

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

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

**Docket No. DW 04-048**

**PENNICHUCK'S OBJECTION TO CITY OF NASHUA'S MOTION IN LIMINE  
CONCERNING SEVERANCE DAMAGES**

Pennichuck Water Works, Inc. (PWW), Pennichuck East Utility, Inc. (PEU), Pittsfield Aqueduct Company, Inc. (PAC), Pennichuck Water Service Corporation (PWSC) and Pennichuck Corporation (collectively, "Pennichuck") object to the City of Nashua's Motion in Limine Concerning Severance Damages And To Determine The Proper Interpretation of RSA 38:9 (the Motion). In support of this objection, Pennichuck states as follows:

**The Motion is Moot**

1. In its Motion, Nashua seeks to exclude evidence regarding damages to Pennichuck Corporation, PWSC, PEU and PAC (collectively, the Pennichuck Entities) that would be caused if the Commission approved Nashua's taking of PWW's assets. Yet Nashua's Motion fails to recognize that the Pennichuck Entities did not present any pre-filed testimony in support of a claim for such damages. Thus, this aspect of Nashua's Motion is moot.

2. Nashua does agree that the Pennichuck Entities are entitled to present evidence of the damages they will suffer for the purpose of determining whether Nashua's proposed taking is in the public interest. *See* Motion at 3 ("Nashua does **not** assert that the Commission is precluded from considering evidence concerning the financial consequences of Nashua's Petition as part of the public interest determination to be made by the Commission.")(emphasis in the original). This will include evidence of damage to customers of PEU and PAC, who will suffer a

64% and 66% rate increase, respectively, as well as damage to PWSC, which will be forced out of business, should the Commission allow Nashua to condemn PWW's assets.

3. Nashua's Motion also makes clear that it seeks to take all of PWW's assets, not some subset of them. In fact, Nashua concedes that neither it nor any other party in this proceeding has presented any evidence to support a finding that Nashua should be entitled to take anything less than the entire PWW system. Nashua Motion at 8. As the condemnor, it is up to Nashua to define what it proposes to take. Because the City has presented no evidence for a partial taking of PWW, there is also no evidence in the record as to what the damages would be to any remaining portion of PWW should the Commission find that it is in the public interest to break PWW into pieces, allowing Nashua to take some fraction of the company. The Commission could not make such findings without a factual basis in the record.

#### **Any Partial Taking of PWW Creates Severance Damages**

4. While the Commission need not go any further to decide this motion, if the Commission were subsequently to develop a record concerning a partial taking of PWW, the law is clear that PWW would be entitled to severance damages for the fragment of the company that remained after a condemnation. RSA 38:9, III provides in part:

...the commission shall determine the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from other property of the owner.

5. Nashua makes the argument that any remaining portion of PWW would not be entitled to severance damages because the community water systems are separate and unique property. Nashua's view is based on an inaccurate depiction of the law as well as the assets in question.

6. The New Hampshire Supreme Court has made clear that in determining whether severance damages should be awarded, it applies the “before and after” test; that is, the value of the remainder of the property after the taking is deducted from the value of the whole property before the taking in determining severance damages. *See Lebanon Housing Authority v. National Bank of Lebanon*, 113 N.H. 73, 75-6 (1973). In this case, the Commission would be required to determine the value of all of PWW prior to the taking of some smaller portion of it, and compare it to the value of what remained, with the resulting difference equally PWW’s severance damages.

7. Despite this black letter law, Nashua claims that there would be no damages to the remaining part of PWW because some of the assets are not physically interconnected. Because Nashua cannot find any New Hampshire law to support its position, it relies on *Kennebec Water Dist. v. City of Waterville*, 97 Me. 185 (1902). However, in the *Kennebec* case, the court concluded that no severance damages were allowed because the remaining assets had “no relations whatsoever with the property taken, except those which grow out of common ownership.” That is not the case here, where all of the PWW assets are interdependent. For example, all of PWW’s customers are served by the same employees, computer systems, laboratory, trucks, and other property, regardless of where they are located. Nashua would have the Commission overlook the highly integrated nature of the PWW system. Further, only two years after the *Kennebec* case was decided, the Maine Supreme Judicial recognized this concept – that a water utility that is part of a unified system with a substantial degree of interdependence is entitled to severance damages. *Brunswick Water Company v. Maine Water Company*, 59 A. 537 (1904).

