THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2009-0274

Appeal of City of Nashua
Appeal of Pennichuck Water Works, Inc.,
Pennichuck Corporation, Pennichuck East Utility, Inc.,
Pennichuck Water Service Corporation, Pittsfield Aqueduct Company, Inc.

Appeal by Petition Pursuant to RSA 541:6
from Final Order of New Hampshire Public Utilities Commission

REPLY BRIEF OF CROSS-APPELLANTS

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Pennichuck Water Service Corporation, Pittsfield Aqueduct Company, Inc.

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ARGUMENT

I. THE PUC EXCEEDED ITS AUTHORITY BY PLACING CONDITIONS THAT WOULD RETAIN ITS JURISDICTION OVER NASHUA AFTER THE TAKING OF THE ASSETS OF PENNICHUCK WATER WORKS.

Nashua misconstrues Pennichuck's[1] argument when it asserts that Pennichuck "read[s] the authority in RSA 38:11 as limited to public utilities." Nashua Reply Brief, p.18. Pennichuck does not dispute the PUC's authority to impose conditions and issue orders when making a determination as to whether the taking of utility plant or property is in the public interest. Rather, the issue is the *scope* of that authority. Nashua's interpretation of RSA 38:11 would give the PUC limitless authority, by enabling it to expand its own jurisdiction to include authority that the Legislature had not otherwise delegated to it, namely the power to regulate municipal water utilities operating outside (and in some cases inside) their boundaries regardless of whether the municipal utility would otherwise be statutorily exempt from such regulation. Such an unlimited grant of authority would both expand RSA 38:11 beyond the Legislature's intent and would exceed the Legislature's power to delegate authority to an administrative agency.

A legislature may delegate limited power and authority to administrative agencies with clear standards and guidelines. *Appeal of Monsieur Henri Wines, Ltd.*, 128 N.H. 191, 193 (1986). When a statue provides no guidance, standards, or conditions for the administrative agency to follow, it is an unconstitutional delegation of legislative authority in violation of part I, article 37 of the New Hampshire Constitution. *Guillo v. State*, 127 N.H. 579, 581 (1986) (*citing Opinion of the Justices,* 121 N.H. 552, 557 (1981)); *see also Ferretti v. Jackson*, 88 N.H. 296,

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[1] The five Pennichuck cross-appellants (collectively "Pennichuck") apply the system of references to parties and to the record that it adopted in their opening brief. They include: Pennichuck Water Works ("PWW"); Public Utilities Commission ("PUC"); PUC Order No. 24,878 ("Taking Order"), which appears at Certified Record ("Cert.Rec.") p. 10302, and is included in Nashua's Appendix to Brief ("N.App."), pp. 25-144; witness cross-examination testimony references the date of testimony, transcript page number and first page of its appearance in certified record.

303 (1936) (holding that the challenged statute was a "sweeping and general delegation of power that . . . clearly exceed[ed] constitutional limits," and explaining: "The extent and limits of control must be determined by the legislature.") Under Nashua's interpretation of RSA 38:11, the PUC would have limitless authority, unchecked by any legislatively prescribed standards, to impose conditions enlarging its jurisdiction despite other statutes explicitly limiting that jurisdiction. If Nashua were correct, and the PUC's authority were not bound by legislative enactments that limit it, RSA 38:11 would be an unconstitutional delegation of legislative power.

Nashua also incorrectly relies on *Appeal of Milford Water Works*, 126 N.H. 127, 133-34 (1985) to support its argument that, notwithstanding the exemptions set forth in RSA 38:14 and RSA 362:4, III-a, the PUC may use its authority to impose conditions to extend its jurisdiction to a municipality operating outside of its corporate limits. Nashua Reply Brief p. 17, 18-19. *Milford Water Works* concerned an order in which the PUC attached certain conditions to an exemption it granted from another town's zoning ordinance. At least one of the conditions required continuing PUC oversight. *Id.* p. 130. In upholding the condition, the Court found that the PUC had such authority under RSA 38:12, the statutory precursor to RSA 38:14. *Id.* at 133.

