

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2009-0274

**In the Matter of Appeal of City of Nashua of the Determination of Fair Market
Value of the Plant and Property of Pennichuck Water Works, Inc.**

**APPEAL PURSUANT TO RSA 541
OF VALUATION DECISION OF
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

REPLY BRIEF OF MERRIMACK VALLEY REGIONAL WATER DISTRICT

**Merrimack Valley Regional Water
District**

By Its Attorneys,

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To be argued by Stephen J. Judge

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TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTES CITED

N.H. Rev. Stat. Ann. 541:131, 4, 7

“541:13 Burden of Proof. – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.”

Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

TABLE OF CASES CITED

In re Basani, 149 N.H. 259, 262 (2003).....2

Bauman v. Ross, 167 U.S. 548, 574 (1897).....6

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New Hampshire Dep’t of Enviro. Svcs. v. Marino, 155 N.H. 709, 718 (2007)2

Olson v. United States, 292 U.S. 246, 255-56 (1934).....6

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Opinion of the Justices, 131 N.H. 504 (1989).....5, 6, 7

Society Hill at Merrimack Condominium Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994)1

Southern New Hampshire Water Co. v. Town of Hudson, 139 N.H. 139, 141 (1994).....3

United States v. 564.54 Acres of Land, 441 U.S. 506, 512-13 (1979).....9

United States ex rel. Tennessee Valley Water Authority v. Powelson, 319 U.S. 266, 285 (1943).....6, 7

**ORDERS APPEALED FROM AND MOTION FOR REHEARING—SEE
APPENDIX TO APPEAL OF CITY OF NASHUA**

1. Order No. 24,878, Order Approving Taking and Determining Value (Jul. 25, 2008)
2. Nashua’s Motion for Rehearing and Clarification (Aug. 25, 2008)
3. Pennichuck’s Objection to Motion for Rehearing and Clarification (Aug. 29, 2009)
4. Order No. 24,978, Order Denying Motions for Rehearing (Mar. 13, 2009)
5. Order No. 24,425, Order Addressing Pennichuck’s Motion to Dismiss (Jan.21,2005)

QUESTIONS PRESENTED FOR REVIEW

- 1.) Whether the Public Utilities Commission (“PUC”) erred in valuing Pennichuck Water Works’s (“PWW’s”) plant and property in the hands of the condemnor, as opposed to determining a “fair market value” in the hands of the condemnee, which is the method which should be required under RSA 38.
 - Nashua Appeal Appendix at 137, PUC Order No. 24,948 at 25
- 2.) Whether the Public Utilities Commission’s reliance upon a hypothetical market in its income valuation of PWW’s operating assets amounted to speculation and was therefore plainly erroneous.
 - Nashua Appeal Appendix at 121-37
- 3.) Whether the PUC’s erroneous conclusion, that multiple hypothetical not-for-profit purchasers could have legally purchased PWW’s operating assets, rendered its reliance on the Reilly Hypothesis untenable.
 - Nashua Appeal Appendix at 128

CONCISE STATEMENT OF THE CASE AND MATERIAL FACTS

The summaries of the case and the statements of material facts provided in the Opening Briefs of Merrimack Valley Water District (“the District”) and the City of Nashua (“Nashua”) are incorporated herein by reference.

ARGUMENT

I. THE PUC’S ADOPTION OF THE REILLY HYPOTHESIS DOES NOT PRESENT A PURE ISSUE OF FACT

This Court has the power to review the determination of “just compensation” made by the Public Utilities Commission (“PUC”) under R.S.A. 541:13. Under that statute, the decisions of the PUC must be overturned where they are “clearly unreasonable or unlawful.” Even though the PUC’s findings of fact are deemed “deemed to be prima facie lawful and reasonable,” they may be overturned if a clear preponderance of the evidence shows that factual determinations lead to an order that is unjust or unreasonable. Id. It is evident from the plain language of R.S.A. 541:13 that findings of fact may constitute legal error. See id.

Thus, the PUC’s factual determinations should be upheld unless they are either “unsupported by the evidence,” or, as PWW omits to mention, if they are “clearly erroneous.” Society Hill at Merrimack Condominium Assoc. v. Town of Merrimack, 139 N.H. 253, 256 (1994). While this Court can not analyze the relative credibility of the experts who testified below, it has the power to remand the case to the PUC for a proper determination of “just compensation,” where the PUC’s determination was erroneous as a matter of law—even though the PUC’s determination was supported by the testimony of Mr. Reilly. R.S.A. 541:13.

Despite the Town of Merrimack's assertion¹, the application of law to fact by a lower tribunal is reviewable by this Court "independently, for plain error," and is not itself a finding of fact. New Hampshire Dep't of Enviro. Svcs. v. Marino, 155 N.H. 709, 718 (2007) (standard enunciated in the context of an administrative prosecution in court). As noted by the Town of Merrimack, the application of the "just compensation" standard to the facts presented by the witnesses before the PUC is such an application of law to fact. Brief of Town of Merrimack at 13-14. The statement of PWW, that such an application of law to facts must be upheld if there is "any evidence" to support it, is therefore incorrect. Compare Marino, 155 N.H. at 718 (application of law to facts reviewable independently) with In re Basani, 149 N.H. 259, 262 (2003) (presumption that factual findings are prima facie lawful and reasonable can only be overcome by demonstrating that there is no evidence in the record to support them).

Even were this not so, the PUC, in reliance on the Reilly Hypothesis, arrived at a valuation that had no market basis as it was purely speculative and contradicted by Robert Reilly's own testimony, see Opening Brief of the District ("Opening Brief") at 22, its valuation was unsupported by the evidence, and it was also legally erroneous. See, Opening Brief at 7-17. But see Brief of PWW at 37 (citing Testimony of Robert Reilly which it claims supports the conclusion that the market for PWW's assets includes a competitive market of not-for profit buyers).²

¹ Brief of Town of Merrimack at p. 13

² Although this testimony is competent to show that municipal purchasers in a marketplace might increase the price of a water utility's assets in an open marketplace, it falls far short of establishing that such entities would bid competitively for such assets, which is the essence of the Hypothesis. See PUC Order 24,878 at 74 (advantages unique to hypothetical municipal purchasers "set the range for purchase price."). At best, the testimony cited by PWW could show that the market of municipal, not-for-profit purchasers *influences* the purchase price.

For these reasons and the ones identified in the Opening Brief, the PUC committed a “plain error” in the application of the constitutionally-required “just compensation” standard to the evidence before them. Even if this were not so, the PUC’s reliance on the Reilly Hypothesis, even though supported by Reilly’s opinion, was “clearly unreasonable or unlawful” for the reasons explained in the Opening Brief.

II. THE RELIANCE OF THE PUC ON AN UNSUPPORTED AND LEGALLY SUSPECT EXPERT OPINION ON THE ISSUE OF VALUATION DOES NOT INSULATE THE DECISION FROM REVIEW

PWW cites a number of cases for the proposition that the Reilly Hypothesis, as expert testimony, is beyond the review of this Court because of its factual nature. In all of those cases, this Court’s holding was narrower than PWW claims. For example, in the *Crown Paper* decision, this Court held that a Superior Court opinion, supported by an expert’s testimony and report, should not be overturned just because there was conflicting expert testimony presented. Crown Paper v. City of Berlin, 142 N.H. 563, 570 (1997) (citations omitted). In *Southern New Hampshire Water Co.*, the Court’s refusal to overturn a valuation decision was likewise based on the fact that the appellants’ arguments focused on the conflicting evidence presented by their own experts. Southern New Hampshire Water Co. v. Town of Hudson, 139 N.H. 139, 141 (1994).

Neither of these decisions dealt with a scenario like the instant one, where the expert’s opinion was unsupported by his own testimony. See Opening Brief at 22. Nor did they deal with situations where the valuation provided by the expert witness was unlawful under the standard of just compensation required by R.S.A. 38.

The District is not asking this Court to re-weigh the opposing expert testimony presented below. The District is asking this Court to overturn a valuation decision by the

PUC because that decision adopted an expert opinion which was not supported by the expert's testimony, and which did not measure "just compensation" because it was wildly speculative and effectively valued PWW's assets in the hands of Nashua, the condemnor.

