

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

#2009-0274

**Appeal of City of Nashua
Appeal of Pennichuck Water Works, Inc.**

Brief of the City of Nashua

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QUESTIONS PRESENTED

1. Whether the Public Utilities Commission (“Commission”) erred in accepting a valuation hypothesis that multiple municipal or not-for-profit buyers could afford to pay more than investor- owned utilities for the assets of Pennichuck Water Works, Inc. (“PWW”) and would bid competitively thereby setting a higher market value for its assets (“municipal buyer theory”) when:
 - a) There was no evidence that such a competitive market of municipal buyers exists or would influence the market for PWW, and considerable evidence to the contrary;¹
 - b) The municipal buyer theory is not permissible under New Hampshire law because it assumes municipalities have the authority to compete to acquire water utility assets that are not for the public use of their inhabitants or as provided in RSA 38;²
 - c) The municipal buyer theory is not financially feasible because Nashua is the only municipal buyer that can legally or practically acquire the assets of PWW;³
 - d) The municipal buyer theory fails to account for significant capital gain taxes that a municipal buyer of assets causes the seller to incur;⁴ and
 - e) The municipal buyer theory does not establish the fair market value of the assets and only measures the ability of a municipal buyer to pay.⁵
2. Whether the Commission erred in denying Nashua’s Petition to acquire the assets

¹ Nashua’s Motion for Rehearing and Clarification, August 25, 2008, Pages 2-7, 18, 19 (Certified Record Page 10458 *ff*).

² *Ibid.*, Pages 8-11 (Certified Record Page 10458 *ff*).

³ *Ibid.*, Pages 11-15 (Certified Record Page 10458 *ff*).

⁴ *Ibid.*, Pages 5,6,15-17 (Certified Record Page 10458 *ff*).

⁵ *Ibid.*, Pages 17-19 (Certified Record Page 10458 *ff*).

of Pennichuck East Utility, Inc. (“PEU”) and Pittsfield Acqueduct Company, Inc. (“PAC”) when:

- a) The plain and ordinary language of RSA 38 enables Nashua to acquire plant and property outside Nashua if required by the public interest;⁶
 - b) PEU and PAC are wholly dependent upon PWW for their utility service, and use PWW utility plant and property located in Nashua for such purposes;⁷ and
3. Whether the Commission erred by requiring a Mitigation Fund more than double the combined values and revenues of PEU and PAC when
- a) The Commission failed to consider evidence that the harm was self-inflicted and could easily be mitigated by reducing overhead, merger or sale to another utility;⁸ and
 - b) RSA 38 requires that such harm be avoided by acquisition of the plant and property of PEU and PAC by Nashua.⁹

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. STATEMENT OF THE CASE

Nashua adopts the procedural history set forth in Order No. 24,425, 24,878 and 24,948 set forth in the Appendix.¹⁰ By way of summary, Nashua states:

RSA 38 authorizes a municipality, with the approval of the Commission, to take, at a value established by the Commission, public utility plant and property for the use of its citizens and others. On November 6, 2002, the Nashua Board of Alderman adopted a resolution to “acquire all or a portion of the water works system serving the inhabitants of

⁶ Ibid., Page 20 (Certified Record Page 10458 *ff*).

⁷ Ibid., Pages 21, 22 (Certified Record Page 10458 *ff*).

⁸ Ibid., Pages 22, 23 (Certified Record Page 10458 *ff*).

⁹ Ibid., Pages 20-23 (Certified Record Page 10458 *ff*).

¹⁰ Appendix at Pages 1 (Order No. 24,425), 25 (Order No. 24,878) and 145 (Order No. 24,948).

the City and others” and on January 14, 2003, Nashua voters confirmed the resolution by a margin of 6505 to 1867. On January 28, 2003, pursuant to RSA 38:6, Nashua gave notice for the acquisition of all plant and property of PWW, PEU and PAC. On March 25, 2004, Nashua filed a Petition for Valuation of PWW, PEU, and PAC pursuant to RSA 38:9. The Pennichuck utilities moved to dismiss, and on January 21, 2005, the Commission issued Order No. 24,425, narrowly construing the grant of authority in RSA 38, and concluding that Nashua could not acquire the property of PEU and PAC.

On July 25, 2008, the Commission issued Order No. 24,878 approving Nashua’s Petition and finding that Pennichuck failed to rebut the presumption of RSA 38:3 that Nashua’s acquisition of PWW’s plant and property is in the public interest. The Commission valued PWW’s plant and property at \$203,000,000 as of December 31, 2008, and imposed a number of conditions on the acquisition, including a condition requiring that Nashua establish a mitigation fund of \$40,000,000 to protect customers of PEU and PAC. Commissioner Below dissented from the determination of value and reliance on the municipal buyer theory. He concluded that the value of the assets was \$151,000,000. Pennichuck and Nashua filed motions for rehearing on August 22, 2008 and August 25, 2008. On March 13, 2009, the Commission issued Order No. 24,948 in which it denied Nashua’s and Pennichuck’s motions for rehearing. Commissioner Below dissented on valuation, citing the grounds set forth in Nashua’s Motion for Rehearing.

B. STATEMENT OF FACTS

The Certified Record before the Court consists of more than 17,469 pages of documents, over 6838 pages of which were written testimony and exhibits admitted into evidence at the Commission’s hearings on merits. By necessity, this Statement of Facts

addresses only those facts necessary to understand the specific issues raised in this Brief and reference is made to the first page where a document is found in the Certified Record according to the Agency's Table of Contents.

1. STATEMENT OF FACTS CONCERNING VALUATION

The Commission relied on the valuation of PWW's assets by Pennichuck's expert, Robert F. Reilly. He testified that the value of PWW's plant and property as of December 31, 2005 was \$273,400,000.¹¹ His estimate was based upon his hypothesis that the likely population of hypothetical willing buyers included *any* incorporated New Hampshire City or Town, including Nashua, and any existing or yet to be formed water district,¹² and that these municipal buyers would set the range of the purchase price because they could afford to pay more than investor-owned utilities.¹³

a. Facts concerning the lack of evidence to support the municipal buyer theory.

There is no factual basis to support Mr. Reilly's hypothesis, and, upon examination by Commissioner Below, he was unable to identify a single example where municipal buyers competitively bid up the value of an investor-owned utility.¹⁴ When asked in "how many situations have you seen where there have been multiple non -- not for profit or governmental bidders?"¹⁵ he acknowledged that it only happens in "the minority of the cases".¹⁶ He further indicated that cases in which municipal buyers actually competed to "bid up" the value represented "very few cases -- where it may be back to back literally next door municipalities." When asked by the Commission, he

¹¹ Exhibit 3021, Page 3 (Certified Record Page 15744 *ff*).

¹² Exhibit 3007A, Page 3 (Certified Record Page 14543 *ff*).

¹³ Transcript, September 12, 2007, Page 207 (Certified Record Page 8598 *ff*).

¹⁴ Transcript, September 12, 2007, Pages 210-212 (Certified Record Page 8598 *ff*).

¹⁵ Transcript, September 12, 2007, Pages 210-211 (Certified Record Page 8598 *ff*).

¹⁶ Transcript, September 12, 2007, Page 211 (Certified Record Page 8598 *ff*).

could not recall a single example in which this occurred.¹⁷

There are no examples in the record,¹⁸ and the only evidence before the Commission indicated that municipal buyers do not pay more than other purchasers. Nashua's expert, Glenn Walker, identified 28 sales of water utilities. His analysis showed that the sale of water utility property to municipal buyers fell within the same range of value as investor-owned sales.¹⁹ The Commission also received evidence that in 2002, Pennichuck Corporation engaged its financial advisor S.G. Barr Devlin (SGBD) to solicit buyers for its businesses, which resulted in selection of a proposal to sell Pennichuck Corporation and its subsidiaries, to Philadelphia Suburban Corporation for \$106 million.²⁰ SGBD did not identify *any* municipal buyers for the company.²¹ The acquisition was submitted to the Commission for approval, but later terminated.²²

The municipal buyer theory was contradicted by PWW's other witnesses. Donald Ware, P.E., Chief Engineer and President of PWW testified, based on his 25 years of industry experience, that municipalities have "no interest" in acquiring water systems, and are "not regularly in the business" of doing so.²³ John Joyner prepared a report on the sale of water utilities and their expected market values, which did not identify municipalities or other non-profit entities as potential buyers.²⁴ It recommended a method for valuing water utility property that coincided with the value found by

¹⁷ Transcript, September 12, 2007, Page 212 (Certified Record Page 8598 *ff*).

