

DW 04-048

CITY OF NASHUA

Petition for Valuation Pursuant to RSA 38:9

Order Approving in Part and Denying in Part Motion for Protective Order

ORDER NO. 24,495

July 29, 2005

I. BACKGROUND

This docket involves the petition filed by the City of Nashua, New Hampshire (Nashua) to take the assets of Pennichuck Water Works, Inc. (PWW) by eminent domain, pursuant to N.H. RSA 38:9. This order addresses which information generated during discovery shall be afforded confidential treatment as well as the terms under which Staff and the Parties can access that confidential information.

On July 17, 2005, PWW, Pennichuck Water Service Corporation and Pennichuck Corporation (together, the Pennichuck Entities) filed a Motion for Protective Order requesting the Commission grant protective status to categories of information that the Pennichuck Entities will be required to produce in the instant docket. The Pennichuck Entities anticipate that during the course of discovery, Staff and the Parties will request to review information that falls within the protections of RSA 91-A and N.H. Admin. Rules, Puc 204.05 and 204.06. Some commercial and financial information has already been identified and set aside, pending resolution of this Motion. For the duration of this docket, however, the Pennichuck Entities seek Commission approval for confidential treatment, on a prospective basis, for commercial and financial information reviewed as part of the valuation and public interest inquiries.

The Pennichuck Entities state that they do not make information that falls within the protections of RSA 91-A, Puc 204.05, and Puc 204.06 available to persons outside the Pennichuck Entities, except as required by law or as necessary and subject to appropriate safeguards. The Pennichuck Entities aver that the information sought to be protected, if released, would harm the competitive position of the Pennichuck Entities or would likely cause substantial economic harm to the Pennichuck Entities or their customers and other members of the public.

The Pennichuck Entities also seek approval of a procedure for limiting review of the confidential information to Authorized Representatives¹ and Qualified Persons², depending on the level of sensitivity of the document, as well as a procedure for Staff and the Parties to challenge the claim of confidentiality. The Pennichuck Entities attached to their Motion an Agreement to Comply with Protective Order, which they ask Staff and the Parties to sign in advance of reviewing confidential documents. Thus far there is one inquiry that the Pennichuck Entities describe as requiring a greater level of restricted access: facilities and water treatment information that gives rise to security concerns.

¹ "Authorized Representative" shall mean a person who is a member of the Staff of the Commission (Staff) or the Office of Consumer Advocate (OCA) or is one retained expert and one designated senior staff member of Nashua, or is counsel of record for Staff, OCA, or Nashua. Said Authorized Representative must execute a Non-Disclosure Certificate in the form of Exhibit A to the Motion and be approved by Pennichuck Entities prior to the disclosure of information designated "Confidential – Authorized Representatives Only."

² "Qualified Persons" shall mean and refer to: 1) Counsel of record and persons in the regular secretarial, clerical, stenographical or paralegal employ of counsel of record, members of the Staff or the OCA or any Party; 2) Employees of the City of Nashua who are involved in this proceeding, except that Confidential Information disclosed to such persons shall be limited to that which reasonably relates to their responsibility in this proceeding; 3) Expert witnesses or prospective expert witnesses retained or consulted by any party in this proceeding, except that the Confidential Information disclosed to such persons shall be limited to that reasonably necessary for them to form an opinion or prepare their testimony as to the matters about which counsel consulted or retained them; and 4) Such other persons as may hereafter be qualified to receive Confidential Information pursuant to this order or any other order of the Commission or a written agreement signed by the Pennichuck Entities.

The Pennichuck Entities obtained concurrence from Staff, OCA, Nashua, Nashua Regional Planning Commission, Merrimack Valley Water District, the Towns of Amherst, Raymond, and Pittsfield, and the BIA. Mr. Fred Teeboom opposed the Motion but did not submit any basis for his opposition. No other opposition has been filed to this Motion.

II. COMMISSION ANALYSIS

The New Hampshire Right to Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. *See*, RSA 91-A:4, I. RSA 91-A:5, IV exempts from public disclosure any records pertaining to "confidential, commercial or financial information." The New Hampshire Supreme Court has instructed agencies of state government to interpret this exemption narrowly, applying a balancing test in order to determine whether "the asserted private, confidential, commercial or financial interest" is outweighed by "the public's interest in disclosure." *Union Leader Corporation v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 552-533 (1997).

Consistent with RSA 91-A, Puc 204.06 provides that "the Commission shall grant confidentiality upon its finding that the documents sought to be made confidential are within the exemptions permitted by RSA 91-A:5, IV or other provisions of law based on the information submitted...." Puc 204.06(c) requires petitioners to provide evidence that the information, if made public, would likely create a competitive disadvantage for the petitioner; is a trade secret which required significant effort and cost to produce and would take significant effort and cost by others to develop independently; is other confidential, research, development, financial, or commercial information; is customer information that is financially or commercially sensitive to the customer or which, if released, would likely constitute an invasion of privacy for the customer; or is information that is not general public knowledge or published elsewhere and that

the petitioner takes measures to prevent dissemination of that information. The Pennichuck Entities' Motion supplied information responsive to the elements of Puc 204.06(c).

As to the information already set aside for confidential treatment, we find that the RSA 91-A:5, IV exemption from public disclosure applies and we will accord the documents protection as requested. Applying the balancing test to this case and considering the Pennichuck Entities' representations, we find that the benefits to the Pennichuck Entities of non-disclosure in this case outweigh the benefits to the public of disclosure.

It is not our practice, however, to grant protection in the abstract, without specific documents identified. See, *e.g.*, *Re Northern Utilities*, Order No. 24,389 (October 24, 2004). The portion of the Motion that seeks a finding of exemption from RSA 91-A for documents not yet submitted, therefore, will be denied. This does not mean, however, that such documents, when they are submitted, may be publicly disclosed. As is always the case during the discovery phase of a docket, we will require the parties and Staff to protect the documents and the information contained therein from general dissemination, with an understanding that the entity putting forward the document will file a motion for protective treatment at any point, so long as it is prior to the commencement of the hearings.

The Pennichuck Entities also requested that less than all of the parties have access to particularly sensitive information, specifically data related to its facilities and treatment that pose significant security concerns. This raises two questions: first, is the information appropriately accorded protective treatment and, second, is there a basis to allow some, but not all, of the parties to view the information.

In 2002, the Legislature amended RSA 91-A:5 to include a new exemption from public disclosure for any "records pertaining to matters relating to the preparation for and the

carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life." RSA 91-A:5, VI. We are satisfied that the information regarding the Pennichuck Entities' facilities and water treatment falls within the exemption of RSA 91-A:5, VI.

As to whether less than all of the parties may have access to it, the Commission has not looked favorably on a similar request in the past, stating, "whatever information we might reasonably rely upon in making a decision should be accessible to all Parties who have full intervenor rights and who have sought such information to present their case on the issues they have raised." *North Atlantic Energy Corporation*, 87 NH PUC 396, 399 (2002).

In this case, however, there are distinguishing factors. The heightened sensitivity of information regarding facilities and water treatment in a post September 11 world may at times justify more limited access. In response to the Bioterrorism Act, the EPA now requires community drinking systems serving populations of more than 3,300 persons to submit vulnerability assessments and emergency response plans. Importantly, EPA has developed an Information Protection Protocol which limits access to certain confidential documents community drinking systems file with EPA. In light of EPA's restrictions on access, the Pennichuck Entities' proposal to restrict access to information that raises security concerns appears reasonable.

Second, the parties have a mechanism to challenge the Pennichuck Entities' designation of documents requiring more limited access. Pursuant to section K of the Motion, parties may challenge the confidentiality designation by giving written notice to McLane, Graf, Raulerson & Middleton, P.A. If disagreements cannot be resolved, the challenge will come

before the Commission for resolution. These appeal procedures afford parties a sufficient safety net to challenge their inability to access confidential documents in this docket.

Finally, the only objection to the Motion was the statement of non-concurrence from Mr. Teeboom, without explanation. Given the nature of this docket, with the considerable number of parties, the security concerns posed by the information, and the procedures for challenging the designation of documents for limited access, we do not find it unreasonable to approve the Pennichuck Entities' request to limit access to certain sensitive documents.

Our granting of protective treatment for commercial, financial information and documents that raise security concerns, and approval of the procedure for limiting accessing to certain information, will be subject to the on-going rights of the Commission, on its own motion or on the motion of Staff, any party or any other member of the public, to reconsider this decision should future circumstances so warrant.

Based upon the foregoing, it is hereby

ORDERED, that the Pennichuck Entities' Motion for Protective Order is **GRANTED** in part and **DENIED** in part as described herein.

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

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Michael D. Harrington
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary