

DW04-048



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OFFICES IN:
MANCHESTER
CONCORD
PORTSMOUTH

April 5, 2004

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
8 Old Suncook Road
Concord, NH 03301



Re: DW 04-048; City of Nashua

Dear Ms. Howland:

Enclosed for filing with the Commission in the above-captioned docket are an original and eight copies, along with an electronic copy on a computer disk in Word format, of Pennichuck East Utility, Inc., Pittsfield Aqueduct Company, Inc. and Pennichuck Water Works, Inc.'s Motion to Dismiss in Full or in Part or, Alternatively, to Stay Proceeding. I have assumed that the Commission views the three utilities as necessary parties to this docket and, therefore, I have not submitted petitions to intervene on their behalf. If the Commission believes that the utilities should submit petitions to intervene in order to participate in this proceeding, please let me know and I will do so.

In accordance with N.H. Code of Admin. Rules Puc 203.04, I hereby certify that counsel for the Commission's staff and the Office of the Consumer Advocate have indicated that they take no position at this time on the relief requested by the enclosed motion. Counsel for the city of Nashua has indicated that Nashua does not consent to the relief requested in the motion.

Please note that the enclosed motion is not intended to set forth all grounds on which Pennichuck East Utility, Pittsfield Aqueduct Company and Pennichuck Water Works believe that the City of Nashua's petition in this case should be dismissed, but rather is intended to raise certain procedural issues that the three utilities believe should be addressed on an immediate basis. The three companies reserve the right to file additional motions to dismiss and raise other

Debra A. Howland
April 5, 2004
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substantive and procedural issues at a later date, depending on whether this proceeding continues forward, the scope of the proceeding and additional information that may become available.

Sincerely,

A handwritten signature in black ink, appearing to read 'Steven V. Camerino', with a stylized flourish at the end.

Steven V. Camerino

Enclosure

cc: F. Anne Ross, Esq.
Robert Upton, II, Esq.
David R. Connell, Esq.

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

City of Nashua Taking Of:

**Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Works, Inc.**

Docket No. DW 04-048

**PENNICHUCK EAST UTILITY, INC., PITTSFIELD AQUEDUCT COMPANY, INC.
AND PENNICHUCK WATER WORKS, INC.'S MOTION TO DISMISS IN FULL OR IN
PART OR, ALTERNATIVELY, TO STAY PROCEEDING**

Pennichuck East Utility, Inc. ("PEU"), Pittsfield Aqueduct Company, Inc. ("PAC") and Pennichuck Water Works, Inc. ("PWW") hereby move the Public Utilities Commission to dismiss the city of Nashua's ("City") Petition for Valuation Pursuant to RSA 38:9 filed with the Commission on March 25, 2004 or, alternatively, to stay this proceeding. In support of their motion, PEU, PAC and PWW state as follows:

1. PEU is a New Hampshire corporation formed in 1998. PEU has been granted operating authority by this Commission to provide water service in some or all of the municipalities of Atkinson, Derry, Hooksett, Litchfield, Londonderry, Pelham, Plaistow, Raymond, Sandown and Windham. PEU serves approximately 4,426 customers in the foregoing towns.
2. PAC is a New Hampshire corporation formed in 1997. PAC has been granted operating authority by this Commission to provide water service in a portion of the town of Pittsfield. PEU serves approximately 642 customers in the town of Pittsfield.

3. PWW is a New Hampshire corporation formed in 1852. PWW has been granted operating authority by this Commission to provide water service in some or all of the municipalities of Amherst, Bedford, East Derry, Epping, Hollis, Merrimack, Milford, Nashua, Newmarket, Plaistow and Salem. PWW serves approximately 24,267 customers in the foregoing municipalities.

I. The City's Petition Should Be Treated As Three Separate Eminent Domain Proceedings, Two of Which Should Be Dismissed in Their Entirety.

4. The City's petition in this case requests that the Commission determine the fair market value of the property of PEU, PAC and PWW in order to enable the City to take the property of those companies.

5. Despite the fact that PEU, PAC and PWW are separate legal entities, each with its own assets, its own service territories and its own corporate and legal history, the City included all three entities in a single petition that seeks to obtain the right to take all of their assets by eminent domain. The City's attempt to consolidate these three separate legal proceedings into one ignores the important differences among these entities, specifically the differences in the legal and factual issues governing the City's efforts to take their assets.

6. The legal and factual issues in these cases are plainly separate and distinct and may result in different determinations in each of the cases. For example:

a. Nashua's efforts to take the assets of PAC are subject to a competing municipalization effort currently being undertaken by the Town of Pittsfield. *See* Letter from Pittsfield Selectmen attached as Exhibit A.

b. Neither PEU nor PAC provides water service in the city of Nashua, nor have they ever done so, nor are they authorized to provide such service.

c. Neither PEU nor PAC owns any property in the city of Nashua.

d. The communities served by PEU have not taken the necessary votes regarding municipalization, and therefore there is no evidence at all regarding the "public interest" presumption referred to in the City's petition. Undoubtedly, residents of the ten communities served by PEU would not agree that a vote by Nashua residents provides a legitimate basis for determining what is in the public interest of their own communities.

e. It is unknown, and at this point unknowable, whether the communities served by PAC and PEU will ultimately join the regional water district referred to by the City in its petition, assuming that such an entity is ever formed at all. On information and belief, a number of the communities that are served by PEU are not even participating in the discussions regarding the charter of the proposed regional water district.

7. The City's efforts to consolidate these three proceedings from the outset and ignore the fact that PAC, PEU and PWW are separate legal entities will unnecessarily confuse the legal and factual issues that need to be resolved in these distinct matters. At a minimum, the Commission should sever the three matters into separate dockets and leave open the possibility that the three proceedings will follow separate tracks depending on the development of legal and factual issues in these cases.

8. To the extent that the City has any authority at all under RSA Ch. 38 to attempt to take the assets of PWW by eminent domain, there is absolutely no basis for it to take assets of companies that do not provide service in Nashua and own no property there. The fact that the corporations may have a common shareholder is insufficient to enable the City to make such a leap. The Commission's jurisdiction under RSA Ch. 38 does not extend to attempted takings by municipalities from an entity that does not provide service within the condemnor's municipal boundaries. The City's efforts to improperly extend the reach of RSA Ch. 38 to include such a taking is wholly without basis.

9. In addition, by attempting to take utility assets located in other municipalities, the City presumes that it may preempt the right of other municipalities to exercise their own RSA Ch. 38 rights to eminent domain. The City has no authority, under RSA Ch. 38 or otherwise, to do so.

II. The City Failed to Comply with the Requirements of N.H. Code of Admin. Rules Puc 202.11 and 204.01 and, Therefore, Its Petition Should Be Dismissed.

10. N.H. Code of Admin. Rules Puc 202.11(a) provides that "[a]ll petitions shall be accompanied by prefiled testimony and exhibits."

11. N.H. Code of Admin. Rules Puc 204.01(b) provides that "[w]ith the exception of petitions to intervene, petitions shall be accompanied by written testimony sworn to by the witness." The rule then specifies the material that is to be included in such prefiled testimony and the information that is required to support a petition to the Commission.

12. N.H. Code of Admin. Rules Puc 201.05 provides a specific process by which any party may seek a waiver of the Commission's rules if it believes that the rules would be burdensome or do not apply for some reason.

13. In this case, the City neither complied with the clear requirements of Puc 202.11 or 204.01, nor did it make any attempt to seek a waiver pursuant to Puc 201.05.

14. The City's failure to comply with the Commission's rules is more than a technical oversight on its part. The City rushed to file its petition with the Commission in order to attempt to legitimize the public threats it has been making against Pennichuck Corporation, the parent company of PAC, PEU and PWW, since November 2002 when the City's Aldermen first voted to pursue the taking.

