

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY
SOUTHERN DISTRICT

SUPERIOR COURT

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

v.

City of Nashua

ANSWER TO PETITION TO DECLARATORY JUDGMENT

04-E-0062

NOW COMES the City of Nashua, Defendant in the above-entitled Petition to
Declaratory Judgment and responding thereto, says as follows:

1. To the extent Paragraph 1 contains allegations of fact they are denied. Further
answering, the City says that Paragraph 1 of the Petition and the Petition in general largely
misstates and misrepresents the facts and the lawful actions taken by City pursuant to RSA
Chapter 38. Specifically, with respect to Paragraph 1, the City says:

a. On November 26, 2002 the Nashua Board of Alderman, by a vote of 14 to
1, adopted a Resolution determining that it was expedient for the City to establish and acquire a
water works system pursuant to RSA 38:3. On January 14, 2003 the voters of Nashua, by a 78%
majority confirmed the vote of the Board of Alderman. On February 4, 2003 Nashua, pursuant
to RSA 38:6, notified Pennichuck Water Works, Inc. (hereinafter "PWW"), Pennichuck East
Utility Inc. (hereinafter "PEU") and Pittsfield Aqueduct Company, Inc. (hereinafter "PAC") of
the vote to establish a water works system and to acquire their assets and made inquiry as to

whether each of them elected to sell that portion of its plant identified by the City. On March 25, 2003 PWW, PEU, and PAC responded to the City's Notice and Inquiry pursuant to RSA:7 in the negative. Pursuant to RSA 38:9, if a municipality and utility fail to agree upon a price or cannot agree as to how much of the utility property the public interest requires a municipality to purchase, "**either** the municipality or the utility may petition the Commission for a determination of these questions" (emphasis supplied). Rather than filing a Petition with the Public Utilities Commission (hereinafter "PUC") Nashua chose to pursue a negotiated purchase from Pennichuck. Neither Pennichuck nor PWW, PEU or PAC chose to file a Petition under RSA 38:9. In the course of the negotiations Nashua made a good faith offer to purchase all of Pennichuck's assets, including the assets of PWW, PEU and PAC and other unregulated companies which it believed largely replicated the offer made by Philadelphia Suburban in the failed Merger, even though the City believed that the fair value of the assets was less than the amount of the offer. Pennichuck rejected the offer and abruptly terminated further negotiations by letter of January 27, 2004. Nashua filed its Petition with the PUC on March 24, 2004.

b. Nashua has advised Pennichuck, under RSA 38:6, that it desires to acquire the assets of its three regulated companies, PWW, PEU and PAC. These are the only assets Nashua can acquire under RSA Chapter 38. Although some of the assets are located outside Nashua, they may be acquired by it under RSA 38:2,6,9,10,11 and 14. Under RSA 38:9 the PUC will determine how much plant and property the public interest requires Nashua to purchase. Nashua asserts that acquiring the assets of PWW, PEU and PAC, including those assets outside Nashua, is in the public interest because it will eliminate any claim for severance losses by any of the Pennichuck companies; it will prevent likely rate increases for that portion of the system which is not acquired by Nashua due to the need to generate additional revenue to offset

proportionately higher operating expenses; it will protect the level of service to be received by PEU and PAC consumers; and it will mitigate harm to Pennichuck and Pennichuck shareholders by eliminating the need to operate a small or less efficient and less profitable portion of the system. Moreover, pursuant to Laws 2003, Chapter 281 Nashua and certain other municipalities are exploring the formation of a regional water district and it is contemplated that Nashua, upon its acquisition of the identified assets, will convey them to the regional water district.

c. Pennichuck has no constitutional right to a jury trial for the condemnation of its property. Due process requires it be provided a hearing, a remedy and an appeal all of which are available to it under RSA Chapter 38. The fact that RSA Chapter 38 does not grant a jury trial while RSA 498-A does, is not a violation of equal protection. The statutes relate to different condemnees. Any utility whose property is being condemned by a municipality is treated the same as Pennichuck. The equal protection provision of the state constitution (Part 1, Art. 12) is designed to insure that state law treats groups of similarly situated citizens in the same manner. PWW, PEU and PAC are treated in the same way as all other utilities whose assets are sought to be acquired by a municipality.

d. RSA 38:13, complained of by Pennichuck as providing Nashua “an unlimited option” to back out of condemnation at anytime, merely describes the necessary procedure for the acquisition of any property by a municipality and the issuance of bonds for that purpose. These are not steps which can be bypassed by Nashua for the convenience of Pennichuck and its shareholders.

e. Nashua has done nothing to abuse the acquisition process under RSA Chapter 38. It has taken the necessary votes, given the necessary notices and attempted to negotiate a voluntary acquisition. Pennichuck’s argument that it has been held hostage to these

efforts is negated by its own stock price, which has risen dramatically since it abandoned the Merger with Philadelphia. On February 4, 2003, the date the Merger was abandoned, Pennichuck's stock closed at 23.70. On February 4, 2004, the date of this Petition, it closed at 28.40 an increase of approximately 20%.

2. The allegations in Paragraph 2 of the Petition do not require an answer.
3. It admits the allegations in Paragraph 3 of the Petition.
4. It admits the allegations in Paragraph 4 of the Petition.
5. The allegations of Paragraph 5 are a statement of law and do not require an answer.
6. The allegations of Paragraph 6 are a statement of law and do not require an answer.
7. It admits the allegations of Paragraph 7 of the Petition.
8. It admits the allegations of Paragraph 8 of the Petition.
9. It admits the allegations of the first two sentences of the Petition. It is without sufficient information to form an opinion of the truth of the remaining allegations of Paragraph 9 and, therefore, denies the same.
10. It admits the allegations of the first four sentences of Paragraph 10 of the Petition. It is without sufficient information to form an opinion of the truth of the remaining allegations of Paragraph 10 and, therefore, denies the same. Further answering Nashua says it objected to the Merger for reasons which it believed then and believes now were valid and reasonable.
11. It admits the allegations of the first sentence of Paragraph 11 of the Petition. It denies the remaining allegations of Paragraph 11. Further answering it says that the Board of Alderman on November 26, 2002, by a vote of 14 to 1, adopted a Resolution to establish a water

works system and to acquire all or a portion of the water works system currently serving the inhabitants of the City and others. By a 78% majority, the voters of Nashua confirmed the Board of Alderman Resolution on January 14, 2003. The turnout exceeded 20% of registered voters in Nashua. There was no requirement or reason to provide any cost figures for the acquisition of the assets of PWW, PEU and PAC. However, the price being paid by Philadelphia for those assets and others was a matter of public record, often discussed in newspapers and other media outlets including Exhibit A to the Petition where it is reported that the Merger transaction was “estimated to be worth about \$95 million”.

12. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 12 and, therefore, denies the same.

13. It admits the allegations of Paragraph 13 of the Petition.

14. It admits the allegations of the first three sentences of Paragraph 14 of the Petition. It denies the remaining allegations of Paragraph 14. Further answering, Nashua says that Pennichuck interim CEO Kriech, the second of three Pennichuck CEO's in 2003, advised Nashua, following the March 25, 2003 letter, that Pennichuck would entertain an offer to voluntarily acquire its assets. Its prior CEO, Maurice Arel, had earlier suggested that to acquire the company, Nashua would have to pay more than \$106 million, the alleged merger value and listed certain additional expenses he expected Nashua to pay totaling \$13.2 million. Nashua engaged consultants and attorneys for that purpose and entered into negotiations which led to an offer by it to acquire all of Pennichuck's assets for \$121 million. The negotiations were abruptly terminated by Pennichuck by letter of January 27, 2004.

15. It admits the allegations of Paragraph 15 to the extent that the parties engaged in

negotiations. It denies the remaining allegations of Paragraph 15. Further answering, Nashua says that the negotiations were conducted by it consistent with its desire to acquire Pennichuck's regulated assets. In order to meet Pennichuck's expressed needs Nashua expanded negotiations to include all of Pennichuck's assets including its unregulated companies. It had previously engaged a valuation expert, George E. Sansoucy, P.E., to advise it as to the value of Pennichuck and the value of PWW, PEU and PAC. In connection with the negotiations it engaged Devine, Millimet & Branch, Attorneys at Law, to assist it in preparing any offers and First Southwest Financial, specialist in water acquisitions, to advise it on acquisition, tax and bond issues. Nashua at all times desired a voluntary acquisition rather than a hostile litigated eminent domain proceeding which would take longer and likely be more expensive. Pennichuck on the other hand was never willing to state a price at which it would sell and made no serious effort to negotiate. Nashua believes Pennichuck at all times intended to file this Petition and had no intention of voluntarily selling. The delay of which it complains was of its own making. Moreover, Pennichuck, PWW, PEU and PAC at any time under RSA 38:9, if they were concerned about the delay or the effect of the delay or the negotiations upon their ability to conduct their business, could have petitioned the PUC to set a price.

16. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 16 of the Petition and, therefore, denies the same. Further answering, it says that Nashua made an offer of \$121 million to acquire all of Pennichuck's assets and that Mayor Streeter held a press conference to announce the proposal in order to keep the voters of Nashua informed of the actions being taken by its elected leaders.

17. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 17 and, therefore, denies the same.

18. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 18 and, therefore, denies the same. Further answering, Nashua says that notwithstanding what may have happened on November 20 and 21, Pennichuck's stock prices have increased by approximately 20% since it announced the termination of the Merger with Philadelphia Suburban.

19. It admits the allegations of Paragraph 19 that it received phone calls from Pennichuck shareholders. It denies the remaining allegations of Paragraph 19.

20. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 20 of the Petition and, therefore, denies the same.

21. It admits the allegations of Paragraph 21 that the parties continued negotiations and it admits that Pennichuck rejected Nashua's offer. It denies the remaining allegations of Paragraph 21. Further answering, Nashua says the parties continued to meet to see if resolution was possible until January 27, 2004 when Pennichuck terminated further negotiations.

22. It denies the allegations of Paragraph 22 of the Petition. Further answering, Nashua says that following Pennichuck's March 25, 2003 letter advising Nashua that its Board of Directors had unanimously voted against selling any of the assets to Nashua, the parties engaged in negotiations which were finally terminated by Pennichuck on January 27, 2004. Nashua had determined during this period not to file a Petition with the PUC under RSA 38:9 because it hoped the negotiations would result in a voluntary acquisition. Likewise, neither Pennichuck nor PWW, PEU and PAC filed such a Petition during that period; although expressly permitted to do pursuant to RSA 38:9. On March 24, 2004, following Pennichuck's termination of the negotiations on January 27, 2004, Nashua filed its Petition with the PUC. Nashua has

acted at all times in good faith and pursuant to governing law and has not caused any unnecessary delay.

23. It denies the allegations of Paragraph 23 of the Petition. Further answering, Nashua says to the extent RSA Chapter 38 has had a chilling affect on any sale of Pennichuck or its assets it is the same that existed prior to Philadelphia's offer to acquire. All potential acquirers know that Nashua has the power to condemn under RSA 38. Nashua had done nothing other than what it is permitted to do by statute. Moreover, Pennichuck could have at any time following March 25, 2003 petitioned the PUC under RSA 38:9 for a determination of the extent of the assets Nashua would be permitted to purchase and the fair value of those assets.

24. It denies the allegations of Paragraph 24 of the Petition. Further answering, Nashua states that RSA Chapter 38 contains no limitation on when any Petition must be filed with the PUC but does give either party the right to file it. Nashua engaged with Pennichuck in voluntary negotiations to acquire the entire company and did not believe it was in the best interest of those negotiations to file a Petition while they were ongoing. Pennichuck, for its own reasons, also chose not to file such a Petition with the PUC.

25. It denies the allegations of Paragraph 25 of the Petition. Further answering, it says that any losses alleged to have been incurred by Pennichuck are not relevant to this Petition nor are they ripe for determination. Moreover, Pennichuck's stock has increased approximately 25% since the Merger with Philadelphia Suburban was abandoned. Any decision to incur expense was Pennichuck's alone. Nashua in pursuing the negotiations has likewise incurred expense.

26. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 26 and therefore denies the same. It denies that Nashua killed the

Philadelphia Suburban Merger. Further answering, it says that any alleged damages incurred by Pennichuck are not relevant to this Petition and are not ripe for determination. Nashua legitimately opposed the Merger and following study and deliberation voted to establish a water works system and to acquire the assets of Pennichuck's regulated companies under RSA Chapter 38.

27. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 27 of the Petition and therefore denies the same. Further answering, Nashua says that any alleged damages incurred by Pennichuck are not relevant to this Petition and are not ripe for determination. RSA Chapter 38 existed prior to the Philadelphia Merger proposal and Nashua has done nothing other than what RSA Chapter 38 mandates when a municipality seeks to acquire utility assets.

28. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 28 of the Petition and, therefore, denies the same. Further answering, Nashua says that any alleged damages incurred by Pennichuck are not relevant to this Petition and are not ripe for determination. RSA Chapter 38 existed prior to the Philadelphia Merger proposal and Nashua has done nothing other than what RSA Chapter 38 mandates when a municipality seeks to acquire utility assets.

29. It denies the Paragraph 29 of the Petition. Further answering, Nashua says that any alleged damages, which may have been incurred by Pennichuck, are not relevant to this Petition and are not ripe for determination.

30. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 30 of the Petition and, therefore, denies the same. Further answering, Nashua says that any alleged damages incurred by Pennichuck are not relevant to this Petition

and are not ripe for determination. Moreover, it appears that the NASD investigation relates not to what the City may have done but rather to what insiders of Pennichuck did on November 20, 2003 prior to receipt of Nashua's offer. Cf, Paragraph 20.

31. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 31 of the Petition and therefore denies the same. Further answering, Nashua says that any alleged damages incurred by Pennichuck are not relevant to this Petition and are not ripe for determination. RSA Chapter 38 existed prior to the Philadelphia Merger proposal and Nashua has done nothing other than what RSA Chapter 38 mandates when a municipality seeks to acquire utility assets.

32. It is without sufficient information to form an opinion of the truth of the allegations of Paragraph 32 of the Petition and therefore denies the same. Further answering, Nashua says that any alleged damages incurred by Pennichuck are not relevant to this Petition and are not ripe for determination. RSA Chapter 38 existed prior to the Philadelphia Merger proposal and Nashua has done nothing other than what RSA Chapter 38 mandates when a municipality seeks to acquire utility assets.

33. It denies the allegations of Paragraph 33 of the Petition. Further answering, it says that any alleged damages incurred by Pennichuck are not relevant to this Petition and are not ripe for determination. Nashua has done nothing other than what RSA Chapter 38 mandates when a municipality seeks to acquire utility assets.

34. The allegations of Paragraph 34 do not require an answer.

35. The allegations of Paragraph 35 are a statement of law which requires no answer. Notwithstanding the foregoing, Nashua says RSA 371 and RSA Chapter 38 are different eminent domain schemes for which different procedures have been proscribed. There is no constitutional

requirement that all condemnees be afforded a jury trial. All that is required is that similarly situated condemnees be treated the same. Under RSA 371, all condemnees of a regulated public utility have a right on appeal to a de novo jury trial. They are all treated the same. Under RSA Chapter 38, all public utility condemnees of a municipality are not granted such a right. They, likewise, are all treated the same and there is no violation of equal protection.

36. The allegations of Paragraph 36 are a statement of law which requires no answer. Notwithstanding the foregoing, Nashua says that it did make an initial determination of public interest. Under RSA:38, a rebuttable presumption of public interest was created when the City voters, on January 14, 2003, confirmed the November 26, 2002 vote of the Board of Alderman. Moreover, under RSA 38:9 if the municipality and utility fail to agree, the PUC, following “proper notice and hearing”, determines the extent of the plant and property to be acquired and the price to be paid. The fact that these determinations are not made by a jury does not violate any requirements of equal protection. PWW, PEC and PAC, the companies whose assets are sought to be acquired by Nashua, are regulated utilities. All other regulated utilities are subject to the same requirement that the PUC set the price if a municipality seeks to acquire them. All similarly situated entities are treated the same which is all that is constitutionally mandated.

37. It admits the allegations of Paragraph 37 of the Petition that Nashua’s attempt to acquire Pennichuck assets is governed by RSA, Chapter 38; that RSA 38:9 gives Pennichuck the opportunity for notice and hearing; that RSA Chapter 38 does not provide for a jury trial or a de novo appeal trial; and that RSA Chapter 38 provides an appeal to the Supreme Court. It denies the remaining allegations of Paragraph 37. Further answering, Nashua says that the procedure under RSA Chapter 38 meets the requirements of due process and equal protection. There is no constitutional right to trial by jury on these issues in a condemnation proceeding and all utilities

similarly situated are treated the same when a municipality seeks to acquire them. The process provided under RSA Chapter 38 provides significant procedural protections not afforded pursuant to RSA Chapter 231. Specifically, RSA 38:3 requires a 2/3rds vote of the governing body not simply a majority vote. The vote of the governing body is also subject to veto by the Mayor. Lastly, the voters must confirm the vote of the governing body by a majority vote. RSA Chapter 231 requires none of these added procedural protections.

38 It admits the allegations contained in the first sentence of Paragraph 38, and responds to the remaining allegations as follows. The New Hampshire constitution prohibits taking of property without just compensation. It denies that there is any diverging statutory procedural classifications. All regulated utilities are subject to the same procedure when a municipality seeks to acquire them. Unless such classifications are made, there is no need to scrutinize the purpose and scope of the statutory scheme. LeClair v. LeClair, 137 NH 213, 222 (1993). Moreover, even if such classifications are made, where there is a balancing of public interests involved, the fair and substantial relation test applies to classifications involving important substantive rights such as the right to use and enjoy property, not strict scrutiny. Id. at 222-223; Asselin v. Town of Conway, 135 N.H. 576, 578 (1992). To the degree any classifications are made pursuant to RSA Chapter 38, they meet any applicable equal protection test.

39. It denies the allegations of Paragraph 39. Further answering, Nashua says the test is not whether there is a compelling state interest but whether the classification in RSA Chapter 38 meets the fair and substantial relation test. Because all utilities are similarly situated, when a municipality seeks to acquire them the test is met.

40. It denies the allegations of Paragraph 40 of the Petition.

41. The allegations of Paragraph 41 of the Petition require no answer.

42. The allegations of Paragraph 42 are a statement of law and require no answer.

Notwithstanding the foregoing, Nashua says that under RSA 38:9 Pennichuck had the same ability to petition the PUC for a determination of the fair price and the extent of the assets to be acquired.

43. It admits the allegations of Paragraph 43 that the proceeding is complex and may take time to resolve. It further admits that the proceeding will require expert analysis. It is without sufficient information to form an opinion on the remaining allegations of Paragraph 43 and denies the same. Further answering, Nashua says that it will also incur substantial fees and expenses associated with its Petition to the PUC.

44. It admits the allegations in the first two sentences of Paragraph 44 of the Petition. It denies the last sentence of Paragraph 44. Further answering, Nashua says Pennichuck's conclusions evidence a lack of understanding concerning what a municipality must do to acquire property and interrelation of RSA Chapter 38 and RSA Chapter 33-B. When a municipality acquires any property the public has the right to participate in the process. Moreover, there is no harm to Pennichuck. Pennichuck, under Chapter 38, can continue to operate, unlike what occurs under Chapter 498-A where the municipality immediately receives title.

45. It denies the allegations of Paragraph 45 of the Petition. Further answering, it says that under RSA Chapter 38, unlike RSA 498-A, Pennichuck can continue to operate its business. Moreover, if the Board of Alderman does not ratify the purchase price under RSA 38:13, no other action can be commenced under RSA Chapter 38 for a period of 2 years.

46. It denies the allegations of Paragraph 46 of the Petition. Further answering, Nashua says that RSA Chapter 38 has existed since 1935 and there has always been a possibility

a municipality could acquire Pennichuck's assets. Nashua has taken no action not mandated by RSA Chapter 38. The increase in Pennichuck's stock value is clear proof that what Pennichuck says is occurring to its business is not true. The value of its property has increased since the Merger with Philadelphia Suburban was terminated and during the period Nashua has attempted to negotiate the voluntary acquisition of its assets. Pennichuck participated in those negotiations. If the negotiations contributed to a delay, Pennichuck is as responsible as Nashua. Moreover, Pennichuck has been able to continue to operate its business throughout the entire RSA Chapter 38 process. In fact it has continued to acquire other private water systems. There is no deprivation and no evidence that it cannot sell its property.

47. It denies the allegations of Paragraph 47 of the Petition.

48. The allegations of Paragraph 48 of the Petition do not require an answer.

49. The allegations of Paragraph 49 are a statement of law and require no answer.

Nashua denies, however, that RSA 498-A applies to the condemnation of utility property by a municipality which is governed by RSA Chapter 38.

50. It denies the allegations of Paragraph 50 of the Petition. Further answering, Nashua says following the March 26, 2003 letter, the parties engaged in negotiations, which did not conclude until January 27, 2004. Nashua has engaged consultants necessary to advise it in connection with the negotiations and its Petition to the PUC. Nashua has intended, at all times, to file a Petition with the PUC in a timely fashion if the negotiations were unsuccessful. Nashua filed its Petition with the PUC on March 24, 2004, less than two months following the termination of negotiations by Pennichuck.

51. It denies the allegations of Paragraph 51 of the Petition. Further answering, Nashua says RSA Chapter 38 is the applicable statute and has no such limitations. The parties

engaged in negotiations which did not terminate until January 27, 2004. Pennichuck participated in those negotiations and cannot have it both ways. If the negotiations had been successful, Pennichuck would have been pleased to accept the benefits. The fact that the negotiations were unsuccessful, means that there was a delay and it should not be heard now to complain of a delay which it caused. Moreover, Pennichuck under RSA 38:9 could have at anytime petitioned the PUC for a determination of the fair price and the extent of the assets to be acquired.

52. It denies the allegations of Paragraph 52 of the Petition.

53. The allegations of Paragraph 53 of the Petition do not require an answer.

54. It admits the allegations of Paragraph 54 of the Petition. Further answering, Nashua says that RSA 38:2,6,9,10,11 and 14 permit it to acquire assets outside its limits. The extent of the assets Nashua will be permitted to acquire will be determined by the PUC. On information and belief, the Town of Pittsfield is attempting to acquire the assets of PAC. Nashua asserts that acquiring the assets of PWW, PEU and PAC, including those assets outside Nashua, is in the public interest because it will eliminate any claim for severance losses by any of the Pennichuck companies; it will prevent likely rate increases for that portion of the system which is not acquired by Nashua due to the need to generate additional revenue to offset proportionately higher operating expenses; it will protect the level of service to be received by PEU and PAC consumers; and it will mitigate harm to Pennichuck and Pennichuck shareholders by eliminating the need to operate a small or less efficient and less profitable portion of the system.

55. It admits the allegations of Paragraph 55 of the Petition. Further answering, Nashua says that any action taken by Nashua is not in conflict with the action it proposes. If Pittsfield voluntarily acquires or files a Petition with the PUC to acquire the assets

of PAC, Nashua will not seek to acquire them. Nashua further denies any conflicts with other communities. Many have participated in the formation of the regional water district to which Nashua is expected to convey the assets.

56. It denies the allegations of Paragraph 56 of the Petition. Further answering, it says that the provisions of RSA 38:2,6,9,10,11 and 14 contemplate the acquisition of assets outside the limits of Nashua.

57. It denies the allegations of Paragraph 57 of the Petition.

AFFIRMATIVE DEFENSES

58. Pennichuck, PWW, PEU and PAC have unclean hands and are not entitled to the relief they seek.

59. Pennichuck, PWW, PEU and PAC, by engaging in negotiations for the voluntary acquisition of their assets by Nashua, have caused the very delay of which they complain and are not entitled to relief from any condition they have caused or contributed to cause.

60. Because Pennichuck, PWW, PEU and PAC could have filed a petition with the PUC under RSA 38:9 at any time after March 25, 2003, they are not entitled to any relief from the failure of Nashua to do so prior to March 24, 2004.

61. The actions of Pennichuck, PWW, PEU and PAC, since March 25, 2003, have been arbitrary and capricious and constitute bad faith entitling Nashua to its reasonable costs and attorneys fees incurred in defending this action.

62. Pennichuck, PWW, PEU and PAC have failed to state a case upon which relief can be granted.

63. Pennichuck, PWW, PEU and PAC have failed to exhaust administrative remedies.
64. The City of Nashua is entitled to sovereign immunity.

WHEREFORE, the City of Nashua respectfully prays the honorable court to:

- A. Deny the relief requested by Pennichuck and dismiss the Petition For Declaratory Judgment.
- B. Issue a Declaratory Judgment that RSA Chapter 38 does not deny Pennichuck equal protection of the law.
- C. Issue a Declaratory Judgment that Nashua has not deprived Pennichuck of its right to engage in commerce and that there has been no temporary or permanent taking of Pennichuck's private property rights.
- D. Issue a Declaratory Judgment that RSA Chapter 38 contains no limitation period to filing a Petition with the PUC under RSA 38:9. That Nashua has not unreasonably delayed in filing such a Petition and that Pennichuck, by failing to file its own Petition under RSA 38:9, is responsible for any delay in any alleged losses it believes it incurred because of the delay.
- E. Issue a Declaratory Judgment that RSA Chapter 38 permits Nashua to acquire assets outside its limits, to the extent such an acquisition is found to be in the public interest by the Public Utilities Commission.
- F. Order Pennichuck to pay the reasonable costs and attorney's fees incurred by Nashua in defending this action.
- G. Grant such other and further relief and justice may require.

Respectfully submitted,

Pennichuck Corporation, Pennichuck Water
Works, Inc., Pennichuck East Utility Inc.,
and Pittsfield Aqueduct Company, Inc.
By Their Counsel,
UPTON & HATFIELD, LLP

Date: April 14, 2004

By: _____

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CERTIFICATION

I hereby certify that a copy of the foregoing Answer to Petition to Declaratory Judgment was this day forwarded to Thomas Donovan, Esquire, opposing counsel of record.

Robert Upton, II