

THE STATE OF NEW HAMPSHIRE



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May 24, 2006

Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301



Re: Docket No. DW 04-048
City of Nashua RSA 38 Petition re Pennichuck Water Works
Motion to Compel Discovery

Dear Ms. Howland:

This follows up on my letter of April 28, 2006 in connection with the above-referenced docket. In that letter, I made a report in my capacity as an RSA 363:17 hearings examiner of a conference I conducted with the parties to discuss the pending motion to compel discovery submitted by respondent Pennichuck Water Works (PWW) against petitioner City of Nashua (City). I noted in my letter that the parties had made significant progress toward resolving their dispute informally, and thus I asked the Commission to forebear receiving a substantive recommendation from me and to hold the motion in abeyance for the time being.

On May 9, 2006, the City filed a letter reporting on the progress of the dispute resolution process. The letter suggested that the City is willing to provide at least some information in response to four of the five disputed areas of inquiry. The letter also noted that one of those areas remains in dispute and will require a decision of the Commission. Accordingly, the purpose of this letter is to take up that subject and transmit my recommendation to the Commission pursuant to RSA 363:17.

At issue are PWW's efforts to discover information about the negotiations that preceded the signing of contracts between the City and two outside firms, Veolia¹ and R.W. Beck,

¹ It became apparent during discussions at the discovery conference that Veolia is a large, multinational concern with numerous affiliates. The term "Veolia" is used here without precision, on the assumption that the parties are aware of and in agreement about which specific Veolia affiliate is the appropriate one to produce a response to any particular request. Although the City's ability to require outside contractors to cooperate

entities to which the City apparently intends to delegate some or all of the responsibility for operating the water system the City seeks to acquire via RSA 38.

Request No. 3-14 seeks “copies of all prior drafts of the Veolia and R.W. Beck agreements with Nashua which are set forth as Veolia Ex. B and R.W. Beck Ex. 3, along with documents which constitute or refer to all negotiations concerning said agreements or prior drafts thereof.” The City objected, citing attorney-client privilege and the work product privilege. The City also noted that, “with limited exception,” it has not retained drafts of the agreement. The response indicated that certain drafts were being furnished. According to the PWW motion, the only drafts it has received are the “final draft contracts” for both outside firms. PWW Motion to Compel at 7.

Position of Pennichuck Water Works

According to PWW, it is not seeking any documents that have been shared only between the City and its lawyers but, rather, documents that may have been circulated among a wider circle including parties in addition to City officials and counsel. PWW points out that it has learned via depositions that two of the City’s witnesses assisted the City in the contract negotiations which, according to PWW, “makes them fact witnesses to a business transaction” and thus renders the documents they reviewed amenable to discovery. Finally, PWW contends that the documents are within the scope of reasonable discovery because they are likely to show “what costs Nashua or its advisors thought that Nashua would incur by using third party contractors.” *Id.* at 9. According to PWW, “[t]his is particularly relevant because the contracts in question are not final, and the only information the parties have to assess is based on the costs Nashua or its contractors foresee under these agreements.” *Id.*

Position of City of Nashua

In opposition, the City contends that it furnished PWW with not one but two drafts of each contract. As to the merits of the motion, the City draws the Commission’s attention to its resolution of a discovery dispute two years ago in Order No. 24,310, reported as *Public Service Company of New Hampshire*, 89 NH PUC 226 (2004). Order No. 24,310 concerned the request of Public Service Company of New Hampshire (PSNH) under RSA 369-B:3-a for permission to modify one of the boilers at its Schiller Station in Portsmouth.

In Order No. 24,310, the Commission reiterated its standard for granting a motion to compel discovery: “[D]iscovery should be relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. Therefore, we will deny a

with discovery efforts in this case was a subject of some discussion at the informal conference, the City did not raise that issue in connection with resisting the particular discovery request at issue in the letter.

motion to compel discovery only when we can perceive of no circumstance in which the requested data will be relevant.” *Id.* at 229 (citation omitted).

The Commission refused in Order No. 24,310 to compel PSNH to produce information arising out of the negotiation of a contract to construct part of the project at issue in the case. The Commission noted that such negotiations were “presumably confidential and competitively sensitive” and concluded that, “[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.” *Id.* at 230.

According to the City, the discovery request at issue here presents essentially the same situation and thus demands the same result. The City contends that its RSA 38 petition is based on the results of the negotiations in question, rather than on “confidential discussions that may or may not have taken place prior to the Nashua Board of Aldermen’s decision to provide those contracts for the Commission as part of Nashua’s January 12, 2006 testimony.” Objection to Motion to Compel at 15. According to the City, “[r]eview and extensive discovery concerning these 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 [pre-filed direct testimony in support of] the Commission’s approval in this proceeding.”

Hearings Examiner’s Recommendation

It is my recommendation pursuant to RSA 363:17 that the Commission grant this aspect of PWW’s motion to compel discovery. In my view, the Commission’s previous decision in Order No. 24,310 suggests such a result notwithstanding the City’s reliance upon it.

As noted in Order No. 24,310, the Commission’s standard for compelling discovery is a liberal one, essentially identical to the one typically employed by state and federal courts in civil proceedings. The Commission will compel a party to provide discovery if there are any circumstances in which such discovery could lead to the production of admissible evidence. Such motions are denied only when the Commission is unable to perceive any circumstances in which such information would be relevant.

During the discovery conference, PWW took the position that information about the contract negotiations could be relevant to the question of whether the municipalization of its system is in the public interest. Specifically, PWW contends that the evidence may shed light on how various tasks were allocated as between fixed-price contracts and areas of responsibility not covered by such contracts. This evidence, according to PWW, could be relevant to the question of whether it is more economically efficient for PWW or the City to own the system. Within the rubric of the standard laid out in Order No. 24,310,

one can thus perceive of circumstances in which this discovery could ultimately yield relevant evidence.

I do not read Order No. 24,310 as stating a broad rule to the effect that the Commission will never require a party to produce in discovery evidence relating to contract negotiations in cases where the terms of the contract itself are under review. The discovery dispute resolved in Order No. 24,310 arose in circumstances that were unique to that proceeding. Specifically, at the time of the discovery request in question, the Commission had already conducted a full-blown contested administrative proceeding through to its conclusion, rejecting PSNH's initial petition. *See* Order No. 24,310, 89 NH PUC at 227-28. Upon the submission of a revised proposal from PSNH, and in the face of requests for rehearing of the original order, the Commission opted to conduct another round of hearings, limited to three very specific issues, none of which appear to have had any connection to the terms of the contract that was the subject of the disputed discovery request.² The potential universe of relevant evidence is far greater in the instant case. The equities are also different because this proceeding is of a greater magnitude as a matter of public policy and is not in an "extra innings" phase similar to the one forming the backdrop of Order No. 24,310.

My recommendation to grant this aspect of the motion to compel discovery should not be understood as suggesting that the City must produce anything that is subject to the attorney-client or work product privileges. I understand PWW to have conceded that the City may withhold any otherwise responsive materials the City believes are covered by these privileges.

This is an important and complicated case. Commensurate with its significance to both the City and PWW, the advocacy is fervent and principled on both sides. It is hardly surprising that discovery disputes arise in such circumstances, if only because of the magnitude of the discovery task, and that such disputes are argued emphatically. While it is always preferable for parties to resolve discovery problems informally, here we have the next best thing: parties willing to sit down for an informal meeting with a hearings examiner for cooperative discussions about resolving discovery issues. Both the City and PWW deserve praise for having apparently resolved the bulk of the issues in the pending motion by attending such a meeting and addressing the problems in good faith.

Thus, in making a recommendation favorable to PWW on one very limited discovery issue, I intend no criticism of the City and I express no view as to which of the two litigants is being more fair and reasonable in its interactions with the other. Rather, my

² Specifically, those issues were: (1) the specifics of a mechanism for allocating the project's financial risks and rewards as between shareholders and customers, (2) the basis for an upward revision of allowable capital costs, and (3) how certain cost savings to be achieved by the project would be identified and quantified.

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recommendation is properly viewed as a reflection of the fact that the discovery standard is extremely liberal and, thus, motions to compel discovery generally tend to be granted.

In conclusion, it is my recommendation that the Commission grant the Pennichuck Water Works motion to compel discovery in part as set forth more fully above, and otherwise treat the motion as withdrawn, without prejudice to any right to reassert the motion if circumstances warrant. I am available at 603.271.6006 if there are any questions about the foregoing.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald M. Kreis". The signature is fluid and cursive, with a prominent initial "D" and "K".

Donald M. Kreis
General Counsel

Cc: Service List