-15; Tr. Day VIII at 76. These advantages, or synergies are "widely known in the water service industry" and explain "why 80 percent of all water utilities in the United States are owned by municipalities." Tr. Day VIII at 76.

The inclusion of not-for-profit entities in the population of potential buyers, with their attendant synergies, "impact[s] the fair market value of the system." Exh. 3007 at 14-19; Tr. Day VIII at 75-76, 186 ("[W]e don't need a hundred municipal buyers, we don't even need ten, but we need one or two" to have it influence the bidding); *id.* at 191-93. Reilly's analysis shows

¹⁰¹ "The position of Mr. Sansoucy, for the Counties, is that IPP would be purchased by a government buyer or a merchant buyer, and it would then become a profit oriented operation." *Intermountain Power Agency v. Property Tax Div. of the Utah State Tax Comm'n, Utah Tax Commission*, Appeal No. 99-0576 at 25 (November 20, 2001).

that “across the board the municipalities paid much higher multiples, materially, significantly, obviously higher multiples than the investor owned utilities paid.” Tr. Day VIII at 192. As Reilly explained in the situation where investor owned utilities and not-for-profit public entities are both bidding:

each buyer looks around and says if I want to win, I’ve got to outbid everyone at this table. And if one or two or three people at the table are municipal buyers, then I’ve got to bid at least what they’re going to bid. Now the ultimate winner may well be an investor owned utility. All I’m saying is that investor owned utility is going to have to pay what he thinks the municipal buyer is going to pay, otherwise he’ll never be the winner in the bidding process.

Tr. Day VIII at 188-89.

Walker claims simply that although municipal purchasers are in the mix, they would only bid based on the return a regulated buyer would be able to make. Tr. Day III at 252-53. There is no evidence supporting Walker’s bald assumption that municipals only bid based on the expected return for investor owned utilities.

(b) Sansoucy and Walker Only Looked at the Figures of Pennichuck and Failed to Include Capital Expenditures in the Analysis.

Walker’s unsupported assumption—that municipalities will only bid based on what investor owned buyers can pay—allows Sansoucy and Walker to manipulate the income approach analysis within the Sansoucy Appraisal to reach a value conclusion within the range of value Sansoucy promised the City.

First, Walker basically worked from Pennichuck’s rate filing to conduct his income capitalization. The use of all of Pennichuck’s numbers for revenue, O&M expenses, property taxes, depreciation, income tax and capitalization rate could only be relevant if “the Commission was valuing the rate base of PWW for rate-setting purposes.” Sansoucy acknowledged in his 1995 appraisal of the PWW system that using the regulatory rate of return and capitalization

rates results in a value estimate which approximates rate base and contributes nothing to the valuation process. Exh. 3061 at 16 n.3.

Second, Walker testified that he did a yield capitalization but assumed no growth—which resulted in a direct capitalization calculation. Tr. Day III at 264 (testifying that they did a yield capitalization approach, but “we’ve just assumed zero growth”).

Finally, and most importantly, Walker excluded the capital expenditures that would have to be made by the purchaser. Tr. Day III at 258-60. As Reilly testified why deducting capital expenditures was essential to reaching a proper result:

Well, that is an item of cash flow. Capital expenditures, while not an operating expense that shows up on the company’s income statement, *is a use of funds that shows up as a deduction on the company’s sources and uses of funds statement*. In fact, when a company buys a capital expenditure, the easiest way, again, I always find to think of this is to go back to accounting 101, you debit figured assets for X dollars and you credit cash for X dollars, and a credit to cash is a reduction to cash, so cash is going out the door every time a company buys a fixed asset.

Tr. Day VIII at 222-23 (emphasis added); *see also id.* at 226. Even though the company would have to make these expenditures, and the company may not recover these expenses for several years, Walker simply excluded these expenditures as irrelevant. Tr. Day III at 259.

However, if these capital expenditures were properly added into the analysis, Walker’s income capitalization model would result in value which approximates rate base. Tr. Day III at 264 (agreeing that rate base was “approximately \$44 million”). When asked on redirect to explain why he did not include capital expenditures in his income approach, Walker argued in a circle; he claimed that it could not be proper to include capital expenditures because you would get back to rate base. Tr. Day VI (p.m.) at 83 (noting that his value would “result in a value that is inconsistent in the marketplace”). As Reilly testified, Walker’s reasoning is incorrect: you

cannot alter an appraisal method simply because it does not produce the desired result, i.e., Sansoucy and Walker's predetermined value of \$85 million. Tr. Day VIII at 224-26.

As Walker's income approach is fundamentally flawed, and violates basic accounting principals, it should be disregarded as an indicator of value of the PWW assets.

3. **The Sales Approach Should Not Have Been Used By Sansoucy and Walker Because of the Lack of Comparability and the Data Issues.**

The appraisers in this case differ on the applicability and utility of the Sales Approach in the valuation analysis of the PWW assets. Reilly considered the approach and did a detailed analysis; ultimately, however, he found that it should not be given any weight in the final valuation conclusion because the properties were not sufficiently comparable. In contrast to Reilly, Walker and Sansoucy weighted the Sales Approach as 50% of the value indicator. The analysis within the Sansoucy Appraisal, which purports to constitute a sales approach, however, arbitrarily concludes a value from a limited list of sales transactions, and only on the average of two variables.

(a) **Sansoucy and Walker Misstated Applicable Appraisal Practice by Applying the Sales Approach Simply Because an "Active and Transparent" Market for Water Companies Exist.**

Sansoucy and Walker claim that the market approach is appropriate in this case primarily based on the logic that the market is both "active and transparent." Tr. Day III at 242. In reality, Sansoucy and Walker are telling this Commission that [1] if you have any sales of any water companies (*active market*) and [2] you can get any data on those transactions, however limited, (*transparent market*), then the sales approach is an acceptable valuation technique. This is simply incorrect.

First, The Appraisal of Real Estate specifically states that the market approach is not generally used for valuing special purpose property, such as the PWW assets. Nothing in the

definition of “special purpose property” requires that the property have no market; rather, it simply requires a “limited market.” Tr. Day III at 247. Both parties agree that some sales of water companies have occurred; but, this is not the relevant inquiry. *The Appraisal of Real Estate* states:

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

Tr. Day VI (p.m.) at 115; *The Appraisal of Real Estate* at 419 (emphasis added). Contrary to the authoritative text, Walker and Sansoucy did just the opposite: they weighted the market approach and ignored the cost approach. This is in sharp contrast to Sansoucy’s 2003 appraisal of Pennichuck East Utility for the Town of Hooksett where he stated: “[t]he cost approach has been determined to be the most appropriate to estimate the value of the special purpose properties that are the subject of this report.” Exh. 3062 at 14.

Second, as to the importance placed on the “transparency” of the transaction—which appears to mean only that you can get some information about the financial underpinnings of the deal because that is all that Walker used—this is not supported by any appraisal literature. Tr.

Day VIII at 28-30. Reilly testified:

I’ve never seen that requirement or condition before, the condition of transparency of transactions. I’ve never seen it in any of the valuation textbooks, I’ve never seen it in any of the valuation courses, and I’ve taught course for, I think, virtually all the appraisal organizations. I’ve never seen it on any of the appraisal exams you have to take to become certified. . . . [W]e can only use that type of property for one purpose and one purpose only, that’s the definition of special purpose, and in none of the causes or effects related to special purpose is there any consideration of the transparency of whatever sales transactions occur.

Tr. Day VIII at 29-30. This is nothing but a red herring by Sansoucy to make it appear as if the report has considered some applicable appraisal standard.¹⁰²

(b) The Sansoucy Appraisal's Limited Comparability Analysis, and Application of the Market Approach, is Fundamentally Flawed.

