

DW 04-048

CITY OF NASHUA

RSA 38 Proceeding re Pennichuck Water Works

Order on Motion for Protective Order and Motion to Compel Discovery

ORDER NO. 24,699

November 8, 2006

This order of the New Hampshire Public Utilities Commission (Commission) concerns certain documents sought by Pennichuck Water Works (PWW) from petitioner City of Nashua (Nashua) in connection with a contractor Nashua plans to use should it succeed in municipalizing the PWW system in this RSA 38 proceeding. At issue are subpoenas and other documents pertaining to Nashua's proposed operations and maintenance contractor, Veolia Water North America – Northeast, LLC (Veolia), specifically related to a Veolia affiliate, Veolia Water Indianapolis, LLC. Pursuant to N.H. Code Admin. Rules Puc 203.09(i), PWW, by motion filed on July 21, 2006, seeks to compel Nashua to produce the documents in discovery. Nashua had previously filed a motion for protective treatment of the documents on June 2, 2006, apparently conditioning its production of the documents on the Commission granting such a motion. For the reasons that follow, we decline to grant protective treatment to the documents prospectively and direct Nashua to produce them nonetheless.

As part of its third data request to Nashua on January 17, 2006, PWW asked Nashua to "Please provide all information in the possession or control of Nashua or its agents or consultants or of Veolia with regard to problems or complaints of malfeasance encountered in operating the Indianapolis, Indiana water system." In its response dated January 27, 2006, Nashua objected to this request "on the grounds that it is vague and fails to identify the information sought with

specificity as required by Puc 204.04(b).” However, without waiving its objection PWW answered that “Veolia Water Indianapolis, LLC received a subpoena from the United States Attorney’s Office. Subsequently, the Indiana Department of Environmental Management released test results confirming that Veolia Water Indianapolis, LLC has not violated any state or federal drinking water quality standards.” Nashua provided certain additional information and attachments concerning Veolia Water Indianapolis as part of its response.

Subsequently during depositions PWW made certain follow-up document requests concerning its previous data requests which were memorialized in a letter to Nashua dated February 10, 2006 including: “Any subpoenas issued to Veolia Water Indianapolis, LLC by the U.S. Department of Justice and all related non-confidential documents.” On February 16, 2006 Nashua responded to this request stating that “Counsel to Veolia Water Indianapolis, LLC has advised Veolia Water North America-Northeast, LLC not to provide any documents, including Subpoena, while the investigation remains pending.” On March 16, 2006, PWW filed a motion to compel Nashua to respond to this and various other data and documents requests. All other issues raised in that motion have been otherwise resolved or addressed by the Commission. In its motion to compel, PWW argued that its data request “is specific and limited in scope” and “is clearly relevant to these proceedings, since it concerns Veolia’s qualifications to operate a water system” and “may lead to the discovery of admissible evidence.” See motion at p. 4.

On March 27, 2006, Nashua filed an objection to PWW’s motion to compel arguing that PWW’s follow-up document request to data request 3-6 regarding Veolia Water Indianapolis “is based upon a false premise that there was in fact any ‘problems’ or ‘malfeasance’ related to its operations.” See objection at p. 6. Nashua also argued that certain other assertions in PWW’s motion to compel are materially false, provided various additional information concerning

Veolia Water Indianapolis, and again asserted that counsel for Veolia “has informed Nashua that, under applicable law, the company cannot provide any information related to any subpoena received from the US Attorney.” Nashua also argued that PWW’s “request for ‘all information in the possession or control or its agents or consultants’ is so vague that Nashua cannot identify the particular documents sought.”

With respect to the motion to compel and objection, on April 19, 2006, the Commission issued a secretarial letter advising the parties “that pursuant to RSA 363:17 the Commission has designated Hearings Examiner Donald M. Kreis to hear the parties, report the facts and make recommendations to the Commission concerning the disposition of the motions.” On April 28, 2006, the Hearing Examiner conducted a discovery conference at the Commission offices. In his report of the same date to Commission, Hearing Examiner Kreis reported that petitioner, respondent, the Office of Consumer Advocate, Ms. Claire McHugh and Ms. Barbara Pressly attended the discovery conference and that progress was made toward resolving the outstanding issues and he agreed to forbear making recommendations while the parties continued to work toward an informal resolution.

On May 9, 2006, Nashua filed with the Commission a letter describing proposed resolutions to various issues, understood to be acceptable to the parties present at the April 28, 2006 discovery conference. With regard to Veolia Water Indianapolis, Nashua stated that “*subject to an appropriate protective order*, Veolia Water North America – Northeast, LLC has agreed to make the subpoenas issued in the Indianapolis matter available by May 31, 2006 (earlier if available). Insofar as the proposal included all non-confidential documents or information provided in response to those subpoenas, Nashua further agrees to provide relevant non-confidential documents available, subject to an appropriate protective order, upon

reasonable request and within a reasonable time period, such as 10 days, following disclosure of the subpoenas.”

Nashua sought such a protective order by motion filed on June 1, 2006. Nashua stated that PWW, Commission Staff, the towns of Merrimack, Litchfield and Hudson, and the Merrimack Valley Regional Water District assented to the motion.

On or about June 1, 2006, PWW tendered the following data request, No. 5-89, to Nashua: “Please produce all documents and information provided in response to items 1-4 of Grand Jury Subpoena 05-64-SDD-240-08 issued from the United States District Court for the Southern District of Indiana dated September 30, 2005.”

PWW filed a motion to compel discovery on July 21, 2006. The motion presented numerous discovery disputes to the Commission for resolution; those not covered by this order were resolved in Order No. 24,681 (October 23, 2006). With respect to the Indianapolis grand jury proceedings, PWW focused solely on documents produced in response to the federal subpoenas (as opposed to the subpoenas themselves) and indicated that Nashua had refused to produce them on the grounds that production would be unduly burdensome and their discovery would be unlikely to lead PWW to admissible evidence.

Nashua objected to the motion in a responsive pleading filed on August 1, 2006. In response to PWW’s effort to compel discovery related to the federal grand jury proceedings, Nashua accused PWW of violating the agreement memorialized in the May 5, 2006 letter filed by Nashua with the Commission on May 9, 2006, indicating that Nashua would produce certain documents subject to a protective order. According to a letter to the Commission from its General Counsel Donald Kreis, filed on October 31, 2006, Nashua did provide PWW, but not

staff, nor apparently other parties, a copy of subpoena in question, apparently prior to PWW's June 1, 2006 data request 5-89.

The inference we draw from this somewhat complex series of filings is that Nashua is refusing to produce any additional documents responsive to PWW's request until we issue a protective order. Accordingly, we begin with the arguments marshaled by Nashua in support of such a determination.

Nashua contends that the information in question is confidential, commercial, and financial information within the meaning of RSA 91-A:5, IV. In support of that position, Nashua avers that Veolia provides both water and wastewater operation services through a competitive bid process and that unrestricted disclosure of documents related to any investigation could harm Veolia's competitive position by creating an appearance that Veolia violated drinking water standards. Nashua contends that the financial harm from disclosure of this information would be substantial and irreparable. Nashua further states that Veolia has not publicly circulated copies of any subpoenas or information provided to investigators and states that the information is therefore confidential, commercial, and financial information within the meaning of RSA 91-A.

Nashua seeks Commission approval of a procedure for limiting review of the confidential information to certain representatives of the parties and Staff. Nashua also proposes a procedure for Staff and the parties to challenge the claim of confidentiality. Nashua's proposed limitations on review of confidential information would not prevent any party or Staff from obtaining access to the information, but rather creates a procedure for obtaining access after signing an appropriate agreement to comply with certain confidential obligations. Nashua seeks terms and conditions essentially identical to those contained in Order Nos. 24,495 and 24,605, in which the Commission not only granted confidential treatment within the meaning of RSA 91-A but also

directed that access be limited to certain specific people associated with parties to the proceeding.

The Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. *See* RSA 91-A:4, I. The statute contains an exception, invoked here, for "confidential, commercial, or financial information." RSA 91-A:5, IV. In *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), the New Hampshire Supreme Court provided a framework for analyzing requests to employ this exception to shield from public disclosure documents that would otherwise be deemed public records. There must be a determination of whether the information is confidential, commercial or financial information "*and whether disclosure would constitute an invasion of privacy.*" *Id.* at 552 (emphasis in original, citations omitted). The "asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . . since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id.* at 553.

The Commission's rule on requests for confidential treatment, N.H. Code Admin. Rules Puc 203.08, is designed to facilitate the employment of this balancing test. Consistent with RSA 91-A, the Commission requires petitioners to: (1) provide the material for which confidential treatment is sought or a detailed description of the types of information for which confidentiality is sought; (2) reference specific statutory or common law authority favoring confidentiality; and (3) provide a detailed statement of the harm that would result from disclosure to be weighed against the benefits of disclosure to the public. Nashua has not made the requisite showing in these circumstances.

It has not been the practice of the Commission to grant confidential or protective treatment in the abstract, without specific documents identified. See, e.g. *Re Northern Utilities*, Order 24,389 (October 24, 2004).

Since the documents are not entitled to confidential treatment under RSA 91-A:5, IV prior to their production based on the description provided, it follows that we need not grant Nashua's request for additional protections of the sort previously approved in this docket as to some discovery data. However, in an abundance of caution, we explicitly do not foreclose the possibility that some cognizable basis for confidential treatment under RSA 91-A:5, IV might emerge once Nashua has produced the documents themselves. Our ruling here is limited solely to the grounds invoked by Nashua, based on its description of the documents in question. Nashua remains free to produce the documents subject to Puc 203.08(c) or (d), which protects documents actually produced in discovery from public disclosure on a provisional basis in certain circumstances.

Since we conclude that Nashua is not entitled to a before-the-fact determination that its response to the discovery request in question should not be subject to protective treatment, the question becomes whether to grant the motion to compel discovery in these circumstances. In that regard, we note that in its response to PWW's motion to compel Nashua does not argue that the request is beyond the bounds of permissible discovery – only that it was awaiting our ruling on its request for a protective order. We thus deny the motion, stressing that our disagreement with Nashua on the question of protective treatment does not comprise a basis for withholding documents that are responsive to the discovery request at issue. We also compel Nashua to file with its response a copy of the subpoena previously requested and provided to PWW, but not to staff or other parties in the proceeding.

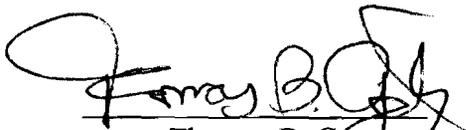
As an additional precaution in this unusual circumstance, where there are some twenty parties in this proceeding and where the documents in questions were the subject of a grand jury investigation and may not be under the direct control of Nashua, we will allow Nashua, should it seek confidential treatment and a protective order pursuant to Puc 203.08 (j) when it files the responsive documents and a copy of the subpoena in question, to limit initial distribution of its response to PWW, Commission staff and the Office of the Consumer Advocate, pending Commission ruling on such motions.

Based upon the forgoing, it is hereby

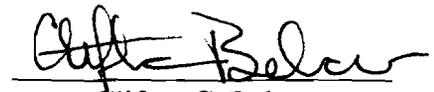
ORDERED, that the motion of the City of Nashua for protective treatment of documents responsive to the Pennichuck Water Works discovery request outlined above is DENIED; and it is further

ORDERED that the motion of Pennichuck Water Works to compel such discovery is GRANTED, subject to the conditions stated herein.

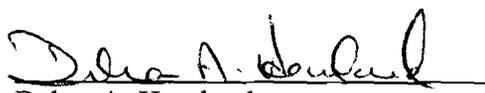
By order of the Public Utilities Commission of New Hampshire this eighth day of November, 2006.


Thomas B. Getz
Chairman


Graham J. Morrison
Commissioner


Clifton C. Below
Commissioner

Attested by:


Debra A. Howland
Executive Director & Secretary