

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 04-048

CITY OF NASHUA

RSA 38 Proceeding re Pennichuck Water Works

Order Denying Motions for Rehearing

ORDER NO. 24,948

March 13, 2009

I. INTRODUCTION

On July 25, 2008, the Commission issued Order No. 24,878 approving the City of Nashua's (Nashua) taking by eminent domain of Pennichuck Water Works, Inc. (PWW) and setting a value for PWW's assets (Order). On August 22, 2008, PWW, Pennichuck Corporation, Pennichuck East Utility, Inc. (PEU), Pittsfield Aqueduct, Company, Inc. (PAC), and Pennichuck Water Service Corporation (PWSC) (collectively Pennichuck), filed a motion for rehearing. On August 25, 2008, Nashua filed its motion for rehearing.

On August 27, 2008, Nashua filed an objection to Pennichuck's motion for rehearing and, on August 29, 2008, Pennichuck filed a motion to strike Nashua's motion for rehearing as untimely together with an objection to Nashua's motion for rehearing. On September 4, 2008, Nashua filed an objection to Pennichuck's motion to strike. On September 8, 2008, Nashua filed a motion to strike Pennichuck's objection to Nashua's motion for rehearing. On September 18, 2008, Pennichuck filed a motion for leave to reply as well as a reply to Nashua's objection to Pennichuck's motion to strike. Also on September 18, 2008, Pennichuck filed an objection to Nashua's motion to strike Pennichuck's objection to Nashua's motion for rehearing. On September 24, 2008, Nashua filed a response to Pennichuck's motion for leave to reply.

II. POSITIONS OF THE PARTIES

A. PENNICHUCK

Motion for Rehearing

Pennichuck alleges that the Order fails to meet the legal standard required by RSA 38 and the New Hampshire and United States Constitutions for the condemnation of utility property; fails to make the factual findings required to support such an order for a taking and for the valuation of PWW's assets; and fails to consider, or misunderstands, relevant evidence.

1. Public Interest Standard

Pennichuck claims that the Order fails to apply an appropriate public interest standard and fails to articulate any cognizable public interest standard. In making these allegations, Pennichuck relies on case law involving takings pursuant to: RSA 231:8 and :23 (laying out public highways); RSA 205:2-b (taking of blighted land for redevelopment); and RSA 423:3 (taking of land for municipal airports). Pennichuck further claims that the Order may have erroneously applied a no net harm standard. According to Pennichuck, the Order fails to set forth the Commission's reasoning and methodology in determining the public interest.

2. Water Systems Entirely Outside of Nashua

Pennichuck claims that the Order erroneously interprets RSA 38 to give the Commission authority to allow Nashua to take water systems (satellite systems) located entirely outside of Nashua, even though those systems are not connected to the system that serves Nashua and are not necessary to supply water service within Nashua. Pennichuck points to the Commission's finding in Order No. 24,425 that the authority conferred under RSA 38:2 should be narrowly construed as it relates to facilities beyond municipal boundaries. Pennichuck then claims that the Commission failed to narrowly construe the takings authority when it used uncertainty, and rate

and service continuity as bases for allowing Nashua to take the satellite systems. Pennichuck further asserts that there was no meaningful evidence to support the Commission's finding that Nashua should acquire the satellite systems. Pennichuck incorporates its arguments in its earlier motions to dismiss and for rehearing of Order No. 24,425 into this motion for rehearing.

3. Segmented Public Interest Analysis

Pennichuck claims the Commission erred when it conducted separate public interest analyses for the taking of PWW's core and satellite systems, where the only proposal before the Commission called for the taking of all systems together. Pennichuck argued that no vote occurred in the municipalities containing satellite systems outside of Nashua and that no rebuttal presumption supports the taking of satellite systems. According to Pennichuck, if the Commission had considered the PWW systems as a whole, including the satellite systems, it would have had to consider the public interest of taking all systems, without the benefit of the rebuttable presumption of RSA 38:3.

4. Municipal Vote for the Taking

Pennichuck repeated arguments made in its earlier motions to dismiss and for rehearing that Nashua's petition exceeded the scope of the January 14, 2003 confirming vote of its residents which, according to Pennichuck, only authorized taking the core system. Pennichuck claimed that voters were not properly informed that Nashua would use eminent domain to take PWW assets.

5. Failure to Consider Relevant Evidence

Pennichuck claims that the Order fails to consider, or weigh properly, evidence of the public interest, including the interests of the broader public, the interests of the state, and the democratic interests of residents of towns outside of Nashua. Specifically, Pennichuck claims

that the Commission failed to accord any weight to testimony by Commission staff, Veolia staff, and Bedford and Milford town officials, that Pennichuck is a well-run utility.

Further, Pennichuck claims that the Commission failed to weigh the damage to the public interest of losing access to the capital and operational capability of the State's largest investor-owned water utility. Pennichuck points out that the public benefits of PWSC, which operates 86 water systems serving 19,230 customers in New Hampshire, would also be lost due to the taking of PWW and the ensuing loss of economies of scale.

Pennichuck argues that the acquisition of troubled water systems was in the interest of an investor-owned utility and will not be in the interest of a municipal utility such as Nashua. As a result, according to Pennichuck, Nashua's acquisition of PWW is not in the public interest.

Pennichuck also claims that the Commission failed to consider the harm to PWW shareholders in the form of a multi-million dollar corporate tax liability that will result from the taking. Pennichuck argues that the legislation allowing Nashua to acquire PWW assets through a stock acquisition was an effort to address this massive tax impact.¹

Finally, Pennichuck claims that, by giving deference to the ability of Nashua's elected officials to make good decisions regarding utility operations, the Commission ignored the opposition to the taking by the elected officials of the Towns of Merrimack and Milford.

6. Tax and Revenue Harm to Pennichuck Shareholders

Pennichuck asserts that the Order fails to consider the harm to Pennichuck Corporation and its shareholders in its public interest analysis. While the Commission considered the harm to customers of PEU and PAC, Pennichuck claims the Order does not discuss the loss of substantial non-regulated revenues to PWSC, nor the substantial corporate tax and capital gains tax at the

¹ See, 2007 Laws, Ch. 347:5 (SB 206).

shareholder level that will result from Nashua's taking of PWW assets. Pennichuck argues that the Order fails to balance customer and shareholder interests as required by RSA 363:17-a. Pennichuck takes the position that the Order's failure to consider the interests of Pennichuck shareholders is plain error.

7. Modifications to Nashua's Proposal

Pennichuck claims that the Order fails to conduct the public interest analysis based on Nashua's pre-filed proposal, upon which PWW conducted discovery, and instead based the ruling upon Nashua's altered proposals presented during hearing. Pennichuck points out that Nashua changed its initial takings proposal by voluntarily submitting to Commission jurisdiction, by agreeing to serve satellite system customers at core rates, by altering its operating contract to consolidate all customer service functions with Veolia, and by offering a mitigation fund for PAC and PEU.

Pennichuck argues that it expended time and expense in countering Nashua's pre-filed proposal and then had to litigate new proposals even as late as the last day of hearing, when Nashua proposed new conditions for the first time. Pennichuck claims that it was deprived of its due process rights because it had no opportunity to conduct discovery on, or respond to, the new conditions. Pennichuck claims that the Commission's consideration of the new conditions without further discovery and hearing violates Pennichuck's due process rights under Pt. 1, Art. 2 and 14 and Pt. 2, Art. 83 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution.

8. Conditions in Order Make the Presumption Irrebuttable

Pennichuck claims that the Order treats the statutory presumption of public interest as irrebuttable by imposing numerous significant substantive conditions in an attempt to overcome

the substantial defects that the Commission found in Nashua's proposal. Because the Order at p. 98 finds the conditions "are explicitly determined to be prerequisites to our decision that the taking is in the public interest," Pennichuck argues that without those conditions the Commission determined that the taking would not be in the public interest. Pennichuck then asserts that the conditions overstepped the Commission's authority to set conditions under RSA 38:11 and converted the statutory rebuttable presumption into one that was essentially irrebuttable. Pennichuck takes the position that the Commission's use of conditions in this way turned the Commission into a "super-legislature" enacting a complicated ownership and operational scheme which served as a basis for a public interest finding. Pennichuck Motion for Rehearing at p.16.

9. Conditions Exceed Commission Authority

Pennichuck claims that the Order imposes numerous conditions to satisfy substantial defects in Nashua's proposal that are beyond the Commission's authority, are not enforceable, and cannot support a public interest finding. Pennichuck refers to conditions that it claims require the Commission to exercise ongoing regulatory authority over the new municipal utility including: (1) customers of PWW outside of Nashua receiving the same rates, terms and conditions as those in Nashua; (2) continuing to oversee service quality issues; (3) continuing to oversee wholesale contracts; and (4) requiring Nashua's membership in DigSafe.

Pennichuck states that RSA 362:4 exempts municipalities from utility regulation. Pennichuck argues that RSA 374:22 (dealing with franchise authority), which does apply to municipalities, does not create ongoing Commission authority over municipalities. Pennichuck also asserts that RSA 38:11 cannot include conditions that would have the effect of extending the Commission's regulatory authority to a municipal water system. Pennichuck concludes that

Nashua's agreement to conditions cannot have the effect of extending the Commission's jurisdiction beyond that granted by statute.

10. Conditions Occurring After the Taking

Pennichuck claims it will not be able to challenge conditions subsequent to the taking, should those conditions not be met, because the Order will have become final. Such conditions include: (1) Commission review and approval of Veolia and R.W. Beck agreements 60 days after the Order becomes final; (2) inclusion of customer service functions in the Veolia agreement; (3) creation of a mitigation fund to benefit PEU and PAC customers; and (4) requirement that Nashua hire a PWW employee familiar with its facilities.

Pennichuck points out that should the conditions not be met post-taking it will not be possible to put the shareholders of Pennichuck back into their original condition. Pennichuck claims that the Order turns several of the prerequisite conditions into conditions subsequent, to be evaluated after the taking has occurred. Pennichuck argues that this is a corporate death penalty case where the gallows have been placed before the conviction. According to Pennichuck, this amounts to a denial of its due process rights under Pt. 1, Arts. 2 and 14 and Pt. 2, Art. 83 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution.

