

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

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

DW 04-048

**MOTION IN LIMINE CONCERNING SEVERANCE DAMAGES AND TO  
DETERMINE THE PROPER INTERPRETATION OF RSA 38:9**

Nashua files this *Motion in Limine* to: (1) exclude evidence related to claims for severance or other economic damages by third-party intervenors in this proceeding, the Pennichuck Corporation (PC), Pennichuck Water Services Corporation (PWSC), Pennichuck East Utility Inc. (PEU) and Pittsfield Aqueduct Company Inc. (PAC) (together, the Pennichuck Companies); (2) to exclude evidence related to claims for severance damages to the Pennichuck Water Works, Inc., (PWW); and (3) to determine the proper interpretation of RSA 38:9 in this proceeding. In support of this Motion, Nashua states as follows:

**I. INTRODUCTION**

1. On April 5, 2005, the Pennichuck Companies filed a *Joint Petition to Intervene*. The Pennichuck Companies stated that PC was the parent company of PWSC, PEU, PAC, as well as PWW, the utility subject to the City of Nashua's RSA 38 valuation petition. They further averred that if Nashua acquired the assets of PWW that they would "suffer direct harm in the form of lost economies of scale, increased operating and capital costs, loss of access to capital markets and other substantial damage."
2. On April 14, 2005, the City of Nashua filed a Response and Objection to the Petition to Intervene. Nashua stated that it did not oppose intervention by the

Pennichuck Companies. Nashua did object, however, to the Pennichuck Companies' statement that "[s]uch a taking would result in a substantial deprivation of the use and enjoyment of the property rights of the Pennichuck Intervenors, resulting in direct damage for which just compensation would be due." Petition at 3. Nashua stated that to the extent the Pennichuck Companies sought to clarify that they could introduce evidence related to their private economic interests or claims for damages, as distinct from the public interest of their customers, their petition to intervene should be denied.

3. Nashua averred that evidence in this proceeding was limited to the issues of valuation and public interest and that the intervention was an attempt to litigate damages that have been either dismissed or held in abeyance by Federal and Superior Courts. Nashua further asserted that only PWW is entitled to damages and argued that the Pennichuck Companies intervention petition was evidence that PWW ratepayers had been subsidizing PEU, PAC, and PWSC.
4. In Order No. 24,487 dated July 8, 2005, the Commission granted intervention but ruled that the question whether the Pennichuck Companies would be entitled to severance damages "depend[s] upon the organizational, legal, financial and operational relationships among the Pennichuck Companies and require[s] further development of the related facts." It further noted that it would entertain motions in limine regarding the scope of the hearings and proper interpretation of RSA 38:9.

5. Subsequent to Order No. 24,487, Nashua filed a *Motion to Reconsider* on August 5, 2005, to which PWW objected on August 12, 2005. On August 17, 2005, Nashua filed a *Motion for Leave to Respond and Response* to PWW's objection.
6. Nashua files this motion for a determination by the Commission that RSA 38:9, as a matter of law, limits an award of damages to PWW alone; to preclude as a matter of law, the Pennichuck Companies from pursuing their claim for any direct damages; to preclude, as a matter of law, PWW from asserting a claim for severance damages if Nashua acquires less than all of its assets; and to strike any testimony pursuant to which they seek such damages.
7. Nashua does **not** assert that the Commission is precluded from considering evidence concerning the financial consequences of Nashua's Petition as part of the public interest determination to be made by the Commission. However, to the extent the Commission finds that Nashua's petition would have a financial impact on PC's regulated (PEU & PAC) or unregulated (PC & PWSC) operations, such evidence is only relevant for the purpose of the Commission's evaluation of the public interest, and not determination of the damages to be awarded to PWW in this proceeding.

## **II. NEITHER THE PENNICHUCK COMPANIES NOR PWW ARE ENTITLED TO SEVERANCE DAMAGES**

### **A. The Pennichuck Companies**

8. The Pennichuck Companies, as intervenors, in this proceeding have alleged that, if Nashua is permitted to acquire the assets of PWW they will suffer "direct economic loss"<sup>1</sup> "direct harm"<sup>2</sup> and "direct damage for which just compensation

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<sup>1</sup> Petition, Page 2, Para. 6.

would be due.”<sup>3</sup> According to the Petition, these damages to the Pennichuck Companies are “distinct from those of PWW”.<sup>4</sup>

9. As PWW and the Pennichuck Companies were eager to point out when it served their purposes, the scope of RSA 38 is limited to the municipality and “the utility” selling water within the municipality.<sup>5</sup> 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 Pennichuck Companies.
10. Under RSA 38:9, III the term “owner” refers to the owner of the utility’s plant and property that a municipality seeks to acquire, not the owner of the stock of the utility (not to mention the owner or owners of the stock of the parent company that owns the stock of the utility that owns the plant and property). Nowhere does RSA 38 indicate that the legislature intended that any entity other than “the utility” referred to in RSA 38:6 *et seq* (as owner of plant and property) would be entitled to damages. If the Legislature had intended “owner” to have a different meaning than “the utility”, it would have said so and included a definition of “owner” in RSA 38:1.

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<sup>2</sup> Id.

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

<sup>4</sup> Petition, Page 3, Para. 10.

<sup>5</sup> See *Memorandum of Law on Scope of RSA Chapter 38*, dated October 25, 2004 at pp. 6-08.

11. Moreover, it is well established under New Hampshire law that the Pennichuck Companies 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 Pennichuck Companies own any of the property to be acquired by Nashua. As a result, they are not entitled to any damages, severance or other, because none of their property has been taken. See also, 95 ALR 2d 887, Annotation: Unity of Ownership Necessary To Allow Award of Severance Damages in Eminent Domain; 26 AmJur 2d, Eminent Domain, See 338, p. 721 and 14A Nichols on Eminent Domain (3d Ed) § 14A. 08, p. 14 A-31.
12. By attempting to maintain an action for severance damages for entities that have no ownership or title to the assets being acquired, the Pennichuck Companies are attempting to take the rose without the thorns. The Pennichuck Companies have been organized into legally separate corporations with separate rates, costs-of-service, separate and geographically distinct service territories, limited liability, separate financial statements, and the ability to act independently for all legal purposes. They should not, and cannot as a matter of law, be allowed to simply ignore the existence of separate corporations for the purpose of severance damages, while on the other hand arguing that those entities are entirely distinct on the other. See *e.g.*, Schenley Distillers Corp. v. U.S., 326 U.S. 432, 437, 66 S. Ct. 247, 249 (1946) (“One who has created a corporate arrangement, chosen as a

means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.”).

13. Likewise, neither the Pennichuck Companies nor PWW can recover severance damages for any alleged lost economies of scale or other incidental losses. For example, in the case 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.

14. 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); and 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.

15. A similar result was reached by the California Public Utilities Commission in City of Fresno, 20 CPUC 2d. 502 (1986), where the Commission noted that “[b]asic to any allowance of severance damage ... is the existence of unity of property taken and the property not taken, including *unity of title*, contiguity and unity of use.” Furthermore, the Commission rejected a claim for “severance damages for categories of projected expenses for restoring efficiencies to service company [and related companies]. We have heretofore rejected the contention that [related companies] should be considered as part of an overall larger entity. They are separate entities. No severance damages are allowable ...” *Id.*
16. This Commission has already noted that all of the Pennichuck Companies are separate and distinct and have separate franchises and rate structures. See, e.g. 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.
17. There is, as a matter of law, no basis for an award of severance damages to any of the Pennichuck Companies. PC, as the owner of the stock of PWW, is not “the owner” referred to in RSA 38:9 (III). PC, PWSC, PEU and PAC are not entitled

to an award of severance or other damages because none of their property has been taken.

**B. Pennichuck Water Works, Inc,**

18. Nashua's Petition seeks to acquire all of the assets of PWW. None of the parties have submitted any evidence to support a finding that Nashua should acquire less than the entire PWW system upon a determination that Nashua's Petition is in the public interest. However, even if the Commission were to determine that Nashua should acquire less than the entire PWW system, e.g. only the core assets of PWW, there is no direct harm or severance damages to the remainder. At best, PWW would only suffer lost economies of scale that impact the cost of service. These are incidental and consequential damages that cannot be awarded to PWW under Kennebec Water and South Bay.
19. Each of the various satellite systems of PWW is physically separate and distinct from the others and has its own separate and unique property. The satellites have no tangible connection to the Nashua core except their common ownership. The satellite systems have no physical connection to the Nashua system and have no relationship to them other than those which grow out of common ownership. Any damages PWW could claim would be incidental and consequential. That is not enough.

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

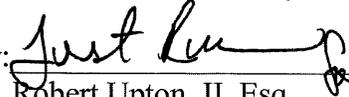
- A. Determine that, under RSA 38:9, III, “the owner” of the assets to be acquired in this proceeding is Pennichuck Water Works, Inc., the same entity as “the utility” which owns plant and property being taken, that is referred to in RSA 38:9 (I);
- B. Determine that, because the Pennichuck Companies are not the owners of the assets to be acquired in this proceeding under RSA 38, they are precluded from seeking severance or other damages;
- C. Determine that PWW is precluded from seeking severance damages as set forth herein;
- D. Exclude all testimony or other evidence seeking severance damages in this proceeding; and
- E. To grant such other and further relief as justice may require.

Respectfully submitted,

**CITY OF NASHUA**

By Its Attorneys

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Date: December 8, 2006

**CERTIFICATION**

I hereby certify that a copy of the foregoing was this day forwarded to all persons on the Commission's official service list in the above proceedings.

Date: *December 8, 2006*

  
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Robert Upton, II, Esquire