

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

City of Nashua – Taking of Pennichuck Water Works, Inc.

DW 04-048

**PENNICHUCK’S OBJECTION TO MOTION TO APPROVE
WATER SUPPLY AGREEMENT**

NOW COME Pennichuck Water Works, Inc. (“PWW”), Pennichuck East Utility, Inc. (“PEU”), Pittsfield Aqueduct Company, Inc. (“PAC”), Pennichuck Water Service Corporation and Pennichuck Corporation (collectively “Pennichuck”) by and through their attorneys, McLane, Graf, Raulerson & Middleton, Professional Association, and object to the Joint Motion to Approve Water Supply and Indemnity Agreement filed by the City of Nashua and Town of Milford (the “Joint Motion”). In support of this Objection, Pennichuck states as follows:

1. The Joint Motion seeks to supplement the record in this proceeding after the record has been closed. Nashua and Milford have made no attempt to comply with the provisions of N.H. Code of Admin. Rules Puc 203.30, which requires that they demonstrate that their late filing "will enhance [the Commission's] ability to resolve the matter in dispute" in this case.
2. In fact, the late filing by Nashua and Milford is likely to further delay and confuse resolution of the matter in dispute because it presents only partial information. For example, the Joint Motion fails to state, as Milford officials have confirmed to Pennichuck, that the Town continues to oppose the taking by Nashua and has entered into this recent agreement with Nashua only as a means of protecting the Town's interests if the Commission were to approve the taking of Pennichuck Water Works’ assets.

3. Pennichuck has not had an opportunity to conduct any cross-examination or discovery regarding the agreement contained with the joint motion. If it were able to do so, additional information of interest to the Commission would be likely to come to light. In particular, if the Commission intends to allow parties to supplement the record regarding agreements reached and events occurring since the close of the evidence, Pennichuck would present public statements by the Mayor of Nashua, including some made during an interview on WMUR-TV, indicating, among other things, her opposition to the City's decision to undertake the eminent domain process, a process that was initiated by the City's former Mayor, Bernard Streeter, who signed the agreement with Milford only two days before leaving office.

4. Regardless of Nashua's efforts to make it appear that the facts have changed, there is nothing new about the legal issues posed by the Water Supply and Indemnity Agreement (the "Agreement") submitted by Nashua and Milford. The Agreement is not a matter that is within the Commission's power to approve. RSA 362:4, III-a.(a) provides in relevant part that "A municipal corporation furnishing water services shall not be considered a public utility under this title...(2) [i]f it supplies bulk water pursuant to a wholesale rate or contract to another municipality, village district, or water precinct." There is no question that the Agreement falls squarely within this provision.

5. Under the Agreement, Nashua purports to subject itself to Commission authority for matters that are beyond the Commission's subject matter jurisdiction and further purports to bind itself not to challenge that jurisdiction. (See Sections 3 and 4 of the Agreement.) As Pennichuck has previously set forth in its post-hearing brief, the Commission's subject matter jurisdiction is a matter for determination by the Legislature, and may not be expanded by

agreement.¹ For the same reason, a contract that purports to accomplish the same, even one including a covenant not to challenge such jurisdiction, would be unenforceable. *See Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 647 n.7 (11th Cir. 1986), *vacated on other grounds*, 785 F.2d 896 (11th Cir. 1986) ("Subject matter jurisdiction cannot be created by contract"); *Ball v. Versar, Inc.*, 454 F. Supp. 2d 783, 810 (S.D. Ind. 2006) (court struck down as unenforceable the portion of a contract that purported to make disputes arising under the agreement fall within federal court jurisdiction); *Publix Super Markets, Inc. v. Cheesboro Roofing, Inc.*, 502 So. 2d 484, 488 (Fla. Dist. Ct. App. 1987) (concluding a contractual venue provision is "unenforceable because the parties cannot by contract confer *in rem* subject matter jurisdiction on a trial court which does not have it"); *RMP Rentals v. Metroplex, Inc.*, 146 S.W.3d 861, 866 (Ark. 2004) (court refused to enforce a forum selection clause because it would contravene a strong public policy under which subject-matter jurisdiction is set by statute); *McConnon v. RXR Group, Inc.*, No. CV 970160843S, 1997 WL 644888, at *1 (Conn. Super. Ct. Oct. 9, 1997) (court declared forum selection clause unenforceable because the federal court would be unable to assert its subject matter jurisdiction). Even if the City government of Nashua could be relied on to honor its stated commitment not to challenge the Commission's authority granted under the Agreement, there is no assurance that a citizen or elected official of Nashua or other interested party would not seek to mount such a challenge.

¹ The well-established rule is that "no action of the parties can confer subject-matter jurisdiction upon a . . . court. Thus, the consent of the parties is irrelevant." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); *Deep v. Boies*, 493 F. Supp. 2d 88, 89 n.1 (D. Me. 2007) (noting that lack of subject-matter jurisdiction cannot be overcome by agreement of the parties (citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934))); *Weiss v. United States*, 146 F. Supp. 2d 113, 118 (D. Mass. 2001) ("The parties agree that this Court has jurisdiction over the case, but the parties' consent cannot confer subject-matter jurisdiction."); *Northeast Fed. Credit Union v. Neves*, 837 F.2d 531, 532 n.2 (1st Cir. 1988) (in which the First Circuit bluntly described a party's inability to agree to a tribunal's subject-matter jurisdiction this way: "subject matter jurisdiction is a bit like pregnancy: it either exists or it does not. If the latter, jurisdiction cannot be conferred by agreement or concession of the parties, or by estoppel.")

6. There are numerous reasons that the Joint Motion is improper and should not be entertained by the Commission, but this proceeding has already been burdened by many pounds of pleadings and other paper and, therefore, rather than detail every aspect in which the Joint Motion is flawed and improper, Pennichuck simply requests that this case be decided on the evidence presented during the hearings concluded in September, rather than allowing Nashua or others to further expand the record. To do otherwise would raise serious due process concerns and would prejudice Pennichuck's rights. It makes no sense to reopen the record to allow a party to attempt to supplement or change evidence presented at the hearing, particularly where that party itself has played a central role in orchestrating the evidentiary changes after conclusion of the hearing.

7. If necessary, Pennichuck is prepared to submit an affidavit to support the information set forth in this Objection.

WHEREFORE, Pennichuck respectfully requests that the Commission:

- A. Deny the Joint Motion to Approve Water Supply Agreement; and
- B. Grant such other and further relief as the Commission deems just and reasonable.

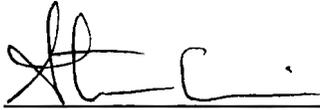
Respectfully submitted,

Pennichuck Water Works, Inc.
Pennichuck East Utility, Inc.
Pittsfield Aqueduct Company, Inc.
Pennichuck Water Service Corporation
Pennichuck Corporation

By Their Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: February 27, 2008

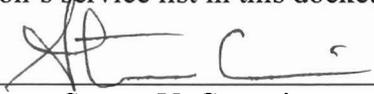
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Certificate of Service

I hereby certify that on this 27th day of February, 2008 a copy of this Objection has been forwarded to the parties listed on the Commission's service list in this docket.



Steven V. Camerino