

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SOUTHERN DISTRICT

SUPERIOR COURT Docket #04-C-OI69

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

v.

City of Nashua

PENNICHUCK'S MEMORANDUM IN SUPPORT OF OBJECTION TO CITY OF NASHUA'S MOTION TO DISMISS

Plaintiffs, Pennichuck Corporation ("Pennichuck"), Pennichuck Water Works, Inc.,

Pennichuck East Utility, Inc. and Pittsfield Aqueduct Company, Inc. (the "Pennichuck Utilities")

(collectively the "Companies"), submit this Memorandum in Support of Objection to the City of

Nashua's ("City" or "Nashua") **Motion to Dismiss**.

I.

INTRODUCTION

This case comes to this Court upon remand from the United States District Court, which determined that it could not rule on Pennichuck's federal civil rights claims against Nashua until this Court had determined whether Pennichuck has an adequate remedy under state law for damages caused by Nashua's violation of Pennichuck's State constitutional rights. Thus, despite Nashua's allegations to the contrary, the issues before this Court -whether Nashua violated Pennichuck's right to due process and its right to conduct business freely as provided in the New Hampshire Constitution, and whether Nashua intentionally interfered with Pennichuck's merger contract and conducted business unfairly -are before this Court for the first time.

Specifically, this case arises out of Nashua's bad faith use of its eminent domain authority in an attempt to take assets to which it is not legally entitled, after intentionally **interfering with and killing a merger agreement between Pennichuck and Philadelphia Suburban Corporation ("PSC")**. These claims have distinctly different legal theories from those decided in

Docket No. 04-E-O62, in which Pennichuck challenged the facial constitutionality of RSA Chapter 38. Here, Pennichuck brings claims for damages, asserting that Nashua acted with **animus and an intent to interfere with the rights of Pennichuck Corporation, an entity not subject** to Nashua's RSA Chapter 38 power of eminent domain or the jurisdiction of the Public Utilities Commission ("PUC). Based on the pleadings in this case, the Companies have stated a claim for relief for each of the four state law counts¹, and thus Nashua's motion should be denied.

II.

FACTUAL AND PROCEDURAL BACKGROUND

On April 20, 2004, the Companies filed a Writ of Summons and Special Declaration ("Decl.") in Hillsborough County Superior Court seeking damages against Nashua based upon its violation of their civil rights and other actionable conduct. Ironically, this case is now back before this Court, where it was originally filed. On May 17, 2004, Nashua removed the case to federal court and requested that the federal court dismiss the federal claims as well as the **remainder** of the case.

The United States District Court for the District of New Hampshire subsequently dismissed Pennichuck's federal civil rights claims on the basis that they were not **ripe for adjudication, given that there had been no ruling on whether Pennichuck had an adequate remedy under state law.**

The federal court also declined to exercise supplemental jurisdiction over the remaining state law claims.

A. Pennichuck's Attempted Merger and Nashua's Municipalization Effort.

Pennichuck Corporation owns three different public utility companies, Pennichuck Water Works, Inc., Pennichuck East Utility, Inc., and Pittsfield Aqueduct Company, Inc. Each of these **utilities is a separate legal entity, with separate assets. Pennichuck Corporation also owns two**

¹ Pennichuck has alleged that Nashua violated its due process rights under the New Hampshire Constitution (Count II), involuntarily condemned its property (Count IV), intentionally interfered with its merger agreement with Philadelphia Suburban Corporation (Count V), and engaged in unfair business practices (Count VI).

unregulated companies, Pennichuck Water Service Corporation² and The Southwood Corporation³, While the Pennichuck Utilities provide direct water service to more than 29,000 customers through New Hampshire, only Pennichuck Water Works ("PWW") provides service to Nashua in what is functionally a stand alone system. Decl., ~ 6.

The other two

Pennichuck Utilities ~ Pennichuck East Utility and Pittsfield Aqueduct Company -provide water service in other towns such as Derry, Epping, Newmarket, Pittsfield, Raymond and Windham with assets that bear no relation to the assets owned by PWW and used to serve Nashua. M
On April 29, 2002, Pennichuck entered into a merger agreement with PSC (the "Merger"), and shortly thereafter, filed a petition with the PUC to approve the Merger because it would **affect the ownership of the three regulated Pennichuck Utilities.** ~, 'if 7. **The proposed Merger led to a vocal negative reaction among a number of City Leaders because it meant that Pennichuck would become a subsidiary of a Philadelphia business, whose shareholders then included a French company.** ~, ~ 9. **Nashua sounded the alarm about "foreign ownership,"** claiming that local water might be sold far afield. 14. Nashua intervened in the PUC proceeding, objected to the Merger, and proposed a protracted PUC approval process to accommodate its **own intervention. Nashua simultaneously established a web site with regular updates designed to stir up popular opposition to the Merger.** ~, ~ 9-10.

In the midst of the PUC's approval process, the Nashua Board of Aldermen adopted a resolution calling for a referendum to seek voter approval to acquire all or a portion of the water works system "currently serving the inhabitants of [Nashua] and others." ~, ~ 11.

At a special

election hastily held on January 14, 2003, the question passed, but with only twenty percent of

² Pennichuck Water Service Corporation provides contract operation of water systems serving additional customers, including 4400 in Hudson. Decl., '6.

The Southwood Corporation owns and develops real estate. I.Q.

the voters participating, one of the lowest voter turnouts in recent years. Id

Shortly thereafter,

and as a direct result of Nashua's ongoing threats to condemn the Pennichuck Utilities, PSC terminated the Merger on February 4, 2003. This occurred even though the Staff at the PUC had filed written testimony in support of the Merger, making PUC approval likely. id., ~13. The day after the Merger was terminated, Nashua, purporting to act pursuant to RSA 38:6, sent each of the Pennichuck Utilities (regardless of whether they were providing service in Nashua or owned **any assets there**) a **demand letter as to whether each company would be willing to sell its assets** to Nashua under the guise of Chapter 38. Id., ~ 15. On March 25, 2003, PWW, Pennichuck East Utility, Inc., and Pittsfield Aqueduct Company, Inc. replied by separate letters, stating that the board of directors had voted against the sale of any assets to Nashua. The next day, Nashua responded that it would "*now proceed*" to petition the PUC to acquire the assets of all three **Pennichuck Utilities.** ~, ~ 16 (emphasis **added**).

B. Nashua Misleads the Public and Roils the Markets.

Despite sending its demand letter to the Pennichuck Utilities in March 2003, Nashua took no further legal steps to pursue its taking until March 24, 2004. Beginning in the late summer, the City periodically requested that Pennichuck attend meetings to discuss Nashua's interest in buying Pennichuck's regulated and unregulated assets. At the meetings, City representatives **sought to pressure Pennichuck into selling its assets on a voluntary basis at a bargain price. One** indication of Nashua's bad faith in its meetings with Pennichuck is the fact that Nashua never hired the financial or tax experts that would have been necessary to consummate such a complex **transaction.** ~, ~ 17. **Despite Nashua's failure to engage in any serious discussions with**

Pennichuck and the fact that the meetings were agreed to be kept strictly confidential, its City

⁴ Whether Nashua's delay in filing its petition with the PUC was reasonable was a question before this Court in Docket 04-E-O62, and is now subject to appeal to the New Hampshire Supreme Court.

Leaders and its Mayor, during the Fall 2003 election cycle, stated publicly that the City was in "active negotiations" to purchase Pennichuck Utilities. Id.

Not surprisingly, because the meetings with Pennichuck were never intended to constitute serious negotiations, they produced little settlement, and on November 20, 2003, Nashua's City

Leaders held a press conference announcing an unsolicited, hostile offer to purchase all of

Pennichuck's assets. The offer was not limited to the assets of PWW, the company serving Nashua, or even the three utility subsidiaries that provided service to other parts of the state.

Rather, it extended to the entire publicly traded company, Pennichuck Corporation, including its unregulated subsidiaries, over which Nashua has no power of eminent domain. The offer was

plainly intended to pressure the Board of Pennichuck to capitulate to Nashua's demands, and

Nashua's representatives even made numerous public statements to that effect. 14., ~ 18. The

impact of the City's hostile offer on Pennichuck was immediate and significant, as the City

intended. Even though the Mayor's press conference was held after the stock market had closed

for the day, trading in Pennichuck's stock prior to the press conference soared to 26,360 shares,

far exceeding the average daily trading of 2,800 shares. ~, ~ 19. The day after the press

conference, trading in Pennichuck stock reached an unprecedented volume -137% higher than

any other daily trading volume of its stock. Id., ~ 20. Indeed, almost 10% of the outstanding

shares of Pennichuck were traded in this one day. 14. This surge in trading was accompanied by

wild gyrations in the market price of Pennichuck's stock, which vacillated between the previous

day's close of \$23.90 to as high as \$35.00. 14.

At this same time, Nashua leaders engaged in a public offensive aimed at pressuring the

Pennichuck Board of Directors through its stockholders to accept its hostile bid. These

stockholders, confused and frustrated, flooded both Pennichuck and Nashua with calls. ~, ~ 21.

