

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

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

Docket No. DW 04-48

**REPLY TO NASHUA'S OBJECTION TO
PENNICHUCK'S MOTION TO STRIKE**

Pennichuck Water Works, Inc., Pennichuck Corporation, Pennichuck East Utility, Inc., Pennichuck Water Service Corporation, and Pittsfield Aqueduct Company, Inc. (collectively, "Pennichuck") reply to the City of Nashua's ("Nashua" or "the City") Objection to Pennichuck's Motion to Strike Nashua's Motion for Rehearing and Clarification of Order No. 24,878 as follows:

1. Nashua exaggerates various authorities to present the illusion of a "well-settled principle" in New Hampshire that "when the terminal date of a time limit falls upon Sunday that day is to be excluded from the computation." Nashua's Objection at ¶

1. In fact, Nashua's only real authority is a secondary holding from a forty-seven year old case that is contradicted by contemporary case law mandating strict adherence to statutory language concerning filing deadlines. Moreover, the New Hampshire legislature, given a recent opportunity to codify the rule advocated by Nashua, declined to do so.

2. Nashua relies primarily on *HIK Corp. v. Manchester*, 103 N.H. 378 (1961), in which the New Hampshire Supreme Court, considering an appeal from a decision of a zoning board of adjustment, remanded on grounds not related to timeliness of appeal. *Id.* at 380-81. After reaching its substantive holding, the Court briefly addressed the issue of timeliness of the appeal. Rather than rely on the plain language of

the relevant statutory provisions (RSA 31:74 and RSA 21:35), the Court instead deferred to Corpus Juris Secundum and observed that “when the terminal day of a time limit falls on a Sunday that day is to be excluded from the computation.” *Id.* at 381 (*citing* 86 C.J.S. Time § 14(2)).

3. In the forty-seven years since the Court decided *HIK Corp.*, the case has never been followed by any court for the principle that Nashua proposes. In fact, contemporary case law discussed in Pennichuck’s Motion to Strike, requiring strict adherence to unambiguous statutory time periods, contradicts the principle advocated by Nashua. *See Phetteplace v. Town of Lyme*, 144 N.H. 621, 624-25 (2000)(when the legislature unambiguously establishes a date certain for filing an appeal, it is immaterial that the final day for filing falls upon a weekend or holiday) and *Appeal of Carreau*, ___ N.H. ___, 945 A.2d 687 (2008)(if the legislature intended to confer authority on a court to waive a 30-day appeal filing deadline, it could have done so explicitly). As explained in Pennichuck’s Motion to Strike, the Court explicitly applied the rationale articulated in *Phetteplace* to require strict compliance with the statutory time requirements established in RSA chapter 541. *See, e.g. Appeal of Carreau, supra.*

4. Nashua places undue importance upon *Hunter v. State*, 107 N.H. 365 (1966), and *Ireland v. Candia*, 151 N.H. 69 (2004), cases which do not support the City’s position. In *Hunter*, the State was willing to concede that the appellant could have taken an extra day to file his appeal when the terminal date fell upon a Sunday, and as such the Court did not address the issue. *See Hunter*, 107 N.H. at 366. The State had little to lose by conceding the point, as the appeal at issue was several days late. *Id.*

5. In *Ireland*, the Court simply quoted a plaintiff's own words to explain the plaintiff's argument:

The plaintiff argues that he filed a timely motion for rehearing . . . because "New Hampshire follows the general rule of time computation that where a terminal day of a deadline falls on a weekend or legal holiday, the required action is considered timely if filed on the following business day."

Ireland, 151 N.H. at 70. The Court, without commenting on whether the plaintiff's argument was correct or not, proceeded to find that "the plaintiff's motion was untimely irrespective of the rule he advocate[d], as the terminal date did not fall on a weekend or legal holiday." *Id.* *Ireland* plainly does not stand for the "settled principle" advocated by Nashua.

6. The New Hampshire legislature has never amended RSA 21:35, the statute governing computation of time periods, to exclude weekends or holidays if the terminal date of a statutory time period should fall upon them. Nashua has cited, misleadingly, to an amendment adding on January 1, 2009 a new subsection to RSA 21:35. Nashua claims that the Legislature now agrees with the City's position, but the amendment seriously undermines it. The newly added language does not apply to appeals or motions for rehearing; rather, it applies only to "documents" or "fees," and was originally intended to govern annual reports filed by business corporations. House Record, Vol. 30, No. 18, Feb. 29, 2008.¹

7. In other words, the Legislature adopted a rule excluding weekends and holidays from the calculation of the terminal date of certain time periods, but deliberately

¹ The amendment states: "If a statute specifies a date for filing documents or paying fees and the specified date falls on a Saturday, Sunday, or legal holiday, the document or fee shall be deemed timely filed if it is received by the next business day." RSA 21:35, II (effective January 1, 2009) (emphasis added).

limited the scope of that rule to include only “documents” and “fees.” The legislature could have extended application of the rule to motions for rehearing and appeals, but did not do so. It is well-established that New Hampshire courts interpret legislative intent from a statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *See, e.g., Bennett v. Hampstead*, __ N.H. __ (decided July 11, 2008).

8. The Commission rule that Nashua cites, Puc 202.03, likewise does not support its argument. That rule extends the last day of time periods ending on a day when the Commission office is closed. But, by its terms, that extension is limited to "periods of time referred to in Commission rules." By definition, the time period to file motions for rehearing pursuant to RSA 541:3 is a creature of statute, not Commission rule. Had the legislature wanted to extend the period of time for filing motions for rehearing in the manner contemplated by Puc 202.03, it could have written similar language into RSA 541. The legislature chose not to do that, and the Commission cannot do so by proxy.

9. As demonstrated above, Pennichuck has not “misstated the law,” as Nashua claims. Nashua’s Objection at ¶ 1. Pennichuck therefore respectfully requests that the Commission grant Pennichuck’s motion to strike.

WHEREFORE, Pennichuck respectfully requests that the Commission strike
Nashua's motion for rehearing and clarification of Order No. 24,878.

Respectfully submitted,

Pennichuck Water Works, Inc.
Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Service Corporation
Pennichuck Corporation

By Their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: September 18, 2008

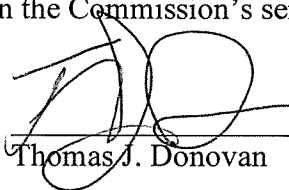
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2008, a copy of the foregoing
Reply to Nashua's Objection to Pennichuck's Motion to Strike has been forwarded by
electronic mail to the parties listed on the Commission's service list in this docket.



Thomas J. Donovan