

**Concord Office**  
10 Centre Street  
PO Box 1090  
Concord, NH  
03302-1090  
603-224-7791  
1-800-640-7790  
Fax 603-224-0320

**Attorneys At Law**  
Robert Upton, II  
Gary B. Richardson  
John F. Teague  
Russell F. Hilliard  
James F. Raymond  
Barton L. Mayer  
Charles W. Grau  
Bridget C. Ferns  
David P. Slawsky  
Heather M. Burns  
Lauren Simon Irwin  
Joyce E. Smithey  
  
**Of Counsel**  
Frederic K. Upton

**Hillsborough Office**  
8 School Street  
PO Box 13  
Hillsborough, NH  
03244  
603-464-5578  
1-800-640-7790  
Fax 603-464-3269

**Attorneys At Law**  
Douglas S. Hatfield  
Margaret-Ann Moran  
Thomas T. Barry\*  
Matthew H. Upton  
\*Also Admitted In Virginia

**North Conway Office**  
23 Seavey Street  
PO Box 2242  
North Conway, NH  
03860  
603-356-3332  
Fax 603-356-3932

www.upton-hatfield.com  
mail@upton-hatfield.com

**Please respond to the North Conway office**

April 14, 2005

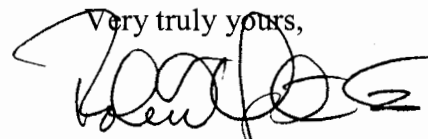
Debra A. Howland  
Executive Director and Secretary  
Public Utilities Commission  
8 Old Suncook Road  
Concord, New Hampshire 03301-7319

Re: Docket DW 04-048  
Petition of the City of Nashua

Dear Ms. Howland:

I enclose herewith an original and 8 copies of a Response and Objection to the Petition to Intervene filed by Pennichuck Corporation and others in the above-matter. I also enclose a diskette copy of the Response and Objection as required by Puc 202.08. A copy of the Pleading has been mailed to the Service List.

