

THE STATE OF NEW HAMPSHIRE  
before the  
PUBLIC UTILITIES COMMISSION

City of Nashua, Petition for Valuation Pursuant to RSA 38:9  
Docket No. DW 04-048

**REPLY BRIEF OF THE TOWN OF MILFORD**

Pursuant to the briefing schedule set by the Public Utilities Commission on October 29, 2007, the Town of Milford submits the following brief in reply to the post-hearing brief of the City of Nashua.

**I. Introduction**

Nashua argues in its brief that upon its acquisition of Pennichuck's assets it will have an incentive to provide the best possible service because failure to provide such service would result in complaints to the city's mayor and board of aldermen. While this political accountability may be of comfort to Pennichuck's Nashua customers, it does not reassure Milford in the slightest because Nashua's elected officials have no obligation or incentive to protect the interests of Milford's citizens.

Given this lack of political accountability to Milford residents, the city argues that it will be accountable to the Commission for its performance under the bulk water supply contract with Milford. According to Nashua, Commission jurisdiction over its delivery of water to customers outside the city limits will provide adequate protection of Milford's interests. It is doubtful, however, that the Commission has or can acquire such jurisdiction. The petition should therefore be denied.

## II. Argument

A. Nashua's Elected Officials are Not Politically Accountable to the Citizens of Milford and Therefore Lack Incentive to Ensure Equal Treatment of Nashua and Satellite Water Customer Interests.

Nashua argues that it will “not only provide service that is reasonably safe and adequate and in all other respects just and reasonable but that it will do so at reduced rates while significantly improving . . . the quality of service customers currently receive.” Nashua Brief at 1-2 (quotation marks omitted). The city contends that water customers can ensure that Nashua lives up to this far-reaching promise through political accountability of its elected officials. *Id.* at 24-25.

To satellite customers such as Milford, this is a meaningless assurance. Nashua's elected officials are not accountable to the citizens of Milford, and complaints from Milford water customers are unlikely to have any effect upon the city's elected officials whose first obligation is to look after the city's interests. *Marbucco Corp. v. City of Manchester*, 137 N.H. 629, 632-33 (1993); *Mayor of Manchester v. Smyth*, 64 N.H. 380, 382 (1887). Thus, political accountability may provide a measure of protection to Nashua residents, but it exposes Milford residents to discriminatory treatment for the benefit of Nashua residents. It plainly does not protect the “public interest” within the meaning of RSA 38:11.

B. Uncertainty Concerning Commission Jurisdiction Makes Any Conditions Imposed by the Commission or Promises Made by Nashua in Connection With the Proposed Taking Likely Illusory.

Contrary to Nashua's assertions, there is a good deal of uncertainty whether the Commission would retain jurisdiction over the city upon approval of the taking or whether the Commission can acquire such jurisdiction through Nashua's consent. Nashua Brief at 3-4. Particularly troubling to Milford is that with very limited exceptions, bulk water contracts

between municipalities are exempt from Commission regulation, RSA 362:4, III-a (2), and Nashua has presented no evidence or argument suggesting that the Milford contract is within the exception to this exemption.

Nashua, moreover, has not cited to any authority that supports its argument that a party can consent to agency jurisdiction if there is no such jurisdiction under statute. In fact, the Commission has only the authority conferred upon it by the legislature and “must act within its delegated powers.” *Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 689 (1981) *citing* *Kimball v. N.H. Bd. of Accountancy*, 118 N.H. 567, 568 (1978). There is therefore no apparent legal basis for Nashua’s contention that the Commission may establish jurisdiction over the city through its power to impose conditions under RSA 38:11.

Because of the serious questions about the Commission’s jurisdiction, Milford expects to submit a request that the Commission transfer the issue to the supreme court pursuant to Supreme Ct. R. 9. If the Commission denies the request or the supreme court denies the transfer, Milford urges the Commission to deny Nashua’s petition. Nashua has failed to make the necessary showing that the Commission would have jurisdiction over the city’s performance of the bulk water supply contract with Milford, and absent such jurisdiction Milford would have no protection against discriminatory treatment by Nashua. The city has not demonstrated that the taking would be in the “public interest,” and its petition should be denied.

C. Nashua Representatives Have No Authority to Bind the City Without a Vote of Approval from the Board of Aldermen.

Nashua argues that its “officials articulated their commitment to provide service to all satellite customers at core rates, on a non-discriminatory basis,” Nashua Brief at 3, and that it will meet this commitment by honoring “the rates, terms, and conditions of all existing wholesale contracts.” *Id.* at A-1, 5 (a).

First, literally read, Nashua's proposed condition does not commit to waive the "poison pill" clause in Milford's contract that effectively terminates the contract upon Nashua's taking of Pennichuck's assets (Exhibit 4002, Attachment A at ¶5) thereby rendering Nashua's commitment to honor the contract as written meaningless.

Second, even assuming that Nashua's brief and proposed conditions are read to include a waiver of the termination clause, Nashua still has offered no evidence that the board of aldermen has voted to assume the obligations of the contract and waive the termination clause. The city has not taken even the basic step of obtaining the approval of its governing body to assume the obligations of Pennichuck under the contract with Milford. As a consequence, Nashua has left open the possibility of a challenge to its assumption of those obligations on the ground that Alderman McCarthy's proposals were not authorized.

Nashua's failure to provide the Commission with evidence of an authorized, unequivocal commitment to honor the Milford contract when it was plainly within the city's power to do so amounts to a failure to prove that the proposed taking, considered in its entirety, is in the public interest. The petition should be denied as a result.

D. A Wholesale Tariff as Proposed by Nashua Would Not Offer Milford the Same Benefits as its Current Water Supply Contract.

Nashua proposes to provide service to wholesale customers in accordance with the "rates, terms and conditions of all existing wholesale contracts . . . and the renewal thereof, or, if required for bonding purposes, [the city will] create a wholesale tariff that incorporates the rates and provisions of the existing wholesale contracts." Nashua Brief at A-1, 2.

As an initial matter, Milford questions whether the Commission has jurisdiction to approve a wholesale tariff as suggested by Nashua given that the Commission's jurisdiction to enforce Milford's water supply contracts is doubtful. RSA 362:4, III-a. If Nashua is not a public

utility subject to Commission regulation regarding bulk water contracts, then the Commission also lacks jurisdiction to implement a tariff leaving Milford uncertain as to its future water supply.

Nashua's proposal, moreover, would deprive Milford of the beneficial terms of its current bulk water contract with Pennichuck. Unlike a tariff, Milford's water contract is not cost based; its terms are uniquely tailored to Milford's needs. The advantage of a contract is that it permits the parties to negotiate for particular terms and conditions. Because Nashua has not demonstrated that its hypothetical tariff would replicate Milford's rights under the contract, Nashua's proposal creates yet another uncertainty that Milford does not now face. Nashua's failure to address this uncertainty is further evidence that the city has not presented the Commission with a mature proposal that protects the public interest.

### **III. Conclusion**

Based upon the foregoing, Milford respectfully requests that the Commission deny Nashua's petition as contrary to the public interest.

Respectfully submitted,

Town of Milford,  
By Its Attorneys,  
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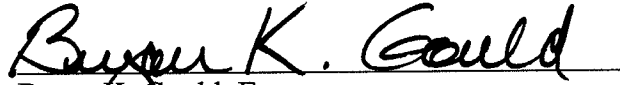
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties listed on the attached service list pursuant to the requirements of Rule Puc 203.02.

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