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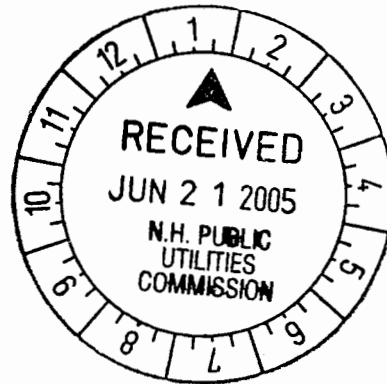
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June 21, 2005

**VIA HAND DELIVERY**

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



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

Dear Ms. Howland:

Enclosed for filing with the Commission are an original and eight copies of Reply To Nashua's Objection To Motion To Compel. I am also enclosing a diskette with the Motion in electronic form.

Thank you for your assistance with this matter. Please call me with any questions.

Very truly yours,

Steven V. Camerino

cc: Service List  
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Docket #: 04-048-1 Printed: June 21, 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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**PURSUANT TO N.H. ADMIN RULE 204.04 (C), FILE DISCOVERY**

**DIRECTLY WITH THE FOLLOWING STAFF**

**RATHER THAN WITH THE EXECUTIVE DIRECTOR**

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**BULK MATERIALS:**

Upon request, Staff may waive receipt of some of its multiple copies of bulk materials filed as data responses. Staff cannot waive other parties' right to receive bulk materials.

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Docket #: 04-048-1  
Printed: 6/21/2005

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

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

**Docket No. DW 04-048**

**REPLY TO NASHUA'S OBJECTION TO MOTION TO COMPEL**

Pennichuck Water Works, Inc. ("Pennichuck") replies to the Objection to Motion to Compel ("Objection") which the City of Nashua ("Nashua" or the "City") filed on or about June 13, 2005 to Pennichuck's Motion to Compel the City of Nashua to Respond to Pennichuck Data Requests filed June 2, 2003. This Reply addresses issues raised in Nashua's Objection.

**PENNICHUCK'S MOTION IS NOT PREMATURE**

1. In its Objection, Nashua complains that Pennichuck's Motion to Compel is premature because, despite the objections asserted by Nashua, the City may yet provide responses to certain of the data requests to which objections were made. Unfortunately, the scope of this case and the time pressures of the discovery schedule did not afford Pennichuck the luxury to wait and see whether Nashua would withdraw some or all of its many objections when it finally answered the data requests propounded by Pennichuck. Far from being premature, Pennichuck's Motion to Compel was absolutely necessary in order to have any hope of maintaining the schedule established by the Commission.

2. Now that Pennichuck has received Nashua's responses to the first set of data requests, it is even more apparent that the Motion to Compel was necessary. Given the disorganized fashion in which Nashua has responded to Pennichuck's data requests, it is virtually impossible to determine whether Nashua has actually withdrawn any of the objections it previously posited. In fact, since the date of Pennichuck's Motion to Compel, Nashua has

increased the number of data requests to which it has asserted an objection. *See* Nashua's Motion for Extension of Time to File Objections to PWW Data Requests and Second Supplemental Objections to Data Requests Propounded by PWW.

3. Pennichuck is operating under a deadline to serve its second round public interest data requests by June 24, 2005, three days from now. That deadline assumed that Pennichuck would have Nashua's first round responses by June 10, 2005, which would form the basis to propound the second round requests. Aside from problems with Nashua's responses to Pennichuck's data requests (to be addressed elsewhere), the refusal to produce a large percentage of the data requested places Pennichuck at a distinct disadvantage as it seeks to consider what follow-up information is needed.

4. Even if Nashua did have an argument that Pennichuck should have taken a wait and see attitude before firing off its motion, Nashua has now made its document responses and Pennichuck now has confirmed that Nashua has refused to produce information in the four categories set forth in Pennichuck's Motion to Compel. Specifically, Nashua refused to produce valuation related information which derived from Nashua's own public interest testimony, Nashua refused to produce information concerning its waste water and other enterprises, and Nashua refused to produce certain pre-November 26, 2002 documents and those relating to the Philadelphia Suburban deal. Nashua also has not produced a privilege log, and Pennichuck remains concerned with the breadth of the work product and attorney client privileges Nashua claims. Therefore, Pennichuck's motion is very much ripe because Nashua in fact substantially did not produce the categories of documents to which it objected.

5. Nashua also asserts that Pennichuck jumped the gun, by filing its Motion to Compel without making a sufficient attempt to negotiate over Nashua's objections. In fact,

Pennichuck's counsel attempted to discuss these issues with Nashua's counsel by telephone. Given counsel's busy schedule, Pennichuck's counsel on May 25 and May 27 sent two separate emails to Nashua's counsel outlining the four categories of objections as to which Pennichuck had issues. Pennichuck filed its motion on June 2, after it received no real response from Nashua. In addition, prior to filing the Motion to Compel, counsel for Pennichuck informed counsel for Nashua that it would be necessary to file such a motion simply to stay on track with the demanding schedule in this case.

### **NASHUA'S OBJECTIONS TO SPECIFIC DATA REQUESTS HAVE NO MERIT**

6. With regard to its objection to provide financial information related to Nashua's public interest testimony, Nashua points to the fact that the discovery schedule contemplates two tracks: public interest followed by valuation. What Nashua conveniently ignores is that when the Commission ordered Nashua to file its *public interest* testimony, *see* Order No. 24,379, p. 13 (Nashua ordered to file testimony "of its technical, financial, and managerial capability to operate a public utility or utilities and how the public interest would be served by taking utility property"), Nashua submitted testimony that included financial information based on an "assumed" acquisition price. Accordingly it must have determined that certain financial information was sufficiently relevant to the public interest issue to include that information in its initial round of testimony. Mr. Sansoucy's testimony is indicative of the financial information included by the City to support its public interest analysis. For instance, Mr. Sansoucy testified:

The purpose of my testimony is to describe the assets Nashua seeks to purchase from PWW, PEU and PAC; to describe the impact PWW's proposed capital investments will have on its future rate structure; to describe what the current financial status of PEU means for its future rate structure; to describe the impact on ratepayers if Nashua acquires all of the assets of PWW, PEU and PAC; and to describe the impact on rate payers if Nashua's acquisition is limited either to PWW or the so-called core system, which Nashua defines as all property and facilities hydraulically connected to the treatment plant. I will not attempt to discuss at this time the value of these assets, **although for**

**purposes of discussing future rates, I have assumed an acquisition price of \$85 million, which is consistent with some recent sales of water systems in New England....**

Direct Testimony of George E. Sansoucy, p. 1 (emphasis added). Mr. Sansoucy then proceeds to submit testimony on the City's financial plan, expected rate structure and rate impact assuming a municipal takeover based on his "assumed value" of the water system. *Id.*, at p.14-15.

Furthermore, Steven Adams' entire testimony is based on the same financing plan that is set forth in Mr. Sansoucy's testimony. *See* Direct Testimony of Steven Adams, p. 3.

7. Nashua cannot now credibly assert that Mr. Sansoucy's testimony, or that of any other witness who submitted testimony on November 22, 2004, is suddenly not related to public interest, but instead is valuation testimony. As is discussed below, this appears to be part of a hit and run pattern in which Nashua first makes an argument in its filings with the Commission, and then tries to have the subject matter ruled off limits on a temporary or permanent basis. The most sensible interpretation of the procedural schedule is that the first round of data requests necessarily includes any matter within the initial testimony filed by the City of Nashua, testimony which Nashua knew was limited to the issue of public interest.