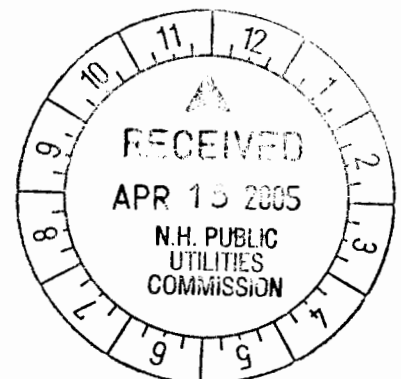
Very truly yours,



Robert Upton, II

RUII/dgg  
Enclosure

Cc: Service List



EDMUND J BOUTIN  
BOUTIN ASSOCIATES PLLC  
ONE BUTTRICK RD  
PO BOX 1107  
LONDONDERRY NH 03053

MICHAEL S GIAIMO  
BUSINESS & INDUSTRY ASSOC  
122 N MAIN ST  
CONCORD NH 03301

JOHN J RATIGAN  
DONAHUE TUCKER & CIANDELLA  
225 WATER ST  
PO BOX 630  
EXETER NH 03833-0630

STEVEN V CAMERINO  
MCLANE GRAF RAULERSON & MIDDLETON  
15 N MAIN ST  
CONCORD NH 03301-4945

JAY HODES  
BOSSIE KELLY HODES BUCKLEY & WILSON  
440 HANOVER ST  
MANCHESTER NH 03104

F ANNE ROSS  
OFFICE OF CONSUMER ADVOCATE  
21 SOUTH FRUIT ST STE 18  
CONCORD NH 03301-2429

DAVID CARON  
LONDONDERRY - TOWN OF  
50 NASHUA RD  
STE 100  
LONDONDERRY NH 03053-3416

MARK JOHNSON  
TOWN OF HOLLIS  
TOWN HALL  
7 MONUMENT SQ  
HOLLIS NH 03049-6121

LAURA A SPECTOR  
MITCHELL & BATES PA  
25 BEACON ST EAST  
LACONIA NH 03246

KATHERINE E CHAMBERS  
TOWN OF MILFORD  
TOWN HALL  
ONE UNION SQ  
MILFORD NH 03055-4240

STEPHEN J JUDGE  
WADLEIGH STARR & PETERS PLLC  
95 MARKET ST  
MANCHESTER NH 03101

EUGENE F SULLIVAN III  
ATTORNEY AT LAW  
210 NORTH STATE ST  
CONCORD NH 03301-3222

DAVID R CONNELL  
CITY OF NASHUA  
229 MAIN ST  
PO BOX 2019  
NASHUA NH 03061-2019

LINDA LAVALLEE  
WADLEIGH STARR & PETERS PLLC  
95 MARKET ST  
MANCHESTER NH 03101

FRED S TEEBOOM  
24 CHEYENNE DR  
NASHUA NH 03063

ELIZABETH COUGHLIN  
MERRIMACK RIVER WATERSHED COUNCIL  
600 SUFFOLK ST 4TH FLR  
LOWELL MA 01854-3629

CLAIRE MCHUGH  
61 DUBLIN AVE  
NASHUA NH 03063-2045

MATTHEW H UPTON  
UPTON & HATFIELD  
10 CENTRE ST  
PO BOX 1090  
CONCORD NH 03302

DOM S D'AMBRUOSO  
RANSMEIER & SPELLMAN PC  
ONE CAPITOL ST  
PO BOX 600  
CONCORD NH 03302-0600

WILLIAM MULLIGAN  
TOWN OF MERRIMACK  
PO BOX 940  
MERRIMACK NH 03054

ROBERT UPTON II  
UPTON & HATFIELD  
23 SEAVEY ST  
PO BOX 2242  
NORTH CONWAY NH 03860

WILLIAM R DRESCHER  
DRESCHER & DOKMO  
21 EMERSON ROAD  
PO BOX 7483  
MILFORD NH 03055-7483

BARBARA PRESSLY  
11 ORCHARD AVE  
NASHUA NH 03060

STEVE WILLIAMS  
NASHUA REGIONAL PLANNING COMMISSION  
115 MAIN ST  
PO BOX 847  
NASHUA NH 03061

Docket #: 04-048-1 Printed: April 14, 2005

**FILING INSTRUCTIONS:**

**WITH THE EXCEPTION OF DISCOVERY (SEE NEXT PAGE) FILE 1 ORIGINAL & COVER LETTER, PLUS 8 COPIES  
(INCLUDING COVER LETTER) TO:**

DEBRA A HOWLAND  
EXEC DIRECTOR & SECRETARY  
NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

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

**IN THE MATTER OF THE  
DETERMINATION OF THE  
FAIR MARKET VALUE OF  
THE PLANT AND PROPERTY  
OF PENNICHUCK WATER  
WORKS, INC., PENNICHUCK  
EAST UTILITY, INC., AND  
PITTSFIELD AQUEDUCT  
COMPANY, INC.**

**DOCKET NO. DW 04-048**

**RESPONSE TO PETITION TO INTERVENE AND  
OBJECTION TO REQUEST FOR CLARIFICATION**

Now comes the City of Nashua ("Nashua") and responds to the Petition to Intervene filed by Pennichuck Corp. ("PNNW"), Pennichuck Water Service Corp. ("PWSC"), Pennichuck East Utility, Inc. ("PEU") and Pittsfield Aqueduct Company, Inc. ("PAC"), (collectively the "Intervenors") as follows:

**I. NASHUA'S RESPONSE AND OBJECTION**

1. Nashua does not oppose intervention or participation by the Intervenors in this proceeding. Under RSA 541-A:32, intervention is permitted by any party demonstrating that its "rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding" and that "the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention." RSA 541-A:32. Applying this broad standard, intervention is authorized.

2. However, while captioned solely as a Petition to Intervene in this proceeding, the Intervenor's Petition makes a number of allegations, unsupported by any affidavit, direct testimony or concise statement of facts (see Puc 202.11 and 203.04), regarding "direct damage[s] for which just compensation would be due." Intervenor asks the Commission "to clarify that [these] interests in this proceeding and the impact on their customers and shareholders may be presented for consideration by the Commission."<sup>1</sup>

3. Intervenor's claims for damages fall broadly into one of two categories: impacts to its customers (i.e. the public) due to alleged economies of scale; and damages to Intervenor as a result of private "contractual arrangements" or other interests. To the extent that the Intervenor seeks to clarify that they may introduce evidence related to their private economic interests or claims for damages, as distinct from the public interest of their customers, Intervenor's Petition should be denied.

## II. UNDER RSA 38, EVIDENCE IN THIS PROCEEDING IS LIMITED TO VALUATION AND DETERMINATION OF THE PUBLIC INTEREST.

4. The Intervenor alleges that, if Nashua is permitted to acquire the assets of Pennichuck Water Works ("PWW"), they will suffer "direct economic loss",<sup>2</sup> "direct harm"<sup>3</sup> and "direct damage for which just compensation would be due."<sup>4</sup> According to the Petition, these damages to the Pennichuck Intervenor are "distinct from those of PWW".<sup>5</sup>

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<sup>1</sup> Petition to Intervene, Page 2, Paras. 8 & 11.

<sup>2</sup> Petition, Page 2, Para. 6.

<sup>3</sup> Id.

<sup>4</sup> Petition, Page 3, Para. 8.

<sup>5</sup> Petition, Page 3, Para. 10.

5. As PWW and the Intervenors were eager to point out when it served their purposes (see their Memorandum of Law on Scope of RSA Chapter 38, dated October 25, 2004 at pp. 6-8), the scope of RSA 38 is limited to the municipality and “the utility” selling water within the municipality. Under RSA 38, the Commission is authorized to award damages to “the utility” (RSA 38:6, 7, 8, 9, 10) which the Commission has already determined to be PWW. (Order No. 24,425, January 21, 2005, p. 12). As a result, the only issues to be decided in an RSA 38 proceeding are the valuation of PWW’s assets under RSA 38:9, and the public interest under RSA 38:11. There is no basis under RSA 38 for the award of damages or losses suffered by any entity which is not “the utility” including the Intervenors. Rather, the Petition by the Intervenors is an attempt to litigate their lawsuit for damages, dismissed or held in abeyance by the Federal and Superior Courts.

6. It is well established under New Hampshire law that Intervenors are not entitled to any damages for diminution in value of their property. In *Manchester v. Airpark Business Center*, 148 NH 471 (2002), the New Hampshire Supreme Court stated that just compensation “does not include diminution in value ... caused by the acquisition and use of adjoining lands [not owned by the landowner] for the same undertaking.” 148 NH at 473-474. In this case, none of the Intervenors own any of the property to be acquired by Nashua. As a result, Intervenors are not entitled to damages because none of their property has been taken.

7. Likewise, neither the Intervenors nor PWW, if only certain PWW plant and property is acquired by Nashua, can recover for any alleged lost economies of scale or other incidental losses with resulting impacts on cost and quality of service. The leading

case is Kennebec Water Dist. v. City of Waterville, et al., 97 Me. 185, 54 A. 6 (1902).

The water company claimed severance damages for the proportionally heavier costs of supervision and management to its remaining property attributable to the loss of its Waterville plant. The court summarized the circumstances:

The compensation asked is not for property taken, but for incidental damages to other property having no physical connection with or contiguity to that taken, and having no relations whatsoever with the property taken, except those which grow out of common ownership.

54 A. at 17. Applying general eminent domain principles, the court held that no severance damages could be awarded because the properties were separate and distinct, and the damages were incidental and consequential. Id. at 17-18. The Kennebec Water District holding was subsequently reaffirmed in East Boothbay Water Dist. v. Boothbay Hbr., 158 Me. 32, 41, 177 A.2d 659 (1962). The same result was reached in South Bay Irr. Dist. v. Calif. – American Water Co., 61 Cal. App. 3d 944, 133 Cal. Rptr. 166 (1976), where the water company owned two water supply and distribution systems that were physically separate and were separate enterprises for rate-making purposes. The two systems jointly used office and operations facilities. The facilities were included in the rate base of the system condemned by the municipality. The water company sought severance damages for the cost the second system would incur to replace the facilities. The court ruled that the facilities were part of the first system, and no severance could be awarded for separate systems. All compensable value must be found in the facilities themselves. 61 Cal. App. 3d at 1002-03.

8. The assertion of damage by the Intervenor is an admission that PWW ratepayers are, and have been, subsidizing PEU and PAC rates and the operations of the unregulated PWSC. The Commission has already noted that all of these companies are

separate and distinct and have separate franchises and rate structures. (Order No. 24,425, supra at p. 9). Likewise, PWW, PEU and PAC noted their separate rate structures in their Memorandum of Law on Scope of RSA Chapter 38, supra at pp. 2-4. The rates and prices of the Intervenor should not be dependent upon what happens to the assets of PWW. Moreover, any contractual or other relationships between PWW and the Intervenor, as even they noted in their Memorandum , supra at p.4, must be based upon the market value of the services or benefits provided by PWW. Unless there has been subsidization, the Intervenor should be able to replace or replicate them for the approximate or equivalent cost in the market place. If they cannot be replaced at an equivalent cost, PWW has been supplying the benefits and services to the Intervenor at less than their fair value, the cost of which is being subsidized by its ratepayers.

III. RSA 541-A:32, III AUTHORIZES THE COMMISSION THE AUTHORITY TO LIMIT INTERVENORS' PARTICIPATION IN THIS PROCEEDING TO VALUATION AND DETERMINATION OF THE PUBLIC INTEREST IN ACCORDANCE WITH RSA 38.

9. RSA 541-A:32, III, gives the Commission the authority to "impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time." Such conditions include "[l]imitation of the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition." By extension, the Commission may limit presentation of evidence which is "irrelevant, immaterial or unduly repetitious" under RSA 541-A:33.

10. Participation by the Intervenor to recover damages or compensation

would nullify the Procedural Schedule agreed upon by the parties and would result in precisely the “attenuated discovery that would not advance [the Commission’s] understanding of how the taking would or would not serve the public interest”. Moreover, it would require discovery into areas that, “while possibly relevant to other disputes among the parties, are not relevant to the issues the Commission must determine.” Order No. 24.447, March 31, 2005, page 8.

11. Because the Intervenor’s claims for private damages have no bearing on the valuation of PWV’s property or the public interest under RSA 38, the Commission should limit Intervenor’s participation in this proceeding accordingly.

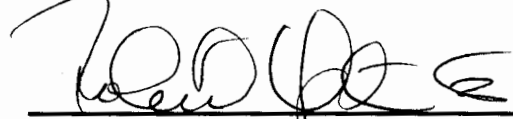
WHEREFORE Nashua respectfully prays the Commission:

- a. Grant Intervenor’s Petition to participate in this proceeding, as coordinated with PWV, for the purpose of submission of evidence relevant to the public interest and/or valuation under RSA 38, subject to the Procedural Schedule agreed to by the parties on April 8, 2005, and ;
- b. Deny Intervenor’s Petition to the extent that it seeks to clarify that Petitioners may introduce evidence unrelated to the public interest and/or valuation under RSA 38; and
- c. Grant such other and further relief as justice may require.



Respectfully submitted,

CITY OF NASHUA  
Upton & Hatfield, LLP  
By its attorneys:



Robert Upton, II  
23 Seavey Street, PO Box 2242  
North Conway, NH 03860  
(603) 356-3332

Dated: April 14, 2005

David Connell, Esquire  
Corporation Counsel  
229 Main Street  
Nashua, New Hampshire 03061-  
2019

#### CERTIFICATION

I hereby certify that a copy of the foregoing Response to Petition to Intervene was this day forwarded to all persons on the attached Service List.



Robert Upton, II