

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

**Order Denying Motion for Summary Judgment and Motion to Bar Testimony
and Granting in Part Motion for Extension of Procedural Schedule**

ORDER NO. 24,567

December 22, 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 and Pittsfield Aqueduct Company, pursuant to N.H. RSA 38:9. The three 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 Pennichuck East Utility or Pittsfield Aqueduct Company.

The case is now in the discovery stage and is scheduled for hearing in January 2007. The procedural schedule set dates for testimony and ensuing discovery on the public interest portion of Nashua's case separate from the valuation inquiry. PWW is due to file testimony on its valuation and its assessment of Nashua's technical, financial, and managerial capability and public interest on January 12, 2006. Also due that date is Nashua's testimony on "valuation and public interest issues dependent upon valuation." Capstone testimony joining the public interest and valuation issues is due from all parties by September 15, 2006; rebuttal on the capstone testimony is due from all parties by November 14, 2006. *See* Letter of Executive Director Debra A. Howland to the Parties and Staff (October 3, 2005).

On September 6, 2005, PWW filed a Motion for Summary Judgment (Motion), asking the Commission to find that Nashua has failed to submit testimony demonstrating its managerial or technical capabilities to operate the water system.

The Commission, by secretarial letter dated September 14, 2005, granted all interested parties until October 6, 2005, to respond to PWW's Motion. On October 6, 2005, Nashua filed an Objection to PWW's Motion for Summary Judgment (Objection).

On October 18, 2005, PWW filed a Motion for Leave to Respond to City of Nashua's Objection to Motion for Summary Judgment and PWW's Reply to the Objection, to which Nashua responded on October 27, 2005, with an Objection to PWW Inc.'s Motion for Leave to Respond.

II. POSITIONS OF THE PARTIES

A. PWW

PWW states that Nashua must obtain a franchise for service beyond Nashua's borders, pursuant to RSA 374:26, and that Nashua bears the burden of proof that it possesses the capability to operate the water system to obtain such a franchise as well as to satisfy one aspect of the public interest requirement of RSA 38:10. The procedural schedule agreed to by the Parties and Staff set deadlines for submission of testimony regarding Nashua's technical and managerial competence, as part of the public interest portion of the case. Under that schedule, testimony on those issues was to have been prefiled by November 22, 2004. Nashua has stated an intention to operate the water system by means of two contracts with third party vendors but, according to PWW, has provided no information as to those "unknown third parties." PWW concludes, therefore, that it is impossible for Nashua to meet its burden of proof and the

Commission should grant summary judgment dismissing the taking petition.

PWW notes in particular the customers of PWW who live outside Nashua's municipal bounds, arguing that Nashua has a "cavalier attitude" towards them. PWW further argues that the rebuttable presumption of RSA 38:3 that a taking is in the public interest extends only to the inhabitants of Nashua and cannot be read to extend to the 27,000 PWW customers residing in other nearby towns. PWW also argues that Nashua should not be allowed to file testimony on these issues as part of the capstone or the rebuttal testimony, in that it has had more than a year to develop its case and should not be allowed to use those responsive filing dates to make out its case in chief. PWW asserts, therefore, that there is no genuine issue of material fact requiring a hearing and requests summary judgment dismissing Nashua's petition in its entirety.

PWW did not seek concurrence of the parties to the Motion, given the relief requested. Finally, PWW requests oral argument on the Motion.

B. Nashua

Nashua's Objection argues first that PWW's Motion is not timely, in that the Commission had set a date of January 31, 2005, for PWW to file a motion for summary judgment, which it failed to do. Second, Nashua asserts that it has filed "extensive information" regarding its technical and managerial qualifications to operate the system and that PWW's Motion is an attempt to prevent the Commission from receiving evidence about the qualifications of the third party contractors Nashua is now soliciting. Finally, Nashua argues that PWW is not entitled to summary judgment as there is a rebuttable presumption that the taking petition is in the public interest, there is no requirement of a franchise and there is ample time to file testimony on the qualifications of its contractors under the current schedule.

III. COMMISSION ANALYSIS

We begin with four procedural matters. First, PWW did not seek concurrence in its Motion, as required by N. H. Admin. Rules, Puc 203.04(e). The purpose of the rule is to make clear to the Commission whether there is opposition to a requested finding, in which case the Commission will refrain from action to allow other parties to respond. Because, as PWW notes, the Motion is dispositive, attempts to obtain concurrence from Nashua would not have been a meaningful exercise, as it was clear that Nashua and possibly others would respond in opposition. Under the circumstances, we waive the requirement of Puc 203.04(e) in this instance.

Second, other than objections to motions, our rules do not authorize responsive pleadings such as were filed by PWW and Nashua. We find no basis to authorize such pleadings in this matter and deny the requests for such filings. Consequently, we have not considered the October 18 and October 27, 2005 submissions of PWW and Nashua in our deliberations.

Third, we reject Nashua's assertion that PWW's Motion was not timely filed. While it is true that a January 31, 2005 deadline had been set for PWW to file a motion for summary judgment, that deadline was in the context of a summary judgment motion PWW had stated it would file regarding the unconnected satellite systems within PWW. PWW did not make such a filing. Nashua seeks to transform the deadline for that particular motion for summary judgment into a deadline for any motion for summary judgment, a conclusion we do not accept. Our rules do not limit when a motion for summary judgment can be filed and PWW's decision not to file for summary judgment on the issue of the interconnectedness of the system does not constitute a waiver of the right to seek summary judgment on the grounds laid

out in the instant Motion.

