

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

City of Nashua: Petition for Valuation Pursuant to RSA 38:9

DW 04-048

OBJECTION TO MOTION TO COMPEL

NOW COMES the City of Nashua (“Nashua”) and objects to the Pennichuck Water Works, Inc., *Motion to Compel* filed on July 21, 2006, and in support of this objection, states as follows:

I. INTRODUCTION AND BACKGROUND

1. On July 21, 2006, the Pennichuck Water Works filed a *Motion to Compel* seeking in responses to discovery requests. As set forth herein, Pennichuck’s Motion to Compel fails to demonstrate that it is entitled to an order compelling the disclosure of additional responses. Nashua has, in each instance, provided reasonable responses to requests for information necessary to evaluate its petition and testimony. Pennichuck is simply using its Motion to Compel as an opportunity to argue its case based on information it hopes will poison the well of support for Nashua’s proposal.
2. Pennichuck cannot argue that it has been denied the opportunity to conduct adequate discovery in this proceeding. Since the Commission’s April 22, 2005 scheduling order in this proceeding, parties in this proceeding have served on Nashua over 651 data requests concerning its proposal.¹ Notwithstanding the

¹ See Exhibit A, Attached. Note that this Exhibit underestimates the number of data requests in that: compound data requests are counted as a single request, record requests from depositions are not counted, and requests to which supplemental responses were provided are counted as a single request.

volume and sweeping nature of these requests, Nashua has largely responded to these requests and provided relevant information where appropriate.

3. In addition, Nashua has made numerous person available for deposition by Pennichuck including Nashua officials,² its consultants,³ and its proposed contractors for operation⁴ and oversight⁵ of its water system. Nashua expects to make additional witnesses available as this case moves forward.⁶ As a result of each of these depositions, Nashua has provided additional, relevant documents based on record requests made by Pennichuck.
4. Nashua recognizes that, under the standard applicable to the data requests, it must provide additional information “necessary to evaluate its petition”⁷. However, a great number of the data requests for which Pennichuck seeks to compel responses have no bearing on the public interest and valuation determinations to be made by the Commission in this proceeding under RSA 38:9-11.
5. Pennichuck argues, however, that it is entitled to request any information “reasonably entitled to lead to the discovery of admissible evidence.”⁸ Essentially, Pennichuck argues that it need only state a reason as to why its data requests concerning, for example, any or all of the private and public water systems operated by Nashua’s contract operator, Veolia Water North America, in

² Mayor Bernard Streeter, Nashua Aldermen Brian S. McCarthy, Nashua Community Development Director Katherine Hersh, Nashua Chief Financial Officer Carol Anderson, and Nashua Assistant to the Mayor Mark Sousa).

³ George E. Sansoucy, P.E., Glenn Walker and Philip L. Munck (Nashua’s engineering, technical and valuation experts)

⁴ David Ford, P.E., Paul Noran, P.E., and Robert Burton.

⁵ Paul B. Doran, P.E. and John M. Henderson, P.E.

⁶ Depositions by Nashua of Don Correll, Steve Densberger, Chris Stala (SG Barr Devlin), and John Joyner have not been completed. Deposition by Pennichuck of Joseph Tomashosky and Philip Ashcroft (Veolia) are also expected to be completed.

⁷ Former Rule 204.04 and Interim Rule 204.04 applied at earlier stages in this proceeding and have not expired.

⁸ *Pennichuck Water Works, Inc.’s Motion to Compel*, Page 2, Para. 5.

order to compel Nashua to provide that information, regardless of its degree of relevance to this proceeding.

6. Conveniently for Pennichuck, this approach provides Pennichuck with the opportunity to request information that it likely will never present for the Commission's consideration. Given the short time frames provided for in the procedural schedule, and Pennichuck's willingness to spend \$5.7 million in legal and consulting fees related to this proceeding,⁹ Pennichuck's use of the procedural schedule, discovery requests, and motions to compel is simply a weapon in its arsenal used to deny Nashua the opportunity to present evidence to the Commission by attempting to overwhelm the City of Nashua and its legal counsel with endless paperwork.
7. Nashua raised this very issue at an early stage in this proceeding when Pennichuck submitted 173 compound data requests in the first round.¹⁰ In Order No. 24,485, the Commission denied Nashua's request to limit the number of data requests to 100 in each round noting that:

The requests thus far, though extensive, do not demonstrate an abuse of the process. Consequently, we do not find a basis to conclude that PWW is using discovery as a means to overtax Nashua's resources. Complex cases such as these are highly time- and resource-intensive and often yield burdensome discovery phases. Nevertheless, the bounds of discovery are subject to reasonable limitations. In that regard, we are mindful of the burdens and if we see signs of abuse of the process, either in the requests or responses, we will take appropriate action.

