

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

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

DW 04-048

**PENNICHUCK’S OBJECTION TO NASHUA’S MOTION FOR LEAVE TO
SUBSTITUTE WITNESSES**

NOW COME Pennichuck Water Works, Inc. (“PWW”), Pennichuck East Utility, Inc. (“PEU”), Pittsfield Aqueduct Company, Inc. (“PAC”), Pennichuck Water Service Corporation and Pennichuck Corporation (collectively “Pennichuck”) by and through their attorneys, McLane, Graf, Raulerson & Middleton, Professional Association, and object to the City of Nashua's Motion for Leave to Substitute Witnesses (the “Motion”).¹ In support of this Objection, Pennichuck states as follows:

1. On August 10, Nashua filed the Motion requesting to replace two Veolia witnesses, Robert Burton and David Ford. Mr. Burton and Mr. Ford had previously submitted testimony on January 12, 2006 and May 22, 2006 regarding operation of PWW's water system, and the proposed contract with Veolia under which it would be operated. Nashua justifies its request on the basis that Mr. Burton and Mr. Ford are no longer employed by Veolia. Nashua seeks to replace these witnesses with two other Veolia employees, Stephen Siegfried and Alyson Willans. The Commission should deny Nashua’s request because allowing the substitution of these witnesses will result in real prejudice to Pennichuck, raise serious due process issues, and disrupt the orderly conduct of this proceeding.

¹ On August 1, 2007, Nashua filed a letter with the Commission which, although not styled as a motion, specifically requested that the Commission allow Nashua to replace two of the Veolia witnesses with other individuals. Nashua's subsequent filing of a second request for relief, this time entitled Motion for Leave to Substitute Witnesses, therefore was unnecessary and an improper supplemental pleading.

2. As the Commission is well aware, this proceeding was stayed for six months to enable Pennichuck and Nashua to discuss a potential settlement. During the stay period, Pennichuck disclosed a significant amount of confidential information about the innermost workings of the Company to Nashua, and in particular, to Mr. Siegfried and Ms. Willans who were the team leaders for Veolia in the due diligence process. At no time did Nashua disclose that Mr. Siegfried or Ms. Willans might participate in this proceeding as witnesses. In his role as Nashua's lead representative in understanding the operations of Pennichuck during the stay period, Mr. Siegfried interviewed Pennichuck employees, toured Pennichuck's facilities, reviewed documents relating to all aspects of Pennichuck's operations, and gained an intimate working knowledge of Pennichuck's assets. Similarly, Ms. Willans participated in an in-depth review of Pennichuck's water treatment and distribution facilities, gaining knowledge about these facilities from one-on-one contact with Pennichuck employees. Pennichuck had no similar access to Veolia and its operations, personnel, historical data, legal and accounting matters and the like.

3. Now at the eve of trial, Nashua has requested to substitute Mr. Siegfried and Ms. Willans for Mr. Ford and Mr. Burton.² In fact, it is noteworthy that Nashua was prepared to have Mr. Ford testify at the hearing in January 2007, long after he had already left Veolia's employ in the fall of 2006. Had Nashua at least disclosed to Pennichuck before beginning the due diligence process that it intended for Mr. Siegfried to take Mr. Ford's place as a testifying witness, Pennichuck could have required Nashua to designate another individual to conduct the due diligence or considered other precautions or reciprocal rights.

² Nashua has provided a list of exhibits to be adopted by Mr. Siegfried and Ms. Willans should they be permitted to testify. Even Nashua's list of exhibits to be adopted is incomplete. Apparently, Mr. Siegfried and Ms. Willans will not be adopting three separate exhibits on Nashua's Exhibit List: 1005A, 1005B, and 1005C, which contain the exhibits to the panel testimony of Mr. Ashcroft, Mr. Ford and Mr. Burton. Pennichuck's counsel informed Nashua's counsel of this omission, which Nashua has still failed to correct.

4. Yet now, having learned about Pennichuck from the inside out, Nashua seeks to put Mr. Siegfried and Ms. Willans on the stand as the public face of the City's operation of the water utility. While Mr. Siegfried and Ms. Willans are prohibited from using or disclosing any confidential information learned about Pennichuck during the stay period, their conduct of the Pennichuck due diligence is likely nonetheless to affect their testimony in significant ways. Armed with knowledge of the inner workings of Pennichuck, this knowledge will undoubtedly shape how these witnesses answer questions on cross and redirect examination. They may now be able to anticipate questions or provide responses to lines of inquiry in a way that appears to be more beneficial to Nashua.

5. While Nashua may assert that this was a risk taken by Pennichuck when agreeing to negotiate, Pennichuck certainly had no knowledge that the individuals who would be leading the due diligence effort would become testifying witnesses in this case. Given that a simple disclosure would have cured this problem, it would be wholly contrary to good public policy if Nashua were now allowed to use the settlement process in this way to ambush Pennichuck in the litigation. Substitution of the witnesses at this point would be contrary to due process and would be fundamentally unfair.

6. Nashua's claim that the substitution of these witnesses is no different than allowing the substitution of witnesses for Merrimack or Anheuser-Bush is without merit. The qualifications of the Merrimack and Anheuser-Bush witnesses are not at issue here because their testimony is not intended to demonstrate the technical, financial and managerial competence to operate a utility, which is the case with the Siegfried and Willans testimony. Rather, the purpose of the Merrimack testimony is simply to state the position of the town as adopted by its board of selectmen, and in the case of Anheuser-Bush, to state the company's position on the proposed condemnation. Thus, the identity and personal knowledge of the individual sponsoring that

testimony is not relevant to the testimony itself. By comparison, both Mr. Ford and Mr. Burton were deposed and their qualifications, personal knowledge and experience and their role in preparing the Veolia proposal to Nashua were explored. One has to ask what the purpose of discovery is if Nashua can now simply change its witnesses and effectively avoid the effect of that discovery.³

7. Notably, the problems caused by the Siegfried/Willans substitution are unique and do not apply to other testifying witnesses such as Mr. Sansoucy and Mr. Walker who participated in the due diligence process. First, Pennichuck was well aware of the role of these individuals in the hearing, and was able to consider whether it would take the risk of disclosing information to them and what that information should be. Second, the information obtained by Mr. Sansoucy and Mr. Walker during the due diligence period was largely duplicative of what they obtained during discovery in this case. In contrast, Mr. Siegfried and Ms. Willans were given direct access to Pennichuck employees and conducted extensive interviews of them regarding the Pennichuck assets and operations, in addition to obtaining a large number of documents that were not sought or produced in discovery in this case. To now allow them to testify would be prejudicial to Pennichuck since these witnesses cannot forget or even segregate in their minds what they know about Pennichuck from such disclosures.

³ Earlier in this case, the Commission considered the purpose of pre-filed testimony, stating that "[i]ts purposes are (1) to make hearings more efficient by, at least in theory, eliminating the need for extensive, live direct testimony and allowing the bulk of hearing time to be devoted to cross-examination, and, **more importantly, (2) allowing parties to prepare for hearing fully by reviewing the evidence opponents intend to marshal at hearing and, in appropriate circumstances, conducting discovery so as to ascertain fully the basis for the written direct testimony.**" Order 24,667 at 6 (emphasis added). Pennichuck would be denied this opportunity if the Motion is granted.

8. Further, that Nashua has only now⁴ provided the resumes of Mr. Siegfried and Ms. Willans, more than a year after discovery has ended, highlights the problematic nature of their participation in this case. These are the two witnesses who Nashua now claims would have day-to-day operational responsibilities for the utility, and yet Nashua has provided no opportunity for parties to probe their knowledge or capabilities. This makes a mockery of the discovery/investigative process, particularly in a case of this magnitude.

9. Pennichuck undertook significant discovery on all of Nashua's testifying witnesses, including taking the depositions of Mr. Ford and Mr. Burton. Pennichuck will not have the same opportunity with these two key Nashua witnesses, and as a result, will have had no chance to inquire into the qualifications of the witnesses, their knowledge of Veolia's operations and the proposed contract with Nashua. It is highly ironic that Nashua is seeking the right to put forth as new witnesses two individuals who have had the opportunity to undertake significant discovery on Pennichuck, given that Pennichuck will have had no opportunity to conduct discovery on them.

10. Even if these proposed witnesses were to adopt the deposition testimony of Mr. Burton and Mr. Ford, it is conceivable – and in fact likely – that Mr. Siegfried and Ms. Willans will testify on cross examination that they do not have the same knowledge about certain matters as Mr. Burton and Mr. Ford did, and thus cannot answer questions on those subjects, or that they have differing opinions. In fact, perhaps of more concern, in areas where Mr. Burton and Mr. Ford previously stated that they had no knowledge, the same questions may elicit a very detailed, thorough response that was not revealed during discovery. Thus, Pennichuck will be left to

⁴ As indicated in Nashua's Motion, Nashua first stated its intention to substitute witnesses at the July 17, 2007 technical session. However, Pennichuck did not assent to the substitution at that time, and its counsel, who were the only representatives of the Company present at the technical session, had no knowledge of Mr. Siegfried and Ms. Willans' participation in the due diligence during the stay period.

discover the opinions and knowledge of these witnesses for the first time at trial. This type of trial by surprise is wholly inappropriate, and will adversely impact the orderly conduct of the proceeding, despite Nashua's claim to the contrary. It is fair to expect repeated procedural problems should these individuals be permitted to take the stand, as Pennichuck attempts to gain for the first time an understanding of their knowledge and position on issues and how they may differ from those of Mr. Burton and Mr. Ford.

11. Moreover, there is no cure to the procedural and substantive problems created by Nashua's request, other than to reject it. Making the witnesses available for deposition on the eve of a major trial when Pennichuck and other parties are in the throes of trial preparation would be patently unfair. Even if an opportunity for discovery were provided at this point, with three weeks remaining before the hearing on the merits (as of the date of this objection), such discovery would hardly be meaningful and would present the parties with the Hobson's choice of engaging in such discovery versus focusing on the already monumental task of preparing the rest of the case for trial. At some point, Nashua should be told that its case must stop changing.

12. Nashua's claim that Mr. Ford and Mr. Burton are "effectively unavailable" is unconvincing. Nashua has offered no credible reason why Mr. Burton and Mr. Ford cannot attend the trial and testify, even if that means paying them for their time (something which Veolia would have done anyway if the two had been on the company's payroll). Mr. Ford is subject to the compulsory process of the Commission, and could be summoned to attend and testify if he refuses to appear. It is hard to believe that Nashua, with Veolia's cooperation, could not produce Mr. Burton for one day of trial testimony. One of Pennichuck's witnesses, Donald Correll, is no longer employed by the Company, but he will be appearing to testify, even though the trial is occurring during a particularly busy time for Mr. Correll because of his company's

pending initial public stock offering. There is no reason that Nashua's witnesses should not, and cannot, do the same.

13. For these reasons, the Commission should deny Nashua's Motion for Leave to Substitute Witnesses, and should require Mr. Ford and Mr. Burton to appear to testify at the September merits hearing.

WHEREFORE, Pennichuck respectfully requests that the Commission:

- A. Deny Nashua's Motion for Leave to Substitute Witnesses; and
- B. Grant such other and further relief as the Commission deems necessary

and just.

Respectfully submitted,

Pennichuck Water Works, Inc.
Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Service Corporation
Pennichuck Corporation

By Their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: August 13, 2007

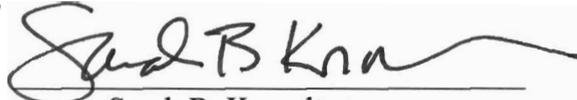
By: 

Thomas J. Donovan
Steven V. Camerino
Sarah B. Knowlton
11 South Main Street, Suite 500
Concord, NH 03301
Telephone (603) 226-0400

Joe A. Conner, Esquire
Baker Donelson Bearman
Caldwell & Berkowitz, P.C.
1800 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450

Certificate of Service

I hereby certify that on this 13 day of August 2007 a copy of this Objection to Nashua's Motion for Leave to Substitute Witnesses has been forwarded to the parties listed on the Commission's service list in this docket.


Sarah B. Knowlton