

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

City of Nashua: Petition for Valuation Pursuant to RSA 38:9

DW 04-048

OBJECTION TO PENNICHUCK WATER WORKS MOTION TO COMPEL

NOW COMES the City of Nashua (“Nashua”) and objects to Pennichuck Water Works, Inc.’s (Pennichuck) Motion to Compel dated March 16, 2006 and in support of this objection states as follows:

I. BACKGROUND

1. Pennichuck’s March 16, 2006, Motion to Compel follows upon extensive discovery already completed in this proceeding. This matter is scheduled for trial beginning in January 2007. If the weather today is any indication, discovery at a pace seldom seen by this Commission in any proceeding, regardless of its complexity, will continue as set forth in the Commission’s procedural schedule.
2. In spite of Pennichuck’s best efforts to portray itself as having had no opportunity to evaluate Nashua’s petition, Nashua has provided a wealth of information concerning its proposal. Pennichuck has submitted over 280 data requests in four sets to Nashua, in addition to approximately 147 requests submitted Staff. In the several rounds of discovery already completed, Nashua made volumes of information available at City Hall related to the issues of public interest, over twenty boxes of information at the offices of George E. Sansoucy, P.E., LLC during the first and second set of public interest data requests, and nearly half as many again in response to Pennichuck’s third set valuation requests.

3. Pennichuck has received copies of Nashua's responses to these data requests and has already used them extensively.
4. On August 5, September 6, and again on October 6, 2005, as set forth in Nashua's *Objection to Pennichuck Water Works, Inc.'s Motion for Summary Judgment*, Nashua has provided Pennichuck several volumes of information set forth in the detailed technical proposals for operation and oversight of its water system. Nashua allowed the Pennichuck Service Corp., to participate in its request for proposal for the operation of its water system.¹
5. In addition to its initial November 22, 2004 testimony, on January 12, 2006 Nashua provided testimony containing detailed contracts related to its operation and oversight of its water system, as well as detailed testimony from George E. Sansoucy, P.E. and Glenn C. Walker, setting forth Nashua's financial projections and assumptions for operation of the system, rates, and other issues.
6. Pennichuck has also had the opportunity to depose numerous Nashua witnesses and experts related to its Petition, including Mayor Streeter, Aldermen McCarthy, Katherine Hersh,² Carol Anderson,³ and Mark Sousa⁴ (Nashua staff and management); George E. Sansoucy, P.E. and Philip L. Munck (Nashua's engineering, technical and valuation experts), David Ford, P.E., Paul F. Noran, P.E., and Rob Burton (representing Nashua's operations contractor, Veolia Water North America – Northeast LLC), Paul B. Doran, P.E. and Jack Henderson, P.E. (representing Nashua's oversight contractors R.W. Beck, Inc., and Tetra Tech,

¹ See Alderman Brian S. McCarthy's affidavit in support of Nashua's October 6, 2005 Objection to Pennichuck Water Works, Inc.'s Motion for Summary Judgment.

² Community Development Director

³ Chief Financial Officer

⁴ Assistant to Mayor Streeter.

Inc.). Pennichuck has also deposed a number of municipal officials involved in the Merrimack Valley Regional Water District, to whom Nashua intends to transfer the assets acquired in this proceeding, including Michael Scanlon and Karen White (Bedford) and Marilyn Petermen (Pittsfield).

7. Yet under the circumstances of this case, Pennichuck would have the Commission believe that it has not had adequate opportunity to obtain information related to Nashua's petition.

II. APPLICABLE RULES

8. Discovery in Commission proceedings is governed by the Commission's procedural rules. Nashua notes that the Commission's prior procedural rules (Puc 200) expired on or about August 18, 2005. On or about August 19, 2005, the Commission adopted Interim Procedural Rules that under RSA 541-A:19, X, expired on or about February 14, 2006.
9. Under RSA 541-A:30-a, the NH Department of Justice's model procedural rules (Jus 800) apply in the absence of the Commission's procedural rules. However, on March 22, Pennichuck Water Works filed an assented-to *Motion to Waive Application of the Jus 800 Rules* requesting that the Commission adopt and apply its former (interim) procedural rules to this proceeding.
10. The Commission has not yet ruled on Pennichuck's assented-to Motion. There are specific provisions in the Jus 800 rules that are not contained in the former Interim rule Puc 200 rules. See, e.g., Jus 811.02 (c) (Requiring that a motion to compel demonstrate that the information sought is "necessary for a full and fair presentation of the evidence at the hearing".); *but see* former Interim Rule Puc

204.04 (a) (“any party shall serve upon any other party or the staff, data requests ... as necessary to evaluate a petition, application or testimony.”). For the purposes of this objection, Nashua has assumed that the former (Interim) Puc 200 Procedural rules apply.

