

REPORT OF THE PENNICHUCK WATER SPECIAL COMMITTEE

APRIL 21, 2004

A meeting of the Pennichuck Water Special Committee was held on Wednesday, April 21, 2004 at 6:30 p.m. in the Aldermanic Chamber.

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Alderman Brian S. McCarthy presided

Members of the Committee present: Alderman-at-Large Steven A. Bolton
 Alderman-at-Large David W. Deane
 Alderman David D. Lozeau
 Alderman Robert G. Shaw, Jr.

Also in Attendance: Alderman David MacLaughlin

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DISCUSSION

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Chair McCarthy

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We only have a half an hour this evening. I just wanted to have a brief update from the legal department on all the various things that have taken place. On your desk is a package of filed in the PUC case and the various actions in superior court.

Atty. Connell

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There are now three proceedings that are pending, including one major amendment. The original declaratory judgment, as you'll recall, was filed in early February by the four companies – the holding company and the three regulating utilities. They recited various allegations about the history of the company, the merger, the municipal vote, the negotiations that followed, the city's offer to purchase, and the supposed losses that the company incurred. They made various claims that their business was being hurt and it was the city's fault and so forth. Then they stated four claims that they asked the court to rule on. They were asking that the court

declare that RSA 38, the eminent domain statute for acquisition of water utilities is unconstitutional as a denial of equal protection because it differs in a couple of ways from another eminent domain statute. They are asking the court to rule that it constituted a taking of the property because it did not have an absolute deadline for filing a petition and also provided that at the end of the process if the bonds were not issued then the acquisition wouldn't go through. They then asked the court to impute, that is to say, write in a 90-day statute of limitation and then it alleged that the city was guilty of the equitable doctrine of laches for not having pursued the acquisition sooner. Finally, they want the court to rule that as a matter of law the city cannot acquire any of the Pennichuck utilities that are outside the court system. An answer was filed to this petition whereupon they requested to amend the declaratory judgment. They added a few updated facts as of April 8th. At that point since the city had filed a PUC petition on March 21st, the company then asked for an injunction against that petition going forward. The main intention here with these actions is that on one hand they claim the court should decide how much of the utilities could be acquired by the city. On the other hand, the statute is pretty specific about the PUC making that determination. Obviously our response to this is that the PUC is the forum for that determination to be made.

The city's petition was filed on March 24th reciting the various facts about the city's vote and then requesting that the PUC under RSA 38:9, 10 find that it was in the public interest for the city to acquire the utility property that it voted to acquire and also value it and then allow the issue to go back for a vote on the issuance of bonds. The company immediately filed a motion to dismiss the city's petition saying that it really ought to be brought in three separate cases because there's three regulating utilities. Furthermore, two of those ought to be dismissed right away. Again, raising their issue about the permissible extent of the taking. They also said that there should be pre-filed testimony which, of course, ignores the fact that there is a statutory presumption once the voters have voted in favor of this. The claimant is premature to file this because there is no water district. They asked that the PUC not act until the superior court acts. The city filed an objection to that claiming that, once again, the PUC is the place where the decision should be made.

Now just yesterday, this hasn't been served yet, but we received an advance copy of an civil action that has now been filed at the superior court which recycles and allegations from the declaratory judgment and then styles these all as civil rights violations claiming that among other things that the actions of the city have been motivated by the desire of local government officials to oppress the rights of Pennichuck and its shareholders. They say this is a violation of due process under both the US and New Hampshire Constitutions and a taking under both US and New Hampshire Constitutions. They have added two more claims. One is that there was an intentional tort in the actions of the city in opposing the merger with Philadelphia Suburban and that had been an intention interference with their contractual relations and finally claiming that

the city's actions constitute unfair business practices under the consumer protection statute.

That is an overview of the lawsuits that have been filed. This final action has a return date of June. It would require a response by then.

Alderman Deane

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The civil action handout that you gave us, on page 4, when you read the first sentence of (c) "Widening the swell of the uproar created by Nashua..." who were they referring to when they say "Nashua?" Is that the city?

Atty. Connell

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I believe so.

Alderman Deane

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Would you, in your opinion, consider the resolution and the referendum a speedy process?

Atty. Connell

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The referendum, the statute allows up to one year to lapse between the aldermen vote and the referendum. It didn't go that way. Instead we did it within the about six to seven weeks. On one

hand Pennichuck complains that that was too fast. On the other hand they are complaining that the whole thing is taking too long.

Alderman Deane

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That was another point I was going to make. I haven't gone through all of this, but I consider it a feel-good question. Once we read through this, if we have questions on any of the language, should we contact corporation counsel directly?

Chair McCarthy

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Yes, although I would actually appreciate if you at least copy Sue so she can make the rest of the board aware of what the concerns are.

Alderman Deane

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Okay. There's just a lot of reading.

Chair McCarthy

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I actually thought about canceling this meeting because I had scheduled it when it wasn't clear where we were going to be with the charter legislation. Particularly given yesterday's events, I was glad that we had it just as a fairly quick update. We have scheduled a fair number of meetings of this committee out for the foreseeable future. Obviously the stuff that has been filed we can discuss in open; the stuff that we may or may not file we may want to have some more

non-public sessions to discuss what our strategy is with respect to some of those things.

Alderman Lozeau

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That's the comment I was going to make. Is it proper to do this in a public session to discuss litigation?

Atty. Connell

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On a very superficial level.

Chair McCarthy

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I will take the notes that I have from our earlier discussions about forms of how we would do the charter governance in Nashua and write those up and send them out to the committee so we can begin some discussion on that. Ultimately we're going to want to introduce some legislation to deal with that. In the meantime, we'll have to figure out what we do with it. It doesn't seem like the regional district will have very many tremendous decisions to make for some period of time because we still have a number of issues to go through.

Alderman Deane

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When are the rest of the communities going to act on this?

Chair McCarthy

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I would suspect that Amherst and Hudson have scheduled at least when their boards will act on the final language of the charter. Bedford certainly did act on it. There are a couple of other towns that have a counsel manager form of government which I would assume will do it soon. Some of them were empowered through a selectmen to vote to join. Some of them will have to actually wait until next year's either SB 2 votes or town meetings.

Alderman Lozeau

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Do we have the three we need to enact the Charter?

Chair McCarthy

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We will as soon as one of the other two communities approves the final language.

Alderman Deane

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What about the communities that were enacted with the power to join? Why haven't they.....

Chair McCarthy

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I think they just haven't gotten to it yet.

Alderman Deane

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You've got to be kidding me. With all the Riga morale about this and the people aren't going to vote on it?

Chair McCarthy

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They will. There's a meeting about a charter committee a week from tomorrow. I'll bring that up then and find out where they are with it.

Atty. Connell

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We anticipate filing motions to dismiss both the superior court actions on the grounds that the claims are not valid and that the issues that do exist should be addressed at the PUC.

Chair McCarthy

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We'll have to file an answer to yesterday's action in June.

Atty Connell

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In civil actions, you actually only have to file an appearance in order to deny the allegations. But if you want to file a dispositive motion soon after that, you can. You can file sooner.

Chair McCarthy

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Do we need to file an answer to the amendment in the declaratory judgment?

Atty. Connell

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Yes. I'm not aware of any order granting at least to amend, although they had an absolute right to it. At some point in the not so distant future, there will probably be a hearing on the preliminary injunction.

ADJOURNMENT

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MOTION BY ALDERMAN DEANE TO ADJOURN

MOTION CARRIED

The Pennichuck Water Special Committee meeting was adjourned at 6:45 p.m.

Alderman-at-Large David W. Deane
Committee Clerk