

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**#2009-0274**

**Appeal of City of Nashua  
Appeal of Pennichuck Water Works, Inc.**

**Reply Brief of the City of Nashua**

**City of Nashua,**

**By its Attorneys,**

**Robert Upton, II, Esq.**

**NHBA #2599**

**Justin C. Richardson, Esq.**

**NHBA #12148**

**Upton & Hatfield, LLP**

**23 Seavey Street**

**PO Box 2242**

**North Conway, NH 03860-2242**

**(603) 356-3332**

**James M. McNamee, Esquire**

**NHBA #1720**

**PO Box 2019**

**Nashua, NH 03061**

**(603) 489-3250**

## TABLE OF CONTENTS

1.	Table of Contents .....	i
2.	Table of Authorities.....	iii
3.	Questions Presented for Review.....	1
4.	Statement of the Case .....	3
5.	Statement of Facts .....	4
	1. Facts Concerning Pennichuck’s Failure to Rebut the Presumption of Public Interest Under RSA 38. ....	4
	2. Facts Concerning the Commission’s Authority to Impose Conditions Offered By Nashua .....	9
	3. Statement of Facts Concerning the Opportunity for Discovery Concerning Conditions Proposed to the Commission.....	11
6.	Argument .....	12
	A. Pennichuck Failed to Rebut the Presumption of Public Interest Under RSA 38 and Misreads the Effect of the Rebuttable Presumption .....	12
	B. The Commission Has the Legal Authority to Impose Conditions on Nashua’s Petition .....	17
	C. The Conditions Imposed by the Commission Did Not Violate Pennichuck’s Constitutional Rights .....	20

D. Pennichuck’s Argument on Valuation Confirms that there Was No Evidence to Support Reilly’s Hypothesis That Municipal Buyers Would Influence the Market Price for Utility Property ..... 22

E. Nashua Preserved for Appeal the Commission Failure to Allow it to Acquire PEU and PAC ..... 25

7. Conclusion ..... 28

8. Request for Oral Argument ..... 29

9. Certificate of Service ..... 30

## TABLE OF AUTHORITIES

### Cases

<i>Appeal of Ann Miles Builder, Inc.</i> , 150 N.H. 315, 320 (2003).....	16
<i>Appeal of Campaign for Ratepayers Rights</i> , 133 N.H. 480, 484 (1990) .....	25
<i>Appeal of Campaign for Ratepayers Rights</i> , 145 N.H. 671, 674 (2001) .....	17
<i>Appeal of Courville</i> , 139 N.H. 119, (1994) .....	25
<i>Appeal of Milford Water Works</i> , 126 N.H. 127, 133, 134 (1985).....	17, 19, 22
<i>Appeal of Pinetree Power</i> , 152 N.H. 92, 95 (2005) .....	16
<i>Blair v. Manchester Water Works</i> , 103 NH 505 (1961).....	10
<i>Cunningham v. Manchester</i> , 129 N.H. 232 (1987) .....	13, 14, 15
<i>In re Sheena B.</i> , 139 N.H. 179, 181 (1994) .....	15
<i>Jodoin v. Barody</i> , 95 N.H. 154, 156-57, 59 A.2d 343, 345 (1948).....	13
<i>Manchester Fire Department v. Gelinas</i> , 139 N.H. 63, 67 (1994).....	15
<i>Manchester Housing Authority v. Fisk</i> , 102 N.H. 280, 283 (1959).....	21
<i>Southern New Hampshire Water v. Hudson</i> , 139 N.H. 139 (1994).....	24
<i>State v. LaRose</i> , 157 N.H. 28, 33 (2008) .....	23

*State v. Marti*, 143 N.H. 608, 614 (1999)..... 15

**NH Public Utilities Commission Orders**

Order No. 24,425 ..... 5, 25, 26

Order No. 24,649 ..... 17

Order No. 24,654 ..... 11

Order No. 24,878 ..... *passim*

Order No. 24,948 ..... 22, 25

**Statutes**

RSA 33 ..... 19

RSA 38 ..... *passim*

RSA 38:2 ..... 20, 21

RSA 38:2, I ..... 20

RSA 38:3 ..... *passim*

RSA 38:11 ..... 1, 17, 18, 21

RSA 38:14 ..... *passim*

RSA 170-C:5, I ..... 15

RSA 281-A:2 ..... 16

RSA 362 ..... 9, 18

RSA 362, I ..... 18

RSA 362:2, I .....	1, 11, 18
RSA 362:4.....	19
RSA 362:4, I .....	1, 11, 17, 18
RSA 362:4, II.....	11, 18, 19
RSA 362:4, III-a .....	<i>passim</i>
RSA 362:4, III-a(b).....	20
RSA 362:4, III-a(1).....	19, 20
RSA 365 .....	20
RSA 374.....	20
RSA 374:1.....	17, 20
RSA 374:22, III.....	20
RSA 541:3.....	25, 26, 27
RSA 541:6.....	26

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commission properly concluded that Pennichuck failed to rebut the presumption in RSA 38:3 when:

- a) RSA 38 implements a significant policy objective;
- b) At least a preponderance of the evidence if not a greater standard is required to rebut the presumption;
- c) The Commission's decision shows that it considered and weighed the evidence and arguments presented by Pennichuck, as well as contrary evidence offered by Nashua; and
- d) The evidence before the Commission supports its decision.

(Pennichuck Appeal Question P 3.)

2. Whether the Commission properly imposed conditions pursuant to RSA 38:11 and its authority over municipal utilities operating outside their corporate limits under RSA 38:14, RSA 362:2, I, and RSA 362:4, I & III-a.

(Pennichuck Appeal Question P 5 & 6.)

