STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

Docket No.: DW 04-048

MOTION FOR REHEARING AND CLARIFICATION

NOW COMES the City of Nashua and moves for rehearing on issues related to valuation and clarification with respect to certain findings made concerning the public interest under RSA 541, and in support hereof states as follows:

I. MOTION FOR REHEARING

A. THE COMMISSION ERRED BY ACCEPTING PENNICHUCK'S THEORY THAT MUNICIPAL BUYERS INFLUENCE VALUE WHICH WAS OVERWHELMINGLY CONTRADICTED BY THE EVIDENCE

1. There can be little doubt that the Commission's Order of July 25, 2008; Order No. 24,878 is among the most comprehensive and thorough in the Commission's history. The City of Nashua, its citizens, and those of surrounding communities commend the Commission for both the scope and thoroughness of its analysis. The City therefore does not undertake lightly its decision to seek rehearing because it recognizes, as it must, the tremendous effort the Commission has undertaken in evaluating the issues and evidence presented to it.

2. However, the primary issue for which Nashua seeks rehearing or reconsideration, i.e. valuation, is one for which the Commission is itself divided. Therefore, rather than ask the Commission to simply weigh the evidence in its favor and accept the testimony of one expert in favor of another, Nashua asks this Commission to re-examine the errors identified by Commissioner Below's dissenting opinion and that lie

at the foundation of the majority's determination of the price to be paid by Nashua: that hypothetical not-for-profit municipal buyers fundamentally alter the market for Pennichuck Water Works' property that is the subject of this proceeding.

3. This motion therefore builds upon the four corners of the Commissioner Below's opinion, and draws the majority of Commission's attention to additional critical evidence that it overlooked that demonstrates that Pennichuck's municipal buyer theory is a not supported by the evidence or the realities of the market for water utilities. Specifically:

i. The Commission erred by concluding that a competitive market of municipal or non-profit buyers exists or influences the market for Pennichuck Water Works, which was unsupported by the evidence.

ii. The Commission erred by accepting a municipal buyer theory that is not legally permissible under New Hampshire Law.

iii. The Commission erred because the municipal buyer theory is impracticable.

iv. The Commission failed to consider that municipal buyers are not active participants in the marketplace because they have no authority to purchase stock of for-profit water companies.

v. The Commission erred by concluding that the Reilly theory established the fair market value of the assets.

These points are addressed below.

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

4. The Commission accepted Pennichuck's theory of value put forth by its expert Robert Reilly, that multiple not-for-profit entities (municipalities) would compete in the pool of buyers and set the range of the purchase price because they could afford to

pay more than investor owned utilities.[1] There is, however, no evidence demonstrating that such a competitive market of municipal or not-for-profit buyers exists. The Commission's own decision, which spans 120 pages, fails to identify a single municipal or not for profit purchaser that would compete against Nashua.

5. Even Mr. Reilly acknowledged when asked in "how many situations have you seen where there have been multiple non -- not for profit or governmental bidders?"[2] that it only happens in "the minority of the cases".[3] He further indicated his belief that the situations in which more than one municipal buyer actually competed to "bid up" the value represented "very few cases – where it may be back to back, literally next door municipalities, why should we -- you know, and the concern is often, I'll just be honest with you, if we're -- if I'm city A and I'm right next to city B and the water company is in the middle, [...]when city A and city B are both bidding, then the prices can get bid up."[4]

6. When asked if he could "recall the names of any of these situations" or examples where municipal buyers had "bid up" the market price for a water utility, however, *he was unable to recall even a single example to support his theory.* Mr. Reilly stated that "Oh, I can look--I can't think on the top of my head, but I can research that and get you that information".[5]

7. It may be that Mr. Reilly's failure to recall even a single example of when municipal or other not for profit purchasers competitively "bid up" the value of an investor owned utility is merely circumstantial evidence. However, "some circumstantial

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[1] Order No. 24,878 at p. 89.
[2] Transcript, September 12, 2007, Pages 210-211.
[3] Transcript, September 12, 2007, Page 211.
[4] Transcript, September 12, 2007, Pages 211-212.
[5] Transcript, September 12, 2007, Page 212.

evidence is very strong, as when you find a trout in the milk."[6] Mr. Reilly's comment that he thought that they existed, but simply could not recall an example, is particularly troubling because the difference between his value of $248 million, and that of Mr. Walker of $85 million is entirely dependent the existence of such a market for Pennichuck Water Works. There is no evidence that such a market exists, and his testimony that he thought one existed but could not recall any specific example is suspect. One would expect the milkman, confronted with the trout, to say no less.[7]

8. There was undisputed affirmative evidence, however, that such a competitive market of municipal buyers does not exist. Donald Ware, P.E., Chief Engineer and President of Pennichuck Water Works testified that, based on his 25 years of industry experience, municipalities as a general matter, have "no interest" in acquiring water systems and are "not regularly in the business" of doing so.[8] There is no rational basis for the Commission to accept Mr. Reilly's vague but unconfirmed sense that municipal buyers might participate competitively in the market with Mr. Ware's 25 years of *actual experience* indicating that they do not.

9. The Commission also heard from John Joyner, President of Infrastructure Management Group, Inc. ("IMG") who testified on cross examination concerning his firm's financial advisory practice made up of former investment bankers specializing in the privatizing and management of utilities, including water systems.[9] He prepared a report entitled *Tapping Public Assets,* with other members with considerable experience

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[6] *McIntosh v. Personnel Commission*, 117 N.H. 334, 339 (1977) *quoting* Henry David Thoreau, Journal, November 11, 1850.

[7] Nineteenth century American dairymen delivered their milk in cans and dispensed the amount each house required. If they forded a stream on the way to the market, there was always the temptation to top up the cans with water from the brook. This led Henry David Thoreau in his journal to observe that "some circumstantial evidence is strong, as when you find a trout in the milk."

[8] Transcript, September 11, 2007, p. 63, 64.

[9] Transcript, September 18, 2007, Page 48.

in selling infrastructure assets and raising capital for new facilities.[10] That report advised that "[r]egulated utilities *usually sell for at or close to their "rate base"*; i.e., roughly, the original cost of the utility, less depreciation" and that "[s]ale prices for water utilities *usually range from $1500 to $3500 per customer connection*, with a $2000 per connection median, but they can go higher if the opportunity for growth or operating cost savings is exceptional."[11]

10. On cross examination, he applied his range of values for water utility assets to Pennichuck's 25,000 customers, which resulted in a value range from $37,500,000 to $87,500,000. Thus, his own upper range of values, again based on his firm's *actual experience*, bears a striking resemblance to the value of $85,000,000 concluded by Nashua's valuation expert Glenn Walker from his analysis of actual sales in actual markets.[12] The Commission's Order and analysis overlooks this testimony which begs for an explanation.

11. Mr. Joyner's testimony and report is also telling in what it does not say. At no point does Mr. Joyner or his team of municipal utility management experts suggest that there is any reason that other municipal buyers might step in and pay a substantial premium above what investor-owned utilities pay. Rather, his report confirms what Donald Ware candidly admitted on cross-examination: that there is no active market of municipal buyers that has any appreciable influence on the market.

12. This omission is particularly damaging to Pennichuck's municipal buyer theory because, as discussed below,[13] a tax-exempt municipal seller would not be subject

[10] Ibid at Page 49.
[11] Exhibit 1099, Page 6 (emphasis added).
[12] Exhibit 1007A, Page 65.
[13] See Section I (A)(iv).

to the capital gains tax that a for profit seller such as Pennichuck would face if it sold its assets to a municipality, due to the municipal purchasers inability to purchase stock without special legislative authorization.[14] As a result, a not-for-profit municipal buyer would have an even greater capacity to buy from another municipality because a municipal seller would not face the "substantial" capital gain tax liabilities amounting to "many tens of millions of dollars" just to make a financially equivalent offer to a for profit stock purchaser.[15] However, Mr. Joyner's testimony and his report confirms what Pennichuck Water Works candidly admitted: that there simply are not municipal buyers actively competing in the marketplace.

13. It is also surprising to Nashua that the Commission would accept Reilly's municipal buyer hypothesis because if in fact municipalities were active competitors influencing the market for Pennichuck Water Works, they would also be active in seeking approval from this Commission for the franchises they acquired. The Commission's own jurisprudence, confirms that municipal acquisitions are in the nature of incremental expansions of existing infrastructure, not competitive acquisitions of the nature hypothesized by Mr. Reilly. The Commission's decisions in *Tilton and Northfield Aqueduct Company Inc.*,[16] the *Manchester Water Works,*[17] *Portsmouth,*[18] and other cases confirm this.[19] Municipal buyers played little or no role in bidding or establishing the market price in the recent acquisitions of investor-owned utilities, including

[14] *Cf.*, Laws of 2007 Chapter 347; SB 206 (2007) (Nashua's limited right to purchase stock).
[15] Exhibit 3001, Page 20.
[16] Order No. 24,562.
[17] *See, e.g., Manchester Water Works*, Order No. 18,628, Order No. 24,326 & Order No. 24,775.
[18] *City of Portsmouth*, Order No. 24,865 (sewer service).
[19] *E.g. City of Laconia*, Order No. 24,433; Order No. 24,841; *City of Dover*, Order No. 24,506; *North Conway Water Precinct*, Order No. 24,360.

Philadelphia's proposed acquisition of Pennichuck Water Works,[20] Aquarion,[21] Hampstead Water Company,[22] or PAC, Consolidated and Central Water Company, Inc., when they were acquired by Pennichuck.[23] Indeed, it was the testimony of the Commission's own Director of the Water Division, Mark A. Naylor,[24] and former PUC Commissioner, Douglas L. Patch,[25] that municipal water systems are not engaged in the *business* of acquiring other water systems.

14. Thus, the Commission erred by accepting Pennichuck's municipal buyer hypothesis, which was not only unsupported by the evidence, but contrary to the evidence before the Commission. However, Nashua does not suggest that the Commission need, as a matter of law, accept the appraisal of its own experts. Nashua requests that the majority reconsider its determination of value based on the lack of evidentiary support for the existence of a municipal buyers' market for Pennichuck Water Works and join Commissioner Below's opinion which tempered the municipal buyer theory in light of the paucity of evidence to support it. To do otherwise would force the citizens of Nashua and customers in surrounding communities to bear an unreasonable and unnecessary $50 million in additional debt as a result of an unsupported theory of value that has made "the only real winners in this game ... the lawyers and expert witnesses, who collect their fees regardless of the outcome."[26]

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[20] *See* Order No. 24,020.
[21] *Aquarion Water Company of New Hampshire*, Order Nos. 24,651 & 24,691.
[22] *Hampstead Area Water Company*, Order No. 24,803.
[23] *Pennichuck Corporation*, Order No. 22,843; *Pittsfield Aqueduct Company, Inc.*, Order No. 24,606.
[24] Exhibit 5001, Page 52, 53, 56.
[25] Exhibit 5002, Page 18.
[26] *Southern New Hampshire Water Company v. Hudson*, 139 N.H. 139, 145 (1995).

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

15. Municipalities in New Hampshire are subdivisions of the State and have only the powers granted to them by the Legislature.[27] In order for a city or town or district to acquire the assets of a utility, therefore, there must be a specific grant of authority from the legislature. Nashua has advocated that RSA 38 is the sole grant of that authority, not only for a taking but also a consensual sale. See RSA 38:2. As the Commission has already ruled in Order No. 24,425, herein, the only New Hampshire city or town or district which could lawfully acquire the assets of Pennichuck under RSA 38 is one in which the Company is engaged in distributing water for sale.

16. Even if Nashua and a municipality could legally acquire by agreement what it cannot accomplish under RSA 38, there must be some other grant of authority, which there is not. Under RSA 31:3, a municipality may only "purchase and hold real and personal estate for the public uses of [its] inhabitants". Thus, a municipality cannot simply vote to raise and borrow funds to compete to acquire water utility property that serves customers in other municipalities under RSA 31:3 unless the acquisition was for "the public uses of [its] inhabitants."

18. The similarity of RSA 31:3 to RSA 38:6 is noteworthy. In both RSA 31:3 and RSA 38:6, in order for a municipality to acquire water utility assets there must be a connection between those assets and the inhabitants of the municipality. Either their purchase serves the public use of the municipality's inhabitants (RSA 31:3) or the assets must belong to a utility which serves its inhabitants (RSA 38:6). There is no grant of

[27] *City of Manchester School Dist. v. City of Manchester*, 150 NH 664, 666 (2004); Order No. 24,425, Page 9.

authority in New Hampshire law for any municipality to acquire the assets of a water utility on a competitive basis regardless of where it is located.

19. Yet this is precisely the approach to value used by Pennichuck's expert and adopted by the Commission. He advocated in his report that the population of likely buyers included "*any* incorporated New Hampshire city or town."[28] In his testimony before the Commission contrary to New Hampshire law, he argued that the "potential buyers did not actually have to either touch the city of Nashua *or touch Pennichuck Water Works*. [...] a buyer could be a municipality or a water district or a regional district *anyplace in New Hampshire; it doesn't have to be actually physically located within the Pennichuck service area.*"[29]

20. Mr. Reilly repeatedly referred to an alleged memorandum he had received from Pennichuk's attorneys which provided the legal authority for his hypothesis.[30] Yet, when asked to produce such a memorandum he was unable to do so.[31] Upon request by Nashua, the Commission required the memorandum to be produced by Pennichuk's attorneys. It became apparent that no memorandum existed and at best there had been a conversation with Mr. Reilly.[32] The substance of that conversation as set forth in the transcript provides no legal support for the Reilly hypothesis that the population of likely buyers could include any New Hampshire city or town. In fact, Mr. Reilly was told:

> [T]hat the potential governmental buyers would be, obviously, Nashua. Any other town where Pennichuck Water Works provides service, any village district, similarly where Pennichuck Water Works provides service, all of those could, by consensually or exercise eminent domain under RSA 38.

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[28] Exhibit 3007A, Page 2.
[29] Transcript, September 12, 2007, Pages 47-48.
[30] Transcript, Sept. 12, 2007, page 58.
[31] Ibid at Pages 58-61.
[32] Ibid at Page 144.

> In addition, the current regional water district, any new water district that was formed or any other intermunicipal special district formed pursuant to RSA 52A all can buy on a consensual basis.
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> The state of New Hampshire could acquire the utility, the United States Government could acquire the utility, or nay out of state or bi-state government body.[33]

It is clear that Reilly's hypothesis is in direct conflict with New Hampshire law. The alleged memorandum confirms that the pool of municipal buyers is limited to those cities and towns served by Pennichuck Water Works. The attempt to include water districts formed under RSA 52A goes nowhere. There is no RSA 52A! Assuming the reference should have been RSA 52, the boundaries of such a district are set by the selectmen in the towns in which they are located.[34] Nashua doubts that the law of New Hampshire is that a town not served by Pennichuck, such as Lancaster,[35] could establish a water district pursuant to RSA 52 that would be able to purchase the very assets the town could not purchase.[36] Likewise, if the reference was to RSA 53A, the same result is reached. Two towns not served by Pennichuck could not create a water district by intermunicipal agreement that could acquire what the towns were not permitted to buy. If Order No. 24,425 is good law, the Reilly hypothesis is vastly limited.

21. The Reilly theory is both factually and legally absurd, and not permitted under New Hampshire law. Relying on it, he was able to assign a value that would result from circumstances that do not and cannot exist as a matter of law. It is not fair market value, but a theoretical value in a hypothetical scenario that may have interest in

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[33] Ibid at p. 145.
[34] RSA 52:1.
[35] See discussion regarding Lancaster at Transcript Sept. 12, 2007, Page 51.
[36] See, e.g., RSA 52:8.

academic circles but does not exist in any market, and certainly not the market for Pennichuck Water Works.

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

22. Even Mr. Reilly admits that if Nashua is the only practical legal not-for-profit buyer then "[t]hat hypothetical is the hardest question to answer [because] we've also seen cases where [bidding up] didn't happen".[37] Such is the case with the market for Pennichuck Water Works, as there are no likely municipal buyers, other than Nashua, that could legally or practically acquire the system under RSA 38, or even RSA 31:3. As a result his hypothesis does not reflect generally accepted standards for valuing the fair market value of property at its legally permissible and reasonably probable highest and best use.[38]

23. There are no reasonably probable competitive municipal or not-for-profit buyers for Pennichuck Water Works. The record is undisputed that 87 percent of Pennichuck Water Works customers, or approximately 21,600 of 25,000, are located in Nashua.[39] The remaining customers are scattered in 10 other municipalities in southern New Hampshire. None of these municipalities have more than a fraction of the customers (RSA 38) or inhabitants (RSA 31) in Nashua.

24. Amherst, the largest in terms of the number of customers, has only 760 customers (3.8%) that use wells as their primary supply and are connected to the core system *as a backup*, and 181 customers in two community well systems not connected to

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[37] Transcript, September 12, 2007, Page 206.
[38] Exhibit 1097 / 3100; *The Appraisal of Real Estate*, Twelfth Edition, Chapter 12 (Highest and Best Use).
[39] Order No. 24,878 at p. 108; Exhibit 3001, Page 7.

the core.[40] The Nashua core system serves only a "small portion of the Towns of Merrimack and Hollis" with 222 (0.8%) and 67 (0.3%) customers, respectively.[41] Pennichuck Water Works' customers in Bedford (812 in 5 systems for 3.2%), Derry (648 in 5 systems for 2.6%), Epping (78 for 0.3%), Newmarket (87 for 0.3%), Plaistow (194 in 3 systems for 0.8%) and Salem (72 for 0.3%) are served by satellite systems that are not hydraulically connected to the Nashua core.[42] Milford has 119 customers in three systems (0.5%), in addition to its wholesale supply contract for its own water department.

26. Under RSA 38, these are the only communities authorized to acquire Pennichuck Water Works. There are no other lawful purchasers. In contrast to Nashua with over 20,000 customers, each of these communities has only a tiny fraction of the customer base, though some, like Merrimack and Milford, have significant wholesale contracts or customers. It is plainly absurd to think that hypothetically, Amherst with 3.8% of the total number of customers would competitively bid against Nashua to acquire Pennichuck Water Works. Yet this is the foundation of the municipal buyer hypothesis adopted by the Commission.

27. The same result is true even if the Commission were to assume, for the purposes of argument, that municipalities have the power to acquire water utilities by agreement, outside the provisions of RSA 38. Under RSA 31:3, only Nashua of all of these municipalities can claim that the acquisition of the entire Pennichuck Water Works bears a rational relationship to the "public uses of [its] inhabitants". To suggest that Amherst, would competitively bid in the market to establish or purchase its own water

[40] Exhibit 3001, Page 7.
[41] Exhibit 3001, Page 6.
[42] Exhibit 3001, Page 7.

department by acquiring over 24,000 foreign customers in order to serve its own 941 customers is fundamentally unsupported by the evidence, setting aside common sense.

28. Even if these communities elected to competitively bid against Nashua, and managed to obtain financing and the votes and other necessary approvals for such an endeavor, the municipal buyer hypothesis still faces a fundamental practical problem. RSA 38:14 provides Nashua or any other municipality the ability to "opt out" of an acquisition by another municipality by conducting its own vote under RSA 38, *which is binding on the acquiring municipality*.

29. Thus, even assuming that one community, such as Bedford (3.2%),[43] bid competitively to acquire Pennichuck Water Works, under RSA 38:14, Nashua could simply not bid at all and conduct its own "vote to establish a municipal plant" and "all the provisions of this chapter shall be binding as to such determination." Nashua would not need to compete and any other municipal buyer, because under RSA 38:14 any municipal buyer that did not cooperate with Nashua as Nashua has done with the Regional Water District, would potentially face the loss of 87% of its customers.

30. The simple reality is that only Nashua is in a position to overcome the financial, political, and legal obstacles that would face any municipality that sought to acquire Pennichuck Water Works. These obstacles make it a legal and practical impossibility for any other municipal or not-for-profit buyer to compete in the market place to acquire an investor owned utility like Pennichuck Water Works. If it were otherwise, it would be reflected in the record. However, the record in this proceeding reflects the fact such a market of competitive municipal buyers simply does not exist. Mr. Reilly's theory is therefore not based on a hypothetical version of New Hampshire in

[43] Bedford, of course, supports Nashua's petition. *See* Exhibit 2003, Pages 4-5.

which municipalities free from legal, financial, political and tax[44] constraints compete in the open market to acquire the State's largest investor owned utility. His valuation does not reflect the reasonably probable highest and best use of property.

31. It is far more likely that, rather than compete in the market to acquire Pennichuck, municipal buyers would cooperate to ensure that they acquired the system at the lowest possible price. The Commission's own experience and the record in this case confirms this. For example:

- In this proceeding, Nashua is a founding member of the Merrimack Valley Regional Water District, which has consistently supported Nashua's petition. Nashua has committed to the principle of transferring ownership to the District,[45] and there is no evidence that even that process would be a competitive bid. Despite Nashua's pre-dominance in terms of the number of customers, Nashua has agreed to a charter for the District that allows in many, but not all, of the votes taken by the District Nashua only "gets one vote, just like any other community."[46]
- The Towns of Amherst and Bedford, the two largest communities by the number of customers outside of Nashua, supported Nashua's petition.[47]
- In the case of the Tilton-Northfield Water District's acquisition of the Tilton and Northfield Aqueduct Company, both municipalities involved cooperated to form a village district under RSA 52, which requires approval by both governing

[44] See Section I (A)(iv), below.
[45] *See e.g.*, Transcript, January 10, 2007, Page 21; Exhibit 1014, generally, and at Pages 2, 15 & MBS Exhibit 3 (Response to Staff 4-93); Exhibit 1016, Pages 3-4.
[46] Transcript, January 11, 2007, Pages 43-44.
[47] Order No. 24,379, Page 8; Exhibit 2003, Pages 4, 5.

bodies.[48] They could have competed against each other up to their ability to pay but there is not evidence to suggest this occurred.[49] Nor did any other surrounding municipal or not-for-profit entity seek to acquire the system. The only municipalities in which the system was located collaborated to minimize their costs, as should be expected of not-for-profit governmental buyers.

- In the case of the proposed sale of Pennichuck to Philadelphia Suburban, as Commissioner Below recognized, Pennichuck's own investment banker SG Barr Devlin did not identify any municipal buyers as likely purchasers of the system.[50]

32. The evidence is clear that of all the potential municipal buyers with the legal authority to purchase Pennichuck Water Works, whether under RSA 38 or otherwise, only Nashua has the practical ability to do so. The record further demonstrates that the same limitations on municipal buyers in the market for Pennichuck Water Works exist throughout the entire water utility market. Were it otherwise, there would be evidence of sales of investor owned utilities similar to Pennichuck to municipalities. The record in this proceeding confirms that there are none that show any appreciable impact of the municipal buyer phenomenon as advocated by Mr. Reilly.

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

33. During his cross-examination, when explaining why he believed SG Bar Devlin had not identified any municipal buyers in 2002, Reilly opined that municipalities cannot buy the stock of a for-profit water company. In doing so he demonstrated yet

[48] *See, e.g.*, RSA 52:1 ("the selectmen of the town or towns shall fix, by suitable boundaries, a district including such parts of the town or towns as may seem convenient").
[49] Order No. 24,562, *Tilton Northfield Aqueduct Company*, 90 NHPUC 599 (2005).
[50] Order No. 24,878, Page 109; Exhibit 1094, Page 33; Transcript, September 12, 2007, Page 71.

another reason why his theory that municipal buyers would set the purchase price for Pennichuck Water Works is fundamentally flawed.

34. Few, if any, asset sales occur in the market place for water utilities such as Pennichuck Water Works. Virtually all of the sales identified by both Reilly and Walker were stock sales. The reason for this is simple: asset sales cause a for-profit seller to recognize gain for federal and state income tax purposes equal to the excess of the aggregate value it receives for each asset less its adjusted tax basis in those assets.[51] The effective rate of such a tax is 39%.[52] By comparison, when the stock of the utility is sold to effectuate transfer, the only gain recognized is the gain in share price by the stock holder. As a result, stock sales avoid an effective 39% capital gain tax liability that sellers to municipalities would incur.[53]

35. New Hampshire municipalities do not have the authority to acquire and hold stock of for profit water utilities like Pennichuck under Part 2, Article 5 of the New Hampshire Constitution, absent a special grant of legislative authority and a public purpose.[54] Without authority to acquire and hold stock, municipalities are unable to compete with for-profit investor owned utilities in the market for water utilities. In a negotiated sale between a willing buyer and a willing seller, the sellers are not willing to incur an additional 39% tax liability without compensation.

36. In fact, Pennichuck's own testimony explains that it would never consider selling to a municipal purchaser. As Donald Correll explained "[b]ecause a large portion of PWW's assets are of a fairly old vintage, this differential would be substantial and *the*

[51] Internal Revenue Code, Sec. 1211(a) ; Exhibit 3001, Page 20.
[52] Ibid.
[53] Exhibit 3001, Page 20.
[54] *Cf. Laws of 2007 Ch 347*; SB 206 (2007) (authorizing Nashua to purchase stock only by agreement).

income tax burden would certainly run into the many tens of millions of dollars."[55] Conveniently, Reilly's municipal buyer theory ignores the "many tens of millions of dollars" costs that a municipal buyer of Pennichuck Water Works would need to overcome just to compete on an equal basis with a stock purchaser, if it were even allowed a seat at the negotiating table, as the SG Barr Devlin report shows it was not.[56]

37. By overlooking "the many tens of millions of dollars" in capital gains tax liability that a municipal buyer would need to overcome, the Commission failed to account for critical evidence demonstrating why municipal buyers do not and cannot appreciably influence the market for Pennichuck Water Works. This error allowed the majority of the Commission to assume a population of municipal buyers operating under financial circumstances that do not exist and arrive at a value far in excess of market value. The Commission should therefore reconsider its determination of price in light of this evidence and adopt the price as determined by Commissioner Below, whose valuation mitigated for the lack of data to support Pennichuck's municipal buyer theory, which was not supported by the evidence.

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

38. What the Commission has done by accepting Reilly's hypothesis, as noted at length by Commissioner Below,[57] is not to establish the fair market value as required by RSA 38, but rather the price that Nashua, because of its many synergies,[58] is able to pay or, in other words, investment value to Nashua. It is not surprising then Reilly created his hypothesis concerning more than one municipal buyer. It allowed him to

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[55] Exhibit 3001, Page 20.
[56] *See* Order No. 24,878, Page 109 and the citations contained therein.
[57] Order No. 24,878, p. 104-108.
[58] Ibid at p. 92.

assume a lower cost of capital and rate of return and in so doing double the values he would have derived if he had used the cost of capital and rate of return of a typical buyer.[59]

39. However, what a buyer can afford to pay is not the same as fair market value. Investment value is specific to a particular investor or class of investors that has specific investment requirements,[60] while fair market value focuses on the *typical* investor with investment requirements *typical* of the market.[61] But, as Commissioner Below has noted, Reilly, himself, has admitted that the *typical* market for water utility assets consists of only one municipal buyer and that under such conditions the one municipal buyer will bid only $1.00 more than what a *typical* for profit buyer would pay for the assets.[62] Because Reilly's market, by his own admission, is not *typical* and focuses on a particular class of investors rather than a typical investor, his hypothesis must fail.

40. Ultimately the best evidence of the market for PWW is the auction of its parent by SG Barr Devlin in 2002. SG Barr Devlin did not identify any potential municipal buyer and none submitted bids.[63] If municipal buyers could pay almost double what a for profit buyer could pay, notwithstanding any capital gains tax, it is likely SG. Barr Devlin would have invited their participation. Municipal buyers were not then, and are not now, the most likely population of hypothetical willing buyers. They do not have the motivations of a typical investor and they have different objectives. And, as Mr. Reilly admitted, the market does not typically consist of more than one.

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[59] Ibid at p. 104, 105; Exhibit 1015, GES Exhibits 16, 17.
[60] The Appraisal of Real Estate, 12th Ed., p. 26.
[61] Ibid.
[62] Order No. 24,878, p. 104, 105.
[63] Exhibit 1094, p. 33.

41. The only empirical evidence about the impact of municipal participation in the market suggests that they do not pay more than for-profit investors[64] confirming Commissioner Below's observation that it is unlikely a municipality would be willing to forego all its potential savings and synergies[65] and Reilly's admission that in a typical market with only one municipality, the price could be only $1.00 more than what a for-profit buyer would pay.

vi. Conclusion.

42. The Commission should reconsider its reliance upon the Reilly hypothesis for the reasons set forth herein, in Nashua's November 16, 2007 Memorandum and in the dissenting opinion of Commissioner Below, which made reasonable adjustments in light of the lack of evidence in the record in this case to support his theory that municipal buyers would compete in the market to acquire Pennichuck Water Works. As noted herein, this theory does not reflect market value and is based on fundamental errors and assumptions.

B. THE COMMISSION ERRED BY DENYING NASHUA'S PETITION TO ACQUIRE PAC & PEU AND REQUIRING THAT NASHUA MITIGATE HARM TO THEIR CUSTOMERS IN AMOUNT MORE THAN DOUBLE THEIR VALUE AND REVENUES

i. The Commission Improperly Denied Nashua The Opportunity To Acquire PEU and PAC.

43. Nashua requests that the Commission reconsider its decision Order No. 24,425, strictly construing the notice provision in RSA 38:6 and prohibiting Nashua from acquiring Pennichuck East Utilities (PEU) and the Pittsfield Aqueduct Corporation

[64] Exhibit 1007 (E); See also Transcript Sept. 10, 2007 (Afternoon) Page 85, 89.
[65] Order 24,878, Page 111.

(PAC). In so doing, the Commission defeated the plain meaning of the clear grant of authority to acquire those utilities consistent with the public interest.

44. In its March 22, 2004 *Petition for Valuation* and its October 21, 2004, *Memorandum of Law*, Nashua asserted that RSA 38:2, 6, 9 and 14 allow Nashua to seek to acquire all three of Pennichuck's regulated utilities, including PEU and PAC, and that it is the Commission's role to determine how much plant and property, including PEU and PAC, the public interest requires Nashua to purchase. Moreover, RSA 38:11grants power to the Commission to set conditions and issue orders to satisfy the public interest, including the authority to require purchase of plant and property outside municipal boundaries it determines such acquisition is in the public interest.

45. At Pennichuck's urging, however, the Commission disregarded the "broad grant of authority" under the plain meaning of RSA 38:2 in favor "considering RSA 38:6 through the lens of strict construction".[66] In so doing, the Commission departed from express grant of authority established by the legislature and disregarded the New Hampshire Supreme Court's decision in the *Appeal of Ashland Electric*, 141 N.H. 336, 341 (1996) which clearly indicates that RSA 38 is to be construed according to "its plain and ordinary meaning," and that the Commission "must keep in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole, and not simply by examining isolated words and phrases found therein."

46. By strictly construing RSA 38:6, a procedural provision of the statute entitled *Notice to Utility*, as limiting the substantive grant of authority in RSA 38:2, entitled *Establishment, Acquisition and Expansion of Plants*, Pennichuck and the Commission made a "fortress out of the dictionary" and defeated the "purpose or object

[66] Order No. 24,425, Pages 10 & 12.

to accomplish" under RSA 38 of allowing the Commission to require that a municipality acquire such plant and property as necessary to protect the public interest.

47. Pennichuck's use of the dictionary has been well played. In effect, strictly construing a procedural notice requirement of RSA 38:6, it has created the very harm that the statute seeks to prevent. As noted in Order No. 24,425, the legislative history of RSA 38 indicates that:

> "a municipality may have to acquire some property outside of its boundaries. If there [are] 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.*"[67]

48. Thus, Pennichuck has caused the Commission to impose a Mitigation Fund condition that will require Nashua to pay twice the value and revenues of the two utilities simply to maintain the status quo.[68] Pennichuck has essentially used this lens to prevent the very result that the plain meaning of RSA 38:2 & 11 are intended to prevent.

49. The evidence before the Commission supports acquisition of all three utilities by Nashua. The Commission found that "PWW, PAC and PEU are highly interdependent companies."[69] In fact, PEU and PAC are simply shells created for rate purposes: they have no employees, no equipment or inventory, all of which are provided by PWW *using property located in Nashua.* Likewise PEU and PAC are operated out of PWW's operations center in Nashua, using its communications and IT system, and its administration, accounting, billing and customer service. Their separation from PWW is

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[67] Order No. 24,425, Page 14 (emphasis added).
[68] Exhibit 3016, Pages 2-3.
[69] Order No. 24,878, Page 95.

a financial and regulatory exercise,[70] but from an operational perspective, the sale and distribution of water by PEU and PAC is controlled from and originates in Nashua using equipment and other property owned by PWW.

ii. The Commission Erred By Requiring A Mitigation Fund Double The Combined Values And Revenues Of PAC And PEU.

50. The Commission's decision suggests that Nashua employed a "litigation strategy" to avoid addressing the mitigation of harm to PEU and PAC customers. This is simply untrue.[71] Pennichuck first submitted testimony of John Guastella describing the harm in Reply Testimony on May 22, 2006, relying on company specific data responses that had not previously been produced.[72] As a result, Nashua never had the opportunity to submit responsive testimony. Even Staff acknowledges it had an inadequate opportunity to complete discovery on the company's testimony.[73]

51. The Commission has chosen to protect PEU and PAC customers from the harm that Pennichuck created by requiring that Nashua establish a $40 million mitigation fund. The only evidence presented on the harm to PEU and PAC was based upon a continuation of the current corporate model. Such an approach, however, fails to consider several different opportunities to mitigate the harm by merging the operations into a larger utility.

52. For example, Donald Correll, former President of PWW and now the CEO of American Water, testified that his company would look at the purchase of PEU and PAC. Donald Ware, the current President of PWW said the sale of PEU and PAC to

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[70] See generally, Exhibit 1132.
[71] Order No. 24,878, Pages 94-95.
[72] *See e.g.*, Exhibit 3010, Page 10; Exhibit 3016, Page 2 (explaining his prior failure to calculate subsidies to PEU and PAC.)
[73] Transcript, September 26, 2007, Pages 129-130.

Nashua should be considered. For its part, Nashua urges the Commission to require that Nashua acquire all three regulated utilities, thereby eliminating the very harm that Pennichuck seeks to create in order to defeat the purposes of RSA 38. In any of these scenarios, PAC and PEU would continue to benefit from being part of a larger water system.

53. As Staff noted, Pennichuck's calculation of harm simply carried Pennichuck's existing overhead over to a much smaller utility without considering opportunities such as these to reduce or even completely eliminate any harm to customers of PEU and PAC.[74] There is every reason to believe that the harm to PEU and PAC has been overstated. The Commission should therefore reconsider its Order No. 24,425 and 24,878 and require that either Nashua acquire the assets of PEU and PAC to satisfy the public interest under RSA 38:11, or establish procedures whereby the mitigation fund may be reduced to a reasonable level in light of Pennichuck's ability to mitigate harm it created for its own customers.

C. THE COMMISSION ERRED IN DETERMINING THE REBUTTABLE PRESUMPTION APPLIES ONLY TO ASSETS LOCATED IN NASHUA

54. The Commission made a significant error by determining that the rebuttable presumption applies only to assets within a municipality's boundaries, which has no support under RSA 38. The error is harmless in this case because the Commission ultimately determined that it was in the public interest for Nashua to acquire all of the assets of Pennichuck Water Works. However, Nashua requests reconsideration of this determination in order to ask the New Hampshire Supreme Court to clarify the law in the event of an appeal by Pennichuck.

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[74] *See, e.g.*, Transcript, September 26, 2007, Page 135.

55. The Commission stated that:

> [T]he rebuttable presumption of public interest applies only to utility property within Nashua's municipal boundaries. Since it is the confirming vote that generates the presumption, *it follows that the Legislature's intent* was to require us to accord a measure of deference to decisions arising out of the democratic process at the municipal level. Obviously, *it would run counter to that principle if the democratic process in one municipality could have a potentially dispositive effect on the municipalization of property in one or more other municipalities.*[75]

56. Nashua has already explained in detail its position that the rebuttable presumption applies to all of the assets of Pennichuck Water Works and incorporates by reference its October 6, 2005 *Objection to Pennichuck Water Works, Inc.'s Motion for Summary Judgment*,[76] and its December 15, 2006 *Memorandum in Support of Petition for Valuation Pursuant to RSA 38:9*.[77]

57. It is apparent that the Commission erred by second guessing what the legislature might have enacted rather than applying the plain meaning of the terms it actually chose to enact. RSA 38 is clear that a favorable vote by Nashua's citizens creates a rebuttable presumption that acquisition of all of the utility's assets is in the public interest. There is no language in RSA 38 that suggests that the rebuttable presumption applies is limited to the voting municipality.

58. The Commission's concern that the will of one community's voters should apply to another is precisely the type of political question that is best left to the legislature, not for this Commission to resolve by re-writing the provisions of RSA 38. In fact, the legislature has already addressed this very concern: RSA 38:14 allows each municipality to conduct its own vote, which is binding on Nashua. The Town of

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[75] Order No. 24,878, Page 25 (emphasis added).
[76] See, e.g., Pages 8-10.
[77] See, e.g., Pages 11-15.

Bedford, a supporter of Nashua's petition and a member of the regional water district, has taken this precise step.

59. The Commission's error is harmless in this case because it determined under RSA 38:9 that acquisition of all of Pennichuck Water Works by Nashua is required by the public interest. Nashua merely requests reconsideration in order to preserve this issue in the event of an appeal by Pennichuck concerning the standard to be applied in this proceeding.

II. REQUESTS FOR CLARIFICATION CONCERNING THE MITIGATION FUND REQUIREMENT

60. The Commission states that it has determined that "a mitigation fund of $40 million is reasonably calculated to insulate PEU and PAC customers from the effects of the taking" and that it "will address the specific method for implementing this result as a compliance matter in this proceeding after the City makes a ratifying vote and all rehearings and appeals are exhausted."[78]

61. However, the amount of the mitigation fund, $40,000,000 is substantial, and increases Nashua's cost to acquire Pennichuck Water Works by nearly 20%. According to Pennichuck's own experts, the amount of the fund is over twice the book value and revenues of utilities whose customers it is intended to benefit.[79] Nashua therefore requests the following clarifications so that its elected officials may evaluate its impact in their decision to ratify the Commission's decision pursuant to RSA 38:13.

[78] Order No. 24,878
[79] Transcript, September 18, 2007, Pages 151-152.

A. CLARIFICATION AS TO WHETHER NASHUA IS ENTITLED TO RECOVER THE MITIGATION FUND TO THE EXTENT THAT HARM TO PEU AND PAC CUSTOMERS IS ELIMINATED OR IS SHOWN TO BE LESS THAN ESTIMATED.

62. The Commission's Order No. 24,878 states that the mitigation fund to be established "should be payable for the benefit of PEU and PAC customers pursuant to our ongoing authority over these utilities".[80] The Commission further ordered that it "will address the specific method for implementing this result as a compliance matter in this proceeding after the City makes a ratifying vote and all rehearings and appeals are exhausted."[81]

63. However, the Commission did not specify what happens to the mitigation fund in the event that the harm to customers to be mitigated ceases or is greatly reduced, for example, in the event that those utilities were: (a) acquired by the City of Nashua; (b) acquired by the municipalities in which they are located, as has already been proposed in Pittsfield; (c) acquired by another investor-owned utility such as Aquarion (Macquarrie); or (d) were found to be over-stated.

64. As a result, it is unclear to Nashua whether when ratifying the Commission's decision pursuant to RSA 38:13, it should consider the mitigation fund requirement as: (1) an additional $40 million capital expenditure never to be returned to Nashua, even if the harm alleged ceases to exist; or (2) as an interim requirement that continues only so long as the Commission deems necessary.

65. This question is important because if the $40 million mitigation fund is intended to be permanent, regardless of whether it is necessary, the combined cost to Nashua approaches the price at which the revenue requirement for a municipally owned

[80] Order No. 24,878, Page 63.
[81] Order No. 24,878, Page 96.

water utility would be approach those of a for-profit, investor-owned utility. Thus, a permanent mitigation fund would reduce the financial benefits of Nashua's ownership.

66. The question is also important for the purposes of financing the acquisition. Nashua understands that under the provisions of the Internal Revenue Code, to the extent that Nashua retains any interest in the fund, including, any right to repayment of amounts in the fund, the bonds required to establish the fund will be taxable. However, without clarification, Order No. 24,878 leaves open a worst case scenario in which Nashua uses taxable bonds to establish the mitigation fund, only to discover at a later date that it is not entitled to receive the proceeds.

67. Nashua urges the Commission to clarify that Nashua will be in fact entitled to return of the mitigation fund upon a final determination by the Commission that it is no longer required. To do otherwise could: (1) substantially erode the financial benefits of municipal ownership; (2) act as a barrier to removal of inefficiencies that the fund is intended to mitigate by removing incentives for Pennichuck Corporation to sell to either the City of Nashua or a larger investor-owned utility in the region such as Aquarion or others or to reduce operating or other costs.

B. CLARIFICATION CONCERNING THE DATE WHEN THE MITIGATION FUND IS TO BE ESTABLISHED.

68. Order No. 24,878 is unclear whether the mitigation fund is to be established upon ratification under RSA 38:13 and RSA 33-B or at the time that the mechanics of the mitigation fund are determined by the Commission. Under the latter approach, for example, Nashua might consider treating the mitigation fund as an operating expense rather than as an initial capital expenditure, if it lowered cost to

customers. Nashua therefore requests that the Commission clarify its intent concerning the timing of the mitigation fund requirement.

C. CLARIFICATION CONCERNING WHETHER THE MITIGATION FUND IS TO BE TREATED AS A CONDITION OF THE PUBLIC INTEREST OR AS SEVERANCE

69. Order No. 24,878 states that the mitigation fund "should be payable for the benefit of PEU and PAC customers pursuant to our ongoing authority over these utilities"[82] as a condition imposed under RSA 38:11. However, the Commission also states that whether the mitigation fund "is more properly characterized as severance or a condition required as a matter of the public interest pursuant to RSA 38:11, the net effect is essentially the same."[83]

70. There is one key distinction, however, insofar as an award of severance damages is payable to the condemnee. Nashua requests that the Commission clarify that the mitigation fund is not to be treated as severance damages payable to any of the Pennichuck entities.

Respectfully submitted,

CITY OF NASHUA
By Its Attorneys
UPTON & HATFIELD, LLP

Date: August 25, 2008

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[82] Order No. 24,878, Page 63.
[83] Order No. 24,878, Page 95.

