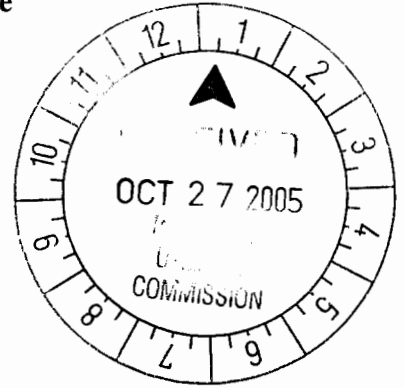




**Upton
& Hatfield**^{LLP}
ATTORNEYS AT LAW

Please respond to the North Conway office

October 26, 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

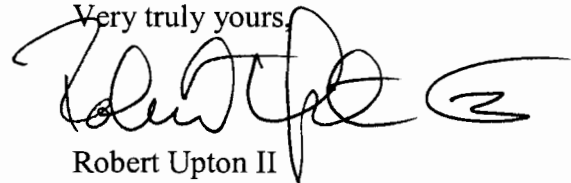
Dear Ms. Howland:

Enclosed for filing with the Commission please find an original and eight copies of Nashua's *Objection to Pennichuck Water Works, Inc.'s Motion For Leave to Respond*. Also enclosed is an electronic copy of the foregoing on disk.

A copy of the foregoing has been sent this day by e-mail and first class mail to all of the parties on the Commission's official service list in this proceeding.

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

Very truly yours,



Robert Upton II
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RUII/bgb
Enclosure

cc: Official Service List

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STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

DW 04-048

OBJECTION TO MOTION FOR LEAVE TO RESPOND

NOW COMES the City of Nashua (“Nashua”) and objects to Pennichuck Water Works, Inc.’s (“PWW”) *Motion for Leave to Respond* (“Motion”) and its *Reply to City of Nashua’s Objection to Motion for Summary Judgment* (“Reply”), and in support thereof states as follows:

A. PWW’s Motion for Leave to Respond is Untimely

1. PWW’s *Motion* and *Reply* are not timely filed under Puc 203.04(g). Nashua filed its *Objection to Pennichuck Water Works, Inc.’s Motion for Summary Judgment* on October 6, 2005. The *Motion* and *Reply* which are in the nature of an “objection” to Nashua’s filing were not filed until October 18, 2005, twelve days after the filing Nashua’s objection. As a result, PWW’s *Motion* and *Reply* are untimely under Puc 203.04 (g) which requires that objections be filed within 10 days.

B. PWW Has Not Shown Good Cause Exists for Filing Additional Pleadings in Support of Its Motion for Summary Judgment

2. In fact, PWW’s *Motion* and *Reply* do not present or respond to any new information. Rather, PWW simply rehashes the same arguments made in its *Motion for Summary Judgment* in order to have the last word before the Commission. For example, PWW’s *Motion* and *Reply* do not respond substantively to Nashua principal argument that it has provided information demonstrating that the technical and managerial

qualifications of its contract operators will likely exceed those of PWW. Rather, PWW simply repeats the same argument made in its *Motion for Summary Judgment* that: the procedural schedule prohibits Nashua from submitting the technical and managerial qualifications of its contract operators to the Commission. See, e.g. *Motion*, at para. 4, *Reply*, at paras. 2-7.

3. PWW has had ample opportunity to present argument in support of its *Motion for Summary Judgment*. PWW has not demonstrated that good cause exists for filing additional pleadings and allowing an additional response simply to have the last word is unwarranted. As a result, its *Motion for Leave to Respond* should be rejected.

C. PWW's Argument is Inconsistent with RSA 38

4. PWW's argument that Nashua is precluded under the Commission's procedural rules (paras. 9-11) and the procedural schedule¹ (paras. 2-7) from supplementing the original testimony that it intended to contract out the operation and management oversight of its water system to skilled operating companies is inconsistent with the express provisions of RSA 38 and the Commission's procedural rules.

5. RSA 38 expressly authorizes Nashua to "establish" a municipal water utility where none previously existed. As RSA 38:2 clearly states: "[a]ny municipality may ... [e]stablish ... one or more suitable plants for the manufacture and distribution of ... water for municipal use, for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized, or directed by the commission." Nothing in RSA 38 suggests or lends support to PWW's argument that Nashua was required begin its bid

¹ Nashua's Objection clearly set forth its position that the procedural schedule allows for additional testimony on the public interest and its technical and managerial qualifications.

process and select an operator “before filing at the Commission and then [submit] its entire public interest case by November 22, 2004.”²

6. Essentially PWW’s argument asks the Commission to read its procedural rules 202.11 (a) and 204.01 (b) to require that Nashua have in place all of its technical and managerial qualifications prior to filing its petition. As PWW is well aware, requiring Nashua to pre-file its “entire public interest case” under these rules would effectively require Nashua to either establish its own water department or complete a third party bid process prior to any opportunity for discovery concerning its water system, its property records, and costs for operation and maintenance. This argument would essentially prohibit a municipality from doing what RSA 38:2 expressly allows: establishing a municipal system when none previously existed by filing an RSA 38 petition.

7. PWW’s argument ultimately seeks to prevent the Commission from making the public interest determination with all the relevant information before it. Raising procedure over substance, PWW in essence wants the Commission to rule is that Nashua’s Petition for Valuation under RSA 38 is no different from a rate case or any other proceeding before the Commission. This argument, however, ignores the fact that a utility seeking a rate increase controls all the information necessary for the Commission to make a rate determination. The same is not true in an RSA 38 proceeding. Nashua could not have known who its contractors would be when it filed the Petition. To require it to have such knowledge would clearly frustrate the intent of RSA 38 and give the PUC Rules greater importance than the statutory presumptions and standards.

² *Reply*, at Page 3, para. 5.

B. PWW's Argument Misreads the Commissions Procedural Rules

8. PWW's argument further misreads the provisions of Puc 204.01(d), which provides that when "issues arise which were not reasonably anticipated by the petitioner, the commission shall allow the petitioner to file supplemental testimony on the new or unanticipated issues." Rule 204.01 (d) clearly applies to this proceeding.

9. PWW correctly states that Nashua "anticipated" that it would be contracting out operations and oversight when it filed its testimony on November 22, 2004. However, it certainly could not be "anticipated" who those entities would be until July 14, 2005 when the bids were submitted. As pointed out in its *Objection to the Motion for Summary Judgment*, Nashua provided to PWW and the other parties information concerning the managerial, technical and financial capability of its contractors to operate the system. Under Puc 204.01(d), Nashua is entitled to supplement its testimony. A contrary reading would render the rule meaningless.

10. There is no harm or prejudice to PWW if Nashua submits testimony from its contractors after it completes negotiation of the contracts. As set forth in Nashua's *Objection* and supported by detailed affidavit, Nashua has provided PWW detailed information concerning the technical and managerial qualifications of its proposed contractors. Notwithstanding PWW's contrary unsupported assertions, Nashua has acted diligently throughout this process³ and trial is not scheduled until January 2007. Supplementing the public interest testimony will allow for full development of the record regarding Nashua's Petition and will not disrupt the orderly conduct of the proceeding.

³ See Nashua's *Objection to Motion for Summary Judgment*, Exhibit 1.0, *Affidavit of Brian McCarthy*.

11. Even if PWW's arguments in the Reply are correct it still has not demonstrated the summary judgment is an appropriate remedy as a matter of law. (See Nashua's Objection to Motion for Summary Judgment, Paragraphs 39 and 40.)

WHEREFORE, Nashua respectfully:

- A. Objects to the Motion and Reply;
- B. Urges the Commission to deny the Motion and disregard the Reply; and
- C. Grant such other and further relief as justice may require.

Respectfully submitted,

CITY OF NASHUA

By Its Attorneys

Date: October 26, 2005

By: 

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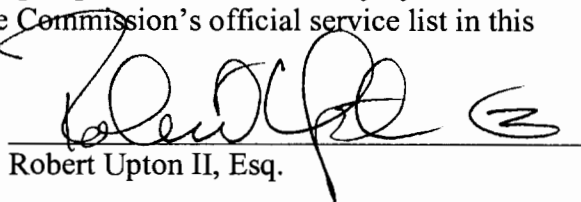
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CERTIFICATE OF SERVICE

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

Date: October 26, 2005


Robert Upton II, Esq.