

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION  
DW 11-026

Re: City of Nashua Acquisition of Pennichuck Corporation

BRIEF OF THE TOWN OF MERRIMACK IN SUPPORT OF ITS REQUEST FOR A  
CONDITION UPON ANY APPROVAL OF THE ACQUISITION

Merrimack respectfully submits that the public interest requires that any approval of Nashua's acquisition of the Pennichuck Corporation's shares be conditioned upon a provision giving Merrimack — the only party other than Nashua itself that is part of the core water delivery system of Pennichuck Water Works, Inc. ("PWW") — a seat on the board of directors of PWW's parent, Pennichuck Corporation. Granting Merrimack the right to nominate a board member is the most reliable and efficient method of protecting the legitimate interests of the Merrimack ratepayers. Without a seat on the board, Merrimack would be left without voice or vote on matters of critical interest to the town and the Merrimack ratepayers. Merrimack should not be left to resort to costly, time consuming appeals to the Commission in order to protect its interests, or to be part of the conversation about them.

## **Background**

A year ago, the Supreme Court ratified the Commission's approval of Nashua's taking of PWW by eminent domain. Nashua now seeks Commission approval of its purchase of the stock of Pennichuck Corporation, the non-public utility holding company of PWW and several other water utilities.

A 2007 special act of the legislature authorized Nashua's purchase of the stock of Pennichuck, but conditioned the purchase on a "public interest determination" by the Commission prior to the purchase. See Special Legislation, Par. I (Petition at ¶ 16). Nashua concedes that such a determination is a prerequisite to its purchase of Pennichuck. Petition ¶¶ 16-22.

Merrimack and several other municipalities intervened in Nashua's Petition for Approval. Merrimack's interest in the petition is unique. First, Merrimack is on the core PWW system. Merrimack's industrial area, which is part of the PWW franchise, is directly subject to Nashua's decision making.<sup>1</sup> Merrimack is a competitor with Nashua for industrial/commercial development. In fact, the vast majority of Merrimack's underutilized or vacant industrial lots are within the PWW franchise. Merrimack Exhibits G and I.

Based on information provided by Nashua's lawyers, 5.6% of PWW's total assets based on cost (3.25% based on net book value) are in Merrimack and almost 5% of PWW's revenue comes from Merrimack. Attachment 1 to Merrimack Exhibit A

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<sup>1</sup> The PWW franchise is that area southeast of the Merrimack Water District. See Merrimack Exhibit E, Map of the Merrimack Water District. The "Merrimack Water District" is a district within Merrimack's municipal boundaries that serves a large portion of Merrimack's residential area and its municipal facilities. It is distinct from the Merrimack Valley Regional Water District, which is comprised of land in multiple municipalities.

(Rothhaus Pre-filed Testimony), p. 2; see also Merrimack Exhibit D. Moreover, Merrimack customers account for over 10% of consumption of PWW water. Attachment 1 to Merrimack Exhibit A, p. 2. Merrimack also contains and must protect, while being unable to significantly tax, nearly 60% of the watershed land held for the benefit of Pennichuck. Id, p.1. Merrimack's southern industrial/commercial zone is adjacent to and parallel with Nashua's Route 101-A corridor. Merrimack Exhibit E. Given these circumstances, without a seat on the Pennichuck board, when it comes to expansion of the water system and/or required capital improvements to support the system in south Merrimack, Merrimack is deeply interested but without voice or vote.

On October 18, 2011, several of the parties to Nashua's approval petition settled their dispute. The Settling Parties executed an agreement which affords the Merrimack Valley Regional Water District, which is comprised of 8 other municipalities<sup>2</sup>, precisely the guarantee Merrimack seeks. As stated in the settlement:

The Commission should condition any order approving the City's acquisition of Pennichuck stock pursuant to the Merger Agreement with a requirement that the City may consummate the acquisition so long as the final By-Laws of Pennichuck in force at the time of the merger requires at least one member of the Pennichuck Board of Directors to be nominated by the Merrimack Valley Regional Water District. ... The By-Laws shall provide that the requirement described in the previous sentence shall not be amended without the consent of the District.

Settlement Agreement, p. 17 at Section III, E, 2 (to be filed in this docket).

Merrimack is not a member of the Water District. Merrimack refused to join the Water District because its charter effectively vested all control on matters of significant import in the City of Nashua. Merrimack Exhibit C, pp. 5-9. The Water District Charter gives each of its eight members a seat on the Water District's Board of Directors. The

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<sup>2</sup> The district is comprised of the City of Nashua and the Towns of Bedford, Pittsfield, Amherst, Londonderry, Litchfield, Pelham and Raymond.

Charter, however, establishes two methods for directors to vote: by director or by customer. *Id.* at 8-9. Matters relating to (1) capital improvements, (2) issuance, refunding or advance payment of bonds, and (3) establishment of fees, rates, charges or tariffs are decided by vote by customer, not vote by director. *Id.* Accordingly, Nashua, having a supermajority of customers for now and the foreseeable future, effectively controls the Board of the Water District as chartered. It is no surprise, then, that Nashua was willing to give the District, but not Merrimack, a seat on the Pennichuck Board.

### **Argument**

**1. The PUC has jurisdiction and the authority to condition its approval.**

The PUC has jurisdiction over this matter pursuant to the requirement of the special legislation that the Commission "make a public interest determination prior to" any purchase by Nashua of the stock of Pennichuck Corporation. Petition ¶ 16. While the special legislation does not itself, like RSA 38:11 (which governs purchase and taking of utility *assets* as opposed to the special legislation relating to stock purchase), explicitly authorize the Commission to "set conditions and issue orders to satisfy the public interest," the Commission has the power to do so based on its inherent authority and the nature and plain meaning of the special legislation.

First, the requirement that the PUC determine that the stock purchase is in the public interest is rendered meaningless if the PUC cannot set conditions on its approval. RSA 38:11<sup>3</sup> makes clear that the fundamental tool of the Commission in assuring that a taking — or in this case a stock purchase — complies with the public interest is the authority to set conditions. Indeed, RSA 38:11 makes explicit that in making the

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<sup>3</sup> RSA 38:11 reads: " When making a determination as to whether the purchase or taking of utility plant or property is in the public interest under this chapter, the Commission may set conditions and issue orders to satisfy the public interest. ..."

determination "the Commission may set conditions and issue orders to satisfy the public interest." It would be nonsense for the Commission's role to be limited to mere approval of stock purchase, where the sum and substance of its power to make the public interest determination in the taking context is the authority to set conditions and issue orders. See *In re Pennichuck Water Works, Inc.*, 160 N.H. 18, 33-34 (2010) (holding that the PUC could condition its approval of Nashua's acquisition of PWW upon Nashua's fulfillment of certain prerequisites). Certainly, if such a result had been the legislature's intent, the legislature would not have used the term "make a public interest determination," a direct reference to RSA 38:11. Instead, it could have merely stated that the public utility Commission shall "approve" such a purchase. The plain language of the special legislation makes clear that the legislature intended the PUC to have the normal authority to issue conditions on its approval of the stock purchase.

2. **The right to appoint a director of Pennichuck secures Merrimack's interests.**

Merrimack's request is a reasonable means of assuring that Merrimack and its ratepayers have a voice and a vote on matters of importance. Eight municipalities are represented on the Board. Although many other Pennichuck customer towns are not, those towns did not intervene, or, if they did, they did not make the same request for board representation. Therefore, Nashua's argument that Merrimack representation would be unfair to some other towns is a fiction.

The bottom line is that Merrimack, as a core customer, is being asked to absorb a share of funding the Rate Stabilization Fund, Settlement Agreement Sect. II, C, 2, the risk associated with intercompany loans, id., the risk that it may be short-changed in allocation of resources, and the risk that its largest employer could be adversely affected

if the special contract is breached or if Nashua takes action harmful to Anheuser Busch. These risks are greatly diminished if Merrimack is part of the conversation before action is taken, rather than after.

Although the Nashua representatives say Merrimack would be protected because PWW is a regulated utility, regulatory proceedings are only effective when parties can pay for experts and expensive lawyers for protracted rate and other proceedings. Merrimack believes that it is better to use reason in the boardroom, where there is a direct opportunity to convince the directors of a course of action, than it is to spend substantial sums of money in often protracted proceedings before the Commission, in order to assert interests that could have been expressed and secured in that board room.

**3. Nashua has no legitimate basis for opposing a Merrimack Director.**

The reasons Nashua has advanced in opposition to giving Merrimack a seat do not hold water. The principal reason Nashua refused Merrimack a seat on the Pennichuck board was Nashua's concern that doing so would result in faction. First, this concern is itself an acknowledgment that Merrimack's interests in Pennichuck affairs are unique and important. Second, the objection that the appointment of a Merrimack Director would introduce parochial concerns is not valid in light of (1) the fact that New Hampshire law recognizes that corporations may prescribe qualifications of directors, (2) the analogy to classes of directors arising from New Hampshire and general business law's acknowledgment that there may be various classes of shareholders who may nominate directors, (3) Nashua's agreement to grant the Water District a seat on the Pennichuck Board and (4) the fact that the bylaws now provide for a non-resident director appointed by the Nashua Board of Aldermen.

The New Hampshire Business Corporation Act, RSA 293-A recognizes that there may be classes of shares issued and that such shares may have differing “preferences limitations, and limited rights.” RSA 293-A:6.01(a). The statute also recognizes that classes of shares may have “special conditional or limited voting rights or no right to vote” (RSA 293-A:6.01(c)). New Hampshire business corporations are also authorized to establish qualifications for directors (RSA293-A:8.02). There is nothing in the statute that limits the power to establish qualifications for directors. For instance, it is not uncommon to have directors elected by class of share (See e.g. RSA 293-A:7.28; See also Fletcher Encyclopedia of the Law of Corporations Section 298). The fact that there may be different and disparate interests among directors is typical of corporations and is implicitly recognized by New Hampshire's Business Corporation Act, and is in no way support for Nashua's decision to bar Merrimack from the Pennichuck Board room.

Nashua's fear that having the Town of Merrimack appoint a director will cause undue faction is further belied by the fact that the Pennichuck articles of incorporation designate Nashua as the sole shareholder, whose powers are exercised by the Board of Aldermen. Nashua's Board of Aldermen is composed of fifteen members, nine of whom are elected by ward and have inherently distinct interests. Prefiled Testimony of Donnalee Lozeau, p. 78, Art. VI. Thus, the appointment of directors is an inherently political process.

The Pennichuck Bylaws also provide that the board shall include one natural person who is not a resident of the city of Nashua but who takes water from one of the regulated utilities. Lozeau, p. 82, Sect. 2, A(2). The identity of that member is within the discretion of the Nashua board of aldermen. The settlement agreement provides that an

additional member may actually be nominated by the Merrimack Valley Regional Water District. But the Water District is controlled by Nashua. Since the Water District Charter (see Merrimack Exhibit C) does not address the issue, it is unclear whether the vote to nominate is done by director or by customer. *Id.*, p. 8.

Indeed, Nashua explicitly recognized the legitimacy of other parochial interests by agreeing to give the seven non-Nashua Water District members a voice and vote through the Water District. The Water District, like Merrimack, is not a shareholder. Merrimack is requesting that it, like the Water District, be allowed to nominate one member to the Board of Directors of Pennichuck Corporation. There is no more or less parochialism involved in having a director nominated by Merrimack than there is in having a director nominated by the Water District. This concern, therefore, does not affect the commission's ability to recognize that the interests of major communities served by the utility subsidiaries should be provided for, especially among communities that have sufficient reason to and did request representation on the Board.

### **Conclusion**

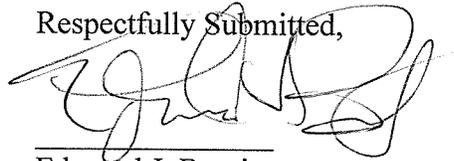
For the reasons set forth above, Merrimack requests that the Commission only approve Nashua's Petition subject to the following condition:

The City may consummate the acquisition so long as the final By-Laws of Pennichuck in force at the time of the merger requires at least one member of the Pennichuck Board of Directors to be nominated by the Town of Merrimack. The By-Laws shall provide that the requirement described in the previous sentence shall not be amended without the consent of the Town of Merrimack.

Granting Merrimack the right to nominate a board member is the most reliable and efficient method of protecting the legitimate interests of the Merrimack ratepayers, interests that are important parts of the Commission's public interest determination.

Without a seat on the board, Merrimack would be left to resort to costly, time consuming appeals to the Commission in order to protect its interests. The Commission has the power to condition its approval on giving Merrimack a seat, and Nashua has no legitimate interest in barring Merrimack from the table where decisions that will indisputably impact the ratepayers of Merrimack are being made.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Edmund J. Boutin', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I, Edmund J. Boutin, hereby certify that a copy of the foregoing document was served in accordance with PUC Rules 203.02 and 203.11 by sending an electronic copy via email to each person identified on the commission's service list.

A handwritten signature in black ink, appearing to read 'Edmund J. Boutin', written over a horizontal line.

Edmund J. Boutin