

**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

May 16, 2005

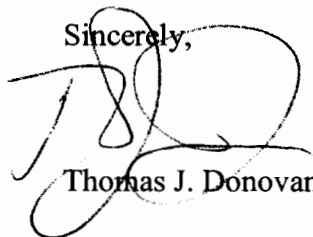
Debra A. Howland  
Executive Director and Secretary  
New Hampshire Public Utilities Commission  
21 S. Fruit Street, Suite 10  
Concord, NH 03301

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 a Motion to Establish Procedure for Depositions.

Sincerely,



Thomas J. Donovan

cc: Service List  
Donald L. Correll



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

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

**Docket No. DW 04-048**

**MOTION TO ESTABLISH PROCEDURE FOR DEPOSITIONS**

Pennichuck Water Works, Inc. ("Pennichuck") presents this Motion to Establish Procedure for Depositions in the above-captioned condemnation proceeding. This Motion follows from the discussion at the April 8, 2005 technical session concerning the procedure for instituting depositions. Counsel for Pennichuck and for the City of Nashua ("Nashua") agreed at the time that further thought and guidance would be required on this subject. Accordingly, the procedural schedule which the parties developed and which the Commission approved in its Order No. 24,457 dated April 22, 2005, included time deadlines for conducting depositions, but not procedures relating to instituting them. Nashua, the Commission staff and the Office of the Consumer Advocate, among others, assent to this Motion, and this Motion addresses that need.

**PUC Deposition Practice**

1. Currently, the Commission has the authority to issue subpoenas for proceedings. RSA 365:10 provides: "The commission shall have power to subpoena witnesses and administer oaths in any proceeding or examination instituted before or conducted by it, and to compel, by subpoena duces tecum, the production of any accounts, books, contracts, records, documents, memoranda and papers of any kind whatever." RSA 365:11 states: "Witnesses summoned before the commission shall be paid the same fees as witnesses summoned to appear before the

superior court, and such summons issued by any justice of the peace shall have the same effect as though issued for appearance before such court.”

2. The right of *parties* to issue subpoenas, if necessary, to conduct depositions in Commission proceedings is not so clear. Puc 204.4(g) provides: "The commission shall employ other forms of discovery including, but not limited to, technical sessions and depositions as needed to enable the parties and staff to evaluate the issues presented." To that end, depositions do take place by agreement occasionally in Commission proceedings. While RSA 365:11 contemplates justices of the peace issuing subpoenas to witnesses, there is no express rule allowing the parties in a Commission proceeding to employ subpoenas where necessary to compel witness attendance at depositions. *See Tilton and Northfield Aqueduct Company*, 74 NH PUC 451 (1989)(Commission expressed doubt about independent authority of parties to subpoena witnesses to a deposition).

3. The Commission has only permitted discovery that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence, *Re Investigation Into Whether Certain Calls are Local*, 86 NH PUC 167 (2001), which is akin to the standard for discovery in superior court cases. While discovery should be relevant to the proceeding or reasonably calculated to lead toward the discovery of admissible evidence, the Commission will deny a discovery request when it “can perceive of no circumstance in which the requested data will be relevant”. *Lower Bartlett Water Precinct*, 85 NH PUC 371 (2000).

#### **Adoption of Superior Court Practice**

4. Because this condemnation proceeding is *inter partes*, Pennichuck proposes that the Commission adapt for this case the deposition procedures of the superior court.

5. Depositions are a widely used and accepted discovery technique largely self-regulated by the parties to litigation. The Superior Court Rules permit the wide-ranging use of depositions. *See*, Superior Court Rule 35(a) and (b)(1). The vast majority of depositions in superior court cases take place by agreement of the parties. That agreement reflects both the collegial nature of the practice of law in New Hampshire, but also the admonitions of bar association professionalism guidelines for conduct.

6. Occasionally, superior court litigation parties cannot agree upon the deposition of a witness identified with a party. Or the witness is truly independent, and refuses to cooperate. In that case, counsel, usually also a justice of the peace, will issue a notice of deposition to the parties pursuant to RSA 517:4, and serve a subpoena upon the witness pursuant to RSA 516:3,4. If the witness is located outside of New Hampshire, a party moves for the appointment of a commissioner (usually a court reporter or lawyer) in that other state, and the court orders that appointment. RSA 517:15. The commissioner then issues the subpoena to the witness, in accordance with that state's statute (analogous to RSA 517:8) for conducting depositions in out of state cases.

7. The Commission should issue an order which adopts to the extent possible the superior court practice, and permits the Commission's Executive Director and Secretary to issue subpoenas where necessary in accordance with that order. The following is a proposed order which would accomplish the foregoing.

#### **Proposed Deposition Prehearing Order**

8. Given the *inter partes* nature of the proceeding, and the fact that depositions have been worked into the procedural schedule approved in Order No. 24,457, the Commission approves the use of depositions as an appropriate discovery technique in this matter. The

Commission hereby adopts Superior Court Rules 35 and 38 through 45-A, to the extent not otherwise covered by Order No. 24,457 or the rules or statutes governing the Commission's proceedings.

9. Each party shall cooperate in scheduling depositions by agreement without involvement from the Commission, to the extent possible. Parties shall use best efforts to produce for deposition, upon request, witnesses employed by a party or under a contractual relationship with a party related to this proceeding.

10. To the extent that a witness or the parties fail to agree on the conduct or scope of a deposition voluntarily, the party requesting it will file with the Executive Director and Secretary of the Commission a request for issuance of a subpoena (if the witness is located within New Hampshire) or appointment of a commissioner to take a deposition (if the witness is located outside of New Hampshire), with service upon all parties. The request shall state how the proposed deposition comes within the scope of Superior Court Rule 35(b)(1). The Executive Director and Secretary will issue such document on the eleventh day thereafter unless any party opposing issuance of the subpoena or commission has filed an objection, stating the reasons therefore, within ten days of the applicant's filing, again with service upon all parties.

11. Upon the timely filing of an objection, the party proposing the deposition shall file any response within five days after service of the objection. The Commission shall then promptly decide whether or not the subpoena or appointment of a commissioner should issue, based upon the criteria set forth in the adopted Superior Court Rules.

12. The party proposing the deposition shall arrange for service of the subpoena and/or commission, and shall serve notice of the deposition in accordance with RSA Chapters 516 and 517.

13. Pennichuck has contacted all parties concerning the relief requested in this Motion, and has obtained the assent of Nashua, the Commission staff, the Office of the Consumer Advocate, and the Towns Milford, Raymond and Pittsfield. The Towns of Merrimack, Litchfield and Hudson have no objection to, and the Nashua Regional Planning Commission takes no position regarding, the relief requested in this motion. The others parties to this proceeding were unable to respond prior to the filing of this motion.

14. Because Nashua and Pennichuck have reached agreement on a process for taking depositions and the issuance of subpoenas, if the Commission grants this Motion and issues an order consistent with the proposed order set forth above, there is no need to address the issue of whether subpoenas may be issued in this proceeding by anyone other than the Commission.

WHEREFORE, Pennichuck Water Works, Inc. requests that the Commission issue a prehearing order concerning depositions as set forth herein in paragraphs 8 through 12.

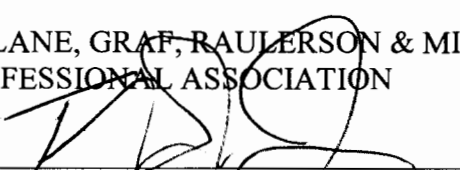
Respectfully submitted,

PENNICHUCK WATER WORKS, INC.  
By Its Attorneys

MCLANE, GRAF, RAULERSON & MIDDLETON,  
PROFESSIONAL ASSOCIATION

May 16, 2005

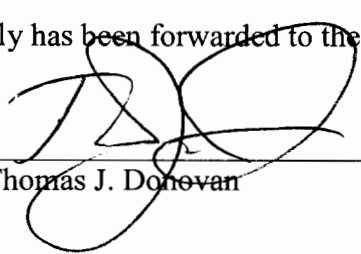
By:

  
\_\_\_\_\_  
Thomas J. Donovan  
Steven V. Camerino  
Sarah B. Knowlton  
15 North Main Street  
Concord, NH 03301

Certificate of Service

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

Dated: May 16, 2005

  
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Thomas J. Donovan