

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

MOTION TO DISQUALIFY

04-E-0062

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-matter. In support of its Motion the City says as follows:

1. In the First Amended Verified Petition for Declaratory Judgment Injunctive Relief, McLane has sought, on behalf of Pennichuck, PWW, PEU and PAC, 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 behalf of Pennichuck, PWW, PEU and PAC, McLane, on April 20, 2004, also filed in this Court a Writ of Summons 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. At the same time these actions were filed on behalf of Pennichuck, PWW, PEU and PAC asserting the unconstitutionality of RSA 38, McLane was and had been since August 13, 2003, representing the Town of Ashland before the New Hampshire Public Utilities Commission ("PUC") (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.

4. NHEC has contested the Petition and the docket is pending a final hearing before the PUC. 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 PUC.

5. The position taken by McLane in the actions before this Court, asserting that RSA 38 is unconstitutional, is detrimental to the interest of the Town of Ashland in the pending docket before the PUC 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.

6. The position taken by McLane before the PUC relying on the provisions of RSA 38 on behalf of Ashland is detrimental to the interests of Pennichuck, PWW, PEU and PAC in these actions 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.

7. 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.

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

WHEREFORE, the City of Nashua respectfully moves the Honorable Court:

- 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 Thomas Donovan, Esquire, opposing counsel of record.

Robert Upton, II