

DW 04-048

CITY OF NASHUA

RSA 38 Petition re Pennichuck Water Works

Order on Motion *in Limine* to Disqualify Certain Witnesses

ORDER NO. 24,706

December 8, 2006

In this RSA 38 proceeding before the New Hampshire Public Utilities Commission, scheduled to be heard by the Commission beginning on January 10, 2006, respondent Pennichuck Water Works (PWW) moved *in limine*, on November 28, 2006, to disqualify, and thus exclude the testimony of, two witnesses offered by petitioner City of Nashua on the issue of valuation.¹ For the reasons that follow, rather than await responsive pleadings we deem it consistent with the public interest to deny the motion summarily but without prejudice.

At issue are witnesses George E. Sansoucy and Glenn C. Walker, who submitted prefiled direct testimony on January 12, 2006, that offered a proposed valuation of \$85 million with respect to the PWW property the City seeks to municipalize pursuant to RSA 38. Relying on assertions made in that testimony, the witnesses' subsequently filed reply testimony, material adduced in discovery and certain public statements made by the witnesses in the course of seeking their engagement with the City, PWW contends that Sansoucy and Walker are so unreliable as witnesses that their testimony should be excluded prior to hearing.

¹ Although motions *in limine* – i.e., motions at the threshold of a trial or hearing, designed to resolve issues related to the taking of evidence -- are not normally a part of practice before the Commission, in light of the complexity of this proceeding and the need to use hearing time efficiently we explicitly invited the submission of such motions on or before December 12, 2006. *See* Secretarial Letter of November 22, 2006.

The specific issues raised by PWW are to the effect that (1) Sansoucy and Walker are biased in favor of the City in a manner that is inconsistent with the Uniform Standards of Professional Appraisal Practice (USPAP) because they stand to profit personally from an outcome favorable to the City and specifically sought their engagement by promising to recommend a predetermined outcome, and (2) that the two witnesses failed to follow the USPAP standards when they conducted their actual valuation by employing a “no net harm” approach that bears no relationship to accepted valuation methodologies as well as misapplying the accepted methodologies. Relying on the leading U.S. Supreme Court case on the admissibility of expert testimony, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the state-law codification of the *Daubert* principles found at RSA 516:29-a, PWW contends that the Commission “should not lower the bar to allow Sansoucy and Walker to testify as to their opinion of value if such an expert opinion would not be permitted in court.”

We are aware that the parties confront significant and time-consuming tasks in the weeks ahead so as to prepare for lengthy hearings scheduled in January. In these circumstances, it serves no useful purpose to require the parties to expend further resources on drafting pleadings on an issue that is essentially, and obviously, unripe.

The law relied upon by PWW does not apply to proceedings before the Commission. The Legislature has explicitly determined that the rules of evidence, as used in civil courts, are not applicable in contested cases before administrative tribunals generally, *see* RSA 541-A:33, II, and the Commission specifically, *see* RSA 365:9. The fact finders here are not jurors who would be unfairly misled by experts whose expertise is dubious in ways not obvious to lay decision makers, a consideration that was important in *Daubert*. *See Daubert*, 509 U.S. at 595-

96 (reminding trial judges of their discretion under federal evidence rules to exclude otherwise-relevant evidence if it would mislead the jury, but cautioning not to be “overly pessimistic about the capabilities of the jury and of the adversary system generally” to deal with “shaky but admissible evidence”).

The Commission has traditionally relied upon its expertise to evaluate the credibility of expert testimony, something that is best exercised through hearing, which provides the opportunity both to hear vigorous cross examination of such witnesses and to pose our own questions.² That is the appropriate result here. Accordingly, and without expressing any views as to the substance of the concerns raised by PWW about witnesses Sansoucy and Walker, we deny the pending motion *in limine* without prejudice to PWW’s opportunity to preserve such arguments at the appropriate point in the merits hearing.

Based upon the foregoing, it is hereby

ORDERED, that the motion *in limine* of Pennichuck Water Works to disqualify and exclude the testimony of City of Nashua witnesses George E. Sansoucy and Glenn C. Walker is DENIED without prejudice.

² The Washington Utilities and Transportation Commission (WUTC) made essentially the same point in the one administrative decision PWW cites in support of its invocation of *Daubert* here. *See In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination* (Wash. Utils. and Transp. Comm’n Docket No. UT-003013, October 11, 2002), 2002 Wash. UTC LEXIS 393 at *30-*31 (“The Commission is satisfied that we have met [the *Daubert*] standard, because of our active participation in the evidentiary hearings” including “pertinent and substantial cross-examination by the bench of virtually every subject matter expert who appeared in support of the cost models sponsored by the parties”) (quoting earlier order in same docket, citation omitted).

By order of the Public Utilities Commission of New Hampshire this eighth day of
December, 2006.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary