

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

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

Docket No. DW 04-048

DIRECT TESTIMONY OF DOUGLAS L. PATCH

January 12, 2006

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1 Q. Please state your name and business address.

2 A. My name is Douglas L. Patch. My business address is One Eagle Square,
3 Concord, NH 03302.

4 I. **BACKGROUND AND PURPOSE OF TESTIMONY**

5

6 Q. Who is your current employer and what position do you hold?

7 A. I am employed by Orr & Reno, Professional Association where I am a
8 Director/Shareholder.

9 Q. What is your background?

10 A. I have been with Orr & Reno since November of 2001. Prior to that I was the
11 Chairman of the New Hampshire Public Utilities Commission from March of
12 1992 until October of 2001. A more complete description of my education and
13 experience is included as Attachment DLP-1.

14 Q. What is the purpose of your testimony?

15 A. The purpose of my testimony is to provide my direct experience in dealing with
16 Pennichuck Water Works (PWW, Pennichuck, or the Company) and its affiliates
17 and to give my opinion on the City of Nashua's proposed eminent domain taking
18 of the assets of PWW based on my familiarity with PWW and the important role
19 that PWW plays in providing water in New Hampshire, as well as my knowledge
20 of the water and utility industry in New Hampshire.

21 II. **PENNICHUCK'S EXPERTISE AND REPUTATION**

22

23 Q. Are you familiar with Pennichuck Water Works?

24 A. Yes, I am. During the nine and one-half years I was the Chairman of the
25 Commission I presided over a number of adjudicative and public hearings

1 involving PWW and was a member of the Commission that issued a number of
2 orders concerning PWW. A complete list of the orders involving PWW issued
3 while I was on the Commission is included as Attachment DLP-2. During the
4 time I was on the Commission I also visited PWW's facilities and talked with
5 PWW managers on a number of occasions as part of fulfilling my duty to keep
6 informed under RSA 374:4. During that time I also had discussions with
7 Commission Staff about issues related to PWW's operations.

8 **Q. What is your opinion of PWW's qualifications as a public utility?**

9 A. My opinion is that PWW has excellent qualifications to own and operate a public
10 utility. It clearly fulfills the obligation that all utilities have under New
11 Hampshire law to provide "such service and facilities as shall be reasonably safe
12 and adequate and in all other respects just and reasonable." RSA 374:1.

13 **Q. On what information do you base your opinion?**

14 A. My opinion is based on the knowledge I gained of PWW while I was a member of
15 the Commission which included my observations of the Company's officers and
16 employees, the witnesses who testified on behalf of the Company, attendance at
17 public hearings in Nashua, visits to the Company's facilities, and conversations
18 with Staff members who worked with the Company and had more frequent and
19 less formal contact with the Company than I did as a member of the Commission.
20 It is also based on a comparison of PWW's qualifications to those of other water
21 utilities in New Hampshire. My opinion is also based on my knowledge of water
22 utilities gained through my experience as a member of the National Association of
23 Regulatory Utility Commissioners and as a member of the New England

1 Conference of Public Utility Commissioners, both of which organizations hold
2 periodic meetings and conferences to share information and discuss utility-related
3 issues, as well as on my experience since I have been in the private practice of
4 law.

5 **Q. Please provide examples that demonstrate the Commission's recognition of**
6 **the expertise and reputation of PWW and related entities for providing**
7 **reliable and efficient service.**

8 A. There are numerous instances where the Commission has recognized PWW's
9 expertise and reputation for reliable and efficient service to the public. In Order
10 No. 20,610, 77 NH PUC 559 (1992) the Commission approved petitions from
11 Pennichuck for franchises in Great Brook Condominium in Milford and Redfield
12 Estates in Derry. The settlement agreement cited in the order refers to
13 Pennichuck's "reputation for reliable and efficient service to the public." 77 NH
14 PUC at 561. The Commission analysis says: "The record amply demonstrates
15 that Pennichuck is financially, managerially, and technically able to provide the
16 requested service." 77 NH PUC at 563. In Order No. 20,808, 78 NH PUC 218
17 (1993) the Commission granted franchises to Pennichuck for Maple Haven in
18 Epping and Glen Woodlands in Derry. In doing so the Commission said it had
19 "consistently held that Pennichuck has the managerial, financial, and technical
20 expertise to operate as a public utility." 78 NH PUC at 219. In Order No. 21,026,
21 78 NH PUC 621, 623 (1993) which granted PWW a permanent rate increase, the
22 Commission said "Pennichuck presents a strong, stable and attractive opportunity
23 for investment." *See also* Order No. 22,054, 81 NH PUC 191 (1996), authorizing

1 Pennichuck to extend service in Bedford; Order No. 22,532, 82 NH PUC 292
2 (1997) authorizing Pennichuck to extend service into Salem; Order No. 22,792,
3 82 NH PUC 814, 816 (1997) approving the transfer of assets of Consumers New
4 Hampshire Water Company outside Hudson to Pennichuck Corporation which
5 refers to Staff's support "in light of Pennichuck's [PWW's] overall competence
6 and experience with both core and small community water systems"; Order No.
7 22,843, 83 NH PUC 44, 45 (1998) approving Pennichuck Corporation's
8 acquisition of Pittsfield Aqueduct, in which the Commission noted that it had
9 "recognized the financial, managerial and technical expertise of Pennichuck
10 [PWW] to operate a water utility on numerous occasions"; Order No. 23,044, 83
11 NH PUC 575, 577 (1998) authorizing Pennichuck to acquire the assets of Great
12 Bay Water Company, Inc., where the Commission said Pennichuck "has a history
13 of competent and reliable service"; Order No. 23,670, DW 00-285, issued April 2,
14 2001, approving PWW's franchise expansion in Milford; Order No. 24,264, DW
15 03-023, issued January 9, 2004, approving Pennichuck East Utility, Inc.'s (PEU)
16 acquisition of the water system of White Rock Senior Living Community in Bow
17 and authority to provide water service to White Rock; Order No. 24,370, DW 04-
18 129, issued September 10, 2004, approving PEU's franchise petition to serve the
19 Pines of Bow; Order No. 24,413, DW 04-120, issued December 22, 2004,
20 approving franchise rights for PEU in a limited area in the Town of Lee. To the
21 extent that some of the more recent orders cited above refer to PEU or Pittsfield
22 Aqueduct Company, Inc. (PAC), not PWW, it is important to note that these
23 companies are heavily reliant on the skill, expertise and assets of PWW, and in

1 fact there is a management agreement that provides for the allocation of PWW's
2 assets and expertise to these utilities.

3 **Q. What is PWW's reputation in the state?**

4 A. PWW is generally known as a well-run, highly qualified utility. In my opinion it
5 is the premier water utility in the state. The Company has been providing water
6 service to customers since 1852. It has grown from a privately held company to a
7 publicly traded company. The growth that PWW has made in recent years has, in
8 my opinion, been done carefully and responsibly. PWW expanded its operations
9 to provide more customers with excellent service while not putting shareholders
10 or the existing customers of the Company at risk. PWW also enjoys a very good
11 reputation for being a good corporate citizen by virtue of its contributions to
12 numerous organizations and programs in the communities in which it operates.

13 **Q. How has PWW served the public good as a public utility?**

14 A. In addition to the high quality of service it has brought to its customers, PWW has
15 made a significant contribution to the public good in New Hampshire through its
16 willingness to expand its operations in the state. PWW has taken over a number
17 of smaller water systems and provided good quality water at reasonable rates to
18 customers of those systems. In many cases, without PWW's intervention, service
19 to customers in these smaller, satellite systems would have further deteriorated
20 and/or their rates would have been much higher to provide comparable service.
21 One example of this is Order No. 20,808, 78 NH PUC 218 (1993), cited above,
22 where the Commission granted franchises to Pennichuck for Maple Haven in
23 Epping and Glen Woodlands in Derry. In doing so the Commission noted that the

1 New Hampshire Department of Environmental Services and the United States
2 Environmental Protection Agency “in recognition of the substantial costs of
3 monitoring and treatment under the Safe Drinking Water Act, have encouraged
4 the acquisition of developer owned water distribution systems by established and
5 competent water utilities.” 78 NH PUC at 220.

6 **III. THE NEGATIVE IMPACT OF AN EMINENT DOMAIN TAKING ON**
7 **PENNICHUCK, ITS AFFILIATES AND CUSTOMERS**

8
9 **Q. What is your opinion generally of the impact that an eminent domain taking**
10 **of PWW by the City of Nashua would have?**

11 A. I believe an eminent domain taking of PWW by the City of Nashua would have a
12 number of negative effects on the ratepayers of various Pennichuck systems, both
13 within and outside the borders of Nashua, on the state of New Hampshire, on the
14 regulatory environment in the state, and ultimately on the public interest in New
15 Hampshire. It would also have a negative impact on investors and shareholders.

16 **Q. What is your opinion of the impact such a taking would have on**
17 **Pennichuck’s ratepayers?**

18 A. The answer to this question falls into three parts: the impact on ratepayers in
19 Nashua, the impact on PWW customers in municipalities other than Nashua, and
20 the impact on ratepayers in other towns who are part of PAC and PEU. It is my
21 understanding that there are approximately 24,500 customers of PWW, 4,900
22 customers of PEU, and 640 customers of PAC. Economies of scope and scale
23 currently inure to the benefit of all of the Company’s customers regardless of their
24 location. These economies will be reduced if there are fewer ratepayers from
25 whom fixed costs can be collected. Thus all of PWW’s current customers would

1 be at risk of having their rates rise to a higher level than would otherwise be the
2 case if PWW continues to own and operate the entire system.

3 PWW customers also stand to lose other benefits that accrue to them as
4 customers of PWW. I am not convinced that the City of Nashua (Nashua or the
5 City) and the operator it intends to hire, if it succeeds in the taking, can run the
6 system as well and as economically as PWW has. I have attached two articles by
7 Dr. Janice A. Beecher, the Director of the Institute of Public Utilities at Michigan
8 State University, an expert in the water industry who has testified before this
9 Commission. "Options for Water Company Ownership" Indianapolis Star,
10 October 12, 2000, attached as Attachment DLP-3; "The Rationale for Regulating
11 Municipal Contract Services" PWFinancing, November 2000, attached as
12 Attachment DLP-4. As her articles indicate, when a local government retains
13 ownership of a system and hires a private operator that has responsibility for
14 operations there are often problems that develop. Some of the problems that Dr.
15 Beecher points to are with the deployment of capital and operating resources.
16 There is also often confusion as to accountability, in other words, which entity is
17 responsible for environmental compliance, which is responsible for resolving
18 service complaints, and which is responsible for planning to meet future needs. In
19 short municipalization combined with the outsourcing of operational
20 responsibility often leads to fragmentation.

21 Contrast this with investor-owned utilities, where regulation brings a
22 reasonably predictable system of accountability and incentives. Regulation also
23 balances the interests of shareholders and ratepayers, as reflected in the most

1 fundamental responsibility required of the Commission in RSA 363:17-a.
2 Regulation also typically seeks long term solutions that are in the public interest,
3 *see* Order No. 22,462, *Re Least-cost Planning for Water Utilities*, 81 NH PUC
4 1037 (1996), and insures the prudence of investments and expenditures. Before a
5 regulated utility can recover investments it must show that the investments were
6 prudent, i.e. that they were reasonable at the time they were made. As the
7 Commission noted in Order No. 24,276, *Public Service Company of New*
8 *Hampshire, Petition for Authority to Modify Schiller Station*, February 6, 2004:
9 “A prudence review, as we understand the concept, involves an after-the-fact
10 review of investment decisions, in light of actual performance, but limited to what
11 was reasonably foreseeable at the time of the decisions.” Regulators also look at
12 the justness of prices. Investor-owned companies, not bound by geopolitical
13 boundaries, are better able to achieve regional economies of scale. Although it is
14 not perfect, regulation also provides a mechanism for the timely resolution of
15 disputes and it tends to depoliticize the provision of water services, particularly
16 the investment and pricing decisions.

17 Municipalization, on the other hand, imposes an added oversight burden
18 on the local government. Although a municipality and/or an operator hired to run
19 a municipally-owned system may promise savings to customers, there is no
20 assurance that utility customers will realize the promised savings as there will no
21 longer be a regulatory body with the responsibility for deciding whether any
22 savings should be passed on to customers. This concept is of particular relevance
23 to the situation at hand in that Nashua intends to take assets outside of its

1 boundaries, assets that are located as far away as Newmarket and Epping. If
2 Nashua is successful, customers in these towns will be subject to the whims of
3 Nashua officials. I am not aware of anything that Nashua has proposed, or could
4 propose to assure the Commission that the interests of these customers would be
5 adequately protected. A municipal utility, unlike an investor-owned public utility,
6 would have to recover all investments, even imprudent ones, from ratepayers. In
7 addition a municipal water utility would have no incentive to invest in water
8 systems outside of its boundaries, it would have no independent review like that
9 conducted of an investor-owned water utility by regulators in a rate case, no
10 periodic independent audit of the utility like what the Commission does, and no
11 disallowance of unjustified or imprudent costs. Although a municipal utility
12 would not have the added obligation of local taxes, which investor-owned utilities
13 are allowed to recover through rates, there is no guarantee that the City will lower
14 rates to take into account the elimination of this expense from the rate calculation.

15 **Q. What is your opinion of the impact such a taking would have on PAC and**
16 **PEU ratepayers?**

17 A. In so far as the customers outside the PWW system are concerned it seems likely
18 that their rates would rise faster or the quality of their service would suffer
19 because there would not be as large a base of customers over which to spread the
20 costs of purchasing assets and running the system. The Commission has
21 recognized this in many orders, such as Order No. 21,713, 80 NH PUC 394, 398
22 (1995) where it said: "The addition of new customers spreads the cost of system
23 improvements among a larger customer base, and the public is better served by a

1 water source which is continually monitored for quality and safety problems.”
2 There is also a significant difference between smaller water utilities and larger
3 water utilities in their ability to pay for the costs of meeting environmental
4 requirements. In Order No. 22,883, 83 NH PUC 197, 201 (1998), approving a
5 rate increase for Pennichuck and allowing it to consolidate core and community
6 water services for rate-making purposes, the Commission said: “Most of the
7 community systems are simply too small to absorb the magnitude of investments
8 mandated by environmental enactments.” Similarly, in Order No. 21,219, 79 NH
9 PUC 264, 268 (1994), approving a sale of the water utility assets in Springwood
10 Hills to Southern NH Water Co. and rejecting an alternative proposal by an
11 association of homeowners, the Commission noted the high cost of complying
12 with the Safe Drinking Water Act and other federal and state requirements, as
13 well as the need for resources to finance “significant capital expenditures that
14 might be encountered in the future as a result of federal or state requirements or
15 an emergency that might occur.” *See also* Order No. 20,808, 78 NH PUC 218,
16 220 (1993), cited above. If the City succeeds in this eminent domain taking, the
17 reduced size of the remaining company will make it difficult to maintain the
18 expertise that it currently has and to afford the purchase of new assets. Without a
19 larger investor-owned company, there is not likely to be the consolidation of
20 smaller and mid-size systems to achieve economies of scale as there has been. I
21 believe there is also a significant risk that the pace of modernization under a
22 smaller company would be slower because of insufficient capital.

1 As Dr. Beecher points out, investor-owned companies have clearer
2 incentives for efficiency in investment, operations, service and pricing. In the
3 case of municipally- owned systems, cost savings are not necessarily reinvested in
4 the system or returned to ratepayers.

5 **Q. Please explain your answer in more detail as it pertains to customers in**
6 **Nashua.**

7 A. While the City might be able to lower rates somewhat in the short term if it takes
8 over the PWW system, as the report from Maine included as Attachment DLP-5
9 points out, it is important to consider more than just the impact on rates. The
10 Maine report, "Review Necessary to Determine the Benefits of Ownership
11 Changes for Public Water Utilities, Developed by the Maine Public Utilities
12 Commission, June 2005 at the Request of the Utilities and Energy Committee",
13 evaluates "what review should be undertaken by a municipality or water utility
14 before a decision is made to change the ownership structure of a public water
15 utility." The report says that such a review should determine the costs and
16 benefits of an ownership change. The report also says that the "determining
17 factor should be what is best for the ratepayers of the water utility." The report
18 notes: "While cost of operation is important, the ability to provide a safe,
19 adequate and reliable source of water, now and in the future, should be the
20 primary consideration of any utility. When looking at the choices of ownership,
21 the question should be what entity will best be able to achieve this end."

22 The first priority of any entity serving water customers should be to
23 provide them with safe and adequate service. Pennichuck has repeatedly and

1 consistently proven that it can provide such service. The City and its potential
2 operator have no track record with this Commission regarding their ability to own
3 and operate a water system in New Hampshire. Thus there is a real risk that the
4 quality of service provided to Nashua customers will decline. If there had been
5 concerns about PWW's qualifications to serve customers it might make sense to
6 take such a risk. However, past experience has been just the opposite. In the
7 absence of any such issue or question, there seems to be no benefit to PWW's
8 customers of making such a change; in fact there is a significant risk of harm to
9 the customers.

10 Over the years the Commission has encountered situations where
11 municipal systems were not willing to provide service to customers even within
12 their own municipal boundaries. *Re Beaver Village Realty Trust*, 80 NH PUC 31
13 (1995) is one such example, where a community water system serving 80
14 customers had been put into receivership by the Commission because of an
15 imminent threat to the health and welfare of customers. The Town of Salem was
16 approached to see if it would provide water to the customers of Beaver Village
17 Realty Trust who were residents of Salem, but who were being served by the
18 private water system that had been put into receivership. Because the town
19 refused to serve those customers, the system had to be abandoned and the
20 customers had to drill their own wells. If Salem had been served by an investor-
21 owned public utility instead of a municipal water system, the utility would have
22 had an economic incentive to work with the Commission to address this problem
23 because the expansion would have presented an investment opportunity for it.

1 Moreover, the Commission would have had the authority (under RSA 374:7) to
2 order the utility to serve those customers and the utility would have had an
3 obligation to serve the customers. There is no such requirement for a municipal
4 utility to serve customers who reside within the boundaries of the municipality.
5 In 2005 a bill was introduced to the New Hampshire Legislature, HB 318, which
6 would have required that any municipal water company provide service to any
7 person within the municipality's boundaries. The bill did not pass. The fact that
8 such a bill was introduced, however, points out that this is a problem and the
9 experience in Salem demonstrates the reality of the problem. This also highlights
10 one of the limitations of switching to a publicly-owned system: the
11 responsibilities and obligations of a municipal system are more limited than an
12 investor-owned public utility.

13 **Q. Please explain your answer in more detail as it pertains to customers outside**
14 **of Nashua who are part of the PWW system.**

15 A. I believe there is also a serious concern about what will happen to other customers
16 of PWW who reside outside the boundaries of Nashua. The Report to the New
17 Hampshire Legislature Prepared by the Department of Environmental Services
18 and the Commission in 2001, "Regulatory Barriers to Water Supply Regional
19 Cooperation and Conservation in New Hampshire", a copy of which is attached as
20 Attachment DLP-6, recognized that there are limitations that result from
21 municipal ownership: "Many municipal water suppliers have a parochial view of
22 their current water supplies and will not readily extend service beyond municipal
23 borders even when this might be part of the 'optimum' alternative from a regional

1 perspective. For example, some municipal water suppliers have refused to serve
2 customers beyond their boundaries even to address relatively small, localized
3 water storage or quality problems in neighboring municipalities; other
4 municipalities have contested development within their boundaries by public
5 utilities and others. These decisions are frequently driven by (1) the desire to
6 ensure that water is available for future growth within a municipality with existing
7 surplus supply and (2) the competitive advantage that ample water supply
8 provides to attract future industrial and commercial development to communities
9 with surplus capacity.” Report at 9.

10 Furthermore, under RSA 362:4, Nashua could raise rates for customers
11 outside of Nashua to a rate that is substantially higher than customers inside
12 Nashua without the approval of the Commission or any other authority. These
13 concerns are in addition to those pointed out previously about the City’s inability
14 or lack of incentive to adequately meet the needs of customers outside of Nashua.

15 **IV. THE DIFFERENCES BETWEEN A MUNICIPALLY-OWNED AND**
16 **INVESTOR-OWNED UTILITY**

17
18 **Q. How does a municipally-owned water utility compare to an investor-owned**
19 **public utility?**

20 A. There is a much different dynamic when you have a municipally-owned and run
21 water system than an investor-owned, regulated public utility. In *Blair v.*
22 *Manchester Water Works*, 103 N.H. 505 (1961) the NH Supreme Court said that
23 the Commission does not have authority to compel a municipal utility that extends
24 its service to a small area in an adjoining town to extend its service over the entire
25 area of the adjoining town. In other words the Commission has little authority

1 over municipal systems operating outside their boundaries. In the case of a public
2 utility the Commission has the authority under RSA 374:26 to “prescribe such
3 terms and conditions for the exercise of the privilege granted under such
4 permission as it shall consider for the public interest.” The Commission also has
5 the power of “general supervision of all public utilities” under RSA 374:3. Under
6 RSA 374:7 the Commission has the power to order extensions of service if it
7 believes that it is necessary to do so to protect customers who otherwise may not
8 have options available to them. The Commission has no such authority over
9 municipal water systems, which means that there is a distinct possibility that
10 water customers who would otherwise benefit from service from a public utility
11 may not be served by a municipal water system. As the Court noted in the *Blair*
12 case: “There is indication that the statutes regulating municipally-owned water
13 works were intended to place a primary duty to furnish water to the residents of
14 the municipality and that any right to furnish water to nonresidents in adjoining
15 towns and districts is secondary.” *Blair*, 103 N.H. at 507.