15. It is remarkable that the City was unable to comply with the Commission's filing requirements, given that it has been contemplating this action for over a year. As long ago as March 26, 2003, in a letter to the Pennichuck utilities, the City stated that it "will *now* proceed

under RSA 38:10 to petition the Public Utilities Commission in order to complete the acquisition of the plant and property specified in Nashua's letters sent earlier under RSA 38:6." *See* letter from City of Nashua dated March 26, 2003, attached as Exhibit B (emphasis added). And just last month, the City's attorney informed the Nashua Aldermen that the City's petition was "already prepared and is ready to file." *See* excerpt from transcript of March 16, 2004 meeting of Nashua Budget Review Committee ("Budget Comm. Transcript") attached as Exhibit C. Not only was the petition prepared in advance, the City's consultant, as he told the Aldermen at the March 16 meeting, had already developed "some very hard numbers on what that purchase is going to look like and why those numbers are the price." *See* Budget Comm. Transcript attached as Exhibit D.

16. The City has posited no reason why it could not have complied with the Commission's rules. The City's failure to comply with those rules is particularly suspect given the long history of this case prior to its filing with this Commission. Incredibly, the vast majority of the documentation included with the City's filing is simply a copy of the materials previously filed in New Hampshire Superior Court *by Pennichuck Corporation and its subsidiaries*, rather than the type of factual and legal support required by Puc 202.11 and 204.01.

17. Without the additional facts that are a necessary part of the City's direct case in this proceeding, it is impossible to know exactly what assets the City is seeking to take, whether the City has the legal authority to take those assets (including whether the assets are even included within the scope of the vote taken by the citizens of Nashua in January 2003), what amount the City is proposing to pay for the assets it is attempting to take and the basis for that value, and numerous other matters.

18. The City's petition appears to be nothing more than a place holder, either to buy time to allow the City to prepare its case further or to respond superficially to the issues raised in

the litigation pending in New Hampshire Superior Court regarding the City's prior bad faith attempts to take Pennichuck Corporation and/or its utility subsidiaries. Perhaps the best evidence of the fact that the petition is merely intended to buy time is the fact that the entity to which Nashua says it intends to transfer the assets of PAC, PEU and PWW *does not yet exist* (and may never exist), yet it is the very existence of that entity and the intended transfer of assets to it that, according to the City, will support a finding by this Commission that the proposed taking is in the public interest.

19. At best, Nashua's petition is grossly premature. At worst, it was filed in bad faith and there is no factual or legal basis that can support the proposed taking. In either case, the petition should be dismissed in its entirety for failure to comply with the Commission's rules.

III. The City's Petition Should Be Dismissed Because the Regional Water District to Which the City Claims It Intends to Transfer the Utility Assets Does Not Exist.

20. Given the City's reliance on the creation of a regional water district to support its claim that the proposed taking is in the public interest, it is clear that the City's petition is premature and should be dismissed.

21. In order to assess the City's public interest claim, the Commission will need to know, among other things, which municipalities currently served by PAC, PEU and PWW are members of the district. At this point, not only is the membership of the water district unknown, the very existence of the district is in doubt.

22. Because the water district does not yet exist, there is no way for the Commission to determine who the owner of the assets to be taken will be or whether the proposed owner has the technical, managerial and financial ability to provide water service consistent with the quality delivered by PAC, PEU and PWW. A determination of public good will require the Commission, at a minimum, to determine that the new owner will be able to provide the same or better service than PAC, PEU and PWW. Simply put, the Commission cannot conduct a public

interest analysis without knowing who will own and operate the water systems in the twenty-two communities served by PAC, PEU and PWW and, in fact, it is a near certainty that many of the municipalities involved would have a very different position on whether the taking should go forward at all depending on whether the ultimate owner was the City of Nashua rather than a regional district.

23. Because the basic facts relied on by the City and necessary to resolve its petition have yet to be determined, the Commission should not proceed in this matter and should instead dismiss it in its entirety.

IV. To the Extent that the Commission Determines that Any Portion of this Proceeding Should Not Be Dismissed, the Commission Should Stay the Proceeding Until the Superior Court Rules on the Declaratory Judgment Petition.

