

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DW 04-048**

**In Re: City of Nashua Petition  
For Valuation of Property of  
Pennichuck Water Works**

**BRIEF OF ANHEUSER-BUSCH**

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## **Background**

Anheuser-Busch, Incorporated ("AB") operates a brewery in Merrimack that employs approximately 450 people. Exhs. 4004, 4008. In 1970, AB and Pennichuck Water Works ("PWW") collaborated in a main extension from PWW's core system in Nashua to AB's facility. Day XI, p. 45. A number of other businesses in Merrimack have since tied in to that main extension. Day II, p. 72. PWW has supplied AB with water pursuant to a series of long-term special contracts. AB uses this water to produce its beer, as well as for cleaning of machinery and other plant purposes. AB is PWW's largest customer, accounting for approximately fifteen percent of the system's average daily volume of water sales. Exhs. 4004, 4008.

AB has four principal requirements for its water supply:

1. High-quality water;
2. Reliable service;
3. Long-term, stable rates that are reasonable and cost-based; and
4. Operational cooperation with its supplier.

PWW has consistently met each of these requirements. The special contracts have permitted AB to make long-term decisions for its Merrimack facility by providing stable, cost-based rates for water. The contracts have also benefited PWW by assuring a reliable, high volume of sales with minimal operational complications and costs, keeping rates lower for PWW's other customers. Commission review and oversight have been invaluable in helping AB and PWW reach and implement their agreements and maintain good working relations.

The current supply contract is effective from July 1, 2005 to July 1, 2015. Exh. 4004, Att. A. Anheuser-Busch pays a cost-based rate approved by the Commission in accordance with PWW's 2001 cost of service study. The Commission found that "service to AB constitutes a

special circumstance because of its high level of consumption and the low level of cost associated with providing that service. [...] [W]e find special circumstances exist which justify departure from PWW's schedules of general application. We further find that the departure described in the terms and conditions of the [] Contract with AB are just and reasonable, and consistent with the public good in accordance with RSA 378:18." Exh. 4004, Att. B, pp. 4-5.

The current special contract contemplates the possibility of an eminent domain proceeding:

Introductory Statement, ¶ 2: The parties agree that water supply is a vital element of Anheuser-Busch's business, and that Anheuser-Busch has relied on this [] Contract in making long-term decisions concerning its acquisition of water and concerning its operations in Merrimack as a whole.

¶ 13: If any governmental entity or group of governmental entities acquires properties, assets and/or facilities of PWW necessary for PWW to perform its obligations under this [] Contract, PWW's obligations shall terminate and, to the fullest extent permitted by law, shall be assumed by the acquiring governmental entity or entities.

¶ 15: Insofar as may be legally possible, each party covenants and agrees that the benefits and burdens of this [] Contract shall be binding upon the successors and assigns of each including any successor in title to all or substantially all of the properties of each.

Exh. 4004, Att. A, pp. 2, 7. Thus PWW and AB entered into the contract with the intention that a governmental entity taking PWW's system by eminent domain would continue to honor the contract's terms. In approving the contract, the Commission acknowledged the reasonableness of the provisions for transfer of the contract's obligations to an acquiring governmental entity.

Exh. 4004, Att. B, p. 5.

## **Discussion**

The City of Nashua seeks to take PWW's core water system by eminent domain pursuant to RSA 38, and to establish a municipal system serving its residents and certain customers outside its city limits, including Anheuser-Busch. The Commission conducted hearings in January and September of 2007 to determine: (1) whether the proposed taking is in the public interest; and (2) if so, the value of PWW's assets to be taken. *See* RSA 38:9; RSA 38:11. AB participated in the hearings to educate itself about Nashua's efforts and to protect the company's vital interest in its water supply.

### **I. Valuation of PWW's System**

Anheuser-Busch has a limited interest in the details of the valuation of PWW's system, and will generally defer to the considered analysis and judgments of PUC Staff. However, valuation is intertwined with the public interest, and the amount Nashua pays for PWW's property will ultimately affect customers' rates. AB therefore urges the Commission to give all due consideration to questions raised by other parties about the objectivity of Nashua's appraiser and about the validity and reliability of the City's appraisal methodology.

### **II. The Public Interest – Background and Legal Issues**

Anheuser-Busch's facility is located in Merrimack. As a result, AB does not contribute directly to Nashua's property tax base, and would have no vote in decisions that affect its water supply. In the early phases of this proceeding, AB was concerned that ratemaking decisions could be influenced by political pressures unfavorable to large industrial customers located outside Nashua, and that the City's rates and service would not be subject to PUC jurisdiction. Exh. 3158; Day I, pp. 150-152. The Commission's role in ensuring the fair treatment of all

ratepayers has been an essential protection in the sale and purchase of a vital commodity, in an environment that is not subject to ordinary market forces.

The chief architect of Nashua's municipalization plan initially stated that the City's residents subsidize AB's special contract rate, and suggested that the City would eliminate special contracts. Exh. 3218, pp. 27-31; Day I, pp. 155-158; Day II, pp. 75-77. Mr. Sansoucy based his premise about a subsidy on a belief that the Commission's order approving AB's special contract rate excludes a contribution toward PWW's administrative and operational costs. Day II, p. 50.

In the hearings, however, Mr. Sansoucy agreed that if he was mistaken about the lack of contribution toward overhead costs, he would have to revise his opinion about the existence of a subsidy. Day II, p. 51. The evidence shows that the special contract rate in fact includes a contribution to PWW's overhead costs, consistent with an allocation derived from a cost of service study and approved by the Commission. Although Mr. Sansoucy did not formally amend his testimony, it is essentially undisputed that Nashua ratepayers do not subsidize AB's rate. Exh. 4004, Atts. A, B; Day VII, p. 109; Day XII, pp. 74-75.

This clarification and additional overtures by Nashua have to some degree allayed AB's concerns about the potential results of municipalization. The City has now stated its commitments to serve AB according to the terms of its current special contract, to submit any future disputes to Commission jurisdiction, and to ask the Commission to condition its approval order on fulfillment of those commitments. Day I, pp. 118-119; Day II, pp. 45-46; Day X, pp. 206-207; Day XI, pp. 19-20, 61-62, 65-67, 81-82, 111-112; Day XII, pp. 155-156, 165-166. This proposal seems to be a good faith attempt to address AB's concerns, and to permit a more meaningful comparison between PWW's service and potential municipal service.

While AB appreciates Nashua's efforts, it also understands some parties' frustration at the "moving target" presented by the changes in position. Day XII, pp. 77, 108, 177-178. Due to the late timing of the commitments, AB had little if any opportunity to conduct discovery on key issues such as the possibility of service under a special contract and the Commission's authority to set and enforce the proposed conditions.

**A. Special Contract vs. Tariff**

RSA 38:17 authorizes municipalities to enter into water supply contracts. In its pre-hearing submissions, Anheuser-Busch asked the Commission to condition any approval of Nashua's petition on the City's assumption of the existing special contract, or on the execution of a substantially similar new contract. However, the City has represented that it cannot enter into such a contract without forfeiting the tax-exempt status of bonds used to fund the taking. Instead, AB's rate would be implemented through a tariff. Day I, pp. 158-159; Day II, p. 46; Day XI, pp. 19-20, 67. Nashua has not offered a draft tariff for review by AB or the Commission.

Nashua's inability to serve AB through a special contract creates inherent difficulties. AB questions whether any tariff can offer the "same terms" as a contract. Contracts allow parties to negotiate and specify their rights and obligations. Contracts have definite effective dates. Most importantly, contracts are judicially enforceable. The enforceability of Nashua's present commitments remains largely a matter of speculation. If Nashua is not a regulated public utility, AB knows of no mechanism that limits the City's ability to unilaterally amend or revoke a tariff. Even if the current board of aldermen abides steadfastly by the commitments made in this proceeding, its authority to bind future boards – or a regional water district – is uncertain at best.

**B. Commission Conditions on Approval**

If it grants Nashua's petition, the Commission may set conditions to ensure that the public good is satisfied. RSA 38:11. The extent of this authority became a central issue during the last few days of the hearings. The statute does not describe the scope of permissible conditions or any means of enforcing them. The fundamental dilemma is that the Commission's express authority to set conditions on approval of municipal water service is at odds with its apparent loss of jurisdiction over the municipality as soon as it issues that approval. The City's inability to enter into binding supply contracts seems to preclude the imposition of judicially-enforceable conditions. Anheuser-Busch is not convinced that a court could enjoin the City's unilateral amendment of a tariff or enforce a non-contractual "commitment" made in a PUC proceeding.

Nashua proposes to resolve the dilemma by stipulating that its water ordinance and its service to AB will remain subject to Commission jurisdiction under RSA 362:4 and RSA 374, as will the enforcement of any conditions the Commission imposes. Exh. 1016, pp. 19-20; Day X, pp. 206-207; Day XI, pp. 19-20, 61-62, 65-67, 81-82, 111-112; Day XII, pp. 155-156, 165-166. This proposal has some appeal, provided the Commission would retain full regulatory authority to review and approve proposed rate changes, and to exclude imprudently-incurred costs from rates. Day XI, pp. 81-82; Day XII, pp. 104-106. However, the correct interpretation and application of RSA 362:4 and RSA 374 are less than clear. If the statutes deprive the Commission of subject matter jurisdiction to regulate municipal water systems, it is doubtful that parties may confer that jurisdiction by agreement. If the Commission cannot lawfully exercise that jurisdiction, the uncertainties of municipalization are extremely problematic.

**C. Exemption of Municipal Water Systems from PUC Regulation**

The primary rule is that any entity owning or operating a public water system is considered a regulated public utility. The first exception is for municipalities operating *within* their corporate limits. See RSA 38:14 (“[t]he operation by a municipality outside its own limits shall be subject to the jurisdiction of the commission except as provided in RSA 362”); RSA 362:2; *Blair v. Manchester Water Works*, 103 N.H. 505, 507 (1961). The Commission should construe exemptions consistently with these general principles, which effectively create a presumption that service outside municipal boundaries remains subject to regulation absent a specific statutory provision to the contrary.

**1. RSA 362:4, III-a (a)(1)**

A municipality providing service outside its borders is not a public utility for purposes of “accounting, reporting, or auditing functions.” RSA 362:4, II. It is not a public utility if it offers *new* customers outside its municipal boundaries the same service it offers municipal customers, at a rate no more than fifteen percent higher than the rate it charges municipal customers. RSA 362:4, III-a (a)(1). The term “new customers” apparently refers to customers served by an expansion of a municipal system occurring after May 13, 2002, and therefore would not include customers such as Anheuser-Busch. See RSA 362:4, III-a (c).

The legislature presumably intended the fifteen-percent rule of Section III-a (a)(1) to protect “outside customers” from unfair treatment. Given AB’s unique position as a high load-factor industrial customer, such a comparison with other customers’ rates is not meaningful and offers no real protection. In any event, Nashua has committed to treat customers outside its city limits on the same basis as municipal customers, and to supply water to AB in accordance with the terms of its current special contract. Exh. 1016, pp. 19-20; Day X, pp. 206-207; Day XI, pp.



19-20, 61-62, 65-67, 81-82; Day XII, pp. 155-156, 165-166. If these commitments are enforceable, they ensure that service to customers in other towns will not trigger the fifteen percent rule of Section III-a (a)(1), and will not subject the City to PUC regulation with respect to that service.

**2. RSA 362:4, III-a (e)**

In addition to the mandatory exemption described above, the statute creates conditional exemptions, including a different fifteen-percent rule set forth in Section III-a (e). If a municipality serves customers outside its boundaries at a rate no more than fifteen percent higher than the rate its municipal customers paid prior to July 1, 2002, the Commission *may* exempt it from regulation as a public utility with respect to that service. Conversely, the Commission may decline to exempt the municipality from regulation if it finds after a hearing that exemption would be inconsistent with the public good.

On its face, Section III-a (e) seems to apply whether the prior rate was charged by the municipality or by a private water company. There is no obvious reason to treat municipalities or customers differently based on that distinction. Arguably, the provision's plain language dictates that if Nashua charges outside customers a rate no more than fifteen percent higher than the rate PWW charged Nashua residents before July 2002, the Commission must decide whether exempting the City from regulation with respect to service to the outside customers would be in the public good.

RSA 362:4 is silent as to a municipality's ability to charge outside customers a rate that is more than fifteen percent higher than the rate its residents paid before July 2002. However, it would be anomalous to subject a municipality to PUC regulation if it charges outside customers a rate *less* than a particular benchmark, while exempting it from regulation if it charges them a

rate *more* than that benchmark. A logical reading is therefore that the Commission may only exempt a municipality from regulation outside its borders if it charges outside customers a rate less than fifteen percent higher than the rate municipal residents paid before July 2002.

### 3. RSA 374

Nashua's counsel also noted that a general exemption from public utility status does not exempt a municipality from the "franchise application" requirements of RSA 374. Day X, pp. 205-209. *See* RSA 362:4, III-a (a) and (e). It is unclear whether RSA 374 confers PUC jurisdiction over the rates and service of a municipal water system.<sup>1</sup>

### III. The Public Interest – Additional Issues

Anheuser-Busch presumes that Nashua could be a reliable supplier of good quality water, and an effective guardian of the watershed. The evidence also suggests that the City could achieve some cost savings, principally through minimizing tax burdens. Day X, pp. 101-102, 112-115; Day XII, pp. 102, 141. If those savings resulted into lower rates, they would be an important factor favoring municipalization. At this time, however, there is no rate structure or final rate ordinance. Day II, p. 78; Day III, p. 90; Day VI, p. 68. The effect of any cost savings is therefore unknown.

#### A. PWW's Operations

The "public good" includes not only the needs of particular persons directly affected by an action, but also the needs of the public at large and the general welfare of the utility involved. *Boston & Maine Railroad v. State*, 102 N.H. 9 (1959). The record shows that PWW is a well-run utility. Exh. 5001, p. 69; Day III, pp. 67-68. PWW has extended service across municipal

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<sup>1</sup> Granting Nashua's petition would have serious repercussions for all the parties, especially PWW and its customers. If the Commission assumes its continuing regulatory jurisdiction and is later proven incorrect, its approval of the exercise of eminent domain could have effects very different from those it anticipates. The Commission may wish to consider certifying this question to the New Hampshire Supreme Court before issuing a final ruling.

borders into areas experiencing supply problems – in at least once instance, where a municipally-owned system refused to do so. Day XI, pp. 33, 47, 102-103, 119-122. PWW has also served the public interest by acquiring a number of financially-troubled water systems.

Several witnesses expressed the view that private companies have a profit incentive to expand their service territories across municipal boundaries, while competition between municipalities to attract new businesses to increase their tax bases can create a disincentive to cross-boundary cooperation. Day I, p. 198; Day XI, pp. 45-47, 105-106; Day XII, pp. 98-99. The Towns of Milford and Merrimack have voiced serious reservations about the proposed taking. Day XI, pp. 14, 32, 63-64. The Town of Bedford does not support Nashua's petition unless the Regional Water District will control service in Bedford. Day XI, pp. 129-133. The fact that no municipalities unconditionally support the petition may portend future frictions that would not serve the interests of the region as a whole.

#### **B. Nashua's Proposed Operations**

Anheuser-Busch presumes that Veolia could be a capable operator of a municipal water system, and could meet AB's needs for clear communication and cooperative relations. However, no contract has yet been finalized between Nashua and Veolia. AB retains some concern that a different, unknown company could take over operations in the future, or that changes to the draft Veolia contract could result in operational changes not contemplated during the hearings.

AB also has some question about R.W. Beck's relevant experience, its proposed role in supervising Veolia's contract compliance, and whether that role could be filled more economically by City employees. Day V, pp. 21-27, 40-45, 100-102. There is no signed contract between the City and R.W. Beck either, and the draft contract contains a thirty-day

convenience termination provision. Day I, pp. 227-228; Day V, pp. 13-16. There has already been a dispute between the City and R.W. Beck over a bill for services. Day V, pp. 32-38. AB defers to the judgment of PUC Staff on whether the proposed operational arrangement is consistent with the public good.

**C. The Regional Water District**

The Commission has determined that it cannot decide issues concerning the Merrimack Valley Regional Water District in this docket, as that entity's potential control of the water system in Nashua is not ripe for consideration. Anheuser-Busch understands the legal and practical difficulties of passing judgment on the future of a regional district that is largely hypothetical, and the viability of which depends on approval of Nashua's petition. Nevertheless, AB cannot realistically assess the ramifications of municipalization without recognizing that in the near future it would likely be dealing with an entirely different water provider, one that presented no witnesses in this proceeding. Day I, pp. 21, 95.

The legal rights and obligations of a regional water district are open to debate, as is the Commission's regulatory authority over the transfer of assets to a regional district and over water rates and service by a regional district. Unlike Nashua, the Regional District has not offered to provide service on the same terms as PWW. It has not agreed to abide by any conditions the Commission may impose on Nashua, or to submit its rates and service to Commission regulation. AB must conclude that the Commission's decisions in this docket may remain in effect only until control of the water system passes from Nashua to the Regional District.

### Conclusion

Water supply is of vital importance to Anheuser-Busch. The company is satisfied with the service PWW has provided for nearly forty years. The evidence shows that PWW is a well-run company that has made commendable efforts to promote the interests of New Hampshire's citizens inside and outside of Nashua. AB does not doubt that the City and Veolia could also provide excellent water service. For AB, however, the fundamental issue is predictability.

Like any business, AB must base decisions about capital investment, plant expansion, and allocation of resources on the predictability of future operating costs in a given area. Predictability is especially crucial when it concerns a brewery's water supply. The special contracts with PWW have allowed a great measure of certainty about rates and terms of service. Those contracts have not given AB preferential treatment. Commission review and approval ensure that rates reflect the costs of providing water to a customer whose unique situation makes general rate schedules inapplicable. The special contract process is open to public scrutiny, and protects the public interest by offering fair and equal treatment of customers.

Despite the City's efforts, it can offer only limited assurances about the predictability of future service. It is not a criticism of Nashua to note that the City is unable to state what rate AB will pay for how long, what entity will set the rate in the future, what methodology it will apply, whether an independent authority will review and approve the rate, and what procedure will be used to change the rate.

If the Commission grants the petition, AB requests at a minimum that it implement all the conditions to which Nashua has agreed, and to make those conditions binding on the City's successors and assigns. AB further asks the Commission to consider its authority under RSA 362:4, III-a (e) or any other statute to decline to exempt Nashua from regulated public utility

status with respect to service outside its city limits. If the Commission has such authority, AB urges it to condition any approval of the petition on its retention of full regulatory jurisdiction over Nashua's service and rates outside its boundaries.

Respectfully submitted,

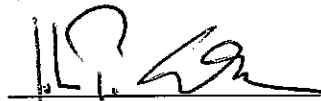
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By Its Attorneys

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Dated: November 16, 2007

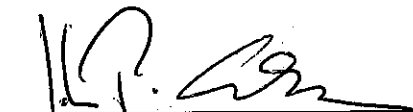
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this brief has this day been sent electronically to those whose names appear on the attached service list.



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