III. STANDARD

11. Under the Commission's regulations, data requests are limited to requests “as necessary to evaluate a petition, application or testimony” and must “identify with specificity the information or materials sought.” PUC 204.04 (a) & (b).
12. Discovery in Commission proceedings is not, however, unlimited. Under RSA 541-A, the Commission has the authority to exclude evidence which is “irrelevant, immaterial or unduly repetitious”. RSA 541-A:33, I1. The Commission admonition in two separate orders that it will “not allow [this proceeding] to be ensnared by issues that no doubt are important to the parties but have little bearing on the determinations the Commission must make” is not without relevance here.
13. Pennichuck relies on the Commission’s decision in the *Petition to Modify Schiller Station*, Order No. 24,310 (2004) and the cases cited therein to support its position that the Commission will deny discovery requests only when it “can perceive of no circumstance in which the requested data will be relevant.”⁵ However, the Commission’s decision in *Schiller*, and the authorities cited therein, concerned challenges based on relevance. They did not involve or implicate the

⁵ Pennichuck Motion to Compel, Page 2, Para. 4.

Commission's authority under RSA 541-A:33, II to control the scope and orderly conduct of proceedings such as this one.⁶

14. Pennichuck's citation to *Schiller* is not without irony. In that decision, the Commission specifically found that:

The remaining subsections of Question No. 8 seek information arising out of the *negotiation of contracts* associated with the wood yard. These negotiations are presumably confidential and competitively sensitive. *In contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem information about the negotiations themselves admissible.* (emphasis added).

In this case, as in *Schiller*, Nashua's January 12, 2006 provided Pennichuck with "the results of [Nashua's] negotiations". Unhappy or unwilling to face the results of those negotiations, Pennichuck now seeks to compel precisely what the Commission determined to be not subject to discovery in *Schiller*: confidential "information about the negotiations themselves".

15. As set forth in this objection, Pennichuck's discovery requests are exceedingly broad in scope, particularly when viewed in light of the number and complexity of the issues to be resolved in this proceeding. Nashua has responded to specific requests for relevant information. However, Pennichuck's Motion to Compel raises the fundamental question that was not addressed in *Schiller*: the extent of the Commission's authority under RSA 541-A:33 to regulate the orderly conduct and scope of proceedings before it in order to focus on the issues that are most relevant to the determinations the Commission must make.

⁶ See *Schiller*; *Petition for Valuation of J. Brodie Smith Hydro-Electric Station*, Order No. 23,831 (2001); *Investigation into Whether Certain Calls Are Local*, Order No. 23,658 (2001); *Lower Bartlett Water Precinct*, Order No. 23,471 (2000).

16. An argument can conceivably be argued that nearly any information related to water system operations, financial matters, or valuation could lead to the discovery of information relevant to this proceeding. More immediately and likely, however, as with Pennichuck's prior requests for information concerning the operations of all Nashua Departments, Nashua submits that it would lead to discovery abuse. The Commission should not allow relevance to be stretched to its very limits, and focus this proceeding on the important determinations to be made in this proceeding by denying Pennichuck's Motion to Compel.

IV. NASHUA HAS FULLY RESPONDED TO Pennichuck'S REQUEST RELATED TO FALSE CLAIMS OF "MALFEASANCE" BY VEOLIA WATER INDIANAPOLIS, LLC

17. Pennichuck seeks to compel an *additional* response to its data requests no. 3-6 concerning Veolia Water Indianapolis, LLC's operations in Indiana. That request, as Nashua has already indicated in its response, is based upon a false premise that there was in fact any "problems" or "malfeasance" related to its operations. Data request no. 3-6 states:

3-6 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 or claims of malfeasance encountered in operating the Indianapolis, Indiana water system.

18. Pennichuck claims that its data request no. 3-6 is "specific and limited in scope." However, the request seeks "all information in the possession or control of Nashua or its agents or consultants". By any reasonable interpretation, it is vague, overbroad and fails to identify the information or documents sought with specificity.

19. In moving to compel, Pennichuck alleges (without any reference to discovery or other supporting information) that “Indianapolis is indeed the only Veolia contract to operate an entire water system”⁷ and that “[H]aving first delayed responding by asserting [its] objection, Nashua later responded that no problems or malfeasance have taken place”.⁸
20. These statements are materially false. As shown in its own Exhibit I, Nashua’s response was submitted on January 27, 2006, ten days after Pennichuck’s request and the same day as Nashua’s objection. There was absolutely no “delaying” of Nashua’s response, nor any change in position that no “malfeasance” or “problems” took place.
21. Pennichuck’s unsupported allegation that “Indianapolis is indeed the only Veolia contract to operate an entire water system” is also materially false and directly conflicts with information Nashua has provided in discovery concerning its water systems operated in the United States.
22. For example, Exhibit 1A (attached hereto) shows Nashua’s response to Pennichuck’s data request 3-1 which sought the following information:

Req. 3-1 Please identify all municipal and privately owned water systems directly or indirectly operated by Veolia or any subsidiary thereof in the United States. For each such system provide the name of the entity that operates the system, the jurisdiction in which such entity was organized, the name of the owner of the system, the location of the system, the number of customers served by the system, the annual revenues received from all payments by customers of the system, and the annual revenues to Veolia from the services provided. [Ten day response]

⁷ Pennichuck Motion to Compel, Page 4, Para. 7.

⁸ Pennichuck Motion to Compel, Page 4, Para. 7.

23. Notwithstanding the broad nature of Pennichuck's request 3-1, Exhibit 1A shows on February 13, 2006, that Nashua identified some 59 water systems operated by Veolia Water North America through its subsidiaries and affiliates in the United States. Exhibit 1A shows that the 59 water systems Nashua identified include the following water systems (in addition to the Indianapolis), where, contrary to Pennichuck's allegation, Veolia Water North America operates production, treatment, and distribution facilities, i.e., the entire water system or the substantial portion thereof:

Veolia Water Systems identified in response to Pennichuck 3-1 (Exhibit 1A) involving operation of production, treatment and distribution facilities (in the order listed in Nashua's Response to Pennichuck 3-1).

Blackwell, OK
Boonville, IA,
Crystal River, FL,
Demopolis, AL,
Gladewater, TX,
Hardinsburg, KY,
Heavener, OK,
Hindman, KY,
Albertville, MN,
Hobe Sound, FL,
Karnes City, TX,
Kenedy, TX,
Maple Shade, NJ,
Matewan, WV,
Moore, OK,
Tupelo, MS,
Kenedy, TX
Maple Shade, NJ
Matewan, WV
Moore, OK
Tupelo, MS
Overton, TX
Marion, AL
Pikeville, KY
Beverly Hills, FL

Jefferson, VT
McDowell, KY
St. Michael, MN
Sturbridge, MA
Tama, IA
Whitesburg, KY
Williamson, WV

24. As a result, Pennichuck's statement in its Motion to Compel that "Indianapolis is indeed the only Veolia contract to operate an entire water system" is materially misleading and in direct conflict with information provided to Pennichuck in this proceeding.

25. With respect to request 3-6 concerning Indianapolis, Nashua provided the following response and objection on January 27, 2006:

OBJECTION: Nashua objects to this data requests on the grounds that it is vague and fails to identify the information sought with specificity as required by Puc 204.04 (b). Furthermore, as set forth in the answer below, no problems or malfeasance took place with respect to Veolia's operation.

ANSWER: Without waiving the foregoing objection, 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. See IDEM and Veolia Water Indianapolis Press Releases (attached separately).

IDEM's findings were consistent with those of Veolia Water Indianapolis; VWI has continually met or exceeded state and federal drinking water standards since beginning operations in 2002. In fact, Indianapolis is the only major United States city to benefit from ISO certification for its drinking water.

26. Nashua included a press release from Indiana Department of Environmental Management (IDEM) finding that "Laboratory results do not indicate a violation of state or federal drinking water quality standards." (Exhibit 1). Nashua further

provided a statement from Veolia Water Indianapolis stating that VWI's own findings confirmed those of IDEM (Exhibit 2).

27. Counsel for Veolia Water North America – Northeast LLC has informed Nashua that, under applicable law, the company cannot provide any information related to any subpoena received from the US Attorney. Veolia Water Indianapolis, LLC cooperated fully with the US Attorney's subpoena but is unable to provide any information related to that investigation. However, Nashua notes that since the IDEM released its findings that the company was in compliance with all applicable state and federal drinking water standards and no charges of misconduct or violations have been brought by either the US Attorney, EPA, IDEM or any other agency.
28. In addition, since providing its response to Pennichuck, Nashua has learned that:
 - (a) Veolia Water Indianapolis, LLC has received *national recognition* from the United States Conference of Mayors for its operations (see Exhibit 3), and that since taking over operation of the system, Veolia Water Indianapolis, LLC's has reduced taste and odor complaints from over 500 in 2001 (prior to its operation) to 26 in 2004 (see Exhibit 4, Page 4).
29. Pennichuck may have in mind a particular document or response it should have received based on its perception of "problems" or "malfeasance". However, its 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. Furthermore, it is based on an entirely false assumption that malfeasance or problems actually took place. In the absence of any problems or malfeasance,

there simply are no documents that Nashua can provide. As a result, Pennichuck's Motion to Compel further information should be denied. Even if it were granted, however, the practical effect would be the same.

V. REQUEST FOR THE VEOLIA WATER INDIANAPOLIS, LLC COLLECTIVE BARGAINING AGREEMENT(S)

30. Pennichuck seeks Veolia Water Indianapolis, LLC's collective bargaining agreement(s) with its work force. Pennichuck argues that this information is somehow relevant to Nashua petition because: "[t]he limited information which Veolia disclosed in depositions shows that Veolia ended defined benefit pension plans as soon as its contractual obligation to retain them expired."⁹ Once again, Pennichuck provides no citation to the source which supports its statement. Once again, these statements are materially false.
31. Pennichuck apparently refers to the deposition of Robert Burton, a current employee of Veolia Water Indianapolis, LLC. During this deposition, contrary to Pennichuck's unsupported statement, Mr. Burton stated the following:

16 **Q. As to prior employees who were part of**
17 **the defined benefit plan, was Veolia still going to**
18 **make contributions and were they still going to**
19 **accrue service after May 1 of '04 to the --**

20 A. To the defined plan?

21 **Q. Correct.**

22 A. My recollection would be that the
23 defined plan for existing employees was not changed.

35

1 **Q. Well, there's a difference between a**
2 **benefit that's already been earned, continuing to**
3 **exist as opposed to accruing new service years or**
4 **points and accruing additional benefits over time.**
5 **Do you know whether those employees continued to**
6 **accrue new benefits over time?**

7 A. My recollection is the rules

⁹ Pennichuck Motion to Compel, Page 5, Para. 10.

8 underneath which the defined plan has operated have
9 not changed.

10 **Q. Any other changes to pay and benefits**
11 **that you recall in the contract that was negotiated**
12 **beginning May 1, '04?**

13 A. Any changes?

14 **Q. Other changes.**

15 A. I do know that there was pay increases
16 given.

Deposition Transcript of Robert Burton, Pages 34-35 (Exhibit 5).

32. In any event, Veolia Water Indianapolis, LLC terms of employment have little or no relevance here. As set forth in response to Staff Data Request 4-55, Nashua expects that Veolia will offer a competitive compensation package detailed in Volume 1, Section 4 of its proposal. However, even if Pennichuck refuses to provide Veolia and/or Nashua the opportunity to contact its existing employees to offer employment,¹⁰ Veolia will use its existing base of employees to fully staff the water system. As Nashua and Veolia have made clear, the compensation package offered by Veolia “will not include a defined benefit pension plan or post retirement medical coverage as provided by Pennichuck under the existing collective bargaining agreement.”¹¹
33. As a result, Pennichuck’s request for Veolia Water Indianapolis, LLC’s collective bargaining agreement is simply not relevant to this proceeding. Veolia has indicated that it will provide a competitive compensation package but that it will not adopt Pennichuck existing collective bargaining agreement. Even if some remote relevance could be established, admission of discovery and evidence

¹⁰ Nashua and Veolia have had no contact with Pennichuck’s existing employees because of the likelihood that Pennichuck would sue Nashua and/or Veolia.