¹⁸ Order No. 24,878 (Certified Record Page 10302 *ff*) Appendix at 25 fails to identify a single municipal buyer that would compete against Nashua.

¹⁹ Exhibit 1007E (Certified Record Page 11317 *ff*); Transcript, September 10, 2007 (afternoon), Pages 85, 89 (Certified Record Page 8458 *ff*).

²⁰ Exhibit 1001, Page 5 (Certified Record Page 10631 *ff*); *generally*, Exhibits 1091 (Certified Record Page 12600 *ff*), 1093 (Certified Record Page 12733 *ff*) & 1094 (Certified Record Page 12928 *ff*).

²¹ Transcript, September 12, 2007, Pages 71, 77 (Certified Record Page 8598 *ff*); Exhibit 1094, Page 33 (Certified Record Page 12928 *ff*).

²² See *Pennichuck v. Nashua*, 152 NH 729, 732 (2005).

²³ Transcript, September 11, 2007, Page 63, 64 (Certified Record Page 8841 *ff*).

²⁴ Exhibit 1099 (Certified Record Page 13237 *ff*).

Nashua's expert.²⁵ Finally, Mark Naylor, Director of the Water Division of the PUC, and Douglas C. Patch, a former PUC Commissioner, testified that municipalities are not engaged in the business of acquiring other water systems.²⁶

There was not a single example of an actual sale in which multiple municipal buyers competitively bid against each other. Nor was there any market data showing a market of sales to municipalities for greater value. Nashua, in the strongest of terms, urged the Commission to reconsider its reliance on the municipal buyer based on the complete absence of actual market transactions, or any other evidence.²⁷ Commissioner Below agreed.²⁸ The majority simply noted that no new evidence was presented.²⁹ This was precisely the point and demonstrates the error.

b. Facts demonstrating that the municipal buyer theory is not legally permissible.

Mr. Reilly was questioned extensively concerning the legal basis for his municipal buyer theory. He agreed "that any likely buyer has to be legally able to buy the subject assets."³⁰ He asserted that "the potential buyers did not actually have to either touch the City of Nashua, or touch Pennichuck Water Works. [...] a buyer could be a municipality, a water district, or a regional district anywhere in New Hampshire; it does not have to be actually physically located within the Pennichuck service area."³¹ Mr. Reilly was unable to explain how his municipal buyer theory was legally permissible

²⁵ Transcript, September 18, 2007, Page 48, 49 (Certified Record Page 9268 *ff*); Exhibit 1099, page 6 (Certified Record Page 13237 *ff*), Exhibit 1007A, Page 65 (Certified Record Page 11051 *ff*).

²⁶ Exhibit 5001, Page 52, 53, 56 (Certified Record Page 17043 *ff*); Exhibit 3002, Page 18 (Certified Record Page 14147 *ff*).

²⁷ See generally, Nashua's *Motion for Rehearing*, Appendix Page 172.

²⁸ Order No. 24,948 at Page 27; Appendix at 171.

²⁹ Order No. 24,948 at Page 25; Appendix at 169.

³⁰ Transcript, September 12, 2007, Page 49 (Certified Record Page 8598 *ff*); the Appraisal of Real Estate, 12th Ed, p. 305.

³¹ Transcript, September 12, 2007, Pages 47, 48 (Certified Record Page 8598 *ff*).

under RSA 38 and New Hampshire law,³² which require that a municipal buyer serve a public purpose for its inhabitants. Nor could he resolve conflicts between his municipal buyer theory and the Commission's Order No. 24,425 in this case, which prohibited Nashua from purchasing PEU and PAC because they were not engaged in distributing water for sale in Nashua.

c. Facts demonstrating that the City of Nashua is the only municipal buyer that could practically acquire Pennichuck Water Works.

The evidence before the Commission demonstrated that Nashua was the only likely municipal buyer. Eighty-seven percent (87%) of PWW's customers are located in Nashua.³³ The remaining customers are scattered in ten other municipalities in southern New Hampshire. The next largest in terms of customers is in Amherst (3.8%).³⁴ The smallest (.03%) is located in Hollis.³⁵ The two largest municipalities supported Nashua's petition, Amherst (3.8%) and Bedford (3.2%), as did the newly formed Merrimack Valley Regional Water District. There was no evidence that these or any other municipal or public agencies ever offered to purchase Pennichuck.

d. Facts explaining that the municipal buyer theory failed to account for the significant capital gains taxes and preclude municipal buyers from competing in the market for Pennichuck Water Works.

The evidence before the Commission showed that virtually all the sales of water utilities identified by the valuation experts were stock sales.³⁶ Asset sales cause a seller to recognize gain for federal and state income tax purposes equal to the excess of the

³² RSA 31:3 (“[t]owns may purchase and hold real and personal estate for the public uses of the inhabitants, and may sell and convey the same;”).

³³ Order No. 24,878, Page 108 (Certified Record Page 10302 *ff*); Exhibit 3001, Page 7 (Certified Record Page 14060 *ff*).

³⁴ Exhibit 3001, Page 7 (Certified Record Page 14060 *ff*).

³⁵ *Ibid* (Certified Record Page 14060 *ff*).

³⁶ Exhibit 3007A, Page 40-45 (Certified Record Page 14583 *ff*); Exhibit 1007B, Page 99-102 (Certified Record Page 11187 *ff*).

aggregate value it receives for each asset, less its adjusted tax basis in those assets, at an effective tax rate of thirty-nine percent (39%).³⁷ Donald Correll, Pennichuck's former CEO, testified that because many of PWW's assets were of an old vintage, the tax burden would run to "many tens of millions of dollars."³⁸ He further explained that these capital gains taxes would prevent Pennichuck Corporation from ever voluntarily selling its assets to a municipal buyer "under any realistic scenario"³⁹ stating as follows:

[C]ity officials misrepresented that the city's offer for all of PNNW's assets was *equivalent to the value offered by the stock for stock transfer* proposed by Philadelphia Suburban Corporation ("PSC"). [...] The tax expenses are costs that Nashua has assumed should be borne by the company and by shareholders, despite the fact that *they would not have arisen under any realistic scenario in the absence of eminent domain.*

Nashua, through the enactment of special legislation, is the only municipal buyer with authority to acquire stock.⁴⁰ No other municipal buyer could purchase stock or avoid the "many tens of millions of dollars" in taxes that preclude a municipal asset purchase "under any realistic scenario." Commissioner Below, in his dissenting opinion on rehearing, agreed.⁴¹

e. Facts demonstrating that the municipal buyer theory does not establish the fair market value.

The evidence before the Commission demonstrated that the municipal buyer theory advanced by Mr. Reilly and accepted by the Commission establishes investment value, not fair market value. Mr. Reilly used his municipal buyer theory to endow his hypothetical municipal buyers with certain advantages or benefits not available to other buyers in the market, including the avoidance of income taxes, access to low-cost

³⁷ IRC Sec. 1001 (a); Exhibit 3001, Page 20 (Certified Record Page 14060 ff).

³⁸ Exhibit 3001, Page 20 (Certified Record Page 14060 ff).

³⁹ Exhibit 3001, Page 20 (emphasis added) (Certified Record Page 14060 ff).

⁴⁰ Laws of 2007, Chapter 347, Appendix at 214.

⁴¹ Order No. 24,948, Page 27, Appendix at 171.

municipal financing, and reduced regulation.⁴² However, these benefits are not attributes of the property being acquired, nor can they subsequently be transferred. As a result, he measured the ability to pay of a “particular buyer” rather than what a “typical buyer” with investment requirements typical of the market would actually pay.⁴³ In doing so, it establishes an investment rather than fair market value.⁴⁴ His valuation report assigned no weight to the sales approach.⁴⁵ However, on cross examination, he applied ratios he considered reliable to the sales to municipalities which showed a value of \$116 million, for less than indicated by his municipal buyer hypothesis.⁴⁶

In his dissenting opinion concerning valuation, Commissioner Below points out that Mr. Reilly himself admitted that a typical market for a water utility consists of only one municipal buyer, which will bid only \$1.00 more than what a typical for-profit buyer would pay for the assets.⁴⁷ When asked if he could recall any actual transactions in which multiple non-profit buyers competed, Mr. Reilly could recall none.⁴⁸

2. STATEMENT OF FACTS CONCERNING PUBLIC INTEREST

a. Facts Concerning Nashua’s Legal Authority to Acquire Pennichuck East Utilities and Pittsfield Aqueduct, Inc.