8. Nashua's position regarding the attorney-client privilege and work product doctrine also confirms the concerns set forth in Pennichuck's Motion to Compel. Having put forward an attorney as a witness in its public interest case who explicitly stated he was testifying in "favor of the City's Petition for Valuation", *see* testimony of Steven L. Paul, p. 1, Nashua now seeks to protect Mr. Paul from discovery using the attorney-client privilege. The cases which Nashua cites, *Bennett v. ITT Hartford Corp.*, 150 N.H. 753 (2004) and *Petition of Dean*, 142 N.H. 889 (1998) deal with attorneys who are not paid to be witnesses, but rather are merely trial counsel who may have information relevant to a case. Nashua has waived its privilege with



regard to Mr. Paul by presenting his testimony, and Nashua is entitled to discovery from him. Nashua could easily have hired an attorney with whom it had no prior relationship to handle this limited issue as a witness, but for unknown reasons it decided to use its own attorney to bolster its testimony.

9. Pennichuck also seeks (and Nashua objects to) production of Nashua documents relating to the Philadelphia Suburban transaction and potential acquisition information (DR 22 and 59-62). It is most relevant what Nashua had to say about the quality (i.e. public interest) of Pennichuck's operations in light of the then potential sale of the company. For example, did Nashua have concerns at the time of the transaction about Pennichuck's capabilities to run a water utility? In addition, there may be information in the City's possession about its views on public versus private ownership, information that is highly relevant to the public interest determination in this proceeding.

10. In an effort to block the disclosure of any documents that might be detrimental to its position in this case, Nashua has objected to Pennichuck's efforts to obtain information about how well (or poorly) Nashua operates its other enterprises, either directly or through contractors, including waste water treatment and solid waste disposal. This is the case even though Nashua itself put this at issue, *see* Direct Testimony of Philip L. Munck, pp, 2-3 ("Nashua's sewer collection and treatment utility is such an operation [one run by 'dedicated public employees'] and Nashua, if it desired, could readily combine the sewer and water systems and operate them as one").

11. The Commission must weigh Nashua's operational capabilities against Pennichuck's, and so discovery as to Nashua's utility operations is highly relevant. For instance, to the extent that Nashua's operation of its wastewater facilities has been decreed to be in

ongoing violation of clean water statutes (as it is), or to the extent that Nashua's operation through a contractor of certain activities at its landfill has been decreed to be in ongoing violation of clean air statutes (as it has), the Commission will have to weigh that against Pennichuck's well respected environmental record. Pennichuck needs to explore these environmental and other operational issues so that the Commission will be able to judge accurately Nashua's relative capability to operate a drinking water system.

12. Despite Nashua's exhortations to the contrary, hiring a contractor is no guarantee that problems will not occur. Nashua is currently involved in a public-private partnership for the operation of its landfill gas collection/combustion system. Upon information and belief, since 2003, this landfill operation has resulted in thousands of violations of Nashua's Clean Air Act Title V permit. There can be no question that Nashua's operations – whether by "dedicated public employees", *see id.*, or by contractors involved in public/private partnerships – are relevant to a proceeding like this in which the Commission must determine whether Nashua has the technical and managerial capabilities to operate a complex and geographically diverse water system.

13. For these reasons, Pennichuck requests that the Commission grant its Motion to Compel, and order Nashua to immediately respond to all data requests propounded by Pennichuck.

WHEREFORE, Pennichuck Water Works, Inc. respectfully requests that the Commission:

- A. Grant the Motion to Compel the City of Nashua to Respond to respond to Pennichuck Water Work's Data Requests as set forth herein; and

B. Grant Pennichuck such other and further relief as the Commission deems necessary and just.

Respectfully submitted,

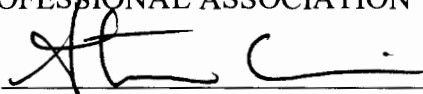
Pennichuck Water Works, Inc.

By Its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,  
PROFESSIONAL ASSOCIATION

Date: June 21, 2005

By:



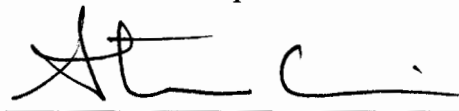
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Certificate of Service

I hereby certify that a copy of this Reply to Nashua's Objection to Pennichuck's Motion to Compel Response to Data Requests has been forwarded to the parties listed on the Commission's service list in this docket.

Dated: June 21, 2005



Steven V. Camerino