

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

Order Addressing Motion to Establish Procedure for Depositions

ORDER NO. 24,486

July 8, 2005

I. INTRODUCTION

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) (collectively the Pennichuck Companies), pursuant to N.H. RSA 38:9. The Pennichuck Companies 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 the discovery stage and is scheduled for hearing in September 2006. For the full history and procedural schedule, see Order No. 24,457 (April 22, 2005).

The issue addressed in this order is the establishment of a procedure for the taking of depositions. Order No. 24,457 approving the procedural schedule for this docket provides that depositions on technical, financial, and managerial capabilities and public interest issues be completed by August 29, 2005, and depositions on valuation issues be completed by April 7, 2006.

On May 17, 2005, PWW filed with the Commission a Motion to Establish Procedure for Depositions. The motion summarized the Commission's authority to issue subpoenas and conduct discovery for proceedings before it, and addressed the question of whether the parties have authority to issue subpoenas for depositions. PWW's motion proposed that the Commission employ the deposition procedures of the New Hampshire Superior Court and requested that the Commission issue an order that adopts, to the extent possible, the Superior Court rules on deposition practice.

Nashua, the Towns of Milford, Raymond, and Pittsfield, the Office of Consumer Advocate, and Staff assent to the motion. Nashua Regional Planning Commission takes no position. None of the other parties object to PWW's Motion to Establish Procedure for Depositions.

II. COMMISSION ANALYSIS

A. Commission Authority

The Commission has broad authority to issue subpoenas for proceedings before it pursuant to RSA 365:10, which provides "[t]he commission shall have power to subpoena witnesses and administer oaths in any proceeding or examination instituted before or conducted by it, and to compel, by subpoena duces tecum, the production of any accounts, books, contracts, records, documents, memoranda and papers of any kind whatever." N.H. Admin. Rules, Puc 204.4 (g) provides that "[t]he commission shall employ other forms of discovery including, but not limited to, technical sessions and depositions as needed to enable the parties and staff to evaluate the issues presented."

B. Parties' Rights to Issue Subpoenas

There is no PUC rule allowing *parties* in a Commission proceeding, as opposed to the Commission itself, to issue subpoenas or compel witness attendance at depositions and the Commission has frowned on such a practice in the past. *See, Tilton and Northfield Aqueduct Company, 74 NH PUC 451 (1989)* which states “. . . although RSA 365:10 and RSA 365:11 authorize the PUC to subpoena witnesses to appear in any proceeding or examination instituted before or conducted by it, there does not appear to be authority for a party to independently compel persons to appear for depositions.” In fact, the Commission’s order in *Tilton* granted motions to quash by the Attorney General.

Additionally, in the matter before the Commission, we are cognizant of the fact that several of the parties are not represented by counsel, may not know the rules and statutes governing the service of subpoenas, and do not have easy access to a Justice of the Peace or other authorized officer of the court to serve subpoenas. Therefore, parties to this action may not issue subpoenas.

C. Deposition By Agreement

We expect that if depositions are to be conducted in this docket, they take place by agreement of the parties. As noted in the motion, depositions are a widely used and accepted discovery technique largely self-regulated by parties in adversarial matters. The Commission permits discovery that is “relevant to the proceedings or reasonably calculated to lead to the discovery of admissible evidence.” *See Re Investigation into Whether Certain Calls are Local, 86 NH PUC 167 (2001)*. We urge the parties to move forward in an amicable, cooperative

manner to take the depositions of witnesses by agreement of the parties. We agree with the sentiment of the motion that the parties, to the extent practicable, generally follow accepted practices and procedures for the taking of depositions found in Superior Court Rules 35 through 45-A and RSA 517, and cooperate in scheduling depositions by agreement without involvement from the Commission. Parties shall use best efforts to produce for deposition, upon request, witnesses employed by a party or under a contractual relationship with a party relating to this proceeding.

The party requesting the deposition shall be responsible for arranging a stenographer, videographer, or other means of recording of the deposition, and shall be solely responsible for the costs associated therewith. Depositions may be conducted at the Commission's offices or other location mutually agreeable to the parties and Staff.

D. Subpoenas

The Commission has the power granted to it under RSA 365:10 to subpoena witnesses and administer oaths. As envisioned by the motion, to the extent that a witness or the parties fail to agree on the conduct or scope of a deposition voluntarily, the party requesting the deposition may file with the Executive Director of the Commission a request for issuance of a subpoena (if the witness is located within New Hampshire) or appointment of a commissioner to take a deposition (if the witness is located outside of New Hampshire, pursuant to RSA 517:2), with service upon all parties and Staff. The request shall state how the proposed deposition comes within the scope of Superior Court Rule 35(b)(1), which states:

b. Scope of Discovery. Unless otherwise limited by order of the Court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The Executive Director may issue a subpoena on the eleventh day after the request is filed unless an objection is made by any party or Staff to the issuance of the subpoena. Any objection to a request for a subpoena must be filed with the Commission within ten days of the date on which the request of the petitioning party was filed, must contain detailed reasons for the objection, and must be served upon all parties and Staff. Upon the timely filing of an objection, the party requesting the deposition may file a response within five days of the filing date of the objection. The Commission will then decide if a subpoena will issue based on the filings, without a hearing on the matter.

The party requesting the subpoena shall arrange for the service of the subpoena and/or commissioner and shall serve notice on all parties and Staff of the deposition in accordance with NH RSA 516 and 517. Staff shall not be subpoenaed.

E. Witness Fees

NH RSA 365:11 states: "Witnesses summoned before the commission shall be paid the same fees as witnesses summoned to appear before the superior court, and such summons issued by any justice of the peace shall have the same effect as though issued for appearance before such court." RSA 516:16 provides for a witness fee of \$12 for each half day's attendance, plus \$.17 per mile.

If a witness is willing but unable to attend a deposition and needs to be subpoenaed for any legitimate reason, such as the witness's inability to be absent from work unless subpoenaed, and the Commission is required to issue a subpoena upon that witness, the party requesting the witness at deposition shall pay the attendant witness fee and travel.

Based upon the foregoing, it is hereby

ORDERED, that the Motion to Establish Procedures for Depositions be GRANTED, as discussed herein.

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

Thomas B. Getz
Thomas B. Getz (KNS)
Chairman

Graham J. Morrison
Graham J. Morrison (KNS)
Commissioner

Michael D. Harrington
Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Debra A. Howland
Executive Director & Secretary