The crucial difference between *Milford Water Works* and the present case is that there was no question that, *under prior law*, the PUC already had regulatory authority over Milford as a public utility to the extent that it operated outside its municipal boundaries. As the Court specifically stated, "The PUC had jurisdiction over the Milford Water Works ...under RSA 38:12." *Id.* at 134. That prior statute stated in relevant part:

> A municipality, which has so acquired the plant, property, or facilities of a public utility in any other municipality, may thereafter operate therein as a public utility . . . ; and *operation by a municipality outside its own limits, shall be subject to the jurisdiction of the public utilities PUC as in the case of any other public utility.*"

RSA 38:12 (1988) (emphasis added).

In 1997, RSA 38:12 became RSA 38:14, Laws 1997 206:1, which is substantively similar but specifically included an important exception: "The operation by a municipality outside its own limits shall be subject to the jurisdiction of the PUC **except as provided in RSA 362**." RSA 38:14 (emphasis added). As Pennichuck explained in its opening brief, RSA 362:4, III-a exempts municipalities furnishing water services from the jurisdiction of the PUC

> if it serves new customers outside its municipal boundaries, charging such customers a rate no higher than 15 percent above that charged to its municipal customers . . . and serves those customers a quantity and quality of water or a level of water service equal to that served to customers within the municipality.

RSA 362:4, III-a(1).[2] Thus, unlike the public utility described in *Milford Water Works*, Nashua remains a municipality not subject to the jurisdiction of the PUC.[3] The fact that Nashua is willing to consent to the PUC's jurisdiction, *see* Taking Order, pp. 59-60, N.App. pp. 83-84, is immaterial. *See* Pennichuck Initial Brief at 13 and authority cited therein.

The Court can read RSA 38:11 in harmony with RSA 38:12 and RSA 362:4, III-a(1) to hold that the PUC has the power to impose conditions upon a taking, but may not use RSA 38:11 to grant to itself authority not otherwise granted by the legislature. "The PUC is a creation of the legislature and as such is endowed with only the powers and authority explicitly granted or fairly implied by statute," *Appeal of Pub. Serv. Co. of N.H.*, 122 N.H. 1062, 1066 (1982), and the

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[2] The applicable exemption for municipalities set forth in RSA 362:4 did not go into effect until 1989, four years after *Milford Water Work.* Laws 1989 240:1. The legislature intended the exemption to "remove[] PUC regulation of municipal water . . . utilities when they . . . furnish services outside their municipal boundaries at rates and quality of service comparable to their own municipality." N.H.H.R. Jour. 519 (1989) (emphasis added); *see also* N.H.S. Jour. 786 (1989) (explaining that the exemption "allows the municipality to go outside its boundaries without coming under the jurisdiction of the PUC if they are not increasing the rates being charged.") (Emphasis added). The legislature further amended RSA 362:4 in 2002 to permit a municipal corporation to charge customers outside its boundaries rates that are up to 15% higher than those charged to its municipal customers while still remaining outside of the PUC's jurisdiction. Laws 2002 141:5.

[3] Nashua confirmed to the PUC that it will charge out of town customers the same rates as Nashua customers. Taking Order pp. 49, 59; N. App. pp. 73, 83, and therefore under RSA 362:4, III-a it will remain exempt from the PUC's jurisdiction.

PUC's authority is explicitly circumscribed by RSA 38:12 and RSA 362:4, III-a(1) with respect to municipalities providing water services outside of their municipal boundaries. With the exception of the franchise application requirements of RSA 374,[4] the PUC cannot exercise jurisdiction over Nashua as a municipal utility; to do so would contravene the plain language of RSA 38:12 and RSA 362:4, II-a(1).[5]

The PUC's attempt to expand its own jurisdiction is not the exercise of powers that are merely incidental to the authority already granted to it. In describing the limitations on its authority over municipal utilities even before the current, expanded exemption was enacted, the PUC itself observed that the exemption placed "severe restrictions...upon the PUC on regulating municipal corporations," and noted that "despite being subject to our jurisdiction, the Legislature has carved major exceptions to the PUC's power that would normally emulate [sic] from that jurisdiction." *Re Manchester Water Works*, 67 NH PUC 387, 388 (1982).

While *Milford Water Works* dealt solely with PUC jurisdiction under prior law outside of municipal boundaries, the PUC purports to impose equal regulation within and without Nashua. The conditions imposed by the PUC in this case simply cannot be enforced without ignoring the jurisdictional limitations imposed by statute. For instance, despite the fact that RSA 362:4, II provides that a municipal utility "shall not be considered a public utility under this title for purpose of accounting, reporting, or auditing functions with respect to said service," the PUC's

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[4] To the extent that the PUC has not already fully exercised its jurisdiction in this regard, it will have fully done so by the time of any taking of Pennichuck's assets. *See* Pennichuck Opening Brief at p. 12 n. 6.

