

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

**Order Denying Motions for Rehearing and Granting Certain Requests for Clarification of
Procedural Orders**

ORDER NO. 24,555

December 2, 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 entities opposed the petition and challenged Nashua's interpretation of the reach of RSA Chapter 38:9. In Order No. 24,425 (January 21, 2005), the Commission determined that RSA Chapter 38 authorized Nashua to pursue the taking of PWW but not PEU or PAC. The case is now in the discovery stage and is scheduled for hearing in January, 2007.

In July 2005, the Commission issued four orders on discovery disputes: Order No. 24,487 (July 8, 2005) granting a request by the Pennichuck Companies that the scope of severance damages be determined after review of testimony on that issue and not in advance; Order No. 24,488 (July 18, 2005) denying a Motion to Compel filed by PWW regarding Nashua's operation of other municipal services and the scope of discovery into matters prior to November 26, 2002; Order No. 24,489 (July 18, 2005) denying a Motion to Compel filed by PWW regarding discovery requests and participation of parties not filing testimony; and Order No. 24,494 (July

29, 2005) denying a Motion to Compel filed by Nashua regarding privilege and discovery into other valuations performed by or for PWW.

Each motion for rehearing gave rise to an objection and in some cases responses from other parties or Staff. The motion filed by Nashua regarding Order No. 24,487 gave rise not only to an objection from the Pennichuck Companies but also a request by Nashua to respond to the objection, which in turn was opposed by the Pennichuck Companies. The Commission's procedural rules do not authorize responses to objections and multiple rounds of pleadings are not favored. We find no basis here for allowing such additional pleadings and have not considered them in reaching our determinations herein.

II. Order No. 24,487

A. Order

In Order No. 24,487, the Commission held that the scope of severance damages and/or financial consequences of a taking of PWW would be determined after review of the testimony on this issue and not as a threshold legal matter as urged by Nashua.

B. Nashua Motion

Nashua filed a Motion for Reconsideration, alleging that the Commission should not interpret the phrase "the utility" in RSA 38:6 narrowly in Order No. 24,425, limiting a taking to PWW alone, and then interpret the phrase "the owner" in RSA 38:9 broadly in Order No. 24,487, allowing entities other than PWW to be compensated for severance damages if the evidence so supports. Nashua argues that the legislature intended damages for severance to be limited to the plant and property of the utility being taken, not of the parent company or stock ownership of the parent company of the utility. Nashua asserts that if the legislation is to be read expansively to

include “indirect effects” on other Pennichuck entities, so too should the taking request be read expansively. Nashua asserts that the Commission violated fundamental principles of eminent domain severance damages by not establishing “a unity of use and unity of ownership between the property taken and the remaining property.”

C. Pennichuck Companies’ Objection

The Pennichuck Companies objected, arguing that the Commission appropriately considered the issue of damages to be a factual one, and a component of the public interest analysis in this docket. They also assert that the legislature, in using both “owner” and “utility” in Chapter 38 must have intended that the words have separate meanings. The Pennichuck Companies argue that the question of damages can only be resolved after development of a factual record and that the cases on eminent domain severance do not lead to the conclusions reached by Nashua.

D. Responses of Other Parties and Staff

Merrimack Valley Regional Water District (District) concurred in Nashua’s Motion. All other parties were silent. Staff took no position.

E. Commission Ruling

In this order we did not conclude that PEU, PAC, Pennichuck Corporation or any other entity was *entitled* to damages. Rather, we left open until testimony is received on this matter whether entities would suffer “severance damages and/or financial consequences of a taking of some or all of PWW” that would entitle them to compensation under RSA Chapter 38. Order No. 24,487 at 4. As we stated in the order, the extent to which the companies are “organizationally, legally, financially and operationally inter-related” will be factual issues to be developed on the

record. We did not rule on who, if anyone, is entitled to damages in Order No. 24,487 and remain open to the arguments of the Parties and Staff on this issue. Accordingly, we deny the Motion for Rehearing.

III. Order No. 24,488

A. Order

In Order No. 24,488, the Commission denied requests by PWW to compel responses to certain data requests regarding Nashua's claim of expertise in operating other municipal systems and certain questions regarding events prior to November 26, 2002, the date the Nashua Aldermen voted to proceed with a taking. As stated in the Order, to avoid becoming "ensnared by issues that no doubt are important to the parties but have little bearing on the determinations the Commission must make, we will not allow the parties to engage in debate over the Philadelphia Suburban transaction". Order No. 24,488 at 7-8.

B. PWW Motion

PWW filed a Motion to Reconsider or Rehear Order No. 24,488, arguing that it should not be prohibited from discovery into these areas. Details of Nashua's operations of other municipal systems, PWW asserts, is relevant if Nashua is to operate the water system. The questions regarding events prior to November 26, 2002, according to PWW, must be explored: 1) to determine "what gave rise to the City's consideration of pursuing a taking under RSA Chapter 38" and 2) because the Order is "contrary to the Superior Court's directive" regarding the scope of discovery in the Commission docket. PWW quotes Superior Court Judge Lynn's order that Nashua's "alleged bad faith, improper motive and lack of intent to follow through with the acquisition obviously are matters that would have a significant bearing on the question of

whether the proposed condemnation is in fact in the public interest. As such, these issues can be raised by [PWW] before the [Commission.]”. Hillsborough County Superior Court, Southern District, Order on Motion to Dismiss (December 1, 2004) at 4, Docket 04-C-169.

C. Nashua Objection

On Nashua’s claim of expertise operating other municipal systems, Nashua stated “it does not intend to operate its water system as a City Department and is fully willing to accept a condition to that effect” and further would “strike those portions of its testimony relating to its experience operating other Departments.” As to information prior to November 26, 2002, Nashua argues that there is no showing of bad faith on the part of the Aldermen or Nashua, and that the Commission must determine only if a taking is in the public interest, not what Nashua’s motives are in pursuing a taking. Nashua asserts that Judge Lynn’s order is not a directive for discovery, but instead is “a recognition of the fact that the Commission is the proper forum for these issues to be raised” and was not binding on the Commission.

D. Responses of Other Parties and Staff

The Town of Merrimack supported PWW in part, arguing that Order No. 24,488 places unreasonable limitations on discovery. The Town of Amherst opposed PWW’s Motion. OCA took no position and other parties were silent. Staff concurred with PWW.

E. Commission Ruling

Nashua has affirmed it will not operate the water system if acquired and is willing to strike the testimony regarding its experience operating municipal systems. We therefore instruct Nashua and PWW to identify the portion(s) of Nashua’s testimony to be stricken, for submission to the Commission no later than December 23, 2005. The first issue raised in PWW’s Motion,

therefore, appears to be moot.

As to information prior to November 26, 2002, we agree with Nashua that Judge Lynn's order does not give PWW a *right* to discovery on those issues, but rather acknowledges a right to raise with the Commission whether it may pursue these issues. Even if the order were read as PWW urges, the Commission is not bound by Judge Lynn's ruling and will not authorize general discovery into Nashua's conduct or frame of mind regarding the Philadelphia Suburban transaction.

Evidence of "lack of motive and lack of intent to follow through with the property taking" related to a petition under RSA Chapter 38, however, whether generated prior to or after November 26, 2002, would be relevant. As a clarification, we will allow PWW to pursue those issues in discovery, provided the inquiry is *directly related to a petition under RSA Chapter 38*, but at the same time, we recognize that, pursuant to RSA 38, Nashua need not make a commitment to proceed with a taking until valuation is determined.

It is quite clear that the relationship between Nashua and PWW has not been cordial for some time, which of itself is not relevant to this proceeding. The thing that is relevant would be evidence showing that Nashua had no intention whatsoever to carry through on a taking under RSA Chapter 38. Accordingly, we deny in part and grant in part the Motion for Rehearing.

IV. Order No. 24,489

A. Order

In Order No. 24,489, the Commission denied a Motion to Compel filed by PWW, finding that those who did not file testimony would not be required to respond to data requests. Data requests to the Town of Amherst and the District were at issue.

B. PWW Motion

PWW filed a Motion to Clarify, Reconsider or Rehear, claiming that the District in particular should not be allowed to assert it is a critical party for intervention purposes and then not submit testimony or respond to discovery requests. PWW also asked for clarification of the ongoing rights of the District in the proceedings and the extent to which the District may participate in the hearing on the merits.

C. Responses of Other Parties and Staff

The District objected to the Motion, arguing that to compel data responses of the District would allow “economic warfare” against the District in order to chill its participation in the docket.” The District goes on to assert a “right” to propound data requests as well as rights regarding the “cross-examination of witnesses, the presentation of oral and written argument, the filing of briefs and by making a public statement on the record.”

The Town of Merrimack argued that Order No. 24,489 places unreasonable limitations on discovery. The OCA argues that the District should be allowed “cross examination, argument and briefing.” In its response, the OCA states that the focus should be on a possible transfer to Nashua, not a transfer to the District, which may not occur even if the taking is found to be in the public interest. Other parties were silent. Staff sought clarification as to the extent of discovery and hearing participation for one who does not file testimony.

D. Commission Ruling

PWW has presented nothing new that would cause us to alter our decision on this issue. To the extent it is not already clear, the Town of Amherst and the District are not subject to discovery but they will nevertheless be allowed to propound data requests, cross-examine

witnesses and make argument at the closing of the case. It will not be allowed to testify. A party should not expect to testify on another's behalf or supplement the record through documents generated by a non-testifying party. We therefore deny the rehearing request.

V. Order No. 24,494

A. Order

In Order No. 24,494, the Commission denied without prejudice Nashua's Motion to Compel certain responses regarding prior valuations of the water system assets done by or for PWW and other appraisals of Pennichuck Corporation. The Order found data requests on valuation to be premature and could be propounded in response to PWW's testimony on that issue. It did not make any ruling regarding the admissibility or privilege extended to any document.

B. Nashua's Motion

Nashua filed a Motion to Reconsider and Clarify, alleging that the Commission's determination that Nashua was premature in seeking prior appraisals done by PWW was in error. Nashua also argues the Hearings Examiner's opinions regarding privilege were in error.

C. PWW Objection

PWW objected, arguing that the Commission's conclusion that the issue could be addressed after filing of PWW's testimony on valuation was appropriate and that Nashua's attempted exploration into certain assets of Pennichuck Corporation was overly broad.

D. Responses of Other Parties and Staff

The District and Town of Litchfield concurred with Nashua. The Town of Merrimack and OCA took no position. Other parties and Staff were silent.

E. Commission Ruling

In Order No. 24,494, the Commission denied Nashua's motion, without prejudice, allowing Nashua to propound the requests during a later phase of this docket. The Commission made no ruling regarding privileges. We find no basis in Nashua's Motion for Rehearing to disturb our original determination on this issue.

Based upon the foregoing, it is hereby

ORDERED, that Nashua's Motion to Reconsider Order No. 24,487 is DENIED;
and it is

FURTHER ORDERED, that PWW's Motion to Reconsider or Rehear Order No. 24,488 is GRANTED to the extent the Order is clarified as stated herein and in all other respects is DENIED; and it is

FURTHER ORDERED, that PWW's Motion to Clarify, Reconsider or Rehear Order No. 24,489 is GRANTED to the extent the Order is clarified as stated herein and in all other respects is DENIED; and it is

FURTHER ORDERED, that Nashua's Motion to Reconsider and Clarify Order No. 24,494 is GRANTED to the extent it is clarified as stated herein and in all other respects is DENIED.

By order of the Public Utilities Commission of New Hampshire this second day
of December, 2005.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Lori A. Normand
Assistant Secretary