

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant To RSA 38:9

Order Denying Motion for Rehearing

O R D E R N O. 24,448

April 4, 2005

I. PROCEDURAL HISTORY AND BACKGROUND

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

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

II. POSITIONS OF THE PARTIES

A. Pennichuck Water Works, Inc.

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

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

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

B. Town of Merrimack

The Town of Merrimack joined PWW in its Motion, stating that though it has not stated a position on Nashua's petition to take the property of PWW by eminent domain, it has "expressed skepticism as to some of the claims in support thereof."

Merrimack also notes that "a substantial part" of the franchise and utility property being sought is located in Merrimack and serves its main industrial area. Among the customers located in Merrimack is Anheuser-Busch, described as PWW's largest customer.

According to Merrimack, its residents have not had an opportunity to vote on the taking; they should not be "disenfranchised by Nashua's arbitrary action" taking property beyond Nashua's bounds.

C. City of Nashua

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

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

III. COMMISSION ANALYSIS

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

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

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

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

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

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

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

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

Based upon the foregoing, it is hereby

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

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

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary