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August 19, 2005

AUG 19 2005
COMMISSION

VIA HAND-DELIVERY

Debra A. Howland, Executive Director
N.H. Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

RE: City of Nashua, Petition for Valuation Pursuant to RSA 38:9
Docket No. DW04-048

Dear Ms. Howland:

Enclosed please find an original and eight copies of Nashua's Objection to PWW's Motion for Reconsideration of PUC Order No. 24,488, as well as an electronic copy on diskette. A copy of the foregoing Motion is being sent this day by e-mail and first class mail to all of the parties on the Commission's official service list in this proceeding.

Thank you for your assistance in this matter. If you have any questions, please contact me.

Very truly yours,

Justin C. Richardson
jrichardson@upton-hatfield.com

JCR/lm
Enclosure

cc: Official Service List

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STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

City of Nashua: Petition for Valuation Pursuant to RSA 38:9

DW 04-048

NASHUA'S OBJECTION TO PENNICHUCK WATER WORKS, INC.'S MOTION FOR RECONSIDERATION OF PUC ORDER NO. 24,488

NOW COMES the City of Nashua ("Nashua") and objects to Pennichuck Water Works, Inc.'s ("PWW") *Motion for Reconsideration and/or Rehearing Regarding Order No. 24, 488*, ("*Motion for Reconsideration*") and in support hereof states as follows:

I. The Commission Properly Excluded Discovery Related to the Operation of Other City Departments.

1. PWW's *Motion for Reconsideration* of the Commission's Order No. 24, 488 concerning the operation of other City departments essentially argues that, upon showing the smallest degree of relevance to this proceeding, the Commission has no power to control the nature and scope of discovery. As evident from the 173 compound data request submitted in the first round of this proceeding, PWW's goal in this regard is not to present evidence related to the operation of its water system, public interest or the valuation of the assets to be acquired in this proceeding, but rather to sift through nearly every aspect of the operations of the City of Nashua in order to find evidence that will enable it to conduct a "trial within a trial" concerning the effectiveness of some yet-to-be-determined aspect of the Nashua's operations.[1]

[1] As Nashua has noted in its objections to PWW's *Motion to Compel*, PWW states that it does not know how much, if any, of the request information will "trickle down" into testimony or exhibits in this proceeding. *See,* PWW's *Motion to Compel*, Para. 12. Rather, PWW is simply requesting as much information as possible concerning the operations of City Departments in the hopes that it may discover some evidence relevant to this proceeding.

2. In making these arguments, PWW ignores the Commission's inherent power under RSA 541A:33, II to exclude evidence that is immaterial, unduly repetitious, or whose relevance is so attenuated that discovery is unwarranted, and, the Commission's inherent power to control the orderly conduct of this proceeding.

3. As Nashua has stated previously in this proceeding, it does not intend to operate its water system as a City department, and is fully willing to accept a condition to that effect. Furthermore, consistent with the Commission's Order, Nashua is willing to strike those portions of its testimony relating to its experience operating other Departments in order to address the central issue in this proceeding: whether its Petition for Valuation of PWW's assets is in the public interest under RSA 38.

4. Allowing PWW to conduct discovery, including data requests, depositions, etc., related to all aspects of the operations of the City of Nashua would expand the scope of this proceeding so greatly that adherence with any reasonable procedural schedule would likely be impossible. As PWW has indicated in its *Motion to Compel*, Para. 12, it does not even know what information concerning the operation of other City Departments it intends to submit in this proceeding. Following the scope of discovery proposed by PWW, it seems likely that the parties will be forced to evaluate and engage in discovery related to everything from the City's solid waste collection practices, solid waste landfill operations, wastewater treatment operations, tax collection, budget process or any other matter, and then "wait and see" which operations PWW chooses to present experts and testimony. Such an approach, however, would simply invite Nashua to submit rebuttal testimony related to such operations, as well as its most successful operations, in order to respond to PWW's allegations that a particular department or

activity was not operated efficiently. This type of trial-within-a-trial is exactly the type of evidence that RSA 541A:33, II contemplates excluding.

5. PWW further argues that the Commission's decision in the *Petition for Authority to Modify Schiller Station*, Order No. 24,310 (2004), stands for the position that discovery is permitted unless the Commission "can perceive of no circumstance in which the requested data will be relevant." It should be noted, however, that the Commission's decision in *Schiller*, and the authorities cited therein, concerned only challenges to data request based on relevance. *See Id.*; *Petition for Valuation of J. Brodie Smith Hydro-Electric Station*, Order No. 23,831 (2001); *Investigation into Whether Certain Calls Are Local*, Order No. 23,658 (2001); *Lower Bartlett Water Precinct*, Order No. 23,471 (2000). The Commission's decision in *Schiller* does not address the issues raised by Nashua's objections in response to PWW's 173 compound data requests submitted in the first round of this proceeding: that the requests were (a) not necessary to evaluate Nashua's Petition under PUC 204.04; (b) sought information that was immaterial, unduly repetitious, and properly excluded under the Commission's authority under RSA 541-A:33, II; and (c) were overbroad and unduly burdensome.[2] Thus, *Schiller* and the Commission's prior decisions deal only with relevance and did not address the Commission's authority under RSA 541-A:33, II to control the scope and orderly conduct of proceedings before it.

6. However, because PWW's 173 compound data requests sought information related to nearly all aspects of the operations of the City of Nashua, thereby stretching the doctrine of relevance beyond its reasonable limits, Nashua sought to invoke the Commission's inherent authority, and that under RSA 541-A:33, II, to control the orderly

[2] *See e.g., Nashua's Objection to Motion to Compel*, Pages 4 to 7.

conduct of proceedings before it by limiting discovery to those issues which were not "irrelevant, immaterial, or unduly repetitious" to the issues to be evaluated by the Commission under RSA 38. PWW's *Motion for Reconsideration* presents no evidence that the Commission erred in that regard.

7. Moreover, Nashua's desire to exclude evidence related to its other City departments should not be construed as an effort to conceal relevant information from the Commission's consideration. Indeed, as noted in the deposition of City Mayor Streeter attached to PWW's motion, Nashua's operation of its wastewater treatment plant has been award winning and received state and national recognition. This is, however, beside the point, as these operations are not reasonably related or connected to the issues of public interest and valuation of PWW's assets under RSA 38.

II. The Commission Properly Excluded Discovery Related to Events Prior to November 26, 2002.

8. PWW's *Motion for Reconsideration* similarly argues that the motives of the Nashua aldermen in deciding to proceed under RSA 38 are relevant to the Commission's evaluation of the public interest in this proceeding. For example, PWW states that it is "entitled to discovery on Nashua to determine whether the City has embarked on its eminent domain efforts in bad faith, rather than based on a good-faith belief that it is in the public interest to take PWW's assets." *Motion for Reconsideration,* Pg. 7.

9. First, as a factual matter, there is no basis for concluding that Nashua has engaged in bad faith or improper conduct related to its Petition. Given, the extent of depositions and discovery that has already taken place in this proceeding, PWW's failure to produce any evidence in that regard is noteworthy. Second, under RSA 38, it is the Commission, and not the Board of Alderman, that determines whether or not Nashua's

Petition is in the public interest. The issue to be decided in this proceeding is not whether, prior to November 26, 2002, the Board of Aldermen believed it was acting in the public interest, but whether the Commission determines that Nashua's Petition is in the public interest. In that regard, PWW is free to submit evidence regarding its water system, operations, and the valuation thereof. However, evidence that is irrelevant, immaterial or unduly repetitious, such as what particular Alderman believed prior to November 26, 2002, may be properly excluded under RSA 541A:33, II.

10. Finally, PWW grasps at advisory language in Judge Lynn's decision suggesting that PWW's allegations as to bad faith, improper motive and lack of intent "are matters that would have a significant bearing on the question of whether the proposed condemnation is in fact in the public interest" and that "these issues can be raised before the PUC." *Order*, Hillsborough County Superior Court, Southern District, Docket No. 04-C-169 (Nov. 30, 2004). Judge Lynn's ruling however, read in its proper context, was not a "directive"[3] for the Commission to evaluate Nashua's intent, but rather a recognition of the fact that the Commission is the appropriate forum for these issues to be raised. Given the Court's conclusion that it was not the appropriate forum, the Court's opinion as to scope and extent of data requests in this proceeding was in no sense binding on the Commission. As the Commission noted, "[t]his proceeding raises numerous complex issues that must be addressed to reach a sound result; we will not allow it to be ensnared by issues that no doubt are important to the parties *but have little bearing on the determinations the Commission must make*." Order No. 24,488, Pg. 7 (emphasis added).

[3] PWW's *Motion for Reconsideration*, Page 7.

WHEREFORE, Nashua respectfully requests that the Commission:

A. Deny PWW's *Motion for Reconsideration and/or Rehearing Regarding Order No. 24, 488*; and

B. Grant such other relief as justice may require.

Respectfully submitted,

CITY OF NASHUA
By Its Attorneys
UPTON & HATFIELD, LLP

Date: August 19, 2005

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Objection to Pennichuck Water Works, Inc.'s Motion for Reconsideration of PUC Order No. 24, 488 has been sent this day by e-mail and first class mail to all persons on the Commission's official service list in this proceeding.

Date: August 19, 2005

_____
Justin C. Richardson, Esq.