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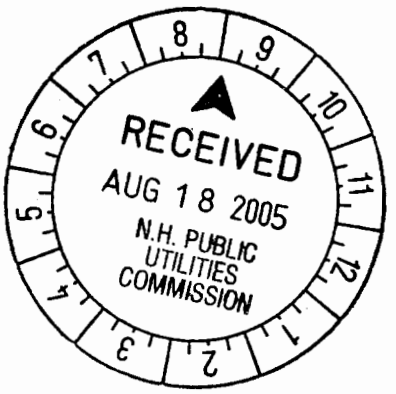
August 17, 2005



Debra A. Howland, Executive Director
N.H. Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

RE: City of Nashua, Petition for Valuation Pursuant to RSA 38:9
Docket No. DW04-048

Dear Ms. Howland:

Enclosed please find an original and eight copies of Nashua's Motion for Leave to Respond and Response to Objection to Nashua's Motion to Reconsider Order No. 24,487. A copy of the foregoing is being sent this day by email and first class mail to all of the parties on the Commission's official service list in this proceeding.

Because of the time constraints imposed by RSA 541:5, Nashua has not sought the concurrence of any other party with respect to the enclose motion.

Thank you for your assistance in this. If you have any questions, please contact me

Very truly yours,

Justin C. Richardson
jrichardson@upton-hatfield.com

JCR/lm

cc: Official Service List

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

City of Nashua: Petition for Valuation Pursuant to RSA 38:9

DW 04-048

NASHUA'S MOTION FOR LEAVE TO RESPOND AND RESPONSE TO THE OBJECTION TO CITY OF NASHUA'S MOTION TO RECONSIDER ORDER NO. 24,487

NOW COMES the City of Nashua ("Nashua") and submits this *Motion for Leave to Respond and Response to the Objection to the City of Nashua's Motion to Reconsider Order No. 24,487* submitted by Pennichuck Water Works, Inc., Pennichuck East Utility, Inc., Pittsfield Aqueduct Company, Pennichuck Corporation and the Pennichuck Water Service Corporation (collectively the "Pennichuck Intervenors"). In support of this motion, Nashua states as follows:

I. **Background and Request for Leave to Respond**

1. On or about August 5, 2005, Nashua submitted its *Motion to Reconsider Order No. 24,487* pursuant to RSA 541:3.[1] On August 12, 2005, the Pennichuck Intervenors filed an *Objection to City of Nashua's Motion to Reconsider Order No. 24,487.*

2. The Commission's Procedural Rules and, in particular, Rule PUC 204.04, do not ordinarily allow for responses to objections. However, Rule PUC 201.05 allows for waiver of the Commission's regulations where waiver serves the public interest and shall not disrupt the orderly proceeding of the Commission.

[1] On August 4, 2005, a copy of Nashua's Motion was sent by email to all parties on the Commission's official service list. On August 5, 2005, service by first class mail was also provided.

3. In this case, good cause exists to allow Nashua to respond to the Pennichuck Intervenors' objection because: (a) the Intervenors have fundamentally misconstrued Nashua's position in its *Motion to Reconsider* and confused the issues of damages and the public interest under RSA 38; and (b) the Pennichuck Intervenors have misstated the holdings and law concerning severance damages. Nashua requests leave to respond to the Pennichuck Intervenors' Objection in order to clarify the issues before the Commission and assist the Commission in its deliberations.

4. Consideration of this response to Pennichuck Intervenors' objection is in the public interest because it will clarify the issues before the Commission. In addition, because the Commission has not ruled on Nashua's *Motion to Reconsider*, consideration of this response will not disrupt the orderly conduct of these proceedings.

II. The Pennichuck Intervenors' Objection Misconstrues Nashua's Position Concerning Damages and the Public Interest

5. The Pennichuck Intervenors' Objection begins with the observation that "the question of damages suffered to any remaining assets of PWW or to the other Pennichuck Intervenors is, in the first instance, an issue of *public interest* for the Commission to determine at hearing." Objection, Paragraph 1 (emphasis added). Nashua does not disagree that the scope of the Commission's inquiry under the public interest is broad, and may include issues such as potential economies of scale or other potential impacts to Pennichuck Intervenors' customers. To the extent that their objection argues that Nashua's motion seeks to preclude the Commission from considering any such evidence as it relates to the public interest,[2] as opposed to damages, they fundamentally misconstrue Nashua's motion.

[2] See, e.g. Objection, Para. 1.

6. Consideration of the public interest is not synonymous with "damages" for the purposes of eminent domain for which payment of just compensation is required, a distinction clearly recognized by RSA 38.

7. The Pennichuck Intervenors' attempts to muddle these issues are not without motive. If impacts to the public interest are treated as damages, then the Pennichuck Intervenors will argue entitlement to just compensation, notwithstanding the fact that they may seek to pass any such costs to their customers. By characterizing considerations relevant to the public interest as "damages", Pennichuck Intervenors seek to recover for their *shareholders* matters which are properly the concern of Intervenors' *customers*. As set forth in Nashua's *Motion to Reconsider*, the Commission should reconsider and clarify that, while Pennichuck Intervenors may present evidence relative to the public interest, they are not entitled to damages in this proceeding because they have no title to assets which are the subject of this proceeding.

III. Pennichuck Intervenors' Objection Misconstrues Statements Made Prior to their Dismissal as Condemnees.

8. Paragraph Three (3) of the Pennichuck Intervenors' Objection quotes a statement made by Alderman Brian McCarthy as supporting its position that Pennichuck Intervenors having no title in the property being acquired are entitled to severance damages. This argument, however, conveniently overlooks the fact that those statements contained in Nashua's November 22, 2004 Pre-filed Testimony were made well before the Commission's January 21, 2005 Order No. 24, 425, which dismissed the Pennichuck Intervenors as defendants for the purposes of RSA 38 in this proceeding.

9. Nashua's November 22, 2004 testimony, including that of Alderman Brian McCarthy, was submitted in support of Nashua's Petition to take all of the assets owned

by all of the Pennichuck Intervenors. Alderman McCarthy's statement that taking the property owned by the Pennichuck Intervenors would "eliminate any claim for severance damages" is obviously a reference to the fact that those parties were defendants who owned property sought by Nashua under RSA 38.

10. Obviously, in light of the Commission's ruling that those affiliates are no longer condemnees in this proceeding, Alderman McCarthy's statement concerning severance damages no longer applies to those affiliates. The Pennichuck Intervenors' use of Mr. McCarthy's statement in that context is disingenuous, at best.

IV. Pennichuck Intervenors' Argument That Intervenors with No Title to the Condemned Property May Recover Severance Damages Has Been Widely Rejected and Does Not Require a Factual Record.

11. Pennichuck argues that the Commission cannot dismiss its affiliates' claims for damages because "there has been no evidence submitted in this case regarding the relationship among the Pennichuck Entities, other than that they are separate corporations." *Objection*, Para. 7. However, that is precisely the point. The fact that Pennichuck Intervenors do not own any part of PWW's assets means that they cannot show unity of ownership necessary to claim damages under the United States or New Hampshire constitutions.

12. By attempting to maintain an action for severance damages for Intervenors that have no ownership or title to the assets being acquired, Pennichuck is attempting to take the rose without the thorns. The Pennichuck Intervenors have been organized into separate corporations for the purposes of having separate rates, cost-of-service, separate and geographically distinct service territories, limited liability, separate financial statements, and the ability to act independently for all legal purposes. They should not,

and cannot as a matter of law, be allowed to simply ignore the existence of separate corporations for the purpose of severance damages, while on the other hand arguing that those entities are entirely distinct on the other. *See e.g., Schenley Distillers Corp. v. U.S.*, 326 U.S. 432, 437, 66 S. Ct. 247, 249 (1946) ("One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.").

13. Pennichuck cites only two (2) cases in support of its position that the Intervenors are entitled to severance damages even though they have no ownership in the property being taken whatsoever. The first of these cases, *South Bay Irrigation District v. California American Water Co.*, 133 Cal. Rptr. 166 (Cal. App. 1976), does not even support the Pennichuck Intervenors' position as the case involved a company that "through an agreement of transfer and sale, and with subsequent approval by the Public Utilities Commission, became the owner and operator of the six separate water systems." *South Bay*, 61 Cal. App. 3d. at 958, 133 Cal. Rptr. at 177. Thus, *South Bay* involved six properties all owned by the same company, not independent companies with their own rates and service territories. Indeed, the court in *South Bay* made quite clear:

> Basic to any allowance of severance damage ... is the existence of unity of the property taken and the property not taken, *including unity of title*, contiguity and unity of use (*City of Los Angeles v. Wolfe, supra*, 6 Cal.3d 326, 330, 99 Cal.Rptr. 21, 491 P.2d 813). *Although there is unity of title between the Sweetwater and Coronado Systems, for purposes of severance damage they are not parts of a single parcel.* To the contrary, they are separate systems, separate utilities and separate enterprises. Each is a separate unit for rate-making purposes. Each has a separate rate base. The Chula Vista office and Operations Center facilities are a part of The Sweetwater System and not a part of the Coronado System. The Company's investment in these facilities is included in the rate base of The Sweetwater System and not of the Coronado System. The profits

> computed on this rate base with resultant rates are paid by the consumers of The Sweetwater System and not of the Coronado System. The unity of the two water systems does not equate the unity required of two parcels of land forming a single parcel for purposes of determining severance damage (*gen. see Wisconsin Power & Light Co. v. Public Service Com'n*, 219 Wis. 104, 261 N.W. 711, 716; 2 Orgel, *Valuation under Eminent Domain*, 172, 173).

South Bay, supra, 61 Cal.App.3d at 1002, 133 Cal.Rpt at 206 (emphasis added).

14. Not only is Pennichuck's reading of *South Bay* in direct conflict with its facts and holding, California Courts have constantly ruled that a company (such as the Intervenors) that has no ownership interest whatsoever in the assets being acquired has no entitlement to severance damages, in direct contradiction with Pennichuck Intervenors' assertions. For example, in *Ventura County Flood Control District v. Campbell*, 71 Cal. App 4th 211, 218, 83 Cal. Rptr. 2d. 725, 729 (1999), the California Court of Appeals stated that "[j]ust compensation is based on the loss the *owner* suffers" (emphasis added). In *San Diego Metropolitan Transit v. Cushman*, 53 Cal. App. 4th, 918, 928, 62 Cal, Rptr. 2d. 121, 126 (1997), the California Court of Appeals stated that the owner seeking severance damages must establish "his contiguous *commonly owned* lots are ... use[d] as an integrated economic unit". (emphasis added). Thus, unlike in this case, the properties held as a common enterprise were held by the same owner, not a legally separate entity.

15. While Pennichuck Intervenors suggest that California law supports their case, the California Public Utilities Commission has taken the opposite view. In *City of Fresno*, 20 CPUC 2d. 502 (1986), the Commission, in stark contrast to Pennichuck's argument, noted that "[b]asic to any allowance of severance damage ... is the existence of unity of property taken and the property not taken, including *unity of title*, contiguity and unity of use." Furthermore, the Commission rejected a claim for "severance

damages for categories of projected expenses for restoring efficiencies to service company [and related companies]. We have heretofore rejected the contention that [related companies] should be considered as part of an overall larger entity. They are separate entities. No severance damages are allowable ..." *Id.*

16. The Pennichuck Intervenors' position that California law supports its position that separate corporations may claim severance damages for property in which they have no title unsupported. Rather, it is clear that neither a service company, nor separate companies with their own rates and service territories can recover damages in a municipal condemnation proceedings. *City of Fresno, supra.*

17. The second case cited by Pennichuck Intervenors, *Housing Authority of Newark v. Norfolk Realty Co.*, 71 N.J. 314, 364 A.2d. 1052 (1976) concerned a corporation and partnership, both owned by the same three individuals, who owned a meat processing plant and garage that were across the street from each other and were "functionally integrated part of the meat processing business." 71 N.J. at 317, 364 & 320, 364 A.2d. at 1054 & 1055. Its facts and holdings have little relevance here.

18. Furthermore, the reasoning of the *Housing Authority* decision, and to a large extent the decision itself, have been widely rejected by other courts. *See, e.g., Salem v. H.S.B.*, 302 Or. 648, 733 P.2d. 890 (1987) (Supreme Court of Oregon); *Bogese, Inc. v. State Highway and Transportation Commissioner of Virginia*, 250 Va 226, 462 S.E. 2d. 345 (1995) (Supreme Court of Virginia); *Sams v. New Kensington Redevelopment Authority*, 431 Pa. 240, 244 A. 2d. 775 (1967) (Supreme Court of Pennsylvania); *Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E. 2d. 390 (1978) (Supreme Court of North Carolina); *Arnold v. South Carolina Public Service Authority*, 292 S.C. 396, 356

S.E.2d. 837 (1987) (Supreme Court of South Carolina); Jonas v. Wisconsin, 19 Wis.2d. 638, 121 N.W.2d. 235 (1963) (Supreme Court of Wisconsin). The rationale behind these holdings is simple: the corporation, not its shareholders or affiliates, is the owner of the property being condemned. Having duly organized into separate legal corporations, Pennichuck Intervenors may not imply disregard when it suits their purposes to enhance their claims for damages.

WHEREFORE, Nashua respectfully requests that the Commission:

A. Grant this Motion for Leave to Respond to Pennichuck Intervenors' Objection.

B. Grant reconsideration of the Order No. 24,487 for the reasons set forth herein and in Nashua's Motion to Reconsider.

C. Grant such other relief as justice may require.

Respectfully submitted,

CITY OF NASHUA
By Its Attorneys
UPTON & HATFIELD, LLP

Date: August 17, 2005

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion for Reconsideration has been sent this day by email and first class mail to all persons on the Commission's official service list in this proceeding.

Date: August 17, 2005

Justin C. Richardson, Esq.