
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

REPLY BRIEF OF TOWN OF MERRIMACK

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ARGUMENT

I. THE PUC'S DECISION WILL NOT PROTECT THE INTERESTS OF MUNICIPALITIES OTHER THAN NASHUA.

A. The Presumption of Public Interest Does Not Apply to Towns Outside of Nashua

In its reply brief, Nashua focuses upon the rebuttable presumption of public interest found in RSA 38:3. Merrimack adopts Pennichuck's argument concerning the interpretation of that presumption in the context of PWW assets within Nashua. But that presumption of public interest simply does not apply to PWW assets outside of Nashua. As the PUC stated in its Taking Order, "[t]he RSA 38:3 presumption, however, extends only to the borders of the petitioning municipality". Taking Order, p. 97, N.App. p. 121. *See also*, Taking Order, p. 25, N.App. p. 49.

Nashua did not prove its case and the PUC did not offer much in the way of lawful protection to those towns outside of Nashua, and especially Merrimack, which lie in the service area of PWW. As stated in its opening brief, Merrimack fears that Nashua will favor itself when conducting capital expansion of its water system. Merrimack fears that its largest property taxpayer, Anheuser-Busch, will lose its special contract for water supply. And Merrimack fears, as set forth below, that Nashua's commitment and the PUC's condition to the taking -- that retail rates in Merrimack and other towns remain equal to those in Nashua -- will prove to be unenforceable and out of town rates will rise well above those in Nashua. Merrimack addresses here only those additional points raised in answering briefs that appear to require response or clarification.

¹ The Town of Merrimack applies the system of references to parties and to the record that it adopted in its opening brief. They include: Town of Merrimack ("Merrimack"); the Pennichuck companies collectively ("Pennichuck"); Pennichuck Water Works ("PWW"); Merrimack Valley Regional Water District ("District"); Public Utilities Commission ("PUC"); PUC Order No. 24,878 ("Taking Order"), which appears at Certified Record ("Cert.Rec.") p. 10302, and is included in Nashua's Appendix to Brief ("N.App."), pp. 25-144.

B. The Conditions that the PUC Imposed Upon Nashua Are Unenforceable, and Leave Towns Outside of Nashua Without Protection

As Pennichuck and Merrimack have stated repeatedly, the PUC lacked the authority to impose the many important conditions that address a number of the deficiencies in Nashua's proposal to take PWW's assets. In its reply, Nashua notes the exemption from PUC regulation contained in RSA 362:4, III-a for municipalities that charge their customers outside of town at rates no higher than fifteen percent above in-town customers. Under PWW, customers in Merrimack and other towns pay the same rates as Nashua residents. The PUC found it important to continue that parity, and so required Nashua to continue charging all retail customers equal rates, and to subject itself to continuing PUC jurisdiction to monitor that situation. Taking Order, pp. 26, 98, N.App. p. 50, 112.

While the PUC's action relating to setting retail rates may have a laudable goal, it simply exceeds its authority. *Id.* Likewise, its order protecting Anheuser-Busch and other special contracts requires similar continued PUC oversight, exceeding its authority. *Id.* The PUC only has "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). It simply lacks the statutory power to set rates for a municipality supplying water to customers out of town, where the municipality charges rates no more than fifteen percent above in-town rates. RSA 362:4, III-a. Merrimack and other towns thus cannot rely upon any promises made by Nashua, since the PUC cannot enforce them after the fact. The PUC's condition and Nashua's commitment both demonstrate their recognition that the applicability of core rates to Merrimack and of contract rates to

Anheuser-Busch were essential to support a public interest finding.² Thus Nashua's taking is not in the public interest.

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

In its reply brief, intervenor Merrimack Valley Regional Water District continues its transparent effort to sidestep the limited scope of review this Court must apply to the PUC's fair market value determination by attempting to recast the PUC's factual value determination as an issue of law. The District cites only one case in support of this argument, *New Hampshire Dept. of Env. Svcs. v. Marino*, 155 N.H. 709 (2007), which was not an appeal from the PUC and which did not involve any issues related to fair market value. As noted in Merrimack's previous brief, this Court has already specifically ruled that the determination of fair market value is a finding of fact. *Society Hill at Merrimack Condominium Assoc. v. Town of Merrimack*, 139 N.H. 253, 255 (1994). The *Marino* case, therefore, is completely irrelevant, and provides no support for the District's argument. The PUC's fair market value determination is unquestionably a finding of fact. And it is reviewable as such. This Court must therefore uphold the PUC's valuation decision if there is any evidence in the record to support the PUC's decision. Because there is ample evidence in support of the PUC's decision in this case, the decision must be upheld.

The District acknowledges that this Court may not reweigh the credibility of the experts in this case. District Reply Brief p. 1. However, the District's entire valuation argument is premised on the accusation that Pennichuck's valuation expert, Robert Reilly, did not really apply the just compensation standard of fair market value, even though he explicitly stated that

² Merrimack remains concerned that the concessions made by Nashua during the proceeding and the conditions the PUC adopted are so broad in scope that they fundamentally altered the original proposal put to the Nashua voters when this proceeding commenced and upon which the PUC based its analysis of the public good.

he did. Essentially, the District is claiming this Court should reexamine the evidence in this case, determine that Mr. Reilly lied, and remand the case to the PUC with directions to start over. Despite its protestations to the contrary, the District is asking this Court to do exactly what is not permitted under the scope of review: reweigh the credibility of the expert testimony in this case. *See, e.g., Tennessee Gas Pipeline Co. v. Town of Hudson*, 145 N.H. 598, 602 (2002). Mr. Reilly testified as to his opinion of the fair market value of PWW's assets. The PUC found Reilly's opinion credible, and adopted that opinion with regard to the hypothetical buyer determination for use in a capitalization of income calculation. This Court may not reverse the PUC's decision based on the District's assertion that Reilly's testimony stating he concluded "fair market value" should not be believed.

The District waves away the numerous cases that have specifically held that expert testimony is sufficient, standing alone, to satisfy the "any evidence" standard of review for factual determinations. In doing so, it argues, without citation of authority, that this case is different because Mr. Reilly's opinion concerning the impact of potential municipal buyers on the price PWW would bring on the open marketplace was not supported by his own testimony. District Reply Brief p. 3. As noted in the previous Pennichuck and Merrimack briefs, the District is simply wrong; Reilly offered a substantial amount of testimony and factual support for his opinion, much of which Nashua's experts agreed with. *See, e.g., Pennichuck Opening Brief* pp. 29-31 and 35-37 (detailing the portions of the record where all experts agreed the hypothetical pool of PWW buyers includes municipal entities, and that those municipal buyers have certain advantages over private owners; also detailing citations to Reilly's testimony and examples demonstrating that municipals pay higher prices to acquire water utilities than private entities). Faced with these detailed citations, the District concedes in its reply brief that Reilly's

testimony “is competent to show that municipal purchasers in a marketplace might increase the price of a water utility’s assets in an open marketplace” District Reply Brief, p. 2, n. 2.³ Reilly’s opinion was not unsupported; the District simply disagrees with it. As the District also acknowledged in its previous brief, and as the PUC expressly stated in its order on rehearing, the PUC carefully considered all of the conflicting arguments and expert testimony concerning the hypothetical buyer issue, and, after weighing the credibility of the testimony, ultimately adopted Mr. Reilly’s opinion as to that particular component of the income approach. District Opening Brief p. 24; Order No. 24,948, p. 25, N.App. p. 169, Cert.Rec. p. 10601. The PUC’s decision is supported by Mr. Reilly’s testimony and the evidence in the record, and thus must be upheld by this Court.

Finally, the District’s reply brief makes a telling retreat from its earlier reliance on *Onodagha County Water Authority*, 139 N.Y.S2d 755 (N.Y. App. Div. 1955). As explained in Merrimack’s previous brief, the *Onodagha* case provides additional support for the PUC’s rejection of the regulated income approach that Nashua’s experts used in this case. The District argues that this Court should mandate this rejected regulated income approach. Merrimack Brief p. 23. As the *Onodagha* court recognized, capitalizing regulated income will always result in an income approach valuation that approximates rate base, just as Nashua’s approach did in this case. As the court noted, rate base is so far removed from true fair market value that the distinction “needs no comment.” 139 N.Y.S.2d at 768. The District blithely dismisses the

³ The District concludes the quoted statement with the somewhat nonsensical assertion that although the testimony demonstrated that the presence of municipals could increase the price, it “falls far short of establishing that such entities would bid competitively for such assets, which is the essence of the [Reilly] Hypothesis.” District Reply Brief, p. 3, n.2. Of course, as explained in PWW’s reply brief, it is impossible for any expert to present factual proof as to what a *hypothetical* purchaser would bid and why. The answer to this hypothetical question requires the expert to analyze the known facts, and then apply his professional judgment to determine what would happen under the hypothetical scenario. Mr. Reilly opined that the presence of potential municipal purchasers, which the District concedes could raise the price, would affect what a hypothetical purchaser would offer and ultimately pay to acquire the system.

Onodagha holding as irrelevant, and claims that neither the District nor Nashua is asking this Court to value PWW's assets in its own hands by capitalizing PWW's regulated income. District Reply Brief p. 10. The District's claim is directly contradicted by its own previous brief, where the District expressly argued for the rule it now acknowledges has been repeatedly rejected: that the only way to value PWW's assets consistent with just compensation law is to capitalize PWW regulated income. See District Opening Brief at p. 12 ("To the extent that this Court has not announced or adopted the rule that valuations of public utility should focus *only on the value of what is taken in the hands of the condemnee when such utilities are seized by eminent domain*, this case presents the perfect opportunity to do so."), p. 14 (arguing that Mr. Reilly wrongly used a municipal capitalization "*instead of capitalizing PWW's future income.*"), p. 17 ("It follows that the PUC erred and reached an unreasonable and excessive valuation when it accepted Robert Reilly's hypothesis, which did not *value the cash flow as to a for-profit, regulated buyer, specifically PWW*") (emphasis added in all).

The District has retreated so far from its previous positions that its arguments now simply defy logic. What is certain, however, is that none of the District's arguments, in either their current or previous incarnations, provide sufficient grounds to justify a reversal of the PUC's valuation decision in this case.

CONCLUSION

This Court should hold that, because Nashua's proposed taking cannot meet the public interest without continuing jurisdiction of the PUC beyond its authority, and because of other reasons set forth in Merrimack's and Pennichuck's opening briefs, the public interest order of the PUC should be reversed. 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 PWW system.

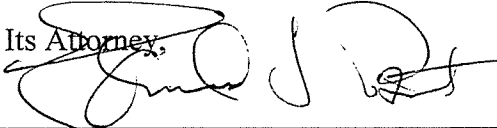
REQUEST FOR ORAL ARGUMENT

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,

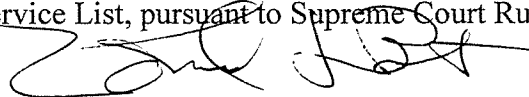


Date: November 18, 2009

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Certificate of Service

I hereby certify that on November 18, 2009, I served the foregoing Reply Brief by first class mail, postage prepaid, to the attached Service List, pursuant to Supreme Court Rule 26(2).



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