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PUBLIC UTILITIES COMMISSION

21 S. Fruit Street, Suite 10
Concord, N.H. 03301-2429

Tel. (603) 271-2431

FAX (603) 271-3878

TDD Access: Relay NH
1-800-735-2964

Website:
www.puc.nh.gov

February 22, 2008

Debra A. Howland
Executive Director and Secretary
N.H. Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301



Re: Docket No. DW 04-048 City of Nashua Valuation Petition
Staff Position on Joint Motion for Approval of
Wholesale Municipal Water Contract

Dear Ms. Howland:

On February 21, 2008, the Town of Milford and City of Nashua filed a Joint Motion for Approval of Water Supply and Indemnity Agreement and requested the Commission approve said agreement. The agreement is between Town of Milford and City of Nashua and is dated Friday, January 4, 2008. This agreement essentially requires Nashua to assume the present Pennichuck-Milford water supply contract terms and includes additional provisions providing for remedies in Superior Court.

It is unclear from the motion whether the Town of Milford's position, as set forth in its brief and reply brief, has changed or whether the joint petitioners intend to reopen the evidentiary record in docket no. DW 04-048. It is important to know how the joint petitioners wish the Commission to treat this filing since it impacts administrative procedures the Commission may consider.

First, regarding the request for approval of the agreement, it is Staff's opinion that the Commission lacks jurisdiction to perform the review the joint petitioners seek. Specifically, RSA 362:4,III-a(a)(2) excludes inter-municipal wholesale water supply agreements from the Commission's jurisdiction. There has been no sound legal analysis to date showing how the Commission, under the general condition authority of RSA 38:11, can overcome the legislature's specific prohibition in RSA 362:4,III-a(a)(2). In its brief, and in opposition to Nashua's petition, Milford in fact argued that the Commission does not have jurisdiction over inter-municipal contracts pursuant to RSA 362:4,III-a(a)(2). Neither the joint petition nor agreement retracts Milford's argument. Paragraph 3 of the agreement deals with the issue of jurisdiction but it is Nashua, not Milford, who asserts the Commission has jurisdiction over this contract. In the event the Commission declines jurisdiction, the agreement is enforceable in Superior Court. If

Nashua has legal support for Commission jurisdiction, such support would be important for the Commission's public interest analysis and should be produced for the Commission's edification.

Second, it is important to know whether the joint petitioners intend the agreement to be entered into the evidentiary record in this docket. A request to reopen a closed evidentiary record is very different than a request for approval of an agreement. As the Commission is aware, N.H. Code Admin. R. Puc 203.30 allows petitioners to reopen an evidentiary record after the close of hearing when "the Commission finds that late submission of additional evidence will enhance its ability to resolve the matter in dispute." In making its determination, the Commission considers: "(1) [t]he probative value of the exhibit; and (2) [w]ether the opportunity to submit a document impeaching or rebutting the late filed exhibit without further hearing shall adequately protect the parties' right of cross examination pursuant to RSA 541-A:33, IV."

The joint petitioners have not made any statement that the agreement is being offered to enhance the Commission's ability to resolve the public interest issue in this docket. No party to this docket has been given an opportunity to opine on the probative value of this agreement and further, no party has had an opportunity to cross examine the extent of the meeting of the minds between Nashua and Milford. Because this agreement has not been subjected to these due process elements, and to the extent the joint petitioners wish to add this agreement to the evidentiary record, it is Staff's position that the agreement should not be considered evidence in this docket unless proper due process relating to this new evidence is given to the parties.

Sincerely,



Marcia A. B. Thunberg
Staff Attorney

cc: Service List