8. The leading treatise in this area, Nichols, *Law of Eminent Domain* (3<sup>rd</sup> Ed. 2000), confirms this proposition, particularly as it relates to the damage caused by a partial taking of water utility property. Section 14A.08 on utility severance damages provides in its entirety:

Severance damages reflect the loss to the value of the remainder of a utility company's system resulting from the company's future inability to use the condemned property. The utility company's inability to collect unbilled revenues and unpaid customer accounts receivable is a compensable severance damage. It is necessary to analyze the effect of the taking on the utility's responsibilities under existing governmental development orders and any remaining franchise requirements.

The remainder property for which the utility company claims severance damages must be part of the same integrated system as the portion condemned for severance damages to be compensable. In other words, the condemnee must prove a unified parcel (from which only part is being taken), before severance damages will be allowed. **In determining whether a unified parcel exists (a parent tract), courts will consider whether:**

- The properties are the same or separate for rate-making purposes;
- The properties have the same rate base;
- Different sets of consumers pay the profits on the properties; and
- The properties have an interdependent use.

One measure of allowable severance damages is the before-and-after rule. Under this rule, damages are expressed as the difference between the fair market value of the business as a going concern immediately before the damage and the fair market value of any assets remaining after the taking. Those damages include an evaluation of economic damage caused by the loss of future growth and the extended service that one could reasonably expect that the utility would have provided. [citations omitted]

9. Mr. Ware's testimony plainly demonstrates the interdependent nature of all of the systems within PWW. For example, all of the PWW water systems are the same for rate-making purposes, and rely on the same personnel, equipment, and access to capital for their operation. If only PWW's assets in Nashua were taken, the remaining customers would be left without access to the trucks, laboratory, engineering expertise, billing programs and related computers, among other assets, that are necessary to operate the water systems. Thus, Nashua's claim that PWW would not be entitled to damages to cover these losses caused by breaking the company into pieces is completely unfounded.

10. If the Commission were to find that a taking of only a portion of PWW's assets was in the public interest, it would be required to award PWW severance damages based on the decline in value of the remainder of the PWW property after the taking. That determination would have to include consideration of the reduction to the fair market value of those assets as a result of no longer being a part of a much larger, efficient, integrated enterprise. However, because there is no evidence of record yet regarding what lesser portion should be taken or regarding what the resulting damages would be, the Commission would be required to hold additional hearings on the extent of such taking and the amount of such damages. Such an exercise, however, is unnecessary because the public interest does not support the taking of the PWW assets, in their entirety, or in pieces.

11. For these reasons, the Commission should deny Nashua's Motion as moot and as not supported by the record.

WHEREFORE, Pennichuck respectfully requests that the Commission:

- A. Deny Nashua's Motion;
- 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: December 18, 2006

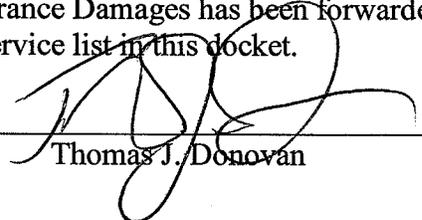
By: \_\_\_\_\_

  
Thomas J. Donovan  
Steven V. Camerino  
Sarah B. Knowlton  
Bicentennial Square  
Fifteen North Main Street  
Concord, NH 03301  
Telephone (603) 226-0400

Joe A. Conner, Esquire  
Baker Donelson Bearman  
Caldwell & Berkowitz, P.C.  
1800 Republic Centre  
633 Chestnut Street  
Chattanooga, TN 37450

Certificate of Service

I hereby certify that on this 18th day of December, 2006, a copy of this Objection to City of Nashua's Motion in Limine Concerning Severance Damages has been forwarded by electronic mail to the parties listed on the Commission's service list in this docket.

  
\_\_\_\_\_  
Thomas J. Donovan