

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

Order on Motion to Compel Discovery

ORDER NO. 24,681

October 23, 2006

I. BACKGROUND

The New Hampshire Public Utilities Commission (Commission) opened this docket to consider the petition of the City of Nashua to take certain assets of Pennichuck Water Works, Inc. (PWW) pursuant to the municipalization process authorized by RSA 38. On July 20, 2006, PWW filed a motion to compel Nashua to answer certain data requests PWW had propounded as part of its fifth set of data requests.

Some of these data requests were the subject of another motion to compel filed by PWW in March 2006 and have either been responded to by Nashua or have been the subject of our Order Nos. 24,654 and 24,671. In this Order, we will address the following data requests PWW seeks Nashua to answer: PWW 5-13; PWW 5-18; PWW 5-31; PWW 5-40; PWW 5-43; PWW 5-55; PWW 5-56; PWW 5-57; PWW 5-60; PWW 5-63; PWW 5-77; PWW 5-78; PWW 5-79; PWW 5-81; PWW 5-82; PWW 5-88; PWW 5-89; PWW 5-90; PWW 5-91; PWW 5-99; and PWW 5-150.

According to PWW's motion to compel, Nashua objected to data requests PWW 5-13, PWW 5-31; PWW 5-40; PWW 5-57; PWW 5-60; PWW 5-77; PWW 5-78; PWW 5-79; PWW 5-88; PWW 5-99; and PWW 5-150. On July 31, 2006, Nashua filed an objection to PWW's motion and those specific objections are incorporated into our analysis below.

II. COMMISSION ANALYSIS

New Hampshire RSA 541-A:33,II states in part as follows:

The rules of evidence shall not apply in adjudicative proceedings. Any oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. Agencies shall give effect to the rules of privilege recognized by law.

Our applicable rule, N.H. Code Admin. R. Puc 203.23, likewise recites that the Commission may exclude irrelevant, immaterial or unduly repetitious evidence. These principles are important in the discovery context because, in general, discovery that seeks irrelevant or immaterial information is not something we should require a party to undertake.

In the context of civil litigation, New Hampshire law favors liberal discovery, *see, e.g.*, *Yancey v. Yancey*, 119 NH 197, 198 (1979), and that discovery is regarded as “an important procedure ‘for probing in advance of trial the adversary’s claims and his possession or knowledge of information pertaining to the controversy between the parties.’” *Johnston v. Lynch*, 133 NH 79, 94 (1990) (citing *Hartford Accident etc., Co. v. Cutter*, 108 NH 112, 113 (1967)). Consistent with Superior Court Rule 35(b) regarding the scope of discovery, we require parties to show that the information being sought in discovery is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence. *See Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001). We will review PWW’s motion to compel Nashua to answer certain data requests in light of these principles.

Some specific aspects of the PWW motion are moot. For instance, regarding PWW 5-55,¹ Nashua states that it provided the information requested by means of its response to PWW

¹ PWW 5-55: Please describe in detail “One and Done” customer service referenced on page 9 of your testimony and produce all documents relating to it. Identify all systems in which this has been implemented, and identify those systems operated by a Veolia entity where billing and collection remains the responsibility of the government owner of the water system.

5-55 and PWW 3-1. With respect to PWW 5-56,² Nashua provided the information as an attachment to its objection. Regarding PWW 5-60,³ Nashua states it answered that data request on July 20, 2006. Lastly, Nashua states that its answers to PWW 5-63, PWW 5-81, and PWW 5-82 are responsive and complete.⁴ Nothing in the motion papers supports a determination by us that Nashua's characterization of these responses is inaccurate. Obviously, PWW is likewise justified in relying on this representation at hearing and otherwise. Accordingly, we will deny PWW's motion to compel as to the requests referenced in this paragraph as moot or adequately answered.

With respect to PWW 5-43,⁵ PWW asks Nashua to identify the years over which it intends to expend \$9.5 million on capital projects. In its objection, Nashua states that the number of years can be found in Exhibits 4 and 5 to George E. Sansoucy's January 12, 2006 testimony: 2007 to 2028. We deem Nashua to have responded to this data request and we will not compel Nashua to provide any further answer.

² Directed to Ashcroft/Ford/Noran: PWW 5-56: Produce all "customer service process charts" referred to on page 9 of your testimony.

³ Directed to Ashcroft/Ford/Noran: PWW 5-60: Veolia's affiliate later sued the Rockland Sewer Commission concerning the contract (D.Mass.No. 04-11131-PBS). Please attach copies of any interrogatory answer or deposition testimony by Mr. Corvi in that case, and provide a status report on the case, including any depositions taken, dispositive motions decided or pending, and trial schedule.

⁴ Directed to Ashcroft/Ford/Noran:

PWW 5-63: How does the "comprehensive asset management program" described in your testimony at page 13, line 21, compare with the "reliability centered maintenance" that was set forth as a part of Veolia's alternative proposal set forth in section six of its original proposal to Nashua (Burton Dep. Ex. 81).

PWW 5-81: Describe all performance standards of any kind that VVNA has agreed to comply with under its contract with Indianapolis and identify where in VVNA's contract with Indianapolis the performance standards is set forth.

PWW 5-82: With regard to the performance standards described in response to data request 5-82, indicate for which of these standards VVNA has agreed to comply with a similar standard (i.e., the subject matter, rather than the particular level of compliance) in its agreement with Nashua and where in the contract with Nashua the performance standard is set forth.

⁵ PWW 5-43 directed to Sansoucy and Walker: You note at page 24 that the City is projecting annual capital expenses of \$9.5 million. Please provide copies of all documents that relate to or support the development of this \$9.5 million figure, and state the number of years the City has committed to make capital expenditures at this level.

With respect to PWW 5-99,⁶ PWW seeks Nashua's position as to whether Nashua would support a rate increase to purchase "land in the watershed." Nashua objects, stating it has answered the question. Nashua cites its representations that (1) it will seek guidance from its contactors as to watershed protection, and (2) that it does not agree that rate increases would necessarily be required for land acquisition. We believe Nashua's answer is responsive to PWW's request. Accordingly, we will deny PWW's motion to compel as to PWW 5-99.

Data requests PWW 5-57⁷ and PWW 5-77 through 5-79⁸ relate to allegedly inappropriate behavior attributed to Veolia (contractor to Nashua) or an employee, an issue that Nashua discussed in May 22, 2006 testimony of Messrs. Ashcroft, Ford, and Noran. We find that information regarding Veolia's operations is relevant to this proceeding or is reasonably calculated to lead to the discovery of admissible evidence. In its objection to PWW's motion to compel, Nashua states that it informed PWW of how to obtain the documents through a web site. Further, Nashua disputes PWW's complaint that it is difficult to obtain the documents since Nashua can easily access them through Public Access to Court Electronic Records (PACER). Since PACER is a fee-based system it is reasonable for PWW to expect Nashua to produce the documents rather than rely on their availability elsewhere. Therefore, we direct Nashua to produce to PWW documents responsive to PWW 5-57, PWW 5-77, PWW 5-78, and PWW 5-79.

⁶ PWW 5-99, directed to Hersh/Henderson/McCarthy: Would Nashua support an increase in PWW's rates based on its purchase of land in the watershed? If so, how much of a rate increase would Nashua support?

⁷ PWW 5-57: The Inspector general of the Commonwealth of Massachusetts on January 30, 2004 recommended that the Town of Rockland contract with Veolia be terminated for, among other reasons, "inferences of impropriety in the awarding of the contract." What specific instances of impropriety in the award to Veolia's affiliate have been alleged, and what is Veolia's response to each allegation?

⁸ PWW 5-77: Ref. page 5, line 21. Identify by name, position and employer the individual referred to as "our day-to-day Rockland customer contact."

PWW 5-78: Ref. page 6, line 3. Identify by name, position and employer the individual referred to as "as Veolia Water employee."

PWW 5-79: Ref. page 6, line 6. Provide all information that supports or explains what you mean when you say that Rockland deemed a continued relationship with Veolia to be "infeasible."

In PWW 5-88,⁹ PWW seeks information as to Veolia's intention to purchase water systems in New Hampshire. Nashua objects and states the issue of Veolia's plans to purchase systems in New Hampshire is not relevant to this proceeding. We disagree, in light of our obligation pursuant to RSA 38:11 to make a finding of whether the taking is in the public interest. At least one party has posited that our review of the public interest includes the issue of PWW's relationship with small water systems in the state. In testimony dated April 13, 2006, Staff identified the purchase of troubled water systems as a public benefit that may be lost under municipal ownership. In light of the standard that discovery be allowed on information that is either relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence, we find it permissible for parties to inquire as to whether Nashua or its contractors may or may not purchase water systems in New Hampshire. We direct Nashua to respond to PWW 5-88.

Data request PWW 5-89¹⁰ relates to alleged problems or malfeasance at Veolia's Indianapolis operation. This request is also the subject of a related motion for a protective order. We address both the discovery request and the need for protective treatment in a separate order.

PWW 5-90 and PWW 5-91 request collective bargaining agreements relating to Veolia's Indianapolis operation.¹¹ With respect to PWW 5-90, PWW seeks a so-called Exhibit C to the collective bargaining agreement Nashua produced. PWW describes this exhibit as pertaining to benefits. In its objection, Nashua states that Exhibit C to the collective bargaining agreement

⁹ PWW 5-88: Does Veolia have any plans to purchase water systems in the State of New Hampshire?

¹⁰ PWW 5-89: Please produce all documents and information provided in response to items 1-4 of Grand Jury Subpoena 05-64-SDD-240-08 issued from the United States District Court for the Southern District of Indiana dated September 30, 2005.

¹¹ PWW 5-90: Please produce Exhibit C to the 2004-2006 Veolia collective bargaining agreement for Indianapolis.

PWW 5-91: Please produce all collective bargaining agreements assumed by Veolia when it began operating the Indianapolis system, including all exhibits thereto.

does not exist and refers the Commission to Exhibit C, a July 14, 2006 e-mail from Nashua to PWW stating that no Appendix C to the “Indy CBA” exists. Neither party disputes the relevance of this information. Despite PWW’s skepticism that an appendix specifically referenced in a collective bargaining agreement would be missing, nothing suggests that we should not simply rely on this statement. Therefore, we will deny PWW’s motion to compel with regard to PWW 5-90.

With respect to PWW 5-91, we understand part of this information was the subject of PWW’s March 16, 2006 motion to compel and that by letter dated May 5, 2006, Nashua agreed to provide information responsive to this request. At issue now is whether Nashua should be compelled to produce collective bargaining agreements its contractor Veolia inherited when Veolia first began operating the Indianapolis water system. PWW states it seeks to compare prior collective bargaining agreements to Veolia’s current agreement. In its response to PWW 5-91, it does not appear Nashua interposed a timely objection to the request. Nashua stated that the request was unduly burdensome and was not reasonably calculated to lead to the discovery of admissible information. In its objection to PWW’s motion to compel, Nashua states the information is not relevant. We disagree. We find the issue of whether collective bargaining agreements have changed under Veolia’s management to be relevant to this proceeding or that discovery into this issue is reasonably calculated to lead to the discovery of admissible evidence. For this reason, we compel Nashua to produce collective bargaining agreements that existed when Veolia assumed operation of the Indianapolis water system.

In PWW 5-13,¹² PWW seeks actual and equalized tax rates for 2002 through 2006. Nashua objects to the relevance of this information and states it provided PWW with a web site

¹² PWW 5-13: Identify the actual and equalized city, county, local school and state school property tax rates for Nashua for each year from 2002 through 2006.

address from which PWW could obtain the information. We are aware from the pre-filed testimony in this docket that taxes are implicated in the valuation of PWW's assets and in determining customer rates. It is not sufficient for Nashua to merely supply a web site address of another entity, and thus evade making any representations about the adequacy and truthfulness of the data provided, particularly when Nashua has in its possession the information responsive to the request. Accordingly, we compel Nashua to produce the requested tax information.

In PWW 5-18,¹³ PWW seeks clarification of what geographic area Nashua intends to describe by the phrase "lower Merrimack River watershed and surrounding communities." Nashua objects by stating that its response is complete. We disagree. The Merrimack River extends from the White Mountains to Newburyport, Massachusetts and it is relevant to this proceeding to know what portion of this watershed and surrounding communities to which Nashua refers. We understand from Nashua's response that it cannot commit to identifying all communities to which it refers; but nonetheless we think it reasonable to require Nashua to clarify, so that PWW has an understanding of which communities are involved. We direct Nashua to respond further to PWW 5-18.

In PWW 5-31,¹⁴ PWW seeks Nashua's knowledge of any municipal water system comprised of a core and satellite structure. In its objection, Nashua states its response to PWW 5-31 is complete. We read Nashua's response otherwise. Nashua states that the request is overbroad and unduly burdensome and also that it provided PWW with a list of systems operated by Veolia Water North America. Nashua does not state whether the extent of its knowledge of

¹³ PWW 5-18, directed to Streeter/Rootivich/McCarthy: Ref. page 5, line 10. Please specify which communities you intend to include by your reference to the "lower Merrimack River watershed and surrounding communities."

¹⁴ PWW 5-31: Please provide any examples of which you are aware in which a municipality in which a core water system was located also owned multiple disconnected water systems outside the municipality. For each such example indicate the number of disconnected systems owned and the number of customers in each such system.

municipal water systems is embodied in the list of systems Veolia operates. We believe it is reasonable to inquire of Nashua as to whether Nashua knows of water systems that operate in a manner similar to how Nashua seeks to operate PWW. PWW's request does not require Nashua to conduct extensive research; rather PWW only seeks information that is already within Nashua's knowledge. We direct Nashua to provide a more responsive answer to PWW 5-31.

Next, PWW seeks, in PWW 5-40,¹⁵ to compel Nashua to produce certain work papers of George E. Sansoucy and his consulting firm relating to the valuation of a fossil fuel generation facility for a municipal client. Nashua objects to the production of documents based on attorney-client and work product privileges. We are persuaded by these objections. We understand the request to involve a present valuation effort and that it does not involve historical work. We agree that either the work product or attorney client privilege or both could apply to this information. To the extent documents responsive to PWW 5-40, a through g, have not been released to the public by this municipal client, Nashua is not required to produce them. If, however, this information has been made public, such as the scope of work or the subject municipality's bid to purchase, then the privilege no longer applies, consistent with Rule 510 of the New Hampshire Rules of Evidence. We therefore instruct Nashua to state the extent to which this information has been made public and to produce any such information that responsive to PWW 5-40. To the extent Nashua has documents it believes are privileged, it must provide PWW with an index of the documents, as described below. We deny in part and grant in

¹⁵ PWW 5-40: On page 9 of reply testimony, Sansoucy states that "our firm was recently retained to prepare a valuation of a fossil fuel generation facility by a municipal client in preparation of a bid to purchase. The group indicated that in developing our income capitalization approach we were to use a for-profit entity's cost of capital as it did not want to influence the price that it paid for this asset." Please provide: a. The identity of the municipal client that retained you; b. Copies of any and all engagement agreements; c. A summary of the scope of work; d. The amount paid by the municipal client to George E. Sansoucy and/or his company on the assignment; e. All copies of any notes, correspondence, documents or other communications relating to your communications with the client about the income capitalization approach; f. Copies of any reports, appraisals, studies, opinions or other documents provided by George Sansoucy or his company to the City; g. The City's bid to purchase.

part PWW's motion to compel production of these documents depending on whether the documents are protected by privileges.

Lastly, in PWW 5-150,¹⁶ PWW seeks an order directing Nashua to produce a privilege log relating to documents Nashua argues are protected by the attorney-client privilege and other privileges and which pertain to communications between Nashua and its tax expert, Steven Paul. The parties do not dispute relevance; PWW merely states Nashua failed to produce a privilege log. Nashua counter argues PWW failed to produce adequate privilege logs itself. Since the motion before us concerns PWW's, and not Nashua's, motion to compel, we will restrict our analysis to Nashua's response to PWW 5-150.

Disclosure of facts or data underlying expert opinions is permissible in discovery. In superior court, a party is entitled to disclosure of the opposing party's experts, the substance of the facts and opinions about which they are expected to testify, and the basis of those opinions. See, *McLaughlin v. Fisher Eng'g*, 150 N.H. 195, 202 (2003). Failure to supply this information may result in exclusion of the expert testimony unless good cause is shown to excuse the failure to disclose. *Id.* As stated earlier, RSA 541-A:33, II requires us to give effect to the rules of privilege recognized by law. The New Hampshire Rules of Evidence recognize the attorney-client privilege and other privileges Nashua asserts here. In situations such as this where a privilege is asserted in a forum which is subject to the State's Right-to-Know Law, RSA 91-A, courts have ordered preparation of a so-called Vaughn Index.¹⁷ See *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997). The index forces the government

¹⁶ PWW 5-150, directed to Paul: Provide copies of all correspondence to or from the City of any of its representatives or other documents relating to this proceeding or the subject matter thereof, including all drafts of any testimony submitted in this proceeding.

¹⁷ The Vaughn Index includes a general description of each document withheld and a justification for its nondisclosure. *Id.* at 548.

to analyze carefully any material withheld, it enables a trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible on the basis of which he can present his case to the trial court. *Id.* at 548. Such indexes should include descriptions sufficient to “provide the connective tissue between the document, the deletion, the exemption and the explanation.” *Id.* at 549 citing *Davin v. U.S. Dept. of Justice*, 60 F.3d 1043, 1051 (3d Cir. 1995). For the same reason caselaw has required government entities to produce such indices of documents they contend are privileged, we direct Nashua to produce such a list as to communications with the municipality’s tax expert. To that extent, we grant PWW’s motion to compel as to PWW 5-150.

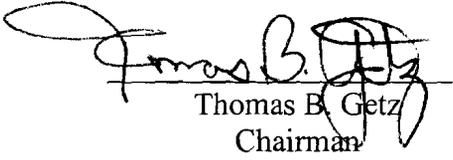
Based upon the foregoing, it is hereby

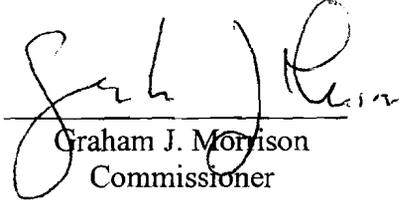
ORDERED, Pennichuck Water Works, Inc.’s motion to compel is DENIED as to data requests PWW 5-55, PWW 5-56, PWW 5-60, PWW 5-63, PWW 5-81, PWW 5-82, PWW 5-43, WW 5-99, and PWW 5-90, and it is

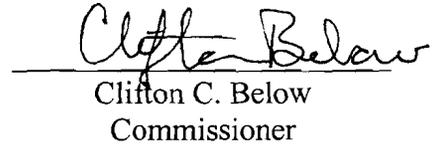
FURTHER ORDERED, that Pennichuck Water Works, Inc.’s motion to compel is GRANTED as to data requests PWW 5-57, PWW 5-77, PWW 5-78, PWW 5-79, PWW 5-88, PWW 5-91, PWW 5-13, PWW 5-18, PWW 5-31, and PWW 5-150; and it is

FURTHER ORDERED, that Pennichuck Water Works, Inc.’s motion to compel is DENIED IN PART and GRANTED IN PART as to PWW 5-40 as discussed above.

By order of the Public Utilities Commission of New Hampshire this twenty-third day of
October, 2006.


Thomas B. Getz
Chairman


Graham J. Morrison
Commissioner


Clifton C. Below
Commissioner

Attested by:


Debra A. Howland
Executive Director & Secretary