The Commission found that “PWW, PAC, and PEU are *highly interdependent* companies sharing resources through Commission-approved affiliate agreements” and that “PWW supplies the majority of the shared resources that PAC and PEU *rely on to*

⁴² Exhibit 1015, Page 6 (Certified Record Page 11720 *ff*).

⁴³ The Appraisal of Real Estate, 12th Ed., Page 26.

⁴⁴ Ibid (investment value is “the specific value of a property to a particular investor or class of investors based on individual investment requirements; distinguished from market value, which is impersonal and detached,” and “investment value is value to an individual, not necessarily value in the market place.”)

⁴⁵ Order No. 24,878, Page 83 (Certified Record Page 10302 *ff*). Appendix at 107.

⁴⁶ Transcript, September 12, 2007, Pages 135-141 (Certified Record Page 8,598 *ff*).

⁴⁷ Order No. 24,878, Page 104, 105 (Certified Record Page 10302 *ff*). Appendix at 128-129.

⁴⁸ Transcript, September 12, 2007, Pages 210-212 (Certified Record Page 8598 *ff*).

provide water service to customers.”⁴⁹ In the testimony of PWW President Donald Ware, these shared resources include all of the “computer systems, office space, vehicles, heavy equipment, management labor and other assets” which are owned by PWW but used to provide service to PAC and PEU.⁵⁰ The utilities are so integrated that “PWW staff often perform work in two or three of the utilities in a day”⁵¹ and “[a] field employee could start with a final reading for a PEU system, migrate to a pull and test of a meter in a PWW system, migrate to a line flushing in a PWSC system and end with a service box repair in Pittsfield.”⁵²

Donald Correll, CEO of Pennichuck Corp., testified that while PEU and PAC own some assets such as pipes “almost every other asset needed to operate any of the Pennichuck entities and their businesses is owned by PWW”⁵³ including “computer systems, offices, vehicles, inventory and supplies, and almost anything that is needed to operate a utility but is not located on site at a specific water system.”⁵⁴ In fact, using its SCADA⁵⁵ system, Pennichuck monitors and operates the treatment plants and pumping stations of three utilities from its operational headquarters in Nashua.⁵⁶

According to Bonalyn Hartley, Vice President of Operations, all of the administrative and customer service functions are provided by PWW “through its integrated relationship with its affiliates, ... to the approximately 5,550 customers of PEU and PAC.” Indeed, Pennichuck Corporation “does not have any employees, nor do any

⁴⁹ Order No. 24,878, Page 95 (emphasis added) (Certified Record Page 10,302 *ff*). Appendix at 119.

⁵⁰ Exhibit 3004, Page 6 (Certified Record Page 14,262 *ff*).

⁵¹ Exhibit 3004, Page 16 (Certified Record Page 14,262 *ff*).

⁵² Exhibit 3004, Page 6 (Certified Record Page 14,262 *ff*).

⁵³ Exhibit 3001, Page 10 (Certified Record Page 14060 *ff*).

⁵⁴ Exhibit 3001, Page 11 (Certified Record Page 14060 *ff*).

⁵⁵ Supervisory Control and Data Acquisition

⁵⁶ See *e.g.* Exhibit 3007A, Page 32-33 (Certified Record Page 14583 *ff*).

of its [utility] subsidiaries other than PWW”.⁵⁷ Costs are simply allocated to each of the utilities according to a regulatory formula approved by the Commission.⁵⁸

Nashua petitioned the Commission to acquire the assets of PEU and PAC in addition to PWW in order to avoid any potential harm to PEU and PAC customers.⁵⁹ However, the Commission denied Nashua’s Petition as to PEU and PAC,⁶⁰ which ultimately created the need to mitigate the very harm that the statute is intended to prevent.⁶¹

b. Facts Concerning the Establishment of the Mitigation Fund

The Commission’s imposition of a mitigation fund in the amount of \$40,000,000 is more than twice the rate base or regulatory investment of \$13,672,839⁶² in PEU and PAC.⁶³ The harm to PEU and PAC to be mitigated is based on the existing corporate model without consideration of whether the model was justified or whether there were less costly alternatives, and despite testimony from Pennichuck witnesses that they could take steps to reduce harm to those customers.⁶⁴

The Commission rejected conditions proposed by Nashua that would have allowed it to acquire these utilities as allowed by RSA 38:9 and 38:11, or limited the amount of the fund to the value at which those utilities could be acquired in the market.

⁵⁷ Exhibit 3001, Page 10 (Certified Record Page 14060 *ff*).

⁵⁸ Exhibit 1132, Pages 1 to 16 (Certified Record Page 13802 *ff*), shows the allocation methodology and actual allocations.

⁵⁹ Exhibit 1001, Page 8 (Certified Record Page 11631 *ff*).

⁶⁰ Order No. 24,425 (Certified Record Page 767 *ff*). Appendix at 1.

⁶¹ See, e.g., RSA 38:9, I.

⁶² Exhibit 3016A, Pages 16-17 (Certified Record Page 15,553 *ff*).

⁶³ Exhibit 3016, Pages 2,3 (Certified Record Page 15542 *ff*); Transcript, Sept. 18, 2007, Pages 127, 128 (Certified Record Page 9268 *ff*).

⁶⁴ Transcript, Sept. 18, 2007, Page 119-121 (Certified Record Page 9268 *ff*); Transcript Sept. 11, 2007, pages 61-63 (Certified Record Page 8841 *ff*).

SUMMARY OF ARGUMENT

The municipal buyer theory adopted by the Commission resulted in a value for the assets of PWW, was not supported by any evidence and is contrary to New Hampshire law which requires that any municipal acquisitions of such property be for the public use of its inhabitants or others. Nashua is the only municipal buyer that could legally or feasibly acquire the assets under RSA 38 or RSA 31:3. The municipal buyer theory measures ability to pay, not fair market value as required by RSA 38:9 and reliance on it by the Commission was error.

The Commission unreasonably and unlawfully denied Nashua's petition to also acquire the assets of PEU and PAC by strictly construing the notice provisions of RSA 38:6 and ignoring the plain and ordinary meaning of RSA 38:2, 9 and 11. The mitigation fund imposed by the Commission to protect the customers of PEU and PAC in the amount of \$40 million is more than twice the regulatory value of those entities and disregards that statutory authority to require the municipality to acquire the plant under RSA 38:9 and 11.

ARGUMENT

I. Standard of Review

The standard of review of a Commission order is clear. "A party seeking to set aside an order of the PUC has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or reasonable."⁶⁵

II. The Commission Erred By Concluding That A Competitive Market Of Non-Profit Purchasers Exists, Or Influences The Market for Pennichuck Water Works.

⁶⁵ *Appeal of Verizon*, No. 2008-645, May 7, 2009; RSA 541:13; *Appeal of Ashland Electric Dept.*, 141 NH 336, 339 (1996).

The Commission's decision to accept the municipal buyer theory that multiple not-for-profit entities (municipalities) would compete in the pool of buyers and set the range of the purchase price because they could afford to pay more than investor owned utilities⁶⁶ must be based on "some evidence" to support a rational finding in its favor.⁶⁷ "Some evidence" means "more than a minutia or a scintilla of evidence".⁶⁸ "To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be real and of such quality as to induce conviction."⁶⁹ Order No. 24,878, and the record in this case, however, fail to identify a single example in which municipal or not for profit purchasers competed thereby influencing the value of a privately owned water company such as PWW.

When PWW's expert, Robert F. Reilly, was asked if he could "recall the names of any of these situations" or examples where municipal buyers had "bid up" the market price for a water utility, he was unable to recall *even a single example* to support his theory.⁷⁰ His failure to recall even a single example of when municipal or other not for profit purchasers competitively "bid up" the value of an investor owned utility may be merely circumstantial evidence. However, "some circumstantial evidence is very strong, as when you find a trout in the milk."⁷¹

There was undisputed evidence that such a competitive market of municipal

⁶⁶ Order No. 24,878 at p. 89 (Certified Record Page 10302 *ff*); Appendix at 113.

⁶⁷ *NH Ball Bearings v Jackson*, No. 2008-073 (March 18, 2009).

⁶⁸ *State v Larose*, 157 NH 28,33 (2008).

⁶⁹ *State v Duran*, No. 2007-611 (Dec. 5, 2008).

⁷⁰ Transcript, September 12, 2007, Page 212 (Certified Record 8598 *ff*). "Oh, I can look – I can't think on the top of my head."

⁷¹ *McIntosh v. Personnel Commission*, 117 N.H. 334, 339 (1977) *quoting* Henry David Thoreau, Journal, November 11, 1850. Nineteenth century American dairymen delivered their milk in cans and dispensed the amount each house required. If they forded a stream on the way to the market, there was always the temptation to top up the cans with water from the brook. This led Henry David Thoreau to observe that "some circumstantial evidence is strong, as when you find a trout in the milk."

buyers does not exist. Donald Ware, P.E., President of PWW, testified based on his 25 years of industry experience, that municipalities have “no interest” in acquiring water systems and are “not regularly in the business” of doing so.⁷² Likewise, both Mark Naylor, Director of the Water Division and former PUC Commissioner, Douglas C. Patch, confirmed that municipalities are not engaged in the business of acquiring water systems.⁷³ There was no evidentiary basis for the Commission to accept Mr. Reilly’s unconfirmed speculation that municipal buyers might compete in the market, when the actual experience and testimony of all the water utility professionals showed this was not the case.

John Joyner, IMG, testified concerning his firm’s financial advisory practice specializing in the privatizing of municipally owned water systems.⁷⁴ He prepared a report entitled *Tapping Public Assets*⁷⁵ that advised that “[r]egulated utilities *usually sell for at or close to their “rate base”*; and that “[s]ale prices for water utilities *usually range from \$1500 to \$3500 per customer connection.*”⁷⁶ On cross examination, he applied his range of values for water utility assets to Pennichuck’s 25,000 customers, which resulted in a value range from \$37,500,000 to \$87,500,000. Thus, his own upper range of values bore a striking resemblance to the value of \$85,000,000 concluded by Nashua’s valuation expert Glenn Walker from his analysis of actual sales in actual markets.⁷⁷ At no point did Mr. Joyner suggest that municipal buyers might pay a substantial premium above what investor-owned utilities pay. His report and testimony confirmed what Donald Ware and

⁷² Transcript, September 11, 2007, p. 63, 64 (Certified Record Page 8841 *ff*).

⁷³ Exhibit 5001, Pages 52,53,56 (Certified Record Page 17043 *ff*); Exhibit 3002, Page 18 (Certified Record Page 14147 *ff*).

⁷⁴ Transcript, September 13, 2007, Page 48 (Certified Record at Item No. 364).

⁷⁵ *Ibid* at Page 49 (Certified Record at Item No. 364).

⁷⁶ Exhibit 1099, Page 6 (Certified Record Page 13237 *ff*) (emphasis added).

⁷⁷ Exhibit 1007A, Page 65 (Certified Record Page 11051 *ff*).

others candidly admitted on cross-examination: that municipal buyers do not appreciably influence the market.

Mr. Reilly chose to assign no weight to the sales or market approach to value in his appraisal of the PWW assets.⁷⁸ *The Appraisal of Real Estate* is less cavalier:

The sales comparison approach is a significant and essential part of the valuation process, even when its reliability is limited. Although appraisers cannot always properly identify and quantify how the factors affecting property value are different, they can still use the sales comparison approach to determine a probable range of value in support of a value indication derived using one of the other approaches. Furthermore, the comparison process often provides data needed to apply the other approaches —e.g., overall capitalization rates for the income capitalization approach or depreciation estimates for the cost.⁷⁹

Given the important role in developing value the sales or market approach plays, the reasons for Reilly's failure to use it are telling.

It is not enough that he believed the sales were not comparable. Even when the market is limited, the appraiser “must search diligently for whatever evidence of market value is available”,⁸⁰ if only to find evidence to support the other approaches. It is particularly important in a case such as this one, where an expert believes a different use of the subject property, in this case as a municipal utility, would lead to a different value.⁸¹

Mr. Reilly did, however, identify 7 sales to municipalities in his appraisal.⁸² For each sale, he provided evidence of the sales price and revenues of the acquired water companies which could be used to create a sales price to revenue ratio,⁸³ recognized as

⁷⁸ Transcript, September 12, 2007, page 118 (Certified Record Page 8598 ff).

⁷⁹ *The Appraisal of Real Estate*, 12th Ed. Page 421 (Appendix at 245); See also *USCOC v Bow*, 493 F. Supp. 199 (DNH 2007)

⁸⁰ *Ibid* at Page 26 (Appendix at 219).

⁸¹ Cf. *Town of Croydon v Current Use Advisory Board*, 121 NH 442,447(1981); *USCOC v Bow*, 493 F. Supp.2d 199 (DNH 2007).

⁸² Exhibit 3007A, pages 42-45 (Certified Record Page 14583 ff).

⁸³ Exhibit 1007A Pages 41-46(40-45) (Certified Record Page 11051 ff).

important in his book.⁸⁴ It was immediately apparent, however, that those sales did not support his overall value. Taken as a group, the median sales price to revenues ratio was 6.89.⁸⁵ Applied to PWW's 2005 earnings of \$16.9 million it implied a value of \$116,400,000.⁸⁶ Applied to PWW's 2004 earnings of \$15.9 million⁸⁷ the implied value is \$109,500,000. The sales approach was not used by Mr. Reilly because it disproved his flawed hypothesis, and confirmed the testimony of every water professional in the case that municipalities are not competitors in the market for water utility property..

Nashua's expert, Glenn Walker, on the other hand, prepared for the Commission a graph identifying the sale price to EBITDA⁸⁸ ratio for all sales of water companies he identified, including sales to municipalities.⁸⁹ The ratios for municipal acquisitions clustered in the same range with the ratios for investor owned purchases, confirming Commissioner Below's observation that it is unlikely a municipality would be willing to forego all its potential savings and synergies⁹⁰ and Reilly's admission that in a typical market with only one municipality, the price could be only \$1.00 more than what a for-profit buyer would pay.⁹¹

RSA 516:29-a is instructive. Before an expert witness is allowed to testify, the court must find that the testimony is based on "sufficient facts or data". Completely missing from Mr. Reilly's testimony are the facts and data necessary to support the municipal buyer theory. For the Commission to accept such a hypothesis without any

⁸⁴ Exhibit 1081, Page 263 (Certified Record at Item No. 1081).

⁸⁵ Transcript, September 12, 2007, Page 139 (Certified Record Page 8598 *ff*); Exhibit 1096 (Certified Record Page 13226 *ff*).

⁸⁶ Transcript, September 12, 2007, Pages 136, 137 (Certified Record Page 8598 *ff*).

⁸⁷ Exhibit 1075, Page 2 (Certified Record Page 12429 *ff*).

⁸⁸ Earnings Before Interest Taxes Depreciation and Amortization (a measure of operating cash flow).

⁸⁹ Exhibit 1007 (E) (Certified Record Page 11317 *ff*); See also Transcript Sept. 10, 2007 (Afternoon) Page 85, 89 (Certified Record Page 8458 *ff*).

⁹⁰ Order 24,878, Page 111 (Certified Record Page 10302 *ff*); Appendix at 135.

⁹¹ Transcript, September 12, 2007, Page 206 (Certified Record Page 8598 *ff*).

supporting facts or data, is contrary to law, and unjust and unreasonable.

a. The Commission Erred by Accepting a Municipal Buyer Theory That Is Not Legally Permissible Under New Hampshire Law.

The municipal buyer theory is founded on Mr. Reilly's conclusion "that any likely buyer has to be legally able to buy the subject assets".⁹² Indeed in measuring the fair market value of property, his valuation must identify its highest and best use which must meet four criteria: physically possible; *legally permissible*; financially feasible; and maximally productive.⁹³ In order for a city, town or district to acquire the assets of a utility, there must be a specific grant of authority from the legislature.⁹⁴ That grant of authority is contained in RSA 38, which governs both the taking of utility assets but also to their consensual sale.⁹⁵ RSA 38 is a comprehensive proceeding and the only statute which authorizes a New Hampshire city, town or district to buy or take the assets of a *utility*.

The municipal buyer theory, however, conflicts with RSA 38 and is therefore not legally permissible. RSA 38:2 requires that any acquisition be necessary for the "use of its inhabitants and others." Consequently, notwithstanding Reilly's understanding that a municipal buyer did not "have to be actually physically located within the Pennichuck service area",⁹⁶ the only New Hampshire city, town or district that could acquire PWW's assets is one in which PWW owns plant or property, or for which its acquisition is required by the public interest. His view that "any" New Hampshire city or town could acquire a water system is inconsistent with the law.

⁹² Transcript, Sept. 12, 2007, page 49 (Certified Record Page 8598 ff).

⁹³ Ibid., Page 44 (Certified Record Page 8598 ff); The Appraisal of Real Estate, 12th Ed., p. 3079 Appendix at 221.

⁹⁴ *Piper v. Meredith*, 100, NH 291, 296 (1970); *Dugas v. Conway*, 125 NH 175, 181 (1984); *City of Manchester School District v. City of Manchester*, 150 NH 664, 666 (2004).

⁹⁵ RSA 38:2, 7, 8, 9, 10; (Appendix at 247, 249, 250).

⁹⁶ Ibid at Pages 48, 49.

The Commission ruled in this case that the provisions of RSA 38:6 precluded Nashua from taking the assets of PEU and PAC.⁹⁷ Reilly argued that Order No. 24,425 did not affect his hypothesis because RSA 38 applies only to takings and not consensual sales. There is, however, no authority for a municipality to acquire water utility property except for the public “use of its inhabitants and others” whether the acquisition is a taking or a consensual sale.⁹⁸ The Commission’s ruling on the one hand that Nashua cannot acquire PEU and PAC, but on the other that they would compete to acquire PWW, cannot survive scrutiny under the law or reason.

Even under RSA 31:3, a municipality may only “purchase and hold real and personal estate for the public uses of [its] inhabitants”. Thus, a municipality cannot simply vote to raise and borrow funds to compete to acquire water utility property in other municipalities under RSA 31:3 unless the acquisition was for “the public uses of [its] inhabitants.” The test for public use in RSA 31:3 and RSA 38:2 is the same.⁹⁹ There is no grant of authority in New Hampshire law for a municipality to acquire the plant of a water utility regardless of where it is located, and even less the ability to competitively “bid up” the price that other municipalities might pay to serve their own citizens.

Yet this is precisely the approach to value used by Pennichuck’s expert and adopted by the Commission. Completely at odds with Order No. 24,425 and RSA 38, Reilly advocated in his report that the population of likely buyers included “*any* incorporated New Hampshire city or town.”¹⁰⁰ He argued that the “potential buyers did not actually have to either touch the city of Nashua *or touch Pennichuck Water Works*.”

⁹⁷ Order No. 24,425, January 21, 2005 (Certified Record Page 767 *ff*); Appendix at 1.

⁹⁸ RSA 38:2 (Appendix at 247).

⁹⁹ Leary v Manchester, 91 NH 442,444 (1941) (same test of public use applies to acquisition of property whether by eminent domain or voluntary purchase);

¹⁰⁰ Exhibit 3007A, Page 2 (Certified Record Page 14583 *ff*).

[...] a buyer could be a municipality or a water district or a regional district *anyplace in New Hampshire; it doesn't have to be actually physically located within the Pennichuck service area.*¹⁰¹ **Mr. Reilly even agreed with the suggestion that the town of Lancaster (New Hampshire) in which Pennichuck has no assets and provides no service, could acquire PWW.**¹⁰²

Such a theory is not legally permissible under New Hampshire law. By relying on it, the Commission, notwithstanding its own prior order, has assigned a value that would result from circumstances that do not exist and are not legally permissible as a matter of law. It is not fair market value, but a theoretical value in a hypothetical scenario, unsupported by any market data.

b. In The Few Municipalities That Have The Legal Authority To Acquire Pennichuck Water Works, The Evidence Is Overwhelming That It Is Neither Practical Nor Reasonably Probable They Would Compete To Purchase Pennichuck Water Works.

Even Mr. Reilly admits that if Nashua is the only practical legal not-for-profit buyer then “[t]hat hypothetical is the hardest question to answer [because] we’ve also seen cases where [bidding up] didn’t happen”.¹⁰³ Such is the case with the market for PWW, as there are no likely municipal buyers, other than Nashua, that could legally or practically acquire the system under RSA 38, or even RSA 31:3; his opinion does not reflect the generally accepted standards for valuing property at its legally permissible and reasonably probable highest and best use.¹⁰⁴

¹⁰¹ Transcript, September 12, 2007, Pages 47-48 (Certified Record Page 8598 ff).

¹⁰² Transcript, September 12, 2007, Pages 50, 51 (Certified Record Page 8598 ff).

¹⁰³ Transcript, September 12, 2007, Page 206 (Certified Record Page 8598 ff).

¹⁰⁴ Exhibit 1097 (Certified Record Page 13227 ff); Exhibit 3100 (Certified Record Page 16495 ff); *The Appraisal of Real Estate*, Twelfth Edition, Chapter 12 (Highest and Best Use) (Appendix at 222ff).

The record shows that 87 percent of PWW customers are located in Nashua.¹⁰⁵ The remaining customers are scattered in 10 other municipalities in southern New Hampshire. It is unreasonable to speculate that Amherst, the next largest municipality in terms of customers, with 3.8% of the total number of customers¹⁰⁶ could competitively bid against Nashua. Yet this is the foundation of the municipal buyer theory adopted by the Commission.

The same result is true under RSA 31:3. Only Nashua can reasonably claim that acquisition of the entire PWW bears a rational relationship to the “public uses of [its] inhabitants”. To suggest that Amherst would competitively bid to establish its own water department by acquiring over 24,000 foreign customers in order to serve its own 941, ignores both the evidence and common sense.

RSA 38:14 provides a municipality the ability to “opt out” of an acquisition by another municipality by conducting its own vote under RSA 38, *which is binding on the acquiring municipality*. Thus, if Amherst desired to bid competitively to acquire PWW, Nashua could simply not bid at all and “vote to establish [its own] municipal plant” and “all the provisions of this chapter shall be binding as to such determination.” RSA 38:14. Any competitive bidder could not overcome the potential loss of 87% of its customers.

The evidence is clear that of all the potential municipal buyers with the legal authority to purchase PWW, whether under RSA 38 or otherwise, only Nashua has the practical ability to do so. If a competitive municipal buyer market were reasonably probable, there would be evidence of sales of investor owned utilities similar to PWW to competing municipalities in which they bid against one another. The record in this

¹⁰⁵ Order No. 24,878 (21,600 of 25,000 total) at p. 108 (Certified Record Page 8598 *ff*); Exhibit 3001, Page 7 (Certified Record Page 14060 *ff*).

¹⁰⁶ Exhibit 3001, Page 7 (Certified Record Page 14060 *ff*).

proceeding confirms that there are none and there is no appreciable impact of the municipal buyer theory as speculated by Mr. Reilly.

c. The Commission Failed To Consider That Municipal Or Not-For-Profit Buyers Are Not Active Participants In The Marketplace Because They Have No Authority To Purchase Stock Of For-Profit Water Companies And Are Therefore Unable To Compete In The Marketplace.

When asked during his cross-examination why SG Bar Devlin had not identified any municipal buyers in 2002, Reilly opined that municipalities cannot buy the stock of a for-profit water company.¹⁰⁷ In doing so he demonstrated yet another reason why his theory that municipal buyers would set the purchase price for PWW is fundamentally flawed. Few asset sales occur in the market place for water utilities. Most of the sales identified by both Reilly and Walker were stock sales. The reason for this is simple: asset sales cause a for-profit seller to recognize gain for federal and state income tax purposes equal to the excess of the aggregate value it receives for each asset less its adjusted tax basis in those assets.¹⁰⁸ The effective rate of such a tax is 39%.¹⁰⁹ By comparison, when the stock of a utility is sold to effectuate transfer, the only gain recognized is the gain in share price by the stock holder. This capital gain tax incurred by the seller precludes municipal asset purchases “under any realistic scenario.”¹¹⁰

New Hampshire municipalities do not have the authority to acquire and hold stock of for profit water utilities like Pennichuck under Part 2, Article 5 of the New Hampshire Constitution,¹¹¹ absent a special grant of legislative authority and a public purpose.¹¹² Without authority to acquire and hold stock, municipalities are unable to compete with

¹⁰⁷ Transcript, Sept. 12, 2007, Page 71, 72 (Certified Record Page 8598 ff).

¹⁰⁸ Internal Revenue Code, Section 1001; Exhibit 3001, Page 20 (Certified Record Page 14060 ff) (Appendix at 289).

¹⁰⁹ Exhibit 3001, Page 20 (Certified Record Page 14060 ff).

¹¹⁰ Exhibit 3001, Page 20 (Certified Record Page 14060 ff).

¹¹¹ Appendix at 288.

¹¹² Cf. *Laws of 2007 Ch 347*; SB 206 (2007) (authorizing Nashua to purchase stock only by agreement).

for-profit investor owner utilities in the market for water utilities.

In fact, PWW's own testimony explains that it would never consider selling to a municipal purchaser. As Donald Correll stated "[b]ecause a large portion of PWW's assets are of a fairly old vintage, this differential would be substantial and *the income tax burden would certainly run into the many tens of millions of dollars*" and that such a sale would not arise "under any realistic scenario in the absence of eminent domain."¹¹³ Conveniently, Reilly's municipal buyer theory ignores the tax burden that a municipal buyer of PWW would need to overcome just to compete on an equal basis with a stock purchaser, if it were even allowed a seat at the negotiating table, as the SG Barr Devlin report shows it was not.¹¹⁴

The Commission failed to account for this critical evidence demonstrating that municipal buyers do not and cannot appreciably influence the market for PWW. This error allowed the majority of the Commission to assume a population of municipal buyers operating under financial circumstances that do not exist and arrive at a value far in excess of market value.

d. The Commission Erred By Concluding That The Reilly Theory Established The Fair Market Value Of The Assets.

The Commission correctly concluded that the price to be paid for PWW assets under RSA 38:9 is the fair market value of the property.¹¹⁵ What the Commission has done by accepting Reilly's hypothesis, however, as noted at length by Commissioner Below in his dissent,¹¹⁶ is not establish fair market value as required by RSA 38, but

¹¹³ Exhibit 3001, Page 20 (Certified Record Page 14060 *ff*).

¹¹⁴ See Order No. 24,878, Page 109 (Certified Record Page 10302 *ff*), and the citations contained therein.

¹¹⁵ Order No. 24,878, July 25, 2008, Pages 63, 64 (Certified Record Page 10302 *ff*).

¹¹⁶ Order No. 24,878, p. 104-108 (Certified Record Page 10302 *ff*).

rather the price that Nashua, because of its many synergies,¹¹⁷ is able to pay or, in other words, the investment value to Nashua.

What a buyer can afford to pay is not the same as fair market value.¹¹⁸ Investment value is specific to a particular investor with specific investment requirements,¹¹⁹ while fair market value reflects *typical* investors with investment requirements *typical* of the market.¹²⁰ But, as Commissioner Below noted, and Reilly himself admitted, the *typical* market for water utility assets consists of only one municipal buyer and that under such conditions a municipal buyer will bid only \$1.00 more than what a *typical* for profit buyer would pay for the assets.¹²¹ Such is the case with Nashua and PWW. Reilly's market, by his own admission, is not *typical* and focuses on the ability to pay of a particular class of investors.

Ultimately the best evidence of the market for PWW is the auction of Pennichuck Corporation by SG Barr Devlin in 2002. SG Barr Devlin did not identify any municipal buyers and none submitted bids.¹²² If municipal buyers could pay almost double what typical buyers could pay, notwithstanding any capital gains tax, SG Barr Devlin would have invited their participation. However, municipal buyers were not then, and are not now, the most likely population of hypothetical willing buyers. They do not have the motivations of a typical investor and they have different objectives.

¹¹⁷ Ibid at p. 92 (Certified Record Page 10302 ff).

¹¹⁸ *Emmons v. Utilities Power*, 83 NH 181 (1927) (“The value to the condemnor of the land taken is not the measure of its market value.” page 181); *Amoskeag-Lawrence Mills v State*, 101NH 392 (1958)(In an eminent domain, it is the owner's loss and not the gain to the condemnor which is the measure of damages. page 399); *Sabine v. Merrill*, 67 NH 226 (1892) (Size of decedent's estate has no legitimate bearing on question of the value of services performed by Plaintiff for decedent)

¹¹⁹ *The Appraisal of Real Estate*, 12th Ed., p. 26 (Appendix at 219).

¹²⁰ Ibid.

¹²¹ Order No. 24,878, p. 104, 105 (Certified Record Page 10302 ff).

¹²² Exhibit 1094, p. 33 (Certified Record Page 12928 ff).

III. THE COMMISSION ERRED BY DENYING NASHUA’S PETITION TO ACQUIRE PENNICHUCK EAST & PITTSFIELD AQUEDUCT AND BY REQUIRING THAT NASHUA MITIGATE HARM TO THEIR CUSTOMERS IN AN UNREASONABLE AMOUNT

a. The Commission Strictly Construed RSA 38 Contrary to New Hampshire Law.

In its March 22, 2004 *Petition for Valuation* and its October 21, 2004, *Memorandum of Law*, Nashua asserted that RSA 38:2, 6, 9, 11 and 14 allow Nashua to acquire all three of Pennichuck’s regulated utilities, including PEU and PAC, and that it was for the Commission to determine how much plant and property, including PEU and PAC, the public interest requires Nashua to purchase.¹²³ However, in lieu of examining the plain and ordinary meaning of the provisions of RSA 38, the Commission in Order No. 24,425 applied “the lens of a strict construction”¹²⁴ to a single provision concerning notice in RSA 38:6 and prohibited Nashua from acquiring PEU and the PAC.

By examining RSA 38 through a distorted “lens of a strict construction” the Commission denied Nashua the power to acquire the “plant and property” serving stranded customers of PEU and PAC, contrary to the grant of authority in RSA 38:2, 9 & 11.¹²⁵ This ultimately resulted in the Commission’s decision to impose a \$40 million mitigation fund intended to compensate its customers for “the harm to PEU and PAC customers from losing the synergies associated with PWW’s assets”¹²⁶ including “a return and depreciation expense on assets PEU and PAC would need to acquire *to replace the common assets lost with the taking of PWW.*”¹²⁷ Thus, despite denying Nashua the authority to acquire the assets of PEU and PAC, the Commission required Nashua to

¹²³ Certified Record Page 1 *ff.*

¹²⁴ Order No. 24,425, Page 12 (Certified Record Page 767 *ff.*); (Appendix at 12).

¹²⁵ *See Generally*, Order No. 24,425 (Certified Record Page 767 *ff.*); (Appendix at 1 *ff.*).

¹²⁶ Order No. 24,878, Page 96 (Certified Record Page 10,302 *ff.*); (Appendix at 120).

¹²⁷ *Id.* (emphasis added).

replace assets used by those utilities.

The error of the Commission in Order 24,425 is central to this proceeding and must be examined in its substantial part.¹²⁸ The following is noted briefly: The Commission recognized that “[o]n first reading, RSA 38:2 appears to be a broad grant of authority to a municipality.”¹²⁹ However, it found RSA 38:2 to be ambiguous due to “plausible conflicting interpretations of RSA Chapter 38”.¹³⁰ To resolve ambiguity, the Commission relied on *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 NH 179 (1940) and 26 *American Jurisprudence, Eminent Domain*, Sec. 20, which it deemed to require that the Commission apply “the lens of a strict construction” in lieu of the plain and ordinary meaning of the statute.¹³¹ It read RSA 38:6 concerning notice to “any utility engaged, at the time of the vote, in generating or distributing ... water for sale in the municipality” as limiting the grant of authority contained in the entire statute.¹³²

The Commission’s strict construction of RSA 38 conflicts with the requirement that words and phrases in a statute be read according to their plain and ordinary meaning.¹³³ This rule applies even in the context of eminent domain.¹³⁴ Indeed, the Commission disregarded *Ashland Electric* and other decisions of this Court applying plain meaning to the words and phrases RSA 38.¹³⁵ The Commission selected its lens of

¹²⁸ Appendix at 1.

