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February 27, 2008

Via Hand Delivery
Debra A. Howland, Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

Re: City of Nashua; Petition for Valuation DW04-048

Dear Ms. Howland:

Nashua has received a letter from Staff Attorney Marcia Thunberg dated February 22, 2008 in response to the *Joint Motion for Approval of Water Supply and Indemnity Agreement* filed by the Town of Milford and the City of Nashua on February 21, 2008. Staff's letter is not captioned in the form of pleading or objection and poses a number of questions concerning how Milford and Nashua "wish the Commission to treat this filing since it impacts administrative procedures the Commission may consider." Nashua offers the following comments in response to the questions posed in Staff's letter.

1. The Commission has jurisdiction to approve the Joint Motion under RSA 38:11 and RSA 38:17, notwithstanding RSA 362:4.

Staff states its position that the Commission is unable to approve the relief requested in the join motion because "[t]here has been no sound legal analysis to date showing how the Commission, under the general condition authority of RSA 38:11, can overcome the legislature's specific prohibition in RSA 362:4, III-a (a)(2)" and requests that "[i]f Nashua has legal support for the Commission jurisdiction, such support would be important for the Commission's public interest analysis and should be produced for the Commissions edification." Nashua offers the following by way of response to Staff:

The New Hampshire Legislature has, in clear and unmistakable terms, given this Commission plenary authority to "set conditions and issue orders to satisfy the public interest." RSA 38:11. The public interest inquiry is broad, and includes not only issues concerning rates and the terms and conditions of service to customers, but, in this proceeding, has covered a range of other issues such as watershed protection and conservation, regional water supply, compliance with

drinking water standards. There can be little doubt that, to the extent that any of these factors weighs on the public interest, the Commission is authorized to impose appropriate conditions. Indeed, as recently as the Commission's order in *Verizon New England, Inc.*, the Commission has used its authority under the public interest standard to impose conditions in areas over which the Commission has no regulatory authority, such as broadband internet service,[1] the retention of jobs and economic development.[2]

RSA 38:11 gives the Commission not only the authority to review Nashua's petition under the public interest standard as in the *Verizon New England, Inc.*, and other cases, but authorizes the Commission to affirmatively "set conditions ... to satisfy the public interest." Thus, even if the Commission concluded that Nashua's petition was deficient in some respect, it could cure that deficiency by imposing an appropriate condition. This is precisely the approach used by the Commission in *Verizon New England, Inc.*,[3] where the Commission initially rejected the company's proposal, but later imposed conditions concerning broadband service and other matters effecting the public interest over which it has no direct regulatory jurisdiction.

There is no evidence or reason to believe that the legislature intended to limit the Commission's authority under RSA 38:11 to setting conditions only in those areas in which it *already* has jurisdiction under RSA 362:4. Such an interpretation of RSA 38:11 would preclude the Commission from imposing conditions related to areas such as municipal governance, inter-municipal supply agreements, or any number of other considerations relevant to the public interest. While RSA 362:4 sets the limits of the Commission's authority to regulate public utilities, this proceeding concerns the establishment of a municipal utility under RSA 38, and gives the Commission additional powers.[4]

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[1] *Verizon New England Inc.*, Order No. 24,823, Page 70 ("In considering major utility transactions, our public interest determination is not wholly dependent on a positive decision on the question of financial, managerial and technical capacity. These capabilities are necessary but may not be sufficient. We must also undertake a broader assessment of the effects of the transaction."); Page 79 ("Although broadband is an exogenous benefit with respect to the utility services we regulate, FairPoint offers these commitments as support for the proposed franchise transfer. We agree that broadband service is sufficiently related to utility service so that broadband commitments are an appropriate consideration in the circumstances of this case.").

[2] *Verizon New England, Inc.*, Pages 80-81 ("We have no direct regulatory authority with respect to a utility's relationships with its employees but those relationships can and do affect utility service.... For these reasons, we condition our approval of the transaction on FairPoint agreeing that it may not, without Commission approval, eliminate or reduce the workforce of the call center it is developing in Littleton and the data center it is developing in Manchester.").

[3] *See generally Verizon New England, Inc.*; Page 38 ("[the Commission] may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest"); and Page 88 ("*As conditioned by the pending settlement and the additional terms we have set forth herein*, we are persuaded that FairPoint has demonstrated that the proposed transaction is for the public good....").

[4] There are circumstances where a water utility is both a public utility and a municipal utility. For example, under RSA 362:4, III a municipally-owned water utility that does not provide "a quantity and quality of water or a level of water service equal to that served to customers within the municipality" or charges rates more than 15% higher than those charged within the municipality, would be subject to both the provisions of RSA 38 and the fully panoply of public utility regulation under Title XXXIV.