24. On February 4, 2004, Pennichuck Corporation, PEU, PAC and PWW filed a petition for declaratory judgment in the Hillsborough County Superior Court, Southern District, Docket No. 04-E-0062 (the "Superior Court Litigation"), seeking that Court's intervention to protect Pennichuck Corporation and its regulated utilities' constitutional rights. The return date in the Superior Court Litigation is April 6, 2004.

25. The Superior Court Litigation raises a host of claims that could dispose of the City's petition without the need for the Commission to undertake what is certain to be a long and intensive proceeding regarding complex legal and factual matters, a proceeding that is likely to be exceedingly costly for the parties and potentially for the Commission. For example, the declaratory judgment petition in the Superior Court Litigation requests that the Court declare RSA 38:9-11, the very provisions invoked by the City in this proceeding, unconstitutional and violative of the three utilities' fundamental rights under Pt. 1, Article 12 of the New Hampshire Constitution because the statute does not provide for a trial by jury, a right that exists in other condemnation actions. In addition, the Superior Court Litigation will address the

constitutionality of the process set forth in RSA 38:1-13, including whether those provisions have resulted in an inverse condemnation of the utilities' assets without compensation.

26. In addition to addressing these constitutional infirmities, the Superior Court will also be determining whether the City is even authorized to bring the action that it has now filed with this Commission, given the City's failure to promptly file an RSA Ch. 38 proceeding with the Commission, and given that the provisions of RSA Ch. 38 do not appear to provide the City with the necessary authority to take assets in municipalities that are served by water systems that are not even physically connected to the system that serves Nashua and, in many cases, are owned by companies that do not provide utility service in Nashua.

27. Because the Superior Court Litigation directly implicates the process to be employed by the Commission in this matter and the legitimacy of the docket itself, it would be wasteful and inefficient for the Commission to proceed prior to a definitive ruling by the Superior Court. The additional expense of litigating this matter before the Commission, when a ruling from the Superior Court could dispose of the matter in its entirety, would also place an unnecessary burden on PAC, PEU, PWW and their customers. Such a use of public and private resources is not in the public interest.

28. For these reasons, PAC, PEU, and PWW request that, to the extent that the Commission does not otherwise dismiss any of Nashua's claims, any and all remaining dockets related to this matter be immediately stayed pending final determination by the New Hampshire Superior Court in Docket No. 04-E-0082 and any appellate rights that flow therefrom.

WHEREFORE, Pennichuck East Utility, Inc., Pittsfield Aqueduct Company, Inc. and Pennichuck Water Works, Inc. respectfully requests that the Commission:

A. Sever Nashua's petition into three separate dockets;

B. Dismiss Nashua's petition with regard to PAC and PEU on the basis that Nashua has no authority to take the assets of those companies pursuant to RSA Ch. 38 and the Commission has no jurisdiction to hear such a proceeding;

C. Dismiss Nashua's petition with regard to PAC, PEU and PWW on the basis that Nashua failed to comply with the requirements of N.H. Code of Admin. Rules 202.11 and 204.01 and/or that Nashua's petition is premature;

D. Alternatively, stay this proceeding pending final resolution of the Superior Court Litigation; and

E. Grant such other and further relief as may be just and equitable.

Respectfully submitted,

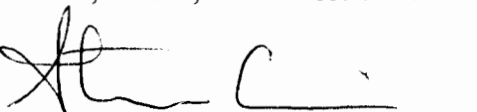
Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Works, Inc.

By Their Attorneys

MCLANE, GRAF, RAULERSON & MIDDLETON, P.A.

April 5, 2004

By:

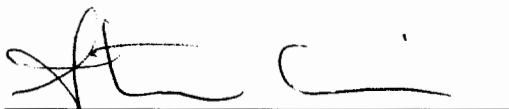


Thomas J. Donovan, Esq.
Steven V. Camerino, Esq.
Sarah B. Knowlton, Esq.
15 North Main Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion has been forwarded to F. Anne Ross, Esq., Consumer Advocate, and Robert Upton, II, Esq. and David R. Connell, attorneys for the City of Nashua.

Dated: April 5, 2004



Steven V. Camerino

TOWN OF PITTSFIELD*Incorporated March 27, 1782*

DW 04-048
City of Nashua
Exhibit A to Pennichuck Motion
Page 1 of 2 to Dismiss

OFFICE OF SELECTMEN

P.O. Box 98

Pittsfield, New Hampshire 03263

603-435-6773

FAX 603-435-7922

April 8, 2003

Pittsfield Aqueduct Company, Inc.
Pennichuck Corporation
4 Water Street
PO Box 448
Nashua, New Hampshire 03061-0448

Dear Sirs:

At the 2003 Annual Town Meeting under Article 23 of the Warrant, the Town of Pittsfield voted by ballot 163 in favor and 6 opposed, to establish a municipal water system, and to authorize the Board of Selectmen to purchase, or otherwise acquire, the plant and water works of the Pittsfield Aqueduct Company, Incorporated for municipal use and for use of the inhabitants of the Town of Pittsfield, in accordance with RSA 38:4.

The Board of Selectmen, in accordance with such vote, and under the provision of RSA 38:6 hereby notifies the Pittsfield Aqueduct Company, Incorporated of such vote. The governing body, the Board of Selectmen, has determined that it is necessary for the Town of Pittsfield to purchase all of the property and utility plant within the Town of Pittsfield together with all of the records, plans, engineering documents; meter reading equipment and records; billing and collection materials and records; treatment plant records and maintenance and operations manuals; all tangible property, materials, assets and supplies; all intangible property and assets; all historical documents related to the plant and its property and operations; and such other items as may be necessary to operate and maintain the plant and its systems.

In accordance with the requirements of RSA 38:10 the Town inquires if the Pittsfield Aqueduct Company, Incorporated, a whole owned corporation of Pennichuck Corporation elects to sell the Pittsfield Aqueduct Company, Incorporated in its entirety, as identified, to the Town of Pittsfield.

Representatives of the Town of Pittsfield are willing to meet with you to discuss the subject of acquiring Pittsfield Aqueduct and to engage in meaningful discussions pertaining to that subject. Please note that a reply is required by Statute, within 60 days (RSA 38:7).

We look forward to hearing from you on this important subject.

Very truly yours,


Frederick T. Hast


Thomas E. Marston


Donna M. Keeley

Board of Selectmen



Mayor Bernard A. Streeter
Nashua, New Hampshire

March 26, 2003

Maurice Arel, CEO
Pennichuck Corporation
P.O. Box 448
Nashua, New Hampshire 03061

RE: City of Nashua Acquisition of Pennichuck Water System

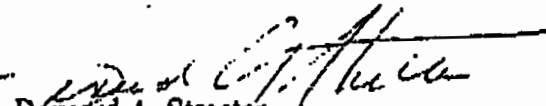
Dear Mr. Arel:

This is in response to your recent letters indicating that your company is not willing to sell plant and property of the Pennichuck water system to the City of Nashua.

As you know, the City has determined that the acquisition is in the public interest based on the 78 percent vote of the people at the special election in January and the vote of the Board of Aldermen to acquire all plant and property of the three regulated utilities.

The City will now proceed under RSA 38:10 to petition the Public Utilities Commission in order to complete the acquisition of the plant and property specified in the City's letters sent earlier under RSA 38:6.

Very truly yours,


Bernard A. Streeter
Mayor

cc - Board of Aldermen

Seasquicznlgennlsl

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is on vacation so the suggestion is that we may want to hold this Resolution in committee. Do I have any motions with regard to R-04-13?

MOTION BY ALDERMAN DEANE TO HOLD O-04-13 IN COMMITTEE
MOTION CARRIED

R-04-14

Endorsers: Mayor Bernard A. Streeter
Alderman-at-Large Brian S. McCarthy

RELATIVE TO TRANSFERRING \$100,000 FROM GENERAL CONTINGENCY – ENERGY COSTS – ACCOUNT 591-86633 AND \$200,000 FROM ANTICIPATED BOND INTEREST – NEW – ACCOUNT 592-85011, TOTALING \$300,000, INTO CAPITAL IMPROVEMENTS – WATER SYSTEM ACQUISITION – ACCOUNT 699-07, TO HIRE CONSULTANTS AND ATTORNEYS FOR PUBLIC UTILITIES COMMISSION AND COURT PROCEEDINGS IN CONNECTION WITH ACQUIRING PENNICHUCK WATER WORKS

MOTION BY ALDERMAN DEANE TO RECOMMEND FINAL PASSAGE

ON THE QUESTION

Chairman Bolton

I understand that one of the consultants proposed to be employed, Mr. SanSoucy, is here and I think the presentation that appears to be set up is his. Am I right on that? With the acquiescence of the committee this might be an appropriate time.

Robert Upton, Esq.

What we thought the Board should know and this committee should know about are what the remaining steps were in this acquisition if you were to vote this money, and the city were to proceed. You've come through really at this point the most difficult part of what I call the RSA Chapter 38 acquisition procedure. It is not easy to get 2/3 vote of the Board and then the overwhelming confirming vote that you got of the City voters. When the towns along the Merrimack and some of the other rivers were thinking about buying the PSNH hydro in deregulation that was by far the most difficult part of the process for them was getting those votes.

The procedure going forward at this point is largely directed at two things; first convincing the PUC that the acquisition is in the public interest and then determining the price. It starts with a simple petition to the PUC, which is already prepared by the way and is ready to file – it relates the history of the proceedings and ask the PUC because the parties don't agree to determine what property is in the public interest for the city to acquire and to set the price. Remember that the city is asking thus far to acquire property outside of the City of Nashua so the PUC has to make a determination that acquiring that property is in the public interest. Notwithstanding the 2/3 vote of this council. By Statute that 2/3 vote creates a presumption that it is in the public interest, but because property outside of the city's boundaries is going to be acquired if you go forward with this the PUC has to make that determination.

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Most likely Pennichuck, if you do go forward with this acquisition, will argue that it is not in the public interest so the PUC will have to make that determination. In a prior case, when a utility made this argument what the PUC did when it received the petition was bifurcate the issues, in other words split them up, initially dealt with the question of public interest first and then to the extent that the city wanted to go through with the acquisition after that determination was made it looked at value. I think that I prefer if we can to do public interest and valuation at the same time. It may be that the PUC is not going to let us do that. They are creatures of habit generally. Having bifurcated these issues in a prior proceeding it is likely that they would do that again, but I would prefer in this case to see value and public interest dealt with simultaneously because those questions are largely the same in this case because they are driven by rates. Rates are going to determine the value that you will have to pay for it and it will determine whether or not it is in the public interest. I think they are much more closely connected in a case like this where rates are going to be so important and I would hope that the PUC would deal with them together.

The resolution of those issues before the PUC is similar to litigation of any kind in any forum – there is a significant amount of discovery that occurs, there is a motion practice that occurs, and ultimately there is a trial. The only thing unusual are the time limits I think that the PUC generally puts on for discovery. They are more immediate than the Superior Court would require. It is a much faster turnover of discovery. The other thing that is a little bit unusual about it is the way direct evidence is presented. It is all done with written pre-filed testimony that everybody gets a chance to review before you actually have a trial.

Both of those questions and issues are expert driven – that is that the testimony of the experts is largely going to determine the outcome, and that is generally true with these kinds of cases. There are a couple of things the City can do I think to improve its position especially in the issue of public interest. The first I think is to complete the negotiations for the formation of the Regional Water District. We want those communities, those other communities, lined up to support our petition, and the Regional Water District will be I think the key to getting their support. The PUC and its staff has for a long time supported the idea of regionalization. If they think that will be one of the results of the acquisition I think that will work in the city's benefit if it goes forward with this acquisition. Likewise if we don't become a part of the Regional Water District I think it might work against us. What I am most concerned about are those other towns in which Pennichuck property is located not supporting us and have the PUC ask what is the benefit of just having the city acquire those assets and simply replace Pennichuck in the scheme of things.

Secondly it is important that the city present a united front. It is very important that the PUC in all of this see that the city has the political will to carry this acquisition through if the price is going to be right. If you decide to do this I hope that there won't be public second-guessing. The PUC reads the papers and it won't like that. Anyway after a trial the PUC makes a decision, which is appealable by either party to the New Hampshire Supreme Court. There aren't many reasons I can think of why the city would want to appeal unless they do something very unusual in setting the price or if it concluded that for example that the city couldn't acquire property outside of Nashua – I think that might be an appealable issue, but short of something like that I can't see a lot of reasons why I would ever recommend appealing a decision. The company on the other hand might appeal for a variety of reasons. Don't forget that we're taking

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– if we do this we are taking their operational companies, their regulated operational companies. They will be concerned about price. They will be concerned about trying to delay the process. They will be concerned about trying to preserve their assets.

After the price is finally set, RSA:38-13, which is a great and important provision permits you to decide within 90 days whether or not to acquire the property at that price. This is I think an extremely important right and it was built into the Statute in 1997 during that time that I was representing those towns that were seeking to acquire the PSNH hydros. Under eminent domain procedure, which was in effect at the time, a municipality when it took property – any kind of property, took a title to it immediately and then it would go fight about the value. Whatever price was set by the court the municipality was stuck with it. I thought especially having dealt with utility value for a fair bit of time that these were pretty enormous values for a municipality to get simply stuck with so I encouraged the legislature and they did it to give municipalities a second look at the acquisition after the price was set so that if it was too high, if everybody thought it was too high, that there was a procedure for an out. The city or town could say this is just too much money we don't want to do it at this price. I thought that was very important to have just because of the enormous values that you are dealing with when you are dealing with utility values.

Just as an example say the PUC sets a price of \$200 million for these assets and after they set that price and Mr. SanSoucy and the financial people conclude that in order to pay that you would have to raise rates enormously you probably aren't going to want to do this. There is that opportunity for you to then get out. I know immediately what you are thinking because it is the first thing that always comes to my mind is if we go all the way through this and they set a price of \$200 million or anything that is above where we want to do it we are going to have spent a lot of money on guys like me and SanSoucy and the other experts in this thing and we will not get it back because the only way you get it back is if you actually go forward with the purchase you can bond all of that – you can put all of that into your revenue bonds and then that gets paid for instead of by taxpayers it gets paid for by the ratepayers. While that is true if you get to the end of the day and decide not to go forward that money has been spent and you don't get it back remember why you are getting out – you are getting out because that value has been set too high. You can now use that value, that too high value that was too high for you to buy it – that is a determination of fair market value that you can use for setting your assessment level.

What I tried to do was give you an example – your current assessment of property in Nashua is about \$54 million at a 75% ratio. I didn't know what your tax rate was – it used to be around \$23 so I used \$23 as that tax rate. The tax on \$54 million is \$1.2 million. If the PUC set the value of the Nashua property for example at \$100 million essentially doubling so that you didn't want to get out that tax would be \$2,300,000 for an increase of about \$1.1 million. I think what I am saying is the increased tax that you might get – that you would get from that increased value is one method that you might use to make sure you get yourself paid back for what you spent on acquisition costs. It is a interesting double sword. The company is in the position where it wants to get the absolute most that it can get from the PUC, but if it gets too much and you back out that upper level is then going to be the level of taxation and they will get hammered with taxes so it is a double-edged sword.

