

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

Order on Scope of Testimony

ORDER NO. 24,487

July 8, 2005

I. BACKGROUND

The New Hampshire Public Utilities Commission (Commission) opened this docket upon the March 25, 2004 filing by the City of Nashua, New Hampshire (Nashua) to take the utility assets of Pennichuck Water Works, Inc. (PWW), Pennichuck East Utility (PEU) and Pittsfield Aqueduct Company (PAC) pursuant to N.H. Revised Statutes Annotated 38:9. These entities opposed the petition and challenged Nashua's interpretation of the reach of RSA 38:9. The Commission determined that RSA Chapter 38 authorized Nashua to pursue the taking of PWW, but not PEU or PAC, in Order No. 24,425 (January 21, 2005). The case is now in discovery and is scheduled for hearing in September 2006. For the full history, see Order No. 24,457 (April 22, 2005), which also granted intervenor status to affiliated entities Pennichuck Corporation and Pennichuck Water Services Corporation (PWSC)¹ (collectively, with PWW, PEU and PAC, the Pennichuck Companies). The Commission acknowledged Nashua's

¹ In their intervention petition, PC and PWSC assert that the Pennichuck Companies will suffer direct harm in the form of lost economies of scale, increased operating and capital costs, loss of access to capital markets, and other substantial damage. They also assert that they will suffer direct damages to existing contractual arrangements.

objection² and stated that it would address whether RSA Chapter 38 provides for damages to affiliated entities that may suffer harm as a result of a taking, even if their particular assets are not taken.

On May 4, 2005, the Pennichuck Companies asked that this issue of the scope of damages be decided at the time of hearing on the merits of Nashua's petition in September 2006.

On May 6, 2005, Nashua urged the issue be determined now, as a threshold matter. This order addresses the scope of testimony as the case moves forward.

II. COMMISSION ANALYSIS

Pursuant to RSA Chapter 38, the Commission must determine whether a municipal taking of utility property is in the public interest and, if so, the value of property being taken. N.H. RSA §§ 38:9 and 38:11. The Commission previously held that the issues of valuation and public interest are so tightly interwoven that litigating them separately could undermine the orderly and efficient conduct of these proceedings. Order No. 24,447 (March 31, 2005), slip op. at 6; the Pennichuck Companies' proposed scope of testimony relates to both issues. It also brings to the fore two significant financial questions: whether the taking of some or all of PWW's assets could result in 1) compensable severance damages, pursuant to RSA 38:9 and/or 2) financial consequences that affect the public interest determination pursuant to RSA 38:11. Both issues require factual development before we can make a ruling.

The first issue, what severance damages are compensable under RSA Chapter 38, will depend upon a determination of the entity the legislature intended to be the "owner" in the

² Nashua objected to the Pennichuck Companies' contention that they were entitled to damages, arguing that RSA Chapter 38 does not allow damages for entities other than the utility being taken.

event a taking is ordered. As with many aspects of this case, it is one of first impression for the Commission.

Under RSA 38:9 we must determine “the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner.” Pursuant to RSA 38:15, a municipality “shall pay all damages sustained thereby.” Though Nashua initially sought to take the property of PWW, PEU and PAC, we found in Order No. 24,425 that RSA 38:6 limited Nashua to seeking the property of PWW and not other assets of the Pennichuck Companies. If the “owner” referenced in RSA 38:9 is the *utility* being taken, *i.e.* PWW, there would be no severance damages to PAC, PEU or PWSC. If only a portion of PWW were to be taken, conceivably there could be severance damages to what remains of PWW. If, however, the “owner” referenced in RSA 38:9 is the *parent company* of PWW, *i.e.* Pennichuck Corporation, conceivably there could be severance damages. Whether Pennichuck Corporation would be entitled to severance damages under any of these scenarios has not yet been resolved. These determinations depend upon the organizational, legal, financial and operational relationships among the Pennichuck Companies and require further development of the related facts. The proper interpretation of RSA 38:9 will be addressed after February 21, 2006, the due date for reply testimony on this issue, but prior to the conduct of the hearing.

The second issue concerns whether taking some or all of PWW could have financial consequences to the Pennichuck Companies, as well as to ratepayers in Nashua and elsewhere, that in turn could affect the public interest determination. We find it appropriate to allow the parties and Staff to develop a factual record on the degree to which assets under PWW ownership, as well as assets owned by the Pennichuck Companies are organizationally, legally,

financially and operationally inter-related. Whether a taking of some or all of PWW's assets would have such impact so as to "tip the balance" against a taking will no doubt be one a point of contention in the hearing. PWW and/or the Pennichuck Companies should be allowed to present testimony as to why they believe adverse financial impacts render the taking not in the public interest; parties and Staff should be allowed to fully explore and challenge those assertions.

For these reasons, we will allow the Pennichuck Companies to submit the proposed testimony, subject to discovery and a similar scope of testimony by Nashua and others in reply. Our decision to allow pre-filed testimony on these issues does not mean such evidence is necessarily admissible at hearing. Admissibility will be determined at a later date and we believe that decision will be assisted by a fully developed factual record.

Accordingly, to the extent the Pennichuck Companies wish to submit testimony on severance damages and/or financial consequences of a taking of some or all of PWW, they may do so by October 14, 2005, the date the procedural schedule next allows pre-filed testimony. This testimony will be subject to discovery by all parties and Staff, as well as response in the reply testimony due by February 21, 2006, pursuant to the procedural schedule already in place. The Pennichuck Companies may participate in the rest of this docket as full intervenors but must abide by the dates designated for PWW.

We will entertain *motions in limine* regarding the scope of the hearings and proper interpretation of RSA 38:9, as well as other procedural matters to enable efficient and orderly hearings, after February 21, 2006.

Based upon the foregoing, it is hereby

ORDERED, that Pennichuck Corporation, Pennichuck Water Services Corporation, Pennichuck East Utility, Inc., and Pittsfield Aqueduct Company, Inc. may include within their pre-filed testimony claims of severance damages and/or financial consequences they allege will occur from a taking of PWW and that such testimony be filed on or before October 14, 2005, subject to discovery and similar testimony in reply.

By order of the Public Utilities Commission of New Hampshire this eighth day of July, 2005.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary