

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

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

DW 04-048

**OBJECTION TO PENNICHUCK WATER WORKS, INC.'S**  
**MOTION FOR SUMMARY JUDGMENT**

**NOW COMES** the City of Nashua (“Nashua”) and objects to Pennichuck Water Works, Inc.’s (“PWW”) *Motion for Summary Judgment*, and in support of its objection, states as follows:

**I. INTRODUCTION & BACKGROUND**

1. On September 6, 2005, PWW filed a *Motion for Summary Judgment* in this proceeding. PWW’s Motion argues that “there is no genuine dispute as to material fact that Nashua does not have the managerial and technical capability to operate a water utility, and therefore, Pennichuck is entitled to judgment as a matter of law.”<sup>1</sup>
2. As set forth herein, the Commission should deny PWW’s *Motion for Summary Judgment* because (a) it is untimely; (b) Nashua has provided extensive information regarding its technical and managerial qualifications; and (c) PWW is not entitled to judgment as a matter of law.

**II. PWW’S MOTION FOR SUMMARY JUDGMENT IS UNTIMELY**

3. PWW’s September 6, 2005 *Motion for Summary Judgment*, as it must, relies heavily on the orders of this Commission. It cites Order No. 24,379 which required that Nashua submit its initial public interest testimony by November 22,

---

<sup>1</sup> *Motion for Summary Judgment*, Page 1, Para. 2.

2004.<sup>2</sup> It cites Commission Order No. 24,425 which dismissed Pittsfield Aqueduct Company and Pennichuck East Utility as defendants.<sup>3</sup> In addition, PWW references Commission Orders No. 24,447,<sup>4</sup> 24,488,<sup>5</sup> and 24,501.<sup>6</sup>

4. Yet notably absent from its *Motion for Summary Judgment* is any reference to the fact that, in Order No. 24,425, the Commission required that PWW submit its *Motion for Summary Judgment* no later than January 31, 2005. In that order, the Commission observed that “the Pennichuck Utilities ... intend to submit a Motion for Summary Judgment and have asked for 10 days from the issuance of this order to make their filing.”<sup>7</sup> The Commission stated that the motion was “due” on January 31, 2005, and on Page 23, directly ordered “that PWW has until January 31, 2005 to file a Motion for Summary Judgment, responses to which shall be submitted by March 2, 2005”.
5. PWW’s September 6, 2005 *Motion for Summary Judgment*, is over seven months too late under Order No. 24,425. While PWW could have submitted a timely request for an extension under Rule PUC 202.04 by showing good cause or other circumstances it did not do so. Instead, in a letter dated January 28, 2005, PWW’s counsel simply stated that “the company does not plan to make such a filing prior to the January 31 date set forth in the Commission’s order, but reserves the rights to file a motion for summary judgment during later stages of

---

<sup>2</sup> See e.g., *Motion for Summary Judgment*, Paras. 4 & 5.

<sup>3</sup> See e.g., *Motion for Summary Judgment*, Para. 4.

<sup>4</sup> See e.g., *Motion for Summary Judgment*, Para. 6.

<sup>5</sup> See e.g., *Motion for Summary Judgment*, Para. 8.

<sup>6</sup> See e.g., *Motion for Summary Judgment*, Para. 5.

<sup>7</sup> Order No. 24,425, Page 21.

- the case.” While PWW may argue that it “reserved its rights” to file at a later date, under Commission Rule 202.04, it must show good cause for doing so.
6. However, neither PWW’s January 28, 2005 letter nor its *Motion for Summary Judgment* provide any grounds showing good cause as to why it has ignored the Commission’s Order No. 24,425.
  7. In fact, PWW’s *Motion for Summary Judgment* is based almost entirely on Nashua’s November 22, 2004 testimony. It ignores completely information provided in discovery by Nashua concerning its technical and managerial qualifications. PWW similarly fails to mention its own involvement in Nashua’s selection of qualified operations and oversight contractors. See Exhibit 1.0 *Affidavit of Brian S. McCarthy*, and Exhibits 1.5 & 1.6. As a result, it is highly unlikely that good cause could be shown, or even exists.
  8. PWW’s filing its *Motion for Summary Judgment* over seven months late is inexcusable and significantly disruptive. Summary judgment is a dispositive motion and objections to summary judgment typically require assembly and preparation of affidavits and other documents not normally required for motions under Rule 203.04. For this reason if no other, Order No. 24,425 provided Nashua 30 days for responding to PWW’s motion for summary judgment, instead of the 10 days normally allowed under Rule 203.04 (g).
  9. After PWW’s September 6, 2005 *Motion for Summary Judgment*, counsel for Nashua requested PWW’s consent to the 30 day period provided for by Order No. 24,425, which consent was refused. In effect, by filing its *Motion for Summary Judgment* seven months late, PWW gained a procedural advantage by disrupting

Nashua's previously scheduled commitments and forcing it to prepare to respond to a dispositive motion within 10 days, rather than the 30 days provided by the Commission's Order No. 24,425. By letter dated September 9, 2005, Nashua requested that Commission clarify that the 30 day period applied. However, Nashua did not receive a response until September 14, two days prior to the date by which Nashua's objection under Rule 203.04 (g) would be due.

10. The timing of PWW's *Motion for Summary Judgment* is not coincidental. During the deposition of Carol Anderson, the City's Chief Financial Officer, on August 23, 2005, it was disclosed for the first time that Nashua intended to select its O&M and Oversight Contractors "within the next month". PWW's Motion was filed prior to the selection in a transparent attempt to prevent the Commission from receiving evidence about the superior qualifications of Nashua's contract operators and the significant savings Nashua's operation would produce for ratepayers.
11. As set forth below and in the Affidavit of Brian S. McCarthy (Exhibit 1.0), Nashua has demonstrated that it has the technical and managerial qualifications to operate a water utility. In fact, Nashua believes that its technical and managerial exceed those of PWW. As a result, the Commission can deny PWW's *Motion for Summary Judgment* on its merits and does not need to addressing its timeliness.
12. However, by filing its *Motion for Summary Judgment* over seven months late, without even attempting to show good cause, PWW challenges not only Nashua's Petition, but also the Commission's specific instructions in Order No. 24,495, and

its authority to govern the orderly conduct of this proceeding. Such disregard for the Commission's authority should not be casually dismissed.

**III. MATERIAL FACTS ARE IN DISPUTE BECAUSE NASHUA HAS DEMONSTRATED THAT ITS TECHNICAL AND MANAGERIAL QUALIFICATIONS WILL LIKELY EXCEED THOSE OF PWW**

13. To succeed on a motion for summary judgment, PWW must first demonstrate that there is no genuine dispute as to material fact concerning Nashua's technical and managerial qualifications.<sup>8</sup> A fact is considered material if it effects the outcome of the proceeding.<sup>9</sup>

14. PWW's argument concerning material facts is stated in paragraph two of its *Motion for Summary Judgment* which states that "[i]n this case, there is no genuine dispute of material fact that Nashua does not have the managerial and technical capability to operate a water utility, and therefore, Pennichuck is entitled to judgment as a matter of law."

15. Quite the reverse is true. From the outset of this proceeding, Nashua has indicated that it intends to rely on the technical and managerial qualifications of duly qualified operators. For example, on Pages 10-11 of Brian S. McCarthy's November 22, 2004 direct testimony, Nashua stated:

It is Nashua's intent in the management of the water system to employ contractors to perform the day-to-day operation and maintenance of the system and to exercise certain management oversight. The City has sought expressions of interest in these contract operations and has received eleven (11) positive responses, including one from Pennichuck Service Company, Inc. The City is reviewing drafts of solicitations for proposals in that regard. The first is for direct operation and maintenance of the assets and the second is for the management oversight function.

---

<sup>8</sup> See, e.g., *Panciocco v. Lawyers Title Insurance*, 147 N.H. 610 (2002).

<sup>9</sup> *Id.*

The City intends to have contracts in place when ownership transfers.

16. As set forth in the attached Affidavit of Brian S. McCarthy (Exhibit 1.0), since filing its November 22, 2004 testimony, Nashua has diligently pursued its proposals for operation and oversight of its water system. Nashua has provided timely responses to data requests regarding the technical and managerial qualifications of its operations and oversight contractors. Nashua has further made its responses concerning its technical and managerial qualifications by making such information available in a data room at Nashua's City Hall (Exhibit 1.1), as well as providing this information directly to PWW (Exhibit 1.2), Staff (Exhibit 1.3), and the Office of the Consumer Advocate (Exhibit 1.4).
17. As further set forth in Exhibits 1.0, 1.5 & 1.6, Nashua is currently negotiating contracts related to its RFPs for operation and oversight of its water system from the most competent, technically qualified and proficient operators of water systems in the region, and indeed, the world.
18. Nashua's technical and managerial qualifications set forth in its operation and oversight proposals will clearly benefit the public interest in terms of the quality of service. In addition, as set forth in Exhibits 1.0 and 1.7, Nashua expects that its use of contract operators will result in significant savings to consumers which will further benefit the public interest.
19. In short, there is simply no basis to PWW's claim that Nashua does not have, or has not provided, information demonstrating its technical and managerial qualifications. To the contrary, Nashua has made this information available to all the parties to this proceeding.

20. Construing this information in a light most favorable to Nashua,<sup>10</sup> it is clear that the facts of this case do not bear out PWW's claim that there is no dispute of material fact concerning Nashua's technical and managerial qualifications. Indeed, as Exhibits 1.0, 1.5 & 1.6 demonstrate, Nashua fully expects to provide the Commission with evidence that Nashua's technical and managerial qualifications will exceed those of PWW, in addition to providing rate reductions and other benefits to the public interest.

#### **IV. PWW IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW**

21. To obtain summary judgment, PWW must further demonstrate that it is entitled to judgment as a matter of law. PWW argues that it is entitled to judgment as a matter of law because "[b]ased on the procedural schedule, Nashua's public interest case is now complete."<sup>11</sup> In effect, PWW argues that because Nashua has filed its initial public interest testimony, Nashua has no right to supplement that testimony as a matter of law.

22. PWW's argument fails in several respects. First, under RSA 38:3 Nashua is entitled to a rebuttable presumption that its Petition is in the public interest. Because PWW has provided no evidence to rebut the presumption of public interest under RSA 38:3, it is not entitled to judgment as a matter of law. Second, PWW's argument that the procedural schedule prohibits Nashua from supplementing its initial public interest testimony is inconsistent with the procedural schedule, Nashua's public interest testimony filed before the procedural schedule and purposes of RSA 38. Finally, even if PWW's reading of

---

<sup>10</sup> *Panciocco v. Lawyers Title Insurance Corp.*, 147 N.H. 610 (2002).

<sup>11</sup> *Motion for Summary Judgment*, Page 6, Para. 11.

the procedural schedule were technically correct, PWW has not demonstrated that summary judgment is an appropriate remedy.

**A. Pennichuck's Argument on Summary Judgment Conflicts with the Presumption of Public Interest Under RSA 38:3**

23. As the Commission determined in Order No. 24,425, "Nashua has met the voting requirements of RSA 38:3."<sup>12</sup> As a result, Nashua is entitled to a rebuttable presumption of public interest in this proceeding under RSA 38:3 which states:

Any city may initially establish such a plant after 2/3 of the members of the governing body shall have voted, subject to the veto power of the mayor as provided by law, that it is expedient to do so, and after such action by the city council shall have been confirmed by a majority of the qualified voters at a regular election or at a special meeting duly warned in either case. Such confirming vote shall be had within one year from the date of the vote to establish such a plant, and *if favorable, shall create a rebuttable presumption that such action is in the public interest*. If the vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

(emphasis added).

24. PWW's *Motion for Summary Judgment* submits no affidavits or other evidence to either rebut the presumption of public interest under RSA 38:3, or indicate that Nashua has not complied with RSA 38:3. As a result, even if Nashua had submitted no evidence of technical and managerial qualifications, it would be entitled to the rebuttable presumption of public interest. For this simple reason alone, PWW is not entitled to judgment as a matter of law.

25. PWW attempts to overcome the rebuttable presumption by distinguishing the question of whether Nashua's Petition is in the "public interest" from the question

---

<sup>12</sup> Order No. 24,425, Page 20.



of “whether a franchise should be granted” to Nashua to operate outside its borders.<sup>13</sup>

26. In making this argument, however, PWW cites no provisions of RSA 38, RSA 374, or any other provisions of law in support of its argument that the Commission is required to engage in a separate franchise analysis to which the rebuttable presumption of public interest does not apply. Because PWW’s argument conflicts with the plain language of RSA 38:3, it should be rejected by the Commission.
27. The New Hampshire Supreme Court’s decision in the *Appeal of Ashland Electric Department*, 141 N.H. 336 (1996), is closely on point. In *Ashland Electric*, the Court reviewed an order from this Commission determining that a municipality was required to submit an RSA 38 Petition to operate within an electric utility’s service territory within its own municipal borders.
28. The Court in *Ashland Electric* reviewed the “comprehensive process”<sup>14</sup> under RSA 38 and concluded that “construction of distribution lines in territory served by a public utility may only take place after the municipality has followed the procedures *set forth in RSA chapter 38*.”<sup>15</sup> (emphasis added).
29. Nothing in *Ashland Electric* even remotely suggested that the Commission, in addition to determining the public interest under RSA 38, was then required to engage in a second, entirely redundant, franchise approval for which there is no rebuttable presumption. In fact, the “comprehensive process” under RSA 38 requires the opposite conclusion. Under RSA 38:2, I, Nashua has the authority to

---

<sup>13</sup> *Motion for Summary Judgment*, Page 7, Para. 14.

<sup>14</sup> *Ashland Electric* at 339.

<sup>15</sup> *Ashland Electric* at 340.

establish a municipal water system “for the use of its inhabitants and others ... as may be permitted, authorized, or directed by the Commission.” The statute further provides that, under RSA 39:9, I, the Commission has the authority to determine “how much, if any, of the plant and property lying within or without the municipality *the public interest* requires the municipality to purchase” (emphasis added). RSA 38 makes no reference to a separate requirement for a franchise approval for which there is no rebuttable presumption.

30. The issue before the Commission is whether Nashua’s Petition is in the *public interest* under RSA 38, which includes consideration of Nashua’s technical and managerial capabilities. Exhibit 1.0 demonstrates that Nashua has provided and made available extensive evidence of its technical and managerial capabilities. However, even if Nashua had submitted no information concerning its technical and managerial qualifications, the rebuttable presumption under RSA 38:3 would prohibit summary judgment.

**B. Pennichuck’s Argument is Inconsistent with the Procedural Schedule**

31. The procedural schedule was established by the Commission in Order No. 24,457 on April 22, 2005. By this date, Nashua had already filed its November 22, 2004 testimony setting forth its intention to rely on the technical and managerial qualifications of its contract operators. In that testimony, in response to the first question concerning Nashua’s technical capability, witness Brian S. McCarthy concluded: “Finally, as I will discuss in greater detail below, the City intends to

contract out the day-to-day operation of the system and management oversight to skilled operating companies.”<sup>16</sup>

32. In addition, as noted above and in Exhibit 1.0, Mr. McCarthy further stated:

It is Nashua’s intent in the management of the water system to employ contractors to perform the day-to-day operation and maintenance of the system and to exercise certain management oversight. The City has sought expressions of interest in these contract operations and has received eleven (11) positive responses, including one from Pennichuck Service Company, Inc. The City is reviewing drafts of solicitations for proposals in that regard. The first is for direct operation and maintenance of the assets and the second is for the management oversight function. The City intends to have contracts in place when ownership transfers.

33. Thus, while Nashua has made clear its intention to rely on the expertise of its contract operators from the outset, Pennichuck argues that the Commission intended to prohibit such testimony by the procedural schedule. This argument, however, directly conflicts not only with Nashua’s direct testimony, but also dates for additional testimony concerning the public interest established by the Commission in Order No. 24,457.

34. The procedural schedule provided for public interest to be submitted at several subsequent dates, including: October 14, 2005 (“Testimony by Nashua on ... public interest issues related to valuation”; “Testimony by Pennichuck and parties opposed to the taking, and neutral parties on technical, financial, and managerial capability and public interest”), January 13, 2006 (“Staff and OCA testimony on ... technical, financial, managerial capability and public interest”), and February 21, 2006 (“Reply testimony by PWW and Nashua on valuation and public

---

<sup>16</sup> Direct Testimony of Brian S. McCarthy, Page 10.

interest”). In addition, the procedural schedule provided for “capstone testimony joining public interest and valuation issues” on May 19, 2006.

35. These dates, subsequently revised by the Commission’s October 3, 2005, secretarial letter, make it clear that testimony concerning the public interest aspects of Nashua Petition would continue well beyond November 22, 2004. By arguing that Nashua’s public interest case is complete, PWW is attempting to deny Nashua the opportunity to present the evidence which has been contemplated since even before the procedural schedule was established.
36. As Nashua has made clear in Exhibit 1.0, Nashua diligently pursued its proposals for operation and oversight of its water system and expects to have both contracts and testimony in place by January 12, 2006, the date assigned for its testimony on “public interest issues related to valuation.” This testimony will be subject to two rounds of data requests from any party on January 26 and February 27, and will be *several months* in advance of Nashua’s May 22, 2006 reply testimony on the public interest and its capstone testimony joining public interest and valuation issues on September 15, 2006. As a result, Nashua’s public interest testimony concerning its managerial and technical qualifications is by no means complete under the procedural schedule
37. In addition, the position advocated by PWW would essentially require that Nashua already have its technical and managerial qualifications in place before filing its petition under RSA 38. RSA 38 does not contain such a requirement and to impose one as a purely procedural requirement would frustrate the purposes of RSA 38 and render the rebuttable presumption of public interest meaningless.

38. Accordingly, PWW's argument that Nashua is prohibited from submitting the technical and managerial qualifications of its contractors should be rejected by the Commission.

**C. Even if Pennichuck's Arguments Were Correct, Summary Judgment is not an Appropriate Remedy**

39. As noted above, Nashua fundamentally disagrees with PWW's reading of the procedural schedule. However, even if the Commission agrees that Nashua's November 22, 2004 testimony is Nashua's only opportunity to present its technical and managerial qualifications, PWW has not demonstrated that summary judgment is an appropriate remedy as a matter of law.

40. Order No. 24,457 intended to establish a procedure for the "orderly review of this docket."<sup>17</sup> It was not intended to be used a substantive weapon to deny Nashua or any other party the opportunity to present evidence. As set forth in Exhibit 1.0, Nashua made its intention to rely on the technical and managerial qualifications of its contract operators clear from the outset of this proceeding, and has provided timely and full information concerning its proposal. To grant summary judgment based on a strained and purely technical reading of the procedural schedule would frustrate the interest of justice and the purposes of RSA 38.

**V. CONCLUSION**

41. PWW's *Motion for Summary Judgment* argues that "there is no genuine dispute as to material fact that Nashua does not have the managerial and technical capability

---

<sup>17</sup> Order No. 24,457, Page 5.

to operate a water utility, and therefore, Pennichuck is entitled to judgment as a matter of law.”<sup>18</sup>

42. As set forth in this Objection and accompanying exhibits, PWW’s Motion is untimely under the Commission’s Order No. 24,425 which ordered that PWW’s Motion “is due January 31, 2005.”<sup>19</sup> PWW Motion fails to show good cause for filing its motion over seven months late under Rule 202.04 and should therefore be rejected.

43. Even if its Motion were timely, however, PWW’s Motion fails on its merits because, as set forth in Exhibit 1.0, Nashua has provided and made available its technical and managerial qualifications to all parties in this proceeding. Based on this and other information, Nashua is confident that the Commission will ultimately conclude that Nashua’s technical and managerial qualifications meet or exceed those of PWW. There is therefore a genuine dispute as to material fact in this proceeding.

44. Finally, PWW’s argument that it is entitled to judgment as a matter of law fails in several respects. First, under RSA 38:3 Nashua is entitled to a rebuttable presumption that its Petition is in the public interest. Even if Nashua had submitted no information on its technical and managerial qualifications, PWW is not entitled to judgment as a matter of law.

45. Second, PWW’s argument that the procedural schedule prohibits Nashua from supplementing its initial public interest testimony is inconsistent with the procedural schedule, Nashua’s public interest testimony filed before the

---

<sup>18</sup> *Motion for Summary Judgment*, Page 1, Para. 2.

<sup>19</sup> Order No. 24,425, Pages 21 & 23.

procedural schedule and purposes of RSA 38. The procedural schedule provides for the filing of additional public interest testimony by Nashua at several intervals, including on January 12, 2006 which coincides with Nashua's schedule for negotiation of contracts with Veolia Water and R.W. Beck (Exhibit 1.0).

46. Finally, even if PWW's reading of the procedural schedule were technically correct, PWW has not demonstrated that summary judgment is an appropriate remedy.

**WHEREFORE**, Nashua respectfully requests that the Commission:

- A. Deny PWW's *Motion for Summary Judgment*;
- B. Grant such other relief as justice may require.

Date: October 6<sup>th</sup>, 2005

Respectfully submitted,  
**CITY OF NASHUA**  
By Its Attorneys  
**UPTON & HATFIELD, LLP**

By: Justin C. Richardson

Justin C. Richardson, Esq.  
10 Centre St., P.O. Box 1090  
Concord, NH 03301-1090  
(603) 224-7791

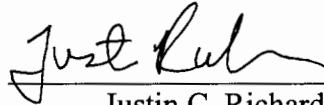
Robert Upton, II, Esq.  
23 Seavey St., P.O. Box 2242  
North Conway, NH 03860  
(603) 356-3332

David Connell, Esq.  
Corporation Counsel  
229 Main Street  
Nashua, NH 03061-2019

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Objection to Pennichuck Water Works, Inc.'s Motion for Summary Judgment* and Affidavit of Brian S. McCarthy (Exhibit 1.0) has been sent this day by first class mail and electronic mail to all persons on the Commission's official service list in this proceeding. Exhibits 1.1 through 1.8 have been sent or made available to all parties as set forth in the cover letter filed with this Objection.

Date: October 6th, 2005



Justin C. Richardson, Esq.