

**Great Lakes Hydro America, LLC v. City of Berlin  
Docket Nos.: 25531-10PT/26219-11PT**

**and**

**Great Lakes Hydro America, LLC v. Town of Gorham  
Docket Nos.: 25532-10PT/26220-11PT**

**ORDER**

On September 10, 2013, the board held a hearing on three discrete discovery issues presented in an August 30, 2013 Joint Motion to Compel and Continue (“Joint Motion”) filed on behalf of the City of Berlin (“City”) and Town of Gorham (“Town”) just 11 days prior to the scheduled date (September 10, 2013) for the hearings on the merits of these appeals. As enumerated in paragraph 6, the Joint Motion seeks to compel the “Taxpayer” to produce three specific classes of documents allegedly responsive to prior discovery attempts (in the form of interrogatories and document production requests). On September 3, 2013, the Taxpayer filed its “Opposition” to the Joint Motion and on September 10, 2013 the municipalities filed a “Joint Reply.” The board determined the scheduled September 10, 2013 hearing on the merits should be “held in abeyance” to allow time to hear and resolve these discovery issues. (See September 5, 2013 Order.) After a brief summary of the relevant discovery rules and principles (in Section A), the board presents its detailed rulings on the three discovery issues (in Section B).

A. The Relevant Discovery Rules

The stated purpose of discovery is to allow each party an opportunity “to adequately prepare” its presentation, but discovery cannot be “overly burdensome” taking into account “the type and complexity of the appeal.” Tax 201.19(a). The same balance between allowing adequate discovery and protection from undue burden is reflected in the superior court rules cited below and in the case law.<sup>1</sup> Tax 201.19(b) further provides the “superior court discovery rules shall apply to all board proceedings,” except as modified by the board’s own rules.

One such modification concerns the number of interrogatories. Tax 201.19(d) limits that number to 15 for each appeal, but further provides that “leave of the board” to serve additional interrogatories can be obtained “if the moving party demonstrates additional interrogatories are required to ensure full discovery.” In the Opposition, the Taxpayer asserts the municipalities exceeded this 15 interrogatory limit. The municipalities point out, however, that four separate appeals are involved and neither the board’s rules nor the superior court rules specifically limit the number of document production requests either party may serve on the other. In these appeals, however, the issue of whether the numerical limit on interrogatories was exceeded is

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<sup>1</sup> See, e.g., New Hampshire Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 429-30 (2009) (“trial court has discretion to determine the limits of discovery” and can “keep discovery within reasonable limits and avoid ‘open-ended fishing expeditions’ or harassment to ensure that discovery contributes to the orderly dispatch of judicial business. [Citations omitted.]”); Petition of Haines, 148 N.H. 380, 381 (2002) (“Control over the breadth and scope of pre-trial discovery is left to the sound discretion of the trial judge. [Citation omitted.]”; and Wal-Mart Real Estate Business Trust v. Town of Conway, BTLA Docket Nos. 20892-04PT and 21665-05PT (December 31, 2007) at p. 5:

There is clearly a spectrum of permissible and impermissible discovery ranging, at the one end, from an information request that is either directly “relevant” to triable issues or “appears reasonably calculated to lead to the discovery of admissible evidence” and, at the other end, an information request that is no more than a ‘fishing expedition,’ or worse, one causing discovery abuse (such as unwarranted annoyance, embarrassment or undue burden or expense). [Citing Super. Ct. R. 35(g)(1).]

now moot in light of the board's specific discovery rulings below. In general, parties should be cognizant of the interrogatory limit and seek "leave" from the board [pursuant to Tax 201.19(d)] if they seek to serve additional interrogatories.

Turning to the superior court rules, the articulated test for the "scope of discovery" is stated in Rule 35 and hinges on whether the discovery items sought are "relevant to the subject matter involved."<sup>2</sup> A party cannot object to production simply by claiming "the information sought will be inadmissible at trial," provided "the information sought is reasonably calculated to lead to the discovery of admissible evidence." Rule 36 addresses written interrogatories and limits to 50 the number of interrogatories that may be propounded "unless the Court otherwise orders for good cause shown." This rule further mentions interrogatories may request the production of documents ("copies of papers"), but does not limit the number of requests that can be made.

#### B. The Disputed Discovery Issues

There is no dispute the Taxpayer has already provided a large number of documents responsive to the municipalities' discovery requests. According to the Taxpayer (Opposition, p. 4), 1,379 pages of responsive documents were provided (through the medium of electronic disks). The municipalities (Joint Motion, p. 1) also acknowledge the Taxpayer has "produced

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<sup>2</sup> See Rule 35.b(1):

[I]n general, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

many but by no means all of the documents [they] requested.” The parties’ representatives and attorneys also met on several occasions (on August 14, 2013 and August 26, 2013, prior to the filing of the Joint Motion) to attempt to resolve the discovery issues discussed below, but without success.<sup>3</sup>

1. “Actual Invoices”

The first area of dispute concerns whether the Taxpayer should be compelled to produce copies of “actual invoices” related to power purchase agreements (“PPA’s”).<sup>4</sup> (The municipalities originally sought invoices dating back to 2002 but in the Joint Reply (p. 3) and at the hearing stated they would shorten the time limit to 2006.) The Taxpayer argues producing the invoices would be “overly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.” (Opposition, p. 6.)

Although a managerial employee of the Taxpayer (Thomas L. Mapletoft) was present at the hearing, no testimony was elicited (either through direct or cross-examination) regarding the alleged burdensomeness of producing these invoices. The board therefore is unable to find production of the invoices would be “overly burdensome” on the Taxpayer. What remains at issue is whether the municipalities met their burden of demonstrating their request for these invoices is “reasonably calculated to lead to the discovery of admissible evidence.”

To help decide this issue, the board reviewed both the Traub Appraisals referenced by the Taxpayer and the municipalities’ own appraisals prepared by George A. Sansoucy. Neither

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<sup>3</sup> See Joint Motion, p. 2; and Opposition, p. 5. These meetings resulted in confusion and misunderstandings regarding whether additional documents would be produced, resulting in the filing of the Joint Motion.

<sup>4</sup> See Joint Motion, paragraph 6.a. The board finds the “sworn statement” aspect of this request is no longer at issue in light of the Taxpayer’s supplemental July 5, 2012 response (attached as Exhibit A to the Opposition) and the representations at the hearing.

appraiser makes any conjectures regarding how review of those invoices would or would not be helpful in developing value conclusions. The Taxpayer's argument that Mr. Traub, its appraiser, did not review or rely on the actual invoices to estimate electricity prices and revenues is supported by the discussion in the 2011 Traub Appraisal (pp. 70-77 and 109-114). Mr. Traub found the prices stated in the PPA's to be of limited use to developing his value estimate and therefore relied on "predictions of market prices for electricity developed by various forecasting services." (Objection, p. 6.)

Similarly, while Mr. Sansoucy discusses in his appraisals his examination of the PPA's, he concludes they were entered into by related parties and therefore the terms stated in them were not "arm's length," diminishing their relevance and usefulness, causing him, like Mr. Traub, to rely on market price information sources. (See, e.g., his City appraisal, pp. 10-11.) Consequently, the record indicates Mr. Sansoucy, like Mr. Traub, developed his valuation estimates without placing reliance on the prices that might be reflected in any actual invoices issued pursuant to the PPA's.

For these reasons, the board concludes the actual invoices issued under the PPA's are of questionable value to resolving the ultimate issues involved in these appeals. These issues turn on whether or not the assessments in each year were or were not proportional and will be dependent on the actual work and conclusions of each appraiser, not additional documents neither appraiser relied upon in developing his respective estimates of value. Balancing the competing interests noted above, the board finds the Taxpayer should not be compelled to produce the actual invoices the municipalities have requested.

2. The Eight “Untendered” Appraisals

The second discovery issue<sup>5</sup> involves eight other unidentified and “untendered” appraisals of other hydroelectric facilities performed over a span of years going back to 2007 by Mr. Traub. He referenced these other appraisals only for a very limited purpose on p. 89 of one of his appraisals in these appeals. (See Taxpayer Exhibit No. 2; and “Exhibit C” attached to the Opposition.) A careful reading of this page indicates these other appraisals were not used to develop or confirm his value conclusion for the hydroelectric facilities at issue in these appeals, but were mentioned in an incidental manner to illustrate a ‘range’ of historical expenses (“\$10 per MWh produced to as high as \$24.44 . . .”). The board finds this limited reference does not justify ordering the production of these other appraisals.

The Taxpayer further argued Mr. Traub cannot produce these appraisals (prepared for clients different from the Taxpayer) without violating his confidentiality obligations under the Uniform Standards of Professional Appraisal Practice (“USPAP”). (See Taxpayer Exhibit No. 1.) The board finds these concerns are valid for the reasons discussed at the hearing. Consequently, the board finds the Taxpayer should not be compelled to produce the eight other appraisals.

3. “Brookfield’s Annual Appraisals”

Both parties presented evidence that establishes the Taxpayer, organized as a limited liability company, has complicated financial linkages (involving a considerable number of intermediate entities, some with minority ownership interests) that ultimately leads to indirect ownership by Brookfield Asset Management, Inc. (“Brookfield”), a company publicly traded on

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<sup>5</sup> Joint Motion, paragraph 6.b.

the New York and Toronto stock exchanges. (Compare Municipality Exhibit A and Taxpayer Exhibit No. 4.) The evidence presented indicates Brookfield owns, along with many other assets, a total of 169 hydroelectric facilities in North America, but only five of them are involved in these appeals (three in the City and two in the Town) and Brookfield is not a party to these appeals.

The municipalities seek to discover what they call the “Brookfield annual appraisals . . . as referenced in Brookfield’s annual reports.”<sup>6</sup> A careful review of the annual report, however, reveals that no such “appraisals,” in the conventional sense of the term (other than, of course the Traub Appraisals already produced by the Taxpayer), have been shown to actually exist. In this respect, the Taxpayer states (in “Exhibit B,” p. 2 of its Opposition) it had “no role in the preparation of” Brookfield’s annual report or the calculations contained therein and, to its knowledge, “the only appraisals performed . . .” are the Traub and Sansoucy appraisals (“commissioned” for these appeals).

The municipalities fail to distinguish financial calculations using internal accounting techniques by Brookfield corporate staff from independent appraisals (completed by a professional appraiser complying with USPAP standards) for the five specific hydroelectric facilities owned by the Taxpayer in these appeals. The evidence presented tends to indicate Brookfield publicly reports aggregate values of its assets using an alternative accounting technique known as the “revaluation method,” one that is not necessarily based on cost or other appraisal methods. The revaluation method, according to Brookfield, is based on the “fair values” of “property, plant and equipment” and has increased Brookfield’s reported “common

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<sup>6</sup> See Joint Motion, paragraph 6.c.

equity” substantially [by “\$8.0 billion” according to the explanation in the 2010 Annual Report (Municipality Exhibit B)]. The value of Brookfield as a publicly traded entity is determined by investors in the stock market. Brookfield is free to perform calculations of its own device pertaining to the aggregated business value of the many assets it owns, either directly or indirectly. Such value calculations, however, are distinct and separate from property specific estimates of the value of the taxable real estate (land and improvements) owned by the Taxpayer in these appeals.

Given the exchange of the Traub and Sansoucy appraisals, which are detailed, property-specific appraisals of the five hydroelectric facilities at issue in these appeals, the board finds the Brookfield analyses are extraneous and of questionable relevance to the issues presented. Consequently, the board finds the Taxpayer is not obligated to ascertain whether they exist at Brookfield (for the five hydroelectric facilities) and, if so, to produce them in additional discovery.

### C. Summary

Reasonable minds can and do sometimes disagree over the scope of permissible discovery and interpretation of the articulated standards noted above. The board has weighed the concerns and competing interests expressed by the parties and finds reasonable discovery limits are warranted in light of the burdens and questionable benefits of compelling further discovery in these appeals. Practical limits are especially appropriate given the volume of documents already produced and exchanged, including the work of each party’s expert appraiser. Based on the evidence presented, the board therefore denies the Joint Motion seeking additional document discovery.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Michele E. LeBrun, Chair

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Albert F. Shamash, Member

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Theresa M. Walker, Member

**CERTIFICATION**

I hereby certify copies of the above Order have this date been mailed, postage prepaid, to: William L. Plouffe, Esq., DrummondWoodsum, 84 Marginal Way – Suite 600, Portland, ME 04101, counsel for the Taxpayer; Christopher L. Boldt, Esq., Donahue, Tucker & Ciandella, PLLC, PO Box 214, Meredith, NH 03253, counsel for the City of Berlin; Robert Upton, II, Esq., Upton & Hatfield, LLP, 23 Seavey Street, North Conway, NH 03860, counsel for the Town of Gorham; George E. Sansoucy, PE, LLC, 89 Reed Road, Lancaster, NH 03584, Contracted Assessing Firm; Chairman, Board of Assessors, City of Berlin, 168 Main Street, Berlin, NH 03570; and Chairman, Board of Selectmen, Town of Gorham, 20 Park Street, Gorham, NH 03581.

Dated: 10/8/13

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Anne M. Stelmach, Clerk