

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

**Order Addressing PWW's Motion to Compel Responses
from the City of Nashua**

ORDER NO. 24,488

July 18, 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 Chapter 38:9. The Commission determined that RSA 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 procedural history and procedural schedule, see Order No. 24,457 (April 22, 2005).

This order addresses 40 data requests posed to Nashua by PWW to which Nashua objected, pursuant to N.H. Admin. Rules, Puc 204.04(f); PWW responded with a Motion to Compel on June 2, 2005, to which Nashua objected on June 13, 2005. PWW filed a Reply to Nashua's Objection on June 21, 2005, giving rise to Nashua's Motion to Strike the Reply on July

5, 2005, arguing that the Commission's rules do not authorize such a filing. PWW filed an Objection to Nashua's Motion to Strike the Reply, also on July 5, 2005.

Amy Ignatius, General Counsel to the Commission, was designated by the Commission to act as Hearings Examiner on this discovery dispute and make a recommendation to the Commissioner. On July 15, 2005, she submitted a memorandum recommending particular rulings in these matters.

II. RESPONSES PWW SEEKS TO COMPEL FROM NASHUA

PWW's Motion to Compel can be broken into the following categories: 11 requests that Nashua argues are premature because they deal with valuation of the system, 21 requests that Nashua argues are not relevant given its plans for the water system, 7 requests that Nashua argues are protected under the attorney-client and/or work product privileges and 1 request that Nashua argues is not relevant because it relates to another transaction.

A. Objections Based on Valuation

Nashua objects to questions 9, 18, 20, 21, 22, 23, 24, 31, 50, 51 and 52 on the basis that they relate to valuation of PWW and therefore are premature. PWW's Motion to Compel concedes that the questions "touch on valuation" but argues that they also relate to the public interest and are in response to statements made in Nashua's testimony. The Hearings Examiner reviewed these requests and agreed with Nashua that they relate primarily to valuation rather than public interest and should be resubmitted, if still needed, upon review of Nashua's testimony on valuation.

B. Objections Based on Relevance

Nashua objects to questions 56, 57, 127, 130, 131, 132, 133, 134, 135, 136, 139, 140, 141, 142, 143, 144, 145, 146, 147, 164 and 166 on the basis that they are not relevant to the taking. The questions relate to Nashua's wastewater and solid waste operations, specifically calling for details over the past 10 years regarding Nashua's revenues, expenses, forecasting and billing and collection of these municipal services. Nashua's objections state uniformly that "it does not propose that the water system to be acquired by it will be operated by any City department" and, therefore, the questions are not relevant. PWV argues that the information is relevant to demonstrate Nashua's ability as an owner of large, capital investment projects, and that Nashua itself cited its operation of the wastewater treatment facilities as an indication of its ability to operate a water system. The Hearings Examiner reviewed these requests and agreed with Nashua that, if in fact Nashua will not operate the water utility, if acquired, most of the questions regarding municipal operations are not relevant.¹

There are three questions on municipal operations, however, that appeared relevant to the Hearings Examiner: 145, 146 and 147, which addressing billing, collection and uncollectibles for both the wastewater treatment and solid waste facilities, whether done by city employees or on a contract basis. Nashua has stated that it will contract out for the operations of the water utility and put the matter to bid in a recent request for proposals but intends to retain billing and collection functions. Questions specific to Nashua's billing and collection, level of

¹ Nashua also objected to questions 154 through 163 on the basis of relevance; these were not identified in the Motion to Compel and therefore will not be addressed herein.

uncollectibles, and oversight of any contractor who provides those services is relevant to this proceeding, according to the Hearings Examiner. In addition, question 166 asks for insurance ratings given to Nashua's Fire Department over the past 10 years. Regardless of who operates the water utility, Nashua's Fire Department would be called upon in the event of a fire. According to the Hearings Examiner, question 166 is relevant and Nashua should respond.

C. Objections Based on Attorney-Client/Work Product Privilege

Nashua objects to questions 67, 68, 69, 70, 80, 89, and 173 on the basis that they violate the attorney-client and/or work product privilege.² Question 67 calls for identification of all legal matters that Palmer & Dodge, attorney Steven L. Paul's law firm, has provided to Nashua, the Merrimack Valley Water District (District) or State of New Hampshire. Mr. Paul is a Nashua expert witness regarding tax issues and the public interest determination. PWW argues that if Nashua has presented him as an expert witness, it has waived the attorney-client privilege. The Hearings Examiner recommended that Nashua be required to respond to this question as fair inquiry into the qualifications and potential bias of an expert.

Question 68 requests documents between Mr. Paul or Palmer & Dodge and Nashua, the District or any other person regarding the taking of PWW's assets or legislation related to such efforts. To the extent the request requires information unrelated to Mr. Paul's role as expert, the communications are privileged and need not be disclosed. To the extent they involve Mr. Paul's opinions and testimony as an expert, the Hearings Examiner recommended

² Nashua also objected to question 70 on the basis of attorney client/work product privilege; this was not identified in the Motion to Compel and therefore will not be addressed herein.

that the response should be limited to disclosure of an expert report, if any.

Question 69 asked if Mr. Paul had previously performed professional services related to any eminent domain matter. Question 70 is similar, asking if Mr. Paul had performed services related to utility tax matter. The Hearings Examiner recommended Nashua be required to respond to these questions, again as fair inquiry into the qualifications and potential bias of an expert.

Question 80 asked for documents regarding communications between Nashua and the consultants referred to page 2 of Alderman McCarthy's testimony. Question 89 is similar. The Hearing Examiner recommended that Nashua not be required to respond as these are privileged communications between a client and its representatives.

Question 173 asked for documents regarding communications between Nashua and intervenors in this docket. The Hearings Examiner noted that New Hampshire Rules of Evidence 502 would protect the response as privileged communications between the client and other parties and their representatives regarding "a matter of common interest," in this case, those who support Nashua's taking of PWW. She recommended that Nashua not be required to respond to this question.

D. Objections based on Relevant Time Frame

Nashua objects to question 120, which calls for documents related to the potential acquisition of PWW, if those documents were produced prior to November 26, 2002³ or if they related to the proposed acquisition by Philadelphia Suburban Corporation, as not being relevant to this docket. PWW argues that the documents are or may lead to relevant evidence, particularly

as to Nashua's "motivation" and "the background facts and opinions to support its public statements alleging that municipal ownership of Pennichuck was in the public interest." The Hearings Examiner's recommendation was that Nashua not be compelled to respond to this request, as Nashua's motivation is not a material issue to resolve and opinions regarding the public interest prior to November 2002 will have no bearing on what constitutes the public interest in 2006 and beyond.

III. COMMISSION ANALYSIS

We have reviewed the pleadings, the report of the Hearings Examiner and our administrative rules governing data requests.⁴ While the Commission allows broad leeway in data requests, there must be some showing that the information being sought is or is likely to lead to relevant evidence that would be admissible in the proceeding. *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167 (2001). Though the rules of evidence do not apply in Commission proceedings, pursuant to RSA 365:9, the New Hampshire Rules of Evidence adopt a similar rule regarding the scope of discovery. *See* NHRE 35(b)(1).

We concur with the recommendation of the Hearings Examiner that the questions identified by Nashua as involving valuation of PWW are premature and should be addressed in that phase of this docket. PWW should repose the questions if need be, after review of Nashua's testimony on that matter.

³ November 26, 2002 is the date of the Aldermanic vote to acquire PWW.

⁴ We have not considered PWW's reply to the Objection filed by Nashua, Nashua's Motion to Strike, which concerns the same underlying issues and effectively is rendered moot, or PWW's Objection to the Motion to Strike. Our administrative rules specifically authorize Motions to Compel and, pursuant to our general rule regarding Motions, it is fair to allow objections to motions. Replies to objections and the like are not authorized and will not be allowed absent specific authorization.

We concur with the recommendation of the Hearings Examiner that most of the questions identified by Nashua as involving municipal wastewater and solid waste operations are not relevant to the proceeding, in that Nashua has stated that no city department will operate the water system. Further, we concur that the three questions addressing billing, collection and uncollectibles for the wastewater treatment and solid waste operations may be relevant, given Nashua's testimony regarding which services it intends to put to contract if it acquires the water system. Nashua is compelled to respond, therefore, to questions 145, 146 and 147. Further, we agree that question 166 regarding Nashua's Fire Department insurance ratings is relevant and should be answered.

We concur with the recommendations of the Hearings Examiner regarding the questions that raise attorney-client and work product privileges. Nashua is compelled to respond, therefore, to questions 67, 68 as limited in her recommendation and 69. Nashua is not compelled to respond to questions 80, 89, and 173.

We also concur with the Hearings Examiner's recommendation that Nashua not be compelled to respond to question 120 as it relates to documents prior to November 22, 2002 or the Philadelphia Suburban Corporation's attempted acquisition of PWW. We will not allow the parties to engage in debate over the Philadelphia Suburban transaction. This proceeding raises numerous complex issues that must be addressed to reach a sound result; we will not allow it to be ensnared by issues that no doubt are important to the parties but have little bearing on the determinations the Commission must make.

Based upon the foregoing, it is hereby

ORDERED, that the Motion to Compel the City of Nashua is GRANTED in part and DENIED in part, as discussed herein.

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

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Lori A. Normand
Assistant Secretary