

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

City of Nashua – Valuation Petition

Docket No. DW 04-048

**STAFF’S POST HEARING REPLY BRIEF**

Staff of the New Hampshire Public Utilities Commission (Staff) hereby submits its post-hearing reply brief. The City of Nashua (Nashua), in its memorandum in support of its petition for valuation, listed a number of conditions it states it is willing to abide by to satisfy that its taking of Pennichuck Water Works, Inc.’s (PWW) assets are in the public interest pursuant to RSA Chapter 38. Some of the conditions were the subject of discovery in this docket, some were not. In this reply brief, Staff has chosen to focus on whether these proposed conditions can be used to bolster a public interest finding in light of present common law on statutory interpretation.

**I. Nashua’s Proposed Conditions Relative to Customers in Franchises Located Outside the City of Nashua**

As the Commission is aware from Staff’s post-hearing brief, the issue of recourse for outside customers is a concern of Staff’s. On page 4 of its memorandum, Nashua states [t]he argument that customers would lose the regulatory oversight if Nashua’s petition were granted is founded on myth and speculation.” Staff agrees with Nashua that if Nashua takes PWW’s assets, the Commission will have some jurisdiction over customers who reside outside Nashua. This jurisdiction, however, will be less. Under RSA Chapter 38, jurisdiction is found in RSA 38:14 which states that “[o]peration by a municipality outside its own limits shall be subject to the

jurisdiction of the [C]ommission *except as provided in RSA 362.*” (emphasis added) RSA 362:4, in turn, states that although a municipality serving customers outside its municipal boundaries at rates no higher than 15 percent above the rates charged inside customers shall not be considered a regulated public utility, a municipality is not exempt from the franchise application requirements of RSA Chapter 374. Thus, the basis of the Commission’s jurisdiction is through RSA Chapter 374. That is the extent of Staff’s agreement with Nashua on the breadth of Commission jurisdiction.

Staff does not agree with Nashua that the Commission’s jurisdiction, as detailed above through RSA 38:14 and RSA Chapter 362 as limited to RSA Chapter 374 will provide the same degree of jurisdiction over Nashua as over PWW. As the Commission is aware, review of franchises under RSA Chapter 374 is a more limited activity than oversight of “accounting, reporting, or auditing functions” pursuant to RSA 362:4, II or rates pursuant to RSA 374:2 and RSA 378:7. For outside customers, it is apparent that the degree of regulatory oversight by this Commission, should Nashua acquire the water system, will be less than the Commission’s present oversight of these customers.

To overcome this diminished oversight, Nashua proposes, in Appendix A, Section I and Section V.9 to its memorandum that service within franchises outside of Nashua’s borders shall be subject to the Commission’s jurisdiction and that the “City of Nashua shall be fully regulated as a water utility for the purposes of accounting, auditing, reporting and rates, until December 31<sup>st</sup> of the fifth year following Nashua’s acquisition and commencement of utility operations.” In summary, Nashua is arguing that these outside customers will have the same protections of Commission oversight as they have now. Staff does not agree with Nashua that these conditions

can apply to these customers in the way Nashua asserts. The legislature has simply not given the Commission authority to entertain this proposal.

A basic tenet articulated by the N.H. Supreme Court is that statutes are not to be construed in isolation; that they must be construed in harmony with the overall statutory scheme. *Estate of Jaycob Gordon-Courtne v. Brown*, 152 N.H. 265, 272 (2005), citing *Nilsson v. Bierman*, 150 N.H. 393 (2003). “When interpreting two statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes.” *Id.* Nashua’s proposal that the Commission retain its present oversight of outside customers pits RSA 38:11, RSA Chapter 362, and RSA Chapter 374 against each other. Staff believes reading RSA Chapter 374 so broadly as to assert that it can be the basis of maintaining the Commission’s present oversight runs afoul of RSA 362:4, II and RSA 362:4, III-a which both specifically state that, with few exceptions, “a municipal corporation furnishing water service *shall not* be considered a public utility.” (emphasis added) These statutes exempt the very oversight Nashua proposes. To read RSA Chapter 38 and RSA Chapter 374 as authorizing the Commission to oversee Nashua’s operation of a water utility to the full extent the Commission oversees PWW’s operation is inconsistent with the legislative purpose expressed in RSA 362:4, II and RSA 362:4, III-a; does not produce a harmonious overall statutory scheme; and construes RSA Chapter 38, RSA 374, and RSA 362 in a contradictory manner.

For these reasons, Staff disagrees that Nashua can remedy the diminished oversight of outside customers through a condition of continued regulation. Nashua must choose some other method of addressing this issue.

The result remains that there will be less customer recourse than presently exists for the approximately 3,000 outside customers. This diminished recourse is in itself a harm that weighs against Nashua's public interest case. As the Commission is aware, under *Appeal of City of Keene*, 141 N.H. 797, 802 (1997), the Commission is charged with balancing "the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss of the property in its present form." Outside customers can presently file complaints against public utilities pursuant to RSA Chapter 365 and can participate in proceedings pursuant to RSA 541-A:32. Under Nashua's ownership of the water system, these customers will no longer have RSA Chapter 365 as a recourse since the water system will no longer meet the definition of a public utility as expressed in RSA 362:2 and RSA 362:4. This is a harm that must be balanced against Nashua's articulated benefits.

## **II. Nashua's Proposed Conditions Relative to Wholesale Customers**

In Appendix A, Section II to its memorandum, Nashua proposes as a condition of approval that:

"Nashua shall be subject to the Commission's jurisdiction relative to any complaint alleging that the rates, terms and conditions for wholesale service provided by Nashua are unjust or unreasonable. Any complaint relative to wholesale service may be brought before the Commission as provided by RSA 365 and applicable laws, rules and regulations of the Commission with respect to such wholesale service."

Nashua bases the Commission's authority to impose this condition on RSA 38:6, RSA 38:11, and RSA Chapter 365, however, as Staff stated in its post-hearing brief, RSA 362:4, III-a, (a)(2) precludes the Commission from regulating wholesale contracts between municipalities. *See*, Staff Brief at 37. Reading RSA 38:6, RSA 38:11, and RSA Chapter 365 as authorizing the Commission to oversee wholesale contracts between municipalities would produce results

contradictory to the legislative purpose of RSA 362:4, III-a(a)(2). The only wholesale contract Staff believes could be subject to Nashua's proposal is the Anheuser-Busch contract because municipal wholesale contracts with non-municipalities are not specifically exempted from Commission oversight in RSA 362:4.

### **III. Nashua's Proposed Conditions Relative to Customer Service**

In Appendix A to its memorandum, Nashua proposes to comply with applicable laws, rules, and regulations governing customer service, including the Commission's Puc Chapter 1200 rules. Staff believes Nashua's proposal is not enforceable by this Commission.

Specifically, as cited above, RSA 362:4, II and RSA 362:4, III-a both state that, with few exceptions, "a municipal corporation furnishing water service *shall not* be considered a public utility." (emphasis added) RSA Chapter 365, which governs complaints and investigations, applies to public utilities, not to municipal corporations.

At hearing, Staff witness Amanda Noonan testified that in the twelve years she has worked with the Commission, it has been the practice of the Commission to not exercise jurisdiction over calls relating to municipal utilities. Hearing Transcript of September 26, 2007 (Tr. 9/26/07) at 50 lines 13-23. For Nashua to argue that RSA 38:6, RSA 38:11, and RSA Chapter 374 authorize the Commission to enforce Nashua's commitment to "provide customer service in compliance with applicable laws, rules, and regulations governing customer service, including the Commission's Puc Chapter 1200 rules" is inconsistent with Commission practice. Lastly, Nashua's proposal fails the test of *Estate of Jaycob-Gordon-Courtne* because it produces a reading of the statutes that is contradictory and goes against the legislative purpose of RSA 362:4 that limits Commission involvement in municipal affairs.

### **IV. Nashua's Discretionary Conditions**

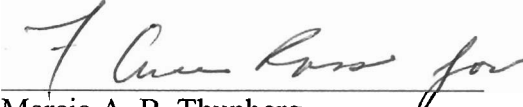
Nashua offers to mitigate the harms its taking of PWW will have on PWW's affiliates, Pennichuck East Utility, Inc. (PEU) and Pittsfield Aqueduct Company, Inc. (PAC), by proposing the Commission require it to take the assets of PEU and PAC. As the Commission is aware, Nashua's initial petition included the taking of PEU and PAC in addition to PWW for the very reason of mitigating harms to these affiliates. As the Commission is also aware, this issue was raised and decided early on in this docket. The Commission found that as a matter of law, RSA Chapter 38 did not authorize Nashua to take PEU or PAC. *City of Nashua*, Order No. 24,425, 90 NH PUC 15 (2005). Because the Commission found Nashua could not take PEU and PAC, Staff does not believe the Commission has authority to now entertain this discretionary condition.

### **III. Conclusion**

In conclusion, Staff does not believe Nashua's proposal to remedy harms through conditions is something the Commission can entertain. Common law on statutory interpretation in instances where two or more statutes address similar subject matter is very consistent. The N.H. Supreme Court requires a reading of the statutes that does not construe the statutes as contradicting one another and that effectuates legislative purpose. Nashua's proposals do not meet that test; they contradict RSA 362:4 and the legislature's clear directive that the Commission limit its involvement in municipal affairs. The remedies proposed to satisfy the public interest test of RSA Chapter 38, therefore, are means that are not legally permissible.

Respectfully Submitted,

Date: December 3, 2007

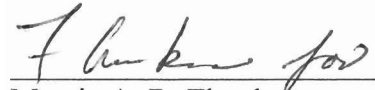
  
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**Certificate of Service**

Staff certifies that a copy of the foregoing brief has been sent this third day of December by first class mail to Ms. Claire McHugh and by electronic means to the remainder of the service list for this docket.

Date: December 3, 2007

  
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Marcia A. B. Thunberg