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March 7, 2005

Debra Howland, Executive Director/Secretary
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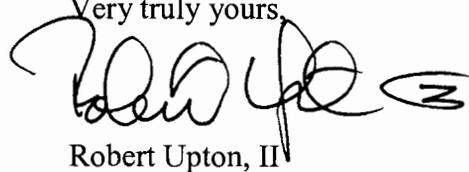
Re: Docket No. DW-04-048
Pennichuck Water Works, Inc./City of Nashua

Dear Ms. Howland:

I enclose herewith a Memorandum of the City of Nashua Regarding Bifurcation of the Determination of Value and Public Interest and Other Procedural Issues. I also enclose an electronic copy of the Memorandum in Word format.

A copy of the Memorandum has been mailed to all parties on the Service List.

Very truly yours,



Robert Upton, II
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RUII/bgb
Enclosure(s)



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

**IN THE MATTER OF THE
DETERMINATION OF THE
FAIR MARKET VALUE OF
THE PLANT AND PROPERTY
OF PENNICHUCK WATER
WORKS, INC., PENNICHUCK
EAST UTILITY, INC., AND
PITTSFIELD AQUEDUCT
COMPANY, INC.**

DOCKET NO. DW 04-048

**MEMORANDUM OF THE CITY OF NASHUA REGARDING
BIFURCATION OF THE DETERMINATION OF VALUE
AND PUBLIC INTEREST AND OTHER PROCEDURAL ISSUES**

In its Order No. 24,425 dated January 21, 2005 the Commission asked the Parties to address “[w]hether the valuation inquiry in the public interest issue should proceed in tandem or one should precede the other.” Statements or memoranda on the issue were ordered to be submitted by March 8, 2005.

In accordance with the Commission’s Order, Nashua submits that the provisions of RSA 38 and the orderly conduct of this proceeding support the Commission’s consideration of valuation prior to any determination concerning the public interest. In the alternative, the Commission should consider the issues of valuation and public interest simultaneously. A public interest determination should not precede a determination of value.

I. STANDARD FOR REVIEW

Whether to bifurcate rests within the sound discretion of the Commission. Appeal of Vasani, 149 N.H. 259, 264 (2003) (An “agency, like a trial judge, has broad discretion over the conduct of its proceedings, including its hearings.”); Blevens v. Bow, 146 NH 67, 72 (2001) (“[T]he manner and timing of the trial of all or part of the issues in an action is a question of justice and convenience within the discretion of the trial judge [whose] findings will not be disturbed in the absence of showing abuse.”)(citations omitted). As a result, the Commission’s discretion over the administration of this proceeding is broad and will not be overturned unless it acts arbitrarily, fails to comply the requirements of its governing legislation or with its own rules and regulations, or fails to follow fair procedures. Appeal of Morin, 140 N.H 515, 517-518 (1995).

In that regard, the Commission should be guided by the “letter and spirit” of RSA 38, fairness and the orderly conduct of these proceedings. Nashua believes that the balance of these factors supports the Commission’s consideration of the valuation of PWW’s prior to its determination of the public interest.

II. DETERMINATION OF THE PUBLIC INTEREST IS HIGHLY DEPENDENT ON, AND SHOULD NOT PRECEDE VALUATION OF PWW’S ASSETS BY THE COMMISSION.

In the event that a municipality and public utility fail to reach an agreement for the establishment of a municipal water district, RSA 38:9 sets forth two issues for the Commission’s consideration. Either the municipality or the public utility may petition the Commission for a determination of these questions. RSA 38:9, I. It is the position of Nashua that the question of the public interest is so dependent upon the Commission’s determination of value, that valuation must be the first inquiry.

Nashua has consistently urged that the most important issue in the public interest determination is the comparison of rates likely to be charged under public ownership versus continued private ownership. In addition, consideration of the public interest will likely involve analysis of other issues related to valuation. For example, issues such as the impacts on PWW's shareholders, PWW's cost of service to any customers not acquired by Nashua, will be largely dependent on the Commission's determination of the value of the assets to be acquired by Nashua.

The Commission's determination of value of the PWW's assets which Nashua seeks to acquire is largely determinative of the rates it will charge. Because this and other major questions related to the public interest can only be determined with certainty once the value of those assets has been determined, the Commission should determine value prior to consideration of the public interest.

III. DETERMINATION OF VALUE PRIOR TO PUBLIC INTEREST WILL PROMOTE THE ORDERLY RESOLUTION OF THIS PROCEEDING.

A determination of value in the first instance will make the work of the Commission and the parties more efficient and meaningful. For example, even if the Commission made an initial determination of public interest in the abstract, the Commission and the parties would still be required to revisit the issue following valuation in order to make a meaningful comparison of rates and services. As a result, consideration of the public interest prior to a determination of value of the assets to be acquired would be speculative and of little ultimate value to the Commission. Only with both parties using a value established by the Commission will the comparison be useful and allow the Commission to make any meaningful determination of public interest.

A determination of value prior to public interest may also advance an earlier resolution of the proceedings. With a determination of value the City's rate structure will be known and the parties will be in a better position to assess the strength of their public interest positions. It is likely an early determination of value would result in settlement discussions between the parties that might not otherwise occur.

If the Commission concludes that valuation should not be the first inquiry, Nashua urges a simultaneous determination of both valuation and public interest. While the parties would be free to use different values for their rate analyses, the Commission will at least have the benefit of the expert appraisals of value available to assist its evaluation and can measure the rate analyses against the appraisals.

IV. CONSIDERATION OF VALUE PRIOR TO THE PUBLIC INTEREST IS CONSISTENT WITH THE STATUTORY SCHEME ESTABLISHED BY RSA 38

In the Petition for Valuation of J. Brodie Smith Hydro-Electric Station, DE 00-211, Order No. 23,733, the Commission considered an RSA 38 petition for valuation to acquire certain hydro-electric facilities owned by PSNH. While the Commission concluded that circumstances such as the legislature's decision to order PSNH to divest its electric generating stations warranted consideration of whether the taking was in the public interest prior to valuation under RSA 38, the Commission noted that this was the exception rather than the rule. The Commission stated:

In adopting the particular procedural course for [this docket] we do not intend to suggest that in most RSA 38 condemnations, valuation will not precede the public interest determination. As a general proposition, RSA 38, when read sequentially sets out an orderly process that begins with local approvals, moves to negotiation with the relevant utility, allows for valuation when the utility refuses to sell, and culminates in condemnation if deemed to be in the public interest. We conclude only that the particular circumstances of this case justify a departure from this sequence and the statute does not prohibit such a departure.

This case does not present any circumstances which warrant departure from the statutory scheme: Nashua has followed the orderly process that begins with local approvals and negotiated with PWW. Despite Nashua's best efforts, PWW, the relevant utility has refused to sell. As a result, following the orderly process set forth in RSA 38, the Commission should establish a procedural schedule which "allows for valuation" and "culminates in condemnation if deemed to be in the public interest" in accordance with Order No. 23,733.

V. BIFURCATION TO CONSIDER PUBLIC INTEREST FIRST IS NOT WARRANTED

Nashua urges the Commission to reject bifurcation to determine public interest first. In a consideration of rates without any determination of value by the Commission the parties will be free to use any value for rate making purposes, which would make any comparison of the resulting rates virtually impossible. PWW would not even be required to utilize an expert tested value for these purposes. It will be able to pick any value off the shelf that suits its purposes. Moreover, RSA 38:11 authorizes the Commission "to set conditions and issue orders to satisfy the public interest". If the Commission has public interest concerns that are not impacted by value, it can impose conditions which satisfy those concerns after the valuation determination.

In order for the Commission to make the kind of rate analysis necessary for its public interest determination the parties should be using the same value of the assets. That can occur only when the Commission has determined the value under RSA 38:9. It cannot occur if the public interest determination is made first.

In this Docket, unlike Petition for Valuation of J. Brodie Smith Hydro-Electric Station, supra., (Order No. 23,733 at p. 19), there are no unusual circumstances which would require a public interest determination first. To the contrary, because of the significant role rates will play in the public interest determination, the “particular circumstances” of the case suggest the value should be decided first.

VI. OTHER PROCEDURAL ISSUES

Although not a part of Order No. 24,425, a procedural issue has arisen which will require the Commission’s involvement. PWW has taken the position in discussions concerning a procedural schedule that Nashua cannot undertake discovery concerning the public interest and cannot file testimony supplementing its prefiled testimony on that issue. In short, PWW insists Nashua is bound by its initial filing, notwithstanding the fact that Nashua has had no discovery on any of the public interest issues. Nashua has consistently posited that an RSA 38:9 petition is unlike most proceedings before the Commission where the petitioning party is in control of the facts and documents necessary to make its case.

In its prefiled testimony, Nashua responded to the Commission’s concerns and further identified what it believed were the public interest issues. The testimony was based upon the information available to the City at the time it was filed. As noted above, value will play a large part in the public interest determination and Nashua will need to conduct considerable discovery on value. Likewise, operation and management is an important public interest consideration. Nashua proposes to contract operations and

management but needs discovery of PWW's operations and management in order to be able to obtain the most advantageous contract. In addition, Nashua is entitled to discovery from PWW concerning the stewardship of the watershed and the impact of the acquisition on employees, both of which are important public interest issues and on which the City was unable to conduct discovery prior to filing its testimony.

Nashua believes the position staked out by PWW is unreasonable and that the Company is seeking to use the procedural schedule to achieve a substantive goal. The procedural process should not benefit one party to the prejudice of another. Nashua urges the Commission to reject any procedural schedule which does not give both parties full discovery of all issues and a fair opportunity to submit testimony based upon that discovery.

Respectfully submitted,

CITY OF NASHUA
Upton & Hatfield, LLP
By its attorneys:



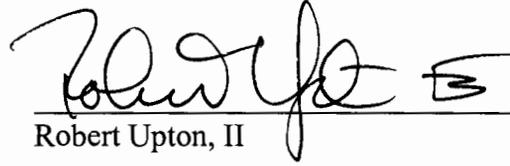
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Dated: March 8, 2005

David Connell, Esquire
Corporation Counsel
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Nashua, NH 03061-2019

CERTIFICATION

I hereby certify that a copy of the foregoing Memorandum of the City of Nashua Regarding Bifurcation of the Determination of the Valuation and Public Interest and Other Procedural Issues was this day forwarded to all persons on the attached Service List.



Robert Upton, II