Nashua responded to these calls by giving Pennichuck investors additional false and misleading

information about its November 20, 2003 offer, thereby causing further turmoil. These events were so unsettling to the market that, at one point, the NASDAQ halted trading in Pennichuck's IQ. During this same time, Pennichuck repeatedly requested that Nashua clarify its offer and requested the opportunity to meet with the City's advisors to discuss it further. However, the City completely rebuffed Pennichuck's requests. 14., ~ 23. On December 8, 2003, the NASD informed Pennichuck that it was investigating the unusual trading activity surrounding Nashua's November 20 offer. ~, ~ 22. On December 15, 2003, Pennichuck rejected Nashua's offer because it was grossly inadequate and totally inferior to the benefits of the PSC Merger. 14., c. Nashua's Master **Plan** is Revealed.

After Pennichuck rejected Nashua's proposal, City Leaders again threatened publicly to **proceed with an eminent domain action. Despite these threats, three more months passed, and still Nashua took no legal action.** In an **attempt to end their** legal limbo, **the Companies brought a declaratory judgment action against Nashua on February 4, 2004.** 14., ~ 23. **Almost** immediately after the Companies filed the declaratory judgment action, Nashua sought emergency funding to engage consultants and attorneys to prepare a filing with the PUC. On **March 25, 2004, Nashua filed a petition with the PUC to initiate condemnation proceedings** against **all** three of the Pennichuck Utilities. Even then, Nashua made only the most superficial of filings, failing to include any written testimony or exhibits in support of its petition as was required by the PUC's rules. ~, ~ 24. The bare bones nature of Nashua's filing at the PUC further demonstrated the City's lack of any real intent to proceed, and indicated again that the City's true intention was to drag the entire process out for as long as possible to continue to pressure Pennichuck. The PUC confirmed Nashua's lapse in its October 1, 2004 Order No. 24,379, stating "that Nashua has not filed testimony as required by Puc 202.11(a) and

204.01 (b)." This direct order by the PUC for Nashua to file its testimony comes more than two years after Nashua initially intervened in the Pennichuck-PSC Merger.

Nashua's master plan to freeze the Companies and disrupt their nonnal business

operations has become even more apparent now that Nashua has begun its legal proceeding.

Nashua's representatives have publicly indicated that the City plans to use the PUC proceeding to "kick the tires" of the Pennichuck Utilities to determine whether their assets are worth paying for. Specifically, Nashua's attorney told the City Board of Aldermen that the PUC process will give Nashua "a second look at the acquisition after the price was set [by the PUC], so that if it was set too high, if everybody thought it was too high, that there was a procedure to get out."

1.4., ~ 26. Nashua's attorney has further stated that if the price set by the PUC for the Pennichuck assets is too high, "[y]ou can now use that [PUC determined] value, that too high value that was too high for you to buy it -that is a determination of fair market value that you can use for setting your [tax] assessment level [Pennichuck] is in the position where it wants to get the absolute most from the PUC, but if it gets too much and you back out that upper level is then going to be the level, of taxation and they will get hammered with taxes so it is a double-edged sword." ~, ~ 27. Thus, Nashua plans to drag the Pennichuck Utilities through a condemnation proceeding that will take at least two years and cost millions of dollars, when it has no authority to take many of the assets and no serious commitment to follow through with the taking. ~, ~28.

Both Pennichuck and the Pennichuck Utilities have suffered, and continue to suffer,

substantial damages as a result of Nashua's actions. The Companies have had to conduct their

business under the specter of a never-ending threat of condemnation, a kind of municipal sword

of Damocles hanging over their heads. As a result, Pennichuck has been significantly hampered

in its ability to pursue new business opportunities, such as the purchase or operation of other

water systems, and has suffered between \$1 to \$1.5 million in lost business opportunities. *M...* In addition, Pennichuck has spent more than \$400,000 in legal fees in connection with Nashua's actions, and has incurred \$2.2 million in merger related expenses associated with the failed Philadelphia Suburban deal. *Id.*, ~ 31-32. Had the Merger been consummated, Pennichuck shareholders' investment would today be worth approximately \$20-30 million greater than the current collective share value. ~, ~ 38. In total, the Companies' expenses and lost business opportunities will total as much as \$6 million, plus shareholder losses of \$25-30 million. ~, ~ 39.

ARGUMENT

In considering a motion to dismiss, the court must consider "whether the plaintiffs' allegations are reasonably susceptible of a construction that would permit recovery." *Silva v. Warden*, 150 N.H. 372,373 (2003); *Hickingbotham v. Burke*, 140 N.H. 28,29-30 (1995). In conducting this review, the court "accept[s] as true the plaintiffs' allegations of fact, and if the **allegations constitute a basis for legal relief," then dismissal is not warranted.** *Miami Subs Comoration v. Murray Family Trust*, 142 N.H. 501,516 (1997). If the plaintiff could recover upon any set of facts under the pleadings, using reasonable inferences in a light most favorable to the plaintiff, the motion to dismiss as to that count should be denied. ~, 150 N.H. at 374; *Proctor v. Bank of N.H.*, 123 N.H. 395,398 (1997). Viewed in light of those standards, the Defendant's Motion To Dismiss should be denied because Pennichuck has alleged sufficient facts to support causes of action for violation of its due process rights, inverse condemnation, intentional interference with contract, and unfair business practices.

A. The Companies' Due Process Rights Have Been Violated.

In Count II of their special declaration, the Companies seek damages for Nashua's violation of their due process rights under the New Hampshire Constitution. The gravamen of

this claim is that Nashua has invoked the municipalization process under RSA Ch. 38
unconstitutionally, in bad faith and for improper purposes. Count II is not a frontal attack on
RSA 38 ng~, but attacks Nashua's use of it against Pennichuck. Specifically, Pennichuck
contends that Nashua has used its eminent domain authority in an attempt to seize assets over
which it has no authority, to freeze Pennichuck and prevent it from finding business partners,
and to "kick the tires" of the Companies on the off chance that it can buy the Companies on the
cheap. Decl., "7-29. As a result of its actions, Pennichuck has suffered damages due to the
violation of its due process rights under Part I, Articles 2 and 14 of the New Hampshire
Constitution and its right to engage in commerce under Part 2, Article 83 of the New Hampshire
Constitution.

This Court and many others have held that such an abuse of the power of eminent domain
or related land use authority may be tantamount to a regulatory taking or violate substantive due
process. ~ August 31, 2004 Order in Docket 04- E-062, p. 13 ("bad faith or unreasonable
delay"). See also, Johnson v. City of Minneapolis, 667 N.W.2d 109, 116 (Minn. 2003)(abuse of
the power of eminent domain); Baker v. Coxe, 230 F.3d 470 (1st Cir. 2000)("abuse of substantive
power that shocks the conscience" and "extreme actions of those who would be parochial
potentates"); Simi Investment Co. v. Harris County, 236 F.3d 240 (5th Cir. 2000)(substantive due
process violation in arbitrary government action relating to land use); Rubinovitz v. Rotato, 60
F.3d 906 (1st Cir. 1995)(**allegations of "a malicious orchestrated campaign causing substantial**
harm" by a city official who ordered cut off of property owner's utilities should have survived
summary judgment 1!!otion); Foster v. Herley, 330 F.2d 87 (6th Cir. 1964)(condemnor of property
may be liable for damages resulting from abusive exercise of such power); Archer Gardens. Ltd.
v. Brooklyn Ctr. DeL. corn., 468 F.Supp. 609,613 (S.D.N.Y. 1979)(plaintiffs stated claim for
abuse of condemnation powers where condemnor delayed condemnation proceeding in order to

acquire property at tax foreclosure sale at price far below that which the condemnor would be required to pay in eminent domain case).

Nashua argues for dismissal of this count because the Court, in a companion case, found that Nashua's delay in filing its RSA Chapter 38 petition with the PUC was not itself unreasonable. While there are some common facts between the two cases, Nashua conveniently ignores the totality of facts plead in Pennichuck's complaint in *this* case, which concern more than just the timing of Nashua's PUC filing. For example, Nashua has overlooked the following **allegations of bad faith'**

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Nashua officials (including Mayor Bernard Streeter and Alderman Brian McCarthy, collectively referred to as "City Leaders") expressed concern with the Merger Agreement because it meant that Pennichuck would become the subsidiary of a Pennsylvania business. These officials sounded the alarm that PSC might be sold to a French company, and that Nashua water might be diverted and sold far afield. Decl., ~9.

Nashua conducted a rushed special election on the question of whether the City should take Pennichuck's assets without identifying the assets to be taken or providing any information to voters on the costs of the potential acquisition, all with the intent of killing the pending PSC Merger. Id., ~ 10-11.

Nashua publicly claimed that it was in "active negotiations" with Pennichuck in an effort to cast a pall on the Company when in fact there were no serious negotiations taking place. Id., ~ 17.

City officials gave Pennichuck investors false and misleading information about its hostile bid to take over Pennichuck Corporation in an effort to put pressure on Pennichuck Corporation, over which Nashua has no right of eminent domain. Id., ~21.

The City decided that even if it could not obtain the Pennichuck assets for a cheap price, it would abandon the eminent domain action and institute a spot property tax assessment based on any finding by the PUC of the value of the regulated utilities. Id., ~27.,

Nashua also suggests that the Court in this case rely on its ruling in Docket 04-E-062, despite that the order is not yet a final decision of Court. In other words, Nashua has assumed that there will be no appeal to the New Hampshire Supreme Court of the August 31, 2004 order, when in fact such an appeal will be taken. One of the issues on appeal will be whether the Court's finding in a laches analysis that Nashua's delay was reasonable is contrary to the facts. Based on the inevitable appeal of the August 31 order, Nashua's suggestion that the order is somehow controlling in this case is misplaced.

Based on these facts alone, Pennichuck has stated a claim that Nashua acted in bad faith when invoking its eminent domain authority, thereby violating Pennichuck's due process rights.

In a bizarre attempt to explain away its actions, Nashua suggests in its Motion to Dismiss that it is not liable for violating Pennichuck's constitutional rights because it made an offer to purchase the Company's assets, which the Company rejected. Ironically, Nashua's explanation reflects the very nature of its bad faith. First, Nashua claims to have offered up a third party buyer for Pennichuck's unregulated assets to enable Nashua to buy the regulated assets, as though chopping the Company into pieces for sale to an unsolicited buyer could compensate the Company for Nashua's improper acts. Nashua then claims that the PUC could value the remaining companies, despite that the PUC has no authority to approve the sale of Pennichuck East Utility and Pittsfield Aqueduct Company to Nashua.

Nashua then relies on Rockhouse Mt. Prop.: Owners Assoc. v. Town of Conway, 127

N.H. 593 (1986) in support of its motion for dismissal, despite the fact that Rockhouse is remarkably different from what is pleaded in Count II. First, in Rockhouse, the Court's refusal to **recognize a constitutional money damages cause of action related to a claim for violation of equal protection rights, not due process rights. In fact, the court specifically distinguished the** claim in that case from due process violation claims, for which money damages have always **been available (i.e. 'wounding with a bullet or defaming with a lie'). Rockhouse, 127 N.H. at** 598. Then, separately applying condemnation principles, it found on the facts that inverse condemnation (another constitutional damages claim) did not apply in this road layout case. Second, the Court found that the existence of a statutory de novo appeal to the superior court **provided some remedy which obviated the need for a separate damages remedy. Finally, the Court recognized that the selectmen's role in town road layout has a quasi-judicial character** which justifies the application of limited sovereign immunity.

In the case now before the Court, the Companies are seeking relief from Nashua's bad **faith and unconstitutional use of a legal process that has subjected them to a taking with no** apparent end; tactics by the City that include both the regulated utility serving Nashua and other corporations that are not subject to eminent domain authority granted to the City by RSA Ch. 38. This situation could not be more different from Rockhouse, where the plaintiff in fact had a statutory remedy available (to appeal the selectmen's decision to the superior court), and the **town selectmen had a quasi-judicial role. Here, even assuming that the PUC could award** damages for taking Pennichuck East Utility and Pittsfield Aqueduct Company, which it cannot because they lie beyond Nashua's grasp, there is no PUC remedy for damages caused to Pennichuck Corporation, The Southwood Corporation, and Pennichuck Water Service Corporation. The PUC has no authority over these unregulated companies, and there is no venue but this Court and this action to obtain for them compensation for these damages.

Despite Nashua's arguments to the contrary, Marguay v. Eno, 139 N.H. 708 (1995) does **provide a private cause of action for violation of constitutional torts:** "[w]here no established remedy exists or the established remedies would be meaningless, however, we will not hesitate to exercise our authority to create an appropriate remedy." Marguay, 139 N.H. at 721-22. As discussed ~, there is no other adequate remedy available to the Companies, especially Pennichuck Corporation and its unregulated subsidiaries, for the losses they have suffered, and thus it is within the Court's purview to provide for one in this instance. To put it plainly, the issue in this case is not what compensation Pennichuck Water Works should receive for the specific assets that the City can theoretically take from that entity under RSA Ch. 38. It is whether Nashua has unconstitutionally and in bad faith used its governmental power to deprive Pennichuck Corporation and its various subsidiaries of rights and property that Nashua has no authority to take or interfere with at all.

Contrary to Nashua's assertion, the constitutional "right to engage in commerce" (pt. 2, art. 83) is alive and well in New Hampshire. Even utilities are entitled to fair constitutional treatment. ~, Anneal of Public Service Co., 122 N .H. 1062 (1982). And Pennichuck Corporation is a publicly traded holding company that owns multiple regulated and unregulated business enterprises. It is not a regulated monopoly. Under Marguay, a money damages actiqn is appropriate for the violation of this constitutional right. The ruling in AI!!eal of Omni Communications, 122 N.H. 860 (1982), which contains an interesting history lesson as to pt. 2, art. 83 of the New Hampshire Constitution, has nothing to do with this case. Nashua's continued efforts to confuse the difference between its potential right to take assets of Pennichuck Water Works and its ongoing efforts to freeze and threaten to acquire other assets of Pennichuck Corporation, the publicly traded holding company, perhaps best illustrates the central issue presented by this case. For these reasons, Count II should stand.

B. The Companies Have Stated a Claim for Inverse Condemnation Under the New Hampshire Constitution in Count IV.

In Count IV of their special declaration, the Companies seek damages for Nashua's

inverse condemnation of their property. N ashua concedes that inverse condemnation is

compensable under the New Hampshire Constitution. The New Hampshire Constitution protects the Companies' fundamental right to own property and engage in commerce. N.H.CONST. pt. 1, art. 2, 12; pt. 2, art. 83. New Hampshire courts for many years have held that the term "property" is more than merely the thing itself, but also includes the right to use, enjoy and dispose of the asset. ~ ~ Eaton v. B.C. & M.R.R., 51 N.H. 504,511 (1872); Metzger v. Town of

Brentwood, 117 N .H. 497, 502 (1977); Burrows, suQra. 121 N .H. at 597; Loughlin, 14 N .H.

Practice § 837. "It follows that any unreasonable interference with any of these rights constitutes

a taking even though physical possession remains in the owner." Metzger, 117 N.H. at 502;

Burrows, 121 N.H. at 597 ("the just compensation principle likewise applies if the abridgment of

the rights is accomplished by a governmental regulation restricting the exercise of these rights.")

The fact that some of the Companies are utilities (and, of course, some of them are not) does not give Nashua carte blanche to engage in public actions which ignore their economic rights. ~, Attorney General of Public Service Co., 122 N.H. at 1071 (there is "no greater right of the government to 'take' merely because a regulated utility is involved"). These well established principles are the basis for the Companies' inverse condemnation claim.

Nashua argues that this claim should fail because this court allegedly repeats allegations made in Docket 04-E-O62. Again, Nashua misconstrues Count IV and the declaratory judgment action. This Court granted the Companies' dismissal without prejudice of their claim that Nashua's use of RSA 38 as applied to this case constitutes inverse condemnation. Order, pp. 11-12. The nub of the claim in Count IV is not that Nashua is taking too long to pursue its rights under RSA Ch. 38 (although it has), but that it has invoked its eminent domain rights under RSA Ch. 38 for improper purposes and using improper means, the result of which is to deprive the Companies of their right to conduct business freely. For example, the special declaration alleges **that: (1) Nashua never had a serious intent to pursue municipalization as evidenced by its one year delay in filing a petition at the PUC, and then filing a petition that was unsupported and in clear violation of the PUC's filing rules, Decl., ~ 24-25; (2) Nashua engaged in an extensive public relations campaign in an effort to take assets of Pennichuck Corporation, over which it has no eminent domain authority, ~, ~ 11,18; (3) Nashua has publicly stated that the PUC process will give Nashua "a second look at the acquisition after the price was set [by the PUC], so that if it was set too high, if everybody thought it was too high, that there was a procedure to get out": M., ~ 26; and (4) In the event that Nashua does not like the price for the Pennichuck Utilities' assets set by the PUC, it intends to use the PUC's price determination as a basis to raise the Companies' property taxes in an apparent illegal spot revaluation ("[Pennichuck] is in the**

position where it wants to get the absolute most from the PUC, I but if it gets too much and you back out that upper level is then going to be the level of taxation and *they will get hammered with taxes so it is a double-edged sword*"(**emphasis added**), 1.4f, ~ 27.

It is precisely this effect of depriving an individual or business from the economic use of its property against which New Hampshire inverse condemnation law is designed to protect. ~ Burrows, 121 N.H. at 598 (citations omitted)(governmental re~trictions substantially depriving an owner of the **economically viable use of his land constitutes a taking within the meaning of the New Hampshire Constitution and requires just compensation**); ~ ~ Amesbury Public Service Co., 122 N.H. at 1071 (PUC order prohibiting the futur~ issuance of securities by utility effected an **inverse condemnation of PSNH's property, reasoning that "the economic impact of ... regulation, especially the degree of interference with investment-backed expectations, is of particular significance in determining whether a taking has occurred."**)(quoting Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164,3171 <1982>). Other courts have found inverse condemnation claims related to municipal attempts to abuse their condemnation powers. ~, ~, Johnson v. Minneapolis, 667 N.W.2d at 116 (**botched taking of downtown land for shopping mall**).

This taking to which the Companies have been subjected is not comparable in any way to the circumstances of the three New Hampshire cases cited by Nashua in which the supreme court found no inverse condemnation. These cases involved claims that town planning boards had violated the plaintiffs' constitutional rights by the manner in which they conducted their quasi-judicial review of the plaintiffs' applications. Alton Land Trust v. Alton, 745 F.2d 730 (1st Cir. 1984); Sanderson v. Candia, 146 N.H. 598 (2001); Smith v. Wolfeboro, 136 N.H. 337 (1992). If the Companies' taking claim were based on some quasi-judicial error made by the PUC in **considering Nashua's petition, or by Nashua's planning board in considering a Pennichuck**

subdivision request, then these cases might have some application. But Nashua's role is that of a municipal business venturer and litigant, and thus Nashua's attempt to hide behind quasi-judicial robes has no merit. Nashua is simply the antagonist trying to acquire a business enterprise and misusing the eminent domain processes.

