THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DW 20-156

Pennichuck East Utility, Inc.

Request for Change in Rates

REPLY OF RICHARD M. HUSBAND TO
PENNICHUCK EAST UTILITY, INC.'S OBJECTION, *ETC.*

Richard M. Husband, petitioning intervenor in the above-captioned matter, hereby respectfully submits the following reply to Pennichuck East Utility, Inc. ("PEU")'s Objection to Intervenor Husband's Request that the Commission Order Limits on Water Withdrawals and Consider Responsible Party Obligations Stemming from Contamination of the State's Groundwater ("Objection").

1. The Commission specifically approved this reply at the prehearing conference held in this matter on January 27, 2021. *See* Clerk Report.

2. As indicated in the Clerk Report, the Objection was supposed to be an objection to my petition for intervention. As such, it fails for the reasons supporting my intervention set forth in my petition, and for the arguments that I made at the prehearing conference. But, as filed, it actually seeks its own relief, to narrow the scope of this proceeding to exclude consideration of matters raised in my petition which fall within the scope of the Order of Notice for the proceeding but are not specifically identified as issues therein, *see* Objection, Prayer A, before there has even been any discovery. As such, PEU's filing should be rejected for exceeding the permissible scope of an objection to my petition, for being a misstyled motion not filed in accordance with Commission rules, and for being premature and the

other reasons set forth in the Consumer Advocate's January 29, 2021 objection to the Objection.

3. Additionally, the relief sought under the Objection should be denied for the following reasons.

4. There is no matter for the Commission to decide right now with respect to my concern for the overuse of Litchfield's aquifers that is raised in my petition to intervene. The Objection claims that paragraph 17 of my petition "requested that the Commission 'issue an order restricting withdrawals and/or PEU's use of withdrawals from the wells to the daily rates' discussed in his petition." Objection, ¶ 2. However, a review of my petition indicates that I only assert that this order *should* issue, and not necessarily in connection with this proceeding: there is no pending request for such relief now for the Commission to address, in the petition's prayers for relief, or otherwise.

5. Actionable requests under Commission rules are made by "a clear and concise statement of the authorization or other relief sought," Puc 203.05(a)(2), not by assertions, and a cap on well withdrawals may never be requested in the proceeding. If discovery establishes the validity of the dewatering concern, hopefully PEU would agree to not purchase and/or convey the water at issue as part of any settlement, or otherwise. If not, I may pursue one or more of several potential avenues for relief, including or not including a cap. Particularly as there has not even been any discovery, I should have, and have, expressly reserved the right to make that change in position. *See* petition to intervene, ¶ 6. But, any relief sought by me at the end of these proceedings will include a request that

rates associated with aquifer overuse be denied, and the obvious propriety of such a request under the noticed scope of these proceeding, alone, entitles me to full discovery on the issue. **Indeed, PEU acknowledges that the issue is within the scope of this proceeding**. Objection, ¶ 5 ("... Mr. Husband could make a colorable argument that the cost of the water PEU purchases from the Town of Hudson is within the scope of this rate proceeding."). As this is the same discovery needed to evaluate the propriety of a withdrawal cap or other relief, anyway, there is no harm to PEU in allowing me to proceed with such discovery, only prejudice to me in not allowing it. Given my entitlement to full litigation rights, including discovery, on the propriety of PEU's proposed rates independent of any other relief, the Objection's request to limit the scope of participation in this proceeding to exclude the water overuse issue is nonactionable even if its premise (that a cap is inappropriate relief) were true.

6. PEU is using the vehicle of my intervention petition to improperly request a narrowing of the noticed scope of this proceeding before it even starts. PEU's position is issue and outcome determinative, and it would be unfairly prejudicial for the Commission to consider and accept it at this time, before I and the other litigants have been afforded a fair opportunity, through discovery, to address it.

7. Moreover, although the issue is not ripe for consideration, PEU is wrong in asserting that the Commission could not order restrictions on the Litchfield wells. As between the Commission and DES, the Commission clearly has the jurisdiction and authority to honor such a request as part of its charge in overseeing the propriety of utility services and rates—the DES, not at all.

8. The Commission, not the DES, has the jurisdiction and authority to determine the propriety of PEU's services, well water use and rates under the Litchfield franchise grant, which facially restricts such services and water use to within the borders of Litchfield:

> " …ORDERED, that Hudson Water Company be, and hereby is, authorized to operate as a public water utility **in the entire Town of Litchfield, and for this purpose to construct the necessary facilities** …"

Order No.11,120, 58 NH PUC 73, dated October 5, 1973, at 95 (emphasis added). On information and belief, 75% or more of the water drawn from Litchfield's wells as a whole has historically been conveyed by PEU to the Town of Hudson or otherwise outside of Litchfield's borders. Since PEU has been providing water service under the Litchfield wells for over 20 years,[1] and they may collectively draw over two million gallons of water per day, billions of gallons of water have undoubtedly been conveyed outside of Litchfield's borders by PEU over the years, under a grant that limits service from the Litchfield infrastructure to within Litchfield's borders.

9. The Commission, not the DES, exercised both jurisdiction and authority over the Litchfield wells in approving their installation and operation in the early '80s under Second Supplemental Order No.15,057, 66 NH PUC 303, dated August 19, 1981, which was **granted in a rate case, such as this case is**. The Commission plainly may have imposed reasonable conditions on the operation of the wells

[1] *See* Joint Petition to Modify Franchise, ¶ 2, filed under Tab 1 in Docket No. DW 17-003.

when they were authorized, and it may so amend, *etc*. its original authorization of the wells now under RSA 365:28.

10. The DES, conversely, has indicated that it considers its authority to address the wells' impacts to be unclear and limited, and thus looks to voluntary remedial action. *See* my petition to intervene Exhibit "A," December 17, 2009 Kernen letter at p. 2 and Attachment 2 p. 4 ("As for NHDES' regulatory authority in this matter, the current surface water quality rules (Env-Ws 1700) do contain criteria that protect the water level of the pond, but these rules do not define a specific process in which impacts are addressed. However, in the case of the low water level in Darrah Pond, Hudson voluntarily elected to establish a process with NHDES to assess and address impacts with the withdrawals ..."). The Commission does not have to rely on voluntary cooperation, as is the DES' "plan," but, if requested, could and should ensure that the waters within the Town of Litchfield are protected by concrete conditions on well usage.

11. PEU claims that consideration of such relief would be improper since the Town of Hudson is not a party to this proceeding and is thus unable to defend its well rights. Objection, ¶ 5. However, given its own interest in the wells, PEU will plainly defend their use. Moreover, the Town of Litchfield clearly had rights respecting the wells but was not made a party to the approval proceedings until Litchfield made itself a party by intervention. *See* Order No.15,057, 66 NH PUC 303, dated August 19, 1981. What was fair and appropriate then should be just as proper now. But, certainly the Commission will ensure that the Town of Hudson

is provided with any required notice of proceedings and would grant its intervention in the same upon request, so Hudson's rights will be protected.

12. The truly disturbing aspect of the well issue is that PEU did not simply dispel it, when raised, with clear proof that it is not a concern.

13. PEU has, undoubtedly, been aware of the dewatering concerns in Litchfield for years. As is shown by Exhibit "A" to this reply, **those involved in the operation of the Litchfield wells knew *a decade ago* that the static ground water level of the Darrah Pond aquifer (and probably all Litchfield aquifers) was <u>eight feet lower</u> then, than it was at the time of installation of the wells in 1983. What is the level at now—after 10 more years of taxing the aquifer?** On information and belief, PEU has had ready access to the Darrah Pond and Litchfield aquifer level readings over the years, as well as the pumping data, to easily respond to the issues I have raised and associated discovery—so it should.

14. As I noted at the prehearing conference, one particularly galling aspect of the Litchfield well issue is that Hudson had at least five operating wells in Hudson at the time the Litchfield wells were approved[2] which, on information and belief, have been shut down and not used since. Hudson could have continued to use the wells, but Hudson customers did not like the water quality and improving the quality would have required filtration,[3] so Hudson has been using Litchfield's water on the cheap, and Litchfield residents have been paying more and more for

[2] *See* Transcript of Information Hearing in Hudson on January 8, 1981 at 113 in Docket No. DR 80-218. **As was noted by the water utility at the time: "[T]hose costs relate strictly to Hudson. Litchfield water does not have those kinds of problems." *Id*. at 55.**

[3] *Id*. at 111-114.

their water, ever since.[4] Why? At least in part because, as I understand it, Litchfield residents are getting less and less water from Litchfield's own aquifers and more and more water from the Merrimack River, through the connection at Taylor Falls (or elsewhere). As the DES has noted:

> "The cost of water obtained from the surface water source [Taylor Falls], however, is significantly higher than that of the water obtained from the three groundwater [Litchfield] wells."