If the position of PWW, that expert opinions adopted by the PUC were effectively unreviewable, were adopted by this Court, then an expert who expressly adopted an "ability to pay" valuation would be able to single-handedly override the Constitutionally required concept of "just compensation." See Onondaga County Water Authority v. New York Water Service Corp., 139 N.Y.S.2d 755, 766 (N.Y. App. Div. 4th Dep't 1955) (expressly overriding a factual determination of value because it was based on the condemnor's ability to pay). Put otherwise, an expert's opinion, accepted by the PUC, that the market value of PWW's assets is "whatever Nashua can afford to pay," would not be reviewable if the bare opinion of an expert were a sufficient evidentiary basis to support the adoption of that opinion. See Brief of PWW at 29. Such a finding would be, as is the PUC's adoption of the Reilly Hypothesis, clearly erroneous, and properly overturned under R.S.A. 541:13.

The Reilly Hypothesis is unsupported by the record in this case. Even if that were not so, the PUC's acceptance of the hypothesis constitutes plain error, since the Hypothesis is speculative and explicitly declines to measure what PWW is losing as opposed to what Nashua stands to gain. Although the standards of review involved here are deferential to the PUC's determinations, and particularly their determinations of fact, it would be illogical to defer to such findings where, as here, those findings are unsupported and lead to a result that is contrary to this State's laws.

III. THE *OPINION OF THE JUSTICES* AND *ONONDAGA* CASES SUPPORT THE POSITION OF NASHUA AND THE MERRIMACK VALLEY WATER DISTRICT

A—The *Opinion of the Justices* Does Not Support PWW’s Position

In *Opinion of the Justices*, 131 N.H. 504 (1989), this Court was examining a piece of proposed legislation regarding the valuation of seized electric utility property, which contained two questionable provisions. The first was a “conclusive presumption” that the highest and best use of all seized property was “in providing electric service as a regulated utility.” *Opinion of the Justices*, 131 N.H. at 507. The second provision required the PUC “in all events [to] consider the effect of utility regulation” on seized property. *Id.*

The “conclusive presumption” violated the New Hampshire State Constitution because it would mandate a valuation below “fair market value” when the market for utility property included non-regulated buyers or when the property being valued was amenable to development in a manner other than as utility property. *Id.* at 508. The “in all events” provision was held unconstitutional because it would require the effect of regulation to be considered in valuation even where the regulation was not relevant. *Id.* at 509. As a marketplace *might* provide more remuneration to a utility owner, it would be illegal to require the PUC to ignore evidence of such higher market values. *Id.*

Neither of these holdings compels the conclusion that a purely speculative, hypothetical, competitive market of municipal purchasers must, or even may, be considered in valuing utility property. Indeed, the federal and state Constitutions require that fair market value be determined after considering the “highest and best use” to which the seized property is adaptable and needed or likely to be needed in the future, “not necessarily as the measure of value, but to the full extent that the prospect of demand for

such use affects the market value *while privately held.*” Id. (citing Olson v. United States, 292 U.S. 246, 255-56 (1934)). It seems clear that the Court’s holding had more to do with the fact that market realities should dictate just compensation, than it did with ensuring that non-regulated buyers be considered in condemnation valuation decisions. Indeed, the Court noted that it is proper to consider the effect of regulation on the valuation of seized property. Id. at 510.

Nowhere did the Court say that municipal purchasers must be taken into account when valuing the condemned property of a utility. The Court did not overrule the axiomatic principle of condemnation law, which has evolved under the Takings Clause of the Fifth Amendment to the Federal Constitution, that the value of what is actually taken, and not its value to the condemnor, should be the measure of “just compensation.” See Bauman v. Ross, 167 U.S. 548, 574 (1897). Nor did the Court abandon or disapprove federal doctrine that prevents the use of speculative or remote uses or situations in determining “just compensation.” See United States ex rel. Tennessee Valley Water Authority v. Powelson, 319 U.S. 266, 285 (1943). The Court’s holding, in its simplest sense, was that “just compensation” cannot be mandatorily fixed to the regulatory status of the market participants involved in the hypothetical negotiations to which the concept of just compensation is keyed.

It follows that the PUC can properly consider the presence of municipal purchasers in the hypothetical pool of market participants. What does not follow is that it can do so when those considerations cause it to value the condemned property in the hands of the condemnor, a valuation which remains unlawful, or that it may use a valuation that is purely speculative in nature, or one unsupported by evidence. Indeed,

such valuations are ascribing significance to considerations which do not bear on market reality—which was the same reason this Court invalidated the provisions of 1989 SB 205-FN-A discussed herein. Opinion of the Justices, 131 N.H. at 507-08.

The rationale of *Opinion of the Justices* supports the position taken by the District because of the deficiencies of the PUC’s decision arrived at in reliance on the Reilly Hypothesis. See Opening Brief of Merrimack Water District (“Opening Brief”) at 17 (citing Exhibit 3007 at 30), 22 (citations omitted). “Artificial” and speculative considerations, even if they come from an expert witness, can not be the basis for a determination of “just compensation.” Opinion of the Justices, 131 N.H. at 508-09. See also Tennessee Valley, 319 U.S. at 285. (purely speculative methods of determining just compensation do not comport with Constitution).

The Reilly Hypothesis should be overturned because it is unsupported by the record and because it provides an unlawful measure of compensation to PWW. To hold that the Hypothesis is beyond review simply because it was the opinion of an expert witness would place expert testimony in a higher position than Constitutional requirements regarding just compensation—a result which plainly does not comport with either R.S.A. 541:13 or with common sense.

B The *Onondaga* Case Holds That Erroneous Principles of Valuation Adopted by Witnesses in Administrative Proceedings Cannot Override the Mandate that “Just Compensation” be Determined as the Value of That Which is Taken to the Condemnee and not the Condemnor.

In its Brief, the Town of Merrimack endeavors to show that the *Onondaga* case supports the Reilly Hypothesis. In *Onondaga*³ the Appellate Division, Fourth

³ Although “Onondaga” is spelled with an “h” in the version published on Westlaw, the proper spelling of the County’s name is as it appears herein.

Department, of the New York Courts was examining the valuation of a water utility. 139 N.Y.S.2d 755, 766 (N.Y. App. Div. 4th Dep't 1955). The Court explicitly discounted the testimony of a witness who testified that the going concern value of the seized utility property was what the condemnor could afford to pay. Id. The Court also repeated, emphatically, the axiom that the value to the condemnee, and not the assets' value to the condemnor, constitutes "just compensation." Id. at 764.

Although the *Onondaga* Court did note that the administrative body could not be *required* to use the regulated rate base as a dispositive method of valuation, Id. at 768, that dicta does not support PWW's position. Neither the District, nor Nashua, is asking this Court to require the PUC *only* to consider the value of PWW's assets in its own hands. What is being asked is that the case be remanded for income valuation proceedings based on the proper measure of just compensation, using supported, non-speculative testimony which provides the value of PWW's property to PWW in a realistic market.

Presently, however, the major difference between the facts of this case and those in the *Onondaga* case is that Reilly managed to phrase the income valuation portion of his opinion to avoid explicitly stating that his valuation approximated what Nashua could afford to pay. As explained in the Opening Brief, the Reilly Hypothesis and the PUC's Order on which it relied, were unsupportable and unlawful. Accordingly, the PUC's decision should be overturned, and this cause should be remanded for income valuation proceedings consistent with the laws of this state and the evidentiary standards discussed herein.

CONCLUSION

The Reilly Hypothesis, which the PUC adopted in valuing the present value of PWW's future income, caused the PUC to use a legally erroneous and factually unsupported standard of valuation. To adopt such a valuation was clearly unreasonable and unlawful on the PUC's part. Even though the factual determinations of the PUC are entitled to great deference, they can not be entitled to absolute deference by this Court, lest they overrun the statutory requirement that "just compensation" be the measure of valuation. The requirement that "just compensation" be the measure of valuation in eminent domain proceedings is a requirement that protects both the entity whose property is taken and the citizens who must pay compensation for the taking. See, e.g. United States v. 564.54 Acres of Land, 441 U.S. 506, 512-13 (1979). To allow the PUC's income valuation method to stand simply because it was the opinion of an expert witness would work a serious and unlawful harm to such citizens.

REQUEST FOR ORAL ARGUMENT

Merrimack Valley Regional Water District renews its request for fifteen minutes of oral argument to be presented by Stephen J. Judge.

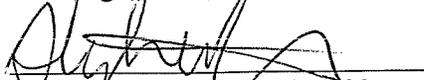
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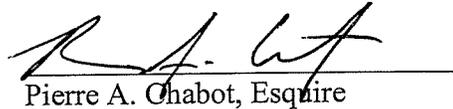
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CERTIFICATION

I hereby certify that a copy of this Brief has been this day forwarded by United States Mail, postage prepaid, to all of the parties or their counsel of record as identified on the enclosed Service List.



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