

**BEFORE THE STATE BOARD OF EQUALIZATION**

**FOR THE STATE OF WYOMING**

IN THE MATTER OF THE APPEAL OF )  
TRANSALTA WYOMING WIND LLC )  
FROM A DECISION BY THE DEPARTMENT ) Docket No. 2016-36  
OF REVENUE )  
(2016 State Assessed Value for Property Tax) )

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**ORDER ON MOTION TO DISMISS AND MOTION IN LIMINE**

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**THESE MATTERS** came before the State Board of Equalization (State Board) on the Wyoming Department of Revenue’s (Department) Motion to Dismiss and Motion in Limine, TransAlta Wyoming Wind, LLC’s (TransAlta) Traverse to the Wyoming Department of Revenue’s Motion to Dismiss and Motion in Limine, and the Department’s Reply to the Traverse.

The State Board, having reviewed the pleadings, and being otherwise advised in the premises, and for the reasons set forth below, grants the Department’s Motion to Dismiss as it relates to an appeal of the capitalization rate, although the remaining issues in TransAlta’s appeal may go forward. Further, the State Board grants the Department’s Motion in Limine with respect to intangible exemptions and other evidence and argument concerning information not available to the Department for its Best Information Appraisal. However, the State Board finds that discovery shall be completed to ensure TransAlta may adequately defend its appeal regarding evidence the Department considered in its Best Information Appraisal.<sup>1</sup>

The State Board provides the following in support of its findings and order:

**Issue 1: Whether the State Board lacks jurisdiction to hear and decide TransAlta’s capitalization rate claim.**

1. The Department set a capitalization rate (cap rate) as required by its Rules on March 31, 2016. The rule provides: “The Department shall annually calculate capitalization rates based upon the band of investment method as defined by these rules for all Department assessed industries.” Rules, Wyo. Dep’t of Revenue, ch. 7, § 7(a) (2014).

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<sup>1</sup> The Best Information Appraisal is also referred to as the Best Information Assessment, the Best Information Available, or the BIA. The State Board recognizes that it is referred to variously in statute and Department Rule, as well. *See infra* ¶ 13. For ease of reference, the State Board will refer to it only as the BIA recognizing that in doing so, it is referring to the Department’s assessment using the best information it had available to it at the time.

2. Prior to setting the cap rate, the Department must conduct a public meeting, and provide appropriate notice and an opportunity to comment. The rule provides:

(b) The Department shall conduct a public meeting for presentation of the capitalization rates to be used for the current Department assessed companies' property valuations no later than the 15th day of March each year. Notice of the date and time of the meeting shall be provided to all interested parties at least thirty days prior to the meeting. Upon written request submitted at least 5 days prior to the meeting interested parties may, at the meeting, **present written or oral comments on the proposed capitalization rates.** The Department will make available the **final determination** of the capitalization rates on the Department's [sic] web site. [sic] on or before March 31st or as soon thereafter as possible. This **final determination** of rates shall not affect the rights of a taxpayers [sic] to object in accordance with contested case procedures of the Administrative Procedure Act (W.S. 16-3-101 et seq.).

Rules, Wyo. Dep't of Revenue, ch. 7 § 7(b) (2014) (emphasis added). Thereafter, the Department set the cap rate for each group and sub-group of industries and informed all interested parties by memorandum dated March 31, 2016.<sup>2</sup>

3. TransAlta did not appeal the cap rate within 30 days of the Department's final determination. Instead, TransAlta raised the cap rate issue through its current appeal of the Department's BIA, dated June 23, 2016. Pet'r's Notice of Appeal 1.

4. The Department claims in its Motion to Dismiss that the State Board does not have subject matter jurisdiction to consider an appeal of the cap rate, arguing TransAlta's appeal was untimely. "The concept of subject matter jurisdiction is applicable equally to courts and administrative agencies. An agency does not have discretion in determining whether or not it has subject matter jurisdiction; subject matter jurisdiction either exists or it does not." *Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 7 P.3d 900, 904 (Wyo. 2000) (internal citations omitted). "Whether a court or agency has jurisdiction to decide a particular matter is a question of law, subject to *de novo* review." *Exxon Mobil Corp. v. Wyo. Dep't of Revenue*, 2011 WY 161, ¶ 24, 266 P.3d 944, 951 (Wyo. 2011).

5. TransAlta responds that "[t]he mere establishment of the capitalization rate by the DOR on March 31, 2016 did not result in an 'adverse' effect, as required by the statute and

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<sup>2</sup> The Department requests the State Board to take judicial notice of the Department's official report, entitled 2016 Executive Summary of Capitalization Rates for Department Assessments, attached to its Motion as Exhibit A. The Executive Summary is an official report of a state agency, and thus, it is appropriate for the State Board to do so. *See State v. Campbell Cty. Sch. Dist.*, 2001 WY 19, ¶ 134, 19 P.3d 518, 563 n. 56 (Wyo. 2001).

regulations, upon TransAlta for purposes of triggering the 30-day period for filing an appeal.” Pet’r’s Traverse 2. TransAlta argues it had no cause to appeal when the Department initially established the rate because any adverse effect would be speculative. “It only became adverse, and therefore subject to appeal, upon the application of the rate by the DOR in a potentially arbitrary and capricious manner which adversely affected TransAlta.” Pet’r’s Traverse 2. TransAlta additionally alleges “[t]he capitalization rate used in deriving the final assessed value fails to capture unique aspects of the property and sub-industry (wind producers).” Pet’r’s Notice of Appeal 1.

6. Pursuant to statute, the State Board has jurisdictional authority over appeals from final Department decisions, as follows:

(c) The state board of equalization shall perform the duties specified in article 15, section 10 of the Wyoming constitution and shall . . . review final decisions of the department upon application of any interested person adversely affected . . . under the contested case procedures of the Wyoming Administrative Procedure Act. Any interested person adversely affected by the adoption, amendment or repeal of a rule pursuant to W.S. 16-3-103(a) shall be afforded an opportunity for a hearing before the board.

Wyo. Stat. Ann. § 39-11-102.1(c) (2015).

7. TransAlta claims it did not have standing because it “did not know what the DOR was going to do or what the effect would be in using the capitalization rate until it acted as to TransAlta’s property.” Pet’r’s Traverse 3. The State Board disagrees with TransAlta that the issue is one of standing to contest the cap rate. *See* Pet’r’s Traverse 2-3. There is no question that TransAlta was a party affected by the cap rate, and thus, had standing at some point to be heard on the issue. The question is whether setting the cap rate was a “final decision” requiring TransAlta to timely appeal from it, or whether it may raise the issue for the first time in the present appeal.

8. TransAlta also claims “[a]ny argument by TransAlta as to a proper capitalization rate prior to [its use in the BIA] would have been merely speculative.” Pet’r’s Traverse 2. The State Board finds that TransAlta incorrectly argues that it suffered no adverse effect until the Department actually issued the BIA. Application of the established cap rate to TransAlta was immediate when it was set. If there were “unique aspects of the property and sub-industry (wind producers)” (Pet’r’s Notice of Appeal 1) the Department should have considered, the time to bring those to the Department’s attention was during the hearing to set the rate, not months later in this appeal. When the Department established the cap rate, its applicability and effect were no longer subject to speculation; there was nothing further for the Department to accomplish in setting this rate. *See* Dep’t’s Mot. to Dismiss, Ex. A.

9. In *Board of County Commissioners for Sublette County v. Exxon Mobil Corp.*, 2002 WY 151, ¶¶ 34-35, 55 P.3d 714, 723 (Wyo. 2002), the Wyoming Supreme Court determined:

Wyo. Stat. Ann. § 39–11–102.1(c) (LexisNexis 2001) states that the SBOE shall review *final decisions*. Here, Sublette County petitioned for review of a value certification. The decision of the DOR in making that value certification is anything but final. The taxpayer still can file an amended return. An audit can occur, and the value or tax can be adjusted over an eight-year period.

In *Amoco Production Co. v. State Bd. of Equalization*, 7 P.3d 900 (Wyo. 2000), we held that a letter sent to a taxpayer after an audit constituted a final decision. **At that point in time the DOR could do nothing more, and a final decision existed. That is the essential definition of a final administrative decision. It is “one ending the proceedings, leaving nothing further to be accomplished.”** *MGTC, Inc. v. Public Serv. Comm'n*, 735 P.2d 103, 106 (Wyo. 1987).

*Id.* (emphasis in original) (emphasis added). See also *TAG Aviation LLC* (Best Information Assessment), Docket Nos. 2015-66 and 2016-02, Order Denying Motions to Dismiss (Wyo. St. Bd. of Equalization, Aug. 3, 2016) for a similar discussion of appeals from final decisions of the Department.

10. The State Board agrees the language in the Department’s Rules at chapter 7, section 7(b) is not as clear as it could be regarding the finality of the cap rate decision and the right to appeal. However, the State Board finds that the 2016 Executive Summary setting forth the cap rate for various industries and sub-groupings is a final determination because it leaves nothing further for the Department to do in setting the cap rate. *Exxon Mobil Corp.*, ¶¶ 34-35, 55 P.3d at 723.<sup>3</sup>

11. For these reasons, the State Board is without jurisdiction to consider TransAlta’s claim as it relates to the cap rate. TransAlta did, however timely appeal the Department’s

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<sup>3</sup> Although not argued by the parties, the State Board also considered whether the Department’s rate setting fell within the parameters of Wyoming Statutes section 39-11-102(d) (2015), requiring that it be done pursuant to the Wyoming Administrative Procedure Act, as opposed to simply considering the Executive Summary a final decision of the Department. The Board considered the issue under these procedures because the rate setting process outlined in the Department’s rule is similar to the rulemaking process with prior notice and the opportunity for public comment. Rules, Wyo. Dep’t of Revenue, ch. 7 § 7(b) (2014). However, even if the 2016 Executive Summary setting out the rates is considered a final rule, TransAlta’s appeal of the Summary was required to have been filed with the State Board within thirty (30) days, as well. Wyo. Stat. Ann. § 39-11-102.1(c) (2015) (“Any interested person adversely affected by the adoption, amendment or repeal of a rule pursuant to W.S. 16-3-103(a) shall be afforded an opportunity for a hearing before the board.”). Like an appeal from a final decision, the appeal from a final rule must be filed within thirty (30) days of the date of the final decision at issue. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5.(e) (2006).

Notice of Valuation and the State Board may hear and consider the claims relating to it.

**Issue II: Whether the State Board should exclude, as irrelevant to the BIA, evidence and argument regarding TransAlta's intangibles, other non-taxable assets, obsolescence, capital structure, and reductions to capital and expenses due to turbine failure and repairs, because TransAlta did not timely file its annual tax report including these claims?**

12. There is no dispute that TransAlta failed to file an annual report with the Department by April 1, 2016, as required by statute, nor did it submit the required supporting information. Wyo. Stat. Ann. § 39-13-107(a)(ii)(B) (2015); Rules, Wyo. Dep't of Revenue, ch. 7 § 5(a)-(c) (2014).

13. Because TransAlta did not file an annual report, the Department valued the property using the best information available. Wyo. Stat. Ann. § 39-13-107(a)(iii) (2015). The "Best Information Appraisal" is "the calculation of taxable value **based upon the most recently filed annual report adjusted by other best information available**, including: (i) The producer price index, if applicable; (ii) Recognized financial measures of economic conditions; and (iii) Comparison to the most comparable Department assessed companies." Rules, Wyo. Dep't of Revenue, ch. 7 § 4(a) (2014) (emphasis added).

14. The question is whether TransAlta may present evidence and argument to the State Board, for the first time, asking it to consider and rule on requested exemptions and other evidence to challenge the Department's BIA of TransAlta's property.

15. The Department argues TransAlta's evidence relating to exemptions, obsolescence, capital structure, and turbine failure and repair reductions and expenses, are irrelevant to the issues before the State Board and are thus, inadmissible. The Department argues TransAlta may only present evidence and argument regarding whether the Department correctly calculated the BIA under Wyoming Statutes section 39-13-107(a)(iii) and Department Rules at chapter 7, section 4(a). Dep't's Mot. to Dismiss and Mot. in Lim. 7.

16. TransAlta responds it does not know what the Department considered in its BIA because discovery is not complete. Consequently, it claims the motion in limine regarding its presentation of evidence relating to exemptions, obsolescence, capital structure, and turbine failure and repair reductions and expenses, is not ripe for consideration by the State Board. Pet'r's Traverse 5-6.

17. The State Board finds TransAlta may only present evidence and argument at the hearing regarding whether the Department correctly calculated the BIA under Wyoming Statutes section 39-13-107(a)(iii) and Department Rules at chapter 7, section 4(a). In other words, it may challenge whether the information actually considered by the Department

was “the best information available” as required by Department Rules. Rules, Wyo. Dep’t of Revenue, ch. 7 § 4(a) (2014).

18. Although the State Board cautions TransAlta that it must show that the evidence it seeks to present at hearing was readily available to the Department, and the Department erred in not considering it, the State Board finds that discovery should be completed to allow TransAlta the benefit of all information available to the Department in its BIA.

19. However, as to TransAlta’s specific request to submit information relative to intangible exemptions, the State Board grants the Department’s Motion in Limine and finds that any discovery regarding intangible exemptions is unnecessary. The annual tax report must include all requests for intangible exemptions. “Taxpayer requests for intangible exemptions on property or property considerations must be submitted on an annual basis to the appropriate assessing jurisdiction. **Prior year exemption requests and granted exemptions shall not carry forward from year to year.** It is the taxpayer’s responsibility to make the exemption request on an annual report to the appropriate assessing jurisdiction.” Rules, Wyo. Dep’t of Revenue, ch. 14 § 11(e) (2015); Wyo. Stat. Ann. § 39-13-107(a)(ii)(B) (2015).

20. As it relates to obsolescence, capital structure, and reductions to capital or expenses due to non-reoccurring, unforeseen failure and repair of turbines, the answer is not as clear. To the extent information relating to these issues was available to the Department, TransAlta may argue the Department erred by not considering it. *Supra* ¶ 17. If it was not available to the Department for consideration in the BIA, it will not be considered by the State Board. *See e.g. RT Commc’ns, Inc. v. State Bd. of Equalization for State of Wyo.*, 11 P.3d 915, 927 (Wyo. 2000).

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**ORDER**

**IT IS ORDERED** the Wyoming Department of Revenue's Motion to Dismiss as it relates to an appeal of the capitalization rate is **granted in part**. TransAlta may not present evidence or argument that the capitalization rate does not apply to it or was improperly determined in this proceeding. However, the State Board finds that the remaining issues regarding TransAlta's appeal of the Best Information Appraisal assessment may proceed; and


**IT IS FURTHER ORDERED** the Department's Motion in Limine is **granted** as it specifically relates to the introduction of evidence concerning intangible exemptions and other evidence and argument concerning information not available to the Department to determine its Best Information Appraisal assessment. However, the State Board finds that the parties shall complete discovery to ensure TransAlta has sufficient information regarding evidence the Department considered in its Best Information Appraisal. Further, TransAlta may present evidence and argument in its appeal related to information available to the Department for consideration in its Best Information Appraisal assessment.

Dated this 2<sup>nd</sup> day of December, 2016.

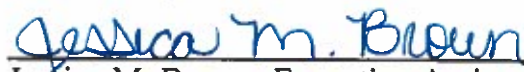
**STATE BOARD OF EQUALIZATION**

  
\_\_\_\_\_  
E. Jayne Mockler, Chairman

  
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Martin L. Hardsocg, Vice Chairman

  
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Robin Sessions Cooley, Board Member

**ATTEST:**

  
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Jessica M. Brown, Executive Assistant

## CERTIFICATE OF SERVICE

I hereby certify that on the 2<sup>nd</sup> day of December, 2016, I served the foregoing **ORDER ON MOTION TO DISMISS AND MOTION IN LIMINE** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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