STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

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

DW 04-048

OBJECTION TO PENNICHUCK'S MOTION FOR RECONSIDERATION

NOW COMES the City of Nashua ("Nashua") and objects to Pennichuck Water Works, Inc.'s *Motion for Reconsideration and/or Rehearing Regarding Order No. 24,878,* and in support thereof states as follows:

I. INTRODUCTION

Pennichuck Water Works and its affiliates allege eighteen (18) reasons for which it argues reconsideration and/or rehearing is necessary. Nashua asserts that none of the alleged grounds were the result of Commission error. Each of the eighteen "errors" is addressed in turn.

II. ARGUMENT

A. PENNICHUCK'S ARGUMENT THAT THE COMMISSION FAILED TO APPLY THE PUBLIC INTEREST STANDARD IGNORES THE COMMISSION'S COMPREHENSIVE ANALYSIS

Pennichuck essentially asserts that the Commission should disregard the express provisions of RSA 38:3 establishing a rebuttable presumption in this proceeding and instead weigh all public benefits of the proposed taking against all burdens and social costs. This argument is not new and was featured in its Post Hearing Brief.[1]

In making this argument, Pennichuck asks the Commission to re-write RSA 38 for its own benefit, so that it may escape its own failure to meet its burden under RSA 38:3 to rebut with credible evidence the presumption of public interest in the first

[1] Post Hearing Brief of the Pennichuck Companies, Pages 2-6.

instance. The Commission's decision makes clear that Pennichuck failed to do this. Section V (A) of the Commission's order shows that it understood and considered all of Pennichuck's arguments,[2] and it specifically reviewed and rejected many in Section V (G) that merited specific mention, including Pennichuck's arguments concerning its record as utility,[3] work force implications,[4] Nashua's model for oversight and operations contractors,[5] customer service and billings and collections practices,[6] the nature of elected municipal officials,[7] the status of Nashua's operations and oversight contracts,[8] rates,[9] and many other issues discussed throughout its decision such as the mitigation fund requirement.

The Commission found none of these arguments or other arguments presented to be sufficiently persuasive to rebut the presumption of public interest.[10] For example, with regard to Nashua's plan to contract operations to Veolia Water, the Commission found that, contrary to Pennichuck's arguments, "the proposed arrangements are reasonably calculated to lead to an effective operation of the PWW system."[11]

The Commission also heard evidence concerning problems with Pennichuck's operations and ways in which Nashua would improve service consistent with the public interest. For example, Nashua presented evidence concerning the considerable experience and expertise its contractors would bring to the operation of its water

[2] Order No. 24,878, Pages 27-35.
[3] Page 51.
[4] Page 52.
[5] Page 53.
[6] Page 53.
[7] Page 55.
[8] Pages 55-56.
[9] Pages 56-57.
[10] Page 63.
[11] Page 53.

system,[12] relative to that of a smaller investor owned utility like Pennichuck,[13] the impact of Pennichuck's tremendous overhead on operating costs,[14] its cost over-runs,[15] its failure to implement CMMS as a cost management system,[16] its violation of drinking water standards,[17] and its rates.[18] The Commission received substantial evidence concerning the advantages that Nashua's public-private partnership would bring in the areas of operations, local control, rate savings and other areas.[19]

The Commission declined to rule on this evidence presented by Nashua because it found that the presumption of the public interest had not been rebutted.[20] Thus, it seems clear that even if the Commission were to apply a different standard, and specifically weigh each argument against another, the outcome would be any different.

Under RSA 38:3, Nashua was entitled to a rebuttable presumption that the acquisition was in the public interest. Unfortunately for Pennichuck and devastating to its argument, the Commission found that following a review of the record neither Pennichuck nor any other party had rebutted the RSA 38:3 presumption that the acquisition was in the public interest.[21] Once such a finding was made the balancing test advanced by Pennichuck was unnecessary and would likely produce the same result under a different name. However, because the Commission's decision is both comprehensive and consistent with the requirements of RSA 38, reconsideration or rehearing is unnecessary.

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[12] Page 44.
[13] Page 44.
[14] Page 45.
[15] Page 45.
[16] Page 45.
[17] Page 46.
[18] Page 47.
[19] Ibid at Pages 50-63.
[20] Page 57.
[21] Order No. 24,878, Page 50.

B. THE COMMISSION CORRECTLY DETERMINED THAT THE PUBLIC INTEREST REQUIRED NASHUA TO ACQUIRE ALL OF PENNICHUCK WATER WORKS UNDER RSA 38:9

Pennichuck argues that Nashua cannot lawfully acquire satellite systems that are not connected to the Nashua core. However, the scope of RSA 38 as it applies to Pennichuck Water Works is not subject to serious debate or doubt. RSA 38:2, I, by its express terms authorizes Nashua to "take … one or more suitable plants for the manufacture and distribution of … water for municipal use, for the use of its inhabitants *and others*, and for such other purposes as may be permitted, authorized, or directed by the commission." (emphasis added). RSA 38:9, I, again by its express terms, requires that the Commission determine "how much, if any, of the plant and property lying within or without the municipality the public interest requires the municipality to purchase".

Order No. 24,425 made clear that this was to be a central issue in this case. Nashua sought all of Pennichuck Water Works assets because it believed that the public interest was best served for all existing customers to be served by one system under a unified rate structure. The Commission agreed.[22]

Pennichuck appears to have chosen an "all or nothing" strategy in this proceeding and did not present any evidence that the public interest would be better served by having the existing satellite customers removed from Pennichuck Water Works utility. It has not presented any evidence to the contrary, and neither the record in this proceeding nor the law supports its argument.

However, the Commission should pause to consider Pennichuck's argument that Nashua cannot lawfully acquire satellite systems because it stands in contrast to the arguments it made concerning the Reilly municipal buyer hypothesis. In effect,

[22] Order No. 24,878, Pages 57-60.

Pennichuck now argues that not even Nashua has the legal authority to acquire water systems outside its borders, let alone any other New Hampshire municipality.

This argument is unfounded, but it does highlight the extent to which Pennichuck overstated its municipal buyer hypothesis to this Commission. As set forth in Nashua's August 25, 2008, *Motion for Rehearing*, New Hampshire law requires that there be a public purpose reasonably related to serving its inhabitants of a municipality (RSA 31:3) or others (RSA 38). In Nashua's case, the public purpose is achieved by allowing Nashua to serve its inhabitants and others as part of a unified rate structure that will treat customers both inside and outside the City equally. *cf*. RSA 362:4, III-a.

To argue that Nashua cannot lawfully acquire the existing satellites is to admit that the municipal buyer hypothesis has no foundation in New Hampshire law, which as set forth in Nashua's *Motion for Rehearing*, does not distinguish between acquisition by taking or by consensual purchase.

C. PENNICHUCK ITSELF ADVOCATED FOR THE SEPARATE PUBLIC INTEREST ANALYSES IT NOW CLAIMS TO BE IN ERR

Pennichuck now seeks to assign error to the Commission's separate analysis of the public interest standard as it applies outside of Nashua, thevery result it advocated to the Commission in this proceeding. Pennichuck first made such an argument as early as its September 6, 2005 *Motion for Summary Judgment*, in which Pennichuck argued that Nashua was not entitled to presumption of public interest for assets located outside of Nashua. In its own words, Pennichuck urged the Commission:

> "Nashua may also claim that the rebuttable presumption in RSA 38:3 provides it with some shelter from the requirement of proving its capability to operate a water utility. But that is not the case. *RSA 38:3 provides a rebuttable presumption that the taking of the system in Nashua is in the public interest, not a rebuttable presumption that a franchise*

should be granted to the municipality to provide utility service to Merrimack, Amherst, and other surrounding towns."[23]

Pennichuck urged the Commission to conduct the same two part analysis in Section III (A)(3) of its December 15, 2006, *Opening Statement and Trial Memorandum.* It cannot now argue that it was legal error to adopt the very result it advocated to the Commission.

Pennichuck's legal flip flop may be permissible advocacy. However, that advocacy comes with certain risks. Pennichuck cannot claim legal error for the very result it advocated, over Nashua's objection. The Commission should rebuke Pennichuck's invitation to find error in an approach it advocated to the Commission.

Moreover, the error for which Pennichuck complains, if Pennichuck's argument that there is no rebuttable presumption for franchises outside of Nashua, is one that is more appropriately directed to the legislature, not to the Commission. The Commission has largely done what RSA 38 requires. Any complaint that it should have evaluated the public interest differently should be made to the New Hampshire

D. PENNICHUCK'S ARGUMENT THAT NASHUA HAS NOT FOLLOWED THE VOTING REQUIREMENTS OF RSA 38:3 IGNORES THE PLAIN LANGUAGE OF THE STATUTE.

Pennichuck's argument regarding the votes taken by Nashua have already been considered and acted upon by the Commisison.[24] It is enough to say that they ignore the plain language of RSA 38:2, followed by Nashua and its attorneys, that a municipality may establish a plant for the distribution of water "for the use of its inhabitants and others". Not only did Nashua clearly contemplate the purchase of PWW assets outside Nashua, but also the assets of PEU and PAC. As is apparent from the attachments to

[23] Pennichuck Water Works' September 6, 2005 Motion for Summary Judgment, Page 8, Paragraph 14.
[24] Order No. 24,425; Order No. 24,448.

Nashua's memorandum of Law dated October 21, 2004, the public was clearly warned of Nashua's intent prior to its confirming vote on January 14, 2003.

The suggestion that the Commission erred by not previously ruling that Nashua's votes did not inform residents that it would use eminent domain is unfounded. There is no requirement in RSA 38 to give such a notice. Nashua fully warned its residents that it was acting under RSA 38. In addition, as in the taking of property outside Nashua, the attachments to Nashua's October 21, 2004 memorandum clearly demonstrate that if Pennichuck did not willingly sell the assets the City could petition the PUC to take them.

Pennichuck's argument also ignores the fact that the vote taken by Nashua was a direct result of the company's proposed sale to Philadelphia Suburban. As set forth in Exhibit 1001, Pages 2-3, that proposed sale received substantial attention and it was widely understood that Nashua sought to acquire Pennichuck in order to preserve local control by acquiring the company. Whether the words "eminent domain" or others should have been employed is ultimately a political question to be answered by the legislature or in the ballot box. As the Commission has already determined, Nashua met the necessary requirements under RSA 38 and there is no evidence to suggest the contrary.

E. PENNICHUCK'S ARGUMENT THAT THE COMMISSION FAILED TO CONSIDER THE BROADER PUBLIC IS NOT SUPPORTED BY THE RECORD

Pennichuck argues that the Commission overlooked evidence that it is a well run utility. However, Pennichuck overstates its case. Nashua concedes that there is some testimony that the employees performing work in the field do their job reasonably well. The same can hardly be said of its management, however, which represent an enormous

overhead expense with 4 or 5 of its officers making the same combined salary as its 44 to 45 employees performing actual maintenance work[25] and which failed to deliver projects such as its water treatment plant and CMMS system on-time and on-budget. [26] *See also* Section II (A), herein.

It is true that it is in the very nature of an investor owned utility to seek to expand its revenues wherever possible. However, it is also true that such incentives come at a cost as it is not always possible by regulation to curb a regulated utilities thirst for a "feeding frenzy at the public trough" as the Nashua Telegraph so aptly described Pennichuck's management practices that ultimately led to its chief executive officer being removed for securities fraud.[27] As discussed in Nashua's brief, there was also evidence of violation of drinking water standards.

The Commission also considered evidence that Nashua's partnership with Veolia Water "will also reduce substantially the overhead that PWW customers currently pay for services that are not related to the actual operation of the water system"[28] and that "if Veolia fails to live up to its service commitments, it can be replaced as contractor in a competitive marketplace, whereas utility customers are not similarly free to replace their utility."[29]

This and other evidence considered by the Commission was extensive. It was not the Commission's role, however, to rule on each and every assertion made, whether by Nashua or Pennichuck, but rather a far more nuanced question, as the Commission recognized, created by the express provisions of RSA 38, as to whether circumstances

[25] Transcript, September 13, 2007, Page 126.
[26] Order No. 24,878, Page 45.
[27] Exhibit 1121.
[28] Order No. 24,878, Page 45.
[29] Order No. 24,878, Page 46.

exist such that the legislative presumption that municipal ownership of water utilities itself promotes the public good must itself be rebutted.

Nashua notes that any party in this proceeding could have requested the opportunity to present findings of fact and rulings of law to the Commission. Pennichuck failed to request such rulings and it cannot now argue that it was the Commission's legal responsibility to rule on each and every piece of evidence presented. So the question is not whether each and every fact presented by Pennichuck was thoroughly and individually analyzed against all of the benefits presented by Nashua, which were many, but whether Pennichuck presented evidence that showed on the whole, viewed through the Commission's own expertise as a regulator of both municipal and investor owned utilities, that the presumption in favor of the public interest had been rebutted.

Finally, Pennichuck argues that the Commission failed to consider broader political interests of other municipalities. In Nashua's own *Motion for Rehearing*, Nashua notes that both Bedford and Amherst, the two largest communities in terms of number of customers, support Nashua's petition, as do many other communities. However, the argument that the Commission should tally the votes of other communities is really an argument to be made to the legislature, and not within the confines of the public interest standard.

F. PENNICHUCK'S ARGUMENT THAT THE COMMISSION FAILED TO CONSIDER HARM TO ITS SHAREHOLDERS IS NOT SUPPORTED BY THE RECORD AND IGNORES THE IMPACT OF THE COMMISSION'S DETERMINATION OF VALUE.

Pennichuck argues that harm to its shareholders should have been considered in the balancing test it performed.[30] However, the sole evidence Pennichuck cites in support

[30] Pennichuck Motion For Reconsideration, Pages 13-14.

of its argument is the testimony of Donald Correll[31] which was not sufficient to rebut the presumption. Mr. Correll alleges that the harm would be substantial, and as much as "many tens of millions of dollars" but does not provide any precise evidence or calculations. Under the circumstances, the Commission correctly concluded that this evidence was not sufficient to rebut the presumption of public interest.

The Commission noted in other contexts, "[t]he source of this impact, according to Pennichuck, would be the constitutional requirement for Nashua to pay the fair market value for PWW assets, as opposed to the book value (i.e., depreciated original cost value) that is currently the basis for PWW's rates."[32] Thus, the harm of taxation of which Pennichuck complains is the result of it receiving fair market value for its assets at a premium that greatly exceeds the value of their regulatory earning potential for the shareholders. Indeed even the value arrived at by Commissioner Below in his dissent includes such a premium over the value of the earnings to the company's shareholders or stock to overcome any potential harm to shareholders.

Pennichuck's argument is in effect an argument that it should be entitled to more than just compensation or fair market value of Pennichuck Water Works. The legislature could have chosen to impose such a requirement in RSA 38 but it did not elect to do so. Even if it had, it seems unlikely that Pennichuck's vague allegations of substantial harm or "many tens of millions" without any supporting calculations or testimony are hardly sufficient to support its claim of error. The Commission should decline Pennichuck's invitation to create such a standard in this proceeding that the legislature chose not to enact, and that is not adequately supported in the record.

[31] Exhibit 3001, Pages 17, 18, 20, 21.
[32] Order No. 24,878, Page 31.

G. THE COMMISSION DID NOT ERR BY REFUSING TO PREVENT NASHUA FROM REFINING ITS PROPOSAL AND THE COMMISSIONS DECISION IS CONSISTENT WITH RSA 38 AND DUE PROCESS.

Pennichuck argues that the Commission erred by not requiring Nashua to freeze its proposal in time the moment it was filed. Such an approach would have greatly benefitted Pennichuck because it could have spent the last four or more years building a case against Nashua while it could only wait. However, there is no basis for Pennichuck's argument.

This argument was conclusively put to rest in Nashua's December 15, 2006 pre-hearing *Memorandum in Support of Petition for Valuation*, in which Nashua explained in detail that RSA 38:2 allows Nashua to *establish* a water system by filing a petition to the Commission. Pennichuck's argument that the Commission should preclude Nashua from moving forward with its proposal during the years in which this proceeding has continued would have had the practical effect of denying Nashua the opportunity to do what the statute expressly allows. Pennichuck's complaint that Nashua proposed conditions is also one that runs contrary to RSA 38:11 which expressly provides the Commission with that authority.

Even assuming that Nashua's proposal changed over time, the record does not support Pennichuck's claim that those changes in any way violated Pennichuck's right to due process or substantive rights. Each round of testimony in this proceeding was subject to extensive discovery. As noted in Nashua's July 31, 2006 *Objection to Motion to Compel*, parties submitted over 651 data requests to the City concerning its proposal. There were multiple rounds of testimony from both the City and the Company, depositions of multiple City witnesses, staff, and experts, and opportunities for updates,

rebuttals, continuances. The Commission itself described discovery in this proceeding as "encyclopedic" and it is hard to imagine another proceeding in which procedural due process was given greater weight.

It is ironic that Pennichuck's counsel in this proceeding would make such an argument, as during the same period in which this case was proceeding, counsel for Pennichuck Water Works represented the petitioner in Docket No. DT07-11, *Verizon New England Inc*., and proposed substantial changes to its proposal in a proceeding operating on a procedural schedule of far greater compression, in a case of no less importance.[33] As the Commission's noted in reviewing those changes, made after the Commission's hearings on the merits, "fundamental aspects of the transaction as presented in New Hampshire have changed" and that "[t]hese changes are positive and ultimately outcome-determinative."[34] Such changes are an inevitable result of the requirement that the Commission evaluate petitions before it and impose conditions to satisfy the public interest. RSA 38:11 expressly allows for this and Pennichuck cannot claim surprise or that its procedural or substantive rights were violated in any way.

H. THE COMMISSION PROPERLY EXERCISED ITS AUTHORITY TO IMPOSE CONDITIONS ON NASHUA'S PROPOSAL

Since long before this proceeding commenced, RSA 38:11 has allowed the Commission to "set conditions and issue orders to satisfy the public interest." The conditions proposed by Nashua were the subject of much discovery and have been known to Pennichuck since at least 2005 when they were first proposed in responses to data requests and later incorporated into testimony and exhibits.[35] As discussed in the May

[33] Order No. 24,823.
[34] Order No. 24,823, Pages 87; see also Pages 20-37 (seventeen pages describing changes to the proposal).
[35] See e.g., Exhibit 1014.

22, 2006 pre-filed *Testimony of Mayor Streeter et al*., these included conditions to protect customers in other municipalities,[36] retail and wholesale customers,[37] transfer of franchises to the Regional Water District,[38] terms and conditions of service under its water ordinance,[39] customers in satellite systems.[40] There are numerous other examples, both in exhibits offered to the Commission,[41] and in responses to data requests that were not admitted as exhibits in this proceeding but were provided to Pennichuck and other parties under Rule Puc 203.09.

Thus, Pennichuck has been keenly aware of both the fact that the statute authorizes conditions and the nature and substance of the Commissions that Nashua had proposed. It has had the opportunity to conduct discovery under the procedural schedule, cross-examination,[42] and file detailed briefs and arguments in that regard. Thus, Pennichuck cannot complain that it had no opportunity to evaluate the conditions proposed to the Commission. It can only complain that the Commission used conditions effectively to achieve their intended result, furtherance of the public interest as contemplated by RSA 38:11.

Pennichuck's attempts to mischaracterize Nashua's proposal as inadequate, are simply not reflected by the evidence in this proceeding, and do not merit further response.

[36] See e.g., Exhibit 1014, Pages 15 (16) to 16 (17).
[37] See e.g., Exhibit 1014, Page 23.
[38] See Exhibit MBS Exhibit 4 attached to Exhibit 1014.
[39] See Exhibit 1016, Pages 19-20.
[40] See Exhibit 1016, Page 20.
[41] See e.g., Exhibit 1026, Pages 1, 2, 19.
[42] See e.g., Transcript, January 10, 2007, Pages 145 & 151; January 11, 2007, Pages 60-61 & 64-65.

I. CONDITIONS IMPOSED BY THE COMMISSION ARE ENFORCEABLE AS A MATTER OF LAW AND WERE USED TO PROMOTE THE PUBLIC INTEREST UNDER RSA 38.

Pennichuck's argument concerning an alleged lack of authority to enforce its conditions has been fairly and adequately addressed by the Commission in its Order. Nashua further incorporates by reference its December 15, 2006,[43] and November 16, 2007,[44] *Memorandum in Support of Petition for Valuation*, which further explains the legal basis for the Commission to impose such conditions.

Pennichuck appears unable to grasp that RSA 38:11 is a specific grant of legislative authority that is not constrained by whether or not Nashua is a public utility. Even assuming for the sake of argument, that Commission lacks authority over municipal utilities as public utilities, the Commission has a specific grant of authority and indeed, jurisdiction, over municipalities under RSA 38:11. In addition, many of the conditions fall well within the Commission's inherent authority to regulate the terms and conditions of service within franchises outside Nashua's borders under RSA 374 and as provided by RSA 362:4, III-a.

As noted above, Pennichuck's attempts to mischaracterize Nashua's proposal as inadequate, are simply not reflected by the evidence in this proceeding, and do not merit further response.

J. IT IS IMMATERIAL WHETHER PENNICHUCK WILL BE UNABLE TO CHALLENGE CONDITIONS IMPOSED UNDER RSA 38:11 AT A LATER DATE.

Pennichuck challenges the Commission's decision because it argues that it will have no authority to adjudicate compliance after the Commission's decision becomes

[43] See, e.g., Pages 9-10.
[44] See, e.g. Pages 2-7.

final. However, the Commission has its own statutory and inherent powers to enforce its orders and the conditions imposed in this proceeding. As set forth above, the Commission has imposed its conditions in a manner that is lawful and reasonable under RSA 38:11. It retains the authority to enforce them on its own initiative, or upon complaint under RSA 365. Nothing further is required.

K. THE ARGUMENT THAT THE COMMISSION DID NOT CONSIDER WHETHER NASHUA COULD FINANCE THE ACQUISITION UNDER CURRENT CONDITIONS IN THE FINANCIAL MARKETS AND ON THE TERMS IN ORDER NO. 24,878 IS A RED HERRING

Although Nashua presented prefiled testimony from Brian McCarthy, then President of the Board of Aldermen and Steven Adams, Senior Vice President of First Southwest Company, the City's financial advisor that Nashua had the financial capability to own and operate a water utility[45] and that there were many financing options under which Nashua could successfully market its acquisition bonds[46] and made available for cross-examination Carol Anderson, its financial officer, Pennichuck made no effort to inquire of these knowledgeable witnesses concerning Nashua's ability to acquire the assets at a higher price and different market conditions. It did not even require Steven Adams to be presented for cross examination.

Nashua's financial capability to own the assets has been established and not challenged. The ultimate financial determination will be made by Nashua when the Board of Aldermen decide whether or not to acquire the Pennichuck property at a price of $203 million by a vote to issue bonds. Until then, Nashua is entitled to the well supported finding that it has the requisite financial capability.

[45] Exhibit 1001, Page 11, 12.
[46] Exhibit 1004, Pages 3-10.

L. PENNICHUCK'S ARGUMENT THAT THE COMMISSION FAILED TO ACCOUNT FOR THE $40 MILLION MITIGATION FUND IN ITS RATE ANALYSIS SIMPLY PROVES NASHUA CASE

It is ironic that Pennichuck argues that Nashua's rates would be higher, when substantial evidence points to the fact that Pennichuck has some of the highest rates in the State of New Hampshire for a similarly sized utility. The Commission, however, has considerable experience in the area of utility rates and accepted both the rate comparison's produced by Nashua at Exhibit 1015, and the acknowledgement by Pennichuck's own experts that Nashua's rates would be lower.

Even assuming for the sake of argument that the difference between Nashua's ownership at a combined costs of $243 million versus the $248 million price at which there would still be savings is "relatively small" as Pennichuck argues, its own argument still shows that savings would result. This can hardly be said to rebut the presumption of public interest.

In addition, Pennichuck's witnesses such as Donald Ware and Donald Correll both testified that Pennichuck would likely reorganize or sell its remaining utility assets to a larger investor owned utility. As discussed in Nashua's August 25, 2008 *Motion for Rehearing*, this could potentially eliminate the need for the mitigation fund entirely. Nashua has requested clarification that the mitigation fund may in fact be reduced in the event that it is shown to be no longer necessary. Such clarification, as seems likely to be granted, would demonstrate that savings would likely be substantial.

Rate savings are but one of many benefits of municipal ownership which is itself entitled to a rebuttable presumption of the public interest. Pennichuck's argument that rate savings may be as little as 2% does nothing to rebut that presumption. There are

other tangible benefits that the Commission noted. For example, Nashua submitted evidence of Veolia Water's experience delivering capital projects on-time and on-budget, compared to Pennichuck's experience, for example, constructing a water treatment plant "originally represented to the Commission in 2002 as a project of $6 million to $14 million [that] had become a project in excess of $40 million by 2006, not including AFUDC (allowance for funds used in construction, a recoverable expense for ratemaking purposes)".[47]

In a case of this magnitude, it can always be argued that some issue has not received the attention it deserved, or that an issue presented at hearings may not have been fully discussed in detail. However, agencies are permitted under RSA 541-A to rely on their own expertise. To require agencies to reproduce detailed calculations of savings would ultimately make their decisions unreasonably difficult. In this case, Pennichuck was charged with the role of rebutting a presumption of public interest. Its argument that savings to customers under municipal ownership would only be 2% does little to help its case.

M. PENNICHUCK'S ARGUMENTS CONCERNING THE MITIGATION FUND DO NOT ADVANCE ITS CASE

Pennichuck argues that the Commission did not consider tax consequences of establishing a mitigation fund and whether Nashua had legal authority to establish such a fund. These questions are not relevant to the Commission's decision and do not rise to the level of legal error. Under RSA 38:13, Nashua is required to ratify the Commission's decision which, subject to pending requests for clarification, appears to require that a mitigation fund be established either as part of ratification, or at a later compliance date.

[47] Order No. 24,878, Page 45.

The Commission does not need to adjudicate in this proceeding whether Nashua in fact has the legal authority to establish such a fund. Those questions can be resolved appropriately in evaluating whether to ratify the decision, as may be clarified by the Commission. Moreover, there is no evidence or legal basis to support Pennichuck's remaining arguments concerning the mitigation fund.

N. THE COMMISSION DID NOT ERR BY CONSIDERING THE WATER SUPPLY AGREEMENT BETWEEN NASHUA AND MILFORD OR PWW'S 2006 AND 2007 ANNUAL REPORTS TO THE COMMISSION

Pennichuck assigns error to consideration of a Water Supply Agreement between Nashua and Milford filed with the Commission on February 22, 2008 under a joint motion for approval to which both Pennichuck and Staff objected at length. In its discussion of Wholesale Contracts and their impact on the public interest, the Commission approved the agreement and incorporated its terms as part of its condition under RSA 38:11 subjecting Nashua to the same oversight as Pennichuck with respect to wholesale contracts.[48]

Because the agreement was submitted in a motion seeking approval, Pennichuck was able to fully contest its use by the Commission in the same manner afforded by Puc. 203.27. By approving the agreement the Commission effectively overruled their objections to its use in the same manner it would have under Puc 203.27.

The Commission used the 2006 and 2007 Annual Reports filed with it by PWW to update its valuation analysis from 2005 to year-end 2008. There can be little doubt that if the commission had given notice of its intent to use the PWW annual reports that

[48] Order 24,878, Pages 60, 61.

Pennichuck would not have contested their use. All the relevant PWW Annual Reports available at the time of trial were made exhibits[49] without objection.

It is fundamental to the scheme of RSA 38 that the Commission determine if an acquisition is in the public interest and set the price and it is "uniquely qualified to make such a determination because of its experience and specialized knowledge."[50] Pennichuck would have the Commission exercise its specialized knowledge and expertise but not permit it to use the tools available to it. In Pennichuck's world substance would always be subordinated to form.

O. THE COMMISSION ADEQUATELY EXPLAINED THE CALCULATIONS IT EMPLOYED TO VALUE PENNICHUCK'S ASSETS AS OF DECEMBER 31, 2008

Pennichuck complains that the Commission failed to explain the numbers in Order No. 24,878. Although Nashua takes exception to the theory that produced the numbers, the methodology and calculations performed by the Commission were apparent.[51] In fact the explanations used by the Commission were clearer than those employed by Reilly to explain his income method.[52]

The Commission told the parties its method, the source of its figures, the date of its valuation and the results of its calculation.

Pennichuck's reliance on Appeal of Newington, 149 NH 347 (2003) is misplaced. In Newington DES arbitrarily reduced a pollution exemption for a stack from 100% to 50% when there was no evidence in the record to support the reduction. The reduction of

[49] See Exhibits 1069A, 1069B and 1070.
[50] Pennichuck Corporation et al v. Nashua, NH Superior Court No. 04_E-0062, Order dated June 8, 2004 at Page 3.
[51] See eg. Order No. 24,878, Pages 88, 89, 91, 92.
[52] Exhibit 3007A, page 38, 39; Exhibit 21.

Pennichuck's capitalization rate by the 2% growth rate was fully supported in the record[53] and fully explained in the Order.

In addition, as noted previously, Pennichuck could have requested the opportunity to present requests for finding of fact and rulings of law but elected not to do so. The Commission adequately explains the basis for its determination of value and it was not error to omit a detailed schedule or other calculation where none was requested.

P. A 2% LONG TERM GROWTH RATE IS NOT SUPPORTED IN THE RECORD AND WAS PROPERLY REPEALED BY THE COMMISSION.

For purposes of calculating economic obsolescence in his cost method and value in his income approach, Reilly utilized a 2% long-term growth rate which he characterized as "inflation only, and no real growth".[54] He further assumed, for purposes of his discounted cash flow analysis,[55] which he used to establish value in his income method, that capital expenditures would equal depreciation[56] and rate base would remain constant.[57] The fact that the rate base remained constant was what he meant by "no real growth".[58]

Notwithstanding his assumption that there would be no growth in rate base and that expenses would increase at the same level as revenues Reilly continued to insist there would be a 2% growth in earnings.[59] His analysis, however, was completely contrary to that of John Guastella and defies sound economics. Mr. Guastella, for purposes of his rate analysis, projected PWW operations including revenues, expenses

[53] Transcript Sept. 18, 2007, Pages 132, 133; Transcript Sept. 12, 2007, Pages 99-104.
[54] Transcript Sept. 12, 2007, Pages 99, 100.
[55] Exhibit 3007X, RFR-1 (Exhibit 21).
[56] Transcript, Sept. 12, 2007, Page 148.
[57] Ibid at Pages 154, 155.
[58] Ibid.
[59] Ibid at Page 154.

and rate base[60] over a similar period as Reilly and likewise concluded that rate base would either remain constant or decline slightly after 2009.[61] Unlike Reilly, however, during the period of flat or declining rate base, Guastella projected a decline in earnings or net operating income.[62] When asked about this in his deposition, Guastella admitted that a declining rate base would result in declining earnings.[63] And he was right! A regulated utility such as PWW experiences growth in earnings through capital expenditures and rate increases allowed by the Commission to pay for the capital additions. If the earnings of PWW increased at Reilly's long term growth rate of 2% without capital expenditures as he projected, and as he must to achieve the level of value he has, the company would soon be over-earning on its allowed rate of return and an adjustment to rates would be necessary.[64]

In light of such testimony, it was proper for the Commission, if not required, to reject a 2% growth rate.

Pennichuck's reference to the growth rate as "modest" is an understatement of considerable proportion. The 2% growth rate represents 40% of Reilly's terminal value or $113,866,800.[65]

Q. PENNICHUCK'S ARGUMENT THAT THE UPDATE OF VALUE PERFORMED BY THE COMMISSION IS INCOMPLETE AND DIFFICULT TO EVALUATE IGNORES THE COMMISSION'S CLEAR ANALYSIS AND RELIANCE UPON ITS EXPERTISE.

The argument that the Commissioner's update of value is incomplete and difficult to evaluate is virtually identical to its argument that the Commission failed to explain the

[60] Exhibit 3010, page 7.
[61] Exhibit 3010X, Schedule B; Transcript, Sept. 12, 2007, Page 155; Transcript, Sept. 18, 2007, Page 132.
[62] Ibid.
[63] Transcript, Sept. 12, 2007, Page 155.
[64] Exhibit 1015X, page 12(11).
[65] Transcript, Sept. 12, 2007, Page 158.

numbers in Order No. 24,478. Nashua therefore, relies on its objection set forth in Paragraph II (O) supra.

Nashua further objects because the argument ignores the agency expertise exercised by the Commission. The update was fully explained and the methodology and calculations were apparent. Moreover, performing an update is precisely what the legislature intended under RSA 38:9 when it provided that the Commission would fix the price.

Finally, the argument ignores the admonition of the NH Supreme Court in the valuation of utility property that "[j]udgment is the touchstone".[66] In New Hampshire there is no judicial or administrative body better equipped to exercise the judgment then the Commission.

R. PENNICHUCK IS NOT ENTITLED TO A JURY TRIAL ON DAMAGES

Pennichuck's argument that it has been denied its equal protection constitutional right to a jury trial on damages is fundamentally flawed. Utility condemnees are not similarly situated with other condemnees[67] and, even if condemnees under RSA 38 and RSA 498-A were deemed similarly situated, the classifications are justified because of the unique requirements of RSA 38.[68] Moreover, both statutes protect the basic interests of condemnees in securing an independent tribunal's determination of public interest/necessity and just compensation. Finally there is no constitutional right to trial by jury on the issue of just compensation.[69]

[66] *New England Power v. Littleton*, 114NH 594, 599 (1974).
[67] Malnali v. State, 148, NH 94, 98 (2002).
[68] Manchester Housing Authority v. Fish, 102 NH 280, 283 (1959).
[69] Whelton v. State, 106 NH 362, 363 (1965).

III CONCLUSION

For the reasons set forth herein Nashua respectfully urges the Commission to deny Pennichuck's Motion for Reconsideration of Order No. 24,878.

Respectfully submitted,

CITY OF NASHUA
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Date: August 27, 2008

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CERTIFICATE OF SERVICE

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

Date: August 27, 2008

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Justin C. Richardson, Esq.