

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
MICHIGAN TAX TRIBUNAL

L'Anse Warden Electric Company LLC,  
Petitioner,

v

MTT Docket No. 392335

L'Anse Township,  
Respondent.

Tribunal Judge Presiding  
Steven H. Lasher

ORDER VACATING MARCH 5, 2014 ORDER DENYING PETITIONER'S  
SUPPLEMENTAL MOTION FOR RECONSIDERATION

ORDER GRANTING PETITIONER'S SUPPLEMENTAL MOTION FOR  
RECONSIDERATION

CORRECTED FINAL OPINION AND JUDGMENT ON REMAND

INTRODUCTION

Petitioner, L'Anse Warden Electric Company LLC, appeals ad valorem property tax assessments levied by Respondent, L'Anse Township, against Parcel No. 07-044-545-013-10 for the 2010 and 2011 tax years. On August 3, 2012, the Tribunal rendered a Final Opinion and Judgment finding that Petitioner failed to meet its burden in establishing the subject property's true cash value for the tax years at issue. The Tribunal concluded that the subject property was not over-assessed, and the subject property's true cash value, as confirmed by the Board of Review, for the 2010 and 2011 tax years was affirmed.

Following Petitioner's Motion for Reconsideration, which was filed on August 22, 2012, and partially granted on September 11, 2012, for errors, including errors relative to the value of the subject's land, misstatements in the Final Opinion and Judgment, and the calculation of functional obsolescence, see *L'Anse Warden Electric Co, LLC v L'Anse Township*, 22 MTTR 234 (Docket No. 392335, September 11, 2012), Petitioner filed a claim of appeal with the

Michigan Court of Appeals. On October 17, 2013, the Michigan Court of Appeals issued an opinion which affirmed in part, reversed in part, and remanded the Tribunal's decision. See *L'Anse Warden Electric Co LLC v L'Anse Twp*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2013 (Docket No. 312536). Specifically, the Court of Appeals concluded that the Tribunal:

. . . erred in failing to make any finding regarding whether the government subsidies affected the true cash value of the property. While the MTT did not err in using the cost approach, it failed to consider subsidies in its calculations. Lastly, the Tribunal did not err in declining to adopt petitioner's calculation of external obsolescence."

Further, in its discussion of the cost and income approaches to value, the Court reiterated that:

. . . there was no error of law or adoption of a wrong legal principle in using the cost approach. However, as we are remanding for the MTT's determination of the effect subsidies may have had on the true cash value, the tribunal may wish to revisit whether the cost approach is the most reliable method in light of subsidies.

The Tribunal issued its Final Opinion and Judgment on Remand on January 29, 2014. Subsequently, Petitioner filed a Motion for Reconsideration of the Final Opinion and Judgment on Remand on February 18, 2014; the Tribunal granted Petitioner's Motion and scheduled a limited default hearing, which was held on May 7, 2014.<sup>1</sup>

Petitioner was represented by Christian E. Meyer, Attorney, and its witnesses were Michael J. Diedrich, Appraiser, and Zachary J. Halkola, Energy Sales and Financial Manager of Petitioner. Respondent did not appear at the limited default hearing.

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<sup>1</sup> By Tribunal Order, dated March 5, 2014, the limited hearing in this matter was scheduled as a default hearing pursuant to TTR 247 because Respondent failed to timely file an Answer to the Petition filed by Petitioner and failed to properly cure the default as ordered by the Tribunal on April 29, 2011. Respondent did not attend the Limited Default Hearing.

Based on the evidence, testimony, and case file, the Tribunal finds that the true cash values (“TCV”), state equalized values (“SEV”), and taxable values (“TV”) of the subject property for the years under appeal are as follows:

**Parcel Number:** 07-044-545-013-10

	TCV	SEV	TV
2010	\$11,063,500	\$5,531,750	\$5,531,750
2011	\$11,259,500	\$5,629,750	\$5,625,789

### PETITIONER’S CONTENTIONS

Petitioner contends that the evidence presented in this limited hearing strongly supports a determination that if the cost approach is to be applied by the Tribunal to determine the TCV of the subject property for the tax years at issue, then the only issue before the Tribunal is the impact that the payment to Petitioner of federal cash subsidies equal to 30% of eligible costs incurred by Petitioner to improve and convert the subject property from a gas plant to a bio-mass burning plant<sup>2</sup> has in determining that value. Petitioner further contends that calculating external obsolescence using an income approach is the most appropriate means by which to reflect the impact of the 1603 Subsidy in the determination of the subject property’s true cash value using the cost approach.<sup>3</sup> Specifically, in developing his economic obsolescence factors of 75% for 2010 and 60% for 2011, Petitioner’s appraiser compared the income the market would require from the project if no external obsolescence existed as opposed to the reduced amount of income required by the market if subsidies were received by the developer. Applying an income approach to determine economic obsolescence, Petitioner’s appraiser concluded to a TCV for the

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<sup>2</sup> Petitioner was paid a cash subsidy in the amount of \$11,690,566 under a federal “1603 Program.” ((1603 Subsidy”)

<sup>3</sup> In its March 5, 2014 Order Granting Petitioner’s Motion for Reconsideration, the Tribunal found that 97% of the 1603 Subsidy was used for real property. Thus, when the Tribunal refers to the 1603 Subsidy, it refers to only the 97% attributable to the real property.

subject property of \$4,274,000 for the 2010 tax year and \$6,914,000 for the 2011 tax year.

(Petitioner's Hearing Brief for Limited Default Hearing, p 4)<sup>4</sup>

Petitioner's appraiser also provided two alternative methods to be considered in measuring the impact of the subsidies on the TCV of the subject property using the cost approach, given the unavailability of such subsidies to a new owner of the subject property. The first alternative proposed by Petitioner is to simply consider the real property portion of the subsidy (\$11,339,849) as the economic obsolescence suffered by a new owner unable to receive any similar subsidy for the plant. The second alternative proposed by Petitioner is to view the value of the 1603 Subsidy as a rebate of dollars spent by Petitioner, allocated "to the various vintages and accounts that were used to derive the original RCN." (Petitioner's Hearing Brief for Limited Default Hearing, p 17)

### **PETITIONER'S ADMITTED EXHIBITS**

The Tribunal incorporates, by reference, the exhibits admitted by Tribunal Member Enyart at the January 31, 2012 hearing and reflected in the August 3, 2012 Final Opinion and Judgment. At the limited hearing, the Tribunal admitted the following additional exhibits:

P-9 Analysis of Alternative 2 for tax year 2010.

P-10 Analysis of Alternative 2 for tax year 2011.

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<sup>4</sup> It has previously been determined by the Tribunal and the Court of Appeals that in applying the cost approach to value for 2010, Reproduction Cost New ("RCN") is \$69,800,000, physical depreciation is 52.82%, functional obsolescence is 22%, IFT property not subject to appeal is 34% and land value is \$50,000. Ro4 2011, RCN has been determined to be \$72,700,000, physical depreciation is 54.14%, functional obsolescence is 22%, IFT property not subject to appeal is 34%, and land value is \$50,000.

### **PETITIONER'S WITNESSES**

#### Michael J. Diedrich

Michael J. Diedrich, a Michigan certified appraiser, was Petitioner's valuation expert. He testified that: (i) he prepared the appraisal report and alternative valuations one and two of the subject property for the 2010 and 2011 tax years, (ii) in the appraisal report, he determined the true cash values of the subject property for the tax years at issue using the cost approach to value, (iii) in order to determine external obsolescence he looked to the income that the subject might produce as it is "affected by the subsidy program because the subsidy program was a one-time cash [reimbursement]." (Transcript, p 25), (iv) he used the income approach, specifically, the income shortfall method, to determine how much cash flow must be generated on a pre-income tax and pre-property tax basis, (v) the gap between the required cash flow and actual income must then be capitalized and deducted from the cost approach so the cost approach reflects market value, (vi) using the income approach to value external obsolescence is more accurate because you can adjust for intangibles, (vii) alternatives one and two were created to provide additional methods of determining the effect the 1603 Subsidy has on the value of the power plant, (viii) alternative one deducts the 1603 Subsidy, as external obsolescence, against the depreciated value of the subject property, (ix) alternative two deducts the trended 1603 Subsidy from the Reproduction Cost New and that value is depreciated, (x) "Alternative number 2 is better than alternative number 1 because it's really a rebate against the original cost." (Transcript, p 61), (xi) the "revenue stream realized by Petitioner is affected by the 30% cash payment upfront," (Transcript, p 28), (xii) 2009 was the first full year of operation for the plant, (xiii) he used one year of operating experience to forecast expenses over the life of the power contract, and (xiv) the subsidies received by Petitioner allowed Petitioner to negotiate a lower

rate from DTE for their power produced “because they already got 30 percent of their money.”  
(Transcript, p 49), (Transcript, p 11-73)

Zachary J. Halkola

Zachary J. Halkola is the Energy Sales and Financial Manager of Petitioner. He testified that: (i) the subject property is a converted biomass plant that burns woodchips from stumpage and from railroad ties, (ii) Petitioner provides energy to DTE at the rate of 14.7 megawatts and is compensated at a rate of \$102 per megawatt hour, (iii) Petitioner has a long-term (10 year) stumpage agreement, a fuel purchase agreement that lasts the length of the DTE contract, and two woodchip contracts, (iv) fuel supply and fuel quality have a significant impact on why Petitioner’s forecasts have not been achieved, (v) Petitioner anticipated \$600,000 - \$700,000 per year for annual maintenance expenditures and budgeted 1 – 1.5 million dollars for maintenance to the turbine every seven years,” (vi) actual expenditures have been over 1.1 million, resulting in reduced revenues, (vii) the reasons attributable to the revenue loss are the utilization of outdated boiler feed pumps, systems converted from a coal system, and significant fires in the ash silo, (viii) Petitioner made decisions with respect to the conversion in order to confirm they were online by a certain time and met the DTE contract to qualify for the 1603 Subsidy.  
(Transcript, p 79-89)

**RESPONDENT’S CONTENTIONS/ADMITTED EVIDENCE/WITNESSES**

Respondent did not file an Answer to Petitioner’s petition and was ultimately held in default by the Tribunal. Respondent was precluded from presenting any testimony or submitting any evidence pursuant to TTR 247(2). Respondent did not attend the default hearing.

## **FINDINGS OF FACT**

The Tribunal incorporates, by reference, the Findings of Fact made by Tribunal Member Enyart in the August 3, 2012 Final Opinion and Judgment and the Revised Findings of Fact made by Tribunal Member Smith in the Tribunal's September 11, 2012 Corrected Final Opinion and Judgment. The Tribunal finds the following additional facts:

1. The 1603 Subsidy paid to Petitioner was \$11,690,566.
2. 97% of the 1603 Subsidy is attributable to real property.
3. In developing the cost approach to value, RCN for the 2010 tax year is \$69.8 million and for the 2011 tax year is \$72.7 million.
4. The plant received Tax Incremental Financing ("TIF") in the amount of \$1,822,720 for 2010 and \$1,888,580 for 2011.
5. Physical depreciation of the subject plant is 52.82% for 2010 and 54.14% for 2011.
6. Functional obsolescence of the subject plant is 22% for both 2010 and 2011.
7. 34% of the subject plant is IFT property exempt from assessment.
8. Petitioner's appraiser's calculation of economic obsolescence of 75% for 2010 and 60% for 2011 was developed using an income approach that reflected the impact of the 1603 Subsidy.
9. Petitioner's appraiser also provided two alternative methods of reflecting the impact of the 1603 Subsidy on the value of the subject property using the cost approach.
10. The first alternative proposed by Petitioner's appraiser reflected the total amount of the 1603 Subsidy as economic obsolescence.
11. The second alternative proposed by Petitioner's appraiser reflected the 1603 Subsidy as a "rebate" and allocated the total amount of the subsidy to each of the cost components of the subject plant in their year placed in service and then trended those costs to 2010 and 2011, consistent with his development of RCN in his appraisal.

## **ISSUES AND CONCLUSIONS OF LAW**

### **I. Whether the Tribunal shall consider Petitioner's Alternatives One and Two.**

At the May 7, 2014 Limited Hearing, Petitioner's counsel again requested the Tribunal consider its alternatives one and two, despite the Tribunal's March 5, 2014 Order Denying Petitioner's Supplemental Motion for Reconsideration and limiting the rehearing to "the issue of the 1603 Subsidy only and Petitioner will not be allowed to supplement its evidence or explain its alternative valuation method presented in Petitioner's Supplemental Motion for Reconsideration." Petitioner's counsel stated that alternatives one and two utilize the cost

approach to value the subsidies, whereas its appraisal quantifies the effect of the 1603 Subsidy as external obsolescence, utilizing the income approach. Therefore, if the Tribunal upholds its original determination that the cost approach is the more reliable approach to value the subject property, it can “exercise its independent judgment to say . . . we don’t think the income approach embedded into his economic and external obsolescence approach is the correct one . . . .” (Transcript, p 9-10) Although the Court of Appeals held “it is apparent from the record that the MTT applied its expertise to arrive at an appropriate method for determining the true cash value . . . using the cost approach,” in remanding the appeal back to the Tribunal it stated that “the Tribunal may wish to revisit whether the cost approach is the most reliable method in light of subsidies.” *L’Anse Warden Electric Co LLC* at 4.

In light of the above, the Tribunal determined, at the limited hearing, that consideration of alternatives one and two is appropriate in light of the Court of Appeals’ directive and in consideration of the need to review multiple approaches to valuing the 1603 Subsidy. Therefore, the Tribunal vacates its March 5, 2014 Order Denying Petitioner’s Supplemental Motion for Reconsideration and grants the same in order to review and analyze Petitioner’s alternative methods of valuation. Finally, the Tribunal admitted Petitioner’s Exhibits P-9 and P-10 as documentary illustrations of Petitioner’s Appraiser’s testimony.

## **II. Whether the 1603 Subsidy had any effect on the true cash value of the subject property**

The assessment of real and personal property in Michigan is governed by the constitutional standard that such property shall not be assessed in excess of 50% of its true cash value. See MCL 211.27a. The Michigan Supreme Court has determined that “true cash value” is synonymous with “fair market value.” See *CAF Investment Co v State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).



Under MCL 205.737(1), the Tribunal must find a property's true cash value in determining a lawful property assessment. See *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981). The Tribunal is not bound to accept either of the parties' theories of valuation. See *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 378 NW2d 590 (1985). The Tribunal may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination. See *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473, 485-486; 473 NW2d 636 (1991).

Here, the Tribunal previously held, in both the Final Opinion and Judgment and the Final Opinion and Judgment on Remand, that the cost approach was the proper method of valuing the subject property. Further, the Court of Appeals held that:

[b]ecause it is apparent from the record that the MTT applied its expertise to arrive at an appropriate method for determining the true cash value, there was no error of law or adoption of a wrong legal principle in using the cost approach.

Although the Court of Appeals suggested that the tribunal “may wish to revisit whether the cost approach is the most reliable method in light of subsidies,” the Tribunal finds that its reliance on the cost approach to determine the true cash value of the subject property for the tax years at issue was proper. In concluding that the cost approach was the most appropriate method to value the subject property, the Tribunal found in its September 11, 2012 Corrected Final Opinion and Judgment that Petitioner’s values for RCN, physical depreciation and functional obsolescence were credible. The Tribunal further found in its Final Opinion and Judgment on Remand that land value was \$50,000 and the 1603 Subsidy was 97% real property. Thus, the sole issue in this limited hearing is to determine the effect of the 1603 Subsidy on the valuation of the subject property for the tax years at issue using the cost approach.

In this regard, Petitioner presents three alternatives for consideration by the Tribunal: (i) consider the 1603 Subsidy as economic obsolescence and calculate that economic obsolescence using the income approach, (ii) consider the 1603 Subsidy as economic obsolescence and treat the total amount of the subsidy as economic obsolescence, and (iii) consider the 1603 Subsidy as a “rebate” against RCN, reducing RCN by the trended cost of the subsidy.

The Tribunal finds no support for Petitioner’s option to consider the amount of the 1603 Subsidy as economic obsolescence in determining the TCV of the subject property using the cost approach. In support of this approach, Petitioner’s appraiser states that because a new owner would not be able to receive some form of subsidy similar to the 1603 Subsidy received by Petitioner, “the simplest and most direct method to account for the ‘value-influencing factor’ of the 1603 Subsidy is to subtract it off the cost approach to value.” (Petitioner’s Hearing Brief for Limited Default Hearing, p 16) However, when specifically questioned by the Tribunal, Petitioner’s appraiser agreed that from a theoretical sense, this alternative is not better than a methodology that considers the 1603 Subsidy as a “rebate” against the original cost. The Tribunal finds no basis for a methodology that simply considers the total amount of the 1603 Subsidy deemed to be real property to constitute economic obsolescence.

Thus, the Tribunal is left to consider whether the impact of the 1603 Subsidy on the value of the subject property using the cost approach is best measured by using an income approach to determine economic obsolescence or by simply treating the 1603 Subsidy as a “rebate” that reduces the RCN of the subject property. Petitioner has consistently contended throughout these proceedings that the income approach to measure economic obsolescence is appropriate because “that’s how the market would view the effects of the subsidies on that plant, is that they would look at the income it can produce, the cash flow that it will generate and it will determine their

purchase price based on that cash flow.” (Transcript, p 65, 66) However, the Tribunal has also consistently rejected Petitioner’s contentions regarding economic obsolescence and the means by which it should be measured in its Opinion and Judgment, Corrected Opinion and Judgment, and Final Opinion and Judgment on Remand. In this regard, the Court of Appeals agreed with the Tribunal, stating that “[a]s the tribunal properly recognized, external obsolescence is ‘loss of value occasioned by outside forces.’ As the MTT [f]ound, petitioner did not present any evidence of ‘outside negative influence to the subject property’ but merely presented evidence that was ‘property specific.’” Although the Tribunal finds that it clearly concluded, and was supported by the Court of Appeals, that in applying the cost approach Petitioner failed to credibly support its contention of economic obsolescence of 75% for 2010 and 60% for 2011, the Tribunal has taken one final look at this issue given the testimony of Petitioner’s appraiser at the limited default hearing. Again, the Tribunal concludes that Petitioner’s attempt to measure the impact of the 1603 Subsidy on the value of the subject property by using an income approach is simply not supported. The Tribunal finds that there is too much uncertainty associated with a methodology that relies upon just one year of actual expenses adjusted for inflation over a 20-year period. Further, such variables as efficiency and fuel pricing based on one year of operation fail to provide sufficient credible information to give the Tribunal comfort that the effect of the 1603 Subsidy on the value of the subject property has been properly determined.

Instead, the Tribunal finds that Petitioner’s appraiser’s consideration of the 1603 Subsidy as a “rebate” is more reflective of how the value of the subsidy should be determined. The payment of the subsidy was 30% of Petitioner’s cost to convert the subject plant from gas to wood, and the payment of the subsidy was upfront and consistent with the rebate concept. In developing his cost approach, Petitioner’s appraiser appropriately applied the Trended Original

Cost method to determine RCN. In applying that method, original costs of assets were segregated by year placed in service and trended to current dollars using the Handy-Whitman Index. As more fully explained by Petitioner's Exhibits P-9 and P-10, in calculating the impact of the 1603 Subsidy, Petitioner's appraiser appropriately allocated the subsidy based on those same trended original costs to conclude that RCN after giving effect to the 1603 Subsidy was \$47,167,452 for 2010 and \$49,368,895 for 2011. After reducing those values for TIF, physical depreciation, functional obsolescence, 34% IFT property, and adding land value of \$50,000, Petitioner concludes to a TCV of \$11,063,500 for 2010 and \$11,259,500 for 2011. The Tribunal finds that the TCV's determined by Petitioner using this methodology best reflects the impact of the 1603 Subsidy on the TCV of the subject property for the tax years at issue.

The subject property's TCV, SEV, and TV for the tax years at issue are as stated in the Introduction section above.

### **JUDGMENT**

IT IS ORDERED that the March 5, 2014 Order Denying Petitioner's Supplemental Motion for Reconsideration is VACATED.

IT IS FURTHER ORDERED that Petitioner's Supplemental Motion for Reconsideration is GRANTED.

IT IS FURTHER ORDERED that the property's assessed and taxable values, for the tax years at issue, are as set forth in the Introduction section of this Corrected Final Opinion and Judgment on Remand.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally provided in this Corrected Final Opinion

and Judgment on Remand within 20 days of the entry of the Corrected Final Opinion and Judgment on Remand, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by the Corrected Final Opinion and Judgment on Remand within 28 days of its entry. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment on Remand. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09%, (iv) after June 30, 2012, and through December 31, 2014, at the rate of 4.25%.

This Corrected Final Opinion and Judgment on Remand resolves the last pending claim and closes this case.

By: Steven H. Lasher

Entered: August 19, 2014  
sms