¹¹ Nashua’s Response to Staff Data Request 4-55.

related to the Indianapolis collective bargaining agreements would quickly ensnare this proceeding in a “trial within a trial” over issues that have no relevance to the issues to be decided in this proceeding. Accordingly, Pennichuck’s Motion to Compel production of any Indianapolis collective bargaining agreement(s) should be denied.

VI. NASHUA HAS ALREADY RESPONDED REASONABLY TO Pennichuck’S REQUESTS FOR INFORMATION RELATED TO OTHER LAWSUITS

34. Pennichuck seeks to compel further response to Pennichuck data request no. 3-9 which seeks information related to all lawsuits brought against Veolia Environnement.
35. Once again, Pennichuck states that its request is “specific, limited in scope and not unduly burdensome” and that it requests “only those lawsuits relating to Veolia subsidiaries or affiliates in the United States that provide drinking water services.”¹²
36. In fact, Pennichuck requested all lawsuits related to “each and every subsidiary or affiliate of VE”.¹³ Pennichuck’s data requests, however, define “VE” as “Veolia Environment, its present or former officers, directors, employees, agents, representatives or assigns, and any person acting on its behalf.”¹⁴ As Nashua informed Pennichuck in its objection, “VE is an international company that, through its subsidiaries in the United States alone, operates over 400 municipal and privately owned water systems serving over 14 million people with annual

¹² Pennichuck Motion to Compel, Page 6, Para. 12.

¹³ Pennichuck Motion to Compel, Exhibit 1, Request 3-9.

¹⁴ Pennichuck Third Set of Data Requests, Page 3, Definition 18.

revenues over \$600 in the year 2003.”¹⁵ Veolia Environnement’s filings with the SEC indicated that in 2004, its annual revenues were approximately 33.6 billion dollars, *nearly two thousand times greater than Pennichuck’s revenues for the same period.*¹⁶

37. The request was not, therefore, “narrowly tailored” to even the 400 municipal and privately owned water and wastewater systems¹⁷ operated in the United States. It was nearly as broad a request as could conceivably be written given the scope and magnitude of VE’s global operations.
38. Notwithstanding the broad scope of Pennichuck’s data request 3-9, Nashua responded by indicating that there was no material litigation involving its North American affiliate, Veolia Water North America. In addition, Pennichuck fails to mention that on February 13, 2006, Nashua provided Pennichuck a response to its data request 3-34 requesting that it identify “any citations issued by the Environmental Protection Agency, any agency of the U.S. Department of Labor, or any state environmental, labor, or safety-related agency since 1996 against Veolia or any owner or operator of any water or wastewater system for which Veolia has or had any operation, maintenance or oversight responsibilities.” (Exhibit 6). As should be apparent in the attached response, Nashua has responded fully, and even included information related to former affiliated companies such as US Filter that are no longer owned or in any way related to Veolia Water North America.

¹⁵ See Pennichuck Motion to Compel, Exhibit 1, Request 3-9 (Objection).

¹⁶ Veolia Environnement’s Form 20-F for the year ending 12/31/2004, Page 5. Pennichuck’s annual revenues assumed to be \$17 million.

¹⁷ See www.veoliawaterna.com/about/media/default.htm

VII. CONTRACT DOCUMENTS

39. Pennichuck further seeks to compel production of “all prior drafts and documents relating to the negotiations of the Veolia and R.W. Beck contracts with Nashua, in addition to any prior drafts or related documents from the R.W. Beck and Tetra Tech contract.”¹⁸
40. In support of its Motion to Compel, Pennichuck states that “PWW has only received the final draft contracts, and one prior draft each of the Veolia and Beck contracts.”¹⁹ In fact, on January 27, 2006, Nashua provided not one but *two* prior drafts proposed by Veolia Water North America – Northeast LLC, in addition to the final draft included with Nashua’s January 12, 2006 testimony: a July 2005 draft included in the company’s technical proposal to Nashua, and an October 5, 2005 draft presented to Nashua for the purpose of negotiating a final contract for operations.
41. Regardless of the number of drafts previously provided, they have no relevance in this proceeding. As in *Schiller*, Nashua’s petition and this proceeding are based on the result of those negotiations, not confidential discussions that may or may not have taken place prior to the Nashua Board of Alderman’s decision to provide those contracts for the Commission as part of Nashua’s January 12, 2006 testimony. Review and extensive discovery concerning those negotiations will only ensnare this proceeding in issues that have no relevance to the end-result, i.e., the final draft included with Nashua’s January 12, 2006 for the Commission’s approval in this proceeding. Accordingly, Pennichuck’s Motion to Compel

¹⁸ Pennichuck Motion to Compel, Page 7, Para. 14.

¹⁹ Pennichuck Motion to Compel, Page 7, Para. 14.

production of prior drafts seeks information that is irrelevant, immaterial within the meaning of RSA 541-A:33, II.

VIII. COMMUNICATIONS BETWEEN NASHUA'S LEGAL COUNSEL AND NASHUA'S CONSULTANTS CONCERNING THE VEOLIA CONTRACT ARE PRIVILEGED UNDER RULE 502

42. New Hampshire law expressly provides for a Lawyer-Client Privilege under Rule 502 of the New Hampshire Rules of Evidence. Rule 502 states that:

General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing *confidential communications* made for the purpose of facilitating the rendition of professional legal services to the client (1) *between the client or his or her representative and the client's lawyer or the lawyer's representative*, (2) between the client's lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(emphasis added).

43. In this proceeding, Nashua's consultants, R.W. Beck, Inc., Tetra Tech, Inc., as well as the firm of George E. Sansoucy, P.E., LLC assisted Nashua's legal counsel in the negotiation of Nashua's contract with Veolia Water North America – Northeast LLC. The consultants provided Nashua with technical advice regarding management standards in the water industry, prudent industry practice in the operation of municipally owned water systems, and other matters.
44. Nashua's consultants were instructed to review specific provisions and provide comments *in confidence* to Nashua's legal counsel in order to assist Nashua's legal counsel in negotiating its OM&M Agreement. To a large extent, those

comments resulted in significant changes to the final draft submitted with Nashua's January 12, 2006 testimony relative to the July 2005 and October 5, 2005 prior drafts Nashua provided has provided to Pennichuck through discovery.

45. Nashua's Petition and its January 12, 2006, is based on the contracts included in its testimony. Any and all prior drafts of those contracts are entirely irrelevant. As was the case in the *Petition to Modify Schiller Station*,²⁰ "[i]n contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem information about the negotiations themselves admissible."
46. Pennichuck has had a full and adequate opportunity to ask questions, both in data requests and depositions, concerning the provisions included, or not included in the final contract submitted with Nashua's January 12, 2006 testimony, as well as the two prior drafts provided in response to Pennichuck's data requests.
47. If Nashua were compelled to provide correspondence including emails between its consultants to its legal counsel concerning the contract to be submitted for approval in this proceeding, Nashua would effectively be denied the very privilege protected by Rule 502, the ability to protect from disclosure communications made in confidence "between the client or his or her representative and the client's lawyer or the lawyer's representative".²¹

IX. VEOLIA WATER NORTH AMERICA – NORTHEAST LLC'S RISK PROFILE AND PRICING MODEL ARE IRRELEVANT AND IMMATERIAL TO THIS PROCEEDING

48. In response to the depositions of Mr. Burton and Noran, Pennichuck seeks to obtain copies of a Veolia Water North America – Northeast LLC's "risk profile"

²⁰ See Order No. 24,310, Page 7.

²¹ NH Rule of Evidence, Rule 502.

and “pricing model” used to generate its bids to operate Nashua’s system.

Pennichuck claims that it “does not seek information concerning Veolia’s likely profit, but rather its estimate of the total revenue it will receive under the proposed contract.”²² However, this is precisely the information that Veolia’s risk model and pricing model are likely to contain.

49. In addition, Pennichuck has sought to depose key witnesses involved in the development of financial provisions related to competitive pricing and internal financial aspects of Veolia’s proposal. Rather than simply object during the deposition and provide, Nashua informed Pennichuck that it would allow Pennichuck to conduct depositions, but if Pennichuck desired to request confidential financial information used by Veolia to determine its bid pricing, it should move to compel that information.
50. Unlike regulated utility rate case in which a water utility seeks to establish rates based on its revenue requirement for operations, Veolia’s profit is entirely irrelevant to this proceeding. Nashua and Veolia have agreed upon a detailed contract for the operation, maintenance and management of the water system to be acquired in this proceeding. Nashua’s liability is limited to that set forth in the contract, regardless of whether Veolia breaks even or turns a profit.
51. Nashua has not been provided, reviewed, or in any way been informed of the risk profile or pricing model used by Veolia to determine its price proposal. The costs of items such as maintenance, capital improvements, and other costs related to Nashua’s ownership of the water system are based, not on Veolia’s costs, but the projections contained in the January 12, 2006 testimony of George E. Sansoucy,

²² Pennichuck Motion to Compel, Page 10, Para. 20.

P.E., and Glenn C. Walker. Those projections are based on Pennichuck's records, reports and other information. Nashua and GES have not reviewed or relied on any risk profile, price model or other financial projections provided by Veolia.

52. Pennichuck has had a full and adequate opportunity to review the January 12, 2006 testimony, reports and exhibits prepared by Sansoucy and Walker and submit data requests related thereto. Furthermore, to the extent that Pennichuck disagrees with Mr. Sansoucy and Walker's projections, it is perfectly capable of producing its own projections of what the costs for maintenance and capital improvements will likely be. Indeed, in the words of its own engineer, Donald L. Ware, Pennichuck stated that:

[T]he cost of certain of the items required to repair ... a paved downtown street in Nashua are assumed to be the same, whether performed by PWW or Nashua. [...] The difference between PWW and Nashua cost comes from differences in the labor rates incurred by PWW and those charged by Veolia.

Pennichuck Water Works, Inc., Response to Staff Data Request 4-19.

Pennichuck then proceeded to calculate what it expected the differences in costs will be.

53. In many respects, Pennichuck is in a better position to calculate future maintenance requirements than Nashua. Pennichuck has access to the water system, its own historical maintenance records, capital improvement plans, and a staff familiar with on-going needs for maintenance, repairs and capital replacement projects. For Pennichuck to argue in its Motion to Compel that it needs access to Veolia's "estimate of the total revenue it will receive from Nashua under the proposed contract" is absurd.

54. Nashua believes that Pennichuck's real motive in requesting Veolia's risk profile and pricing models for Nashua is that, faced with the prospect of having to disclose highly confidential information used to determine its costs for bids on projects throughout the United States, Veolia would be forced to remove itself from the project. Compelling Nashua to provide Veolia's confidential pricing models, risk profiles or internal company confidential financial information would deny Nashua the opportunity to present its case to the Commission and use a procedural tactic to undermine the intent of RSA 38.
55. Similarly, Pennichuck's request for Veolia's projections for fuel, electric and heating costs must also be rejected. From the outset of its RFP process, Nashua has indicated that these costs would not be included in Veolia's fixed fee. Like its projected costs for maintenance and capital expenditures, Nashua has relied on the projections included in the January 12, 2006 testimony of George E. Sansoucy, P.E., and has not reviewed or in any way relied on internal financial documents that may or may not be in Veolia's possession.

X. CONCLUSION

56. For the foregoing and other good reasons, Nashua submits that Nashua has provided sufficient data requests necessary to evaluate its petition. Pennichuck's Motion to Compel seeks production of further information that is largely irrelevant, immaterial within the meaning of RSA 541-A:33, II.

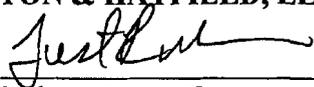
WHEREFORE, Nashua respectfully request this Honorable Commission:

- A. Grant this Motion for Protective Order;
- B. Issue a protective order incorporating the terms set forth herein; and
- C. Grant such other and further relief as just and reasonable.

Respectfully submitted,

CITY OF NASHUA
By Its Attorneys
UPTON & HATFIELD, LLP

Date: March 27, 2006

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CERTIFICATION

I hereby certify that a copy of the foregoing was this day forwarded to all persons on the Commission's official service list in the above proceedings.

Date: March 27, 2006


Justin C. Richardson, Esquire