

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

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

Docket No. DW 04-48

**PENNICHUCK'S OBJECTION TO NASHUA'S MOTION TO STRIKE
PENNICHUCK'S OBJECTION**

NOW COME 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") and object to the motion of the City of Nashua ("Nashua") to strike portions of Pennichuck's objection to Nashua's August 25, 2008 motion for rehearing. In support of this objection, Pennichuck states as follows:

1. Nashua's motion is a blatant attempt to bypass the Commission's rulings that it does not permit replies to objections. (Order No. 24,488, p.6, n.4; Order No. 24,555, p. 2). As Nashua admitted, Pennichuck's objection "should have been essentially the last document filed in this case". Motion, ¶ 2. In fact, Nashua's Motion to Strike, with accompanying documentation, is a barely hidden attempt to be "the last document filed in this case". Its claim that Pennichuck's objection "taint[s] the record" applies more appropriately to Nashua's own Motion to Strike.

2. Nashua's Motion to Strike is a second bite at the apple as to two components of Nashua's earlier Motion for Rehearing regarding Order No. 24,878. Pennichuck will address each of these two "second bites" separately.

A. Not-for-Profit Buyers

3. Nashua argued in its motion for rehearing that the Commission was wrong to consider, in its valuation analysis, not-for-profits as likely purchasers of PWW assets. Nashua argued, contrary to the evidence at the hearing, that no such market exists. The Commission properly agreed with Mr. Reilly's opinion that so long as there is a not-for-profit or municipal entity in the mix of potential purchasers, that will drive the pricing for PWW assets. Pennichuck then, properly, pointed out in its objection that there is a good deal of evidence that not just one but several municipal entities could acquire PWW assets. Pennichuck also sought to counter Nashua's additional unsupported, erroneous and irrelevant assertion that there is no competitive environment generally among non-profits for the purchase of privately owned water utility assets. In doing so, Pennichuck referred to its response to a Commission inquiry made at the final hearing about actual competitive situations among not-for-profit buyers, since that response would bolster the Commission's ruling should it decide to rehear this issue.

4. Pennichuck's response, in what became Exhibit 3258, gave four such examples of negotiations between not-for-profits as an extension of Mr. Reilly's testimony. At the time, Nashua, without a record request from the Commission, sought to counter Exhibit 3258 by submitting Exhibit 1145. Although in the end, the Commission admitted neither exhibit, Nashua's Exhibit 1145 in fact proves Pennichuck's point, that there is an active not-for-profit market to purchase utility assets. While there may not have been *formal* competitive bidding between not-for-profit entities in these four examples, more than one such entity had interest in purchasing the water companies mentioned in Exhibits 3258 and 1145. Appraisers do not require formal competitive

bidding, as implied by Exhibit 1145, and that is not how the market works in reality.

Again, Mr. Reilly testified, and the Commission agreed, so long as there is a hypothetical market involving one or more not-for-profit organizations to purchase PWW assets, that is enough to set the not-for-profit pricing standard for valuation, which gets factored in the income approach and in the economic obsolescence analysis for the asset approach.

B. Failure to Move for Rehearing on Interim Orders

5. Nashua also wants the last word with respect to Pennichuck's argument that Nashua is precluded from seeking a rehearing at this point, with respect to earlier orders of the Commission, Order No. 24,425 (removing PAC and PEU assets from the taking) and Order No. 24,567 (rebuttable presumption not applying outside Nashua), from which Nashua did not file any timely motion for rehearing pursuant to RSA 541:3.

6. RSA 541:3 on its face calls for motions for rehearing to be filed: "[w]ithin 30 days after *any* order or decision." (Emphasis added). It does not distinguish between preliminary and final orders. It is common sense and in keeping with the fundamental purpose of motions for rehearing that any such motion should be filed promptly, when there is still time for the Commission to correct errors that will affect the remainder of the case. A motion for rehearing filed at the end of the case but relating to an issue deciding much earlier in the case would not serve any purpose, except as a hollow precursor to an appeal.

7. The cases Nashua cites do not support its argument. In both *In re Appeal of Working on Waste*, 133 N.H. 312, 317 (1990) and *Appeal of Campaign for Ratepayers Rights*, 133 N.H. 480, 484 (1990), the Court denied appeals to the supreme court on issues not raised at all in the underlying case until the motion for rehearing. In *Working*

on Waste, 133 N.H at 317, the Court noted that "issues must be raised at [the] earliest possible time to allow trial forums full opportunity to come to sound conclusions and to correct claimed errors in the first instance" (citing *Appeal of Bosselait*, 130 N.H. 604, 607 (1988)). That is exactly Pennichuck's point: filing a motion for rehearing "at [the] earliest possible time" on a preliminary order gives the Commission the opportunity to correct errors "in the first instance."

8. In support of its interpretation that the requirement in RSA 541:3 to file a motion for rehearing within 30 days of a Commission order does not mean what it says, Nashua attaches an October 6, 2005 letter from Pennichuck's counsel. Nashua entirely misreads that letter. Pennichuck counsel's October 6, 2005 letter confirmed the common interpretation of the parties that RSA 541:6 appeals to the Supreme Court from Commission rulings need not be taken until the conclusion of the case. The letter did not deal with any interpretation as to when motions for rehearing pursuant to RSA 541:3 should be filed at the Commission. Pennichuck has consistently viewed its responsibility to file motions for rehearing with the Commission within thirty days of any Commission order. In fact, that letter is entirely consistent with Pennichuck's position, because it assumes that the parties would, as a matter of course, file "motions for rehearing of interlocutory orders" in the underlying proceeding.

WHEREFORE, Pennichuck requests that this Court deny Nashua's Motion to Strike Pennichuck's Objection.

Respectfully submitted,

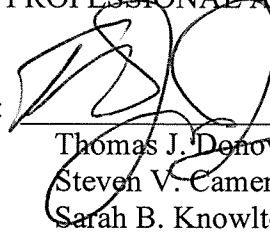
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Pittsfield Aqueduct Company, Inc.
Pennichuck Water Service Corporation
Pennichuck Corporation

By Their Attorneys,

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Date: September 18, 2008

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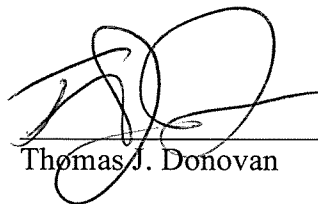
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2008, a copy of the foregoing Pennichuck's Objection to Nashua's Motion to Strike Pennichuck's Objection has been forwarded by electronic mail to the parties listed on the Commission's service list in this docket.



Thomas J. Donovan