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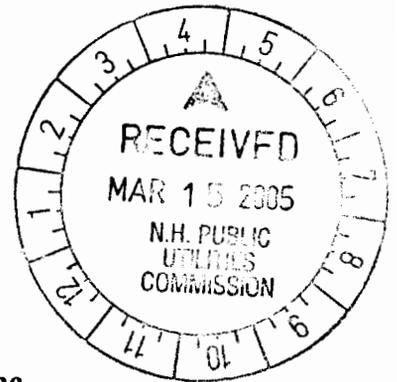
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March 15, 2005

By Hand Delivery

Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301



Re: DW 04-048; City of Nashua – Pennichuck Water Works, Inc.

Dear Ms. Howland:

Enclosed for filing with the Commission in the above-captioned docket are an original and eight copies, along with an electronic copy on a computer disk in Word format, of Pennichuck Water Works, Inc.'s Objection to Memorandum of the City of Nashua Regarding Bifurcation of the Determination of Value and Public Interest and Other Procedural Issues.

Please let me know if you have any questions about this matter.

Sincerely,


Steven V. Camerino

SVC:cb
Enclosure
cc: Service List

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Docket #: 04-048-1 Printed: March 15, 2005

FILING INSTRUCTIONS:

WITH THE EXCEPTION OF DISCOVERY (SEE NEXT PAGE) FILE 1 ORIGINAL & COVER LETTER, PLUS 8 COPIES (INCLUDING COVER LETTER) TO:

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CONCORD NH 03301-2429

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

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

Docket No. DW 04-048

**Objection to Memorandum of the City of Nashua Regarding Bifurcation of the
Determination of Value and Public Interest and Other Procedural Issues**

Pennichuck Water Works, Inc. ("PWW" or "Pennichuck") submits this Objection to address two procedural proposals that Nashua has set forth for the first time in its March 8, 2005 *Memorandum of the City of Nashua Regarding Bifurcation of the Determination of Value and Public Interest and Other Procedural Issues*. First, Nashua argues that the issue of valuation should be heard and determined *before* the Commission considers the issue of whether a taking by Nashua is in the public interest. Second, Nashua argues that it should be allowed to supplement its November 22, 2004 public interest testimony with additional testimony on the issue of public interest after the City has conducted discovery on PWW. For the reasons set forth below, the Commission should deny Nashua's requests and order the parties to propose a procedural schedule in which the public interest and valuation issues are considered simultaneously.

I. Nashua's Position Directly Contradicts The Position It Took Only Three Months Ago.

In its March 8 Memorandum, Nashua asserts for the first time that the Commission should bifurcate this case by first conducting a proceeding to value the assets that the City is seeking to take and then subsequently conducting a separate proceeding to determine whether such a taking would be in the public interest. Such an approach seeks to turn the eminent

domain process completely on its head by asking the Commission to determine the amount of just compensation that is constitutionally required to be paid *before* the Commission determines whether a taking should occur at all and, if any taking is determined to be in the public interest, identification of the assets that may be taken.¹ RSA Ch. 38 does not support such an approach in a case such as the present one, where identification of the assets to be taken "remains a factual determination of the public interest for the Commission to make." Order No. 24,425 at 18. If anything the statute should be read to require a process that is consistent with New Hampshire's general eminent domain statute, RSA Ch. 498-A, which requires that the issue of public interest be finally determined (and if challenged may be appealed to the supreme court) before considerations of valuation begin. *See* RSA 498-A:9-b.

The motivation for Nashua to reverse the order of issues in this case is plain. As Nashua's legal counsel informed the Nashua Budget Review Committee a year ago and only a week before filing the City's petition with the Commission in this docket:

After the price is finally set, RSA:38-13 [sic], which is a great and important provision permits you to decide within 90 days whether or not to acquire the property at that price....Just as an example say the PUC sets a price of \$200 million for these assets and after they set that price and Mr. SanSoucy [sic] and the financial people conclude that in order to pay that you would have to raise rates enormously you probably aren't going to want to do this. There is that opportunity for you to then get out. I know immediately what you are thinking because it is the first thing that always comes to my mind is if we go all the way through this and they set a price of \$200 million or anything that is above where we want to do it we are going to have spent a lot of money on guys like me and SanSoucy and the other experts in this thing and we will not get it back because the only way you get it back is if you actually go forward with the purchase you can bond all of that – you can put all of that into your revenue bonds and then that gets paid for instead of by taxpayers it gets paid for by the ratepayers. While that is true if you get to the end of the day and decide not to go forward that money has been spent and you don't get it back remember why you are getting out – you

¹ In Order No. 24,425, the Commission held that "[w]hether it is in the public interest to allow Nashua to take any or all of PWW's assets, however, remains a factual determination of the public interest for the Commission to make." Order at 18. It would be completely illogical for the Commission to value the assets of PWW as Nashua suggests and then subsequently hold a separate hearing to determine which of those assets, if any, may be taken.

are getting out because that value has been set too high. You can now use that 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 assessment level....I think what I am saying is the increased tax that you might get—that you would get from that increased value is one method that you might use to make sure you get yourself paid back for what you spent on acquisition costs.

Transcript of Nashua Board of Aldermen Budget Review Committee at 4 (Mar. 16, 2004).

Contrary to Nashua's assertions in its Memorandum, the City's new found interest in bifurcation is *not* intended to enhance the efficiency of this proceeding. It is intended to serve the ulterior motives laid out so plainly by the City's legal counsel on the eve of the City's initial filing in this case.

Notably, the position now being promoted by Nashua runs directly contrary to what Nashua's counsel told this Commission only three months ago. At the December 7, 2004 procedural hearing, counsel for Nashua stated "the two [public interest and valuation] really go hand-in-hand. *So, bifurcation we think would cause an unnecessary delay, and we don't think it needs to be bifurcated. We think the two issues can be dealt with at the same time.*" Transcript at 16-17 (emphasis added). Later in the same hearing, after counsel for Pennichuck indicated that, given certain deficiencies in Nashua's public interest filing it might be appropriate to bifurcate the proceeding by first conducting a separate hearing on public interest only, Nashua's counsel responded emphatically, stating:

I'm tired of hearing about how the City is trying to delay this process. We have done everything we could to try to advance this....And, to stand up today and say "the City is delaying, but, oh, by the way, Commissioners, we think there ought to be bifurcation", is—I really think borders on being disingenuous.

Bifurcation is going to cause delay. It's going to cause delay.

Transcript at 61-62 (emphasis added). Only three months later, Nashua has reversed course

completely and now wants the Commission to believe that bifurcating the issues in this case will *expedite* its resolution.

The real reason, of course, that Nashua has urged the Commission to follow such an approach is that it benefits Nashua because Nashua has absolutely no obligation to accept the Commission's determination of value if the amount is greater than what the City would like to pay. Nashua's ability, and its stated intent, to walk away if it dislikes the value set by this Commission is consistent with its strategy since the beginning of this process nearly two and a half years ago—to use the eminent domain process and this Commission as tools to assist it to test the waters to see if it can buy Pennichuck's assets on the cheap whether by obtaining a low valuation from the Commission or by pressuring Pennichuck to bend to Nashua's will and capitulate during the course of the proceeding for an unfair value. That this is Nashua's true goal is laid bare by the City's statement that one of the reasons for bifurcation is that obtaining a ruling on value before public interest may "result in settlement discussions between the parties that might not otherwise occur." Nashua's Memorandum at 4. Of course, under Nashua's scenario such negotiations would only occur if the Commission arrived at a value to Nashua's liking, while a higher value would simply result in Nashua's being able to walk away and increase Pennichuck's real estate taxes in retribution. Although Nashua has repeatedly protested that its motivations throughout the eminent domain process have been pure, the City's true strategy has been laid bare every step of the way by its actions and contradictory statements before both this Commission and the Superior Court.

The other reason posited by Nashua to support bifurcation is equally flawed. Nashua claims that bifurcation is necessary because otherwise when the Commission deliberates on the issue of public interest it will not know the price to be paid by the City for Pennichuck's assets.

The City's argument, of course, ignores the fact that, in a combined proceeding, the Commission remains free to consider the issues of just compensation and public interest separately during its internal deliberations. Contrary to Nashua's argument, in considering the public interest issue, the Commission could readily have a firm valuation figure available simply by considering that issue during whatever stage of the deliberative process it felt was appropriate. Such a process would leave the Commission free to first determine which PWW assets, if any, should be the subject of a taking and then determine the value of those assets only or to consider the issues in a different order if necessary. The Commission is well experienced at deliberating the multiple issues presented in complex cases without dividing the case into separate proceedings on each issue.

II. Nashua's Request for Leave to File Additional Testimony on the Issue of Public Interest Should Be Denied.

In its March 8 Memorandum, Nashua also claims that the prefiled testimony of its five witnesses--George Sansoucy, Brian McCarthy, Philip Munck, Steven Adams and Steven Paul—filed on November 22, 2004 did not constitute its entire direct case on the issue of public interest and that it should be allowed to supplement that filing. It is far too late in this proceeding for Nashua now to try to recreate its public interest case.

The issue of whether and when Nashua was required to file its public interest and valuation testimony was first raised by Pennichuck almost a year ago in the company's Motion to Dismiss filed on April 5, 2004. The issue was extensively argued at a hearing before this Commission on July 28, 2004, at which the Commission specifically considered whether Nashua's failure to comply with the Commission's rules regarding prefiled testimony should result in dismissal of the case. Not once during that hearing did Nashua indicate that it had any need or desire to conduct discovery on the public interest issue. On October 1, 2004, the

Commission issued its Order No. 24,379, ruling on Pennichuck's Motion to Dismiss and the City's request for additional time to submit prefiled testimony. In that order, the Commission gave the City the additional time it requested to submit its public interest case, conduct discovery regarding valuation and submit its valuation testimony.

On the need for testimony, we agree that Nashua has not filed testimony as required by Puc 202.11(a) and 204.01(b), but we will not dismiss Nashua's Petition for Valuation on the basis of that omission. Rather, we will require Nashua to file testimony on its technical, financial and managerial capability to operate the public utilities as requested *and how the public interest would be served by the taking*. To the extent that PEU and PAC were not taken, for reasons of legal authority or otherwise, Nashua shall include testimony on the extent to which that limitation would change its positions on the issues delineated above. Nashua's testimony will be due no later than November 22, 2004. We also find that effective testimony on valuation can best be prepared after Nashua has had the opportunity to conduct relevant discovery on Pennichuck's books and records. Testimony on valuation, therefore, need not be submitted on November 22, 2004.

Order No. 24,379 at 11-12 (emphasis added). The time period for seeking rehearing of Order No. 24,379 expired on October 31, 2004. Nashua filed no such motion for rehearing, no request for clarification, no pleading or request of any kind. Instead, on November 22, 2004, the City filed its case on public interest. Nowhere in that filing or in the letter accompanying it was there any mention of the need to file additional testimony or conduct discovery.

Two weeks later, on December 7, 2004, during a procedural hearing before the Commission, counsel for Pennichuck listed some of the obvious failings of the City's November filing, including the complete failure to address the impact of the City's inability to take the assets of PWW's two sister utilities, Pennichuck East Utility and Pittsfield Aqueduct Company. *See* Transcript at 25-27. In response to those comments, counsel for Nashua insisted that the City's filing was more than adequate, stating "I resent the implications made by Mr. Camerino that our prefiled testimony was deficient." Counsel for the City then went on to detail exactly how he thought the public interest testimony satisfied the requirements set forth in the

Commission's October order. Three months later, Nashua is apparently no longer content with its November submission and seeks to reopen the Commission's determination in Order No. 23,379 by asking for leave to file additional testimony on the very same issues it was previously ordered to address.

In support of this latest request for the Commission to alter its procedures to suit Nashua, the City argues that it "needs discovery of PWW's operations and management *in order to be able to obtain the most advantageous contract*" with a potential operator of PWW's water systems. Nashua's Memorandum at 4. Perhaps the only thing more remarkable than the fact that Nashua is seeking discovery for purposes that are related to its business needs rather than to this litigation, is the unabashed candor of Nashua's statement. There is simply no legal basis that would permit a party to use the legal process of this Commission to assist that party in issuing a request for proposals to potential operators of a water system or negotiating with those interested in providing such services.

The eminent domain process unfolding before this Commission began with an aldermanic vote in November 2002, continued with a referendum in January 2003, progressed to a demand letter and notice of taking in February 2003 and a statement in March 2003 that "[t]he City will now proceed under RSA 38:10 to petition the Public Utilities Commission...." Letter from Mayor Streeter dated March 26, 2003 (included with Nashua's petition in this case). A year later, in March 2004, Nashua finally filed its eminent domain petition, and eight months after that the City submitted its public interest testimony in November 2004 after being ordered to do so by this Commission. Now, in March 2005, twenty-seven months after it began the eminent domain process, Nashua has decided to ask this Commission for discovery and a chance to supplement its public interest case because it is still not ready to go forward on that issue.

Despite Nashua's repeated denials, the City's actions plainly demonstrate that its strategy is to delay this proceeding to the greatest extent possible, either because after nearly two and a half years it is still genuinely unprepared to go forward or because the request is part of a larger strategy to use delay to force Pennichuck to selling its assets for a low price in order to escape the seemingly interminable cloud of condemnation that Nashua has created over the Company.

Finally, yet perhaps of greatest significance, Pennichuck asks the Commission to consider that the additional discovery requested by Nashua will impose a substantial and unnecessary burden on Pennichuck's limited staff--individuals who are responsible for operating the company and providing service to the company's customers. As the Commission is aware, Pennichuck is a company with only five senior executives and only several additional management employees who are familiar with the information necessary to respond to discovery requests from Nashua during this case. Those employees are already faced with the task of responding to what are likely to be dozens and potentially hundreds of complex data requests from the City on the issue of valuation. While Pennichuck recognizes that, for the duration of this case, it will have to meet the significant competing demands of responding to Nashua's eminent domain efforts while at the same time serving its customers, the company is also confident that the Commission is aware of the need to avoid unnecessarily increasing the difficulty of that task by giving Nashua a third opportunity to submit its case on the issue of public interest. Nashua's request to rewrite the Commission's rules, reconsider this Commission's prior orders that have long been final, and reconstruct the City's November 22 filing will pose an undue burden on those employees and, ultimately the Company, its customers and its shareholders. Nashua's request for additional time to supplement its November 22 filing

should therefore be denied, and Nashua should be directed to work with the other parties to this proceeding to develop a schedule on which this case will proceed on a non-bifurcated basis.

Respectfully submitted,

Pennichuck Water Works, Inc.

By Its Attorneys

MCLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

March 15, 2005

By:



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Certificate of Service

I hereby certify that a copy of this Objection has been forwarded to the parties listed on the Commission's service list in this docket.

Dated: March 15, 2005



Steven V. Camerino