Finally, as with the Companies' due process claims, there is no available inverse condemnation remedy at the PUC. Pennichuck Corporation and several of its damaged subsidiaries are not regulated utilities subject to the PUC's jurisdiction. Even as to the utilities, the PUC will only take jurisdiction as to companies and assets needed to service Nashua. The Commission is not normally the place where damages for inverse condemnation are sought, and plainly, Nashua would oppose any effort by the Companies to seek such compensation there.

C. Pennichuck Has Stated a Claim in Count V for Intentional Interference With Contract Because it Has Alleged That Nashua's Efforts to Kill the Merger Were Improper .

In its Motion to Dismiss Count V, Nashua recites the elements of a claim for intentional interference with contract, yet only contests the validity of one of the four elements noted.

Specifically, Nashua asserts that Pennichuck has not stated a claim that Nashua intentionally and improperly interfered with Pennichuck's relationship with psd: Nashua Motion, p. 7-8.

First of all, the question of intent is one of fact, and thus is normally improper for a summary judgment motion, let alone a motion to dismiss. ~, Mundaca Inv. Corn. v. FEBBA, 143 N.H. 499,502 (1999).

Beyond that, Section 767 of the Restatement (Second) of Torts (1977) provides that many factors should be considered in determining whether an actor's conduct is so improper that it amounts to intentional interference with contract. The factors include the nature of the actor's conduct, the actor's motive, and the interests of the person with whom the actor interfered. Not only is "[t]here ...no technical requirement as to the kind of conduct that may result in

interference with the third party's performance of the contract," ~ § 766, comment k, "[t]he desire to interfere with the other's contractual relations need not...be the sole motive." 14.,

Section 767, comment d.

In this case, Pennichuck has alleged facts sufficient to state a claim that Nashua's motive in interfering was improper, as were the means it used to interfere with the Merger. In its special declaration, Pennichuck alleges that Nashua took the following actions with the intent of causing

PSC to reevaluate and ultimately pullout of its merger deal with Pennichuck: (1) City Leaders I

acted to foment discord over the Merger by making inaccurate public statements about the possibility of foreign ownership of the utility, Decl., ~ 9; (2) the City actively objected to the Merger before the PUC by engaging consultants to file testimony in opposition to the Merger and encouraged others to do so, ~, ~ 10; (3) after inciting public sentiment about the "foreign merger," the City called a rushed special election to gain authority for its municipalization action, an effort aimed at taking more assets than the City had legal authority to take.

~, ~ 9,

11, 15 -17. While this conduct in and of itself (e.g., intervening at the PUC, operating a website, and making public statements) might not be illegal, the City's motives in taking these actions were Improper.

Nashua's conduct is akin to the defendant's conduct in G.S. Enterprises, Inc. v. Falmouth Marine, Inc., 571 N.E.2d 1363 (Mass. 1991), which used the power of civil process to block the

purchase of a company. In that case, the plaintiff had entered into a contract to purchase a

business, which contract was interfered with when Falmouth Marine, a non-party to the contract,

brought a lawsuit against the seller. The Supreme Judicial Court of Massachusetts held that G.S.I

Enterprise had stated a claim for intentional interference with its contract because there was

evidence that Falmouth Marine's improper motivation in bringing the suit was to prevent land

developers from obtaining the property to be sold to G.S. Enterprise. G.S. Enterprises, 571

N.E.2d at 274. Based on these facts, Pennichuck has stated facts sufficient to support a claim for the use of improper means and motive by Nashua in interfering with the Pennichuck-Philadelphia Suburban contract.

D. Nashua is Subject to Liability for Violation of RSA 358-A Because it is Acting in a Proprietary Capacity. ;~;

In Count VI, the Companies assert that Nashua has engaged in unfair and deceptive acts or practices by disparaging Pennichuck's services and businesses through false and misleading statements. In its Motion to Dismiss, Nashua does not attempt to refute the substance of these allegations. Rather Nashua attempts to hide behind the cover of its status as a municipality to shield it from liability. Whether Nashua is liable for unfair business practices is dependent upon the nature of its actions, not its municipal status.

RSA 358-A, which provides that it is unlawful for "persons" to engage in unfair business practices, applies to municipalities because they are considered public corporations. ~ RSA

31: 1. Nashua proclaims that based on Massachusetts law, it is not subject to RSA 358-A, despite the fact that the Massachusetts Supreme Judicial Court has never ruled on whether its unfair business practices statute applies to municipalities engaged in trade or commerce. ~ Nashua

Memorandum of Law, p. 9-10. The Supreme Judicial Court strongly suggests that a municipality "acting in a business context" would be subject to its equivalent statute. Park Drive Towing, Inc. v. Revere, 442 Mass. 80,86 (2004).

Regardless, it is well established in New Hampshire that municipalities can act in both "governmental" and "proprietary" capacities. ~, Kardulas v. Dover, 99 N.H. 359 (1955). The **New Hampshire Supreme Court has ruled definitively and repeatedly that operation of a water works or a public sewerage system is corporate or proprietary in nature, and that when acting in this private capacity, municipalities may be liable for their negligence. 14. at 360-361 ; Rowe v. Portsmouth, 56 N.H. 291 (1876); Lockwood v. Dover, 73 N.H. 209,213 (1905); Shea v.**

Portsmouth, 98 N.H. 22, 23 (1953). This also is the trend nationally. ~ McQuillen Mun. Corp.

Section 53.30.10 (3rd Ed)("Certain duties and functions are generally viewed as being corporate and not governmental, including the construction and maintenance of municipal water and light

plants. ..."). It would be appropriate for the Court to apply this governmental/proprietary

distinction when determining the applicability of RSA Chapter 358-A to municipalities such as

Nashua because the genesis of this distinction appears in the law of torts. The law of unfair competition, which is the subject matter of Chapter 358-A, is rooted in the law of torts.

In an effort to explain away this well established precedent, Nashua claims that this case

law is out-of-date and not germane to this action, because they arose in the context of the former

law of sovereign immunity from torts. However, the only case cited by Nashua is Board of

Water Comm'rs. Laconia Water Works v. Mooney, 139 N.H. 21 (1995). In Laconia Water

Works, the Court rejected Laconia's contention that its water utility was a "private business",

which it had claimed in an attempt to receive immunity from all state statute regulating municipal

imposition of growth impact fees.

The Court reasoned that Laconia Water Works was not

immune, because it had not been formed as a separate corporation and did not issue stock, and

thus was an arm of the municipality. Laconia at 624-625. However, whether a municipality has

formed a private corporation is not the test of whether it is acting in a proprietary capacity, and

should not be a necessary predicate to conducting "trade or commerce" under RSA 358-A. ~

McQuillen Mun. Corp. Section 53.29 (3rd Ed)("The test is whether the act is for the common

good of all, in which case it is governmental, or whether the act is for a special corporate benefit

or profit."). Rather, it is the nature of the actions conducted that are proprietary, thereby bringing

Nashua into the fold of the unfair business practices statute.

Given the established law of New Hampshire, it is axiomatic that when operating or

attempting to establish and operate a water utility, attempting to take it from a private company,

Nashua is acting in a proprietary manner, thus engaging in trade or commerce. Based on this law, and the facts as plead, Pennichuck has stated a claim that Nashua has violated RSA 358-A by virtue of its wrongful and bad faith conduct.

IV.

CONCLUSION

Nashua's Motion to Dismiss should be denied because in each instance, as set forth above, the Companies have stated claims for relief. Because of the importance to the parties of the issues raised in this Objection, the Companies request that this Court schedule oral argument on this Motion.

Date: Octob~2004

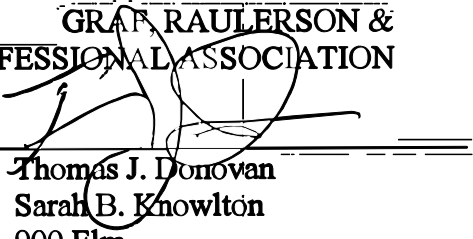
Respectfully submitted,

Pennichuck Corporation, I Pennichuck Water Works, Inc., Pennichuck East Utility, fnc. and Pittsfield Aqueduct Company, Inc. I

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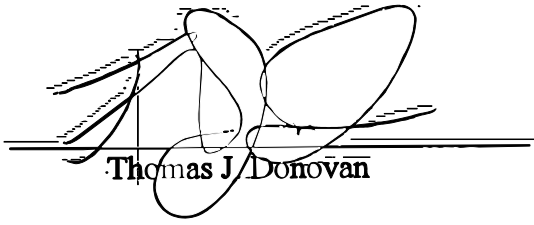
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MIDDLETON ,

Certificate of Service

!I hereby certify that on Octobe~004, I served the. oregoing Objection to Cityof Nashua's Motion to Dismiss by mailing a copy of it by first cl ss mail, postage prepaid, to Robert Upton, II, Upton & Hatfield, LLP, 23 Seavey Street, P .0. Box 2242, North Conway, NH 03860 and David R. Connell, office of Corporation

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