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August 15, 2005

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 for Reconsideration and/or Rehearing Regarding Order No. 24,488. I have e-mailed an electronic copy of the Motion to Ann Guinard, as well as served the parties this same day by e-mail and first class mail.

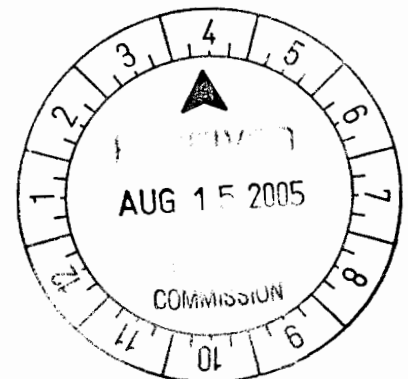
The Staff concurs with the Motion; Mr. Teeboom does not object to it; the Merrimack Valley Regional Water District, the City of Nashua, the Town of Amherst, and Barbara Pressly do not concur. I was unable to reach the remaining parties to determine their position prior to this filing.

Thank you for your assistance with this matter. Please call me with any questions.

Very truly yours,

Thomas J. Donovan

cc: Service List
Donald Correll, CEO and President



**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 FOR RECONSIDERATION
AND/OR REHEARING REGARDING ORDER NO. 24,488**

Pennichuck Water Works, Inc. ("PWW") respectfully requests that, pursuant to RSA 541:3, the Commission reconsider or conduct a rehearing regarding its Order No. 24,488 ("Initial Order") regarding PWW's motion to compel the City of Nashua to respond to PWW's Data Requests ("Motion to Compel Nashua") in the above-captioned proceeding. In its Initial Order, the Commission refused to compel Nashua to respond to a number of data requests relating to the City's municipal wastewater and solid waste operations (Data Requests 1-56, 57, 127, 130-136, 139-144 and 164) and events prior to November 26, 2002 (Data Request 1-120). Because these data requests seek information that is relevant or are reasonably calculated to lead to the discovery of admissible evidence, the Initial Order was in error and should be reconsidered. Re Investigation into Whether Certain Calls Are Local, 86 NHPUC 167 (2001).

I. Data Requests Relating to City Services

The City of Nashua began this case in March 2004, seeking to take all of PWW's assets. On October 1, 2004, in its Order No. 24,379, the Commission ordered Nashua to file its direct case, stating:

On the need for testimony, we agree that Nashua has not filed testimony as required by Puc 202.11(a) and 204.01(b), but we will not dismiss Nashua's Petition for

Valuation on the basis of that omission. Rather, we will require 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...Nashua's testimony will be due no later than November 22, 2004.

Order No. 24,379 at 11 (emphasis added).

In response to the Commission's order giving it additional time to file its testimony, Nashua submitted the prefiled testimony of four witnesses on November 22, 2004. Included in that filing was direct testimony from Brian McCarthy (President of the Nashua Board of Aldermen), Steven Adams (a municipal bond witness) and Philip Munck (a consultant advising the City on operation of the water system). The testimony, which presumably was intended to address the issues identified in Commission Order No. 24,379, set forth the City's public interest case and expressly relied on the City's experience in operating other municipal services as one of the primary bases to substantiate the City's position that it would have the technical, financial and managerial capability to operate the PWW water system. As shown below, these witnesses' reliance on the City's prowess in the conduct of its other municipal services consisted of far more than a mere passing reference.

Q. DOES THE CITY HAVE THE TECHNICAL CAPABILITY OF OWNING AND OPERATING A WATER UTILITY?

A. Yes. Nashua is the second largest City in NH and interestingly the only City in the State which does not own its water system. It provides all the municipal services of a large, urban municipality, including but not limited to wastewater collection and treatment, storm water collection, streets and highways, solid waste disposal and police and fire departments. Moreover, Nashua owns and manages a large and complex physical plant, including but not limited to, a city hall, schools, a public works building, a police station, fire stations and a wastewater treatment plant. This physical plant has a value of approximately \$300 million (as compared to the \$85 million of value of the Pennichuck assets the City seeks to acquire.) Nashua provides all of these services and performs all of these functions through a capable and professional staff. The City is also in a better position than an investor owned utility to implement a water conservation program. Water conservation is an important priority for the City. Finally, as I will discuss in

greater detail below, the City intends to contract out the day-to-day operation of the system and management oversight to skilled operating companies.

Direct Testimony of Brian S. McCarthy at 9-10.

- Q. What does the bond market look for in municipal revenue bonds backed by the revenues of a municipally owned utility?
- A. ...Management can be broken down into two main areas: financial management and operating management. As for the financial management, the City of Nashua already has the necessary expertise in place to serve these functions. The City owns and operates a very successful wastewater utility. All of the required areas of financial management that are required for an investment grade credit rating can easily be assimilated into the City's current management structure. For example, the City already bills and collects funds; invests funds; prepares budgets and audits and all other necessary functions with regard to financial management.

Direct Testimony of Steven A. Adams at 4-5.

- Q. Does the City of Nashua have the managerial capability to own and operate a water utility?
- A. Yes it does. Ownership and operation of a water utility is a common form of municipal function. Local governments as large as New York City and Los Angeles and as small as Epping, New Hampshire, successfully own and operate water utilities. Nashua is the only city in New Hampshire that presently does not own its water utility. As with all other municipal functions, there are levels of management responsibility. It falls to the elected leadership of the City to establish broad policy and to exert financial control by adopting budgets and setting rates. It exerts detailed control by engaging competent professional management to run the system according to City policy. Nashua has determined that it will contract out the operation and maintenance and management oversight of the water system it acquires to skilled operating and management companies.
- Q. Is the City's proposal to contract for operation of the water utility a reasonable approach?
- A. ...Most of the municipal water systems in the United States are staffed and operated by dedicated public employees. Nashua's sewer collection and treatment utility is such an operation and Nashua, if it desired, could readily combine the sewer and water systems and operate them as one. ...

Direct Testimony of Philip L. Munck at 2-3.

As the foregoing plainly demonstrates, the City itself put its operation of other City services in play by relying on its experience in those areas as supporting proof of its ability to own and operate a drinking water system. During the course of discovery in this case, the City has continued to point to its wastewater operations as evidence of its ability to operate a municipal water utility. At his July 26, 2005 deposition in this matter, Nashua's Mayor stated:

...our wastewater treatment plant is one of the best in the country. We've received four national honors this past year for the operation of it. They're a very successful and very environmentally conscious wastewater treatment facility. And that is, in my mind -- and again, I'm not an engineer, but I think it's far more technological to treat wastewater than it is to take water out of the ground, chlorinate it and sell it.

Streeter Deposition at 62, attached hereto as Exhibit A.

Now that PWW seeks to inquire into Nashua's professed success at operating other municipal services at a reasonable cost to the public, Nashua hopes to put that subject beyond the scope of this proceeding. Nashua claims that because it plans to contract out operations of the water utility, the City's success or failure in operating other city services has no relevance to this case. Nashua made these assertions regarding its claimed success in operating its other municipal services as part of its attempt to meet its burden of proof as the condemnor in this case. Yet now, faced with the obligation of responding to discovery on the case it put forward, Nashua seeks to hide behind the cloak of contracts that do not exist with parties who have not been identified. PWW has been severely disadvantaged in developing its defense to Nashua's eminent domain petition because it has not been allowed discovery on the critical issues that go to the heart of Nashua's proof in this matter.

Plainly, the City's own filings in this case make PWW's data requests regarding Nashua's operation of its municipal services highly relevant. N.H. Code of Admin. Rule Puc 204.04(a) provides that "[t]he staff or any party shall serve upon any other party or the staff, data requests,

which may consist of a written interrogatory or request for production of documents, as necessary to evaluate a petition, application or testimony." (Emphasis added.) What PWW seeks in this case is precisely what Puc 204.04(a) allows--discovery from Nashua necessary to evaluate its case and, in particular, the claims made by Nashua itself in its testimony. In its Order No. 24,489 (which is the subject of a separate Motion for Reconsideration), the Commission denied PWW the right to ask parties who had not submitted testimony about matters that are relevant to Nashua's petition in this proceeding. In its Order No. 24,488, on the other hand, the Commission has also denied PWW the right to ask Nashua itself about matters raised in Nashua's own testimony. The Commission's orders, particularly when their combined effect is considered, unduly circumscribes the discovery process and thereby unfairly restricts PWW's ability to demonstrate the failings of Nashua's public interest assertions.

As the Commission has itself held, discovery requests should be denied only when the Commission "can perceive of no circumstance in which the requested data will be relevant." Petition for Authority to Modify Schiller Station Order on Pre-Hearing Motions, 2004 N.H. PUC LEXIS 38, *7, DE 03-166, Order No. 24,310 (2004) (emphasis added). Moreover, the purpose of discovery is "to narrow the issues of the litigation ... and prevent unfair surprise by making evidence available in time for both parties to evaluate it and adequately prepare for trial." Kearsarge Computer, Inc. v. Acme Staple Co., 116 N.H. 705, 366 A.2d 476 (1976) (citations omitted). A party is entitled to "be fully informed and have access to all evidence favorable to his side of the issue." Scontsas v. Citizens Insurance Co., 109 N.H. 386 (1969). The discovery sought by PWW is plainly calculated to lead to the discovery of admissible evidence, and failure to allow it to inquire into an issue directly put in play by the City would result in a denial of due

process. For the foregoing reasons, PWW requests that the Commission reconsider its Order No. with regard to Data Requests 1-56, 57, 127, 130-136, 139-144 and 164.

II. Data Request Relating to Events Prior to November 26, 2002

The Initial Order also erroneously denied PWW's Motion to Compel Nashua with regard to Data Request 1-120 "as it relates to documents prior to November 22[sic], 2002 or the Philadelphia Suburban Corporation's attempted acquisition of PWW." The Commission's order is arbitrary because it simply assumes that if information predated November 26, 2002², it can have no relevance to this proceeding and cannot lead to the discovery of admissible evidence. There is no basis in fact for this conclusion, particularly given the chronology of the City's decision-making process.

It is highly likely that prior to November 26, 2002, the date that the Nashua Aldermen voted to proceed with a taking of PWW's assets, there was consideration of whether such a taking was in the public interest. For example, information about why the Board of Aldermen believed that it was in the public interest for the City to own a water utility, factors that may have indicated that such a taking was not in the public interest, and information weighing the pros and cons of the taking are all relevant to the Commission's public interest determination in this case. What PWW seeks is not information about the PSC transaction, but rather information about what gave rise to the City's consideration of pursuing a taking under RSA Chapter 38. That the City's decision to pursue a taking occurred during the context of the PSC transaction does not render such information irrelevant to this proceeding. By arbitrarily cutting off discovery prior to this date, the Commission is limiting PWW's right to inquire fully on public interest issues that

² The Commission's order inadvertently refers to November 22, 2002, when Nashua's objection to Data Request 1-120 refers to "any document relating to any matter prepared or generated prior to the November 26, 2002 vote of the Board of Alderman."

go to the heart of this case. The Commission should allow PWW to inquire into these issues, and should make determinations about the admissibility of any such information at the time of the hearing.

In addition to being arbitrary, the Commission's order is contrary to the Superior Court's directive that "the City's alleged bad faith, improper motive and lack of intent to follow through with the acquisition obviously are matters that would have a significant bearing on the question of whether the proposed condemnation is in fact in the public interest. As such, these issues can be raised by Pennichuck before the PUC." Hillsborough County Superior Court, Southern District, Order in Docket 04-C-169 at 4.

As Superior Court Chief Justice Lynn ruled in his November 30, 2004 order, PWW is entitled to discovery on Nashua to determine whether the City has embarked on its eminent domain efforts in bad faith, rather than based on a good faith belief that it is in the public interest to take PWW's assets. PWW believes that communications among the Mayor and Nashua aldermen and others relating to the Philadelphia Suburban transaction as well as other communications prior to November 26, 2002 are likely to show that Nashua's representatives did not believe that they could provide the same service to the public as PWW provides, that Nashua was seeking to stop the Philadelphia Suburban transaction but believed that PWW (not Nashua) was the best party to operate the utility, and that such information will undermine the City's current claim that it believes that taking PWW's assets would be in the public interest. Moreover, PWW believes that discovery of such communications will reveal that the City's plan was to proceed with eminent domain only if it could pressure PWW into capitulating at an unreasonably low price or early in the eminent domain process, rather than based on a sincere belief that municipal ownership of a regional utility was good for customers of the utility. To

simply prohibit PWW from any discovery of such matters because they may also relate to other legal claims that PWW has against the City is arbitrary, does not comport with the standard for determining whether to permit discovery and would be clearly erroneous.

IV. Conclusion

For the foregoing reasons, PWW respectfully requests that the Commission grant this Motion for Reconsideration and/or Rehearing and compel the City of Nashua to respond to PWW's data requests.


Respectfully submitted,

Pennichuck Water Works, Inc.

By Its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: August 15, 2005

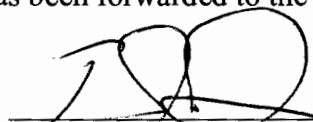
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Certificate of Service

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

Dated: August 15, 2005


Thomas J. Donovan

STATE OF NEW HAMPSHIRE
PETITION FOR VALUATION PURSUANT TO RSA 38:9

CITY OF NASHUA

Docket No. DW-04-048

DEPOSITION of BERNARD A. STREETER

Taken by Notice at the offices of the Nashua City Hall, 229 Main Street, Nashua, New Hampshire, on Tuesday, July 26, 2005, commencing at 2:31 in the afternoon.

Court Reporter: Marcia G. Patrisso,
Certified Shorthand Reporter
NH CSR No. 83 (RSA 331-B)
Registered Professional Reporter
Certified Realtime Reporter

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1 Q. Are you aware of any person employed
2 in the city who has expertise on drinking water
3 systems?

4 A. We're not in the business of -- at
5 present, and I haven't checked the resumes of
6 everyone who works for the city. There conceivably
7 could be cities in our wastewater treatment plant
8 who have some experience in that, although I'm not
9 aware of it. But I will say that our wastewater
10 treatment plant is one of the best in the country.
11 We've received four national honors this past year
12 for the operation of it. They're a very successful
13 and very environmentally conscious wastewater
14 treatment facility. And that is, in my mind -- and
15 again, I'm not an engineer, but I think it's far
16 more technological to treat wastewater than it is to
17 take water out of the ground, chlorinate it and sell
18 it.

19 Q. Nashua does have an issue, and in
20 fact, is subject to EPA orders with respect to its
21 storm water runoff, correct?

22 A. Yes. We do. Yes.

23 MR. UPTON: Objection. Objection. I