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: August 25, 2008

Justin C. Richardson, Esq.

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

City of Nashua: Taking of Pennichuck Water Works, Inc.

Docket No. DW 04-48

PENNICHUCK'S OBJECTION TO NASHUA'S MOTION FOR REHEARING AND CLARIFICATION REGARDING ORDER NO. 24,878

Pennichuck Water Works, Inc. ("PWW"), Pennichuck Corporation, Pennichuck East Utility, Inc. ("PEU"), Pennichuck Water Service Corporation ("PWSC") and Pittsfield Aqueduct Company, Inc. ("PAC") (collectively, "Pennichuck") object to the late-filed Motion for Rehearing and Clarification filed by the City of Nashua ("Nashua") with respect to the Commission's Order No. 24,878 (the "Taking Order"). The Commission has already considered and rejected the issues that Nashua raises, and Nashua has presented no good reason that the Commission should now alter its prior determination on those matters. Pennichuck addresses the lateness of Nashua's Motion in a separate Motion to Strike. By way of further explanation for this Objection, Pennichuck states as follows:

A. IN VALUING PWW'S ASSETS, THE COMMISSION PROPERLY CONSIDERED THE COST OF CAPITAL AND CASH FLOWS FOR NOT-FOR-PROFIT PURCHASERS OF PWW ASSETS

The Commission properly considered the operating cost and cost of capital advantages enjoyed by not-for-profit entities, including municipalities, in its calculation of the income approach component in valuing PWW's assets. (Taking Order, pp. 89-91). That cost of capital percentage is also used in calculating economic obsolescence in determining the value of PWW's assets under the asset approach. (Taking Order, p. 88).

The Commission had no choice but to consider not-for-profit buyers in determining cost of capital for the asset and income approach, and cash flows for the income approach, since the supreme court has determined that it would be error not to do so. *Southern N.H. Water Co. v. Hudson*, 139 N.H. 139, 142 (1994). Despite the clear direction of *Southern N.H. Water*, Nashua took the incredible position that the Commission should limit itself only to considering the cost of capital and cash flows of for-profit entities. In fact, with no authority, Mr. Walker's and Mr. Sansoucy's income approach assumed that the hypothetical purchaser would simply inherit PWW's same income, expenses and cost of capital. (Ex.1007A, pp. 62-64).[1]

Nashua apparently has learned well from Mr. Sansoucy, and has reversed itself with respect to the propriety of considering not-for-profit buyers in the calculation of PWW's asset value. Nashua will now settle for half a loaf--latching on to Commissioner Below's dissent, with its 50-50 weighting of for-profit and not-for-profit buyers. (Taking Order Dissent, pp. 103-110). The problem with Nashua's fawning praise of the dissent's analysis, and with the dissent itself, is its obsession with the likelihood of specific purchase deals, instead of the simple requirement that certain types of deals are hypothetically possible. See, Taking Order, p. 91, n. 14. Contrary to Nashua's argument, the Commission's job is not to confine itself to the one municipal purchaser – Nashua – that is attempting to take PWW assets by eminent domain, but rather to consider all potential purchasers that could buy the assets if offered for sale on a consensual basis. That is precisely what the majority did.

The Commission found Pennichuck's valuation expert, Mr. Reilly, to present a "persuasive" analysis using a *hypothetical* buyer's cost of capital and cash flows, not that of a particular *likely* buyer. (Taking Order, pp. 89-90). And not all of those buyers need be not-for-

[1] Not surprisingly, Mr. Sansoucy took the opposite approach in prior valuations of PWW ("the income analysis presented from the view of the hypothetical municipal utility presents a sound indicator of value", Ex. 3212, p. 9)(see also, Ex. 3200, pp. 4-7).

profit buyers, with their attendant synergies. As Mr. Reilly stated in his report, a single not-for-profit potential buyer among for-profit buyers "impacts the fair market value of the system". (Ex. 3007, pp. 14-19). See, Tr. Day 8, pp. 75-76, 186. As Mr. Reilly said: "we don't need a hundred municipal buyers, we don't even need ten, but we need *one* or two" to have it influence the hypothetical bidding. Tr. Day 8, pp. 186. The mechanics of this hypothetical mixed not-for-profit and for-profit bidding environment are simple:

> each buyer looks around and says if I want to win, I've got to outbid everyone at this table. And if one or two or three people at the table are municipal buyers, then I've got to bid at least what they're going to bid. Now the ultimate winner may well be an investor owned utility. All I'm saying is that investor owned utility is going to have to pay what he thinks the municipal buyer is going to pay, otherwise he'll never be the winner in the bidding process.

Tr. Day 8, pp. 188-89.

The problem with Nashua's motion, and with the dissent, is its transformation of the appraisal concept of *typical* buyers into a subjective review of the motivation of specific not-for-profit entities. For Nashua to identify and then psychoanalyze a subset of specific potential buyers within the pool of typical buyers inserts a level of detail and subjective analysis simply not relevant to an appraiser's determination of typical hypothetical buyers. This added subjectivity is improper because it is impossible to know who *actually* would participate in a consensual bidding process for the assets if they were actually offered up for sale. All that can be known is who *may* participate. As the Commission quoted from Mr. Reilly's testimony:

> What any particular public entity has or has not indicated about its interest in the PWW system is not relevant to a fair market valuation... Appraisal literature and appraisal courses never insert the subjectivity of asking what any particular person's interest is in property subject to a fair market valuation.

Taking Order, p. 90, quoting Ex. 3007, p. 22 [sic, should be 14].

Mr. Reilly's full testimony on this point is as follows:

> What any particular public entity has or has not indicated about its interest in the PWW System is not relevant to a fair market valuation. If I inserted what a particular town was saying about its current interest in the PWW System, it would be the same as inserting what my brother-in-law's motivations and thoughts were about the woodsy cottage in my example above—it has no place in the analysis. Appraisal literature and appraisal courses never insert the subjectivity of asking what any particular person's interest is in property subject to a fair market valuation. If an appraiser had to identify every specific purchaser of a particular piece of property before concluding a fair market valuation, he would never finish his assignment. Moreover, as to the current population of not-for profit public entities, things change and what a particular municipal buyer may or may not do is driven by the current political environment. That environment could change tomorrow. Finally, an appraiser must include in the population of hypothetical buyers entities that may be formed in the future (yet-to-be-formed public entities) that would have the authority to acquire the PWW System. It would not be feasible to ask these yet to-be-formed entities what their subjective current interest is in the PWW System—because they do not exist. In short, the subjective interest of any particular buyer is never a question in a fair market evaluation.

Ex. 3007, pp. 14-15.

The appraisal literature that Mr. Reilly referred to includes, of course, The Appraisal Institute, *The Appraisal of Real Estate*, (12th ed. 2001), which the Commission cited extensively. The Commission rightly found PWW's assets to be special purpose property (Taking Order, p. 84), limiting the market of buyers and requiring an appraiser to use considerable "personal judgment". *The Appraisal of Real Estate*, pp. 25-26. Still, an appraiser must consider whatever market exists, and must be "objective, impersonal and detached" from any one buyer. Id., p. 476. Considering the needs of a "particular investor" means the appraisal is no longer of "market value" but instead of "investment value", using "subjective, personal parameters". Id[2]. Mr. Reilly thus was careful to identify the (albeit small) class of not-for-profits as typical buyers, without getting sucked into a subjective analysis of the specific situation of Nashua or another specific municipality.

[2] The dissent (Taking Order, p. 105) misapplies the concept of investment value, assuming that the class of not-for-profit buyers that Mr. Reilly identified in his determination of market value is the same as a "particular investor" for whom an appraiser would determine investment value.

The Commission is right to find Mr. Reilly's report and testimony, backed up by appraisal literature, to be persuasive. He is a pre-eminent valuation scholar, with six professional designations and certifications, and authorship of six authoritative books in the field. (Ex. 3007, pp. 2-5; Ex 3007A, pp. 96-98). Nashua's only "experts" lacked any meaningful credentials and totally ignored municipal buyers. Ex. 1007, pp. 62-64.

Nashua in its motion points to scattered evidence for the obvious proposition that there is not a large market for water companies the size of PWW. Motion, ¶ ¶ 4-7. That is inconsistent with Nashua's earlier valuation claim, which relied heavily upon the presence of 28 alleged comparable sales, and argued for a fifty percent weighting for that approach. (Taking Order, p. 66). Of course the Commission did not give any weight to the sales approach, finding a "paucity of comparable sales" (Taking Order, p. 84). But the lack of sales that are *comparable* is not indicative of the size of the market and, more important, simply is irrelevant to the income approach and its reliance upon *hypothetical* buyers.

Nashua also misunderstands Mr. Reilly's testimony. There need not be two specific municipal buyers hypothetically competing to acquire PWW assets. See, Motion, ¶ ¶ 13, 22-32. There could be one municipal buyer and one for-profit buyer, and the for-profit buyer may well offer as much as the capitalized cash flow of the municipal buyer.[3] (Tr. Day 8, pp. 188-89). Thus Nashua's discussion as to what two or three not-for-profit buyers would or would not do is subjective and hence irrelevant to an appraiser's work.

[3] Not-for-profit buyers and for-profit buyers may analyze matters differently, but the for-profit buyer must address the synergies that not-for-profits enjoy in cost of capital and expenses, which carries over into the 2% inflation factor that Mr. Reilly applied and which is, in part, the subject of Pennichuck's Motion for Rehearing, sec. P. If the successful buyer is a not-for-profit, its ratemaking need not be based upon rate base, and its revenue would likely rise by no less than inflation over time. If the successful buyer is a regulated for-profit utility, long term income still will go up at least 2% annually, assuming typical rises in recoverable expenses, and ongoing capital expenditures somewhat exceeding depreciation.

While more than one hypothetical not-for-profit buyer is not required, Nashua's motion by itself admits that other hypothetical not-for-profit buyers exist. Nashua admits that Amherst, Merrimack, Bedford, Milford and other communities could acquire PWW assets pursuant to RSA 38. Motion, ¶ 26. The choices those towns made in the current case — such as the choices of Merrimack and Milford not to pursue an acquisition -- are plainly irrelevant to an analysis of fair market value. Of course, Nashua conveniently ignored the evidence that one town, Bedford, actually voted to condemn PWW assets, and would be interested in a consensual purchase as well, either through the Regional Water District or directly. Scanlon Test., Tr. Day 10, pp. 142-150.

Nashua's motion seems to admit, as it must, that the Merrimack Valley Regional Water District, or some other water district, could acquire PWW assets pursuant to RSA 38:2-a. Motion, ¶ ¶ 21,31. The State of New Hampshire and Manchester Water Works, with a franchise in Bedford, could do so as well. See, Tr. Day 10, pp. 145-47. Nashua's own motion (¶ ¶ 43-49), includes mention of Nashua's desire to acquire PEU and PAC assets. Pittsfield has also expressed an interest in buying PAC assets.

As Mr. Reilly testified and the Commission found, there is more than one legally permissible potential not-for-profit buyer for PWW assets. (Taking Order, p. 90). It does not matter that some of the potential municipal buyers identified might face practical or political challenges in pursuing an authorized purchase (just as Nashua has encountered in its efforts to purchase PWW), because that would introduce a level of subjectivity into the appraiser's work. Ex. 3007, p. 14. Whether designing a proposal that is determined to meet the public interest or public use requirements of RSA 38 and 31:3 (Motion, ¶ 18) or the need to form a water district under RSA 52-A and 38:2-a (Motion, ¶ 20), such logistical considerations are irrelevant, if they

exist at all. Nashua claims that its size gives it veto power over any other entity wishing to acquire PWW assets (Motion, ¶ 29, 30). While such threatening statements confirm the fears of surrounding towns about Nashua's intentions, the City's characterization of how negotiations take place in the real world are not true, in addition to being impermissibly subjective. Nashua assumes that a hypothetical negotiation occurs only after non-profit buyers have taken the formal votes needed to close on a consensual transaction with Pennichuck. The more likely scenario is an informal negotiation, including for-profit buyers, at which an agreed upon price is arrived at well before the negotiated price is presented for formal votes.

Nashua then makes the argument that there is no market for municipal buyers of privately owned water companies in New Hampshire because municipalities and other not-for-profits allegedly can only conduct asset purchase transactions, which water companies avoid for tax reasons. Motion, ¶ ¶ 33-37. That is not true: municipalities and other not-for-profits can purchase stock.[4] In fact, the Commission approved a private water company stock sale in *Tilton Northfield Aqueduct Company*, 90 NHPUC 599 (2005). And Nashua itself obtained clarifying legislation to confirm that it can both buy *and hold* Pennichuck shares. Laws 2007, Ch. 347:5.

Contrary to Nashua's specific statements (Motion ¶ 4-7) about the lack of a municipal buyers ' market, Pennichuck offered additional evidence involving competing not-for-profit buyers. The Commission at the hearing specifically requested Pennichuck to locate other completed transactions in which more than one potential municipal buyer expressed interest.

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[4] A recent consensual Connecticut water district purchase of the stock of a water company illustrates this fact and further supports the valuation found in this case. If the Commission were to order a rehearing, Pennichuck would introduce evidence showing that South Central Connecticut Regional Water Authority, even though it was the only bidder for the entire business enterprise of BIW Limited, purchased all of the shares of BIW for $23.75 per share, or 3.55 times book value. See, SEC 8-K filing dated January 14, 2008, found at http://www.sec.gov/Archives/edgar/data/1169237/000107261308000101/0001072613-08-000101-index.htm. If this same multiple were applied to Pennichuck's stock, it would value Pennichuck at approximately $40 per share as of June 30, 2008.

Pennichuck complied, and supplied a list of four such transactions, Ex. 3258. After a post-hearing conference with the Commission chairman, at which Nashua objected to the admission of that exhibit, the Commission by letter order dated October 17, 2007, refused to admit it. A copy of Ex. 3258 is attached to this objection, and the discussion on the record at that hearing provides additional facts about those four transactions (Tr. 10/12/07, pp. 22-28). In light of Nashua's false characterization of Mr. Reilly's testimony on this issue, if the Commission were to grant a rehearing, Pennichuck would again seek admission of Ex. 3258 into evidence, including any necessary supporting material to demonstrate that these transactions respond directly to the questions asked by Commissioner Below during the hearing on the merits.

Nashua also claims that the 39% federal income tax consequence from an asset transaction means that Pennichuck would never agree to an asset sale. Motion, ¶ 34. First of all, whether a purely voluntary transaction takes the form of a stock or asset sale does not define or limit that hypothetical market. Beyond that, of course Pennichuck has steadfastly objected to a forced taking of its assets because, among other things, of the substantial corporate level tax burden it would place on its shareholders. The Commission should have considered this and other shareholder interests in its public interest analysis. See, Pennichuck's Motion for Rehearing, section F. In its motion (¶ 34), Nashua finally seems to concede this harm to Pennichuck's shareholders. If anything, a for-profit company's resistance to sell because of income tax consequences would drive the necessary purchase price *higher* in a true consensual transaction. Yet Nashua just as quickly forgets that Pennichuck shareholders exist, complaining that the Taking Order "would force the citizens of Nashua… to bear … $50 million in additional debt… that has made 'the only real winners in this game ... the lawyers and expert witnesses…' (citation omitted)." Motion, ¶ 14. Nashua is not being forced to do anything. Instead, it seeks to

use raw governmental power to force Pennichuck and its shareholders to hand over private property. This is the nub of Pennichuck's public interest case.

Finally, like the dissent, Nashua incorrectly seizes upon the 2002 work of SG Barr Devlin for Pennichuck. But since SG Barr Devlin's assignment was the sale of the entirety of the publicly traded holding company, not just the regulated utility assets, it is not surprising that municipalities were not considered among the likely purchasers. Mr. Reilly distinguished SG Barr Devlin's work, and the Commission rightly was not concerned with it in its Taking Order. (Ex. 3017A, pp. 17-18)(Tr. Day 8, pp. 227-232).

B. THE COMMISSION CANNOT NOW REVISIT ITS 2005 REMOVAL OF PAC AND PEU ASSETS FROM THIS CASE

Nashua asks the Commission to revisit its Order No. 24,425, dated January 21, 2005, which, among other matters, ruled that Nashua's petition could not include PEU or PAC assets. PWW timely sought rehearing from another portion of that order, dealing with the municipal vote and PWW satellite system assets. Nashua objected to PWW's motion, but never moved for rehearing on the ruling removing PEU and PAC assets from the case. That is, until now.

Nashua's attempt to seek a rehearing on Order No. 24,425 fails because it was not filed within thirty days of the order, as required by RSA 541:3. That requirement is particularly applicable in this case, since the case has proceeded over the past three and one half years, through extensive discovery, valuation testimony and a merits hearing, without the inclusion of the PEU and PAC assets. Mr. Reilly did not value those assets. The Taking Order did not make any public interest analysis or valuation with respect to those assets. In fact, the parties presented no evidence whatsoever regarding the taking of those assets, other than the harm to the customers of PEU and PAC if the assets of PWW are taken. For the Commission to grant a rehearing on this point would lead to revisiting public interest and valuation issues for all of the

Pennichuck entities, requiring additional discovery, expert testimony and a new merits hearing. It is simply too late.

Moreover, the Commission properly stated the law in Order No. 24,425 that eminent domain statutes must be read strictly, that RSA 38 does not afford an interpretation to permit Nashua to take assets of entities with no connection to the City. Order No. 24,425, pp. 9-16. See, *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 181 (1940); RSA 38:6 ("utility [must be] engaged...in...distributing...water for sale in the municipality").

Nashua' s new-found problem with Order No. 24,425 is the fact that the Taking Order requires Nashua, as a condition of taking PWW assets, to establish a $40 million mitigation fund to offset rate increases that PEU and PAC customers will suffer as a result of the taking of PWW assets. Taking Order, pp. 94-96. That requirement reflects the harm to the interests of those customers, as documented by Mr. Guastella's testimony. Nashua now complains that it did not have the chance to counter that evidence, first quantified in Mr. Guastella's May 22, 2006 testimony. Motion, ¶ 50. Yet, in addition to cross-examination of Mr. Guastella at a deposition and at trial, Nashua had more than enough opportunity to conduct discovery on and address this argument. It chose not to. Nashua even agreed to forego a round of capstone testimony as late as September, 2006. Commission Letter Order, September 14, 2006. Nashua has not articulated a reason for a new hearing on the harm suffered by PEU and PAC, other than an attempt to retry the issue.

C. NASHUA WAIVED ANY CLAIM THAT THE REBUTTABLE PRESUMPTION DOES NOT APPLY TO ASSETS OUTSIDE OF NASHUA

The Commission ruled in Order No. 24,567 (December 22, 2005) that the rebuttable presumption contained in RSA 38:2 only applies to PWW assets located within Nashua. It reaffirmed that ruling in the Taking Order, p. 25. Nashua never filed a timely motion for

rehearing of Order No. 24,567, as required by RSA 541:3, and so has waived raising this issue at this point.

The Commission properly interpreted the rebuttable presumption provision of RSA 38:2 not to apply to assets of PWW located in communities outside of Nashua, many of which opposed the taking. To do otherwise would extend beyond the town line the effect of Nashua's already deficient municipal vote. See, Pennichuck Motion for Rehearing, sec. D. Nashua voters cannot presume to speak for Merrimack residents, and vice versa. The Commission made the only logical interpretation possible of the statute.

D. MITIGATION FUND CLARIFICATION

In seeking clarification of the Commission's order, Nashua seeks to gut the $40 million mitigation fund that is required to be established as a condition of Nashua's approval in order to offset the harm to customers of PEU and PAC. Nashua's attempt to eviscerate the mitigation fund before it is even established proves Pennichuck's concern that, after PWW's assets are taken, Nashua will invoke every avenue to reduce or remove the many conditions that underpin the Commission's finding of public interest for this taking. See, Pennichuck Motion for Rehearing, sec. J.

For instance, Nashua seems to hope that it can get a refund of the fund, or that it need continue only so long as the Commission will order it. (Motion, ¶ 64). Nashua seems to hope that it can avoid actually fronting any money for the fund (Motion, ¶ 68), making it an annual operating expense, and thereby placing PEU and PAC at the mercy of Nashua for payment each and every year. Nashua also wants to retain financial control over the fund (Motion ¶ 66), which would harm the customers of PEU and PAC and would defeat the purpose of its establishment in the first place.

The real reason for Nashua's request for clarification concerning the mitigation fund is its desire not to have to pay for it. It admits that: "the combined cost to Nashua approaches the price at which the revenue requirement for a municipally owned water utility would be approach [sic] those of a for-profit, investor owned utility. Thus, a permanent mitigation fund would reduce the financial benefits of Nashua's ownership." Motion, ¶ 65. That proves the point of Pennichuck's Motion for Rehearing, sec. L, that there is no public interest benefit coming from Nashua's ownership of PWW assets, because, among other things, there are no savings to PWW customers under municipal ownership.

E. CONCLUSION

For the reasons set forth herein, Pennichuck requests that the Commission deny Nashua's Motion for Rehearing and Clarification.

Respectfully submitted,

Pennichuck Water Works, Inc.
Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Service Corporation
Pennichuck Corporation

By Their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: August 29, 2008

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2008, a copy of the foregoing Objection to Motion for Rehearing and Clarification has been forwarded by electronic mail to the parties listed on the Commission's service list in this docket.

