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August 15, 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 Motion for Clarification, Reconsideration and/or Rehearing Regarding Order No. 24,489. I have e-mailed an electronic copy of the Motion to Ann Guinard, as well as served the parties this same day by e-mail and first class mail.

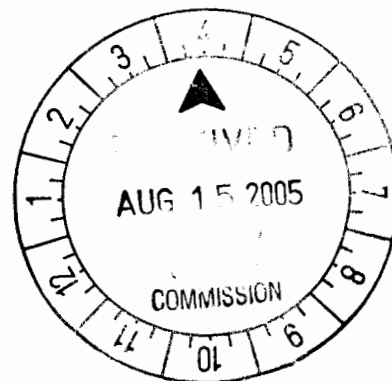
The Merrimack Valley Regional Water District, the Town of Amherst, and Barbara Pressly do not consent to the Motion, and the Office of Consumer Advocate takes no position. I was unable to reach the remaining parties to determine their position prior to this filing.

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

Very truly yours,

  
Thomas J. Donovan

cc: Service List  
Donald Correll, CEO and President



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

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

**Docket No. DW 04-048**

**MOTION FOR CLARIFICATION, RECONSIDERATION AND/OR REHEARING  
REGARDING ORDER NO. 24,489**

Pennichuck Water Works, Inc. ("PWW") respectfully requests that, pursuant to RSA 541:3, the Commission clarify its Order No. 24,489 ("Initial Order") regarding the Merrimack Valley Regional Water District's ("the District") participation in this case as well as reconsider or conduct a rehearing on its denial of PWW's motion to compel the District to respond to PWW's Data Requests ("Motion to Compel the District") in the above-captioned proceeding.

**I. Background**

The City of Nashua began this case in March 2004 seeking to take all of PWW's assets.

In its petition, the City asserted that

16. ...Acquiring such assets is further in the public interest because of the passage of Chapter 281 and Nashua's participation in, and support of, a regional water district. It is the present intention of Nashua, upon completion of the acquisition of the assets of PWW, PEU and PAC and the successful negotiation of a satisfactory water district charter [which Nashua has since indicated has occurred], to convey or otherwise transfer such assets to the newly formed regional water district.

17. Based upon its investigation, Nashua has determined that there are no significant impediments or barriers to acquisition of these assets; that the acquisition by Nashua would be in the public interest; and that acquisition, ownership and control of these facilities by Nashua, or the regional water district, is essential to the economic viability and orderly economic growth of the City and Region.

Nashua's Petition at 5.

On or about July 21, 2004, the District filed a Petition to Intervene (the "District's Petition"). Approximately seventeen parties sought to intervene in this case and PWW objected to only one such intervention request—that of the District. In response to PWW's objection, the District argued vehemently that it should be granted full party status. Counsel for the District asserted:

I think that the District needs to be here, that it is a vital part of this. I rely upon the pleadings before this Commission and representations on numerous occasions by the City of Nashua that it is their intention to turn the assets over to the District at the end of the day, assuming that that's where we get, as far as the Commission is concerned.

Transcript, July 28, 2005, at 16. Simply put, it is Nashua and the District, not PWW, that have put the transfer of PWW's assets to the District and the role of a regional district in serving PWW's customers at issue in this case. It is they who have asserted that the transfer of those assets to the District constitutes part of the City's public interest case, and it is they who have asserted that the District's participation as a full party in this proceeding is vital to the case. However, it is unclear from the Commission's order the extent to which the District may participate in the case since it elected against filing testimony and is now outside the scope of discovery.

## **II. The Initial Order Does Not Address What Continuing Rights The District May Have As A Party If It Is Not Subject To Discovery**

In its Initial Order, the Commission ruled that the District was not obligated to respond to PWW's data requests because the District had not filed any petition, application or testimony in this proceeding. Initial Order at 3. The Commission ruled that the consequence of not filing testimony was that such a party "...forfeits an opportunity to make its case...." *Id.* Given Nashua's stated intention to transfer PWW's assets to the District, and the District's stated intention to own those assets, the question of the District's financial, technical, and managerial

ability to own and operate the PWW assets and provide water service is a critical matter affecting the public interest that must be considered by the Commission in this case. However, the ruling fails to address how a party's decision not to file testimony limits its further participation in the case. PWW requests that the Commission clarify this issue so that the parties have a clear understanding of the nature of the District's role and participation in the case on a going-forward basis.

The Commission's blanket statement raises the question about the role of the District in this case, and the extent to which it may participate in the hearing on the merits. For example, it is unclear from the Initial Order whether the Commission intended to indicate that a party such as the District who decides not to present testimony is then prohibited from cross-examining witnesses. During cross examination, parties often submit important evidence into the record in the form of exhibits and, in multi-party cases such as this one, often use the process of friendly cross examination of witnesses sponsored by other parties to supplement the record and generate additional testimony that supports their own case. Will the District have that right? Similarly, the Initial Order raises the question of whether a party who did not proffer a witness is barred from making oral or written arguments and submitting briefs or appealing rulings by the Commission. In particular, given the procedures traditionally applied by the Commission and the fact that the rules of evidence do not generally apply in Commission proceedings, there is little to limit the means by which a party who has not submitted testimony can still effectively present their case and submit evidence into the record.

PWW requests that the Commission clarify its Initial Order by indicating that the District has forfeited these specific rights because it chose not to file testimony, and thus submit itself to discovery, in this matter. Were the Commission to allow the District to make its case through

friendly witnesses and other cross examination as well as through other means, it would effectively allow the District to achieve indirectly the right that it forfeited by not filing testimony. The Commission should clarify that such an end-run of the Commission process is not permissible. To rule otherwise would lead to a one-sided limitation on PWW's ability to develop its case, while leaving those who argue in support of taking PWW's water systems completely free of such a handicap.

**III. The Commission's Refusal To Compel The District To Respond To Data Requests Is Contrary To Law And, If Not Reversed, Will Result In A Gross Denial Of Due Process For PWW**

In its Initial Order, the Commission denied PWW's Motion to Compel the District on the basis that "[t]he Commission's practice has been for parties to submit data requests to those who file a petition, application or testimony in a proceeding" and its unsupported interpretation of N.H. Code of Admin. Rules Puc 204.04(a) ("Discovery Rule") that the Discovery Rule prohibits a party from propounding discovery requests on any party to a proceeding who has not themselves submitted a petition, application or testimony. See Initial Order at 3. Notably, the Commission did not cite to any prior decision of this Commission or any other tribunal that would provide support for its conclusion. The issue presented by this Motion is one of first impression for this Commission that is of critical importance to this case and the due process rights of PWW, a company that faces a potential governmental taking of its entire business. For the reasons set forth below, PWW believes that the Commission's determination in its Initial Order is incorrect and urges the Commission to reconsider that ruling.

**A. The Initial Order Is based On An Erroneous Reading Of Puc 204.04(a)**

The Commission's ruling in the Initial Order is based on an erroneous interpretation of Puc. 204.04(a), which provides that "[t]he staff or any party shall serve upon any other party or

the staff, data requests, which may consist of a written interrogatory or request for production of documents, as necessary to evaluate a petition, application or testimony" (emphasis added). In denying PWW's Motion to Compel the District, the Commission ignored the plain meaning of the Discovery Rule, effectively inserting words that would transform the meaning of the rule.

It is well established that agency rules, as with statutes, should be construed according to their plain and ordinary reading. See, e.g., Appeal of Flynn, 145 N.H. 422 (2000). But rather than interpret the Discovery Rule as written, the Commission's analysis implicitly rewrites the rule to provide that data requests may be submitted to a party only "as necessary to evaluate the petition, application or testimony of that party." Nowhere does the Discovery Rule say that discovery is limited to the petition, application or testimony filed by the party from which the discovery is sought, and such a rule would defy common sense since there may be other participants in a case (including the Staff) who possess relevant evidence regarding a matter before the Commission but have not chosen to file testimony. Once an agency adopts a rule, it is bound by the rule and must interpret it in a manner consistent with the language of the rule and the purpose for which the rule was first adopted. Appeal of Morin, 140 N.H. 515, 519 (1995). The Initial Order fails to do so and, therefore, it is in error.

**B. The Initial Order Improperly Narrows The Scope And Purpose Of Discovery And Would Prevent PWW From Seeking Relevant Information**

The purpose of discovery is "to narrow the issues of the litigation ... and prevent unfair surprise by making evidence available in time for both parties to evaluate it and adequately prepare for trial." Kearsarge Computer, Inc. v. Acme Staple Co., 116 N.H. 705, 366 A.2d 476(1976) (citations omitted). A party is entitled to "be fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been

raised by him or by his opponents and whether the evidence is in the possession of his opponent or someone else." Scoutsas v. Citizens Insurance Co., 109 N.H. 386 (1969).

As set forth above, Puc 204.04(a) provides for broad discovery. Puc 204.04(g) further mandates that other discovery (such as depositions and technical sessions) be allowed if such discovery is necessary for parties to evaluate the issues presented. These rules clearly contemplate that broad discovery will be allowed precisely so that parties can properly evaluate a wide range of relevant claims and issues and allow them a fair opportunity to evaluate and prepare their case.

What PWW seeks in this case is precisely what the Discovery Rule allows--discovery from a party to evaluate a petition filed with the Commission. It does not matter that the District is not the party that filed the initial petition in this case or that the District has chosen not to present a witness of its own.<sup>1</sup> Nor does it matter that the District did not file testimony. What matters is that PWW seeks discovery that is relevant and necessary for it to test the basis for claims asserted in the City's petition, evaluate those claims, and prepare for the hearing on the merits at which the Commission will consider issues that will affect the continued existence of PWW and the service provided to its customers.

In denying PWW's Motion to Compel the District, the Commission stated that it has been its practice to allow data requests to be submitted only to parties who file a petition, application or testimony in a proceeding. Aside from the fact that the Commission could cite no basis for its statement that such a practice actually exists in the tens of thousands of proceedings conducted

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<sup>1</sup> Arguably, the District has filed a petition in this case, namely its Petition to Intervene, which included numerous factual allegations, that are apparently now beyond the bounds of discovery.

by the Commission over the last century,<sup>2</sup> nothing in the Discovery Rule limits a party to serving data requests only on a party that has already submitted testimony or a petition. As noted above, the cornerstone of discovery is relevancy, not whether a particular party to a case has filed a petition or other documents in a proceeding. As the Commission itself has held, discovery requests are denied only when the Commission "can perceive of no circumstance in which the requested data will be relevant." See, e.g., Petition for Authority to Modify Schiller Station Order on Pre-Hearing Motions, 2004 N.H. PUC LEXIS 38, \*7, DE 03-166, Order No. 24,310 (2004). The scope of discovery in Commission proceedings is broad, and extends to information 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).

If, as the Commission suggests, discovery is limited by whether a party chooses to file certain documents with the Commission, rather than by relevance, the discovery process would be turned on its head. Discovery would no longer be available as a means for building or defending a case. Instead, parties could hide relevant information simply by refusing to file a petition or testimony and allow other parties to take the lead in a case. While such a practice might seem improbable in most cases, in a case such as this one where a "vital" party who is apparently the ultimate real party in interest proposing to acquire the subject assets has failed to file any testimony, the risks posed by such an interpretation of the discovery rules is plain. The "practice" referred to by the Commission is not only contrary to the language of the Discovery Rule itself, it is also contrary to the purpose and spirit of the rule, which is to allow a party to adequately evaluate its case and prepare for a hearing or trial.

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<sup>2</sup> It is noteworthy that, aside from whether there is sufficient institutional memory at the Commission to make such a blanket statement without any evidence to support it, the Commission does not participate in the discovery process and therefore it would not be aware of what data requests are propounded on parties unless a dispute arose that was presented to it for resolution by written order.



To the extent that the Commission may be concerned that allowing discovery on a party who has not filed testimony may have a chilling effect on parties with limited resources, that concern is misplaced given the procedural safeguards available to the parties and the Commission. Data requests, like any discovery, are not unlimited in scope. Parties have a right to object to irrelevant discovery under Rule 204.04(d), see, e.g., Re Public Service Company of New Hampshire, 86 NH PUC 730, 730 (2001); Lower Bartlett Water Precinct, 85 N.H. PUC 371 (2000); Re Public Service Company of New Hampshire, 72 NH PUC 509 (1987), and the Commission has made clear in this very case that it will limit the scope of discovery as it determines to be appropriate. In addition, parties have the ability to intervene at a variety of levels of participation. It was the District that fought so hard for full party status in this case, presumably because it wanted the rights of a full party. Now that it is asked to comply with the obligations of that status, it seeks protection from the Commission. The suggestion that the District should be given full discovery rights, the right to cross-examine witnesses, and the right to make arguments and submit briefs while avoiding being subject to questioning itself through the discovery process simply does not comport with any reasonable sense of full and fair development of issues in this case. Contrary to the District's assertions, a party's right to be fully informed and have access to the evidence necessary to prepare for a hearing or trial, particularly when that party's very existence is at stake, must take precedence over potential inconveniences to parties who have voluntarily intervened.

**C. Failure To Allow PWW To Serve Data Requests On The District Would Violate PWW's Due Process Rights.**

"Agencies, like a trial court, must follow fair procedures and provide due process." Appeal of Morin, 140 N.H. 515, 519 (1995). See also Withrow v. Larkin, 421 U.S. 35, 46 (1975). An agency must act "in a manner to subserve and not impede or defeat the ends of

substantial justice." Id. quoting Surman v. Socha, 463 A.2d 527, 531 (Conn. 1983). Discovery must be granted if refusal to do so would prejudice a party and deny him due process. NLRB v. Valley Mold Co., 530 F.2d 693 (6th Cir.); J.H. Rutter Rex Manufacturing Co. v. NLRB, 473 F.2d 223 (5th Cir. 1973); Electronic Design & Development Co. v. NLRB, 409 F.2d 631 (9th Cir. 1969).

Even if the Commission could limit a party's right to serve data requests in some cases to those parties who have themselves filed a petition, application or testimony, due process mandates that the Commission cannot apply such a restriction in this instance. Central to the City's eminent domain petition is that its plan to transfer PWW's assets to the District supports the City's public interest argument. In order to evaluate the proposed taking, and Nashua's stated plan to turn over ownership and operation of the utility to the District, PWW is entitled to seek information about how the District would provide water service to PWW's customers, including information on rates, regulatory oversight, the District's finances and other matters. These requests go to the heart of the City's allegations in its petition and whether the proposed taking is in the public interest. Denying PWW discovery on a party that has itself conceded it is "vital" to this proceeding would be highly prejudicial and irreparably undermine PWW's ability to be fully informed about evidence bearing on the heart of this case, thereby denying it due process.

The need for direct discovery on the District is amply illustrated by Nashua's refusal or inability to speak on behalf of the District in its own responses to data requests. For example, in response to a data request (Staff Set 1, Round 2 Request 2-1) from Staff regarding whether towns served by the District who are not members of the District would receive payments in lieu of taxes for real estate owned by the District in those towns, Nashua objected on the grounds that

the question called for "an answer from the District," and that "Nashua is not authorized to state a position on behalf of the District in this proceeding." PWW had propounded a similar question to the District, but no response was received because the District's refusal to answer was upheld by the Initial Order. Similarly, in response to a data request from the Staff, Nashua responded "[t]he City cannot speak for the District..." (Staff Set 1, Round 2, Request 2-4). These responses demonstrate how the City has used and will be able to continue to use the Initial Order to hide from legitimate areas of inquiry that are highly relevant to this case. In response to earlier data requests, the City had also avoided definitive answers to questions by stating that "Nashua cannot speak for the District." (Staff Set 1, Round 1, Requests 1-10 and 1-12).

The Commission's Initial Order ignores fundamental principles of justice and fair play. The District clearly has a personal stake in the outcome as it seeks to ultimately own the PWW assets that are the subject matter of this docket. Nashua's own petition makes clear that the District's future role as the owner and manager of those assets is a material part of its case, and the District has characterized its participation as vital. In essence, the District is the real party in interest in the City's petition. Justice dictates that the District not be allowed to play procedural games by maintaining a distinction between its role and that of Nashua's simply in order to evade discovery. Procedural tricks such as not filing testimony should not be allowed to block another party's access to relevant information. Such tactics undermine the fundamental fairness and integrity of this proceeding and the Commission's process and are plainly contrary to due process.

#### **IV. Conclusion**

For the reasons set forth above and as set forth in its Motion to Compel the District, PWW respectfully requests that the Commission reconsider its Initial Order and clarify the

District's participation in this case, and compel the Merrimack Valley Regional Water District to respond to PWW's data requests.


Respectfully submitted,

Pennichuck Water Works, Inc.

By Its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,  
PROFESSIONAL ASSOCIATION

Date: August 15, 2005

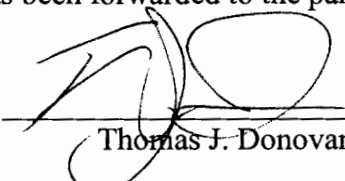
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Certificate of Service

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

Dated: August 15, 2005

  
Thomas J. Donovan