

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

City of Nashua: Taking of Pennichuck Water Works, Inc.

Docket No. DW 04-48

**MOTION TO STRIKE THE CITY OF NASHUA'S MOTION FOR
REHEARING AND CLARIFICATION REGARDING ORDER NO. 24,878**

Pennichuck Water Works, Inc. ("PWW"), Pennichuck Corporation, Pennichuck East Utility, Inc. ("PEU"), Pennichuck Water Service Corporation ("PWSC") and Pittsfield Aqueduct Company, Inc. ("PAC") (collectively, "Pennichuck") respectfully request that the Commission strike the City of Nashua's untimely motion for rehearing and clarification of Order No. 24,878 because it was submitted outside of the statutory period prescribed by RSA 541:3. In support of this Motion, Pennichuck states as follows:

1. Parties to an action or proceeding before the Commission have thirty days after the issuance of an order to submit a motion for rehearing: "Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission . . . may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order." RSA 541:3.

2. The Commission issued Order No. 24,878 relative to the above-captioned Docket on July 25, 2008. On July 22, 2008, Pennichuck timely submitted its motion for reconsideration and / or rehearing of that order pursuant to RSA 541:3. The City of Nashua, however, submitted its motion for rehearing and clarification of Order No. 24,878 on August 25, 2008, more than thirty days after the issuance of the Order.

3. New Hampshire requires strict compliance with the statutory time requirements established in RSA chapter 541. *See, e.g. Appeal of Carreau*, __ N.H. __, 945 A.2d 687 (2008) (holding that where appeal pursuant to RSA 541:6 was filed one day after expiration of statutorily prescribed thirty day period, Supreme Court was deprived of jurisdiction to hear the appeal); *see also Phetteplace v. Town of Lyme*, 144 N.H. 621, 625 (2000); *LaCroix v. Mountain*, 116 N.H. 545, 546 (1976). It makes no difference whether the party moving for rehearing submits their motion a day late or a year late; the motion is untimely and should not be considered. *See, e.g., Appeal of Carreau, supra* (motion submitted one day late); *Appeal of Courville*, 139 N.H. 119, 125 (1994) (motion submitted one year late).

4. It is immaterial that the expiration of the statutorily prescribed thirty day period to submit a motion for rehearing fell on a Sunday. While it is true that any period of time prescribed by the Commission's rules, if ending on a day the Commission is not open, will be computed to include the next business day, N.H. Code of Admin Rules Puc 202.03, the period of time applicable to a motion for rehearing of an Order of the Commission is not established by those rules. Rather, the thirty day period for submitting a motion for rehearing is set forth and governed by RSA 541:3. Procedural rules are not available to cure a party's failure to timely move for a rehearing pursuant to RSA chapter 541:3. *See, e.g., In re Petition of McHale*, 120 N.H. 450, 451 (1980); *see also Appeal of Carreau, supra*. Moreover, "[a]n administrative agency must comply with [a] governing statute, in both letter and spirit," *Appeal of Morin*, 140 N.H. 515, 519 (1995), and "[e]ven a long-standing administrative interpretation of a statute is irrelevant if that interpretation clearly conflicts with express statutory language." *Appeal of Rainville*, 143 N.H. 624, 627 (1999); (*citing N.H. Retirement System v. Sununu*, 126 N.H. 104, 109, 489 A.2d 615, 619 (1985)).

5. In *Phetteplace, supra*, the Supreme Court held that when the legislature unambiguously establishes a date certain for filing an appeal, it is immaterial that the final day for filing falls upon a weekend or holiday. *Id.* at 624-25. In that case, the appellants filed an appeal from a tax abatement decision on September 2, one day after the statutorily mandated September 1 deadline, and argued that their appeal was timely because September 1 had fallen on the Labor Day holiday, when the Court was closed. *Id.* at 624. The Court disagreed, holding that the statute establishing the deadline was unambiguous and that the appellants could have submitted their appeal in advance of the deadline. *Id.*

6. Though the Court did not explicitly decide in *Phetteplace* whether its holding applied to a statutorily prescribed period of time (as opposed to a date certain), *id.* at 625, it recently resolved that question in *Appeal of Carreau, supra*. The Court, holding that its own procedural rules did not vest it with the authority to waive a thirty-day time period prescribed by RSA ch. 541, explicitly applied the *Phetteplace* decision in doing so:

The explicit language of RSA 541:6 requires that an appeal be brought "within thirty days" after an application for rehearing is denied. "The legislature could not have more clearly expressed its intent to require appeals to be filed by a date certain." *Phetteplace v. Town of Lyme*, 144 N.H. 621, 624 (2000). Had the legislature intended to confer authority upon the court to waive this period . . . , it could have said so explicitly.

Appeal of Carreau, supra (emphasis added). Similarly, the explicit language of RSA 541:3 requires that an application for rehearing of an order of the Commission be made "within 30 days" after the order is issued. RSA 541:3. If the legislature had intended to confer authority upon the Commission to defer to its procedural rules and waive the thirty-day period for filing a motion for rehearing when the deadline falls on a weekend, it could have done so explicitly. It did not do so in RSA chapter 541 nor in any other statute.

7. Thus, the unambiguous thirty day period for filing a motion for rehearing pursuant to RSA 541:3 is not tolled until the next business day when the period ends on a weekend. *See Appeal of Carreau and Phetteplace, supra.*

WHEREFORE, Pennichuck respectfully requests that the Commission:

- A. Grant this motion to strike the City of Nashua's untimely motion for rehearing and clarification of Order No. 24,878; and
- B. Grant such other and further relief as the Commission deems necessary and just.

Respectfully submitted,

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

By Their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: August 29, 2008

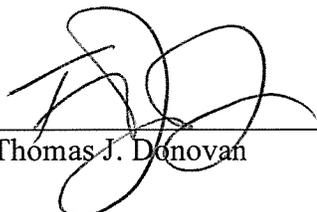
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2008, a copy of the foregoing Motion to Strike the City of Nashua's Motion for Rehearing and Clarification of Order No. 24,878 has been forwarded by electronic mail to the parties listed on the Commission's service list in this docket.



Thomas J. Donovan