

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Pennichuck Water Works, Inc.

Docket No. DW 10-091

JOINT PRE-FILED DIRECT TESTIMONY OF
BONALYN J. HARTLEY AND DONALD L. WARE
Regarding Recovery of Eminent Domain Defense Costs

November 8, 2010

1 **I. Background and Qualifications**

2 **Q. Please state your names and positions with Pennichuck Water Works, Inc.**

3 A. We are Donald L. Ware, President, and Bonalyn J. Hartley, Vice President
4 Administration and Regulatory Affairs of Pennichuck Water Works, Inc. (“PWW” or the
5 “Company”).

6 **Q. Have you previously filed testimony in this case?**

7
8 A. Yes. On May 7, 2010, we each filed testimony in support of the Company’s request for
9 temporary and permanent rates in this docket. Our educational background and
10 qualifications are set forth in that testimony.

11 **Q. What is the purpose of your testimony?**

12 A. The purpose of this testimony is to present information regarding the expense incurred by
13 the Company to defend the City of Nashua’s eminent domain effort in DW 04-048 (the
14 “Defense Costs”) and in support of the Company’s request to recover the Defense Costs
15 in this docket.

16 **Q. What was your involvement with the Company in the defense of the eminent
17 domain matter?**

18 A. We were closely involved as part of the management team that worked on the case and
19 were witnesses on the Company’s behalf in DW 04-048.

20 **Q. What is the total amount of Defense Costs the Company seeks to recover?**

21 A. The Company is seeking to recover \$5.1 million.

22 **Q. Does this differ from the amount of expense contained in the Company’s initial
23 filing in this case?**

1 A. Yes. The Company's May 7, 2010 rate case filing included \$5.3 million in Defense
2 Costs. The Company has reduced that amount to \$5.1 million in order to limit its request
3 to those costs that relate directly to defense of the eminent domain case. The Company
4 removed from the amount included in its initial filing costs such as those associated with
5 Pennichuck Corporation's board meetings relating to eminent domain matters and other
6 less direct expenses it incurred relating to eminent domain.

7 **Q. How did the Company decide which expense to include in its request for recovery?**

8 A. Consistent with the Commission's Order No. 24,465 in DW 04-056, the Company is
9 limiting its request for recovery to expenses incurred after March 25, 2004, the date on
10 which the valuation petition was filed by the City. Order 24,465 at 12. In addition to the
11 excluded amounts described above, the Company is not seeking recovery of expenses
12 associated with public relations activities, legislative efforts associated with the passage
13 of the special legislation related to a potential acquisition of Pennichuck Corporation
14 stock, Superior Court litigation, and other matters outside DW 04-048, even though they
15 were very much a part of the Company's efforts to defend itself against Nashua's efforts
16 to take the Company by eminent domain.

17 **Q. Please describe the Defense Costs for which the Company seeks recovery.**

18 A. The Defense Costs for which the Company seeks recovery are itemized in Exhibit
19 BJH/DLW-1. This exhibit provides a summary schedule showing the amount of expense
20 by category and year-by-year schedules detailing the invoices by vendor. This expense
21 predominantly consists of legal expense and expense associated with expert witnesses in
22 DW 04-048. Of the \$5.1 million in expense, \$3.6 million was for legal costs, \$1.1

1 million was for expert witness costs, and approximately \$0.4 million has been
2 categorized as “other” services.

3 **Q. Please describe the legal costs incurred.**

4 A. The Company engaged three law firms to provide legal advice in association with the
5 defense of DW 04-048, with each firm having different responsibilities. McLane, Graf,
6 Raulerson & Middleton, Professional Association was the Company’s lead counsel,
7 responsible for overall strategy and litigation, particularly as it pertained to the public
8 interest portion of the case. Baker, Donelson was engaged to handle valuation issues. In
9 addition, given Baker, Donelson’s national eminent domain practice, they were asked to
10 consult as needed on other issues as well. Nutter, McLennan and Fish was engaged to
11 provide advice regarding securities law and federal tax issues associated with the
12 proposed taking of the Company’s assets.

13 **Q. Why was it necessary to hire three law firms?**

14 A. The taking of a company’s assets is the equivalent of the corporate death penalty. A
15 taking of all of the assets of Pennichuck Water Works would put the Company out of
16 business, which would have an immense impact on its sole shareholder, Pennichuck
17 Corporation. As explained in the eminent domain case in detail, a successful taking of
18 Pennichuck Water would, in all likelihood, have led to the liquidation of Pennichuck
19 Corporation, and, in fact, at one time Nashua had targeted all three of Pennichuck
20 Corporation’s utility subsidiaries for eminent domain, but the Commission ruled that
21 Nashua did not have any legal authority for its attempt to take Pennichuck East Utilities
22 (“PEU”) or Pittsfield Aqueduct Company (“PAC”). Given the complex nature of the
23 issues in the case, the immense scope of the case and the extent of the threat that it posed

1 to the Company's existence, it was necessary for the Company to obtain the best legal
2 representation it could under the circumstances to defend its franchise and property
3 rights.

4 **Q. What types of services did legal counsel provide?**

5 A. The Company's legal counsel was involved in all aspects of the Company's defense of
6 DW 04-048, including developing and carrying out a defense strategy, and presenting
7 that in the proceeding at the Commission, in addition to efforts to resolve the litigation.
8 The following is a brief summary of the types of legal services provided by the
9 Company's counsel:

10 McLane, Graf, Raulerson & Middleton, Professional Association: The McLane
11 firm was the Company's lead counsel in defense of the City's eminent domain
12 action. Because of their broad experience with the Company, the Commission's
13 processes and New Hampshire regulatory and general law, McLane was given
14 overall responsibility for representing the Company at the Commission. This
15 included handling all hearings and technical sessions, developing the overall legal
16 strategy for the case, determining the evidence to be presented and how to
17 respond to the case put forward by the City and other parties, participating in all
18 aspects of the docket, and litigating the case to conclusion. In addition, the
19 McLane firm was actively involved in efforts to settle the eminent domain matter
20 with the City of Nashua.

21
22 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC: The Baker firm was
23 hired to assist in all legal issues associated with the valuation of the Company's
24 assets given Baker's extensive experience in water company valuation issues.
25 Baker participated in all aspects of the real estate issues in the eminent domain
26 action, including hearings, discovery, the view, and the litigation of the case.
27 Baker helped develop the overall approach to valuation and coordinated the
28 numerous expert witnesses that were necessary to conduct the different valuation
29 methods recognized under New Hampshire law. The Baker firm also provided
30 trial support services in support of the "electronic courtroom" that was employed
31 and which was critical to the efficient conduct of the trial.

32
33 Nutter, McClennen & Fish, LLP: The Nutter firm provided securities and federal
34 tax law advice to Pennichuck Corporation relating to the City's eminent domain
35 action, including preparation and review of public disclosures required by
36 securities laws, as well as assisted in legal issues relating to a potential settlement.
37 Nutter's work included consideration of complicated tax and securities law issues

1 given the City's interest in purchasing stock as a method to amicably resolve DW
2 04-048.

3
4 **Q. Do the Defense Costs include any other legal expense?**

5 A. Yes. The Company hired other counsel on an as-needed basis to address specific issues
6 in the case. The Company engaged Mark Puffer of Preti Flaherty on a consulting basis to
7 address specific issues relating to municipal law and bonding issues that had been raised
8 by the City. It hired Arthur Greene of Greene Lombardi Group because of his special
9 prior experience in New Hampshire valuation cases, including a number of utility
10 property cases involving the City's lead expert, George Sansoucy.

11 **Q. Please describe the expert witness expense.**

12 A. The Company engaged nine¹ outside witnesses to testify on its behalf in DW 04-048.
13 These witnesses included: Robert Reilly (valuation), John Guastella (valuation), Richard
14 Riethmiller (valuation), Harold Walker (valuation), Russell Thibeault (valuation),
15 Douglas Patch (public interest and valuation), John Joyner (public interest), and Eileen
16 Pannetier (public interest). Each of these witnesses provided pre-filed direct testimony.
17 Messieurs Reilly and Guastella provided update testimony, and Messieurs Riethmiller
18 and Reilly provided reply testimony. Given that this testimony is on file at the
19 Commission, we will not summarize that testimony here but incorporate it by reference
20 regarding its subject matter and the nature of the services provided by each witness. If
21 necessary, counsel for the Company will request that official notice of the testimony be
22 taken, so it is part of the record in this case.

23 **Q. Please explain why each of these witnesses was necessary to the Company's defense**
24 **of the eminent domain action.**

¹ The Company filed testimony of R. Kelly Myers but is not seeking recovery of that expense as that testimony was withdrawn.

1 A. Mr. Reilly was the Company's lead valuation witness, providing an in-depth analysis of
2 the value of the Company's assets based on the accepted methods of valuation under New
3 Hampshire law. In order to conduct this valuation, Mr. Reilly needed an inventory of all
4 of the Company's assets, which was conducted by Mr. Walker at Gannett-Fleming, a
5 study of the extent to which the Company's distribution system had depreciated, which
6 was conducted by Mr. Riethmiller, and an appraisal of the value of the Company's land
7 and cross country easements, which was conducted by Mr. Thibeault. Mr. Guastella
8 developed the revenue requirement that would be required by the City of Nashua if it
9 were to acquire the Company's assets at the value established by Mr. Reilly, which was
10 important in understanding the potential rate impact of the taking. Mr. Guastella also
11 performed a detailed analysis of the impact of a taking of Pennichuck Water Works on
12 rates charged to customers of PEU and PAC. Mr. Patch testified on the role the
13 Company has played as the dominant investor-owned water utility in the state, and the
14 negative impact that the taking of the Company would have on the public interest. Mr.
15 Joyner addressed Veolia's history with public-private partnerships and his assessment of
16 the proposed Veolia-Nashua contract. Ms. Pannetier provided testimony on the
17 Company's management of its watershed, a key issue raised by the City in its articulation
18 of why the taking was in the public interest, as well as actions that the City had taken that
19 affected that watershed. The testimony of each of these witnesses was necessary not only
20 to the Company's defense against the City's taking, but also to the Commission's
21 determination of whether the taking was in the public interest and, if so, in setting the
22 value of those assets.

1 **Q. The summary of the Defense Costs refers to “other” services. Please explain this**
2 **category.**

3 A. These services are varied in nature and all relate to providing the support necessary to
4 defend against the City of Nashua’s taking effort. They include stenographer services
5 associated with the PUC hearings and depositions taken during discovery which was
6 shared equally with the City of Nashua (and thus the Company’s request includes only
7 half this expense), mail and courier charges from the Company to witnesses and its
8 counsel, mileage for Company witnesses, temporary labor hired by the Company to assist
9 with administrative support, labor expense associated with Roland Olivier, the
10 Company’s in-house attorney who provided legal advice directly to the Company’s
11 management and oversaw the efforts of outside counsel regarding the appellate process,
12 costs associated with the data room established to handle the voluminous discovery
13 materials requested in DW 04-048, and Hayner/Swanson surveyors which developed
14 plans and displays of the Company’s property that was subject to the City’s taking effort.
15 All of the “other” services were directly necessary to the Company’s defense of the
16 eminent domain action.

17 **Q. How has the Company been accounting for this expense?**

18 A. The Company has been booking the expense to Account 186 as required by the
19 Commission in Order 24,465. In that order, the Commission held that:

20 At the conclusion of Docket No. 04-048, Pennichuck shall submit all expenses
21 booked in the deferred account to the Commission for audit and review. At that
22 time, we will consider, among other things, the expenses that may be recovered,
23 whether particular expenses were reasonably and prudently incurred, the
24 appropriate allocation of expenses among the parent and its subsidiaries and the
25 mechanism for recovery. For the foregoing reasons, we find creation of the
26 deferred account reasonable and we will approve this accounting treatment of

1 Pennichuck's expenses related to its defense against Nashua's eminent domain
2 proceeding in Docket No. DW 04-048.

3
4 Order 24,465 at 12-13.

5 **Q. What is the basis for the Company's recovery of the Defense Costs?**

6 A. The Company's Defense Costs were reasonable and prudent expenditures necessary to
7 defend and protect the Company's franchise and property rights. Under RSA Ch. 38,
8 whether the taking is in the public interest is a question of fact for the Commission to
9 determine. In this case, there were complex issues of fact and law for the Commission to
10 consider in making its determination on the City's condemnation petition, including
11 whether the City was legally entitled to take assets disconnected from the Core system,
12 whether the City was legally entitled to take the assets of affiliates and whether it was in
13 the public interest for the City to own and operate a water utility well outside its
14 municipal bounds, as well as issues relating to the value of the Company's assets.
15 Further, the costs incurred as part of the settlement process were consistent with long-
16 standing Commission policy that favors settlements and were incurred in an effort to
17 resolve the case in a manner that met the concerns of all stakeholders.

18 **Q. Why did the Company engage so many outside service providers, given that so**
19 **many of the issues in the case involved matters in which the Company's senior**
20 **management has knowledge and expertise?**

21 A. First, we have to stress that both of us and numerous other members of the Company's
22 management team were closely and extensively involved in supporting the eminent
23 domain defense team. The data and other information that was required to prepare our
24 case and respond to the extraordinary demands of the discovery requests served on the
25 Company by Nashua and other parties in the case required immense amounts of time and

1 placed extreme pressures on the Company. Second, while this should go without saying,
2 the Company is staffed to meet the needs of running its utility business on a daily basis.
3 The Company had to do what was necessary to ensure that, while it aggressively tried to
4 defend itself from Nashua's attack on its existence, it continued to deliver the highest
5 level of water service to the public. There was simply no way the Company could do
6 both of those things at the same time without bringing on a team of experienced
7 professionals to put together and present the eminent domain case.

8 **Q. From whom is the Company seeking recovery of the Defense Costs?**

9 A. The Company is requesting that the Commission authorize the recovery of its Defense
10 Costs from all customers of Pennichuck Water Works, Inc. The Company believes
11 recovery of these costs from all customers is appropriate because the taking related to all
12 of the Company's assets and the Commission's public interest finding related to all of the
13 Company's service territories, not just Nashua.

14 **Q. Why isn't the Company seeking recovery of the Defense Costs from the customers
15 of PEU and PAC?**

16 A. The Commission excluded the assets of PEU and PAC early in the case. *See* Order
17 24,425. The taking litigation ultimately related to the assets of Pennichuck Water Works
18 only, and therefore the Company did not believe it was appropriate to seek recovery of
19 the costs of defending Pennichuck Water's rights from customers of its affiliates.

20 **Q. Is this request for recovery of the Defense Costs conditional in any way?**

21 A. No. However, if the City completes the taking or otherwise acquires the Company
22 through a consensual transaction, this request for recovery may become moot. The

1 Company expects that it will be known in advance of the hearing on the merits in this
2 case whether or not the City intends to acquire the Company.

3 **Q. Does this conclude your testimony at this time?**

4 A. Yes.