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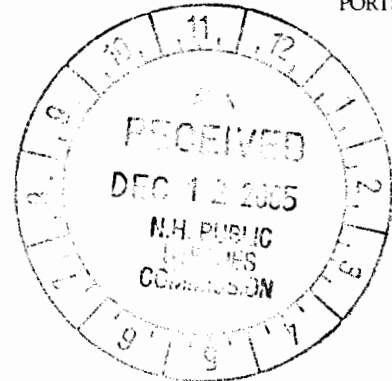
STEVEN V. CAMERINO
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December 12, 2005

OFFICES IN:
MANCHESTER
CONCORD
PORTSMOUTH

By Hand Delivery

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.'s Motion to Bar Late Filed Testimony by Nashua and for Extension of Procedural Schedule. I have e-mailed electronic copies of the Motion for Leave and the Reply to Ann Guinard, as well as served the parties this same day by e-mail and first class mail.

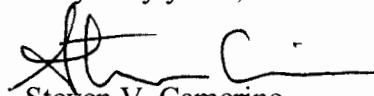
In this Motion, Pennichuck requests that the Commission issue an order barring Nashua from filing testimony on January 12, 2006 on the contractors it intends to hire. Nashua's intention to file that testimony was first disclosed by the City in its objection to the Motion for Summary Judgment filed by Pennichuck in September. However, because that motion and the issues raised by Nashua's stated intention to expand the scope of its January 12, 2006 filing have not yet been ruled upon, it has become necessary for Pennichuck to seek an immediate ruling on the matters set forth in the enclosed motion. In addition, Pennichuck's motion seeks an extension of the time to file its case so that it may complete discovery based on long-outstanding data responses only recently received from Nashua.

Counsel for Pennichuck attempted to seek the assent of the parties to this motion. The City of Nashua and the Town of Litchfield do not assent to the relief sought in this motion. The Staff is not concurring at this time but is actively seeking clarification on certain matters before taking a position. The remaining parties were not able to respond prior to the filing of the motion.

Debra A. Howland
December 12, 2005
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Thank you for your assistance with this matter. Please call me with any questions.

Very truly yours,



Steven V. Camerino

Enclosures

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Docket #: 04-048-1 Printed: December 12, 2005

FILING INSTRUCTIONS:

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

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NASHUA REGIONAL PLANNING COMMISSION
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NASHUA NH 03061

PURSUANT TO N.H. ADMIN RULE 204.04 (C), FILE DISCOVERY

DIRECTLY WITH THE FOLLOWING STAFF

RATHER THAN WITH THE EXECUTIVE DIRECTOR

LIBRARIAN
NHPUC
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BULK MATERIALS:

Upon request, Staff may waive receipt of some of its multiple copies of bulk materials filed as data responses. Staff cannot waive other parties' right to receive bulk materials.

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Docket #: 04-048-1
Printed: 12/12/2005

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

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

Docket No. DW 04-048

**PENNICHUCK WATER WORKS, INC.'S MOTION TO BAR LATE FILED
TESTIMONY BY NASHUA AND FOR EXTENSION OF PROCEDURAL SCHEDULE**

NOW COMES Pennichuck Water Works, Inc. ("Pennichuck" or "PWW") and moves the Commission to issue an order (1) barring the City of Nashua ("Nashua" or the "City") from filing additional public interest testimony as part of its anticipated January 12, 2006 filing in this proceeding and (2) revising the procedural schedule to provide sufficient time for discovery prior to the filing of PWW's entire case based on the ruling in Commission Order No. 24,555, issued December 2, 2005 and on information only recently provided by Nashua in response to Commission Order No. 24,488, issued July 18, 2005. In support of its motion, Pennichuck states as follows.

A. Nashua Should Be Barred From Submitting Additional Public Interest Testimony On January 12, 2006.

1. The procedural schedule for this case was established by agreement of the parties and Commission Staff and was approved by the Commission in its Order No. 24,457 dated April 22, 2005. This schedule was established more than a year after Nashua filed its original petition without any supporting testimony, and only after it was ordered by the PUC to file its testimony on public interest in November 2004. The schedule required Nashua to file its testimony on "valuation" and on "public interest issues *dependent upon valuation*" on October 14, 2005. See Order No. 24,457 at 2. The schedule was later amended, again by agreement of the parties and Commission Staff, to extend the October 14 filing date to January 12, 2006. The amended

schedule was approved by letter dated October 3, 2005 from the Commission's Executive Director.

2. On September 6, 2005, PWW filed a Motion for Summary Judgment based on the Commission's determination in its Order No. 24,488 issued July 18, 2005 that Nashua's case was limited by its stated intention not to operate the water system itself, and that therefore PWW could not pursue discovery of Nashua's experience in operating municipal services. The Motion for Summary Judgment asserted that because Nashua had failed to provide any information regarding the technical and managerial qualifications of its alleged contract operators, Nashua's petition should be dismissed.¹

3. After obtaining an extension of the time to respond, Nashua filed its objection to PWW's motion on October 6, 2005 and, for the first time, stated that it intended to use its upcoming January 12, 2006 filing not just to submit the valuation testimony provided for in the procedural schedule, but also to submit public interest testimony detailing the qualifications of the two contractors it intends to hire—one to operate the Pennichuck water system and the other to oversee the first contractor. See Nashua Objection to Motion for Summary Judgment at 6.²

4. As is set forth in detail in PWW's September 6, 2005 Motion for Summary Judgment and, in particular, in its Reply to Nashua's objection to that motion,³ Nashua's stated plan to file this additional extensive testimony in support of its public interest case is nothing less than a complete overhaul of the testimony that Nashua was required to file over a year ago. Specifically, in its Order No. 24,379 dated October 1, 2004, the Commission set November 22,

¹ To date, the Motion for Summary Judgment has not been ruled upon.

² Recently, Nashua's counsel has confirmed to PWW's counsel that Nashua intends to file testimony regarding these two contractors as part of its January 12, 2006 valuation testimony.

³ Rather than restate the arguments set forth in those pleadings, PWW incorporates them by reference.

2004 as the date for Nashua to file its "testimony on its technical, financial and managerial capability to operate the public utilities."

5. That order was more than a mere request by the Commission that Nashua provide a partial look at Nashua's plan to take the water systems owned and operated by PWW. It was issued in response to Pennichuck's motion to dismiss given Nashua's failure to comply with the Commission's rules requiring testimony in support of any petition filed with the Commission. In particular, during oral argument before the Commission on July 28, 2004 on its motion to dismiss, counsel for PWW set out with specificity the company's concerns about the problems that had already been created by Nashua's failure to file any testimony as required:

The Commission's requirement for filing testimony is a lot more than a mere technicality just to be ignored at Nashua's whim. And, that's particularly true in an eminent domain case like this one. Pennichuck and the public are entitled to know what assets is it that Nashua is trying to take? How much does Nashua think those assets are worth? And, what's the basis for that determination of value? On what basis does Nashua claim it's in the public good for that city to operate water systems in places like Gilford, Bow, Newmarket, Merrimack? **And, what basis does Nashua claim to have the ability to operate a regional utility as well or better than the Pennichuck utilities have?** Is Nashua going to keep the utility assets or will it turn them over to the regional district? In fact, who is it that Nashua proposes is going to operate the utility systems in all of these communities?

Transcript at 43(emphasis added). The Commission subsequently ruled that "we agree that Nashua has not filed testimony as required by Puc 202.11(a) and 204.01(b)." Order 24,379 at 11. However, rather than dismiss Nashua's petition, the Commission gave Nashua until November 22, 2004 – essentially, a second chance - to file its public interest testimony. *Id.*

6. Lest there be doubt as to whether the Commission intended that Nashua's public interest case should include testimony regarding Nashua's ability to operate the water system, the Commission's order expressly "require[d] Nashua to file testimony on its technical, financial and managerial capability to operate the public utilities as requested and how the public interest

would be served by the taking." Id. Moreover, the procedural schedule approved by the Commission in Order No. 24,457 expressly stated that the discovery to be conducted by PWW during the period leading up to the January 12, 2006 testimony should focus on Nashua's "technical, managerial and financial capabilities." Order No. 24,457 at 1-2. There simply is no reasonable interpretation of the Commission's orders that would support Nashua's view that it was not required to file testimony on its or its intended contractor's qualifications to operate a utility by November 22, 2004.

7. Nashua's November 22, 2004 public interest filing was plainly superficial, and apparently Nashua hoped it would be enough to keep this case alive for a period of time. The filing consisted of the written testimony of five witnesses. Rather than provide any information regarding the potential operator or operators of the water system, however, Nashua chose to rely on testimony regarding its own experience providing municipal services to its citizens, testimony that it later agreed should be stricken.

8. At no time prior to or after filing its November 2004 public interest case did Nashua indicate that it would need to make a supplementary filing to establish its technical and managerial capability to operate the water system. It could have done so through a motion for reconsideration of Order No. 24,379 issued October 1, 2004, but it did not. It could have done so on April 12, 2005 when it agreed to the initial procedural schedule in this case, but it did not. It could have done so again through a motion for reconsideration when that schedule was approved in Commission Order No. 24,457 issued April 22, 2004, but it did not. And it could have done so when the procedural schedule was later revised by agreement and approved by letter from the Executive Director on October 3, 2005, but it did not.

9. PWW anticipates that Nashua will argue that information regarding its contractors relates to its valuation case because Nashua needed information regarding the contractors' contract pricing to complete its valuation. Even if the contractors' pricing were relevant to the valuation being performed by Nashua, which is dubious at best, the contractors' testimony is not dependent on the valuation. To the contrary, if Nashua were correct, its valuation would be dependent on the contractors' pricing, not the other way around. There is simply no reason that Nashua could not have filed the testimony regarding its contractors months ago, particularly the information regarding the contractors' qualifications.⁴ The only reason for the delay is that Nashua waited over two years after beginning the eminent domain process to move forward in identifying the contractors.

10. It is time for Nashua to proceed with this case in accordance with the established rules and orders of this Commission and the schedule to which Nashua itself has agreed. PWW, the Commission and the many parties to this case are entitled to know the basis for Nashua's claim that it should be allowed to take an entire utility by eminent domain, rather than waiting for that case to unfold piece by piece over a period of years. The condemnation of an enterprise as significant as a water utility that serves over 24,000 customers throughout the Southern and Central portions of this state and employs close to 100 people should not be treated as if it were a game in which the rules are constantly rewritten.

11. The procedural schedule in this case contemplated that PWW would submit its entire case on January 12 having had the benefit of receiving Nashua's entire public interest case and having taken multiple rounds of discovery on it. The purpose of this requirement was that PWW, and other parties supporting PWW's position, could respond to Nashua's public interest

⁴ As set forth in detail in PWW's Motion for Summary Judgment, Nashua was capable of hiring contractors prior to filing this case. This is borne out by the fact that Nashua issued its request for qualifications for potential contractors before discovery even began in this docket.

case in their initial filing. If Nashua were now allowed to heavily supplement, indeed rewrite, its prior filing on this critical issue, it would severely undermine PWW's ability to file a complete and meaningful response as contemplated by the schedule on issues that go to the heart of this case.

12. For the foregoing reason, Nashua should be barred from submitting any testimony regarding the contractors that it claims it will hire, and its January 12, 2006 filing should be limited to testimony on the issues identified in the approved procedural schedule. If the Commission determines that Nashua may file additional public interest testimony as proposed, PWW alternatively requests that the procedural schedule be adjusted to permit PWW to take discovery on Nashua's complete public interest case prior to filing its own case. If the Commission decides to order this alternative relief, PWW requests that the Commission schedule a procedural hearing to be held as soon as possible to establish a new procedural schedule with the purpose of enabling PWW to conduct discovery on Nashua's new testimony as was originally contemplated.

13. It is critical that the Commission consider and rule on this motion as soon as possible, and at least prior to January 12, in order to avoid unnecessary time and expense of all of the parties. For example, the first round of data requests on the January 12 testimony is due only 14 days after it is filed. Without a ruling on this issue now, the parties will be forced to undertake significant effort and expense to address testimony that was not contemplated by the procedural schedule. Thus, in an effort to conserve the resources of the parties and the Commission, PWW requests that the Commission promptly issue an order barring Nashua's testimony or ordering that a new procedural schedule be established.

B. PWW's January 12, 2006 Filing Date Should Also Be Postponed Because PWW Is Entitled to Further Discovery.

14. The procedural schedule has become further complicated by Nashua's failure to promptly produce information in response to the Commission's July 18 order on PWW's motion to compel, and the Commission's December 2, 2005 order on the rehearing motions.

15. Specifically, although the Commission ordered Nashua to respond to a number of data requests from PWW regarding Nashua's ability to perform billing and collection services for the water utility (see Order 24,488 dated July 18, 2005), Nashua did not produce those responses until November 22, 2005. Promptly after receiving those data responses, PWW requested the depositions of the certain individuals identified by Nashua. Although Nashua has indicated a willingness to make those individuals available to be deposed, to date it has not done so.

16. In addition, Commission Order No. 24,555, dated December 2, 2005, reversed a prior ruling by the Commission and ordered that PWW be allowed to conduct discovery regarding whether Nashua had or has an intent to complete the eminent domain process. Again, PWW has indicated to Nashua that it will need to resume the depositions of certain individuals in order to conduct this discovery, but Nashua has indicated that it is not available for those depositions now.

17. The issues identified above are critical to PWW's ability to respond to Nashua's public interest filing and are necessary for PWW to make its filing that is currently scheduled for January 12. Therefore, PWW proposes that it be allowed a sixty (60) day extension to file its case so that it may incorporate the results of such discovery in its testimony that is now due on January 12, 2006.

WHEREFORE, Pennichuck respectfully requests that the Commission:

A. Bar Nashua from submitting testimony regarding the contractors it proposes to engage to operate or oversee the water system and any other public interest testimony not dependent on valuation, or alternatively, immediately schedule a technical session to develop a new procedural schedule should the Commission permit Nashua to file any testimony on its contractors' qualifications;

B. Order that the procedural schedule in this case be amended to provide PWW and those who are filing testimony in support of PWW an additional 60 days to complete discovery on Nashua's public interest case as currently filed such that the filing date for PWW's entire case (and those in support of PWW) is extended to March 13, 2006; and

C. Grant such other and further relief as the Commission deems just and reasonable.

Respectfully submitted,

Pennichuck Water Works, Inc.

By Its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: December 12, 2005

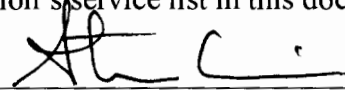
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Certificate of Service

I hereby certify that on this 12th day of December, 2005, a copy of this Motion has been forwarded to the parties listed on the Commission's service list in this docket.

A handwritten signature in dark ink, appearing to read 'St. Camerino', is written over a horizontal line.

Steven V. Camerino