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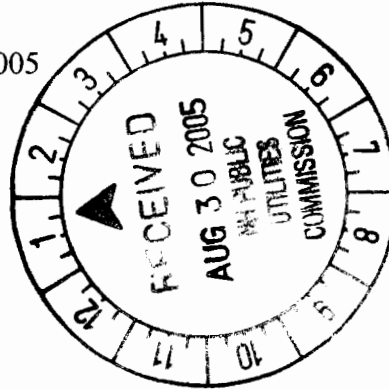
*Professional Association*

FIFTEEN NORTH MAIN STREET • CONCORD, NH 03301-4945  
TELEPHONE (603) 226-0400 • FACSIMILE (603) 230-4448

SARAH B. KNOWLTON  
(603) 334-6928  
sarah.knowlton@mcclane.com

OFFICES IN:  
MANCHESTER  
CONCORD  
PORTSMOUTH

August 31, 2005



***By 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 the City of Nashua's Motion for Reconsideration and Clarification of the Commission's Order Addressing Nashua's Motion to Compel. I have e-mailed an electronic copy of the Objection to Ann Guinard, as well as served the parties this same day by e-mail and first class mail.

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

Very truly yours,

Sarah B. Knowlton

cc: Service List  
Donald Correll, CEO and President

EDMUND J BOUTIN  
BOUTIN ASSOCIATES PLLC  
ONE BUTTRICK RD  
PO BOX 1107  
LONDONDERRY NH 03053

MICHAEL S GIAIMO  
BUSINESS & INDUSTRY ASSOC  
122 N MAIN ST  
CONCORD NH 03301

STEPHEN MERRILL  
OFFICE OF CONSUMER ADVOCATE  
21 SOUTH FRUIT ST STE 18  
CONCORD NH 03301

STEVEN V CAMERINO  
MCLANE GRAF RAULERSON & MIDDLETON  
15 N MAIN ST  
CONCORD NH 03301-4945

BRYAN K GOULD  
BROWN OLSON & GOULD PC  
2 DELTA DR STE 301  
CONCORD NH 03301

ROBERT OLSON  
BROWN OLSON & WILSON  
2 DELTA DR #301  
CONCORD NH 03301-7426

DAVID CARON  
LONDONDERRY - TOWN OF  
50 NASHUA RD  
STE 100  
LONDONDERRY NH 03053-3416

JAY HODES  
BOSSIE KELLY HODES BUCKLEY & WILSON  
440 HANOVER ST  
MANCHESTER NH 03104

BARBARA PRESSLY  
11 ORCHARD AVE  
NASHUA NH 03060

KATHERINE E CHAMBERS  
TOWN OF MILFORD  
TOWN HALL  
ONE UNION SQ  
MILFORD NH 03055-4240

MARK JOHNSON  
TOWN OF HOLLIS  
TOWN HALL  
7 MONUMENT SQ  
HOLLIS NH 03049-6121

JOHN J RATIGAN  
DONAHUE TUCKER & CIANDELLA  
225 WATER ST  
PO BOX 630  
EXETER NH 03833-0630

DAVID R CONNELL  
CITY OF NASHUA  
229 MAIN ST  
PO BOX 2019  
NASHUA NH 03061-2019

STEPHEN J JUDGE  
WADLEIGH STARR & PETERS PLLC  
95 MARKET ST  
MANCHESTER NH 03101

JUSTIN C RICHARDSON  
UPTON & HATFIELD  
PO BOX 1090  
CONCORD NH 03302-1090

ELIZABETH COUGHLIN  
MERRIMACK RIVER WATERSHED COUNCIL  
600 SUFFOLK ST 4TH FLR  
LOWELL MA 01854-3629

LINDA LAVALLEE  
WADLEIGH STARR & PETERS PLLC  
95 MARKET ST  
MANCHESTER NH 03101

F ANNE ROSS  
OFFICE OF CONSUMER ADVOCATE  
21 SOUTH FRUIT ST STE 18  
CONCORD NH 03301-2429

DOM S D'AMBRUOSO  
RANSMEIER & SPELLMAN PC  
ONE CAPITOL ST  
PO BOX 600  
CONCORD NH 03302-0600

CATHERINE MARSELLOS  
NH PUBLIC UTILITIES COMMISSION  
21 SOUTH FRUIT ST STE 10  
CONCORD NH 03301

LAURA A SPECTOR  
MITCHELL & BATES PA  
25 BEACON ST EAST  
LACONIA NH 03246

WILLIAM R DRESCHER  
DRESCHER & DOKMO  
21 EMERSON ROAD  
PO BOX 7483  
MILFORD NH 03055-7483

CLAIRE MCHUGH  
61 DUBLIN AVE  
NASHUA NH 03063-2045

EUGENE F SULLIVAN III  
SULLIVAN LAW OFFICE  
11 SOUTH ST  
CONCORD NH 03301-3719

Docket #: 04-048-1 Printed: August 31, 2005

**FILING INSTRUCTIONS:**

**WITH THE EXCEPTION OF DISCOVERY (SEE NEXT PAGE) FILE 1 ORIGINAL & COVER LETTER, PLUS 8 COPIES (INCLUDING COVER LETTER) TO:**

DEBRA A HOWLAND  
EXEC DIRECTOR & SECRETARY  
NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

FRED S TEEBOOM  
24 CHEYENNE DR  
NASHUA NH 03063

TIMOTHY TIEPERMAN  
TOWN OF MERRIMACK  
BABOOSIC LAKE RD  
PO BOX 940  
MERRIMACK NH 03054

ROBERT UPTON II  
UPTON & HATFIELD  
23 SEAVEY ST  
PO BOX 2242  
NORTH CONWAY NH 03860

STEVE WILLIAMS  
NASHUA REGIONAL PLANNING COMMISSION  
115 MAIN ST  
PO BOX 847  
NASHUA NH 03061

Docket #: 04-048-1

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**PURSUANT TO N.H. ADMIN RULE 204.04 (C), FILE DISCOVERY**

**DIRECTLY WITH THE FOLLOWING STAFF**

**RATHER THAN WITH THE EXECUTIVE DIRECTOR**

LIBRARIAN  
NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

**BULK MATERIALS:**

Upon request, Staff may waive receipt of some of its multiple copies of bulk materials filed as data responses. Staff cannot waive other parties' right to receive bulk materials.

MARK NAYLOR  
NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

MARCIA THUNBERG  
NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

AMANDA NOONAN  
CONSUMER AFFAIRS DIRECTOR  
NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

Docket #: 04-048-1

Printed: 8/31/2005

**STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION**

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

**Docket No. DW 04-048**

**PENNICHUCK WATER WORKS, INC.'S OBJECTION TO CITY OF NASHUA'S  
MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE  
COMMISSION'S ORDER ADDRESSING NASHUA'S MOTION TO COMPEL**

Pennichuck Water Works, Inc. ("Pennichuck") objects to the City of Nashua's ("Nashua") Motion for Reconsideration and Clarification of the Commission's Order Addressing Nashua's Motion to Compel (the "Motion"). In support of this objection, Pennichuck states as follows:

1. In its Motion, Nashua claims that both the Commission and the Hearings Examiner<sup>1</sup> erred in concluding that Nashua's discovery requests relating to appraisals were premature, and by failing to rule on Pennichuck's claim of privilege relating to such information. Nashua's Motion should be denied for a multitude of reasons.

2. Nashua's motion is flawed for several reasons. First, it asks the Commission to grant Nashua advance access to information that, by agreement, is not properly the subject matter of discovery for another two months. Second, it relies on case law relating to discovery of appraisal information that does not support Nashua's position. Third, Nashua's motion seeks to have the Commission apply a different standard to Nashua's discovery requests than it did to

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<sup>1</sup> In its Motion, Nashua repeatedly refers to errors of the Commission and the Hearings Examiner. Pursuant to RSA 541:3, Nashua is only entitled to move for rehearing on matters decided by the Commission, including any express adoption of the Hearings Examiner's recommendations. To the extent that the Commission did not expressly adopt or incorporate the Hearings Examiner's recommendations into its Order, Nashua has no basis for rehearing.

those of Pennichuck. For these reasons and as set forth below in more detail, Pennichuck requests that the Commission deny Nashua's Motion.

3. On July 29, 2005, the Commission issued Order 24,494, denying Nashua's Motion to Compel Pennichuck to respond to certain data requests relating to valuations and appraisals of Pennichuck's assets. Specifically, in its data requests, Nashua sought, among other things, any fairness opinion, appraisal, or valuation of the property or stock of Pennichuck Corporation or Pennichuck Water Works during the period January 1, 1999 to the present.<sup>2</sup> Nashua incorrectly claims that it needs this information to conduct its valuation for the October 14, 2005 filing deadline. Contrary to what Nashua suggests in its Motion, during this first phase of discovery, Nashua is only entitled to obtain factual information about Pennichuck's assets in order to conduct its valuation. To this end, Pennichuck has provided extensive amounts of extremely well organized information to Nashua through its data room, including voluminous amounts of data, maps, and other documents about Pennichuck's assets. In addition, Pennichuck led Nashua's experts on a two day tour of its assets in July 2005. Pennichuck also provided the only fairness opinion it has received in conjunction with the Philadelphia Suburban merger.<sup>3</sup> It is the responsibility of Nashua's expert to take this factual information about Pennichuck's assets and develop its opinion of their value. As explained further below, the information sought by Nashua in its Motion goes well beyond the facts necessary to develop an opinion of value, and thus its request should be denied.

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<sup>2</sup> Despite the fact that Nashua itself has refused to respond to discovery relating to any events prior to November 26, 2002, it claims to be entitled to take discovery on Pennichuck as far back in time as January 1, 1999. Nashua cannot have it both ways.

<sup>3</sup> Nashua's Motion suggests that Pennichuck did not make the SG Barr Devlin fairness opinion available. In response to Nashua Data Request 1-62, Pennichuck provided Nashua with information about the availability of the document on the Securities and Exchange Commission website. That Nashua chose not to access the fairness opinion from the SEC website is its own shortcoming.

### **The Commission Was Correct That Nashua's Data Requests Are Premature**

4. Despite the fact that Nashua agreed to the procedural schedule in this matter, which provides for multiple rounds of discovery on Pennichuck relating to valuation, Nashua claims that the data requests at issue are its “*only* opportunity to request documents related to the value of PWW's assets”. Nashua Motion at 5. This is not the case. In accordance with the agreed upon procedural schedule, on October 14, 2005, the parties will file their valuation testimony. Beginning October 28, 2005, Nashua can recommence its discovery on Pennichuck, which includes discovery on valuation. Thus, Nashua has not had its only chance at discovery on issues relating to valuation.

5. What Nashua really seeks through its Motion is an advance preview of the file of Pennichuck's valuation experts before such experts have even filed their testimony in this case. Specifically, on page 5 of its Motion, Nashua asserts that it is entitled to “the same opportunity to review appraisals, technical reports and other information related to valuation that its [Pennichuck's] own experts are able to review in this proceeding.” Again, Nashua’s request directly conflicts with the procedural schedule. In late October, Nashua can submit discovery requests relating to the information upon which Pennichuck’s experts relied in forming their opinions. The procedural schedule also provides Nashua with ample opportunity to critique the opinions of the Pennichuck experts. On February 21, 2006, Nashua can file rebuttal testimony, in which it can refute Pennichuck’s expert testimony or further refine its position based on information obtained during these later phases of discovery. Nashua’s Motion is nothing more than an effort to fast forward through the procedural schedule, skipping critical steps along the way.

6. The other aspect of Nashua's request which is troubling is its attempt to gain preferential treatment in the course of discovery. Specifically, Nashua wants early access to Pennichuck's experts, yet ironically, Pennichuck has no ability to gain access to information about valuation issues explicitly raised in testimony *already filed* by Nashua<sup>4</sup>, let alone discovery on testimony that has yet to be filed. Nashua should not be granted the right to take discovery on matters that have been put off limits to Pennichuck.

7. Nashua also complains that the Commission has inappropriately refused to rule on assertions of privilege at this time. Again, Nashua misses the point. The Commission will have ample time to consider and rule on objections based on privilege and relevance when the parties engage in the next round of discovery. Because Nashua's discovery requests are premature, there is no need to consider matters of relevance and privilege now.

**Nashua Is Not Entitled to the Information It Seeks**

8. However, even if the Commission were to consider Pennichuck's pending claims of privilege, Nashua's discovery requests should be denied. Specifically, Nashua seeks access to information and opinions of non-testifying experts, information which Nashua itself has objected to providing. See Nashua's Response to Pennichuck Data Request 1-79 ("Nashua further objects to the extent information is sought pertaining to individuals who are not expected to testify at trial"), attached as Exhibit B to Pennichuck's Objection to Nashua's Motion to Compel. Setting aside the hypocrisy of Nashua's position, the law in New Hampshire is clear that information and opinions on non-testifying experts are only discoverable upon a showing of exceptional circumstances under which it is impractical for the party seeking the discovery to obtain facts or

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<sup>4</sup> In Order 24,488, the Commission ruled that Pennichuck could not obtain discovery from Nashua on matters raised in Nashua's November 22, 2004 prefiled testimony. The basis for the Commission's order was that such requests were "premature." Order 24,488, p. 6.



opinions on the same subject by other means. See Johnston v. Lynch, 133 N.H. 79, 95-96 (1990); Wheeler v. School Admin. Unit 21, 130 N.H. 666, 669-70(1988); Willett v. General Electric Company, 113 N.H. 358, 359-60(1973). This is a high burden, which Nashua has not met.

9. In an effort to bolster its position, Nashua cites to a number of cases which in fact do not support its position. For example, in its Motion, Nashua suggests that it is the law in New Hampshire that reports of independent appraisers are not subject to any claims of privilege. Nashua cites to Riddle Spring Realty v. State, 107 N.H. 271, 275-276, in which it asserts that the New Hampshire Supreme Court ruled that "appraisals and reports made by employees of the State or by independent appraisers ....would not normally come under the attorney-client privilege or be part of the work product of a lawyer." Nashua Motion at 8. Yet Nashua conveniently omits the middle of the sentence from its quotation, which makes clear that it is appraisals provided "*to the Department of Public Works and Highways, or other such agency*" acting in the capacity as a condemnor are outside the scope of the attorney-client privilege or work product doctrine. Riddle Spring Realty, 107 N.H. 276-277 (emphasis added). In other words, when the *condemnor* has conducted a pre-taking appraisal, the Supreme Court has ruled that such an appraisal may not be subject to protection by a claim of privilege. For obvious reasons, this rule does not apply here, because Pennichuck is the condemnee, not the condemnor.<sup>5</sup>

10. Nashua further mischaracterized the case law that forms the basis of its Motion when it stated: "That appraisals fall within work product exemption to discovery has been

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<sup>5</sup> Ironically, Riddle Spring Realty and the other cases cite by Nashua and discussed *infra*, support more forthcoming discovery *by Nashua*, since it is acting as the condemnor. Not surprisingly, Nashua has refused to respond to straightforward discovery requests relating to its capability of operating a water utility or of the factors leading to its decision to take the Pennichuck assets. See Pennichuck Motion for Reconsideration and/or Rehearing of Order 24,498.

widely rejected by other courts." Nashua Motion at 9. In support of this statement, Nashua cites to United States v. Block 44, 177 F.R.D. 687, 690 (M.D. Fla 1997), a case in which the Court required the United States, as condemnor, to "'lay its cards on the table' and disclose presuit what it believes to be the fair market value of the subject property." Again, Pennichuck is not the condemnor, and thus this case has no application whatsoever to the present proceeding.

11. Nashua also relies on United States v. McKay, 372 F.2d 174 (5<sup>th</sup> Cir. 1967), where the Court allowed the Internal Revenue Service to obtain discovery of an appraisal report from a taxpayer despite his claim of work product protection. The Court held that:

We think the power of the Commissioner of Internal Revenue to investigate the records and affairs of taxpayers is greater than that of a party in civil litigation. His powers has been characterized by this court as an inquisitorial power, analogous to that of the grand jury and one which should be liberally construed. In such context, the criteria of relevancy and materiality have broader connotations than in the context of trial evidence.

United States v. McKay, 372 F.2d at 176 (citations omitted). Nashua is not the Internal Revenue Service and does not have "inquisitorial powers" in this proceeding, and thus has no basis to argue that the rules of privilege, relevance or materiality should be substantially relaxed. Similarly, Hartman v. Caplan, 115 F.R.D. 599 (N.D. Ill. 1987), has no application. In Hartman, the Court allowed discovery of the identity of an appraiser from the defendant because the defendant placed the value of the property at issue in bringing a counterclaim for breach of fiduciary duty. Hartman, 115 F.R.D. at 602. Here, Pennichuck has not, and cannot, bring any counterclaims in this eminent domain proceeding, and thus has not put any matter in issue. In fact, Pennichuck has not made any affirmative claims or submitted any testimony raising any issues in this proceeding yet, and is not required to do anything of the sort until at least October 14. In sum, not one of the cases cited by Nashua supports its position, and the Commission should reject Nashua's contention that they provide the "appropriate standard" for this case.

### **Nashua Should be Held to the Same Standard as Pennichuck in Discovery**

12. Finally, Nashua requests that the Commission apply a different standard to its discovery requests than those of Pennichuck. In its Motion, Nashua complains that the Hearings Examiner erred by concluding that the appraisal reports were privileged without any privilege log<sup>6</sup> or supporting evidence, and that the burden of proving the existence of the privilege was improperly shifted from Pennichuck to Nashua. Nashua Motion at 6. Ironically, when Pennichuck challenged Nashua's claim of privilege in response to certain of Pennichuck's data requests, Nashua did not provide any privilege log or supporting evidence of the claimed privilege. See Nashua's June 10, 2005 Objection to Pennichuck's Motion to Compel. And yet when the Hearings Examiner reviewed the matter, and recommended to the Commission in the absence of any Nashua privilege log or the like that Nashua's documents were privileged, Nashua did not complain. Nor did Nashua complain, or move for rehearing, when the Commission agreed with the Hearings Examiner's recommendations that such documents were privileged. Nashua cannot have it both ways. It cannot complain that the Commission has applied the wrong standard in evaluating Pennichuck's claim of privilege, when the Commission applied that very standard to Nashua's own documents.

13. For these reasons, the Commission should deny Nashua's Motion.

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<sup>6</sup> On June 17, 2005, Pennichuck provided Nashua with a copy of its privilege log which Nashua could have provided to the Commission had it determined that the log was material to this issue.

WHEREFORE, Pennichuck respectfully requests that the Commission:

- A. Deny Nashua's Motion for Reconsideration and Clarification of the Commission's Order Addressing Nashua's Motion to Compel; and
- B. Grant such other and further relief as the Commission deems necessary and just.

Respectfully submitted,

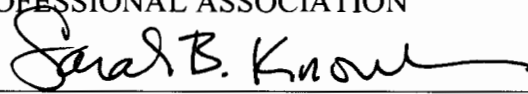
Pennichuck Water Works, Inc.

By Its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,  
PROFESSIONAL ASSOCIATION

Date: August 31, 2005

By:

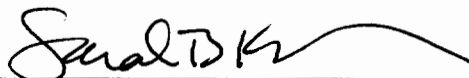


Thomas J. Donovan  
Steven V. Camerino  
Sarah B. Knowlton  
Bicentennial Square  
Fifteen North Main Street  
Concord, NH 03301  
Telephone (603) 226-0400

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 on this 31st day of August, 2005, a copy of this Objection to Nashua's Motion for Reconsideration and Clarification of the Commission's Order Addressing Nashua's Motion to Compel has been forwarded to the parties listed on the Commission's service list in this docket.



Sarah B. Knowlton