16 RSA 362:4 was amended in 2003 to even further reduce the Commission’s
17 authority over municipal systems. Under this law, a municipal corporation
18 furnishing water services is not considered a public utility if it serves new
19 customers outside its municipal boundaries, charging such customers a rate no
20 higher than 15 percent above that charged to its municipal customers and it serves
21 those customers a quantity and quality of water or a level of water service equal to
22 that served to customers within the municipality. A municipal corporation
23 serving customers outside of its municipal boundaries and charging a rate no

1 higher than 15 percent above that charged to its municipal customers prior to July
2 1, 2002, may also ask the Commission for an exemption from regulation as a
3 public utility if it finds such an exemption to be consistent with the public good.

4 Thus, while the Commission has remedies available to it to order public
5 utilities to take certain steps to meet the needs of distressed customers, as well as
6 the authority over rates, as noted above, when the entity providing service is a
7 municipal corporation, those remedies are not available and the public is likely to
8 suffer because of this difference. I believe this should be a concern to the state in
9 these situations and thus to the Commission when it is looking at whether a
10 municipal taking by eminent domain is in the public interest. If the taking were to
11 move forward, the system would be under the control of elected officials in
12 Nashua who would have little incentive to provide low rates and good quality
13 service to customers outside of the municipal boundaries. There would also be
14 little or no incentive for the municipal utility to take on problem systems outside
15 its existing service territory. Furthermore, as the Maine report cited above notes:
16 “If the water utility serves many customers in a number of municipalities, it may
17 be difficult for a department of one of those municipalities to effectively meet the
18 needs of all those customers equally.”

19 There are other important differences between municipally-owned water
20 systems and public utilities. The “anti-cwip” statute, RSA 378:30-a, protects
21 utility customers from paying for construction work in progress. There is no
22 similar statutory protection for municipal customers. Thus if the City of Nashua
23 takes over the Pennichuck system, the City can raise rates to recover costs

1 associated with some projects before the projects have been completed and are
2 providing service to customers. Moreover, there is nothing that would prohibit
3 the municipality from charging its customers for a construction project that was
4 abandoned or otherwise ends up not providing service to the public. Furthermore,
5 there would be no regulatory review of whether any construction costs were
6 appropriate or prudently incurred, regardless of whether the project was placed
7 into service. Yet the costs would be passed on directly to ratepayers. This aspect
8 of municipal ownership is clearly a disadvantage for customers.

9 One of the important functions of a water utility is its ability to develop
10 new sources of water. Pennichuck has shown its expertise in this area over the
11 years. *See* Order No. 23,619, in DW 00-222, issued on January 10, 2001.

12 Because Nashua has no history of providing water to customers and therefore no
13 need to have developed new water sources in the past, there is a serious question
14 whether Nashua has this important expertise.

15 In so far as consumer protection is concerned, in the case of a public
16 utility the Commission acts as a forum for the redress of customer complaints. If
17 Nashua were to take over the system, there would be no forum for complaints for
18 Nashua customers (other than to Nashua itself, which would be akin to a utility
19 resolving its own complaints) and perhaps even more importantly for customers
20 of the system who reside outside of Nashua.

21 One other difference between an investor-owned utility and a municipally-
22 owned utility is in the area of charitable contributions. Pennichuck has an
23 excellent record of contributing to various organizations and events in the Nashua

1 area and throughout its service areas. If the petition is approved and the City
2 takes over the assets, this will remove Pennichuck as a source of contributions to
3 civic and charitable events and organizations in the area.

4 V. **THE NEGATIVE EFFECT OF AN EMINENT DOMAIN TAKING ON**
5 **TROUBLED WATER SYSTEMS AND OTHER UTILITIES IN NEW**
6 **HAMPSHIRE**

7
8 Q. **What effect would an eminent domain taking of PWW by the City of Nashua**
9 **have on other water utility customers in the state?**

10 A. My opinion is that the taking by eminent domain would have a negative effect on
11 customers of other water utilities and privately-owned systems such as those in
12 small developments throughout the state. I say this because PWW has purchased
13 many troubled water systems over the years, as noted above, and has provided
14 much higher quality service at more reasonable rates to many of these customers.
15 The customers of these water systems in many instances had to worry about
16 whether they would be able to receive reliable service at a reasonable rate; once
17 PWW or its affiliates took over the system many of these concerns evaporated. If
18 PWW's size is significantly reduced or PWW is in fact eliminated, the surviving
19 Pennichuck companies will most likely not be in the position to take over troubled
20 water systems. Thus customers in marginal water systems around the state will
21 have few options. In fact I am not aware of any other company currently in the
22 state that has anywhere near the record that PWW and its affiliates have in this
23 respect in recent years. The absence of PWW as a regional water utility would be
24 a big blow to the water industry in New Hampshire and, importantly, to the
25 customers served by that industry. In the *Springwood Hills* case, the Commission

