DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant To RSA 38:9

Order Regarding Sequence of Public Interest and Valuation Inquiries and Procedural Issues

O R D E R N O. 24,447

March 31, 2005

I. BACKGROUND

This order concerns whether the New Hampshire Public Utilities Commission (Commission) should bifurcate its consideration of public interest and valuation issues regarding a petition pursuant to RSA Chapter 38 to acquire the property of a water utility, and addresses the treatment of certain procedural issues. This proceeding was initiated by a petition from the City of Nashua (Nashua), on March 25, 2004, seeking valuation of all plant and property of Pittsfield Aqueduct Company, Inc. (PAC), Pennichuck East Utilities, Inc. (PEU), and Pennichuck Water Works, Inc. (PWW) necessary to establish a municipal water works system. On April 5, 2004, PAC, PEU and PWW jointly filed a Motion to Dismiss in Full or in Part or, Alternately, to Stay Proceeding.

On January 21, 2005, the Commission issued Order No. 24,425 which, among other things, granted the Motion to Dismiss as to PEU and PAC; denied the Motion to Dismiss as to PWW; authorized Nashua to pursue its RSA Chapter 38 filing against PWW; and ordered that memoranda on the sequencing of the inquiries on public interest and valuation be filed on March 8, 2005.

The Commission received legal memoranda and letters of position from Nashua, PWW, the Office of Consumer Advocate (OCA), the Merrimack Valley Regional Water District (District), Town of Merrimack, and Mr. Fred Teeboom, a PWW customer, relating to the sequencing of public interest and valuation. We now consider those arguments.

II. POSITIONS OF THE PARTIES

A. City of Nashua

Nashua argues that the Commission should consider valuation prior to considering public interest. In the alternative, Nashua argues the Commission should consider the issues simultaneously. In support of its argument, Nashua states that the most important issue in the public interest determination is the comparison of rates likely to be charged under public ownership versus continued private ownership. Other public interest aspects, such as impact upon shareholders and cost of service issues, Nashua contends, depend upon the Commission's determination of value. Nashua distinguished the Commission's consideration of public interest prior to valuation in the J. Brodie Smith Hydro-Electric Station docket by citing to the Commission's order which found such sequencing justified by the particular circumstances of that docket. *Public Service Company of New Hampshire*, 86 NH PUC 398 (2001). Nashua therefore urges the Commission to reject the J. Brodie Smith model, arguing that a consideration of public interest should not precede valuation.

Nashua asserts that it should be entitled to full discovery of PWW prior to its filing being deemed complete. Nashua states that it has not had access to important information and thus should be able to supplement its filing. In rebuttal to PWW's objection to Nashua's memorandum, Nashua criticized PWW's charge of "ulterior motives" and Nashua reiterated its contention that valuation is critical to the determination of public interest. Nashua denied that it

seeks to delay the proceeding and requested the Commission hear oral argument concerning the procedural schedule on April 8, 2005.

B. Pennichuck Water Works, Inc.

PWW stated that it does not seek to bifurcate the issues of valuation and public interest. PWW stated that though it had considered asking for bifurcation to protect against valuation being compromised by rate considerations, it was confident that the Commission could consider the two issues in a single proceeding, consistent with the Commission's statutory obligations.

PWW also commented on how the procedural schedule should be crafted. PWW stated its belief that discovery should begin promptly on Nashua's prefiled testimony and the public interest assertions contained therein. PWW envisioned simultaneous discovery between PWW and Nashua so that Nashua could finalize its valuation case. Discovery would then commence on Nashua's valuation case and PWW would plan to submit its rebuttal thereafter. PWW indicated its willingness to work with the parties to develop a proposed procedural schedule but requested the Commissioners be available on the day of the technical session to hear argument on procedural schedule disputes, if any arose.

PWW filed a separate memorandum subsequent to the March 8, 2005 deadline objecting to assertions contained in Nashua's memorandum. Specifically, PWW objects to Nashua's argument that valuation should proceed prior to public interest. PWW avers that RSA 38 does not support such a schedule and that considering valuation first will cause delays. Nashua's real motive, PWW asserts, is to pressure PWW to agree to a low sales price.

PWW also objected to Nashua's opinion that it needed information from discovery to finalize its petition. PWW argued that Nashua has had ample opportunity to submit its case on the public interest. It argues that allowing Nashua additional discovery on PWW to complete its

public interest case and to gather information to put operation of the water system out to bid will place an unnecessary burden on PWW's limited staff. PWW urges the Commission to deny Nashua's attempts to supplement the public interest components of its filing.

C. Office of the Consumer Advocate

The OCA opposes bifurcation of the valuation and public interest inquiries. OCA believes the public interest determination necessarily involves consideration of rate impacts upon water customers and therefore "it is not possible to separate the valuation from the public interest determination in this case." Memorandum of Law, p. 1. In support of its argument, the OCA cited the Commission's reasoning in *Town of Hudson v. Consumers New Hampshire Water Company*, 81 NH PUC 673, 674 (1996) wherein the Commission concluded that the issues of public interest and valuation were inextricably entwined and the Commission denied a motion to bifurcate. OCA argues similarities exist between the instant docket and the Hudson matter and that there is a lack of special circumstances, such as existed in the J. Brodie Smith Hydro-Electric Station docket, warranting bifurcation.

D. Merrimack Valley Regional Water District

The District concurred with the arguments raised in Nashua's memorandum.

E. Town of Merrimack

Merrimack concurred with the Office of the Consumer Advocate's Memorandum of Law Concerning Bifurcation and Objection to Bifurcation.

F. Mr. Fred S. Teeboom

Mr. Teeboom objected to Nashua's opposing bifurcation. He urged the Commission to consider public interest prior to value, stating such a sequence would be more efficient. He stated the Commission could simply close the docket if public interest was not met.

III. COMMISSION ANALYSIS

A. Bifurcation

New Hampshire RSA 38:9 enables a municipality or utility to petition the Commission for a determination concerning the extent of utility property a municipality may acquire and the value of such property. Previously when the Commission considered a municipal taking of a water utility, it concluded that litigating the public interest issue separately from the valuation issue was unworkable. *Town of Hudson v. Consumers New Hampshire Water Company*, 81 NH PUC 673, 674 (1996). The Commission at that time did not believe the public interest could be evaluated without all other issues being fully developed on the record. *Id.*

In the J. Brodie Smith Hydro-Electric proceeding, DE 00-211, the Commission concluded that the particular circumstances of that case rendered it appropriate to defer consideration of valuation until after the Commission had resolved the public interest issue. *Public Service Company of New Hampshire,* 86 NH PUC 398, 405 (2001) Specifically, the legislature had recently mandated a delay in divestiture of PSNH's assets, as expressed in RSA 369-B, and the Commission needed to resolve the relationship between the near-term acquisition of the J. Brodie Smith Hydro-Electric facility and the mandated delay. There being no such issues present in this case, the process employed in that case is not instructive.

In the instant docket, the Commission is faced with municipal acquisition of the State's largest regulated water utility, whose assets comprise integrated and stand-alone systems located both within and without the City of Nashua. Given the potential complexity of public interest considerations involved, the Commission sought input from the parties on whether it would be advisable to bifurcate the public interest consideration from the valuation consideration.

Having reviewed the memoranda submitted by the parties, we find that bifurcation here is not an appropriate procedural device. The issues of valuation and the public interest are tightly interwoven and litigating them separately could undermine the orderly and efficient conduct of these proceedings. Consideration of the issues in this manner is consistent with RSA Chapter 38 and the Commission's approval in *Town of Hudson*, a proceeding much like the present case. We conclude that a properly structured procedural schedule, incorporating appropriate tracks for discovery and testimony on an issue-by-issue basis as necessary, will result in a more orderly proceeding. We therefore find it reasonable to consider the public interest and valuation issues together.

B. Procedural Schedule

It appears from the memoranda that the parties are entrenching themselves into highly adversarial positions on discovery, presumably in the hope of obtaining some litigation or other advantage. While the parties' disputatious characterizations are not a positive portent, we will not schedule oral argument for April 8, 2005, as we remain hopeful that good judgment will prevail and the parties will be able to work out a proposed procedural schedule. If such is not the case, we will direct the filing of an agreed-to description of the contested issues for our consideration.

Although we refrain at this time from addressing the specific discovery and procedural arguments made by the parties in the most recent memoranda, we recommend that they work within the following parameters to come to agreement on a proposed procedural schedule, availability of documents, use of electronic filing and the like. Our goal is to focus the proceedings on the facts in order to avoid overreaching accusations and argumentation that only serve to cloud the fundamental issues the Commission must resolve.

Pursuant to Order No. 24,379, Nashua filed, on November 22, 2004, direct testimony on its technical, financial and managerial capability to operate PWW and how taking PWW would serve the public interest. That testimony should be immediately subject to discovery. Entities that support the taking will also be allowed to promptly submit supporting testimony regarding the public interest. That testimony should also be subject to discovery so that PWW and others opposed to the taking may prepare reply testimony, which then would be subject to discovery. After opposing testimony is filed, then the Consumer Advocate, Staff and any party that is neutral with respect to the taking should be afforded the opportunity to file testimony as to Nashua's capabilities and the public interest.

With respect to valuation, the Commission pointed out in Order No. 24,379 that Nashua would be best prepared to file testimony after it had the opportunity to conduct discovery of Pennichuck's books and records. That discovery should begin immediately and will occur in tandem with the activities taking place with respect to Nashua's capabilities and the public interest. We will limit discovery in the first instance to Nashua inasmuch as it is the petitioner and the one seeking to take utility property. The orderly conduct of the proceeding would be supported by simultaneous filing of direct testimony on valuation by Nashua and PWW. The valuation testimony would then be generally subject to discovery and the filing of simultaneous reply testimony by any party that is inclined to do so.

After Staff and the OCA have had the opportunity to file testimony regarding Nashua's capabilities and the public interest, and after reply testimony has been filed with respect to valuation, the parties will be allowed to file simultaneous capstone testimony that joins the public interest and valuation issues. During that timeframe, the Commission will entertain requests for additional discovery on issues related to the public interest and determine the

allowable scope of the capstone testimony. That testimony will be subject to discovery and simultaneous reply testimony, which may also include rebuttal to previous testimony on Nashua's capabilities and the public interest.

We strongly encourage all parties to focus on the technical and financial issues raised by Nashua's petition and make use of testimony, technical sessions and discovery to develop their understanding of those issues. At the same time, we do not intend to allow attenuated discovery that would not advance our understanding of how the taking would or would not serve the public interest. We will not permit discovery into areas that, while possibly relevant to other disputes among the parties, are not relevant to the issues the Commission must determine.

The parties and Staff should strive to be clear and complete in their questions and responses and be prepared to file Motions to Compel pursuant to Puc 204.04(d) as needed in order to maintain the schedule. We authorize the Executive Director to schedule additional technical sessions and conferences for resolution of discovery disputes, which may be conducted in person or by telephone and presided over by the Commission or a designated Hearings Examiner.

We instruct Staff to develop a proposed procedural schedule consistent with these goals for discussion among the parties at the technical session on April 8, 2005. We await a report of agreements reached at the technical session and a proposed procedural schedule no later than April 12, 2005. Issues that cannot be resolved should be submitted in a joint recitation by the parties and Staff no later than April 18, 2005. If necessary, we will schedule oral argument upon review of such a submission.

Based upon the foregoing, it is hereby

ORDERED, that the issues of public interest and valuation in the instant docket shall not be bifurcated; and it is

FURTHER ORDERED, that the parties develop a proposed procedural schedule and submit the schedule to the Commission no later than April 12, 2005; and it is

FURTHER ORDERED, that in the event disputes arise concerning the proposed procedural schedule, the parties shall submit a joint recitation of the issues to be decided, to be filed no later than April 18, 2005.

By order of the Public Utilities Commission of New Hampshire this thirty-first day of March, 2005.

Thomas B. Getz Chairman	Graham J. Morrison Commissioner	Michael D. Harrington Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary