

DW 04-048

CITY OF NASHUA

RSA 38 Petition re Pennichuck Water Works

Order on Motions in Limine

ORDER NO. 24,722

January 5, 2007

This RSA 38 proceeding before the New Hampshire Public Utilities Commission (Commission), scheduled for hearing beginning on January 10, 2007, involves an effort by the City of Nashua to take its local water utility, Pennichuck Water Works (PWW). In accordance with the procedural schedule, pending are three motions *in limine* submitted by the City, which are considered here *seriatim*.

I. Motion to Exclude Testimony of PWW Witness R. Kelly Myers

The City moves to exclude the testimony of PWW witness R. Kelly Myers on the ground that it is irrelevant. Mr. Myers is a market research expert whose testimony concerns the extent to which voters in Nashua actually support the January 14, 2003 ballot initiative through which the electorate approved the proposed taking. The results of the special election are significant in part because they create a “rebuttable presumption that [the taking] is in the public interest.” RSA 38:3. According to PWW, the testimony of Mr. Myers is to the effect that “voters in Nashua as of 2004 and 2005 [were] consistently opposed to the City’s takeover of Pennichuck Water Works by acquisition or eminent domain.” Pennichuck Objection to Motion at 2.

In its motion, the City points out that the Commission has already decided that the municipality has complied with the requirements of RSA 38 relative to voter approval of the proposed taking. *See* Order No. 24,425 (January 21, 2005), slip op. at 18-21. According to the

City, in these circumstances it is entitled pursuant to RSA 38:3 to rely on a legally valid voter determination and the question of whether that vote truly reflects public sentiment should be excluded as irrelevant pursuant to RSA 541-A:33, II (allowing exclusion from administrative proceedings evidence that is “irrelevant, immaterial or unduly repetitious”). *See also* N.H. Code Admin. Rules Puc 203.03(d) (providing that the Commission “shall” exclude such evidence). The City notes that, if the Commission excludes the Myers testimony, the municipality will likewise withdraw the testimony of Brendan Cooney, the witness it plans to tender to rebut the contentions of Mr. Myers.

PWW objects to the motion to exclude the Myers testimony. According to PWW, relying on various judicial determinations from outside New Hampshire, courts reviewing ballot measures have held that such measures can be invalidated if voters were misled by the language on the ballot and thus did not know what they were actually deciding. Although PWW concedes that the City’s referendum complied with RSA 38:3, just as the courts it references were able to refer to polling data to determine whether ballot wording tainted the results of the election, “the Commission may consider such data to determine how much weight the results of the referendum presented to voters by Nashua should be given as an expression of public intent.” PWW Objection at 3. In other words, PWW seeks to present the Myers testimony in an effort to rebut the RSA 38:3 presumption the City enjoys as to whether the taking is in the public interest.

We agree with the City that the testimony of both Mr. Myers and Mr. Cooney should be excluded as irrelevant. In essence, PWW is offering the testimony of Mr. Myers not to rebut the RSA 38:3 public interest presumption but to undermine it. Evidence that is relevant for the purpose of rebutting the presumption would go to the merits of whether it is in the public interest for the City to own assets of PWW. To allow testimony about the extent to which the vote

accurately reflects public opinion would be to deprive the City, at least in part, of the presumption it gained as the result of the referendum in accordance with RSA 38:3.

Accordingly, we grant the City's motion and exclude both Mr. Myers and Mr. Cooney as witnesses.

II. Motion Concerning Severance Damages and RSA 38:9

We next take up the City's motion concerning evidence related to RSA 38:9, III, which provides that when determining the value of a utility's property for RSA 38 purposes the Commission must "determine the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner."

The City makes three separate requests. First, the City seeks to exclude testimony about such severance damages to the extent they relate to effects on PWW affiliates Pennichuck Corporation, Pennichuck Water Services Corporation, Pennichuck East Utility, Inc. and Pittsfield Aqueduct Company. Second, the City seeks to exclude evidence of severance damages to PWW itself in the event the City acquires less than all of PWW's assets. Finally, the City asks the Commission to determine as a matter of law that RSA 38:9, III limits the award of severance damages in this proceeding to PWW alone.

According to the City, RSA 38:9, III limits the award of severance damages in a municipalization proceeding to "the owner" of the assets taken as opposed to the parent company of the owner (Pennichuck Corporation) or other affiliates of the owner. The City further contends that, if the Legislature had intended "the owner" in RSA 38:9, III to have a different meaning from the phrase "the utility" as used elsewhere in the chapter, it would have made that clear by specifically defining the former term in RSA 38:1.

Relying on a 1902 decision of the Maine Supreme Judicial Court as well as more recent decisions from Maine and California, the City asks the Commission to conclude that neither PWW nor any of its affiliates can recover severance damages in connection with “lost economies of scale or other incidental losses.” Nashua Motion at 6. Pointing out that it seeks to acquire all assets of PWW, the City takes the position that even if the Commission were to decide that the acquisition should involve less than the whole, there is no direct harm to what would remain of PWW and thus no recoverable severance damages. At best, according to the City, such effects would be limited to lost economies of scale that are not compensable based on the foreign precedents it invokes. PWW additionally points out that each of the so-called “satellite systems” owned by PWW outside of Nashua have no connection to PWW’s Nashua system beyond common ownership.

In opposition, PWW characterizes the City’s motion as moot to the extent it concerns severance damages to PWW affiliates, pointing out that neither it nor its affiliates have presented any testimony in support of such damages. However, PWW makes clear that it and its affiliates intend to present evidence about effects on customers of Pennichuck East Utility and Pittsfield Aqueduct Company, whom PWW contends would suffer significant rate increases as the result of the municipalization, as well as evidence about damages to Pennichuck Water Services Corporation, which PWW contends would be forced out of business by the taking. This evidence, according to PWW, will be offered on the question of whether the taking would be in the public interest.

PWW further points out that the City has presented no evidence with respect to a taking of anything less than all PWW assets. Thus, according to PWW, the Commission need not concern itself with questions of what severance damages would arise out of a partial taking.

However, according to PWW, if the Commission were to authorize a partial taking of PWW, the Company would be entitled as a matter of law to severance damages, regardless of whether the assets left to PWW are physically interconnected with those taken by the City. In support of this position, PWW cites the discussion of severance damages in the 2000 edition of Nichols, Law of Eminent Domain, which notes that to obtain such damages “the condemnee must prove a unified parcel.” PWW Opposition at 4.

According to PWW, the “interdependent nature” of all water systems within PWW satisfy this requirement of a unified parcel. *Id.* PWW refers to the fact that all of the water systems rely on the same personnel, equipment and access to capital.

Our review of the arguments on this motion leads to a determination not to exclude any evidence that might be implicated by the City’s request. As PWW and the City appear to agree, evidence as to effects on PWW affiliates is relevant to the question of whether the taking would be in the public interest. And, assuming it would be reasonable for us to consider authorizing the taking of some but not all PWW assets (and thus leaving aside PWW’s position that it would be necessary to hold further hearings to consider such a question), PWW would be entitled to offer evidence in support of its “unified parcel” theory and the damages it would support, if any. As to the City’s request for a ruling about the meaning of RSA 38:9, this is a question of law that is best left to the conclusion of the hearings when all parties have had an opportunity to present evidence and argument fully.

III. Motion Concerning PWW Witnesses Ware and Guastella

The final motion concerns a request by the City to exclude the pre-filed testimony of PWW witnesses Donald Ware and John Guastella submitted on November 14, 2006. The City's essential argument is that, although it agreed on the need for additional testimony from both PWW witnesses as well as the City's on November 14, such testimony was to be limited to analysis of "pre-existing expert opinions" and "post-deposition analysis of opposing experts' opinions" of value and rates. Nashua Motion at 2.

The City contends that Mr. Ware's November 14 testimony consists of analysis and opinions he could have but failed to file at an earlier juncture – the testimony of May 22, 2006. Likewise, the City offers the same argument as to Mr. Guastella's November 14 testimony, characterizing it as "nothing more than an attempt to bolster his prior Rebuttal Testimony with information he missed or overlooked by calling it Limited Update Testimony." *Id.* at 3.

In response, PWW describes the City's motion as "based on an overly narrow and fundamentally flawed interpretation of the language of the Joint Motion [seeking authority to file limited update testimony on November 22] and the parties' agreement regarding the nature of such testimony." PWW Opposition at 2. According to PWW, nothing in the joint motion it submitted with the City limits the scope of the November 14 testimony to discussion of information not available to witnesses when they filed their previous testimony.

Having reviewed these arguments, we believe the best exercise of our discretion is to allow the disputed written testimony to be presented. The secretarial letter authorizing this final round of testimony, issued on September 14, 2006, allows "limited update testimony related to preexisting expert opinions of value and rates and post-deposition analysis of opposing experts' opinions of value and rates." The Commission adopted this language from the joint motion of

PWW and the City. While it is possible that the joint movants each have a plausible interpretation of this language, it is sufficiently imprecise as to allow the testimony submitted in November by Messrs. Ware and Guastella and we therefore deny the motion to exclude such.

Based upon the foregoing, it is hereby

ORDERED, that the motions *in limine* submitted by the City of Nashua on December 8, 2006 are GRANTED insofar as they result in the exclusion of witnesses R. Kelly Myers and Brendan Cooney, and that such motions are otherwise DENIED.

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

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary