

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

**Order Addressing PWW's Motions to Compel Responses from the
Town of Amherst and Merrimack Valley Water District**

ORDER NO. 24,489

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). The issue addressed in this order is whether parties who have not submitted pre-filed testimony should be required to respond to written data requests.

II. POSITIONS OF THE PARTIES AND STAFF

PWW moved to compel Amherst to respond to 10 data requests. It argues that having moved to intervene and gained party status, Amherst is subject to data requests. It reads N.H. Admin. Rules, Puc 204.04(a) to allow requests on *any party* in order to evaluate the petition

filed by Nashua. The fact that Amherst is not the one to have filed the petition or submitted testimony is immaterial, in PWW's view. Because Amherst may have information that is likely to lead to the discovery of relevant evidence, pursuant to the Commission's standard of broad leeway in discovery, Amherst should be required to produce the information in its possession that may lead to relevant evidence in this proceeding. Further, PWW asserts that Amherst has waived any right to object to particular requests or to file first round testimony by choosing not to submit testimony by the designated date. Intervenor Fred Teeboom supported PWW's Motion to Compel Amherst.

Amherst objected to the Motion to Compel, on the basis that it filed no testimony and therefore data requests are improper. Amherst states that the long-standing tradition of the Commission to allow data requests only on those who file petitions, applications or testimony. Amherst asks that if it is required to respond, it should have time to object to the requests and the schedule should be adjusted to allow it to file testimony on the issue of whether a taking is in the public interest. The Office of Consumer Advocate (OCA) and Nashua supported Amherst's opposition.

PWW filed a similar Motion to Compel responses to 11 data requests it served on the Merrimack Valley Water District (District), asserting the same arguments. PWW also argued it was entitled to inquire of the District regarding the testimony of Nashua and the Town of Bedford, in that Bedford's witness is also the Chairman of the District. PWW asserted, as in the Amherst Motion, that the District has waived its rights to object to particular requests or to file first-round testimony. Intervenor Fred Teeboom supported PWW's Motion to Compel the District.

The District's opposition was similar to that of Amherst, stating that because it filed no testimony, it should not be required to respond to data requests. Similarly, the District stated that if it is ordered to respond it should also have the opportunity to object to particular requests and to file testimony. OCA, Amherst and Nashua supported the District's opposition.

III. COMMISSION ANALYSIS

We have reviewed the pleadings as well as our administrative rules governing data requests. N.H. Admin. Rules, Puc 204.04(a) states "The staff or any party shall serve upon any other party or the staff, data requests, which may consist of a written interrogatory or request for production of documents, *as necessary to evaluate a petition, application or testimony*" (emphasis added). PWW's reading of the rule would allow data requests on anyone who has been granted party status, in order to evaluate Nashua's petition or any other party's testimony.

The Commission's practice has been for parties to submit data requests only to those who file a petition, application or testimony in a proceeding. We have found no rulings contrary to this practice. It is logical that a party attempting to make its case through a petition, application or testimony be subject to discovery so that its position is thoroughly reviewed. Conversely, a party to a proceeding that has not submitted a petition, application or testimony forfeits an opportunity to make its case and it is therefore reasonable that it not be subject to discovery.

Ostensibly, PWW could seek a waiver of the rule pursuant to Puc 201.05. However, the practice of requiring parties that have not submitted a petition, application or testimony to respond to data requests poses a potential chilling effect on participation by parties with limited resources. We find that the public interest would not be served in this case by

permitting such discovery.

ORDERED, that the Motion to Compel the Town of Amherst is DENIED; and it is

FURTHER ORDERED, that the Motion to Compel the Merrimack Valley Water District is DENIED.

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