

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

**IN THE MATTER OF THE  
DETERMINATION OF THE  
FAIR MARKET VALUE OF  
THE PLANT AND PROPERTY  
OF PENNICHUCK WATER  
WORKS, INC., PENNICHUCK  
EAST UTILITY, INC., AND  
PITTSFIELD AQUEDUCT  
COMPANY, INC.**

**DOCKET NO. DW 04-048**

**MOTION TO DISQUALIFY**

NOW COMES the City of Nashua and moves to disqualify McLane, Graf, Raulerson and Middleton, Professional Association (“McLane”) from further representation of Pennichuck Corporation (“Pennichuck”), Pennichuck Water Works, Inc. (“PWW”), Pennichuck East Utility Inc. (“PEU”), and Pittsfield Aqueduct Company, Inc. (“PAC”) in the above Docket. In support of its Motion the City says as follows:

1. On April 8, 2004, McLane, on behalf of Pennichuck, PWW, PEU and PAC, filed with the Hillsborough Superior Court, Southern District a First Amended

Verified Petition for Declaratory Judgment Injunctive Relief which sought a ruling, inter alia, that:

- a. RSA 38:9-11 is unconstitutional for failure to provide any superior court and jury trial process; and
- b. RSA 38:1-13 is unconstitutional because it deprives Pennichuck of its right to engage in commerce and constitutes a temporary and permanent taking of Pennichuck's private property rights.

2. On April 20, 2004, on behalf of Pennichuck, PWW, PEU and PAC, McLane also filed a Writ of Summons in the Hillsborough Superior Court, Southern District against the City in which it is alleged inter alia, that the City's reliance on RSA Chapter 38 violated the Fifth and Fourteenth Amendments to the United States Constitution, Part 1, Article 2 and 14 and Part 3, Article 83 of the New Hampshire Constitution and constituted a civil rights deprivation under RSA 42 USC, Section 1983.

3. In this Docket, on behalf of PWW, PEU and PAC, McLane has moved to dismiss or alternatively to stay the City's Petition for Valuation again asserting that RSA 38:9-11 is unconstitutional and that this Commission should not act until the Superior Court has made such a determination.

4. At the same time these Superior Court actions were filed on behalf of Pennichuck, PWW, PEU and PAC asserting the unconstitutionality of RSA 38 and at the same time it was asserting the unconstitutionality of the City's Petition to the Commission, McLane was and had been since August 13, 2003, representing the Town of Ashland before the Commission (Docket DE 03-155) seeking on behalf of the Town of Ashland, NH to condemn and have valued, pursuant to RSA 38:9, certain utility property

of the New Hampshire Electric Cooperative (NHEC). A copy of the petition filed by it on behalf of Ashland is attached as Exhibit A.

5. NHEC has contested the Petition and the docket is pending a final hearing before the Commission on May 17, 2004. On information and belief, NHEC is aware of the arguments advanced by Pennichuck that RSA 38 is unconstitutional and intends to make a similar argument in opposition to Ashland's petition to the Commission.

6. The position taken by McLane in the actions before the Superior Court, asserting that RSA 38 is unconstitutional, is detrimental to the interest of the Town of Ashland in the pending docket before the Commission and there is a significant risk that its actions on behalf of Pennichuck, PWW, PEU and PAC will materially limit its effectiveness in representing Ashland before the PUC. McLane could not reasonably believe in arguing that RSA 38 is unconstitutional in these actions, that its simultaneous representation of Ashland, which relies upon RSA 38, would not be adversely affected.

7. The position taken by McLane before the Commission relying on the provisions of RSA 38 on behalf of Ashland is detrimental to the interests of Pennichuck, PWW, PEU and PAC and there is a significant risk that its efforts on behalf of Ashland will materially limit its effectiveness in representing Pennichuck, PWW, PEU and PAC. McLane could not reasonably believe in asserting the applicability of RSA 38 to the taking by Ashland, that its simultaneous representation of Pennichuck, PWW, PEU and PAC, who urge the unconstitutionality of RSA 38, would not be adversely affected.

8. McLane's representation of Pennichuck, PWW, PEU and PAC in the actions before this Court is a violation of Rule 1.7 of the Rules of Professional Conduct and calls into question the fair and efficient administration of justice.

9. The Plaintiff does not assent to the relief requested in this Motion

WHEREFORE, the City of Nashua respectfully moves the Commission:

- a. To disqualify McLane, Graf, Raulerson and Middleton from any further representation of Pennichuck, PWW, PEU and PAC in these or any other related matters in which they seek to have RSA 38, or any section thereof, declared unconstitutional; and
- b. To grant such other and further relief as justice may require.

Respectfully submitted,

CITY OF NASHUA

By its attorneys:  
Upton & Hatfield, LLP

Dated: April 28, 2004

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#### CERTIFICATION

I hereby certify that a copy of the foregoing Motion to Disqualify was this day forwarded to all persons on the attached Service List.

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Robert Upton, II

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