¹²⁹ Order No. 24,425, Page 10 (Certified Record Page 767 ff); (Appendix at 10).

¹³⁰ Order No. 24,425, Page 11 (Certified Record Page 767 ff); (Appendix at 11).

¹³¹ Order No. 24,425, Page 11 (Certified Record Page 767 ff); (Appendix at 11).

¹³² Order No. 24,425, Pages 10-12 (Certified Record Page 767 ff) (emphasis added); (Appendix at 10-12).

¹³³ See e.g. *State v. Dover*, 153 N.H. 181, 190 (2006) citing *Lamy v. N.H. Pub. Utils. Comm’n*, 152 N.H. 106, 108 (2005) (“We begin by examining the plain meaning of the words used in the statute and consider legislative history only if the statutory language is ambiguous.”).

¹³⁴ See, e.g., *Green Crow, Inc., v. New Ipswich*, 950 A.2d 163, 164-165 & 167 (NH 2008) and citations therein (Provisions of RSA 231 concerning layout of highways interpreted using “plain and ordinary meaning”).

¹³⁵ See *Appeal of Ashland Electric Department*, 141 N.H. 336, 339-341 (1996) (using the “plain and ordinary meaning of words” to interpret the “comprehensive process by which a municipal utility may acquire or establish plant for the manufacture and distribution of electricity” under RSA 38.); *Dover*, *supra*,

construction based on a single decision it believed favored its use: *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 NH 179 (1490). In that case, however, the Court merely held that a legislative grant to condemn land to construct a bridge did not include authority to condemn land to “relocate the high tension line of the New Hampshire Gas & Electric Company.”¹³⁶ The Court *never* applied strict construction. To the contrary, it considered “the clear definition of the grant” as “bounded by the express words or the necessary implication of those words.”¹³⁷

The Commission’s reliance on *26 American Jurisprudence, Eminent Domain*, Sec. 20 is also misplaced.¹³⁸ Assuming the Commission meant to rely on Section 24, *Statutory Construction*, it states that strict construction does not preclude “reasonable and sound construction of the particular statute, should not be carried to the extent of defeating the legislative intent, and does not require such a strained or narrow interpretation of the language of the statute as to defeat its object”.¹³⁹

In any case, the “strict construction” in *American Jurisprudence 2d*, is not the law in New Hampshire.¹⁴⁰ Nor is *Maine-New Hampshire Interstate Bridge Authority, supra*, the very case relied on by the Commission. In *Public Service Company v. Shannon*, 105 N.H. 67, 68-69 (1963), the Court explained that the statutory provision at issue “has been extended in scope since the decision in *Interstate Bridge etc. v. Ham*, 91 N.H. 179... [and] ... *condemnation statutes are entitled to a reasonable construction.*” (emphasis added). No decision citing *Maine-New Hampshire Interstate Bridge* has applied strict

153 N.H. at 190 (using the plain meaning to interpret “RSA chapter 38 is to empower municipalities to take by eminent domain privately owned electric, gas and water

¹³⁶ *Id.*, at 180.

¹³⁷ *Id.*, at 181.

¹³⁸ See Appendix at 282.

¹³⁹ *26 American Jurisprudence, Eminent Domain*, Sec. 24, Appendix at 285.

¹⁴⁰ *Goodrich Falls Electric Co. v. Howard*, 86 N.H. 512, 518 (1934) (Argument rejected that P.L. ch. 44 “should receive narrow adoption”.); *Ashland Electric, supra*.

construction.¹⁴¹

Strict construction of RSA 38 further conflicts with this Court's decision in *Leary v. Manchester*, 91 N.H. 442 (1940) in which the court explained that acquisition of property either voluntarily or by condemnation is subject to the same test of public use. In that case, the Court examined the predecessors to RSA 31:3 and RSA 38, and held that "the test of public use under either method is the same" and that "the general right to condemn is as applicable as the general right to purchase."¹⁴² Order No. 24,425 conflicts with *Leary* by suggesting that condemnation of plant or property under RSA 38 is subject to a different standard of statutory construction. As *Leary* makes clear, this is not the case. The authority for a municipality to purchase or to take plant or property of a water utility, whether under RSA 31:3 or RSA 38:2 must be for "public use under either method".¹⁴³

There is no basis for strictly construing the power to take, while applying the plain meaning to the power to purchase voluntarily. The statutory language has not changed significantly since this Court's decision in *Leary*. To apply strict construction to the use of eminent domain would subject water supply lines travelling across municipal boundaries to different interpretations of RSA 38 depending on whether a land-owner agreed to a sale. The authority to "take, purchase, and hold in fee simple" water utility property in RSA 38:2 does not recognize or call for such a distinction.

b. The Plain Meaning of RSA 38 and Its Legislative History Authorize Nashua To Acquire Pennichuck East And Pittsfield Aqueduct

The question therefore is whether the plain and ordinary meaning of the words

¹⁴¹ See e.g., *Molly v. Exeter*, 107 N.H. 123 (1966) (statute allowing condemnation for "sewers" includes waste water treatment plants);

¹⁴² *Leary*, 91 N.H. at 444.

¹⁴³ *Leary*, 91 N.H. at 444.

used by the legislature provides Nashua with the authority to acquire the “plant and property” of PEU and PAC sought in its petition, subject to a finding of public interest by the Commission, “keep[ing] in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole, and not simply by examining isolated words and phrases found therein”.¹⁴⁴ The plain meaning of the statute, supported by its legislative history, shows that it does.

PWW, PEU and PAC utilities are in fact operated using common assets owned by PWW located in Nashua. This “plant and property” includes its operations headquarters, telephones, computers, communications systems, laboratory facilities, and other utility assets that are all *located in Nashua*. Using its SCADA¹⁴⁵ system, PWW employees monitor and operate the treatment plants and pumping stations of the three utilities from its operational headquarters in Nashua.¹⁴⁶ Pennichuck Corp’s former CEO testified that “almost every other asset needed to operate any of the Pennichuck entities and their businesses is owned by PWW”.¹⁴⁷ The separate identity of each of the three utilities is a regulatory fiction for rate making purposes.

RSA 38:2, I, authorizes a municipality to acquire water “plants for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized or directed by the commission.” This provision expressly incorporates, *within the grant of legislative authority*, the power to take plant the Commission finds to be required by the public interest under RSA 38:9 & 11. It is clear that the plant and property sought by Nashua are for the public use of its “inhabitants and others”. The duty of the

¹⁴⁴ *Ashland Electric, supra*, 141 N.H. at 341 quoting *N.H. Div. of Human Services v. Hahn*, 133 N.H. 776, 778 (1990).

¹⁴⁵ Supervisory Control and Data Acquisition

¹⁴⁶ See e.g. Exhibit 3007A, Page 32-33 (Certified Record Page 14583 ff).

¹⁴⁷ Exhibit 3001, Page 10 (Certified Record Page 14060 ff).

Commission then was not to construe the statute against Nashua, but to determine whether the property was required by the public interest. RSA 38:9 & 11. The fact that the Commission determined that a \$40 million mitigation fund was required, more than twice their rate base,¹⁴⁸ in order to replace “common assets lost with the taking of PWW”¹⁴⁹ used to operate PEU and PAC seems conclusive that the public interest so requires.

The Commission, however, by strict construction of “water for sale in the municipality” in RSA 38:6 failed to undertake the required analysis. This provision, however, does not support the conclusion reached by the Commission. It authorizes, for example, a municipality to acquire electric plant either “generating” or “distributing” electricity for sale in the municipality. The Commission assumed that a municipality could only provide notice to a utility selling to customers within the municipality. This is the narrowest possible interpretation of the statute. If a municipality could only provide notice to a utility, for example, offering electricity for sale to customers located in the municipality, the reference to a utility “generating” electricity is surplus. In fact, the language used by the legislature allows a municipality to provide notice to a utility “generating” electricity for sale, even if it is sold to customers outside its borders.¹⁵⁰

RSA 38:6 as applied to water utilities is no different. Both PEU and PAC use “plant and property” of PWW located in Nashua for “generating” water for sale to customers of PEU and PAC. It is true that water does not travel from pipe to pipe, but this is immaterial as other aspects of generating water are provided. The Commission

¹⁴⁸ Exhibit 3016A, Pages 16 & 17 (Certified Record Page 15553 ff).

¹⁴⁹ *Id.* (emphasis added).

¹⁵⁰ The Commission’s interpretation would allow a utility to avoid RSA 38 entirely by contracting sales outside the municipality.

found PWW employees provide service, including production, using SCADA control system and other common assets located in Nashua.¹⁵¹ Thus, even if RSA 38:6 limits the grant of authority in RSA 38:2, 9 & 11, which it does not, PEU and PAC were in fact “generating” water for sale in Nashua. It was therefore for the Commission to decide not whether notice was given, but whether the plant or property Nashua sought to acquire is required by the public interest.

The legislative history confirms this. For example, on April 21, 1997, Rep. Clifton Below testified before the Senate Committee on Executive Departments and Administration regarding House Bill 528 concerning the authority of the Commission to require acquisition of property outside of municipal boundaries.¹⁵² Rep. Below discussed how the underlying purpose of RSA 38:9 and RSA 38:11 permitted the Commission, when the public interest required, to “order the municipality to acquire that portion of a system that may be outside of their boundaries.”¹⁵³ RSA 38 was not written to be limited, as the Commission strictly construed it, but rather the Commission was given the authority to require acquisition of “plant and property” serving potentially stranded customers. There is no limitation on such authority beyond the Commission’s authority to determine the reasonable requirements of the public interest, and no clearer example than the case presented herein.

Moreover, the legislature understood its power to prevent municipalities from acquiring the plant or property of utilities. Prior to the adoption of RSA 38, under PL ch.

¹⁵¹ See e.g. Order No. 24,878, Page 95 (Certified Record Page 10,302 ff). Appendix at 95.

¹⁵² Testimony before Senate Committee on Executive Departments and Administration regarding House Bill 528 (1997), Appendix at 297.

¹⁵³ Id., Appendix 297.

43, and its predecessors,¹⁵⁴ the legislature authorized taking of only that property “not belonging to any aqueduct company”.¹⁵⁵ Municipal authority did “not apply to any town or district wherein there is established a private water system chartered by the state...”.¹⁵⁶ This language, however, was removed by the legislature, and replaced by P.L. ch. 44 secs. 8-13 (1926) which stated, *inter alia*, that “the municipality may purchase the whole or such parts of such plant, property or facilities outside of its limits as the public service commission, taking into consideration the rights of the public utility and of the other municipalities in which it operates, may, [...] determine is for the public interest”.¹⁵⁷ By making this change, the legislature recognized that there would be occasions when acquisition of plant and property outside a municipality’s borders would be necessary, and left it to the Commission to determine if the public interest standard was met.

c. The Commission Erred By Requiring A Mitigation Fund Double The Combined Values And Revenues Of Pennichuck East And Pittsfield Aqueduct.

The Commission suggested that Nashua employed a “litigation strategy” to avoid addressing the mitigation of harm to PEU and PAC customers.¹⁵⁸ In fact, Nashua sought to acquire all of the assets of PEU and PAC, stating that such acquisition would promote “the public interest because it will ... prevent likely rate increases for that portion of the system which is not acquired by Nashua due to the need to generate additional revenue to offset proportionally higher operating expenses [and] protect the level of service to be received by PEU and PAC customers”.¹⁵⁹

¹⁵⁴ Laws of 1907, Chapter 126, Sections 2 & 8. Appendix at 280.

¹⁵⁵ Public Laws of New Hampshire, Chapter 43, Sec. 2 (1926); Appendix at 271.

¹⁵⁶ Public Laws of New Hampshire, Chapter 43, Sec. 11 (1926); Appendix at 271, 272.

¹⁵⁷ Appendix at 272; *see also* R.L. Chapter 56, Appendix at 276.

¹⁵⁸ Order No. 24,878, Pages 94-95 (Certified Record Page 10302 *ff*); Appendix at 118, 119.

¹⁵⁹ Exhibit 1001, Pages 8-9 (Certified Record Page 10631 *ff*).

Nashua proposed a mitigation fund because there was no alternative once the Commission foreclosed the statutory mechanism for acquiring the plant and property serving stranded customers. However, the Commission acted unreasonably in establishing a mitigation fund requirement more than double the \$13,672,839 combined rate base of PEU (\$11,889,161)¹⁶⁰ and PAC (\$1,783,678).¹⁶¹ As a result, the Commission is requiring Nashua to pay more than twice Pennichuck's actual investment in the plant and property it prevented Nashua from acquiring. Ironically, the mitigation fund is to be used to replace "common assets lost with the taking of PWW"¹⁶²

That approach, based on an erroneous reading of the statute, is unreasonable. The Commission failed to consider a number of different opportunities available to mitigate the harm. Donald Correll, now CEO of American Water, testified that his present company would look at the purchase of PEU and PAC.¹⁶³ Donald Ware, testified that the sale of PEU and PAC to Nashua should be considered.¹⁶⁴ For its part, Nashua urged the Commission to allow Nashua to acquire all three regulated utilities, thereby eliminating the very harm that Pennichuck created, which defeats the purpose of RSA 38.

The only testimony before the Commission in support of a mitigation requirement is that of John Guastella, who submitted Reply Testimony on May 22, 2006, on behalf of Pennichuck. He quantified harm by relying on company data that was not previously produced, including supplemental responses to prior data requests.¹⁶⁵ Nashua never had

¹⁶⁰ Exhibit 3016A, Page 16 (Certified Record Page 15553 ff).

¹⁶¹ Exhibit 3016A, Page 17 (Certified Record Page 15553 ff).

¹⁶² *Id.* (emphasis added).

¹⁶³ *Transcript*, September 13, 2007, Pages 12-13 (Certified Record Volume 20, Item 364 – Page number not identified in the Commission's Table of Contents)

¹⁶⁴ *Transcript*, September 11, 2007, Pages 61-64 (Certified Record Page 8844 ff)

¹⁶⁵ *See e.g.*, Exhibit 3010, Page 10 (Certified Record Page 14861 ff); Exhibit 3016, Page 2 (Certified Record Page 15542 ff) (explaining his prior failure to calculate subsidies to Pennichuck East and Pittsfield Aqueduct.)

the opportunity to submit responsive testimony. Even Staff acknowledged it had an inadequate opportunity to complete discovery on the company's testimony.¹⁶⁶ As Staff noted, Pennichuck's calculation of harm simply carried Pennichuck's existing overhead over to a much smaller utility without considering opportunities to reduce or completely eliminate harm to customers of PEU and PAC.¹⁶⁷ There is every reason to believe that the harm to PEU and PAC has been overstated, or could be reduced or eliminated by their acquisition. Paying more than double the rate base for these assets is unreasonable.

¹⁶⁶ Transcript, September 26, 2007, Pages 129-130 (Certified Record Page 9694 *ff*).

¹⁶⁷ *See, e.g.*, Transcript, September 26, 2007, Page 135 (Certified Record Page 9694 *ff*).

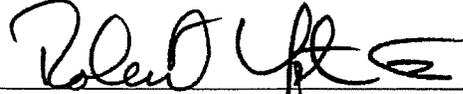
REQUEST FOR ORAL ARGUMENT

The City of Nashua requests oral argument and designates Robert Upton, II to be heard.

Respectfully submitted
City of Nashua
By their Attorneys,
UPTON & HATFIELD, LLP

Dated: August 14, 2009

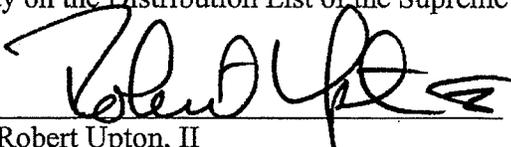
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Certificate of Service

I hereby certify that 2 copies of the above Brief and the Appendix thereto have been sent this day, first class mail, postage prepaid, to all counsel for each party separately represented and to each pro se party on the Distribution List of the Supreme Court.


Robert Upton, II