Thomas J. Donovan

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 04-048

CITY OF NASHUA

RSA 38 Proceeding re Pennichuck Water Works

Order Denying Motions for Rehearing

ORDER NO. 24,948

March 13, 2009

I. INTRODUCTION

On July 25, 2008, the Commission issued Order No. 24,878 approving the City of Nashua's (Nashua) taking by eminent domain of Pennichuck Water Works, Inc. (PWW) and setting a value for PWW's assets (Order). On August 22, 2008, PWW, Pennichuck Corporation, Pennichuck East Utility, Inc. (PEU), Pittsfield Aqueduct, Company, Inc. (PAC), and Pennichuck Water Service Corporation (PWSC) (collectively Pennichuck), filed a motion for rehearing. On August 25, 2008. Nashua filed its motion for rehearing.

On August 27, 2008, Nashua filed an objection to Pennichuck's motion for rehearing and, on August 29, 2008, Pennichuck filed a motion to strike Nashua's motion for rehearing as untimely together with an objection to Nashua's motion for rehearing. On September 4, 2008, Nashua filed an objection to Pennichuck's motion to strike. On September 8, 2008, Nashua filed a motion to strike Pennichuck's objection to Nashua's motion for rehearing. On September 18, 2008, Pennichuck filed a motion for leave to reply as well as a reply to Nashua's objection to Pennichuck's motion to strike. Also on September 18, 2008, Pennichuck filed an objection to Nashua's motion to strike Pennichuck's objection to Nashua's motion for rehearing. On September 24, 2008, Nashua filed a response to Pennichuck's motion for leave to reply.

II. POSITIONS OF THE PARTIES

A. PENNICHUCK

Motion for Rehearing

Pennichuck alleges that the Order fails to meet the legal standard required by RSA 38 and the New Hampshire and United States Constitutions for the condemnation of utility property; fails to make the factual findings required to support such an order for a taking and for the valuation of PWW's assets; and fails to consider, or misunderstands, relevant evidence.

1. Public Interest Standard

Pennichuck claims that the Order fails to apply an appropriate public interest standard and fails to articulate any cognizable public interest standard. In making these allegations, Pennichuck relies on case law involving takings pursuant to: RSA 231:8 and :23 (laying out public highways); RSA 205:2-b (taking of blighted land for redevelopment); and RSA 423:3 (taking of land for municipal airports). Pennichuck further claims that the Order may have erroneously applied a no net harm standard. According to Pennichuck, the Order fails to set forth the Commission's reasoning and methodology in determining the public interest.

2. Water Systems Entirely Outside of Nashua

Pennichuck claims that the Order erroneously interprets RSA 38 to give the Commission authority to allow Nashua to take water systems (satellite systems) located entirely outside of Nashua, even though those systems are not connected to the system that serves Nashua and are not necessary to supply water service within Nashua. Pennichuck points to the Commission's finding in Order No. 24,425 that the authority conferred under RSA 38:2 should be narrowly construed as it relates to facilities beyond municipal boundaries. Pennichuck then claims that the Commission failed to narrowly construe the takings authority when it used uncertainty, and rate

and service continuity as bases for allowing Nashua to take the satellite systems. Pennichuck further asserts that there was no meaningful evidence to support the Commission's finding that Nashua should acquire the satellite systems. Pennichuck incorporates its arguments in its earlier motions to dismiss and for rehearing of Order No. 24,425 into this motion for rehearing.

3. Segmented Public Interest Analysis

Pennichuck claims the Commission erred when it conducted separate public interest analyses for the taking of PWW's core and satellite systems, where the only proposal before the Commission called for the taking of all systems together. Pennichuck argued that no vote occurred in the municipalities containing satellite systems outside of Nashua and that no rebuttal presumption supports the taking of satellite systems. According to Pennichuck, if the Commission had considered the PWW systems as a whole, including the satellite systems, it would have had to consider the public interest of taking all systems, without the benefit of the rebuttable presumption of RSA 38:3.

4. Municipal Vote for the Taking

Pennichuck repeated arguments made in its earlier motions to dismiss and for rehearing that Nashua's petition exceeded the scope of the January 14, 2003 confirming vote of its residents which, according to Pennichuck, only authorized taking the core system. Pennichuck claimed that voters were not properly informed that Nashua would use eminent domain to take PWW assets.

5. Failure to Consider Relevant Evidence

Pennichuck claims that the Order fails to consider, or weigh properly, evidence of the public interest, including the interests of the broader public, the interests of the state. and the democratic interests of residents of towns outside of Nashua. Specifically, Pennichuck claims

that the Commission failed to accord any weight to testimony by Commission staff, Veolia staff, and Bedford and Milford town officials, that Pennichuck is a well-run utility.

Further, Pennichuck claims that the Commission failed to weigh the damage to the public interest of losing access to the capital and operational capability of the State's largest investor-owned water utility. Pennichuck points out that the public benefits of PWSC, which operates 86 water systems serving 19,230 customers in New Hampshire, would also be lost due to the taking of PWW and the ensuing loss of economies of scale.

Pennichuck argues that the acquisition of troubled water systems was in the interest of an investor-owned utility and will not be in the interest of a municipal utility such as Nashua. As a result, according to Pennichuck, Nashua's acquisition of PWW is not in the public interest.

Pennichuck also claims that the Commission failed to consider the harm to PWW shareholders in the form of a multi-million dollar corporate tax liability that will result from the taking. Pennichuck argues that the legislation allowing Nashua to acquire PWW assets through a stock acquisition was an effort to address this massive tax impact.[1]

Finally, Pennichuck claims that, by giving deference to the ability of Nashua's elected officials to make good decisions regarding utility operations, the Commission ignored the opposition to the taking by the elected officials of the Towns of Merrimack and Milford.

6. Tax and Revenue Harm to Pennichuck Shareholders

Pennichuck asserts that the Order fails to consider the harm to Pennichuck Corporation and its shareholders in its public interest analysis. While the Commission considered the harm to customers of PEU and PAC, Pennichuck claims the Order does not discuss the loss of substantial non-regulated revenues to PWSC, nor the substantial corporate tax and capital gains tax at the

[1] *See*, 2007 Laws, Ch. 347:5 (SB 206).

shareholder level that will result from Nashua's taking of PWW assets. Pennichuck argues that the Order fails to balance customer and shareholder interests as required by RSA 363:17-a. Pennichuck takes the position that the Order's failure to consider the interests of Pennichuck shareholders is plain error.

7. Modifications to Nashua's Proposal

Pennichuck claims that the Order fails to conduct the public interest analysis based on Nashua's pre-filed proposal, upon which PWW conducted discovery, and instead based the ruling upon Nashua's altered proposals presented during hearing. Pennichuck points out that Nashua changed its initial takings proposal by voluntarily submitting to Commission jurisdiction, by agreeing to serve satellite system customers at core rates, by altering its operating contract to consolidate all customer service functions with Veolia, and by offering a mitigation fund for PAC and PEU.

Pennichuck argues that it expended time and expense in countering Nashua's pre-filed proposal and then had to litigate new proposals even as late as the last day of hearing, when Nashua proposed new conditions for the first time. Pennichuck claims that it was deprived of its due process rights because it had no opportunity to conduct discovery on, or respond to, the new conditions. Pennichuck claims that the Commission's consideration of the new conditions without further discovery and hearing violates Pennichuck's due process rights under Pt. 1, Art. 2 and 14 and Pt. 2, Art. 83 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution.

8. Conditions in Order Make the Presumption Irrebuttable

Pennichuck claims that the Order treats the statutory presumption of public interest as irrebuttable by imposing numerous significant substantive conditions in an attempt to overcome

the substantial defects that the Commission found in Nashua's proposal. Because the Order at p. 98 finds the conditions "are explicitly determined to be prerequisites to our decision that the taking is in the public interest," Pennichuck argues that without those conditions the Commission determined that the taking would not be in the public interest. Pennichuck then asserts that the conditions overstepped the Commission's authority to set conditions under RSA 38:11 and converted the statutory rebuttable presumption into one that was essentially irrebuttable. Pennichuck takes the position that the Commission's use of conditions in this way turned the Commission into a "super-legislature" enacting a complicated ownership and operational scheme which served as a basis for a public interest finding. Pennichuck Motion for Rehearing at p.16.

9. Conditions Exceed Commission Authority

Pennichuck claims that the Order imposes numerous conditions to satisfy substantial defects in Nashua's proposal that are beyond the Commission's authority, are not enforceable, and cannot support a public interest finding. Pennichuck refers to conditions that it claims require the Commission to exercise ongoing regulatory authority over the new municipal utility including: (1) customers of PWW outside of Nashua receiving the same rates, terms and conditions as those in Nashua; (2) continuing to oversee service quality issues; (3) continuing to oversee wholesale contracts; and (4) requiring Nashua's membership in DigSafe.

Pennichuck states that RSA 362:4 exempts municipalities from utility regulation. Pennichuck argues that RSA 374:22 (dealing with franchise authority), which does apply to municipalities, does not create ongoing Commission authority over municipalities. Pennichuck also asserts that RSA 38:11 cannot include conditions that would have the effect of extending the Commission's regulatory authority to a municipal water system. Pennichuck concludes that

Nashua's agreement to conditions cannot have the effect of extending the Commission's jurisdiction beyond that granted by statute.

10. Conditions Occurring After the Taking

Pennichuck claims it will not be able to challenge conditions subsequent to the taking, should those conditions not be met, because the Order will have become final. Such conditions include: (1) Commission review and approval of Veolia and R.W. Beck agreements 60 days after the Order becomes final; (2) inclusion of customer service functions in the Veolia agreement; (3) creation of a mitigation fund to benefit PEU and PAC customers; and (4) requirement that Nashua hire a PWW employee familiar with its facilities.

Pennichuck points out that should the conditions not be met post-taking it will not be possible to put the shareholders of Pennichuck back into their original condition. Pennichuck claims that the Order turns several of the prerequisite conditions into conditions subsequent, to be evaluated after the taking has occurred. Pennichuck argues that this is a corporate death penalty case where the gallows have been placed before the conviction. According to Pennichuck, this amounts to a denial of its due process rights under Pt. 1, Arts. 2 and 14 and Pt. 2, Art. 83 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution.

11. Nashua's Ability to Finance the Acquisition

Pennichuck claims that the Order's finding that Nashua is financially capable of acquiring and operating the assets of PWW is flawed because the Commission did not consider whether Nashua could finance the acquisition under the conditions prevailing in the financial markets and on the terms set forth in the Order.

12. Nashua's Future Rates

Pennichuck asserts that the rate comparability analysis in the Order between PWW and hypothetical Nashua rates, even assuming the Commission's taking price of $203 million, fails to account for the $40 million mitigation fund and fails to consider evidence of additional costs that were not included in Nashua's revenue requirement model.

Pennichuck notes that the Order relied upon rate analysis by Pennichuck's witness, Mr. Guastella, for its rate comparison and that Mr. Guastella did not include certain additional costs to Nashua in his analysis. According to Pennichuck, those additional costs include; additional payments to Veolia to perform all customer service functions ($311,000 annually), costs of participation in DigSafe ($100,000) annually, additional base fee to Veolia due to passage of time ($200,000 annually), significant unanticipated amounts for regulatory requirements, and additional costs from Veolia as supplemental charges. Pennichuck noted that Nashua's witness, Mr. Sansoucy, estimated operating expenses for Nashua in 2008 at $10,410,000 which Pennichuck claims is a million dollars more than Mr. Guastella's earlier projection.

13. Mitigation Fund

Pennichuck claims that the finding in the Order that a $40 million mitigation fund would generate $3.4 million annually to benefit customers of PEU and PAC is not supported by the evidence because it fails to consider tax consequences and the achievability of an annual rate of return of 8.5%. In addition, according to Pennichuck, the Order fails to consider whether Nashua can legally establish such fund. As a result, Pennichuck argues that the Commission erred in assuming that it had created a valid and enforceable remedy for PEU and PAC customers.

14. Information Outside the Record

Pennichuck asserts that the Order relies upon information outside the record. Specifically Pennichuck claims that the Commission should not have considered a water supply contract between Nashua and the Town of Milford filed on February 22, 2008, and PWW's 2006 and 2007 annual reports. Pennichuck claims that the Order failed to include new assets in the updated valuation and violated Pennichuck's due process rights by failing to give notice of the Commission's intent to use such materials and an opportunity to contest their use. *See, Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1072-73 (1982).

15. Explanation of Valuation Numbers

Pennichuck claims that the Order lacks detail as to a number of numerical components, making it difficult to determine whether the Commission correctly performed the valuation analysis it purported to adopt. Pennichuck asserts that without reviewing the Commission's actual calculations it is not possible to determine whether the Commission applied its valuation methodology properly. *See, Appeal of Newington*, 149 N.H. 347, 352 (2003) and RSA 363:17-b.

16. Lack of Two Percent Growth Rate in Capitalization Rates

Pennichuck claims that the Order wrongfully excluded from its asset and income approach valuation analysis a 2% long-term growth factor in the applicable capitalization rates. Pennichuck claims that the Commission erred in not applying a 2% growth factor and thereby understated PWW's value as of December 31, 2005, by approximately $92.7 million.

17. Update of PWW Value

Pennichuck claims that in the asset approach to valuation the Commission brought forward the value of PWW, from December 31, 2005 to December 31, 2008, without showing the underlying data it used. Pennichuck asserts that the Commission erred when it relied upon

incomplete and extra-record financial information (2006 and 2007 PWW annual reports) to update the asset value of PWW.

18. Pennichuck's Right to Jury Trial

Pennichuck argues that RSA Chapter 38 violates Pennichuck's equal protection rights because it does not provide for a trail by jury on all valuation matters. According to Pennichuck, it has been denied its equal protection constitutional right to a jury trial on damages. See, e.g. N.H. CONST., pt. 1, arts. 2, 12, and 14; *Gazzola v. Clements*, 120 N.H. 25, 29 (1980); *White Mountain Power Co. v. Maine Central RR*, 106 N.H. 443, 445 (1965). Pennichuck asserts that the owner of property facing an eminent domain taking by a public utility (RSA 371:10) and the owners of all other property subject to condemnation processes in New Hampshire (RSA 498-A:9) enjoy the right to a jury trial. Pennichuck concludes that the absence of a right to a jury trial as part of the valuation process set out in RSA 38 is unconstitutional on equal protection grounds.

Motion to Strike Nashua's Motion for Rehearing

Pennichuck's motion to strike concerns RSA 541:3, which requires that motions for rehearing of state agency decisions be filed with the agency within thirty days after the date of the agency decision.[2] Pennichuck states Nashua filed its motion for rehearing on August 25, 2008, thirty-one days after the date of the decision. In support of its argument that the motion is untimely, Pennichuck relies on *Appeal of Carreau*, 157 N.H. 122, 945 A.2d 687 (2008) and

[2] 541:3 Motion for Rehearing –"Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion."

LaCroix v. Mountain, 116 N.H. 545 (1976) in which the Court held that it lacked jurisdiction over the appeals since the respective petitioners filed the appeals beyond the thirty-day time period prescribed by RSA 541:6.[3] In *Carreau*, the Court held that "[w]e have repeatedly held that New Hampshire follows the majority rule regarding compliance with statutory time requirements, and, thus, '[o]ne day's delay may be fatal to a party's appeal.'" *Carreau*, supra at 688 citing *Dermody v. Town of Gilford*, 137 N.H. 294, 296 (1993). Specifically, the Court found that compliance with a statutory appeal period "is a *necessary prerequisite* to establishing jurisdiction in the appellate body." *Id.*

Pennichuck also relies on *Phetteplace v. Town of Lyme*, 144 N.H. 621, 624-625 (2000), a tax appeal under RSA 76, in which the Court held that when the legislature unambiguously establishes a date certain for filing an appeal, it is immaterial that the final day for filing falls upon a weekend or holiday. The Court explained that the legislature contemplated September 1 falling on a weekend or a holiday when it used language "on or before September 1."

Pennichuck argues that the Commission's administrative rule, N.H. Code Admin. Rules Puc 202.03, is immaterial because the period of time applicable to a motion for rehearing is not established by Commission rule, but rather by RSA 541:3. Procedural rules are not available to cure a party's failure to timely move for a rehearing pursuant to RSA 541:3. *See, In re McHale*, 120 N.H. 450 (1980). Finally, Pennichuck points out that "[e]ven a long-standing administrative interpretation of a statute is irrelevant if that interpretation clearly conflicts with express statutory language." *Appeal of Rainville*, 143 N.H. 624, 627 (1999).

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[3] 541:6 Appeal – "Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court."

B. NASHUA

Motion for Rehearing and Clarification

1. Municipal Buyer Theory Is Not Supported by Evidence

Nashua argues that the Commission erred in using the price a hypothetical not-for-profit municipal buyer would pay as a foundation for its determination of valuation. More specifically, Nashua claims that the Commission erred in concluding that a competitive market of non-profit purchasers exists, or influences the market for PWW. Nashua asserts that there is no evidence that such a market exists and it argues that even PWW's valuation expert could not give a single example where two not-for-profits bid on the same water utility. Nashua argues that actual sales of water companies as well as a recently published report on sale prices for water companies support a much lower value for PWW in the range of $85 million. Nashua notes that the only municipal acquisitions of water systems in New Hampshire have been incremental expansions of existing infrastructure and that municipalities have not been active bidders in the market for water companies. As a result, Nashua claims there is no evidence in the record to support a valuation based upon competition among hypothetical not-for-profit bidders.

2. Municipal Buyer Theory Is Not Consistent with New Hampshire Law

Nashua points out that only the municipality where the utility serves may acquire, either by consensual sale or by eminent domain. *See*, RSA Ch. 31 and 38. Nashua argues that New Hampshire law does not permit a municipality to bid competitively on a water company's assets located principally in areas outside the municipality. Nashua asserts that Pennichuck was not able to cite any New Hampshire law that would permit such bidding activity by municipals or other similar not-for-profits. As a result, Nashua claims that the Commission may not use a hypothetical not-for-profit buyer in valuing PWW assets.

3. Nashua Is the Only Municipality Capable of Acquiring PWW

Nashua argues that none of the municipalities which PWW serves, except Nashua, can either legally or practically bid to acquire PWW. According to Nashua, Pennichuck's valuation witness, Mr. Reilly, admitted at hearing that Nashua is the only municipality capable of acquiring the PWW system.

The record demonstrated that there are no reasonably probable competitive municipal or not-for-profit buyers for PWW. Nashua argues that, with 87% of the PWW customers, Nashua is the only municipality with sufficient customers to acquire PWW. Behind Nashua, Amherst has the highest number of PWW customers, but Amherst customers comprise only 3.8% of the PWW customer base. Merrimack, Hollis, Milford, Bedford, Derry, Epping and Newmarket all have smaller percentages of the PWW customer base than Amherst. Plaistow and Salem are served by satellite systems that are not hydraulically connected to the core PWW system. As a result, Nashua claims that none of these municipalities are either legally or practically capable of taking the assets of PWW.

4. Municipal Buyers Lack Authority to Purchase Stock of Water Companies

Nashua claims that even PWW's valuation expert, Mr. Reilly, opined that because municipal buyers cannot buy the stock of a for-profit water company they were not identified as potential buyers by SG Bar Devlin in 2002. Nashua goes on to argue that most water company sales are stock sales as opposed to asset sales in order to avoid a corporate tax on appreciated water company assets. According to Nashua, in negotiated sales between willing buyers and sellers, sellers are not willing to sell assets and incur an additional 39% tax liability without compensation.

Nashua notes that New Hampshire municipalities do not have authority to acquire and hold the stock of utilities such as PWW under Part 2, article 5 of the New Hampshire Constitution, absent a special grant of legislative authority and a public purpose. As a result, Nashua claims that municipal buyers do not and cannot influence the market for PWW.

5. The Reilly Theory Does Not Establish the Fair Market Value of PWW Assets

Nashua argues that by relying on Mr. Reilly's hypothetical municipal purchaser the Commission did not determine the fair market value of PWW. Instead, according to Nashua, the Commission developed the price Nashua was able to pay or, in other words, the investment value of PWW to Nashua. Nashua asserts that the value a buyer can afford to pay is not the fair market value. Nashua posits that the best evidence of the market for PWW is the auction of its parent, SG Barr Devlin in 2002. Nashua claims that SG Barr Devlin did not invite the participation of municipal buyers in the auction and further claims that municipal buyers do not have the motivations of a typical investor. Nashua argues that the evidence suggests that municipal buyers do not pay more than for profit investors. According to Nashua, Mr. Reilly admitted that in a typical market with only one municipal bidder the price could be only $1.00 more than what for-profit buyers would pay. Nashua concludes that the Commission should reject Mr. Reilly's hypothesis regarding municipal buyers and support Commissioner Below's dissenting opinion on that point.

6. Nashua Should be Allowed to Acquire PAC and PEU

Nashua argues that the Commission failed to give proper effect to the broad grant of authority in RSA 38:2 and :11 when it read RSA 38:6 as limiting the more general takings authority. Nashua claims the Commission's decision to allow Nashua to take only PWW is contrary to the plain language of RSA 38:2 and :11.

Nashua observes that PWW, PAC and PEU are highly interdependent companies which all use the computer systems, equipment and employees of PWW to operate. According to Nashua, PAC and PEU have no employees, equipment or inventory, all of which are supplied by PWW and located in Nashua. PAC and PEU are operated out of Nashua, using PWW's communications system, IT system and its administration, accounting, billing and customer service. Nashua claims that separation of PAC, PEU and PWW is a financial and regulatory exercise, but from an operational perspective they are all operated and controlled from PWW facilities in Nashua.

7. Mitigation Fund, Double the Combined Values and Revenues of PAC and PEU, Should be Reduced

Nashua claims that the only evidence of harm to PAC and PEU customers was based upon a continuation of the current corporate model. According to Nashua, establishing a mitigation fund based upon that evidence ignores opportunities for PAC and PEU to mitigate the harm by merging their operations into a larger utility. Nashua asserts that PWWs' calculation of harm simply carried PWW's existing overhead over to a much smaller utility without considering opportunities to reduce or even eliminate harm to customers of PAC and PEU. Nashua argues that the Commission should either require Nashua to acquire the assets of PAC and PEU to satisfy the public interest, or establish procedures to reduce the mitigation fund in light of Pennichuck's ability to mitigate the harm to the PAC and PEU customers.

8. Rebuttable Presumption Applied Only to Assets in Nashua

Nashua argues that RSA 38:3 creates a rebuttable presumption that the action voted on is in the public interest. Nashua insists that the presumption applies to all utility assets, regardless of where they are located. Nashua asserts that the Commission's concern that the will of one

community's voters should not apply to another is precisely the type of political question best left for the Legislature. Nashua points out that RSA 38:14 already addresses this concern by allowing each municipality to conduct its own vote which is binding on Nashua. According to Nashua, the Town of Bedford did just that and voted to support Nashua's petition.

Nashua claims that the Commission's finding that the rebuttable presumption applies only to property within the municipality is harmless error in this case because the Commission found that acquiring assets of PWW outside of Nashua is in the public interest. Nonetheless, Nashua raises the issue for resolution in a possible appeal of this decision.

9. Request for Clarification Regarding the Mitigation Fund

Nashua argues that the Commission failed to specify what happens to the mitigation fund in the event that harm to PAC and PEU customers either ceases or is greatly reduced by acquisition by another investor owned utility, or by acquisition by the municipalities where the utilities are located. As a result, Nashua asks the Commission to clarify whether the mitigation fund is permanent, regardless of whether or not the harm to PAC and PEU customers exists, or whether the fund is an interim requirement which continues only so long as the Commission deems necessary.

Nashua states that the permanent versus temporary status of the mitigation fund determines the type of funding and tax treatment available for the fund. Nashua urges the Commission to clarify that Nashua will be entitled to a return of the mitigation fund upon a final determination by the Commission that the fund is no longer required. Nashua claims that failure to clarify the nature of the mitigation fund substantially erodes the financial benefits of municipal ownership and acts as a barrier to removal of the inefficiencies the fund is intended to mitigate.

Nashua also requests that the Commission clarify the date upon which the fund is to be established. Nashua asks the Commission to specify whether the mitigation fund is to be established upon ratification under RSA 38:13 and RSA 33-B, or at the time the mechanics of the mitigation fund are determined by the Commission. Nashua states that depending upon the timing of establishing the fund it might consider treating the fund as an operating expense rather than as an initial capital expenditure in order to reduce costs to customers.

Nashua notes that the Order states that the mitigation fund should be payable for the benefit of PEU and PAC customers as a condition imposed under RSA 38:11. Order at p. 63. Nashua requests that the Commission clarify that the mitigation fund is a condition required as a matter of public interest and not as severance damages which are payable to the condemnee. in this case PWW, and not to PEU and PAC.

Objection to Pennichuck's Motion to Strike Nashua's Motion for Rehearing

Nashua argues that it has long been a settled principle in New Hampshire that "when the terminal day of a time limit falls upon Sunday that day is to be excluded from the computation." *HIK Corporation v. Manchester*, 103 N.H. 378, 381 (1961), *quoting* 86 C.J.S. Time § 14(2). Nashua explains that the Order was issued on July 25, 2008, causing the 30-day rehearing period to end on August 24, 2008, a Sunday. As a result, Nashua takes the position that its filing on the following Monday, August 25, 2008, was timely.

Nashua also relies on *Hunter v. State*, 107 N.H. 365 (1966) in which the Court noted the State's admission that because the tenth day fell on a Sunday, "the time could be extended to the next day March 1." *Id.* at 366. Nashua argues that the Court in *Ireland v. Town of Candia*, 151 N.H. 69 (2004) made clear the settled principle that if the final day of a time period appeal falls on a Sunday, a motion for rehearing filed on the following Monday is timely. Nashua

distinguishes the cases cited by Pennichuck claiming that in all those cases the facts were not similar to the facts in this docket.

Lastly, Nashua contends that the legislature recently recognized this principle in its adoption of Chapter 11 of the Laws of 2007 (HB 1152) which states: documents are deemed timely when "filed...on the next business day where a statute specifies a deadline that falls on a weekend or legal holiday." This law is effective on January 1, 2009.

Motion to Strike Pennichuck's Objection to Nashua's Motion for Rehearing

Nashua argues that Pennichuck's Objection attaches and attempts to place into the record Exhibit 3258, which the Commission previously ruled was inadmissible. Nashua requests that if Exhibit 3258 is not stricken, Exhibit 1145 should be entered because it contains information concerning the sales listed in Exhibit 3258. Nashua maintains that the information contained in Exhibit 3258 is unreliable and misleading.

Nashua also moves to strike sections B and C of Pennichuck's objection, in which Pennichuck argues that Nashua did not timely seek rehearing of the Commission's earlier decisions: (1) to exclude PAC and PEU assets from Nashua's eminent domain petition; and (2) to apply the RSA 38:3 rebuttable presumption only to assets located within Nashua. The basis for Nashua's motion to strike is a letter from Pennichuck's counsel to Nashua's counsel, dated October 6, 2005, in which Pennichuck's counsel takes the position that motions for rehearing on interlocutory matters are not needed to preserve an appeal and that motions for rehearing can be delayed until a final order is issued.

III. COMMISSION ANALYSIS

A. Motions to Strike

Regarding Pennichuck's motion to strike Nashua's motion for rehearing, we find that the cases cited by Pennichuck are not controlling with regard to the treatment of the 30-day rehearing deadline under RSA 541:3. In this case, the 30-day deadline fell on Sunday, August 24, 2008. We read *HIK Corporation v. Manchester*, 103 N.H. 378, 381 (1961) to provide for filing on the following Monday when the statutory deadline falls on a Sunday and we find no basis for concluding that this precedent has been overturned. The cases cited by Pennichuck in support of its motion to strike involve different facts and, while they may arguably suggest a direction in which the Court might be headed, it is not for us to arrive there ahead of the Court. Consistent with *HIK Corporation*, we find that Nashua's motion for rehearing and clarification was timely filed. Accordingly, we deny Pennichuck's motion to strike.

Regarding Nashua's motion to strike Pennichuck's objection to Nashua's motion for rehearing and clarification, we agree that Exhibit 3258 was excluded from the record by a Secretarial Letter dated October 17, 2007. In that same letter, we also excluded Exhibit 1145. As a result, we will strike both Exhibits 3258 and 1145, and any argument concerning them contained in Pennichuck's objection and in Nashua's motion to strike. With regard to Nashua's request that we strike Pennichuck's arguments regarding the timeliness of Nashua's motions for rehearing on issues decided by earlier orders in this docket, we find no reason to strike those arguments.

B. Motions for Rehearing

The standard for granting a motion for rehearing pursuant to RSA 541:3 and RSA 541:4 requires the movant to 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). Further, in order to preserve a question for review a litigant must not raise an issue for the first time in a motion for rehearing. *Appeal of Campaign for Ratepayers Rights*, 133 N.H. 480, 484 (1990). Instead, the matter raised in a motion for rehearing must have been "determined in the action, or proceeding, or covered or included in the order..." RSA 541:3.

1. Pennichuck

Pennichuck's first three arguments concern the public interest standard described in the Order. Pennichuck claims the standard was not clearly articulated and should not have been segmented to deal with separate customer groups based on location within or without Nashua and upon interconnectivity to the core system. Pennichuck does not raise any new facts or arguments, but nonetheless claims that the Order is deficient and illegal. We find both our articulation and application of the public interest standard sufficiently described and supported by the record in this proceeding. Order at pp. 50-63.

Pennichuck's fourth argument repeats arguments made earlier in its motion to dismiss that Nashua's January 14, 2003 confirming vote pursuant to RSA 38:3 was inconsistent with and more narrowly construed than Nashua's petition in this proceeding. We rejected these arguments by Pennichuck in our earlier Order No. 24,425 and incorporate our analysis in that order by reference in this order.

Pennichuck's fifth and sixth arguments claim that the Commission failed to consider relevant evidence on a number of issues. First, Pennichuck alleges that the Commission did not consider either Pennichuck's good record or the benefit to troubled water systems of having Pennichuck continue to own PWW. Clearly, we considered that evidence as described in the

Order at pp. 51-52, however, we did not give the evidence the weight Pennichuck claims it deserves. Concerning the loss of PWSC, tax impacts to Pennichuck Corporation and its shareholders, and opposition to the taking by Merrimack and Milford, we did not accord the weight to that evidence that Pennichuck claims it deserves. As trier of fact, the Commission must consider and weigh all of the evidence presented in order to make factual determinations. We made those determinations in the Order and Pennichuck has not presented any new evidence or argument that we have not already considered.

Pennichuck's seventh argument asserts that due process required that it should have had further opportunity to conduct discovery on various modifications made to Nashua's proposal, or to conditions proposed by Nashua during the course of the hearing. With regard to the proposed modification to the Veolia contract to include both service and billing functions, we determined that sufficient discovery had been conducted on that issue. Order at p. 54. With regard to establishing a mitigation fund, there was significant evidence presented on the harm to PAC and PEU customers and the size of the investment fund needed to mitigate those harms. Order at pp. 94-96. As a result, we do not find any lack of evidence or due process on that issue. Regarding Commission regulation of Nashua's retail and wholesale water rates, Nashua's membership in the DigSafe program, and guarantees of equal water rates to all PWW customers, those conditions all involve regulatory policy and could have been proposed by the Commission absent any suggestion by Nashua. All parties were allowed briefs and reply briefs following hearing and had ample opportunity to argue against such regulatory proposals. As a result, we conclude that all parties have been afforded due process on both factual and policy issues.

Pennichuck's eighth, ninth and tenth arguments involve the nine conditions the Commission placed on Nashua. Order at pp. 98-99. Pennichuck claims the conditions make the

presumption of public interest irrebuttable, exceed the Commission's authority, and in some cases involve events following the taking. Pennichuck has not presented new evidence or arguments on these points that we have not already considered. We have determined that the Commission has authority to impose these conditions. Order at pp. 25-26. We do not find it unfair or illegal that some conditions, such as the amended contract with Veolia, must follow the taking. Such compliance issues are part of the Commission's legitimate regulatory oversight.

Pennichuck's eleventh argument claims that the Commission failed to consider whether Nashua was financially capable of funding the acquisition of PWW for $203 million plus the $40 mitigation fund. As required, we considered whether Nashua has the financial, managerial and technical capabilities required for a public water utility and granted it a water franchise. Order at p. 62. We do not agree that we were required to find that Nashua is capable of financing the specific amount of $243 million. As Nashua points out, conditions in the financial markets change. Had such a finding been made, it would likely need to be updated at the time the taking actually occurs. Further, if Nashua is unable or disinclined to finance $243 million, presumably it will not vote to acquire the PWW assets, and it will not vote to issue bonds and notes, and the taking will not occur.

Pennichuck's twelfth argument is that the Commission understates Nashua's future rates in order to make its public interest finding. Pennichuck claims that the analysis of rates should have included the cost of the mitigation fund, making the actual cost to be recovered in rates $243 million. Pennichuck has not raised any new facts or arguments not already considered and we find no reason to adjust our analysis on this issue. Order at pp. 56-57

Pennichuck's thirteenth argument challenges the $40 million mitigation fund on the basis that it would not generate $3.4 million annually and that the Commission did not consider

whether Nashua may legally establish such a fund. With regard to the findings required to establish the amount of investment in the mitigation fund, Pennichuck has not presented any evidence or argument we have not already considered. We see no reason to alter our findings or conclusion that a $40 million mitigation fund is both adequate and appropriate. Order at pp. 94-96. As for the details of establishing such a mitigation fund, we indicated that the specific methods for implementing the condition will be addressed as a compliance matter. Order at p. 96.

Pennichuck's fourteenth argument concerns the Commission's use of PWW's 2006 and 2007 annual reports filed with the Commission, Order at p. 89, as well as the Commission's reference to a wholesale water agreement between Nashua and the Town of Milford filed with the Commission after hearing on February 22, 2008, Order at p. 61. Regarding the Commission's use of PWW annual reports, Pennichuck should not be surprised by the Commission's reliance on PWW's annual regulatory filings, the filing and veracity of which is required by RSA 374:15, and Puc 607.06 and Puc 609.04, consistent with the Commission's duty to keep informed as to the capitalization of public utilities and other matters pursuant to RSA 374:4. Such reliance is common in the ratemaking context. *See, New England Tel. & Tel. Co. v. State*, 113 N.H. 92, 101-102 (1973); and *Granite State Alarm Inc. & a. v. New England Tel. & Tel. Co.*, 111 N.H. 235, 238 (1971). Further, Pennichuck could have asked to reopen the record if it needed to respond to the Nashua-Milford wholesale water agreement. The agreement was filed in this docket and is the result of further discussion and negotiation between those parties. We find that our reliance on this agreement is not a violation of Pennichuck's right to due process.

Pennichuck's fifteenth argument claims that the Order fails to give sufficient detail concerning its valuation methodology. Absent showing the actual calculations, Pennichuck claims that it is not possible to determine whether the Commission correctly applied its methodology. The methodology, including the components of the calculation, is described in the Order at pages 84-93 in sufficient detail for the purposes of the Commission's findings.

Pennichuck's sixteenth argument challenges the Commission's rejection of the 2% growth factor recommended by Pennichuck's valuation expert. Order at pp. 91-92. We considered and rejected the recommended growth factor for the reasons set out in the Order. Pennichuck has not presented any new evidence or argument not already considered and we find no reason to reconsider this issue.

Pennichuck's seventeenth argument asserts that the Order does not explain the methodology or the detailed information used for updating the valuation in sufficient detail to allow a party to check the calculations. Our description of the methodology and the detail provided in the Order at pages 89 and 92 is sufficient for the purposes of the Commission's findings.

Pennichuck's final argument asserts that, because RSA Chapter 38 does not provide the right to a jury trial in the valuation of the PWW assets, the statute is unconstitutional. We generally assume the constitutionality of the statutes under which we operate. Accordingly, we will not grant rehearing on this argument.

2. Nashua

Nashua's first five arguments deal with assumptions in our valuation analysis concerning hypothetical municipal bidders and their influence on the fair market value of PWW's assets as well as claims that Mr. Reilly's theory reaches an investment value rather than a fair market value. Nashua presents no new arguments or evidence not previously considered. Rather, Nashua re-marshals its previous arguments as to why fair market value should not be based on the hypothetical presence of more than one not-for-profit buyer. Nashua's arguments in this regard were not overlooked; they were simply not found to be persuasive. As discussed in the Order at pages 89-93, we found instead that Pennichuck's witness was persuasive regarding the influence of not-for-profit buyers. Our analysis and conclusions remain as previously stated.

Nashua's sixth argument challenges our decision to prevent Nashua from acquiring PAC and PEU by eminent domain pursuant to RSA Chapter 38. Pennichuck claims that Nashua waived this argument by failing to move for rehearing of Order No. 24,425, which was issued on January 21, 2005, in which we excluded these two entities. We find Nashua's motion for rehearing on this issue timely. The scope of the taking was raised early in the proceeding and determined in Order No. 24,425. Nashua has not raised any new arguments or evidence on this issue in its motion for rehearing and we incorporate by reference the analysis contained in Order No. 24,425.

Nashua's seventh argument alleges that the harm to PEU and PAC has been overstated by Pennichuck's witnesses and that the mitigation fund provides an excessive amount of compensation to those entities. Nashua presents no new evidence or argument on these issues. We find our analysis of the evidence as well as the resulting mitigation fund discussed in the Order at pp. 94-96 to be supported by the record.

Nashua's eighth argument challenges the decision in Order No. 24,567 and also discussed in the Order at pp. 24-25 that the rebuttable presumption contained in RSA 38:3 applies only to assets located in Nashua. The issue was raised earlier in the proceeding and was decided in Order No. 24,567. Nashua has not raised any new arguments on this legal issue not already considered in Order No. 24,567 as well as the Order.

With regard to Nashua's request for clarification concerning the mitigation fund, when we established the mitigation fund, Order at pp. 94-96, we did not conclude that a mitigation fund would be maintained in perpetuity. Rather, details such as the length and start date of the fund will be determined as compliance matters. PEU and PAC are both regulated public utilities and the Commission will continue to oversee their rates and operations. We required the establishment of a mitigation fund as a public interest condition to ensure that the ratepayers of PEU and PAC are not harmed as a result of the taking. As circumstances change for PEU and PAC there may be no further need for the mitigation fund to continue to exist, however, it is not possible to forecast such future events. We anticipate that interested parties will participate in the Commission's ongoing oversight of the mitigation fund.

Based upon the foregoing, it is hereby

ORDERED, that Pennichuck's motion to strike Nashua's motion for rehearing is DENIED; and it is

FURTHER ORDERED, that Nashua's motion to strike Pennichuck's objection to Nashua's motion for rehearing is GRANTED in part and DENIED in part as discussed herein; and it is

FURTHER ORDERED, that Pennichuck's motion for rehearing is DENIED; and it is

FURTHER ORDERED, that Nashua's motion for rehearing is DENIED.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of March 2009.

Thomas B. Getz
Chairman

Graham J. Morrison (KNS)
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

Concurring and Dissenting Opinion of Commissioner Below

I concur with the majority in all respects except with regard to its analysis and conclusion concerning Nashua's first five arguments that deal with assumptions in the majority's original valuation analysis concerning hypothetical municipal bidders and their influence on the fair market value of PWW's assets. Consistent with the reasoning set forth in my previous dissent on the issue of valuation, I would grant rehearing on this issue to consider, among other things, the testimony of Donald Ware and John Joyner cited on page 4 of Nashua's motion for rehearing and the auction of Pennichuck's parent by SG Barr Devlin in 2002, discussed at page 18.

Clifton C. Below
Commissioner

REVISED:
02-08-05

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant To RSA 38:9

Order Addressing the Pennichuck Utilities' Motion to Dismiss

ORDER NO. 24,425

January 21, 2005

APPEARANCES: Upton & Hatfield, L.L.P. by Robert Upton, II, Esq., for City of Nashua; McLane, Graf, Raulerson & Middleton, P.A., by Steven V. Camerino for Pennichuck Water Works, Inc., Pennichuck East Utilities, Inc., and Pittsfield Aqueduct Company, Inc; Wadleigh, Starr & Peters, P.L.L.C., by Stephen J. Judge, Esq. for Merrimack Valley Regional Water District; Elizabeth Coughlin, Merrimack Valley Regional Watershed Council, Inc.; Stephen William for Nashua Regional Planning Commission; Fred S. Teeboom, a customer representing himself; Barbara Pressly, a customer representing herself; Drescher & Dokmo, P.A. by William R. Drescher, Esq., for the Towns of Amherst and Milford; Bossie, Kelly, Hodes, Buckley & Wilson, P.A., by Jay L. Hodes, Esq., for the Towns of Litchfield and Hudson; Mitchell & Bates, P.A., by Laura A. Spector, Esq., for the Town of Pittsfield; Eugene F. Sullivan, III for the Town of Bedford; Edmund J. Boutin, Esq., for the Town of Merrimack; Ransmeier & Spellman, P.A. by Dom S. D'Ambruoso, Esq. for Anheuser-Busch, Inc.; Michael S. Giaimo, Esq. for the Business & Industry Association of New Hampshire; New Hampshire State Representative Claire B. McHugh; Office of the Consumer Advocate by F. Anne Ross, Esq. for residential ratepayers; and Marcia A. B. Thunberg, Esq. for the Staff of the New Hampshire Public Utilities Commission.

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) (together, the Pennichuck Utilities or Pennichuck) necessary to establish a municipal water works system. The subsequent procedural history has been detailed in Order No. 24,379 (October 1, 2004) and we will not reiterate it at length here. Briefly, the Commission granted interventions by interested parties and required Nashua to file supportive testimony in accordance with Puc 204.01(b). On

April 5, 2004, the Pennichuck Utilities filed a Motion to Dismiss in Full or in Part or, Alternately, to Stay Proceeding.[1]

On October 1, 2004, the Commission issued Order No. 24,379 requesting briefs on the following legal questions: 1) can Nashua take the assets of PEU and PAC; 2) can Nashua take assets of PWW that are not integral to the core system; 3) has Nashua properly followed the voting requirements of N.H. RSA Chapter 38; and 4) was the vote consistent with the requests made in Nashua's valuation petition? Nashua, the Pennichuck Utilities, Fred Teeboom, and Barbara Pressly filed briefs or position statements. Some members of the Merrimack Valley Regional Water District (District) filed letters expressing support of Nashua's Brief, though one District member wrote to clarify that the District's intervention is to provide members with information only and that, in its view, support of Nashua's brief was beyond the District's authority.

