

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. _____

**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

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APPEAL BY PETITION
PURSUANT TO RSA 541:6

TABLE OF CONTENTS

	<u>PAGE</u>
a) Names of the Parties and Counsel	1-4
b) Supreme Court Rule 10(b) documents:.....	4
c) Questions Presented for Review	4-6
d) Constitutional Provisions and Statutes,.....	6
e) Relevant Contracts	6
f) Statement of the Case.....	6-12
g) Jurisdictional Basis for Appeal.. ..	12
h) Reasons for Accepting the Appeal.....	12-23
i) Statement of Preservation of Issues	23
Certificate of Compliance	24

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Pennichuck Water Works, Inc. ("PWW"), Pennichuck Corporation, Pennichuck East Utility, Inc. ("PEU"), Pennichuck Water Service Corporation ("PWSC"), and Pittsfield Aqueduct Company, Inc. ("PAC"), (collectively "Pennichuck"), by and through their attorneys, McLane, Graf, Raulerson & Middleton, Professional Association, pursuant to RSA 541:6 and Supreme Court Rule 10, appeal to this Court from the New Hampshire Public Utilities Commission's ("PUC") order on reconsideration, Order No. 24,948, dated March 13, 2009. In support of this Petition, Pennichuck states as follows:

a) The parties and counsel are as follows:

Parties seeking review:

Pennichuck Water Works, Inc.
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Pennichuck East Utility, Inc.
Pennichuck Water Service Corporation
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b) Copies of the PUC order on the merits, its rehearing order, its other orders referred to in the rehearing order, the motion for rehearing and objections thereto, and related motion rulings are contained in the Appendix ("Appx.") filed with the Petition as follows:

PUC Order Approving Taking and Determining Value Order No. 24,878, July 25, 2008	Appx. p. 1-120
Pennichuck's Motion for Rehearing Regarding Order No. 24,878 August 22, 2008	Appx. p. 121-148
Nashua's Objection to Pennichuck's Motion for Rehearing August 27, 2008	Appx. p. 149-171
PUC Order Denying Motions for Rehearing Order No. 24,948, March 13, 2009	Appx. p. 172-198
PUC Order Addressing the Pennichuck Utilities' Motion to Dismiss Order No. 24,425, January 21, 2005	Appx. p. 199-222
PUC Order Denying Motion for Rehearing Order No. 24,448, April 4, 2005	Appx. p. 223-228
PUC Order Denying Motion for Summary Judgment Order No. 24,567, December 22, 2005	Appx. p. 229-236
Superior Court Order on Motion to Dismiss Hillsborough South No. 04-E-62, August 31, 2004	Appx. p. 237-253

c) Questions Presented for Review

1) Does RSA 38 violate Pennichuck's constitutional equal protection rights, and is thus an unconstitutional statute, because, unlike every other eminent domain statute in New Hampshire, it fails to afford condemnees a trial by jury on valuation matters?

2) Did the PUC err in interpreting RSA 38 to give it the authority to order that Nashua may take by eminent domain PWW water systems located entirely outside of Nashua's

city limits, even though those systems are not connected to the water system in Nashua, are not necessary to supply water service within Nashua, and are located in municipalities that never voted pursuant to RSA 38:2 to authorize such a taking?

3) Did the PUC err by failing to apply to Nashua's petition the 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 ownership interest of shareholders, the service quality interest of customers, the voter participation interest of municipalities outside of Nashua, and the statewide public interest in favor of regional water systems?

4) Did the PUC err in interpreting and applying RSA 38 by first conducting a public interest analysis that was limited to the proposed taking of PWW's water system within Nashua, and then conducting a separate analysis for PWW's water systems outside Nashua, rather than conducting a single public interest analysis of the taking proposed by Nashua that weighed all of the elements of public interest at once?

5) Did the PUC exceed its authority by grafting numerous substantive conditions onto Nashua's otherwise defective proposal, and thereby improperly act in a legislative capacity and convert the RSA 38:3 statutory presumption of public interest into an irrebuttable presumption?

6) Did the PUC deny Pennichuck its constitutional property and due process rights by basing its public interest determination permitting the taking of PWW property upon material conditions which Nashua must meet, but as to which the PUC will not adjudicate their sufficiency, until after the taking order becomes final?

7) Was there evidence to support the PUC's public interest determination upon a finding of future customer rates of the PWW system under Nashua ownership that was dependent on Nashua paying \$203 million when in fact the PUC actually ruled that Nashua would have to pay a total of \$243 million?

8) Was there evidence to support the PUC's public interest determination that a \$40 million fund would be sufficient to mitigate the harm it found Nashua's proposed taking would cause to customers of water systems owned by PWW's affiliates, when there was no evidence that a fund in that amount could actually generate the annual revenues that the PUC itself found to be necessary for that purpose?

d) The following constitutional provisions and statutes are involved in this case and are contained in the Appendix filed with the Petition as follows:

United States Constitution, Amendments V and XIV	Appx. p. 254
New Hampshire Constitution, Pt. 1, Arts. 2, 12 and 14	Appx. p. 255
New Hampshire Constitution, Pt. 2, Art. 83	Appx. p. 255-256
RSA 38: 1-13	Appx. p. 257-261
RSA 362:4	Appx. p. 262-264
RSA 363: 17-a, 17-b	Appx. p. 265
RSA 374:22, 26	Appx. p. 266

e) There are no specific provisions of existing contracts central to the case on appeal.

f) Statement of the case:

This case concerns Nashua's attempt to take by eminent domain all of the operating assets of PWW, an investor-owned water utility that serves eleven communities in southern New Hampshire. The PUC authorized Nashua to take PWW's assets, even though Nashua, the PUC staff and all parties agree that PWW serves its customers well. The PUC authorized Nashua to take PWW's assets, even though the PUC found that Nashua's proposal failed to meet the public interest unless it was changed to include numerous substantive conditions, including imposition

of a \$40 million fund to mitigate the significant harm that Nashua's proposed taking would cause to customers of water systems served by affiliates of PWW. The PUC also authorized Nashua to take the assets of 21 community water systems owned and operated by PWW in nearly a dozen other towns, despite the fact that they are physically separate from the Nashua system and despite the fact that none of those other towns conducted a vote authorizing Nashua's eminent domain taking.

Background Concerning the Petitioners

PWW is the state's oldest business corporation and has provided water service in New Hampshire for 157 years, initiating service in Nashua in 1852. Within the past 25 years, PWW has expanded to provide regulated utility service in 11 communities in southern New Hampshire. In 1983, PWW converted to a holding company structure, with the establishment of Pennichuck Corporation as its parent company. Its current subsidiaries are PWW, PEU, PAC and PWSC. Beginning with PEU's acquisition of the troubled satellite systems of another major water company in 1998, PWW personnel have also provided regulated utility service to PEU's operations in 16 communities throughout southern, central and northern New Hampshire. PWW also staffs the utility operations of PAC, which Pennichuck Corporation acquired in 1998. In addition, PWW personnel operate water systems under contract for several municipalities and dozens of small community water systems on an unregulated basis through PWSC.

Pennichuck undertook the expansion of regulated utility service with the support and encouragement of the PUC as a means of, among other things, addressing problems that had arisen in many small, poorly capitalized water systems in the state. All of the employees required for the operation of the utility and unregulated water service businesses of Pennichuck Corporation have been and continue to be employed by PWW. The costs associated with these

employees are divided among PWW's various affiliates in accordance with a cost allocation agreement on file with the PUC.

Procedural Background

On April 29, 2002, Pennichuck Corporation entered into a merger agreement with another water company, then known as Philadelphia Suburban Corporation. In response to the proposed merger, and while the transaction was under review by the PUC, Nashua's board of aldermen voted on November 6, 2002 to pursue acquisition of some or all of the water works system serving Nashua residents. At a special election held on January 14, 2003, Nashua voters confirmed the aldermanic resolution. Nashua then provided notice to PWW, PEU and PAC on February 5, 2003 pursuant to RSA 38:6 of the city's request to acquire the assets of those three utilities. The utilities responded in the negative on March 25, 2003. Meanwhile, given the threat of condemnation by Nashua, Philadelphia Suburban backed out of the merger.

When Nashua then failed to file any petition with the PUC, Pennichuck brought an equity action in superior court (Hillsborough South, No. 04-E-62) on February 4, 2004 seeking various rulings concerning RSA 38 and Nashua's actions. The superior court ruled against Pennichuck on some of those issues, Appx. p. 237, and the Supreme Court affirmed on appeal. *Pennichuck Corp. v. Nashua*, 152 N.H. 729 (2005). The superior court did not rule on Pennichuck's argument that RSA 38's failure to provide a right to a jury trial on damages denied Pennichuck equal protection, ruling that the issue was not ripe for adjudication because the PUC might not rule in favor of the proposed taking.

Meanwhile, Nashua finally filed with the PUC its petition for condemnation of the assets of all three Pennichuck utilities - PWW, PEU and PAC - on March 25, 2004, over a year after the initial public vote. Then, almost a year later, the PUC ruled on Pennichuck's motion to dismiss

in its Order No. 24,425 dated January 21, 2005. Appx. p. 199. The PUC stated that “the eminent domain authority delegated by the Legislature in RSA 38:2 should be narrowly construed...,” Appx. p. 214, and ruled that Nashua could not condemn the property of PEU and PAC because those companies did not provide water service in Nashua. Nevertheless, the PUC also ruled that it had the authority to authorize Nashua to condemn all assets of PWW, regardless of whether they were located in Nashua and regardless of whether they were connected to the system serving Nashua or were necessary to the operation of that system. Id., p. 216. See also, Order No. 24,448, Appx. p. 223, 226-27. Later in the proceeding, the PUC denied Pennichuck's motion for summary judgment, ruling that “[t]he rebuttable presumption [of public interest in RSA 38:3] extends only to the public interest analysis for Nashua itself, as only voters of Nashua had a voice in the vote that gave rise to that presumption. For service beyond Nashua’s municipal bounds, Nashua must obtain a franchise [under RSA 374:26 and 362:4, III-a(a)].” Order No. 24,567, Appx. p. 229, 233.

Merits Hearing

The merits hearing took place on January 10 and 11 and September 4, 5, 7, 10, 11, 12, 13, 18, 19, and 26, 2007. All parties submitted extensive pre-filed testimony both on the question of whether the public interest supported Nashua taking the assets of PWW and the value of those assets. The PUC merits hearing consisted primarily of cross examination and redirect testimony of witnesses. The staff of the PUC and a number of intervenors also participated at the hearing.

Pennichuck introduced uncontroverted evidence of its excellent service to customers. Pennichuck reminded the PUC that it needed to weigh not just the interest of Nashua residents, but also the public interest of the entire state, the state's policy in favor of regional water service, and the interest of Pennichuck customers in towns outside of Nashua. Pennichuck supported its

public interest case in part with testimony from a former PUC chairman and from the current director of the PUC's gas and water division regarding the significant role Pennichuck played in working with the State and the PUC to support the growth of regional utilities and regarding Pennichuck's acquisition of troubled smaller water systems around New Hampshire at the request of the PUC. Pennichuck showed how Nashua's taking of PWW would result in substantially higher rates for customers of the remaining Pennichuck entities, and would deprive the state of a regional utility able to acquire troubled systems.

The Towns of Merrimack and Milford, and the PUC's own staff, submitted written and oral testimony that they opposed an acquisition by Nashua because the public interest did not support the proposed taking. Merrimack expressed its grave concern about another municipality controlling the water system serving part of the town and about the loss of PUC oversight over the system. The PUC staff noted, among other matters, its concern about future rates, particularly for PWW customers outside of Nashua, and for PEU and PAC customers who would remain as customers of a gutted Pennichuck, should Nashua proceed with its condemnation.

With respect to valuation, Pennichuck relied upon the testimony of nationally renowned business valuation expert, Robert Reilly. He worked with engineers and real estate appraisers to determine a value of PWW as of December 31, 2005, the agreed upon valuation date. To value PWW's assets, Mr. Reilly retained engineers to excavate, observe, and in some cases sample, pipes in the ground to determine their remaining useful life. Nashua relied upon George Sansoucy, whose valuation approach the PUC rejected.

Taking Order and Reconsideration Order

The PUC issued its Order Approving Taking and Determining Value on July 25, 2008, Order No. 24,878, Appx. p. 1. Most of the 101 page order simply restates the arguments of the

parties, and only about one third of it contains the PUC's analysis. Most notably, nowhere does the order set forth the PUC's articulation of the public interest standard that it applied or the balancing approach required for the constitutional condemnation of property in New Hampshire.

In confining itself to the language of RSA 38, the PUC also failed to examine whether Nashua's proposal as a whole met the applicable statutory standard. Rather, the PUC first examined the interests of customers within Nashua, giving the city the benefit of the rebuttable presumption in RSA 38:3. In doing so, it failed to consider a number of critical elements of the public interest, including the service quality interest of customers, the voter participation interest of municipalities outside of Nashua, the statewide public interest in favor of regional water systems and the interests of Pennichuck shareholders. Instead, the PUC simply concluded that that the public interest evidence submitted by Pennichuck and other opponents of the taking could not rebut the presumption as to the Nashua system, saying at one point: "[a]lthough this evidence is credible, it is not the type of evidence that can form the basis for denying Nashua's petition", Order No. 24,878, Appx. p. 52, and at another point: "arguments concerning Nashua's future role in the region are not adequate to rebut the statutory presumption in favor of municipal ownership." *Id.*

The PUC then went on to review the public interest in Nashua taking PWW water systems in other communities not connected to the Nashua system, and not subject to the statutory presumption. Again, the PUC did not consider wider public interest issues. It simply treated the taking of the Nashua assets as a given, and determined that those other systems could also be taken, so long as there would be continued PUC oversight. *Id.*, pp. 50-60. Specifically, in constructing its order, the PUC placed at least nine conditions upon Nashua's taking of PWW assets, each one intended to address substantial defects in Nashua's petition pointed out by

Pennichuck, PUC staff and various intervenors. Id., pp. 98-99. Those conditions required, among other things, ongoing PUC oversight over Nashua, despite statutory clear limitations placed upon the PUC's jurisdiction over municipalities.

With respect to valuation, the PUC thoroughly discredited Mr. Sansoucy's approach. It adopted Mr. Reilly's approaches to valuation, and adopted much of his methodology, while rejecting certain elements thereof. The PUC in the end valued the PWW assets as of December 31, 2008 at \$203 million. Id., p. 93.

The PUC also required Nashua to establish a separate \$40 million mitigation fund to alleviate rate shock to the customers of PEU and PAC. Id., p. 96. It established that fund on the assumption, not supported by any evidence, that it could actually generate the \$3.4 million in annual revenue necessary to mitigate the harm to those customers. The PUC then failed to include that \$40 million as part of the initial cost that Nashua would incur to take over the utility. Then the PUC made erroneous conclusions as to the level of rates under future Nashua ownership, even though the PUC considered future rates to be a critical public interest concern.

On August 22, 2008, Pennichuck filed its motion for rehearing, raising 18 separate issues. Appx. p. 121. The PUC denied Pennichuck's motion for rehearing, as well as that of Nashua, by its Order No. 24,948 dated March 13, 2009. Appx. p. 172.

g) The jurisdictional basis for this appeal is RSA 541:6.

h) Acceptance of the appeal will protect Pennichuck from irreparable injury/a substantial basis for a difference of opinion exists on the questions presented/court has the opportunity to decide issues of general importance for the administration of justice:

Irreparable Injury

This is the largest eminent domain case in New Hampshire's history, involving assets that both sides agree are worth a nine figure sum. The future employment of about 100 workers may

be at stake. If the PUC's order stands, it will result in the condemnation of the assets of PWW, the oldest business corporation in the state. It is a corporate death penalty case. It will also cripple the operations of PWW's affiliates, to the detriment of their customers throughout dozens of New Hampshire communities. Pennichuck will shrink to the point where it is unable to work with the State to acquire troubled small water systems around New Hampshire.

If the PUC order stands, it would mean that a single municipality served by a statewide utility could condemn all of the utility's assets throughout New Hampshire. Such a precedent would have immense significance for all utilities subject to RSA 38, including not just New Hampshire's water utilities but also electric and gas utilities such as Public Service Company of New Hampshire, National Grid and Unitil.

This taking comes over the opposition of Nashua's neighboring municipality, Merrimack, many of whose residents and businesses would face a new owner – Nashua - for their water service. Nashua officials have in the past stated their intent to end what they consider to be Nashua's rate subsidy to customers in surrounding towns, including Merrimack.

Substantial Basis for Difference of Opinion/Issues of General Importance

This dispute has gone on for over six years. It has been hotly contested. The parties presented substantial arguments before the PUC on a number of constitutional, statutory and factual issues, only a few of which now appear in this petition. Pennichuck's position on these issues is not an outlier. It is shared by other central parties in the case, including the PUC's own staff and the Town of Merrimack. The limited issues which Pennichuck seeks to appeal may be summarized as follows:

- 1) Equal protection right to a jury trial.

Unlike other New Hampshire eminent domain statutes, RSA 38 does not afford Pennichuck a right to a jury trial on damages to be awarded for the condemnation of PWW

assets. The superior court in Hillsborough South No. 04-E-062, Appx. pp. 242-47 ruled that the question, whether RSA 38 is unconstitutional because it does not entitle Pennichuck to a jury trial, would become ripe only if and when the PUC found that a taking was in the public interest and made an award of damages. With the ripeness criteria having now been met, and the PUC having refused to consider the issue, RSA 38 has now in fact deprived Pennichuck of its equal protection constitutional right to a jury trial on damages. *See, e.g.*, N.H. CONST., pt. 1, arts. 2,12,14; *Gazzola v. Clements*, 120 N.H. 25, 29 (1980); *White Mountain Power Co. v. Maine Central RR*, 106 N.H. 443, 445 (1965).

All “persons whose land is about to be taken by the State are “similarly situated.”” *Gazzola, supra*. *See also, Malnati v. State*, 148 N.H. 94, 99 (2002); *White Mountain Power Co., supra*. The owners of other public utility assets facing an eminent domain taking (RSA 371:10) and the owners of all other property subject to condemnation processes in New Hampshire (RSA 498-A:9) enjoy this right. RSA 38 provides Pennichuck with no such jury trial right. Because private property ownership rights are fundamental rights under the New Hampshire Constitution, this Court applies strict scrutiny in determining whether there is a sound basis for different procedural safeguards for taking similarly situated property. N.H. CONST. pt. I, art. 12; *Gazzola*, 120 N.H. at 30; *Merrill v. Manchester*, 124 N.H. 8, 14 (1983); *Malnati*, 148 N.H. at 99. The absence of a jury trial right in RSA 38 imposes disparate treatment upon Pennichuck without a compelling state interest to support it. Therefore, the valuation process in RSA 38 is unconstitutional on equal protection grounds, and Nashua's eminent domain petition should have been dismissed.

- 2) The PUC lacks authority to authorize Nashua to condemn water systems located entirely outside Nashua.

The PUC ordered the taking of 22 community water systems located in eleven communities outside of Nashua and not connected to Nashua's system. It did so, even though the PUC earlier ruled in this case as follows: "[b]ased on the overall statutory scheme, the construction of the statute as a whole, and the legislative history and intent, the related threads of the analysis of RSA Chapter 38 lead to the conclusion that the eminent domain authority delegated by the Legislature in RSA 38:2 should be narrowly construed...." Order No. 24,425, Appx. p. 214. The PUC went on to rule in that order that the statute did not permit Nashua to take the assets of PEU and PAC, and that its attempt to take PWW assets outside of Nashua would depend upon a factual inquiry. *See also*, Order No. 24,448 (order on Nashua's Motion for Rehearing), Appx. at pp. 226-27.

In the end, the PUC allowed Nashua to condemn those water systems outside of the city, based upon its review of the facts at the hearing. Order No. 24,878, Appx. pp. 58-59. The exercise of such broad and devastating powers by a municipality and the PUC requires a more specific and unambiguous authorization from the Legislature, something that is wholly lacking here. In New Hampshire, a Legislative grant of power to condemn is strictly limited by the clear definition of that grant. *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 181 (1940). The PUC and municipalities only have those powers specifically granted by the Legislature. *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1066 (1982) (PUC); *Lavallee v. Britt*, 118 N.H. 131, 131 (1978) (municipalities). With those constraints, the PUC badly misconstrued the clause in RSA 38:6 permitting municipalities to "purchase that portion, if any, [of the utility's assets] lying without the municipality which the public interest may require...as determined by the commission" (emphasis added). A common sense reading of the

statute leads to the conclusion that the Legislature intended to permit the taking of extra-territorial portions of a utility that were necessary to operate the system within the municipality attempting the taking, not independently operated systems located in distant communities that happened to be owned by the same company. Given the strict reading of eminent domain statutes, the PUC should have ruled that the only PWW assets outside of Nashua that arguably are *require[d]* are those assets immediately adjacent to Nashua and hydraulically connected to the operation of the Nashua system.

3) No Public Interest Methodology or Weighing of Interests.

The PUC's Order explains its entire public interest analysis in terms of burdens of proof, with the statutory presumption of public interest in favor of Nashua appearing to be given an overwhelming and insurmountable weight. Order No. 24,878, Appx. p. 51. The PUC failed to engage in the balancing approach required by N.H. CONST., pt. 1, arts. 2,12,14; pt. 2, art. 83 and by RSA 38 for eminent domain proceedings. Specifically, the PUC failed to apply the net benefit test, which required it to weigh the "public benefits... against all burdens and social costs suffered by every affected property owner." *Petition of Bianco*, 143 N.H. 83, 86 (1998); *see, Merrill*, 127 N.H. at 237. This Court has held that "public interest" is measured on a spectrum, and takings for convenience are justified only if they result in a slight imposition on private rights, *Rodgers Dev. Co. v. Tilton*, 147 N.H. 57, 59 (2001).

In this case, the proposed taking imposes significant burdens on public and private rights. In addition to putting the State's largest investor-owned utility essentially out of business, the PUC's decision ignored a number of very relevant public and private rights. The Order ignores the interest of Pennichuck customers in continued good service, something that all parties agree they now enjoy. The Order ignores the interest of voters in eleven towns outside of Nashua, who did not vote on whether Nashua should own a water system in their town and, in some cases,

whose representatives actively opposed the taking in the PUC proceeding. The Order ignores the policy interest of the State and the broader public, previously articulated by the PUC and the Department of Environmental Services, that regional water companies can best implement safety, quality, environmental and planning standards for water supply and delivery. The Order ignores the interest of Pennichuck shareholders for adequate compensation, since the tax impact of the proposed taking will reduce the "just compensation" paid for PWW assets. In short, the Order ignores the constitutional, statutory and policy principles that require heightened vigilance to protect the property interests of business ventures providing regulated service to the public.

Even if the PUC thought that it conducted the balancing required by *Bianco, Merrill* and *Rodgers*, it certainly failed to set forth its methodology in Order No. 24,878, contrary to general New Hampshire administrative law, *Appeal of Conservation Law Foundation*, 127 N.H. 606, 683 (1986); *Appeal of Newington*, 149 N.H. 347, 352 (2003) and the specific "reasoning" requirement of RSA 363:17-b for all PUC decisions. Nowhere does the PUC's order articulate the standard that it applied or how the facts presented met that standard. Rather, it simply proclaims that the evidence presented was "not the type of evidence that can form the basis for denying Nashua's petition". Order No. 24,878, Appx. p. 52.

4) Piecemeal public interest analysis.

In conducting its public interest analysis pursuant to RSA 38:3 and 9, the PUC should have reviewed Nashua's proposal for what it was, a single taking of all of the assets of PWW. It was on that basis that the parties prepared and presented their cases to the PUC. Instead, the PUC broke Nashua's proposal into two separate parts. First, it analyzed the taking of the Nashua "core" system only, relying heavily upon the statutory presumption in favor of municipal ownership. Order No. 24,878, Appx. pp. 50-57. Acting as if the taking of PWW's Nashua assets

was a separate proposal, the PUC concluded that PWW had not rebutted the statutory presumption and therefore the taking was found to be in the public interest.

Next, the PUC analyzed the proposed taking of the assets *outside* Nashua, treating the taking of the Nashua system assets as a given. It concluded that a taking of the satellite system assets would cause substantial harm to customers. Rather than determining that the taking of those systems should not be allowed to proceed or that the harm to those customers outweighed the public interest finding regarding the core system, the PUC instead concocted a long list of substantive conditions that, it asserted, could remedy those harms. It then ruled that, with the imposition of those conditions, the taking of the water systems outside Nashua would minimize uncertainty for those customers and would render the proposed taking consistent with the public interest. Order No. 24,878, Appx. pp. 58-59 Although the PUC had previously ruled that the statutory rebuttable presumption did *not* apply to Nashua's proposal to take PWW assets outside of the city, Order No. 24,878, Appx. p. 25; Order No. 24,567, Appx. p. 233, its merits order did in effect apply that presumption to those assets.

The PUC's piecemeal analysis failed to consider Nashua's proposal for taking PWW as a whole - the sole proposal before the PUC - and so misapplied RSA 38:3 and 9 and deprived Pennichuck of its constitutional due process rights. Had the PUC considered the proposed taking of PWW as a whole, it would have needed to confront – without the benefit of any rebuttable presumption – whether the satellite systems would be better off with PWW remaining as owner of all the assets. Given that the satellite system communities had no vote, and some even expressed their fear of Nashua's control, the result would have been very different.

- 5) The PUC transformed the RSA 38:3 statutory presumption into an irrebuttable presumption by its legislative acts and by the addition of conditions beyond its authority.

The PUC imposed nine conditions for Nashua's taking of PWW's assets which were "prerequisites to our decision that the taking is in the public interest." Order No. 24,878, Appx. pp. 98-99. In doing so, the PUC exceeded its authority under RSA 38:9 and 11 and turned itself into a legislative rather than a quasi-judicial body. Those conditions included Nashua's creation of a \$40 million mitigation fund for the benefit of PEU and PAC customers, a requirement that service to customers outside of Nashua be maintained at the same rates as for Nashua customers, a requirement that a private contractor handle all customer service functions, the creation of a technical advisory board, and a requirement for PUC approval of the final operations and oversight contractor agreements.

This transformed the PUC's RSA 38:11 authority to set conditions for a municipal taking into a mechanism that made it effectively impossible for PWW to overcome the presumption of RSA 38:3. Each harm to the public interest that Pennichuck proved was simply met by another new condition from the PUC designed to address that harm. These conditions were not part of Nashua's flawed proposal that the parties litigated. In so doing, the PUC badly overstepped its RSA 38:11 authority to impose conditions, using it to convert the statutory rebuttable presumption into one that was effectively irrebuttable. The PUC exceeded its quasi-judicial obligation to serve as a neutral arbiter of the public interest under RSA 38:9 and 363:17-a and to adjudicate the proposal before it. Instead, it performed as a super-legislature to enact (under the guise of imposing "conditions") a complicated ownership and operational scheme that then served as a basis for the PUC to determine that Nashua met its public interest requirements to take PWW assets. By doing so, the PUC also deprived Pennichuck of its constitutional due process rights in taking its property.

Beyond that, many of those conditions require the PUC to exercise ongoing regulatory authority over the new municipal utility that Nashua proposes to create. Specifically, the PUC, among other things, asserts that it will assure that customers of PWW outside of Nashua continue to receive the same rates, terms and conditions as Nashua customers. Order No. 24,878, pp. 59, 98; that it will continue to oversee service quality issues, *id.*, that it will continue to have oversight of PWW's wholesale contracts *id.* pp. 60-61; 98; and that it will require Nashua's membership in DigSafe. *Id.*, pp. 61-62, 99.

RSA 362:4 exempts municipalities from utility regulation. 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. at 1066. *See, Gould v. N.H. Div. of Motor Vehicles*, 138 N.H. 343, 347 (1994); *Blair v. Manchester Water Works*, 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. *See, Appeal of Public Service Co., supra; Plaquemines Port, Harbor and Terminal Dist. v. Fed. Maritime Comm'n*, 838 F.2d 536, 542, n. 2 (D.C. Cir. 1988)(consent of parties cannot add to administrative agency jurisdiction); 2 Am Jur 2d Administrative Law § 283 (...deviations from an agency's statutorily established sphere of action cannot be upheld based upon an agreement, contract, or consent of the parties). The PUC's public interest finding was conditioned on its determination that Nashua will be subject to its ongoing authority, contrary to RSA 362:4, and therefore the PUC's determination that Nashua should be allowed to take PWW's assets is fatally flawed.

- 6) The PUC imposed conditions subsequent that will be determined only after the order allowing the taking of PWW assets has become final and non-appealable.

Several of the "prerequisite" public interest conditions that the PUC has imposed upon Nashua will be reviewed by the PUC only after the taking becomes final, or thereafter, in

violation of Pennichuck's constitutional due process rights. For instance, condition 8 requires Nashua to submit to the PUC for approval its agreements with Nashua's contractors within sixty days *after* the taking becomes final, condition 3 requires Nashua to include in its operations agreement that the contractor will provide all customer service functions, condition 7 requires Nashua to create a \$40 million mitigation fund to benefit PEU and PAC customers (and provides for a later proceeding to determine how it will be administered), and condition 9 requires Nashua to hire a PWW employee familiar with its facilities. Order No. 24,878, Appx. pp. 96, 98-99.

This post-appellate PUC review process, however, leaves Pennichuck and the public with no recourse if the PUC is faced with the reality of significant, but necessary, cost changes to contractor agreements in the latter proceeding such that it has an impact on rates and renders the taking no longer in the public interest. By the time the PUC finishes its review, Pennichuck's appeals will have ended and PWW's assets may well have been taken. Similarly, if the PUC later determines that the \$40 million fund has structural defects or will not yield sufficient annual revenues, PWW and the customers of its remaining affiliates will have no meaningful recourse.

It is not overstating matters to say that this is a corporate death penalty case. But here, the PUC proposes continuing its review of public interest "prerequisites" *after* the death sentence has been carried out. In other words, the PUC has turned several of its conditions precedent, i.e. "prerequisite" matters needed to find public interest, into conditions subsequent, evaluated after the taking has occurred. This placement of the cart before the horse – or more appropriately the placement of the gallows before the conviction -- is the very essence of the denial of due process to which PWW has a right under Pt. 1, Art. 2 and 14 and Pt. 2, Art. 83 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. See, *Bianco, Merrill, supra; Appeal of Concord Steam*, 130 N.H. 422, 427-28 (1988).

- 7) The PUC forgot the \$40 million mitigation fund and other costs when calculating likely Nashua rates.

In conducting its analysis of public interest under RSA 38:9, the PUC found it critically important that rates would be lower for PWW customers under Nashua ownership. But the evidence showed otherwise. The PUC relied upon testimony of a Pennichuck rate expert, John Guastella, that a \$248.4 million price tag for PWW assets would likely generate a Nashua revenue requirement about the same as that for PWW, even before considering the higher operating expenses that Nashua would likely incur. The PUC then compared that amount with its valuation of PWW assets at \$203 million and concluded that municipal ownership "would produce a rate advantage". Order No. 24,878, Appx. p. 57.

Mathematics, let alone the evidence submitted, does not support the PUC's finding. First, the correct comparison is not \$203 million with \$248.4 million. The correct figure is \$243 million, not \$203 million, because the cost to Nashua of the \$40 million mitigation fund, that the PUC also ordered, must be included. Second, Mr. Guastella's analysis did not factor in additional Nashua operating costs that would flow from the PUC's nine conditions for approval, such as costs for Nashua's contractor to perform all customer service functions, for Nashua's participation in DigSafe, and for Nashua to submit to PUC regulatory requirements (such as rate cases, financing approvals, and accounting). Finally, Mr. Guastella's analysis did not reflect certain additional operating costs assumed by Nashua's own expert, Mr. Sansoucy.

When all of these cost increases are factored in, ratepayers in all of PWW's service territories would face higher rates under Nashua ownership. Had the PUC reviewed the evidence on this point, this important public interest factor would weigh in favor of continued PWW operation of its water systems.

- 8) The \$40 million mitigation fund cannot generate the \$3.4 million in revenue required.

At Nashua's urging during the merits hearing, the PUC latched onto the concept of a mitigation fund for customers of PWW affiliates, finding that "the public interest requires as a condition of our approval that Nashua establish an appropriate mitigation fund." Order No. 24,878, Appx. p. 96. Because no party had proposed such a fund in its prefiled testimony, there was very little testimony on the subject. The PUC determined that the fund should generate \$3.4 million per year, but it did not hear testimony beyond the mathematical fact that a net return of 8.5% on a \$40 million fund could generate that amount of money. Specifically, there was no testimony about the tax consequences of the initial establishment of the fund, or the tax consequences of the annual revenue from the fund, or the likelihood that the fund could achieve an 8.5% rate of return based upon the permissible vehicles for such investments.

Because the record lacked such critical evidence, the PUC deferred "the specific method for implementing this result as a compliance matter in this proceeding after the City makes a ratifying vote and all rehearings and appeals are exhausted." Order No. 24,878, Appx. p. 96. While the PUC is correct that PEU and PAC customers would suffer harm that requires compensation in the event of a taking, it lacked the evidence to find that a \$40 million fund would be enough to meet the PUC's own \$3.4 million annual revenue target. Because the establishment of such a fund was a critical component of the PUC's public interest determination, its error on this point requires that the public interest finding be reversed.

i) Every issue raised in this appeal has been presented to the PUC and has been properly preserved for appellate review by objection or other pleading.

Respectfully submitted,

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

By their Attorneys,

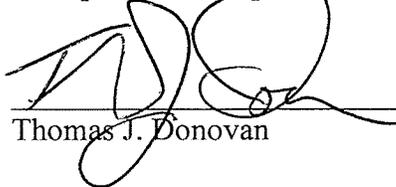
McLANE, GRAF, RAULERSON & MIDDLETON,
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Date: April 13, 2009

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Certificate of Compliance

Pursuant to Supreme Court Rules 10(8) and 26, I hereby certify that I have this 13th day of April, 2009 forwarded a copy of the foregoing Appeal By Petition Pursuant to RSA 541:6 and the accompanying Appendix by first class mail, postage prepaid, to the parties of record or their counsel as listed in section (a) above, to Debra A. Howland, Executive Director of the Public Utilities Commission (three copies), 21 So. Fruit St., Suite 10, Concord, NH 03301, and to the Attorney General of the State of New Hampshire, 33 Capitol St., Concord, NH 03301.


Thomas J. Donovan

