

July 7, 2008

Mr. Norm Labbe
Superintendent
Kennebunk, Kennebunkport and Wells Water District
PO Box 88
Kennebunk, ME 04043

Dear Mr. Labbe,

**Re: Review of proposed KKW-Nestlé water contract
by Maine Public Utilities Commission (MPUC) and
Maine Citizen Trade Policy Commission (MCTPC)**

During the public meeting organized by citizens on June 22 in Kennebunk, I intervened to emphasize the potential for international investment treaty disputes over the proposed contract between KKW and Nestlé. Since unanswered questions about this key issue go to the heart of democratic control over fresh water in the state of Maine, I asked that the proposed contract “be submitted formally both to the Maine Public Utilities Commission (MPUC) and to the Maine Citizen Trade Policy Commission (MCTPC) for their review.”

You replied:

“Well, yes. Public Utilities Commission is in here and they must agree to this. We wanted one more layer of protection by our primary regulator- the Public Utilities Commission. And that’s in there and we wouldn’t do it without their approval.”¹

I am very grateful for your response. However, in light of the text of the proposed contract, aspects of your response raise new disquieting questions.

It appears that the provisions of the contract that purport to facilitate a review of the contract by the Maine Public Utilities Commission would in fact limit the scope of such a review. Moreover, the wording of the contract could have the adverse effect of increasing citizens’ vulnerability to expensive, time-consuming and undemocratic investment treaty challenges.

¹ unofficial transcript; video of response can be viewed online at:
<http://www.youtube.com/watch?v=dfbWnwSygbw>

Is a review by the MPUC to be limited in scope ... or avoided altogether?

While the District may well have intended to include, as you aptly put it, “one more layer of protection” by incorporating in the text of the proposed contract provision for its approval by the MPUC, it appears that the contract would *reduce* the likelihood of a review taking place and, if such a review were to take place, would limit its scope.

Specifically, the contract states that the KKW-Nestlé contract would take effect only upon the completion of certain conditions. For our purposes here, the key condition is *either* that the MPUC approve of the contract *or* that PUC staff confirm that such approval is not required.

The proposed contract states:

“1. Scope and Effective Date of Agreement.

This Agreement shall take effect upon:

[...]

(c) approval of this Agreement by the Maine Public Utilities Commission (“MPUC”), on terms and conditions that are not materially adverse to Poland Spring or the District, or confirmation by the MPUC staff that such approval is not required, it being understood that the District shall file such application with the MPUC...”

Would you please explain the District’s interpretation of this clause?

1. Is it the District’s understanding that no review of the proposed contract would occur if unspecified MPUC “staff” indicate to the parties that MPUC approval “is not required”?

2. Is the District concerned that this provision could have the serious unintended consequence of appearing to grant MPUC “staff” the authority under the contract to short-circuit established MPUC processes, undermine the authority of the Public Utility Commission members, and so *eliminate* a layer of protection for District and state citizens?

3. In the event that MPUC intervention is deemed to be required, could you please confirm that the District and Nestlé jointly intend that MPUC intervention is to be limited in scope... specifically, that a review is *not* to result in rejection of the contract itself ... even if it were found to be contrary to the public interest? The contract explicitly states that MPUC approval must be “on terms and conditions that are not materially adverse to Poland Spring or the District”. I would be grateful if you could explain how this provision is not at odds with the District’s stated intention, as you put it, to add “one more level of protection” and how it would not constitute a joint attempt by

the District and Nestlé to fetter the rightful activities of the MPUC and is not an attempt to place contractual interests above the public interest?

4. Could you please inform me if the District has filed an application with the MPUC seeking approval of the proposed contract as specified in Article 1 of the draft, and if so, when that application was filed?

“[N]ew angle”: could a signed contract be the subject of international investment treaty challenges?

In your reply to my question about the potential role of international investment treaties in the event of a future dispute concerning the proposed contract, you indicated that your legal counsel had already begun to examine the issue.

You stated:

“...[W]ith respect to international trade agreements- that’s a new angle. Our legal counsel has looked at it and it’s obvious it’s a whole new set of laws and they’re not sure yet, but it’s definitely something that we’ll look at because we don’t want to get involved in something that’s going to get very, very complicated down the road. So[...] that question is going out to legal counsel again tomorrow and if they have any specialists on international trade ...we do want to find that out. I wanted more information by Wednesday is my goal and we’ve got a lot of things to look at in the next few days.

5. In the interest of ensuring that we don’t, as you so aptly put it, “get involved in something that’s going to get very, very complicated down the road”, would the District agree to allow due diligence to be done with respect to international investment treaties *before* taking any irrevocable action? Specifically, will the District refrain from signing the proposed contract with Nestlé until the extent of vulnerability to the District, State, and other taxpayers under potentially applicable international investment treaties can be fully assessed?

In particular, the District and State should assess the citizens’ exposure to investment treaty litigation taking the following into consideration:

- the likelihood that a signed contract, which would be subject to only limited review by the MPUC, would almost certainly constitute an “investment” for the purposes of international investment treaties and could become subject of “investor-to-state” challenges in the event of future disputes over its terms;
- the potential in the future for the signed contract to be transferred or sold (cf. Article 8 of the draft) to another Nestlé subsidiary or multinational corporation

based in a foreign country that is party to a bilateral investment treaty with the United States;

- in the event of an investor-to-state treaty challenge pertaining to the contract, that the District's commitment in the contract to act as Nestlé's legal ally (cf. Article 6(j)) would complicate its ability to act in the public interest.

6. Would you please inform me of what action(s) you or the District have taken to examine the potential for a KKW-Nestle contract to be subject to international investment treaty litigation and what results have been obtained?

7. Has the Water District submitted, or is it its intention to submit, the proposed KKW Nestle contract to the Maine Citizen Trade Policy Commission or any other public body for their review?

Thank you very much for your attention to these requests.

I look forward to hearing from you at your earliest convenience.

Respectfully,

Martha Spiess

c.c. - KKW Board of Trustees (Messrs: James E. Burrows, Richard Littlefield, Thomas P. Oliver, Robert A. Emmons)
- other interested parties