

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

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

DW 04-048

**PENNICHUCK'S OBJECTION TO NASHUA'S MOTION IN LIMINE TO
EXCLUDE THE TESTIMONY OF R. KELLY MYERS**

NOW COME Pennichuck Water Works, Inc. ("PWW"), Pennichuck East Utility, Inc., Pittsfield Aqueduct Company, Inc., Pennichuck Water Service Corporation and Pennichuck Corporation (collectively "Pennichuck") by and through their attorneys, McLane, Graf, Raulerson & Middleton, Professional Association, and hereby object to the City of Nashua's Motion in Limine to Exclude the Testimony of R. Kelly Myers. In support of this Objection, Pennichuck states as follows:

1. On January 12, 2006, Pennichuck submitted the testimony of R. Kelly Myers. In his testimony, Mr. Myers described the scientifically sound polling of Nashua voters regarding their opinions on the taking of Pennichuck Water Works by acquisition or eminent domain:

The polling . . . has consistently shown that voters are opposed to the takeover of Pennichuck Water Works through acquisition or eminent domain. In March 2004, 60% of voters said that they would vote against the measure, and 24% would vote for it. In September 2005, 64% of voters said that they would vote against the measure, and 22% would vote for it. . . . **The results indicate that when voters are asked explicitly about the City's effort to acquire Pennichuck Water Works, support for the City is quite low.** The polls have consistently found that when voters are asked whether they would vote for or against a ballot initiative that would authorize the City to acquire Pennichuck Water Works, most voters would vote against it.

(emphasis added). Mr. Myers concluded, based upon the results of the polling, that voters in Nashua as of 2004 and 2005 are consistently opposed to the City's takeover of Pennichuck Water Works by acquisition or eminent domain.

2. The question presented to the voters of Nashua at the January 14, 2003 special election was limited to the following issue:

Shall the resolution of the Board of Alderman adopted on November 26, 2002 determining that it is expedient for the City to establish a water works system and in order to establish such water works system, to acquire all or a portion of the water works system currently serving the inhabitants of the City and others be confirmed?

Not only was Pennichuck Water Works never named in the vote, the vote never referred to a taking by eminent domain.

3. Mr. Myers testified that as of September 2005, if a ballot initiative were held in Nashua asking voters to authorize Nashua's taking of Pennichuck Water Works through acquisition or eminent domain, the proposal would fail:

I would predict that as of September 2005 if a ballot initiative were held in Nashua . . . a proposal to take the assets of Pennichuck Water Works would be defeated. . . . [T]he election result [of January 14, 2003] reflected the fact that voters were not asked whether they favored a taking by eminent domain. **Given the wording of the referendum in 2003, many voters may have believed that an acquisition would be on a consensual basis or that they were simply authorizing the City to continue to consider the possibility of an acquisition but not to actually move forward with a taking.** . . . I am confident that a majority of Nashua voters oppose taking the assets of Pennichuck Water Works.

(emphasis added).

4. Courts reviewing ballot measures have held that such measures can be invalidated where voters are misled by the language of the ballot such that they do not know what they are voting for or against. *See, e.g., Burton v. State of Georgia*, 953 F.2d 1266, 1269 (11th Cir. 1992); *Kohler v. Tugwell*, 292 F.Supp. 978, 982 (E.D. La. 1968).

In determining whether a ballot measure misleadingly injected bias towards an affirmative vote, courts have looked to polling data as evidence of such misunderstandings. *See Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972). In *Boucher*, the Alaska Supreme Court considered the results of a survey, introduced by an expert witness, showing that the language employed in a referendum to call a constitutional convention had indeed biased voters. *Id.* at 80-81. Based upon the record, the Alaska Supreme Court concluded that the language was misleading, affirming the electorate's right to vote was unconstitutionally infringed upon. *Id.* at 78. One justice, "strongly concurring" with the majority, wrote separately to elaborate on propriety of admitting expert testimony based upon a poll of selected voters for assistance. *Id.* at 83. Noting that the poll admitted in the underlying action was "highly relevant," the justice further stated: "[A]n expert-conducted poll is really the only satisfactory objective evidence available to assist the trial judge in deciding whether the error on the ballot was sufficient to change the result of the election." *Id.* at 84.

5. While this objection does not dispute that Nashua met the voting requirements of RSA 38:3, the question remains whether polling data that relates to that vote may be admissible at hearing. Just as courts may refer to polling data to determine whether the wording of a referendum impermissibly injected bias into a vote, the Commission may consider such data to determine how much weight the results of the referendum presented to voters by Nashua should be given as an expression of public intent.

6. As the Commission has already recognized, "the rules of evidence, as used in civil courts, are not applicable in contested cases before administrative tribunals

generally, *see* RSA 541-A:33, II, and the Commission specifically, *see* RSA 365:9."

Order No. 24,706 (December 8, 2006). Nevertheless, Pennichuck notes that public opinion polls are traditionally admissible in administrative proceedings, as well as other proceedings in which the rules of evidence are applicable. 18 Am. Jur. Proof of Facts 2d 305, §2 (2006); *see also Nationscapital Mortgage Corp. v. State of Washington*, 137 P.3d 78, 92 (Wash. App. 2006); *Schwab v. Philip Morris USA, Inc.*, 449 F.Supp.2d 992, 1245 (E.D.N.Y. 2006)("Properly developed survey evidence is admissible subject to arguments regarding its weight and probative value.")(RICO action).

7. Assuming that the favorable vote resulting from Nashua's January 14, 2003 special election created a rebuttable presumption that "acquir[ing] all or a portion of the water works system currently serving the inhabitants of the City and others" is in the public interest, Pennichuck should be entitled to present evidence showing that the vote comes with a biased premise in order to help rebut the presumption. Specifically, the phrasing of the ballot measure created a bias towards an affirmative vote, and ultimately misled voters who would otherwise be opposed to a taking by eminent domain. Moreover, Pennichuck should be entitled to present evidence showing the Nashua public's waning interest since 2003 in any acquisition of Pennichuck.

8. As noted above, Mr. Myers' testimony that voters in Nashua are consistently and increasingly opposed to the City's takeover of Pennichuck by acquisition or eminent domain is highly relevant to rebutting the presumption that Nashua's efforts to take Pennichuck Water Works' assets are in the public interest. Mr. Myers' testimony is relevant within the meaning of RSA 541-A:33, II, and should not be excluded.

WHEREFORE, Nashua's Motion in Limine to Exclude the Testimony of R. Kelly Myers should be denied.

Respectfully Submitted,

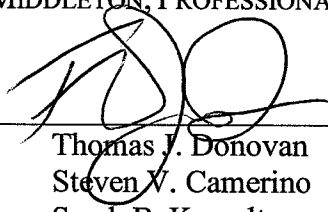
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Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Service Corporation
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By Their Attorneys,

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December 18, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2006, a copy of Pennichuck's Objection to Nashua's Motion in Limine has been forwarded by electronic mail to the parties listed on the Commission's service list in this docket.



Thomas J. Donovan