II. POSITIONS OF THE PARTIES

A. City of Nashua

Nashua argues that RSA Chapter 38 allows Nashua to take any plant and property of the Pennichuck Utilities lying outside the municipality that is required to promote the public interest, as determined by the Commission. In Nashua's view, 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. It contends that the statute makes clear that the

[1] In addition to proceedings at the Commission, Nashua and the Pennichuck Utilities have been in litigation on related matters in the New Hampshire Superior Court and United States Federal District Court. Among the issues has been whether the Commission or the Court should have jurisdiction over the valuation and taking. On September 1, 2004, the Hillsborough County Superior Court – Southern District ruled that Nashua could proceed with its valuation petition before the Commission, as the agency with primary jurisdiction to hear matters of this type.

Commission must determine how much plant and property situated outside the municipality the public interest requires the municipality to acquire. See, RSA 38:2; 38:6; 38:9; and 38:14.

RSA 38:12 clearly permits a municipality to expand plant beyond its boundaries pursuant to RSA 38:6-11, according to Nashua, and it avers that, in public utility matters, the scope of public interest and public good are broad. *See*, RSA 369:1 and 4; 374:26; 374:30; 375-B:7; 378:27; and 378:28. Determining the scope of public interest requires a balancing of the public goods and the public harms and Nashua contends that in some state eminent domain proceedings, including Montana, the public interest test involved a broad analysis of the impacts of a taking. Similarly, it points out that in Pennsylvania the public interest analysis is broad, involving review of the benefits and detriments to all affected parties.

Nashua urges the Commission to define the public interest broadly and review the interests of customers, ratepayers, the will of Nashua voters, PWW's shareholders, regional water supplies, and the effect on smaller systems that might be retained by the Pennichuck Utilities. The scope of taking, it contends, should be commensurate with the scope of public interest.

Unlike in past eminent domain proceedings before the Commission, while the Pennichuck Utilities are separate legal entities, each with its own assets, own service territories, and own corporate and legal history, Nashua contends that the utilities operate in an integrated manner. Taking of only assets situated in Nashua, it asserts, could cause the Pennichuck Utilities to lose economies of scale that would impact cost and quality of service.

Since 1913, Nashua points out, New Hampshire has allowed municipal purchase of plant and property outside municipal limits that is necessary and in the public interest. Based on that fact, it is apparent, according to Nashua, that the Legislature envisioned instances in which the

utility would want the municipality to acquire utility property outside the municipal limits such as when the utility would be left with small, uneconomic portions of its business. It cites for support the testimony of Representative Below on House Bill 528 before the Senate Committee on Executive Department and Administration on April 21, 1997, wherein Rep. Below testified as to the breadth of public interest the Commission would review.

According to Nashua, the Pennichuck Utilities' argument that RSA 38:6 prohibits a municipality from taking assets of a utility that does not provide service within the municipality is not supported by the broad public interest. Further, it ignores the reality of how PAC, PEU and PWW operate. In giving the Commission the authority to require a municipality to acquire property outside its municipal boundaries, Nashua contends the Legislature recognized that there might be situations where outlying property that is part of a utility system, if not acquired, would shift costs to the remaining ratepayers. PAC, PEU, and PWW are linked by economies of scale, it concludes, and, therefore, should be considered one system.

With respect to the confirming vote, Nashua avers that the Nashua Board of Aldermen intended to acquire the assets outside Nashua for the purpose of establishing a regional water district as evidenced by their passage of Resolution R-02-27. The Aldermen resolved 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 serving the inhabitants of the City and others."[2]

According to Nashua, the voting procedure used by Nashua was the same as that used by the City of Berlin in a municipal taking of the J. Brodie Smith Hydro Station in Berlin, New

[2] Resolution: Endorsing and Encouraging the Creation of a Regional Water District, Providing for Municipal Acquisition of the Public Water Works System and Pursuing Possible City Membership in a Regional Water District on Mutually Beneficial Terms, dated December 2, 2002.

Hampshire[3] and in that case the Commission allowed Berlin to proceed under RSA Chapter 38. Similarly, in this case, Nashua states, the acquisition was discussed at ward meetings and in other forums around Nashua. Nashua also relied on newspaper articles in the Nashua Telegraph[4] as well as PAC, PEU, and PWW's vigorous public relations campaign to provide the balance of information to educate voters. On January 14, 2003, by a margin of 6505 to 1867, Nashua voters confirmed Resolution R-02-127. On January 28, 2003, pursuant to RSA 38:6, the Aldermen passed Resolution R-03-160 in which the Aldermen determined it necessary and in the public interest to acquire PWW, PEU, and PAC. Finally, on February 5, 2003, Nashua indicated that it notified PWW, PAC, and PEU of its interest to acquire all plant and property of the utilities.

B. Pennichuck East Utilities, Inc., Pittsfield Aqueduct Company, Inc., and Pennichuck Water Works, Inc.

The Pennichuck Utilities argue that the plain meaning of RSA Chapter 38 is contrary to Nashua's position and that RSA 38:6 is unambiguous in its requirement that a municipality may only take property of a utility that serves the municipality. The Pennichuck Utilities also make the following assertions: PAC and PEU are separate legal corporations and neither PAC nor PEU generates or distributes water for sale in Nashua .[5] While the pipes, mains, and water supply of each of the Pennichuck Utilities are distinct and owned by the respective utility, PWW employs the personnel necessary to operate the three utilities, and owns all of the trucks and office equipment used to serve the customers of PAC, PEU, and PWW. PWW charges PAC and PEU their proportionate shares of overall costs. Furthermore, Pennichuck argues that the Legislature used the singular form of the word "utility" in 38:7; 38:8; 38:9; 38:10; and 38:11 and

[3] The docket, DE 00-211, was closed before a final determination was made, when the City of Berlin withdrew its request to take the facility by eminent domain.
[4] Nashua attached newspaper articles dated 1/6/03, 1/7/03, 1/8/03, 1/10/03, 1/11/03; 1/12/03 and 1/14/03.
[5] PEU serves approximately 4,526 customers in the Towns of Atkinson, Bow, Derry, Hooksett, Litchfield, Londonderry, Pelham, Plaistow, Raymond, Sandown, and Windham, New Hampshire. PAC serves approximately 645 customers in the Town of Pittsfield. Pennichuck Utilities Brief at 3.

the Legislature did not use the term to refer to affiliate public utilities. It also states that utility affiliates have existed for years, preceding the Legislature's amendment of RSA Chapter 38 in 1997 and the Legislature did not expand the definition of utility to include affiliates. According to Pennichuck, eminent domain statutes are construed narrowly, which further supports the argument that RSA Chapter 38 should not be expanded beyond its plain meaning.

Pennichuck argues that Nashua's request essentially asks the Commission to pierce the corporate veil. PAC, PEU and PWW are three separate, legally distinct corporations and Pennichuck contends that the New Hampshire Supreme Court limits piercing of the corporate veil to instances when the corporate identity has been used to promote injustice or fraud.

Nashua's interpretation of RSA Chapter 38, Pennichuck argues, could turn the public interest presumption in RSA 38:6 on its head. Following Nashua's logic, the vote by twenty percent of Nashua's voters creates a presumption that taking the water systems in Bow, Newmarket, and Salem is in the public interest. This flawed logic, it asserts, would lead to patently absurd results.

Pennichuck also posits that the Legislature contemplated a municipality needing to take less than the complete plant and property of a utility as evidenced by RSA 38:9,III and the provisions allowing severance damages. Legislative testimony on RSA Chapter 38, it states, indicates the legislature envisioned municipalities establishing distribution systems within municipal bounds and only taking portions of the system outside the municipality to avoid stranding customers and the legislative history thus confirms the plain meaning of RSA Chapter 38.

The New Hampshire Supreme Court has affirmed the importance of municipal votes, according to Pennichuck. In the case involving Manchester Water Works and its decision to

fluoridate water, Pennichuck points out that the Court held that Manchester Water Works had violated RSA 485:14 by failing to obtain approval from the other towns it served.

With respect to the confirming vote, the Pennichuck Utilities aver that the action taken by the Board of Aldermen is not consistent with the referendum presented to voters. The referendum posed to voters was limited to whether acquiring "all or a portion of the water works system currently serving the inhabitants of the City and others be confirmed." It asserts that the satellite systems in Newmarket, Raymond, and Salem do not serve "the inhabitants of the City". The Pennichuck Utilities argue, therefore, that Nashua's attempt to lay claim to the assets of PAC, PEU and PWW exceeds the scope of authority granted by the voters.

Finally, the Pennichuck Utilities assert that Nashua is essentially acting in the District's stead. Because RSA 38:2-a, VI specifically prohibits regional water districts from having the power of eminent domain, it argues that the effort by Nashua to do what the District could not should be prohibited.

C. Mr. Fred S. Teeboom

Mr. Teeboom avers that the City of Nashua did not follow the voting requirements of RSA Chapter 38. He also contends that the votes taken are not consistent with the requests made in Nashua's Valuation Petition. In support of his argument, Mr. Teeboom states that Nashua failed to provide voters with sufficient information in support of and against the acquisition. The lack of information did not allow voters to understand the full ramifications of the vote. He contends that Nashua downplayed the actual costs of and revenue bond needs for the eminent domain proceeding. He also contends that relevant cost comparison and valuation information was not provided to voters prior to the vote and the information is still outstanding.

Mr. Teeboom argues that Resolution R-02-127 endorses Nashua's acquisition of PWW but fails to state why the acquisition is in the public interest. The proffered reason is only a general assertion that maintenance of an adequate supply of clean, affordable drinking water is essential to the viability of any community. He also states that Nashua offers no explanation as to why public ownership is better than private ownership. RSA 38:3 required voters be "duly warned" of the confirming vote and Mr. Teeboom asserts that voters were only supplied information through local newspaper articles and limited informational meetings. Mr. Teeboom concludes that this does not qualify as being duly warned and Nashua should have provided voters with negative aspects of the acquisition rather than solely disseminating positive information.

D. Ms. Barbara Pressly

Ms. Pressly supported the purchase and regionalization of the water company but objected to certain language contained in the District Charter. Ms. Pressly provided a detailed account of how the decision to create the Charter came about. Ms. Pressly explained her involvement in drafting the Charter and then how the Charter language changed subsequent to her involvement. Ms. Pressly averred that it would be "logical and in the public interest to maintain the status quo of the delivery service and transfer only ownership" of the water company. Position Statement filed October 25, 2004. Ms. Pressly recommended that Nashua be given more votes on the District's board because Nashua ratepayers constitute such a high percentage of customers served. She also advocated for more Commission oversight of the District.[6]

[6] Ms. Pressly's comments focus on the Regional Water District Charter and are not pertinent to the specific questions posed for consideration of the Motion to Dismiss. The actions she urges the Commission to take, moreover, are beyond the Commission's authority.

III. COMMISSION ANALYSIS

By Order No. 24,379 (October 1, 2004), we provided, among other things, that the parties submit briefs addressing four questions: 1) does RSA Chapter 38 grant Nashua the authority to take the property of PEU, PAC and PWW, three affiliated entities that are subsidiaries of Pennichuck Corporation; 2) can Nashua take assets of PWW that are not integral to the core system; 3) has Nashua properly followed the voting requirements of RSA Chapter 38; and 4) was the vote consistent with the requests made in Nashua's valuation petition?

A. Does RSA Chapter 38 Grant Nashua Authority to take PEU, PAC and PWW?

The first question is a legal issue that must be resolved as a threshold matter in order to promote the orderly conduct of the proceeding. In analyzing this issue, we first take official notice that each of the three affiliates is a separate corporate entity,[7] that each has been granted separate franchises for the areas they serve,[8] that each is separately assessed by the Commission pursuant to RSA Chapter 363-A,[9] and that only PWW is engaged in the sale of water in Nashua.[10] Nashua contends its eminent domain authority extends to all three affiliates; the Pennichuck Utilities contend that Nashua's authority does not extend to the property of PEU or PAC.

Inasmuch as a municipality may exercise only those powers the legislature specifically grants, and those powers that are implied or incidental to an express grant, *Lavallee v. Britt*, 118 N.H. 131, 131 (1978), the first step in our analysis is to examine the enabling language contained in RSA 38:2. That provision states: "Any municipality may…take…plants for the manufacture

[7] Pennichuck Utilities' Memorandum of Law on Scope of RSA Chapter 38, October 25, 2004 at 2-3.
[8] See, e.g. *Pennichuck Water Works, Inc.* 68 NHPUC 253 (1983); *Pennichuck East Utilities, Inc.* 83 NHPUC 191 (1998); *Pittsfield Aqueduct Company, Inc.* 83 NHPUC 44 (1998).
[9] State of New Hampshire Public Utilities Commission Fiscal Year 2005 List of Utility Assessments at 27-28.
[10] *Pennichuck Water Works, Inc.* 68 NHPUC 253 (1983).

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."

After setting forth the grant of authority, RSA Chapter 38 then details the process that a municipality must follow in order to exercise that authority. RSA 38:3 provides that a 2/3 majority vote of the governing body must approve the acquisition, which in turn must be confirmed by a majority vote at a general or special election of the municipality's voters. This confirming vote creates a rebuttable presumption that the taking is in the public interest. RSA 38:6 then requires that the governing body "notify in writing any utility engaged, at the time of the vote, in...distributing...water for sale in the municipality, of the vote." That section also provides that the municipality "may purchase all or such portion of the utility's plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, and shall purchase that portion, if any, lying without the municipality which the public interest may require...as determined by the commission."

RSA 38:7 concerns a reply by the utility. If the reply is in the negative, then the municipality may proceed to condemnation of the property as provided by RSA 38:10. In the event the municipality and the utility are not agreed as to price and to how much, if any, of the property to be taken, the Commission, after notice and hearing, must decide what will be condemned and the price to be paid. RSA 38:9. Unless the municipality and the utility agree on the sale of utility property, pursuant to RSA 38:11, the Commission must determine whether the taking is in the public interest and may set conditions in order to satisfy that the public interest will be met.

On first reading, RSA 38:2 appears to be a broad grant of authority to a municipality. It allows the taking of property for use not only by the municipality and its inhabitants but by

"others", which is undefined, and "for such other purposes," also undefined, as authorized by the Commission. Nashua argues, accordingly, that it may take the property of the three utilities, PWW, PEU and PAC. The Pennichuck Utilities disagree, arguing that RSA 38:6 limits Nashua's authority to take the property only of a utility engaged in the sale of water in Nashua, namely PWW.

While the Pennichuck Utilities contend that the plain and ordinary meaning of RSA Chapter 38 is unambiguous, we disagree. The parties have posed plausible conflicting interpretations of RSA Chapter 38 based on references to separate, specific statutory language. As a consequence, in order to resolve the conflict, we look to case law, legal treatises, and to recognized rules of statutory construction for guidance on how to interpret the breadth of the power of eminent domain. First, as an overarching principle, we recognize that a legislative grant of power to condemn for a public use may be exercised only within a clear definition of the grant, bounded by the express words or necessary implication of those words, *Maine-New Hampshire Interstate Bridge Authority v. Ham*, 91 N.H. 179, 181 (1940). In addition, we note that "Statutes conferring the power of eminent domain are subject to strict construction against the one exercising the power and in favor of the landowner." 26 Am Jur2d, Eminent Domain §20. Furthermore, we must interpret the statute "not in isolation, but in the context of the overall statutory scheme" and we must "keep in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole." *Appeal of Ashland Electric Department,* 141 N.H. 336, 341 (1996). Finally, in light of the internal conflict posed by the seemingly broad grant of authority that Nashua argues is contained in RSA 38:2 and the limitation that the Pennichuck Utilities argue is contained in RSA 38:6, we turn to legislative

history to determine the Legislature's intent. *Petition of Public Service Co. of New Hampshire*, 130 N.H. 265, 282 (1988).

Within this analytical framework, the crux of the issue here is the proper interpretation of RSA 38:6. Nashua essentially ignores the portion of the statute that requires notice to a utility engaged in the sale of water in Nashua and focuses instead on the later reference in RSA 38:6 to acquiring such property as the public interest requires. Pennichuck, by contrast, centers its argument on the required notice to a utility engaged in the sale of water in Nashua, which would be limited to PWW. The relevant questions then become: Is RSA 38:6 a mere notice provision, *i.e.*, can the reference to a utility engaged in the sale of water in the municipality be read broadly or overlooked? Or does RSA 38:6 constitute a substantive limitation on the grant of authority in RSA 38:2, *i.e.*, must the reference to a utility engaged in the sale of water in the municipality be strictly construed? Furthermore, is RSA 38:6 instructive as to legislative intent, *i.e.*, can it be read in concert with legislative history and other principles of statutory construction to divine the proper interpretation?

To answer these questions, we begin first by considering RSA 38:6 through the lens of a strict construction which, based on the citations above, we conclude we are required to do. In the context of a strict construction, we must give meaning to the language requiring that the governing body notify the "utility engaged...in...distributing...water for sale in the municipality." RSA 38:6. Consequently, because PWW is the only utility selling water in Nashua, it follows that only PWW could be the recipient of a valid notice and, therefore, only the property of PWW could be taken.

As to Nashua's argument regarding the language later in RSA 38:6 that the municipality "shall purchase that portion, if any, [of the plant and property] lying without the municipality

which the public interest may require," that particular public interest determination must be read in the context of a narrowly construed grant of authority and not in a manner that would invalidate the notice requirement. *Appeal of Ashland*, 141 N.H. at 341 (one must read two statutes of similar subject matter so as not to contradict one another and to effectuate the overall legislative purpose). In addition, we must read the provision in the context of the statute overall and not isolate particular words or phrases. *Appeal of Ashland*, 141 N.H. at 341.

Moreover, Nashua's approach would conceivably make the taking power pursuant to RSA 38:2 virtually unlimited, which would be incompatible with the Court's ruling in *Maine-New Hampshire Interstate Bridge* that a power of eminent domain may be exercised only within a clear definition of the grant of authority. In *Maine-New Hampshire Interstate Bridge,* the Bridge Authority's taking of an easement for use by a utility was neither expressly authorized nor necessarily implied by its enabling statute. 91 N.H. at 181. In this case, Nashua seeks to make the reference in RSA 38:2 to "others" limited only by the Commission's determination of the scope of the public interest, which we conclude that, as is applied to PEU and PAC, would be an unwarranted expansion of the enabling language.

The strict constructionist approach is supported also by the Legislature's actions in adopting RSA Chapter 498-A, the Eminent Domain Procedure Act. While RSA Chapter 498-A was later amended to exempt municipal takings of utility property pursuant to RSA Chapter 38, see Laws 1981, 3:2; Laws 1990, 70:3, the Legislature's commitment to elements of due process cannot simply be overlooked in the context of a public utility condemnation. This conclusion is bolstered by the Court's observations in *Fortin v. Manchester Housing Authority*, 133 N.H. 154 (1990) that RSA Chapter 498-A "protects the proprietary rights of individuals by imposing numerous procedural burdens on the condemning authority." 133 N.H. at 157. It is reasonable

to conclude that the Court, in light of its decision in *Fortin*, would give comparable weight to procedural steps that serve to safeguard proprietary interests in this case as well.

In seeking to resolve the conflicting interpretations of RSA Chapter 38 posed by the parties, we look also to legislative intent as expressed through its legislative history. In his opening remarks before the Senate Committee on Executive Departments & Administration on April 21, 1997, concerning the re-enactment of RSA Chapter 38, Representative Bradley indicated that House Bill 528 clarifies, simplifies and "lays some new groundwork for what is an existing right now of municipalities, towns and cities across the state to, through a process, take over the existing utility network within their community or in some circumstances outside of their community."[11] In addition, Representative Below noted that "it is important to realize that the right of municipalities to municipalize a monopoly utility system has existed from early in this century and it exists in almost every state in the nation, and it has been exercised from time to time."[12] Representative Below acknowledged as well "that a municipality may have to acquire some property outside of its boundaries. If there [are] 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."[13]

Our reading of the legislative history of the re-enactment of RSA Chapter 38 persuades us that the Legislature intended that the extent of the taking power that could be exercised beyond municipal boundaries would be limited. This conclusion is driven in good part by

[11] New Hampshire Senate Committee on Executive Departments and Administrative, April 21, 1997 Committee Report, p. 1.
[12] Id. at 3.
[13] Id. at 7

Representative Below's stated concern that a municipality may have to take some property outside its boundaries in order to prevent the stranding of some customers. The fair inference to be drawn from his statement is that extra-territorial takings were presumed and intended to be limited. The legislative history also makes repeated references to the taking of the property of a utility, in the singular, and does not appear to contemplate the taking of the property of multiple utilities, as Nashua seeks to do. It is also instructive to note that, given that PWW, PEU and PAC are separately formed and franchised utilities, that the stranding concern espoused by Representative Below would seem to be logically obviated with respect to customers of PEU and PAC if Nashua were only permitted to pursue a taking of the property of PWW.

The legislative history and the legislative intent, therefore, are in conflict with Nashua's expansive interpretation of RSA Chapter 38. Moreover, Nashua's interpretation would lead to the incongruous result that a single municipality could effectively "municipalize" property in the 21 towns and cities that the Pennichuck Utilities serve. Finally, if Nashua's expansive interpretation of RSA Chapter 38 were to be given credence, it would mean that Nashua had the power to take property on a scale equivalent to a regional water district. We know, however, that the Legislature specifically held back the power of eminent domain for water districts that are formed pursuant to RSA 38:2-a. RSA 38:2-a, VI could not be clearer: "No regional water district shall have the authority to take property by eminent domain." Allowing Nashua to take the property of up to 21 towns and cities and either operate them as a district or transfer them to the District would appear to violate the intent of RSA 38:2-a,VI. As the Court noted in *Maine-New Hampshire Interstate Bridge,* the Legislature could have granted such power but chose not to; unless the power can be found by express words or clear implication of the statute, there can be no such grant of authority. 91 N.H. at 181.

Based on the overall statutory scheme, the construction of the statute as a whole, and the legislative history and intent, the related threads of the analysis of RSA Chapter 38 lead to the conclusion that the eminent domain authority delegated by the Legislature in RSA 38:2 should be narrowly construed and that the notice requirement in RSA 38:6 should be given full effect. Accordingly, we find that the property of PEU and PAC may not, as a matter of law, be taken by the City of Nashua.

B. Can Nashua Take Assets of PWW that are not Integral to the Core System?

We have determined that Nashua is not entitled to take the property of PAC and PEU but that Nashua is entitled to take the property of the utility that serves Nashua, namely PWW, if we determine the taking to be in the public interest. We now address the issue of how much of PWW's property Nashua has a right to pursue. Preliminarily, we note that the question as posed above implies a standard for taking, i.e., whether assets to be taken are integral to the core system. Such a standard is not found in statute and has not been established by the Commission. Consequently, the question is more accurately stated: What assets of PWW may Nashua pursue through condemnation?[14]

RSA Chapter 38 contains no language defining the extent of a municipality's taking, other than the requirement that it be some or all of the utility that provides water to the inhabitants of Nashua, as the Commission finds to be in the public interest. PWW's franchise includes the entire municipality of Nashua, as well as areas of three towns that are physically

[14] The parties are not disadvantaged by our recasting of the question, as the determination of the extent of PWW's assets that Nashua may be entitled to take will be a factual one, based on the record yet to be developed in this proceeding.

interconnected to PWW's Nashua facilities[15] and portions of eight other towns that are not physically interconnected.[16]

RSA Chapter 38 does not expressly restrict a municipality to taking only the minimum amount of plant and property needed to serve its inhabitants, or require that the customers of the newly formed municipal water system all reside within the municipality. Nor is there a requirement that the assets to be taken be physically located within, or even connected to, the municipality. To the contrary, within the context of our discussion in the previous section, which limits Nashua's authority to PWW, RSA 38:2 states that a municipality is entitled to take "plants for the manufacture and distribution of water for municipal use, for the use of its inhabitants *and others*..." (emphasis supplied). RSA 38:6 states further that the municipality "may purchase all or such portion of the utility's plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, *and shall purchase that portion, if any, lying without the municipality which the public interest may require...*" (emphasis supplied).

When feasible, we must construe the language of the statute in accordance with its plain meaning. *Appeal of Ashland Electric Department*, 141 N.H. at 341. As discussed above, RSA 38:2 expressly authorizes taking of plant and property "for the use of its inhabitants and others". Furthermore, RSA 38:6 expressly allows a municipality to take property outside its municipal boundaries "which the public interest may require". Finally, RSA 38:9 states that, when the municipality and the utility fail to agree upon how much property "within or without the municipality the public interest requires" be taken, the Commission will make the determination.

[15] Portions of Amherst, Hollis and Merrimack are served through facilities interconnected to the Nashua facilities. Pennichuck Utilities Memorandum of Law on Scope of RSA Chapter 38, October 25, 2004 at 2.
[16] Portions of Bedford, East Derry, Epping, Merrimack, Milford, Newmarket, Plaistow and Salem are served through facilities that are not interconnected to the Nashua facilities. Pennichuck Utilities Memorandum of Law on Scope of RSA Chapter 38, October 25, 2004 at 2.

We conclude, therefore, that Nashua is entitled to pursue all assets of PWW, regardless of which customers those assets serve and where the assets are located. Whether it is in the public interest to allow Nashua to take any or all of PWW's assets, however, remains a factual determination of the public interest for the Commission to make. *See* RSA 38:10.

C. Has Nashua Followed Voting Requirements of RSA 38:3?

In order for a municipality to take utility property, it must first obtain a 2/3 majority vote of the governing body to do so. RSA 38:3. The vote must then be confirmed by "a majority of the qualified voters at a regular election or at a special meeting duly warned in either case" within one year from the date of the initial vote of the governing body. If favorable, the majority vote will create a rebuttable presumption that the taking is in the public interest. RSA 38:3.

It is uncontested, from the submissions of Nashua and the Pennichuck Utilities, that the governing body, in this case the Nashua Board of Aldermen, passed by a 2/3 majority a resolution to "establish a water works system and acquire all or a portion of the water works system currently serving the inhabitants of the City and others." Board of Aldermen Resolution No. R-02-127, November 26, 2002. Nashua has thus satisfied the first prong of the required votes necessary to pursue a taking.

The second voting requirement is that a majority of the voters of the municipality confirm the decision to take the utility property, within one year of the resolution. Again, according to the uncontested submissions of Nashua and PWW, the voters of Nashua approved by nearly 78% the Aldermen's resolution to acquire "all or a portion of the water works system currently serving the inhabitants of the City and others." (8,395 votes were cast, 6,525 of which were in favor.) This vote has been represented, without challenge, to have occurred on January 14, 2003, which satisfies the one year requirement of the statute. The Pennichuck Utilities argue that,

although a majority voted in favor, the voter turnout was very low and the information provided in advance of the vote was not specific as to the assets to be taken. Mr. Teeboom shares the concern that the information prior to the vote did not fully inform voters.

RSA 38:3 is silent as to whether it requires a majority of votes cast in support or a majority of eligible voters in support. New Hampshire law, however, resolves this question in a similar case. In *Laconia Water Company v. Laconia,* 99 N.H. 409, 410 (1955), the City of Laconia sought to acquire by eminent domain the Laconia Water Company and, pursuant to the statutory requirements at the time, a majority of the "qualified voters" had to approve the acquisition. Laconia Water Company challenged the vote, in which a majority of those voting approved, but the majority in favor was far less than a majority of the qualified voters in the city. The court rejected the water company's argument stating that, absent a statutory provision to the contrary, the city needed to attain a majority of those qualified voters *at the meeting*, not a majority the qualified voters *of the city*. 99 N.H. at 412. The *Laconia* Court noted this is the general rule, long respected, so that "[s]ilence on the part of the members not voting cannot be counted against the express voice of another part voting." 99 N.H. at 411, quoting *Richardson v. Union Congregational Society*, 58 NH 187, 188 (1877).

Mr. Teeboom argues that the voters were not "duly warned" because Nashua did not pose the issue in a "pro" and "con" format as votes for some purposes require. This is an issue that has been addressed by the Hillsborough County Superior Court in Docket 02-E-0441, *Fred S. Teeboom v. City of Nashua*. The Superior Court, on January 6, 2003, ruled that Nashua was not required to present the vote in the form Mr. Teeboom suggests, and denied Mr. Teeboom's request for declaratory or injunctive relief. Similarly, we do not find the vote invalid for having been presented in the format that Nashua selected.

Further, Mr. Teeboom argues that Nashua did not present adequate forums on the proposal to voters prior to the vote and thus did not meet the requirement that voters be "duly warned" prior to the vote. We do not construe the statute to require that voters be fully briefed on all aspects of the issue, only that they be put on notice of the place, day and hour of the vote and the subject matter of the question to be posed. We will not invalidate the vote on the basis that Nashua did not present the matter to the public as often or in the format Mr. Teeboom might have preferred. Based on the information presented, Nashua has met the voting requirements of RSA 38:3.

D. Was the Vote Consistent with Requests in Nashua's Valuation Petition?

The final question we posed for briefing was whether the vote taken on January 14, 2003, was consistent with the petition filed with the Commission on March 25, 2004. Because we have found that Nashua is not entitled to pursue the assets of PAC or PEU, it is not necessary to determine if the vote sufficiently addressed the assets of those utilities. Further, having found that Nashua is entitled to pursue the assets of PWW both within and without Nashua's municipal boundaries, we only need to evaluate if the confirming vote was consistent with a taking of PWW.

The language of the vote, as presented by Mr. Teeboom[17] and uncontested by the Pennichuck Utilities and Nashua, mirrors the Board of Aldermen's resolution R-02-127. It asks if the voters will confirm the resolution to "establish a water works system and, in order to establish such a water works system, to acquire all or a portion of the water works system currently serving the inhabitants of the City and others..." It then states that "[a] YES vote means that the City may continue to pursue acquisition of the Pennichuck water system under the procedures outlined in RSA 38. A NO vote means that the City may not acquire the water system

[17] Teeboom Brief, Exhibit III.

now, and the issue may not be submitted to the voters again for at least two years." The resolution clearly puts voters on notice that the vote is whether to acquire some or all of the Pennichuck water system serving the inhabitants of Nashua and others which, in light of the rulings contained herein, pertains only to the property of PWW. The Pennichuck Utilities argue that the "system" Nashua voted to take must be limited to the "core system" of interconnected facilities serving Nashua. We disagree, finding no basis to conclude that the vote extended only to the physically integrated so-called "core system" of PWW. The vote is consistent with the extent of the City's authority and, therefore, Nashua has satisfied the threshold voting requirements of RSA 38:3 and is entitled to pursue the valuation petition.

E. Procedural Issues

Finally, we must address outstanding procedural issues. The Business and Industry Association of New Hampshire (BIA), which claims among its members some PWW customers, sought late intervention and stated it did not anticipate sponsoring testimony. We will grant the request but encourage the BIA and all parties, in the interests of efficiency, to join where possible, and avoid duplicative lines of testimony and examination.

A procedural schedule has not yet been adopted for the duration of this docket. We understand from a filing of the Pennichuck Utilities on December 16, 2004, that they intend to submit a Motion for Summary Judgment and have asked for 10 days from the issuance of this order to make their filing. We granted the request by secretarial letter December 21, 2004. The Motion for Summary Judgment, therefore, is due January 31, 2005. As recommended by the Parties and Staff, responses thereto must be filed within 30 days from the date the Motion is due, that is, March 2, 2005.

Another threshold issue discussed at the prehearing conference was whether the valuation inquiry and the public interest inquiry should proceed in tandem or one should precede the other. The Staff letter stated that the Parties and Staff recommended that four days after the submission of objections to the Motion for Summary Judgment, those interested may file "statements or memoranda on the question of whether the Public Interest and Valuation issues should be bifurcated in this proceeding." We accept this recommendation and await these submissions, which will be due March 8, 2005. The only other procedural date proposed as a result of the prehearing conference was a technical session. The recommendation had been to hold the session on March 8, 2005, which would have been 30 days from the date statements were filed on whether to separate the valuation and public interest inquiries. Though the timing seems somewhat lengthy, we will adopt the recommendation of the Parties and Staff and schedule a technical session 30 days from the date that memoranda on bifurcation are filed, that is, April 8, 2005.

The letters also refer to discussion, though no resolution, regarding a "data room" for all documents related to the case. This would be in addition to the files (both electronic and in hard copy) maintained at the Commission, all of which are open for inspection. We believe it is appropriate to have a full set of materials available for review in the Nashua area, but will not order creation of a data room at this time, as we understand the Parties and Staff will be discussing this at the April 8, 2005 technical session. To assist in those discussions, however, we will require the data room to meet the following conditions: it shall make materials available for review during regular business hours; it shall allow copying, at a reasonable fee, of any materials which parties or members of the public may request; and information which the Commission

determines to be confidential and exempt from public disclosure pursuant to RSA Chapter 91-A shall be available only in redacted form.

We will not rule on other procedural issues that have been discussed, such as the use of electronic filing, as we understand the Parties and Staff are still working on recommendations. We will, however, provide the following guidance: we expect the Parties and Staff to use electronic means where possible, and we will waive administrative rules as needed to facilitate electronic exchange of filings and discovery.

Based upon the foregoing, it is hereby

ORDERED, that the Pennichuck Utilities' Motion to Dismiss as to Pittsfield Aqueduct Company, Inc. and Pennichuck East Utilities, Inc. is hereby GRANTED; and it is

FURTHER ORDERED, that the Pennichuck Utilities' Motion to Dismiss as to Pennichuck Water Works is hereby DENIED; and it is

FURTHER ORDERED, that the City of Nashua may proceed in this docket as to the assets of Pennichuck Water Works, Inc. and not as to the assets of Pittsfield Aqueduct Company, Inc. and Pennichuck East Utilities, Inc.; and it is

FURTHER ORDERED, that the intervention request of the New Hampshire Business and Industry Association is GRANTED; and it is

FURTHER ORDERED, that PWW has until January 31, 2005 to file a Motion for Summary Judgment, responses to which shall be submitted by March 2, 2005; and it is

FURTHER ORDERED, that memoranda on the sequencing of the inquiries on public interest and valuation shall be filed on March 8, 2005; and it is

FURTHER ORDERED, that there shall be a technical session on April 8, 2005 at the offices of the Commission, at which time the data room and other procedural issues will be addressed.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of January, 2005.

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

Attested by:

Debra A. Howland
Executive Director & Secretary

Part 2, Article 5

[Art.] 5. [Power to Make Laws, Elect Officers, Define Their Powers and Duties, Impose Fines and Assess Taxes; Prohibited from Authorizing Towns to Aid Certain Corporations.] And farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defense of the government thereof, and to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this state, and the forms of such oaths or affirmations as shall be respectively administered unto them, for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and also to impose fines, mulcts, imprisonments, and other punishments, and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same; to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of the government of this state, and the protection and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same; provided that the general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stocks or bonds. For the purpose of encouraging conservation of the forest resources of the state, the general court may provide for special assessments, rates and taxes on growing wood and timber.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 38
MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS

Section 38:2

38:2 Establishment, Acquisition, and Expansion of Plants. – Any municipality may:

I. Establish, expand, take, purchase, lease, or otherwise acquire and maintain and operate in accordance with the provisions of this chapter, one or more suitable plants for the manufacture and distribution of electricity, gas, or 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.

II. For these purposes, take, purchase, and hold in fee simple or otherwise lease or otherwise acquire and maintain any real or personal estate and any rights therein, including water rights.

III. Do all other things necessary for carrying into effect the purposes of this chapter.

IV. Excavate and dig conduits and ditches in any highway or other land or place, and erect poles, place wires, and lay pipes for the transmission and distribution of electricity, gas, and water in such places as may be deemed necessary and proper.

V. Change, enlarge, and extend the same from time to time when the municipality shall deem necessary, and maintain the same, having due regard for the safety and welfare of its citizens and security of the public travel.

Source. 1997, 206:1, eff. July 1, 1997.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 38
MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS

Section 38:3

38:3 By Cities. – Any city may initially establish such 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. Such confirming vote shall be had within one year from the date of the vote to establish such a plant, and if favorable, shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

Source. 1997, 206:1, eff. July 1, 1997.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 38
MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS

Section 38:6

38:6 Notice to Utility. – Within 30 days after the confirming vote provided for in RSA 38:3, 38:4, or 38:5 the governing body shall notify in writing any utility engaged, at the time of the vote, in generating or distributing electricity, gas, or water for sale in the municipality, of the vote. The municipality notifying any utility in such manner may purchase all or such portion of the utility's plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, and shall purchase that portion, if any, lying without the municipality which the public interest may require, pursuant to RSA 38:11 as determined by the commission. The notice to such utility shall include an inquiry as to whether the utility elects to sell, in the manner hereinafter provided, that portion of its plant and property located within or without the municipality which the municipality has identified as being necessary for the municipal utility service.

Source. 1997, 206:1, eff. July 1, 1997.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 38
MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS

Section 38:7

38:7 Reply by Utility. – The utility shall reply to the inquiry provided for in RSA 38:6 by delivering its answer in writing to the governing body within 60 days of the receipt of the inquiry. If the reply is in the negative, or if the reply is not made within the 60 days, the utility thereby forfeits any right it may have had to require the purchase of its plant and property by the municipality, and the municipality may proceed to acquire the plant as provided in RSA 38:10. If the reply is in the affirmative, the utility shall submit the price and terms it is willing to accept for all of its plant and property identified by the municipality in its inquiry, together with a detailed schedule of such plant and property with proper evidence of title. All of the plant and property identified by the municipality shall at all reasonable times thereafter be open to the examination of the officers and agents of the municipality and others charged with the duty of determining the fair value of the property.

Source. 1997, 206:1, eff. July 1, 1997.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 38
MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS

Section 38:8

38:8 By Agreement. – The governing body of a municipality may negotiate and agree with the utility upon the price to be paid for such plant and property; provided, however, that such agreement shall not be binding upon the municipality until ratified pursuant to RSA 38:13.

Source. 1997, 206:1, eff. July 1, 1997.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 38
MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS

Section 38:9

38:9 Valuation. –

I. If the municipality and the utility fail to agree upon a price, or if it cannot be agreed as to how much, if any, of the plant and property lying within or without the municipality the public interest requires the municipality to purchase, or if the schedules of property submitted in accordance with RSA 38:7 are not satisfactory, either the municipality or the utility may petition the commission for a determination of these questions.

II. The commission, after proper notice and hearing, shall decide the matters in dispute.

III. When required to fix the price to be paid for such plant and property, the commission shall 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. In the case of electric utilities, such amount shall be limited to the value of such plant and property and the cost of direct remedial requirements, such as new through-connections in transmission lines, and shall exclude consequential damages such as stranded investment in generation, storage, or supply arrangements which shall be determined as provided in RSA 38:33.

IV. The expense to the commission for the investigation of the matters covered by the petition, including the amounts expended for experts, accountants, or other assistants, and salaries and expenses of all employees of the commission for the time actually devoted to the investigation, but not including any part of the salaries of the commissioners, shall be paid by the parties involved, in the manner fixed by the commission.

Source. 1997, 206:1, eff. July 1, 1997.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 38
MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS

Section 38:11

38:11 Public Interest Determination by Commission. – When 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. The commission need not make any public interest determinations when the municipality and utility agree upon the sale of utility plant and property.

Source. 1997, 206:1, eff. July 1, 1997.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 38
MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS

Section 38:14

38:14 Operation of Plant. – A municipality, which has so acquired the plant, property, or facilities of a public utility in any other municipality, may operate within such other municipality as a public utility with the same rights and franchises which the owners of such outlying plant, as purchased, would have had such purchase not been made. The operation by a municipality outside its own limits shall be subject to the jurisdiction of the commission except as provided in RSA 362. If the outlying municipality shall itself vote to establish a municipal plant all the provisions of this chapter shall be binding as to such determination.

Source. 1997, 206:1, eff. July 1, 1997.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 31
POWERS AND DUTIES OF TOWNS

Powers

Section 31:3

31:3 In General. – Towns may purchase and hold real and personal estate for the public uses of the inhabitants, and may sell and convey the same; may recognize unions of employees and make and enter into collective bargaining contracts with such unions; and may make any contracts which may be necessary and convenient for the transaction of the public business of the town.

Source. RS 31:3. CS 32:3. GS 34:3. GL 37:3. PS 40:3. PL 42:3. RL 51:3. RSA 31:3. 1955, 255:1, eff. July 14, 1955.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 52
VILLAGE DISTRICTS

Section 52:1

52:1 Establishment. –

I. Upon the petition of 10 or more voters, persons domiciled in any village situated in one or more towns, the selectmen of the town or towns shall fix, by suitable boundaries, a district including such parts of the town or towns as may seem convenient, for any of the following purposes:

(a) The extinguishment of fires;

(b) The lighting or sprinkling of streets;

(c) The planting and care for shade and ornamental trees;

(d) The supply of water for domestic and fire purposes, which may include the protection of sources of supply;

(e) The construction and maintenance of sidewalks and main drains or common sewers;

(f) The construction, operation, and maintenance of sewage and waste treatment plants;

(g) The construction, maintenance, and care of parks or commons;

(h) The maintenance of activities for recreational promotion;

(i) The construction or purchase and maintenance of a municipal lighting plant;

(j) The control of pollen, insects, and pests;

(k) The impoundment of water;

(l) The appointing and employment of watchmen and police officers;

(m) The layout, acceptance, construction, and maintenance of roads; and

(n) The maintenance of ambulance services.

II. The voters who are domiciled in any village shall cause a record of the petition, pursuant to paragraph I, and their proceedings thereon to be recorded in the records of the towns in which the district is situate.

Source. 1849, 852:1. CS 116:1. GS 97:1. GL 107:1. 1889, 82:1. PS 53:1. 1909, 27:1. 1911, 5:1. PL 57:1. 1939, 108:1. RL 70:1. RSA 52:1. 1957, 179:1. 1961, 120:3. 1975, 13:1; 455:1. 1977, 154:1. 1981, 375:1, eff. Aug. 22, 1981. 2003, 289:14, eff. Sept. 1, 2003.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 53-A
AGREEMENTS BETWEEN GOVERNMENT UNITS

Section 53-A:1

53-A:1 Purpose. – It is the purpose of this chapter to permit municipalities and counties to make the most efficient use of their powers by enabling them to cooperate with other municipalities and counties on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities.

Source. 1963, 275:14. 1974, 15:1. 1977, 238:1, eff. Aug. 19, 1977.

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properties. Examples of such properties include houses of worship, museums, schools, public buildings, and clubhouses.

Limited-market properties may be appraised based on their current use or the most likely alternative use. Due to the relatively small markets and lengthy market exposure needed to sell such properties, there may be little evidence to support an opinion of market value based on their current use. The distinction between market properties and limited-market properties is subject to the availability of relevant market data. If a market exists for a limited-market property, the appraiser must search diligently for whatever evidence of market value is available.

If a property's current use is so specialized that there is no demonstrable market for it but the use is viable and likely to continue, the appraiser may render an opinion of use value if the assignment reasonably permits a type of value other than market value. Such an estimate should not be confused with an opinion of market value. If no market can be demonstrated or if data is not available, the appraiser cannot develop an opinion of market value and should state so in the appraisal report. It is sometimes necessary to render an opinion of market value in these situations for legal purposes, however. In these cases, the appraiser must comply with the legal requirement, relying on personal judgment and whatever direct market evidence is available. Note that the type of value developed is not dictated by the property type, the size or viability of the market, or the ease with which that value can be developed; rather, the intended use of the appraisal determines the type of value to be developed. If the client needs a market value opinion, the appraiser must develop an opinion of market value, not use value.

Investment Value

While use value focuses on the specific use of a property, investment value represents the value of a specific property to a particular investor. As used in appraisal assignments, investment value is the value of a property to a particular investor based on that person's (or entity's) investment requirements. In contrast to market value, investment value is value to an individual, not necessarily value in the marketplace.

Investment value reflects the subjective relationship between a particular investor and a given investment. It differs in concept from market value, although investment value and market value indications sometimes may be similar. If the investor's requirements are typical of the market, investment value will be the same as market value.

Investment value: The specific value of a property to a particular investor or class of investors based on individual investment requirements; distinguished from market value, which is impersonal and detached.

When measured in dollars, investment value is the price an investor would pay for an investment in light of its

perceived capacity to satisfy that individual's desires, needs, or investment goals. To render an opinion of investment value, specific investment criteria must be known. Criteria to evaluate a real estate investment are not necessarily set down by the individual investor; they may be established by an expert on real estate and investment value, i.e., an appraiser.

Going-Concern Value

A going concern is an established and operating business with an indefinite future life. For certain types of properties (e.g., hotels and motels, restaurants, bowling alleys, manufacturing enterprises, athletic clubs, landfills), the physical real estate assets are integral parts of an ongoing business. The market value of a such a property (including all the tangible and intangible assets of the going concern, as if sold in aggregate) is commonly called its *going-concern value*. (See Figure 2.1.) Appraisers may be called upon to develop an opinion of the investment value, use value, or some other type of value of a going concern, but most appraisals of going-concern value relate to market value.

Traditionally, going-concern value has been defined as the value of a proven property operation. The emerging definition of the term highlights the assumption that the business enterprise is expected to continue operating well into the future (usually indefinitely); in contrast, liquidation value assumes that the enterprise will cease operations. Going-concern value includes the incremental value associated with the business concern, which is distinct from the value of the real property. The value of the going concern includes an intangible enhancement of the value of the operating business enterprise, which is produced by the assemblage of the land, buildings, labor, equipment, and the marketing operation. This assemblage creates an economically viable business that is expected to continue. The value of the going concern refers to the total value of the property, including both the real property and the intangible personal property attributed to business enterprise value (see Figure 2.2).

It may be difficult to separate the market value of the land and the building from the total value of the business, but such a division of realty and non-realty components of value is often required by federal regulations. When an appraiser cannot effectively separate the market value of the real estate from its business enterprise value, it is appropriate to state that the reported opinion of value includes both market value and business enterprise value and that the appraiser has not been able to distinguish between them. Only qualified practitioners should undertake these kinds of assignments, which must be performed in compliance with appropriate USPAP standards. (Business enterprise value is discussed in Chapter 27.)

value are worked into the test of financial feasibility for redevelopment of the land.

The timing of a specified use is an important consideration in highest and best use analysis. In many instances, a property's highest and best use may change in the foreseeable future. For example, the highest and best use of a farm in the path of urban growth could be for interim use as a farm, with a future highest and best use as a residential subdivision. (The concept of interim use, which is a special situation in highest and best use analysis, is discussed in more detail later in this chapter.) If the land is ripe for development at the time of the appraisal, there is no interim use. If the land has no subdivision potential, its highest and best use would be for continued agricultural use. In such situations, the immediate development of the land or conversion of the improved property to its future highest and best use is usually not financially feasible.

highest and best use of land as though vacant. Among all reasonable, alternative uses, the use that yields the highest present land value after payments are made for labor, capital, and entrepreneurial coordination.

highest and best use of property as improved. The use of a property as improved that will maximize its value.

The intensity of a use is another important consideration. The present use of a site may not be its highest and best use. The land may be suitable for a much higher, or more intense, use. For instance, the highest and best use of a parcel of land as though vacant may be for a 10-story office building, while the office building that currently occupies the site has only three floors.

Testing Criteria in Highest and Best Use Analysis

In addition to being reasonably probable, the highest and best use of both the land as though vacant and the property as improved must meet four implicit criteria. That is, the highest and best use must be

1. Physically possible
2. Legally permissible
3. Financially feasible
4. Maximally productive

These criteria are often considered sequentially.[1] The tests of physical possibility and legal permissibility must be applied before the remaining tests of financial feasibility and maximum productivity. A use may be financially feasible, but this is irrelevant if it is legally prohibited or physically impossible.

1. Although the criteria are considered sequentially, it does not matter whether legal permissibility or physical possibility is addressed first, provided both are considered prior to the test of financial feasibility. Many appraisers view the analysis of highest and best use as a process of elimination, starting from the widest range of possible uses. The test of legal permissibility is sometimes applied first because it eliminates some alternative uses and does not require a costly engineering study. It should be noted that the four criteria are interactive and may be considered in concert.

U.S. Code collection

TITLE 26 > Subtitle A > CHAPTER 1 > Subchapter O > PART I > § 1001

§ 1001. Determination of amount of and recognition of gain or loss

(a) Computation of gain or loss

The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount realized

The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized—

(1) there shall not be taken into account any amount received as reimbursement for real property taxes which are treated under section 164 (d) as imposed on the purchaser, and

(2) there shall be taken into account amounts representing real property taxes which are treated under section 164 (d) as imposed on the taxpayer if such taxes are to be paid by the purchaser.

(c) Recognition of gain or loss

Except as otherwise provided in this subtitle, the entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized.

(d) Installment sales

Nothing in this section shall be construed to prevent (in the case of property sold under contract providing for payment in installments) the taxation of that portion of any installment payment representing gain or profit in the year in which such payment is received.

(e) Certain term interests

(1) In general

In determining gain or loss from the sale or other disposition of a term interest in property, that portion of the adjusted basis of such interest which is determined pursuant to section 1014, 1015, or 1041 (to the extent that such adjusted basis is a portion of the entire adjusted basis of the property) shall be

disregarded.

(2) Term interest in property defined

For purposes of paragraph (1), the term "term interest in property" means—

(A) a life interest in property,

(B) an interest in property for a term of years, or

(C) an income interest in a trust.

(3) Exception

Paragraph (1) shall not apply to a sale or other disposition which is a part of a transaction in which the entire interest in property is transferred to any person or persons.

LAWS

of the

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CONCORD, N.H.

(b) A percentage of each amount collected under this section shall be retained in the debt recovery fund for the purpose of funding the costs of all debt collection. The percentage shall be set annually by the attorney general in consultation with the commissioner of the department of administrative services at 150 percent of the total costs and expenses of the debt collection during the prior fiscal year divided by the total debt collected. Any amount remaining in the fund at the end of a fiscal year in excess of 200 percent of the costs and expenses of debt collection during the fiscal year shall be paid in a proportional amount to the accounts for which they were collected.

(c) The treasurer shall deposit in the debt recovery fund all amounts collected by the department of justice under this section. The attorney general is authorized to accept, budget, and expend moneys in the debt recovery fund received from any party without the approval of the governor and council for the purposes of:

(1) After deducting the amounts authorized in subparagraph IV(b), transferring on a quarterly basis a proportional amount recovered to the accounts for which they were collected; and

(2) Recruitment, training, administration, overhead, and supervision of such assistant attorneys general and support staff as necessary for the purposes of this section.

(d) All moneys in the debt recovery fund shall be continually appropriated to the department of justice and shall not lapse.

(e) The state treasurer, upon approval of the attorney general, shall pay the expenses of recruitment, training, administration, and supervision of assistant attorneys general and support staff as necessary for the purposes of this section, and transfer a proportional amount of unretained funds recovered to the accounts for which they were collected.

V. For purposes of this section, the term "debt" shall include fines and other debts or amounts owed to the state.

VI. Notwithstanding any other provision of this section, and subject to the supervision of the attorney general as to matters of law, state agencies and departments may seek collection of debts in small claims court without referring the debt to the attorney general. The authorization granted to seek collection of debts in small claims court under this paragraph shall not be construed to constitute a waiver of the sovereign immunity of the state, or any other defense, right, immunity, or other protection under law, including any statutory provision.

346:2 Attorney General; Duties. Amend RSA 7:6 to read as follows:

7:6 Powers and Duties as State's Attorney. The attorney general shall act as attorney for the state in all criminal and civil cases in the supreme court in which the state is interested, and in the prosecution of persons accused of crimes punishable with death or imprisonment for life. The attorney general shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state, and with the aid of the county attorneys, the attorney general shall enforce the criminal laws of the state. The attorney general shall have the power to collect uncollected debts owed to the state as set forth in RSA 7:15-a.

346:3 New Subparagraph; Debt Recovery Fund. Amend RSA 6:12, I(b) by inserting after subparagraph (252) the following new subparagraph:

(253) Moneys deposited in the debt recovery fund by the treasurer under RSA 7:15-a, IV.

346:4 New Section; Position Established. Amend RSA 7 by inserting after section 15-a the following new section:

7:15-b Debt Collection Attorney. The department of justice shall have the authority to hire a full-time support attorney and such staff as may be necessary, who shall be responsible solely for all duties associated with the collection of debt owed to the state. The position shall be funded through the debt recovery fund established in RSA 7:15-a, IV.

346:5 Appropriation. The amount of $100,000 for the fiscal year ending June 30, 2008 is hereby appropriated to the debt recovery fund established by RSA 7:15-a, IV for the purpose of start-up costs, provided that 25 percent of the recoveries collected each quarter shall be paid into the general fund until $100,000 has been paid into the fund. The appropriation in this section shall be in addition to any other sums appropriated to the department for such purpose. The governor is authorized to draw a warrant for said sum out of any money in the treasury not otherwise appropriated.

346:6 Effective Date. This act shall take effect July 1, 2007.

(Approved: July 16, 2007)
(Effective Date: July 1, 2007)

CHAPTER 347 (SB 206)

AN ACT RELATIVE TO THE INVESTMENT AUTHORITY OF LOCAL GOVERNMENT ENTITIES AND AUTHORIZING THE CITY OF NASHUA TO PURCHASE PENNICHUCK CORPORATION STOCK.

Be it Enacted by the Senate and House of Representatives in General Court convened:

347:1 County Treasurers. Amend RSA 29:3 to read as follows:

29:3 Excess Funds. Whenever the county treasurer has in custody an excess of funds which are not immediately needed for the purpose of expenditure the county treasurer may, with the approval of the county commissioners and county executive committee and upon such terms as shall be approved by the county commissioners, invest the same in participation units in the public deposit investment pool established pursuant to RSA 383:22 or in obligations fully guaranteed as to principal and interest by the United States government. The obligations may be held directly or in the form of securities of or other interests in any open-end or closed-end management-type investment company or investment trust registered under 15 U.S.C. section 80a-1 et seq., if the portfolio of the investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations. Any person who directly or indirectly receives any such funds or moneys for deposit or for investment in securities of any kind shall, prior to acceptance of such funds, make available at the time of such deposit or investment,

an option to have such funds secured by collateral having a value at least equal to the amount of such funds. Such collateral shall be segregated for the exclusive benefit of the county. Only securities defined by the bank commissioner in rules adopted pursuant to RSA 386:57 shall be eligible to be pledged as collateral. At least yearly, the county treasurer, with the approval of the county commissioners, shall review and adopt an investment policy for the investment of public funds in conformance with the provisions of applicable statutes.

347:2 Investment by Single Trustee. Amend RSA 31:26 to read as follows:

31:26 Investments by Single Trustee. In towns which have chosen a single trustee of trust funds such funds shall be invested only by deposit in any federally or state-chartered bank or association authorized to engage in a banking business in this state, or in state, county, town, city, school district, water and sewer district bonds and the notes of towns or cities in this state and when so invested the trustee shall not be liable for the loss thereof; and in any common trust fund established by the New Hampshire Charitable Foundation in accordance with RSA 292:23; or in obligations fully guaranteed as to principal and interest by the United States government. The obligations may be held directly or in the form of securities of or other interests in any open-end or closed-end management-type investment company or investment trust registered under 15 U.S.C. section 80a–1 et seq., if the portfolio of the investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations. Deposits in a federally or state-chartered bank or association shall be made in the name of the town which holds the same as a trust, and it shall appear upon the books thereof as a trust fund. Any person who directly or indirectly receives any such trust funds for deposit or for investment in securities of any kind shall, prior to acceptance of such funds, make available at the time of such deposit or investment an option to have such funds secured by collateral having value at least equal to the amount of such funds. Such collateral shall be segregated for the exclusive benefit of the town depositing or investing such funds. Only securities defined by the bank commissioner as provided by rules adopted pursuant to RSA 386:57 shall be eligible to be pledged as collateral. The trustee may retain investments as received from donors until the maturity thereof.

347:3 Refunding Bonds. Amend RSA 33:3–d, II to read as follows:

II. Refunding bonds shall be payable in installments, the first of which shall be not later than the earliest stated principal maturity date of the bonds being refunded and the last of which shall be not later than the last date on which the bonds being refunded could have been made payable under that law applicable to the bonds being refunded. The installment payments of refunding bonds shall be arranged in accordance with RSA 33:2 except that any installment that is payable earlier than the date on which the first installment is required to be made payable may be in any amount. The proceeds of refunding bonds, exclusive of any premium and accrued interest and any proceeds used to pay issuing or marketing costs, shall, upon their receipt, be paid immediately to the paying agent for the bonds which are to be called and prepaid; and such paying agent shall hold such proceeds in trust until the bonds are redeemed. While such proceeds are held in trust, they may be invested for the benefit of the municipality or county as may be provided in any

other applicable law of the state of New Hampshire relating to the investment or deposit of municipal or county funds; and the income derived from investment may be expended to pay the principal of and redemption premium, if any, on the refunded bonds and interest thereon until they are redeemed. Refunding bonds issued in accordance with this section shall be subject to the same statutory limit of indebtedness, if any, as the bonds refunded; provided, however, that upon the issuance of the refunding bonds, the bonds refunded shall no longer be counted in determining any limit of indebtedness of the municipality or county.

347:4 Treasurer's Duties. Amend RSA 197:23–a to read as follows:

197:23–a Treasurer's Duties. The treasurer shall have custody of all moneys belonging to the district and shall pay out the same only upon orders of the school board or upon orders of the 2 or more members of the school board empowered by the school board as a whole to authorize payments. The treasurer shall deposit the moneys in participation units in the public deposit investment pool established pursuant to RSA 383:22, or in solvent banks in the state, except that funds may be deposited in banks outside the state if such banks pledge and deliver to a third party custodial bank or the regional federal reserve bank collateral security for such deposits United States government obligations, United States government agency obligations, or obligations of the state of New Hampshire in value at least equal to the amount of the deposit in each case. The amount of collected funds on deposit in any one bank shall not at any time exceed the sum of its paid-up capital and surplus. The treasurer shall keep in suitable books provided for the purpose a fair and correct account of all sums received into and paid from the district treasury, and of all notes given by the district, with the particulars thereof. At the close of each fiscal year, the treasurer shall make a report to the district, giving a particular account of all of the treasurer's financial transactions during the year. The treasurer shall furnish to the school board statements from the books, and submit the books and vouchers to them and to the auditors for examination, whenever so requested. Whenever the treasurer has in custody an excess of funds which are not immediately needed for the purpose of expenditure, the treasurer shall, with the approval of the school board, invest the same in participation units in the public deposit investment pool established pursuant to RSA 383:22, in savings bank deposits of banks incorporated under the laws of the state of New Hampshire, or in certificates of deposits and repurchase agreements of banks incorporated under the laws of the state of New Hampshire or in banks recognized by the state treasurer, and obligations fully guaranteed as to principal and interest by the United States government. The obligations may be held directly or in the form of securities of or other interests in any open-end or closed-end management-type investment company or investment trust registered under 15 U.S.C. section 80a–1 et seq., if the portfolio of the investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations. Any person who directly or indirectly receives any such funds for deposit or for investment in securities of any kind shall, prior to acceptance of such funds, make available at the time of such deposit or investment an option to have such funds secured by collateral having a value at least equal to the amount of such funds. Such collateral shall be segregated for the exclusive benefit of the district. Only securities defined by the bank commissioner as provided by rules adopted pursuant to RSA

386:57 shall be eligible to be pledged as collateral. At least yearly, the school board shall review and adopt an investment policy for the investment of public funds in conformance with the provisions of applicable statutes.

347:5 Purchase of Pennichuck Corporation Stock by the City of Nashua.

I. Notwithstanding the provisions of any law to the contrary, the city of Nashua is authorized to purchase the stock of Pennichuck Corporation or one or more of its subsidiaries upon agreement with such corporation. The public utilities commission shall make a public interest determination prior to any such purchase. For the purpose of obtaining control of the plant and property of Pennichuck Corporation or its subsidiaries, the city may acquire and hold such stock, or establish one or more business corporations under RSA 293–A. Except as otherwise provided in this section, the provisions of RSA 38 shall apply to the acquisition of stock by the city.

II. The acquisition of such stock shall be deemed to be within the policy and purposes of RSA 38 if, prior to the acquisition of stock as provided in this section, the board of aldermen of the city find that:

(a) The acquisition of stock, rather than the direct acquisition of plant and property, will provide a more orderly method for the city to establish, own, and operate a municipal water utility consistent with the purposes of RSA 38.

(b) The acquisition of stock, rather than the direct acquisition of plant and property, will be financially beneficial to the city and its customers and will, therefore, be in the best interests of the city and provide a public benefit.

III. The acquisition by the city of the stock of Pennichuck Corporation or its subsidiaries as provided by this act is a purpose for which the city may issue bonds and notes pursuant to RSA 33–B.

347:6 Effective Date.

I. Sections 1–4 of this act shall take effect 60 days after its passage.

II. The remainder of this act shall take effect upon its passage.

(Approved: July 16, 2007)
(Effective Date: I. Sections 1–4 of this act shall take effect September 14, 2007.
II. The remainder of this act shall take effect July 16, 2007.)

CHAPTER 348 (SB 217)

AN ACT ESTABLISHING THE NEW HAMPSHIRE HOUSING AND CONSERVATION PLANNING PROGRAM.

Be it Enacted by the Senate and House of Representatives in General Court convened:

348:1 New Subdivision; Office of Energy and Planning; Housing and Conservation Planning Program. Amend RSA 4–C by inserting after section 23 the following new subdivision:

Housing and Conservation Planning Program

4–C:24 Definitions. In this subdivision:

I. "Eligible applicant" means a single municipality or 2 or more municipalities applying together.

II. "Growth and development strategy" means a plan by a single municipality or 2 or more municipalities to guide community growth in a way that creates a balanced housing supply, including higher density and workforce housing opportunities, while preserving valuable natural resources and the community's quality of life through efficient and compact development.

III. "Program" means the housing and conservation planning program.

IV. "Stage" means one of the 4 specific stages of developing and implementing a growth and development strategy to be funded through the housing and conservation planning program.

4–C:25 Housing and Conservation Planning Program Established. There is hereby established the housing and conservation planning program, which shall be administered by the office of energy and planning. The program shall provide technical assistance matching grants to municipalities to plan for growth and development in a manner that permits a balanced housing stock, including higher density and workforce housing opportunities, and promotes, whenever possible the reuse of existing buildings, including historic properties, while protecting communities' natural resources through more efficient and compact development. Participation in the program is voluntary.

4–C:26 Program Administration; Eligible Applicants; Use of Program Funds.

I. Eligible applicants shall include:

(a) Municipalities; or

(b) A group of municipalities applying together to plan on a regional basis.

II. Awards of program funds may be used to purchase technical assistance from third-party technical assistance providers, including but not limited to regional planning commissions, to achieve the purposes of the program.

4–C:27 Program Administration; Eligible Technical Assistance.

I. The program shall award matching grants to fund technical assistance activities in the development and implementation of a growth and development strategy. The 4 specific stages of activities are as follows:

(a) Stage 1: Natural and Historic Resource and Housing Data Gathering and Analysis. This stage includes:

(1) Understanding and mapping housing, income, and demographic data, including housing market costs, housing units needed to meet future expected growth in a municipality and the region, and the affordability of a municipality's housing for all income ranges.

(2) Mapping land use values, including conservation, soils, wetlands, working forests, farmlands, and other natural resources.

(3) Developing a build-out analysis of growth and development impacts on housing availability and natural resources.

(4) Mapping historic structures and buildings within communities.