We remind the parties and Staff that the purpose of discovery is to develop and explore the facts at issue in a case. Discovery is not

⁹ See May 22, 2006 *Reply Testimony of Mayor Streeter et al*, Page 25-26, documenting Pennichuck's spending of \$5.7 million related to this proceeding while accusing Nashua of spending millions of taxpayer dollars related to this proceeding.

¹⁰ See Nashua's May 24, 2005 *Motion to Limit Data Requests*.

the time to argue policy or advocate for the final result but merely to seek and respond to factual matters that may lead to admissible evidence in determination of Nashua's petition to take property of PWW pursuant to RSA 38:9.

8. The Commission's reasoning in Order No. 24,485, in the abstract, is not unreasonable on its face. However, given that Pennichuck has pursued the details of Veolia water system throughout the United States, seeking to compel production of non-existent appendices to collective bargaining agreements in other jurisdictions, filed motions to deny Nashua the opportunity to file testimony such as that immediately prior to Nashua January 12, 2006 valuation and public interest testimony, the data requests and procedural motions take on entirely new significance.
9. Discovery in Commission proceedings is not, however, unlimited. Under New Hampshire's Administrative Procedures Act, the Commission has the authority to exclude evidence which is "irrelevant, immaterial or unduly repetitious". RSA 541-A:33, II. Furthermore, the Commission has previously warned the parties in this proceeding in two separate orders that it will "not allow [this proceeding] to be ensnared by issues that no doubt are important to the parties but have little bearing on the determinations the Commission must make".
10. Pennichuck relies on the Commission's decision in the *Petition to Modify Schiller Station*, Order No. 24,310 (2004), and the cases cited therein to support its position that the Commission will deny discovery requests only when it "can perceive of no circumstance in which the requested data will be relevant." However, the Commission's decision in *Schiller*, and the authorities cited therein, concerned challenges based on relevance. They did not involve or implicate the

Commission's authority under RSA 541-A:33, II to control the scope and orderly conduct of proceedings such as this one.

II. PENNICHUCK'S JUNE 28 AND JUNE 30, 2006 LETTERS OVERSTATE ITS CASE

11. Pennichuck's June 28 and June 30 letters overstate its case. Pennichuck's counsel states that while responses were due on June 22, 2006, she "did not receive a hard copy of Nashua's data responses until June 27 at 5:00 P.M." Pennichuck's counsel fails to mention, however, that a hard-copy of its Pennichuck's own responses were sent to Nashua's counsel in North Conway, New Hampshire and not received until June 26, 2006. While Nashua has made efforts to ensure that both hard and electronic copies are delivered in a timely manner, a difference of one day hardly merits mention in a letter.
12. Ironically, during a deposition on June 26, 2006, Pennichuck's counsel in fact remarked that Nashua's use of an FTP site to deliver its responses worked well and that Nashua had provided a lot of information in its responses. Obviously, these remarks were not intended to be an admission as to whether Nashua's responses were complete. However, they certainly make clear that, contrary to the case argued in the June 28, 2006 letter, Nashua's delivery of a hard copy of its responses has not prejudiced Pennichuck.
13. Particularly troubling, however, is the fact that counsel for Nashua had previously advised that he would be unavailable beginning on or near July 1 until approximately July 18 for medical reasons. Rather than seeking relief or modification of the procedural schedule, Pennichuck simply sent letter requests

on June 28 and June 30 that Nashua likely could not respond to then referenced those letters as the basis for its *Motion to Compel*.

III. SPECIFIC DATA REQUESTS

14. Pennichuck's data request No. 5-55 seeks to compel disclosure of an additional response to that request. Nashua provided a list of all systems using Veolia's "one and done" customer service by reference to its response to Pennichuck Data Request 3-1 (as supplemented on February 13, 2006). That response identifies those systems for which Veolia provides customer service. There is no basis for ordering Nashua to provide this information as it has already been provided in response to Data Requests 5-55 and 3-1.
15. Pennichuck's Data Request 5-56 seeks Veolia's customer service process charts. Those customer service charts are being provided this day. See Exhibit B.
16. Pennichuck moves to compel an additional response to its Data Requests Nos. 5-57 and 5-77 through 5-79 concerning the operation of a wastewater treatment plant by Professional Services Group in Rockland Massachusetts. On January 27, 2006, Nashua objected to the production of these documents in response to Data Requests 3-7 and 5-57, *but noted their availability on the web site of the United States District Court*. See Nashua's Response to 3-7. Pennichuck complains that it is "difficult" to obtain those documents, notwithstanding its ability to download them using PACER. Counsel for Nashua has viewed some of the documents and they are neither difficult to obtain nor relevant to Nashua's petition as set forth in Nashua's objection and response to Data Request No. 3-7 and other requests. For

- Pennichuck to claim six months later that Nashua's objection has made it difficult to obtain this information is simply untrue.
17. Pennichuck Data Request 5-60 was responded to on July 20, 2006. See Exhibit C.
 18. Pennichuck seeks to compel an additional response to its Data Request 5-63. Nashua's response explained that Reliability Centered Maintenance, described in Section 6 of Veolia's technical proposal previously provided, is one of several approaches to comprehensive asset management. The response explain the basis for the terms as used in Nashua's testimony.
 19. Nashua response to Pennichuck's Data Request 5-81 and 5-82 are complete. The performance standards contained in Veolia's contract with Nashua are set forth in Article V of the OM&M Agreement and are self-explanatory. Pennichuck's request in 5-81 to describe "all performance standards of any kind" contained in the Indianapolis contract is little more than a request for an explanation of the entirety of both contracts and serves little purpose other than to occupy Nashua's consultants with details that have no relation to its operation of Nashua's water system.
 20. Nashua duly objected to Pennichuck's Data Request No. 5-88 concerning whether Veolia plans to purchase other water systems in New Hampshire. Even if it did have such plans, they would be completely irrelevant to this proceeding under RSA 38, and would be subject to review and approval by the Commission under its authority over public utilities under RSA 362 et seq. No such approval is sought, referred to, or relied on as part of this proceeding.

21. Pennichuck's Motion to Compel a response to Data Request No. 5-89 violates the agreement reached resolving Pennichuck's prior Motion to Compel.

Pennichuck's prior Motion sought all documents related to what it alleges were problems or malfeasance in Indianapolis. An agreement was reached that Nashua would respond to requests for relevant information subject to a protective order.

Pennichuck's Data Request No. 5-89, however, simply ignores the fact that the parties agreed to limit this data request to focus on limited documents and "all documents and information".

22. As noted in Pennichuck's *Motion to Compel*, the Exhibit C to the Collective Bargaining Agreement already provided to Pennichuck in response to Request No. 5-90 does not exist. Nashua cannot provide this document because it does not exist. See Exhibit C.

23. Nashua provided a copy of the collective bargaining agreement for the Indianapolis Water System in response to Pennichuck Data Request No. 5-91. The reference to agreement(s) in the plural, simply reflects the fact that counsel for Nashua did not know at the time of the agreement resolving Pennichuck's prior *Motion to Compel*, whether there was more than one collective bargaining organization. Pennichuck states that prior versions (if there are any) are "important for comparison purposes with the current agreement." However, Nashua fails to see how this comparison would be relevant even under a liberal construction of the discovery rule. That Pennichuck may want to compare one Indianapolis document to another Indianapolis document has no bearing on the

- public interest issues to be decided by the Commission in this proceeding concerning the water system in Nashua.
24. With respect to Data Request No. 5-13, Pennichuck states that Nashua's objection is based on the fact that the information is available elsewhere. It is in fact available from the Department of Revenue's web site.¹¹ Nashua further objected that the information is not necessary to evaluate Nashua's petition, within the meaning of former Rule Puc 204.04. Whether state and local school taxes based on property values, changes in state funding and other factors, has no relevance to the public interest and valuation issues in this proceeding. That Pennichuck desires to compare it to Pennichuck's rates does not make the comparison relevant for the purposes of RSA 38, or necessary to evaluation Nashua's petition.
25. Nashua's answer to Data Request 5-18 and 5-31 are complete. The terms sought by Nashua have not been further defined.
26. Pennichuck seeks to compel responses to Data Requests No. 5-40 & 5-150 concerning information protected by "attorney client and other privileges" but did not provide a privilege log. In prior rounds of discovery, Pennichuck has asserted similar privileges and without providing a privilege log. Furthermore, in response to the first round of data request, Nashua prepared a detailed privilege log concerning hundreds of documents. Pennichuck on the other hand, produced a log identifying only 3 or 4 documents that was so vague that it made no identification of documents whatsoever. See Exhibit D.
27. Pennichuck also claims that Nashua did not respond to its Data Request No. 5-43 regarding "the number of years" that Nashua plans to make certain capital

¹¹ http://www.nh.gov/revenue/property_tax/by_year.htm

expenditures shown on the January 12, 2006 GES Exhibits 4 and 5. Those exhibits, however, cover a period from 2007 to 2028, and the expenditures are as noted on those Exhibits.

28. Nashua's response to Pennichuck Data Request No. 5-99 is self-explanatory. Nashua believes that it has fully and honestly responded given the uncertainty inherent in the question itself.
29. Pennichuck makes a number of passing statements concerning additional data requests to which it alleges Nashua has not responded, or repeats allegations made above. Pennichuck does not attach these responses with its motion.

V. CONCLUSION

30. Pennichuck Motion to Compel fails to present a compelling case that Nashua has not provided appropriate discovery. As set forth herein, Nashua has made every effort to provide relevant responses given the breadth of information sought by Pennichuck and the limited time available under the procedural schedule.
31. The volume of discovery requests, depositions, testimony, motions and other requirements set forth in the procedural schedule have turned the procedural schedule into a substantive weapon. Pennichuck has effectively used the nearly \$5.7 million it has already spent on this proceeding as a means to ensure that Nashua and the Commission focus on largely irrelevant details in the hopes that Nashua will be unable to present relevant information for the Commission's consideration, not least of which being Capstone Testimony on September 15, 2006 and Pre-Hearing Briefs on December 15, 2006.

32. The Commission should deny Pennichuck's invitation to ensnare this proceeding in issues which ultimately have no bearing on the public interest and valuation issues to be decided under RSA 38.
33. Nashua fully intends to file a motion seeking to continue the procedural schedule in order to prevent this proceeding from becoming one wherein the party that spends the most, or files the greatest volume of paper emerges as the victor. In denying Pennichuck's Motion to Compel, the Commission can contribute much toward that goal.

WHEREFORE, Nashua respectfully requests that the Commission:

- A. Deny Pennichuck's Motion to Compel; and
- D. Grant such other relief as justice may require.

Respectfully submitted,

CITY OF NASHUA
By Its Attorneys
UPTON & HATFIELD, LLP

Date: July ____, 2006

By: _____
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229 Main Street
Nashua, NH 03061-2019

CERTIFICATION

I hereby certify that a copy of the foregoing was this day forwarded to all persons on the Commission's official service list in the above proceedings.

Date: July ____, 2006

Justin C. Richardson, Esquire

EXHIBIT A

Date	Subject	Data Requests to Nashua	Requesting Party
May 5, 2005	Technical, financial and managerial capabilities and public interest - 1st round.	172	Pennichuck
June 24, 2005	Technical, financial and managerial capabilities and public interest - 2nd round.	35	Pennichuck
June 24, 2005	Technical, financial and managerial capabilities and public interest - 2nd round.	3	Merrimack River Watershed Council
July 8, 2005	Public Interest	20	Staff
January 17, 2006	Rolling data requests on January 12, 2006 testimony regarding third- party contractors.	25	Pennichuck
January 26, 2006	Rolling data requests on January 12, 2006 testimony regarding third- party contractors; 1st Round Data Requests on January 12, 2006 testimony.	61	Pennichuck
February 1, 2006	Rolling data requests on January 12, 2006 testimony regarding third- party contractors.	18	Pennichuck
February 7, 2006	January 12, 2006 Testimony - CONFIDENTIAL	21	Staff

EXHIBIT A

February 7, 2006	January 12, 2006 Testimony - NON- CONFIDENTIAL	6	Staff
February 27, 2006	2nd Round Data Requests on January 12, 2006 testimony.	11	Pennichuck
February 27, 2006	2nd Round Data Requests on January 12, 2006 testimony.	100	Staff
June 1, 2006	Data Requests concerning May 22, 2006 Testimony.	155	Pennichuck
June 1, 2006	Data Requests concerning May 22, 2006 Testimony.	24	Staff
TOTAL		651	

EXHIBIT B

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Please respond to the Portsmouth office

July 31, 2006

VIA Electronic & First Class Mail

Sarah Knowlton, Esq.
McLane, Graf, Raulerson & Middleton
100 Market Street, Suite 301
Portsmouth, NH 03802-0459

Re: City of Nashua, Petition for Valuation
NHPUC Docket No. DW 04-048

Dear Sarah:

Enclosed please find:

Customer Service Process Charts in response to PWW 5-56 referenced in
Nashua's Objection to Motion to Compel.

If you have any questions, please contact me.

Very truly yours,

Justin C. Richardson
jrichardson@upton-hatfield.com

Enclosure(s)

Justin Richardson

From: Rob Upton
Sent: Friday, July 14, 2006 7:38 AM
To: 'sarah.knowlton@mclane.com'
Cc: Justin Richardson
Subject: Discovery

Attachments: Code%20of%20Business%20Conduct%20%20(rev.%2005.06).pdf



Code%20of%20Bu
siness%20Conduct..

Sarah

I have confirmed that there is no Appendix C to the Indy CBA. Attached is the Veolia Code of Conduct.

Rob

Justin Richardson

From: Rob Upton
Sent: Thursday, July 20, 2006 12:22 PM
To: 'sarah.knowlton@mclane.com'
Cc: Justin Richardson; 'robert.arendell@veoliawaterna.com'
Subject: Discovery

Attachments: Corvi_letter.pdf; Customer Complaints-2004.xls; Customer Complaints-2005.xls; Customer Complaints-2006.xls



Corvi_letter.pdf (27 KB)



Customer Complaints-2004.xls



Customer Complaints-2005.xls



Customer Complaints-2006.xls (

Sarah

Attached are documents responsive to 5-59 and 5-83 that should shorten your motion.
Rob

EXHIBIT D

**McLane, Graf,
Raulerson &
Middleton**

Professional Association

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June 27, 2005

By Electronic and First Class Mail

Robert Upton, II
Upton & Hatfield, LLP
23 Seavey Street – P.O. Box 2242
North Conway, NH 03860

**Re: DW 04-048 – Nashua's Response to Pennichuck's First Set of Data Requests
on Public Interest**

Dear Rob:

I enclose a copy of Pennichuck Water Works, Inc. and Pennichuck Corporation's privilege log in the above captioned matter. I am copying Marcia Thunberg on this as well as Staff also visited the data room. We will place a copy of the log in the data room for future reference. If you have any further questions, please let me know.

Very truly yours,

Sarah B. Knowlton

Enclosure

cc: Marcia Thunberg, Esq.
Donald L. Correll



EXHIBIT D**DW-04-048****PRIVILEGE LOG**
FOR PENNICHUCK WATER WORKS, INC. AND PENNICHUCK CORPORATION

DATE	AUTHOR	RECIPIENT	SUBJECT	PRIVILEGE
08/24/04	McLane, Graf, Raulerson & Middleton, P.A.	Pennichuck Corporation	Email regarding Third Contract Draft Provisions with draft contract attached	Attorney Client; Work Product
05/13/04	McLane, Graf, Raulerson & Middleton, P.A.	Pennichuck Corporation	Email regarding AB/PWW Special Contract with draft contract attached	Attorney Client; Work Product
7/29/03	Pennichuck Corporation	McLane, Graf, Raulerson & Middleton, P.A.	Preliminary Valuation Considerations; Confidential, Attorney/Client Work Product	Attorney Client; Work Product
March- April 2003	Consultant	McLane, Graf, Raulerson & Middleton, P.A.	Pennichuck Corporation - Strategic Considerations	Work Product
02/06/02	Pennichuck Corporation	Gottesman & Hollis	Correspondence regarding Milford Contract with contract attached	Attorney Client; Work Product