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

City of Nashua – Valuation Petition

Docket No. DW 04-048

**STAFF’S POST HEARING BRIEF**

Staff of the New Hampshire Public Utilities Commission (Staff) hereby submits its post-hearing brief. Staff submits this brief solely on the issue of public interest; Staff is not submitting argument relating to valuation.

**I. BACKGROUND AND PROCEDURAL HISTORY**

RSA Chapter 38 authorizes a municipality to establish, expand, take, purchase, lease, or otherwise acquire, maintain, and operate utilities for the use of its inhabitants. In the event the municipality and the owner of the utility assets dispute the value of the assets sought, RSA 38:9 charges the Commission with determining what plant and property is required to effectuate the municipality’s goal, the value of that plant and property, and the amount of any damages suffered by the public utility by the severance of said plant and property.

Pursuant to these authorities, on March 25, 2004, the City of Nashua filed with the Commission a petition seeking the Commission’s determination of a fair market value of the plant and property of Pennichuck Corporation’s three regulated utilities: Pennichuck Water Works, Inc. (PWW); Pittsfield Aqueduct Company, Inc. (PAC)<sup>1</sup>; and Pennichuck East Utilities, Inc. (PEU)<sup>2</sup> (collectively, the Pennichuck Utilities).<sup>3</sup>

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<sup>1</sup> PAC was established to acquire the water system serving much of the core area of the Town of Pittsfield after the previous private owner had encountered difficulties in maintaining water quality. *Pittsfield Aqueduct Company*, Order No 22,811, 82 NH PUC 863 (1997)

<sup>2</sup> PEU was established when the Town of Hudson acquired all water system assets from Consumers New Hampshire Water Company. All non-Hudson properties were then acquired by PEU.

On January 21, 2005, the Commission found that as a matter of law Nashua could not take the assets of PAC and PEU. *City of Nashua*, Order No. 24,425, 90 NH PUC 15 (2005). The Commission reasoned “[o]ur reading of the legislative history...persuades us that the Legislature intended that the extent of the taking power that could be exercised beyond municipal boundaries would be limited.” “[E]minent domain authority delegated by the Legislature in RSA 38:2 should be narrowly construed.” 90 NH PUC 15 at 23. The docket thus proceeded as to the assets of PWW.

The assets of PWW are used to serve approximately 24,485 customers in 12 municipalities as follows: 941 customers in Amherst, 812 customers in Bedford, 648 customers in Derry, 78 customers in Epping, 67 customers in Hollis, 222 customers in Merrimack, 119 customers in Milford, 21,604 customers in Nashua, 87 customers in Newmarket, 194 customers in Plaistow, 72 customers in Salem, and one customer in the town of Tyngsboro, MA. Portions of Amherst, Hollis, and Merrimack are served through facilities interconnected to the Nashua core system. The remaining customers are located in systems that are not interconnected to the core system.

This docket has not been the only forum in which Nashua and PWW have debated Nashua’s acquisition of the water system. Prior to Nashua filing its petition with the Commission, negotiations between Nashua and the Pennichuck Utilities soured and the Pennichuck Utilities and their parent, Pennichuck Corporation, filed a declaratory judgment action against Nashua in Hillsborough County Superior Court. Pennichuck Utilities and

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<sup>3</sup> PAC, PEU, and PWW are regulated subsidiaries of Pennichuck Corporation. Pennichuck Water Service Company, Inc. (PWSC) and Southwood Corporation are unregulated subsidiaries of Pennichuck Corporation. Pennichuck Corporation is a publicly traded company.

Pennichuck Corporation later filed a damages action against Nashua, also in Superior Court.<sup>4</sup> This latter action was removed to U.S. District Court but then remanded back to Superior Court.<sup>5</sup> Ultimately, the Superior Court granted summary judgment to Nashua with the exception that the portion of count two regarding an as-applied inverse condemnation was dismissed without prejudice. Count one regarding differing condemnation procedures was also made without prejudice to the Pennichuck Utilities' ability to reassert its claimed right to a jury trial, pursuant to RSA 371:10, on the issue of just compensation if it is dissatisfied with the Commission's assessment of damages.<sup>6</sup> The Court deferred to the Commission to consider the "myriad of economic factors and other considerations" relating to these issues since the Commission "has the primary jurisdiction to determine the extent of a municipal taking that is in the public interest." Docket No. 04-E-0062, 2004 WL 1950458 (N.H. Super.) at 8. Appeal was taken to the N.H. Supreme Court and the Superior Court's ruling was affirmed. *Pennichuck Corporation v. City of Nashua*, 152 N.H. 729 (2005). Thus, the instant docket could proceed.

This docket is shaped by the Commission's dual charge under RSA Chapter 38 to determine whether the taking of the utility plant and property lying within and without the municipality is in the public interest and, if so, for what price. RSA 38:9. Early on, parties disputed whether consideration of public interest and valuation should be bifurcated and the Commission ordered that discovery on public interest and valuation occur simultaneously. *City*

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<sup>4</sup> Docket No. 04-C-0169 *Pennichuck Corporation, et al v. City of Nashua*. Docket No. 04-E-0062 *Pennichuck Corporation, et al v. City of Nashua*.

<sup>5</sup> Docket No. 04-CV-00187-JD *Pennichuck Corporation, et al v. City of Nashua*. The Pennichuck Utilities asserted four claims: 1) that RSA 38 violates Pennichuck's constitutional right to the equal protection of the laws because it creates different condemnation procedures for the municipal acquisition of utility property than for the condemnation of other property; 2) that the RSA 38 condemnation procedure is both per se unconstitutional and unconstitutional as applied in this case because it results in an inverse condemnation of Pennichuck's property; 3) that Nashua is prohibited from proceeding with the condemnation proceedings by the doctrine of laches; and 4) that Nashua's notices pursuant to RSA 38:6 are overbroad and invalid insofar as they seek to acquire property of Pennichuck not specifically needed to provide water service to consumers located within Nashua.

<sup>6</sup> Docket No. 04-E-0062, 2004 WL 1950458 (N.H. Super.)

of Nashua, Order No. 24,447 (March 31, 2005), 90 NH PUC 126 (2005). The Commission found that the two issues were so tightly interwoven in this matter that litigating them separately could undermine the orderly and efficient conduct of the proceedings.

Discovery commenced with the filing of testimony by Nashua on November 22, 2004. Numerous rounds of data requests and responses were exchanged, depositions of witnesses and technical sessions were held, Staff and the parties filed additional testimony, and the Commission ruled on various discovery motions. The Commission conducted two days of hearings in January 2007 before Nashua and PWW requested a stay in the proceedings while they engaged in settlement negotiations. After the negotiations proved fruitless, the Commission resumed hearings in September 2007. The Commission held a total of twelve days of hearings on the merits and received thousands of pages of documentary evidence.

## **II. STANDARDS OF REVIEW**

### **A. Public Interest Standard set forth in RSA Chapter 38**

RSA Chapter 38 sets forth a public interest standard for a municipal taking of utility assets. RSA 38:2 specifically authorizes the taking of plant and property “for the use of its inhabitants and others.”<sup>7</sup> RSA 38:6 expressly allows a municipality to take property outside its municipal boundary “which the public interest may require.”<sup>8</sup> Pursuant to RSA 38:11, “the [C]ommission may set conditions and issue orders to satisfy the public interest.” Pursuant to RSA 38:3, the municipal vote in favor of taking the utility assets creates a “rebuttable presumption that such action is in the public interest.”

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<sup>7</sup> RSA 38:2, any municipality may take one or more suitable plants for the manufacture and distribution of water for municipal use for the use of its inhabitants and others and for such other purposes as may be permitted, authorized, and directed by the Commission.

<sup>8</sup> RSA 38:6, a municipality “may purchase all or such portion of the utility’s plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, and shall purchase that portion, if any, lying without the municipality which the public interest may require.”

In *City of Nashua*, 90 NH PUC 15 (2005), the Commission stated that “[w]hether it is in the public interest to allow Nashua to take any or all of PWW’s assets...remains a factual determination of the public interest for the Commission to make.” *City of Nashua*, 90 NH PUC 15 at 24. In determining that Nashua’s power of eminent domain under RSA Chapter 38 did not apply to PAC and PEU, the Commission observed that the following legal principles also apply to this docket:

- 1) a legislative grant of power to condemn for a public use may be exercised only within a clear definition of the grant, bounded by the express words or necessary implication of those words. *See, Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 181 (1940);
- 2) “statutes conferring the power of eminent domain are subject to strict construction against the one exercising the power and in favor of the landowner.” 26 Am Jur2d, Eminent Domain §20; and
- 3) Statutes are to be interpreted “not in isolation, but in the context of the overall statutory scheme” and we must “keep in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole.” *Appeal of Ashland Electric Department*, 141 N.H. 336, 341 (1996).

The Commission’s observations are consistent with *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) and *Lavallee v. Britt*, 118 N.H. 131 (1978) (municipalities may exercise only those powers which the legislature has explicitly granted.)

When faced with determining the public interest, the Commission has historically conducted a balancing of benefits in order to determine whether net benefits will result from a particular merger or acquisition. *See, National Grid plc, National Grid USA, Granite State Electric Company and KeySpan Corporation*, DG 06-107, Order No. 24,777 at 69-71 (July 12, 2007), \_\_\_\_ NH PUR \_\_\_\_ (2007). This same net benefits analysis is appropriate in the instant docket. Nashua has structured its case to illustrate the benefits that will result from the taking and Staff believes that the net benefits analysis is nearly identical to the common law balancing of benefits under the public necessity determination. As discussed below, determining public

necessity is the hallmark analysis for eminent domain matters and conducting such an analysis in this docket would be entirely consistent with that eminent domain principle.

**B. Public Good Standard set forth in RSA 374:26 Franchise Approval**

In Order No. 24,567, the Commission concluded that for service beyond Nashua's municipal borders, franchise approval is required pursuant to RSA 374:26 and 362:4,III-a (a). *City of Nashua*, Order No. 24,567, 90 NH PUC 619 (2005).

Nashua did not appeal Order No. 24,567, but nonetheless Nashua appears to dispute that it must seek franchise approval for service to PWW customers outside of Nashua. In its trial memorandum Nashua argues that nothing in RSA 38:3 or 38:4 require Nashua to hold a special election in each community in which PWW provides service in order to establish the statutory rebuttable presumption of public interest as to those assets in those communities. Nashua argues the Commission's erroneous reading of RSA 38:3 fundamentally changes the nature of the rebuttable presumption and that Nashua would acquire the subject franchise rights under RSA 38:14. Nashua posits that engaging in a second franchise approval is entirely redundant.

Staff does not believe the Commission's analysis fundamentally changes the nature of the rebuttable presumption in RSA 38:3. When read together, RSA 38:3 and RSA 374:22 do not stand in conflict with each other. Municipalities have long been subject to the Commission's role as traffic cop to franchise extensions beyond municipal corporate limits.<sup>9</sup> Nothing in RSA

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<sup>9</sup> RSA 362:4 has long provided that a municipal corporation serving outside its boundaries is exempt from Commission regulation under certain circumstances, but that a municipal corporation is not exempt from the "franchise application requirements of RSA 374."

Pursuant to RSA 374:22, I,

"[n]o person or business entity shall commence business as a public utility within this state, or shall engage in such business, or begin the construction of a plant, line, main or other apparatus or appliance to be used therein, in any town in which it shall not already be engaged in such business, or shall exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the commission.

Pursuant to RSA 374:22, III,

Chapter 38 removes this important oversight performed by the Commission. The Commission's franchise jurisdiction under RSA Chapter 374 is not impeded by RSA Chapter 38. Staff does not believe when the Commission stated in its order that RSA Chapter 374 applied, it envisioned a separate franchise filing. Staff believes that the franchise analysis is merely added to the instant docket, therefore there is no redundancy or any undue complication.

Nashua's argument is a tempest in a teapot since the public good analysis in RSA 374:26 and the Commission's franchise analysis is subsumed in the public interest analysis under RSA Chapter 38. There is simply no fundamental change to the nature of the rebuttable presumption.

**C. Public Necessity Determination of Eminent Domain Cases also Apply**

At common law, it has been long recognized that the power of eminent domain can be exercised only where the public exigency requires it. *State v. Griffin*, 69 N.H. 1, at 23 (1896). The power is both as broad as the necessity and is limited by the necessity.<sup>10</sup> These principles apply to this docket because RSA Chapter 38 provides for eminent domain authority. The Commission thus must make a determination that Nashua's taking of PWW's assets satisfies the tests of public necessity. In determining whether a proposed taking is a public necessity, the analysis must involve consideration of whether there is a public purpose for the taking and whether the taking will result in a public benefit. *Petition of Bianco*, 143 NH 83, 86 (1998) citing *Appeal of City of Keene*, 141 NH 797, 802 (1997). Public benefit in turn is measured by considering "the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss

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No water company shall obtain the permission or approval of the commission to operate as a public utility without first satisfying any requirements of the department of environmental services concerning the suitability and availability of water for the applicant's proposed water utility. Pursuant to RSA 374:26, the Commission shall grant permission to commence business as a utility or construct utility plant operate after it finds that such activity is "for the public good, and not otherwise." Further, the Commission "may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest."

<sup>10</sup> 11 E. McQuillin, *Municipal Corporations* § 32.06 (3d ed. 1983).

of the property in its present form.” Id. In other words, in conducting the appropriate balancing test to determine public necessity, the Commission must consider all the public benefits of the proposed taking against all burdens and social costs suffered by every affected property owner. Id. at 87. Absolute necessity need not be shown, only reasonable necessity need be shown. Id. at 86.

Staff does not believe the public necessity determination inherent in eminent domain cases is much different than RSA 38:6 and the Commission’s obligation to determine what the “public interest may require.” The Commission’s public interest analysis involves a balancing of benefits just as public necessity involves a balancing of benefits. Staff believes as long as the Commission balances all of the benefits of the taking against the harm and social costs, it will effectively cover both the public interest requirement in RSA 38:6 and the eminent domain public necessity requirement.

### **III. ARGUMENT**

#### **A. The Positive Benefits Articulated by Nashua in Support of the Taking**

Since the public interest analysis under the various legal standards involve a balancing of benefits against harms, it is important to identify at the outset what benefits Nashua seeks to achieve by its acquisition of PWW’s assets. As indicated in Nashua’s petition and in pre-filed and hearing testimony from witnesses Bernard A. Streeter, David Rootovich, Brian S. McCarthy, and George E. Sansoucy, these benefits fall into the following categories:

- 1) Nashua's taking will lower customer rates,
- 2) the taking will further the goal of a regional water district,
- 3) the taking is essential to the economic viability and orderly economic growth of Nashua and the region,
- 4) the taking will promote retention of local control over water resources,
- 5) Nashua will be a better watershed steward than PWW,
- 6) the taking will enable Nashua to continue safe and adequate service while providing an adequate level of customer service, and

7) the taking will not harm Pennichuck Corporation shareholders because a fair price will be paid for the assets, and capital gains taxes can be avoided by reinvesting the sale proceeds.

In its memorandum of law filed on October 21, 2004, Nashua stated other benefits of the acquisition include: implementing the will of Nashua voters; promoting the goals of the Merrimack Valley Regional Water District; lower rates over time; retention of adequate service; long range public control over water supplies; continued employment of current PWW employees; and fair value to PWW owners for the assets taken. Memorandum at 7.

Intervenors supporting Nashua's petition have benefits of their own. They believe the taking is justified to remedy PWW having broken faith with the public and violating its trust by selling off buffer lands for profit and that the taking will save money for ratepayers by eliminating the profit paid to shareholders. Exh. 2002 at 5. Exh. 2001 at 3. These benefits were the subject of much discovery during this docket and most were presented at hearing. Staff has focused its analysis on some of the major issues and presents its opinion below.

**B. Nashua's Argument that the Taking Will Lower Rates is Uncertain**

Nashua has stated that one of the most important benefits supporting its public interest argument is that it will be able to provide safe and adequate service at an overall lower cost of service. As Staff sees this issue, the analysis needs to be broken out into three separate analyses: 1) whether customers of PWW's core system will realize lower rates, 2) whether the rates of PWW's satellite customers will be impacted by the taking, and 3) whether the rates of customers in PAC and PEU will change.

After reviewing the evidence, Staff does not agree that this argument is as important as Nashua asserts primarily because the weight of this argument is greatly diminished by the number of uncertainties. Staff is only able to conclude that at a minimum Nashua could realize

savings in the areas of cost of capital, the elimination of federal income taxes, and the elimination of regulatory compliance costs and corporate overhead. Whether Nashua chooses to apply these savings to lower rates is not certain. Indeed, Nashua has made no commitment to reduce customer rates.

As stated in Staff's April 13, 2006 pre-filed testimony, a major portion of any possible reduction in rates will depend on the fair market value ultimately set by the Commission if Nashua's proposal is deemed to be in the public interest. Valuation is presently an unknown. Another unknown is whether the Commission will find that severance damages are appropriate. See, *City of Nashua*, Order No. 24,487, 90 NH PUC 294 (2005). Staff also believes the record is uncertain as to the extent of savings in rates that Nashua claims can be realized through municipal ownership of the water system. These uncertainties aside, Staff will now address rates as to customers in PWW's core system, in PWW's satellite systems, and in PAC and PEU.

**1. How the Taking will Affect PWW Customer Rates is Uncertain**

Whether rates will be lower depends upon whether the future cost of service will be lower. According to Donald L. Ware on behalf of PWW, a number of Nashua's estimates of costs are understated.<sup>11</sup> Costs related to billing and collections, customer service, labor rates, and the development of a Geographic Information System (GIS) are either not accounted for or are underestimated. Exh. 3014 at 2-6. Staff looked at some of these costs in its April 2006 testimony and, according to PWW's 2005 Annual Report to the Commission, it appeared that Nashua had underestimated the cost of unplanned maintenance, utilities such as fuel and electricity, purchased water, and costs related to the Dig Safe program or Nashua's alternative to that program. Exh. 5001 at 43. The omission of some of these costs were challenged by Nashua

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<sup>11</sup> These include unplanned maintenance of \$815,000, purchased water of \$82,125, hydrant checks of \$23,967, permitting and police protection of \$12,417, power and fuel of \$475,758, and Dig Safe related activities of \$78,198, for a total of \$1,487,465.

at hearing, but in any event some costs still need to be added to both party's calculated revenue requirements. Other uncertainties were raised by PWW's consultant, John E. Joyner. He testified that Nashua's analysis showing that municipal ownership will result in lower rates for customers does not take into account various costs. Exh. 3013 at 13 lines 1-22. Further, Mr. Joyner testified rates could be further impacted if the purchase price is higher than that used in Nashua's calculations. Id. at 14. Staff does not believe Nashua fully responded to these uncertainties at hearing.

Per-unit costs for activities in Supplemental Service in Appendix E and Renewal, Repair, and Replacement Maintenance (RRRM) in Appendix H of Nashua's proposed Operation, Maintenance, and Management Agreement (OM&M) with Veolia Water North America, LLC are missing.<sup>12</sup> Exh. 1005B at 62-75 and at 80-94.

At hearing, PWW cross examined Veolia's witnesses as to the shifting of risks between the less risky base fixed fee and the variable and incomplete fees in the more risky portions of the agreement such as Supplemental Services and RRRM. PWW argued that there are likely to be substantial additional charges above the base fee, including capital costs, unplanned maintenance, and energy costs. Exh. 3015 at 13 lines 1-23 and at 14 lines 1-20. Merrimack and PWW also argued that the base fee portion of the Veolia OM&M contract was lower because cost items were pushed into RRRM and Supplemental, which thereby would lower rates.<sup>13</sup> After cross examination was concluded, Staff was unable to conclude that there was sufficient information to conclusively determine whether the OM&M base fee was artificially suppressed or not.

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<sup>12</sup> Nashua has entered into a proposed contract with Veolia Water North America, LLC to operate the PWW water system in the event it is successful with its taking. Nashua has entered into a proposed professional services agreement with R. W. Beck, Inc. whereby Beck will generally oversee Veolia and the OM&M contract.

<sup>13</sup> Hearing Transcript of September 5, 2007 at 335-337.

Staff did not find the hearing evidence persuasive enough to change its position that Nashua's cost of service would likely be lower. The evidence only reaffirmed that uncertainties exist in Staff's opinion and that these uncertainties prevent Staff from forming an opinion as to Nashua's revenue requirement and as to rates. In conclusion, any finding that lower rates will be a benefit provided by Nashua's taking of PWW's assets will be fraught with uncertainties.

As to the magnitude of future rate increases under Nashua's ownership, it remains Staff's opinion that rates will need to increase in coming years under either PWW or Nashua ownership. This is due to the fact that ongoing upgrade to the water treatment facility and other improvements will occur. The increases, however, will likely be less over the long term under municipal control due largely to 100% debt financing as opposed to equity financing. But even this projection will be affected by the uncertainties of costs related to Supplemental Services and RRRM. Another uncertainty is that Nashua may find operation of the oversight and OM&M contracts unworkable without a city employee dedicated to working with Veolia and Nashua's oversight contractor, R.W. Beck, Inc. (Beck). An additional city employee would increase costs.

## **2. Rates as to PWW Satellite Systems**

During discovery in this proceeding, Nashua gave conflicting signals as to what it would do to rates for customers in the approximately 3,000 customers in PWW's satellite systems. Nashua stated it would charge satellite customers the same rates as it charges core customers. Exh. 1014 at 23 and Exh. 5001 at 80. At another time, Nashua indicated that satellite rates could be adjusted once a cost of service study is performed. Exh. 5001 at 81.

Staff looked beyond these conflicting responses to see if there was other evidence that would give some assurance as to what Nashua would do. Staff found, however, that Nashua's general attitude toward customers in satellite systems was not positive. Nashua has complained

that its ratepayers are subsidizing the water service to customers located in other municipalities, is subsidizing acquisitions of other water systems by PWW, and is subsidizing acquisitions by PAC and PEU. In its response to Staff 3-6 the City lists numerous reasons why it feels that PWW's extension of water service outside Nashua has harmed Nashua and ratepayers within the City. Recognizing that rates to satellite system customers are the same as those charged in Nashua, the City has stated that one of the reasons for the taking is that it no longer wishes to subsidize the rates of those satellite systems. *Id.* Exh. 5001 at 82-84. Given Nashua's complaints about inappropriate "subsidies," Staff believes there is a legitimate question as to whether rates for satellite customers really will be the same as core customers.

This Commission has reviewed rates for PWW's satellite system customers and the issue of subsidies in docket DR 97-058. *Pennichuck Water Works, Inc.*, 83 NH PUC 197, 200 (1998). In that docket, the Commission granted PWW's request to consolidate satellite system customer rates with core customer rates. The Commission found it just and reasonable to consolidate rates such that rates paid by customers of the core system would increase at that time by approximately \$8.00 annually. The Commission noted that to keep rates separate would result in rates for satellite system customers that were "well beyond" the zone of "just and reasonable." The Commission reasoned that traditional cost of service regulation already includes some rate averaging and that "[m]ost of the community systems are simply too small to absorb the magnitude of investments mandated by environmental enactments. However, without these investments, it is clear that the small community systems would have been unable to provide safe and adequate water service to their customers." *Id.*

Staff concludes that under the current rate structure, there is legitimate question whether Nashua has any incentive whatsoever to treat satellite system customers equally with respect to

rates, customer service, maintenance, and future capital improvements. While Staff acknowledges that the proposed draft Water Ordinance may create the basis for how satellite systems will be treated, Staff can come to no other conclusion than that ownership by one municipality of unconnected water systems in other municipalities is a poor model that is not in the public interest. This is especially troubling given that these customers have no recourse, as discussed below, unless rates for satellite system customers become more than 15% higher than core customer rates under RSA 362:4.

### **3. The Taking will Adversely Affect the Rates for Customers in PAC and PEU**

As stated earlier, PAC and PEU utilize common assets and personnel of PWW, pursuant to an affiliate agreement, to conduct their business. Once Nashua takes PWW's assets, PAC and PEU will be without these resources and they will lose the efficiencies that arose out of the shared use of resources. As part of a larger entity, PEU and PAC have been able to access capital at reasonable rates, and have been able to rely on engineering and management expertise not typically available to smaller utilities. Nashua acknowledged that loss of PWW in this shared arrangement would result in loss of efficiencies and economies of scale; that is what fueled its initial request to take PAC, PEU, and PWW.<sup>14</sup> For these reasons, rates for PAC and PAC customers will need to be increased.

At hearing, Nashua asserted that PAC and PEU are obligated to do whatever possible to mitigate these adverse rate impacts and asserted that PEU and PAC could consider a contract operator to mitigate rate impacts, or that Pennichuck Corporation could consider selling the two

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<sup>14</sup> Alderman Brian McCarthy testified Nashua sought to take all three utilities because "it will prevent likely rate increases for that portion of the system which is not acquired by Nashua due to the need to generate additional revenue to offset proportionally higher operating expenses." Taking the three utilities "will mitigate harm to PWW and PWW shareholders by eliminating the need to operate a small or less efficient and less profitable portion of the system." [Emphasis added] Exh. 1001 at 8-9. "We're also saying that, if we acquire all the assets, it will prevent likely rate increases for the remaining assets." Hearing Transcript of July 28, 2004 (Tr. 7/28/04) at 28.

companies. Nashua also asserted that the Commission may not find reasonable the rate increases the parties suggest will likely be necessary after the taking. Staff believes that Nashua's point has some merit in the abstract, but misses the mark in terms of measuring the impact from a taking. Eminent domain principles require a weighing of "the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss of the property in its present form." *Appeal of City of Keene*, 141 NH 797, 802 (1997). Staff believes this Commission has an obligation to evaluate this proposed taking on the basis of what Nashua's taking will presently do, or can be reasonably expected to do, and not on Nashua's suggested future form of PAC, PEU, or Pennichuck Corporation. To do otherwise inappropriately shifts the burden to PWW, PAC, PEU, and Pennichuck Corporation.

With respect to the estimated rate impact to PAC and PEU, Pennichuck Utilities' witness Guastella estimated that PAC rates would need to increase approximately 64% and PEU rates would need to increase approximately 66% and over their respective 2005 revenue requirements. Additionally, Pennichuck Corporation's unregulated subsidiary, Pennichuck Water Service Corporation (PWSC) would become unprofitable. Staff testified at hearing that, although Staff continues to believe there will be negative impacts on PAC and PEU, these percentage increases appear to be "worse case scenarios." Hearing Transcript of September 26, 2007 at 173 lines 12-13. Regardless of the exact harm to PAC & PEU, harm itself will occur. This Commission and other regulatory commissions around the country have long recognized that efficiencies and economies of scale can result from acquisition of smaller systems by larger systems or from the common sharing of assets and personnel. Simply because the Commission denied Nashua's request to take PAC and PEU does not change the efficiencies arguments that Nashua itself

acknowledged early on to support its taking of the three utilities Staff believes rates for customers of PAC and PEU will increase if PWW's assets are taken and that this harm ought to be considered in the Commission's balancing of public benefits against burdens and social costs.

**C. Nashua Abhors So-Called 'Subsidies'**

Nashua has argued that its ratepayers subsidize acquisitions by PWW and its affiliates, PAC and PEU. Nashua's argument, as put forth in its response to Staff data request 3-6, as best as Staff can understand it, is that because PWW is a substantial portion of the entire corporation and derives the majority of its revenues and earnings from within Nashua, Nashua is therefore "subsidizing" PWW's and Pennichuck Corporation's growth as a business. Exh. 5001 at 82-84. This also extends to wholesale contracts. While it is true that PWW does derive earnings from its infrastructure investments in the core system and can reinvest those earnings in acquisitions, Staff would not categorize such earnings as Nashua customers "subsidizing" acquisitions by PWW. In Staff's opinion, it is more likely that, over the long term, such acquisitions benefit Nashua ratepayers because of operating efficiencies and the sharing of common assets over a larger customer base, exactly in the manner perceived by Mr. McCarthy as to why Nashua sought to take all three utilities at the outset.

With respect to wholesale contracts, Staff witness Mark A. Naylor rejected Nashua's suggestion that Nashua ratepayers subsidize the wholesale agreements with Anheuser Busch and Milford. Tr. 9/26/07 at 74 lines 18-24 and at 75 lines 1-14. Staff directs the Commission to those dockets and to the Commission's findings that rates set in those agreements cover the cost of the service provided. *Pennichuck Water Works, Inc.*, 90 NH 87 (2005). *Pennichuck Water Works, Inc.*, 88 NH 58 (2003).

As to PEU, PAC and PWSC, PWW's cost allocation methodology is reviewed regularly in filings such as rate cases and in affiliate agreement filings. In fact, Nashua core customers are protected from subsidies that may arise by PWW's expansions through PAC and PEU by the cost allocation formula the Commission approved. Another point worth noting is that the small subsidy of approximately \$8 annually created during rate consolidation as discussed earlier is presently somewhat offset by the fact that PWW satellite customers are now paying for the new treatment plant which only serves core-system customers. This type of ebb and flow in rate design offers a rate safety net and has been recognized nationally as beneficial. It has also been reaffirmed by this Commission in recent rate consolidations such as Lakes Region Water Company<sup>15</sup> and Hampstead Area Water Company.<sup>16</sup>

As to PWW satellite system rates, as mentioned earlier, it is clear as a result of Commission order in docket DR 97-058 that there has been a subsidy running from core system customers to customers in PWW's satellite systems.<sup>17</sup> The Commission has already considered the argument for adhering to traditional cost of service ratemaking which would support non-consolidation of core and satellite rates. The Commission stated it is appropriate to recognize that, beyond the public benefit of a utility acquiring smaller systems and bringing them up to standard, efficiencies can be realized through sharing of common assets as mentioned above.<sup>18</sup>

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<sup>15</sup> *Lakes Region Water Company*, 84 NH PUC 125 (1999). The Commission stated "In addition to the foregoing considerations, we also believe that rate consolidation will have the salutary effect of encouraging financially sound utilities to acquire community systems that are not otherwise attractive acquisitions in the short term. Rate consolidation is therefore a policy that promotes the expansion of public water systems, which we believe is in the overall public good."

<sup>16</sup> *Hampstead Area Water Company, Inc.*, Order No. 24,626 (2006).

<sup>17</sup> See *Pennichuck Water Works, Inc.*, 83 NH PUC 197, 201 (1998).

<sup>18</sup> *Id.*

Finally, Nashua is apparently critical of the Pennichuck Corporation corporate structure since it makes Nashua's eminent domain case more difficult.<sup>19</sup> Staff acknowledges the structure may make this eminent domain taking more difficult than a municipal taking of an unaffiliated utility, but Staff does not believe this factual corporate structure lessens Nashua's burden of proof under RSA Chapter 38.

**D. Nashua Seeks to Take Pennichuck Water Works, Inc. to Establish a Regional Water District**

**1. Regionalization is Presently Recognized as an Important Benefit to the State**

By way of background, the legislature has already deemed this to be an important benefit to the state. In 2000, the legislature required the Commission and the Department of Environmental Services (DES) to prepare a report and make "findings and recommendations for future action to encourage water conservation and regional cooperation on water resource management matters." 2000 N.H. Laws 64. According to legislative history, regional cooperation was important because "[w]ater supply and needs are exceeding the capacity of local public water systems. There is uncertainty regarding the adequacy of developing water supplies on a community by community basis. The cost associated with expanding or developing a regional water supply are significant, or perhaps inhibited in areas of sparse development, and the state could develop ways to more efficiently use limited resources." In its findings and recommendations, the Commission and DES stated: "[r]egional water resources management is key to ensuring that New Hampshire can provide adequate quantities of high quality drinking water in the future." "In some localized areas, water supply deficits exist which might only be addressed by regional solutions." The Commission and DES recognized regionalization would

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<sup>19</sup> Exh. 5014 at 17. Tr. 9/26/07 at 131 lines 22-24, at 132 lines 1-9. Staff notes that Nashua's opinion is contrary to the American Water Works Association and National Association of Regulatory Commissioners promotion of this very type of structure of corporate affiliation because of the efficiencies that can benefit customers.

likely grow in importance: “The extent and magnitude of these deficits are likely to increase with time as growth continues unless regional water supply issues are better encouraged.” Id. at 90.

As the Commission-DES report stated, regionalization has been a means to solve specific water problems. Regionalization has not been a goal in and of itself in a petition for a water service franchise. Staff testified that from its experience, water problems that necessitate a regional solution often involve a small, undercapitalized water utility that has aging facilities . A number of small systems that were built prior to DES review in the 1960’s and 1970’s by developers using substandard materials have become troubled. Tr. 9/26/07 at 81 lines 1-5. For example, small water utilities often struggle to meet the cost of Safe Drinking Water Act (SDWA) testing requirements. Tr. 9/26/07 at 80 lines 7-9. Larger water utilities operating in the region can offer assistance such as interconnections to help maintain safe and adequate service and operational expertise which may allow a smaller utility to share equipment and resources and thereby share in operational efficiencies.

**2. Private and Regional Models for Regionalization were Reviewed and Rate Incentives were Added to Encourage Municipalities to Overcome Reluctance to Participate in Regional Solutions**

The Commission and DES reviewed public and private models for regionalization and reported that: “[m]any municipal water suppliers have a parochial view of their current water supplies and will not readily extend service beyond municipal borders even when this might be part of the ‘optimum’ alternative from a regional perspective. For example, some municipal water suppliers have refused to serve customers beyond their boundaries even to address relatively small, localized water shortages or quality problems in neighboring municipalities; other municipalities have contested water development within their boundaries by public utilities

and others.” Exh. 3002 at 29. In short, the Commission and DES found municipalities may contribute to the lack of regional cooperation. To remedy this apparent disparity in willingness to offer regional solutions, the Commission and DES recommended the legislature allow a rate premium for inter-municipal retail water service to provide additional incentive for municipalities to serve retail customers outside of local boundaries. Exh. 3002A at 33-34. This recommendation became law in 2002 as RSA 362:4, III-a.<sup>20</sup> Staff thus places Nashua and PWW on an equal footing in balancing whether Nashua’s taking of PWW’s assets will produce a benefit with respect to regionalization.

**3. In Considering Whether Nashua’s Promotion of Regionalization is in the Public Interest, the Commission should Note that Nashua and its Supporter’s Use of the Term Regionalization Differs from the Commission’s Use of the Term**

According to Nashua’s initial filing, Nashua’s promotion of regionalization was to take PWW’s assets and transfer them to the newly-formed Merrimack Valley Regional Water District (MVRWD). The MVRWD would own and operate the assets thereafter. Exh. 1001 at 9. Nashua’s proposal has since evolved to Nashua’s sole ownership and operation of PWW’s assets. Transfer to MVRWD, if it happens, will be at some point in the future. Nashua’s promotion of regionalization will be that it will own PWW’s vast assets and stand ready to interconnect to other systems in the lower Merrimack River Valley. Exh. 1015 at 18. At hearing, Nashua testified: “[w]hen water becomes a more difficult resource to obtain, as other communities in the state are built out, that the resources through that valley will have to be managed in some common way, and that will involve [interconnections].” Hearing Transcript of January 10, 2007 at 91 lines 21-24 and at 92 lines 1-2. Nashua also testified that it wants to participate in a regional solution for “the protection and use of the resource.” Tr. 1/10/07 at 95

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<sup>20</sup> RSA 362:4,III-a allows municipalities to charge outside customers a premium of “no higher than 15 percent above that charged to its municipal customers” in order to remain free from Commission regulation.

lines 16-18. Nashua testified that it could advance regionalization by partnering with other towns and cities within the Nashua region through the use of inter-municipal agreements. Exh. 1016 at 4. Nashua's view of regionalization is thus the immediate Nashua area. It argues PWW's non-connected, satellite systems have nothing to do with regionalization. Exh. 1016 at 5. Nashua argues regionalization is best done through municipalities.<sup>21</sup>

Further contrasting itself from PWW, Nashua argues PWW's business plan is a detriment to the regionalization of water because it "creates pockets of private ownership and private operation that interfere with the aggregation of connected municipal water systems." Exh. 5001 at 94. Other evidence in the record suggests PWW's model of regionalization has actually been beneficial to the state.<sup>22</sup>

At hearing, the Town of Bedford testified in support of Nashua and had slightly different regional goals than Nashua. Bedford sees ownership of PWW's assets by a regional entity such as the MVRWD as maintaining local control in the Nashua region, significantly lowering or stabilizing water rates for customers, and keeping customer service functions in New Hampshire. Id. at 8. Bedford sees a world-wide trend of mergers of small water companies into a few mega-corporations, such as what was attempted by Pennichuck Corporation and Philadelphia Suburban,<sup>23</sup> and believes this trend will result in loss of control of local water resources, degradation of customer service, and escalation of consumer fees for water services that are unrelated to the actual cost of service. Exh. 2003 at 6.

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<sup>21</sup> "Pennichuck Corporation has developed a business plan which creates pockets of private ownership and private operation that stand in the way of the aggregation of connected municipal water systems. Ultimately municipal entities are capable of forming larger regional partnerships and better able to achieve regional goals." Exh. 1016 at 5-6.

<sup>22</sup> As cited in Staff's testimony, PAC, PEU, and PWW work throughout the state to provide solutions in numerous towns including: Amherst, Bedford, Derry, Hudson, Merrimack, Milford, Pelham, Raymond, and Windham. Exh. 5001 at 54-55.

<sup>23</sup> Docket No. DW 02-126 (2002).

#### **4. Public Regionalization Model is not Unanimous among Municipalities in the Region**

Not all municipalities that would be likely eligible to join the MVRWD and that are served by PWW are supportive of Nashua's petition. Specifically, the Town of Milford and Town of Merrimack testified about their concerns if Nashua were successful in acquiring PWW's assets. At hearing Town of Milford listed five reasons why it did not support Nashua's taking:

- 1) Milford's contract for back up water supply from PWW will be affected by the taking and negotiations with Nashua have not produced a substitute agreement;
- 2) Milford finds PWW to be reliable and Milford cannot count on the same level of commitment from Nashua;
- 3) MVRWD's involvement was to insure local control but now an out-of-state company will manage the system and it will be less responsive to local needs, local control will be lost;
- 4) Milford opposes Nashua's attempts to exercise its authority beyond its borders; and
- 5) Nashua expects members who join the MVRWD to reimburse Nashua for the legal costs of this taking and Milford had no control over those expenses. Exh. 4001.

The Town of Merrimack testified that it did not have confidence that Nashua could provide the same level of service that PWW provides and thus it did not support Nashua's taking. Merrimack listed four general areas of concern:

- 1) PWW serves important businesses and approximately 300 residents in southeastern Merrimack and Merrimack is concerned that these customers continue to receive high quality water at a reasonable price in order for it to remain economically competitive;
- 2) the Pennichuck Brook watershed lies partly in Merrimack and Merrimack is responsible for maintaining the quality of that watershed;
- 3) twenty percent of PWW's daily flow is consumed by Merrimack customers thereby creating a vital economic and legal stake in this proceeding;
- 4) PWW supplies a vital emergency connection to the Merrimack Village District. Merrimack also expressed concern that Nashua's valuation estimate was artificially low. Exh. 4003.

Merrimack's concern is not unfounded. Intervenor Claire B. McHugh implied in testimony that Nashua would consider Merrimack's use of water as a threat: "We already have Anheuser-Busch in Merrimack consuming 15% of the daily flow of water. Suppose another bottling company would come in and want to tap into our water. I would trust the city/regional water district – not PWW – to handle the situation. Nashua citizens have spoken by voting to keep control of our water locally forever." Exh. 2002 at 2-3.

#### **5. Nashua's Taking of PWW is not without Risks to Regional Water Solutions**

Staff acknowledges that Nashua's proposition for regionalization is different but believes the Commission weighing of whether the proposed taking is in the public interest as to this benefit must encompass the full breadth of the benefit as it exists today. As Staff testified, PWW, PAC, and PEU share resources according to an affiliate agreement. Exh. 5001 at 53. According to the agreement, the assets are owned by PWW and PAC, PEU, and PWSC have use of the assets. *Id.* If Nashua takes PWW's assets, then the efficiencies of joint use of these assets will be lost. As stated earlier, the loss of operating efficiencies will cause PAC and PEU's rates to rise which would harm customers. It will likely be more difficult to raise capital. The loss could also cause PAC and PEU to cease being able to provide regional solutions. Nashua has argued that Veolia could fulfil this role but Staff is aware that Veolia has no interest in owning water system assets, troubled or otherwise. Exh. 5014 at 66. Therefore, Staff does not believe Veolia will fill this role. In the event Nashua takes PWW's assets, Staff believes the breadth of regional solutions the Pennichuck Utilities provided will go unfilled.

**6. Nashua's Hostility toward PWW's Regional Role Undermines its Argument that it will be a Regional Player**

As stated earlier, Nashua confines its intended regional role to the Nashua region but Staff is not convinced that even within this narrower region, Nashua will be a regional player. Evidence exists that shows Nashua is hesitant to play this role. When pressed on providing solutions to so-called troubled systems, Nashua qualifies its regional participation and stated it “would be willing to entertain the acquisition of troubled water systems if the Town wanted it to do so and if the system was in a geographically logical location” and that Nashua “would be willing to acquire troubled water systems in Towns in which it already had a presence and for which there was no objection by the Town.” Exh. 5001 at 100-101. When commenting on PWW's acquisitions, Nashua stated PWW is incited to expand piecemeal in Newmarket, Lee, or Exeter even though they could be more efficiently serviced from a core system within their own watershed and more directly focused on the needs of that region. Exh. 1014 at 11. The scattered systems have no bearing on the core operations of Nashua in the Merrimack Valley region. Id. Nashua further stated that acquisitions of troubled systems would be considered on a “case by case basis.” Exh. 5001 at 101. There is a limit to the amount of dirt that can be swept under the carpet before costs to operate hundreds of disconnected systems creates such an inefficient system that core rate payers can no longer afford. Exh. 1014 at 12.

At hearing, Nashua referenced PWW's acquisition of a community water system in Newmarket and testified that acquisition of troubled systems that are not hydraulically connected does not create beneficial economies of scale. Tr. 1/10/07 at 58 lines 1-7. Nashua refers to the community systems as a “hodge podge” and asserted that they are an impediment to regionalization. Exh. 1016 at 5 line 8 and at 13.

In what amounts to double speak, Nashua’s consultant stated the “city has always intended to assist or purchase community water systems” Exh. 1014 at 23. One month later, Nashua’s consultant spoke at an Aldermanic Water Committee meeting: “Of course Nashua won’t [buy troubled water systems]. I’ve been very honest.” Exh. 3198A at 12. These responses do not bolster Nashua’s argument that it is serious about performing a regional role. On the contrary, they evidence Nashua’s role will be much more limited than the role PWW presently plays.

Having considered Nashua’s case that it will promote regionalization in such a way as to satisfy the public interest, Staff concludes that the State will lose this beneficial role if the taking is approved. Based on the evidence in this docket Staff has little doubt that the public benefit to the region and the State that PWW provides would end as a result of Nashua’s municipalization of the PWW’s water system assets.

**E. Economic Viability and Economic Growth of the Nashua Area**

Nashua makes the assertion in its petition that its ownership of the PWW system will ensure continued economic viability and growth in the Nashua area. Nashua, however, did not develop this assertion further in testimony or at hearing. The Town of Merrimack presented evidence of its concerns that commercial and industrial development in Merrimack may be hindered if Merrimack does not receive fair consideration when decisions regarding capital improvements are made by Nashua’s leadership, given the natural competition between municipalities for such economic growth. In addition, the Town of Milford’s witnesses, Gary Daniels and William F. Ruoff, indicated that Milford is concerned that its contract with PWW for a backup supply of water may be terminated, and without an agreement with the City of Nashua, Milford may be economically harmed. In addition, the witness for Anheuser-Busch

(AB), Dennis Nesbitt, expressed concerns with Nashua's proposal in light of Anheuser-Busch's special contract with PWW, related those concerns to need for a stable, long-term cost-based rate for water. Having reviewed the evidence developed in this docket, Staff does not see how a taking of the assets of PWW furthers economic viability and growth. Nashua has not presented any evidence that PWW ownership of the water system has harmed economic development in Nashua, and Staff would suggest that a reading of the evidence in this case does not show a significant enough price or reliability difference under City ownership to have any impact. Thus, Staff does not agree with Nashua that the taking is reasonably necessary to achieve this benefit.

**F. Local Control Over Water Resources**

Nashua and supporters of its petition have expressed concern regarding a future sale to a foreign company, which it infers would result in loss of local management. In 2002, Nashua opposed the Philadelphia Suburban acquisition of Pennichuck Corporation and it still is concerned that a possible future sale of Pennichuck Corporation would result in a loss of local control. Nashua argues that, in this scenario, decisions would be made without the interests of the City and the Nashua region in mind. Nashua has also asserted that, since water is a crucial community resource, it should be locally owned and controlled.

Nashua states the taking is necessary to maintain local control over water resources. Staff believes Nashua actually means *public* control, not local control. Staff questions, however, how effective public ownership would be in achieving this goal, given how Nashua proposes to structure its operation of the water system. A municipal taking of PWW would prevent the water resources in the Nashua area from being controlled by any entity other than the City of Nashua, however, day to day decisions regarding the management of the utility will rest with contractors. Staff finds it difficult to follow how local control becomes a benefit of this taking when

contractors are actually running the water system. Further, Staff finds it difficult to conclude that more local control is offered under Nashua's proposal than does exist under Commission regulation. For example, when the Commission considered Aquarion Water's proposed purchase of Hampton Water Works in Docket No. DW 01-215, the Town of Hampton expressed similar concerns as to possible loss of local control. The Commission in its final order approved conditions requiring Aquarion to maintain a local presence, to honor existing labor contracts, and to participate in a local advisory committee. *See, Hampton Water Works, Inc.*, 87 NH PUC 104 (2002). In Staff's opinion, local control can be safeguarded under the present regulatory system. The existence of alternate means of addressing Nashua's concerns diminishes Nashua's argument that the taking is necessary to achieve this benefit.

**G. Nashua Stewardship of the Pennichuck Watershed**

Nashua's reply testimony filed in May and July 2006 makes assertions that PWW has mismanaged the watershed, and suggests that Nashua would do a better job. Exh. 1014 and 1016. Specifically, Nashua as well as intervenors Ms. McHugh and Barbara Pressly, allege that PWW, primarily through the development of "buffer" areas along the PWW pond system, has not done enough to protect the surface water system that provides water to the core system. PWW has pointed to its 1998 watershed management plan and the significant efforts PWW has taken to implement that plan.

Staff does not believe this issue provides a basis for a taking of PWW's assets. Importantly, not the entire Pennichuck Brook watershed lies within Nashua. Significant portions lie within the Towns of Merrimack, Hollis, and Amherst. Municipal control and management of the watershed is therefore limited without substantial inter-municipal cooperation. Not all

development considered to be within the watershed has been instigated by PWW. Tr. 1/10/07 at 35, lines 9-14.

For instance, within Nashua, development in the watershed has been reviewed and approved by all of Nashua's land use boards. Nashua's witnesses at hearing confirmed this. Tr. 1/10/07 at 37, lines 12-34; at 38 lines 1-24; at 39 lines 1-24; at 40 lines 1-3. Further, DES has jurisdiction over activities taking place within watersheds and DES has never cited PWW for any reason. Nashua has not provided any evidence that PWW has violated any rules, regulations, or statutes of New Hampshire. Considering the substantial power given to municipalities by the legislature for the regulation of land use, Nashua cannot point a finger of blame at PWW for development within buffer lands that were expressly approved by Nashua.

In its reply testimony Nashua discusses the enactment in 1998 of a Water Supply Protection Ordinance (WSPO). Staff finds it ironic that, considering the City appealed this Commission's 1980 order permitting PWW to remove certain amounts of land from rate base, it took Nashua until 1998 to enact such an ordinance.<sup>24</sup> It is noteworthy as well, that according to Nashua's witness at hearing, it appears that all watershed buffer development that took place prior to the 1998 enactment of the WSPO met all the requirements of the WSPO anyway. Tr. 1/10/07 at 44, lines 15-19.

**H. Nashua's Assurance that it will Provide Safe and Adequate Water Service is Based on Contracts for Operations & Maintenance and Oversight**

**1. Structure of Contracts for Operation, Maintenance, and Management with Veolia Water North America – Northeast, LLC and Oversight with R.W. Beck, Inc.**

Staff's summary of the terms of the proposed contracts is more fully described in Exh. 5001 at 13-25. In summary, Nashua plans to hire Veolia Water North America – Northeast, LLC

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<sup>24</sup> *City of Nashua*, 121 NH 874 (1981)

(Veolia) to operate and maintain the PWW assets. Nashua plans to hire R.W. Beck (Beck) to provide oversight of Veolia. Nashua believes its proposal to use Veolia and Beck capitalizes on efficiencies that private-public partnerships have created across the country. Exh. 1016 at 9. The benefit being that savings can then be applied to capital infrastructure and help avoid rate increases. Id. According to the City, the elected Board of Aldermen will cooperate with Veolia and Beck to set rate design, capital, and operating budgets. Exh. 1014 at 4. The Mayor will be responsible for implementation policies established by the Board of Aldermen and will ensure decisions are made in a timely manner. Id. at 5. Beck and appropriate Nashua officials will report directly to the Mayor, or the Mayor's designee, to ensure that timely and appropriate decisions are made with the involvement of key staff and/or technical personnel. Id.

**2. Staff is Concerned that the Draft Nature of the Veolia and Beck Contracts Makes a Public Interest Determination Impossible**

Staff believes Veolia and Beck likely have the resources to fulfill their obligations under the proposed contracts with Nashua.<sup>25</sup> What Staff finds disconcerting is the extent of incompleteness of the contracts and Nashua's position that it can simply amend the documents later to ameliorate any deficiencies. At hearing, Veolia confirmed that the proposed contract is draft and that price will need to be adjusted.<sup>26</sup> Price adjustments will affect the cost of Supplemental Services<sup>27</sup> and Renewal, Repair & Replacement Maintenance,<sup>28</sup> both of which are

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<sup>25</sup> Nashua also proposes to satisfy the Commission's managerial and technical prerequisites under RSA 374:22 through the use of Veolia and Beck. Exh. 5001 at 86.

<sup>26</sup> Tr. 9/5/07 at 39 lines 3-13. Nashua's pretrial memorandum essentially states that the Veolia agreement is draft because Nashua expects the Commission will impose other terms and conditions as part of its approval. Nashua argues there is some certainty in the Veolia contract in that Nashua and Veolia have entered into an MOU that requires that, following approval by the Commission, Nashua and Veolia enter into a final 'definitive agreement' that will have substantially the same terms as the proposed agreement. Pre-Trial Memo at 19. See also, Hearing Transcript of September 7, 2007 at 147 lines 23-24 and at 148 lines 1-14. This reasoning appears circular; if Nashua is expecting a substantially similar agreement, then there is little room for conditions. At hearing, Nashua proposed conditions which already substantially change what the 'definitive agreement' will contain.

<sup>27</sup> Exh. 1005B at 62-75.

<sup>28</sup> Exh. 1005B at 80-94.

major components of the proposed contract. If these costs are adjusted as Veolia's witness Philip G. Ashcroft states, then Nashua's estimated revenue requirement will also need to be adjusted. Since the revenue requirement will be adjusted, so too will Nashua's estimated lower rates and savings argument. Staff finds it troubling that this level of uncertainty exists in one of Nashua's major public interest arguments.

**3. Staff is Concerned over Lack of Day-to-Day Contact with Nashua by Contractors**

Since Staff's testimony of April 13, 2006, Staff has expressed its concern that Veolia will have no day-to-day contact with Nashua except for billing and customer service. Veolia reports to Beck who in turns reports to the Mayor or his or her designee, or in the case of policy matters, Beck will consult the Board of Aldermen. Since Staff's testimony, Nashua has not proffered any evidence to allay this concern.<sup>29</sup>

Beck's consultations occur monthly with the Chief Financial Officer and Finance Committee and every three months with the Board of Aldermen. For Recurring Tasks, Beck will meet with the Mayor and Board of Aldermen once a month and two meetings with Nashua, which Staff presumes will be Nashua's Finance Department. Having a city employee involved in the operational aspects of the water utility would be particularly important in the event the Veolia or Beck contracts are terminated. At present, only the city customer service and billing employees will be involved in any day-to-day contact, although at hearing, Nashua proposed that Veolia assume the customer service functions Nashua's Finance Department was to have performed.<sup>30</sup> Staff's concern is not unreasonable. As Mr. Douglas L. Patch states in his testimony, that Dr. Janice Beecher, Director of the Institute of Public Utilities at Michigan State

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<sup>29</sup> Nashua makes it clear that there will be no municipal technical staff or employees who will perform cost control functions or who will have expertise in water system operations by stating that R.W. Beck will perform these functions. Exh. 5001 at 106.

<sup>30</sup> Tr. 9/26/07 at 66 lines 22-24 and at 67 lines 1-3.

University and a reputable authority in the water utility industry, found that when local governments take over water system ownership and use third party contract operators, problems often result with regard to the deployment of capital and operating resources. Confusion also arises as to responsibilities for example with environmental compliance, resolution of customer service complaints, and long range planning. Exh. 3002 at 9. If Nashua fully delegates day-to-day responsibility of operating the water utility to contractors, Staff does not see that there is any assurance that safe and adequate service will be provided to all customers, core or satellite.

Based on Staff's experience, Staff sees the absence of internal oversight by Nashua and delegation of responsibility as not creating an effective ownership and management approach for a major business. Nashua's proposal creates risks for an inefficient and ineffective water utility and Staff can not agree that Nashua's proposal satisfies the public interest test.

**4. Staff is Concerned that Customer Service Functions are Split and Service Quality Standards are Lacking**

Staff understands Nashua's proposal splits customer service functions between itself and Veolia. For instance, calls regarding billing and collection functions would be handled by Nashua and calls regarding operational issues would be forwarded to Veolia for resolution.<sup>31</sup> Staff testified in April 2006 that many customer calls are a combination of operational issues and billing and collection issues such as calls regarding bill adjustments to compensate for the water used to clear service lines after water mains have been flushed; high bill complaints may indicate a leak; and disconnection is both an operational and billing and collection function.<sup>32</sup> These types of calls necessitate integration of the customer service functions; otherwise customers risk the frustration of being bounced between Nashua and Veolia to resolve their call. Consistent with Staff's concerns, Veolia witness Robert Burton testified that dividing the responsibility for

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<sup>31</sup> Exh. 1008 at 2.

<sup>32</sup> Exh. 5003 at 5 lines 1-6.

customer service and billing can cause problems and that the best way to operate is to have one party conduct all customer service functions.<sup>33</sup> To add to the confusion, Veolia testified at hearing that who Veolia interacts with on a day-to-day basis on customer service operational issues has yet to be determined, it will be whoever Nashua designates.<sup>34</sup>

In response to Staff's concerns, Veolia filed testimony explaining it would utilize a 'One and Done Customer Service' program, customer service process charts, call logs, regular training, and a work order system, among other things.<sup>35</sup> At hearing, Veolia testified that the customer service process charts supplement its obligations under the proposed contract.<sup>36</sup> Veolia also testified that Nashua is relying on Veolia to help it develop call answering service quality standards.<sup>37</sup> On the last day of hearings, Nashua's counsel proposed that Veolia would handle all of the customer service functions and that the functions would not be split.<sup>38</sup> Staff believes this proposal represents a change of heart since Nashua filed testimony that Staff's criticism of the

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<sup>33</sup> Tr. 9/5/07 at 46 lines 10-20.

<sup>34</sup> Tr. 9/5/07 at 304 lines 3-15.

<sup>35</sup> Exh. 1013 at 9 lines 9-23 and at 10 lines 1-17.

Integration and Delineation of Responsibilities: Integration of the office and field customer service functions; Providing 'One and Done Customer Service' by assigning responsibility for follow through to the customer service representative receiving the call; and Utilizing customer service process charts to identify the responsibilities between Nashua and Veolia. To provide a smooth transfer of information between the departments, Nashua and Veolia will document processes for the customer service office and field operations. Work flows will be documented using step-by-step procedures for each individual and his/her respective scope of responsibility. Veolia will utilize call logs and work orders to: (a) track work that has been transitioned to other divisions or entities, (b) ensure completion of any necessary follow up tasks, and (c) update the database of completed work. This system will ensure that all divisions will have access to the most recent status of the work which, in turn, will allow the agents to provide quality customer service to the Nashua community.

Training: Nashua and Veolia will provide training for all new agents and ongoing training for existing agents that are associated with the functions of billing, collections, field operations, and water quality. In addition, all agents will be provided with refresher training throughout the year for seasonal information. There will be weekly meetings between managers and supervisors of office and field customer service.

Work Order System and Prioritization: All field customer services to be provided will have a work order. The work orders will be prioritized. A high priority work order would be a customer with a water quality problem. Field personnel will have a computer to generate and complete work orders. The work orders will have detail for labor, materials and equipment used. A representative sampling of the customers provided field services will get a post card to measure the customer satisfaction on the services provided.

<sup>36</sup> Exh. 9/5/07 at 306 lines 14-19.

<sup>37</sup> Id. at 313 lines 22-23 and 314 line 1.

<sup>38</sup> Tr. 9/26/07 at 66 lines 22-24 and at 67 lines 1-3.

split was “flawed” and misunderstood Nashua’s plan.<sup>39</sup> Although this latest proposal would likely address Staff’s concerns, Staff does not believe it is appropriate to consider this as part of Nashua’s public interest case since no party has had the opportunity to conduct discovery and thoroughly review the merits of the proposal. As such, Staff reverts to Nashua’s initial proposal that it plans to split customer service functions, and Staff does not believe it is in the public interest to do so.

In addition to the split between customer service billing and collection and operational issues, the number of employees Nashua plans to devote to these functions is still an issue. Much evidence was exchanged regarding the number of employees Nashua plans to devote to customer service functions and how many calls PWW and Nashua employees can handle per month. Some of the information from PWW was based on calls relating to all Pennichuck Utilities, not just PWW calls;<sup>40</sup> and this makes comparisons difficult. Staff’s conclusion after reviewing this information is that it is not clear that Nashua will perform either an equivalent or better job than PWW. Even if Nashua could prove that it could produce savings through the use of fewer employees while maintaining an adequate level of customer service, there are other more important risks to this taking that cause Staff not to support the petition.

Another issue relating to customer service functions that Nashua repeatedly raised relates to PWW having provided Nashua with erroneous readings.<sup>41</sup> Nashua relied upon these readings in calculating wastewater bills. While Staff understands this error caused Nashua’s billing and collections department much angst, the record indicates PWW promptly corrected the error.

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<sup>39</sup> Exh. 1015 at 17 “Our testimony will address how the testimony offered by PWW and Staff is flawed with respect to whether the City’s purchase of the PWW system is in the public interest. Our conclusions are as follows...” “Giving it the benefit of the doubt, PWW and Staff have “misunderstood” Nashua’s plan for customer service.” Id. at 18.

<sup>40</sup> Exh. 1066.

<sup>41</sup> Hearing Transcript of January 11, 2007 at 194 lines 7-16, and at 285-286.

More importantly, Nashua has not tied PWW's error to any proof that Nashua will be immune from such errors or that Nashua will do a better job in the same situation. This lack of connection is simply unhelpful in proving Nashua's public interest case and is not worthy of further analysis.

**5. Safe and Adequate Service at Reasonable Rates is not Assured for Satellite Customers and Wholesale Contract Customers**

In reply testimony filed by Messrs Streeter, Rootovich, and McCarthy dated May 22, 2006, Nashua committed to the following conditions to protect customers outside its borders:

- 1) Nashua commits to operate its water system according to the terms of its Water Ordinance in a manner that treats all customers equally;
- 2) To the extent that Nashua serves customers outside of its borders, Nashua agrees and commits to the principle that the terms and conditions of its service, i.e. its Water Ordinance, will continue to be subject to the jurisdiction of the Public Utilities Commission under RSA 362:4 and RSA 374; and<sup>42</sup>
- 3) Nashua commits to provide service to all satellite customers at core rates, notwithstanding its authority to charge satellite customers higher rates.<sup>43</sup>

As with issues discussed earlier these commitments are also diminished by comments Nashua has made in this proceeding as well as by the legal inability of the Commission to entertain such commitments. First, as discussed earlier, Nashua's reference to PWW's satellite systems as "far flung" and "hodge podge"<sup>44</sup> are words hardly imbued with a benevolent attitude. Second, Nashua's Water Ordinance is draft<sup>45</sup> and thus the statement that the Water Ordinance will be drafted in final form so as to treat all customers equally is premature. The final version has not been subject to discovery in this docket, the Commission has yet to see it, and whether it indeed treats all customers equally is an unknown. Even when the ordinance becomes final and

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<sup>42</sup> Staff does not believe that Nashua has the ability to opt in or out of regulation and this is discussed later in this brief.

<sup>43</sup> Exh. 1014 at 16.

<sup>44</sup> Exh. 1016 at 13 line 18.

<sup>45</sup> Exh. 1014 at 3: The Draft Water Ordinance "is intended to serve as a starting point."

in the event the Commission approves the taking, under the exemption in RSA 362:4, III-a (a)(1), there shall never be a review to ensure it treats all customers equally. Third, Nashua has complained frequently that Nashua customers in the core are subsidizing non-Nashua customers in the satellite systems.<sup>46</sup> Fourth, Nashua has testified that it intends to avoid Commission regulation, and therefore regulatory costs, as a way of reducing rates to customers.<sup>47</sup> As indicated earlier in Staff's discussion concerning rates, adding back regulatory costs has not been factored into Nashua's revenue requirement.

Nashua's commitments also do not assure satellite customers will have any recourse if Nashua fails to keep its word to treat core and satellite customers equally.<sup>48</sup> Nashua will be in charge of directing maintenance and capital improvement dollars and Staff believes Nashua underestimates the risk that it will take care of its own resident's needs prior to the needs of outside customers. The approximately 3,000 customers located outside Nashua will be left with no forum for raising complaints, nor will they be electing any of the officials who will be in charge of water utility decisions. The Commission has itself noted that a customers' ability to have recourse and have a forum for bringing complaints are legitimate concerns. In situations where municipalities or homeowners associations seek exemption from regulation, the Commission has made specific note that residents have recourse similar to what would be

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<sup>46</sup> Exh. 1016 at 19. Exh. 1007 at 13 at 14. Exh. 3198 at 9 "I brought this list along so we can keep a scorecard as to what you are subsidizing. Every time there's a purchase, you can plan on some of your water money subsidizing it." George E. Sansoucy, P.E. speaking to Aldermanic committee.

<sup>47</sup> Exh. 5001 at 108, Nashua Response to Staff 1-169: "Since Nashua does not plan to have different rates inside and outside the City, it will not be subject to N.H. Public Utilities Commission regulation in the ordinary course of events."

<sup>48</sup> Exh. 5001 at 49: "Under the current rate structure, I question what incentive Nashua has to treat the satellite systems equally with respect to rates, customer service, maintenance, and future capital improvements. My further concern is that customers of these satellite systems live in municipalities other than Nashua and would have no recourse absent Commission oversight, and would have no input into selecting municipal officials in the City."

provided through regulation and thus exemption from regulation is in the public interest.<sup>49</sup>

Recourse and a having access to a fair forum for raising concerns are issues of concern to the Town of Merrimack. As stated earlier, Merrimack opposes Nashua's taking of PWW's assets because Nashua's ownership of the water system serving an economically vital portion of the town may place Merrimack at a competitive disadvantage and Merrimack would have little to no recourse.

Nashua may argue that the legislature has found recourse not to be an impediment to regulatory exemption since RSA 362:4, III-a (a)(1) specifically exempts municipalities serving outside customers from regulation. Staff believes, however, this legislative presumption of public interest does not extend to the instant case. In this case, the vast majority of outside customers are in stand alone satellite systems that themselves had capital needs and other challenges. These customers are not hydraulically connected to the municipal core system. The Commission's 2003 exemption of Manchester Water Works is illustrative that the issue of recourse is not set aside by RSA 362:4, III-a (a)(1). In *Manchester Water Works*, 88 NH PUC 111 (2003), the outside customers are hydraulically connected and the risk that these customers will experience a decreased level of safe and adequate service is much lower than customers in PWW's satellite systems. Manchester Water Works also had a track record of performance, something that Nashua does not have. Notwithstanding these positive factors, the Commission reiterated the importance of recourse:

“we note that MWW has an excellent compliance record during the period in which it has been subject to regulatory oversight by the Commission. Customer complaints are rare. We thus have confidence in MWW's ability to provide safe and reliable service, charging just and reasonable rates, to customers outside of Manchester even in the absence of traditional regulation by the Commission. Absence of regulation by this Commission will not mean that MWW will have

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<sup>49</sup> *Atkinson Woods Owners Association*, Order No. 24,754 dated May 25, 2007. *Tilton and Northfield Water District*, 90 NH PUC 599 (2005).

unfettered discretion with regard to the rates it charges or the quality of water it provides beyond Manchester's boundaries. Testimony at hearing revealed that the Manchester Water Commission will continue to have authority over disputes between MWW and any of its customers, even those outside the city limits.

Accordingly, because customers will have another regulatory forum for the redress of complaints against MWW to the extent necessary, we find that granting the requested exemption is consistent with the public interest." Id. at 115.

"Ultimately, moreover, if a serious and persistent problem arose with respect to the treatment of customers outside of Manchester, the Commission would have authority to revoke the exemption." Id. at 116.

To address the Town of Londonderry's concerns that no one will be performing a "watch dog function" so as to assure customers in Londonderry (and presumably other affected towns) are not paying a rate higher than 15 percent above those charged to Manchester customers, the Commission required Manchester to submit a copy of its tariff each year to both the Commission and to all towns outside of Manchester in which MWW has customers.

For these reasons, Staff does not agree that Nashua's commitments, however well intended, are able to assure that customers in satellite systems will receive safe and adequate service if Nashua were to take PWW's assets.

With respect to wholesale contracts, Nashua has committed to having these contracts subject to Commission regulation.<sup>50</sup> As discussed later, the problem with Nashua's commitment is that the Commission is precluded under RSA 362:4, III-a (a)(2) from regulating wholesale contracts between municipalities. It would otherwise be all well and good that Nashua has provided this assurance to overcome concerns that the Town of Hudson, Town of Merrimack, Town of Milford, Town of Tyngsboro, and City of Manchester have no recourse, however, the Commission cannot simply entertain this under RSA 362:4, III-a (a)(2). The only wholesale contract that could be considered for regulation by the Commission would be PWW's wholesale

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<sup>50</sup> Exh. 1014 at 22; Hearing Transcript of September 19, 2007 at 20 lines 12-21.

contract with Anheuser-Busch but that would involve reading RSA 362:4, II as not prohibiting such a condition under RSA 38:11.

**I. Lack of Membership and Compliance with Dig Safe Program Remains a Risk that Threatens Public Safety**

The state's Underground Utility Damage Prevention System, so-called Dig Safe, under RSA 374:48-56 protects public safety by requiring excavators and operators of public utilities to take certain precautions when digging near buried public utility facilities. The statute does not require municipalities to join, however Concord, Dover, Hudson, Portsmouth are voluntary members. Tr. 9/26/07 at 26 lines 2-3. The City of Nashua is not currently a member nor has it ever been a member.

To allay Staff's concerns that the public's safety may be placed at risk if Nashua takes PWW but does not join Dig Safe, Nashua offered that it or its contractor would become a member of Dig Safe.<sup>51</sup> According to RSA 374:48, IV-a, and RSA 374:49, an owner or operator of the underground facilities shall participate in the underground utility damage prevention system. Since Veolia is Nashua's agent, only Nashua, not Veolia can become a member of Dig Safe. Veolia cannot become a member of Dig Safe contrary to what was stated in testimony. This displays a lack of understanding of the Underground Damage Prevention program. At hearing, Staff distinguished that if a municipality is excavating and hits a private line, then it is subject to civil penalties just like any other contractor. Tr. 9/26/07 at 17 lines 7-10. But as an operator, Nashua would not be required to participate in the Dig Safe program. This is the crux of Staff's concern.

If Nashua were to become a member of Dig Safe as a condition of Commission approval of its taking of PWW's assets, the perpetual nature of Nashua's membership would remain a

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<sup>51</sup> Tr. 9/26/07 at 21 lines 21-24 and at 22 line 1.

risk. Even under RSA 38:11, the Commission cannot ignore Part I, Article 28-a of the State Constitution and the prohibition on unfunded state mandates.<sup>52</sup> See, *Public Service Company of New Hampshire*, 130 NH 265 (1988) (Commission could not ignore RSA 378:30-a, the anti-CWIP statute in determining whether an emergency existed under RSA 378:9 which warranted a temporary adjustment in rates.) Nashua would have to vote to accept funding for the Dig Safe membership in order to make perpetual membership binding upon Nashua. The membership dues are not the main cost of Dig Safe membership. The primary costs are the cost obligations of marking and locating 24 hours/day 7 days a week for standard notifications and emergency notifications. Dig Safe membership requires accountability and associated costs expected of the responsibilities of an operator.

Staff also has concerns relating to Nashua's plans to have Veolia conduct Dig Safe locates pursuant to Appendix D of Veolia's proposed contract. Exh. 1005B at 48. Veolia does not have familiarity with PWW's facilities. Staff testified at hearing that familiarity is important to public safety.<sup>53</sup> Staff further testified that when outside contractors perform locates, it is customary that locates are done on a unit cost which puts time constraints on these important tasks. Tr. 9/26/07 at 28 lines 11-16. If the Commission were to place conditions that would assure a continued level of public safety as exists under PWW ownership, then that condition should involve Nashua hiring a PWW employee who is familiar with PWW's facilities.

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<sup>52</sup> "The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision." Added in 1984. The Underground Utility Damage Prevention System was enacted in 1983 and although portions may predate Article 28-a, the best solution would be for Nashua to affirmatively take on this Dig Safe responsibility.

<sup>53</sup> Tr. 9/26/07 at 26 lines 16-24.

Given the historical lack of participation by City of Nashua and Nashua's inability to show an improved commitment to safety or even an equivalent level of safety, the Staff does not believe it is in the public interest for this taking.

**J. Nashua's Late Proffered Condition for Commission Regulation and Modification of its Case is Inappropriate and Contrary to Law**

From May 2006 and up through the last day of hearings, Nashua has expressly and impliedly offered to condition its proposed taking. Staff believes these attempts to accept Commission-imposed conditions as part of an approval are inappropriate and contrary to law. Nashua's offers relate to Commission regulation of Nashua's contracts with PWW's current wholesale customers, continued Commission regulation of Nashua's service to customers outside its municipal boundaries, and modification of Nashua's proposal for providing customer service. Tr. 9/26/07 at 53 lines 13-19. Tr. 9/26/07 at 66 lines 22-24 and at 67 lines 1-3.

If Nashua's petition in this docket is approved, Nashua would be the water provider for some 3,000 customers located in municipalities other than Nashua. In response to concerns expressed in this docket that these customers would not have recourse to the "management" of their water utility since that management consists of Nashua elected officials, Nashua has apparently modified its case by suggesting that the Commission could condition its approval for the taking by maintaining regulatory authority over Nashua's service to customers outside the city. By suggesting that the Commission can condition an approval on Nashua remaining regulated as to its service outside City boundaries, or suggesting that Nashua can "volunteer" to be so regulated, Nashua is ignoring the clear wording of the applicable statutes. There is no option for a municipal corporation to be regulated; it either is regulated or it is not according to the criteria in RSA 362:4 as follows:

RSA 362:4, I states that “every corporation” “shall be deemed to be a public utility by reason of the ownership or operation of any water...system.” This statute casts a rather large net which includes municipal corporations. Municipal corporations are then systematically removed from regulation under the following situations:

RSA 362:4, II states municipal corporations servicing outside its borders shall not be considered a public utility under this title for purposes of accounting, reporting, and auditing functions.<sup>54</sup> This paragraph interestingly does not list “for purposes of rate setting”. This paragraph is more limited in its declaration of non-regulation than RSA 362:4, III-a for instance.

RSA 362:4, III-a states “[a] municipal corporation furnishing water services shall not be considered a public utility under this title: (1) If it serves new customers outside its municipal boundaries, charging such customers a rate no higher than 15 percent above that charged to its municipal customers, including current per-household debt service cost for water system improvements, within the municipality, and serves those customers a quantity and quality of water or a level of water service equal to that served to customers within the municipality”..., and “(2) If it supplies bulk water pursuant to a wholesale rate or contract to another municipality, village district, or water precinct...”

Commission regulation of Nashua’s contracts with current PWV wholesale customers is not something that Nashua can volunteer to do. This Commission has no jurisdiction as to contracts entered into by municipal entities. It is simply not an option that is available to Nashua to attempt to enhance its public interest case in this proceeding.

Nashua’s suggestion on the last day of hearings that the Commission can and should condition its approval to its customer service structure is a significant concession. This very structure has been criticized by parties in this proceeding. As stated earlier, Nashua’s original proposal was for its tax collection department to handle billing, collections, and customer service inquiries relative to both. Veolia was to handle all other customer service matters. Now, instead of this split of customer service between Veolia and Nashua’s tax collection office, Nashua has

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<sup>54</sup> RSA 362:4,II: “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.”

proposed to have Veolia handle all these functions. Whether this apparent change of heart is for the better or not is not at issue. What is relevant is that this new proposal may have significant implications as to the Commission's public interest determination and Nashua's concession has not been subject to discovery by the parties to the case. It cannot be simply accepted without critical review.

Staff is troubled by these conditions because they are modifications to Nashua's case. Nashua is asking this Commission to essentially assist it in making its public interest case. In Staff's view, Nashua is obligated to make a clear and definitive proposal to the Commission in consideration of its request for a taking. The Commission serves as arbiter in this proceeding. Requesting the Commission to condition an approval also seriously disadvantages the parties to this docket. It is also disadvantages stockholders since failure on the part of Nashua to comply with any conditions can never put the stockholders back in their original position, i.e. as owners of PWW's assets

This Commission has entertained conditions in other cases involving the transfer of utility assets, but the instant docket differs substantially from the consensual transactions where the Commission has set conditions for approval. Another important distinction is that in those cases, the Commission retained full regulatory authority to ensure that the conditions are met in the future. See, *Hampton Water Works Company*, 85 NH PUC 506 (2000); *New England Telephone and Telegraph Company d/b/a NYNEX*, 82 NH PUC 30 (1997); *Northern Utilities, Inc.*, 83 NH PUC 401, 187 P.U.R.4<sup>th</sup> 67 (1998). That would not be the case here; once a transfer of assets to Nashua occurs, the Commission would have limited jurisdiction and PWW stockholders could never be put back into their previous position.

#### **IV. CONCLUSION**

Staff's view of this request by the City of Nashua remains the same as it has been since Staff's testimony was filed on April 13, 2006. For the reasons as cited herein, Staff does not believe Nashua's request for a taking of the assets of PWW meets the applicable public interest tests. Staff is unable to conclude that the taking will provide net benefits to the public. Staff's opinion of the issues presented in this case remains as Mr. Naylor, Ms. Noonan, and Mr. Randall Knepper conclude in their April 2006 testimony.

Nashua's request to take the assets of PWW presents the Commission with a critical decision relative to water supply and distribution not only in Nashua, but in the greater Nashua region and in the state as a whole. The importance of this decision is made clear in the fact that Nashua would largely become unregulated and thus the Commission's decision will be irreversible.

Staff has reviewed all of the public interest issues implicated by Nashua's proposal to take and operate the PWW core and satellite systems, including rates, quality of service in Nashua and to PWW's satellites, regionalization, water supply cooperation, and the goals and objectives of the State relative to these issues. Staff has very carefully considered all of the issues in this case, and has extensively reviewed all of the evidence presented with these public interest issues in mind.

Staff understands that the definition of public interest can be as broad as the public necessity and that the balancing of the benefits against the costs and social harms requires the Commission to look beyond Nashua's municipal boundaries. Staff has concerns with Nashua's proposal that render a presumption of public interest to Nashua residents uncertain, particularly as to rates, customers service, and public safety. If the proposed taking by Nashua has uncertain

benefits to Nashua residents, it is difficult to imagine that there are benefits beyond Nashua. It is Staff's view that not only are there no net benefits outside Nashua, there are real harms to outside customers that will result from the taking of the assets of PWW.

In Staff's review of this docket, one complaint by Nashua has stood out time and again, and that is the issue of the promotion of real cooperation in and sharing of not only water resources, but the necessary technical expertise to solve water-related issues which routinely cross municipal boundaries. The evidence put forward in this docket contains numerous citations to where Nashua views its water and rates in a parochial manner. It is Staff's opinion that the elimination of PWW through a taking by Nashua will be a step backward for regional cooperation and will create risks to non-Nashua customers. Nashua is not convincing or incented to be a regional player. The substantial public benefit that results from the acquisition and rehabilitation of small water systems by PWW and its affiliates will end. Staff does not believe Nashua will be a catalyst for problem solving and promoting regional cooperation.

The taking of the assets of PWW would also be harmful to the customers of PAC and PEU. The economies of scale which generate efficiencies in operations and allow for the sharing of common assets will drive up rates for PAC and PEU customers. The business operations of PWSC will be similarly impacted, and since PWSC operates largely on a contract basis, it cannot simply increase its prices to remain profitable.

Staff questions the structure Nashua proposes for the water system to be taken, which fractures ownership, oversight, and operations three different ways. Nashua will depend entirely dependent on outside contractors to provide all of the capabilities required for efficient operation, including cost control. Staff believes Nashua is risking a reduction in overall efficiency and effectiveness over time. Customer service and billing and collection are to be divided up

between Veolia and the City's tax collection department, yet in reality these functions constantly overlap. Nashua's projected savings to customers remain uncertain and depend substantially on the value to be set for the assets. The projected workforce reductions run the risk of degrading the quality of service PWW customers have been receiving.

Nashua's attitude regarding PWW's acquisitions of other water systems leads to questions and concerns about the service approximately 3,000 customers in satellite systems can expect, and the rates they may pay. Those customers would not have Commission oversight or a municipal vote as a way of addressing rates and service. Not all of Nashua's neighbors, such as the Town of Merrimack and Town of Milford, feel that replacing the existing ownership and management of the PWW system will be beneficial.

Nashua has asserted that its proposed taking is necessary to maintain local control of the water resources of the area, and to ensure economic viability of the Nashua area going forward. While presumably City leaders will ultimately make the decisions regarding water resources, the lack of City staff involved in the operation of the water utility leads Staff to question how that local control will be of benefit over the Commission's present ability to consider the same. Staff does not believe that the evidence shows that a taking of the assets of an investor-owned company is necessary to protect economic viability in the Nashua region.

Nashua's proposed taking is unlike typical eminent domain cases where a municipality wishes to take over a poorly run company so that service to its citizens can be improved. This is not a poorly run water company and even Nashua acknowledges this. This is a well-run, healthy business that provides safe and adequate service. PWW 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. The only persistent criticism of PWW

has been of alleged mismanagement of the Pennichuck watershed. However, Nashua has not put forth evidence to illustrate that anything PWW has done, or has failed to do in that watershed, has negatively impacted water quality or caused higher treatment costs.

Staff questions whether the legislature, in enacting RSA 38, ever intended that a taking of a water utility which is a substantial and integral part of a larger regional entity be in the public interest. Staff does not believe anyone questions that removing PWW's assets from this company is going to gut it. As stated before, in 2004, PWW provided nearly 70% of Pennichuck Corporation's revenues and 77% of its net income. PWW owns approximately 75% of Pennichuck Corporation's assets. Due to the historical development of the corporation, PWW employs all of the employees used in Pennichuck Corporation's businesses, and holds the common assets used in PWW's businesses. Removing PWW's assets, and PWW's revenues, and PWW's earnings, and the people it employs, will substantially harm this business. Acquisition of small troubled systems, encouraged by and deemed to be in the public interest by the Commission, will end. PWW's role as an effective catalyst in problem-solving and promoting regional cooperation will end. The proposed taking will in fact inflict economic loss to PWW's investors. Staff asks again, can this be what the legislature intended?

In summary, Staff believes:

1) PWW and its regulated affiliates, and to some degree PWSC, constitute a true regional water utility with a track record of pro-active cooperation on water supply and water distribution issues; the evidence clearly shows that a taking of PWW's assets will eliminate this important benefit to the State;

2) The evidence clearly shows that the taking of PWW's assets will adversely affect rates and cause economic harm to Pennichuck Corporation's regulated and unregulated businesses;

3) Nashua's proposal contains uncertainties and lacks evidence demonstrating that important functions such as public safety, customer service and billing and collections will be adequately addressed;

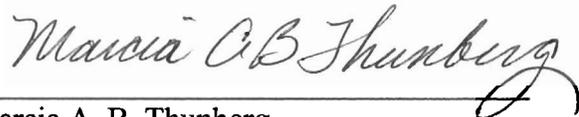
4) Acquisitions of small troubled water systems by PWW, PAC, and PEU are not likely to continue if PWW ceases to exist;

5) Nashua's projection of a lower cost of service under its contracts with its third party operator and oversight contractor is speculative considering that Nashua's rate projections are based on the City's estimate of value for the assets and this value has yet to be established; and

6) PWW is a water utility that serves customers in stand-alone systems far beyond the boundaries of the City, and Nashua's attitude toward PWW's acquisition of those systems raises concerns as to whether the level of service and capital improvements those systems would receive would be compromised by Nashua's ownership.

WHEREFORE, for the reasons stated above, Staff respectfully requests the Commission deny the City of Nashua's petition, without prejudice.

Respectfully submitted,



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Date: Nov. 16, 2007

## Certificate of Service

Staff certifies that a copy of the foregoing brief has been sent this sixteenth day of November 2007 by first class mail to Ms. Claire McHugh and by electronic means to the remainder of the service list.

  
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Marcia A. B. Thunberg