1 recognized the benefit of a company's willingness to take on troubled waters
2 systems stating: "We find the Company's willingness to provide service to
3 customers in stand-alone systems which are often fraught with problems to be of
4 assistance in resolving difficult situations and we do not want to discourage that
5 willingness." *Springwood Hills*, 79 NH PUC at 268. Though some might argue
6 that the other Pennichuck systems, PAC and PEU, will still be there even if the
7 Nashua system is gone, the remaining systems would be far more limited in size
8 and resources. Companies that acquire troubled water systems often apply for
9 Community Development Block Grants to rehabilitate the distribution system.
10 The Commission recognized the value of having a larger, investor-owned water
11 company in Order No. 22,843, 83 NH PUC 44 (1998), where it approved
12 Pennichuck's acquisition of Pittsfield Aqueduct. In its order, the Commission
13 cited Pennichuck's greater access to financial markets and to the State Revolving
14 Fund for low interest loans and grants as a factor supporting the acquisition. 83
15 NH PUC at 45. Thus, if Pennichuck is reduced to a substantially smaller utility, it
16 is unlikely that it will have the resources to be able to respond to these critical
17 situations as it has in the past. For example, if the Company exists as a smaller
18 utility, it may not have the same access to capital as the larger company now has.
19 Thus, even if the surviving company has the same desire to commit to smaller
20 systems, it may not have the option financially.

21 There is also a question of whether a smaller utility would be in a position
22 to help in other emergency situations that might arise. One such example
23 occurred in 1990 when Pennichuck made an emergency interconnection from its

1 system to the Merrimack Village District so that it could furnish the village
2 district with water when its water supply was lost because of industrial
3 contamination. Having a company that is as large, deeply experienced and
4 competent as PWW is very much in the public interest.

5 **Q. Are there other concerns raised by the elimination of PWW as a company?**

6 A. There would also be a concern about whether the Pennichuck companies that
7 would remain could maintain the expertise that PWW has and could afford the
8 assets that PWW has, both of which are very useful to providing water and
9 services to the systems that are now part of the Pennichuck family. A new,
10 smaller company would have a far smaller base of customers over which to
11 spread its costs. This could result in a diminution of services and/or the quality of
12 services or a failure to modernize operations as quickly as would otherwise
13 happen unless there were what could amount to a significant rate increase. Over
14 the years, I have observed many troubled water systems in the state and attended
15 many public hearings where customers were desperate for better service and more
16 reasonable rates. Without PWW to help in at least some of these situations, I
17 believe many water customers would have to continue to suffer poor service and
18 high rates. Smaller systems tend to have higher rates and more problems with
19 water quality and quality of service. The economics of a smaller system often do
20 not support the ability to run a high quality system. It is unlikely that a pared-
21 down Pennichuck could offer customers the same level of service without
22 increasing rates.

1 One additional consequence of a taking of the Pennichuck assets by
2 Nashua would be a loss of state revenues from the statewide property utility tax,
3 the business profits tax, and business enterprise tax. Obviously because a
4 municipal utility would not be liable for such taxes, the revenue would be lost to
5 the state.

6 **Q. What is your opinion of the impact an eminent domain taking would have on**
7 **the public utility industry in the state of New Hampshire?**

8 A. My opinion is that a Commission-ordered taking of PWW's assets by the City of
9 Nashua would have a chilling effect on the investor-owned utility industry in New
10 Hampshire. Such a decision would not be looked on favorably in the utility
11 industry in New Hampshire or by the community outside of New Hampshire. For
12 the Commission to approve the eminent domain taking of the premier water utility
13 in the state, an otherwise successful, well-run, growth-oriented company, against
14 its wishes would send an unfavorable message about investor-owned utilities and
15 the regulatory community in New Hampshire. Other utilities might be seen as
16 being at risk of similar takings by eminent domain. Commission approval of this
17 taking would send the message that the Commission puts little weight on the
18 interests of investors of a utility that provides excellent service to customers.
19 Such an action could also send a negative message to the financial community
20 and could potentially drive up the cost of borrowing money to other New
21 Hampshire utilities. One of the other consequences of such a decision might be
22 that individual or institutional investors would be less willing to invest in NH
23 utilities. Such a decision would not be good for the regulatory industry across the

1 board. There could also be a ripple effect from such a decision: municipalities in
2 the state might start to look seriously at taking over utility assets in their
3 communities and outside of their communities, like what Nashua is proposing to
4 do here. I believe the Commission needs to be very concerned about the impact
5 such a decision would have on the industry and the precedent it would set.