11. Nashua's Ability to Finance the Acquisition

Pennichuck claims that the Order's finding that Nashua is financially capable of acquiring and operating the assets of PWW is flawed because the Commission did not consider whether Nashua could finance the acquisition under the conditions prevailing in the financial markets and on the terms set forth in the Order.

12. Nashua's Future Rates

Pennichuck asserts that the rate comparability analysis in the Order between PWW and hypothetical Nashua rates, even assuming the Commission's taking price of \$203 million, fails to account for the \$40 million mitigation fund and fails to consider evidence of additional costs that were not included in Nashua's revenue requirement model.

Pennichuck notes that the Order relied upon rate analysis by Pennichuck's witness, Mr. Guastella, for its rate comparison and that Mr. Guastella did not include certain additional costs to Nashua in his analysis. According to Pennichuck, those additional costs include; additional payments to Veolia to perform all customer service functions (\$311,000 annually), costs of participation in DigSafe (\$100,000) annually, additional base fee to Veolia due to passage of time (\$200,000 annually), significant unanticipated amounts for regulatory requirements, and additional costs from Veolia as supplemental charges. Pennichuck noted that Nashua's witness, Mr. Sansoucy, estimated operating expenses for Nashua in 2008 at \$10,410,000 which Pennichuck claims is a million dollars more than Mr. Guastella's earlier projection.

13. Mitigation Fund

Pennichuck claims that the finding in the Order that a \$40 million mitigation fund would generate \$3.4 million annually to benefit customers of PEU and PAC is not supported by the evidence because it fails to consider tax consequences and the achievability of an annual rate of return of 8.5%. In addition, according to Pennichuck, the Order fails to consider whether Nashua can legally establish such fund. As a result, Pennichuck argues that the Commission erred in assuming that it had created a valid and enforceable remedy for PEU and PAC customers.

14. Information Outside the Record

Pennichuck asserts that the Order relies upon information outside the record. Specifically Pennichuck claims that the Commission should not have considered a water supply contract between Nashua and the Town of Milford filed on February 22, 2008, and PWW's 2006 and 2007 annual reports. Pennichuck claims that the Order failed to include new assets in the updated valuation and violated Pennichuck's due process rights by failing to give notice of the Commission's intent to use such materials and an opportunity to contest their use. *See, Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1072-73 (1982).

15. Explanation of Valuation Numbers

Pennichuck claims that the Order lacks detail as to a number of numerical components, making it difficult to determine whether the Commission correctly performed the valuation analysis it purported to adopt. Pennichuck asserts that without reviewing the Commission's actual calculations it is not possible to determine whether the Commission applied its valuation methodology properly. *See, Appeal of Newington*, 149 N.H. 347, 352 (2003) and RSA 363:17-b.

16. Lack of Two Percent Growth Rate in Capitalization Rates

Pennichuck claims that the Order wrongfully excluded from its asset and income approach valuation analysis a 2% long-term growth factor in the applicable capitalization rates. Pennichuck claims that the Commission erred in not applying a 2% growth factor and thereby understated PWW's value as of December 31, 2005, by approximately \$92.7 million.

17. Update of PWW Value

Pennichuck claims that in the asset approach to valuation the Commission brought forward the value of PWW, from December 31, 2005 to December 31, 2008, without showing the underlying data it used. Pennichuck asserts that the Commission erred when it relied upon

incomplete and extra-record financial information (2006 and 2007 PWW annual reports) to update the asset value of PWW.

18. Pennichuck's Right to Jury Trial

Pennichuck argues that RSA Chapter 38 violates Pennichuck's equal protection rights because it does not provide for a trial by jury on all valuation matters. According to Pennichuck, it has been denied its equal protection constitutional right to a jury trial on damages. See, e.g. N.H. CONST., pt. 1, arts. 2, 12, and 14; *Gazzola v. Clements*, 120 N.H. 25, 29 (1980); *White Mountain Power Co. v. Maine Central RR*, 106 N.H. 443, 445 (1965). Pennichuck asserts that the owner of property facing an eminent domain taking by a public utility (RSA 371:10) and the owners of all other property subject to condemnation processes in New Hampshire (RSA 498-A:9) enjoy the right to a jury trial. Pennichuck concludes that the absence of a right to a jury trial as part of the valuation process set out in RSA 38 is unconstitutional on equal protection grounds.

Motion to Strike Nashua's Motion for Rehearing

Pennichuck's motion to strike concerns RSA 541:3, which requires that motions for rehearing of state agency decisions be filed with the agency within thirty days after the date of the agency decision.² Pennichuck states Nashua filed its motion for rehearing on August 25, 2008, thirty-one days after the date of the decision. In support of its argument that the motion is untimely, Pennichuck relies on *Appeal of Carreau*, 157 N.H. 122, 945 A.2d 687 (2008) and

² 541:3 Motion for Rehearing –“Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.”

LaCroix v. Mountain, 116 N.H. 545 (1976) in which the Court held that it lacked jurisdiction over the appeals since the respective petitioners filed the appeals beyond the thirty-day time period prescribed by RSA 541:6.³ In *Carreau*, the Court held that “[w]e have repeatedly held that New Hampshire follows the majority rule regarding compliance with statutory time requirements, and, thus, ‘[o]ne day's delay may be fatal to a party's appeal.’” *Carreau*, supra at 688 citing *Dermody v. Town of Gilford*, 137 N.H. 294, 296 (1993). Specifically, the Court found that compliance with a statutory appeal period “is a *necessary prerequisite* to establishing jurisdiction in the appellate body.” *Id.*

Pennichuck also relies on *Phetteplace v. Town of Lyme*, 144 N.H. 621, 624-625 (2000), a tax appeal under RSA 76, in which the Court held that when the legislature unambiguously establishes a date certain for filing an appeal, it is immaterial that the final day for filing falls upon a weekend or holiday. The Court explained that the legislature contemplated September 1 falling on a weekend or a holiday when it used language “on or before September 1.”

Pennichuck argues that the Commission’s administrative rule, N.H. Code Admin. Rules Puc 202.03, is immaterial because the period of time applicable to a motion for rehearing is not established by Commission rule, but rather by RSA 541:3. Procedural rules are not available to cure a party’s failure to timely move for a rehearing pursuant to RSA 541:3. *See, In re McHale*, 120 N.H. 450 (1980). Finally, Pennichuck points out that “[e]ven a long-standing administrative interpretation of a statute is irrelevant if that interpretation clearly conflicts with express statutory language.” *Appeal of Rainville*, 143 N.H. 624, 627 (1999).

³ 541:6 Appeal – “Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.”

B. NASHUA**Motion for Rehearing and Clarification**1. Municipal Buyer Theory Is Not Supported by Evidence

Nashua argues that the Commission erred in using the price a hypothetical not-for-profit municipal buyer would pay as a foundation for its determination of valuation. More specifically, Nashua claims that the Commission erred in concluding that a competitive market of non-profit purchasers exists, or influences the market for PWW. Nashua asserts that there is no evidence that such a market exists and it argues that even PWW's valuation expert could not give a single example where two not-for-profits bid on the same water utility. Nashua argues that actual sales of water companies as well as a recently published report on sale prices for water companies support a much lower value for PWW in the range of \$85 million. Nashua notes that the only municipal acquisitions of water systems in New Hampshire have been incremental expansions of existing infrastructure and that municipalities have not been active bidders in the market for water companies. As a result, Nashua claims there is no evidence in the record to support a valuation based upon competition among hypothetical not-for-profit bidders.

2. Municipal Buyer Theory Is Not Consistent with New Hampshire Law

Nashua points out that only the municipality where the utility serves may acquire, either by consensual sale or by eminent domain. *See*, RSA Ch. 31 and 38. Nashua argues that New Hampshire law does not permit a municipality to bid competitively on a water company's assets located principally in areas outside the municipality. Nashua asserts that Pennichuck was not able to cite any New Hampshire law that would permit such bidding activity by municipals or other similar not-for-profits. As a result, Nashua claims that the Commission may not use a hypothetical not-for-profit buyer in valuing PWW assets.

3. Nashua Is the Only Municipality Capable of Acquiring PWW

Nashua argues that none of the municipalities which PWW serves, except Nashua, can either legally or practically bid to acquire PWW. According to Nashua, Pennichuck's valuation witness, Mr. Reilly, admitted at hearing that Nashua is the only municipality capable of acquiring the PWW system.

The record demonstrated that there are no reasonably probable competitive municipal or not-for-profit buyers for PWW. Nashua argues that, with 87% of the PWW customers, Nashua is the only municipality with sufficient customers to acquire PWW. Behind Nashua, Amherst has the highest number of PWW customers, but Amherst customers comprise only 3.8% of the PWW customer base. Merrimack, Hollis, Milford, Bedford, Derry, Epping and Newmarket all have smaller percentages of the PWW customer base than Amherst. Plaistow and Salem are served by satellite systems that are not hydraulically connected to the core PWW system. As a result, Nashua claims that none of these municipalities are either legally or practically capable of taking the assets of PWW.

4. Municipal Buyers Lack Authority to Purchase Stock of Water Companies

Nashua claims that even PWW's valuation expert, Mr. Reilly, opined that because municipal buyers cannot buy the stock of a for-profit water company they were not identified as potential buyers by SG Bar Devlin in 2002. Nashua goes on to argue that most water company sales are stock sales as opposed to asset sales in order to avoid a corporate tax on appreciated water company assets. According to Nashua, in negotiated sales between willing buyers and sellers, sellers are not willing to sell assets and incur an additional 39% tax liability without compensation.

Nashua notes that New Hampshire municipalities do not have authority to acquire and hold the stock of utilities such as PWW under Part 2, article 5 of the New Hampshire Constitution, absent a special grant of legislative authority and a public purpose. As a result, Nashua claims that municipal buyers do not and cannot influence the market for PWW.

5. The Reilly Theory Does Not Establish the Fair Market Value of PWW Assets

Nashua argues that by relying on Mr. Reilly's hypothetical municipal purchaser the Commission did not determine the fair market value of PWW. Instead, according to Nashua, the Commission developed the price Nashua was able to pay or, in other words, the investment value of PWW to Nashua. Nashua asserts that the value a buyer can afford to pay is not the fair market value. Nashua posits that the best evidence of the market for PWW is the auction of its parent, SG Barr Devlin in 2002. Nashua claims that SG Barr Devlin did not invite the participation of municipal buyers in the auction and further claims that municipal buyers do not have the motivations of a typical investor. Nashua argues that the evidence suggests that municipal buyers do not pay more than for profit investors. According to Nashua, Mr. Reilly admitted that in a typical market with only one municipal bidder the price could be only \$1.00 more than what for-profit buyers would pay. Nashua concludes that the Commission should reject Mr. Reilly's hypothesis regarding municipal buyers and support Commissioner Below's dissenting opinion on that point.

6. Nashua Should be Allowed to Acquire PAC and PEU

Nashua argues that the Commission failed to give proper effect to the broad grant of authority in RSA 38:2 and :11 when it read RSA 38:6 as limiting the more general takings authority. Nashua claims the Commission's decision to allow Nashua to take only PWW is contrary to the plain language of RSA 38:2 and :11.

Nashua observes that PWW, PAC and PEU are highly interdependent companies which all use the computer systems, equipment and employees of PWW to operate. According to Nashua, PAC and PEU have no employees, equipment or inventory, all of which are supplied by PWW and located in Nashua. PAC and PEU are operated out of Nashua, using PWW's communications system, IT system and its administration, accounting, billing and customer service. Nashua claims that separation of PAC, PEU and PWW is a financial and regulatory exercise, but from an operational perspective they are all operated and controlled from PWW facilities in Nashua.

7. Mitigation Fund, Double the Combined Values and Revenues of PAC and PEU, Should be Reduced

Nashua claims that the only evidence of harm to PAC and PEU customers was based upon a continuation of the current corporate model. According to Nashua, establishing a mitigation fund based upon that evidence ignores opportunities for PAC and PEU to mitigate the harm by merging their operations into a larger utility. Nashua asserts that PWWs' calculation of harm simply carried PWW's existing overhead over to a much smaller utility without considering opportunities to reduce or even eliminate harm to customers of PAC and PEU. Nashua argues that the Commission should either require Nashua to acquire the assets of PAC and PEU to satisfy the public interest, or establish procedures to reduce the mitigation fund in light of Pennichuck's ability to mitigate the harm to the PAC and PEU customers.

8. Rebuttable Presumption Applied Only to Assets in Nashua

Nashua argues that RSA 38:3 creates a rebuttable presumption that the action voted on is in the public interest. Nashua insists that the presumption applies to all utility assets, regardless of where they are located. Nashua asserts that the Commission's concern that the will of one

community's voters should not apply to another is precisely the type of political question best left for the Legislature. Nashua points out that RSA 38:14 already addresses this concern by allowing each municipality to conduct its own vote which is binding on Nashua. According to Nashua, the Town of Bedford did just that and voted to support Nashua's petition.

Nashua claims that the Commission's finding that the rebuttable presumption applies only to property within the municipality is harmless error in this case because the Commission found that acquiring assets of PWW outside of Nashua is in the public interest. Nonetheless, Nashua raises the issue for resolution in a possible appeal of this decision.

9. Request for Clarification Regarding the Mitigation Fund

Nashua argues that the Commission failed to specify what happens to the mitigation fund in the event that harm to PAC and PEU customers either ceases or is greatly reduced by acquisition by another investor owned utility, or by acquisition by the municipalities where the utilities are located. As a result, Nashua asks the Commission to clarify whether the mitigation fund is permanent, regardless of whether or not the harm to PAC and PEU customers exists, or whether the fund is an interim requirement which continues only so long as the Commission deems necessary.

Nashua states that the permanent versus temporary status of the mitigation fund determines the type of funding and tax treatment available for the fund. Nashua urges the Commission to clarify that Nashua will be entitled to a return of the mitigation fund upon a final determination by the Commission that the fund is no longer required. Nashua claims that failure to clarify the nature of the mitigation fund substantially erodes the financial benefits of municipal ownership and acts as a barrier to removal of the inefficiencies the fund is intended to mitigate.

Nashua also requests that the Commission clarify the date upon which the fund is to be established. Nashua asks the Commission to specify whether the mitigation fund is to be established upon ratification under RSA 38:13 and RSA 33-B, or at the time the mechanics of the mitigation fund are determined by the Commission. Nashua states that depending upon the timing of establishing the fund it might consider treating the fund as an operating expense rather than as an initial capital expenditure in order to reduce costs to customers.

Nashua notes that the Order states that the mitigation fund should be payable for the benefit of PEU and PAC customers as a condition imposed under RSA 38:11. Order at p. 63. Nashua requests that the Commission clarify that the mitigation fund is a condition required as a matter of public interest and not as severance damages which are payable to the condemnee, in this case PWW, and not to PEU and PAC.

Objection to Pennichuck's Motion to Strike Nashua's Motion for Rehearing

Nashua argues that it has long been a settled principle in New Hampshire that "when the terminal day of a time limit falls upon Sunday that day is to be excluded from the computation." *HIK Corporation v. Manchester*, 103 N.H. 378, 381 (1961), quoting 86 C.J.S. Time § 14(2). Nashua explains that the Order was issued on July 25, 2008, causing the 30-day rehearing period to end on August 24, 2008, a Sunday. As a result, Nashua takes the position that its filing on the following Monday, August 25, 2008, was timely.

Nashua also relies on *Hunter v. State*, 107 N.H. 365 (1966) in which the Court noted the State's admission that because the tenth day fell on a Sunday, "the time could be extended to the next day March 1." *Id.* at 366. Nashua argues that the Court in *Ireland v. Town of Candia*, 151 N.H. 69 (2004) made clear the settled principle that if the final day of a time period appeal falls on a Sunday, a motion for rehearing filed on the following Monday is timely. Nashua

distinguishes the cases cited by Pennichuck claiming that in all those cases the facts were not similar to the facts in this docket.

Lastly, Nashua contends that the legislature recently recognized this principle in its adoption of Chapter 11 of the Laws of 2007 (HB 1152) which states: documents are deemed timely when “filed...on the next business day where a statute specifies a deadline that falls on a weekend or legal holiday.” This law is effective on January 1, 2009.

Motion to Strike Pennichuck’s Objection to Nashua’s Motion for Rehearing

Nashua argues that Pennichuck’s Objection attaches and attempts to place into the record Exhibit 3258, which the Commission previously ruled was inadmissible. Nashua requests that if Exhibit 3258 is not stricken, Exhibit 1145 should be entered because it contains information concerning the sales listed in Exhibit 3258. Nashua maintains that the information contained in Exhibit 3258 is unreliable and misleading.

Nashua also moves to strike sections B and C of Pennichuck’s objection, in which Pennichuck argues that Nashua did not timely seek rehearing of the Commission’s earlier decisions: (1) to exclude PAC and PEU assets from Nashua’s eminent domain petition; and (2) to apply the RSA 38:3 rebuttable presumption only to assets located within Nashua. The basis for Nashua’s motion to strike is a letter from Pennichuck’s counsel to Nashua’s counsel, dated October 6, 2005, in which Pennichuck’s counsel takes the position that motions for rehearing on interlocutory matters are not needed to preserve an appeal and that motions for rehearing can be delayed until a final order is issued.

III. COMMISSION ANALYSIS

A. Motions to Strike

Regarding Pennichuck's motion to strike Nashua's motion for rehearing, we find that the cases cited by Pennichuck are not controlling with regard to the treatment of the 30-day rehearing deadline under RSA 541:3. In this case, the 30-day deadline fell on Sunday, August 24, 2008. We read *HIK Corporation v. Manchester*, 103 N.H. 378, 381 (1961) to provide for filing on the following Monday when the statutory deadline falls on a Sunday and we find no basis for concluding that this precedent has been overturned. The cases cited by Pennichuck in support of its motion to strike involve different facts and, while they may arguably suggest a direction in which the Court might be headed, it is not for us to arrive there ahead of the Court. Consistent with *HIK Corporation*, we find that Nashua's motion for rehearing and clarification was timely filed. Accordingly, we deny Pennichuck's motion to strike.

Regarding Nashua's motion to strike Pennichuck's objection to Nashua's motion for rehearing and clarification, we agree that Exhibit 3258 was excluded from the record by a Secretarial Letter dated October 17, 2007. In that same letter, we also excluded Exhibit 1145. As a result, we will strike both Exhibits 3258 and 1145, and any argument concerning them contained in Pennichuck's objection and in Nashua's motion to strike. With regard to Nashua's request that we strike Pennichuck's arguments regarding the timeliness of Nashua's motions for rehearing on issues decided by earlier orders in this docket, we find no reason to strike those arguments.

B. Motions for Rehearing

The standard for granting a motion for rehearing pursuant to RSA 541:3 and RSA 541:4 requires the movant to demonstrate that the order is unlawful or unreasonable. Good cause for

rehearing may be shown by new evidence that was unavailable at the time or that evidence was overlooked or misconstrued. *Dumais v. State*, 118 N.H. 309, 312 (1978). Further, in order to preserve a question for review a litigant must not raise an issue for the first time in a motion for rehearing. *Appeal of Campaign for Ratepayers Rights*, 133 N.H. 480, 484 (1990). Instead, the matter raised in a motion for rehearing must have been “determined in the action, or proceeding, or covered or included in the order...” RSA 541:3.

1. Pennichuck

Pennichuck’s first three arguments concern the public interest standard described in the Order. Pennichuck claims the standard was not clearly articulated and should not have been segmented to deal with separate customer groups based on location within or without Nashua and upon interconnectivity to the core system. Pennichuck does not raise any new facts or arguments, but nonetheless claims that the Order is deficient and illegal. We find both our articulation and application of the public interest standard sufficiently described and supported by the record in this proceeding. Order at pp. 50-63.

Pennichuck’s fourth argument repeats arguments made earlier in its motion to dismiss that Nashua’s January 14, 2003 confirming vote pursuant to RSA 38:3 was inconsistent with and more narrowly construed than Nashua’s petition in this proceeding. We rejected these arguments by Pennichuck in our earlier Order No. 24,425 and incorporate our analysis in that order by reference in this order.

Pennichuck’s fifth and sixth arguments claim that the Commission failed to consider relevant evidence on a number of issues. First, Pennichuck alleges that the Commission did not consider either Pennichuck’s good record or the benefit to troubled water systems of having Pennichuck continue to own PWW. Clearly, we considered that evidence as described in the

Order at pp. 51-52, however, we did not give the evidence the weight Pennichuck claims it deserves. Concerning the loss of PWSC, tax impacts to Pennichuck Corporation and its shareholders, and opposition to the taking by Merrimack and Milford, we did not accord the weight to that evidence that Pennichuck claims it deserves. As trier of fact, the Commission must consider and weigh all of the evidence presented in order to make factual determinations. We made those determinations in the Order and Pennichuck has not presented any new evidence or argument that we have not already considered.

Pennichuck's seventh argument asserts that due process required that it should have had further opportunity to conduct discovery on various modifications made to Nashua's proposal, or to conditions proposed by Nashua during the course of the hearing. With regard to the proposed modification to the Veolia contract to include both service and billing functions, we determined that sufficient discovery had been conducted on that issue. Order at p. 54. With regard to establishing a mitigation fund, there was significant evidence presented on the harm to PAC and PEU customers and the size of the investment fund needed to mitigate those harms. Order at pp. 94-96. As a result, we do not find any lack of evidence or due process on that issue. Regarding Commission regulation of Nashua's retail and wholesale water rates, Nashua's membership in the DigSafe program, and guarantees of equal water rates to all PWW customers, those conditions all involve regulatory policy and could have been proposed by the Commission absent any suggestion by Nashua. All parties were allowed briefs and reply briefs following hearing and had ample opportunity to argue against such regulatory proposals. As a result, we conclude that all parties have been afforded due process on both factual and policy issues.

Pennichuck's eighth, ninth and tenth arguments involve the nine conditions the Commission placed on Nashua. Order at pp. 98-99. Pennichuck claims the conditions make the

presumption of public interest irrebuttable, exceed the Commission's authority, and in some cases involve events following the taking. Pennichuck has not presented new evidence or arguments on these points that we have not already considered. We have determined that the Commission has authority to impose these conditions. Order at pp. 25-26. We do not find it unfair or illegal that some conditions, such as the amended contract with Veolia, must follow the taking. Such compliance issues are part of the Commission's legitimate regulatory oversight.

Pennichuck's eleventh argument claims that the Commission failed to consider whether Nashua was financially capable of funding the acquisition of PWW for \$203 million plus the \$40 mitigation fund. As required, we considered whether Nashua has the financial, managerial and technical capabilities required for a public water utility and granted it a water franchise. Order at p. 62. We do not agree that we were required to find that Nashua is capable of financing the specific amount of \$243 million. As Nashua points out, conditions in the financial markets change. Had such a finding been made, it would likely need to be updated at the time the taking actually occurs. Further, if Nashua is unable or disinclined to finance \$243 million, presumably it will not vote to acquire the PWW assets, and it will not vote to issue bonds and notes, and the taking will not occur.

Pennichuck's twelfth argument is that the Commission understates Nashua's future rates in order to make its public interest finding. Pennichuck claims that the analysis of rates should have included the cost of the mitigation fund, making the actual cost to be recovered in rates \$243 million. Pennichuck has not raised any new facts or arguments not already considered and we find no reason to adjust our analysis on this issue. Order at pp. 56-57

Pennichuck's thirteenth argument challenges the \$40 million mitigation fund on the basis that it would not generate \$3.4 million annually and that the Commission did not consider

whether Nashua may legally establish such a fund. With regard to the findings required to establish the amount of investment in the mitigation fund, Pennichuck has not presented any evidence or argument we have not already considered. We see no reason to alter our findings or conclusion that a \$40 million mitigation fund is both adequate and appropriate. Order at pp. 94-96. As for the details of establishing such a mitigation fund, we indicated that the specific methods for implementing the condition will be addressed as a compliance matter. Order at p. 96.

Pennichuck's fourteenth argument concerns the Commission's use of PWW's 2006 and 2007 annual reports filed with the Commission, Order at p. 89, as well as the Commission's reference to a wholesale water agreement between Nashua and the Town of Milford filed with the Commission after hearing on February 22, 2008, Order at p. 61. Regarding the Commission's use of PWW annual reports, Pennichuck should not be surprised by the Commission's reliance on PWW's annual regulatory filings, the filing and veracity of which is required by RSA 374:15, and Puc 607.06 and Puc 609.04, consistent with the Commission's duty to keep informed as to the capitalization of public utilities and other matters pursuant to RSA 374:4. Such reliance is common in the ratemaking context. *See, New England Tel. & Tel. Co. v. State*, 113 N.H. 92, 101-102 (1973); and *Granite State Alarm Inc. & a. v. New England Tel. & Tel. Co.*, 111 N.H. 235, 238 (1971). Further, Pennichuck could have asked to reopen the record if it needed to respond to the Nashua-Milford wholesale water agreement. The agreement was filed in this docket and is the result of further discussion and negotiation between those parties. We find that our reliance on this agreement is not a violation of Pennichuck's right to due process.

Pennichuck's fifteenth argument claims that the Order fails to give sufficient detail concerning its valuation methodology. Absent showing the actual calculations, Pennichuck claims that it is not possible to determine whether the Commission correctly applied its methodology. The methodology, including the components of the calculation, is described in the Order at pages 84-93 in sufficient detail for the purposes of the Commission's findings.

Pennichuck's sixteenth argument challenges the Commission's rejection of the 2% growth factor recommended by Pennichuck's valuation expert. Order at pp. 91-92. We considered and rejected the recommended growth factor for the reasons set out in the Order. Pennichuck has not presented any new evidence or argument not already considered and we find no reason to reconsider this issue.

Pennichuck's seventeenth argument asserts that the Order does not explain the methodology or the detailed information used for updating the valuation in sufficient detail to allow a party to check the calculations. Our description of the methodology and the detail provided in the Order at pages 89 and 93 is sufficient for the purposes of the Commission's findings.

Pennichuck's final argument asserts that, because RSA Chapter 38 does not provide the right to a jury trial in the valuation of the PWW assets, the statute is unconstitutional. We generally assume the constitutionality of the statutes under which we operate. Accordingly, we will not grant rehearing on this argument.

2. Nashua

Nashua's first five arguments deal with assumptions in our valuation analysis concerning hypothetical municipal bidders and their influence on the fair market value of PWW's assets as well as claims that Mr. Reilly's theory reaches an investment value rather than a fair market value. Nashua presents no new arguments or evidence not previously considered. Rather, Nashua re-marshals its previous arguments as to why fair market value should not be based on the hypothetical presence of more than one not-for-profit buyer. Nashua's arguments in this regard were not overlooked; they were simply not found to be persuasive. As discussed in the Order at pages 89-93, we found instead that Pennichuck's witness was persuasive regarding the influence of not-for-profit buyers. Our analysis and conclusions remain as previously stated.

Nashua's sixth argument challenges our decision to prevent Nashua from acquiring PAC and PEU by eminent domain pursuant to RSA Chapter 38. Pennichuck claims that Nashua waived this argument by failing to move for rehearing of Order No. 24,425, which was issued on January 21, 2005, in which we excluded these two entities. We find Nashua's motion for rehearing on this issue timely. The scope of the taking was raised early in the proceeding and determined in Order No. 24,425. Nashua has not raised any new arguments or evidence on this issue in its motion for rehearing and we incorporate by reference the analysis contained in Order No. 24,425.

Nashua's seventh argument alleges that the harm to PEU and PAC has been overstated by Pennichuck's witnesses and that the mitigation fund provides an excessive amount of compensation to those entities. Nashua presents no new evidence or argument on these issues. We find our analysis of the evidence as well as the resulting mitigation fund discussed in the Order at pp. 94-96 to be supported by the record.

Nashua's eighth argument challenges the decision in Order No. 24,567 and also discussed in the Order at pp. 24-25 that the rebuttable presumption contained in RSA 38:3 applies only to assets located in Nashua. The issue was raised earlier in the proceeding and was decided in Order No. 24,567. Nashua has not raised any new arguments on this legal issue not already considered in Order No. 24,567 as well as the Order.

With regard to Nashua's request for clarification concerning the mitigation fund, when we established the mitigation fund, Order at pp. 94-96, we did not conclude that a mitigation fund would be maintained in perpetuity. Rather, details such as the length and start date of the fund will be determined as compliance matters. PEU and PAC are both regulated public utilities and the Commission will continue to oversee their rates and operations. We required the establishment of a mitigation fund as a public interest condition to ensure that the ratepayers of PEU and PAC are not harmed as a result of the taking. As circumstances change for PEU and PAC there may be no further need for the mitigation fund to continue to exist, however, it is not possible to forecast such future events. We anticipate that interested parties will participate in the Commission's ongoing oversight of the mitigation fund.

Based upon the foregoing, it is hereby

ORDERED, that Pennichuck's motion to strike Nashua's motion for rehearing is DENIED; and it is

FURTHER ORDERED, that Nashua's motion to strike Pennichuck's objection to Nashua's motion for rehearing is GRANTED in part and DENIED in part as discussed herein; and it is

FURTHER ORDERED, that Pennichuck's motion for rehearing is DENIED; and it is

FURTHER ORDERED, that Nashua's motion for rehearing is DENIED.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of
March 2009.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

Concurring and Dissenting Opinion of Commissioner Below

I concur with the majority in all respects except with regard to its analysis and conclusion concerning Nashua's first five arguments that deal with assumptions in the majority's original valuation analysis concerning hypothetical municipal bidders and their influence on the fair market value of PWW's assets. Consistent with the reasoning set forth in my previous dissent on the issue of valuation, I would grant rehearing on this issue to consider, among other things, the testimony of Donald Ware and John Joyner cited on page 4 of Nashua's motion for rehearing and the auction of Pennichuck's parent by SG Barr Devlin in 2002, discussed at page 18.

Clifton C. Below
Commissioner