
THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0274

**Appeal of City of Nashua
Appeal of Pennichuck Water Works, Inc.,
Pennichuck Corporation, Pennichuck East Utility, Inc.,
Pennichuck Water Service Corporation, Pittsfield Aqueduct Company, Inc.**

Appeal by Petition Pursuant to RSA 541:6
from Final Order of New Hampshire Public Utilities Commission

BRIEF OF TOWN OF MERRIMACK

Its Attorney:

**Edmund J. Boutin No. 59
Boutin & Altieri, P.L.L.C.
P.O. Box 1107
Londonderry, NH 03053**

To be argued by: Edmund J. Boutin

TABLE OF CONTENTS

TABLE OF AUTHORITIESIII

QUESTIONS PRESENTED FOR REVIEW THAT ARE ARGUED IN THIS BRIEF.....1

 I. QUESTIONS REVIEWING PUC’S PUBLIC INTEREST RULING.1

 II. QUESTIONS REVIEWING PUC’S FAIR MARKET VALUE
 DETERMINATION.1

STATUTES INVOLVED IN THIS CASE.....2

STATEMENT OF THE CASE AND OF FACTS2

 I. PROCEDURAL BACKGROUND.....2

 II. PUBLIC INTEREST FACTS.....3

 III. VALUATION FACTS.....4

SUMMARY OF ARGUMENT7

ARGUMENT.....8

 I. THE PUC DID NOT WEIGH SUBSTANTIAL EVIDENCE SHOWING
 NO PUBLIC INTEREST FROM A TAKING BY NASHUA.....8

 II. THE PUC LACKS AUTHORITY TO RETAIN JURISDICTION OVER
 NASHUA TO PROTECT THE INTEREST OF MERRIMACK AND
 OTHER TOWNS.....10

 III. THE PUC’S FAIR MARKET VALUE DETERMINATION PROPERLY
 APPLIED THE CONSTITUTIONAL STANDARD OF JUST
 COMPENSATION.13

 A. THIS COURT’S RULING IN OPINION OF THE JUSTICES
 SUPPORTS THE PUC’S FAIR MARKET VALUE
 DETERMINATION.17

 B. THE PUC’S VALUATION WAS A MARKET VALUATION,
 NOT A VALUATION OF THE WORTH OF THE PWW
 SYSTEM TO NASHUA.....20

 C. THE ONONDAGHA WATER CASE ALSO REJECTED THE
 VERY RULE THE DISTRICT PROPOSES THIS COURT
 ADOPT IN THIS CASE.....22

CONCLUSION.....23

REQUEST FOR ORAL ARGUMENT24

ADDENDUM TO BRIEF OF TOWN OF MERRIMACK.....26

TABLE OF AUTHORITIES

FEDERAL CASES

Boston Chamber of Commerce v. City of Boston, 217 U.S. 189 (1910)18, 21

STATE CASES

In re Aldrich, 156 N.H. 33 (2007)12

Appeal of Basani, 149 N.H. 259 (2003)14

Appeal of O'Dell, 140 N.H. 484 (1995).....20

Appeal of Public Service Co. of N.H., 122 N.H. 1062 (1982)11

Blair v. Manchester Water Works, 103 N.H. 505 (1961)11

Dade County v. General Waterworks Corp., 267 So. 2d 633 (Fla. 1972)19

Legislative Utility Consumers' Council v. Public Service Co., 119 N.H. 332 (1979).....17

Massachusetts-American Water Co. v. Grafton Water District, 631 N.E.2d 59 (Mass. App. Ct. 1994).....19

Merrill v. Manchester, 127 N.H. 234 (1985)8

Onondaga County Water Authority, 139 N.Y.S.2d 755 (N.Y. App. Div. 1955).....22, 23

Opinion of the Justices, 131 N.H. 504 (1989)15, 17, 18, 19, 21

Petition of Bianco, 143 N.H. 83 (1998)8

Pridham v. Cash & Carry Building Center, Inc., 116 N.H. 292 (1976).....15

Sanborn Reg'l Sch. District v. Budget Committee of Sanborn Reg'l Sch. District, 150 N.H. 241 (2003)12

Society Hill at Merrimack Condominium Association v. Town of Merrimack, 139 N.H. 253 (1994)13

Southern N.H. Water v. Town of Hudson, 139 N.H. 139 (1994)5, 14, 19

Washington Suburban Sanitary Commission v. Utilities, Inc. of Maryland, 775 A.2d 1178 (Md. 2001)19

STATE STATUTES AND REGULATIONS

RSA 38 passim

RSA 362:4 passim

RSA 374:2211

RSA 541:1314

N.H. Code Admin R. Part 800 and 120011

QUESTIONS PRESENTED FOR REVIEW THAT ARE ARGUED IN THIS BRIEF

I. QUESTIONS REVIEWING PUC'S PUBLIC INTEREST RULING.

3) Whether the PUC erred by failing to apply to Nashua's petition the public interest balancing approach constitutionally required for eminent domain takings in New Hampshire, by failing to articulate its methodology for analyzing the public interest, and by failing to weigh all relevant aspects of the public interest, including the statewide interest in PWW's capacity to operate a regional water system and to take over small troubled water systems, the interests of customers in towns outside of Nashua and the ownership interest of shareholders. (Preserved as Pennichuck Motion for Reconsideration and/or Rehearing ("Rehearing Motion"), pp. 5-6, 10-14, Cert.Rec., pp. 10429)

5) Whether the PUC erred by requiring, as a condition for its finding of public interest for the condemnation of PWW assets, the continued exercise of jurisdiction over Nashua beyond the PUC's authority, contrary to RSA 362:4. (Rehearing Motion, pp. 17-18, Cert.Rec. pp. 10429)

II. QUESTIONS REVIEWING PUC'S FAIR MARKET VALUE DETERMINATION.

1) Whether there was evidence to support the PUC's consideration of hypothetical not-for-profit buyers in its valuation of PWW's assets, where there was substantial expert testimony that the presence of not-for-profit buyers can influence the value of a water utility. (Nashua appeal)

STATUTES INVOLVED IN THIS CASE

RSA 38:1-14 (Addendum. p. 27)

RSA 362:4 (Addendum p. 31)

RSA 374:22, 26 (Addendum p.32)

RSA 541:13 (Addendum p. 33)

STATEMENT OF THE CASE AND OF FACTS¹

I. PROCEDURAL BACKGROUND.

This case concerns Nashua's use of eminent domain to take over the privately-owned water system that serves the Town of Merrimack, as well as ten other communities in southern New Hampshire. Pennichuck Water Works, Inc. ("PWW"), an investor-owned water utility that is regulated by the New Hampshire Public Utilities Commission ("PUC"), has provided water service to Merrimack since 1969, and Merrimack's largest employer, Anheuser Busch, consumes 15 percent of PWW's total average daily water flow. Hinch Test., Ex. 4003, Cert.Rec. p. 16994, included in the Appendix to Merrimack's brief ("M.App."), pp. 34-40.² On March 24, 2004, Nashua filed a petition with the PUC under RSA 38 requesting the PUC approve its condemnation of PWW and determine the price Nashua must pay to PWW as just compensation. Order No. 24,379, p. 10, 89 NH PUC 565 (2004), Cert.Rec. p. 365.

Merrimack moved to intervene in the PUC proceedings, noting that because PWW is a key water supplier to Merrimack, "Nashua's eminent domain petition directly affects the water

¹ Merrimack also adopts by reference PWW's Statement of the Case and Statement of Facts as set forth in its brief.

² The parties prefiled witness direct testimony. Each witness' testimony was entered at the hearing in separate exhibits and is referenced by the witness' last name plus "Test.", the designated exhibit number and page reference. Witness cross-examination appears in the hearing transcript, referenced by the witness' last name plus "Test.", the hearing date and page reference. Parallel page reference is also provided to the initial page of the document in the Certified Record ("Cert.Rec.").

service provided to the Town's citizens. . . ." Cert.Rec. p. 332. The PUC granted Merrimack's intervention request, and Merrimack participated actively in the four-year-long PUC proceeding. Order No. 24,379, p. 10, 89 NH PUC 565 (2004), Cert.Rec. p. 365.

II. PUBLIC INTEREST FACTS.

Merrimack opposes Nashua's petition. Merrimack Selectmen chairperson Richard Hinch testified in support of Merrimack's position that it is not in the town's best interest for Nashua to take over its water supplier:

Merrimack has been historically and is well served today by PWW, providing good quality water service at a reasonable price. Merrimack does not have the confidence that Nashua could provide that same good level of service, based upon the evidence Nashua has presented. Merrimack also worries that Nashua will favor its own residents in terms of rates and capital investments, at the expense of Merrimack residents and businesses. I am concerned that Nashua cannot be counted on in the future to act in a manner that would give appropriate weight to the interests of Merrimack businesses and residents... Merrimack's citizens have not voted for municipalization of the water system, and we are not comfortable with Nashua voters and elected officials making decisions that would directly affect Merrimack water customers...

PWW is an excellent supplier of water service at a reasonable price to customers in Merrimack. Its management is responsive to customer needs, as well as to Town concerns such as road excavation and fire protection. Ever since PWW obtained a water service franchise in 1969 for the southeastern portion of Merrimack, it has worked diligently to satisfy town requirements.

Hinch Test., Ex. 4003, pp. 4, 5-6, M.App. pp. 37, 38-39.

The testimony of Merrimack town council member David McCray further explained Merrimack's concern with its much larger neighbor controlling its water supply, specifically when Merrimack and Nashua compete in the future to attract new businesses. McCray Test., 9/19/07, p. 46, M.App. p. 43, Cert.Rec. p. 9491. Mr. McCray astutely noted that Nashua's condemnation would place Merrimack's water supply in the control of Nashua's mayor and aldermen, who are "elected people, they're always going to cater to the people that elect them,

and no one in Merrimack has a vote in there [Nashua]." McCray Test., 9/19/07, p. 66, M.App. p. 49.

The PUC issued its ruling on July 25, 2008, finding that, assuming Nashua complies with certain conditions the PUC set forth, Nashua's condemnation is in the public interest. Order No. 24,878 ("Taking Order") pp. 98-99, Cert.Rec. p. 10302, included in Nashua's Appendix to Brief ("N.App."), pp. 25-144. In reaching this conclusion, the PUC did not consider the substantial evidence of harm to PWW customers living outside of Nashua, including customers in Merrimack. For example, one of the PUC's conditions for its public interest finding required Nashua to establish a \$40 million mitigation fund to offset the harm Nashua's condemnation of PWW would cause to customers of the company's remaining PEU and PAC systems. Taking Order, pp. 94-96, N.App. pp. 118-120. Because PWW, not PEU or PAC, serves Merrimack, its residents would not benefit from the mitigation fund, but Merrimack's residents would nevertheless have to pay for the fund as Nashua passes on its costs to the system's ratepayers, which include the residents of Merrimack.

III. VALUATION FACTS.

In its July 25, 2008 order, the PUC also awarded PWW damages of \$203 million, which the PUC determined was the fair market value of the PWW system serving Nashua and ten other towns, including Merrimack. Taking Order, pp. 97-98, N.App. pp. 121-122. Merrimack agrees with PWW that the PUC's valuation ruling is supported by evidence in the record, and therefore should be upheld.³ Specifically, Merrimack agrees with PWW that the record contains credible

³ Merrimack also adopts by reference the valuation arguments presented in PWW's brief. To avoid undue repetition, this brief will focus specifically on refuting the arguments raised in the brief filed by another intervenor, the Merrimack Valley Regional Water District. In doing so, Merrimack does not argue for a specific valuation, only that the value arrived at was soundly based on the only credible evidence before the PUC.

evidence supporting the PUC's determination that PWW's expert testimony as to the single issue Nashua challenges on appeal (the expert's judgment as to the impact of hypothetical buyers on the market price) was more credible than that of Nashua's experts. Taking Order, pp. 89-92, N.App. pp. 113-116.

PWW's principal valuation expert, Robert Reilly, is a pre-eminent, nationally-known expert in the field of business valuation who holds numerous professional appraisal designations and certifications and has written or co-authored six authoritative books on valuation principles. Mr. Reilly's expert qualifications were unchallenged, and his testimony was admitted into evidence without objection. Reilly Test., Ex. 3007, pp. 2-5, Cert.Rec. p. 14543; Ex. 1007A App. F, Cert.Rec. p. 14583.

The same cannot be said for Nashua's principal valuation expert, George Sansoucy, whose qualifications, partiality, and credibility were subject to vigorous challenge. Taking Order, pp. 80-82., N.App. pp. 104-106. As to experience, and in stark contrast to Mr. Reilly, neither Mr. Sansoucy nor his colleague Glenn Walker has any designation or certification from any of the major professional appraisal organizations. Sansoucy Test., 9/4/07, pp. 30-31, Cert.Rec. p. 7518. Moreover, the evidence presented before the PUC established that numerous courts and other tribunals have heard, and ultimately rejected, Mr. Sansoucy opinion as, variously, unsupported, wrong, and based on unreliable data and reasoning.⁴ See, Sansoucy Test., 9/4/07, pp. 271-283, Cert.Rec. p. 7518; Sansoucy Test., 9/10/07 PM, pp. 6-9, Cert.Rec. p. 8458; Pennichuck Post-Trial Brief, November 16, 2007, Appendix B, Cert.Rec. p. 10032; Merrimack Post-Trial Brief, November 16, 2007, p. 8, Cert.Rec. p. 10126.

⁴ As noted by other New Hampshire courts, Mr. Sansoucy also "enjoys the dubious distinction of being the only person ever to have been censured by FERC for improper and unethical conduct." *Southern New Hampshire Water Company, Inc. v. Town of Hudson*, Docket 92-E-545, 547 (October 5, 1993) (Lynn, J., Opinion and Order), *aff'd* 139 N.H. 139 (N.H. 1994). Ex. 3072, Cert.Rec. p. 16489.

The evidence concerning Mr. Sansoucy's bias in his appraisal of PWW, was perhaps the most damaging to the credibility of his valuation testimony. During the proceedings, it was revealed that Mr. Sansoucy's valuation was performed as part of an overall consulting deal with Nashua which stipulated that, in addition to valuing the PWW system, Mr. Sansoucy would also: (1) testify that the condemnation is in the public interest and generally assist Nashua in building its public interest case; and (2) assist Nashua in various operational matters and transition activities should the condemnation be approved. Sansoucy Test., 1/10/07, p. 18, Cert.Rec. p. 6784. Mr. Sansoucy, a long-standing proponent of municipal ownership of utilities, readily acknowledged that under the consulting agreement, he stood to benefit financially in the form of additional compensation if Nashua's condemnation of PWW is successful. Sansoucy Test., 9/4/07, pp. 103-04, Cert.Rec. p. 7518. The evidence concerning the circumstances of Mr. Sansoucy's hiring provided a compelling example of how his multiple roles influenced his valuation conclusions. The record showed that Mr. Sansoucy promised Nashua before he was even hired, that if engaged, he would produce a valuation in the range of \$81 and \$82 million, which he assured the city would allow it to finance the purchase without having to raise rates.⁵ Ex. 3197A, p. 17, Cert.Rec. p. 16618; Sansoucy Test. 9/4/07, p. 111, Cert.Rec. p. 7518. Mr. Sansoucy even told Nashua how he would accomplish this goal, in part, by promising that he would give the cost approach no weight. Sansoucy Test. 9/4/07, pp. 95-102, Cert.Rec. p. 7518. Mr. Sansoucy lived up to his promise, producing an appraisal that gave zero weight to the cost approach and that concluded a value of \$85 million, within \$3 million of the valuation number

⁵ A valuation which allows Nashua to acquire without raising rates is what Mr. Sansoucy termed the "no net harm" standard, which his colleague, Mr. Walker, admitted was not the same as fair market value, and was not a valid appraisal standard. Walker Test. 9/4/07, pp. 103-04, Cert.Rec. p. 7518.

Sansoucy promised Nashua he would reach before he was even hired. Sansoucy Test. 9/4/07, pp. 103-104, Cert.Rec. p. 7518.

SUMMARY OF ARGUMENT

The PUC failed to perform any sort of meaningful review of the public interest factors favoring PWW in its analysis of Nashua's petition. In particular, the PUC failed to weigh Pennichuck's good record of service to Merrimack and other communities in New Hampshire outside of Nashua, and it failed to weigh the substantial concerns of Merrimack and other towns that fear Nashua obtaining control over PWW water systems in those towns. To the extent the PUC did recognize concerns raised by Merrimack and other towns, the PUC responded by placing conditions for Nashua to take PWW's assets that require continued PUC oversight over Nashua. But that oversight exceeds the PUC's authority, since it will not have jurisdiction over Nashua after the taking, because Nashua will be exempt from regulation under RSA 362:4, III.

In its valuation of PWW's assets, the PUC heard conflicting opinions on the impact the government entity buyers would have on the market price. PWW's expert opined that hypothetical purchasers would consider the competing government entity buyers relevant, and therefore would bid higher to acquire the system; Nashua's experts opined that government entity buyers would be present, but would have zero impact on market price. The PUC adopted PWW's expert's approach, and this Court may not disturb on appeal that factual finding. Nashua and the Merrimack Valley Regional Water District would have this Court value PWW's assets using an approach – PWW's lost income -- that does not lead to fair market value and that has been repeatedly rejected by this Court. PWW's expert properly considered the three major methods of valuation, unlike Nashua's expert, and the record reflects the PUC's careful review of the conflicting evidence relating to the effect of municipal buyers on the marketplace for water companies.

ARGUMENT

I. THE PUC DID NOT WEIGH SUBSTANTIAL EVIDENCE SHOWING NO PUBLIC INTEREST FROM A TAKING BY NASHUA.

In reviewing Nashua's petition to take the property of PWW in communities outside of Nashua, the presumption of public interest found in RSA 38:3 does not apply. At least on paper, the PUC confirmed just that when it ruled: "as to assets located outside of Nashua, Nashua bears the burden of proving that the taking of those assets is in the public interest." Taking Order, p. 25, N.App., p. 49. However, with respect both to PWW assets located inside and outside of Nashua, the PUC failed to perform any sort of meaningful review of public interest factors. Specifically and as further explained in PWW's brief, the PUC failed to conduct the constitutionally required net benefit analysis, weighing "public benefits... against all burdens and social costs suffered by every affected property owner." *Petition of Bianco*, 143 N.H. 83, 87 (1998). See *Merrill v. Manchester*, 127 N.H. 234, 237 (1985).

For instance, Merrimack provided testimony as to PWW's good service in the town. Hinch Test., Ex. 4003, pp. 4-6, M.App. pp. 37-39: The PUC staff that regulate PWW testified that it is a well run company providing good service to its customers. Naylor Test., Ex. 5001, p. 69, Cert.Rec. p. 17043. Even Nashua and its contractors had to admit that Pennichuck operates well and provides an adequate supply of clean drinking water to its many customers throughout New Hampshire. McCarthy Test., 1/10/07, p. 242. Cert.Rec. p. 6784; Noran Test., 9/5/07, p. 129, Cert.Rec. p. 7804.

Merrimack and other witnesses testified as to Pennichuck's important work as a truly regional water supplier in New Hampshire, consistent with the state's policy to increase regional water supply initiatives. Patch Test., Ex. 3002, pp. 15-16, Cert.Rec. p. 14147 quoting from New Hampshire Department of Environmental Services and PUC, *Regulatory Barriers to Water*

Supply Regional Cooperation and Conservation in New Hampshire (2001), Ex. 3002A, Att. DLP-A, Cert.Rec. p. 14173. Mr. Hinch testified about PWW's extension into Merrimack to serve the new Anheuser-Busch brewery, to serve other new industrial users in South Merrimack and to provide a necessary back-up connection to the water system of the Merrimack Village Water District. Hinch Test., Ex. 4003, pp. 4-6, M.App. pp. 37-39. Other witnesses testified about Pennichuck's ability and willingness to take over troubled water systems statewide, often with the encouragement of the PUC. Patch Test., Ex. 3002, pp. 5-7, 15-16, 20-23, Cert.Rec. p. 14147; Naylor Test., Ex. 5001, pp. 49-53, Cert.Rec. p. 17043; Ware Test., 9/11/07, p. 62, Cert.Rec. p. 8841.

Merrimack and other witnesses pointed out that Nashua's ownership of PWW would interject a political element into the operation of a water system not to the benefit of those communities that cannot elect those politicians. For instance, former Mayor Bernard Streeter of Nashua testified that he was "not concerned" with the interests of Newmarket or Epping customers of PWW. Streeter Test., 1/10/07, pp. 144-45, Cert.Rec. p. 6784. He and Alderman McCarthy testified that "far-flung" communities like Epping or Newmarket served by PWW might be better off other than under Nashua ownership. Streeter Test., 1/1/07, pp. 142-44, Cert.Rec. p. 6784. The PUC's response was: "It would be inappropriate for us to adopt such a skeptical view of the ability of elected officials to make good decisions." Taking Order, p. 55, N.App. p. 79. That is not how Merrimack sees it as the town next door to Nashua. Merrimack competes with Nashua for industry. As town councilor McCray said: "It would certainly be a concern that [Nashua politicians] were able to control whether or not how we competed for that for the same large corporate client coming to town....". McCray Test. 9/19/07, p. 46, M.App. p. 43. The PUC may think town councilor McCray is a "skeptic", but he is simply being a realist when he testified that Nashua's mayor and aldermen are "elected people, they're always going to cater to

the people that elect them, and no one in Merrimack has a vote in there [Nashua]." McCray Test., 9/19/07, p. 66, M.App. p. 49.

Although the PUC was quite ready to cure defects in Nashua's petition and case by assuming dubious authority to adopt "conditions", it is significant to Merrimack that none of those conditions addresses two major issues of concern for Merrimack: Nashua's sole control over capital expansion of infrastructure for industrial and commercial development in South Merrimack and Nashua's incentive to keep domestic rates artificially low by deferring capital repairs and expansion system wide. Hinch Test., Ex. 4003, pp. 4-7, M.App. p. 37-40.

II. THE PUC LACKS AUTHORITY TO RETAIN JURISDICTION OVER NASHUA TO PROTECT THE INTEREST OF MERRIMACK AND OTHER TOWNS.

In addressing the many concerns raised by Merrimack and other towns, the PUC responded by placing at least nine conditions for Nashua to take PWW's assets. Taking Order, pp. 98-99, N.App., pp. 122-23. Many of those conditions require the PUC to continue to assert jurisdiction over Nashua, including continuing oversight over rates, customer service, DigSafe and the mitigation fund. Id. At the hearing, Nashua's attorney cross-examined town councilor McCray whether the addition of various conditions along with PUC oversight would soften the blow of a Nashua takeover of PWW's system in Merrimack. He testified that it would not. McCray Test., 9/19/07, pp. 61-63, 65-67, M.App. pp. 44-46, 48-50. But, as explained in greater detail by Pennichuck, the PUC thereby exceeded its statutory authority to impose conditions upon a municipality under RSA 38:11, because the enforcement of those conditions requires the PUC to extend its jurisdiction over Nashua, which is forbidden by RSA 362:4.

As a municipality, Nashua is statutorily exempt from PUC regulation as a utility under RSA 362:4, III-a, so long as it does not charge its out of town customers more than a fifteen percent premium over customers living in Nashua. Nashua has confirmed to the PUC that it will

charge out of town customers at the same rate as Nashua customers, thus exercising that exemption. Taking Order, p. 49, 59, N.App., p. 73, 83.⁶ Nashua even argued before the PUC that it was exempt from continuing PUC jurisdiction, except to the extent it consented. Taking Order, p. 59, N.App. p. 83. Since Nashua would be statutorily exempt from PUC jurisdiction, the PUC has no authority to exert continued oversight over Nashua as set forth in the PUC's substantive conditions to its public interest finding. This means that the PUC's review of retail and contract (including Anheuser-Busch) rates in Merrimack likewise would exceed its authority. Likewise, imposition upon Nashua of the PUC's customer service and DigSafe regulations (N.H. Code Admin. R. 800 and 1200) exceeds the PUC's authority.

The PUC was justifiably concerned about Nashua's woefully inadequate proposal, and believed that the public interest could only be met by its continued oversight. With respect specifically to Merrimack and other towns, the PUC answered that

[t]he public interest concern with respect to non-Nashua core customers goes to the fact that they are not citizens of Nashua and therefore lack a voice in Nashua's decisionmaking. The Commission, however, can effectively protect such customers inasmuch as Nashua, to the extent it provides service outside its municipal boundaries, will be regulated by the Commission....

Taking Order, pp. 57-58, N.App. pp. 81-82.

However, the PUC cannot protect Merrimack customers, because the PUC has only "the powers and authority which are expressly granted or fairly implied by statute." *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1066 (1982). *See also, Blair v. Manchester Water Works*,

⁶ RSA 362:4, III-a does not exempt municipalities from PUC jurisdiction to grant geographic franchises for out-of-town service. RSA 374:22 and 26 retain PUC jurisdiction for that single purpose, and in this case the PUC has exercised that jurisdiction, explicitly permitting Nashua to obtain those franchises as a parallel finding to its public interest finding under RSA 38. Taking Order, pp. 26-27, 62, 97, N.App. pp. 50-51, 86, 121. Therefore the PUC's one-shot jurisdiction over Nashua to grant franchises has been or will have been fully exercised by the time of any taking of PWW assets.

103 N.H. 505, 507-508 (1961). The PUC cannot expand its jurisdiction by Nashua's agreement, since its jurisdiction is limited to that granted by statute. *Id.*

The PUC recognizes that its assertion of continued jurisdiction over Nashua may rest on thin ice, but makes the “assumption” that it can do so based upon a broad interpretation of its authority to “set conditions... to satisfy the public interest” in RSA 38:11. *Taking Order*, p. 26, N.App. p. 50. As PWW explained in its brief, that general power to establish conditions does not create any specific power to impose conditions that conflict with the limitations in RSA 362:4 concerning PUC regulation of municipalities. *See, e.g., Sanborn Reg'l Sch. Dist. v. Budget Comm. of Sanborn Reg'l Sch. Dist.*, 150 N.H. 241, 242 (2003) (“[I]n the case of conflicting statutory provisions, the specific statute controls over the more general statute.”). Also, statutes should be read in harmony, where possible. *See, e.g., In re Aldrich*, 156 N.H. 33, 35 (2007) (“We do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme.”). Section 362:4 can be harmonized with section 38:11 by reading the latter as permitting the PUC to impose conditions only when such conditions would not result in the exercise of jurisdiction over municipalities. For instance, the PUC might require the municipality as part of the transaction to purchase a certain amount of pipe inventory from the utility, or to assume a pre-existing maintenance agreement.

Since the substantive conditions requiring PUC continuing oversight to protect Merrimack and other customers after the taking are “prerequisites” to its finding of public interest, and since that oversight exceeds the PUC’s statutory authority, Nashua’s proposed taking without those unauthorized conditions can no longer be in the public interest. This Court has no alternative but to reverse the PUC’s determination of public interest and dismiss Nashua’s case.

III. THE PUC'S FAIR MARKET VALUE DETERMINATION PROPERLY APPLIED THE CONSTITUTIONAL STANDARD OF JUST COMPENSATION.

Another intervenor in the PUC proceedings was the Merrimack Valley Regional Water District (the "District"), the entity to which Nashua states it intends to convey the PWW system following the successful conclusion of Nashua's condemnation effort. Taking Order, p. 41, N.App., p. 65. In its brief, the District attempts to recast the PUC's determination of fair market value, which is a finding of fact, as an error of law by arguing that the PUC's decision was contrary to the constitutional standard of just compensation that must be followed in all eminent domain actions. *See Society Hill at Merrimack Condominium Ass'n v. Town of Merrimack*, 139 N.H. 253, 255 (1994) (decision on fair market value is a finding of fact).

The determination of just compensation in eminent domain is a multi-step process that involves both questions of law and questions of fact. In this case, there is no dispute on the questions of law; the only dispute is the application of the law to the facts in this case, which is undoubtedly a question of fact. All parties in this case agreed, and the PUC properly found, that its valuation decision must provide just compensation to PWW. Taking Order, pp. 63, 82, Cert.Rec. pp. 87, 106. All parties in the case also agreed, and the PUC properly found, that the standard of just compensation in New Hampshire is fair market value. *Id.* All parties also agreed that the PUC correctly defined fair market value as the price that would be arrived through fair negotiations between a willing buyer and a willing seller. *Id.* Once the trier of fact decides the legal standard that should be applied, the second step is to determine the value that results when the legal standard is applied to the facts of the case. Step one (deciding the governing legal standard, which in this case is the definition of fair market value) is a question of law; step two (applying that standard to the facts of the case), is a question of fact. *See Society Hill at Merrimack Condominium Ass'n*, 139 N.H. at 255. Contrary to the District's argument,

the PUC's valuation decision is a finding of fact which is presumed lawful and reasonable (*see* RSA 541:13), and which is typically given "considerable deference," *Southern N.H. Water v. Town of Hudson*, 139 N.H. 139, 142 (1994). Thus, this Court must uphold the PUC's valuation determination if there is any evidence in the record supporting the PUC's decision. *Appeal of Basani*, 149 N.H. 259, 262 (2003).

The District's arguments are based on numerous stunning misconstructions of caselaw. In more than one instance, the cases cited by the District hold exactly the opposite of what the District claims, and actually support the PUC's decision in this case. The very cases cited by the District demonstrate that the PUC's fair market value determination properly applied both the legal definition of fair market value and the constitutional standard of just compensation.

Merrimack is presenting arguments in support of the PUC's valuation because, having participated in the proceedings and viewed the conflicting evidence firsthand, the town agrees with PWW that Nashua's expert testimony on valuation was not impartial, did not follow generally accepted appraisal standards, and was simply not credible. Nashua's valuation was decidedly result-oriented to buttress Nashua's public interest case and not to provide any defensible basis for valuing PWW. For instance, Nashua ignored the cost approach. The PUC noted multiple instances in which Nashua's valuation testimony was not credible or persuasive. For Merrimack, it brings into question the good faith basis of Nashua's petition for taking. *See*, *Hinch Test.* pp.4-7, *M.App.* pp. 38-40.

Given the numerous fundamental flaws in Nashua's valuation evidence, the PUC reached its valuation decision by relying, in large part, on Mr. Reilly's testimony, which was the only credible valuation evidence presented to the PUC. As a municipal entity, Merrimack regularly deals with issues of fair market value, in both condemnation and ad valorem tax matters. Thus,

Merrimack has an interest in ensuring that courts and administrative agencies correctly apply the definition of fair market value, adhere to generally accepted appraisal principles, and scrupulously hold valuation experts to the highest professional standards. The PUC's decision was consistent with all applicable legal standards and is supported by the evidence in the record, and therefore should be upheld.

There is no dispute that the PUC correctly defined fair market value as "the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining." Taking Order, p. 63, N.App. p. 87, *citing Opinion of the Justices*, 131 N.H. 504, 510 (1989). Under this definition, the process of determining fair market value is a hypothetical exercise: the trier of fact must determine which considerations a hypothetical willing seller and hypothetical willing purchaser would take into account in negotiating the purchase price for the system. As with all hypothetical questions, a trier of fact tasked with determining fair market value is entitled to rely upon expert testimony. *Pridham v. Cash & Carry Bldg Center, Inc.*, 116 N.H. 292, 298 (1976) (trier of fact may rely upon qualified expert's opinion as to hypothetical questions). In this case, the parties' valuation experts presented conflicting opinions on the single issue that both Nashua and the District challenge on appeal: the determination of potential hypothetical buyers the PUC employed as part of the income approach component of its overall valuation.

To determine the fair market value of PWW, the PUC considered the three generally accepted valuation approaches: (1) the sales, or market comparison approach; (2) the income approach; and (3) the cost, or asset-based approach. The PUC ultimately determined that the sales approach should not be used due to a lack of comparable sales. The PUC separately

computed a value for the PWW system under both the income approach and the cost approach, and reached its overall fair market value conclusion by giving 60% weight to its cost approach value and 40% to its income approach value, as did Mr. Reilly. Taking Order, pp. 82-96, N.App. p. 106-120.⁷ The hypothetical buyer determination that is the basis of Nashua's valuation appeal and the subject the District's brief was one component within the PUC's income approach calculation.

The income approach, which assumes that the value of a business is equal to the present worth of the future income that business can generate over time, is premised upon the general appraisal concept of the hypothetical buyer. Taking Order, p. 74, N.App. p. 98. Because the goal when determining fair market value is to conclude the value the business will bring on the market, the appraiser must determine the likely pool of hypothetical buyers for that business if it were placed for sale in the market. Both PWW's and Nashua's valuation experts agreed that the pool of hypothetical buyers for the PWW system includes two types of entities: private, regulated utility companies, and non-regulated municipal, or government entities. Both experts also agreed that the PWW system would have greater income-generating potential if owned by a non-regulated government entity than in the hands of a private, regulated utility company. This greater income-generating potential, both experts agreed, is due in large part to certain advantages, or synergies, government entities have, including: lower taxes; lower-cost

⁷ The PUC agreed with Mr. Reilly that general appraisal practice is to give the cost (asset) approach the most weight in valuing public utilities, because utilities are "special purpose properties" with a limited market, and the cost approach is the only method which discretely identifies and fairly values all of the utility's tangible and intangible property. The income approach, while still relevant, is less data intensive than the cost approach and only indirectly values the utility's tangible and intangible assets by assuming they are reflected in the utility's overall income. Taking Order, pp. 81, 93, N.App. pp. 105, 113. The PUC noted that Mr. Sansoucy did not do a full cost approach himself, and did not challenge most of Mr. Reilly's cost approach, choosing instead to abide by his pre-engagement promise and simply give the cost approach no weight in his overall valuation conclusion, even though he acknowledged the cost approach is appropriate to rely upon for special purpose properties such as public utilities. Mr. Sansoucy's overall valuation conclusion was based 50% on the income approach, and 50% on the sales approach. Taking Order, p. 66, N.App. p. 90.

financing; and ability to set utility rates without PUC regulation. These advantages or synergies are “widely known in the water service industry” and explain “why 80 percent of all water utilities in the United States are owned by municipalities.” Reilly Test., 9/12/07 p. 76, Cert.Rec. p. 8598.

Although the experts agreed on the two different types of entities present in the pool of hypothetical buyers for the PWW system, they presented conflicting opinions on the impact the government entity buyers would have on the market price. Mr. Reilly opined that hypothetical purchasers would consider the competing government entity buyers relevant, and therefore would bid higher to acquire the system; Nashua’s experts opined that government entity buyers would be present, but would have zero impact on market price. Ultimately, the PUC found Mr. Reilly’s testimony more credible, and the PUC’s determination of the weight and credibility of the evidence may not be disturbed on appeal. *Legislative Utility Consumers’ Council v. Public Service Co.*, 119 N.H. 332, 340 (1979) (Court may not sit as a trier of fact in appeals from the PUC, and must instead uphold the PUC’s factual determinations if supported by expert testimony, even if the Court would have reached a different result).

A. This Court’s Ruling in Opinion of the Justices Supports the PUC’s Fair Market Value Determination.

The District cites *Opinion of the Justices*, 131 N.H. 504 (1989), as holding that it is unconstitutional for the trier of fact to “ascribe what the market would consider as an artificial significance” to the use the condemnor might intend for the property. 131 N.H. at 510. The District argues that the PUC’s adoption of Mr. Reilly’s opinion on the influence of hypothetical government buyers is an “artificial significance” that would not be considered in the marketplace. Ironically, the “artificial significance” the court found unconstitutional in *Opinion of the Justices* is the exact same presumption that Nashua’s expert employed in Nashua’s income

approach, and the exact same presumption the District urges this Court to adopt as the hard and fast rule of just compensation for public utility condemnations. The “artificial significance” the *Opinion of the Justices* court found unconstitutional was the presumption that public utility property be valued by assuming the property will remain in the hands of a regulated buyer. This is precisely what Nashua’s experts did in this case: they used PWW’s own regulated income stream and regulated rate-of-return capitalization rate to compute value under the income approach.⁸

The *Opinion of the Justices* case involved the constitutionality of proposed electric utility legislation that contained a “conclusive presumption” that just compensation be determined by valuing the property as a regulated utility. 131 N.H. at 505. The *Opinion of the Justices* court found that conclusive presumption unconstitutional, because it impermissibly limited the trier of fact’s valuation, and could, in certain circumstances, result in a determination that was less than fair market value:

If a different potential usage of the property was more generously valued by the market, applying the presumption would impermissibly limit the valuation, and considering an irrelevant regulatory effect would impermissibly depress it. In each such case the required application of the market value standard would to some degree be thwarted by ascribing what the market would regard as an artificial significance to the use that the utility had made of the property, see *Olson v. United States supra*, or to the use that the energy authority might intend, see *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459, 460, 54 L.Ed. 725 (1910).

⁸ The District’s brief exemplifies contempt for the concept of fair market value, essentially arguing that governmental entity buyers are not likely to affect fair market value because they can condemn what they want. “Indeed, it would be irrational for a municipality to pay a premium when negotiating with a utility such as PWW, or to engage in a bidding war for its assets, for the precise reason that municipalities have the power of eminent domain at their disposal to obtain property which a utility refuses to sell to them at a fair price. See, R.S.A. 38:10.” District Brief, p. 23.

Opinion of the Justices, 131 N.H. at 509-510. The *Opinion of the Justices* ruling does not contradict the PUC's valuation of PWW; it supports it. This Court held in *Opinion of the Justices* that just compensation is defined as fair market value, which must be based on whatever considerations the hypothetical market would consider important. *Id.* The *Opinion of the Justices* Court also specifically rejected a per se rule that would limit the valuation analysis by presuming the marketplace would only consider regulated buyers. *Id.* Thus, this Court has already specifically rejected the very rule the District now proposes the Court adopt. This Court, consistent with other jurisdictions, has steadfastly refused to proscribe hard and fast rules for utility valuations and instead held that, in order to preserve the constitutional guarantee of just compensation, the trier of fact must be free to consider all relevant evidence on a case-by-case basis. In the case of public utilities, that means the court must consider the impact of non-regulated government entity buyers. *Opinion of the Justices*, 131 N.H. at 509-510; *see also Southern New Hampshire Water*, 139 N.H. at 142 (rejecting the water utility's contention that the PUC valuation "fail[ed] to reflect the full impact of PUC regulation" and requiring the valuation to account for non-regulated municipal buyers); *Washington Suburban Sanitary Comm'n v. Utilities, Inc. of Maryland*, 775 A.2d 1178 (Md. 2001) (noting that the experts had testified that hypothetical government purchasers were included in the relevant market); *Massachusetts-American Water Co. v. Grafton Water District*, 631 N.E.2d 59, 61 (Mass. App. Ct. 1994) (stating that it was not error to consider the existence of unregulated buyers in valuing a utility); *Dade County v. Gen. Waterworks Corp.*, 267 So.2d 633, 641 (Fla. 1972) (holding that capitalization of public utility's regulated earnings did not result in fair market). In this case, the PUC found that the income approach performed by Nashua's experts improperly assumed a regulated buyer, and that Mr. Reilly's was the only income approach analysis that properly accounted for impact of

hypothetical government entity buyers, as required by New Hampshire law. This Court may not reweigh the evidence or substitute its judgment for that of the PUC. *Appeal of O'Dell*, 140 N.H. 484, 498 (1995) (the Court's task in reviewing agency factual determinations is not to determine whether the Court would have found differently, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record).

B. The PUC's Valuation was a Market Valuation, Not a Valuation of the Worth of the PWW System to Nashua.

The District argues that the PUC, by relying on Mr. Reilly's opinion as to the impact of potential municipal purchasers, improperly premised its valuation on the value of the PWW system to Nashua, rather than the value PWW would bring on the market. The District's entire argument is based on a gross misconstruction of the PUC's ruling, and Reilly's opinion, and ignores the clear explanation the PUC provided as to why it adopted Reilly's opinion on the impact of hypothetical municipal buyers. The District's argument creates a straw man, and then knocks him down. The PUC did not use a municipal income stream and municipal capitalization rate in its income approach because it was appraising the value of the PWW system to Nashua. Rather, as it expressly stated in the opinion, it used municipal-based numbers in its income approach because the PUC specifically found those municipal numbers properly reflected the range of prices for the PWW system in the marketplace. *Taking Order*, pp. 89-91, N.App. pp. 113-115.

The District argues that the PUC's income approach should have capitalized PWW's income, because according to the District, PWW's lost income, and not fair market value, should be the proper measure of just compensation, essentially arguing that rate base is fair market value. The District's argument is directly contrary to the same case the District relies upon earlier in its own brief. In *Opinion of the Justices*, this Court held that the measure of just

compensation is the fair market value of the property rights being condemned. 131 N.H. at 505. In this case, PWW did not merely lose the income it could generate from the PWW system, but rather PWW, as the fee owner of the PWW system, lost the full fair market value of the assets, i.e., the full price the assets would bring to the marketplace. The case cited by the District as upholding the rule that value should be measured by what the property owner lost involved a situation where the property owner held less than the full fee ownership of the property being condemned, and therefore did not lose the fair market value of the property. *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (holding that fair market value was not appropriate measure of just compensation where none of the easement holders held the property in fee, and therefore none could be said to have lost the full fair market value of the fee due to the condemnation). Here fair market value does compensate PWW for what it lost, i.e., the full price the entire system could bring on the marketplace. The District's proposed standard of value – the amount of income the PWW system generated specifically for PWW – simply ignores the fact that PWW could place the utility for sale in the marketplace at any time. The District's "PWW's lost-income" standard also ignores the fact that, as demonstrated by the evidence presented to the PUC and as this Court previously recognized in *Opinion of the Justices* and *Southern N.H. Water*, the PWW system would bring a price on the market that is higher than the value of the income it generates in PWW's hands. Because the District's proposed "PWW's lost income" standard does not provide PWW with the full fair market value of its system, the standard does not provide just compensation, and is therefore unconstitutional. *Opinion of the Justices*, 131 N.H. at 505.

C. The Onondaga Water Case Also Rejected the Very Rule the District Proposes this Court Adopt in this Case.

Continuing with its complete disregard for the market basis of the PUC's hypothetical buyer determination, the District argues that the PUC's valuation results in a windfall to PWW because it allows PWW, a regulated buyer, to reap the benefits of municipal ownership. Again, the PUC specifically found that using a municipal-based capitalization rate in the income approach was appropriate only because those municipal rates reflected the range of prices that would be paid in the market. *Taking Order*, pp. 89-91, N.App. pp. 113-115. The District also cites a 1955 New York case, *Onondaga County Water Authority*, 139 N.Y.S.2d 755 (N.Y. App. Div. 1955), in support of the proposition that public utility value may not be measured by capitalizing the income the system will generate in the condemnor's hands. The District has grossly misconstrued the holding in *Onondaga*, which has no discussion whatsoever on the impact of hypothetical municipal buyers in the marketplace, and in actuality provides additional support for the PUC's valuation in this case.

In *Onondaga*, the only valuation proof the condemnor offered was its investment advisor's calculation of how much the condemnor could afford to pay, taking into consideration the condemnor's bond issuance and other financing limitations. 139 N.Y.S.2d at 766. The Court noted that the investment advisor admitted his valuation number "does not represent what this property is worth, but at a figure which the Onondaga Water Authority can afford to pay." *Id.* The court rejected the condemnor's ability-to-pay proof as irrelevant to the determination of fair market value, noting that "limitations, practical or otherwise, upon the [condemnor's] availability of the wherewithal to provide 'just compensation' do not constitute the measure of that compensation." *Id.* In this case, Nashua's expert, Mr. Sansoucy, promised Nashua, before he was even hired, that he would value the PWW system under a "no net harm" standard, which

would ensure that the valuation would be a number PWW could afford to pay without raising water rates. Ex. 3197A p. 14, Cert.Rec. p. 16618. Mr. Sansoucy's "no net harm" standard, like the ability-to-pay proof submitted in *Onondagha*, is completely irrelevant to the determination of fair market value, and thus the *Onondagha* case provides further support of the PUC's determination that Reilly's opinion was more credible than Sansoucy's.

The *Onondagha* case also provides additional support for the PUC's rejection of the Nashua's experts' income approach. In *Onondagha*, the Court specifically rejected the very rule that the District proposes this Court adopt – a rule mandating use of a regulated rate of return as the capitalization rate for valuing public utilities under the income approach. The *Onondagha* Court correctly noted that if the income approach is completed using a regulated rate of return, then the valuation conclusion under that approach will always approximate the utility's rate base, which the Court found does not provide just compensation: "The complete lack of similarity between the original cost used in rate-making and the just compensation for the purpose of taking [in eminent domain] needs no comment." 139 N.Y.S.2d at 768. Similar to the *Onondagha* court, the PUC specifically found in this case the income approach performed by Nashua's experts, by employing a regulated rate of return capitalization rate, reached a result approximately equal to PWW's rate base, which the PUC found was not representative of fair market value. Taking Order, pp. 109-110, N.App. pp. 133-34.

CONCLUSION

This Court should hold that, since Nashua's proposed taking cannot meet the public interest without continuing jurisdiction of the PUC beyond its authority, the order of the PUC should be reversed. Alternatively, the Court should remand the case because the PUC failed to apply the required constitutional balancing approach to public interest requirements, in light of all the evidence submitted. Alternatively, if the Court does not reverse the PUC's public interest

ruling, the Court should uphold the PUC determination of the fair market value of the PWV system.

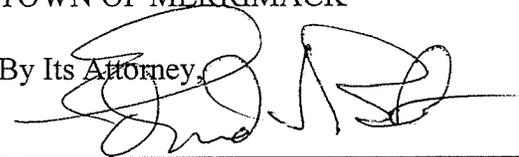
REQUEST FOR ORAL ARGUMENT

Merrimack requests to be heard in oral argument not to exceed 15 minutes. Mr. Boutin will argue.

Respectfully submitted,

TOWN OF MERRIMACK

By Its Attorney,

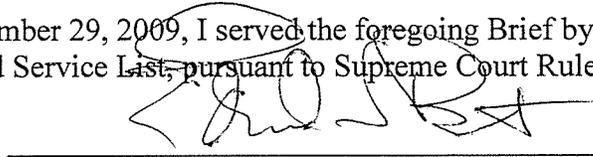


Date: September 29, 2009

Edmund J. Boutin No. 59
Boutin & Altieri, P.L.L.C.
P.O. Box 1107
Londonderry, NH 03053

Certificate of Service

I hereby certify that on September 29, 2009, I served the foregoing Brief by first class mail, postage prepaid, to the attached Service List, pursuant to Supreme Court Rule 26(2).



Service List

Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

Michael Delaney, Attorney General
Office of Attorney General
33 Capitol Street
Concord, NH 03301-6397

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301

Robert Upton, II, Esquire
Upton & Hatfield
23 Seavey Street, P.O. Box 2242
North Conway, NH 03860

Meredith A. Hatfield, Esquire
Office of Consumer Advocate
21 S. Fruit Street, Suite 18
Concord, NH 03301

Bryan K. Gould, Esquire
Brown, Olson & Gould
2 Delta Drive, Suite 301
Concord, NH 03301

Eugene F. Sullivan, III, Esquire
11 South Street
Concord, NH 03301

Laura A. Spector, Esquire
Mitchell & Bates, PA
25 Beacon St., East
Laconia, NH 03246

Town of Hollis
Mark Johnson
7 Monument Square
Hollis, NH 03049-6121

Nashua Reg. Planning Commission
Steven Williams
115 Main St., P.O. Box 847
Nashua, NH 03061

Merrimack River Watershed Council, Inc.
Christine Tabak, Executive Director
600 Suffolk Street, 5th Floor
Lowell, MA 01854

Thomas J. Donovan, Esquire
McLane, Graf, Raulerson & Middleton P.A.
11 South Main St., Suite 500
Concord, NH 03301

Claire McHugh
61 Dublin Avenue
Nashua, NH 03063-2045

Marcia A. B. Thunberg, Esquire
NH Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301-2429

Business & Industry Association
Michael Licata
122 N. Main Street
Concord, NH 03301

William R. Drescher, Esquire
Drescher & Dokmo
21 Emerson Road, P.O. Box 7483
Milford, NH 03055-7483

Jay L. Hodes, Esquire
Hage & Hodes P.A.
440 Hanover Street
Manchester, NH 03104

Town of Londonderry
David Caron
268B Mammoth Road
Londonderry, NH 03053

Stephen J. Judge, Esquire
Wadleigh, Starr & Peters, PLLC
95 Market Street
Manchester, NH 03101

Daniel J. Mullen, Esquire
Ransmeier & Spellman, PA
One Capitol St., P.O. Box 600
Concord, NH 03302-0600

Barbara Pressly
11 Orchard Avenue
Nashua, NH 03060

ADDENDUM TO BRIEF OF TOWN OF MERRIMACK

Statutes Involved in This Case

RSA 38:1-14	p. 27
RSA 362:4	p. 31
RSA 374:22, 26	p. 32
RSA 541:13	p. 33

Other Documents

Testimony of Richard Hinch. (Ex. 4003, Cert.Rec. p. 16994)	p. 34
Testimony of David McCray (9/19/07, Cert.Rec. p. 9491)	p. 41

REVISED STATUTES ANNOTATED

38:1 Definitions. – In this chapter:

I. "Commission" means the public utilities commission, unless the context otherwise indicates.

II. "Utility" means any public utility engaged in the manufacture, generation, distribution, or sale of electricity, gas, or water in the state.

III. "Municipality" means any city, town, unincorporated town, unorganized place, or village district within the state.

IV. "Municipal water company" means any water distribution system or water supply utility, owned or operated by a municipality, whether as a municipal department, separate company, or otherwise.

V. "Regional water district" means any regional water district formed pursuant to RSA 53-A, for the purpose of providing and assuring the provision of an adequate and sustainable supply of clean water.

38:2 Establishment, Acquisition, and Expansion of Plants. – Any municipality may:

I. Establish, expand, take, purchase, lease, or otherwise acquire and maintain and operate in accordance with the provisions of this chapter, one or more suitable plants for the manufacture and distribution of electricity, gas, or water for municipal use, for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized, or directed by the commission.

II. For these purposes, take, purchase, and hold in fee simple or otherwise lease or otherwise acquire and maintain any real or personal estate and any rights therein, including water rights.

III. Do all other things necessary for carrying into effect the purposes of this chapter.

IV. Excavate and dig conduits and ditches in any highway or other land or place, and erect poles, place wires, and lay pipes for the transmission and distribution of electricity, gas, and water in such places as may be deemed necessary and proper.

V. Change, enlarge, and extend the same from time to time when the municipality shall deem necessary, and maintain the same, having due regard for the safety and welfare of its citizens and security of the public travel.

38:2-a Establishment, Acquisition, and Expansion of Plants; Regional Water Districts. – Any regional water district may:

I. Establish, expand, purchase, lease, or otherwise acquire and maintain and operate in accordance with the provisions of this chapter, one or more suitable plants for the manufacture and distribution of water for the use of municipalities that are members of the regional water district and for such other purposes as may be permitted, authorized, or directed by the commission.

II. For these purposes, purchase and hold in fee simple or otherwise lease or otherwise acquire and maintain any real or personal estate and any rights therein, including water rights.

III. Do all other things necessary for carrying into effect the purposes of this chapter.

IV. Excavate and dig conduits and ditches in any highway or other land or place, and erect poles, place wires, and lay pipes for the distribution of water in such places as may be deemed necessary and proper.

V. Change, enlarge, and extend the same from time to time when the regional water district shall deem necessary, and maintain the same, having due regard for the safety and welfare of the citizens of the member municipalities and security of the public travel.

VI. No regional water district shall have the authority to take property by eminent domain.

38:3 By Cities. – Any city may initially establish such a plant after 2/3 of the members of the governing body shall have voted, subject to the veto power of the mayor as provided by law, that it is expedient to do so, and after such action by the city council shall have been confirmed by a majority of the qualified voters at a regular election or at a special meeting duly warned in either case. Such confirming vote shall be had within one year from the date of the vote to establish such a plant, and if favorable, shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

38:3-a By Regional Water Districts. – Any regional water district may initially establish such a plant after 2/3 of the members of the governing body of the district shall have voted affirmatively, and a majority of the constituent municipalities of the district by a majority vote of their legislative bodies have confirmed that vote. Such confirming vote shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the constituent municipalities within 2 years thereafter.

38:4 By Towns or Village Districts. – Any town or village district may initially establish such a plant after 2/3 of all the voters present and voting at an annual or special meeting, duly warned in either case, have voted by ballot with the use of the checklist that it is expedient to do so. A favorable vote to establish such a plant shall create a rebuttable presumption that such action is in the public interest. If such vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

38:5 By Unincorporated Towns and Unorganized Places. – Any unincorporated town or unorganized place may initially establish such a plant after 2/3 of the members of the county convention shall have voted that it is expedient to do so, and, if there are any registered voters in that unincorporated town or unorganized place, after such action by the county convention shall have been confirmed by a majority of the qualified votes in that unincorporated town or unorganized place at a regular election or at a special meeting duly warned in either case. Such confirming vote shall be had within one year from the date of the vote to establish such a plant, and if favorable, shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

38:6 Notice to Utility. – Within 30 days after the confirming vote provided for in RSA 38:3, 38:4, or 38:5 the governing body shall notify in writing any utility engaged, at the time of the vote, in generating or distributing electricity, gas, or water for sale in the municipality, of the vote. The municipality notifying any utility in such manner 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, pursuant to RSA 38:11

as determined by the commission. The notice to such utility shall include an inquiry as to whether the utility elects to sell, in the manner hereinafter provided, that portion of its plant and property located within or without the municipality which the municipality has identified as being necessary for the municipal utility service.

38:7 Reply by Utility. – The utility shall reply to the inquiry provided for in RSA 38:6 by delivering its answer in writing to the governing body within 60 days of the receipt of the inquiry. If the reply is in the negative, or if the reply is not made within the 60 days, the utility thereby forfeits any right it may have had to require the purchase of its plant and property by the municipality, and the municipality may proceed to acquire the plant as provided in RSA 38:10. If the reply is in the affirmative, the utility shall submit the price and terms it is willing to accept for all of its plant and property identified by the municipality in its inquiry, together with a detailed schedule of such plant and property with proper evidence of title. All of the plant and property identified by the municipality shall at all reasonable times thereafter be open to the examination of the officers and agents of the municipality and others charged with the duty of determining the fair value of the property.

38:8 By Agreement. – The governing body of a municipality may negotiate and agree with the utility upon the price to be paid for such plant and property; provided, however, that such agreement shall not be binding upon the municipality until ratified pursuant to RSA 38:13.

38:9 Valuation. –

I. If the municipality and the utility fail to agree upon a price, or if it cannot be agreed as to how much, if any, of the plant and property lying within or without the municipality the public interest requires the municipality to purchase, or if the schedules of property submitted in accordance with RSA 38:7 are not satisfactory, either the municipality or the utility may petition the commission for a determination of these questions.

II. The commission, after proper notice and hearing, shall decide the matters in dispute.

III. When required to fix the price to be paid for such plant and property, the commission shall determine the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner. In the case of electric utilities, such amount shall be limited to the value of such plant and property and the cost of direct remedial requirements, such as new through-connections in transmission lines, and shall exclude consequential damages such as stranded investment in generation, storage, or supply arrangements which shall be determined as provided in RSA 38:33.

IV. The expense to the commission for the investigation of the matters covered by the petition, including the amounts expended for experts, accountants, or other assistants, and salaries and expenses of all employees of the commission for the time actually devoted to the investigation, but not including any part of the salaries of the commissioners, shall be paid by the parties involved, in the manner fixed by the commission.

38:10 Construction or Condemnation. – If the utility shall have replied to the inquiry provided for in RSA 38:7 in the negative or if it shall have failed to reply within the time prescribed in RSA 38:7, the municipality, in the event that it shall have passed the vote or votes required in RSA 38:3, 38:4, and 38:5 and after the commission upon proper notice and hearing has determined that it is in the public interest to do so, may construct a municipal plant or may take

all or any portion of such private plant and property by condemnation, paying therefor just compensation determined in the manner provided in RSA 38:9.

38:11 Public Interest Determination by Commission. – When making a determination as to whether the purchase or taking of utility plant or property is in the public interest under this chapter, the commission may set conditions and issue orders to satisfy the public interest. The commission need not make any public interest determinations when the municipality and utility agree upon the sale of utility plant and property.

38:12 Expansion of Existing Municipals. – A municipality that has an existing municipal plant may expand such plant or may purchase or take, in the manner prescribed in RSA 38:6-11 and RSA 38:33, all or a portion of such plant owned by a utility which is necessary for expanded municipal utility service. Such action shall not require any further vote under RSA 38:3, 38:4, or 38:5.

38:13 Ratification. – Within 90 days of the final determination of the price to be paid for the plant and property to be acquired under the provisions of RSA 38:8, 38:9 or 38:10 and any consequential damages under RSA 38:33, the municipality shall decide whether or not to acquire the plant and property at such price by a vote to issue bonds and notes pursuant to RSA 33-B as may be necessary and expedient for the purpose of defraying the cost of purchasing or taking the plant, property, or facilities of the utility which the municipality may thus acquire. The municipality is authorized to hold a special meeting, if necessary, to take such vote without having to petition the superior court for permission to do so. An affirmative vote under RSA 33-B shall constitute ratification on the part of the municipality of the final determination of the price to be paid for the plant and property under the provisions of RSA 38:8, 38:9, or 38:10 and any consequential damages under RSA 38:33. If the money is so raised it shall immediately be paid to the utility, which shall thereupon execute a proper conveyance and surrender the plant and property to the municipality. If the ratifying vote provided for in this section shall be in the negative, no other action under this chapter shall be had during the ensuing period of 2 years.

38:13-a Aggregate Municipal Revenue Bonds. – If the commission orders divestiture of generation facilities in the implementation of electric utility restructuring under RSA 374-F, any municipality which has voted to acquire a hydro-electric facility as provided in RSA 38 may jointly issue with any other municipality which has also voted to acquire a hydro-electric facility as provided in RSA 38 municipal revenue bonds and notes pursuant to RSA 33-B as may be necessary and expedient for the purpose of defraying the cost of purchasing or taking such hydro-electric generation facilities. Such municipal revenue bonds or notes may be in the aggregate of the total cost of purchasing or taking such generation facilities as set forth in RSA 33-B:3 and may be issued in the joint names of any such municipalities in accordance with their respective interests therein. In all other respects, the provisions of RSA 33-B shall apply to the issuance of such municipal revenue bonds and notes.

38:14 Operation of Plant. – A municipality, which has so acquired the plant, property, or facilities of a public utility in any other municipality, may operate within such other municipality as a public utility with the same rights and franchises which the owners of such outlying plant, as purchased, would have had such purchase not been made. The operation by a municipality

outside its own limits shall be subject to the jurisdiction of the commission except as provided in RSA 362. If the outlying municipality shall itself vote to establish a municipal plant all the provisions of this chapter shall be binding as to such determination.

362:4 Water Companies, When Public Utilities. –

I. Every corporation, company, association, joint stock association, partnership, or person shall be deemed to be a public utility by reason of the ownership or operation of any water or sewage disposal system or part thereof. If the whole of such water or sewage disposal system shall supply a less number of consumers than 75, each family, tenement, store, or other establishment being considered a single consumer, the commission may exempt any such water or sewer company from any and all provisions of this title whenever the commission may find such exemption consistent with the public good.

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.

III. A municipal corporation furnishing sewage disposal services shall not be considered a public utility under this title:

(a) If it serves customers outside its municipal boundaries, charging such customers a rate no higher than that charged to its customers within the municipality, and serves those customers a level of sewage disposal service equal to that served to customers within the municipality. Nothing in this section shall exempt a municipal corporation from the franchise application requirements of RSA 374.

(b) If it supplies bulk sewage disposal services pursuant to a wholesale rate or contract to another municipality, village district, or water precinct.

III-a. (a) 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 costs 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. Nothing in this paragraph shall exempt a municipal corporation from the franchise application requirements of RSA 374.

(2) If it supplies bulk water pursuant to a wholesale rate or contract to another municipality, village district, or water precinct. This subparagraph shall not apply to bulk water contracts which were in effect before July 23, 1989, or to the renewal of said bulk water contracts.

(b) The commission may exempt a municipal corporation from any and all provisions of this title except the franchise application requirements of RSA 374, and may authorize a municipal corporation to charge new customers outside its municipal boundaries a rate higher than 15 percent above that charged to its municipal customers, if after notice and hearing, the commission finds such exemption and authorization to be consistent with the public good. The commission may not authorize a municipal corporation to charge existing customers outside its municipal boundaries a rate higher than 15 percent above that charged to its municipal customers until any rate agreements in effect for those customers on May 13, 2002 shall have expired.

(c) A municipal corporation's authority to charge higher rates for new customers outside of its municipal boundaries shall be applied prospectively to new customers taking water service

provided by means of a main extension or an expansion of the municipal corporation's system after the effective date of this paragraph.

(d) A municipal corporation's authority to charge higher rates for existing customers outside of its municipal boundaries shall not become effective until any rate agreements in effect on May 13, 2002 have expired.

(e) A municipal corporation serving customers outside of its municipal boundaries and charging a rate no higher than 15 percent above that charged to its municipal customers prior to July 1, 2002, may also be exempted from regulation as a public utility, except for the franchise application requirements of RSA 374, if after notice and hearing, the commission finds such exemption and authorization to be consistent with the public good.

IV. (a) Any customer of a water utility shall have the right to terminate water service and secure water from an alternate source, if the customer can demonstrate the ability to comply with the requirements of RSA 485-A:29 and RSA 485-A:30-b, and the administrative rules adopted to implement these sections.

(b) Any covenant in a deed or contract that restricts the right to terminate water service from a water utility or in any way limits that right, shall be void as against public policy.

V. No property owner shall be required to connect to a municipal corporation furnishing water, provided such property owner can demonstrate the ability to comply with the requirements of RSA 485-A:29 and RSA 485-A:30-b.

VI. (a) For purposes of this chapter, a municipal corporation shall include a regional water district.

(b) During the initial 4 years of its operation, if a regional water district seeks to alter rates other than in a manner that uniformly impacts all customers within the district, any municipality that is a member of the regional water district may seek commission review of the proposed rate change. In order for the proposed rate change to take effect, the commission must determine that the proposed rates are cost-based and that they are not unduly discriminatory.

(c) A regional water district shall adopt and enforce quality of water service standards consistent with the commission's administrative rules.

(d) With respect to regional water districts, the 15 percent benchmark employed in this section shall be calculated in relation to an average of the regional water district's relevant rates as determined by the public utilities commission.

VII. (a) A homeowners association, including but not limited to a condominium unit owners association, shall not be considered a public utility under this title by virtue of providing water service if:

(1) The service is furnished only to members of the association or the occupants of their residential units; and

(2) The association is organized on a not-for-profit basis and is democratically controlled by the owners of the residential units and not the developer or subdivider thereof.

(b) Such a homeowners association is one consumer for purposes of paragraph I, and its individual members or their lessees shall not be treated as individual consumers.

374:22 Other Public Utilities. –

I. No 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.

II. No permission or approval under this section shall be required to be obtained by a foreign electric utility as defined in RSA 374-A:1 in connection with its participation in an electric power facility as defined in said section where the electric utility having the largest financial interest therein and the utility or utilities having primary responsibility for the construction or operation of the facility are domestic electric utilities as defined in said section or have obtained such permission.

III. 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.

374:26 Permission. – The commission shall grant such permission whenever it shall, after due hearing, find that such engaging in business, construction or exercise of right, privilege or franchise would be for the public good, and not otherwise; and may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest. Such permission may be granted without hearing when all interested parties are in agreement.

541:13 Burden of Proof. – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

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

Docket No. DW 04-048

TESTIMONY OF RICHARD HINCH

Q: Please state your name and public office.

A: My name is Richard Hinch, and I serve as chairperson of the Merrimack Board of Selectmen, a five member board which serves as the governing body of the Town of Merrimack ("Merrimack")

Q: What is the reason for your testimony?

The Town is quite concerned that the Commission closely scrutinize the proposed taking of the Pennichuck Water Company ("PWW") by the City of Nashua. PWW has been a valued corporate citizen. It employs several Merrimack residents. The Town's largest employer is Anheuser-Busch, with nearly 800 employees. It accounts for 15% of PWW's average daily flow of water distribution. With the Merrimack Village District and citizens of Merrimack, this amounts to nearly 20% of PWW's average daily flow. Merrimack's prime industrial zone is in the PWW franchise. I am particularly concerned about the following issues.

First, I am concerned that the Commission will review this as a zero sum game. This will involve an unstated assumption that municipal ownership is better and that the whole public good issue is nothing but an argument among municipalities. If so, staff will see this as merely a political decision.

[1]

However, Merrimack has a lot at stake. Merrimack sees in Nashua's pre-filed testimony, and in the defects it perceives in the Merrimack Valley Regional Water District Charter ("Charter"), severe problems which may not be resolvable. What is presently known is that PWW is a well-managed water utility with reasonable rates, by all accounts. It will have normal demands for foreseeable rate increases, involving capital improvements and a decent rate of return on its investment. What is unknown is whether a municipal utility, heavily weighted by Nashua's municipal interests, is a viable replacement for a known quantity. The Charter raises the specter of overbearing Nashua control of capital investment and rate setting, as well as where, when and how to place capital improvements. There is the additional question of whether Nashua or the Merrimack Valley Regional Water District ("District") will have the wherewithal financially to even equal PWW's performance.

The Commission has a vital role that Merrimack is depending on it to perform. The District seems to take the position that all it has to do is demonstrate that it will do no worse as a water utility than PWW does. If that is the District's ambition, the public good has been ignored, since the test should be whether the District can be a long-term improvement and how. PWW has a demonstrated ability to do the utility business. The District bears the burden of showing why this is not enough.

Merrimack has a more significant interest than other non-Nashua towns. As noted above, the combined Merrimack consumption is about 20% of average daily flow. Merrimack is a community that has its own water district which wheels PWW water through to consumers in Amherst and Bedford. The Anheuser-Busch plant employs 800 people in Merrimack. Based on prefiled testimony, Nashua has declined to respond to

[2]

questions as to whether it would honor its existing special contract with Anheuser-Busch, a contract that, in predecessor form, lured the brewery to New Hampshire.

This case affects Merrimack's important interests in at least four ways. First, PWW is the public water supplier for the southeasternmost portion of Merrimack. Its customers include important Merrimack businesses, employers and taxpayers such as Anheuser-Busch, Nashua Corporation, BAE Systems, and Brookstone. PWW serves over 300 residential customers in that part of Merrimack. The town is also a customer, and PWW provides fire protection service (i.e. hydrants) in sections of Merrimack. Each of these customers is part of PWW's core system, i.e. all of the water receives treatment at the Nashua treatment plant. Merrimack is concerned that these customers receive high quality water service at a reasonable price. Second, Pennichuck Brook forms a portion of Merrimack's border with Nashua, and part of the watershed and PWW's water supply is located in Merrimack. Merrimack therefore has a responsibility for maintaining the quality of that watershed. Third, as previously stated, about 20 percent of the daily flow from PWW's core system is delivered to and consumed by Merrimack customers. Because of this, Merrimack, more so than any other town, has a vital economic and legal stake in this proceeding. Fourth, since 1990 or so, PWW has supplied an emergency connection to the Merrimack Village District ("MVD") water system, which serves much of Merrimack. That emergency connection is vital when (as has happened in the past) the MVD water sources become contaminated.

Q: Does Merrimack believe that it would be in the public interest of Merrimack residents, businesses and taxpayers for Nashua to take PWW's assets?

[3]

A: No. Merrimack has been historically and is well served today by PWW, providing good quality water service at a reasonable price. Merrimack does not have the confidence that Nashua could provide that same good level of service, based upon the evidence Nashua has presented. Merrimack also worries that Nashua will favor its own residents in terms of rates and capital investments, at the expense of Merrimack residents and businesses. I am concerned that Nashua cannot be counted on in the future to act in a manner that would give appropriate weight to the interests of Merrimack businesses and residents. Currently, Merrimack customers are billed at the same rate as Nashua customers, and receive the same consideration in terms of new connections. Merrimack remains insecure at this point about ownership of the water system by Nashua; especially since Nashua's water operations would likely become exempt from Commission oversight should Nashua and/or the District take over PWW. Merrimack's citizens have not voted for municipalization of the water system, and we are not comfortable with Nashua voters and elected officials making decisions that would directly affect Merrimack water customers.

Merrimack also reiterates its concern that considering the public good in a vacuum from realistic valuation evidence begs the central question of a public good determination. The question is simple. Given the economics of this taking, can Nashua, or a regional water district, provide long-term service and capital improvements for this water system, while maintaining reasonable rates? As a regulated entity, Merrimack presumes that this regulation will ensure, as much as possible, that capital needs are met and that rates are realistically balanced against those needs. To date there has been no testimony by Nashua, other than questionable prefiled testimony, which is based upon

[4]

naked assumptions, as to how much the acquisition costs of this water system will be in condemnation. Although Nashua has now supplied what appear to be draft contracts for operation and maintenance of the system and for oversight, the contracts and Nashua's reservation of rights appear to be laden with so many contingencies as not to provide a full picture of operating costs. Merrimack is desirous of maintaining third party regulated status for any entity that serves its citizens. It sees this as the only way to ensure that decisions are not made in a vacuum in which Merrimack has no real say.

Merrimack is aware, and the Commission knows, that Nashua is a stalking horse for the District, which has no staff, experience, background or funding with which to purchase or operate this water system. Even if it did, or could, overcome these deficiencies, the Charter places effective control of decisions about rates and capital investments in Nashua's hands. Even as a member of the District, Merrimack could not counter this disadvantage. It is more pronounced because Merrimack's main industrial/commercial zone abuts a similar zone in Nashua. In a competition of the municipalities over development which depends on water service, Merrimack considers it unlikely that it would receive fair consideration in an unregulated environment.

Q: Has the Merrimack Board of Selectmen considered this issue?

A: Yes, on January 11, 2006, the Selectmen authorized me to file this testimony.

Q: How has PWW served the public interest in Merrimack?

A: PWW is an excellent supplier of water service at a reasonable price to customers in Merrimack. Its management is responsive to customer needs, as well as to Town concerns such as road excavation and fire protection. Ever since PWW obtained a water service franchise in 1969 for the southeastern portion of Merrimack, it has worked

[5]

diligently to satisfy town requirements. For instance, when the MVD water supply became contaminated in 1989-90, PWW stepped up to extend an emergency connection so that Merrimack residents could continue to receive potable water service. PWW's expansion into the southeastern corner of town enabled the development of Merrimack's industrial zone, which is a substantial contributor to the town's and the state's tax base, as well as a substantial contributor of high quality, well-paying jobs in southern New Hampshire. Those businesses are all dependent upon the availability of water service. Specifically, when Anheuser-Busch was planning to construct a brewery in New England, it considered locations out of state as well. The availability of a substantial water supply was a precondition to its decision to locate in Merrimack. As mentioned before, PWW provides fire protection service in part of the town. PWW is also a good corporate citizen. As an example, it donated four acres of land in Merrimack to enable the construction of the Home Health Hospice. Finally, PWW on its own has advocated that Merrimack look into approving a watershed protection ordinance so that privately held land within the watershed would not be used in a matter which harmed the PWW water supply.

Q: Does Merrimack have other concerns about whether this acquisition is in the public good?

A: I also want to express Merrimack's grave concern that the foundation for the economic viability of the acquisition is based upon what may be an artificially low estimated valuation. The public good cannot be determined without understanding how valuation affects the economics of the condemned utility. Cost of capital is a key concept here. Although there are many factors that determine cost of capital and may affect the

[6]

comparison of cost of capital for a municipality and a private entity, there is a glaring defect in the pre-filed testimony. In determining relative cost of capital, one has to assume a capital requirement. Acquisition price is a large part of determining that capital requirement. Therefore, a 2 to 3 % differential in the cost of capital percentage rate does not yield a meaningful answer to the cost of capital question. Rather, the cost of capital question is determined by what capital is needed. Since PWW does not have to raise acquisition capital, its capital requirements may be considerably less than Nashua's and the cost of capital for Nashua considerably higher than estimated, when viewed in real terms. Nashua has never demonstrated, for instance, that its estimated value is based on comparable sales, as that term is customarily used in valuation of property. A per customer allocation of value is only meaningful if it can be effectively demonstrated that the customer base of each acquisition is similar. Nashua bears the burden of proof of this issue and has provided little by way of testimony to meet that burden.

If Nashua's cost of capital is relatively higher than estimated, this could have an impact on their willingness to expand outside of Nashua. As a regulated utility, PWW has little choice but to expand where there is demand. Merrimack fears that Merrimack's concerns have not to date been addressed. However, the Town remains receptive to any efforts to meaningfully address these concerns. Nashua may seek to inhibit expansion in non-local areas because other towns may be competing for the most valuable industrial customers with Nashua.

Q: Does this conclude your testimony?

A: Yes.

[7]

[1]

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

September 19, 2007 - 9:13 a.m. DAY XI
21 South Fruit Street
Concord, New Hampshire

RE: DW 04-048
CITY OF NASHUA, NEW HAMPSHIRE:
Petition for valuation pursuant to RSA 38:9

BEFORE: Chairman Thomas B. Getz, Presiding
Commissioner Graham J. Morrison
Commissioner Clifton C. Below

Sandy Deno, Clerk

APPEARANCES

Representing the City of Nashua, NH:
Robert Upton, II, Esq.
Justin C. Richardson, Esq.
Linda Regan, paralegal
Representing Pennichuck Water Works, Pennichuck
East Utilities & Pittsfield Aqueduct Co.:
Steven V. Camerino, Esq.
Sarah B. Knowlton, Esq.

Court Reporter:
Pamela Carle, CCR, RPR

[45]

1 ...smallest, and if economic climate changes
2 throughout the country and the world, it would
3 be -- it would certainly be considered one of the
4 first breweries to be closed.

5 My concern is if all of a sudden costs
6 did not make it economically viable, it would be
7 closed down. What that would do to Merrimack would
8 be a very grave consequence.

9 Q. Now, when that brewery was built, there
10 was no water service to that location, was there?

11 A. No, there was not.

12 Q. So Pennichuck had to actually extend
13 its system out to that facility so the facility
14 could be built?

15 A. To my knowledge, that is correct.

16 Q. Do you have concerns if there were a
17 similar situation today, a major industrial
18 employer is considering coming to Merrimack rather
19 than Nashua, do you have concerns about whether
20 Nashua would be willing to extend the system so
21 that the business could locate in Merrimack?

22 A. I have major concerns. Again, dealing
23 with the individuals in Nashua, I have a positive

[46]

1 relationship with them, but the real world is when
2 it comes to attracting business it is a competitive
3 environment, and we do what we have to do to bring
4 business to town.

5 And if they were in position to affect
6 that, it would be a concern. It would certainly be
7 a concern that they were able to control whether or
8 not how we competed for that for the same large
9 corporate client coming to town, for lack of a
10 better word.

11 Q. Are there community water systems in
12 Merrimack that are not served by Pennichuck at the
13 moment?

14 A. To my knowledge there are still several
15 from the old days of cluster development in the
16 town. My last discussions were -- this were
17 several years ago -- I do know that Pennichuck
18 has -- has a division where they've actually been
19 buying them up. So I am not sure what the status
20 is in the town of Merrimack for systems, but I do
21 know there used to be several.

22 Q. Do you have similar concerns to the one
23 we just discussed about Anheuser-Busch as to if...

[61]

1 to a data request. I'd like to have you look at
2 what Nashua said in its testimony in 2006. Go
3 to -- I'm sorry.

4 A. I'd be happy to look at it. I believe
5 I'm very familiar with it, but I'd be happy to look
6 at it again.

7 MR. UPTON: I didn't say for the
8 record, but that's Exhibit 1014 starting at page
9 15.

10 A. Is there any way to make that a little
11 larger?

12 MR. UPTON: Yeah, I'm going to blow it
13 up for you.

14 A. Thank you.

15 Q. Because I need it, too. This is the
16 testimony, I'll represent to you, of the mayor and
17 Alderman McCarthy. We would also like to
18 highlight that Nashua has made significant
19 commitments that will benefit the public interest
20 and insure that the interest of customers located
21 outside the city of Nashua are protected and
22 treated fairly in all respects.

23 Nashua expects that the public

[62]

1 utilities commission in its discretion will make
2 these commitments into binding conditions on its
3 acquisition of the water system. The following
4 are examples of Nashua's commitment to treat
5 customers outside -- I'm sorry, go onto the next
6 page -- outside the city fairly.

7 · The list is by no means exhaustive.
8 Nashua remains open, and then the commitments.
9 Nashua has committed to operate its water system
10 according to the terms of its water ordinance in a
11 manner that treats all customers equally.

12 Two. To the extent that Nashua serves
13 customers outside of its borders, it has agreed
14 and committed to the principle that the terms and
15 conditions of its service will continue to be
16 subject to the jurisdiction of the PUC.

17 Three. It has committed to provide
18 service to all satellite customers -- and that
19 would include Merrimack, wouldn't it?

20 A. Yes. Yes, sir.

21 Q. -- at core rates. And you understand
22 core rates to mean the same rates as they charge
23 the people in Nashua?

[63]

1 A. I'm very familiar with that, yes, sir.

2 Q. All right. If Nashua has made these
3 commitments, wouldn't they satisfy your concern
4 about the rates and service that the Merrimack
5 ratepayers will receive?

6 A. Absolutely not, Mr. Upton.

7 Q. Why not?

8 A. Thank you very much for the opportunity
9 to speak to that. This is some of my -- some of my
10 and the council's major concerns. The first thing
11 is the fact if -- scenario No. 1 is if Nashua
12 residents end up paying a very large amount, that
13 does not make the people in Merrimack feel any
14 better if we're paying a large amount, too. So the
15 fact that Nashua is paying a large amount and we're
16 paying a large amount doesn't help our citizens.

17 And my concern is if this truly ends up
18 being sold for what the real valuation is, I
19 believe that there will be immediately a major
20 increase to all -- not just Merrimack residents,
21 but to Nashua -- to begin recouping it.

22 Again, they are going to have to run
23 this like a business, which means once they buy

[64]

1 this, they're going to have payments to make, and
2 they are going to have to make sure that part of it
3 comes from the source.

4 So, again, to look at that and say,
5 well, as long as you pay the same as Nashua are you
6 comfortable, oh, heck no, because I think everyone
7 is going to see what I consider to possibly be a
8 doubling of the rates if this goes through. That's
9 just my first concern.

10 My second concern gets into the fact of
11 what I said before about perpetuity. Bernie
12 Streeter is a nice guy, the people in Nashua are
13 great people, but overall, according to the RSAs
14 they can increase it up to 15 percent if we don't
15 become core.

16 And a contract that is not in
17 perpetuity -- and I want to stress, I know one
18 don't exist -- that's a major concern. We in
19 Merrimack, as do all municipal people, we have an
20 obligation to look out one, two, 300 years.
21 Mankind is going to be here a long time, not ten
22 years.

23 So, no, none of it gives me any -- any

[65]

1 concerns. I think if this happens it will be major
2 increases to everyone. I'm very concerned about
3 Anheuser-Busch leaving town, and I think the
4 consequences could be grave for the people of
5 Merrimack.

6 Q. So you don't think that the PUC
7 exercising its jurisdiction under these conditions
8 has the ability to control any of the things you
9 spoke about?

10 A. The answer is I think they can control
11 some, possibly, but overall, as I look into the far
12 picture, I definitely have concerns.

13 Q. Now, you clearly have expressed concern
14 about the impact on Anheuser-Busch.

15 A. As one, yes. Absolutely.

16 Mr. Upton, can I assume every time
17 you're going to bring something up you're going to
18 blow it up?

19 Q. Absolutely.

20 A. Good. I appreciate that.

21 Q. This again is Mayor Streeter and
22 Alderman McCarthy. Nashua stands behind its
23 commitments to service both wholesale and retail

[66]

1 customers on an equal basis, and is fully willing
2 to accept appropriate conditions to that effect.

3 Do you see that?

4 A. Yes, I do.

5 Q. Does that indicate to you that Nashua
6 intends to fairly treat the wholesale contracts?

7 A. What it indicates to me is that on a
8 day in time when Mr. Streeter is the mayor he had a
9 commitment, but this is an elected force of
10 government, which means it's always going to be
11 rotating people. And, unfortunately, elected
12 people, they're always going to cater to the people
13 that elect them, and no one in Merrimack has a vote
14 in there.

15 So I am not questioning and impugning
16 the intentions, but time changes, and in the end
17 elected officials are going to do what makes Nashua
18 residents happy and re-elect them. So I do have
19 concerns, but I do not question the intentions of
20 Mr. Streeter or Mr. McCarthy, but, again, it's just
21 a day in time they made that statement.

22 Q. If Nashua has committed in its
23 testimony and agreed to a condition of approval by

[67]

1 the commission that it will provide service in
2 accordance with the rates, terms and conditions of
3 all the existing wholesale contracts, including
4 the Anheuser-Busch contract and the renewal
5 thereof, and if required to create a wholesale
6 tariff for Anheuser-Busch that incorporates the
7 rates and provisions of the existing wholesale
8 contract, wouldn't that alleviate your concern?

9 A. It wouldn't. Mr. Upton, I don't want
10 to beat a dead horse, but, again, I'm sitting here
11 looking out for the concerns of Merrimack residents
12 for the next hundred, 200 years, and the fact is
13 that I believe the current situation provides more
14 protection to the citizens of Merrimack than a new
15 situation, so it would not.

16 Q. And I gather it wouldn't make any
17 difference to you either if the wholesale
18 contracts and any complaints concerning the
19 wholesale contracts were subject to PUC
20 jurisdiction?

21 A. I want to -- I want to stress one
22 thing, because I don't want my testimony to be
23 misunderstood by the members of the panel or anyone