

1 STATE OF NEW HAMPSHIRE

2 PUBLIC UTILITIES COMMISSION

3 **July 28, 2004** - 10:05 a.m.
4 Concord, New Hampshire

5 NHPUC AUG02'04 PM 2:11

6 RE: DW 04-048

7 CITY OF NASHUA, NEW HAMPSHIRE:

8 Petition for valuation pursuant to RSA 38:9.

9 (Prehearing conference for limited purposes
10 as specified in order of notice dated 6/22/04)

11 PRESENT: Chairman Thomas B. Getz, Presiding
12 Commissioner Graham J. Morrison

13 Diane Bateman, Clerk

14 APPEARANCES: Reptg. the City of Nashua, NH:

15 Robert Upton, II, Esq.

16 Matthew H. Upton, Esq.

17 Reptg. Pennichuck Water Works, Pennichuck
18 East Utilities & Pittsfield Aqueduct Co.:

19 Steven V. Camerino, Esq.

20 Thomas J. Donovan, Esq.

21 Reptg. Merrimack Valley Reg. Water District:

22 Stephen J. Judge, Esq.

23 Reptg. Merrimack River Watershed Council:

24 Elizabeth Coughlin, President

Reptg. Nashua Regional Planning Commission:

Stephen Williams

COURT REPORTER: STEVEN E. PATNAUDE, CCR

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APPEARANCES: (C o n t i n u e d)

Reptg. the Towns of Amherst & Milford:
William Drescher, Esq.

Reptg. the Towns of Litchfield & Hudson:
Jay Hodes, Esq.

Reptg. the Town of Pittsfield:
Laura Spector, Esq.

Fred Teeboom, pro se

Barbara Pressley, pro se

Reptg. Residential Ratepayers:
F. Anne Ross, Esq.
Susan Weiss Alexant, Esq.
Office of Consumer Advocate

Reptg. PUC Staff:
Marcia A. B. Thunberg, Esq.

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P R O C E E D I N G S

CHAIRMAN GETZ: Good morning. We'll open the prehearing conference in docket DW 04-048, fair market value of Pennichuck, petition filed by the City of Nashua. Before I start with the summary of where we are procedurally at this point, let me address a few issues of how we conduct this proceeding, for those of you who are not familiar with the process. First thing I'll do is give a quick summary of where we are and a summary of the order of notice, and then we'll address interventions. Well, before that, we'll take appearances. And, what that means is, parties who have moved to intervene, if we can just go around the room, starting with the Petitioner, and if you can indicate your name and who you represent, and then the court reporter will have that information. So, at that point, it would be just the parties who have moved for formal intervention who would make an appearance. After we have had the appearances for this proceeding, then I will address interventions. I have a long list of interventions, and then we'll give an opportunity, if there are any objections to the interventions, to hear argument about the interventions. And, then, we will turn to the report that we had asked for from the City of Nashua and from Pennichuck, with respect to other court proceedings, which

1 was indicated, if you read the order of notices, the main
2 reason, we're trying to understand whether this proceeding
3 should proceed in light of other proceedings that are going
4 on. All I'll be asking for at that time will be from the
5 City and from Pennichuck or the parties to those other
6 proceedings to just give me the -- give us the facts on the
7 procedural status of those, of those other proceedings. I'm
8 not asking for argument at that time, and it will be just
9 confined to the two parties to those proceedings to give us
10 a status report.

11 Then, we'll turn to the three issues of oral
12 argument, and we'll go in reverse order as they're listed in
13 the order of notice. My understanding is, two of the three
14 are probably deferred and we're not going to take up today,
15 so hear from them first. And, then, we'll turn to the main
16 issue today, which is whether it's appropriate for us to
17 consider to deal with the underlying petition. Our process
18 there is to let the Petitioner go first, which would be the
19 City of Nashua, they also get to go last, in the way that
20 our practice is conducted here. And then -- But we'll start
21 with the Petitioner, and then to the other folks who have
22 intervened will get an opportunity, and then, in that
23 grouping, the last person will be Pennichuck, because
24 they're obviously opposed, and then we'll give the final

1 opportunity for closing to the Petitioner.

2 So, that's how the proceeding will go today.
3 So, let me turn to some of the administrative issues. On
4 March 25, 2004, the City of Nashua filed with the Commission
5 a petition for valuation pursuant to RSA 38:9. New
6 Hampshire RSA Chapter 38 authorizes municipalities to
7 establish, expand, take, purchase, lease, or otherwise
8 acquire, maintain and operate utilities for the use of its
9 inhabitants. Nashua seeks the Commission's determination of
10 a fair market value of the plant and property of Pennichuck
11 Corporation's three regulated utilities, Pennichuck Water
12 Works, Pennichuck East Utilities and Pittsfield Aqueduct
13 Company.

14 On June 22nd, 2004, the Commission issued an
15 order of notice setting the prehearing for this morning.
16 Among other things, the order of notice notes that, inasmuch
17 as the superior court had denied Pennichuck's Motion for
18 Preliminary Injunction, the Commission determined,
19 consistent with a prior secretarial letter, that it's
20 appropriate to issue the order of notice and it's time to
21 hold a prehearing conference for the limited purposes of
22 addressing motions for intervention, receiving a report from
23 the City of Nashua and the Pennichuck utilities on the
24 current procedural status of other court proceedings, and to

1 hear oral arguments on certain preliminary matters.

2 It noted in the order of notice that there
3 would not be a technical session following the prehearing
4 conference today, and that the Commission would defer, among
5 other things, hearing statements of position and
6 establishing a procedural schedule, pending resolution of
7 the preliminary matters.

8 Okay. And, if we can begin with appearances
9 from the City of Nashua.

10 MR. UPTON: My name is Robert Upton.
11 Good morning. I represent the City of Nashua. With me
12 today is my partner Matthew Upton, and corporation counsel
13 David Connell. Also with us is Philip Munck, a consultant
14 to the City.

15 CHAIRMAN GETZ: Good morning.

16 MR. JUDGE: Good morning. My name is
17 Stephen Judge. I'm with the law firm of the Wadleigh, Starr
18 & Peters, and I represent the Merrimack Valley Regional
19 Water District.

20 CHAIRMAN GETZ: Good morning.

21 Mr. Teeboom.

22 MR. TEEBOOM: Yes. My name is Fred
23 Teeboom, and I requested to be a intervenor. And, when --
24 Mr. Chairman, when do I make a statement of why I wanted to

1 be an intervenor?

2 CHAIRMAN GETZ: At this point, we have
3 your filing of why you want to be an intervenor. What we're
4 trying to do now is just establish who's here for the
5 record. I'll note all the motions for intervention after we
6 go around the room. And, then, what I'll really need to do
7 at that time is to find out if there's objections to any of
8 the particular motions to intervene. So, we don't need a
9 statement on why you want to intervene. We'll just, if
10 there are objections, we may have to get into that.

11 MR. TEEBOOM: Thank you. Thank you.

12 MS. COUGHLIN: I am Elizabeth Coughlin,
13 and I'm president and representing Merrimack River Watershed
14 Council. Good morning.

15 CHAIRMAN GETZ: Good morning.

16 CMSR. MORRISON: Good morning.

17 MS. PRESSLEY: Good morning. I'm Barbara
18 Pressley. The notice has incorrectly attributed me as
19 representing the Pennichuck Watershed Council. That is
20 incorrect. I represent myself, and was a -- the president
21 of the Citizens for Local Water Control, which is a local
22 organization that was formed. So, if you'd be so kind to
23 change that for the record, I would appreciate that.

24 CHAIRMAN GETZ: And, I'm sorry, the

1 notice, I've got a lot of paper work here. What notice --
2 Are you referring to the service list?

3 MS. PRESSLEY: The service list, --

4 CHAIRMAN GETZ: Okay.

5 MS. PRESSLEY: -- under my name, says
6 "Pennichuck Watershed".

7 CHAIRMAN GETZ: Okay. We'll take care
8 of that, if that's a mistake.

9 MS. PRESSLEY: Thank you.

10 CHAIRMAN GETZ: Anyone else?

11 MR. WILLIAMS: Good morning. I'm Steve
12 Williams, with the Nashua Regional Planning Commission.
13 We've petitioned to intervene.

14 CHAIRMAN GETZ: Thank you.

15 MR. DRESCHER: Good morning, Mr.
16 Chairman. My name is William Drescher. I'm an attorney in
17 Milford, New Hampshire, and I represent the Towns of Amherst
18 and Milford. With me today are the Chairman of the Board of
19 the Selectmen for the Town of Milford, Cynthia Herman, and
20 also Katherine Chambers, who is the Town Administrator for
21 the Town of Milford.

22 CHAIRMAN GETZ: Thank you. Good
23 morning.

24 MR. HODES: Good morning. My name is

1 Jay Hodes. I'm an attorney from Manchester, New Hampshire.
2 I'm here on behalf of the Town of Litchfield and the Town of
3 Hudson. And, I have filed a petition to intervene on behalf
4 of both towns.

5 CHAIRMAN GETZ: Thank you. Good
6 morning.

7 MS. SPECTOR: Good morning. My name is
8 Laura Spector. I'm an attorney from Mitchell & Bates, and
9 I'm here on behalf of the Town of Pittsfield, and we filed a
10 motion to intervene.

11 CHAIRMAN GETZ: Good morning.

12 MR. CAMERINO: Good morning,
13 Commissioners. Steve Camerino, from McLane, Graf, Raulerson
14 & Middleton, and with me today is my partner, Tom Donovan.
15 Also with me at counsel table is Donald Correll, and
16 directly behind him is Steve Densberger, both with the three
17 Pennichuck utilities. We are appearing on behalf of those
18 utilities, Pennichuck Water Works, Inc., Pittsfield Aqueduct
19 Company, and Pennichuck East Utilities.

20 And, let me just also note for anyone in the
21 room, we submitted this morning an objection to the
22 Merrimack Valley Regional Water District's motion to
23 intervene. I believe I have handed out copies to everybody
24 in the room. But, if there is an intervenor who has not

1 received one, I would be happy to make it available.

2 CHAIRMAN GETZ: And, we have a copy.

3 MR. CAMERINO: Thank you.

4 MS. ROSS: Good morning, Commissioners.

5 Anne Ross, with the Office of Consumer Advocate,
6 representing residential ratepayers. And, with me today is
7 Susan Weiss Alexant and Ken Traum.

8 CHAIRMAN GETZ: Good morning.

9 CMSR. MORRISON: Good morning.

10 MS. THUNBERG: Good morning,
11 Commissioners. Marcia Thunberg, representing Staff. And,
12 with me today is Mark Naylor, Doug Brogan, Jim Lenihan and
13 Jayson LaFlamme. Thank you.

14 CHAIRMAN GETZ: Good morning.

15 CMSR. MORRISON: Good morning.

16 CHAIRMAN GETZ: Okay. Let me go through
17 my list to make sure we have everything. I also have, in
18 addition to the people who have made appearances today, I
19 have an intervention by the Town of Bedford, by the Town of
20 Hollis, by the Town of Raymond, by the Town of Londonderry
21 and, I'm sure I have this right, the Nashua Regional
22 Planning Commission, is Mr. Williams?

23 MR. WILLIAMS: Steve Williams.

24 CHAIRMAN GETZ: Okay. Is there anyone

1 who I've missed who intends to make a motion to intervene?

2 (No verbal response)

3 CHAIRMAN GETZ: Okay. Hearing nothing,
4 then given the appearances today and the other motions to
5 intervene, I only see on the record one objection to the
6 intervention, and that's with respect to Merrimack River
7 Watershed Council. Mr. Camerino, or Mr. Upton, for that
8 matter, are there any objections to any of the motions to
9 intervene?

10 MR. UPTON: I don't, on behalf of the
11 City, object to any of the motions. I do want to just say,
12 with respect to Mr. Teeboom, that he represents that he is
13 the representative of the 1,800 voters who voted against the
14 resolution in the special election. We don't have any
15 concerns about Mr. Teeboom representing himself. We don't
16 think he represents the 800 -- 1,800 voters who voted
17 against it, without something more from them.

18 CHAIRMAN GETZ: Okay. Thank you. Any
19 other objections, Mr. Camerino?

20 MR. CAMERINO: No other objections. I
21 just want to note for clarification, our objection is to the
22 Water District's intervention, not the Regional -- not the
23 Watershed Council's intervention.

24 CHAIRMAN GETZ: Thank you for that

1 clarification. Well, then, let's get a response on these
2 two issues then. Mr. Judge, then, I guess it's -- do you
3 want to respond to the objection?

4 MR. JUDGE: I would respond in the first
5 instance by drawing the Commission's attention to the motion
6 to dismiss that was filed by Pennichuck Corporation. There
7 are two sections that suggest that the Regional Water
8 District is a necessary party to this action, in order for
9 the Commission to decide whether it's in the public interest
10 for Nashua to proceed with its petition. I don't think they
11 can have it both ways. They can suggest in their initial
12 filings that we must be here, and now that we're here, of
13 course, they did that when they were perhaps hoping that the
14 district would not be established, but now that we're here,
15 of course, we shouldn't be here, I would suggest an absurd
16 position. And, it's further absurd by the fact that Nashua
17 has made in its petition the representation that it intends
18 to turn the assets, if they are successful in their
19 petition, over to the Regional Water District. I don't
20 believe there can be any real question that the District
21 needs to be here as a vital part of these proceedings. So,
22 I would ask you that you deny the objection and allow the
23 District to intervene.

24 CHAIRMAN GETZ: Okay. Thank you.

1 Mr. Camerino.

2 MR. CAMERINO: Thank you, Mr. Chairman.
3 First of all, I wouldn't disagree with Mr. Judge's
4 characterization of our motion or of Mr. Upton's petition on
5 behalf of the City. The concern I have, and we thought the
6 District was going to be the real party in interest here,
7 and that's why we said what we said in our motion to
8 dismiss. It's our understanding, based on a clear reading
9 of the initial petition, that Nashua was justifying its
10 public interest argument on the basis that it intended to
11 transfer the assets to the Water District.

12 On July 19th, I sat in New Hampshire Superior
13 Court and heard Mr. Upton tell Chief Judge Lynn of the
14 Superior Court that "Nashua would decide, after this
15 proceeding was completed, whether it would then transfer the
16 assets to the District." And, he told Judge Lynn that
17 "Nashua is not a stalking-horse for the District".

18 Having heard that, it seems to me that the
19 District has no role in this proceeding. Now, Mr. Upton is
20 saying "Nashua will acquire these assets. And, when the
21 Commission is out of the picture, and Nashua decides whether
22 to go forward, it will then on its own decide what it will
23 do with those assets." And, so, if the District has an
24 interest, that would be determined down the road. But

1 that's the reason for our, if Mr. Judge wants to phrase it
2 that way, "change of position", is because, apparently, the
3 City has changed its position.

4 CHAIRMAN GETZ: Well, in reading your
5 objection, it seems that there's a -- largely it goes to the
6 issue of what I would look at is orderly conduct of the
7 proceeding, whether there's going to be some consolidation
8 of parties, conduct of discovery and testimony, seems to be
9 the -- looked to me to be the larger issue that you're
10 addressing. You're also challenging, though, whether they
11 have a recognizable interest that would allow them to
12 intervene?

13 MR. CAMERINO: That's correct. You're
14 certainly correct that we have a concern about the orderly
15 conduct of the proceeding, for some obvious reasons. But we
16 also recognize that those concerns, to some extent, can be
17 addressed by the Commission restricting how parties
18 participate, what the scope of their intervention is, what's
19 proper discovery. And, whether parties should be here in
20 the first place is sort of a threshold issue. And, I think
21 that the Commission, on an ongoing basis, can police the
22 conduct of the proceeding, if you will.

23 CHAIRMAN GETZ: Well, Mr. Judge, it was
24 your motion, I'll give you the last opportunity to speak on

1 this issue.

2 MR. JUDGE: I certainly think that we
3 can address any problems, if there are any, regarding the
4 coordination of the players who are representing individual
5 members of the District and my representation of the
6 District as a whole. Again, I think that the District needs
7 to be here, that it is a vital part of this. I rely upon
8 the pleadings before this Commission and representations on
9 numerous occasions by the City of Nashua that it is their
10 intention to turn the assets over to the District at the end
11 of the day, assuming that that's where we get, as far as the
12 Commission is concerned.

13 CHAIRMAN GETZ: Okay. The second issue
14 then I guess goes to on interventions, Mr. Teeboom, do you
15 want an opportunity to respond to Mr. Upton's statement
16 about you representing yourself or representing others in
17 the City of Nashua?

18 MR. TEEBOOM: Yes, Mr. Chairman. That
19 representation is not the only reason that I asked for
20 intervention, particularly on this point. I, during this
21 referendum vote, voted in opposition, voted "no". Eighteen
22 hundred and sixty-seven (1,867) voters, or more than 20
23 percent of the vote, voted "no" on the referendum to allow
24 the City to proceed with the -- with the acquisition.

1 I'm not sure that the voters were
2 well-informed. I took the question to superior court, and
3 it was docket 02-E0441, asking that the City prepare pro and
4 con positions on the merit of this question, the referendum
5 question. The court denied me that motion and request to
6 have the City publish that on a technicality, but the fact
7 is the City could have, irrespective, done due diligence and
8 sent the pro and con positions. The City did not. I feel
9 that the voters were ill-informed on a very complex issue.

10 CHAIRMAN GETZ: Well, that goes to the
11 ultimate issue in this case, whether it's in the public
12 interest for a taking to occur.

13 MR. TEEBOOM: That's right.

14 CHAIRMAN GETZ: So, I think all we're
15 dealing today with are the procedural issues of whether
16 intervention should be allowed and also whether the case
17 should proceed. In the event that we rule on the
18 preliminary motions that the proceeding should proceed, then
19 we will deal with the arguments -- the substantive
20 underlying arguments of whether it's in the public interest
21 for a taking to occur. So, I think, for purposes of this
22 morning, Mr. Upton has indicated no objection to you
23 intervening in your own behalf.

24 MR. TEEBOOM: Okay. Well, I'll just

1 leave it at that.

2 CHAIRMAN GETZ: Okay.

3 MR. TEEBOOM: I voted "no", and over
4 22 percent of the population voted "no" in that vote.

5 CHAIRMAN GETZ: Okay. All right. Thank
6 you. Okay. With respect to the interventions and the
7 objections to the one intervention, we will take that matter
8 under advisement.

9 The second thing we wanted to deal with today
10 is just an update from City of Nashua and from Pennichuck,
11 with respect to the other proceedings in state and federal
12 court. And, if you could proceed, Mr. Upton.

13 MR. UPTON: Sure. The first action is a
14 Petition for Declaratory Judgment that is pending at the
15 Hillsborough County -- Hillsborough Superior Court, Southern
16 District. I think a week ago there were arguments on the
17 City's motion to dismiss the petition, and those are pending
18 -- that is pending. So that the DJ has a pending motion to
19 dismiss, and the parties also filed cross motions for
20 summary judgment. So, hopefully, it will be resolved and
21 resolved shortly. It was heard by Judge Lynn, the Chief
22 Judge. I am somewhat surprised that we don't have a
23 decision now. I expect a decision shortly.

24 The other action that is pending is an action

1 brought by the Companies against the City for money damages.
2 That was also brought in Hillsborough County South. That
3 was removed, because there were constitutional issues,
4 removed by the City to the federal court, and the City has
5 filed a motion to dismiss in the federal court all of the
6 counts, and that is currently pending.

7 I don't believe there are any other actions
8 pending, other than the rate case, which we were here
9 yesterday on.

10 CHAIRMAN GETZ: Okay. Thank you.
11 Mr. Camerino, do you have anything to add to that?

12 MR. CAMERINO: My partner, Mr. Donovan,
13 is handling the court litigation and is going to address the
14 summary.

15 MR. DONOVAN: I'm Tom Donovan. I'm
16 handling the superior court and the federal court
17 litigation. As Mr. Upton said, we did have a hearing last
18 week in superior court before Chief Judge Lynn, with respect
19 to that case, that's a declaratory judgment action. In
20 other words, we're not looking for money damages in that
21 case, we're looking for the court to declare what the law is
22 on certain issues relating to this condemnation. And, both
23 Mr. Upton and myself agree that, on some of the issues in
24 this case, it's ripe for decision now by the superior court.

1 We've raised some issues as to the constitutionality of a
2 part of RSA 38 or in how it's applied. And, in deference to
3 the fact that PUC precedent is clear that this body does not
4 decide constitutional issues, that that will be something
5 that the judge will decide. It relates to a couple of
6 issues. It's how the statute is structured, particularly
7 because the statute in New Hampshire is structured that
8 Nashua has the ability to go through this proceeding however
9 long it takes. And, then, at the end of the proceeding, it
10 has the ability to decide to walk away. And, Nashua has
11 made it very clear they want to keep their options open,
12 that, at the end of the proceeding, if they don't like the
13 price they get from the PUC, they will walk away. And, that
14 would leave Nashua with the ability, according to them, to
15 use that higher value than they wanted to pay for the assets
16 to then raise the property taxes --

17 MR. UPTON: I -- I hesitate to stand up,
18 Mr. Commissioner, but this is way --

19 MR. DONOVAN: Excuse me, I'm speaking.

20 MR. UPTON: This is way beyond the
21 status of the litigation. This is getting now into the
22 arguments that were made before the superior court. And, my
23 understanding is that, if that was going to happen, that was
24 going to happen at a subsequent time in this proceeding.

1 CHAIRMAN GETZ: Mr. Donovan, I --

2 MR. DONOVAN: I'm not going to go into
3 all of that. But that's -- I just want to give you a flavor
4 that there are issues that relate to the constitutionality
5 of the statute, because the New Hampshire statute on
6 municipalization is different than other statutes, either
7 the municipality --

8 CHAIRMAN GETZ: Well, Mr. Donovan, I
9 think actually --

10 MR. DONOVAN: -- has to -- has to --
11 right. They either have to make a decision or not.

12 CHAIRMAN GETZ: Mr. Donovan?

13 MR. DONOVAN: Yes.

14 CHAIRMAN GETZ: One person can talk at a
15 time for the reporter to cover it. I think Mr. Upton is
16 correct. All I wanted to do now was find out the status of
17 these other proceedings. You're going to get the
18 opportunity, either you or Mr. Camerino, with respect --
19 when we deal with the issue of whether this case should
20 proceed, to characterize these other proceedings in a manner
21 that, if it makes a good argument for us not to proceed,
22 then you can make that argument, when we get to whether it's
23 appropriate for us to proceed.

24 MR. DONOVAN: Okay. Okay. So, that is

1 -- that's where on the declaratory judgment action is, we
2 agree that some of it is ripe for decision now, in front of
3 Judge Lynn. We disagree whether other parts of it are ripe
4 for decision now in front of Judge Lynn.

5 The other case, we call it the "money damages
6 case", that's the case in which Pennichuck is seeking money
7 damages against Nashua. We brought that case as well in
8 Superior Court in Nashua. Nashua elected to remove the case
9 to federal court. They have the right to do that, because
10 we raised a federal issue, a federal constitutional issue.
11 So, they took the case up to federal court, and then they
12 filed a motion to dismiss the case up there, largely based
13 on some federal issues. They filed a motion to dismiss, we
14 have objected to that motion, and they are going to reply.
15 The options that the federal court has are to send the case
16 back to state court, or to dismiss the case on the merits,
17 or to do something in between. So, we're not sure what
18 they're going to do. So, that's the status of that. But,
19 certainly, on how we're going to proceed, which are the
20 issues largely pending in the declaratory judgment action,
21 we would like to talk about that when we talk about
22 scheduling issues. Thank you.

23 CHAIRMAN GETZ: Thank you. Okay. Then,
24 let's turn to the three issues that we laid out in the order

1 of notice for oral argument this morning. In reverse order
2 then, there's the Town of Milford's motion to consider and
3 maintain effectiveness of an existing contract, and whether
4 that's premature. And, that motion, I guess it was
5 Mr. Drescher, you filed that motion. Can you tell us what
6 the status of that is?

7 MR. DRESCHER: Yes, Mr. Chairman. I
8 think it's been objected to or at least responded to by
9 Attorney Camerino, and indicated that this could be held in
10 abeyance until the issue is resolved. We don't have any
11 problem with that. What we want to be sure of is that we're
12 on record as indicating that the Town of Milford wants to
13 participate in this proceeding, or at least be present, and
14 have the Commission consider the fact that we have a bulk
15 water contract with Pennichuck Water Works, which is a
16 critical component of the Town of Milford's water supply.
17 And, we'd like to be sure that, whenever that is appropriate
18 to be considered in the mix, that it gets taken up at that
19 time. And, I don't think that I'm representing incorrectly
20 that Mr. Camerino doesn't have any objection to that either.

21 CHAIRMAN GETZ: Mr. Camerino.

22 MR. CAMERINO: I think that's a fair
23 statement. I'd just add an abundance of care, would qualify
24 it by saying we don't know what Nashua's case is going to be

1 yet, what the scope of it is. And, that's why we just don't
2 want to be put in a position of having to address what will
3 or won't be evidence or issues in front of the Commission.
4 But, to be quite frank, it's hard for me to imagine, given
5 what Nashua has indicated preliminarily, that the issues
6 raised by Milford would not be appropriate for
7 consideration.

8 CHAIRMAN GETZ: Okay. Thank you. Okay.
9 Then, based on the representations of the parties, then we
10 will defer consideration of the Town of Milford's motion and
11 consider it later, as appropriate, in the proceeding.

12 The second item then is whether counsel for
13 Pennichuck utilities is disqualified from representing it in
14 this proceeding. And, we have motions filed. Mr. Upton?

15 MR. UPTON: Yes. The Motion to
16 Disqualify is probably moot, in light of the settlement
17 between Ashland and NHEC. I have, as the Commission is
18 aware, moved to suspend consideration of the motion to
19 disqualify, in light of the settlement. And, I will
20 withdraw that motion upon completion of the transfer from
21 NHEC to Ashland, or upon a review of an agreement that makes
22 that -- makes that transfer probable. That doesn't mean
23 that we don't think that there was a conflict. I just want
24 to make sure the Commission is aware of that. But we think

1 that the settlement has eliminated that conflict.

2 CHAIRMAN GETZ: Thank you. Mr.
3 Camerino.

4 MR. CAMERINO: Yes. As the Chairman can
5 imagine, I'm tempted to say a whole lot about that motion,
6 including Mr. Upton's comments this morning about the
7 conflict. But I'm not going to burden the Commission with
8 that. We believe very strongly there was not a conflict.
9 We have the consents of both of our clients. And, in light
10 of Mr. Upton's Motion to Suspend, I'm just going to leave
11 that issue at that. There's been enough ill will without
12 addressing that issue further.

13 CHAIRMAN GETZ: We will then suspend
14 deliberation on that, on that motion. Okay. Then, the
15 final issue is whether it is appropriate for the Commission
16 to proceed to consider Nashua's petition for a valuation.
17 And, Mr. Upton, we'll start with you.

18 MR. UPTON: The stenographer has
19 indicated that he picks me up better if I'm sitting.

20 CHAIRMAN GETZ: That's fine.

21 MR. UPTON: Does the Commission mind if
22 I sit?

23 CHAIRMAN GETZ: That's quite all right.

24 MR. UPTON: As the Commission noted, the

1 final question is whether it's appropriate for the
2 Commission to proceed and to consider Nashua's petition.
3 Since the Companies' motion asks you to dismiss or stay, I
4 think the resolution of this question, the determination of
5 whether or not to go forward, probably necessarily resolves
6 in some way a resolution of the motion. So, I'm going to
7 talk about the motion, in addition to -- in addition to why
8 we think you should go forward.

9 I want to make sure I say this as clearly as
10 I can. The Commission has statutory jurisdiction under RSA
11 38 to consider this petition, and it should do so. It's
12 only because of the legal maneuvering by the Companies in
13 the superior court that this docket is not presently moving
14 forward. If another municipality filed an RSA 38 petition,
15 and the same kind of maneuvering did not occur, you would
16 not have hesitated to advance that docket. That's what
17 happened when the Town of Ashland filed its petition against
18 NHEC. The same thing should happen here. The Companies'
19 legal maneuvering is being dealt with by the courts. Its
20 Motion for Preliminary Injunction was denied. And, the
21 court specifically said in the denial of that motion that
22 you have jurisdiction to proceed. The City's Motion to
23 Dismiss, both the petition for DJ and the damages actions,
24 as I said earlier, are pending. Your counsel has followed

1 those proceedings. She's fully aware of what's been
2 happening. You should exercise your jurisdiction under RSA
3 38, unless and until a supreme court says that "RSA 38 is
4 unconstitutional". Until that happens, the City believes
5 you are obligated to proceed to consider its petition and
6 move forward with this docket. RSA 38:9 doesn't say "you
7 may decide the matters before you", it says "you shall
8 decide the matters before you".

9 Now, with respect to the motion, it has four
10 parts, as you pointed out in the order of notice. The first
11 is that the Commission should treat the petition as four
12 dockets. That argument we think boils down to Pennichuck's
13 claim that RSA 38 permits Nashua to acquire only assets
14 within Nashua, or those assets outside of Nashua which are
15 necessary to operate those within Nashua. This was the
16 basis of the Companies' Motion for Preliminary Injunction.
17 The superior court rejected that contention, saying that it
18 was unlikely that Pennichuck would prevail on the merits.
19 And, it further held that you, the PUC, had jurisdiction to
20 make that determination, as the public interest requires,
21 because that's what the plain language of the statute says.
22 "A municipality can take property outside the limits --
23 outside its limits which the public interest requires." It
24 doesn't say "which is physically required", it says "what

1 the public interest requires". And, the determination of
2 what is in the public interest is made by the Commission
3 under RSA 38:11.

4 Nashua has asserted in its petition that
5 acquiring the assets of Pennichuck Water Works, Pennichuck
6 East Utilities and Pittsfield Aqueduct, including those
7 assets outside Nashua, is in the public interest, because,
8 among other things, it will eliminate any claim for
9 severance losses by any of the Pennichuck companies. We
10 don't know what claim they're going to make, but my guess is
11 there will be a claim, if we wanted to acquire something
12 less than the whole, there would be a claim for severance
13 loss to the remaining assets. We're trying to eliminate
14 that argument. We're trying to say "We don't want to pay
15 severance damages." We want to acquire all of the assets,
16 and we believe that it's in the public interest for us to
17 acquire those assets. We're also saying that, if we acquire
18 all the assets, it will prevent likely rate increases for
19 the remaining assets. If we acquired less than the whole,
20 you now have a smaller company, you have -- or, you have the
21 same company, but you have smaller assets which it's got to
22 support. It's still got heavy overhead. It's going to cost
23 more to provide that service. We think that will lead to
24 higher rates if we don't take those other assets, those

1 other systems.

2 We think it's in the public interest because
3 it will protect the level of service to be received by those
4 -- by those same consumers. And, we also think it will
5 mitigate harm to the Company and its shareholders by
6 eliminating the need to operate a smaller, less efficient,
7 less profitable system. The determination of what's in the
8 public interest is complex and technical, and it involves
9 such things as public versus private rates, the value of
10 these assets, the quality of service that both entities can
11 provide, the cost of operations, and impact on employees.
12 It's a far broader determination than what assets are
13 located where, and which assets may be interconnected. And,
14 it is because the PUC has expertise on these broad technical
15 issues of public interest and deals with them all the time
16 that the New Hampshire courts have recognized the doctrine
17 of primary jurisdiction, and have abstained from exercising
18 their concurrent jurisdiction until the agency decides the
19 question. This was the basis upon which the City objected
20 to the preliminary injunction, and it was the basis for the
21 decision in the Motion for Preliminary Injunction. It's
22 also the basis for the City's Motion to Dismiss the DJ, on
23 the extent of the taking. The courts have recognized that
24 part -- have required parties, under these circumstances, to

1 exhaust their administrative remedies, and here that would
2 be to put this issue of what property outside Nashua is in
3 the public interest for it to acquire before you. And, the
4 obvious reasons for this doctrine of primary jurisdiction is
5 to encourage the expertise of the agency, the exercise of
6 the agency's expertise, to preserve agency autonomy, and
7 promote judicial efficiency. This isn't a constitutional
8 issue. This isn't a constitutional issue. This is a
9 question of the Commission exercising its jurisdiction to
10 make a factual determination, what is in the public
11 interest, what the public interest requires Nashua to
12 purchase.

13 Yes. My co-counsel just points out to me,
14 the Ashland case, the Town of Ashland case, in which the
15 doctrine of primary jurisdiction is discussed, is very clear
16 that the PUC interprets what the meaning of RSA 38 is. So,
17 as I said earlier, we think the Commission should exercise
18 its statutory jurisdiction, use its expertise to make the
19 determination of what property outside Nashua the public
20 interest requires the City to purchase. There's no reason
21 this can't be done in one docket.

22 The second point of the motion is purely
23 procedural, which is that we didn't comply with the rules of
24 the Commission and submit prefiled testimony. I'm fully

1 aware of the rules. And, I made the decision that prefiled
2 testimony would have been of no benefit to anybody. The
3 only thing that the prefiled testimony could have said
4 anything about was what was in the petition itself. This
5 isn't like a rate case, like we had yesterday, where the
6 City, as the Petitioner, has control of the facts necessary
7 to make the determination. This is a disagreement between
8 the City of Nashua and the Pennichuck companies, both as to
9 what Nashua can acquire and how much it's going to have to
10 pay for it. How you can submit prefiled testimony on those
11 issues is beyond me. Those are not issues on which prefiled
12 testimony would have illuminated the Commission in any way.
13 After discovery on those issues, it may be that prefiled
14 testimony will be necessary. And, when we know what we
15 think we want, and how much it's worth, we're happy to do
16 that. But, until then, it accomplishes nothing.

17 In addition, there is already a statutory
18 presumption that this taking is in the public interest. The
19 statute provides that, if there is a two-thirds vote of the
20 Board of Aldermen in making the determination to go forward
21 with the taking, that there is a presumption that the taking
22 is in the public interest. There was a 14 to 1 vote of the
23 Board of Aldermen.

24 Until that discovery is undertaken that

1 allows us to determine what we want and how much we think we
2 should pay for it, I concluded, I'll fall on the sword, I'm
3 happy to fall on the sword, I concluded that any prefiled
4 testimony would have no value. And, so, I made the decision
5 not to file it. I was also aware, I will say, of Rule
6 202.11(b). And, I thought, if the Commission wanted the
7 City to address any issue with testimony prior to discovery,
8 it could and it would order it. So, if you think it's
9 necessary, you know, order us, order me to file it. But I
10 think dismissing the City's petition under the circumstances
11 would be draconian.

12 The third point of the motion --

13 CHAIRMAN GETZ: Before we get to the
14 third point, would it be fair to say, to the extent that
15 prefiling of direct testimony is required, you're seeking a
16 waiver of that requirement?

17 MR. UPTON: Sure. And, maybe I should
18 have done that. I'm not a regular practitioner here. I
19 didn't think about a waiver. I just thought that it would
20 be of no benefit to you and so I didn't file it.

21 CHAIRMAN GETZ: Okay.

22 MR. UPTON: The third point of the
23 motion was that the regional water district, that the City
24 intended to transfer the assets to the regional water

1 district, and that the regional water district didn't exist,
2 it now does exist. It has intervened, sought to intervene.
3 And, I think this argument is largely moot. And, I do want
4 to just say about this issue that, although Nashua has said,
5 and it is true, that it is not a stalking-horse for the
6 district, Nashua believes wholeheartedly that regional
7 cooperation on water issues is essential to the future of
8 that part of the state. It is aware of this Staff's report
9 to the Legislature about regional -- regionalization. The
10 City participated in the legislative effort that authorized
11 the creation of regional water districts. And, it has
12 joined the Merrimack Valley District. I can't say with
13 certainty, obviously, that the City would always conclude to
14 transfer whatever assets it acquires to the regional
15 district. But I believe that, if you found that the public
16 interest required us to purchase all of the assets that
17 we've petitioned to acquire, that the City would transfer
18 those to the regional water district right after that
19 occurred, or as soon after that order occurred as it could.
20 If, on the other hand, you limited the acquisition to just
21 the assets in Nashua, well, then maybe we wouldn't do it.
22 But I don't know the answer to that, and I can't know the
23 answer to that, nor can the City, until a determination is
24 made by the Commission. All we can say is, we support

1 regionalization. We support the Merrimack Regional Valley
2 -- the Merrimack Valley Regional Water District. We're a
3 member of it, and we fully expect to participate in it.

4 In part, one of the reasons I think I have to
5 say that is that this petition is Nashua's. It's not the
6 Regional Water District's. And, we expect that what you're
7 going to do, in making your determination, is base it upon
8 whether Nashua, not the Regional Water District, meets its
9 statutory burdens.

10 The fourth point of the motion is that the
11 Commission should stay any action until the superior court
12 rules on the DJ petition. And, that's essentially what
13 you're asking about anyway. And, I think this argument is
14 completely inconsistent with the positions that Pennichuck
15 has taken at the superior court. In the DJ petition and its
16 suit for damages, Pennichuck claims the lack of action by
17 the City on the taking has caused it lost business
18 opportunity and financial loss. To now ask for a stay of
19 the very proceeding it says the City has deliberately been
20 avoiding in order to harm it, I think borders on being
21 disingenuous. The Company's whole strategy in these actions
22 has been to delay and we think observe obfuscate what is
23 essentially a pretty simple determination by this
24 Commission: What can the city acquire and for how much?

1 It started with the Petition for DJ. It
2 added a Motion for Preliminary Injunction, which has been
3 denied. The City has moved to dismiss the DJ, and that's
4 been argued. The Company has also filed a damages suit,
5 which has been removed to the federal court. If this
6 petition is stayed or further delayed, rather than the
7 Companies, it is Nashua that will suffer harm. The taking
8 was approved by a 14 to 1 vote, as I said, of the Board of
9 Mayor and Aldermen, and by a 78 percent majority vote in a
10 referendum. A delay will thwart the obvious will of the
11 voters of Nashua. And, moreover, Nashua will lose the
12 opportunity to secure attractive financing of the
13 acquisition at currently prevailing rates.

14 Nashua's financial advisors, First Southwest
15 Company, has advised it that, if there is a delay of two
16 years or more while the petition for DJ is considered, it
17 will likely result in an increase of 2 percent in the
18 interest rate it would pay for a revenue bond for the
19 purchase of these assets. Now, just assuming for purposes
20 of this argument only, that that fair value of those assets
21 is \$100 million. At the prevailing rate of 5 percent for 25
22 years, the yearly overall payment would be approximately
23 \$7,095,000. If the interest rate increased to 7 percent
24 because of a delay, the yearly overall payment increases to

1 \$8,580,000, a difference of a \$1,485,000. Over the 25 year
2 life of the bonds, the increased cost to Nashua and to the
3 ratepayers ultimately, if Nashua acquires it, is in excess
4 of \$37 million. There is significant harm to Nashua by
5 delaying this proceeding.

6 The Company's motion should be denied.
7 There's no merit to its argument, just as there's no good
8 reason for you not to exercise the clear jurisdiction that
9 we think RSA 38 gives you and move forward. The issues
10 presented in Nashua's petition and in the determination of
11 what the public interest requires it to purchase, they're
12 interesting and they're unique. The Legislature recognized
13 that this Commission has the expertise to make those
14 determinations. That's what we should be talking about, and
15 fighting about, if we have to fight. Not whether we should
16 even get this docket moving or start the process.

17 Very respectfully, the City urges the
18 Commission to rapidly schedule a prehearing conference to
19 take statements of position and any other -- and consider
20 any other preliminary motions, and to schedule a tech
21 session to establish a procedural schedule. Thank you.

22 CHAIRMAN GETZ: Thank you. Mr. Judge.

23 MR. JUDGE: Briefly, the District joins
24 in the arguments that are raised by the City here. We ask

1 you to deny the motion. The motion references the District,
2 as outlined by Attorney Upton. The District has been
3 established. As we've already discussed this morning, we're
4 trying to intervene in the matter. And, I won't belabor the
5 irony of the Company arguing that we need to be here in this
6 motion, and trying to keep us out and objecting to the
7 motion to intervene.

8 CHAIRMAN GETZ: Mr. Teeboom.

9 MR. TEEBOOM: I have no -- no comment.

10 CHAIRMAN GETZ: Ms. Coughlin.

11 MS. COUGHLIN: No position on that.

12 CHAIRMAN GETZ: Ms. Pressley.

13 MS. PRESSLEY: Thank you, Mr. Chairman.

14 I encourage you to move ahead as quickly as possible. The
15 Company is for sale, that's what started this whole process.
16 The people have spoken. You keep referencing the
17 municipality. It's the ratepayer who wants to buy the
18 Company. We'd like to buy it at a fair price. We'd like to
19 buy it as quickly as possible. And, we'd like to really
20 keep it the way it is. We would just like to transfer
21 ownership. I believe it is in your power to do so. This is
22 an issue that is happening across the country, where
23 communities are buying back their water companies that they
24 sold to private corporations. We, the people, want to have

1 control over a natural resource that is part of our
2 community. Thank you very much.

3 CHAIRMAN GETZ: Thank you.
4 Mr. Williams.

5 MR. WILLIAMS: Members of the
6 Commission, we would support the City of Nashua's arguments
7 in this question.

8 CHAIRMAN GETZ: Thank you. And,
9 Mr. Drescher.

10 MR. DRESCHER: The Town of Amherst would
11 probably support this. I think the Town of Milford at this
12 point is in a position where they want to just watch the
13 proceedings and see where they're going to end up.

14 CHAIRMAN GETZ: Thank you. Mr. Hodes.

15 MR. HODES: We're not taking a position
16 on the motion.

17 CHAIRMAN GETZ: Ms. Spector.

18 MS. SPECTOR: We're not taking a
19 position on the motion.

20 CHAIRMAN GETZ: Ms. Ross.

21 MS. ROSS: The OCA believes that it is
22 appropriate to move forward on the eminent domain petition
23 under RSA 38, and that the superior court has clearly
24 indicated that it expects the Commission to move forward

1 with this docket. So, we do support the moving forward
2 rapidly with this docket. Thank you.

3 CHAIRMAN GETZ: Ms. Thunberg.

4 MS. THUNBERG: Thank you, Commissioners.
5 Staff would like to just address the four arguments briefly
6 that were made in the motion to dismiss. With respect to
7 Pennichuck's argument that the Commission should separate
8 this docket into multiple dockets, at this point, Staff is
9 prepared, should the proceeding go forward or should this
10 docket go forward, of just analyzing per company unit within
11 the 04-048 docket framework. So, at this point, Staff
12 doesn't see having all of the assets in one docket as being
13 a hurdle to its analysis.

14 With respect to the argument that the City of
15 Nashua failed to comply with the administrative rules, Staff
16 found it curious that Nashua was arguing that the Commission
17 could just order Nashua to file testimony. When the
18 Commission has already adopted these rules, put petitioners
19 on notice that testimony is to be accompanied -- is to
20 accompany petitions, unless there's a waiver that was
21 submitted, but I think Mr. Upton has at least conceded on
22 the waiver issue.

23 With respect to the District's formation,
24 whether the docket should proceed because the District was

1 not formed, it appears the District is now formed. So, I
2 think that argument -- the Commission should not delay this
3 proceeding based on that argument.

4 With respect to the fourth argument, that the
5 Commission should delay this proceeding pending the outcome
6 of the superior court and federal court matters -- or,
7 rather the superior court matters regarding
8 constitutionality of this whole process, I think Staff
9 believes it has some merit. Staff understands that Nashua
10 may be harmed by a delay, but it hasn't had a chance to
11 corroborate or do any analysis on quantifying the harms, to
12 know how much is the harm if we go forward, how much is the
13 harm if the proceeding doesn't go forward, and how that
14 compares to any constitutional rights that Nashua has -- I
15 mean that Pennichuck has, rather.

16 Staff does posit that there may be some
17 usefulness in going forward in helping the parties determine
18 a value. If a value can be reached, perhaps it may aid in
19 the parties settling the issue. But, at this point, Staff I
20 guess has no position, whether recommending that the
21 Commission go forward or not go forward, but does raise
22 those issues that, if we go forward, it may be difficult to
23 undo any harms, if we do go forward and the, I guess, undo
24 the harm if the constitutionality of our process is deemed

1 to be unconstitutional. If we do go forward and the process
2 is deemed constitutional, perhaps there is some value in the
3 Commission acting as a facilitator to the parties. Thank
4 you.

5 CHAIRMAN GETZ: Thank you. Mr.
6 Camerino.

7 MR. CAMERINO: Mr. Chairman, if I may,
8 I'm going to speak from the lecturn. When I was in law
9 school, they always said "start with the statute". And, I
10 think the corollary to that is "start with the regulation".
11 New Hampshire Code of Administrative Rules, PUC 202.11(a)
12 and 204.01(b) both expressly require a petitioner, in all
13 cases, to file testimony with their petition. I said "all
14 cases". There actually is one exception, a petition to
15 intervene. 202.11 says "all petitions shall be accompanied
16 by prefiled testimony and exhibits". And, 204.01(b) says
17 "with the exception of petitions to intervene, petitions
18 shall be accompanied by written testimony." Nashua has not
19 complied with either of those requirements. It didn't seek
20 a waiver. It could have done that. It just ignored the
21 Commission rules. You heard Mr. Upton state flat out this
22 morning, "I'm fully aware of the rules." "I made the
23 decision that prefiled testimony would have been of benefit
24 to nobody." It's not Nashua's right to make that decision.

1 And, in a minute I'll explain to you why prefiled testimony
2 would have been of a lot of use for all of us and saved a
3 lot of us time thus far, and will save us time going
4 forward. There is not a distinction between this case and
5 any other case that would justify Mr. Upton simply ignoring
6 the rules and writing his own.

7 So, let's ask ourselves, "why would Nashua
8 just ignore the rules?" It's not really a mystery. If you
9 look at the context of this case, Nashua rushed to file its
10 petition in this case in response to the declaratory
11 judgment petition we were discussing before. It sat on its
12 hands from January of 2003 until the end of March 2004, and
13 did nothing at this Commission, even though it was
14 threatening eminent domain, and it did nothing until the
15 Companies filed a declaratory judgment petition in superior
16 court. At that point, they quickly cobbled together a
17 petition and filed it here on March 25th. And, if you look
18 at that petition, there is almost no substance in it. In
19 fact, one of the only substantive items in it is the
20 statement that "the formation of the district is critical to
21 this process and it's their intention to transfer the
22 assets", which we now hear may not, in fact, be the case.
23 The bulk of that filing, which is about three-quarters of an
24 inch thick, is the Companies' pleadings in the superior

1 court. They just put that on there to bulk it up and make
2 it look legitimate. All we have is a placeholder filing and
3 nothing more.

4 The Commission's requirement for filing
5 testimony is a lot more than a mere technicality just to be
6 ignored at Nashua's whim. And, that's particularly true in
7 an eminent domain case like this one. Pennichuck and the
8 public are entitled to know what assets is it that Nashua is
9 trying to take? How much does Nashua think those assets are
10 worth? And, what's the basis for that determination of
11 value? On what basis does Nashua claim it's in the public
12 good for that city to operate water systems in places like
13 Gilford, Bow, Newmarket, Merrimack? And, what basis does
14 Nashua claim to have the ability to operate a regional
15 utility as well or better than the Pennichuck utilities
16 have? Is Nashua going to keep the utility assets or will it
17 turn them over to the regional district? In fact, who is it
18 that Nashua proposes is going to operate the utility systems
19 in all of these communities?

20 As we've already discussed this morning,
21 there is considerable confusion about the status of the
22 District that's been raised by Nashua's comments, because of
23 what they have alleged in their petition, versus what they
24 told the superior court two weeks ago. That's only the

1 latest example of the problems that are caused by Nashua's
2 failure to file its case when it filed the petition.

3 We don't know what the scope of the issues
4 are before us in this case. We don't even know who should
5 be here, which are the proper parties, and would shouldn't
6 be here. Does the District have an interest in this
7 proceeding or doesn't it? As they used to say in the old
8 television ad, "Only Nashua knows for sure." We don't know,
9 because we don't have their case. All we have is there
10 placeholder.

11 Now we stand here today more than four months
12 after Nashua filed that placeholder, and we still don't have
13 their case. Are they waiting for you to order them to file
14 it? If so, why do they need to be ordered to file their
15 case? Whether it's by you or by the superior court. Unless
16 and until they submit that case, the Pennichuck utilities
17 have nothing to respond to. We're just left standing here
18 waiting for the next shoe to drop. We're waiting for an
19 eminent domain taking that's always threatened, but never
20 coming.

21 I hope that the Commission can appreciate why
22 Pennichuck feels that it's been placed into a kind of legal
23 limbo by Nashua's maneuvering. They say they want to move
24 expeditiously with the eminent domain process. But first

1 they waited 14 months from the City referendum before they
2 filed their placeholder petition, and now they have waited
3 four more months, a total of 19 months since that public
4 vote without filing their case here. It's certainly
5 legitimate for the Commission to ask Nashua "What are you
6 waiting for? Where is your case?" It hasn't been lost on
7 Pennichuck, and I don't think it will be lost on anyone
8 else, that while Nashua has waited 19 months and counting
9 without submitting their eminent domain case here, all the
10 while they continually proclaim to anyone who will listen
11 that they are the ones who want to move forward
12 expeditiously. They are the agents of delay. Like the
13 inconsistencies between their statements to this Commission
14 and the superior court regarding the transfer of assets to
15 the district, when it comes to acting expeditiously, Nashua
16 seems to say one thing and then do another. So, the
17 Commission should ask Nashua "How long is long enough for
18 you to tell us what your case is?"

19 Pennichuck believes that the Commission's
20 rules are clear and should not be ignored. That would just
21 encourage Nashua to continue their strategy of trying to
22 keep Pennichuck in legal limbo to pressure the Company into
23 capitulating to the City's demands. There are at least 19
24 parties in this case already. If this case is going to go

1 forward, it's going to be long and complex, and the
2 Commission knows it. Are we going to start off by simply
3 ignoring one of the most fundamental rules of this
4 Commission, "First file your case"? We ask that you dismiss
5 Nashua's petition and tell them to come back here if and
6 when they have a case to submit.

7 With regard to the RSA 38 issue, I want to
8 start by saying that I don't think we would be comfortable,
9 having been in superior court nine days ago arguing that
10 very issue, to now ask this Commission to decide it and
11 trump that, that court. We did raise that issue in our
12 motion to dismiss, and I think it's clear from the status of
13 the motion that we raised it here and said "you should
14 either stay your proceeding or you should dismiss the case
15 under RSA 38." But we argued that issue just nine days ago,
16 and I don't think we can stand here today and say to this
17 Commission "Hurry up and issue an order on the exact same
18 issue before the superior court does."

19 But starting with the statute, I want to
20 direct your attention to RSA 38, Section 6, and that's the
21 critical section of Chapter 38. And, bear in mind that what
22 we're talking about here are three separate legal
23 corporations, each one separately incorporated, each one
24 with its own history, each one with its own debt

1 obligations, with its own rate base, its own rate structure,
2 serving different towns. They're different. And, if you
3 look at RSA 38:6 and focus on the plain meaning of the
4 statute, which I do believe is a term that I heard Mr. Upton
5 use, it says "The governing body", in that case -- in this
6 case referring to the Board of Aldermen, "shall notify in
7 writing any utility engaged at the time of the vote in
8 generating or distributing electricity, gas or water for
9 sale in the municipality." Well, let's identify the utility
10 that is engaged in distributing its water for sale, for sale
11 in the municipality: Pennichuck Water Works. Pennichuck
12 East is not doing any of those things in Nashua. Pittsfield
13 Aqueduct Company is not doing any of those things in Nashua.

14 So, in my mind, if the Commission looks at
15 38:6 and simply looks at the plain meaning of that statute,
16 you have no jurisdiction over those two companies with
17 regard to this petition, and those can be dismissed flat
18 out. If you look further into that section, it says "The
19 notice to such utility", clearly it's contemplating the
20 utility that distributes in that town, "shall include an
21 inquiry as to whether the utility elects to sell that
22 portion of its plant and property located within or without
23 the municipality, which the municipality has identified as
24 being necessary for the municipal service." The whole

1 context of that statute makes it clear that what the
2 Legislature contemplated is you look at a utility that is
3 providing service in that town, and that's the utility that
4 can be taken. And, I don't see how any reasonable reading
5 of that statute gets you to a different conclusion. And,
6 then, we can have a discussion, a separate discussion, which
7 I will address, about what assets outside of the town of the
8 utility that is serving in the town can be taken. But there
9 is not a reasonable way that you can get from 38:6, which
10 identifies the proper condemnee, identifying who the --
11 whose property can be taken, you can't get to utilities that
12 don't operate there, just because they happen to have common
13 shareholders.

14 CHAIRMAN GETZ: Mr. Camerino, would your
15 position be then that a town, a municipality could only take
16 a utility within its borders, putting aside the issue of
17 going outside its borders, but then only a -- would it
18 follow from that that only a water district could take
19 multiple localities or multiple companies?

20 MR. CAMERINO: I don't believe -- First
21 of all, I don't think that issue is before you, but I'm
22 happy to answer it. I don't believe that anyone, other than
23 possibly the State of New Hampshire under some general
24 eminent domain concept, can take multiple utility companies

1 that are providing service in various towns. And,
2 certainly, the regional water district can't, because, under
3 RSA 38:6 -- under RSA 38, I believe it's Section 2, the
4 regional water district is expressly denied the power of
5 eminent domain. And, I'm going to get to the relevance of
6 that in just a minute.

7 The point here wasn't to enable a town, or a
8 city like Nashua, to become the water company for New
9 Hampshire. It was, if a people in a particular town wanted
10 to own their own utility assets, there was a mechanism for
11 doing that, not to take on more grandiose schemes. And,
12 certainly, if the Legislature had ever intended that, it
13 could have articulated that standard.

14 If you look at other sections of RSA 38,
15 Section 7 mentions "the utility" three times. Section 8
16 mentions it. Section 9 says "the utility" twice. Section
17 10 and 11 both say "the utility". Clearly, they were
18 thinking of one utility, not multiple utilities. And,
19 common ownership is not relevant to that determination. You
20 never get to that question. So, Section 38:6 limits the
21 taking in two ways. First, it identifies the condemnee, and
22 it says "The condemnee -- The proper condemnee is limited to
23 a utility that sells electricity, gas or water in the
24 municipality". And, then, it identifies the assets. And,

1 it says "Of that utility", now we're talking Pennichuck
2 Water Works, "the assets you can take are limited to the
3 plant and property that are necessary for the municipal
4 service", not the "regional service", the "municipal
5 service".

6 As I mentioned, RSA 38 expressly denies
7 eminent domain power to a regional district. If there had
8 been any intent at all to allow the property of multiple
9 utilities and systems in multiple towns to be taken,
10 certainly that authority could have been given to a regional
11 district. If a regional district doesn't have it, why would
12 a single municipality have it? It makes no sense for a
13 single city, like Nashua, to have that power over facilities
14 in far-flung towns, when a regional district, covering all
15 of those towns acting jointly, wouldn't have the same
16 authority.

17 If Raymond tomorrow decides to municipalize,
18 can it take all of the Pennichuck utilities' properties, and
19 Nashua has to get its service from Raymond? I don't think
20 you would come to that conclusion. If you look at RSA
21 38:15, that's further evidence that the Legislature intended
22 to deal with taking inside and outside the municipality in
23 different ways. There's a different structure for takings
24 of other property, non-utility property, inside and outside

1 the municipality as well.

2 The law is clear that eminent domain statutes
3 are to be interpreted narrowly. It is not reasonable to
4 assume that the Legislature intended that, because voters in
5 Nashua would like to own their own water company, that they
6 can then become the water company for all of southern and
7 central New Hampshire.

8 The public interest presumption in Sections
9 3, 4 and 5 of RSA 38 become completely nonsensical, if the
10 idea is that, once Nashua votes in favor, that that's a
11 presumption of the public interest for all of the other
12 towns, which never voted on it. So, I think, again, there's
13 more evidence that the Legislature was thinking of this as a
14 town-by-town process.

15 What are some of the results of Nashua's
16 theory of taking? Granite State Electric. What if tomorrow
17 the City of Lebanon decided to municipalize electric
18 service. Does that mean it could take the electric system
19 in the Town of Salem, because they're both served by the
20 same electric company? What about Unitil? If tomorrow
21 Concord decides to municipalize, can Concord take the
22 electric system in the Town of Hampton? And, then, what
23 about PSNH? Let's talk about a system that's truly
24 physically interconnected now. Let's not even talk about

1 separate systems, the way Pennichuck Water Works is set up.
2 Let's talk about physical interconnection. If tomorrow
3 Manchester decides to municipalize, can it take the electric
4 system that serves 70 percent of the State of New Hampshire,
5 just become the Electric Company of New Hampshire, because
6 it wants to municipalize within its company? Those types of
7 absurd results make no sense at all. If you want to look at
8 what the Legislature intended, if you want to go past the
9 plain meaning, which I think is already clear, ask yourself
10 about what a reasonable legislative intent would be, and I
11 think you've got to conclude that there is no way that that
12 was what the Legislature meant. And if they meant it, they
13 could have said it. And, only last year they addressed this
14 issue of regional utilities, and they gave the regional
15 utilities less authority than the municipalities have. They
16 can't take at all.

17 The last thing I -- Two other things I want
18 to address very quickly. One is, minimization of damages as
19 a motive for taking the entire system. I understand that's
20 Nashua's motive, and I don't know what the impact of taking
21 only part of the system would be. What I do know is that
22 has nothing to do with what the law is on what they are
23 entitled to take. That has to do with what they have to
24 pay. I don't even think it goes to the public interest

1 question, that they have to pay more to acquire. It
2 absolutely may go to the public interest question what the
3 rate impact will be on the remaining customers. But the
4 fact that their purchase price goes up, because they can
5 only take a portion of the system, that's their problem.
6 That doesn't go to what the statute allows or doesn't allow.

7 The other thing I want to address very
8 briefly, because I'm troubled by it, is this idea that
9 Nashua is not going to file their case at all. That what
10 they want is for you to set up a procedural schedule that
11 starts with discovery, and then at some point down the line
12 they'll file their case. Well, number one, that's not how
13 the process works here. Number two, it, again, creates
14 problems as to what is the scope, proper scope of this
15 proceeding. But, most important, they have this
16 information. This is something the Commission may not be
17 aware of, because it's not privy to the discovery process.
18 But we had a year long proceeding here regarding the
19 acquisition of Pennichuck by Philadelphia Suburban. And, we
20 made incredibly extensive data available to Nashua regarding
21 the operation of our system. And, I guaranty you that that
22 information was sought by them for purposes of analyzing a
23 municipalization. In fact, that was the basis of their
24 Rizzo report and their determination to go forward with

1 municipalization. So, they have that information. And, if
2 we have a procedural schedule and they file their case,
3 they'll get a chance for discovery when the Company files
4 its case. And, then, they'll have a chance for rebuttal
5 testimony, if they want to tweak their case. But they have
6 the information they need now. The rest of that is just
7 delay. Thank you, Mr. Chairman.

8 (Chairman Getz and Commissioner Morrison
9 conferring.)

10 CHAIRMAN GETZ: Before we conclude with
11 a response by Mr. Upton on behalf of the City, Mr. Judge,
12 with respect to the Regional Water District, I'd like to
13 hear if you have any response to the issues that
14 Mr. Camerino has raised with respect to the Water District's
15 interests and authority with respect to this proceeding? Do
16 you have anything to add?

17 MR. JUDGE: I don't think he said
18 anything additional to what he said previously, which I've
19 already addressed, except for his reference to the fact
20 that, and he's correct about this, that in the session law
21 that was passed regarding the Regional Water District, there
22 is a provision in there that specifically does not give the
23 Regional Water District eminent domain authority. I
24 wouldn't read into that what he's claiming, that that's some

1 evidence that the Legislature didn't want anyone to be able
2 to take a utility that's operating in more than one
3 community. It was specific to the particular Regional Water
4 District, the effort to get that legislation through. I'm
5 sure the Commission is aware of the sausage-making that goes
6 on when legislation goes through. I don't believe that that
7 really was evidence of legislative intent at all in that
8 particular issue. It just has to do with this particular
9 Regional Water District.

10 CHAIRMAN GETZ: Thank you. Mr. Upton.

11 MR. UPTON: Yes. And, just briefly on
12 that, too, Commissioners. The Legislature was fully aware
13 of the individual community's ability to engage in eminent
14 domain, and didn't believe that it was necessary for the
15 Regional Water District to have additional taking ability,
16 because its constituent members did have that power to take.
17 The Companies complain that the City has done nothing.
18 Well, that's not true. We've taken the votes required by
19 the statute. We've given the notice required by the
20 statute. We gave notice to all three utilities. And, we
21 gave a detailed schedule. We attached a detailed schedule,
22 which I think is an exhibit to the petition, with respect to
23 each of the utilities as to what property we sought to
24 acquire. We were very specific about what we sought to

1 acquire.

2 We have stated in the petition why we think
3 it's in the public interest. He says that we didn't tell
4 you why we should operate, what we should be -- how we were
5 going to operate it. We don't know how we're going to
6 operate it. That's going to be a matter of proof at the
7 time you deal with whether or not the acquisition of all of
8 those assets is in the public interest. I suspect we'll
9 have to satisfy you that we have the capability to operate
10 it. I expect that what we probably will do is to hire
11 somebody. But we don't know that at this point. That's why
12 you -- That's why you can't make those kinds of filings that
13 he keeps insisting that I have to make. I can't make them
14 yet.

15 All I know is that, under RSA 38:9, we had a
16 dispute about how much we could take and what the price of
17 those assets would be. And, under that statute, when we
18 have that disagreement, we petition you to decide those
19 matters. And, I don't know what more I can say about it,
20 other than we have a disagreement about what we can acquire
21 and how much. You're going to hold hearings. There's going
22 to be requirements of us to satisfy you that it is in the
23 public interest for us to acquire these assets, beyond just
24 the statutory presumption. I'm sure you're going to make me

1 go beyond the statutory presumption. I fully expect that
2 I'm going to have to do that. And, I need discovery on, you
3 know, aspects of the Company before I can make those
4 decisions. It's not like the information that we sought in
5 the merger docket two or three years ago is going to be
6 helpful to us in those things. That's stale. That's got
7 nothing to do with this company right now, or its value
8 right now. It's going to require a whole new determination
9 of value, and, you know, what this company is. It's
10 acquired subsequent assets. It's taken on additional
11 systems that it operates. There's all kinds of issues.
12 That stuff isn't helpful. We've got to do discovery in
13 order to get this docket off the ground.

14 Under RSA 38:6, Mr. Camerino asked if Raymond
15 could take all of these assets, and concluded that you
16 wouldn't reach that conclusion. Well, you would have to
17 make that determination based upon what the public interest
18 requires. That's what this is all about. There has to be
19 some kind of a determination at some point about what the
20 public interest requires Nashua to purchase.

21 Now, these Pennichuck utilities are
22 different, than a system like PSNH. The only reason these
23 other companies exist, the only reason this isn't all being
24 done under the umbrella of Pennichuck Water Works is for

1 rate purposes. They were set up as different companies for
2 rate purposes, and that's the only reason. Even a taking of
3 PWW alone, Pennichuck Water Works alone, even if it was
4 limited to that alone, it clearly involves the fate of those
5 other ratepayers. So that, to argue that Nashua, you know,
6 is limited to just Pennichuck Water Works, it impacts those
7 others so dramatically it doesn't make sense. It just plain
8 doesn't make sense.

9 And, then, I'm troubled by this whole
10 discussion about severance. I mean, every time severance is
11 raised, I keep saying, I suppose I'm baiting Mr. Camerino to
12 some degree, I'm baiting him, in the hopes that he'll say
13 "severance isn't", you know, 'we're not entitled to
14 severance on PEU or PAC." If he said that, that might make
15 a difference. But, as long as severance is an issue, as
16 long as severance is an issue, Nashua believes it has a
17 right to acquire the assets, rather than to pay severance.
18 Because it believes that it is in the public interest to the
19 ratepayers to have it acquire and operate those assets,
20 rather than simply pay damages for allowing Pennichuck to
21 keep them. I really don't have anything more to add to
22 that. Thank you.

23 CHAIRMAN GETZ: That concludes the oral
24 argument on the three issues listed in the order of notice.

1 But I'll give one opportunity, is there any other issues
2 that should be raised this morning before we close this
3 hearing? Mr. Camerino.

4 MR. CAMERINO: This is a refrain from
5 yesterday. But, just for the parties, I know a lot of the
6 parties are not used to participating here, and I know there
7 were a lot of filings made that we did not receive copies
8 of. If the Commission could remind parties to check the
9 service list, and whenever they submit something to the
10 Commission, to copy everyone else.

11 CHAIRMAN GETZ: Okay. And, we'll note
12 for the benefit of the parties, that please take a look at
13 our Chapter 200 rules with respect to procedural
14 requirements. And, depending on how we rule on the matters
15 today, in the event there is a succeeding prehearing
16 conference, then issues about proceeding in a consolidated
17 manner will be an important part of that procedural process.

18 So, is there anything else?

19 (No verbal response)

20 CHAIRMAN GETZ: Okay. Hearing nothing,
21 then we will close this prehearing conference and take the
22 matters under advisement. Thank you very much.

23 (Prehearing conference ended at 11:27
24 a.m.)