

DW 06-073

PENNICHUCK WATER WORKS, INC.

Petition for Permanent and Temporary Rate Increase

Order on Motion to Compel Discovery

ORDER NO. 24,725

January 12, 2007

I. BACKGROUND

Pending in this rate proceeding before the New Hampshire Public Utilities Commission is a motion to compel petitioner Pennichuck Water Works, Inc. (PWW) to furnish a response to a discovery request tendered by intervenor City of Nashua. Pursuant to the applicable procedural schedule, discovery requests to PWW were due on December 15, 2006, responses to these requests were due no later than December 29, 2006, and pre-filed written direct testimony from intervenors, including Nashua, are due on February 23, 2007. Following discovery on that testimony, the merits hearing is scheduled for April 3-7, 2007.

At issue is a data request propounded by Nashua to PWW on September 14, 2006. The only such data request made by the City, it reads:

In the Commission's Order No. 22,883 (1998) approving the Pennichuck Water Works request for a permanent rate increase, the Commission observed that "Pennichuck stated that while it would not keep full books on each system, it would record and make available all costs on a system by system basis." The Commission further noted that:

Although we are approving the rate consolidation proposal, we share the concerns of [Staff witness Mark] Naylor that there is a risk that there will be inadequate information tracked on a community system basis and, as a result, a troubled system, or over-investment, could escape the scrutiny of management and regulators. *We accept the commitment of Pennichuck to record costs on a system specific basis.*

a. Please explain what system specific or system by system cost data the company maintains. Please provide that data (including electronic format, if available). This request covers the period subsequent to Order No. 22,883, up to and including the 2005 test year in this proceeding.

b. Please provide all reports or analyses related to that data. This request covers the period subsequent to Order No. 22,883, up to and including the 2005 test year in this proceeding.

Exh. A to Nashua Motion at 3-4 (footnotes omitted, emphasis in original). PWW sent Nashua a written objection to the discovery request on September 22, 2006. Consistent with this objection, the then-applicable deadline of September 28, 2006 for discovery responses from PWW passed without the Company furnishing a substantive response to the data request.

Nashua submitted its motion to compel discovery on October 11, 2006. PWW filed a written opposition to the motion on October 20, 2006.

II. POSITIONS OF THE PARTIES

A. City of Nashua

Nashua contends that its data request arises out of PWW's "prior commitment to the Commission to maintain information related its cost of service for its satellite systems." Nashua Motion at 1. By "satellite systems," Nashua refers to freestanding water systems owned and operated by PWW that are not located in Nashua nor interconnected with the PWW water system serving Nashua. According to Nashua, the Commission obtained the referenced commitment from PWW in response to concerns about the use of "core" rates – i.e., PWW rates applicable to its water system serving Nashua – for customers of the satellite systems.

According to Nashua, it is entitled to the requested discovery to allow the City to protect its interest in ensuring that the rate design and allocation of the PWW revenue requirement to its customers is reasonable as required by RSA 378. Nashua points out that when the Commission

exercises its authority under that statute, its concern is not limited to considering whether the proposed increase in the Company's overall revenue requirement is just and reasonable. Rather, Nashua notes, the Commission must also concern itself with the question of whether the proposed rate design – i.e., the method of apportioning the Company's revenue requirement among the various classes of customers – meets the statutory standard.

The Nashua motion makes reference to Docket No. DW 04-048, in which the City is seeking to municipalize PWW pursuant to RSA 38. The extensive merits hearing in that complex proceeding is currently in progress, scheduled to conclude in early February. According to Nashua, PWW's objection to its discovery request here is grounded in arguments to the effect that the City is using the discovery process in the rate case to supplement its discovery in DW 04-048, the discovery phase of which has obviously expired. According to Nashua, information concerning PWW's proposed rate increase, in connection with DW 04-048 or otherwise, was "largely unavailable" until PWW filed its rate case in this proceeding. Nashua Motion at 3. According to Nashua, it is entitled to investigate through the discovery process in the rate case the question of whether the cost of providing service to the satellite systems is being adequately recovered (and thus not being subsidized by customers in Nashua) using PWW's proposed rate design.

B. Pennichuck Water Works

In support of its objection to the motion, PWW makes three arguments. First, PWW contends that Nashua's discovery motion was untimely. PWW states that N.H. Code Admin. Rules Puc 203.09 requires that motions to compel discovery be made within 15 business days of receiving the applicable response or objection, or the deadline for providing the response, whichever is sooner. According to PWW, since Nashua received PWW's objection on

September 22, 2006, Nashua's motion was due on September 28, 2006, the then-applicable deadline for providing responses. Nashua did not file its motion until nearly two weeks later.

Second, PWW contends that the information Nashua seeks is not relevant. PWW characterizes Nashua's stated need for the information as "incomprehensible," alleging that the request merely "demonstrates that Nashua's stated reasons for seeking the requested data are really a subterfuge for accomplishing an end run on the discovery deadlines in the pending eminent domain case." PWW Objection at 2. PWW points out that it has not acquired a community water system since 2001 and, thus, no acquisitions are included in the 2005 test year used to figure the Company's operating expenses for purposes of its rate request. PWW also notes that it is proposing to maintain the rate design previously approved by the Commission, thus making the cost of serving particular satellite systems not at issue in the instant case.

PWW dismisses as a "last ditch effort" Nashua's reference to the utility's commitment to maintaining system-specific information. According to PWW, although it does indeed maintain information about the costs associated with operating the community water systems, this information is neither relevant nor likely to lead to the discovery of information that is relevant to the rate case.¹

Finally, PWW contends that it would be unduly burdensome for PWW to produce the information. PWW states that it does maintain information on the cost associated with operating its community water systems but that only some of the information is available electronically, with the rest available only in hard copy. According to PWW, "it would be extremely burdensome for the company to sort through potentially hundreds of boxes of records that have

¹ To its opposition, PWW attached an exhibit setting forth what PWW describes as "the system-specific cost data it maintained for the 2005 test year." PWW objection at 3. According to PWW, it continues to maintain its objection to the discovery motion in all other respects.

been archived to produce work orders and invoices which reflect expenses for which the company seeks no recovery in this case.” PWW Objection at 4.

III. COMMISSION ANALYSIS

We begin our analysis with PWW’s contention that the Nashua motion to compel discovery is untimely. Our applicable rule, Puc 203.09(i), provides that a motion to compel discovery is timely if “made within 15 business days of receiving the applicable response or objection, or the deadline for providing the response, whichever is sooner.” Nashua received the PWW objection on September 22, 2006. According to PWW, the deadline for Nashua’s motion to compel was September 28, 2006 – PWW’s original deadline for providing its substantive response.

This is an incorrect interpretation of Puc 203.09(i). The intention of the rule is to provide a party 15 business days to consider and submit a motion to compel discovery, commencing on the date the party knows or should know it has a reason to make such a motion. If the deadline for a response to a discovery request passes with no response or objection being tendered, the requestor knows or should know of the discovery problem, even if it has received no response or objection. The period for making discovery motions never ends on the original deadline for providing the discovery response but, rather, 15 business days *after* that original deadline if the deadline comes before the receipt of a response or objection. Nashua had 15 business days from September 22, 2006– i.e., until October 13, 2006 – to make its motion. A motion to compel discovery made on October 11, 2006 was therefore timely.

Next we consider the disputants’ disagreement about whether the discovery request was substantively appropriate. The standard the Commission uses, applying by analogy the standard applicable to civil litigation in Superior Court, requires a party seeking to compel discovery “to

show that the information being sought in discovery is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence.” *City of Nashua*, Order No. 24,681 (October 23, 2006), slip op. at 2 (citations omitted) (noting generally that New Hampshire law “favors liberal discovery”).

The motion papers demonstrate that Nashua’s discovery request is either relevant to the rate case or reasonably calculated to lead to the discovery of admissible evidence. As Nashua points out, the question of how PWW allocates its revenue requirement, as between its “core” system in Nashua and the so-called “satellite” systems outside the municipality, is relevant to whether the proposed rates are just and reasonable pursuant to RSA 378. The City is entitled to discover whether any costs of the satellite systems are being recovered from Nashua customers using the core system. It is no answer, as PWW contends, that this subject is irrelevant because the utility is not proposing to change its previously approved rate design and the utility has not acquired any new satellite systems during the test year. In the context of a full rate case, the question of whether the existing rate design, applied to a static set of water systems, remains just and reasonable in light of current circumstances is relevant and the City is entitled to propose changes to the rate design. Obviously, data related to the costs of the satellite systems would be relevant to this inquiry.

Equally unavailing is the PWW contention that the discovery request here is merely a ruse to obtain additional and untimely discovery for use in the RSA 38 proceeding. In assessing a motion to compel discovery, we do not inquire into the requestor’s underlying motivation. Rather, our inquiry is limited to issues related to relevance or potential relevance in the instant case. We thus need not consider PWW’s contentions regarding Nashua’s purpose, absent

allegations that the purpose is “annoyance, embarrassment, oppression, or undue burden or expense.” Superior Court Rule 35(c) (applying this standard in civil proceedings).

An allegation of undue burden or expense is the essence of PWW’s final argument in opposition to the discovery motion. PWW’s suggestion that it would be unduly burdensome to produce the requested information is (1) limited to that portion of the requested data that exists in paper rather than electronic form, and (2) premised on the notion that PWW should not be required “to sort through *potentially* hundreds of boxes of records.” PWW Objection at 3. The use of the word “potentially” is an indication that PWW’s allegation of undue burden is merely speculative. As such, it is not a basis for avoiding otherwise lawful discovery.

At the conclusion of its motion, Nashua asks that we not only compel PWW to produce the requested discovery but that we afford Nashua “a reasonable opportunity for follow-up requests as provided by the procedural schedule.” Nashua Motion at 4. The question of whether such requests are appropriate is premature prior to Nashua’s receipt of the Company’s discovery response. We therefore decline to address this aspect of the City’s motion at this time.

Based upon the foregoing, it is hereby

ORDERED, that the City of Nashua’s motion to compel Pennichuck Water works to produce certain information in discovery is hereby **GRANTED**, and it is

FURTHER ORDERED, that Pennichuck Water Works is directed to produce the requested discovery within ten calendar days of this order.

By order of the Public Utilities Commission of New Hampshire this twelfth day of
January, 2007.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

ChristiAne G. Mason
Assistant Executive Director & Secretary