THE STATE OF NEW HAMPSHIRE
SUPREME COURT

#2009-0274

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

Appendix to the Reply Brief of the City of Nashua

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STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

DW 04-048

In the Matter of:
City of Nashua
Petition for Valuation
Pursuant to RSA 38:9

CITY OF NASHUA'S MEMORANDUM IN SUPPORT OF PETITION FOR VALUATION PURSUANT TO RSA 38:9

November 16, 2007

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

City of Nashua: Petition for Valuation Pursuant to RSA 38:9

DW 04-048

MEMORANDUM IN SUPPORT OF PETITION FOR VALUATION PURSUANT TO RSA 38:9

NOW COMES the City of Nashua ("Nashua") and respectfully submits the following *Memorandum in Support of Petition for Valuation pursuant to RSA 38:9:*

I. INTRODUCTION: NASHUA WILL PROMOTE THE PUBLIC INTEREST

On December 15, 2006, Nashua submitted its pre-trial Memorandum in these proceedings. Nashua's pre-trial Memorandum described the public interest standard applicable under RSA 38 and articulated its position that its acquisition of the Pennichuck Water Works, ("Pennichuck" or "PWW") would be entirely consistent with the public interest. Rather than simply reiterate Nashua's pre-trial Memorandum, this Memorandum documents how the evidence presented at the Commission's hearings demonstrates that: (a) approval of Nashua's Petition for Valuation will promote the public interest; and (b) any alleged harms to the public interest have been adequately addressed, or, are entirely speculative and unsupported by the evidence.

Nashua therefore incorporates by reference its pre-trial Memorandum, and, by way of summary, notes that: (a) while RSA 38:2 expressly authorizes Nashua to *establish* a water system by filing a petition for valuation before this Commission, Nashua has gone to extraordinary lengths to demonstrate that it will operate and manage its water system consistent with the public interest; and (b) while RSA 38 entitles Nashua to a rebuttable presumption that its petition is in the public interest, Nashua has provided evidence demonstrating that it will not

only provide service that is "reasonably safe and adequate and in all other respects just and reasonable"[1] but that it will do so at reduced rates while significantly improving its operations and the quality of service customers currently receive.

The examples of improvements in the quality of service that will result from Nashua's acquisition are too numerous to list comprehensively. However, several merit mention in this introduction. For example, the Commission received evidence that Pennichuck provided service in violation of primary drinking water standards for radionuclides, arsenic, lead and other contaminants in order to make sure capital improvements are recovered in rates.[2] Under Nashua's OM&M Agreement, Veolia Water is required to "identify capital improvement projects necessary […] in order to meet prospective operating parameters, such as changes in regulatory standards" and implement those projects before they occur.[3] Nashua also provided testimony that, rather than deliver capital projects and services to customers over budget estimates, with no fixed prices, and no contractual recourse when projects are over-budget or do not perform, Nashua, Veolia Water and R.W. Beck will ensure that projects are delivered on-time, on-budget and that customers receive value for the dollar.[4] In addition, Nashua's acquisition of the Pennichuck Water Works will provide customers legal and political accountability for the management of the water system to ensure that profits cloaked behind fraudulent financial transcations[5] and revision to technical reports[6] do not supplant protection of the state's limited water resources, or result in a "feeding frenzy at the public trough."[7]

While Pennichuck and Staff have speculated that political or other motivations will harm

[1] RSA 374:1.
[2] Transcript, September 11, 2007, Page 78.
[3] Exhibit 1005B, Appendix G, Section 2 (C), Page 78.
[4] See Section II(c), infra**.**
[5] Exhibit 1121.
[6] See Section VI, infra**.**
[7] Exhibit 1011A, Pages 87-88.

the public interest, these speculations stand in stark contrast to the evidence, to the commitments Nashua has made in this proceeding to protect the public interest, and to the State policy as embodied by RSA 38. In Nashua's May 22, 2007 and July 20, 2007 Testimony,[8] Nashua officials articulated their commitment to provide service to all satellite customers at core rates, on a non-discriminatory basis; to make the terms and conditions of its wholesale service, and outside its borders, its retail service including its Main Extension Policy, its customer service, its compliance with Dig Safe and other Commission's regulations, all subject to the Commission's jurisdiction.[9] In Appendix A to this Memorandum, Nashua has incorporated these and other commitments into proposed conditions for the Commission's consideration. *Nashua invites the Commission to impose these or any other conditions it deems necessary to satisfy the public interest, as conditions on the Commission's approval that pursuant to RSA 38:11 will legally bind the City as a matter of law*.

Nashua believes that the evidence it has presented in this proceeding and the commitments it has made as part of this proceeding are indicative of Nashua's greater commitment to acquire PWW's assets in order to promote the public interest**.** Unlike PWW, which must gear its operations to satisfy the needs of shareholders, Nashua's Petition is rooted in the motivation to serve the public which is the driving force behind all municipal operations. It explains why municipalities provide fire and police protection, education, street lighting and public works and why 80% of all water systems in the country are owned and operated by municipalities.[10] It further explains why cities such as Nashua provide services outside their political borders[11] contrary to the cynical assertions of PWW and Staff that they act only in their

[8] Exhibits 1014 & 1016.
[9] See Exhibit 1014, Pages 4-5, 16-17, 21-23 & 70-88; Exhibit 1016, Pages 19-20.
[10] Exhibit 3007A, Page 17
[11] See generally, Exhibit 1014.

own self-interest. As an example of such criticism and the false foundation on which it is built, the Commission should consider the assertion that if PWW is acquired by Nashua, a resource for the acquisition of "troubled systems" will be lost. In the first place, the Pennichuck companies are not the only purchasers of troubled systems.[7] The Pennichuck companies consider such purchases on a case-by-case basis and they must fit a financial model.[8] In fact, other companies during the last five years have purchased more so called "troubled systems."[9] What makes this assertion so cynical is that Nashua has committed to consider purchasing "troubled systems" on a case by case basis in the same manner as Pennichuck; and that contrary to the impression both PWW and Staff would leave with the Commission the universe of "troubled systems" is small[10] and will become smaller over time.[11]

The suggestion that the commitments made by Nashua and the conditions it has proposed are not enforceable by the Commission is not supported by law. The authority of the Commission to enforce conditions to satisfy the public interest is clear from RSA 38:6 and RSA 38:11. Furthermore, the Commission's decisions affirm that it retains jurisdiction over the service provided by a municipal utility decades, or even a century, after it is established under RSA 362 and RSA 374.[12] The argument that customers would lose the regulatory oversight if Nashua's petition were granted is founded on myth and speculation; is inconsistent with the law, and the Commission's own decisions; and is not supported by any facts.

Nashua is confident that the Commission will not read RSA 38:2 to require that in order to establish a water utility Nashua must have described its proposal with absolute certainty. Such

[7] Exhibit 1132, Data Request 6-45, 6-46; Transcript, September 26, 2007, Page 117.
[8] Transcript, Sept. 13, 2007, Page 138, 139.
[9] Exhibit 1132, Data Request 6-45, 6-46.
[10] Exhibit 1132, Regulated Water Systems, Transcript, September 26, 2007, Page 121-124.
[11] Env-Ws 360-363; Transcript, September 26, 2007, Page 113-115.
[12] See e.g., Exhibit 1074, Order No. 24,649, *Petition of Peter St. James* (Warner Village District).

a requirement would impose a standard no municipality could meet without creating and operating a water department before filing its RSA 38 Petition and conflicts with the plain language of RSA 38:2. It would further ignore the reality that Nashua from the outset has sought to take whatever steps are necessary to protect the interests of customers consistent with the public interest.

There was no roadmap for Nashua when it commenced this proceeding. Nashua has pursued its Petition with diligence and has presented a compelling case that its acquisition of the PWW assets is in the public interest pursuant to a statute which recognizes that public ownership, in and of itself, is consistent with the public good. The fact that Nashua has made commitments and proposed conditions should not be seen as detracting from its case. Rather, they should be viewed by the Commission as evidence of Nashua's assurance that it is prepared to do whatever is reasonably necessary to satisfy the public interest and serve the public good.

II. OPERATIONS: NASHUA'S PUBLIC-PRIVATE PARTNERSHIP WITH VEOLIA WATER WILL PROMOTE THE PUBLIC INTEREST

A. OVERVIEW

This section illustrates how Nashua's operations, through its partnership with Veolia Water, will improve operations and will promote the public interest. A complete list of all the benefits, direct and indirect, is beyond the scope of this memorandum. However, the direct, tangible benefits that customers will realize as a result of Nashua's establishment of its water system include the following:

- Nashua will provide customers with greater technical and managerial expertise and improved performance of operations, maintenance, capital projects than currently exists under Pennichuck ownership.
- Nashua's OM&M Agreement will ensure that Veolia Water provides service to

customers in compliance with all contractual and regulatory requirements, and delivers performance at its contract price, whereas Pennichuck passes all of its costs to customers without any contract or direct contractual oversight.

- Nashua's OM&M Agreement with Veolia Water will ensure that drinking water violations are identified and prevented before they occur, in contrast to Pennichuck's testimony that it waits for drinking water violations to occur in order to reduce its risk and guarantee its costs in rates.

The Commission is undoubtedly aware that Pennichuck leveled a number of criticisms specifically at Veolia Water. For example, in pleadings, motions and objections, Pennichuck argued that Veolia Water, a company that depends on the success of its performance to promote its business, engaged in "disturbing themes"[12] and was therefore not worthy of the public's trust. However, when given the opportunity to raise its alleged "disturbing themes" before the Commission, Pennichuck carefully avoided asking even a single substantive question related to the alleged disturbing themes it had discovered, and even offered to "stipulate for the record that I understand that Veolia feels that the claims relating to them are ill founded" and that so that it was unnecessary "to put on the record what the other side of the story might be".[13]

Veolia Water received only limited opportunity to respond to these allegations, noting, for example, that in the case of Bridgeport, Connecticut, Veolia Water received a letter from law enforcement "thanking us … for our complete and open cooperation with law enforcement" and that "[n]o one from Veolia was ever accused of anything and there was no litigation."[14] These opportunities were limited because Pennichuck's counsel repeatedly emphasized that "all I want

[12] See Exhibit 3014, as revised, Pages 14-17.
[13] Transcript, September 5, 2007, Page 280.
[14] Transcript, September 5, 2007, Pages 278-279.

to do is identify these items" in order to ask "a more generalized question." [15]

Nashua has little doubt that Pennichuck's passing reference to its criticisms and allegations sought to go only as far as necessary to include them in its brief. However, Nashua does not believe that the Commission will or should decide a case of this magnitude on the basis of newspaper articles downloaded from internet, and then never raised at trial. Pennichuck's failure to raise its allegations of "disturbing themes" is evidence that those allegations have little or no merit and were never intended to withstand the light of day.

In fact, Pennichuck's President, Donald Ware, when faced with numerous letters of deficiency showing violation of drinking water and environmental standards acknowledged, that "sometimes good companies can have Letters of Deficiency written to them, where they can violate drinking water standards, and that doesn't mean they're a bad company."[16] Donald Correll, Pennichuck's former CEO, further acknowledged that it was possible to find negative articles concerning any large water services provider because companies such as Veolia Water "are large companies, operating all over the country, and are big targets" and "because the authors of many of these [types of articles] are anti-privatization/anti-business"[17] and that "if you looked for them, you'd likely find, for all three companies, articles and information that are favorable to them".[18] It is telling that, despite these acknowledgments, the Pennichuck witnesses made no effort to weigh both the positives and (alleged) negatives in their analysis.

That two Pennichuck witnesses both provided testimony to the Commission, without attempting to consider opposing views or evidence, strongly suggests that in order to arrive at the truth in this proceeding, when evaluating Pennichuck's testimony concerning complicated or

[15] Transcript, September 5, 2007, Pages 279-280.
[16] Transcript, September 11, 2007, Page 83, Lines 11-16.
[17] Transcript, September 13, 2007, Page 17, Lines 15-22.
[18] Transcript, September 13, 2007, Pages 17-18.

technical matters such as rates, the Commission should carefully consider whether these or other witnesses failed to take in to consideration opposing views or evidence contrary to the position they advocate.

Nashua therefore describes herein the evidence presented to the Commission that responds to those concerns related to rates and quality of service that it expects the Commission will want to address directly. In particular, Nashua asserts :

- Pennichuck's criticism of Veolia Water's staffing levels contained in its proposal is misplaced because it does not include the additional staff that Veolia Water will add to perform capital projects and is not relevant to the OM&M Agreement which requires Veolia Water to perform operations and maintenance in compliance with the Agreement, regardless of the number of employees required.
- Pennichuck's criticism of variable costs for RRRM and capital projects under Nashua's OM&M Agreement is baseless because these same variable costs under Pennichuck ownership are passed directly to customers, without any contractual oversight or accountability.
- Pennichuck's argument that Nashua's OM&M Agreement should specify fixed costs for fuel, electricity, and maintenance is misplaced because Pennichuck has never reported those costs accurately, and its own experts acknowledge that the OM&M Agreement effectively mitigates the kinds of financial risks that resulted in the failures and "mass exodus" that had occurred under the agreement he negotiated in Atlanta.

B. NASHUA WILL PROVIDE CUSTOMERS WITH GREATER TECHNICAL AND MANAGERIAL EXPERTISE AND IMPROVE OPERATIONS, MAINTENANCE, AND EXECUTION OF CAPITAL PROJECTS RELATIVE TO PENNICHUCK.

Nashua's selection of Veolia Water as its operator brings the knowledge, expertise and

qualifications of an industry-leader and the largest water service provider in the world.[19] Veolia Water's parent company, Veolia Water North America, provides water and waste water services in over 600 communities in the United States, annual revenues of $530,000,000 serving approximately 1.4 million customers.[20]

The Northeast LLC alone ("Veolia Water" as referenced herein), operates in all 6 New England states and New York and has approximately 560 operations and maintenance and support employees, provides service to 36 municipal/government clients and 5 industrial-private clients. It operates 11 municipal water plants, 30 municipal waste water plants, 2 industrial waste water plants and 1 industrial water plant.

Veolia Water's president, Mr. Philip Ashcroft, testified that its expertise and resources from its North American operations would "absolutely" be available to benefit not only the Nashua "core" system, but also its satellites.[21] As a result, "staff involved in the operation, maintenance and management of Nashua's water system will have the ability to draw upon professional experience and resources gained from other water systems in the United States and around the globe."[22]

C. BY COMPARISON, PENNICHUCK'S TECHNICAL AND MANAGERIAL EXPERTISE IS LIMITED AND ADVERSELY IMPACTS CUSTOMERS.

By comparison, Pennichuck, as a stand-alone utility serving only 30,000 customers "can not reasonably afford the Northeast LLC's tools and level of sophistication."[23] Its President and former Chief Engineer admitted that construction of its water treatment plant was a "major challenge" and that Pennichuck "did not have the internal expertise to carry out an in-depth,

[19] Exhibit 1005, Page 2.
[20] Exhibit 1005, Page 2.
[21] Transcript, September 7, 2007, Page 141.
[22] Exhibit 1013, Page 14, Lines 13-16, Transcript September 7, 2007, Page 142.
[23] Exhibit 1013, Pages 13-14.

detailed study of an appropriate approach for the Company to follow."[24] In fact, Pennichuck's President testified that its current water treatment plant upgrade is the "first major water treatment plant construction project [he has] been involved in,"[25] with the exception of a "relatively small"[26] treatment plant he constructed for Augusta Water, that was decommissioned eleven years after it was constructed, leaving some $14 million in treatment plant costs on the books for a treatment plant it no longer uses.[27] Indeed, Pennichuck's limited "in house technical expertise" relative to Philadelphia Suburban was cited by Pennichuck's former CEO, Mo Arel, in support of the proposed sale of Pennichuck Corporation in 2002.[28]

This lack of experience has a profound impact on the service provided to customers and rates. In the case of Pennichuck's own water treatment plant, what was once described to this Commission as a "6 million to 14 million"[29] dollar filter upgrade in 2002 increased to a $25.5 million engineer's estimate in May of 2004,[30] and subsequently to a "final projected cost for the water treatment plant upgrades [of] about $40,425,000, *not including AFUDC*" according to testimony filed with the Commission on June 16, 2006.[31] Pennichuck accrues AFUDC,[32] at a rate of 8% meaning that cost of the upgrade will continue to increase by a rate of 8% per year until the plant is placed into service.[33] Thus, assuming that assets costing $20 million have not yet been placed in service, the costs to customers for the treatment plant would increase by 8% per year, or approximately $1.6 million in the first year.

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[24] Transcript, September 11, 2007, Pages 15-16.
[25] Transcript, September 11, 2007, Pages 15-16.
[26] Transcript, September 11, 2007, Page 12, Lines 16-17.
[27] Transcript, September 11, 2007, Pages 12-13.
[28] Transcript, September 11, 2007, Page 18, Lines 9-23.
[29] Transcript, September 11, 2007, Page 19, Lines 23-24.
[30] Transcript, September 11, 2007, Page 21, Lines 6-7 & Page 20, Lines 20-24.
[31] Transcript, September 11, 2007, Page 20, Lines 11-18.
[32] AFUDC or "Allowance for Funds Used During Construction" is
[33] *Re Pennichuck Water Works*, 90 NH PUC 371, 374-375 (Order No. 24,510) (noting that "Utilities recognize the revenue from AFUDC in their earnings, even though the associated cash is not collected from ratepayers until the project is completed and in service, and rates are increased to reflect recovery of the new asset").

Under Pennichuck's ownership as an investor-owned regulated monopoly utility, customers are liable for not only the original estimated cost of $25.5 million, but also the $14 million (or 53%) in costs over the original estimate, plus AFUDC and return on Pennichuck's investment.[34] As a result, Pennichuck is actually rewarded for its failure to control costs, in theory, as long as it is able to convince the Commission that its costs are reasonable. In practice, however, if Pennichuck itself lacks the technical resources to manage the technical challenges of upgrading its own water treatment plant, it is nearly impossible to imagine how the Commission or its staff could second guess whether in fact those costs were reasonable.

There is, however, another way. Despite Pennichuck's President opining gratuitously that "[i]n this case, Veolia would have never taken a preliminary estimate on a five year project going into a design/build" the City of Nashua using R.W. Beck as its oversight contractor and Veolia Water as its operator, intend to accomplish precisely that.

As a provider of water services under contracts to municipalities, Veolia Water operates in what it described under cross examination as a "very competitive industry".[35] In this competitive environment, Veolia Water's business strategy is not to "make a quick buck" by exploiting opportunities for price increases, but rather "to develop a long-term relationship, […] supplying the citizens of Nashua with water for many years to come."[36] This was stated precisely in Veolia Water's pre-filed testimony that:

> Veolia Water's "business model relies on its ability to provide results to its customers. The Northeast LLC's ability to provide savings to the City of Nashua and customers of the water system will only increase the likelihood that Nashua will extend and continue to renew its contract with the City of Nashua. In addition, because the success of the Northeast LLC's business is based on its performance in a competitive environment, the Northeast LLC's ability to produce these savings will further its competitive business opportunities in other

[34] Transcript, September 11, 2007, Pages 23-24.
[35] Transcript, September 11, 2007, Page 155, Lines 15-16.
[36] Transcript, September 5, 2007, Page 271, Lines 6-16.

markets."[37]

Veolia Water's approach to the performance of RRRM and capital projects is to "develop a detailed RRRM plan and a capital plan by projects and scope [and] if those projects are approved, for a certain estimated cost, our intent is to deliver those projects within that budget."[38] Furthermore, its approach to capital projects is not to use "open-ended" contracts but rather, "[we] quote a price and we deliver on that price."[39] Indeed, when asked if one of Veolia Water's capital project costs were "53 percent higher than [when] it had been proposed to the client before construction started, would you consider that a successful project and would you pass that cost onto the customer?" Mr. Philip Aschcroft responded:

> Certainly, it's not acceptable. When we bid for some design/build/operate contracts, which is our general modus operandi, we bid a price and we deliver on that price. If the costs go up, we have to absorb it. And, as for coming in at 53 percent over budget, we just wouldn't accept that. And, clearly, there would be some redirection of someone's career.[40]

Indeed Veolia Water must do precisely that because Nashua's water system will be overseen by R.W. Beck and its "considerable expertise in alternative project delivery methods including design-build contracting and program management."[41] R.W. Beck's Project Manager for the Nashua, Mr. Paul Doran, P.E., lists as his first item of experience "utilize[ing] a blend of technical, business and project implementation skills to manage all facets of nationwide Design/Build (D/B), Design/Build/Operate (D/B/O) and Contract Operations (CO) alternate project delivery/contracting approaches for municipal and industrial water and wastewater collection, distribution and treatment projects".[42] Stated more plainly, as project manager for

[37] Exhibit 1013, Page 18, Lines 3-10.
[38] Transcript, September 7, 2007, Page 161, Lines 11-15.
[39] Transcript, September 7, 2007, Page 161, Lines 19-20.
[40] Transcript, September 7, 2007, Page 166, Lines 3-14
[41] Exhibit 1006, Page 2.
[42] Exhibit 1006, Page 10.

Nashua, Mr. Doran's expertise is ensuring that projects are delivered on time, on budget, and as promised.

Another example of the adverse impact of Pennichuck's limited technical and managerial expertise was revealed in its use of computerized maintenance management software ("CMMS"), and specifically, Synergen. CMMS is a system that Veolia Water uses as a tool to "to optimize asset performance and reliability"[43] and an entire section of Nashua's OM&M Agreement with Veolia Water focuses on its use of CMMS-Synergen to develop a comprehensive asset registry and optimize asset performance, maintenance, inventory and other functions,[44] with a goal of reducing expensive unplanned maintenance.[45]

In his pre-filed testimony to the Commission, Pennichuck's President, Donald Ware, tried to claim that Pennichuck "has used a CMMS package for over five years so Veolia will gain no 'operating efficiencies' over Pennichuck's current operations by using a CMMS."[46] The CMMS program used by Pennichuck was known to be Synergen.[47] In fact, prior to the commencement of the Commission's hearings in January 2007, Mr. Ware had responded in data requests that Synergen, Inc., was its "Vendor of CMMS software package" [48] and in Pennichuck's valuation effort Robert Reilly had identified Synergen as the Company's fully functional work order database and valued it at $8.1 million."[49]

However, in February of 2007, the Commission staff released an audit report highly critical of Pennichuck's use of Synergen, stating that, despite its spending over $600,000 to

[43] See generally, Exhibit 1013, Page 33 9 (discussing Synergen-CMMS). .
[44] See generally, Exhibit 1005B, Appendix D, Section 9.0, Pages 51-53.
[45] Exhibit 1013, Page 13 (12).
[46] Exhibit 3014, Page 9, Lines 10-14.
[47] See Exhibit 1005C, Page 21 ("PWW is currently using the Synergen maintenance management software (now SPL Enterprise Asset and Work Management System) to track their maintenance tasks and procedures."); and generally, Nashua's Motion to Strike Testimony of Donald Ware.
[48] Exhibit 1055, Page 3.
[49] Exhibit 3007A, Pages 30, 31(29, 30); Transcript September 12, 2007 Pages 79-83

acquire and implement the system, its use of the system "as in the prior audit, do not reflect the information in a manner that is useful" due to its failure to record even the performance of maintenance information and that "the system does not appear to be used and useful to the extent reported or anticipated".[50] When asked "if this were a Veolia operation, and the system was, after spending $600,000, the system wasn't used and useful, what would happen within the Company?" Mr. Philip Ashcroft testified that there "would be a major inquiry into why the money had been spent and not utilized"[51] and that he would not consider Veolia Water to be in compliance with its contract, and expects that Nashua's oversight contractor, R.W. Beck "would be all over that."[52]

Armed with the knowledge that Nashua knew that Pennichuck had spent over $600,000 on a system that Staff had described as "meaningless", "not used and useful to the extent reported or anticipated", Donald Ware having previously testified that Synergen was its "Vendor of CMMS software package"[53] and that its CMMS package was just as good as Veolia's, chose to provide false testimony that the CMMS package Pennichuck uses was "OPS 32", a water treatment plant program that has no CMMS capabilities, which he would later confide to Veolia Water's project manager was a mistake.[54]

There was indeed a series of mistakes: first when Pennichuck charged its customers over $600,000, not including its return on investment, for a system that Staff described as not useful; second, when Donald Ware provided written testimony, either with actual knowledge or reckless disregard of its failures, that Pennichuck's own CMMS package would provide the same "operating efficiencies" that Veolia Water had described in its proposal and in the OM&M

[50] Transcript, September 7, 2007, Pages 152-153 ; Transcript, September 12, 2007, p. 87-95 (includes 2004 Audit).
[51] Transcript, September 7, 2007, Page 153.
[52] Transcript, Septemner 7, 2007, Page 153.
[53] Exhibit 1055, Page 3.
[54] See generally, Nashua's *Motion to Strike Testimony of Donald Ware*.

Agreement; and third, when Donald Ware testified under oath before this Commission that he had no knowledge of what Synergen is used for, and, despite several opportunities to correct his testimony concerning OPS 32, he declined to do so. These mistakes, however, have consequences. For the customers of Pennichuck Water Works, it means that they have spent over $600,000 to acquire, and allegedly $8.1 million to maintain, a system that is "useless". For the Commission, it means that Donald Ware's testimony, not only that related to Synergen, but also his allegations concerning "disturbing themes" and Pennichuck's costs of operations and maintenance, should be given no weight in this proceeding.

D. NASHUA'S WILL PROVIDE SERVICE TO CUSTOMERS IN COMPLIANCE WITH ALL CONTRACTUAL AND REGULATORY REQUIREMENTS AND DELIVER PERFORMANCE AT ITS CONTRACT PRICE WHEREAS PENNICHUCK PASSES ALL OF ITS COSTS TO CUSTOMERS WITHOUT ANY CONTRACTUAL OVERSIGHT.

Nashua's proposed OM&M Agreement with Veolia Water[55] describes in detail how Nashua will provide service that exceeds that currently provided to customers of Pennichuck. The OM&M Agreement is described as a "proposed" agreement because Nashua intends to modify incorporate any terms and conditions imposed by the Commission as a result of this proceeding. Pennichuck delights in referring to the OM&M Agreement as a "draft" contract, because it hopes to convince the Commission that neither Nashua nor Veolia Water are bound by its terms. However, both Nashua and Veolia Water have entered into a *Memorandum of Understanding* that requires that, they enter into a final "definitive agreement" based on the terms as the OM&M Agreement, and any conditions imposed by the Commission.[56]

The OM&M Agreement, by its very existence, provides customers a level of oversight and accountability that currently does not exist. As a direct contract between the City of Nashua,

[55] Exhibit 1005B.
[56] Exhibit 3054.

representing customers of the water system, and Veolia Water, the service provider, it is a document that requires Veolia Water to provide service to customers in compliance not only with its provisions and regulatory requirements such as drinking water standards. Veolia Water must also live up to customers' expectations as to the level of service they receive. If Veolia Water fails to live up to either the terms and conditions of the OM&M Agreement, or customers' expectations, it faces the same risks faced by any supplier of services in a "very competitive industry":[57] that its Agreement will not renewed; that it will not receive a more valuable long-term contract; or that its contract could even be terminated for convenience or for cause.[58]

This level of performance and value driven accountability does not currently exist under Pennichuck ownership. Should Pennichuck fail to deliver value for the dollar, fail to live up to its commitments, or fail to provide service in compliance with regulatory requirements, as was demonstrated in evidence before the Commission, the only recourse available to customers is to complain to the company that failed to provide the service in the first instance, or to the Commission staff in order to invoke regulatory process that is likely to be untimely and uncertain in the eyes of the customer. Pennichuck is a regulated monopoly in both the legal and practical sense.

Under Nashua's ownership, however, in addition to continued oversight by the Commission as provided by RSA 362:4, RSA 374, and the conditions imposed by the Commission pursuant to RSA 38:11, customers will have recourse to both their ability to require service in compliance with the terms and condition of Nashua's OM&M Agreement, but also recourse to the very competitive markets for water services to select another service provider.

It is for these reasons that Mr. Philip Ashcroft testified that: with respect to fire insurance

[57] Transcript, September 5, 2007, Page 155, Lines 15-17.
[58] See e.g., Exhibit 1005B, Article XIII, Section 13.2.

ratings Veolia Water "will not in any way put the citizens of Nashua at any disadvantage";[59] with respect to hydrant flushing that "the bottom line driver for hydrant flushing is, as you stated articulately, is the impact on the customers, and not only residential, but industrial and commercial customers [and] we'll schedule the hydrant -- the flushing as necessary to be sure we don't adversely impact the -- the -- the customers";[60]and with respect to capital and RRRM projects that Veolia Water will "quote a price and we deliver on that price."[61] There are numerous other examples.

Nashua does not, however, simply ask the Commission to expose the operation of its water system to competitive forces without clearly defining the requirements for service. Nashua's oversight contractor, R.W. Beck, described in detail its approach to the oversight of the system and ensuring that Veolia Water meets not only regulatory and contractual requirements, but that it provides value for the services provided. Both the structure and the terms of the OM&M Agreement provide the means to achieve this.

The Agreement provides specific performance standards, such as requiring that Veolia Water operate the system in compliance with the provisions of the OM&M Agreement,[62] the various operating and maintenance "plans generated in conformity with [the OM&M] Agreement,[63] all Applicable State, Federal or local laws and regulations, including all applicable permits, authorizations, licenses or other requirements, including conditions imposed by this Commission,[64] all applicable State and Federal water quality standards,[65] Prudent Industry

[59] Transcript, September 5, 2007, Page 195, Lines 3-8.
[60] Transcript, September 5, 2007, Page 197-198.
[61] Transcript, September 7, 2007, Page 161, Lines 19-20.
[62] Exhibit 1005B, Article V, Section 5.1.1.
[63] Exhibit 1005B, Article V, Section 5.1.1.
[64] Exhibit 1005B, Article V, Section 5.1.2.
[65] Exhibit 1005B, Article V, Section 5.1.3.

Practice,[66] and where appropriate and consistent with the above, manufacturer's instructions and warranty requirements related to the water system.[67]

E. NASHUA'S OM&M AGREEMENT WITH VEOLIA WATER WILL ENSURE THAT DRINKING WATER VIOLATIONS ARE IDENTIFIED AND PREVENTED BEFORE THEY OCCUR WHEREAS PENNICHUCK WAITS FOR DRINKING WATER VIOLATIONS TO OCCUR IN ORDER TO REDUCE ITS RISK AND GUARANTEE RECOVERY IN RATES.

Pennichuck has received a number of letters of deficiency for violations drinking water standards by the New Hampshire Department of Environmental Services related to its water system operations. These include violations for contaminants such as arsenic,[68] total coliform bacteria,[69] radon, uranium and other radiological contaminants,[70] including violations at the Glen Ridge system viewed by the Commission on December 6, 2006, organics and other violations of drinking water and environmental or safety standards.[71] Additional violations for contaminants such as arsenic, lead, total coliform bacteria, trihalomethanes, and uranium were reported in the company's consumer confidence reports.

It could be argued that violations of drinking water standards is the result of increasingly stringent water quality standards established by Federal or state regulatory agencies. Indeed, Donald Ware argued just that, stating that a May 23, 20056 Letter of Deficiency issued by the NHDES for drinking water violations for uranium at Glen Ridge,[72] was not due Pennichuck's non-compliance but due to "[t]he way the regulations were written, when the regulation passed, you were immediately in noncompliance for this particular item" and that "Pennichuck had no choice but to wait for this system to find out what the new rules were going to be and then be out

[66] Exhibit 1005B, Article V, Section 5.1.4.
[67] Exhibit 1005B, Article V, Section 5.1.5.
[68] Exhibit 1119, Pages 21-27.
[69] Exhibit 1119, Pages 9-10.
[70] Exhibit 1119, Pages 1-3 & 17-20.
[71] Exhibit 1119, Pages 4-8 , 11-13 & 25-26.
[72] Exhibit 1119, Page 1.

of compliance".[73]

However, Donald Ware's testimony misleads the Commission: the maximum contaminant level of 30 [mu]g/L for Uranium, the very standard violated by Pennichuck , was established by the EPA on December 7, 2000.[74] According to the EPA, "[u]nder the Safe Drinking Water Act, the final rule [for Uranium] becomes effective three years after promulgation[:] December 8, 2003."[75] Thus, contrary to Mr. Ware's testimony to the Commission, that Pennichuck reads all the "notices issued by the EPA", his testimony that this standard became effective immediately is false. The standard was established and known for nearly five years prior to the NHDES's issuance of Letter of Deficiency.[76]

Similarly, Mr. Ware's testimony that Pennichuck did not treat for total coliform violations, an indicator that more harmful bacteria may be present, because "customers don't like chlorine in the water" [77] is not credible and demonstrates a level of disregard for the health and safety of the public. In fact, on or about September 10, 2007, the day before Donald Ware's testimony, it was reported "nine people became ill as a result of drinking the water, that some were hospitalized" due to harmful bacteria, e-coli,[78] or giardia being present in the water.[79] It is simply inconceivable that nine customers that fell ill or were hospitalized would prefer to risk their health and safety because they "don't like chlorine in the water." Even worse, while the bacteria violations were first reported in July 2007,[80] Pennichuck did not install treatment until

[73] Transcript, September 11, 2007, Page 77-78.
[74] *See* Environmental Protection Agency, *National Primary Drinking Water Regulations; Radionuclides, Final Rule*, 65 FR 76708, 76712 (December 7, 2000) *codified as* 40 CFR Pts 9, 141 & 142.
[75] 65 FR 76708 at 76731.
[76] Exhibit 1119, Page 1.
[77] Transcript, September 11, 2007, Page 80, Lines 9-12.
[78] Transcript, September 11, 2007, Page 83, Lines 21-23.
[79] Transcript, September 26, 2007, Pages 161-162.
[80] Transcript, September 26, 2007, Pages 161, Lines 8-11.

September 10, 2007, after a boil water order had been issued.[81]

Pennichuck's strategy of not acting to protect the public health and waiting "to find out what the new rules were going to be and then be out of compliance" because "if we spend money on proposed regulations that aren't finalized, and they aren't finalized, such as the radon standard, *we would not be able to earn on that investment*"[82] is inconsistent with the public interest, as embodied by the State and Federal Drinking Water Acts, and the NHDES findings of violations.

It is also, fundamentally at odds with the approach to be taken by Nashua and Veolia Water. Under the OM&M Agreement, Veolia Water is required to operate the system in compliance with all "State, Federal or local laws and regulations, including all applicable permits, authorizations, licenses or other requirements"[83] and all applicable State and Federal water quality standards.[84] As part of its initial 5-year capital improvements plan, updated annually, Veolia Water is also required to "identify capital improvement projects necessary for the OM&M of the Managed Assets in accordance with this Agreement, *or in order to meet prospective operating parameters, such as changes in regulatory standards*".[85] In the event that Veolia Water fails to identify the necessary improvements, it is liable for any resulting fines or penalties and must indemnify Nashua for the same.[86]

III. NASHUA WILL IMPROVE CUSTOMER SERVICE.

The City of Nashua, in partnership with Veolia Water, will provide customer service that meets or exceeds that currently provided by the Pennichuck Water Works. Testimony provided to the Commission, both in writing and at the Commission's hearings, demonstrated that

[81] Transcript, September 26, 2007, Pages 161-162 & September 11, 2007, Page 83, Lines 21-23.
[82] Transcript, September 11, 2007, Page 78, Lines 6-13.
[83] Exhibit 1005B, Article V, Section 5.1.2., Page 9.
[84] Exhibit 1005B, Article V, Section 5.1.3., Page 9.
[85] Exhibit 1005B, Appendix G, Section 2 (C), Page 78 (emphasis added).
[86] Exhibit 1005B, Section 12.4, Page 21.

Nashua's customer service department is highly efficient and capable of doing whatever is necessary in order to provide high quality customer service related to customer billings and collections. The evidence showed Nashua, in partnership with Veolia Water, will use sophisticated management tools, call logs and work orders to track customer and respond to customer service questions related to operational issues. Finally, Nashua demonstrated that criticisms and concerns expressed by Pennichuck and Staff witnesses that Nashua's customer service proposal is inadequate are based on fundamental errors and misunderstandings.

A. NASHUA'S CUSTOMER SERVICE DEPARTMENT IS HIGHLY EFFICIENT AND CAPABLE OF DOING WHATEVER IS NECESSARY IN ORDER TO PROVIDE HIGH QUALITY CUSTOMER SERVICE

Nashua presented evidence that its current customer billings and collections department is highly efficient and capable of doing whatever is necessary in order to provide high quality customer service for all of its enterprises, including its property tax, waste water, vehicle registrations, and all of its other enterprises. Nashua's Chief Financial Officer, Carol Anderson, and Deputy Treasurer-Tax Collector, Ruth Raswyck, testified that the City of Nashua's billings and collections department currently manages 141,000 customer bills per year related to its wastewater treatment facilities, property taxation and other services provided by the City.[87] These 141,000 bills per year include 27,000 property tax customers, over 18,000 residential sewer system customers, and 1,000 commercial and industrial sewer system customers.[88]

Ms. Anderson and Ms. Raswyck testified that Nashua currently employs six full time customer service employees and one part-time data entry person within the billings and collections department.[89] They indicated that "[a]ll six [customer service representatives] are

[87] Exhibit 1008, Page 6; Transcript, January 11, 2007, Page 158.
[88] Transcript, January 11, 2007, Pages 163-164 (commercial and industrial customers are billed monthly)
[89] Transcript, January 11, 2007, Page 165, Lines 14-19.

highly and fully-cross trained to handle waste water, property tax, and all the other billings"[90] questions, and, when they are not performing customer service functions, they are "looking at other ways to streamline functions, whether its in [the customer service department] or in other departments[.]"[91] Ms. Anderson and Raswyck also explained to the Commission that the six existing cross-trained employees have time and resources to assist in providing customer service to customers of the water system.[92]

Ms. Anderson and Raswyck explained that the City has experience using Pennichuck's water consumption data to generate customer bills for its waste water system and has "a ten year history" of information "at our fingertips"[93] including pipe sizes, group numbers, consumption history, periods of billing. Because of the City's experience using the existing Pennichuck data, Ms. Anderson and Raswyck indicated that assumption of the Pennichuck water billings and collections function "is not going to be a major change" for its billings and collections department.[94] Nashua's already puts Pennichuck "meter readings through extensive testing to pick up"[95] errors it receives from the company including "poor readings, decimal points missing, meter removed information that we have not always gotten, negative bills, negative consumption, [and] zero consumption."[96] Indeed, during the normal course of operations, Nashua's customer service staff regularly performs "a series of exception reports"[97] that discovered in 2002, that approximately 2,500 customers[98] had received bills containing "zero

[90] Transcript, January 11, 2007, Page 166, Lines 7-9.
[91] Transcript, January 11, 2007, Page 167 Lines 9-18.
[92] Transcript, January 11, 2007, Pages 166-167, Beginning at Line 12.
[93] Transcript, January 11, 2007, Page 191, Lines 1-3.
[94] Transcript, January 11, 2007, Page 191, Lines 3-81.
[95] Transcript, January 11, 2007, Page 193, Lines 193.
[96] Transcript, January 11, 2007, Page 193, Lines 5-8; see also Exhibit 1008, Page 5, Lines 68-75 & Page 10.
[97] Transcript, January 11, 2007, Page 194, Lines 2-5.
[98] Exhibit 1008, Page 10.

consumption, high/low readings, readings that are not complete in a 90 day period".[99] In fact, it was Nashua's customer service representatives that discovered "major discrepancies" and "unusually high or low readings" in Pennichuck's billing data, and brought it to Pennichuck's attention.[100] Despite Pennichuck's commitment that "it has taken steps to correct the situation so that it will not happen again[,]"[101] Ms. Anderson and Ms. Raswyck testified that these problems continue to this day.[102] Nashua corrected these errors through the diligence and professionalism of its own staff. Neither Pennichuck nor Staff provided any explanation as to why Pennichuck's own staff failed to identify and correct these errors.

B. NASHUA'S CUSTOMER SERVICE PROPOSAL

The City of Nashua proposes to use: (a) two additional customer service representatives within the City of Nashua to handle billing and collection functions; (b) all six existing customer service representatives, plus other staff,[103]who will be cross-trained to respond to customer inquiries related to the water system to be acquired by this proceeding; and (c) additional customer service representatives to be employed by Veolia Water to perform customer service functions related to operations.

During the Commission's hearings and in their testimony, both Pennichuck and Staff focused on Veolia's staffing proposal for two customer service employees related to operations. These two employees proposed by Veolia Water reflect its estimate of the incremental number of employees necessary to meet its customer service obligations under its OM&M Agreement with the City of Nashua. The OM&M Agreement, however, requires that Veolia Water provide customer service related to operations in full compliance with the Agreement, applicable law,

[99] Transcript, January 11, 2007, Page 194, Lines 2-5.
[100] Exhibit 1008, Page 5 & Page 10 (2,500 customer accounts incorrectly billed).
[101] Exhibit 1008, Page 10.
[102] Transcript, January 11, 2007, Pages 251-252
[103] This would include data entry staff and interns used from time-to-time.

and prudent industry practice, *regardless of the number of employees required to get the job done*.

In fact, the OM&M Agreement requires that Veolia Water "maintain the number of qualified, certified and experienced employees, staff and third-party contractors to operate, maintain and manage the Managed Assets in accordance with this Agreement"[104] and sets specific enforceable standards for customer service. For example, Veolia Water is required to: (a) perform all meter reading as required by the OM&M Agreement;[105] (b) "[p]erform service disconnects (shutoffs) and reconnects (turn ons) for enforcement of payment and for other utility requirements [as required by Nashua's] rules pertaining to water service";[106] (c) test meters in accordance with PUC regulations;[107] (d) "[i]nform and update customers during service outages";[108] and (e) "provide a customer contact *to answer all water quality-related customer inquiries*".[109] In addition, Veolia Water must operate and manage the water system in compliance with all applicable laws and regulations, including those related to customer service such as the Commission's Puc 1200 rules.[110] Thus, the OM&M Agreement requires Veolia Water meet all customer service and operational requirements regardless of the number of employees required.

Nashua and Veolia Water are confident that evidence demonstrates that Nashua and Veolia Water will provide customer service that meets or exceeds that currently provided by Pennichuck. Moreover, both Nashua and Veolia Water have a strong incentive to provide the best possible customer service because failure to provide quality customer service would result

[104] Exhibit 1005B, Appendix D, Section 15.0 (emphasis added).
[105] Exhibit 1005B, Section 7.2, Page 12.
[106] Exhibit 1005B, Appendix D, Section 7.0 (b), Page 50.
[107] Exhibit 1005B, Appendix D, Section 7.0 (c), Page 50.
[108] Exhibit 1005B, Appendix D, Section 7.0 (h), Page 51.
[109] Exhibit 1005B, Appendix D, Section 7.0 (i), Page 51 (emphasis added).
[110] Exhibit 1005B, Article 5.1, Page 9; Appendix D, Section 7.0 (d), Page 51.

in complaints to the City of Nashua's Mayor and Board of Aldermen, both of which are accountable to the public they serve. Furthermore, because the OM&M Agreement is limited to an initial term of six years, Veolia Water has an exceptionally strong incentive to provide superior customer service in order to obtain renewals of the Agreement, and potentially to negotiate a long-term contract thereafter. As a regulated monopoly, Pennichuck Water Works has no such incentive.

C. NASHUA'S PARTNERSHIP WITH VEOLIA WATER WILL ENHANCE CUSTOMER SERVICE.

Nashua's customer service representatives will provide the first point of contact for customers. However, behind the scenes, Nashua and Veolia Water will work in partnership to greatly enhance the customer service.

Veolia Water brings to Nashua its experience operating water systems throughout the Northeast, North America and world-wide to the benefit of Nashua customers.[111] Veolia Water provided testimony that "staff involved in the operation, maintenance and management of Nashua's water system will have the ability to draw upon professional experience and resources gained from other water systems in the United States and around the globe."[112] In the case of the Indianapolis Water System, for example, Veolia Water implemented automation of customer bill payment "which resulted in streamlining this task from hours to minutes, resulting in faster response time to customer inquiries" and numerous other improvements.[113]

Veolia Water will maintain a call log of all customer inquiries related to water service, water quality or operational issues and "[w]hen necessary, specific work orders will be issued to

[111] See e.g., Exhibit 1051, Pages 3-15 (List of North American Water Systems); Exhibit 1005, Page 2 (Scope of Water and Wastewater operations in North America).
[112] Exhibit 1013, Page 13, Line 17 to Page 14, Line 19.
[113] Exhibit 1013, Page 29.

investigate and resolve the issue related to the call."[114] Veolia Water provided examples of detailed customer service process charts it uses to ensure that all customer inquiries and related field work is completed in a timely and efficient matter.[115] These and other measures will ensure that all customer service responsibilities will be clearly delineated and tracked in order to ensure that customers receive timely and efficient responses to all billings or operational inquiries.

For example, whenever Nashua receives a request for customer service such as a new account or new service connection, Veolia Water is required to generate a work order which Nashua customer service will have the ability to track by accessing Veolia Water's work order system.[116] This system will "(a) track work that has been transitioned to other divisions or entities, (b) ensure completion of any necessary follow up tasks, and (c) update the database of completed work. This system will ensure that all divisions will have access to the most recent status of the work which, in turn, will allow the agents to provide quality customer service to the Nashua community."[117]

Nashua's OM&M Agreement requires that Veolia Water implement a CMMS system, called Synergen, capable of "issuing equipment status and repair reports"[118] that can be accessed by customer service representatives that would inform them not only of the status of work on their service connection, but also the cost, time and materials spent performing work to address their service requests.[119] Pennichuck also uses Synergen. However, despite its spending over

[114] Exhibit 1008, Page 7, Response to Staff Data Request 4-22.
[115] The customer service process charts were provided in response to data requests included in Exhibit 1053 and used extensively by Staff during cross examination of Ms. Anderson and Raswyck (see e.g. Transcript, January 11, 2007, Page 181, Lines 7-16); and Veolia Water (see Transcript, September 5, 2007, Pages 305 Line 16 to Page 309 Line 7; Pages 317 Line 15 to Page 322, Line 11). However, following the hearings on October 17, 2007, the Commission ruled that this exhibit was inadmissible as supplemental testimony.
[116] Exhibit 1005B, Page 12, Para. 7.3.
[117] Exhibit 1013, Pages 9-10.
[118] Exhibit 1005B,
[119] See generally, Exhibit 1005B, Section 9.0, beginning at Page 51.

$600,000 to purchase this system,[120] and over $8 million in expenses to maintain its work order database,[121] Pennichuck's President and Chief Engineer testified that he could not recall what the system was used for and, [122] due to numerous errors in database, the Commission staff has described the information contained therein "not useful" and "meaningless" because of the lack of quality information concerning labor, inventory and other costs incurred related to work performed in the field.[123] .

D. VEOLIA WATER'S CUSTOMER SERVICE EXPERIENCE IN INDIANAPOLIS

Veolia Water's experience transitioning investor-owned utilities to public ownership while maintaining, and actually improving customer service will benefit customers. As noted in the testimony of Philip Ashcroft et al.:[124]

> Many of the team members, including key technical and management staff, were involved in Indianapolis in 2002 when the City acquired the water assets from an investor owned utility and then transitioned the operations and management responsibility for the system to a public-private partnership with a Veolia Water North America subsidiary providing them with unique experience to carry out this transition.

Veolia Water's experience transitioning the Indianapolis Water system from private to public operations will ensure that customers continue to receive the same or better customer service during the transition and in the future. Veolia Water's testimony includes a customer satisfaction survey documenting the improvements made to customer service relative to the prior investor-owned utility.[125]

Veolia Water's experience in Indianapolis is also helpful to understanding the degree to which an efficiently operated customer service department can produce savings for customers.

[120] Transcript, September 11, 2007, Page 56.
[121] Exhibit 30071, Pages 30-31.
[122] Transcript, September 11, 2007, Page 56.
[123] See, Transcript, September 7, 2007, Pages 152-153; Transcript, September 12, 2007, Pages 85-95.
[124] Exhibit 1005, Page 4.
[125] Exhibit 1013, Pages 38-46.

For example, Veolia Water further testified that:

> In 2005, Veolia Water Indianapolis's twenty-seven, full-time, customer service representatives handled 614,027 calls (or 51,169 calls per month on average with a peak month of 58,849 calls). *In other words, each customer service representative in Indianapolis handled 1,859 calls per month, roughly the same volume as the entire PWW customer service staff.*[126]

Veolia Water's testimony provides a significant measure of the savings that can result from efficient, performance-based operations relative to a regulated monopoly like Pennichuck that, despite its failures to successfully implement technology, is able to recover its cash from its customers.

E. PENNICHUCK AND STAFF CRITICISMS OF NASHUA'S CUSTOMER SERVICE PROPOSAL ARE BASED ON FUNDAMENTAL ERRORS AND MISUNDERSTANDINGS

Pennichuck and Staff provided testimony criticizing Nashua's customer service proposal. However, the evidence presented to the Commission demonstrated that Pennichuck and Staff witnesses made fundamental errors in their assumptions that allowed them to reach that they desired or expected. These errors include the following:

- Pennichuck and Staff criticisms were based on Pennichuck's current staffing levels and failed to take in to account that 22,419 customers, nearly one-half of the total customers served by Pennichuck, are not customers of the system to be acquired by this proceeding
- Pennichuck and Staff failed to consider or conduct any real analysis of Veolia Water's experience providing customer service as a regulated utility in the City of Indianapolis.
- Pennichuck and Staff witnesses failed to consider that, within franchises located outside of the City, Nashua's customer service will be subject to Commission jurisdiction.
- Pennichuck and Staff witnesses conclusion that a lack of coordination or delineation of

[126] Exhibit 1013, Page 11, Lines 13-19 (emphasis added).

responsibilities will occur is pure speculation or opinion, unsupported by any real evidence.

These errors are addressed below.

1. Pennichuck and Staff failed to take into account that half of the customers served by PWW customer service department are not customers of PWW.

Mr. Donald Ware provided written testimony stating that:

> Customer service - The Veolia staffing model (DLW-5C) shows only two customer service employees to handle customer complaints and requests for service. **PWW has at least a half dozen employees who field well over 10,000 calls a year from customers on a wide range of inquiries**. This reduction in staffing can be expected to have a direct impact on responsiveness to customer concerns.[127]

Mr. Ware failed to inform the Commission of a key point: Pennichuck Water Works customer service employees provide customer service not only for the 24,500 customers of Pennichuck Water Works, Inc., but they also serve "approximately 4,900 customers" of PEU,[128] a total of 1,685 customers of PAC,[129] and, as part of its unregulated service company, 5,300 customers in Hudson,[130] 7,300 customers in Barnstable and 3,234 customers in Salisbury, Massachusetts.[131] Pennichuck's customer service representatives also perform customer service functions for "developer and other privately owned water systems in New Hampshire and Massachusetts under contracts with over 80 owners of those systems."[132] Thus, Pennichuck customer service representatives serve over 22,419 non-PWW customers, in addition to the 24,500 customers of the system to be acquired by Nashua.

Ms. Hartley also confirmed in her testimony that Pennichuck's customer service

[127] Exhibit 3014, Page 7, Lines 1-6 (emphasis added).
[128] Exhibit 3001, Page 7, Lines 20-21.
[129] Exhibit 3001, Page 9, Lines 1-6.
[130] Although not reflected in the testimony, Nashua understands that, similar to Nashua proposal, the Town of Hudson performs its own billings and collections while Pennichuck provides customer service related to operations.
[131] Exhibit 3001, Page 9, Lines 16-20.
[132] Exhibit 3001, Page 9, Lines 16-20.

department serves some 21,400 non-PWW customers, in addition to those that Nashua will acquire as a result of this proceeding.[133] However, like Mr. Ware, in her data responses and testimony before the Commission, she attempted to use the entire Pennichuck customer service staff to demonstrate that Nashua's customer service levels are "woefully inadequate *to meet the needs of the Company's 24,000 customers*."[134] Thus, while both Mr. Ware and Ms. Hartley were fully aware that Pennichuck Water Works represents only half of Pennichuck's total customers, their testimony attempts to mislead the Commission into reaching the conclusion that the entire customer service staff is necessary to serve only "the Company's 24,000 customers."[135]

In fact, in her testimony to the Commission, Ms. Hartley attempted to add additional employees from other Departments to beef up the numbers:

> There's currently six full-time equivalents at Pennichuck and two part-time employees at Pennichuck, and two supervisors. One is a billing supervisor and the other is the manager of the department. That's at Pennichuck. And, then, we have two administrative assistants located at our Will Street facility, and one administrative assistant located at the Water Street -- at the water treatment plant, and then administrative assistant for engineering. And, in some fashion, those folks and those administrative assistants in the outlying, outside the department, still service customers in one fashion or another. So, even though there are six customer service reps, and a receptionist, I neglected to mention that, at the front desk to take payments, we have a complement of people with different expertises and even cross-trained in the Customer Service Department to answer any question a customer has regarding their service, their water quality, or pressure, or any of the various items that may come forward.[136]

It should be apparent that Ms. Hartley is simply an attempt to multiply the number of customer service employees Pennichuck has in order to make as fantastic a comparison as possible, while ignoring the fact that at least half of customer service is being provided non-PWW customers. She adds a supervisor and manager overseeing the customer service, four administrative

[133] Exhibit 3003, Page
[134] Exhibit 1068, Page 1, Para (a) (emphasis added).
[135] Exhibit 1068, Page 1, Para (a).
[136] Transcript, January 13, 2007, Pages 105-106.

assistants, additional administrative assistants in outlying areas, plus a receptionist, all of whom she claims are necessary to perform customer service. Ms. Hartley testified that she was unable to state how many calls or employees were necessary in order to provide customer service to non-PWW customers, or its unregulated insurance program sales.[137]

Her testimony does reveal one important point. Nearly all staff, whether a field services employee, receptionist, treatment plant specialist, engineer, or any other employee performs a function related to customer service. The fact that Veolia Water's proposal identified two employees to provide as customer service some operations function simply recognizes that it expects two employees will focus exclusively on customer service questions related to operation of the water system. However, simply doing the arithmetic shows that Nashua has selected an appropriate number of customer service representatives. Pennichuck employs six full time, plus two part-time, customer service representatives to handle calls, plus one utility disconnect employee, as well as a supervisor and a manager.[138] Dividing these nine[139] or ten full time equivalent employees in half to reflect that approximately half of the customer service is being provided to non-PWW customers results in a total of only four and one half to five employees.

2. Pennichuck and Staff failed to consider Veolia Water's experience providing customer service as a regulated utility in the City of Indianapolis.

Pennichuck and Staff witnesses failed to take into account Veolia Water's experience providing customer service to the City of Indianapolis, a regulated water utility.[140] Both with respect to the improvements made to customer service, and the fact that Veolia Water Indianapolis is a water utility regulated by the Indiana Utility Regulatory Commission.

[137] Transcript, January 13, 2007, Page 147, Lines 1-19.
[138] Exhibit 1068.
[139] Transcript, September 13, 2007, Page 145, Lines 18-19.
[140] Transcript, September 26, 2007, Pages 42-50.

3. Pennichuck and Staff failed to consider that Nashua's customer service outside the City will be subject to Commission jurisdiction.

Both Pennichuck and Staff witnesses based much of their criticism on the loss of Commission oversight. Donald Ware's testimony represents the extreme end of such testimony, when he states that:

> If Nashua were to take over PWW's assets, it would not be governed by the NHPUC from a ratemaking or customer service perspective, it would not be subject to the statewide DIG SAFE program, it would be exempt from mandatory zoning and planning ordinances, and its own employees would not have to comply with federal worker safety regulations promulgated by OSHA. The loss of these protections for PWW's customers, the public and utility employees is quite significant, and could well lead over time to a degradation of service quality, land use protection, and public and worker safety.[141]

As a matter of law, Nashua's franchises outside the City of Nashua remain subject to the Commission's jurisdiction under RSA 362:4, III-a and RSA 374. Nashua will continue to be subject to the Commission's jurisdiction except as set forth in the limited areas articulated by statute., i.e. auditing, reporting, and to the extent that it provides the same service to all customers outside its borders, rates. However, nothing in N.H. law suggests that Nashua will be wholly exempt from regulations by the Commission, particularly to service outside its borders.

IV. VALUATION & RATES

In *Appeal of Seacoast Anti-Pollution League,* 125 NH 708 (1984), the Court reminded the Commission that "the primary public interest may be found to be affected injuriously" "if it appears, upon all the evidence, that the capitalization sought is so high that the utility, because of [its] inability to earn operating costs, depreciation and other charges, will not be able to give its consumers at reasonable rates the service to which they are entitled . . . ." 125 NH at 718. Consequently, one of the most important, if not the "primary" issues in the public interest

[141] Exhibit 3004, Pages 13-14.

determination is whether, under Nashua ownership, customers will be afforded the service to which they are entitled at reasonable rates. Nashua asserts that the evidence before the Commission demonstrates that customers, under its ownership, will receive service that will equal or exceed that provided under continued PWW ownership at rates below those that will be charged under continued PWW ownership.

In order for the Commission to make the kind of rate analysis necessary for its public interest determination, it must establish the price or "fair value" under RSA 38:9 Nashua must pay for the PWW assets. The value concluded by the Commission is largely determinative of the rates Nashua will charge and therefore is the first inquiry of this Brief.[142]

A. THE FAIR MARKET VALUE OF THE PWW ASSETS WILL BE $139,000,000 AS OF DECEMBER 31, 2007.

Nashua employed George E. Sansoucy, P.E., LLC to appraise the value of the PWW assets. The firm's certified appraiser, Glen C. Walker with assistance from George E. Sansoucy, P.E., employing all three generally accepted appraisal methods[143] concluded that the value of PWW's assets as of December 31, 2004 was $85,000,000.[144] Because of the addition of new plant, property and equipment by PWW after December 23, 2004, much of it related to capital improvements to its water treatment plant, Walker increased the fair market value by the cost of such plant, property and equipment by $54,000,000 to a total of $139,000,000.[145] A true up to the date of closing will also be necessary.

In his appraisal of the PWW assets as of December 31, 2004, Walker reconciled the three appraised methods used to his final determination of value by relying on the sales comparison and income capitalization methods, which he asserted, were the most reliable. The trended cost

[142] See Nashua's March 8, 2005 Memorandum Regarding Bifunication Page 3.
[143] Cost, sales comparison and income capitalization. The Appraisal of Real Estate, 12th Ed. Page 62.
[144] Exhibit 1007, Page 3; Exhibit 1007A, Page 2, 65.
[145] Exhibit 1017, Page 5.

approach performed by Sansoucy was given no weight because the value derived (cost new less physical deterioration and functional obsolescence), $104,000,000 was greater than what the revenue from the PWW system could support. As a result a deduction for economic obsolescence would have been necessary that would have reduced the cost approach value to an amount equal to those derived by the sales and income methods.[146]

Because Walker ultimately gave no weight to it, PWW's attack on the cost approach performed by Sansoucy was largely irrelevant. Moreover, it was ironic for the Company to urge that the use of a trended cost analysis was inappropriate because **it** failed to keep accurate continuing property records (CPRs) as required by the Uniform System of Accounts for Water Utilities, Rule Puc 610. As Sansoucy noted, in any event, even though, use of trended cost results in inaccuracies when the CPR's are not properly kept, "[I]t's an efficient method of arriving at a good band of reproduction cost and some of the [in]accuracies that are bound to occur in regulatory bookkeeping become deminimus."[147]

The attack on cost and Walker's determination to give no weight to it, because of the extent of economic depreciation evidenced by the sales and income approach, was necessitated as a result of PWW's valuation witness, Robert Reilly's reliance on it; and especially because of his insistence that since the water system was special purpose property, the cost method was most reliable. As with several other important valuation issues, Mr. Reilly was wrong.

There is no doubt that the water system is special purpose property.[148] Likewise there is no doubt that the cost method is not the exclusive method for valuing special purpose property. The key, as noted by Sansoucy and Walker, and confirmed by *The Appraisal of Real Estate*, is

[146] *The Appraisal of Real Estate, 12th Ed.*, Pages 412-414.
[147] Transcript, September 4, 2007, Pages 206, 207.
[148] Transcript September 4, 2007, Pages 241-243; Transcript September 10, 2007 (Afternoon) Pages 72-72.

the existence of a market for the special purpose property.[149] What was once special purpose property with no market can become special purpose property with a limited market that provides evidence of value that must be considered. For example, when Sansoucy and Walker appraised the PWW property in 1995 there was an insufficient market on which they could rely. By 2004, however, an "active and transparent market" of sales of water systems had developed such that the cost method was no longer the most reliable.[150] Once a market develops, even if it is limited, an appraiser is obligated to consider the sales and if they provide evidence of value to utilize the findings.[151] Because the cost method sets the upper limit of value,[152] it was critical for Mr. Reilly to justify its use at all cost and to ignore the market evidence.

The sales method used by Walker identified 28 sales of water systems that he analyzed for comparability to PWW. The characteristics he considered in selecting comparable sales to PWW were: size (customers, assets, revenue); location; motivation of buyer and seller; expectations of future cash flows; whether other businesses were involved; age of the assts; and physical condition and economic characteristics.[153] Ultimately Walker concluded that the characterization that had the greatest impact was size and the sales were grouped according to the National Association of Water Companies classification for revenue.[154] From these 28 sales Walker developed market-based ratios be believed were the best indicators of the value of PWW and ultimately selected sale price to net plant less CIAC and sale price to EBITDA. Applying these ratios he concluded that the larger system typically commanded a premium over the smaller systems[155] and as a result he selected those sales of systems with gross annual revenues

[149] Transcript September 4, 2007, Pages 250, 251; *The Appraisal of Real Estate, 12th Ed.*, Pages 354, 419.
[150] Transcript September 4, 2007, Pages 243, 244.
[151] *The Appraisal of Real Estate, 12th Ed.*, Page 419.
[152] Ibid Page 355.
[153] Exhibit 1007A Pages 49, 50.
[154] Ibid.
[155] Ibid Pages 53, 54.

of $10 million or more as the most comparable to PWW.[156] The ratios established for the 9 most comparable sales were then applied to PWW, which resulted in range of values under the sales comparison approach of between $81.6 million and $96 million, which Walker reconciled to$89 million.[157]

In order to determine the reliability of his sales approach value, Mr. Walker examined the auction of Pennichuck Corp. in 2002 which resulted in four confidential competing bids for the entire company including PWW.[158] The bid made by Philadelphia Suburban for $106 million was accepted by Pennichuck Corp. following the auction process. Mr. Walker deemed the 2002 offer of Philadelphia Suburban, which was withdrawn only after Nashua took its RSA 38:3 vote, to be an important indicator and evidence of value as December 31, 2004 and a confirmation of his sales comparison value.[159]

PWW's cross-examination of Walker concerning his sales method utilized a ploy often used by lawyers to attack an appraisal witness who has hurt them – identify an error contained in the mountain of data relied upon by the witness to imply that his work was not reliable but never provide the trier of fact with the impact of the error. So Mr. Conner pointed out that one of the sales relied upon by Walker contained erroneous information transferred from his work papers[160] to his report[161] but never asked what impact dominating that sale would have on his sales analysis. In fact, as Mr. Walker testified to on redirect, over Mr. Conner's objection, there was **no** impact whatsoever and equally important his income method supported his sales method even

[156] Ibid.
[157] Ibid Pages 55, 56.
[158] Transcript, September 10, 2007, Pages 78, 79; Exhibit 1015 (confidential version) Pages 7-8, 48, GES Exhibit, 11.
[159] Ibid.
[160] Exhibit 3252. Walker agreed that the document contained in his work papers marked by PWW was erroneous. He was not permitted to introduce the correct document, which was contained in his copy of his work papers.
[161] Exhibit 1007A.

with the sale in question eliminated.[162] The PWW cross-examination of Walker concerning sales accomplished nothing. The ratios he developed, his reliance on the Philadelphia Suburban transaction and his conclusions were untouched and stand in stark contrast with Mr. Reilly's failure to complete or weight the sales method.[163]

The income capitalization method used by Mr. Walker recognizes that buyers of income producing property such as a water system are making an investment and view cash flow as the critical element affecting value.[164] Under the income capitalization method a value is estimated by capitalizing the cash flows available to satisfy debt and equity with a market based rate of return.[165] Because Walker's capitalization rate assumed no further earning growth, it is considered a yield capitalization method.[166] The value estimated by Mr. Walker applying this method was $80,000,00.[167] When developing the income capitalization approach Walker correctly employed a "typical buyer"[168] as opposed to the not-for-profit or special buyer used by PWW's expert Robert Reilly which has certain benefits or synergies available to it that a "typical buyer" would not. These benefits or synergies would include, inter alia, the ability to utilize tax-exempt debt and to avoid certain types of taxes and other expenses. The availability of these benefits to a not-for-profit buyer are not attributes of the property being acquired nor are they subsequently transferable by the not-for-profit buyer unless it also sells to another not-for-profit buyer. Rather, they are attributes that are unique to the buyer and impact the buyer's investment decision.

Mr. Walker then reconciled the cost, sales comparison and income capitalization

[162] Transcript September 10, 2007 (Afternoon), Pages 111-113.
[163] Exhibit 3007A, Pages 46.
[164] Transcript, September 10, 2007 (Afternoon) Page 33; *The Appraisal of Real Estate, 12th Ed.,* Page 471.
[165] Exhibit 1007A, Pages 59, 63(54), 63(58).
[166] Transcript, September 4, 2007, Pages 252, 263, 264; Exhibit 1007A, Pages 63(58).
[167] Exhibit 1007A, Pages 63(58), 64(59).
[168] Exhibit 1007B, Pages 114-120 (Appendix K).

approaches to arrive at a final value estimate of $85 million as December 31, 2004 which was the valuation date established by the Commission. As noted above, Walker then trued up this value to account for the additions to rate base made by PWW subsequent to December 31, 2004 and concluded that the value of PWW's assets as of December 31, 2007 would be $139,000,000.

The Walker valuation as of December 21, 2004 was confirmed by an unlikely source. John Joyner, President of IMG, a consulting firm with significant experience in the utility industry and investment banking,[169] was produced by PWW to criticize Nashua's contract with Veolia. Mr. Joyner and two of his colleagues at IMG, including an SEC registered broker-dealer who provided financial advisory services for IMG Capital, authored a report entitled "Tapping Public Assets"[170] which suggested that municipalities should consider selling their infrastructure assets including water systems to private companies to ease financial crunches.[171] In the section of the report providing advice about the value of infrastructure assets, Mr. Joyner and his colleagues stated certain "rules of thumb" based on "experience and case studies of comparable sales" were applicable.[172] For municipal water utilities Mr. Joyner and his IMG colleagues opined that regulated utilities "usually sell for at or close to their 'rate base'" which they defined as original cost less depreciation.[173] Sales prices for water utilities they stated "usually range from $1,500 to $3,500 per customer connection…"[174] When Mr. Joyner applied the highest price in the range to PWW (25,000 customers), it yielded a value of $87.5 million,[175] virtually identical to the value concluded by Mr. Walker on December 31, 2004.

Much time during the cross examination of Sansoucy and Walker was devoted to the

[169] Transcript, September 2007, Pages 47, 48.
[170] Ibid at Pages 48, 49; Exhibit 1099.
[171] Exhibit 1099 Pages 4(1).
[172] Ibid., Page 6(3).
[173] Ibid.
[174] Ibid.
[175] Transcript Sept 2007, Page 51.

allegations of PWW that, in particular, Sansoucy was biased and partial; that their engagement violated USPAP; and that they were not credible witnesses.[176] This "shoot the messenger" approach by PWW is an indication of the harm it believed Nashua's valuation had inflicted. Rather than challenge the conclusion of value, PWW and its ally, Merrimack, attacked the witnesses. The effort flopped.

Sansoucy and Walker have been providing utility valuations in New Hampshire and elsewhere since at least the early 1990's and in the case of Mr. Sansoucy prior to that time. As their resumes[177] reflect they have hands-on experience in the construction, pricing and appraisal of underground utilities and have been found by numerous judges and other fact finders to be credible and competent witnesses.[178] As early as 1994 utilities began attacking Sansoucy's credibility by pointing to his suspension from practice before FERC for misrepresentation, just as occurred here.[179] No court or regulatory body in which this attack was made has found that the events made him or his testimony less credible and the New Hampshire Supreme Court has upheld a lower court determination to that effect.[180] The 1984 FERC 3 month suspension is yesterday's stale news. It has no place in this proceeding.

PWW and its ally Merrimack attempted through the use of the minutes of several Aldermanic meetings in Nashua and in particular the minutes of March 16, 2004,[181] to show that Mr. Sansoucy had predetermined the value of PWW's assets and promised Nashua a particular value; predetermined the valuation methods to be used and the weighting of those methods; and used an improper valuation method. Focusing on the minutes in a vacuum and ignoring

[176] See also discussion concerning the testimony of Robert Reilly, infra.
[177] Exhibit 1007 B, Pages 122-135 (Appendix L).
[178] See e.g., Public Service Co., of New Hampshire v. Town of Bow, 139 NH 105, 108, 109 (1994); Crown Paper Co., v. City of Berlin, 142 NH 563, 570 (1997).
[179] Transcript, September 4, 2007 Pages 271-280.
[180] Southern NH Water Co., v. Town of Hudson, 39 NH 139, 144 (1994).
[181] Exhibit 3197A.

Sansoucy's prior history in valuing the assets of the Pennichuck companies, they ignored the plain meaning of Sansoucy's remarks. Mr. Sansoucy never predetermined or promised the Aldermen a value. He had previously valued the Company for tax purposes and had considerable knowledge about it and the water utility industry when he made his remarks. Lost in PWW and Merrimack's rant is the fact that his discussion of value related to **all three regulated companies** and was less than Mr. Walker's final value for **PWW alone**. Moreover, the language of his remarks shows the length of the stretch they were taking. Sansoucy didn't say he was presenting a value. Instead, he discussed the three valuation methods and the ratios that could be used based on other sales. He then told the Aldermen, "Let's look at what the indicators **might** mean." (emphasis supplied).[182] This is not the language of a promise or the statement of a predetermined value. Even his final statement of value, "We feel the PUC will likely be finding a value in the range of $82-100 million" is not a promise or predetermination of value.[183] Mr. Sansoucy is merely giving the Aldermen, based on his knowledge of the value of the Company from his prior valuations and his knowledge of the water utility industry, his thoughts about what might ultimately happen. They already had been told about all of the valuation methods and the work that was required for each. Mr. Sansoucy was not shy in announcing there was "a lot more work digging out data".[184] Nobody in the room understood, nor would anyone fairly reading the minutes, that Sansoucy had prejudged what the value of PWW's assets were and promised the value he would deliver. Moreover, the proof is in the pudding because Mr. Walker's value was not the same.

PWW would also have the Commission believe that Sansoucy, as of March 16, 2004, had already decided that he would not give any weight to the cost method. Again his remarks do not

[182] Ibid at Page 16.
[183] Ibid at Page 17.
[184] Ibid at Page 15.

support the argument. What he told the Aldermen is the same thing he and Walker told the Commission: from their experience in the industry they knew in 2004 and when they testified that a value based on replacement cost new, less physical and functional depreciation could not be supported by the revenues that could be generated from the system and as a result the application of economic obsolescence would be necessary and would result in the cost approach value approximating the values derived from the sales and income approaches.[185] He specifically told the Aldermen that in the valuation he did in 1996 for tax purposes that the cost approach exceeded income and sales by 30-40%.[186] Moreover, it is important to note that even if one could conclude that Sansoucy had prejudged the weighting of cost, it was Walker who performed the reconciliation where the weighting occurred and there is no suggestion or evidence that he had prejudged the matter.

Finally the minutes were used by PWW and Merrimack to suggest that Sansoucy, through his discussions of the concept of no net harm, had decided prior to performing an appraisal that a value would be concluded that would not raise rates. What he told the Aldermen[187] is consistent with his testimony. If he and Mr. Walker had estimated a value that would have caused rates to exceed those that would otherwise have been charged by PWW, he would not recommend that Nashua commence this case.[188] PWW, as it has throughout the proceedings in this Docket has attempted to manipulate the facts in its favor. Its use of the minutes of March 16, 2004 is an example of its overreaching.

In the same vein was the cross-examination of Sansoucy and Walker regarding their

[185] Transcript September 4, 2007, Pages 99-101; Transcript, September 10, 2007 (Afternoon) Pages 31-32, 43-44.
[186] Exhibit 3197A, Page 15.
[187] Exhibit 3197A, Page 14, 21.
[188] Transcript September 10, 2007 (Afternoon) Page 93.

"loyalty" to Nashua.[189] Although explained benignly as not doing work adverse to a client as opposed to the suggested notion of doing whatever a client wants,[190] PWW and Merrimack sought to convert their loyalty, along with the assertion that Sansoucy had predetermined value and the methods of valuation he would and would not use, into advocacy under USPAP in an effort to discredit the reliability of their Appraisal Report (Exhibit 1007A).

Although Sansoucy, neither a certified or licensed appraiser in New Hampshire, is not technically subject to USPAP,[191] both Sansoucy and Walker, whose compliance with USPAP was raised only because of his association with Sansoucy, fully complied with its requirements. Their work on behalf of Nashua was no different and no greater advocacy than the work performed by Reilly on behalf of PWW. In his May 22, 2006 testimony (Exhibit 3017), for example, Mr. Reilly concluded that the Sansoucy/Walker Report contained "14 fundamental errors", which made it one of the most flawed appraisals he had reviewed and rendered its conclusion an unreliable indicator of value.[192] Discrediting the Sansoucy/Walker Report certainly advances the interest of PWW and when Reilly went beyond defending his own appraisal he was engaged in advocacy.[193] If the Sansoucy/Walker appraisal is not reliable under USPAP, the same is true of the Reilly appraisal.

What PWW ignores in this argument, however, is that appraisers are often engaged to do more than render a value and that there different roles are permitted under USPAP. USPAP distinguishes between "valuation services" defined as services pertaining to aspects of property value and "appraisal practice" defined as valuation services performed by an individual acting as

[189] Transcript September 4, 2007, Page 45.
[190] Transcript September 10, 2007 (Afternoon) Pages 90-94.
[191] New Hampshire Real Estate Appraiser Board, Rule Rab. 301,01(F).
[192] Exhibit 3017, Pages 2(1), 3(2).
[193] Exhibit 3259, Page 1 (advocacy defined as "representing the cause or interest of another…").

an appraiser.[194] USPAP applies to appraisal practice,[195] but when a person who acts as an appraiser performs valuation or other services, the only USPAP requirements is not to mislead the users of the service about the capacity in which he is acting.[196] Services, which are neither appraisal practice or valuation services are obviously not governed by USPAP.

The relationship between appraisal practices and valuation services is well illustrated by the figure in Advisory Opinion 21 to USPAP.[197] As explained by Mr. Walker the inner circle representing active appraisal work required full compliance with USPAP and as you move away from the center what is required to make sure the user is not mislead about the services being performed.[198] Walker and Sansoucy, when the services they provided to Nashua were within the circle met the requirements of USPAP. The fact that they had previously valued the PWW assets in 1995 and 2002 provided a level of knowledge about the value of the assets in 2004, which Sansoucy shared with the Aldermen. That knowledge, however, was neither a prejudgment of the 2004 value nor a promise of what the value the appraisal would produce. Nor did that knowledge create a bias under USPAP any more than Reilly's work in Peoria[199] created a bias in his appraisal.

The services provided by Sansoucy in addition to the appraisal performed by Walker were outlined in the contract with Nashua.[200] Those services, which go beyond appraisal practice and constitute valuation services are clearly identified and explained. The USPAP required that an appraiser not misrepresent his role was satisfied by the contract. It is important to note that many of the services to be performed are neither appraisal practice or valuation

[194] Exhibit 3259, Page. 183.
[195] Ibid.
[196] Exhibit 3259, Page 185.
[197] Exhibit 3259, Page. 186.
[198] Transcript, September 10, 2007 (Afternoon), Page 71-72. See also explanation of figure at Exhibit. 3259, Page. 186.
[199] Exhibit 1084.
[200] Exhibit 3036.

services and are not, therefore, covered by USPAP.

B. THE VALUATION TESTIMONY AND OPINION OF VALUE PRESENTED BY ROBERT REILLY IS UNRELIABLE.

PWW's expert valuation witness, Robert Reilly, has testified that the value of PWW's assets as of December 31, 2004 was $248,400,000,[201] which he updated to $273,400,000 as of December 31, 2005.[202] Both estimates of value are based upon a hypothesis, which is not supported by appraisal theory, the facts of this case or the law of New Hampshire. The hypothesis in Reilly's own words is that the likely population of hypothetical willing buyers includes "any incorporated New Hampshire city or town" including Nashua and "any existing or yet to be formed district".[203] Because this hypothesis, which is the foundation of his inflated opinion of value fails, his testimony and conclusions of value are unreliable and not entitled to any weight.

1. The Reilly hypothesis results in an estimate of investment value rather than fair market value.

Because of his hypothesis, Reilly endows his hypothetical not-for-profit public entity buyer with certain benefits or synergies that are not available to other potential buyers (IOUs), including the avoidance of income and other taxes, access to low-cost municipal financing and less regulation.[204] As previously noted, these benefits are not inherent in the PWW assets but rather are available only to the particular class of hypothetic buyers. By using his hypothesis Reilly has focused not on a "typical buyer" but rather a "particular buyer" which establishes not fair market value but rather investment value.

The Appraisal of Real Estate, 12th Ed. defines investment value as "the specific value of a

[201] Exhibit 3007, Page 3(1).
[202] Exhibit 3021, Page 3.
[203] Exhibit 3007A, Page 3(2).
[204] Exhibit 3007A, Page 4(3).

property to a particular investor or class of investors based on individual investment requirements; distinguished from market value, which is impersonal and detached"[205] (emphasis supplied). It further notes that in contrast to fair market value," investment value is value to an individual, not necessarily value in the marketplace.[206] By relying on his hypothesis, Reilly has created a buyer, who because of the benefits and synergies available to it, has the ability if it becomes necessary as a part of its investment decision to pay more for the property. The ability to pay more, which is what Reilly is really measuring, however, is not the same as fair market value.[207] As a result, the Reilly hypothesis does not measure what RSA 38:9 demands – fair or fair market value – and is contrary to sound appraisal theory.

2. The Reilly hypothesis is not supported by the market.

If the Reilly hypothesis was true, the sales from IOUs to municipalities should reflect the higher prices they can pay. The ratios established from such sales should be greater than the rations from sales to IOUs. Mr. Reilly, conveniently, however, performed no sales or market analysis other than to conclude from the sales he looked at that there were no comparables. He asks the Commission to accept his hypothesis not because the evidence supports it but because he says it is true. After all, he "literally" wrote the book on business valuation.[208]

In fact the only empirical evidence in the case about whether municipalities pay more than IOU's came from Nashua's witness, Glenn Walker. In his sales or market approach Mr. Walker prepared a scatter graph for the sale price to EBITDA ratio, on which he relied, for all twenty-eight sales he identified.[209] He subsequently, for the benefit of the Commission,

[205] *The Appraisal of Real Estate, 12th Ed.*, Page 26.
[206] Ibid.
[207] Transcript September 12, 2007, Page 76.
[208] Exhibit 3007, Page 5(3).
[209] Exhibit 1007A, Page 54(49).

identified the municipal sales on the scatter graph.[210] These sales clearly cluster in a pattern in the middle of the chart, similar to investor owned sales, demonstrating with market based evidence that the Reilly hypothesis is incorrect. If the Reilly hypothesis was correct and not-for-profit public entities were expected to pay a premium of almost twice what a typical buyer would pay, it is probable that Pennichuck Corporation's financial advisor, in the 2002 auction of the Company, S.G. Barr Devlin ("SGBD") would have relied on it. Certainly SGBD was aware of the benefits that such entities possess[211] but when it identified strategic partners for the Company there were no cities or towns or districts on its list.[212] They were not included because SGBD recognized that cities, towns and districts do not pay more than other purchasers, unless they are driven by investment decisions which are peculiar to their needs. In other words, it was apparent that SGBD, which had access to much of the same sales information as Walker and Reilly, did not view not-for-profit public entitles any different than any other purchasers.

PWW will attempt to distinguish the 2002 auction and what SGBD did by arguing that the auction was for Pennichuck Corporation's stock and a municipality could not buy stock. Such an argument ignores the Tilton Northfield Aqueduct Company sale of stock to the Tilton and Northfield Water District[213] and the fact that there is no prohibition against a municipality using a stock purchase as a vehicle to acquire assets.[214] Mr. Reilly tried to distinguish the Tilton Northfield stock sale by suggesting that a municipality can acquire the stock of a private corporation but not a publicly traded corporation.[215] He testified that he gained this understanding from PWW's attorneys but couldn't remember the method of communication.[216]

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[210] Exhibit 1007E, See also Transcript, September 10, 2007 (Afternoon) Pages 85, 89.
[211] Transcript September 12, 2007, Page 77.
[212] Transcript September 12, 2007, Page 71; Exhibit 1094 Page 33.
[213] Order No. 24562, December 9, 2005.
[214] Transcript September 12, 2007, Pages 73, 74.
[215] Transcript September 12, 2007, Pages 74, 75.
[216] Ibid.

One can only imagine what the attorneys might recall about this communication and the validity of Reilly's understanding. There is no such distinction in the NH Business Corporation Act, RSA 293-A, or elsewhere.

3. The Reilly hypothesis is not legally permissible.

Mr. Reilly's hypothesis is founded on the conclusion "that any likely buyer has to be legally able to buy the subject assets".[217] Consequently, under his hypothesis, any New Hampshire city or town or any existing or yet to be formed district must be legally able to buy the PWW assets.[218] In fact he agreed that the Town of Lancaster, as an incorporated New Hampshire town, was legally able to buy the PWW assets[219] and that Nashua was legally able to acquire the assets of PEU and PAC.[220]

Under New Hampshire law, cities, towns, regional water districts and other municipal corporations are subdivisions of the State and have only the powers the legislature grants them.[221] In order for a city, town or district to acquire the assets of a utility, therefore, there must be a specific grant of authority from the legislature. That grant of authority is contained solely in RSA 38, which applies not only to the taking of utility assets but also to their consensual sale.[222]

Although Mr. Reilly believed he had received a memorandum from PWW's attorneys, which confirmed his understanding that any New Hampshire city, town or district could acquire the assets of PWW,[223] it turned out there was no such memorandum. One of the PWW attorneys recalled a conversation with Mr. Reilly about the subject but it was different from his ultimate

[217] Transcript, September 12, 2007, Page 49.
[218] Ibid at Pages 50, 51.
[219] Ibid at Page 51.
[220] Ibid at Pages 52, 53.
[221] 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).
[222] RSA 38:2, 7, 8, 9, 10.
[223] Ibid at Pages 48, 49.

hypothesis.[224] Assuming the same information was actually conveyed to Mr. Reilly, his hypothesis is a considerable leap. Moreover, with the exception of the discussion about RSA 38 and the ability of the State or United States government to acquire the assets, the information given to Mr. Reilly was wrong. There is no authority in RSA 52 for a village or other district to acquire or take the assets of a utility. The grant of that authority is contained solely in RSA 38:4.

In order to assess whether the Reilly hypothesis is legally permissible, the question then becomes whether any New Hampshire city, town or district can acquire the assets of PWW under RSA 38. The answer to that question is contained in RSA 38:6. After a municipality takes the required votes to establish a utility, RSA 38:6 requires notice to the "utility engaged…in… distributing…water for sale in the municipality". The notice provisions of RSA 38:6 apply whether the acquisition is consensual or pursuant to a taking. Consequently, notwithstanding the Reilly hypothesis and notwithstanding his understanding that a municipal buyer did not "have to be actually physically located within the Pennichuck service area",[225] the only New Hampshire city, town or district that could acquire PWW's assets is one in which PWW is engaged in distributing water for sale. Although PWW serves a number of satellite systems in other communities, as a practical matter the only likely and legally permissible municipal buyer is Nashua. This Commission has already ruled in this case, that the provisions of RSA 38:6 precluded Nashua from taking the assets of PEU and PAC.[226] As noted above, there is nothing in RSA 38:6 which limits its applications to takings. Even if the acquisition is consensual, the notice must be given and is limited to the utility engaged in distributing water for sale in the municipality. Moreover, making a distinction between a taking and consensual sale makes no sense give the language of RSA 38:6. Even the language that a municipality shall acquire plant

[224] Ibid at Pages 144, 145.
[225] Transcript, September 12, 2007, Pages 48, 49.
[226] Order No. 24, 425, January 21, 2005.

or property outside the municipality which "the public interest may require", as the Commission noted, is limited by the notice requirement.[227]

Reilly sought to bolster his hypothesis by relying on *Southern NH Water v. Hudson*, 139 NH, 139 (1994) which he argued held that hypothetical buyers for water companies in New Hampshire consist of both municipalities and private regulated companies.[228] Any fair reading of the case without a bias toward achieving the highest possible estimate of value, would conclude that the Court recognized for purposes of calculating economic depreciation that the utility's argument that a buyer would have to be regulated ignored RSA 38:3 (now RSA 38:3,4 and 5), which permitted the Town of Hudson, not any New Hampshire city, town or district to acquire the utility's property. This actual holding is a far cry from what Mr. Reilly has represented to the Commission.

4. Reilly's use of a long-term growth rate of 2% is not supported by the evidence and is contrary to the rate analysis performed by PWW's witness, John Guastella.

For purposes of calculating economic obsolescence in his cost method and value in his income approach, Reilly utilized a 2% long-term growth rate which he characterized as "inflation only, and no real growth".[229] He further assumed, for purposes of his discounted cash flow analysis,[230]which he used to establish value in his income method, that capital expenditures would equal depreciation[231] and rate base would remain constant.[232] The fact that the rate base remained constant was what he meant by "no real growth".[233]

Notwithstanding his assumption that there would be no growth in rate base and that expenses would increase at the same level as revenues Reilly continued to insist there would be a

[227] Ibid at Pages 12, 13.
[228] Transcript September 12, 2007 Page 65.
[229] Transcript September 12, 2007, Pages 99, 100.
[230] Exhibit 3007X, RFR-1 (Exhibit 21).
[231] Transcript, September 12, 2007, Page 148.
[232] Ibid at Pages 154, 155.
[233] Ibid.

2% growth in earnings.[234] His analysis, however, is completely contrary to that of John Guastella and defies sound economics. Mr. Guastella, for purposes of his rate analysis, projected PWW operations including revenues, expenses and rate base[235] over a similar period as Reilly and likewise concluded that rate base would either remain constant or decline slightly after 2009.[236] Unlike Reilly, however, during the period of flat or declining rate base, Guastella projected a decline in earnings or net operating income.[237] When asked about this in his deposition, Guastella admitted that a declining rate base would result in declining earnings.[238] And he is right! A regulated utility such as PWW experiences growth in earnings through capital expenditures and rate increases allowed by the Commission to pay for the capital additions. If the earnings of PWW increased at Reilly's long term growth rate of 2% without capital expenditures as he projects, and as he must to achieve the level of value he has, the company would soon be over-earning on its allowed rate of return and an adjustment to rates would be necessary.[239]

Reilly's a long term growth rate of 2%, even though seemingly small, had a huge impact on his valuation under the income method. Because of his hypothesis he used a municipal discount rate of 5%. The long-term growth rate of 2% represented 40% of his terminal value conclusion.[240] In the case of his updated valuation, the terminal value conclusion was $284,667,000[241] of which $113,866,800 was attributable solely to the 2% long-term growth rate. Without a growth rate, as projected by Guastella, the Reilly income valuation would have been

[234] Ibid at Page 154.
[235] Exhibit 3010, Page 7.
[236] Exhibit 3010X, Schedule B; Transcript, September 12, 2007, Page 155; Transcript, September 18, 2007, Page 132.
[237] Ibid.
[238] Transcript, September 12, 2007, Page 155.
[239] Exhibit 1015X, Page 12(11).
[240] Transcript, September 12, 2007, Page 150.
[241] Exhibit 3021X (Exhibit 21).

approximately $170,800,000 and caused a considerable decline in his overall valuation estimate.

What Reilly did with his use of the 2% long-term growth rate is consistent with his entire approach to his appraisal. Whenever he could make a choice, he always chose whatever would increase the value of the PWW assets. He chose the hypothetical buyer that would result in the greatest value; he chose a long term growth rate when there was no projected growth to rate base; and as will become apparent, he chose a municipal capitalization rate and chose not to do a sales or market approach. He knew from his Peoria appraisal that these were choices that would result in the highest possible valuation which was clearly his goal.

5. The use by Reilly of a municipal capitalization rate in the calculation of economic depreciation in the cost approach and in the development of value in the income approach was not warranted.

Because of the benefits or synergies available to his hypothetical not-for-profit public entities, Mr. Reilly has assumed a 5% rate of return, which he used to establish the capitalized income shortfall from which he calculated economic obsolescence attributable to his cost method.[242] Because his hypothesis concerning the likely buyers of the system is flawed and fails, his use of a municipal cost of capital and the resulting rate of return is likewise flawed and must fail. Instead, the cost of capital and rate of return of a typical buyer or investor should have been used.[243] A good proxy for a typical buyer is the rate of return of PWW itself, or 8.68%, according to Walker.[244] If a rate of return of 8.68% had been used by Reilly, the economic obsolescence applied to his cost method, instead of 47% would have increased to 68% and resulted in a cost method value of $160,000,00.[245] Because Reilly weighted his cost approach at 60% the overall impact on value would be significant.

[242] Exhibit 3007A, Exhibit 14, 15.
[243] *The Appraisal of Real Estate, 12th Ed.,* Pages 487-493.
[244] Exhibit 1015, Page 13(12).
[245] Ibid; GES Exhibits 16, 17.

If, in addition to using the rate of return of a typical as opposed to a municipal buyer, Reilly's unsupported 2% growth rate was eliminated, the economic obsolescence would have increased to 83% and resulted in a cost approach value of $89,000,000.[246] The cost approach value concluded by Walker was $104,000,000.[247] Correcting the erroneous and unsupported rate of return and long-term growth ate in Reilly's income approach had a similar impact. Changing the rate of return from 5% to PWW's 8.68% alone, would reduce his income method value to $90,000.00.[248] If the 2% long-term growth rate was also corrected, Reilly's income approach value would have been $68,000,000.[249] The Walker income approach value was $80,000,000.[250]

In his correlation of value, Reilly weighted his cost approach 60% and his income approach 40%. If the same weighting was applied to the values estimated after correcting for the erroneous and unsupported rate of return and growth rate, his fair market value would have been $81,000,000[251] which is remarkably similar to Walker's estimate of $85,000,000.

6. Reilly failed to perform a sales or market method valuation because the result would have required him to reduce his estimate of fair market value.

The Appraisal of Real Estate states that:

> The sales comparison approach is a significant and essential part of the valuation process, even when its reliability is limited. Although appraisers cannot always property 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 .[252]

Given the important role in developing value the sales or market approach plays, the reasons for

[246] Ibid.
[247] Exhibit 1007A. Page 48(43).
[248] Exhibit 1015, Page 14(13); GES Exhibit 18.
[249] Exhibit 1015, Page 14(13); GES Exhibit 19.
[250] Exhibit 1007A, Page (64)59.
[251] Exhibit 1015, Page 14(13); GES Exhibit 20.
[252] *The Appraisal of Real Estate, 12th Ed.* Page 421.

Reilly's failure to use it become suspect. It is not enough, as he says, that the sales were not comparable. Even when the market is limited, the appraiser "must search diligently for whatever evidence of market value is available",[253] if only to find evidence to support the other approaches.

In this case, it was not that Reilly was unable to find any sales – he identified 12. And it was not that his research yielded insufficient information to develop ratios that could be applied to PWW. In his Report alone, without reference to his work papers, he provided evidence of its customers and revenues of the acquired water companies both of which can be used to create ratios.[254] Rather it was that Reilly had recently performed a sales comparison approach in Peoria, Illinois, in which he applied these ratios and he knew that it concluded a value almost $100,000,000 less than his income and cost method values,[255] which were based on the same hypothesis concerning hypothetical likely buyers that he has used here. He knew, in other words that the market approach provided no support for his hypothesis or the values he concluded relying on his hypothesis. It is small wonder, therefore, that Reilly did not use the sales or market approach for the PWW assets. He knew it would lower his overall value and he probably knew he wasn't going to use it as soon as he looked at the sales he identified. Using the revenues from these sales and creating the same sales price to revenues ratio used by Reilly in Peoria[256] and recognized as an appropriate ratio or deal multiple in his book,[257] it was immediately apparent that not only didn't they support his overall value but more importantly, how much they supported Walker's value. Taken as a group, the median ratio was 6.89.[258]

[253] Ibid at Page 26.
[254] Exhibit 1007A Pages 41-46(40-45).
[255] Exhibit 1084, Pages 33, 36.
[256] Exhibit 1084 (Ex. 28, 29, 33).
[257] Exhibit 1081, Page 263.
[258] Transcript, September 12, 2007, Page 139; Exhibit 1096.

Applied to PWW's 2005 earnings of $16.9 million it implied a value of $116,400,000.[259] Applied to PWW's 2004 earnings of $15.9 million[260] the implied value is $109,500,000.

When the same analysis is performed for the sales price per customer ratio, also used by Reilly in Peoria,[261] the results are no different. The median price per customer developed from Reilly's 12 sales is $3,243.00. Applied to PWW's 25,000 customers, it yields an indicated value of $81,000,000.

The sales approach was not used by Mr. Reilly because it did not support the values derived from his flawed hypothesis. Notwithstanding that it was the only empirical data about what buyers were doing in the market place, he ignored it because it did not fit his model. The irony of Mr. Reilly's criticism of Sansoucy and assertions of USPAP violations is not lost on Nashua.

7. Reilly's value of PWW alone exceeds the value of Pennichuck Corporation including PWW.

On December 31, 2005, the day for which Reilly concluded a value of $273,400,000 for PWW alone, the stock of its parent, Pennichuck Corporation, closed at $20.45.[262] The outstanding number of shares was 4,200,000 (rounded) and its outstanding debt was $41,456,000.[263] Applying the stock and debt method which is premised on the assumption that the market value of the equities and liabilities that comprise an enterprise equal its market value[264], indicates a value for Pennichuck Corp., including PWW, of $127,346,000. This enterprise value of Pennichuck Corporation is consistent with the opinion of value expressed by

[259] Transcript, September 12, 2007, Pages 136, 137.
[260] Exhibit 1075, Page 2.
[261] Exhibit 1084 (Exhibit 28, 29).
[262] YahooFinance http://finance,yahoo.com/g/hp?s=PNNW&a=ll&b=31&c=2005&d=118&d=11&e=2005&g-d
[263] Pennichuck Corp., Form 10-K, December 31, 2005 http://www.sec.gov/Archives/edgar/data/788885/0000910647068005/penn-10K.htm
[264] Exhibit 1007A, Page 57(52).

the Company's former chief executive officer, Maurice Arel,[265] the opinions of value expressed by S.G. Barr Devlin prior to the 2002 auction,[266] the bids received in the auction[267] and the offer of Philadelphia Suburban, which was accepted.[268]

If the value of PWW alone is $273,400,000, no buyer, including a municipal buyer, would pay that price when it could pay approximately one-half, buy the whole company and sell off the assets it did not want. Mr. Reilly's value defies not only accepted appraisal theory, it defies common sense. Nashua urges the Commission to give the incredible Reilly estimate of fair market value the weight it deserves – none.

C. UNDER NASHUA OWNERSHIP RATES WILL BE LESS THAN RATES LIKELY TO BE CHARGED BY PWW OVER THE SAME TIME PERIOD.

In GES Exhibit 2-7-Revised ll/14/2006[269] Nashua has presented a comparison of the revenue requirements for PWW and Nashua using the same methodology required by the Commission for rate cases. Excluding year 2007, the savings that accrue to ratepayers under City ownership are approximately $360,000,000[270]. The Nashua revenue requirements are largely driven by the cost of its acquisition bonding and the cost of operation of the system. For purposes of the analysis Nashua has assumed the Walker value as well as the cost of completing the water treatment plant and additional reconstruction of the system.[271] It further has assumed capital spending of $6 million per year, which is reflected by a system repair and replacement bond of $18 million every 3 years.[272]

The starting point for the revenue requirements for PWW is the 2004 Annual Report

[265] Exhibit 1059 ($119,200,000).
[266] Exhibit 1094, Page 41 ($85,000,000 to $96,000,000).
[267] Exhibit 1093, Page 40-51.
[268] Exhibit 1059 ($106,000,000)
[269] Exhibit 1017
[270] Exhibit 1017, GES Exhibit 7.
[271] Exhibit 1017, GES Exhibit 5.
[272] Ibid.

escalated annually.[273] What Nashua's analysis shows clearly is that the City's operation and maintenance expense is $1.7 million less than PWW's in the first year alone and that the difference increases each year.[274] Nashua is able to achieve lower cost of operation as a result of its contract with Veolia, the elimination of PWW's bloated administrative and overhead expense and the unique benefits and synergies available to municipalities.

The Veolia contract presented a unique model in Hew Hampshire. Unlike the traditional regulated model used by PWW in which there is no incentive to control cost, the Veolia contract introduced the public-private partnership which brings significant advantages to customers because it exposes both the cost and quality of service to competitive market forces[275]. These advantages were recognized by PWW's former CEO, Donald Correll who testified to a Congressional subcommittee, while still employed by PWW, inter alia, that the public-private partnership frees up capital for infrastructure without burdening the customer or the taxpayer and that communities relying on the partnership realize cost savings of up to 40%.[276]

PWW made great moment of what it claimed were areas not covered by the Veolia contract for which it argued there would be additional expense. What this argument overlooked or ignored was the fact that the Veolia contract was designed to mirror PWW's operation, maintenance and capital cost.[277] As a result, if Nashua overlooked any expenses in the Veolia contract, (and it submits that the evidence was clear that it did not) both Nashua **and** PWW would have that additional cost and there would be no change in the analysis. For example, PWW, cross-examined the Veolia panel at length about the fact that unplanned maintenance was a supplemental service under the contract for which Nashua would have to pay above the annual

[273] Exhibit 1007, Page 7.
[274] Exhibit 1017, (GES2, line 10); (GES 4, lines 2-11).
[275] Exhibit 1016, (SMS Exhibit., Pages 5, 7, 9).
[276] Transcript, September 13, 2007, Page 20; Exhibit 1016 (SMS, Exhibit 2).
[277] Exhibit 1007, Page 5.

fee. Lost in this discussion was the fact that under PWW ownership ratepayers paid for unplanned maintenance whenever it occurred in the same manner. The fact that Nashua has to pay Veolia for unplanned maintenance creates no benefit to the ratepayer under PWW ownership. In either case, the cost will be incurred and paid for. What is different, however, is the ability of Veolia to perform preventive and predictive maintenance to reduce the cost of more expensive unplanned maintenance, something PWW's inability to use Synergen effectively, precludes.

Another reason for Nashua's lower cost of operations is that in its model it will be able to eliminate virtually all of the administrative and general expense carried by PWW, especially the portion attributable to salaries. In 2004, administrative and general salaries were approximately 58% of the companies' total salary cost.[278] By 2005 administrative and general salaries had increased to 76 percent.[279] Officers' salaries alone grew from $913,307 in 2004 to $1,129,114 in 2005.[280] According to the 2005 Annual Report[281] the five officers of the Company made almost as much as the 45 operations and maintenance employees. The elimination of PWW's administrative expense, alone, accounts for much of the difference in operation and maintenance expense.

The balance of the difference between Nashua and PWW's cost of operations were attributable to the synergies of a municipality as recognized by Messrs. Reilly and Guastella in addition to Sansoucy. A relatively comprehensive list of such benefits is contained in Sansoucy's Reply Testimony of May 22, 2006[282] and does not need to be repeated here.

Nashua's lower cost of operation was also reflected in the rate analysis performed by Mr.

[278] Transcript, September 13, 2007, Page 126; Exhibit 1069B (F-58).
[279] Transcript, September 13, 2007, Page 127; Exhibit 1070 (F-58).
[280] Exhibit 1069-B (F-58); Exhibit 1070 (F-58).
[281] Exhibit 1070 (F-58).
[282] Exhibit 1015, Pages 41-44 (44-43).

Guastella. Under PWW ownership, operating expenses were projected at $17.7 million in 2008 and escalated to $25.3 million in 2015.[283] Under City ownership, Guastella projected operating expense at $9.3 million in 2008, which escalated to $14.3 million in 2015 – a considerable savings over PWW's projected operating expense.

Moreover, the difference between the Nashua and PWW operating cost in the Guastella analysis did not even consider the savings that accrue from the Veolia contract. In fact, he never even looked at the Veolia contract[284] or tried to determine if Veolia would have the same employee cost as PWW.[285] He just assumed that the City could not, through the Veolia contract be more efficient than PWW and consequently adjusted PWW's operating cost only to eliminate the municipal synergies.[286] The revenue requirements analysis performed by Guastella was nothing more than an attempt to demonstrate that Nashua could pay Mr. Reilly's original value of $248,000,000 and not raise rates.[287] He readily admitted that using the Walker value of $85,000,000 would result in the City needing significantly less revenue[288] and that if the City's operating expenses were less than he projected the rate differential between PWW and the City would increase.[289] It is no wonder that PWW did not request that he do a similar analysis with Reilly's updated value of $273,400,000.[290] Clearly with an increased revenue requirement of $25,000,000 Nashua would have to raise rates.

Although Mr. Guastella says he excluded from his City operating costs those costs a municipality would not incur, there were some that be overlooked. For example, notwithstanding that under Nashua's proposal it will have no employees, Mr. Guastella requires

[283] Exhibit 3016X, (JFG-1 Revised, Schedule B).
[284] Transcript, September 18, 2007, Pages. 105, 110, 111.
[285] Ibid at Pages 105, 106.
[286] Ibid at Pages 103-107.
[287] Transcript, September 18, 2007, Page 101.
[288] Ibid at Page 102.
[289] Ibid at Page 103.
[290] Ibid at Pages 129, 130.

the City to pay a payroll tax of $427,272, escalating to $585,574.[291] In addition, he was unaware of the Sarbanes-Oxley law and did not exclude that cost from City operations[292] although it is significant. Those 2 items alone would have reduced Nashua's overall revenue requirements by well in excess of $4 million.[293]

In order to conclude Nashua could pay $248,400,000 and not raise rates, Mr. Guastella had to use what he called revenue anticipation notes or RANs. These notes required payment of interest only for the first three years. No principal was paid until the permanent financing occurred. Although Mr. Guastella argued it could be beneficial, the use of RANs created and deferred interest rate risk. If during the 3-year period they are used, interest rates rise, when the permanent financing is placed, it will be subject to the higher rates. In the same vein, the municipality, if RANs are used, will incur issuance costs for each year of the temporary financing as well as the issuance costs for the permanent financing. Under traditional revenue bond financing, the issuance fees would be paid only once. It is important for the Commission to recognize that under the Guastella financing plan what is really happening in the first 3 years, is that current ratepayers will not pay the actual cost of service which will be borne by future ratepayers.

Another problem with Mr. Guastella's financing plan is that he does not assume the use of revenue bonds[294] or assume an interest rate attributable to revenue bonds.[295] RSA 38:13 requires a municipality to issue bonds and notes "pursuant to RSA 33-B" to purchase utility assets. RSA 33-B, entitled "Municipal Revenue Bonds", applies to the financing of "revenue

[291] Ibid at Pages 112, 113; Exhibit. 3016X, (JFG-1 Revised, Sch. C).
[292] Transcript, September 18, 2007, Page 113.
[293] Exhibit 3016X, (JFG-1 Revised, Sch. C).
[294] Transcript, September 18, 2007, Pages 126, 127.
[295] Ibid at Pages 128, 129.

producing facilities", the definition of which includes "waterworks".[296] It further distinguishes such bonds from general obligation bonds by stating the bonds issued under RSA 33-B "shall not be deemed to be a pledge of the faith and credit of…the municipality".[297] By not assuming the use of revenue bonds the Guastella financing plan does not meet the requirements of RSA 38 and as a result is unreliable.

In addition, the interest rate used by Mr. Guastella is not reliable. Not only is it not an interest rate associated with a revenue bond,[298] it was a figure he simply accepted from Mr. Reilly[299] instead of making his own analysis.[300] And once again, true to form, Mr. Reilly made a choice which best suited PWW. When PWW needed the value to be high, Reilly used a cost of capital of 5%.[301] When PWW needed Nashua's need for revenue to be low, Reilly provided Guastella a cost of capital of 4.6%.

Most importantly, what the Guastella revenue requirement analysis demonstrates is that any value determined by the Commission that is less than that derived by Reilly, there will be immediate and growing savings to ratepayers under Nashua's ownership. The fact that his analysis of Nashua's costs ignores the savings from the Veolia contract and fails to give effect to certain synergies available to the City only increases those savings. Contrary to what he intended, Mr. Guastella's analysis demonstrates that at any value less than what Mr. Reilly has opined, the acquisition is in the public interest.

In his zeal to support PWW, Mr. Guastella has also reworked the Sansoucy revenue requirements analysis in an effort to demonstrate that Sansoucy had understated Nashua's

[296] RSA 38-B:1 (VI).
[297] RSA 33-B:2.
[298] Transcript, September 18, 2007, Pages 128, 129.
[299] Ibid at Page 115.
[300] Ibid at Page 129.
[301] Exhibit 3007, Page 39 (38).

operating costs.[302] In doing so, Guastella relied solely on PWW's President, Donald Ware, as the source of his figures[303] and admitted that his analysis was only as good as the information provided to him by Mr. Ware.[304] In fact, many of the adjustments or figures provided by Mr. Ware were wrong, or overstated, including taxes,[305] insurance,[306] mailing cost for bills,[307] utilities (electric and heat),[308] maintenance of vehicles,[309] providing computers,[310] equipment maintenance[311] and PWW labor rates.[312] In addition, he was also wrong when he stated that Veolia would gain no operating efficiencies from the use of computerized maintenance management systems (CMMS) also referred to as Synergen, because PWW has used CMMS for over 5 years.[313] By relying on Mr. Ware's erroneous and overstated adjustments and changes to the operating costs used by Sansoucy, Mr. Guastella's attempt to discredit the Sansoucy analysis fails.

V. PENNICHUCK FAILED TO DEMONSTRATE ANY ALLEGED HARM TO PENNICHUCK EAST UTILITY, PITTSFIELD AQUEDUCT COMPANY AND PENNICHUCK WATER SERVICE CORPORATION THAT CANNOT BE MITIGATED OR ADDRESSED THROUGH CONDITIONS

Pennichuck has argued that if Nashua is permitted to acquire the assets of PWW, its two regulated affiliates, PEU and PAC will require rate increases in excess of 64% to continue to provide service to its regulated customers, and its unregulated contracts with PWSC. Pennichuck has in turn argued that because of the alleged harm to its sister companies, the

[302] Exhibit 3020, Page 2(1).
[303] Transcript, September 18, 2007, Pages 135, 135, Exhibit. 3020, Page (2)1.
[304] Transcript, September 18, 2007, Pages 135, 135, 138.
[305] Transcript, September 11, 2007, Pages 24-29.
[306] Ibid at Pages 30-33.
[307] Ibid at Pages 33-34.
[308] Ibid at Pages 35-37.
[309] Ibid at Pages 37-39.
[310] Ibid at Pages 39-41.
[311] Ibid at Page 42.
[312] Ibid at Pages 47-54.
[313] See generally Motion to Strike Testimony of Donald Ware, dated September 25, 2007.

acquisition of PWW's assets is not in the public interest.

As set forth herein: a) the alleged harm is vastly overstated and self-inflicted; b) the Guastella analysis of the alleged harm is deficient; c) any harm at the level alleged goes beyond economy of scale that benefits all customers of the system and constitutes an unreasonable subsidy; d) any alleged harm to PWSC, an unregulated company, should not be considered by the Commission; and e) it is beyond the scope of this Docket to determine the extent of the alleged harm, if any, to PEU and PAC.

A. ANY ALLEGED HARM TO PEU AND PAC IS SELF-INFLICTED.

Nashua commenced this proceeding on March 25, 2004 by filing its *Petition for Valuation Pursuant to RSA 38:*9 that sought to acquire all of the assets of PWW, PEU and PAC. As explained in the November 19, 2004 testimony of Brian McCarthy, Nashua sought to acquire the assets of PEU and PAC to eliminate any potential harm to their customers in the form of rate increases and diminished service and to mitigate harm to Pennichuck Corp., and its shareholders by eliminating the need to operate smaller and less profitable portions of the system.[314] Nashua stands by its commitment to acquire the assets of PEU and PAC at their fair market value as determined by the Commission, and has proposed for that purpose.[315]

As part of a legal strategy, to create harm to its own customers in order to argue that Nashua's Petition should not be approved, PWW moved to dismiss PEU and PAC from the case. It then, instead of making the harm part of its public interest case in January 2006 when it would have been subject to significant discovery and scrutiny, waited to file it with its rebuttal testimony on May 22, 2006 when the remaining discovery and opportunity for rebuttal testimony had passed. Even the Commission Staff Director, Mark Naylor, commented that there was no

[314] Exhibit 1001, Testimony of Brian McCarthy, November 22, 2004, Pages 8, 9.

[315] See Appendix A, proposed Condition 11.

opportunity for discovery on the alleged harm.[316] If PWW had been truly concerned about the impact on the ratepayers of PEU and PAC it would not have moved to dismiss them from Nashua's petition. By doing so it has crated the very harm that forms the basis of its legal strategy that the acquisition is not in the public interest. It further demonstrates that PWW's real concern is the shareholders of Pennichuck Corp., as opposed to its ratepayers and the ratepayers of PEU and PAC.

Over time PWW has created a corporate structure that was largely driven by its acquisition of other systems and creation of other companies. Rather than provide PEU, PAC and PWSC with their own employees and assets, PWW retained them and performed all service on their behalf. Rather than require each company to pay its actual cost of service, Pennichuck has devised a Cost Allocation and Services Agreement,[317] under which costs incurred by Pennichuck Water Works and its parent, the Pennichuck Corporation, are allocated to its regulated utilities regardless of the actual cost to each. In theory, its unregulated companies also pay a share of the cost allocation. In practice, however, their costs, calculated under the Agreement, are non-existent.[318]

Pennichuck uses this corporate structure to argue that any event which affects PWW will have a ripple effect on PEU and PAC and will permit PEU and PAC to cry that they have been harmed. If PWW's argument is accepted, it means that, contrary to the policies established by RSA 38, PWW could never be acquired because of the harm it alleges to the others precludes a finding that the acquisition is in the public interest.[319] And this will be so in spite of the fact that, as in this case, the number of customers in the company to be acquired (25,000) dwarfs the

[316] Exhibit 5001, Page 46.
[317] Exhibit 3001A, p.1
[318] See eq. Exhibit 1132, Page 4 (Southwood paying $2,000 in corporate costs relative to $957,000 by PWW).
[319] Transcript, September 26, 2007, Page 132

number of customers in the remaining companies (6,300). Nashua urges the Commission not to subvert the legislative policy contained in RSA 38 to this argument.

B. THE GUASTELLA ANALYSIS OF ALLEGED HARM IS DEFICIENT.

Pennichuck alleged, through the testimony of John Guastella, that if Nashua acquired PWW, PEU would need a rate increase of 64% and PAC a rate increase of 66%.[320] Their combined additional revenue requirement under his analysis was $3.4 million.[321]

In order to obtain these results Guastella determined the employee needs of the companies, including PWSC, the assets necessary for their operations and the cost of operation.[322] Although he objected to the term, he then allocated cost to the employees, assets and operations based on the PWW model without any consideration of whether the model was justified or whether a less costly model could be used. For example, he did not test his analysis by looking at the operations of similarly sized water companies, chanting the Reilly mantra that there are no similarly sized or comparable water systems.[323] Despite Nashua's Petition to acquire both PEU and PAC in this proceeding, he did not consider a sale of the two companies to Nashua or a third party.[324] He did not look at how PAC operated before its purchase by Pennichuck.[325] Nor did he consider the market or actual contracts to operate water systems by contract operators like Veolia Water to see if his conclusions about the cost of operations made sense.[326] Given his regulatory background,[327] it is apparent he was stuck in the regulated model and unwilling to consider anything different. Or perhaps he just didn't want to know what such comparisons would show.

[320] Exhibit 3016, Page 1.
[321] Exhibit 3016, Page 2.
[322] Exhibit 3016, Page 2.
[323] Ibid at Pages 141, 142.
[324] Ibid at Page 155.
[325] Ibid at Pages 142,143.
[326] Ibid at Page. 143.
[327] Exhibit 3010, Page 2-4.

There is evidence that these alternatives could have reduced PAC and PEU's costs. Even Mr. Correll recognized that a big company that either purchased or operated PEU and PAC would have economies of scale that could replace those existing under PWW.[328] More importantly Mr. Correll testified that the purchase of PEU and PAC was something his company, American Water, would take a look at.[329] Donald Ware also testified the sale of PAC and PEU to Nashua should be considered .[330] Guastella's failure to even consider such possibilities, along with everything else he refused to look at, makes his analysis suspect.

A simple way to test Guastella's conclusion that PEU and PAC could not be operated at a lower cost is to compare the rates of the new PEU and PAC with the Guastella rate increases in place to the rates of other New Hampshire water utilities. Application of a 64% increase to the listed rate of PEU would raise its GMS-A rate from $604.96 to $992.13.[331] Likewise, increasing PAC's rates by 66% would raise them from $413.64 to $686.64.[332] With the exception of two companies, PEU and PAC would have the highest rates in New Hampshire.[333] PEU is comparable in size with Aquarion Water Company[334] but its new rates would be more than double Aquarion's rates. PAC is comparable in size to Hanover Water Works[335] but its new rates would be one-third greater. If these similarly sized water companies **in New Hampshire** can operate at rates so much lower than Guastella's analysis requires, there is something wrong with what he has done.

Another measure of the Guastella analysis is his calculation of a proposed mitigation

[328] Transcript, September 13, 2007, Pages 10-13.

[329] Ibid.
[330] Transcript, September 11, 2007, Page 61.
[331] New Hampshire Hampshire PUC Water Company Annual Rates (July 2007); http://www.puc.state.nh.us/Water-Sewer/Water%20Company%20Annual%20Rates.pdf.
[332] Ibid.
[333] Ibid.
[334] Exhibit 1132, Regulated Water Systems.
[335] Ibid.

fund. Using the total revenue shortfall of $3.4 million and a capitalization rate of 6.5% to 8.5%,[336] Guastella suggested a mitigation fund of $40 to $50 million to protect PEU and PAC.[337] The only problem with his suggestion is that his mitigation fund exceeds the regulatory value of the two companies. What Mr. Guastella has proved by suggesting a mitigation fund that exceeds the value of the two companies is what Nashua has urged from the beginning. Under RSA 38:6 and RSA 38:11, the PUC should determine that the public interest requires that Nashua purchase the property of PEU and PAC. The mitigation fund discussion further demonstrates, that if the Commission does not require the purchase, that a prudent owner of PEU and PAC, concerned with the impact on their ratepayers would consider a sale to Nashua or a third party.

C. HARM AT THE LEVEL PROJECTED BY GUASTELLA DEMONSTRATES THAT PWW PROVIDES AN UNREASONABLE SUBSIDY TO PEU AND PAC.

What is apparent from the Guastella analysis, that if Nashua acquired the assets of PWW, PEU and PAC it would require rate increases of 64% and 66% respectively, is that, under the Cost Allocation and Services Agreement, PEU and PAC, as well as PWSC and Southwood, do not pay anything resembling the actual cost of the service provided by PWW.

If PEU, PAC, and PWSC need additional combined revenue of $3.4 million without PWW that means PWW is providing services to PEU, PAC, and PWSC which have an actual cost of $3.4 million more than what PEU and PAC pay under the Cost Allocation and Services Agreement. The $3.4 million represents $136 for each of 25000 PWW ratepayers that is not being paid by PEU, PAC, and PWSC and would, if paid, offset their rates. Without some demonstrated benefit in return, by any definition, this arrangement results in a subsidy. In fact, there is no hard evidence to demonstrate that the harm to PEU and PAC is not the result of PWSC pricing its contract below market by avoiding their true costs under the Cost Allocation

[336] Why he did not use Reilly's capitalization rate of 5% was never explained.
[337] Exhibit. 3016, p. 3.

Agreement.[338]

Both Staff and PWW point to the Commissions' 1998 Order No. 22,883 in which it permitted an $8.00 per year subsidy by the PWW core ratepayers of the satellite rate payers as justification for the level of support PWW provides PEU and PAC. Their reliance on order No. 22,883, however, is not justified. The subsidy that was allowed in 1998 was **intra** as opposed to **inter** company. Some ratepayers of PWW were subsidizing other PWW ratepayers. In that context rate averaging can make sense. For example, Nashua has recognized the potential for harm by agreeing to continue to charge the satellites the same core rates. The same is not true when the ratepayers of PWW are subsidizing the ratepayers of two separate and distinct companies and the customers of the unregulated PWSC. In addition, the level of subsidy in 1998 was only $8.00 per year. A subsidy of $136.00 per year is 17 times greater and includes unregulated real estate and contract operations simply cannot be justified. It represents approximately one-third of the current rate of $395.52.[339]

D. IT IS BEYOND THE SCOPE OF THIS DOCKET TO DETERMINE THE EXTENT OF HARM, IF ANY, TO PEU AND PAC.

As has been noted, the Guastella analysis was not filed until May 2006 and, thereafter, there was "a pretty limited window of time" to conduct discovery and perform any independent analysis.[340] As a result neither Nashua nor Staff have been able to properly test the Guastella analysis, which is the only attempt to quantify the harm in the case. Nashua has presented a number of deficiencies in the Guastella work which make it unreliable and even Director Naylor admitted that if PEU and PAC came in seeking 60+% interest rate increases, Staff would want to

[338] See generally Exhibit 1132.
[339] NHPUC, Water Company Annual Rates, July 2007.
[340] Transcript, September 26, 2007, Page 129.

see whether there were more economical ways for them to operate,[341] including treating them as "troubled systems" and looking for a buyer.[342]

The public interest standard under RSA 38 does not and should not allow a self-inflicted harm to trump the legislative policy of RSA 38. Moreover, the record concerning the alleged harms is flavored, speculative and untested. Nashua urges the Commission, in light of the way this issue was raised and the lack of discovery and independent analysis, to hold further hearings after appropriate time for discovery and developing the record on what the harm is or to establish a related docket for that purpose. Consistent with Nashua's Petition, Nashua proposes in Appendix A, a condition that would require Nashua to either purchase the assets of PEU and PAC at their fair market value, or, mitigate that harm up to their fair market value.

VI. NASHUA WILL PROMOTE THE PUBLIC INTEREST BY PROTECTING NEW HAMPSHIRE'S LIMITED WATER RESOURCES FOR FUTURE GENERATIONS

The testimony concerning watershed protection highlights some of the differences between a municipally owned water utility and one owned by shareholders. To some extent, it could be argued that publicly owned systems focus more heavily on conservation whereas an investor-owned regulated utility might focus more heavily on installation of best management practices funded using public grants. The general question as to whether one approach or the other is better could be debated. The specific question presented in this case, however, is not open for debate. The following evidence is not meaningfully contested:

- Nashua has taken significant steps to protect the watershed, both by adopting regulations that the NHDES cites as an example for other communities to follow, and by acquiring 483 acres of land within the watershed.

[341] Ibid at Page 132.
[342] Ibid at Page 133.

- Kathy Hersh, Nashua's Director of Community Development, provided testimony that she spoke with Ms. Eileen Pannetier during her preparation of Pennichuck's August 1998 Watershed Management Plan[343] and she told Ms. Hersh that "she was very upset *because Pennichuck management was pressuring her to make changes in her recommendations.*"[344]
- In fact, a July 1997 draft of the Watershed Management Plan, one year prior to the final version, analyzed the potential development of lands owned by Pennichuck's real estate development affiliate, the Southwood Corporation,[345] and stated that: "[t]here is a *significant difference in the pollutant load* from those with conservation and those without"; that development would cause phosphorous levels to "jump to 0.06 mg/l, *nearly twice as high as the current level* and almost three times as high as naturally occurring" and that "*to keep the pollutant load low, Pennichuck and the towns must conserve the existing lands*."[346]
- However, under the pressure described by Ms. Hersh, the same section of the final Watershed Management Plan was watered down to state that "[t]here is not a significant difference in the pollutant load from those with conservation and those without."[347] Ms. Pannetier was able to reverse her earlier conclusion because, shockingly, all of the undeveloped Southwood Corporation lands, formerly owned for water supply protection, was removed from the analysis of conservation lands.[348] By taking these 1000 (+/-) acres of land out of the build out analysis, Ms. Pannetier was able to conclude that there was

[343] Exhibits 3005a (starting at Page 4), 3005b, 3005c, 3005d & 3005e (up to page 30).
[344] Exhibit 1012, Page 7, Lines 10-15 (emphasis in the original).
[345] Exhibit 1109, Page 101, Figure 6-2 (CEI Map showing lands subject to potential development); *see also* Exhibit 1016A
[346] Exhibit 1109, Section 6.4, Page 100 (6-16) (emphasis added).
[347] Exhibit 3005B, Section 6.4, Page 21 (221)(6-15). w
[348] Exhibit 3005B, Figure 6.2, Page 23 (223); *compare to* Exhibit 1109, Figure 6-2, Page 101 and Exhibit 1016A.

not a significant benefit to conservation. However, the original conclusion remains valid, but is simply disguised by the statement that "[a] more significant difference would be noted if the amount of the conservation land owned by Pennichuck Water Works or others were larger."[349]

- This change from the draft to the final report corroborates a key point made in the testimony of Allan Fuller: that "while the CEI reports look real good and it shows that Pennichuck is thinking about watershed management, it doesn't really bring into play the fact that Pennichuck, … at the other side of the coin they're actually developing the land and destroying the watershed, and they know -- because the reports are there, they know what the right thing to do is, and what they're doing is not the right thing."[350]
- During the period that Ms. Pannetier was developing Pennichuck's Watershed Management Plan, including the July 1997 draft recommending that "Pennichuck and Towns must preserve existing lands[,]"[351] Pennichuck continued to transfer its real estate assets to develop commercial and residential projects, including Westwood Park, LLC on December 4, 1997[352] (overlying the Parcel M, high-yield aquifer described in the Testimony of Kathy Hersh et al.),[353] Heron Cove at Bowers Pond, LLC in August 1998,[354] Bowers Pond LLC developments in October 1997,[355] June 1997,[356] December

[349] Exhibit 3005B, Section 6.4, Page 21 (221)(6-15). w
[350] Transcript, September 10, 2007, Page 59, Lines 11-19.
[351] Exhibit 1109, Section 6.4, Page 100 (6-16).
[352] See Exhibit 1127; Transcript, September 18, 2007, Page 55.
[353] *See* Exhibit 1012, Pages 4-5, Page 31 ("Despite the fact that "a good part of that site overlies a very high yield ground water aquifer … City had to step forward and purchase the developable parcels of Parcel M to prevent it from being developed by the water company."). *See also* Exhibit 1123 (showing the location of the aquifer relative to the land Pennichuck proposed to develop in Exhibit 1127 and that acquired by the City in Exhibit 1016B).
[354] Transcript, September 18, 2007, Page 58.
[355] Transcript, September 18, 2007, Pages 59-60.
[356] Transcript, September 18, 2007, Page 60.

1996,[357] and many others.[358]

- Pennichuck's real estate operations were not disinterested third-party transactions. During the same period that Pennichuck officials were reviewing drafts of its Watershed Management Plan, at least one Pennichuck official, its CEO Maurice Arel, was actively engaged in the negotiation of the purchase of his own residence on the very lands that Ms. Pannetier had recommended be conserved in her July 1997 draft report.[359] Mr. Arel's son, Timothy Arel[360] and Bernie Rousseau, a Pennichuck employee that Ms. Pannetier identified as one of her contacts at Pennichuck,[361] also received lands formerly held for water supply protection.
- These and other transactions involved fraudulent misrepresentations to investors and to the public. On December 16, 2004, Pennichuck and its CEO, Maurice Arel, agreed to pay significant fines and penalties related to "material, false, and misleading" statements made to Pennichuck's investors related to its real estate development operations,[362] in which Pennichuck "failed to oversee the negotiations [and] [t]he Developer received over two million dollars in profit personally through his profit-sharing arrangement with the joint venture, in addition to the profits made by the Stabile Companies on the site work, construction, management fees, and home sale commissions."[363]

Pennichuck's real estate operations have harmed the public interest. According to its own experts, in a March 2003 report funded by the NHDES, Ms. Pannetier reported that "the estimated yield of Pennichuck Brook has declined by over 75% in the last 100-years" and "these

[357] Transcript, September 18, 2007, Page 60.
[358] See e.g. Exhibits 1127 & 1128 generally.
[359] See Exhibits 1128, Pages 24-25 (deed from Bowers Pond, LLC dated December 1998), Page 26 (property shown on Nashua tax maps)
[360] Exhibit 1128, Pages 1-2.
[361] Exhibit 1128, Pages 1-3; Transcript, September 18, 2007, Page 67, Lines 7-19.
[362] Exhibit 1121, Page 6 and generally, Pages 6-9.
[363] Exhibit 1121, Page 9.

water supplies are being affected because natural hydrologic cycles have been interrupted."[364] In an November 2002 application to the EPA, Ms. Pannetier reported: that "the watershed has become more "flashy" and much of the water runs off impervious surfaces and out to the ocean without being captured for water supply or ground water recharge"; that "[y]ields of the surface water supply in the Pennichuck Brook pond system have declined by about 75% over the last 100 years, largely due to imperviousness, which reaches 35+% in some of the more urban subwatersheds and an overall 15% in the watershed"; and that "[m]any of the ponds experience algae blooms and are in various stages of eutrophication."[365]

These reports, offered freely and voluntarily outside the context of this proceeding, confirm the testimony of Nashua's witnesses, that Pennichuck's role as a real estate developer and its failure to act as a proper steward of the water supply "has led to significant deterioration within the supply ponds"[366] and "undesirable impacts in both the quantity and quality of water within the chain pond system."[367]

They also serve to illustrate a key difference between a publicly-owned and an investor-owned water utility. Regardless of whether Pennichuck's decision to pursue thousands of acres of real estate development in the early 1980s was consistent with the public interest, it became clear by the time Pennichuck began preparing its Watershed Management Plan in 1997 that this was no longer the case.[368] But rather than discontinue, or reverse or even scale back its real estate development operations, Pennichuck continued or even accelerated those operations and its consultants modified their reports to allow these operations to continue. It even opposed

[364] Exhibit 1105, Page 12 (2-2).
[365] Exhibit 1108, Pages 3-4.
[366] Exhibit 1012, Page 22.
[367] Exhibit 1012, Pages 22-23.
[368] See, e.g. Transcript, September 10, 2007, Page 18, Lines 21-23 ("as time has gone on, scientific information has said no, that's not good to do.").

legislation intended to protect its own water supply,[369] arguing it would make numerous parcels in the watershed "undevelopable".[370]

Nashua did not follow this approach. Rather it adopted regulations to protect the water supply over Pennichuck's objection,[371] and acquired 483 acres in the watershed, including the significant portions of the Parcel M high yield aquifer property formerly owned by Pennichuck.[372] Nashua's protections are not perfect: It has denied permits for projects in the watershed and had those decisions reversed by the Courts, and it has issued permits for others. However, in response to a question from Commissioner Morrison, Alan Fuller noted that the "reason why I think the city would be better is Pennichuck is kind of not controllable, but the city can be controlled by the people with elections, and so ultimately you have some control what's going on, some control [over] what's going on."[373] At the end of the day, it is not Nashua's history of acquiring key parcels to protect Pennichuck's water supply, or its record approving or denying particular developments, or the success of its own Water Supply Protection Overlay District that matters. It is the fact that it will be a water supply owned, controlled and accountable to the public it serves and not the needs of the investment community. It is for this fundamental reason that approval of Nashua's petition will help protect many of the most important water supplies in Southern New Hampshire, in a manner that will promote the public interest.

VII. CONCLUSION

RSA 38 is a unique eminent domain statute limited to the acquisition of utilities. Its provisions call upon the Commission not only to be the arbiter of fair value but also to make

[369] See, e.g. Exhibit 1011, Pages 25-27 (Fuller); Exhibit 1012, Pages 5-6 (Hersh).
[370] Exhibit 1012, Page 46 (Exhibit 4)
[371] See e.g., Exhibit 1012, Page 14.
[372] Exhibit 1012, Pages 11-13; Exhibit 1016B.
[373] Transcript, September 18, 2007, Pages 37-38.

determinations regarding the public interest, a more traditional regulatory concept. Because, however, of the impact of value on rates and the impact of rates on public interest, the two functions are intimately intertwined.

Not only has Nashua met all the requirements of RSA 38, entitling it to a presumption that its acquisition is in the public interest, but also the evidence demonstrated that Nashua has gone to great lengths to promote the public interest. Approval of Nashua's petition, upon such conditions as the Commission determines to be reasonable and appropriate, will result in significant rate savings to customers and in all likelihood improve the quality of service provided to customers as well as advance other important public benefits such as land and water conservation.

WHEREFORE, Nashua respectfully requests that the Commission:

a. Find that Nashua's Petition is in the public interest and impose in its discretion, pursuant to RSA 38:6, 11, 14, RSA 362, RSA 374 and as otherwise provided by law, any or all of the conditions proposed by Nashua in Appendix A or such other conditions the Commission shall deem necessary and appropriate to satisfy the public interest;

b. Determine the price to be paid by Nashua for the assets of PWW under RSA 38:9 and, in connection therewith, establish a procedure to determine the value of any additions to and deletions from the assets of PWW after December 31, 2004.

c. Equitably allocate the expense of the Commission in its investigation of the matter covered by Nashua's Petition under RSA 38:9; and

d. Grant such other and further relief as justice may require.

Respectfully submitted,

CITY OF NASHUA

By Its Attorneys,

UPTON & HATFIELD, LLP

Date: November 16, 2007

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent this day by e-mail and first class mail to all persons on the Commission's official service list in this proceeding.

Date: November 16, 2007

_____
Justin C. Richardson, Esq.

APPENDIX A - CITY OF NASHUA'S PROPOSED CONDITIONS

Pursuant to RSA 38:11 & 14, RSA 362, RSA 374, Nashua proposes the following conditions to the Commission:

I. PROPOSED CONDITIONS RELATIVE TO CUSTOMERS IN FRANCHISES LOCATED OUTSIDE THE CITY OF NASHUA

1. Service to All Customers at Core Rates.

Nashua shall provide service to all customers located outside the City, including customers of satellite systems, at core rates.

2. Quality of Service is Subject to Commission Jurisdiction.

Nashua shall provide service to customers outside the City that shall be reasonably safe and adequate and in all other respects just and reasonable. Service within franchises outside of Nashua's borders shall be subject to the Commission's jurisdiction under RSA 374, and, the Commission shall have jurisdiction relative to any complaint alleging that service is not reasonably safe and adequate and in all other respects just and reasonable.

3. Non-discriminatory Service Pursuant to Nashua's Water Ordinance.

a. Nashua shall provide service to all customers pursuant to its Water Ordinance, including a Main Extension Policy, as may be amended. Nashua's service to customers and the terms and conditions of its Water Ordinance shall not discriminate against customers located outside of the City.

b. The terms and conditions of the Water Ordinance, including its Main Extension Policy, shall be subject to the jurisdiction of the Commission, except as provided by RSA 362:4, III-a and RSA 362:4, II. The Commission shall have jurisdiction relative to any complaint alleging that the terms and conditions of Nashua's water ordinance are unjust or unreasonable.

4. No transfer of franchises without prior Commission Approval.

As a condition of approval pursuant to RSA 38:11, Nashua shall not sell, lease or otherwise transfer its franchises without prior approval from the Commission.

II. PROPOSED CONDITIONS RELATIVE TO WHOLESALE CUSTOMERS

5. Wholesale Contracts.

a. Nashua shall provide service in accordance with the rates, terms and conditions of all existing wholesale contracts (i.e., Anheuser Busch, Town of Milford) and the renewal

thereof, or, if required for bonding purposes, Nashua shall create a wholesale tariff that incorporates the rates and provisions of the existing wholesale contracts.

b. Nashua shall be subject to the Commission's jurisdiction relative to any complaint alleging that the rates, terms and conditions for wholesale service provided by Nashua are unjust or unreasonable. Any complaint relative to wholesale service may be brought before the Commission as provided by RSA 365 and applicable laws, rules and regulations of the Commission with respect to such wholesale service.

III. PROPOSED CONDITIONS RELATIVE TO CUSTOMER SERVICE

6. Compliance with Laws and Regulations Concerning Customer Service.

Nashua shall provide customer service in compliance with applicable laws, rules and regulations governing customer service, including the Commission's Puc 1200 governing customer service.

7. Technical Advisory Help Line and Process Information.

a. Nashua shall have technical advisors on call 24-hour per day available to industrial and wholesale customers of the system.

b. Nashua shall make technical water treatment process information available electronically on a daily or more frequent basis, upon request from any industrial or wholesale customer.

8. Technical Advisory Board.

a. Nashua shall establish a technical advisory board to provide recommendations concerning technical operations and policies related to the water system, including but not limited to: customer service, technical operations, watershed, water quality, and source water protection.

b. Membership in the technical advisory board shall include representatives of retail and wholesale customers, regulatory agencies, municipalities served by the system, developers, and public interest organizations. Nashua shall provide updates to the technical advisory board concerning its operations, maintenance and management of the system. The technical advisory board shall meet on a monthly basis and all meetings and recommendations of the technical advisory board shall be open and available to the public, except as provided by RSA 91-A.

c. On an annual basis, the technical advisory board shall make a report of recommendations to the City of Nashua concerning its operations.

V. DISCRETIONARY CONDITIONS

While Nashua does not believe the following conditions are necessary to protect the public interest, Nashua offers them for the Commission's consideration. These proposed conditions are not intended to limit in any way the Commission's authority to impose any conditions it deems necessary and appropriate under RSA 38:11:

9. Interim Commission Jurisdiction.

Pursuant to the Commission's authority under RSA 38:11, the City of Nashua shall be fully regulated as a water utility for the purposes of accounting, auditing, reporting and rates, until December 31st of the fifth year following Nashua's acquisition and commencement of utility operations of the assets acquired as a result of this proceeding.

10. Integration of Customer Service

a. Nashua shall amend its OM&M Agreement with Veolia Water so that Veolia Water shall provide all customer service functions, including billings and collections, in full compliance with all applicable, laws, rules, and regulations related to customer service, including but not limited to the Commission's Puc 1200 regulations.

b. Veolia Water's performance of customer service shall be just and reasonable, and subject to the Commission's jurisdiction as provided by RSA 374, and the terms and conditions imposed by the Commission.

11. Mitigation of Harm to PEU and PAC

a. Nashua shall acquire the assets of PEU and PAC to satisfy the public interest pursuant to RSA 38:11 at a price to be agreed upon by the parties. If the parties fail to agree upon a price, either may petition this Commission to establish a price under RSA 38:9. Nothing in this condition shall be deemed to require the sale of PEU and PAC by Pennichuck Corp.

b. If Pennichuck Corp. shall elect not to sell the assets of PEU and PAC to Nashua, Nashua shall mitigate the harm, if any to PEU and PAC, occasioned by its acquisition of the assets of PWW, by creating a mitigation fund. The amount of the harm, if any, and mitigation fund shall be established in a new docket proceeding but shall be capped at the value of their plant in service as determined by the Commission.

12. Final OM&M Agreement Subject to Commission Approval.

Within 60 days of entry of the entry of a final order not subject to appeal, Nashua shall submit for approval by the Commission, a duly authorized and executed: (a) OM&M Agreement with Veolia Water; and (b) Professional Services Agreement with R.W. Beck, incorporating all conditions imposed by the Commission.

THE STATE OF NEW HAMPSHIRE

BEFORE THE
PUBLIC UTILITIES COMMISSION

CITY OF NASHUA'S PETITION FOR VALUATION PURSUANT TO RSA 38:9

Docket No. DW04-048

CITY OF NASHUA'S MEMORANDUM OF LAW REGARDING (1) AUTHORITY TO TAKE ASSETS OUTSIDE MUNICIPAL BOUNDARIES UNDER RSA 38 AND (2) NASHUA'S VOTES UNDER RSA 38

The Commission's Order No. 24,379 dated October 1, 2004 called for briefs on (1) "whether RSA Chapter 38 provides Nashua authority to take PEU, PAC and the entirety of PWW," i.e., "assets of PWW that are not integral to the core system"; and (2) "whether Nashua has properly followed the voting requirements of RSA 38 and whether the votes taken are consistent with the requests made in the Petition." (Order, page 11).

RSA 38 allows the City of Nashua to take any Pennichuck plant and property required to promote the public interest as determined by the Commission.

RSA 38 links the scope of authority to take plant and property outside municipal boundaries to the scope of the public interest protected by the Commission. In four places, the statute makes clear that the Commission is intended to determine how much plant and property situated outside the municipality the public interest requires the municipality to acquire:

(1) RSA 38:2 I empowers a municipality to acquire plants for distribution of "water for municipal use, for the use of its inhabitants and others,

and for such other purposes as may be permitted, authorized or directed by the commission."

(2) RSA 38:6 provides for written municipal notice to the utility of plant and property it seeks to acquire including that "portion, if any lying without the municipality which the public interest may require, pursuant to RSA 38:11 as determined by the commission."

(3) RSA 38:9 I describes the issues that either party may present to the PUC, including "how much, if any, of the plant and property lying within or without the municipality the public interest requires the municipality to purchase."

(4) RSA 38:14 expressly sets certain conditions for a municipality's operation of "the plant, property, or facilities of a public utility in any other municipality," including the potential for the second municipality, in turn, to establish its own waterworks by eminent domain.

The "public interest" standard of RSA 38 does not limit extra-municipal acquisitions to property that is absolutely essential for water service within the municipality (e.g. reservoirs or wells for water supply). RSA 38:12 makes this clear. It permits a municipality with an existing plant (i.e., a fully functioning system) to expand beyond its boundaries pursuant to RSA 38:6-11 (i.e., by eminent domain). Consequently, an expansion of this sort is, by definition, beyond the scope of what is essential for service within the municipality.

RSA 38:11 also links the power to take to the breadth of public interest concerns. It provides that "[w]hen making a determination as to whether the purchase or taking of utility plant or property is in the public interest under this chapter, the Commission may

set conditions and issue orders to satisfy the public interest. . . . " In order to set such conditions and issue such orders, the Commission must have sufficient authority to do so, including the power to require/allow purchase of sufficient plant and property outside municipal boundaries to address any public interest issues that apply outside municipal boundaries.

In short, the statute indicates that the scope of authority to acquire extra-municipal plant and property is commensurate with the scope of the public interest that the Commission is authorized to consider.

The scope of "public interest" concerns under RSA 38

In public utilities theory and law, a state may use the police power to regulate businesses "affected with a public interest". 64 AmJur 2d Public Utilities, §15, p. 458. The term "public interest" denotes the various interests of consumers, investors, other interested parties and the general public that must be considered and balanced by a public utilities regulator in decision-making prescribed by statute. The New Hampshire Supreme Court has not construed RSA 38 "public interest," so other authorities may be referred to.

"Public interest" under other public utility statutes in New Hampshire

The focus of "public interest", or "public good," varies somewhat with the type of decision delegated to the Commission, but is typically broad. E.g.:

- RSA 369:1 and 4 require the Commission to approve issuance of securities for utility financing only upon a finding that the objects and amounts of the financing

will be in the "public good", i.e., "reasonable taking all interests into consideration" or "reasonably to be permitted under all the circumstances of the case". Appeal of Conservation Law Foundation, 127 N.H. 606, 614-15 (1986), citing earlier cases. The primary concern is ensuring acceptable service at reasonable rates. Id. at 615.

- RSA 374:26 requires a finding of "public good" and "public interest" for granting of a new or extended public utility franchise. The respective advantages and disadvantages of ratepayers within and without the area in question must be balanced. Parker-Young, Co. v. State, 83 N.H. 551, 563 (1929).
- RSA 374:30 requires a finding of "public good" for a transfer of control of utility facilities. The general welfare of the utility itself may predominate, for example, where insolvency is threatened. Appeal of Legislative Utility Consumers' Council, 120 N.H. 173, 174 (1980).
- RSA 375-B:7 calls for any permit issued to a contract carrier to be in the "public interest", defined broadly to include the needs of the public at large as well as the utility and other particular persons directly affected. Browning-Ferris Indus. v. Public Util. Comm'n., 116 N.H. 261, 262 (1976).
- RSA 378:27 & 28, of course, call for public utility rates to be in the "public interest", delegating to the Commission "the difficult task of deciding among many competing arguments and policies in reaching decisions that serve the public interest". LUCC v. Public Serv. Co. of N.H., 119 N.H. 332, 339 (1979).

RSA 38 "public interest" in Commission decisions

The meaning and scope of "public interest" under RSA 38 has been addressed in decisions of the Commission:

- In Petition for Valuation of J. Brodie Smith Hydro-Electric Station, DE-00-211, Order No. 24,086, the city sought to acquire hydro-generating facilities from PSNH. The Commission posed the public interest question as a balancing of public goods and public harms. The factors presented for the Commission were the statutory presumption created by the favorable city referendum vote; the city's projected reliable supply of reasonably priced electricity; the adverse impacts on the PSNH ratepayers outside Berlin; and the effects on the PSNH workers whose jobs were likely to be affected.
- In Petition of Town of Ashland, DE-03-155, Order No. 24,214, the town sought to acquire plant and property of NH Electric Cooperative to serve Ashland residents. Arguing that the "public interest" test was a "no net harm" standard, the town claimed that rates would be lowered for the Ashland customers, while the Cooperative pointed to the adverse cost-shifting to other Cooperative ratepayers elsewhere in its system.

"Public interest" in water company eminent domain in other states

Appellate court decisions in municipal waterworks acquisition cases in other jurisdictions have discussed the scope of public interest:

- In City of Missoula v. Mountain Water Co., 228 Mont. 404, 743 P.2d 590 (1987), the city sought to acquire a water system that served customers both inside and

outside the municipal boundaries. (Under Montana statute, the "public interest" test required a finding that the taking be a "more necessary" public use than utility ownership, a stricter standard than RSA 38. Id. at 411-12.)

The court found relevant to "public interest" all the following factors: (a) the impact on water company employees; (b) effects of company profits and out-of-state ownership; (c) savings on rates and charges; (d) the level of cooperation between the water company and the city; (e) the "public interest" expressed in the city council and referendum votes; (f) the importance of city control of water rights to assure long-range access to water supply. Id. at 413-14.

- In Middletown Twp. v. Pa. P.U.C., 85 Pa. Commw. 191, 482 A.2d 674 (1984), the water company operated an integrated water supply and distribution system serving customers in three municipalities. The township sought to acquire only the system's facilities within the township. The Pennsylvania P.U.C. found that the acquisition would benefit most customers in the township but would have an adverse effect on commercial customers in the township and customers in the other communities, and therefore denied the acquisition as not in the public interest. Id. at 197. The court upheld the decision, emphasizing that the "public interest" measures the benefits and detriments of the acquisition on all affected parties. Id. at 202-03.

The scope of "public interest" in the present case

As illustrated above, determination of "public interest" is certainly concerned with impacts on rates and quality of service to both customers of the waterworks facilities being acquired and residual customers of the privately owned portions of the system. The importance of the local votes must also be considered. Analysis is also apt to consider the impacts on water company employees and long-term local control of water supply and protection areas.

In the present case, the City seeks to acquire all the assets of the three Pennichuck regulated utilities because the City believes it would promote the interests of all customers/ratepayers, the general public, the employees of Pennichuck and, indeed, the owners of Pennichuck. The will of Nashua voters would be implemented; the goals of the Merrimack Valley Regional Water District, organized under Laws 2003, Chapter 281, would be promoted; rates would be lower over time; service would remain adequate; water supplies would come under long range public control; continued employment of Pennichuck operation and maintenance personnel would be reasonably accommodated; and Pennichuck owners would receive fair value for their assets without the disadvantages of retaining ownership of smaller systems only.

The present case, however, differs from efforts to municipalize water or electric public utilities cited above in one important respect. In the other cases, a portion of a single water or electric system was proposed for municipalization. In the present case, as Pennichuck points out in its Motion To Dismiss (paragraph 5), "PEU, PAC, and PWW are separate legal entities, each with its own assets, its own service territories and its own corporate and legal history. On the other hand the Pennichuck operations are

somewhat integrated. PWW has historically supplied employees, office facilities, and office equipment to Pennichuck Corporation, PEU, and PAC for a fee. See management fee agreement dated January 1, 2001 on file with the Commission (copy attached as Exhibit A, furnished in response to City's Data Request No. 1-11 in Case No. DW 04-056). Perhaps similar arrangements exist for operations and maintenance personnel and equipment working in the field. If only certain PWW facilities were acquired by Nashua, arguably there would be losses of economies of scale to residual water utility operations with resulting impacts on cost and quality of service. Given the issue of the extent of taking authority under RSA 38, a key question is whether such indirect impacts on separate water systems would be factored in to the determination of "public interest", or be outside the Commission's area of concern under RSA 38.

In other jurisdictions, the issue has arisen in the context of whether a municipality must pay severance damages for such incidental losses when acquiring a portion of a water company's multiple systems. The leading case is Kennebec Water Dist. v. City of Waterville, et al., 97 Me. 185, 54 A. 6 (1902). The water company claimed severance damages for the proportionally heavier costs of supervision and management to its remaining property attributable to the loss of its Waterville plant. The court summarized the circumstances:

> The compensation asked is not for property taken, but for incidental damages to other property having no physical connection with or contiguity to that taken, and having no relations whatsoever with the property taken, except those which grow out of common ownership.

54 A. at 17. Applying general eminent domain principles, the court held that no severance damages could be awarded because the properties were separate and distinct, and the damages were incidental and consequential. Id. at 17-18. The

Kennebec Water District holding was subsequently reaffirmed in East Boothbay Water Dist. v. Boothbay Hbr., 158 Me. 32, 41, 177 A.2d 659 (1962). The same result was reached in South Bay Irr. Dist. v. Calif. – American Water Co., 61 Cal. App. 3d 944, 133 Cal. Rptr. 166 (1976), where the water company owned two water supply and distribution systems that were physically separate and were separate enterprises for rate-making purposes. The two systems jointly used office and operations facilities. The facilities were included in the rate base of the system condemned by the municipality. The water company sought severance damages for the cost the second system would incur to replace the facilities. The court ruled that the facilities were part of the first system, and no severance could be awarded for separate systems. All compensable value must be found in the facilities themselves. 61 Cal. App. 3d at 1002-03.

If the Commission is inclined to take an expansive view of the "public interest" under RSA 38 to include indirect effects on PEU and PAC, then it is essential to also interpret the scope of Nashua's potential authorized taking expansively. City acquisition of PAC and PEU and non-core PWW could eliminate loss of economies of scale and prevent severance damages. A scope of taking commensurate with the scope of "public interest" protection is required to fulfill the purpose of RSA 38, to allow the Commission to balance all relevant factors and to issue orders and attach conditions under RSA 38:11 to produce the optimal outcome.

Legislative History of RSA 38

The history of RSA 38 establishing the ability of a municipality to acquire property outside its boundaries is unbroken. Beginning with the passage of Laws 1913, Chapter 218:2-5, which became Public Laws, Chapter 44 the Legislature incorporated the concept of a municipality purchasing electric plant and property outside its limits. "Where the major part of the plant, property or facilities of such utilities lies within the limits of the municipality" and the public service commission, the predecessor of the PUC, determines the purchase "is for the public interest and necessary for the proper carrying on of its business", "taking into consideration the rights of the public utility and of the other municipalities in which it operates", a municipality may purchase the whole or part of the plant or property outside its limits. (emphasis supplied) PL 44:13. A copy of PL 44:13 is attached as Exhibit L.

This concept of acquiring property outside a municipality if it is in the public interest has been utilized by the Legislature from the outset, and subsequent amendments and re-enactments have done nothing to diminish it.

In Laws 1935, Chapter 153, which substituted a new Chapter 44, Section 5 (Demand) was amended to permit acquisition of the plant and property lying outside the municipality "which the public interest may require the said municipality to purchase." Exhibit M. Likewise, Section 8 (Valuation) introduced the principle of the municipality acquiring property lying outside the municipality, which the public interest requires. Exhibit M. Since Section 8 permitted the utility to likewise petition the commission to make such a determination, it is apparent that the Legislature envisioned instances in which the utility would want the municipality to acquire its property outside the

municipality's limits such as when the utility would be left with small, uneconomic portions of its business.

These concepts have continued unchanged into the current RSA 38 as is apparent from the testimony of Rep. Clifton Below on April 21, 1997 before the Senate Committee on Executive Departments and Administration regarding House Bill 528, which was enacted as Laws 1997, Chapter 206 and codified as the current RSA 38. In discussing the ability of the PUC to set conditions and issue orders to satisfy the public interest under RSA 38:11, Rep. Below said:

> This clarified their ability to positively assert conditions or even issue orders that say the public interest requires, for instance, that a municipality may have to acquire some property outside of its boundaries. If there is some customers that would otherwise be stranded with a small distribution line that crosses a municipal boundary the commission would have the power to order the utility that is selling its property or having its property acquired and also order the municipality to acquire that portion of a system that may be outside of their boundaries.

The extent to which the Legislature viewed the public interest determination to be broad is evident from Rep. Below's testimony regarding valuation.

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

There is nothing in the legislative history which would indicate an intent on the part of the Legislature to preclude a municipality from taking utility property outside its boundaries. Rather, the history is clear that not only were such acquisitions permitted,

they might even be required, in the public interest. The public interest determination has been made paramount.

PEU and PWW have argued that RSA 38 does not extend to takings from a utility that does not provide service within the municipalities' boundaries. RSA 38:6. Such an argument is not supported by the broad public interest determination envisioned by the Legislature and apparent from the legislative history. In giving the PUC the power to require the purchase of property outside the municipality's boundaries if it is in the public interest, the Legislature recognized that there might be situations, such as here, where property, which is part of a utility system and lying outside the municipality, if not acquired would result in a shifting of cost to the remaining ratepayers. See testimony of Rep. Clifton Below, supra. Its solution was to permit and perhaps even to require the property to be acquired to prevent such a result. The argument of PEU and PAC would prevent the PUC from making this kind of broad public interest determination, which the statute so clearly contemplates.

Moreover, the argument ignores the reality of the relationship among PWW, PEU and PAC. While they are separate corporations, they were created that way for rate purposes and are subsidiaries of a single utility holding company. They are a part of a "system" as described by Rep. Below, in the broad sense of being linked by economies of scale. It makes sense for an acquirer of the assets of one of the companies to own the assets of all three and that is what the City seeks in its Petition.

Voting Requirements of RSA 38

RSA 38 contains a road map for municipalities to follow to acquire, as here, a suitable plant for the "manufacture and distribution" of "water for municipal use, for the use of its inhabitants and others and for such other purposes as may be permitted, authorized, or directed by the commission". (Emphasis supplied) RSA 38:2(I). A city, such as Nashua, may establish a plant "after 2/3 of the members of the governing body shall have voted subject to the veto power of the mayor as provided by law, that it is expedient to do so, and after such action by the city council shall have been confirmed by a majority of the qualified voters at a regular election or at a special meeting duly warned in either case". RSA 38:3.

On November 26, 2002, the Nashua Board of Aldermen, pursuant to RSA 38:3, by a vote of 14-1, determined that it was "expedient for the city to establish a water works system and, in order to establish such water works system, to acquire all or a portion of the water works system currently serving the inhabitants of the City and others." (Emphasis supplied) Exhibit B.

The language of the Resolution, drafted by the City's attorneys and bond counsel, Palmer & Dodge of Boston, MA, follows the language of RSA 38:2 and 3 and clearly intends the acquisition of a system which serves not only the inhabitants of Nashua but also "others". The Aldermen's intent to seek to acquire assets outside Nashua for the purpose of establishing a regional water district is further evident from the findings it made in connection with the Resolution. Exhibit B.

On November 26, 2002, the Alderman also voted to hold a special election on January 14, 2003 to seek the confirmation of its action by a majority of City voters

pursuant to RSA 38:3. The question to be presented to the voters, again drafted by the City attorneys and Palmer & Dodge, with knowledge of the Aldermen's intent to seek to acquire assets outside Nashua, was:

> Shall the resolution of the Board of Alderman adopted on November 26, 2002 determining that it is expedient for the City to establish a water works system and in order to establish such water works system, to acquire all or a portion of the water works system currently serving the inhabitants of the City and others be confirmed?" (Emphasis supplied)

The procedure followed by Nashua is the procedure required by RSA 38 and is the same as that followed by the City of Berlin in its earlier attempt to acquire the J. Brodie Smith Hydro-Electric Station from PSNH (DE 00-211). Berlin initially sought the acquisition under the provisions of Laws 2000, Ch. 249:5 but then took the requisite RSA 38:3 vote of the qualified voters of the City. Following the vote, Berlin elected to proceed under Chapter 38 rather than Laws 2000, Ch. 249:5. The Commission agreed that Berlin, having taken the required vote, was entitled to proceed under RSA 38 over the objection of PSNH (DE 00-211; Order No. 23,775, Sept. 7, 2001).

Following the adoption of the November 26, 2002 Resolution, the Aldermen conducted public hearings and meetings in all of the wards of Nashua during which the proposed acquisition, including property outside Nashua and the regionalization efforts, was discussed. Attached as Exhibits C - I are copies of articles appearing in the Nashua Telegraph on June 6, 2003, January 7, 2003, January 8, 2003, January 10, 2003, January 11, 2003, January 12, 2003 and January 14, 2003, respectively. These articles report not only the extensive effort made by the City through the meetings in the wards and other forums to inform the voters about its intended acquisition but also document the fullness of the debate. Pennichuck Corp., the parent of PWW, PEU and

PAC, engaged in a vigorous public relations campaign to defeat the resolution. What is apparent from all of these articles and the debate they report is the intent of the City to acquire property outside Nashua, including the assets of PEU and PAC. For example in the January 8, 2003 article, Exhibit E, it is reported that the merger price was approximately $95 million and that the company's advertisement says the City can't afford to spend $100 million to buy it. That even Pennichuck was aware of the City's intent is particularly evident from Exhibit F where a company official discusses what the City would have to pay over and above the merger price to make shareholders whole. Perhaps the most revealing article concerning Pennichuck's awareness of the City's intent to acquire the assets of PWW, PEU and PAC, including those outside Nashua was published on November 28, 2002, immediately following the adoption of the Resolution by the Alderman. (Exhibit J) In the article, Pennichuck's President and CEO Maurice Ariel is clear that the Company will require a sale of all of its assets to replicate the merger and that the price will have to be superior to the merger price. Any suggestion by PWW, PEU, PAC or any intervener that voters were not aware of the City's intent to acquire assets outside Nashua, including the assets of PEU and PAC borders on being disingenuous.

On January 14, 2003 by a 78% majority (6505 in favor, 1867 opposed), the voters of Nashua confirmed the Resolution of the Alderman, creating a rebuttable presumption that the acquisition is in the public interest, RSA 38:3.

Following the overwhelming confirmatory vote, the Alderman pursuant to RSA 38:6 determined that all of the property of PWW, PEU and PAC was necessary for its municipal utility service (Exhibit K) and on February 5, 2003 gave notice to PWW, PEU

and PAC of the vote and made inquiry whether they would sell the property it had identified. (Exhibits B, C and D to the Petition) The property identified is specific and comprehensive for all three companies.

It is apparent under RSA 38 that the governing body (in Nashua the Board of Aldermen) is responsible for the determination of the property to be acquired while the voters merely confirm the general determination that it is expedient to establish a water works system. Cf RSA 38:3 and RSA 38:6. RSA 38:12 makes this distinction between the roles of the Aldermen and the voters clear. Under RSA 38:12, a municipality, which has an existing plant can expand "in the manner prescribed by RSA 38:6-11". Even though such an expansion could include property outside the municipality there is no requirement to obtain a confirmatory vote under RSA 38:3. Having confirmed the general proposition that it is expedient to establish a municipal plant, the voters leave the specific determinations about what property to acquire and where to the governing body. Consequently, even though the Aldermen in Nashua were very clear with the voters about their intent to acquire property outside Nashua, there is no requirement for the City voters to do anything other than confirm the action of the Aldermen that it was expedient to establish a water works system and in order to do so to acquire all or a portion of the water works system currently serving the inhabitants of Nashua and others, which they did. Any argument that the January 14, 2003 vote was not adequate fails to comprehend the different roles given to the Aldermen and voters under RSA 38.

Conclusion

RSA 38 supported by its legislative history provides the City of Nashua authority to take the assets of PWW, that are not integrated to the core system, located outside

Nashua, as well as the assets of PEU and PAC, if that is determined to be in the public interest by the Commission. Moreover, the City has properly followed the voting requirements of RSA 38 and all votes taken pursuant to the statute are consistent with the City's Petition to acquire the assets of PWW, PEU and PAC.

Respectfully submitted,
CITY OF NASHUA

By its attorneys:
Upton & Hatfield, LLP

Dated: October 21, 2004

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CERTIFICATION

I hereby certify that a copy of the foregoing Motion to Disqualify was this day forwarded to all persons on the attached Service List.

Robert Upton, II

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant To RSA 38:9

Order Denying Motion for Rehearing

O R D E R N O. 24,448

April 4, 2005

I. PROCEDURAL HISTORY AND BACKGROUND

This docket was initiated by a petition from the City of Nashua (Nashua) on March 25, 2004, seeking valuation of all plant and property of Pittsfield Aqueduct Company, Inc. (PAC), Pennichuck East Utilities, Inc. (PEU), and Pennichuck Water Works, Inc. (PWW) necessary to establish a municipal water works system. The Commission, on January 21, 2005, issued Order No. 24,425 which found, as a matter of law, that Nashua was entitled to seek the property of PWW but not the property of PAC or PEU.

On February 18, 2005, PWW filed a Motion for Reconsideration and/or Rehearing of Order No. 24,425 (Motion) pursuant to RSA 541:3. Fred Teeboom, a PWW customer who formally intervened, noted his support of the Motion but did not make a filing of his own. The Town of Merrimack argued in support of the Motion in a February 23, 2005 filing. Nashua filed an Objection to Motion for Rehearing (Objection) on February 24, 2005; the Merrimack Valley Regional Water District (District) stated its concurrence with Nashua's Objection on February 28, 2005. PWW noted, pursuant to N.H. Admin. Rules, Puc 203.04(f) that the Town of Litchfield was also opposed to the Motion. PWW submitted a Reply to Nashua's Objection on March 2, 2005.

II. POSITIONS OF THE PARTIES

A. Pennichuck Water Works, Inc.

PWW asks for reconsideration and/or rehearing of Commission findings that 1) Nashua was entitled to pursue all assets of PWW and 2) the vote by Nashua residents validly authorized Nashua to pursue those assets. In support, PWW referenced the arguments posed in its October 25, 2004 memorandum of law and further argued as follows: Under the Commission's reasoning, RSA Chapter 38 "would potentially allow a single municipality to take assets throughout the state merely because the people within that one town or city had voted to municipalize utility service." PWW argues that the powers of eminent domain should be narrowly construed and that the Legislature never intended as broad a reach of powers as the Commission found. Specifically, PWW argues, the Commission ignored the legislative history that demonstrated it allowed takings beyond municipal bounds in order to protect against "stranding of customers who would otherwise be disconnected from the utility's system." PWW argued that RSA Chapter 38 should be read to limit a taking to "just those assets necessary to provide municipal utility service and any additional assets necessary to ensure that remaining customers would not be cut off from service." Motion at pp. 2-3.

As to the vote, PWW argued that the Commission should have limited the taking to the assets that are necessary to serve customers within Nashua, absent a vote of every other municipality that PWW serves, as was required by *Balke v. City of Manchester*, 150 N.H. 69 (2003) and RSA 485:14.

In reply to Nashua's Objection to the Motion, PWW argues that the towns of Hollis and Milford have not stated a position regarding the taking and should not be identified as in support of Nashua's position.

B. Town of Merrimack

The Town of Merrimack joined PWW in its Motion, stating that though it has not stated a position on Nashua's petition to take the property of PWW by eminent domain, it has "expressed skepticism as to some of the claims in support thereof." Merrimack also notes that "a substantial part" of the franchise and utility property being sought is located in Merrimack and serves its main industrial area. Among the customers located in Merrimack is Anheuser-Busch, described as PWW's largest customer. According to Merrimack, its residents have not had an opportunity to vote on the taking; they should not be "disenfranchised by Nashua's arbitrary action" taking property beyond Nashua's bounds.

C. City of Nashua

Nashua's Objection urges the Commission to reject the Motion, as it states no new arguments and ignores the plain language of RSA 38:6 that allows taking of property outside a municipality's bounds when required by the public interest. Nashua also takes issue with PWW's suggestion that 'public interest' is not sufficiently defined, noting previous Commission dockets addressing the public interest in the context of eminent domain. Nashua identifies the towns of Amherst, Bedford, Hollis and Milford that have either joined the District or have voted to enter joint agreements to establish the District. Finally, Nashua takes issue with PWW's argument that because the New Hampshire Supreme Court found that fluoridation requires a vote of each municipality,

so too should each municipality vote on eminent domain, as the statute in question explicitly requires each municipality to put the fluoridation question to a vote.

III. COMMISSION ANALYSIS

To grant a motion for rehearing pursuant to RSA 541:3 and 541:4, the movant must demonstrate that the order is unlawful or unreasonable. Good cause for rehearing may be shown by new evidence that was unavailable at the time or that evidence was overlooked or misconstrued. *Dumais v. State*, 118 N.H. 309, 312 (1978). PWW has not submitted new evidence; rather, it argues that the Commission erred on the law, interpreting RSA Chapter 38 in such a way that violated the legislature's intent and resulted in an overly broad reach of eminent domain powers.

PWW is correct in noting that eminent domain powers are to be strictly construed. Strict construction, however, does not mean an agency may disregard the language of a statute, which is what PWW would have us do. Our reading of RSA Chapter 38 and in particular RSA 38:6, led us to the conclusion that Nashua was entitled to pursue the assets of PWW, though not affiliated utilities PEU or PAC. Whether such taking is in fact in the public interest is yet to be determined in this docket.

PWW presumes a statutory limitation, i.e., "just those assets necessary to provide municipal utility service and any additional assets necessary to ensure that remaining customers would not be cut off from service." Motion, p. 3. While such a test may merit consideration in determining the public interest in a case such as this, it is only one formulation of the public interest to be considered during hearing.

We do not disagree that our analysis leads to the theoretical possibility that one municipality could vote to pursue assets located throughout the state if served by that

utility. Such a hypothetical result, however, would be constrained by the limits of the public interest as informed by legislative history.

PWW's assertion that we ignored the legislative history regarding stranding of customers is plainly wrong. Legislative intent was an express part of the analysis of the scope of RSA Chapter 38. We acknowledged that stranding of customers was a reason cited to allow taking beyond municipal boundaries, and that "the Legislature intended that the extent of the taking power that could be exercised beyond municipal boundaries would be limited." Order at 14. The degree to which customers may be stranded and the costs imposed on them as a result are part of the public interest inquiry to be undertaken in this proceeding. The actual extent of the assets of PWW that Nashua may pursue outside its municipal bounds, however, cannot be resolved in advance by analysis of the statute and legislative history alone.

We agree with Nashua that the Supreme Court's requirement that each municipality vote before fluoridation of the water supplies that serve them is not relevant. The statute at issue in that case, RSA 485:14, explicitly required such votes. *Balke v. City of Manchester*, 150 N.H. at 73. There is no such requirement in RSA Chapter 38; to impose one would be beyond our powers.

PWW readily acknowledges that it has restated its arguments from prior pleadings and oral argument, and in fact incorporated those arguments by reference. Having presented no new evidence or persuasive argument, the Motion for Rehearing and/or Reconsideration will be denied.

Based upon the foregoing, it is hereby

ORDERED, that Pennichuck Water Works, Inc.'s Motion for Rehearing and/or Reconsideration of Order No. 24,425 is hereby DENIED.

By order of the Public Utilities Commission of New Hampshire this fourth day of April, 2005.

Thomas B. Getz	Graham J. Morrison	Michael D. Harrington
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

Order on Scope of Testimony

O R D E R N O. 24,487

July 8, 2005

I. BACKGROUND

The New Hampshire Public Utilities Commission (Commission) opened this docket upon the March 25, 2004 filing by the City of Nashua, New Hampshire (Nashua) to take the utility assets of Pennichuck Water Works, Inc. (PWW), Pennichuck East Utility (PEU) and Pittsfield Aqueduct Company (PAC) pursuant to N.H. Revised Statutes Annotated 38:9. These entities opposed the petition and challenged Nashua's interpretation of the reach of RSA 38:9. The Commission determined that RSA Chapter 38 authorized Nashua to pursue the taking of PWW, but not PEU or PAC, in Order No. 24,425 (January 21, 2005). The case is now in discovery and is scheduled for hearing in September 2006. For the full history, see Order No. 24,457 (April 22, 2005), which also granted intervenor status to affiliated entities Pennichuck Corporation and Pennichuck Water Services Corporation (PWSC)[1] (collectively, with PWW, PEU and PAC, the Pennichuck Companies). The Commission acknowledged Nashua's

[1] In their intervention petition, PC and PWSC assert that the Pennichuck Companies will suffer direct harm in the form of lost economies of scale, increased operating and capital costs, loss of access to capital markets, and other substantial damage. They also assert that they will suffer direct damages to existing contractual arrangements.

objection[2] and stated that it would address whether RSA Chapter 38 provides for damages to affiliated entities that may suffer harm as a result of a taking, even if their particular assets are not taken.

On May 4, 2005, the Pennichuck Companies asked that this issue of the scope of damages be decided at the time of hearing on the merits of Nashua's petition in September 2006. On May 6, 2005, Nashua urged the issue be determined now, as a threshold matter. This order addresses the scope of testimony as the case moves forward.

II. COMMISSION ANALYSIS

Pursuant to RSA Chapter 38, the Commission must determine whether a municipal taking of utility property is in the public interest and, if so, the value of property being taken. N.H. RSA §§ 38:9 and 38:11. The Commission previously held that the issues of valuation and public interest are so tightly interwoven that litigating them separately could undermine the orderly and efficient conduct of these proceedings. Order No. 24,447 (March 31, 2005), slip op. at 6; the Pennichuck Companies' proposed scope of testimony relates to both issues. It also brings to the fore two significant financial questions: whether the taking of some or all of PWW's assets could result in 1) compensable severance damages, pursuant to RSA 38:9 and/or 2) financial consequences that affect the public interest determination pursuant to RSA 38:11. Both issues require factual development before we can make a ruling.

The first issue, what severance damages are compensable under RSA Chapter 38, will depend upon a determination of the entity the legislature intended to be the "owner" in the

[2] Nashua objected to the Pennichuck Companies' contention that they were entitled to damages, arguing that RSA Chapter 38 does not allow damages for entities other than the utility being taken.

event a taking is ordered. As with many aspects of this case, it is one of first impression for the Commission.

Under RSA 38:9 we must determine "the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner." Pursuant to RSA 38:15, a municipality "shall pay all damages sustained thereby." Though Nashua initially sought to take the property of PWW, PEU and PAC, we found in Order No. 24,425 that RSA 38:6 limited Nashua to seeking the property of PWW and not other assets of the Pennichuck Companies. If the "owner" referenced in RSA 38:9 is the *utility* being taken, *i.e.* PWW, there would be no severance damages to PAC, PEU or PWSC. If only a portion of PWW were to be taken, conceivably there could be severance damages to what remains of PWW. If, however, the "owner" referenced in RSA 38:9 is the *parent company* of PWW, *i.e.* Pennichuck Corporation, conceivably there could be severance damages. Whether Pennichuck Corporation would be entitled to severance damages under any of these scenarios has not yet been resolved. These determinations depend upon the organizational, legal, financial and operational relationships among the Pennichuck Companies and require further development of the related facts. The proper interpretation of RSA 38:9 will be addressed after February 21, 2006, the due date for reply testimony on this issue, but prior to the conduct of the hearing.

The second issue concerns whether taking some or all of PWW could have financial consequences to the Pennichuck Companies, as well as to ratepayers in Nashua and elsewhere, that in turn could affect the public interest determination. We find it appropriate to allow the parties and Staff to develop a factual record on the degree to which assets under PWW ownership, as well as assets owned by the Pennichuck Companies are organizationally, legally,

financially and operationally inter-related. Whether a taking of some or all of PWW's assets would have such impact so as to "tip the balance" against a taking will no doubt be one a point of contention in the hearing. PWW and/or the Pennichuck Companies should be allowed to present testimony as to why they believe adverse financial impacts render the taking not in the public interest; parties and Staff should be allowed to fully explore and challenge those assertions.

For these reasons, we will allow the Pennichuck Companies to submit the proposed testimony, subject to discovery and a similar scope of testimony by Nashua and others in reply. Our decision to allow pre-filed testimony on these issues does not mean such evidence is necessarily admissible at hearing. Admissibility will be determined at a later date and we believe that decision will be assisted by a fully developed factual record.

Accordingly, to the extent the Pennichuck Companies wish to submit testimony on severance damages and/or financial consequences of a taking of some or all of PWW, they may do so by October 14, 2005, the date the procedural schedule next allows pre-filed testimony. This testimony will be subject to discovery by all parties and Staff, as well as response in the reply testimony due by February 21, 2006, pursuant to the procedural schedule already in place. The Pennichuck Companies may participate in the rest of this docket as full intervenors but must abide by the dates designated for PWW.

We will entertain *motions in limine* regarding the scope of the hearings and proper interpretation of RSA 38:9, as well as other procedural matters to enable efficient and orderly hearings, after February 21, 2006.

Based upon the foregoing, it is hereby

ORDERED, that Pennichuck Corporation, Pennichuck Water Services Corporation, Pennichuck East Utility, Inc., and Pittsfield Aqueduct Company, Inc. may include within their pre-filed testimony claims of severance damages and/or financial consequences they allege will occur from a taking of PWW and that such testimony be filed on or before October 14, 2005, subject to discovery and similar testimony in reply.

By order of the Public Utilities Commission of New Hampshire this eighth day of July, 2005.

Thomas B. Getz Chairman	Graham J. Morrison Commissioner	Michael D. Harrington Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

Order Denying Motions for Rehearing and Granting Certain Requests for Clarification of Procedural Orders

O R D E R N O. 24,555

December 2, 2005

I. INTRODUCTION

The New Hampshire Public Utilities Commission (Commission) opened this docket upon the March 25, 2004 filing by the City of Nashua, New Hampshire (Nashua) to take the utility assets of Pennichuck Water Works, Inc. (PWW), Pennichuck East Utility (PEU) and Pittsfield Aqueduct Company (PAC) (collectively, the Pennichuck Companies), pursuant to N.H. RSA 38:9. The Pennichuck entities opposed the petition and challenged Nashua's interpretation of the reach of RSA Chapter 38:9. In Order No. 24,425 (January 21, 2005), the Commission determined that RSA Chapter 38 authorized Nashua to pursue the taking of PWW but not PEU or PAC. The case is now in the discovery stage and is scheduled for hearing in January, 2007.

In July 2005, the Commission issued four orders on discovery disputes: Order No. 24,487 (July 8, 2005) granting a request by the Pennichuck Companies that the scope of severance damages be determined after review of testimony on that issue and not in advance; Order No. 24,488 (July 18, 2005) denying a Motion to Compel filed by PWW regarding Nashua's operation of other municipal services and the scope of discovery into matters prior to November 26, 2002; Order No. 24,489 (July 18, 2005) denying a Motion to Compel filed by PWW regarding discovery requests and participation of parties not filing testimony; and Order No. 24,494 (July 29, 2005) denying a Motion to Compel filed by Nashua regarding privilege and discovery into

other valuations performed by or for PWW.

Each motion for rehearing gave rise to an objection and in some cases responses from other parties or Staff. The motion filed by Nashua regarding Order No. 24,497 gave rise not only to an objection from the Pennichuck Companies but also a request by Nashua to respond to the objection, which in turn was opposed by the Pennichuck Companies. The Commission's procedural rules do not authorize responses to objections and multiple rounds of pleadings are not favored. We find no basis here for allowing such additional pleadings and have not considered them in reaching our determinations herein.

II. Order No. 24,487

A. Order

In Order No. 24,487, the Commission held that the scope of severance damages and/or financial consequences of a taking of PWW would be determined after review of the testimony on this issue and not as a threshold legal matter as urged by Nashua.

B. Nashua Motion

Nashua filed a Motion for Reconsideration, alleging that the Commission should not interpret the phrase "the utility" in RSA 38:6 narrowly in Order No. 24,425, limiting a taking to PWW alone, and then interpret the phrase "the owner" in RSA 38:9 broadly in Order No. 24,487, allowing entities other than PWW to be compensated for severance damages if the evidence so supports. Nashua argues that the legislature intended damages for severance to be limited to the plant and property of the utility being taken, not of the parent company or stock ownership of the parent company of the utility. Nashua asserts that if the legislation is to be read expansively to include "indirect effects" on other Pennichuck entities, so too should the taking request be read

expansively. Nashua asserts that the Commission violated fundamental principles of eminent domain severance damages by not establishing "a unity of use and unity of ownership between the property taken and the remaining property."

C. Pennichuck Companies' Objection

The Pennichuck Companies objected, arguing that the Commission appropriately considered the issue of damages to be a factual one, and a component of the public interest analysis in this docket. They also assert that the legislature, in using both "owner" and "utility" in Chapter 38 must have intended that the words have separate meanings. The Pennichuck Companies argue that the question of damages can only be resolved after development of a factual record and that the cases on eminent domain severance do not lead to the conclusions reached by Nashua.

D. Responses of Other Parties and Staff

Merrimack Valley Regional Water District (District) concurred in Nashua's Motion. All other parties were silent. Staff took no position.

E. Commission Ruling

In this order we did not conclude that PEU, PAC, Pennichuck Corporation or any other entity was *entitled* to damages. Rather, we left open until testimony is received on this matter whether entities would suffer "severance damages and/or financial consequences of a taking of some or all of PWW" that would entitle them to compensation under RSA Chapter 38. Order No. 24,487 at 4. As we stated in the order, the extent to which the companies are "organizationally, legally, financially and operationally inter-related" will be factual issues to be developed on the record. We did not rule on who, if anyone, is entitled to damages in Order No. 24,487 and

remain open to the arguments of the Parties and Staff on this issue. Accordingly, we deny the Motion for Rehearing.

III. Order No. 24,488

A. Order

In Order No. 24,488, the Commission denied requests by PWW to compel responses to certain data requests regarding Nashua's claim of expertise in operating other municipal systems and certain questions regarding events prior to November 26, 2002, the date the Nashua Aldermen voted to proceed with a taking. As stated in the Order, to avoid becoming "ensnared by issues that no doubt are important to the parties but have little bearing on the determinations the Commission must make, we will not allow the parties to engage in debate over the Philadelphia Suburban transaction". Order No. 24,488 at 7-8.

B. PWW Motion

PWW filed a Motion to Reconsider or Rehear Order No. 24,488, arguing that it should not be prohibited from discovery into these areas. Details of Nashua's operations of other municipal systems, PWW asserts, is relevant if Nashua is to operate the water system. The questions regarding events prior to November 26, 2002, according to PWW, must be explored: 1) to determine "what gave rise to the City's consideration of pursuing a taking under RA Chapter 38" and 2) because the Order is "contrary to the Superior Court's directive" regarding the scope of discovery in the Commission docket. PWW quotes Superior Court Judge Lynn's order that Nashua's "alleged bad faith, improper motive and lack of intent to follow through with the acquisition obviously are matters that would have a significant bearing on the question of whether the proposed condemnation is in fact in the public interest. As such, these issues can be

raised by [PWW] before the [Commission.]". Hillsborough County Superior Court, Southern District, Order on Motion to Dismiss (December 1, 2004) at 4, Docket 04-C-169.

C. Nashua Objection

On Nashua's claim of expertise operating other municipal systems, Nashua stated "it does not intend to operate its water system as a City Department and is fully willing to accept a condition to that effect" and further would "strike those portions of its testimony relating to its experience operating other Departments." As to information prior to November 26, 2002, Nashua argues that there is no showing of bad faith on the part of the Aldermen or Nashua, and that the Commission must determine only if a taking is in the public interest, not what Nashua's motives are in pursuing a taking. Nashua asserts that Judge Lynn's order is not a directive for discovery, but instead is "a recognition of the fact that the Commission is the proper forum for these issues to be raised" and was not binding on the Commission.

D. Responses of Other Parties and Staff

The Town of Merrimack supported PWW in part, arguing that Order No. 24,488 places unreasonable limitations on discovery. The Town of Amherst opposed PWW's Motion. OCA took no position and other parties were silent. Staff concurred with PWW.

E. Commission Ruling

Nashua has affirmed it will not operate the water system if acquired and is willing to strike the testimony regarding its experience operating municipal systems. We therefore instruct Nashua and PWW to identify the portion(s) of Nashua's testimony to be stricken, for submission to the Commission no later than December 23, 2005. The first issue raised in PWW's Motion, therefore, appears to be moot.

As to information prior to November 26, 2002, we agree with Nashua that Judge Lynn's order does not give PWW a *right* to discovery on those issues, but rather acknowledges a right to raise with the Commission whether it may pursue these issues. Even if the order were read as PWW urges, the Commission is not bound by Judge Lynn's ruling and will not authorize general discovery into Nashua's conduct or frame of mind regarding the Philadelphia Suburban transaction.

Evidence of "lack of motive and lack of intent to follow through with the property taking" related to a petition under RSA Chapter 38, however, whether generated prior to or after November 26, 2002, would be relevant. As a clarification, we will allow PWW to pursue those issues in discovery, provided the inquiry is *directly related to a petition under RSA Chapter 38,* but at the same time, we recognize that, pursuant to RSA 38, Nashua need not make a commitment to proceed with a taking until valuation is determined.

It is quite clear that the relationship between Nashua and PWW has not been cordial for some time, which of itself is not relevant to this proceeding. The thing that is relevant would be evidence showing that Nashua had no intention whatsoever to carry through on a taking under RSA Chapter 38. Accordingly, we deny in part and grant in part the Motion for Rehearing.

IV. Order No. 24,489

A. Order

In Order No. 24,489, the Commission denied a Motion to Compel filed by PWW, finding that those who did not file testimony would not be required to respond to data requests. Data requests to the Town of Amherst and the District were at issue.

B. PWW Motion

PWW filed a Motion to Clarify, Reconsider or Rehear, claiming that the District in particular should not be allowed to assert it is a critical party for intervention purposes and then not submit testimony or respond to discovery requests. PWW also asked for clarification of the ongoing rights of the District in the proceedings and the extent to which the District may participate in the hearing on the merits.

C. Responses of Other Parties and Staff

The District objected to the Motion, arguing that to compel data responses of the District would allow "economic warfare" against the District in order to chill its participation in the docket." The District goes on to assert a "right" to propound data requests as well as rights regarding the "cross-examination of witnesses, the presentation of oral and written argument, the filing of briefs and by making a public statement on the record."

The Town of Merrimack argued that Order No. 24,489 places unreasonable limitations on discovery. The OCA argues that the District should be allowed "cross examination, argument and briefing." In its response, the OCA states that the focus should be on a possible transfer to Nashua, not a transfer to the District, which may not occur even if the taking is found to be in the public interest. Other parties were silent. Staff sought clarification as to the extent of discovery and hearing participation for one who does not file testimony.

D. Commission Ruling

PWW has presented nothing new that would cause us to alter our decision on this issue. To the extent it is not already clear, the Town of Amherst and the District are not subject to discovery but they will nevertheless be allowed to propound data requests, cross-examine witnesses and make argument at the closing of the case. It will not be allowed to testify. A party

should not expect to testify on another's behalf or supplement the record through documents generated by a non-testifying party. We therefore deny the rehearing request.

V. Order No. 24,494

A. Order

In Order No. 24,494, the Commission denied without prejudice Nashua's Motion to Compel certain responses regarding prior valuations of the water system assets done by or for PWW and other appraisals of Pennichuck Corporation. The Order found data requests on valuation to be premature and could be propounded in response to PWW's testimony on that issue. It did not make any ruling regarding the admissibility or privilege extended to any document.

B. Nashua's Motion

Nashua filed a Motion to Reconsider and Clarify, alleging that the Commission's determination that Nashua was premature in seeking prior appraisals done by PWW was in error. Nashua also argues the Hearings Examiner's opinions regarding privilege were in error.

C. PWW Objection

PWW objected, arguing that the Commission's conclusion that the issue could be addressed after filing of PWW's testimony on valuation was appropriate and that Nashua's attempted exploration into certain assets of Pennichuck Corporation was overly broad.

D. Responses of Other Parties and Staff

The District and Town of Litchfield concurred with Nashua. The Town of Merrimack and OCA took no position. Other parties and Staff were silent.

E. Commission Ruling

In Order No. 24,494, the Commission denied Nashua's motion, without prejudice, allowing Nashua to propound the requests during a later phase of this docket. The Commission made no ruling regarding privileges. We find no basis in Nashua's Motion for Rehearing to disturb our original determination on this issue.

Based upon the foregoing, it is hereby

ORDERED, that Nashua's Motion to Reconsider Order No. 24,487 is DENIED; and it is

FURTHER ORDERED, that PWW's Motion to Reconsider or Rehear Order No. 24,488 is GRANTED to the extent the Order is clarified as stated herein and in all other respects is DENIED; and it is

FURTHER ORDERED, that PWW's Motion to Clarify, Reconsider or Rehear Order No. 24,489 is GRANTED to the extent the Order is clarified as stated herein and in all other respects is DENIED; and it is

FURTHER ORDERED, that Nashua's Motion to Reconsider and Clarify Order No. 24,494 is GRANTED to the extent it is clarified as stated herein and in all other respects is DENIED.

By order of the Public Utilities Commission of New Hampshire this second day of December, 2005.

Thomas B. Getz	Graham J. Morrison	Michael D. Harrington
Chairman	Commissioner	Commissioner

Attested by:

Lori A. Normand
Assistant Secretary

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

City of Nashua: Petition for Valuation Pursuant to RSA 38:9

DW 04-048

MOTION IN LIMINE CONCERNING SEVERANCE DAMAGES AND TO DETERMINE THE PROPER INTERPRETATION OF RSA 38:9

Nashua files this *Motion in Limine* to: (1) exclude evidence related to claims for severance or other economic damages by third-party intervenors in this proceeding, the Pennichuck Corporation (PC), Pennichuck Water Services Corporation (PWSC), Pennichuck East Utility Inc. (PEU) and Pittsfield Aqueduct Company Inc. (PAC) (together, the Pennichuck Companies); (2) to exclude evidence related to claims for severance damages to the Pennichuck Water Works, Inc., (PWW); and (3) to determine the proper interpretation of RSA 38:9 in this proceeding. In support of this Motion, Nashua states as follows:

I. INTRODUCTION

1. On April 5, 2005, the Pennichuck Companies filed a *Joint Petition to Intervene*. The Pennichuck Companies stated that PC was the parent company of PWSC, PEU, PAC, as well as PWW, the utility subject to the City of Nashua's RSA 38 valuation petition. They further averred that if Nashua acquired the assets of PWW that they would "suffer direct harm in the form of lost economies of scale, increased operating and capital costs, loss of access to capital markets and other substantial damage."

2. On April 14, 2005, the City of Nashua filed a Response and Objection to the Petition to Intervene. Nashua stated that it did not oppose intervention by the

Pennichuck Companies. Nashua did object, however, to the Pennichuck Companies' statement that "[s]uch a taking would result in a substantial deprivation of the use and enjoyment of the property rights of the Pennichuck Intervenors, resulting in direct damage for which just compensation would be due." Petition at 3. Nashua stated that to the extent the Pennichuck Companies sought to clarify that they could introduce evidence related to their private economic interests or claims for damages, as distinct from the public interest of their customers, their petition to intervene should be denied.

3. Nashua averred that evidence in this proceeding was limited to the issues of valuation and public interest and that the intervention was an attempt to litigate damages that have been either dismissed or held in abeyance by Federal and Superior Courts. Nashua further asserted that only PWW is entitled to damages and argued that the Pennichuck Companies intervention petition was evidence that PWW ratepayers had been subsidizing PEU, PAC, and PWSC.

4. In Order No. 24,487 dated July 8, 2005, the Commission granted intervention but ruled that the question whether the Pennichuck Companies would be entitled to severance damages "depend[s] upon the organizational, legal, financial and operational relationships among the Pennichuck Companies and require[s] further development of the related facts." It further noted that it would entertain motions in limine regarding the scope of the hearings and proper interpretation of RSA 38:9.

5. Subsequent to Order No. 24,487, Nashua filed a *Motion to Reconsider* on August 5, 2005, to which PWW objected on August 12, 2005. On August 17, 2005, Nashua filed a *Motion for Leave to Respond and Response* to PWW's objection.

6. Nashua files this motion for a determination by the Commission that RSA 38:9, as a matter of law, limits an award of damages to PWW alone; to preclude as a matter of law, the Pennichuck Companies from pursuing their claim for any direct damages; to preclude, as a matter of law, PWW from asserting a claim for severance damages if Nashua acquires less than all of its assets; and to strike any testimony pursuant to which they seek such damages.

7. Nashua does **not** assert that the Commission is precluded from considering evidence concerning the financial consequences of Nashua's Petition as part of the public interest determination to be made by the Commission. However, to the extent the Commission finds that Nashua's petition would have a financial impact on PC's regulated (PEU & PAC) or unregulated (PC & PWSC) operations, such evidence is only relevant for the purpose of the Commission's evaluation of the public interest, and not determination of the damages to be awarded to PWW in this proceeding.

II. NEITHER THE PENNICHUCK COMPANIES NOR PWW ARE ENTITLED TO SEVERANCE DAMAGES

A. The Pennichuck Companies

8. The Pennichuck Companies, as intervenors, in this proceeding have alleged that, if Nashua is permitted to acquire the assets of PWW they will suffer "direct economic loss"[1] "direct harm"[2] and "direct damage for which just compensation

[1] Petition, Page 2, Para. 6.

would be due."[3] According to the Petition, these damages to the Pennichuck Companies are "distinct from those of PWW".[4]

9. As PWW and the Pennichuck Companies were eager to point out when it served their purposes, the scope of RSA 38 is limited to the municipality and "the utility" selling water within the municipality.[5] Under RSA 38, the Commission is authorized to award damages to "the utility" (RSA 38:6, 7, 8, 9 & 10) which the Commission has already determined to be PWW. Order No. 24,425, January 21, 2005, p. 12. As a result, the only issues to be decided in an RSA 38 proceeding are the valuation of PWW's assets under RSA 38:9, and the public interest under RSA 38:11. There is no basis under RSA 38 for the award of damages or losses suffered by any entity which is not "the utility" including the Pennichuck Companies.

10. Under RSA 38:9, III the term "owner" refers to the owner of the utility's plant and property that a municipality seeks to acquire, not the owner of the stock of the utility (not to mention the owner or owners of the stock of the parent company that owns the stock of the utility that owns the plant and property). Nowhere does RSA 38 indicate that the legislature intended that any entity other than "the utility" referred to in RSA 38:6 *et seq* (as owner of plant and property) would be entitled to damages. If the Legislature had intended "owner" to have a different meaning than "the utility", it would have said so and included a definition of "owner" in RSA 38:1.

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[2] Id.
[3] Petition, Page 3, Para. 8.
[4] Petition, Page 3, Para. 10.
[5] See *Memorandum of Law on Scope of RSA Chapter 38*, dated October 25, 2004 at pp. 6-08.

11. Moreover, it is well established under New Hampshire law that the Pennichuck Companies are not entitled to any damages for diminution in value of their property. In *Manchester v. Airpark Business Center*, 148 NH 471 (2002), the New Hampshire Supreme Court stated that just compensation "does not include diminution in value … caused by the acquisition and use of adjoining lands [not owned by the landowner] for the same undertaking." 148 NH at 473-474. In this case, none of the Pennichuck Companies own any of the property to be acquired by Nashua. As a result, they are not entitled to any damages, severance or other, because none of their property has been taken. See also, 95 ALR 2d 887, Annotation: Unity of Ownership Necessary To Allow Award of Severance Damages in Eminent Domain; 26 AmJur 2d, Eminent Domain, See 338, p. 721 and 14A Nichols on Eminent Domain (3d Ed) § 14A. 08, p. 14 A-31.

12. By attempting to maintain an action for severance damages for entities that have no ownership or title to the assets being acquired, the Pennichuck Companies are attempting to take the rose without the thorns. The Pennichuck Companies have been organized into legally separate corporations with separate rates, costs-of-service, separate and geographically distinct service territories, limited liability, separate financial statements, and the ability to act independently for all legal purposes. They should not, and cannot as a matter of law, be allowed to simply ignore the existence of separate corporations for the purpose of severance damages, while on the other hand arguing that those entities are entirely distinct on the other. *See e.g., Schenley Distillers Corp. v. U.S.*, 326 U.S. 432, 437, 66 S. Ct. 247, 249 (1946) ("One who has created a corporate arrangement, chosen as a

means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.").

13. Likewise, neither the Pennichuck Companies nor PWW can recover severance damages for any alleged lost economies of scale or other incidental losses. For example, in the case Kennebec Water Dist. v. City of Waterville, et al, 97 Me. 185, 54 A. 6 (1902), the water company claimed severance damages for the proportionally heavier costs of supervision and management to its remaining property attributable to the loss of its Waterville plant. The court summarized the circumstances:

> The compensation asked is not for property taken, but for incidental damages to other property having no physical connection with or contiguity to that taken, and having no relations whatsoever with the property taken, except those which grow out of common ownership.

54 A. at 17. Applying general eminent domain principles, the court held that no severance damages could be awarded because the properties were separate and distinct, and the damages were incidental and consequential. Id. at 17-18.

14. The Kennebec Water District holding was subsequently reaffirmed in East Boothbay Water Dist. v. Boothbay Hbr., 158 Me. 32, 41, 177 A.2d 659 (1962); and the same result was reached in South Bay Irr. Dist. v. Calif. – American Water Co., 61 Cal. App. 3d 944, 133 Cal. Rptr. 166 (1976), where the water company owned two water supply and distribution systems that were physically separate and were separate enterprises for rate-making purposes. The two systems jointly used office and operations facilities. The facilities were included

in the rate base of the system condemned by the municipality. The water company sought severance damages for the cost the second system would incur to replace the facilities. The court ruled that the facilities were part of the first system, and no severance could be awarded for separate systems. All compensable value must be found in the facilities themselves. 61 Cal. App. 3d at 1002-03.

15. A similar result was reached by the California Public Utilities Commission in City of Fresno, 20 CPUC 2d. 502 (1986), where the Commission noted that "[b]asic to any allowance of severance damage … is the existence of unity of property taken and the property not taken, including *unity of title*, contiguity and unity of use." Furthermore, the Commission rejected a claim for "severance damages for categories of projected expenses for restoring efficiencies to service company [and related companies]. We have heretofore rejected the contention that [related companies] should be considered as part of an overall larger entity. They are separate entities. No severance damages are allowable …" *Id.*

16. This Commission has already noted that all of the Pennichuck Companies are separate and distinct and have separate franchises and rate structures. See, e.g. Order No. 24,425, supra at p.9. Likewise, PWW, PEU and PAC noted their separate rate structures in their Memorandum of Law on Scope of RSA Chapter 38, supra at pp. 2-4.

17. There is, as a matter of law, no basis for an award of severance damages to any of the Pennichuck Companies. PC, as the owner of the stock of PWW, is not "the owner" referred to in RSA 38:9 (III). PC, PWSC, PEU and PAC are not entitled

to an award of severance or other damages because none of their property has been taken.

B. Pennichuck Water Works, Inc,

18. Nashua's Petition seeks to acquire all of the assets of PWW. None of the parties have submitted any evidence to support a finding that Nashua should acquire less than the entire PWW system upon a determination that Nashua's Petition is in the public interest. However, even if the Commission were to determine that Nashua should acquire less than the entire PWW system, e.g. only the core assets of PWW, there is no direct harm or severance damages to the remainder. At best, PWW would only suffer lost economies of scale that impact the cost of service. These are incidental and consequential damages that cannot be awarded to PWW under Kennebec Water and South Bay.

19. Each of the various satellite systems of PWW is physically separate and distinct from the others and has its own separate and unique property. The satellites have no tangible connection to the Nashua core except their common ownership. The satellite systems have no physical connection to the Nashua system and have no relationship to them other than those which grow out of common ownership. Any damages PWW could claim would be incidental and consequential. That is not enough.

WHEREFORE, Nashua respectfully requests that the Commission:

A. Determine that, under RSA 38:9, III, "the owner" of the assets to be acquired in this proceeding is Pennichuck Water Works, Inc., the same entity as "the utility" which owns plant and property being taken, that is referred to in RSA 38:9 (I);

B. Determine that, because the Pennichuck Companies are not the owners of the assets to be acquired in this proceeding under RSA 38, they are precluded from seeking severance or other damages;

C. Determine that PWW is precluded from seeking severance damages as set forth herein;

D. Exclude all testimony or other evidence seeking severance damages in this proceeding; and

E. To grant such other and further relief as justice may require.

Respectfully submitted,

CITY OF NASHUA
By Its Attorneys
UPTON & HATFIELD, LLP

Date: December 8, 2006

By: _____

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CERTIFICATION

I hereby certify that a copy of the foregoing was this day forwarded to all persons on the Commission's official service list in the above proceedings.

Date: December 8, 2006

Robert Upton, II, Esquire

DW 06-001

PETITION OF PETER ST. JAMES et al.

Petition to Assert Jurisdiction of the Public Utilities Commission Over the Warner Village Water District

Order Granting Petition

O R D E R N O. 24,649

July 18, 2006

APPEARANCES: Eugene F. Sullivan III, Esq. for Peter St. James, Rhonda St. James, Debra Buckley and Kenneth Benward; Brackett L. Scheffey, Esq. for Water Village Water District; Suzanne Amidon, Esq. of the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

The New Hampshire Public Utilities Commission (Commission) opened this docket upon the jointly filed petition of Peter and Rhonda St. James, Debra Buckley and Kenneth Benward (Petitioners), all of Warner. They comprise three of the four residential customers who have been placed on notice by the Warner Village Water District (District) that the District intends to discontinue the provision of water service to them at some point in the summer of 2006. The Petitioners, all of whom reside outside the boundaries of the District, seek an order of the Commission that temporarily restrains the District from disconnecting them and that takes "appropriate actions" to ensure that the Petitioners "are adequately protected to ensure that they continue to receive safe and adequate service for the long term." The Petitioners made their filing on January 4, 2006.

On January 19, 2006, the Commission's executive director sent a letter to the District requesting that the District respond to the petition by February 3, 2006. The District sought additional time to file a response, was allowed an extension until February 20, 2006, and submitted its response on February 21, 2006. Included in the pleading was a motion to dismiss

the petition on the ground that the Commission lacks jurisdiction over the dispute. No objection was made to this submission for late filing.

The Petitioners filed an opposition to the dismissal motion on March 15, 2006. The Commission issued an order of notice on April 6, 2006, scheduling a prehearing conference for April 25, 2006, and establishing April 21, 2006, as the deadline for submitting intervention petitions. No requests for intervention were filed. Pursuant to RSA 363:17, the Commission designated Hearings Examiner Donald M. Kreis to conduct the prehearing conference, report the facts and make recommendations to the Commission. The prehearing conference took place as scheduled, after which the parties and Staff conducted a technical session. Staff filed a report of the technical session on April 26, 2006, and Mr. Kreis submitted his report and recommendations on May 1, 2006. In summary, Mr. Kreis noted that the parties agreed that the issue of jurisdiction was a legal question and recommended that the Commission order a briefing schedule.

Consistent with the hearings examiner's recommendations, the Commission issued Order No. 24,625 (May 18, 2006) directing that the parties submit a stipulation of facts on April 28, 2006, and briefs on the question of the Commission's jurisdiction by May 23, 2006. In addition, the Commission directed the District to refrain from terminating service to the Petitioners or any household similarly situated pending further order of the Commission..

On April 28, 2006, Petitioners requested additional time to file the stipulation of facts, and the District filed the stipulation of facts on behalf of the parties on May 3, 2006. The Petitioners and the District filed legal briefs regarding the Commission's jurisdiction on May 23, 2006. Staff did not file a brief.

The stipulation of facts states, in pertinent part, as follows:

1. The District is a body corporate and politic governed established as a village district pursuant to RSA 32:1.

2. Petitioners reside outside of the boundaries of the District.

3. Silver Lake was the original source of water for the District, and the pipe through which Petitioners receive service is the pipe that traverses from Silver Lake to Warner.

4. Silver Lake is no longer the supply source. The water that once flowed from the lake to the actual village district now flows in the other direction to the four affected properties.

5. The District's Bylaws and Terms and Conditions of Service contemplate the provision of service outside the District's geographical boundaries.

6. There is no record of approval of a service area or franchise are granted to the District from the Commission for the service provided outside its geographical boundaries as required under RSA 362:2 and 362:4.

7. The District informed Petitioners, by letter dated October 11, 2005, that the District would terminate service to their properties, and that Petitioners would need to drill wells.

8. All customers of the District contribute to operations costs and debt service on bonded indebtedness, including capital expenditures.

II. POSITIONS OF THE PARTIES

A. Petitioners

Petitioners state that the Commission's jurisdiction is set forth generally in RSA 362. Petitioners noted that the term "public utility" does not include municipal corporations operating within their corporate limits but this exception does not apply to the District because Petitioners'

households are outside the District's boundaries. RSA 362:2, I.

Petitioners further argue that the provisions of RSA 362:2 as they apply to municipal water service are further set forth in RSA 362:4, which provides that the District would be entitled to exemption from Commission regulation under RSA 362:2 if the District serves customers outside the District boundaries and serves such customers "a quantity and quality of water or a level of water service equal to that service to customers within the municipality." RSA 362:4, III-a (a) (1). Petitioners claim that the District is not providing the same quantity or quality of water outside its boundaries as it provides within its boundaries, asserting that while improvements have been made to the District's water system, none have been made for the improvement of service to Petitioners.

The Petitioners characterize the District's decision not to make improvements in service to the affected households as a failure to maintain the same quantity and quality of service as that provided to customers within the municipality, contrary to the requirements of RSA 362:4,III-a (a) (1). Petitioners argue that they are the type of ratepayer "the Legislature sought to protect in RSA 362:4, III-a (a) (1), [a] ratepayer without the right to vote on issues affecting their service, [a] ratepayer whose only protection is the Commission." Petitioners' Brief at 3.

B. Warner Water District

The District acknowledges that it serves households outside its corporate limits and concedes that it is a utility, but argues that it is not a public utility subject to Commission jurisdiction. The District relies on the Supreme Court's determination in *Appeal of Zimmerman*, 141 NH 505 (1997), concerning the provision of telecommunications services by a landlord to his tenants, that "unless a person has publicly professed his readiness to perform a particular

service he is under no duty to render that service to all who request it." The District contends that because it has not publicly professed its readiness to supply water to others, nor offered service to the public at large, it does not qualify as a public utility.

The District also argues that the Supreme Court in *Zimmerman* indicated that "if there is a separate relationship between the utility and the customer, it is necessarily a private enterprise (and thus not a public one). As such, it would not be under PUC jurisdiction." District's brief at 5. The District asserts that the "separate relationship" that exists between the provision of water service and the Petitioners is the proximity of the Petitioners to the pipe line. The District concludes on this basis that the Petitioners are not members of the general public.

The District argues as well that the fact that the District served the affected households in the past does not mean it undertook a permanent obligation. The District claims that it is not engaged in the business of providing water to people outside its boundaries and that while it may be desirable for Petitioners to continue receiving service, the Petitioners are not and never were the intended customers of the District.

The District also contends that it is exempt from regulation as a public utility by virtue of RSA362:4, III-a (a) which reads as follows:

> A municipal corporation furnishing water services shall not be considered a public utility under this title:
>
> (1) If it serves new customers outside its municipal boundaries, charges such customers a rate no higher than 15 percent above that charged to its municipal customers, including current per-household debt service costs for water system improvements, within the municipality, and serves those customers a quantity and quality of water or a level of water service equal to that served to customers within the municipality. Nothing in this paragraph shall exempt a municipal corporation from the franchise application requirements of RSA 374.

Finally, the District states that it does not serve "new" customers outside its boundaries

and does not intend to do so. The District states that it charges its "old" customers outside the District boundary the same rates for water, and that the water service is the same quality and quantity as that provided "to the rest of the District." District Brief at 7. As to the requirement contained in RSA 362:4, III-a (a), which requires a municipal water company to apply for a franchise to serve outside its boundaries, the District states that "it is nonsensical for the District to apply at this late date for a franchise to do something it does not want to do and for the purpose of being able to stop doing it." *Id*. The District concludes by arguing that it is not required to apply for a franchise under RSA 374:22 because it is not "commencing business" nor is it doing anything "in which 'it shall not already be engaged.'" District Brief at 9.

III. COMMISSION ANALYSIS

At the outset, we note that there is agreement between Petitioners and the District that the District is a village district within the meaning of RSA 52:1 and, therefore, is a body corporate and politic with all powers "in relation to the objects for which it is established that towns have or may have in relation to like objects." RSA 52:2. It follows that the District is a municipality within the meaning of RSA 38:1, III and a municipal water company within the meaning of RSA 38:1, IV.[1] The question remaining is whether the District is a public utility subject to the Commission's jurisdiction.

According to RSA 362:2, a municipal corporation is not a public utility if it operates within its corporate limits. The Petitioners and the District have stipulated that the District's

[1] We have previously recognized that a village district is a municipal corporation. For an example, *See North Conway Water Precinct*, 89 NH PUC 496, 498 (2004).

bylaws allow the District to provide water service to customers outside its boundaries, and that the District in fact provides water service to Petitioners.[2] These facts are undisputed.

Pursuant to RSA 362:4, III-a (a)(1), a municipal corporation furnishing water outside its municipal boundaries, shall not be considered a public utility if:

> (1) If it serves new customers outside its municipal boundaries, charging such customers a rate no higher than 15 percent above that charged to its municipal customers, including current per-household debt service costs for water system improvements, within the municipality, and serves those customers a quantity and quality of water or a level of water service equal to that served to customers within the municipality. *Nothing in this paragraph shall exempt a municipal corporation from the franchise application requirements of RSA 374.*" (Emphasis added.)

It is also undisputed that the District has not sought a franchise from the Commission to provide water service outside its service territory.

Nonetheless, the District contends that its provision of services to property owners outside the District's boundaries is not dispositive. It argues instead that the controlling factor is that the Petitioners are "serendipitously" located near the water line previously used to serve the

[2] Article IV of the bylaws states:

> Residents outside the boundaries of the District, (Precinct) may be provided services because of special conditions but only under contracts approved by the Commission." We have not been provided any evidence that service contracts exist, but note that Item 2 of the Warner Village Water District Terms and Conditions states ". . . the rendering of service by the District and its use by the customer shall be deemed a contract between the parties, subject to all terms and conditions of the District's Regulations.

entire District from Silver Lake and that this "discrete characteristic" of Petitioners' homes—the proximity to the water main—constitutes a separate, and private, relationship to the District.

To support its argument, the District relies on an expansive interpretation of the holding in the New Hampshire Supreme Court's 1997 *Zimmerman* decision. In that case, a commercial landlord who owned and managed several buildings offered telephone services to his commercial and retail tenants. The Commission determined that the landlord was operating a public utility and ordered him to show cause why he should not be subject to sanctions for doing so without Commission authorization. On appeal, the Supreme Court noted that one characteristic of a public utility is to offer service without discrimination. The Court observed that the landlord only offered telephone services to tenants with whom he had a landlord-tenant relationship.[3] The Court observed that members of the public would have to be tenants of the landlord to qualify for the telephone service he offered. The Court concluded that "[b]ecause Zimmerman does not share this affinity [landlord-tenant relationship] with other members of the relevant public, he cannot be said to offer telecommunications services to all comers without discrimination. His [telephone] network, therefore, is not a public utility within the commission's jurisdiction under RSA 362:2." *Zimmerman*, 141 NH at 612.

In our view, the District draws too broad an inference from the Court's reliance on the landlord-tenant relationship as the dispositive factor in *Zimmerman*. The Petitioners' proximity to the pipe emanating from Silver Lake may be a geographic and historical happenstance that limits the universe of households that the District might be inclined to serve, but the same can be said of every public utility in New Hampshire, since none has a service territory that

[3] *Claremont Gas Light Co. V. Monadnock Mill*, 92 NH 468 (1943), relied upon by the District, also involved

encompasses the entire state. Therefore, we do not agree that geographic proximity, and any historical happenstance that caused the entity in question to serve some physical places and not others, creates a business relationship that is "sufficiently discrete as to differentiate [Petitioners in their capacity as customers of the District] from other members of the relevant public." *Id.*. Indeed, to conclude otherwise in the context of RSA 362:4 would mean that municipalities could build pipelines outside their boundaries and declare that they are not subject to Commission regulation because they only intend to serve customers in proximity to those pipelines.

Furthermore, the District operates according to a set of bylaws that contemplates water service to households outside the District without distinction.[4] This in itself tends to undermine the District's position that its conduct is, like that of the landlord in *Zimmerman*, not "[s]ervice to the public without discrimination." *Id*. at 609 (citations and internal quotation marks omitted). In these circumstances, service to customers outside the district without a franchise by the Commission to do so violates the requirements of RSA 362:4, III-a (a)(1).

The District further contends that, because it no longer intends to serve members of the public outside its boundaries, and, if it successfully disconnects Petitioners from service, it will not serve outside its boundaries, it will not be a public utility and, therefore, does not need the

service offered by a provider to service recipients in a lessor-lessee relationship with the provider.

[4] Further, we note that the Terms and Conditions of the District indicate that the District would disconnect for nonpayment (Item 13) but does not state any other condition under which it would be acceptable for the District to terminate service. The District cannot now argue that, because it does not intend to continue service Petitioners, it can now terminate them without any consequence. This action would also appear to be in conflict with its own Bylaws, and Terms and Conditions which only permits disconnection for nonpayment of bills.

Commission's franchise. Essentially, the District is relying on historic non-compliance with RSA 362 to escape the Commission's jurisdiction. The District also contends that it is not operating illegally because it has not added "new" customers, but proposes to discontinue service to "old" customers. *See* RSA 362:4, III-a (a)(1). Both of these arguments are illogical when considered in the context of the statute.

We recognize that there are arguably some internal inconsistencies in the language of the statute. We also acknowledge that the Supreme Court is the final arbiter of the intent of the legislature as expressed in the words of a statute. *Carter v. Lachance*, 146 NH 11, 13 (2001). Using the guidance enunciated by the Supreme Court, however, we conclude that the District's interpretation of the statute is inconsistent with standards of statutory construction used by the Court.

As noted above, RSA 362:4, III-a (a)(1) provides that a municipal corporation is not a public utility when it serves customers outside its boundaries at a rate no higher than 15 percent billed to the rest of its customers, and with a quantity and quality of water equal to that provided to the rest of the customers. RSA 362:4, III-a (a)(1) further states that no municipal corporation is exempt from obtaining a franchise pursuant to RSA 374:22. The Petitioners contend in their brief that the legislative purpose is to protect customers outside of a municipal corporation from high rates, and to assure the quantity and quality of water service provided to such customers.

In examining the meaning of the statute, the Court first looks at the words in the statute and applies the plain meaning of the words used. *Id.* If we follow the District's interpretation that a franchise is only required of a municipal corporation seeking to provide service to "new" customers, the consumer protection purposes of the statute would be frustrated because the out-

of-franchise customers of a municipal corporation would have the protections afforded by the statute in situations where municipalities observed the franchise requirements of RSA 374 but not in situations where municipalities failed to observe the franchise requirements of RSA 374. In such circumstances, it is appropriate to examine the statute's overall objective and presume the legislature would not pass an act that would lead to such an illogical result. *Estate of Gordon-Couture v. Brown*, 152 NH 265, 266 (2005).

The District contends that, although it proposes to completely discontinue service to the Petitioners, it has provided the same quantity and quality of water to households outside the District as it has within the District and therefore qualifies as an exempt municipal corporation pursuant to RSA 362.4, III-a(a) (1). The District ignores the obvious reality that its proposed action—terminating service to Petitioners—is the most drastic expression possible of inequity in service in violation of the statutory requirement.

Regardless of how the District arrived at the current state of affairs, it has shown no basis for us to conclude that it has not been or is not subject to the requirement of RSA 362:4, III-a(a) (1) that it obtain a franchise from the Commission pursuant to RSA 374:22. RSA 374:22 states in pertinent part: "No person or business entity shall commence business as a public utility within this state, or *shall engage in such business*. . . without first having obtained the *permission and approval* of the commission." (Emphasis added.) The Commission typically grants a franchise by issuing an order[5] that, among other things, delineates the area of the franchise. The granting of a franchise brings with it certain rights and obligations. In the case of a municipality operating

[5] An example of such an order can be found at 86 NH PUC 746 (2001) and, more recently, 89 NH PUC 496 (2004).

outside its boundaries, the breadth of regulation is constrained under certain conditions, but unambiguously leaves such a municipality subject to the franchise application requirements of RSA 374, which in turn lays out the general regulatory authority of the Commission (as distinct, e.g., from its oversight of rates and charges pursuant to RSA 378). If the effect of the reference to RSA 374 in RSA 362:4, III-a(a)(1) were limited to requiring the District to make a filing with the Commission (a franchise application) when deemed a convenient exercise by the District, the requirement would amount to nothing beyond a rote exercise. In other words, notwithstanding the exemption of the District from the definition of "public utility" for other purposes, our responsibility to give substance to the franchise application requirement is among those to be reasonably inferred from the franchise application requirement. *See State v. New England Tel. & Tel. Co*., 103 N.H. 394, 397 (1961) (noting that Commission's authority extends from express enactments to the "fairly implied inferences" drawn from such exactments) (citations omitted). Thus, RSA 362:4, III-a (a)(1) does not provide nearly the free rein to a municipality that the District posits.

The District appears to be arguing that, because it has not sought a franchise pursuant to RSA 362.4, III-a (a)(1), it need not seek the Commission's permission under RSA 374:28 to discontinue service to the Petitioners. It is reasonable to read RSA 362:4, III-a (a)1 as expressing the Legislature's intent to preclude economic and financial regulation of municipalities under certain circumstances. The statute, however, is clear in retaining Commission regulation over franchising, which pertains to both market entry and market exit. The granting of a franchise confers on an entity the right to provide service and along with the right to serve goes the obligation or duty to serve customers within the franchise or service territory. Concomitant with

an entity's duty to serve is the restriction on its ability to discontinue service or exit the market. *See, e.g., State v. Frost*, 91 N.H. 229, 232 (1941) (referring to public utility's "obligation to serve"). In any event, the fact remains that although the District did not seek the Commission's permission and approval, pursuant to RSA 374:22, to serve customers outside its boundaries, it is nonetheless subject to the Commission's jurisdiction and it may not discontinue service to the Petitioners without Commission authorization to do so.

Based on the preceding analysis, we find that the District has operated and is operating as a municipal corporation providing services outside its boundaries without a franchise in violation of RSA 362.4, III-a (a) (1) and that it is subject to the Commission's jurisdiction. There may be some merit in the District's argument that applying for a franchise, or requiring it to apply for a franchise, at this time would be illogical since it only intends to seek discontinuance of service to the Petitioners. Nevertheless, in an attempt to clarify the situation, we grant the District permission to provide service outside its boundaries to the households currently taking service from the Silver Lake pipeline. We also note that the Commission has previously ordered the District to refrain from discontinuing service to Petitioners and that requirement remains in force. Finally, we point out that in the event the District seeks to discontinue service outside its boundaries it is required to file a petition explaining how such discontinuance would be for the public good.

Based upon the foregoing, it is hereby

ORDERED, that the Commission has jurisdiction over the Warner Village District and the District shall not discontinue water service to the Petitioners without Commission authorization.

By order of the Public Utilities Commission of New Hampshire this eighteenth day of July, 2006.

Thomas B. Getz	Graham J. Morrison	Clifton C. Below
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 07-136

MOUNTAIN LAKES DISTRICT

Investigation into Service Provided Outside Corporate Boundaries in the Town of Bath

Order Approving Exemption from Regulation

O R D E R N O. 24,880

July 28, 2008

I. BACKGROUND

This proceeding concerns issues raised in November 2007 by two customers of the Mountain Lakes District (MLD), a municipal water district that provides service in Haverhill and Bath. The customers, both residents of Bath, reported that they had been notified that MLD intended to terminate water service to all properties located in the Town of Bath by April 1, 2008.

On November 29, 2007, New Hampshire Public Utilities Commission Staff filed a letter recommending a proceeding be opened to investigate the proposed termination of service. Staff advised that the water system serving the customers of MLD had been acquired from a previously regulated water utility, Mountain Springs Water Company (Mountain Springs), whose service territory was located in Haverhill and Bath. When MLD acquired the water system in 1986, the Commission determined it to be precluded from regulation pursuant to RSA 362:2. *Mountain Springs Water Co.*, 71 NH PUC 194 (1986).

Staff noted that the letter from the MLD commissioners referred to the Bath customers as "non-district" users. According to Staff, MLD sent the letters to Bath customers because it had concluded they were not paying their full share of the district's expenses because some of the

expenses were recovered through a tax assessed only to district customers in Haverhill. According to the MLD letter, the tax could not be levied on the customers in Bath because the Town of Bath had not authorized expansion of the water district into Bath. Staff pointed out that, if the Bath customers are truly outside the corporate limits of the water district, rates for the customers living in Bath could nevertheless be increased and MLD could still be exempted from regulation.

On January 7, 2008, the Commission issued an order of notice, scheduling a prehearing conference and technical session for January 29, 2008, and inviting interventions from interested parties. On January 14, 2008, Robert Duquette, a Bath resident and water customer of MLD, filed an intervention request. The prehearing conference was held as scheduled, and Mr. Duquette's request for intervention was granted. The Office of Consumer Advocate (OCA) also appeared at the prehearing conference, stating an intention to monitor the hearing.

On February 7, 2008, MLD filed a letter indicating that the water district was no longer planning to terminate service to the Bath customers. The letter also expressed interest in developing a fair and equitable rate such that Bath customers would be charged a fair proportion of the cost of water service. Additionally, the letter indicated that, notwithstanding references to RSA 362:2 in any previous Commission order concerning the district, the district did not consider itself automatically exempt from utility regulation.

On March 4, 2008, Staff filed a report on the technical session held subsequent to the prehearing conference. Staff and the parties requested approval of a procedural schedule, which was granted by the Commission in a secretarial letter issued March 12, 2008. The procedural schedule provided that recommendations from the Staff and parties be filed on April 18, 2008.

On April 18, 2008, the Commission received a joint recommendation from Staff and MLD. The OCA and Mr. Duquette also filed recommendations. On May 28, 2008, Staff filed a letter with the Commission explaining that it had contacted Mr. Duquette to ascertain whether he wanted the Commission to conduct a hearing at which he could present evidence. According to Staff, Mr. Duquette characterized any presentation he would make at a hearing as duplicative and he did not object to the Commission ruling on this matter based on the papers on file.

II. POSITIONS OF THE PARTIES

A. Staff and MLD

Staff and MLD filed a joint recommendation that the Commission treat a water rate of $765 annually for the 16 MLD customers in Bath as equivalent to the $400 rate charged within the corporate boundaries of MLD when adjusted for taxes paid by customers within the district. Staff and MLD recommended that the Commission find MLD's provision of water service outside its corporate boundaries to be exempt from Commission regulation pursuant to RSA 362:4, III-a (b). The letter noted that, although paragraph (a) of section RSA 362:4, III-a limits regulatory exemptions to municipal corporations seeking to serve new customers outside their boundaries, paragraph (b) authorizes the Commission to exempt any water district from utility regulation upon a determination after notice and hearing that the exemption would be consistent with the public good.

Staff and MLD acknowledged that, although the Commission approved the franchise transfer from Mountain Springs Water Company to MLD in 1986 and determined that MLD was not subject to regulation based on RSA 362:2, the Town of Bath never approved the expansion of the water district into the town. Since some MLD operating costs are recovered through the

district tax not collected in Bath, MLD has not been charging equivalent rates outside its corporate boundaries.

To remedy the rate disparity, Staff and MLD proposed that a proportionate share of MLD's debt service and administrative costs be added to the district's water rate charged to Bath customers as permitted under RSA 362:4, III-a. This rate, for 2008, would be $400 inside the district boundaries and $765 outside, with the difference paid by Haverhill customers through the district tax. Staff and MLD also recommended the Commission approve the method, as set forth in the attachment to their recommendation, for calculating the Bath rate in future years. Staff and MLD proposed that certain district administrative and debt service costs be allocated to the provision of water service, which would then be allocated to district and non-district customers based on the relative proportion of property value assessment inside MLD and in Bath. Staff and MLD contend that the proposed rate of $765 for 2008 for the 16 Bath customers is an equivalent rate to that charged inside MLD, and that Commission approval of that rate and the method to calculate future rates would be for the public good.

In addition, MLD agreed to provide adequate notice to Bath customers regarding the water rates, including supplying a copy of the MLD proposed budget each year as well as the final budget approved by the MLD voters. MLD stated that Bath customers are invited to attend and participate in the meetings where the proposed budget is presented to residents and discussed. For these reasons, Staff and MLD recommend that the Commission find MLD's provision of water service exempt from regulation pursuant to RSA 362:4, III-a (b).

B. Robert Duquette

Mr. Duquette objected to the allocation of certain district expenses to water service. He stated that MLD had refused to respond to certain of his questions, or had inadequately

responded to questions regarding MLD's budget. Mr. Duquette objected to the allocations of costs associated with the office manager's salary, debt service associated with the MLD dam, failure of MLD to allocate costs to the MLD Lodge, and costs associated with office supplies and utilities such as telephone, electricity, propane and water. Mr. Duquette proposed reducing costs allocated to water service, and thereby increasing the costs allocated to recreation services. The adjustments would result in an annual rate to Bath customers of $697.94, rather than the $765 proposed by MLD and Staff.

C. Office of the Consumer Advocate

OCA agreed that MLD should be exempted from regulation under the public good standard of RSA 362:4, III-a (b). OCA asserted that MLD may not terminate service to Bath customers without explicit authorization from the Commission. OCA cites the Commission's decision in *Petition of Peter St. James*, Order No. 24,649 (July 18, 2006), in which a municipal water district subject to the franchising requirements of RSA 374:28 was ordered to not discontinue service to customers outside its corporate boundaries without Commission approval.

III. COMMISSION ANALYSIS

According to RSA 362:2, a municipal corporation is not a public utility if it operates only within its corporate limits. It is clear that, as a result of the Town of Bath's refusal to permit the extension of the water district into Bath, that the Mountain Lakes District provides water service to customers outside its boundaries. The Commission's 1986 order is therefore inoperative insofar as it presumed the boundaries of MLD would extend into Bath.

In addition to the general provisions defining "public utility" in RSA 362:2, RSA 362:4 refines the definition as applied specifically to providers of water service to the public. There have been numerous amendments to RSA 362:4 over the years. At one point, RSA 362:4, III(a)

provided that so long as a municipality was providing water service outside its boundaries at rates no higher, and at a quality and quantity equal, to that provided municipal customers, it was not a public utility. This automatic exemption from regulation did not survive statutory changes made in 2003, but separate language allowing for permissive exemption from regulation in certain circumstances was retained. For instance, pursuant to RSA 362:4, III-a (b), the Commission may exempt a municipal corporation from regulation, except for the franchise application requirements of RSA 374, upon a finding that such exemption is consistent with the public good.

Despite any previous representations to the contrary, MLD seeks to continue to serve its Bath customers. To do so, however, MLD must have the ability to charge a rate to those customers that reflects their fair share of the costs of providing them service.

Staff and MLD propose a rate of $765 for the Bath customers, and assert that this rate is equivalent to that charged within MLD when consideration is given to the additional amount Haverhill customers pay for water service through their district tax bills. Mr. Duquette does not dispute the imposition of an equivalent rate. Rather, he proposes an equivalent rate lower than the one calculated by MLD and Staff, based on his adjustment of specific items in the MLD budget.

In their joint recommendation, Staff and MLD provided a clear method for the establishment of a water rate for the non-district customers once MLD's annual budgets are adopted. This method allocates certain administrative and debt service budget items to MLD's water service, which are paid for by all customers, inside MLD as well as outside, on an equivalent basis. Significantly, this allocation also results in property owners within the district, who have yet to construct homes and take service, contributing to the fixed costs of the water

system through the payment of their district tax rate. This is a clear benefit to the Bath customers outside the district.

MLD plans to use this same method for setting its water rate in the future as it has done for the 2008 budget. MLD commits to providing adequate notice to Bath customers regarding the water rates, and has agreed to provide the Bath customers with a copy of the MLD proposed budget each year as well as the final budget approved by the MLD voters. MLD states that Bath customers are invited to attend and participate in the meetings where the proposed budget is presented to residents and discussed.

After reviewing the filings of Staff, MLD, Mr. Duquette, and OCA, we generally adopt the recommendations of Staff and MLD. First, we reiterate that MLD may not terminate service to Bath customers at any time without explicit authorization from the Commission. Second, we find that the proposed rates for service to the Bath customers outside MLD's corporate boundaries are equivalent to rates charged within the district through both the water rate and the district tax. In this regard, we observe that Mr. Duquette's objection really concerns the overall water rate level charged by MLD within its boundaries. His objection is not the relevant inquiry under the statutory scheme set forth in RSA 362:4, III-a, which focuses on the comparability of treatment of customers inside and outside the boundaries of the water district. In any event, we observe as well that MLD arguably could charge Bath customers a water rate up to 15 percent above that charged to Haverhill customers. Furthermore, we note that the rate setting method recommended by Staff and MLD provides adequate protection for non-district customers, and we will accept it. Finally, we find that, to the extent MLD could be considered a public utility insofar as it serves customers outside its boundaries, it is consistent with the public good in these circumstances to exempt it from regulation.

Based upon the foregoing, it is hereby

ORDERED, that MLD's request to charge an annual rate outside district boundaries of $765 for 2008 is approved; and it is

FURTHER ORDERED, that MLD's provision of water service to customers in the Town of Bath, within the franchise area previously granted, is exempt from Commission regulation consistent with the public good; and it is

FURTHER ORDERED, that future annual rates to be charged outside MLD's corporate boundaries shall be established in accordance with the method as recommended by Staff and MLD, and that any material alterations of that method shall be submitted to the Commission for review.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of July, 2008.

Thomas B. Getz	Graham J. Morrison	Clifton C. Below
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 07-136

MOUNTAIN LAKES DISTRICT

Investigation into Service Provided Outside Corporate Boundaries in the Town of Bath

Order Modifying Order No. 24,880

O R D E R N O. 25,004

August 12, 2009

I. BACKGROUND

Mountain Lakes District (MLD) is a village district that provides, among other services, water service in the towns of Haverhill and Bath. Customers in Bath are not residents of the MLD and, therefore, MLD serves customers outside its municipal boundaries. On July 28, 2008, the Commission issued Order No. 24,880, which approved MLD's continued exemption from regulation based upon a rate-setting formula recommended by Staff and MLD for Bath customers. This formula takes into account the fact that certain portions of MLD's water department budget are collected through the district tax to residents, and establishes a sharing of those costs with the Bath customers based on a weighting of property values within and without the district.

On April 16, 2009, the Commission received a copy of a letter written by Mr. Robert Duquette, a non-resident water customer of MLD, directed to the Commissioners of MLD. Mr. Duquette expressed concern that the MLD was not following Commission Order No. 24,880. Mr. Duquette stated that MLD was required to provide notice to Bath customers each year so that they would be made aware of, and have an opportunity to participate in, MLD's budget meetings concerning the water department budget. Mr. Duquette stated that he was not notified

of the scheduled meetings and had not received a copy of the proposed budget, or of the final budget. Mr. Duquette also questioned the formula MLD used to allocate costs to the Bath customers. Mr. Duquette stated that he was unable to reconcile the value of the 16 properties served in Bath with the value used by MLD for allocating costs. He requested that MLD provide him with copies of the records used to determine the property values, and also requested that the Commission intercede and permit Bath customers to withhold payment of their water bills until the matter of the property values was resolved.

On May 5, 2009, Staff filed a letter indicating that it had investigated Mr. Duquette's concerns. Staff stated that it had contacted MLD concerning the two issues raised by Mr. Duquette. With respect to the issue of adequate notice, Staff stated that MLD had provided notice in compliance with applicable state law regarding budget meetings, but the notice did not reach Bath customers as contemplated by Order No. 24,880. Staff stated that MLD had represented to the Commission that it would provide the Bath customers with a copy of the MLD proposed budget as well as the final budget approved by the MLD voters. Staff stated that Mr. Duquette was not notified of the scheduled budget meetings and did not receive a copy of the proposed budget or the final approved budget. Staff stated that MLD will now send individual letters to the Bath customers each year, notifying them of the dates of the budget meetings and will indicate how copies of the voluminous proposed budget can be obtained. Staff stated that it believed this more specific notice would enable Bath customers to meaningfully participate in the budget discussions that ultimately impact the water rates they will pay.

With respect to Mr. Duquette's concern relating to the formula, Staff stated that there was a misunderstanding within the recommendation of Staff and MLD previously adopted by the

Commission. At the time, Staff believed that the value of the Bath property used in the formula was for the 16 lots currently being served; while MLD understood the property value to include both the 16 customer lots as well as the remaining undeveloped lots in Bath that were within the original franchise recognized in 1986. *See Mountain Springs Water Company, Inc.*, 71 NH PUC 194 (1986). Staff also stated that the Bath property valuation figure of $2,170,100 for 2008 included in Staff and MLD's joint recommendation included the undeveloped Bath lots, unbeknownst to Staff. Staff stated that it had reviewed the issue with MLD and concluded that MLD's interpretation of the formula was not inappropriate. Noting the fact that the undeveloped Bath lots remain within the MLD franchise area, and the fact that undeveloped lots within the MLD in Haverhill are included as part of the weighting of costs for allocation between the two towns, Staff stated that including the value of the undeveloped lots in Bath will not alter the equivalency of the rates charged inside and outside MLD.

On May 28, 2009, Mr. Duquette filed a letter responding to Staff's recommendation. Mr. Duquette agreed with Staff's recommendation concerning notice but requested that MLD also provide supplemental worksheets so that costs, percent of costs allocated, and the property valuations used in the formula could be verified. Mr. Duquette objected to Staff's recommendation concerning the use of property values in the formula. He stated that, notwithstanding Staff and MLD's differing interpretations of the formula, allowing MLD to continue to include the value of the undeveloped lots in Bath is inappropriate. Mr. Duquette objected to the use of undeveloped values in the formula because, while lot owners within MLD pay water-related costs through their MLD tax regardless of whether they take service or not, owners of undeveloped lots in Bath do not and thus there is an unfair shifting of costs to Bath

customers actually taking service. Mr. Duquette also objected to Staff's position that owners of undeveloped lots in Bath may request water service in the future. He stated that these same owners also have a right to drill their own well and never take service from MLD.

II. COMMISSION ANALYSIS

RSA 378:7 provides the Commission with the general authority to fix rates for public utilities after a hearing upon determining that the rates, fares, and charges are just and reasonable. Pursuant to RSA 362:4, III-a (b) and (d), the Commission may approve different rates for existing customers located outside a municipal corporation's boundary so long as such rates are consistent with the public good. Prior to the 2003 changes to RSA 362:4, the Commission approved exemptions from regulation when a municipal corporation could demonstrate that it provided customers located outside its municipal boundaries with a quantity and quality of water, or level of water service, equal to that served to customers within the municipality and at equal rates. *See*, *Plymouth Village Water and Sewer District*, Order No. 22,527, 82 NH PUC 283 (1997). We apply these principles to the case at hand.

In Order No. 24,880, the Commission approved a joint recommendation of Staff and MLD, which provided a method for establishing a water rate for MLD's customers located outside the district in Bath such that the total cost for water service charged within MLD would be equivalent to the rate charged to Bath customers. A portion of the allocation method used property values as a weighting factor to allocate water-related costs that, within MLD, are recovered through the district tax. We now understand that the joint recommendation of Staff and MLD was ambiguous as to the inclusion of values for undeveloped property within Bath as part of the allocation formula. MLD subsequently included all Bath properties that were in the

original franchise approval in its value weighting for the calculation of its 2009 rates. Mr. Duquette, a Bath customer of MLD contends that the inclusion in the formula of undeveloped lots in Bath unfairly disadvantages current Bath customers since those customers end up paying a greater share of allocable costs based on inclusion of the undeveloped lots in its formula, which pay nothing, whereas the owners of undeveloped lots in Haverhill are reached through MLD's taxing authority.

Having reviewed the filings made since Order No. 24,880, we find that it is just and reasonable and consistent with the public interest to modify the formula as recommended by Mr. Duquette. Although it may not be inappropriate to include all Bath and all Haverhill properties that were in the original franchise request in the formula, we note that the district was not fully incorporated in Bath as originally planned. Since the district only exists in Haverhill, it does not have taxing authority over the properties in Bath. Instead, MLD reaches the Bath properties only by virtue of the fact that select properties receive water service from MLD. We find this distinction sufficient to approve use of a formula structured in the way Staff originally understood the formula to be; that is, the total property value used for allocation of certain administrative and debt service costs to Bath customers should include only those properties in Bath that receive water service from MLD, while the total property value for Haverhill should continue to include that of both MLD customers and undeveloped lot owners subject to MLD property taxes for those costs. At the same time, we find that MLD's interpretation of the rate formula was not unreasonable nor did it produce unreasonable rates. Accordingly, we will not require a retroactive adjustment of rates.

We find that the refinement and clarification of the formula better reflects the intent of the Commission's prior order and will produce just and reasonable rates. Therefore, we will require MLD to institute this change in formula on a prospective basis to coincide with its next budget cycle. In Order No. 24,880, we found that the formula produced rates that were equivalent to rates charged within the district through both the water rate and the district tax. We continue to find this to be the case. Accordingly, we find it consistent with the public interest to exempt MLD from regulation so long as MLD continues to provide to Bath customers a quantity and quality of water or level of water service, equal to that served to customers within the district and at equivalent rates based upon the formula as modified by this Order.

Based upon the foregoing, it is hereby

ORDERED, that Mountain Lakes District is authorized to charge an annual rate outside its district boundaries in accordance with the method approved in Order No. 24,880 and as modified herein; and it is

FURTHER ORDERED, that Mountain Lakes District shall notify Bath customers by first class mail of its budget meetings and shall provide Bath customers with an opportunity to obtain a complete copy of the proposed budget as well as any supplemental worksheets that exist that may aid the Bath customers in their understanding of the budget and, in particular, the allocation of costs to Bath customers; and it is

FURTHER ORDERED, that Mountain Lakes District's provision of water service to customers in the Town of Bath, within the franchise area previously granted, is exempt from Commission regulation consistent with the public good; and it is

FURTHER ORDERED, that future annual rates to be charged outside Mountain Lakes District's corporate boundaries shall be established in accordance with the method as recommended by Staff and MLD and as modified by this order, and that any material alterations of that method shall be submitted to the Commission for review.

By order of the Public Utilities Commission of New Hampshire this twelfth day of August, 2009.

Thomas B. Getz
Chairman

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 07-094

GUNSTOCK ACRES VILLAGE WATER DISTRICT

Petition for Authority to Expand Franchise and Serve Outside District Boundary

Order Approving Petition

O R D E R N O. 24,834

March 21, 2008

On August 31, 2007, Gunstock Acres Village Water District (Gunstock) filed a petition requesting authority to expand its franchise and serve a single customer outside its District boundaries. Gunstock is a municipal corporation and is not regulated by the Commission. It currently serves approximately 700 customers in Gilford.

Gunstock was approached by a family that resides just outside the District on Hook Road in Gilford, seeking permission to connect to Gunstock's water system. This family obtains its domestic water from a well located on its property and, after purchasing the home in 2005, has experienced difficulty with that well running dry. After contacting a local well company, the family found out that the previous owner of the property had the same problems, and in fact attempted to increase the well's production, without success. The family was unaware of these facts when it purchased the home.

After consulting with the town's administrator, the family discussed with Gunstock the possibility of connecting to the Gunstock water system. The commissioners of the water district agreed to permit the family to connect, and filed the instant petition for Commission approval to serve this single customer outside District boundaries. Gunstock indicates that it will charge the

family the same rate as customers inside the District and will provide it with the same quality and quantity of water. Included with Gunstock's petition is a copy of a portion of the Town of Gilford's tax map, identifying the family's property as Lot 95. Gunstock will extend a main of approximately 50 feet to serve this family.

On March 14, 2008, Staff filed a letter recommending approval of Gunstock's petition. Staff stated that it had conducted discovery and attached the discovery responses to its letter. Included with the discovery responses is a letter from the Department of Environmental Services (DES), indicating the support of DES for the expansion of the Gunstock franchise and indicating that the Gunstock water system meets the availability and suitability requirements of RSA 374:22, III. Staff indicated that approval of the petition would not affect Gunstock's status as a municipal corporation exempt from Commission regulation, since Gunstock's service to this single customer will be provided at a rate no higher than 15 percent above that charged to Gunstock's municipal customers, pursuant RSA 362:4, III-a.

The Commission grants requests for franchise authority and allows an entity to engage in the business of a public utility when it finds, after due hearing, that the exercise of the right, privilege, or franchise is for the public good. RSA 374:26. In determining whether a proposed franchise is for the public good, the Commission assesses, among other things, the managerial, financial, and technical expertise of the petitioners. *See Lower Bartlett Water Precinct*, Order No. 23,562, 85 NH PUC 635, 641 (2000).

Another relevant issue concerns the proximity of the proposed service territory to nearby franchises. This issue is important when different entities hold franchises within the same municipality. We authorize expansion of water franchises that are consistent with the orderly

development of the region. *See Pennichuck Water Works*, 72 NH PUC 589, 593 (1987). According to Gunstock's data responses, there is no other public water service in the area, and this family's declining well output necessitates it finding an alternative supply. A water main is just 50 feet from the family's property line and the DES has provided a letter supporting the connection and indicating that the District's water supply meets the availability and suitability requirements consistent with RSA 374:22, III. The proximity of Gunstock's main and Gunstock's available water supply supports a finding that the granting of the requested franchise authority will be consistent with the orderly development of the region.

Therefore, upon our review of the information on file concerning Gunstock's ability to provide water service, we find granting Gunstock a franchise to serve a single customer outside its corporate boundaries, also known as Lot 95 on Hook Road in Gilford, to be for the public good. Furthermore, pursuant to RSA 362:4, III-a (a)(1),a municipal corporation serving customers outside its corporate limits is not considered a public utility if the municipality provides a quantity and quality of water to outside customers that is equal to that provided within its corporate boundaries and charges a rate that is no higher than 15 percent above that charged to its municipal customers. We find that Gunstock will meet these requirements.

Based upon the foregoing, it is hereby

ORDERED, that Gunstock Acres Village Water District's petition to expand its franchise to serve a single customer outside its District boundaries, as described above, is hereby approved; and it is

FURTHER ORDERED, that Gunstock's provision of service outside its boundaries to Lot 95 on Hook Road in Gilford is not subject to Commission regulation pursuant to RSA 362:4, III-a.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of March, 2008.

Thomas B. Getz	Graham J. Morrison	Clifton C. Below
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary