

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

OBJECTION TO MOTION FOR PRELIMINARY INJUNCTION

04-E-0062

NOW COMES the City of Nashua (hereinafter “City” or “Nashua”), Respondent in the above-entitled Petition for Declaratory Judgment and objecting to the Motion For Preliminary Injunction filed by the Petitioners, Pennichuck Corporation (hereinafter “Pennichuck”), Pennichuck Water Works, Inc. (hereinafter “PWW”), Pennichuck East Utility Inc. (hereinafter “PEU”) and Pittsfield Aqueduct Company, Inc. (hereinafter “PAC”) says as follows:

1. By petition dated June 14, 2002, Pennichuck petitioned the New Hampshire Public Utilities Commission (“PUC”) to approve the indirect acquisition of PWW, PEU and PAC by Philadelphia Suburban Corporation (“PSC”) to be accomplished through the merger of Pennichuck into a wholly owned subsidiary of PSC.
2. Nashua intervened in the docket established by the PUC regarding the merger on July 2, 2002 and engaged consultants to conduct a comprehensive review of the Pennichuck system. Simultaneously, the City participated in discussions with citizens and representatives of other municipalities relating to the formation of a regional water district.

3. By report dated November 1, 2002 the City's consultants, Rizzo Associates and George E. Sansoucy, PE, inter alia, recommended that the City consider public ownership of the Pennichuck system. Either on its own or through a regional water entity.

4. On November 26, 2002, the Board of Alderman, pursuant to RSA 38:3, by a vote of 14 to 1, determined that it was expedient for the City 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. The Board further authorized the Mayor to support, along with other municipalities, proposed legislation to establish regional water districts and in particular to support the formation of a regional water district including the City (Exhibit A). On January 14, 2003, pursuant to RSA 38:3, a special meeting of the voters of the City was held as a special election for the purpose of confirming the vote of the Board of Alderman determining that it was expedient for the City to establish a water works system. The turnout was approximately 20% of the registered voters of the registered voters of Nashua and the vote was confirmed by a margin of 6,525 to 1,867 or a 78% majority.

5. On February 4, 2003, Pennichuck and PSC terminated the merger by mutual agreement.

6. On February 5, 2003, the City, pursuant to RSA 38:6, notified PWW, PEU and PAC of the vote to establish a water works system and to acquire their assets and made inquiry as to each of them elected to sell that portion of its plant identified by the City. Copies of those notices are attached to Pennichuck's Petition as Exhibit B.

7. On March 25, 2003, PWW, PEU and PAC responded to the City's notice pursuant to RSA 38:7 in the negative. Copies of the responses are attached to Pennichuck's petition as Exhibit C.
8. Following the March 25, 2003 response, Pennichuck's interim CEO Krick, the second of three Pennichuck CEO's in 2003, advised Nashua that Pennichuck would entertain an offer to voluntarily acquire its assets. Pennichuck's prior CEO Maurice Arel, had earlier suggested that to acquire the company Nashua would have to pay more than the alleged merger value of \$106 million and listed certain additional expenses Pennichuck expected Nashua to pay of approximately \$13.2 million (Exhibit B).
9. Nashua engaged consultants and attorneys and entered into negotiations with Pennichuck, which led to an offer by it to acquire all of Pennichuck's assets for \$121 million on November 20, 2003. Pennichuck rejected the offer and then abruptly terminated negotiations on January 27, 2004.
10. It has been clear to Pennichuck since February 4, 2003 that Nashua intended to acquire all of the assets of PWW, PEU and PAC, including those laying outside of Nashua.
11. The statutory scheme of RSA 38, and in particular RSA 38:2, 6, 9, 10, 11 and 14, permit Nashua to acquire assets outside its limits if the PUC finds the acquisition to be in the public interest.
12. There is nothing in RSA 38, which limits an acquisition to plant and property within a municipality or to plant and property without the municipality necessary for operation of the property within it. The only limitation on acquiring property outside the

municipality is a determination by the Commission that the acquisition is in the public interest.

13. 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.

14. Pennichuck will not suffer irreparable harm if Nashua seeks to acquire the assets of PWW, PEU and PAC.

- a. Pennichuck is protected by the public interest determination that must be made by the PUC under RSA 38:9. In order for Nashua to acquire property of Pennichuck outside Nashua, the PUC must determine that such acquisition is in the public interest.
- b. Pennichuck's assertions that Nashua has delayed and abused the acquisition process under RSA 38, thereby placing the company "in a state of suspended animation and interfering with its ability to conduct business" are not supported by the facts. Under RSA 38:3, the confirming vote on January 14, 2003 could have been held at any time within one year of the November 26, 2002 Board of Alderman vote. Instead, it was held within two months. Any delay caused by the voluntary negotiations in which the parties engaged was

caused in part by Pennichuck. Moreover, under RSA 38:9, if Pennichuck was concerned about a delay it could have petitioned the PUC itself. Finally, during the period Pennichuck claims it was held hostage, it has continued to acquire water systems and its stock, which on February 4, 2003 the day the merger was abandoned, closed at 23.7 has risen to 28.5 on April 13, 2004, an increase of approximately 20%.

- c. Pennichuck will be compensated for any of its property acquired by Nashua at its fair value as determined by the PUC.
15. Pennichuck has not demonstrated a strong likelihood of success on the merits.
- a. RSA 38 does not limit an acquisition by a municipality to plant and property within that municipality or to plant and property without the municipality necessary for operation of the property within it. Under RSA 38, the PUC must determine that the acquisition of any property by a municipality outside its boundaries is in the public interest.
 - b. Because the PUC has made no determination of whether or not the acquisition of assets outside Nashua is in the public interest, Pennichuck's argument is premature.
 - c. Pennichuck's assertion that Nashua is attempting to legitimize an unlawful taking by claiming that it is promoting the regionalization of water services is without any basis and fact and is the product of speculation. The benefits of a regional water district are clear and significant but Nashua does not rely on them to justify its acquisition of assets outside Nashua. Instead Nashua asserts that the acquisition, including assets outside the City, 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 those portions of the system which would not be 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 its shareholders by eliminating the need to operate a small and less efficient and less profitable portion of the system.

- d. Pennichuck has failed to exhaust its remedy at the PUC to determine the extent of the plant and property which the PUC requires the City to purchase.
 - e. The fact that the regional district acting in its own capacity does not have the right of eminent domain under RSA 38 is of no significance to Nashua's petition. It is not the regional district, which seeks to acquire the assets, and it is Nashua that will have to convince the PUC that its acquisition is in the public interest. Moreover, any municipality which is a member of the district has the same powers under RSA 38 as Nashua.
16. The harm sought to be prevented by the Injunction is not greater than the harm which Nashua might suffer if the relief is granted.
- a. Pennichuck's harm is neither immediate nor irreparable. In its petition before the PUC, Nashua will have to satisfy the Commission that its acquisition of property outside Nashua is in the public interest. If it does satisfy that burden, Nashua will have to pay Pennichuck the fair value of those assets.

- b. If Nashua is enjoined, its ability to go forward with its petition before the PUC will be unnecessarily delayed and it will lose the opportunity to secure attractive financing at currently prevailing market rates.
 - c. If Nashua is enjoined the will of the voters of Nashua, expressed in the confirmatory vote of January 14, 2003, and the resulting presumption that the acquisition is in the public interest will be thwarted.
 - d. Nashua will also incur expense in prosecuting its petition before the PUC and defending Pennichuck's petition before this Court.
17. The public interest will not be served by the requested relief.
- a. Any delay will hinder Nashua's attempts to secure attractive financing of the acquisition at currently prevailing market rates.
 - b. Any delay will thwart the will of the voters of Nashua, expressed in the confirmatory vote of January 14, 2003, and the resulting presumption that the acquisition is in the public interest.
 - c. It was the choice of Pennichuck to file this action with knowledge of the City's intent to file a petition before the PUC. Nashua and its residents should not be subjected to additional delays and the potential increase bond costs due to the voluntary choices of the Respondents from which they now seek protection.
 - d. The public interest is a determination that will be made by the PUC. The statutory scheme requires that the PUC determine how much of the plan and property of Pennichuck, lying without Nashua, the public interest requires the

City to purchase. It would contravene that statutory scheme and be premature for this Court to make such a determination at this time.

WHEREFORE, the City of Nashua objects to the Motion for Preliminary Injunction and requests that the Court:

- a. Deny the Motion for Preliminary Injunction and refuse to issue a Preliminary Injunction against the City enjoining it from pursuing its petition to the PUC to take by eminent domain any assets of PWW, PEU or PAC;
- b. Grant such other and further relief as justice may require.

Respectfully submitted,
CITY OF NASHUA

By its attorneys:
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Dated: April 16, 2004

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