

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

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

Docket No. DW 04-048

**PENNICHUCK WATER WORKS, INC.'S REPLY TO CITY OF NASHUA'S
OBJECTION TO MOTION FOR SUMMARY JUDGMENT**

NOW COMES Pennichuck Water Works, Inc. ("Pennichuck" or "PWW") and replies to the City of Nashua's ("Nashua" or the "City") objection to PWW's Motion for Summary Judgment (the "Objection") as follows:

1. Nashua's Objection erroneously relies on information that is not part of its direct case on public interest, instead proffering information that the City claims it would submit if the Commission were to allow it to supplement its November 22, 2004 public interest testimony. That direct case was required to be filed by Commission Order No. 24,739 because Nashua had failed to file any testimony in support of its petition as required by this Commission's rules.

There Is No Genuine Dispute Of Material Fact That Nashua Does Not Have The Required Capabilities To Operate A Water Utility

2. In an attempt to fill the void in its prefiled case on public interest, Nashua attached to its Objection reams of paper from a recent municipal bid process. Nashua apparently submitted these documents, which consist of mere proposals to operate and oversee the operation of the water utility, as placeholders for the public interest case it apparently hopes to file next January, admitting that it does not have contracts with either of these parties and will not be prepared to file public interest testimony on their qualifications until then. Objection at ¶ 36 ("Nashua...expects to have both contracts and testimony in place by January 12, 2006"). Because those contracts are not in place and testimony relating to the contractors has not been

filed, there is not, and cannot be, any genuine dispute of material fact that Nashua has not met its burden to present a *prima facie* case demonstrating its technical and managerial capabilities to operate a water utility.

3. To try to further cover for its failings, Nashua misquotes the language of the procedural schedule to suggest that it was *always* the plan to file testimony regarding its managerial and technical capabilities with its valuation case, rather than with its public interest case. The procedural schedule belies Nashua's posturing. As agreed by the parties, Commission Order No. 24,457 provided that on October 14, 2005¹ "[t]estimony by Nashua on valuation and public interest issues *dependent upon valuation*" would be due (emphasis added). The technical and managerial competence of a City-hired contractor is in no manner "*dependent upon valuation*," and thus was never intended to be part of this second phase of testimony. Rather, testimony on the City's contractors' competence plainly and indisputably falls within the Commission's October 1, 2004 admonition that by November 22, 2004 "Nashua...file testimony on its *technical, financial and managerial capability* to operate the public utilities as requested and how the public interest would be served by the taking." Order 24,379 at 11.

4. Had Nashua intended to file additional testimony regarding its technical and managerial ability to operate the water system along with its valuation case, it should have raised that issue in a motion for reconsideration of Order No. 24,379 or at least during either the technical session at which the procedural schedule was negotiated or the procedural hearing that was held the same day. The fact of the matter is that, not only was Nashua not prepared to file its case on public interest when it first filed its petition in March of 2004, it still was not prepared by November 22, 2004 when it was ordered by the Commission to have done so.

¹ This date was subsequently extended to January 12, 2006. See October 3, 2005 Secretarial letter in DW 04-048.

5. It is now clear that Nashua initially hoped that its November 22, 2004 public interest filing would be sufficient to keep this case alive and that, by alleging that Nashua had experience in operating other municipal services, it would be able to provide a *prima facie* case as to its ability to operate a water utility, thereby deferring to a later date the need to select a third party operator. But when Pennichuck sought discovery on Nashua's experience in providing other municipal services, Nashua successfully argued that its own ability to operate the utility based on its experience with other city services was not relevant to this proceeding because it claimed it intended to operate the utility through a third party, rather than on its own. In making that argument, however, Nashua failed to note that it had not submitted one iota of evidence in its public interest case regarding the identity or capabilities of the supposed third party. Having successfully avoided discovery on its own ability to operate the water utility, and in the face of Pennichuck's Motion for Reconsideration regarding the issue, Nashua then made a precipitous decision to rush to select a contractor, apparently realizing for the first time that it could not meet its burden of proof without doing so. There is no reason that Nashua could not have proceeded in an orderly fashion. It could have begun the bid process before filing at the Commission and then submitted its entire public interest case by November 22, 2004, as it was ordered to do.² The reality is that Nashua is "making it up as it goes along," at the expense of Pennichuck's customers, shareholders, the other parties to this case, and the Commission itself. This is precisely the concern that Pennichuck raised when Nashua failed to provide any testimony in support of its initial filing and that led to this Commission's ordering Nashua to submit its public

² In fact, the City issued its request for qualifications on May 24, 2004, and then waited until a year later, until March 25, 2005, to issue its requests for proposals for operation and maintenance of the water utility and for oversight of the operation and maintenance contractor. There was nothing that prevented the City from beginning (and completing) this process in time for filing testimony on its contractors' qualifications either with its petition in March 2004 or on November 22, 2004. For example, the City needed no information from Pennichuck for the bid process, since both the RFQ and the RFP were issued well in advance of any discovery in this case.

interest case, including testimony supporting Nashua's technical, managerial and financial capability to operate the water utility, by last November. See July 28, 2004 Transcript at 43.

6. Nashua's attempt through its Objection to show what additional evidence it would present if it were allowed to supplement its original public interest filing completely ignores the fact that, unlike in a Superior Court proceeding, a party's direct case in a proceeding before this Commission is required to be presented in writing, in advance, in accordance with the procedural schedule ordered by the Commission. Submitting affidavits outside of the procedural schedule from witnesses stating what additional things they might say at a hearing is insufficient to sustain a petition. At best, a party who has failed to present its entire case at the outset of a proceeding should be told to begin again, so that responding parties, particularly one whose very existence is at stake, can be on notice as to the issues that are in dispute and can conduct thorough discovery on those issues. See Appeal of Smithfield Dodge, 145 N.H. 23, 26 (2000)(defendant materially prejudiced by plaintiff's failure to follow administrative agency rules and provide sufficient notice of allegations, thereby denying defendant opportunity to properly defend against them). To do anything less would be a denial of the most fundamental aspects of due process.

7. Because Nashua has not filed any testimony in support of the capabilities of its alleged contractors who will operate and maintain any water utility it may own, there is no genuine issue of material fact that Nashua does not possess such capabilities. To allow Nashua to supplement its public interest testimony now to enable it to create a genuine issue of material fact where none existed would be in error.

8. "The law of this State is well settled that an administrative agency must follow its own rules and regulations." Appeal of Smithfield Dodge, 145 N.H. 23 (2000); Attitash Mt. Service Co. v. Schuck, 135 N.H. 427, 430(1992)(agency violated its own regulations when it

failed to comply with its rule requiring the consent of both parties to conduct a hearing telephonically); Appeal of the City of Nashua, 121 N.H. 874, 876 (1981)(Public Utilities Commission bound by its accounting regulations); Petition of State Police, 126 N.H. 72, 76(1985)(agency must follow plain meaning of its regulations); Colburn v. Personnel Commission, 118 N.H. 60, 63 (1978); see also U.S. ex rel Accardi v. Shaughnessy, 347 U.S. 260,268 (1957); Service v. Dulles, 354 U.S. 363, 388-89 (1957); Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959). By violating their own rules, agencies frustrate reliance on their policies and procedures. Violations By Agencies of Their Own Regulations, 87 Harv. L. Rev. 629, 631 (1974); see also U.S. v. Leahey, 434 F.2d 7, 10 (1st Cir. 1970). Given that the power of eminent domain has been described as “one of the most harsh proceedings known to law,”³ there is no question that the Commission should strictly adhere to its rules in this case.

9. The rules in question could not be more clear. Puc 202.11(a) states that “[a]ll petitions shall be accompanied by prefiled testimony and exhibits” and Puc 204.01(b) provides that “[w]ith the exception of petitions to intervene, petitions shall be accompanied by written testimony sworn to by the witness.” Under these rules, filing of testimony with a petition is mandatory, not discretionary. In this case, the Commission has already given Nashua a second bite at the apple by allowing it until the end of last November to file its public interest case. Of even greater significance is the fact that the Commission's rules expressly provide that supplemental testimony is only allowed where the scope of a proceeding has been expanded or issues have arisen which were not reasonably anticipated by the petitioner. See Puc 204.01(d). Nashua’s own pleading makes it clear that this is not a situation where the issues have been expanded or were not reasonably anticipated. In its Objection, the City concedes “[f]rom the outset of this proceeding, Nashua has indicated that it intends to rely on the technical and

³ 26 Am Jur2d, Eminent Domain § 20.

managerial qualifications of duly qualified operators.” Objection at ¶ 15. Because Nashua always anticipated that it would rely on the qualifications of an outside contractor, there is no basis to allow supplemental testimony under Puc 204.01.

10. For the Commission to find that there is a genuine issue of material fact, the Commission would have to waive its rules and wait until Nashua was ready to submit its direct case regarding the third parties that the City has indicated it intends to contract with. But Nashua’s request for more time to submit the rest of its public interest case does not meet the criteria for a waiver under Puc 201.05, which provides that Commission rules can be waived only when, among other things, the waiver does not “disrupt the orderly proceeding of the commission,” Puc 201.05(a)(2), and “[t]he purpose of the rule [is] satisfied by an alternative method proposed.” Puc 201.05(e)(2). Here, the submission of late filed testimony of this magnitude and significance would be immensely disruptive of the proceeding and would impose substantial costs and burdens on the other parties. In addition, the purpose of the pre-filed testimony rule cannot at this late date be satisfied by an alternative method.

11. The purpose of the pre-filing rule is to allow for the issues in a case to be more sharply defined and the offering of proof to be more orderly, thereby eliminating unnecessary, time consuming examination of witnesses and allowing for a more thorough and scientific investigation of the main issues of the controversy, while still allowing for the fundamental right of the parties to a fair hearing to be preserved. Public Service Commission Procedure – A Problem and a Suggestion, 87 U. Pa. L. Rev. at 160 (1938). It also allows for the time of the parties and of the agency to be devoted to the important issues instead of being wasted on obstructive tactics and immaterial or uncontested facts. Id. This process also allows for the parties not only to have a very detailed idea of the case to be presented, but also to have

sufficient time to prepare their questions for cross-examination. Aman Jr. & Mayton, Administrative Law, 223 (1993).

12. Here, the purpose of the rule has been repeatedly violated by Nashua. Nineteen months after it filed its petition to take all of Pennichuck's assets, and three full years after it formally began the condemnation process at the municipal level, the City still has not filed its public interest case demonstrating that it has the technical capabilities to operate a utility. The purpose of the rule cannot be satisfied by filing the testimony at some later date, since substantial time and resources have been incurred by all the parties as a result of Nashua's actions. The effects of Nashua's failure to file its public interest case have significant implications. It has caused, and will continue to cause, delay in the case, and will cause the parties to engage in further, expensive discovery to yet again attempt to probe the factual basis of Nashua's claims.

13. As Professor Davis observed, "the power to be lenient is the power to discriminate," Kenneth Culp Davis, Discretionary Justice 170 (1969)(referring to agencies' selective enforcement of statutes). Should the Commission grant any further leniency toward Nashua's flagrant violation of Commission rules, there will be significant discrimination against and harm to Pennichuck's property interests and the rights of other parties. That harm affects not just Pennichuck and its shareholders, but also has the potential to harm the Company's employees, its customers and the customers of its affiliates as Pennichuck attempts to provide service to the public at the same time as it fights for its very existence.

14. The Federal Energy Regulatory Commission, which also has a regulation requiring pre-filed testimony, see e.g., 18 C.F.R. § 154.301, has not hesitated to grants motions for summary disposition based on the inadequacy of a party's pre-filed case. See K N Interstate Gas Transmission Company, 1999 FERC LEXIS 406 (March 3, 1999)(granting summary

disposition against petitioner and refusing to allow it to file supplemental direct testimony or affidavits to cure deficiencies in its pre-filed case); see also Ozark Gas Transmission System, 75 FERC P61,101 at p. 61,334 (1996)(refusing to allow pipeline company to reserve right to later change its pre-filed case because otherwise the company's proposal would become a “moving target”); Mississippi River Transmission Corp., 53 FPC 1924 (1975), reh’g denied, 54 FPC 422 (1975)(where company fails to file sufficient evidence to support its case, summary disposition should be granted). This Commission, like the FERC, should enforce its own rules, and grant summary judgment based on Nashua’s failure to meet its burden of proof through its pre-filed case. It should not condone Nashua's efforts to create a moving target, thereby improperly and unfairly burdening this Commission, Pennichuck or the other parties in this proceeding.

RSA 38:3 Does Not Obviate The Requirement For Filing Testimony

15. Nashua’s claim that Pennichuck is not entitled to summary judgment simply because of the rebuttable presumption in RSA 38:3 is plainly erroneous. Specifically, Nashua argues that RSA 38:3 prevents PWW from prevailing on summary judgment because PWW has not yet presented any evidence to rebut the presumption that the taking is in the public interest. Nashua goes so far as to claim that “even if [it] had submitted no evidence of technical and managerial qualifications, it would be entitled to the rebuttable presumption of public interest.” Objection ¶ 24.

16. First, there is nothing in RSA Chapter 38 which extends the statutory presumption to an attempt to take assets outside of the City, particularly given that the presumption is created by a vote of “qualified voters” in the municipality that is pursuing the taking. To claim that a vote by the people of Nashua could create a rebuttable presumption that it is in the public interest for Nashua to take assets in Epping, Newmarket and Plaistow defies logic and common sense.

Second, in order to take any assets beyond its municipal boundaries, Nashua would have to first obtain a franchise from the Commission, something which independently would also require a finding that the City has the technical, financial and managerial capability to operate the water system. See Hampstead Area Water Company, Inc., Order No. 24,501 at 3-4 (August 19, 2005)(“[i]n determining whether a franchise is in the public good, the Commission assesses the managerial, technical, financial and legal expertise of the petitioner.”). Third, if the presumption were as strong as Nashua suggests (i.e., that the City could have filed no testimony whatsoever on its ability to operate the utility), it would have made no sense for the Commission to have required the City to file testimony on its “technical, financial and managerial capability to operate the public utilities as requested and how the public interest would be served by the taking.” Order 24,379 at 11. Thus, Nashua's reliance on the statutory presumption as a basis for not dismissing this case is plainly erroneous.

PWW's Motion for Summary Judgment Was Timely

17. Nashua claims that PWW's motion for summary judgment was untimely because it was not filed by January 31, 2005. Nashua was well aware of the scope of Pennichuck's intended summary judgment motion because at the December 9, 2004 prehearing conference in this docket, counsel for Pennichuck repeatedly stated that the Company intended to file a summary judgment motion with regard to the non-core systems owned by PWW. See December 9, 2004 Transcript at 27-28. In a December 16, 2004 letter to the Commission, counsel for PWW again referenced its intention to file such a summary judgment motion once the Commission had issued an order on the scope of taking issues. When the Commission issued that order on January 21, 2004, establishing the January 31, 2005 deadline for PWW's summary judgment motion, it expressly referenced PWW's December 16 letter, which plainly referred to a

motion for summary judgment on that limited issue. On January 31, 2005, PWW notified the Commission that it did not intend to file a motion for summary judgment on that limited issue given the Commission's January 21 order, but expressly reserved the right to file a motion for summary judgment during later stages of the case. Nashua's view that PWW is forever barred from filing a motion for summary is plainly incorrect.

18. For the reasons stated above, there is no genuine dispute of material fact that Nashua does not have the managerial or technical capability to operate a water utility, and therefore, as a matter of law, PWW's motion must be granted.

WHEREFORE, PWW respectfully requests that the Commission:

- A. Grant its motion for summary judgment; and
- B. Grant such other and further relief as the Commission deems just and reasonable.

Respectfully submitted,

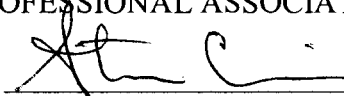
Pennichuck Water Works, Inc.

By Its Attorneys,

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Date: October 18, 2005

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Certificate of Service

I hereby certify that on this 18th day of October, 2005, a copy of this Reply to Nashua's Objection to Motion for Summary Judgment has been forwarded to the parties listed on the Commission's service list in this docket.



Steven V. Camerino