3. Whether it was error for the Commission to rely on the municipal buyer theory supported only by the opinion of its proponent who failed to recall a single example where more than one municipal buyer influenced the market, and there

was no evidence in the record to support such a theory and all other relevant witnesses testified that it was not the case.

(Nashua Appeal Question 1.)

4. Whether Nashua preserved for appeal the issue of the Commission's failure to allow it to acquire PEU and PAC where it raised the issue in its motion for rehearing of the Commission's final order.

(Nashua Appeal Question 2.)

## **STATEMENT OF THE CASE**

Nashua incorporates by reference the Statement of the Case provided in its opening brief.

## STATEMENT OF FACTS

Nashua supplements the Statement of Facts provided in its opening brief as set forth below.

### **1. Facts Concerning Pennichuck's Failure to Rebut the Presumption of Public Interest Under RSA 38.**

Given the scope of the record, it is not possible to summarize all of the evidence presented to the Commission, and no attempt will be made to do so here. Order No. 24,878, however, describes in detail the evidence and arguments presented by Pennichuck. It shows that the Commission weighed each of its arguments and evidence appropriately, as well as contrary evidence offered by Nashua, and ultimately concluded that Pennichuck failed to rebut presumption of public interest under RSA 38:3.

In particular, Section V (A) of Order No. 24,878 shows that the Commission understood and considered all of Pennichuck's arguments.<sup>1</sup> In Section V (G) of Order No. 24,878, it reviewed and rejected those arguments for which evidence was presented, including, for example, Pennichuck's record as utility,<sup>2</sup> work force issues,<sup>3</sup> Nashua's oversight and operations contractors<sup>4</sup> and their operations and

---

<sup>1</sup> *Order No. 24,878*, Pages 27-35. (Certified Record, Page 10302 *ff*; Appendix to Brief, Pages 51 to 59.)

<sup>2</sup> *Order No. 24,878*, Page 51. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 75.)

<sup>3</sup> *Order No. 24,878*, Page 52. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 76.)

<sup>4</sup> *Order No. 24,878*, Page 53. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 77.)

oversight contracts,<sup>5</sup> Nashua’s customer service and billings and collections practices,<sup>6</sup> the nature of elected municipal officials,<sup>7</sup> rates,<sup>8</sup> and many other issues. The interests of customers of PAC and PEU due to the Commission’s Order No. 24,425 granting Pennichuck’s *Motion to Dismiss* those utilities was discussed at length.<sup>9</sup>

After considering the evidence, the Commission found none of Pennichuck’s arguments to be sufficiently persuasive to rebut the presumption of public interest.<sup>10</sup> For example, regarding its criticism of Nashua’s contract for operation with Veolia Water, the Commission found that “the proposed arrangements are reasonably calculated to lead to an effective operation of the PWW system.”<sup>11</sup> It also found that “the prior experience of R.W. Beck as an owner’s representative is adequate”.<sup>12</sup> Regarding Pennichuck’s claims to “success as a regional utility” the Commission found that “the testimony is speculative”<sup>13</sup> and “not adequate to rebut the statutory presumption in favor of municipal ownership”.<sup>14</sup> The Commission

---

<sup>5</sup> *Order No. 24,878*, Pages 55-56. (Certified Record, Page 10302 *ff*; Appendix to Brief, Pages 79-80.)

<sup>6</sup> *Order No. 24,878*, Page 53. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 77.)

<sup>7</sup> *Order No. 24,878*, Page 55. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 79.)

<sup>8</sup> *Order No. 24,878*, Pages 56-57. (Certified Record, Page 10302 *ff*; Appendix to Brief, Pages 80-81.)

<sup>9</sup> *Order No. 24,878*, Pages 50, 62-63, 94-96, 99 & 119. (Certified Record, Page 10302 *ff*; Appendix to Brief, Pages 74, 86-87, 118-120, 123 & 143.)

<sup>10</sup> *Order No. 24,878*, Page 63. (Certified Record Page 10302 *ff*; Appendix to Brief, p. 87.)

<sup>11</sup> *Order No. 24,878*, Page 53. (Certified Record Page 10302 *ff*; Appendix to Brief, p. 77.)

<sup>12</sup> *Order No. 24,878*, Page 53. (Certified Record Page 10302 *ff*; Appendix to Brief, p. 77.)

<sup>13</sup> *Order No. 24,878*, Page 52. (Certified Record Page 10302 *ff*; Appendix to Brief, p. 76.)

<sup>14</sup> *Order No. 24,878*, Page 52. (Certified Record Page 10302 *ff*; Appendix to Brief, p. 76.)

also found that Pennichuck’s “positive record as a utility” was “not the type of evidence that can ... rebut the presumption in favor of the taking by demonstrating that the utility has a good record.”<sup>15</sup>

In addition to considering Pennichuck’s arguments, the Commission also heard evidence concerning problems with Pennichuck’s operations. For example, Nashua presented evidence concerning the considerable experience that its contractors would bring to the operation of its water system<sup>16</sup> relative to that of Pennichuck,<sup>17</sup> the impact of Pennichuck’s tremendous overhead costs,<sup>18</sup> its cost over-runs,<sup>19</sup> its failure to implement “CMMS” to control costs,<sup>20</sup> and its rates<sup>21</sup> which are the highest in the state for a comparably sized utility,<sup>22</sup> its violation of drinking water standards<sup>23</sup> for contaminants such as arsenic,<sup>24</sup> total coliform bacteria,<sup>25</sup> radon, uranium and other radiological contaminants,<sup>26</sup> and other violations of drinking water and environmental or safety standards.<sup>27</sup> On-cross examination, Pennichuck Water Works president Donald Ware testified that the

---

<sup>15</sup> *Order No. 24,878*, Page 52. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 76.)

<sup>16</sup> *Order No. 24,878*, Page 44. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 68.)

<sup>17</sup> *Order No. 24,878*, Page 44. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 68.)

<sup>18</sup> *Order No. 24,878*, Page 45. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 69.)

<sup>19</sup> *Order No. 24,878*, Page 45. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 69.)

<sup>20</sup> *Order No. 24,878*, Page 45. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 69.)

<sup>21</sup> *Order No. 24,878*, Page 47. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 71.)

<sup>22</sup> *Exhibit 1016*, Pages 3 & 63 . (Certified Record, Page 11940 *ff*.)

<sup>23</sup> *Exhibit 1016*, Page 46. (Certified Record, Page 11940 *ff*.)

<sup>24</sup> *Exhibit 1119*, Pages 21-27. (Certified Record, Page 13554 *ff*.)

<sup>25</sup> *Exhibit 1119*, Pages 9-10. (Certified Record, Page 13554 *ff*.)

<sup>26</sup> *Exhibit 1119*, Pages 1-3 & 17-20. (Certified Record, Page 13554 *ff*.)

<sup>27</sup> *Exhibit 1119*, Pages 4-8 , 11-13 & 25-26. (Certified Record, Page 13554 *ff*.)

company would not install treatment systems but would wait “to find out what the new rules were going to be and then be out of compliance” because “if we spend money on proposed regulations that aren't finalized, and they aren't finalized, such as the radon standard, *we would not be able to earn on that investment*”.<sup>28</sup>

Nashua’s Chief Financial Officer, Carol Anderson and Deputy Treasurer/Tax Collector, Ruth Raswyck, testified concerning significant errors in Pennichuck’s customer billing procedures including “poor readings, decimal points missing, meter removed information that we have not always gotten, negative bills, negative consumption, [and] zero consumption.”<sup>29</sup> In one example, Nashua discovered that approximately 2,500 customers<sup>30</sup> had received bills containing “zero consumption, high/low readings, readings that are not complete in a 90 day period”<sup>31</sup> and brought these problems to Pennichuck’s attention.<sup>32</sup> Despite Pennichuck’s statement that “it has taken steps to correct the situation so that it will not happen again”<sup>33</sup> the problems continued.<sup>34</sup>

Nashua further offered substantial evidence concerning the advantages that

---

<sup>28</sup> *Transcript, September 11, 2007, Page 78, Lines 6-13. (Certified Record, Page 8841 ff.)(Emphasis added.)*

<sup>29</sup> *Transcript, January 11, 2007, Page 193, Lines 5-8; see also Exhibit 1008, Page 5, Lines 68-75 & Page 10. (Certified Record, Page 7051 ff; Certified Record, Page 11318.)*

<sup>30</sup> *Exhibit 1008, Page 10. (Certified Record, Page 11318 ff.)*

<sup>31</sup> *Transcript, January 11, 2007, Page 194, Lines 2-5. (Certified Record, Page 7051 ff.)*

<sup>32</sup> *Exhibit 1008, Page 5 & Page 10 (2,500 customer accounts incorrectly billed). (Certified Record, Page 11318 ff.)*

<sup>33</sup> *Exhibit 1008, Page 10. (Certified Record, Page 11318 ff.)*

<sup>34</sup> *Transcript, January 11, 2007, Pages 251-252. (Certified Record, Page 7051 ff.)*

Nashua's public-private partnership with Veolia Water would provide in the areas of operations, local control, rate savings and other areas. Nashua Alderman Brian McCarthy and former Mayor Bernard Streeter testified extensively on cross examination concerning such advantages and compared them to the operation of Pennichuck as a state regulated investor-owned utility monopoly.<sup>35</sup> There was also evidence concerning the specific performance standards Nashua would meet, such as, requiring that Veolia Water operate in compliance with its detailed OM&M Agreement,<sup>36</sup> various operating and maintenance plans required by that Agreement,<sup>37</sup> all State, Federal or local laws, regulations and permits<sup>38</sup> and all applicable State and Federal water quality standards<sup>39</sup> and other requirements.<sup>40</sup>

These and other benefits are set forth in Nashua's pre-filed testimony submitted to the Commission, and summarized in its November 16, 2007 closing *Memorandum in Support of Petition for Valuation* included as an Appendix to this Reply Brief.<sup>41</sup> In essence, Nashua presented evidence that its proposal would provide local control and accountability currently unavailable to customers of Pennichuck, improved compliance with drinking water standards and better service

---

<sup>35</sup> See e.g. *Transcript, January 10, 2007*, Pages 26 to 54. (Certified Record, Page 6784 ff.)

<sup>36</sup> *Exhibit 1005B*, Article V, Section 5.1.1. (Certified Record, Page 10770 ff.)

<sup>37</sup> *Exhibit 1005B*, Article V, Section 5.1.1. (Certified Record, Page 10770 ff.)

<sup>38</sup> *Exhibit 1005B*, Article V, Section 5.1.2. (Certified Record, Page 10770 ff.)

<sup>39</sup> *Exhibit 1005B*, Article V, Section 5.1.3. (Certified Record, Page 10770 ff.)

<sup>40</sup> For example, Prudent Industry Practice, *Exhibit 1005B*, Article V, Section 5.1.4; and all manufacturer's instructions and warranty requirements related to the water system, *Exhibit 1005B*, Article V, Section 5.1.5. (Certified Record, Page 10770 ff.)

<sup>41</sup> Appendix to Reply Brief, Page 1 et seq.

at lower cost. Order No. 24,878 shows that the Commission considered but declined to rule on this evidence because it found that Pennichuck had failed to rebut the presumption of the public interest.<sup>42</sup>

## **2. Facts Concerning the Commission’s Authority to Impose Conditions and the Conditions Offered by Nashua.**

The Commission heard testimony from a former Public Utilities Commissioner Douglas Patch and a New Hampshire lawyer who represented Pennichuck.<sup>43</sup> He testified concerning his opinion that the Commission lacked regulatory authority to regulate Nashua’s franchises outside of its borders. During his testimony, it became clear that he did not fully understand the regulation of municipal utilities under RSA 38 and RSA 362. For example, in response to a question from Commissioner Clifton Below, he acknowledged his experience concerning municipal utilities was “pretty limited”.<sup>44</sup> He had dealt with municipal utilities “on occasion” as a former Commissioner and, on one occasion, he “was involved in [a] Manchester Water Works case that came before the Commission, ... representing Pennichuck in that particular situation.”<sup>45</sup> Regarding RSA 38:14, which states that “operation by a municipality outside its own limits shall be subject to the jurisdiction of the commission except as provided in RSA 362” he

---

<sup>42</sup> *Order No. 24,878, Page 57.* (Certified Record, Page 10770 *ff.*; Appendix to Brief, Page 81.)

<sup>43</sup> *Transcript, September 18, 2007, Page 190-191.* (Certified Record, Page 9268 *ff.*)

<sup>44</sup> *Transcript, September 18, 2007, Page 219.* (Certified Record, Page 9268 *ff.*)

<sup>45</sup> *Transcript, September 18, 2007, Page 219, Lines 5 to 14.* (Certified Record, Page 9268 *ff.*)

testified that he believed he had “looked at [RSA] 38:14 at some point” but was not sure that he reviewed it when he prepared his testimony stating that customers outside of Nashua “would be subject to the whims of Nashua officials.”<sup>46</sup> He was later shown RSA 38:14 and asked to explain why the legislature made municipalities public utilities outside of their borders if (in his opinion) they were not subject to the Commission’s jurisdiction. Unable to explain this inconsistency, he stated that “without doing a thorough analysis of this, it's difficult for me to say exactly what the Legislature was saying here.”

Mr. Patch based his opinion on this Court’s decision in *Blair v. Manchester Water Works*, 103 N.H. 505 (1961).<sup>47</sup> He acknowledged, however, that the statutory provision relied on in *Blair*, had been amended,<sup>48</sup> and was asked to review one of several opinions of the Commission concerning municipal utilities operating outside their borders.<sup>49</sup> He acknowledged thereafter that, under the current statutory language, the Commission “does appear to be saying” that it has the authority to regulate franchises of municipal utilities but he was “not sure, in the context of this particular case before us here today, how that would play out.”<sup>50</sup> He was ultimately contradicted by the Commission’s finding under RSA 38:14,

---

<sup>46</sup> *Transcript September 18, 2007*, Page 199. (Certified Record, Page 9268 ff.)

<sup>47</sup> *Transcript September 18, 2007*, Page 203. (Certified Record, Page 9268 ff.)

<sup>48</sup> *Transcript September 18, 2007*, Page 204. (Certified Record, Page 9268 ff.)(Appendix to Reply Brief, Page 127.)

<sup>49</sup> *Exhibit 1074*. (Certified Record, Page 12415 ff.)

<sup>50</sup> *Transcript September 18, 2007*, Pages 203-204. (Certified Record, Page 9268 ff.)

RSA 362:2, I, and RSA 362:4, I, that a municipality operating outside its borders is in fact a public utility, and is only exempt to the extent provided in RSA 362:4, II & III-a.<sup>51</sup>

### **3. Statement of Facts Concerning the Opportunity for Discovery Concerning Conditions Proposed to the Commission.**

The conditions proposed by Nashua were the subject of much discovery provided to all parties since as early as July 28, 2005, and that were later incorporated into testimony and exhibits.<sup>52</sup> Nashua's proposed conditions related to protecting customers in other municipalities,<sup>53</sup> retail and wholesale customers,<sup>54</sup> seeking approval before transferring franchises to a Regional Water District,<sup>55</sup> the terms and conditions of service under a water ordinance,<sup>56</sup> and customers in satellite systems.<sup>57</sup> Others were set forth in responses to data requests and in pre-filed exhibits offered to the Commission.<sup>58</sup> During this period, the Commission noted that "the amount of discovery, including the numerous depositions that have taken place, in this docket is fairly described as encyclopedic."<sup>59</sup>

---

<sup>51</sup> *Order No. 24,878*, Page 26; (Certified Record, Page 10302 *ff.*) (Appendix to Brief, Page 50.)

<sup>52</sup> *See e.g., Exhibit 1014*. (Certified Record, Page 11632 *ff.*)

<sup>53</sup> *See e.g., Exhibit 1014*, Pages 15 (16) to 16 (17). (Certified Record, Page 11632 *ff.*)

<sup>54</sup> *See e.g., Exhibit 1014*, Page 23. (Certified Record, Page 11632 *ff.*)

<sup>55</sup> *See Exhibit MBS Exhibit 4 attached to Exhibit 1014*. (Certified Record, Page 11632 *ff.*)

<sup>56</sup> *See Exhibit 1016*, Pages 19-20. (Certified Record, Page 11940 *ff.*)

<sup>57</sup> *See Exhibit 1016*, Page 20. (Certified Record, Page 11940 *ff.*)

<sup>58</sup> *See e.g., Exhibit 1026*, Pages 1, 2, 19. (Certified Record, Page 12072 *ff.*)

<sup>59</sup> *Order No. 24,654*, Page 4. (Certified Record, Page 5638 *ff.*)

## ARGUMENT

### A. Pennichuck Failed to Rebut the Presumption of Public Interest Under RSA 38 and Misreads the Effect of the Rebuttable Presumption

Pennichuck argued to the Commission that the rebuttable presumption contained in RSA 38:3 had “no meaningful application” to this case.<sup>60</sup> Pennichuck appears to argue that the rebuttable presumption merely shifts the initial burden of production of evidence and that, upon the showing of some evidence to the contrary, the presumption disappears and it becomes the duty of the Commission to weigh all of the evidence *de novo*, giving no effect to the presumption and determine whether granting Nashua’s petition was in the public interest. There is no such *de novo* review under RSA 38, however. Instead, RSA 38:3 provides for a vote of both the governing and the legislative bodies of the municipality which then creates a presumption that it is in the public interest for the municipality to establish a publicly owned water utility.

The Commission recognized “[t]hat the provision of public water supply is a public purpose of constitutional sufficiency requires no discussion here”<sup>61</sup> and that “by enacting RSA 38 the Legislature has explicitly endorsed the propriety of municipalities taking utility property, further making the policy choice that such a taking is presumed to be in the public interest in the circumstances of this case.

---

<sup>60</sup> *Order No. 24,878*, Page 21. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 46.)

<sup>61</sup> *Order No. 24,878*, Page 24. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 48.)

Consequently, we are called upon to *allocate the burden of proof here to the municipalization opponents* as to the assets lying within Nashua.”<sup>62</sup> Nashua presented significant evidence to demonstrate that its petition would promote the public interest. However, it was not Nashua’s burden to prove that its petition was in the public interest, but rather it was Pennichuck’s burden to prove otherwise.

RSA 38:3

The case of *Cunningham v. Manchester*, 129 N.H. 232 (1987), is instructive on this point. In that case, the Court examined at length the nature of rebuttable presumptions and their use by the legislature. The Court noted that the first theory of presumptions, articulated by James Bradley Thayer in 1898, holds that “the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact [and that] [i]f that evidence is produced by the adversary, the presumption is spent and disappears.”<sup>63</sup> However, the Court stated that this theory has been criticized “on the ground that it grants presumptions too weak an effect, *especially when substantial policy considerations underlie a presumption.*”<sup>64</sup>

There do not appear to be any cases decided by this Court that follow the Thayer theory of presumptions.

The second theory of presumptions, developed by Professor Edmund

---

<sup>62</sup> *Order No. 24,878*, Page 25. (Certified Record, Page 10302 ff; Appendix to Brief, Page 49.)

<sup>63</sup> *Cunningham v. Manchester*, 129 N.H. 232, 236 (1987) *citing* McCORMICK ON EVIDENCE § 344, at 974 (E. Cleary 3d ed. 1984); see *Jodoin v. Baroody*, 95 N.H. 154, 156--57, 59 A.2d 343, 345 (1948).

<sup>64</sup> *Cunningham, supra* at 236 (emphasis added).

Morgan, “holds that the strong social policy reasons underlying some presumptions may persist despite the introduction of some evidence tending to rebut the existence of the presumed fact.”<sup>65</sup> The Court stated that:

In such situations, the presumption should act to shift the burden of persuasion, as well as the burden of producing evidence. The opponent of the presumption must then demonstrate the non-existence of the presumed fact by at least a preponderance of the evidence, *if not by a greater standard*. [...] A Morgan theory presumption thus operates with a weight commensurate with the policy considerations that the presumption embodies. In general, jurisdictions will adopt the Morgan theory of the effect of a particular presumption when the legislature or judiciary wishes to implement a significant policy objective. [...] In deciding which of the two presumption theories should govern the meaning of the presumption contained in RSA 281:2, V-a, we must consider whether the statute reflects a significant policy objective.

Thus, as in this case, when the legislature seeks to “implement a significant policy objective” it shifts not only the burden to produce evidence, but also the burden of persuasion “by at least a preponderance of the evidence, if not by a greater standard.”<sup>66</sup>

There can be little doubt that the legislature enacted RSA 38 to advance significant policy objectives in favor of allowing municipalities to establish publicly owned water supplies to provide service to their residents and others. *See Senate Committee on Executive Departments and Administration, Hearing on HB*

---

<sup>65</sup> *Cunningham, supra* at 236.

<sup>66</sup> *Cunningham, supra* at 236.

528, Pages 1-2, Appendix to Brief, Pages 291-292. The Commission found this to be the case<sup>67</sup> and the Statement of Facts detailed herein as well as in Nashua's November 16, 2007 *Memorandum in Support of Petition for Valuation* (Appendix to Reply Brief, Page 1, et seq.) present many of the policy reasons in favor of such a presumption, including local control over water utility operations, preservation of watershed and water supply resources, reduced rates and improved service.

The decisions of this Court decided since *Cunningham* confirm that at least a preponderance of the evidence, if not a greater standard, is required to rebut the presumption of public interest in RSA 38. For example, in *Manchester Fire Department v. Gelinis*, 139 N.H. 63, 67 (1994), the Court stated that “slight evidence” was “not sufficient to overcome the presumption”. Similarly, in the case of *In re Sheena B.*, 139 N.H. 179, 181 (1994), the Court stated that “[t]o determine whether the respondent has rebutted the presumption” under RSA 170-C:5, I, a trial court must consider and weigh the evidence before it. In *State v. Marti*, 143 N.H. 608, 614 (1999), the Court stated that “to rebut a presumption of prosecutorial vindictiveness” the State “must show objective reasons for the new charges that were not present when the prosecutor initially charged the defendant.” The Court examined the evidence offered to overcome the presumption and found “these reasons insufficient to rebut the presumption”. 143 N.H. at 614. This was

---

<sup>67</sup> *Order No. 24,878*, Pages 24-25. (Certified Record, Page 10302 ff; Appendix to Brief, Pages 48-49.)

precisely the approach taken by the Commission after review of the extensive body of evidence before it.

Most recently, in the *Appeal of Ann Miles Builder, Inc.*, 150 N.H. 315, 320 (2003), the Court examined the presumption under the Workers Compensation Statute, RSA 281-A:2, and stated that because “the legislature intended to provide increased protection to employees, we hold that the employer bears both the burden of producing evidence and the burden of persuasion on all five of the criteria set forth in the statute.”

In this case, Pennichuck had the burden to persuade the Commission that the harm to the public interest was such that the legislative policy in favor of establishing publicly-owned and operated water supplies must be disregarded. The public interest is a broad concept and the Commission considered and weighed the evidence before it, including that offered by Nashua, and ultimately concluded that Pennichuck had failed to meet its burden.<sup>68</sup>

The Commission’s findings of fact are presumed lawful and reasonable and Pennichuck bears the burden of demonstrating that the Commission’s order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable. *Appeal of Pinetree Power*, 152 N.H. 92, 95 (2005) *citing*

---

<sup>68</sup> *Order No. 24,878*, Page 57. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 81.)

*Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001).

Pennichuck seeks to “supplant the PUC's balancing with one more nearly to [its] liking.” *Id.* However, the Commission set forth its public interest analysis in considerable detail and it is fully supported by the record before it.

**B. The Commission Has the Legal Authority to Impose Conditions on Nashua’s Petition.**

Pennichuck argument that the conditions imposed by the Commission are not legally enforceable by the Commission is not supported by law. The authority of the Commission to impose conditions to “satisfy the public interest” is clearly set forth in RSA 38:11. It is also clear that the Commission has jurisdiction over the service provided by a municipality outside its corporate limits under RSA 38, RSA 362:4, I & III-a and RSA 374:1. *Appeal of Milford Water Works*, 126 N.H. 127, 133-134 (1985). The argument that customers would lose the regulatory oversight if Nashua’s petition were granted is founded on speculation; is inconsistent with the law, this Court’s decision in *Milford*, the Commission’s own decisions,<sup>69</sup> and is not supported by the evidence.

By its express terms, RSA 38:11 allows the Commission to “set conditions and issue orders to satisfy the public interest.” It is a specific grant of legislative authority that is not constrained by whether or not Nashua is a *public utility* under

---

<sup>69</sup> See e.g., *Exhibit 1074*, Order No. 24,649, *Petition of Peter St. James* (Warner Village District). (Certified Record, Page 12415 *ff*; Appendix to Reply Brief, Pages 128 et seq.)

RSA 362:4, III-a. It is simply a grant of authority to impose a condition of approval *upon the municipality* as may be required to satisfy the public interest. To read the authority in RSA 38:11 as limited to public utilities would render it meaningless because under such an interpretation, rather than grant authority to the Commission to implement RSA 38, it would merely limit the Commission to the authority it already has over a municipality serving customers outside its borders under RSA 362 and RSA 374. However, RSA 38:11 is a grant of authority to impose conditions, not a limitation thereon.

RSA 38:14 is clear that “[t]he operation by a municipality outside its own limits shall be subject to the jurisdiction of the commission except as provided in RSA 362.” Municipalities are public utilities outside their limits unless they fall within an exemption under RSA 362. Like RSA 38:14, however, RSA 362, I, starts with the assumption that all municipalities operating outside their borders are public utilities. RSA 362:2, I (Public utility includes all persons “except municipal corporations ... operating within their corporate limits”); RSA 362:4, I (“Every corporation, company, association, joint stock association, partnership, or person shall be deemed to be a public utility by reason of the ownership or operation of any water or sewage disposal system or part thereof.”). Pennichuck’s legal argument that “Nashua is statutorily exempt from PUC regulation as a utility under

RSA 362:4, III-a”<sup>70</sup> does not correctly reflect the law or this Court’s decision in *Milford*, 126 N.H. at 133-134.

It is true that there are exemptions from some regulatory requirements under RSA 362:4. However, they are limited in ways that make clear that the Commission retains jurisdiction over their service to customers outside their borders, particularly in areas such as quality of service and in ensuring that there is no discrimination in rates. RSA 362:4, II, for example, provides that municipal corporations serving outside their boundaries “shall not be considered a public utility under this title for the purpose of accounting, reporting, or auditing functions with respect to said service”. The Commission therefore retains jurisdiction in all other areas. The reason for this exemption is simple: municipal corporations are subject to municipal budget, reporting and auditing requirements as public institutions under RSA 33 and other provisions that make them legally, politically and economically accountable to the public.

The exemption provided in RSA 362:4, III-a relates to municipal corporations serving customers outside their borders and “charging such customers a rate no higher than 15 percent above that charged to its municipal customers”. RSA 362:4, III-a (1). This statutory exemption is limited because it does not exempt municipal corporations from the “franchise application requirements of

---

<sup>70</sup> See e.g. *Brief of the Cross-Appellants*, Page 12.

RSA 374”<sup>71</sup> and, in order to be exempt, a municipal corporation must provide all such “customers a quantity and quality of water quantity and quality of water or a level of water service equal to that served to customers within the municipality”.<sup>72</sup>

RSA 374:1 requires that all service provided be “reasonably safe and adequate, and in all other respects just and reasonable.” Thus, if a municipality failed to provide service that was just and reasonable, it would be subject to the Commission’s jurisdiction over its franchises, as the Commission’s decisions confirm.<sup>73</sup> Under RSA 365, the Commission would have the jurisdiction to hear any complaint that it failed to comply with any of the franchise requirements under RSA 374, and Order No. 24,878 has already required that Nashua comply with RSA 374:22, III.<sup>74</sup> In addition, any person that demonstrated by Petition to the Commission under RSA 365 that a municipality had failed to provide the same “quantity and quality” of service under RSA 362:4, III-a, would give the Commission the authority to regulate the rates or service of the municipality as public utility.

**C. The Conditions Imposed by the Commission Did Not Violate Pennichuck’s Constitutional Rights.**

RSA 38:2, I, authorizes Nashua to “[e]stablish ... in accordance with the

---

<sup>71</sup> RSA 362:4, III-a (a)(1) and RSA 362:4, III-a (b).

<sup>72</sup> RSA 362:4, III-a (a)(1).

<sup>73</sup> *See generally*, Appendix to Reply Brief, Pages 145 et seq.

<sup>74</sup> *Order No. 24,878*, Page 62. (Certified Record, Page 10302 *ff*; Appendix to Brief, Page 86.)

provisions of this chapter, one or more suitable plants for the manufacture and distribution of ... water for municipal use, for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized, or directed by the commission.” The fact that RSA 38 authorizes Nashua to *establish* a municipal water utility for the use of its inhabitants and others where none previously existed is itself significant. Nothing in RSA 38 suggests that Nashua was required have in place all of the details concerning its proposal prior to filing its Petition and due process does not guarantee a particular form of eminent domain procedure.

*Manchester Housing Authority v. Fisk*, 102 N.H. 280, 283 (1959).

To read a requirement that Nashua must describe its operations with certainty prior to establishing a water utility in this proceeding would effectively impose a standard that no municipality could meet. It would require Nashua to establish an existing water department before filing its RSA 38 Petition with the Commission. Such a requirement is not contained in RSA 38 and would conflict with what RSA 38:2 expressly allows, that Nashua may establish a water utility by filing a petition under RSA 38.

As set forth in the Statement of Facts herein, Pennichuck knew from an early stages of this proceeding in testimony and in responses to data requests the conditions that Nashua had proposed, and it was free to conduct discovery thereon. As the Commission noted, it could impose a condition pursuant to RSA 38:11 even

without Nashua having first proposed it. Order No. 24,948, Page 21; Appendix to Brief, Page 165. There is no constitutional right yet discovered that would require a municipality to set forth every conceivable detail concerning the design of its public projects before it seeks to acquire property therefore. *Milford*, 126 N.H. at 133-134. The Commission's conditions are reasonable in that regard.

**D. Pennichuck's Argument on Valuation Confirms that there was no Evidence to Support Reilly's Hypothesis that Municipal Buyers Would Influence the Market Price for Utility Property.**

Pennichuck argues in reply to Nashua that Reilly based his municipal buyer theory on "specific sales data".<sup>75</sup> Its citations to the record do not support its argument, however, and the fact remains that its expert failed to identify a single example of a sale wherein municipal buyers influenced the market. In fact, he avoided any reliance on "specific sales data" because the actual sales of water utilities contradicted his municipal buyer theory. None of the sales he identified involved multiple competing municipal buyers and when sales ratios he considered reliable taken from those sales were applied to Pennichuck Water Works property, the resulting value did not support his conclusion of value.<sup>76</sup>

All of the actual water utility professionals that offered an opinion on the subject testified that in their experience municipal buyers did not influence the market for water utility property. Pennichuck's witnesses, President Donald Ware,

---

<sup>75</sup> *Brief of Cross-Appellants*, Page 9.

<sup>76</sup> *Transcript, September 12, 2007*, Pages 133-141. (Certified Record, Page 8598 ff.)

and even former Commissioner Douglas Patch, as well as Mark Naylor, the Director of the Commission's Water Division, all testified that municipalities had no interest in and were not in the business of acquiring water systems.<sup>77</sup> Likewise, Nashua's expert, Glenn Walker, evaluated sales of water utilities to both municipalities and investor-owned purchasers and prepared a graph for the Commission showing that there was no evidence that municipal buyers paid more than non-municipal buyers.<sup>78</sup>

Pennichuck argues that the opinion of its expert alone, without any supporting data, satisfies the requirement that the Commission's decision is supported by "some evidence".<sup>79</sup> This argument is circular reasoning and would uphold any opinion simply because an expert says it is so, even though all the evidence points to the contrary.<sup>80</sup> It is also inconsistent with the requirement that the decision of a fact finder must be supported by "some evidence" which means "more than a minutia or a scintilla of evidence" and cannot be "vague, conjectural, or the mere suspicion about the existence of a fact, but must be real and of such quality as to induce conviction."<sup>81</sup> If Pennichuck's argument is accepted, any

---

<sup>77</sup> *Transcript, September 11, 2007*, Pages 63, 64 (Certified Record, Page 8841 ff); *Exhibit 5001*, Pages 52, 53, 56 (Certified Record, p. 17043 ff); *Exhibit 3002*, Page 18 (Certified Record, Page 14147 ff).

<sup>78</sup> *Exhibit 1007 (E)* (Certified Record, Page 11317 ff); *Transcript, September 10, 2007* (afternoon), Pages 85-89 (Certified Record, Page 8458 ff).

<sup>79</sup> *Brief of Cross-Appellants*, Page 32.

<sup>80</sup> *See generally Brief of the City of Nashua*, Statement of Facts and Pages 11-13.

<sup>81</sup> *State v. LaRose*, 157 N.H. 28, 33 (2008).

agency could arbitrarily adopt the opinion of any expert merely by relying on an opinion unsupported and, in fact, contradicted by the evidence, merely because the witness says it is so.

Pennichuck's reliance on *Southern New Hampshire Water v. Hudson*, 139 N.H. 139 (1994) to support the municipal buyer theory is misplaced. In that case the Court found that the "purchase by the town is unlikely, but the same is true of a purchase by any entity."<sup>82</sup> *Southern New Hampshire Water* was decided November 7, 1994 and reflects a period when deregulation of utilities was in its infancy. It was then just as "unlikely" that a Town would purchase a utility as "any entity." *Id.*, at 142. Fourteen years later, a market of utility sales has developed. According to the testimony of every water professional in this case, municipalities participate little if at all. Reilly thought otherwise, but could not recall any example. He rejected all sales data because it did not support a theory which he used to raise the value to levels above and beyond any reflection of what the market demonstrated, not merely a "ten percent discount for economic depreciation" at issue in *Southern New Hampshire*.<sup>83</sup> Nothing in *Southern New Hampshire* nor any other case suggests that the existence of a municipal buyer allows the finder of fact to ignore market data and accept speculation that it would compete in the market, despite all evidence to the contrary. As Commissioner

---

<sup>82</sup> *Southern New Hampshire*, 139 N.H. at 142.

<sup>83</sup> *Southern New Hampshire*, 139 N.H. at 142.

Below noted and Reilly agreed,<sup>84</sup> the fact a municipal buyer such as Nashua exists, does not mean that it would pay more than the fair market value.

**E. Nashua Preserved for Appeal the Commission’s Failure to Allow it to Acquire PEU and PAC.**

Nashua’s Brief has already presented to this Court its arguments that the plain and ordinary meaning of RSA 38 allows Nashua to acquire the plant and property of PAC and PEU as required by the public interest, in order to mitigate harm to stranded customers. Pennichuck argues that this issue has not been preserved for appeal because Nashua did not move for rehearing several years earlier in the proceeding when Order No. 24,425 was issued.

The Commission itself rejected Pennichuck’s argument that “Nashua waived this argument by failing to move for rehearing of Order No. 24,425” and found that “Nashua's motion for rehearing on this issue timely.”<sup>85</sup>

RSA 541:3 does not require that a motion for rehearing be filed during the course of a proceeding. *Cf. Appeal of Courville*, 139 N.H. 119, (1994) (“final decision that began the statutory appeal period.”). Rather, to preserve an issue for appeal it must be “raised during the course of the hearing”. *Appeal of Campaign for Ratepayers Rights*, 133 N.H. 480, 484 (1990). Once a commission renders its

---

<sup>84</sup> *Order 24,878*, Page 111 (Certified Record, Page 10302 *ff*; Appendix, Page 135); *Transcript, September 12, 2007*, Page 206 (Certified Record, Page 8598 *ff*).

<sup>85</sup> *Order No. 24,948*, Page 925. (Certified Record, Page 10601 *ff*; Appendix to Brief at Page 169.)

final decision, rehearing may then be sought concerning “*any matter determined in the action or proceeding*, or covered or included in the order”. RSA 541:3 (emphasis added). Nashua has in its Appendix to this Reply Brief Memorandum of Law Regarding Authority to Take Assets Outside Municipal Boundaries<sup>86</sup> to the Commission and orders showing it repeatedly “raised during the course of the hearing” the scope of RSA 38.<sup>87</sup>

The statute does not require that, in cases where there may be multiple disputes concerning the scope of testimony or other matters decided prior to the final decision, that each be the subject of separate motions for rehearing. RSA 541:6 requires that a petition for appeal be filed within 30 days of denial of rehearing. The statutory framework does not contemplate or suggest that rehearing must be sought repeatedly during the course of a proceeding such as this, but that the statutory time periods for appeal is then tolled until some later date.

Nashua presented a detailed memorandum concerning the scope of its authority to acquire PAC and PEU.<sup>88</sup> Nashua therefore met its obligation to raise the issue adequately during the course of the proceeding. The Commission considered the issue in Order No. 24,425 and ordered the parties to proceed accordingly. Upon issuance of the Commission’s final Order No. 24,878, Nashua

---

<sup>86</sup> *Appendix to Reply Brief*, Page 80.

<sup>87</sup> *See Appendix to Reply Brief*, Pages 97-127.

<sup>88</sup> *See Appendix to Reply Brief*, Pages 80-96.

sought rehearing of the “matter determined in the action or proceeding, or covered or included in the order”. RSA 541:3. The Commission then denied rehearing resulting in this appeal.

## **CONCLUSION**

Pennichuck has failed to show by a clear preponderance of the evidence that the Commission's decision to approve Nashua's Petition to acquire Pennichuck Water Works is unjust or unreasonable, or contrary to law. Rather, the record in this case demonstrates that the Commission correctly applied the law and, after weighing the evidence for and against Nashua's Petition, determined that Pennichuck failed to rebut the presumption of public interest under RSA 38:3. Nashua therefore prays that the Supreme Court deny Pennichuck's appeal.

## REQUEST FOR ORAL ARGUMENT

Nashua requests oral argument on the issues raised in its Opening Brief and this Reply Brief and has designated Robert Upton, II in that regard. Given the status of the proceeding as an Appeal and Cross-Appeal, and the extent of the Certified Record and issues presented, Nashua suggests that the Court permit 15 minutes of oral argument on valuation issues and 15 minutes of oral argument on public interest and other non-valuation issues. Nashua would then designate Robert Upton, II to be heard on valuation issues and Justin C. Richardson to be heard on public interest and other non-valuation issues.

Respectfully submitted,

**CITY OF NASHUA,**

By its Attorneys,  
**UPTON & HATFIELD, LLP**

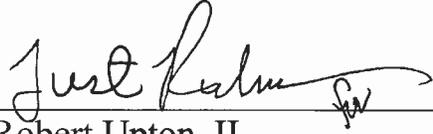
Dated: October 28, 2009

By:   
\_\_\_\_\_  
Robert Upton, II, Bar #2599  
Justin C. Richardson, Bar #12148  
23 Seavey Street – PO Box 2242  
North Conway, NH 03860  
(603) 356-3332  
[rupton@upton-hatfield.com](mailto:rupton@upton-hatfield.com)

Nashua Corporation Counsel  
James M. McNamee, Jr., Bar #1720  
229 Main Street  
Nashua, NH 03061-2019  
(603) 589-3250

### **Certificate of Service**

I hereby certify that 2 copies of the above Reply Brief and the Appendix thereto have been sent this day, first class mail, postage prepaid, to all counsel for each party separately represented and to each *pro se* party on the Distribution List of the Supreme Court.

  
\_\_\_\_\_  
Robert Upton, II