DW 04-048

CITY OF NASHUA

RSA 38 Proceeding re Pennichuck Water Works

Order on Motion to Strike or Exclude Testimony

O R D E R N O. 24,667

September 22, 2006

In this RSA 38 proceeding before the New Hampshire Public Utilities Commission (Commission), pending is a motion, submitted on August 1, 2006, by respondent Pennichuck Water Works, Inc. (PWW) to strike or exclude certain prefiled direct testimony submitted by petitioner City of Nashua. The City filed an opposition to the motion on August 11, 2006.

This matter is presently scheduled for hearing in January 2007 on specific dates to be determined. In anticipation of the hearing, the parties have been developing, submitting and conducting discovery upon written prefiled direct testimony of numerous witnesses. The final round of written prefiled direct testimony is presently scheduled for filing on or before November 14, 2006. *See* Secretarial Letter of September 14, 2006 (granting joint motion of City and PWW to eliminate scheduled "capstone" testimony and related discovery in favor of November 14 submission of "limited update testimony related to preexisting expert opinions of value and rates and post-deposition analysis of opposing experts' opinions of value and rates").

In support of its motion, PWW makes certain assertions about the course of the proceedings to date. According to PWW, when Nashua first invoked RSA 38 in seeking to municipalize PWW's assets, it publicly stressed the objective of assuring an adequate supply of clean drinking water to the public. Then, according to PWW, the initial prefiled written direct testimony submitted by Nashua on November 22, 2004, "prominently identified Pennichuck's

stewardship of its watershed as one of [the City's] primary reasons for this eminent domain action." PWW Motion to Strike at 2. Nevertheless, according to PWW, Nashua waited another 18 months, after the November 2004 deadline for addressing "public interest" issues in prefiled testimony, to provide any detailed testimony on so-called watershed issues. PWW contends that Nashua "chose to submit a direct case that consisted of the barest of unsupported allegations, either hoping that that would be sufficient to support its case or, more likely, planning from the outset to lay in wait to provide the substance of its case in chief until Pennichuck had responded to the City's direct case." *Id.* at 3-4. According to PWW, Nashua thus took advantage of the May 22, 2006 opportunity for submission of rebuttal testimony to provide, for the first time, detailed testimony about from three witnesses -- Katherine Hersh, Brian McCarthy and John Henderson -- about PWW's stewardship of the water supply at issue. PWW contends there is no reason Nashua could not have provided this testimony with its initial evidentiary filing in November 2004.

Additionally, according to PWW, the City's submission on May 22, 2006, of prefiled testimony from Allan Fuller comprises a "further effort to remake its direct case on public interest." *Id.* at 5. PWW characterizes Mr. Fuller as "a private citizen and chairman of the Pennichuck Brook Watershed Council" who was "apparently encouraged by the City of Nashua to present testimony on Pennichuck's stewardship of the watershed." *Id.* PWW contends that Mr. Fuller's concerns about the watershed have been a matter of public record for several years but he nevertheless simply chose to withhold them in the context of this proceeding for no valid reason. PWW accuses both Nashua and Mr. Fuller of adopting a "cavalier attitude about Commission deadlines and Pennichuck's due process rights." *Id.* at 6.

Finally, PWW accuses Nashua of improperly withholding until after a Commission-established January 22, 2006 deadline certain testimony about the City's qualifications to operate a water utility. At issue, specifically, is Nashua's ability to perform billing and collections tasks. According to PWW, Nashua received a clear directive in Order No. 24,567 (December 22, 2005) to submit such testimony by January 12, 2006. Nevertheless, according to PWW, Nashua did not address these issues until it submitted written testimony from witnesses Carol Anderson and Ruth Raswyck on May 22, 2006, "under the guise of a reply" to certain testimony submitted by witnesses for PWW and Commission Staff. *Id.* at 7.

Accordingly, PWW asks the Commission "to strike or exclude" the testimony of witnesses Hersh, McCarthy, Henderson, Fuller, Anderson and Raswyck referenced above. In support of this request, PWW relies on authorities that describe what is typically the order of proof at a trial in a civil proceeding. Citing *Public Service Co. of New Hampshire*, 71 NH PUC 547 (1986), PWW points out that the Commission has followed this body of law in managing its own proceedings.

PWW contends that unless the Commission strikes or excludes the offending testimony, PWW will have suffered actual prejudice of the sort the Commission should not countenance. In support of this position, PWW points out that it and other parties were entitled to submit two rounds of data requests on the direct case originally submitted by Nashua. Similarly, PWW points out, the procedural schedule allowed for rolling data requests on the City's January 12, 2006 testimony through February 6, 2006, followed by a second round of discovery on February 27, 2006. According to PWW, the timing of the challenged testimony is such that PWW had actually been limited to one round of data requests on the testimony "and the opportunity to

address Nashua's allegations only as part of its capstone testimony, which presumably was intended to bring together all of the testimony that had previously been filed." PWW Motion at 10.[1] According to PWW, unless the Commission grants the motion PWW will have suffered the violation of its due process rights in a manner that could do real harm to PWW's customers.

In opposition to the motion, Nashua contends that (1) prior to January 12, 2006, the focus of its evidentiary submissions was its ability to provide service that is equal or better than that currently provided by PWW, and (2) the January 12, 2006 testimony of PWW witness Eileen Pennetier about watershed issues opened the door to responsive testimony on this subject from the City. Moreover, according to Nashua, the PWW motion itself demonstrates why there are no due process issues here by showing the extent to which PWW had been at liberty to conduct discovery on what began, in Nashua's view, as a single sentence in Nashua's November 22, 2004 testimony referencing concerns about PWW's stewardship of the watershed.

In reviewing the motion, we note that PWW does not contend that the submission of the challenged prefiled testimony violates any statute or rule. Rather, PWW's concerns relate to notions of due process and fundamental fairness. Having reviewed the motion papers carefully, it is our determination that PWW's right to due process and fundamental fairness does not presently require the extraordinary remedy proposed by PWW.

In the context of administrative proceedings, due process is a "flexible" concept to which three factors are relevant:

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[1] As noted, *supra*, the Commission has approved the jointly filed request of PWW and Nashua to forego capstone testimony in favor of a more limited opportunity to submit a final round of prefiled testimony. For purposes of considering the instant motion, and in the absence of any indication to the contrary from PWW, we assume it views itself as having been placed in no better or worse position as the result of the schedule change.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (citations omitted); *see also Appeal of Office of Consumer Advocate*, 148 N.H. 134, 138 (2002) (applying same standard in context of both New Hampshire and federal constitutions). Although the private interest of any utility subject to an RSA 38 municipalization proceeding is significant, and granting the motion would likely have few implications for the government's interest (which we take in the present context to mean the Commission's interest as opposed to that of the municipality), we see little or no risk that PWW's private interests would suffer an erroneous deprivation if we do not exclude the challenged testimony at this time.

The authorities relied upon by PWW concern the appropriate order of presenting live testimony in the context of a civil trial. Those authorities would be relevant here if the question were whether unfairness would result by allowing witnesses to testify, or parties to present evidence, in a particular sequence *at hearing*. Our rule governing the order of procedure at hearings on petitions, N.H. Code Admin. Rules Puc 203.26, specifies that the petitioner – in this instance, Nashua – has the opportunity to open and close any part of the presentation. *See also* Puc 203.25 (noting that petitioner has burden of proving the truth of any factual proposition). At hearing the parties can expect us to require Nashua to take advantage of its role defined by Puc 203.06 and 203.26 to make its case in chief via direct testimony, confining rebuttal testimony to issues raised by opposing parties (including Commission staff, as appropriate) that Nashua could

not reasonably have been expected to anticipate. This is in keeping with the 1986 order cited by PWW, which comprised a similar admonition about how the Commission would structure an upcoming hearing. *See Public Service Co. of New Hampshire*, 71 NH PUC at 549 ("Direct testimony constitutes a party's case in chief. The Commission will not countenance a party's attempt to present its entire case in rebuttal.").