My petition to intervene Exhibit "A," Attachment 2 at p. 1. From the attached Exhibit "A," Hudson apparently installed a replacement well in Litchfield circa 2011, and I would be surprised if the bulk of that and other well costs almost exclusively benefiting Hudson, not Litchfield, have been passed on to Litchfield ratepayers over the years.

15. Because of Hudson and Saint-Gobain, Litchfield residents have gone from high quality aquifer water to river water—and are paying a lot more for it. Meanwhile, Hudson continues to pound the Litchfield wells, not only for its own needs, but to sell to PEU at likely a handsome profit.

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[4] Yes, the water is owned by the State, not the Town of Litchfield, but, again, this means that it must be preserved for the benefit of all—including Litchfield ratepayers and other residents—under the public trust doctrine, not consumed by the Town of Hudson. Litchfield ratepayers (and other residents of the town) have water needs and rights, too, for which they should be entitled to some kind of reasonable compensation and reconciliation in their water rates if the town's aquifers have been overused to their detriment. As previously noted, the town still has well users. Darrah Pond has abutters and is the site of the town's lone park. Because of the stress on the Darrah Pond aquifer caused by the Hudson wells, Litchfield must reduce the water used at its recreational fields at this park; Litchfield must reduce the water used at its high school; Litchfield must curtail its buildout (impacting property rights)—not Hudson—even though "the Dame and Ducharme wells accounts [sic] for 80-90% of all water use in the Darrah Pond aquifer." *See* my petition to intervene Exhibit "A," Attachment 1, pp. 3-4. Given the limitations on withdrawals from Litchfield's aquifers necessitated by Hudson's pumping, Litchfield has almost assuredly been deprived of any opportunity to establish its own municipal water utility from the water within its borders.

16. Although the DES has been pressing Hudson to find new water resources for 20 years to relieve the stress on Litchfield's aquifers, Hudson has failed, to my knowledge, to open any new wells, even including re-opening any of the five previously working wells in Hudson. Perhaps if/when the Litchfield aquifers are drained dry, Hudson will spend money on a new well somewhere other than in Litchfield.

17. PEU's arguments concerning the Saint-Gobain issue must be rejected for similar reasons. **The Objection acknowledges that the charges I flagged as the possible responsibility of Saint-Gobain in my petition "as well as how much of the revenue requirement that includes these expenses that customer classes pay are issues within the scope of issues noticed in this proceeding."** Objection, ¶ 7. As issues within the scope of the proceeding, the Commission clearly has jurisdiction and authority to consider them, but PEU takes the position that only the DES or a court has jurisdiction and authority. *Id*. at ¶¶ 7, 8. It is not unusual for two agencies and/or a court to have concurrent jurisdiction and authority over at least some issues in a dispute, and PEU has not established that this is not the case here. Whether Saint-Gobain is involved in this proceeding and/or subject to the Commission's jurisdiction is irrelevant: the determination of whether rates are just, reasonable and lawful is not grounded in such considerations, but in whether *ratepayers* are responsible for the rates. PEU cannot obtain approval for its rates merely by pointing to an empty chair and saying "no one else here could be held responsible, so it has to be the ratepayers."

The burden of proof on the propriety of its rates and ratepayer responsibility lies with PEU; ratepayers are not required to prove the opposite. *See* Puc 203.25.

18. Again, minimally, participants in this proceeding need discovery on the Saint-Gobain issue before it can be fairly considered. PEU's reliance on a letter for a legal determination of the parties' rights and responsibilities, *see* Objection, ¶ 8, is misplaced. Indeed, the letter itself supports the proposition that Saint-Gobain is liable for the costs at issue, for it states that the company is responsible for "the *full* cost" (emphasis added) of the Litchfield connections, which includes the costs at issue.

19. For all of the above reasons, PEU's Objection must be rejected, its request for relief denied, and my petition for intervention granted with full intervention rights, including the right to unrestricted discovery.

Respectfully submitted,

/s/ Richard M. Husband
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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 5th day of February, 2021, served a copy of this pleading, by electronic mail, on all individuals and parties identified on the service list for this proceeding, including Pennichuck East Utility, Inc. and the Consumer Advocate.

/s/ Richard M. Husband
Richard M. Husband