

**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

The board has reviewed in great detail the November 14, 2014 “Joint Motion for Reconsideration and Rehearing” (the “Joint Motion”) filed by the “City” and the “Town” (collectively, the “municipalities”) with respect to the October 16, 2014 Decision and the “Taxpayer’s” December 3, 2014 “Opposition” to the Joint Motion. The suspension Order issued on November 21, 2014 is hereby dissolved. For the reasons explained below, the board grants partial reconsideration and denies the rehearing request.

In brief, and as noted by the Taxpayer (Opposition, pp. 2 and 8): reconsideration and rehearing motions are governed by the “good reason” standard set forth in RSA 541:3 and Tax 201.37; “mere disagreement” with the Decision is not sufficient grounds to grant such motions; and such motions are not granted “for harmless errors that, if corrected, would not change the board’s [D]ecision.”

The disagreements with the Decision expressed in the Joint Motion stem from disputes between the municipalities and the Taxpayer regarding some of the many assumptions made by

their respective experts to form opinions regarding the 2010 and 2011 market values of the Taxpayer's property, consisting of five hydroelectric facilities ("hydros") located in the City and the Town. The board evaluated these disagreements between the experts before making its own findings. (See, e.g., Decision, p. 15.)

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.

Applying these standards and after careful review of the record and the arguments presented, the board finds a "rehearing" is not warranted. The consolidated hearing of these appeals spanned seven days (March 31 through April 4 and June 26 and 27, 2014), many documents and extensive witness testimony were presented and the board made detailed findings in a 92 page Decision, including two addenda, one of which responded to several hundred requests for findings of fact and rulings of law from the parties. Upon review of the voluminous record, the board finds no useful purpose would be served by granting a rehearing.

On the other hand, the board finds reconsideration of one aspect of the Decision is warranted due solely to an inadvertent computational error in one of the attached spreadsheets

pertaining to one of the five hydros (“Riverside”) for one tax year (2011). The board’s reconsideration and modification of the Decision in this minor respect is explained below, along with a brief discussion of the other arguments in the Joint Motion (which the municipalities presented in three sections).

A. Section I of the Joint Motion

The board finds only one of the eight issues argued in Section I of the Joint Motion warrants reconsideration of the Decision. The municipalities note, and the Taxpayer agrees, the “2011 Riverside DCF” in Addendum A (pp. 37-38) contains an error affecting five cells on this spreadsheet: a \$200,000 expense deduction for “relicensing costs” in each of five years (2019-2023) for this hydro. This error was inadvertent and the text of the Decision (p. 21 and fn. 20) states why the board did not intend to apply a relicensing cost to the Riverside hydro: “the Riverside license will not expire until 2033, three years after the 20-year holding period in the DCF. . . . Neither appraiser included any part of Riverside’s licensing costs as an expense item in their respective DCFs and the board has chosen not to do so either.” While the board correctly omitted the Riverside relicensing cost from the “2010 Riverside DCF,” the cost was mistakenly included in the corresponding 2011 Riverside DCF. (Compare Addendum A, pp. 27-28 and 37-38.)

As noted in the Opposition (pp. 3-4), the municipalities’ arguments and calculations regarding the magnitude of this spreadsheet error contain significant errors of their own. The board agrees with the Taxpayer that correction of the 2011 Riverside DCF has a “relatively minor” effect on the board’s market value findings and “removal of the expense would only

Great Lakes Hydro America, LLC v. City of Berlin

Docket Nos.: 25531-10PT/26219-11PT

Great Lakes Hydro America, LLC v. Town of Gorham

Docket Nos.: 25532-10PT/26220-11PT

Page 4 of 8

change the value [of the Riverside hydro in tax year 2011] by \$200,000, not by the \$1.1 million that [the municipalities] erroneously contend.” (See Opposition, p. 3 and Exhibit 1 thereto.)

Correcting this unintended spreadsheet error requires amendment of five pages of the Decision. (See the Amendment to the Decision issued concurrently herewith, correcting pages 6, 23, 24, 37 and 38 of the Decision.) As amended, the estimated market value of the Riverside hydro in 2011 increases by just \$200,000: from \$14,400,000 to \$14,600,000 (less than a 1.4% difference). When the market value of the Taxpayer’s entire estate in the City for tax year 2011 is considered (consisting of three hydros, including Riverside), the effect is even less significant, increasing the total estimated market value from \$27,600,000 to \$27,800,000, or 0.72%.¹ This higher market value finding, when adjusted by the 122.8% level of assessment in the City, results in an abated assessment of \$34,138,000; when compared to the \$34,500,000 assessment under appeal, the extent of disproportionality narrows to \$361,600 in tax year 2011.

The board does not agree with the other seven issues in Section I of the Joint Motion for the reasons stated in the Opposition (pp. 5-13). For the sake of brevity, and because many of the points argued are addressed adequately in the Decision, the board will limit its comments to only several points pertaining to these issues.

The municipalities make arguments regarding conflicts in the evidence with respect to the estimated cost of “headwater dam repairs” (discussed in the Decision, p. 21 and fn. 19), but these arguments do not withstand scrutiny. While they now contend the board should have used a

¹ The board has considered the Taxpayer’s arguments as to why this could be considered “harmless error.” (See Opposition, pp. 3-4.) On balance, however, the board finds it is more reasonable to correct this spreadsheet error. Recognizing both parties’ experts placed heavy reliance on the DCF approach to reach their respective market value conclusions, “[t]he board’s DCFs contain what the board finds are the most credible assumptions and methodology based on the evidence presented in these appeals, recognizing full well the uncertainties involved in projecting cash flow components for each hydro over a 20-year period.” Decision, p. 15.

lower cost estimate (approximately \$25 million rather than \$37 million in tax year 2010), both parties' experts, including the municipalities' own appraiser (George E. Sansoucy), used the higher \$37 million estimate for 2010 and it was not a point of dispute: as noted in the Opposition (p. 5), the \$37 million estimate "is consistent with the values used by both appraisers. Munis. Ex. A, B, App. J, K, L; Taxpayer Ex. 1-4; Vol. 5, 263:1-5; 264:6-12; Vol. 6, 139:7-20. . . ."

The board agrees with the points made in the Opposition (pp. 6-9) rebutting the separate arguments in the Joint Motion (¶¶ 5, 14-24 and 30-31) regarding operating expenses, the "future price of power" (over the 20 year DCF time span) and the allocation of relatively minor components of revenue from "renewable energy credits [RECs]." (See Decision, pp. 16-18.) For the reasons stated on pages 21 and 22 of the Decision, the board does not agree with the municipalities it was error to "expense" rather than "amortize" certain capital expenditures in the manner suggested by their appraiser. (Cf. Joint Motion, ¶¶ 32-35 and Opposition, pp. 11-12.)

Further, the board does not find merit in the arguments in the Joint Motion (¶¶ 28-29) regarding why the anticipated capital expenditures will necessarily "increase generation by 5% for each" of the five hydros, as well as "cash flows." As noted in the Opposition (pp. 9-11), the municipalities do not provide "reasonable support or explanation" for these arguments and the municipalities appear to overlook the fact that "even major capital expenditures are often tied to *maintaining*, rather than to increasing generation" at each hydro. (Emphasis in original.) The DCF's presented by their own appraiser (Mr. Sansoucy), like the Taxpayer's appraiser (Stephen G. Traub), do not "increase generation of any of the facilities following capital improvements." (Id. at p. 11.) As stated in the Decision (pp. 16-17), the board reviewed this evidence and explained the basis of its "Effective Energy Generation" findings.

Finally, the board agrees with the Opposition (p. 12) that the Joint Motion (¶36) misreads one summary paragraph of the Decision to argue for an ‘arbitrary’ increase in the value of the “Cross” hydro in 2011. While the second full paragraph on page 24 of the Decision does note a specific percentage change (“5.75%,” between 2010 and 2011) in the aggregate estimated value of the three hydros in the City (Riverside, Cross and Sawmill), this change resulted from the board’s detailed findings for each hydro (reflected in the spreadsheets in Addendum A) and was not because the board found a uniform percentage increase should be applied to each. (Cf. Decision, pp. 6 and 24.) Thus, the board does not agree further adjustment to the value of the Cross hydro is warranted by its findings.

B. Section II of the Joint Motion

In Section II of the Joint Motion, the municipalities repeat arguments made both during² and before the hearing that the board erred by not compelling production of the so-called “Brookfield Internal Appraisals.” The board disagrees, for the reasons stated in the Decision (p. 10), in its rulings prior to the consolidated hearing (see, e.g., October 8, 2013 Order) and in the Opposition (pp. 13-14). As further noted in the Opposition (p. 13), the Supreme Court “declined to entertain” the municipalities’ interlocutory appeal of the board’s rulings on this discovery issue. (See January 27, 2014 Order in Appeal of City of Berlin, Supreme Court Docket No. 2013-0829.)

² According to the Joint Motion (paragraphs 39 and 40), the municipalities “renewed” their motion on April 1 and April 4, 2014 in the course of the hearing. The Objection (p. 13, fn. 12) correctly cites the places in the unofficial transcript where this occurred and the board’s repeated denials of the renewed motion.

C. Section III of the Joint Motion

This section of the Joint Motion essentially argues a taxpayer should be foreclosed from proving an assessment is disproportional simply because a municipality used the same or a similar methodology to assess another property the taxpayer does not own. The board does not agree for the reasons stated on page 12 of the Decision and in the Opposition (pp. 14-15).

D. Summary

For all of these reasons, the board denies the rehearing requested in the Joint Motion and grants partial reconsideration as to only one issue (pertaining to the 2011 Riverside DCF). As noted above, the board is issuing concurrently herewith an Amendment to the Decision for this purpose.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Michele E. LeBrun, Chair

Albert F. Shamash, Member

Theresa M. Walker, Member

Great Lakes Hydro America, LLC v. City of Berlin

Docket Nos.: 25531-10PT/26219-11PT

Great Lakes Hydro America, LLC v. Town of Gorham

Docket Nos.: 25532-10PT/26220-11PT

Page 8 of 8

CERTIFICATION

I hereby certify copies of the above Order have this date been mailed, postage prepaid, to: William L. Plouffe, Esq., and Matthew H. Upton, Drummond Woodsum, 84 Marginal Way – Suite 600, Portland, ME 04101, counsel for the Taxpayer; Peter J. Crossett, Esq., Hiscock & Barclay, One Park Place, 300 South State Street, Syracuse, NY 13202, co-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, P.O. Box 2242, North Conway, NH 03860, counsel for the Town of Gorham; Chairman, Board of Assessors, City of Berlin, 168 Main Street, Berlin, NH 03570; Chairman, Board of Selectmen, Town of Gorham, 20 Park Street, Gorham, NH 03581; and George E. Sansoucy, PE, LLC, 89 Reed Road, Lancaster, NH 03584, Contracted Assessing Firm.

Dated: 01/02/15

Anne M. Stelmach, Clerk