6 **VI. THE PROPOSED TAKING OF PWW'S ASSETS IS NOT IN THE PUBLIC**
7 **INTEREST**

8
9 **Q. Do you think it would be consistent with good public policy for the**
10 **Commission to approve the eminent domain taking of PWW's assets by the**
11 **City of Nashua?**

12 A. No, I do not. Our state has a history of encouraging free enterprise and of
13 avoiding government intervention in and government operation of what are
14 traditionally private functions unless it is absolutely necessary. This philosophy is
15 reflected in the New Hampshire Constitution, Part II, Article 83, which the New
16 Hampshire Supreme Court has said “declares our fundamental preference for free
17 enterprise.” *Appeal of Omni Communications, Inc.* 122 N.H. 860, 862 (1982). As
18 the Omni court noted, referring to the Commission: “The role and duty of such a
19 commission is to oversee and regulate those few necessary monopolies so that the
20 *constitutional rights of free trade and private enterprise* are disrupted as little as
21 possible.” [emphasis added] 122 N.H. at 862, 863. Giving the City of Nashua the
22 approval to take the assets of an investor-owned water utility that operates not
23 only within, but also outside the borders of the city, is clearly not necessary “to
24 protect the health, safety and general welfare of the public”, which the New
25 Hampshire Supreme Court, in an eminent domain case, recognized as the

1 fundamental purpose of government. *Leary v. Manchester*, 91 N.H. 442, 445
2 (1941), quoting *New York &c. Authority v. Muller*, 270 N.Y.333. In this instance,
3 there is no “menace to the public health, safety or general welfare” like what the
4 *Leary* court noted should be a basis for the exercise of eminent domain powers.
5 What we have here is an excellent public utility that provides all of the benefits
6 and services that it is asked to provide at reasonable rates and that provides
7 services to its customers and the state above and beyond what is required to
8 maintain its status as a public utility. I have a difficult time envisioning a state-
9 approved taking of a public utility that would be any less in the public interest and
10 more troubling than this one. To take the largest and best privately-owned water
11 company in the state and dismantle it is not in the public interest.

12 The extent of eminent domain powers and how they are exercised by the
13 government is currently being reevaluated in our state, and throughout the
14 country, as a result of the United States Supreme Court decision in *Kelo v. City of*
15 *New London and New London Development Corporation*. Since the *Kelo*
16 decision the underlying power of the government to take privately-owned
17 property has become a major issue for the New Hampshire Legislature and
18 legislatures throughout the country. Our Legislature is carefully scrutinizing any
19 exercise of eminent domain powers that could be viewed as overstepping the
20 bounds of reasonableness. Approval of Nashua’s acquisition of Pennichuck’s
21 property within Nashua and in other municipalities, given the reputation that
22 PWW has and the overall circumstances in Nashua and the other towns served by
23 Pennichuck, could provoke an adverse response. There is already public

1 sentiment for changing the burden of proof that a municipality must meet to
2 authorize a taking. *See* Attachment DLP-7, Union Leader editorial dated
3 11/18/05. It seems inconsistent with the free enterprise philosophy in this state
4 (*see* Attachment DLP-8, “The End of Free Enterprise in New Hampshire” by
5 Charles M. Arlinghaus), the desire to encourage the development of a healthy
6 water industry, and a judicious exercise of eminent domain powers to find that
7 such a taking is in the public interest given the totality of the circumstances.

8 **Q. Overall do you believe it would be in the public interest for the Commission**
9 **to approve the City’s petition?**

10 A. No, I do not. As the New Hampshire Supreme Court said in *Waste Control*
11 *Systems, Inc. v. State*, 144 N.H. 21 (1974), the Court has given a broad definition
12 to “public good”, which this Commission has determined is analogous to “public
13 interest”. Order No. 20,668, 77 NH PUC 708, 712 (1992). According to the
14 Court in *Waste Control Systems, Inc.* the public good includes not only the needs
15 of particular persons who are directly affected, but also “the needs of the public at
16 large and the general welfare of the utility involved.” 144 N.H. at 24. When the
17 Commission looks closely at the needs of ratepayers, the needs of the public at
18 large, and the general welfare of the utility itself, it is clear that there would be
19 significant harm to the public interest if the taking were approved and this harm
20 clearly outweighs any potential benefits from such a taking.

21 **Q. Does this conclude your testimony?**

22 A. Yes.