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May 7, 2004

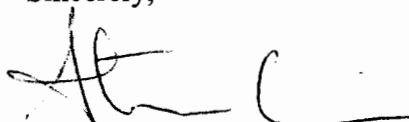
Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
8 Old Suncook Road
Concord, NH 03301

Re: DW 04-048; City of Nashua

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 East Utility, Inc., Pittsfield Aqueduct Company, Inc. and Pennichuck Water Works, Inc.'s Objection to City of Nashua's Motion to Disqualify.

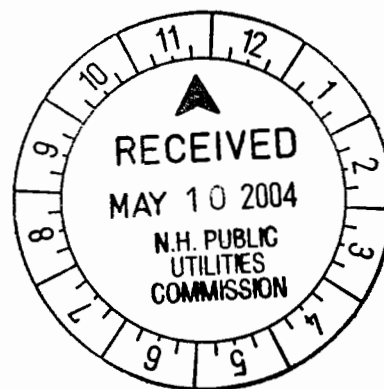
Sincerely,



Steven V. Camerino

Enclosure

cc: F. Anne Ross, Esq.
Robert Upton, II, Esq.
David R. Connell, Esq.
Kathryn E.L. Chambers
Dom S. D'Ambruoso, Esq.



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

City of Nashua Taking Of:

**Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Works, Inc.**

Docket No. DW 04-048

OBJECTION TO CITY OF NASHUA'S MOTION TO DISQUALIFY

Pennichuck East Utility, Inc. ("PEU"), Pittsfield Aqueduct Company, Inc. ("PAC") and Pennichuck Water Works, Inc. ("PWW") (PEU, PAC and PWW are collectively referred to below as the "Pennichuck Utilities") hereby object to the Motion to Disqualify filed by the City of Nashua ("City") on April 29, 2004. In support of their objection, the Pennichuck Utilities state as follows:

1. In its motion, Nashua seeks to disqualify Pennichuck's chosen law firm, McLane, Graf, Raulerson & Middleton, Professional Association ("McLane") from representing Pennichuck in this docket. The sole basis for Nashua's motion is that McLane currently represents the Ashland Electric Department ("Ashland") in a different docket before the Commission in which Ashland is seeking to expand municipal retail electric service to about 348 additional customers located within the Town of Ashland.

2. It may well be the case that Nashua wishes that Pennichuck had selected a law firm other than McLane to represent Pennichuck's interests in opposing Nashua's efforts to take Pennichuck's assets by eminent domain. Regardless, Nashua plainly lacks standing to raise the

issue of who should be Pennichuck's lawyer, and even if there were merit to the issue raised by Nashua, which there is not, this Commission is not the proper place to raise such a concern.

3. Nashua's only basis for claiming that McLane should be disqualified from representing Pennichuck is that McLane has asserted a position on behalf of Pennichuck in Superior Court that may be different from the position that Ashland would take if that issue were raised at some point in the future before this Commission. Simply put, no right of Nashua is affected by McLane's representation of Ashland and Pennichuck. See, In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 90 (2nd Cir. 1976); Developments in the Law – Conflicts of Interest in the Legal Professional, 94 Harv. L. Rev. 1244, 1479-80 (1981).

4. It is clear that the only reason that Nashua is raising a conflict issue is because it wishes to inconvenience and disadvantage Pennichuck by forcing the company to change legal counsel and hire other counsel who may be less experienced in the matters at issue in this case. The Rules of Professional Conduct governing the practice of law in New Hampshire clearly and directly address the problem posed by allowing opposing parties in litigation to use the rules as a weapon. “The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.” See N.H. R. Prof. Conduct Scope at 428, par. 7 (NH Rules of Court - State 2004, West Pub.)

5. McLane strongly believes that its representation of Ashland and Pennichuck has been entirely consistent with its obligations under the Rules of Professional Conduct, but that issue is not one that is properly before this Commission. As the New Hampshire Supreme Court held in State v. Decker, 138 N.H. 432, 438 (1984), “[t]he New Hampshire Rules of Professional Conduct are aimed at policing the conduct of attorneys, not at creating substantive rights on behalf of third parties.”

6. Although there may be cases in which enforcement of the Rules of Professional Conduct is within the proper purview of the courts during the course of litigation, the issue raised by Nashua in the present case is not such an issue. As the Supreme Court observed in Sullivan County Reg'l Refuse Disposal Dist. v. Town of Acworth, 141 N.H. 479, 483 (1996), "Decker reflects our reluctance to allow the Rules to become a wellspring of rights that protect other parties or other interests." Unlike Sullivan County, where the party seeking disqualification was "seeking to protect duties that [were] owed to it by its former counsel," id., here Nashua has no proper interest in who Pennichuck chooses to represent it, notwithstanding its self-proclaimed and wholly undefined interest in the "administration of justice."

7. In addition, the key to Nashua's motion is its reliance on its allegation that it has obtained information that counsel for the New Hampshire Electric Cooperative ("Coop") intends at some point in the future to raise in the Ashland docket the same or similar constitutional issues that Pennichuck has raised in Superior Court. Nashua does not indicate when the Coop intends to raise these issues, what portions of the statute the Coop might question or what facts might be relevant to the issues when raised. Not only is this information unknown at this time, it is entirely possible that the Coop's supposed intentions could change in the future, that the case between Ashland and the Coop could settle or otherwise terminate before the issue is raised, that the case involving Nashua and Pennichuck could end prior to the time when the Coop might raise similar issues in the Ashland case, or that any of numerous other events could occur which would eliminate the potential conflict that has so aroused Nashua's concern.

8. In the meantime, and of critical importance, both Ashland and Pennichuck have consented to McLane's representation of their interests, with knowledge of the consequences, including the potential that McLane might conclude at some point that it would have to withdraw

from representing their interests. Simply stated, it is not for Nashua to tell Ashland or Pennichuck who should be their legal counsel.

9. Nashua's Motion to Disqualify also completely ignores the fact that the "conflict" about which it complains is an "issue conflict" or "positional conflict," a type of potential conflict that is treated far less directly and far less clearly by the Rules of Professional Conduct than those situations in which a lawyer's representation of a client is adverse to that of another client or former client of the lawyer in the same case.

10. Nashua's motion also ignores the fact that this Commission has repeatedly stated that it has no jurisdiction to determine the constitutionality of statutes that purport to give it the authority to act. As a result, there is almost no potential that the constitutional issues that Pennichuck has raised in this case will be considered by the Commission in the Ashland case, regardless of whether the Coop's counsel ever attempts to raise them there. See, e.g., Public Service Co. of N.H., 71 NHPUC 581, 582 (1986)("Commission has no jurisdiction to determine the constitutionality of legislation"); Public Service Co. of N.H., 75 NHPUC 263, 264 (1991); Public Service Co. of N.H., 69 NHPUC 174, 177 (1984)("It is not [the Commission's] function to tell the legislature that its statutes either meet or do not meet constitutional tests. Therefore, we must assume that all applicable statutes are constitutional.") If the issues that create the potential for conflict were ever to arise, it would be at the Supreme Court. If and when that occurs, McLane and its clients will certainly take appropriate action to ensure that no ethical issues are raised.

11. It is also worth noting that Nashua's motion inaccurately characterizes the Motion to Dismiss filed by the Pennichuck Utilities. That motion did not, as Nashua asserts, ask the Commission to dismiss Nashua's filing because of constitutional issues relating to RSA Ch. 38. The motion set forth several completely unrelated grounds for dismissal, and merely asked, if

the Commission did not dismiss the case altogether, that it stay the proceeding pending a determination by the Superior Court in the litigation already pending before that tribunal.

12. It is no secret that Nashua has created a highly charged political atmosphere by successfully seeking to kill Pennichuck's proposed merger with Philadelphia Suburban Corporation in 2002, then taking steps to place Pennichuck in an extended state of suspended animation and now attempting to take the company's utility assets by eminent domain. Nashua's Motion to Disqualify, however, goes beyond the pale in terms of adopting aggressive tactics, and appears to be intended as retaliation for Pennichuck's filing of a civil rights damages lawsuit against Nashua last month. Notably, Nashua did not raise any conflict issues involving McLane when Pennichuck filed its declaratory judgment action three months ago, on February 4, 2004.

13. The circumstances under which the Motion to Disqualify was filed demonstrates Nashua's true motivation. Nashua did not act with "caution," as the ABA Comment to Rule 1.7 of the Model Code advise. Rather than simply filing its motion with this Commission, Nashua issued a press release, and Nashua's mayor arranged to speak with the media immediately thereafter to address the issue. Nashua is a governmental entity, and therefore wields substantial power. Consistent with Nashua's behavior that gave rise to the Superior Court litigation in the first place, Nashua's motion is designed to harass and to intimidate Pennichuck, and force it to spend its resources responding to issues that have nothing to do with providing water service to the public. Such conduct is entirely improper and should not be countenanced.

WHEREFORE, the Pennichuck Utilities respectfully request that the Commission deny the City of Nashua's Motion to Disqualify.

Respectfully submitted,

Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Works, Inc.

By Their Attorneys

MCLANE, GRAF, RAULERSON & MIDDLETON, P.A.

May 7, 2004


By: 

Thomas J. Donovan, Esq.
Steven V. Camerino, Esq.
Sarah B. Knowlton, Esq.
15 North Main Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Objection to Motion to Disqualify has been forwarded to F. Anne Ross, Esq., Robert Upton, II, Esq., David R. Connell, Esq., Katherine E. L. Chambers, Dom S. D'Ambruoso, Esq.

Dated: May 7, 2004


Steven V. Camerino