The legislative history of RSA 38:11, as repealed and re-enacted in 1997, strongly reinforces the view that the Commission has the authority to set any reasonable condition it deems necessary to protect the public interest. Indeed, Exhibit A to the Pennichuck companies' October 25, 2004 *Memorandum of Law on Scope of RSA Chapter 38* included testimony before the Senate Committee on Executive Departments & Administration by then Representative Clifton Below making it absolutely clear that under RSA 38:11 the Commission can, on its own initiative or as a result of a petition by a "neighboring municipality" "set conditions or issue orders to insure that public interest is satisfied." His testimony as reflected in the minutes submitted herewith, includes the following:

> [RSA] 38:11 at the bottom of the page the public interest determination by the commission is a change from the existing statute to the extent that they determine if it is in the public interest, although we've created a rebuttable presumption that it is by a two-thirds vote of the municipality, but it says [the Commission] may set condition[s] and issue orders to satisfy the public interest. *This clarified their ability to positively assert conditions or even issue orders that say the public interest requires, for instance, that a municipality may have to acquire some property outside of its boundaries*. If there is some customers that would otherwise be stranded with a small distribution line that crosses a municipal boundary *the commission would have the power to order the utility that is selling its property or having its property acquired and also order the municipality to acquire that portion of a system that may be outside of their boundaries*.
>
> For instance, which was a gap that we found in the current statute that wasn't addressed if that's what the public interest would require. Again, it goes on to say the commission need not make a determination if there is an agreement for sale. *But again, if there is a third party, such as a neighboring municipality or some customers who felt that they would be aggrieved by the proposed sale, the commission could be on their own initiative or petitioned by another party go ahead and make a public interest determination even if there is mutual agreement. And again, they could set conditions or issue orders to insure that public interest is satisfied.* (emphasis added).

Thus, both the express provisions of RSA 38:11 and its legislative history erase any doubt concerning this Commission's authority to impose conditions requiring compliance with not only the *Water Supply and Indemnity Agreement* between Milford and Nashua, but also the commitments Nashua has made in this proceeding in order to further secure the public interest.

Finally, Nashua notes that RSA 38:17 specifically allows Nashua to enter into agreements to supply water to the Town of Milford on such terms and rates "as may from time to time be authorized by the commission." This provision, enacted as early as 1935 and readopted in 1997, specifically grants the Commission the authority to approve water supply agreements such as that proposed by Milford and Nashua. While it is true that the entering into of such

agreements does not make Nashua a public utility under RSA 362:4, III-a (a)(2), that fact does not eliminate the Commission's authority under RSA 38:17 to approve the terms and rates contained in the agreement. To read these statutes in that manner would render RSA 38:17 a nullity which would violate all standards of statutory construction.

2. Milford and Nashua have not offered or asked the Commission to consider new evidence or asked to re-open the record.

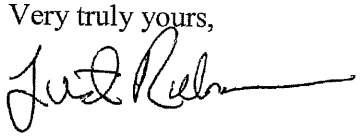
Staff asks "whether the joint petitioners intend the agreement to be entered into the evidentiary record in this docket" and related procedural questions. Nashua offers the following response:

Milford and Nashua asked that "the Commission approve the *[Water Supply and Indemnity Agreement]* pursuant RSA 38:11 and RSA 38:17 as a condition of any Commission approval of Nashua's petition" in order to resolve Milford's concerns as expressed in the *Joint Motion*. While a motion constitutes part of the record under RSA 541-A, neither Nashua nor Milford ask the Commission to consider the *Joint Motion* or the Agreement as evidence on the merits.

From a legal perspective, the Agreement is binding settlement agreement between Nashua and Milford. In the event the Commission approves Nashua's petition, Nashua has agreed to abide by its terms and Milford has agreed to a resolution of the issues addressed by the Agreement and that, as a result, it will not appeal or seek reconsideration with respect to those issues. As a result, the *Joint Motion* and Agreement have only a legal effect, but not an evidentiary one that requires additional evidence or re-opening of the record.

I trust that these comments respond to the questions contained in Staff's letter of February 22, 2008. If you have any questions, please contact me.

Very truly yours,



Justin C. Richardson
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JCR/sem
cc: Service List (via Electronic Mail)

Date: April 21, 1997
Time: 11:00 a.m.
Room: 104 LOB

The Senate Committee on Executive Departments & Administration held a hearing on the following:

HB 0528 relative to municipal water, gas and electric utilities.

Members of Committee present:

Senator J. King
Senator Rubens
Senator Whipple
Senator Roberge
Senator Podles
Senator Patenaude

The Chair, Senator John A. King, opened the hearing.

Representative Jeb Bradley, Carr 8: For the record, Jeb Bradley, Carroll County District 8. I come back before you again this morning with probably one of the most important pieces of the year. This bill, HB 528, is similar to a bill that passed the Senate last year. It clarifies, it simplifies, and it lays some new groundwork for what is an existing right now of municipalities, towns, and cities across the state to, through a process, take over the existing utility network within their community or in some circumstances outside of their community.

We believe that this is a very important piece of legislation for several reasons. As I said, it clarifies and it simplifies an existing right and opportunity, but perhaps more importantly should the process of electric utility deregulation falter or get slowed down in the courts, this provides some balance and some needed opportunities for municipalities to proceed on their own if the benefits of competition don't arrive as quickly as we had hoped.

I'll just touch upon some of the main changes in the statute that are in this bill, and then Cliff, I think, would be happy to take you through some of the details. This re-enacts RSA 38, repeals and re-enacts, so there are many

changes, but the specific ones are that those areas that are different for electric and water are spelled out with different provisions. The water sections that are separate are later in the bill.

The public interest determination is changed, and that is throughout the bill, starting on page 1 of the bill, or page 2 actually, line 29, 38:3, cities, towns, or village districts, 38:4 and 38:5, unincorporated places. What the language "rebuttable presumption" says is that once there has been a vote by the community, there is a presumption by the community that the public utilities commission should listen to that there is a presumption that the public interest is satisfied by that vote.

It is further illuminated on page 3 of the bill in section 38:11 where the public interest determination by the commission is spelled out, and it does give the commission the opportunity to set conditions and issue orders to satisfy the public interest. So clearly the commission is an integral player here.

Language in the bill added "unincorporated places" which, while most of us who live south of the White Mountains don't have to worry about that, it was a major interest for Representative Larry Guay, who represents several unincorporated places, that they be given ample opportunity.

The ratification section on page 4, language was added to make it explicitly clear that municipalities were authorized to hold special meetings if necessary. That was a possible shortcoming in the prior statute. The limitation in RSA 33-B on bonding was removed so that communities could exceed, I believe, it was a 10% cap and go forward without that limitation.

Senator Eleanor Podles, D. 16: Where is that bonding? On page 4? That you're talking about.

Representative Jeb Bradley, Carr 8: It is ...yes, in section 38:13.

Senator Eleanor Podles, D. 16: So, we're still on ratification in other words?

Representative Jeb Bradley, Carr 8: It is in that section. Yes, Senator. And, I think one of the last other major changes that is in this bill are on page 9, the consequential damages section that allows the commission to determine, in essence, consequential damages which is what we're calling stranded costs, if the Federal Energy Regulatory Commission decides it does not have jurisdiction, which is highly unlikely.

The following section, 38:34, says that any newly municipalized electric company shall unbundle rates, and it also allows those five communities that now have municipal electric departments, which include my town of Wolfeboro, Woodsville, Littleton, Ashland, and New Hampton, that they may voluntarily unbundle.

Another key provision is the financial responsibility section, which in essence says that if you're not part of the service territory of a municipal utility or you choose not to take generation services from that municipalized entity that you cannot be held responsible for any problems through taxes or other charges.

I think that highlights most of the bill. Once again, I think this is a really important piece of legislation in that it hopefully will provide an opportunity for communities to go forward based on statutory rights that they've had in the past and will offer another option should there be protracted litigation with regard to the restructuring of our electric utility industry.

Representative Clifton Below, Grafton 13: I am Representative Clifton Below, representing Grafton District 13, the City of Lebanon and Town of Enfield.

I would just like to elaborate on Representative Bradley's comments and say that I think this bill in part was part of a sort of carrot and stick approach to help us move towards competition restructuring and lower electric rates. Obviously it is in a sense the stick part in that it provides municipalities, it strengthens and reinforces an existing right of municipalities to municipalize their distribution system and makes that opportunity more meaningful and one that can really be exercised should this effort to restructure result in protracted litigation, or whatever.

I think it is important to realize that the right of municipalities to municipalize a monopoly utility system has existed from early in this century and it exists in almost every state in the nation, and it has been exercised from time to time. In fact, there are over 2,000 municipal electric systems in this country, some of which were created by municipalization. Most of which were formed in the early days of electrification, and they serve somewhere in the order of 20% of the nation's customers.

Our laws have not been updated in this regard for many years. This bill, I think was SB 610 last year, went through this committee, was approved, went through our committee. We provided some amendments and when we got to conference committee there was a feeling that we really hadn't done as much work as needed to be done, and the bill was allowed to die in conference committee by sort of mutual consent of all the parties.

It was reintroduced and we put a lot of work into this. There was a number of different bills that essentially became this one bill. We had ones that attempted to update the water system section. There was another bill, HB 411, which looked at the bonding issue, and went to update RSA 33-B, and they were all merged into this one bill. After we had taken them apart and worked on each separate part we put them all back together.

If you'd like, I don't know how much detail you want to go into this, but I would be happy to walk through some of the more detail in terms of what is new and what has changed. We'll try to go through this slowly. Starting on page 1, chapter 38. I believe that is the same title of the chapter as currently exists, and we're simply repealing and re-enacting the whole chapter.

On line 10, Roman three (III), the term "municipality" is defined to include unincorporated towns and unorganized places. On line 16, there were some words added such as "establish, expand ...". We already had "take, purchase, lease." We just wanted to make clear the terminology included expansion of an existing system.

For the five systems that exist, I think a couple of them serve their whole towns, but at least three of them only serve part of their existing towns, Ashland, New Hampton, and Haverhill or Woodsville, only serve part of their towns. Wolfeboro I think serves basically almost the whole town.

Representative Jeb Bradley, Carr 8: 98%.

Representative Clifton Below, Grafton 13: Line 20 on the first page again there were some words that were added for these purposes. "Take" was added in. It wasn't there. "Or otherwise lease," "or otherwise acquire and maintain" I think were some additions.

When we turn to page 2 on line 4 or line 3 is where this phrase comes that says, "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." This provides this process where it takes a two-thirds vote of the governing body. I should mention that is also a new term. In many places there were specific references to the city council, the town selectmen, mayors, so on and so forth. We changed the reference so it generally talks about the governing body of a particular entity, which is a defined term elsewhere in the statutes.

But, this creates the notion that if there is a two-thirds vote to establish a municipal utility system that that creates a rebuttable presumption. That it is in the public interest. When we talk about this, there were attempts I

think in 610, as well as the way this bill was introduced, to define what public interest was meant. We ended up deciding not to do that because there is a long history of defining the term "public interest" in the law, in the case law, and the law before the PUC.

Both the utilities that were involved in testifying on this as well as the other groups, municipalities all felt it was better to not try to create a new definition for public interest, but rather to allow the one that exists in case law that has evolved over time to stand. But, it does create that presumption that can be rebutted and challenged when it goes to the commission. That's repeated on line 9, and it is a vote of the town or village district which is obviously at an annual meeting or a special meeting duly warned.

The whole section starting on line 12, 38:5, By Unincorporated Towns and Unorganized Places, this is a whole new section because they were not addressed previously. Senator Fred King and Representative Guay were concerned, and Coos County has taken something of a position on this. They had representation in this matter wanting to be sure that in Coos County where there are so many unincorporated towns that there would be a mechanism to provide for municipalization, which is through two-thirds of the members of the county convention.

Again, on line 22, there is a reference to within 30 days after the confirming vote the governing body shall notify in writing any utility engaged of the vote. Previously this mentioned there was a lot of different sections that talked about the mayor of a city or the selectmen. We just said the governing body shall provide the notice.

Down on line 33 where the utility is then to reply within 60 days of the receipt as to whether they are, in effect, willing to sell or not. That is given back to the governing body. Then it does provide if the utility says no, then 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 as provided in 38:10.

I believe that that exists in the current statute. We looked at taking that in and out, but ended up deciding that that should stay. It simply says if they say no then it is up to the process that is set forth as to what property is to be acquired. Whereas if the utility applies in the affirmative as provided in line 37, then they set forth the price in terms it is willing to accept and specify what plant and give a schedule of plant that is to be sold to the municipality.

Then 38:8 on page 3, line 6 provides that the governing body may negotiate and agree with the utility if there is a negotiated agreement on the sale. 38:9, Valuation, of course that was part of the existing statute, although

there are some changes to it. For instance, on line 18 it specifies that "...the commission shall determine the amount of damages if any caused by the severance of 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."

That is an important section because traditionally it was up to the commission to determine all damages of all nature. This has separated the damages into sort of the severance damages versus the consequential damages and stranded cost.

If you turn to 38:33, which is at the bottom of page 9, line 36, provides that consequential damages are going to be determined by the Federal Energy Regulatory Commission. Although it says to the extent they don't have jurisdiction actually, it says the commission shall determine just and reasonable consequential damages. The reason it says it in that way is because basically the FERC, Federal Energy Regulatory Commission, last spring in a major order addressing the whole issue of stranded costs in the electric utility industry said that they will ...they asserted jurisdictions that they will determine damages of this nature stranded cost related to generation and supply arrangements as a result of municipalization.

So, the point is that FERC has asserted jurisdiction over this issue in what is called FERC Order 888, and the feeling was that since FERC has said they have jurisdiction over determination of these kinds of stranded costs and what is going to be paid for them in the case of municipalization because it is transforming part of a retail system into a wholesale customer, and basically FERC says it has jurisdiction over wholesale transactions and arrangements. That is where it is assumed that it is going to be determined.

However, it does say that if FERC does not assert jurisdiction and is legally challenged, there are some entities challenging FERC's assertion of jurisdiction, then the commission shall have the ability to determine that on a just and reasonable basis. And then of course it says the commission need not make a determination when there is an agreement between the utility and the municipality. It says need not because it is conceivable that there would be a third party which felt that there needed to be issues addressed so the commission could step in and make a determination if they felt that was the public interest required.

So, if you turn back to page 3, and I think the section IV on line 23 and 38:10 are essentially similar to what currently exists. 38:11 at the bottom of the page the public interest determination by the commission is a change from the existing statute to the extent that they determine if it is in the public interest, although we've created a rebuttable presumption that it is by a two-thirds vote of the municipality, but it says they may set condition and issue orders to satisfy the public interest. This clarified their ability to positively assert conditions or even issue orders that say the public interest requires, for instance, that a municipality may have to acquire some property outside of its boundaries. If there is some customers that would otherwise be stranded with a small distribution line that crosses a municipal boundary the commission would have the power to order the utility that is selling its property or having its property acquired and also order the municipality to acquire that portion of a system that may be outside of their boundaries.

For instance, which was a gap that we found in the current statute that wasn't addressed if that's what the public interest would require. Again, it goes on to say the commission need not make a determination if there is an agreement for sale. But again, if there is a third party, such as a neighboring municipality or some customers who felt that they would be aggrieved by the proposed sale, the commission could be on their own initiative or petitioned by another party go ahead and make a public interest determination even if there is mutual agreement. And again, they could set conditions or issue orders to insure that public interest is satisfied.

When we get into this actually I think this expansion of existing municipals is a new section. Again that wasn't clearly addressed in the existing statute, and we added a provision that parallels the process for expansion. Ratification -- this is where the issue of bonds came up -- under the existing statute does not really reference out of its own language. It talks about municipality issuing bonds to pay for the acquisition cost, and it says such indebtedness shall not exceed at any one time 10% of the tax valuation of the community. However, the existing statute doesn't make clear whether these bonds are general obligation bonds, revenue bonds, or what. So, various bond counsel who looked at the current statute said it is really ambiguous and would be very difficult to utilize.

Typically, any acquisition that is being contemplated is less than 10% of the valuation of the municipality. However, usually that condition is only related to general obligation bonds and not tied in to revenue bonds. So, it was felt the appropriate thing to do was tie this into RSA 33-B which is the existing statute on municipal revenue bonds that disconnects them from sort of the general obligation of the community. It makes them specific to anticipated revenues from specific facilities. So, what we have done is tied

this off to the fact that the municipality may issue bonds and notes pursuant to RSA 33-B.

I'm going to ask you to turn to page 10. Near the bottom of the page, line 32, there is an amendment to RSA 33-B on revenue producing facilities, the term that provides the definition the existing statute covers water works, sewage treatment plants, solid waste facilities, but it doesn't cover electricity and gas systems. So, we have specified and included into the definition of revenue producing facilities "facilities for the production, generation, transmission, or distribution of electricity or gas," so then it all flows right out of that 33-B which has been updated in recent years and is considered to be a pretty clear good statute about how to do revenue bonds.

As Jeb mentioned, it goes on because there is a time limit at the start of – I'm back on page 4 on line 8 – it provides that the municipality within 90 days of a final determination of price has to decide whether or not to proceed with the acquisition, it does provide in line 13 that the municipality is authorized to hold a special meeting to take such a vote, and it clarifies that the special meeting doesn't have to be an emergency situation, but they can take it to satisfy the timing requirement, and of course the purpose of the timing requirement is so that once evaluation is made it proceeds without dragging it out so the evaluation would change over time by a delay in the vote to decide whether to go ahead and do it.

We did consider changing this, but we left it in on line 19. There is a specification that if the ratifying vote provided for in this section is in the negative, no other action under this chapter shall be had during the ensuing two year period. So, if a town chooses not to proceed, essentially under the voting provisions of 33-B which I believe requires a two-thirds majority vote to issue revenue bonds, if that two-thirds vote fails then the whole, there can be no other action for at least a 2 year period of time, so that this provides sort of a time out period where it is not, the incumbent utility has a chance to go ahead and perform and not be bothered by this for a couple of years.

Going on down to section 38:14, Operation of Plant, line 25-26, there is a new phrase that provides that "The operation by a municipality outside its own limits shall be subject to the jurisdiction of the commission except as provided in RSA 362." In RSA 362 which has to do with the general jurisdiction of the commission, it does provide that if a municipality provides utility service outside of its boundaries on the same rates and terms as it provides to its own residents within its boundaries it is not subject to the commission jurisdiction.

So, for instance, and I don't know if this is the case, but the Manchester Water Works, the Manchester Water Department which serves communities

outside of its boundaries, is or isn't subject to jurisdiction depending on whether it charges the same rates or different rates as it does to its own customers. Does that make sense? So, we just tied that off and tied it back into RSA 362. I think there was an attempt to spell that out in the existing statute, but it was felt to just tie it back into the other.

I think there is a little clarification on page 4, line 30 that a municipality may take by eminent domain land, any interest in land or water right within its limits. It doesn't allow a town to go outside of its limits for the expansion of plant, so that could only be done pursuant to a commission order to satisfy the public interest or by mutual agreement.

I think on page 5 and 6, most of that is pretty much as it exists in the current statute. There is something, I think the supply contract section had a little bit of language that was changed on line 4 where it starts off "Any such municipality may contract with individuals, corporations, and other municipalities and the citizens of such other municipalities for supplying them ...." There was just clarification language. You say citizens thereof. There are quite a few places, I'm not hitting every point, but there are quite a few places where we tried to clean up language that was ambiguous or not very clear or archaic. I'm not hitting all those points.

Page 7 is where the next major set of changes is. On page 7, line 8 is the additional provisions for water systems. It used to be that some of these sections were blended right in to the rest of the chapter. We decided to take out the ones that are specific to water systems and electric systems and put them at the end of the chapter, so it is just a little more clear. Most of this exists in the current statute. An example of the kind of minor changes we made on line 33, there is the section called Water Rates. It used to be Water Rentals, and used the term "rentals" throughout. We just changed it to the word "rates" because that is the term used these days.

Turning on to page 9, the additional provisions for electric systems, as Representative Bradley mentioned, at the bottom of the page, there is the section on consequential damages, and as I previously mentioned, it explains how that would be dealt with. On page 10, line 5 the Unbundling Rates and Open Access, that's new as well as the 38:35 is all new.

Maybe I'll just take a minute to explain the significance of that. It does provide that if a municipality establishes a municipal system then in effect it can't require customers to pay through taxes or otherwise costs associated with the utility except for power or services consumed either directly by the municipality or by the customer. That's on lines 13, 14, 15. So, it provides that if you are going to municipalize you can't use the taxpayers' ability to

pay taxes as a way of subsidizing that municipalization effort. It really has to stand on its own as a revenue producing activity.

Obviously, the intent there is as we're moving generation to the competitive side, we recognize that distribution will remain a regulated monopoly, but it was felt that the taxing ability of communities should not be used to subsidize and affect municipalization efforts. It should stand on its own.

The next section Roman two (II) at line 16 goes into address the specific issue of generation services. I should just say that we considered not allowing municipal systems to own generation. Since generation is subject to competition. We had a lot of debate about that. We ended up coming down on the side of saying that we aren't going to presume to know better than the municipality whether they should actually own generation or not. We're going to leave that as a local decision, but we want to make it clear that if they acquire generation either through ownership or through contract, for instance, there again they cannot make their customers or the taxpayers of the community responsible for the cost of those generation services except to the extent that they take power from that generation facility.

So, what it says here in this line 16 through 24 is that if a municipality is going to own generation it has to support itself on its own revenues and they can't go back to the taxpayers or the customers to subsidize or support that. In a sense it has to compete on its own merits.

So, that would certainly be something that bond council for a municipal system would look at as they were authorizing the issuance of revenue bonds to make sure that the credit really is that they are secured only by the facility itself, such as a mortgage would do.

The other new thing in here is the Roman three (III) at line 25, which provides that if a municipal electric utility acquires a generation plant and equipment, the municipal electric utility shall make payments in lieu of taxes in the amount that the plant and equipment would have paid taxes if it had been owned by a private owner. So there again, it is stating that you are not going to subsidize a municipal owned generation plant to compete against private owned generation by exempting it from the payment of property taxes. That it should make payments comparable to what it would pay if it was privately owned.

The last sentence essentially ties that back in and says it is not part of the cost of generation services that people that aren't taking those services can be held liable for it.

Going on down on line 32 again is the amendment to RSA 33-B, which I discussed before. On page 11, line 5 there is a heading "Redundant Electric Lines." This is a new section, which I think we put in the House version of the Senate bill last year, which we retained, which specifies that "No public utility or municipal utility shall construct redundant parallel electric utility lines. Such duplication of lines shall be deemed contrary to sound economic policy and contrary to the public interest," and does not apply until retail electric competition is certified to exist.

That is just to make clear that if a municipal system wants to expand, the way they should expand is by taking or acquiring existing distribution lines and not constructing parallel lines, because obviously parallel lines, two sets of poles down the same street could present a situation where it is not really in the public interest, because you're duplicating the cost of the distribution system. We did make that apply prospectively only because there has been a case where the Town of Ashland has attempted to expand. The PUC found 2 to 1 against the municipal system, and said that they could not expand by running parallel lines to the co-op lines. They appealed that. I don't know exactly where that stands, but this is intended to not really address their issue but to set a policy going forward from a time some time next year when the competition is established. So we're saying really competition can exist in generation services, but not in distribution services at this time.

The remaining references throughout the rest of this are simply existing statutes that tie back to this section to this RSA and 38 because we've re-enacted it. The numbering has changed, so it makes the proper references to the numbers. If that helps you.

Senator Jim Rubens, D. 5: My compliments to the House committee. This is some quality draftsmanship. I have some questions.

On page 9, line 37 where you would use the terminology of the standard "just and reasonable" as opposed to the "fair, balanced, equitable" language in 1392. So, we have 2 standards by which stranded costs can be determined. Why did the committee choose to not recognize the standard.

Representative Jeb Bradley, Carr 8: FERC would use the "just and reasonable" standard under Order 888, and that's why we chose to do that.

Senator Jim Rubens, D. 5: But here we are coming back to the state. The state determination where we've set a policy for all other which would probably be the vast majority of stranded costs determination fee would be using the fair, balanced and equitable. Why the difference here is probably a small category of that asset.

Representative Jeb Bradley, Carr 8: Primarily because that would be a FERC standard that they would use it. We just felt that that was appropriate because of the reliance on the FERC standard.

Representative Clifton Below, Grafton 13: To be honest, that was drafted last year, and there was no really question of it this year, so we didn't really revisit that particular question. Although, it was drafted after HB 1392 had passed. But, just to let you know we didn't actually discuss that in the House this year.

Senator Jim Rubens, D. 5: You didn't discuss changing it then?

Representative Clifton Below, Grafton 13: Correct.

Senator Jim Rubens, D. 5: You have required, I just want to be clear what you are meaning here at the top of page 10. When competition exists anywhere in the state, automatically by statute any municipalized authority muscle out choice by consumers who live in that municipality zone, municipalized zone must allow choice?

Representative Jeb Bradley, Carr 8: Anyone going forward. Those five existing may voluntarily.

Senator Jim Rubens, D. 5: Do you define anywhere, do you define direct versus consequential damages anywhere in here so we have a clear demarcation?

Representative Jeb Bradley, Carr 8: No.

Representative Clifton Below, Grafton 13: Well, I think there is ...it is not a defined term, that's correct. There is an elaboration of it which was on page 3, lines 16-22. It says "...caused by the severance" in the first instance, and then it clarifies so that severance really happens with regard to any kind of utility. So, a water system, if there is severance, it is the broad term. In case of electric utilities, it is limited to the value of plant and property and the cost of direct remedial requirements. So that's how there is an attempt to define it.

And then it says "...consequential damages such as ..." so people seem to feel that sufficiently ...

Senator Jim Rubens, D. 5: You discussed that in committee and those definitions were considered sufficient?

Representative Clifton Below, Grafton 13: Yes.

Senator Jim Rubens, D. 5: For costs that are direct damages, is there reference to net depreciated book value or book value of those assets besides remedial costs as you debated, decided?

Representative Clifton Below, Grafton 13: It was debated. There was some question about the whole valuation process. There was consideration to whether it should be thrown to the board of tax and land appeals in terms of the appeal procedure to the commission determination. It was felt that the commission in many ways really was more expert in terms of utility property and in terms of how it was going to balance the public interests between shifting costs to say an existing rate base versus a municipalized effort, i.e. if you set the price too low in an acquisition, you would actually potentially shift cost onto existing ratepayers that are left behind with the incumbent utility.

So, this is an indirect answer, but we felt that it should stay with the commission. There was discussion about whether we should spell out whether it is net depreciated book value, but it was felt that was not ...it was decided not to do that.

Senator Jim Rubens, D. 5: So now it is ambiguous. The PUC decides.

Representative Clifton Below, Grafton 13: Yes.

Senator Jim Rubens, D. 5: How could there be, if the definition net book were used aside from the remedial costs, how could it be argued that would be anything other than fair to all parties on both sides?

Representative Clifton Below, Grafton 13: It might be. You may hear some other arguments on that point.

Senator Jim Rubens, D. 5: On page 5, line 3, the definition of supply contracts. The list isn't exhausted there. For example, LLC's, persons, which under the law is deemed to include all other types of entities. Could that language be somewhat expanded to make sure we don't lose anyone or any entity?

Representative Clifton Below, Grafton 13: I don't see a problem.

Senator Allen Whipple, D. 8: What page was that, Jim?

Senator Jim Rubens, D. 5: Page 5, line 3. "...municipality may contract with individuals, corporations, and other municipalities and the citizens ..." but you may have other entities like LLC's or a person.

Representative Clifton Below, Grafton 13: Sure, partnerships. That sounds like a good idea to me.

Senator Jim Rubens, D. 5: On page 10, line 18, let's say a municipality makes a bad decision with respect to some kind of generation supply, some kind of open ended generation contract with cost escalation provisions, would that be possible? And the customer is then, by virtue of the municipal price going up would decide to elect to go to another supplier, then there will become fewer and fewer customers for the municipal generation choice and we get into a death spiral situation, and you prohibit the municipality from loading that back on the taxes. What do you foresee here?

Representative Clifton Below, Grafton 13: Well, potentially what is foreseen here because there is this unbundling rates and open access that the party at the other end of the contract, say it is a contracted provision for services, would have their contractual rights limited in essence by the statute which would exist prior to that contract, which says that if the municipal system say defaults on that contract, that they couldn't force that municipal system to have recourse back on their customers, because of what will then be an existing statutory provision saying that they are limited. I think the ...

Senator Jim Rubens, D. 5: The municipal system would, in essence, have limited assets and a limited ability to collect from any party. The party entering into a generation contract would be forewarned of that?

Representative Clifton Below, Grafton 13: Should be forewarned of it in light of this provision in the statute. Likewise, if the municipal owned a generation plant, decided to build one, it proved to be uneconomic, they couldn't get any customers for it, they would probably default on it, and whoever loaned the money would foreclose on the facility itself as their recourse, and that would be the only recourse considering that this provision was on the books prior to the indenture, the debt obligation.

Senator Jim Rubens, D. 5: So this provision then would, in essence, foreclose any municipal entity from having an open ended liability?

Representative Clifton Below, Grafton 13: Yes. Yes that's the intent of it.

Senator Jim Rubens, D. 5: Is that right? No doubt about that?

Representative Clifton Below, Grafton 13: Well ...

Senator Jim Rubens, D. 5: This could be a huge problem unless there is no doubt. Municipalities could make mistakes.

Representative Clifton Below, Grafton 13: There is no doubt that this is the intent, and the effect of this would be to very much discourage a new municipal system from getting involved in generation at all. You know, I can never totally anticipate how something like this might be litigated, but clearly the people who looked at it felt like that would be the effect, that it would very much limit what could be done.

It was thought that the nature of the things that a municipal might do, because many municipalities have a large electric load of their own, is that they might go out and arrange for a contract to provide generation services for their own plant, and they might say to their customers in town, their customers of the distribution system, "We've got a good deal for supply of generation. If you'd like to join in our contract, there is a three year commitment here at this price. You're welcomed to do so, but you have to sign a contract."

So, the municipality might sort of aggregate some amount of load in part to satisfy their own load, but it would be anticipated in light of this provision they would only do so to the extent, they would only make a commitment to the extent they had customers signed up and committed to it. But, there again, the interpretation we have heard that this provision in the statute prior to the enactment of the contract would sort of rule over the contract. The contract would be subject to these statutory conditions so that the party at the other end supplying generation would have limited recourse if there is a default on that.

Senator Jim Rubens, D. 5: Right now in Dover, the Dover situation, Dover may wish to municipalize and then ensues a lengthy prospect of litigation over valuation. Does this bill streamline that valuation contest, valuation disagreement contest so that that doesn't become an inhibitory barrier? How would we delegate it to the PUC?

Representative Clifton Below, Grafton 13: That was certainly part of the intent of updating this legislation, and I think it does in a couple ways. It clarifies the vote process by the community, and the turnaround times. It clarifies the bonding authority, and it takes to the extent that it narrows what the commission has to decide the damages are, the valuation is, it narrows that so that can go ahead and happen.

If there is litigation with FERC as to the consequential damages, that can take years, but that could, and that is typically what has delayed

municipalization efforts, but in this case it could proceed under state law while those issues are litigated before FERC, and they will land however they play out.

Senator Jim Rubens, D. 5: So, perhaps by virtue of FERC 888 there could still be massive inhibitions against municipalization due to the prospect of extended litigation in Washington before FERC?

Representative Clifton Below, Grafton 13: There is certainly that risk factor, and we couldn't see any way to get around that.

Senator Eleanor Podles, D. 16: On page 8, on 38:30, line 28, it allows the municipality the power of eminent domain, section 30, the water supply. Is that new or is that in statute?

Representative Jeb Bradley, Carr 8: I believe that is existing statute. I'll check.

Representative Clifton Below, Grafton 13: We're pretty certain that is in the existing statute.

Senator Eleanor Podles, D. 16: Could you find out for me?

Representative Jeb Bradley, Carr 8: We'll find out.

Senator Eleanor Podles, D. 16: Going back to page 4 now, on 38:12, line 3, the expansion of plants by the municipalities. Could you expand on that? Is that something that is new?

Representative Clifton Below, Grafton 13: Yes. The current law didn't really have any clear provision for how an existing municipal utility would expand, and I think there have been cases about existing water plants and electric ones in the case of Ashland where they have sought to expand and it just hasn't been clear how they do that.

So, in the case of Ashland they said we are offering the co-op so much money to buy a distribution line on a road in the Town of Ashland that they serve part of and they wanted to serve the rest of it. The co-op said no thank you and so the Town of Ashland proposed to build their own set of (tape change) the process of determining value and damages to the PUC.

Senator Eleanor Podles, D. 16: So, does this apply to all municipalities?

Representative Jeb Bradley, Carr 8: No, just the 5 existing municipalities: Wolfeboro, Ashland, New Hampton, Woodsville ...

Senator Eleanor Podles, D. 16: Oh, I see.

Representative Clifton Below, Grafton 13: Well, those are the 5 electric. There are many municipalities that have water systems that may want to expand. Typically, there is not a private and a public water system in the same town, but that is not always the case. Obviously they could do it by mutual agreement, but it may be that the voters in a particular town felt strongly that they wanted their existing municipal water system to serve the whole town or more of it. This provides a clear route for doing that.

Senator Eleanor Podles, D. 16: Would that apply to Manchester, Manchester Water Works?

Representative Clifton Below, Grafton 13: They would not have the authority to expand outside their boundaries using eminent domain or the power of taking. They could only do that outside their boundaries by mutual agreement. So, it would only apply to the City of Manchester within its own boundaries if there is some part that it doesn't serve already.

William Bartlett, Jr.: For the record, I am William Bartlett, Jr., and I represent Consumers New Hampshire Water Company. Consumers supports HB 528 provided it is not intended to effect any matter before the Public Utilities Commission at this time.

There was discussion in the House, and I believe it was the intent that HB 528 was not to effect the issue between Consumers and the Town of Hudson. Representative Below mentioned today that this was to go forward. I would hope that that forward means that anything that would come before the commission in the future.

We did not find any exception or any grandfathering, so-called, and it is our request that the committee consider adding "However, it shall not be applicable to any proceeding then pending under the former Chapter 38 as this legislation is to be effective July 1, 1997." So, we feel it would be unfair to legislate the matter that is before the Public Utilities Commission at this time.

Senator Jim Rubens, D. 5: Do you know no other cases relative to any type of utility that would be effected by this grandfathering?

William Bartlett, Jr.: It is to the best of my knowledge that this is the only one that is appearing before the Public Utilities Commission. There is a representative from the Public Utilities Commission here today that could

costs to mark up D&D assets. Here we are leaving that question open. These could be very large sums of money we're talking about here. Not inconsequential sums of money. Again, when we set policy last year we said D&D assets are not to be marked up.

Representative Jeffrey MacGillivray, Hills 21: I believe the exact phrase is that it is not a preferred method, and we were sending a clear signal that they better have a very, very, very good reason for doing anything different. I agree with you.

Senator Jim Rubens, D. 5: I don't have the language in front of me. I think it was stricter than that.

Representative Jeffrey MacGillivray, Hills 21: You may be correct. My recollection is otherwise, but in any case the intent was clear. We don't like the idea.

With regard to the main point of your question ...

Senator Jim Rubens, D. 5: Then it ties in with Senator Whipple's concerns about valuation and above net book. We explored that.

Senator Allen Whipple, D. 8: Any other questions? Any one else wish to testify? If not, I'll close the hearing.

Hearing closed at 1:00 p.m.

COMMITTEE REPORT

COMMITTEE: **Science, Technology and Energy**

BILL NUMBER: **HB 528-Local**

TITLE: relative to municipal water, gas and electric utilities.

DATE: March 13, 1997 CONSENT CALENDAR YES ☐ NO ☒

☐ OUGHT TO PASS

☒ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☐ RE-REFER

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

This legislation repeals and reenacts RSA 38 which allows for municipalization of electric, gas, or water systems by towns and cities. The provisions of this statute have not been updated in many years and are cumbersome for any community seeking to municipalize utility services. With competition coming in the electric industry, the committee believes that towns and cities need the option to municipalize electric utility services if there is to be a level playing field with utilities that might seek to delay implementation of competition. The provisions in this bill are balanced as the Public Utilities Commission must determine if a municipalization is in the public interest. A two thirds favorable vote by a city of town would, however, constitute a rebuttable presumption of public interest. Furthermore, there are protections for residents of a community that are not customers of a municipal utility.

Vote 17-0.

Rep. Clifton C. Below &
Rep. Jeb E. Bradley
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT