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OFFICES IN:
MANCHESTER
CONCORD
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June 27, 2005

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 Pennichuck Water Works, Inc. and Pennichuck Corporation's Objection to City of Nashua's Motion to Compel. I am also enclosing a diskette with the Objection in electronic form.

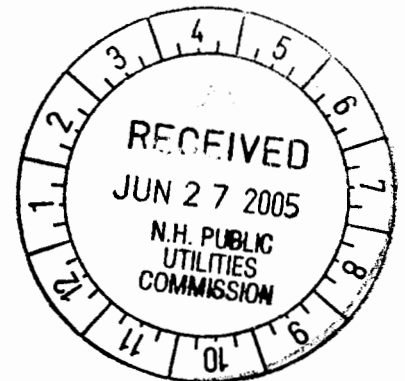
Thank you for your assistance with this matter. Please call me with any questions.

Very truly yours,


Richard A. Samuels

RAS/SBK:ksm

cc: Service List
Donald L. Correll, President & CEO



STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

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

DW 04-048

**PENNICHUCK WATER WORKS, INC. AND PENNICHUCK CORPORATION'S
OBJECTION TO THE CITY OF NASHUA'S MOTION TO COMPEL**

Pennichuck Water Works, Inc. ("PWW") and Pennichuck Corporation ("PC")

(collectively, the "Companies") submit this objection to the City of Nashua's Motion to Compel.

In support hereof, the Companies state as follows:

1. On June 15, 2003, the City of Nashua ("Nashua") moved to compel PWW and PC to further respond to certain Data Requests ("Nashua DR's") propounded by Nashua, specifically Nashua DR's 1-47, 1-59, 1-60, 1-62, 1-64, 1-66, 1-67, 1-68, 1-69, 1-70 and 1-71.
2. Upon consideration of Nashua's objections, PWW and PC have supplemented their responses to Nashua DR's 1-47 and 1-62, which are attached hereto as Exhibit A.
3. The remaining data requests that are the subject of Nashua's motion to compel relate entirely to expert witnesses with whom the Companies have consulted or may consult on this matter, and any opinions of value the Companies have received.
4. Nashua's request is at best premature. Under the procedural schedule approved by the Commission, *see* Order No. 24,457 (April 22, 2005), the Companies are not required until October 14, 2005 to submit expert testimony on valuation and testimony that the taking is not in the public interest. Yet through its data requests, Nashua seeks an advanced look at information that will be the subject of that October filing. There is no justifiable basis for allowing this sneak preview, because the procedural schedule grants Nashua ample opportunity to discover the basis for the Companies' experts' opinions. Beginning October 28, Nashua can submit data requests

based on such expert testimony, and by April 7, 2006, take depositions on valuation issues. The Commission should deny Nashua's motion to compel on this basis alone.

5. Not only are Nashua's discovery requests premature, they also seek information to which Nashua is not entitled. Specifically, in Data Requests 1-66, 1-67, 1-68, 1-70, and 1-71, Nashua attempts to discover information concerning consultants who may have been retained in anticipation of litigation but who are not currently expected to testify.

6. Nashua cannot meet its burden of proof on this issue. Information and opinions on non-testifying experts are only discoverable upon a showing of exceptional circumstances under which it is impractical for the party seeking the discovery to obtain facts or opinions on the same subject by other means. *See Johnston v. Lynch*, 133 N.H. 79, 95-96 (1990) (citing Superior Court Rule 35(b)(2) that information known and opinions held by a non-testifying expert are not subject to discovery absent a showing of exceptional circumstances). *See also Wheeler v. School Admin. Unit 21*, 130 N.H. 666, 669-70(1988) (plaintiff failed to demonstrate exceptional circumstances allowing for discovery from consulting expert based on allegation that consulting expert was the only New Hampshire expert qualified in law and psychiatry); *Willett v. General Electric Company*, 113 N.H. 358, 359-60(1973) (expert reports, which are subject to protection under work product doctrine, are discoverable in very limited circumstances such as where relevant facts are unobtainable by other means or obtainable under such conditions of hardship as would unfairly prejudice the party seeking discovery).

7. In this case, Nashua has not, and cannot, demonstrate any exceptional circumstances that would support its access to such information. The only conceivable reason that Nashua now seeks information about the Companies' experts is to use the information in the formation of its own opinion of value. However, by the conclusion of the first phase of

discovery in this case, Nashua will have all of the factual information it needs to value PWW's assets. Nashua can take the factual information produced by PWW and conduct its own valuation. But Nashua does not need access to information on the Companies' experts in order to make its determination of the value of PWW's assets. Thus, Nashua's allegation that information relating to its experts "is necessary for a full and fair evaluation of the value of PWW's property under RSA 38", *see* Nashua Motion to Compel PWW, ¶ 10, does not rise to the level of "exceptional circumstances."

8. Tellingly, Nashua, itself has objected to providing information from "individuals who are not expected to testify at trial." *See* Nashua's Response to Pennichuck Data Request 1-79 ("Nashua further objects to the extent information is sought pertaining to individuals who are not expected to testify at trial"), attached hereto as Exhibit B. Nashua cannot have it both ways.

9. Nashua also seeks access to other information subject to the work product doctrine. In its Data Requests 1-59, 1-60, and 1-64, Nashua requested appraisals or valuations of the Companies' property, to which the Company objected. The Companies have produced the only document prior to the beginning of the parties' controversy that falls within the scope of these data requests, and should not be required to produce documents that were created for the purpose of responding to Nashua's threatened eminent domain litigation.

10. The New Hampshire Supreme Court has defined work product as:

...the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation...The work product of a lawyer consists generally of his 'mental impressions, conclusions, opinions or legal theories. It may consist of correspondence, memoranda, reports,...exhibits, trial briefs, drafts of proposed pleadings, plans for presentation of proof, statements and other matters, obtained by him or at his direction in the preparation of a pending or reasonably anticipated case on behalf of a client.

State v. Chagnon, 139 N.H. 671, 674 (1995). Information protected by the work product doctrine is only available to a litigant who can demonstrate a "substantial need for the requested materials and that it could not without undue hardship obtain the materials by other means."

Bennett v. ITT Hartford Group, 150 N.H. 753, 761 (2004).

11. Again, Nashua has not, and cannot, meet its burden of proof of "substantial need" to overcome the privilege. Nashua has no substantial need for valuation information subject to the work product doctrine because it can take the factual information produced by the Companies and prepare its own valuation. It can then contest any valuation put forth by the Companies in its February 21, 2006 reply testimony. But it does not need the Companies' work product information to do so.

12. Nashua's claimed legal authority for its position is also not compelling. *Appeal of Public Service Company of New Hampshire*, 120 N.H. 830 (1980), has no application here. In that case, the New Hampshire Supreme Court considered whether a finding of value by the board of taxation in prior litigation constituted "conclusive proof" of the value of the property in a subsequent litigated matter, and held that to ignore the board's previous findings would frustrate the orderly disposition of property tax appeals. Clearly, the PSNH case, which did not involve an issue of privilege or the work product doctrine, simply is not relevant here. Similarly, *New England Power v. Littleton*, 114 N.H. 594 (1974), does not relate in any way to privilege issues, but rather states the Court's view that various methodological approaches to valuation can be considered by a tribunal. *Id.* at 599.

13. For the reasons stated above, Nashua's Motion to Compel should be denied.

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

- A. Deny Nashua's Motion to Compel; and
- B. Grant such other and further relief as the Commission deems necessary and just.

Respectfully submitted,

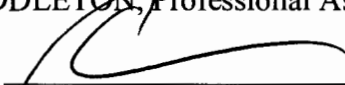
Pennichuck Water Works, Inc.
Pennichuck Corporation

By Its Attorneys,

McLANE, GRAF, RAULERSON &
MIDDLETON, Professional Association

Date: June 27, 2005

By:



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Certificate of Service

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



Richard A. Samuels

Dated: June 27, 2005

Exhibit A

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

DW 04-048

Pennichuck Water Works, Inc. and Pennichuck Corporation's Supplemental Responses to
City of Nashua's First Set of Data Requests on Valuation

Date of Supplemental Response: June 27, 2005

Data Request No.: Nashua 1-47

Witness: William D. Patterson

REQUEST: Provide estimates [sic] the cost of capital for the Pennichuck Companies with and without PWW indicating the breakdown between equity and debt.

**SUPPLEMENTAL
RESPONSE:**

Pennichuck and PWW incorporate their Objections into this response. Without waiving the Objections, while the Commission did not make a specific determination of PWW's cost of capital in its last rate case Order (Order No. 24,465), it can be estimated from information in that case. For instance, PWW's authorized revenue requirement of \$16,469,258 based on a net operating income of \$3,574,734 and a rate base of approximately \$44,600,000 translates to a cost of capital of approximately 8%. The cost of equity was not specified. Per PWW's rate filing, as of 12/31/03, the embedded cost of long-term debt was 7.32% and short-term debt was 2.43%.

Pennichuck does not maintain an estimate of its cost of capital on a consolidated basis. The consolidated cost of capital, without PWW cannot be predicted at this time, since it would depend on a number of factors that are unknown, including without limitation, the amount of after-tax proceeds from the disposition of PWW; the manner in which such proceeds are redeployed; and the capital structure of the resultant entity.

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

DW 04-048

Pennichuck Water Works, Inc. and Pennichuck Corporation's Supplemental Responses to
City of Nashua's First Set of Data Requests on Valuation

Date of Supplemental Response: June 27, 2005

Data Request No.: Nashua 1-62

Witness: Donald L. Correll

REQUEST: Attach a copy of each such report or opinion of fairness or value and any document relied upon in connection therewith including, but not limited to work papers, reports, presentations to management or shareholders and notes.

**SUPPLEMENTAL
RESPONSE:** Pennichuck and PWW incorporate their Objections into this response. Without waiving the Objections, Philadelphia Suburban Corporation's January 13, 2003 S-4 which contains a fairness opinion and was filed with the U.S. Securities and Exchange Commission, is available in the data room or at www.sec.gov.

EXHIBIT B

CITY OF NASHUA
Petition for Valuation Pursuant to RSA 38:9
DW 04-048

**City of Nashua's Responses to Pennichuck's Public Interest Data
Requests - Set 1 Round 1**

Date Request Received: May 5, 2005

Date of Response: June 10, 2005

Request No. 1-79

Respondent: Brian A. McCarthy

Request: Provide copies of the engagement agreement between the City and the consultants referenced on page 2 of Mr. McCarthy's testimony and an itemization of all amounts paid by the City to the consultants, including all invoices relating to such payments.

Response: Nashua objects to the extent the information sought relates to information about any agreement with or any invoices from its attorneys, which is privileged and/or work product. Nashua further objects to the extent information is sought pertaining to individuals who are not expected to testify at trial.

Documents responsive to this request, to the extent that they are not privileged or work product, are available for inspection and marking for copying at the Nashua City Hall.

See response to Data Request 1-78.

CITY OF NASHUA
Petition for Valuation Pursuant to RSA 38:9
DW 04-048

**City of Nashua's Responses to Pennichuck's Public Interest Data
Requests - Set 1 Round 1**

Date Request Received: May 5, 2005

Date of Response: June 10, 2005

Request No. 1-78

Respondent: Brian A. McCarthy

Request: Identify the consultants referred to on page 2 of Mr. McCarthy's testimony and provide copies of any documents and/or reports prepared for the City by such consultants.

Response: Nashua engaged Rizzo Associates, One Grant St., Framingham, MA 01701-9005, who produced two reports ("Rizzo Reports"). One report, Summary Report - Comprehensive Review, Pennichuck Water System Nashua, New Hampshire, was delivered to the City Nov. 1, 2002. A second report, Summary Report - Additional Research, Pennichuck Water System, Nashua, New Hampshire, was delivered January 30, 2003.

Other parties who provide consulting services were:

First Southwest

Divine & Millimet

Palmer & Dodge

George E. Sansoucy, P.E., LLC

Documents responsive to this request, to the extent that they are not privileged or work product, are available for inspection and marking for copying at the Nashua City Hall.