

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**In re: Appeal of City of Nashua in the matter  
of the determination of the fair market value  
of the plant and property of Pennichuck Water Works, Inc.**

**Appeal Pursuant to RSA 541  
(Rule 10)**

**City of Nashua,**

**By its Attorneys,**

**Robert Upton, II, Esq.  
Justin C. Richardson, Esq.  
Upton & Hatfield, LLP  
23 Seavey Street  
PO Box 2242  
North Conway, NH 03860-2242  
(603) 356-3332**

**James M. McNamee, Esq.  
Nashua Corporation Counsel  
PO Box 2019  
Nashua, NH 03061  
(603) 489-3250**

## TABLE OF CONTENTS

1.	Table of Contents.....	i
2.	A. Parties and Counsel .....	1
	B. Orders Appealed From and Motion for Rehearing .....	5
	C. Questions Presented for Review .....	5
	D. Provisions of the Constitution, Statutes, Ordinances, Rules or Regulations Involved in the Appeal .....	7
	E. Other Documents Involved in the Appeal.....	7
	F. Statement of the Case	
	1. Procedural History .....	7
	2. Facts Material to Consideration of the Question Presented.....	9
	A. Valuation .....	9
	B. The Commission Erred by Denying Nashua’s Petition to Acquire the Assets of PEU and PAC .....	14
	C. It was Error for the Commission to Establish a Mitigation Fund of \$40,000,000 .....	14
	G. Jurisdictional Basis for the Appeal .....	15
	H. Statement of the Reasons Why a Substantial Basis Exists for a Difference of Opinion on the Question and Why the Acceptance of the Appeal Would Protect a Party from Substantial and Irreparable Injury, or	

	Present the Opportunity to Decide, Modify or Clarify an Issue of General Importance in the Administration of Justice.....	15
I.	Preservation of Issues.....	16

**STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In re: Appeal of City of Nashua in the matter  
of the determination of the fair market value  
of the plant and property of Pennichuck Water Works, Inc.**

**Appeal Pursuant to RSA 541  
(Rule 10)**

**A. Parties and Counsel**

**1. Party Seeking Review**

**Party**

City of Nashua  
Donnalee Lozeau, Mayor  
PO Box 2019  
Nashua, NH 03061

**Counsel**

Upton & Hatfield, LLP  
Robert Upton II, Esquire  
Justin C. Richardson, Esquire  
23 Seavey St. - PO Box 2242  
North Conway, NH 03860

Nashua Corporate Counsel  
James McNamee, Esquire  
PO Box 2019  
Nashua, NH 03061

**2. All other Parties**

**Party**

Pennichuck Water Works, Inc.  
Pennichuck Corporation  
Pennichuck East Utility, Inc.  
Pittsfield Aqueduct Company  
Inc.  
Pennichuck Water Service

**Counsel**

McLane, Graf, Raulerson &  
Middleton, PA  
Steven V. Camerino, Esquire  
Thomas Donovan, Esquire  
Sarah Knowlton, Esq.  
11 S. Main Street; Suite 500  
Concord, NH 03301

	<p>Baker, Donelson, Bearman, Caldwell &amp; Berkowitz Joe A. Conner, Esquire 1800 Republic Centre 653 Chestnut Street Chattanooga, TN 37450</p>
<p>New Hampshire Public Utilities Commission Staff</p>	<p>Marcia Thunberg, Esquire 21 S. Fruit Street, Suite 10 Concord, NH 03301-2429</p>
<p>Office of Consumer Advocate</p>	<p>Rorie Hollenberg, Esquire Meredith A. Hatfield, Esquire Ken E. Traum 21 S. Fruit Street, Suite 10 Concord, NH 03301</p>
<p>New Hampshire Office of the Attorney General</p>	<p>Kelly A. Ayotte, Esq. 33 Capitol Street Concord, NH 03301-6397</p>
<p>Anheuser-Busch, Inc.</p>	<p>Ransmeier &amp; Spellman John T. Alexander, Esquire Daniel Mullen, Esquire 1 Capital Street PO Box 600 Concord, NH 03302-0600</p>
<p>Town of Bedford</p>	<p>Eugene Sullivan, Esquire 11 South Street Concord, NH 03301</p>
<p>Town of Merrimack</p>	<p>Boutin &amp; Altieri, PLLC Edmund J. Boutin, Esquire One Buttrick Road PO Box 1107 Londonderry, NH 03053</p>

Merrimack Valley Regional Water District	Wadleigh, Starr & Peters Stephen J. Judge, Esquire Susan Schaller, Esquire 95 Market Street Manchester, NH 03101
Town of Milford	Brown, Olson & Gould Bryan K. Gould, Esquire Robert A. Olson, Esquire Maria Reinemann, Esquire 2 Delta Drive, Suite 301 Concord, NH 03301
Town of Amherst	Drescher & Domko William R. Drescher, Esquire PO Box 7483 Milford, NH 03055-7483
Town of Hudson	Bossie, Kelley, Hodes, Buckley & Wilson Jay L. Hodes, Esquire 440 Hanover Street Manchester, NH 03104
Town of Londonderry David Caron 50 Nashua Road Londonderry, NH 03053	
Town of Raymond	Donahue, Tucker & Ciandella John J. Ratigan, Esquire PO Box 630 Exeter, NH 03833-0630
Town of Pittsfield	Mitchell Municipal Group, PA Laura A. Spector, Esquire 25 Beacon Street East Laconia, NH 03246

Barbara Pressly  
11 Orchard Avenue  
Nashua, NH 03060

Claire McHugh  
61 Dublin Avenue  
Nashua, NH 03061

Michael Licata  
Business & Industry Associates  
122 North Main Street  
Concord, NH 03301

Henry Fuller  
Robert Landman  
North Hampton Water Commission  
PO Box 710  
North Hampton, NH 03862

Elizabeth Coughlin  
Merrimack River Watershed  
600 Suffolk Street, 4<sup>th</sup> Floor  
Lowell, MA 01854

Steve Williams  
Nashua Regional Planning Commission  
9 Executive Park Drive  
Merrimack, NH 03054

**B. Orders Appealed From And Motion For Rehearing-See Appendix**

1. Order No. 24,878, Order Approving Taking and Determining Value, July 25, 2008
2. Nashua's Motion for Rehearing and Clarification, August 25, 2008
3. Pennichuck's Objection to Nashua's Motion for Rehearing and Clarification, August 29, 2008
4. Order No. 24,978, Order Denying Motions for Rehearing, March 13, 2009
5. Order No. 24,425, Order Addressing the Pennichuck Utilities' Motion to Dismiss

**C. Questions Presented For Review**

1. Whether the Public Utilities Commission ("Commission") erred in accepting a hypothesis advanced by Pennichuck that multiple municipal or not-for-profit entities could afford to pay more than investor-owned utilities for the assets of Pennichuck Water Works, Inc. ("Pennichuck Water") and that they would bid competitively for its assets thereby setting a higher purchase price than investor-owned utility buyers ("municipal buyer theory") when:
  - a) There was no evidence that such a competitive market of municipal buyers exists, and there was considerable evidence to the contrary;
  - b) Such a competitive municipal buyer hypothesis is not permissible under New Hampshire law because municipal buyers do not have the authority to compete to acquire water utility assets outside of their borders except for the public uses of their inhabitants and as provided by RSA 38.
  - c) Such a competitive municipal buyer hypothesis is not financially feasible because Nashua is the only municipal buyer that can legally or practically acquire the assets of Pennichuck Water;



- d) Such a municipal buyer hypothesis fails to account for the significant capital gains taxes that a municipal asset purchase would trigger and without a special grant of legislative authority and a public purpose, a municipal buyer has no authority to purchase stock of for-profit water companies.
  - e) The municipal buyer hypothesis does not establish the fair market value of the assets.
2. Whether the Commission erred in denying Nashua's Petition to acquire the assets of Pennichuck East Utility, Inc. ("Pennichuck East") and Pittsfield Aqueduct Company, Inc. ("Pittsfield Aqueduct") when:
- a) RSA 38:2, 9 and 11 enable Nashua to acquire plant and property outside Nashua if required by the public interest;
  - b) The customers of Pennichuck East and Pittsfield Aqueduct are wholly dependent upon Pennichuck Water for their utility service, using the Pennichuck Water utility plant, property and employees located in Nashua; and
  - c) The Commission required Nashua to mitigate the alleged harm to Pennichuck East and Pittsfield Aqueduct by establishing a mitigation fund greatly in excess of their value, instead of eliminating such harm by requiring the acquisition of Pennichuck East and Pittsfield Aqueduct as contemplated by RSA 38.
3. Whether the Commission erred by requiring a mitigation fund greatly in excess of the value of Pennichuck East and Pittsfield Aqueduct when:
- a) The alleged harm to Pennichuck East and Pittsfield Aqueduct was self-inflicted in an effort to preclude a public interest finding; and
  - b) The Commission failed to consider evidence that Pennichuck could easily mitigate any alleged harm by reducing overhead or by acquisition by another utility.

- c) The Commission failed to establish any standards or limits for the application of the mitigation fund.

**D. Provisions of the Constitution, Statutes, Ordinances, Rules or Regulations Involved in the Appeal – See Appendix**

1. New Hampshire Constitution Part 2, Art. 5
2. RSA 38:2, 3, 6, 7, 8, 9, 11, 14
3. RSA 31:3
4. RSA 52:1
5. RSA 53-A :1
6. Laws 2007, Chapter 347
7. Internal Revenue Code, Sec. 1211(a)

**E. Other Documents Involved in the Appeal-See Appendix**

1. The Appraisal of Real Estate, 12<sup>th</sup> Ed., p. 26, 307

**F. Statement of the Case**

1. Procedural History

Nashua adopts the procedural history set forth in Order Nos. 24,425; 24,878; and 24,948. By way of summary, Nashua states:

RSA 38 authorizes a municipality, with the approval of the Commission, to acquire by agreement or to take, at a value established by the Commission, public utility property for the use of its citizens and others. On November 6, 2002, the Nashua Board of Alderman adopted a resolution to “establish a water works system and, in order to establish such water works system, to acquire all or a portion of the water works system serving the inhabitants of the City and others” pursuant to RSA 38:3. On January 14, 2003, Nashua voters confirmed the resolution of the Aldermen by a margin of 6505 to 1867. On January 28, 2003, pursuant to RSA 38:6, the Aldermen determined it was necessary and in the public interest to acquire the assets of Pennichuck Water Works, Inc. (“Pennichuck Water”), Pennichuck East Utilities, Inc. (“Pennichuck East”) and Pittsfield Aqueduct Company, Inc. (“Pittsfield Aqueduct”).

On March 25, 2004, Nashua filed a Petition for Valuation of the Pennichuck utilities pursuant to RSA 38:9. On April 4, 2005, the Pennichuck utilities moved to dismiss Nashua's Petition. On January 21, 2005, following submission of memoranda on the scope of RSA 38, the Commission issued Order No. 24,425, finding that it must narrowly construe the grant of authority in RSA 38:2 due to the notice provisions of RSA 38:6. As a result, the Commission concluded that Nashua could not acquire the property of Pennichuck East and Pittsfield Aqueduct.

Following extensive discovery, including Nashua's responses to over six hundred and fifty one (651) data requests, submissions of pre-filed testimony, procedural disputes, a summary judgment motion, motions in limine and a full-day view of the property, hearings on the merits commenced on January 4, 2007. On January 16, 2007, Nashua and Pennichuck filed a joint motion for a 120-day stay for the purpose of facilitating settlement discussions. On July 16, 2007, Nashua and Pennichuck reported that they were unable to reach agreement, and requested that the Commission resume its hearings.

Hearings resumed on September 4, 2007. A total of 41 witnesses presented testimony, individually or in panels. The parties filed post hearing briefs on November 16, 2007, and reply briefs on December 3, 2007.

On July 25, 2008, the Commission issued Order No. 24,878 approving Nashua's Petition and finding that Pennichuck had failed to rebut the presumption of RSA 38:3 that Nashua's acquisition of Pennichuck Water's plant and property is in the public interest. The Commission set the value of the assets at \$203,000,000 as of December 31, 2008, relying on the hypothesis advanced by Pennichuck that municipal buyers would compete in the market to acquire Pennichuck Water's assets. The Commission imposed a number of conditions on the acquisition, including a condition requiring that Nashua establish a mitigation fund of \$40,000,000 to protect Pennichuck East and Pittsfield Aqueduct ratepayers.

The Commission's decision to approve Nashua's petition and its finding on public interest were unanimous. However, Commissioner Below dissented from the determination of value and the total reliance by the majority on the municipal buyer theory. He concluded that the market value of the assets was \$151,000,000.

Pennichuck filed a Motion for Rehearing on August 22, 2008, and Nashua filed its Motion for Rehearing on August 25, 2008. Pennichuck objected to Nashua's Motion for Rehearing on August 29, 2008. On August 28, 2008, by Secretarial Letter the Commission suspended Order No. 24,878 to allow additional consideration on motions for rehearing.

On March 13, 2009, the Commission issued Order No. 24,948 in which it denied Nashua's and Pennichuck's motions for rehearing and ruled on procedural issues. Commissioner Below concurred with the majority's findings on public interest but dissented on valuation, citing Nashua's Motion for Rehearing and testimony of Pennichuck witnesses that municipal purchasers are not active participants in the marketplace.

## 2. Facts Material to Consideration of the Question Presented

### A. Valuation

#### *i. The municipal buyer theory is not supported by the evidence.*

Pennichuck's expert, Robert F. Reilly, testified that the value of Pennichuck Water's plant and property as of December 31, 2005 was \$273,400,000.<sup>1</sup> His estimate was based upon his hypothesis that the likely population of hypothetical willing buyers included *any* incorporated New Hampshire City or Town, including Nashua, and any existing or yet to be formed water district,<sup>2</sup> and that these municipal buyers would set the range of the purchase price because they could afford to pay more than investor-owned utilities.<sup>3</sup>

There is no factual basis to support Mr. Reilly's hypothesis, and, upon examination by Commissioner Below, he was unable to identify a single example where municipal buyers competitively bid up the value of an investor-owned utility.<sup>4</sup>

---

<sup>1</sup> Exhibit 3021, Page 3.

<sup>2</sup> Exhibit 3007A, Page 3.

<sup>3</sup> Transcript, September 12, 2007, Page 207.

<sup>4</sup> Transcript, September 12, 2007, Pages 210-212.

Not only are there no such examples in the record, the only evidence before the Commission indicated that municipal buyers do not pay more than other purchasers. Nashua's expert, Glenn Walker, identified 28 sales of water utilities. His analysis showed that the sales prices of water utility property in which a municipal buyer was the purchaser cluster in the same range as investor-owned sales,<sup>5</sup> demonstrating with market-based evidence that Reilly's municipal buyer theory is incorrect.

In 2002 Pennichuck Corporation, upon the recommendation of its financial advisor, S.G. Barr Devlin (SGBD) engaged in an auction process to find a buyer for its businesses. SGBD did not identify *any* municipality as a strategic partner to acquire the company.<sup>6</sup> This 2002 auction of Pennichuck, further evidenced the lack of support for the municipal buyer theory in the record and the market.

The municipal buyer theory was contradicted by Pennichuck Water's other witnesses. Donald Ware, P.E., Chief Engineer and President of Pennichuck Water testified, based on his 25 years of industry experience, that municipalities have "no interest" in acquiring water systems, and are "not regularly in the business" of doing so.<sup>7</sup> John Joyner, another expert for Pennichuck, prepared a report on the sale of municipally-owned water systems and their expected market values. His report, based on years of experience involving sales of water utility property, indicated a value that coincided exactly with that of Nashua's experts.<sup>8</sup> His report also did not identify municipal buyers.

Finally, Mark Naylor, Director of the Water Division of the PUC, and Douglas C. Patch, a former PUC Commissioner, testified that municipal water systems are not engaged in the business of acquiring other water systems.<sup>9</sup>

---

<sup>5</sup> Exhibit 1007E; Transcript, September 10, 2007 (afternoon), Pages 85, 89.

<sup>6</sup> Transcript, September 12, 2007, Pages 71, 77; Exhibit 1094, Page 33.

<sup>7</sup> Transcript, September 11, 2007, Page 63, 64

<sup>8</sup> Transcript, September 18, 2007, Page 48, 49; Exhibit 1099, page 6, Exhibit 1007A, Page 65.

<sup>9</sup> Exhibit 5001, Page 52, 53, 56; Exhibit 3002, Page 18.

*ii. The municipal buyer theory is not legally permissible*

Mr. Reilly based his municipal buyer theory on the conclusion “that any likely buyer has to be legally able to buy the subject assets.”<sup>10</sup> He then asserted that “the potential buyers did not actually have to either touch the City of Nashua, or touch Pennichuck Water Works. [...] a buyer could be a municipality, a water district, or a regional district anywhere in New Hampshire; it does not have to be actually physically located within the Pennichuck service area.”<sup>11</sup>

Mr. Reilly testified that he had received a memorandum from Pennichuck’s attorneys that provided the legal authority for his municipal buyer theory.<sup>12</sup> When ordered by the Commission to produce the memorandum, it became apparent that it did not exist, and, at best, Pennichuck’s attorneys had discussed the question with him.<sup>13</sup> The substance of the discussion provided no legal support for the municipal buyer theory.<sup>14</sup> As a result, Mr. Reilly’s hypothesis, relied on by the Commission, is in direct conflict with RSA 38 and New Hampshire law which requires that a municipal buyer serve a public purpose on its inhabitants, and does not allow *any* New Hampshire municipality to simply compete in the market without any statutory authority or public purpose.

*iii. The municipal buyer Nashua is the only municipal buyer that could legally or practically acquire PWW.*

The record reveals that Nashua is the only probable municipal buyer. Eight-seven percent (87%) of Pennichuck Water’s customers are located in Nashua.<sup>15</sup> The remaining customers are scattered in ten other municipalities in southern New Hampshire. The next largest in terms of customer base is in Amherst (3.8%).<sup>16</sup> The smallest (.03%) is located in Hollis.<sup>17</sup> The two largest municipalities supported Nashua’s petition, Amherst (3.8%) and

---

<sup>10</sup> Transcript, September 12, 2007, Page 49; the Appraisal of Real Estate, 12<sup>th</sup> Ed, p. 305.

<sup>11</sup> Transcript, September 12, 2007, Pages 47, 48.

<sup>12</sup> Ibid, Page 58.

<sup>13</sup> Ibid, Pages 58-61, 144.

<sup>14</sup> Ibid, Page 145.

<sup>15</sup> Order No. 24878, Page 108; Exhibit 3001, Page 7.

<sup>16</sup> Exhibit 3001, Page 7.

<sup>17</sup> Ibid.

Bedford (3.2%), as did the newly formed Merrimack Valley Regional Water District.

RSA 38:14 authorizes any municipality to opt out of an acquisition by another municipality by conducting its own vote to establish a water system, the result of which is binding on the acquiring municipality. As a result, the municipal buyer theory is neither practical nor financially feasible.<sup>18</sup>

- iv. *The municipal buyer theory fails to account for the significant capital gains taxes that a municipal asset purchase would trigger and that municipal buyers are not active participants in the market place because without a special grant of legislative authority and a public purpose, they have no authority to purchase stock of for-profit water companies.*

Virtually all the sales identified by the valuation experts were stock sales.<sup>19</sup> Asset sales cause a seller to recognize gain for federal and state income tax purposes equal to the excess of the aggregate value it receives for each asset, less its adjusted tax basis in those assets, at an effective tax rate of thirty-nine percent (39%).<sup>20</sup> Donald Correll, Pennichuck's former CEO, testified that because many of Pennichuck Water's assets were of an old vintage, the tax burden would run to "many tens of millions of dollars."<sup>21</sup>

This tax burden explains why the municipal buyer hypothesis is impractical and not financially feasible. Such a tax burden would cripple a seller on an asset sale, but is avoided by a stock sale. Nashua, through the enactment of special legislation, is the only municipal buyer with authority to acquire stock.<sup>22</sup> No other municipal buyer could avoid the "many tens of millions of dollars" in taxes necessary to compete with stock purchases.

---

<sup>18</sup> The Appraisal of Real Estate, 12<sup>th</sup> Ed., Page 307.

<sup>19</sup> Exhibit 3007A, Page 40-45; Exhibit 1007B, Page 99-102.

<sup>20</sup> IRC Sec. 1001 (a); Exhibit 3001, Page 20.

<sup>21</sup> Exhibit 3001, Page 20.

<sup>22</sup> Laws of 2007, Chapter 347.

- v. *The municipal buyer theory does not establish the fair market value of the assets.*

RSA 38:9 requires the Commission to establish the fair market value of the assets. The municipal buyer theory advanced by Mr. Reilly and accepted by the Commission establishes investment value, not fair market value.

Mr. Reilly used his municipal buyer theory to endow his hypothetical municipal buyer with certain advantages or benefits not available to other buyers in the market, including the avoidance of income taxes, access to low-cost municipal financing, and reduced regulation.<sup>23</sup> These benefits are not attributes of the property being acquired, nor can they subsequently be transferred. As a result, it values the ability of a “particular buyer” to pay rather than what a “typical buyer” with investment requirements typical of the market would actually pay.<sup>24</sup> In doing so, it establishes an investment rather than fair market value.<sup>25</sup> As pointed out by Commissioner Below, Mr. Reilly himself admitted that a typical market for a water utility consists of only one municipal buyer, which will bid only \$1.00 more than what a typical for-profit buyer would pay for the assets.<sup>26</sup>

It was unreasonable for the Commission to base its determination of value on an unproven theory concerning hypothetical municipal purchasers of which there is no market evidence. The municipal buyer theory creates a hypothetical buyer which, because of the benefits and advantages available to it, has the ability to pay more for the property. Ability to pay more, however, is not the same as fair market value.<sup>27</sup> The municipal buyer theory does not measure fair market value.

---

<sup>23</sup> Exhibit 1015, Page 6.

<sup>24</sup> The Appraisal of Real Estate, 12<sup>th</sup> Ed., Page 26.

<sup>25</sup> Ibid (investment value is “the specific value of a property to a particular investor or class of investors based on individual investment requirements; distinguished from market value, which is impersonal and detached,” and “investment value is value to an individual, not necessarily value in the market place.”)

<sup>26</sup> Order No. 24,878, Page 104, 105.

<sup>27</sup> Transcript, Sept. 12, 2007, Page 76.



B. The Commission Erred by Denying Nashua's Petition to Acquire the Assets of Pennichuck East and Pittsfield Aqueduct.

Pennichuck has organized its regulated utilities to completely integrate their operations. Pennichuck Water owns all the telephone and computer systems, equipment, offices, vehicles, inventory, and supplies and other assets that are used to provide utility service to customers of Pennichuck East and Pittsfield Aqueduct. Pennichuck Water also employs all of the operations and management staff to service Pennichuck East and Pittsfield Aqueduct.<sup>28</sup> The cost to provide service to Pennichuck East and Pittsfield Aqueduct using Pennichuck Water's utility property is allocated to each utility and is accounted for using a cost allocation formula.<sup>29</sup>

Nashua petitioned the Commission to acquire the assets of Pennichuck East and Pittsfield Aqueduct in addition to Pennichuck Water in order to avoid any potential harm to Pennichuck East and Pittsfield Aqueduct customers.<sup>30</sup> However, at Pennichuck's insistence, the Commission denied Nashua's Petition as to Pennichuck East and Pittsfield Aqueduct,<sup>31</sup> which ultimately created the very harm that the statute is intended to prevent.<sup>32</sup> Thus, the Commission's strict construction of the notice provisions in RSA 38 led the Commission to require a mitigation fund to mitigate any harm to Pennichuck East and Pittsfield Aqueduct in an amount that unreasonably exceeds the value of those utilities.

C. It was Error for the Commission to Establish a Mitigation Fund of \$40,000,000.

The Commission's imposition of a mitigation fund in the amount of \$40,000,000 is more than twice the regulatory investment value of Pennichuck East and Pittsfield Aqueduct.<sup>33</sup> The harm to Pennichuck East and Pittsfield Aqueduct to be mitigated is based on the existing corporate model without consideration of whether the model was justified or whether

---

<sup>28</sup> Exhibit 3016, Page 5, 6.

<sup>29</sup> Ibid.

<sup>30</sup> Exhibit 1001, Page 8.

<sup>31</sup> Order No. 24,425.

<sup>32</sup> See, e.g., RSA 38:9, I.

<sup>33</sup> Exhibit 3016, Pages 2,3; Transcript, Sept. 18, 2007, Pages 127, 128.

there were less costly alternatives,<sup>34</sup> and despite testimony from Pennichuck witnesses that they could take steps to reduce harm to those customers. Indeed, the harm was self-inflicted by Pennichuck in an effort to rebut the presumption of public interest under RSA 38.

The Commission rejected proposals by Nashua that would have allowed it to acquire these utilities as allowed by RSA 38:9 and 38:11, or limited the amount of the fund to the value at which those utilities could be acquired in the market. It further failed to establish reasonable standards or limits on the mitigation fund. As a result, the Commission has unreasonably required Nashua to ratify its decision without any understanding of the circumstances governing how the mitigation fund might be terminated or returned to Nashua.

#### **G. Jurisdictional Basis For the Appeal**

1. RSA 38:9.
2. RSA 541:6.

#### **H. Statement of the reasons why a substantial basis exists for a difference of opinion on the question and why the acceptance of the appeal would protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice. (Paragraph numbers refer to the Questions presented in Paragraph C.)**

- C-1. Use of the municipal buyer theory resulted in a determination of value more than double the value that would have been derived if the cost of capital and rate of return of a typical buyer had been used. This additional cost must be borne by the customers of the water system to be acquired by Nashua. As a consequence, the Commission's decision will force those customers to pay damages that unreasonably exceed fair market value, that are not supported by the evidence, legally permissible or practical. Determination of these issues will provide guidance to the Commission for future proceedings under RSA 38, as well as to the Superior Court and other

---

<sup>34</sup> Transcript, Sept. 18, 2007, Page 119-121; Transcript Sept. 11, 2007, pages 61-63.

administrative agencies which deal with the valuation of utility property.

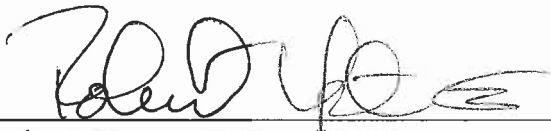
- C-2. A determination of whether Nashua should have been permitted to acquire the assets of Pennichuck East and Pittsfield Aqueduct will resolve a dispute over the meaning and intent of RSA 38:2, 3, 6, 9, and 11, and provide guidance for the Commission in future RSA 38 proceedings on an issue concerning which utilities, municipalities and the Commission have considerable disagreement. It will further resolve whether a company, through its organizational structure, can defeat the intent of RSA 38, by creation of separate legal entities that use common assets owned by a single utility.
- C-3. A determination of whether it was proper for the Commission to require a mitigation fund more than double the combined values of Pennichuck East and Pittsfield Aqueduct will assist Nashua in its decision to ratify the acquisition under RSA 38:13, and will provide guidance to the Commission regarding the extent of its authority to set conditions under RSA 38:11.

## **I. Preservation of Issues**

The City of Nashua certifies that every issue specifically raised in this Appeal has been presented to the Public Utilities Commission and has been properly presented for appellate review by a contemporaneous objection or where appropriate, by a properly filed pleading.

Respectfully submitted  
City of Nashua  
By its Attorneys,  
UPTON & HATFIELD, LLP

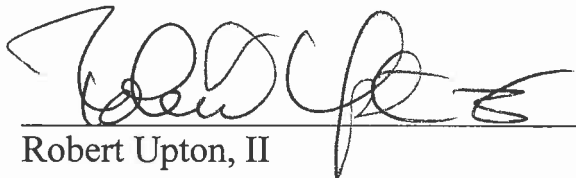
Date: April 10, 2009

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 certify that a copy of the within Appeal has been mailed to all persons of the Public Utilities Commission's official service list in this proceeding.

  
Robert Upton, II