

In Re:

New Hampshire Electric Cooperative, Inc.

(See Attached Case List)

ORDER

The board has reviewed: the August 3, 2015 “Motion for Rehearing” (“Rehearing Motion”) filed by the “Taxpayer”; the August 10, 2015 “Joint Objection” to the Rehearing Motion filed by the “municipalities”; the Taxpayer’s August 14, 2015 “Motion to Submit Limited Reply” (“Reply Motion”); and the municipalities’ August 20, 2015 “Joint Objection” to the Reply Motion (hereinafter the “Reply Objection”). These pleadings all pertain to the July 2, 2015 Decision, issued by the board after a consolidated hearing spanning nine days, as well as consideration of pre-hearing and post-hearing legal memoranda, on a total of 23 individual tax abatement appeals on the Taxpayer’s “Property” located in 11 municipalities (for tax year 2011) and 12 municipalities (for tax year 2012).

The suspension Order issued on August 5, 2015 to allow the board more time to consider the Rehearing Motion is hereby dissolved. Both motions are denied for the reasons stated below and in the Joint Objection and the Reply Objection.

A. The Reply Motion

The Reply Motion is denied insofar as the Taxpayer contends the board is obligated to consider at this time the extraneous materials contained in Attachments A and B to the Rehearing Motion. These attachments contain documents from three prior year tax abatement appeals filed by an unrelated taxpayer (the owner and operator of an oil pipe line) against one town. [See Portland Pipe Line Corp. v. Town of Gorham, BTLA Docket Nos. 24198-08PT/25123-09PT/25539-10PT (hereinafter “Portland Pipe Line”), decided by the board on July 22, 2013 and affirmed by the supreme court in an unpublished November 25, 2014 Order.]

The documents consist of selective excerpts from: (1) what appears to be an unofficial and incomplete transcript of parts of the direct testimony and cross-examination of Portland Pipe Line’s expert witness (John H. Davis, III); and (2) legal arguments submitted by one attorney (Robert Upton, II) representing the Town of Gorham in those appeals. As such, the documents are not probative in determining whether a rehearing is warranted in the present appeals. Both the Taxpayer and the municipalities have already argued at great length, both orally and in their respective legal memoranda, the relevance of the board’s decision in Portland Pipe Line. That decision speaks for itself and must stand on its own merits. No useful purpose can be served by further perusal or delving into what is, at best, a small aspect of the voluminous record pertaining to those prior appeals involving another taxpayer and only one town.

Further, the board agrees with the municipalities the Taxpayer has not complied with Tax 201.37(g). (See Joint Objection, pp. 3-4, fn.1.) The Taxpayer has made no showing the documents in these attachments were “newly discovered and could not have been discovered with due diligence in time for the [consolidated] hearing” or that their submittal at this time would “assist the board.” Nor has the Taxpayer established why a “waiver” should be granted to

permit the “Limited Reply” requested in the Reply Motion. [See Tax 201.37(c); and Tax 201.41.]

Finally, while the Reply Motion admits it was “error” (however “inadvertent”) in the Rehearing Motion (p. 11) to substitute arguments of the Taxpayer’s attorney (in her opening statement) for actual witness testimony, the board finds this error is self-evident and does not entitle her to present further citations to the record not contained in the Rehearing Motion.¹ Consequently, the board agrees with the points made in the Reply Objection (pp. 1-2) with respect to this issue.

For all of these reasons, the Reply Motion is denied.

B. The Rehearing Motion

The Rehearing Motion is denied because it fails to satisfy the “good reason” standard for granting a rehearing (or reconsideration) set forth in RSA 541:3 and Tax 201.37. The Rehearing Motion, in many instances without specific citations to the Decision or the actual evidence presented, generally faults the board for not giving more weight and credibility to the expert testimony and appraisal evidence presented by the Taxpayer at the consolidated hearing. Far from being “undisputed,” however, as implied throughout the Rehearing Motion, the market value estimates and other evidence presented by the Taxpayer were challenged in almost every material respect by the municipalities, notably with extensive cross-examination of the experts called by the Taxpayer, along with the municipalities’ own expert testimony, appraisals and other evidence.

¹ The municipalities (in the Joint Objection, pp. 2-3) mention only this one error; there are, in fact, additional miscitations to the record in the Rehearing Motion (e.g., p. 4, lines 13 and 18).

Mere disagreement with the board's findings regarding contested evidence does not constitute "good reason" to grant a rehearing. See Decision, pp. 12-13; and, e.g., Great Lakes Hydro America, LLC v. City of Berlin, BTLA Docket Nos.: 25531-10PT/26219-11PT/Great Lakes Hydro America, LLC v. Town of Gorham, BTLA Docket Nos.: 25532-10PT/26220-11PT (January 2, 2015 Order at pp. 1-2):

The disagreements with the [d]ecision stem from disputes between the municipalities and the [t]axpayer regarding some of the many assumptions made by their respective experts to form opinions regarding the 2010 and 2011 market values of the [t]axpayer's property, consisting of five hydroelectric facilities ("hydros") located in the City and the Town. . . .

When expert testimony is presented: the board's task is to "resolve issues of fact and conflicts of opinion"; the board "is not compelled to accept the opinion evidence of any one witness or group of witnesses, including expert witnesses"; and the board can "accept or reject such portions of the evidence as it [finds] proper, including that of expert witnesses." See, e.g., Appeal of Pennichuck Water Works, 160 N.H. 18, 41 (2010) (citations omitted). In light of the "extraordinary difficulties" in "valuing the property of a regulated utility," the Supreme Court in Pennichuck further noted: the fact finder is given "considerable deference in this area"; can rely "upon its own experience and expertise"; and is "not required to believe even uncontroverted evidence." Id. at pp. 37 and 40-41.

See also Appeal of Liberty Assembly of God, 163 N.H. 622, 634-35 (2012), which held:

[When a taxpayer] contends, in effect, that the BTLA failed to weigh the evidence properly, we defer to its judgment on such issues as resolving conflicts in testimony, measuring the credibility of witnesses, and determining the weight to be given evidence. See LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 739 (2010);

and Joint Objection, p. 2, citing "Sears, Roebuck & Co. v. City of Manchester, 2008 WL

2812755.”² Accord, MTS Development Corp. v. City of Lebanon, BTLA Docket No. 26031-10PT (October 31, 2013 Order at pp. 1-2) (“mere disagreement either with the board’s specific findings or its overall conclusion that the [t]axpayer failed to present sufficient evidence to meet its burden of proving disproportionality” does not constitute proper ground for granting a rehearing motion).

Much of the Rehearing Motion is premised on very general assertions regarding regulation and its alleged impact on the market value of property. To the extent the Taxpayer believes it was the tribunal’s task, not the Taxpayer’s obligation, to “measure the impact of regulation” (cf. Rehearing Motion, p. 3) as it relates to its claims for tax abatements, the board does not agree. The board reviewed the entire record before finding the Taxpayer failed to present sufficient evidence to satisfy its acknowledged burden of proving disproportionality. In other words, the contested issue in these tax abatement appeals is not whether, in the abstract, various forms of government regulation (such as zoning, to cite another, more common example) can impact a property’s market value, a principle recognized “by New Hampshire Law” (id.) on which the parties probably agree. Rather, one of the contested issues the Taxpayer failed to address with sufficient probative evidence at the consolidated hearing (rather than mere assertions during and after that hearing) is how the specific utility regulatory environment in

² BTLA Docket No. 20820-04PT (April 25, 2008 Order). As stated on page 4 of that Order:

The board is not obligated to make a wholesale adoption of the expert testimony or other evidence presented by either one side or the other. To the contrary, when there are contested factual issues and “conflicting evidence” bearing on those issues, the board must determine, for itself, the credibility of witnesses and the weight to be given the testimony of each because “judgment is the touchstone.” [Citations omitted.]

which it operates³ (considering both the benefits and burdens of such regulation) impacted the market value of the Property in each municipality to a such a degree as to make each challenged local assessment disproportional in tax years 2011 and 2012.

The Taxpayer mischaracterizes statements in the Decision regarding “net book value.”⁴ The Rehearing Motion (pp. 2 and 7 - 9) first acknowledges “net book value” (actually “original cost less depreciation”) is but one of “5 approaches to valuation potentially applicable to utility property” articulated by the supreme court, a fact recognized in the Decision [see p. 10 (quoting from Public Serv. Co. v. Town of Ashland, 117 N.H. 635, 638-39 (1977))], but then faults the board for not giving this one approach more weight. The Taxpayer’s own expert (George K. Lagassa) presented multiple approaches to value the Taxpayer’s property in each municipality

³ The Taxpayer acknowledges, for example, that, at least since the “early 2000’s,” it has not been subject to ‘rate making’ regulation by the New Hampshire Public Utilities Commission (“PUC”). (See Decision, pp. 9 and 20, fn. 19.) Instead, the electricity rates the Taxpayer charges to generate revenues are set by its own board of directors.

⁴ Compare, for example: the Taxpayer’s arguments based on the selective indented quotation of two sentences from page 20 of the Decision (in the Rehearing Motion, p. 7); with the full paragraph where those two sentences appear in the Decision:

Turning to Mr. Lagassa’s two cost approaches, the first, NBV, is a simple arithmetic calculation of original cost less book depreciation. The board finds NBV is not credible as an indication of market value. Simply put, what the Taxpayer paid for the Property (to acquire and construct) over many decades does not provide any probative evidence of its market value today. The municipalities emphasize the many problems associated with use of the “net book” (original cost less book depreciation) approach to valuing utility property for tax purposes and how these problems have been recognized by the board and the New Hampshire superior and supreme courts. See, e.g., the discussion in Upton & Hatfield’s “Pretrial Memorandum” (filed in the PSNH Appeals), pp. 4-6, citing and discussing Public Service Company of New Hampshire v. New Hampton, 101 N.H. 142, 151 (1957); Public Service Company of New Hampshire v. Farmington, BTLA Docket Nos. 1281-81 and 1940-82 (February 9, 1990); and Public Service Company of New Hampshire v. Bow, Merrimack County Superior Court Docket No. 88-E-161, where the superior court noted: “The facilities in question were built over a span of years under varying conditions as to construction costs, rates of inflation, and strategic considerations of the company. A comparison based on original cost may thus be quite misleading.” [Additional emphasis added.]

Contrary to the implications in the Rehearing Motion, the board did not find net book value can never be considered in valuing utility property; instead, the board simply made a case-specific finding regarding the application of one cost approach in the Lagassa Appraisals and how these appraisals do not provide “credible opinions of market value,” as noted on p. 16 of the Decision. (See also Joint Objection, p.5, for additional examples of how the Rehearing Motion “mischaracterizes” the findings in the Decision and the evidence presented.)

and did not place exclusive reliance on his estimated “net book value” to establish the value of the Property located in each municipality: in some instances he relied instead on other approaches (income and sales comparison) rather than net book value and the board took note of these inconsistencies in the Decision (pp. 15-16). [Cf. Rehearing Motion, p. 7 (admitting there was evidence, in a “few” municipalities at least, that “a price in excess of NHEC’s net book value would make sense . . .”).] Additional reasons for not accepting as credible the value conclusions in the Lagassa Appraisals (as well as the DRA Appraisals prepared by Mr. Dickman) are contained in the Decision and are also discussed in the Joint Objection. Consequently, they need not be repeated here.

The reliance in the Rehearing Motion (pp. 21-22) on “*Appeal of Bow, et al.*, 133 N.H. 194 (1990)” is misplaced: the board does not agree the findings in the Decision “are directly at odds” with Appeal of Bow for several reasons. That decision resulted from appeals by three towns of the “assessment ratios and equalization” procedures used by the department of revenue administration (DRA) for one tax year (1987), not tax abatement appeals filed under RSA 76:16-a against municipalities exercising their statutory obligation to assess utility property at the local level. (Cf. Joint Objection, p. 4.) Nothing in Appeal of Bow⁵ precludes each municipality

⁵ See, e.g., 133 N.H. at 202-04:

The [three] Towns do not question the way the DRA determines the market value of PSNH as a whole as noted above. Rather, they object to the DRA's method of allocating that market value to PSNH's property located in various towns. . . .

Bow and Newington have [] waived their objection to the DRA's method of allocation of PSNH property. We therefore approach the allocation issue only as it relates to Seabrook.

The record does not reveal that Seabrook has demonstrated mathematically exactly how the DRA's method of allocation of PSNH property over-values the total property within the Town of Seabrook, or the extent of the harm to Seabrook from such allocation. While it is conceivable that the DRA's method could unfairly disadvantage Seabrook, we have insufficient evidence before us upon which we can determine that the allocation has harmed Seabrook. Given the inherent difficulty in precisely determining the value of a

from assessing utility property annually (using its own appraisal methodology) without deference to the value allocated by the DRA (using a different methodology) for purposes of equalization (or, for that matter, the RSA ch. 83-F utility tax). (See Decision, pp. 15-16.) This practice of local property tax assessment, rather than centralized assessment relying upon the DRA, is authorized by statute. (Id.)

Finally, whether phrased as “quasi estoppel” or “judicial estoppel” by the Taxpayer (Rehearing Motion, pp. 26-28), the board agrees with the Joint Objection (p. 7) this “novel theory of estoppel” is without merit. The cases cited in support of this theory by the Taxpayer are not on point.⁶ Insofar as judicial estoppel is concerned, the Taxpayer has not cited any prior litigation where any of the municipalities have taken inconsistent or contrary positions. See also Porter v. City of Manchester, 155 N.H. 149, 156-57 (noting the factors necessary for judicial estoppel did not apply to the facts presented).

property such as the Seabrook plant, and given that the Town of Seabrook did not present a viable alternative to the DRA's method of allocation, or evidence that the DRA's method actually harmed the Town of Seabrook (it is conceded by the Towns that the DRA's method likely benefits the Towns of Bow and Newington), we will not disturb the [b]oard's findings.

It is possible that an acceptable alternative exists to the DRA's method of determining PSNH's market value as a whole and to its method of allocating that value to the various New Hampshire municipalities. However, the Town of Seabrook has not persuaded us that the DRA's method is unreasonable. . . . In short, Seabrook has not met its burden of proving unreasonableness in the DRA's original cost method of allocation. We therefore affirm the [b]oard's decision on this issue.

⁶ The board further notes the Taxpayer does not cite any estoppel cases involving a municipality, even though one of the decisions cited several times in the Rehearing Motion, Appeal of Coos County Commissioners, 166 N.H. 379, 389 (2014), squarely addresses this issue: in affirming the denial of an estoppel claim, the Coos County decision cites City of Concord v. Tompkins, 124 N.H. 463, 467-68 (1984), for the “four essential elements” to maintain an estoppel claim against a municipality and further notes “[t]he party asserting estoppel bears the burden of proof.” The Taxpayer fails to cite anywhere in the record where it attempted to present evidence regarding each element or satisfy its burden of proof as to each of them.

C. Summary

In summary, both the Rehearing Motion and the Reply Motion are denied. Any appeal of the Decision must be by petition to the supreme court filed within thirty (30) days of the date of this Order, with a copy provided to the board in accordance with Supreme Court Rule 10(7).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Chairman

Albert F. Shamash, Member

Theresa M. Walker, Member

NH ELECTRIC COOP CERTIFICATION FOR TAX YEAR 2011

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Margaret H. Nelson, Esq., Sulloway & Hollis, 9 Capitol Street, Concord, NH 03301, Taxpayer representative; Walter L. Mitchell, Esq. and Judith E. Whitelaw, Esq., Mitchell Municipal Group, P.A., 25 Beacon St. East, Laconia, NH 03246; Shawn M. Tanguay, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766; Mr. George E. Sansoucy and Mr. Brian D. Fogg, George E. Sansoucy, PE, LLC, 89 Reed Road, Lancaster, NH 03584; Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258; Brett S. Purvis & Associates, Inc., c/o Allison Purvis, 1195 Acton Ridge Road, Acton, ME 04001; Chairman, Board of Selectmen, PO Box 61, Andover, NH 03216; Chairman, Board of Selectmen, 1 Dalton Road, Brentwood, NH 03833; Chairman, Board of Selectmen, 17 Bridge Street, Colebrook, NH 03576; Chairman, Board of Selectmen, 157 Main Street, Epping, NH 03042; Chairman, Board of Selectmen, PO Box 299, Grafton, NH 03240; Chairman, Board of Selectmen, PO Box 33, East Lempster, NH 03605; Chairman, Board of Selectmen, PO Box 126, Lyme, NH 03768; Chairman, Board of Selectmen, 6 Pinnacle Hill Road, New Hampton, NH 03256; Chairman, Board of Selectmen, PO Box 380, Meriden, NH 03770; Chairman, Board of Selectmen, 16 Merrill Access Road, Thornton, NH 03285; and Chairman, Board of Selectmen, Town of Unity, 13 Center Road #1, Charlestown, NH 03603-7500.

In Re: NH Electric Cooperative, Inc.

(See Attached Case List)

Page 10 of 10

NH ELECTRIC COOP CERTIFICATION FOR TAX YEAR 2012

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Margaret H. Nelson, Esq., Sulloway & Hollis, 9 Capitol Street, Concord, NH 03301, Taxpayer representative; Walter L. Mitchell, Esq. and Judith E. Whitelaw, Esq., Mitchell Municipal Group, P.A., 25 Beacon St. East, Laconia, NH 03246; Shawn M. Tanguay, Esq., Gardner, Fulton & Waugh, PLLC, 78 Bank Street, Lebanon, NH 03766; Mr. George E. Sansoucy and Mr. Brian D. Fogg, George E. Sansoucy, PE, LLC, 89 Reed Road, Lancaster, NH 03584; Avitar Associates of New England, Inc., 150 Suncook Valley Highway, Chichester, NH 03258; Brett S. Purvis & Associates, Inc., c/o Allison Purvis, 1195 Acton Ridge Road, Acton, ME 04001; Chairman, Board of Selectmen, PO Box 61, Andover, NH 03216; Chairman, Board of Selectmen, 1 Dalton Road, Brentwood, NH 03833; Chairman, Board of Selectmen, 17 Bridge Street, Colebrook, NH 03576; Chairman, Board of Selectmen, 157 Main Street, Epping, NH 03042; Chairman, Board of Selectmen, PO Box 299, Grafton, NH 03240; Chairman, Board of Selectmen, PO Box 126, Lyme, NH 03768; Chairman, Board of Selectmen, 6 Pinnacle Hill Road, New Hampton, NH 03256; Chairman, Board of Selectmen, 21 Summer Street, Northfield, NH 03276; Chairman, Board of Selectmen, PO Box 380, Meriden, NH 03770; Chairman, Board of Selectmen, 16 Merrill Access Road, Thornton, NH 03285; Chairman, Board of Selectmen, Town of Unity, 13 Center Road #1, Charlestown, NH 03603-7500; and Chairman, Board of Selectmen, PO Box 40, Warren, NH 03279.

Dated: 9/14/15

Anne M. Stelmach, Clerk