Assuming you vote to acquire the property following the setting of the price by the PUC you then have to move forward and issue revenue bonds and close the purchase and that always

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takes longer than you think. In a nutshell that is really sort of what you would have to do going forward from here. I haven't referred to this point the lawsuit against the city, but that obviously is going to have to be defended as you go along too. I don't see a huge amount of risk in that lawsuit right now and I am guessing that its purpose was primarily to try to keep the city from moving ahead. Dave Connell and I think we should aggressively defend it if you go forward at the PUC and try to get it concluded as soon as we can. If we don't go forward I am again guessing that if the company prevail it will be dismissed or that we can reasonably settle it. I think its primary purpose was to get you not to go forward. There is always, however, the possibility that the company will see a failure to go forward as all of this was done to obstruct their legitimate attempt to merge with Philadelphia Suburban. They have alleged that in this lawsuit and that they will convert the suit to one for money damages. They currently aren't seeking money damages in that lawsuit, but they can convert it over pretty easily if that is what they were attempting to do and try to get the city to pay for the losses that they feel occurred as a result of the failed merger. If that happened that would be a considerable risk in exposure. Whenever there is that large an exposure the risk is considerable.

To give you a likelihood of an unfavorable outcome I will say as I say when I respond to auditors always it is neither probable nor remote. It is very hard to tell you what that could be, but I think it could be settled. My judgment now is that it could be settled if you walked away from it probably with very little consequence to the city. It is only if the company decides that they want a pound of flesh from you that that would happen.

Alderman LaRose

I have a parliamentary question – Mr. Upton stated something about a 2/3 vote – I thought we were doing a transfer so that is really a majority vote – am I correct?

Chairman Bolton

I think Attorney Upton was referring to a previous vote we had to take to put this matter on the ballot.

Robert Upton, Esq.

In order to get this thing off the ground, this Board of Aldermen had to vote by 2/3 majority to consider acquisition of the company.

Chairman Bolton

The vote we are considering now is by majority.

Alderman Deane

Could I ask Attorney Upton a question – I want to go back in time a little bit to when you first came to us and were sitting over there. You had stated that if the City was going to move forward they should start the eminent domain proceedings immediately.

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Robert Upton, Esq.

We are the city's consultants. We're not the regional district's consultants, and if an agreement isn't concluded with the regional district that is to the benefit of the city we are going ahead for the city.

Alderman McCarthy

A question for Attorney Upton regarding the 800-pound gorilla. Would you consider a Charter in which Nashua and Nashua alone gets to set the rates and in which Nashua and Nashua alone gets to determine the capital improvements plan, and in which Nashua and Nashua alone gets to determine whether bonding is issued to pay for anything one in which we are the 800 pound gorilla?

Robert Upton, Esq.

Yeah, and that is where I understood that the negotiations largely were getting to. The key thing is who controls the rates, who controls the spending. That is what is important in the regional district, and as long as Nashua can ultimately have that control I think the other issues are probably to some degree maybe window dressing. The important thing is who will set the rates. It should be – that is the benefit you get for your risk is that you get to set them.

Chairman Bolton

Unless there are other questions now this might be a good time to let Mr. SanSoucy proceed with his presentation to us.

George SanSoucy

What I have prepared tonight at the request of the Mayor's office and Mr. Connell your attorney is a very concise presentation on where we are, what we are proposing to purchase should you go ahead, and some very hard numbers on what that purchase is going to look like and why those numbers are the price. We are going to throw out the price tonight – it is a shot over the bow so to speak. I will guarantee you by 8:00 a.m. tomorrow morning everything I say tonight they will say is wrong and that is the way this process works.

I am the expert that was involved with Hudson – did the deal for the Town of Hudson and we actually took Consumers Water in the State of New Hampshire completely and basically threw them out of the State. I negotiated the sale of what is now Pennichuck East to Nashua so I do know what is involved in that sale. I also know how those towns got that system and I am going to hopefully enjoy helping you possibly resolve some of the regionalization issues to everyone's benefit hopefully because I know what is involved in that sale for example. While Philadelphia Suburban was trying to buy Pennichuck I had the good fortune of being hired by the County of Ashtabula, OH – the County took by eminent domain Philadelphia Suburban in Ashtabula, OH with the exception of the city of Geneva. It was the Consumer System – Philadelphia bought all of Consumer. Philadelphia bought the company that we ran out of Hudson in May. They have a division in OH and they had county property in Ashtabula. We successfully bought that system. The Judge in that case ordered the parties into a room with his personal mediator, Mr.