[5] In its Reply Brief, Nashua identifies a number of regulatory powers that it claims the PUC can exercise with regard to municipal utilities that have obtained a franchise to operate outside their municipal boundaries. See Nashua Reply Brief at 20. Nashua's argument is entirely circular because it presumes the very matter at issue—that is, whether the PUC has the authority to exercise such powers when the municipality satisfies the requirements for exemption from the PUC's general jurisdiction. The authority to grant a franchise (i.e., authorize a municipality to provide utility service in a defined service territory outside its boundaries) does not in itself give the PUC the power to exercise ongoing regulatory authority, otherwise the exemption would be meaningless.

order requires Nashua to file reports with the PUC regarding a technical advisory board that the PUC required the City to establish. Taking Order pp. 98-99, N.App. pp. 122-23.

The PUC will also enforce equal rates inside and outside Nashua. Not satisfied with Nashua's assurance that it would maintain rates at the same level inside and outside the City, the PUC ordered Nashua to do so and added a requirement that Nashua provide service in accordance with the water ordinance presented at the hearing. *Id.* at 98. As a result, Nashua is now prohibited from changing the terms and conditions of service it provides *within its municipal boundaries* unless it first receives PUC approval, because the same terms and conditions must also apply outside its boundaries. The only terms and conditions it is authorized to use outside of Nashua are those presented at the hearing. The PUC also required Nashua to participate as an operator in the Digsafe program (both inside and outside Nashua), *id.* at 99, even though RSA 374:48 only subjects public utilities—not municipal utilities—to such a requirement. Similar jurisdictional usurpations exist with regard to almost every one of the conditions imposed by the PUC. In particular, most if not all of the conditions apply to service provided both inside and outside the City's municipal boundaries.

By imposing conditions upon Nashua's taking of PWW that require continued regulatory oversight over Nashua's water services operations, the PUC expanded its jurisdictional reach beyond that which the legislature granted to it and exceeded its authority under RSA 38:11.

II. NASHUA, LIKE THE PUC, CONFUSES THE PRESUMPTION CONTAINED IN RSA 38:3 WITH THE CONSTITUTIONAL REQUIREMENT TO BALANCE THE PUBLIC INTEREST IN A TAKING CASE.

Nashua's Reply Brief (pp. 12 – 17) engages in a lengthy discussion of the evidentiary role played by presumptions under New Hampshire law. It argues that RSA 38:3, because of its policy objectives, shifts both the evidentiary burden of production, as well as the burden of

persuasion, citing *Cunningham v. Manchester*, 129 N.H. 232, 236 (1987). Pennichuck has never disagreed with that point on those issues to which RSA 38:3 applies. Instead, Pennichuck's argument has always been that a presumption is merely an evidentiary tool, and it does not eliminate a tribunal's duty to assure that each substantive element of a claim for relief is met.

At most, a rebuttable presumption requires PWW to prove its public interest case by a preponderance of the evidence. There is nothing in New Hampshire case law that would place any greater burden upon PWW, the entity whose property is the subject of an eminent domain action. *See*, *Appeal of Ann Miles Builder, Inc.*, 150 N.H. 315, 320 (2003) (Court applied preponderance of evidence standard to rebuttable presumption issue).

Perhaps the most important substantive issue involved in this case is whether the public interest permits Nashua to take the assets of PWW. For that to happen, RSA 38:10 and the New Hampshire Constitution require the PUC to determine whether Nashua's taking of PWW assets is in the public interest. Over the years, this Court has provided courts and administrative agencies with a road map as to how to approach the public interest determination. Assuming that a taking has a public purpose, the Court then requires the application of a net benefit test, in which are weighed the "public benefits... against all burdens and social costs suffered by every affected property owner." *See*, *e.g.*, *In re Bianco*, 143 N.H. 83, 86 (1998). Here, the PUC confused the undisputed public *purpose* of a taking under RSA 38 with whether such a taking in this case constituted a net public *benefit*. The burden shifting provisions of RSA 38:3 do not eliminate the requirement that the PUC find a net public benefit, because the existence of an evidentiary presumption does not amount to a legislative declaration of public interest.[6]

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[6] The Legislature knows how to create an unalloyed declaration of public interest to allow government taking of property. It is found in RSA 228:60-a. *See*, *Malnati v. State*, 148 N.H. 94, 100 (2002).

As Pennichuck set forth in its brief (pages 19 – 22), the PUC never weighed the evidence showing the absence of public interest -- that is the lack of a net public benefit -- for a taking by Nashua. It either ignored PWW's evidence completely, or simply labeled it "speculative", or, when it could not avoid a point, stated that "[a]lthough this evidence is credible, it is not the type of evidence that can form the basis for denying Nashua's petition". Taking Order, pp. 51-52, N.App. pp. 75-76. Pennichuck does not contest that it had the burden of proof in this case as to the public interest for a taking of its assets within Nashua. The PUC never got beyond that burden of proof and its Taking Order reflects a failure to conduct any weighing of the evidence presented. At the least, the Taking Order reflects a failure to articulate the basis for the PUC's public interest decision making, as required by RSA 363:17-b and case law. *See*, *Appeal of Town of Newington*, 149 N.H. 347, 352 (2003).

III. NASHUA CONFUSES FACTUAL AND HYPOTHETICAL DETERMINATIONS, AND ASKS THIS COURT TO RE-WEIGH THE CONFLICTING EXPERT VALUATION TESTIMONY IN THIS CASE, WHICH IS BEYOND THE PERMITTED SCOPE OF REVIEW.

Nashua concedes that the PUC's valuation must be upheld unless Nashua can demonstrate there was no evidence from which the PUC could conclude as it did. Nashua also does not dispute that there was evidence in the record to support the PUC's hypothetical buyer determination in this case, namely the professional opinion of PWW's expert Robert Reilly. Nashua Reply Brief p. 23; s*ee Appeal of Basani*, 149 N.H. 259, 262 (2003).

Ignoring the numerous cases holding that it is the PUC, and not the Court, that must resolve conflicting expert testimony, Nashua instead invites this Court to not only reweigh the expert testimony in this case, but to go a step further and look behind the expert opinion and examine what Nashua claims are the true underlying facts. Nashua Reply Brief, pp. 23-24. Nashua's arguments ask this Court to do what is specifically prohibited by the narrow standard

of review applicable to this case. However, even setting aside, for purposes of argument, the fact that the Court is prohibited from undertaking the very analysis Nashua seeks, Nashua's arguments suffer from an additional fatal flaw: Nashua's failure to distinguish fact testimony from opinion testimony. Experts are asked to answer hypothetical questions all the time. Their opinions are not invalid, as Nashua insists, simply because they have not personally experienced that precise hypothetical situation before. Hypothetical questions frequently involve situations that have not occurred before, thus requiring the expert to rely on his professional judgment in predicting what he thinks would happen. So long as the underlying opinion is based upon an accepted methodology in that field, an expert is free to give an opinion. *See, e.g.*, RSA 516:29-a. The consideration of municipal buyers in the income approach to utility valuation is both an accepted methodology, and has been explicitly approved in New Hampshire. *Southern N.H. Water Co. v. Town of Hudson*, 139 N.H. 139 (1994). Mr. Reilly's opinion followed this model for expert testimony precisely, and he grounded his opinion on considerable factual analysis. See, Pennichuck Opening Brief, pp. 29-31, 35-37.

Nashua begins its valuation argument with an incorrect statement: that Reilly based his hypothetical buyer theory on "specific sales data." Nashua Reply Brief p. 22. As PWW stated in its previous brief, Reilly's opinion was based on his considerable expertise, experience and professional judgment. Pennichuck Opening Brief pp. 35-37. He testified about his experience with other water utility and hospital sales, which he concluded proved that municipal buyers do influence the market. Id. Still, an expert's specific determination of the hypothetical buyer is, as the name suggests, a ***hypothetical*** exercise, not a factual investigation. In this case, the dispute between the parties' experts centered not on identifying the hypothetical buyers, since Nashua's and Pennichuck's experts agreed the pool of hypothetical buyers included both municipal and

private entities. Pennichuck Opening Brief, p. 34. Rather the dispute centered on what impact those potential municipal buyers would have on the amount a hypothetical buyer would bid to acquire the system in a free market negotiation. Reversing the position he had steadfastly taken in years of previous valuations, Nashua's expert George Sansoucy opined that potential municipal buyers would have no impact whatsoever on the price. Pennichuck Opening Brief, pp. 37-38. Mr. Reilly opined, as Mr. Sansoucy did in all his previous valuations, that the presence of municipal buyers would increase the price.[7]

Nashua bases its appeal on the argument that Mr. Reilly failed to identify a single example where the presence of potential municipal buyers caused a bidder to increase the price he paid. Nashua's argument asks this Court to hold Mr. Reilly, and by extension, all experts, to an impossible standard. How could Mr. Reilly possibly present proof of what a specific buyer offered when bidding at some point in the past to acquire a water system, much less what motivated the buyer to bid as they did? As this Court explicitly recognized in *Southern N.H. Water*, water systems are not like houses; they are not regularly bought and sold[8], and even when they do change hands, the sales price is not always made public.[9] Even when the ultimate sales

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[7] Mr. Sansoucy also admitted on cross-examination in this case that a New Hampshire municipality purchased a private water utility recently at a multiple of $9770 per customer. *In re Tilton-Northfield Aqueduct Co.,* 90 NHPUC 599 (2005), Ex. 1085, Cert.Rec. p. 12590. Applying that same multiple to PWW would result in an equivalent price of $239 million. Sansoucy Test., 1/10 /07, pp. 199-202, Cert.Rec. p. 6784.

[8] Nashua repeats the statements from its previous brief grossly mis-citing the testimony of various fact witnesses concerning their personal experience with municipal buyers in the limited market for water utilities. Nashua Reply Brief p.p. 22-23. To correct all of the miscitations and misstatements would consume innumerable pages of this brief. PWW would invite the Court to simply review the cited portions of the transcript, which would make the gross mischaracterizations immediately evident, but such effort would be a waste of the Court's time. Ultimately, none of those witnesses was qualified to present expert testimony as to the specific question raised by Nashua's appeal: the fair market value of PWW's assets. The only relevant testimony on that issue came from the parties' two experts, Mr. Sansoucy and Mr. Reilly, and the PUC properly focused its analysis on the relative credibility of those two experts.

[9] Nashua also makes a ridiculous attempt to distinguish *Southern N.H. Water* based on the wholly unsupported assertion that "deregulation" has caused a market of water utility sales to spring up since 1994, when the case was decided. Nashua Reply Brief p. 24. Nashua's argument is nonsensical. There has, of course, been no deregulation whatsoever of water utilities. Unlike natural gas, telecommunications, and electricity companies, water utilities remain just as regulated today as they were in 1994.

price is reported, there is certainly no information available as to what other bidders were involved, much less what the bidders offered and why. Utility valuation is a difficult task requiring that the PUC make specific determinations based on the answers to hypothetical questions. In reaching its conclusion, the PUC has no choice but to rely on the testimony of experts, who in this case have been involved in multiple sales of water utilities. That is exactly what the PUC did in this case. Because the PUC's determination is supported by evidence in the record in the form of Reilly's expert testimony, the PUC's decision must be upheld.

CONCLUSION

This Court should reverse the decision of the PUC because Nashua's taking of PWW's assets is not in the public interest, for the reasons set forth in this reply brief and in Pennichuck's opening brief. Should this Court uphold the PUC's decision related to public interest, then it should also affirm the PUC's valuation determination, as well as the requirement for a mitigation fund that would generate $3.4 million annually. Finally, it should affirm the PUC's determination dismissing the taking petition as to PEU and PAC.

REQUEST FOR ORAL ARGUMENT

Pennichuck requests oral argument on the issues set forth in the parties' briefs. Thomas J. Donovan will argue for appellants. Because of the many issues set forth in Nashua's appeal and Pennichuck's cross-appeal, and the extent of the certified record, Pennichuck agrees with Nashua's suggestion that the Court permit fifteen minutes of oral argument on public interest and other issues and fifteen minutes of oral argument on valuation issues. Pennichuck would then designate Thomas J. Donovan to argue public interest and other issues, and Joe A. Conner to argue valuation issues.

Respectfully submitted,

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Certificate of Service

I hereby certify that on November 18, 2009, I served the foregoing Reply Brief by first class mail, postage prepaid, to the attached Service List, pursuant to Supreme Court Rule 26(2).

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