The Sansoucy Appraisal *lists* 28 sales of water companies. At the beginning of Walker's analysis, he noted the following in his "summary of the characteristics that were considered in selecting comparable sales for comparison to the subject:"

- Size of the water system (customers, assets, revenue, etc.)
- The location of the region of the country in which the sale was located
- Motivation of the buyers and sellers
- Did the transaction involve other businesses
- Age of assets being acquired
- Physical condition and economic characteristics

Exh. 1007 at 49-50; Tr. Day III at 129-31.¹⁰³ Of the 28 listed transactions, the Sansoucy Appraisal only actually *uses* 9 in the analysis. However, while recognizing the correct comparability factors, Walker's reference point of comparability boils down to *one single criterion*: "gross annual revenues of \$10 million or more." Exh. 1007A at 50-55; Tr. Day III at 131-32.

¹⁰² This type of conduct has caused other courts and tribunals to criticize Sansoucy. For instance, in *Sprague Energy Corp. v. Town of Newington*, New Hampshire Superior Court (Docket No. 94-E-161) (May 30, 1996), the Court bluntly stated: "Mr. Sansoucy opined: 'when no local comparable sales are available, it is necessary, for the purposes of ad valorem taxation, to develop a land valuation matrix, sub-divide the community into specific neighborhoods and proceed with estimating the value of the property based on reasonable information, comparable sales of similar components of property to the Sprague's property and an overall valuation estimate based on equity within the community for all of the taxpayers' concerned.' *What the hell does that mean?*" *Id.* at 18-19 (emphasis added), *overruled on other grounds*, 142 N.H. 804 (1998). In *County of Wayne v. Michigan State Tax Comm'n*, 2002 Mich. Tax. LEXIS 8, 58, Michigan Tax Tribunal 2002, Docket No. 273674 (2002), the Tribunal also criticized Sansoucy on his terminology: "Sansoucy also frequently misuses regulatory terms of art and Michigan regulatory concepts. The extent to which Petitioners' explanations or terminology are confused is an indication that they failed to meet their burden of proof."

¹⁰³ "Q. Now to do a comparability analysis, though, you have to look at the companies themselves and the transactions involved, correct? A. (Walker) That is something that you do, yes." Tr. Day III at 129.

Despite considering companies with revenues that exceed \$10 million, the nine transactions are not comparable to Pennichuck for the reasons set forth in the Reilly Rebuttal: (1) four transactions are stale; (2) three are part of one multi-state transaction that has different overall synergies; (3) one is a non-consummated sale that is not, in fact, an actual transaction; and (4) one served citizens in Texas and Oklahoma, and was subject to a different regulatory environment than PWW. Exh. 3017A at 14-15 and Appendix C. In short, other than providing water to customers, these systems cannot be considered comparable to Pennichuck in the first instance.

Sansoucy has been criticized for a similar approach to comparability analysis in the past. The Michigan Tax Tribunal stated that “[n]ot a single sale identified the motivations of the buyers and sellers of the property, nor financing terms,” and that Sansoucy had not “identified the property included in the sale in addition to the type of T&D property subject to the tables.” *County of Wayne v. Michigan State Tax Comm’n*, 2002 Mich. Tax. LEXIS 8, 29-30, Michigan Tax Tribunal 2002, Docket No. 273674 (2002).

Unlike Walker, Reilly performed a company-by-company comparison to determine whether the twelve transactions Reilly identified as possibly comparable were valid indicators of market value. He concluded that they were not. The comparability problems included: (1) the differing geographic areas (supply and demand differences); (2) the differing regulatory environments that can impact the regularity of rate increases; (3) the size of the systems in

comparison to Pennichuck; and (4) the inclusion of wastewater, with the attendant environmental concerns and rate and revenue impact. Exh. 3007A at 40-45; Tr. Day VIII at 167-68, 171-72.¹⁰⁴

By using an average, Walker failed to make any adjustments to try to reach a more reliable result. As Reilly testified, when companies are not wholly comparable, the appraiser needs to make sufficient adjustments to use comparable companies in the analysis. Reilly tried this, but ultimately determined it would require too much subjectivity:

I didn't include all the schedules and exhibits that I ran because I couldn't rely on them, but I tried to make adjustments for size. I tried to make adjustments for different – you know, how quickly we can get regulatory rates through. I tried to make adjustments for geography. I tried to make a lot of adjustments.

The problem with my conclusion was – you know, which is almost like an appraisal of real estate. When you have so many adjustments that are hard to quantify, it just becomes unreliable.

If I'm going to compare an 80-year-old six bedroom house to a six-year-old three bedroom house and I have to start making all those adjustments, you know, at that point it's just not a good comparable.

Tr. Day VIII at 169-70. Unlike Reilly, Walker did not even attempt to make any adjustments in his sales comparisons.

Walker also erred in including an unconsummated transaction as a “sale.” The Sansoucy Appraisal considered the “2001 offer of \$106 million for the exchange of Pennichuck Corporation for Philadelphia Suburban Company stock as a comparable sale transaction.” Walker candidly admitted that he relied on this unconsummated transaction and that it had an effect on the valuation approach and conclusion. Tr. Day VI (p.m.) at 77-80.¹⁰⁵

¹⁰⁴ This is not the first case where Sansoucy has been criticized for stretching comparability. In *Intermountain Power Agency v. Property Tax Div. of the Utah State Tax Comm'n, Utah Tax Commission*, Appeal No. 99-0576, p. 45 (November 20, 2001), the Commission noted that “[w]hile Mr. Sansoucy set out a chart of six sales for consideration in doing his comparative sales analysis, four of the six were post-lien date and the other ‘two’ sales were actually the sale of a single plant in Pennsylvania, and three of the sales were never consummated.”

¹⁰⁵ Walker testified that the “Philadelphia *sale*” [sic] “certainly did” have an “impact on [his] conclusion about whether to use the cost approach, Tr. Day VI (p.m.) at 77, and an impact on the valuation itself, *id.* at 78-79.

In the course of questioning Reilly, Nashua also seemed to rely on an offering memorandum with regard to this aborted sale of stock in early 2002 that was prepared by SG Barr Devlin. Tr. Day VIII at 69; Exh. 1094- (Confidential.) Nashua implied in its question that this material was somehow relevant to the hypothetical buyer of Pennichuck, *id.* at 71-72, or the estimated range of values for the company, *id.* at 78-79. However, this is another red herring because SG Barr Devlin was “valuing a different company at a different point in time, structured as a different type of deal.” Tr. Day VIII at 232. In particular, Nashua's reliance on the offering memorandum was erroneous because:

- ***The sale never occurred.*** As this was an unconsummated offer, its inclusion in the mix of sales comparables is inappropriate. Exh. 3017A at 15.
- ***A municipality cannot acquire the stock of a publicly traded company.*** Therefore, any implication that the exclusion of municipalities from the SG Barr Devlin report is evidence that a municipality purchaser is not properly included in the pool of hypothetical buyers is a red herring. Tr. Day VIII at 73-76.
- ***“A stock for stock transaction is just a fundamentally different type of transaction” than an asset purchase from a risk and return investment perspective.*** Tr. Day III at 228-29; Exh. 3017A at 16. Asset purchases sell at a higher price because, in part, “(1) depreciation of stepped-up basis of acquired assets, (2) the ability to releverage acquired assets, (3) avoidance of all contingent liabilities, and (4) avoidance of all built-in gain tax liability.” Exh. 3017A at 17-18; Day VIII at 229-31.¹⁰⁶
- ***It was based on entirely different financial data.*** This appraisal is looking at the 2004 and 2005 earnings, while the SG Barr Devlin analysis capitalized 2001 earnings. Tr. Day VIII at 231. Moreover, the projections that were used “did not have in it any material rate base increase” (i.e. “their projection did not have the new water treatment plant in it, which effectively doubled the rate base of Pennichuck”). Tr. Day VIII at 232.

This fundamental error corrupts the entirety of the appraisal.

¹⁰⁶ As Reilly testified, “Exactly the same company on exactly the same day, if you structure it as an asset deal, the purchase price would be so much higher than if you structured it as – as a stock deal. So there are big differences in buying stock versus buying assets.” Tr. Day VIII at 231. This point was recognized by the Michigan Tax Tribunal: “Another significant issue is finding the cash equivalent of what the buyer gave up, because major utility sales are rarely for cash. Rather stock is frequently exchanged and such stock must be valued. The volatility of stock prices makes the date of valuation critical. *Converting stock to a cash equivalency as of any date is difficult.*” *County of Wayne v. Michigan State Tax Comm’n*, 2002 Mich. Tax. LEXIS 8, 36, Michigan Tax Tribunal 2002, Docket No. 273674 (2002) (emphasis added).

(c) The Sales Data That Was Included Within the Sansoucy Appraisal Was Incorrect and Inaccurate.

Finally, in addition to foundational errors in failing to analyze comparability, adjust for differences, and using only a few transactions on limited multipliers, the Sansoucy Appraisal errs in its application of its limited analysis. Walker described the data that he used as “excellent sales data for this system” and “great data.” Tr. Day VI (p.m.) at 32. He did admit, however, that reliable data was critical to an accurate approach:

Q. If you don’t have reliable data, then garbage in, garbage out. You can’t get a decent appraisal, can you?

A. (Walker) We try to find most reliable data, yes.

Tr. Day III at 134-35. Critically, however, Walker admitted to numerous errors underlying his sales approach analysis, and errors in the data that he relied on. In each of these instances, Walker makes critical data errors that show that his sales approach is unreliable. This demonstrates two points. First, it shows the overall sloppy nature of the sales analysis performed by Walker. Second, it demonstrates Walker’s exceedingly limited knowledge regarding his comparable properties. Walker did not make any personal review of the assets, or follow-up with any of the companies that he used in his analysis. Tr. Day III at 157.

The most glaring of Walker’s data errors were discussed in the cross examination of Walker and relate to three of the nine transactions analyzed: (1) the Citizens Communications sale to Illinois-American; (2) the Massachusetts-American sale to Aquarion; (3) Aquarion sale to the Kelda Group.

In analyzing the Citizens Communications sale to Illinois-American, Walker demonstrated that he had no working knowledge of the sales comparables that he used. Walker broke down a huge multi-state transaction (American Water Works acquired assets for a total

price of \$850 million in cash and \$120 million in assumed liabilities) into numerous separate transactions, based solely on Walker's speculation that the asset allocations were individually negotiated. Walker admitted that he did nothing to check his unconfirmed assumption. Tr. Day III at 146.

Walker also claimed that he did take into consideration the condition of the assets because his multiplier Net Utility Plant/Customer would reflect the asset condition. Based on his calculation, the Citizens sale only brought \$683/per customer, Exh. 1007A at Appx. H at 4, which indicated to Walker that the Citizens Company Illinois acquisition by American Water would "have less plant or older assets with the lower net utility plant per customer," and "less investment per capita, so older plant or less property per customer." Tr. Day III at 136, 138, 147-49. However, Walker had incorrectly recorded the number of customers, causing a distortion of the ratio. Walker testified that the Citizens Illinois company had 214,000 customers, and used that to form his ratios; in actuality the plant only had "approximately 35,000 customers" for water. Tr. Day III at 147-49. This would change his multiplier from \$683/per customer to \$4,175 and totally change his position on the condition of the system.

In analyzing the Massachusetts-American sale, Walker included the acquisition of a non-regulated capital company and did not adjust for that piece. Walker stated that it was his "understanding" that this company could be combined with the regulated entity, but he did not put any footnote or other explanation in his report to explain that. Tr. Day III at 155-57. Moreover, the Massachusetts-American transaction occurred at the same time as three other transactions (including the New York-American, Hampton Water Works, and Connecticut-American sales to Aquarion). Tr. Day III at 150-51. These four transactions were "all one transaction from American Water to Aquarion." *Id.* As such, there are substantial synergies that

are simply unaccounted for in the Walker analysis that go with such a large, multi-state sale. Finally, this was a stock sale/assumption of debt transaction. As explained above, this changes the synergies and expectations of the parties, and was not accounted for in the Walker analysis. Tr. Day III at 151-52.

Finally, in analyzing the sale of Aquarion to Kelda, Walker used data dated December 31, 2002 for a transaction that closed two years earlier. In regard to the Kelda/Aquarion purchase, Walker testified that “something appears to be an error there, yes,” Tr. Day III at 163-64, and later admitted that this was an error, Tr. Day III at 270. Moreover, Walker excluded customers (and assets) that were located in another state, but were included in the sale of the company. Walker simply did not consider the assets and customers of Sea Cliff Water Company and admitted that “with respect to that transaction, yes, that would be a problem.” Tr. Day III at 159-60, 166-69. Finally, this was a stock sale, and Walker made no adjustments for that fact in his analysis. Tr. Day III at 156-57.

In short, with its myriad of data inaccuracies and reliance on nine “non-comparable” properties, Walker's sales approach is fundamentally flawed and without merit.

B. Walker and Sansoucy are not unbiased, impartial, and objective appraisers or consultants.

In addition to promising to reach a particular value, Sansoucy made another promise to Nashua at the beginning of his retainer that he would provide them a valuation that would allow the PWW assets to be transferred without an increase in rates. This is Sansoucy’s “no net harm” standard:

The test of value—the ultimate test of value is no net harm. What is the no net harm standard—it is a very practical standard that we applied in Hudson, we applied in Ashtabula where the rate payers are not asked to carry a greater rate because of the sale, the company is not asked to give up or constrict assets, we pay fair market value for the assets, but we don’t

overpay those assets so that there is a rate increase. *We will be going in with no rate increase as the standard of transfer of the value.*

Exh. 3197A at 14 (emphasis added). Walker admitted that this was an incorrect valuation standard: when you are determining the value of public utility assets, the value is not based upon what the rates will be; rather, you determine the value and then determine what impact that fair market value has on the rates. Tr. Day III at 107-11.

Sansoucy's "no net harm" approach is not a legitimate standard of valuation. It is not recognized, it is untested, is not subject to peer review, is unreliable and subjective, and is not generally accepted in any appropriate appraisal literature. RSA 516:29-a, II(a); *see also Baker Valley*, 148 N.H. at 614. In short, PWW is entitled to the *fair market value* of its assets.

Sansoucy's "no net harm" standard is, in essence, a public interest concept that is disconnected from the determination of value. This unreliable standard of valuation underpins the whole of the Sansoucy Appraisal, and also provides considerable insight into the quality of his work, as well as his credibility as a witness in this proceeding.

Sansoucy's firm was retained to conduct so many activities with regard to this condemnation that it is too space-consuming to fully delve into in this Post-Hearing Brief. Sansoucy indicated that his company was retained as both an appraiser and a consultant to the City of Nashua. Tr. Day III at 82-83. Sansoucy's testimony at the hearing shows that he has been guiding and quarterbacking the whole condemnation.¹⁰⁷

¹⁰⁷ Mr. Sansoucy: advised whether to bring the action, Tr. Day II at 84; appraised the assets, Tr. Day I at 125; advised regarding the potential tax assessment if the condemnation were unsuccessful, Tr. Day II at 92-93; provided the City a "threshold" value, Tr. Day II at 93-94; assisted the City with case planning and preparation, Tr. Day I at 126, Tr. Day II at 84; handled the RFP process for the City for contract operators, Tr. Day I at 208; was in charge of the "initial negotiations" of the contracts with Veolia and Beck, Tr. Day I at 208-9, 219; Tr. Day II at 136; advised on the final contracts, Tr. Day I at 228; analyzed incentives in the Veolia/Beck contracts, Tr. Day I at 231-32; drafted the water ordinance, Tr. Day II at 80-81, 128-29, visited towns in connection with the water district, Tr. Day II at 82-83, and; will assist the City on raw water quality issues, Tr. Day II at 238-39.

Sansoucy's involvement, however, did not stop at the hearing. He was also hired "to assist the city in the orderly transfer of assets to the city in the contemplation of those things necessary to have an orderly transfer to a city-owned utility." Tr. Day III at 87. The Commission heard extensive testimony at the hearing regarding all that Sansoucy had to gain in regard to Sansoucy's March 19, 2004 contract with Nashua, each of which is dependant on Nashua's success for Sansoucy to make more money. Tr. Day III at 75-93; Exhs. 3036 and 3041.¹⁰⁸ *Id.* It is not surprising that Sansoucy testified that Pennichuck "must be sold"—and, he has told this Commission, he has found the buyer. Tr. Day I at 105.

Reilly testified that, in his experience and opinion, that Sansoucy and Walker violated USPAP: "Sansoucy viewed his assignment as protecting the interest of the involved parties, trying to keep rates static, and promoting the property transfer, and not as independently appraising PWW assets." Exh. 3017A at 3-5. Reilly's opinion finds support in the language of USPAP.

In Advisory Opinion 21 ("AO-21"), in referring to the USPAP ethics rule, when an individual is acting as an appraiser:

The ETHICS RULE states that an individual should comply any time that individual represents that he or she is performing the services as an appraiser. An ethical obligation to comply with USPAP is created by choice, that is, by choosing to represent one's self as an appraiser.

¹⁰⁸ These contractual activities included: (1) an agreement to assist with the initial interest finding and RSA 38 proceedings at the NH Public Utilities Commission and prepare a "summary to show public benefit of total taking;" (2) testimony before the NH Public Utilities Commission, which includes valuation and rate studies, submission of testimony and assistance "in the preparation of the trial plan for the main proceedings before the PUC"; (3) general consulting, including support for attorneys concerning declaratory judgment action, "support efforts related to regionalization" and "public presentation and meetings for the City relating to all issues of the taking"; and (4) final asset transfer to public ownership, including "assist with transfer documents," "prepare final contracts for..." system operation, assist with adoption of final rate ordinance, assist with the closing, set up customer account procedures and transfer customer balances, set up CIAC and contractor specifications. *Id.*

Exh. 3259 at 182. As Reilly explained, the ETHICS RULE was instituted so that “users, readers of appraisal reports such as this Commission or a buyer or seller or a financing institution, knows that the appraisal report is reliable because the appraiser prepared the appraisal report under ethical standards; there was no bias, there was no intention to deceive, there was no advocacy for a certain party or position.” Tr. Day VIII at 15. This ethical requirement is further explained in AO-21 issue 3 as follows:

An ‘appraiser’ is defined as *one who is expected to perform valuation services **competently and in a manner that is independent, impartial, and objective*** (bold added for emphasis). Therefore, an individual ‘acting as an appraiser’ is expected, in part, to be competent in the service being provided. Also, an individual ‘acting as an appraiser’ is expected to provide the service in a manner that is independent, impartial, and objective. Performing a service in a manner that is independent, impartial, and objective is an ethical requirement within USPAP.

Exh. 3259 at 183 (emphasis in original).

It is clear in the USPAP commentary that an appraiser cannot perform the role of an appraiser, and the role of an advocate, in the same assignment: “if a valuation service is premised on advocacy or compensation arrangements that are contrary to the ETHICS RULE, the valuation service is not consistent with the objectives of USPAP and cannot be performed by the individual acting as an appraiser.” Exh. 3259 at 185. This was made clear in the example of Marie Vaughn in AO-21: “Marie may provide litigation services by either acting as an appraiser or acting as an advocate for the client’s cause; however, she must not perform both roles in the same case.”¹⁰⁹ Exh. 3259 at 190-91.

¹⁰⁹ Reilly summarized it this way: “Well, again, I think USPAP is just very clear that an appraiser – an individual can act as an appraiser and perform an appraisal, where you have to independent, unbiased, objective, and so forth, or an individual can act as an agent, an advocate, an investment banker, a representative and be – be an advocate, but you can’t do both for the same client at the same time. You can be one or the other for difference clients at different times, but you can’t do both for the same client at the same time.” Tr. Day VIII at 22-24.

Walker's interpretation—that his firm can be an appraiser and a general advocate for the takeover—without violating USPAP would strip the independence criterion of any real meaning. Tr. Day VI at 53-54, 71-72. This is practical commonsense and should guide the Commission's decision: if Sansoucy as a hired consultant for the City strongly supports municipalization and the Nashua takeover, how can he reasonably testify as to the fair market value without being influenced by those biases?¹¹⁰ This practical inconsistency is precisely what the USPAP standards are designed to prohibit. Sansoucy's firm was openly and candidly hired by the City as a consultant to help the City make its public interest case before the Commission and to appraise the PWW system. In addition, "Phase D" of their contract is entirely contingent on the Commission finding that the condemnation is in the public interest. Accordingly, Walker and Sansoucy's "certification" of USPAP compliance is unequivocally wrong and misleading.

As the court in *Sprague Energy Corp. v. Town of Newington*, New Hampshire Superior Court (Docket No. 94-E-161), 17 (May 30, 1996) stated with regard to Sansoucy:

If one compartmentalizes his testimony, it may sound logical, but not when taken together. It reminds the Court of the game where a child is asked to create the perfect face and is given a series of eyes, ears, noses, chins and hair. Although the child is able focus in on each specific area and meticulously conclude which nose is the best, et cetera, when all of the selections are put together, the total picture is ugly. So, to, a thorough reading of [Sansoucy's] report is ugly. It bears no relationship to any reasonable relationship to any reasonable assessment of fair market value for this particular piece of property."

This is equally appropriate here. Reilly's appraisal provides the only credible evidence of the fair market value of the PWW assets.

¹¹⁰ See Tr. Day VIII at 25-26 ("[T]hat really is one of the fundamental reasons for the passage of USPAP, which is a reader or party that relies on the appraisal wants to know that the appraiser really is objective, they don't have a hidden agenda, they're not working for a party, they're not an advocate for a deal, they're not getting a commission on a deal, they're not getting some sort of a performance bonus on a deal, they're not representing a party; they're not an agent; they're totally independent.").

XII. CONCLUSION

The complexity of the taking proposed by Nashua is a product of both the unprecedented nature of the operation and management structure it is seeking to impose as well the highly integrated nature of the regional utility operated by the Pennichuck Corporation and its subsidiaries. In the face of such complexity, Nashua has offered simple answers, changing answers and, in some instances, no answers at all. One thing is clear—the City's grandiose plan is poorly conceived and leaves important matters for resolution either by this Commission or for determination after Nashua is able to gain control of the assets it so covets.

Some might be tempted to say that the people of Nashua are entitled to the quality of water service that their elected officials can provide, but in this case the condemnation for which the City seeks Commission authorization will have a devastating impact on customers in over two dozen other New Hampshire communities and, potentially, the State at large. As Mr. Naylor pointed out on more than one occasion, such a taking would be irreversible, and it is fair to say that its effects would be felt for decades. The record in this case demonstrated that PWW is a first class utility providing excellent customer service. Its demise is not in the public interest at any price, and Nashua has failed to prove otherwise.

For the reasons set forth above, the Pennichuck Companies request that the Commission find that Nashua's proposed taking is not in the public interest. If the Commission determines that the taking proposed by Nashua should proceed, the PWW assets should be valued at \$273,400,000 as of December 31, 2005 based on the appraisal presented by Reilly.

Respectfully submitted,

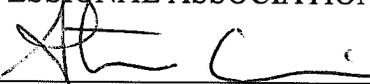
Pennichuck Water Works, Inc.
Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Service Corporation
Pennichuck Corporation

By Their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: November 16, 2007

By:

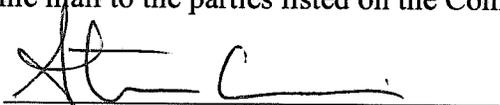


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Certificate of Service

I hereby certify that on this 16th day of November, 2007, a copy of the foregoing Post-Hearing Brief has been forwarded by electronic mail to the parties listed on the Commission's service list in this docket.



Steven V. Camerino