Finally, we will not grant PWW's request for oral argument. We find the Motion and Objection to be an adequate basis on which to rule.

Inasmuch as the issue underpins much of the argument before us, we next address whether a franchise is required for Nashua in the event a taking of PWW is found to be in the public interest. We agree with PWW that a franchise is required for service beyond Nashua's municipal borders, pursuant to RSA 374:26 and 362:4,III-a (a). We do not agree with Nashua's assertion that such a franchise requirement is inconsistent with the rebuttable presumption of RSA 38:3. The rebuttable presumption extends only to the public interest analysis for Nashua itself, as only voters of Nashua had a voice in the vote that gave rise to that presumption. For service beyond Nashua's municipal bounds, Nashua must obtain a franchise.

We move now to the heart of the Motion and Objection thereto. Nashua has stated in testimony, pleadings and discovery that it intends to enter into a contract for the management of the water system and a second contract for oversight of that management. That being the case, the issue underlying the Motion for Summary Judgment is whether Nashua should have had those contractors identified and under contract by November of 2004, more than two years before a determination whether the taking will be authorized.

We find it unreasonable to conclude that Nashua should have had a fully-developed plan, including executed contracts for third-party operation of the water system, by November 22, 2004. Hence, we will not dismiss the taking petition on the basis that third party contractors have not yet been identified or their qualifications laid out in prefiled testimony. Among other things, this result is reasonable inasmuch as there was no distinction drawn at the

time Order No. 24,379 was issued between Nashua operating the system itself and operating the system through contracts with third parties, which is an important distinction. It would strain credulity to expect, in the context of a statutory scheme that allows the petitioner to forestall a final determination on whether to proceed with a taking until after valuation is determined, and a procedural schedule of the type employed here, that Nashua should have had final contracts developed so early in the process. Furthermore, we find the testimony filed on November 22, 2004, to have been sufficient to move forward in this proceeding.

If Nashua were intending to operate the system itself, there might be an argument for considering summary judgment, but that circumstance does not apply. We disagree with PWW's assertion, however, that, as a matter of law, there exists no issue of material fact as to the qualifications of Nashua to operate the system. The record is not completely devoid of evidence on that issue, though admittedly it is far from fully-developed.

Arguably, we could accept testimony on the qualifications of the third party contractors at the time of the capstone testimony, which would still allow the opportunity for discovery and rebuttal on these issues. However, Nashua has indicated that it is prepared to file testimony on these issues by January 12, 2006. We find that such filing will promote the orderly and efficient conduct of this proceeding and that there will be adequate opportunity for PWW to conduct discovery on these issues. Moreover, we will revise the procedural schedule such that testimony from PWW on these issues shall be due February 27, 2006.

We conclude that there is no prejudice to any party in proceeding in this manner. Furthermore, we find it logically consistent to segregate the broader issue of whether the taking is in the public interest from the more narrow issue of whether Nashua, through contractual

arrangements with third parties, can demonstrate the technical, financial and managerial ability to operate a public utility.

Finally, we note that on December 12, 2005, PWW filed a Motion to Bar Late Filed Testimony by Nashua and for Extension of Procedural Schedule and Nashua objected on December 16, 2005; Claire McHugh also objected. Our decision today renders moot the Motion to Bar and it is therefore, denied. As for the request to extend the procedural schedule, we grant the request in part as described below.

PWW argues for an extension inasmuch as it has not had the opportunity to conduct depositions regarding Nashua's ability to perform billing and collection services or conduct discovery regarding Nashua's intent to complete the eminent domain process. We disagree that these issues are "critical to PWW's ability to respond to Nashua's public interest filing." However, we consider the billing and collections issue related to the issues of technical, financial, and managerial capability, regarding which Nashua, as determined above, will be filing testimony on January 12, 2006. Consequently, PWW may pursue depositions in order to file relevant testimony on February 27, 2006. As for the issue of Nashua's intent to carry through with a taking, PWW may pursue discovery for its testimony on that issue to be filed on May 22, 2006. We will separately issue by Secretarial Letter a revised procedural schedule consistent with the various findings above,

Based upon the foregoing, it is hereby

ORDERED, that the request by Pennichuck Water Works, Inc. for waiver of N.H. Admin. Rules, Puc 203.04(e) requiring that it seek concurrence to its Motion for Summary Judgment is GRANTED; and it is

FURTHER ORDERED, that the requests of Pennichuck Water Works, Inc. and the City of Nashua for responsive pleadings are DENIED; and it is

FURTHER ORDERED, that the request of Pennichuck Water Works, Inc. for oral argument is DENIED; and it is

FURTHER ORDERED, that Pennichuck Water Works, Inc.'s Motion for Summary Judgment is DENIED; and it is

FURTHER ORDERED, that the Motion to Bar Late Filed Testimony is DENIED; and it is

FURTHER ORDERED, that the Motion for Extension of Procedural Schedule is GRANTED IN PART.

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

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary