

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

City of Nashua: Taking Of Pennichuck Water Works, Inc.

Docket No. DW 04-048

**MOTION TO COMPEL THE CITY OF NASHUA
TO RESPOND TO PENNICHUCK WATER WORKS, INC.'S
DATA AND DOCUMENT REQUESTS**

Pennichuck Water Works, Inc. ("PWW") respectfully requests that the Commission compel the City of Nashua ("Nashua") to respond to PWW's Data Requests and related document requests in the above-captioned proceeding. In support of its motion, PWW states as follows:

1. PWW propounded its third set of Data Requests to Nashua on January 17, 2006, pursuant to Commission Order 24,457 approving procedural schedule in this docket. Nashua submitted its objections and supplemental objections to the Data Requests on January 27, 2006. During several depositions, PWW made follow-up document requests relating to the subject matter of earlier data requests. Nashua has refused to produce certain of these documents as well. Copies of those portions of Nashua's objections (with the text of the applicable data request) are attached as Exhibit 1. The related deposition document requests made to Nashua that are the subject of this motion and Nashua's objections are attached as Exhibit 2.

Background Concerning Scope of Data Requests

2. Nashua has submitted objections to a number of the third set of data requests submitted by PWW relating to the proposed Nashua contracts with third parties to operate the PWW water systems. In addition, Nashua has failed to produce a number of related documents

requested by PWW arising from depositions conducted concerning those proposed third party contracts.

3. These data requests concerning Nashua's contractors followed immediately on the heels of Commission Order No. 24,567 dated December 22, 2005, opening up discovery on that issue. That order established a very a limited period of time to conduct discovery prior to a new deadline of February 27, 2006 for PWW to file testimony concerning those contractors. Because of Nashua's objections and incomplete responses to numerous data requests and related deposition requests, in order for PWW to meet the testimony deadline its testimony was of necessity incomplete.

4. The standard for discovery in Commission proceedings is broad and extends to information that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. Re Investigation into Whether Certain Calls are Local, 86 NH PUC 167 (2001). The Commission recently reaffirmed that standard in this case in its Order No. 24,488 (July 8, 2005) ("...the information being sought is or is likely to lead to relevant evidence that would be admissible in the proceeding."). The Commission will typically deny discovery requests only when it "can perceive of no circumstance in which the requested data will be relevant." Lower Bartlett Water Precinct, 85 NH PUC 371 (2000); Accord, Petition for Authority to Modify Schiller Station, 2004 NH PUC LEXIS 38, *7 (2004). Clearly, a party in a legal proceeding in New Hampshire is entitled to "be fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponents and whether the evidence is in the possession of his opponent or someone else." Scontsas v. Citizens Insurance Co., 109 N.H. 386, 388 (1969). The Commission has recognized the "liberality of the applicable discovery rule" in utility

condemnation cases. See Re Public Service of New Hampshire, 86 NH PUC 730 (2001) (Commission ordered PSNH to produce a copy of a power supply agreement with a bankrupt paper mill over objection that the data request was not relevant to the public interest inquiry concerning the proposed taking of the Brodie Smith Hydro-Electric Station).

5. With that background in mind, PWW will address in groupings Nashua's objections as well as the documents it refuses to produce in response to requests made at depositions, explaining why the requests are appropriate, and the need for a Commission order compelling the production of the requested information.

I. REQUESTS RELATED TO VEOLIA'S BACKGROUND

6. As the Commission has previously noted, Nashua's public interest case relies on the City's proposal to contract out to third parties the operation and oversight of the PWW water systems. The two lead contractors proposed by Nashua are Veolia and R.W. Beck, and therefore PWW's discovery relating to Nashua's February 27 contractor testimony has focused upon them. With regard to Veolia, Nashua has refused to produce information with respect to three critical areas: Veolia's operational problems in Indianapolis (the single largest drinking water system operated by Veolia in the United States), Veolia's labor contracts in Indianapolis, and lawsuits against Veolia relating to contract operations.

a) **Indianapolis Operational Problems**

7. Paw's Data Request Number 3-6 requested information with regard to problems or complaints or claims of malfeasance encountered in Veolia's operation of the Indianapolis, Indiana water system. Both Veolia and Nashua tout Indianapolis as a successful model for the sort of public-private partnership they wish to create following the condemnation of PWW's assets. Other discovery has shown that Indianapolis is indeed the only Veolia contract to operate

an entire water system (i.e. supply, treatment and distribution) of any size in the United States. Still, Nashua objected to this data request by claiming that it was vague and failed to identify the information sought with specificity. Having first delayed responding by asserting that objection, Nashua later responded that no problems or malfeasance have taken place with respect to Veolia's operation, but indicated that a subpoena was issued from the United States Attorney's Office concerning its Indianapolis operations. See Exhibit 1.

8. This Data Request is specific and limited in scope. The Request relates specifically to Veolia's operations of the Indianapolis water system, which Nashua itself highlighted in its January 10, 2006 prefiled testimony filed by Philip G. Ashcroft et al. This information is clearly relevant to these proceedings, since it concerns Veolia's qualifications to operate a water system. Without discovery on this issue, not only PWW, but other parties, the Staff, and the potentially the Commission will have incomplete information to assess Veolia's capabilities to operate a water system. Moreover, the information sought may lead to the discovery of admissible evidence, since it will develop areas for cross-examination of witnesses who have submitted testimony in this case and who are familiar with Veolia's services in Indianapolis.

9. PWW followed up on a portion of this request at the depositions of Veolia employees Robert Burton and Paul Noran on February 9, 2006. Counsel for PWW specifically requested copies of any and all subpoenas issued to Veolia Water Indianapolis, LLC by the United States Department of Justice and all related non-confidential documents. This request is directly related to Data Request 3-6. PWW's counsel followed up with a letter request for this material on February 10, 2006, and Nashua has refused to produce it, as evidenced by its counsel's letter dated February 15, 2006. See Exhibit 2.

b) Indianapolis Collective Bargaining Agreements

10. At the February 9, 2006 depositions, and in a follow-up letter, PWW specifically requested copies of the current collective bargaining agreement governing Veolia's Indianapolis employees, and the prior collective bargaining agreement which Veolia assumed from the prior operator in 2002 when Veolia took over in Indianapolis. This information ties back to Data Request 3-6 (complaints or claims of malfeasance). As is discussed in the February 27, 2006 testimony of Donald Correll, PWW is aware of ongoing Veolia labor difficulties in Indianapolis, yet Nashua has refused to provide access to such information. The limited information which Veolia disclosed in depositions shows that Veolia ended defined benefit pension plans as soon as its contractual obligation to retain them expired. The old and new Indianapolis collective bargaining agreements would confirm that and other employee contract changes. Given that Veolia's initial proposal to Nashua in this case touted the importance of retaining PWW employees and the City's own public statements of its desire to retain employees after any taking, Veolia's experience with labor disputes in other systems is plainly relevant to this proceeding, particularly given the lack of any employee contract protection contained in the proposed Nashua/Veolia contract and Veolia's plan as set forth in its response to Staff DR 3-23 to scale back employee benefits. Veolia's ability to employ staff to operate the PWW system clearly is relevant, even vital, to the public interest. By letter dated February 15, 2006, Nashua has nevertheless refused to produce any of these documents.

c) Other Lawsuits

11. Paw's Data Request Number 3-9 sought information relating to any lawsuit or complaint filed from 2000 to the present in any court or administrative agency regarding the Veolia entities relating to their operation of drinking water systems in the United States. Nashua

objected to this request on the grounds that: (A) the request is overbroad and the information requested is not necessary to evaluate or relevant to Nashua's petition; (B) the request fails to identify the information sought with specificity; (C) Production of the requested information would be unduly burdensome; and (D) the request includes confidential information such as personnel records, financial information, and other information likely subject to confidentiality agreements and/or protective orders, and is not subject to disclosure. Nashua's only substantive answer is that there is no "material litigation" against Veolia's northeastern United States subsidiary, without explaining what it considers to be "material". See Exhibit 1.

12. Veolia's history regarding complaints and lawsuits relating to its operations of drinking water systems is certainly relevant or could lead to the discovery of admissible evidence because it could shed light on the extent of Veolia's capabilities in its day-to-day operations. This request is specific, limited in scope and not unduly burdensome. The scope of the request is narrowly tailored to the period from 2000 to the present and specifically requests information about only those lawsuits relating to Veolia subsidiaries or affiliates in the United States that provide drinking water services. Further, this request does not seek any confidential information, and Nashua need not produce portions of documents which contain it. It is routine to request from a party in litigation the production of information about other lawsuits. Patterns emerge from such disclosure that may be of importance to the case. For instance, repeated litigation over employment disputes, or over violations of water quality standards, should be of concern in the review of Veolia's qualifications. For these reasons, this information is relevant to these proceedings or could lead to the discovery of admissible evidence.

II. REQUESTS RELATED TO NASHUA'S OPERATING COSTS

13. As Nashua has repeatedly asserted, part of the public interest inquiry in this proceeding is a comparison of the proposed costs between PWW's continued operation of its water systems and Nashua's proposed operation using Veolia, Beck and the City's other contractors or subcontractors. Some of those costs appear as fixed fees in the draft contracts between Nashua and Veolia and Nashua and Beck. But there are other costs which are harder to determine, such as supplemental charges which Veolia and Beck and their subcontractors are expected to charge Nashua above and beyond the fixed fee charges. These supplemental costs are substantial, and include charges detailed in Appendix E and H to the proposed Veolia contract (Exhibit B to Philip G. Ashcroft, et al. 1/12/06 Testimony) for all engineering and repair costs. Also, the proposed contracts leave Nashua saddled with a number of operational costs, such as for property insurance and electricity. PWW seeks to obtain a basis for determining the likely amount of supplemental contractor charges and Nashua's own costs to assess Nashua's allegations that at the end of the day, it can operate the PWW systems at a lower cost than can PWW. To that end, PWW seeks documents relating to contract negotiations with these third parties, and specific cost estimate documents.

a) **Contract Documents**

14. Paw's Data Request Number 3-14, as well as requests made at the depositions of R.W. Beck employee Paul Doran and Tetra Tech (Beck's subcontractor) employee John Henderson on February 16, 2006, sought copies of all prior drafts and documents relating to the negotiations of the Veolia and R.W. Beck contracts with Nashua, in addition to any prior drafts or related documents from the R.W. Beck and Tetra Tech contract. To date, PWW has only received the final draft contracts, and one prior draft each of the Veolia and Beck contracts. It

has received no correspondence between parties, e-mail messages between parties, memoranda or notes relating to the negotiation of these contracts.

15. Nashua objected to PWW's Data Request Number 3-14, stating that it requested work product or attorney-client privileged material. See Exhibit 1.

16. PWW recognizes that the work product doctrine exists with respect to materials developed in anticipation of litigation not otherwise discoverable (i.e. testifying retained expert witnesses materials are discoverable, non-testifying retained expert materials are not discoverable). See, Johnston v. Lynch, 133 N.H. 79, 95-96 (1990). Still, the work product doctrine cannot shield against the production of routine business documents.

17. Here, however, Nashua appears to be using the attorney-client and work product privileges as a means to shield information relating to the negotiations of these contracts. These drafts and contract negotiation documents are not subject to work product or attorney-client privileges simply because an attorney was one member of the business team involved in the negotiation of the contracts. See Riddle Spring Realty Co. v. State, 107 N.H. 271, 274 (1966)("lawyers work must have formed an essential step in the procurement of the data which the opponent seeks"); see also 81 Am Jur 2d Witnesses § 431; Georgia-Pacific Corp. v. GAF Roofing Mnfr., Inc., 1996 WL 29392 (SDNY 1996)(lawyer's work as contract negotiator not protected from discovery); Super Tire Engineering Co. v Bandag, Inc., 562 F Supp 439 (ED Pa 1983)(business communications will not be protected merely because they were directed to an attorney). PWW does not seek documents in which a lawyer is giving his or her client legal advice about a proposed contract term, but PWW does seek documents which may have been circulated among different parties, including a party's lawyers, if those involved go beyond the lawyer and his or her client.

18. In addition to the fact that no attorney-client or work product privilege applies, the deposition testimony has revealed that third party non-lawyer witnesses who had submitted pre-filed testimony on Nashua's behalf, Messrs. Doran (Beck) and Henderson (Tetra Tech), assisted Nashua with these contract negotiations. They attended negotiating session and exchanged documents by e-mail. Accordingly, these testifying third party witnesses enjoy no attorney-client privilege (see N.H.R.Ev. 502), and their efforts as part of the Nashua negotiation team make them merely fact witnesses to a business transaction. Accordingly, documents they reviewed or developed are not subject to attorney-client or work product privilege. Those documents may lead to admissible evidence, by showing what costs Nashua or its advisors thought that Nashua would incur by using the third party contractors. This is particularly relevant because the contracts in question are not final, and the only information the parties have to assess is based on the costs Nashua or its contractors foresee incurring under these agreements. Such discovery may also show what Nashua knows about the qualifications of Veolia or Beck. Finally, and perhaps most importantly, it may show what Nashua believes that the contracts address (or do not address) by way of Veolia's performance concerning crucial public interest concerns such as water quality, watershed protection, and customer service.

b) Proposed Nashua Payments to Veolia and Nashua's Retained Expenses

19. Nashua also objected to PWW's Data Request Number 3-88, which sought the names, positions and roles of those individuals who were involved on behalf of Veolia in negotiating and/or determining the pricing and pricing provisions of the contract with Nashua. In part, Nashua objected on the grounds that it seeks confidential information concerning Veolia's operations in the United States, including price and pricing provisions that, if disclosed to PWW, could result in competitive harm to Veolia.

20. Related to that, at the February 9, 2006 depositions of Veolia employees Robert Burton and Paul Noran, PWW learned that Veolia created internal documents concerning what it likely would receive from Nashua in total fees, apparently on an annual basis as well as over the life of the contract. This information is not otherwise available, since the draft Nashua contract with Veolia contains some fixed fee sections, but it also contains many supplemental services for which Nashua will be billed an indeterminate amount on an hourly or per job basis, including costs for all repairs, most maintenance, and any capital program work. PWW learned from the depositions that these documents are known as the “risk profile” and “pricing model” created by a Veolia entity for the Nashua contract. PWW counsel requested this information in a letter dated February 10, 2006, but Nashua has refused in its February 15, 2006 letter and February 28, 2006 e-mail message. See Exhibit 2 The proposed contract with Nashua provides for supplemental services and fees above and beyond the base contract. PWW does not seek information concerning Veolia’s likely profit, but rather its estimate of the total revenue it will receive from Nashua under the proposed contract. Nothing could be more relevant to the public interest inquiry, since a substantial portion of Nashua’s public interest case rests upon its contention that it can operate the water system cheaper than can PWW, using Veolia and Beck as third party contractors.

21. PWW's Data Requests Numbers 3-99 and 3-102 ask for Nashua's estimates of the annual cost of electricity, heating fuel and natural gas associated with the operation of the water utility and the cost of addition property insurance which will be required. These are retained expenses which the proposed Veolia contract allocates to Nashua. The contract could have allocated those expenses to Veolia, but did not. Nashua objects to this data request stating that it is not properly directed to Veolia’s contract operations, the subject of these data requests, but

rather to Nashua's financial projections. It referenced in its answer George E. Sansoucy's assumptions in his revenue requirements model, but provides no answer from Nashua itself.

22. The requests seek information on the costs involved with Nashua's outsourcing of its proposed operation of the water system. To the extent that some of the costs will be retained by Nashua under the contract with Veolia is still an important and relevant inquiry in this matter, because the information is critical to determining Nashua's overall cost to operate the PWW water systems. Without this information in hand, it will be a near impossibility to determine whether Nashua's assertions of alleged cost savings are accurate.

23. Nashua also objected to PWW's Data Request Number 3-104, which sought a break down of each of the Veolia labor rates provided for in the proposed contract with Nashua. Nashua's objection states that the information is not relevant, seeks competitive information concerning Veolia's operations and is overly broad and unduly burdensome.

24. Again, this request is specific and direct. It seeks information relating to the labor rates in Nashua's agreement with Veolia. Veolia will provide many of its services to Nashua as extras, using per hour labor rates for Veolia staff. The information about Veolia rates is relevant or could lead to the discovery of admissible evidence because it will help the parties, and ultimately the Commission, determine Nashua's total operating costs for the water system. This request does not seek competitive information concerning Veolia's operations in the United States, but is narrowly tailored to obtain cost information associated with Veolia's contract with Nashua.

Assent

25. PWW has sought the assent of the other parties to this proceeding. The Commission Staff and the Town of Merrimack assent. Nashua does not assent. The Town of

Pittsfield takes no position. Other parties did not have the opportunity to respond prior to the filing of this Motion.

WHEREFORE, Pennichuck Water Works, Inc. respectfully requests that the Commission:

- A. Grant this Motion to Compel the City of Nashua to Respond to respond to Pennichuck Water Work's Data Requests and Document Requests as set forth herein; and
- B. Grant PWW such other and further relief as the Commission deems necessary and just.

Respectfully submitted,
Pennichuck Water Works, Inc.

By Its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
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Dated: March 16, 2006

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Certificate of Service

I hereby certify that a copy of this Motion has been forwarded to the parties listed on the Commission's service list in this docket.

Dated: March 16, 2006


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