

SUPREME COURT OF NEW HAMPSHIRE

Appeal of Pennichuck Water Works, Inc. and another (New Hampshire Public Utilities Commission)

160 N.H. 18, 992 A.2d 740 (2010) · No. No. 2009-274 · Decided March 25, 2010

SUMMARY

The New Hampshire Supreme Court reviewed a New Hampshire Public Utilities Commission order approving the City of Nashua's condemnation and acquisition of Pennichuck Water Works, Inc.'s assets. The court upheld the finding that the acquisition was in the public interest, affirmed conditions imposed on the municipal operation, and agreed that the City's authority did not extend to separately incorporated affiliates that did not serve Nashua residents. The court also upheld the Commission's valuation and mitigation-fund requirements.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Dalianis, J.; Broderick, C.J.; Duggan, J.; Hicks, J.
JURISDICTION	New Hampshire
DECIDED	March 25, 2010
DOCKET	No. 2009-274
DISPOSITION	affirmed
PROCEDURAL POSTURE	Pennichuck Water Works and related utilities appealed a New Hampshire Public Utilities Commission order approving the City of Nashua's petition to acquire Pennichuck Water Works by eminent domain, finding the acquisition in the public interest, imposing conditions, and setting the fair market value of the assets. Nashua cross-appealed the dismissal of its petition as to Pennichuck East Utilities and Pittsfield Aqueduct and the valuation of Pennichuck Water Works' assets.
STANDARD OF REVIEW	A party challenging a PUC order must show that it is contrary to law or, by a clear preponderance of the evidence, unjust or unreasonable. PUC factual findings are presumed prima facie lawful and reasonable, and the court gives substantial deference to the PUC's evidentiary weighing, policy choices, and valuation determinations. Statutory interpretation is reviewed de novo.

PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Pennichuck Water Works, Inc., Pennichuck East Utilities, Pittsfield Aqueduct, Inc. v. City of Nashua

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QUESTIONS PRESENTED

1. Whether RSA chapter 38 authorized Nashua to acquire by eminent domain the assets of Pennichuck East Utilities and Pittsfield Aqueduct, which had not distributed water for sale in Nashua.
2. Whether the opponents rebutted the statutory presumption that the acquisition of Pennichuck Water Works' assets within Nashua was in the public interest.
3. Whether the PUC adequately conducted the constitutionally required public-purpose and probable-net-benefit analysis under Part I, Article 12 of the New Hampshire Constitution.
4. Whether RSA 38:11 authorized the PUC to impose conditions on Nashua's acquisition even though Nashua would not ordinarily be a PUC-regulated public utility after the acquisition.
5. Whether the PUC's conditions violated the utilities' procedural due process rights.
6. Whether the PUC properly determined the fair market value of Pennichuck Water Works' assets.
7. Whether the PUC properly required Nashua to establish a \$40 million mitigation fund for customers of Pennichuck Water Works' affiliates.

HOLDINGS

1. RSA chapter 38 permits a municipality to take by eminent domain only a privately owned water utility that was engaged, at the time of the confirming vote, in distributing water for sale in the municipality. Because Pennichuck East Utilities and Pittsfield Aqueduct had never served Nashua residents, Nashua could not condemn their assets.
2. The presumption under RSA 38:3 that a municipal acquisition of a privately owned utility is in the public interest is a Morgan-theory presumption. Opponents must rebut it by demonstrating, by at least a preponderance of the evidence, that the proposed taking is not in the public interest.
3. The PUC adequately considered the evidence bearing on whether the taking served a public purpose and would produce a probable net benefit to the public. The provision of a public water supply is a constitutionally sufficient public purpose, and the court would not reweigh the PUC's balancing of the evidence.

4. RSA 38:11 authorizes the PUC to impose conditions on a municipality's acquisition of a privately owned water utility, even if the municipality will not qualify as a regulated public utility under RSA chapter 362 after the acquisition.
5. The PUC's imposition of the nine conditions did not violate the utilities' state or federal procedural due process rights because the PUC was presumed impartial and the utilities had a meaningful opportunity to address the concerns underlying the conditions.
6. The PUC's determination that the fair market value of Pennichuck Water Works' assets was \$203,031,079 was supported by the record and was not legally erroneous.
7. The PUC did not err in requiring Nashua to establish a \$40 million mitigation fund for customers of Pennichuck Water Works' affiliates.

KEY QUOTATIONS

"Giving these words their plain meaning, we agree with the PUC that these statutes allow a municipality only to take by eminent domain a privately-owned water utility that is "engaged, at the time of the vote, in generating or distributing... water for sale in the municipality."" (750)

"Accordingly, to rebut this presumption, those opposing the City's petition to acquire PWW had to demonstrate, by at least a preponderance of the evidence, that the proposed taking was not in the public interest." (751)

"As part of the oversight authority expressly granted to it by RSA chapter 38 generally and RSA 38:11 specifically, the PUC may condition its approval of the acquisition upon the City's fulfillment of certain prerequisites, even though, after the acquisition, the City will not operate as a "public utility" under RSA chapter 362." (755)

"Having found that the PUC's valuation has support in the record and that it is not erroneous as a matter of law, we uphold it." (761)

FACTUAL BACKGROUND

The City of Nashua voted to establish a municipal waterworks system and acquire all or part of the privately owned water system serving its residents. Pennichuck Water Works served approximately 24,500 customers in Nashua and other New Hampshire municipalities, while its separately incorporated affiliates served customers outside Nashua and had never served Nashua residents. After negotiations failed, Nashua sought PUC approval to condemn the utilities' assets. The PUC approved the taking of Pennichuck Water Works' assets, imposed nine conditions including a \$40 million mitigation fund for affiliate customers, and valued the assets at \$203,031,079.

PROCEDURAL HISTORY

Nashua voted to establish a municipal waterworks system and subsequently filed a condemnation petition with the PUC. The PUC dismissed the petition as to Pennichuck East and Pittsfield Aqueduct but approved the taking of Pennichuck Water Works' assets, subject to nine conditions, and valued those assets at \$203,031,079. The PUC denied rehearing motions, and the utilities and Nashua appealed and cross-appealed to the New Hampshire Supreme Court.

DISPOSITION

affirmed

CASES CITED

- Pennichuck Corp. v. City of Nashua, 152 N.H. 729, 886 A.2d 1014 (2005)
- Appeal of Verizon New England, 153 N.H. 50, 889 A.2d 1027 (2006)
- Legislative Utility Consumers' Council v. Public Utilities Comm'n, 118 N.H. 93, 383 A.2d 89 (1978)
- Appeal of Basani, 149 N.H. 259, 817 A.2d 957 (2003)
- Appeal of McKenney, 120 N.H. 77, 412 A.2d 116 (1980)
- New England Tel. & Tel. Co. v. State, 113 N.H. 92, 302 A.2d 814 (1973)
- Appeal of Verizon New England, 158 N.H. 693, 972 A.2d 996 (2009)
- Appeal of Conservation Law Foundation, 127 N.H. 606, 507 A.2d 652 (1986)
- Maine-New Hampshire Interstate Bridge, etc. v. Ham, 91 N.H. 179, 16 A.2d 362 (1940)
- Zorn v. Demetri, 158 N.H. 437, 969 A.2d 464 (2009)
- Appeal of Ashland Elec. Dept., 141 N.H. 336, 682 A.2d 710 (1996)
- Nashua School Dist. v. State, 140 N.H. 457, 667 A.2d 1036 (1995)
- State v. City of Dover, 153 N.H. 181, 891 A.2d 524 (2006)
- Cunningham, Adm'x v. Manchester Fire Dep't, 129 N.H. 232, 525 A.2d 714 (1987)
- Appeal of Town of Newington, 149 N.H. 347, 821 A.2d 1100 (2003)
- Appeal of Cheney, 130 N.H. 589, 551 A.2d 164 (1988)
- Merrill v. City of Manchester, 127 N.H. 234, 499 A.2d 216 (1985)
- Public Service Co. v. Shannon, 105 N.H. 67, 192 A.2d 608 (1963)
- Appeal of Beyer, 122 N.H. 934, 453 A.2d 834 (1982)
- Petition of Betty Sprague, 132 N.H. 250, 564 A.2d 829 (1989)
- Appeal of Dell, 140 N.H. 484, 668 A.2d 1024 (1995)
- Appeal of N.H. Fireworks, 151 N.H. 335, 856 A.2d 725 (2004)
- State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983)
- Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)
- Society for Protection of N.H. Forests v. Site Evaluation Comm., 115 N.H. 163, 337 A.2d 778 (1975)
- Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)
- Opinion of the Justices, 131 N.H. 504, 555 A.2d 1095 (1989)
- Daly v. State, 150 N.H. 277, 837 A.2d 340 (2003)
- 590 Realty Co. Ltd. v. City of Keene, 122 N.H. 284, 444 A.2d 535 (1982)
- Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 651 A.2d 928 (1994)
- Public Serv. Co. v. Town of Ashland, 117 N.H. 635, 377 A.2d 124 (1977)
- Public Service Co. v. New Hampton, 101 N.H. 142, 136 A.2d 591 (1957)

- Public Serv. Co. of N.H. v. Town of Seabrook, 126 N.H. 740, 496 A.2d 352 (1985)
- Crown Paper Co. v. City of Berlin, 142 N.H. 563, 703 A.2d 1387 (1997)
- Brent v. Paquette, 132 N.H. 415, 567 A.2d 976 (1989)
- Appeal of Public Serv. Co. of N.H., 122 N.H. 1062, 454 A.2d 435 (1982)

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