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October 17, 2007

Re: DW 04-048, City of Nashua
RSA 38 Petition re Pennichuck Water Works
Admission of Exhibits

To the Parties:

On October 11, 2007, the Pennichuck companies filed a list of the 33 exhibits remaining in dispute with the City of Nashua. On October 12, 2007, representatives of the City of Nashua, the Pennichuck companies and Commission Staff participated in a hearing concerning the admissibility of the disputed exhibits.

Most of the exhibits, 29 out of 33, concern data responses made by the City, which it now seeks be admitted as evidence, and which Pennichuck opposes as essentially constituting impermissible supplemental testimony. As for the remaining four exhibits, Exhibit 1096 is a compilation of information from different sources in a single page that the City used for the purposes of cross examination, which it asserts serves as a convenience in understanding the issues. Exhibit 1117A, meanwhile, relates to certain Consumer Confidence Reports that the city sought to introduce and which were excluded at hearing. Finally, Exhibits 1145 and 3258 relate to a record request made by the Commission to Pennichuck at hearing regarding bidding by multiple government entities for the purchase of an investor owned utility.

As a general matter, the Commission has wide discretion in determining the admissibility of evidence inasmuch as, pursuant to RSA 365:9, it is not "bound by the technical rules of evidence." Furthermore, consistent with the Commission's rules and RSA 541-A:33, II, "the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence." Accordingly, the determination whether to admit particular exhibits can be made by balancing the goals of constructing a complete record while providing a fair process, and considering whether there is a need to admit a particular exhibit or, inversely, whether there is a harm to admit such an exhibit.

With respect to the 29 exhibits composed of the City's responses to various data requests, while there may be cases where the parties are in agreement regarding the admission of such responses, the wholesale entry of disputed responses as sought here is

problematic as a matter of fairness for a number of reasons. For example, seven of the exhibits, nos. 1034, 1035, 1045, 1046, 1051, 1053 and 1054 total over 450 pages in additional material. Exclusion of these materials is most in concert with Pennichuck's argument that the City's responses are akin to supplemental testimony that could have or should have been submitted in that form. In addition, ten of the exhibits, nos. 1021, 1022, 1023, 1024, 1028, 1037, 1039, 1040, 1044 and 1050, are responses the City made to parties other than Pennichuck (for the most part, Staff data requests). Consequently, any argument that the condemnee opened the door to the condemnor by asking these questions, and that they should now be admitted as evidence, is unavailing. Furthermore, four of the exhibits, nos. 1020, 1036, 1042 and 1049, were objected to by the City in the first instance. It would seem incongruous at this juncture, without some greater showing of the need for the particular evidence, to admit exhibits concerning which both the City and Pennichuck have, at different times, registered objections.

It should also be noted that there is some overlap among the categories in that some exhibits reflect more than one infirmity. Moreover, a goodly number of the exhibits contain statements and arguments made during the hearings, often more than once, and which render the particular exhibits unduly repetitious as well. As for data responses containing argument as opposed to factual responses, Exhibit No. 1038 is an example of a data request that contains material more appropriate for a brief and which need not be admitted as evidence.

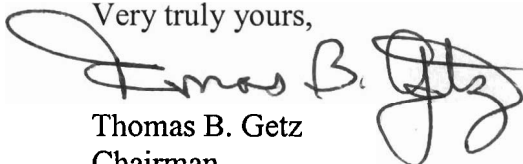
Of the seven remaining exhibits, nos. 1019, 1025, 1026, 1027, 1041, 1043 and 1052, there is much duplicative material in the data responses and some of it is both argumentative and non-responsive. Nevertheless, there does not appear to be anything unfairly prejudicial in the materials, or different in nature from statements made by the City's witnesses in their pre-filed testimony or on cross-examination, or what might be expected in briefing, that requires exclusion of these exhibits as a matter of due process. However, insofar as these exhibits are admitted as evidence, it does not mean that a reference in a particular data response to another document in and of itself has the effect of including that document as evidence. For example, Exhibit 1043, page 1, refers to the "Hayward Publication" but that document is not admitted into evidence. Finally, a few of the data responses included in these exhibits were initially objected to by the City but, based on the substance of the responses, admitting them is not harmful to Pennichuck from a due process perspective and is administratively efficient at this time.

As for Exhibit 1096, the compilation prepared by the City's counsel does serve as a convenience in considering the evidence in the proceeding and it does not constitute an unfair advantage for the City or handicap Pennichuck. With respect to Exhibit 1117A, there is no basis for reversing the decision at hearing to exclude the exhibit. Finally, concerning Exhibits 1145 and 3258, neither exhibit will be admitted.

In summary, the disputed exhibits will be treated as follows.

Exhibit 1019--Admitted	Exhibit 1039--Excluded
Exhibit 1020--Excluded	Exhibit 1040--Excluded
Exhibit 1021--Excluded	Exhibit 1041--Admitted
Exhibit 1022--Excluded	Exhibit 1042--Excluded
Exhibit 1023--Excluded	Exhibit 1043--Admitted
Exhibit 1024--Excluded	Exhibit 1044--Excluded
Exhibit 1025--Admitted	Exhibit 1045--Excluded
Exhibit 1026--Admitted	Exhibit 1046--Excluded
Exhibit 1027--Admitted	Exhibit 1049--Excluded
Exhibit 1028--Excluded, except pp. 4-5	Exhibit 1050--Excluded
Exhibit 1034--Excluded	Exhibit 1051--Excluded, except pp. 4-15
Exhibit 1035--Excluded	Exhibit 1052--Admitted
Exhibit 1036--Excluded	Exhibit 1053--Excluded, except pp. 138
Exhibit 1037--Excluded, except pp. 3-4	& 173
Exhibit 1038--Excluded	Exhibit 1054--Excluded, except p. 34
Exhibit 1096--Admitted	
Exhibit 1117A--Excluded	
Exhibit 1145--Excluded	
Exhibit 3258--Excluded	

It should also be noted that neither Pennichuck nor the City sought to renew requests that the Commission take administrative notice of particular materials, as was indicated they might in Pennichuck's October 11, 2007 letter. Having failed to pursue the requests at hearing, the requests for administrative notice are deemed denied. Finally, based on the disposition of these evidentiary matters, briefs will be due in 30 days, or November 16, 2007.

Very truly yours,

Thomas B. Getz
Chairman

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