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June 10, 2005

RECEIVED
JUN 13 2005
UTILITIES COMMISSION

Debra A. Howland
Executive Director and Secretary
Public Utilities Commission
8 Old Suncook Road
Concord, New Hampshire 03301-7319

Re: Docket DW 04-048
City of Nashua – Pennichuck Water Works, Inc.
Petition for Valuation Pursuant to RSA 38:9

Dear Ms. Howland:

I enclose for filing, herewith, an original and 8 copies, along with an electronic copy on a computer disk in word format, of Objection to Motion to Compel on behalf of the City of Nashua.

A copy of this letter and the above Objection to Motion to Compel has been mailed to all persons on the attached service list.

Very truly yours,

Robert Upton, II

RUII/dgg
Enclosure

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Docket #: 04-048-1 Printed: June 10, 2005

FILING INSTRUCTIONS:

WITH THE EXCEPTION OF DISCOVERY (SEE NEXT PAGE) FILE 1 ORIGINAL & COVER LETTER, PLUS 8 COPIES (INCLUDING COVER LETTER) TO:

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STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE DETERMINATION OF THE FAIR MARKET VALUE OF THE PLANT AND PROPERTY OF PENNICHUCK WATER WORKS, INC., PENNICHUCK EAST UTILITY, INC., AND PITTSFIELD AQUEDUCT COMPANY, INC.

DOCKET NO. DW 04-048

OBJECTION TO MOTION TO COMPEL

NOW COMES the City of Nashua and objects to the Motion to Compel filed by Pennichuck Water Works, Inc., ("PWW"). In support of its objection, Nashua states as follows:

I. PWW'S MOTION TO COMPEL IS PREMATURE AND SHOULD BE DENIED

1. PWW's Motion to Compel responses to its Data Requests is premature. As set forth in Nashua's Motion to Limit Data Requests, PWW's submission of over 173 data requests for the first phase of this proceeding exceeds the limits of what is reasonable for the orderly conduct of this proceeding. However, notwithstanding its objections, Nashua intends to provide Responses to certain of the Data Requests to which it objected which may make PWW's Motion wholly or partially moot.

2. Furthermore, PWW has made little or no substantive attempt to negotiate with Nashua concerning its objections or the scope of PWW's Data Requests in accordance with long standing practice at the Public Utilities Commission.

II. PWW'S MOTION TO COMPEL SEEKS DATA RELATED TO VALUATION IN VIOLATION OF THE COMMISSION'S PROCEDURAL SCHEDULE ORDERS IN THIS PROCEEDING AND SHOULD BE DENIED

3. PWW's Data Requests concerning valuation are an attempt to bypass the Commission's procedural schedule and obtain information on valuation prior to the dates established by the Commission, presumably for the benefit of PWW's valuation expert, or simply to obtain an additional round of discovery above and beyond that provided by the Commission.

4. While PWW argues that its valuation data requests "relate specifically to the public interest testimony filed by Nashua[,]" this argument, misses the point. The Commission was well aware of the potential overlap between valuation and public interest when the procedural schedule was established. See, *Order Addressing the Pennichuck Utilities' Motion to Dismiss*, Order No. 24,425 (January 21, 2005) ("[a]nother threshold issue discussed at the prehearing conference was whether the valuation inquiry and the public interest inquiry should proceed in tandem or one should precede the other."); *Order Regarding Sequence of Public Interest and Valuation Inquiries and Procedural Issues*, Order No. 24,447 (March 31, 2005) ("[t]he issues of valuation and the public interest are tightly interwoven and litigating them separately could undermine the orderly and efficient conduct of these proceedings."). However, the Commission concluded that "a properly structured procedural schedule, incorporating appropriate tracks

for discovery and testimony on an issue-by-issue basis as necessary, will result in a more orderly proceeding." *Order Regarding Sequence*, Page 6.

5. Given the extent of the Commission's focus on this issue, it is highly unlikely that the Commission's schedule allocating public interest and valuation data requests to separate tracks was accidental. Rather, the Commission specifically required that data requests to Nashua related to valuation be submitted on October 28, 2005, following Nashua's testimony on valuation. Allowing discovery on valuation at this point will simply undermine the Commission's specific determination that discovery and testimony "on an issue-by-issue basis as necessary, will result in a more orderly proceeding." *Id.*

III. PWW'S "CONCERN" THAT NASHUA IS USING ATTORNEY CLIENT OR WORK PRODUCT PRIVILEGES IS UNFOUNDED

6. There is no basis for the assertion that "Nashua appears to be using the attorney/client privilege and/or work product doctrine as a means to shield the documents of Nashua public officials....." Motion to Compel, Para. 17.

7. The Motion as it relates to Data Requests 66, 67, 68, 69 and 70 to Nashua's witness Stephen Paul, clearly misunderstands the nature of Nashua's objections and misstates the basis of Nashua's assertion of the attorney/client privilege. Mr. Paul is a partner in the law firm of Palmer & Dodge of Boston, Massachusetts. Palmer & Dodge act as bond counsel for Nashua and have provided legal advice on other matters. The fact that Mr. Paul has been offered as a witness on the tax ramifications of a condemnation does not waive the attorney/client privilege that Nashua has with respect to other work performed by Palmer & Dodge for the

City. *Bennett v. ITT Hartford Group*, 150 NH 753, 761 (2004); *In re Dean*, 142 N.H. 889 (1998).

8. Nashua objected to Data Request 22 because it believes that PWW is seeking such documents because they may be relevant to other disputes among the parties but are not relevant to the issues the Commission must determine. The Commission has cautioned the parties not to engage in such discovery. *See* Order No. 24,447 ("We will not permit discovery into areas that, while possibly relevant to other disputes among the parties, are not relevant to the issues the Commission must determine.").

IV. PWW'S DISCOVERY REQUESTS RELATED TO OPERATION OF OTHER CITY DEPARTMENTS ARE OVERLY BROAD, UNDULY BURDENSOME AND RESPONSE IS NOT REQURED BY RSA 541-A OR THE COMMISSION'S ADMINSTRATIVE RULES

9. PWW seeks to compel responses to Data Requests Nos. 56, 57, 127, 130, 131, 132, 133, 134, 135, 136, 139, 140, 141, 142, 143, 144, 145, 146, 147, 164 and 166, all of which relate to the operation of City Departments, such as the City's wastewater collection and treatment facilities (56, 57, 127, 131, 133, 135, 139, 140, 141, 143, 145, 146 and 147), capital and financial improvement records for all City Departments (130), solid waste collection and disposal (132, 134, 136, 139, 140, 142, 144 and 164), and fire protection services (166).

10. For each of these Departments, the requests seek nothing short of a detailed breakdown of virtually every aspect of the Department, including, operation (56, 57, 127 and 139), financial and capital improvements (130), breakdown of all funds and revenues (131, 132, 135, 136, 141, 142, 143 and 144), business plans

and projections (133 and 134), billing and collection procedures (145, 146 and 147), and other aspects.

11. In addition to the above-requests referenced in PWW's Motion to Compel: Data Request 154 seeks "a list of all persons ... who currently perform work related to the City's waste water system" including each person's job title, union membership, salary, allocation of time spent performing duties related to the waste water system and/or other duties; Data Requests 155 and 156 seek detailed lists of all union members within the City's public works and other departments including salary and benefits information; Data Request 157 seeks details concerning every insurance policy held by the City of Nashua; and Data Requests 158 through 163 seek monthly reports, logbooks, EPA/OSHA correspondence, operating procedures and other documents related to Nashua's waste water treatment plant.

12. While these requests cover comprehensively nearly all aspects of these City Departments, PWW has failed to demonstrate any significant value that responses will provide to the public interest determination to be made by the Commission in this proceeding. In fact, PWW states that it "does not know how much of the requested documentation would filter down into testimony or exhibits in the proceeding" Motion to Compel, Para. 12. Rather, PWW simply argues that it is not required to make any demonstration that it will actually use such evidence if it may, under some set of circumstances, "lead to the discovery of admissible evidence." *Id.*

13. Whatever the standard may be in other court or legal proceedings, this proceeding is governed by RSA 541-A and the Commissions administrative rules. Under RSA 541-A, the Commission has the authority to exclude evidence which is "irrelevant, immaterial or unduly repetitious". RSA 541-A:33, II. Furthermore, under the Commission's regulations, data requests are limited to documents "necessary to evaluate a petition, application or testimony" and must "identify with specificity the information or materials sought." PUC 204.04 (a) & (b). Applying the appropriate standard, PWW's Motion to Compel should be denied because PWW has not demonstrated that the information sought is necessary to evaluate Nashua's Petition, and has failed to identify with specificity the necessary information. Rather, PWW simply requested as much information as possible in its 173 data requests because it may, at some later date, "filter down" that information into its own testimony.

14. As set forth in its pre-filed testimony, Nashua does not propose that the water system will be operated by any City department. The operations of current City departments, therefore, have no relevance to the operation of the water system by Nashua. Requests for proposals (RFP's) have been issued for an Operation and Maintenance Contract and for a Management Oversight Contract. Copies of the RFP's are available at www.ci.nashua.nh.us. Based on the responses due July 14, 2005, Nashua will negotiate contracts that reflect the best interests and value for its customers.

15. The attempt to inject the operation of other City departments into this matter on the grounds that some of Nashua's witnesses pointed out that some of Nashua's

current departments operate similar to a water utility is misplaced and misconstrues the testimony. The purpose of such testimony was not to "boast" about Nashua's ability but rather to point out that many water systems are municipally owned. PWW's data requests seeking a detailed investigation into what Nashua's current City departments do or do not do in their operations are, therefore, unwarranted and ultimately will have no relevance to how the water system acquired by Nashua will be operated.

16. Applying the appropriate standard, the Commission should reject PWW's Motion to Compel responses to data requests related to other City Departments because (a) PWW has failed to demonstrate that they are necessary for the evaluation of Nashua's Petition under PUC 204.04; (b) the Data Requests are largely irrelevant and immaterial under RSA 541-A:33; and (c) any potential relevance is far outweighed by the burden imposed by the requests.

WHEREFORE, City of Nashua respectfully requests that the Commission:

a. Deny PWW's Motion to Compel for the reasons set forth herein, without prejudice;

b. Order that Nashua is not required to respond to Data Requests concerning valuation prior to October 28, 2005, as set forth in the Commission's procedural schedule;

c. Order that Nashua is not required to respond to any Data Request concerning the operation of other City departments; and

d. Grant such other and further relief as justice may require.

Respectfully submitted,

CITY OF NASHUA
Upton & Hatfield, LLP
By its attorneys:

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Dated: June 10, 2005

David Connell, Esquire
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CERTIFICATION

I hereby certify that a copy of the foregoing Objection to Motion to Compel was this day forwarded to all persons on the attached Service List.

Robert Upton, II