THE STATE OF NEW HAMPSHIRE

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Thomas B. Getz

COMMISSIONERS
Graham J. Morrison
Clifton C. Below

EXECUTIVE DIRECTOR
AND SECRETARY
Debra A. Howland

PUBLIC UTILITIES COMMISSION
21 S. Fruit Street, Suite 10
Concord, N.H. 03301-2429

Tel. (603) 271-2431

FAX (603) 271-3878

TDD Access: Relay NH
1-800-735-2964

Website:
www.puc.nh.gov

November 21, 2006

Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street
Concord, New Hampshire 03301

Re: Docket No. DW 04-048
City of Nashua
RSA 38 Petition re Pennichuck Water Works
Procedural Matters

Dear Ms. Howland:

Please treat this letter as my report of the conference of the parties I conducted yesterday pursuant to RSA 363:17 in the above-referenced docket. Participating either directly or through counsel were petitioner City of Nashua, respondent Pennichuck Water Works (PWW), intervenors Town of Merrimack, Merrimack Valley Regional Water District, Clair B. McHugh, and Anheuser-Busch, Inc., as well as Commission Staff. **To the extent that other parties were not present at the conference, I emphatically recommend they read this letter carefully as it concerns matters that may affect their right to participate in the hearings and/or to submit evidence and argument.**

I. View

As you know, although the procedural schedule previously approved contemplates the Commission conducting a view pursuant to Puc 203.38 in December, such an exercise has not yet been scheduled. The City and PWW have entered into a stipulation with respect to the logistics of a view and thereafter responded to the Commission's invitation to comment on the stipulation as well as the general issue of whether the view should take place. I advised the parties that they could approach the merits hearing scheduled for January on the assumption that the Commission would be conducting a view on December 6, 2006. The participants

requested that the Commission resolve the question of a view at its earliest convenience.

II. General Hearing-Related Matters

I advised the participants that the Commission intended to use the available hearing time very efficiently by limiting the presentations at hearing to the cross-examination of witnesses based on their previously submitted written direct testimony. To that end, I noted that the Commission would forego both opening statements and closing arguments made orally. Rather, I said the Commission intended to entertain opening statements in written form on a specified date prior to hearing and, following the hearing and submission of transcripts, would invite the parties and Staff to submit written briefs.

The parties reminded me that the procedural schedule already includes an opportunity to submit prehearing briefs on December 15, 2006. It was suggested that these filings could serve as the parties' opening statements. It seems reasonable to invite the parties to make only one pre-hearing submission, given the demands this proceeding places on all involved.

With respect to post-hearing briefs, I noted that the Commission expected to set a deadline that would allow the parties to rely on the hearing transcripts as they draft these pleadings. The specific deadline, obviously, must await the conclusion of the hearing in these circumstances.

III. Motions in Limine

The previously approved schedule in this docket contains references to the possibility of the parties submitting motions in limine, i.e., motions at the threshold of the hearings that are designed to resolve in advance issues that would otherwise await real-time resolution at hearing. I encouraged the parties to raise issues in this manner to the fullest extent possible and there appeared to be agreement that motions in limine would be a helpful vehicle for reducing uncertainty and avoiding the waste of hearing time. Accordingly, there was agreement to recommend a motion deadline of December 12, with responsive pleadings due on December 22.

IV. Exhibits, Electronic Litigation

I advised the participants that the Commission would require the parties to pre-mark exhibits for possible admission into evidence. The participants did not seem averse to such a protocol, but the petitioner and the respondent in particular expressed an avid interest in not having to compile and circulate multiple printed copies of evidentiary materials, particularly prefiled

testimony that has already been submitted to the Commission with many duplicates.

This, in turn, led to a discussion about the possible use of technology to allow for a paperless hearing, in whole or in part, as well as the creation of a real-time transcript. This will need to be the focus of additional discussions involving the parties and your office. The Commission should establish a firm timetable for resolving these issues, establishing a deadline for the premarking of exhibits accordingly. It was noted that a formal rules waiver may be necessary. See Puc 203.22(e) (requiring a party presenting an exhibit at hearing to "provide a copy to the hearing clerk, each commissioner, the court reporter, if any, any witness or witnesses then testifying and each party present at the hearing").

V. Testimony at Hearing

As noted above, I advised the participants that the Commission generally planned to entertain no direct testimony beyond the bare minimum necessary to cause witnesses to adopt their prefiled asseverations. This led to concerns about opportunities to correct and update prefiled testimony. I suggested that the Commission would not foreclose such opportunities but that it, in general, wanted to limit the hearings to cross-examination followed by redirect testimony.

With respect to the order of witness presentation, I advised that the City, as petitioner, would be expected to present its witnesses first, followed by intervenors supporting the petition (if any), intervenors with no position on the petition (if any), intervenors opposing the petition, Staff and, finally, PWW as respondent. I further noted that cross-examination would likewise proceed from "friendly" to "unfriendly" questions, with an opportunity for the party sponsoring the witness to conduct redirect limited to issues raised on cross-examination. I noted that the Commission would likely be very strict about limiting recross, expecting that in most instances nothing further beyond redirect testimony would be necessary.

One party raised the question of rebuttal witnesses. I indicated that the Commission did not expect to hear rebuttal testimony, inasmuch as witnesses have already prefiled both direct and, in most instances, rebuttal testimony.

VI. Confidential Evidence

The participants discussed the extent to which it would be necessary for the Commission to hear testimony and receive evidence that is entitled to confidential treatment based on prior orders of the Commission to that effect. Both the petitioner and respondent indicated that there would be such evidence introduced, albeit in a very limited amount. I asked the participants to be mindful of the extent to which they can ask witnesses about confidential information without necessarily requiring the disclosure of such information. We noted that

not all parties have signed the non-disclosure agreements that would allow them full access to confidential information. I recommend that the Commission stress to the parties that they should sign these agreements as a means of gaining full access to all evidence adduced at hearing. There was agreement that the participants would endeavor to introduce confidential information in a manner that minimizes disruption and inconvenience, particularly with respect to the court reporter(s) who will be obliged to produce separate confidential and non-confidential transcripts.

VII. Hearing Schedule

With respect to the hearings themselves, I advised the parties and Staff that the Commission plans to schedule nine days of hearings, on Tuesday, Wednesday and Thursday of three successive weeks. I noted that the specific dates are January 9, 10, 11, 16, 17, 18, 23, 24 and 25. I further advised the parties that on each hearing day, the Commission plans to hear evidence for a total of six hours, in four 90-minute sessions running from 9:00 to 10:30, 11:00 to 12:30, 2:00 to 3:30 and 4:00 to 5:30.

To varying degrees, the participants expressed concerns about whether this would be an adequate amount of hearing time. There was a general, and laudable, willingness among the participants, especially the petitioner and respondent, to collaborate on a plan for using the available hearing time efficiently and effectively without sacrificing due process. With that willingness, however, came skepticism that even an efficient hearing could be concluded within nine days.

Several participants suggested that the Commission hold additional hearing dates in reserve. I agree that the Commission may want to consider taking such a step, possibly without announcing how many additional hearing dates are available (so as not to give parties an incentive to use all available time). In my view, for the hearing to unfold in a manner that is orderly and efficient, it will be necessary for the Commission to require the parties to confer and agree on a schedule that would specify which witnesses would testify on which day and now much time would be devoted to their cross-examination. I note that RSA 541-A:32, III(b) and (c) explicitly authorize the Commission to limit any intervenor's cross-examination, presentation of evidence, argument and other participation "so as to promote the orderly and prompt conduct of the proceedings."

VIII. Conclusion

I am pleased to report that yesterday's conference was productive and suggestive that the parties are working cooperatively to assure that the hearings take place in a manner that is efficient, respectful of due process concerns and enlightening. I request that the

Commission reward these good efforts by using this week's Commission meeting (Wednesday, November 22, 2006, 1:30 p.m.) to advise the parties how it intends to proceed with respect to the procedural issues discussed above.

Sincerely,

Donald M. Kreis
General Counsel

Cc: Service List