In focusing on the fairness of this proceeding *prior* to hearing, it is useful to make explicit the reasons for requiring the preparation and submission of prefiled direct testimony in the first place. This longstanding practice of the Commission is neither required nor precluded by the Administrative Procedure Act, RSA 541-A, nor our rules governing adjudicative proceedings, N.H. Code Admin. Rules Puc 200.[2] Its purposes are (1) to make hearings more efficient by, at least in theory, eliminating the need for extensive, live direct testimony and allowing the bulk of hearing time to be devoted to cross-examination, and, more importantly, (2) allowing parties to prepare for hearing fully by reviewing the evidence opponents intend to marshal at hearing and, in appropriate circumstances, conducting discovery so as to ascertain fully the basis for the written direct testimony. Puc 203.06(b) encourages the submission of prefiled direct testimony by petitioners not otherwise required to do so, on the explicit premise that such a petition will reach hearing more expeditiously because hearing preparation can begin as soon as the petition is filed.

Strictly speaking, there is nothing to strike at this juncture because prefiled testimony does not become part of the evidentiary record until it is adopted under oath by a live witness at

[2] The only exception concerns petitions for adjustments to rates, which utilities are obliged to submit with prefiled direct testimony. Puc 203.06(c).

hearing. *See* Puc 203.23(b). Indeed, it is the Commission's longstanding practice to allow parties to offer exhibits, including prefiled testimony, over the course of a hearing, marking such exhibits for identification purposes but ruling on their admissibility only at the conclusion of the hearing, thus giving parties as full an opportunity as possible to consider bases for objecting to such evidence.

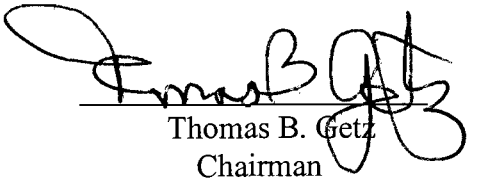
Given these principles, at the prehearing stage a party aggrieved on due process grounds by the contents of prefiled direct testimony would have to make a showing that the party's ability to prepare for hearing had been unfairly compromised. PWW has not made such a showing here. Rather, its motion consists of non-specific allegations to the effect that Nashua has sought unfair advantage, devoid of any particulars as to what lines of discovery inquiry or other case development opportunities have been precluded as the result of the timing, in relation to discovery opportunities, of the challenged prefiled testimony about watershed, collections and billing issues.

We do not rule out the possibility of PWW making such a showing at hearing or *in limine*. See Order No. 24,487 (July 8, 2005), slip op. at 4 (suggesting that, in light of the complexity and importance of this case, *limine* motions would be entertained). Thus our denial of the motion is without prejudice and we admonish the parties that, at hearing, we will be attentive to the possibility of excluding evidence if admission of such evidence would be fundamentally unfair in the circumstances. Our decision today is simply that a motion to strike testimony is premature and PWW has thus far failed to demonstrate a cognizable basis on due process grounds for prospectively excluding the prefiled direct testimony cited in its motion.

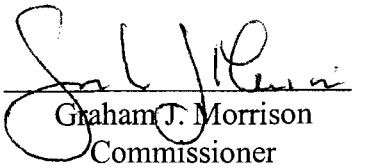
Based upon the foregoing, it is hereby

ORDERED, that the motion of Pennichuck Water Works. Inc. *et alia* to strike or exclude certain prefiled direct testimony of the City of Nashua is DENIED without prejudice.

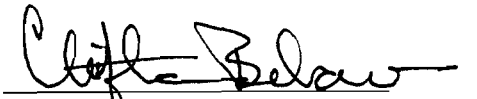
By order of the Public Utilities Commission of New Hampshire this twenty-second day of September, 2006.



Thomas B. Getz
Chairman

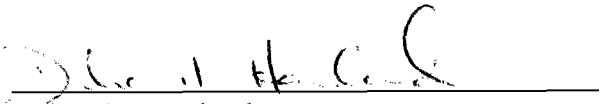


Graham J. Morrison
Commissioner



Clifton C. Below
Commissioner

Attested by:



Debra A. Howland
Executive Director & Secretary