

McLane

McLane, Graf,
Raulerson &
Middleton

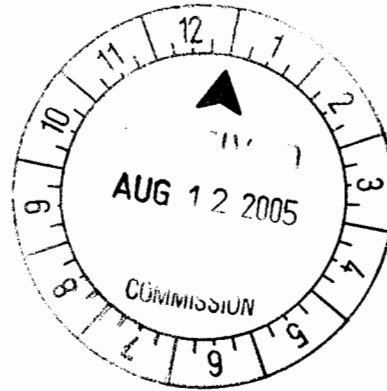
Professional Association

NINE HUNDRED ELM STREET • P.O. BOX 326 • MANCHESTER, NH 03105-0326
TELEPHONE (603) 625-6464 • FACSIMILE (603) 625-5650

THOMAS J. DONOVAN
(603) 628-1337
tdonovan@mcclane.com

OFFICES IN:
MANCHESTER
CONCORD
PORTSMOUTH

August 12, 2005



VIA HAND DELIVERY
Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301

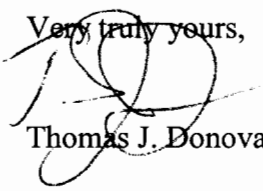
Re: **DW 04-048; City of Nashua—Taking of Pennichuck Water Works, Inc.**

Dear Ms. Howland:

Enclosed for filing with the Commission are an original and eight copies of Pennichuck Water Works, Inc.'s Objection to City of Nashua's Motion to Reconsider Order No. 24,487. I am also enclosing a diskette with the Objection in electronic form.

Thank you for your assistance with this matter. Please call me with any questions.

Very truly yours,


Thomas J. Donovan

TJD;jls

cc: Service List
D. Correll

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

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

DW 04-048

**PENNICHUCK WATER WORKS, INC. AND THE PENNICHUCK INTERVENORS'
OBJECTION TO THE CITY OF NASHUA'S MOTION TO RECONSIDER ORDER NO.
24,487**

Pennichuck Water Works, Inc. ("PWW") and Pennichuck East Utility Inc., Pittsfield Aqueduct Company, Pennichuck Corporation, and Pennichuck Water Services Corporation (collectively the "Pennichuck Intervenors"), submit this objection to the Motion of City of Nashua ("Nashua") To Reconsider Order No. 24,487. In support of this Objection, PWW and the Pennichuck Intervenors state as follows:

The Commission Correctly Ruled that it is Too Early to Limit Damages Testimony.

1. In Order No. 24,487, the Commission properly noted that the question of damages suffered to any remaining assets of PWW or to the Pennichuck Intervenors is, in the first instance, an issue of public interest for the Commission to determine at hearing. As the Commission noted in its prior Order, No. 24,425 (January 21, 2005), public interest "remains a factual determination...for the Commission to make. See RSA 38:10. Nashua's motion ignores the fact that damage to the Pennichuck Intervenors resulting from the taking of PWW's assets relates directly to the issue of public interest in this case because, among other things, the Pennichuck Intervenors provide regulated and non-regulated utility service to numerous communities outside Nashua. Damage to those companies, particularly damage that has a direct effect on the cost of providing service to their customers, is an issue of fact that is at the core of the analysis that the Commission is required to perform in an RSA Ch. 38 proceeding.

2. The extent and nature of the damages suffered by the Pennichuck Intervenors can only be determined by the Commission after development of the factual record in this case. The procedural schedule agreed to by Nashua and approved by the Commission expressly provides for the development of these facts, by allowing for the submission of testimony relating to both public interest and damages by October 14, 2005. The Pennichuck Intervenors believe that the testimony will show direct financial harm in the form of lost economies of scale, increased operating and capital costs, loss of access to capital markets and other substantial damages. The Pennichuck Intervenors also have certain contractual arrangements with PWW relating to shared use of employees and assets, as well as closely-integrated operations, such that there will be direct damages for which compensation will be due under applicable constitutional and statutory principles. Staff and other parties, including Nashua, will have the opportunity to conduct discovery on those issues and file reply testimony by February 21, 2006.

3. Nashua's motion seeks to preclude the Commission from considering evidence of those damages. That is particularly ironic, since Nashua Alderman Brian McCarthy, whose testimony was submitted by Nashua in support of the City's public interest case on November 22, 2004, argued at that time that that the Commission should include the two utility Pennichuck Intervenors as condemnees in this case, so as to "eliminate any claim for severance damages" and "prevent likely rate increases for that portion of the system that is not acquired by Nashua due to the need to generate additional revenues at proportionately higher operating expenses". McCarthy pre-filed testimony, p.8. Now that Alderman McCarthy's scenario is before us, the City seeks to prevent the development of the record on these very damages in an effort to avoid liability for them. The Commission should reject Nashua's request, allow the development of the

record, and determine whether any damages are due the Pennichuck Intervenors when it rules on the merits of this case.

New Hampshire Statutes and Constitution both Require Consideration of the Pennichuck Intervenors' Damages

4. The Commission, in its Order No. 24,487 declined to define who is an “owner” entitled to severance damages pursuant to RSA 38:9,III until after the testimony on this subject is filed. Nashua, in its motion to reconsider, suggests that the Commission not consider the facts that will be developed on this issue during the course of this proceeding, and instead simply rule that the term “owner” in RSA 38:9,III is identical to the term “utility” in RSA 38:6, so as to achieve Nashua’s desired result in limiting consequential damages payable to PWW. Such an interpretation is directly inconsistent with the basic tenet of statutory interpretation that in using different terms, the Legislature must have intended the terms to have different meanings. See, Fischer v. Hooper, 143 NH 585, 588 (1999).

5. In addition to severance damages, a fair reading of RSA 38:9,III indicates that the Legislature contemplated that consequential damages would also be awarded, requiring only in those electric utility takings subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), that consequential damages be determined by the FERC. See, RSA 38:33.

6. Beyond the provisions of RSA 38, the New Hampshire Constitution, part I, article 12, requires that the government pay just compensation for the taking of property. To the extent the Pennichuck Intervenors are able to show that their property has been taken, they are constitutionally entitled to compensation.. This Commission has the ability to award those damages, and the superior court (Lynn, J.) in its November 30, 2004 order dismissing without prejudice the Pennichuck Intervenors’ money damages action against Nashua, took a broad view

of what the Commission can and should take into consideration in its deliberations concerning a compensable taking.

Nashua's Legal Citations are Incomplete and Premature in the Absence of a Factual Record

7. In paragraph 5 of its Motion to Reconsider, Nashua cites a variety of legal sources for the proposition that the Commission cannot open the door to an award of severance or other damages in this case. Nashua incorrectly argues that the Commission can dismiss any damages claimed by the Pennichuck Intervenors now as a matter of law. However, Nashua's own Motion to Reconsider is based upon factual assumptions that have no basis in the record in this case. For instance, in paragraph 6 of its Motion, Nashua states, "based on what is already known about the separate nature of the three regulated Pennichuck utilities and their holding company...." Yet there has been no evidence submitted in this case regarding the relationship among the Pennichuck entities, other than that they are separate corporations. The parties have not yet had the opportunity to submit any testimony regarding the tightly integrated operating relationship among the various entities, including their reliance on common staff, certain common assets, cost sharing arrangements and other economies of scale. Nor have the parties had an opportunity to demonstrate the direct benefit to the public from such an arrangement or the substantial harm that would be incurred if it were to be torn apart. Nashua concedes there is a factual issue but apparently does not want to give PWW and the Pennichuck Intervenors the opportunity to present their testimony on October 14 as the procedural schedule allows.

8. Even the case law which Nashua cites is easily distinguishable. Kennebec Water District v. City of Waterville, et al, 54 A. 6 (Me. 1902), a case decided over 100 years ago, involved a special legislative statute permitting an "anomalous" condemnation process with no specified right to consequential damages. That court recognized the uniqueness of the case when

it stated “...in scarcely any two cases are the statutes authorizing condemnation alike...the expressions of other courts, and the results derived by them, are frequently of less authority than they otherwise would be”. 54 A. at 11. Compare, Brunswick Water Co. v. Maine Water Co., 59 A. 537 (Me. 1904)(different statute allowing severance damages applies to a unified water system). In South Bay Irrigation District v. California – American Water Co., 133 Cal. Rptr. 166 (Cal. App. 1976), the court held that an award of severance damages depends upon the evidence presented, and thus is a factual determination. While the facts of that case did not support an award of severance damages, the court acknowledged that other, direct damages could be awarded in a case like this. The California court stated:

Although the evidence does not satisfactorily establish the fact, for the purpose of argument it may be assumed the total investment in these facilities was not essential to the separate use thereof by either system; the joint use would constitute a saving by each system, and when the use thereof by the Coronado System is terminated, because of the taking, The Company will lose that saving; and this loss, under appropriate pleading and proof, might be found to be compensable even though not categorized as severance damage. It is a direct loss that the Company will sustain by virtue of the taking.

.... The issue of the claimed loss resulting from the separation of use was litigated without specific pleading allegations....The Company should be permitted to amend its pleadings and present evidence on this theory of damage. However, in light of the Irrigation District’s express wish to abandon its appeal...we will affirm the award on this basis.

133 Cal. Rptr. at 206-07.

9. Nashua then cites to a commentator’s presentation of when there is enough of a common enterprise among the condemned utility and the interveners so that severance, direct and/or consequential damages may be ordered for condemnation of a part of their assets. Again, that presents a question of fact. Courts recognize that an enterprise arranges itself into different corporations for business purposes, such as the Pennichuck Intervenors, and that reality should not result in a penalty in a condemnation proceeding. See, Housing Authority of City of Newark

v. Norfolk Realty, 364 A.2d. 1052, 1057 (NJ 1976)(severance damages awardable to a corporate owner of a parcel of land across the street from another parcel taken from a related corporation by the city).

10. Whether the Pennichuck Intervenors succeed in presenting a case that they have suffered direct, consequential or severance damages as a result of Nashua's proposed taking, depends upon the Commission's determination of the relationship among the entities and the economic consequences caused by the taking. This determination is necessarily predicated on the development of a factual record. Moreover, given the significance of this issue, once the factual record has been developed and the merits of the case have been presented, the parties should be permitted to submit briefs on this issue to the Commission.

WHEREFORE, PWW and the Pennichuck Intervenors respectfully request that the Commission:

- A. Deny Nashua's Motion for Reconsideration of Order No. 24,487; and
- B. Grant such other and further relief as the Commission deems necessary and just.

Respectfully submitted,

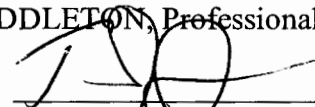
Pennichuck Water Works, Inc.
Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Corporation
Pennichuck Water Services Corporation

By Their Attorneys,

McLANE, GRAF, RAULERSON &
MIDDLETON, Professional Association

Date: August 12 2005

By:



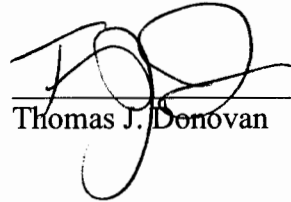
Thomas J. Donovan
Steven V. Camerino

Sarah B. Knowlton
Bicentennial Square
Fifteen North Main Street
Concord, NH 03301
Telephone (603) 226-0400

Joe A. Conner, Esquire
Baker Donelson Bearman
Caldwell & Berkowitz, P.C.
1800 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450

Certificate of Service

I hereby certify that a copy of this Objection has been forwarded to the parties listed on the Commission's service list in this docket.



Thomas J. Donovan