

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant To RSA 38:9

Pre-Hearing Conference Order

ORDER NO. 24,379

October 1, 2004

APPEARANCES: Upton & Hatfield, L.L.P. by Robert Upton, II, Esq., for City of Nashua; Wadleigh, Starr & Peters, P.L.L.C., by Stephen J. Judge, Esq. for Merrimack Valley Regional Water District; Fred S. Teeboom, representing himself; Elizabeth Coughlin, Merrimack Valley Regional Watershed Council, Inc.; Barbara Pressly, a resident of the City of Nashua and a rate payer and user of the Pennichuck Water System, representing herself; Stephen William for Nashua Regional Planning Commission; Drescher & Dokmo, P.A. by William R. Drescher, Esq., for the Towns of Amherst and Milford; Bossie, Kelly, Hodes, Buckley & Wilson, P.A., by Jay L. Hodes, Esq., for the Towns of Litchfield & Hudson; Mitchell & Bates, P.A., by Laura A. Spector, Esq., for the Town of Pittsfield; McLane, Graf, Raulerson & Middleton, P.A., by Steven V. Camerino for Pennichuck Water Works, Inc., Pennichuck East Utilities, Inc., and Pittsfield Aqueduct Company, Inc.; Office of the Consumer Advocate by F. Anne Ross, Esq. on behalf of residential ratepayers; and Marcia A. B. Thunberg, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On March 25, 2004, the City of Nashua, New Hampshire (Nashua) filed with the New Hampshire Public Utilities Commission (Commission) a Petition for the Determination of the Fair Market Value of the Plants and Property of Pennichuck Water Works, Inc. (PWW); Pennichuck East Utilities, Inc. (PEU); and Pittsfield Aqueduct Company, Inc. (PAC) (together, the Pennichuck Utilities), pursuant to RSA 38:9. On April 5, 2004, the Pennichuck Utilities filed a Motion to Dismiss in Full or in Part or, Alternatively, to Stay the Proceeding, to which Nashua objected on April 15, 2004.

On April 29, 2004, Nashua filed a Motion to Disqualify the law firm of McLane, Graf, Raulerson and Middleton, P.A. from further representing PWW, PEU, and PAC in Docket

No. DW 04-048, to which the Pennichuck Utilities objected on May 10, 2004. Nashua later asked the Commission to suspend consideration of this motion, in a pleading dated July 8, 2004. The Pennichuck Utilities responded on July 14, 2004.

The Commission notified all parties by secretarial letter on May 3, 2004, that it would defer issuance of an Order of Notice and action on other preliminary motions for a reasonable period to allow the Superior Court to act on the request to enjoin Nashua from pursuing its Petition for Valuation. On June 14, 2004, Nashua filed a copy of a June 7, 2004 Order from the Hillsborough County Superior Court – Southern District (Superior Court) denying the Motion for Preliminary Injunction.

On May 26, 2004, Milford filed an Appearance and a Motion to Consider and Maintain Effectiveness of an Existing Contract, to which the Pennichuck Utilities responded on June 4, 2004.

The Pennichuck Utilities requested, on June 16, 2004, that the Commission direct all parties to be prepared at any hearing to address, among other things, the issue raised by the Pennichuck Utilities' Motion to Dismiss filed on April 5, 2004. On June 22, 2004, the Commission issued an Order of Notice setting a Prehearing Conference for July 28, 2004, for the limited purpose of addressing motions for intervention, receiving a report from Nashua and the Pennichuck Utilities on the current procedural status of other court proceedings, and to hear oral argument on certain preliminary matters, namely: 1) whether it is appropriate for the Commission to proceed to consider Nashua's Petition for Valuation; 2) whether counsel for the Pennichuck Utilities is disqualified from representing it in this proceeding; and 3) whether Milford's Motion to Consider and Maintain Effectiveness of Existing Contract is premature.

On June 24, 2004, the Office of the Consumer Advocate (OCA) notified the Commission of its intent to participate in this docket. The following municipalities requested intervention: Milford (April 15, 2004), Bedford (June 24, 2004), Hollis (July 14, 2004), Raymond (July 16, 2004), Hudson (July 20, 2004), Pittsfield (July 20, 2004), Amherst (July 21, 2004), Londonderry (July 22, 2004), Litchfield (July 23, 2004), and Merrimack (August 6, 2004). The following residential and commercial customers requested intervention: Barbara Pressly (July 7, 2004), Fred S. Teeboom (July 19, 2004), State Representative Claire B. McHugh (August 3, 2004) and Anheuser-Busch, Inc. (August 25, 2004). There were no objections to any of these intervention requests.

On July 22, 2004, Merrimack Valley Regional Water District (District) filed an Appearance and Motion to Intervene, to which the Pennichuck Utilities objected on July 28, 2004. On July 23, 2004, the Nashua Regional Planning Commission requested it be granted full Intervenor status. On July 28, 2004, the Merrimack River Watershed Council, Inc. filed a Petition to Intervene.

On July 28, 2004, the Commission held a duly noticed hearing and heard argument on the limited issues identified in the Order of Notice.

On September 1, 2004, Nashua faxed to the Commission a copy of an order dated September 1, 2004 from the Superior Court granting Nashua's motion for summary judgment and motion to dismiss with respect to all Counts contained in the Pennichuck Utilities' Petition for Declaratory Judgment.

II. POSITIONS OF THE PARTIES AND STAFF

Of the three issues initially noticed for oral argument, the only one remaining for consideration was whether the Petition for Valuation should be dismissed.¹

A. The Pennichuck Utilities

The Pennichuck Utilities request the Commission act upon its Motion to Dismiss in Full or in Part or, Alternatively, to Stay Proceeding. The Pennichuck Utilities made four arguments: First, the Pennichuck Utilities argue that the Commission should treat Nashua's Petition as three separate proceedings against three separate legal entities and that the Commission should dismiss Nashua's taking of assets of PEU and PAC, as these assets are not necessary for service to Nashua. In support of this argument, the Pennichuck Utilities argue that PEU, PAC, and PWW are separate legal entities. PEU and PAC do not own property in Nashua and do not provide water service to Nashua. The separate legal nature of these entities will likely produce separate determinations under RSA 38. Nashua's combination of these entities in one Petition for valuation unnecessarily confuses the legal and factual issues that need to be resolved with respect to the assets of PEU, PAC, and PWW.

Second, the Pennichuck Utilities argue the Commission should dismiss Nashua's Petition for failure to follow Commission rules. In support of this argument, the Pennichuck Utilities state that Puc 202.11(a) and Puc 204.01(b) require all petitions to be accompanied by prefiled testimony; Nashua's Petition failed to do so. Pennichuck avers that prefiled testimony is necessary as Nashua's Petition fails to adequately identify what assets Nashua seeks and whether Nashua has the legal authority to take those assets. On this later point, the Pennichuck Utilities

¹ The other two issues were no longer in need of addressing at the July 28, 2004 hearing. Nashua asked that the Commission suspend consideration for the time being of the request to disqualify McLane, Graf, Raulerson and Middleton. Milford requested its motion regarding the effectiveness of its contract with PWW be held in abeyance.

question whether the assets Nashua seeks to take are within the scope of Nashua's January 14, 2003 Special Meeting of the voters.

Third, the Pennichuck Utilities argue that the Commission should dismiss Nashua's petition as premature. The Pennichuck Utilities argue that the regional water district contemplated by Nashua has not been formed and that the Commission cannot conduct a proper public interest analysis without the existence of the regional water district.

Fourth, the Pennichuck Utilities argue that the Commission should stay consideration of Nashua's Petition until the Superior Court has ruled upon the Declaratory Judgment Petition. In support of this argument, Pennichuck states the Superior Court will be deciding the constitutionality of the very statutes authorizing the Commission to review Nashua's Petition. The Pennichuck Utilities argue it would be wasteful and inefficient for the Commission to proceed with reviewing Nashua's Petition.

With respect to the objection to the District's intervention request, the Pennichuck Utilities argue that notwithstanding Nashua's assertion in its petition that it intends to turn the assets over to the District, Nashua stated in Superior Court on July 19, 2004 that it would not be a "stalking horse" for the District and that Nashua would decide, after this proceeding, whether it would transfer the assets to the District. The Pennichuck Utilities, therefore, believe the District plays no role in this proceeding. That being the case, the Pennichuck Utilities are concerned that the District's presence may improperly expand the scope of these proceedings, though they recognize the Commission can police the conduct of the proceedings to keep this in check.

B. City of Nashua

Nashua objects to the Pennichuck Utilities' motion to dismiss, arguing that taking PWW, PEU, and PAC eliminates any claim for severance losses; that it prevents "likely rate

increases for that portion of the system which is not acquired by Nashua due to the need to generate additional revenues to offset proportionately higher operating expenses”; it will protect the level of service to be received by PEU and PAC customers; and it will mitigate harm to PEU and PAC shareholders resulting from operating smaller, less efficient and less profitable enterprises. The Commission is capable of dealing with the legal and factual issues as presented in Nashua’s petition and the Commission does not need to consider acquisition of PEU, PAC, and PWW in separate dockets.

Nashua is aware of Puc 202.11 and 204.01, which require prefiled testimony to accompany petitions, but believes prefiled testimony is unnecessary and would be of no benefit to the Commission. RSA 38:9 requires the Commission to decide value, unlike the kinds of issues that a merger petition might raise. Nashua believes it is not currently in possession of all of the evidence necessary for the Commission to consider. After discovery, both sides will be able to offer constructive testimony if the Commission deems it necessary.

Nashua argues its petition should not be dismissed on the grounds that the District is not yet formed because the District has now, in fact, been formed. Nashua urges the Commission to act on its valuation petition posthaste in order to minimize expensive delays.

According to Nashua, the Pennichuck Utilities’ attempt to dismiss or stay the proceeding is in stark contrast to their assertion before Superior Court that the lack of any action by Nashua has cost it lost business opportunity and financial harm.

Nashua argues that the doctrine of primary jurisdiction requires the Pennichuck Utilities to exhaust their administrative remedies and allow the Commission to resolve what assets outside of Nashua are in the public interest for Nashua to take. The Superior Court found no basis to enjoin the Commission and thus Nashua’s Petition should proceed. Finally, Nashua

asserts that it is Nashua, and not the District, that seeks the assets; the Commission should determine whether Nashua, rather than the District, meets the burden of RSA 38, even though the District may be the entity that ultimately operates the system.

C. Merrimack Valley Regional Water District

The District joins in Nashua's arguments and requests the Commission deny the Pennichuck Utilities' motion to dismiss. In response to the Pennichuck Utilities' objection to the District's intervention request, the District states the Pennichuck Utilities' motion to dismiss suggested that the District was a necessary party to this action and that since the District will ultimately operate the water utility, the Commission would need to consider whether the District's operation of the water utility was in the public interest. Nashua's petition states it intends to turn the assets over to the District and therefore the District is a vital part of the proceeding. The District asks that the Commission deny the objection.

D. Fred S. Teeboom

Mr. Teeboom did not offer a position on the issues at hearing. He is representing only himself, although he remains concerned that the voters who rejected municipalization have not been adequately heard.

E. Merrimack River Watershed Council, Inc.

The Watershed Council did not offer a position at hearing.

F. Barbara Pressly

Ms. Pressly is a resident of Nashua and a customer of PWW. She requested the Commission move forward with Nashua's valuation petition as quickly as possible. She stated, among other things, that the people want to have control over natural resources that are part of their community.

G. Nashua Regional Planning Commission

The Regional Planning Commission supports Nashua's arguments in this docket.

H. Town of Milford

Having asked the Commission to hold the Motion regarding its contract with PWW in abeyance, Milford's only role at this stage is to observe the proceedings.

I. Town of Amherst

Amherst supports Nashua's valuation petition.

J. Town of Litchfield

Litchfield takes no position at this time.

K. Town of Hudson

Hudson takes no position at this time.

L. Town of Pittsfield

Pittsfield takes no position at this time.

M. Office of the Consumer Advocate

OCA believes it is appropriate for the Commission to move forward, rapidly, on the valuation petition. OCA also asserts that the Superior Court has indicated it expects the Commission to move forward.

N. Staff

With respect to the Pennichuck Utilities' Motion to Dismiss, Staff does not recommend the Commission dismiss Nashua's petition on the grounds that the valuation proceeding should be separated into multiple dockets. Staff is prepared to conduct its analysis on a per company basis and does not view the three Pennichuck Utilities being in the same docket as a hindrance. Staff does not recommend the Commission dismiss Nashua's petition on the

grounds that Nashua failed to comply with Commission rules requiring testimony. Staff believes Nashua should have complied with the Commission's rules or sought a waiver, but this can be cured by the Commission ordering Nashua to provide that missing part of the filing. Staff also does not recommend the Commission dismiss Nashua's petition on the grounds that the water district that Nashua proposes will ultimately operate the water utility is not formed. Staff is aware that subsequent to Nashua filing their valuation petition, the Merrimack Valley Regional Water District has in fact been formed.

With respect to the Pennichuck Utilities' fourth argument that Nashua's petition be stayed pending the outcome of the Superior Court matter questioning the constitutionality of the RSA 38 taking process, Staff has not analyzed the harm Nashua claims it will suffer by the delay nor the harm to the Pennichuck Utilities of moving forward and thus cannot recommend whether the Commission should grant or deny the Pennichuck Utilities' Motion. According to Staff, there may be some merit to moving forward with valuation, perhaps to facilitate settlement between the parties. Staff, however, takes no position on this fourth issue at this time.

III. COMMISSION ANALYSIS

A. Nashua's Motion to Disqualify

We will suspend consideration of Nashua's Motion to Disqualify in light of its representation that it will withdraw the Motion once a transfer between New Hampshire Electric Cooperative and the Town of Ashland in a docket presently before the Commission is completed or probable.

B. Milford's Motion to Consider and Maintain Effectiveness of Existing Contract

Milford and the Pennichuck Utilities request the Commission hold Milford's motion in abeyance until an appropriate stage to address Milford's concern that its bulk water

supply contract with PWW remain in effect. We agree that this is a reasonable approach.

C. Interventions

The Commission's Order of Notice specified that the Commission would entertain requests to intervene and would take positions only on the specific noticed issues. Based upon our review of the petitions to intervene and arguments at hearing, we find that Merrimack Valley Regional Water District, Merrimack River Watershed Council, Inc., Nashua Regional Planning Commission, customers Fred S. Teeboom, Barbara Pressly and Anheuser-Busch, Inc.; Representative Claire B. McHugh and the Towns of Amherst, Milford, Hudson, Litchfield, Pittsfield, Bedford, Raymond, Hollis, Londonderry, and Merrimack have satisfied the requirements of RSA 541-A:32 and N.H. Code Admin. R. Puc 203.02 (b) which require a petitioner to demonstrate that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law. Further, we find that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by the interventions. Finally, we specifically find that the District is a necessary party in light of Nashua's statement in its petition that it is the "present intention of Nashua, upon completion of the acquisition of the assets of PWW, PEU, and PAC and successful negotiations of a satisfactory regional water district charter, to convey or otherwise transfer such assets to the newly formed regional water district." Petition at 5.

D. Motion to Dismiss

On the reach of RSA 38, we find sufficient basis for Nashua to pursue, at a minimum, the taking of portions of the PWW system by eminent domain, pursuant to RSA 38. There are, however, significant legal questions that have not been sufficiently developed in the

materials and argument presented to the Commission. Those issues go to whether, as a matter of law, Nashua may take the assets of PEU and PAC and, for that matter, whether Nashua may take assets of PWW that are not integral to the core system.

To promote the prompt and orderly conduct of the proceeding and for the efficient use of the resources of the parties and the Commission, we will proceed simultaneously along several paths. Thus, we will provide the parties the opportunity to submit briefs on whether RSA Chapter 38 provides Nashua authority to take PEU, PAC and the entirety of PWW. We encourage the parties to address the specific language of RSA 38, legislative history and case law, as may be applicable, and not merely argue, in a conclusory fashion, that Nashua can or cannot take certain property. The parties should also address in their filings the issue of whether Nashua has properly followed the voting requirements of RSA 38 and whether the votes taken are consistent with the requests made in the Petition. Briefs will be due no later than October 25, 2004.

On the need for testimony, we agree that Nashua has not filed testimony as required by Puc 202.11(a) and 204.01(b), but we will not dismiss Nashua's Petition for Valuation on the basis of that omission. Rather, we will require Nashua to file testimony on its technical, financial and managerial capability to operate the public utilities as requested and how the public interest would be served by the taking. To the extent that PEU and PAC were not taken, for reasons of legal authority or otherwise, Nashua shall include testimony on the extent to which that limitation would change its positions on the issues delineated above. Nashua's testimony will be due no later than November 22, 2004. We also find that effective testimony on valuation can best be prepared after Nashua has had the opportunity to conduct relevant

discovery of Pennichuck's books and records. Testimony on valuation, therefore, need not be submitted on November 22, 2004.

Finally, we will hold a prehearing conference on November 10, 2004, at which parties will be given the opportunity to state their respective positions with respect to the Petition. In addition, the Commission will be prepared to address other preliminary procedural issues that may arise. The parties should also be prepared to work out a procedural schedule regarding, among other things, discovery and responsive testimony relating to Nashua's direct testimony due November 22, 2004, as well as discovery and direct and responsive testimony related to valuation issues.

Based upon the foregoing, it is hereby

ORDERED, that the Commission's deliberations on Nashua's Motion to Disqualify are hereby **SUSPENDED** until such time as the transfer between New Hampshire Electric Cooperative and the Town of Ashland in a docket presently before the Commission is completed or probable; and it is

FURTHER ORDERED, that the Town of Milford's Motion to Consider and Maintain Effectiveness of Existing Contract is held in abeyance until the Commission determines the proper scope of Docket No. DW 04-048; and it is

FURTHER ORDERED, that the requests for intervention filed by Merrimack Valley Regional Water District, Merrimack River Watershed Council, Inc., Nashua Regional Planning Commission, customers Fred S. Teeboom, Barbara Pressly, and Anheuser-Busch, Inc., Representative Claire B. McHugh, and the Towns of Milford, Amherst, Litchfield, Hudson, Pittsfield, Bedford, Raymond, Hollis, Londonderry and Merrimack are hereby **GRANTED**; and it is

FURTHER ORDERED, that the parties may file briefs regarding the interpretation of RSA 38 as discussed herein by October 25, 2004; and it is

FURTHER ORDERED, that Nashua shall file testimony by November 22, 2004 of its technical, financial and managerial capability to operate a public utility or utilities, and how the public interest would be served by taking utility property; and it is

FURTHER ORDERED, that the Commission will conduct a prehearing conference on November 10, 2004 at 10:00 a.m. to hear positions of the parties and Staff and develop a procedural schedule regarding discovery and testimony on valuation of the property subject to the Petition.

By order of the Public Utilities Commission of New Hampshire this first day of October, 2004.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary